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ARNOLD v. EVATT 113 F.3d 1352 (4th Cir. 1997) United States Court of Appeals, Fourth Circuit

claims were actual innocence and a due process violation resulting from the trial judge's denial of O'Dell's request to inform the jury of his parole ineligibility, the latter claim receiving the most judicial attention.[60]

If the *Simmons* issue in *O'Dell* is approached from another angle, from the angle of the Commonwealth Attorney's role, a new issue arises. An argument can be made that when the prosecutor proceeded against O'Dell at sentencing under the future dangerousness aggravator, aware that O'Dell was parole ineligible, the prosecutor engaged in prosecutorial misconduct. "In support of his argument to the jury that nothing short of death would be sufficient, the prosecutor emphasized petitioner's misconduct when he was 'outside the prison system.'"[61] In his closing statement at the sentencing hearing, the prosecutor implied that the jury should be concerned about O'Dell being released and posing a danger to the community. He asked "[i]sn't it interesting that he is only able to be outside of the prison system for a matter of months to a year and a half before something has happened again?"[62] His concluding statements reiterated that message:

> [Y]ou may still sentence him to life in prison, but I ask you ladies and gentlemen[,] in a system, in a society that believes in its criminal justice system and its government, what does this mean? ... [A]ll the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.[63]

There is little room for doubt that the Commonwealth Attorney cavalierly misled and misinformed the jury in *O'Dell*.

Exactly this kind of misconduct was addressed in *Berger v. United States*.[64] In *Berger*, the Court characterized the prosecutor's argument to the jury as "containing improper insinuations and assertions calculated to mislead the jury."[65] Noting the prosecutor's special relationship to the government, the Court described the prosecutor's proper interest as "not that it shall win a case, but that justice shall be done."[66] The Court observed that the average jury knows of and has confidence in this interest. "Consequently, improper suggestions [and] insinuations ... are apt to carry much weight against the accused when they should properly carry none."[67] The Court went on to state that the proper remedy for such prosecutorial misconduct is a new trial.[68] Under the *Berger* Court's reasoning, there can be little doubt that Joseph O'Dell was entitled to a new sentencing hearing.[69]

Summary and Analysis by:
Craig B. Lane

[60] *Id.* at 1972.
[61] *Id.* at 1979 (Stevens, J., dissenting) (quoting App. 61).
[62] *O'Dell*, 117 S.Ct. at 1979, n. 1 (Stevens, J., dissenting) (quoting App. 61).
[63] *Id.* (Stephens, J., dissenting) (quoting App. 66).
[64] 295 U.S. 78 (1935).
[65] *Berger*, 295 U.S. at 85.
[66] *Id.* at 88.
[67] *Id.*
[68] *Id.* at 89.
[69] Joseph O'Dell was executed on July 23, 1997.

ARNOLD v. EVATT

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FACTS

On April 12, 1978, a party of four set out on an expedition to find wild mushrooms. The party included cousins John Arnold and John Plath, both in their early twenties, and their girlfriends, eleven-year old Carol Ullman and seventeen-year old Cindy Sheets.[1] During their search, they came upon Betty Gardner, a farm worker, walking along the side of the road.[2] After the party gave Gardner a ride to her brother's home, they refused her request to take her to work. However, based on Arnold's suggestion, the group decided to go back and kill Gardner.[3]

After picking up Gardner, they took her to a remote wooded area near a garbage dump. There, all four in the group, at one time or another, physically assaulted Gardner. She was alternately sexually assaulted, urinated on, stomped, beaten with a belt, hit with a jagged bottle, stabbed with a knife and choked with a garden hose.[4] After dragging Gardner into the woods, Arnold completed the murder by strangling her with the garden hose. In an attempt to misdirect the police, Arnold carved "KKK" into Gardner's body.[5]

A jury found Arnold and Plath guilty of murder and kidnapping, and both were sentenced to death.[6] On appeal, the South Carolina Supreme Court affirmed Arnold's conviction, but remanded the case for resentencing based on improper prosecutorial argument.[7] After the new jury recommended the death penalty, the South Carolina Supreme Court affirmed Arnold's death sentence.[8] The United States Supreme Court denied Arnold's petition for writ of certiorari, but two Justices dissented

[1] *Arnold v. Evatt*, 113 F.3d 1352, 1355 (4th Cir. 1997).
[2] *Arnold*, 113 F.3d at 1355.
[3] According to testimony, Arnold proposed going back to kill Gardner because he "didn't like niggers." *Id.* at 1355.
[4] *Id.* at 1355.
[5] *Id.* at 1355. Law enforcement did not find Gardner's body until Sheets' role in the murder was discovered, and she revealed the location of Gardner's decomposed remains. *Id.*
[6] *Id.* at 1355.
[7] *State v. Plath*, 284 S.E.2d 221 (S.C. 1981).
[8] *State v. Plath*, 313 S.E.2d 619 (S.C. 1984).

based on Arnold's Sixth Amendment claim concerning the jury view of the crime scene.[9]

Arnold then filed an application for post-conviction relief in the Beaufort County Court of Common Pleas. After the lower court denied the application, the South Carolina Supreme Court denied Arnold's petition for writ of certiorari. Four years later, the United States Supreme Court granted a writ of certiorari and remanded the case to the Beaufort County Court of Common Pleas for reconsideration on the issue of the trial court's implied malice instruction.[10]

On remand, in denying the application for post-conviction relief, the lower court held that the malice instruction did not include an impermissible presumption, or alternatively, that any error was harmless.[11] On an appeal from the denial of the post-conviction relief, the South Carolina Supreme Court concluded that under United States Supreme Court precedent the implied malice instruction was harmless error.[12] In 1993, the United States Supreme Court denied another petition for writ of certiorari.[13]

Later that same year, Arnold filed a writ of habeas corpus in the United States District Court for the District of South Carolina.[14] Based on a recommendation to deny the petition by the United States Magistrate Judge, the United States District Judge adopted the magistrate's findings and granted the State's motion for summary judgment.[15] Arnold appealed the district judge's order.

HOLDING

The United States Court of Appeals, Fourth Circuit, affirmed the district court's denial of the writ of habeas corpus, holding that (1) the implied malice instruction was harmless error;[16] (2) "the solicitors'[17] comments did not so infect the resentencing trial with unfairness as to make the resulting sentence a denial of due process;"[18] (3) defense counsel's exclusion from jury view of crime scene was harmless error;[19] (4) instruction that sentence must be unanimous and that jury must unanimously find existence of any aggravating circumstances did not create substantial possibility that jury thought it must also unanimously agree as to existence of mitigating circumstances;[20] and (5) defendant was not entitled to instruction regarding actual effect of life sentence.[21]

ANALYSIS/APPLICATION IN VIRGINIA

I. Implied Malice Instruction

A. Background

At the guilt phase of Arnold's trial, the trial court instructed the jury that murder is "the killing of any person with malice aforethought either expressed or implied."[22] Moreover, the trial court stated that malice may be expressed "as where one makes previous threats of vengeance or where one lies in wait or other circumstances which show directly that the intent to kill was really entertained," or may "be implied from the willful, deliberate and intentional doing of any unlawful act without just cause or excuse, or from the use of a deadly weapon."[23] The South Carolina Supreme Court found that this implied malice instruction denied Arnold his due process right by erroneously shifting the burden of proof as to malice from the prosecution to the defendant.[24]

In *Sandstrom v. Montana*,[25] the United States Supreme Court held that a jury instruction which stated that, "'the law presumes that a person intends the ordinary consequences of his voluntary acts'" violated the Due Process Clause of the Fourteenth Amendment, in that it did not require the prosecution to prove each element of the crime beyond a reasonable doubt.[26] Following *Sandstrom*, in *Yates v. Evatt*,[27] the United States Supreme Court held that an implied malice instruction, comparable to the one used in Arnold's trial, was constitutional error subject to harmless-error analysis.[28] The harmlessness standard is whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[29] *Yates* explained that the reviewing court must only determine that the error was unimportant in relation to the other evidence which was considered by the jury, independently of the erroneous presumption.[30] Under *Yates*, the reviewing courts must ask "what evidence the jury actually considered in reaching its verdict" and must "weigh the probative force of that evidence against the probative force" of the erroneous presumption standing alone.[31]

B. *Yates* Analysis Applied to *Arnold*

In applying the first prong of the *Yates* two-part analysis to Arnold's case, the court of appeals found that the jury considered the entire record in making its decision.[32] Following *Yates*, the court of appeals did not attempt an inquiry into the jurors' minds, but rather, it scrutinized the jury instructions and applied "the customary presumption that the jurors followed the instructions in making their decision."[33] The trial court had instructed the jurors to determine malice based on all of the evidence presented, that any presumption of malice could be rebutted, and that malice had to be shown beyond a reasonable doubt. Based on these instructions and the presumption that the jurors followed them, the court of appeals found that the jury looked beyond the erroneous presumption and weighed all of the malice evidence.[34]

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[9] *Arnold v. South Carolina*, 467 U.S. 1265 (1984).

[10] *Arnold v. South Carolina*, 484 U.S. 1022 (1988).

[11] *Arnold v. Evatt*, 113 F.3d at 1356.

[12] *Arnold v. State*, 420 S.E.2d 834 (S.C. 1992).

[13] *Arnold v. South Carolina*, 507 U.S. 927 (1993).

[14] *Arnold v. Evatt*, 113 F.3d at 1356.

[15] The United States District Judge's order was filed on September 29, 1995. *Id.* at 1356.

[16] *Id.* at 1357.

[17] South Carolina uses the term "solicitor" in place of "prosecutor."

[18] *Id.* at 1359.

[19] *Arnold*, 113 F.3d at 1361.

[20] *Id.* at 1363.

[21] *Id.* at 1363.

[22] *Id.* at 1356.

[23] *Arnold*, 113 F.3d at 1356.

[24] *Arnold v. State*, 420 S.E.2d at 838. The court of appeals agreed with the South Carolina Supreme Court that the trial court's implied malice instruction denied Arnold his due process right.

[25] 442 U.S. 510 (1979).

[26] *Id.* at 513, 524 (quoting *In re Winship*, 397 U.S. 358 (1970)).

[27] 500 U.S. 391 (1991), *disapproved in part on other grounds, Estelle v. McGuire*, 502 U.S. 62, 72-73 n. 4 (1991).

[28] *Yates*, 500 U.S. at 400-02.

[29] *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Based on this standard, the court of appeals stated that, in order to obtain habeas relief, Arnold must show "actual prejudice" resulting from the implied malice instruction. *Arnold*, 113 F.3d at 1356.

[30] *Yates*, 500 U.S. at 403.

[31] *Id.* at 404.

[32] *Arnold*, 113 F.3d at 1357.

[33] *Yates*, 500 U.S. at 404.

[34] *Arnold*, 113 F.3d at 1357.

In response to the second inquiry outlined by the *Yates* analysis,[35] the court of appeals found that Arnold's case "reek[ed] of express malice" and that any reasonable jury would have found malice with or without the flawed instruction.[36] The court emphasized that fourteen pieces of evidence showing express malice on the part of Arnold existed.[37]

Arnold argued that those pieces of evidence bolstered the predicate facts of the erroneous presumptions, thereby reducing the probative force of the evidence. Furthermore, he contended that the solicitor's allusions to the implied malice instructions in his closing argument augmented the probative force of the erroneous presumptions standing alone. However, the court of appeals rejected both of the defendant's arguments, concluding that Arnold failed to "tip the scales sufficiently in his favor."[38]

Despite the court of appeal's holding that the implied malice instruction was harmless error, there are some points to be made from the opinion which are favorable for capital defense counsel. First, the court's reliance on the customary presumption that juries always follow the given instructions in making their decisions can be turned around to help the defendant. By placing such an emphasis on the instructions, the court is subjecting the instructions to careful scrutiny, and subsequently potential attacks. When dealing with errors in instructions, such as the implied malice instruction, defense counsel should examine these charges with great care. If part of the instructions are incorrect, counsel should question what evidence the jury actually considered in light of the customary presumption.

Second, in addressing the second prong of the *Yates* analysis, the court of appeal's language was inundated with numbers and measurements. For example, the court stressed the "fourteen" pieces of express malice evidence and the failure of Arnold to "tip the scales" in his favor. Given such language, it is suggested that capital defense counsel apply a similar "numbers" theory. Counsel can count the pieces of evidence going against the defendant and those in favor of the defendant. If the numbers work out, counsel can argue that his or her client successfully tipped the scales in his or her favor.[39]

[35] *Yates*, 500 U.S. at 405.

[36] *Arnold*, 113 F.3d at 1357.

[37] *Id.* at 1357. The South Carolina Supreme Court referred to these fourteen pieces of evidence. *Arnold v. State*, 420 S.E.2d at 840.

[38] *Arnold*, 113 F.3d at 1357.

[39] *Gilbert v. Moore*, 121 F.3d 144 (4th Cir. 1997), a case that has come down since *Arnold*, is an example of the scales tipping in favor of a capital defendant. In *Gilbert*, the court of appeals held that the implied malice jury instruction that erroneously shifted the burden of proof as to malice from prosecution to defense resulted in actual prejudice to the defendants, thereby finding harmful error. *Id.* at 149. The fact pattern in *Gilbert* involved two half-brothers, Larry Gilbert and J.D. Gleaton, whose appeals were consolidated into a single opinion. While driving around one afternoon in 1977, searching for drugs, the half-brothers decided to rob a lone attendant in a service station. Upon entering the station, Gleaton pulled out a knife and told the attendant that it was a robbery. A struggle ensued between Gleaton and the attendant, resulting in Gleaton's slashing and stabbing the attendant. During the struggle, Gilbert entered the station with a gun and shot the attendant once. As the defendants fled the station, Gilbert grabbed a nearby pocketbook in the station. The autopsy report revealed that the attendant died from a stab wound which pierced his heart.

After several denied appeals, in 1996, the district court granted the defendants' habeas corpus petitions. The district court found the implied malice instruction, which had been presented to the jury in the 1977 guilt phase of the trial contained unconstitutional rebuttable presumptions and was not harmless error. *Id.* at 145-47. In affirming the district court's finding of harmful error, the court of appeals applied the *Yates* two-part analysis. In support of its decision, the court emphasized that the *Gilbert* solicitor offered no evidence of express malice, that the nature of this crime was not extreme (unlike the cases cited by the State to support its argument that the intent instructions were harmless), and that the solicitor's reference to the implied malice instruction in his closing heightened the prejudicial effect of the erroneous instruction.

The court of appeals discussed its holding in *Arnold*, but distinguished it from the circumstances surrounding *Gilbert*. First, the *Arnold* solicitor presented fourteen pieces of evidence of express malice. In contrast, the *Gilbert* solicitor offered no such evidence. In fact, the court of appeals found a lack of malice on the part of the defendants, pointing out the following facts: (1) physical evidence indicated that the stabbings resulted from a scuffle; (2) Gilbert did not enter the station with a gun until after the scuffle began; and (3) the attendant was still alive and mobile when the defendants left the station. Second, the nature of the crime in *Arnold* was more extreme than that in *Gilbert*, in that the *Arnold* victim was sexually assaulted, beaten with a belt, hit with a bottle, stabbed with a knife, and choked with a garden hose. Conversely, the *Gilbert* defendants assaulted their victim, but made no effort to ensure his death, instead claiming it was an accident resulting from a struggle. Third, the court of appeals did not find the *Arnold* solicitor's references to the implied malice instruction in his closing argument to be sufficiently prejudicial to tip the scales in favor of Arnold. However, in *Gilbert*, the court found that similar references by the solicitor exacerbated the prejudicial effect of the erroneous instruction. The *Gilbert* court noted that such an action by a solicitor is not a dispositive factor, but in the absence of overwhelming evidence of malice, whether express or implied, it becomes more likely that the solicitor's use of the presumption influenced the jury's determination. *Id.* at 149.

The court of appeals concluded that unlike the defendant in *Arnold*, the *Gilbert* defendants tipped the scales sufficiently in their favor in the inquiry of "whether the guilty verdict actually rendered in their trial was surely unattributable to the error." *Id.* at 149 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993)). *Gilbert* is certainly a victory for capital defense, in that the court of appeals actually found an error harmful. This case is a "must read" for any capital defense counsel faced with the issue of whether an implied malice instruction is unconstitutional. Counsel should pay particular attention to how the *Gilbert* court distinguishes *Arnold* because the court itself offers some persuasive attacks against the *Arnold* decision.

II. Prosecutorial Misconduct

Arnold alleged that, during the resentencing phase, the solicitors undermined the jury's role as fact finder by giving their personal opinions on the evidence, the credibility of witnesses, and the jury's decision.[40] The solicitors allegedly emphasized Arnold's failure to testify, urged the jury to have the "guts" to give Arnold the death penalty, hypothesized that Arnold could escape from prison if given a life sentence, noted the tax dollars which had been spent on the trial, and urged the jury to put itself in the place of the victim.[41]

According to *Darden v. Wainwright*,[42] the test for misconduct by a prosecutor is whether the remarks "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[43] The factors for making a determination of whether a prosecutor's comments

[40] *Arnold*, 113 F.3d at 1358.

[41] *Id.*

[42] 477 U.S. 168 (1986).

[43] *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). Misconduct by a prosecutor during closing argument can result in reversal of a conviction, but the fact that remarks were "undesirable or even universally condemned" is not sufficient. *Id.*

denied the defendant fundamental fairness are: (1) the nature of the comments; (2) the nature and quantum of evidence before the jury; (3) the arguments of opposing counsel; (4) the judge's charge; and (5) whether the errors were isolated or repeated.[44]

Truly disturbing is that the *Arnold* case was not the first time the lead solicitor's comments during a closing warranted appellate review. The South Carolina Supreme Court vacated Arnold's original death sentence because the solicitor told the jury that he would never seek the death penalty again in Beaufort County if the jury did not recommend a death sentence for Arnold.[45] The court of appeals conceded that the solicitor and his assistant solicitor obviously learned nothing from this condemnation since they repeated such misconduct at the resentencing trial. However, the court downplayed these blatant and repeated wrongdoings by declaring that the solicitors' remarks must be examined in the context of the entire proceedings.

Not surprisingly, upon examination of the record of the entire trial, the court found no support for Arnold's claim of prosecutorial misconduct. The court reasoned that based upon the overwhelming evidence supporting the imposition of the death sentence and the relative isolation of the solicitor's inflammatory comments within his long oration,[46] the misconduct by the solicitor did not infect the resentencing trial with unfairness, thereby creating a denial of due process.[47]

In arguing that prosecutorial misconduct has occurred, capital defense counsel should first emphasize the obligation courts have to demand the utmost professional and principled conduct from attorneys. The test outlined in *Darden* bolsters this obligation, requiring a thorough examination of the actions of any prosecutor accused of denying a defendant's due process. Furthermore, counsel should combat any reliance placed on a judge's instructions to the jurors as curative of prosecutorial misconduct. Despite a presumption that jurors fully adhere to given instructions, it is difficult to imagine that they would not be influenced by unfair and prejudicial remarks from someone as prominent and powerful as the prosecutor. In *Arnold*, the reviewing court's acknowledgment of misconduct by the solicitor and subsequent dismissal of such actions as a denial of due process can be regarded as nothing but a condonation by the court of such wrongdoing.

[44] *Lawson v. Dixon*, 3 F.3d 743, 755 (4th Cir. 1993) (citing *Darden*, 477 U.S. at 182 and *Donnelly*, 416 U.S. at 647).

[45] *State v. Plath*, 284 S.E.2d at 230 (1981).

[46] Unfortunately though, the record reveals that the leading solicitor's inflammatory remarks were neither isolated nor limited to his closing argument. The solicitors referred to Arnold by his nickname "Mad Dog" throughout both the guilt trial and the resentencing trial. Arnold claimed these references violated his rights under the Eighth and Fourteenth Amendments by injecting an arbitrary factor into the proceedings. *Arnold*, 113 F.3d at 1362. The test for an arbitrary factor claim is whether the trial was so infected with unfairness as to make the conviction a denial of due process. *Darden*, 477 U.S. at 181 (quoting *Donnelly*, 416 U.S. at 643). The *Arnold* court conceded that the solicitors "occasionally" used the nickname during **both** trials and stated that they did not approve of such references. *Arnold*, 113 F.3d at 1362. Nonetheless, with no explanation, the court found the solicitors' use of the nickname did not deny Arnold due process. This highly prejudicial action goes directly to the fifth factor in the test for prosecutorial misconduct, whether the errors were isolated or repeated. The "Mad Dog" references, as admitted by the court of appeals, were repeated, in that they occurred "occasionally" and during both the guilt and resentencing trials. It is difficult to understand how the court can turn its head from such a blatant disregard for fairness and professional responsibility on the part of these supposed officers of the court.

[47] *Arnold*, 113 F.3d at 1359. The court also relied on the judge's instruction to the jury not to be governed by sympathy, prejudice, passion or public opinion in making its decision. *Id.*

III. Jury Viewing of Crime Scene

Arnold also claimed that the jury's viewing of the crime scene during the resentencing phase constituted a Sixth Amendment violation on the following grounds: (1) denial of his right to counsel because his trial attorneys were excluded from going to the jury view; and (2) denial of his right to effective assistance of counsel because his trial attorneys did not object to their exclusion.[48]

At the resentencing trial, the solicitor argued that the jury should view the crime scene because Gardner had been murdered in a remote area on an island off the South Carolina coast.[49] Despite an objection by defense counsel, the trial judge granted the solicitor's jury view motion, finding the scene relevant to the kidnapping charge against Arnold. However, the judge stipulated that neither the solicitor nor defense counsel could attend the view, stating that he would go with the jury and "make the provision that they would not say anything."[50] No record or transcripts of the jury view exists.

Both the district court and the South Carolina Supreme Court relied on *Snyder v. Massachusetts*,[51] concluding that the absence of defense counsel at the jury view could not have prejudiced Arnold, thereby preventing any constitutional claim. In *Snyder*, the United States Supreme Court held that a jury view was not part of a trial requiring the presence of the defendant.[52] The lower courts reviewing *Arnold* reasoned that because the defendant did not have to be at the jury view, then an exclusion of defense counsel was not inappropriate either. The court of appeals rejected this rationale, emphasizing that in *Snyder*, the presence of the defense counsel at the jury view was most likely the reason why the Supreme Court did not find the absence of the defendant at the jury view to be unconstitutional.[53] Instead, the court of appeals stated, "the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[54]

Given this reasoning, the court of appeals framed its inquiry as whether potential substantial prejudice to defendant's rights exists in a certain event where counsel was not present.[55] The court of appeals concluded that a jury view affords the possibility of potential substantial prejudice to a defendant.[56] As a result, the absence of Arnold's counsel at the jury view was found to constitute constitutional error under the Sixth Amendment.[57] The court applied the harmless error standard to

[48] *Arnold*, 113 F.3d at 1359.

[49] *Id.* at 1359.

[50] *Id.*

[51] 291 U.S. 97 (1934).

[52] *Snyder*, 291 U.S. at 114.

[53] *Arnold*, 113 F.3d at 1359-60.

[54] *Id.* at 1360 (quoting *United States v. Wade*, 388 U.S. 218, 226 (1967)). The court of appeals stated that a right to counsel exists during any "critical stage" of a defendant's criminal proceeding, including a pretrial identification procedure, a preliminary hearing, a pretrial psychiatric examination, sentencing and an appeal. *Id.*

[55] *Id. See Wade*, 388 U.S. at 227.

[56] The court of appeals noted that a jury could be affected by words or actions of officers showing the scene, by the manner in which the scene is presented, or by the condition of the scene during the view. Furthermore, such a denial of access to information given to the jury could reduce the efficacy of the defense counsel's advocacy. *Id.* at 1360.

[57] *Arnold*, 113 F.3d at 1360. After determining this to be a constitutional error, the court of appeals then had to decide if this was a structural error, and thereby subject to automatic reversal or if this error was subject to harmless-error analysis. In order to establish a new structural error, it must be determined that the error's presence would render every trial in which it occurred unfair. *Arizona v. Fulminante*, 499

determine whether the error "had substantial and injurious effect or influence in determining the jury's verdict."[58] The court found no such prejudicial effect to the verdict in that the crime scene view effectively illustrated the remoteness of the kidnapping location and the view was indicative of other evidence admitted at trial. Furthermore, the court determined that the trial judge's presence mitigated any possible prejudice to Arnold.

In analyzing the issue of the jury crime scene view, there are two important points that capital defense counsel should note. First, the court of appeals clearly recognizes that jury views should be conducted in the presence of defense counsel.[59] Therefore, defense counsel should always insist on being present at a jury view. The defendant has the right to have counsel present at this stage of the trial and a denial of this right is a violation of the Sixth Amendment. Second, although *Arnold* recognizes the required presence of defense counsel, it does not provide for any other safeguards during a jury view. Specifically, there exists no record of transcripts of the jury view of the crime scene during Arnold's resentencing trial. The absence of a record is particularly damaging because so many of the standards and criteria used by the court of appeals to determine any prejudice from this error rely so heavily on what transpired during the view. This includes jurors' reactions, the actions of any law enforcement or judicial officers present and the condition of the scene at the time of the view. It is difficult to imagine how a defense counsel can satisfy such standards and criteria with no record of what occurred at the view.[60] Hence, it is imperative that capital defense counsel demand that both a video and audio record of the view be made and entered into the trial record.

IV. Challenge to the Jury Instructions

In making his challenges to the jury instructions, Arnold argued that there was a strong possibility that the jury believed it had to agree unanimously as to the existence of any mitigating circumstance.[61] The trial court instructed the jury that its decisions on the sentence and the existence of any aggravating circumstances must both be unanimous. Arnold claims that because of these instructions, a substantial possibility exists that the jury thought it also had to reach a unanimous decision on the existence of any mitigating circumstances.[62]

The court of appeals rejected Arnold's "substantial possibility" argument, finding that the jury instructions never required the jury to determine any mitigating factor with unanimity.[63] Furthermore, the court stated that the probability of jury confusion on the issue of unanimity was not substantial.[64]

Despite the fact that this claim was unsuccessful, capital defense counsel should underscore the point that mitigating circumstances do not have to be determined by unanimity. Arnold may not have been able to use this point in his favor, but there are certainly occasions in which defense counsel will want to remind the jury of its contents.

V. The Cumulative Effect of the Alleged Errors

Arnold's final argument centered around a tally of all the errors he alleged occurred in the jury instructions. He argued that the cumulative effect of all the trial court's alleged errors in its instructions rendered his sentence of death unreliable based on the Sixth, Eighth and Fourteenth Amendments.[65] Not surprisingly, the court of appeals quickly rejected this claim, giving no explanation.

This case raises the issue of not just the cumulative effect of the alleged errors in the instructions, but the cumulative effect of all of the alleged errors throughout the proceedings. The pages of the *Arnold* opinion are filled with acknowledgments of errors, and then subsequent cursory findings of harmlessness. It is difficult to understand how the court could review all of the errors, both alleged and confirmed, and not at least contemplate how this trial was anything but a series of errors, void of any sense of justice. The only explanation is that the court ignored the totality of the circumstances, instead choosing to compartmentalize each of the issues. This opinion is another example of result-oriented judicial review with the result being the rendering of very little justice.

Summary and Analysis by:
Mary K. Martin

U.S. 279, 306-307 (1991). In making this determination, the court of appeals relied on *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996) (*en banc*), *cert. denied*, 117 S.Ct. 765, (1997). In *Sherman*, the court held that an unsupervised visit to a crime scene undertaken by a juror in a criminal trial was subject to harmless-error analysis. *Id.* at 1137. The *Sherman* court found that an unsupervised juror view does not render every trial in which it occurs unfair. Given the *Sherman* decision, the *Arnold* court concluded that if an unsupervised juror view is subject to harmless-error analysis, then a supervised jury view in the absence of defense counsel does not warrant a higher level of scrutiny. *Arnold*, 113 F.3d at 1361. The court also noted that a reviewing court should consider the nature and extent of the jury's activity and how that activity fit into the context of the evidence offered at trial. *Id.* (quoting *Sherman*, 89 F.3d at 1139).

[58] *Arnold*, 113 F.3d at 1361. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

[59] *Id.* at 1361. *See generally Clemente v. Carnicon-Puerto Rico Management Assoc.*, 52 F.3d 383, 386 (1st Cir. 1995) (suggesting "fundamental safeguards" that should be part of jury view).

[60] Notwithstanding the absence of a record, defense counsel has an extremely difficult time meeting these standards and criteria because they are founded on the thoughts and feelings of a jury.

[61] *Arnold*, 113 F.3d at 1363. Arnold also made two other challenges to the trial court's instructions to the jury: (1) his due process rights were violated by the trial court's refusal to give a requested instruction regarding the actual effect of a life sentence or a death sentence; and (2) the failure to give a curative instruction concerning the admission of Cindy Sheets' immunity agreement injected an arbitrary factor into the proceedings. The court of appeals rejected the due process claim, finding that the rule from *Simmons v. South Carolina* required such an instruction only if the defendant is parole ineligible. *Simmons v. South Carolina*, 512 U.S. 154, 177-79 (1994) (O'Connor, J., joined by Rehnquist, C.J., and Kennedy, J., concurring in the judgment). The court found nothing to indicate Arnold would have been parole ineligible, and even if it had, the court stated it could not apply the *Simmons* rule retroactively. *Arnold*, 113 F.3d at 1363. The court also denied Arnold's claim concerning the curative instruction, determining that Arnold was not denied fundamental fairness. *Id.* at 1364.

[62] *Id.* Arnold based his arguments on the United States Supreme Court's decisions in *McKoy v. North Carolina*, 494 U.S. 433 (1990) and *Mills v. Maryland*, 486 U.S. 367 (1988).

[63] *Id.*

[64] *Id. See Kornahrens v. Evatt*, 66 F.3d 1350, 1364 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 1575 (1996).

[65] *Id.* at 1364.