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Quesinberry v. Taylor 162 F.3d 273 (4th Cir. 1998)

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I. Facts

At approximately 6:00 A.M. on September 25, 1989, George Quesinberry ("Quesinberry") and Eric K. Hinkle ("Hinkle") broke into a warehouse owned by Tri City Electric Company.[1] Despite the fact that they expected the building to be empty, Quesinberry was carrying a gun he had taken from his step- mother's house.[2] After gaining entry to the building by prying open a back door with a screwdriver, Quesinberry and Hinkle stole a pair of walkie talkies, three rolls of stamps, and $200 in coins.[3] Thomas L. Haynes ("Haynes"), the owner of Tri City, found the intruders in a warehouse office and asked them what they were doing.[4] After Hinkle (to whom Quesinberry had previously handed the gun) refused Quesinberry's demand to shoot Haynes, Quesinberry took the pistol from Hinkle and shot Haynes twice in the back.[5] As Hinkle and Quesinberry were leaving the warehouse they passed Haynes, who was trying to push himself up off the ground.[6] Quesinberry hit Haynes on the head at least twice with the pistol.[7]

Quesinberry and Hinkle learned of Haynes's death from a television report.[8] Hinkle turned himself in later that day and gave a report implicating Quesinberry in the murder.[9] Quesinberry was subsequently arrested and also gave a report which described his part in Haynes's death.[10] On January 22, 1990, a grand jury indicted Quesinberry for capital murder, breaking and entering with the intent to commit larceny and robbery, and the use of a firearm in the commission of the burglary, robbery, and mur-

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1. Quesinberry v. Taylor, 162 F.3d 273, 275 (4th Cir. 1998).
2. *Id.*
3. *Id. See also* Quesinberry v. Commonwealth, 402 S.E.2d 218, 221-22 (Va. 1991).
4. *Quisenberry*, 162 F.3d at 275.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

der.[11] On May 2, 1990, Quesinberry was convicted of all charges.[12] On May 4, 1990, during the penalty trial, the jury found both the future dangerousness and vileness statutory aggravating factors and recommended a sentence of death.[13] The trial court adopted the jury's recommendation and imposed the death penalty.[14] The Supreme Court of Virginia affirmed the convictions and the death sentence.[15] The United States Supreme Court denied certiorari.[16]

After exhausting his state appeals,[17] Quesinberry petitioned the federal district court for a writ of habeas corpus.[18] The district court denied the writ and issued a memorandum opinion dated April 20, 1996.[19] Quesinberry appealed to the Fourth Circuit.[20]

On appeal, Quesinberry claimed the district court made the following errors: (1) holding Quesinberry could not establish cause to excuse the procedural default of his claim of ineffective assistance of trial counsel;[21] (2) applying a procedural bar to Quesinberry's claim that the trial court violated Quesinberry's constitutional rights when it (i) inadequately instructed jurors regarding Quesinberry's Fifth Amendment rights, (ii) received the jurors' verdicts based on those inadequate instructions, and (iii) released the jurors from the guilt phase proceeding; (3) holding as a matter of law that trial counsel were not ineffective for failing to interview Eric Hinkle or otherwise discover the information he possessed regarding the trial issues;[22]

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* (citing Quesinberry, 402 S.E.2d at 218).
16. *Id.* (citing Quesinberry v. Virginia, 502 U.S. 834 (1991).
17. *Id.* (citing Quesinberry v. Murray, 515 U.S. 1145 (1995)).
18. *Id.*
19. *Id.*
20. *Id.*
21. This claim is not discussed in detail in this summary because the court of appeals dealt with it by applying clearly established and widely understood legal principles and because the default arose under now repealed state habeas procedures. In brief, the Fourth Circuit rejected the claim on the sound reasoning that any deficiency in Quesinberry's state habeas counsel could not excuse the default due to the fact that Quesinberry had no constitutional right to effective state habeas representation. *Id.* at 276 (citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (concluding habeas petitioner has no right to effective assistance of counsel); Mackall v. Angelone, 131 F.3d 442, 446-49 (4th Cir. 1997) (same)).
22. This claim is not discussed in detail because the court's resolution of the matter is based on factual circumstances peculiar to this case. In short, the court declined to grant relief because it found Quesinberry had failed to meet his burden under either of the two prongs of *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984). The court of appeals found that defense counsel's performance was not objectively unreasonable in that counsel had private investigators interview Hinkle twice, moved for discovery, and determined that his

and (4) finding that good cause had not been shown to grant Quesinberry's discovery-related motions.[23]

II. Holding

The Fourth Circuit rejected Quesinberry's claims and affirmed the district court's denial of relief.[24]

III. Analysis / Application in Virginia

A. Fifth Amendment Right Not to Testify Claims

Quesinberry raised several Fifth Amendment claims, all of which stem from a single incident.[25] Although both the trial judge and defense counsel had earlier in the proceeding explained to the jury that it was not permitted under the Fifth Amendment to consider the fact that Quesinberry chose not to testify, the judge failed to do so when he read the jury instructions prior to the jury's guilt deliberations.[26] Neither defense counsel nor the Commonwealth called the omission to the judge's attention.[27] After the jury returned a guilty verdict, the judge permitted the members to go to lunch in the custody of the sheriff.[28] Before doing so, he explicitly instructed them not to talk among themselves or with others.[29] While the jury was at lunch,

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testimony did not differ substantially from Quesinberry's confession or from that of the medical examiners. Similarly, the Fourth Circuit found that Quesinberry had not demonstrated any prejudice resulting from his counsel's failure to exhaustively cross examine Hinkle. The court reasoned that counsel chose not to do so in order to avoid focus on the vileness of the crime and to avoid inadvertently providing the Commonwealth with damaging testimony which defense counsel was unsure the Commonwealth possessed. *Quesinberry*, 162 F.3d at 278-79. For an exposition of the current state of ineffective assistance of counsel law in Virginia, see Paige B. McThenia, Case Note, 11 CAP. DEF. J. 385 (1999) (analyzing Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998)).

23. *Quesinberry*, 162 F.3d at 276. Quesinberry's fourth claim, that the district court erred in denying his request for discovery, is not discussed in detail because of its cursory treatment by the Fourth Circuit. In brief, the court of appeals concluded that due to its resolution of claims 1 and 3, discussed *supra*, Quesinberry had failed to show good cause under Rule 6(a) of the rules governing Section 2254 of Title 28 of the United States Code. *Quesinberry*, 162 F.3d at 279 (citing Bracy v. Gramley, 520 U.S. 899, 908 (1997) (noting that a court of appeals reviews a district court decision to grant or deny discovery for an abuse of discretion); Harris v. Nelson, 394 U.S. 286, 300 (1969) (concluding that "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to [grant discovery]").

24. *Quesinberry*, 162 F.3d at 276.

25. *Id.* at 276-77.

26. *Id.* at 277.

27. *Id.*

28. *Id.*

29. The trial court stated explicitly:

the trial judge realized his omission and notified counsel thereof.[30] Defense counsel moved for a mistrial, and the judge denied the motion.[31] Upon the jury's return, the judge told the jury "[y]ou are instructed that the defendant does not have to testify [and that the] exercise of that right cannot be considered by you." He then asked the jurors to retire to their room and state their verdict in written form.[32] The jury returned with a guilty verdict approximately fifteen minutes later.[33]

The Fourth Circuit held that, on direct appeal, Quesinberry based his claim that the jury was improperly reassembled solely on Virginia state law.[34] Further, the Supreme Court of Virginia rejected Quesinberry's claim on that ground.[35] In his federal petition, Quesinberry attempted to couch his claim in terms of his Fifth Amendment right not to testify.[36] Because Quesinberry had failed to "federalize" his claim on direct appeal, however, the Fourth Circuit correctly refused to consider it on the ground that the Supreme Court of Virginia had decided the matter on an independent state ground and it was therefore procedurally defaulted.[37]

The court's resolution of this claim is a potent reminder of one of the basic tenets of capital defense representation in Virginia: Every claim presented to state courts should be grounded in both state and federal law. As is plainly evident from this case, the penalty for doing otherwise is the categorical stripping of half the precious little due process a petitioner is entitled to receive.

Douglas R. Banghart

> [B]ecause the case is still going on and there are other matters of such severity that you must consider, do not talk among yourselves; do not let anybody talk to you; do not let anybody approach you; do not respond to any comments; try to avoid what would be inadvertent communication from anyone of any source.

Id. (citing Quesinberry v. Commonwealth, 402 S.E.2d 218, 225 (Va. 1991)).

30. *Id.*

31. *Id.*

32. *Id.* (citing *Quesinberry*, 402 S.E.2d at 226).

33. *Id.*

34. *Id.*

35. *Id.*

36. Id. at 276-78.

37. *Id.* (citing Duncan v. Henry, 513 U.S. 364, 365-66 (1995) (barring federal habeas petitioner from raising constitutional claim which he failed to raise in state court); VA. CODE ANN. § 8.01-654(B)(2) (Michie Supp. 1998) (requiring, on penalty of subsequent default, state habeas petitioner to raise all claims "the facts of which petitioner had knowledge at the time of filing any previous petition"); George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996) (noting that "[a] claim that has not been presented to the highest state court . . . may be treated as exhausted if it is clear that the claim would be procedurally defaulted under state law if the petitioner attempted to raise it at this juncture")).