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## AMADEO v. ZANT 108 S.Ct 1771 (1988)

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## AMADEO v. ZANT

108 S.Ct 1771 (1988)

In an opinion written for an unanimous court by Justice Marshall, the U.S. Supreme Court held: "evidence supported district court's factual finding that petitioner established cause for failure to raise in state trial court constitutional challenge to composition of juries that had indicted him, convicted him and sentenced him to death. **Reversed and Remanded**

### FACTS

Tony B. Amadeo was convicted of first degree murder and criminal attempt to commit theft in the Superior Court of Putnam County, Georgia in November, 1977. The jury recommended the death sentence for the murder conviction and a ten-year sentence for the attempted theft charge, which the court subsequently imposed.

While the petitioner was pursuing his appeal through the Georgia Supreme Court an independent civil action was brought in Federal Court challenging the master jury lists used in Putnam County, Georgia. Coincidentally, the attorney representing the plaintiff in the civil suit was one of Amadeo's attorneys. The suit was based on new information recently discovered concerning the make up of the jury array used in criminal trials.

### CASE HISTORY

In the case of *Bailey v. Vining*, Civ. Action No. 76-199 MAC (MD Ga., Aug. 17, 1978) a challenge was made to the at-large voting procedures in Putnam County. While researching plaintiff's case his attorney, reviewed the master jury lists for a period of 20-30 years and uncovered a handwritten memorandum from the District Attorney to the Jury Commissioner. In the memorandum, there was a heading listed as "Result," the sheet listed figures for the number of black people and women to be placed on the master jury lists that would result in their underrepresentation on grand and traverse juries by a range of 5 to 11%. The district court concluded, in *Bailey*, that the memorandum was intentionally designed to under represent these two groups and ordered that the master lists could not be used for any further purpose until the discrimination had been corrected to be in compliance with the Constitution.

In petitioner's direct appeal to the Georgia Supreme Court he relied on the district court's opinion in *Bailey* and raised for the first time a challenge to the composition of the Putnam County juries that had indicted, convicted and sentenced him. Petitioner's attorney's filed a supplemental brief which solely addressed the jury composition issue and further stated Amadeo had not waived this challenge at the trial level because the information was not previously discoverable. The Georgia Supreme Court affirmed petitioner's convictions and sentences rejecting his challenge to the jury on the ground that it had been waived by not raising the challenge earlier. *Amadeo v. State*, 243 Ga. 627, 255 S.E.2d 718, cert. denied, 444 U.S. 974, (1979). Petitioner sought habeas relief through the state courts without success and was twice denied certiorari by the U. S. Supreme Court.

After exhausting state remedies, petitioner sought a writ of habeas corpus in Federal District Court. The habeas petition was heard by the same judge who had previously decided the *Bailey* case. The court held that the petitioner had been indicted, tried and sentenced by an unconstitutionally composed jury. The court went on to explain that since the Georgia Supreme Court had determined that petitioner had waived his challenge as a matter of state law, petitioner's only forum for relief would be through the federal habeas petition but he must establish cause for not raising the issue at trial and that there was prejudice resulting from the faulty master jury lists. After reviewing the facts and determining that petitioner's attorney filed his petition as soon as the information was discovered and concluding that to overlook the intentional discrimination would result in a miscarriage of justice, the district court found sufficient cause and prejudice to excuse the procedural default and granted the writ of habeas corpus.

The State of Georgia appealed to the Court of Appeals for the Eleventh Circuit which remanded the case for an evidentiary hearing. *Amadeo v. Kemp*, 773 F.2d 1141 (11th Cir. 1985). The district court judge reaffirmed his earlier conclusion and noted that the District Attorney had made no attempt to deal honestly with petitioner's lawyers regarding the jury lists and it was unreasonable for petitioner's attorney to challenge the list at the proper time during trial. Again, the Eleventh Circuit reversed. *Amadeo v. Kemp*, 816 F.2d 1502 (11th Cir. 1987). The court stated that the jury master list information was readily available to petitioner since these lists are a matter of public record. The court held that petitioner had not made conclusive argument to challenge the Georgia procedural law and therefore entitled to no relief from the federal court. The petitioner appealed and the U.S. Supreme Court granted certiorari, 108 S. Ct. 257 (1987).

### HOLDING

The High Court reviewed the standard of "cause and prejudice" adopted in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The *Sykes* Court, however, did not elaborate upon the actual requirements, rather it left the issue open to interpretation in further proceedings. The Court held in *Reed v. Ross*, 468 U.S. 1 (1984), that "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." In a later decision the Court went on to state that "the existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with State's procedural rule." *Murray v. Carrier*, 477 U.S. 478 (1986). The district court concluded there was a factual basis for the petitioner to establish cause for his procedural default. The District Attorney's memorandum had not been reasonably

discoverable by defense counsel and only through further investigation was the information eventually obtained. The memorandum had been concealed by the Putnam County officials. The burden was on petitioner to prove it was this external intervening act of concealment by the Putnam County officials that had "caused" petitioner's failure to raise this objection at trial, that it was not a tactical decision. The court of appeals may not reverse district court's conclusion of the evidence if it is plausible in the light of the record viewed in its entirety, even though it may be convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564 (1985). There was sufficient evidence in the record, considered in its entirety, to support the district court's findings. The court of appeals erred by holding that petitioner's jury challenge was procedurally barred from federal habeas review. The Supreme Court held that the decision of the court of appeals be reversed and the case remanded for proceedings consistent with the opinion.

## APPLICATION TO VIRGINIA

The standard applied here in *Amadeo* makes it clear that the petitioner must prove: 1) the information had been "reasonably unknown" and 2) some "objective factor" external from the petitioner "caused" the jury challenge not to be raised at trial. State procedural rules will be upheld unless the attorney can prove this information was not available at trial. All issues available at trial must be raised and preserved for appeal.

It is critically important in a capital defense for the attorney to check the composition of the jury array before the trial. If there is a question about the legality of the jury master list and the attorney fails to identify and preserve the issue for appeal, it will probably be lost through procedural default. For additional information regarding the key issues in jury selection see the article in this edition of the *Digest*, written by Professor William Geimer, *Capital Jury Selection in Virginia*, at page 24. (Elizabeth P. Murtagh)

## SATTERWHITE v. TEXAS

486 U.S. \_\_\_\_, 108 S.Ct. 1792, 100 L.Ed.2d. 284 (1988)

### FACTS

Petitioner was charged with the capital crime of murdering Mary Francis Davis during a robbery, but before he was represented by counsel, he was subjected to a court-ordered examination by a psychologist to determine his competency to stand trial, sanity at the time of the offense, and future dangerousness. Petitioner was not served with either a copy of the State's motion for the examination or the court's order. Petitioner was later indicted, counsel was appointed to represent him and he was arraigned.

The District Attorney, without serving a copy of his motion on defense counsel, requested a second psychiatric evaluation of petitioner as to the same matters. Without determining whether defense counsel had been notified of the State's motion, the trial court granted the motion and ordered an examination by the same psychologist and a specified psychiatrist.

After petitioner was tried by a jury and convicted of capital murder, a separate sentencing procedure was conducted in accordance with Texas law before the same jury. Another psychiatrist, Dr. Grigson, (whose letter had appeared in the court file sometime during trial), appeared as a witness for the State at the sentencing hearing and testified that, pursuant to court order, he had examined petitioner and concluded that petitioner was suffering from a severe antisocial personality disorder, is extremely dangerous and will commit future acts of violence. The petitioner was sentenced to death.

On petitioner's appeal of his death sentence, the Texas Court of Criminal Appeals held that the admission of Dr. Grigson's testimony violated his Sixth Amendment right, recognized in *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), (a defendant formally charged with a capital crime has the right to consult with counsel before sub-

mitting to a psychiatric examination designed to determine future dangerousness). However, the court concluded that the constitutional violation was subject to harmless error analysis, and that the error was harmless in this case. The U.S. Supreme Court granted certiorari.

### HOLDING

Whether harmless error analysis applies to violations of the Sixth Amendment right set out in *Estelle v. Smith*.

The Court held that the harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith*. The placement of the State's motions and the court's ex parte orders for the psychiatric testimony in the court file did not satisfy the requirement of notice to the defense counsel that such psychiatric evaluation of his client's future dangerousness would take place. Consequently, the Court concluded that the use of Dr. Grigson's testimony at the capital sentencing proceeding on the issue of future dangerousness violated the Sixth Amendment.

The Court reasoned that although it has generally held that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless and the verdict may stand, "some constitutional violations by their very nature cast so much doubt on the fairness of the trial process that, as a matter of law, they can never be considered harmless. Sixth Amendment violations that pervade the entire proceeding fall within this category." 108 S.Ct. at 1797. The Court cited many cases including *Holloway*