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LOWENFIELD v. PHELPS 108 S.Ct. 546 (1988)

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There is a lesson to be learned: Attorneys pursuing a habeas corpus petition must be aware of all subsequent federal law that could possibly apply in the case. Rights to argue those issues should be claimed if there is any reasonable possibility that the client is covered by the subsequently announced law.

Attorney's should carefully review the jury instructions they use at trial and to review the ones the Commonwealth offers. In Virginia there is a jury instruction very similar to the one in *Yates*:

Instruction No. 34.240
Inference of Malice — Use of Deadly Weapon

You may infer malice from the deliberate use of a deadly weapon unless, from all the evidence, you have a reasonable doubt as to whether malice existed.

A "deadly weapon" is any object or instrument that is likely to cause death or great bodily injury because of the manner, and under the circumstances, in which it is used.

This instruction would probably pass a constitutional test since the language allows the jury to consider all the evidence presented and then draw their own conclusions. The instruction

does not require that the jury come to one conclusion unless defendant disproves malice.

There is another instruction used in Virginia that does come closer to being an unconstitutional burden-shifting jury instruction:

Instruction No. 2.600

Inference of Intention

You may infer that every person intends the natural and probable consequence of his acts.

The language of the instruction says the jury "may infer" though it does not instruct the jury to consider any of the evidence in making this inference. The U.S. Supreme Court is clear that the burden is on the State to prove all the elements of the crime beyond a reasonable doubt. A strong argument could be made that this instruction is unconstitutional as written, at least without the exploratory phrase "but need not" following the word "may." (Elizabeth P. Murtagh)

LOWENFIELD v. PHELPS

108 S.Ct. 546 (1988)

FACTS

A Louisiana trial court found Lowenfield guilty of two counts of manslaughter and three counts of first degree murder. An essential element in the definition of the first degree murder offense was identical to the sentencing phase aggravating factor of intention "to kill or inflict great bodily harm upon more than one person." La. Rev. Stat. Ann. § 14:30(A)(3) (West 1986). Before the jury began sentencing deliberations the trial judge gave the jury instructions. After the jury failed to reach a unanimous verdict, the judge twice polled the jury to assess the benefit of continued deliberation. The judge subsequently re-instructed the jury, the jury returned for further deliberation, and thereafter returned a death verdict. Defense counsel did not object to either the polling or supplemental charge. The Louisiana Supreme Court upheld Lowenfield's conviction. 495 So.2d 1245. The United States District Court for the Eastern District of Louisiana denied relief, and the United States Court of Appeals Fifth Circuit affirmed. 817 F.2d 285 (CA5 1987).

HOLDING

a) Supplemental charge by judge did not constitute coercion.

Lowenfield claimed that the jury was improperly coerced by the judge's supplemental charge. *Lowenfield v. Phelps*, 108 S.Ct. 546, 550. The Supreme Court majority, however, found

that because the object of the jury system is to reach unanimity by weighing contrasting views, "the use of a supplemental charge has long been sanctioned." *Id.* The petitioner also urged that because unanimity was not required to reach a proper sentence, in that the Louisiana legislature provides that if a jury could not agree the court shall impose a life sentence, La. Code Crim. Proc. Ann. Art. 905.8 (West 1984), the second charge was impermissible under the Fourteenth and Eighth Amendments of the United States Constitution. *Lowenfield*, 108 S.Ct. at 551. The Court concluded that the state had a strong interest in having the jury express the will of the community as to petitioner's sentence, and not to use the legislature default mechanism. *Id.*

b) The polling of the jury did not exacerbate the coercion.

Lowenfield claimed that the polling of the jury exacerbated the coercive effect of the supplemental charge. *Id.* at 552. The Court's view was that since the judge's inquiry into the numerical division of the jury questioned how the jurors felt about further deliberation, and did not go to the merits of the case, the polling did not effect the constitutionality of the sentence. Although the jury handed down the final verdict soon after the supplemental instruction, defense counsel did not object to either the polling or supplemental instruction at the time. Although petitioner waived no rights by this inaction, the omission was said to indicate that the petitioner did not perceive, as readily apparent, the potential for coercion. *Id.*

c) Duplication of element of the offense and aggravating factor

not constitutionally impermissible.

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

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

d) Separate Opinion

Justice Marshall, with whom Justice Brennan joins, and Justice Stevens joins as to Part I, dissenting. Part I: The jury charge and supplemental polling gave the impression that the judge was anxious for a quick verdict, collectively creating an unacceptable risk of coercion. *Id.* at 555-556. Part II: The death penalty is in all circumstances cruel and unusual punish-

ment prohibited by the Eighth Amendment to the United States Constitution. *Id.* at 555. The fact that the statutory aggravating factor duplicated an element of the underlying crime prevented the adequate guidance of the jury’s discretion as to the propriety of the death sentence, in that it led the jury to decide the point in the guilt phase instead of the penalty phase. *Id.* at 556.

APPLICATION TO VIRGINIA

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

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

MILLS v. MARYLAND

486 U.S. _____, 108 S.Ct. 1860 (1988)

FACTS

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

Mills appealed, claiming that the State’s death penalty, as applied to him, was unconstitutionally mandatory because it required the imposition of the death sentence if the jury unanimously found an aggravating circumstance, but could not agree unanimously as to the existence of any particular mitigating circumstance. The defendant hypothesized that “even

if some or all of the jurors were to believe *some* mitigating circumstance or circumstances were present, unless they could unanimously agree on the existence of the *same* mitigating factor, the sentence necessarily would be death.

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

HOLDING

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