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Capital Punishment: Summary of Supreme Court Decisions of the 2003-2004 Term

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Summary

In the 2003-2004 term, the Supreme Court decided in *Banks v. Dretke*, that Delma Banks should be allowed to raise *Brady* challenges based on failure by the prosecution to release exculpatory evidence in federal *habeas* proceedings even though they had been fully presented to the state courts. In *Nelson v. Campbell*, it ruled that a challenge to the method of execution under 42 U.S.C. § 1983 is not equivalent to a *habeas corpus* petition, provided that the petitioner is not contesting his imprisonment (the petitioner claimed that the Alabama prison's intended use of a "cut-down" procedure to access his veins for a lethal injection violated his Eighth Amendment protection against cruel and unusual punishment) and that section (§ 1983) is appropriate for his Eighth Amendment claim seeking a temporary stay and permanent injunctive relief. In *Beard v. Banks*, the Court held that the petitioner could not benefit from retroactive application of its 1988 decision in *Mills v. Maryland* regarding consideration of less than unanimously-found mitigation. In *Schriro v. Summerlin*, the Court decided against retroactive application of its 2002 decision in *Ring v. Arizona*, regarding the right to have a jury find any fact necessary for imposition of the death penalty. In *Tennard v. Dretke*, the Court held that the Court of Appeals for the Fifth Circuit used an improper legal standard when it refused to allow Tennard to appeal the district court's decision denying him a writ of *habeas corpus* based on his failure to establish a nexus between his crime and evidence of his low IQ. In *Mitchell v. Esparza*, (*per curiam*) it concluded that the Ohio Court of Appeals had properly subjected the *habeas* petitioner's claims to harmless error, when, although the sole offender, he argued he had not been charged with being the principal offender.

The capital punishment decisions which were decided during the 2003-2004 Term involved issues concerning: (1) prosecutorial misconduct and ineffective assistance of counsel, (2) a complaint brought under 42 U.S.C. § 1983 by a death-sentenced prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, relative to whether it was properly recharacterized as a *habeas corpus* petition under 28 U.S.C. § 2254, (3) whether a Supreme Court 1988 decision that

held that jurors did not have to agree unanimously on the existence of mitigating circumstances when determining the appropriate sentence, could be applied retroactively to invalidate a death sentence, (4) whether intellectual functioning has mitigating dimensions beyond the impact it has on the ability to act deliberately, and (5) whether the Eighth Amendment precluded the death sentence and did the state court improperly subject the defendant's claims to harmless error review.

*Banks v. Dretke*¹ was a death penalty case in which, despite *Brady v. Maryland*,² which requires the state to turn over material, exculpatory or impeachment evidence, the state withheld evidence that would have allowed Banks to discredit two key prosecution witnesses.³ In the course of litigating his federal *habeas* petition, Banks uncovered the evidence to support his *Brady* claim. The district court granted a writ of *habeas corpus* with respect to Bank's death sentence, but did not overturn the conviction, deciding that Banks had not sufficiently pressed his *Brady* claim earlier.⁴ The Court of Appeals vacated the writ.⁵

In an opinion written by Justice Ginsburg, the Supreme Court reversed. The decision turned on the application of the Court's since replaced "cause and prejudice standard" that governed when a state prisoner's federal *habeas* claim might be heard notwithstanding his failure to afford state courts the opportunity to cure the asserted defect. Three factors account for "cause" on Bank's behalf: (1) the state knew of but kept back information that undermined the creditability of two of its witnesses, (2) before trial, the state asserted that it would disclose all *Brady* material, and (3) in the state post conviction proceedings, the state continued to deny the substance of Bank's suggestions of *Brady* violations.⁶ After finding cause, Justice Ginsburg addressed the prejudice issue. The issue here was whether the suppressed evidence could reasonably be taken so as to place the case in such a different light as to undermine the confidence in the verdict. The Court answered this question in the affirmative,⁷ although Justices Thomas and Scalia dissented here in the belief that full disclosure would not have changed the result.⁸

The lower courts had rejected the *Brady* claim, in part because Banks had failed to properly amend his *habeas* petition (pleadings) to include the claim once he uncovered evidence to substantiate it.⁹ Banks' contention was that the claim mentioned in other

¹ 124 S.Ct. 1256 (2004).

² 373 U.S. 83, 87 (1963).

³ 124 S.Ct. at 1262.

⁴ *Id.* at 1269-270.

⁵ *Id.* at 1270-271.

⁶ *Id.* at 1273.

⁷ *Id.* at 1279.

⁸ 124 S.Ct. 1281 (Thomas, J. with Scalia, J.) (concurring in part and dissenting in part).

⁹ *Id.* at 4203-4204.

submissions should have been treated as if raised in the pleadings under Civil Procedure Rule 15(b) in an evidentiary hearing as Rule 15(b) instructs.¹⁰ The Court agreed.

*Nelson v. Campbell*¹¹ involved a death row inmate who had filed a claim under 42 U.S.C. § 1983 of the civil rights statute stating that his damaged veins would make it impossible to insert an intravenous line for the lethal injection without cutting deep into his flesh and muscle. Nelson said that this procedure which is called a “cut-down” was a violation of his rights under the Eighth Amendment. The writ of *certiorari* was limited to the issue of whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the constitutionality of the “cut-down” procedure for carrying out the execution is a proper recharacterization of a *habeas corpus* petition under 28 U.S.C. §2254?

The Court ruled that Nelson could pursue his claim that the lethal injection procedures in his case constituted cruel and unusual punishment and that 42 U.S.C. § 1983 is an appropriate vehicle for his Eighth Amendment claim seeking a temporary stay and permanent injunctive relief. The Court also ruled that a challenge to the method of execution under 42 U.S.C. § 1983 is not equivalent to a *habeas corpus* petition, provided the challenger is not contesting his imprisonment. Writing for a unanimous Court, Justice O’Connor agreed that Nelson’s claim was separate from any challenge to the method-of-execution or conviction. The Court also said that it need not reach the difficult question of how “method-of-execution” claims should be classified generally.¹²

*Beard v. Banks*¹³ was a death penalty case in which the petitioner was sentenced to death on 12 counts of first-degree murder. After the Pennsylvania Supreme Court upheld the conviction, the United States Supreme Court announced its decision in *Mills v. Maryland*,¹⁴ which overturned a death sentence when a jury understood the sentencing instructions to preclude consideration of mitigating factors not unanimously found to exist. Under the Court’s *Teague v. Lane* standard rule,¹⁵ *Mills* could only be retroactively applied to Banks’ case (after the completion of his direct appeals) if *Mills* was not a “new rule” of constitutional construction or if *Mills* were “a watershed” decision. The Third Circuit held that *Mills* did not announce a new principle of law for retroactivity purposes, and therefore its application of *Mills* to its review of Banks’ sentence was proper.

In a 5-4 decision written by Justice Thomas, the Court decided that the rule announced in *Mills* — -that sentencing schemes could not prevent jurors from considering mitigating evidence that had not been accepted unanimously when deciding whether to apply the death penalty — -was a new rule, because it was not compelled by previous U.S.

¹⁰ *Id.* at 1280.

¹¹ 124 S.Ct. 2117 (2004).

¹² *Id.* at 2123-124.

¹³ 124 S.Ct. 2504 (2004).

¹⁴ 486 U.S. 367 (1988).

¹⁵ 489 U.S. 288 (1989).

Supreme Court decisions.¹⁶ As a new rule, it could only be applied retroactively if, under the second exception, it was a “...watershed rule[] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.”¹⁷ Deciding that it was not a watershed rule, the Court held that it could not be applied retroactively and (reversing the Court of Appeals) Banks’ conviction was therefore constitutional.

Justice Stevens, writing for the dissenting justices, finding nothing novel about the *Mills* rule stated: “...the kind of arbitrariness that would enable 1 vote in favor of death to outweigh 11 in favor of forbearance would violate the bedrock fairness principles that have governed our trial proceedings for centuries. Rejecting such a manifestly unfair procedural innovation does not announce a ‘new rule’...but simply affirms that our fairness principles do not permit blatant exceptions.”¹⁸

In *Schriro v. Summerlin*,¹⁹ the defendant (Summerlin) was convicted and sentenced to death under an Arizona law, which authorized the trial judge, rather than the jury, to determine the presence of aggravating circumstances which would cause the defendant to become eligible for the death sentence. After unavailingly exhausting his direct appeal to the Arizona state supreme court, and while his *habeas* case was pending in the Ninth Circuit Court of Appeals, the U.S. Supreme Court decided in *Ring v. Arizona*²⁰ that the Arizona sentencing law was unconstitutional because a jury must decide the existence of the aggravating circumstances. The Ninth Circuit applied the *Ring* decision retroactively on the basis that *Ring* was a substantive decision, or, in the alternative, if it was procedural it was a “watershed” decision. The U.S. Supreme Court reversed, deciding first, *Ring* was procedural, not substantive, and, second, as procedural it was not a “watershed” decision.²¹

Commenting upon the differences between death row inmates granted new sentencing hearings and death row inmates denied new sentencing hearings because they are in a later stage of appeals, Justice Breyer stated: “Certainly the ordinary citizen will not understand the difference. That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing.”²² How can the Court square this spectacle with what it has called the ‘vital importance to the defendant and to the

¹⁶ *Id.* at 2509.

¹⁷ *Id.*

¹⁸ 124 S.Ct. 2515, 2516 (2004) (Stevens, J., with Souter, Ginsburg, and Breyer, JJ., dissenting).

¹⁹ 124 S.Ct. 2519 (2004).

²⁰ 536 U.S. 584 (2002).

²¹ 124 S.Ct. at 2524-2526.

²² According to the majority opinion in the *Schriro* case, the rule for determining when constitutional criminal rulings that impose a “new rule” are retroactive appears to be as follows: If a convicted person still has a direct appeal available, a decision applies retroactively; but if direct appeals are exhausted and a convicted defendant only has incidental relief available, the rule may not apply.

community that any decision to impose the death sentence be, and appear to be, based on reason’?”²³

In *Tennard v. Dretke*²⁴ the Court reversed the Fifth Circuit’s decision that denied *habeas* relief to a prisoner on death row in Texas. In 1986, the petitioner, Tennard, was convicted of capital murder in Texas. During the penalty phase of his trial, Tennard’s parole officer testified regarding his low IQ, and his defense counsel argued that the low IQ mitigated his culpability. Presented with the only two “special issues” used in the Texas capital sentencing scheme at the time — whether the petitioner’s conduct was committed deliberately and whether the petitioner posed a threat of future dangerousness — the jury answered both issues in the affirmative.

The Fifth Circuit denied Tennard a certificate of appealability. It held that Tennard had not met the Fifth Circuit’s two-part, post-*Penry* test regarding whether his evidence was “constitutionally relevant.” The court explained that Tennard had failed to present evidence of a “uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,” because a low IQ — standing alone — is not a “uniquely severe” condition. In any event, the court emphasized, Tennard had not shown that the criminal act was attributable to this permanent condition.

In an opinion by Justice O’Connor, and joined by Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer, the Court reversed the Fifth Circuit. A certificate of appealability should issue if the applicant demonstrates that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong, and this analysis must take into account the deferential standard of review applicable to federal *habeas* petitions (28 U.S.C. § 2254(d)(1)).²⁵ The Court noted that the “constitutional relevance” test “...has no foundation in the decisions of this [Supreme] Court, and that it could not countenance “the suggestion that low IQ evidence is not relevant mitigating evidence . . . unless the defendant also establishes a nexus to the crime.”²⁶ The Fifth Circuit should have granted the certificate of appealability. Reasonable jurists could conclude that the low IQ evidence was relevant mitigating evidence and that the state courts unreasonably concluded otherwise in this case.²⁷

Chief Justice Rehnquist, Justices Scalia, and Thomas each wrote separate dissenting opinions contending basically that the District Court conducted the proper inquiry regarding whether the low IQ evidence was before the jury and properly concluded that it was.²⁸

²³ 124 S.Ct. 2526, 2529 (2004) (Breyer, J., with Stevens, Souter and Ginsburg, JJ., dissenting).

²⁴ 124 S.Ct. 2562 (2004).

²⁵ *Id.* at 2569.

²⁶ *Id.* at 2572.

²⁷ *Id.* at 2573.

²⁸ 124 S.Ct. 2573 (2004) (Rehnquist, CJ., dissenting); 124 S.Ct. 2575 (2004) (Scalia, J. dissenting); 124 S.Ct. 2576 (2004) (Thomas, J. dissenting).

In *Mitchell v. Esparza*²⁹ the Court held, *per curiam*, that *habeas* relief is appropriate only if a court applied harmless error review in an objectively unreasonable manner. Esparza was convicted of murder in Ohio and received the death penalty. After appealing his conviction within the Ohio courts, he petitioned the federal district court for a writ of *habeas corpus*. The district court granted habeas and the Sixth Circuit affirmed on the grounds that Esparza had not been charged as the “principal offender,” a prerequisite for imposition of the death penalty under Ohio law. The Ohio courts rejected the claim, holding that it was harmless error since Esparza was the only person charged in the crime.

The Court reversed the Sixth Circuit, concluding that the error was harmless since “principal offender” had the same meaning as “actual killer.”³⁰

²⁹ 124 S.Ct. 7 (2003).

³⁰ *Id.* at 12.

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