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MILLS v. MARYLAND 486 U.S. , 108 S.Ct. 1860 (1988)

not constitutionally impermissable.

Petitioner claimed that the sentencing phase did not narrow the class of death eligible murderers. *Id.* at 553. Lowenfield objected to the fact that the sole aggravating factor found by the jury during sentencing was identical to an element of the underlying crime. The Court ruled that "petitioner's argument that the parallel nature of these provisions requires that his sentence be set aside rest on a mistaken premise as to the necessary role of aggravating circumstances is not an end in itself, but only a means of sufficiently guiding the jury's discretion and narrowing the class of death-eligible convicts. This guiding and narrowing can be done in both the guilt stage or the sentencing stage. *Id.*

The Court concluded that state statutes fulfill the constitutional requirements in one of two ways. A legislature may narrow the definition of capital offenses, so that the jury responds to the constitutional concerns by finding guilt; or the legislature may have a broad definition of capital crimes which require narrowing through the use of aggravating circumstances at the sentencing phase. *Id.* at 555. The court held that the Louisiana statute sufficiently narrowed the definition of capital murder to meet the constitutional requirements. Thus, the finding of an independent aggravating factor was not necessary. The Louisiana statute both narrows the class of defendants, and allows for proper consideration of mitigating factors to produce a correctly based decision. *Id.*

d) Separate Opinion

Justice Marshall, with whom Justice Brennan joins, and Justice Stevens joins as to Part I, dissenting. Part I: The jury charge and supplemental polling gave the impression that the judge was anxious for a quick verdict, collectively creating an unacceptable risk of coercion. *Id.* at 555-556. Part II: The death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. *Id.* at 555. The fact that the statutory aggravating factor duplicated an element of the underlying crime prevented the adequate guidance of the jury's discretion as to the propriety of the death sentence, in that it led the jury to decide the point in the guilt phase instead of the penalty phase. *Id.* at 556.

APPLICATION TO VIRGINIA

Although at first glance the United States Supreme Court ruling in *Lowenfield* appears contrary to the spirit of *Furman v. Georgia,* 408 U.S. 238 (1972) and *Greg v. Georgia,* 428 U.S. 153 (1976), the *Lowenfield* decision is technically correct. The Court previously held that the constitution requires an individualized determination as to the culpability of the defendant, and the appropriateness of the death penalty. This has traditionally been implemented through the balancing of aggravating and mitigating factors. The Supreme Court now explains that a death sentence can be based on a statutory definition of capital crimes which sufficiently narrow the scope of death-eligible murderers. The jury is still required to consider any factors in mitigation in order to reach a constitutionally sufficient individualized decision.

The *Lowenfield* case is not directly applicable in Virginia, which has a narrowed definition of capital murder, Va. Code Ann. § 19.2-264.4(C)(1988). Also, the unconstitutionality of the Louisiana factor, on its face or as applied, was not an issue in *Lowenfield.* At least one of Virginia's aggravating factors is constitutionally suspect. (*See* summary of *Maynard v. Cartwright, infra*). Whether these differences are constitutionally significant must await further answers from the Court. (Sandra Fischer)

MILLS v. MARYLAND

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FACTS

Ralph Mills was convicted of the first-degree murder of his cellmate in the Maryland Correctional Institute in Hagerstown, Maryland, and sentenced to death. The jury was provided with a verdict form which required, in part, that it be marked "yes" as to every mitigating circumstance listed that had been found by a preponderance of the evidence to exist, and "no" as to factors not so found. The jury was then to weigh the mitigating circumstances found against aggravating circumstances. The jury marked "no" in every case, and where the form asked for any other mitigating circumstances found to exist, marked "none," thereby sentencing Mills to death.

Mills appealed, claiming that the State's death penalty, as applied to him, was unconstitutionally mandatory because it required the imposition of the death sentence if the jury unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance. The defendant hypothesized that "even if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death.

The Maryland Court of Appeals affirmed the sentence, *Mills v. State,* 310 Md. 33, 527 A.2d 3 (1987), interpreting the statute as requiring unanimity to *accept* or *reject* any mitigating factor, noting that in the absence of unanimity on the ultimate question of what sentence should be imposed, the statute (*Md.* Ann. Code, Art. 27, §413 (1987 Repl. Vol.)) required life imprisonment. The Supreme Court granted certiorari. *Mills v. Maryland,* 108 S.Ct. 1860 (1987).

HOLDING

a) Constitutionality of a statute that requires a jury to unanimously agree on the existence of any mitigating circumstance in order to introduce that evidence in the weighing process.

Citing *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Mills Court, in a majority opinion by Justice Blackmun, found it beyond dispute that, in a capital case, "the sentencer [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that a defendant proffers as a basis for a sentence less than death." at 1865.

The Court also cited the corollary "that the sentencer may not refuse to consider *or be precluded from considering* any relevant mitigating evidence." *Mills*, at 1865, citing *Eddings,* 455 U.S. at 114.

The court decided that, if the defendant's interpretation is correct, the "failure [of the jury] to consider all of the mitigating evidence risks erroneous imposition of the death sentence in plain violation of *Lockett,* [and] it is our duty to remand this case for resentencing." *Mills,* at 1866 citing *Eddings,* 455 U.S. at 117.

b) Probability that reasonable jurors could have drawn such an interpretation of the law from the instructions and verdict form employed in this case.

The Court, demanding "greater certainty in death cases that the jury's conclusion rested on proper grounds," stated that "[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." *Mills,* at 1867.

Reviewing the judge's instructions and the verdict form, the Court, "while conceding that the Court of Appeals' construction of the jury instructions and verdict form is plausible" could not conclude "that the jury did not adopt petitioner's interpretation of the jury instructions and verdict form." *Id.*

To support its conclusion, the Court noted that a new form had been promulgated on an emergency basis by the court of appeals, "expressly incorporat[ing] the unanimity requirement as to both accepting and rejecting aggravating circumstances" and completely rewriting the mitigation section. *Id.,* at 1869. The Court inferred from these changes some concern that juries *could* misunderstand the previous instructions. *Id.*

Judgment of the Maryland Court of Appeals was vacated and the case remanded for resentencing.

APPLICATION TO VIRGINIA

Mills is not directly applicable to Virginia, principally because the Virginia scheme does not require "balancing" of particular circumstances found to exist. *See Briley v. Bass*, 584 F.Supp. 807 (E.D. Va.), aff'd 742 F.2d 155 (4th Cir. 1984). Virginia juries are permitted to fix a sentence at life imprisonment even if aggravating factors are found, and may consider any evidence in mitigation. *Mills,* however, does make it reversible error to mislead a jury into thinking that particular mitigating factors must be unanimously agreed upon. A better practice might be the giving of an instruction to this effect. Failure to give such an instruction was held not to be error in *Clark v. Commonwealth,* 220 Va. 201, 212-213. The reason given by the Virginia Supreme Court, however, was not responsive to the issue:

> Since only by unanimous agreement can the death penalty be inflicted, a disagreement by one or more of the jurors as to the proper sentence would, by statute, result in a life sentence. *Id.,* at 212.

The response does not at all address the contingency that a jury given a unanimity requirement as to aggravating factors might not disagree that death was the proper sentence because it mistakenly thought it must also be unanimous as to a particular mitigating circumstance.

Mills, on its facts, makes it reversible error to mislead a jury into thinking that particular mitigating factors must be unanimously agreed upon. Virginia Code provides for sentencing procedure in §§19.2-264.3 and 19.2-264.4. There it will be noted the verdict form used by the jury sets out the aggravating factors to be considered but lists no mitigating factors specifically. In this way, Virginia does not limit the jury's consideration of any factor they deem mitigating. *See Watkins v. Commonwealth,* 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099 (1986). The question is whether juries require any instruction on *how* to consider mitigating factors, in contrast to their duties respecting aggravating factors. (Helen Bishop)