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STATUS OF SUPREME COURT CASE LAW HELPFUL TO CAPITAL DEFENDANTS

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Therefore, 3:1's requirement to disclose twenty-one days before trial, an intention to call an expert to testify in the penalty trial is only enforceable if the defense counsel's intentions are in fact certain. If they are not, the defense cannot be compelled to assess the value of the expert's testimony before the moment in which the expert will be called. More accurately in the context of a capital case, a state may not compel a defendant to surrender sixth, eighth, and fourteenth amendment rights if he wants to assert his Fifth Amendment rights.[19]

Virginia's 3:1 does not only threaten preclusion of defense evidence for failing to notify the Commonwealth of an intention to use expert testimony, 3:1 also threatens preclusion of defense expert testimony if the defendant does not cooperate with an independent Commonwealth's expert evaluation of the defendant, as provided in subsection F.[20] The defense should ensure that the Commonwealth's evaluation is in fact independent by refraining from disclosing any of the defense reports required by subsections C and D until after the Commonwealth's evaluation has taken place.

Second, the statute limits the scope of this independent examination to the "existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense."[21] By definition, then, the evaluation cannot include inquiry into future dangerousness. In addition, the defendant should be warned that the Commonwealth's expert is not permitted to go into issues of unrelated acts or crimes.

This warning is especially important because subsection G precludes the Commonwealth's use of any of defendant's statements, or evidence derived from the defendant's statements or disclosures, in its case-in-chief. "Such statements or disclosures shall be admissible in rebuttal only when relevant to issues in mitigation raised by the defense."[22] As a practical matter, before the Commonwealth makes any use at the penalty trial of information gained through 3:1, defense counsel should request a side-bar and verify exactly what issues in mitigation have been raised by the defense as a means of narrowing what the Commonwealth may rebut.

Although 3:1's initial qualifying requirements are not difficult to meet, as compared to an *Ake* request, the subsequent statutory requirements expose the defense case in mitigation to some pretrial discovery by the Commonwealth. Nevertheless, the assistance provided in 3:1, properly utilized, may be crucial for a capital defendant and defense attorneys should not be scared away by its potential pitfalls. Rather, a structured strategy should be undertaken to give the Commonwealth no more than the statute clearly requires and the Constitution permits. The Commonwealth can only move beyond the bounds of the statute, as this article has described, if defense attorneys permit it.

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[1]*Ake v. Oklahoma*, 470 U.S. 68, 83 (1985).

[2]*See Little v. Armentrout*, 835 F.2d 1240, 1245 (8th Cir. 1987) (en banc) (where identification from victim was only evidence linking defendant to crime, and identification came after hypnosis, court reversed and remanded defendant's post-conviction habeas petition which found failure to appoint a hypnotist was not error), *cert. denied*, 487 U.S. 1210 (1988).

[3]Monahan, *Obtaining Funds for Experts in Indigent Cases*, Champion, August, 1989.

[4]Va. Code Ann. § 19.2-169.1 (1990).

[5]Va. Code Ann. § 19.2-169.5 (1990).

[6]Va. Code Ann. § 19.2-264.3:1(A) (1990).

[7]Va. Code Ann. § 19.2-264.3:1(A) (1990).

[8]Va. Code Ann. § 19.2-264.3:1(A) (1990).

[9]Va. Code Ann. § 19.2-264.3:1(A) (1990).

[10]Va. Code Ann. § 19.2-264.3:1(C) (1990).

[11]Va. Code Ann. § 19.2-264.3:1(C) (1990).

[12]Va. Code Ann. § 19.2-264.3:1(D) (1990).

[13]Va. Code Ann. § 19.2-264.3:1(E) (1990).

[14]Va. Code Ann. § 19.2-264.3:1(E) (1990).

[15]*Williams v. Florida*, 399 U.S. 78 (1970).

[16]*Williams*, 399 U.S. at 85.

[17]*Brooks v. Tennessee*, 406 U.S. 605, 606 (1972).

[18]*Brooks*, 406 U.S. at 609 (*quoting Malloy v. Hogan*, 378 U.S. 1 (1964)).

[19]*Simmons v. United States*, 390 U.S. 377, 392-94 (1968) (unconstitutional to force defendant to surrender fifth amendment right to raise fourth amendment objection).

[20]Va. Code Ann. § 19.2-264.3:1(F) (1990).

[21]Va. Code Ann. § 19.2-264.3:1(F) (1990).

[22]Va. Code Ann. § 19.2-264-3:1(G) (1990).

STATUS OF SUPREME COURT CASE LAW HELPFUL TO CAPITAL DEFENDANTS

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The purpose of this article is to assist capital defense counsel in their preparation for future cases by identifying and assessing the current status of Supreme Court cases that have been particularly helpful to capital defendants. First, some of the most useful Supreme Court cases will be highlighted. Against this background, decisions which suggest a retreat by the Court will be evaluated.

In its 1972 decision in *Furman v. Georgia*,[1] the United States Supreme Court held that all death penalty statutes, as applied, were unconstitutional because they failed to guide the sentencer's discretion.[2] In 1976, the Supreme Court struck down North Carolina and Louisiana statutes containing mandatory death sentence provisions, but upheld Georgia, Florida, and Texas death penalty statutes that sufficiently guided the sentencer's discretion.[3]

The 1976 decisions outlined the fundamental eighth amendment requirements that death penalty statutes must comply with in order to pass constitutional scrutiny. The constitutionally required elements are that a statute must narrow the class of death eligible defendants, and guide the jury's discretion to ensure an individualized determination on the appropriateness of the death sentence.[4] Since 1976, the Court has further defined these principles, and subsequently established the present constitutional boundaries of these fundamental eighth amendment requirements.

AGGRAVATING FACTORS

I. Vague Statutory Aggravating Factors:

One of the approved means to guide jury discretion is to allow the sentencer to consider certain factors that aggravate a homicide, thereby setting it apart from an ordinary murder.[5] However, some of the general statutory terms employed for this purpose may be constitutionally deficient.

In *Godfrey v. Georgia*,[6] the Supreme Court held that a Georgia trial court's application of an unconstitutionally vague aggravating

factor violated the eighth amendment.[7] In *Godfrey*, the statutory aggravating factor required that the murder be "outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim".[8] The jury sentenced Godfrey to death upon a finding that the murder was "outrageously or wantonly vile, horrible or inhumane".[9] The Georgia Supreme Court had previously provided a narrowing construction for the aggravating factor, which essentially required the jury to find that the murder was committed through "torture".[10] However, the trial court in *Godfrey* failed to instruct the jury according to the Georgia Supreme Court's definition.[11] Furthermore, the Georgia Supreme Court failed to review the sentence using the limiting construction.[12] The Supreme Court reversed Godfrey's death sentence due to the Georgia Supreme Court's failure to adequately review the trial court's application of the aggravating factor, a constitutional safeguard it had performed in previous cases.[13] It said that there was nothing in the words "outrageously or wantonly vile, horrible and inhumane" to sufficiently guide the sentencer's discretion.[14] In previous acceptable cases that term and the rest of the statutory phase, "in that it involved torture, depravity of mind or aggravated battery to the victim", had been given the narrowing construction by the courts to ensure that the jury's discretion was guided.[15]

Godfrey implies that the mere addition of the phrase "torture, depravity of mind, or aggravated battery to the victim" will not be sufficient unless the jury had been given some constitutionally acceptable narrowing construction by the state court. Further, the narrowing construction must either be communicated to the jury, or applied by the state appellate court on review.

Eight years later in *Maynard v. Cartwright*,[16] the Supreme Court held an Oklahoma statutory aggravating factor requiring murder to be "heinous, atrocious or cruel" to be unconstitutionally vague.[17] The Court stated that the state legislature must guide the sentencer's discretion so that on appellate review the court can determine if the evidence supported a capital conviction.[18] The Court found that the Oklahoma statute in *Maynard* failed to provide any standard to give meaning to the statutory aggravating factor. The statute was not only vague on its face, but the trial court also failed to provide any limiting constructions to sufficiently guide the jury's discretion.[19] Therefore, the Supreme Court held that the Oklahoma statute violated the eighth amendment and reversed the defendant's death sentence.[20]

Last term, the Supreme Court commented further on when a vague aggravating factor is unconstitutionally applied.[21] In *Shell v. Mississippi*, the Supreme Court issued a per curiam opinion disapproving a state court's limiting construction.[22] A Mississippi jury sentenced Shell to death after finding the statutory aggravating factor that the murder was "especially heinous, atrocious, or cruel."[23] In order to avoid the constitutional problems addressed in *Maynard*, the trial court defined the components of the aggravating factor in an effort to provide a constitutionally sufficient limiting construction. The trial court defined heinous as "extremely wicked or shockingly evil"; atrocious as "outrageously wicked or vile"; and cruel as "designed to inflict high degree of pain with indifference to, or even enjoyment of, the suffering of others."[24] Justice Marshall stated in his concurring opinion that the trial court's limiting construction only defined "cruel" more concretely than the supplemental instructions used in *Maynard*.[25] While the court did not address whether "cruel" was permissibly defined, it stated that even assuming it was permissibly defined, the jury was still left with two impermissible definitions of the aggravating factors: "heinous" and "atrocious".[26] The possibility that the jury based the death sentence on one of these factors required the Court to reverse the sentence.[27]

The holdings in *Godfrey*, *Maynard*, and *Shell* have proven beneficial to capital defendants by requiring that statutory aggravating factors be specifically tailored to narrow the class of death eligible defendants and to give meaningful guidance to the jury. However, the Court has procedurally restricted these eighth amendment requirements in two other cases.

First, in *Clemons v. Mississippi*,[28] the Supreme Court reversed and remanded a death sentence based upon both a valid and an invalid aggravating factor.[29] The jury sentenced Clemons to death after finding that two aggravating factors outweighed the mitigating factors.[30] The aggravating factors included a finding that the murder was (1) committed during the course of a robbery for pecuniary gain; and (2) that the murder was "especially heinous, atrocious, or cruel."[31] In light of the holding in *Maynard*, the Court found the second aggravating factor invalid.[32] However, the Court remanded the case to the state appellate court to clarify its balance of the remaining aggravating factor against the mitigating factors.[33] Thus, the Court left open the possibility that instead of awarding the defendant a new sentencing hearing, the Mississippi appellate court could preserve the death sentence by either reweighing the valid aggravating and mitigating factors or conducting harmless error analysis.[34]

Another case procedurally restricting the eighth amendment requirements is *Lowenfield v. Phelps*.[35] In *Lowenfield*, the Court upheld a defendant's death sentence based on an aggravating factor which was a duplication of an element of the offense.[36] It stated that "petitioner's argument that the parallel nature of these provisions requires the sentence to be set aside rests on a mistaken premise as to the necessary role of aggravating factors."[37] The Court stated that use of aggravating factors is not an end in itself, but rather a means of narrowing the class of death eligible defendants and guiding the jury's discretion in determining the appropriateness of the sentence.[38] Because the Louisiana statute in question limited the class of death eligible defendants through a narrower capital offense definition, the Court stated that the finding of an independent aggravating factor was not necessary.[39] In light of the Court's holding in *Lowenfield*, it is still unclear whether a state, which limits the class of death eligible defendants through a narrower capital offense definition, must still provide for aggravating factors during the sentencing stage.

Overall, *Godfrey* and its progeny are still helpful law for capital defendants. This is especially true in Virginia where the *Godfrey* aggravating factor is used, and the narrowing constructions are constitutionally suspect if they are given to the jury at all. *See* Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 1, p. 19 (1989). As the particular case may require, counsel should be sure the trial record reflects objections to unconstitutional applications of statutory aggravating factors, particularly Virginia's vileness factor.

II. Relevancy in Sentencing:

While the concept of relevancy of mitigation evidence is very broad, the Court has held that the constitution requires a more limited scope of relevancy with regard to aggravating factors.[40] Because aggravating factors are to guide the jury's discretion, the Court has stated that the factors should focus the jury's attention on the defendant's culpability and the circumstances of the crime.[41]

In its 1987 decision in *Booth v. Maryland*,[42] the Court directly addressed whether victim impact statements were constitutionally permissible.[43] The Maryland statute in question required the prosecution to issue a pre-sentencing report to the jury which included a victim impact statement.[44] The victim impact statement provided the jury with information on the family's personal characterizations of the victim, the crime, the defendant, and the emotional impact of the crime upon them.[45]

The Supreme Court found that the victim impact statement violated the eighth amendment and that the state statute was invalid to the extent it required the jury to consider the statement.[46] The Court stated that such information is irrelevant to a capital sentencing decision because the jury must focus its attention on the background

and record of the defendant and the particular circumstances of the crime.[47] It further stated that the statement's "admission creates a constitutionally unacceptable risk because the jury may impose the death penalty in an arbitrary and capricious manner."[48] Such statements could divert the jury's attention away from the defendant and toward punishing him according to the family's grief.[49] Once death sentences are based upon the jury's sympathy for the victim's family, then it would be impossible to distinguish rationally between cases in which the defendant received death, and cases where the defendant received a life sentence.[50] Quoting from its decision in *Gardner v. Florida*,[51] the Court noted that death sentences must "be, and appear to be, based on reason rather than caprice or emotion".[52]

In *South Carolina v. Gathers*,[53] the Supreme Court expanded further on its decision in *Booth*.[54] In *Gathers*, the Court found that the defendant's death penalty was imposed in violation of the constitution when the prosecutor read, during closing arguments, from a prayer found in the victim's possessions and argued the personal worth of the victim based upon the prayer and a voter registration card.[55] The Court stated that prosecutor's statements were similar to the victim impact statement used in *Booth* because the prosecutor's statements tended to divert the jury's attention away from its proper focus on characteristics suggesting heightened individual culpability of the defendant.[56]

The Court's decisions in *Booth* and *Gathers* are helpful precedent for capital defendants. These cases serve as a useful basis to keep prejudicial evidence from the jury during the penalty phase of the trial. To date, the Supreme Court has not issued an opinion which undermines the importance of these cases.

JURY'S ROLE IN CAPITAL SENTENCING

The fundamental requirements established in the Court's 1976 decisions have been applied in several areas regarding the jury's involvement in capital murder trials. Of greatest importance are the Courts decisions regarding jury selection and jury responsibility in determining the appropriate sentence.

I. Jury Selection:

The standard traditionally employed to excuse a juror for cause based upon his beliefs about the death penalty has been substantially relaxed.[57] In its 1968 decision in *Witherspoon v. Illinois*,[58] the Supreme Court established that prospective jurors may be excluded for cause if the juror makes it "unmistakably clear" that he would automatically vote against the death penalty or that he could not be impartial as to guilt.[59] While not overruling *Witherspoon*, the Court relaxed this standard in *Wainwright v. Witt*.[60] In *Witt*, the Court stated that a prospective juror no longer had to make it "unmistakably clear" that he would not vote for the death penalty or could not be impartial as to guilt; rather, if his attitudes toward the death penalty would "prevent or substantially impair" the performance of his duties as instructed by the court and required by under oath, then the court should excuse him for cause.[61] In addition, it noted that the trial judge's determination of whether to excuse a juror for cause is a finding of fact subject to a presumption of correctness in habeas actions pursuant to 28 U.S.C. 2254(d).[62] In *Gray v. Mississippi*,[63] the Court held that a trial judges erroneous exclusion of a juror was not subject to harmless error analysis even though the prosecutor had peremptory challenges remaining at the conclusion of jury selection.[64] Thus, if a juror with reservations about the death penalty is nevertheless qualified to sit under *Witherspoon* and *Witt*, it is prejudicial error to exclude her.[65] This is true in spite of the fact that the prosecution contends that it had peremptory challenges it would have used against the juror had the trial judge ruled properly and allowed her to be qualified.[66]

While not overruling *Gray*, the later case of *Ross v. Oklahoma*,[67] illustrates that not every error by the trial judge regarding qualification of jurors will entitle the defendant to relief. In *Ross*, the Court found that a trial judge's failure to exclude a prospective juror, who stated that he would automatically vote for the penalty of death if the defendant was adjudged guilty, did not require a reversal because the defense counsel used a peremptory challenge to remove the juror.[68] It stated that there was no constitutional deficiency in the makeup of the jury because the defense counsel "cured" the error by using a peremptory strike to exclude the prospective juror from the panel.[69]

Defense counsel in this position faces the dilemma of either preserving an appellate issue by allowing the challenged juror to be empaneled, or using one of the limited number of peremptory strikes and losing the issue. The latter course is probably the best alternative. The Court has not decided whether the seating of the unqualified juror would automatically be an error if defense counsel had the opportunity to "cure" the error, but instead used his peremptory strike on other prospective jurors who had not been challenged for cause.

II. Jury Responsibility:

With the appropriate statutory guidance, the jury is solely responsible for making the determination as to the appropriateness of the sentence.[70] The Supreme Court has looked unfavorably on attempts to undermine the jury's responsibility.[71] In *Caldwell v. Mississippi*,[72] the Court reversed a death sentence where the prosecutor suggested, during closing arguments at the sentencing phase of the trial, that the jury was not responsible for the determination of the appropriate sentence.[73] The prosecutor suggested that the responsibility of determining the appropriate sentence did not rest with the jury because the Mississippi Supreme Court would review the case on automatic appeal.[74] The Supreme Court found that the prosecutor's statement violated the eighth amendment's heightened need for reliability in determining the appropriate sentence in a specific case.[75]

However, the Court later found that a prosecutor's emotional arguments and personal characterization of the defendant did not infect the trial with unfairness so as to deny the defendant due process.[76] In *Darden v. Wainwright*,[77] the Court held that the prosecutor's reference to the defendant, as an "animal" who should only be let out of prison on a leash, did not render the trial unfair.[78] This seems to be distinguished from *Caldwell* on the basis that the prosecutor's statement did not undermine the jury's responsibility for determining the appropriate sentence.

One area of jury responsibility which has proven less helpful to capital defendants is the Court's standard of review for arguably misleading jury instructions.[79] In *Boyde v. California*,[80] the Court reviewed arguably misleading jury instructions used during the sentencing phase of the capital murder trial.[81] It noted that several standards of review have been applied to determine whether the jury instructions did mislead the jury.[82] The standards of review have ranged from what a reasonable juror could have understood the instructions to require, to a substantially possibility that the jury may have rested its verdict on improper grounds.[83] The Court announced that the standard of reviewing would be "whether there is a reasonable likelihood that the jury has applied the challenged jury instructions in a way that prevents consideration of constitutionally relevant evidence."[84] This standard shifts a previously announced analysis which reviewed how a reasonable juror would interpret the instructions, to the new standard which focuses on how the jury would interpret the instructions.[85]

However, in *Cage v. Louisiana*,[86] a per curiam opinion issued in November of 1990, the Court used the "reasonable juror" standard to review jury instructions used in the guilt phase of a capital murder trial.[87] It found that a "reasonable juror" could have interpreted the jury instructions to permit a conviction on a standard below the

fourteenth amendment requirement of "beyond a reasonable doubt".[88] While the jury instructions did state that the jury must find guilt "beyond a reasonable doubt", the Court observed that it also equated reasonable doubt with "grave uncertainty" and an "actual substantial doubt".[89] The ordinary meaning of these terms was found to require a higher degree of "doubt" for an acquittal than the "beyond a reasonable doubt" standard.[90] Therefore, the defendant's conviction and death sentence was reversed and the case remanded.[91] It is possible that the Court's decision in *Cage* has shifted the standard back the to the "reasonable juror."

In essence, the court has retreated from some of its earlier standards involving the jury selection. The present standard to excuse a juror for cause is whether the juror's attitude would prevent or substantially impair the performance of his duties.[92] While the Court has emphatically prevented prosecutors from misleading juries about their responsibility to determine the appropriate sentence, there remains uncertainty about the standard of review when jury instructions arguably mislead juries about their responsibility in the capital murder trial.

MITIGATION

I. Introduction

When dealing with issues of mitigation, the United States Supreme Court has consistently held that the sentencer must be allowed to consider any relevant evidence offered by the capital defendant for a sentence less than death. As a result, Supreme Court decisions concerning mitigation offer the most helpful case law to the capital defense.

Mitigation is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[93] Thus, as long as the information offered is relevant to the defendant or to the crime committed, there should be no limit to what the defendant can present at trial as mitigation.

II. U.S. Supreme Court Mitigation Decisions

In *Lockett v. Ohio*,[94] the Supreme Court granted certiorari to consider whether Ohio violated the eighth and fourteenth amendments by sentencing Sandra Lockett to death pursuant to a statute that narrowly limited the sentencer's discretion to consider the circumstances of the crime and the record and character of the offender as mitigating factors. In Ohio, once the trier of fact found the defendant guilty of aggravated murder, the death penalty would be imposed unless the sentencing judge determined that one or more of the following mitigating circumstances was established by a preponderance of the evidence:

1. The victim of the offense induced or facilitated it.

2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

3. The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.[95]

Because of the Ohio sentencing procedure, the judge was unable to consider factors such as Lockett's minor role in the crime, her lack of specific intent to cause death, her prior record which included only minor offenses, and evidence which tended to show she could be rehabilitated.

The Supreme Court concluded that:

> The eighth and fourteenth amendments require that the sentencer, in all but the rarest kind of capital case, 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 the defendant proffers as a basis for a sentence less than death.[96]

Thus, in *Lockett*, the Supreme Court virtually invalidated limits on the presentation of mitigation evidence. *Lockett* is an effective precedent for the capital defendant when mitigation evidence is at issue.

In *Eddings v. Oklahoma*,[97] the Supreme Court applied the rule announced in *Lockett* to the actions of an Oklahoma trial judge because the judge refused, as a matter of law, to consider in mitigation the defendant's turbulent family history and his emotional disturbances. The U.S. Supreme Court disagreed with the trial court and found such evidence especially relevant because the defendant was only 16 years old at the time he committed a capital offense.[98]

The *Eddings* Court announced the broad rule that "state courts must consider *all* relevant mitigating evidence" that the defendant offers.[99] Thus, *Eddings* helps the capital defendant by requiring consideration of mitigation evidence that *Lockett* permits to be offered.

In 1987, the Court reaffirmed the rules announced in *Lockett* and *Eddings* in *Hitchcock v. Dugger*.[100] The Court granted certiorari to determine whether Florida's death penalty statute, which contained enumerated mitigating circumstances, unconstitutionally precluded both the advisory jury and the sentencing judge from considering (1) certain evidence of mitigating circumstances that had been introduced and (2) additional evidence that had been withheld by defendant's counsel in the reasonable belief that it could not be considered under the statute.

The Florida death penalty statute in effect at that time provided for separate post-conviction proceedings to determine whether those convicted of capital crimes should be sentenced to life imprisonment or death. Both an advisory jury and the trial court were required to weigh statutory aggravating circumstances against statutory mitigating factors in determining the defendant's fate.[101] In sentencing the defendant to death, the sentencing judge found that "there [were] insufficient mitigating circumstances *as enumerated in Florida Statute 921.141(6)* to outweigh the aggravating circumstances."[102]

A unanimous Supreme Court held that, due to the statutory requirement, the defendant was sentenced to death in proceedings that did not comport with the requirement that the sentencer may neither refuse to consider nor be precluded from considering any relevant mitigating evidence.

A year later, the Court determined that a death penalty statute which requires a jury to unanimously agree on the existence of any mitigating circumstances in order to introduce that evidence into the weighing process violates the eighth and fourteenth amendments.[103]

Petitioner challenged the state of Maryland's death penalty statute which required the jury to unanimously agree on the existence of any mitigating circumstances. Thus, the jury was not free "to consider *all* relevant evidence in mitigation as they balanced aggravating and mitigating circumstances."[104] The statutory requirement was impermissible because, the Court determined, "it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, by the sentencing court, or by an evidentiary ruling."[105]

The Court reaffirmed its belief that "under our cases, the sentencer must be permitted to consider *all* mitigating evidence."[106] "The possibility that a single juror could block such consideration and consequently require the jury to impose the death penalty, is one we

dare not risk."[107] Thus, the *Mills* decision makes it reversible error to mislead a jury into thinking that particular mitigating factors must be unanimously agreed upon.

One favorable 1990 decision for the defense, which reaffirmed the Court's *Mills* decision, was *McKoy v. North Carolina.*[108] In *McKoy*, the Supreme Court held that North Carolina's sentencing scheme, which required the jury to agree unanimously on the existence of every mitigating circumstance proffered by the defense, unconstitutionally limited the jurors' consideration of mitigation evidence. The Court emphasized that 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.

Thus, in *McKoy*, the Court expanded its holding in *Mills v. Maryland,*[109] by stating 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.[110]

Some recent Supreme Court decisions tend to undermine the previously announced standard of allowing the sentencer to consider any and all information in mitigation. In *Saffle v. Parks,*[111] the Court held that the petitioner was not entitled to federal habeas relief because he was requesting that the Court apply a new rule which stated that an antisympathy instruction violated the eighth amendment.

Parks argued that an antisympathy instruction was barred by *Lockett* and *Eddings* "because jurors who reach sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether."[112] Characterizing Parks' claim as one contesting the ability of a state to dictate the *manner* in which a jury may consider mitigating evidence, the Court said, "there is a simple and logical difference between rules that govern *what* factors the jury must be permitted to consider in making its sentencing decision, and rules that govern *how* the State may guide the jury in considering and weighing those factors in reaching a decision."[113]

The *Parks* decision may indicate that the Court intends to slowly change established mitigation case law. However, because the Court did not directly rule on whether or not the jury instruction was constitutionally permissible, *Parks* is basically an advisory opinion on the issue of mitigation. In dicta, the Court indicated that the antisympathy instruction might be permissible under the what/how dichotomy, because the Court noted, "*Lockett* and *Eddings* do not speak directly, if at all, to the issue presented here: whether the State may instruct the sentencer to render its decision on the evidence without sympathy."[114]

Also, Justice Antonin Scalia recently called into question the future of *Lockett* as a helpful precedent for the capital defendant in *Walton v. Arizona.*[115] Scalia's concurring opinion in that case announced that it is impossible to understand why "the Constitution demands that the aggravating standards and mitigating standards be accorded opposite treatment."[116] Scalia stated that in the future he would not vote to uphold an eighth amendment claim that the sentencer's discretion to consider mitigation was unlawfully restricted in the sentencing phase of a capital trial. He also said that he would no longer abide by the Court's *Lockett* decision.

None of the other eight Supreme Court Justices joined Scalia's concurring opinion in *Walton* nor indicated that the *Lockett* decision was outdated. Thus, *Lockett* is still a helpful precedent for the capital defendant and should be used when courts try to limit the jury's consideration of mitigation evidence.

III. Conclusion

Fortunately for the capital defendant, most of the Supreme Court decisions regarding mitigation stress that the sentencer must be allowed to consider *any* relevant evidence offered by the defendant for a sentence less than death. Thus, the *Lockett* line of cases are still effective precedents for the capital defendant. However, as indicated by the 1990 Supreme Court decisions, the state may be able to structure the sentencer's consideration of mitigation evidence through the use of statutes and instructions to the jury.

SUBSTANTIVE LIMITS

I. Introduction

Throughout the years, the United States Supreme Court has placed limits on the types of crimes and the classes of defendants qualifying for the death sentence. Those limits are generally based upon the eighth amendment prohibition against cruel and unusual punishment and upon personal characteristics of the defendant. What constitutes cruel and unusual punishment must be assessed at any given time by reference to "evolving standards of decency that mark the progress of a maturing society."[117] Thus far the Supreme Court has not found the death penalty cruel and unusual in all cases.

II. Supreme Court Decisions

A. Victim Not Killed

In 1977, the Supreme Court held that "death is indeed a disproportionate penalty for the crime of raping an adult woman" when that woman was not killed.[118] The Court reasoned that a rapist should not be punished more heavily than a deliberate killer as long as that rapist did not take the life of his victim. Thus, imposition of the death penalty in this case violated the prohibition against cruel and unusual punishment under the eighth and fourteenth amendments.[119] However, had a homicide occurred in this case, imposition of the death penalty would not have been disproportionate.

B. Accomplices

Another case favorable to the capital defendant, *Enmund v. Florida*[120] held that the death penalty was a disproportionate punishment for a person who aided and abetted in the commission of a murder but "did not kill or intend to kill."[121] Reiterating its decision in *Lockett v. Ohio,*[122] the Court emphasized "individualized consideration as a constitutional requirement in imposing the death sentence."[123]

In *Enmund*, the Court said putting to death one who aids and abets an offense "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[124] Thus, under the *Enmund* decision, death is an inappropriate sentence for one who only aids but does not execute the actual offense.

Five years later, in *Tison v. Arizona,*[125] the Supreme Court seemed to limit its *Enmund* holding by announcing that the death penalty is not a disproportionate punishment for one who was not the triggerman, but who played a major role in a felony murder and acted with reckless indifference to human life.[126] In *Tison*, the defendants entered a prison with a chest filled with guns, armed their father and another convict, helped to abduct and rob a family of four and then watched their father and the other convict murder the members of that family. Neither defendant made any effort to help the victims.

The Court held that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state . . . that may be taken into account in making a capital sentencing judgment."[127] Thus, defendants who make a major contribution to a felony and display reckless indifference to human life may be punished with death even though they did not actually commit the offense.

C. Age

After examining several state statutes, a plurality of the Court in 1988 decided that the cruel and unusual punishment prohibition of the eighth amendment "prohibits the execution of a person who was under 16 years of age at the time of his or her offense."[128] The Court determined that less culpability should be assigned to a crime committed by a juvenile due to the juvenile's inexperience, lack of education, vulnerability to peer pressure, and inability to properly evaluate the consequences of his or her conduct.[129] Thus, when a capital punishment statute specifies no minimum age for who may be eligible for the death penalty, offenders who commit capital crimes before they reach age 16 cannot be sentenced to death under *Thompson*.

More recent decisions by the Supreme Court are less helpful to the defense in establishing substantive limits of the death penalty. In 1989 the Court held that imposition of the death penalty on any person who murders at 16 or 17 years of age "does not offend the eighth amendment's prohibition against cruel and unusual punishment."[130]

In reaching its decision, the Court examined various state statutes. The Court determined that no consensus existed against death sentence eligibility for all juvenile offenders because 22 states at that time allowed 16 year olds to receive the death penalty. Thus, unless a state legislature specifies otherwise, 16 and 17 years olds are eligible to receive the death penalty.

D. Mental Retardation

Additionally, in *Penry v. Lynaugh*,[131] the Court said that there was "insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."[132]

Mental retardation may be offered as mitigating evidence by capital defendants. However, the Court in *Penry* concluded that while mental retardation may lessen a defendant's culpability for a capital offense, it could not conclude that "the eighth amendment precludes the execution of any mentally retarded person . . . convicted of a capital offense simply by virtue of their mental retardation alone."[133]

III. Conclusion

Although the Court has placed some limits on who may be eligible for a death sentence, those decisions indicate that substantive limits may be redefined by the legislature or current public opinion. As it stands now, the death penalty is disproportionate for criminal offenders under the age of 16; for those who rape but do not kill their victims; and for those who aid in an offense but do not play a major role in its commission. Those who fall outside those categories may be subjected to a sentence of death unless state death penalty statutes offer more substantive limits on the imposition of the death penalty. At the present time, the United States Supreme Court appears to have reached its limit in identifying types of crimes and classes of people which are not subject to the death penalty.

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[1]408 U.S. 238, 256 (1973)(Douglas, J., concurring).

[2]*Id.* at 238.

[3]*Woodson v. North Carolina*, 428 U.S. 280 (1976)(North Carolina death penalty statute held unconstitutional because it mandated a sentence of death for the commission of particular offenses); *Roberts v. Louisiana*, 428 U.S. 325 (1976)(Louisiana death penalty statute held unconstitutional because it mandated a sentence of death for the commission of particular offenses); *compare, Gregg v. Georgia*, 428 U.S. 153(1976)(Georgia death penalty statute sufficiently guided the jury's discretion by authorizing a sentence of death if certain aggravating circumstances were established); *Proffitt v. Florida*, 428 U.S. 242 (1976)(Florida death penalty statute sufficiently guided the jury's discretion by authorizing a sentence of death after a weighing of aggravating and mitigating circumstances); *Jurek v. Texas*, 428 U.S. 262 (1976)(Texas death penalty statute sufficiently guided the jury's discretion by authorizing a sentence of death upon the finding of various aggravating factors, including future dangerousness).

[4]*Gregg*, 428 U.S. at 189; *see also Zant v. Stephens*, 462 U.S. 862, 877-78 (1983)(noting that aggravating factors must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder).

[5]*Gregg*, 428 U.S. at 195.

[6]446 U.S. 420 (1980).

[7]*Id.*

[8]*Id.* at 429.

[9]*Id.*

[10]*Id.* at 430.

[11]*Id.* at 426.

[12]*Id.* at 427.

[13]*Id.* at 433.

[14]*Id.*

[15]*Id.*

[16]486 U.S. 356 (1988).

[17]*Id.*

[18]*Id.* at 361-362.

[19]*Id.* at 364.

[20]*Id.* at 366.

[21]*Shell v. Mississippi*, 111 S. Ct. 313 (1990).

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Id.* at 314.

[26]*Id.*

[27]*Id.*

[28]110 S. Ct. 1441 (1990).

[29]*Id.*

[30]*Id.* at 1445.

[31]*Id.*

[32]*Id.* at 1444.

[33]*Id.* at 1452.

[34]*Id.* at 1451.

[35]484 U.S. 231 (1988).

[36]*Id.*

[37]*Id.* at 244.

[38]*Id.*

[39]*Id.* at 256.

[40]*Booth v. Maryland*, 428 U.S. 496 (1988).

[41]*Id.* at 502.

[42]428 U.S. 496 (1988).

[43]*Id.*

[44]*Id.* at 498.

[45]*Id.* at 498-499.

[46]*Id.* at 509.

[47]*Id.* at 502 (noting that the jury must make an individualized determination of the appropriate sentence for the defendant based upon his character, and the circumstances of the crime).

[48]*Id.* at 505.

[49]*Id.*

[50]*Id.* at 506.

[51]430 U.S. 349, 358 (1977).

[52]*Booth*, 482 U.S. at 508.

[53]109 S. Ct. 2207 (1986).

[54]*Id.*

[55]*Id.*

[56]*Id.* at 2210.
[57]*Wainwright v. Witt*, 469 U.S. 412 (1985).
[58]391 U.S. 510 (1968).
[59]*Id.*
[60]469 U.S. 412 (1985).
[61]*Id.* at 424.
[62]*Id.* at 429.
[63]481 U.S. 648 (1987).
[64]*Id.* at 668.
[65]*Id.*
[66]*Id.* at 669-670 (Powell, J., concurring).
[67]487 U.S. 81 (1988).
[68]*Id.* at 88-89.
[69]*Id.* at 90-91.
[70]*Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985).
[71]*Id.*
[72]472 U.S. 320 (1985).
[73]*Id.* at 341.
[74]*Id.* at 325.
[75]*Id.* at 330.
[76]*Darden v. Wainwright*, 477 U.S. 168 (1986).
[77]*Id.*
[78]*Id.* at 180-181.
[79]*See e.g., Mills v. Maryland*, 486 U.S. 367 (1988)(finding that a reasonable juror could have misinterpreted the jury instructions as requiring unanimous findings on the absence as well as presence of mitigating factors); *Boyde v. California*, 110 S. Ct. 1190 (1990)(finding that there was no substantial possibility that the jury misinterpreted the jury instructions and rested its verdict on improper grounds); *Cage v. Louisiana*, 111 S. Ct. 328 (1990)(per curiam)(finding that a reasonable juror could have misinterpreted the jury instructions to allow for a conviction on a standard below the fourteenth amendment requirement of "beyond a reasonable doubt").
[80]110 S. Ct. 1190 (1990).
[81]*Id.*
[82]*Id.* at 1197.
[83]*Id.*
[84]*Id.* at 1198.
[85]*Id.; see also Mills v. Maryland*, 486 U.S. 367 (1986)(employing a "reasonable juror" standard to determine if the jury instructions were misleading).
[86]111 S. Ct. 328 (1990).
[87]*Id.*
[88]*Id.* at 329.
[89]*Id.*
[90]*Id.* at 329-330.
[91]*Id.* at 330.
[92]*Wainwright v. Witt*, 469 U.S. 412, 424 (1985).
[93]*Lockett v. Ohio*, 438 U.S. 586, 604 (1978).
[94]438 U.S. 586 (1978)
[95]*Id.* at 612-13.
[96]*Id.* at 604 (emphasis in original).
[97]455 U.S. 104 (1982).
[98]*Id.* at 115.
[99]*Id.* at 117 (emphasis added).
[100]481 U.S. 393 (1987).
[101]*See* Fla. Stat. § 921.141 (1975).
[102]Tr. of Sentencing Proceedings 7 (emphasis added).
[103]*See Mills v. Maryland*, 486 U.S. 367 (1988).
[104]*Id.* at 380 (emphasis in original).
[105]*Id.* at 375.
[106]*Id.* at 384 (emphasis added).
[107]*Id.*
[108]110 S. Ct. 1227 (1990).
[109]486 U.S. 367 (1988).
[110]*McKoy*, 110 S. Ct. at 1232.
[111]110 S. Ct. 1257 (1990).
[112]*Parks*, 110 S. Ct. at 1262.
[113]*Id.* at 1261 (emphasis added).
[114]*Id.*
[115]110 S. Ct. 3047 (1990).
[116]*Walton*, 110 S. Ct. at 3064.
[117]*Trop v. Dulles*, 356 U.S. 86, 101 (1958).
[118]*Coker v. Georgia*, 433 U.S. 584, 597 (1977).
[119]*Id.* at 592.
[120]458 U.S. 782 (1982).
[121]*Id.* at 798.
[122]438 U.S. 586, 605 (1978).
[123]*Enmund*, 458 U.S. at 798.
[124]*Id.* at 801.
[125]481 U.S. 137 (1987).
[126] *Id.* at 158.
[127]*Tison*, 481 U.S. at 157-158.
[128]*Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988).
[129]*Id.* at 835.
[130]*Stanford v. Kentucky*, 109 S. Ct. 2969, 2980 (1989).
[131]109 S. Ct. 2934 (1989).
[132]*Penry*, 109 S. Ct. at 2955.
[133]*Id.* at 2958.

A WORD OF THANKS

AND

A CONTINUED APPEAL

Last Spring we noted that the cost of publishing and mailing Capital Defense Digest is quite significant. We noted further that the Digest is intended to serve the Commonwealth, that its purpose is to assist capital defense counsel by increasing the fund of knowledge available to the entire legal community, including judges and prosecutors. We asked that those who believed that the Digest is helpful and should continue in the widest possible distribution consider defraying a portion of the cost.

The response has been gratifying, and we hope it will continue. The amount contributed does not represent a major percentage of the publication cost but it is a clear endorsement of the continuing need for the Digest.

The suggested sum is $10.00. Checks should be made payable to Washington and Lee University and mailed to:

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