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MURPHY v. NETHERLAND 116 F.3d 97 (4th Cir. 1997) United States Court of Appeals, Fourth Circuit

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MURPHY v. NETHERLAND

116 F.3d 97 (4th Cir. 1997)

United States Court of Appeals, Fourth Circuit

FACTS

Mario Murphy pleaded guilty to murder-for-hire and to conspiracy to commit capital murder, and was consequently sentenced to death.¹ Murphy was hired by Robin Radcliff (hereinafter "Radcliff") and her lover, Gary Hinojosa, to kill Robin's husband, James Radcliff (hereinafter "the victim").² After one failed attempt, Murphy enlisted the help of two other men, Aaron Turner and James Hall.³ The three men, with the help of Radcliff and Hinojosa, planned to stage a burglary in which they would kill the victim. In preparation, Radcliff drove Murphy to her apartment building, pointed out the victim's car, and told him the specific bedroom in which the victim slept.⁴

On July 28, 1991, after dressing and arming themselves at Hinojosa's home, Murphy, Turner, and Hall went to the Radcliff apartment.⁵ There, they entered through a window that Radcliff had left unlocked for them.⁶ As they made their way down the hallway, Radcliff left the bedroom in which her husband was sleeping, walked past the three men, and went to the living room.⁷ Murphy, Turner, and Hall entered the bedroom, where, using a metal pipe and two knives, they beat and stabbed the victim to death. On their way out of the apartment, following the instructions of Radcliff and Hinojosa "to make it look like a robbery," the three men took a videocassette recorder and a video game.⁸

Following his arrest on September 4, 1992, Murphy waived his constitutional rights and confessed to killing the victim.⁹ The Virginia Beach Circuit Court found Murphy's guilty pleas to murder-for-hire and to conspiracy to commit murder both voluntary and intelligent.¹⁰ At a separate sentencing hearing, the court found that: (1) Murphy's actions constituted "aggravated battery"; (2) Murphy exhibited "depravity of mind"; and (3) Murphy was "a continuing serious threat to society."¹¹ The Supreme Court of Virginia affirmed both the convictions and the sentences.¹²

Murphy's efforts on state habeas proved equally unsuccessful, as all of his habeas claims were dismissed upon findings that they were either procedurally barred or without merit.¹³ Furthermore, his appeal to the Supreme Court of Virginia was dismissed as untimely after being filed one day too late.¹⁴

Murphy filed a federal habeas petition, claiming that his conviction and death sentence were unconstitutional because the local authorities

did not inform him that, as a foreign national of Mexico, he had a right under the Vienna Convention on Consular Relations to speak to the consulate of Mexico.¹⁵ The district court rejected this claim because it was not raised in state court, and, therefore, was procedurally defaulted. Murphy appealed the denial of his habeas petition, arguing that the violation of his rights under the Vienna Convention rendered his guilty plea involuntary.¹⁶

HOLDING

The United States Court of Appeals, Fourth Circuit, denied the motion for a certificate of appealability and dismissed the appeal, holding that (1) petitioner's claim under the Vienna Convention on Consular Relations did not involve a denial of any constitutional right; and (2) any such claim was procedurally barred.¹⁷

ANALYSIS/APPLICATION IN VIRGINIA

I. The Vienna Convention on Consular Relations

A. Background

The Vienna Convention on Consular Relations was unanimously adopted by the more than 100 participating countries on April 24, 1963.¹⁸ Under Article 36 of the Convention, a citizen of one country who is arrested in another country is given the right to contact the country's consul, and consequently the consul is allowed to visit the detainee and provide assistance.¹⁹ The various forms of consular assistance which

¹⁵ *Id.*¹⁶ *Id.*¹⁷ *Id.* at 100.¹⁸ Uribe, *Consuls at Work: Universal Instruments of Human Rights and Consular Protection in the Context of Criminal Justice*, 19 Hous. J. Int'l L. 375, 384 (1997).¹⁹ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 100-01, 596 U.N.T.S. 261, 292-94 (hereinafter Vienna Convention). Article 36(1) of the Vienna Convention states:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

(a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

(b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

(c) consular officers shall have the right to visit a national

¹ *Murphy v. Netherland*, 116 F.3d 97, 98 (4th Cir. 1997).² *Murphy*, 116 F.3d at 98.³ *Id.*⁴ *Murphy v. Commonwealth*, 246 Va. 136, 139, 431 S.E.2d 48, 50 (1993).⁵ *Murphy*, 116 F.3d at 98.⁶ *Id.* at 98.⁷ *Murphy v. Commonwealth*, 246 Va. 136, 139, 431 S.E.2d 48, 50 (1993).⁸ *Id.* at 140, 431 S.E.2d at 50.⁹ *Id.* at 141, 431 S.E.2d at 51.¹⁰ *Murphy*, 116 F.3d at 99.¹¹ *Id.*¹² *Id.*¹³ *Id.*¹⁴ *Murphy*, 116 F.3d at 99.

can be provided, including legal assistance, are enumerated in Article 5 of the Convention.²⁰ These consular functions depend on the right to communicate with and have access to the nationals.²¹

The United States ratified the Vienna Convention on November 24, 1969,²² thereby making it the "supreme Law of the Land" under the Supremacy Clause of the United States Constitution,²³ and binding upon both federal and state authorities.²⁴ Nevertheless, jurisprudence illustrates quite a different outcome for claims under the Vienna Convention in the courts of the United States.²⁵ Courts generally admit that a violation of the international treaty has occurred, but they consistently

of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment.

²⁰ See *id.* art. 5, 21 U.S.T. at 82-85, 596 U.N.T.S. at 268-70. According to Article 5 of the Convention, consular functions include: the protection and assistance of co-nationals in the sending State; the protection of the interests of the sending State and of its nationals, both individuals and bodies corporate, in accordance with the laws of the receiving State; the protection of the interests of minors and other persons lacking full capacity who are nationals of the sending State, within the limits imposed by the laws of the receiving state; the representation or arrangement of appropriate representation for co-nationals before local tribunals and other authorities insofar as the laws of the receiving State permit; and the assistance of vessels, aircraft, and their crews with the nationality of the sending State in accordance with the laws of the sending State.

²¹ Uribe, 19 Hous. J. Int'l L. at 387.

²² Vienna Convention, 21 U.S.T. at 77.

²³ U.S. Const. art. VI, cl. 2. The Supremacy Clause states that, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

²⁴ Uribe, 19 Hous. J. Int'l L. at 407.

²⁵ See *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 487 (1996). In *Faulder*, a Canadian national, working in Texas, was convicted and sentenced to death for the robbery-murder of a local resident. During his federal appeals process, Faulder's attorneys raised the claim that Faulder had been denied his right to consular access under the Vienna Convention. The Canadian government itself filed an amicus brief on behalf of Faulder, stating that the denial of these rights under international law may have prevented Faulder from getting a fair trial. Nevertheless, the Fifth Circuit found the omission to be harmless error, explaining that the defendant had access to all of the information that could have been acquired by the Canadian government. 81 F.3d at 520. Furthermore, the court noted that the evidence that would have been acquired by the Canadian government was merely the same as or cumulative of evidence Faulder's counsel had or could have gotten. *Id.* The evidence, characterized by the court as "merely the same," which Faulder's counsel could have obtained from his homeland included the following: the fact that Faulder suffered from permanent organic brain damage after a severe childhood injury, favorable testimony from Faulder's family in Canada, and the fact that Faulder had never been convicted or accused of violent acts in Canada. See Urbine, 19 Hous. J. Int'l L. at 91-92 n.220.

See also *Montoya v. State*, 810 S.W.2d 160 (Tex. Crim. App. 1989). In *Montoya*, a Mexican national was convicted of capital murder and sentenced to death in a Texas district court for the stabbing death and robbery of a U.S. citizen. The prosecution centered their case around a confession Montoya signed after several hours of police interrogation,

dismiss capital defendants' Vienna Convention claims as harmless error or insufficient to allow federal habeas relief.²⁶

B. Murphy's Vienna Convention Claim

The courts in Virginia did not deviate from this pattern with regard to Mario Murphy's Vienna Convention claim. Murphy first raised this claim in his federal habeas petition in April 1996, alleging that both his conviction and death sentence were constitutionally invalid because local authorities failed to inform him of his right to contact the Mexican consulate under the Vienna Convention.²⁷ The district court dismissed Murphy's claim, holding that it was procedurally defaulted because it had not been raised in state court.²⁸

Similarly, the court of appeals found Murphy's Vienna Convention claim to be procedurally defaulted, in that he had not previously argued that the violation of the Vienna Convention rendered his guilty plea involuntary.²⁹ Furthermore, the court found that Murphy did not satisfy the requirements to obtain a certificate of appealability, in that he failed to make "a substantial showing of the denial of a constitutional right."³⁰

prior to his initial appearance before any court, and before counsel had been appointed to represent him. Despite the fact that Montoya was unable to read, write or speak English, his confession was in English. Moreover, the confession occurred after a midnight arrest, at which time the defendant was intoxicated. The defendant was placed in solitary confinement overnight and suffered from sleep deprivation at the time of the interrogation. 81 S.W.2d at 173. Montoya was never informed of his Vienna Convention right to contact his consul. Montoya claimed that this denial significantly impaired his right to counsel. The court rejected his claim, noting "[w]e find no abuse of discretion in the trial court's decision concerning the voluntariness of the confession." *Id.* at 174.

See also *Breard v. Netherland*, 949 F.Supp. 1255 (E.D. Va. 1996). In *Breard*, a dual citizen of Paraguay and Argentina, who had been convicted and sentenced to death for capital murder and attempted rape, filed a petition for writ of habeas corpus in district court. In responding to Breard's claim that the Commonwealth had denied him his Vienna Convention rights, the court noted that "Virginia's persistent refusal to abide by the Vienna Convention troubles the Court." 949 F.Supp. at 1263. Notwithstanding, the court held that the claim was procedurally defaulted and that federal review was barred. Furthermore, the court found that Virginia's consistent denial of Vienna Convention rights was not just cause for the default, noting "[Virginia's] failure to comply with the Vienna Convention did not prevent Breard's counsel from raising the issue during state proceedings. The only predicate fact required to raise the claim was the knowledge of Breard's foreign nationality." *Id.*

²⁶ It is interesting to note that although the United States does not strictly adhere to the Vienna Convention in the case of foreign nationals in the United States, it has been quick to demand that other countries uphold the Convention with regard to U.S. citizens detained by other countries. See Doherty, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 Va. L. Rev. 1281, 1345 n.165 (1996). In 1975, the United States protested Syria's arrest of two U.S. citizens and its failure to notify the American Embassy. In a telegram to Syria, the United States spoke of the Vienna Convention as a type of international law, stating that: "The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals." *Id.* (quoting Dep't of State Telegram 40298 to Embassy Damascus, Feb. 21, 1975).

²⁷ *Murphy*, 116 F.3d at 99.

²⁸ *Id.*

²⁹ *Id.* at 100.

³⁰ *Id.* at 99 (citing 28 U.S.C. § 2253(c)(2)).

The court reasoned that the Supremacy Clause does not transform violations of treaty provisions into violations of constitutional rights. Therefore, according to the court of appeals, the Vienna Convention is said to create "individual" rights, but not "constitutional" rights.³¹

Murphy's failed Vienna Convention claim reiterates the importance of raising all issues as early as possible in capital cases. Once a capital defense attorney realizes he or she is representing a foreign national, it is imperative to determine whether the client received the benefits of the Vienna Convention. If the client did not, counsel should move for a dismissal at the trial level of the charges and should establish factually the violation and the effects of the violation. If the trial court denies the motion, counsel should preserve the issue for appeal.

The rights afforded under the Vienna Convention raise several important and potentially beneficial issues for the capital defendant. For example, the defendant may have had language barriers or deficient understandings of the American legal system at the time of his or her arrest. These problems could be alleviated by contact with a consulate at the time of arrest or detention. Moreover, access to a consulate could benefit counsel's development of mitigating evidence including securing medical records, school records, records of prior criminal activity, and character witnesses. This evidence could be exclusively located in the defendant's homeland, and, therefore, only accessible through the means provided for in the Vienna Convention.

The violation of the Vienna Convention is a relatively new claim for capital defendants. Although the court of appeals in Murphy's case stymied the claim, its holding was primarily based on procedural default. Capital defense counsel should not surrender the issue, but rather should raise it at the trial level, should develop a factual record for it, and should preserve it at every level.

II. The Procedural Default of Murphy's Vienna Convention Claim

A. Standard for Cause

In *Wainwright v. Sykes*,³² the United States Supreme Court held that a petitioner is procedurally barred from raising a claim in a federal habeas corpus proceeding if that issue could have been presented on direct appeal or in a state habeas proceeding, unless the petitioner can establish cause for the default and resulting prejudice.³³ In Murphy's case, the court of appeals noted that even if Murphy could appeal the district court's decision, the court of appeals would find his Vienna Convention claim to be procedurally barred because he did not raise it in state court and failed to show cause and prejudice for his default.³⁴

In attempting to show cause for not raising the Vienna Convention claim in state court, Murphy argued that the claim was novel and that the state had not informed him of his rights under the Convention.³⁵ The court of appeals soundly rejected Murphy's novelty argument, stating that the Convention has been in effect since 1969, and "a reasonably diligent search" would have uncovered the existence and relevance of the Convention. Moreover, the court noted that treaties should be the first

³¹ *Murphy*, 116 F.3d at 100. Hence, the court of appeals seemed to condone the Commonwealth's denial of Murphy's individual rights.

³² 433 U.S. 72 (1977).

³³ *Id.* at 87. The *Wainwright* Court declined to give precise definitions of the "cause-and-prejudice" standard, leaving the issue for future decisions. *Id.* at 87. See also *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990) (holding that federal habeas petitioner cannot raise claim in federal habeas petition that he has never brought in any state court).

³⁴ *Murphy*, 116 F.3d at 100.

³⁵ *Id.*

source consulted by "a reasonably diligent" counsel representing a foreign national.³⁶

In rejecting Murphy's argument that his failure to raise the Vienna Convention claim in state court was a result of the Commonwealth's failure to advise him of his Convention rights, the court of appeals found that Murphy had failed to show any "external impediment preventing [his] counsel from constructing or raising the claim."³⁷ The court offered no further explanation of this reasoning, leaving capital defense counsel uncertain as to what constitutes an "external impediment" and to what degree it must prevent counsel from making a claim.³⁸

Again, the lesson to be learned from Murphy's failed attempts to avoid procedural default is the importance of raising issues in state court and preserving them for appeal. Awareness of the Vienna Convention as a source of claims for capital defendants, specifically foreign nationals, is growing.³⁹ Hopefully, this growing awareness will prompt capital defense counsel to raise Vienna Convention claims prior to the trial in state court. Upon failure to raise the issue, habeas counsel faced with the task of showing cause for procedural default of a Vienna Convention claim must be prepared to meet the *Murphy* court's "external impediment" standard. It will obviously not be enough to claim that the Commonwealth violated the Vienna Convention by denying a defendant access to his or her consul. Habeas counsel will need to show how the denial and subsequent violation actually prevented the defendant's counsel from raising the claim.

B. Standard for Prejudice

Murphy argued that he was prejudiced by the Commonwealth's violation of the Vienna Convention, in that the consulate could have helped him either obtain a plea bargain or acquire mitigating evidence for the sentencing hearing.⁴⁰ Specifically, Murphy argued that the Mexican consulate could have helped him avoid a sentence of death which he asserted was the product of ethnic discrimination.⁴¹ The court rejected

³⁶ To illustrate its "reasonably diligent search" argument, the court cited several cases in which defendants raised Vienna Convention claims. *Id.* at 100. Murphy, however, had different counsel representing him in the state and federal court proceedings. Particularly since this is a capital case and there is a life at stake, the court could have given consideration to the fact that Murphy's habeas counsel did conduct "a reasonably diligent search" and raised the Vienna Convention as soon as he learned of its applicability.

³⁷ *Id.* at 100 (quoting *Murray v. Carrier*, 477 U.S. 478, 492, 106 S.Ct. 2639, 2648 (1986)).

³⁸ The court notes that the factual predicate for the Vienna Convention claim was that Murphy was a citizen of Mexico and that this fact was within Murphy's knowledge. *Id.* at 100. Nevertheless, even though Murphy obviously knew he was a Mexican citizen, he did not necessarily know that he was entitled to certain rights under the Vienna Convention. Furthermore, knowledge of his citizenship did not mean that Murphy knew to tell his counsel about his citizenship in order to invoke his rights under the Convention.

³⁹ Mario Murphy's September 17, 1997, execution generated a significant amount of publicity concerning his claim that the Commonwealth violated the Vienna Convention. The government of Mexico and the United States Department of State appealed to the Governor of Virginia to reconsider the execution, both citing the importance of the Vienna Convention.

⁴⁰ *Murphy*, 116 F.3d at 100-101.

⁴¹ *Id.* at 101. There was a total of six people involved in the murder-for-hire scheme that led to Murphy's conviction. Four of the codefendants received plea bargains, resulting in life sentences. The victim's

Murphy's claim that his sentence was the product of ethnic discrimination and found instead that Murphy possessed a greater degree of culpability than the codefendants.⁴² Even if discrimination was involved, the court reasoned that Murphy failed to offer any evidence that his consulate could have provided him with assistance not provided by his counsel.⁴³

Likewise, the court rejected Murphy's claim that he was prejudiced by his inability to obtain mitigating evidence through his consulate. In rejecting this claim, the court cited the district court's finding that Murphy made no showing of what evidence his consulate would have provided.⁴⁴ According to the court of appeals, Murphy did not show how he needed the consulate's help in order to obtain character testimony, and even if he had, the court did not see how such testimony would have been any different from that offered at Murphy's sentencing hearing.

wife, who refused a bargain, was convicted and sentenced to life. Murphy was the only one of the six not offered a plea bargain.

⁴² *Id.* The court agreed with the prosecutor's determination that Murphy was more culpable because of his primary role in the murder and his efforts to recruit others to help carry out the murder.

⁴³ *Id.*

⁴⁴ *Murphy*, 116 F.3d at 101.

In these few sentences, the court of appeals managed to establish an extremely high standard for capital defendants attempting to show the existence of prejudice from a procedurally defaulted Vienna Convention claim. *Murphy* illustrates that, in the eyes of the court of appeals, it simply will not be enough to say the defendant might have obtained this evidence or assistance if the defendant had received his Convention rights. Habeas counsel will have to produce actual evidence that the defendant would have received from his or her consulate. For example, if counsel wanted to submit testimony of a character witness, counsel would actually have to produce the witness and the witness' testimony. This requirement of actuality also applies to the contents of any records that a consulate would have acquired on behalf of the defendant. Consequently, counsel must present as much actual evidence as possible in order to prevail on a showing of prejudice on a procedurally defaulted claim.

The fundamental lesson here is that capital defense counsel should avoid a procedural default bind at all costs, but if counsel does find a client in such a situation, counsel must make showings of both cause and actual prejudice.

Summary and analysis by:
Mary K. Martin

POPE v. NETHERLAND

113 F.3d 1364 (4th Cir. 1997)¹

United States Court of Appeals, Fourth Circuit

FACTS

On the evening of January 12, 1986, Carlton Jerome Pope shot and killed Cynthia Gray. While sitting in her car in the parking lot of "Nicks Pool Hall" in downtown Portsmouth with Marcie Ann Kirchheimer, Gray and Kirchheimer were approached by Pope. Pope asked Gray for a ride home and she agreed. Pope got into the back seat of the car and the three of them departed. After making one short stop, Pope directed Gray to Bagley Street where she stopped the car. Immediately after exiting the car, Pope turned toward the two women, pointed a pistol at them and demanded all their money. When the women made no immediate response, Pope fired a shot into Gray's head. Kirchheimer reached up from the passenger seat and briefly struggled with Pope for the gun. After he pulled free, Pope took a couple of steps away from the car, turned around and shot Kirchheimer in the back of the head. He then fled the scene. Gray died from the gun-shot wound to the head. Kirchheimer survived and testified against Pope at his trial.²

Kirchheimer told the police that Pope had taken nothing from her, but that Gray had been carrying a clutch-type purse which was missing after the shooting. Kirchheimer last remembered seeing the purse between the front seats. Although Kirchheimer did not actually see Pope

take the purse, she testified that "it was in his view and that he had ample opportunity 'to grab it without [her] seeing him.'"³

The police examined the car shortly after the two women arrived at the hospital. In the car, the police found a wine bottle from which they obtained a fingerprint which positively matched Pope's fingerprint. In addition to the wine bottle, the police found a checkbook belonging to Gray in the car between the passenger seat and door. Kirchheimer testified that Gray had written and cashed a check from her checkbook earlier that evening and had then placed the checkbook back in her purse.⁴

The jury convicted Pope of capital murder in the commission of a robbery pursuant to Virginia Code Section 18.2-31(d)⁵ and sentenced him to death. On direct appeal, the Supreme Court of Virginia affirmed Pope's conviction and sentence.⁶ The supreme court held that "where a killing and a [larceny] are so closely related in time, place, and causal

³ *Pope v. Netherland*, 113 F.3d 1364, 1367 (4th Cir. 1997) (quoting *Pope v. Commonwealth*, 234 Va. 114, 119, 360 S.E.2d 352, 355 (1987)).

⁴ During Pope's second state habeas proceeding, the Commonwealth produced bank records that indicated that the check Gray wrote that night did not come from the checkbook found in the car. Thus, in his second state and federal habeas petitions, Pope contended that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. Additionally, Pope contended that the Commonwealth knowingly presented Kirchheimer's false testimony. See, *infra*, note 56 and accompanying text.

⁵ This section has since been amended and changed to Virginia Code Section 18.2-31(4) (1995). See, *infra*, note 22.

⁶ *Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987).

¹ The United States Supreme Court, with Justices Stevens and Ginsburg dissenting, recently denied Pope's petition for a writ of certiorari. *Pope v. Pruett*, 1997 WL 429193 (U.S. Aug. 19, 1997). On that same day, Carlton Jerome Pope was executed by lethal injection.

² *Pope v. Netherland*, 113 F.3d 1364, 1367 (4th Cir. 1997).