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## Hill v. Ozmint 339 F.3d 187 (4th Cir. 2003)

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# Hill v. Ozmint

## 339 F.3d 187 (4th Cir. 2003)

### I. Facts

On March 7, 1994, at approximately 7:00 p.m., Major Spencer Guerry (“Guerry”), the Deputy Police Chief for the City of Georgetown, South Carolina, observed a Honda Prelude being driven with an expired Colorado license plate. Guerry stopped the Honda, approached it, and asked the driver, David Hill (“Hill”), for his driver’s license and vehicle registration. Hill provided Guerry with his registration but was unable to produce his license. Guerry returned to his vehicle and radioed the information to headquarters.<sup>1</sup>

Before headquarters was able to get back in touch with Guerry, Guerry again approached Hill’s Honda and instructed Hill to exit his vehicle.<sup>2</sup> Hill then shot Guerry in the face and drove away.<sup>3</sup> Guerry managed to use the radio attached to his uniform to call for help.<sup>4</sup> A tape recording made at headquarters indicated that Guerry “muttered” words including “6-9” and “-eh shot me.”<sup>5</sup> Medical personnel arrived and transported Guerry to the Medical University of South Carolina, where he died a few days later.<sup>6</sup>

Driving the Honda back to his home, Hill stopped and picked up his girlfriend, Wendy Richardson (“Richardson”). The two of them drove to his parent’s home. Hill abandoned his car in a ditch with his mother and Richardson following behind.<sup>7</sup>

Officers located and searched Hill’s home and proceeded to the home of Hill’s parents.<sup>8</sup> By the time the officers arrived at Hill’s parents’ home, Hill had abandoned his vehicle, returned with his mother and Richardson, and left again.<sup>9</sup> Officers advised Hill’s parents and Richardson to encourage Hill to contact authorities.<sup>10</sup>

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1. Hill v. Ozmint, 339 F.3d 187, 190 (4th Cir. 2003).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* The numbers “6-9” are the first two numbers in the code “6-9-1” that is the dispatch for headquarters. *Id.*

6. *Id.*

7. *Hill*, 339 F.3d at 190.

8. *Id.* at 190–91.

9. *Id.* at 191.

10. *Id.*

Shortly after the authorities left Hill's parents' home, Hill returned covered in mud.<sup>11</sup> After showering and cleaning his hands with Clorox, Hill phoned the police and reported his car stolen.<sup>12</sup> Investigators responded and arrested Hill.<sup>13</sup> At headquarters, Hill waived his Miranda rights and began to talk with investigators.<sup>14</sup> Not believing his story, investigators probed Hill about the "precise timing" of the events he described.<sup>15</sup> Hill stopped the interview and requested a lawyer.<sup>16</sup>

On April 20, 1994, Hill was indicted for the murder of Guerry, and the State announced it would seek the death penalty.<sup>17</sup> Due to the publicity surrounding the case, the court sequestered the jury for the trial's duration.<sup>18</sup> At trial, during the State's case-in-chief, the State presented significant evidence pointing toward Hill's guilt and rested its case after four days.<sup>19</sup>

At trial, Hill's version of the events of March 7 had changed significantly since his initial interview.<sup>20</sup> Hill finished his testimony at approximately 4:30 p.m.

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11. *Id.*

12. *Id.*

13. *Hill*, 339 F.3d at 191. Hill was taken to headquarters where investigators performed tests on his hands. *Id.* The tests revealed that Hill had recently fired a firearm. *Id.*

14. *Id.* The story Hill related to investigators was very different than the story Hill related at trial. *Id.* Hill told investigators that he and Richardson had fought earlier in the day. *Id.* Afterwards, Hill walked from his home to his parents' home where he fell asleep reading a magazine outside by a shed. *Id.* Hill recalled waking up, entering his parents' home and his mother informing him that the authorities were looking for him. *Id.* Hill then called the police. *Id.*

15. *Id.*

16. *Id.* Later that evening, investigators discovered Hill's Honda abandoned in a ditch. *Id.* Visiting an Exxon station, the investigators recovered a credit card receipt time-stamped at 6:00 p.m. on March 7, 1994, bearing Hill's signature. *Id.* This was one hour before the shooting. *Id.*

17. *Id.*; see S.C. CODE ANN. § 16-3-26 (Supp. 2002) (stating the punishment for murder and the procedures for seeking the death penalty).

18. *Hill*, 339 F.3d at 191.

19. *Id.*

20. *Id.* Hill testified that he and Johnny Cribb ("Cribb") were in the Honda at the time Guerry was shot. Hill related that he owed Cribb \$16,000 because of a "drug deal gone awry." Hill stated that Cribb shot Guerry. Hill continued to testify that earlier that day he had traveled to Pawleys Island, South Carolina, to buy marijuana. On his way back to Georgetown, Hill stopped and picked up Steve Blankenship ("Blankenship"), an acquaintance of both himself and Cribb. Hill stated that Blankenship entered his car, threatened him with a pistol, and forced him to drive to a Ramada Inn near Georgetown. Next, Blankenship removed Hill's gun from the glove compartment. When Blankenship and Hill arrived at the Ramada Inn, they met Cribb. Blankenship gave Cribb both weapons. Hill testified that Cribb told him they had "unfinished business" to take care of and entered the Honda. Cribb pointed the gun at Hill's head. Hill testified that he was instructed to drive to his home and they were on the way there when Guerry stopped them. Hill related that Cribb was hiding in the backseat and that when Guerry approached the vehicle Cribb leaned forward and shot Guerry with Hill's handgun. After the shooting, Cribb instructed Hill to discharge the handgun into the woods. According to Hill, Cribb left with Blankenship, and Hill drove the Honda home. *Id.* at 191-92.

on Saturday, October 28, 1994.<sup>21</sup> The next defense witness scheduled to testify was Dr. Stephen Cain ("Dr. Cain").<sup>22</sup> Due to unforeseeable events, Dr. Cain was not able to arrive in Georgetown on Saturday afternoon or evening.<sup>23</sup> The defense sought a continuance until Monday in order to allow Dr. Cain to testify, which the court denied.<sup>24</sup> The defense rested and closing arguments were made on Saturday night.<sup>25</sup> On Sunday morning the jury received its instructions and found Hill guilty of murder in forty-five minutes.<sup>26</sup>

During the sentencing phase, the defense called three experts "who testified that Hill suffered from a treatable neuro-chemical disorder."<sup>27</sup> After closing arguments, the jury returned a verdict recommending that Hill be sentenced to death.<sup>28</sup> Accepting the jury's recommendation, the trial court imposed the death sentence.<sup>29</sup> Hill directly appealed his conviction to the Supreme Court of South Carolina.<sup>30</sup> "[T]hat court upheld Hill's conviction and death sentence."<sup>31</sup> The United States Supreme Court denied certiorari.<sup>32</sup>

Next, Hill filed an Application for Post-Conviction Relief ("PCR").<sup>33</sup> After a four-day evidentiary hearing, the PCR was dismissed.<sup>34</sup> The Supreme Court of South Carolina refused to review the PCR order, and the United States Supreme Court again denied certiorari.<sup>35</sup>

Hill filed a petition for a writ of habeas corpus in the United States District Court for South Carolina.<sup>36</sup> After a thorough evaluation, a magistrate judge recommended that the petition be dismissed.<sup>37</sup> The district court adopted the

21. *Id.* at 192.

22. *Id.* Dr. Cain was an expert witness from Wisconsin who was scheduled to fly in from Nevada for the trial. *Id.* at 192, 195.

23. *Id.*; see *infra* note 61.

24. *Hill*, 339 F.3d at 192. The court had already allowed the prosecution one continuance. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Hill*, 339 F.3d at 192; see S.C. CODE ANN. § 16-3-25 (Supp. 2002) (prescribing review by the supreme court of the imposition of the death penalty).

31. *Hill*, 339 F.3d at 192 (citing *State v. Hill*, 501 S.E.2d 122, 122 (S.C. 1998)).

32. *Id.* (citing *Hill v. South Carolina*, 525 U.S. 1043, 1043 (1998) (mem.) (denying certiorari)).

33. *Id.* Subsequently, Hill amended his PCR "to assert additional claims for relief." *Id.* at 192 n.2. The PCR cited is the PCR as amended. *Id.*

34. *Id.* at 192.

35. *Id.* (citing *Hill v. Maynard*, 537 U.S. 979, 979 (2002) (mem.) (denying certiorari)).

36. *Id.* at 193. Hill amended his petition for habeas relief several times. *Id.* at 193 n.3. The petition referred to is the petition as amended. *Id.*

37. *Hill*, 339 F.3d at 193; see 28 U.S.C. § 636(b) (2000) (allowing a district court to refer a

magistrate's recommendation, dismissed Hill's petition, and declined to issue a Certificate of Appealability ("COA").<sup>38</sup>

Despite the district court's refusal to issue a COA, the United States Court of Appeals for the Fourth Circuit issued Hill a COA for several habeas claims.<sup>39</sup> The claims certified were the following: (1) that the trial court violated the Sixth Amendment in its refusal to grant Hill a continuance ("the continuance claim"); (2) that the number of officers in uniform in both the courtroom and at the courthouse, pursuant to *Holbrook v Flynn*,<sup>40</sup> violated Hill's right to a fair trial ("the *Holbrook* claim"); (3) that the district court erred in not holding a hearing to allow for discovery on the *Holbrook* claim (the "discovery claim"); and (4) that Hill's counsel were ineffective (the "ineffective assistance of counsel" ("IAC") claim).<sup>41</sup> The court addressed each in turn.

## II. Holding

The Fourth Circuit rejected each of the four claims upon which it granted a COA and affirmed the judgment of the district court.<sup>42</sup> The court found that none of the state court's adjudications of Hill's claims were "contrary to" or an "unreasonable application of" clearly established federal law.<sup>43</sup> Hill's claims, therefore, were properly decided by the district court.<sup>44</sup>

## III. Analysis

### A. The Standard of Review

*Basden v Lee*<sup>45</sup> instructs that a federal circuit court review de novo a district court's "decision on a petition for a writ of habeas corpus based on a state court record."<sup>46</sup> Additionally, when a district court refuses to hold an evidentiary

petition for habeas corpus to a magistrate judge).

38. *Hill*, 339 F.3d at 193; see 28 U.S.C. § 2253(c)(1) (2000) (stating 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).

39. *Hill*, 339 F.3d at 193.

40. 475 U.S. 560 (1986).

41. *Hill*, 339 F.3d at 193; *Holbrook v. Flynn*, 475 U.S. 560, 570-71 (1986) (observing that having too many uniformed officers in a courtroom can "pose [a threat] to a defendant's chances of receiving a fair trial").

42. *Hill*, 339 F.3d at 203.

43. *Id.* at 197, 199, 202; see 28 U.S.C. § 2254(d) (2000) (stating that a federal court may award relief to a claim only if it was "contrary to" or an "unreasonable application of" clearly established federal law; part of AEDPA).

44. *Hill*, 339 F.3d at 203.

45. 290 F.3d 602 (2002).

46. *Hill*, 339 F.3d at 193 (quoting *Basden v. Lee*, 290 F.3d 602, 608 (4th Cir. 2002)); *Basden*, 290 F.3d at 608 (recognizing the standard of review for petitions of writs of habeas corpus based

hearing or to authorize discovery, the state court decision is reviewed under an abuse of discretion standard.<sup>47</sup>

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), federal courts can only issue a writ of habeas corpus if the state's adjudication of a claim resulted in a decision that: (1) was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>48</sup> The Supreme Court explained in *Williams v Taylor*<sup>49</sup> that state action is "contrary to" clearly established federal law when it results in a decision that is contrary to a conclusion the Supreme Court reached on a question of law, or when a state court reaches a decision contrary to a decision the Supreme Court has reached on a set of materially indistinguishable facts.<sup>50</sup> In deciding what is an "unreasonable application," the Court has held that "[u]nder the unreasonable application clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."<sup>51</sup> Additionally, under 28 U.S.C. § 2254(e)(1), a state court's findings of fact are afforded a "presumption of correctness" which a petitioner can rebut with "clear and convincing evidence."<sup>52</sup>

### B. The Continuance Claim

In his petition for habeas corpus, Hill asserted, "that the trial court violated his Sixth Amendment right to present his defense to the indictment in refusing to grant a continuance from Saturday evening until Monday morning so that he could introduce Dr. Cain's testimony and an enhanced version of Guerry's final radio transmission."<sup>53</sup> At 5:40 p.m. on Friday, October 27, 1994, the State had

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on state court claims).

47. *Hill*, 339 F.3d at 193 (citing *Thomas v. Taylor*, 170 F.3d 466, 474-75 (4th Cir. 1999)).

48. *Id.*; 28 U.S.C. § 2254(d) (setting the standard for federal application of a habeas petition from a state court claim; part of AEDPA).

49. 529 U.S. 362 (2000).

50. *Hill*, 339 F.3d at 193-94 (citing *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000) (O'Connor, J., concurring)); see *Taylor*, 529 U.S. at 412-13 (discussing the "contrary to" clearly established federal law standard set forth in 28 U.S.C. § 2254(d)).

51. *Hill*, 339 F.3d at 194 (first alteration in original) (internal quotation marks omitted) (quoting *Taylor*, 529 U.S. at 413 (O'Connor, J., concurring)).

52. *Id.* (quoting 28 U.S.C. § 2254(e)(1)).

53. *Id.*; see *Herring v. New York*, 422 U.S. 853, 856-57 (1975) (reciting that pursuant to the Sixth Amendment of the Constitution, the accused has a right to present a defense to a criminal charge).

exhausted its available witness list and sought an overnight recess to accommodate its final four witnesses who were not available until Saturday.<sup>54</sup> Court was recessed until 9:00 a.m.<sup>55</sup> Hill's lawyers "had anticipated that the State's case-in-chief would last at least through Saturday."<sup>56</sup> As a result of their prediction, Hill's counsel had not planned on beginning their case-in-chief until Monday morning.<sup>57</sup>

The defense proposed that Guerry, in his final transmission after being shot, actually said "they shot me" rather than "-eh shot me" as the prosecution alleged.<sup>58</sup> Hill's counsel retained Dr. Cain, a forensic tape analyst, to enhance the last transmission of Guerry.<sup>59</sup> Dr. Cain's testimony was to "establish the foundation for admission of the enhanced recording, which Hill hoped would convince the jury that Guerry had said 'they shot me.'"<sup>60</sup> Due to circumstances beyond his control, Dr. Cain could not be in court on Saturday.<sup>61</sup>

The defense moved for a continuance until Monday morning.<sup>62</sup> The court initially reserved ruling on the motion for continuance.<sup>63</sup> The State rested its case around noon, and by 4:40 p.m. the defense had exhausted its list of available witnesses.<sup>64</sup> The defense renewed its motion for a continuance.<sup>65</sup> "The court denied the one-day continuance, stating that it: 'simply cannot wait until Monday morning. It is Saturday. According to my[watch] it is approximately twenty-two [until] five, and the court declines to recess the trial until Monday morning.'"<sup>66</sup> Hill's counsel rested.<sup>67</sup>

54. *Hill*, 339 F.3d at 194.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* This argument supported defense counsel's allegation that Cribb was in the car with Hill the night of the shooting. *Id.*

59. *Id.*

60. *Hill*, 339 F.3d at 194.

61. *Id.* at 195. On Friday, October 27, Hill's counsel contacted Dr. Cain in Nevada. *Id.* Dr. Cain told Hill's lawyers he would be completing his business and flying out Friday night or Saturday morning. *Id.* Dr. Cain purchased his airline ticket. *Id.* After purchasing the ticket, Dr. Cain's assistant became violently sick and, as a result, Dr. Cain was unable to leave Nevada. *Id.* Dr. Cain contacted Hill's defense team and informed them he would not be able to be there on Saturday. *Id.*

62. *Id.* Dr. Cain called defense counsel on Saturday morning, told them that the condition of his assistant had improved, and that he could be in court on Monday. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Hill*, 339 F.3d at 195.

67. *Id.*

In his direct appeal to the Supreme Court of South Carolina, Hill argued that the denial of his motion for a continuance interfered with his Sixth Amendment right to present a defense.<sup>68</sup> The court rejected this claim relying on *State v. Babb*.<sup>69</sup> In his petition for habeas relief in the district court, Hill renewed his argument.<sup>70</sup> The district court rejected this claim as procedurally defaulted because the Supreme Court of South Carolina had relied on state law.<sup>71</sup> The Fourth Circuit issued a COA on this claim, but because the state's resolution of the claim was neither "contrary to" nor an "unreasonable application of" clearly established federal law, the court declined to issue habeas relief.<sup>72</sup>

Within the guise of his continuance claim Hill raised several subissues.<sup>73</sup> First, Hill asserted that the district court was mistaken in deciding that his claim had been procedurally defaulted.<sup>74</sup> Second, Hill argued "that there was no state court adjudication 'on the merits,' and that [the court] should therefore review the Continuance claim de novo."<sup>75</sup> Finally, Hill argued that he was entitled to habeas relief because the trial court denied his Sixth Amendment right to present a defense.<sup>76</sup>

### 1. Procedural Default

The Fourth Circuit found that the district court erred when it decided that Hill's continuance claim was procedurally defaulted.<sup>77</sup> In this case, the state court did not decide the claim based on a procedural rule, but instead, "considered the merits of the claim, ruling that, under South Carolina law, the 'denial of [a] motion for continuance will not be disturbed absent clear abuse of discretion resulting in prejudice.'<sup>78</sup> The state court did not determine that Hill procedurally defaulted but rejected the claim wholly on its merits.<sup>79</sup> Thus, federal review was not barred.<sup>80</sup>

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68. *Id.*

69. *Id.*; see *State v. Babb*, 385 S.E.2d 827, 829 (S.C. 1989) (standing for the proposition that absent clear abuse of discretion resulting in prejudice, a denial of a motion for continuance will not be disturbed).

70. *Hill*, 339 F.3d at 195.

71. *Id.*

72. *Id.* at 195, 197.

73. *Id.* at 195.

74. *Id.*

75. *Id.*

76. *Hill*, 339 F.3d at 195.

77. *Id.* at 196.

78. *Id.* (quoting *Hill*, 501 S.E.2d at 128) (alteration in original).

79. *Id.*

80. See *id.* (stating "that the district court erred in ruling that the Continuance claim was procedurally defaulted").



## 2. *De Novo Review*

Hill argued that the court should review his continuance claim *de novo*.<sup>81</sup> Hill claimed that, because the state court only referred to state law when resolving the claim, it failed to “adjudicate [it] on the merits.”<sup>82</sup> The United States Supreme Court has held that “a state court may adjudicate a claim ‘on the merits’ without relying on or citing Supreme Court precedents.”<sup>83</sup> In this case, the court concluded that the state court resolved the issue on the merits even if it did not cite federal law.<sup>84</sup>

## 3. *Denial of Sixth Amendment Right to Present Defense*

A defendant must satisfy two elements in order to succeed on a claim “that a trial court violated the Constitution in refusing to grant a continuance.”<sup>85</sup> First, the defendant must prove that the trial court abused its discretion in choosing to deny the defendant’s claim.<sup>86</sup> In *Ungar v. Sarafite*,<sup>87</sup> the United States Supreme Court stated that a “‘matter of continuance is traditionally within the discretion of the trial judge,’ a trial court is not entitled to deny a continuance because of a ‘myopic insistence upon expeditiousness in the face of a justifiable request for delay.’”<sup>88</sup> Second, the defendant must establish that the trial court’s ruling was erroneous and prejudiced his defense.<sup>89</sup>

Because the court could not determine whether the state court used abuse of discretion or prejudice as its rationale for denying relief, the Fourth Circuit examined the record to determine if the state court’s rejection of the continuance claim was “contrary to” or involved an “unreasonable application” of federal law.<sup>90</sup> Additionally, the Fourth Circuit concluded that the treatment of the defense team was inequitable in light of the fact that the prosecution was granted the continuance it requested.<sup>91</sup> The Fourth Circuit noted that the trial court’s refusal to grant the continuance appears to have been arbitrarily made and the

81. *Id.*

82. *Hill*, 339 F.3d at 196.

83. *Id.*; see *Early v. Packer*, 537 U.S. 3, 7–8 (2002) (finding that applying AEDPA deference to a state court decision that was resolved without citing controlling federal precedent is a claim adjudicated on the merits).

84. *Hill*, 339 F.3d at 196.

85. *Id.*

86. *Id.*

87. 376 U.S. 575 (1964).

88. *Hill*, 339 F.3d at 196 (quoting *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964)).

89. *Id.* at 196–97; see *United States v. Colon*, 975 F.2d 128, 130 (4th Cir. 1992) (finding that the trial court’s refusal to grant a continuance prejudiced the Government’s case).

90. *Hill*, 339 F.3d at 197 (citing *Bell v. Jarvis*, 236 F.3d 149, 157–58 (4th Cir. 2000)).

91. *Id.*

court's only justification was that it "simply[could not] wait until Monday morning."<sup>92</sup> The Fourth Circuit found that although Hill's request for a continuance was justifiable; it was denied in the name of expeditiousness.<sup>93</sup>

In spite of this evidence, the Fourth Circuit concluded that Hill failed to show he suffered prejudice from the trial court's ruling.<sup>94</sup> Dr. Cain, at the PCR proceeding, testified that the enhanced tape would not resolve the issue of the garbled language.<sup>95</sup> The PCR court found that both the original and the enhanced tapes were "indecipherable."<sup>96</sup> Concluding that neither Dr. Cain's testimony nor the enhanced tape would have aided Hill's defense, the court determined that the state court's rejection of Hill's continuance claim was neither "contrary to" nor an "unreasonable application of" clearly established federal law.<sup>97</sup>

### C. *The Holbrook and Discovery Claims*

Hill argued that he was denied his constitutional right to a fair trial because the number of uniformed police officers improperly suggested to the jury that he was guilty.<sup>98</sup> Alternatively, Hill contended in his discovery claim that the district court erred in not allowing him to develop the record, through discovery or an evidentiary hearing, regarding the number of police officers present during trial to show that their presence interfered with his right to a fair trial.<sup>99</sup> The Fourth Circuit issued a COA on both claims.<sup>100</sup>

#### 1. *Holbrook Claims*

Hill first contended that during jury selection the number of uniformed officers present in the courtroom prejudiced him by "improperly suggesting to

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

93. *Id.*

94. *Id.*

95. *Id.*

96. *Hill*, 339 F.3d at 197. The PCR court's finding of fact, under AEDPA, is entitled to a presumption of correctness. See 28 U.S.C. § 2254(e)(1) (2000) (stating that a state court's determination of a factual issue in a proceeding instituted by a writ of habeas corpus is presumed correct; part of AEDPA).

97. *Hill*, 339 F.3d at 197; see *Gardner v. Barnett*, 199 F.3d 915, 920 (7th Cir. 1999) (denying relief because refusal to grant a continuance did not affect the verdict when the excluded testimony would not have aided the defense).

98. *Hill*, 339 F.3d at 197-98; see *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) (stating that the right of the accused to a fair trial is an essential requirement of due process).

99. *Hill*, 339 F.3d at 198. Hill wanted to utilize videotape recordings of the trial to establish the number of uniformed officers that were present. *Id.*

100. *Id.*

the jury that he was guilty."<sup>101</sup> On Tuesday, October 24, during a hearing on the issue, Hill maintained that the number of officers in the hallways of the courthouse caused the jury to walk through a veritable "gauntlet" of law enforcement officers before being able to enter the courtroom.<sup>102</sup> Second, Hill contended that "the presence of security officers in the courtroom could unfairly prejudice the jury."<sup>103</sup> When questioned at the hearing, Hill admitted that not all of the people in the hallways were officers, some were bailiffs and prosecution staff.<sup>104</sup> Additionally, not all of the officers in the courtroom were uniformed.<sup>105</sup> For example, the officer next to the judge wore a suit.<sup>106</sup> The trial court rejected Hill's contention that the presence of uniformed officers made his trial unfair.<sup>107</sup>

On direct appeal, in support of his assertion that uniformed officers at his trial's guilt phase violated his constitutional right to a fair trial, Hill's counsel asked the Supreme Court of South Carolina to allow them to subpoena television videos that had been produced by several local stations during the trial.<sup>108</sup> Pursuant to Rule 605 of the South Carolina Appellate Rules of Procedure, the court declined to authorize such discovery.<sup>109</sup> The court rejected Hill's *Holbrook* claim because Hill was unable to show that he suffered from "actual or inherent prejudice from the presence of uniformed law officers."<sup>110</sup> The district court reasoned that an evidentiary hearing and discovery on the point of the relevance of the videotapes "would not have aided any relevant evidence not already contained within the record" and denied Hill's petition.<sup>111</sup> The district court concluded that on the *Holbrook* issue the state court's decision was neither "contrary to" nor an "unreasonable application of" clearly established federal law.<sup>112</sup>

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101. *Id.*

102. *Id.*

103. *Id.* Hill recounted that two uniformed officers sat next to Guerry's widow during trial, one stood next to the trial judge, and another stood in a corner of the courtroom. *Id.*

104. *Id.*

105. *Hill*, 339 F.3d at 198.

106. *Id.*

107. *Id.*

108. *Id.* at 198-99.

109. *Id.* at 199; see S.C. APP. CT. R. 605 (stating that in most instances recording in the courtroom is prohibited).

110. *Hill*, 339 F.3d at 199.

111. *Id.* The district court also ruled in the alternative that Hill was barred from using the videotapes in federal court because the state court had refused to allow them based on a state procedural rule. *Id.* at 199 n.13. The Fourth Circuit declined to address this point because it found that, regardless, Hill failed to make the requisite showing to obtain discovery or an evidentiary hearing in a federal habeas proceeding. *Id.*

112. *Id.* at 199.

The Fourth Circuit agreed with the district court that the state court's decision was not a violation of 28 U.S.C. § 2254(d).<sup>113</sup> The court noted that a defendant is "entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial."<sup>114</sup> Applying this principle, the Supreme Court has determined that "a roomful of uniformed and armed policemen might pose [a threat] to a defendant's chances of receiving a fair trial."<sup>115</sup> To determine if a courtroom full of officers at a criminal trial is prejudicial and, therefore, unconstitutional, a court must determine if there was "an unacceptable risk . . . of impermissible factors coming into play."<sup>116</sup> The reviewing court must assess the courtroom scene to establish if the jury was inherently prejudiced.<sup>117</sup>

Hill relied on *Woods v Dugger*.<sup>118</sup> In *Dugger*, a highly publicized murder trial, the United States Court of Appeals for the Eleventh Circuit found that approximately forty-five uniformed prison guards were present as spectators during much of the trial.<sup>119</sup> In Hill's case, although highly publicized, the record failed to establish the number of officers present at trial.<sup>120</sup> The officers who were present were spread throughout the courtroom and the jury could have believed that they were waiting to testify.<sup>121</sup> The Fourth Circuit failed to find that Hill's circumstances rose to the level of inherent prejudice that could threaten a fair trial and, consequently, the state court's decision on Hill's *Holbrook* claim was neither "contrary to" nor an "unreasonable application of" clearly established federal law.<sup>122</sup>

## 2. Discovery Claim

Hill argued that if the current record was not sufficient to support a *Holbrook* claim, then he was entitled to develop the record further through discovery.<sup>123</sup> The district court, reasoning that "introduction of the videotapes

113. *Id.*; see 28 U.S.C. § 2254(d) (2000) (setting out the guidelines for a federal court to hear a state claim on a petition for a writ of habeas corpus; part of AEDPA).

114. *Hill*, 339 F.3d at 199 (quoting *Taylor v. Kentucky*, 436 U.S. 478, 485 (1978)).

115. *Id.* at 199 (alteration in original) (quoting *Holbrook*, 475 U.S. at 570-71).

116. *Id.* (quoting *Holbrook*, 475 U.S. at 570).

117. *Id.*

118. *Id.* at 200; see *Woods v. Dugger*, 923 F.2d 1454, 1460 (11th Cir. 1991) (ruling that "pretrial publicity combined with the large number of uniformed spectators rose to the level of inherent prejudice, thereby depriving the petitioner of a fair trial").

119. *Hill*, 339 F.3d at 200.

120. *Id.*

121. *Id.*; see *United States v. Elder*, 90 F.3d 1110, 1131 (6th Cir. 1996) (denying relief because the uniformed officers were spread throughout the room).

122. *Hill*, 339 F.3d at 200 (citing 28 U.S.C. § 2254(d) (2000)).

123. *Id.*

would not have aided any relevant evidence not already contained within the record," denied Hill's request to obtain videotapes.<sup>124</sup> Hill argued that the district court abused its discretion by denying him the opportunity to conduct an evidentiary hearing or to conduct discovery.<sup>125</sup>

"To obtain authorization to conduct discovery, Hill is obliged to 'make [ ] a specific allegation that shows reason to believe that [he] may be able to demonstrate that he is entitled to relief.'"<sup>126</sup> The Fourth Circuit concluded that Hill failed to provide any justifiable indication that the videos would prove an entitlement to relief under *Holbrook*.<sup>127</sup> Similarly, Hill failed to make the showing necessary to obtain an evidentiary hearing.<sup>128</sup> Hill failed to point to any evidence, which if believed, *would* entitle him to relief.<sup>129</sup> "Just as he is unable to demonstrate that he is entitled to discovery, Hill has failed to make the showing necessary to obtain an evidentiary hearing."<sup>130</sup> Hill failed to allege that an evidentiary hearing would establish that his due process rights were violated.<sup>131</sup> Absent a specific allegation that would establish a *Holbrook* violation requiring relief, the court concluded that the district court did not abuse its discretion by denying discovery or by denying the evidentiary hearing.<sup>132</sup> The Fourth Circuit affirmed the district court's denial of Hill's discovery claim.<sup>133</sup>

#### D. *The Ineffective Assistance of Counsel Claim*

In his IAC claim, Hill asserted that his lawyers were ineffective when they called Dr. Edward Burt ("Dr. Burt") to testify during the sentencing phase.<sup>134</sup> The defense sought to establish that Hill had a genetic condition that caused neurochemical imbalances in his brain.<sup>135</sup> Counsel contended, and sought to establish through expert testimony, that "Hill suffered from a genetically-based serotonin deficiency, which resulted in aggressive impulses."<sup>136</sup> The lawyers

124. *Id.* at 201.

125. *Id.*

126. *Id.* (alteration in original) (quoting *Quesinberry v. Taylor*, 162 F.3d 273, 279 (4th Cir. 1998)).

127. *Id.* The court noted that Hill's reasons for requesting the video were speculative because he had no proof that the videotapes panned the entire courtroom. *Id.*

128. *Hill*, 339 F.3d at 201.

129. *Id.*; see *McCarver v. Lee*, 221 F.3d 583, 598 (4th Cir. 2000) (requiring "facts that, if true, would entitle [the petitioner] to relief" to obtain an evidentiary hearing).

130. *Hill*, 339 F.3d at 201.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Hill*, 339 F.3d at 201-02.

attempted to establish that after Hill was arrested and incarcerated, he received medication that controlled these serotonin controlled impulses.<sup>137</sup> Further, counsel hoped to persuade the jury that the death penalty was not warranted because Hill's behavior was caused by a treatable genetic deficiency.<sup>138</sup> Counsel called Dr. Emil Coccaro to testify about the importance of serotonin in brain chemistry and how genetics affect serotonin levels.<sup>139</sup> Next, Dr. Bernard Albinia, a forensic psychologist who had performed several spinal taps on Hill, testified that Hill suffered from a "chronic serotonin deficiency."<sup>140</sup>

Finally, the defense called Dr. Burt.<sup>141</sup> He was expected to testify that he had prescribed Hill Prozac to treat Hill's serotonin deficiency and that Hill had responded well to the treatment.<sup>142</sup> Dr. Burt was expected to explain that Hill's aggressive behavior and a significant history of violence and suicide in Hill's family indicated that his aggressive impulses were a result of a genetic condition.<sup>143</sup> However, while on the stand, Dr. Burt had a mental breakdown that made it difficult for counsel to establish the information they were attempting to convey to the jury.<sup>144</sup>

Hill contended that his lawyers were ineffective because they should have known that Dr. Burt would not be able to testify effectively.<sup>145</sup> The state court rejected Hill's claim and concluded that "Hill's lawyers were not constitutionally ineffective in calling [Dr. Burt] as a witness because they had properly investigated him and prepared him for trial."<sup>146</sup> The district court also denied relief on the IAC claim because it concluded the state court's ruling was neither "contrary to" nor an "unreasonable application of" clearly established federal law.<sup>147</sup>

The Fourth Circuit agreed with the district court that the state court's resolution of this issue was neither "contrary to" nor an "unreasonable application of" clearly established federal law.<sup>148</sup> Guided by the principles set out in

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137. *Id.* at 202.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Hill*, 339 F.3d at 202.

143. *Id.*

144. *Id.*

145. *Id.* Hill contended that his attorney's knew that eight months before trial Dr. Burt had been arrested for public intoxication. *Id.* This knowledge, coupled with his attorney's decision to call Dr. Burt to the stand, in Hill's view, caused his attorney's performance to fall below an objective standard of reasonableness and prejudiced his defense by undermining previously established compelling evidence. *Id.*

146. *Id.*

147. *Id.*

148. *Hill*, 339 F.3d at 202.

*Strickland v Washington*<sup>149</sup> and the cases that followed, the Fourth Circuit agreed that the state court was correct in its conclusion that Hill's lawyers were not constitutionally defective.<sup>150</sup> In *Strickland*, the Supreme Court set out the requirements for an IAC claim.<sup>151</sup> A defendant must demonstrate the following: (1) counsel's performance was defective; and (2) the deficient performance prejudiced the defense.<sup>152</sup>

In this case, the record established that Dr. Burt was competent to testify and that Hill's defense team "prepped" him before he was called to the stand.<sup>153</sup> Although counsel knew about Dr. Burt's arrest, they made a decision that he was capable of testifying.<sup>154</sup> The magistrate noted that Dr. Burt's performance was "unforeseen and unforeseeable"; thus, the defense counsel could not reasonably have foreseen a breakdown.<sup>155</sup> The Fourth Circuit concluded that Hill's attorneys were not ineffective in putting Dr. Burt on the stand to testify.<sup>156</sup>

#### IV. Application in Virginia

##### A. Habeas Proceeding

*Hill* illustrates that if a state court decides a constitutional claim on the merits, for purposes of federal habeas corpus, the state court has ruled on the merits of that constitutional claim even if it did not explicitly say it had done so.<sup>157</sup> If the defendant raises a constitutional claim in state court and the state court does not rule on the merits, then the defendant has not procedurally defaulted for purposes of federal habeas and may obtain plenary review. If, however, the defendant raises a constitutional claim in state court and the state court rules on the merits of the claim, the defendant is not procedurally defaulted for federal habeas, but may only obtain deferential review.

149. 466 U.S. 668 (1984).

150. *Hill*, 339 F.3d at 202-03; see *Strickland v. Washington*, 466 U.S. 668, 699-700 (1984) (holding that *Strickland's* attorney's were not constitutionally ineffective because the attorneys' performance did not fall below the "reasonableness standard" and the defendant could not prove prejudice).

151. *Hill*, 339 F.3d at 202.

152. *Id.* (citing *Strickland*, 466 U.S. at 687). A "deficient" performance is one which falls below the objective reasonableness standard. *Strickland*, 466 U.S. at 688. The prejudice that follows a deficient performance must be a prejudice where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

153. *Hill*, 339 F.3d. at 203.

154. *Id.*

155. *Id.*

156. *Id.* The court even noted that the magistrate commented that trial counsel could have been ineffective if they had failed to call Dr. Burt. *Id.* at 203 n.16; see also *Anderson v. Butler*, 858 F.2d 16, 18-19 (1st Cir. 1988) (stating that the failure to call an expert could amount to ineffective assistance of counsel).

157. *Hill*, 339 F.3d at 196.

### B. Continuance

The lawyers in *Hill* did an excellent job of keeping in touch with their expert witness and presenting a factually specific case for a continuance. The defense team, immediately upon learning that its expert would be late, notified the court, explained the circumstances and reasons for the delay, and summarized the expected testimony.<sup>158</sup> After this, they moved for a continuance.<sup>159</sup> Defense counsel should always be prepared to state how the defense case will be prejudiced if a continuance is not granted.

### C. Officers in the Courthouse and Courtroom

If practitioners believe that the defendant's right to a fair trial might be prejudiced by the number of uniformed officers in the court complex, they should create a detailed trial record of such presence. *Hill* illustrates that a defendant can only later obtain discovery in habeas proceedings if he can establish what the discovered material would show.<sup>160</sup> If the number of officers in the courtroom is a concern, counsel should make a pre-trial motion to exclude uniformed officers and to exclude officer witnesses from the courtroom during other witnesses' testimony.<sup>161</sup> At appropriate times during the course of the trial, for example each day as court is called into session, counsel should put on the record the number of uniformed officers in the courtroom and their locations. If a large number of officers come into the courtroom after court is called into session, counsel are encouraged to ensure that this is properly reflected in the record.

### V. Conclusion

First, *Hill* illustrates that if a state court decides a constitutional claim on the merits, for purposes of federal habeas corpus, that state court has ruled on the merits of that constitutional claim even absent language explaining it had done so. Second, trial counsel should be aware of the importance of being able to establish that the defense would be prejudiced if the court denies a critical continuance. Finally, *Hill* illustrates the importance of creating a trial record of the number of officers in and around the area of the court proceedings should there be a *Holbrook* situation.

Meghan H. Morgan

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158. *Id.* at 197.

159. *Id.*

160. *Id.* at 201.

161. Practitioners are encouraged to contact the Virginia Capital Case Clearinghouse at (540) 458-8557 for relevant motions.



