The Burger Court Opinion Writing Database

Schick v. Reed

419 U.S. 256 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 4, 1974

Re: 73-5677 - Schick v. Reed

MEMORANDUM TO THE CONFERENCE:

Again, to facilitate consideration I send the above opinion in typewritten form as enhanced by Xerox. Any changes which may develop between this and the printed version will be clearly marked.

Regards,

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun ✓
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

Circulated: DEC 4 1974

Recirculated: _____

12/3/74 Attached to 12-4 Memo

Re: 73-5677 - Schick v. Reed

In 1960 the President, acting under the authority of Article II, section 2, clause 1 of the Constitution, commuted Petitioner Maurice L. Schick's sentence from death to life imprisonment, subject to the condition that he would not thereafter be eligible for parole. The Petitioner challenges the validity of the condition We granted certiorari to determine the ~~validity~~ enforcibility of that commutation as so conditioned.

The pertinent facts are undisputed. In 1965 Petitioner, then a master sergeant in the United States Army stationed in Japan, was tried before a court martial for the brutal murder of an eight-year-old girl. He admitted the killing, but contended that he was insane at the time that he committed it. Medical opinion differed on this point. Defense experts testified that Petitioner could neither distinguish between right and wrong nor adhere to the right when he killed the girl; a board of psychiatrists, testifying on behalf of the prosecution, concluded that Petitioner was suffering from a non-psychotic behavior disorder and was mentally aware of able to control and ~~responsible for~~ his actions. The court martial rejected Petitioner's defense and he was sentenced to death on March 27, 1954, pursuant to Article 118 of the Uniform Code of Military Justice, 10 U.S.C. § 918. The conviction and sentence were affirmed by an Army Board of Review and, following a remand for consideration of additional psychiatric reports, by the Court of Military Appeals. 7 U.S.C.M.A. 419.

The case was then forwarded to President Eisenhower for final review as required by Article 71(a) of the U.C.M.J., 10 U.S.C. § 871(a).

Stylistic changes throughout;
see pp. 1, 3-8, 10-12.

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackm
Mr. Justice Powell
Mr. Justice Rehnqu

1st PRINTED DRAFT

From: The Chief Justic

Circulated:

SUPREME COURT OF THE UNITED STATES

Recirculated: DEC 10

No. 73-5677

Maurice Schick, Petitioner,
v.
George J. Reed, Chairman of the United States Board of Parole, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In 1960, the President, acting under the authority of Art. II, § 2, cl. 1, of the Constitution, commuted Petitioner Maurice L. Schick's sentence from death to life imprisonment, subject to the condition that he would not thereafter be eligible for parole. The petitioner challenges the validity of the condition and we granted certiorari to determine the enforcability of that commutation as so conditioned.

The pertinent facts are undisputed. In 1954 petitioner, then a master sergeant in the United States Army stationed in Japan, was tried before a court martial for the brutal murder of an eight-year-old girl. He admitted the killing, but contended that he was insane at the time that he committed it. Medical opinion differed on this point. Defense experts testified that petitioner could neither distinguish between right and wrong nor adhere to the right when he killed the girl; a board of psychiatrists testifying on behalf of the prosecution concluded that petitioner was suffering from a nonpsychotic behavior disorder and was mentally aware of and able to

Stylistic changes throughout; See pp. 6, 10-12.

153-12 and 153

To: Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: The Chief Justice

2nd DRAFT

Circulated: _____

Recirculated: DEC 19 19

SUPREME COURT OF THE UNITED STATES

No. 73-5677

Maurice Schick, Petitioner,
v.
George J. Reed, Chairman of the United States Board of Parole, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December —, 1974]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

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The pertinent facts are undisputed. In 1954 petitioner, then a master sergeant in the United States Army stationed in Japan, was tried before a court martial for the brutal murder of an eight-year-old girl. He admitted the killing, but contended that he was insane at the time that he committed it. Medical opinion differed on this point. Defense experts testified that petitioner could neither distinguish between right and wrong nor adhere to the right when he killed the girl; a board of psychiatrists testifying on behalf of the prosecution concluded that petitioner was suffering from a nonpsychotic behavior disorder and was mentally aware of and able to

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 7, 1975

Re: No. 73-1433 - Hurt v. Britton (p. 16)
(held for No. 73-5677 - Schick v. Reed)

MEMORANDUM TO THE CONFERENCE:

My views on the disposition of the above case are as follows:

In 1955 petitioner, then a sergeant in the United States Army stationed in Okinawa, was convicted by a court-martial of murder and rape and sentenced to death. In 1960 President Eisenhower commuted the death sentence to dishonorable discharge, forfeiture of all pay and allowances, and imprisonment for 45 years at hard labor; the commutation was conditioned upon petitioner's never being eligible for pardon or parole. Petitioner has now served nearly 20 years of his sentence and under the relevant statute would have been considered for parole in 1970 but for the condition in the President's order of commutation.

In 1971 petitioner sought release by habeas corpus from the United States District Court for the District of Kansas, contending that his conviction had been tainted by prejudicial pretrial publicity and command influence, that it was invalid because he had been convicted by a

two-thirds vote of the court-martial, and that the no-parole condition in the commutation denied him due process and equal protection. The District Court (O'Connor) rejected each of petitioner's claims. First, it concluded that the publicity claim had been given fair and adequate consideration by the military courts and that, in any event, a review of the record revealed that petitioner had not been prejudiced. Second, the District Court observed that military personnel are not entitled to a jury trial when tried by a court-martial and that due process does not require unanimity. Finally, the court held:

> "[P]etitioner has already unsuccessfully tested the legality of his conditional commutation. See Hurt v. Moseley (10th Cir., 71-1307, September 13, 1971). He may not resurrect this same issue by successive applications or by merely attempting to combine it with new issues."

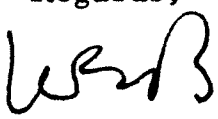
CA 10 affirmed per curiam.

Petitioner's attacks on his conviction are insubstantial. His claims of prejudicial publicity and command influence have been carefully reviewed by the Court of Military Appeals and the District Court; even assuming that federal courts may review such claims by military personnel to the same extent as in cases involving civilians, but see Burns v. Wilson, 346 U.S. 137 (1953) (plurality opinion of Vinson, C.J.), the issue is not cert-worthy.

Similarly, the District Court correctly disposed of petitioner's argument that he could only be convicted by a unanimous vote. The Sixth Amendment right to a jury trial does not apply to courts-martial, see Kahn v. Anderson, 255 U.S. 1, 8 (1923), and unanimity is not required by the Due Process Clause. See Johnson v. Louisiana, 406 U.S. 356, 359-63 (1972).

Finally, the single significant respect in which petitioner's commutation differs from the one upheld in Schick v. Reed, No. 73-5677, is that the condition purports to exclude him from future pardon as well as parole. However, that provision is not challenged in this case and probably could not be until petitioner was denied a pardon on the basis of it. Schick therefore controls, and I recommend that certiorari be denied.

Regards,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 18, 1974

Dear Thurgood:

Please join me in your dissent in 73-5677, SCHICK v. REED.

WOD by Sandra

WILLIAM O. DOUGLAS

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 18, 1974

RE: No. 73-5677 - Schick v. Reed

Dear Thurgood:

Please join me in your dissenting opinion in the above.

Sincerely,

Bill

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

December 4, 1974

Re: No. 73-5677, Schick v. Reed

Dear Chief,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 12, 1974

Re: No. 73-5677 - Schick v. Reed

Dear Chief:

Please join me.

Sincerely,

Byron

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 5, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-5677 -- Schick v. Reed

In due course, I hope to circulate a dissent in this case.

T.M.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

Circulated: DEC 1

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-5677

Maurice Schick, Petitioner, v. George J. Reed, Chairman of the United States Board of Parole, et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December —, 1974]

MR. JUSTICE MARSHALL, dissenting.

The Court today denies petitioner relief from the no-parole condition of his commuted death sentence, paying only lip service to our intervening decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because I believe the retrospective application of *Furman* requires us to vacate the death sentence and substitute the only lawful alternative—life with the opportunity for parole, I respectfully dissent.

I

The Court misconstrues petitioner's retroactivity argument. Schick does not dispute the constitutional validity of the death penalty in 1954. Nor does he contend that he was under sentence of death[1] in 1972 when the decision issued in *Furman*, invalidating "the imposition and carrying out" a discretionary death sentences. 408 U. S. 239. Rather he argues that the retroactive application of *Furman* to his no-parole commutation is required because the imposition of the death sentence was the indispensable vehicle through which he became subject to his present sentence. In other words, the no-parole condition could not now exist had the court martial before which Schick was tried not imposed the death penalty.

[1] But see Part II, *infra*.

STYLISTIC CHANGES THROUGHOUT.

pp 1-8, 10-12

HAB

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

2nd DRAFT

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

No. 73-5677

Recirculated: DEC 19 1974

Maurice Schick, Petitioner, *v.* George J. Reed, Chairman of the United States Board of Parole, et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[December —, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The Court today denies petitioner relief from the no-parole condition of his commuted death sentence, paying only lip service to our intervening decision in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Because I believe the retrospective application of *Furman* requires us to vacate petitioner's sentence and substitute the only lawful alternative—life with the opportunity for parole, I respectfully dissent.

I

The Court misconstrues petitioner's retroactivity argument. Schick does not dispute the constitutional validity of the death penalty in 1954 under then existing case law. Nor does he contend that he was under sentence of death [1] in 1972 when the decision issued in *Furman*, invalidating "the imposition and carrying out" of discretionary death sentences. 408 U. S. 239. Rather he argues that the retroactive application of *Furman* to his no-parole commutation is required because the imposition of the death sentence was the indispensable vehicle through which he became subject to his present sentence. In other words, the no-parole condition could not now exist had the court

[1] But see Part II, *infra*.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 12, 1974

Re: No. 73-5677 - Schick v. Reed

Dear Chief:

Please join me.

Sincerely,

Harry

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 12, 1974

No. 73-5677 Schick v. Reed

Dear Chief:

Please join me.

Sincerely,

L. Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 5, 1974

Re: No. 73-5677 - Schick v. Reed

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

Copies to the Conference