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# Recent Developments: *Mills v. Maryland*: Supreme Court Rules That Maryland's Capital Sentencing Procedure Is Unconstitutionally Mandatory

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By its decision in *Whitehead*, the United States Court of Appeals for the Fourth Circuit has held that occupants of overnight train sleeping compartments do not have the same expectation of privacy as individuals in their homes or hotel rooms. Additionally, the court has stated that where such diminished expectation exists, the importance of the law enforcement interests at stake and the "minimal intrusiveness" of the search abrogate the requirement of probable cause under the fourth amendment. As a result of this ruling, the court of appeals has not only redefined the privacy interests of individuals travelling by train, but it appears to justify the abrogation of probable cause as a prerequisite to a canine sniff search for contraband by endorsing the use of police profiles to establish a reasonable, articulable suspicion of criminal activity.

—Virginia Marino Harasti

### *Mills v. Maryland*: SUPREME COURT RULES THAT MARYLAND'S CAPITAL SENTENCING PROCEDURE IS UNCONSTITUTIONALLY MANDATORY

In *Mills v. Maryland*, \_\_\_ U.S. \_\_\_, 108 S. Ct. 1860 (1988), the Supreme Court of the United States, in a 5-4 decision, reversed a Maryland Court of Appeals death sentence affirmation on the ground that the jury verdict form used was unconstitutional.

Ralph Mills, an inmate in the Maryland Correctional Institution, was convicted by a jury of the first degree murder of his cellmate, Paul Brown. At the conclusion of the sentencing hearings, the same jury, using the verdict form provided for in Md. Rule Proc. 772A, found beyond a reasonable doubt that an aggravating circumstance had been proven; namely, that the "defendant committed the murder at a time when he was confined in a correctional institution." *Id.* at 1871. Equally important, the jury found none of the mitigating circumstances provided for in Rule 772A had been proved by a preponderance of the evidence. Consequently, the jury had marked "no" beside each of the eight mitigating circumstances listed on the verdict form. Accordingly, as required by the Maryland Capital Punishment Statute, Md. Ann. Code, art. 27 § 413 (1987 Repl. Vol.), the jury handed down a sentence of death.

On appeal to the Court of Appeals of Maryland, petitioner argued that the statute, in conjunction with the jury instructions and the verdict form, was

unconstitutional in that jury unanimity was required to find the presence or absence of an aggravating circumstance, but not required to find the absence of any mitigating circumstances. Therefore, a sentence of death could result in a situation where the jury unanimously found an aggravating circumstance, but could not agree on the presence of any one specific mitigating circumstance, even if all twelve agreed that some mitigating factors existed. *Id.* at 1865. Conversely, even if eleven of the jurors agreed to the existence of a particular mitigating circumstance, the failure of the remaining juror to agree to the same circumstance may result in the jury marking the verdict form "no" in regard to that particular circumstance.

The court of appeals rejected this argument, and concluded that the requirement of unanimity imposed by the statute applied not only to a finding of the existence of a particular mitigating circumstance, but also to a finding of the absence of any mitigating circumstance. The Court found that the verdict form should be read as requiring unanimity for "no" answers as well as "yes" answers. Furthermore, they found that the trial judge's instructions to the jury stressed the need for unanimity on all of the issues presented. *Id.* at 1864. Therefore, the Court concluded that a finding by any one juror of a mitigating circumstance was sufficient to compel the jury to weigh this factor against any aggravating circumstance.

The Court of Appeals of Maryland recognized, however, that the statute did not provide a procedure to be followed when unanimity could not be reached. Thus, pursuant to its authority to fill gaps in the sentencing process, as provided by § 413(1), they directed that if the jury could not agree unanimously on the acceptance or rejection of any mitigating circumstances, it should leave that answer blank and proceed to the balancing phase. *Id.* at 1864.

The Supreme Court initially noted the importance of mitigating factors in capital cases, stating that "the sentencer may not refuse to consider or be precluded from considering any relevant evidence." *Eddings v. Oklahoma*, 455 U.S. 104 (1982). With this proposition in mind, the Court proceeded to analyze "whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Mills* at 1866.

The strength of Mill's argument rested on the possibility that alternate grounds existed for the sentence of death. If the jury adopted the interpretation favored by the Court of Appeals of Maryland, then it only marked "no" on the verdict form when all twelve of the jurors agreed that the mitigating circumstances were not proved by a preponderance of the evidence. *Id.* Conversely, if the jury adopted the approach advanced by the petitioner, then the marking of "no", only indicated a failure to unanimously agree to the existence of a particular mitigating circumstance. Thus, the jury would be precluded from considering mitigating factors that some jurors found to exist. The Supreme Court said, "[U]nless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." *Id.* at 1867.

They decided that the two crucial factors to be considered were the judge's instructions to the jury regarding the verdict form stipulated by Md. Rule Proc. 772A, and the verdict form itself. Regarding the jury instructions, the Court found that while the trial judge repeatedly stressed the need for unanimity concerning the finding of both aggravating and mitigating circumstances, he failed to stress that the answer of "no" to either one also required a unanimous finding. Thus, the Court determined that it was possible that the jury made the inference that the "no" answer is merely a failure to unanimously agree on the existence of a particular circumstance, either aggravating or mitigating, not a unanimous finding that

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circumstances were not proven. Additionally, there was nothing in the trial judge's instruction to indicate that the jury had the third option advanced by the court of appeals; namely, to leave the answer blank when a unanimous finding of either "yes" or "no" could not be reached and then proceed to the balancing phase. Therefore, the Supreme Court concluded that it was possible that a jury following the trial judge's instructions could be precluded from considering possible relevant mitigating circumstances, "if even a single juror adhered to the view that such a factor should not be so considered." *Id.* at 1868.

Regarding the verdict from itself, the Supreme Court found persuasive the fact that subsequent to the decision below, the Court of Appeals of Maryland had found it necessary to promulgate a new verdict form, which expressly made provisions for the jury to find that not all twelve jurors agree on the existence or nonexistence of a particular mitigating circumstance. This new form also expressly makes provisions for such findings to be included in the balancing portion of the sentencing. The Court also noted that in the two cases tried before juries which used the new verdict form, both juries reported non-unanimous votes.

Consequently, the Court found that there is a substantial possibility that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular such circumstance.

*Id.* at 1870.

The Court therefore determined that the death sentence, which was upheld by the Court of Appeals of Maryland, must be vacated and the case remanded for resentencing.

In a vigorous dissent, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Kennedy, concluded that the charges of the trial judge to the jury were reasonably sufficient to emphasize the need for unanimity on all the issues involved, including the existence or nonexistence of mitigating circumstances. Furthermore, the dissent noted that the reworking of the verdict form was not evidence that the form itself was improper, since "a sentencing instruction that is constitutionally acceptable may be improved in any number of ways." *Id.* at 1874 n.2.

A sentence of death places a heavy burden on the court system to regulate the

procedure by which it may be imposed. The decision of the Supreme Court in *Mills* illustrates not only the careful scrutiny that the imposition of such sentence demands, but also the controversial questions that face the courts when protecting the constitutional rights of a person accused of a capital offense.

—Gregory J. Swain

***McCoy v. Court of Appeals of Wisconsin:*  
NO-MERIT BRIEF PROVIDED TO  
THE COURT BY COURT  
APPOINTED APPELLATE  
COUNSEL DOES NOT VIOLATE  
INDIGENT'S SIXTH AND  
FOURTEENTH AMENDMENT  
RIGHTS**

In *McCoy v. Court of Appeals of Wisconsin*, \_\_\_U.S.\_\_\_, 108 S. Ct. 1895 (1988), the United States Supreme Court held that Wisconsin's no-merit brief rule, by which court-appointed counsel must prepare for the court a statement of why particular cases, statutes, or facts in the record lead him to believe his client's appeal is without merit, is constitutional under the Sixth and Fourteenth Amendments. In so holding, the Court indicates that counsel's role as an officer of the court is at least as important, if not more important, than his role as an advocate and essentially places the attorney in the position of decision-maker.

A Wisconsin trial judge found the appellant, an indigent, guilty of abduction and sexual assault and sentenced him to twelve years in prison. Appellant then filed an appeal and the court appointed a lawyer to represent him. The attorney, after reviewing the case, advised appellant that an appeal would be useless. Rule 809.32(1) of the Wisconsin Rules of Appellate Procedure provides:

If [a court-appointed attorney] is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal *and a discussion of why the issue lacks merit.* (Emphasis added).

Counsel partially complied with the rule by submitting arguments in support of the appeal, stating his belief that the arguments were without merit, and asking for permission to withdraw from the case. Counsel failed, however, to provide the

court with a discussion of why he believed those arguments were without merit, claiming such action would contravene *Anders* and violate the appellant's Sixth Amendment right to counsel. *McCoy* at 1898. Since the brief did not fully comply with Rule 809.32(1), the court ordered it stricken and told the attorney to submit a conforming brief. Instead, counsel sought a declaratory judgment in the Wisconsin Supreme Court, asking the court to declare unconstitutional that portion of the rule which requires the attorney to discuss why the issue lacks merit. *Id.* at 1899. In upholding the rule, the Wisconsin court and the Supreme Court both relied on and expanded upon *Anders*.

The petitioner in *Anders* was convicted of the felony of possession of marijuana. Counsel was appointed to represent him on appeal; however, after reviewing the record, the attorney advised his client and the court that the appeal was without merit. After petitioner's request for a new attorney was denied, he proceeded to represent himself on appeal, but his conviction was affirmed. Six years later, petitioner filed a writ of habeas corpus in the Supreme Court of California, asking the courts to reopen his case because he had been denied the right to counsel on his appeal. Both petitions were denied.

The U.S. Supreme Court, however, held that California's procedure, by which court-appointed counsel can withdraw from an appeal merely by furnishing the court with a letter in which counsel states that the appeal lacks merit, "does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." *Anders* at 741. Although the no-merit letter alerts the court of potentially frivolous litigation, it gives no basis for counsel's conclusion and fails to notify appellant of potential arguments in support of reversal.

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