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BLYSTONE v. PENNSYLVANIA 110 S. Ct. 1078,108 L.Ed.2d 255 (1990)

ANALYSIS/APPLICATION IN VIRGINIA

Citing its decisions in *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (Holding that sentencing court's failure to consider the defendant's turbulent family history as a mitigating factor was constitutional error), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (Holding that sentencer must allow consideration of any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant offers as the basis for a sentence less than death), the Court stated that the eighth amendment requires the sentencing decision to be based on the facts and circumstances surrounding the defendant, his background, and his crime. *Clemons v. Mississippi*, 110 S. Ct. 1441, 1448 (1990). The Court also noted that *Eddings* established two objectives to be followed when evaluating death penalty claims under the eighth amendment: "measured consistent application and fairness to the accused." *Eddings*, 455 U.S. at 110-111. The Court reasoned that careful appellate court weighing of aggravating against mitigating circumstances would produce the required consistent application of the death penalty. Such a weighing process would also result in fairness to the accused, especially because state supreme courts often review death sentences.

The Court remanded this case to the Mississippi Supreme Court because the opinion below did not clearly state whether the court did in fact perform a weighing function, and whether it claimed the power to reweigh at the appellate level under state law. Under the *Eddings* and *Lockett* decisions, an automatic rule of affirmance in a weighing state would be invalid because it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances.

Justice Blackmun filed a dissenting opinion stating that the majority's speculation that the Mississippi Supreme Court could reweigh aggravating and mitigating circumstances and possibly salvage Clemons' death sentence amounted to an advisory opinion. *Clemons*, 110 S. Ct. at 1455. He further reasoned that appellate court reweighing of a death sentence that in part rests on a constitutionally impermissible factor allows the reviewing court to assume the role of sentencer. Blackmun concluded that appellate sentencing is improper because appellate courts do not hear the trial testimony or observe the accused, and therefore, appellate courts have diminished ability to act as factfinders.

As in Mississippi, the application of Virginia's vileness factor is often unconstitutional under the U.S. Supreme Court's decisions in *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Holding that the jury's discretion to impose the death penalty is unguided unless the trial court communicates a limiting instruction to the jury regarding the meaning of vileness factors); and *Godfrey v. Georgia*, 446 U.S. 420 (1980) (Holding that the words "outrageously or wantonly vile, horrible and inhuman," standing alone, fail to limit the jury's discretion).

Under Virginia Code Section 19.2-264.4C an individual may receive the death sentence if the jury finds beyond a reasonable doubt the probability that: (1) the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society (future dangerousness); or (2) that the defendant's conduct in committing the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim" (vileness). Va. Code Ann. § 19.2-264.4C (Repl. Vol. 1990). If both the future dangerousness and vileness factors originally are found, and one aggravating circumstance later is found to be invalid or unsupported by the evidence, the Virginia Supreme Court claims the authority automatically to salvage the death penalty without any weighing or harmless error analysis, and without considering mitigation evidence at all. See case summary of *Mu'min v. Commonwealth, Capital Defense Digest*, this issue.

Virginia's capital scheme differs from that of Mississippi because the Mississippi statutory scheme expressly calls for the weighing and balancing of aggravating and mitigating circumstances. See Miss. Code Ann. § 99-19-101(3)(c) (Repl. Vol. 1989). Virginia Code Section 19.2-264.4C only requires the sentencer to consider mitigating evidence and to find an aggravating factor to support a sentence of death. However, the absence of a formal weighing process in the Virginia statutory scheme is not dispositive because a Virginia jury has the option to sentence the defendant to life even if both aggravating circumstances are present. Thus, a weighing process arguably occurs because the jury must consider both aggravating and mitigating factors in determining the appropriate sentence.

Virginia attorneys should also observe that the appellate findings authorized in *Clemons* — balancing the aggravating and mitigating circumstances and harmless error review — open to litigation the fact-finding machinery of the Virginia Supreme Court when one of two aggravating factors found at trial is invalidated. In summary, *Clemons* does not hold, but strongly suggests, that Virginia's "automatic salvaging" holdings are unconstitutional. If the Virginia Supreme Court abandons a claim of authority to *automatically* salvage death sentences, the next step for the defendant is to litigate the adequacy of the supreme court's rules and procedure for fact finding.

Summary and analysis by:
Ginger M. Jonas

BLYSTONE v. PENNSYLVANIA

110 S. Ct. 1078, 108 L.Ed.2d 255 (1990)
United State Supreme Court

FACTS

During September 1983, Scott Wayne Blystone, accompanied by his girlfriend and another couple, picked up a hitchhiker along a Pennsylvania road. Blystone intended to rob the hitchhiker, Dayton Charles Smithburger. Learning that Smithburger had very little money, Blystone pulled off the road and searched him in a nearby field, recovering only thirteen dollars. Blystone ordered Smithburger to lie face down, and then he shot Smithburger six times in the back of the head. During subsequent conversations, Blystone bragged in detail about killing Smithburger.

The Court of Common Pleas convicted Blystone of first-degree murder, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery. At the sentencing stage of the capital trial, the Pennsylvania jury found that Blystone "committed a killing while in the perpetration of a felony", one of the aggravating factors under the Pennsylvania death penalty statute. 42 Pa. Cons. Stat. § 9711(d)(6) (1988). The Pennsylvania death penalty statute mandates death if the aggravating circumstances outweigh the mitigating circumstances, or if there is at least one aggravating circumstance and no mitigating circumstances. 42 Pa. Cons. Stat. § 9711(c) (1)(iv). Finding no mitigating circumstances, the jury sentenced Blystone to death. The Pennsylvania Supreme Court affirmed the conviction and the sentence. The United States Supreme Court granted certiorari to determine whether the mandatory aspects of the Pennsylvania death penalty statute unconstitutionally limited the jury's discretion.

HOLDING

The Supreme Court held that the Pennsylvania death penalty statute satisfied the eighth amendment requirement that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence as required by *Lockett v. Ohio*, 438 U.S. 586 (1986) (holding that the jury must be allowed to consider as mitigating evidence any aspect of the defendant's character or record and any other circumstances of the offense that the defendant proffers as a basis for a sentence less than death).

The Court specifically rejected Blystone's argument that the mandatory aspect of the jury instructions prohibited the jury from assessing whether the relative severity of the conduct that constituted the aggravating factor warranted the death penalty. Writing for the majority, Chief Justice Rehnquist stated that the aggravating factors served to narrow the class of death eligible defendants and that the eight amendment requires no further refinement. He further justified this conclusion by noting that the eighth amendment requirement of individualized sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence. *Blystone v. Pennsylvania*, 110 S. Ct. 1087, 1083 (1990).

The Court also rejected Blystone's challenge that the statute foreclosed the jury from considering some types of mitigating evidence, particularly lesser degrees of statutory mitigating factors. The judge gave the jury examples of some statutory mitigating circumstances it could consider, including whether the petitioner was under "extreme" emotional disturbance, "substantially" impaired in appreciation of his conduct, or under "extreme" duress. The Court rejected the claim that these instructions precluded the jury from considering lesser degrees of disturbance, impairment or duress because the judge elsewhere explained and the statute provided that the jury could consider any relevant mitigating evidence. *Id.* at 1084. Specifically, the judge explained to the jury that these examples were merely items that could be considered and that the jury was entitled to consider any other mitigating evidence. Furthermore, the Pennsylvania death penalty statute provided a catchall mitigating factor which instructed the jury that it could consider "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of the offense." 42 Pa. Cons. Stat. § 9711 (e)(8).

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The United States Supreme Court has upheld mandatory aspects of death penalty statutes. In *Jurek v. Texas*, the court upheld the Texas sentencing scheme which required a sentence of death if certain findings were made against the defendant beyond the initial murder conviction. *Jurek v. Texas*, 428 U.S. 262 (1976) (White, J., concurring) (stating that the Texas sentencing scheme satisfactorily guided the jury's discretion so as to cure the constitutional defect identified in *Furman v. Georgia*, See *Furman*, 408 U.S. 238, 309-310 (1976) (Stewart, J., concurring) (holding death penalty statutes unconstitutional because unguided juries were applying the death penalty in an arbitrary and capricious manner).

The Court rejected Blystone's argument that the jury instructions precluded the jury from considering the severity of the aggravating circumstances in determining whether the imposition of death was warranted. It held that aggravating circumstances limit the class of defendants eligible for death, and the eighth amendment does not command that these circumstances be further refined. See *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (use of aggravating factors in the definition of an offense is a means of narrowing the class of death eligible defendants). The Pennsylvania death penalty statute does not automatically call for the death penalty for certain types of murders; rather, it mandates a sentence of death when the aggravating circumstances outweigh the mitigating circumstances in a particular crime. *Blystone*, 102 S. Ct. at 1082.

One could argue that the Supreme Court upheld the Pennsylvania statute because the judge gave explicit instructions to the jury and made extensive references to the catchall factor to inform the jury that it could consider all mitigating circumstances. The Virginia death penalty statute contains many of the same mitigating factors as the Pennsylvania statute. However, Virginia procedures do not necessarily insure that the jury understands the meaning and scope of mitigation. The Virginia Supreme Court has expressly rejected the argument that the trial court fails to give the jury any guidance about the nature and function of mitigating circumstances. *See O'Dell v. Commonwealth*, 236 Va. 672, 701, 364 S.E.2d 491 (1987).

In Virginia, there is very little explanation of mitigation. The model jury instructions and the Virginia verdict form provide the jury with minimal guidance regarding the meaning of mitigation. Furthermore, the Virginia Supreme Court has held that even though the Virginia legislature permits the jury to grant a sentence of life when the jury finds all aggravating circumstances and no mitigating circumstances, the jury does not have to be explicitly informed about this alternative. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). These factors not only fail to provide the Virginia jury with guidance about the meaning of mitigation, but also have a tendency to mislead the jury about its discretion to consider and give effect to any relevant mitigating evidence.

In *Blystone*, the judge gave the jury examples of mitigating evidence. These included whether the defendant was under "extreme" emotional disturbance, "substantially" impaired in appreciation of his conduct, or under "extreme" duress. Even though the jury is also entitled to consider lesser degrees of impairment, the Supreme Court did not consider these examples misleading because the judge explicitly instructed the jury to consider any other mitigating evidence concerning the defendant's character, or record and any other circumstance of the offense. Virginia, however, fails to provide any instructions that inform the jury that it may consider any other mitigating evidence the defendant proffers at trial. In fact, the Virginia Supreme court has held that it is not necessary that the statutory factors be communicated to the jury. *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979).

Because the jury is entitled to consider and give effect to all relevant mitigating evidence and because the Virginia jury instructions and verdict form fail to provide guidance in consideration of mitigation, counsel has the responsibility to inform the jury of its discretion in considering mitigation. Closing arguments and proposed jury instructions are mechanisms counsel can use to inform the jury about its proper role in the capital trial.

The failure to explain the meaning of mitigation to the jury takes on new meaning in light of the Supreme Court's decision in *Walton v. Arizona*, 110 S. Ct. 3047 (1990) (See case summary of *Walton v. Arizona*, Capital Defense Digest, this issue). In *Walton*, the Court stated that the jury must be informed about every aspect of the sentencing process. *Id.* at 3057. Therefore, the jury may not be properly informed as required under *Walton* if it does not understand the meaning and scope of mitigation.

The *Blystone* holding may have further implications for capital defense in Virginia. The Court stated that the eighth amendment does not require that aggravating circumstances be further refined. If the state legislature has not provided and the court will not allow comparative severity to be weighed as an aggravating factor, relative lack of severity should, and can, be introduced as a mitigating factor. *Lockett* specifically authorized that circumstances of the offense may be introduced as mitigating evidence. *Lockett*, 438 U.S. 586 (1986).

In summary, there is a strong argument that the Pennsylvania death penalty statute was upheld because of the instructions that explicitly informed the jury about the scope of mitigation. Furthermore, the Supreme Court may not require that aggravating factors be further refined; however, this does not prohibit counsel from introducing relative lack of severity as a mitigating factor.

Summary and analysis by:
Steven K. Herndon