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Palmer v. Clarke

293 F. Supp. 2d 1011 (D. Neb. 2003)

I. Facts

Charles Jess Palmer (“Palmer”) was tried, convicted, and sentenced to death three times for the 1979 capital felony murder of Eugene Zimmerman.¹ Palmer’s first two convictions were reversed on direct appeal to the Supreme Court of Nebraska.² In 1984, a jury tried and convicted Palmer for the third time, and a three-judge panel sentenced him to death.³ In accordance with section 29-2522(3) of the Nebraska Revised Statutes, the panel conducted a proportionality review in which it compared Palmer’s case to all other murder cases since 1973.⁴ The panel concluded that Palmer’s death sentence was proportionate to the sentences in the other murder cases.⁵ On direct appeal, the Supreme Court of Nebraska also performed a proportionality review.⁶ Unlike the sentencing panel’s review, the appellate proportionality review compared Palmer’s case only to other death penalty cases.⁷ The court held that Palmer’s sentence was proportional and affirmed his conviction and death sentence.⁸

On January 28, 2000, Palmer filed a federal habeas petition in the United States District Court for the District of Nebraska.⁹ Palmer argued that the

1. *Palmer v. Clarke*, 293 F. Supp. 2d 1011, 1017–18 (D. Neb. 2003).

2. *Id.* at 1020; *see* *State v. Palmer*, 313 N.W.2d 648, 654–55 (Neb. 1981) (reversing Palmer’s first conviction due to hypnotically-induced testimony); *State v. Palmer*, 338 N.W.2d 281, 282 (Neb. 1983) (reversing Palmer’s second conviction due to a violation of spousal privilege).

3. *Palmer*, 293 F. Supp. at 1022, 1025.

4. *Id.* at 1025; *see* NEB. REV. STAT. § 29-2522(3) (2003) (stating that the sentencing panel shall consider “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant”).

5. *Palmer*, 293 F. Supp. 2d at 1025.

6. *Id.* at 1026; *see* NEB. REV. STAT. § 29-2521.03 (1995) (requiring the Supreme Court of Nebraska to “determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances,” and forbidding the imposition of any sentence “greater than those imposed in other cases with the same or similar circumstances”); *State v. Palmer*, 399 N.W.2d 706, 737–38 (Neb. 1986) (discussing the court’s proportionality review).

7. *Palmer*, 293 F. Supp. 2d at 1026. At the time the Supreme Court of Nebraska conducted its proportionality review, then-Chief Justice Krivosha vigorously dissented to the majority’s method of comparison. *Palmer*, 399 N.W.2d at 738–55 (Neb. 1986) (Krivosha, C.J., concurring in part and dissenting in part).

8. *Palmer*, 293 F. Supp. 2d at 1026.

9. *Id.* at 1028; *see* 28 U.S.C. § 2254 (2000) (setting forth the requirements for seeking federal habeas relief; part of AEDPA). In his federal habeas petition, Palmer asserted numerous other

improper proportionality review performed by the Supreme Court of Nebraska violated his Eighth and Fourteenth Amendment rights.¹⁰ The district court considered whether the appellate proportionality paradigm comparing death sentences only to other death sentences was illogical and whether Palmer's due process rights were violated.¹¹

II. Holding

The district court held that the Supreme Court of Nebraska's reformulated proportionality review violated both state and federal law by effectively resentencing Palmer and denying him his right to meaningful appellate review.¹² The court found that the appellate method of comparison violated Palmer's due process rights by rendering the proportionality review meaningless.¹³ Thus, the district court held that the Supreme Court of Nebraska's proportionality review comparing death sentences only to other death sentences was unconstitutional and commuted Palmer's death sentence to life in prison.¹⁴

III. Analysis

A. Proper Comparison

Nebraska law entitles defendants who receive a death sentence to a proportionality review at the sentencing level and a mandatory review at the state supreme court level.¹⁵ Palmer claimed that his due process and Eighth Amendment rights were violated "because the Supreme Court of Nebraska failed to conduct a proper proportionality review."¹⁶ The district court explained that "[w]hile the federal Constitution does not mandate a proportionality review, once one is in place it must be conducted consistently with the Due Process Clause."¹⁷ In *Kilgore v Bowersox*,¹⁸ the Eighth Circuit stated that due process is satisfied when

constitutional claims that will not be discussed in this case note. *Palmer*, 293 F. Supp. 2d at 1032-39.

10. *Palmer*, 293 F. Supp. 2d at 1040; see U.S. CONST. amend. VIII (prohibiting the infliction of "cruel and unusual punishments"); U.S. CONST. amend. XIV (prohibiting states from "depriv[ing] any person of life, liberty, or property, without due process of law").

11. *Palmer*, 293 F. Supp. 2d at 1041-43.

12. *Id.* at 1041-42.

13. *Id.* at 1043.

14. *Id.* at 1042-44, 1067.

15. *Id.* at 1040; see NEB. REV. STAT. § 29-2522(3) (2003) (requiring the sentencing panel to perform a proportionality review); NEB. REV. STAT. § 29-2521.03 (1995) (mandating that the Supreme Court of Nebraska perform a proportionality review on direct appeal).

16. *Palmer*, 293 F. Supp. 2d at 1040.

17. *Id.* (citing *Kilgore v. Bowersox*, 124 F.3d 985, 996 (8th Cir. 1997)).

18. 124 F.3d 985 (8th Cir. 1997).

a state's proportionality review compares a defendant's case to *similar* cases.¹⁹ The comparison required by Nebraska law is supposed to entail an examination of " 'all criminal homicides . . . with the same or similar circumstances,' " *not similar* penalties.²⁰ A proper comparison of cases with similar circumstances " 'compensate[s] for the lack of uniformity in charges which are filed' " and ensures similar results.²¹ Thus, the Supreme Court of Nebraska's comparison of Palmer's case to other death sentence cases was clearly an improper attempt to reformulate the requirements of section 29-2521.01.²² The district court held that the state supreme court's failure to compare Palmer's case to all similar homicides, rather than just those cases that resulted in a death sentence, violated Palmer's due process rights and denied him "meaningful appellate review."²³

The district court further stated that Nebraska's two-tiered proportionality review system was unconstitutional because it was "arbitrarily applied."²⁴ In *State v. Simants*²⁵ the Supreme Court of Nebraska stated that it would compare " 'each capital case under review with those previous cases in which the death penalty has or *has not* been imposed' " in order to prevent the arbitrary application of death sentences.²⁶ By comparing death sentences only to other death sentences, the Supreme Court of Nebraska denied Palmer meaningful review and thereby facilitated the arbitrary application of his death sentence.²⁷ The United States

19. *Palmer*, 293 F. Supp. 2d at 1041; *Kilgore*, 124 F.3d at 996. This comparison can be narrowly tailored such that a murder committed during a robbery is compared only to other cases involving a murder committed during a robbery. *Id.* (citing *Hall v. Luebbers*, 296 F.3d 685, 700 (8th Cir. 2002)).

20. *Id.* (alteration in original) (quoting NEB. REV. STAT. § 29-2521.01 (1995)); see *Palmer*, 399 N.W.2d at 747 (Krivosha, C.J., concurring in part and dissenting in part) (stating that Nebraska law clearly requires the state supreme court "to determine whether the imposition of the death penalty in the case on appeal is more severe than that imposed in other cases having same or similar circumstances").

21. *Palmer*, 293 F. Supp. 2d at 1041 (quoting NEB. REV. STAT. § 29-2521.01).

22. *Id.* at 1041-42.

23. *Id.* at 1042-43. The district court stated that "[h]ad a proportionality review been properly performed in Palmer's case, . . . the result would have been fifty-seven robbery/murders to compare to Palmer's crime, only six of which resulted in a sentence of death." *Id.* at 1042 (citing *Palmer*, 399 N.W.2d at 752-53 (Krivosha, C.J., concurring in part and dissenting in part)).

24. *Id.* at 1043; see *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (stating that the death penalty may "not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner").

25. 250 N.W.2d 881 (Neb. 1977).

26. *Palmer*, 293 F. Supp. 2d at 1042 (quoting *State v. Simants*, 250 N.W.2d 881, 890 (Neb. 1977)).

27. *Id.* The district court stated that "[f]inding a sentence of death 'no greater than or disproportionate to' another sentence of death is a fallacy since a death penalty cannot be 'greater than or disproportionate to' another death sentence." *Id.* (citing *State v. Lotter*, 586 N.W.2d 591, 638 (Neb. 1998) (Connolly, J., concurring)).

Supreme Court stated in *Godfrey v Georgia*²⁸ that “ ‘the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner.’ ”²⁹ The district court stressed that “[l]imiting proportionality review to death sentence cases is irrational and destroys the analytic value of proportionality review itself.”³⁰ Thus, the district court concluded that the Supreme Court of Nebraska’s irrational method of proportionality review facilitated the arbitrary application of the death penalty in Palmer’s case.³¹

B. Two-Tiered Review and Appellate Resentencing

The district court noted that the purpose of Nebraska’s two-tiered system of proportionality review is to provide true appellate *review* of the sentencing panel’s analysis.³² Instead, “the Nebraska Supreme Court acted as an independent and unreviewable sentencing panel.”³³ By conducting its proportionality analysis differently from the sentencing panel, the state supreme court denied Palmer his statutory right to a two-tiered system of review.³⁴ The district court concluded that this method of review “amount[ed] to impermissible ‘appellate resentencing’ in violation of the Due Process Clause.”³⁵ Rather than reviewing the first proportionality determination, the Supreme Court of Nebraska essentially resentenced Palmer under a newly created standard of comparison.³⁶ Therefore, the district court held that by “act[ing] as an unreviewable sentencing panel,” the state supreme court denied Palmer his due process right to meaningful appellate review.³⁷

28. 446 U.S. 420 (1980).

29. *Palmer*, 293 F. Supp. 2d at 1042 (quoting *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980)); see *Godfrey*, 446 U.S. at 427 (prohibiting the imposition of the death penalty under arbitrary sentencing procedures); see also *Furman v. Georgia*, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) (discussing the Eighth Amendment’s “impl[ie]d condemnation of the arbitrary infliction of severe punishments”).

30. *Palmer*, 293 F. Supp. 2d at 1042; see *State v. Bey*, 645 A.2d 685, 690 (N.J. 1994) (stating that for proportionality review “the relevant universe of cases consists of those that are death eligible”).

31. *Palmer*, 293 F. Supp. 2d at 1042–43.

32. *Id.* at 1043 (citing *Rust v. Hopkins*, 984 F.2d 1486, 1493 (8th Cir. 1993)).

33. *Id.*

34. *Id.*

35. *Id.* at 1043–44.

36. *Id.* at 1044.

37. *Palmer*, 293 F. Supp. 2d at 1044.

IV. *Application in Virginia*

A. *Two-Tiered Review*

Nebraska's two-tiered system requires a proportionality review to be performed by both the sentencing panel and the Supreme Court of Nebraska.³⁸ In Virginia, the first opportunity for a defendant to receive a proportionality review is by the trial judge.³⁹ Under section 19.2-264.5 of the Virginia Code, the trial judge may "upon good cause shown" commute the defendant's death sentence to life in prison.⁴⁰ A defendant can attempt to show cause by asserting that his death sentence is disproportionate to sentences received in other cases or by co-defendants in the same case.⁴¹ However, the trial court is not required to conduct a proportionality review. According to *Yarbrough v Commonwealth*,⁴² the trial court may "declin[e] to exercise its discretionary authority" to consider the proportionality of the defendant's sentence of death.⁴³

In addition to the trial judge's discretionary proportionality review, the Supreme Court of Virginia is required to perform a proportionality review in all cases in which a death sentence has been imposed.⁴⁴ Thus, depending on whether or not the trial judge performs a proportionality review, Virginia's system may be similar to Nebraska's two-tiered system. *Palmer* provides a clear example of the problem that may exist in Virginia's proportionality review process. To the extent that the trial judge may conduct a proportionality review, it may not be the same type of review performed by the Supreme Court of Virginia. No standard exists that requires the two levels of review to use the same criteria. Therefore, the Virginia system is plagued by the same flaw seen in Nebraska's two-tiered system.

38. See NEB. REV. STAT. § 29-2522(3) (2003) (requiring the sentencing panel to perform a proportionality review); NEB. REV. STAT. § 29-2521.03 (1995) (mandating that the Supreme Court of Nebraska perform a proportionality review on direct appeal).

39. See VA. CODE ANN. § 19.2-264.5 (Michie 2000) (requiring the trial court "to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just" before imposing the sentence).

40. *Id.*

41. See NEB. REV. STAT. § 29-2521.03 (requiring the Supreme Court of Nebraska to "determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances," and forbidding the imposition of any sentence "greater than those imposed in other cases with the same or similar circumstances").

42. 551 S.E.2d 306 (Va. 2001).

43. *Yarbrough v. Commonwealth*, 551 S.E.2d 306, 312 (Va. 2001).

44. See VA. CODE ANN. § 17.1-313(C)(2) (Michie 2003) (stating that the Supreme Court of Virginia shall "consider and determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

B. *Flawed Comparison Procedure*

A defendant who is found guilty of capital murder but receives a life sentence may appeal his sentence to the Court of Appeals of Virginia.⁴⁵ When a defendant receives a death sentence, the Supreme Court of Virginia automatically reviews the sentence.⁴⁶ The court is required by section 17.1-313(C)(2) of the Virginia Code to perform a proportionality review.⁴⁷ In performing its proportionality review, the supreme court "may accumulate the records of all capital felony cases tried within such period of time as the court may determine."⁴⁸ However, the Supreme Court of Virginia apparently only compiles records of capital cases that it has itself heard on appeal.⁴⁹ The only time the supreme court reviews a life sentence case is on a discretionary appeal, which is very rare.⁵⁰ Therefore, because the supreme court only compiles records of cases that it actually heard, very few life sentence cases are included in the records.

In addition, when the Court of Appeals of Virginia hears a life sentence case on appeal, the issues that are appealed are not capital sentencing issues.⁵¹ As a result, when the Supreme Court of Virginia does hear life sentence cases after they have been appealed to the court of appeals, the record is bare on sentencing issues. This lack of factual development leaves the supreme court with a record devoid of sentencing data upon which a comparison could be made.⁵² Thus, even if the Supreme Court of Virginia does consider life sentence cases, such cases will offer little guidance.

45. See VA. CODE ANN. § 17.1-406(A)(i) (Michie 2003) (giving jurisdiction to the Court of Appeals of Virginia to hear appeals from any crime except those involving a death sentence).

46. See VA. CODE ANN. § 17.1-406(B) (granting jurisdiction over all death sentence appeals to the Supreme Court of Virginia).

47. See VA. CODE ANN. § 17.1-313(C)(2) (requiring the Supreme Court of Virginia to consider and determine whether a death sentence is proportionate to similar crimes and defendants).

48. VA. CODE ANN. § 17.1-313(E).

49. For a more complete discussion of this topic, see generally Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103 (1999).

50. See VA. CODE ANN. § 17.1-406(A)(i) (giving jurisdiction to the Court of Appeals of Virginia to hear appeals from any crime except those involving a death sentence).

51. Because a capital murder conviction can only result in a death sentence or a life sentence, no grounds exist to challenge a life sentence. See VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (stating that "[w]hen the punishment of any person has been fixed at death . . . the court may set aside the sentence of death and impose a sentence of imprisonment for life").

52. In order to examine the sentence, the Supreme Court of Virginia must look back at the trial record.

C. *What Is the Correct Pool for Comparison?*

The Supreme Court of Virginia has not limited its pool of cases for proportionality comparison to cases decided under the current capital system.⁵³ If a death sentence case is compared with other similar cases decided at a different time, under different statutory or judicial guidelines, then the comparison is unreliable. For example, in *Simmons v South Carolina*⁵⁴ the United States Supreme Court stated that due process requires that the jury be instructed that life imprisonment means life without the possibility of parole when the defendant's future dangerousness is at issue.⁵⁵ Significant changes in the death penalty system, such as *Simmons*, should affect which cases are considered in a proportionality review. The Supreme Court of Virginia should not compare current death sentence cases with pre-*Simmons* cases because of the impact such a case has on the type of sentences handed down. Proportionality review that is not confined to the current capital context cannot provide a meaningful basis for comparison.

D. *Changing Standards of Proportionality Review*

Recent cases hint that the standard of proportionality review in Virginia may be changing.⁵⁶ Twenty years ago the court stated in *Peterson v Commonwealth*⁵⁷ that it conducted its proportionality review by comparing "the records in all capital murder cases reviewed by this court."⁵⁸ Yet the court's list of examined cases only included cases in which a death sentence was imposed.⁵⁹ By 1999, the Supreme Court of Virginia had begun to acknowledge that proportionality review should "include not only those capital murder cases in which the death penalty was imposed, but also those cases in which the trial court or jury imposed a life sentence."⁶⁰ However, the court neglected to consider numerous similar cases that resulted in life sentences when performing its proportionality review.⁶¹

53. See, e.g., *Yarbrough*, 551 S.E.2d at 312 (listing cases that were considered during the court's proportionality review, including *Jenkins v. Commonwealth*, 423 S.E.2d 360 (1992), which was decided prior to the United States Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994)).

54. 512 U.S. 154 (1994).

55. *Simmons*, 512 U.S. at 156.

56. See *Powell v. Commonwealth*, 590 S.E.2d 537, 563 (Va. 2004) (stating that the Supreme Court of Virginia's proportionality review included cases, such as *Keil v. Commonwealth*, 278 S.E.2d 826 (Va. 1981), which resulted in life sentences).

57. 302 S.E.2d 520 (Va. 1983).

58. *Peterson v. Commonwealth*, 302 S.E.2d 520, 528 (Va. 1983).

59. *Id.*

60. *Orbe v. Commonwealth*, 519 S.E.2d 808, 816 (Va. 1999) (citing *Whitley v. Commonwealth*, 286 S.E.2d 162, 171 (Va. 1982)).

61. See, e.g., *Horne v. Commonwealth*, 339 S.E.2d 186, 187 (Va. 1986) (affirming a life sentence for a defendant convicted of capital felony murder); *Keil v. Commonwealth*, 278 S.E.2d

Recently it appears that the Supreme Court of Virginia may be broadening the base of cases examined in its proportionality review process. In *Powell v Commonwealth*,⁶² handed down on January 16, 2004, the court's proportionality review included cases that resulted in life sentences.⁶³ However, it is still unclear whether the supreme court reviewed the trial court record or the court of appeals record. In the latter case, of course, the proportionality review would be incomplete because of the absence of any sentencing data from the appeal.⁶⁴

V. Conclusion

Palmer stands for the proposition that a proportionality review that compares death sentences only to other death sentence cases is ineffective and violates a defendant's due process rights. To ensure similar results, death sentences must be compared to *all* homicide cases, including those that resulted in a life sentence, with similar circumstances. *Palmer* also highlights the similar flaws that exist in Virginia's proportionality review system.

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826, 827 (Va. 1981) (same).

62. 590 S.E.2d 537 (Va. 2004).

63. *Powell*, 590 S.E.2d at 563 (stating that the Supreme Court of Virginia "also considered cases in which defendants received life sentences, rather than the death penalty, for capital murder during the commission of rape or attempted rape"). Unlike other cases in which the court stated that it considered life sentence cases, the court in *Powell* actually cited *Horne* and *Keil* as examples of such cases. See *Horne*, 339 S.E.2d at 186 (affirming a life sentence for a defendant convicted of capital felony murder) and *Keil*, 278 S.E.2d at 826 (same). For a more complete discussion of *Powell*, see Terrence T. Eglund, Case Note, 16 CAP.DEF.J. 591 (2004) (analyzing *Powell v. Commonwealth*, 590 S.E.2d 537 (Va. 2004)). See also *Burns v. Commonwealth*, 541 S.E.2d 872, 896 (Va. 2001) (citing *Horne* and *Keil* as examples of capital murder cases that resulted in life sentences).

64. See *supra* Part IV.B.

COURT RULES
