Capital Defense Journal

Volume 2 | Issue 1 Article 9

Fall 9-1-1989

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

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

knew of the scope of the examination before it took place. Unlike Buchanan, petitioner did not know the examination would involve the issue of future dangerousness. Because this evidence was taken in deprivation of petitioner's right to assistance of counsel without a showing of waiver of this right, the Supreme Court ruled that *Smith* and *Satterwhite* control and reversed the judgment of the Court of Criminal Appeals.

In Virginia, a potential problem exists because an evaluation may be performed on the issue of competency to stand trial (V.C.A. §19.2-169.1), sanity at the time of the offense (V.C.A. §19.2-169.5), or when defendant's mental condition is relevant to capital sentencing (V.C.A. §19.2-264.3:1, see article this issue). In Virginia, future dangerousness is one of the statutory aggravating factors sufficient to support a death sentence. At any of the aforementioned examinations, the defendant could make statements to the mental health expert which could be considered relevant to the issue of future dangerousness. Left unanswered is the question, what are counsel's rights and duties upon notification?

Summary and analysis by: Elizabeth A. Bennett

EVANS v. THOMPSON
881 F.2d 117 (4th Cir. 1989)
United States Court of Appeals for the Fourth Circuit

FACTS

Petitioner Wilbert Lee Evans shot and killed Deputy Sheriff William Truesdale while attempting to escape from state custody. In June 1981, petitioner was convicted of capital murder and sentenced to death in the Circuit Court of Alexandria, Virginia.

On March 28, 1983, Virginia enacted emergency legislation, amending its procedures for trial by jury in capital cases to permit capital resentencing by a newly impaneled jury where a prior death sentence was vacated due to sentencing errors. Va. Code Ann. §19.2-264.3(c). Previously, if the Commonwealth failed to secure a valid death sentence due to errors in the sentencing process, it was foreclosed from seeking capital resentencing and the defendant received an automatic sentence of life imprisonment. *Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). On April 12, 1983, the Commonwealth confessed that erroneous evidence of petitioner's prior convictions had been admitted during the sentencing phase of the trial. Petitioner's death sentence was thereafter vacated and a new jury was impaneled for resentencing in accordance with the new statute. After hearing evidence of petitioner's history of violent criminal conduct, the new jury recommended that the death penalty be imposed based upon a finding of petitioner's "future dangerousness." In March 1984, the trial court imposed the death penalty. The Virginia Supreme Court affirmed the sentence.

In May 1986, petitioner filed a petition for a writ of habeas corpus in Alexandria Circuit Court. The Circuit Court dismissed this petition. The Virginia Supreme Court, as well as the United States Supreme Court, denied review.

Petitioner then sought a writ of habeas corpus in the Eastern District of Virginia. Among other things, petitioner claimed that his resentencing was barred by the Ex Post Facto Clause and the protection against prosecutorial misconduct guaranteed by the Due Process Clause. He further claimed that he was denied the effective assistance of counsel at trial and on appeal. The district court rejected his petition and Evans thereafter appealed to the Fourth Circuit Court of Appeals.

HOLDING

a) Ex Post Facto Claim

Petitioner claimed that since his offense and trial occurred before the new statute was promulgated, his resentencing should have been barred by the holding in *Patterson v. Commonwealth, supra.* Petitioner, thus alleged, under an ex post facto theory, that he was retroactively deprived of his right to have his death sentence converted to life imprisonment.

In holding that Petitioner was not denied any of his rights, the Fourth Circuit explained that the rationale of the Ex Post Facto Clause is to assure fair notice of the nature and consequences of criminal behavior and to prevent the alteration of pre-existing rules subsequent to the commission of an act. In order for an ex post facto claim to be valid, the law must be retrospective and it must disadvantage the offender affected by it. However, "No ex post facto violation occurs if the change in the law is merely procedural and does `not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt.'" *Miller v. Florida*, 482 U.S. 423, 433, 107 S. Ct. 2446, 2452-2453 (1987), *quoting Hopt v. Utah*, 110 U.S. 574, 590, 4 S. Ct. 202, 210 (1884). *See also United States v. Juvenile Male*, 819 F.2d 468, 470-471 (4th Cir. 1987); *United States v. Mest*, 789 F.2d 1069, 1071 (4th Cir. 1986). The Fourth Circuit held that the new statute does no more than change the procedures surrounding the imposition of the death penalty. The nature and consequences of petitioner's criminal behavior were not changed and therefore petitioner had fair warning that the death penalty was a possible punishment and could not have been disadvantaged by the new statute.

b) Prosecutorial Misconduct

Petitioner also argued that the state prosecutors violated his due process rights when they knowingly proffered false conviction records at his original sentencing hearing and then deliberately delayed confessing error until after the 1983 statute was enacted. Petitioner claimed that this type of prosecutorial misconduct barred his resentencing.

The Fourth Circuit rejected this argument, relying on the state court's finding that the government acted in good faith. A state court finding that the government acted in good faith where defendant alleges he has been the victim of intentional or purposeful government misconduct, is entitled to a presumption of correctness. *Sanderson v. Rice*, 777 F.2d 902, 909 (4th Cir. 1985). In concluding that the state court's findings did not lack fair support in the record, the Fourth Circuit determined that the prosecutors were only guilty of unintentional errors and that these errors were remedied when petitioner received a new sentencing proceeding free of false or misleading evidence.

c) Ineffective Assistance of Counsel

Petitioner further alleged that he received ineffective assistance of counsel at trial and on direct appeal. First, petitioner claimed that his trial counsel improperly failed to object to the prosecution's assertion, in his closing argument, that petitioner was a multiple murderer. Second, petitioner argued that on direct appeal his counsel failed to discover and inform the court that his death sentence was based on false evidence.