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SHELL v. MISSISSIPPI 111 S. Ct. 313, 112 L.Ed.2d 1 (1990)

SHELL v. MISSISSIPPI

111 S. Ct. 313, 112 L.Ed.2d 1 (1990)
United States Supreme Court

FACTS

A trial court convicted Robert Lee Shell of capital murder while in the act of committing an armed robbery. Miss. Code Ann. § 97-3-19(2)(e) (Supp. 1989). The jury then sentenced Shell to death. Relying on the United States Supreme Court decision in *Maynard v. Cartwright*, 486 U.S. 356, 361-64 (1988) (holding "especially heinous, atrocious, or cruel" aggravating circumstance invalid under eighth and fourteenth amendments because the statutory language did not direct the jury's discretion in deciding when the death penalty is appropriate), Shell appealed his sentence on the ground that the court improperly instructed the jury as to whether the charged murder was "especially heinous, atrocious or cruel."

On appeal, the Mississippi Supreme Court affirmed Shell's sentence because it believed the trial court had "limited the 'especially heinous, atrocious or cruel' factor in its charge to the jury." *Shell v. State*, 554 So.2d. 887, 905-06 (Miss. 1990). The United States Supreme Court granted certiorari, and for the first time, the Court unanimously struck down a state's narrowing construction of an aggravating factor.

HOLDING

The Supreme Court held that the limiting instruction utilized by the trial court to define the "especially heinous, atrocious or cruel" aggravating factor was not constitutionally sufficient. In order to be constitutionally sufficient, a limiting instruction must provide meaningful guidance to the sentencer. *See Walton v. Arizona*, 110 S. Ct. 3047, 3057 (1990). The Court vacated Shell's sentence and remanded the case to the Mississippi Supreme Court for further consideration in light of *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990) (holding that Constitution does not prevent state appellate court from upholding death sentence that is based in part on an invalid or improperly applied aggravating circumstance, as long as appellate court either reweighs aggravating and mitigating evidence or conducts harmless error review). *See* case summary of *Clemons v. Mississippi*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1990).

ANALYSIS/APPLICATION IN VIRGINIA

The instruction called into question in this case provided that:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others. *Shell*, 554 So.2d at 905-06.

Concurring in the judgment, Justice Marshall stated that the narrowing constructions of "extremely wicked or shockingly evil" and "outrageously wicked and vile" used by the Mississippi Supreme Court could be used by a person of ordinary sensibility to fairly characterize almost *every* murder." *Shell*, 111 S. Ct. at 314 (emphasis in original). Even though the narrowed construction of "cruel" might pass constitutional muster, that would not save Shell's conviction. Citing the Court's opinion in *Leary v. United States*, 395 U.S. 6, 31-32 (1969) (holding that when a case is submitted to jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside), Marshall concluded that even if the trial court correctly defined "cruel," the two unconstitutional alternative bases of heinous and atrocious which were presented to the jury required a reversal of Shell's conviction.

The Virginia Supreme Court has said that a trial court's refusal to give a definitional instruction to the jury and instead instructing only in the statutory language of aggravating factors, "does not constitute reversible error." *Clark v. Commonwealth*, 219 Va. 237, 243, 257 S.E.2d 784, 790 (1979). The court explained its position by stating that aggravating factors in Virginia's death penalty statute are "commonly used and each has an accepted meaning." *Id.* In Virginia, the jury may impose the death penalty if it finds (1) that 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. § 19.2-264.4(C) (Supp. 1990). Virginia's vileness factors of "outrageously or wantonly vile, horrible or inhuman" are identical to Georgia's "outrageously or wantonly vile, horrible or inhuman" factors that were found invalid in *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980). The *Godfrey* decision made it clear that the statutory language itself provided no sentencing guidance. *Id.* Georgia's vileness factors were in turn equated to "heinous, atrocious, or cruel" in *Maynard v. Cartwright*, 486 U.S. 356 (1988). The U.S. Supreme Court has not passed judgment on the application of Virginia's vileness factors. Thus, application of those factors in Virginia death penalty cases remains constitutionally suspect.

The Virginia Supreme Court, like Mississippi, purportedly has applied a narrowing construction to two of the Virginia statutory vileness factors. *See Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978). In *Smith*, the court defined "depravity of mind" as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." *Id.* "Aggravated battery" means "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Id.* Virginia has not yet defined torture. Thus, if the trial court decides to give Virginia's "narrowing" construction to the jury, especially the construction of "depravity of mind," *Shell* indicates that the narrowed construction is probably not sufficient.

Therefore, in cases where the death penalty is sought or imposed only on Virginia's vileness factor, defense counsel must file a bill of particulars which compels the prosecution to identify the aggravating factors upon which the Commonwealth will rely. This bill of particulars should inquire into how many and which of the three vileness components the Commonwealth will assert. Additionally, the bill of particulars should seek disclosure of all "narrowing constructions" on which the Commonwealth intends to rely. Defense counsel should also preserve constitutional challenges to the application of Virginia's vileness factors, whether presented to the jury with or without the narrowing construction at trial. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

In summary, Virginia's vileness factors are equivalent to those in Georgia and Oklahoma found invalid by the U.S. Supreme Court. Consequently, instructing the jury in nothing more than the statutory language of the factors is error, and the Virginia Supreme Court's *Clark* opinion is no longer good law. Second, the sufficiency of the narrowing constructions of the factors offered in *Smith* has not spe-

cifically been addressed in the federal courts. But, after *Shell*, those narrowing constructions may not be sufficient. Finally, the defendant has a due process right to notice and opportunity to defend against every aggravating factor and every narrowing construction on which the Commonwealth intends to offer evidence.

Properly raising and preserving challenges to the application of the vileness factors is even more critical after *Shell*. Please contact the Virginia Capital Case Clearinghouse for assistance on how to raise and preserve this claim.

Summary and analysis by:
Ginger M. Jonas

PARKER V. DUGGER

111 S. Ct. 731 (1991)
United States Supreme Court

FACTS

A Florida jury convicted the petitioner Robert Parker of two first degree drug related murders and recommended a life sentence for both killings. The trial court judge accepted the jury's life recommendation for one murder but overrode its findings on the second and sentenced Parker to death. In the latter crime, the judge found six aggravating factors and no statutory mitigating factors, but did not discuss non-statutory mitigating evidence. Under Florida law, if a judge finds clear and convincing evidence that supports the death sentence, and further determines that no reasonable person could differ in this assessment, the judge may override the jury's life recommendation and impose the death sentence. *See Tedder v. State*, 322 So.2d 908 (Fla. 1975).

On direct appeal, the Florida Supreme Court found that evidence of the second murder did not support two of the six aggravating factors found by the trial court judge. The reviewing court did not vacate the death sentence because it determined that the trial court found no mitigating factors to weigh against the four remaining, valid aggravating factors. In the penalty phase, defense counsel offered no mitigating factors enumerated by the Florida death penalty statute, but did present evidence that the defendant was under the influence of large amounts of alcohol and drugs during the murders, that he suffered a difficult childhood, that none of his accomplices received a death sentence, and that defendant maintained a positive adult relationship with his family and neighbors. The Florida Supreme Court did not consider these non-statutory mitigating factors and affirmed the death sentence.

HOLDING

The United States Supreme Court concluded that the trial court judge found non-statutory mitigating factors. The Court based its holding on the fact that the judge overrode the jury's sentencing recommendation for only one of the two murders. Because the trial court judge found five aggravating factors in the first killing and accepted the life recommendation, the Court inferred that the judge found non-statutory mitigating evidence. Considering that the non-statutory mitigating evidence applied to both killings the Court further held that the judge also weighed the non-statutory evidence for the second killing, but found that evidence supporting the death sentence was so clear and convincing that no reasonable juror could find otherwise. The U.S. Supreme Court held that the defendant was denied meaningful appellate review when the Florida Supreme Court failed to acknowledge the availability of non-statutory mitigating evidence. The Court remanded the case to the Florida Supreme Court under the authority of *Clemons v. Mississippi*, 110 S. Ct. 1441 (1990), which permits either appellate reweighing of aggravating and mitigating factors or harmless error analysis on the correct record.

ANALYSIS/APPLICATION IN VIRGINIA

Florida is a "weighing" state, whose statutory sentencing scheme differs from that of Virginia. The Florida statute defines certain aggravating and mitigating factors relevant to the imposition of the death penalty. *See* Fla. Stat. §§ 921.141(5) and 921.141(6) (1985 and Supp. 1990). The death penalty may be imposed only where sufficient aggravating circumstances exist that outweigh mitigating circumstances. Fla. Stat. § 921.141(3) (1985). A jury makes the initial sentencing recommendation to the judge and the judge imposes the sentence. Fla. Stat. §§ 921.141(2) and 921.141(3). The jury considers only those aggravating circumstances enumerated, but may weigh any mitigating evidence.

The Virginia death penalty scheme requires the jury to consider only the "vileness" and "future dangerousness" aggravating factors, and further directs the jury to consider both statutory and non-statutory mitigating factors. However, after reviewing aggravating and mitigating evidence, the Virginia jury has the option of imposing a life sentence even if it finds both aggravating factors. Therefore, there is a strong argument that Virginia is a *de facto* "weighing" state and meaningful appellate review must take that into account if one of the two Virginia aggravating factors is found to be constitutionally infirm. *See* case summary of *Clemons v. Mississippi*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1989).

In any event, the importance of *Parker v. Dugger* does not depend on whether state review is in a "weighing" state. This case shows that it is proper for a federal habeas court to monitor whether a state court truly affords meaningful appellate review of a state sentencing scheme. This is a different message than that sent by the Court just last term in *Lewis v. Jeffers*, 111 S. Ct. 111 (1990). *See* case summary of *Lewis v. Jeffers*, Capital Defense Digest, Vol. 3, No. 1, p.7 (1990). In *Lewis*, the Court assessed the application of an aggravating factor and held that if any rational fact finder could have found the aggravating factor, an irrational or inconsistent application by state courts was not a federal concern. The *Parker* court went to great lengths to reconstruct the trial record in support of its conclusion that the state court behaved arbitrarily. In doing so, the Court rejected the dissenters' position that a state supreme court's findings were "mere errors of state law."

Summary and analysis by:
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