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SAWYER v. WHITLEY

112 S.Ct. 2514 (1992)
United States Supreme Court

FACTS

In 1979 Robert Wayne Sawyer and an accomplice, Charles Lane, murdered Frances Arwood by beating and kicking her, submerging her in a bathtub, dousing her with scalding water and, finally, setting her on fire. The murder took place in Sawyer's home while Sawyer's girlfriend and her two children were there. A Louisiana jury found Sawyer guilty of first degree murder.

During the sentencing phase of Sawyer's trial, Sawyer's sister testified that he had suffered a deprived childhood and that he had been committed to a mental institution while a teenager. The jury, however, found no statutory mitigating factors while finding three statutory aggravating factors and sentenced him to death.

On appeal, the Louisiana Supreme Court affirmed Sawyer's conviction and sentence.[1] Subsequently, the United States Supreme Court granted certiorari, vacated and remanded to the supreme court of Louisiana for consideration of the sentence under *Zant v. Stephens*.[2] The Louisiana Supreme Court again affirmed Sawyer's sentence and conviction.[3] Sawyer's first state habeas petition was denied,[4] and his first federal habeas petition, in which he raised 18 claims, was denied on the merits.[5] The Supreme Court again granted certiorari and affirmed the federal court's denial of relief.[6] Sawyer's second state habeas petition was denied and the Louisiana Supreme Court denied discretionary review.[7]

In response to Sawyer's second federal habeas petition, the federal district court denied one claim on the merits and held that the others were barred as abusive and successive. The Fifth Circuit Court of Appeals "granted a certificate of probable cause on the issue of whether [he] had shown that he [was] 'actually innocent of the death penalty' such that a court could reach the merits of the claims contained in [his] successive petition."[8]

Sawyer argued that he was actually innocent of the death penalty in that certain evidence had been kept from the jury during his trial. Sawyer claimed that the police failed to produce a statement of one of the children who was present during the murder to the effect that Sawyer had tried to prevent Lane from setting the victim on fire. Sawyer argued that the police's failure to produce the child's statement violated his due process rights under *Brady v. Maryland*.[9] Sawyer also claimed ineffective assistance of counsel in that his trial counsel failed to introduce medical records from two mental institutions in which Sawyer had stayed while a teenager.[10]

HOLDING

The Supreme Court affirmed the Fifth Circuit's decision,[11] holding that a court may not reach the merits of successive claims, new claims which constitute an abuse of the writ, or procedurally defaulted claims, unless the petitioner first shows cause and prejudice or, if unable to make such a showing, demonstrates that refusal to hear the claim would result in a "miscarriage of justice."[12] This last exception is known as the "actual innocence" exception.[13] The *Sawyer* Court held that "to show 'actual innocence' [of the death penalty] one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[14]

ANALYSIS / APPLICATION IN VIRGINIA

The *Sawyer* Court began by explaining that the "prototypical" example of "actual innocence" is in the case where the wrong person has been convicted of a crime. At the state level, claims of "actual innocence" in this circumstance would be made, for example, in a motion for a new trial. The Court noted that standards for granting such motions are rigorous.[15]

At the federal habeas level, to successfully claim "actual innocence" of a non-capital crime a petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent.[16] When one has been convicted of capital murder and sentenced to death, however, the petitioner may also argue that he is "innocent of death."[17] The Court noted that it had failed to define satisfactorily the "innocent of death" exception in prior cases and set its task in *Sawyer* as one of "further amplify[ing] the meaning of 'actual innocence' in the setting of capital punishment."[18]

The majority suggested three possible ways to define "actual innocence" in the capital punishment context. The first and most strict definition would be "to limit any showing to the elements of the crime which the State has made a capital offense."[19] The Court rejected this definition as contrary to *Smith v. Murray*,[20] where the Court had expanded the definition of "actual innocence" to include "innocent of death."[21] Limiting the definition to the elements of the offense of capital murder would be to effectively eradicate an "innocent of death" excep-

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1 *State v. Sawyer*, 422 So.2d 95 (La. 1982).

2 *Sawyer v. Louisiana*, 463 U.S. 1223 (1983) (relying on *Zant*, 462 U.S. 862 (1983)).

3 *Sawyer v. State*, 442 So.2d 1136 (La. 1983), *cert. denied*, 446 U.S. 931 (1984).

4 *Louisiana ex rel. Sawyer v. Maggio*, 479 So.2d 360, *reconsideration denied*, 480 So.2d 313 (La. 1985).

5 *Sawyer v. Butler*, 848 F.2d 582 (5th Cir. 1988), *aff'd on reh'g en banc*, 881 F.2d 1273 (5th Cir. 1989).

6 *Sawyer v. Smith*, 497 U.S. 227 (1990).

7 *See Sawyer v. Whitley*, 945 F.2d 812, 815 (5th Cir. 1991).

8 *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518 (1992).

9 373 U.S. 83 (1963).

10 *Sawyer*, 112 S.Ct. at 2518.

11 *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir. 1991).

12 *Sawyer*, 112 S. Ct. at 2518. The Court based this holding on its concerns for finality and for the costs involved in federal habeas review.

13 *Id.*

14 *Id.* at 2517.

15 *Id.* at 2519.

16 *Murray v. Carrier*, 477 U.S. 478 (1986).

17 *See, e.g., Dugger v. Adams*, 489 U.S. 401 (1989); *Smith v. Murray*, 477 U.S. 527 (1986).

18 *Sawyer*, 112 S. Ct. at 2519.

19 *Id.* at 2521.

20 477 U.S. 527 (1986).

21 *Sawyer*, 112 S.Ct. at 2521.

tion since one would have to be innocent of the capital crime itself.

The second definition that the Court entertained was rejected as too lenient. Sawyer urged the Court to allow the showing of "actual innocence" to encompass the elements of the crime, the existence of aggravating factors, **and** the mitigating evidence which the sentencer would use in its decision of whether to impose a life sentence or the death penalty. Sawyer argued that the test should be whether the sentencer was given a "factually inaccurate sentencing profile" of the petitioner because of a constitutional error.

The Court found, however, that Sawyer's suggested definition of "actual innocence" was too lenient and subjective because it extended to the existence of mitigating factors.[22] The Court argued that if federal courts are to reach the merits of successive, procedurally defaulted, or abusive habeas petitions, the petitioner should be required to show more than that which he was required to show on the first petition. The Court noted that this would not be the case if "innocence of death" encompassed consideration of new mitigating evidence.[23]

Instead, the *Sawyer* Court settled on a third alternative it deemed the "middle ground" and adopted the Court of Appeals' definition of "actual innocence":

> [W]e must require the petitioner to show, based on the evidence proffered plus all record evidence, a fair probability that a rational trier of fact would have entertained a reasonable doubt as to the existence of those facts which are prerequisites under state or federal law for the imposition of the death penalty.[24]

Thus, "innocence of death" cannot be shown by simply claiming that mitigating evidence was prevented from being introduced, but requires a finding that the petitioner would not have been death eligible at all under the statute (i.e. aggravating circumstances were missing). The *Sawyer* Court saw this standard as desirable because it provided a workable, relatively objective test for courts to apply.[25]

Applying this standard to Sawyer's two claims of error, the Court found that reasonable jurors could still have found Sawyer eligible for the death penalty. In so doing, the Court reemphasized that it was not enough that the evidence might present new mitigating evidence, but must cast doubt on the likelihood that aggravating factors would have been found.

As to the child's statement that was not produced by the police, the Court agreed that it was exculpatory and went "both to petitioner's guilt or innocence of the crime . . . and the aggravating circumstance of a murder committed in the course of an aggravated arson."[26] The Court found, however, that in light of all the other evidence before the jury, the jury could still have found Sawyer death eligible. For example, the Court noted that because evidence showed that the murder also fell under the aggravating circumstance of being "cruel, heinous and atrocious," the jury could have found Sawyer death eligible even without the arson aggravating circumstance.[27]

In considering the psychological evidence which Sawyer claimed was kept from the jury, the Court found that it did not bear on either guilt or innocence or the aggravating factors that the jury found. Thus, even if the jury had been given the opportunity to consider Sawyer's psychological records, the Court found that "it cannot be said that a reasonable juror would not have found both of the aggravating factors which make petitioner eligible for the death penalty."[28]

The differences between Louisiana's and Virginia's statutory aggravating factors should be noted for purposes of a *Sawyer* claim. Louisiana's aggravating factors are fairly specific and read more like Virginia's statutory definition of capital murder.[29] Conversely, Virginia's statutory aggravating factors are extremely vague:

> [T]he Commonwealth shall prove beyond a reasonable doubt that there is a fair probability based upon the evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.[30]

Sawyer may be one of the few instances where the breadth of Virginia's aggravating factors can work to the defense's benefit. Given that the Virginia Supreme Court has extended great leeway in what can be used to prove future dangerousness and vileness, similar leeway should exist as to what can **disprove** the factors and thus fall within *Sawyer*'s definition of actual innocence. New evidence of a psychological disorder, for example, should be presented not as mitigating evidence, but as casting doubt on whether the jury could have found future dangerousness or vileness. The disorder, for instance, may suggest that the jury would not have found that the defendant posed a future danger if treated or that his acts were "vile" or "depraved" given his mental condition.

At bottom, though, the *Sawyer* standard for showing "actual innocence of death" is extremely difficult to meet. Therefore, defense counsel should attempt to prevent ever having to make this showing by avoiding successive, procedurally defaulted or abusive federal habeas petitions.

One way to avoid the need for these types of petitions is to properly preserve all issues for appeal. In Virginia, defense counsel must make a timely objection,[31] assign the ruling as error[32] and argue the issue on brief[33] in order to preserve issues for appeal. In addition to preserving issues, defense counsel should "federalize" the issues early in the capital trial process beginning pre-trial if possible. Federal courts have no jurisdiction to decide claims that are presented and decided purely on the

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22 *Sawyer*, 112 S.Ct. at 2521.

23 *Id.* at 2522.

24 *Id.* at 2523 (citing *Sawyer v. Whitley*, 945 F.2d 812, 820 (5th Cir. 1991))

25 The Court, in its quest for this objective standard, examined the broad constitutional requirements of *Furman v. Georgia*, 408 U.S. 238 (1972) (requiring that states adopt narrowing factors which limit the class of death eligible defendants); and *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring that the sentencer give individualized consideration of particular defendants),and decided that the most objective, practical and expedient focal point of the "innocent of death" question is whether the defendant was death eligible.

26 *Sawyer*, 112 S.Ct. at 2524.

27 *Id.*

28 *Id.*

29 For example, one of Louisiana's aggravating factors is that "the victim was a fireman or peace officer engaged in his lawful duties," La.Code Crim. Proc. Ann. 905.4(b)(West 1984), which in Virginia is a basis for capital murder: "[t]he willful, deliberate, and premeditated killing of a law enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties." Va. Code Ann. §18.2-31(6)(1990).

30 Va. Code Ann. §19.2-264.4(C) (1990). For a discussion of the Virginia "vileness" factor in light of three recent Supreme Court cases, *see* case summary of *Stringer v. Black*, *Sochor v. Florida*, and *Espinosa v. Florida*, Capital Defense Digest, this issue.

31 Va. Sup. Ct. R. 5:25.

32 Va. Sup. Ct. R. 5:27.

33 Va. Sup. Ct. R. 5:17.

basis of state law.

Although the best course is to try to avoid having to make the "actual innocence of death" showing, some defensive preparation for making the claim is necessary. Since *Sawyer* limits the showing of "innocence of death" to aggravating factors alone, defense counsel should begin litigation of Virginia's "vileness" and "future dangerousness" aggravating factors at the pre-trial stage. Defense counsel should file a motion for a bill of particulars asking the Commonwealth to identify the aggravating factor(s) upon which it intends to rely in seeking the death penalty and, generally, to identify all evidence which it intends to produce in support of the aggravating factors identified. These steps not only preserve issues for appeal, but also help narrow the issues should the capital defendant argue "actual innocence of death" at the federal level.

More specifically, defense counsel should state in this motion that if the Commonwealth intends to prove "vileness," the court should order the Commonwealth to identify which components of that aggravating factor — torture, depravity of mind, aggravated battery — it intends to prove. The motion for a bill of particulars should also request that the Commonwealth identify any unadjudicated acts which it intends to offer as evidence of future dangerousness. If the court grants the motion, defense counsel should also argue that the jury instructions must be limited to the aggravating factors enumerated in the bill of particulars.

If the trial court orders the Commonwealth to provide a bill of particulars to the defense, federal courts may be precluded from relying on other aggravating factors to argue that reasonable jurors could have found the defendant death eligible. For instance, had the prosecution in Sawyer's capital trial relied **solely** on Louisiana's "aggravated arson" aggravating factor,[34] Sawyer's *Brady* claim might have been sufficient to establish "actual innocence of death," for without that one aggravating factor, no reasonable juror could have found Sawyer to be death eligible. Under those circumstances, the court could not have then found that a reasonable juror still could have found Sawyer to be death eligible under Louisiana's "heinous, atrocious, or cruel" aggravating factor.[35]

Summary and analysis by:
Wendy Freeman Miles

34 La. Code Crim. Proc. Ann. art. 905.4(c) (West 1984).
35 La. Code Crim. Proc. Ann. art. 905.4(g) (West 1984).

TREVINO v. TEXAS

112 S.Ct. 1547 (1992)
United States Supreme Court

FACTS

In 1983, Joe Mario Trevino, of Hispanic descent, was charged with the murder and rape of eighty-year-old Blanche Miller, a capital offense in the State of Texas. Prior to the jury selection in his trial on February 1, 1984, Trevino's counsel filed a "Motion to Prohibit the State from Using Peremptory Challenges to Strike Members of a Cognizable Group." The motion stated: "This common use of the State's peremptory challenge in a criminal trial deprives the Accused of due process and a fair trial. This practice deprives the Accused of a jury representing a fair cross-section of the community in violation of the Sixth Amendment to the United States Constitution." The trial court did not rule on the motion until the voir dire. During voir dire, the State used its peremptory challenges to excuse the only three black members of the panel. After each of these strikes, defendant's counsel renewed his motion. Each time the court denied his motion.

Trevino was convicted by an all-white jury, and the court sentenced Trevino to death. Trevino appealed to the Court of Criminal Appeals for Texas and filed his brief in December, 1985. Renewing his pretrial motion and objections, Trevino contended that the prosecution's use of its peremptory challenges was based solely on race and that such a use violated his "rights to due process of law and to an impartial jury fairly drawn from a representative cross section of the community," basing his claim on the provisions of the Texas Constitution and the Sixth and Fourteenth amendments to the United States Constitution.

Five years after Trevino filed his brief in the Court of Criminal Appeals for Texas, that court affirmed Trevino's conviction and death sentence.[1] The Court of Criminal Appeals relied upon *Holland v. Illinois*,[2] which held that peremptory challenges based upon race are not prohibited by the Sixth Amendment. The appellate court stated in a footnote that Trevino's arguments "did not amount to a reliance on the Equal Protection Clause."[3] The United States Supreme Court reversed and remanded.[4]

HOLDING

The United States Supreme Court held that Trevino had adequately preserved his claim at trial that the prosecution's race-based use of its peremptory challenges violated the Equal Protection Clause.[5] The Court also found that because Trevino's case was presented on direct appeal, he was entitled to retroactive application of the rule announced in *Batson v. Kentucky*.[6] The Court reversed the judgment of the Court of Criminal Appeals for Texas and remanded the case for further proceedings.[7]

ANALYSIS/APPLICATION IN VIRGINIA

Trevino had conceded to the Court of Criminal Appeals for Texas that under *Swain v. Alabama*[8] there was no equal protection violation for the race-based use of peremptory challenges in a single case. However, Trevino noted that the United States Supreme Court was considering the question under the Sixth Amendment in *Batson v. Kentucky*.[9] Trevino argued that even if the *Batson* decision did not relax the requirement of a pattern of discrimination, the Texas Court of Criminal Appeals should prohibit race-based peremptory challenges as a matter of state law.

The United States Supreme Court held in *Batson* in April 1986 that if a defendant could make a *prima facie* showing that the prosecution had used its peremptory challenges to strike members of the defendant's race from the jury, the prosecution would bear the burden of proving another justification for the strikes.[10] The *Batson* court based its decision not upon a Sixth Amendment rationale, but upon an equal protection basis.

1 *Trevino v. State*, 815 S.W.2d 592 (1991).
2 493 U.S. 474 (1990).
3 *Trevino v. State*, 815 S.W. 2d at 598, n.3.
4 *Trevino v. Texas*, 112 S.Ct. 1547, 1550 (1992).
5 *Id.*
6 *Id.* (citing *Batson*, 476 U.S. 79 (1986) (holding that a defendant can make a prima facie case for an equal protection violation by showing that the State exercised its peremptory challenges to exclude members of the defendant's racial group)).
7 *Trevino*, 112 S.Ct. at 1550.
8 380 U.S. 202 (1965).
9 No. 84-6263, *cert. granted*, 471 U.S. 1052 (1985).
10 476 U.S. 79 (1986).