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MUELLER v. VIRGINIA 113 S. Ct. 1880 (1993)

did not produce a jury verdict of guilt beyond a reasonable doubt. It was, therefore, constitutionally deficient; it denied Sullivan his Sixth Amendment right to a jury trial.

All constitutional errors do not, however, require reversal.[6] In concluding that a *Sullivan*-type error is not amenable to harmless-error analysis, the Court distinguished a situation such as that found in *Sandstrom v. Montana*.[7] The *Sandstrom* trial court — at the request of the state and over the objection of the defendant — instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."[8] On appeal, the United States Supreme Court held that the instruction was unconstitutional because the jury might have interpreted the presumption as being conclusive, or as shifting the burden of persuasion, and either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.[9] The *Sullivan* court explained that when the jury is instructed to presume an element of the offense, it must still make a finding beyond a reasonable doubt as to the facts upon which the presumption is based. Therefore, if the predicate facts are closely related to the presumed fact, and no reasonable juror could find one without finding the other, the court may be able to conclude that the presumption did not influence the jury's findings.[10]

The *Sullivan* court further articulated a standard for determining whether constitutional errors are indeed harmless: "The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in **this** trial was surely unattributable to the error."[11] Because in the *Sullivan* case there was in effect no jury verdict of guilty beyond a reasonable doubt, there can be no meaningful question of whether the **same** verdict of guilty beyond a reasonable doubt would have been rendered without the constitutional error.

Sullivan should not present many issues for Virginia practitioners. Virginia's Model Jury Instructions which deal with capital murder, instructions 34.100 and 34.120, each mention "prove beyond a reasonable doubt" three times, but do not attempt to define the term. Instruction 2.100 however, entitled "Reasonable Doubt and Presumption of Innocence," makes a cursory attempt at a definition: "A reasonable doubt is a doubt based upon your sound judgment after a full and impartial consideration of all the evidence in the case." The Supreme Court of Virginia has discouraged attempts at reducing or defining what reasonable doubt is any further. The court has wisely warned that attempting to do so tends to cloud rather than clarify the issue.[12] Since there is no constitutional reason to expressly define such a term, and since Virginia discourages such attempts at definition, a *Sullivan* error should not occur here unless a judge goes further than is customary. If it becomes an issue, an objection can, and indeed should, be made to instructions that resemble the ones given in *Cage* and *Sullivan*.

The reasonable doubt issue does suggest another possible issue, however. Virginia Code section 19.2-264.4(C) requires the Commonwealth to prove the existence of an aggravating factor beyond a reasonable doubt before the jury can impose the death penalty. Without asking for a **definition** of reasonable doubt, defense counsel should consider requesting an instruction to the effect that the Commonwealth must erase all reasonable doubt about the aggravating factors from the minds of the jurors before they can impose death, as well as further instructions that make the jury aware that there is in no instance a duty to sentence to death, even if aggravating factors are found beyond a reasonable doubt.[13]

Summary and analysis by:
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6 *Chapman v. California*, 386 U.S. 18 (1967) (holding that even errors of constitutional magnitude may be harmless, but that a reviewing court must consider the error's actual effect on the jury verdict to determine whether it was harmless).

7 442 U.S. 510 (1979).

8 *Id.* at 512.

9 *Id.* at 514-527.

10 *Sullivan*, 113 S. Ct. at 2082.

11 *Id.* at 2081.

12 *See Strawderman v. Commonwealth*, 200 Va. 855, 108 S.E.2d 376 (1959), and *Smith v. Commonwealth*, 155 Va. 1111, 156 S.E. 577 (1931). *See also McCoy v. Commonwealth*, 133 Va. 731, 112 S.E. 704 (1922); *Manetta v. Commonwealth*, 231 Va. 123, 340 S.E.2d 828 (1986); *Cooper v. Commonwealth*, 2 Va.App. 497, 345 S.E.2d 775 (1986).

13 The Virginia Capital Case Clearinghouse offers the following instruction as a guideline:

> Members of the jury, I will now instruct you on the manner in which you are to consider the evidence that has been presented in this sentencing proceeding.
>
> Before you may fix the punishment of defendant at death, you must find, unanimously and beyond a reasonable doubt, the existence of the aggravating circumstance(s) about which I have previously instructed you.
>
> In order to fix the punishment of defendant at life imprisonment, you are not required to reach a unanimous decision as to the existence of any particular fact in mitigation. You are not required to find any fact in mitigation beyond a reasonable doubt.
>
> I further instruct you that, under our law, you are permitted to fix the punishment of defendant at life if you find that to be the appropriate sentence, even if you find unanimously and beyond a reasonable doubt the existence of the aggravating circumstance(s) about which I have previously instructed you.

MUELLER v. VIRGINIA

113 S. Ct. 1880 (1993)
United States Supreme Court

FACTS

Authorities arrested Everett Lee Mueller for the rape and murder of ten-year old Charity Powers after her body was found in a shallow grave near his home. The police advised the defendant of his *Miranda* rights and he agreed to talk to authorities. At one point during the questioning Mueller asked the detective, "[D]o you think I need an attorney here?" The detective shook his head and shrugged. He then said, "[y]ou're just talking to us." Shortly thereafter, Mueller confessed to the rape and murder.

The defendant moved to suppress the confession, claiming it was obtained in violation of *Edwards v. Arizona*.[1] The trial court denied the

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1 451 U.S. 477, 484-85 (1981) (holding that once defendant invokes right to counsel, all police questioning must cease until counsel has been provided).

motion. The jury found Mueller guilty of the rape and murder and sentenced him to death. On review, the Supreme Court of Virginia affirmed its holding in *Eaton v. Commonwealth*[2] that a defendant must make an unambiguous and unequivocal request for an attorney in order to trigger the *Edwards* protection.[3]

Mueller petitioned to the United States Supreme Court which denied certiorari. Three justices dissented from the denial of certiorari and it is their dissent that we review here. It is not a common practice of the Capital Defense Digest to review dissents from denial of certiorari, but we believe that this dissent may portend a change in the law on an issue of importance for Virginia defense attorneys and, for this reason, wish to bring it to the attention of the bar. Denial of certiorari, of course, has no significance as precedent.

ANALYSIS/APPLICATION IN VIRGINIA

In *Edwards v. Arizona,*[4] the United States Supreme Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing **only** that he responded to further police-initiated custodial interrogation."[5] In *Edwards*, the Court reaffirmed an accused's Fifth and Fourteenth Amendment rights to have counsel present during custodial interrogation. In *Miranda v. Arizona*,[6] the Court had previously established that once a defendant asserted his right to counsel the police were required to halt the interrogation until the arrival of his attorney. In *Edwards*, the police ceased the interrogation upon the defendant's invocation of his right to counsel, only to resume questioning the next day outside the presence of the requested attorney. The Supreme Court noted that this behavior violated the defendant's constitutional right to have counsel present during interrogation and held that the trial court should have suppressed the subsequent confession.

In *Smith v. Illinois*,[7] the United States Supreme Court observed that the states have developed three standards by which to judge an **ambiguous** request for counsel.[8] Some courts require that all questioning cease. Some courts set a threshold standard and hold that if defendant does not prove that he acted with sufficient clarity to satisfy this standard, the protections in *Edwards* do not apply. Other courts require police officers to clarify the defendant's wishes after an equivocal request in order to determine whether the defendant has invoked his Fifth Amendment right.[9] The dissenters from the denial of certiorari in *Mueller* construed the Virginia approach to be a variation on the second (threshold) standard and lamented the high court's refusal to rule upon the differences: "[I]t is apparent that a substantial number of criminal defendants who are identically situated in the eyes of the Constitution have received and will continue to receive dissimilar treatment because of the different approaches taken by the lower courts."[10]

There is support for the view that the Virginia standard is unconstitutional. In *Smith*, the United States Supreme Court found that the defendant's response, "I'd like to do that," to a detective's question about the defendant's comprehension of the right to have an attorney present was sufficient to trigger the defendant's Fifth Amendment protections.[11]

The Supreme Court then established the framework for the application of this rule. First the courts must find that the accused "actually invoked his right to counsel."[12] If so, then the courts must suppress any further statements made in response to interrogation unless the defendant both initiated the ensuing conversation with the authorities and knowingly and intelligently waived his right to have an attorney present. In *Smith*, the defendant's statement was found to have invoked the right to an attorney and his later post-request response could not be used to make his question appear ambiguous.[13]

An argument can be made that Mueller's request was clearer than Smith's. Mueller brought the subject to the detective's attention himself. Smith merely responded to the detective's statement. Moreover, Mueller's question suggests his desire to have a lawyer present. The detective's somewhat deceptive response prevented Mueller from stating that desire in more forceful terms. Indeed, the detective's response made clear that he would not honor Mueller's rights on those terms alone. Mueller did not know that his rights would be honored under any circumstances.

The Fourth Circuit Court of Appeals has also opted for an approach to the *Edwards* issue that is more favorable to defendants. In *Poyner v. Murray,*[14] approving the approach taken by the Fifth Circuit,[15] the court stated that "the court correctly noted that once a suspect makes an equivocal request for an attorney, all interrogation must cease except that which is necessary to clarify whether or not the accused wants an attorney."[16] This standard clearly falls within the third bracket noted in *Smith* — a standard much higher than the one employed in Virginia and a standard that may have made all the difference for defendant Mueller.

The dissent of three Supreme Court justices and the deviation from the Fourth Circuit standard make the *Edwards* issue worth recognizing and probing because the Virginia rule may fall in the future.[17]

Summary and analysis by:
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2 240 Va. 236, 397 S.E.2d 385 (1990). *See also* case summary of *Eaton*, Capital Defense Digest, Vol. 3, No. 1, p. 22 (1990).

3 *Id.* at 253-54, 397 S.E.2d at 395-96.

4 451 U.S. 477 (1981).

5 *Id.* at 484 (emphasis added).

6 384 U.S. 436, 474 (1966).

7 469 U.S. 91 (1984).

8 *Id.* at 95-96.

9 *Mueller v. Virginia*, 113 S. Ct. 1880, 1881 (1993) (citing *Smith*, 469 U.S. at 95-96, & n.3).

10 *Mueller*, 113 S. Ct. at 1881.

11 *Smith*, 469 U.S. at 95.

12 *Id.*

13 *Id.*

14 964 F.2d 1404 (4th Cir. 1992).

15 *United States v. Jardina*, 747 F.2d 945, 948 (5th Cir. 1984).

16 *Poyner*, 964 F.2d at 1411 (citing *Jardina*, 747 F.2d at 948).

17 EDITOR'S NOTE: Indeed, as this issue was going to print, the United States Supreme Court granted certiorari in *Davis v. United States* (92-1949), raising the issue of whether clarification by interrogators of the ambiguous request, "maybe I should talk to a lawyer," is sufficient, or whether interrogation must cease altogether.