

GINSBURG, J., concurring

SUPREME COURT OF THE UNITED STATES

RICKY BELL, WARDEN *v.* GARY BRADFORD CONE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04–394. Decided January 24, 2005

JUSTICE GINSBURG, with whom JUSTICE SOUTER and JUSTICE BREYER join, concurring.

The Sixth Circuit assumed that the Tennessee Supreme Court, on direct appeal, adjudicated the merits of respondent’s vagueness claim. See 359 F.3d 785, 791–794 (2004); see also *ante*, at 4. This Court indulges the same assumption. See *ante*, at 9–11, 13. I agree with the Court that, once the highest court of a State has dispositively decided a point of law, it is not incumbent on that court to cite its precedential decision in every case thereafter presenting the same issue in order to demonstrate its adherence to the pathmarking decision.

Today’s decision, as I comprehend it, is confined to the situation the Sixth Circuit posited, one in which the state court has confronted and decided an issue governed by a prior ruling. This Court’s opinion, it bears emphasis, does not grapple with the following scenario: A state prisoner petitions for federal habeas review after exhausting his state remedies. In the anterior state proceeding, the prisoner raised multiple issues. The state court, in disposing of the case, left one or more of the issues unaddressed. There would be no warrant, in such a case, for an assumption that the state court, *sub silentio*, considered the issue and resolved it on the merits in accord with the State’s relevant law. Nothing in the record would discount the possibility that the issue was simply overlooked. A federal court would act arbitrarily if it assumed that an issue raised in state court was necessarily decided there, despite the absence of any indication that the state court itself adverted to the point.