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Perkins v. Lee No. 02-25, 2003 WL 21729943, at"*l (4th Cir. July 25, 2003)

Perkins v. Lee
No. 02-25, 2003 WL 21729943, at *1 (4th Cir. July 25, 2003)

I. Facts

Sammy Crystal Perkins ("Perkins") was tried for the first-degree murder and first-degree rape of LaSheena Renae "JoJo" Moore ("JoJo").[1] On April 19, 1992, at approximately 3:00 a.m., Perkins mounted seven-year-old JoJo, covered her face with a pillow, raped her, and suffocated her to death.[2] A North Carolina jury convicted Perkins "under the theories of premeditation and deliberation and felony murder."[3] At the capital sentencing hearing, the jury found the three aggravating circumstances submitted to be present.[4] The jury found that six mitigating circumstances existed, "but concluded that the mitigating circumstances did not outweigh the aggravating circumstances" and returned a death verdict.[5] The trial court then sentenced Perkins to death for the first-degree murder conviction and to life imprisonment for the first-degree rape conviction.[6]

On appeal, the Supreme Court of North Carolina upheld Perkins's conviction and sentence of death.[7] After the United States Supreme Court denied his petition for writ of certiorari, Perkins filed a Motion for Appropriate Relief ("MAR") in Pitt County Superior Court.[8] Perkins claimed that he was denied his

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1. Perkins v. Lee, No. 02-25, 2003 WL 21729943, at *1 (4th Cir. July 25, 2003) (opinion not selected for publication). JoJo was the granddaughter of Theia Esther Moore, a woman Perkins had known for ten or eleven years and had been dating for two months. *Id.*

2. *Id.*

3. *Id.* at *2.

4. *Id.* The jury found: "(1) Perkins had been previously convicted of a felony involving the use or threat of violence; (2) Perkins committed the murder while engaged in the commission of or an attempt to commit first-degree rape; and (3) the murder was especially heinous, atrocious, or cruel." *Id.*

5. *Id.*; *see* N.C. GEN. STAT. § 15A-2000(b) (2001) (stating that the jury shall deliberate and render a sentence based upon consideration of aggravating and mitigating circumstances); N.C. GEN. STAT. § 15A-2000(c) (stating that the jury may recommend death when the mitigating circumstances are "insufficient to outweigh the aggravating circumstances"); State v. Perkins, 481 S.E.2d 25, 28 (N.C. 1997) (discussing the jury's decision to sentence the defendant to death).

6. *Perkins*, 2003 WL 21729943, at *2.

7. *Id.*; *see Perkins*, 481 S.E.2d at 31, 34 (holding in part that prospective jurors' responses to death-qualification questions justified challenges for cause and that no outside influence was exerted on the jury).

8. *Perkins*, 2003 WL 21729943, at *2; *see* N.C. GEN. STAT. §15A-1415 (2001) (explaining when a defendant may assert a MAR and the appropriate grounds upon which the defendant may

Sixth Amendment right to counsel because his trial counsel were ineffective in their presentation of mental health testimony.[9] The state MAR court concluded that Perkins was procedurally barred from raising the ineffective assistance of counsel ("IAC") claim under section 15A-1419(a)(3) of North Carolina General Statutes because he had not raised it on direct appeal.[10] After the Pitt County Superior Court denied Perkins's MAR, the Supreme Court of North Carolina denied review.[11]

In September 1999 Perkins petitioned the federal district court for habeas relief.[12] The State filed an answer and motion for summary judgment.[13] In March 2000 Perkins filed a motion requesting discovery into a claim that his trial counsel were ineffective for failing to present properly mental health evidence.[14] Perkins filed additional motions "for leave to proceed ex parte in moving for expert assistance and . . . for funds to hire experts to pursue his ineffective assistance of counsel claim."[15] The district court ruled that Perkins had procedurally defaulted federal habeas review of the IAC claim because the claim had been procedurally barred in state court.[16] The district court granted the State's motion for summary judgment and dismissed Perkins's habeas petition.[17] Perkins filed an application for a certificate of appealability ("COA") which was granted by the United States Court of Appeals for the Fourth Circuit.[18]

II. Holding

The Fourth Circuit affirmed the district court's dismissal of Perkins's petition for writ of habeas corpus.[19] The court found that the district court did

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do so); Perkins v. North Carolina, 522 U.S. 837, 837 (1997) (mem.) (denying certiorari).

9. *Perkins*, 2003 WL 21729943, at *3; *see* U.S. CONST. amend. VI (stating that in all criminal prosecutions the accused shall enjoy the right to "have the Assistance of Counsel for his defence"); Strickland v. Washington, 466 U.S. 668, 687 (1984) (stating that the defendant must show that counsel's deficient performance was so greatly lacking that the defendant did not receive a reasonable standard of care and competence guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense).

10. *Perkins*, 2003 WL 21729943, at *3 (citing N.C. GEN. STAT. § 15A-1419(a)(3) (2001)).

11. *Id.* at *2.

12. *Id.* at *3.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Perkins*, 2003 WL 21729943, at *3; *see* N.C. GEN. STAT. § 15A-1419(a)(3) (2001) (explaining when a state MAR court can deny relief).

17. *Perkins*, 2003 WL 21729943, at *3.

18. *Id.* at *1; *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).

19. *Perkins*, 2003 WL 21729943, at *9.

not err in ruling that Perkins procedurally defaulted his IAC claim.[20] The Fourth Circuit agreed with the district court's decision that Perkins was not entitled to an evidentiary hearing regarding the alleged juror misconduct claim rejected by the state court.[21] Finally, the Fourth Circuit held that the district court properly dismissed the claim that Perkins was denied the right to an impartial jury after a juror was excluded based on his personal views on capital punishment.[22]

III. Analysis

A. Procedural Default of Federal Habeas Review

The Fourth Circuit relied on the Supreme Court's decision that a federal habeas court is prevented from reviewing claims that a state court declined to review on the merits " 'pursuant to an independent and adequate state procedural rule . . . unless the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.' "[23] An adequate state rule is one that is " 'firmly established and regularly or consistently applied by the state court.' "[24] A state rule is independent " 'if it does not depend on a federal constitutional ruling.' "[25] The district court ruled that Perkins had procedurally defaulted his IAC claim pursuant to section 15A-1419(a)(3) of the North Carolina General Statutes.[26] The statute bars state court review of claims if the defendant could have raised the claim on a previous appeal but failed to do so.[27] Section 15A-1419(a)(3) does not provide an exception for IAC claims.[28] This rule does not prevent state courts from reviewing any claim that was not brought on direct appeal.[29] Rather, " 'the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review.' "[30] If the claim could have been raised but was not, it is procedurally barred in MAR proceedings.[31] If the court determines that

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20. *Id.* at *6.

21. *Id.* at *8.

22. *Id.* at *9.

23. *Id.* at *4 (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

24. *Id.* (quoting Brown v. Lee, 319 F.3d 162, 169 (4th Cir. 2003)).

25. *Perkins*, 2003 WL 21729943, at *4 (quoting *Brown*, 319 F.3d at 169).

26. *Id.*; *see* N.C. GEN. STAT. § 15A-1419(a)(3) (2001) (discussing when a state MAR court may deny relief).

27. *Perkins*, 2003 WL 21729943, at *4.

28. *Id.*

29. *Id.*

30. *Id.* (quoting State v. Fair, 557 S.E.2d 500, 525 (N.C. 2001)).

31. *See* N.C. GEN. STAT. § 15A-1419(a)(3) (2001) (explaining when a state MAR court can deny relief).

a claim has been asserted on direct appeal prematurely, the claim will be dismissed without prejudice and may be reasserted at a subsequent MAR proceeding.[32]

Perkins argued that his IAC claim was not procedurally defaulted because section 15A-1419(a)(3) was not an independent and adequate state procedural rule.[33] Perkins claimed that the rule was not adequate because North Carolina courts did not regularly and consistently apply the bar to IAC claims.[34] As his evidence, Perkins pointed to twenty-seven state court cases.[35] In only one of the twenty-seven cases did the MAR court refuse to apply the bar after the State raised it because the defendant did not raise the claim on direct appeal.[36] The MAR court applied the bar in four cases in which the State raised it as a defense.[37] In eight of the cases pointed to by Perkins, the State never raised the bar at all.[38] In the rest of the cases cited by Perkins, it was unclear whether the bar was raised by the State.[39] Perkins claimed that section 15A-1419(a)(3) was not regularly and consistently applied because the state courts reached the merits in all but four of the cases.[40]

The Fourth Circuit clarified that of the twenty-seven procedurally analogous cases, the court can only consider those in which the State actually raised the bar as a defense.[41] The court found that of the twenty-seven cases, there was only one case in which the bar was raised but was not applied.[42] In *McCarver v. Lee*,[43] the Fourth Circuit held that for the petitioner

> "to make a colorable showing that section 15A-1419(a)(3) . . . [was] not consistently and regularly applied to ineffective assistance claims, he would need to cite a non-negligible number of cases in which ineffective assistance claims could have been brought on direct review but were not, and in which the collateral review court nonetheless failed to bar the claim under section 15A-1419(a)(3) because the claim was an ineffective assistance claim."[44]

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32. *Perkins*, 2003 WL 21729943, at *4 (quoting *Fair*, 557 S.E.2d at 525).
33. *Id.* at *5.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Perkins*, 2003 WL 21729943, at *5.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. 221 F.3d 583 (4th Cir. 2000).
44. *Perkins*, 2003 WL 21729943, at *5 (quoting McCarver v. Lee, 221 F.3d 583, 589 (4th Cir. 2000)).

The court held that this single deviation was not enough to find that North Carolina courts had not regularly and consistently applied the procedural bar.[45] The Fourth Circuit concluded that section 15A-1419(a)(3) is both independent and adequate.[46]

Perkins failed to argue " 'cause for the default and actual prejudice as a result of the alleged violation of federal law.' "[47] In addition, he did not demonstrate that failure to consider his ineffective assistance of counsel claim would result in a " 'fundamental miscarriage of justice.' "[48] Therefore, the Fourth Circuit did not review the merits of Perkins's claim and affirmed the district court's dismissal of Perkins's IAC claim on the grounds of procedural default.[49]

B. Juror Misconduct

Perkins also asserted that one or more of the jurors prematurely formed an opinion as to his guilt and the appropriateness of the death penalty.[50] At his trial, Perkins made a motion to excuse a certain juror for cause and made a motion for a mistrial.[51] After questioning the specific juror, the rest of the jurors, and other relevant witnesses, the trial judge determined that there had been no juror misconduct.[52] Perkins claimed that the denial of these motions violated his Sixth and Fourteenth Amendment rights to due process and to a fair and impartial jury.[53] On appeal, the Supreme Court of North Carolina, holding that the trial

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45. *Id.*

46. *Id.*

47. *Id.* at *4 (quoting *Coleman*, 501 U.S. at 750).

48. *Id.* (quoting *Coleman*, 501 U.S. at 750).

49. *Id.* at *6.

50. *Perkins*, 2003 WL 21729943, at *6.

51. *Id.* at *7.

52. *Id.* Perkins claimed that at some point near the conclusion of his case, juror Alecia Staton ("Staton") told her babysitter, Wendy Clark ("Clark"), that the jurors had already decided that Perkins was guilty. *Id.* at *6. Staton also allegedly told Clark that all but one juror agreed that the death penalty was warranted. *Id.* The trial judge brought Clark in for questioning. *Id.* at *7. In addition, all of the jurors denied having discussed, expressed, or formed an opinion about Perkins's guilt or appropriate punishment. *Id.* Staton denied that she had formed or expressed an opinion as to guilt or punishment, and denied the alleged statements to Clark. *Id.*

53. *Id.* at *6; U.S. CONST. amend. VI; U.S. CONST. amend XIV; *see* Fullwood v. Lee, 290 F.3d 663, 678 (4th Cir. 2002) (setting forth the standard for habeas petitioners making a juror bias claim). The *Fullwood* court stated that "when a habeas petitioner bases a juror bias claim on improper communication between, or improper influence exerted by, a nonjuror upon a juror . . . he 'must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict.' " *Fullwood*, 290 F.3d at 678 (quoting Stockton v. Virginia, 852 F.2d 740, 743 (4th Cir. 1988)).

court did not abuse its discretion by concluding that there was no juror misconduct, affirmed the trial court's ruling.[54]

Because the state court rejected this claim, Perkins needed to show that the state court's adjudication of his claim 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 was 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' "[55] The Fourth Circuit found that Perkins did not prove that the state court's decision was "contrary to or an unreasonable application of clearly established law."[56] The court also found the state court's decision reasonable in light of the facts presented at trial.[57] There was no evidence adduced at trial indicating that the juror in question was improperly influenced or made aware of outside information.[58] Under these facts, the Fourth Circuit found it reasonable for the trial court to conclude that no improper juror conduct occurred.[59]

The Fourth Circuit also concluded that Perkins failed to show that he was entitled to a federal evidentiary hearing into the alleged juror misconduct.[60] When a habeas petitioner "has failed to develop the factual basis for a claim in State court," he must meet certain requirements before a federal habeas court will grant a hearing.[61] The State did not claim that Perkins had failed to develop the factual basis for his juror misconduct claim.[62] Although 28 U.S.C. § 2254(e)(2) presented no bar to a hearing in this case, an evidentiary hearing is not

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54. *Perkins*, 2003 WL 21729943, at *7; *see* State v. Bonney, 405 S.E.2d 145, 152 (N.C. 1991) (explaining that a trial court's decision will not be disturbed unless a clear showing exists that the court abused its discretion).

55. *Perkins*, 2003 WL 21729943, at *6 (quoting 28 U.S.C. § 2254(d) (2000)).

56. *Id.* at *8; *see* 28 U.S.C. § 2254(d) (discussing the grounds for granting a federal writ of habeas corpus; part of AEDPA). It is interesting to note that in Part III of the opinion, the Fourth Circuit does not cite any United States Supreme Court cases. It is unclear whether there was no federal law on point or whether the Fourth Circuit simply neglected to include relevant cases. If there was no clearly established federal law to apply, the Fourth Circuit could have denied Perkins's claim on that basis. The state court could not have unreasonably applied federal law if there was no federal law to apply.

57. *Perkins*, 2003 WL 21729943, at *8.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*; *see* 28 U.S.C. § 2254(e)(2) (stating that an evidentiary hearing will only be held if "the claim relies on a new rule of constitutional law," previously undiscovered fact, or if the applicant can show "by clear and convincing evidence" that "no reasonable factfinder would have found the applicant guilty"; part of AEDPA).

62. *Perkins*, 2003 WL 21729943, at *8.

automatic.[63] A state prisoner must still allege " 'additional facts that, if true, would entitle him to relief.' "[64] Further, the Fourth Circuit reiterated that the petitioner must establish one of the six factors set forth by the United States Supreme Court in *Townsend v Sain*.[65]

The Fourth Circuit held that the district court properly found that Perkins had failed to establish any of the six *Townsend* factors.[66] Perkins did not point the district court to any witnesses, testimony, or information that was not presented in the state court.[67] In addition, the Fourth Circuit found that the trial court "conducted a full and fair hearing" into the alleged juror misconduct claim.[68] Therefore, the Fourth Circuit affirmed the district court's decision to deny Perkins an evidentiary hearing.[69]

C. *Death Qualification*

Perkins's final claim before the Fourth Circuit was that the trial court impinged on his Sixth and Fourteenth Amendment rights to an impartial jury by improperly dismissing a potential juror for cause based on his answers during death qualification questioning.[70] The trial court asked prospective juror William Jackson ("Jackson") if his personal beliefs would prevent him from being able to vote for a recommendation of the death penalty.[71] Jackson responded that "he did not 'know whether [he] could vote on the death penalty' and was 'unable to respond' to the question."[72] In *Wainwright v Witt*[73] the United States Supreme Court held that a potential juror may be excused based on his personal views on capital punishment if "the juror's views would prevent or substantially impair the

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63. *Id.*

64. *Id.* (quoting *Fullwood*, 290 F.3d at 681).

65. *Id.*; *see* Townsend v. Sain, 372 U.S. 293, 313 (1963) (stating that "[a] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing").

66. *Perkins*, 2003 WL 21729943, at *8.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*; *see* U.S. CONST. amend. VI (stating that in all criminal prosecutions, the defendant has the right to an impartial jury); U.S. CONST. amend. XIV, § 1 (stating that no state shall "deprive any person of life, liberty, or property, without due process of law").

71. *Perkins*, 2003 WL 21729943, at *9.

72. *Id.* (quoting *Perkins*, 481 S.E.2d at 30).

73. 469 U.S. 412 (1985).

performance of his duties as a juror in accordance with his instructions and his oath."[74] The Fourth Circuit previously determined that the trial judge's assessments of demeanor and credibility were " 'to be accorded a presumption of correctness under 28 U.S.C.A. § 2254(d).' "[75] If the juror's responses are vague or otherwise unclear, the trial court's determination based on its observation of the juror is " 'presumed to be consistent with the applicable standard.' "[76]

The Supreme Court of North Carolina concluded that the trial judge, "who was in a position to hear 'Jackson's tone of voice and observe[ ] his demeanor,' did not err in excusing Jackson for cause."[77] The Fourth Circuit was unable to say that the state court's adjudication of this claim " 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law,' or '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.' "[78] Therefore, the Fourth Circuit affirmed the district court's dismissal of Perkins's final claim.[79]

IV. Application in Virginia

The first issue of interest arising from *Perkins* concerns the manner in which a defendant can preserve an IAC claim for federal habeas review.[80] Between 1985 and 1990, a Virginia statute permitted defendants to raise IAC claims on direct appeal.[81] The effect was to have cases similar to *Perkins* in which the defendant defaulted habeas review because he did not raise the claim on direct appeal.[82] In 1990, the statute was repealed; defendants can no longer raise IAC claims on direct appeal.[83] The current Virginia rule ensures that an IAC claim can

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74. Wainwright v. Witt, 469 U.S. 412, 424 (1985).

75. *Perkins*, 2003 WL 21729943, at *9 (quoting Maynard v. Dixon, 943 F.2d 407, 415 (4th Cir. 1991)); *see* 28 U.S.C. § 2254(d) (2000) (stating when a writ of habeas corpus can be granted pursuant to a state court decision).

76. *Perkins*, 2003 WL 21729943, at *9 (quoting *Maynard*, 943 F.2d at 415).

77. *Id.* (quoting *Perkins*, 481 S.E.2d at 30).

78. *Id.* (quoting 28 U.S.C. § 2254(d)).

79. *Id.*

80. *See id.* at *3 (discussing the defendant's ineffective assistance of counsel claim).

81. *See* VA. CODE ANN. § 19.2-317.1 (Michie 1985) (repealed 1990) (stating that a claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial); Frye v. Commonwealth, 345 S.E.2d 267, 287 (Va. 1986) (discussing a defendant's attempt to argue ineffective assistance of counsel on direct appeal after the trial court denied the defendant's motion for new counsel to handle the appeal).

82. *See* VA. CODE ANN. § 19.2-317.1 (Michie 1985) (repealed 1990) (stating that a claim of ineffective assistance of counsel may be raised on direct appeal if assigned as error and if all matters relating to such issue are fully contained within the record of the trial).

83. *Id.*

always be raised in a state habeas proceeding.[84] The lesson to be taken from *Perkins* is that attorneys should be very aware of procedural default rules. In Virginia, a defendant must raise his IAC claim in the state habeas proceeding to avoid procedural default in federal habeas review.[85] Attorneys must also anticipate that the federal issues will be different in a Virginia case. In *Perkins*, the federal habeas court focused its inquiry on whether the North Carolina MAR court invoked an "independent and adequate" state rule for procedurally barring the IAC claim.[86] In a Virginia case, the federal habeas court will require a defendant to show cause for not raising his IAC claim in state habeas court and to show that he suffered "actual prejudice as a result of the alleged violation of federal law."[87]

The second issue of interest concerns the death qualification questioning of jurors. Perkins argued that it was improper for the trial court to dismiss juror Jackson based on his responses to questions concerning whether he could "vote" for the death penalty.[88] The Fourth Circuit upheld the decision by the Supreme Court of North Carolina to affirm the trial court's dismissal of the juror.[89] Yet, when taken in context with Jackson's other responses, it is at least possible that Jackson believed he would be able to return a guilty verdict notwithstanding the possibility of the death penalty.[90] The United States Supreme Court has held that a juror's bias need not be proven with unmistakable clarity.[91] Therefore, in cases in which a juror's responses during death qualification are ambiguous or contradictory, the court does not need to find with unmistakable clarity that the juror is biased against the death penalty.[92] The court may determine, regardless of responses to the contrary, that the juror's views "would prevent or substantially impair the performance of his duties as a juror in accordance with his instruction

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84. *See* VA. CODE ANN. § 8.01-654(C)(1) (Michie 2000) (stating "[w]ith respect to any such petition filed by a petitioner held under the sentence of death . . . the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus").

85. *Id.*

86. *Perkins*, 2003 WL 21729943, at *4.

87. *Coleman*, 501 U.S. at 750 (stating that a federal habeas court will not review a state court's decision to deny a claim unless the petitioner can show "cause for the default and actual prejudice").

88. *Perkins*, 2003 WL 21729943, at *9; *see Perkins*, 481 S.E.2d at 43 (recounting testimony in which the juror stated that he could follow the law and vote for a guilty verdict if he was satisfied beyond a reasonable doubt).

89. *Perkins*, 2003 WL 21729943, at *9.

90. *See Perkins*, 481 S.E.2d at 43 (discussing the death qualification of a prospective juror).

91. *See Wainwright*, 469 U.S. at 424 (holding that the standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment does not require that a juror's bias be proved with unmistakable clarity).

92. *See* United States v. Jackson, 327 F.3d 273, 296 (4th Cir. 2003) (discussing how a juror's conflicting responses were enough to convince the court that his views would prevent or substantially impair the performance of his duties).

and his oath."[93] Virginia courts may not empanel jurors if there is a reasonable doubt as to their impartiality.[94] Attorneys should be aware that a court may excuse a juror based on an indication that the juror will not vote for death, even if the juror's other responses indicate that he will follow the law.

In *Witherspoon v Illinois*,[95] the United States Supreme Court stated that it is improper to exclude jurors for cause "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[96] The Court stated that "[t]he most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law."[97] The Supreme Court clarified its *Witherspoon* decision when it decided the case of *Wainwright v Witt*.[98] When read together, *Witherspoon* and *Witt* suggest that the relevant inquiry is whether the prospective juror can *consider* both life and death.[99] Voir dire questions that require prospective jurors to say whether they could "vote" for death may eliminate constitutionally eligible jurors.[100] Instead, defense attorneys should steer prospective jurors toward a determination of whether they could "consider" both life and death. Life jurors may be seated, even if they admit that they are reluctant to *vote* for death, as long as they concede that they could *consider* death. A prospective juror may be seated as long as his views on capital punishment do not " 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "[101] Thus, to prevent the dismissal of potential life jurors, voir dire questions should be phrased in a manner that assesses whether the juror can "consider" both life and death.

In *Perkins*, the trial court also asked jurors whether they felt they could vote for a "*recommendation* of death."[102] In *Caldwell v Mississippi*,[103] the Supreme Court held that it is unconstitutional to impose the death penalty when jurors are led

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93. *Id.* (quoting *Wainwright*, 469 U.S. at 424).

94. *See* Damien P. DeLaney, Case Note, 14 CAP. DEF. J. 145, 146 (2001) (analyzing Green v. Commonwealth, 546 S.E.2d 446 (Va. 2001)).

95. 391 U.S. 510 (1968).

96. Witherspoon v. Illinois, 391 U.S. 510, 522 (1968).

97. *Id.* at 522 n.21.

98. *See Wainwright*, 469 U.S. at 424 (clarifying *Witherspoon* by affirmatively stating that the proper standard for examining the exclusion of a juror for cause is whether the juror's views impair his ability to perform his duties).

99. *Id.*

100. *See* Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 221 (2003) (analyzing United States v. Jackson, 327 F.3d 273 (4th Cir. 2003)).

101. *Wainwright*, 469 U.S. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

102. *Perkins*, 481 S.E.2d at 43 (emphasis added).

103. 472 U.S. 320 (1985).

to believe that ultimate sentencing responsibility lies elsewhere.[104] The Court stated that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."[105] In the federal system, the jury's verdict is not a recommendation at all. 18 U.S.C. § 3594 states that "[u]pon a recommendation . . . that the defendant should be sentenced to death . . . the court *shall* sentence the defendant accordingly."[106] According to the language of § 3594, it is clearly improper to ask a federal jury if they would be able to "recommend" death.[107] In the Virginia death penalty system, the jury's sentencing recommendation is in fact a recommendation.[108] Virginia Code section 19.2-264.5 requires a post-sentence report "[w]hen the punishment of any person has been fixed at death" so that the court "may be fully advised as to whether the sentence of death is appropriate and just."[109] After consideration of the post-sentence report, the court may set aside the death sentence and impose life imprisonment.[110] Yet, the Supreme Court of Virginia stated that under both Virginia law and the rule announced in *Caldwell*, "it is improper for the jury to be told that the trial judge shares the responsibility for the death sentence."[111] It is improper for the Commonwealth to characterize the jury's verdict as a "recommendation" because it minimizes the jury's sense of responsibility in imposing a death sentence in violation of *Caldwell*.[112] Defense attorneys should use *Caldwell* and *Frye* to object to death qualification questions which lead jurors to believe that a sentence is merely a recommendation and that the ultimate responsibility for imposing death lies elsewhere.

By following the holdings of *Witherspoon* and its progeny, defense attorneys can avoid situations proscribed by *Caldwell*. Death qualification questions that require jurors to "consider" life and death do not violate *Caldwell*. If attorneys stray from *Witherspoon* and ask jurors whether they can "vote" for death, vote for a "recommendation" of death, or even consider a "recommendation" of death,

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104. Caldwell v. Mississippi, 472 U.S. 320, 328–29 (1985).

105. *Id.* at 333.

106. 18 U.S.C. § 3594 (2000) (emphasis added).

107. *See id.* (stating that "the court shall" sentence the defendant to death in accordance with the jury's verdict).

108. *See* VA. CODE ANN. § 19.2-264.5 (Michie 2000) (stating that a post-sentence report shall be prepared when a defendant's sentence has been fixed at death).

109. *Id.*

110. *Id.*

111. Frye v. Commonwealth, 345 S.E.2d 267, 286 (Va. 1986) (explaining that the use of the term "recommendation" by prosecutors and other similar comments describing the jury's sentencing duty are misleading because they minimize the jury's sense of responsibility for imposing death).

112. *Id.*; *see Caldwell*, 472 U.S. at 333 (stating that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role").

they run the risk of violating *Caldwell*. Defense attorneys should consciously phrase voir dire questions to prevent the dismissal of life jurors and to follow the Supreme Court's ruling in *Caldwell*. In addition, defense attorneys should object to "vote" and "recommend" questions posited by the Commonwealth or the court.[113]

V. Conclusion

Virginia attorneys should be aware of three important issues addressed by *Perkins*. First, attorneys must raise their clients' ineffective assistance of counsel claims on state habeas to avoid procedurally defaulting the claim on federal habeas review. Second, death qualification questions should be aimed at determining whether a juror is able to *consider* both life and death. Finally, attorneys should object to death qualification questions that describe the sentence by the jury as a mere "recommendation" because it minimizes the jury's sense of responsibility for imposing the death sentence.[114]

Jessie A. Seiden

113. *See* Schmitt v. Commonwealth, 547 S.E.2d 186, 197 (Va. 2000) (stating that a defendant must object to an improper question posed by the trial judge during voir dire and that the objection must be "stated in a timely manner with reference to the precise question at issue").

114. *See Caldwell*, 472 U.S. at 333 (stating that the importance of the jury's role in sentencing a defendant to death should not be minimized).