SUPREME COURT
OF THE UNITED STATES

In the Matter of:	)	
	)	
RALPH MILLS,	)	
	)	No. 87-5367
Petitioners,	)	
v.	)	
	)	
MARYLAND.	)	

PAGES: 1 through 51

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IN THE SUPREME COURT OF THE UNITED STATES

RALPH MILLS,

Petitioner,

v. No.87-5367

MARYLAND

Washington, D.C.

Wednesday, March 30, 1988

The above-mentioned matter came on for oral argument before the Supreme Court of the United States at 1:00 p.m.

GEORGE E. BURNS, JR. ESQ., Baltimore, Maryland, on behalf of the Petitioner.

CHARLES O. MONK, II, ESQ., Deputy Attorney General of Maryland, Baltimore, Maryland, on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Very well, you may proceed whenever you are ready.

ORAL ARGUMENT BY GEORGE E. BURNS, JR., ESQ.

ON BEHALF OF PETITIONER

MR. BURNS: Thank you, Mr. Chief Justice, and may it please the Court:

This case presents a rather intriguing problem of cryptography. The cryptogram in question is contained in the Maryland capital sentencing proceeding used in this case.

It sets forth on page 14 of the Petitioner's brief, and I quote, 'Based upon the evidence, we 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 preponderance of the evidence."

The court of appeals determination is that a reasonable juror reading that language will conclude that even though there is only the possibility on the form for "yes," and "no," that there are actually three possibilities; that you have all agreed for yes; all agreed for no, or you have a split decision.

Then this reasonable juror, without being instructed to do so will conclude that, "If I disagree I'll leave it blank. Then I will retain the memory of my mitigating

circumstance, and when it comes to weighing aggravating and mitigating, I as an individual juror will weigh this, even though my other jurors may not." None of this with instructions to do that.

An additional problem, however, is precisely the same language with the substitution of "beyond a reasonable doubt," for "preponderance of the evidence," is used to preface the aggravating circumstance.

Now the court of appeals has held in Maryland that the aggravating circumstances is that simply they are either unanimous or it doesn't exist. So that, once again our reasonable juror, when he comes upon this language in the aggravating circumstances, he looks at this language and says, 'The only possibility is either we all agree or it doesn't exist."

A few moments later, encountering precisely the same language, a reasonable juror who is now somewhat schizophrenic concludes, "This language must mean something different now: it means indeed that there is a third possibility -- this leaving it blank," I submit is the test, unless it becomes a schizophrenic rather than reasonable, juror, it is difficult to accept the Court of Appeal's interpretation.

Moreover, there are several external factors cutting against this interpretation. First of all --

QUESTION: Before you go on, I guess I have two

different versions of the jury form here.

MR. BURNS: I apologize to you, Justice Scalia, there are two different versions.

QUESTION: Which is the true version?

MR. BURNS: The one that was used in this case is quoted in this case is quoted in the brief and is contained in the joint appendix. The one printed in the appendix to the brief is the on that was a modification with style only.

There is also a third one, which is also included in the appendix which is also the one propounded subsequent to this case.

So let me go back: there are actually three forms in Maryland, the one used in this case, and the one that the language I quoted comes from.

A second one where that language was changed slightly, but as pointed out by Judge MacAuliffe in his dissent, just for stylistic purposes?

QUESTION: Where is that?

MR. BURNS: That is in the joint appendix --

QUESTION: Page 99?

MR. BURNS: I believe that is correct, Your Honor.

MR. BURNS: That's what I've been working on.

MR. BURNS: That's unfortunately -- that's not. That's the modification that was not used in this case, but we put it there --

QUESTION: Where is the one that was used in this case?

MR. BURNS: In this case it is in the joint appendix at, I believe --

QUESTION: Fourteen?

MR. BURNS: No, 99 of the joint appendix.

QUESTION: And also 14 of the brief?

MR. BURNS: And 14 is the quote.

QUESTION: My gosh?

MR. BURNS: It is somewhat confusing. There are three, and that is just to say, Justice Scalia, that there is a third one, and perhaps in some ways that is the most significant: that's the one about a month after this case there was an emergency change instituted. That one is also in the appendix to the Petitioner's brief, page let's see -- 21A.

So we have three. The last one is, was not used but was changed as a result of this case. Indeed, about a month after this case --

QUESTION: And the second one was not used in this case?

MR. BURNS: The second one was not used in the case. We only put it there -- and perhaps we shouldn't have, for information to the Court that existed.

QUESTION: It was fun, trying to you know --

MR. BURNS: I apologize.

QUESTION: "Will the real form please stand up?

[Mirth.]

MR. BURNS: Actually, Justice Scalia, when I was looking over this case yesterday, I came to the conclusion that whatever reason we thought for putting that second form in there was probably not good; it is somewhat confusing, and I apologize for that.

QUESTION: Where was "cryptic" in here?

MR. BURNS: Yes, Justice White, and I seem to have gotten lost in the "cryptic" avenue in this instance, but I think that the forms are, this first form is -- and the second one is not real important anyway. It's just a stylistic change.

And the new form, as I think the Court will note, the new form is, at best, a distant cousin to the first form. It specifically sets out the possibility you either all agree; you don't agree; you're divided; and you mark three alternatives for each mitigating, you mark according to these three possibilities.

At the end of that form it provides each juror to individually assess what he thought; she thought; the mitigating factors were. So if you had a situation where six jurors thought there were five mitigating factors; and six didn't; those six jurors would weigh those mitigating factors against the aggravating.

In short, I think it is very difficult to accept the court of appeals' assurance that every juror who understood the first form, when the court of appeals thought it was necessary on an emergency basis to drastically change that form.

I also think it is worth pointing out, as the dissenter did in the court of appeals, that prior to this case, there is no evidence that any juror ever indicated in any way that there was a divided jury on any mitigating circumstance.

Subsequent to this case there was an opportunity in the forms and instructions to show division, two of the three capital cases that were decided jurors indeed demonstrated that they were split on some mitigating factors.

I think that the dissent persuasively points out that it defies reason to suppose this is all a matter of coincidence.

I also think it's important to look at the interplay between the court of appeals' opinion and the brief of the state in this Court. The court of appeals has held that this reasonable juror is going to sit around and think of a rather intricate procedure to follow, even with instructions.

The state, on its part, disagrees with the court of appeals. Indeed, the state says the court of appeals is wrong in how they interpret the statute. The state says that what the statute actually meant was that if you disagree, any disagreement, any mitigating factor; hung jury; mistrial. The

court of appeals specifically rejected that interpretation in its opinion.

The point of this, I think, on the one hand we have the court of appeals offering an interpretation in which it then says every reasonable juror would have understood. Yet the state, even to this day, doesn't understand that interpretation.

On the other hand, the state offers us an interpretation that the court of appeals says it's wrong and didn't understand. I submit that if the state and the court of appeals can't agree, it's far too much and far to optimistic to assume somehow that this hypothetical reasoning juror would have understood all this, or indeed, any of it.

QUESTION: Would you go through it for me once more? You know, this is kind of a hard case to follow.

MR. BURNS: I understand, Justice Stevens.

QUESTION: The difference between the state and the court of appeals is that the court of appeals said that if there was disagreement on one mitigating factor, the consequence would be mistrial?

MR. BURNS: No. The court of appeals says a juror would conclude that we leave this blank, and then I, but if I found the mitigating factor, I'm the only juror that did -- if I found that mitigating factor, when we weigh aggravating and mitigating, in my mind, I would weigh them and at that point I

might decide that even if I found this mitigating, aggravating still outweighed mitigating, you could have Death -- or it could be the other way. The state position's the other.

QUESTION: I thought the state court of appeals said the form would be left blank on such a --

MR. BURNS: That was their conclusion -- their conclusion was that that particular part of the form would be left blank, and that that juror would know to leave it blank and he would remember that he's entitled in the final analysis to use that mitigating circumstance.

Now, the state's position is not that. The state's position in their brief --

QUESTION: Wait, what do you mean, "he would remember?" How could he fail to remember when --

MR. BURNS: Oh, I think he would remember.

QUESTION: -- well, because it walks you through it, and in the determination of sentence, it says, "(1) if all of the answers in section one are marked "no," do this; if section two is completed and all of the answers are marked "no," then enter Death. It doesn't take a whole lot of memory; it just takes reading the form. If all of them were not marked "no'" --

MR. BURNS: That's true.

QUESTION: -- if one of them was left blank, that means that all of them are not marked no. That doesn't take a

whole lot of ingenuity to figure out.

MR. BURNS: But it presupposes, of course, that you understood in the beginning that you could leave it blank, and that you were entitled on an individual basis.

QUESTION: You mean your second point is your first point?

MR. BURNS: They're related, Justice Scalia.

QUESTION: They're one and the same, it seems to me.

MR. BURNS: I don't think so because if you look at the new form, the court of appeals thought it was necessary to add specific language at the end, saying that each individual juror would do this.

So apparently the court of appeals, notwithstanding their opinion in Mills, wasn't so sure jurors would understand unless they were told.

QUESTION: You can always make somebody that's tolerably good better. I don't think that we should decide this case on the basis that this form could have been improved.

MR. BURNS: I agree with that, but I think just looking at the forms, we don't really have much in terms of making good better, we have here, if you weren't familiar with the statute, I'd be willing to bet that I could show these two to any lawyer and you would never guess that they came from the same state. These forms are decidedly different.

And I think it is difficult on the one hand to say

that it's important and certainly good to explain all these things, but the same thing could have presumably been accomplished if we said we use this form but we give all these instructions.

But the point is, these are decisive differences between these two forms.

QUESTION: I think you ought to talk about this case as though there hadn't been a new form published and just you are faced, then, with the court of appeals decision that the form that was used in this case was perfectly adequate.

MR. BURNS: I said that, Justice White --

QUESTION: Well, that's your problem.

MR. BURNS: I don't think so, because as I pointed out, one of the problems that I see besides the instructions not directing the jury to do any of these mental gymnastics, the other problem is this language using the same language in the aggravating and the mitigating, yet at the same time saying the juror without being told to do so, is going to have to treat it in a different way, although it's the same language in the aggravating and mitigating.

QUESTION: Mr. Burns, I take it the defendant in this case made no objection to the use of this particular form, and made no objections to the instructions given at the time?

MR. BURNS: That is true, Justice O'Connor.

QUESTION: So for you to prevail, we would have to

find that the error amounted to plain error, if it existed at all?

MR. BURNS: I don't think so, Justice O'Connor, because, of course, the court of appeals did not decide it on this basis. And I think what it really comes down to, if the court of appeals is right, of course, there is no problem; everyone understood and these were all the instructions you were entitled to.

If we're right, what we're saying is no rational person could have possibly understood what the court of appeals has today in this case said, and therefore, no one would have objected because no one would have thought this was really what it meant.

So I think in this case, and in a normal case, that would be true. But I think the two problems here procedurally, the court of appeals didn't decide it on that; and the way the court of appeals decided it -- and our position being that the court of appeals obviously has the right to interpret the statute, but they don't have the right to interpret it in a dramatically new way, and then apply it to this petitioner.

QUESTION: Well, at least we know that, on this -- the form that this jury returned, they at least, the jurors indicated they unanimously agreed that none of the -- there were no mitigating factors.

MR. BURNS: They did, Justice O'Connor, but of

course, there is no evidence to show, and they were certainly never told, that if you look at the instructions, it was clear, "unanimous -- yes or no," they weren't told anything about this possibility, that perhaps if you're not unanimous, you still may retain your individual judgment --

QUESTION: Well, the fact is, though, we have a situation where they've indicated unanimously that they don't find any of the mitigating circumstances or any at all.

MR. BURNS: Well, we have a form. Our position is we have a situation where they have indicated that it's not unanimous that they find one. Now, the court of appeals says, and that, I think is the court of appeals' position is, there is more than that: there is also a finding that they necessarily unanimously don't find the non-existence; that is, the opposite.

The problem, of course, is that there is nothing, no instruction, even coming close talking about that case. Nothing on the form talking about that case; and so what it really comes down to is a matter of fate.

QUESTION: Weren't they told several times in the instructions they had to be unanimous on all their findings as to mitigation?

MR. BURNS: They were told, but I think that that may cut the other way because I think they would also be told the other thing if the court of appeals' interpretation be correct,

you also have to be unanimous on the lack thereof. Because if you're told you have to be unanimous, it seems to me that jury can say then, we don't find it: no. Eleven of us thought it was; one person didn't think it was; therefore, we aren't unanimous; we mark no. That's the problem I think in this case, is obviously none of us can tell what went on in the jury room, but I think --

QUESTION: There is absolutely no indication to support your hypothesis. I mean, we have the return forms by the jury and the instructions; and they tally perfectly. Your hypothesis is that some jurors might have reasoned a different way. But there is simply no indication that they did.

MR. BURNS: The problem, Chief Justice Rehnquist, is of course, our position is under these forms, there is no way they would have any way to communicate that to anyone. And if you set up the form in such a way, and set up the instructions in such a way that you don't offer the possibility of this third possibility, then you're never going to get the third possibility. I don't think it means it doesn't exist; it just means that you've presented it to the court in such a way, that unless you have a juror that is very, very creative, even if he thinks all these things, or even if eleven of them thinks them, there is simply nothing in the form that they can show that to the court.

QUESTION: It's just as likely that there was

unanimity, actual unanimity.

MR. BURNS: Well, there could have been, Justice White --

QUESTION: Well, there could have been.

MR. BURNS: I think the problem is --

QUESTION: It's not unusual.

MR. BURNS: -- the court of appeals -- well, the court of appeals, to be correct, I think, has to be more than a toss of the coin; there has to be some certainty; and if the only certainty it seems to me that you can get is if you have very specific instructions or a form that makes it clear that the jury knows what it is that you are doing.

Indeed, I think it's interesting that even one judge at the court of appeals says that he would have never have imagined this system and could have never believed that anyone thought of it; no one had ever talked about it in the past; and yet, we're asking this court to believe that jurors on their own were fully aware of all these subtleties, that I think are fairly difficult at this point to understand.

As to the victim-impact issue, I would only comment on the harmless error argument.

QUESTION: I just want to ask you one question before you get to that: if the jury had simply been instructed orally with no form, would your argument be the same?

MR. BURNS: I think depending on the instructions --

QUESTION: The instructions would be the same.

MR. BURNS: Then I think it would be the same. Because I think these instructions fairly cover this form, so I think either way you have the instructions and the form, I agree, are absolutely consistent in this case, so I think that may be the problem. And the reason I asked that, Justice Kennedy, because you might have a case where by instructions, obviously, you could give all these alternatives, and then with the forms that we would say is inadequate, it might be okay.

But in this case you had instructions obviously, the judge thought the form worked that way. Not unreasonably.

As to the harmless error --

QUESTION: Before you get to the other question, too, in your brief, you list seven potentially mitigating circumstances on page 4. And I gather the defense lawyer did argue those to the jury?

MR. BURNS: He did, and there is one other one we also pointed out in our footnote 4, they didn't argue, he argued them, yes. There was evidence presented for these but they could have found didn't.

QUESTION: Do you interpret the jury's finding that there were no mitigating circumstances to mean that they didn't think that these were factually correct, or that if indeed the man had a low I.Q., we don't consider that mitigating?

MR. BURNS: An interesting question, Justice Stevens.

I'm not sure because, again, we have no way of knowing what a juror thought about this; it seems to me --

QUESTION: Did the judge give them any help?

MR. BURNS: The judge gave the generally set-out routine instructions; he did not specifically say that; he really put it to the jury and said that you consider it, and they do consider it.

Now, I think it's possible, obviously, a juror could, I suppose, in a case, consider them factually, but most of these things, some of them are argumentative. Some of them are --

QUESTION: Wasn't there evidence in the record that he terminated his education at the sixth grade?

MR. BURNS: Yes, Justice Stevens, evidence like that.

QUESTION: Was that a disputed fact?

MR. BURNS: Most of the factual things were not. They were not disputed. So it would seem that if the jury all concluded that it was not, it would seem that their finding is not mitigating.

QUESTION: So what they're saying in effect is, these facts are not sufficiently sufficient even to be justified as to be called mitigating, so we don't have to even weigh them, which is quite different, per se.

MR. BURNS: I think so, Justice Stevens. I think that's a fair interpretation, at least of the historical fact.

QUESTION: We find these facts but we think the aggravating circumstances are much more serious?

MR. BURNS: I think so, Justice Stevens. I think it's a fair interpretation of the ones that at least present more or less historical facts, because they are not things that are seriously -- or at all disputed, I should say.

QUESTION: If you please counsel, one more question on this point: I'm not sure I understood your answer to Justice O'Connor's question, when she asked you -- when she pointed out to you that there had been no objection below.

MR. BURNS: As I agreed, there certainly has not been. I think there are two points: one is the procedural point. The court of appeals never addressed this and -- perhaps they could have but they didn't -- to say that there was any procedural bar to the consideration.

But the second point, perhaps more importantly, is if the court of appeals is correct, and this is all clear to everyone there'd be no reason he'd be entitled to no more instructions. If we're correct, and you could possibly have foreseen what the court of appeals says this means, then no reasonable person would have foreseen it as an instruction.

So I think in this particular case, that's the reason -- the double reason -- I think that's perhaps why the court of appeals didn't address the problem whether or not there were objections.

On the harmless error part, the victim impact --

QUESTION: You are going to leave to your briefs whatever questions there may be as to whether the introduction of this evidence was a violation of the Eighth Amendment?

MR. BURNS: Yes, of course, Chief Justice. If you have any questions, I would be happy to answer them. But our position has been set out in the briefs. But of course, obviously we're relying on booth, and our point was, I think, too, (1) that the court of appeals simply ignored one prong of the Booth test; and the state's response is in part that it's harmless because there were no mitigating factors brought back; the state arguing you can't have any bad influence on weighing of pendency.

QUESTION: I understood the state to argue it was not a violation of the Eighth Amendment.

MR. BURNS: Yes, Chief Justice, and obviously we, for the same reasons in Booth, think it is. If you have any further questions, I would be happy to answer them; but I have not, obviously repeated them, because we rely absolutely on Booth.

The harmless error is separate, though, and that's why I wanted to say something about that, the argument being that you don't have a weighing and balancing because there are no mitigating; therefore, it's harmless.

The problem, of course, is if you have improper

evidence to come in, then that also affects in the weighing in balance perhaps of whether you decide a historical fact really is worth bringing back a mitigating. So the prejudice can arise before you get to the weighing and balancing between aggravating and mitigating. So indeed, I suggest it cannot be harmless. Thank you.

QUESTION: I do have one further question. You also are assuming on the first point about the form, you're assuming without arguing that, if the form did require -- if it was misleading, and if the jury indeed didn't realize that they had to be unanimous as to no mitigating circumstance, then it would be unconstitutional?

MR. BURNS: Yes, Justice Scalia. The reason I haven't argued it is of course the court of appeals did not decide that it was unconstitutional; but decided that clearly that wasn't going to be the law in Maryland.

I think, as we pointed out in our brief, you would have a very serious constitutional problem, because what it would amount to, if it were interpreted as we originally thought it was to be interpreted, you could have in essence one juror deciding you were going to get capital punishment, even though eleven disagree.

QUESTION: It would still allow all mitigating circumstances to be taken into account; it would be a state saying if a jury unanimously finds one aggravating

circumstance, they are entitled to consider all mitigating circumstances, but if they find a mitigation, once they've unanimously found one of these aggravating circumstances, they have to find it unanimously. And you're think it's all that clear that that's unconstitutional? It doesn't narrow the jury's discretion; it prevents frivolous and irrational and inconsistent decisions quite well.

MR. BURNS: It may be -- I'm not so sure about that, Justice Scalia, because it may be you could draft the statute, getting around the problem of unanimity, but I think here you'd have a fully open statute, and what I mean by that is, you'd have a situation literally where one juror says, I think this person deserves death; I don't think there are any mitigating factors.

Eleven jurors think there are 13 mitigating factors, and it's simply overwhelming. And yet, the one juror, that is, the one juror rule, if you're unlucky to get one juror who thinks you should get Death; then you're going to get Death.

And I find it very difficult to understand how that can be arbitrary, because what you're doing in that case is saying, the biggest single test would be not mitigating and aggravating; but whether you get one juror who doesn't think you deserve the mitigating.

QUESTION: Well, it has to be more than that: you have one juror who thinks there should be Death, and 12 jurors

who find the particular aggravating circumstances.

MR. BURNS: You do have to find the aggravating as a practical matter. However, if you look at these aggravating factors, they're usually things that are going to be in effect having litigated at trial, the most common one is felony-murder.

Now, if you found someone guilty of felony-murder, you logically, for example, going to have an aggravating.

But in very few of these cases --

QUESTION: But you're saying that if one juror finds no mitigating circumstances, nothing that he would regard as mitigating, and 12 agree with him that this was a murder committed in prison or whatever the aggravating factor is, and all eleven think there are mitigating circumstances, then the statute mandates Death, does it not?

MR. BURNS: It would if interpreted the way Justice Scalia is asking the question.

QUESTION: Well, even under this form it would?

MR. BURNS: Under this form, as we interpret it, yes. In that sense we're in agreement. I'm sorry Justice Scalia. I was getting to the constitutionality question. That't true we do interpret it in that way.

The problem with the constitutionality is that you would have the situation, if you were right, that's the exact problem that you have; is you have the possibility of not 12

jurors agreeing but one juror deciding it's death. And our position, of course, is it's difficult to imaging a more arbitrary system than luck of the draw: do I get one juror?

QUESTION: I don't know -- suppose it only takes one to find a mitigating circumstance, and that's going to be enough? Or a majority you can say you know it's the difference whether you die or not depends on whether it's six or seven-five one way or seven-five the other way. How arbitrary life is?

You can say that no matter what kind of a system you adopt. It's always going to turn on one vote, isn't it?

MR. BURNS: You can certainly say that, Justice Scalia, but we draw lines every day, and I suggest the one where one's enough to execute, is probably a line no one really wants to draw.

I agree with you that, at some point, for example, this Court in an entirely different situation talking about majority verdicts in non-capital cases has said yes, everything is arbitrary and we may tolerate certain ones to a point. We draw a line.

But we do have to draw a line, and under this interpretation of this statute, the line is one in twelve, and I suggest --

QUESTION: Zero versus one against, and you think it should be seven versus five. I don't see that that rises

that one seems terribly arbitrary and the other one doesn't. Maybe one is harsher than the other. I can understand that. But I don't see how one is capricious.

MR. BURNS: I think in the context of the jury system, that we 're looking for a jury of 12 people to decide this to say in effect we'll tolerate one saying it is capricious, because if we looked at the jury, and even if we had the seven-five, we're giving some play to the notion that it's the group, it's the jury, deciding it.

If we're looking at one, it's -- I don't want to use the term, "anti-democratic," but it is an odd notion in a more or less democratic society, of this extreme decision being made on the basis of one as opposed to eleven. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Burns.

Mr. Monk, we'll hear from you now.

ORAL ARGUMENT BY CHARLES J. MONK, II, ESQ.

ON BEHALF OF RESPONDENT

MR. MONK: Mr. Chief Justice and may it please the Court:

The last instruction -- the very last instruction, the jury in this case heard before it retired to deliberate -- and this is on page 95 of the joint appendix, is as follows: The court said as it passed out the forms to the jury, "Let me remind you that, as you consider each of the circumstances, you must indicate yes or no, however your unanimous decision falls.

You must indicate yes or no as to each of those circumstances."

It seems to me that that instruction, together with the form that was used in this case, plus the instructions that where the court before the closing arguments of counsel, went through the form, and six or seven times reminded the jury that their determination on each question must be unanimous.

QUESTION: Where is that in the materials here? I'd like to look at what he told them just before they went --

MR. MONK: At page 95, Justice Scalia.

QUESTION: Page 95 of what?

MR. MONK: Of the joint appendix.

The closing arguments are concluded; the court has already reviewed with the jury before closing arguments the form itself, which is discussed in our brief, and now he is sending the jury out to deliberate and he says, "Let me remind you as you consider each of the circumstances, you must indicate yes or no however your unanimous decision falls."

QUESTION: What point are you making?

MR. MONK: The point, Justice White, is that these instructions read by a reasonable juror would have led them to conclude that they must unanimously decide yes or no on each one of the mitigating circumstances, and if that is so, then we don't have a Lockett - Eddings problem in this case. In other words, the jury deliberated, considered the evidence considered in mitigation, and rejected it.

QUESTION: As I read your brief, and as I seem to have the same notion now, you don't think you need to go through the routine that the court of appeals did to sustain this?

MR. MONK: I don't think that, with all due respect to Mr. Burns, that his interpretation of what the court of appeals said is correct. I think the court of appeals reached precisely that point. Their view was that the statute requires unanimity as to yes or no with respect to the mitigating circumstances, that they consider that the jury in this case consider the evidence --

QUESTION: And if eleven jurors thought there was a mitigating circumstance and one thought not, they had to -- the jury had to proceed on the basis that there were no mitigating circumstances?

MR. MONK: That's not correct. If eleven jurors thought there were mitigating circumstances and one thought there was not, the jury would have to continue to deliberate until they reached a conclusion.

And if they could not reach a conclusion, then there would be a hung jury. If you look at the joint appendix where the court of appeals opinion is at 126 - 127, the court of appeals makes that exact argument.

QUESTION: So you say that under that instruction, the way it would work out is that there couldn't have been a

hold-out juror; there couldn't have been a hold-out juror?

MR. MONK: There couldn't have been a hold-out juror; the jury would have hung and under the Maryland statute, life imprisonment would have been tendered.

QUESTION: And the tender would have been another proceeding?

MR. MONK: No. Under the Maryland statute, life imprisonment would have imposed. The instructions in this case, and I think this is a jury instruction case under California v. Brown, one is obligated to look at all the instructions including the language of the form and the instructions that the court gave as it explained the form in its final instructions, as I pointed out, and determined what a reasonable juror under the circumstance would have -- how he or she would have viewed this instruction.

And I think it's very clear that they would have concluded that there was a requirement of unanimity and that they had to make an ultimate determination.

QUESTION: Under the Maryland rules there would have been a hung jury?

MR. MONK: Right.

QUESTION: And life imprisonment?

MR. MONK: And life imprisonment.

QUESTION: What do you do with the Petitioner's argument when he points out that the form had been used 25 or

30 times and the "no's" were filled out in every case all the same, and then when they changed the form, blanks began to occur?

MR. MONK: Justice Kennedy, the instructions of this court were "answer every question." So I would expect in every form in the other cases when this was used, that they would have answered every question. When they changed the form, when the new form came into place, and the jury was given the opportunity to say, "Well, we've taken an initial straw vote and some of us think there's mitigation evidence here, but we all can't agree," they didn't have to force themselves to deliberate and debate the issue further; they were just given the opportunity on the new form to indicate that and go on to weighing.

And so I don't think they were compelled as a jury through the deliberative process to reach a conclusion.

QUESTION: If somebody felt like leaving something blank under the old form there would just have been a hung jury?

MR. MONK: Well, they could not reach a conclusion, and therefore decided to leave it blank on the old form, they would have had a hung jury.

QUESTION: And it would have been life imprisonment.

MR. MONK: That is correct, and indeed there is at least one case --

QUESTION: So that the new form would make it more likely that Death would be imposed?

MR. MONK: That's exactly the problem that the court of appeals thinks that they were addressing when they set forth in their opinion explaining why the new form came into being. They posit what they describe as the "anomalous circumstance" where the jury might hang on mitigating circumstances; but if they had gotten to weighing, would have concluded that the Death penalty should be imposed.

QUESTION: Anyway.

MR. MONK: Anyway. So under the Maryland scheme, life imprisonment would have been imposed. And in order to avoid that circumstance, they announced therefor the new form which allows the jury to say "we can't all agree on mitigating circumstances. bit we'll go to weighing anyhow, and reach an ultimate conclusion."

QUESTION: May I ask you just to be sure -- it's kind of hard to keep this complicated case in mind; did Maryland law at the time of this trial require that any finding of a mitigated circumstance be unanimous?

MR. MONK: The Maryland Court of Appeals so-stated.

QUESTION: In this opinion.

MR. MONK: In this opinion.

QUESTION: Had it previously done that? Was there anything in the text of the statute --

MR. MONK: The statute talks about unanimity and the final version and the Maryland Court of Appeals had adopted the form, although there is one minor change between the form that was used in this case and the rule. But that formed part of the statute, too.

QUESTION: If the statutes so required, how could they authorize the new form?

MR. MONK: Well, what they did was under the old arrangement, before the new form came into place, the court of appeals, relying upon the statute, and relying upon their rulemaking authority, adopted a form which mandated unanimity for a no answer on the form.

The statute itself talks in terms of unanimity for yes. It does not talk in terms of unanimity for no, and also has a unanimity for an ultimate determination.

QUESTION: So there was no statutory requirement that a finding of no mitigating circumstances be unanimous?

MR. MONK: But Maryland law was by virtue of the rule adopted by the court of appeals, which is a part of Maryland law, that unanimity was required.

QUESTION: You mean the rule adopted in this case?

MR. MONK: No, a rule that was pre-existing this case, because the form itself was adopted by rule in Maryland, and was in place for all the cases that was decided before this.

QUESTION: Was there a rule other than the rule approving of this form, or was that the rule?

MR. MONK: No.

QUESTION: So to the extent the form was ambiguous, or at least as the dissenting justice in the court of appeals thought, that ambiguity would also have existed in the rule?

MR. MONK: That's correct. But that was clarified by the judge's question.

QUESTION: And so when the adopted a new form, they basically changed the law under your view?

MR. MONK: When they adopted a new form, they allowed the jury not to get hung up on --

QUESTION: I understand, but they did change the law?

MR. MONK: That's correct, they did.

QUESTION: Mr. Attorney-General, we do recognize, don't we, that nobody at these two tables here, nobody here -- two people, agree what those forms mean, yet 12 jury men can easily understand it. We recognize that, don't we?

MR. MONK: Well, Justice Marshall, I can't agree with you. I think that if you read the instructions in this case as I think you are compelled to do in their totality, under California v. Brown, --

QUESTION: Room for disagreement.

MR. MONK: Well, I don't believe so, Justice Marshall. I think that those instructions fairly and

reasonably would lead a reasonable juror under these circumstances to conclude they had to reach unanimous agreement.

QUESTION: Do you think that your rationale for affirmance is the same as the court of appeals used?

MR. MONK: I believe it is. I believe it is.

QUESTION: Can I ask you, General Monk about perhaps another portion of the form? I still hope I'm using the right one. It's on 16A and 17A. Now we're past section II, where we have to mark "yes, or no" and we have established that they only mark "no" if they unanimously find no mitigating circumstance, right?

MR. MONK: That is correct.

QUESTION: And they leave it blank. If only eleven of them find a mitigating circumstance, right?

Then they move on to section III of the form which begins at the bottom of 16A and goes over to the top of 17A -- "We unanimously find that it has been proven by a preponderance of the evidence that the mitigating circumstances marked "yes" outweigh the aggravating circumstances marked "yes." Right?

MR. MONK: That's so.

QUESTION: So, if they've left some of those forms blank, by reason of the fact there are only 11 of them that think that they're mitigating, there are really only still in the balancing, they are only going to balance those mitigating

circumstances that have been unanimously found, so they would check -- and let's assume that, on the basis of those, that a few of them, or there are none of them, they check that "no," they don't outweigh the aggravating circumstances.

That moves them on to the last part of the form, determination of sentence, okay, and they go down to number four, "If section III is completed and was marked 'no," enter Death," they'd come back with the Death sentence wouldn't they?

And the only way you would know that you had a hung jury is if the judge didn't just look at the bottom of the form, but went back and looked in section II and saw, "By god, they came in with a Death sentence, but I know that that's wrong because in fact some of the portions of section II are marked neither checked yes or no." Isn't that the only way you can get a hung jury?

The jury would not know itself to be hung. It would go right through to the end of the form, come in with a Death penalty, and the judge would find out they're hung because there were no answers to section II.

MR. MONK: Justice Scalia, I don't mean to quarrel with your hypothetical, but I don't think that's the way it operates.

QUESTION: Okay, tell me why not?

MR. MONK: For the first reason is, as the judge in this case instructed, he instructed the jury "You must indicate

yes or no after each of those circumstances." They weren't given the option of a non-answer, and that's why they answered every one of these questions; why the dissent points out in every one of the capital cases that you look at --

QUESTION: You must be unanimous? How can a judge instruct them to be unanimous?

MR. MONK: Well, just as a judge instructs them to be unanimous in the guilt or innocence phase: reach a determination; do you agree that the defendant is guilty or not?

And if the straw poll at guilt or innocence is seven to five, the answer is is not he's not guilty; the answer is you continue to deliberate. What the Maryland --

QUESTION: You mean they'd come back out and say, we cannot finish section II. We cannot get unanimity on either yes or no, that's what you are saying?

MR. MONK: That is exactly right, and indeed there is one circumstance in the --

QUESTION: It would be life imprisonment?

MR. MONK: It would be life imprisonment under the Maryland procedure, because they could not reach an unanimous verdict. And that's exactly why the Maryland Court of Appeals posits in their hypothetical that if they hang on mitigation, had they gotten to weighing, they would have decided on the death penalty, that then there is a need for the change in the

form.

I would like to make just a few more points on this issue before we turn --

QUESTION: Let me just clarify one other thing: I am correct, am I not, that the judge did not specifically tell them what to do if the situation should arise that they were not unanimous on a mitigating circumstance? Other than the general statement that there must be unanimity?

MR. MONK: He did not, if you're question is, did he instruct them what would happen if they were hung, he did not so-instruct them.

QUESTION: What about on whether or not there was a particular, six or seven different, mitigating circumstances, but if there was not unanimity on one of the mitigating circumstances, did he tell them what to do there? He didn't tell them to leave it blank, is what I'm really asking?

MR. MONK: No, that is correct. I mean, he did just the opposite. He said, consider each of the circumstances: you must indicate either yes or no, however your unanimous decision falls. Those were his exact words: "You must indicate yes or no as to each of those circumstances." That's the last instruction the jury got from the court before they retired to deliberate. That instruction is very clear.

QUESTION: Wouldn't it be better to introduce it to the jury if they answered this way?

MR. MONK: That's exactly right. The jury reached the unanimous verdict. And there's no objective evidence here that would suggest that there was any disagreement. Chief Justice Rehnquist asked the question of Mr. Burns, you know, is there anything to suggest that this is anything more than a hypothetical? The answer is clearly no.

QUESTION: It was Mr. Burns' response that the form didn't give them any opportunity to express, yet if there were, but if there were none, non-unanimity?

MR. MONK: Well, Justice Rehnquist, it seems to me that they would have -- the two possibilities -- if they could not agree, they would have come back to the court and said they can't agree, we know at least in one circumstance, that one of the lodgings that was submitted to the Court by the Petitioner, that a jury in fact did hang, and it appears that they hung up on mitigating circumstances, and if they deliberated for 12 hours and a life imprisonment was imposed.

QUESTION: Well, Mr. Monk, does any jury form in an ordinary case, let's talk about a capital case for a minute. You are deciding, you are asking the jury to decide whether the defendant is guilty or not guilty. Now does the verdict form in your state ever have another blank for them to indicate if they're hung, or are they just given "guilty" or "not guilty" and you must be unanimous?

MR. MONK: They are not instructed in Maryland that

what the possibility of hanging might be. They are asked to make a determination.

QUESTION: And isn't that what most states do? There's never another form for if they're hung, is there?

MR. MONK: That's correct.

QUESTION: You don't want one for the jury to hang.

MR. MONK: And indeed you don't want to encourage a jury to not be able to reach a conclusion to hang. That's the whole purpose of not including that notion, or instructing the jury.

QUESTION: But what is the reason for requiring unanimity when you find you are not agreed that there is a mitigating circumstance? It's a little different than in the normal situation. Than that little form indicated recognizes.

MR. MONK: The mitigating circumstances under the state statute are -- I mean, there are seven statutorily defined mitigating circumstances, and then another category --

QUESTION: A catch-all.

MR. MONK: A catch-all for anything else.

QUESTION: All right.

MR. MONK: And really the first seven are really factual determinations that the court, the rule, is requiring the jury to make: tell us where you find that there is credible evidence to support whatever the mitigating circumstance is?

And that's a question capable of a yes or no answer. We have listened to the evidence; we have weighed it, and we don't find it credible. We mark no.

We listen to the evidence and we do find it credible, yes that mitigating circumstance exists and we go to the next one. That's the process of the jury system.

QUESTION: Yes, but some of the mitigating circumstances on which he relied were not really in dispute factually. He was a man of limited education; a man of low I.Q., who was 19 or 20 years old -- I can't remember what it was. The question they really answered there was whether they thought what was described as a mitigating circumstance really was entitled to that label. I think, because there really was -- correct me if I'm wrong about that?

MR. MONK: Well, I think you are part wrong, Justice Stevens. Let me try and explain. The trial judge, in his trial judge's report,which is required under the Maryland statute, said "I don't disagree with the conclusions reached by the jury, although there was evidence of a mitigating circumstance: youth. He was 20 years old.

Now, the argument of counsel at the sentencing phase was, the prosecutor says, "He's 20."

QUESTION: I understand on that one, but on the sixth grade education and the low I.Q. I know they're not one of the enumerated ones.

MR. MONK: They are not one of the enumerated ones, and then --

QUESTION: But you suggest that no juror, none of the 12 jurors, you are satisfied that none of the 12 jurors -- you certainly not saying that none of those facts were correct? That he didn't have --

MR. MONK: Under number 8, the jury makes a two-part determination, it seems to me. One part is, do we find credible evidence that this fact exists or not?

The second part is, does that fact mitigate?

QUESTION: Correct.

MR. MONK: Because one through seven are defined to be mitigating. Number 8 is a two-part question.

QUESTION: And so what they're really -- because what the facts were essentially undisputed, they are really saying none of us think that a low I.Q. or a sixth grade education has any mitigating value at all?

MR. MONK: That's correct. That, I believe is the conclusion --

QUESTION: That is probably what they concluded. Rather than that they were not convinced unanimously that those factors should be considered mitigating. Which is what the dissenting judge apparently found?

MR. MONK: Right. And their answer to number 8 was none.

QUESTION: Right.

MR. MONK: I mean, they affirmatively went to the point to where -- this jury, it seems to me --

QUESTION: Arguably those instructions and those forms said you should answer no to a mitigating circumstance unless you're unanimous that it exists?

MR. MONK: Well, Justice White --

QUESTION: In order to find there is a mitigating circumstance, you must be unanimous?

MR. MONK: That's right, and in order to find that there is no mitigating circumstance, you must be unanimous. And if you are in neither position, you must continue to deliberate. And if you can't reach --

QUESTION: That he did not tell them. That he did not tell them.

MR. MONK: Well, he did, I believe. In the last instruction, I believe he precisely does that. It says, "However your unanimous decision falls, answer yes or no."

QUESTION: Well, it certainly could have been a lot clearer. It's hard to believe that in a matter of this importance, those instructions could be drafted in that way.

MR. MONK: Well, Justice Scalia, let me --

QUESTION: Just to read them, they certainly don't leap out and mean that to me.

MR. MONK: Well, if you look at all of the

instructions together, I believe that under California v. Brown, a reasonable juror would have understood the instructions to be read as the court of appeals interpreted them in this case.

But there is a couple of other things that I would point to that would lead you to that same conclusion.

QUESTION: I shouldn't be interrupting you so much. But may I ask you a historical question that there was reference that Justice Kennedy made: has there ever been a case in Maryland in which a jury filled out everything in the form except one mitigating circumstance, including a recommendation of Death, and then the judge said, "they obviously were hung on the mitigating circumstance, so it must be a life sentence?"

MR. MONK: No. There has been a circumstance where the jury answered the aggravating questions; found an aggravating circumstance; got to the mitigating circumstance; answered one of those yes; didn't fill out anything else; and was hung; deliberated for 12 hours and couldn't reach a verdict.

QUESTION: But the jury was hung on the ultimate determination, too?

MR. MONK: Well, I submit we don't know. The form has some marks next to the mitigating --

QUESTION: The thing that's unlikely, it seems to me,

in the way that things happen in real life, is that they would come to the unanimous conclusion that there should be a Death sentence, but that they should be hung on an intermediate -- a mitigating circumstance, and they leave that blank. And I gather that has never happened.

Whereas, if it did happen, you are telling me the judge would look at the form and impose a life sentence?

MR. MONK: Well, if the jury was unable to reach a determination on each of the questions, then they would be hung and a life sentence under the form --

QUESTION: Even though they filled out the rest of the form, they said -- they said that even one mitigating blank, filled everything else out that would qualify for a capital -- for the Death sentence, the judge would then under Maryland law have a duty to impose the life sentence, just because of that one blank in the form?

MR. MONK: That is the anomalous circumstance that the court of appeals was concerned about and therefore announced a new form to be used in future cases.

QUESTION: Counsel, at page 141 of the joint appendix, the majority opinion discusses in the first full paragraph the jury's duty, and as I understand it, if the jury is hung on mitigating, they go ahead on aggravating anyway?

MR. MONK: Well, the aggravating comes first in the form, Justice Kennedy.

QUESTION: But it says, if they're hung as to mitigating, they go on in any event to determine the aggravating circumstance?

MR. MONK: I'm sorry, Justice Kennedy, that passage that you are referring to in 141 is referring to the new procedure, not the form that was in place at the time that this case was decided.

Remember that when the court of appeals announced that they didn't want the form to be limited as it was in this case, which would create the circumstance if the jury couldn't reach a determination on mitigating, but had gone on to weigh, and had reached the Death penalty, under those circumstances they would have been a hung jury, life imprisonment would have been imposed under the Maryland statute. They wanted to avoid that anomalous circumstance, so they announced this new form.

Let me just point out a couple more points with respect to this issue: why I think a reasonable juror would have read the instructions the way the court of appeals held it to be.

The defendant in this case did not object to these instructions. There is nothing in the closing arguments from defense counsel, or from the prosecutor, which suggested that anybody understood the form in any way other than it was a unanimous decision was required by the jury on each one of the questions presented.

QUESTION: The court of appeals didn't rely on that at all, did they?

MR. MONK: The court of appeals did not rely on that.

QUESTION: It didn't did they?

MR. MONK: They did not.

If you agree with the Maryland Court of Appeals that a reasonable juror would have understood these instructions to require a unanimous decision whether the answer was yes or no to the mitigating circumstances,then there really is not a problem in Lockett or Eddings. The defendant was given the opportunity to present his evidence on mitigation for the jury to consider, and the jury in this case did consider it and rejected it. And therefore there was nothing to weigh, and the statute is permissively mandatory.

The Maryland statute was designed to impose a system of guided discretion, so that the court of appeals could conduct a proportionality review, and so that in each case, whether the defendant be sentenced by a judge or a jury, the same process would obtain. The court would know what aggravating factor the sentencer relied upon for the determination; what mitigating factor the sentencer had found, and what the ultimate decision was.

And the word "sentencer" I think is key, because the determination here, the sentencer is the jury, in the context where the jury is selected by the defendant. It's not

individual members of the jury; it is the jury as a whole, and juries under Maryland law decide things unanimously.

I'd like to turn if I could now briefly to our argument with respect to the victim impact evidence in Booth. This case was decided by the court of appeals ten days after the decision in Booth. The issue was not briefed or argued before the court.

The court of appeals construes the evidence that came in this case not to be victim-impact evidence within the meaning of the Maryland statute. This evidence did come in as victim impact evidence. It was introduced, read to the jury as a victim impact statement.

I think it is distinguishable, however, from the victim impact evidence that came in Booth in the sense that it is the total other end of the spectrum. The victim impact statement that came in Booth was inflammatory. It contained a cause, possibly for the Death penalty; it commented on the evidence; it described in great detail the sufferings of the children and grandchildren of the victims.

QUESTION: You were defending that in Booth, weren't you?

MR. MONK: Yes, I was, Justice Blackmun. And I think this is an opportunity for the Court to rethink its holding in Booth. I think the decision in Booth goes too far. I think it would be appropriate for the Court to limit Booth to the

context and uphold the court of appeals on this case by saying that it is okay to consider the victim, the victim himself; not the victim's children or grandchildren, or call for the Death penalty; clearly that's bad.

QUESTION: That wouldn't be a limitation of the Booth holding was that the particular impact evidence there had to be excluded. Everything else is dicta.

MR. MONK: The victim impact evidence in Booth included all of those things, Justice Rehnquist.

QUESTION: It's not often that a lawyer gets to argue the same case twice.

[Mirth.]

MR. MONK: It is not, Justice Marshall, and I beg the Court's indulgence. It seems to me --

QUESTION: It's even rarer that the wins the first time and loses the second.

MR. MONK: Understanding that, Justice Scalia, let me just make one more point about how this Court might distinguish the decision in that case from this case: this victim was the lowest part of humanity. He was a convicted felon in jail and he was murdered by his cell buddy. The victim impact in this case came in only to give some humanity to him, so when the jury tried to determine what the loss to society was from this life, they at least understood who this victim was.

Can it be that this Court intends for victim impact

to be so excluded that it would simply give the victim a number? "This is number 28, and we never have to know anything about the victim." So that when a jury is making that ultimate determination, that moral judgment, what was the loss of society from this victim? They'll never know who he was or what his contribution to society was -- I think that really goes too far, and I think there is a principled reason that the Court could say Booth was right because it was outrageous, goes way beyond what we can tolerate, but that some evidence about the victim alone tempered by the trial judge's admonition to avoid undue prejudice, could be appropriate. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Monk. Mr. Burns, you have five minutes remaining.

ORAL ARGUMENT BY GEORGE E. BURNS, JR., ESQ.

ON BEHALF OF PETITIONER -- REBUTTAL

MR. BURNS: Initially, I think the crucial problem with the state's position as I now understand it to be, is the court's opinion set forth in the joint appendix at 136 - 141, curiously there is not one word about a new law announcing new forms; what the court says is Petitioner has got it all wrong; this is what it's always meant.

The crucial point for the state to be right is just the opposite. It's just that the court is changing the law. But the court specifically rejects that. And when the court does that, the instruction on 95, of course, cuts against the

state's case because you only need yes or no, and the court very clearly at 139 and 140 says we always imagine the jury would know that you had this "maybe;" leave it blank.

On the victim impact I would only say that I don't agree with the state that anyone is in the lowest rung of humanity. I don't think it's necessary to build up his contribution to society for all of us to take into consideration as the jury does, that at the trial, the facts and circumstances of the crime. And I think this court was right in Booth, and I'm glad to see Mr. Monk today think, in at least most respects, that he was wrong on that day.

QUESTION: You can't say that we must accept the Maryland Court of Appeals construction of the form that you were talking about, and yet not accept it for another reason.

MR. BURNS: Justice White, I never said you shouldn't accept the interpretation of what the jury should do. My only contention in this case on this point is that the court of appeals' position is untenable that a jury actually with these instructions in this form could have done that. Obviously, I don't think that this court should change the interpretation of the Maryland Court of Appeals as what it should mean.

But the question here is in this case, could a reasonable juror from this form and these instructions gather all of the materials on 136 - 141? That's our position.

QUESTION: Well, if we're free to do that, why I

suppose we're free to accept the state's submission?

MR. BURNS: I don't think so, Justice White --

QUESTION: Well, I know, because one or the other; but there's nothing to bar us -- we're not legally barred.

MR. BURNS: Of course the Supreme Court can do anything.

QUESTION: No, it can't. We usually don't disagree with state courts on their construction of their own law; their own justice; but you're asking us to do what?

MR. BURNS: I'm asking -- I'm not asking at all to say their construction is wrong; I'm simply saying if this is the correct instruction of this, we get the benefit of these instructions and this sentencing form. That's the reason that it was unfair in this case.

QUESTION: Well, they said you did.

MR. BURNS: Well, that's where we disagree with the court. But that's not disagreeing with their construction of the law. That's just disagreeing with their interpretation of the instructions and the effect of the form in this case. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you Mr. Burns. The case is submitted.

(Whereupon at 3:00 p.m. the case was submitted.)

REPORTERS' CERTIFICATE

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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the SUPREME COURT OF THE UNITED STATES.

Date: March 30, 1988

Margaret Daly

Official Reporter

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