Capital Defense Journal

Volume 2 | Issue 1 Article 8

Fall 9-1-1989

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FACTS AND HOLDING

In a class action suit initiated by death row inmates, the U.S. Supreme Court held that states were not constitutionally required to appoint counsel to indigent death row inmates in state collateral proceedings.

The Supreme Court overturned a Fourth Circuit opinion which held that the legal assistance provided to death row inmates in Virginia, who wish to pursue state habeas corpus appeals, did not meet the Constitutional requirements of meaningful access to the courts as set forth in *Bounds v. Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977). Although *Bounds* itself only required states to furnish access to adequate law libraries or other legal aid so that all prisoners might prepare petitions for judicial relief, 430 U.S. at 828, 97 S. Ct. at 1498, the district court in *Giarratano* had found that the special "considerations" applicable to death row inmates entitled these inmates to counsel if the access requirement of *Bounds* was to be satisfied. These special considerations were that the inmates had a limited amount of time to prepare their petitions, that their cases were unusually complex, and that the shadow of impending execution would interfere with their ability to do legal work. *Giarratano v. Murray*, 847 F.2d 1118, 1120 (4th Cir. 1980). The Fourth Circuit, determining that the district court's findings were not clearly erroneous, affirmed the district court's holding that death row inmates were entitled to the continuous assistance of counsel throughout state collateral proceedings.

The Fourth Circuit also affirmed the district court's holding that *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987), which held that there was no constitutional right to counsel in state collateral proceedings, was not dispositive in this case. The reasoning for this determination was that *Finley* was not a meaningful access case, but rather held that the Sixth Amendment's right to counsel did not require a state to provide counsel in a collateral proceeding. Further, *Finley* did not address the rule enunciated in *Bounds*, and it did not involve a capital case. *Giarratano v. Murray*, 847 F.2d at 1122.

The Supreme Court rejected the holdings of the district court and the Fourth Circuit which stated that capital cases require more legal assistance at collateral proceedings than non-capital cases. The Court first reiterated that states are not constitutionally obligated to provide post-conviction relief. *United States v. MacCollum*, 426 U.S. 317, 96 S. Ct. 2086, 48 L. Ed. 2d 666 (1976). When relief is provided, however, "the fundamental fairness mandated by the Due Process Clause does not require that the state supply a lawyer as well." *Pennsylvania v. Finley*, 481 U.S. at 556-557, 107 S. Ct. at 1994-1995. Rather, the Court determined that the *Finley* holding of no right to counsel at state collateral proceedings did indeed apply to death row inmates.

The Court noted that a capital defendant receives special procedures at trial to insure that all due process rights are protected. Further, the additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case will assure "a greater degree of reliability" in the process by which the death penalty is imposed. *Murray v. Giarratano*, 109 S. Ct. 2765, 2770 (1989); *citing Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954 57 L. Ed. 2d 973 (1978). Finally, the Court stated that the "direct appeal is the primary avenue for review of a conviction of sentence, and death penalty cases are no exception." *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S. Ct. 3383, 3391, 77 L. Ed. 2d 1090, 1097 (1983). Since the rights of capital defendants have been specially looked after at both the trial level and direct appeal stages, the Court determined there was no need to provide extra protection to death row inmates at the collateral stage as well. Rather, the minimal protection afforded by *Bounds, supra*, would suffice to meet the constitutional requirement of meaningful access to the courts.

The Court also addressed the Fourth Circuit's argument that there was a tension between the holdings in *Bounds, supra*, which required that states provide prisoners meaningful access to the courts and *Finley, supra*, which held that "meaningful access" did not require the State to appoint counsel for indigent prisoners seeking postconviction relief. The Fourth Circuit had distinguished *Finley*, holding that in light of *Bounds*, the Supreme Court in *Finley* could not have been addressing death row inmates when it declared that prisoners had no constitutional right to the appointment of counsel in state collateral proceedings. The Supreme Court rejected this interpretation of *Finley* by stating that the right of meaningful access to the courts at issue in *Bounds* rests on the constitutional theories of due process and equal protection which were also considered in *Finley*. Thus, the holdings of *Bounds* and *Finley* are to be used as guidelines to the states for interpreting the type of access to the courts the constitution guarantees. The Court stated further, that the Constitutional doctrine of meaningful access must be applied uniformly in every state. Allowing *Bounds* to overrule *Finley* based on lower court findings of special "considerations" in a case would permit a different constitutional rule to apply in different states if the lower court judge hearing that claim reached different conclusions. Therefore, the Court concluded that the rule of *Pennsylvania v. Finley*, should apply no differently in capital cases than in non-capital cases.

Justice Kennedy, concurring in the judgment, conceded that collateral relief proceedings were a central part of the review process for prisoners sentenced to death. He further stated that the complexity of jurisprudence in the area of capital cases makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without counsel. However, he explained that the Supreme Court lacked the capacity to formulate appropriate rules for meaningful access to the courts and would therefore have to leave this task to the state legislatures. While stating that the procedures adopted in Virginia for providing legal assistance to inmates were not as far reaching and effective as those in other states, Justice Kennedy noted that as of this opinion, no prisoner on death row had been unable to obtain counsel for representation in a post-conviction proceeding.

ANAYLSIS

In light of Justice Kennedy's concurrence and the fact that there was only a 5-4 majority in this case, the standard for meaningful access to the courts could change in the future. Should the state legislature refuse to adopt improved measures for meaningful access to the courts and ultimately cause a prisoner on death row to be without effective assistance in a collateral proceeding, Justice Kennedy could swing the vote in favor of requiring counsel to be appointed to death row inmates in post-conviction proceedings. For now, however, attorneys should be aware that there is a statutory entitlement in Virginia which permits the appointment of counsel at state habeas corpus proceedings. Va. Code Ann. §14.1-183 (1989). The Attorney General's Office does not oppose these appointments,

Murray v. Giarratano, 109 S. Ct. at 2781, n. 25, and they are made if a *pro se* inmate can raise at least one non-frivolous claim in his/her petition. However, petitions with a chance for ultimate success usually claim ineffective assistance of counsel or denial of *Brady* materials and these claims are difficult for a *pro se* petitioner to assert without necessary investigative services.

Summary and analysis by: Catherine M. Hobart

POWELL v. TEXAS
109 S. Ct. 3146, 106 L. Ed. 2d 551 (1989)
United States Supreme Court

FACTS

(The following facts were undisputed.)

On the day of petitioner's arrest, the trial court, at the State's request ordered that a psychiatric examination be performed to determine (1) petitioner's competency to stand trial and (2) his sanity at the time of the offense. In all, petitioner was examined on six occasions by two doctors. Neither petitioner nor his counsel was notified that the examination would encompass the issue of future dangerousness; nor was petitioner informed of his right to remain silent. Finally, over petitioner's objection, both doctors testified at the sentencing hearing, their opinion based on these examinations, that petitioner "would commit future acts of violence that would constitute a continuing threat to society." 109 S. Ct. at 3148, quoting 742 S.W.2d 353, 356 (*Tex. Crim. App.* 1987) (en banc).

Defendant was convicted of capital murder and sentenced to death. Petitioner sought review asserting that evidence received during the penalty phase of his trial violated his Fifth and Sixth Amendment rights. The United States Supreme Court, 108 S.Ct. 2891, vacated the Texas court's judgment and remanded for further consideration in light of *Satterwhite v. Texas*, 486 U.S. 249, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988)(held, *inter alia*, that neither the placement of the State's motions nor the court's ex parte orders for psychiatric testimony satisfied the notice requirement to defense counsel that such evaluation of defendant's future dangerousness would occur). On remand, the Texas court reinstated its prior decision. The Court, noting that this precise question was before the Court for the second time, reversed the judgment of the Court of Criminal Appeals because that decision was inconsistent with its decisions in *Satterwhite v. Texas, supra,* and *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981).

HOLDING

The Supreme Court held that: (1) [the] defendant was deprived of his Sixth Amendment right to counsel when psychiatric examinations were performed by state experts, without notice to defendant or his attorney that the examinations would encompass [the] issue of future dangerousness, and (2) defendant's introduction of psychiatric testimony in support of defense of insanity did not waive his Sixth Amendment right to notification. 109 S.Ct at 3146.

ANALYSIS

In *Estelle v. Smith, supra,* the Court held that a capital defendant's Fifth Amendment right against compelled self-incrimination precludes the State from subjecting him to a psychiatric examination concerning future dangerousness without first informing the defendant that he has a right to remain silent and that anything he says can be used against him. *Powell, citing Estelle*, 451 U.S. at 461-469. In *Estelle*, the Court unanimously held that, once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes examination without notification that "the psychiatric examination (will) encompass the issue of their client's future dangerousness." *Id.* at 471.

Despite the close similarity between the facts of this case and those in *Estelle*, the Court of Criminal Appeals alternatively held: (1) that petitioner's Fifth and Sixth Amendment rights were not violated, 742 S.W.2d at 357-359, and (2) even if they were, that the error was harmless, *id.*, at 359-360. After granting a writ of certiorari, the Supreme Court vacated the lower court's judgment and remanded the case for further consideration in light of *Satterwhite*. The Court of Criminal Appeals simply withdrew the portion which relied on harmless-error analysis and retained the remaining holdings, over one dissenting opinion. The court reasoned that petitioner not only waived his right to object to the State's use of psychiatric testimony to rebut his defense, but also waived his right to its use to satisfy the State's burden of proving future dangerousness. *Id.* at 358-359. Finding faulty Fifth and Sixth Amendment analysis and no support for this conclusion, the Supreme Court reversed. The Supreme Court declined to address whether a waiver (by the defendant) of the right to object to the use of psychiatric testimony at the guilt phase of a capital trial extends to the sentencing phase as well.

Support for the lower court's decision on the waiver issue is found primarily in the Fifth Circuit's opinion in *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981). In that case, the Court of Appeals suggested that if a defendant introduces psychiatric testimony to establish a mental-status defense, the government may be justified in also using such testimony to rebut the defense notwithstanding the defendant's assertion that the psychiatric examination was conducted in violation of his right against self-incrimination. *Id.* at 701-702. The Supreme Court went on to state that in such circumstances, "the defendant's use of psychiatric testimony might constitute a waiver of the Fifth Amendment privilege, just as the privilege would be waived if the defendant himself took the stand." *Id.* at 701-702, n.22. The Court of Appeals explained that "any burden imposed on the defense by this result is justified by the State's overwhelming difficulty in responding to the defense psychiatric testimony without its own psychiatric examination of the accused and by the need to prevent fraudulent mental defenses." *Id.* at 702.

The Supreme Court, however, was quick to point out that *Battie* dealt exclusively with the Fifth Amendment privilege and that the Fifth Circuit was not passing on a separate Sixth Amendment challenge. 109 S.Ct. at 3149, *citing*, 655 F.2d, at 694, n. 2. The Court observes that Fifth and Sixth Amendment issues must be discussed separately since distinct analyses apply. Noting that while it may be unfair to the State to deny the State a means of rebutting defendant's psychiatric testimony, the Court concludes it certainly is not unfair to require the State to provide counsel with notice prior to examination on the issue of future dangerousness. *Id.* at 3149.

The distinction between the Fifth and Sixth Amendment analyses was recognized in *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987). In *Buchanan*, the Court held that a defendant waived his Fifth Amendment privilege by raising a mental status defense, but in a separate section of the opinion the Court addressed the Sixth Amendment issue, concluding counsel