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TREVINO v. TEXAS 112 S.Ct. 1547 (1992)

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:
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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).

The United States Supreme Court's decision in *Ford v. Georgia*[11] established the steps a criminal defendant is required to take to preserve an equal protection claim regarding the prosecution's race-based use of peremptory challenges. In *Ford*, the defendant filed a pre-trial motion similar to Trevino's. Although Ford's motion did not specifically mention the Equal Protection Clause, the Supreme Court held that he had adequately raised this claim by reference in his motion to the "exclusion of black jurors 'over a long period of time'", and his counsel's argument to the same effect.[12]

In *Trevino*, the defense relied on a similar argument in its motion. In addition, in his argument before the trial court, Trevino's counsel expressly contended that the Supreme Court "would modify *Swain*'s burden of proof and that the Texas courts should anticipate" that decision.[13] The Supreme Court, therefore, found that although Trevino's claim was not expressly presented as an equal protection claim to the trial court, he had adequately raised the essence of the claim to preserve its consideration.[14] The Court further found that Trevino had preserved his equal protection claim before the Court of Criminal Appeals because "[h]is argument caption made an express reference to the Fourteenth Amendment and the issue presented for review was the very same one that he had raised before the trial court."[15] Finally, the Court noted that when the State of Texas filed its brief in Trevino's appeal about a month after the *Batson* ruling, it did not contend that Trevino's argument was not based on equal protection, but rather that *Batson* did not apply in Trevino's case because the stricken jurors were black, while Trevino was Hispanic (a claim that later lost merit when the Court decided in *Powers v. Ohio*[16] that a defendant need not be of the same race as the challenged jurors).

The Court also recognized that Trevino was entitled to the *Batson* rule because his case was presented on direct appeal. Prior to *Griffith v. Kentucky*,[17] new Supreme Court rules could not be applied retroactively if the new rules were a "clear break" from the past rules. The *Griffith* court, however, determined that the "clear break" exception was inappropriate and announced that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."[18]

The Supreme Court's decision in *Trevino* demonstrates the significance of preserving federal issues for appeal. The defendants in both *Trevino* and *Ford* benefitted from a change in the law but **only** because defense counsel were deemed to have raised the issues at the trial level. Therefore, it is particularly important to timely raise any colorable federal issues during the trial process even if they are not currently accepted under the law. The Rules of the Supreme Court of Virginia require that in order to preserve an issue for review, counsel must timely state the objection at trial "with reasonable certainty."[19] In addition, counsel must assign the ruling as error[20] and argue the issue in the appeal brief.[21]

Trevino also reaffirms the principle that state procedural default rules when applied to federal constitutional rights are a matter of federal law.[22] The *Trevino* court expressly overruled the Texas court's finding of default and in effect spelled out the standard state courts are to apply in determining whether an equal protection claim has been defaulted. Consequently, where counsel is faced with a Commonwealth argument that a federal constitutional claim has been procedurally defaulted, counsel should explore an argument that the constitutional claim was adequately preserved as a matter of federal constitutional law.

During jury selection in Virginia cases, it is important that, where appropriate, the Commonwealth's peremptory strikes be challenged under the Equal Protection Clause of the Fourteenth Amendment. In order to present a *Batson* challenge to such peremptory strikes, the defendant must make a prima facie showing of purposeful race discrimination in the exclusion of a juror. If the defendant makes a prima facie case, then the burden shifts to the prosecution to offer a neutral explanation for the strike. The trial court must then rule whether the strike was based upon race.[23]

Defense counsel should also remember that under *Holland v. Illinois*[24] and *Powers v. Ohio*,[25] a defendant has standing to assert a juror's Fourteenth Amendment Equal Protection claim that his or her exclusion from the venire was based upon race, even if the juror and the defendant are not of the same race. In addition, *Hernandez v. New York*[26] recognized that the state's neutral explanation for a peremptory strike may only disguise purposeful discrimination based upon race. It has also been held that the state's explanation for a peremptory challenge must be evaluated in light of the level of inquiry given to other jurors seated on the venire.[27] Therefore, in order to establish an improper exercise of a peremptory challenge, the record must reflect the content and depth of the prosecution's examination of the other jurors who were not excluded from the venire.

Summary and analysis by:
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11 111 S.Ct. 850 (1991). *See* case summary of *Ford*, Capital Defense Digest, Vol. 4, No. 1, p. 6 (1991).

12 *Ford*, 111 St. Ct. at 854-855.

13 *Trevino*, 112 S.Ct. at 1550.

14 *Id.*

15 *Id.*

16 111 S.Ct. 1364 (1991).

17 479 U.S. 314 (1987).

18 *Id.* at 328. A new rule, however, will **not** apply to cases that are presented for collateral review. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court found that the habeas petitioner had failed to assert a *Swain* equal protection claim at trial or on direct appeal. Therefore, the petitioner forfeited his right to review of the claim in state court, and subsequent review of the issue in a federal habeas corpus proceeding was barred. *See* case summary of *Williams v. Dixon*, Capital Defense Digest, this issue; case summary of *Adams v. Aiken*, Capital Defense Digest, this issue; and case summary of *Stringer v. Black*, Capital Defense Digest, this issue (discussing application of the *Teague* rule).

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

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

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

22 *See Johnson v. Miss.*, 486 U.S. 578, 587 (1988) ("'[W]e have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.'") (quoting *Henry v. Miss.*, 379 U.S. 443, 447 (1965)).

23 The Supreme Court has also applied the *Batson* rule to peremptory strikes made by the defendant. *See Georgia v. McCollum*, 112 S.Ct. 2348 (1992).

24 493 U.S. 474 (1990).

25 111 S.Ct. 1364 (1991).

26 111 S.Ct. 1859 (1991).

27 *Gamble v. State*, 357 S.E.2d 792 (Ga. 1987) (*cited in Jackson v. Commonwealth*, 8 Va.App. 176, 380 S.E.2d 1 (1989)).