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**McKOY v. NORTH CAROLINA 110 S. Ct. 1227, 108 L.Ed.2d 369
(1990)**

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The Court's relaxed standard of review is part of a series of holdings that highlight the increased importance of the trial itself. Capital defendants in Virginia are no less worthy than Boyde of six days of mitigation testimony. Such presentation in Virginia often consumes less than a day. Furthermore, Virginia trial courts are not even required to provide capital juries as much information about the meaning and scope of mitigation as is contained in California's catchall phrase. It is the duty of counsel to inform the jury through evidence, argument, and

proposed jury instructions (a) that it may consider non-crime related evidence and base a sentence of life on that evidence and (b) that in Virginia the jury may fix punishment at life even if satisfied that both aggravating factors have been proven.

Summary and analysis by:
Steven K. Herndon

McKoy v. NORTH CAROLINA

110 S. Ct. 1227, 108 L.Ed.2d 369 (1990)
United States Supreme Court

FACTS

The Superior Court of Stanly County, North Carolina, convicted Dock McKoy of the first-degree murder of a deputy sheriff and sentenced him to death in accordance with N.C. Gen. Stat. § 15A-2000 (1988). McKoy appealed his sentence to the North Carolina Supreme Court, basing his constitutional challenge of North Carolina's sentencing procedures on *Mills v. Maryland*, 486 U.S. 367 (1989). See case summary of *Mills v. Maryland*, *Capital Defense Digest*, Vol. 1, No. 1, p. 11 (1988). In *Mills*, the United States Supreme Court reversed a death sentence imposed under Maryland's capital punishment statute because the sentencing scheme could have precluded a jury from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular mitigating circumstance. *McKoy v. North Carolina*, 110 S. Ct. 1227 (1990). The North Carolina Supreme Court affirmed both McKoy's conviction and sentence. The United States Supreme Court granted certiorari. *Id.*

NORTH CAROLINA'S SENTENCING SCHEME

In the sentencing phase of McKoy's trial, the trial court instructed the jury, both orally and in a written verdict form, to determine unanimously four issues which would ultimately be used in the determination of the sentence. The instructions with Issue One required that the jury indicate "yes" to every aggravating circumstance listed that it had found unanimously from the evidence and beyond a reasonable doubt and "no" as to all circumstances not so found. The jury found as aggravating circumstances that McKoy previously had been convicted of a felony involving violence and that the instant murder was committed against a deputy sheriff while engaged in the performance of his official duties.

Issue Two similarly required the jury to agree unanimously on the existence of every mitigating circumstance listed and to indicate its decision by marking "yes" or "no" on the verdict form. The jury found as mitigating that McKoy's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. The jury also found that his borderline intellectual abilities were mitigating. However, the jury did not unanimously agree on the existence of several other mitigating factors raised by the defendant and he was therefore denied consideration of them.

Because the jury found the existence of mitigating circumstances, it was instructed to proceed to Issue Three which required the jury to decide unanimously whether the mitigating circumstances unanimously found in Issue Two were insufficient to outweigh the aggravating circumstances found by the jury in Issue One. The jury answered "yes" to this question and so proceeded to the final Issue.

Issue Four asked whether the jury unanimously found beyond a reasonable doubt that the aggravating circumstances found by the jury were sufficiently substantial to warrant the imposition of the death penalty when weighed against the mitigating circumstances found by the jury. Again, the jury answered "yes." In accordance with the verdict

form and instructions, the jury subsequently made a binding recommendation of death.

In ruling on McKoy's direct appeal of his sentence, the North Carolina Supreme Court rejected McKoy's challenge which was based on *Mills. Id.* at 1228. The court distinguished North Carolina's sentencing scheme from the Maryland scheme, the subject of *Mills. State v. McKoy*, 372 S.E.2d 12 (N.C. 1988). Maryland's scheme, declared invalid by the Supreme Court, required the jury to impose the death penalty if it found at least one aggravating circumstance and no mitigating circumstances or, alternatively, if it unanimously agreed that the mitigating circumstances did not outweigh the aggravating factors. *Id.* at 33. The North Carolina Supreme Court emphasized that Issue 4 allowed a jury to return a recommendation of life imprisonment if it felt that the aggravating circumstances did not call for the death penalty, even if the jury found aggravating factors and no mitigating factors. *Id.*

HOLDING

The Supreme Court found that North Carolina's sentencing scheme impermissibly limited the jurors' consideration of mitigating evidence. *McKoy*, 110 S. Ct. at 1228. The unanimity requirement is a violation of the eighth amendment protection against cruel and unusual punishment because it allows one juror to prevent others from giving effect to evidence that the juror might believe suggests a sentence less than death. Both Issues Three and Four restrict the jury's consideration of mitigating factors to those found unanimously under Issue Two. *Id.* at 1233. The Court emphasized that, in contrast to the narrowly defined standards on which a sentencer may rely to impose the death penalty, the Constitution strictly limits a State's ability to narrow the sentencer's discretion to consider relevant evidence that might persuade it to decline to impose the death penalty. *Id.* at 1234 (citing *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989)).

Mills and *McKoy* require that each juror be permitted to consider any evidence in mitigation of the offense. See *Skipper v. South Carolina*, 476 U.S. 1 (1986), *Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Lockett v. Ohio*, 438 U.S. 586 (1978) (death penalty schemes must allow consideration of any aspect of the defendant's character or record and any circumstances that the defendant offers as a basis for a sentence less than death). Additionally, *Mills* and *McKoy* require that each juror be permitted to give effect to mitigating evidence when deciding the ultimate question of life or death. *McKoy*, 110 S. Ct. at 1233.

The High Court vacated McKoy's death sentence and remanded the case to the North Carolina Supreme Court for resentencing.

ANALYSIS/APPLICATION IN VIRGINIA

McKoy is not directly applicable to Virginia because Virginia's sentencing scheme does not formally require jurors to weigh the mitigating circumstances against the aggravating circumstances to determine

the appropriate sentence. Va. Code Ann. § 19.2-264.4 (1990). However, the Virginia verdict form does instruct the jury to consider both aggravating and mitigating evidence. Further, Virginia law permits juries to fix the penalty at life in prison even if aggravating circumstances are found. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). In this respect, a "balancing" of aggravating and mitigating circumstances almost certainly takes place.

In both *Mills* and *McKoy*, the Court stated that it is irrelevant whether the barrier to the sentencer's consideration of all mitigating evidence is imposed by statute, by the sentencing court, or by evidentiary ruling. Whatever the cause, a procedure that impedes consideration of all the mitigating evidence risks erroneous imposition of the death penalty. *McKoy*, 110 S. Ct. at 1233 (citing *Mills*, 486 U.S. at 375).

Notably, Virginia's verdict form and model instructions may act as a barrier to the consideration of mitigating evidence. The Virginia verdict form lists statutory aggravating factors for consideration. The form generally refers to mitigating evidence but fails to explain the effect mitigating evidence can have on the sentence. The model instructions do not discuss evidence in mitigation at all. While the jury may consider

any mitigating circumstances, it is, in fact, uninformed as to what constitutes a "mitigating factor."

Therefore, by close analogy, the Virginia model instructions and verdict form may act as an impermissible barrier to a juror's ability to consider and give effect to mitigating evidence no less than the verdict form and instructions which the Court struck down in *McKoy*.

Fortunately, the Court reiterated in *McKoy* that its decision regarding the consideration of mitigating evidence is not limited to those cases in which the jury is *required* to impose the death penalty if it finds that aggravating circumstances outweigh mitigating circumstances or that no mitigating circumstances exist at all. *McKoy*, 110 S. Ct. at 1232.

Counsel should consider preparing alternative jury instructions to properly inform the jury of its obligation to consider all mitigating evidence and of its ability to impose a sentence less than death under any circumstances. Defense counsel should also be prepared to object to the model jury instructions as a barrier to consideration of mitigation evidence.

Summary and analysis by:
Anne E. McInerney

WHITMORE v. ARKANSAS

110 S. Ct. 1717, 109 L.Ed.2d 135 (1990)
United States Supreme Court

FACTS

Ronald Gene Simmons was sentenced to death for multiple homicide by an Arkansas court and filed a petition requesting expedited review and waiver of his direct appeal. Simmons specifically requested permission both to waive the appeals process and receive the death penalty as soon as possible. See *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). Arkansas has no rule requiring mandatory direct appeal of capital case convictions and sentences, and the Arkansas Supreme Court granted the requests. Jonas H. Whitmore, another death row inmate, convicted of robbery-murder, had exhausted his direct appellate review, been denied post-conviction relief, but had not yet initiated federal habeas corpus proceedings. Whitmore attempted to intervene in Simmons' case with a two-part argument claiming both direct interest in the outcome and "next friend" status to assert the claims of Simmons.

Whitmore's direct interest approach asserted that the execution of Simmons without appeal would violate his own eighth and fourteenth amendment rights because Arkansas has a comparative review of capital cases. This is achieved at the appellate level by comparing records in Arkansas capital cases in an effort to ensure that the sentence of the appellant is not disproportionate to the sentence of others similarly situated. The comparative review is compiled from records of the direct appeal procedure. It is this procedure which Simmons was permitted to waive.

Whitmore reasoned that his injury arose from his future habeas corpus appeal. He argued that if his future habeas corpus proceedings resulted in a remand to state court and in that court he was sentenced to death a second time, he would be entitled to a second comparative review at the state level. At that putative review, Simmons' case would not be in the pool of cases consulted, because Simmons waived his right to the appeals process. The absence of Simmons' case, therefore, could prejudice Whitmore because Whitmore would not be reviewed in comparison with a possibly more culpable Simmons. He claimed this could result in an unjust capital sentence. Reasoning on another personal standing issue, Whitmore sought to intervene as an Arkansas citizen interested in preserving constitutional governance. Alternatively, Whitmore sought to enter into the case as Simmons' next friend.

HOLDING

In a seven to two decision written by Chief Justice Rehnquist (Justice Marshall, joined by Justice Brennan, dissenting), the Court held that Whitmore lacked standing to invoke the jurisdiction of the court directly and that Whitmore could not bring an appeal for Simmons as next friend.

The Court stated that in order to invoke the intervention of a federal court in Simmons' case with respect to Whitmore's claimed constitutional violations, Whitmore had to pass the "cases and controversies" requirement of Article III of the U.S. Constitution. The Court set out the criteria necessary to meet the requirement: 1) demonstrate injury-in-fact. Whitmore would have to show that Simmons' waiver of his appeal would be *directly responsible* for Whitmore's execution. 2) Satisfy the "causation and redressability" prongs of Article III. Whitmore would have to show how entering Simmons' case would result in a different sentence, *in fact*, for Whitmore.

The Court decided that Whitmore's argument was too speculative to pass the Article III tests because the prospect of injury was not certain enough. The Court noted that Arkansas' comparative review had recorded capital punishment for others in Whitmore's class. Other persons convicted of robbery-murder under similar fact scenarios to Whitmore's have been sentenced to death in Arkansas. Whitmore's attempt to enter under an interest in constitutional governance was also held to be too generalized.

The Court then addressed Whitmore's attempt to join as Simmons' next friend. The Court outlined a two-part test for achieving next friend status. First, the would-be next friend must "provide adequate explanation - such as inaccessibility, mental incompetence, or other disability - why the real party in interest cannot appear." *Whitmore*, 1727. Second, the next friend must be "truly dedicated to the best interests of the person on whose behalf he seeks to litigate." *Id.*, 1727. The Court added that there is a heavy burden on the seeker to demonstrate the propriety of the next friend status. *Id.*, 1727.

Whitmore was unable to meet either requirement of the test. On several occasions, Simmons stated his intention not to appeal and his desire for execution. He also underwent psychiatric evaluation that