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The Writ of Habeas Corpus After Cone v. State

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The Writ of Habeas Corpus After Cone v. State

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I. Introduction

In *Cone v. Bell*,¹ the U.S. Court of Appeals for the Sixth Circuit overruled the District Court's denial of a prisoner's habeas corpus petition. The Sixth Circuit held that the jury relied on an unconstitutional statutory aggravating factor in its decision to impose the death sentence. Accordingly, the Sixth Circuit remanded the case with instructions to grant the habeas corpus petition, thereby vacating Cone's death sentence.²

After convicting Gary Bradford Cone of two counts of first degree murder for brutally killing an elderly couple, the jury sentenced Cone to death.³ The jury found four aggravating factors were present, including, in particular, that the murders were "especially heinous, atrocious and cruel."⁴ In his habeas corpus petition, Cone argued that the terms "heinous, atrocious and cruel" were unconstitutionally vague.⁵ On appeal, the Sixth Circuit was asked to decide whether Cone's death sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.⁶

Before addressing Cone's Eighth Amendment challenge, the Sixth Circuit resolved two key preliminary

¹ *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004).

² *Id.* at 799.

³ *Id.* at 787; *Cone v. Bell*, 243 F.3d 961, 965 (6th Cir. 2001).

⁴ *Cone*, 243 F.3d at 965; see TENN. CODE ANN. § 39-13-204(i) (2003) (citing 12 aggravating factors that a jury can consider in deciding whether to impose death penalty when defendant has been convicted of first degree murder). Many courts refer to the "especially heinous, atrocious and cruel" factor as the "HAC aggravator," and I will also refer to it as such throughout this note.

⁵ See *Cone*, 243 F.3d 961 (affirming district court's refusal to issue writ of habeas corpus).

⁶ *Cone*, 359 F.3d at 787.

issues.⁷ First, the court held that under Tennessee law, the Tennessee Supreme Court implicitly reviews a death sentence for arbitrariness, regardless of whether the challenge is explicitly asserted by the petitioner.⁸ Second, the court held that although the petitioner did not explicitly raise an Eighth Amendment claim in his first petition for post-conviction relief, the issue had been implicitly reviewed by the Tennessee Supreme Court. Accordingly, Cone's Eighth Amendment challenge had not been "procedurally defaulted" and, therefore, was a valid consideration for the court.⁹

After resolving the preliminary issues, the Sixth Circuit analyzed Cone's primary Eighth Amendment claim. Granting Cone's habeas corpus petition, the court held that the Tennessee Supreme Court's implicit decision regarding the constitutionality of the HAC aggravator was contrary to "clearly established" United States Supreme Court precedent existing at the time of Cone's state court conviction.¹⁰ By vacating Cone's death sentence, the Sixth Circuit furthered the primary purpose of the writ of habeas corpus – to ensure that a petitioner's imprisonment is lawful.

Astonishingly, three years earlier, in 2001, the Sixth Circuit had concluded that it was unnecessary to address Cone's vagueness challenge when it determined he was entitled to habeas relief. Taken together these decisions emphasize that, when reviewing a state prisoner's sentence and conviction for the purposes of a habeas corpus petition, the Federal courts *must* exercise the utmost care and diligence.

⁷ *Id.* at 790-91.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 797.

II. The Development of Habeas Relief for State Prisoners Sentenced to Death

A. Writ of Habeas Corpus: A Historical Perspective

A writ of habeas corpus is most often used to examine the legality of the petitioner's imprisonment.¹¹ The writ of habeas corpus originated in England in the thirteenth century. As is evidenced by its inclusion in the Constitution, the Founders clearly recognized the importance of the writ of habeas corpus.¹² Initially, only a federal prisoner could petition a court for habeas corpus relief.¹³ However, in 1867, the Habeas Corpus Act extended the writ to include state prisoners and enabled federal courts to grant the writ in "all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution."¹⁴ Although the federal habeas corpus statute has undergone numerous amendments since its enactment, the "jurisdictional grant" endured.¹⁵

Today, 28 U.S.C. §§ 2241-2255 gives federal courts the authority to grant habeas corpus relief.¹⁶ The current version of Section 2254 contains revised procedural guidelines that a court must follow in granting the writ to state prisoners.¹⁷ Congress, however, did not pass

¹¹ BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

¹² U.S. CONST. art. I, §9 cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."); Stuart E. Walker, Note, *"What We Meant Was . . ." The Supreme Court Clarifies Two Ineffective Assistance Cases in Bell v. Cone*, 54 MERCER L. REV. 1271, 1275 (2003).

¹³ Walker, *supra* note 12.

¹⁴ *Id.* Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

¹⁵ Williams v. United States, 401 U.S. 362, 375 (2000).

¹⁶ Walker, *supra* note 12.

¹⁷ 28 U.S.C. § 2254 (2004).

legislation outlining these substantive guidelines until April 24, 1996, when it enacted the Antiterrorism and Effective Death Penalty Act (hereinafter the "AEDPA").¹⁸ The AEDPA limited the circumstances under which a federal court may grant habeas relief to a state prisoner.¹⁹ The most substantial change effectuated by the AEDPA regarding federal habeas relief came in the form of an amendment to 28 U.S.C. § 2254, which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."²⁰

B. From Teague to Williams: The Evolution of Federal Habeas Corpus Practice

Prior to the AEDPA amendments, state prisoners had greater latitude from which to appeal their convictions. More specifically, habeas relief was not limited only to

¹⁸ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of title 28 of the U.S. Code).

¹⁹ *Id.*

²⁰ 28 U.S.C. § 2254(d) (emphasis added).

decisions that were either “contrary to” or “unreasonable applications of clearly established Federal law.”

1. *Teague v. Lane Sets the Stage*

The limitation on habeas relief originated with the United States Supreme Court’s holding in *Teague v. Lane*.²¹ In *Teague*, during the process of jury selection, the prosecutor utilized all ten of his preemptory challenges to exclude potential black jurors. Subsequently, the defendant, a black man, was convicted of attempted murder and other related offenses by an all-white jury.²² On appeal, the petitioner argued that he had been “denied [] the right to be tried by a jury that represented a fair cross section of the community.”²³

In ruling on *Teague*’s habeas claim, the Court clarified when a “new rule” should be applied retroactively and when a petitioner’s claim for habeas relief is procedurally barred in collateral review cases.²⁴ According to the Court, “[a] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”²⁵ Hence, the Court adopted Judge Harlan’s view of retroactivity for collateral review cases and found two narrow exceptions to the general rule that “new rules” should not be applied retroactively.²⁶

²¹ *Teague v. Lane*, 489 U.S. 288 (1989).

²² *Id.* at 292-93.

²³ *Id.* at 293.

²⁴ *See, e.g., Harris v. Reed*, 489 U.S. 255, 263 (1989) (holding that “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a state procedural bar”).

²⁵ *Teague*, 489 U.S. at 301.

²⁶ *Id.* at 307; *Mackey v. United States*, 401 U.S. 667, 682 (1971).

According to the Court, a “new rule” should be applied retroactively “if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe’” or “if it requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’”²⁷ Ultimately, the Court “noted the fundamental importance of finality to our system of criminal justice and commented that ‘[w]ithout [it], the criminal law is deprived of much of its deterrent effect.’”²⁸

2. *Williams v. Taylor Aligns the Supreme Court with the Post-AEDPA Writ*

Eleven years later, in *Williams v. Taylor*,²⁹ the Supreme Court thoroughly analyzed the scope of habeas corpus relief, when it interpreted the amended version of 28 U.S.C. § 2245(d)(1)³⁰ for the first time. Williams, a state prisoner convicted of capital murder, collaterally attacked his conviction, arguing that his attorney failed to discover mitigating evidence during sentencing.³¹ After exhausting his state court remedies, Williams sought a writ of habeas corpus in district court.³²

²⁷ *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 693).

²⁸ Walker, *supra* note 12, at 1277 (quoting *Teague*, 489 U.S. at 309).

²⁹ *Williams*, 529 U.S. at 362; *see also* *Ramdass v. Angelone*, 530 U.S. 156, 168 (2000) (“On review of state decisions in habeas corpus, state courts are responsible for a faithful application of the principles set out in the controlling opinion of the [Supreme] Court.”).

³⁰ 28 U.S.C. § 2254(d)(1) (2004) (“An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – resulted in a decision that was *contrary to*, or involved an *unreasonable application of clearly established Federal law*, as determined by the Supreme Court of the United States.”) (emphasis added).

³¹ *Williams*, 529 U.S. at 370-71.

³² *Id.* at 372.

The federal trial judge granted the petition, holding that Williams's sentence was unconstitutional because it was reasonable to conclude that his punishment would have been different but for his counsel's failure to discover the mitigating evidence.³³ The Fourth Circuit reversed the district court's decision, however, holding "that a federal court may issue habeas relief only if 'the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.'"³⁴ Ultimately, the Supreme Court granted Williams's petition for habeas relief concluding that "the Virginia Supreme Court rendered a 'decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.'"³⁵

Writing for the majority, Justice Stevens noted that the "AEDPA codifie[d] *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."³⁶ While *Teague* prohibited a reliance on "new rules,"³⁷ the AEDPA expanded that premise, mandating that habeas relief be granted only if the claim's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."³⁸ Consequently, the AEDPA did not simply codify the *Teague* holding. Rather, it expressly limited the application of the *Teague* holding to those cases where a

³³ *Id.* at 373.

³⁴ *Id.* at 376 (quoting *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998)).

³⁵ *Williams*, 529 U.S. at 399.

³⁶ *Id.* at 380.

³⁷ *Teague*, 489 U.S. at 301.

³⁸ 28 U.S.C. § 2254(d)(1); 110 Stat. 1214 (codified in scattered sections of title 28 of the U.S. Code).

lower court unreasonably applied Supreme Court precedent existing at the time of the petitioner's state court conviction.³⁹

Additionally, the *Williams* Court carefully considered the standard of review applicable to habeas corpus proceedings. In particular, the Court analyzed the phrases "contrary to" and "unreasonable application" as they are used in § 2254(d)(1).⁴⁰ Ultimately, the majority relied on the Webster's Dictionary to define the phrase "contrary to" as meaning "in conflict with."⁴¹ The majority stated that the phrase was broad enough "to include a finding that the state-court 'decision' [wa]s simply 'erroneous' or wrong."⁴² Furthermore, the majority noted that "there is nothing in the phrase . . . that implies anything less than independent review by the federal courts."⁴³

In a concurring opinion, Justice O'Connor faulted the majority's failure "to give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of [28 U.S.C. § 2254(d)(1)]."⁴⁴ Justice O'Connor reasoned that Section 2254(d)(1) provides two distinct types of cases where a state prisoner can obtain federal habeas relief, assuming the state court claim is adjudicated on the merits.⁴⁵ Justice O'Connor emphasized that "[u]nder the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) 'contrary

³⁹ *Williams*, 529 U.S. at 380.

⁴⁰ 28 U.S.C. § 2254(d)(1) (mandating that court only grant writ if petitioner's state court conviction resulted in decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law").

⁴¹ *Williams*, 529 U.S. at 388.

⁴² *Id.* at 389.

⁴³ *Id.*

⁴⁴ *Id.* at 404 (O'Connor, J., concurring) (referring to the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)).

⁴⁵ *Id.* at 404-05.

to...clearly established Federal law’...or (2) ‘involved an unreasonable application of...clearly established Federal law.’⁴⁶ The concurring opinion illustrated two scenarios in which a state court decision is “contrary to” Supreme Court precedent.⁴⁷ Similarly, the concurring opinion also identified two scenarios in which a state court decision involves an “unreasonable application” of Supreme Court precedent.⁴⁸

3. The Court Remains True to the Purpose of Habeas Corpus Relief as Envisioned in 1867

Although the AEDPA modified the scope of habeas relief, the purpose of the writ remains intact. Today, the writ of habeas corpus continues to ensure that criminal sentences are properly imposed. More specifically, in analyzing a state prisoner’s sentence, federal courts often must examine both the constitutionality of the sentencing guidelines as well as the jury’s interpretation of these guidelines.

⁴⁶ *Id.*

⁴⁷ *Id.* at 405-06:

First, a state-court decision is contrary to this Court’s precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court’s precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

⁴⁸ *Id.* The first scenario arises when a “state court identifies the correct legal rule . . . but unreasonably applies it to the facts.” The second scenario, on the other hand, occurs when a “state court either unreasonably extends a legal principle . . . to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.”

C. Vague Aggravating Circumstances and Eighth Amendment Rights

The Eighth Amendment of the U.S. Constitution forbids the infliction of "cruel and unusual" punishment.⁴⁹ For more than thirty years, the Supreme Court has been committed "to guiding sentencers' discretion so as to 'minimize the risk of wholly arbitrary and capricious action,' and to achieve principled distinctions between those who receive the death penalty and those who do not."

⁵⁰ In accordance with the Supreme Court's commitment, many state legislatures have enacted statutory aggravating circumstances to limit the factfinder's discretion in imposing the death penalty.⁵¹

To avoid being labeled unconstitutionally vague, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."⁵² Therefore, the proper analysis of a vagueness claim focuses on whether the challenged aggravating

⁴⁹ U.S. CONST. amend. VIII; *see also* TENN. CONST. art. I, § 16.

⁵⁰ *Tuilaepa v. Proctor*, 512 U.S. 967, 995 (1994) (Blackmun, J., dissenting); *see also* *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (concluding that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty").

⁵¹ *Zant v. Stephens*, 462 U.S. 862, 872 (1983); *see, e.g.*, TENN. CODE ANN. § 39-13-204(i).

⁵² *Zant*, 462 U.S. at 877; *see also* *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (noting that because "the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty," arbitrariness and capriciousness in imposing the death penalty are eliminated).

circumstance adequately informs the jury as to what it must find in order to impose the death penalty.⁵³

The constitutionality of a death sentence hinges on two primary issues: (1) whether the defendant is eligible for the death penalty and (2) whether the defendant should receive a death sentence.⁵⁴ For example, a defendant convicted of murder is eligible for the death penalty if the factfinder determines that at least one aggravating circumstance is present.⁵⁵ Additionally, the aggravating circumstance must not apply to every defendant convicted of murder⁵⁶ and must not be unconstitutionally vague.⁵⁷ Assuming the defendant is eligible for the death penalty, the sentencer must then decide whether the defendant *should* be sentenced to death.⁵⁸ In this part of the analysis, “[w]hat is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”⁵⁹

While the eligibility determination “fits the crime within a defined classification,”⁶⁰ the selection determination “requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s

⁵³ *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988).

⁵⁴ *Tuilaepa*, 512 U.S. at 971-72.

⁵⁵ *Id.* at 971-72; *see, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988); *Zant*, 462 U.S. at 878.

⁵⁶ *Id.* at 972; *see Arave v. Creech*, 507 U.S. 463, 474 (“If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.”).

⁵⁷ *Tuilaepa*, 512 U.S. at 972; *Godfrey*, 446 U.S. at 428 (“If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”).

⁵⁸ *Tuilaepa*, 512 U.S. at 972.

⁵⁹ *Zant*, 462 U.S. at 879.

⁶⁰ *Tuilaepa*, 512 U.S. at 879.

culpability.”⁶¹ Ultimately, “[w]hen only a narrow subclass of murderers can be subjected to the death penalty, the risk of cruel and unusual punishment . . . is diminished.”⁶²

To overcome a vagueness challenge, the statutory HAC aggravator used to impose the death penalty must contain a limiting construction.⁶³ In other words, the plain language of the statutory HAC aggravator must inherently limit the application of the death penalty.⁶⁴ In general, however, the aggravator is inherently vague because it is hard to imagine a person who would not believe that murder itself is “especially heinous, atrocious, or cruel.”⁶⁵ Therefore, in order to uphold the integrity of the Eighth Amendment’s prohibition against cruel and unusual punishment, a decision to impose the death sentence must be “based on reason rather than caprice or emotion.”⁶⁶

The Tennessee Supreme Court first addressed the HAC aggravator in *State v. Dicks*.⁶⁷ In *Dicks*, the jury found Jeffrey Stuart Dicks guilty of first degree murder for killing a store owner during the commission of a crime.⁶⁸ During sentencing, the jury found that three aggravating circumstances and zero mitigating circumstances were present and, therefore, recommended that Dicks receive the death penalty.⁶⁹ In particular, the jury deemed the murder “especially heinous, atrocious or cruel in that it involved depravity of mind.”⁷⁰

⁶¹ *Id.*

⁶² *Id.* at 982 (Stevens, J., concurring).

⁶³ *Maynard*, 486 U.S. at 363.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

⁶⁷ *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981).

⁶⁸ *Id.* at 127.

⁶⁹ *Id.* at 128.

⁷⁰ *Id.*

Upon review, the Tennessee Supreme Court applied a narrow interpretation of Tennessee's HAC aggravator,⁷¹ defining "especially heinous, atrocious or cruel" as a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim."⁷² Adhering to the United States Supreme Court decision in *Proffitt v. Florida*,⁷³ which interpreted a similar Florida statutory aggravator, the Tennessee Supreme Court rejected Dicks's argument that the Tennessee statutory HAC aggravator was unconstitutionally vague..⁷⁴

D. Cone's Crime Spree and the Ensuing Criminal Proceedings

On August 9, 1980, Cone's crime spree began when he robbed a jewelry store in Memphis, Tennessee.⁷⁵ While attempting to drive away, Cone was spotted by police and a high speed chase ensued.⁷⁶ Cone abandoned his car in a residential neighborhood, shot both a police officer and a citizen, and attempted to shoot a third person who refused to give Cone his car.⁷⁷ The following day, Cone again appeared in the same residential area and pulled a gun on a woman after she refused to let him use her phone.⁷⁸ The two-day crime spree concluded after Cone broke into an elderly couple's home and brutally murdered the couple after they refused his demands for help.⁷⁹ Cone was later

⁷¹ TENN. CODE ANN. § 39-13-204(i)(5).

⁷² See *Dicks*, 615 S.W.2d at 132 (quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)).

⁷³ *Proffitt v. Florida*, 428 U.S. 242, 255-56.

⁷⁴ *Dicks*, 615 S.W.2d at 132.

⁷⁵ *Cone*, 243 F.3d at 965.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

arrested and charged with two counts of first degree murder for the elderly couple's deaths.⁸⁰

After the jury convicted Cone of first degree murder as well as several other offenses committed during the two-day crime spree, Cone appealed directly to the Tennessee Supreme Court, challenging both his conviction and death sentence.⁸¹ Pursuant to TENN. CODE ANN. § 39-2-205, the Tennessee Supreme Court conducted a mandatory review of Cone's death sentence, which was consolidated with Cone's direct appeal.⁸² After reviewing the four aggravating factors the jury relied upon during Cone's sentencing, the court concluded:

(1) that the evidence supported the finding that Cone had been convicted previously of one or more felonies involving violence; (2) that the evidence supported the finding that the murders were "especially heinous, atrocious, or cruel in that they involved torture or depravity of mind"; (3) that the evidence supported the finding that the murders were committed for the purpose of preventing a lawful arrest or prosecution; and (4) that the evidence was *insufficient* to support the jury's affirmative finding that the petitioner "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during [the] act of murder."⁸³

Accordingly, the Tennessee Supreme Court affirmed both the first degree murder convictions and

⁸⁰ *Id.*

⁸¹ *Id.*; see TENN. CODE ANN. § 39-13-206(a)(1) (2003).

⁸² TENN. CODE ANN. § 39-2-205 (1982) (current version at TENN. CODE ANN. § 39-13-206).

⁸³ *Cone*, 359 F.3d at 788 (citing *State v. Cone*, 665 S.W.2d 87, 94-95 (1984) (emphasis in original)).

Cone's death sentence.⁸⁴ In doing so, the court also "considered the validity of the aggravating circumstances relied on by the jury in imposing the death penalty."⁸⁵

On June 22, 1984, Cone filed his first state post-conviction petition alleging that his constitutional rights were violated due to prosecutorial misconduct and ineffective assistance of counsel at trial.⁸⁶ The trial court denied the petition, and the Tennessee Court of Criminal Appeals affirmed the denial of habeas relief.⁸⁷ The Tennessee Supreme Court denied Cone's request for an appeal.⁸⁸

Five years later, in his second state post-conviction petition, Cone again alleged numerous violations of his constitutional rights, including "an *Eighth Amendment* claim that the language of the HAC aggravator considered by the jury in the sentencing phase was unconstitutionally vague."⁸⁹ The trial court determined that Cone's second state post-conviction petition asserted claims that were barred under Tennessee's post-conviction statute because

⁸⁴ *Id.*

⁸⁵ *Id.* At the time of Cone's conviction, the death penalty could only be imposed if the prosecution proved beyond a reasonable doubt that at least one of twelve aggravating factors existed. See TENN. CODE ANN. § 39-2404(i) (1981) (current version at TENN. CODE ANN. § 39-13-204(i)). After finding Cone guilty of two counts of first degree murder, in addition to other crimes, the jury found four of the aggravating factors listed in Section 2404(i), including (1) the defendant's previous conviction of one or more felonies involving the use or threat of violence; (2) the defendant "knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder;" (3) the murder was committed to avoid or prevent the defendant's arrest; and (4) the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Cone, 359 F.3d at 788.

⁸⁶ *Id.* at 788-89.

⁸⁷ *Id.* at 789.

⁸⁸ *Id.*

⁸⁹ *Id.* (emphasis added).

they had either been waived or previously determined.⁹⁰ The Tennessee Court of Criminal Appeals affirmed the trial court's holding. The Tennessee Supreme Court denied Cone's application for permission to appeal, and the United States Supreme Court denied Cone's petition for writ of certiorari.⁹¹

Still unsatisfied with the courts' determinations regarding the constitutionality of his death sentence, Cone filed a petition for habeas corpus relief in federal district court.⁹² Cone again argued that the HAC aggravator relied upon by the jury in imposing the death penalty was unconstitutionally vague and, therefore, violated his Eighth Amendment rights.⁹³ The district court denied Cone's petition. On appeal, however, the Sixth Circuit granted the writ of habeas corpus, holding that Cone had been "unconstitutionally denied the effective assistance of counsel at sentencing."⁹⁴

In reaching its initial decision to grant habeas relief, the Sixth Circuit found it unnecessary to address Cone's cruel and unusual punishment argument.⁹⁵ The U.S. Supreme Court, however, later reversed the Sixth Circuit's grant of the writ and remanded the case for further proceedings.⁹⁶ On remand, the Sixth Circuit noted that the "Tennessee Supreme Court's 'implicit decision,' upon mandatory review of Cone's death sentence, was that the HAC aggravator relied upon by Cone's jury in imposing the death sentence was not arbitrary, and consequently, not unconstitutionally vague. The court held that this

⁹⁰ See TENN. CODE ANN. § 40-30-111 (1990) (*repealed by Post-Conviction Procedure Act*, ch. 207 §1) (1995).

⁹¹ *Cone*, 359 F.3d at 789.

⁹² *Cone*, 243 F.3d 961. Thus, Cone had exhausted Tennessee's appeal and post-conviction procedures.

⁹³ *Cone*, 359 F.3d at 789.

⁹⁴ *Cone*, 359 F.3d at 789; *Cone*, 243 F.3d at 965.

⁹⁵ *Cone*, 359 F.3d at 789; *Cone*, 243 F.3d at 975.

⁹⁶ *Cone*, 359 F.3d at 795.

“implicit” Tennessee Supreme Court decision “was contrary to clearly established U.S. Supreme Court precedent as announced in *Maynard*⁹⁷ and *Shell*⁹⁸ and made applicable to Cone’s case via the rule of retroactivity explained in *Stringer*.”⁹⁹

Having determined that the HAC aggravator was unconstitutional, the final issue hinged on whether the jury’s reliance on the invalid aggravating factor constituted harmless error.¹⁰⁰ The Sixth Circuit concluded that the invalid aggravators “had [a] substantial and injurious effect or influence”¹⁰¹ on the jury’s imposition of the death sentence.¹⁰² As a result, the Sixth Circuit reversed the district court’s decision and remanded the case instructing the district court to “issue a writ of *habeas corpus* vacating the petitioner’s death sentence due to the jury’s weighing of an unconstitutionally vague aggravating factor at sentencing.”¹⁰³

E. Determining the Constitutionality of the HAC Aggravator

The fundamental issue in *Cone* involves the “constitutionality of the jury’s finding that the murders

⁹⁷ *Maynard*, 486 U.S. at 356.

⁹⁸ *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam).

⁹⁹ The Sixth Circuit concluded that the U.S. Supreme Court remanded the case for the court to consider the constitutional challenge to the HAC aggravator raised by Cone in his petition for habeas corpus relief. *Cone*, 359 F.3d at 797.

¹⁰⁰ *Id.* The harmless error standard is “whether the error had substantial injurious effect or influence in determining the jury’s verdict.” *Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998) (holding that Sixth Circuit could perform a harmless-error analysis to determine whether a jury’s reliance on the unconstitutional HAC aggravator required habeas relief) (quotations omitted).

¹⁰¹ *Coe*, 161 F.3d at 334.

¹⁰² *Cone*, 359 F.3d at 799.

¹⁰³ *Id.*

were ‘especially heinous, atrocious, or cruel.’”¹⁰⁴ Before Cone’s conviction was finalized, “[n]o Supreme Court case ha[d] addressed the precise language at issue.” However, after Cone’s conviction, numerous decisions examining the constitutionality of similar statutory language “indicate clearly that the language of the HAC aggravator the jurors used to sentence Cone to death . . . is unconstitutionally vague.”¹⁰⁵

The importance of the HAC aggravator’s constitutionality is grounded in the belief that punishment should not be arbitrary or capricious, but should be proportionate to the criminal act. In the advent of the AEDPA amendments to federal habeas corpus relief, Cone argued that his death sentence was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”¹⁰⁶ Consequently, Cone’s habeas corpus petition is of the utmost importance, and the judicial system was required to carefully examine any and all constitutional challenges raised. Furthermore, if Cone were “restrained of his . . . liberty in violation of the constitution,”¹⁰⁷ the purpose of habeas relief, as envisioned by our forefathers, would be seriously undermined.

III. What Does *Cone v. Bell* Add to the Evolution of Habeas Corpus Relief?

Since the AEDPA amendments to the writ of habeas corpus took effect in 1996, courts hearing habeas petitions have been given a kind of “instruction manual.” Courts only grant habeas corpus relief to state prisoners if the state

¹⁰⁴ *Id.* at 788.

¹⁰⁵ *Id.* at 795.

¹⁰⁶ 110 Stat. 1214 (codified in scattered sections of title 28 of the U.S. Code).

¹⁰⁷ 14 Stat. 385.

court adjudication of the claim “resulted in a decision that was *contrary to*, or involved an *unreasonable application of clearly established Federal law*, as determined by the Supreme Court.”¹⁰⁸ Therefore, in light of the Supreme Court’s holdings in *Maynard*, *Shell* and *Stringer*, the jury’s reliance on the HAC aggravator in imposing the death penalty upon Cone clearly violated his constitutional rights, a fact that was evident when the Sixth Circuit first heard Cone’s habeas petition in 2001. According to the Sixth Circuit:

Normally, post-*Cone* decisions would be immaterial, but . . . the Supreme Court’s fairly recent application . . . of the ‘non-retroactivity’ of new constitutional rules, in the context of an *Eighth Amendment* vagueness challenge to a death penalty instruction, makes several post-*Cone* Supreme Court decisions not only material, but controlling.¹⁰⁹

After Cone’s conviction, the Court addressed whether the language “especially heinous, atrocious, or cruel” was unconstitutional in *Maynard v. Cartwright*.¹¹⁰ In short, the Supreme Court determined that the vagueness ruling of

¹⁰⁸ 28 U.S.C. § 2254(d)(1)(emphasis added).

¹⁰⁹ *Cone*, 359 F.3d at 795; see *Stringer v. Black*, 503 U.S. 222 (1992) (addressing the “new rule” non-retroactivity doctrine in regard to *Godfrey* and *Maynard*); see, e.g., *Maynard*, 486 U.S. at 363-64 (holding Oklahoma’s HAC aggravator unconstitutionally vague); *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam) (holding aggravating factor containing language “heinous, atrocious, or cruel” unconstitutional). But see *Walton v. Arizona*, 497 U.S. 639, 654 (1990) (holding “Arizona’s ‘especially heinous, cruel or depraved’ aggravating factor not facially vague”) (emphasis added).

¹¹⁰ *Maynard*, 486 U.S. at 356.

Godfrey, decided before Cone's conviction, was not limited to the precise language at issue in that case.¹¹¹

Therefore, "[i]n applying the language before [the Court] in *Maynard*, [the] Court did not 'break new ground.'"¹¹² Because the *Maynard* case did not "break new ground," *Godfrey* clearly established the unconstitutionality of the HAC aggravator in the early 1980's.¹¹³ Although there are no "Supreme Court decisions that [are] 'on all fours' with the instruction in Cone's case . . . *Stringer*'s statement that *Maynard*'s invalidation of Oklahoma's HAC aggravator was an 'old rule' dictated by *Godfrey*, points ineluctably to the conclusion that *Godfrey* represents a 'clearly established' Supreme Court precedent dictating that Tennessee's HAC aggravator is unconstitutionally vague."¹¹⁴ Therefore, Cone was entitled to habeas corpus relief because the jury's reliance on the HAC aggravator was "contrary to clearly established" Supreme Court precedent existing at the time of Cone's sentencing.¹¹⁵

IV. Habeas Corpus – A Procedural Safeguard for Imposing the Death Penalty?

While some might argue that affording prisoners sentenced to death numerous procedural means to challenge their sentences does little to deter future crime, "the utter finality of the death penalty may [also] cruelly frustrate the cause of justice."¹¹⁶ Therefore, the writ of habeas corpus acts as a procedural safeguard to ensure that the sentencer does not apply the death penalty in an arbitrary or capricious manner. For, "[o]nce the prisoner

¹¹¹ *Stringer*, 503 U.S. at 228-29.

¹¹² *Id.* (citing *Butler v. McKellar*, 494 U.S. 407, 412 (1989)).

¹¹³ *Cone*, 359 F.3d at 796.

¹¹⁴ *Id.* at 796-97.

¹¹⁵ See 28 U.S.C. § 2254(d)(1).

¹¹⁶ *Dicks*, 615 S.W.2d at 136 (Brock, C.J., dissenting).

has been put to death by the state there can be no relief granted although later developments in the evidence of the case or of the controlling law may show, conclusively, that the penalty was mistakenly inflicted.”¹¹⁷ Consequently, it is crucial that prisoners sentenced to death are afforded an opportunity to seek habeas relief to ensure that death is a proper and proportionate punishment.

When the Sixth Circuit first addressed Cone’s petition for habeas corpus, it did not determine whether the HAC aggravator was unconstitutional.¹¹⁸ After the Supreme Court reversed the Sixth Circuit’s grant of habeas relief, however, the Sixth Circuit had to confront this constitutional challenge.¹¹⁹ In failing to dispose of the issue the first time around, the Sixth Circuit wasted valuable time and resources. There is no doubt that this was all in an effort to ensure that Cone was not put to death unless his trial and sentence had been properly adjudicated. Yet the question remains – was Cone really entitled to habeas corpus relief? The answer is yes. Cone was entitled to habeas corpus relief from the moment the jury recommended the death penalty.

Although the jury recommended that Cone be sentenced to death in 1984, the Sixth Circuit did not grant habeas corpus relief until 2004. Why did the court not get it right the first time? Cone challenged the constitutionality of the HAC aggravator in his initial habeas proceedings in 2001, but the Sixth Circuit never addressed this constitutional challenge once it determined that Cone was entitled to habeas relief on his ineffective assistance of counsel claim. Had the court ruled on both issues in 2001, the habeas proceeding may not have reached the Supreme Court only to be remanded again to the Sixth Circuit.

¹¹⁷ *Id.*

¹¹⁸ *Cone*, 243 F.3d at 961.

¹¹⁹ *Cone*, 359 F.3d at 789.

The Supreme Court requires that “a jury be given guidance . . . when the death penalty is a possible punishment.”¹²⁰ This requirement stems from the idea that “death remains as the only punishment that may involve the conscious infliction of physical pain . . . , [and] mental pain is an inseparable part . . . of punishing criminals by death, for the prospect of ending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”¹²¹ Additionally, the time between the sentence and the actual execution is compounded by a prisoner’s right to habeas corpus relief. Given this option, few prisoners idly await execution. Instead, they file numerous post-trial proceedings, including a habeas corpus petition. The question then becomes – is this all merely an effort to postpone impending death or to prove that the death sentence is improper under the circumstances of a given case?

It has been almost twenty years since Cone was sentenced to death for the brutal murders of an elderly couple. Unfortunately, the importance of the jury’s determination that the murders committed by Cone fit into the category of “especially heinous, atrocious, and cruel” and that the death penalty was the proper punishment has diminished. Cone’s case is so far removed from the actual events of August 9, 1980, that it has become lost in a mess of legal minutia that now focuses on Cone’s life instead of the elderly couples’ deaths.

If nothing else, Cone’s case should illustrate the diligence with which federal courts should analyze habeas corpus petitions in the future. If the Sixth Circuit analyzed the constitutionality of the HAC aggravator in 2001, or better yet, if the Tennessee Supreme Court properly

¹²⁰ *Gregg v. Georgia*, 428 U.S. 153, 192 (1976).

¹²¹ *Furman*, 408 U.S. at 288 (Brennan, J., concurring).

analyzed the HAC factor in 1984, Cone might be serving a life sentence without parole.¹²²

The Tennessee Supreme Court arrived at a conclusion that was opposite to existing Supreme Court precedent when it “implicitly reviewed” Cone’s death sentence and found that the HAC aggravator was constitutional.¹²³ In short, the HAC aggravator does not “achieve principled distinction between those who receive the death penalty and those who do not.”¹²⁴ The Tennessee’s HAC aggravator does not narrow the class of people eligible for the death penalty because any murder may be deemed “especially heinous, atrocious or cruel” and, therefore, a finding of the same is totally arbitrary. Furthermore, the HAC aggravator relied upon in *Cone* is unconstitutional because neither the aggravating circumstance’s plain language nor the court’s attempt to limit the construction thereof adequately informed the jury of what it needed to find in order to punish Cone by death.

Even assuming that Tennessee’s HAC aggravator was constitutional and did not apply to every first degree murder committed *and* that, therefore, Cone was “eligible” for the death penalty, he should not have received the death penalty. In the end, as the Sixth Circuit seemed to conclude, the jury relied on emotion in deciding to recommend a death sentence. For that reason, the sentence was capricious.¹²⁵ As a result, the Sixth Circuit correctly determined that the unconstitutionality of the HAC aggravator had an injurious effect on the jury’s sentence

¹²² See *Cone*, 243 F.3d at 961; *Cone*, 665 S.W.2d at 87.

¹²³ See n.46 *supra*.

¹²⁴ See *Tuilaepa*, 512 U.S. at 995.

¹²⁵ The narrow construction articulated in *Dicks* is also arbitrary because it does not define what is meant by “unnecessarily tortuous” in the same way that the HAC aggravator does not define what is “especially heinous, atrocious or cruel.”

and properly instructed the district court to grant Cone's habeas corpus petition, reversing his death sentence.

V. Conclusion

The death penalty is an unnecessary punishment because "[s]ociety would be adequately protected from the condemned murderer by his permanent imprisonment."¹²⁶ Since the Tennessee and federal courts should have rectified this constitutional issue at least three years ago, *Cone* properly illustrates what can happen when a court does not get it right the first time. In the aftermath of the Sixth Circuit's decision, federal courts analyzing habeas corpus petitions should *always* examine *all* of a petitioner's arguments. After all, when a state prisoner petitions the federal courts for a habeas corpus petition, a life hangs in the balance.

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¹²⁶ *Dicks*, 615 S.W.2d at 138 (Brock, C.J., dissenting).

