Capital Defense Journal

Volume 15 | Issue 1 Article 7

9-1-2002

Bell v. Cone 122 S. Ct. 1843 (2002)

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I. Facts

On August 9, 1980, Gary Bradford Cone ("Cone") began a two-day crime spree through Memphis, Tennessee.[1] After robbing a jewelry store, Cone led police on a high speed chase that ended when Cone abandoned his car in a residential neighborhood.[2] While fleeing from the police, Cone shot a pursuing police officer and a bystander, attempted to shoot a third individual, and demanded that the third individual give up his car to Cone.[3] The next day, Cone broke into the home of Shipley and Cleopatra Todd. He beat and mutilated the Todds, killing them both.[4]

A Tennessee jury found Cone guilty of two counts of first-degree murder in the perpetration of a burglary, three counts of assault with intent to murder, and one count of robbery with a deadly weapon.[5] At the sentencing hearing on the first-degree murder charges, Cone's counsel gave an opening statement and cross-examined the prosecution's witness.[6] He did not present mitigating evidence and he waived his closing argument.[7] Under Tennessee law, the jury was required to impose a death sentence on a first-degree murder charge if it unanimously found beyond a reasonable doubt that the prosecution proved at least one aggravating circumstance that was not outweighed by a mitigating circumstance.[8] The jury found that the State proved two aggravating factors for each of the murder charges and that no mitigating circumstances outweighed them.[9]

On appeal, the Supreme Court of Tennessee affirmed the convictions and death sentence.[10] In his petition for post-conviction relief, Cone argued that his

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1. State v. Cone, 665 S.W.2d 87, 90 (Tenn. 1984).
2. *Id.*
3. *Id.*
4. *Id.*
5. Bell v. Cone, 122 S. Ct. 1843, 1847-48 (2002); *see* TENN. CODE ANN. § 39-2-202 (1982) (identifying murder in perpetration of burglary as first-degree murder, punishable by life imprisonment or death).
6. *Bell*, 122 S. Ct. at 1848.
7. *Id.*
8. *Id.*; *see* TENN. CODE ANN. § 39-2-203(g) (1982) (setting forth situations in which jury shall impose sentence of death).
9. *Bell*, 122 S. Ct. at 1848-49.
10. *Cone*, 665 S.W.2d at 96.

counsel rendered ineffective assistance at the sentencing hearing.[11] A division of the Tennessee Criminal Court denied Cone relief on this claim.[12] The Tennessee Court of Criminal Appeals found that Cone's attorney provided competent representation under the standards set forth in *Baxter v. Rose*[13] and *Strickland v. Washington*[14] and affirmed the denial of relief.[15] The Supreme Court of Tennessee denied Cone permission to appeal, and the United States Supreme Court denied certiorari.[16]

Cone filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the United States District Court for the Western District of Tennessee at Memphis.[17] The federal district court denied his petition on the ground that he did not meet the requirements of § 2254(d).[18] The United States Court of Appeals for the Sixth Circuit affirmed the denial of the writ as to Cone's conviction, but reversed as to his sentence.[19] The Sixth Circuit found that *United States v. Cronic*[20] should have been applied to Cone's ineffective assistance of counsel claim, and thus the Tennessee Criminal Court's use of *Strickland* constituted an unreasonable

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11. *Bell*, 122 S. Ct. at 1849.

12. *Id.*

13. 523 S.W.2d 930 (Tenn. 1975).

14. 466 U.S. 668 (1984).

15. Cone v. State, 747 S.W.2d 353, 356-58 (Tenn. Crim. App. 1987); *see* Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975) (setting forth a state standard for analyzing ineffective assistance of counsel claims); Strickland v. Washington, 466 U.S. 668, 688, 694 (1984) (stating a two-part test for determining whether a defendant's counsel provided such ineffective assistance that the defendant's conviction or sentence should be reversed). The Supreme Court of Tennessee deemed the *Baxter* standard for determining competency of representation in ineffective assistance of counsel claims to be the same as the standard found in *Strickland*. *Bell*, 122 S. Ct. at 1849.

16. *Bell*, 122 S. Ct. at 1849; Cone v. Tennessee, 488 U.S. 871, 871 (1988) (mem.)(denying writ of certiorari).

17. *Bell*, 122 S. Ct. at 1849; *see* 28 U.S.C. § 2254 (2000) (setting forth evidentiary requirements for writ of habeas corpus; part of the Anti-Terrorism and Effective Death Penalty Act of 1996).

18. *Bell*, 122 S. Ct. at 1849; *see* 28 U.S.C. § 2254(d). Section 2254(d) reads:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in the light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d).

19. *Bell*, 122 S. Ct. at 1849; Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001).

20. 466 U.S. 648 (1984).

application of established law.[21] The United States Supreme Court granted certiorari.[22]

Cone argued that the state court's denial of his appeal was contrary to applicable federal law because the court applied the wrong legal rule to his claim of ineffective assistance of counsel.[23] He claimed that the state court mistakenly applied the law of *Strickland* because *Cronic* should have governed the court's analysis of his claim.[24] Cone alleged that this misapplication of law constituted grounds for habeas relief under § 2254(d).[25] The Court undertook a two-step analysis of Cone's claim. It first analyzed whether the state court's decision was contrary to applicable federal law and then addressed whether the law was unreasonably applied to the facts of the case.[26]

In *Williams v Taylor*,[27] the Supreme Court stated that to meet the "contrary to" standard of § 2254(d), a defendant must show that the state court erred in one of two possible ways.[28] First, a defendant may obtain relief if the state court reached a conclusion of law opposite to that reached by the Supreme Court.[29] Alternatively, if the facts of a case are materially indistinguishable from those in a United States Supreme Court precedent, and the state court comes to an opposite conclusion from that of the Supreme Court, a defendant may be entitled to relief.[30]

The Court analyzed both *Strickland* and *Cronic* to determine whether the state court's denial of Cone's appeal was contrary to applicable federal law.[31] In *Strickland*, the Supreme Court set forth a two-part test for use in determining when a defendant's counsel has performed so ineffectively that the defendant's conviction or sentence should be reversed.[32] If a defendant can prove that his counsel's "representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," then a defendant

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21. *Cone*, 243 F.3d at 979; *see* United States v. Cronic, 466 U.S. 648, 659 (1984) (describing the circumstances under which *Strickland* prejudice need not be shown); *Strickland*, 466 U.S. at 688, 694.

22. Bell v. Cone, 122 S. Ct. 663, 663 (mem.) (2001) (granting writ of certiorari).

23. *Bell*, 122 S. Ct. at 1850.

24. *Id.*; *see Strickland*, 466 U.S. at 688, 694; *Cronic*, 466 U.S. at 659.

25. *Bell*, 122 S. Ct. at 1850; *see* 28 U.S.C. § 2254(d) (stating that misapplication of federal law is cause for granting writ of habeas corpus).

26. *Bell*, 122 S. Ct. at 1850, 1852.

27. 529 U.S. 362 (2000).

28. Williams v. Taylor, 529 U.S. 362, 405 (2000); *see* 28 U.S.C. § 2254(d).

29. *Williams*, 529 U.S. at 405.

30. *Id.*

31. *Bell*, 122 S. Ct. at 1850-51.

32. *Id.* at 1850; *see Strickland*, 466 U.S. at 687 (stating two-part test for reversing conviction based on ineffective assistance of counsel).

may be granted relief.[33] In *Cronic*, the Court outlined three circumstances in which a defendant need not show the prejudice usually required by *Strickland*.[34] They are as follows: (1) when a defendant is completely denied counsel at a critical stage of the proceeding; (2) if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing;" and (3) in those circumstances in which counsel is called upon to render assistance when "competent counsel very likely could not."[35]

Cone argued that his situation fell within the second *Cronic* exception to *Strickland*.[36] In support of this argument, Cone pointed to his attorney's failure to present mitigating evidence and his waiver of closing argument at the sentencing hearing.[37] The Court rejected this argument and stated that to fall within the second *Cronic* exception, a defendant must demonstrate that his attorney entirely failed to test the prosecution's case.[38] The Court found that Cone's situation did not meet the requirements of the second *Cronic* exception because Cone only contended that his attorney failed at certain points during his sentencing hearing.[39] In addition, the Court found that the alleged errors of Cone's counsel were of the same type as those to which it had applied *Strickland* in the past.[40] After considering these factors, the Court concluded that the state court correctly applied *Strickland* to Cone's claim of ineffective assistance of counsel, and thus the state court's denial of Cone's appeal was not contrary to the applicable federal law.[41]

The Supreme Court then addressed whether the state court applied *Strickland* to Cone's claim in an objectively reasonable manner.[42] In *Strickland*, the Court stated that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[43] In order to overcome the strong presumption that counsel performed professionally, a defendant must show that competent attorneys would agree that trial counsel's action or inaction could not be considered

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33. *Bell*, 122 S. Ct. at 1850 (quoting *Strickland*, 466 U.S. at 688, 694).

34. *Id.* at 1850-51; *see Cronic*, 466 U.S. at 658-60 (stating circumstances in which defendant is not required to meet *Strickland* standards).

35. *Bell*, 122 S. Ct. at 1851 (quoting *Cronic*, 466 U.S. at 659).

36. *Id.* at 1851.

37. *Id.* at 1854 (Stevens, J., dissenting). Cone pointed to a letter of forgiveness from the victim's sister, his loving relationship with his family, the tragic deaths of his brother and fiancee, his drug addiction, and his experiences in Vietnam as mitigating evidence that his attorney did not present at the sentencing hearing. *Id.* at 1854-56 (Stevens, J., dissenting).

38. *Id.* (quoting *Cronic*, 466 U.S. at 659).

39. *Id.* at 1851-52.

40. *Id.*

41. *Bell*, 122 S. Ct. at 1852.

42. *Id.*

43. *Strickland*, 466 U.S. at 690.

reasonable trial strategy.[44] After considering the behavior of Cone's attorney, the Court found that his decision not to present mitigating evidence and his waiver of closing argument could have been part of a reasonable trial strategy.[45] The Court concluded that the behavior of Cone's attorney was not so unreasonable as to overcome the *Strickland* presumption that a defendant received reasonable representation.[46]

II. Holding

The United States Supreme Court reversed the Sixth Circuit's grant of habeas relief.[47] The Court found that Cone failed to show that the state court's decision was "contrary to" or "an unreasonable application of" federal law under § 2254(d).[48]

III. Analysis / Application in Virginia

It is important to recognize that *Bell* does not set the standard for adequate representation in a capital case. Despite the Court's conclusion that Cone's attorney provided adequate representation, a capital defense attorney should take certain steps to ensure that his presentation of mitigating evidence adequately protects his client.[49] An attorney should thoroughly investigate potentially mitigating evidence, organize this evidence, and consider the potential impact that presentation of this evidence may have on his client's case. After the guilt phase, an attorney should determine the correlation between the evidence presented in the guilt phase with that which he may present during the sentencing hearing.[50] Finally, an attorney should present the mitigating evidence in a professional and compelling manner.

A comparison of *Williams* and *Bell* reinforces the concept that a capital defense attorney cannot base his trial strategy upon the standard for minimal effectiveness.[51] In *Williams*, the United States Supreme Court concluded that a defendant's attorney provided ineffective representation by failing to present

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44. *Bell*, 122 S. Ct. at 1854.

45. *Id.* Cone's attorney attempted at trial to prove that Cone was not guilty by reason of insanity. He stated that he believed that the jury would remember the mitigating evidence that he had presented during the guilt phase because the sentencing hearing took place the day after the conclusion of the trial. He claimed that he did not give a closing argument because he did not want the experienced lead attorney for the Government to have the opportunity to give a compelling argument for death in rebuttal. He also stated that he had pleaded for life in his opening statement, thus making a plea for life unnecessary in the closing argument. *Id.* at 1853-54.

46. *Id.* at 1854.

47. *Id.*

48. *Id.* at 1852, 1854; *see* 28 U.S.C. § 2254(d).

49. *Bell*, 122 S. Ct. at 1854.

50. *See* Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55, 67-68 (2001) (discussing the responsibilities of an attorney whose client seeks death).

51. *See Bell*, 122 S. Ct. at 1854; *Williams*, 529 U.S. at 391.

significant and available mitigating evidence at the sentencing hearing.[52] Williams's attorney did not present evidence of Williams's dismal childhood or low IQ.[53] His attorney did not seek prison records documenting Williams's commendations for assisting in the break-up of a drug ring and he did not discover the testimony of prison guards stating that Williams was unlikely to act violently or dangerously in prison.[54] In contrast, Cone's attorney was found to have provided adequate representation, although at the sentencing hearing he failed to present evidence of a drug addiction developed in Vietnam, several personal tragedies, and testimony from close friends and family.[55]

Although *Bell* itself involves a defendant who apparently expected a full presentation of mitigating evidence, some capital defendants forbid presentation of mitigating evidence.[56] If the attorney in such a case is not prepared to present mitigating evidence and the client changes his mind, the attorney will find himself unable to present mitigating evidence.[57] Neither *Bell* nor *Williams* is authority for the proposition that failure to prepare mitigating evidence in such a case is not ineffective assistance.[58]

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52. *Williams*, 529 U.S. at 390, 399.

53. *Id.* at 373 n.4.

54. *Id.*

55. *Bell*, 122 S. Ct. at 1855-56 (Stevens, J., dissenting). Cone's attorney did present some of this evidence during the guilt phase. *Id.* at 1853.

56. *Id.* at 1851; *see also* Zirkle v. Commonwealth, 551 S.E.2d 601, 602 (Va. 2001) (involving defendant who directed counsel not to introduce mitigating evidence); Overton v. Commonwealth, 539 S.E.2d 421, 423 (Va. 2000) (involving defendant who wrote letter to the trial court asking for sentence of death).

57. *See* Eisenberg, *supra* note 50, at 63-64.

58. *See* Bell, 122 S. Ct. at 1854; *Williams*, 529 U.S. at 391.