Capital Defense Journal

Volume 1 | Issue 1 Article 17

Fall 12-1-1988

FRANKLIN v. LYNAUGH 487 U.S. -, 108 S.Ct. 2320 (1988)

impartial jury. Therefore, so long as the jury which is empaneled is impartial, there is no constitutional violation. The nine peremptory challenges allowed in capital cases heard in Oklahoma are created by statute and are not required by the Constitution. The "right" to a peremptory challenge is only denied if the defendant does not receive that which is provided under the statute, the petitioner was allowed to use his nine challenges, therefore, there was no denial of this "right."

The Court held that even though the trial court did err by not excusing juror Huling for cause, this error did not impair the petitioner's right to trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments of the Federal Constitution. The decision of the Oklahoma Court of Criminal Appeals was **affirmed.**

DISSENT

Justice Marshall, joined by Justices Brennan, Blackman and Stevens, opened his dissent by stating that "A man's life is at stake. We should not be playing games." There is no debate whether or not the trial court erred when it refused to strike the juror, it was error and the dissent feels reversible error. The loss of this peremptory challenge did affect the make up of the impaneled jury. There is no way to determine that the composition of that jury would have been the same if the defendant had not used this challenge. The issue is not whether the error was "corrected" by the challenge, rather, the trial court erred and this error could have had a significant affect on the jury ultimately impaneled.

The dissent relied on, *Gray v. Mississippi,* 481 U.S. _____, _____, 107 S.Ct. 2045, 2055, 95 L.Ed.ed 622 (1987), where the Court found there was a Sixth Amendment violation requiring the resentencing of the defendant in a capital case if "the composition of the **jury panel as a whole** could possibly have been affected by the trial court's error." In *Ross* the trial court, rather than exclude a qualified juror, refused to excuse a biased juror. The defense attempted to correct the court's error by using a peremptory challenge and argued this deprivation fell within the Sixth Amendment protection outlined in *Gray.* The dissent therefore concluded that the result reached by the majority was in direct contradiction with the holding in *Gray.*

APPLICATION TO VIRGINIA

Virginia permits only four peremptory challenges, and the jury selection process virtually ensures they will all be used. A similar error, like the one committed by the trial court in *Ross,* would require a Virginia defendant to use one fourth of his peremptory strikes to correct that error. If a *Ross* situation arises, there may be insufficient peremptory strikes to remove all prospective jurors whom the defense has unsuccessfully challenged for cause. In any event, *Ross* suggests that defense counsel should; a) use all peremptory strikes, b) ask for more, c) identify one juror **who is to sit** that would have been stricken if a peremptory strike were available, d) note and preserve the objection on both federal and state grounds. (Elizabeth P. Murtagh)

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FACTS

Donald Franklin was accused of capital murder of a woman who had been abducted, stabbed, robbed, and possibly raped, and who subsequently died of her wounds in a hospital. Franklin was convicted of capital murder, *Franklin v. State,* 693 SW2d 420 (Tex. Crim. App. 1985) and sentenced to death under the Texas Special Issue sentencing scheme. The jury at Franklin's sentencing trial answered two special issues: 1) whether the jury found beyond a reasonable doubt that Franklin's conduct causing the death was committed deliberately and with the reasonable expectation that the death of the deceased or another could result, and 2) whether the jury found beyond a reasonable doubt that there was a probability that Franklin would commit criminal acts of violence that would constitute a continuing threat to society. Affirmative answers to the two issues would automatically require imposition of the death penalty. Franklin's only proffered mitigating evidence was his good conduct while in jail before and after the crime. Franklin's requested instructions, which were not given, specified that any mitigating evidence should be taken into account when answering the Special Issues.

The Court of Criminal Apeal of Texas affirmed the judgment. *Franklin v. Texas,* 693 SW2d 420 (1985, Tex. Crim.). Franklin petitioned for habeas corpus relief based on a claim that the two special issues, absent his requested instructions, unconstitutionally limited the jury's consideration of mitigating evidence. (See summary of *Mills v. Maryland, Supra* at p.). The United States District Court for the Western District of Texas denied Franklin's petition. *Franklin v. Texas,* 475 U.S. 1031 (1986). In the subsequent habeas petition, certiorari was granted in part by *Franklin v. Lynaugh,* 108 S.Ct. 221 (1987), and affirmed by this case.

HOLDING

a) Residual doubts as to the defendant's identity, responsibility for the death, and intent to cause death as mitigating circumstances.

Franklin claimed that the instructions and special issues did not provide sufficient opportunity for the jury to consider whatever residual doubts it may have had about Franklin's guilt. The three doubts delineated were 1) Franklin's identity as the murderer, 2) actual cause of death, and 3) Franklin's intent to act in a way so as to cause death.

As to the first possible doubt, the court, in a plurality opinion by Justice White, stated that a defendant has never had a constitutional right to have a jury instruction requiring that the jury revisit the question of identity. 108 S.Ct. at 2326. Even if such a right existed, the court continued, it was not violated here—the trial court made no active limitation *against* such consideration by the jury. *Id.*, at 2327. As an aside, the court noted that Franklin's "requested instructions on mitigating evidence themselves offered *no* specific direction to the jury concerning the potential consideration of 'residual doubt.'" *Id.*

As to the second and third concerns, the Court found that consideration of these was not limited either; in fact, Special Issue One, regarding deliberate conduct with the reasonable expectation that death would occur, specifically required the jury to look at intent and deliberateness of actions. *Id.*, at 2328.

In a concurring opinion, Justice O'Connor, joined by Justice Blackmun, firmly stated that residual doubt is not a mitigating circumstance. *Id.*, at 2334.

b) Independent consideration of mitigating factor of good disciplinary record during periods of incarceration.

Secondly, Franklin claimed that the instructions given did not allow the jury to give adequate weight to the mitigating evidence of Franklin's good behavior while in prison.

Once again the court found these concerns answered in the Special Issues. "In resolving the second Texas Special Issue the jury was surely free to weigh and evaluate petitioner's disciplinary record as it bore on his 'character'—that is, his 'character' as measured by his likely future behavior." *Id.*, at 2329. The court also noted that Franklin's case was phrased in terms of relevancy to future dangerousness. *Id.*

In the concurring opinion, Justice O'Connor stated that confinement of consideration to the special verdict question did not interfere with presentation or effect of mitigating evidence, because "the stipulation [regarding good conduct in jail] had no relevance to any other aspect of petitioner's character" besides future dangerousness. *Id.*, at 2333.

In dissent, however, Justice Stevens, joined by Justices Brennan and Marshall, stated that mitigating evidence concerning the defendant's good behavior while incarcerated is relevant independently of future dangerousness and that the instructions failed to afford this evidence its proper weight. *Id.*, at 2336, citing *Lockett v. Ohio*, 438 U.S. 586 (1978), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Skipper v. South Carolina*, 476 U.S. 1 (1987). In particular, the dissent noted that "[p]ast conduct often provides insights into a person's character that will evoke a merciful response to a demand for the ultimate punishment even though it may shed no light on what may happen in the future." *Id.*

The dissent also noted that it is not permissible to channel jury discretion in capital sentencing by foreclosing jury consideration of relevant mitigating evidences, including aspects of defendant's character unrelated to good conduct while incarcerated. *Id.*

c) Constitutionality of Texas sentencing scheme.

Franklin's third claim was that the jury, in violation of the Eighth Amendment, was not afforded an opportunity to give independent mitigating weight to the circumstances he presented, apart from the special issues. The court found that the claim that the jury was unconstitutionally limited by the special issues was foreclosed by *Jurek v. Texas*, "which held that Texas could constitutionally impose the death penalty if a jury returned "Yes" answers to the two Special Issues." *Id.*, at 2330.

The court added that nothing precludes the state from establishing a sentencing framework, adding that *Gregg v. Georgia*, 428 U.S. 153 (1976), requires death penalty statutes to be structured so as to prevent arbitrary and unpredictable administration of the death penalty. *Id.*, at 2331.

Franklin was executed on November 3, 1988.

APPLICATION TO VIRGINIA

Virginia's capital sentencing scheme is described in Virginia Code §§ 19.2-264.3 and 19.2-264.4. Although Virginia employs an aggravating factor of future dangerousness, unlike Texas, Virginia juries are free to fix a sentence of life imprisonment even if one or both of the statutory aggravating factors are found to exist. Juries, of course, should be reminded of this.

Also, it is not the usual practice in Virginia to inform juries of statutory mitigating factors. It is, therefore, important to stress that the jury is free to consider any mitigating circumstance in the final sentencing procedure, and that the jury be informed of the thrust of *Lockett, Eddings,* and *Skipper.*

The dissent noted in particular the "rigorously enforced" rule of mitigating evidence in capital sentencing:

> *A sentencing jury must be given the authority to reject the imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense proffered by the defendant in support of a sentence less than death. That rule does not merely require that the jury be allowed to hear any such evidence the defendant desires to introduce, Skipper v South Carolina,* 476 U.S. at 4 (1978), it also requires that the jury be allowed to give "independent mitigating weight" to the evidence. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Eddings v. Oklahoma,* 455 U.S. 104, 112-113 (1982). *Id.*, at 2336.

If this information is clearly presented in the jury instructions, confusion as to the scope and weight of mitigating factors may not occur. (Helen Bishop)