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Mueller v. Angelone
181 F.3d 557 (4th Cir. 1999)

I. Facts

On October 5, 1990, Charity Powers ("Powers"), a ten-year-old girl, was abducted, raped, and killed. Months later, upon receiving indications that Everett Lee Mueller ("Mueller") might have been involved, police searched Mueller's backyard and found Powers's body and a knife buried there. Mueller was arrested and advised of his rights under *Miranda v. Arizona*.[1] During a videotaped interrogation, Mueller confessed to the rape and murder.[2]

On September 11, 1991, Mueller was convicted by a jury of rape and abduction with intent to defile. He was also convicted of capital murder in the commission of abduction with intent to defile and capital murder in the commission of, or subsequent to, rape. The jury found Mueller to be a future danger to society and his crime to be vile and sentenced him to death on the two capital charges. Mueller exhausted his direct appeal and state habeas proceedings and his first petition for federal habeas corpus relief was dismissed.[3] Mueller appealed this judgment to the United States Court of Appeals for the Fourth Circuit, based on the following assertions: (1) the application of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[4] to his case had an impermissible retroactive effect; (2) AEDPA violates the Supremacy Clause of the United States Constitution; (3) the circumstances of his confession violated his right against self-incrimination under the Fifth Amendment and his right to counsel under the Sixth Amendment; (4) the alleged withholding of exculpatory evidence by the Commonwealth violated *Brady v. Maryland*[5]; (5) his trial counsel was

1. 384 U.S. 436, 444 (1966) (holding that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination").

2. Mueller v. Angelone, 181 F.3d 557, 563-64 (4th Cir. 1999).

3. *Id.* at 564-65.

4. Pub. L. No.104-132, 110 Stat. 1214 (amending 28 U.S.C. Title 153).

5. 373 U.S. 83, 87 (1963) (holding that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

ineffective; and (6) he was wrongly denied an evidentiary hearing on his *Brady* and ineffective assistance claims.[6]

II. Holding

The Fourth Circuit determined that AEDPA applied and found no basis for federal habeas relief in the claims advanced; thus, it denied Mueller's motion for a certificate of appealability and dismissed the appeal.[7]

III. Analysis / Application in Virginia

A. AEDPA and Retroactive Effect

Mueller argued that, though his federal habeas petition was filed post-enactment of AEDPA, application of AEDPA to his case would have an impermissible retroactive effect because his claim *arose* prior to the enactment of AEDPA. In addressing this claim, the court looked to *Lindh v.*

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6. *Mueller*, 181 F.3d at 565-86.

7. *Id.* at 587. The court's disposition of some of Mueller's claims will not be discussed further in this article due to their insignificance to Virginia capital practice. These claims are discussed briefly below.

Mueller claimed that AEDPA violated the Supremacy Clause of the United States Constitution, which declares the Constitution the supreme law of the land. The court, noting that the Supremacy Clause concerns conflicts between state and federal law, not state and federal judiciaries, rejected Mueller's argument that AEDPA strips from the federal courts the power vested in them by Article III by restricting the scope of federal habeas review. The court noted that it had previously rejected a similar argument made under the Suspension Clause of the Constitution. *Id.* at 572-73. *See* U.S. CONST. art. I, § 9, cl. 2.

Mueller also claimed four instances of ineffective assistance of counsel. Mueller's first ineffective assistance claim was that his counsel searched for neither evidence of Mueller's susceptibility to falsely confessing nor evidence of his innocence. Mueller's second assertion of error was that his attorney did not *present* any evidence of his innocence. The court, relying on the fact that Mueller told his trial counsel that his confession was accurate and that he was guilty, rejected Mueller's argument that this inaction fell below the objective reasonableness standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *But see* Jason J. Solomon, Case Note, 11 CAP. DEF. J. 367, 372 (1999) (analyzing *Sexton v. French*, 163 F.3d 874 (4th Cir. 1998), and examining the duty of counsel to present certain exculpatory evidence even if it is against the wishes of the defendant). The court also held that Mueller failed to show that the outcome of the trial was prejudiced by these alleged deficiencies. *Mueller*, 181 F.3d at 579-81.

Mueller's third and fourth ineffective assistance claims, that trial counsel conceded his guilt in closing arguments and failed to offer a first-degree murder alternative instruction to the jury, were barred from review on federal habeas due to the state procedural default rules regarding arguments raised in appellate briefs. The court rejected Mueller's argument that the page restrictions on his brief prevented his compliance with these rules and found federal habeas review of these claims barred. Lastly, Mueller argued that the district court erred in denying his request for an evidentiary hearing on his *Brady* and ineffective assistance claims. The court rejected this argument because no information was added to that available to the Supreme Court of Virginia on direct appeal which would warrant an evidentiary hearing under 28 U.S.C. § 2254(e)(2). *Mueller*, 181 F.3d at 581-87.

Murphy,[8] which held that Congress had intended "to apply the amendments to chapter 153 only to such cases as were filed after [AEDPA's] enactment" and not to cases pending at enactment.[9]

The court noted the two interpretations of *Lindh*.[10] Many courts have read *Lindh* to mean that AEDPA necessarily applies to petitions filed after April 24, 1996.[11] A second interpretation, which the court adopted here, is that for claims arising prior to AEDPA's enactment, but for which federal habeas petitions on the claims were filed post-enactment, AEDPA will apply *only* if its application will not have an impermissible retroactive effect.[12] In order to assess impermissible retroactive effect, the court used the test applied in *Landgraf v. USI Film Products*.[13] Under *Landgraf*, a new statute should be applied in cases in which its application would have a genuinely retroactive effect *only* where Congress has clearly expressed its intent that the statute act retroactively.[14]

Mueller argued that the view which takes impermissible retroactive effect into account was correct. Further, Mueller thought that his case was one in which, though his federal habeas petition was filed after the date of AEDPA's enactment, application of AEDPA would have an impermissible retroactive effect to his claims originating pre-enactment. The court agreed with Mueller's analysis for AEDPA application, but it also found that AEDPA would not have an impermissibly retroactive effect in his case.[15] In undertaking its *Landgraf* analysis, the court looked to whether "the new provision attaches new legal consequences to events completed before its enactment."[16] The court used the concepts of fair notice and reasonable reliance to reject Mueller's arguments that his appellate litigation strategy had relied upon the federal habeas requirements in effect prior to AEDPA's enactment.[17]

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8. 521 U.S. 320 (1997).

9. Lindh v. Murphy, 521 U.S. 320, 326 (1997).

10. *Mueller*, 181 F.3d at 565-66.

11. *Id.* at 566. *See, e.g.*, Green v. French, 143 F.3d 865, 868 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 844 (1999); Breard v. Green, 523 U.S. 371 (1998).

12. *Id.* at 567-69. *See, e.g.*, In re Hanswerd, 123 F.3d 922, 934 (6th Cir. 1997) (holding that AEDPA did not apply to bar filing of second or successive petition under 28 U.S.C. § 2255 where first petition was filed before date of enactment); In re Minarik, 166 F.3d 591 (3rd Cir. 1999) (concluding that *Lindh* did not mandate application of 28 U.S.C. § 2244's limitation on the filing of second or successive federal habeas petitions to a case in which its application would have a genuine retroactive effect).

13. 511 U.S. 244 (1994).

14. *Mueller*, 181 F.3d at 568.

15. *Id.* at 572.

16. Landgraf v. USI Film Products, 511 U.S. 244, 269-270 (1994). *See Mueller*, 181 F.3d at 569.

17. *Mueller*, 181 F.3d at 569-70. Mueller's burden per *Landgraf* was merely to show that

The court's analysis of this point clarifies the circumstances in which federal habeas petitions will be held to AEDPA standards. The necessity of conducting *Landgraf* retroactivity review is important for the small set of cases in which claims arising pre-enactment of AEDPA might be barred from federal habeas review because the federal habeas petition was filed after AEDPA's enactment.[18] In argument for federal habeas review of these claims, counsel must show that reliance on the pre-AEDPA procedures hindered appellate argument. The scathing review the court accords Mueller's arguments regarding reliance should deter superficial claims of retroactive prejudice.[19] However, strong reliance-based arguments may convince a court not to bar consideration of claims in federal habeas proceedings per section 2254 of AEDPA.

B. Self-Incrimination

Mueller argued that both his right not to incriminate himself and his right to counsel were violated during the interrogation which led to his confession. During interrogation, Mueller was advised of and waived his *Miranda* rights. Mueller asked Detective Garber ("Garber"), "Do you think I need an attorney here?"[20] Garber replied with a shrug and said, "You're just talking to us."[21] After this exchange, Mueller confessed to the rape and murder of Powers.[22]

Mueller first argued that the failure of the police to cease the interrogation when Mueller asked whether he needed an attorney superseded his

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he "might have acted differently had he known that his conduct would be subject to the new law," not necessarily that he *did* rely on the prior law. *Id.* at n.6. Specifically, Mueller tried to argue the following: (1) that he had lacked incentive to pursue adjudication on the merits of his federal claims in state court; (2) that he had lacked incentive to raise all claims on certiorari to the Supreme Court on direct appeal; and (3) that the state courts lacked incentive to diligently review his federal claims due to lack of knowledge of the deferential review that their decisions receive under the newly enacted AEDPA. These claims were dismissed summarily by the court and were criticized as without merit and bordering on frivolous. *Id.* at 570-72.

18. Claims arising post-enactment are *not* entitled to *Landgraf* retroactivity analysis. *Id.* at 568.

19. *Id.* at 570-572. Specifically, Mueller argued retroactive effect in his case for the following reasons: (1) he had lacked incentive to pursue in state court the merits adjudications of his federal constitutional claims due to the pre-AEDPA regime which only required him to exhaust his state court remedies in order to get independent and de novo review of these claims by the federal habeas court; (2) he omitted some claims from his petition for a writ of certiorari that he would have included had he foreseen the tougher habeas standard by which the claims would be measured; and (3) the state courts lacked the incentive to diligently review his federal claims because they were unaware of the degree of deference to those decisions. *Id.*

20. *Mueller*, 181 F.3d at 573-74.

21. *Id.*

22. *Id.* at 574.

initial waiver of his right to have counsel present.[23] The court rejected this claim because Mueller's question did not constitute an "unambiguous request for counsel,"[24] which would require police to stop the questioning under *Edwards v. Arizona*.[25] The court noted also that the United States Supreme Court reiterated this rule in *Davis v. United States*, stating that a suspect must "unambiguously request counsel" before officers must halt the interrogation.[26]

Additionally, Mueller argued that Garber's response to Mueller's question invalidated the initial waiver of his *Miranda* rights.[27] The court rejected this claim based upon the totality of the circumstances which showed Mueller's extensive experience with and understanding of *Miranda* rights.[28] Due to this understanding, the court found that Garber's actions could not affect the voluntary, knowing, and intelligent waiver by Mueller of his *Miranda* rights.[29]

Mueller also argued that he invoked his right to remain silent by asking to be taken to jail during the interrogation.[30] The court, finding that Mueller had not clearly asserted his right, rejected this argument.[31]

C. Brady *Issues*

Mueller argued that the Commonwealth, in violation of *Brady*, failed to disclose the fact that a witness had seen a photographic line-up prior to trial and possibly had failed to identify Mueller as the man seen talking to Powers on the night of the murder.[32] Although the court conceded that the line-up identification may have been marginally exculpatory, it noted that Mueller could not demonstrate a reasonable probability that the result

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23. *Id.* at 573-74.

24. Mueller v. Commonwealth, 422 S.E.2d 380, 387 (Va. 1992).

25. 451 U.S. 477, 487 (1981) (requiring interrogations to stop upon an unequivocal request for counsel).

26. 512 U.S. 452, 459 (1994).

27. *Mueller*, 181 F.3d at 574.

28. *Id.* at 574-75.

29. *Id.* at 575.

30. *Id.*

31. *Id.* at 575-76. The court's analysis of this issue has little practical value for Virginia capital practice. As a general rule, defense counsel should note that when a defendant has requested the assistance of counsel, *Miranda* violation claims should be couched in the language of *Edwards* and *Davis*. Specifically, defense counsel should argue that the defendant's request for counsel was unequivocal, but that even if the defendant's request was not unequivocal, the totality of the circumstances (for example, ignorance of the defendant or officer coercion) was such that the defendant's request nevertheless necessitated the halting of questioning.

32. *Id.* at 577. Allegedly, Mueller was seen talking to Powers at a McDonald's the night of her disappearance.

would have been different at trial had the prosecution disclosed the exculpatory evidence prior to trial.[33] This standard was announced by the United States Supreme Court in *United States v. Bagley*.[34] The court emphasized that the evidence was disclosed at trial and was used by the defense in summation.[35] This disclosure permitted the defense to use the evidence to its advantage in closing statements, allowing jurors to make inferences beneficial to the defense as to exculpatory evidence not disclosed pre-trial.[36] Moreover, the court noted the tremendous effect of Mueller's videotaped confession and Mueller's ability to lead the police to the crime scenes, evidence which made a witness placing Mueller and Powers together on the night of the murder unnecessary.[37]

In Mueller's case, the late-disclosed *Brady* evidence did not materially damage his case, in part because of the tremendous amount of evidence the Commonwealth had against Mueller. However, the use of evidence uncovered by a *Brady* motion is critical to the defense in other cases. For examples of motions to compel discovery under *Brady*, please contact the Virginia Capital Case Clearinghouse.

Kimberly A. Orem

33. *Id.* at 578.
34. 473 U.S. 667, 681 (1985).
35. *Mueller*, 181 F.3d at 577.
36. *Id.*
37. *Id.* at 577-78.