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871 F.2d 18 (4th Cir. 1989)
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FACTS

In 1978, Alton Waye was convicted of capital murder and sentenced to death. After exhausting all state court appeals, Waye filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia under 28 U.S.C.A. §2254 (West 1977). The district court dismissed Waye's petition. Waye appealed the district court's dismissal to the United States Court of Appeals for the Fourth Circuit.

Waye's primary complaint on appeal to both the Supreme Court of Virginia and to the federal district court was the following instruction given to the jury at the conclusion of the evidence in the guilt phase of Waye's trial:

> The court instructs the jury that a man is presumed to intend that which he does, or which is the immediate or necessary consequences [sic] of his act.

Waye's attorney neither objected to the instruction at the jury trial nor raised the issue on Waye's direct appeal to the Supreme Court of Virginia.

In *Sandstrom v. Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 594 (1979), the United States Supreme Court held that a burden-shifting instruction such as the one given at Waye's trial violated a defendant's right to due process. U.S. Const. Amend. XIV, § 1. The Court held that the instruction in *Sandstrom* violated the principle stated in *In Re Winship*, 397 U.S. 358 (1970), that the prosecution has the burden of proving each and every element of the crime with which the defendant is charged. The *Sandstrom* Court held that the burden-shifting instruction could be understood by a reasonable juror as forcing the defendant to show that he had no intent and, therefore, violated *Winship*.

HOLDING

The Fourth Circuit affirmed the district court's dismissal of Waye's petition for a writ of habeas corpus.

The Fourth Circuit noted that Virginia procedure requires a defendant to lodge a contemporaneous objection at trial to preserve an issue for review by the Supreme Court of Virginia on appeal. In addition, the Court of Appeals stated, the Supreme Court of Virginia will not address errors unless they are clearly indicated on appeal. The Fourth Circuit, under *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), reasoned that failure to timely object at trial as required by a state contemporaneous objection rule forecloses federal habeas corpus review "absent a showing of actual prejudice resulting from the alleged constitutional violation." *Id.*, 433 U.S. at 84, 97 S. Ct. at 2505. The *Sykes* analysis requires two showings: first, the defendant must show cause for failure to make a timely objection, and second, the defendant must show that actual prejudice resulted from the failure to object.

The Fourth Circuit's holding represents a complex combination of three overlapping doctrines: excuse for default at trial in order to meet the *Sykes* test for admission to the federal courts; the two-part test for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 397 (1984); and the harmless error doctrine expressed in *Rose v. Clark*, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The core of all three doctrines is the harmless error doctrine. Regardless of whether counsel can meet the other two tests, if the error was harmless - the verdict would not have been different even if the error was corrected - then the defendant loses anyway.

Waye alleged in his petition for federal habeas corpus relief that his cause for failure to object at trial was the ineffectiveness of his counsel at trial. The Fourth Circuit rejected Waye's contention, stating that Waye's ineffective assistance of counsel claim could not meet the two-prong test for ineffective assistance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 397 (1984). The Court of Appeals held that, even if Waye could show that his counsel was "so deficient that he was not functioning as counsel," *Waye*, 871 F.2d at 20 (the first prong of the *Strickland* test), the evidence at trial of Waye's intent was so overwhelming that Waye could not show that "there is a reasonable probability that, but for counsel's unprofessional [error], the result of the proceeding would have been different." *Id., quoting Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068 (the second prong of the *Strickland* test).

The Court of Appeals held that, even if Waye met the *Strickland* test, Waye failed to show actual prejudice as required under a *Sykes* analysis. Again, the Fourth Circuit stated that the evidence of Waye's intent to kill was so overwhelming at trial that no possibility of actual prejudice could remain.

Finally, the Fourth Circuit held that, even if Waye could meet *Strickland* and *Sykes*, "it is clear that the presumption instruction charged here was harmless beyond a reasonable doubt under *Rose v. Clark*," 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986).

ANALYSIS

Sandstrom v. Montana was decided after Waye's jury trial. Therefore, although Waye had a valid constitutional argument to make, his attorney did not have the benefit of the Supreme Court's thinking on the subject. The jury instruction which the Supreme Court invalidated in *Sandstrom* had been routinely given until the *Sandstrom* opinion. The *Sandstrom* court, however, found its decision to be a logical extension of *In Re Winship*. Because *Winship* was decided before Waye's jury trial, Waye's counsel was charged with the knowledge of *Winship* and should have objected to the instruction. Unfortunately, Waye's counsel did not object. Because Waye's trial counsel made no contemporaneous objection to the jury instruction, Waye's only avenue to federal habeas corpus relief was to complain of ineffective assistance of counsel.

The opinion of the Fourth Circuit in this case is illustrative of the difficult burden a defendant must meet *even to get his case heard by the federal courts*. Had Waye's counsel made the necessary objection at trial and preserved the issue on appeal to the Supreme Court of Virginia, Waye would have been able to complain about the constitutional error without connecting it to a claim of ineffective assistance of counsel. Accordingly, the federal court would not have had to address the strict criteria for review under *Strickland* and *Sykes*.

Virginia attorneys representing capital defendants should be careful not to let *any* arguably meritorious objections go unmade, even though the issue will clearly be overruled at the trial court. The capital appeals process will cover many years, and the claim that may save a client's life may have been unheard of at the time of trial. With the benefit of hindsight, Waye had a valid argument that his constitutional rights were violated, but because of the Virginia contempora-

neous objection rule, Waye could not raise the issue on appeal unless he could show cause under *Sykes*. The most common "cause" is an ineffective assistance of counsel claim, which requires a defendant to meet the stringent two-part test of *Strickland*. Alton Waye was executed on August 30, 1989.

No one can predict which claims the United States Supreme Court will recognize in the years to come. *Sykes* does recognize later "new law" as an excuse for not raising claims at trial. Nevertheless, because of Virginia's contemporaneous objection rule, unless a claim was *unheard of* before a client's trial, failure to object at trial will close the door to federal collateral review for a capital defendant. The only protection the attorney representing a capital defendant can provide a client is to know *all existing law, including "logical extensions" of that law*. This includes the law of your own state, but also the law of any jurisdiction with similar capital statutes.

Of course, this is impossible. No one has the unlimited time and resources such a task would require. Nevertheless, federal courts require such foresight. The attorney's only defense is to use his or her own sense of fairness to guide making of objections at trial.

Additionally, it is critical to tie every objection to the 6th, 8th and 14th amendments of the United States Constitution. This is necessary because, even if an objection was made to the correct issue at trial, if the court overrules an objection on purely state law grounds, federal courts do not have jurisdiction to hear the claim. Trial counsel must assert a federal basis for every objection. One arguable basis is the necessity for a heightened degree of reliability in death penalty cases ("super due process") under the 8th and 14th amendments and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

As to matters that implicate only state law in non-capital cases, the United States Supreme Court has sometimes required the higher standard, and sometimes not. *Green v. Georgia*, 442 U.S. 586, 99 S. Ct. 2150, 60 L. Ed. 2d 738 (1978), for example, overrode a state hearsay rule to require consideration of mitigating evidence. *Strickland* itself, however, refused to impose a higher standard of competence for attorneys in capital cases.

Summary and analysis by: Diane U. Montgomery

SPENCER v. COMMONWEALTH
Supreme Court of Virginia

SPENCER I (victim-Tucker): 1989 Va. LEXIS 147, WL 109529 (1989)
and
SPENCER II (victim-Davis): 1989 Va. LEXIS 127, WL 109530 (1989)

The defendant received two separate trials for the murders of two women. In both of the trials the jury found him guilty of capital murder and deserving of the death penalty. He appealed the conviction and sentence of both trials asserting numerous assignments of error. In reviewing the alleged errors the Supreme Court of Virginia, in two per curiam opinions by Justice Stephenson, affirmed the conviction and sentence of the defendant and held that "DNA printing" is both a reliable and admissible form of identification evidence. In addition, Spencer II reviewed alleged errors pertaining to the selection of prospective jurors and assignments of error regarding the admission of evidence.

NOTE: Although they are two separate cases, due to the similarity of the facts and holdings both decisions will be discussed in a single summary. Also, all *Spencer* citations are to *LEXIS* pages.

FACTS

Timothy Wilson Spencer was arrested and charged with the rape and murder of both Susan Tucker and Debbie Dudley Davis. The murders occurred approximately ten weeks apart in 1987. In each case, Spencer entered the dwellings through a ground floor window. Both victims were found strangled in their bed, naked or partially clothed. Each victim was bound in a similar fashion; their wrists were tied behind their back and the bindings connected to a ligature around their neck.

At both locations the police found hair that was described as "characteristically Negroid" in origin, as well as semen stains on the victims' bedding. Upon analysis, the hair samples removed from the scene were found to be "consistent with Spencer's underarm hair". *Spencer* II, at 4. Further, the testing indicated that the semen stains on the bedding were deposited by a "secretor" (an individual whose bodily fluids exhibit chemical traits of the person's blood). *Id.* The chemical properties of the stains were found to be consistent with those of a member of a blood group comprising about 13 percent of the population, a group to which Spencer belongs. *Id.* The prosecution had the DNA structures in the semen stains compared to known blood samples taken from the defendant. This process identified the semen stains and blood samples as belonging to the same person and the court noted that the chance of mis-identification error had a statistical probability numbering 1 in 705 million. *Id.* at 5.

HOLDING

In *Spencer* II, defendant asserted (44) separate assignments of error, many of which the court dismissed as being without merit. Many of the other alleged errors were dismissed as being based on well settled areas of law, such as the claim that the death penalty violated both the U.S. and Virginia Constitutions. However, four holdings issued by the court deserve analysis because they involve either a new and previously undeveloped area of the law, or discuss a common error committed by defense attorneys.

The summarized holdings are: (1) That "DNA printing" is a reliable and admissible form of identification evidence; (2) That once a prima facie *Batson* challenge is made, the prosecution has the burden of articulating *racially neutral* reasons for its exclusion of potential jurors; (3) That the objection to the seating of a juror made during voir dire is deemed *waived unless restated* immediately prior to the actual seating of that juror; and (4) That an alleged restriction in the defendant's cross-examination of a witness cannot be appealed where the defense counsel failed to proffer evidence, *on the record*, regarding the nature of the proposed questions and the witness's answers to those questions.

ANALYSIS

(1) DNA PRINTING:

Spencer alleged that the trial court erred in admitting into evidence the results of a DNA analysis comparing his blood to the semen stains found at the scene of the crimes. *Spencer* II, at 27. Specifically, Spencer claimed that the prosecution had not proved the *reliability* of DNA testing procedures. *Id.* at 29.