The Burger Court Opinion Writing Database

Estelle v. Smith

451 U.S. 454 (1981)

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

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

From: The Chief Justice

Circulated: Mar 1981

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1127

W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner, *v.* Ernest Benjamin Smith.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights. 445 U. S. 926 (1980).

I

A

On December 28, 1973, respondent Ernest Benjamin Smith was indicted for murder arising from his participation in the armed robbery of a grocery store during which a clerk was fatally shot, not by Smith, but by his accomplice. In accordance with Art. 1257 (b)(2) of the Texas Penal Code (Vernon 1973) concerning the punishment for murder with malice aforethought, the State of Texas announced its intention to seek the death penalty. Thereafter, a judge of the 195th Judicial District Court of Dallas County, Texas, informally ordered the State's attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial.[1] See n. 5, *infra*.

[1] This psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at

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

CHAMBERS OF
THE CHIEF JUSTICE

March 17, 1981

MEMORANDUM TO THE CONFERENCE:

Re: 79-1127 - Estelle v. Smith

Another draft in this case with largely stylistic changes will be along in a few days.

Regards,

WEB

CHANGES THROUGHOUT

NEW FOOTNOTES: 7, 15

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

From: The Chief Justice

Circulated: _____

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1127

W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner, *v.* Ernest Benjamin Smith.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April —, 1981]

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[1] This psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at

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

CHAMBERS OF
THE CHIEF JUSTICE

April 16, 1981

Re: 79-1127 - Estelle, Director, Texas Department of Corrections v. Smith

Dear Lewis:

My first look at your memo of April 15 leads me to suggest that your concern is on cases not before us. I will take another look to see if some narrowing will meet your concerns.

As of now, I see no implications about the "other cases" you find troublesome.

Regards,

WEB

Justice Powell

Copies to the Conference

HAB

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

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1981

Re: No. 79-1127 -- Estelle v. Smith

Dear Lewis:

In my view, the situations described in your April 15 memo are not presented in this case and are not controlled by our holding. The opinion is specifically addressed to psychiatric inquiries bearing on future dangerousness. We hold that:

> "A criminal defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness." [emphasis added]

This conclusion, I think, is narrowly focused on the reality that "the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist" and that "the State used as evidence against respondent the substance of his disclosures during the pretrial psychiatric examination." Another type of psychiatric evaluation, however, may present different consequences or may be based solely on observation of the defendant rather than on his statements.

You suggest that the principles articulated in subpart II-A(1) of the opinion "can be read as applying to many sentencing procedures." I do not read it so broadly; that section is addressed only to whether the Fifth Amendment privilege is applicable to the penalty phase of a bifurcated capital murder trial. The hypothetical examples you posit - psychiatric inquiry concerning the prospects for rehabilitation as bearing on the length of a prison sentence and interviews with probation officers - are clearly in a different sphere. Depending upon the particular facts, they may or may not raise Fifth Amendment concerns. We cannot know how our decision here

might be applied to such issues, but our consideration of them should await a case or controversy bringing them properly before us. I see no point - indeed I am opposed - to trying to negate all conceivable readings of our decision others might make.

With regard to the practical operation of the Fifth Amendment privilege, your suggestion that judicial "supervision" is ordinarily exercised over its invocation seems to me at odds with Miranda v. Arizona. Moreover, you appear to imply that a criminal defendant can be compelled to respond to certain out-of-court inquiries, even though the State cannot compel him to testify at trial, regardless of whether his answers would be incriminating. In this case, the psychiatrist's diagnosis on future dangerousness was based on the totality of respondent's disclosures, and the trial judge could not realistically have been expected to differentiate between questions that required incriminating answers and those that did not. Whatever role judicial "supervision" generally has to play regarding Fifth Amendment privilege claims by non-party witnesses, its role is significantly different when a criminal defendant invokes the privilege. The opinion attempts to preclude a defendant from frustrating the proper conduct of competency and sanity examinations, but it does give him the right not to respond to a psychiatrist if his answers can be used on the issue of future dangerousness to assist the State's case for the death penalty. In other words, he cannot be compelled to fasten a noose around his own neck. I can see no other way for the Fifth Amendment privilege to function in this context.

In an effort to meet some of your concerns, I am willing to add the following footnote after the last paragraph on page 13 of the opinion:

> "13/ Of course, we do not hold that the same Fifth Amendment concerns are necessarily presented by all types of interviews and examinations that might be ordered or relied upon to inform a sentencing determination."

Regards,

WEB

Justice Powell
cc: Conference

NEW FOOTNOTES: #13

CHANGES AS MARKED: 8, 11, 14, 15

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

From: The Chief Justice

Circulated: _____

Recirculated: APR 30 1981

3d DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1127

W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner, *v.* Ernest Benjamin Smith. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether the prosecution's use of psychiatric testimony at the sentencing phase of respondent's capital murder trial to establish his future dangerousness violated his constitutional rights, 445 U. S. 926 (1980).

I

A

On December 28, 1973, respondent Ernest Benjamin Smith was indicted for murder arising from his participation in the armed robbery of a grocery store during which a clerk was fatally shot, not by Smith, but by his accomplice. In accordance with Art. 1257 (b)(2) of the Texas Penal Code (Vernon 1973) concerning the punishment for murder with malice aforethought, the State of Texas announced its intention to seek the death penalty. Thereafter, a judge of the 195th Judicial District Court of Dallas County, Texas, informally ordered the State's attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial.[1] See n. 5, *infra*.

[1] This psychiatric evaluation was ordered even though defense counsel had not put into issue Smith's competency to stand trial or his sanity at

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

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1981

Re: 79-1127 - Estelle v. Smith

Dear Lewis:

My postscript to you on the April 29 memo solicited a "bill of particulars" on your disquiet. I will surely give careful consideration when I understand your problems with the opinion. Like you, I don't want an opinion broader than necessary.

Regards,

WEB

Justice Powell

Copies to the Conference

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

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1981

Re: Cases held for No. 79-1127 -- Estelle v. Smith

MEMORANDUM TO THE CONFERENCE:

The following cases are held for No. 79-1127 -- Estelle v. Smith:

1.) No. 79-721 -- Woods v. Texas (CAPITAL CASE). Petitioner was convicted in Texas state court of capital murder for the killing of a 62-year-old woman during the course of a robbery. Petitioner's conviction and death sentence were affirmed by the Texas Court of Criminal Appeals. Petitioner argues that the trial court erred: (a) in admitting into evidence certain photographs of the deceased; (b) in allowing the prosecutor to advise prospective jurors that he could not call petitioner as a witness; (c) in allowing the prosecutor to advise prospective jurors that affirmative answers to the Special Issues would result automatically in the imposition of the death penalty; (d) in failing to sustain the defense challenge for cause to three prospective jurors; and (e) in allowing a State psychiatrist to examine petitioner without his attorney being present. The Texas Court of Criminal Appeals held that these issues "present[ed] nothing for review" since they were raised without citation of authorities or argument as required by the Texas Code of Criminal Procedure. The court's decision thus rests on an adequate and independent state ground. Moreover, petitioner requested the appointment of the examining psychiatrist and was advised that he could decline to answer questions, and, in Estelle v. Smith, we found no constitutional right to have counsel present during a psychiatric interview.

I will vote to DENY.

2.) No. 79-5002 -- Wilder v. Texas (CAPITAL CASE): Petitioner and his co-defendant Armour were tried jointly and convicted in Texas state court of capital murder for the killing of a gas station attendant during the course of a robbery. The Texas Court of Criminal Appeals affirmed petitioner's conviction and death sentence. Prior to trial,

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 10, 1981

RE: No. 79-1127 Estelle v. Smith

Dear Chief:

I agree.

Would you please add at the foot of your opinion the following:

"JUSTICE BRENNAN.

I join the Court's opinion. I also adhere to my position that the death penalty is in all circumstances unconstitutional."

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 1, 1981

RE: No. 79-1127 Estelle v. Smith

Dear Chief:

I agree with your recirculation of March 31 in the above. I assume that you will add at the foot of your opinion the statement I sent you on March 10, as follows:

"JUSTICE BRENNAN.

I join the Court's opinion. I also adhere to my position that the death penalty is in all circumstances unconstitutional."

Sincerely,

Bill

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE POTTER STEWART

April 17, 1981

Re: 79-1127 - Estelle v. Smith

Dear Chief:

I share the concerns expressed by Lewis in his letter to you of June 15. In addition, I have at least three other concerns, as follows:

1. In the third line from the bottom of page 13, you refer to the Miranda safeguards as "constitutionally required", and the same thought is repeated in the third line of footnote 13 on page 15. Yet in Michigan v. Tucker, 417 U.S. 433, the Court expressly held that the Miranda guidelines are not constitutionally required.

2. The opinion refers repeatedly to the applicability of the Fifth and Sixth Amendments to this case. Yet those Amendments are not applicable at all to Texas or any other State, but only to the federal government. My concern on this score is longstanding, and I have publicly expressed it at least once. See Williams v. Florida, 399 U.S. 78, 144 (dissenting opinion).

3. At the end of the runover paragraph on page 8, there is a reference to an infringement of "Fifth Amendment values". The pertinent question, however, is whether there was an infringement of the Constitution. See Columbia Broadcasting v. Democratic Committee, 412 U.S. 94, 145, (concurring opinion).

Sincerely yours,

P.S.

Blind Copy Justice Powell

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Stewart

Circulated: 1 MAY 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1127

W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner, *v.* Ernest Benjamin Smith.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1981]

JUSTICE STEWART, concurring in the judgment.

The respondent had been indicted for murder and a lawyer had been appointed to represent him before he was examined by Dr. Grigson at the behest of the State. Yet that examination took place without previous notice to the respondent's counsel. The Sixth and Fourteenth Amendments as applied in such cases as *Massiah* v. *United States*, 377 U. S. 291, and *Brewer* v. *Williams*, 430 U. S. 387, made impermissible the introduction of Dr. Grigson's testimony against the respondent at any stage of his trial.

I would for this reason affirm the judgment before us without reaching the other issues discussed by the Court.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1127

W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner, *v.* Ernest Benjamin Smith.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May —, 1981]

JUSTICE STEWART, with whom JUSTICE POWELL joins, concurring in the judgment.

The respondent had been indicted for murder and a lawyer had been appointed to represent him before he was examined by Dr. Grigson at the behest of the State. Yet that examination took place without previous notice to the respondent's counsel. The Sixth and Fourteenth Amendments as applied in such cases as *Massiah* v. *United States*, 377 U. S. 291, and *Brewer* v. *Williams*, 430 U. S. 387, made impermissible the introduction of Dr. Grigson's testimony against the respondent at any stage of his trial.

I would for this reason affirm the judgment before us without reaching the other issues discussed by the Court.

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

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 1, 1981

Re: 79-1127 - Estelle v. Smith

Dear Chief,

Please join me in your 3/31/81 circulation.

Sincerely yours,

The Chief Justice

Copies to the Conference

cpm

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

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 10, 1981

Re: No. 79-1127 - Estelle v. Smith

Dear Chief:

I join all but Part II-C of your opinion. Please add the following at the foot of your opinion:

"JUSTICE MARSHALL, concurring in part."

"I join in all but Part II-C of the opinion of the Court. I adhere to my consistent view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. I therefore am unable to join the suggestion in Part II-C that the penalty may ever be constitutionally imposed."

Sincerely,

T.M.

T.M.

The Chief Justice

cc: The Conference

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

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 1, 1981

Re: No. 79-1127 - Estelle v. Smith

Dear Chief:

Please join me in your recirculation of March 31, received today.

Sincerely,

HAB.

The Chief Justice

cc: The Conference

February 6, 1981

79-1128 Montana v. United States

Dear Potter:

I think your opinion in this case is excellent, and will join it.

I may file a brief concurring statement along the lines enclosed, although I believe by adding somewhat similar language to your note 17 you could make clear that state regulation must be nondiscriminatory. It is possible, though unlikely, that sportsmen might persuade the state to allow larger bag limits within an Indian reservation (where game might be more plentiful) than the limits applicable elsewhere.

Sincerely,

Mr. Justice Stewart

lfp/ss

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 15, 1981

79-1127 Estelle v. Smith

Dear Chief:

I have not joined your opinion because of concerns as to how far it reaches.

1. Will the Fifth Amendment privilege apply to sentencing procedures of all criminal cases or only to the sentencing phase of a bifurcated capital punishment trial?

What if the trial court wanted phychiatric advise as to the prospects of rehabilitation, thinking this relevant to length of a prison sentence? And what about interviews by probation officers? Although your holding is limited to this capital punishment case, it seems to me that the principles broadly articulated - particularly in subpart II-A(1) - can be read as applying to many sentencing procedures. If this is a permissible reading of your opinion, I would have difficulty joining it.

2. Nor is it clear to me how invocation of the Fifth Amendment privilege - as you apply it - will work in practice. Ordinarily, the claim of privilege is made during a judicial or investigative committee proceeding, with a judge or some appropriate official present to rule on the legitimacy of the claim. I understand your opinion to hold that, at least in a capital case, the accused before trial - and the convicted defendant after trial - may invoke the privilege to prevent a psychiatric examination simply by refusing to be examined. Normally this would not occur in the presence of the court. The question, of course, could be brought to the attention of the presiding judge by the state's attorney who could request a ruling. But if every accused person (or defendant) has an absolute right not to be examined, there would be nothing for the judge to decide.

I would suppose that some answers to questions by a psychiatrist would not be incriminating, and the answers

might be helpful - either to the state or to the defendant - at the sentencing hearing. But I read your opinion as creating a per se rule that, with or without any judicial supervision, a defendant may refuse a psychiatric examination altogether or cut it off at any point. If so, would the principle extend to any question asked a convicted defendant by a probation officer?

Perhaps there are entirely satisfactory answers to these concerns. If so, they would be helpful to me in deciding whether to join your opinion or simply concur in the result.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 30, 1981

79-1127 Estelle v. Smith

Dear Chief:

Thank you for your letter of April 29.

I remain somewhat disquieted by what seems to me to be the broad sweep of your opinion. If there is other writing, I will await it.

Alternatively, I may try my hand at a brief concurring opinion.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

CORRECTED COPY

May 7, 1981

79-1127 Estelle v. Smith

Dear Potter:

Please add my name to your opinion concurring in the judgment in this case.

Sincerely,

L. F. P.

Mr. Justice Stewart

lfp/ss

cc: The Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: APR 30 1981

Recirculated: _____

No. 79-1227 Estelle v. Smith

JUSTICE REHNQUIST, concurring in the judgment.

I concur in the judgment because, under Massiah v. United States, 377 U.S. 201 (1964), respondent's counsel should have been notified prior to Dr. Grigson's examination of respondent. As the Court notes, ante, at 14, respondent had been indicted and an attorney had been appointed to represent him. Counsel was entitled to be made aware of Dr. Grigson's activities involving his client and to advise and prepare his client accordingly. This is by no means to say that respondent had any right to have his counsel present at any examination. In this regard I join the Court's careful delimiting of the Sixth Amendment issue, ante, at 15 n. 13.

page 2

Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

1st PRINTED DRAFT

Recirculated: MAY 1 1981

SUPREME COURT OF THE UNITED STATES

No. 79-1127

W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner, *v.* Ernest Benjamin Smith.

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

[May —, 1981]

JUSTICE REHNQUIST, concurring in the judgment.

I concur in the judgment because, under *Massiah* v. *United States*, 377 U. S. 201 (1964), respondent's counsel should have been notified prior to Dr. Grigson's examination of respondent. As the Court notes, *ante*, at 14, respondent had been indicted and an attorney had been appointed to represent him. Counsel was entitled to be made aware of Dr. Grigson's activities involving his client and to advise and prepare his client accordingly. This is by no means to say that respondent had any right to have his counsel present at any examination. In this regard I join the Court's careful delimiting of the Sixth Amendment issue, *ante*, at 15, n. 13.

Since this is enough to decide the case, I would not go on to consider the Fifth Amendment issues and cannot subscribe to the Court's resolution of them. I am not convinced that any Fifth Amendment rights were implicated by Dr. Grigson's examination of respondent. Although the psychiatrist examined respondent prior to trial, he only testified concerning the examination after respondent stood convicted. As the court in *Hollis* v. *Smith*, 571 F. 2d 685, 690–691 (CA2 1978) analyzed the issue, "The psychiatrist's interrogation of [defendant] on subjects presenting no threat of disclosure of prosecutable crimes, in the belief that the substance of [defendant's] responses or the way in which he gave them

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

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 10, 1981

Re: 79-1127 - Estelle v. Smith

Dear Chief:

Please join me.

Respectfully,

John

The Chief Justice

Copies to the Conference