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HILL v. FRENCH 133 F.3d 915 (4TH CIR. 1997) United States Court Of Appeals, Fourth Circuit

Washington[53] for the rule that in order "[t]o prove a constitutional claim for ineffective assistance of counsel, a defendant must show both that his counsel's representation was deficient and that he was prejudiced by the deficiency."[54] In applying Strickland, the court found that in none of the challenged decisions was defense counsel deficient under the Strickland standard. The court opined that Howard's past prison record would have been a double-edged sword with the jury, and that Howard's military and school records "were, at best, 'checkered.'"[55]

V. Commentary on Defendant's Failure to Testify

Howard asserted that his Fifth Amendment[56] right against self-incrimination was violated when the prosecutor, in his closing remarks to the sentencing jury, repeatedly asked: "Where is the remorse?"[57] Howard claimed that these statements were an impermissible commentary on his decision not to testify. The court of appeals disagreed, stating that "when a prosecutor's comments are merely a 'fair response to a claim made by a defendant or his counsel,' there is no constitutional violation."[58] The court observed that "those remarks were in direct response to defense counsel's argument that Howard was remorseful for his actions. The court concluded that the comments did not violate Howard's Fifth Amendment rights.[59]

Summary and analysis by:
Craig B. Lane

[53] 466 U.S. 668 (1984).

[54] *Howard,* 131 F.3d at 421 (citing *Strickland,* 466 U.S. at 687).

[55] *Id.*

[56] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V

[57] *Howard,* 131 F.3d at 421 (quoting App. at 1612-13).

[58] *Id.* (quoting *United States v. Robinson,* 485 U.S. 25, 32 (1988).

[59] *Id.*

HILL v. FRENCH

133 F.3d 915 (4TH CIR. 1997)
United States Court Of Appeals, Fourth Circuit

FACTS

Randall Hill was killed on January 10, 1990, by three bullets to the chest and abdomen. Eyewitness testimony of defendant's wife (also victim's mother) and ballistics evidence established that Zane Brown Hill ("Hill") entered the residence of his estranged wife and son armed with a rifle. Hill introduced evidence that on that day he had ingested twelve beers, four Darvons, a pain reliever, and two Flexorils, a muscle relaxant. Randall Hill, who was in possession of a pistol, attempted to call the police, but was shot and killed by Hill while in the process of doing so. Hill then struck his wife with the butt of the rifle. While he reloaded the rifle, his wife fled the house. Neighbors testified that Hill shot at his fleeing wife but missed her.[1] Hill was charged and convicted of first-degree murder under North Carolina General Statute section 14-17.[2] He was sentenced to death under North Carolina General Statute section 15A-2000.[3]

[1] *State v. Hill,* 417 S.E.2d 765, 769-70 (N.C. 1992).

[2] North Carolina General Statute section 14-17 states in pertinent part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnaping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000....

N.C. Gen. Stat. § 14-17 (Michie 1993 & Supp. 1997).

[3] North Carolina General Statute section 15A-2000 states in pertinent part, with respect to the separate sentencing hearing, the following:

> After hearing the evidence, argument of counsel and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based on the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

Hill appealed the verdict and sentence to the North Carolina Supreme Court.[4] The court rejected Hill's assignments of error which included impropriety in voir dire, inadmissibility of evidence of prior bad acts, inadmissibility of photographs of victim, and impropriety of jury instructions.[5] The United States Supreme Court denied certiorari.[6] Hill's petition for state habeas corpus also failed, and the Court denied certiorari.[7]

In his petition for federal habeas corpus in the United States District Court for the Western District of North Carolina, Hill raised claims regarding 1) the trial judge's failure to recuse himself, 2) the prosecution's suppression of exculpatory evidence, and 3) the trial counsel's ineffective assistance of counsel. The habeas petition was denied and Hill appealed to the United States Court of Appeals for the Fourth Circuit.[8]

HOLDING

The United States Court of Appeals for the Fourth Circuit found no Due Process Clause violation requiring the recusal of the state court trial judge,[9] no violation of *Brady v. Maryland*[10] by the prosecution,[11] and no ineffective assistance of counsel.[12]

ANALYSIS/APPLICATION IN VIRGINIA

I. Recusal of the Trial Judge

Hill contended that the state judge should have recused himself from hearing Hill's post conviction claims. Hill asserted this claim to the court of appeals in order to establish that he was denied a "full, fair and adequate hearing"[13] in state court, and thus qualified for a new evidentiary hearing in federal court, under the federal habeas corpus statute in force at the time.[14]

Hill based his recusal claim on two statements made by the state court judge. The first statement was made in court, in response to a request by Hill's trial counsel for appointment of new counsel for Hill's direct appeal. Hill asserted that new counsel was necessary for him to pursue effectively an ineffective assistance of counsel claim on direct appeal. After denial of the request, the judge stated: "I saw no reason during the course of the trial, from a personal viewpoint, . . . how that could be raised."[15]

The other statement in question made by the judge was extrajudicial, made to an employee at a dry cleaning establishment after the conclusion of the trial. The employee commented that she felt sorry for Hill, and the judge responded: "Anybody that their family's happy to see them get the death penalty got what they deserved."[16]

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(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

N.C. Gen Stat. § 15A-2000 (Michie 1997).

[4] *Hill*, 417 S.E.2d at 769.

[5] *Id.* at 786.

[6] *Hill v. North Carolina*, 507 U.S. 924 (1993).

[7] *State v. Hill*, 459 S.E.2d 514 (N.C. 1995).

[8] *Hill v. French*, 133 F.3d 915 (4th Cir. 1997). Hill is an unpublished disposition. According to Fourth Circuit Local Rule 36(c), "citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel. or the law of the case and requires service of copies of cited unpublished dispositions of the Fourth Circuit." The full opinion can be found at *Hill v. French*, No. 97-13, 1997 WL 787126 (4th Cir. Dec. 24, 1997). All subsequent citations to Hill in this paper will use this electronic database citation.

[9] *Hill*, 1997 WL 787126 at *1.

[10] 373 U.S. 83 (1962) (suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution). The court of appeals' opinion gives no information about the nature of the alleged exculpatory evidence, and neither does the North Carolina Supreme Court opinion on Hill's direct appeal. *State v. Hill*, 417 S.E.2d 765 (N.C. 1992). The court of appeals found that the documents in question were in fact not suppressed by the prosecutor. "The prosecutor not only provided defense counsel with documents in her file and made the file available, but literally opened up the file on her desk and discussed its contents with defense counsel." Hill, 1997 WL 787126 at *2.

[11] *Hill*, 1997 WL 787126 at *2.

[12] *Id.* at *2-4.

[13] 28 U.S.C.A. § 2254(d) (West 1994).

[14] *Id.*

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;

Id.

[15] *Hill*, 1997 WL 787126 at *1.

[16] *Id.*

To the question of recusal in this case, the court of appeals applied the standard used by the United States Supreme Court in *Liteky v. United States,*[17] which held that "opinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible."[18] The court found that the standard used in *Liteky* did not require the recusal of the trial judge in Hill's case. In a footnote, the court went on to explain that the *Liteky* court had applied the standard of the federal recusal statute applicable to federal judges only.[19] Citing to *United States v. Couch,*[20] the court reasoned that although the proper standard a federal court must use in reviewing a recusal decision by a state court judge is the Due Process Clause of the Fourteenth Amendment, such standard is more difficult for the petitioner to meet than the *Liteky* standard, and thus, if the petitioner fails the latter standard, then he presumptively fails the former standard as well.[21] The court held that Hill did not meet the *Liteky* standard, and thus did not meet the Due Process standard either.[22]

However, the court only cited to the portions of *Couch* which aided its conclusion. *Couch* also relied on *Aetna Life Ins. Co. v. Lavoie*[23] for the proposition that "the Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weight the scales of justice equally between contending parties."[24] Thus, while the court of appeals held here that the due process standard is more difficult for a petitioner to meet than the *Liteky* standard for federal judges, it is clear from the *Aetna* decision that a state trial judge may be required to recuse him or herself even if there has been no showing of actual bias.

The American Bar Association's Model Code of Judicial Conduct states that "a judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."[25] In the accompanying Commentary, the Code further states that "a judge must avoid all impropriety and appearance of impropriety. . . . The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[26] When the trial judge in this case stated that in receiving the death penalty Hill "got what he deserved,"[27] arguably the trial judge created "in reasonable minds a perception that the trial judge's ability to carry out judicial responsibilities with . . . impartiality . . . [was] impaired."[28]

Though the trial judge's actions created an appearance of impropriety and thus met the recusal standard used in *Liteky*, trial counsel must be careful to note that an appearance of impropriety is not a due process violation. The vast majority of death penalty litigation originates in the state courts. Those trial counsel must bear in mind that for state trial judges, the applicable recusal standard is the Due Process Clause, not the *Liteky* appearance standard.

The United States Supreme Court stated in *Aetna* that "'most matters relating to judicial disqualification [do] not rise to a constitutional level.'"[29] The proper inquiry is whether the "situation is one 'which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'"[30] The *Couch* court went on to say that "[t]he Due Process Clause requires a judge to step aside when a reasonable judge would find it necessary to do so."[31]

II. Ineffective Assistance of Counsel Claims

Hill alleged four instances of ineffective assistance of counsel. Three of the allegations the court dismissed by invoking "the wide range of reasonable professional assistance" rule of *Strickland v. Washington.*[32] The court found that none of the three alleged instances of ineffective assistance of counsel fell outside *Strickland's* wide range, but rather that they all were potentially strategic trial decisions.[33]

The court found no ineffective assistance of counsel violation based on defense counsel's failure to obtain further neuropsychological testing in support of medical testimony when the doctor stated that further testing would not affect his opinion. The court further found no ineffective assistance of counsel in the defense counsel's failure to call as witness a doctor who could have testified about Hill's personality disorder, when such evidence may have opened the door to damaging evidence. And finally, the court found no ineffective assistance of counsel in defense counsel's failure to call as witnesses doctors to testify about Hill's drug use pattern, because the testimony would have contradicted other defense evidence.[34]

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[17] 510 U.S. 540 (1994).

[18] *Liteky,* 510 U.S. at 555.

[19] 28 U.S.C. § 455 (West 1993). Subsection (a) states: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

[20] 896 F.2d 78 (5th Cir. 1990).

[21] *Hill,* 1997 WL 787126 at *2 n.* (citing *Couch,* 896 F.2d at 81).

[22] *Id.*

[23] 475 U.S. 813 (1986).

[24] *Couch,* 896 F.2d at 82 (quoting *Aetna,* 475 U.S. at 825).

[25] Model Code of Judicial Conduct Canon 2 (1990).

[26] Model Code of Judicial Conduct Canon 2 cmt. (1990).

[27] *Hill v. French,* No. 97-13, 1997 WL 787126 at *1 (4th Cir. Dec. 24, 1997).

[28] Model Code of Judicial Conduct Canon 2 cmt. (1990).

[29] *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 820 (1986) (quoting *FTC v. Cement Institute,* 333 U.S. 683 (1948)).

[30] *Id.* at 822 (quoting *Ward v. Monroeville,* 409 U.S. 57, 60 (1972)).

[31] *United States v. Couch,* 896 F.2d 78, 82 (5th Cir. 1990).

[32] 466 U.S. 668, 689 (1984).

[33] *Hill v. French,* No. 97-13, 1997 WL 787126 at *3 (4th Cir. Dec. 24, 1997).

[34] *Id.* at *3-4.

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).