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Horn v. Banks 122 S. Ct. 2147 (2002)

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I. Facts

In Wilkes-Barre, Pennsylvania, on September 25, 1982, George Banks ("Banks") shot and killed thirteen people. Banks began by killing three of his girlfriends and their five children inside his home. When he left his home, a group of bystanders had gathered outside the house. Banks shot and killed one bystander and wounded a second before carjacking a nearby car. He then drove to a trailer park and shot another one of his girlfriends, his girlfriend's mother, and his son. A state court jury convicted Banks of twelve counts of first degree murder and one count of third degree murder.[1]

During the penalty phase, the judge instructed the jury that to impose death it must find unanimously either the presence of one aggravating circumstance and no mitigating circumstances or, alternatively, one or more aggravating circumstances which outweighed any mitigating evidence. The verdict form required the jury to check one of two boxes that presented the same two choices in essentially the same language. The jury marked the form indicating that it had found an aggravating circumstance and a mitigating circumstance, but that the mitigating circumstance did not outweigh the aggravator. The jury sentenced Banks to death on each of the twelve counts of first-degree murder.[2]

The defendant's direct appeal was denied.[3] Afterwards, the United States Supreme Court decided *Mills v. Maryland*;[4] the defendant used *Mills* in his state post-conviction proceedings to challenge the jury instructions and verdict form given at his trial.[5] The Supreme Court of Pennsylvania rejected the defendant's *Mills* claim, as did the United States District Court for the Middle District of Pennsylvania. Neither court based its rejection on the argument that *Mills* should not be applied retroactively, but rather rejected defendant's petition on the merits. The defendant appealed to the United States Court of Appeals for the

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1. Banks v. Horn, 271 F.3d 527, 531 (3rd Cir. 2001).
2. Horn v. Banks, 122 S. Ct. 2147, 2148-49 (2002) ("*Banks*").
3. *Id.* at 2149.
4. 486 U.S. 367 (1988).
5. *Banks*, 122 S. Ct. at 2149; *see* Mills v. Maryland, 486 U.S. 367, 384 (1988) (vacating death sentence because trial court's jury instructions and the verdict form could have been interpreted by the jury to require that all twelve jurors agree on a mitigating circumstance prior to weighing the mitigator against the aggravating circumstances).

Third Circuit and the decision was reversed. The Commonwealth then appealed to the United States Supreme Court.[6]

II. Holding

The United States Supreme Court held that the Third Circuit committed plain error when it failed to analyze Banks's argument under the rule of *Teague v Lane*.[7] It further held that whenever the State makes a *Teague* argument, retroactivity becomes a threshold question that the federal courts must address.[8]

III. Analysis

The Court in *Mills* held that "the Constitution prohibits a state from requiring jurors unanimously to agree that a particular mitigating circumstance exists before they are permitted to consider that circumstance in their sentencing determination."[9] Banks asserted that the jury instructions and the verdict form used in his trial created a reasonable possibility that the jury believed that it was required to agree "unanimously" on a mitigator before it could consider that mitigator in the sentencing determination.[10] The Commonwealth argued that the *Mills* rule was handed down after the defendant's final judgment; therefore, retroactive application of *Mills* was barred under *Teague*.[11] The lower courts did not consider the retroactivity issue because they did not find that the *Mills* argument met the AEDPA standard of review.[12] The Third Circuit found that the Supreme Court of Pennsylvania applied *Mills* unreasonably and reversed the death sentence; it did not conduct a *Teague* analysis because *Teague* had not been a part of the lower court's decision.[13]

The United States Supreme Court relied on its decision in *Caspari v Bohlen*[14] to find that the Third Circuit had erred in not performing a *Teague* analysis.[15] *Caspari* held that in every habeas case that involves a new rule, it is a threshold question whether *Teague* bars the new rule from retroactive application.[16] *Caspari*

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6. *Banks*, 122 S. Ct. at 2149-50.

7. *Id.* at 2148; *see* Teague v. Lane, 489 U.S. 288, 289 (1989) (holding that new rules of constitutional criminal procedure do not apply to defendants who have received final judgments, unless the rule falls within two narrow exceptions).

8. *Banks*, 122 S. Ct. at 2148.

9. *Id.* at 2149 (citing *Mills*, 486 U.S. at 374).

10. *Id.* at 2150-51.

11. *Id.* at 2151.

12. *Id.* at 2149; *see* 28 U.S.C. § 2254(d)(1) (2000) (stating that a writ of habeas corpus pursuant to a state court decision can only be granted if the state court's decision was contrary to, or an unreasonable application of clearly established federal law; part of the Anti Terrorism and Effective Death Penalty Act of 1996).

13. *Banks*, at 2149.

14. 510 U.S. 383 (1994).

15. *Banks*, 122 S. Ct. at 2150 (citing Caspari v. Bohlen, 510 U.S. 383, 389 (1994)).

16. *Id.* at 2150; *see Caspari*, 510 U.S. at 389 (holding *Teague* is a threshold question if raised in

clarified that a federal court need not perform a *Teague* analysis if the State fails to raise the issue; if the State does raise the issue, however, the court must analyze retroactivity before addressing the merits of the claim.[17] The Court held that because the State did raise *Teague*, the federal court was obligated to apply *Teague* to *Mills* and that this threshold analysis was a separate requirement from any analysis required under AEDPA.[18]

IV. Application in Virginia

A. Trial

Pennsylvania's capital sentencing statute textually *requires* a finding of death if the jury finds an aggravator without finding any mitigators, or if the jury finds an aggravator that is not outweighed sufficiently by any mitigation.[19] The jury must impose a life sentence in all other instances.[20] Virginia's sentencing statute is different from Pennsylvania's on two levels. Virginia does not require a specific "weighing" of the mitigators and the aggravators, and Virginia never requires a jury to return a finding of death.[21] Because of this statutory difference, the exact circumstances that occurred in *Horn* will not arise in Virginia. Nevertheless, a jury instruction or a verdict form given in Virginia could generate confusion amongst the jurors as to the role of the mitigators in sentencing. If, for example, the defense did not put forth any mitigating evidence and the jury found at least one of the statutory aggravators, the jury may believe that it must impose a sentence of death. Similarly, if the jury agrees upon an aggravator, but does not agree on a particular mitigator, it may still think it is obligated to impose a sentence of death. *Mills* provides that the jury may not be led to believe that it must agree unanimously on a mitigator in order to consider mitigation in its

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a federal habeas case).

17. *Banks*, 122 S. Ct. at 2150; *see Caspari*, 510 U.S. at 389 (concluding that if the State does not raise a *Teague* argument, the court does not have to perform a retroactivity inquiry).

18. *Banks*, 122 S. Ct. at 2150-51.

19. *See* 42 PA. CONS. STAT. ANN. § 9711(c)(iv) (West Supp. 2002) (stating that "the verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases").

20. *Id.*

21. *See generally* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that a jury may impose a sentence of death if it finds one of two aggravators and has considered any mitigating evidence). The Virginia statute never states that the jury must or shall impose a sentence of death if it reaches certain conclusions. Nevertheless, the statute does not underscore this point with direct language stating that the jury may always impose a life sentence, regardless of its findings. The most effective way to counter this potential confusion is to ask for the court to instruct the jury that death is not mandatory.

final decision.[22] Capital defenders should be alert to instructions or verdict forms which might confuse the jury in violation of *Mills*.

B. Federal Habeas

The Court's holding that *Teague* is a threshold question is applicable in Virginia capital cases in federal habeas proceedings. On a practical level, the Court has put the Commonwealth on notice to raise the *Teague* issue in the federal district court. Defense attorneys need to be prepared to present a *Teague* argument for any new rule of constitutional criminal procedure they may want to invoke retroactively.[23] In cases, however, in which the Commonwealth does not raise *Teague*, the federal courts still maintain discretion over whether to conduct a *Teague* inquiry into the application of a new rule.[24] The Court instructed that a *Teague* inquiry is to be conducted before addressing AEDPA and that *Teague* conclusions are separate and distinct from AEDPA.[25]

Finally, the Fourth Circuit has previously held that *Mills* is retroactive.[26] Thus, in federal habeas proceedings involving a *Mills* issue, the initial *Teague* question has already been answered favorably for the defense. The remaining question for the habeas court to review will be if the lower court complied with AEDPA in its application of *Mills*.

V. Conclusion

The confusing jury instructions and verdict form used in *Horn* could occur in Virginia, but are prohibited by *Mills v Maryland*. Unlike Horn, a defendant in Virginia would not have to argue for retroactive application of *Mills* because the Fourth Circuit has already authorized its retroactive applicability. *Horn* clarified that before applying new rules which have not undergone a *Teague* analysis, federal courts must conduct a *Teague* inquiry if the State raises the issue; courts are not obligated to conduct an inquiry if the State does not raise a *Teague* argument. Virginia attorneys can rely on *Horn* to argue that *Teague v Lane* is a threshold question and that the results of a *Teague* inquiry cannot be ignored by using the language of AEDPA.

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22. *Mills*, 486 U.S. at 384.

23. *See Teague*, 489 U.S. at 311 (holding that there are two types of new rules of constitutional criminal procedure that can be applied retroactively— rules that place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or "watershed rules of criminal procedure").

24. *Banks*, 122 S. Ct. at 2150; *see Caspari*, 510 U.S. at 389.

25. *Banks*, 122 S. Ct. at 2151. *See generally* Janice L. Kopec, Case Note, 15 CAP. DEF. J. 197 (2002) (analyzing Hartman v. Lee, 283 F.3d 190, 193 (4th Cir. 2002)).

26. *Banks*, 122 S. Ct. at 2150 n.4 (citing Williams v. Dixon, 961 F.2d 448, 443, 456 (4th Cir. 1992) (holding that *Mills* is a new rule that can be applied retroactively under *Teague*'s second exception because it affects "bedrock procedural elements" which are "implicit in ordered liberty")).