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Recent Developments: McCoy v. Court of Appeals of Wisconsin: No-Merit Brief Provided to Tile Court by Court Appointed Appellate Counsel Does Not Violate Indigent's Sixth and Fourteenth Amendment Rights

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circumstances were not proven. Additionally, there was nothing in the trial judge's instruction to indicate that the jury had the third option advanced by the court of appeals; namely, to leave the answer blank when a unanimous finding of either "yes" or "no" could not be reached and then proceed to the balancing phase. Therefore, the Supreme Court concluded that it was possible that a jury following the trial judge's instructions could be precluded from considering possible relevant mitigating circumstances, "if even a single juror adhered to the view that such a factor should not be so considered." *Id.* at 1868.

Regarding the verdict from itself, the Supreme Court found persuasive the fact that subsequent to the decision below, the Court of Appeals of Maryland had found it necessary to promulgate a new verdict form, which expressly made provisions for the jury to find that not all twelve jurors agree on the existence or nonexistence of a particular mitigating circumstance. This new form also expressly makes provisions for such findings to be included in the balancing portion of the sentencing. The Court also noted that in the two cases tried before juries which used the new verdict form, both juries reported non-unanimous votes.

Consequently, the Court found

> that there is a substantial possibility that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all twelve jurors agreed on the existence of a particular such circumstance.

Id. at 1870.

The Court therefore determined that the death sentence, which was upheld by the Court of Appeals of Maryland, must be vacated and the case remanded for resentencing.

In a vigorous dissent, Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Kennedy, concluded that the charges of the trial judge to the jury were reasonably sufficient to emphasize the need for unanimity on all the issues involved, including the existence or nonexistence of mitigating circumstances. Furthermore, the dissent noted that the reworking of the verdict form was not evidence that the form itself was improper, since "a sentencing instruction that is constitutionally acceptable may be improved in any number of ways." *Id.* at 1874 n.2.

A sentence of death places a heavy burden on the court system to regulate the procedure by which it may be imposed. The decision of the Supreme Court in *Mills* illustrates not only the careful scrutiny that the imposistion of such sentence demands, but also the controversial questions that face the courts when protecting the constitutional rights of a person accused of a capital offense.

—Gregory J. Swain

McCoy v. Court of Appeals of Wisconsin: NO-MERIT BRIEF PROVIDED TO THE COURT BY COURT APPOINTED APPELLATE COUNSEL DOES NOT VIOLATE INDIGENT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS

In *McCoy v. Court of Appeals of Wisconsin*, __U.S.__, 108 S. Ct. 1895 (1988), the United States Supreme Court held that Wisconsin's no-merit brief rule, by which court-appointed counsel must prepare for the court a statement of why particular cases, statutes, or facts in the record lead him to believe his client's appeal is without merit, is consitutional under the Sixth and Fourteenth Amendments. In so holding, the Court indicates that counsel's role as an officer of the court is at least as important, if not more important, than his role as an advocate and essentially places the attorney in the position of decision-maker.

A Wisconsin trial judge found the appellant, an indigent, guilty of abduction and sexual assault and sentenced him to twelve years in prison. Appellant then filed an appeal and the court appointed a lawyer to represent him. The attorney, after reviewing the case, advised appellant that an appeal would be useless. Rule 809.32(1) of the Wisconsin Rules of Appellate Procedure provides:

> If [a court-appointed attorney] is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California*, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal *and a discussion of why the issue lacks merit.* (Emphasis added).

Counsel partially complied with the rule by submitting arguments in support of the appeal, stating his belief that the arguments were without merit, and asking for permission to withdraw from the case. Counsel failed, however, to provide the court with a discussion of why he believed those arguments were without merit, claiming such action would contravene *Anders* and violate the appellant's Sixth Amendment right to counsel. *McCoy* at 1898. Since the brief did not fully comply with Rule 809.32(1), the court ordered it stricken and told the attorney to submit a conforming brief. Instead, counsel sought a declaratory judgment in the Wisconsin Supreme Court, asking the court to declare unconstitutional that portion of the rule which requires the attorney to discuss why the issue lacks merit. *Id.* at 1899. In upholding the rule, the Wisconsin court and the Supreme Court both relied on and expanded upon *Anders.*

The petitioner in *Anders* was convicted of the felony of possession of marijuana. Counsel was appointed to represent him on appeal; however, after reviewing the record, the attorney advised his client and the court that the appeal was without merit. After petitioner's request for a new attorney was denied, he proceeded to represent himself on appeal, but his conviction was affirmed. Six years later, petitioner filed a writ of habeas corpus in the Supreme Court of California, asking the courts to reopen his case because he had been denied the right to counsel on his appeal. Both petitions were denied.

The U.S. Supreme Court, however, held that California's procedure, by which court-appointed counsel can withdraw from an appeal merely by furnishing the court with a letter in which counsel states that the appeal lacks merit, "does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." *Anders* at 741. Although the no-merit letter alerts the court of potentially frivolous litigation, it gives no basis for counsel's conclusion and fails to notify appellant of potential arguments in support of reversal.

As a result of the California procedure's shortcomings, the Court held that before permission to withdraw will be granted, counsel must prepare a brief "referring to anything in the record that might arguably support the appeal." *Id.* at 744. The procedure the Court adopted was intended to "assure penniless defendants the same rights and opportunities on appeal — as nearly as is practicable — as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745.

Anders was a logical progression from *Gideon v. Wainwright,* 372 U.S. 335 (1963) and *Douglas v. California,* 372 U.S. 353 (1963), wherein the Court expanded the rights of indigents to effective representation. *Gideon* provided for the right of an indigent defendant in a state criminal trial to have the assistance of counsel. The Court held that the Sixth Amendment's guarantee of counsel is a fundamental right made obligatory upon the states by the Fourteenth Amendment. *Gideon* at 342. Similarly, *Douglas* provided for the right of an indigent defendant to counsel in a criminal appeal as of right. "Where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel,...an unconstitutional line has been drawn between rich and poor." *Douglas* at 357.

Anders recognize counsel's conflicting responsibilities to his client and to the court. "His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." *Anders* at 744. By requiring the attorney to file a brief outlining possible arguments for reversal at the same time that he opines that those arguments are without merit, the attorney satisfies both his duty to his client and his duty to the court.

McCoy's arguments on appeal to the U.S. Supreme Court were two-fold. First, he argued that the rule violates the Fourteenth Amendment's equal protection guarantee by discriminating against indigents. Since only court-appointed counsel must petition the court for permission to withdraw from a case, it is only court-appointed counsel who must file the no-merit brief. In contrast, if retained counsel believes his client's appeal to be without merit, he simply tells his client that he will not represent him. A paying client, then, can continue to search for an attorney until he finds one who believes the appeal may succeed.

Appellant's second argument was that the rule violated his Sixth Amendment "right to effective representation by an advocate." *McCoy* at 1900. "The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Anders* at 744.

The *McCoy* Court went a step further than *Anders* by requiring counsel to discuss not only arguments which would support reversal but also why he believes those arguments to be without merit. The Supreme Court held that by requiring counsel to thoroughly review the record in preparation of the brief, "the discussion requirement provides an additional safeguard against mistaken conclusions by counsel that the stongest arguments he or she can find are frivolous." *McCoy* at 1904. Although the Supreme Court believed this requirement would serve the interests of the client, the Wisconsin Supreme Court described the requirement as a judicial aid:

> we view the rule as an attempt to provide the court with notice that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. *McCoy v. Court of Appeals of Wisconsin,* 137 Wis.2d 90, 100, 403 N.W.2d 449, 454 (1987).

Justice Brennan's dissenting opinion in *McCoy* presents a cogent argument of why Wisconsin's discussion requirement would violate these constitutional guarantees. In *Anders,* he said:

> we held that a court may not permit appointed counsel to withdraw from a criminal appeal on the basis of the bald assertion that there is no merit to the appeal. Instead, appointed counsel's role as advocate requires that he support his client's appeal to the best of his ability and that any request to withdraw on the ground that the appeal is frivolous must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *McCoy* at 1906.

Justice Brennan interpreted that to mean that an attorney is expected to argue in support of his client's appeal but not against it. "When counsel has nothing further to say in his client's defense, he should say no more". *Id.* at 1907. If the attorney proceeds to argue against his client, which is what the discussion requirement forces him to do, he is no longer an advocate, but is, instead, a friend of the court.

McCoy illustrates a willingness of the Court to limit the rights of an indigent on appeal when his attorney expresses the opinion that the indigent does not have a viable case. *McCoy* also attempts to curb litigation by prohibiting what is, in court-appointed counsel's opinion, frivolous litigation.

This case goes a step further than *Anders* by sanctioning no-merit briefs. States that did not previously have a no-merit brief rule, believing such was unconstitutional and in violation of *Anders,* may not enact such a rule in an attempt to unclog their own courts. Finally, *McCoy* indicates a possibility that the Court will continue to limit an indigent's right to counsel on the theory that counsel is merely fulfilling his professional and ethical responsibilities by acting as an officer of the court rather than solely as an advocate.

—Linda C. Eddy