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SATTERWHITE v. TEXAS 486 U.S. -, 108 S.Ct. 1792, 100 L.Ed.2d. 284 (1988)

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 it's 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 submitting 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*

v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 17 C.Ed.2d 705 (1967); and *White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963) to support this proposition.

In this case the Court stressed that the effect of the Sixth Amendment violation is limited to the admission into evidence of Dr. Grigson's testimony at the sentencing hearing. Consequently, the error did not pervade the entire proceeding. Nevertheless, the erroneous admission of the psychiatric testimony might have affected the capital sentencing jury and accordingly, the court held that the *Chapman* harmless error rule applies to the admission of psychiatric testimony in violation of the Sixth Amendment right set out in *Estelle v. Smith*. The Court, citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967) stated that the question to be addressed is whether the State has proved beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Here the Court found that Dr. Grigson's testimony "stands out both because of his qualifications as a medical doctor specializing in psychiatry and the powerful content of his message . . . he told the jury that Satterwhite was beyond the reach of psychiatric rehabilitation."108 S.Ct. at 1799. Accordingly, the Court found the error not to be harmless beyond a reasonable doubt and reversed the judgment of the Texas court of Criminal Appeals insofar as it affirmed Satterwhite's death sentence and remanded the case for further proceedings.

APPLICATION TO VIRGINIA

In Virginia as in Texas, the finding of future dangerousness can be critical to the imposition of the death sentence. §19.2-264.2 of the Virginia Code enumerates the conditions for the imposition of the death sentence in language very similar to that cited by the court in *Satterwhite* at 1798. The Virginia code states; "In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall . . . find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . ." Va. Code Ann., §19.2-264.2 (1983).

The Commonwealth must comply with the Sixth Amendment requirement set out in *Estelle v. Smith,* that defense counsel be given advance notice of a psychiatric examination encompassing the issue of future dangerousness. Under the Court's application of the *Chapman* harmless error analysis, failure to comply with the notice requirement, coupled with a failure on the part of the State to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained, may result in reversal. It is important to note, that admission of psychiatric testimony in violation of this Sixth Amendment right to notice will not result in automatic reversal (as is the case in which the violation of a Sixth Amendment right affects the entire criminal proceeding), but neither will it easily be deemed harmless error. (Cecilia A. McGlew)

MAYNARD v. CARTWRIGHT

108 S.Ct. 1853 (1988)

FACTS

On May 4, 1982 Cartwright killed his employers Mr. and Mrs. Hugh Riddle in their Oklahoma home. He shot and killed Mr. Riddle, shot and stabbed Mrs. Riddle, and slit her throat. The trial court found Cartwright guilty of first degree murder, and sentenced him to death. The jury based the sentence, in part, on the aggravating circumstances that the murder was 'especially heinous, atrocious or cruel." Okla. Stat, tit 21, § 701.12(4)(19). The Oklahoma Court of Criminal Appeals affirmed on direct appeal, *Cartwright v. State,* 695 P.2d 548, cert denied, 473 U.S. 911, 87 L.Ed.2d 661, 105 S.Ct. 3538 (1983), and affirmed denial of state habeas corpus. *Cartwright v. State,* 708 P.2d 592 (1985), cert denied, 474 U.S. 1073, 88 L.Ed. 2d 808, 106 S.Ct. 837 (1986). The United States District Court denied federal habeas corpus relief. A panel of the Court of Appeals for the Tenth Circuit affirmed, 802 F.2d 1203 (1986), but after rehearing en banc granted relief on the limited claim challenging as unconstitutionally vague the aggravating circumstance that the murder was "especially heinous, atrocious or cruel."

The Court of Appeals for the Tenth Circuit sitting en banc considered the vagueness challenge to the aggravating circumstance and ruled that the words "heinous," "atrocious" and "cruel" were unconstitutionally vague under the Eighth Amendment of the United States Constitution, because the words did not direct the jury's discretion in deciding when the death penalty is appropriate.

Petitioner Maynard sought review of the Tenth Circuit's holding that the aggravating circumstance was unconstitutionally vague in the Supreme Court of the United States.

HOLDING

The United States Supreme Court held unconstituionally vague the statutory aggravating factor that the murder be "heinous, atrocious or cruel." Title 21, §701.12(4). *Maynard v. Cartwright,* 108 S.Ct. 1853, 1860 (1988).

Godfrey and *Maynard* compared

a) *Godfrey v. Georgia* as Controlling Precedent.

The United States Supreme Court saw its decision in *Godfrey v. Georgia,* 446 U.S. 420 (1980) as controlling in this case. In *Godfrey,* the aggravating factor in the Georgia Statute required that the murder be "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity or an aggravated battery to the victim." Ga. Code § 27-2534.1