

sidering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death" (*Lockett*, p 604, emphasis in original). In *Mills v. Maryland*, 486 U.S. 367 (1988), the U.S. Supreme Court held that capital jury instructions and verdict forms are invalid if they require juries to consider in mitigation only those factors unanimously found to be mitigating.

In *Smith v. Spisak*, the U.S. Supreme Court held that the jury instructions and verdict forms differed from *Mills*. Although the jury was instructed that it had to unanimously find that the aggravating factors outweighed any mitigating circumstances to recommend the death sentence, the instructions did not require the jury to determine the existence of each mitigating factor unanimously. For example, if only one jury member believed that being abused in childhood is a mitigating circumstance, while the other 11 jury members did not believe that it was a mitigating circumstance, the instructions did not state that the one jury member has to exclude it as a mitigating factor in the overall balance.

Regarding the claim of "inadequate counsel," in *Strickland v. Washington*, 466 U.S. 668 (1984), the U.S. Supreme Court held that the defendant must show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Strickland*, p 698). In *Smith v. Spisak*, the Court held that, even if the defense counsel's closing argument was inadequate, the Court found no "reasonable probability" that a better closing argument would have overcome the imposition of the death penalty due to Mr. Spisak's crimes, his boastful and unrepentant confessions, and his threats of further violence.

In a concurring opinion, Justice Stevens identified two constitutional errors. First, the jury was instructed to reject a death sentence unanimously before considering other sentencing options. Citing *Beck v. Alabama*, 447 U.S. 625 (1980), Justice Stevens opined that the jury instructions in *Smith v. Spisak* may have led jury members to go along with a sentence of death in the erroneous belief that if they did not sentence Mr. Spisak to death, he would be freed or have a new trial. Second, Justice Stevens opined that the defense counsel's closing argument was deficient. However, he concluded that both the instructional error and the inadequate counsel were harmless, because it is unlikely that the jury would

have reached a different conclusion, given Mr. Spisak's heinous crimes and damning trial conduct.

Discussion

The decision in *Smith v. Spisak* clarified that a jury instruction is not unconstitutional if it either instructs the jury that each mitigating circumstance does not have to be unanimously agreed on or remains silent on the issue. However, a jury instruction is unconstitutional if the jury is told that it must unanimously agree on individual mitigating circumstances.

If the ruling regarding "inadequate counsel" had favored Mr. Spisak, it may have limited the future use of defense strategies, such as asserting the severity of the client's crimes, to build credibility and diminish the impact of the opposition's argument.

Mr. Spisak's conduct terrorized the Cleveland community. Because it was racially motivated, it would probably qualify as a hate crime today. There was very little sympathy for him in the press. One of the authors (PJR) of this case report testified that Mr. Spisak was not legally insane. On February 17, 2011, after more than 27 years on death row, Mr. Spisak was executed at age 59.

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Retrospective Competency Determinations

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Retrospective Competency to Stand Trial Determinations Are Permitted in Addressing an Appeal Alleging Sixth Amendment Violation During a Competency Hearing. The Tenth Circuit Court of Appeals Adopts a Per Se Rule That Counsel Is Automatically Deemed Ineffective When a Defendant Is Unknowingly Represented by a Bogus Attorney

In *United States v. Bergman*, 599 F.3d 1142 (10th Cir. 2010), Gwen Bergman was charged with solici-

tation to commit murder and criminal conspiracy. Ms. Bergman was adjudicated competent to stand trial while being unknowingly represented by an impostor. Ms. Bergman was convicted and sentenced to 108 months' imprisonment after being assigned new counsel. In her appeal, Ms. Bergman argued that her Sixth Amendment right to counsel had been violated at her competency hearing and trial and that her sentence was unreasonable. While the court did not address her claim of inadequate representation at trial, it carefully considered her claim of deficient counsel at the competency hearing. The pivotal question that the court considered was whether a retrospective determination of her competency to stand trial could be made.

Facts of the Case

In 2004, Gwen Bergman pleaded guilty to a violation of the federal Travel Act and criminal forfeiture after paying \$3,000 to an undercover agent posing as a hit man to kill her ex-husband. She was sentenced to 60 months' imprisonment. She successfully appealed her conviction, arguing that she did not admit to facts sufficient to establish a violation of the law. Once the prosecution vacated her original charges, a grand jury indicted her on new charges: use of interstate commerce facilities and mail in the commission of murder for hire, conspiracy to commit murder for hire, and criminal forfeiture.

In 2006, Ms. Bergman's attorney filed a motion to determine her competency to stand trial. She was adjudicated incompetent and remanded to the Bureau of Prisons for treatment. She retained a new attorney, Howard Kieffer, who represented her during a subsequent competency hearing in which she was adjudicated competent. She was convicted in a 2007 bench trial of solicitation to commit murder and criminal conspiracy while represented by Mr. Kieffer and co-counsel. Before sentencing, it came to light that Mr. Kieffer was a fraud. He was not a licensed attorney and never attended law school. After new counsel was appointed, Ms. Bergman was sentenced to 108 months' imprisonment. She appealed, alleging a violation of her Sixth Amendment right to counsel at her competency hearing and at trial and that her sentence was unreasonable.

Ruling

The Tenth Circuit Court of Appeals remanded the case to the district court to consider whether the

district court could retrospectively determine Ms. Bergman's competence to stand trial.

The court of appeals declined to rule on her claim of ineffective counsel at trial because there was an inadequate record of the extent of Mr. Kieffer's activities during the trial. The court of appeals did not sustain Ms. Bergman's claim that her sentence was unreasonable and ruled that the district court did not abuse its discretion in determining her sentence.

Reasoning

The court first considered whether Ms. Bergman's Sixth Amendment rights were violated when she was represented by an impostor at her 2007 competency hearing. The court considered the competency hearing a "critical stage" of the proceedings. She asserted that the court should apply a *per se* rule, automatically deeming any representation by counsel not admitted to any bar as ineffective counsel.

This was a case of first impression for the Tenth Circuit. The prosecution urged the court of appeals to apply the U.S. Supreme Court ruling in *Strickland v. Washington*, 466 U.S. 668 (1984), where a two-part test for establishing ineffectiveness of counsel was developed. The test consisted of establishing that the counsel's representation fell below an objective standard of reasonableness and that counsel's faulty representation resulted in a reasonable probability that, had the counsel performed adequately, the result of the proceedings would have been different.

In a prior ruling in a similar case, *United States v. Stevens*, 978 F.2d 565 (10th Cir. 1992), in which an attorney representing a defendant had his bar membership revoked unknowingly, the Tenth Circuit Court of Appeals did not adopt a *per se* ineffectiveness rule and applied the *Strickland* standard instead.

However, Ms. Bergman's case was distinguished from *Stevens* in that her bogus counsel was never an attorney to begin with. The court looked for similar cases in other circuits for guidance. In *Solina v. United States*, 709 F.2d 160 (2d Cir. 1983), the Second Circuit Court of Appeals established a *per se* ineffectiveness rule where an attorney had never been admitted to practice in any state. The *Solina* court reasoned that effective counsel should at least be a licensed practitioner, and adopted a narrow *per se* rule of ineffective counsel where a defendant is unknowingly represented by someone who has failed to

meet the requirements to practice law. Applying the *Solina* standards, the Tenth Circuit Court of Appeals concluded that Ms. Bergman's Sixth Amendment rights were violated at her October 2007 competency hearing.

The court then considered a remedy. The Sixth Amendment required automatic reversal of Ms. Bergman's conviction only if the violation of the Sixth Amendment pervaded the entire proceedings; thus, only if she stood trial while incompetent would her conviction be overturned.

The court relied on the Supreme Court's decision in *Drope v. Missouri*, 420 U.S. 162 (1975), which discouraged retrospective competency determinations but did not categorically prohibit them. The *Drope* Court delineated factors relevant to a retrospective competency assessment that included the passage of time, availability of contemporaneous medical records, any statements by the defendant in the trial records, and the availability of individuals who were in a position to interact with the defendant before and during trial. The Tenth Circuit remanded the case to the district court for an evidentiary hearing to determine whether it could retrospectively determine Ms. Bergman's competency to stand trial. If the district court determined that her trial competence could not be retrospectively determined or determined that she was incompetent at the time of her competency hearing in 2007, her conviction would be vacated. She could then be retried only if she was determined to be currently competent.

The Tenth Circuit declined to address Ms. Bergman's claim of ineffective counsel at trial, stating that the record was insufficient to rule on the issue.

The court did not sustain Ms. Bergman's claim that her sentence of 108 months' imprisonment was unreasonable, because the district court did not abuse its discretion when sentencing Ms. Bergman. She claimed that the district court should have considered her mental condition, the fraudulent representation by Mr. Kieffer, and the possibility that she was incompetent to stand trial. The court of appeals pointed out that Ms. Bergman's sentence reflected a downward variance from the sentencing guidelines range of 121 to 151 months in consideration of her mental health; her competence to stand trial was not relevant at sentencing; and the district court's decision not to reduce her sentence because of her fraud-

ulent representation did not constitute an abuse of discretion.

Dissent

Justice Holmes of the Tenth Circuit concurred in part and dissented in part. He concurred that Ms. Bergman's Sixth Amendment rights were violated when she was determined to be competent while represented by an impostor. The dissent did not agree with the proposed remedy of a remand for a hearing to establish whether a retrospective competency determination was possible. The dissent argued that retrospective competency determinations are inherently difficult to conduct, and in this case even more so because of the limited trial records. The dissent's suggested remedy was to remand for a new trial.

Discussion

The court addressed whether inadequate counsel at a competence to stand trial hearing constitutes a violation of the Sixth Amendment right to counsel. What made the case unique (and a case of first impression for this court) was that the counsel in question was a fraud who had not attended law school. The Tenth Circuit Court of Appeals concluded that this constituted a *per se* violation of the defendant's Sixth Amendment rights and also considered whether a defendant's competence could be retrospectively determined.

A competency evaluation is usually a present-state evaluation. Evaluators only rarely evaluate a defendant's competency to stand trial retrospectively. The court allowed, in this case, for a retrospective analysis of the defendant's competency to stand trial, but did not imply that retrospective competency evaluations are always permissible. The court allowed a retrospective reassessment of evidence of the defendant's competence at trial, which included contemporaneous competency evaluations conducted by forensic professionals at that time. If the court concluded through such a retrospective reanalysis that Ms. Bergman was competent at trial, the outcome of the trial would be upheld. Only if the court concluded retrospectively that she was incompetent but was tried nevertheless would there be grounds for a reversal of conviction. Finally, if Ms. Bergman were to be retried, then her trial competency would be reassessed.

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