1986

Another Incredible Dilemma: Psychiatric Assistance and Self-Incrimination

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Another "Incredible Dilemma:" Psychiatric Assistance and Self-Incrimination

by Michael L. Perlin

Michael Marnell Smith
v.
Allyn B. Sielaff
(Docket No. 85-5487)

Argued March 4, 1986

The Supreme Court's fascination with the impact of mental disability on criminal law and procedure continues unabated. In recent terms, the Court has considered such issues as the necessity of giving *Miranda* warnings prior to a psychiatric competency evaluation (*Estelle v. Smith*, 451 U.S. 454 (1981)), the admissibility of psychiatric testimony on future dangerousness in response to a hypothetical where the witness never examined the defendant (*Barefoot v. Estelle*, 463 U.S. 880 (1983)) and an indigent defendant's right to psychiatric assistance where his sanity is likely to be a significant factor at trial (*Ake v. Oklahoma*, 105 S.Ct. 1087 (1985); *Preview*, 1984-85 term, pp. 149-51).

Already this term, the Court has held that a prosecutor could not use a defendant's post-*Miranda* silence in an effort to rebut an insanity defense (*Wainwright v. Greenfield*, 54 U.S.L.W. 4077 (1986); *Preview*, 1985-86 term, pp. 82-4), and has granted *certiorari* in cases raising the questions of whether a defendant's mental condition rendered a *Miranda* waiver ineffective (*Colorado v. Connelly*, 3457 (1986)) and what finding of competency must be made before the death penalty may be imposed (*Ford v. Strickland*).

ISSUE

The issue in *Smith v. Sielaff* is one more aspect of the same overall inquiry: when a criminal defendant facing the death penalty seeks a pretrial psychiatric evaluation to explore the possibility of the insanity defense or mitigation of punishment, can the prosecutor use incriminating statements made by the defendant to the psychiatrist to prove the state's "case-in-aggravation" at the sentencing phase?

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The case also presents two other issues: 1) Assuming that the testimony was inadmissible, whether, under *Zant v. Stephens* (462 U.S. 862 (1983)), the death sentence need not be invalidated because the error did not taint another valid "aggravating factor" found by the jury, and (2) Whether the case is improperly before the Court because of "procedural default" under the doctrine of *Wainwright v. Sykes* (433 U.S. 72 (1977)).

FACTS

Michael Marnell Smith was charged with raping and murdering Audrey Weiler on May 23, 1977, in James City County, Virginia. Smith confessed that he met Weiler on a beach near his home, grabbed her, pulled a knife and asked her to remove her clothes. After she complied, he sexually assaulted her, then choked her, dragging her into the water, submerging her head and eventually stabbed her in the back with a knife. While the medical examiner concluded that drowning was the immediate cause of death, death also could have been caused by either the stabwounds or strangulation. Following the attack, Smith returned home.

Two days later, police investigators came to the defendant's family farm; when they confronted him with their suspicions, Smith asked for a Bible. Smith and the investigators then knelt and prayed before Smith gave his confession.

Upon being appointed trial counsel (David F. Pugh) immediately asked that Smith be examined to determine if he were competent to stand trial; the examiner concluded that he was. Because of the seriousness of the offense and the possibility of a death sentence, Pugh sought more comprehensive psychiatric evaluations, and asked that Smith be committed to a state hospital for testing, where he was examined by Dr. James Dimitris. Dissatisfied with the hospital evaluation, Pugh asked the trial court to appoint a private psychiatrist to evaluate Smith, and pursuant to this order, Dr. Wendell Pile evaluated him on October 1, 1977.

Pugh had warned Smith not to discuss the offense with which he had been charged (or any prior offense) with anyone other than counsel and co-counsel. While Dr. Dimitris warned Smith that anything he said "could be used one day against [him] in a court of law," he nevertheless inquired about the defendant's criminal behavior, telling Smith it would be "helpful" if he dis-

cussed these matters; Smith complied. Dr. Pile told Smith nothing about either the purposes of the evaluation or the uses to which the information revealed could be put.

Specifically, Dr. Pile did not tell Smith that a copy of his report would be sent to the prosecutor and that it could be used against him at trial as part of the state's affirmative case. This practice conformed with what was then the law in Virginia (*Gibson v. Commonwealth*, 216 Va. 412, 219 S.E. 2d 845 (1975) (*Gibson* I; but see *Gibson v. Zahradnick*, 581 F. 2d 75 (4 Cir. 1979), *cert. den.* 439 U.S. 996 (1978) (*Gibson* II) holding that any affirmative use by a prosecutor of information disclosed in a pretrial mental evaluation so as to prove guilt was unconstitutional).

In his letter to the court and counsel, Dr. Pile reported that Smith told him that, thirteen years earlier when he had been a teenager, he had "come close" to raping a girl on a school bus that he had been driving, but that, after he tore her clothes off, "he thought better of it and did not do so." Smith had never been charged with this crime; neither defense counsel nor the prosecutor had any knowledge of it prior to Dr. Pile's report. Pile concluded that defendant was a "sociopathic personality; sexual deviation (rape)."

At the sentencing hearing which followed Smith's murder conviction, Dr. Pile was called by the state and testified about the "school bus incident," the court overruling defense counsel's objection on the grounds that the evidence was relevant and that the witness had examined the defendant at defense counsel's request. On cross-examination, defense counsel asked Dr. Pile for his diagnosis. After the witness stated the diagnosis, he further explained it in response to counsel's questioning: "They seem to feel no guilt, and they don't seem to learn from either experience or punishment. They seem to particularly have no feelings or standards of what's right and what's wrong."

In urging the death penalty be imposed in his closing argument, the prosecutor relied on Dr. Pile's description of the school bus incident as well as his diagnosis of Smith. The jury returned a death sentence, finding two statutory aggravating circumstances: that there was a "probability" that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society," and that his conduct in committing the underlying offense was "outrageously or wantonly vile, horrible or inhuman, in that it involved torture and aggravated battery to the victim."

On direct appeal—at which trial counsel did *not* assign the admission of Pile's testimony as error—the Virginia Supreme Court affirmed (219 Va. 455, 248 S.E. 2d 135 (1978)). After trial briefs had been submitted but prior to oral argument before the Virginia Supreme Court, the Fourth Circuit decided *Gibson* II.

On state habeas (alleging ineffective assistance of counsel), appellate counsel called Pugh to testify; Pugh stated that he did not assign Dr. Pile's testimony as error because he thought the claim was without merit under Virginia law. He admitted that he had not personally researched the question of the claim's possible merit under federal law, and did not know the extent of research his student assistant had performed on the issue. The trial court found that the claim was forfeited on the grounds of "procedural default" under *Sykes*, rejecting Smith's claim that trial counsel's failure to raise the issue on appeal was due to "ignorance or neglect" rather than "informed professional deliberation."

Defendant's collateral habeas attack was dismissed by the district court, and that dismissal was affirmed by the Fourth Circuit, which addressed the question of Dr. Pile's testimony without explicitly dealing with the issue of procedural default; although the circuit assumed without deciding that Dr. Pile's testimony was inadmissible, and that it tainted the jury's finding of future dangerousness, it ruled that the death sentence was still valid because the testimony did not taint the jury's *other* finding (an offense "outrageously or wantonly vile, horrible or inhuman"). The court of appeals interpreted *Zant* to permit a death sentence to stand as long as it is predicated on *one* valid aggravating circumstance (769 F. 2d 170 (4th Cir. 1985)).

BACKGROUND AND SIGNIFICANCE

The questions raised in this case draw sharply into focus one of the persistent problems of criminal procedure: can a defendant be forced to give up *one* right (in this case, the privilege against self-incrimination) to exercise *another* right (here, clinical evaluation and assistance by a trained mental health professional)? Coming so soon after the *Ake* decision, which entitled a defendant to such expert help in both evaluative *and* consultative functions, *Smith* will likely signal whether the Supreme Court sees this problem as another truly "incredible dilemma" after all. (See *Green v. United States*, 355 U.S. 184, 193 (1957) (finding it "intolerable" to force the defendant to abandon a Fourth Amendment right to assert an independent Fifth Amendment guarantee."

Smith relies extensively on last term's decision in *Ake*, which characterizes the psychiatric evaluation as often being "crucial to the defendant's ability to marshal a defense," noting that the exam will be reliable only if it can be a "full and probing inquiry into the circumstances of the offense and the defendant's previous behavioral history." He reads *Ake* in close juxtaposition with *Estelle*, which held that a "neutral" pretrial competency evaluation cannot be transformed into a proceeding enabling the prosecution to meet its burden of proving statutory aggravating circumstances at the penalty phase—a practice which would implicate a defendant's interest, in the *Estelle* court's words, in not being the "deluded instrument of his own execution."

It is fundamentally unfair, Smith argues, to put a defendant to a Hobson's Choice—forced to choose between the right to a clinical evaluation (guaranteed by *Ake*) and the privilege against self-incrimination (mandated by *Estelle*)—a position that has been endorsed by at least five circuits, and which is consonant with the ABA Criminal Justice Standards, the Model Penal Code and the opinions of many commentators. Although these cases have dealt with findings of guilt, they similarly apply to the penalty phase of death cases. Also, while Smith asked that Dr. Pile be assigned to evaluate him, under *Estelle*, witness's role changed and "became essentially like that of an agent of the state."

In an analogous area, those courts that have upheld the constitutionality of compulsory psychiatric evaluations for defendants who wish to plead not guilty by reason of insanity have, almost without exception, reduced the potential impact on the defendant's privilege against self-incrimination by holding that the state cannot use any of defendant's disclosures at such an evaluation on the question of guilt, but merely to rebut claims raised by defendant as to mental condition.

Further, Smith suggests that the Virginia practice is aberrational; in at least thirty-eight states, either through caselaw court rule or statute, the affirmative prosecutorial use of disclosures made by a defendant through a defense-requested mental evaluation is prohibited. Even Virginia has amended its statutes so as, apparently, to prevent introducing into evidence a statement made by defendant during a pretrial evaluation about the offense, unless the defendant raises the issue of lack of responsibility.

Finally, Smith argues that the Fourth Circuit, in a "breathtaking" error, both misread and misapplied the *Zant* doctrine, and that the constitutional defect represented by admitting Dr. Pile's testimony cannot be ignored.

On the other hand, the state focuses initially on the procedural default issue, urging the Court to bar substantive consideration of Smith claim under *Sykes*. On the merits, it construes Dr. Pile's testimony as "insignificant" and suggests that *Estelle* is distinguishable because Pile was chosen to evaluate the defendant specifically by defense counsel. It concludes that, even if Pile's testimony was inadmissible, the death sentence should stand under *Zant* because there was ample indpendent basis for a "vileness" finding by the jury.

The Court has not ruled consistently that defendants cannot be penalized when they are faced with an "incredible dilemma." What is most intriguing about this case, however, is that the two rights in question—the "*Ake* right" and the "*Estelle* right"—were, until the Court's recent *Greenfield* decision, articulated in the *only* cases in which mentally disabled criminal defendants have prevailed in the Supreme Court in recent terms.

The Court remains drawn to cases involving all aspects of the impact of mental disability on criminal prosecution. Its decision in *Ake* reflected a significant sensitivity to the value of psychiatric examinations, both for purposes of trial strategy and for evaluative reasons. In many ways, the key question in the case before it is whether the careful and sensitive psychiatric evaluation and assistance envisioned by the *Ake* majority can be reconciled with the permissible use of testimony such as Dr. Pile's.

ARGUMENTS

***For Michael Marnell Smith** (Counsel of Record, J. Lloyd Snook, III, 230 Court Square, Charlottesville, VA 22901; telephone (804) 293-8185)*

1. Dr. Pile's testimony was constitutionally inadmissable; defendants cannot be forced to choose between the privilege against self-incrimination and the right to an adequate mental evaluation; the principle that the state cannot affirmatively use evidence from a pretrial mental evaluation to prove guilt also applies to the penalty phase of a death case; the identity of the party that requested the examination is not relevant for purposes of the constitutional determination.
2. The testimony in question was not harmless beyond a reasonable doubt.
3. Nothing in *Zant* suggests that a prejudicial defect in sentencing should be ignored because there is an additional untainted statutory predicate.

***For Allyn R. Sielaff** (Counsel of Record, James E. Kulp, Supreme Court Building, 101 N. 8th Street, Richmond, VA 23219; telephone (804) 786-6565)*

1. Smith's claim is barred under the procedural default rule of *Sykes*.
2. The evidence in question was admissible; in addition, it was insignificant, and did not influence the jury's decision to impose a death sentence.
3. The court of appeals properly applied *Zant*.

AMICUS ARGUMENTS

In Support of Michael Marnell Smith

A brief by the New Jersey Department of the Public Advocate's Division of Mental Health advocacy describes in depth the latitude given to defendants in New Jersey to fully explore and develop psychiatric defenses without impeding the reasonable aims of law enforcement. A joint brief by the American Academy of Psychiatry and Law (the professional association of forensic psychiatrists) and American Psychiatric Association argues that the psychiatric function envisioned in *Ake* also precludes prosecution access to psychiatrists consulted by the defense but not called as witnesses. A brief by the American Psychological Association asked the Court to clarify that its rulings in this area are meant to apply to psychologists and other "appropriately trained mental health professionals" as well.