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SPENCER v. MURRAY (SPENCER H) 18 F. 3d 229 (4th Cir. 1994)

SPENCER v. MURRAY

(SPENCER II)

18 F. 3d 229 (4th Cir. 1994)
United States Court of Appeals, Fourth Circuit

FACTS

On the night of October 2, 1987, or in the early morning of October 3, 1987, Timothy Wilson Spencer cut out a large portion of screen from a second-story bedroom window and entered the home of Dr. Susan Hellams. Upon finding Dr. Hellams, Spencer fractured her nose, used blunt force on her lower lip, kicked her in the back of the leg, and caused various bruises and scrapes. Spencer then raped Hellams and strangled her to death with a ligature device. A medical examiner found fluid consistent with seminal fluid on her back and in the gluteal fold. Spermatozoa was present on swabs taken from Hellams' vagina, rectum and perianal area. Spermatozoa and seminal fluid were also discovered on her slip and skirt. The stains on the slip and skirt, as well as the swab taken form the perianal area were examined by an expert serologist for the Commonwealth. When these samples were compared to samples of Spencer's blood, the seminal fluid secretions were found to be consistent with Spencer's secretion type, while inconsistent with Hellams' husband's type. Further, the secretions in the seminal fluid found in the perianal area were inconsistent with a combination of the blood types of Dr. Hellams and her husband, while consistent with the combination of Dr. Hellams' and Spencer's blood. DNA analysis done on Spencer's blood and a sample of the seminal fluid on Dr. Hellams' slip resulted in a match.

The DNA evidence was presented at trial, and the jury convicted Spencer of capital murder, rape, sodomy and burglary. Spencer was sentenced to death. The Supreme Court of Virginia affirmed the death sentence on direct appeal.[1] Spencer continued unsuccessfully to seek relief through appeals and collateral proceedings. Following denial of relief in the federal district court, this case reached the Fourth Circuit.[2]

Spencer based his appeal to the Fourth Circuit on seven grounds: (1) his trial counsel were ineffective because they failed to secure a DNA expert for the defense; (2) he is "actually innocent" of the crime for which he received a capital sentence, and he would not have been convicted if he had (a) been able to challenge the DNA evidence and (b) if there had not been a "prejudicial injection of astronomical probability ratios" into the trial; (3) his trial counsel were ineffective because they failed to conduct voir dire on the issue of racial prejudice; (4) Virginia's proportionality review is unconstitutional, as is the application of Virginia's default rules because there are no "rational exceptions"; (5) the jury instructions on mitigating evidence were constitutionally inadequate; (6) his trial counsel were ineffective because they failed to explore or present certain mitigating evidence; (7) (a) the DNA analysis used in this particular case was subject to error and thus produced unreliable results, (b) the DNA analysis results should not have been admitted, and (c) his trial counsel were ineffective in the manner they handled the DNA evidence.

HOLDING

The United States Court of Appeals for the Fourth Circuit held that several of Spencer's claims were procedurally defaulted, and thus precluded from federal habeas review. The court relied on the rule set forth in *Slayton v. Parrigan*.[3] *Slayton* held that federal review of a claim is barred when a habeas petitioner has defaulted that claim in a state court on the basis of an independent and adequate state procedural rule. Spencer's claims that the proportionality review and the default rules are unconstitutional were also defaulted, as were his claims concerning the jury instructions regarding mitigation evidence, and most of Spencer's DNA analysis claims.

The court considered and rejected Spencer's claims of ineffective assistance of counsel. First, the court held that defense counsel had acted acceptably in trying to obtain a defense expert. Defense counsel questioned at least four experts and tried to find one willing to testify at trial, but none of the experts were willing to do so. The court held that as counsel made an affirmative attempt to obtain an expert, they should not be deemed ineffective merely because they could not find one who would testify.

Second, the court held that defense counsel's decision not to question the venire on issues of race was based on a sound trial strategy decision and thus did not amount to ineffective assistance of counsel. The fact that counsel had previously obtained a change of venire, in which the members were selected from Norfolk rather than Richmond, was sufficient for defense counsel to conclude that race was not an issue in the case.

Third, the court rejected Spencer's claim that defense counsel were ineffective regarding the collection and presentation of mitigation evidence. The court ruled that defense counsel had conducted a thorough investigation of Spencer and his background, both on their own and with the aid of a private investigator. Defense counsel talked with Spencer's family and friends, and also observed defense mitigation witnesses in Spencer's other trials for similar murders in Arlington and Richmond. Further, the court held that it was not ineffective assistance of counsel for the defense counsel to fail to call a psychologist to the witness stand. Again, the court ruled that the decision amounted to trial strategy.

As an excuse for default on his claim regarding the reliability of DNA evidence in this particular case, Spencer raised an "actual innocence" claim. Spencer claimed that he would not have been convicted if there had not been a "prejudicial injection of astronomical probability ratios" into the trial. The Court held, however, that Spencer's claim was procedurally defaulted because it was not presented to the Supreme Court of Virginia on direct appeal. Further, the court held that Spencer failed to meet the threshold requirement of the "innocent of the death penalty" exception of *Sawyer v. Whitley*.[4] Under the *Sawyer* test, a defendant's

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[1] *Spencer v. Commonwealth*, 238 Va. 563, 385 S.E.2d 850 (1989).
[2] *Spencer v. Murray*, No. 3:92CV160 (E.D. Va. Jan. 21, 1993).
[3] 215 Va. 27, 205 S.E.2d 680 (1974).
[4] 112 S. Ct. 2514 (1992). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992). *See also* case summary of *Spencer I*, Capital Defense Digest, this issue.

claim of "innocence of the death penalty" will not be considered unless the defendant first shows "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."[5]

ANALYSIS/APPLICATION IN VIRGINIA

Of the issues that the Fourth Circuit considered on the merits, those concerning ineffective assistance of counsel and "actual innocence" may be the most interesting and of the most help to Virginia defense counsel. The ineffective assistance of counsel claims will be considered separately on the narrower issues of: (a) procurement of a defense expert; (b) conducting voir dire to determine if there is any race bias by venire members; and (c) mitigation investigation. Spencer's "actual innocence" claim will be discussed as a whole.

I. Ineffective Assistance of Counsel

The Sixth Amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." In *Strickland v. Washington*,[6] the United States Supreme Court established a deferential standard for attorneys, which created a very high threshold for convicted defendants to meet before they may succeed on an ineffective assistance of counsel claim. According to *Strickland*, the representation must be so defective as to constitute a denial of fundamental fairness. The two-prong test that defendants must meet is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.[7]

Strickland further states that when a petitioner is challenging a death sentence, "the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[8]

A. Procurement of a Defense Expert

Spencer had two trials in the Circuit Court for the City of Richmond (*Spencer I* and *Spencer II*), both of which were tried before the same judge and defended by the same counsel. As the two trials were only four months apart, the state trial judge allowed defense counsel to file consolidated motions for the cases. Defense counsel filed a motion with the trial court to notify the judge that they might later seek funds for an expert.[9] Spencer's claim of error is that the defense counsel did not follow through with their motion. Spencer claims that,

> [n]othing in the record reveals that counsel did anything to follow through with this motion. No mention is made anywhere in the record of any additional requests for hearings or experts.
>
> As counsel recognized the need for specific experts, some affirmative steps should have been taken to secure them . . . . If nothing else, counsel should have read the current literature dealing with forensic DNA.[10]

The Fourth Circuit concluded that defense counsel did follow through in trying to procure an expert.[11] Defense counsel submitted an affidavit with the trial court, outlining their DNA research. Further, defense counsel talked with at least four DNA experts in an attempt to locate one who would be willing to testify on behalf of Spencer. Yet defense counsel explained that they "were unable to find an expert who was willing to accept such an appointment."[12] Further, as a means of verifying the reliability of the DNA evidence, the attorneys had a blind analysis of Spencer's blood performed by an independent laboratory,[13] and attended Spencer's third capital murder trial for a third defendant, which was held in Arlington.[14]

The Fourth Circuit held that these actions were enough to overcome a Sixth Amendment ineffective assistance of counsel claim, as Spencer failed to meet his burden of proof as to the deficiency of defense counsel's work.[15] Failure to procure a DNA expert may not violate the *Strickland* test, but every effort should be made to secure independent evaluation of important prosecution evidence, even if the evaluation does not ultimately prove helpful.

First, under *Ake v. Oklahoma*,[16] an indigent defendant is entitled to court appointment of an expert on issues of sufficient importance. *Ake* requires neither that defense counsel reveal the expert's opinions to the Commonwealth, nor call the expert to testify at trial. Second, it may help defense counsel to know that there are several organizations that are available to aid defense counsel in finding expert witnesses for trial.[17]

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[5] *Sawyer*, 112 S. Ct. at 2517.

[6] 466 U.S. 668 (1984). For more information on *Strickland* and on ineffective assistance of counsel in general, *see* Marlowe, *Ineffective Assistance of Counsel or "How I Can Satisfy the Sixth Amendment and Still Not Help My Client,"* Capital Defense Digest, Vol. 3, No. 1, p. 29 (1990).

[7] *Strickland*, 466 U.S. at 687.

[8] *Id.* at 695.

[9] *Spencer v. Murray*, 18 F. 3d 229, 233 (4th Cir. 1994); *see also* case summary of *Spencer I*, Capital Defense Digest, this issue.

[10] *Spencer II*, 18 F. 3d at 233.

[11] *Id.*

[12] *Id.*

[13] The independent analysis only verified the Commonwealth's results. *Id. See* case summary of *Spencer I*, Capital Defense Digest, this issue.

[14] In addition to the capital murders in *Spencer I* and *Spencer II*, Spencer was tried and convicted of the capital murder of Susan Tucker in Arlington County. An appeal concerning the Arlington trial is pending on the Fourth Circuit's docket as Case Number 93-4004. *Spencer II*, 18 F. 3d at 234 n. 5.

[15] *Spencer II*, 18 F. 3d at 234.

[16] 470 U.S. 68 (1985). For more information on using *Ake* to obtain a defense expert, *see* case summary of *Spencer I*, Capital Defense Digest, this issue.

[17] For help in obtaining an expert, defense counsel may want to contact one or more of the following: Virginia Capital Case Clearinghouse; NAACP Legal Defense and Educational Fund, Inc., Suite 301, 1275 K Street, NW, Washington, D.C. 20005, (tel.) (202) 682-1300, (fax) (202) 682-1312; Virginia Capital Representation Resource Center, 1001 East Main Street, P.O. Box 506, Richmond, Virginia, 23219 (tel.) (804) 643-6845 or 1-800-697-6841.

B. Race Bias Voir Dire

Spencer claimed that his counsel were ineffective because they did not conduct voir dire on the issue of racial bias.[18] Pre-trial, counsel obtained a change of venire from Richmond because of the publicity surrounding Spencer's first Richmond trial. Thus, jury selection took place in Norfolk. Defense counsel alleged at habeas that during individual voir dire, if a venire member gave counsel any reason to doubt the member's impartiality, they would continue to ask questions until the person satisfied them that they could be impartial or until the counsel had enough suspicion to strike the venire member for cause. The counsel explained their reasoning for not explicitly conducting rase bias voir dire:

> In our view, particularly because of the change of venire, race was simply not an issue in the case. We had no reason to believe that any prospective juror harbored any racial bias against Spencer, and our decision not to ask any questions on voir dire that might have injected race into the case was a matter of trial tactics.[19]

Relying on *Strickland*,[20] the Fourth Circuit deferred "to counsel's sound trial strategy decisions."[21]

Both *Strickland* and *Burger v. Kemp*[22] held that tactical decisions based on sufficient evidence are not to be second-guessed:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.[23]

The Fourth Circuit is likewise very deferential to defense attorneys, as evidenced by the decision rendered in *Clozza v. Murray*.[24] In that case, defense counsel made statements at trial that he "did not want to put petitioner 'back on the street' and that if Clozza's attempt at suicide had been successful, 'it would not have been the greatest tragedy.'"[25] The Fourth Circuit accepted defense counsel's statement that his comments were part of his trial strategy to build credibility with the jury.[26] The court held:

> The remarks which Clozza contends shows hopelessness and disgust indicated to the jury that defense counsel understood the gravity of the crimes as well as their horrible nature. Had counsel attempted to pass the crimes off as anything other than the atrocities that they were, his credibility with the jury would most certainly become [sic] suspect. Thus we conclude, that counsel's remarks were consistent with his trial strategy.[27]

Despite this deference, counsel should know that race is a factor in cases when the defendant and the victim are not of the same race. In *Spencer II*, Spencer was black and his victim was white. Statistics reported by the NAACP Legal Defense and Educational Fund, Inc., indicate that out of the total of twenty-one executions in Virginia under its modern statute, more than one-third have been black defendants whose victims were white. Virginia has yet to execute a white person for the murder of a black person.[28] Counsel should be armed with this knowledge when conducting voir dire, to ferret out any potential racial bias on the part of the venire members.

C. Mitigation Investigation

In his ineffective assistance of counsel claim regarding mitigation evidence, Spencer first claimed that his counsel failed to conduct a thorough investigation, and that if they had, they would have discovered information about Spencer's troubled childhood, about his use of the drug PCP, and about the possibility that Spencer suffered from organic brain damage.[29] The Fourth Circuit held that there was sufficient evidence to show that defense counsel conducted an investigation, both alone and with the help of a private investigator. Further, defense counsel had observed the mitigation witnesses at both of Spencer's other trials in Arlington and Richmond.[30]

The Fourth Circuit followed the general trend of courts rarely to find that the extent of an investigation by counsel is insufficient. In *Strickland*, the court held: "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a **heavy measure of deference to counsel's judgments.**"[31]

Spencer next claimed that defense counsel should have obtained a psychiatrist to testify as to Spencer's mental state. Defense counsel responded by explaining that they personally never had any reason to doubt Spencer's sanity. Counsel knew that counsel in the Arlington trial had hired a psychiatrist and a psychologist, neither of whom found any mitigating circumstances. At the suggestion of Richmond's criminal defense bar, defense counsel asked Dr. Mullaney to evaluate Spencer before his first Richmond trial. The psychiatrist concluded that Spencer's imprisonment would minimize his future dangerousness. However, if called to testify at the penalty stage, the psychiatrist would have to admit that Spencer still denied his guilt and showed absolutely no remorse. Defense counsel alleged at habeas that they had made a tactical decision not to call Dr. Mullaney as a witness because:

> We knew that if we wanted to use Dr. Mullaney, then pursuant to Virginia Code section 19.2-264.3:1F, the prosecution would be entitled to have Spencer evaluated by its own expert. Based upon what we knew about Spencer and his offenses, we had no doubt that the state's expert would render an opinion that Spencer was, in fact, "future dangerous."[32]

For ineffective assistance of counsel purposes, defense counsel acted adequately. However, there is a case in mitigation for everyone, developed through a thorough investigation and the procurement of

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[18] *Spencer II*, 18 F. 3d at 234.
[19] *Id.*
[20] 466 U.S. 668 (1984).
[21] *Spencer II*, 18 F. 3d at 234.
[22] 483 U.S. 776 (1987).
[23] *Burger*, 483 U.S. at 789 (quoting *Strickland*, 466 U.S. at 689).
[24] 913 F.2d 1092 (4th Cir. 1990). *See* case summary of *Clozza*, Capital Defense Digest, Vol. 3, No. 2, p. 9 (1991).
[25] *Clozza*, 913 F. 2d at 1098.
[26] *Id.* at 1100.
[27] *Id.* at 1099.
[28] NAACP Legal Defense and Educational Fund, Inc., *Death Row, U.S.A*, p. 4 (Fall 1993).
[29] *Spencer II*, 18 F. 3d at 234.
[30] *Id.*
[31] *Strickland*, 466 U.S. at 691 (emphasis added).
[32] *Spencer II*, 18 F. 3d at 235.

experts. Under Virginia Code section 19.2-264.3:1F, defense counsel has no duty to surrender the defendant for a reciprocal examination by the Commonwealth unless the defense decides to call the expert as a witness.[33] Therefore, defense counsel may want to get informal assistance in developing a theory of mitigation. Such informal assistance avoids the need for a reciprocal examination, while still enabling the defense to build its case.[34]

II. Actual Innocence[35]

On the issue of actual innocence, Spencer was alleging "innocence" as an excuse for default. The Fourth Circuit held that the applicable test was the "no reasonable juror" test of *Sawyer v. Whitley*,[36] which requires that but for the alleged error, no reasonable juror would have found the defendant eligible for the death penalty. Although the *Sawyer* test is a very stringent test, it is somewhat easier to meet than the *Herrera* "newly-discovered evidence" test.[37]

Although the Fourth Circuit found *Sawyer* to be the "excuse for default" standard, it found that the error complained of—the admission of the expert evidence—was a state evidentiary law matter. If, however, the issue **defaulted** was a **clearly federal issue**, the *Sawyer* test should provide a way to save the defaulted claim for consideration in federal court. An example of when the *Sawyer* "excuse for default" standard would help the defendant is in a situation where the only aggravating factor supporting the death sentence was "vileness" and the jury was not given any limiting construction of that term, and where the circumstances of the crime were arguably not vile within a constitutionally acceptable definition of that term. In such a situation, defense counsel could argue that no reasonable juror using a proper definition of the term would have found vileness. In such a case the *Sawyer* test should permit a defaulted challenge to the application of the vileness factor to be determined on its merits since the error complained of plainly implicates federal constitutional law.

Summary and analysis by:
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[33] Va. Code Ann. § 19.2-264.3:1(F) states, in relevant part:

> If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense, the court shall appoint one or more qualified experts to perform such an evaluation.

(emphasis added)

[34] *See* case summary of *Spencer I*, Capital Defense Digest, this issue.

[35] For more information about the actual innocence tests set forth in *Herrera v. Collins* and *Sawyer v. Whitley*, *see* case summary of *Spencer I*, Capital Defense Digest, this issue.

[36] 112 S. Ct. 2514 (1992). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992). For an explanation of the "no reasonable juror" requirement set forth in *Sawyer*, *see also* case summary of *Spencer I*, Capital Defense Digest, this issue.

[37] For an explanation of the "actual innocence" test set forth in *Herrera v. Collins*, 113 S. Ct. 853 (1993), *see* case summary of *Herrera*, Capital Defense Digest, Vol. 5, No. 2, p. 4 (1993). *See also* case summary of *Spencer I*, Capital Defense Digest, this issue.

SWANN v. COMMONWEALTH

441 S.E. 2d 195 (Va. 1994)
Supreme Court of Virginia

FACTS

On November 7, 1992, Calvin Swann, in need of money to buy drugs, entered the Danville home of Conway Forrest Richter intending to rob him. When Richter resisted, Swann shot him in the chest with a shotgun. Richter staggered to his front porch and collapsed. Swann then removed Richter's wallet and fled with sixty dollars. After fleeing, Swann disposed of most of his bloody clothing and sold his shotgun.

After an investigation, the police identified Swann, who was serving time in the city jail on other charges, as a possible suspect. After securing a *Miranda* waiver, the police interviewed Swann. After a number of inconsistent statements by Swann and a series of suggestive representations and misrepresentations by the police, Swann confessed to the killing, was tried, and convicted of capital murder.

At the penalty trial, defense counsel attempted to explain to the jury that should Swann be sentenced to life in prison, it would be at least twenty-one years before he could be released on parole. The Commonwealth objected to counsel's attempt to inject information about parole law into the proceeding. Foreclosed from discussing the reality of parole eligibility, defense counsel then attempted to assure the jury that sentencing Swann to life in prison logically meant that he would remain in prison for the rest of his life. The Commonwealth's attorney objected to this argument as well, and was permitted to deny before the jury that it correctly characterized Swann's future after a life sentence. Relying on the statutory aggravating factor of "future dangerousness," the jury sentenced Swann to death.

Upon appeal to the Supreme Court of Virginia, Swann made numerous assignments of error concerning various aspects of the case.[1] In addi-

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[1] Swann properly preserved a number of assignments of error which the court reviewed in this case. They include: (1) failure to suppress Swann's statements allegedly made involuntarily at the pretrial stage; (2) failure to appoint an additional mental health expert to assist in evaluating Swann's reaction to anti-schizophrenic drugs, and to assist with the case in mitigation; (3) the improper use of peremptory strikes to remove two jurors from the panel on the basis of race; (4) the prejudicial admission of photographs and videotapes of the victim and the crime scene; (5) the insufficiency of evidence of capital murder and robbery; (6) the unconstitutionality of Virginia's capital statute and statutory verdict form. The court rejected all of Swann's assertions, and the various arguments will not be discussed in this summary.