ORIGINAL

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
JOHN T. SATTERWHITE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-6284
	)	
TEXAS.	)	

Pages: 1 through 34

Place: Washington, D.C.

Date: December 8, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN T. SATTERWHITE,

Petitioner,

v.

TEXAS : No. 86-6284

Washington, D.C.

Tuesday, December 8, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:58 p.m.

APPEARANCES:

RICHARD D. WOODS, ESQ., San Antonio, Texas, appointed by this Court; on behalf of the Petitioner.

CHARLES A. PALMER, ESQ., Assistant Attorney General of Texas, Austin, Texas; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 86-6284, John T. Satterwhite v. Texas.

Mr. Woods, you may present whenever you're ready.

ORAL ARGUMENT OF RICHARD D. WOODS, ESQ.

ON BEHALF OF PETITIONER

MR. WOODS: Mr. Chief Justice, and may it please the Court:

This is a criminal case from the State of Texas, involving a death penalty which was imposed on the Petitioner, and a case that was tried in 1979, error complained of and the question presented before the Court is whether there was a denial of effective assistance to counsel in the allowing of testimony of Dr. James P. Grigson, a Dallas psychiatrist, during the punishment phase of the Defendant's trial.

The complained-of error is couched on this Court's decision in Estelle v. Smith in that counsel was not advised nor notified previously to the order appointing Dr. Grigson to examine the Defendant for two reasons. One was for the purpose of determining competency to stand trial and the other was the purpose of determining future dangerousness.

QUESTION: Was that by court order?

MR. WOODS: Yes, sir, it was.

This order was signed and filed by the District Attorney's Office, the prosecutor in San Antonio, Texas, on

April 18th, 1979. Trial counsel was appointed April 10th, 1979.

The order was submitted to the Court in whose case, the Petitioner's case, was indicted. So, counsel should have been advised prior to at least the examination of the Defendant. The Defendant was not examined by Dr. Grigson till May 3rd of 1979.

QUESTION: This is the same Dr. Grigson that appears in every Texas case or did appear?

MR. WOODS: Yes, sir.

QUESTION: Is he now deceased?

MR. WOODS: No. I believe he's still practicing. I don't believe he is testifying anymore in these types of cases, at least I have not heard.

QUESTION: Mr. Woods, what's the role of defense counsel in connection with one of these examinations by a psychiatrist in Texas?

MR. WOODS: Justice, the role as far as the defense counsel would be is to determine or to at least advise the client of the scope of the examination. Let him know what the impact of it could be, what ramifications could be derived from it.

QUESTION: The attorney doesn't actually sit in and participate at the time of the examination.

MR. WOODS: Such a request, of course, was not made

and I don't think the attorney would necessarily --

QUESTION: But it doesn't normally occur, is that right?

MR. WOODS: No, I don't think so.

QUESTION: It would simply be a matter of consultation of some kind with the defendant in advance of the examination?

MR. WOODS: To let him know what the ramifications could possibly be as to the examination.

QUESTION: Now, there were two other doctors appointed in this instance to examine Mr. Satterwhite, is that right?

MR. WOODS: Yes. That was Dr. Holbrook, I believe.

QUESTION: And in each case, did his attorney advise -- were you representing him below?

MR. WOODS: Yes, I was.

QUESTION: Did you talk to him in advance of those -- each of those examinations?

MR. WOODS: I was not advised. First of all, Dr. Holbrook did not examine Mr. Satterwhite.

QUESTION: There was a psychologist who did.

MR. WOODS: Dr. Betty Lou Schroeder.

QUESTION: Yes, and did you talk to Mr. Satterwhite before that examination?

MR. WOODS: Dr. Schroeder examined Mr. Satterwhite on

March 16th, before I was appointed to represent him.

QUESTION: And not again?

MR. WOODS: The testimony that was elicited in the trial shows that she talked to him on several occasions. Now, specifically when is unknown to anybody.

QUESTION: That testimony is not challenged.

MR. WOODS: Well, basically, it is challenged, but, of course, it's challenged through the means of the complaint of Dr. Grigson, because of Dr. Grigson's impact on the jury, which, of course, is buttressed by the state's argument. They argued and supported their position for the death penalty and for the affirmative findings of Special Issue Number 2, stating that Dr. Grigson's a Dallas psychiatrist and a medical doctor and not referring to just a mere county-employed psychologist.

And, so, the impact to the jury was very great. Of course, the impact of Dr. Grigson to any jury is devastating and it's for those reasons for which, of course, --

QUESTION: Now, what was the April 18th order signed by the Court?

MR. WOODS: That was the -- there was an order signed. That was the order for appointment of a Dr. Holbrook and Dr. Schroeder to examine the Defendant for purposes of mental competency.

QUESTION: And you knew about that order?

MR. WOODS: No, ma'am.

QUESTION: Never?

MR. WOODS: Did not -- was not told. I was not advised.

QUESTION: Never looked at the file?

MR. WOODS: I saw the file several times.

QUESTION: You did not see that order in the file?

MR. WOODS: Well, I can only tell you from my own personal observation and knowledge, I didn't see that order in the file --

QUESTION: But it was there?

MR. WOODS: Well, I tell you, I saw the file on, I can say, two occasions, both of which I did not see the order in the file nor did I see Dr. Grigson's letter that he wrote on May 3rd.

QUESTION: I'm talking about the April 18th order.

MR. WOODS: The April 18th order did not surface until after, I'd say it was, about the middle of May, and that's when I prepared several motions which were filed May 29th.

QUESTION: Isn't there a copy of that for each case?

MR. WOODS: The entry of a docket sheet as to that particular order, if made, and I don't have it in front of me right now, was not necessarily entered, as I could see.

QUESTION: Well, has it ever been entered?

MR. WOODS: I don't remember. I couldn't tell you.

QUESTION: I suppose if it's on the docket, entered on the docket sheet and there's a date on it, that's what you usually look at to see what's in a file.

MR. WOODS: Yes, sir.

QUESTION: Did you look at it?

MR. WOODS: I looked. I did look at the docket sheet because sometimes they keep --

QUESTION: Well, don't you think you ought to look at the docket sheet?

MR. WOODS: Well, that's true, but, Your Honor, the point is that in examining the file -- first of all, the order that was presented in front of the Judge, after I was appointed as counsel, was not even -- in fact, I was not even provided any notice for it. Without notice --

QUESTION: Wouldn't Texas practice ordinarily provide that if there's an attorney of record for the Defendant, that a copy of that -- at least a proposed formal order would be served?

MR. WOODS: As far as I'm concerned, yes. In every court I've practiced in, there's always been a notice or certificate of service to opposing counsel.

QUESTION: What date were you appointed?

MR. WOODS: April 10th, I believe, yes. I was --

QUESTION: Was April 18th the order serviced?

MR. WOODS: That's the date the order was signed by

the Judge.

QUESTION: And you didn't see it until May some time?

MR. WOODS: I didn't see it until mid-May.

QUESTION: Is this the Schroeder order or the Grigson order?

MR. WOODS: This is actually the Holbrook order. There was never an order for Dr. Grigson. He came in under the guise of the Holbrook order.

QUESTION: I thought that the order pursuant to which Schroeder examined your client was entered before you were appointed.

MR. WOODS: Yes, sir. That order was entered the day after he was arrested.

QUESTION: What order is it we're talking about? What were the contents of the order entered on April 18th?

MR. WOODS: The contents of the order on April 18th dealt with the appointment of Drs. Holbrook and Schroeder to examine John Satterwhite for purposes of determining competency to stand trial and to determine whether or not he would be a continuing threat to society in the future.

QUESTION: You're not directly challenging either the Holbrook or the other expert testimony, are you?

MR. WOODS: There was no expert testimony from Holbrook.

QUESTION: Well, then, the other, the Schroeder.

MR. WOODS: I am effectively challenging --

QUESTION: You're not saying that it was a violation of the Sixth Amendment to have permitted her to testify?

MR. WOODS: Her testimony came in based upon her examination at a time prior to counsel being appointed and then, as she testified, at a time after counsel was appointed. She said and the record should reflect that she was aware of counsel being appointed but did not notify counsel of her examinations.

QUESTION: But, now, was that point raised in the Texas Court of Criminal Appeals?

MR. WOODS: The point was raised more towards Dr. Grigson than it was --

QUESTION: Much more, almost to the exclusion of --

MR. WOODS: I'll have to agree. That's true.

QUESTION: So, but, now, do you challenge the Schroeder testimony here, not having challenged it in the Texas Court of Criminal Appeals?

MR. WOODS: Well, it was challenged in the Motion for Rehearing in the Texas Court of Criminal Appeals.

QUESTION: And what did the Texas Court of Criminal Appeals do with the Motion for Rehearing?

MR. WOODS: They did not write an opinion. They denied the Motion for Rehearing.

QUESTION: Now, when was the order appointing Dr.

Grigson entered by the Court, do you know?

MR. WOODS: There was no order for Dr. Grigson ever submitted. The only thing that was --

QUESTION: Well, the Court did something or he wouldn't have made the examination presumably.

MR. WOODS: The Court -- Dr. Grigson acted in the stead of Dr. Holbrook.

QUESTION: Relying on the appointment of Dr. Holbrook.

MR. WOODS: Yes, ma'am.

QUESTION: Did they practice together? Is that --

MR. WOODS: I don't recall where exactly Dr. Holbrook is from. He is from the North Texas area, I believe. He may also be from Dallas. I'm not sure.

QUESTION: At the beginning of the argument, I asked you whether Dr. Grigson's examination was pursuant to court order, and I thought you said yes.

MR. WOODS: Well, of course, technically, he was not in the body of the order. He testified that he examined the Defendant as per a court order, which was arranged through the District Attorney's Office. That is the basis of what his testimony was.

QUESTION: Do you accept that, that he was examining him pursuant to some order?

MR. WOODS: I can only accept that because he wrote a

letter to the trial judge on May 8th, about five days after he examined the Defendant.

QUESTION: Is there any court order which specifically names Dr. Grigson?

MR. WOODS: There is not.

QUESTION: Did the same judge that appointed you sign the order of April 18th?

MR. WOODS: Yes.

QUESTION: And didn't send you a copy after he appointed you?

MR. WOODS: No copy.

It's not so much the substance of the testimony, of the psychiatric testimony or the psychological testimony, it's the lack of notice to counsel, the opportunity to at least advise the client of what the ramifications of the examination could be.

QUESTION: Well, Mr. Woods, let me ask you this. You say no harmless error standard can be applied. What if the state had not put Dr. Grigson on the stand but, in fact, had had Dr. Grigson examine the Defendant and simply didn't use the testimony? Would you be making the same argument, that that's error and it's error per se?

MR. WOODS: If Dr. Grigson did not testify, I may not be here today.

QUESTION: Why not? You're saying that it's the

appointment without notice to you that creates the problem.

MR. WOODS: If Dr. Grigson had, as was in Barefoot v. Texas, if Dr. Grigson had, in fact, -- notice been provided to counsel and he did examine him --

QUESTION: No, no, no notice provided to you. Just like you say happened here, and Dr. Grigson examined the Defendant but the state doesn't try to use the testimony.

MR. WOODS: Well, if the state didn't use the testimony, of course, there's no harm to the Defendant.

QUESTION: So, we do apply harmless error then in examining the question?

MR. WOODS: Well, I believe you'd almost have to, yes.

QUESTION: Then, why shouldn't we apply harmless error here?

MR. WOODS: Well, I have seen some decisions which this Court has -- there seems to be a trend towards harmless error doctrine or Chapman towards these cases in which --

QUESTION: So, you don't object to that really?

MR. WOODS: Well, because of the trends of the Court and the law of this land, I would say no.

QUESTION: And it would be your submission then that in this case, error was not harmless?

MR. WOODS: Exactly. And as far as the harm to be effected, we have to, of course, look at what a jury is going

to do. Is a jury -- and do we have any type of a standard in which we can say what a jury is going to say.

I think as this Court said in Cal v. Romulus, California v. Romulus, that there's no objective or normative marker available to say what a jury is really thinking, and if, in fact, there is a harm or at least there is the error and if the error is of constitutional dimensions, such as in Estelle v. Smith, without the notice, then this Defendant has been harmed because the jury very well could have used that testimony, even though there may have been some very horrible fact situations underlying the prosecution.

We don't know, and for that reason, we cannot really peer into the minds of the jury and see exactly what they would do, and it's on that basis that I believe that harm has been made. It is the conduct so much not of a state agency as it is of the prosecutor of an attorney, one in which knows by the ethical rules should be noticing opposing counsel of motions that are presented to the court.

This is exactly what is being complained of. More so than anything else.

The harm -- if this is harmless error, it is still the Government's burden of proving this beyond a reasonable doubt, and they have got to prove that the error did not contribute to the verdict of taint. Now, I don't see how that could possibly in this case, especially since this Court has

before reviewed the testimony of Dr. Grigson, and there's no question about it but for the notice provision, but for the availability of a defendant to have his counsel, at least to talk to him prior to such examination, he may not have said anything and there may not have been an examination, there may not have been even testimony, and this is one thing that is just so ever-presently clear.

There is continued repeated references made to the Dallas psychiatrist and that he was a medical doctor in the jury argument, and it's this basis in which the state's use of this improperly-admitted evidence that the Defendant was denied a fair trial, was denied effective assistance of counsel, and it's on that basis, following Chapman, upon the harmless error doctrine, that harm was made. Harm was committed.

I reserve my time.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Woods.

Mr. Palmer, we'll hear now from you.

ORAL ARGUMENT OF CHARLES A. PALMER, ESQ.

ON BEHALF OF RESPONDENT

MR. PALMER: Mr. Chief Justice, and may it please the Court:

In disputing the harmless error finding of the Court below, the briefs filed by Satterwhite and by the amicus advance essentially two arguments. The first being that this type of error can never be harmless, and as I understand Mr.

Woods, he's abandoned that argument here today.

The second argument then, and the issue for the Court to decide, is whether on the facts of this case, the state proved that Dr. Grigson's testimony was harmless beyond a reasonable doubt.

Now, we have made an argument that there was no Sixth Amendment violation in connection with Dr. Grigson's examination of Satterwhite. Assuming for the sake of argument that we are wrong on that point, given the trial record before this Court, any error in the admission of Dr. Grigson's testimony certainly was harmless.

QUESTION: You don't suggest that your opposition has abandoned the notion that it was harmful?

MR. PALMER: No, Your Honor.

QUESTION: No.

MR. PALMER: One of the arguments made at some length in the amicus brief was that this particular type of error can never be harmless, and I understand that argument to be abandoned.

QUESTION: Do you think we're bound by that abandonment? You don't think we're free to decide this kind of error could never be harmless? Having Dr. Grigson, who is a professional witness in these cases. He's a specialist in testifying on capital punishment cases, isn't he, or he was?

MR. PALMER: He was, Your Honor.

QUESTION: And doesn't the state use him because he's particularly persuasive to juries? Doesn't he have a record of seventy-nine out of eighty or something like that?

MR. PALMER: I don't know what Dr. Grigson's record is. I assume the state uses him just as they use any other witness, expert or otherwise, because they believe he is persuasive.

QUESTION: Because they believe he'll be persuasive to the jury.

MR. PALMER: Yes, Your Honor.

QUESTION: And do we have any reason to doubt that he was persuasive to the jury in this case?

MR. PALMER: No reason to doubt it.

QUESTION: Then, how could we say it was harmless? How could we possibly say it was harmless?

MR. PALMER: Well, for a number of reasons. First of all, Dr. Grigson's testimony was not as critical to the state's case on punishment as Satterwhite would have the Court believe. It is true that his testimony was important in that it went to an ultimate issue on punishment, one of the two special issues submitted to the punishment phase of the Texas capital trial.

QUESTION: Wasn't he the only doctor who testified on that issue?

MR. PALMER: He was the only medical doctor. There was testimony from a psychologist, Dr. Schroeder, whose

testimony was very similar to that of Dr. Grigson. Her diagnosis of Satterwhite was virtually the same as that of Dr. Grigson, and there was no evidence by Satterwhite to the contrary, psychiatric or otherwise.

There was no evidence whatsoever presented by Satterwhite in either the guilt or the punishment phases.

QUESTION: You feel that his testimony on a scale of one to ten, he's a ten plus?

MR. PALMER: Your Honor, I --

QUESTION: It would not be harmful in any way?

MR. PALMER: I would not agree with that. I've never met the man or heard him testify. I don't have a personal opinion, but it's the state's position in this case that a particular witness' testimony cannot be deemed to be never harmless simply because he is a persuasive witness.

Under traditional harmless error analysis, the Court looks at the entire record of the case and considers the number of factors, including whether the state's case is overwhelming, whether the evidence is cumulative, whether it was important.

QUESTION: Is Dr. Grigson alive?

MR. PALMER: As far as I know, Your Honor. Dr. Holbrook, who --

QUESTION: As far as you know, he is alive right now? Is the state still using him in every single criminal case?

MR. PALMER: Again, Your Honor, I don't know. The

prosecution of this case is in the trial court. Whoever handled it at the local District Attorney's Office. There is no coordination. Their office is in the Attorney General's Office. So, I simply am unaware.

QUESTION: Mr. Palmer, what -- where do we find the court order appointing Dr. Grigson?

MR. PALMER: There is no court order appointing Dr. Grigson. There was an order entered on April 18th appointing Dr. Holbrook and I think, as Mr. Woods has stated, it was Dr. Grigson performing the examination instead of Dr. Holbrook.

QUESTION: Were they practicing psychiatry together?

MR. PALMER: Your Honor, I do not know, and I don't want to represent that as a fact to the Court, but I'm under the impression that they were. They were both used extensively in capital trials at this time in Texas. Dr. --

QUESTION: Is there any evidence of record that defense counsel was sent a copy or otherwise served with a copy of that April 18th order?

MR. PALMER: No, Your Honor.

QUESTION: Do you think that is a requirement? Notice to counsel of proposed examination?

MR. PALMER: Certainly, Your Honor, and we have argued that counsel is effectively put on notice by the fact that the court order was filed in the record of the case, was filed the same day it was entered, April 18th, some two weeks

prior to the examination.

QUESTION: But is that ordinary practice in Texas, that you expect a lawyer for a party to the case to be bound by an order of which he had never seen a copy, that was simply put in the case file?

MR. PALMER: Again, Your Honor, I'm not aware of what's ordinary practice statewide. Apparently, in 1979, in Bexar County, this was a common practice.

QUESTION: Was the Defendant required to submit for the examination?

MR. PALMER: No, he was not. If I may back up a moment, --

QUESTION: Well, but he did and I suppose that counsel might have advised him not to submit.

MR. PALMER: He might have. Our argument that counsel was put on notice is really twofold; one being the fact that the order was on file for two weeks prior to the examination, and the second part being that prior to counsel being appointed, Satterwhite had been examined by Dr. Schroeder, at which time he waived his Sixth Amendment right.

Between the time of Dr. Schroeder's examination and that of Dr. Grigson, counsel was appointed. It strains credulity to assert that Satterwhite and counsel did not discuss the previous examination and any possible future examinations in light of that.

QUESTION: How could he have discussed the possible future examinations when they hadn't even been requested?

MR. PALMER: At the time counsel was appointed, there had been one examination requested and performed.

QUESTION: Yes, but I know, but you're saying that the client should have told the lawyer that another examination which hadn't even been requested might take place.

MR. PALMER: I'm saying, Your Honor, that competent counsel would tell his client, hey, don't let them do this to you again. If this happens again, don't submit.

QUESTION: Well, more likely, if the counsel is told, he would say, well, I guess that phase of it is over, they aren't going to do it again.

MR. PALMER: That's possible, Your Honor.

QUESTION: Wouldn't you sort of think that? One is enough. Usually it is.

MR. PALMER: Perhaps so.

QUESTION: Yeah.

QUESTION: Mr. Woods, I think, told us that -- I think you've just said that that order of April 18th was in the file at least two weeks?

MR. PALMER: It was in the file as of April 18th.

QUESTION: Well, now, where do you get that? I thought Mr. Woods had told us he looked at the file twice and there was no order then.

MR. PALMER: The order is in the transcript before the Court. It was file marked April 18th. Stamped with the Clerk's stamp, showing it as filed on that date.

QUESTION: Is there a docket sheet? Is it listed on the docket sheet?

MR. PALMER: No. The only docket sheet in the transcript, Your Honor, is the trial docket sheet of the proceedings in open court. But the order in question very definitely bears the Clerk's stamp, showing when it was filed.

QUESTION: Do you disbelieve the representation to us that when he looked at it, it wasn't there?

MR. PALMER: I have no reason to disbelieve Mr. Woods on any point. I'm simply telling the Court what the record reveals.

QUESTION: Where is it now?

MR. PALMER: It's in the transcript which is in the Court's possession, along with the entire trial records.

QUESTION: All it says is it was filed and you don't know where it was filed, do you?

MR. PALMER: The file is maintained --

QUESTION: It must have been filed in the Judge's file.

MR. PALMER: No, Your Honor. This is the file of the District Clerk.

QUESTION: Does it have a court trial on it? I mean,

a stamp that says the Court?

MR. PALMER: It has a stamp saying it's filed by the District Clerk's Office, yes.

QUESTION: Was there a finding by the Texas Court that it was on file?

MR. PALMER: I don't --

QUESTION: I mean, what I'm saying, if Mr. Woods is wrong about, you know, if he says it wasn't there, maybe that should have been raised before the Texas Court? Is there a finding by the Texas Court?

MR. PALMER: There was not a specific finding one way or the other. I think implicit in the decision of the Texas Court is that assuming it was on file, it was inadequate notice. I believe that's the legal conclusion.

QUESTION: Why is that implicit in the decision?

MR. PALMER: Because, as a matter of record, the thing was filed and was stamped filed. It's entitled to presumption of regularity and the defense has never questioned that it was filed on that date. Mr. Woods represented he didn't see it when he saw the file, but there's no reason to doubt it was filed on the date it shows to have been filed, and if it was filed on that date, then I can only surmise that that is implicit in the Court's holding that it was not sufficient.

QUESTION: Part of your submission was that the lack of notice was irrelevant as long as the order is on file. The

attorney is charged with everything -- with notice of everything in the file, is that it?

MR. PALMER: That is our first argument. Yes, Your Honor.

QUESTION: Has this Court ever held that?

MR. PALMER: No, Your Honor.

QUESTION: Has the Texas Court ever held that?

MR. PALMER: I'm not aware that they have.

QUESTION: So much would depend on local practice, it seems to me, and there's really no representation or anything very authoritative here about what the practice in Texas is.

MR. PALMER: That is true, Your Honor.

QUESTION: What city was this in?

MR. PALMER: San Antonio.

QUESTION: San Antonio. That's a pretty big city, isn't it?

MR. PALMER: Yes, Your Honor.

QUESTION: I mean, you usually don't run over to the Clerk's office every day to see what's been filed in the cases that you are involved in.

MR. PALMER: Well, assuming for the sake of argument that this examination was conducted in violation of Satterwhite's right to counsel, we would submit that certainly in this record any error was harmless.

QUESTION: Do you know whether or not we possibly got

a copy of that order of April 18th?

MR. PALMER: The record is silent on that.

QUESTION: Well, we do know that Dr. Grigson must have because on May 8th, he wrote a letter to the Judge reporting on the results of his examination.

MR. PALMER: This is true.

QUESTION: Does the record tell us whether a copy of Dr. Grigson's letter to the Judge went to the Defendant or his counsel?

MR. PALMER: I don't know that it does, Your Honor.

QUESTION: I couldn't find any indication of it.

MR. PALMER: But, again, the letter was placed in the file on that same day. At the punishment hearing, the punishment hearing lasted five and a half hours, Dr. Grigson was one of a number of witnesses. There were eight witnesses to Satterwhite's bad reputation. There was testimony by the psychologist, Dr. Schroeder, whose diagnosis of Satterwhite was the same as that of Dr. Grigson.

There was testimony about Satterwhite's prior criminal record, two misdemeanor convictions, two felony convictions. There was testimony about Satterwhite's violent nature. A year and a half before the capital offense, he attacked his blind father-in-law in the man's home, shot him twice through the door, put him in the hospital for a month.

Some six months prior to this capital offense, he was

arrested for carrying a concealed weapon which he attempted to pull from his waist band and use it on a policeman who accosted him.

In the face of all of this very damaging testimony, Satterwhite presented no evidence whatsoever, no psychiatric testimony, a reputation evidence, nothing.

It's -- as I said, the punishment hearing lasted five and a half hours, and we really can't tell from the record how long Dr. Grigson was on the stand, but it was certainly not the bulk of that time or anything approaching it.

Now, as far as how the prosecutor relied on the testimony, again the record doesn't show how much time elapsed during the final argument on punishment, but it does show in the printed statement of facts of the trial that the prosecutor's argument occupied 291 lines of argument, nine of those were devoted to Dr. Grigson.

I would submit to the Court that that is not heavy reliance on Dr. Grigson's testimony.

Unless the Court is prepared to say that this type -- well, perhaps I should back up a moment. Only last term in Buchanan v. Kentucky, the Court stated that this type of error can be harmless. In Buchanan, the defendant claimed that he was examined in violation of his right to counsel and that there was error in the admission of psychiatric testimony. The Court rejected that, holding there was no Estelle v. Smith

violation and then also stated, however, even if there had been, it would be harmless.

So, I think there's no substance whatsoever to Satterwhite's argument that this particular type of error cannot be harmless.

That being so, I would submit to the Court that certainly on this record, it was harmless beyond a reasonable doubt. When the state puts on overwhelming evidence to support the issues on punishment and when the defendant puts on no evidence whatsoever, and when the complained-of testimony is essentially the same as that of properly-admitted testimony, it would seem that any error was harmless beyond any doubt whatsoever.

Satterwhite has chosen to focus on the fact that Dr. Grigson testified on a critical issue and from that argues that this can never be harmless. However, the admission of a confession taken in violation of Miranda can be harmless. Certainly, Dr. Grigson's testimony on punishment is no more damaging to the defendant than his own words inculpating himself.

If that sort of error could be harmless, we submit to the Court that this can, too, and that on this record, it certainly was.

QUESTION: Mr. Palmer, this -- the testimony of Dr. Grigson, though, was the -- am I correct that it was the only

expert testimony by a psychiatric on the matter of future dangerousness?

MR. PALMER: That is true, Your Honor.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Palmer.

Mr. Woods, you have fifteen minutes remaining.

ORAL ARGUMENT OF RICHARD D. WOODS, ESQ.

ON BEHALF OF PETITIONER - REBUTTAL

MR. WOODS: I'll be short.

Your Honor, just in response, the representations I made are accurate. It's one of these things that I don't think in a city the size of San Antonio, about the tenth largest in the nation here, that the counsel here can be charged with the responsibility of going each and every day to check the Court's jackets, and also with regard to this practice, local practice, in Texas or specifically San Antonio, usually motions are noticed to opposing counsel, and very rarely have I seen otherwise, and I believe that the Court can take the same posture.

QUESTION: Well, now, does this ordinarily require a motion? Does the state ordinarily make a motion to the judge for an examination?

MR. WOODS: The practice has been. Now, I'll say since the Estelle v. Smith was handed down, Dr. Grigson has not been used in San Antonio.

QUESTION: But supposing the state wants an examination of a defendant by an expert witness, is that ordinarily accomplished by a motion under Texas procedure?

MR. WOODS: Yes, sir, it is.

QUESTION: Not just an order filed by the judge?

MR. WOODS: It's usually a practice of a motion and an order, is what I've seen.

QUESTION: But, here, I gather, at least there's no record of any motion having been made and just the order filed?

MR. WOODS: I believe there was a motion and an order both signed by -- the motion was signed by the prosecutor and the order was signed.

QUESTION: Was it in one document, a motion and an order?

MR. WOODS: No. Two separate documents.

QUESTION: And you say that the defense attorney got -- was served copies of neither the motion nor the order?

MR. WOODS: That's correct.

QUESTION: Well, the purpose of the examination was for what?

MR. WOODS: To determine whether or not --

QUESTION: Competence?

MR. WOODS: Competency and future dangerousness, and the body of that motion and order of that.

QUESTION: But if there's some question of

competence, I suppose the district judge or the trial judge has got some obligation of his own to respond, if there's some question in his mind about competency, wholly aside from any motion. He could and should order an examination, shouldn't he?

MR. WOODS: Justice, that's correct, except in this case, there was no raising of the issue of competency whatsoever by the Defendant, by his counsel being myself, or by anybody except the prosecutor. The State of Texas, the attorneys, they're the only ones that raised it.

QUESTION: Mr. Woods, is there no local rule of practice governing notice to be given to counsel in criminal cases?

MR. WOODS: I know of no such rule which says that no notice has to be given to opposing counsel.

QUESTION: Well, do you know of a rule that says notice must be given?

MR. WOODS: I can't say that there is a specific local rule that says that, ma'am, no.

QUESTION: Have you checked the local rules?

MR. WOODS: I have read the local rules before, but I don't recall anything such as that.

QUESTION: Not in preparation for this case, I take it?

MR. WOODS: Well, certainly not that.

QUESTION: Well, you know, when your opposing party makes a motion, not necessarily in a capital case, but just in the run-of-the-mind criminal case, in a run-of-the-mind civil case, doesn't he ordinarily serve opposing counsel with a copy of the motion?

MR. WOODS: Absolutely. In fact, more specifically in a civil case, that would be grounds for reversal of the trial if it was adversely decided against that party.

QUESTION: Doesn't that practice pertain in criminal cases, too?

MR. WOODS: Everywhere I've practiced in the criminal courts and also civil courts, that practice has always been maintained.

QUESTION: Beyond that, isn't it also typical in your motion to include a proof of service or some kind of an indication that the opposing counsel received notice?

MR. WOODS: That's correct. In fact, in this case, the record --

QUESTION: The record doesn't show that.

MR. WOODS: Yes, sir. In this case, the record reflects that all of the pre-trial motions filed by the Defendant did have a certificate of service because the joint appendix shows that the certificate of service was omitted from printing, and the prosecutor's motion and order, there is no such notation made.

QUESTION: Mr. Woods, you had been appointed ten days before the order of April 18th.

MR. WOODS: Eight days.

QUESTION: Eight days before. The prosecutor knew of your appointment?

MR. WOODS: I would assume he did. Now, there are several -- at that time, the Bexar County Attorney's Office had over fifty prosecutors.

QUESTION: Well, I don't quite understand this. If he knew that you were representing and he filed a motion for the judge without sending a copy to you.

MR. WOODS: That's basically it.

QUESTION: Maybe your appointment was just noted, put in the file, and no notice sent to him.

MR. WOODS: They let me go my way.

QUESTION: Yes, but the judge, it was the same judge, so the judge certainly knew it.

MR. WOODS: The judge that appointed me is the same judge that signed the April 18th order.

QUESTION: And tried the lawsuit. Same judge tried the case, didn't he?

MR. WOODS: In fact, the arraignment was on April 13th, in which, of course, the prosecutor knew that --

QUESTION: You were there?

MR. WOODS: There was a representative on April 13th.

QUESTION: And then he filed a motion on the 18th and didn't send you a copy?

MR. WOODS: That's correct.

QUESTION: What about Judge -- I mean, Dr. Grigson's letter of May 8th? Did he send you a copy of that?

MR. WOODS: I did not receive a copy of it.

QUESTION: I don't think they like you very much.

MR. WOODS: You may be right.

QUESTION: Or maybe not Mr. Satterwhite.

MR. WOODS: Counsel referred to Buchanan v. Kentucky in his argument and I'd just like to point out that in that case, the defense was used of extreme emotional disturbance. They, in fact, did join with the prosecution in the motion for the psychiatric examination.

So, therefore, it could very well be deemed proper to use psychiatric evidence in rebuttal to a defensive issue. We don't have that in this case. There was no such allusion to any psychiatric evidence by the Defendant because no defense was raised.

And with that, I'll close. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Woods.

The case is submitted.

(Whereupon, at 1:28 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

DOCKET NUMBER: 86-6284

CASE TITLE: John T. Satterwhite v. Texas

HEARING DATE: December 8, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States, and that this is a true and accurate transcript of the case.

Date: December 8, 1987

Margaret Daly

Official Reporter

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