Capital Defense Journal

Volume 5 | Issue 1 Article 7

Fall 9-1-1992

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receiving this report, the court determines if the defendant is competent to stand trial.[31] A hearing on the issue is not required unless requested by one of the parties.[32] As with the California statute in *Medina*, at a Virginia competency hearing, the party raising the issue of incompetency must prove it by a preponderance of the evidence.[33] As a practical matter, in almost all cases this will be the defendant. Further, while there is no statutory presumption of sanity under Section 19-2.169.1, *Payne v. Slayton*[34] and *Graham v. Gathright*[35] established that a defendant is presumed to be sane at trial.

Although the Virginia statute only requires that one expert be ordered to evaluate the defendant's competency, there appears to be no exclusion to a defendant being examined by an expert of his own choice. If a hearing is held, the defendant has the right to introduce evidence and, presumably, this evidence could include expert testimony of the defendant's choice. The statute is silent, however, on what happens when an indigent defendant is unable to pay for expert assistance of his or her choosing.

In *Ake v. Oklahoma*[36], the United States Supreme Court held that where a defendant's mental condition will be a significant factor at trial, the state is required to provide an indigent defendant with psychiatric assistance. Therefore, in a Virginia competency proceeding, if an indigent defendant desires to be examined and assisted by a psychiatric expert, defense counsel should argue that *Ake* requires the Commonwealth to provide this assistance. Particularly in light of the *Medina* decision, a compelling argument can be made that if a defendant must bear the burden of proving incompetency, due process requires that the means for bearing that burden must be made available.

Summary and analysis by:
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31 Va. Code Ann. § 19.2-169.1E (1990).
32 *Id.*
33 *Id.*
34 329 F.Supp. 886 (W.D.Va. 1971).
35 345 F.Supp. 1148 (W.D.Va. 1972).
36 470 U.S. 68 (1985).

STRINGER v. BLACK

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SOCHOR v. FLORIDA

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United States Supreme Court

During the 1992 term, the United States Supreme Court decided three cases with potentially broad application to Virginia law, particularly with respect to Virginia's "vileness" aggravating factor.[1] This summary will first examine each case individually and then attempt to draw some broader implications from the Court's rulings in all three cases.

CONSTITUTIONAL BACKGROUND: THE SPECIFICITY REQUIREMENT OF THE EIGHTH AMENDMENT

When the United States Supreme Court held that the death penalty was not a *per se* violation of the Eighth Amendment's proscription of cruel and unusual punishment, it placed a duty on states that allow capital punishment to establish a "meaningful method for differentiating between the few cases where [the death penalty] is imposed from the many cases in which it is not."[2] In *Godfrey v. Georgia*[3] the Supreme Court found that the application of the Georgia "vileness" factor failed to meet the obligation enunciated in *Furman* because "nothing in [the factor's] few words, standing alone, . . . implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence." The statute in *Godfrey* allowed imposition of the death penalty under the exact same terms as the Virginia statute, where the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim."[4] The Court found this language to be unconstitutionally vague, in violation of the Eighth Amendment.

The Court revisited the issue in *Maynard v. Cartwright*.[5] Okla-

1 Virginia law permits imposition of the death penalty for capital murder only where at least one of two statutory aggravating circumstances exists. The second such factor is that "the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C) (1990). *See also* Va. Code Ann. § 19.2-264.2 (1990).

2 *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (*quoted in Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

3 446 U.S. 420, 428 (1980) (opinion of Stewart, J., joined by Blackmun, Powell, and Stevens, JJ.).

4 Ga. Code § 27-2534.1(b)(7) (1978).

5 486 U.S. 356 (1988) (requiring a narrowing construction of Oklahoma "vileness" factor). *See* case summary of *Maynard*, Capital Defense Digest, Vol. 1, No. 1, p. 15 (1988).

homa law permitted capital punishment where the crime was "especially heinous, atrocious and cruel." A unanimous Court held that this language gave no more guidance than the statute found constitutionally deficient in *Godfrey*.[6] The Court noted, however, that a state may salvage a vague aggravating factor by providing a sufficient limiting construction of the statute.[7]

Since *Maynard*, many state courts have further defined the statutory terms within their respective "vileness" or "heinousness" factors in order to provide the narrowing construction that *Godfrey* and *Maynard* require. The Court has scrutinized these narrowing constructions to ensure that they provide meaningful guidance to the sentencer.[8]

FACTS AND HOLDINGS

I. *Stringer v. Black*

Stringer v. Black[9] involved a collateral challenge to a Mississippi death sentence. James R. Stringer was convicted of capital murder[10] by a Mississippi jury for his part in a murder during the commission of a robbery. During the penalty phase of Stringer's trial, the jury found three statutory aggravating factors, including that the murder was "especially heinous, atrocious or cruel"[11] (the "heinousness" factor). These terms were not defined by the trial court. Stringer was sentenced to death, and the Mississippi Supreme Court affirmed the conviction.[12] Stringer's conviction and sentence became final on February 19, 1985, when the United States Supreme Court denied certiorari.[13] Stringer's state habeas corpus challenges to his conviction were unsuccessful.[14]

In federal court, Stringer brought a habeas corpus petition claiming, *inter alia*, that the "heinousness" aggravating factor was unconstitutionally vague. Stringer argued that the use of this factor rendered his sentence arbitrary, in violation of the eighth amendment's prohibition of cruel and unusual punishment. The District Court found the claim procedurally defaulted, and alternatively, ruled against it on its merits.[15] The Fifth Circuit affirmed the denial of habeas, finding no Eighth Amendment violation in the jury's consideration of the "heinousness" factor, since two other aggravating factors were also found.[16]

After the Fifth Circuit's ruling in Stringer's federal habeas petition, the Supreme Court decided *Clemons v. Mississippi*.[17] *Clemons* held that in a state such as Mississippi, where aggravating and mitigating factors are "weighed" by the sentencer, a death sentence which is based on an unconstitutional aggravating factor along with one or more legitimate factors is invalid unless the state appellate court independently reweighs the legitimate factors or finds the error to be harmless.[18] The Supreme Court subsequently vacated the Fifth Circuit's *Stringer v. Jackson* opinion for further consideration in light of *Clemons*.[19]

On remand, the Fifth Circuit ruled that Stringer was not entitled to rely on *Clemons* or the related case of *Maynard v. Cartwright*[20] because they both announced "new rules" which were not available for relief when Stringer's conviction had become final. The Fifth Circuit's analysis was based on the doctrine of *Teague v. Lane*,[21] which prohibits the retroactive application of any "new rule" to a habeas petitioner whose conviction became final before that rule was announced. *Teague* defines a "new rule" as one which "breaks new ground or imposes a new obligation on the States or the Federal Government, . . . [or] if the result was not **dictated** by precedent existing at the time the defendant's conviction became final."[22]

The Supreme Court granted Stringer's petition for certiorari to determine whether a habeas corpus petitioner whose death sentence became final before *Maynard* and *Clemons* is forclosed by *Teague* from relying on those cases.[23] In a surprising six to three decision (Justice Kennedy joined by Chief Justice Rehnquist and Justices White, Blackmun, Stevens and O'Connor), the United States Supreme Court reversed Stringer's sentence of death because it had been based on the vague "heinousness" aggravating factor and the state appellate court had never engaged in the reevaluation required by *Clemons*.[24] The Court held that *Teague* does **not** prevent the retroactive application of *Maynard* and *Clemons*.[25]

The Court pointed to *Godfrey* as the case which dictated the result in *Maynard*. *Stringer* thus held that the *Maynard* Court "did not 'break[] new ground'" in applying *Godfrey* to Oklahoma's "heinousness" aggravating factor.[26] As a result of this ruling, Stringer, whose conviction and sentence became final after *Godfrey* but before *Maynard*, was entitled to rely upon *Maynard* in collateral proceedings.

Despite this initial holding, the State of Mississippi further argued that prior to *Clemons* (which was decided after Stringer's sentence had become final), it would have been a "new rule" to apply *Godfrey* to Mississippi, based upon claimed fundamental differences between the sentencing schemes of Georgia (in *Godfrey*) and Mississippi. The State argued that Mississippi's status as a "weighing" state[27] differentiated it

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6 *Maynard*, 486 U.S. at 363-64.

7 *Id.* at 365.

8 Although the Court has approved several narrowing constructions, *see, e.g., Walton v. Arizona*, 110 S.Ct. 3047 (1990), *see* case summary of *Walton*, Capital Defense Digest, Vol. 3, No. 1, p. 5 (1990), the Court has not given blanket approval. For instance, in *Shell v. Mississippi*, 111 S.Ct. 313 (1990), the Supreme Court found a narrowing construction of the Mississippi "vileness" factor to be unconstitutionally vague. The Mississippi court had defined the "especially heinous, atrocious, or cruel" aggravating factor as follows: "the word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict high degree of pain with indifference to, or even enjoyment of the suffering of others." The Supreme Court held that these definitions were "not constitutionally sufficient." *Id.* *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

9 112 S.Ct. 1130 (1990).

10 In Mississippi, a capital sentence may be imposed only for those crimes designated by statute as "capital murder." Miss. Code Ann. § 97-3-19(2) (Supp. 1991). One such crime is a killing in the course of a burglary or robbery.

11 *See* Miss. Code Ann. § 99-19-101(5)(h) (Supp. 1992).

12 *Stringer v. State*, 454 So.2d 468 (Miss. 1984).

13 *Stringer v. Mississippi*, 469 U.S. 1230 (1985).

14 *Stringer v. State*, 485 So.2d 274 (Miss. 1986).

15 *Stringer v. Scroggy*, 675 F.Supp. 356, 366 (S.D. Miss. 1987).

16 *Stringer v. Jackson*, 862 F.2d 1108 (5th Cir. 1988).

17 494 U.S. 738 (1990). *See* case summary of *Clemons*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1990).

18 *Id.*

19 *Stringer v. Jackson*, 494 U.S. 1074 (1990).

20 486 U.S. 356 (1988). For a discussion of *Maynard*, *see supra* notes 5-7 and accompanying text.

21 489 U.S. 288 (1989).

22 *Id.* at 301 (emphasis in original).

23 *Stringer v. Black*, 111 S.Ct. 2009 (1991).

24 *Stringer v. Black*, 112 S.Ct. 1130 (1992).

25 *Id.* at 1135-36.

26 *Stringer* at 1135 (quoting *Butler v. McKellar*, 494 U.S. 407 (1990) (holding that under *Teague*, the result of a case is **not** "dictated by precedent" — and thus a "new rule" is present — if the issue was "susceptible to debate among reasonable minds" at the relevant time). *See* case summary of *Butler*, Capital Defense Digest, Vol. 3, No. 1, p. 2 (1990)).

27 A "weighing" state is one in which the sentencer, after convicting a defendant of capital murder and finding at least one aggravating factor, must **weigh** aggravating factors against mitigating factors.

from Georgia, a "non-weighing" state,[28] and that several factors rendered the applicability of *Godfrey* to a weighing state "susceptible to debate among reasonable minds" in 1985.[29]

The Court rejected the State's argument, holding that *Teague* does not foreclose the retroactive application of *Clemons*.[30] According to the *Stringer* Court, *Clemons* merely applied a "clear principle" which emerged from a "long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing."[31] Indeed, the majority stated that to the extent differences existed between the Georgia scheme in *Godfrey* and Mississippi's scheme, the difference argued even more strongly for reevaluation of a death sentence, because under the Mississippi scheme, jurors were required to weigh the aggravating factors that they had found.[32] The Court concluded that the "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or re-weighing in the state judicial system."[33]

II. *Sochor v. Florida*

Dennis Sochor was charged and convicted of capital murder by a Florida jury. After a capital conviction in Florida, the trial court conducts a two-step penalty hearing to determine the appropriate punishment.[34] The prosecution and defense present aggravating and mitigating evidence before the jury and the judge. In the first step of the proceeding, the court charges the jury to weigh any aggravating or mitigating factors that they find and then reach an advisory verdict by majority vote.[35] The jury is not required to disclose the aggravating and mitigating factors that they find. During the second step, the trial judge ultimately issues the penalty.[36] If the trial judge decides to impose the death penalty, the judge must issue a written statement of the aggravating and mitigating circumstances which he or she finds.[37] The sentence is then subject to automatic review by the Florida Supreme Court.[38]

At Sochor's penalty hearing, the trial court instructed the jury as to the possibility of finding any of four aggravating factors. Two of the factors were: (1) that the crime was "especially wicked, evil, atrocious or cruel"[39] (the "heinousness" factor), and (2) that the crime was committed in a "cold, calculated and premeditated manner, without any pretense of moral or legal justification"[40] (the "coldness" factor). The jury recommended that the death penalty be imposed, by a ten to two vote. The trial judge followed the jury's recommendation, finding that all four aggravating factors and no mitigating factors existed.

The Supreme Court of Florida affirmed Sochor's conviction and sentence.[41] In so doing, the court rejected Sochor's arguments that the "heinousness" and "coldness" factors were unconstitutionally vague. The Florida court held that the issues were procedurally defaulted for failure to object and then stated, "[i]n any event, Sochor's claims here have no merit."[42] In a footnote to that passage, the court stated, "[w]e reject without discussion Sochor's . . . claims that the instructions as to the aggravating factors of heinous, atrocious, or cruel[;] and cold, calculated, and premeditated were improper."[43]

The Florida Supreme Court agreed, however, with Sochor's contention that the "coldness" factor was unsupported by the evidence in his case, holding that that factor requires a heightened degree of premeditation that was not present in Sochor's case.[44] Despite that ruling, the Florida Supreme Court affirmed Sochor's conviction and sentence, finding that the sentence was "proportionate" to the crime.[45] The court noted that even without the "coldness" factor, the trial judge found three other aggravating circumstances and no mitigating circumstances. The court stated that, "[s]triking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing."[46]

The United States Supreme Court granted certiorari on direct review to consider two issues: (1) whether the application of Florida's "heinousness" factor to Sochor violated the Eighth and Fourteenth Amendments; and (2) whether the Florida Supreme Court's review of Sochor's death sentence violated the Eighth and Fourteenth Amendments where the court upheld the sentence despite the trial court's instruction on, and application of, the inapplicable "coldness" aggravating factor.[47]

The Supreme Court refused to consider Sochor's claim that the trial court's jury instruction on the Florida "heinousness" factor was unconstitutionally vague.[48] The Court reasoned that the issue had been decided by the Florida courts on the "adequate and independent" state ground of procedural default.[49] In making this ruling, the Court relied upon the Florida Supreme Court's ambiguous dismissal of the issue as stating with "requisite clarity" that Sochor's claim was unsuccessful due to his failure to preserve the issue.[50]

The Court also rejected Sochor's arguments that the trial court's application of the "heinousness" factor was violative of the Eighth and Fourteenth Amendments.[51] The Court relied on its holding in *Walton v. Arizona*[52] that a trial court **may** weigh a statutory aggravating factor which is impermissibly vague, if the highest state court had previously given constitutionally acceptable narrowing constructions of the factor.[53] The Court found such constructions in *State v. Dixon*,[54] where the

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28 In a "non-weighing" state, the sentencer must only find the existence of one or more aggravating factors in order to sentence a convicted capital defendant to death. Mitigating factors must still be considered, but there is no formal "weighing" process.

29 The State again relied upon *Teague* and *Butler* in support of this argument.

30 *Stringer*, 112 S.Ct. at 1136.

31 *Id.* at 1137.

32 *Id.* at 1136.

33 *Id.* at 1140.

34 Fla. Stat. § 921.141(1) (1991).

35 Fla. Stat. § 921.141(2) (1991).

36 Fla. Stat. § 921.141(3) (1991).

37 *Id.*

38 Fla. Stat. § 921.141(4) (1991).

39 *See* Fla. Stat. § 921.141(5)(h) (1991). The statute itself states this factor as "especially heinous, atrocious, or cruel," while the typical jury instruction states the factor as "especially wicked, evil, atrocious, or cruel." *See, e.g., Smalley v. State*, 546 So.2d 720, 722 (Fla. 1991).

40 *See* Fla. Stat. § 921.141(5)(i) (1991).

41 *Sochor v. State*, 580 So.2d 595 (Fla. 1991).

42 *Id.* at 602-603.

43 *Id.* at 603, n.10.

44 *Id.* at 603.

45 *Id.* at 604.

46 *Id.* (citations omitted).

47 *Sochor v. Florida*, 112 S.Ct. 436 (1991).

48 *Sochor v. Florida*, 112 S.Ct. 2114, 2120 (1992) (Souter, J., joined by Rehnquist, C.J. and White, O'Connor, Scalia, Kennedy, and Thomas, JJ.).

49 *Id.*

50 *Id.*

51 *Sochor*, 112 S.Ct. at 2121 (Souter, J., joined by Rehnquist, C.J., and White, O'Connor, Scalia, Kennedy, and Thomas, JJ.).

52 497 U.S. 639 (1990). *See* case summary of *Walton*, Capital Defense Digest, Vol. 3, No. 1, p. 5 (1990).

53 *Sochor*, 112 S.Ct. at 2121.

54 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974) ("It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies — the conscienceless or pitiless crime which is unnecessarily torturous to the victim.").

Florida Supreme Court defined the relevant terms in the state's "heinousness" factor. The United States Supreme Court had previously determined that the *Dixon* limitation of the factor to only "conscienceless or pitiless crime[s] which [are] unnecessarily torturous to the victim," gave adequate guidance to the sentencer.[55]

Instead, the Court reversed Sochor's conviction based on the trial court's application of the "coldness" aggravating factor, which the Florida Supreme Court determined was inapplicable to the facts of Sochor's case as a matter of state law.[56] Before reaching this conclusion, the Court rejected Sochor's claim that Eighth Amendment error occurred as a result of the **jury's** consideration of the inapplicable "coldness" aggravating factor.[57] The Court reasoned that since a capital jury in Florida does not reveal the factors relied upon in reaching its recommendation, it cannot be known whether Sochor's jury actually applied the inapplicable factor. Relying on *Griffin v. United States*,[58] the Court found that "although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence."[59] Because of this likelihood, the Court declined to presume jury error.[60]

Eight members of the Supreme Court, however, held that the **trial court's** application of the inapplicable "coldness" aggravating circumstance violated the Eighth Amendment.[61] The Court determined that a factor which is unsupported by the evidence under state law is an "invalid" factor for purposes of *Clemons v. Mississippi*,[62] and, therefore, the Eighth Amendment prevents the sentencer from weighing that factor.[63]

Five justices further held that the Florida Supreme Court's determination that Sochor's sentence was "proportional" did not cure the trial court's error of applying an invalid aggravating circumstance.[64] The Court emphasized that in considering a death sentence where the sentencer has unconstitutionally applied an invalid aggravating circumstance, a reviewing state court must either independently reweigh the valid factors or apply harmless error analysis to the constitutional flaw.[65] Because a state's "proportionality" review is quite different from either of these processes, the Court vacated the judgment of the Florida Supreme Court and remanded.[66]

III. *Espinosa v. Florida*

Henry Jose Espinosa was convicted of first degree murder by a Florida jury. During Espinosa's penalty hearing,[67] the trial court provided instructions on several aggravating factors. Among the given instructions was the aggravating factor that the murder was "especially wicked, evil, atrocious or cruel."[68] The jury recommended the death penalty, and the trial court followed that recommendation, finding four valid aggravating factors and two mitigating factors.

Espinosa appealed to the Florida Supreme Court, arguing that the "wicked, evil, atrocious or cruel" instruction was unconstitutionally vague. The court rejected Espinosa's argument, relying on *Smalley v. State*,[69] and affirmed the conviction and sentence.[70] In *Smalley*, the Florida Supreme Court had concluded that Florida capital juries need not be instructed with the specificity mandated in *Maynard v. Cartwright*[71] and *Godfrey v. Georgia*[72] because a Florida jury is not the "sentencer" for Eighth Amendment purposes.[73] Because the jury's recommendation is not binding on the trial judge, the *Smalley* court concluded that a Florida jury can be instructed on a vague aggravating factor consistently with the constitution.[74]

Espinosa petitioned the United States Supreme Court for certiorari, contending that his Eighth Amendment rights had been infringed by the vague instruction. In a per curiam opinion, the Supreme Court reversed Espinosa's sentence based on the vague aggravating factor instruction which was given to the jury.[75] The Court rejected the state's argument that a Florida capital jury is not the "sentencer" for Eighth Amendment purposes.[76] The Court pointed to Florida law requiring the trial court (the ultimate decisionmaker in Florida) to give "great weight" to the jury's recommendation.[77] Although the trial court did not weigh any invalid aggravating circumstance at Espinosa's trial, the United States Supreme Court stated that it must "presume that the jury did so . . . just as we must presume that the trial court followed Florida law . . . and gave 'great weight' to the resultant recommendation."[78] Because a recommending jury's weighing of an unconstitutionally vague aggravating circumstance "creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor," the consideration of that factor by Espinosa's jury was Eighth Amendment error.[79]

ANALYSIS/APPLICATION IN VIRGINIA

In this trilogy of cases, the United States Supreme Court provided a wealth of information about the specificity requirement for aggravating factor instructions and the duty of a reviewing state court when an invalid factor has been applied. The Court reemphasized that vague aggravating factors pose a significant threat of arbitrariness in capital sentencing. As

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55 *Proffitt v. Florida*, 428 U.S. 242 (1976).

56 *Sochor*, 112 S.Ct. at 2122-23.

57 *Id.* at 2122 (Souter, J., joined by Rehnquist, C.J., and White, O'Connor, Kennedy, and Thomas, JJ.).

58 112 S.Ct. 466 (1991).

59 *Sochor*, 112 S.Ct. at 2122 (Souter, J., joined by Rehnquist, C.J., and White, O'Connor, Kennedy, and Thomas, JJ.).

60 *Id.* For an example of a situation where jury error **is** presumed based on the unlikelihood that a jury will "disregard a theory flawed in law," *see Espinosa v. Florida*, 112 S.Ct. 2926 (1990). *See infra* notes 67-79 and accompanying text.

61 *Id.* at 2122 (Souter, J., joined by Rehnquist, C.J., and White, Blackmun, Stevens, O'Connor, Kennedy, and Thomas, JJ.).

62 494 U.S. 738 (1990). For a discussion of *Clemons*, *see supra* notes 17-18 and accompanying text.

63 *Sochor*, 112 S.Ct. at 2122.

64 *Id.* at 2123 (Souter, J., joined by Blackmun, Stevens, O'Connor, and Kennedy, JJ.).

65 *Id.*

66 *Id.*

67 For a discussion of Florida's statutory capital sentencing scheme, *see supra* notes 34-38 and accompanying text.

68 *See* Fla. Stat. § 921.141(5)(h) (1991). *See also supra* note 20.

69 546 So.2d 720 (Fla. 1991).

70 *Espinosa v. State*, 589 So.2d 887, 894 (Fla. 1991).

71 *See supra* notes 5-7 and accompanying text.

72 *See supra* notes 3-4 and accompanying text.

73 *Smalley v. State*, 546 So.2d 720, 722 (Fla. 1991).

74 *Id.*

75 *Espinosa v. Florida*, 112 S.Ct. 2926, 2928-29 (1992) (per curiam).

76 *Id.*

77 *Id.* at 2928.

78 *Id.* (citations omitted).

In contrast, the Supreme Court will **not** presume jury error where the flawed instruction is based on a theory which is "simply unsupported by evidence." *Sochor v. Florida*, 112 S.Ct. 2114, 2122 (1992), *see supra* notes 57-60 and accompanying text. This is because a jury "is indeed likely to disregard" such an option. *Id.*

79 *Id. Espinosa* is reconcilable with *Sochor* in that the issue in *Espinosa* — the weighing of a vague aggravating factor by the jury — was procedurally defaulted in *Sochor*. *See supra* notes 48-50 and accompanying text.

a result, the specificity requirement of *Godfrey* applies to all sentencing schemes, in both "weighing" and "non-weighing" states. The specificity requirement also applies to a jury instruction where the jury's conclusion is only a recommendation in which it is unknown which factors were actually applied by the jury. Additionally, the Court ruled that the results in *Maynard* and *Clemons* were "dictated" by *Godfrey*, allowing subsequent habeas petitioners to rely on those two cases, no matter when their sentences became final. From this trilogy of cases, several valuable lessons can be derived.

I. The United States Supreme Court Continues To Take *Godfrey v. Georgia*'s Ban On Vague Aggravating Factors Seriously

Stringer represents a welcome departure from recent Supreme Court retroactivity rules. However, it is unlikely that *Stringer* fundamentally changes the analysis for determining when a "new rule" may be retroactively applied. Rather, it is more likely that the Supreme Court is willing to apply retroactivity rules in a less rigid fashion when vague aggravating factor instructions are at issue.

The Court has been involved in a systematic expansion of the "new rule" doctrine of *Teague v. Lane* since 1989. The seemingly benign holding that "a 'new rule' may not be retroactively applied" has had an enormous impact due to the Court's broad definition of a "new rule" in subsequent cases. The Court generally has found that **any** issue which is somewhat unclear leads to a "new rule" when the issue is resolved.[80] The question that the Court asks in order to decide if a "new rule" is at stake has changed from the *Teague* inquiry of whether the case "breaks new ground" to the more easily satisfied *Butler* inquiry of whether the holding at issue was "susceptible to debate among reasonable minds."[81] Thus, in order for a habeas petitioner to claim constitutional error based on a Supreme Court ruling decided after his or her sentence became final, the petitioner typically must show that the rejection of the claim on direct appeal was "**so** clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist."[82]

The first issue in *Stringer* was whether *Maynard* announced a "new rule." Thus, the Court looked to the time when Stringer's conviction became final, February 19, 1985, and determined that the *Maynard* issue was not "susceptible to debate among reasonable minds" at that time.[83] This holding is consistent with previous retroactivity rules. *Godfrey* found that the words "outrageously or wantonly vile, horrible and inhuman" were vague and imprecise, inviting arbitrary application of the death penalty. After *Godfrey*, it certainly was not "new" for the *Maynard* Court to find that the words "especially heinous, atrocious, or cruel" were also violative of the Eighth Amendment.

Stringer's determination that *Clemons* did not announce a "new rule," however, is somewhat surprising. The issue in *Clemons* was whether a sentencing scheme in which the sentencer weighs a vague aggravating factor with a valid aggravating factor violates the Eighth Amendment. *Clemons* held that in a "weighing" state, the application of a vague aggravating factor creates a risk of arbitrariness which the Eighth Amendment does not tolerate.[84] Thus, where a death sentence is based on valid and invalid aggravating factors which have been weighed together, a violation of the Eighth Amendment can only be avoided by an independent "re-weighing" process by the state appellate court, without the invalid factor.

Prior to *Clemons*, the Court had specifically reserved this issue in *Zant v. Stephens*.[85] In *Zant*, the Court held that in a state where no formal weighing process takes place, the use of an invalid aggravating factor does **not** require invalidation of the sentence, so long as the sentence is supported by at least one valid aggravating factor.[86] However, the Court expressly stated that it voiced no "opinion concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to **weigh** statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty."[87]

Prior to *Clemons*, the Court had offerred no indication of how the question reserved in *Zant* might be resolved. Indeed, even the majority in *Stringer* characterizes the *Zant* language as a mere "possibility" of how the issue would be decided.[88] Applying the rigid rules of *Teague* and *Butler*, certainly the issue was "susceptible to debate among reasonable minds"[89] in 1985. However, the Court in *Stringer* held that *Clemons* did **not** announce a new rule.[90] In making its ruling that *Clemons* was dictated by precedent, the Court stated that "[t]his clear principle emerges not from any single case, . . . but from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing."[91]

That the Supreme Court had a clear opportunity to reject Stringer's *Clemons* claim based on *Teague*, but chose not to do so, is informative. It seems that the Court is willing to relax the procedural formalities of *Teague* in order to ensure that states meaningfully channel the sentencer's discretion in death penalty cases.[92] The Court's more flexible application of retroactivity rules in *Stringer* underscores the importance of raising and preserving vagueness challenges to the Virginia "vileness" aggravating factor. The strong, overriding message of *Stringer* is that the current United States Supreme Court continues to take the specificity rule of *Godfrey* seriously. Virginia attorneys would be well advised to do the same.

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80 *Butler v. McKellar*, 110 S.Ct. 1212 (1990).

81 *Id.* at 1217.

82 *Id.* at 1219 (Brennan, J., joined by Marshall, Blackmun, and Stevens, JJ., dissenting) (criticizing the majority's ruling that any legal issue which was previously "susceptible to debate among reasonable minds" results in a "new rule" when that issue is subsequently resolved) (emphasis in original).

83 *Stringer*, 112 S.Ct. at 1135.

84 494 U.S. at 753.

85 462 U.S. 862 (1983).

86 *Id.* at 890.

87 *Id.* (emphasis added).

88 *Stringer*, 112 S.Ct. at 1136.

89 *Butler*, 110 S.Ct. at 1217.

90 *Stringer*, 112 S.Ct. at 1137.

91 *Id.* at 1137.

92 This approach is also consistent with *Espinosa v. Florida*, 112 S.Ct. 2926 (1992), *see supra* notes 67-79 and accompanying text. In *Espinosa*, the Court **could** have found that since a Florida jury's decision is only a recommendation, the jury is not a "sentencer" for Eighth Amendment purposes. Under this approach, the jury's consideration of an invalid aggravating factor would not give rise to Eighth Amendment error, so long as the trial judge, who actually determines the appropriate penalty, does not consider the invalid factor.

However, the Court ruled that the jury **does** play an important role in Florida capital sentencing. Because Florida law requires the sentencing judge to give "great weight" to the jury's recommendation, the Court held that a Florida judge "indirectly weigh[s]" the invalid factor: "This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, and the result, therefore, was error." *Id.* at 2928.

In *Espinosa*, as in *Stringer*, the United States Supreme Court displayed an unusual eagerness to address the merits of the Eighth Amendment issue, despite a clear opportunity to deny relief and decide the case on much more narrow grounds.

II. Attorneys Should Continue To Raise and Preserve the Claim that Virginia's "Vileness" Aggravating Factor Is Unconstitutionally Vague

One of the few federal claims which has proved successful in recent capital penalty litigation is that an aggravating factor fails to sufficiently narrow the sentencer's discretion. *Stringer*, *Sochor*, and *Espinosa*, collectively, reaffirm this trend. In both *Stringer* and *Espinosa*, a death row inmate received judicial relief based on the vagueness of aggravating factors applied in determining the appropriate penalty. In *Sochor*, the Court granted relief based on an aggravating factor which was invalid under Florida law, and indicated in *dicta* that relief might also have been appropriate on the vagueness issue but for a procedural default.

It has often been noted that Virginia's "vileness" aggravating factor is identical to the one found unconstitutionally vague in *Godfrey*.[93] Virginia permits a death sentence for a murder which is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim."[94] Under *Godfrey* and *Maynard*, Virginia may apply its "vileness" factor only if the courts closely monitor its use and provide narrowing constructions of this vague language.[95]

So far, the Virginia Supreme Court has defined only two of the three factors listed within its vileness predicate. *Smith v. Commonwealth*[96] defines "depravity of mind" as "a degree of moral turpitude and psychic debasement surpassing that inherent in the definition of legal malice and premeditation." *Smith* also defines "aggravated battery" as "a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder."[97] The term "torture," meanwhile, remains undefined in Virginia.

In *Jones v. Murray*,[98] the Fourth Circuit Court of Appeals approved the Virginia narrowing constructions announced in *Smith*. However, the United States Supreme Court has not yet passed on the issue, and the definitions provided in *Smith* are constitutionally suspect.[99] In the words of *Furman*, Virginia's "narrowing" constructions are hardly a "meaningful basis for distinguishing those **few cases in which [the death penalty] is imposed** from the many cases in which it is not."[100] Indeed, the definitions themselves imply that all capital murders, save the singular case with the least "vileness," warrant the ultimate penalty. Additionally, the definitions lack specificity and, if anything, confuse more than they clarify.

Even though Virginia's capital sentencing scheme partially narrows the class of offenders who are eligible for the death penalty at the guilt phase,[101] any attempt to further narrow that class with aggravating factors **must** be done with specificity. The Supreme Court stated in *Stringer* that "[a]lthough our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content."[102]

Attorneys should continue to vigorously litigate this issue pre-trial, during trial, and on appellate and collateral review. A useful tool to preserve a challenge to the Virginia "vileness" factor is a pre-trial motion for a bill of particulars. In such a motion, defense attorneys can request that the court direct the Commonwealth to identify what aggravating factors it intends to rely upon in seeking the death penalty. Further, if the Commonwealth intends to rely upon the "vileness" factor, the motion should request identification of every narrowing construction of that factor upon which the Commonwealth intends to rely.

If no such identification is provided, defense counsel can preserve the challenge for appeal by filing a brief arguing that the Virginia death penalty scheme is unconstitutionally applied without such narrowing constructions, relying upon *Godfrey* and *Maynard*. If the Commonwealth responds with the *Smith* narrowing constructions, defense counsel can preserve the challenge with a motion that the narrowing constructions are themselves unconstitutionally vague under *Shell*.

III. Using *Stringer*, *Sochor*, and *Espinosa* to Frame Vileness Challenges To The Virginia Supreme Court

Stringer, *Sochor*, and *Espinosa* place an obligation on every state to ensure that aggravating factor jury instructions meaningfully guide the sentencer's discretion. There are two components to this obligation. First, since Virginia's "vileness" aggravating factor is unconstitutionally vague,[103] the Virginia courts must supply constitutionally sufficient narrowing constructions. Second, if a jury renders a death sentence using a vague aggravating factor without a sufficient narrowing construction, the Virginia Supreme Court must expressly and with explanation either independently reweigh the valid aggravating and mitigating factors or find that the error was harmless beyond a reasonable doubt.

A. The Virginia Supreme Court Must Apply Constitutionally Adequate Narrowing Constructions

As noted above, Virginia's current narrowing constructions are constitutionally suspect.[104] Indeed, the Virginia definitions[105] are much less informative than the Mississippi narrowing constructions found unconstitutionally vague in *Shell v. Mississippi*.[106]

Virginia does not require that its suspect narrowing constructions be provided for the sentencing jury.[107] Consequently, Virginia's reviewing courts must themselves monitor the application of those factors to each

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93 *See* Case summary of *Bunch v. Thompson*, Captial Defense Digest, Vol. 4, No. 2, p. 3 (1992); Case summary of *Shell v. Mississippi*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991); Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991); Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 1, p. 19 (1989); Priddy, Comment, *Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law*, 15 U. Rich. L. Rev. 951 (1981).

94 Va. Code Ann. § 19.2-264.2 (1990); Va. Code Ann. § 19.2-264.4(C) (1990).

95 *Maynard*, 486 U.S. at 356.

96 *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 148-49 (1978), *cert. denied*, 441 U.S. 967 (1979).

97 *Id.*

98 947 F.2d 1106 (1991). *See* case summary of *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992).

99 *See Shell v. Mississippi*, 111 S.Ct. 313 (1990); *see supra* note 8 and accompanying text.

100 *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (emphasis added) (*quoted in Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

101 *See* Va. Code Ann. § 18.2-31 (1990).

102 *Stringer*, 112 S.Ct. at 1139.

103 *See supra* notes 93-95 and accompanying text.

104 *See supra* notes 99-100 and accompanying text.

105 "Depravity of mind" is "a degree of moral turpitude and psychic debasement surpassing that inherent in the definition of legal malice and premeditation," and "aggravated battery" is "a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 148-49 (1978), *cert. denied*, 441 U.S. 967 (1979).

106 111 S.Ct. 313 (1990). ("heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict high degree of pain with indifference to, or even enjoyment of the suffering of others.")

107 *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979).

case individually. In the past, the Virginia Supreme Court has not explicitly done so.[108] In *Jones v. Murray*,[109] the Fourth Circuit salvaged a death sentence in which the Virginia Supreme Court had not specifically applied any narrowing construction. The Fourth Circuit reasoned that the Virginia Supreme Court's ruling on direct review that the death penalty is not "disproportionate" implicitly includes an application of the *Smith* narrowing factors.[110]

In *Sochor v. Florida*, the State of Florida made an argument exactly like the one used by the Fourth Circuit in *Jones*. The Florida Supreme Court, in upholding Sochor's death sentence, had not applied any narrowing construction to its vague aggravating factor. The Supreme Court rejected the State's argument that the Florida Supreme Court's "proportionality" review cured the error.[111] The Court affirmatively held that a "proportionality" ruling is a "quite different enquiry" from the question of whether an improper aggravating factor tainted the trial court's death sentence.[112]

What this means in Virginia is that in every case involving the vileness aggravating factor, the Virginia Supreme Court must expressly examine whether the facts meet its narrowing construction of vileness and explain its findings. The United States Supreme Court has repeatedly stressed that application of the narrowing construction must occur at some point within the state system. Since Virginia juries are not given instructions on how the vileness factor has been narrowed, that clear constitutional duty falls upon the Virginia Supreme Court. The court's explanation will then supply full grounds for challenging the inadequacy of the narrowing construction to the United States Supreme Court and in federal habeas.

B. Without Constitutionally Sufficient Narrowing Constructions, The Virginia Supreme Court Must Find That Application Of The Vague Aggravating Factor Was Harmless Beyond A Reasonable Doubt

If the Virginia Supreme Court should find that the vileness aggravating factor was unconstitutionally applied in a particular case, it is then faced with the obligation of taking further action. If the only aggravating factor found was vileness, the court has no choice but to reverse since no other valid aggravating factor could support the sentence of death. If the future dangerousness aggravating factor also was found, then the Virginia Supreme Court should be required to expressly find that reliance on the vileness aggravating factor was harmless error or engage in a full reweighing of the mitigating and aggravating evidence.

Stringer held that where a death penalty is based upon multiple aggravating circumstances, one of which is invalid, the state appellate court must determine "that the invalid factor would not have made a difference to the jury's determination."[113] This inquiry is not one which may be resolved in a conclusory manner. The Court emphasized that a reviewing court "may not make the automatic assumption that [an invalid aggravating factor] has not infected the weighing process."[114] The state appellate court must closely scrutinize each case to determine the impact which the invalid factor had on the sentencer.

One example of the high level of scrutiny required in this process is *Sochor*. The Florida Supreme Court, in finding Sochor's sentence "proportionate," stated that:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing."[115]

The Court found this discussion insufficient to cure the trial court's error. *Sochor* holds that state appellate courts must "explain" the basis for upholding the sentence.[116] As Justice O'Connor noted, the "justifiably high standard . . . can be met without uttering the magic words 'harmless error,' . . . [but] the reverse is not true."[117] The Supreme Court requires a "'principled explanation' of how the [state] court reached [its] conclusion."[118]

CONCLUSION

In *Stringer*, *Sochor*, and *Espinosa*, the United States Supreme Court has reaffirmed the extremely significant issue of specificity in aggravating factor instructions. Due to the indifference of the Virginia courts in addressing this important issue, many attorneys may feel that pursuing it is futile. However, it is this very judicial indifference that makes a vagueness challenge even more likely to succeed now than it ever has been in the past. The United States Supreme Court has reaffirmed that state courts must actively ensure that aggravating factors meaningfully narrow who is "death eligible." Defense attorneys should impress upon the Virginia Supreme Court that the Eighth Amendment requires more guidance and more scrutiny than Virginia currently supplies. If the state courts do not respond, it seems likely that the federal courts will intervene in an appropriate case.

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108 Prior to 1992, the Virginia Supreme Court's practice has been merely to affirm the finding of "vileness," to detail specific aspects of the crime, and to find the penalty not "excessive" or "disproportionate." *See, e.g., Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991); *George v. Commonwealth*, 242 Va. 264, 411 S.E.2d 12 (1990); *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609 (1990).

More recently, however, the Virginia Supreme Court has at least cursorily applied the *Smith* factors. *See e.g., Thomas v. Commonwealth*, 244 Va. 1, 419 S.E.2d 606 (1992); *Mueller v. Commonwealth*, Nos. 920287, 920449, 1992 Va. LEXIS 97 (1992). In *Thomas* and *Mueller*, the Virginia Supreme Court has identified which narrowing construction of the "vileness" factor is applicable.

109 947 F.2d 1106 (1991). *See* case summary of *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992).

110 *Id.*

111 *Sochor v. Florida*, 112 S.Ct. 2114, 2123 (1992).

112 *Id.*

113 *Stringer*, 112 S.Ct. at 1137.

114 *Id.*

115 *Sochor v. State*, 580 So.2d 595, 604 (Fla. 1991).

116 112 S.Ct. at 2123.

117 *Id.* at 2123 (O'Connor, J., concurring).

118 *Id.*