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SWANN v. COMMONWEALTH 441 S.E. 2d 195 (Va. 1994)

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.

tion, the court reviewed Swann's death sentence to determine whether it had been imposed under the influence of passion or prejudice, and whether the punishment was disproportionate or excessive, as required by statute.

HOLDING

The Supreme Court of Virginia rejected all of Swann's assignments of error and affirmed the death sentence.[2] The court disposed of Swann's claims in one of three ways: each issue was either (1) summarily dismissed as an "issue previously decided"; (2) rejected due to procedural default; or (3) rejected on the merits.

ANALYSIS/APPLICATION IN VIRGINIA

It is becoming more and more apparent to observers of Virginia capital cases that the Supreme Court of Virginia is refusing to consider viable claims of capital defendants, some involving the most fundamental of rights, based on little more than a respect for procedural orderliness. The strict manner in which the court applies its default rules strikes at the very heart of a reliable capital sentencing scheme. Unless capital defense counsel begin to perform perfectly at the trial, properly preserving each and every error on the proper grounds, it is likely that capital defendants will continue to be denied meaningful appellate review of claims that their trials were infected with fundamental constitutional error.

The capital trial of Calvin Swann illustrates many of the deficiencies in the application of Virginia's default rules. Rather than analyze the specific holdings of the *Swann* decision, which is our practice, we will use *Swann* as a framework for analysis of the systematic denial of meaningful review of capital defendants' constitutional assignments of error.

I. Parole Eligibility

Before discussing the issues which Swann defaulted, it is important to note that Swann did object to the court's refusal to allow the jury to hear evidence during the penalty phase relating to parole eligibility. Knowledge of this factor is essential to a proper understanding of the import of sentence-related claims by Swann that the court later found to have been defaulted. The evidence would have shown that if sentenced to life in prison, the defendant would not be eligible for parole for twenty-five years,[3] and even if Swann was a model prisoner for the next twenty years, he would only be eligible to earn five days of "good time" per month against his sentence,[4] and therefore his absolute minimum time served would be twenty-one years. As has been its practice, the Supreme Court of Virginia rejected the attempted proffer of parole eligibility law.[5]

By allowing the Commonwealth to block any attempts by defense counsel to present accurate parole information to the jury, the Virginia courts undermine the reliability of the capital trial. In many cases, parole eligibility information might mean the difference between a life sentence and the death penalty for many defendants, because of the misconceptions the average juror carries with regard to what a life sentence means in real prison time.[6] The duty of the defense bar is to educate the public at every opportunity outside of trial about the reality of Virginia's parole laws mentioned above, until the time arrives when juries will be allowed to be fully informed.[7]

II. The Mysterious Disappearance of Constitutional Claims

As was described above, once Swann had lost on the parole eligibility issue, he attempted to tell the jury during his closing argument that they could assume that a life sentence meant a prison term for life, and

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[2] *Swann v. Commonwealth*, 441 S.E. 2d 195 (Va. 1994).

[3] *See* Va. Code Ann. § 53.1-151(C).

[4] *See* Va. Code Ann. § 53.1-199.

[5] *See, e.g., King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992), and case summary of *King*, Capital Defense Digest, Vol. 5, No. 1, p. 37 (1992); *Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989), and case summary of *Watkins*, Capital Defense Digest, Vol. 2, No. 1, p. 15 (1989). *See also* Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol. 5, No. 1, p. 45 (1992).

[6] In 1988, the National Legal Research Group issued a report that the typical jury-eligible citizen living in Prince Edward County, Virginia, believed that a defendant sentenced to "life" in prison will serve only ten years before being released. *See* Hood, *The Meaning of Life for Virginia Jurors and Its Effect in Capital Sentencing*, 75 Va. L. Rev. 1605, 1624 (1989) (citing National Legal Research Group, Inc., Jury Research and Trial Simulation Services, *Report on Juror's Attitudes Concerning the Death Penalty* (Dec. 6, 1988)).

The importance of dispelling these misperceptions is especially significant when one considers the data on attitudes towards the death penalty when jurors are given definite alternatives. One study indicated that more than two-thirds of those surveyed would be more likely to favor a life sentence over the death penalty if they were assured that the defendant would serve at least twenty-five years of real prison time. *See* Paduano & Smith, *Deathly Errors: Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 223 (1987) (citing Codner, *The Only Game in Town*, 45 n. 114). A recent report by the Death Penalty Information Center revealed that while seventy-seven percent of those questioned expressed abstract support for the death penalty, the percentage of those favoring the death penalty falls to forty-four percent if the respondent was given the choice between death or no parole for twenty-five years plus restitution. *See* Dieter, *Sentencing for Life: Americans Embrace Alternatives to the Death Penalty*, A Report by the Death Penalty Information Center, at 5 (April 1993).

[7] It must be conceded, however, that if "truth in sentencing" became permissible on motion by either party, **each** side in a capital case would face an important tactical decision. Accurate parole information might make a particular jury **more** likely to impose the death penalty. Despite that possibility, given the statistics enumerated in the previous note, defendants will normally be in a better position if their request for an instruction on parole eligibility (or ineligibility) is granted. On the whole, giving the jury all relevant information will be good for the system, and will avoid the anguished reasoning a jury was forced to resort to in one recent capital trial. The foreperson in that case remarked after the trial:

> Unfortunately, due to our lack of knowledge and **the fear that if given a death sentence [the defendant] would win an automatic new trial** and be able to win freedom with another jury, we decided, through discussion and creations of different scenarios, that the [life] sentence we gave . . . would incarcerate him for a longer time.

Letter to the Editor, *Layne jury found itself in a quandary*, The Fincastle Herald, Mar. 23, 1994, at 2A.

the Commonwealth's attorney objected. Because defense counsel did not object at this point, the Supreme Court of Virginia held that claims challenging the procedure to this point had been defaulted. Defense counsel did object, however, when the Commonwealth's attorney was permitted to rebut the "life means life" argument and told the jury: "The Commonwealth denies the **accuracy** of [the life means life] statement." The court admitted that defense counsel had properly objected at trial, but rejected this argument **without reviewing** it because defense counsel based his argument on this point before the Supreme Court of Virginia on constitutional grounds, rather than on the grounds originally urged at trial.[8] In addition, the court allowed a witness to state that Swann's earlier prior releases from prison were due to "mandatory release."

The ultimate result of the court's efforts was to deny Calvin Swann the right to accurately inform the jury about what a life sentence actually means. Moreover, it could be argued that the Commonwealth was allowed to mislead the jury affirmatively. Nothing is more fundamental to the constitutionality of a death penalty scheme than reliability in the determination that death is the appropriate sentence.[9] Swann's case demonstrates that in Virginia, even with that reliability at stake, failure to object at the proper point or to base an appeal on the proper grounds, will foreclose attempts to protect that right.

It is important to emphasize that the assignments of error which the Supreme Court of Virginia routinely refuses to remedy are not minor, rather they often concern the most basic constitutional rights. In addition to the parole information issue discussed above, due to procedural default the court refused to consider defendant's claim under *Caldwell v. Mississippi*[10] that the Commonwealth's attorney had made an improper statement at voir dire when he said: "you wouldn't necessarily be taking a life . . . you'd just be making a decision . . . about the evidence." The court also invoked Rule 5:25 of the Rules of the Supreme Court of Virginia to hold defaulted Swann's claim that the Commonwealth violated *Griffin v. California*[11] when the Commonwealth's attorney mentioned in his closing argument during the penalty phase that Swann had invoked his right not to testify against himself at trial.[12]

III. Conclusion

Calvin Swann's death sentence rested on a finding of future dangerousness by the jury. The jury that made that determination was not allowed to consider that the defendant would not be eligible for parole for twenty-five years. The jury was told that "life" does not mean life when rendering a sentence. They were also introduced to the concept of mandatory parole. They listened to the Commonwealth's attorney suggest to them that the defendant was somehow at fault for invoking his constitutional rights, and at least one panel at voir dire was told that this proceeding was just about judging evidence, rather than putting a man to death.

All three of the constitutional claims sacrificed by the *Swann* court to procedural orderliness bear on a factor that was found to be a prerequisite to the granting of permission for states to employ the death penalty:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[13]

Procedural order is certainly a legitimate state interest. The force of that interest pales, however, in comparison to the importance of reliability in capital sentencing. Until the Supreme Court of Virginia acknowledges this imbalance, however, only two basic approaches are available to defense counsel.

One response is simply to refuse to be rushed at trial. Rarely will defense counsel be able to try a capital case and properly preserve every constitutional error under the strict standards of the Supreme Court of Virginia. If the Supreme Court of Virginia is going to continue its hypertechnicality, however, counsel can at least insist at trial on being afforded the time and opportunity to make the record at every critical point and on every available ground.

An additional option is to confront Virginia's imbalance in priorities directly, by attacking Virginia's default scheme facially. Normally, federal courts will respect a state's default regime and will not hear arguments procedurally defaulted under the state's rules. However, federal courts may choose to disregard a state's default rules and will consider a defendant's claim for the first time on federal habeas if the federal court determines that the state procedural bars are unevenly and unjustly applied. It has been argued that a Virginia litigant with a claim involving his right to property may be faced with a less stringent application of the default rules than a capital defendant, a manifest injustice.[14] If defense counsel can convince the federal courts that Virginia's procedural default scheme is applied unjustly, they will open a new avenue for meaningful appellate review.

Summary and analysis by:
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[8] In its zeal to apply procedural bars, the court also failed to address the merits of this claim on the grounds that **were** raised at trial, or even to identify them. *Swann*, 441 S.E. 2d at 201. Perhaps this was because the **trial** grounds were not brought forward on appeal, a point on which the opinion is silent.

[9] *See* note 13 *infra* and accompanying text.

[10] 472 U.S. 320 (1985) (holding that an argument which undermines the jury's responsibility for rendering a death verdict is inconsistent with the Eighth Amendment's need for heightened reliability in capital cases).

[11] 380 U.S. 609 (1965) (holding that one should not draw inferences from a defendant's silence because there are numerous reasons why an innocent party might choose not to testify).

[12] *Swann*, 441 S.E. 2d at 201 n.5.

[13] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

[14] For further analysis of this point and a general discussion on attacking Virginia's procedural bars, *see* Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, this issue.