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Bell v. Cone 125 S. Ct. 847 (2005)

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I. Facts

In 1984 a Tennessee jury convicted Gary Bradford Cone of two counts of murder in the commission of a burglary. The jury unanimously found four aggravating factors and, upon a finding that the aggravating circumstances outweighed the mitigating evidence, sentenced Cone to death. The Supreme Court of Tennessee affirmed.[1]

Cone petitioned for state postconviction relief, raising fifty-two constitutional claims including a challenge to the "especially heinous, atrocious, or cruel" aggravating circumstance as unconstitutionally vague.[2] The trial court held that Cone's claims were barred pursuant to Tennessee Code § 40-30-111, which limited collateral review to claims not waived or decided in previous proceedings.[3] The Tennessee Court of Criminal Appeals affirmed, and the Supreme Court of Tennessee denied Cone permission to appeal.[4] Cone then sought habeas relief under 28 U.S.C. § 2254, but the United States District Court for the Western District of Tennessee denied his claims.[5] The court dismissed the vagueness challenge as procedurally barred for failure to raise the issue in state court.[6]

The United States Court of Appeals for the Sixth Circuit did not reach Cone's challenge to the statutory aggravating circumstance but overturned his sentence on another ground.[7] The United States Supreme Court reversed.[8] On remand, the Sixth Circuit again granted relief, this time by invalidating Tennessee's "especially heinous, atrocious, or cruel" aggravating factor as unconstitu-

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1. Bell v. Cone, 125 S. Ct. 847, 849 (2005); State v. Cone, 665 S.W.2d 87, 96 (Tenn. 1984).

2. *Bell*, 125 S. Ct. at 849–50; *see* TENN. CODE ANN. § 39–13-204(i) (2003) (formerly § 39-2-204(i)) (listing the statutory aggravating circumstances).

3. *Bell*, 125 S. Ct. at 850; *see* TENN. CODE ANN. § 40-30-111 (1990) (repealed) (stating that a claim is waived if not raised or if decided in a prior proceeding).

4. *Bell*, 125 S. Ct. at 850; *see* Cone v. State, 927 S.W.2d 579, 582 (Tenn. 1995) (affirming the denial of relief).

5. *Bell*, 125 S. Ct. at 850; *see* 28 U.S.C. § 2254 (2000) (outlining the requirements for a federal court to grant habeas corpus relief; part of AEDPA).

6. *Bell*, 125 S. Ct. at 850.

7. *Id.*; *see* Cone v. Bell, 243 F.3d 961, 979 (6th Cir. 2001) (concluding that defense counsel's failure to present mitigating evidence and a closing argument in the penalty phase amounted to ineffective assistance of counsel).

8. Bell v. Cone, 535 U.S. 685, 702 (2002).

tionally vague under the Eighth Amendment in light of *Godfrey v. Georgia*.[9] The court rejected the State's claim that the Supreme Court of Tennessee cured any constitutional failing by applying the narrowing construction adopted by that court in *State v. Dicks*.[10] The Sixth Circuit based this rejection on the Supreme Court of Tennessee's failure to cite *Dicks* or mention any narrowing construction of the aggravating circumstance.[11] The United States Supreme Court granted certiorari.[12]

II. Holding

The United States Supreme Court again reversed the Sixth Circuit.[13] The Court held that, given the deferential standard for federal habeas review of state criminal judgments under § 2254, the Sixth Circuit erred in presuming that the Supreme Court of Tennessee did not apply its own narrowing construction.[14] Despite that court's failure to cite its own precedent, the rationale of the state court decision "closely tracked" cases in which the court affirmed death sentences under its narrowing construction.[15] Therefore, the Tennessee court's decision upholding the sentence was not "contrary to . . . clearly established Federal law."[16]

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9. *Bell*, 125 S. Ct. at 850; *see* Cone v. Bell, 359 F.3d 785, 799 (6th Cir. 2004) (granting relief); U.S. CONST. amend. VIII (prohibiting cruel and unusual punishment); *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (striking down Georgia's vileness aggravating circumstance because it not did adequately limit the jury's discretion in determining if the crime committed had been "outrageously or wantonly vile, horrible and inhuman"). The Sixth Circuit reached the merits of Cone's vagueness challenge, rejecting the argument that Cone defaulted his claim by not raising the issue in state court. *Bell*, 125 S. Ct. at 850. The court determined that the state's statutory review of death sentences required the court to address constitutional deficiencies, and therefore, the claim was "fairly presented" to the court despite Cone's failure to raise the issue. *Id.*; *see* TENN. CODE ANN. § 39-13-206(c)(1) (2003) (formerly § 39-2-205(c)(1)) (listing the issues for consideration by an appellate court conducting mandatory statutory review of a sentence of death).

10. *Bell*, 125 S. Ct. at 851, 853; *see* State v. Dicks, 615 S.W.2d 126, 131–32 (Tenn. 1981) (adopting the Supreme Court of Florida's construction of an identical aggravating circumstance approved by the United States Supreme Court in *Proffitt v. Florida*); Proffitt v. Florida, 428 U.S. 242, 255–56 (1976) (holding that the "especially heinous, atrocious, or cruel" aggravating circumstance was not unconstitutionally vague as construed by the Supreme Court of Florida).

11. *Bell*, 125 S. Ct. at 853.

12. *Id.* at 848.

13. *Id.* at 856.

14. *Id.* at 853; *see* 28 U.S.C. § 2254(d) (2000) (stating that a federal court shall not grant a writ of habeas corpus unless the adjudication of the state claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law . . . (2) resulted in a decision that was based on an unreasonable determination of the facts"; part of AEDPA).

15. *Bell*, 125 S. Ct. at 853–54.

16. *Id.* at 856–57.

III. Analysis

Under 28 U.S.C. § 2254, a federal court may grant a writ of habeas corpus based upon a constitutional claim adjudicated by a state court only if that state court decision " 'was contrary to, or involved an unreasonable application of, clearly established Federal law.' "[17] Accordingly, in *Bell* the United States Supreme Court began by summarizing the controlling precedent, settled at the time of the Supreme Court of Tennessee decision in *Cone*, for vagueness challenges to statutory aggravating circumstances.[18] Pursuant to *Walton v. Arizona*,[19] a federal court must make two determinations: (1) whether the statute's language is unconstitutionally vague on its face, and (2) if so, whether the state court's construction of the statute has provided sufficient definition to the vague terms so as to render the aggravating circumstance constitutionally sufficient.[20]

The Court then distinguished *Cone* from *Godfrey v. Georgia*, the case relied upon by the Sixth Circuit, which "followed precisely" the procedure set forth above.[21] In *Godfrey*, the Supreme Court first determined that nothing in the language of the Georgia aggravator itself " 'implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence.' "[22] In addition, the trial court's instructions gave no guidance as to the meaning of the statutory terms, and the Supreme Court of Georgia failed to apply " 'a constitutional construction' " of the aggravating circumstance.[23] Although the Supreme Court of Georgia had previously applied a narrowing construction of the aggravator, the facts of *Godfrey* did not resemble those cases.[24] Further, the Georgia court provided no explanation for its decision to uphold the sentence of death.[25] Accordingly, the United States Supreme Court invalidated the aggravating circumstance.[26] However, the Court suggested and later emphasized that, " '[h]ad the Georgia Supreme Court applied a narrowing construction of the aggravator, [it] would have rejected the Eighth Amendment challenge to Godfrey's sentence,

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17. *Id.* at 851 (quoting 28 U.S.C. § 2254(d)(1)).

18. *Id.* at 851–52. For the sake of clarity, the Supreme Court of Tennessee decision, State v. Cone, 665 S.W.2d 87, will hereinafter be referred to as "*Cone*" to distinguish it from the United States Supreme Court decision.

19. 497 U.S. 639 (1990).

20. *Bell*, 125 S. Ct. at 852; *see* Walton v. Arizona, 497 U.S. 639, 654 (1990) (setting forth the two-prong inquiry for addressing a constitutional vagueness challenge).

21. *Bell*, 125 S. Ct. at 852.

22. *Id.* (quoting *Godfrey*, 446 U.S. at 428).

23. *Id.* (quoting *Godfrey*, 446 U.S. at 432).

24. *Id.*

25. *Id.*

26. *Id.*

notwithstanding the failure to instruct the jury on that narrowing construction.' "[27]

In contrast, the Court found that the Supreme Court of Tennessee had construed the aggravating circumstance narrowly in *Dicks* and had "followed that precedent numerous times" in cases prior to *Cone*.[28] In addition, the reasoning in *Cone* closely followed the court's rationale for affirming sentences in cases where it expressly followed a narrowed construction.[29] On those facts, the United States Supreme Court held that, "absent an affirmative indication to the contrary, we must presume that [the Supreme Court of Tennessee] did the same thing here."[30] Accordingly, the Court concluded that the Tennessee court applied its narrowing construction in *Cone*.[31] Further, because the United States Supreme Court upheld an identical construction in *Proffitt v. Florida*,[32] the Court determined that any claim that the aggravating circumstance applied by the Tennessee court was "contrary to" clearly established federal law must fail.[33]

In footnote six, the Court cited *Ring v. Arizona*,[34] in which it held "that the Sixth Amendment requires a jury, rather than a judge, to find the aggravating circumstance that renders a defendant death-eligible."[35] The Court subsequently held in *Schriro v. Summerlin*[36] that *Ring* does not apply retroactively.[37] Therefore, *Bell* did not "present the question whether an appellate court may, consistently with *Ring*, cure the finding of a vague aggravating circumstance by applying a narrower construction."[38]

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27. *Bell*, 125 S. Ct. at 852 (quoting Lambrix v. Singletary, 520 U.S. 518, 531 (1997)).

28. *Id.* at 853.

29. *Id.*

30. *Id.* The Court noted that this "is especially true in a case such as this one, where the state court has recognized that its narrowing construction is constitutionally compelled and has affirmatively assumed the responsibility to ensure that the aggravating circumstance is applied constitutionally in each case." *Id.*

31. *Id.*

32. 428 U.S. 242 (1976).

33. *Bell*, 125 S. Ct. at 854–55; *see Proffitt*, 428 U.S. at 255–56 (1976) (holding that the "especially heinous, atrocious, or cruel" aggravating factor was not unconstitutionally vague as construed by the Supreme Court of Florida).

34. 536 U.S. 584 (2002).

35. *Bell*, 125 S. Ct. at 852; *see* Ring v. Arizona, 536 U.S. 584, 589 (2002) (holding that a jury must make any factual determination that may increase a defendant's maximum sentence).

36. 124 S. Ct. 2519 (2004).

37. *Bell*, 125 S. Ct. at 852; *see* Schriro v. Summerlin, 124 S. Ct. 2519, 2522–26 (2004) (holding that *Ring* was not a watershed rule of criminal procedure and therefore was subject to the nonretroactivity rule of *Teague v. Lane*); Teague v. Lane, 489 U.S. 288, 311 (1989) (setting forth the rule for retroactive application of new constitutional rules on federal habeas review). *See generally* Tamara L. Graham, Case Note, 17 CAP. DEF. J. 253 (2004) (analyzing Schriro v. Summerlin, 124 S. Ct. 2519 (2004)).

38. *Bell*, 125 S. Ct. at 852.

IV. Application in Virginia

Virginia's capital sentencing scheme includes only two aggravating factors, future dangerousness and vileness.[39] The vileness aggravating circumstance requires a capital jury to find 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 aggravated battery to the victim."[40] This language is, word-for-word, identical to that involved in *Godfrey*.[41] Further, as in *Godfrey*, there is no instruction that must be read to Virginia capital juries in order to narrow the overly broad statutory language.[42]

However, beginning with the United States Supreme Court's 1976 ruling in *Proffitt*, there was little question that Virginia could conduct its "narrowing" on appeal. In *Proffitt*, and later in *Lambrix v. Singletary*[43] and *Godfrey*, the Court made clear that an appellate court could apply a narrowing construction to an unconstitutionally vague statute and thereby rectify an inadequate aggravating circumstance.[44] For example, faced with a vague aggravating circumstance in *Proffit*, the Court responded, "[w]e cannot say that the provision, *as so construed* [by the Supreme Court of Florida], provides inadequate guidance to those charged with the duty of recommending or imposing" a sentence of death.[45] Accordingly, in the almost thirty years since *Godfrey*, the Supreme Court of Virginia has consistently treated its construction of the vileness aggravating circumstance as providing the constitutionally required sentencing standards.[46]

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39. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (stating the findings required for a judge or jury to recommend death).

40. *Id.*

41. *See Godfrey*, 446 U.S. at 428–29 (striking down Georgia's vileness aggravating circumstance because it not did adequately limit the jury's discretion in determining if the crime committed had been "outrageously or wantonly vile, horrible and inhuman").

42. In *Godfrey*, the jury instruction on vileness only quoted the statutory language. *Godfrey*, 446 U.S. at 426. The trial judge did not further define or explain the statutory language. *Id.*

43. 520 U.S. 518 (1997).

44. *See Proffitt*, 428 U.S. at 255–56 (holding that the "especially heinous, atrocious, or cruel" aggravating circumstance was not unconstitutionally vague as construed by the Supreme Court of Florida); Lambrix v. Singletary, 520 U.S. 518, 530–31 (holding that "failure to instruct the sentencing jury properly with respect to the aggravator does not automatically render a defendant's sentence unconstitutional" because "a sentencing jury's consideration of a vague aggravator can be cured by appellate review"); *Godfrey*, 446 U.S. at 432 (holding that the Supreme Court of Georgia failed to apply a constitutional construction to an unconstitutionally vague aggravating circumstance).

45. *Proffitt*, 428 U.S. at 255–56 (emphasis added).

46. *See, e.g.*, Bailey v. Commonwealth, 529 S.E.2d 570, 580 (Va. 2000) (rejecting the defendant's assertion that the vileness aggravating factor is unconstitutionally vague); Walker v. Commonwealth, 515 S.E.2d 565, 569 (Va. 1999) (same); Cherrix v. Commonwealth, 513 S.E.2d 642, 647 (Va. 1999) (same); Beck v. Commonwealth, 484 S.E.2d 898, 907 (Va. 1997) (same). *But see*, Douglas R. Banghart, *Symposium: A Quarter-Century of Death: A Symposium on Capital Punishment in Virginia Since*

The same issue arose in *Bell*, and consistent with *Proffitt*, the United States Supreme Court concluded that the state court's construction of a facially inadequate statute provided sufficient definition as to render the aggravating circumstance constitutionally sound.[47] However, in footnote six, the Court quietly indicated that this appellate narrowing may no longer be adequate in light of *Ring v. Arizona*.[48] In *Ring*, the United States Supreme Court held that Arizona's capital sentencing scheme violated the Sixth Amendment because it allowed the sentencing judge, rather than a jury, to find an aggravating circumstance.[49] The Court reasoned that because the existence of the aggravating circumstance could mean the difference between life and death, it "operate[d] as the 'functional equivalent of an element of a greater offense.' "[50] Pursuant to its previous holding in *Apprendi v. New Jersey*,[51] a jury must determine whether a defendant is guilty of every element of the offense beyond a reasonable doubt.[52] Thus, after *Ring*, the Sixth Amendment is violated if a trial court judge *or* an appellate court adjudicates an element of the offense, including the statutory aggravating factors.[53] That finding, the *Ring* Court held, must be made beyond a reasonable doubt by the jury.[54]

Although *Bell* did not present a question under *Ring*, capital defendants in Virginia may take advantage of this implied constitutional challenge in the future. The Virginia aggravator, facially unconstitutional under *Godfrey*, can only be regarded as constitutional because of the Supreme Court of Virginia's narrowing construction.[55] That construction by the Virginia court is, therefore, as much a part of the "vileness" element as the statutory language itself. Thus, absent a jury instruction that includes the Supreme Court of Virginia's narrowing construction, the element of vileness cannot be said to have been found by a jury beyond a reasonable doubt as *Ring* requires. Further, it is not enough that the instruction simply repeat to the jury the Supreme Court of Virginia's language. The trial

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Furman v. Georgia, 12 CAP. DEF. J. 77, 79 n.11 (arguing that "[t]he Supreme Court of Virginia has yet to provide a coherent explanation of why the Virginia vileness predicate is constitutional when Georgia's identical predicate was not").

47. *Bell*, 125 S. Ct. at 854.

48. *Id.* at 852 n.6.

49. *Ring*, 536 U.S. at 609.

50. *Id.* at 609 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).

51. 530 U.S. 466 (2000).

52. *Apprendi*, 530 U.S. at 477 (requiring a jury to determine whether a defendant is guilty beyond a reasonable doubt for every element of the offense).

53. *Ring*, 536 U.S. at 609.

54. *Id.* at 602.

55. *See* Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (claiming to construe the vileness aggravator so as to satisfy the constitutional narrowing requirement).

court must provide a detailed jury instruction that explains and defines the statutory terms.

Thus, the United States Supreme Court has opened the door for defense counsel in Virginia to challenge a vague jury instruction or failure to provide an instruction on the vileness aggravator because, after *Ring*, the constitutional error cannot be cured on appeal. Given the Court's holding in *Summerlin* that *Ring* does not apply retroactively, this challenge is available *only* in those cases that arose or were pending on appeal after the date of the *Ring* decision. Further, if a capital jury in Virginia makes a finding that both "future dangerousness" *and* "vileness" are proven beyond a reasonable doubt, the constitutional infirmity of the vileness aggravator may be considered harmless error.[56] However, when a sentence of death is secured by a finding of vileness alone and on the basis of a vague jury instruction, the defendant will have a strong argument that his sentence was imposed in violation of *Ring*, and that the over-breadth of the aggravating factor cannot be cured on appeal.

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56. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 891 (1983) (upholding a death sentence despite the fact that the Supreme Court of Georgia had invalidated as unconstitutional one of the aggravating factors found by the jury).