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Sifting through the Fallout of North Carolina's Death Penalty Jurisprudence: Getting Down to the Real McKoy

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Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.[1]

North Carolina, like many states, has struggled to fashion capital sentencing guidelines that accommodate both the constitutional protections required by the eighth and fourteenth amendments and the state's desire for a forceful and extensively utilized death penalty.[2] The United States Supreme Court has made clear that capital sentencers must not wield limitless discretion;[3] yet the Court has also held that states may not remove the sentencer's discretion altogether.[4] Thus, capital sentencers must exercise discretion in a manner that is constitutionally appropriate.[5]

One way in which states have guided the discretion of capital sentencers has been to require them to weigh aggravating and mitigating circumstances at a separate sentencing phase to determine whether the death penalty is appropriate in each case.[6] North Carolina jury instructions and verdict forms require jurors

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

2. For discussions of the evolution of capital sentencing in North Carolina, see State v. McKoy, 327 N.C. 31, 39-42, 394 S.E.2d 426, 431-32 (1990); Exum, *Symposium Address: The Death Penalty in North Carolina*, 8 CAMPBELL L. REV. 1 (1985); Weissman, *Sentencing Due Process: Evolving Constitutional Principles*, 18 WAKE FOREST L. REV. 523 (1982); Comment, *Vague and Overlapping Guidelines: A Study of North Carolina's Capital Sentencing Statute*, 16 WAKE FOREST L. REV. 765 (1980); Note, *Criminal Procedure—North Carolina's Capital Sentencing Procedure: The Struggle for an Acceptable Jury Instruction*, 62 N.C.L. REV. 833 (1984); Note, *Criminal Procedure—Limitations Upon the Jury's Discretion in Capital Punishment Sentencing*—State v. Pinch, 19 WAKE FOREST L. REV. 621 (1983).

3. *See infra* notes 42-44 and accompanying text.

4. *See infra* notes 45-48 and accompanying text.

5. *See infra* notes 49-64 and accompanying text.

6. North Carolina's capital criminal procedure is bifurcated into a guilt phase and a sentencing phase. After the guilt phase of the trial, both the State and the defendant are given the opportunity to offer evidence relevant to sentencing:

> After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:
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> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;
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> (2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and
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> (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

N.C. GEN. STAT. § 15A-2000(b) (1988).

> In order to recommend a sentence of death, the jury must find three things:
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> (1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and
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> (2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and
>
> (3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

Id. § 15A-2000(c).

to unanimously find both aggravating and mitigating circumstances before giving either any weight in the final sentencing decision. The Supreme Court disapproved unanimity requirements for mitigating circumstances in *Mills v. Maryland*,[7] and the Court squarely addressed the unanimity issue in *McKoy v. North Carolina*.[8] In *McKoy*, the Court unequivocally held unconstitutional any requirement that a jury unanimously find mitigating circumstances before giving them any weight in sentencing.[9]

This Note examines the progression of *McKoy* through the North Carolina and United States Supreme Courts and the case's implications for imposition of the death penalty in North Carolina. Studying eighth amendment jurisprudence through *Mills*, the Note demonstrates that *McKoy* was a logical and necessary application of *Mills*. The Note outlines the analysis that will be required of North Carolina courts in resentencing in light of *McKoy* the many defendants whose juries were given unconstitutional instruction. The Note concludes that the *McKoy* decision eliminates any doubt left after *Mills* regarding the constitutionality of unanimity requirements for jury findings of mitigating circumstances.

A jury found Dock McKoy guilty of first degree murder.[10] The trial then proceeded to the sentencing phase, in which the jury addressed four successive issues in order to decide whether to impose the death penalty. First, the jury considered whether there were any aggravating circumstances and unanimously found two such circumstances propounded by the prosecution.[11] Second, the jury assessed whether any mitigating circumstances existed.[12] The trial judge instructed the jury that it had to be unanimous on any mitigating circumstances it found.[13] Of eight possible mitigating circumstances, the jury unanimously found only two to be present.[14] Third, the jury determined that the two mitigat-

7. 486 U.S. 367, 384 (1988) ("We conclude that there is a substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. . . . We therefore vacate the judgment.").

8. 110 S. Ct. 1227 (1990).

9. *Id.* at 1228-29.

10. State v. McKoy (*McKoy I*), 323 N.C. 1, 6, 372 S.E.2d 12, 14 (1988), *vacated sub nom.* McKoy v. North Carolina, 110 S. Ct. 1227, *on remand sub nom.* State v. McKoy (*McKoy II*), 327 N.C. 31, 394 S.E.2d 426 (1990).

Dock McKoy's conviction stemmed from an incident on December 22, 1984, when the Anson County Sheriff's Department responded to a call from McKoy's neighbor, who reported that McKoy had been firing shots into the air. *Id.* at 6, 372 S.E.2d at 15. McKoy caused a great disturbance in the neighborhood by firing three shots in the direction of a teenager. *Id.* Two deputies responded to the complaint and asked McKoy to come outside. *Id.* McKoy first responded that he would kill them if they did not leave, and then fired one shot that hit an officer; the officer later died from the wound. *Id.* McKoy surrendered only after the officers threw tear gas into his house and engaged him in a brief exchange of gun fire. *Id.*

11. The jury found that "McKoy had been previously convicted of a felony involving violence to the person . . . and [that] the murder was committed against a deputy sheriff while engaged in the performance of his official duties." *McKoy II*, 327 N.C. at 35, 394 S.E.2d at 428.

12. The verdict form explicitly required the jury to "answer 'no' to any mitigating circumstances on which the jurors were unable to reach unanimous agreement." Brief for the Petitioner at 3, McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (No. 88-5909).

13. *McKoy II*, 327 N.C. at 35, 394 S.E.2d at 428.

14. The jury found:

ing circumstances did not outweigh the two aggravating circumstances.[15] Finally, the jury found that when balanced against the mitigating circumstances, the aggravating circumstances were sufficiently substantial to warrant the death penalty.[16] Having so answered these four issues, the jury was obligated to sentence McKoy to death.

In *State v. McKoy* (*McKoy I*), the North Carolina Supreme Court heard Dock McKoy's appeal as of right and addressed the constitutionality of the sentencing phase instruction that required the jury to consider only those mitigating circumstances it unanimously found.[17] McKoy argued that the United States Supreme Court's then recent decision in *Mills v. Maryland*[18] compelled the conclusion that such an instruction violated the eighth and fourteenth amendments,

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[1]. [That] [t]he capacity of Dock McCoy [sic] to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

[2]. That Dock McCoy [sic] has borderline intellectual functioning with a [sic] I.Q. score of 74.

Id. at 36, 394 S.E.2d at 428.

The jury failed to find unanimously, and answered "no" to, the following mitigating circumstances submitted to it:

[1]. This murder was committed while Dock McCoy [sic] was under the influence of mental or emotional disturbance.

[2]. The age of Dock McCoy [sic] at the time of this murder is a mitigating circumstance.

[3]. That for several decades Dock McCoy [sic] has exhibited signs of mental or emotional disturbance or defect that went untreated.

[4]. That Dock McCoy's [sic] mental or emotional disturbance is aggravated by his poor physical health.

[5]. Dock McCoy's [sic] ability to remember the events of December the 22nd, 1984, is actually impaired.

[6]. Any other circumstance or circumstances arising from the evidence which you the jury deem to have mitigating value.

Id. at 36, 394 S.E.2d at 428-29.

The defense introduced evidence at trial to support these six mitigating circumstances. The evidence revealed that at the time of his arrest, McKoy had a blood alcohol level of 0.26, more than two and a half times the level of legal intoxication in North Carolina. *Id.* at 34, 394 S.E.2d at 428. The defendant was 65 when the incident occurred. *Id.* The Clinical Director of the State's forensic psychiatry unit testified "that defendant had a personality disorder. . . . [and] that defendant was under the influence of a mental or emotional disturbance at the time he shot Deputy Horne." *Id.* at 34-35, 394 S.E.2d at 428-29. A psychiatrist from Dorothea Dix Hospital testified that McKoy had suffered from emotional disturbances and disorders for many years, and that these conditions were "exacerbated when defendant was impaired by alcohol." *Id.* at 35, 394 S.E.2d at 428. On December 22, 1984, the day of the shooting in question, when McKoy's neighbor asked him why he had fired several shots into the air, McKoy responded that " 'everybody else is shooting' and 'well, it's Christmas.' " *McKoy I*, 323 N.C. at 6, 372 S.E.2d at 14. The defense produced much evidence indicating not only that McKoy was mentally impaired at the time of the shooting, but also that his recollection of the events was impaired. When McKoy took the stand to testify on his own behalf, he gave an outlandish account of what had occurred, including the following testimony:

> Some men came to the house and had [him] turn on his T.V. After the T.V. was turned on. . . . You could see us, what we were doing in the house on my T.V. After that, at least forty or fifty "transporters" gathered in front of the house. Eventually, two men came in the house and started appraising the furnishings.

Brief for the Petitioner at 30, McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (No. 88-5909) (citations omitted).

15. Record at 5, McKoy v. North Carolina, 110 S. Ct. 1227 (1990) (No. 88-5909).

16. *McKoy I*, 323 N.C. at 39, 372 S.E.2d at 33.

17. *Id.* at 30-31, 372 S.E.2d at 27-28.

18. 486 U.S. 367 (1988).

and thus mandated a reversal of his death sentence.[19] In *Mills*, the United States Supreme Court rejected Maryland's jury instructions and verdict form because the Court believed "reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance."[20] The *McKoy I* court rejected McKoy's *Mills* argument, however, and found the issue "clearly settled contrary to defendant's position."[21] The court simply reiterated its holding of an earlier case that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing."[22] The North Carolina court delineated two ways in which the North Carolina approach differed from the Maryland scheme at issue in *Mills*:

> In contrast to the Maryland procedure . . . [North Carolina law] does not mandate the death penalty where there are no mitigating circumstances and at least one aggravating circumstance, nor does it mandate the death penalty if the mitigating circumstances do not outweigh the aggravating circumstances. . . . Second, in North Carolina evidence in effect becomes legally irrelevant to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor.[23]

The court thus upheld McKoy's conviction and death sentence.

McKoy then appealed to the United States Supreme Court.[24] The Supreme Court flatly rejected both the holding and the reasoning of the North Carolina Supreme Court and vacated McKoy's death sentence.[25] Writing for the majority, Justice Marshall maintained that "[d]espite the state court's inventive attempts to distinguish *Mills*, our decision there clearly governs this case."[26] Because the North Carolina sentencing scheme permitted the jury to consider at the weighing stage only those mitigating circumstances it unanimously found, the scheme was constitutionally infirm.[27] As it noted in *Mills*, the Court exhorted that "it would be the 'height of arbitrariness to allow or require the imposition of the death penalty' where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence."[28] Such a rule, the Court recognized, would lead to the absurd result that—in a case in which several mitigating circumstances are possible—a person could be executed because the jury failed to find unanimously a particular mitigating circumstance, even though all jurors would

19. *See McKoy I*, 323 N.C. at 31, 372 S.E.2d at 28.

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

21. *McKoy I*, 323 N.C. at 31, 372 S.E.2d at 28.

22. *Id.* at 30, 372 S.E.2d at 27-28 (quoting State v. Kirkley, 308 N.C. 196, 218, 302 S.E.2d 144, 157 (1983), *overruled on other grounds*, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988)).

23. *Id.* at 40, 372 S.E.2d at 33.

24. McKoy v. North Carolina, 110 S. Ct. 1227 (1990).

25. *Id.* at 1234.

26. *Id.* at 1231.

27. *Id.*

28. *Id.* at 1232 (quoting Mills v. Maryland, 486 U.S. 367, 374 (1988)).

have found at least *some* mitigating factors present.[29]

The Court rejected the State's argument that the unanimity requirement was valid as a parallel to the requirement that aggravating factors be found by a unanimous jury. The Court held that unlike the elective consideration of aggravating circumstances, "[t]he Constitution *requires* States to allow consideration of mitigating evidence in capital cases," and "[a]ny barrier to such consideration must therefore fall."[30] Accordingly, the Court vacated McKoy's death sentence and remanded his case.

Justice Scalia wrote a dissenting opinion, in which Chief Justice Rehnquist and Justice O'Connor joined.[31] He rejected the Court's characterization of *Mills* as controlling authority on the *McKoy* question. "To be sure," he wrote, "*Mills* contains language suggesting that a unanimity requirement would contravene [prior cases holding that juries must be permitted to consider all relevant mitigating factors]. But, under the circumstances, these suggestions were plainly dicta."[32] Consequently, Justice Scalia found that the precedents upon which the majority relied were "quite simply irrelevant" to the Court's decision.[33] In addition, he criticized the Court for attempting not only to control what evidence the jury considers but also to control the way in which the jury considers it.[34]

In *State v. McKoy* (*McKoy II*),[35] the North Carolina Supreme Court addressed several issues concerning the implementation of the United States Supreme Court's holding: (1) whether the unconstitutional jury instruction was merely a trial error or was a more serious deficiency in the capital punishment statute; (2) whether *McKoy* error can be harmless error; and (3) if so, whether the error was harmless in McKoy's case. The court first held that the unconstitutional jury instruction was merely trial error and not an inherent deficiency of the statute.[36] Because the unanimity requirement came from the jury instructions and the verdict form, rather than directly from the statute, the court rejected McKoy's argument that North Carolina's entire capital sentencing scheme was invalid.[37] The sentencing statute therefore remained in effect and McKoy was not entitled to a life sentence as a matter of law, the court held.[38]

29. *Id.* at 1231-32.

30. *Id.* at 1233 (emphasis in original).

31. *Id.* at 1241 (Scalia, J., dissenting).

32. *Id.* at 1243 (Scalia, J., dissenting).

33. *Id.* at 1245 (Scalia, J., dissenting).

34. *Id.* (Scalia, J., dissenting) ("What petitioner complains of here is not a limitation upon *what* the sentencer was allowed to give effect to, but rather a limitation upon the *manner* in which it was allowed to do so—viz., only unanimously.").

35. 327 N.C. 31, 394 S.E.2d 426 (1990).

36. *Id.* at 37, 394 S.E.2d at 429.

37. *Id.* at 39, 394 S.E.2d at 430. The defendant had cited several death penalty cases that were remanded for the imposition of a life sentence. *Id.*; *see* State v. Davis, 290 N.C. 511, 227 S.E.2d 97 (1976); State v. Covington, 290 N.C. 313, 226 S.E.2d 629 (1976); State v. Waddell, 282 N.C. 431, 194 S.E.2d 19 (1973), *superseded by statute as stated in* State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979); State v. Hill, 279 N.C. 371, 183 S.E.2d 97 (1971). In rejecting McKoy's argument that he was entitled to a life sentence as a matter of law, the court distinguished each of those cases by illustrating why the relevant sentencing *statutes*, in fact, had been invalid at the time of sentencing. *McKoy II*, 327 N.C. at 40-42, 394 S.E.2d at 431-32.

38. *McKoy II*, 327 N.C. at 42-43, 394 S.E.2d at 432-33.

Next, the court rejected defendant's argument that such faulty instructions never can be harmless.[39] Because the error was of "constitutional dimension," however, the court held that the state bears the burden of proving that the error was, in fact, harmless.[40] Finally, the court was not satisfied that the State had met this burden in McKoy's case.[41] It thus remanded the case for resentencing.

For nearly twenty years, the United States Supreme Court has struggled to define constitutional parameters for systems of capital punishment. In 1972, in the watershed case *Furman v. Georgia*,[42] the Court held that a capital sentencing scheme giving juries unbridled discretion to impose or not impose the death penalty violates the eighth amendment prohibition against cruel and unusual punishment.[43] Unconstrained discretion is unconstitutional, the Court reasoned, because it permits juries to dole out capital punishment in a discriminatory and capricious manner.[44] The Court's action created the new problem of how to lead juries in their decision-making without imposing strictures so rigid that they do not allow sentencing juries the opportunity to make an individualized and particular consideration of each defendant's circumstances.[45] Some states, including North Carolina, responded to *Furman* by making capital punishment mandatory for some crimes, thereby removing all jury discretion in imposing the death penalty.[46] In *Woodson v. North Carolina*,[47] however, the Court held that a mandatory death penalty also violates the eighth amendment because it does not allow the sentencing jury to make an individualized determination of the defendant's circumstances.[48] Thus, the problem of how to narrow the discretion of juries without imposing unduly rigid strictures continued to exist. Most states answered with a system that guided the jury's discretion by requiring that the jury find certain defined aggravating circumstances before imposing the death penalty. In addition, the schemes permitted the jury to consider whether there were mitigating circumstances that made the death penalty an inappropriate punishment for the particular defendant.[49] The Court upheld such a capital sentencing scheme in *Gregg v. Georgia*.[50]

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39. *Id.* at 43-44, 394 S.E.2d at 433.

40. *Id.* at 44, 394 S.E.2d at 433.

41. *Id.* at 45, 394 S.E.2d at 433-34.

42. 408 U.S. 238 (1972).

43. *Id.* at 256-57 ("[D]iscretionary statutes are unconstitutional in their operation. They are . . . not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.").

44. *See id.*

45. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("[D]iscretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

46. The North Carolina Supreme Court held unconstitutional the statutory jury option to return a life sentence for a first degree murder conviction in State v. Waddell, 282 N.C. 431, 445, 194 S.E.2d 19, 28-29 (1973), *superseded by statute as stated in* State v. Johnson, 298 N.C. 457, 257 S.E.2d 597 (1979).

47. 428 U.S. 280 (1976).

48. *Id.* at 303 ("A . . . constitutional shortcoming of the North Carolina statute is its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.").

49. After *Woodson*, North Carolina adopted a bifurcated capital sentencing procedure. *See supra* note 6.

50. 428 U.S. 153, 207 (1976).

The Court firmly introduced the requirements for the sentencer's consideration of mitigating circumstances in the seminal case of *Lockett v. Ohio*.[51] Reaffirming that the jury or factfinder must take every individual defendant's character and history into account, and noting the impossibility of remedial measures for an executed capital sentence, the *Lockett* Court stressed that the sentencer must be permitted to weigh all relevant mitigating circumstances at trial. The Court wrote:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffered as a basis for a sentence less than death.[52]

In a concurring opinion to *Eddings v. Oklahoma*,[53] Justice O'Connor expanded upon and gave support to *Lockett* by clarifying that a "trial court's failure to consider *all* of the mitigating evidence risks erroneous imposition of the death sentence" and clearly violates *Lockett*, and is, therefore, impermissible.[54]

The question whether a unanimity requirement violates the holdings of *Lockett* and *Eddings* first reached the Supreme Court in *Mills v. Maryland*.[55] In *Mills*, a jury convicted the defendant of first degree murder for the stabbing of his cellmate in the Maryland Correctional Institution.[56] During the sentencing phase, the jury completed a verdict form divided into two sections, one for aggravating circumstances and one for mitigating circumstances.[57] The mitigating section stated: "Based upon the evidence we [the jury] unanimously find that each of the following mitigating circumstances which is marked 'yes' has been proven to exist by A PREPONDERANCE OF THE EVIDENCE and each mitigating circumstance marked 'no' has not been proven by A PREPONDERANCE OF THE EVIDENCE."[58]

On appeal to the Maryland Court of Appeals, Mills argued that the jury might have understood the jury instructions to mean that "a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and must impose the sentence of death."[59]

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51. 438 U.S. 586 (1978). Ohio's capital sentencing scheme, like North Carolina's, required an initial determination of guilt. *Id.* at 609 (appendix to opinion of the Court). A guilty verdict against the defendant for aggravated murder compelled the trial judge to sentence the defendant to death unless the judge found one of three particular mitigating circumstances. *Id.* at 611-13 (appendix to opinion of the Court). In Lockett's case, the judge did not find any of those conditions: "[T]he judge said that he had 'no alternative, whether [he] like[d] the law or not' but to impose the death penalty. He then sentenced Lockett to death." *Id.* at 594.

52. *Id.* at 604 (plurality opinion).

53. 455 U.S. 104 (1981).

54. *Id.* at 117 n.* (O'Connor, J., concurring).

55. 486 U.S. 367 (1988).

56. *Id.* at 369.

57. *Id.* at 384-89 (appendix to opinion of the Court).

58. *Id.* at 387 (appendix to opinion of the Court).

59. *Id.* at 375.

The court of appeals affirmed Mills' conviction and death sentence, but did not hold that, if Mills' interpretation of the jury instructions in fact had been adopted by the jury, the subsequent sentence would be constitutional. Instead, the appellate court simply found that such an interpretation was not reasonable.[60] The Supreme Court, however, disagreed with the Maryland court and found that members of Mills' jury indeed may have followed Mills' interpretation of the instruction.[61] The Court then held that a jury instruction which creates that possibility is unconstitutional.[62] The Court explained that such an instruction might give rise to a situation in which all twelve jurors believed there to be mitigating circumstances but, because they failed to find unanimously any one particular circumstance, they are precluded from considering any mitigating circumstances in the final sentencing phase.[63] Furthermore, such an instruction might create a situation in which one "holdout vote" could prevent the jury from considering mitigating circumstances that all eleven other jurors found present.[64] Such a result violates the *Lockett* principle that the jury not be precluded from considering any relevant mitigating evidence.

The requirement that the jury unanimously find mitigating circumstances first became part of the North Carolina capital sentencing scheme five years before *Mills*. In *State v. Kirkley*,[65] the North Carolina Supreme Court upheld the unanimity requirement, explaining that it is based on the general premise of constitutional law that "all verdicts . . . must be unanimous."[66] The court stated that the jury's ability to consider all evidence in its initial determination of whether a given mitigating circumstance exists satisfies *Lockett*.[67] As long as the jury is permitted to determine the existence of all possible mitigating factors, the *Kirkley* court held, further consideration of mitigating circumstances should be no different from that of aggravating circumstances, which the jury must unanimously find.[68] The court held that "consistency and fairness dictate that a jury unanimously find that a mitigating circumstance exists before it may be considered for the purpose of sentencing."[69] After *Kirkley*, juries in North Carolina were instructed that they could consider mitigating circumstances at the

60. *Id.* at 372. The court of appeals interpreted the statute to require unanimity on "all critical issues" and concluded, therefore, that the form required "the jury to agree unanimously in order to mark 'no' with respect to the existence of each mitigating circumstance." *Id.* If the jury could not agree unanimously to accept or reject a circumstance, the court stated that the jury should have left the blank unmarked. *Id.* at 373.

61. *Id.* at 384.

62. *Id.*

63. *Id.* at 374. It is worth noting that unanimity is not a standard of proof. Burdens of proof are standards that must be met before any particular juror may consider the evidence. For example, in McKoy's case, evidence had to be proven "beyond a reasonable doubt." *McKoy II*, 327 N.C. at 35-36, 394 S.E.2d at 428-29. Such a burden of proof is different, however, from telling an individual juror who is satisfied a defendant has met his burden of proof that he may not consider the evidence unless all other jurors are equally satisfied.

64. *See Mills*, 486 U.S. at 373-74.

65. 308 N.C. 196, 302 S.E.2d 144 (1983), *overruled on other grounds*, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

66. *Id.* at 218, 302 S.E.2d at 157.

67. *Id.* at 219, 302 S.E.2d at 157.

68. *Id.*

69. *Id.* at 218, 302 S.E.2d at 157. Justice Exum, dissenting from the *Kirkley* majority, stated

weighing stage of the capital sentencing phase only if they first found unanimously that mitigating circumstances were present. Dock McKoy's jury heard such an instruction.[70]

The United States Supreme Court made it clear in *Mills*, however, that any restraint, at any stage, on a jury's consideration of mitigating circumstances violates *Lockett*.[71] The leap from *Mills* to *McKoy v. North Carolina*, therefore, was really only a small step. If the *possibility* that the jurors in *Mills* thought they must find mitigating circumstances unanimously was unconstitutional, surely the explicit instruction in *McKoy* should also be unconstitutional. Since the decision in *McKoy v. North Carolina*, the North Carolina Supreme Court has recognized that "*McKoy* error" is present in any case in which the jury instructions at the sentencing proceeding created "an unacceptable risk that individual jurors were prevented from considering mitigating evidence in making their sentencing decision."[72]

In the wake of *McKoy v. North Carolina*, North Carolina courts must resentence all of the defendants who were sentenced under the defective jury instructions, unless the instructions were harmless. The courts will remedy the problem on a case-by-case basis as defendants petition for resentencing hearings. In evaluating the merits of a petitioner's claim, the courts will have to address four issues. The first issue concerns whether a *McKoy* error in fact exists; that is, was the jury subject to the unanimity instruction before sentencing?[73] Second, each reviewing court must determine whether *McKoy v. North Carolina* is retroactive: does *McKoy* cover the particular petitioner, or was his judgment final at the time this "new law" was established?[74] Third, is the petitioner procedurally barred from raising a *McKoy* claim? If he did not object to the unanimity in-

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that although the majority position "might pass constitutional muster," he did not believe it to be the best solution to the problem:

> I think the better practice would be to instruct: (1) unanimity is not required in order to answer the question of the existence of a mitigating circumstance favorably to defendant; (2) such an issue should be answered unfavorably to the defendant only if all jurors agreed to so answer it; (3) such an issue should be answered favorably to defendant if any juror would so answer it with an indication on the verdict form as to how many jurors so voted; and (4) in the final balancing process each juror would be free to consider only those mitigating circumstances which he or she were persuaded existed in the case.

Id. at 229-30, 302 S.E.2d at 163 (Exum, J., dissenting in part and concurring in part).

It is important to recognize that aggravating and mitigating circumstances serve two distinct constitutional purposes and thus should not be treated the same. Aggravating circumstances serve the purpose of *narrowing* the sentencer's discretion. They are constricting requirements and, therefore, should be unanimously found. If each juror could consider only the aggravating circumstances she found, the concept of aggravating circumstances would accomplish very little narrowing since most jurors can find at least one such circumstance present in a murder case.

Mitigating circumstances, on the other hand, serve the purpose of permitting individualized consideration of the defendant's circumstances and character. See the discussion of *Lockett v. Ohio*, in *supra* notes 51-52 and accompanying text.

70. *See supra* text accompanying note 13.

71. Mills v. Maryland, 486 U.S. 367, 375 (1988).

72. State v. McNeil, 327 N.C. 388, 389, 395 S.E.2d 106, 107 (1990), *cert. denied*, 111 S. Ct. 1403 (1991).

73. *See infra* notes 79-87 and accompanying text.

74. *See infra* notes 88-89 and accompanying text.

struction at trial, is he barred from raising the issue on appeal?[75] Finally, was the error harmless in the petitioner's case?[76] *McKoy II* established that *McKoy* error is subject to harmless error analysis, but the onus is on the State to prove that the error was harmless beyond a reasonable doubt.[77]

Determining whether a particular defendant's trial contained *McKoy* error is not as simple as it first appears. The juries that sentenced inmates currently on North Carolina's death row received one of three different instructions regarding the unanimity of mitigating circumstances, depending on when the trial took place. First, in trials after *Kirkley*,[78] courts generally gave juries clear, unequivocal instructions that they must find unanimously mitigating circumstances before considering them in choosing a sentence.[79] The *Kirkley* court explicitly held:

> The consideration of mitigating circumstances must be the same as the consideration of aggravating circumstances. The unanimity requirement is only placed upon the finding of whether an aggravating or mitigating circumstance exists .... Each circumstance must be established by the party who bears the burden of proof and if he fails to meet his burden of proof on any circumstance, that circumstance may not be considered in that case.[80]

In these cases, *McKoy* error is clear, and defendants may proceed to the three other requirements for review.

The second category of jury instructions includes those which are vague on the question of unanimity. The cases most likely to involve this type of instruction are those tried before *Kirkley*. In *State v. McNeil*,[81] for example, the jury instructions did not explicitly require the jury to find unanimously mitigating circumstances. Three out of four of the sentencing phase issues presented to the jury began with, "Do you *unanimously* find ...."[82] The other sentencing phase issue—the jury's findings of mitigating circumstances—began only with, "Do you find ...."[83] The North Carolina Supreme Court stated that the test for

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75. *See infra* notes 90-94 and accompanying text.

76. *See infra* notes 95-97 and accompanying text.

77. State v. McKoy (*McKoy II*), 327 N.C. 31, 44, 394 S.E.2d 426, 433 (1990) ("We recognize that ... it would be a rare case in which a *McKoy* error could be deemed harmless. ... We are unwilling to say, however, that the State could never meet this burden.").

78. *See supra* notes 65-69 and accompanying text.

79. In seven cases, including *McKoy II*, the North Carolina Supreme Court already has found the presence of *McKoy* error and, accordingly, has vacated defendants' capital sentences and remanded for resentencing. *See* State v. Jones, 327 N.C. 439, 449-50, 396 S.E.2d 309, 315 (1990); State v. Sanderson, 327 N.C. 397, 402-03, 394 S.E.2d 803, 805-06 (1990); State v. McNeil, 327 N.C. 388, 397, 395 S.E.2d 106, 112 (1990), *cert. denied*, 111 S. Ct. 1403 (1991); State v. Robinson, 327 N.C. 346, 363-64, 395 S.E.2d 402, 412 (1990); State v. Sanders, 327 N.C. 319, 343, 395 S.E.2d 412, 428 (1990), *cert. denied*, 111 S. Ct. 763 (1991); State v. McKoy (*McKoy II*), 327 N.C. 31, 45, 394 S.E.2d 426, 433-34 (1990); State v. Brown, 327 N.C. 1, 30, 394 S.E.2d 434, 451-52 (1990).

80. State v. Kirkley, 308 N.C. 196, 219, 302 S.E.2d 144, 157 (1983), *overruled on other grounds*, State v. Shank, 322 N.C. 243, 367 S.E.2d 639 (1988).

81. 324 N.C. 33, 375 S.E.2d 909 (1989), *vacated sub nom.* McNeil v. North Carolina, 110 S. Ct. 1516, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 111 S. Ct. 1403 (1991).

82. *McNeil*, 327 N.C. at 390-91, 395 S.E.2d at 108 (emphasis in original).

83. *Id.* at 391, 395 S.E.2d at 108. The United States Supreme Court vacated McNeil's judgment and remanded the case to the North Carolina Supreme Court "for further consideration in

McKoy error with respect to jury instructions that did not expressly require unanimity is "whether there is a 'reasonable likelihood' that the jury here believed it was required to apply 'the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' "[84] The *McNeil* court determined that, taken in the context of the other three jury charges, McNeil's jury reasonably may have understood that it had to unanimously find any mitigating circumstance before it could consider it in sentencing.[85] The court vacated the sentence and remanded *McNeil* for resentencing.[86]

The third category of jury instructions includes those given to some sentencing juries after *Mills*. Some judges, interpreting *Mills* and anticipating *McKoy*, did not follow *Kirkley*, but instead instructed juries that they were free to consider, in final sentencing, any circumstance they found to be proven by the evidence.[87] Defendants in such cases are of course not victims of *McKoy* error and thus are not entitled to resentencing on *McKoy* grounds. The North Carolina Supreme Court has not yet disposed of any cases with these facts.

Once a defendant shows that *McKoy* error occurred in his trial, he next must establish that he is eligible for review in light of retroactivity laws. It is certain that any defendant who was subject to *McKoy* error, but whose judgment is not final, deserves *McKoy* review.[88] The most difficult determination concerns what happens to those defendants whose judgments were final when the Supreme Court decided *McKoy*.[89]

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light of *McKoy v. North Carolina*." McNeil v. North Carolina, 110 S. Ct. 1516, 1516 (1990). Justice Kennedy, joined by Chief Justice Rehnquist, and Justices O'Connor and Scalia, dissented from the Court's grant of certiorari, arguing that "it is . . . clear . . . that no unanimity requirement was involved in this case." *Id.* at 1516-17 (Kennedy, J., dissenting). Justice Kennedy maintained that even though McNeil was sentenced after *McKoy I* and before *McKoy v. North Carolina*, McNeil's jury was not given the defective instructions and therefore his sentence should remain in place. *Id.* at 1516 (Kennedy, J., dissenting).

84. *McNeil*, 327 N.C. at 392, 395 S.E.2d at 109 (quoting Boyde v. California, 110 S. Ct. 1190, 1198 (1990)).

85. *Id.* at 393, 395 S.E.2d at 110 ("[W]e are forced to conclude that, in their entirety, the jury instructions gave rise to a reasonable likelihood that some of the jurors were prevented from considering constitutionally relevant evidence.").

86. *Id.* at 397, 395 S.E.2d at 112.

87. In one case, the trial judge instructed the jury on the fourth issue—the weighing issue—as follows:

> In deciding this issue, you're not to consider the aggravating circumstances standing alone. *You must consider them in connection with any mitigating circumstances found by you, even if the jury has not found, unanimously, the existence of a certain proposed mitigating circumstance; if an individual juror believes that [the] mitigating circumstance has been proved by a preponderance of the evidence in a particular case, that juror may consider that mitigating circumstance in his evaluation on this fourth issue.*

State v. Huff, 328 N.C. 532, 537-38, 402 S.E.2d 577, 580 (1991).

The North Carolina Supreme Court, evaluating Huff's remand in light of *McKoy v. North Carolina*, however, found that *McKoy* error was present, despite the trial judge's instruction. *Id.*

88. A judgment is final if it falls in one of the three following categories: (1) the case has been decided on its merits and certiorari has been denied; (2) the case has been decided on its merits, certiorari has been granted, and the judgment has been affirmed; or (3) the statute of limitations for petitioning certiorari has elapsed.

89. Neither the federal courts, for the purpose of federal habeas corpus relief, nor the North Carolina Supreme Court, for the purpose of state post conviction relief, has resolved the question of whether *McKoy* applies retroactively to convictions that were already final when *McKoy* was handed down. Teague v. Lane, 489 U.S. 288 (1989), set the parameters for retroactivity analysis with re-

A defendant whose death sentence was tainted by *McKoy* error next must face the question of procedural default. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides that a trial error is generally not grounds for reversal on appeal, unless objected to and, therefore, preserved at trial.[90] One exception arises when the violation constitutes "plain error."[91] This standard is satisfied when "the appellate court '[is] convinced that absent the error the jury probably would have reached a different verdict.' "[92]

The North Carolina Supreme Court, in *State v. Sanderson*,[93] declined to require that a *McKoy* error be reviewed under the plain-error standard when the defendant failed to object at trial to the error for a trial conducted after *Kirkley* and before *Mills*. The *Sanderson* court explained:

> *Kirkley* held there was no constitutional or other error in North Carolina's jury instructions requiring jury unanimity in the finding of mitigating circumstances. At least until *Mills* . . . objection at trial to the unanimity instruction would have been in vain.[94]

Therefore, inmates convicted between *Kirkley* and *Mills* automatically pass the procedural default hurdle. There is no clear indication, however, whether this analysis will apply to cases tried before *Kirkley* or after *Mills*.

The final issue facing a victim of *McKoy* error is whether, in the particular

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spect to federal habeas corpus. In *Teague*, the Court, in a plurality opinion written by Justice O'Connor, stated that "new rules" of constitutional law are not to be applied retroactively to the cases of federal habeas corpus petitioners whose convictions were final when the Court announced the new rule, with two narrow exceptions. *Id.* at 310. It is unclear whether *McKoy* constitutes a "new rule" within the meaning of *Teague*. On the one hand, *McKoy* was the first Supreme Court decision to hold unconstitutional a jury instruction that expressly limited the jury to considering only those mitigating circumstances it unanimously finds. On the other hand, the Court in *McKoy* suggested that its decision was simply an application of *Mills*, which "clearly governs" the case. McKoy v. North Carolina, 110 S. Ct. 1227, 1231 (1990). In fact, Justice Blackmun wrote a separate concurring opinion "only to underscore [his] conviction that *Mills v. Maryland* controls [*McKoy*] and that *Mills* was correctly decided." *Id.* at 1234 (Blackmun, J., concurring) (citation omitted). Indeed, it is even arguable that *Mills* itself was not a "new rule," but rather a direct application of the *Lockett* requirement that the sentencer not be precluded from considering any relevant mitigating circumstances.

The retroactivity issue in the context of state post-conviction relief is more unclear than in the context of federal habeas corpus. The North Carolina Supreme Court, of course, is not bound by *Teague* with regard to state post-conviction proceedings, but the State has convinced at least one North Carolina superior court that a *Teague*-like analysis should apply to state post conviction proceedings. If the North Carolina Supreme Court does adopt a *Teague*-like approach to retroactivity, then the concerns raised above with respect to federal habeas corpus will become relevant to the state retroactivity analysis.

90. Rule 10(b)(2) states:

> A party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection; provided, that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. APP. PRO. 10(b)(2).

91. *Id.* 10(c)(4).

92. State v. Walker, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

93. 327 N.C. 397, 394 S.E.2d 803 (1990).

94. *Id.* at 404, 394 S.E.2d at 807; *see also* State v. Sanders, 327 N.C. 319, 345, 395 S.E.2d 412, 428-29 (1990) ("For the reasons given in *State v. Sanderson*, we elect not to apply Appellate Rule 10(b)(2), but to apply instead Appellate Rule 2 and consider the *McKoy* error as if defendant had timely objected to it at trial.") (citation omitted), *cert. denied*, 111 S. Ct. 763 (1991).

defendant's case, the error was harmless. In *McKoy II*, the supreme court expressly held that *McKoy* error is not harmful per se, but rather must be determined on a case-by-case basis.[95] While conceding that it would be an unusual case in which *McKoy* error proved to be harmless, the court held, nonetheless, that such a finding is possible.[96] Because the error is of constitutional magnitude, the state bears the burden in each case of showing that the error was, in fact, harmless beyond a reasonable doubt.[97] As of this writing, the court has found this burden satisfied by the state in only one of the cases it has heard on remand.[98]

The United States Supreme Court's decision in *McKoy* was not only predictable, but, according to the Court, it was clearly governed by *Mills*. Nonetheless, the case is noteworthy for several reasons. *McKoy* was the first major death penalty case to be heard by the Supreme Court in over fifteen years; and though the Court's decision leaves the North Carolina sentencing statute intact, the constitutionally infirm jury instructions draw into question the death sentences of at least twenty defendants.[99] Perhaps most importantly, *McKoy* finally puts to rest any doubt that was left after *Mills* regarding the constitutionality of unanimity requirements for mitigating circumstances.

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95. *McKoy II*, 327 N.C. at 44, 394 S.E.2d at 433 (1990).

96. *Id.* The court found such a rare case in State v. Laws, 328 N.C. 550, 555, 402 S.E.2d 573, 577 (1991) ("Although an erroneous *McKoy* instruction may preclude a juror or jurors from considering a defendant's mitigating evidence, here the jurors' responses to the polling establish that in fact no such preclusion occurred. . . . Even giving the most favorable reading to the relatively inconsequential evidence that defendant argues supports a finding of the catchall mitigating circumstance, the *McKoy* error here is harmless beyond a reasonable doubt.").

97. *McKoy II*, 327 N.C. at 44, 394 S.E.2d at 433.

98. *See supra* note 96.

99. *See Laws*, 328 N.C. at 550, 402 S.E.2d at 574; State v. Huff, 328 N.C. 532, 532, 402 S.E.2d 577, 578 (1991); State v. Quesinberry, 327 N.C. 480, 480, 397 S.E.2d 233, 233 (1990); State v. Price, 327 N.C. 479, 479, 397 S.E.2d 233, 233 (1990); State v. McLaughlin, 327 N.C. 478, 478, 397 S.E.2d 231, 231 (1990); State v. Lloyd, 327 N.C. 477, 477, 397 S.E.2d 230, 230 (1990); State v. Hunt, 327 N.C. 476, 476, 397 S.E.2d 229, 229 (1990); State v. Greene, 327 N.C. 474, 474, 397 S.E.2d 226, 226 (1990); State v. Fullwood, 327 N.C. 473, 473, 397 S.E.2d 226, 226 (1990); State v. Cummings, 327 N.C. 472, 472, 397 S.E.2d 226, 226 (1990); State v. Barnes, 327 N.C. 471, 471, 397 S.E.2d 224, 224 (1990); State v. Artis, 327 N.C. 470, 470, 397 S.E.2d 223, 223 (1990); State v. Allen, 327 N.C. 469, 469, 397 S.E.2d 222, 222 (1990); State v. Jones, 327 N.C. 439, 449-50, 396 S.E.2d 309, 315 (1990); State v. Sanderson, 327 N.C. 397, 402-03, 394 S.E.2d 803, 805-06 (1990); State v. McNeil, 327 N.C. 388, 397, 395 S.E.2d 106, 112 (1990), *cert. denied*, 111 S. Ct. 1403 (1991); State v. Robinson, 327 N.C. 346, 363-64, 395 S.E.2d 402, 412 (1990); State v. Sanders, 327 N.C. 319, 343, 395 S.E.2d 412, 428 (1990), *cert. denied*, 111 S. Ct. 763 (1991); *McKoy II*, 327 N.C. at 45, 394 S.E.2d at 433-34; State v. Brown, 327 N.C. 1, 30, 394 S.E.2d 434, 451-52 (1990).