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Recent Developments: Nelson v. State: Trial Judge's Refusal to Allow Presentence Investigation in a Serious Noncapital Case, in the Absence of Sound Reason, Is Abuse of Discretion

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(1) Did the court of special appeals misapply *Batson v. Kentucky* to the circumstances of this case?

(2) Can Gorman assert a sixth amendment claim of fair cross-section deprivation in the composition of his jury?

(3) Did the court of special appeals err in mandating a new trial?

Id. at 413-14, 554 A.2d at 1208.

Regarding the first question, the court considered the applicability of *Batson* to the facts before it. *Batson*, which involved the state exercising its peremptory challenges to strike black jurors from the trial of a black man, created a three-part evidentiary standard that a defendant must meet in order to establish a prima facie case of purposeful discrimination in petit jury selection: 1) defendant must establish that he is a member of a cognizable racial group and that the prosecution has used peremptory challenges to strike members of the same race from venire; 2) the defendant may rely on the fact that peremptory challenges permit discrimination by those who desire to discriminate in their selection of a petit jury; and 3) defendant must show that these facts and any other circumstances surrounding the jury selection raise an inference that the state used their peremptory challenges to strike veniremen from the petit jury because of their race. *Id.* at 410, 554 A.2d at 1207 (relying on *Batson* 476 U.S. at 96).

The *Gorman* court held that the court of special appeals had misapplied the *Batson* standard as that holding did not include situations where the jurors struck were not the same race as the defendant. *Gorman*, 315 Md. at 414-16, 554 A.2d at 1208-10. Furthermore, the circumstances in *Gorman* failed to meet the first prong of the *Batson* evidentiary standard. Gorman was not a member of a cognizable racial group, nor were the jurors who were struck the same race as Gorman. *Id.* at 416, 554 A.2d at 1209-10.

Next, the court rejected Gorman's contention that the state's exercise of peremptory challenges violated his constitutional right to due process of law. Although Gorman relied on *Peters v. Kiff*, 407 U.S. 493 (1972) for support, the court noted that *Peters* involved due process because the jury had been illegally composed, not because of any misuse of peremptory challenges. Therefore, the court concluded that the state's use of peremptory challenges in Gorman's case did not rise to the level of a due process violation. *Gorman*, 315 Md. at 417, 554 A.2d at 1210.

Similarly, the court rejected Gorman's sixth amendment claim of fair cross-section deprivation; first, because the *Batson* Court had ignored a similar claim; and second, because the later case of *Lockhart v. McCree*, 476 U.S. 162 (1986) expressly rejected the notion that the fair cross-section guarantee of the sixth amendment applied to peremptory challenges. *Gorman* at 417-19, 554 A.2d at 1210-11.

Regarding the issue of whether the lower court erred in mandating a new trial, the court stated that the question would only arise if in fact *Batson* applied to the facts of Gorman's case. Since the court previously determined that *Batson* did not apply, it was not necessary to consider the question. *Id.* at 420, 554 A.2d at 1211. Thus, the court of appeals reversed the decision of the court of special appeals, finding no constitutional violations from the state's exercise of its peremptory challenges.

In a lengthy dissent, Judge Eldridge opined that the actions of the state in this case did constitute a prima facie case of purposeful discrimination in violation of the equal protection clause, and therefore, required the prosecution to provide an explanation for its conduct. *Id.* at 420-23, 554 A.2d at 1212-13. He also believed that both Gorman's fourteenth amendment due process rights and his sixth amendment right to an impartial jury had been violated, that the "same class" rule (the first step of the *Batson* evidentiary test) was inconsistent with equal protection of the law (as it applies to race discrimination), and that Gorman had standing to challenge the racial discrimination in the selection of the petit jury in his case, based on the rationale of *Peters Id.* at 423-38, 554 A.2d at 1213-21. In the dissent's view, the state's use of peremptory challenges to strike persons from a petit jury solely because of their race should shift the evidentiary burden to the state to prove otherwise. *Id.* at 438, 554 A.2d at 1220-21.

The *Gorman* decision is significant as it illustrates Maryland's refusal to extend the holding of *Batson* beyond the specific factual scenario in *Batson*. The consequences are: 1) the unconditional nature of the peremptory challenge as it has historically existed is preserved; and 2) white criminal defendants in Maryland are now precluded from asserting discrimination when the state uses its peremptory challenges to strike black veniremen. Conversely, the state remains free to strike blacks from the jury panel in any criminal trial where the defendant is not black.

—Gregory J. Swain

***Nelson v. State*: TRIAL JUDGE'S REFUSAL TO ALLOW PRESENTENCE INVESTIGATION IN A SERIOUS NONCAPITAL CASE, IN THE ABSENCE OF SOUND REASON, IS ABUSE OF DISCRETION.**

In *Nelson v. State*, 315 Md. 62, 553 A.2d 667 (1989), the Court of Appeals of Maryland held that the trial court's refusal to order a presentence investigation report in a serious noncapital case, without giving a sound reason why the investigation should not be made, was an abuse of discretion.

The defendant, Michael B. Nelson, was convicted of first degree murder in the Circuit Court for Baltimore City. Following pronouncement of the verdict, Nelson requested that the court order a presentence investigation under Md. Ann. Code art. 41, §4-609 (1986 & Supp. 1988), before imposing sentence. Although the state had no objection to the investigation, the sentencing judge refused. The court's reasoning was that such investigations were costly and would not be ordered without a showing of particular need.

On the date of the disposition, Nelson again requested a presentence investigation, arguing that, because the court has the discretion to suspend any part of a life sentence, the court was obligated to learn as much as possible about the defendant in order to impose a fair sentence. The court again refused and imposed a life sentence and two consecutive one-year sentences. The Court of Special Appeals of Maryland subsequently affirmed the judgments and sentencing. The only issue before the court of appeals was whether the trial court erred in refusing to order a presentence investigation.

The court of appeals began its analysis by turning to Md. Ann. Code art. 41, §4-609(b) which requires agents of the Division of Parole and Probation to provide the court with presentence reports or other investigations in all cases when requested by any judge. Section 4-609 (c)(1) provides:

> Prior to the sentence by the circuit court of any county to the jurisdiction of the Division of Correction of a defendant convicted of a felony, or a misdemeanor which resulted in serious physical injury or death to the victim, or the referral of any defendant to the Patuxent Institution, a presentence investigation shall be completed by the Division of Parole and Probation and considered by the court, unless the court

specifically orders to the contrary in a particular case.

Seeking to ascertain the legislative intent of section 4-609, the court made an extensive review of the statute's legislative history. The court found that presentence investigations were first addressed in 1953 Md. Laws, ch. 625, which provided that the Board of Parole and Probation would be available to the judges of the circuit courts "for the purpose of making presentence or other investigations" requested by the court.

In 1968, the statute was expanded to include judges of any court of limited criminal jurisdiction, "including, but not limited to the Municipal Court of Baltimore City, any people's court or any trial magistrate, . . . in all cases which may include commitment for two or more years . . . . " Md. Ann. Code art. 41 §124 (Supp. 1968). 1972 Md. Laws, ch. 532 made presentencing investigations available in cases where the commitment was for less than two years, and present subsection (c) was added in 1976. In 1982, misdemeanors were added to the list of crimes entitling a defendant to an investigation and, in 1983, the investigation was made mandatory in any case in which the death penalty was requested. In 1987, the requirement for a presentencing report was further extended to include cases where imprisonment for life without a possibility of parole is requested.

Reading the plain language of section 4-609 in the context of the legislative history of the statute, the court of appeals determined that the statute reflected an obvious legislative preference for the use of presentence investigation reports, and determined that to overcome the presumption in favor of these reports, a court must have a valid reason, particular to the facts of a given case, for refusing to order an investigation. The court reiterated that a presentence report in capital cases is mandatory. In all cases falling within subsection (c)(1), the presentencing report also must be prepared and considered, unless the court orders to the contrary.

The court observed that a trial judge is vested with broad discretionary powers, including the power to fashion an appropriate sentence. The court noted however, that this discretion is limited. This judicial discretion must be reflected in the record, and it must not be arbitrary or capricious, otherwise, the court's action is erroneous. *Nelson*, 315 Md. at 70, 553 A.2d at 671.

In the case *sub judice*, the trial judge refused to order an investigation, because: 1) there had been no showing that there was anything pertaining to the defendant's background that the defense lawyer himself could not have developed; and 2) the process was costly. The court of appeals rejected both reasons. In the court's view, placing the burden on defense counsel to point out with specificity, to the satisfaction of the judge, that a presentence investigation should be ordered was clearly contrary to the statute. Under section 4-609 the burden is on the judge to show why an investigation should not be conducted. The trial judge's belief that the issue of cost was relevant to ordering an investigation had no basis in either the language or the history of the statute. *Nelson*, 315 Md. at 71-72, 553 A.2d at 671-72.

According to the court of appeals, the trial judge had required his own conditions to be met before a presentence investigation would be ordered: an initial investigation by defense counsel, the uncovering of a fact requiring additional explanation, and a finding that the fact to be explained was relevant to the imposition of a fair sentence. Thus, the trial court's denial of the presentence investigation was an abuse of discretion. The court of appeals reversed the judgment of the court of special appeals to the extent that the sentence imposed by the Circuit Court for Baltimore City was affirmed, and remanded the case for resentencing with the benefit of a presentence investigation report.

The decision in *Nelson* is an attempt to accommodate two significant interests: the interest in fair sentencing based on the best available information, and the interest in historic deference to judicial discretion. In holding that presentence investigations in serious noncapital cases are required, unless the judge provides adequate reasons to support a denial, the court severely restricted the trial judge's discretionary power in this area.

—Suzanne R. Cohn

Texas v. Johnson: FLAG-BURNING AS PROTEST PROTECTED WITHIN CONTEXT OF FIRST AMENDMENT

In *Texas v. Johnson*, 491 U.S. ___, 109 S. Ct. 2533 (1989), the United States Supreme Court, in a 5-4 decision, held that the conviction of a protestor for burning an American flag as part of a political demonstration violated the first amendment to the United States Constitution.

The Republican National Convention was held in Dallas, Texas in 1984. A political demonstration took place in the city streets during the convention. The demonstration was staged to protest the policies of the Reagan Administration, the nomination of President Reagan for reelection and the activities of several Dallas-based corporations. The protest culminated at the Dallas City Hall where Gregory Lee Johnson poured kerosene on an American flag and set it ablaze. Although the protestors chanted anti-American slogans over the burning flag, they did not threaten or injure any bystanders.

Johnson was charged and convicted under a Texas statute of desecrating a venerated object. His conviction was affirmed by the Court of Appeals for the Fifth District of Texas. However, the Texas Court of Criminal Appeals reversed, holding that Johnson's actions were the equivalent of symbolic speech and were protected by the first amendment. The state argued that two separate interests supported Johnson's conviction: "preserving the flag as a symbol of national unity and preventing breaches of the peace." *Johnson*, 109 S. Ct. at 2537.

The court of criminal appeals rejected the state's arguments on both points. It noted that although the Supreme Court had not yet decided whether a state could criminalize flag-burning to protect the symbolic value of the flag, a government could not impose upon its citizens beliefs or messages associated with a symbol of unity and that the first amendment protects differences of opinion with respect to such symbols. *Id.* The Texas court also believed that Johnson's conduct did not seriously threaten the status of the flag nor did it lessen the flag's symbolic value. *Id.*

Pertaining to the second interest, the court of criminal appeals noted that the desecration statute was not limited in scope to punishing only those acts that were likely to result in breaches of the peace and also pointed out that Johnson's actions, while offensive to most, were not likely to (and in fact did not) cause a breach of the peace. Additionally, the court noted that Texas had another statute that specifically addressed breaches of the peace, and if the state was truly interested in punishing Johnson for this reason it could have done so without punishing him for flag-burning. Since the court found the desecration statute to be unconstitutional as applied, it did not reach the issue of whether the statute was facially unconstitutional. *Id.* at 2537-38.

The United States Supreme Court also chose to resolve the case on an "as ap-