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Graham v. Angelone
No. 99-4, 1999 WL 710385
(4th Cir. Sept. 13, 1999)[1]

I. Facts

In the early morning hours of October 8, 1993, Andre L. Graham ("Graham") and another man, allegedly Mark Sheppard ("Sheppard"), approached the car of Sheryl Stack ("Stack"). Stack was seated in her car with her companion, Edward Martin ("Martin"). Graham, with a gun in hand, told Stack and Martin to exit the car and instructed Martin to give his wallet and car keys to Sheppard. Sheppard started Stack's car and then got in Martin's car where he saw some compact discs ("CDs"). During this time, Graham told Stack and Martin to lie down and close their eyes. They did as he directed and Graham shot each of them in the head. Graham and Sheppard then drove off in Martin's car. Stack later died from her wound but Martin lived and testified. A few days later, Priscilla Booker ("Booker"), who lived with Graham, found over 200 CDs in the trunk of her car. Graham told Booker that he had bought them and Booker put them in storage.[2]

While incarcerated on another charge, Martin telephoned Booker in the presence of Gary McGregor ("McGregor"), a deputy sheriff, who overheard Martin tell Booker to throw away a bag in his closet. McGregor relayed this information to his superiors and the police searched Booker's apartment and found a .45 caliber pistol in a plastic bag in a closet. A firearms expert testified that the gun was the source of the bullets recovered from Stack and Martin and a cartridge from the scene. The police also recovered Martin's CDs from a locker rented by Booker's mother. A fingerprint expert testified that many of the identifiable prints on the CDs were Graham's.[3]

Graham was convicted on eight felony counts, including the capital murder of Stack. The jury recommended the death sentence based on the future dangerousness and vileness predicates and the trial court adopted the jury's recommendation.[4] Graham's appeals to the Supreme Court of Vir-

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1. This is an unpublished opinion referenced in the "Table of Decisions Without Reported Opinions" at 191 F.3d 447 (4th Cir. 1999).

2. Graham v. Angelone, No. 99-4, 1999 WL 710385, at *1-3 (4th Cir. Sept. 13, 1999).

3. *Id.*, at *2-3.

4. *Id.*, at *3. Specifically, the jury found "(1) that Graham was a continuing serious threat to society (the 'future dangerousness' predicate), and (2) that Graham's murder of Stack

ginia and the United States Supreme Court were unsuccessful. Prior to state habeas proceedings, Graham's appointed counsel withdrew and another attorney was appointed. This attorney did not learn of his appointment until a few days before Graham's petition was due. The new counsel was allowed to amend Graham's state habeas petition and raised three grounds for relief.[5] The Supreme Court of Virginia dismissed the petition and denied a motion for rehearing.[6]

Graham's application for federal habeas relief was denied by the United States District Court for the Eastern District of Virginia. Graham then appealed to the United States Court of Appeals for the Fourth Circuit.[7]

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed the denial of Graham's writ of habeas corpus with respect to the claims for which a certificate of appealability was granted. The Court also denied Graham's motion for a certificate of appealability on his remaining claims and dismissed his appeal.[8]

III. Analysis / Application in Virginia

A. AEDPA and Retroactive Effect

Graham argued that although his application for federal habeas relief was filed after the Anti-Terrorism and Effective Death Penalty Act of 1996[9] ("AEDPA") had taken effect, AEDPA should not apply to his claims because it had an impermissible retroactive effect. To substantiate this argument, Graham asserted that had he known about the effects of the

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was 'vile' in that it involved 'depravity of mind' (the 'vileness' predicate)." *Id.*

5. His asserted grounds for relief were ineffective assistance of counsel, the Commonwealth's failure to provide him with exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and denial of meaningful and rational review of his death sentence. *Graham*, 1999 WL 710385, at *3.

6. *Id.*, at *4.

7. *Id.*

8. *Id.*, at *21. The court's disposition of several of Graham's claims will not be discussed in this article due to the fact that they add nothing of substance to capital defense law in Virginia. These claims include the following: (1) Graham's attacks on 28 U.S.C. § 2254 as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214; (2) a sufficiency of the evidence claim as to whether he was the triggerman; (3) whether his procedural defaults should have been dismissed due to cause and prejudice; (4) numerous ineffective assistance of counsel claims; (5) his challenge of the constitutionality of the verdict forms; (6) his challenge of the constitutionality of the future dangerousness predicate; and (7) whether he was entitled to an evidentiary hearing. *Id.*, at *4-7, *10-20.

9. 28 U.S.C. Title 153, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214.

amendment previously, he would have raised all of his claims in his first petition for certiorari to the United States Supreme Court. Applying its holding in *Mueller v. Angelone*,[10] the Fourth Circuit rejected Graham's argument. As the court noted in *Mueller*, "[w]e find even the suggestion that petitioner might have withheld legitimate claims from his petition for certiorari so that they would be considered by a federal court for the first time on habeas review illogical and thus unpersuasive."[11]

The court's analysis of Graham's argument falls succinctly in line with its previous decision in *Mueller*. In order to overcome the high standard set forth in *Mueller*,[12] counsel must show that the application of AEDPA creates novel problems that were not possible in pre-AEDPA cases. For example, federal habeas counsel should demonstrate that reliance on pre-AEDPA procedures so impaired appellate argument that the retroactive effect of AEDPA is an impossible hurdle.[13]

B. Claim of Innocence to Overcome Default

In an attempt to overcome the procedural default of many of his claims, Graham raised a claim of actual innocence under *Schlup v. Delo*.[14] The *Schlup* Court held that in order for a petitioner to satisfy a "gateway" innocence claim, the petitioner "must show that it is more likely than not that no reasonable juror would have *convicted him in light of the new evidence*."[15] The district court rejected Graham's claim purporting to apply *Schlup* but actually using a "clear and convincing" standard derived from *Sawyer v. Whitley*.[16] In *Sawyer*, the Supreme Court held that a habeas petitioner "must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner

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10. 181 F.3d 557 (4th Cir. 1999).

11. *Graham*, 1999 WL 710385, at *5 (quoting Mueller v. Angelone, 181 F.3d 557, 571 (4th Cir. 1999)).

12. A petitioner may avoid the application of the AEDPA-amended 28 U.S.C. § 2254(d) only if its application "would attach new legal consequences such that the party affected might have acted differently had he known that his conduct would be subject to the new law." *Mueller*, 181 F.3d at 569.

13. *See* Kimberly A. Orem, Case Note, 12 CAP. DEF. J. 221, 224 (1999) (analyzing *Mueller v. Angelone*, 181 F.3d 557 (4th Cir. 1999), and suggesting that reliance-based arguments may move courts not to impose harsh AEDPA-amendments of section 2254).

14. 513 U.S. 298 (1995). The Fourth Circuit explained that "[u]nder *Schlup*, a 'claim of innocence is . . . not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Graham*, 1999 WL 710385, at *7 (quoting Schlup v. Delo, 513 U.S. 298, 315 (1995)).

15. *Schlup*, 513 U.S. at 327 (emphasis added).

16. 505 U.S. 333 (1992). Sawyer, who was convicted of first-degree murder and sentenced to death due to the presence of aggravating factors, made a gateway claim to show that he was "actually innocent" of the death penalty, not of the murder itself. *Id.* at 335-36.

eligible for the death penalty."[17] Graham argued that the district court should have applied the *Schlup* "more likely than not" standard because his claim was that he was actually innocent of capital murder whereas *Sawyer*'s "clear and convincing" standard applies when the defendant contests a finding of a special circumstance rendering the defendant eligible for death.[18]

The Court of Appeals declared that Graham's assertion of actual innocence did not meet the standard announced in either *Schlup* or *Sawyer*.[19] Thus, the court saw no reason to determine which standard applied.[20] The evidence on which Graham based his claim of actual innocence consisted of two letters allegedly written by Sheppard. According to Graham, the letters purportedly showed that Sheppard was the perpetrator.[21] In ruling against Graham the court seemed to apply *Schlup* rather than *Sawyer*. The court specifically held that "we are not at all persuaded that it was more likely than not that no reasonable juror would have convicted Graham in view of the new evidence."[22]

Neither *Schlup* nor *Sawyer* directly addresses Graham's claim that he was innocent of *capital murder*. Graham's "gateway" claim of innocence was based on the notion that *he should not have been convicted of capital murder* because he was not the triggerman. The *Schlup* analysis applies only to claims of actual innocence and the *Sawyer* analysis applies only to post-conviction death eligibility. Neither case specifically applies to cases in which the petitioner claims he was guilty of murder, but innocent of capital murder. The court's citation of *Calderon v. Thompson*[23] does little to decide which standard would apply in such a case. Unlike *Calderon*, in which the "jury . . . found the special circumstance of murder during the commission

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17. Sawyer v. Whitley, 505 U.S. 333, 336 (1992) (emphasis added).

18. *Graham*, 1999 WL 710385, at *7.

19. *Id.*, at *8.

20. *Id.* The court did attempt to explain that the nature of the habeas applicant's claim is the deciding factor of which standard to apply:

> [T]o the extent a capital petitioner claims he did not kill the victim, the *Schlup* more likely than not standard applies, whereas [t]o the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* clear and convincing standard applies, irrespective of whether the special circumstances are elements of the offense of capital murder or, as here, mere sentencing enhancers.

Id., at *7 (quoting Calderon v. Thompson, 523 U.S. 538, 560 (1998)) (internal quotation marks omitted).

21. *Id.*, at *8-10. One of the letters reinforced that Graham maintained possession of the murder weapon after trial, which would provide more circumstantial evidence that he was the triggerman. The other letter chastised Graham for implicating Sheppard, the alleged author, in the murders. *Id.*

22. *Id.*, at *10.

23. 523 U.S. 538 (1998).

of rape, making Thompson eligible for the death penalty,"[24] triggerman status in Virginia is not a "special circumstance" or a sentence enhancer. It is an element that the Commonwealth must prove to convict the defendant of capital murder. Thus, it does not fall squarely into either of the two niches that *Schlup* and *Sawyer* carve.

Schlup better fits Graham's claim than does *Sawyer*. By its literal terms, *Schlup* applies to cases of "actual innocence." Indeed, Graham claimed that he was actually innocent of capital murder, but not of murder itself, because of the triggerman rule. The *Schlup* Court did not consider situations created by triggerman rules, but the broad "innocence" language would seem to encompass such situations. Given the Fourth Circuit's treatment of the issue, habeas counsel should cite *Graham* for the proposition that the "more likely than not" standard of *Schlup* applies to claims of actual innocence of capital murder based on the triggerman rule. It is important to argue that *Schlup* applies because the "more likely than not" standard is lower than the "clear and convincing" standard employed in *Sawyer*. In order to succeed on this type of claim under *Schlup*, a petitioner would need to present new triggerman evidence showing that it is more likely than not that he would not have been convicted of capital murder had this evidence been presented to a jury.[25]

Matthew S. T. Clark

24. *Calderon*, 523 U.S. at 544.
25. *See Schlup*, 513 U.S. at 327.

CASE NOTE:

Virginia Supreme Court