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SAWYER v. SMITH 110 S. Ct. 2822, 111 L.Ed.2d 193 (1990)

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may not bar the presentation, consideration or use of relevant mitigating evidence at the penalty phase of a capital trial. More recently, in *Penry*, the Court found that resolution of a claim that the Texas death penalty scheme prevented the jury from considering and giving effect to certain types of mitigating evidence, "was dictated by *Lockett* and *Eddings*," and that it therefore, did not involve the creation of a new rule under *Teague*. *Penry*, 109 S. Ct. at 2947.

Despite the fact that the *Teague* framework severely limits the scope of federal habeas review, the court's holding in *Penry* gave new hope to the capital defense community that the *Teague* standards could be met. *Penry*, required something "new" of a Texas system that had been previously approved by the Court in *Jurek v. Texas*, 428 U.S. 262 (1976), and suggested that enforcement of the broad commands set out in *Lockett* and *Eddings* would not constitute a new rule under *Teague*. However, the Court's holdings in *Parks*, *Butler* and *Sawyer* have effectively destroyed most of the optimism generated by *Penry*.

In support of his contention that the antisympathy instruction violated the eighth amendment, Parks argued that an antisympathy instruction was barred by *Lockett* and *Eddings* "because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether." *Parks*, 110 S. Ct. at 1262. The Court disagreed with Parks' argument, stating that it "misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration." *Id.*

In an effort to keep from deciding Parks' constitutional challenge, the Court recharacterized his claim as one contesting the ability of a state to dictate the *manner* in which a jury may consider mitigating evidence. This enabled the majority to find that Parks' requested relief would constitute a new rule under *Teague*. The recharacterization of Parks'

claim seems to have made a distinction without a difference. There is no significant difference between a jury instruction that directly limits the jury from considering and giving effect to mitigation evidence and one that achieves the same result in the course of telling the jury *how* it can consider and give effect to that evidence. Both instructions will erect barriers to a sentencer's understanding and ability to give effect to mitigation evidence. Parks may also be a sign that the Court, by using its "manner of consideration" rubric, intends to slowly dig away at established mitigation case law which, heretofore, has been a bulwark of capital defense. Because this has not yet been explicitly done, however, defense counsel should continue to insist that trials be conducted in a manner that does not permit barriers of any kind to the presentation, consideration, and use by the sentencer of any evidence proffered as a basis for a sentence less than death.

In *Parks*, *Butler* and *Sawyer*, the Court has taken the position that requested relief will constitute a "new rule" on collateral review unless it is absolutely compelled by an earlier case and that no other court could reasonably find otherwise. These decisions will bar federal review of many claims which allege that trials were conducted in violation of the U.S. Constitution. Consequently, it is even more important for trial attorneys to insure that additional claims are not lost by waiver and default. One way to do this is to learn *all* of the law, state and federal, upon which a defendant is entitled to rely at trial. Substantial pretrial time may be required to do this research. Constitutional claims based on existing law, properly raised and preserved, are not affected by *Teague* and its progeny.

Summary and analysis by:
Catherine M. Hobart

SAWYER v. SMITH

110 S. Ct. 2822, 111 L.Ed.2d 193 (1990)
United State Supreme Court

FACTS

Sawyer's conviction and death sentence became final in 1984 with the denial of certiorari by the United States Supreme Court. Sawyer petitioned for federal habeas corpus review on the grounds that the prosecutor's closing argument during the penalty phase of his trial diminished the jury's sense of responsibility for the capital sentencing decision in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Caldwell* established the rule that the eighth amendment prohibits the imposition of the death penalty by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the capital sentence rests elsewhere.

The United States District Court for the Eastern District of Louisiana and the Court of Appeals denied relief. Sawyer petitioned for rehearing, and the Court of Appeals for the Fifth Circuit affirmed. The Supreme Court granted certiorari and affirmed. Justice Kennedy wrote the 5-4 majority opinion.

HOLDING

The Court refused to address the petitioner's *Caldwell* claim, holding that *Caldwell* relief was a "new rule" decided after Sawyer's sentence became final, and therefore, unavailable to Sawyer. Under *Teague v. Lane*, 109 S. Ct. 1060 (1989), a petitioner cannot receive the retroactive benefit of a decision if such decision establishes a "new rule" and does not fall within one of two exceptions. *Teague* defined a new rule

as a rule one that "breaks new ground or imposes a new obligation on the States or the Federal Government," or that "was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* at 1070 (emphasis in original). The primary purpose of *Teague* is to ensure that federal habeas corpus review of state convictions holds state courts to compliance with the federal law in existence at the time a conviction becomes final.

Sawyer argued that the *Caldwell* claim was based on the heightened eighth amendment due process requirements of capital cases, and therefore, was dictated by *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Gardner v. Florida*, 430 U.S. 349 (1977); and *Woodson v. North Carolina*, 428 U.S. 280 (1976). The Court rejected this argument on the grounds that the principles of heightened reliability expressed in those cases were too generalized, and further, the cases did not expressly deal with improper argument.

Sawyer also argued that the pre-*Caldwell* case, *Donnelly v. De Christoforo*, 416 U.S. 637 (1974), warned state courts about improper argument. The Supreme Court refused to recognize this argument because *Donnelly* dealt with improper argument in a non-capital fourteenth amendment "fundamental fairness" claim, and not the heightened eighth amendment reliability basis of *Caldwell*.

Two narrow exceptions exist under *Teague*. "First, a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague v. Lane*, 109 S. Ct. 1060, 1073 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 675 (1971) (Harlan, J. separate opinion)). Second, a new rule will be applied retroactively if it

is a “watershed” rule that is essential to the fundamental fairness of the proceeding. *Sawyer v. Smith*, 110 S. Ct. 2822, 2831 (1990). Although the first exception also covers classes of people not subject to the death penalty, it did not apply to the Sawyer case because it did not involve a “primary, private individual conduct,” nor was he a member of a protected group such as the extremely young or retarded. See *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988) (See summary of *Saffle v. Parks*, Capital Defense Digest, this issue.)

The court evaluated Sawyer’s claim under the second *Teague* exception, and held the *Caldwell* claim to be insufficiently fundamental. “It is thus not enough under *Teague* to say that a new rule is aimed at improving accuracy of trial. More is required. A rule that qualifies under this exception must not only improve accuracy, but also ‘alter our understanding of the bedrock procedural elements’ essential to the fairness of a proceeding.” *Teague*, 109 S. Ct. at 1076 (quoting *Mackey*, 401 U.S. at 693)(emphasis in original).

ANALYSIS/APPLICATION IN VIRGINIA

The Supreme Court essentially closed the door on the second exception under *Teague*. Justice Kennedy made it very clear that it is unlikely the court will find any new components of due process essential

to the fundamental fairness and accuracy of the criminal process. All eighth amendment jurisprudence in capital cases is directed towards accuracy and reliability, and if the standard for the second exception were not so extreme, much new eighth amendment law could satisfy the second exception.

The Court majority opined that a lesser standard would undermine the principles of finality that are essential to the functioning of the criminal justice system. “The ‘cost imposed upon the State(s) by retroactive application of the new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application.’” *Sawyer*, 110 S. Ct. 2822, 2831-32 (quoting *Solem v. Stumes*, 465 U.S. 638, 654 (1984)). In the view of the majority, the interest in reliability of a death sentence established in *Eddings*, *Lockett*, *Gardner*, and *Woodson*, is balanced against the interest in finality, and the cost to the states. Eighth amendment reliability loses.

Sawyer clearly continues the narrowing of federal habeas corpus review, and consequently re-emphasizes the importance of trial and direct appeal. Therefore, it is more important than ever to avoid waiver and default at trial by making federalized objections, including objecting to the prosecutor’s argument on *Caldwell* grounds.

Summary and analysis by:
Robert L. Powley

WALTON v. ARIZONA

110 S. Ct. 3047, 111 L.Ed.2d 511 (1990)
United States Supreme Court

FACTS

Petitioner Jeffrey Walton and two codefendants encountered the victim, Thomas Powell, at a bar in Tucson. After robbing Powell at gunpoint, the trio forced the victim into his own car and drove him into the desert. Walton marched Powell into the desert, forced him to lie down on the ground and shot him once in the head. A medical examiner later determined that the gunshot wound did not immediately kill Powell and that Powell regained consciousness before dying of starvation and dehydration.

Walton was convicted of first-degree murder, armed robbery, kidnapping, and theft by control. Under the Arizona first-degree murder statute, the capital sentencing hearing must be conducted before the trial judge. The court must impose the death sentence if it finds first, one or more of the aggravating circumstances listed in the statute and second, that there are no mitigating circumstances sufficiently substantial to call for leniency. Ariz. Rev. Stat. Ann. § 13-703(E) (Repl. Vol. 1988).

At Walton’s sentencing hearing, the judge found two aggravating circumstances: (1) that the murder was committed in an especially heinous, cruel or depraved manner, and (2) that the murder was committed for pecuniary gain. The judge also concluded that there were no mitigating factors sufficiently substantial to call for leniency. On direct appeal, the Arizona Supreme Court upheld Walton’s sentence. Walton contended that Arizona’s “especially heinous, cruel, or depraved” aggravating circumstance, as interpreted by the Arizona courts, fails to channel the sentencer’s discretion as required under the Constitution. The United States Supreme Court granted certiorari to determine whether Arizona’s application of the “especially heinous, cruel, or depraved” aggravating circumstance satisfied the requirements of the eighth and fourteenth amendments to the Constitution.

HOLDING

The Supreme Court held that Arizona’s “especially heinous, cruel or depraved” aggravating circumstance was constitutionally sufficient because the Arizona Supreme Court gave substance to the operative terms of the statute through use of a narrowing construction or definition, and because the trial judge, rather than a jury, determines the sentence. The trial judge is presumed to know and to apply the narrowing constructions. The Arizona court previously had stated that a crime is committed in an especially cruel manner “when the perpetrator inflicts mental anguish or physical abuse before the victim’s death” and that “mental anguish includes a victim’s uncertainty as to his ultimate fate.” *State v. Walton*, 769 P.2d 1017, 1032 (Ariz. 1989). Further, an especially depraved manner occurs when the perpetrator either “relishes the murder, evidencing debasement or perversion,” or shows an “indifference to the suffering of the victim and evidences a sense of pleasure” in the killing. 769 P.2d at 1033. The Supreme Court concluded, therefore, that these definitions gave meaningful guidance to the sentencer and thus were constitutional.

ANALYSIS/APPLICATION IN VIRGINIA

In order to prevent the infliction of cruel and unusual punishment, the eighth amendment requires a method of meaningfully distinguishing cases in which the death penalty is imposed from the many cases in which it is not. *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

One method of making the required distinction is to require the application of a narrowing construction to aggravating circumstances. Recently, the Court found Oklahoma’s “especially heinous, atrocious,