the Jasuta / Schulman report

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TIBA's Case of the Week

Supreme Court of the United States

Case Name: ***Brenda Evers Andrew v. Tamika White (Warden)***

- **NATURE OF CASE**: Drug Possession
- **DATE OF OPINION**: January 21, 2025 **OPINION**: *Per Curiam* (6-1-2)
- **DISPOSITION**: Vacated & Remanded
- **TRIAL COURT**: Tenth Circuit Court of Appeals

(**Background Facts**): In November of 2001, Rob Andrew was fatally shot while in his garage. Brenda Andrew, who herself had been shot in the arm during the incident, told the police that two armed assailants had committed the shooting. Andrew further explained that she had separated from her husband and was now dating James Pavatt, but that she and Rob continued to see each other as they had two children together. Pavatt and Andrew traveled to Mexico together after Rob Andrew's death and soon became suspects in his murder. Eventually, Pavatt confessed to committing the shooting with a friend. Pavatt denied that Andrew had been involved. The State thereafter charged both Pavatt and Andrew with capital murder, and a jury convicted Pavatt and sentenced him to death.

Ed Note (**Procedural History**): At Applicant's trial, the prosecution sought to prove that Applicant had conspired with Pavatt, an insurance agent, to murder her husband for the proceeds of his life insurance policy. Among other things, the prosecution elicited testimony about Applicant's sexual partners reaching back two decades; about the outfits she wore to dinner or during grocery runs; about the underwear she packed for vacation; and about how often she had sex in her car. At least two of the prosecution's guilt-phase witnesses took the stand exclusively to testify about Applicant's provocative clothing, and others were asked to comment on whether a good mother would dress or behave the way Applicant had. In its closing statement, the prosecution again invoked these themes, including by displaying Applicant's "thong underwear" to the jury, by reminding the jury of Applicant's alleged affairs during college, and by emphasizing that Applicant "had sex on [her husband] over and over and over" while "keeping a boyfriend on the side." At both the guilt and sentencing phases, prosecutors contrasted Applicant with the deceased, whom they asserted had been "committed to God." They suggested nothing could mitigate murder of Rob Andrew because he just "wanted to love God." The Oklahoma Court of Criminal Appeals (OCCA) held that admission of evidence about Andrew's extramarital affairs had been proper

because it showed that "[h]er co-defendant was just the last in a long line of men that she seduced." The OCCA "struggl[ed]," however, "to find any relevance . . . other than to show [Andrew's] character" for the remaining challenged evidence. By now, the State "agree[d] that most of this evidence was irrelevant to any issue in this case." The OCCA nonetheless denied relief on the ground that the trial court's errors had been harmless.

[§§ **209 Trial Courts / Trial Proceedings - Fair Trial**]: In federal court, Applicant reiterated her claim that the admission of this evidence rendered the guilt and penalty phases of her trial fundamentally unfair, in violation of due process. A divided Tenth Circuit affirmed because, it held, Applicant had failed to cite "clearly established federal law governing her claim." The majority acknowledged that Applicant had cited ***Payne v. Tennessee***, 501 U. S. 808 (1991), in which this Court said that the Due Process Clause "provides a mechanism for relief " when the introduction of unduly prejudicial evidence "renders [a] trial fundamentally unfair." According to the majority of the Court of Appeals, however, that had been a "pronouncement," not a "holding." It therefore concluded Applicant had failed to identify "clearly established federal law governing her claim," as required under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). As a result, the majority declined to consider whether the OCCA unreasonably applied Payne, i.e., whether a fairminded jurist could hold that the admission of irrelevant evidence about Applicant's demeanor as a woman was not so prejudicial as to deprive her of a fundamentally fair trial. ***Andrew v. White***, 62 F. 4th 1299 (10th Cir. 2023). In dissent, Judge Bacharach condemned the State's focus "from start to finish on Ms. Andrew's sex life," a move he argued "portrayed Ms. Andrew as a scarlet woman, a modern Jezebel, sparking distrust based on her loose morals . . . plucking away any realistic chance that the jury would seriously consider her version of events." Judge Bacharach, therefore, would have held that the combination of evidentiary errors "deprived Ms. Andrew of a fundamentally fair trial."

Holding: A federal court may grant *habeas* relief as to a claim adjudicated on the merits in state court only if the state court relied on an unreasonable determination of the facts or unreasonably applied "clearly established Federal law, as determined by" this Court. See 28 USC §§2254(d)(1)–(2). To show that a state court unreasonably applied clearly established federal law, a petitioner must show that the court unreasonably applied "'the holdings, as opposed to the dicta, of this Court's decisions.'" ***White v. Woodall***, 572 U. S. 415 (2014)[quoting ***Howes v. Fields***, 565 U. S. 499 (2012)]. An unreasonable application, in turn, is one with which no fairminded jurist would agree. ***Harrington v. Richter***, 562 U. S. 86, 101 (2011). *** In ***Payne***, this Court considered whether to overrule a set of prior cases that had categorically barred the introduction of victim impact evidence during the sentencing phases of a capital trial. The Court noted that, in many circumstances, "victim impact evidence serves entirely legitimate purposes," . . . even though in others it could be prejudicial. It then concluded that a categorical bar was not necessary to protect against the risk of prejudicial testimony because "the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief " against the introduction of evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." *** To the extent that the Court of Appeals thought itself constrained by AEDPA to limit Payne to its facts, it was mistaken. General

legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court. *** Specifically, the question now is whether a fair minded jurist reviewing this record could disagree with Andrew that the trial court's mistaken admission of irrelevant evidence was so "unduly prejudicial" as to render her trial "fundamentally unfair." *** The ultimate question is whether a fair minded jurist could disagree that the evidence "so infected the trial with unfairness"as to render the resulting conviction or sentence "a denial of due process." *** At the time of the OCCA's decision, clearly established law provided that the Due Process Clause forbids the introduction of evidence so unduly prejudicial as to render a criminal trial fundamentally unfair.

Concurring / Dissenting Opinions: **Justice Samuel Alito** concurred in the judgment (P.11) "*because our case law establishes that a defendant's due-process rights can be violated when the properly admitted evidence at trial is overwhelmed by a flood of irrelevant and highly prejudicial evidence that renders the trial fundamentally unfair*." **Justice Clarence Thomas** dissented and was joined by **Justice Neil Gorsuch** (P. 12). He argued that, while the majority faulted the Tenth Circuit for failing to distill a "general legal principle" about fairness from ***Payne***'s one sentence due process caveat. "*In the process, the Court does not once mention, much less distinguish, our many precedents admonishing lower courts not to define clearly established law too abstractly*." He further argued that, "*Defining clearly established law at an overly high level of generality makes it virtually impossible to find an unreasonable application warranting relief*." He concluded with the assertion that the Court was wrong to find a clearly established rule of law.

Sidebars

(**Troy McKinney**) On the technical side, the Court made it clear that its *Payne* decision was a "holding" and not just a "pronouncement" (akin to dicta). On remand, the analysis will focus on whether "the OCCA unreasonably applied ***Payne***, i.e., whether a fair minded jurist could hold that the admission of irrelevant evidence about Andrew's demeanor as a woman was not so prejudicial as to deprive her of a fundamentally fair trial." It is a heavy burden, but one that might be met here given the closeness of the OCCA and Tenth Circuit rulings. In other words, this is an extreme facts case where the State has already conceded that much of the character evidence it sponsored was not even relevant. *** Most significantly, the Court continued its trend to expand AEDPA (and qualified immunity) analysis not just to the facts of any given prior decision, but to the legal holdings of its decisions. "General legal principles can constitute clearly established law for purposes of AEDPA so long as they are holdings of this Court." "Although this Court has not previously relied on ***Payne*** to invalidate a conviction for improperly admitted prejudicial evidence, moreover, 'certain principles are fundamental enough that when new factual permutations arise, the necessity to apply the earlier rule will be beyond doubt.'" *** Outside of the legal issues, the dissent is not much more than a factual road-map for the Tenth Circuit (or maybe the District

Court) to ultimately deny relief. It is yet to be seen whether the six SCOTUS justices in the majority think that this case falls within the scope of ***Payne*** and fundamental fairness in trials. Time will tell. *** Whatever else is true, this decision requires Appellate lawyers (especially in capital cases) to raise the fundamental fairness due process issue on direct appeal lest it be procedurally defaulted and never see its way to federal *habeas*.

(**John G. Jasuta**) Color me stupid but I thought ***Payne*** was written in English and that the wording was pretty clear. Writing that the Due Process Clause provides a remedy when evidence is so unduly prejudicial that it denied a fair trial seems to me a statement of law and, given its context, it certainly isn't *dictum*.

(**David A. Schulman**) As I understand Justice Thomas's dissent, his primary complaint is that, to the extent that any statements in ***Payne*** which would support the Court's decision here were mere dicta, not a holding. To prove this, he sites to ***Estelle v. McGuire***, 502 U. S. 62 (1991). First, I see nothing in ***McGuire*** which would bolster his argument. Second, when Roy Greenwood, Lee Haidusek, and I appeared at the Supreme Court for ***Texas v. Cobb***, 532 U.S. 162 (2001), a case Sixth Amendment case which Justice Thomas clearly never understood, Chief Justice Rehnquist asked Roy about the application of a Fifth Amendment case. When Roy pointed out that we were before the Court in a Sixth Amendment case, beginning with the statement that, "We're the Supreme Court, CJ Rehnquist pointed out to Roy that the Court says a lot of things and every statement would be binding on the courts below. That notwithstanding, six members of the Court are firmly behind the statement "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." There is nothing unclear about that.