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McHone v. Polk 392 F.3d 691 (4th Cir. 2004)

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I. Facts

On June 2, 1990, nineteen-year-old Steven Van McHone and his friends Jimmy McMillian and Tammy Sawyers embarked on an afternoon of drinking.[1] After consuming a great deal of whiskey and several beers, the three drove back to Mount Airy from Winston Salem, North Carolina, and were stopped in transit by a state trooper.[2] The officer arrested McMillian for driving under the influence; afterwards, Sawyers drove McHone to his mother's house.[3] Around midnight Sawyers and McHone went to a party, at which McHone consumed more liquor and beer and acted very erratically, getting into loud arguments and even pointing an unloaded gun at several party guests.[4] When asked by his girlfriend, Tammy Bryant, to explain his behavior, McHone revealed that he had taken some hits of LSD.[5]

After McHone returned home from the party, his mother, step-father, half-brother, sister-in-law, and nephew arrived at the house from a day of fishing.[6] While Wendy, Alex, and Wesley, Jr. got ready for bed, McHone and his mother began to argue about money.[7] After the argument, McHone went to his room in the basement, and Mildred asked Wesley, Jr. if he had seen the family's handgun.[8] She then left the room.[9]

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1. McHone v. Polk, 392 F.3d 691, 714–15, 717 n.11 (4th Cir. 2004) (Gregory, J., concurring in part and dissenting in part).

2. *Id.* at 715.

3. *Id.*

4. *Id.*

5. *McHone*, 392 F.3d at 696; *McHone*, 392 F.3d at 717 (Gregory, J., concurring in part and dissenting in part).

6. *McHone*, 392 F.3d at 696; *McHone*, 392 F.3d at 713 (Gregory, J., concurring in part and dissenting in part). McHone lived with his mother, Mildred Adams, and his step-father, Wesley Adams, Sr. *Id.* His half-brother, Wesley Adams, Jr., and Wesley, Jr.'s wife, Wendy, were on leave from the Air Force and visiting with their son, Alex. *Id.* Randy Adams, McHone's other half-brother, was also at the house when the family came home. *Id.*

7. *McHone*, 392 F.3d at 696; *McHone*, 392 F.3d at 713 (Gregory, J., concurring in part and dissenting in part). McHone was on probation and had to pay reparations for his prior offense. *Id.* at 713 n.2. His mother managed that money. *Id.*

8. *McHone*, 392 F.3d at 696; *McHone*, 392 F.3d at 713 (Gregory, J., concurring in part and dissenting in part).

9. *McHone*, 392 F.3d at 696; *McHone*, 392 F.3d at 713 (Gregory, J., concurring in part and dissenting in part).

Shortly thereafter, the family heard three gunshots from the backyard. Wesley, Jr. hurried to call the police, while Wesley, Sr. ran to investigate the origin of the shots. Soon, Wesley, Sr. and McHone reappeared, fighting over a gun. Wesley, Sr. told Wesley, Jr. to help his mother, who was "facedown out back," and continued fighting McHone until he thought he had subdued him. Wesley, Sr. returned to the kitchen, but McHone soon emerged from the hallway holding a shotgun. When Wesley, Sr. lunged for the gun, McHone shot him. Wesley, Jr. then attempted to wrest control of the gun from his half-brother. After ten minutes of struggling, Wesley, Jr. was able to subdue McHone, who burst into tears and screamed at Wesley, Jr., demanding that he kill him. Both Mildred and Wesley, Sr. died from their wounds.[10]

The State of North Carolina charged McHone with the first-degree murders of Mildred and Wesley, Sr. and assault with a deadly weapon with intent to kill inflicting serious injury on Wesley, Jr.[11] The jury found McHone guilty of each charge.[12] After a sentencing hearing in which it found one aggravating and eleven mitigating factors for the murder of Mildred and two aggravating and ten mitigating factors for the murder of Wesley, Sr., the jury recommended a death sentence for each murder.[13] The court imposed both death sentences.[14] The Supreme Court of North Carolina denied McHone's direct and postconviction appeals.[15] Although the United States District Court for the Middle District of North Carolina denied McHone's federal habeas corpus petition, the United States Court of Appeals for the Fourth Circuit issued McHone a certificate of appealability for two of his claims: (1) the prosecution withheld material exculpatory evidence from McHone's trial counsel in violation of *Brady v. Maryland*;[16] and (2) McHone's trial counsel were constitutionally ineffective under the standard announced in *Strickland v. Washington*[17] in both the guilt and penalty phases of his trial.[18] McHone's defense at trial was that he was too intoxicated to have devel-

10. *McHone*, 392 F.3d at 696; *McHone*, 392 F.3d at 713–14 (Gregory, J., concurring in part and dissenting in part).

11. State v. McHone, 435 S.E.2d 296, 298 (N.C. 1993); *see* N.C. GEN. STAT. § 14-17 (2003) ("A murder which shall be perpetrated by . . . willful, deliberate, and premeditated killing . . . shall be deemed to be murder in the first degree, . . . and any person who commits such murder shall be punished with death or imprisonment . . . for life without parole"); N.C. GEN. STAT. § 14-32 (2003) (punishing as a class C felony an assault on "another person . . . with intent to kill [that] inflicts serious injury").

12. *McHone*, 392 F.3d at 697.

13. *Id.*

14. *Id.*

15. *Id.*

16. 373 U.S. 83 (1963).

17. 466 U.S. 668 (1984).

18. *McHone*, 392 F.3d at 695–96; *see* Brief for Appellant at 1, McHone v. Polk, 392 F.3d 691 (4th Cir. 2004), No. 04-14 (on file with author); Strickland v. Washington, 466 U.S. 668, 687 (1984)

oped the *mens rea* of specific intent to kill or of premeditation and deliberation; each of his habeas claims centered around his counsel's failings in mounting this defense at both the guilt and the sentencing phases of his trial.[19]

II. Holding

The Fourth Circuit rejected McHone's appeal and affirmed the district court's denial of his habeas corpus petition.[20] The court rejected McHone's *Brady* claim that the prosecution withheld exculpatory witness statements that would have strengthened his voluntary intoxication defense.[21] The court was also unpersuaded by McHone's *Strickland* argument that his counsel unreasonably failed to investigate his lack of ability to form specific intent to kill, to object to the prosecution's closing argument, and to conduct a thorough mitigation investigation.[22] Ultimately, the court held that the district court had correctly applied the federal habeas corpus standards required by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") because it agreed that the Supreme Court of North Carolina's treatment of McHone's *Brady* and *Strickland* claims was "neither contrary to, nor an unreasonable application of, established federal law."[23]

III. Analysis

A. The Brady *Claim*

The Fourth Circuit began by explaining the standard, defined by the United States Supreme Court in *Brady*, for determining prosecutorial misconduct in withholding exculpatory evidence from a defendant.[24] The court stated the three-part test for relief: (1) " 'the evidence must be *favorable* to the accused' "; (2) the Government must have suppressed the evidence; and (3) the evidence must also be material, " 'i.e., it must have prejudiced the defense at trial.' "[25] The

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(defining the two-pronged standard of deficient performance and prejudice for a finding of constitutional ineffective assistance of counsel); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

19. *McHone*, 392 F.3d at 696.
20. *Id.*
21. *Id.* at 697–700.
22. *Id.* at 704–10.
23. *Id.* at 696.
24. *Id.* at 697.
25. *McHone*, 392 F.3d at 697 (quoting Kyles v. Whitley, 514 U.S. 419, 433–34 (1995)).

court then cited the Supreme Court's ruling in *Kyles v. Whitley*[26] that such "evidence 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.' "[27] With these rules in mind, the court considered the evidence to which McHone claimed he should have had access.[28]

The Fourth Circuit rejected McHone's *Brady* claims on the grounds that the evidence he sought was neither favorable nor material.[29] McHone argued that the prosecution should not have withheld statements made to police by Wesley, Jr., Wendy, Randy, Sawyers, Mark Tuttle, Deputy Inman, and William Kent Hall.[30] McHone claimed that the statements of Wesley, Jr., Wendy, Sawyers, Inman, and Hall were both favorable and material because they contradicted their trial testimony and would have provided evidence that they believed that McHone was more intoxicated than they had indicated to the jury.[31] McHone also argued that the statements of Randy and Tuttle, McHone's Alcoholics Anonymous ("AA") sponsor, would have shown that McHone was out of control because of his intoxication and that he had no specific plan to kill his parents.[32] The court considered the impact that the withheld evidence might have had on the trial and found that the statements were not strong enough to impeach the credibility of the State's witnesses or to convince the jury that McHone was too impaired to have formed the specific intent to kill.[33]

The court also rejected McHone's claim that the cumulative effect of the withheld evidence would have changed the outcome of his trial and sentencing.[34] Noting that the jury had heard enough evidence to find as a mitigating factor that McHone was "under the influence of alcohol" during the crime, the court found that the additional evidence would have had little effect on the jury's determination that McHone, although drunk, was aware enough of his actions to deserve a death sentence.[35] McHone also presented an affidavit from the State's expert, Dr. Groce, stating that if he had had access to the withheld evidence, he would not have testified at the sentencing hearing that McHone could have formed the specific intent to kill.[36] The Fourth Circuit deemed Dr. Groce's postconviction

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26. 514 U.S. 419 (1995).

27. *McHone*, 392 F.3d at 697 (quoting *Kyles*, 514 U.S. at 433–34 (emphasis supplied by Fourth Circuit)).

28. *Id.*

29. *Id.* at 703–04.

30. *Id.* at 697–98.

31. *Id.* at 697–703.

32. *Id.* at 701–02.

33. *McHone*, 392 F.3d at 697–704.

34. *Id.* at 704.

35. *Id.* at 703.

36. *Id.*

affidavit to be too conclusory to provide McHone with grounds for relief on his *Brady* claim.[37] In rejecting McHone's *Brady* arguments on the merits, the Fourth Circuit upheld the district court's determination that the Supreme Court of North Carolina had neither acted contrary to nor unreasonably applied the federal law governing his claim.[38]

B. Ineffective Assistance of Counsel

The Fourth Circuit identified the standard the United States Supreme Court laid out in *Strickland* for evaluating the performance of counsel on a constitutional level.[39] Under this standard, the court would find that counsel were ineffective if their performance fell below an objective standard of reasonableness under the circumstances and if the deficient performance prejudiced the defense.[40] McHone claimed that his trial counsel were ineffective for their failure to (1) investigate and present evidence that McHone lacked the specific intent to kill required for first-degree murder, (2) object to the prosecution's incorrect statement of the law in closing argument, and (3) investigate mitigation evidence thoroughly.[41] Finding that none of these claims met the prejudice standard required by *Strickland*, the court ruled that the Supreme Court of North Carolina had not applied federal law unreasonably and that McHone was not entitled to relief under AEDPA.[42]

1. Failure to Investigate Inability to Form Specific Intent

The Fourth Circuit did not accept McHone's argument that his counsel were ineffective for failing to interview a number of people in order to gather evidence that he was so intoxicated on the night of the crime that he could not have formed the *mens rea* required by the first-degree murder statute.[43] McHone claimed that his counsel could have gathered valuable evidence from his AA sponsor and the two jailors who booked him on the night of the murders that would have shown that McHone was out of control and "appeared . . . [to have] taken some kind of drugs or . . . consumed a lot of alcohol."[44] This evidence would have clarified his actual level of impairment.[45] The Fourth Circuit, how-

37. *Id.* at 704.

38. *Id.*

39. *McHone*, 392 F.3d at 704; *see Strickland*, 466 U.S. at 687 (setting the standard for a court's review of counsel's performance under an ineffective assistance of counsel claim).

40. *McHone*, 392 F.3d at 704.

41. *Id.*

42. *Id.* at 706–10.

43. *Id.* at 704–06.

44. *Id.* at 705.

45. *Id.*

ever, found that such evidence would have been merely cumulative of the evidence offered by prosecution witnesses that McHone was indeed drunk.[46] Because the jury had heard evidence of McHone's level of intoxication and still found beyond a reasonable doubt that he had the specific intent to kill, the court stated, counsel's failure to obtain this evidence could not have been prejudicial.[47] The court also found that the evidence that McHone's substance abuse counselor and probation officer might have offered of McHone's cooperativeness and obedient nature would have been insufficient to undermine the prosecution's argument that McHone resented his parents and had planned to kill them for quite some time.[48]

The court also ruled that McHone's counsel could not have been ineffective for failing to provide their expert with the information with which he could have made a blood alcohol content ("BAC") determination that might have lent credence to McHone's lack of specific intent defense.[49] The court concluded that the expert may have erred by not calculating McHone's BAC from the information he received from the State's expert's report and from McHone himself, especially given the fact that the jury used such evidence to find the statutory mitigator that McHone was under the influence of alcohol when he committed the crimes.[50] The court, however, would not impute the expert's error to his trial counsel and thus render them vicariously ineffective.[51]

2. Failure to Object to Prosecution's Misstatement of the Law in Closing Argument

The Fourth Circuit also found insufficient prejudice in McHone's claim that his counsel were ineffective for failing to object to the prosecutor's closing argument.[52] In his final argument to the jury, the prosecutor incorrectly stated the law of voluntary intoxication and impermissibly shifted the burden of proof to the defense.[53] The prosecution characterized McHone's defense of voluntary intoxication as an affirmative defense and argued that McHone needed to prove that "he was so drunk that he was utterly incapable of forming a deliberate and premeditated purpose to kill."[54] The Fourth Circuit pointed out that this interpretation of the law was incorrect and was in fact the standard that a defendant needed to meet to receive a voluntary intoxication affirmative defense instruction

46. *McHone*, 392 F.3d at 705.
47. *Id.*
48. *Id.* at 705–06.
49. *Id.* at 706.
50. *Id.*
51. *Id.*
52. *McHone*, 392 F.3d at 706–08.
53. *Id.* at 707.
54. *Id.*

from the court.[55] The court showed that under North Carolina law, all McHone needed to do was to establish a reasonable doubt sufficient to negate the *mens rea* of specific intent or premeditation.[56] The court pointed to North Carolina precedent, *State v. Mash*,[57] to illustrate that a jury " 'need only conclude that because of his intoxication either defendant did not form the requisite intent or there is at least a reasonable doubt about it.' "[58] Although in *Mash* the legal misstatement by the prosecution warranted a new trial, the Fourth Circuit held that McHone's counsel were not ineffective in failing to object because the trial court cured the prosecutor's mistake with its own instruction that correctly stated the law.[59] Relying on the presumption that a jury will follow the court's instructions, the Fourth Circuit found that no prejudice resulted from counsel's error.[60]

3. Failure to Investigate Mitigation Evidence

The Fourth Circuit finally rejected McHone's claim, under *Wiggins v. Smith*,[61] that his counsel were ineffective for failing to investigate thoroughly potential mitigation evidence.[62] McHone claimed that with a proper investigation, his counsel would have found and been able to present to the jury evidence that his childhood was beset by an alcoholic and violent father, that he was introduced by his father to alcohol and drugs at an early age, and that he suffered great emotional instability as a result.[63] Relying on the fact that the jury found as mitigating factors that "the defendant enjoyed a normal childhood until the time his parents separated, and after that, he began using alcohol and drugs," that "[d]efendant's father abused alcohol and gambled excessively and defendant, when he was a child, often spent time with his father in bars," that "[d]efendant often witnessed arguments between his father and mother," and that "[d]efendant, while he resided with his father, often had to reside in undesirable places," the Fourth Circuit concluded that McHone's trial counsel had presented sufficient evidence in mitigation to be deemed objectively reasonable.[64] Because the

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55. *Id.*

56. *Id.*

57. 372 S.E.2d 532 (N.C. 1988).

58. *McHone*, 392 F.3d at 707 (quoting State v. Mash, 372 S.E.2d 532, 537 (N.C. 1988)).

59. *Id.* at 707–08.

60. *Id.* at 708; *see* Weeks v. Angelone, 528 U.S. 225, 234 (2000) (holding that "[a] jury is presumed . . . to follow [the court's] instructions").

61. 539 U.S. 510 (2003).

62. *McHone*, 392 F.3d at 708–10; *see* Wiggins v. Smith, 539 U.S. 510, 527 (2003) (holding that when considering the effectiveness of counsel's presentation of mitigation evidence in a death penalty case, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

63. *McHone*, 392 F.3d at 708–09.

64. *Id.* at 709.

jury found these mitigating factors and still imposed the death penalty, the court found that the lack of further evidence in mitigation also did not prejudice McHone.[65]

IV. Application in Virginia: The Importance of Effective and Vigilant Trial Presentation

McHone illustrates the importance of trial counsel's presentation to the jury in a capital case. Despite the fact that the jury found twenty-one total mitigating factors compared with only three aggravating factors, it still sentenced nineteen-year-old Steven McHone to death.[66] The prosecution presented the jury with the picture of a resentful son, a kid in trouble with the law, and a violent young man who indulged in drinking and drugs with little care for the people in his life who only wanted to help him find his way.[67] The prosecution told the jury that McHone "had a 'plan' to be free of his parents, to rid himself of the confines of order and discipline."[68] The prosecution held McHone in stark contrast to his upstanding Air Force Captain brother and asked the jury to impose death as the proper punishment for a son who murdered his mother and step-father in cold blood in an argument over money.[69]

Defense counsel needed an alternative picture to stand against the grisly one painted by the prosecution. With a little more searching, counsel certainly could have had the ingredients for a powerful story to argue for McHone's life. McHone's defense team could have argued the tale of a son lost in the shuffle of alcoholism, abuse, and divorce.[70] Instead of growing up with his half-siblings in an intact family, McHone had to witness the alcoholic rages of his father, sometimes having to sleep in the bars where his father gambled and drank.[71] Although McHone was introduced to alcohol and drugs at an early age and had been in trouble with the law, his counselors, sponsor, and probation officer also spoke of a young man who followed directions, asked for permission to stay out late, and was trying to improve his relationship with his parents.[72] Counsel could have argued that on the night of the murders, McHone had not hatched a carefully thought-out plan to be rid of his controlling mother and father; he instead had spent the day drinking and doing drugs.[73] After a night of chaos and out of

65. *Id.* at 710.
66. *Id.* at 697.
67. *McHone*, 392 F.3d at 728 (Gregory, J., concurring in part and dissenting in part).
68. *Id.*
69. *Id.* at 713.
70. *Id.* at 727.
71. *Id.*
72. *Id.* at 725.
73. *McHone*, 392 F.3d at 715–18 (Gregory, J., concurring in part and dissenting in part).

control behavior from the effects of alcohol and LSD, he killed his mother and his step-father.[74] Had trial counsel presented this kind of story, the jury might have been better able to weigh the mitigating against the aggravating factors and recommended a life sentence.

McHone also underscores the need to be vigilant during the prosecution's closing argument. Despite the Fourth Circuit's faith in the jury's ability to listen only to the judge when it comes to matters of law, it is likely that McHone's jury was influenced by the prosecutor's "several pages" of erroneous instruction on the law of voluntary intoxication.[75] At the very least, the jury might have been confused by the contrast between the judge's instruction and the prosecution's argument and believed that McHone had the burden to prove his utter incapability to form intent or premediation.[76] A timely objection from defense counsel would have alerted the jury to the prosecutor's error and perhaps made them more vigilant about their application of law to the facts.

V. Conclusion

McHone illustrates several obstacles that a capital defense attorney must overcome to avoid a death sentence for his or her client. The narrative that counsel presents is essential to the case for life. Without a strong and cohesive argument to the jury, otherwise useful evidence can become sanitized and ripe for the prosecution's molding into a case for death.

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74. *Id.* at 713–14.
75. *Id.* at 729.
76. *Id.*