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Walker v. Lee 87 Fed. Appx. 835 (4th Cir. 2004)

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I. Facts

On August 12, 1992, Charles Walker, his girlfriend Pamela Haizlip, and fellow housing project residents Jesse Thompson, Rashar Darden, Antonio Wrenn, Sabrina Wilson, and Nicki Summers gathered at Summers's apartment, located directly across the parking lot from Haizlip's apartment. Walker lived with Haizlip in her apartment. Thompson, Wrenn, and Darden worked for Walker selling drugs. The night before, Tito Davidson had allegedly tried to rob Haizlip's apartment, where she typically kept $4,000-$5,000 in drug money.[1]

While the group discussed the attempted robbery, Wrenn noticed Davidson nearby. Walker directed Haizlip to lure Davidson to her apartment. Walker told Haizlip that Thompson and Darden were going to beat up Davidson. After Haizlip left the apartment, Walker pulled out a gun and loaded it. According to Wilson and Darden, Walker said he was going to kill Davidson. Walker, Thompson, and Darden, armed with his own gun, then walked to Haizlip's apartment. After Haizlip had lured Davidson to her apartment and the three men had arrived, Haizlip returned to Summers's apartment.[2]

Walker and Darden ordered Davidson to the floor at gunpoint and bound his hands. Walker then asked whether Davidson had tried to rob him. When Davidson denied any knowledge of a robbery, Walker taped his mouth shut, struck him three times in the kneecaps with a hammer, handed his gun to Thompson, and left the apartment. Thompson sliced Davidson's throat with a Ginsu knife and shot Davidson in the finger and arm with Walker's gun. Darden also shot Davidson with his own gun.[3]

During this time, Walker moved back and forth between Haizlip's apartment and Summers's apartment.[4] After some time, Darden went to Walker, now at Summers's apartment, to explain that, "[Davidson] ain't dying."[5] According to Darden, he and Walker then returned to Haizlip's apartment where Walker shot Davidson in the neck.[6] The men purchased trash bags and cleaning sup-

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1. Walker v. Lee, 87 Fed. Appx. 835, 837 (4th Cir. 2004) (opinion not selected for publication).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

plies, disposed of the body, and cleaned Haizlip's apartment.[7] Walker, Haizlip, Wrenn, Darden, and Thompson were all arrested for Davidson's murder.[8]

While in jail, Haizlip wrote letters to Walker in which she indicated she had lied when she told police that Walker murdered Davidson.[9] In one letter, she commented that "[y]ou must have had a bad past, Charles."[10] At Walker's trial, Haizlip testified for the State.[11] On cross examination, defense counsel, seeking to impeach Haizlip's testimony, questioned Haizlip about the letters and then entered them into evidence.[12] On redirect, the Government asked Haizlip about the letter in which she referred to Walker's bad past.[13] Haizlip answered that the comment referred to an attempted murder charge about which Walker had previously told her.[14]

The state trial judge instructed the jury on first-degree murder, and the jury returned a guilty verdict.[15] A separate sentencing hearing followed.[16] Walker's counsel did not raise as a non-statutory mitigating factor the question of whether Walker actually fired the fatal shot.[17] The judge instructed the jury that "all of the evidence relevant to your recommendation has been presented . . . . All of the evidence which you hear in *both phases* of the case is competent for your consideration in recommending punishment."[18] The sentencing form asked specifically whether Walker fired the fatal shot.[19] The jury answered "no" but found that Walker intended to kill the victim while acting in concert with others.[20] After

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7. *Walker*, 87 Fed. Appx. at 837–38.

8. *Id.* at 838.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Walker*, 87 Fed. Appx. at 838.

14. *Id.*

15. *Id.*

16. *Id.* The sentencing proceeding for defendants convicted of capital felonies in North Carolina is governed by N.C. GEN. STAT. § 15A-2000 (2003). The statute provides for a separate sentencing proceeding at which "[e]vidence may be presented as to any matter that the court deems relevant to sentence." N.C. GEN. STAT. § 15A-2000(a)(3). Such evidence "may include matters relating to any of the aggravating or mitigating circumstances enumerated" in the statute and further, "[a]ny evidence which the court deems to have probative value may be received." *Id.*

17. *Walker*, 87 Fed. Appx. at 838.

18. *Id.* (emphasis added); *see* N.C. GEN. STAT. § 15A-2000(b) (stating that in cases for which the death penalty may be authorized, the judge must include in his jury instructions that the jury "must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances" from the statutorily enumerated circumstances and must "furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances").

19. *Walker*, 87 Fed. Appx. at 838.

20. *Id.*

weighing the aggravating and mitigating factors, the jury sentenced Walker to death.[21]

On direct appeal, the Supreme Court of North Carolina affirmed the sentence of death, and the United States Supreme Court denied Walker's petition for a writ of certiorari.[22] After exhausting North Carolina postconviction procedures, Walker filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina.[23] The district court denied Walker relief, and he sought a certificate of appealability ("COA") from the United States Court of Appeals for the Fourth Circuit.[24]

II. Holding

The Fourth Circuit granted Walker a COA on the issues he presented but denied his claims on the merits.[25] The court held that the state trial court did not unreasonably apply *Beck v. Alabama*[26] when it refused to give a second-degree murder instruction based upon the evidence introduced at trial.[27] In addition, the court determined that the state court did not unreasonably apply *Brady v. Maryland*[28] when it refused to order a new trial based on the prosecution's failure

21. *Id.* The jury found as aggravating circumstances that Walker had been previously convicted of a violent felony and that the murder was especially heinous, atrocious, or cruel. State v. Walker, 469 S.E.2d 919, 924 (N.C. 1996). The jury also found eight mitigating circumstances, including Walker's mental or emotional disturbance at the time of the crime. *Id.*; *see* N.C. GEN. STAT. §§ 15A-2000(e), (f) (listing the aggravating and mitigating factors that may be considered by the jury in determining a capital defendant's sentence); N.C. GEN. STAT. § 15A-2000(c)(3) (providing that the jury may recommend death when "the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found").

22. *Walker*, 87 Fed. Appx. at 838; Walker v. North Carolina, 519 U.S. 901 (1996) (mem.).

23. *Walker*, 87 Fed. Appx. at 838; *see* 28 U.S.C. § 2254(d) (2000) (outlining the standard of review for a federal court hearing a habeas petition arising from a state proceeding on the merits; part of AEDPA).

24. *Walker*, 87 Fed. Appx. at 837; *see* 28 U.S.C. § 2253(c)(1)(2000) (providing that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"; part of AEDPA); 28 U.S.C. § 2253(c)(2) (stating that for a certificate of appealability to issue, the applicant must make a "substantial showing of the denial of a constitutional right"; part of AEDPA).

25. *Walker*, 87 Fed. Appx. at 837.

26. 447 U.S. 625 (1980).

27. *Walker*, 87 Fed. Appx. at 839; *see* Beck v. Alabama, 447 U.S. 625, 637–38 (1980) (finding that Alabama was constitutionally prohibited from withdrawing a lesser-included offense instruction from a capital jury when such withdrawal enhanced the risk of an unwarranted conviction).

28. 373 U.S. 83 (1963).

to disclose a witness statement.[29] Finally, the court concluded that Walker was not denied effective assistance of counsel.[30]

III. Analysis

A. Beck *Claim*

Walker argued that the state trial court should have instructed the jury on second-degree murder and that its failure to do so resulted in an unreasonable application of the rule articulated in *Beck*.[31] To address Walker's first claim, the Fourth Circuit relied on *Hopper v. Evans*[32] and looked to North Carolina law to determine what evidence would warrant a jury instruction on the lesser-included offense of second-degree murder.[33] In North Carolina, "first-degree murder is 'the unlawful killing of a human being with malice, premeditation, and deliberation.' "[34] Premeditation requires the formation of the specific intent to kill, however briefly, before the act of murder.[35] Deliberation means the formation of the above intent in a cool state of blood and not in the heat of passion.[36] Second-degree murder requires malice but not premeditation or deliberation.[37]

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29. *Walker*, 87 Fed. Appx. at 841; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that the suppression by the prosecution of evidence favorable to an accused, upon request, violates due process where the evidence is material either to guilt or punishment). *See generally* Jannice Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33 (2004) (discussing the effects of allowing prosecutors to make final determinations on the materiality of exculpatory evidence).

30. *Walker*, 87 Fed. Appx. at 841; *see* Strickland v. Washington, 466 U.S. 668, 687–96 (1984) (holding that to prove ineffective assistance of counsel a defendant "must show that counsel's performance was deficient" and that the deficiency prejudiced the defense to such a degree so "as to deprive the defendant of a fair trial").

31. *Walker*, 87 Fed. Appx. at 838; *see Beck*, 447 U.S. at 637–38 (governing a defendant's right to a jury instruction on a lesser-included offense).

32. 456 U.S. 605 (1982).

33. *Walker*, 87 Fed. Appx. at 839; *see* Hopper v. Evans, 456 U.S. 605, 611 (1982) (concluding that due process only requires a jury instruction on a lesser-included offense if the evidence warrants such an instruction).

34. *Walker*, 87 Fed. Appx. at 839 (quoting State v. Nicholson, 558 S.E.2d 109, 134 (N.C. 2002)).

35. *Id.*

36. *Id.*

37. *Id.* (citing State v. Watson, 449 S.E.2d 694, 699 (N.C. 1994)). North Carolina appellate courts recognize three kinds of malice. State v. Reynolds, 297 S.E.2d 532, 536 (N.C. 1982). The first, express malice, connotes a positive concept of express hatred, spite, or ill-will. *Id.* Another kind of malice arises when an inherently dangerous act is done so recklessly and wantonly as to manifest a disregard for human life and social duty. *Id.* Both of these forms of malice would support a second-degree murder conviction. *Id.* The third kind of malice is defined as a "condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *Id.*

After reviewing the trial record, the Fourth Circuit concluded that there "was *no evidence* that Davidson's murder was committed with an intent other than one characterized as premeditated and deliberate."[38] Wilson and Darden's statements, that Walker said he was going to kill Davidson, supported the court's finding of premeditation and deliberation.[39] Although Haizlip's testimony suggested that Walker intended to beat up Davidson rather than kill him, the court reconciled the conflicting statements.[40] The Fourth Circuit determined that the testimony, consistent with the events of the murder, indicated Walker's intent to both beat up and kill Davidson.[41] The court also rejected Walker's contention that the evidence was inconsistent concerning what acts Walker committed during the course of the murder.[42] Instead, the court concluded that any inconsistency did not concern whether Walker had the intent to commit first- or second-degree murder, but only whether Walker was guilty of murdering Davidson at all.[43] Accordingly, the Fourth Circuit interpreted the evidence as fully substantiating the trial court's decision and concluded that so long as the jury believed Walker killed Davidson, premeditation was clear.[44]

B. Brady *Claim*

Walker also asserted that the North Carolina court unreasonably applied *Brady* when it declined to grant a new trial based upon the prosecution's suppression of a witness statement, which Walker contended contained exculpatory and material evidence.[45] On September 30, 1992, police recorded an oral statement by Marquita Schofield.[46] According to Schofield, Thompson told her that after the attempted robbery of Haizlip's apartment, Thompson confronted Davidson and "bust [him] twice," meaning that Thompson shot Davidson twice.[47] Thompson apparently also told Schofield that in response to his recounting of the

38. *Walker*, 87 Fed. Appx. at 839 (emphasis added). The court based this determination upon uncontroverted testimony that Walker instructed Haizlip to lure Davidson to her apartment, that Walker took out and loaded a gun prior to walking to Haizlip's apartment, and that Darden and Wilson heard Walker say he was going to kill Davidson. *Id.* The court also considered the prolonged nature of the crime and Walker's participation in the clean-up of the murder scene. *Id.*

39. *Id.*

40. *Id.* at 839–40.

41. *Id.* at 840.

42. *Id.*

43. *Id.*

44. *Walker*, 87 Fed. Appx. at 840.

45. *Id.*; *see Brady*, 373 U.S. at 87 (holding that the prosecution must disclose evidence favorable to the accused if suppression of that evidence will deprive the accused of a fair trial).

46. *Walker*, 87 Fed. Appx. at 840.

47. *Id.* (alteration in original).

shooting, Walker told Thompson "he was crazy."[48] On October 19, 1992, Schofield provided police with a written statement that was substantially the same as the first but did not include Thompson's statement that Walker told Thompson he was crazy.[49]

At Walker's trial, the Government provided Walker with the October 19 statement only.[50] The state trial court determined that the first statement was "substantially consistent with and merely cumulative to" the second statement and held that the September 30 statement was not material under *Brady*.[51] On appeal, Walker argued that the difference between Schofield's two statements was vital to the determination of Walker's involvement in the murder because it called into question his specific intent to kill Davidson.[52]

The Fourth Circuit concluded that, even if the withheld statement was favorable to Walker, the North Carolina court properly determined that the statement's suppression did not present a reasonable probability of affecting the jury's verdict.[53] Given the "overwhelming weight" of the Government's evidence of Walker's intent to kill Davidson, Thompson's subordinate position as drug runner for Walker, and the potentially ambiguous nature of the statement that Thompson "was crazy," the Fourth Circuit determined that the "difference between the disclosed and undisclosed versions of Schofield's testimony could reasonably be found to have had no impact on the outcome of the trial."[54] Therefore, the court concluded that the state court decision not to order a new trial was not an unreasonable application of *Brady*.[55]

C. Ineffective Assistance of Counsel Claims

The Fourth Circuit found no merit in Walker's first ineffective assistance of counsel ("IAC") claim.[56] The court noted that defense counsel submitted affidavits attesting to their efforts to locate witnesses, including Schofield.[57] Citing

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48. *Id.*

49. *Id.* at 840–41.

50. *Id.* at 841.

51. *Id.*; *see* United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that exculpatory evidence withheld by the prosecution is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

52. *Walker*, 87 Fed. Appx. at 841.

53. *Id.*

54. *Id.* The court also noted that describing someone as crazy could have alternate meanings, including maniacal and ruthless. *Id.* The court then reasoned that such interpretation would be consistent with the remainder of Thompson's statement in which Walker bragged about the merciless way in which he avenged the wrongs he believed Davidson had committed. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

Huffington v. Nuth,[58] the court determined that failure to locate witnesses after reasonable efforts did not rise to the level of ineffective assistance of counsel.[59] Finally, the court found no reasonable probability that Schofield's testimony would have affected the outcome of the trial.[60] Thus, the court concluded that Walker's first claim failed to satisfy either prong of the *Strickland* test.[61]

In dismissing Walker's second IAC claim, the Fourth Circuit concluded that Walker's counsel made a strategic decision to enter Haizlip's letters into evidence.[62] The letters showed that Haizlip, one of the Government's key witnesses, had lied to police.[63] The fact that one of the letters also included the potentially damaging reference to Walker's bad past was a "strategic price" paid by defense counsel and not the basis for a finding of ineffective assistance of counsel.[64]

Finally, the court concluded that defense counsel's failure to propound, at sentencing, the fact that Walker did not fire the fatal shot, had no reasonable probability of affecting the outcome of the sentencing hearing.[65] The court recognized defense counsel's obligation, under *Williams v. Taylor*,[66] to investigate possible mitigating factors in preparation for a capital sentencing hearing.[67] The court placed weight, however, on the fact that counsel *did* raise the issue of who fired the fatal shot during the guilt phase of the trial.[68] Further, the jury answered "no" on the sentencing form as to the question of whether Walker had fired the fatal shot.[69] Because the trial judge instructed the jury to "consider any other circumstance . . . arising from the evidence which you deem to have mitigating value," the Fourth Circuit found that defense counsel's failure explicitly to raise at sentencing the fact that Walker did not fire the fatal shot did not deprive

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58. 140 F.3d 572 (4th Cir. 1998).

59. *Walker*, 87 Fed. Appx. 841; *see* Huffington v. Nuth, 140 F.3d 572, 581 (4th Cir. 1998) (finding that even if defense counsel's failure to contact witnesses identified by the defendant in a capital murder case fell below the standard of objective reasonableness, the failure did not prejudice the defendant).

60. *Walker*, 87 Fed. Appx. at 841. The court determined that at most, Schofield would have reiterated the statement she gave to police. *Id.*

61. *Id.*

62. *Id.* at 842.

63. *Id.*

64. *Id.*

65. *Id.*

66. 529 U.S. 362 (2000).

67. *Walker*, 87 Fed. Appx. at 842; *see* Williams v. Taylor, 529 U.S. 362, 396 (2000) (stating that counsel's limited investigation of mitigating evidence could not be justified as a tactical decision).

68. *Walker*, 87 Fed. Appx. at 842.

69. *Id.*

Walker of a fair trial.[70] Accordingly, the court concluded that Walker failed to satisfy *Strickland*'s prejudice prong.[71]

IV. Application in Virginia

A. Ineffective Assistance of Counsel

In North Carolina, all mitigating circumstances, both those expressly mentioned in the statute and those offered by the defendant as having mitigating value, must be submitted in writing to the jury upon the defendant's request.[72] Pursuant to this rule, Walker's counsel could have requested that the issue of whether Walker in fact fired the fatal shot be submitted to the jury in writing as a mitigating factor.[73] However, in doing so, defense counsel would have taken a risk.

For example, suppose that a hypothetical jury is presented with a list of twelve possible mitigating factors for consideration. Members of the jury find only two of those twelve factors to be substantiated by the evidence.[74] The list no longer looks like an enumeration of possible mitigating circumstances. Instead, the rejected factors provide positive evidence that mitigation evidence was sparse. The lack of mitigation reinforces the defendant's culpability. A similar concern would apply to defense counsel's decision not to raise a mitigating factor at sentencing, for example, the contention that Walker did not fire the fatal shot. Given the evidence, defense counsel might have concluded that the jury was unlikely to find in Walker's favor. Failure to find that Walker did *not* fire the fatal shot had the potential to damage Walker's case in mitigation by providing a strong reminder to the jury that Walker in fact inflicted the lethal injury.

Virginia does not have a comparable rule requiring that mitigating circumstances specifically be enumerated for the jury upon defendant's request. However, the same strategic considerations apply when defense counsel determines which and how many mitigating circumstances to present to the jury. Defense counsel's decision not to present a non-statutory mitigator that the jury is unlikely to find may reflect a conscious decision to focus attention on those mitigating circumstances best supported by the evidence.

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70. *Id.*

71. *Id.*

72. *See* State v. Johnson, 257 S.E.2d 597, 619 (N.C. 1979) (holding that all statutory and non-statutory mitigating circumstances must, upon defendant's timely request, be submitted in writing to the jury).

73. *Id.*

74. *See* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (invalidating North Carolina's requirement that the jury limit its consideration to mitigating circumstances unanimously found).

B. Brady *Claim*

When, as here, the Government discloses a witness statement, the reasonable inference to be made by defense counsel is that *all* favorable statements by that witness have been produced. Logic dictates that if one of Schofield's statements was covered by *Brady*, the other, substantially similar but likely more favorable statement, was also covered by *Brady*. Claims under *Brady* may be strengthened if defense counsel makes a specific *Brady* request for conflicting witness statements and obtains a representation from the prosecution, prior to trial, that all *Brady* material has been disclosed to the defense.

The Fourth Circuit rejected Walker's claim that the suppressed statement by Schofield was material under *Brady*.[75] Rather than giving Walker's statement that Thompson was "crazy" its common sense meaning, for example, "you're nuts" or "I can't believe you did that," the court substantially ignored the statement as potential evidence negating Walker's intent to kill Davidson.[76] The court instead resorted to dictionary definitions of crazy, including maniacal and ruthless, to transform Walker's words from an expression of disbelief to affirmation.[77] This manipulation of language satisfied the court that Schofield's second statement was immaterial under *Brady*.[78] In fact, such evidence negating Walker's intent to kill Davidson would have bolstered Walker's final claim, that under *Beck*, the judge should have instructed the jury on second-degree murder.

C. Beck *Claim*

The Fourth Circuit held that Schofield's suppressed statement would not have altered the jury verdict. The court applied strained reasoning when it concluded that "as long as the jury believed that Walker killed Davidson, there was no question but that he did it with the intent required for first-degree murder."[79] In fact Walker had pointed to inconsistent testimony regarding both the underlying facts, i.e., whether he actually fired the fatal shot, and his intent to commit the murder. Further, despite the fact that counsel did not propound the issue at sentencing, the jury actually found on the sentencing form that Walker did not fire the fatal shot.

The court's determination that the above evidence did not warrant a lesser-included offense instruction demonstrates the difficult standard set forth in *Beck* as applied in the Fourth Circuit. The test is not whether the evidence raises a question about the defendant's guilt of the greater offense, but rather, whether the evidence supports a conviction of the lesser offense to the exclusion of the

75. *Walker*, 87 Fed. Appx. at 841.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 840.

greater offense. This is consistent with the federal rule that a lesser-included offense instruction should be given "if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater."[80]

Under Virginia case law, consistent with *Beck*, when the evidence in a prosecution warrants a conviction of the crime charged, and no independent evidence warrants a conviction for a lesser-included offense, the lesser-included offense instruction should not be submitted to the jury.[81] In other words, jury instructions on lesser-included offenses are proper only when supported by "more than a scintilla of evidence."[82] Conversely, when the record includes evidence that would support conviction for a lesser-included offense, the court must allow the jury to consider that lesser-included offense. Therefore, defense counsel must effectively counter evidence of premeditation and evidence of a predicate offense in order to obtain a lesser-included offense instruction.

V. Conclusion

Walker illustrates the difficult choices faced by defense counsel when preparing and presenting mitigation evidence. Counsel's duty to zealously advocate on behalf of a client may or may not include strenuously arguing *every* possible non-statutory mitigating circumstance. *Walker* also provides a reminder that the prosecution effectively gets the final say regarding the materiality of exculpatory evidence under *Brady*, and further, that the materiality standard can be very difficult for a defendant to satisfy on appeal. Finally, under *Beck* and the equivalent Virginia rule as applied by the Fourth Circuit, a capital defendant will not receive a lesser-included offense instruction unless the evidence would support a conviction of the lesser offense and an acquittal of the greater offense.

Jessica M. Tanner

80. *Hopper*, 456 U.S. at 612 (citing Keeble v. United States, 412 U.S. 205, 208 (1973)).

81. Guss v. Commonwealth, 225 S.E.2d 196, 197 (Va. 1976).

82. Commonwealth v. Donkor, 507 S.E.2d 75, 76 (Va. 1998).

CASE NOTES:

Supreme Court of Virginia