Capital Defense Journal

Volume 17 | Issue 1 Article 10

Fall 9-1-2004

Longworth v. Ozmint 377 F.3d 437 (4th Cir. 2004)

Longworth v. Ozmint
377 F.3d 437 (4th Cir. 2004)

I. Facts

On the night of January 7, 1991, Richard Longworth and David Rocheville robbed the Westgate Mall Cinema. In the course of the robbery, the men encountered theater usher Alex Hopps. Longworth knocked Hopps to the floor and dragged him outside the theater where Rocheville shot him in the left side of the head. The men reentered the theater and directed theater employee James Greene to open the safe in the ticket booth. They took money bags from the safe, retrieved more bags from Greene's car, and forced Greene into their minivan. Longworth instructed Rocheville to shoot Greene if he moved. A short distance from the theater, Longworth stopped the van, ordered Greene out of the vehicle, and instructed him to walk five paces, get on his knees, and stare straight ahead. Rocheville then shot Greene in the back of the head.[1]

Longworth and Rocheville were each indicted on one count of kidnapping, one count of robbery, and two counts of murder.[2] After Longworth's arrest, his parents retained attorney Hubert Powell to represent him in the capital murder trial.[3] The parents paid $12,000 in attorney's fees.[4] When Powell requested additional resources, the trial court appointed private attorney Andrew Johnston and the county Public Defender's Office as additional counsel.[5] Three days later, the trial court amended the order to "clarify" that Powell was actually the attorney for Longworth's parents.[6] The apparent reason for the change was to make Longworth eligible for state funds to aid his defense.[7] The amendment was made without the request or knowledge of Powell, Longworth, or his parents.[8] Powell learned of the change shortly before trial but nevertheless continued as a member of the defense team.[9]

---

1. Longworth v. Ozmint, 377 F.3d 437, 440 (4th Cir. 2004).
2. *Id.*
3. *Id.* at 441.
4. *Id.*
5. *Id.*
6. *Id.* at 441–42.
7. *Longworth*, 377 F.3d at 442.
8. *Id.*
9. *Id.* Powell testified that he acted as a liaison with Longworth's family and helped to investigate mitigation evidence. *Id.*

At trial, Deputy Sheriff James Murray testified for the State concerning Longworth's postarrest interrogation.[10] Following the interrogation, Murray prepared a statement from his notes and asked Longworth to sign it.[11] Longworth refused to sign, preferring to wait for the advice of his attorney.[12] Nonetheless, Murray read the statement at trial as an accurate account of Longworth's statements.[13] When the prosecutor asked Murray if he had anything to add that was not included in the statement, Murray replied that Longworth "mentioned . . . that . . . he observed Rocheville raising the gun up to Alex's head, and he did nothing to stop him. He just watched him."[14] The prosecutor pushed further, asking, "[d]id [Longworth] say he knew what was happening?"[15] Murray responded that Longworth "said *he knew what was going to happen* . . . [b]ut he did nothing to stop him."[16]

Longworth's counsel objected because the defense had not been informed of any such statement.[17] The court questioned Murray outside the jury's presence.[18] Murray stated that his trial testimony was not a quote but a paraphrase of Longworth's interrogation statement.[19] The court concluded that Murray's trial testimony was his own interpretation, not reflected in his interrogation notes, and accordingly, gave a curative instruction to the jury.[20]

Also at trial, Murray testified that during the postarrest interrogation, "Longworth slammed his fist on the table . . . and exclaimed, '[M]y god, we killed

---

10. *Id.* at 444–45.
11. *Id.* at 445.
12. *Id.*
13. *Longworth*, 377 F.3d at 445.
14. *Id.*
15. *Id.* (alteration in original).
16. *Id.*
17. *Id.*
18. *Id.*
19. *Longworth*, 377 F.3d at 445.
20. *Id.* The judge gave the following instruction:

> You had heard testimony from the statement by Chief Murray that the defendant says I saw Rocheville with the gun, and I did nothing to stop it. That's part of the statement. The solicitor went on to say did Longworth say I knew what, he knew what was going to happen. And Chief Murray says yes, he says he knew what was going to happen. And that's not true. And that's not in the statement.
>
> And I have conferred with Chief Murray here in this courtroom on the record. And that is his interpretation. That is not a statement by the defendant. I must ask you to disregard that, to wipe that comment from your mind. It is [an] improper thing to be injected into this trial, and you disregard it entirely please. It is so important.
>
> The only statement made was I saw Rocheville, and I did nothing to stop him. And that's the end of it as best as I can tell. Disregard anything further from Chief Murray on that point as I have outlined to you.

Id. at 445–46 (alteration in original).

those kids for fifteen hundred dollars.' "[21] On cross-examination, Murray stated that he did not know whether the statement by Longworth indicated remorse.[22] At a later postconviction relief ("PCR") proceeding, however, Murray testified that he thought Longworth expressed remorse but that Longworth could just have been upset that he got caught.[23]

Separate juries convicted and sentenced both men to death.[24] The Supreme Court of South Carolina affirmed Longworth's conviction and sentence, and the United States Supreme Court denied certiorari.[25] Longworth then filed an application for postconviction relief raising more than thirty grounds for relief.[26] The state PCR court permitted discovery and held an evidentiary hearing.[27]

At the hearing, "Longworth's mother testified that she told Powell about alcohol abuse and domestic violence" in the Longworth family but indicated that she did not want the evidence presented at sentencing "unless it was absolutely necessary."[28] At trial, defense counsel presented mitigation evidence that detailed Longworth's own history but not his family background.[29]

Represented by new counsel, Longworth contended in the PCR proceedings that this reflected a conflict of interest on the part of Powell.[30] However, the hearing revealed that Johnston, not Powell, made the decision to de-emphasize the defendant's family history.[31] Johnston testified that he made a strategic decision to focus the mitigation defense on Longworth's own history of substance abuse, his intoxication at the time of the murders, his minor role in the murders, and Rocheville's influence over Longworth.[32]

The PCR court concluded that Longworth's parents hired Powell to represent Longworth's interests and not their own.[33] The court noted that Powell met with Longworth at least forty-four times and considered Longworth

---

21. *Id.* at 447 (alteration in original).

22. *Id.*

23. *Id.*

24. *Id.* at 440.

25. *Longworth*, 377 F.3d at 440–41; *see* State v. Longworth, 438 S.E.2d 219, 220 (S.C. 1993) (affirming Longworth's conviction and sentence); Longworth v. South Carolina, 513 U.S. 831, 831 (1994) (denying certiorari).

26. *Longworth*, 377 F.3d at 441.

27. *Id.*

28. *Id.* at 442. Longworth's mother feared that her foster children would be taken away from her. *Id.*

29. *Id.*

30. *Id.* at 441.

31. *Id.* at 442.

32. *Longworth*, 377 F.3d at 442.

33. *Id.*

his "true client."[34] The court determined that Powell's "interests were solely directed to saving [Longworth's] life."[35] Finally, the PCR court found that Powell did not prevent the defense's social worker from receiving pertinent information about Longworth's family history.[36]

Also during the PCR hearing, the prosecutor testified that in a meeting with Murray about a week before trial, Murray "told him that Longworth said 'something like' he knew or intended that the killings would take place."[37] According to the prosecutor, he told Murray that the statement, which was not recorded in Murray's notes, was not sufficiently reliable and that he would not use it at trial.[38] The court concluded that Murray's trial statement was not false but rather an "honest, but vague, recollection that Longworth indicated to him during the interrogation that he knew what was going to happen, but was unable to recall the precise words used."[39] The PCR court further determined that the judge's curative instruction negated any prejudice that might have resulted from Murray's statement.[40]

After the evidentiary hearing, both parties submitted supplemental briefs.[41] The PCR court eventually directed the State to submit a proposed order.[42] The court denied Longworth's claims and substantially adopted the State's proposed order.[43] In 2002 the Supreme Court of South Carolina denied Longworth's petition for review.[44] The United States Supreme Court also denied Longworth's certiorari petition.[45] Longworth then filed a petition for a writ of habeas corpus,

34. *Id.* at 443.

35. *Id.*

36. *Id.* Dr. Raskin, a forensic psychiatrist who examined Longworth prior to trial, testified in a later deposition that his evaluation did not include information about the domestic abuse and that he had assumed Longworth had grown up in a stable environment. *Id.* at 442. He explained that information about abuse and violence would have influenced his interview strategy with Longworth. *Id.* Accordingly he would have presented new information about Longworth's family history to the jury. *Id.*

37. *Id.* at 446.

38. *Longworth*, 377 F.3d at 446.

39. *Id.*

40. *Id.*

41. *Id.* at 441.

42. *Id.*

43. *Id.* The United States Court of Appeals for the Fourth Circuit stated in a footnote that, "[a]lthough we have indicated that we 'do not applaud' a state court's practice of substantially adopting the prosecution's proposed memorandum and order, the state court's decision still merits the deferential review required by § 2254(d)." *Id.* at 443 n.1; *see* 28 U.S.C. § 2254(d)(1) (2000) (stating that a federal court may grant a writ of habeas corpus to a state prisoner only if the state court decision was "contrary to, or involved an unreasonable application of, clearly established Federal law"; part of AEDPA).

44. *Longworth*, 377 F.3d at 441.

45. *Id.*; *see* Longworth v. South Carolina, 536 U.S. 928, 928 (2002) (denying certiorari).

raising nineteen claims for relief.[46] The United States District Court for the District of South Carolina adopted the magistrate judge's recommendation and denied fifteen of the nineteen claims.[47] The court then denied three of the four remaining claims on their merits and held that the fourth, alleging ineffective assistance of counsel ("IAC"), was procedurally defaulted.[48] The district court granted a certificate of appealability with respect to all four claims.[49]

II. Holding

The United States Court of Appeals for the Fourth Circuit reviewed the district court's decision de novo and held that, although Longworth's retained counsel also represented Longworth's parents, he did not have an actual conflict of interest.[50] The court also found that even if retained counsel had a conflict of interest, Longworth failed to show that anything counsel did on Longworth's behalf compromised his interest or representation.[51] Thus, the PCR court's determination that any conflict did not adversely affect Longworth's representation was not an unreasonable determination of the facts.[52] The Fourth Circuit next determined that the State PCR court acted reasonably when it concluded that Murray's statement that Longworth knew what was going to happen was not actually false and that the curative instruction was sufficient.[53] The court also concluded that Murray's mental impression, that Longworth expressed remorse during the postarrest interview, was not exculpatory evidence that had to be disclosed to the defendant pursuant to *Brady v. Maryland*.[54] Finally,

---

46. *Longworth*, 377 F.3d at 441.

47. *Id.*

48. *Id.*

49. *Id.*; *see* Longworth v. Ozmint, 302 F. Supp. 2d 569, 574–75 (D.S.C. 2004) (denying in part and granting in part a certificate of appealability with respect to Longworth's claims); 28 U.S.C. § 2253(c)(1) (2000) (providing that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals"; part of AEDPA); 28 U.S.C. § 2253(c)(2) (stating that for a certificate of appealability to issue, the applicant must make a "substantial showing of the denial of a constitutional right"; part of AEDPA).

50. *Longworth*, 377 F.3d at 444; *see* Hunt v. Lee, 291 F.3d 284, 289 (4th Cir. 2002) (stating that the review of district court decisions under 28 U.S.C. § 2254(d) is de novo); 28 U.S.C. § 2254(d) (2000) (stating the proper standard for granting a writ of habeas corpus; part of AEDPA).

51. *Longworth*, 377 F.3d at 444.

52. *Id.*; *see* 28 U.S.C. § 2254(d)(2) (stating that a writ of habeas corpus pursuant to a state court decision shall not be granted unless the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; part of AEDPA).

53. *Longworth*, 377 F.3d at 446–47.

54. *Id.* at 447; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding "that the 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").

the Fourth Circuit upheld the district court's determination that Longworth's IAC claims were procedurally barred.[55]

III. Analysis

A. Conflict of Interest Claim

The court cited *Cuyler v. Sullivan*[56] for the proposition that "[a] defendant can prove a Sixth Amendment violation based on counsel's conflict of interest by 'demonstrat[ing] that an actual conflict of interest adversely affected his lawyer's performance.' "[57] Although the pretrial order entered by the state trial court indicated that Powell "had the position of attorney for the parents of the Defendant," the Fourth Circuit relied on the PCR court's findings and rejected Longworth's conflict of interest claim.[58] In support of its conclusion, the Fourth Circuit pointed to several lower court findings.[59] First, the record showed that an attorney in the Public Defender's Office independently sought the revision in the record to make Longworth eligible for public funds.[60] Second, Powell, Longworth, and Longworth's parents were unaware of the amended order.[61] Next, Powell thought of himself as a member of the defense team and as a representative of Longworth's interests.[62] Finally, Longworth's parents were not charged with any crime and therefore did not require representation.[63] On these facts, the Fourth Circuit concluded that the PCR court's finding of no conflict was not an unreasonable determination of the facts.[64]

Longworth also contended that Powell's performance compromised his representation.[65] Longworth pointed to the testimony of Dr. Raskin, a forensic psychiatrist, who stated in a deposition that his evaluation of Longworth did not

---

55. *Longworth*, 377 F.3d at 447.

56. 446 U.S. 335 (1980).

57. *Longworth*, 377 F.3d at 443 (alteration in original) (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)); *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the [a]ssistance of [c]ounsel for his defence").

58. *Longworth*, 377 F.3d at 444. Longworth contended that the conflict of interest was manifested by Powell's failure to disclose to co-counsel the mitigation evidence concerning his family history, which would have adversely affected his parents but benefited Longworth. *Id.* at 441. He also pointed to Powell's duty to protect the parents' income for his own benefit. *Id.*

59. *Id.* at 444.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Longworth*, 377 F.3d at 444; *see* 28 U.S.C. § 2254(d)(2) (2000) (stating that if an adjudication of the claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented" in state court, then an application for a writ of habeas corpus shall be granted; part of AEDPA).

65. *Longworth*, 377 F.3d at 444.

include information about the domestic problems in Longworth's family history.[66] The Fourth Circuit, however, relied on evidence that it was Johnston who took responsibility for the information given to or withheld from Dr. Raskin.[67] Finally, even if Longworth had shown an actual conflict of interest, the Fourth Circuit concluded that the PCR court's determination that any conflict did not prejudice Longworth's representation was not an unreasonable determination of the facts.[68]

B. Introduction of False or Misleading Testimony

Longworth asserted that Murray's trial testimony was knowingly false.[69] Both the trial court and district court concluded, however, that Murray's statement was merely an interpretation of Longworth's words, consistent with Murray's own testimony that his trial statement was "not verbatim" and "not a quote *per se*."[70] Further, during his PCR court testimony, Murray repeatedly insisted that his response at trial was in fact a true statement of what he thought Longworth meant.[71] On these facts, the Fourth Circuit credited the court's determination and held that the decision was not an unreasonable determination of the facts.[72] The court found reasonable the Supreme Court of South Carolina's conclusion that the trial court's "forceful curative instruction" was sufficient to negate any prejudicial effect of Murray's statement.[73]

C. Brady *Claim*

Longworth argued that Murray's statement regarding his mental impression of Longworth's remorse was *Brady* material and should have been provided to the defense for use at trial.[74] The Fourth Circuit distinguished Longworth's claim

---

66. *Id.* at 442, 444.

67. *Id.* at 444.

68. *Id.*; *see* 28 U.S.C. § 2254(d)(2) (stating that a writ of habeas corpus pursuant to a state court decision shall not be granted unless the state court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; part of AEDPA).

69. *Longworth*, 377 F.3d at 444.

70. *Id.* at 446.

71. *Id.*

72. *Id.*; *see* 28 U.S.C. § 2254(d)(2) (stating that if an adjudication of the claim resulted in a decision based on an "unreasonable determination of the facts in light of the evidence presented" in state court, then an application for a writ of habeas corpus shall be granted; part of AEDPA).

73. *Longworth*, 377 F.3d at 446–47.

74. *Id.* at 447; *see Brady*, 373 U.S. at 87 (holding "that the 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").

from the claim in *Strickler v. Greene*,[75] on which Longworth relied for the proposition that *Brady* applies to a witness's mental impressions.[76] The court noted that the suppressed mental impressions in *Strickler* were contained in written documents.[77] In contrast, Murray's mental impressions were not recorded and were only vague perceptions.[78] Further, Murray's actual statement *was* disclosed to the defense.[79] The Fourth Circuit concluded that there was no " 'clearly established federal law' " requiring the State to disclose Murray's mental impressions as *Brady* material.[80]

D. Procedural Default

In addition to the conflict of interest claim, Longworth asserted five general IAC claims.[81] The Fourth Circuit determined that those claims were procedurally defaulted because Longworth failed to assert them in the certiorari petition to the Supreme Court of South Carolina for review of the PCR court's decision.[82] Longworth argued that the IAC claim based on conflict of interest and the general claim of ineffective assistance were effectively the same.[83] The Fourth Circuit rejected his argument and held that because the general IAC claims and underlying operative facts were not presented to the state supreme court, the claims were procedurally barred.[84]

---

75. 527 U.S. 263 (1999).

76. *Longworth*, 377 F.3d at 447; *see* Strickler v. Greene, 527 U.S. 263, 289–90 (1999) (stating that the question of whether the suppressed evidence would have more than likely produced a different verdict is not material and that whether the defendant received a fair trial, meaning a trial whose verdict is worthy of confidence, is the true test of materiality).

77. *Longworth*, 377 F.3d at 447.

78. *Id.*

79. *Id.*

80. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2000)).

81. *Id.*

82. *Id.* at 447–48. In Longworth's petition for a writ of certiorari, he contended that he was deprived of effective assistance of counsel for numerous reasons including: "failure to disclose Longworth's alleged cocaine use at the time of the murders . . . ; the failure to provide an expert witness evidence of Longworth's cocaine use and his family history; the presentation of two witnesses who offered some allegedly damaging testimony; and counsels' alleged incompetence and inexperience." *Id.* at 447; *see* 28 U.S.C. § 2254(b) (barring consideration of federal habeas claims if the petitioner has not exhausted state court remedies; part of AEDPA).

83. *Longworth*, 377 F.3d at 448.

84. *Id.*

IV. Application in Virginia

A. Conflict of Interest

The United States Supreme Court has addressed attorney conflict of interest claims in a series of cases. In *Cuyler*, the Court addressed a conflict of interest claim in the context of an attorney's representation of co-defendants.[85] The Court held that "[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection [to such multiple representation] at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."[86] Notably, *Cuyler* also imposed a duty on trial courts to inquire into conflicts of interest if the court "knows or reasonably should know" that a potential conflict exists.[87] At the same time, the Court held that absent such knowledge or an objection from the defendant, multiple representation does not per se entail a conflict.[88] The Court in *Cuyler* did not answer the question of whether the standards announced would apply in all conflict of interest cases, including personal conflict and successive representation conflict.

In *Wood v. Georgia*,[89] a case more on point with *Longworth*, the Supreme Court addressed the inherent risks that arise whenever a lawyer is hired and paid by a third party to represent a criminal defendant.[90] In *Wood*, the defendants were charged with distribution of obscene materials at their place of work and were represented by a lawyer hired by their employer.[91] The employer assured the defendants that he would pay fines resulting from the charges but reneged when fines were actually imposed.[92] As a result, the court revoked the defendants' probations and held the defendants in jail.[93] The defendants then claimed the court's ruling discriminated against them on the basis of poverty, in violation of the Equal Protection Clause.[94] When the case reached the United States Supreme

---

85. *Cuyler*, 446 U.S. at 346–48.

86. *Id.* at 348. An actual conflict of interest occurs if the interests of the lawyer and the client diverge during the representation in regards to "a material factual or legal issue or to a course of action." *Id.* at 356 n.3; *see* U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the [a]ssistance of [c]ounsel for his defence").

87. *Cuyler*, 446 U.S. at 347–48; *see* Holloway v. Arkansas, 435 U.S. 475, 488 (1978) (creating an automatic reversal rule when counsel is required to represent co-defendants over his timely objection, unless the trial court has conducted an inquiry and determined that there is no conflict).

88. *Cuyler*, 446 U.S. at 346–47. The Court emphasized defense counsel's own "ethical obligation to avoid conflicting representation and to advise the court when a conflict arises during the course of a trial." *Id.* at 346.

89. 450 U.S. 261 (1981).

90. Wood v. Georgia, 450 U.S. 261, 268–74 (1981).

91. *Id.* at 262, 266.

92. *Id.* at 264.

93. *Id.* at 262.

94. *Id.*

Court, the Court determined that the case had the appearance of a test case engineered by the employer in its own interest.[95] The Court noted that, "[i]f the offenders [could not] be jailed for failure to pay fines that are beyond their own means, then this [employer or] operator of [the] 'adult' establishment[ ] [would] escape" having to pay fines imposed on employees arrested for conducting its business.[96] The Supreme Court found a serious potential for injustice and remanded for a determination of whether an actual conflict existed at trial.[97]

Longworth highlights a particular conflict of interest problem that is perhaps less obvious than the potential conflict in *Wood.* Retained counsel are typically hired by family members, whose complete and unadulterated stories are often an essential component of a defendant's own life history in mitigation. In *Longworth*, whether or not Powell labored under an actual conflict of interest, his agreed-upon $12,000 fee was dependent upon the stable income stream of Longworth's parents.[98] He had a pecuniary interest in protecting the Longworth family by not disclosing the history of alcohol abuse and domestic violence.[99] Further, Longworth's mother specifically entreated Powell not to introduce the family's troubled history.[100] Although Longworth's parents clearly had Longworth's interests at heart, they strongly preferred an expurgated defense for their son.[101] At the same time, Longworth, on trial for his life, had an interest in and a right to a fully developed and unvarnished defense. Thus, even absent a colorable claim that defense counsel *actually* represents the parents, there is a substantial risk that counsel's trial and mitigation decisions will be clouded by a concern for alienating or angering the paying family members. Defense counsel should be aware of and take seriously this potential for conflict.

B. *The Right to State-Paid Costs and Services under* Ake v. Oklahoma

Longworth raises a question in regard to a defendant's right to state-paid costs and services under *Ake v. Oklahoma.*[102] Specifically, should the fact that an

95. *Id.* at 267.

96. *Wood*, 450 U.S. at 267.

97. *Id.* at 273. The language in the holding of *Wood* did not include the second adverse effect prong of the test set forth in *Cuyler. Id.* at 273–74. Later, in an attempt to clarify the standard, the Supreme Court stated that the language in *Wood* was shorthand for the statement in *Cuyler* that " 'a defendant who shows that a conflict of interest *actually affected the adequacy of his representation* need not demonstrate prejudice in order to obtain relief.' " Mickens v. Taylor, 535 U.S. 162, 171 (2002) (quoting *Cuyler*, 466 U.S. at 349–50) (emphasis in *Mickens*).

98. *Longworth*, 377 F.3d at 441. Longworth's mother testified that she informed Powell of her fear that Longworth's father would lose his job if the details of their family life became public. *Id.* at 442.

99. *Id.* at 441–42.

100. *Id.* at 442.

101. *Id.*

102. Ake v. Oklahoma, 470 U.S. 68, 82–83 (1985) (discussing the showing that would entitle

indigent's parents paid the sum of $12,000 to a private lawyer have any bearing on whether the indigent defendant is entitled to state-paid costs and services under *Ake*? The Supreme Court in *Ake* noted "that when a State brings its judicial power to bear on an indigent [criminal] defendant . . . , it must take steps to assure that the defendant has a fair opportunity to present his defense."[103] Due process is violated if, as a result of a defendant's poverty, he "is denied the opportunity to participate meaningfully in a judicial proceeding in which his [life] is at stake."[104] Although the Supreme Court has not held that a state must provide for indigent defendants all of the assistance that wealthier counterparts might purchase, it has affirmed that indigent defendants are entitled to " 'an adequate opportunity to present their claims fairly within the adversary system.' "[105]

In *Longworth*, a deputy Public Defender independently prepared an amended order that designated Powell as the attorney for Longworth's parents.[106] His motivation was to make Longworth eligible for public funds.[107] However, given *Ake*, the modest $12,000 from Longworth's parents to defend a capital case should not have affected Longworth's eligibility for public aid unless the $12,000 was sufficient to assure that Longworth received adequate opportunity to fairly present his defense. Any defense need that extended beyond the $12,000, including expert and investigation services, should have been covered by the state.

C. *Unrecorded Interrogation*

Longworth illustrates the systemic problem of casual interrogation procedures that result in unreliable and often prejudicial testimony at trial. Murray testified at trial that Longworth told police in an unrecorded postarrest interrogation that he knew what was going to happen before Rocheville shot Alex Hopp.[108] Although the prosecutor had already determined the statement was too unreliable to offer into evidence, Murray nonetheless repeated the statement on the witness stand.[109] The trial judge denied defense counsel's motion for a mistrial and gave an emphatic curative instruction.[110] The instruction, however, did not alter the

---

a defendant to psychiatric assistance as a matter of federal constitutional law).

103. *Id.* at 76.

104. *Id.*

105. *Id.* at 77 (quoting Ross v. Moffitt, 417 U.S. 600, 612 (1974)).

106. *Longworth*, 377 F.3d at 443.

107. *Id.*

108. *Id.* at 445.

109. *Id.* at 446.

110. *Id.* at 445–46.

plain fact that crucial aspects of a capital defendant's unrecorded interrogation were misrepresented.[111]

Without an accurate record of interrogation proceedings, the accused may suffer infringements of his basic right against self incrimination, his right to have counsel present, and ultimately, his right to a fair trial.[112] However, despite calls for routine taping of interrogations, only three states require electronic recording of interrogations: Alaska, Minnesota, and Texas.[113] The Supreme Court of Alaska, in 1985, concluded that recording routine stationhouse interrogations would serve the public interest, the interests of law enforcement officers, and the interests of the accused.[114] As recently as 2002 the Illinois Commission on Capital Punishment recommended that "[c]ustodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped."[115] The recommendation went further, stating that "[v]ideotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process."[116] The Commission listed numerous benefits which flow from the institution of videotaping of postarrest interrogations, including increased safeguards for suspects and deterrence of coercive interrogation methods likely to elicit untrustworthy confessions.[117] Seven months after Illinois Governor George H. Ryan commuted the sentences of 171 death row inmates to life, Governor Rod Blagojevich signed a bill that made Illinois the first state to statutorily require the electronic recording of custodial interrogations.[118]

---

111. The lack of an electronic recording of Longworth's interrogation may also be partially responsible for the *Brady* dispute.

112. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1259–1270 (2002) (detailing the constitutional violations that can arise from unrecorded interrogations).

113. *Id.* at 1263; *see* Stephan v. State, 711 P.2d 1156, 1159–60 (Alaska 1985) (applying the due process guarantee of the Alaska Constitution and concluding that "when the interrogation occurs in a place of detention and recording is feasible," an electronic record is "a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against selfincrimination and, ultimately, his right to a fair trial"); State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (requiring that custodial interrogations "shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention"); *see also* TEX. CODE CRIM. PROC. ANN. art. 38.22 § 3(a)(1) (Vernon Supp. 2004–05) (stating that oral and sign language statements by a defendant shall not be admissible against the accused unless an electronic recording is made).

114. Sklansky, *supra* note 112, at 1265; *Stephan*, 711 P.2d at 1159–61.

115. THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, REPORT OF THE GOVERNOR'S COMM'N ON CAPITAL PUNISHMENT, Recommendation 4 (April 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/index.html.

116. *Id.*

117. *Id.*

118. *See* 20 ILL. COMP. STAT. 3930/7.5 (West Supp. 2004) (granting appropriations for the purpose of purchasing equipment for electronic recording); 50 ILL. COMP. STAT.705/10.3 (West Supp. 2004) (providing for training of police officers on the methods of conducting electronic

The logic applied by the Supreme Court of Alaska some twenty years ago and by the Illinois Commission on Capital Punishment in 2002 is compelling. Although the Supreme Court of Virginia has not considered the issue, at least one Virginia circuit court judge called out for change following the Supreme Court of Alaska ruling. In *Commonwealth v Sink*,[119] Judge Coulter noted that a rule mandating recorded interrogations would enhance the reliability of police work and eliminate battles at trial between an accused and an officer of the law about what was actually said during questioning.[120] Accordingly, Judge Coulter pronounced a "prospective ruling" that "all interrogation conducted in a interview room where recording equipment is available, or can be made available, should be faithfully recorded from beginning to end."[121] The courts in Virginia should follow the lead of Illinois, Alaska, and Judge Coulter and require the videotaping of all stationhouse interrogations of suspects, and in particular, capital suspects. Until such time, defendants will continue to face a needless risk to their basic constitutional and trial rights.

D. Adoption Verbatim of Prosecution's Proposed Memorandum and Order

The Fourth Circuit observed in a footnote that, "[a]lthough we have indicated that we 'do not applaud' a state court's practice of substantially adopting the prosecution's proposed memorandum and order, the state court's decision still merits the deferential review required by § 2254(d)."[122] The Fourth Circuit has applied this same reasoning in no fewer than three cases since 1998.[123] Although this record may be consistent with a statement that the court does not "applaud" the practice of state courts signing orders prepared in this way, the regularity with which the court continues to afford such decisions § 2254 deference suggests the court does not *disapprove* the practice of rubber-stamping.

Longworth made two relevant claims that the state court's decision should not be subject to the deferential standards of § 2254(d). First, Longworth asserted that the facts in the state court's order cannot meet § 2254(d)(2)'s

---

recordings of interrogations); 705 ILL. COMP. STAT. 405/5-401.5 (West Supp. 2004) (stating that the "oral, written, or sign language statement[s] of [an accused] minor . . . made as a result of a custodial interrogation . . . [are] presumed inadmissible as evidence . . . unless an electronic recording is made"); 725 ILL. COMP. STAT. 5/103-2.1 (West Supp. 2004) (stating that the "oral, written, or sign language statement[s] of an accused made as a result of a custodial interrogation [are] presumed inadmissible as evidence . . . unless an electronic recording is made").

119. 1988 WL 626028, at *1 (Va. Cir. Ct. Aug. 24, 1988).

120. Commonwealth v. Sink, No. CR88-367, 1988 WL 626028, at *15 (Va. Cir. Ct. Aug. 24, 1988).

121. *Id.*

122. *Longworth*, 377 F.3d at 443 n.1.

123. *See generally* Bell v. Ozmint, 332 F.3d 229, 233 (4th Cir. 2003); Young v. Catoe, 205 F.3d 750, 755 n.2 (4th Cir. 2000); Carter v. Lee, 202 F.3d 257 (4th Cir. 1999) (unpublished table decision).

definition of an "unreasonable determination" because they were not in fact *determined* by the court but rather by the Attorney General.[124] Second, and more importantly, he argued that rubber-stamping the prosecution's proposed order precluded an "adjudication on the merits" or a "decision" by the state court as required by § 2254(d).[125] None of the facts in the PCR court's order, Longworth contended, were actually *found* independently by the state court.[126] Longworth's habeas counsel noted that "all of the facts 'found' by the PCR court [were] contained in the Respondent's Proposed Order in the same language, in the same chronological order, and using identical punctuation."[127] The Fourth Circuit rejected both arguments.[128]

Fourth Circuit case law suggests that the level of diligence with which the state court considers a proposed order before adopting it does not affect whether a petitioner's claim was adjudicated on the merits. In *Young v. Catoe*[129] the Fourth Circuit rejected an argument substantially the same as Longworth's.[130] The court held that the disposition of a petitioner's constitutional claims by adoption of the state's proposed order "is unquestionably an adjudication by the state court."[131] The court further stated that "[i]f that court addresses the merits of the petitioner's claim, then § 2254(d) must be applied."[132] Thus, a formal pronouncement of judgment by the state court, as opposed to disposal of a claim on procedural grounds, is sufficient, regardless of whether the state court carefully reviewed the prosecution's order.[133]

In practice then, § 2254 deference is given to factual findings put forth exclusively by the prosecution. Such deferential review is inherently prejudicial

---

124. Brief for Petitioner at 12, Longworth v. Ozmint, 377 F.3d 437 (4th Cir. 2004) (No. 04–4).

125. *Id.* at 10.

126. *Id.*

127. *Id.*

128. *Longworth*, 377 F.3d at 443 n.1.

129. 205 F.3d 750 (4th Cir. 2000).

130. Young v. Catoe, 205 F.3d 750, 755 n.2 (4th Cir. 2000) (stating that if a state court adopts one party's proposed order in a proceeding, then such an action is a decision on the merits and 28 U.S.C. § 2254(d) must be applied upon habeas review by a federal court).

131. *Id.*

132. *Id.*; *see* 28 U.S.C. § 2254(d) (2000) (limiting a federal judge's ability to grant habeas relief to instances in which the petitioner shows that a state court decision on the merits of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; part of AEDPA).

133. *See also* Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998) (rejecting the defendant's argument that a "perfunctory decision issued by the Virginia Supreme Court did not constitute an 'adjudicat[ion] on the merits' "); Wright v. Angelone, 151 F.3d 151, 156–57 (4th Cir. 1998) (holding that the Fourth Circuit will not "presume that a summary order is indicative of a cursory or haphazard review of a petitioner's claims").

to the defendant because the prosecution's version of the facts becomes the basis for all future appeals by the defendant. As a result, the defendant may be effectively deprived of meaningful appellate review. In addition, the possibility exists that the prosecution may draft a proposed order after the State knows what the ruling will be, encouraging over-reaching in fact finding by the prosecution to the detriment of the defendant.

V. Conclusion

Longworth illustrates a common but little-noticed conflict-of-interest problem faced by defense attorneys retained by families of capital defendants. Regardless of whether the conflict amounts to a Sixth Amendment violation, retained counsel must take care that underlying duties to third-party payers do not cloud decisions made in representation of a client. *Longworth* also highlights the casual nature with which the Fourth Circuit defers under § 2254 to a state court decision derived substantially or entirely on the prosecution's proposed memorandum and order. Finally, *Longworth* demonstrates the need for safeguards in the police interrogation process to insure that defendant and witness statements are not misrepresented at trial.

Jessica M. Tanner