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I. Facts

On the night of June 30, 1994, a patron of the Witchduck Inn discovered the bodies of Lam Van Son, the owner of the Inn, Wendell Parish and Karen Sue Rounds, Inn employees, and Abdelaziz Gren, an Inn patron. All four victims had been shot once in the head. The cash register was found open with no money inside.[1] On July 1, 1994, the police arrested Michael D. Clagett ("Clagett") for public intoxication, took him into custody, and read him his *Miranda* rights.[2] Detective Paul C. Yoakum ("Yoakum") interrogated Clagett regarding the events at the Inn. Clagett initially denied that he had been at the Inn on the night of the killings. Yoakum mentioned that Clagett's girlfriend had spoken to the police about him. Additionally, Yoakum falsely indicated that eyewitnesses had identified Clagett and that Inn security cameras established his presence at the Inn. Soon after, Clagett confessed to the killings and explained the details of the crime. Later on July 1, while still in police custody, Clagett confessed to a television news reporter.[3]

A grand jury indicted Clagett on four counts of capital murder in the commission of a robbery.[4] Clagett unsuccessfully moved to suppress his confession to Yoakum.[5] At trial, the jury convicted Clagett on all counts and sentenced him to death.[6] State and federal courts upheld the capital murder convictions on direct appeal and in habeas proceedings.[7] Appealing the district court's denial of federal habeas relief, Clagett made the following arguments to the United States Court of Appeals for the Fourth Circuit: (1) that the trial court erred when it refused to instruct the jury on his parole ineligibility; (2) that his confession to police was involuntary; (3) that

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1. Clagett v. Commonwealth, 472 S.E.2d 263, 266 (Va. 1996).

2. Clagett v. Angelone, 209 F.3d 370, 372 (4th Cir. 2000). The arresting officer claimed that Clagett had bloodshot eyes, smelled of alcohol, and was having problems with his balance. *Id.* at 372-73.

3. *Id.* at 372-73.

4. *Id.* at 373; *see* VA. CODE ANN. § 18.2-31(4) (Michie 2000). Clagett was also charged with, and convicted of, multiple homicide capital murder. However, that conviction was reversed on double jeopardy grounds. *Clagett*, 472 S.E.2d at 272-73.

5. *Clagett*, 209 F.3d at 373. Clagett argued that the confession should have been suppressed because there was no probable cause for the public intoxication arrest, Clagett's request for counsel was denied, deceit was used to overbear Clagett's will, and the public intoxication arrest was pretextual. *Id.* at 373.

6. *Id.* at 374.

7. *Id.* at 374; *see Clagett*, 472 S.E.2d 272-73; *Clagett*, 209 F.3d at 374.

he was unable to understand his *Miranda* warnings because of intoxication and sleep deprivation; and (4) that trial counsel was ineffective for failing to suppress the confession to the police on the grounds expressed in (2) and (3).[8]

II. Holding

The Fourth Circuit rejected Clagett's four claims, denied his application for a certificate of appealability, and dismissed his petition for a writ of habeas corpus.[9]

III. Analysis / Application in Virginia

A. Procedural Default

Clagett argued that his confession to Yoakum was involuntary and that he was incapable of understanding his *Miranda* warnings at the time they

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8. *Clagett*, 209 F.3d at 374.

9. *Id.* at 383. The court's consideration of the jury instruction claim, discussed briefly below, will not be analyzed further in this article.

The Fourth Circuit rejected Clagett's claim that the trial court should have instructed the jury that he was not eligible for parole. *Id.* at 377. The court reviewed Clagett's claim pursuant to the standard mandated by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Id.* at 375; *see* Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. Title 153). The Supreme Court of Virginia had already adjudicated on the merits, and dismissed, Clagett's claim regarding the jury instruction given to the trial court. *Clagett*, 209 F.3d at 375. According to AEDPA, federal habeas relief can only be granted if the state adjudication of the claim either, "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or resulted in a decision that was not based on a reasonable determination of the facts considering the evidence. *Id.*; *see* 28 U.S.C. § 2254(d) (1996). Clagett relied on *Simmons v. South Carolina* to argue that the jury should have been told that he was parole ineligible. *Clagett*, 209 F.3d at 375; *see* Simmons v. South Carolina, 512 U.S. 154, 171 (1994) (finding that a jury is entitled to hear of parole ineligibility when future dangerousness of defendant is at issue). However, the Supreme Court of Virginia found that Clagett did not establish his parole ineligibility. *Clagett*, 472 S.E.2d at 272. The Fourth Circuit agreed with the district court that the finding of the Supreme Court of Virginia was not unreasonable. *Clagett*, 209 F.3d at 376. According to Virginia's three-strikes provision, felony offenses that are "part of a common act, transaction or scheme" are not counted individually for purposes of parole eligibility under section 53.1-151(B1) of the Virginia Code. *Id.* at 376; *see* VA. CODE ANN. § 53.1-151(B1) (Michie 1998). The Fourth Circuit ruled that the acts at the Inn clearly constituted a "common act, transaction or scheme." *Clagett*, 209 F.3d at 376; *see* Fitzgerald v. Commonwealth, 455 S.E.2d 506, 510 (Va. 1995) (stating that a series of murders committed in different places over a time of several hours constituted a common act, transaction or scheme for purposes of three-strikes analysis); Ramdass v. Angelone, 187 F.3d 396, 404-07 (4th Cir. 1999), *cert. granted in part*, 120 S. Ct. 784 (2000) (concerning three-strikes analysis when a guilty verdict had been returned but judgment had not been entered). For more detailed facts of *Ramdass*, see Ashley Flynn, Case Note, 12 CAP. DEF. J. 179 (1999) (analyzing Ramdass v. Angelone, 187 F.3d 396 (4th Cir. 1999)). For a discussion of the United States Supreme Court's decision in *Ramdass*, on certiorari, see Melissa A. Ray, Case Note, 13 CAP. DEF. J. 111 (2000) (analyzing Ramdass v. Angelone, 120 S. Ct. 2113 (2000)). Clagett was not parole ineligible, and made no argument that he was in any way "technically eligible but functionally ineligible" for parole. *Clagett*, 209 F.3d at 377.

were given to him.[10] The Fourth Circuit determined that Clagett had procedurally defaulted these claims.[11] The federal courts may treat claims that were not exhausted in the state court but that would be barred in state court at the time the petition for federal habeas relief was sought as procedurally defaulted.[12] Clagett did not exhaust the involuntariness and unknowing waiver claims in state court.[13] Clagett did not exhaust the claims because he objected in his federal habeas petition to his confession's admissibility based on different grounds than those argued during trial, on direct appeal, and in state habeas proceedings.[14] Clagett argued in the state courts that the confession was inadmissible, claiming that his arrest lacked probable cause, that his request for counsel during interrogation was denied, that his will was overcome by police misrepresentations, and that the arrest was pretextual.[15] In his federal habeas petition, Clagett argued that the confession was inadmissible because it was involuntary and because he had been unable to understand his *Miranda* warnings.[16] At the time of the federal habeas petition, the claims challenging the admissibility of Clagett's confession would have been barred in state court under three independent state procedural rules.[17]

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10. *Clagett*, 209 F.3d at 377-78.

11. *Id.* at 378-83.

12. Coleman v. Thompson, 501 U.S. 722, 735 (1991) (finding that federal courts generally cannot review a state court dismissal, for procedural default, of a federal constitutional claim).

13. *Clagett*, 209 F.3d at 378.

14. *Id.*; *see* U.S. CONST. amend. V (reading in relevant part: "nor shall any person be . . . compelled in any criminal case to be a witness against himself"); 28 U.S.C. § 2254(b) (1996) (requiring exhaustion of claim in state court before petitioner can make the claim in federal habeas proceedings).

15. *Clagett*, 209 F.3d at 373.

16. *Id.* at 374.

17. *Id.* at 379. In Virginia, claims not argued at trial cannot be argued on direct appeal. Coppola v. Warden, 282 S.E.2d 10, 11 (Va. 1981) (dismissing appeal of denial of writ of habeas corpus because trial counsel did not make an objection at trial to intent instruction, despite the fact that such instructions had not been determined to be unconstitutional at the time of trial). Claims that were not argued on direct appeal cannot be raised in state habeas proceedings when the petitioner does not raise an ineffective assistance of counsel claim in the state habeas petition. *See* Walker v. Mitchell, 299 S.E.2d 698, 699 (Va. 1983) (restricting ineffective assistance of counsel claims to habeas proceedings); Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (rejecting petitioner's right to argue at habeas proceeding that the process by which he was identified in court was impermissibly suggestive). However, Clagett could not have made an ineffective assistance of counsel argument because claims that are not raised in the initial state habeas petition generally cannot be raised in later state habeas proceedings. *See* VA. CODE ANN. § 8.01-654(B)(2) (Michie 2000) (stating that "[n]o writ shall be granted on the basis of any allegation of facts of which petitioner had knowledge at the time of filing any previous petition"). Therefore, Clagett's claims would have been procedurally defaulted by the Virginia courts, and consequently, could not be considered by federal courts either. *Clagett*, 209 F.3d at 378.

B. Use of Ineffective Assistance of Counsel to Argue Procedurally Defaulted Claims

While procedural default on state grounds would normally preclude federal habeas review of a state prisoner's claims, a petitioner may argue defaulted claims after demonstrating cause for the default and actual prejudice.[18] Cause for procedural default can be demonstrated by showing that the petitioner did not receive effective assistance of counsel.[19] In this way, arguing ineffective assistance of counsel can serve as a "gateway" to federal habeas review of a procedurally defaulted claim.[20] Assistance of counsel that is at or above the constitutionally acceptable level cannot provide sufficient cause to excuse the procedural default.[21]

Strickland v. Washington[22] established the standard for determining which ineffective assistance of counsel claims excuse procedural default.[23] The test required Clagett to show that defense counsel's conduct did not meet an objective standard of reasonableness and that actual prejudice resulted.[24] Clagett's claim that his counsel's performance constituted ineffective assistance of counsel would have required the conclusion that counsel's pursuit of the pretextual arrest argument was not objectively reasonable.[25] However, the district court believed, and the Fourth Circuit agreed, that the pretextual arrest theory possibly could have precluded admission of the confession to Yoakum and of the later confession to the reporter, if the latter had been considered "fruit of the poisonous tree."[26] However, if Clagett had chosen to argue on the bases asserted in his federal habeas proceeding, the later confession may have been admissible regardless

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18. Coleman v. Thompson, 501 U.S. 722, 750 (1991). The court in *Clagett* also noted that another exception to procedural default is allowed when a fundamental miscarriage of justice would be the result. However, Clagett did not make such an argument and the court denied the existence of any miscarriage of justice. *Clagett*, 209 F.3d at 379 n.5.

19. Murray v. Carrier, 477 U.S. 478, 488 (1986) (finding that evidence of counsel's inadvertent error in raising a substantive claim is not sufficient to show cause for a procedural default).

20. The court noted that Clagett argued the claim of ineffective assistance of counsel as a free standing ground for habeas relief rather than as a means for justifying his procedural default of the new grounds for objecting to the admissibility of the confession. The court, however, also analyzed the assistance of counsel argument in its "gateway" function to cure the procedural default. *Clagett*, 209 F.3d at 379. The court later dismissed the free standing ineffective assistance of counsel claim. *Id.* at 382; *see infra* note 41.

21. *Murray*, 477 U.S. at 488.

22. 466 U.S. 668 (1984).

23. Strickland v. Washington, 466 U.S. 668, 687 (1984) (finding that a successful ineffective assistance of counsel claim requires a showing by the defendant that counsel's performance was deficient and that prejudice resulted).

24. *Id.* at 687-88, 693-94.

25. *Clagett*, 209 F.3d at 380.

26. *Id.*

of the decision precluding the initial confession.[27] The court added that other facts of the case substantiated defense counsel's decision to pursue the pretextual arrest theory, including the following: (1) the arresting officer knew police were searching for Clagett in connection with the murders; (2) the call regarding Clagett was an "assist-rescue" rather than a "suspicious-person" call; (3) the police found Clagett sleeping, not unconscious; (4) the police testified to Clagett's responsiveness; (5) the police never considered the possibility that Clagett resided at the apartment outside of which he was found; (6) the condition in which Clagett was found was as consistent with sleep deprivation as intoxication; and (7) the police never charged Clagett with public intoxication.[28] Additionally, counsel must be allowed significant latitude in determining strategy.[29] The Fourth Circuit concluded, therefore, that counsel's pursuit of the theories that Clagett's arrest lacked probable cause, that Clagett's request for counsel during interrogation was denied, that Clagett's will was overcome by police misrepresentations, and that the arrest was pretextual, did not fall below an objective standard of reasonableness.[30]

The court rejected Clagett's argument that defense counsel could have argued both the pretextual arrest theory and the theory that the confession was involuntary. Arguing the pretextual arrest required counsel to deny that the defendant was intoxicated, whereas intoxication was a prerequisite for the claim that the confession was involuntary or that the *Miranda* warnings were ineffective.[31]

Clagett's argument that the involuntary confession, unknowing waiver claims were as likely to preclude admission of the second confession as the pretextual arrest theory, was also rejected.[32] The best strategy available need not be employed for counsel's performance to be objectively reasonable.[33] The court proceeded to explain, however, that Clagett's argument would fail even if a more stringent standard were required of counsel.[34] If the arrest had been found to be pretextual, Clagett would have been able to argue that the second confession to the reporter was "fruit of the poisonous tree."[35] Arguing that the constitutional violations involved with the first confession so "tainted" the second confession would have been more difficult under the involuntary confession, unknowing waiver claims.[36] Pursuit of the involuntary confession, unknowing waiver claims would have re-

27. *Id.* at 380-81.
28. *Id.*
29. Strickland v. Washington, 466 U.S. 668, 689 (1984).
30. *Clagett*, 209 F.3d at 380-81.
31. *Id.*
32. *Id.* at 381-82.
33. *Id.* at 381.
34. *Id.*
35. *Id.* at 380.
36. *Id.* at 381.

quired Clagett to make a connection between the first confession to the police and the second confession to the reporter because, under the new theory, the police were lawfully holding Clagett at the time of the second confession.[37] The court concluded that while a confession following an involuntary confession is subject to "taint" analysis,[38] the petitioner failed to offer anything indicating that any alleged "taint" on the first confession had not dissipated at the time of the later confession.[39] Therefore, the Fourth Circuit concurred with the finding of the district court that even if the original confession had been suppressed, the later confession to the reporter was its "substantive equal."[40] Counsel's strategy at trial met the objectively reasonable standard necessary to overcome an ineffective assistance of counsel claim.[41] As a result, the procedurally defaulted state court claims could not be argued in federal habeas proceedings.[42]

IV. Implications for Virginia Capital Practice

The implications of this case for general Virginia capital practice are two-fold. On appeals to Virginia state courts, the defense generally cannot substitute the grounds upon which a claim is based for new grounds.[43] Therefore, the defense must choose carefully the grounds upon which a claim is based. This is of added concern when, as in the current case, the respective grounds are conflicting and cannot be argued in the alternative.[44] Furthermore, the Fourth Circuit has demonstrated that a petitioner can argue defaulted claims at federal habeas proceedings if the petitioner shows that the ineffective assistance of counsel caused the procedural default, and that actual prejudice ensued.[45] However, it is necessary to remember that the court does not need to consider a free standing ineffective assistance of counsel claim as a basis for habeas relief. The claim of ineffective assistance of counsel should be stated as cause to excuse the procedural default.[46] The court's interpretation of counsel's performance allows great deference to the strategy utilized.[47]

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37. *Id.*

38. *See* Oregon v. Elstad, 470 U.S. 298, 307 (1985) (determining that a *Miranda* violation will not automatically "taint" a later confession from the suspect).

39. *Clagett*, 209 F.3d at 382.

40. *Id.* at 380, 382.

41. *Id.* at 382. The ineffective assistance claim was considered in regards to procedural default. As a result, the court's conclusion on the merits required it to reject Clagett's independent ineffective assistance of counsel claim. *Id.*

42. *Id.*

43. *See supra* notes 10-17 and accompanying text.

44. *Clagett*, 209 F.3d at 381.

45. *Id.* at 379; *see* Coleman v. Thompson, 501 U.S. 722, 750 (1991).

46. *Clagett*, 209 F.3d at 379; *see supra* note 20 and accompanying text.

47. *Id.* at 380; *see* Strickland v. Washington, 466 U.S. 668, 689 (1984).

V. Epilogue

On the night of July 6, 2000, Michael Clagett was executed in the electric chair at the Greensville Correctional Center in Virginia.[48] The United States Supreme Court rejected Clagett's final appeal.[49] Before his death, Clagett apologized to the families of the victims killed at the Inn. Reactions from the victims' family members who were present varied. After Clagett was declared dead, one commented that he was not angry anymore. Another family member said, "It doesn't bring any one of them back."[50]

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48. *The Week in Review*, RICH. TIMES-DISPATCH, July 9, 2000, at C4.

49. *Id.*

50. Chris Grier, Tim McGlone, & Cindy Clayton, *In Prison, Clagett Married Cousin Widow Says She "Can't Explain" Why She Loved Executed Killer*, THE VIRGINIAN-PILOT AND THE LEDGER-STAR, July 8, 2000, at B1.