

ORIGINAL

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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

**CAPTION:** DOCK McKOY, JR., Petitioner V. NORTH CAROLINA

**CASE NO:** 88-5909

**PLACE:** WASHINGTON, D.C.

**DATE:** October 10, 1989

**PAGES:** 1 - 48

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1                   IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 DOCK McKOY, JR.,                   :  
4                                    Petitioner                   :  
5                   v.                   :    No. 88-5909  
6 NORTH CAROLINA                   :  
7 -----x

8                                    Washington, D.C.

9                                    Tuesday, October 10, 1989

10                   The above-entitled matter came on for oral argument  
11 before the Supreme Court of the United States at 12:59 p.m.

12 APPEARANCES:

13 MALCOLM RAY HUNTER, JR., ESQ., Raleigh, North Carolina; on  
14 behalf of the Petitioner.

15 JOAN HERRE BYERS, ESQ., Special Deputy Attorney General of  
16 North Carolina, Raleigh, North Carolina; on behalf of the  
17 Respondent.

C O N T E N T S

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MALCOLM RAY HUNTER, JR., ESQ.	
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MALCOLM RAY HUNTER, JR., ESQ.	
On behalf of the Petitioner	44



1 Court held, that the instructions in this case would require  
2 12 jurors to find mitigation, but only one to reject it.  
3 North Carolina, after Mills, is the only jurisdiction in the  
4 United States where this method of finding and excluding  
5 mitigation is still allowed. In Mills this Court applied a  
6 well established rule.

7 QUESTION: Excuse me, what -- what do you mean is still  
8 allowed? Did some states previously use this method?

9 MR. HUNTER: Well, Maryland previously used this  
10 method, and --

11 QUESTION: Well, maybe, right.

12 MR. HUNTER: -- I think they were the only ones.

13 QUESTION: Mr. Hunter, is it your position that the  
14 Constitution requires the state to prove lack of mitigating  
15 circumstances?

16 MR. HUNTER: No, Your Honor. No, it is not. It is  
17 simply our position that it is unconstitutional to allow one  
18 juror to preclude the rest of the jurors from considering  
19 mitigating circumstances at -- at the penalty, at the final  
20 sentencing stage.

21 QUESTION: But you do feel that the state may say to  
22 the defendant, you bear the burden as to the existence of  
23 mitigating circumstances?

24 MR. HUNTER: I, frankly, I don't know the answer to  
25 that question, Your Honor. I know this Court is considering

1 that question. We're -- there is a burden of proof in North  
2 Carolina on the defendant. It is a preponderance of the  
3 evidence which we have not contested in this case.

4 QUESTION: So you don't -- you don't disagree with, at  
5 least in your position here, that North Carolina may place the  
6 burden of proof on the defendant by a preponderance of the  
7 evidence to show mitigating circumstance?

8 MR. HUNTER: We -- we are not disagreeing in this case,  
9 no sir. There -- there is -- was a burden in this case, and  
10 that is not the subject of our complaint. Our complaint is  
11 that -- is that that question can be resolved by one juror for  
12 the other 12, as it was in Mills.

13 QUESTION: Well, but it -- it does seem to me, perhaps  
14 I am wrong, that there is a certain inconsistency if you say  
15 that the state may place the burden on the defendant to prove  
16 it, but -- but then you say the question should be addressed  
17 to each juror.

18 MR. HUNTER: No, I think it may be addressed to the  
19 entire jury, Your Honor, but then the entire jury has to find  
20 that fact truly unanimously. The -- the system that we have  
21 here is -- as I understood the dissent in Mills, for example,  
22 the -- the dissenters in Mills understood Mills to have a  
23 scheme where the jury had to be unanimous to find or to reject  
24 mitigation. In other words, they had to agree about whether a  
25 mitigating fact either existed -- it was either true or it was

1 not true. They had to agree. And on that basis the  
2 dissenters felt that that was a constitutional instruction in  
3 the constitutional scheme.

4 In the North Carolina scheme, on the other hand, and as  
5 I think the -- the Court in the Mills decision held the  
6 Maryland scheme, they interpret it to mean that 12 jurors were  
7 required to find that a mitigating circumstance was present,  
8 but only one juror could upset that mitigating circumstance --  
9 that is, to unfind it or to reject that mitigating  
10 circumstance.

11 QUESTION: One -- one could --

12 MR. HUNTER: And it's that one-way unanimity that was  
13 the problem in -- in Mills, I think, and is -- is clearly,  
14 there is no debate about it, the problem in North Carolina.

15 QUESTION: Of course, one -- one could upset an  
16 aggravating circumstance in North Carolina as well, couldn't  
17 it?

18 MR. HUNTER: That is exactly right, I think, and that's  
19 --

20 QUESTION: So why isn't that even handed enough?

21 MR. HUNTER: Well, Your Honor, it's -- it's even handed  
22 in a certain sense, but in -- in one sense you're letting some  
23 defendants in some trials get arbitrary life sentences perhaps  
24 because the jury can -- one juror can reject aggravation for  
25 whatever reason. It is unreviewable. And that --

1 QUESTION: You think that is bad too. You think maybe  
2 -- maybe aggravating circumstances should just be majority --  
3 majority vote.

4 MR. HUNTER: Well, if the state -- I think that's up to  
5 the state as to exactly how they found. The state may decide  
6 that they should be unanimous, but it should be true  
7 unanimity.

8 QUESTION: Well, why -- why shouldn't that be the same  
9 rule about a mitigating circumstance? How are you going to  
10 prove something by a preponderance of the evidence if you only  
11 get 11 votes? You haven't proved it any more than you have  
12 proved an aggravating circumstance if you only get 11 votes.

13 MR. HUNTER: Well, my complaint, and -- and the  
14 complaint in Mills, was not so much about unanimity. It was  
15 about the fact that it could be rejected by one juror. In  
16 every other way that we consider unanimity, unanimity is when  
17 everybody agrees, that is we all agree that a fact is found or  
18 we all agree that a fact is not found. That's -- that's the  
19 problem in this case. It was the same problem that existed in  
20 Mills.

21 QUESTION: Well, you don't need a unanimous vote to  
22 acquit somebody in a criminal trial. All you need is a --  
23 failure to have 12 people vote for guilt.

24 MR. HUNTER: Well, if -- if -- if the jury -- if all 12  
25 don't agree that the appropriate judgment is not guilty, then



1 it is a hung jury.

2 QUESTION: Well?

3 MR. HUNTER: And I think that --

4 QUESTION: Then you don't need -- well, that may be so.  
5 That may be so, but you don't need a -- but, you -- you have  
6 to -- if you are going to prove something, by any normal  
7 understanding, you say that the jury has to be unanimous.  
8 Unless there is some rule of less than unanimous.

9 MR. HUNTER: And again, our, Your Honor, our problem,  
10 the unconstitutionality in North Carolina, does not have to do  
11 with requiring the jury to be unanimous to find mitigation.  
12 It is allowing them to reject that mitigation by only one  
13 juror. And I think the examples that were given in Mills v.  
14 Maryland really illustrate the problem that also exists in  
15 North Carolina. In Mills v. Maryland the two hypotheticals  
16 that were suggested there was that 11 jurors could believe  
17 that there was mitigation in the case, be convinced of it by a  
18 preponderance of the evidence, Your Honor, and yet one juror  
19 could say I am not convinced by a preponderance of the  
20 evidence.

21 QUESTION: Sure.

22 MR. HUNTER: Further, those 11 jurors, if they were  
23 allowed to consider that mitigation, would have found that  
24 life was the appropriate decision in this case.

25 QUESTION: So you just don't think that they have to --

1 that they should be able to require proof of a mitigating  
2 circumstance by a preponderance of the evidence.

3 MR. HUNTER: Yes, sir, I agree that they can require  
4 proof of a mitigating circumstance by a preponderance of the  
5 evidence, but I don't agree --

6 QUESTION: Well, you haven't proved it if only 11  
7 people vote for it.

8 MR. HUNTER: That's right. But at that point -- the  
9 question is what do you do at that point where there is  
10 disagreement.

11 QUESTION: Well, you haven't proved it.

12 MR. HUNTER: It hasn't been proved yet, and it hasn't  
13 been, I would say, disproved yet.

14 QUESTION: But so the party that carries the burden of  
15 the proof loses at that -- the party that has to carry the  
16 burden of proof ordinarily we would say loses at that point.

17 MR. HUNTER: They haven't convinced all 12 at that  
18 point, but they don't lose, Your Honor. In a -- in a criminal  
19 case where the state has the burden, if they convince 11  
20 people by a -- by whatever the standard is, that the defendant  
21 is guilty, and one doesn't agree, the result is not an  
22 acquittal.

23 QUESTION: No.

24 MR. HUNTER: The result is -- is that the defendant  
25 gets a new trial, there is a hung jury or whatever happens.

1 QUESTION: Hung jury.

2 QUESTION: Well, if they convince 11 that there are  
3 aggravating circumstance and they don't convince one that  
4 there is an aggravating circumstance, they haven't carried  
5 their burden, and the result in North Carolina is that the  
6 defendant cannot be given death. Isn't that right?

7 MR. HUNTER: That is exactly right, Your Honor.

8 QUESTION: He gets a life sentence instead.

9 MR. HUNTER: And that's --

10 QUESTION: So this is perfectly parallel.

11 MR. HUNTER: It is perfectly parallel, but it is also  
12 perfectly arbitrary. I think, and as I was -- I was trying to  
13 answer this question earlier --

14 QUESTION: Or is it perfectly parallel? Let me  
15 interrupt there a minute.

16 In the aggravating circumstance category, the  
17 aggravating circumstances are statutorily defined, are they  
18 not?

19 MR. HUNTER: Yes, they are.

20 QUESTION: So that if the fact is proved, there is no  
21 issue about whether it was aggravating. But in the mitigating  
22 circumstance category there are two things the defendant must  
23 prove: one, that the fact exists, and, two, that it is  
24 mitigating. So they are not parallel.

25 MR. HUNTER: Your Honor, as -- that is correct, Your

1 Honor. As to the nonstatutory mitigating circumstances which  
2 may be considered, and also as to the statutory mitigating  
3 circumstance of age that was submitted in this case, the jury  
4 did have to find two things. So that, in this case, different  
5 from Mills, there are really two layers of possible arbitrary  
6 action by the jury.

7 All 12 jurors could agree that a fact is proven -- they  
8 -- so that the defendant has -- has made his burden of proof  
9 on the question of fact, and 11 of them could find that it is  
10 extremely mitigating. And in fact, so mitigating that they  
11 would impose a life sentence if they could consider that  
12 evidence. But one juror can find, in the jury room, in  
13 secret, that that circumstance, to his mind, is not  
14 mitigating. And on that basis, the evidence -- the jury has  
15 to decide the case without considering that evidence. And  
16 that can be so even though that 12th juror might believe there  
17 is some other mitigating circumstance in the case upon which  
18 basis that juror would vote for life. But because that is not  
19 unanimous, all 12, if they were allowed to consider the  
20 mitigation each of the 12 believes, would vote for life. But  
21 because of the unanimity requirement none of them would be  
22 able to consider that mitigation.

23 QUESTION: This happens all the time with respect to  
24 subissues that are -- that -- that are within one major issue.  
25 Even on the issue of guilt. You might have -- you might have

1 11 jurors who believe that -- that the defendant was there at  
2 -- the scene, one who doesn't believe he was at the scene.  
3 Perhaps all 12 believe that if he was at the scene he pulled  
4 the trigger. You -- you have an odd result, since only --  
5 they all believe he pulled the trigger, since only one of them  
6 believed he wasn't there, even the one that -- every --  
7 everybody's vote is -- is distorted when you have subissues  
8 like this. That happens all the time.

9 MR. HUNTER: Your Honor --

10 QUESTION: I don't know why this is such -- such an  
11 extraordinary thing.

12 MR. HUNTER: The difference is, Your Honor, is that in  
13 this case when jurors disagree, the 11 have to look at the  
14 case from that point on through the eyes of -- of the one.  
15 That -- that's the difference. If they could disagree and  
16 then bring that down to the final sentencing stage and say  
17 well, we disagree as to the basis, but we'll talk about it,  
18 and here is what we think the appropriate sentence is in the  
19 case, after being directed through the aggravating and  
20 mitigating circumstance. That is the scheme that the vast  
21 majority of states, I believe, have.

22 QUESTION: But -- but very often, if -- if you need one  
23 additional element for first degree murder, for example, only  
24 one juror believes that that element does not exist, all of  
25 the other 11 therefore have to regard the rest of the case as

1 a second degree case --

2 MR. HUNTER: Only --

3 QUESTION: -- and proceed on that basis. Isn't that  
4 right?

5 MR. HUNTER: Only if those 11 decide to join that one  
6 and say yes, it's second degree murder. Only if they do that.  
7 Now, if you have a system that requires the jury to be  
8 unanimous as to all the points, then there's going to be give  
9 and take, and one may convince the other 11. But I submit to  
10 you that that is a much different case than the case where one  
11 can take a position, he has no duty or no interest in trying  
12 to convince the other 11 that his position is correct. He can  
13 just black ball, he can just literally prevent them from  
14 considering that mitigation at the sentencing stage without  
15 any convincing.

16 If we had a true unanimity system in North Carolina,  
17 then I think it would be like the system that the dissenters  
18 approved in Mills. But the problem is --

19 QUESTION: But that -- that argument would apply to  
20 aggravating circumstances as well, necessarily.

21 MR. HUNTER: That's exactly right, Your Honor. But  
22 because North Carolina -- and I don't believe the system for  
23 deciding aggravation is a reliable one either. Because we  
24 have a system that in some cases would allow one juror to  
25 black ball aggravation in some cases, and therefore that

1 defendant might get a life sentence who doesn't deserve it. I  
2 don't think the cure for that is to allow black ball of  
3 mitigation in another case, in Dock McKoy's case, and -- and  
4 allow a defendant to get a death sentence in a case where it  
5 is not appropriate.

6 You know, the -- the requirement that the jury be  
7 unanimous as to aggravation and the requirement that the jury  
8 be unanimous as to mitigation was a decision that is not in  
9 our statute; it was a decision that was made by the North  
10 Carolina Supreme Court. It is essentially judicial gloss on  
11 our statute; it is not required by the statute. They -- they  
12 simply made the decision in Kirkley, back in 1983, that that  
13 would be the appropriate way to go.

14 The problem with it, though, as shown in Mills, decided  
15 by this Court, is that it allows preclusion of mitigation. It  
16 could allow the imposition of the death penalty despite the  
17 existence of factors which would call for a lesser penalty.  
18 That was exactly the problem that was seen in Mills, decided  
19 last term --

20 QUESTION: Now, how -- how would a majority vote solve  
21 this problem? I mean, you -- you could still have the same  
22 kind of extortion on the part of one juror if you -- if you  
23 say only a majority has to find both aggravation and  
24 mitigation, and the jury is split six-six. What incentive is  
25 there for any of the six to change their mind? They -- they

1 know that if they don't change their mind there is no  
2 aggravation found.

3 MR. HUNTER: Well, I think there are problems with even  
4 having a majority system, Your Honor. I -- I think you are  
5 correct. The three things that I think can be -- can be done  
6 --

7 QUESTION: We can't run a legal system; there are  
8 problems with everything.

9 MR. HUNTER: -- is one, you have true unanimity.  
10 Unanimity both ways, which is the way the dissenters in Mills  
11 interpreted the statute in -- in Maryland.

12 QUESTION: So, in your view, if the jurors had to be  
13 unanimous either to find or to reject mitigating  
14 circumstances, you would find no objection?

15 MR. HUNTER: There would be no preclusion in that  
16 instance, because all -- all 12 jurors, they would have  
17 thought it out and agreed as to what was -- whether a fact was  
18 true or not. It seems to me that if --

19 QUESTION: And what if they can't agree? Then under  
20 that system what happens?

21 MR. HUNTER: Under that system there would be a hung  
22 jury, and I should add that in North Carolina where the jury  
23 can't agree the -- the legislature has decided that that  
24 defendant should get a life sentence. Maryland also used to  
25 have this same statutory scheme. They thought better of it



1 and changed it so that now in Maryland if there is a hung jury  
2 they go back and have another sentencing hearing. If the  
3 state is concerned about reliability and concerned to the  
4 extent that they think that unanimity is required for a  
5 finding of mitigating circumstances, then there's a -- there's  
6 a certain cost to that, I think, in efficiency. There are  
7 going to be more hung juries if you have true unanimity.

8 But our point is simply if it is very important, for  
9 instance for this jury to decide whether Dock McKoy had a  
10 mental disturbance at the time that this crime occurred --  
11 well, it's important, the jury's decision that that is true is  
12 important, but the jury's decision that that is not true is  
13 equally important. Because what they are deciding is not  
14 merely that a burden has not been met. They are deciding Dock  
15 McKoy's life without consideration of any mental disturbance  
16 in the case. So I think there should be equal concern for  
17 reliability in the decision that that mitigating circumstance  
18 is not present.

19 It -- it seems to me all together arbitrary to allow  
20 one juror to dictate to the other 11 that -- that fact, that  
21 question of fact, and that all 12 should either have to agree.  
22 Or there is another suggestion that would be more efficient,  
23 and that is to allow -- continue to direct the jurors to the  
24 mitigating circumstances, even let the jurors vote on the  
25 mitigating circumstances, but those jurors who do not command

1 a unanimous verdict on a mitigating circumstance can simply  
2 consider that in steps 3 and 4. In other words, just simply  
3 allow those jurors to consider the mitigation that those  
4 jurors would find, those 11 jurors would find, allow them to  
5 consider it at the final sentencing stage.

6 That, it seems to me, you lose nothing in reliability,  
7 and in fact I think that is a more reliable determination. I  
8 think that determination about -- about the defendant, where  
9 11 of the 12 jurors agree on the fact, is much more reliable  
10 than a determination where only one of 12 agree.

11 QUESTION: Mr. Hunter, you keep emphasizing agree on  
12 the fact. But am I not correct that, say -- how -- how young  
13 -- what is the youngest age at which a person can be executed  
14 in North Carolina?

15 MR. HUNTER: 6 -- 17, now, Your Honor.

16 QUESTION: Well, supposing there is uncontradicted  
17 evidence that the defendant was 17 years old, and all 12 agree  
18 to that fact, and one of the 12 says that may be true, but I  
19 don't think that is any mitigation. I think a 17-year old  
20 should be treated the same as a 30-year old, so I don't  
21 consider it mitigating. Now that means, as I understand it,  
22 the other 11 may not treat it as mitigating.

23 MR. HUNTER: That is correct, Your Honor, and --

24 QUESTION: It seems to me that is much more significant  
25 than the question of whether they disagree on whether he is 17

1 or not.

2 MR. HUNTER: That is -- that is really the second layer  
3 of arbitrariness that exists in the North Carolina system that  
4 did not exist in -- in the Maryland system, as least as I read  
5 footnote 8 in -- in the Mills decision, where all the jury was  
6 deciding in the Maryland case is -- was whether the fact was  
7 proven or not. And if they couldn't agree, then it was -- the  
8 fact was out of the case.

9 But in this case a juror can do exactly what the judge  
10 did in Skipper, for example. He can decide that some piece of  
11 evidence, some non statutory mitigating circumstance, is not  
12 relevant in his mind. But instead of being done out in open  
13 court where every, where it will be recorded by a trained  
14 judge and where we can review it and decide that in fact that  
15 judge made an error, all we have is a -- is a jury sheet that  
16 says the answer is no. We don't know if it was on the basis  
17 of the facts or on the basis of the law.

18 And so it seems to me that, if anything, these jury  
19 sentencing states, like Maryland and like North Carolina, we  
20 should be more careful with the scheme so as not to allow this  
21 sort of preclusion, because it's essentially unreviewable. If  
22 we have a scheme that allows it, there is no way to prove it  
23 after the fact.

24 QUESTION: Do you think the Constitution requires that  
25 it be a set of questions and answers, rather than a judge's

1 charge to the jury outlining the steps they should go through,  
2 and then just a verdict of death or life?

3 MR. HUNTER: No, Your Honor, and I think --

4 QUESTION: No, no what?

5 MR. HUNTER: No, the Constitution does not require it.  
6 I think, in fact, North Carolina's system is a lot more  
7 elaborate than it needs to be, but elaborate -- being  
8 elaborate and being formal is not the same as being fair and  
9 being -- being more careful about the defendant's rights. And  
10 I think the way the North Carolina system can work is an  
11 example of that fact. In fact, the statute itself does not  
12 even require any formal findings of mitigation. Again that  
13 was decided by our North Carolina Supreme Court. You could  
14 simply find an aggravating circumstance, narrow the case, ask  
15 the jury to consider the mitigation, and then go on and make  
16 your ultimate decisions. The problem with the North Carolina  
17 --

18 QUESTION: If you had a system without any findings,  
19 where the judge just charged on all the points and the jury  
20 came back with a simple verdict of either death or life, you  
21 --wouldn't have the basis for review that you're talking  
22 about.

23 MR. HUNTER: That is right, Your Honor. That -- and  
24 that would be one reason to perhaps have another scheme. But  
25 I think a scheme that allowed the -- either required the jury

1 to be unanimous all the way or a scheme that said where you  
2 are not unanimous, those jurors can bring it down, it seems to  
3 me the North Carolina Supreme Court in reviewing the case  
4 would be interested to know, for example, that they were 11 to  
5 one in favor of one mitigator that they didn't consider. And  
6 that they were nine to three in favor of another mitigator  
7 that they didn't consider. That would just be additional  
8 information.

9 So, if the concern is for better recordkeeping, then --  
10 then -- then that could certainly be accomplished by --

11 QUESTION: Mr. Hunter, do you think that the question  
12 whether an age of 16 is a mitigating factor or not is a  
13 question of law or a question of fact?

14 MR. HUNTER: I think it's a question of law, Your  
15 Honor.

16 QUESTION: Thank you.

17 QUESTION: Tell me, what if -- what if -- I mean, we're  
18 dealing with a situation where there are no enumerated  
19 mitigating factors in the law, right?

20 MR. HUNTER: There are some enumerated mitigating  
21 factors.

22 QUESTION: Right. And perhaps constitutionally there  
23 can't be a closed list of mitigating factors.

24 MR. HUNTER: There is no enclosed list, there are some  
25 enumerated, and then there are additional nonstatutory

1 mitigators --

2 QUESTION: And you expect a jury to be unanimous in --  
3 some cases, that in the whole scope of whatever might be  
4 considered mitigating by anybody in the world, none exists in  
5 this case. That is the kind of unanimity factor you think the  
6 Constitution requires the jury in North Carolina to be asked.

7 MR. HUNTER: No, Your Honor --

8 QUESTION: All it takes is one juror who thinks that --  
9 that one thing -- I don't know -- one thing is a mitigating  
10 factor which nobody else in the world conceives of.

11 MR. HUNTER: The way that Maryland changed its  
12 sentencing scheme, even before Mills was decided, to allow --  
13 if it is just one juror, let that one juror bring it down and  
14 consider it in the ultimate sentencing phase. And then there  
15 would be no exclusion. In other words, you don't have to  
16 require unanimity both ways, that is not the only way the  
17 Constitution can be satisfied. Another way the Constitution  
18 could be satisfied would be to allow the jurors to vote on  
19 mitigation, and then those that don't have a unanimous  
20 verdict, those jurors can still consider that mitigation at  
21 the ultimate sentencing phase.

22 In other words, it doesn't -- and as I -- as I said to  
23 the Chief Justice, I don't believe that you even have to have  
24 formal findings of mitigation at all to have a constitutional  
25 sentencing scheme, but what you can't have, what Mills held

1 last term you can't have, is a scheme that allows the  
2 preclusion of mitigation by as few as one juror for all the  
3 rest. That, it seems to me, is -- and as the Court said, was  
4 the height of arbitrariness.

5 You know, if -- if we look back at the Lockett cases,  
6 if -- if we're making a decision as to who is better to make a  
7 decision about whether a circumstance is mitigating, for  
8 example, we won't let a judge do it for the -- for the jury.  
9 The -- the -- the -- a single hold-out juror, it seems to me,  
10 is the worst possible person, if you are thinking of all the  
11 decision makers. We won't let the legislature do it. A  
12 single hold-out juror, it seems, is the worst possible  
13 decision maker to be in the position to make that decision.

14 If -- if there are no further questions I would like to  
15 reserve the remainder of my time for rebuttal. Thank you very  
16 much.

17 QUESTION: Very well, Mr. Hunter.

18 Mrs. Byers.

19 ORAL ARGUMENT OF JOAN HERRE BYERS

20 ON BEHALF OF THE RESPONDENT

21 MRS. BYERS: Mr. Chief Justice, and may it please the  
22 Court:

23 The issue here, as in several other cases now before  
24 this Court, deals with the state's right to have a sentencer  
25 rationally assess evidence, or plead for life sentence instead

1 of death. McKoy versus North Carolina specifically involves  
2 whether a state may hold the defendant to a burden of proving  
3 his mitigation with a reasonable certainty to the entire  
4 sentencing body, the jury. In North Carolina, just as  
5 aggravating factors must be found by all jurors or they are  
6 considered not to exist, North Carolina has made the policy  
7 determination to have symmetry, so that likewise the  
8 mitigation must be found by all jurors, or it likewise does  
9 not exist.

10 QUESTION: Mrs. Byers, if the Mills case applies here,  
11 how do you distinguish the North Carolina scheme?

12 MRS. BYERS: Justice O'Connor, I do not read the Mills  
13 case as holding that this type of system is per se bad. I  
14 understood Mills to be concerned with the issue of ambiguous  
15 jury instructions in a very different system, a system where  
16 the no vote by one juror on mitigation could force a death  
17 penalty without any kind of further consideration of the  
18 appropriateness of the death penalty by the rest of the jury.  
19 This is not present in North Carolina.

20 One juror in North Carolina can, at best, say that  
21 mitigation -- that -- that -- that juror does not find that  
22 mitigation exists by a preponderance of the evidence. One  
23 juror in North Carolina cannot mandate a death sentence. I  
24 think that is a significant difference, because just as there  
25 is no one way to reach --



1 QUESTION: What happens in North Carolina if one out of  
2 12 jurors finds no mitigating circumstances proven?

3 MRS. BYERS: If one juror, pursuant to their  
4 instructions, finds that the evidence does not rise to a  
5 preponderance of the evidence, and after deliberation does  
6 not, cannot agree, then the mitigation is deemed  
7 insufficiently reliably proved and does not exist. However,  
8 that --

9 QUESTION: So, that would result, if there is an  
10 aggravating circumstance, in an instruction that tells the  
11 jury to impose the death sentence?

12 MRS. BYERS: No, Justice O'Connor. There is yet one  
13 more step, where the jury must determine unanimously and  
14 beyond a reasonable doubt, that the aggravating factor found  
15 by the jury -- or factors found by the jury to exist, is  
16 sufficiently substantial to warrant imposition of the death  
17 penalty in this case. So the jury still has that vehicle  
18 through which to give their reasoned, moral response, and  
19 determine whether or not, given the substantiality of the  
20 aggravating factor, death is in fact appropriate in this case.

21 QUESTION: And you say that was absent in Maryland.

22 MRS. BYERS: Yes, in Maryland the failure to find  
23 mitigation mechanistically forces a sentence of death. The  
24 jury cannot even vote about whether they consider the  
25 aggravating sufficiently substantial.

1           In Maryland the statute ends with the weighing process  
2 and does not go on to that fourth step. North Carolina is  
3 unique, or almost unique, among the states in having this type  
4 of step. Therefore, we feel that this kind of burden of proof  
5 does not raise any of the dangers of arbitrariness which  
6 possibly could have resulted from a Maryland burden of proof  
7 of this type. So, for that reason alone we find it, a  
8 difference.

9           Further, North Carolina, as a matter of state policy  
10 unlike Maryland, has determined, as a matter of our state law,  
11 that evidence ceases to be used in the balancing process once  
12 it is found insufficiently reliable to support a mitigating  
13 factor. And, as Justice Blackmun noted in footnote 7, the  
14 Maryland court had taken the opposite tack on that, so we say  
15 that this is another state law rule which does distinguish  
16 these cases.

17           QUESTION: May I question you a moment about the  
18 distinction, because, supposing you have a case in which if  
19 you just look at the aggravating side you feel quite confident  
20 the jury would say this is a sufficiently serious crime that  
21 it justifies the death penalty. But if the jury were to  
22 consider the fact that the defendant was 16 years old and had  
23 military service, say -- or maybe he couldn't do that if he  
24 was just 16 -- but say two or three factors like that, and --  
25 and if they were in the balance there would be great doubt

1 about whether there would, the aggravating would outweigh the  
2 mitigating. In such a case, as I understand it, if one juror  
3 agrees that the facts exists but the -- thinks they have no  
4 mitigating significance, that juror can require the others not  
5 to consider them, and therefore requires the death penalty be  
6 imposed.

7 MRS. BYERS: Well, again, no, Your Honor. We have a  
8 specific -- an absolutely specific statutory instruction in  
9 our issue 4.

10 QUESTION: I understand. I am assuming you satisfy  
11 issue four if you don't consider mitigating circumstances.

12 MRS. BYERS: Oh, okay. I apologize.

13 QUESTION: But that is not sufficient if they were to  
14 consider youth, military service, the fact he was intoxicated,  
15 three or four things like that, but one juror says I don't  
16 care about those things, I don't consider it mitigating, even  
17 though I agree all those facts are correct. That juror will  
18 therefore cause the death penalty to be imposed, if I  
19 understand it.

20 MRS. BYERS: No, you do not understand our system  
21 totally correctly, then, sir. Justice Stevens, the North  
22 Carolina statute sets out eight specific mitigating factors,  
23 much like Maryland did.

24 QUESTION: I understand. Age is one of them.

25 MRS. BYERS: And -- age is one of them. And if they

1 are found to exist, they must be given mitigating effect, that  
2 is --

3 QUESTION: Well, you always have some age. You always  
4 have some age. And a juror can say I don't think that age is  
5 mitigating. You don't always get mitigating -- maybe he's 35  
6 years old.

7 MRS. BYERS: Well --

8 QUESTION: And everybody agrees on his age -- but the  
9 only issue is whether that age is a mitigating factor or not.

10 MRS. BYERS: That is probably the only one of the  
11 statutory mitigating circumstances where we could even talk  
12 about the --

13 QUESTION: Well, suppose the significant, no  
14 significant past -- criminal history. Supposing he has three  
15 speeding tickets. One juror could say that is significant.  
16 The other 11 could say that is silly; that's not significant.  
17 But if one thinks it is significant, that cannot be counted as  
18 a mitigating circumstance. Is that not correct?

19 MRS. BYERS: That's correct, but again it is an issue  
20 of a burden of persuasion and the defendant has not reached  
21 it, and he carries it, just as we carry the burden of proving  
22 that aggravating factors exist beyond a reasonable doubt to  
23 all 12 of the jurors, or they don't exist. And again, here we  
24 also have the same kind of line drawing you have in  
25 mitigation, because we have the especially heinous, atrocious

1 or cruel aggravating circumstance which also brings into -- to  
2 bear a mixed issue of fact and -- and law.

3 So, this is not just on the mitigating side,  
4 necessarily, where these -- these lines are drawn. Likewise -

5 - QUESTION: Yes, but on the mitigating side, the Lockett  
6 case imposes a duty on the state to allow its jurors to  
7 consider all mitigating circumstances. And how can you  
8 reconcile that case with a system which allows one juror to  
9 say age and significant history and so forth can't be  
10 considered?

11 MRS. BYERS: If it please the Court, I believe this is  
12 not a Lockett problem. Lockett, Eddings, Hitchcock, Skipper,  
13 Penry, all deal with exclusion of types of evidence or  
14 limitation on the ability to give the proved mitigation full  
15 effect. That is not what we have here. We are simply dealing  
16 with a vehicle by which this mitigation is proved. We do not  
17 in any way in North Carolina limit what the jury can hear,  
18 what can be put in beyond the -- the wildest realm of just the  
19 ordinary evidentiary requirements.

20 The only thing that North Carolina does, and we believe  
21 properly does, is we require the defendant to prove his  
22 mitigating factors to the satisfaction of the whole jury so  
23 that we can have an understanding and a belief that the  
24 evidence in mitigation, like the aggravation in aggravation,  
25 is reliably proven. And we believe this is different from

1 Lockett. Lockett dealt with a jury not being allowed to hear  
2 certain types of evidence or give any consideration to types  
3 of evidence.

4 QUESTION: You have to use the words may not consider.  
5 It says the jury must be able to consider it.

6 MRS. BYERS: There is full consideration with our jury.

7 QUESTION: Mrs. Byers --

8 QUESTION: How is your -- excuse me --

9 QUESTION: Go ahead.

10 Well -- what if the jury -- all the jurors think that  
11 there is some mitigating circumstance, but they don't agree  
12 unanimously on what it is. They have different reasons. Some  
13 think age, some think mental capacity, some think different  
14 things. Now, under the North Carolina system, none of the  
15 mitigating evidence could be given effect then. Is that  
16 correct?

17 MRS. BYERS: I would -- well, obviously, under the  
18 North Carolina system, all must agree as to the presence of  
19 the various ones.

20 QUESTION: Well, and they -- as I have posited to you,  
21 that they all find there is some mitigating circumstance, but  
22 they disagree on what it would be.

23 MRS. BYERS: Under those --

24 QUESTION: How do they give effect to that if they  
25 think that the defendant should not be given the death

1 penalty?

2 MRS. BYERS: Well, again, Justice O'Connor, the  
3 sentencer here is the jury, not the jurors. And if the entire  
4 jury is not convinced of these factors in mitigation, then it  
5 ought not use them in its weighing and balancing process.  
6 Now, the --

7 QUESTION: So -- so that it cannot be considered by the  
8 jury as a mitigating factor. Let's just get this very clear.

9 MRS. BYERS: It -- it --

10 QUESTION: In Justice O'Connor's hypothetical there are  
11 three different possible mitigating factors that the jury  
12 discusses. Each one has one juror object to it. As of that  
13 point a conscientious jury, following the laws of North  
14 Carolina, cannot consider any one of those as a mitigating  
15 factor under North Carolina law. Correct?

16 MRS. BYERS: That is correct, because, again, there was  
17 full consideration of the evidence which supports these  
18 factors, and if the defendant has not carried his burden of  
19 proving these factors to this jury, then it ought not use them  
20 in the balancing against those aggravating factors which --

21 QUESTION: The problem with that is, it seems to me, is  
22 there really, as Justice Stevens' earlier question pointed  
23 out, two aspects to mitigation. One is, did the historical  
24 fact exist. Was he drunk? Did he have mental retardation?  
25 As to that, I can see that a preponderance of the evidence by

1 a unanimous jury may be relevant.

2 But the next question is whether or not, as a matter of  
3 judgment, this should bear on the sentence. And it seems to  
4 me, that if you require unanimity as to that before any juror  
5 may consider it, that you are violating the rule we set forth  
6 in Mills.

7 MRS. BYERS: Again, Your Honor, I would come back with  
8 the fact that the -- it's not each juror; it is the jury that  
9 is the sentencer. And we put the same type of burden, in fact  
10 more heinous burden, on the state to prove the aggravation,  
11 which also calls into question not only historical facts, but  
12 judgments. And if we are going to have symmetry, if we're  
13 going to have balancing where the sentencers are balancing off  
14 the same sheet, or using the same factors, then we have to  
15 have this type of rule. And, again, we believe that we have  
16 not violated Lockett because there is full consideration --

17 QUESTION: Well, of course I was talking initially  
18 about Mills. It -- it seems to me you may be right, as an  
19 abstract matter, that symmetry is -- is an appropriate goal,  
20 and that what is fair for the state is fair for the defendant.  
21 But I think we did not follow that principle in Mills.

22 MRS. BYERS: And, if it please the Court, I would  
23 suggest that -- that Mills did not go that far. And further,  
24 I think one of the problems in Mills was that, unlike North  
25 Carolina, the danger of having an otherwise reasonable burden



1 of proof is that suddenly the jury was faced with a fact where  
2 the decision was taken entirely out of their hands and they  
3 could not give any type of -- reasoned approach, or  
4 discretion, to giving the death penalty.

5 QUESTION: But -- but that is your system, too. If one  
6 juror says in these circumstances I do not consider mental  
7 capacity to be a mitigating factor, the conscientious jury may  
8 not consider that as mitigating circumstance. And that is  
9 exactly what you've described.

10 MRS. BYERS: No -- no -- that -- that is not correct,  
11 Justice Kennedy. If that factor, if a mental capacity is  
12 found, it is one of our statutory mitigating factors, and it  
13 must be given effect. And in fact, it was given in -- effect  
14 in this case under the capacity to appreciate the criminality  
15 if his conduct was impaired. So, again, as to the statutory  
16 mitigating factors, it -- it was given full effect here. The  
17 --

18 QUESTION: Well, I was speaking in a hypothetical case.  
19 If one juror could have prevented that from being considered  
20 by all the rest of the jurors.

21 MRS. BYERS: Yes, that's true. But, by the same token,  
22 one juror can force the aggravating factors not to be found.  
23 We must prove it to all jurors unanimously and beyond a  
24 reasonable doubt, or those factors do not exist. Mitigating  
25 factors, the defendant merely carries a preponderance of the

1 evidence. That is hardly an onerous standard.

2 Then -- and then we go to the balancing. If all 12 do  
3 not agree beyond a reasonable doubt that the mitigating  
4 factors found are insufficient to outweigh the aggravating  
5 factors found, again, a -- a life sentence is forced by that  
6 one juror. Indeed, at the balancing stage there is a  
7 presumption of life, since it goes to the state to prove  
8 beyond a reasonable doubt that the -- that the aggravating  
9 factors really do outweigh that -- that mitigation.

10 QUESTION: Well, what if there is no mitigating  
11 circumstance found, and there is an aggravating circumstance  
12 found? How are they instructed?

13 MRS. BYERS: Then we go to -- then we go to issue 4 of  
14 the instructions, and on page 14 of the Joint Appendix, or  
15 page 14 and 15 of the Joint Appendix, the jury is told to  
16 "unanimously find beyond reasonable doubt that the aggravating  
17 circumstance found by you is or are sufficiently substantial  
18 to call for imposition of the death penalty." And again, they  
19 are to look at this in light of the case. They are to find it  
20 beyond a reasonable doubt, and they're told an aggravating --  
21 circumstance, may exist in a particular case and still not be  
22 sufficiently substantial to call for the death penalty.  
23 Therefore, it is not enough for the state to prove from the  
24 evidence beyond a reasonable doubt the existence of one or  
25 more aggravating circumstances. It must still -- also prove

1 beyond a reasonable doubt --

2 QUESTION: Well, I asked you what happened if there  
3 were no mitigating circumstances --

4 MRS. BYERS: And when there are no mitigating  
5 circumstances --

6 QUESTION: -- found by unanimous jury.

7 MRS. BYERS: Then -- then the jury still must determine  
8 in that fourth issue whether the aggravating factors found are  
9 sufficiently substantial to warrant imposition of the death  
10 penalty, and they are specifically told the mere fact of  
11 finding an aggravating factor does not mandate death. They  
12 still have to find that death is deserved in this case. And  
13 they look at it in light of the case, and not in light of --  
14 you know, in any kind of abstract form. They don't just say  
15 heinous, atrocious or cruel; that sounds bad to me, therefore  
16 death. They are to look at it under the facts of that case  
17 and in light of the case.

18 The -- as -- as I said, the burden of proof that we  
19 place upon the defendants to prove their mitigation is not  
20 onerous. And it's an easy one, it is one traditionally placed  
21 on defendants to prove matters, particularly within their own  
22 knowledge. It is suggested that there is a hold-out juror;  
23 this has been the hypotheticals. There clearly was no hold-  
24 out juror here, since two matters in mitigation were found  
25 unanimously. So, the issue of the hold-out juror precluding

1 all mitigation and forcing a death sentence simply does not  
2 exist in this case.

3 Further, the -- I think what this Court needs to look  
4 at is the risk of arbitrary action. And in looking at that,  
5 your other cases would suggest that the danger of the hold-out  
6 juror is more illusory than real. This Court, in Johnson v.  
7 Louisiana and several other cases, have looked to the fact  
8 that jurors take the responsibility seriously and deliberate  
9 together. There is -- so there is no real issue of one not  
10 listening to the 12, or we certainly can't assume that on a --  
11 on an empty record such as this.

12 Further, through the -- through the use of voir dire,  
13 cause and preemptories, full instructions on the burdens and  
14 how to find the individual factors in mitigation, reminders to  
15 the jury to deliberate together, something which was done in  
16 this case, --

17 QUESTION: Ms. Byers, --

18 MRS. BYERS: Yes.

19 QUESTION: Is there anything in the record to show that  
20 this juror did give reasons?

21 MRS. BYERS: That the -- that the jury gave reasons?

22 QUESTION: The juror that wouldn't go along.

23 MRS. BYERS: There -- there's no showing in this --  
24 record that there was a juror that wouldn't go along. There  
25 is no showing at all that there was any problem whatsoever.

1 QUESTION: Is there any way of having that known?

2 MRS. BYERS: Well --

3 QUESTION: Of course not.

4 MRS. BYERS: I would -- I would not be sure, Your  
5 Honor. I would think that if there is a substantial problem  
6 within the jury that there would start being notes coming out  
7 --

8 QUESTION: Would you have a problem if a juror, when he  
9 walked into jury room, said I am not going on this mitigating  
10 business? Is there anything you could do about that?

11 MRS. BYERS: Well, there's nothing, of course, that I  
12 can do about that, except --

13 QUESTION: Is there anything anybody could do about  
14 that in North Carolina?

15 MRS. BYERS: Well, yes, sir. The other 12 -- the other  
16 11 could refuse to go along with the rest of the process. I  
17 think that we can't presume that we have this type of  
18 arbitrary jury action. Jurors are assumed to follow their  
19 oaths, and part of the requirement --

20 QUESTION: Well, if a juror violates his oath, what can  
21 you do about it, if he does it in the jury room?

22 MRS. BYERS: You can do nothing about it in the jury  
23 room if someone violates their oath, but I would -- I would  
24 think that this Court has --

25 QUESTION: Wait a minute. Then you agree that if one

1 juror, one juror can stop that mitigating evidence without  
2 giving a reason.

3 MRS. BYERS: One juror -- theoretically one juror could  
4 stop mitigating evidence without giving a reason, but I think  
5 that it takes --

6 QUESTION: Well, why do you need the word theoretical?  
7 Give me a reason where they can.

8 MRS. BYERS: Well, when I say theoretically, Your  
9 Honor, I think that the dynamics of the jury system suggest  
10 that that is simply not the way jurors behave, and I believe  
11 that this Court has written a series of opinions that say that  
12 the jurors are presumed to follow their oaths, and are  
13 presumed to act in a responsible manner, Johnson v. Louisiana,  
14 and the Oregon case that I can't pronounce the first name of.

15 The -- but again, you have so many issues along the way  
16 to winnow out those irresponsible jurors. You have the use of  
17 wide-ranging voir dire, which was done in this case. All  
18 jurors agreed that they could understand and give attention to  
19 ideas of -- of mental problems. If -- you get full  
20 instructions on how they are to behave. And indeed, this  
21 case, I think, Your Honor, exemplifies the remoteness of the  
22 concern you brought out, because here two factors were found.  
23 So they were clearly no hold-out jurors.

24 The state has a significant stake in having the type of  
25 line-drawing that we have in this case, and one of the things

1 that is important to our system are -- and promotes its  
2 rationality, is we have a searching proportionality review,  
3 and the listing of this mitigating evidence helps us with this  
4 proportionality review. Our court looks not only to the  
5 aggravating factors found in determining whether this is a  
6 proportionate sentence, but they also look to all of the  
7 issues found in mitigation. Indeed, this is probably why they  
8 started urging us to keep these findings, so that they could  
9 look to the cases where life was found, as well as the cases  
10 where death was returned, to ensure that this case fell within  
11 that core of cases, more appropriately life or more  
12 appropriately death.

13 The issue of unanimity is important because burdens on  
14 the defendant, as well as on the state, tend to force the jury  
15 at both places to follow channeling, follow reliable  
16 standards. So that -- so that those people who get life, and  
17 those people who get death, get that in accordance with rules,  
18 as opposed to a free-floating whimsy. The failure to allow  
19 the state to allow burdens of proof will -- in mitigation as  
20 well as aggravation, will really open one end of the  
21 sentencing equation to complete open-endedness, complete --  
22 complete arbitrary -- it -- what could be complete  
23 arbitrariness.

24 The Eighth Amendment has never said that its goal was  
25 the minimum number of death sentences possible, but rather, to

1 the extent we can, the issues that we're trying to deal with  
2 by these sentences -- by these -- these evidentiary rules, are  
3 to ensure that one person doesn't get the death penalty on the  
4 same basis that another person would, trying to bring  
5 rationality into the system.

6 The jury, after hearing an individual's evidence, by  
7 having this -- this standard, and if we are going to have  
8 aggravation found by this standard, the need for symmetry is  
9 such that we do need this type of rule, the jury, after  
10 hearing an individual's evidence, will have a standard to  
11 follow in assessing the evidence's believability. And so  
12 while each jury of necessity will hear the different evidence  
13 that each defendant presents, the -- the uniqueness of his  
14 circumstances which he brings forth in -- in suggestion of a  
15 sentence less than death.

16 Nevertheless, we have in North Carolina, a -- a belief  
17 and an appreciation that jury to jury, county to county,  
18 defendant to defendant, the same standards are being used.  
19 This reliability, this rationality in the process, the  
20 systemwide rationality is a very important thing to the North  
21 Carolina jury system.

22 QUESTION: Let me just ask you one question there. You  
23 say you have the same result in every county in every trial.  
24 In this case, the defendant was 65 and he asked the jury to  
25 find that was mitigating, and they didn't, so 65 is not a



1 mitigating circumstance in this trial. Is it not possible  
2 that another 65-year old defendant, in another county, might  
3 persuade the jury that that's mitigating?

4 MRS. BYERS: I know of no case where a 65-year old has  
5 convinced them that that is --

6 QUESTION: No, but I'm just saying it's possible, is it  
7 not?

8 MRS. BYERS: It's possible --

9 QUESTION: And it would not violate any North Carolina  
10 rule.

11 MRS. BYERS: It would not violate any North Carolina  
12 rule, but again, giving these types of standards to the jury  
13 in finding these mitigating factors helps eliminate the  
14 arbitrariness inherent in having different juries determining  
15 different cases.

16 QUESTION: I don't understand why the fact that this  
17 jury so found in this case will have any impact whatsoever on  
18 another trial. The other jury won't even know about this one,  
19 will it?

20 MRS. BYERS: Well, no, they won't. But again, they'll  
21 be using the same mechanisms to reach the end, so they will be  
22 gauging the -- the worthiness of the evidence by the same  
23 standards. And we think that that is a very important part of  
24 what we consider to be a systemwide reliability.

25 QUESTION: Well, the standard, as I understand it, is

1 if one juror thinks it is not mitigating, it is not  
2 mitigating. That is the standard.

3 MRS. BYERS: I think it is more that the -- that the  
4 defendant has not proved to the entire jury and --

5 QUESTION: That's right. He -- he only convinced 11 of  
6 them, but he might convince 12 in the next case. That is  
7 what, I don't see how you can say this enhances uniformity.

8 QUESTION: Under your system, as I understand it, the  
9 defendant would have to convince all 12 that -- that a bizarre  
10 factor like the fact that he is 65, or 60, or 53, is  
11 mitigating.

12 MRS. BYERS: That is correct.

13 QUESTION: He possibly could, but he would have to  
14 convince all 12.

15 MRS. BYERS: That is right.

16 QUESTION: Whereas under the system urged by -- by the  
17 Petitioner here, if he convinces just one that the fact that  
18 he is 53 should be mitigating, that alone will justify that  
19 juror in using that factor to prevent the others from imposing  
20 the death penalty.

21 MRS. BYERS: Well, that -- that's correct, Your Honor.  
22 And to take that --

23 QUESTION: And your point is that that seems much more  
24 bizarre.

25 MRS. BYERS: That is right. And we -- we basically,

1 when we have people weighing and things like that, we want  
2 them using the same list, both in aggravation and mitigation.  
3 There is no real principled way -- the unanimity requirement  
4 forces people to gauge the weight and worthiness of this  
5 evidence as they go through the deliberative process. We are  
6 concerned that telling every juror that they can find what  
7 they want will cause us simply to have laundry lists of  
8 mitigation, and where it will simply not have so much a jury  
9 verdict, and that is after all the sentencer, as a consensus,  
10 a -- a listing of what everyone thought they believed to be  
11 mitigating.

12 The -- the jury is the cross-section of the community.  
13 They are the community's voice. We believe that what the  
14 entire cross section of the community does not believe as  
15 mitigating should not be found to be mitigating, because they  
16 are, after all, the expression of the community's voice.

17 This Court has said that there is really no one right  
18 way to reach a sentencing decision. Spaziano and Pulley, and  
19 many other cases, have emphasized that everyone has a  
20 different way of doing things. North Carolina's system meets  
21 all of the Eighth Amendment concerns. We narrow the class of  
22 death-eligible defendants, we allow all mitigating factors to  
23 be fully considered, as they are necessarily considered when  
24 the -- the decision is made whether in fact mitigating factors  
25 are found. There is weighing, and even beyond weighing, we go

1 further and require the jury to still determine, even if the  
2 aggravating outweigh the mitigating, that it is really  
3 sufficiently substantial to warrant imposition in this death -  
4 - in that particular case.

5 This is more than the Constitution requires. We  
6 believe that our system provides a rational basis, a  
7 systemwide reliability, and part and parcel of that is our  
8 mitigating --

9 QUESTION: Could -- couldn't you live with the notion  
10 that you will make -- you will require a unanimous verdict for  
11 historical facts, like age, or whether he was drunk, or things  
12 like that. But if -- if the jury says we unanimously find  
13 that these facts exist, wouldn't you let -- would you also  
14 have to require that the jury, to a man or to a woman,  
15 believes that that fact is mitigating?

16 MRS. BYERS: Well, the -- the statutory --

17 QUESTION: Couldn't -- couldn't you live with letting  
18 each juror give what significance to a -- an established fact,  
19 that it wants to?

20 MRS. BYERS: Well, of course that is not the system we  
21 have before us here, or even the one that was suggested. And  
22 certainly wasn't the one that was --

23 QUESTION: Well, why is that the system? Don't you  
24 require -- you require unanimity both as to the existence of  
25 the fact and whether it's mitigating.

1 MRS. BYERS: We require unanimity as to the existence  
2 of the fact and as to the eight mitigating factors. The  
3 legislature has already told us those are mitigating, so there  
4 is no judgment made on that.

5 QUESTION: Right.

6 MRS. BYERS: As to the others, we say that the jury  
7 also unanimously should determine that, since the jury is the  
8 sentencer, is the cross-section of the community, and we  
9 believe the whole cross-section of the community should also  
10 believe that that in fact mitigates. Thank you.

11 QUESTION: Thank you, Ms. Byers.

12 Mr. Hunter, do you have rebuttal? You have five  
13 minutes remaining.

14 REBUTTAL ARGUMENT OF MALCOLM RAY HUNTER, JR.

15 ON BEHALF OF THE PETITIONER

16 MR. HUNTER: Thank you very much, Chief Justice.

17 QUESTION: Counsel, with reference to Justice White's  
18 last question, North Carolina has never contended, has it,  
19 that there must be unanimity only as to the historical fact,  
20 but that thereafter jurors can weigh or weigh -- not weigh on  
21 an individual basis. They've never contended that, have they?

22 MR. HUNTER: No, Your Honor. No, they have not.

23 QUESTION: And is -- does the North Carolina Supreme  
24 Court's decision explicitly come to grips with this and say  
25 that unanimity is required for both?

1 MR. HUNTER: They acknowledge the fact that, as to the  
2 nonstatutory mitigators and also the statutory mitigator of  
3 age, the jury has to find two things, as this jury was  
4 explicitly instructed, that it is a fact, number one, and that  
5 it is mitigating, as a matter of law, if you will, number two.

6 QUESTION: Well you -- you say that it is  
7 unconstitutional to -- to require the jury to unanimously find  
8 and -- what a person -- what age a person is.

9 MR. HUNTER: Well, I think if, for instance --

10 QUESTION: Suppose, well -- say it is intoxication.

11 MR. HUNTER: Okay.

12 QUESTION: Say there was a dispute on a fact as to  
13 whether the person was intoxicated at the time of the crime.  
14 Now, is it unconstitutional in your view to require that fact,  
15 if it is going to be considered in mitigation, to be  
16 unanimously found?

17 MR. HUNTER: Your Honor, I think if 11 jurors believe  
18 he was intoxicated, and that it's an important mitigator and -

19 - QUESTION: So your answer is yes. It is  
20 unconstitutional.

21 MR. HUNTER: My answer is yes. My answer is yes, with  
22 an explanation, Your Honor, as they say in district court. My  
23 -- Your Honor, if 11 believe that he was intoxicated and  
24 that's important, and only one believes that he is not  
25 intoxicated, I think that it is a less reliable and more

1 arbitrary to decide the case as if the defendant were not  
2 intoxicated. If I have to choose between how that fact is  
3 going to be decided in that case, I think if we decide on the  
4 basis of the one juror's vote instead of the 11, that is less  
5 reliable. So, my answer is yes.

6 QUESTION: What about age? What if there is an  
7 argument about how old the person is?

8 MR. HUNTER: If 11 believe that the -- the defendant's  
9 age is mitigating, and only one doesn't --

10 QUESTION: No, no. No, no. There is a fight over --  
11 there is a dispute as to how old he is. And that has happened  
12 in this Court, by the way. Is that -- is it wrong then to --

13 MR. HUNTER: I would still -- I think that's what was  
14 held in -- in Mills, Your Honor, that allowing one juror to  
15 decide for the 11 -- other 11 -- because in Mills, this second  
16 level was not there. In Mills they were only finding facts.  
17 The jury was only finding facts --

18 QUESTION: Historical facts, yes.

19 MR. HUNTER: Yes. And this Court held, in -- in Mills,  
20 that that was the height of arbitrariness, to let one person  
21 essentially veto facts for the others. I did want to --

22 QUESTION: Well, what if it comes out seven to five?  
23 Are you -- are you going to let seven people veto facts for  
24 the other five?

25 MR. HUNTER: Well, I would say -- my personal belief is

1 no, that still wouldn't be constitutional, because they could  
2 be preclusion, but it is seven times less arbitrary than the  
3 system we have in North Carolina now.

4 As to the question about what the jury does with  
5 question 4, Justice, I wanted to be sure and point out that in  
6 North Carolina it is very clear in question 4 the only thing  
7 that jury can consider is the mitigating circumstances that  
8 were found, not the whole case. They are not doing a -- a  
9 review of the entire case.

10 On page 73 of the Joint Appendix, at the top of the  
11 page, the North Carolina Supreme Court says it then allows the  
12 jury to consider only that evidence which is relevant, which  
13 in North Carolina's definition of the word is that evidence  
14 which the jury has unanimously found, in sentencing the  
15 defendant.

16 QUESTION: Yes, but, apparently the jury is instructed  
17 that if there are no mitigating circumstances and there are  
18 aggravating circumstances, that they still have to determine  
19 whether those aggravating circumstances are sufficiently  
20 substantial to justify giving the death penalty. There is  
21 another layer of decision.

22 MR. HUNTER: That is true. There is another layer, but  
23 it is only a reconsideration of the aggravating circumstances  
24 that were found, plus if any mitigating circumstances were  
25 found, consideration of those. This Court has never held that



1 because we are very solicitous about the consideration of  
2 aggravation, for instance in Sumner and Roberts are two cases  
3 that -- that occur to me, we have never held that because, no  
4 matter how narrowly we -- we -- we treat aggravation, that  
5 that excuses the exclusion of mitigating evidence. That's, I  
6 think, the Lockett doctrine which was violated in Mills, Your  
7 Honor, and again in this case. Thank you very much, Your  
8 Honor.

9 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hunter.

10 The case is submitted.

11 (Whereupon, at 2:00 p.m., the case in the above-  
12 entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 88-5909 - DOCK McKOY, JR., Petitioner V. NORTH CAROLINA

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BY

Leona M. May

(REPORTER)

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