Capital Defense Journal

Volume 5 | Issue 2 Article 6

Spring 3-1-1993

RICHMOND v. LEWIS 113 S.Ct. 528 (1992)

Graham clearly demonstrates the powerful role which *Teague* continues to play in the appellate process for capital cases. The Court generally has taken a narrow view of what reasonable jurists at the time of a defendant's trial would have held,[23] and therefore innovative theories of law put forth on collateral review will rarely succeed. There is little defense counsel can do at this point to combat the harshness of *Teague* other than to try and place a claim within the realm of prior precedent. So long as the *Teague* new rule doctrine is in force defendants will be trapped in time, with only the remedies available to them when their sentences became final to rely upon during their appeals.

The other notable aspect of this case is Justice Thomas' concurrence. Echoing Justice Scalia's sentiments in *Walton v. Arizona*,[24] Justice Thomas used his concurrence to argue that the *Lockett-Eddings* line of mitigation cases represent a regression towards the days of less rational sentencing schemes. Justice Thomas examined at great length the history of racially discriminatory practices in the use of the death penalty, and argued that justice and fairness require less and not more discretion on the part of juries in capital cases. Too much discretion, he suggested, would allow racism to infiltrate the sentencer's decision.

Justice Thomas focused much of his attack on *Penry* itself, arguing that the type of leniency which that case allows opens the door to discriminatory practices: "We have consistently recognized that the discretion to accord mercy — even if 'largely motivated by the desire to mitigate' — is indistinguishable from the discretion to impose the death penalty."[25] Justice Thomas sought to uphold rational responses over moral ones, and therefore advocated giving *Eddings* a narrow reading through which it would act more as a rule of evidence than a rule of substantive law.[26] In the end Justice Thomas viewed the *Penry* decision as too big a step away from rationality and argued that it should be overturned.

Summary and Analysis by:
Paul M. O'Grady

---

23 *But see Stringer v. Black*, 112 S.Ct. 1130 (1992) (holding that *Clemons v. Mississippi* was not a "new rule" for *Teague* purposes). In *Stringer*, the Court looked beyond the *Teague* threshold issue in order to effectuate the requirement that the aggravating factors be stated with specificity. *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11, nn. 84-92 and accompanying text (1992).

24 497 U.S. 639, 661 (1990)(Scalia, J., dissenting). *See* case summary of *Walton*, Capital Defense Digest, Vol. 3, No. 1, p. 5 (1990).

25 *Graham*, 113 S.Ct. at 913 (quoting *Furman*, 408 U.S. at 313-14 (White, J., concurring)).

26 *Graham*, 113 S.Ct. at 910.

RICHMOND v. LEWIS

113 S.Ct. 528 (1992)
United States Supreme Court

FACTS

On August 25, 1973, Bernard Crummet met Rebecca Corella in an Arizona bar where she agreed to perform an act of prostitution with Crummet. The two left the bar and met the petitioner, Willie Lee Richmond, and his girlfriend in the parking lot. Petitioner, Richmond drove the group to Corella's hotel where he indicated to the group that he intended to rob Crummet.

After the encounter between Crummet and Corella concluded, the group again went for a drive. Once outside Tucson, Richmond stopped the car, got out and struck Crummet to the ground. He then threw several large rocks at the deceased, and either Richmond or Corella or both of them proceeded to rob Crummet. Finally, either the petitioner or Corella, whoever was driving, drove the car over Crummet twice and caused his death.

Richmond was convicted of both robbery and first degree murder, with the murder conviction being returned by a general verdict. The trial judge then held the required penalty hearing and found that two statutory aggravating factors existed: that petitioner had a prior felony conviction involving the use or threat of violence on another person and that the petitioner had committed the offense in an especially cruel or depraved manner. The judge sentenced Richmond to death.

Although Richmond unsuccessfully sought state postconviction relief of his specific sentence,[1] the Supreme Court of Arizona eventually held the Arizona death penalty statute unconstitutional because it limited defendants to statutory mitigating factors.[2] Consequently, the Arizona court vacated every pending death sentence, including Richmond's.[3]

At Richmond's resentencing hearing, petitioner's witnesses testified to the fact that Richmond was not the driver of the car and presented evidence of petitioner's rehabilitation in prison. However, the judge sentenced Richmond to death, this time finding three statutory aggravating factors: a prior violent felony, the offense was especially heinous, cruel or depraved, and a prior felony meriting life imprisonment.[4] Once again, the judge did not specifically find that Richmond had been the driver of the car. In addition, the judge found no mitigating circumstances sufficiently substantial to warrant leniency.

---

1 *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976). In applying for state postconviction relief, Richmond attached two affidavits by persons who stated that Corella had claimed that she, not the petitioner, had driven the car over the victim. The Supreme Court of Arizona affirmed the conviction and sentence. In affirming the sentence, the court did not reach defendant's vagueness challenge to the "especially heinous, cruel or depraved" factor because it found that his death sentence was supported by another valid statutory aggravating factor and that no mitigating factors applied.

Soon after denial of state relief, federal habeas proceedings took place and the petitioner's conviction was affirmed but the sentence was found invalid. *See State v. Watson*, 120 Ariz. 441, 444-445, 586 P.2d 1253, 1256-57 (1978).

2 *Id.*

3 *Id.*

4 *See* Ariz. Rev. Stat. Ann. §13-703(F).

A divided Arizona Supreme Court affirmed Richmond's death sentence, with each of the five justices joining one of three opinions.[5] Two justices joined in the principal opinion, two justices concurred in the result and one justice dissented. The two concurring justices concluded that petitioner committed neither "gratuitous violence" nor "needless mutilation" within the meaning of the Arizona death penalty statute. However, these two justices agreed that the death sentence was appropriate, regardless of the absence of the above factor.[6]

Upon considering Richmond's habeas corpus action, the Ninth Circuit denied relief and held that the "elimination of the the challenged factor would still leave enough support for [petitioner's] sentence because the statute at issue here is not a 'weighing' statute."[7] Richmond then filed a petition for a writ of certiorari to the United States Supreme Court, challenging his death sentence at the resentencing on the grounds that the "especially heinous, cruel or depraved" aggravating factor, upon which the sentencing judge relied, was unconstitutionally vague, and that the Supreme Court of Arizona failed to cure this constitutional invalidity in *Richmond II*. Specifically, he argued that the Arizona Supreme Court did not specifically reweigh the remaining valid aggravating factors to determine if the death penalty was appropriate.

HOLDING

The United States Supreme Court reversed the Ninth Circuit decision. While the Court did not find that the Arizona statute was facially unconstitutionally vague, they did agree with the petitioner that the concurrence in *Richmond II* did not properly reweigh the remaining aggravating factors, as required by the Eighth Amendment.[8]

ANALYSIS/APPLICATION IN VIRGINIA

The Supreme Court began its analysis by stating clearly that where an invalid aggravating factor is relied upon by the sentencer, the state court **must** reweigh at the resentencing hearing.[9] The Court wrote that while case law does not set forth the degree of clarity with which a state must reweigh in order to cure an otherwise invalid death sentence, at a minimum the Court must be able to ascertain with certainty that the reweighing actually took place.[10] The Court held that where "the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must **actually** perform a new sentencing calculus, if the sentence is to stand."[11] The Supreme Court, with forceful language, emphasized that "[o]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."[12] Because in *Richmond* the concurring justices did not even purport to perform such a reweighing or mention the evidence in mitigation, reversal was required.[13]

Richmond strongly emphasizes the importance the Supreme Court places on the constitutional mandate of individualized consideration.[14] Moreover, the Court explicitly stated that death sentences will not be upheld and due process will not be satisfied unless it can be clearly seen in the reviewing state court opinion that the defendant was given express individualized consideration. The Court found that there could be no presumption of reweighing in this case, as the opinion appeared to automatically affirm the death sentence.[15]

Richmond reinforces the seriousness of the holdings set forth in *Stringer v. Black*,[16] *Sochor v. Florida*,[17] and *Espinosa v. Florida*.[18] This trilogy of cases used strong language to emphasize the need for "reweighing" or harmless error analysis when an aggravating factor is found invalid. For example, *Stringer* held that when an aggravating factor is held unconstitutional, the court **must** determine "that the invalid factor would not have made a difference to the jury's determination."[19] The Court also concluded that the reviewing court "may not make the automatic assumption that [an invalid aggravating factor] has not infected the weighing process."[20] Similarily, in *Richmond* the Court clearly stated that individualized consideration must be accorded and that it will not read into the opinion that this has been done. The weighing and scrutinizing process must be explicitly evidenced.

In *Sochor*, the Court held that state appellate courts must "explain" the basis for upholding a sentence.[21] In Justice O'Connor's concurrence, she stated that the "justifiably high standard. . . can be

---

[5] *State v. Richmond*, 136 Ariz. 312, 666 P.2d 57 (1983) (*Richmond II*).

[6] *Id.* (concurring opinion of J. Cameron and J. Gordon).

[7] *Richmond v. Ricketts*, 921 F.2d 933, 947 (1990). The Ninth Circuit later amended the opinion to omit that sentence, but the amended opinion still reasoned that "under the statute at issue in Clemons, the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial in a relative sense; the same, however, cannot be said under the terms of the Arizona statute at issue here." 948 F.2d 1473, 1488-1489 (1992).

[8] *Richmond v. Lewis*, 113 S.Ct. 528, 537 (1992).

[9] The Supreme Court rejected the Ninth Circuit's conclusion that Arizona is not a "weighing" state. The Court's conclusion was based partly on the Arizona statute itself and partly on Arizona caselaw which purportedly held that Arizona was a "weighing" state. The Arizona statute, however, requires only that at least one aggravating factor must be present and that no mitigating factors are "sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(E) (1989). This language seems to indicate that Arizona does **not** formally "weigh" aggravating factors against mitigating factors. Additionally, the only recent Arizona case cited by the Supreme Court which was *State v. Brewer*, 826 P.2d 783, 801 (Ariz.), *cert. denied*, 113 S. Ct. 206 (1992), which hardly indicated Arizona's status on this issue with any clarity. *Brewer* stated only that all mitigating evidence must be considered and that "it is within the discretion of the trial judge how much weight should be given to the proffered mitigating evidence." *Id.*

It is unclear whether Virginia is a "weighing" or "non-weighing" state. However, much like the Ninth Circuit's ruling with respect to Arizona law in *Richmond*, the Fourth Circuit Court of Appeals recently concluded that Virginia is not a "weighing" state. *See Jones v. Murray*, 976 F.2d 169 (4th Cir. 1992), and case summary of *Jones*, Capital Defense Digest, this issue. Despite *Jones*, attorneys should note that the *Richmond* Court held that specificity rules for aggr :g factors applied to Arizona, a state which arguably was not a "weighing" state.

[10] *Id.* at 535.

[11] *Id.* (emphasis added).

[12] *Id.*

[13] *Id.*

[14] In *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), the court held that states that allow capital punishment must 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."

[15] *Richmond*, 113 S.Ct. at 535.

[16] 112 S.Ct. 1130 (1992). *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[17] 112 S.Ct. 2114 (1992). *See* case summary of *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[18] 112 S.Ct. 2926 (1992). *See* case summary of *Espinosa*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[19] *Stringer*, 112 S.Ct. at 1137.

[20] *Id.*

[21] 112 S.Ct. at 2123.

met without uttering the magic words 'harmless error,'. . .[but] the reverse is not true."[22] In other words, the Supreme Court requires a "'principled explanation' of how the [state] court reached [its] conclusion."[23] This high level of scrutiny set forth by Justice O'Connor is reinforced in her majority opinion in *Richmond*.

With the aid of *Stringer*, *Sochor*, *Espinosa* and now *Richmond*, Virginia attorneys should be better equipped to battle the indifference of the Virginia Supreme Court on the issue of specificity in aggravating factor instructions. The cases provide clear authority for the requirement that at some point in the Virginia sentencing scheme, an express and specific use of properly named aggravating factors must be made evident. Defense attorneys should be prepared to argue the importance of these cases and how the Eighth Amendment requires a level of individualized consideration that Virginia does not currently provide.

Summary and analysis by:
Lesley Meredith James

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

23 *Id.*

DOBBS v. ZANT

113 S. Ct. 835 (1993)
United States Supreme Court

FACTS

Wilburn Dobbs was found guilty of murder and was sentenced to death by a Georgia jury. In his first federal habeas petition, Dobbs argued that he had received ineffective assistance of counsel at his sentencing hearing, particularly citing the closing argument made by his court-appointed attorney. At an evidentiary hearing held on the matter, the State was unable to produce a transcript of counsel's closing argument, so the court relied on the testimony of the attorney himself as to the content of his closing arguments. The district court found Dobbs had received effective assistance.[1] The Court of Appeals for the Eleventh Circuit affirmed, relying once again on counsel's testimony at the evidentiary hearing regarding his closing argument in mitigation.[2]

Subsequently, the State located a transcript of the closing argument, which varied in some degree from counsel's recollection.[3] Nevertheless, the court of appeals denied the petitioner's motion to supplement the record with the sentencing transcript. In affirming that denial, the Eleventh Circuit found that the "law of the case" doctrine prevented it from reconsidering its prior rejection of the ineffective assistance of counsel claim.[4] Although the court acknowledged the manifest injustice exception to the law of the case doctrine,[5] the court refused to apply the exception, reasoning in Catch-22 fashion that without the transcript, petitioner would be unable to show an injustice.[6]

Petitioner Dobbs filed a petition for a writ of certiorari.

HOLDING

The United States Supreme Court granted the writ of certiorari and reversed the decision of the Eleventh Circuit.[7] Citing *Gardner v. Florida*[8] and *Gregg v. Georgia*,[9] the Court emphasized the importance of reviewing capital sentences on a complete record.[10] The Court went on to consider the transcript's key relevance here (i.e., the factual predicate for deciding the ineffective assistance of counsel claim) and found that a complete record would have allowed the appeals court to waive the law of the case doctrine by applying the manifest injustice exception.[11] Further, the Court held that the exclusion of the transcript was not justified by the delay between the original determination of effective assistance and the discovery of the transcript, because the delay resulted from the State's erroneous representations and not the petitioner's actions.[12] Finally, although the Court speculated that an inadequate or harmful closing argument, coupled with a failure to present mitigating evidence, could produce harmful results, the Court followed its normal practice of letting the courts more familiar with a case conduct the harmless error analysis.[13] Therefore, the case was remanded for further proceedings consistent with the opinion.[14]

1 Civ. Action No. 80-247 (ND Ga., Jan. 13, 1984), p. 24.

2 *Dobbs v. Kemp*, 790 F.2d 1499, 1514, and n. 15 (1986).

3 The majority wrote that the newly found transcript "flatly contradicted the account given by counsel in key respects." *Dobbs v. Zant*, 113 S. Ct. at 835 (1993). However, in his concurring opinion, Justice Scalia objected to this characterization of the transcript. At the evidentiary hearing, defense counsel thought he had raised two issues in his closing argument: the death penalty is improper in any case, and the killing was impulsive. Counsel testified that he was "'sure' he had argued the impulsive-killing point," that he "assume[d] [he] argued it," and that "a lot of this is really not from actual recollection." Tr. 70-71 (Nov. 10, 1982). The transcript revealed that counsel made only the impropriety of the death penalty argument.

4 *Dobbs v. Zant*, 963 F.2d 1403, 1409 (1991).

5 Under the policy of "law of the case," an appellate court's determination of a legal question (here petitioner's ineffective assistance of counsel claim) will generally be found binding on both trial courts on remand and appellate courts on subsequent appeals. Since it is policy and not law, it is general practice to disregard law of the case when to hold otherwise would work manifest injustice.

6 *Dobbs*, 963 F.2d at 1409.

7 *Dobbs v. Zant*, 113 S. Ct. 835 (1993).

8 430 U.S. 349, 361 (1977) (emphasizing the importance of a complete record in reviewing capital sentences).

9 428 U.S. 153 (1976) (finding that the provision requiring transmittal of a complete transcript and record on appeal provides an important "safeguard against arbitrariness and caprice").

10 *Dobbs*, 113 S. Ct. at 836.

11 *Id.*

12 *Id.*

13 *Id.*, at 836, n. 1.

14 *Id.* at 836.