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Mills v. Maryland: The Supreme Court Guarantees the Consideration of Mitigating Circumstances Pursuant to Lockett v. Ohio

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MILLS V. MARYLAND: THE SUPREME COURT GUARANTEES THE CONSIDERATION OF MITIGATING CIRCUMSTANCES PURSUANT TO *LOCKETT V. OHIO*

The underlying goal of the eighth amendment of the United States Constitution[1] is to guarantee that a state's[2] ability to punish criminals is "exercised within the limits of civilized standards."[3] Contemporary societal values regarding the imposition of punishment determine these civilized standards.[4] History, traditional usage, jury determinations, and legislative enactments in the form of death penalty statutes reflect these standards.[5] The prevention of arbitrary and inconsistent imposition of punishment is also included in the goals of the eighth amendment.[6] These goals are questioned when capital punishment is involved. Arguably, the finality of a death penalty is inconsistent with the eighth amendment's prohibition against cruel and unusual punishment.[7]

The imposition of capital punishment is a decision unlike any other that a state and its citizens, as jurors, are called upon to make.[8] Capital punish-

1. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. XIII. The phrase "cruel and unusual" first appeared in the English Bill of Rights of 1689. Gregg v. Georgia, 428 U.S. 153, 169 (1976).

2. The fourteenth amendment of the Constitution makes the eighth amendment binding on the states. *See* Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring); Francis v. Resweber, 329 U.S. 459, 463 (1947). The fourteenth amendment provides, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

3. Trop v. Dulles, 356 U.S. 86, 100 (1958).

4. Woodson v. North Carolina, 428 U.S. 280, 288 (1976).

5. *Id.* Jury sentencing maintains the necessary link between community standards and the penal system. *Gregg,* 428 U.S. at 190.

6. Furman v. Georgia, 408 U.S. 238, 242 (1972) (Douglas, J., concurring). The principle that the state may not arbitrarily inflict severe punishment stems from the idea that the state disregards human dignity when, without reason, it imposes a severe penalty on some, but not others. *Id.* at 274 (Brennan, J., concurring).

7. *Id.* at 286. "[T]he fundamental premise of the Clause [is] that even the vilest criminal remains a human being possessed of common human dignity." *Id.* at 273.

8. *See* Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988); Gardner v. Florida, 430 U.S. 349, 357 (1977).

> [D]eath is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign

ment expresses society's moral outrage at particularly offensive conduct.[9] Central to an inquiry into the constitutionality of capital punishment statutes is whether the death penalty is appropriate punishment for the crime charged.[10] Due to the uniqueness and finality of the decision to execute a person convicted of murder,[11] "[e]volving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case."[12] During the second half of the twentieth century, the United States Supreme Court has devoted substantial attention to capital cases.[13] This attention has created an evolution in the Court's interpretation of the constitutionality of capital punishment statutes.[14]

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in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Id. at 357-58.

9. *Gregg*, 428 U.S. at 183.

10. *Id.* at 187.

11. This Note will only discuss the death penalty as a punishment for murder. The Supreme Court struck down a Georgia statute imposing capital punishment for a rape conviction. Coker v. Georgia, 433 U.S. 584, 592 (1977). The Court held that the punishment of death for a rape conviction was grossly disproportionate and excessive if no murder is involved. *Id.* at 598. The *Coker* decision implied that no state statute may invoke the death penalty as a punishment for a crime in which no life is taken. *See* Combs, *The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S.U.L. REV. 1, 33 (1980). Some states, however, still consider some crimes, such as aggravated kidnapping, aggravated rape, treason, skyjacking, and certain drug offenses, as capital crimes. *See* Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1222-24 (1984). The federal government may punish espionage as a capital offense, although there is currently no death mechanism. *See* 18 U.S.C. § 794 (1982).

12. Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988).

13. *See, e.g.*, Thompson v. Oklahoma, 108 S. Ct. 2687 (1988); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); California v. Brown, 479 U.S. 538 (1987); Baldwin v. Alabama, 472 U.S. 372 (1985); Eddmonds v. Illinois, 469 U.S. 894, 895 (1984) (Marshall, J. dissenting); Pulley v. Harris, 465 U.S. 37 (1984); Zant v. Stephens, 456 U.S. 410 (1982); Eddings v. Oklahoma, 455 U.S. 104 (1982); Estelle v. Jurek, 450 U.S. 1014 (1981) (Rehnquist, J., dissenting); Beck v. Alabama, 447 U.S. 625 (1980); Godfrey v. Georgia, 446 U.S. 420 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Gardner v. Florida, 430 U.S. 349 (1977); Gilmore v. Utah, 429 U.S. 1012 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Furman v. Georgia, 408 U.S. 238 (1972); McGautha v. California, 402 U.S. 183 (1971); Witherspoon v. Illinois, 391 U.S. 510 (1968).

Several groups attacked the death penalty, such as the NAACP Legal Defense and Education Fund. Combs, *supra* note 11, at 4. An unofficial stay on execution in the United States began in 1967. Special Project, *supra* note 11, at 1130 n.3. Such heightened opposition to capital punishment probably caused the Supreme Court's increased scrutiny of death penalty statutes. *Id.*

14. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982). Justice Powell described the evolu-

Throughout history, societies have attempted, generally without success, to categorize before the fact specific types of murder for which capital punishment would be appropriate.[15] For example, when the eighth amendment was adopted in 1791, the states maintained the common law practice of imposing a mandatory death penalty for specific offenses, such as murder.[16] Juries, however, viewed mandatory death penalties with disfavor from the outset,[17] resulting in a rebellion against the common law practice.[18] State legislatures responded to this hostility by limiting the number of capital offenses.[19]

The American public, however, remained dissatisfied with state legislative attempts to curtail the imposition of capital punishment by limiting the number of capital offenses. As a result, juries took the law into their own hands.[20] De facto jury discretion subsequently developed as a method of avoiding the mandatory imposition of the death penalty in cases where the

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tion of the death penalty statue as the "product of a considerable history reflecting the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." *Id.*

15. McGautha v. California, 402 U.S. 183, 197 (1971). The Bible may be regarded as the first attempt to categorize classes of offenses for which capital punishment was appropriate. The thirty-fifth chapter of the Book of Numbers states:

> [1] The Lord spoke to Moses in the steppes of Moab at the Jordan near Jericho, saying: . . . [10] "Speak to the Israelite people and say to them: When you cross the Jordan to the land of Canaan, [11] you shall provide yourselves with places to serve you as cities of refuge to which a manslayer who has killed a person unintentionally may flee. [12] The cities shall serve you as a refuge from the avenger, so that the manslayer may not die unless he has stood trial before the assembly . . .
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> [16] Anyone, however, who strikes another with an iron object so that death results is a murderer; the murderer must be put to death. [17] If he struck him with a stone tool that could cause death, and death resulted, he is a murderer; the murderer must be put to death. [18] Similarly, if the object with which he struck him was a wooden tool that could cause death, and death resulted, he is a murderer; the murderer must be put to death . . . [20] So, too, if he pushed him in hate or hurled something at him on purpose and death resulted, [21] or if he struck him with his hand in enmity and death resulted, the assailant shall be put to death; he is a murderer. The blood-avenger shall put the murderer to death upon encounter.

35 *Numbers* 1:21.

16. Woodson v. North Carolina, 428 U.S. 280, 289 (1976). At the time of the American Revolution, the colonies imposed death sentences on all persons convicted of any of a variety of crimes, ranging from murder to treason, piracy, arson, rape, robbery, burglary, and sodomy. *Id. See* H. BEDAU, THE DEATH PENALTY IN AMERICA 3, 6-9 (3d ed. 1982).

17. *Woodson,* 428 U.S. at 289. *See infra* notes 64-68 and accompanying text.

18. *McGautha,* 402 U.S. at 198.

19. *Id.* at 198-99. *See* Furman v. Georgia, 408 U.S. 238, 246 (1972) (Douglas, J. concurring). Pennsylvania was the first state to abolish capital punishment except for "murder of the first degree," and many states followed suit. *McGautha,* 402 U.S. at 198 (citing Pa. Laws 1794, c. 1777).

20. *McGautha,* 402 U.S. at 199; *Furman,* 408 U.S. at 246-47 (Douglas, J., concurring).

jury found execution inappropriate.[21] Juries continued to find the death penalty an inappropriate punishment in many first degree murder cases and, consequently, refused to return guilty verdicts.[22]

Jury nullification[23] and the inadequate attempt to distinguish offenders through legislative criteria[24] led the states to grant juries broad sentencing discretion in capital cases.[25] Rather than continuing to redefine capital homicides, the Federal Government finally authorized juries to impose the death penalty in 1897.[26] In *Winston v. United States*,[27] the Supreme Court gave the jury discretion to determine whether the imposition of capital punishment for a murder conviction was appropriate.[28] Despite the American Law Institute's 1959 recommendation[29] that capital punishment statutes specifically identify aggravating and mitigating circumstances[30] with which

21. *McGautha*, 402 U.S. at 199.

22. Woodson v. North Carolina, 428 U.S. 280, 291 (1976); BEDAU, *supra* note 16, at 9-10.

23. Jury nullification refers to a jury's refusal to convict capital offenders to avoid automatic death sentences. *Woodson*, 428 U.S. at 290.

24. When Congress enacted the eighth amendment, all states followed the common law practice of inflicting the death penalty exclusively and mandatorily for certain specified offenses. *Id.* at 289. Due to jurors' unwillingness to impose mandatory death sentences, state legislatures eventually limited the classes of capital offenses. *Id.* at 290.

25. *Id.* at 291; *McGautha*, 402 U.S. at 199. Tennessee was the first state to grant jury sentencing discretion. *Id.* at 200.

26. *McGautha*, 402 U.S. at 200 (citing Act of Jan. 15, 1897, ch. 29, § 1, 29 Stat. 487).

27. 172 U.S. 303 (1899).

28. *Id.* at 312-13. The Supreme Court relied on Congress' Act of 1897, *see supra* note 26, which conferred upon the jury the right to decide whether the punishment in a murder case should be death or imprisonment. 172 U.S. at 313. In reversing the judgments of the three murder cases before it, the Court held that the judge's instructions to the jury were erroneous because they led the jury to understand that it could not impose imprisonment unless mitigating circumstances were shown. *Id.* The Court held that the instructions attempted to control the discretionary power that Congress had vested in the jury. *Id.*

29. Special Project, *supra* note 11, at 1133. MODEL PENAL CODE § 201.6 (Tent. Draft No. 9, 1959) (revised and approved in 1962 as § 201.6 of the Proposed Official Draft). Section 201.6 of the Model Penal Code: Proposed Official Draft (1962) is included in an appendix to the *McGautha v. California* opinion. *See McGautha*, 402 U.S. at 222-25.

30. Aggravating circumstances weigh in favor of imposing the death penalty. There are generally five broad areas of aggravation: 1) defendant's motive, such as killing for pecuniary reasons; 2) defendant's cruelty in method and manner of the offense, such as "heinous, atrocious or exceptionally brutal"; 3) defendant's background, such as whether the defendant was incarcerated at the time of the offense; 4) circumstances surrounding the offense, such as whether the offense occurred during the commission of another felony; and 5) the victim(s) of the offense, for example a police officer. *See* Special Project, *supra* note 11, at 1227-32.

Mitigating circumstances weigh in favor of mercy. Types of mitigating factors include: 1) age/youth of the defendant; 2) whether the defendant committed the offense while under duress or coercion; 3) defendant's inability to appreciate the wrongfulness of the offense at the time of its commission; 4) defendant's role in the offense; 5) victim's participation in the offense; 6) defendant's lack of prior criminal conduct; and 7) the unlikelihood that defendant will commit crime in the future. *Id.* at 1232-37.

to guide the sentencing process,[31] most death penalty statutes prior to 1972 continued to delegate broad discretion to the sentencing authority.[32]

Dissatisfaction with broad jury sentencing discretion eventually developed because state death penalty statutes allowed juries to impose the death penalty in an arbitrary and capricious manner.[33] However, the constitutional status of discretionary capital punishment sentencing drastically changed in 1972.[34] At that time, the Supreme Court held in *Furman v. Georgia*[35] that the "untrammeled discretion" of the sentencing authority created a substantial risk that the imposition of the death penalty would occur in an inconsistent and arbitrary manner, and would thus violate a capital offender's constitutional rights to be free from cruel and unusual punishment.[36] Following *Furman v. Georgia,* the Supreme Court focused on how much statutory guidance and limitation should be placed upon the sentencing authority to prevent inconsistent sentencing without depriving the capital offender of individualized sentencing.[37]

In *Mills v. Maryland,*[38] the Court re-examined the discretion of the sentencing authority to determine whether the sentencing instructions permitted the jury to impose the death penalty in a fair and consistent manner.[39] In March 1985, a Maryland jury tried and convicted Ralph Mills for the first

31. *Id.* at 1133.

32. *Id.*

33. *See* Furman v. Georgia, 408 U.S. 238, 248, n.11 (1972) (Douglas, J., concurring). "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976).

34. Lockett v. Ohio, 438 U.S. 586, 598 (1978).

35. 408 U.S. 238, 248-49 (1972) (Douglas, J., concurring).

36. *Id.* at 248-49; *Gregg,* 428 U.S. at 188. In a concurring opinion in *Furman v. Georgia,* Justice White maintained that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Furman,* 408 U.S. at 313 (White, J., concurring).

37. Individualized sentencing requires the sentencing authority to consider all relevant aspects of the character of the offender and the nature of the offense not included in a death penalty statute. In particular, the sentencing authority must take into consideration any mitigating circumstance not outlined in the state statute. *See* Roberts v. Louisiana, 431 U.S. 633, 637 (1977) ("[I]t is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense."); *Lockett,* 438 U.S. at 604. Forty years earlier, the Supreme Court held that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937).

38. 108 S. Ct. 1860 (1988).

39. *Id.* at 1863. The Court split five to four in favor of remanding the case for resentencing. *Id.* at 1870. Justices Brennan, Marshall, Blackmun, White, and Stevens represented the

degree murder of his cellmate.[40] The jury determined that Mills had stabbed Paul Brown six times in the chest and thirty-nine times in the back while the two shared a cell at a Maryland correctional institution.[41] During the sentencing phase, the Maryland Rules[42] required the sentencing authority to complete a verdict form[43] and to list the aggravating and/or mitigating circumstances that it found.[44] The same jury[45] found that the state had proven beyond a reasonable doubt the existence of a statutory aggravating circumstance: Mills " 'committed the murder at a time when he was confined in a correctional institution.' "[46] The jury, however, marked "no" beside each listed mitigating circumstance.[47] The Maryland death penalty statute also required the sentencing authority to weigh any proven aggravating circumstance(s) against any mitigating circumstance(s).[48] Because there was no mitigating circumstance to weigh against the aggravating circumstance, the jury imposed the death penalty.[49]

The majority in *Mills v. Maryland* concluded that the jury instructions were ambiguous.[50] One possible interpretation would result in unconstitu-

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majority. Chief Justice Rehnquist, and Justices O'Connor, Scalia, and Kennedy dissented. *Id.* at 1872.

40. Mills v. State, 310 Md. 33, 38, 527 A.2d 3, 5 (1987), *vacated,* 108 S. Ct. 1860 (1988).

41. *Id.* at 39, 527 A.2d at 5.

42. MD. RULE PROC. 772A.

43. *Id.* The verdict form was entitled "Findings and Sentence Determination." The completed verdict form is printed in the Appendix of the *Mills v. Maryland* decision. *Mills,* 108 S. Ct. at 1870-72. Rule 772A was rescinded and replaced by Maryland Rules of Procedure 4-343. The revised form is similar to the former, and was in effect at the time of petitioner's trial. However, petitioner raised no objection to the use of the outdated form. *Mills,* 108 S. Ct. at 1863 n.2.

44. *See* Appendix of the *Mills v. Maryland* decision for a listing of aggravating and mitigating circumstances considered. *Mills,* 108 S. Ct. at 1870-72.

45. The current Maryland death penalty statute provides for a bifurcated trial. MD. ANN. CODE art. 27, § 413(a) (1987). This means that after a judge or jury returns a guilty verdict, a sentencing hearing convenes. There are three ways a sentencing hearing may proceed. The jury that determined the defendant's guilt may make the sentencing determination. *Id.* § 413(b)(1). Alternatively, the court may impanel a new jury for the sentencing hearing for the following reasons: i) the defendant was convicted upon a plea of guilty; ii) the defendant was convicted after a trial before the court sitting without a jury; iii) the jury that determined the defendant's guilt has been discharged by the court for good cause; or iv) review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing. *Id.* § 413(b)(2)(i)-(iv). Finally, if the jury sentencing proceeding is waived by the defendant, the court alone may determine the sentence. *Id.* § 413(b)(3).

46. *Mills,* 108 S. Ct. at 1863.

47. *Id.*

48. MD. ANN. CODE art. 27, § 413(h)(1).

49. *Mills,* 108 S.Ct. at 1863.

50. *See id.* at 1867. Section II of the verdict form instructed the jury to mark each answer to the existence of mitigating circumstances with "yes" or "no." It was clear that the jury could not mark "yes" without unanimity. However, neither the verdict form nor the judge's

tionally precluding the jury from considering all mitigating circumstances when imposing Mills' death sentence.[51] The majority argued that if the reviewing court was unable to determine whether the jury rested its verdict on the unconstitutional or constitutional ground, the death sentence must be vacated.[52] The majority ruled that the possibility remained that the jury misinterpreted the judge's instructions resulting in an unconstitutional imposition of the death penalty, and therefore vacated the judgment of the Maryland Court of Appeals.[53]

The dissent in *Mills v. Maryland* argued that the jury instructions allowed for one interpretation: that the jury unanimously found that no mitigating circumstances existed.[54] The dissent maintained that a reasonable juror could have understood the charge as meaning only this interpretation. The dissent, therefore, was in favor of affirming the court of appeals' judgment.[55]

This Note examines the law prior to the *Mills v. Maryland* decision, demonstrating how the Supreme Court has wrestled with the conflict between a sentencing authority's discretion and the defendant's right to individualized sentencing. In addition, this Note traces the development of the Maryland death penalty statute, the state statute that the Supreme Court interpreted in *Mills*. This Note shows how Maryland has endeavored to refine its capital punishment statute to comply with constitutional standards. The Note then takes a closer look at the *Mills* decision by discussing the rationale behind the majority and dissenting opinions. This Note agrees with the *Mills* majority, because the majority tried to provide further protection to the capital offender by requiring reliability in the imposition of death sentences. However, this Note takes the approach that the *Mills* opinion is limited to its facts, namely that death sentences based on faulty sentencing instructions must be vacated.

I. THE SHAPING OF A CAPITAL PUNISHMENT STATUTE

A. Unbridled Jury Discretion in the Twentieth Century

Prior to 1972, nearly all death penalty statutes gave the sentencing authority, either a judge or jury,[56] broad discretion in determining the appropriate

instructions dispelled the probable inference that "no" is the opposite of "yes" and therefore the appropriate answer to reflect an inability to answer the question in the affirmative. *Id.*

51. *Id.* at 1866.

52. *Id.*

53. *Id.* at 1870.

54. *Id.* at 1873 (Rehnquist, C.J., dissenting).

55. *Id.*

56. All states with death penalty statutes now require bifurcated trial and sentencing pro-

punishment, death or imprisonment, in capital cases.[57] In *McGautha v. California,*[58] the Supreme Court held that the lack of sentencing guidelines controlling the discretion of capital juries did not offend the United States Constitution's fourteenth amendment due process clause.[59] The rationale behind granting broad discretion to sentencing authorities was that state legislatures could not properly identify, before the fact, those characteristics of criminal homicides and convicted murderers which could justify imposing the death penalty.[60] Correspondingly, the legislatures failed to express those characteristics in a manner which a sentencing authority could interpret and apply in a fair and consistent fashion.[61] The Court determined that an attempt to categorize all relevant factors that a sentencing authority should consider would be futile, because the list would never be complete and would inhibit rather than expand the scope of consideration.[62]

Although these statutes gave the sentencing authority broad discretion, none of the death penalty statutes authorized mandatory death penalties.[63] The Supreme Court later noted, in *Woodson v. North Carolina,*[64] that mandatory death penalty statutes in the United States had proven unsatisfactory partly because jurors often refused to return a guilty verdict against those whom the government had proven guilty of murder if a death sentence would automatically result.[65] Jury determinations and legislative enactments indicated the overriding concern of the American public that automatic death sentences were unduly harsh and unworkably rigid.[66] Indeed, the attitude in the United States moved so far "from a mandatory system that the imposition of capital punishment frequently had become arbitrary and capricious."[67] To break away from the rigors of a mandatory sentencing system, the courts and legislatures went to the other extreme by commit-

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ceedings. The sentencing authority, either a judge, judges, or jury, varies according to state statute. *See* Special Project, *supra* note 11, at 1237-38.

57. *Id.* at 1133.

58. 402 U.S. 183 (1971).

59. *Id.*

60. *Id.* at 204.

61. *Id.*

62. *Id.* at 208.

63. Lockett v. Ohio, 438 U.S. 586, 597-98 (1978).

64. 428 U.S. 280 (1976).

65. *Id.* at 293. In *Winston v. United States,* the Supreme Court held that

> [t]he hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a capital conviction, have induced American legislatures, in modern times, to allow some cases of murder to be punished by imprisonment, instead of by death.

172 U.S. 303, 310 (1899).

66. *Woodson,* 428 U.S. at 293.

67. Eddings v. Oklahoma, 455 U.S. 104, 111 (1982).

ting the use of the death penalty to the absolute discretion of juries.[68]

B. Unbridled Sentencing Discretion Ruled Unconstitutional

In 1972, however, the Supreme Court's view on the sentencing procedure for capital punishment changed abruptly with the landmark decision in *Furman v. Georgia.*[69] In *Furman,* the Supreme Court held that the eighth and fourteenth amendments' prohibition against cruel and unusual punishment precluded imposing the death penalty under the Georgia and Texas capital punishment statutes,[70] because the broad sentencing discretion afforded in those statutes allowed for the arbitrary and capricious imposition of the death penalty.[71] Ironically, what the Supreme Court had allowed in *McGautha v. California* under the fourteenth amendment's due process clause was then rendered unconstitutional in *Furman,* under the eighth and fourteenth amendments.[72] The *Furman* decision left state legislatures with the difficult task of determining what type of death penalty statute would pass constitutional muster. The legal community perceived the *Furman* Court as disapproving death penalty statutes that conferred any discretion upon the sentencing authority.[73]

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68. *Id.*

69. 408 U.S. 238 (1972).

70. *Id.* at 239-40. The *Furman* decision rejected the Court's argument in *McGautha v. California* that unrestricted jury discretion did not lead to unconstitutional arbitrariness in sentencing. One commentator argued that the Supreme Court's abrupt departure from *McGautha* was based on the two different types of constitutional analyses the Court employed. In *McGautha,* the Court focused on the due process analysis to support its conclusion. In *Furman,* however, the Court scrutinized the Georgia and Texas death penalty statutes in light of the eighth amendment of the Constitution. *See* Comment, *Constitutional Criminal Law-The Role of Mitigating Circumstances in Considering the Death Penalty,* 53 TUL. L. REV. 608, 611 n.24 (1979); *see also* Lockett v. Ohio, 438 U.S. 586, 599 (1978) ("[W]hat had been approved under the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment in *McGautha* became impermissible under the [e]ighth and [f]ourteenth [a]mendments by virtue of the judgment in *Furman.*").

71. Combs, *supra* note 11, at 4. Many people convicted of capital offenses were as unscrupulous as the petitioners in the *Furman* case, yet those in *Furman* were "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Furman,* 408 U.S. at 309-10 (Stewart, J., concurring). The *Furman* Court held the Texas and Georgia statutes "unconstitutional, not because they conferred discretion upon the sentencing authority, but because the discretion conferred was 'standardless.' " Rockwell v. Superior Court of Ventura County, 18 Cal. 3d 420, 446, 556 P.2d 1101, 1117, 134 Cal. Rptr. 650, 666 (1977) (Clark, J., concurring).

72. *Lockett,* 438 U.S. at 599. One commentator suggested that the uncertainty emanating from the Supreme Court decisions regarding capital punishment reflected the Court's attempt to maintain control over the development of procedural safeguards. *See* Combs, *supra* note 11, at 38-41; Special Project, *supra* note 11, at 1131 n.5.

73. *Rockwell,* 18 Cal. 3d at 446, 556 P.2d at 1117, 134 Cal. Rptr. at 666. The problem with the *Furman* decision was that, although it was a five to four decision, each justice filed an

The *Furman* Court specifically invalidated two death penalty statutes.[74] However, *Furman* effectively invalidated thirty-nine of the forty state death penalty statutes in effect at that time.[75] Moreover, the judgment in *Furman* removed the death sentences previously imposed on over 600 persons.[76] In the wake of *Furman,* state legislatures drafted new death penalty statutes. The theme underlying these new state statutes was control of the discretion of the sentencing authority.[77] Ten states adopted mandatory death penalties for a limited category of specific offenses in an effort to eliminate all sentencing discretion in capital cases.[78] Twenty-five state statutes adopted a modified version of the Model Penal Code's capital sentencing scheme.[79] These statutes provided guided sentencing discretion through the use of bifurcated

individual opinion. The majority reversed the judgments sustaining the death penalties. Two justices, Brennan and Marshall, concluded that capital punishment is unconstitutional per se according to the eighth and fourteenth amendments. *Furman,* 408 U.S. at 305-6 (Brennan, J., concurring) ("[D]eath stands condemned as fatally offensive to human dignity."); *id.* at 360-61 (Marshall, J., concurring) ("[I]t is morally unacceptable to the people of the United States at this time in their history."). Three justices disagreed that capital punishment is unconstitutional per se, but voted to reverse on procedural grounds. *Lockett,* 438 U.S. at 599; Combs, *supra* note 11, at 5. Justices Douglas, Stewart, and White concluded that discretionary sentencing, unguided by legislatively defined standards, violated the eighth amendment, *Lockett,* 438 U.S. at 599, because it was "pregnant with discrimination," *Furman,* 408 U.S. at 257 (Douglas, J., concurring), because it permitted the death penalty to be "wantonly" and "freakishly" imposed, *id.* at 310 (Stewart, J., concurring), and because it imposed the death penalty with "great infrequency" and "that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not." *Id.* at 313 (White, J., concurring); *see Lockett,* 438 U.S. at 599.

74. *Furman,* 408 U.S. at 239-40. Two cases before the Court dealt with the Georgia statute; one dealt with the Texas statute. *Id.* at 239. The Court struck down the Georgia death penalty statute as it applied to murder, GA. CODE ANN. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969), and the death penalty provision applicable to rape, GA. CODE ANN. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). *Id.* The Texas case involved a rape conviction. The Court invalidated the applicable provision accordingly. *Id.* (TEX. PENAL CODE, art. 1189 (1961)).

75. Note, *State v. Wilson: The Improper Use of Prosecutorial Discretion in Capital Punishment Cases,* 63 N.C.L. REV. 1136, 1136 n.5 (1985). While the constitutionality of mandatory death penalty statutes remained undecided, only the Rhode Island statute, which permitted a mandatory death penalty sentence for a life term prisoner convicted of murder, remained in effect after *Furman. Id. But see* Comment, *The Furman Case: What Life is Left in the Death Penalty,* 22 CATH. U.L. REV. 651, 652 n.3 (1973) (four state statutes with mandatory death penalties were unaffected by *Furman*).

76. *Furman,* 408 U.S. at 417.

77. Combs, *supra* note 11, at 5.

78. Lockett v. Ohio, 438 U.S. 586, 600 & n.8 (1978); Woodson v. North Carolina, 428 U.S. 280, 313 (1976) (citing State Capital Punishment Statutes Enacted Subsequent to *Furman v. Georgia,* CONGRESSIONAL RESEARCH SERVICE PAMPHLET 17-22 (June 19, 1974)); Rockwell v. Superior Court of Ventura County, 18 Cal. 3d 420, 446-48, 556 P.2d 1101, 1116-18, 134 Cal. Rptr. 650, 665-67 (1977).

79. Special Project, *supra* note 11, at 1219.

trials, the consideration of aggravating and mitigating circumstances, and appellate review.[80] Guided discretion provided a method of balancing the broad discretion endowed on the sentencing authority prior to *Furman* and the mandatory death penalty statutes that some states enacted subsequent to *Furman*.[81]

C. Mandatory Death Penalty Ruled Unconstitutional

In 1976, the Supreme Court, in *Woodson v. North Carolina,*[82] held mandatory death penalty statutes for first degree murder unconstitutional.[83] Those state legislatures that had interpreted *Furman v. Georgia* to require a mandatory death penalty were compelled to return to the drawing board. Prior to *Furman,* the North Carolina death penalty statute provided for unbridled jury discretion in the determination of whether to impose the death penalty.[84] After *Furman,* the North Carolina Supreme Court held its discretionary death penalty statute unconstitutional in *State v. Waddell,*[85] and the North Carolina General Assembly enacted a mandatory death penalty statute to comply with *Furman.*[86] Pursuant to the revised statute, the *Woodson* defendants were convicted of first degree murder and sentenced to death.[87] In *Woodson,* the Court considered for the first time the constitutionality of a mandatory death penalty statute.[88] After presenting a detailed history of the mandatory death penalty, the Court concluded that jurors, and society as a whole, have an aversion to automatic death sentences.[89] The Court maintained that the mandatory death penalty statutes enacted after *Furman* did not reflect a renewed societal acceptance of mandatory death sentencing, but

80. *See* Combs, *supra* note 11, at 5. *See Lockett,* 438 U.S. at 600. These states attempted to enact statutes that simultaneously allowed for the individual assessment of each convicted capital offender and complied with *Furman* by providing guidelines to the sentencing authority when determining whether to impose death or imprisonment.

81. *See* Comment, *supra* note 70, at 612.

82. 428 U.S. 280 (1976). The case involved four men convicted of murder during an armed robbery. Woodson was in the getaway car when the robbery and murder occurred. The jury found all four men guilty on all charges, and as required by statute, sentenced them to death. *Id.* at 282-84.

83. *Id.* at 305. *See* Roberts v. Louisiana, 431 U.S. 633, 638 (1977); Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

84. *Woodson,* 428 U.S. at 285.

85. 282 N.C. 431, 447, 194 S.E.2d 19, 30 (1973). The Supreme Court of North Carolina interpreted the *Furman* decision to mean that permitting either a judge or a jury to impose the death penalty as a matter of its discretion violated the eighth and fourteenth amendments. *Id.* at 439, 194 S.E.2d at 25.

86. *Woodson,* 428 U.S. at 286 (citing N.C. GEN. STAT. § 14-17 (Supp. 1975)).

87. *Id.* at 282-83.

88. *Id.* at 287.

89. *Id.* at 295.

rather constituted an attempt by state legislatures to comply with *Furman's* ambiguous holding.[90] The Court invalidated mandatory death sentences because they conflicted with contemporary standards of decency and thus violated the eighth amendment's prohibition against cruel and unusual punishment.[91] Further, the Court determined that such statutes failed to meet *Furman's* basic requirement that objective standards, which guide, regularize, and make rationally reviewable the process for imposing a sentence of death, must replace broad sentencing discretion.[92] Finally, the Court held that mandatory death penalty statutes failed to allow complete consideration of the character of the offender and the nature of the offense.[93] As a result, the Supreme Court held all mandatory death penalty statutes unconstitutional.[94]

D. Individualized Sentencing

Along with *Woodson v. North Carolina,* the Supreme Court ruled on four other cases involving the imposition of capital punishment.[95] In *Roberts v. Louisiana,*[96] the Court invalidated Louisiana's mandatory death penalty statute based on the *Woodson* reasoning.[97] However, the Supreme Court upheld the Georgia, Texas, and Florida capital punishment statutes,[98] finding that they sufficiently directed the sentencing authority so as to prevent the arbitrary and capricious imposition of the death penalty.[99] The Court

90. *Id.* at 298.
91. *Id.* at 301.
92. *Id.* at 303.
93. *Id.* at 303-04.
94. *Id.* at 305.
95. Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
96. 428 U.S. 325 (1976).
97. *Id.* at 331-334. The Louisiana statute in *Roberts* required mandatory death sentences for those convicted of first degree murder, aggravated rape, aggravated kidnaping, or treason. The jury could not add any qualification or recommendation to the verdict. *Id.* at 331. The Court stated that "[t]he constitutional vice of mandatory death sentence statutes - lack of focus on the circumstances of the particular offense and the character and propensities of the offender - is not resolved by Louisiana's limitations of first-degree murder to various categories of killings." *Id.* at 333. Louisiana's mandatory death penalty statute failed "to comply with *Furman's* requirement that standardless jury discretion be replaced by procedures that safeguard against arbitrary and capricious imposition of death sentences." *Id.* at 334.
98. *See Proffitt*, 428 U.S. at 259-60; *Gregg*, 428 U.S. at 206-07; *Jurek*, 428 U.S. 262.
99. *Proffitt,* 428 U.S. at 252-53; *Gregg,* 428 U.S. at 220-24; *Jurek,* 428 U.S. at 273-74. In *Gregg,* the Supreme Court upheld the Georgia death penalty statute due to the jury's finding of one of the aggravating circumstances listed in the statute and the direction to the jury to consider "any mitigating circumstances." *Gregg,* 428 U.S. at 197.

In *Proffitt,* the Supreme Court upheld the Florida death penalty statute, which the Court acknowledged was similar to the Georgia statute upheld in *Gregg,* except that in Florida, the

determined that a death penalty statute was constitutional if the statute provided for individualized sentencing,[100] which, although not a constitutional imperative, reflected enlightened policy that is fundamental to complying with the eighth amendment's respect for human dignity.[101]

According to the Court, ensuring individualized sentencing in a death penalty statute allowed the sentencing authority to consider mitigating, as well as aggravating circumstances.[102] The Court reasoned that a jury must be allowed to consider all relevant evidence before deciding if the death penalty should or should not be imposed.[103] The Court maintained that consideration of statutory aggravating circumstances adequately limits and directs the jury, thereby reducing the risk of the arbitrary and capricious imposition of the death penalty.[104] Simultaneously, requiring the jury to consider any relevant mitigating factors "maintain[s] the essential link with contemporary community values" regarding when the imposition of capital punishment is appropriate.[105]

E. Consideration of All Mitigating Factors is Required

In *Lockett v. Ohio,*[106] the Court maintained that a sentencing authority

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trial judge is the sentencing authority. *Proffitt,* 428 U.S. at 252. The Florida statute required the trial judge to weigh eight aggravating circumstances against seven mitigating circumstances in determining whether to impose the death penalty. This method, the Court maintained, forced the judge to consider the character of the offender and the circumstances of the crime. *Id.* at 251.

In *Jurek,* the Court upheld the Texas death penalty statute although it did not explicitly speak of mitigating circumstances. The Court held that requiring the jury to find an aggravating circumstance before imposing death forced the jury to consider the particularized nature of the crime and therefore encompassed other mitigating factors as well. *Jurek,* 428 U.S. at 273. The Texas statute accomplished this not by listing statutory aggravating circumstances, but rather by narrowing the categories of murders for which a death sentence could be imposed. *Id.* at 270.

100. *Jurek,* 428 U.S. at 271; *Woodson,* 428 U.S. at 303-05. *See supra* note 37.

101. *See supra* note 37; Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

102. *Jurek,* 428 U.S. at 271.

> But a sentencing system that allowed the jury to consider only aggravating circumstances would almost certainly fall short of providing the individualized sentencing determination that we today have held in *Woodson v. North Carolina* . . . to be required by the eighth and fourteenth amendments . . . . Thus, in order to meet the requirement of the eighth and fourteenth amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances.

Id. For an explanation of aggravating and mitigating circumstances, see *supra* note 30.

103. *Jurek,* 428 U.S. at 271.

104. *See* Mills v. State, 310 Md. 33, 82, 527 A.2d 3, 27 (1987), *vacated,* 108 S. Ct. 1860 (1988) (McAuliffe, J., dissenting) (commenting on the *Jurek, Proffitt,* and *Gregg* decisions).

105. *Id.*

106. 438 U.S. 586 (1978). An Ohio court convicted Sandra Lockett of aggravated murder

must consider any and all relevant mitigating factors[107] that the defendant offered.[108] Commentators have suggested that the "unlimited mitigation" theory promoted in *Lockett* represents a return to the period of unguided jury discretion that existed before *Furman.*[109] However, *Lockett* and *Furman* can be reconciled in that *Lockett* returned discretion to the jury only with regard to mitigating circumstances.[110] Thus, after *Lockett,* constitutionally valid death penalty statutes must carefully guide the jury's consideration of aggravating circumstances, yet allow the jury broad discretion to consider mitigating factors. The justification for this apparent imbalance rests on the perception that erroneous decisions not to impose the death penalty are acceptable, while errors imposing it are not.[111]

II. *MILLS V. MARYLAND:* THE SUPREME COURT ADHERES TO THE ARBITRARY IMPOSITION OF MERCY

A. Development of the Maryland Death Penalty Statute

The Maryland death penalty statute at issue in the *Mills* decision was the product of the Maryland General Assembly's careful drafting and revising in

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for her participation in the robbery of a pawn shop. Lockett allegedly drove the getaway vehicle. *Id.* at 589-90.

107. The *Lockett* Court's definition of relevant mitigating evidence was any aspect of the defendant's character or the nature of the offense. *Id.* at 604. In *California v. Brown,* the Court held that "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" is not mitigating evidence. 479 U.S. 538, 542-43 (1987).

108. *Lockett,* 438 U.S. at 604. The Court struck down the Ohio death penalty statute because it allowed for the consideration of only three mitigating factors. *Id.* at 608. The three factors were:

> 1) the victim of the offense induced or facilitated [the offense];
> 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; and
> 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.

Id. at 607 (citing OHIO REV. CODE ANN. § 2929.04(B) (1975)). The Court concluded that once the sentencing authority established the absence of these three mitigating circumstances, the statute mandated the death penalty. *Lockett,* 438 U.S. at 608. The statute, however, did not provide for the consideration of the defendant's intent, the defendant's comparatively minor role in the offense, or the defendant's age. *Id.* The Court held that the death penalty statute was incompatible with the eighth and fourteenth amendments because it provided for too limited a range of mitigating circumstances. *Id.* By holding as unconstitutional a state statute that limits the number of possible mitigating circumstances, "*Lockett* represents an effort by the Court to further individualize the sentencing procedure in capital cases." Combs, *supra* note 11, at 34.

109. Comment, *Dark Years on Death Row: Guiding Sentencer Discretion After Zant, Barclay & Harris,* 17 U.C. DAVIS L. REV. 689, 699 (1984) (the "Furman-Lockett Paradox").

110. *Id.*

111. *Id.* This view of *Lockett* thus holds *Furman* to preclude the arbitrary and capricious imposition of death, not of mercy. *Id.*

compliance with previous Supreme Court decisions. Originally, Maryland's death penalty statute endowed the sentencing authority with unbridled discretion to impose capital punishment unless the jury specified "without capital punishment" in its verdict.[112] The Maryland Court of Appeals, in response to *Furman,* declared Maryland's discretionary death penalty statute unconstitutional.[113] The Maryland court interpreted *Furman,* as did many state courts,[114] to mean that the non-mandatory imposition of the death penalty was unconstitutional.[115] Accordingly, the Maryland General Assembly revised its death penalty statute in 1975. The statute required the automatic imposition of capital punishment for narrowly defined first degree murder convictions.[116]

After the *Woodson* decision, the Maryland Court of Appeals followed suit by holding Maryland's mandatory death penalty statute unconstitutional.[117] Correspondingly, the Maryland General Assembly revised the death penalty statute. The new capital punishment statute[118] provided for bifurcated proceedings to determine separately guilt from sentencing;[119] a requisite finding of at least one aggravating circumstance;[120] a list of eight aggravating circumstances[121] to be weighed against[122] seven specific mitigating factors;[123]

112. Note, *infra* note 116, at 876 n.10 (citing MD. CODE ANN. art. 27, § 413 (1971)(repealed 1975)).

> Every person convicted of murder in the first degree, his or her aiders, abettors and counsellors, shall suffer death or undergo a confinement in the penitentiary of the [S]tate for the period of their natural life, in the discretion of the court before whom such person may be tried; provided, however, that the jury in a murder case who render [sic] a verdict of murder in the first degree, may add thereto the words "without capital punishment," in which case the sentence of the court shall be imprisonment for life . . . .

Id.

113. Bartholomey v. State, 267 Md. 175, 184, 297 A.2d 696, 701 (1972).

114. *See supra* note 78.

115. *Bartholomey,* 267 Md. at 184, 297 A.2d at 701; Mills v. State, 310 Md. 33, 81, 527 A.2d 3, 26 (1987) (McAuliffe, J., dissenting) ("Unfortunately, we read *Furman* as holding 'that the death penalty is unconstitutional when its imposition is not mandatory.' "), *vacated,* 108 S. Ct. 1860 (1988).

116. Note, *Tichnell v. State - Maryland's Death Penalty: The Need for Reform,* 42 MD. L. REV. 875, 877 (1983) (citing MD. ANN. CODE art. 27, § 413 (1976) (repealed 1978)).

117. Blackwell v. State, 278 Md. 466, 471-73, 365 A.2d 545, 548-49 (1976), *cert. denied,* 431 U.S. 918 (1977). The court interpreted the Maryland statute as lacking "any clear or precise guidelines enabling the sentencing authority to focus [upon] and consider particularized mitigating factors." *Id.* at 472-73, 365 A.2d at 549.

118. MD. ANN. CODE art. 27, § 413 (Supp. 1980).

119. *Id.* § 413(a).

120. *Id.* § 413(d), (f).

121. These same eight aggravating circumstances were listed in the 1975 and 1987 laws but the wording was somewhat different. *See,* Mills v. State, 310 Md. 33, 82, 527 A.2d 3, 27 (1987) (McAuliffe, J., dissenting). The aggravating circumstances were: i) the defendant committed

and mandatory appellate review.[124] Two days after the revised Maryland

the murder at a time when he was confined or under sentence of confinement to any correctional institution in this State; ii) the defendant committed the murder in furtherance of an attempt to escape from or evade the lawful custody, arrest, or detention of or by a law enforcement officer, correctional officer, or guard; iii) the victim was a hostage taken or attempted to be taken in the course of a kidnapping or an attempt to kidnap; iv) the victim was a child abducted in violation of section 2 of this article; v) the defendant committed the murder pursuant to an agreement or contract to commit the murder for pecuniary gain; vi) at the time of the murder, the defendant was under a sentence of life imprisonment; vii) the defendant committed more than one offense of murder in the first degree arising out of the same or separate incidents; and viii) the defendant committed the murder while committing or attempting to commit robbery. MD. ANN. CODE art. 27, § 413(d) (1975).

The Maryland General Assembly kept the eight aggravating circumstances and included two additional aggravating circumstances upon repeal of the 1975 law: i) the victim was a law enforcement officer who was murdered while in the performance of his duties, and ii) the defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration. Provision (viii) above has added the crimes of arson, rape or sexual offense in the first degree to the list. MD. ANN. CODE art. 27, § 413(d) (1987).

122. MD. ANN. CODE art. 27, § 413(h).

123. *Id.* § 413(g)(1)-(7). The mitigating circumstances are: 1) the defendant has not previously (i) been found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. A "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence; 2) the victim was a participant in the defendant's conduct or consented to the act which caused the victim's death; 3) the defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution; 4) the murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance; 5) the youthful age of the defendant at the time of the crime; 6) the act of the defendant was not the sole proximate cause of the victim's death; 7) it is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society. *Id.*

124. *Id.* § 414(a). The Supreme Court has never declared that the Constitution required appellate review of death sentences. Special Project, *supra* note 11, at 1194. However, several of the Court's decisions suggested that appellate review is "an important additional safeguard" in a capital sentencing scheme. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 198, 206 (1976); *see also* Proffitt v. Florida, 428 U.S. 242, 253, 258-60 (1976) (plurality opinion); Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion).

The basis for requiring appellate review of death sentences stems from the nature of the punishment. Due to the unique and final nature of the death penalty, as compared with other forms of punishment, the Court has recognized "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson,* 428 U.S. at 305; *see* Special Project, *supra* note 11, at 1192-98.

Every state death penalty statute includes automatic appellate review. *Id.* at 1241. There are essentially three components of appellate review, although each state statute varies as to which components are implemented. The three components are: a comparative proportional-

death penalty statute became effective,[125] the Supreme Court decided *Lockett v. Ohio.* The Maryland legislature responded to *Lockett* by including an eighth mitigating circumstance, a catch-all provision that allowed the sentencing authority to consider any relevant mitigating factor.[126]

B. Mills v. State

In 1985, a Maryland state court jury sentenced Ralph Mills to death for killing his cellmate.[127] Mills appealed to the Court of Appeals of Maryland, arguing that the Maryland death penalty statute, as applied to him, was unconstitutionally mandatory.[128] Mills maintained that the statute required the jury to impose the death penalty if it unanimously found that an aggravating circumstance existed, but could not agree unanimously on the existence of a mitigating circumstance.[129] If the jury could not agree unanimously on the existence of any one mitigating circumstance, the statute precluded the jury from considering any relevant mitigating factors.[130] Such

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ity review of how defendant's sentence compares with sentences given to defendants convicted of similar crimes, *id.* at 1189-90; a procedural review of whether the sentencing authority applied the statutory guidelines properly, *id.* at 1190-91; and a narrowing function, which allows the reviewing court to narrow a potentially broad or vague guideline to within constitutionally permissible bounds, *id.* at 1191.

125. Mills v. State, 310 Md. 33, 82-83, 527 A.2d 3, 27 (1987), *vacated,* 108 S. Ct. 1860 (1988).

126. *Id.* at 83, 527 A.2d at 27. The legislature enacted Chapter 521 of the Laws of 1979 to add this eighth mitigating circumstance: "8) Any other facts which the jury or the court specifically sets forth in writing that it finds as mitigating circumstances in this case." MD. ANN. CODE art. 27, § 413 (g)(8) (1987).

The Court of Appeals of Maryland subsequently ruled that the capital sentencing procedures in Sections 412-414 of Article 27 of the Maryland Code comply with the United States Supreme Court guidelines. Tichnell v. State, 297 Md. 432, 447-48, 468 A.2d 1, 8-10 (1983), *cert. denied,* 466 U.S. 993 (1984). The Court of Appeals of Maryland held that the Maryland statute complied with the three methods of guiding the discretion of the sentencing authority: by providing for a bifurcated trial procedure; by imposing the death penalty only in cases where the sentencing authority found at least one aggravating circumstance, which outweighed any existing mitigating circumstance(s); and by requiring an automatic appellate review of all death sentences. *Id.* at 448-49, 468 A.2d at 9-10.

The *Mills* Court did not discuss whether the Maryland death penalty statute itself was constitutional. Rather, the Court addressed whether the trial court properly instructed the jury so as to allow it to consider the statutory provisions in a constitutional manner. Mills v. Maryland, 108 S. Ct. 1860, 1863 (1988).

127. *Mills,* 310 Md. at 39, 527 A.2d at 5-6.

128. *Id.* at 49, 527 A.2d at 10-11.

129. Mills v. Maryland, 108 S. Ct. 1860, 1864 (1988). Essentially, if one, some, or all of the jurors believed a mitigating circumstance existed, but not all twelve agreed as to the same mitigating factor, no mitigating circumstance would be considered. *Mills,* 310 Md. at 89, 527 A.2d at 30 (McAuliffe, J., dissenting).

130. *Mills,* 108 S. Ct. at 1866. Mills' defense counsel attempted to convince the jury that four mitigating circumstances existed, namely: petitioner's relative youth (20 years old); his

an effect, Mills argued, directly violated the *Lockett* rule.[131]

The court of appeals declared that the instructions to the jury were clear.[132] The jurors were required to agree unanimously both to the existence or absence of any mitigating factors.[133] The court determined that a "no" marked next to a mitigating circumstance listed on the verdict form represented the jury's unanimous decision of the absence of any mitigating factors.[134] Consequently, the court affirmed Mills' conviction.[135]

The dissenting opinion in the court of appeals sharply disagreed with the majority's views.[136] The dissent argued that both the judge's and verdict form's instructions allowed the jury reasonably to conclude that a "no" marked on the form beside a mitigating circumstance represented the jury's inability to agree unanimously on the existence of the mitigating circumstance. It did not represent the jury's unanimous decision that the mitigating circumstance did not exist.[137] Thus, the dissent maintained that the ambiguous nature of the instructions unconstitutionally precluded the jury from considering any mitigating factor during the sentencing determination.[138]

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mental infirmity; his lack of future dangerousness; and the state's failure to attempt to rehabilitate him while he was incarcerated. *Id.* at 1863.

131. *Id.* at 1866; *see* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[T]he sentencer [may] 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.").

132. *Mills,* 310 Md. at 58, 527 A.2d at 15.

133. *Id.*

134. *Id.* Moreover, common law and Maryland statutory law both required jury unanimity on all critical issues, *id.,* and the presence or absence of an aggravating or mitigating circumstance, as well as weighing these circumstances against each other, constituted "ultimate issues," according to the Court. *Id.* at 60, 527 A.2d at 16.

135. *Id.* at 63, 527 A.2d at 17.

136. Mills v. Maryland, 108 S. Ct. 1860, 1864 (1988). Judge McAuliffe maintained that had the verdict form stated " 'we unanimously find beyond a reasonable doubt that the following aggravating circumstance(s) exist,' " followed by a list of aggravating circumstance(s), the jury would have had no difficulty in marking only those aggravating circumstance(s) that they unanimously found to exist. *Mills,* 310 Md. at 77, 527 A.2d at 24 (McAuliffe, J., dissenting). Moreover, this language, if used on the form, would have prevented the jury from marking, either with yes or no, those circumstances about which they disagreed. *Id.* Judge McAuliffe further maintained that the Maryland General Assembly did not intend to require a unanimous finding as to an historic fact (a fact which leads up to the determination of any ultimate issue essential to the verdict, namely the non-existence of a mitigating circumstance). *Id.* at 84, 527 A.2d at 28.

137. *Id.* at 91, 527 A.2d at 31.

138. *Id.*

C. Mills v. Maryland

In an effort to resolve whether the jury's interpretation of the sentencing instructions as applied to Mills was unconstitutionally mandatory,[139] the Supreme Court granted certiorari.[140] The majority[141] in *Mills v. Maryland* analyzed whether a reasonable jury would have understood the sentencing instructions from the trial judge and the verdict form according to Mills' interpretation[142] or the court of appeals' interpretation.[143] The Court maintained that it would uphold the death sentence only if it could rule out Mills' interpretation of the jury instructions.[144]

The Court pointed out several reasons why it could not reject Mills' interpretation and instead exclusively adopt the court of appeals' analysis. First, neither the judge nor the verdict form instructed the jury that, in the case of the inability to agree unanimously, it could leave an answer blank.[145] The Court found this lack of instruction impermissible because it forced the jury to answer "no" to a mitigating factor, although one or more jurors found that the factor existed.[146] Furthermore, by not instructing the jury that it could leave an answer blank, the Court determined that the instructions pos-

139. *Mills*, 108 S. Ct. at 1863.

140. 108 S. Ct. 484 (1988). The Court noted that generally a reviewing court must set aside a verdict if the court is uncertain whether that verdict possibly rested on an unconstitutional ground. *Mills*, 108 S. Ct. at 1866; *see, e.g.*, Yates v. United States, 353 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-68 (1931). This rule has particular force when capital punishment is involved. The Supreme Court requires even greater certainty that the jury's conclusions rested on proper grounds when it reviews death sentences. *Mills*, 108 S. Ct. at 1866; *see, e.g.*, Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the [e]ighth and [f]ourteenth [a]mendments[.]"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused.").

141. Justice Blackmun wrote the opinion for the Court. Justices Brennan, Marshall, White, and Stevens joined. Justices Brennan and White filed concurring opinions. Justice Brennan maintained that the death penalty in all circumstances constitutes cruel and unusual punishment prohibited by the eighth and fourteenth amendments. *Mills*, 108 S. Ct. at 1872.

142. *See supra* notes 128-31 and accompanying text.

143. *Mills*, 108 S. Ct. at 1866; *see* Francis v. Franklin, 471 U.S. 307, 315-16 (1985) ("The question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning") (citing Sandstrom v. Montana, 442 U.S. 510, 516-17 (1979) (which held that the state court "is not the final authority on the interpretation which a jury could have given the instruction.").

144. *Mills*, 108 S. Ct. at 1867.

145. *Id.* at 1867-68. Rather, the probable inference for the jurors was that " 'no' is the opposite of 'yes' and therefore the appropriate answer to reflect an inability to answer a question in the affirmative." *Id.* at 1867.

146. *Id.* at 1868.

sibly confused the jury as to how it should weigh any mitigating circumstances against the aggravating circumstances.[147] Moreover, the majority found it significant that the appellate court majority's reading of the statute completely astonished the dissenting judge of the court of appeals. The Court noted that the dissenting appellate judge claimed that the majority's appellate interpretation "appear[ed] out of the blue after nearly ten years of extensive litigation involving this statute."[148] Finally, the Supreme Court regarded the court of appeals' adoption[149] of a new verdict form[150] as additional evidence illustrating the ambiguous nature of the older form's instructions.[151] The Court held that there was a "substantial probability" that reasonable jurors would have been precluded from considering any or all mitigating evidence.[152] Because it could not dismiss the possibility of the verdict resting on an improper ground, the Court ruled that the imposition of the death penalty was unconstitutional.[153]

The Court's dissenting opinion[154] disagreed foremost with the standard of review[155] that the majority used in determining the jury's interpretation of

147. *Id.*

148. *Id.* at 1869 (citing Mills v. State, 310 Md. 33, 94, 527 A.2d 3, 33 (1987), *vacated*, 109 S. Ct. 1860 (1988)). The dissenting judge remarked that twenty-five state cases utilized the verdict form, and "no answer as to the existence of mitigating circumstances was ever left blank." *Mills*, 108 S. Ct. at 1867 (citing *Mills*, 310 Md. at 94 n.9, 527 A.2d at 33 n.9).

149. The court of appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, and may prescribe forms for the court or jury's use in making its written findings and determinations of sentence. *Mills*, 108 S. Ct. at 1869; *see* MD. ANN. CODE art. 27, § 413(l) (1987).

150. MD. RULE PROC. 4-343(e) (amended July 27, 1987, effective August 17, 1987).

151. *Mills*, 108 S. Ct. at 1869. The section concerning the mitigating circumstances was completely rewritten to provide the jury three response options for each listed mitigating circumstance. The jury may declare that i) it unanimously finds the mitigating circumstance to exist; ii) it unanimously finds the mitigating circumstance does not exist; or iii) one or more of the jurors finds that the mitigating circumstance exists. *Id.* Moreover, the new form expressly requires the jury to write down any additional mitigating factor(s) not listed but either agreed upon unanimously or found by one or more jurors. *Id.; see also* MD. RULE PROC. 4-343.

Form 4-343 in effect rejects Judge McAuliffe's argument in *Mills v. State* that the unanimity requirement does not apply to historic questions of fact, namely the nonexistence of a mitigating factor.

152. *Mills*, 108 S. Ct. at 1870. "When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976).

153. *Mills*, 108 S. Ct. at 1870. The Supreme Court vacated the judgment of the court of appeals with regard to the imposition of the death penalty and remanded the case for resentencing.

154. *Id.* at 1872. Chief Justice Rehnquist wrote the dissenting opinion. Justices O'Connor, Scalia, and Kennedy joined in the dissent.

155. *Id.* at 1875 ("unless we can rule out the substantial possibility that the jury may have rested its verdict on an improper construction of the sentencing instructions and jury charges, petitioner's sentence must be set aside."); *see id.* at 1867 (Blackmun, J.).

the statute.[156] The dissent maintained that the relevant inquiry is not whether the jury could possibly misinterpret the sentencing instructions, but rather whether a reasonable juror could have understood the charge.[157] Indeed, the dissent argued that the degree of assurance required by the majority when determining whether the jury may have rested its verdict on an improper ground is an unobtainable goal due in large part to the secret nature of the jury proceedings and the inability to ascertain the judgment of each individual juror.[158]

The dissent further maintained that a reasonable juror would understand from the judge's instructions and the verdict form that a negative response signified the jury's unanimous finding that no mitigating circumstance existed.[159] The dissent disagreed with the majority's reliance on the *Lockett* rule that the issue is whether the jury heard all extenuating evidence.[160] Rather, the dissent argued that the proper inquiry was whether a reasonable jury's interpretation of the sentencing instructions would have allowed the consideration of this mitigating evidence in a constitutional manner.[161] Finding that only one reasonable interpretation of the sentencing instructions was possible[162] under the "reasonable juror" standard,[163] the dissent voted to uphold the death sentence.[164]

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156. *Id.* at 1875 (Rehnquist, C.J., dissenting).

157. *Id.* at 1873. The dissent cited California v. Brown, 479 U.S. 538 (1987), to support its position. However, the majority also cited *Brown*. *Mills*, 108 S. Ct. at 1866. Thus, the majority and dissent applied the rule laid out in *Brown* differently to support their own positions.

158. *Mills*, 108 S. Ct. at 1875; *see* FED. R. EVID. 606. The Notes of the Advisory Committee for Rule 606(b) state:

> Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statement, discussions, mental and emotional reaction, votes and any other feature of the process. . . . The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment.

Id.

159. *Mills* at 1873. "Over and over again the trial court exhorted the jury that *every* determination made on the sentencing form had to be a unanimous one." *Id.* at 1874.

160. *Id.* at 1875. The dissent claimed that undoubtedly the jury heard all mitigating evidence. However, the majority did not consider the issue as whether or not the jury heard all mitigating evidence. Rather, the majority concentrated on what the jury considered when it determined whether to impose the death penalty.

161. *Id.* at 1875.

162. *Id.* at 1873 ("[T]here is absolutely no reason to think that this meaning was not abundantly plain to the jurors acting under these instructions.").

163. *Id.* at 1875.

164. *Id.*

D. Faulty Sentencing Instructions in Death Sentence Determinations

The history of the *Mills* case alone supported the majority opinion in *Mills v. Maryland.* If the Supreme Court and the Maryland Court of Appeals could not agree on a single interpretation of the sentencing instructions, it was unlikely that a jury of lay people could have properly interpreted the instructions either. The majority in *Mills* recognized the substantial possibility of juror misinterpretation and consequently refused to uphold the death sentence.[165] The majority refused to allow the possibility that even one juror was precluded from considering a mitigating factor due to faulty sentencing instructions.[166]

The majority opinion reflected the attitude that if a jury has the responsibility of determining whether to execute a person, that person is at least entitled to the guarantee that the sentencing instructions given to the jury leave no room for misinterpretation. The majority did not overturn Mills' conviction, but merely vacated the death sentence and remanded it for resentencing.[167] Thus, the majority opinion, which refused to allow any room for error in the sentencing instructions, continued to endorse the concept of certainty in death sentence determinations that *Furman* initiated.[168]

The dissent, on the other hand, believed that there is room for uncertainty in capital cases. By using the "reasonable juror" standard,[169] the dissent ignored the central concern of the majority: that the jury may have imposed the death penalty on Mills not because it wanted to, but rather because, based on the sentencing instructions, it had to impose the death sentence.

III. *MILLS V. MARYLAND'S* EFFECT ON THE *FURMAN* TREND

A. The Furman *Trend*

The goal of capital sentencing schemes is to comply with the basic purposes behind *Furman v. Georgia,* the elimination of erratic and irregular capital sentencing caused by unbridled jury discretion.[170] Guided sentencing

165. *Id.* at 1870.
166. *Id.*
167. *Id.*
168. *Id.*
169. *See supra* notes 154-62 and accompanying text.
170. Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976). This is a far cry from the Court's reasoning in *McGautha,* which stated that the State may

> assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel.

McGautha v. California, 402 U.S. 183, 208 (1971).

discretion is the key behind a fair and reasonably consistent manner of imposing the death penalty.[171] The Supreme Court has established several guiding measures for state legislatures to adopt in their capital punishment statutes to guarantee the constitutionality of the statutes.[172] Consideration of aggravating and mitigating circumstances provides for individualized sentencing because by viewing the character of the defendant, his record, and the circumstances of the offense,[173] the jury evaluates the totality of the circumstances in determining whether it, as a voice of community values, should impose a penalty less severe than death. The rule in *Lockett,* which required that the sentencer consider the individual characteristics of the offender,[174] acknowledged the idea that a consistency which results from ignoring individual differences is in effect no consistency.[175] Mitigating circumstances provide the possibility of leniency.[176] The consideration of unlimited mitigating evidence precludes capricious death sentence determinations and provides for capricious mercy determinations.[177]

B. Mills v. Maryland *Continued the* Furman *Trend*

In *Mills v. Maryland,* the Court reemphasized the necessity of a reliable decision before imposing the death penalty in order to guarantee that the sentencing authority exercised its guided discretion in a fair manner pursuant to the fourteenth amendment's due process clause and the eighth amendment's prohibition against cruel and unusual punishment.[178] In refusing to uphold a death sentence returned by a jury that may have been precluded from considering all mitigating evidence,[179] the majority in *Mills v. Maryland* recognized the "qualitative difference"[180] between the death penalty

171. Special Project, *supra* note 11, at 1134-35.

172. These measures include: 1) bifurcated trial and sentencing proceedings; 2) a list of statutory aggravating circumstances; and 3) automatic judicial review of death sentences. *See* Comment, *supra* note 109, at 690.

173. *See* Eddings v. Oklahoma, 455 U.S. 104, 110-12 (1982); Lockett v. Ohio, 438 U.S. 586, 601-05 (1978); Proffitt v. Florida, 428 U.S. 242, 251-52 (1976); Gregg v. Georgia, 428 U.S. 153, 197 (1976); Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-34, 636-37 (1976).

174. *Lockett,* 438 U.S. at 604-05.

175. *Eddings,* 455 U.S. at 112.

176. *See supra* note 30.

177. Comment, *supra* note 109, at 699.

178. Special Project, *supra* note 11, at 1132.

179. Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988) ("Under our cases, the sentencer must be permitted to consider all mitigating evidence. 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.").

180. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

and other punishments.[181]

Furman and its progeny established a method of guaranteeing a capital offender his constitutional rights by requiring individualized sentencing and consistency in death sentence determinations.[182] The *Mills* decision extended this method of guaranteeing consistency one step further. Not only must individualized sentencing be present in death penalty determinations, but if there is even a possibility that the jury did not consider every mitigating factor, the sentence will not stand. The *Mills* decision illustrated the majority's uneasiness toward capital punishment. Although the Court did not hold capital punishment unconstitutional per se,[183] the Court refused to tolerate any risk of arbitrariness or unfairness due to faulty sentencing instructions. Accordingly, the Court has established another mechanism to prevent the arbitrary imposition of the death penalty.

Unlike *Furman,* the *Mills* Court did not discuss how broad the sentencing authority's discretion could reach before it actually infringed on the offender's right to individualized sentencing. Rather, the *Mills* Court assumed that caselaw has adequately determined how to guarantee a fair and constitutional sentencing procedure.[184] The crux of the *Mills* decision is the review of the sentencing instructions to determine whether they violated the *Lockett* rule. After years of developing a constitutionally sound method of

181. The death penalty is final and "is unique in its total irrevocability." Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). The majority in *Mills* recognized the unique quality of the death penalty by imposing such a strict standard on the review of death sentences, namely that if there is a possibility that the sentence rested on improper grounds, it must be set aside. *Mills,* 108 S. Ct. at 1866. It appears that by putting such a high standard of review on death sentences, the majority in *Mills* was interested in having the sentencing procedures following constitutional guidelines as closely as possible. *See* Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("Given the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases.").

182. *See supra* notes 170-75 and accompanying text.

183. The *Furman* Court did not rule on the constitutionality of the death penalty itself, although Justices Brennan and Marshall have consistently argued that capital punishment is cruel and unusual per se. *Furman,* 408 U.S. at 305 (Brennan, J., concurring); *id.* at 370 (Marshall, J., dissenting); Gregg v. Georgia, 428 U.S. 153, 228-31 (1976) (Brennan, J., dissenting); *id.* at 231 (Marshall, J., dissenting) (both Justice Brennan's and Justice Marshall's opinions also applied to Proffitt v. Florida, 428 U.S. 242 (1976), and Jurek v. Texas, 428 U.S. 262 (1976)); *Lockett,* 438 U.S. at 619 (Marshall, J., concurring in judgment) (Justice Brennan took no part in consideration or decision of the *Lockett* case); *Mills,* 108 S. Ct. at 1872 (Brennan, J., concurring).

184. *See Mills,* 108 S. Ct. at 1865. The Court cited cases holding that the sentencer may not be precluded from considering mitigating circumstances. *See* Skipper v. South Carolina, 476 U.S. 1, 4 (1986); Eddings v. Oklahoma, 455 U.S. 104, 110, 114 (1982); *Lockett,* 438 U.S. at 604. Whether the sentencing instructions precluded the *Mills* jury from considering any mitigating circumstances was central to the discussion in the majority opinion. *Mills,* 108 S. Ct. at 1870.

implementing the death penalty, the *Mills* Court required an additional procedural safeguard.[185] By requiring certainty in the sentencing instructions and consequently in the imposition of death sentences, the *Mills* Court maintained that the method developed from *Furman* and its progeny, in some cases, may not be a sufficient safeguard to prevent arbitrary and inconsistent death penalty determinations.

C. *The Future Effect of* Mills v. Maryland

The *Mills v. Maryland* decision essentially required a stricter standard of review of sentencing instructions used in death sentence determinations. After *Mills,* if the possibility exists that a single juror was precluded from considering any mitigating factor due to faulty instructions, the reviewing court must vacate the death sentence.[186] The purpose of *Mills* was to guarantee certainty in death sentences. The *Mills* decision probably will result in reviewing courts vacating several death sentences.[187] The Supreme Court's decision in *Mills v. Maryland* illustrated the majority's willingness to continue protecting capital offenders from unconstitutional death sentences. The Supreme Court has consistently made it more difficult for the state to execute its citizens, and *Mills v. Maryland* stands as another constitutional roadblock to the execution chamber.

IV. CONCLUSION

The eighth amendment prohibits cruel and unusual punishment, and consequently, the Supreme Court has devoted much attention to determining the constitutionality of death penalty statutes. The decision in *Mills v. Maryland* represented a continuation of the trend established in *Furman v. Georgia.* In *Mills,* the majority concurred with the *Furman* Court that capital punishment statutes must guarantee the fair and consistent imposition of the death penalty through guided sentencing discretion and individualized sentencing procedures. The majority went a step further, however, by refusing to uphold a death sentence if a possibility exists that the jury was precluded from considering any mitigating factor. The basis for this refusal was

185. *See Mills,* 108 S. Ct at 1866. The Court argues that greater certainty is required, and always has been, in reviewing death sentences. *Id.* The additional procedural safeguard is the requirement that a death sentence be vacated if there is a possibility that it rests on unconstitutional grounds. *Id.* Thus, this safeguard already technically existed. However, the *Mills* majority is guaranteeing that reviewing courts implement it when considering death sentences.

186. *See, e.g.,* Lloyd v. North Carolina, 109 S. Ct. 38, 39 (1988); State v. Bey, 112 N.J. 123, 130-31, 548 A.2d 887, 890 (1988); State v. Koedatich, 112 N.J. 225, 325-27, 548 A.2d 939, 991-92 (1988); State v. Colvin, 314 Md. 1, 25, 548 A.2d 506, 517-18 (1988); Jones v. State, 314 Md. 111, 112, 549 A.2d 17, 17 (1988); State v. Hines, 758 S.W.2d 515, 524 (Tenn. 1988).

187. *See supra* note 186.

the nature of the punishment itself. Therefore, consideration of any mitigating factor that might call for a punishment less severe than death is not the last step before execution. It is up to the reviewing court to guarantee that the jury was sufficiently guided and directed, through proper instruction, such that it afforded the defendant individualized sentencing, or the death sentence must be vacated.

Mills v. Maryland was a compassionate decision and a good decision. Because it granted more protection to the convicted capital offender, the Court helped reduce the possibility that the jury would base its sentencing determination on unconstitutional grounds. The *Mills* decision, which followed from a history of aversion toward arbitrary and capricious capital punishment in American society, reemphasized the Court's recognition of the need for reliability when imposing death sentences.

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