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CLEMONS v. MISSISSIPPI 110 S. Ct. 1441, 108 L.Ed.2d 725

Justice Blackmun filed a dissenting opinion in which Justices Brennan, Marshall, and Stevens joined. Blackmun found fault with the Arizona Supreme Court's narrowing construction of the aggravating factor of "especially heinous, cruel, or depraved manner." Ariz. Rev. Stat. Ann. § 13-703(F)(6) (1989). Blackmun reasoned that the Arizona Supreme Court had identified many such factors and had "shown itself so willing to add new factors when a perceived need arises, that the body of its precedents places no meaningful limitations on the application of this aggravating circumstance." *Jeffers*, 110 S. Ct. at 3111. In other words, Arizona's narrowing construction of the aggravating factor is not prospective, but rather retrospective in that it expands the definition to include whatever characterizes the case currently under review.

Blackmun also argued that a proportionality review that involves a comparison between the case under review and prior state court decisions applying the same aggravating factor, is necessary in capital cases no matter what standard of review the habeas court uses. The comparison would be a means of determining whether the state court's application of its construction to the instant case expands the scope of the aggravating factor in such a way as to make a previously valid limiting construction unconstitutionally broad. *Jeffers*, 110 S. Ct. at 3113. The comparison approach would allow a defendant on federal habeas to raise challenges based on how the aggravating circumstance had previously been construed by the reviewing court.

Mandating use of the "rational factfinder" standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979), the Court also said that a state court's finding of an aggravating circumstance is arbitrary or capricious "if and only if no reasonable sentencer could have so concluded." *Jeffers*, 110 S. Ct. at 3103. Curiously, the Court also relied on a *dissenting* opinion by Justice White in *Godfrey v. Georgia*, 446 U.S. 420 (1980). White reasoned that when the issue on review is solely whether a state court properly found the existence of a constitutionally narrowed aggravating circumstance, the Court has never required federal courts "to peer majestically over the [state] court's shoulder so that [they] might second-guess its interpretation of facts that quite reasonably — perhaps even quite plainly — fit within the statutory language." *Id.* at 450. Thus, the Court concluded that "respect for a state court's findings of fact and application of its own law counsels against the sort of de novo review undertaken by the Court of Appeals in this case." *Jeffers*, 110 S. Ct. at 3102.

The *Jeffers* decision marks a significant change in habeas cases. Lower federal courts must now apply the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), which says that when a federal habeas claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine only whether any rational trier of fact could have found the essential elements of the crime or the appropriately narrowed aggravating factor beyond a reasonable doubt. Therefore, there will be less supervision of application of the Virginia vileness factor in federal habeas cases.

Virginia, like Arizona, applies its vileness factor retrospectively, expanding the definition to accommodate the case under review. *(See* case summary of *Mu'min v. Commonwealth*, Capital Defense Digest, this issue.)

At trial, an attempt can be made to combat this unfair "moving target" approach. Defendant should try to obtain notice and an opportunity to defend against factors upon which the Commonwealth will rely and to limit the Commonwealth to those factors. This can be done by filing a pretrial motion for a bill of particulars which compels the prosecution: (a) to identify the aggravating factors upon which the Commonwealth will rely, including how many and which of the three vileness components will be asserted; and (b) to identify the narrowing construction which will be used and to supply evidence supporting that assertion.

If the response from the Commonwealth is general and simply names everything in the statute, the defense attorney should look at the evidence and make a motion to strike factors which are not supported by the evidence, prohibiting the Commonwealth from relying on an aggravating factor, or component thereof, which is unsupported by the evidence.

Summary and analysis by:
Ginger M. Jonas

CLEMONS v. MISSISSIPPI

110 S. Ct. 1441, 108 L.Ed.2d 725
United States Supreme Court

FACTS

In need of cash, Chandler Clemons called a pizza delivery man with the intent to rob him. After taking money and some pizza from the delivery vehicle, Clemons shot the delivery man, Arthur Shorter, even though Shorter begged for his life. Clemons fled the scene and the victim died shortly thereafter. The trial court convicted Clemons of capital murder. At the sentencing hearing, the State presented evidence of two aggravating factors: (1) the murder was committed during the course of a robbery for pecuniary gain, and (2) the murder was an "especially heinous, atrocious, or cruel" killing. Finding both aggravating factors present and that they sufficiently outweighed any mitigating circumstances, the jury sentenced Clemons to death.

On appeal, the Mississippi Supreme Court affirmed Clemons' sentence but found that the Mississippi aggravating circumstance of an "especially heinous, atrocious, or cruel" killing was constitutionally invalid in light of the U.S. Supreme Court's decision in *Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding the "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). However, the Mississippi Supreme Court stated that "when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict." *Clemons v. State*, 535 So.2d 1354, 1362 (Miss. 1988). Clemons petitioned the United States Supreme Court for certiorari, and in an opinion filed by Justice White, joined by Justices Rehnquist, O'Connor, Kennedy, and Scalia, the Supreme Court vacated Clemons' sentence and remanded the case to the Mississippi Supreme Court.

HOLDING

The Court held that the United States Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly applied aggravating circumstance, as long as the appellate court either reweighs the aggravating and mitigating evidence or conducts a harmless error review. The Court vacated Clemons' sentence and remanded the case to the Mississippi Supreme Court because it was unclear whether that court correctly employed either of those methods of review.

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:
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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.