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Capital Punishment: Summary of Supreme Court Decisions of the 1998-99 Term

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Summary

The most significant capital punishment cases decided by the Supreme Court during the 1998-99 term did very little in terms of reversing the lower courts where the petitioners were the defendants at the trial level.¹ Significantly, among these cases, the Court settled splits in the circuits on issues of statutory interpretation and other trial-related issues. The Court also made clear that withholding an element of an offense from a jury's consideration can be a harmless error. In the *Strickler* case, the Court gave some guidance on what "materiality" means for purposes of the disclosure rule of *Brady v. Maryland*. Additionally, the Court took its first look at the new federal death penalty statute.

Decisions During the October 1998 Term

The four capital punishment decisions which were decided during the October 1998 Term involved issues concerning (1) erroneous jury instructions prior to a sentence of death, (2) prosecutorial misconduct, (3) jury instructions on consequences of deadlock in a sentencing hearing conducted under the Federal Death Penalty Act of 1994, and (4) challenge to use of lethal gas over lethal injection as a method of execution.

¹For additional background materials on the subject, see W. White, *Capital Punishment's Future*, 91 Mich. L. Rev. 1429, 1429 (1993); D. Schrader, *Capital Punishment: Summary of Supreme Court Decisions on the Death Penalty*, CRS Report 96-116 A (Feb. 1, 1996); P. Wallace, *Capital Punishment Summary of Supreme Court Decisions During the 1997-98 Term*, CRS Report RL30145 (April 19, 1999).

In two cases² the Court rejected the defense arguments for specific jury instructions. In the third,³ the Court decided that the suppression by the prosecution of evidence favorable to the accused did not violate due process inasmuch as the accused failed to demonstrate the prejudice necessary to establish “materiality”. In the fourth,⁴ the Court refused to entertain an action challenging the state’s use of lethal injection rather than the use of lethal gas.

Calderon v. Coleman.⁵ In a 5-4 *per curiam* opinion, the Supreme Court held that the Ninth Circuit erred in failing to apply the harmless error analysis of *Brecht v. Abrahamson*⁶ to determine whether to grant habeas corpus relief to a prisoner sentenced to death following an erroneous jury instruction about the power of the governor of California to commute a sentence of life without possibility of parole. Under *Brecht*, relief may be granted only if the erroneous instruction had “... a substantial and injurious effect or influence on the jury’s sentence of death”⁷ This criterion insures that a state will not be put to the “arduous task” [of retrial] “based on mere speculation that the defendant was prejudiced by trial error.”⁸ Rather than pursue the *Brecht* test, the Ninth Circuit applied the *Boyde v. California*⁹ test to determine whether there is a “reasonable likelihood that the jury” applied the challenged instruction in a way that “prevent[s] [the] consideration of constitutionally relevant evidence.”¹⁰ The opinion indicated that this *Boyd* analysis “... is not a harmless-error test at all,” but rather a “test for determining, in the first instance, whether constitutional error [has] occurred”¹¹ The Court returned the case for application of the proper test.

²*Jones v. United States*, 119 S.Ct. 2090 (1999); *Calderon v. Coleman*, 119 S.Ct. 500 (1998).

³*Strickler v. Greene*, 119 S. Ct. 1936 (1999).

⁴*Stewart v. LaGrand*, 119 S. Ct. 1018 (1999).

⁵119 S. Ct. 500 (1998).

⁶507 U.S. 619 (1993).

⁷119 S. Ct. at 502.

⁸*Id.* at 503.

⁹494 U.S. 370, 377 (1990).

¹⁰119 S.Ct. at 503.

¹¹*Id.* The “reasonable likelihood” test applied in *Boyd* is the test for determining whether a constitutional error has occurred in the jury instructions at the penalty phase of a capital proceeding; it is not for determining whether the error is harmless. After a court determines that a constitutional error occurred, a federal court sitting in *habeas corpus* review must go on to apply the “substantial and injurious effect or influence” test from *Brecht*, the majority confirmed. The jury instruction at issue had to do with the governor’s authority to commute a sentence of life imprisonment without parole. The state had conceded that the jury instruction was erroneous, and the majority did not review this conclusion. However, the majority pointed out that the precedent upon which the Ninth Circuit relied has not been approved by the Supreme Court and the decision in *California v. Ramos*, 463 U.S. 992 (1983), constituted no violation of the U.S. Constitution in a capital jury instruction regarding the governor’s commutation authority.

Jones v. United States.¹² In the 1994 Federal Death Penalty Act (FDPA), Congress established procedures for imposing capital punishment for several federal capital crimes.¹³ In what appeared to be the first case to be tried under the FDPA, the issue was whether the submission of invalid non-statutory exacerbating factors was properly found to be harmless,¹⁴ and whether the jury should have been instructed that a failure by it to agree on a sentencing recommendation would automatically result in a court-assessed sentence of life imprisonment without possibility of release.¹⁵ Upon the jury's recommendation, he was sentenced to death.¹⁶ On appeal, he complained, *inter alia*, of the district court's refusal to instruct the jury that a sentence of life imprisonment without possibility of release would be imposed if the jury could not agree on the proper sentence or if it agreed only that the sentence should not be less than life without possibility of release. The U.S. Court of Appeals for the Fifth Circuit read the statute as providing that in the event of a deadlock on punishment, a second jury would be empaneled; therefore, the Court of Appeals held, the requested instruction was properly denied.¹⁷

The Supreme Court in a 5-4 decision said the interpretation given the statute by the Court of Appeals was incorrect. After providing for the court's imposition of a sentence of death or life without possibility of release if the jury recommends, section 3594 continues: "Otherwise the court shall impose any lesser sentence that is authorized by law."¹⁸ As the defendant argued, the deadlock position is covered by the quoted language and not by section 3593(b)(2)(C)'s provision for the empaneling of a new jury if the first one is discharged for good cause, said the majority.¹⁹

The defendant did not prevail, however, on the constitutional issues on which his hopes for reversal depended. The court's refusal to instruct the jury that the court would impose a sentence of life imprisonment without possibility of parole if the jury was unable to reach a unanimous agreement on a sentence did not violate the Eighth Amendment.²⁰ The Supreme Court declined to exercise its supervisory power to require that an instruction on the consequences of deadlock be given in every capital case.²¹ In this case the court gave the jury three options: (1) it could by unanimous vote recommend the death penalty, (2) the death penalty or life imprisonment without possibility of parole, or (3) ...

¹²119 S. Ct. 2090 (1999).

¹³18 U.S.C. §§ 3591-98 (1994).

¹⁴*Id.* at 2096.

¹⁵*Id.* The defendant was convicted of capital murder under 18 U.S.C. § 1201(a)(2), for kidnapping and bludgeoning to death a 19-year-old female Air Force private.

¹⁶*Id.* at 2097.

¹⁷132 F.3d 232 (5th Cir. 1998).

¹⁸119 S.Ct. at 2098.

¹⁹*Id.*

²⁰*Id.* at 2098-99.

²¹*Id.* at 2099.

“some other lesser sentence.”²² If the jury recommended “some other lesser sentence,” the instruction explained, “the court is required to impose a sentence that is authorized by law.”²³ The instruction did not constitute “plain error,” even though a “lesser sentence” was not authorized in this case.²⁴ There is “no reasonable likelihood that the jury applied the instructions incorrectly.”²⁵ The instructions, read in their entirety, were not misleading as to the consequences of the jury’s failure to reach a unanimous verdict.²⁶ Any confusion over the effect of a lesser sentence recommendation was allayed by the court’s instruction that the jury should not concern itself with such matters.²⁷ Loose drafting of “nonstatutory” aggravating factors was harmless error if it constituted error at all.²⁸

Stewart v. LaGrand.²⁹ In 1984, the petitioner and his brother were convicted in an Arizona court of a capital crime and were sentenced to die in the gas chamber which was the only method of execution at that time provided by Arizona law. The petitioner did not challenge the method of execution on direct appeal or in his petition for state post-conviction relief. By the time of his current petition, the state had changed its law to provide that death sentences will be carried out by means of lethal injection unless the prisoner opts for lethal gas. The petitioner exercised his option in favor of gas and challenged that method of execution as violative of the Eighth Amendment’s Cruel and Unusual Punishment Clause. The U.S. Court of Appeals for the Ninth Circuit issued an order restraining the state from executing the petitioner by means of gas. It did not stay the execution but it ruled that he could not be executed under a death warrant that allowed him to choose gas as an execution method. The court relied on its reasoning in an opinion it issued just days before in the case of the petitioner’s brother, who has since been executed. In that opinion, the court noted that the constitutional challenge was not available at the time the petitioner defaulted in the state court, and held that — in light of circuit precedents — Eighth Amendment protections could not be waived in capital cases.³⁰

In a *per curiam* opinion, the Court held that the petitioner waived any objection he might have had to the constitutionality of execution by lethal gas.³¹ The petitioner also procedurally defaulted by failing to raise the claim on direct appeal after having been sentenced to death by lethal gas prior to the State’s adoption of the lethal injection

²²*Id.* at 2100.

²³*Id.*

²⁴*Id.* at 2102.

²⁵*Id.* at 2103.

²⁶*Id.* at 2104.

²⁷*Id.* at 2103.

²⁸*Id.* at 2108-109.

²⁹119 S. Ct. 1018 (1999).

³⁰*Id.* at 1020.

³¹*Id.* at 1021.

alternative.³² At the time of the petitioner’s direct appeal (1987) there had been sufficient debate about the constitutionality of lethal gas executions that he cannot show cause for his failure to raise the issue on appeal.³³ A holding in a *habeas* case that Eighth Amendment protections cannot be waived in the capital context would violate the “new rule” prohibition of *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court noted.³⁴

The companion decision stemmed from Germany’s effort to obtain enforcement of an *ex parte* order by the International Court of Justice directing the United States to prevent the scheduled execution.³⁵ Germany claimed that LaGrand, a German national, should have been informed at the time of his arrest that the Vienna Convention gave him the right to contact the German Consulate. The Supreme Court held that the United States did not waive its sovereign immunity, and it is “doubtful” that Article III, § 2, cl. 2, which extends jurisdiction to cases affecting ambassadors and consuls, “provides an anchor” for the action.³⁶ The Federal Republic’s suit against the State of Arizona, as was Paraguay’s suit against Virginia in *Breard v. Greene*,³⁷ “is without evident support in the Vienna Convention and in probable contravention of the Eleventh Amendment.”³⁸

Strickler v. Greene.³⁹ The petitioner was convicted of kidnapping a college student and killing her. The evidence linking the petitioner to the crime included physical evidence and the testimony of an eyewitness by the name of Anne Stolfus. The prosecution failed to disclose evidence which consisted of notes made by a detective during interviews he had with Stolfus and letters she sent to the detective. This evidence cast doubt on the detailed testimony she gave at the trial.

The prosecutor permitted the defense to see everything in his file except for some documents which were not in the file. The documents surfaced after the affirmance of the petitioner’s conviction and the denial of the state post-conviction relief, when the federal district court ordered that the files be made available to the petitioner’s counsel. The district court subsequently vacated petitioner’s capital murder conviction and death sentence on the grounds that the State had failed to disclose those materials and that petitioner had not, in consequence, received a fair trial. The Fourth Circuit reversed because the petitioner had procedurally defaulted his *Brady* claim by not raising it at his trial or in the state collateral proceedings. In addition, the Fourth Circuit concluded that the claim was, in any event, without merit.

The Supreme Court held that Virginia did not violate the rule derived from *Brady v. Maryland* that suppression by the prosecution of evidence favorable to an accused violates

³²*Id.*

³³*Id.*

³⁴*Id.* a 1020.

³⁵*Federal Republic of Germany v. United States*, 119 S. Ct. 1016 (1999).

³⁶*Id.* at 1017.

³⁷523 U.S. 371 (1998).

³⁸119 S. Ct. at 1017.

³⁹119 S. Ct. 1936 (1999).

due process where the evidence is material either to guilt or to punishment.⁴⁰ In this case the prosecution withheld an initial statement made to police by a prosecution witness.⁴¹ The statement, much less definite about the defendant's role in the crime than her later testimony, could have been used by the defendant to impeach her credibility.⁴² The petitioner's procedural default in not raising the *Brady* claim in state courts is excused by an adequate showing of cause and prejudice.⁴³ The petitioner did in fact rely on the prosecution's "open file" policy and on assurances that "everything known to the government" had been disclosed.⁴⁴ The petitioner could not, however, establish the basic *Brady* violation.⁴⁵ Two of the three components of a violation were established: (1) the evidence was favorable to the accused and (2) was suppressed by the State.⁴⁶ The petitioner failed, however, to demonstrate the prejudice necessary to establish "materiality" because he failed to show that there is a reasonable probability that his conviction or sentence would have been different if the materials had been disclosed.⁴⁷ Even if the witness had been "severely impeached," there was other evidence in the record lending "strong support" for the conclusion that the petitioner still would have been convicted and sentenced to death.⁴⁸ Furthermore, the testimony in question did not relate to the petitioner's eligibility for the death sentence, and was not relied upon by the prosecution in its closing argument during the penalty phase of the trial.⁴⁹

⁴⁰119 S. Ct. at 1939-40.

⁴¹*Id.* at 1940.

⁴²*Id.* at 1948.

⁴³*Id.* at 1948-49.

⁴⁴*Id.* at 1949-50.

⁴⁵*Id.* at 1951.

⁴⁶*Id.* at 1955.

⁴⁷*Id.* Under Virginia law, the death penalty is available not only against a predominant participant in a capital offense, but against equally prominent participants as well.

⁴⁸*Id.* at 1954.

⁴⁹*Id.* at 1954-55.

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