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MUELLER v. MURRAY 252 Va. 356,478 S.E.2d 542 (1996) Supreme Court of Virginia

prosecution is exercising its peremptory challenges to acquire a fair and impartial jury, not for racially discriminatory purposes. This presumption, however, can be overcome when the defendant shows that the prosecution has systematically challenged prospective jurors on the basis of race.[53] *Swain*, therefore, provides defense counsel with a legal basis for establishing an Equal Protection Clause claim for racially discriminatory practices by the prosecution through evidence of specific acts over time.

Intentional discrimination based on race is reprehensible.[54] It is even more so where the life of the accused is at stake. Counsel should not hesitate in an appropriate case to undertake the issues and questions authorized by *Swain*.

Summary and analysis by:
Deborah A. Hill

[53] *Id.* at 223-24.

[54] *See* case summary of *Hoke*, Capital Defense Journal, this issue.

MUELLER v. MURRAY

252 Va. 356, 478 S.E.2d 542 (1996)
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FACTS

In the early morning hours of October 6, 1990, ten year old Charity Powers was abducted from a fast food restaurant near the skating rink where her mother had earlier dropped her off. Her body was found the following February buried 900 feet from the home of Everett Lee Mueller. During interrogation, Mueller confessed to enticing Powers into his car with the promise of a ride home; instead, he took her to his house. Mueller claimed that Powers consented to sex with him and that afterwards he strangled her to keep her from reporting the incident. The state's evidence, however, tended to prove that Powers was raped and that her throat had been slit.[1]

The jury found Mueller guilty of capital murder, rape, and abduction with intent to defile.[2] At the sentencing phase of the trial, four women, including Mueller's sister, testified that they had been raped by Mueller. Mueller had been convicted of two of these rapes. Mueller's own expert testified that he lacked a "working conscience."[3] Mueller was sentenced to death based upon the jury's finding of both "vileness" and "future dangerousness."[4]

The Supreme Court of Virginia affirmed the judgment,[5] and the United States Supreme Court denied a writ of certiorari.[6] Mueller then petitioned for state habeas relief; his petition was dismissed in part and denied in part. The Supreme Court of Virginia granted review but limited it to the issue of whether Mueller's constitutional rights were violated by the trial court's refusal to inform the jury that Mueller would be ineligibile for parole if he received a life sentence.[7]

HOLDING

The Supreme Court of Virginia held that the United States Supreme Court's decision in *Simmons v. South Carolina*[8] was a "new rule"under *Teague v. Lane*,[9] and that consequently Mueller was not entitled to the benefit of the *Simmons* holding. The court affirmed the lower court's denial of Mueller's petition.[10]

ANALYSIS/APPLICATION IN VIRGINIA

I. *Teague* Analysis

The decision in *Teague* was intended, in the interest of finality and federal-state comity, to prevent application of "new" rules of criminal procedure to defendants whose convictions were final before the new rule was announced.[11] The Supreme Court stated that "a case announces a 'new' rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[12] *Teague* requires a three step analysis: first, determining whether the defendant's conviction became final before the date on which the new rule was announced; second, surveying the legal landscape as of the date of final conviction to determine whether a state court examining the issue **at that time** would have felt compelled by precedent to conclude that the rule was constitutionally required; and finally, the court must decide whether the new rule falls within one of two narrow exceptions to the *Teague* doctrine.

[1] *Mueller v. Murray*, 252 Va. 356, 358-60, 478 S.E.2d 542, 544-45 (1996).

[2] *Id.* at 360, 478 S.E.2d at 545. The capital murder convictions were based upon Va. Code § 18.2-31(5) (murder in commission of a rape) and former Va. Code § 18.2-31(8) (murder of child under 12 in the commission of an abduction with intent to defile).

[3] *Id.*

[4] *Id.*

[5] *Mueller v. Commonwealth*, 244 Va. 386, 414, 422 S.E.2d 380, 398 (1992).

[6] *Mueller v. Commonwealth*, 507 U.S. 1043 (1993).

[7] *Mueller v. Murray*, 252 Va. 356, 358, 478 S.E.2d 542, 544 (1996).

[8] 512 U.S. 154, 162 (1994) (ruling that the defendant has a constitutional right to rebut the state's evidence of future dangerousness with the fact that the defendant would be parole ineligible if sentenced to life instead of death).

[9] 489 U.S. 288, 310 (1989) (finding that habeas prisoners generally not entitled to benefit of new favorable Supreme Court decisions).

[10] *Mueller*, 252 Va. at 367, 478 S.E.2d at 549.

[11] *Id.* at 361, 478 S.E.2d at 546 (explaining that *Teague* and its progeny have determined that the defendant's conviction becomes final on the date of denial of certiorari or of other final disposition by the United States Supreme Court).

[12] *Teague*, 489 U.S. at 301.

Because Mueller was denied a rehearing on his petition for certiorari to the United States Supreme Court on June 7, 1993, that is the date of "finality" for *Teague* purposes.[13] Thus, the Supreme Court of Virginia surveyed the legal landscape as of that date. Rather than conduct a fresh survey of their own, however, the court essentially adopted the Fourth Circuit's recent 7-6 decision in *O'Dell v. Netherland.*[14] In *O'Dell*, the court of appeals addressed the question of whether *Simmons* was a new rule for *Teague* purposes.[15] The court of appeals first defined the "rule" of *Simmons* narrowly: "where the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury—by either argument or instruction—that he is parole ineligible."[16]

The *O'Dell* court found that three United States Supreme Court opinions, *Gardner v. Florida*,[17] *Skipper v. South Carolina*,[18] and *California v. Ramos*,[19] constituted the "legal landscape" prior to *Simmons*. The majority found that *Ramos* left the question of parole ineligibility to state law. Additionally, the court found that the *Ramos* holding made the apparently contrary holdings in *Gardner* and *Skipper* at least ambiguous enough that a state court would not have felt compelled to find the *Simmons* rule.

Relying heavily on *O'Dell*, the court in *Mueller* ruled that *Simmons* was not a new rule for purposes of Virginia law. This holding is an interesting example of "reverse comity"—a state court adopting a federal court decision as its own. Ironically, one of the purposes of the *Teague* doctrine was to encourage federal courts to respect state court opinions.

Once the Supreme Court of Virginia found that *Simmons* was a new rule, Mueller was not entitled to its benefit on appeal unless the court found that *Simmons* was an exception to the *Teague* doctrine. As the court noted, if *Simmons* established a so-called "watershed" rule of criminal procedure, one in which the holding was fundamental to civil liberties, the *Teague* doctrine would not apply and the rule of *Simmons* could be applied retroactively to Mueller on appeal.[20] The court summarily dismissed the argument that *Simmons* is a "watershed" rule, suggesting only that it obviously was not as "ground breaking" as *Gideon v. Wainwright*, which granted the right to counsel to indigent defendants.[21] Perhaps, however, the court should have taken this portion of Mueller's argument more seriously. It is not altogether obvious why a rule that a defendant is entitled to have an attorney speak for him in court is fundamental to due process (*Gideon*) while a rule that a defendant may tell the jury with or without the assistance of counsel that he is ineligible for parole is not (*Simmons*). Put another way, *Simmons* was grounded in a fundamental due process right to contest the state's case for death. So why is that right less important than the right to exercise it, and other rights, through counsel? The argument at least deserved a more thorough analysis than the *Mueller* and *O'Dell* courts accorded it.

II. Beyond O'Dell - Is Parole Ineligibility Mitigation?

More important than the Supreme Court of Virginia's adoption of *O'Dell*'s analysis of *Simmons*, however, is the fact that Mueller raised a *Simmons*-based argument that was **not** addressed by the Fourth Circuit in *O'Dell*. Mueller argued that the trial court's refusal to allow him to inform the jury of his parole ineligibility violated not only his right to rebut "future dangerousness" (*see* Justice O'Connor's "narrow" interpretation of *Simmons*, *infra*), but also violated his Eighth Amendment right to present evidence in mitigation. It has never been authoritively decided whether parole ineligibility is mitigation evidence. If it is, such a claim may not be barred by the rule of *Teague* because it has long been held that a defendant has a constitutional right to present any evidence to the jury which is mitigating.[22] Unfortunately, the court ruled that this argument was procedurally barred because Mueller did not raise it on direct appeal.[23] If parole ineligibility is mitigation (it tends to show that a life sentence is severe and sufficient punishment), then defense counsel must be permitted to communicate it to the jury in all capital cases, regardless of which aggravating factor Virginia relied upon to make the defendant eligible for the death sentence.[24]

Summary and Analysis by:
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[13] *Mueller*, 252 Va. at 362, 478 S.E.2d at 546.

[14] 95 F.3d 1214 (4th Cir. 1996). The United States Supreme Court granted O'Dell's petition for writ of certiorari on the *Teague* issue on December 17, 1996. *O'Dell v. Netherland*, 117 S. Ct. 631 (1996). Oral arguments were heard on March 18, 1997.

[15] For a much more thorough examination of *O'Dell* and of the argument that *Simmons* is **not** a new rule, as well as the alternative argument, also made by Mueller, that *Simmons* is a "watershed" rule, *see* case summary of *O'Dell*, Capital Defense Journal, Vol. 9, No. 1, p. 29 (1996).

[16] *O'Dell*, 95 F.3d at 1223 (quoting *Simmons*, 114 S. Ct. at 2201 (O'Connor, J., concurring)).

[17] 430 U.S. 349 (1977) (holding that sentencing court had violated defendant's constitutional rights when it relied upon a secret report that defendant never had the opportunity to rebut).

[18] 476 U.S. 1 (1986) (holding that exclusion of evidence that defendant adjusted well to incarceration violates *Lockett v. Ohio*).

[19] 463 U.S. 992 (1983) (holding that California law requiring instruction as to governor's power to commute life sentence without possibility of parole did not violate Constitution).

[20] *Mueller*, 252 Va. at 366, 478 S.E.2d at 549.

[21] *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

[22] *Lockett v. Ohio*, 438 U.S. 586 (1978).

[23] *Mueller*, 252 Va. at 367, 478 S.E.2d at 549. For an examination of Virginia's default and waiver rules see Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994).

[24] Note that even the "narrow" interpretation of *Simmons* requires that parole ineligibility be allowed to be argued to the jury whenever "future dangerousness" is an issue at sentencing. It is hard to imagine a capital case where "future dangerousness" would not be an issue at sentencing, even if the Commonwealth formally relied only upon "vileness."