Jeff Deskovic

United States Supreme Court Justice Sonia Sotomayor Part 1

Background

As I have written numerous times prior to her appointment to the United States Supreme Court, Judge Sonia Sotomayor's nomination represents a threat to justice and to all of our rights. I base my assessment on a variety of factors:

Firstly, (and very personally) Sotomayor condemned me to a life sentence. I had filed a *Habeas Corpus* Petition in Federal District Court arguing actual innocence, as demonstrated by a **negative DNA Test**. Because my attorney was given inaccurate information by the court clerk regarding the filing procedure, resulting in my petition arriving 4 days late, that petition was dismissed, as urged by then-Westchester District Attorney Jeanine Pirro's Office, despite my innocence issue.

I was then stuck trying to get the procedural ruling overturned. I appealed that ruling to Sotomayor's court, the United States Second Circuit Court of Appeals, arguing three issues: a) that upholding the ruling would result in a miscarriage of justice continuing-which tied back to my innocence; b) that overturning the ruling would open the door to more sophisticated DNA testing; and, c) that the error was caused by the court clerk, not negligence on either my attorney's or my own part.

Sotomayor twice signed off on upholding the ruling. In one opinion, she wrote "*The alleged reliance of Deskovic's attorney on verbal misinformation from the court clerk constitutes excusable neglect that does not rise to the level of an extraordinary circumstance. Similarly, we are unpersuaded that equitable tolling is appropriate based upon Deskovic's contentions that the four day delay did not prejudice respondent, petitioner himself did not create the delay, his situation is unique, and his petition has substantive merit.*"

In the case of another individual, a defendant well-known to ***Guardian*** readers, Paul Cote, Sotomayor was one of three judges sitting on a Second Circuit panel who reinstated Cote's wrongful conviction which had been overturned by Federal District Judge Charles Brieant, as being against the weight of evidence, which indicated that a fellow Correction Officer, John Mark Reimer had, in fact, caused the fatal injuries that Cote had been convicted of delivering to a violent inmate.

There were also several cases where, despite her acknowledging that multiple errors had occurred, including prosecutorial misconduct, she nonetheless consistently found that every error was "harmless".

According to the ***Mother Jones*** blog, "*Sen. Schumer, bragging about Sotomayor and her confirmability, released his Office's own study of Sotomayor's 848 decisions in federal asylum cases, which included people seeking refuge from alleged violations of the Convention on Torture. Sotomayor ruled in favor of asylum-seekers just 17 percent of the time. One defense attorney labeled her a 'dead bang loser for the defense.' John Siffert, an attorney who used to teach appellate advocacy classes with her stated that she 'tends to see relatively few grounds to overturn criminal convictions.'*

Criminal Justice Legal Foundation agreed, and on its blog praised Sotomayor on these very grounds: 'She has resolved the overwhelming majority of her cases without reaching the merits of a defendant's claim. Significantly, she frequently concludes that trial defects resulted in harmless rather than structural error. Her restrained manner is most evident in her habeas corpus *decisions, in which she strictly adheres to the procedural requirements of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), often dismissing habeas petitions as unexhausted or time-barred under AEDPA, even when faced with potentially credible—and, in one instance, ultimately proven—claims of actual innocence.*"

Concerned about the implications of her confirmation with regard to wrongful convictions, justice, and all of our rights, I unsuccessfully sought to testify at her confirmation hearing in Washington. In addition, the national media, with the exception of ***The New York Times***, ***Huffington Post***, and a short video by the ***Associated Press***, all blacked out the story.

I am very sad to say that my fears have already began to be realized with the recent United States Supreme Court case, Wood v. Allen, whose opinion she authored, which signed off on the execution of a borderline retarded man whose inexperienced attorney did not even present evidence of his mental deficiencies during the penalty phase. ■

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United States Supreme Court Justice Sonia Sotomayor Part 2

Wood v. Allan

Holly Wood was convicted in Alabama in 1993 of breaking into the home of his ex-girlfriend and shooting her in the head and face as she lay in her bed. He was charged with capital murder during a first-degree burglary.

The principle issue upon appeal involved whether or not the defendant received ineffective assistance of counsel during the penalty phase based upon the fact his attorney did not present evidence before the sentencing jury that he had scored **below 70 on a preliminary IQ test** and failure to investigate and present evidence of his mental deficiencies, or whether the attorney's action could be considered strategy.

The sentencing jury recommended death by a 10-2 vote. The U.S. Supreme Court, in *Atkins v. Virginia*, held that executing retarded persons was banned under the Constitution.

Wood was appointed two experienced lawyers, who placed a third attorney whose name was Trotter, in charge of the penalty phase. Trotter had only been practicing law for five months. Trotter testified that he had come across Wood's intellectual functioning in the mental health expert's report but did not recall considering whether to pursue that issue. Trotter further testified that he had unsuccessfully attempted to subpoena Wood's school records and that he did not recall speaking to any of Wood's teachers.

He had also written to an attorney at the Southern Poverty Law Center explaining that he was "stressed out over this case and [didn't] have anyone with whom to discuss the case, including the other two attorneys.'" Although Trotter did not present the evidence in front of the sentencing jury, he did place it in front of the sentencing judge.

When Wood filed a Writ of *Habeas Corpus*, the federal court ruled in his favor: "Nothing in the record even remotely supports a finding that counsel made a strategic decision not to let the jury at the penalty stage know about Wood's mental condition." That decision was reversed by the 11th Circuit, despite the dissent arguing, "The weight of the evidence in the record demonstrates that Trotter, an inexperienced and overwhelmed attorney, unassisted by senior counsel, realized too late—only in time to present it to the sentencing judge, not to the penalty jury—what any reasonably prepared attorney would have known: that evidence of Wood's mental impairments could have served as mitigating evidence and deserved investigation so that it could properly be presented before sentencing." The dissent also noted that the information would likely have altered the outcome, "Because the jury could have concluded that Wood was less culpable as a result of his diminished abilities."

Sotomayor's opinion, which was joined by six other "Justices", was that, "The state court's conclusion that Wood's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts." Turning to the evidence that Wood's attorney points out of the non-strategic nature of the decision, she writes, "speaks not to whether counsel made a strategic decision, but rather to whether counsel's judgment was reasonable—a question we do not reach. As for any evidence that may plausibly be read as inconsistent with the finding that counsel made a strategic decision, we conclude that it does not suffice to demonstrate that the finding was unreasonable."

Justices Stevens' and Kennedy's dissent stated "On the contrary, the only reasonable factual conclusion I can draw from this record is that counsel's decision to do so was the result of inattention and neglect." The dissent also noted that "Wood's former special education teacher testified during post conviction review that Wood was classified as 'educable mentally retarded' by the local school system. In short, Wood has the type of significant mental deficits that we recognize as 'inherently mitigating,' and that he was reading at a 3rd grade level."

Commentary

This ruling is outrageous. I believe that it is abundantly clear to any objective observer that there is no way, despite Sotomayor and six of her colleagues contrary view, that the attorney's omission can be considered "strategy". There was no benefit to be gained by not presenting the evidence. I agree with Justice Kennedy and Stevens. Given the closeness of the death recommendation vote -10 -2, it is likely that the information would have changed at least one juror's mind. The evidence's significance was no minor thing: as Chris Cassidy wrote on *www.Criminaljustice.change.org*, "In other words, Wood likely was developmentally disabled."

Other angles which indicate it was not strategy: Trotter's presenting the evidence in front of the judge was a tacit admission that it was important. Furthermore, he could not recall making a decision not to pursue it. Therefore, there was no thought process, weighing, or line of reasoning that he went down. The absence of those things ipso-facto indicate that the decision was not strategic.

The Court saying that Wood's evidence speaks to whether the decision is reasonable rather than strategic, and that they do not reach this question, is just another example of Sotomayor's prior record of liking to resolve issues on procedural rather than substantive grounds, which from where I stand simply is not justice.

It seems like anything she can possibly do not to rule in favor of a defendant, she will do. That however, is not the role of a judge, who is supposed to be neutral and whose rulings are supposed to be directed by the facts, laws, and justice. We are now stuck with her shameful tradition on the highest court in the land. That six other "Justices" agreed with her is flabbergasting.

I don't know how Sotomayor and the other six judges can look at themselves in the mirror, knowing that they just sent a borderline retarded man to his death, barring unlikely intervention by Alabama Governor Bob Riley. Riley, it will be recalled, signed off on the execution of Darryl Grayson without allowing him to receive DNA testing despite the existing previously untested semen.

The more experienced attorneys' placing Trotter in charge of the penalty phase, which was a literal life and death matter, was extremely irresponsible, and an abdication of their responsibility.

It is a sad, sad day, when the highest court in America signs off on the death sentence of a developmentally disabled man. What would be lost to give the man a new sentencing hearing where important evidence of retardation could be considered? Money? I guess a man's life is not worth the money a hearing would cost. ■