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ADMISSIBILITY OF PSYCHIATRIC EVALUATIONS UNDER MIRANDA AND THE RIGHT TO COUNSEL: PATTERSON AND BUCHANAN

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For a complex combination of reasons, see “Symbolic Values,” supra at 3, the Court has remained irresistibly drawn to these issues. Even more recently, it has decided two additional cases—*Buchanan v. Kentucky*, 483 U.S. —, 107 S. Ct. 2906 (1987); and *Satterwhite v. Texas*, 486 U.S. —, 108 S. Ct. 1792 (1988)—both of which deal with prosecutorial use at trial or sentencing of statements made by criminal defendants to psychiatrists while institutionalized, and which, when read together help clarify how seriously the Rehnquist Court takes the 1981 *Estelle* decision, and what its significant values are in cases involving putatively mentally disabled criminal defendants.

**Background: Estelle v. Smith**

In *Estelle*, the Supreme Court reversed a death sentence that seemed to flow from expert testimony by the now well-known Dr. Grigson that the defendant was a “remorse[less]” and a “very severe sociopath.” *Estelle*, 451 U.S. at 459-60. Dr. Grigson's opinion followed an evaluation of the defendant (made at the court's request) about which defense counsel had “inexplicably” never been notified. *Smith v. Estelle*, 445 F. Supp. 647, 651 (N.D. Tex.), aff'd, 602 F.2d 694 (5th Cir. 1977), aff’d, 451 U.S. 454 (1981).

In its opinion, the Supreme Court found both a Fifth Amendment *Miranda* violation (finding the privilege against self-incrimination applicable to the penalty phase of a death case, and holding that a defendant—who neither initiated a psychiatric examination nor attempted to introduce any psychiatric evidence—may not be compelled to respond to a psychiatrist if his statements could be used against him at a capital sentencing proceeding), *Estelle*, 451 U.S. at 461-68, and a Sixth Amendment violation as well (ruling that the defendant's right to counsel was violated by the state's failure to notify the defendant's lawyer of the pretrial psychiatric evaluation), id. at 469-72.

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Interestingly, however, it was generally construed fairly narrowly in later lower federal court cases, and was distinguished in cases where defendants had sought competency examinations, where they raised insanity defenses, and in a civil case where a prison adjustment committee imposed disciplinary sanctions on a prisoner for his refusal to participate in a screening interview. See, e.g., United States v. Shulsen, 600 F. Supp. 432, 435-36 (D. Utah 1980) (competency evaluation; Estelle distinguished); but see Sturgis v. Goldsmith, 796 F.2d 1103, 1109-09 (9th Cir. 1986) (competency examination; Estelle stage under Estelle); Sturgis, 796 F.2d at 108 (insanity defense; Estelle distinguished); Watters v. Hubbard, 724 F.2d 381, 384 (6th Cir. 1984) (accord); U.S. v. Byers, 740 F.2d 1104, 1109-11 (D.C. Cir. 1984) (Scalia, J. dissenting); see also 1137, 1147-50 (Bazelon, J., dissenting); Taylor v. Best, 745 F.2d 220, 223-24 (4th Cir. 1984) (screening interview; Estelle distinguished). Such decisions appeared to bear out Professor Slobogin's cautious concern over what he had predicted would be Estelle's "limited applicability." Slobogin, "Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation," 31 Emory L.J. 71, 76 (1982); see generally "Symbolic Values," supra at 63-64. The decision still remained, however, "the Burger Court's highwater Miranda mark." Id. at 80.

After it handed down Estelle, the Supreme Court remained largely silent for the next six years as to the potential future contours of its doctrine. Then it decided, within a year, Buchanan v. Best, 480 U.S. 131 (1985), in an attempt to answer two of the many unanswered substantive and procedural questions left in Estelle's aftermath: whether, when defense counsel seeks an evaluation for the purposes of pretrial treatment, a statement to an examining psychiatrist can be used at trial on issues of dangerousness or to rebut a mental status defense, and, when there is an Estelle violation, whether the "harmless error" doctrine applies?

Buchanan v. Kentucky

In Buchanan, the defendant, in a non-capitol homicide trial, had attempted to establish an affirmative defense of "extreme emotional disturbance" by having a social worker read from psychological evaluations that had been prepared following earlier, unrelated juvenile arrests. According to reports, defendant was an "isolated [individual], mistrustful of others and in possession of a "prodigious, incredible," displaying "flat affect" and a "mild thought disorder," exhibiting "extremely simplistic and very concrete thinking" and "very poor" impulse controls, and appearing to be "a very young, very emotionally disturbed and very easily confused youth," with the "potential for developing a full blown schizophrenic disorder," id. at 2910-11 n.9.

On cross-examination, the prosecutor attempted to rebut this defense by having the witness read from another evaluation prepared by another mental health professional (Dr. Lange) following a joint motion by counsel to seek a determination as to whether the defendant should appropriately receive psychiatric treatment when making various treatment decisions. Id. at 2911. According to Dr. Lange, the defendant was a "fairly sophisticated youth who would be capable of manipulative contrasting type behaviors." Id. at 10.

The court noted that, while Dr. Lange also expressed his views on the defendant's competency to stand trial, that was not the purpose of his evaluation; rather, the motion was filed "to enable [the defendant] and the Court to make an informed decision as to what type of psychiatric care, if any, is in the defendant's best interest." Id. at 2911-12.

When defense counsel objected that this evaluation had nothing to do with his emotional disturbance defense (but only with his competency to stand trial, an issue defendant had never raised), id. at 2911-12, the court allowed an edited version to be read to the jury, reasoning, "You can't argue about his mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status." Id. at 2912.

After the Supreme Court of Kentucky affirmed the defendant's non-civil defense on the theory that he had "opened the door" to the introduction of Dr. Lange's report by introducing the earlier report, Buchanan v. Commonwealth, 638 S.W.2d 210, 213 (Ky. 1985), and that the use of the report did not violate the Supreme Court's decision in Estelle v. Smith), the U.S. Supreme Court affirmed.

First, Justice Blackmun, writing for the six-Judge majority, stated in Estelle, among other things, that the defendant had neither raised a mental state defense nor offered psychiatric evidence at trial, Buchanan, 107 S. Ct. at 2917, discussing Estelle, 451 U.S. at 465-66. Here, since the defendant had not raised a mental status defense, the court noted that the defendant's expert evaluation and presented some psychiatric evidence (on the issue of an extreme emotional disturbance defense), "at the very least, the prosecution may rebut this presentation with the reports of the examination that the defendant requested." Buchanan, 107 S. Ct. at 2918.

Under such circumstances, the Fifth Amendment would not apply. Id., citing, inter alia, Byers, 740 F.2d at 1111-13. Estelle was further distinguishable since (1) Buchanan's lawyer joined in the motion for Dr. Lange's examination, and (2) the "entire defense strategy" was to establish the defendant's "extreme emotional disturbance." Buchanan, 107 S. Ct. at 2918.

Second, the Court further rejected the defendant's Sixth Amendment Estelle argument; since defense counsel requested Dr. Lange's examination, "It can be assumed—and there are no allegations to the contrary—that defense counsel consulted with the [defendant] about the nature of the examination." Id. See Estelle, 451 U.S. at 467-71. It similarly rejected defendant's argument that he could not have anticipated that the requested evaluation might be used to undermine its "mental status" defense; under Estelle, the Court reasoned, counsel "was certainly on notice that if . . . he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." Buchanan, 107 S. Ct. at 2919.

The Court finally concluded that, if there were any constitutional error, it was "harmless in the circumstances." Id. at 469-71. Specifically, the Court noted that: (1) Buchanan's lawyer joined in the motion; (2) defendant had failed, under Kentucky law, to show provocation, an additional element of the extreme emotional disturbance defense, independent of defendant's mental status; (3) Justice Marshall's dissent (on this issue, for himself and Justice Brennan; Justice Stevens joined the dissent on an unrelated issue) focused on the "fundamental distinction" between an examination for the purposes of assessing defendant's then-current amenability to intensive hospitalization, evaluation and treatment, and one for assessing his prior mental condition at the time of the offense. Id. at 2919, 2922 (Marshall, J., dissenting). The examination request stemmed from "humanitarian and therapeutic concerns unrelated to the prosecution," id. at 2923, and these concerns could only be satisfied if there were "unimpeded establishment of relations of trust and cooperation among the physician, the [state], and the potential patient," id. He added:

These concerns apply with full force to the mental status criminal defense. In this context, the Court held that the state was required to prove the defendant's mental status beyond a reasonable doubt. No such heightened standard is necessary in the pretrial context, where the defendant has not been placed at risk by the state. Therefore, the Court held that a state defendant has no constitutional right to an expert evaluation under the Fifth Amendment and Compelled Psychiatric Examination; "Instead, the state may, if it wishes to do so, withhold access to any and all expert psychiatric testimony that an accused may seek to present at trial." Buchanan, 107 S. Ct. at 2923.

It is also assumed—and there are no allegations to the contrary—that defense counsel consulted with the defendant about the nature of the examination. Id. See Estelle, 451 U.S. at 467-71. It similarly rejected defendant’s argument that he could not have anticipated that the requested evaluation might be used to undermine his “mental status” defense; under Estelle, the Court reasoned, counsel “was certainly on notice that if [he] intended to put on a ‘mental status’ defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.” Buchanan, 107 S. Ct. at 2919.

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fendant places his mental status in issue by relying on reports that do not address his trial competency, "he should expect that the results of his competency examination may be used by the prosecutor in rebuttal." Id. at 2924 n.6. Such an expectation would be contrary to the integrity of the adversary process [which] requires the creation and maintenance of relations among the prosecution, defense, examiner, and defendant that are as open and cooperative as possible."

Id.

Satterwhite v. Texas

In an even more recent case, the Court was faced with a fact situation much closer to the one in Estelle, and one that involved the same witness, Dr. James P. Grigson. In Satterwhite, after the defendant was charged with a capital murder offense (but before indictment or the appointment of counsel), the state requested (and was granted) a psychological evaluation (by Dr. Schroeder, a psychologist) as to the defendant's competency to stand trial. The defendant's responsibility at the time of the offense and his future dangerousness. Satterwhite, 108 S. Ct. at 1975.

After indictment and appointment of counsel, the state successfully sought a pretrial evaluation (by Dr. Holbrook, a psychiatrist) on the same topics, defense counsel was not notified of this examination, either. About one month later, Dr. Grigson submitted a letter to the trial court, reporting that he had evaluated the defendant in jail, and that the defendant had a severe antisocial personality disorder and [was] extremely dangerous. That's his personality. That's John T. Satterwhite. Id. at 1975.

The majority further rejected the state's argument that other motions and orders filed with the Court provided defense counsel with sufficient notice that a "future dangerousness" examination would take place. First, there was an unresolved factual dispute as to the applicability and timing of some of the filings in question. See id. at 1976, and n. 2. Second, even if all filings had been made in a timely manner, they would not have "adequately notified" defense counsel as to Dr. Grigson's ensuing examination. Third, there was no support for a "constructive notice" theory (based on the placement of the state's motions and certain ex parte orders in the file) urged by the state. Id. at 1977, n. 3.

Moving on to the harmless error issue, the Court found that while a Sixth Amendment violation that "perceived the entire proceeding," could "never be considered harmless, the effect of this error was simply limited to the admission of Dr. Grigson's testimony. Satterwhite, 108 S. Ct. at 1977 (citing, inter alia, Chapman v. California, 386 U.S. at 23 n.9; Holloway v. Arkansas, 435 U.S. 475 (1978)). Furthermore, a reviewing court would be "warying the case that it made an intelligent judgment about whether the erroneous admission of psychiatric testimony might have affected a capital sentencing jury."

Id. at 1978. Thus, the harmless error doctrine would apply to the Sixth Amendment violations. Id. Interestingly, the Court noted, on this point, that it had applied the harmless error doctrine to a psychological evaluation proceeding in Buchanan, 107 S. Ct. at 2319 n.21.

Under the circumstances, however, the Court found the error not to be harmless, because the state had failed to prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," Satterwhite, 108 S. Ct. at 1979, and the "powerful content of his message" (Grigson had stated "unequivocally" that the defendant would pose a "continuing threat" to society, that he had a "lack of conscience," that he was "as severe a sociopath as you can find," he was "beyond the reach of psychiatric rehabilitation," id., a message highlighted by the district attorney in his closing argument. See id.: [Dr. Grigson] was clear that he wanted to testify at a capital sentencing."

Justice Marshall agreed. In an opinion, concurring in part and concurring in judgment, Justice Marshall wrote: "Dr. Grigson's findings were critical" to the death sentence, and the Court, finding it impossible to say beyond a reasonable doubt that the testimony did not influence the jury, concluded that the error was thus not harmless.

In a separate opinion, Justice Marshall argued that admission of Dr. Grigson's testimony was a "bald violation" of Estelle, and that the defendant's death sentence should thus be vacated. Id. at 1979 (Marshall, J., concurring in part and concurring in judgment).

The potential prejudice is "so high" that any analysis could ever apply to the admission of psychiatric testimony as to a defendant's future dangerousness, this aspect of his opinion only.

First, the Estelle Court "gave no hint" that such an analysis could ever apply to the admission of psychiatric testimony as to a defendant's future dangerousness. Id. at 1980 (Blackmun, J., concurring in part and concurring in judgment).

Impact of Buchanan and Satterwhite?

When read together, Buchanan and Satterwhite reveal some backsliding from the Estelle position, but also appear to clarify that the Rehnquist Court is not ready to abandon that doctrine in toto. The Estelle violation in Satterwhite was a clear one; the Court's opinion needs to be read more as a reflection of its post-Barefoot desire to treat death penalty cases procedurally more like non-capital cases than as a separate category. See "Symbolic Values, Suspected of Nuclear Weapons with Narrowing of the Universe of Potential New Issues which could be Raised in Death Penalty Appeals" (emphasis in original).

While the Satterwhite majority suggests that a revision of Estelle's "confluence of factors" approach to whether inappropriately admitted testimony unconstitutionally tainted a subsequent verdict, it does not respond directly to Justice Marshall's fears that the patina of scientific authority given to such testi-
mony may carry dispositive weight with lay jurors, *Satterwhite*, 108 S. Ct. at 1798. Interestingly, the majority does focus on the stature of Dr. Grigson’s credentials (“the only licensed physician to take the stand”). *Id.* at 1799. See also *id.*: “He informed the jury of his educational background and experience, which included teaching psychiatry at a Dallas medical school and practicing psychiatry for over 12 years.”

On the other hand, the *Buchanan* opinion is more problematic for at least two separate reasons. First, it appears to indicate that the Supreme Court is as confused as others as to the different types of potential mental status examinations, and the significant temporal differences in these evaluations. See *Buchanan*, 107 S. Ct. at 2919, 2922 (Marshall, J., dissenting). While defense counsel did join in the request for Dr. Lange’s examination, it appears clear that this was conceived of as a means of seeking pretrial hospitalization for his client, not as an attempt to “sandbag” the state (by creating “self-serving” testimony as to his history of “extreme emotional disturbance”). *Id.* at 2919, 2923 n.5 (Marshall, J., dissenting); compare *id.* at 2919 n.21 (defendant argued to Supreme Court that affirmation might cause future defense counsel to “sandbag” the court by waiting until after trial to raise the competency to stand trial question) (majority opinion).

This leads to a more troubling inquiry: has the Supreme Court created yet another “incredible dilemma,” for mentally disabled defendants? See Perlin, “Another ‘Incredible Dilemma’: Psychiatric Assistance and Self-Incrimination,” [1985-86] ABA Preview, No. 10 (March 14, 1986); see generally Smith v. Murray, 477 U.S. 527, 106 S. Ct. 2678 (1986). If they are to exercise their statutory right to seek hospital treatment awaiting trial, are they sacrificing their right to counsel and their privilege against self-incrimination in the ensuing criminal trial? See, e.g., Ky. Rev. Stat. § 202A.070(5) (1977), discussed in *Buchanan*, 107 S. Ct. at 2911 n.11. While this concern is raised in Justice Marshall’s dissent, *id.* at 2923, it is not squarely dealt with in the majority opinion. Thus, the majority suggests that, given its opinion in *Estelle*, counsel was “certainly on notice” that if he intended to raise a “mental status” defense, he would have to anticipate testimonial rebuttal. *Id.* at 2919.

While that suggestion certainly does comport with *Smith* as to the mental status defense, it is not on point on the question of ameliorative pretrial hospitalization, which the majority conceded was the purpose of defense counsel’s motion. *Id.* at 2911 n.11.

This issue is largely independent of the *Estelle* concerns (and is irrelevant to the fact pattern in *Satterwhite* where counsel had never received notice of the examination at all). Yet, it remains an important one. If counsel respond to *Buchanan* by advising clients not to seek such ameliorative treatment (so as to avoid the possibility of an over-inclusive examination such as the one apparently done by Dr. Lange), then the state statutory scheme becomes only hortatory.

Are there other links between *Satterwhite* and *Buchanan*? When read together, they should probably also be considered in the context of two other Supreme Court doctrines: its watered-down “reasonable effectiveness of counsel” standard as enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), and its procedural default doctrine set out in *Wainwright v. Sykes*, 433 U.S. 72 (1977). These cases make it fairly clear that the Supreme Court will be loath to tamper with a jury verdict when the complained-of error appears to be, to almost any appreciable extent, the result of counsel’s decision making. Thus, it refused to reverse in *Buchanan* (where counsel allegedly should have been able to anticipate what might have happened once he “opened the door”) but did so in *Satterwhite* (where counsel had no way of knowing what was transpiring). This gloss gives life to two Supreme Court policies: not inquiring into counsel competency, but also not sanctioning abusive use of mental health testimony by the state in the criminal process (as reflected first in *Estelle*).

**Conclusion**

While there has not yet been any commentary or significant follow-up litigation on *Satterwhite* or on this aspect of *Buchanan*, it is likely that both will be considered carefully in the future. The two cases show that the Supreme Court is still like a moth drawn to a flame, fascinated by cases involving mentally disabled criminal defendants. The Court’s fascination shows no sign of ebbing. No doubt cases offering further refinement of these issues will emerge in coming Supreme Court Terms.

**SUPREME COURT LINEUP**

Certiorari Denied

The Supreme Court denied review in the following cases:

- Effective assistance. Will a defense attorney’s rejection of an alibi defense strategy before talking to all of the individuals whose testimony would support defendant’s alibi amount to ineffective assistance? *Olson v. U.S.*, No. 88-62, seeking review of 846 F.2d 1103 (7th Cir. 1988), which refused to question counsel’s choice of defense strategy.