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MENTAL DISABILITY

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, 345 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)).

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-
Court, the Fourth Circuit decided prior to oral argument before the Virginia Supreme Court, the 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, 195 (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 "breath taking" 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 independent 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 inadmissible; 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.