In Re: Christopher Bacon, No. 230-5-06 Wmcv (Wesley, J., Nov. 6, 2006)

STATE OF VERMONT
WINDHAM COUNTY

IN RE: CHRISTOPHER BACON WINDHAM SUPERIOR COURT

DOCKET NO. 230-5-06 Wmcv

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

In this petition for post-conviction relief, relying on *State v. Provost,* 2005 VT 134, Petitioner Bacon challenges the validity of his sentence of life without parole, imposed following his jury conviction for first degree murder. In *Provost*, the Vermont Supreme Court ruled that 13 V.S.A. § 2303, Vermont's statutory sentencing procedure for murder at the time Bacon was sentenced, was unconstitutional because it established a presumptive sentence but then allowed the sentencing judge to enhance that presumptive sentence up to life without parole based on aggravating factors found by the judge rather than the jury.[1] As Bacon's conviction and sentence had been conclusively determined through appellate review when *Provost* was decided, the success of his petition turns on whether the rule of *Provost* applies retroactively for purposes of

[1] 13 V.S.A. § 2303 has since been amended. See 2006 Vt. Laws P.A. 119 (H.874). For murders committed on or after the effective date of the amendment, the judge now has discretion to sentence the defendant to the prior presumptive sentence or to life without parole without findings on aggravating factors. See 13 V.S.A. § 2303(a). For cases involving murders before the effective date in which there had not yet been a sentencing, or in which there had been a sentencing but that sentence was vacated under *Provost* and the case remanded for resentencing, the statute sets up a procedure for the jury to make findings regarding aggravating and mitigating factors. See 13 V.S.A § 2303 (b)-(g).

collateral review.[2] This is a purely legal question, and the State and Bacon have both filed motions for summary judgment.

Applying the retroactivity analysis set forth in *Teague v. Lane,* 489 U.S. 288 (1989), every federal circuit has held that the *Apprendi* rule – the rule on which *Provost* is based – does not retroactively apply for purposes of collateral review. See *Sepulveda v. United States*, 330 F.3d 55, 59-63 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 82-90(2nd Cir. 2003); *United States v. Swinton*, 333 F.3d 481, 487-91 (3rd Cir. 2003); *United States v. Sanders*, 247 F.3d 139, 146-51 (4th Cir. 2001); *United States v. Brown*, 305 F.3d 304, 306-10 (5th Cir. 2002); *Goode v. United States*, 305 F.3d 378, 382-85 (6th Cir. 2002); *Curtis v. United States*, 294 F.3d 841, 842-44 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993, 997-1001 (8th Cir. 2001); *Jones v. Smith*, 231 F.3d 1227, 1236-38 (9th Cir. 2001); *United States v. Mora*, 293 F.3d 1213, 1218-19 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1255-58 (11th Cir. 2001).

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[2] Our Supreme Court's holding in *Provost* flowed from the United States Supreme Court's holding in 2000 that, other than a prior conviction, any fact that increases a penalty beyond a prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt, see *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), and the Supreme Court's subsequent holding in 2004 clarifying that for *Apprendi* purposes, the statutory maximum means the maximum a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts, see *Blakely v. Washington*, 542 U.S. 296, 303 (2004). Bacon's third and last direct appeal was decided in 1999. See 169 Vt. 268 (1999). Thus, since Bacon's case was final even before the *Apprendi* decision, the retroactivity question would control this petition even if the Court viewed Bacon's argument as being based on the *Apprendi* rule directly.

These courts reasoned that the *Apprendi* rule was a new procedural rule, and thus subject to the presumption created by *Teague* that it would not be retroactively applied. Furthermore, they reasoned that while the *Apprendi* rule does involve important constitutional rights, it does not fit within the very narrow exception to non-retroactivity for "watershed" changes in procedural law that not only impact the accuracy of the result of the proceeding, but also are so necessary and fundamental that they "'alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'" *Coleman,* 329 F.3d at 88; *Moss*, 252 F.3d at 999; *Sanders*, 247 F.3d at 150, each quoting *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). Several of these courts pointed out that the United States Supreme Court held in *United States v. Cotton*, 535 U.S. 625, 632-33 (2002), that an *Apprendi* violation was not "plain error" (such that it could be considered on appeal even though it had not been raised below) because it "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings." See *Coleman*, 329 F.3d at 89-90; *Brown,* 305 F.3d at 309-10; *Curtis*, 294 F.3d at 843-44; *Mora*, 293 F.3d at 1219. The relative ease with which the impact of the rule could be minimized by legislative amendment of the sentencing scheme was also noted as a factor weighing against a conclusion that the new rule was so fundamental that it altered our understanding of the bedrock procedural elements essential to a fair proceeding. See *Moss*, 252 F.3d at 1000.

Even more compelling is the United States Supreme Court's decision in *Schriro v. Summerlin*, 542 U.S. 348 (2004). In 2002, the Supreme Court had held that Arizona's capital sentencing scheme, which authorized the judge to increase the punishment from life to death if the judge found an aggravating circumstance, was unconstitutional under *Apprendi. Ring v. Arizona,* 536 U.S. 584 (2002). Mr. Summerlin, who had previously been sentenced to death

under the invalidated procedure, challenged his sentence in a habeas proceeding; and the Supreme Court held that *Ring v. Arizona* did not announce a "watershed" rule and did not apply retroactively to a death penalty case already final on direct review. 542 U.S. at 356-58.

Petitioner acknowledges this overwhelming federal law, but suggests that Vermont allows a more liberal approach to retroactivity. Specifically, Petitioner cites the statement in *State v. Brown,* 165 Vt. 79 (1996) that in an "extraordinary case," retroactive effect could be given a new procedural rule "whose major purpose 'is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials.'" *Id.* at 84, quoting *United States v. Johnson*, 457 U.S. 537 (1982).

Because *Provost* is clearly based on federal doctrine, as articulated in United States Supreme Court decisions interpreting federal constitutional provisions, it seems doubtful that our Supreme Court would ignore the federal retroactivity analysis that has followed from *Apprendi.* In any case, even considering the impact of the holding in *Brown,* Petitioner finds scant solace, since the new rule's major purpose was not to "overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials." At bedrock, the judge's finding of an aggravating factor which increases punishment beyond that warranted by the jury's verdict alone, though unconstitutional under *Apprendi,* simply does not cast such doubt on the integrity of the process and the accuracy of the result that we must go back and revisit every case in which that procedure was used.

In reaching this conclusion, the Court notes that it is consistent with the decisions of at least two other Vermont trial courts on this basic issue. See *In re LeClaire*, Docket No. S0998-

03 CnC (Norton, J., Feb. 11, 2005); *State v. Kelley*, Docket No. 779-8-92 Wrcr (DiMauro, J., Sept. 11, 2006). The first, *LeClaire*, pre-dated *Provost* and thus addressed the retroactivity of *Apprendi-Blakely* directly. In that decision, Judge Norton applied the *Brown* standard urged by Bacon, but concluded that this was not one of the extraordinary cases in which a new rule should be retroactively applied on collateral review, as it did not correct a procedure or aspect of the criminal trial that substantially impaired its truth-finding function, and thus did not raise serious questions about the accuracy of guilty verdicts previously rendered. In *Kelley*, Judge DiMauro first determined that the federal *Teague* analysis should govern the retroactivity question and noted the overwhelming amount of federal law holding that *Apprendi* and its progeny should not be retroactively applied. She then went on to hold that the result would be the same under Vermont's *Brown* analysis.

For these reasons, this Court concludes that *Provost* does not apply retroactively for purposes of collateral review.

ORDER

Based on the foregoing discussion, Petitioner's motion for summary judgment is **DENIED,** and the State's motion for summary judgment is **GRANTED**

. Dated at Newfane, Vermont, this ____ day of November, 2006.

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John P. Wesley
Presiding Judge