2015

Section 6: Criminal

Institute of Bill of Rights Law at The College of William & Mary School of Law

VI. Criminal

In This Section:

Hurst v. Florida

14-7505

Ruling Below: *Hurst v. State*, 18 So. 3d 975 (Fla. 2009), *cert granted*

Hurst was convicted for the May 2, 1998, first-degree murder of Cynthia Harrison in a robbery at the Popeye's restaurant where Hurst was employed in Escambia County, Florida. Hurst's conviction and death sentence were originally affirmed in *Hurst v. State*, 819 So. 2d 689 (Fla. 2002). The Supreme Court of Florida affirmed the trial court's order denying relief as to the guilt phase claims defendant raised. It reversed the trial court's order denying relief as to Hurst's penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacated his sentence of death, and remanded for a new penalty phase proceeding before a jury, which could consider evidence of aggravation and mitigation.

Question Presented: Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*

Timothy Lee HURST
Appellant
v.
STATE of Florida
Appellee

Supreme Court of Florida

Decided on May 1, 2014

[Excerpt; some footnotes and citations omitted]

Per curium

Timothy Lee Hurst appeals his sentence of death that was imposed for the 1998 first-degree murder of Cynthia Harrison. For the reasons set forth below, we affirm his sentence.

FACTS AND PROCEDURAL HISTORY

On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and

bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.

On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone.

Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer. The victim had her hands bound behind her back with black electrical tape and she also had tape over her mouth. Similar tape was later found in the trunk of Hurst's car. The scene was covered with a significant amount of the victim's blood, and it was apparent from water on the floor that someone had attempted to clean up the area. The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. Hurst told him that he had an argument with the victim, she "retaliated," and that Hurst hit the victim and cut her with a box cutter. Hurst said he had killed the victim because, "he didn't want

the woman to see his face." Williams stated that Hurst had talked about robbing Popeye's on previous occasions.

Another of Hurst's friends, "Lee-Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal-Mart to purchase a new pair of shoes. They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. An employee at the shop, Bob Little, testified that on the day of the murder, a man fitting Hurst's description purchased three rings. Little picked Hurst out of a photographic lineup as the man who had purchased the rings. The police recovered the three rings from Hurst.

Smith's parents were out of town the weekend of the murder but upon their return, and after discovering the container with the money from Popeye's in Smith's room, Smith's mother contacted the police and turned the container over to them. The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab." On the back of the notebook paper someone had added several numbers, and one number was the same as the amount on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes that appeared to have blood stains on them and that he had retrieved from the same trash can. Jack Remus, a Florida Department of Law Enforcement (FDLE) crime lab analyst, testified that the shoes were tested with phenolpthalein to detect blood, and while the test results exhibited some of the chemical indications associated with blood, attempts at DNA testing were not successful. Remus also tested the blood-stained sock and determined that the DNA typing was consistent with the victim. Hurst's pants were also tested, but no blood evidence was detected. FDLE fingerprint expert Paul Norkus testified that the deposit slip in the garbage can had three of Hurst's fingerprints on it. At trial, the State played the tape of an interview the police had conducted with Hurst shortly after the murder. Hurst said that on the morning of the murder he was on his way to work and his car broke down. He said that he telephoned Harrison at Popeye's to say he was unable to come to work, and when he talked to her, she sounded scared and he heard whispering in the background. Hurst then went to Smith's house and changed out of his work clothes. Hurst said he went to the pawn shop and bought necklaces for friends, but he did not mention purchasing the

> three rings or buying a new pair of shoes at Wal-Mart.
>
> At the close of the guilt phase of the trial, the jury deliberated for approximately six hours before finding Hurst guilty of first-degree murder.

Hurst filed his initial, amended postconviction proceeding in circuit court. On appeal from denial of postconviction relief, we affirmed on all but one of his postconviction claims. Although we concluded that the State should have disclosed certain field notes by investigator Donald Nesmith, and that the trial court's refusal to perpetuate the testimony of Willie Griffin was an abuse of discretion, we concluded no prejudice accrued from those errors. However, we reversed the denial of relief on Hurst's claim of ineffective assistance of counsel in investigation and presentation of mitigation in the penalty phase, and remanded for a new penalty phase proceeding. In granting a new penalty phase, we explained that there was no sound basis for Hurst's defense counsel to have failed to investigate and present evidence of Hurst's borderline intelligence, possible organic brain damage, the fact that he was in special education classes as a child, and other mitigation for which there appeared to be no apparent disadvantage in presentation.

Prior to the new sentencing trial, the trial court denied Hurst's successive motion for an evidentiary hearing on mental retardation. In addition, the court denied Hurst's request to present mental retardation to the penalty phase jury as an absolute bar to recommendation of a death sentence, although the court allowed him to present mental retardation and other mental issues as mitigation to the jury. After the new penalty phase evidence was presented, in which the State presented an abbreviated version of the trial testimony as to the circumstances of the murder, and after the defense presented testimony concerning mitigation, the jury returned a recommendation of death by a seven-to-five vote.

Before sentencing, the trial court held a *Spencer* hearing at which defense counsel presented further argument that the evidence at the penalty phase established that Hurst was mentally retarded. The trial court subsequently entered a sentencing order sentencing Hurst to death. In doing so, the court found as aggravating factors that (1) the murder was especially heinous, atrocious or cruel, which was assigned great weight; and (2) the murder was committed while Hurst was engaged in commission of a robbery, which was assigned great weight. In mitigation, the trial court found the following two statutory mitigators: (1) no significant history of prior criminal activity, which was assigned moderate weight; and (2) Hurst's age of 19 and his young mental age, which was assigned moderate weight.

The trial court found as additional mitigation that Hurst had significant mental issues—limited mental and intellectual capacity with widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome, which was assigned moderate weight—although the court expressly found that Hurst is not mentally retarded. The trial court rejected as unproven proffered mitigating

factors that the defendant was under the influence of mental or emotional disturbance; the defendant was an accomplice with relatively minor participation; the defendant acted under extreme duress or substantial domination of another; or the defendant lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law.

Hurst took a timely appeal from the sentence of death raising the following issues: (1) whether the trial court erred in refusing to give him a separate evidentiary hearing on his successive mental retardation claim, in refusing to allow the jury to determine mental retardation as a bar to execution, and in finding after trial that he is not mentally retarded and exempt from execution; (2) whether this Court should recede from precedent holding that the jury need not expressly find specific aggravators or issue a unanimous advisory verdict on the sentence; and (3) whether his death sentence is proportionate. We turn to Hurst's first issue on appeal.

ANALYSIS

A. Mental Retardation Issues

The United States Supreme Court held in *Atkins v. Virginia*, that the Eighth Amendment to the United States Constitution forbids execution of mentally retarded defendants. However, the Supreme Court left it to the states to determine the manner in which this constitutional restriction on execution of its sentences will be enforced. Florida law sets forth a three-pronged test to determine mental retardation as a bar to the death penalty. In order to prove mental retardation as a bar to execution, the defendant must prove all three of the following factors: (1) significantly subaverage general intellectual functioning, which has been interpreted to be a full scale IQ of 70 or below on a standardized intelligence test; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. The burden is on the defendant raising a claim of mental retardation as a bar to execution to prove mental retardation by clear and convincing evidence.

Hurst contends that the trial court erred in denying a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203. He contends that he is mentally retarded and exempt from execution based on a recent Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) test that indicated his full scale IQ is 69, and based on expert testimony that he suffered from adaptive deficits—all before age eighteen—such that he met the statutory requirements for mental retardation. Hurst was previously provided a full evidentiary hearing on the question of mental retardation in his initial postconviction proceeding. At that evidentiary hearing, Hurst presented the expert testimony of Dr. Valerie McClain, a licensed clinical psychologist, who administered a number of tests to Hurst, including the Wechsler Abbreviated Scale of Intelligence (WASI). That test placed Hurst in the borderline range with a full scale IQ score of 70. As to deficits in adaptive functioning, Dr. McClain testified that in her opinion Hurst did not meet the adaptive functioning deficit threshold for mental

retardation, and she did not determine that Hurst is mentally retarded. At that same evidentiary hearing, the State presented clinical psychologist Dr. James D. Larsen. After testing Hurst with the WAIS-III test, Dr. Larsen concluded that Hurst's full scale IQ was 78. Dr. Larsen also found no deficits in adaptive functioning necessary for a diagnosis of mental retardation. The circuit court in that initial postconviction proceeding denied the mental retardation claim, relying primarily on the testimony of Dr. McClain and Dr. Larsen that Hurst's adaptive behavior was not substantially impaired; however, no appeal was taken of that ruling when it was denied in 2007.

In this case, Hurst contends that the trial court should have held a second *Atkins* mental retardation hearing prior to the new sentencing trial. The trial court denied the request for a pretrial evidentiary hearing on several grounds, one of which was that the motion was untimely under the requirements of rule 3.203. We conclude that denial of the request for a second *Atkins* hearing was not an abuse of discretion under the circumstances present in this case. Moreover, any error in denying the pretrial evidentiary hearing on mental retardation was harmless because Hurst was allowed to present all his mental retardation evidence at the penalty phase, after which the trial court ruled that he failed to establish that he is mentally retarded. The background and mental mitigation evidence presented by Hurst at the penalty phase is discussed next.

Hurt's sister, Sequester "Tina" Hurst; brother, Jermaine Bradley; mother, Bertha Bradley; father, Timothy Bradley; Bible study teacher, Isaac Sheppard; administrator at Hurst's high school, Calvin Harris; and former United States Army Major and principal of East Charter School, Jerome Chism, all testified concerning Hurst's family and background. Hurst's mother was age fifteen when Hurst was born and, during pregnancy, she drank all day, every day.

As a child Hurst stuttered and developed very slowly. As a toddler, he was slow to learn to walk. He was disciplined harshly when he was growing up and was punished more than the other children because he could not do things correctly.

Hurst was a fun-loving child and teenager with a good personality. He liked to play jokes and was mild tempered, but was slow mentally and did very poorly in school. In Bible study classes as a child, Hurst was unable to progress out of the most basic children's Bible study book and could not look up the Bible verses that went with the stories. He was embarrassed because he had difficulty reading. Hurst should have been in special education classes because he was low functioning and could not understand what was going on in class; and for that reason, he would skip class and play basketball in the gym. Even though his school wanted to place Hurst in a special education program, his mother objected because she was afraid he would be picked on. He did go to East Charter School, which taught low achievers and children with behavioral problems, and while there, was teased about his large size and his slowness. His maturity level remained very low and even at age eighteen, he exhibited the maturity of a middle-school student. Hurst could not obtain a GED, but did have a

driver's license and obtained a car with his father's help, although he was a poor driver.

Family members testified that Hurst had to be reminded to take care of himself; and he allowed his mother and sister to wash his clothes, and allowed his mother to cook for him. He had poor hygiene and had to be reminded to bathe and dress appropriately. He had to be reminded to keep appointments and be awakened for work. Hurst did not have a checking account and would likely have had difficulty making change if he was working a cash register. However, Hurst was employed at Popeye's and did food "prep work."

Dr. Joseph Wu, a psychiatrist, professor of psychiatry, and clinical director of the University of California at Irvine College of Medicine Brain Imaging Center, testified as an expert on the use of positron emission tomography (PET) in regard to neurological and psychiatric disorders. He was present when a PET scan was performed on Hurst and later interpreted the results of that PET scan. Dr. Wu testified that the scan showed a decreased cortical cerebellum metabolic rate, which indicated widespread damage to the cortical region of Hurst's brain. He opined that Hurst has widespread abnormalities in multiple areas of his brain, which abnormalities are associated with lack of judgment, risk taking, impulsivity, and immaturity. Dr. Wu was aware that it was reported Hurst suffered from fetal alcohol syndrome, which, along with other trauma, can cause the types of problems seen in Hurst's PET scan, although he could not say from the PET scan what caused the abnormalities in Hurst's brain.

Dr. Harry Krop, a clinical and forensic psychologist, testified that he administered the WAIS-IV test, as well as a test of memory malingering (TOMM), to Hurst in January and February 2012. The testing resulted in a full scale IQ of 69, which is in the range of mental retardation. Dr. Krop reviewed details of the murder, Hurst's regular school records, the charter school records, Florida Department of Corrections records, tests and reports of other testing performed on Hurst, and Dr. Wu's PET scan report. He also spoke to various family members for the purpose of evaluating Hurst's adaptive functioning as measured by completion of the Adaptive Behavior Assessment System (ABAS). He did not listen to the recorded statement Hurst gave to police. After reviewing the questionnaire for the ABAS, which was completed by Hurst and three family members, Dr. Krop concluded that Hurst is significantly deficient in all areas of adaptive functioning. Dr. Krop was aware of earlier testing in which Hurst scored in the 78 IQ range on a different WAIS test, which Dr. Krop opined was not as accurate as the newer WAIS-IV, and his final opinion was that Hurst is mentally retarded.

Dr. Gordon Taub, psychologist and associate professor at the University of Central Florida specializing in measurement of intelligence, structure of intelligence, intelligence theory, and evaluation of intelligence tests, testified that he has written articles about the Wechsler Scale of Intelligence tests. He testified that the WAIS-IV, which was revised in 2008, now measures four areas of intelligence, made changes in the subtests, and added some completely new tests. Dr. Taub was aware that Hurst received a full

scale IQ score of 78 on the earlier WAIS-III test in 2004, which he said tested for only two main factors. He agreed that on the WAIS-IV test, which was given by Dr. Krop and which tests for four main factors, Hurst received a full scale score of 69. Dr. Taub opined that scores on the current WAIS-IV and earlier Wechsler tests cannot properly be compared because of the changes to the newer test and because the WAIS-IV is a much better test. However, Dr. Taub agreed that the WAIS-III is a "valid score of intelligence and there's no reason not to use that score if you attained it at the time that it was the test to use to measure intelligence."

Dr. Taub testified that other testing done on Hurst when he was under the age of eighteen and still in school showed depressed scores. As to Hurst's adaptive functioning, Dr. Taub testified that the information gathered by Dr. Krop showed Hurst was impaired in functioning in the real world in areas of self-care and in communication. Dr. Taub administered the Woodcock Johnson Test of Achievement, Third Edition, to Hurst, which tests areas in reading, writing, math, and spelling. He opined that Hurst's limited proficiency shown on the achievement test is consistent with his school records showing low performance. He concluded based on the WAIS-IV test and on information concerning Hurst's adaptive functioning, school records, and achievement testing, that Hurst meets the legal criteria for mental retardation in Florida.

The State presented the testimony of Dr. Harry McClaren, forensic psychologist, who testified that he reviewed court documents, the testimony of Hurst's family members, the testimony of Drs. McClain and Larson at the prior evidentiary hearing, mental health records from the Department of Corrections, educational records and school test results, information about the crime, Hurst's statement to police, and the testimony of Drs. Taub and Krop. Dr. McClaren also reviewed a WAIS-III test given to Hurst by a Dr. Riebsame in 2003 and the WASI (Wechsler Abbreviated Scale of Intelligence) given by Dr. McClain in 2004. He testified that it would be a mistake to ignore Hurst's past testing with the WAIS-III resulting in full scale IQ scores of 76 and 78 because that test was the state of the art instrument at the time. Dr. McClaren also testified that there was no adaptive behavior testing done when Hurst was young, and now the reports of his deficits are anecdotal. He opined that Hurst does not meet the criteria for mental retardation.

The trial court relied primarily on the testimony of Dr. McClaren and on evidence of Hurst's actions in and around the time of the crime in determining that Hurst did not meet the test for mental retardation as a bar to the death penalty. In addition to testimony of members of law enforcement who investigated the crime and recovered evidence from Lee-Lee Smith's house, the State presented Hurst's statement given to detectives at the time. After Hurst signed a waiver of his rights and agreed he was speaking voluntarily with the detectives, he gave a narrative of what he said he did that morning in which he described going to a friend's house to unsuccessfully try to use the telephone because, he said, his car broke down. He gave street directions to that friend's house. Hurst said he then went to the E-Z Serve to use the pay telephone to call

Popeye's and tell Cynthia Harrison he would not be able to come into work. He said that she spoke "in a scary voice" with a "scary tone," and he could hear some whispering in the background. He recited the telephone number that he called to talk with her. Hurst also related to detectives that he went to Lee-Lee Smith's house that morning, and then to his own house where his brother Jermaine asked Hurst to take him to a pawn shop. Hurst described putting something in his car to clean out the gas tank and then driving to the pawn shop with Jermaine, Lee-Lee, and another young man. Hurst said in his statement that he bought his brother two necklaces at the pawn shop with his brother's money. Hurst told detectives that after leaving Lee-Lee Smith's house and before going to the pawn shop, he changed his shirt and shoes but not his work pants. Timothy Bradley, Hurst's biological father, testified that on the morning of May 2, 1998, at around 7:45 a.m., he saw Hurst putting the battery back into his car after the battery had been on the charger all night. At that time, Hurst was wearing his Popeye's uniform.

The trial court concluded in the sentencing order that Hurst was able to maintain a job and had acquired a driver's license. The court noted that Hurst's statement to police and his efforts to conceal his involvement in the crime were particularly persuasive in determining that Hurst did not suffer significant deficits in adaptive functioning. The court stated, "The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes." We also note that evidence that Hurst was a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry does not establish that he is unable to care for himself. Because the trial court had before it competent, substantial evidence to support its conclusion that Hurst is not mentally retarded under the three-prong test set forth in Florida law, we find no error in this ruling.

Although Hurst was allowed to present all his mental retardation and other mental mitigation to the jury, he also contends that the trial court erred in refusing to submit the question of mental retardation as a bar to the death penalty to the jury for its determination. This claim lacks merit. We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded. Florida is not one of those states, and the United States Supreme Court has not mandated any specific procedure for making the determination of mental retardation in the capital sentencing context. Thus, the trial court did not err in refusing to submit to the jury the question of Hurst's mental retardation as a bar to the death penalty in this case.

B. Lack of Jury Findings as to Specific Aggravators and Lack of a Unanimous Advisory Verdict on the Sentence

Hurst next contends that constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors, and that the jury was not required to make a unanimous recommendation as to the sentence. In this case, the jury voted seven to five to recommend a death sentence be imposed. Hurst bases his claims on the United States Supreme Court's decision in *Ring*, which held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment. Hurst recognizes that our precedent has repeatedly held that Ring does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our precedent on the issue in the decisions in *Bottoson v. Moore* and *King v. Moore*. In the plurality decisions in both cases, we rejected claims that *Ring* applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

Hurst contends that the facts of this case support a conclusion that *Ring* applies to require the jury to expressly find one or more aggravators and to issue its recommendation based on a unanimous advisory verdict. He contends that this case is distinguishable from cases where a jury has unanimously found an aggravating factor such as conviction of a prior violent felony or that the murder was committed in the course of committing, attempting to commit, or flight after commission of a separate enumerated felony. There is no prior violent felony aggravator in this case, nor did this jury convict Hurst of a contemporaneous felony such as robbery. However, we have rejected the *Ring* claim in similarly situated cases.

We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State*, a case which also did not involve conviction for a prior violent felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." Similarly, in *Butler v. State*, this Court rejected the Ring claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. We continue to adhere to this same body of precedent.

We also note that the Eleventh Circuit Court of Appeals in *Evans v. Secretary, Fla. Dep't. of Corrections*, reversed a federal district court's ruling that Florida's sentencing scheme violates *Ring*. The Eleventh Circuit noted that the United States Supreme Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures" came in *Hildwin v. Florida*, which predated *Ring. Evans*. This Court, in *Hildwin v. State*, rejected the claim that the sentencing scheme was unconstitutional because the jury is not required to make specific findings authorizing the imposition of the death penalty. On review, the United States Supreme Court affirmed our decision in *Hildwin* and stated, "[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." As the Eleventh

Circuit noted in *Evans*, the United States Supreme Court has never expressly overruled *Hildwin*, and did not do so in *Ring*. The *Evans* court also agreed with the State that Florida's sentencing procedures do provide for jury input about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring*. For all these reasons, we reject Hurst's claim that Florida's capital sentencing scheme is unconstitutional under *Ring.*

C. Proportionality

Hurst next contends that the death sentence in this case is not proportional because it is not one of the most aggravated and least mitigated of first-degree murders, thus requiring that his death sentence be reduced to life in prison. He contends that a life sentence should be imposed based on evidence of abnormalities in his brain due to fetal alcohol syndrome, his low mental functioning, and other mental and background mitigation. In performing the proportionality review, this Court has explained:

> "[W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails "a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis." In other words, proportionality review "is not a comparison between the number of aggravating and mitigating circumstances."

This Court has long recognized an obligation to perform a proportionality review.

In reviewing proportionality, this Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." In doing so, we "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent, substantial evidence in the record.'" We "review the weight the trial court ascribes to mitigating factors under the abuse of discretion standard." The Court will also "affirm the weight given an aggravator if based on competent substantial evidence." "The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard."

Hurst contends, inter alia, that his case is similar to *Cooper v. State*, in which the Court vacated the death sentence and imposed a life sentence on the basis of lack of proportionality when compared to other capital cases. In *Cooper*, the evidence showed the defendant was eighteen years old at the time of the crime. Cooper also suffered from borderline mental retardation, brain damage likely caused by beatings and head trauma as a child, a history of seizures, schizophrenia, cognitive brain impairment, and an abusive childhood including being repeatedly threatened with a gun by his

father. The trial court in Cooper found three aggravators and two statutory mitigators, as well as other nonstatutory mitigation. We conclude that although there was more aggravation in Cooper, there was also more mitigation than is present in this case. Cooper does not require us to find Hurst's sentence disproportionate.

The State relies on *Jeffries v. State*, as a basis on which to find the sentence in this case proportional. In *Jeffries*, the murder occurred in a somewhat similar manner to the instant case—the victim was stabbed, suffering multiple sharp force injuries, and was beaten. The trial court found two aggravators, murder in course of commission of a robbery and HAC. The mitigation included findings that the defendant's capacity to appreciate the criminality of his conduct was impaired, that the codefendant was equally culpable and received a plea deal for a twenty-year sentence, and that Jeffries had a long history of emotional and mental problems, as well as drug and alcohol abuse. We held that the death sentence in Jeffries was proportional when compared to other capital cases.

More recently, in *Allen v. State*, we found the death sentence proportionate. The victim was bound and had chemicals poured on her face. Allen beat the victim with belts, put a belt around her neck and, in spite of her pleas to stop, strangled her. The autopsy also revealed facial bruising, bruising on the torso, hand, thigh, knee, and shoulder; and the victim had contusions on her hands, face, and torso. Her hands showed ligature marks from having been tied, and her neck showed signs of ligature.

The trial court in *Allen* found two aggravators—commission of the murder in the course of committing or attempting to commit a kidnapping, and that the murder was especially heinous, atrocious, or cruel. The nonstatutory mitigation found by the court included that Allen had been the victim of physical and possibly sexual abuse, had brain damage due to numerous prior head injuries resulting in lack of impulse control, suffered a poor childhood environment, and exhibited helpfulness. The evidence also showed that Allen had significant organic brain damage and intracranial injuries, and was at the lower end of intellectual capacity. Testimony was received that a PET scan revealed at least ten brain injuries, mostly to the right side of Allen's brain which would affect impulse control, judgment, and mood, and would make it hard for her to conform her conduct to the requirements of society. We found the death sentence in Allen proportionate when compared to sentences in other capital cases.

Similarly, in *Rogers v. State*, the victim was murdered by being brutally stabbed, and had bruises, abrasions, and a shallow defensive wound to her arm. The trial court found two aggravators—that the murder was committed for pecuniary gain and that it was especially heinous, atrocious, or cruel. The court found one statutory mitigator—that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. This last mitigating factor was based on the trial court's finding that Rogers suffers from psychosis and brain damage that may have been exacerbated by long-term alcohol abuse. The trial court found other

mitigation in Rogers' difficult family background, abusive childhood, and his exhibition of good qualities as a father and employee. We upheld the death sentence in *Rogers* as proportionate.

Based on the forgoing, we find that Hurst's death sentence, when compared to the death sentences in other comparable capital cases, is proportionate.

CONCLUSION

For the reasons expressed above, we affirm Hurst's sentence of death for the first-degree murder of Cynthia Harrison.

It is so ordered.

POLSTON, C.J., and LEWIS, QUINCE, and CANADY, JJ., concur. PARIENTE, J., concurs in part and dissents in part with an opinion, in which LABARGA and PERRY, **JJ., concur. NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED**.

PARIENTE, J., concurring in part and dissenting in part.

I concur in the majority's conclusion that the trial court did not abuse its discretion in denying Hurst a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203 prior to the new sentencing proceeding. I dissent, however, from the majority's affirmance of Hurst's sentence of death because there was no unanimous jury finding of either of the two aggravating circumstances found by the trial judge—that the murder was heinous, atrocious, or cruel; and that the murder was committed in the course of a robbery.

No jury ever convicted Hurst of the contemporaneous robbery, so this case does not fall within the exception to the constitutional requirement of juror unanimity for a contemporaneous felony conviction or a prior violent felony conviction as an aggravating circumstance, which automatically demonstrate that the jury has made the necessary findings to warrant the possibility of a death sentence.

In Hurst's case, the jury recommended death by the slimmest margin permitted under Florida law—a bare majority seven-to-five vote. Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied. In my view, Hurst's death sentence cannot be constitutionally imposed, consistent with the United States Supreme Court's decision in *Ring v. Arizona*, and Florida's right to trial by jury, in the absence of a unanimous finding by the jury that any of the applicable aggravators apply, which is not present here.

I have previously expressed my view that "[t]he absence of a requirement of a unanimous jury finding as a precondition to a sentence of death is . . . a matter of constitutional significance." Indeed, I continue to believe that, in light of Ring, Florida's death penalty statute, as applied in circumstances like those presented in this

case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional.

As I stated in my opinion dissenting as to the affirmance of the death sentence in Peterson:

> "Under our current sentencing scheme, not all defendants who are convicted of first-degree murder are eligible for a sentence of death. The trial judge must make additional findings before the death penalty can be imposed. Without these findings, a trial court cannot impose a higher sentence than life imprisonment on the basis of the verdict alone. It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.
>
> In addition, as interpreted by the United States Supreme Court in *Ring*, the Sixth Amendment requires that a jury find those aggravating factors. As Justice Scalia explained in his concurring opinion in *Ring*, the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury."

"Apart from capital sentencing, the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment." "Florida's exclusion of the death penalty from the requirement of jury unanimity cannot be reconciled" with the Supreme Court's holdings in *Ring* that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death," and that "the Sixth Amendment applies to both."

It remains my view that *Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury, and that Florida's state constitutional right to trial by jury, which is embodied in article I, section 22, of the Florida Constitution, "requires a unanimous jury finding beyond a reasonable doubt on the existence of any element necessary to increase an authorized punishment, most especially the ultimate punishment of the death penalty." In other words, article I, section 22, is violated in the rare case where the death penalty is imposed without any of the aggravators that automatically demonstrate that a jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony conviction or that the murder occurred while in the course of an enumerated felony that was also found by a jury. This is one of those rare cases.

This case also illustrates how the use of a special verdict form would help solve the problem, as Hurst's counsel requested an interrogatory verdict to specify the

aggravators found by the jury and the votes on each, but the motion was denied in accordance with this Court's case law preventing the use of penalty-phase special verdict forms detailing the jurors' determination concerning aggravating factors. Had the jury been permitted to specify its findings, it is possible that this Court would have evidence in the record that Hurst's jury unanimously found the existence of one of the aggravators found by the trial judge in imposing the death sentence, thereby curing the constitutional infirmity in this case. Because the jury was not permitted to indicate its findings, however, this evidence does not appear in our record.

I have previously expressed my view as to the "difficulties created" by this Court's decisions that fail to allow or mandate the use of special interrogatories in death penalty cases to permit the jury to make special findings as to the aggravators. I once again renew this position here, as the use of a special verdict form during the penalty phase would enable this Court "to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous."

Finally, I also take this opportunity to note an evolving concern as to the possible Eighth Amendment implications of Florida's outlier status, among those decreasing number of states that still retain the death penalty, on the issue of jury unanimity in death penalty cases. Except for Florida, every state that imposes the death penalty, as well as the federal system, requires a unanimous jury verdict as to the finding of an aggravating circumstance. This means that in no other state or federal court in the country would Hurst have been sentenced to death in this case in the absence of a unanimous jury finding of an aggravating circumstance. Florida is a clear outlier.

In *Steele*, this Court urged the Legislature to reexamine Florida's capital sentencing statute in light of Ring and Florida's outlier status. I have also previously echoed this suggestion, encouraging the Legislature to bring Florida "closer to the mainstream of capital sentencing states in regard to jury findings."

Although those calls for legislative action have arisen primarily due to *Ring* and Sixth Amendment concerns, the Eighth Amendment ramifications of Florida's outlier status are also clear. For example, two Justices on the United States Supreme Court have recently expressed "deep concerns" about the federal constitutionality of Alabama's death penalty statute in light of its outlier status on the issue of jury overrides.

The United States Supreme Court has repeatedly explained that "death is different" from every other form of punishment. The Supreme Court has also emphasized the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." As this Court has pointed out, "[m]any courts and scholars have recognized the value of unanimous verdicts," particularly given that the "reliability" of death sentences "depends on adhering to

guided procedures that promote a reasoned judgment by the trier of fact." While questions of public policy regarding Florida's capital sentencing statute are left to the Legislature, the Sixth and Eighth Amendment implications of Florida's outlier status on the lack of jury unanimity, which threaten to unravel our entire death penalty scheme, should be of serious concern. I once again urge the Legislature, as has former Justice Cantero, to revisit this issue in Florida's capital sentencing scheme.

For all these reasons, I dissent from the majority's affirmance of Hurst's death sentence because there is no unanimous finding by the jury that any of the applicable aggravators apply. The absence of juror unanimity in the fact-finding necessary to impose the death penalty remains, in my view, an independent violation of Florida's constitutional right to trial by jury.

LABARGA and PERRY, JJ., concur.

"Supreme Court to Review Florida's Capital Punishment System"

The Wall Street Journal
Jess Bravin
March 9, 2015

The Supreme Court agreed Monday to review whether Florida's capital punishment system too easily allows juries to recommend the execution of criminals.

Florida permits executions based on divided jury votes and doesn't require a jury to make specific findings regarding the aggravating factors that can justify death. The high court is to decide whether those practices violate of the U.S. Constitution. Alabama is the only other state that allows a divided jury vote for the death penalty.

The case involves Timothy Hurst, 36, who was convicted of the 1998 murder of his manager, Cynthia Harrison, while robbing the Popeye's fast-food restaurant where he worked. He was sentenced to death by the jury's 7-5 vote. Among other issues, Mr. Hurst's appeal to the Supreme Court argued Florida didn't adequately consider his claims of intellectual disability, and that the jury rule allowing a divided vote was unconstitutional.

The Florida Supreme Court affirmed Mr. Hurst's death sentence, ruling the state's sentencing system wasn't subject to *Ring v. Arizona*, a 2002 U.S. Supreme Court decision requiring that jurors, rather than a judge acting alone, determine whether aggravating factors justified executing a defendant.

The *Ring* decision "says a jury has to make a unanimous determination regarding any factor in a criminal trial that has the effect of increasing the maximum sentence," said Evan Mandery, an expert in capital punishment at the John Jay College of Criminal Justice. "On the face, it would seem that would apply to a death-penalty case," but no specific ruling of the high court has found the precedent invalidates the Florida system, he said.

The Florida attorney general's office declined to comment beyond its legal brief. In its brief opposing Mr. Hurst's petition, the state argued its sentencing procedures were adequate. Trial rules "do provide jury input about the existence of aggravating circumstances that was lacking in the Arizona procedures that the court struck down in *Ring*," the state said.

The Florida Supreme Court has suggested the state legislature tighten requirements for death sentences, including requiring unanimous jury recommendations. Bipartisan legislation to make those changes is going before a state Senate committee on Tuesday.

"The specter of having our sentencing scheme invalidated is what motivates those of us seeking to reform our laws—and those odds just increased," said state Rep. José

Javier Rodriguez, a Miami Democrat who introduced a sentencing bill in December.

A separate U.S. Supreme Court decision from 2002 found it unconstitutional to execute intellectually disabled defendants, but gave the states leeway in complying with the ruling. Last year, the justices found Florida's method—a rigid cutoff of a 70 IQ score—insufficient, instead requiring that those with scores in that range be allowed to introduce additional evidence speaking to their mental capacity.

Only Florida and Alabama permit death sentences without a unanimous jury recommendation—with Florida requiring a simple majority and Alabama requiring at least a 10-2 vote, Mr. Hurst's petition said.

Florida has executed 90 convicts since the death penalty was reinstated in 1976, the fourth highest number among the states, and Alabama has executed 56, ranking sixth, according to the Death Penalty Information Center.

Alabama also permits judges to impose the death penalty despite a jury's recommendation for a life sentence, a practice the Supreme Court upheld in 1995. Two years ago, the court declined an opportunity to revisit the issue, over the dissent of Justices Sonia Sotomayor and Stephen Breyer. New petitions raising that issue currently are pending before the court. Florida and Delaware also permit a judge to override a jury, but that hasn't happened for at least 15 years, Mr. Mandery said.

The Hurst case will be heard in the high court's next term, which begins in October.

"Florida's Death Row Could See Vacancies if Supreme Court Rules Juries Must be Unanimous"

The Florida Times Union
Larry Hannan
April 25, 2015

Very few people in Jacksonville have heard of Timothy Hurst. But the Panhandle man may soon be responsible for getting dozens of people from the Jacksonville area off Death Row.

The scenario could happen because of the way Florida sentences convicted killers to death. Hurst, 36 and on Death Row for killing an Escambia County fast-food manager, claims his death sentence violates the Sixth Amendment because only seven of his 12 jurors recommended he get the death penalty. The other five said he should get life without the possibility of parole.

Florida, Delaware and Alabama are the only states that don't require juries in death-penalty cases to reach a unanimous decision when sentencing someone to death. In Florida a jury must unanimously vote to convict someone of first-degree murder and then decides whether to recommend death after a separate sentencing hearing.

The U.S. Supreme Court agreed to consider Hurst's case. Oral arguments are expected to occur this year with a ruling likely in the spring of 2016.

Jacksonville-area Public Defender Matt Shirk said he believes in the death penalty, but not the way Florida practices it. He hopes the Supreme Court throws out Hurst's death sentence.

"In this state we're just getting it wrong when we don't require a unanimous jury verdict," Shirk said.

Seventy-five people are on Death Row for murders committed in Duval, Clay, Nassau, Putnam or St. Johns counties. Only 13 got sentenced to death after a jury unanimously recommended it.

That means 62 people on Death Row from Northeast Florida could have their death sentences thrown out if the Supreme Court rules in Hurst's favor. People who could be impacted include Rasheem Dubose, convicted of the murder of 8-year-old Dreshawna Davis; Paul Durousseau for the murder of Tyresa Mack; and Alan Wade, Tiffany Cole and Michael James Jackson for the robbery, kidnapping and murders of Carol and Reggie Sumner.

RING VS. ARIZONA

Ronald Clark, 47, knows Hurst very well. Hurst lives down the hall from him on Florida's Death Row. There since 1991 for the murder of Ronald Willis in Jacksonville, Clark sees Hurst as perhaps his best chance to die of natural causes. The jury that convicted Clark recommended death on an 11-1 vote.

"I think this case is way overdue," Clark said in a letter to the Times-Union. "Florida, in

ignoring the courts ruling in *Ring vs. Arizona* basically was slapping the U.S. Supreme Court in the face, saying it's our way or the highway, we run things down here in the dirty South, not you do-gooders in Washington."

Richard Dieter, executive director of the Death Penalty Information Network, said death-penalty opponents have been waiting a long time for a case like Hurst's. In fact they've been waiting since 2002.

That was the year the U.S. Supreme Court ruled in *Ring vs. Arizona* that a jury — not a judge — must make the factual findings required to sentence someone to death.

The 7-2 majority opinion, written by Justice Ruth Bader Ginsburg, said juries must find beyond a reasonable doubt each factor considered in determining whether a death sentence should be imposed.

To involve jurors any less, she said, violated defendants' Sixth-Amendment right to a trial by jury.

"We all took note of *Ring* when it was decided," said former Jacksonville Public Defender Bill White. "It was obvious that without a unanimous jury recommendation there were going to be Sixth Amendment issues in Florida."

The ruling essentially invalidated Arizona's death-penalty law, which had trial judges decide whether someone should be sentenced to death with no jury feedback. Dieter said it also should have invalidated Florida's death-penalty law because the court ruling required the jury to decide if someone should be sentenced to death.

"Florida does not allow for such a determination," Dieter said. "Instead, the jury makes only an advisory recommendation to the judge that aggravating factors exist [thus indicating eligibility for the death penalty] and that the person should be sentenced to life or death."

The factual determination of death-penalty eligibility is left to the judge, not the jury, and that violates the Sixth Amendment as interpreted in *Ring*, Dieter said.

But in 2005 the Florida Supreme Court ruled it did not violate the Constitution. However, in his majority opinion upholding the law, Supreme Court Justice Raoul Cantero called on the Legislature to revisit Florida's death-penalty statute to require unanimity for jury recommendations of death.

Nothing happened. Legislation was introduced multiple times, but it has never come close to passing.

"The Legislature seems scared to do anything that will make them seem soft on crime," White said.

Jacksonville lawyer Frank Tassone defended death-penalty clients for decades at trials and appeals. He thinks there's a good chance the Supreme Court rules in favor of Hurst.

"Common sense says that the Supreme Court isn't going to issue a ruling that lets thousands of people out of prison," Tassone said. "But they may be willing to do this."

No one would get out of prison; it would just mean some people would get off Death Row

and get sentenced to life without the possibility of parole, he said.

The Hurst case is a strong appeal because the jury recommended death on a 7-5 vote and he had no previous criminal record, said Gainesville-area Chief Assistant Public Defender Al Chipperfield, who previously defended death-penalty clients as an assistant public defender in Jacksonville.

“It’s possible the Supreme Court has been waiting for the right case,” Chipperfield said. “And this is it.”

AN UNEXPECTED EMOTION

Even when his son’s killer got the death penalty, Glen Mitchell was pretty certain he would never be executed.

“I had done research and saw that other murders much worse than what happened to Jeff had been overturned,” Mitchell said. “So even during the trial I thought the death penalty wouldn’t hold up.”

Jeff Mitchell, then 14, was shot and killed during a robbery attempt outside Terry Parker High.

Omar Shareef Jones, now 41, was convicted of first-degree murder and originally sentenced to death for shooting Mitchell as he waited outside school for a ride home. Also sentenced for first-degree murder was Edward Jerome Goodman, 41, who received life in prison. Two others involved in the shooting were convicted of second-degree murder.

When the Florida Supreme Court overturned Jones’ death penalty in 1998 and ordered him resentenced to life, Mitchell experienced an emotion that he’d never expected to have.

“It seemed like Jeff’s life had just been cheapened,” Mitchell said. “It wasn’t the case, but even though I knew this was likely to happen, that’s what it felt like.”

The feeling went away at the end of the day, but it’s something Mitchell said he always remembered because it was so unexpected.

While Mitchell will never experience that feeling again, many other people may soon deal with similar emotions.

Cecil King was convicted of beating 82-year-old Renie Telzer-Bain to death with a hammer. The jury recommended death on an 8-4 vote.

Telzer-Bain’s daughter-in-law, Lysa Telzer, said it was “unnerving” to think King may get his death sentence thrown out.

“The law was followed in putting him on Death Row,” she said. “There was never any doubt that he was guilty.”

To put her family and other families who lost someone to violent crime through this isn’t fair, and it isn’t justice, Telzer said.

If the Supreme Court rules in favor of Hurst, it shouldn’t be retroactive, she said. Everyone now on Death Row should remain and new rules requiring a unanimous jury verdict of death should only factor into future cases.

RETROACTIVE

If the U.S. Supreme Court rules for Hurst, the 62 First Coast Death Row inmates who had at least one juror recommend life will likely all claim they should have their death-penalty sentences thrown out. But Stephen Harper, a Florida International University law professor who previously worked as an assistant public defender in Miami, believes that most of them won't be happy with what happens next.

After *Ring vs. Arizona* was decided in 2002 the U.S. Supreme Court issued a follow-up ruling in 2004 that said the *Ring* decision couldn't be applied retroactively. That means anyone sentenced to death before 2002, such as Clark, is probably out of luck.

But since 2002 every lawyer of someone facing a potential Death Row sentence always makes a motion to declare Florida's death-penalty rules unconstitutional, citing the *Ring* case. The motion is always denied by the trial judge, but on making that motion the issue is preserved for an appeal.

Which, in layman's terms, means that everyone sentenced to death after 2002 has a chance of getting off Death Row.

The Florida Department of Corrections lists about 30 First Coast Death Row inmates who have arrived on Death Row since 2002, although a few of them were originally sentenced before 2002 but had to be retried or resentenced after that date.

Shirk said he hopes that if the Supreme Court rules in favor of Hurst, the justices will explain in detail what it means for other people on Death Row in Florida. He said he thinks prosecutors will be more reluctant to seek the death penalty if a unanimous jury recommendation of death is required.

"But I can't say that will apply to our own prosecutor," Shirk said, referring to State Attorney Angela Corey, who has put more people on Death Row than any other prosecutor in Florida since she took office in 2009.

THE EFFECT

State Attorney Senior Managing Director Bernie de la Rionda, who has put more people on Death Row than just about any other prosecutor in Florida and spoke on behalf of Corey to the Times-Union, said the office would not change how the death penalty is sought if the ruling goes through.

But de la Rionda expressed hope that justices would recognize that the current system is fair.

A jury has already made a unanimous finding that a person is guilty of first-degree murder before they decide whether someone deserves death, and that's the most important finding a jury makes, he said.

"We believe the system as it is now works and is accurate and fair," he said.

De la Rionda also cited Ted Bundy, one of the most notorious serial killers in Florida history, as an example of why the death penalty is fair even without a unanimous jury verdict of death.

Bundy was executed for the murder of 12-year-old Kimberly Leach of Lake City, but he might have killed up to 30 women. The Orlando jury who convicted Bundy recommended death on a 10-2 vote.

"I think the most anti-death penalty person would struggle with keeping him alive," de la Rionda said.

But former Jacksonville State Attorney Harry Shorstein said the Bundy argument has been used for years, and it's not really valid.

"If that jury had to be unanimous, I think it would have been," he said. "Those 10 jurors would have gotten the other two to change their votes."

If that hadn't happened, Bundy would have ended up being executed for another murder, Shorstein said.

While prosecutors argue that many majority verdicts recommending death would become unanimous verdicts if that was the requirement, Chipperfield isn't so sure.

When picking juries, defense lawyers always seek assurances from potential jurors that they will stick to what they believe even if other jurors disagree with them, and most jurors say they will do that.

"I know prosecutors say the other jurors would wear the holdouts down," Chipperfield said. "But in other states, all you need is one juror opposed to death and you've got a life sentence."

De la Rionda said a lot of the 9-3 or 10-2 recommendations of death should be taken with a grain of salt because some people vote no because they know they're outvoted and don't want a death sentence on their conscience.

He remembers one death-penalty vote in a case he tried that was either 10-2 or 11-1, and afterward a juror came up to him and apologized that it wasn't unanimous.

"That juror said everyone wanted death, a couple of them just didn't want to vote for it," de la Rionda said. "I am convinced some people vote for life even though they really think a defendant deserves death."

De la Rionda said it would be more difficult if the Supreme Court requires a unanimous jury to call for death. But he doesn't think it will reduce the number of people his office puts on Death Row.

Juror selection will take more time and trials might also take longer, but the results will likely remain the same, he said.

De la Rionda also said if the Supreme Court throws out the death-penalty convictions of people in Jacksonville based on a jury not being unanimous, his office has the option of seeking another penalty phase with a new jury that puts those people back on Death Row.

"I think Ms. Corey would seek to put all of them back on Death Row," de la Rionda said.

His office hasn't spoken to victims' families yet in detail about this, although de la Rionda said a few have contacted them.

“It’s too early to talk about this,” de la Rionda said. “We don’t want to add to their stress.”

But the Hurst case already is making an impact. Attorneys for Lance Eugene Kirkpatrick, convicted this month for killing 38-year-old Kim Dorsey, asked Circuit Judge Mark Hulsey to delay his death-penalty phase until after the court rules on Hurst’s case.

“This court should strike the death notice and move to protect Mr. Kirkpatrick from a trial under a scheme which, as shown below, the Supreme Court is virtually certain to find unconstitutional,” said attorney Julie Schlax in her motion. “To allow a death sentence in these circumstances would waste scarce judicial resources and, more important, subject the defendant to constitutionally infirm capital proceedings.”

Hulsey refused to delay the sentencing phase, and the jury rejected prosecutors’ calls to execute him and recommended life without parole.

De la Rionda said at least one other death-penalty case is getting the same motion, but it’s not realistic to wait for the Supreme Court to rule.

“We have to try these cases,” he said. “It gets more difficult to prove your case the longer you wait.

"Talking About the Death Penalty, Court to Court"

The New York Times
Linda Greenhouse
August 20, 2015

The Connecticut Supreme Court could have taken an easy route to finding the state's death penalty unconstitutional in the decision it issued last week. The State Legislature repealed the death penalty in 2012, but it made the repeal prospective, leaving 11 men on death row. The reason for the prospective-only repeal was obvious to all: Two of the death-row inmates, Joshua Komisarjevsky and Steven Hayes, had committed a horrific home-invasion triple murder that shocked the state in 2007, and the prospect of barring their execution was unpalatable to Connecticut politicians and many members of the public.

As a matter of constitutional doctrine, the State Supreme Court might simply have found the distinction between those who committed murder before and after the repeal date of April 25, 2012, to be arbitrary — a violation of due process, equal protection or both. Taking the repeal law, signed by Gov. Dannel P. Malloy, to embody the collective judgment of the people's elected representatives that capital punishment is no longer an appropriate tool of criminal justice in Connecticut, on what basis could the state apply the death penalty to one class of murderers and spare another, with the two groups separated only by the date of offense?

The 92-page majority opinion in Connecticut v. Santiago, written by Justice Richard N. Palmer for four of the court's seven justices, was much more ambitious than that, however, and in its ambition lies its significance.

On hearing that the Connecticut Supreme Court had invalidated the state's death penalty, many people probably shrugged and thought, "O.K., that's one little blue state that hardly ever executed anyone (a single execution in the past 55 years, if you're counting) and that was already never going to add anyone new to death row. How important can this decision be?"

That was, frankly, my thought as well, and I picked up the decision — more than 200 pages, including concurring and dissenting opinions — with some reluctance and a sense of obligation. (My apartment building is across the street from the New Haven courthouse where crowds, gathered for the consecutive trials in the home-invasion murders, blocked the sidewalks for weeks in 2010 and 2011.) But I turned the pages with mounting excitement. In the breadth of its perspective on the history and current problematic state of the death penalty, in its cleareyed dissection of the irreconcilable conflict at the heart of modern death-penalty jurisprudence, the Connecticut Supreme Court not only produced an important decision for its own jurisdiction; but it addressed the United States Supreme Court frankly and directly. The decision engages the Supreme Court at a crucial moment of mounting unease, within the court and outside it, with the death penalty's trajectory

over the nearly four decades since the court permitted states to resume executions.

Next year marks the 40th anniversary of Gregg v. Georgia and the four other Supreme Court decisions that reviewed the new generation of laws the states enacted in an effort to comply with the 1972 decision that had invalidated all existing death-penalty laws. "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual," Justice Potter Stewart famously wrote in a concurring opinion in the 1972 case Furman v. Georgia. The new laws that the Supreme Court upheld were supposed to avoid just such arbitrariness by limiting those defendants deemed eligible for the death penalty and by channeling juries' discretion over when to impose it.

The problem, as the Connecticut Supreme Court demonstrates, is that it hasn't worked. Of some 200 cases in the state that might have been charged as capital murder between 1973 and 2007, prosecutors sought the death penalty in some 130 and obtained death sentences in 12. "The selection of which offenders live and which offenders die appears to be inescapably tainted by caprice and bias," the court said, pointing to "an inherent conflict in the requirements that the Eighth Amendment's ban on cruel and unusual punishment, as interpreted by the United States Supreme Court, imposes on any capital sentencing scheme."

On the one hand, the death penalty can't be automatic, but has to result from specific findings about the crime and the defendant through a process that relies on specifically identified "aggravating factors." That's the effort to channel discretion and treat like cases alike. On the other hand, the jury must have absolute discretion to consider any "mitigating factors" that it deems relevant. That's the effort to treat each defendant as an individual. The United States Supreme Court deems both efforts as constitutionally essential. But to quote from the Connecticut opinion:

"The question is whether this individualized sentencing requirement inevitably allows in through the back door the same sorts of caprice and freakishness that the court sought to exclude in Furman, or, worse, whether individualized sentencing necessarily opens the door to racial and ethnic discrimination in capital sentencing. In other words, is it ever possible to eliminate arbitrary and discriminatory application of capital punishment through a more precise and restrictive definition of capital crimes if prosecutors always remain free *not* to seek the death penalty for a particular defendant, and juries not to impose it, for any reason whatsoever? We do not believe that it is."

Six weeks earlier, Justices Stephen G. Breyer and Ruth Bader Ginsburg, dissenting from the decision that rejected a challenge to Oklahoma's lethal-injection protocol, identified another inherent contradiction. Deploring lengthy delays that "both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale" (the average delay between sentencing and execution is now more than 17 years, they noted), the justices said that the "special need for reliability and fairness in capital cases" means that substantial delay is inevitable.

Justice Breyer, who wrote the 42-page dissenting opinion that Justice Ginsburg joined, said this: "In this world, or at least in this nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both."

The two justices didn't flatly declare a belief that the death penalty is unconstitutional, saying rather that it was "highly likely" to violate the Eighth Amendment; the court, they said, should invite full briefing on that question "rather than try to patch up the death penalty's legal wounds one at a time."

Like the Connecticut justices, these two justices went beyond the confines of the case before them to confront the deeper questions. (Along with Justice Elena Kagan, Justices Breyer and Ginsburg also signed Justice Sonia Sotomayor's dissenting opinion, which more conventionally addressed the majority's holding on lethal injection.) The Connecticut decision and the Breyer-Ginsburg dissent were meant for wider audiences, and to a notable degree, each found an audience in the other. The Connecticut justices cited Justice Breyer's dissent. I have no idea whether Justice Breyer knew about the Connecticut case, which had been pending for more than two years by the time the United States Supreme Court issued its lethal injection decision, Glossip v. Gross, on June 29. (I found no mention of the Connecticut case in the briefs the court received.) But Justice Breyer did cite the same statistical evidence in the same study of the Connecticut death penalty that the Connecticut justices used, concluding that "such studies indicate that the factors that most clearly ought to affect application of the death penalty — namely, comparative egregiousness of the crime — often do not."

Were the Connecticut justices emboldened by Justice Breyer's invitation to grapple with the death penalty itself? Maybe they were; coming late in what by all signs was a brutally contentious process within the Connecticut Supreme Court, the Breyer dissent must have appeared to the majority justices as a gift from on high, an open door. And clearly Justices Breyer and Ginsburg mean to spur hard thinking about the death penalty by every judge in the country.

And what about the Supreme Court itself? The last member of the court to renounce the death penalty was Justice John Paul Stevens, who retired in 2010. In the ensuing five years of silence, executions plummeted to a 20-year low (35 last year, compared with a high of 98 in 1999) and public approval of the death penalty, at 56 percent earlier this year, was the lowest in 40 years. Seven states carried out executions last year, compared with 20 in 1999. It's no exaggeration to say that there is a widespread de facto moratorium in place, even in most of the 31 states that still have the death penalty on their books. (In four of those states — Washington, Oregon, Colorado and Pennsylvania — governors have imposed an actual moratorium.)

Although a Supreme Court decision abolishing the death penalty wouldn't shock much of the country, it's not easy to imagine the John G. Roberts Jr. court taking that step.

If the question, as it is so often, is "what would Justice Kennedy do?" it's worth noting that he signed neither of the dissenting opinions in the lethal injection case. He silently joined the majority opinion of Justice Samuel A. Alito Jr. — the justice who during the oral argument, in one of the uglier performances that I can recall on the Supreme Court bench, asked the lawyer for the Oklahoma death-row inmates whether it was "appropriate for the judiciary to countenance what amounts to a guerrilla war against the death penalty." On the other hand, Justice Kennedy has become an outspoken advocate for reform of the criminal justice system, with a recent focus on solitary confinement.

I'm not counting the days, or the Supreme Court terms, until the court declares the death penalty unconstitutional. But from two courts, the highest in the land and the highest court of one of the smallest states, a fruitful conversation emerged this summer that will inevitably spread, gain momentum and, in the foreseeable if not immediate future, lead the Supreme Court to take the step that I think a majority of today's justices know is the right one.

“Death Penalty in Fast-Food Slaying”

Pensacola News Journal
August 16, 2012

A judge this morning sentenced a Pensacola man who brutally murdered his boss at a restaurant during a robbery in 1998 to death.

Timothy Hurst, 32, was convicted in April 2000 of first-degree murder in the killing of 28-year-old Cynthia Harrison. Harrison was Hurst's manager when he worked at the Popeye's on Nine Mile Road. Her body was found in the restaurant's freezer.

Her hands and mouth were wrapped with electrical tape, authorities said at the time, and her body had been slashed more than 60 times with a box cutter.

Circuit Judge Linda Nobles read the order sentencing Hurst during a hearing that lasted about 30 minutes at the M.C. Blanchard Judicial Building in Pensacola.

Hurst, who was in the courtroom dressed in a green and white jumpsuit, did not react after she read her decision.

This is the second time Hurst has been sentenced to death.

In 2000, a jury decided 11-1 that he deserved the death penalty.

Former Circuit Judge Joseph Tarbuck initially sentenced him to death for what he called an "especially heinous, atrocious and cruel" crime, explaining that Hurst murdered Harrison in an attempt to cover his tracks for robbing the restaurant.

However, that sentence was overturned by the Florida Supreme Court in 2009 because certain pieces of evidence, including those that established Hurst's mental capacity, were not shown to the jury during the penalty phase, said Assistant State Attorney John Molchan.

A new penalty phase was held over several days last year, and the jury decided 7-5 to recommend the death penalty. While the jury's recommendation is given consideration for Hurst's sentence, his fate ultimately lies in Nobles' hands.

Molchan said the defendant's attorney presented evidence showing that Hurst had a lower mental capacity during last year's penalty phase.

Kansas v. Carr

14-449 (consolidated with *Kansas v. Carr*, 14-450)

Ruling Below: *State v. Carr*, 300 Kan. 340 (Kan. 2014)

Defendant Jonathan D. Carr, and his brother, Reginald Dexter Carr, Jr., were jointly charged, tried, convicted, and sentenced for crimes committed in a series of incidents in December 2000 in Wichita.

The Kansas Supreme Court determined that (a) the evidence was sufficient to convict defendant of felony murder because his possession of the murder weapon was clear in that he had it in his possession minutes after the shooting, and he thoroughly cleaned both the gun and the bullets it held; defendant's conviction did not require inference to be stacked upon inference; (b) The trial court did not err in refusing to grant a mistrial based on comments made by the codefendant's counsel during opening statements; at the time counsel wrapped up his opening statement, the jury was immediately told that his remarks were "improper;" and (c) The trial judge's failure to sever the penalty phase of defendant and the codefendant's trial violated defendant's U.S. Const. amend. VIII right to an individualized sentencing determination and could not be deemed harmless error. (Credit Lexis Nexis)

Question Presented: Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively* instructed that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances; and whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here – a decision that comports with the traditional approach preferring joinder in circumstances like this – violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event.

State of KANSAS
Appellee
v.
Jonathan D. CARR
Appellant

Supreme Court of Kansas

July 25, 2014, Opinion Filed

[Excerpt; some citations and footnotes omitted]

PER CURIUM:

This is J. Carr's direct appeal from his 43 convictions and four death sentences.

Our opinion in codefendant R. Carr's direct appeal also is filed today. With the exception of the brief introduction to follow, this opinion will refer to the opinion in R. Carr's appeal as much as possible, rather than repeat facts, procedural history, or legal discussions and resolutions.

The first incident giving rise to the charges in this case occurred on December 7 and 8. Andrew Schreiber was the victim. The State charged J. Carr and R. Carr with one count of kidnapping, one count of aggravated robbery, one count of aggravated battery, and one count of criminal damage to property. The jury acquitted J. Carr on all counts and convicted R. Carr on all counts.

In the second incident on December 11, Linda Ann Walenta was the victim. The State charged J. Carr and R. Carr with one count of first-degree felony murder. The jury convicted both men.

In the third incident on December 14 and 15, Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims of an invasion at the men's Birchwood Drive home that led to sex crimes, kidnappings, robberies, and, eventually, murder and attempted murder. The State charged J. Carr and R. Carr with eight alternative counts of capital murder, four based on a related sex crime under K.S.A. 21-3439(a)(4) and four based on multiple first-degree premeditated murders under K.S.A. 21-3439(a)(6); one count of attempted first-degree murder; five counts of aggravated kidnapping; nine counts of aggravated robbery, eight of which were alternatives, four based on use of a dangerous weapon and four based on infliction of bodily harm; one count of aggravated burglary; 13 counts of rape, eight of which were based on coerced victim-on-victim sexual intercourse and one of which was based on a victim's coerced self-penetration; three counts of aggravated criminal sodomy, two of which were based on coerced victim-on-victim oral sex; seven counts of attempted rape, six of which were based on coerced victim-on-victim overt acts toward the perpetration of rape; one count of burglary; and one count of theft. The State also charged J. Carr and R. Carr with one count of cruelty to animals because of the killing of Holly G.'s dog. The jury convicted J. Carr and R. Carr on all of the charges arising out of the Birchwood incident.

In connection with the three incidents, the State also charged R. Carr alone with three counts of unlawful possession of a firearm. The jury convicted him on these three counts as well.

After J. Carr's acquittal on the Schreiber incident and the defendants' convictions on all other charges, in a separate capital penalty proceeding, J. Carr and R. Carr were sentenced to death for each of the four capital murders committed on December 15. They each received a hard 20 life sentence for the Walenta felony murder. J. Carr received a

controlling total of 492 months' imprisonment consecutive to the hard 20 life sentence, and R. Carr received a controlling total of 570 months' imprisonment consecutive to the hard 20 life sentence for the remaining non-death-eligible convictions.

In his briefs, J. Carr raises 21 issues tied to the guilt phase of his prosecution and 16 issues tied to the death penalty phase of his prosecution. In addition, because this is a death penalty case, this court is empowered to notice and discuss unassigned potential errors under K.S.A. 2013 Supp. 21-6619(b), which we do. J. Carr does not challenge the sentences he received for the Walenta felony murder; for the crimes in which Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims that were not eligible for the death penalty; or for the cruelty to animals conviction.

Both sides sought many extensions of time to file briefs in this appeal and in R. Carr's separate appeal. In J. Carr's case, all of these extension requests were unopposed by the other side of the case. After completion of briefing, this court heard oral argument on December 17, 2013.

After searching review of the record, careful examination of the parties' arguments, extensive independent legal research, and lengthy deliberations, we affirm 25 of J. Carr's 43 convictions, including those for one count of capital murder of Heather M., Aaron S., Brad H., and Jason B. under K.S.A. 21-3439(a)(6) and for the felony murder of Walenta. We reverse the three remaining convictions for capital murder because of charging and multiplicity errors. We also reverse his convictions on Counts 25, 26, 29 through 40, and 42 for coerced sex acts for similar reasons. We affirm the convictions based on Counts 2, 9 through 24, 27, 28, 41, and 43 through 55.

We vacate J. Carr's death sentence for the remaining capital murder conviction, because the district judge refused to sever the defendants' penalty phase trials. We remand to the district court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND FOR GUILT PHASE ISSUES

The general factual and procedural background for the guilt phase issues in this case is set out in full in the R. Carr opinion. We need not repeat it or supplement it here. To the extent additional, issue-specific factual or procedural background is necessary to resolve any legal issue unique to J. Carr, it will be included in the discussion sections below.

GUILT PHASE ISSUES AND SHORT ANSWERS

We begin our discussion by setting out the questions we answer today on the guilt phase of J. Carr's trial. We have taken the liberty of reformulating certain questions to focus on their legally significant aspects or effects. We also have reordered questions raised by the defense and have inserted among them unassigned potential errors noted by us, because we believe this organization

enhances clarity. We number the questions disposed of by our opinion in R. Carr's appeal 1 through 21, despite occasional intervening subheadings. We do not repeat our full discussion of these questions in this opinion; rather, we include only their short answers and references to the appropriate sections of the R. Carr opinion that control the resolution of the similar issues raised or noticed in this appeal. We number the four additional questions not disposed of by our opinion in R. Carr's appeal J1 through J4. Our short answer to each question follows the question. We then discuss these four questions fully in individual sections of this opinion.

Issues Disposed of by Opinion in R. Carr Appeal

Issues Affecting All Incidents

1. Did the district judge err in refusing to grant defense motions for change of venue? A majority of six of the court's members answers this question no for reasons explained in Section 1 of the R. Carr opinion, while one member of the court dissents and writes separately on this issue and its reversibility, standing alone.

2. Did the district judge err in refusing to sever the guilt phase of defendants' trial? A majority of six members of the court answers this question yes for reasons explained in Section 2 of the R. Carr opinion, while one member of the court dissents and writes separately on this issue. A majority of four members of the court agrees that any error on this issue was not reversible standing alone for reasons explained in the R. Carr appeal, while three members of the court dissent, and one of them writes separately for the three on the reversibility question.

3. Was it error for the State to pursue conviction of J. Carr for all counts arising out of the three December 2000 incidents in one prosecution? The court unanimously answers this question no for reasons explained in Section 3 of the R. Carr opinion.

4. Did the district judge err (a) by excusing prospective juror M.W., who opposed the death penalty, for cause, (b) by failing to excuse allegedly mitigation-impaired jury panel members W.B., D.R., D.Ge., and H.Gu. for cause, or (c) by excusing prospective jurors K.J., M.G., H.D., C.R., D.H., and M.B., who expressed moral or religious reservations about the death penalty, for cause? The court unanimously agrees there was no error on any of these bases for reasons explained in Section 4 of the R. Carr opinion.

5. Did the district judge err by rejecting a defense challenge under *Batson v. Kentucky*, to the State's peremptory strike of juror and eventual foreperson W.B.? The court unanimously answers this question yes for reasons explained in Section 5 of the R. Carr opinion. A majority of four members of the court agrees that any error on this issue was not reversible standing alone for reasons explained in Section 5 of the R. Carr opinion, while three members of the court dissent, and one of them writes separately for the three on the reversibility question.

Issue Specific to Walenta Incident

6. Was the district judge's admission of statements by Walenta through law enforcement error under the Sixth Amendment and *Crawford v. Washington*? The court unanimously answers this question yes for reasons explained in Section 6 of the R. Carr opinion, but the court also unanimously agrees that this error was not reversible standing alone.

Issues Specific to Quadruple Homicide and Other Birchwood Crimes

7. Did faulty jury instructions on all four K.S.A. 21-3439(a)(4) sex-crime-based capital murders and a multiplicity problem on three of four K.S.A. 21-3439(a)(6) multiple-death capital murders combine to require reversal of three of J. Carr's death-eligible convictions? The court unanimously answers this question yes for reasons explained in Section 9 of the R. Carr opinion.

8. Was a special unanimity instruction required for Counts 1, 3, 5, and 7 because of multiple sex crimes underlying each count? The court declines to reach the merits of this issue for reasons explained in Section 10 of the R. Carr opinion.

9. Must sex crime convictions underlying capital murder Counts 1, 3, 5, and 7 be reversed because they were lesser included offenses of capital murder under K.S.A. 21-3439 (a)(4)? The court declines to reach the merits of this issue for reasons explained in Section 11 of the R. Carr opinion.

10. Was the State's evidence of aggravated burglary sufficient? The court unanimously answers this question yes for reasons explained in Section 12 of the R. Carr opinion.

11. Did the State fail to correctly charge and the district judge fail to correctly instruct on coerced victim-on-victim rape and attempted rape, as those crimes are defined by Kansas statutes, rendering J. Carr's convictions on those offenses void for lack of subject matter jurisdiction? The court unanimously answers this question yes for reasons explained in Section 13 of the R. Carr opinion.

12. Was the State's evidence of J. Carr's guilt as a principal on Count 41 for Holly G.'s digital self-penetration sufficient? A majority of four of the court's members answers this question yes for reasons explained in Section 14 of the R. Carr opinion, while three members of the court dissent, and one of them writes separately for the two of them on this issue and its reversibility.

13. Were Count 41 and Count 42 multiplicitous? The court unanimously answers this question yes and reverses J. Carr's conviction as a principal on Count 42 for reasons explained in Section 15 of the R. Carr opinion.

14. Was evidence of results from mitochondrial DNA testing of hairs found at the Birchwood home erroneously admitted? The court unanimously answers this question no for reasons explained in Section 19 of the R. Carr opinion.

15. Did the district judge err by failing to instruct on felony murder as a lesser included crime of capital murder? The court

unanimously answers this question no for reasons explained in Section 21 of the R. Carr opinion.

Other Evidentiary Issues

16. Did the district judge err by automatically excluding eyewitness identification expert testimony proffered by the defense? The court unanimously answers this question yes for reasons explained in Section 22 of the R. Carr opinion, but the court also unanimously agrees that any error on this issue was not reversible standing alone.

17. Did the district judge err by permitting a jury view of locations referenced in evidence, in violation of the defendants' right to be present, right to assistance of counsel, and right to a public trial? The court unanimously answers this question no for reasons explained in Section 23 of the R. Carr opinion.

Other Instructional Issues

18. Did the district judge err by failing to include language in the instruction on reliability of eyewitness identifications to ensure that jurors considered possible infirmities in cross-racial identifications? The court unanimously answers this question no for reasons explained in Section 24 of the R. Carr opinion.

19. Was the instruction on aiding and abetting erroneous because (a) it permitted jurors to convict the defendants as aiders and abettors for reasonably foreseeable crimes of the other, regardless of whether the State proved the aider and abettor's premeditation, (b) it failed to communicate that the defendant aider and abettor had to possess the premeditated intent to kill in order to be convicted of capital murder, or (c) it omitted language from K.S.A. 21-3205(2)? The court unanimously answers the first question yes for reasons explained in Section 25 of the R. Carr opinion. The court unanimously answers the second question no for reasons explained in Section 25 of the R. Carr opinion. The court unanimously answers the third question no for reasons explained in Section 25 of the R. Carr opinion. The court unanimously agrees that the error on the first question was not reversible standing alone for reasons explained in Section 25 of the R. Carr opinion.

Prosecutorial Misconduct

20. Did one of the prosecutors commit reversible misconduct by telling jurors to place themselves in the position of the victims? The court unanimously answers this question no for reasons explained in Section 26 of the R. Carr opinion.

Cumulative Error

21. Did cumulative error deny J. Carr a fair trial on his guilt? A majority of four of the court's members answers this question no for reasons explained in Section 27 of the R. Carr opinion, while three members of the court dissent, and one of them writes separately for them on this issue.

Issues Not Disposed of by Opinion in R. Carr Appeal

J1. Did the district judge err by refusing to grant a mistrial when the opening statement by R. Carr's counsel implicated J. Carr and another unknown man as the perpetrators of the Birchwood crimes? A majority of four of the court's members answers this question no. Three members of the court would hold this to be error and include it among those considered under the cumulative error doctrine.

J2. Did admission of Walenta's statements violate J. Carr's confrontation rights under Section 10 of the Kansas Constitution Bill of Rights? The court declines to reach the merits of the Section 10 argument.

J3. Did J. Carr's conviction on the Walenta felony murder depend upon impermissible inference stacking, meaning the State's evidence was insufficient? A majority of six members of the court answers this question no. One member of the court dissents and writes separately on this issue and its reversibility, standing alone.

J4. Was the State's evidence of J. Carr's guilt as an aider and abettor of R. Carr's rape and aggravated criminal sodomy of Holly G. sufficient? The court unanimously answers this question yes.

J1. REFUSAL TO GRANT MISTRIAL AFTER OPENING STATEMENTS

This court rules today in the R. Carr appeal that District Judge Paul Clark erred by refusing to sever the defendants' guilt phase trials but that the error does not require reversal standing alone. These holdings apply equally to this appeal on behalf of J. Carr.

J. Carr has argued additional reasons peculiar to him why severance was required—that a joint trial limited his ability to introduce certain hearsay testimony through Tronda Adams, that it allowed R. Carr to act as a second prosecutor by introducing testimony from Stephanie Donley and a statement from Holly G. that were inculpatory of J. Carr, and that it permitted the jury to observe and be prejudiced by R. Carr's improper courtroom behavior. But these reasons, if meritorious, would only add weight to our holding that the failure to sever was error. They would not persuade us that reversal of all of J. Carr's convictions is required as a result of that error.

We mention the severance issue in this context because it is distinct from but related to the unique challenge J. Carr makes on this appeal to Judge Clark's refusal to grant him a mistrial after opening statements.

R. Carr's counsel told the jury during opening statement that his client merely stored property stolen from the Birchwood victims for J. Carr and another unknown, uncharged third man, suggesting that J. Carr and the third man were responsible for all of the charged Birchwood crimes. These remarks prompted an objection from counsel for J. Carr on the grounds that they were argumentative and unsupported by the evidence. Judge Clark overruled the objection.

This ruling by Judge Clark was correct. Counsel for R. Carr began his explanation of what happened on the night of December 14 and 15, 2000, with the phrase "the evidence will show." That phrase signals the purpose of opening statement; it provides an opportunity for counsel to outline a version of events that he or she expects the evidence to prove to the jury. In addition, the objection by J. Carr's counsel that the opening statement was unsupported by evidence was virtually impossible to sustain at that stage of the case, when all evidence was yet to be admitted.

R. Carr's counsel continued to discuss the involvement of J. Carr and the third unknown man in the Birchwood crimes, finally observing that "the Birchwood address is replete with Jonathan Carr's DNA . . . . Ultimately, the DNA evidence will show that Jonathan Carr, not Reginald Carr, Jonathan Carr committed most, if not all of the crimes which are alleged in the complaint and that he did it with a third black male who still walks the streets of Wichita."

At this point the State objected, and Judge Clark sustained the objection, saying, "It's an improper comment."

During that day's lunch break, outside the presence of the jury, the State argued that the opening statement by counsel for R. Carr had violated rulings on motions in limine and that he should be sanctioned for misconduct. The prosecutor also asked the judge to instruct the jury to disregard the statement. J. Carr moved for a mistrial. The grounds his counsel advanced in support of the motion, although abbreviated, were exactly the same as those advanced in support of J. Carr's multiple motions for severance: The defenses of J. Carr and R. Carr were mutually and irreconcilably antagonistic.

When examining an appellate claim arising out of denial of a mistrial, we review the district judge's decision for an abuse of discretion. We first ask whether the district judge abused his or her discretion when deciding whether there was a fundamental failure in the proceedings. If so, we then examine whether the district judge abused his or her discretion when deciding whether the problematic conduct resulted in prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in an injustice.

Having already held that defense motions for severance of the guilt phase should have been granted, we also hold that Judge Clark abused his discretion by failing to recognize a fundamental failure in the proceedings when R. Carr's counsel made his remarks during opening statement. Those remarks made the irreconcilable antagonism of the codefendants' cases inescapably clear. However, also in line with the majority view on severance, we further hold that there was no abuse of discretion in refusing to grant a mistrial to cure that failure.

At the time R. Carr's counsel wrapped up his opening statement, the jury was immediately told that his remarks were "improper." No evidence to support the third-party theory of the case was ever introduced. And, ultimately, the jury received the usual

instruction that statements of counsel are not evidence. Under these circumstances, we do not discern enough additional damage to J. Carr's case attributable to the opening statement by R. Carr's counsel—i.e., any damage beyond that J. Carr's case already was bound to suffer because of the denial of severance—to persuade us that all of his convictions must be reversed.

J2. CONFRONTATION RIGHTS UNDER SECTION 10 OF KANSAS CONSTITUTION BILL OF RIGHTS

Like R. Carr, J. Carr challenges the admission of Walenta's statements under the Sixth Amendment and the Confrontation Clause. We have fully discussed those arguments in Section 6 of the R. Carr opinion and need not revisit them here. J. Carr also invoked Section 10 of the Kansas Constitution Bill of Rights in support of his position on this issue, and it is that invocation that prompts us to make a brief response in this opinion.

We have not previously differentiated the rights of a defendant protected by the Sixth Amendment and those protected by Section 10. And we need not do so here. We leave the merits of any argument under Section 10 to the next case.

J3. SUFFICIENCY OF EVIDENCE ON WALENTA FELONY MURDER

J. Carr challenges the evidence supporting his conviction of Walenta's felony murder as insufficient, arguing that impermissible inference stacking was required in order for the jury to convict.

Additional Factual and Procedural Background

Count 51 in the amended complaint charged both defendants with first-degree felony murder of Walenta while committing or attempting to commit the inherently dangerous felony of aggravated robbery.

Summarized for ease of reference, the evidence showed Walenta was approached by a black male shortly after she pulled into her driveway about 9:40 p.m. on the evening of December 11, 2000. Walenta saw the man get out of a light-colored four-door car that had followed her and then parked near her house. The man indicated in some way that he needed assistance, and Walenta rolled down her driver's-side window a few inches to talk to him. As soon as she did so, the man stuck a black handgun into the car, holding it palm down and pointing it at her head. When she attempted to put her Yukon in reverse to get away, the man shot her three times. He then ran away and the light-colored car pulled away. Walenta said she was not sure whether the gunman had been left behind by whoever was driving the light-colored car.

Later on the evening of December 11, about 11:15, J. Carr showed up at Adams' house. Adams testified in pertinent part:

> "Q. Do you remember what he was driving?
> "A. I think he was dropped off that night and his brother came back to pick him up.

> "Q. And so you are not sure of the vehicle?
> "A. The Camry, it would have been the [light-colored four-door] Camry.
> "Q. Okay. So when his brother returned, did you see him to the door?
> "A. No, I don't think so.
> "Q. Do you recall whether you saw the Camry the early morning hours of the 12th?
> "A. No, I don't, no."

Adams also testified that J. Carr had a black handgun with him on the same night, which he left with her. Late the next day he asked her to return the gun to him, scolded her for touching it too much, and then proceeded to clean it and every bullet in it thoroughly. Adams identified the black Lorcin at trial as the gun J. Carr had with him on the night of December 11, 2000.

A few days later, after J. Carr and R. Carr had been arrested in the wake of the Birchwood crimes, Walenta picked two pictures out of a photo array as representative of the general appearance of the man who had shot her. One of those pictures was of R. Carr. She also said that the eyes of the man in the photo of R. Carr represented what she remembered of the gunman's eyes. She did not see anyone else at the scene of the shooting and was not able to pick any photo from an array containing a photo of J. Carr.

Ballistics expert testimony established that the black handgun used in the shooting of Walenta was the same black Lorcin .380 used to shoot out Schreiber's tire and to murder the four friends from the Birchwood home.

J. Carr was acquitted on the four charges arising out of the Schreiber incident and convicted on all charges against him arising out of the Walenta and Birchwood incidents.

Evidence Sufficiency

Our standard of review on sufficiency claims is often stated and familiar:

> "When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, examined in the light most favorable to the prosecution, the appellate court is convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt. While the State must sustain its burden of proof on each element of an offense charged, circumstantial evidence and the logical inferences therefrom are sufficient to support a conviction of even the most serious crime. If an appellate court holds that evidence to support a conviction is insufficient as a matter of law, the conviction must be reversed; and no retrial on the same crime is possible."

In addition, appellate courts do not reweigh evidence, resolve evidentiary conflicts, or make witness credibility determinations.

We do not agree with J. Carr that his conviction of Walenta's felony murder required inference to be stacked upon inference.

Walenta saw the gunman emerge from the passenger seat of the light-colored car, and she saw the car pull away from its parking

place immediately after the shooting. A juror need only make one inference from these facts to arrive at a finding that there was another person driving the car that followed her. Adams testified that J. Carr was with his brother on the night of the crime. Adams' testimony on whether she ever saw J. Carr in the company of R. Carr on the night of December 11 is ambiguous; she may have seen them together, but she may not have. Regardless, she had many ways of knowing they had been together. Her testimony on that point was not ambiguous or unclear, and it placed J. Carr with R. Carr not long after Walenta was shot. This testimony did not require the jury to draw an inference at all. Adams' testimony on the car J. Carr and R. Carr would have been using was equally clear. The phrasing of the questions put to her gave her every opportunity to say that she was unsure; she did not. This testimony, again, did not require any inference to be stacked on any other inference. Finally, J. Carr's possession of the black gun later identified as the Walenta murder weapon also was clear. He had it in his possession on December 11, 90 minutes after Walenta's shooting; he gave it to Adams; he took it back from her on December 12; he was unhappy that she had been handling it, and he cleaned it and the bullets it held—remarkably thoroughly. These were direct observations of Adams. No inference of any kind was required.

What was required was the jury's willingness to be persuaded of J. Carr's guilt on circumstantial evidence. This is expressly allowed under Kansas law. Circumstantial proof is still proof. It is not equivalent to impermissible inference-stacking. It can rise to the level of beyond a reasonable doubt.

Particularly when we view the evidence in the light most favorable to the prosecution, we conclude the evidence in this case was sufficient to convict J. Carr of Walenta's murder. This conclusion is reinforced by our recent decision in *State v. McBroom* in which we held that evidence of the defendant's participation in a string of burglaries with a friend could be relied upon by a jury to find he also participated in a burglary/homicide that was apparently committed by more than one person in the same general area and time frame. In this case, the evidence against J. Carr on the Birchwood incident would naturally have reinforced the evidence on the Walenta incident.

J4. ACCOMPLICE CULPABILITY FOR CODEFENDANT'S SEX CRIMES

J. Carr also challenges his conviction as an aider and abettor of R. Carr's rape and aggravated criminal sodomy of Holly G.
We fully discussed the mirror image of this challenge in our opinion on the R. Carr appeal, in Section 16. There we ruled that R. Carr could be found guilty as an aider and abettor of J. Carr's sex crimes against Holly G. and Heather M., even though R. Carr was out of the Birchwood home on a trip with a victim to one or more ATMs or in another room when the crimes occurred. The all-night joint enterprise of the Birchwood intruders was plainly and repeatedly demonstrated by the State's evidence, particularly Holly G.'s lengthy and detailed testimony. Under the standard of review recited in the previous

section of this opinion, we have no hesitation in holding that the evidence J. Carr aided and abetted R. Carr's rape and aggravated criminal sodomy of Holly G. was sufficient.

CONCLUSION FOR GUILT PHASE

For the reasons set forth above and in the opinion filed today in R. Carr's appeal, we affirm J. Carr's capital murder conviction under Count 2. We reverse his three remaining capital murder convictions based on the alternative theories under K.S.A. 21-3439(a)(4) and (a)(6).

We affirm J. Carr's convictions on Counts 9 through 24. Because four pairs of these counts were charged in the alternative, this results in affirmance of 12 rather than 16 convictions.

The convictions based on Counts 25, 26, and 29 through 40 are void for lack of subject matter jurisdiction. We affirm the convictions based on Counts 27 and 28. We affirm J. Carr's conviction on Count 41. We reverse his conviction on Count 42 because it is multiplicitous with Count 41.

We affirm J. Carr's convictions on Counts 43 through 55.

PENALTY PHASE

The general factual and procedural background for the penalty phase issues in this case is set out in full in the R. Carr opinion. We need not repeat it or supplement it here. In addition, nearly all penalty phase legal issues raised by J. Carr are discussed as needed and disposed of in the R. Carr opinion. We therefore merely list them with accompanying short responses.

P1. Did the district judge err in refusing to sever the penalty phase of defendants' trial? A majority of six members of the court answers this question yes for reasons explained in Section P1 of the R. Carr opinion and because of the family circumstances argument raised by J. Carr. The majority also relies on the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase. One member of the court dissents and writes separately on this issue. A majority of six members of the court agrees that this error requires J. Carr's remaining death sentence to be vacated, consistent with Section P1 of the R. Carr opinion. One member of the court dissents and writes separately on this issue.

P2. Despite compliance with K.S.A. 21-4624(a), was it constitutional error to omit the four aggravating circumstances asserted by the State from the complaint? To provide guidance on remand, the court unanimously answers this question no for reasons explained in Section P2 of the R. Carr opinion.

P3. Did the four aggravating circumstances asserted by the State adequately channel the jury's discretion in arriving at the sentence of death? To provide guidance on remand, the court unanimously answers this question yes for reasons explained in Section P3 of the R. Carr opinion.

P4. Does the unavailability of a transcript of the jury view deprive J. Carr of a meaningful opportunity for appellate review of his death sentence? To provide guidance on remand, the court unanimously answers this question no for reasons explained in Section P4 of the R. Carr opinion.

P5. Does K.S.A. 21-4624(c)'s allowance of testimonial hearsay (a) offend the heightened reliability standard applicable in death penalty cases, or (b) violate the Confrontation Clause of the United State Constitution and *Crawford v. Washington*? To provide guidance on remand, the court unanimously answers the first question no for reasons explained in Section P5 of the R. Carr opinion. To provide further guidance on remand, the Court unanimously answers the second question yes for reasons explained in Section P5 of the R. Carr opinion.

P6. Did the district judge err in excluding mitigating evidence of (a) likelihood of parole, or (b) the anticipated impact of J. Carr's execution? To provide guidance on remand, the court unanimously answers the first question no for reasons explained in Section P6 of the R. Carr opinion. To provide further guidance on remand, in Section P6 of the R. Carr opinion, the court discusses the standard that should govern consideration if the second question arises again.

P7. Did the district judge err by permitting the State's rebuttal witness to testify that he had consulted other experts and that they agreed with his opinion? To provide guidance on remand, in Section P7 of the R. Carr opinion, the court discusses the standard that should govern consideration if this question arises again.

P8. Did the district judge err in denying an opportunity for surrebuttal testimony? For reasons explained in Section P8 of the R. Carr opinion, the court unanimously agrees that the district judge abused his discretion. The court declines to reach the issue of harmlessness because of the necessity of remand.

P9. Must J. Carr's sentencing on his noncapital convictions have occurred before the penalty phase of his trial, and, if so, should the jury have been informed of the sentences he would serve if he were not sentenced to death? For reasons explained in Section P9 of the R. Carr opinion, the court declines to reach the merits of the first part of this question because it is moot and, to provide guidance on remand, unanimously answers the second part of the question no.

P10. Did the district judge err in failing to instruct the jury that the existence of mitigating factors need not be proved beyond a reasonable doubt? To provide guidance on remand, for reasons explained in Section P10 of the R. Carr opinion, a majority of five members of the court answers this question yes. Two members of the court dissent, and one of them writes separately for the two on this issue.

P11. Did the district judge err by failing to instruct jurors that "the crime" to be considered when evaluating aggravating circumstances was capital murder? In Section P11 of the R. Carr opinion, we discuss this issue to provide guidance on remand.

P12. Was the jury instruction on the role of mercy clearly erroneous? To provide guidance on remand, for reasons explained in Section P12 of the R. Carr opinion, the court unanimously answers this question no.

P13. Did the wording of Instruction 10, when read with the verdict forms, misstate the law on the need for jury unanimity on mitigating factors not outweighing aggravating factors? To provide guidance on remand, for reasons explained in Section P13 of the R. Carr opinion, the court unanimously answers this question yes.

P14. Must J. Carr's death sentence be vacated because a fact necessary to imposition of the penalty—his age of 18 or older at the time of the capital crimes—was not submitted to the jury or found beyond a reasonable doubt? For reasons explained in Section P14 of the R. Carr opinion, the court declines to reach the merits of this issue because the situation that prompted it is unlikely to arise again on remand.

P15. Does K.S.A. 21-3205 authorize punishing an aider and abettor the same as a principal? In Section P16 of the R. Carr opinion, the court declines to reach the merits of this issue because the record on appeal does not demonstrate that R. Carr was convicted of capital murder as an aider and abettor. This is also true of J. Carr, and no further discussion of the issue is warranted in this opinion.

P16. Is the death penalty an unconstitutionally disproportionate punishment as applied to aiders and abettors of capital murder under Section 9 of the Kansas Constitution Bill of Rights? In Section P17 of the R. Carr opinion, the court declines to reach the merits of this issue because the record on appeal does not demonstrate that R. Carr was convicted of capital murder as an aider and abettor. This is also true of J. Carr, and no further discussion of the issue is warranted in this opinion.

P17. Was the penalty phase infected by prosecutorial misconduct? J. Carr argues that one prosecutor's multiple references to his unadjudicated criminal conduct and his jailhouse bragging about shooting the Birchwood victims and the crude reason for raping one of the female victims were misconduct. Even though one such reference during closing argument was the subject of a successful objection and an order for the jury to disregard it, J. Carr argues the damage was incurable. Defense counsel's earlier objection suggesting that the prosecutor could not refer to such material without being able to "prove it up" had been overruled. This objection probably should have been sustained by Judge Clark. For reasons explained in Section P18 of the R. Carr opinion, the court declines to reach the further merits of this issue because the situations that prompted it are unlikely to arise again on remand.

P18. Do verdict forms such as those used in this case pose a threat of double jeopardy? For reasons explained in Section P19 of the R. Carr opinion, the court declines to reach the merits of this issue because it is unripe.

P19. Does Kansas' execution protocol protect against unnecessary pain? For reasons explained in Section P20 of the R. Carr opinion, the court declines to reach the merits of this issue because it is unripe.

CONCLUSION FOR PENALTY PHASE

Because the district judge's failure to sever the penalty phase of defendants' trial violated J. Carr's Eighth Amendment right to an individualized sentencing determination and cannot be deemed harmless error, the death sentence for J. Carr's remaining K.S.A. 21-3439(a)(6) conviction for the murders of Heather M., Aaron S., Brad H., and Jason B. is vacated. The case is remanded to the district court for further proceedings consistent with this opinion.

***

BEIER, J., concurring in part and dissenting in part: I respectfully dissent from two of the majority's rulings on the guilt phase of Jonathan Carr's trial: cumulative error and sufficiency of evidence on Count 41.

As discussed in my separate opinion in Reginald Carr's appeal, two of the district judge's errors—failure to sever the guilt phase of the defendants' trial and rejection of the reverse Batson peremptory challenge—may have been reversible standing alone. Even if the court is unwilling to go that far today, when these two errors are considered with the six other J. Carr errors upon which the court unanimously agrees—erroneous instructions on the sex-crime based capital murders, multiplicity of the multiple-homicide based capital murders, lack of subject matter jurisdiction for the victim-on-victim sex charges, automatic exclusion of expert testimony on the reliability of eyewitness identifications, erroneous instruction on eyewitness certainty, and erroneous instruction on aiding and abetting—and Judge Paul Clark's refusal to grant J. Carr's motion for mistrial after opening statements, reversal of all of J. Carr's convictions under the cumulative error doctrine is unavoidable. Despite weighty evidence, there was simply too much pervasive and interrelated error in the guilt phase of J. Carr's trial for me to be confident in the outcome.

I also would hold, for the reasons stated in my separate opinion in the R. Carr appeal, that the evidence supporting Holly G.'s digital self-rape under Count 41 was insufficient to convict J. Carr as a principal. This would mean that Count 42 can stand, rather than being reversed as multiplicitous.

LUCKERT, and JOHNSON, JJ., join the foregoing concurring and dissenting opinion.

* * *

JOHNSON, J., concurring in part and dissenting in part: I join the separate opinion authored by Justice Beier, but I write separately because I believe that the district court erred in refusing to change the venue of the trial and that this defendant's felony murder conviction should be reversed for want of sufficient evidence.

The district court ignored statistically valid evidence that prejudice against the defendant was pervasive throughout Sedgwick County to the extent that one could not expect to find an unbiased jury pool in that community. My rationale in this case is the same as set forth in my separate opinion in codefendant Reginald Carr's opinion, which I adopt here by reference.

Specific to this case, however, I cannot find in the record sufficient competent evidence from which a rational jury could have found J. Carr guilty beyond a reasonable doubt of the felony murder of Linda Ann Walenta. Instead of basing its prosecution upon proven facts and the relevant inferences that could reasonably be drawn from those proven facts, the State relied on speculation as to what might have happened.

As with the change of venue issue, the sufficiency of the evidence issue involves the defendant's constitutionally guaranteed individual rights. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove, beyond a reasonable doubt, each and every element necessary to constitute the crime charged. While that right emanates from the "people's document," the constitution, its enforcement will not always be publicly applauded. Nevertheless, it is incumbent upon this court to make the State comply with its constitutional burden of proof, without regard to the popularity of the result.

As the majority notes, the defense complains of impermissible "inference-stacking." This court has previously tried to explain that prohibition by stating that "inferences may be drawn only from facts established," that is, inferences may not rest upon another inference. But here, the majority appears to focus on its notion of the difference between direct evidence and circumstantial evidence, which leads it to recite the familiar mantra that even the most serious crime may be proved by circumstantial evidence. Then, the majority declares that circumstantial proof is not the same as impermissible inference-stacking.

Certainly, I cannot quibble with the notion that just because the State's case is based on circumstantial evidence does not mean that the State is relying on impermissible inference-stacking. But that statement does not answer the question presented here. We are looking at the quality of the evidence, rather than the type of evidence. To support a conviction, the evidence must be competent evidence, even if it is circumstantial in nature. In *Williams*, 229 Kan. at 648, we noted that "[c]onvictions based upon circumstantial evidence . . . can present a special challenge to the appellate court" when reviewing the sufficiency of the evidence because we only permit juries "to draw *justifiable* inferences from proven circumstances and established facts." Williams set forth an alternative explanation of the prohibited practice of inference-stacking by specifically placing it in the context of circumstantial evidence: "'[W]here reliance is placed upon circumstantial evidence, the circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances.'"

Here, to get to the circumstances that would support a reasonable inference that the defendant committed the crime of felony murder, one has to make presumptions and inferences from other circumstances.

When reviewing whether the record contains substantial competent evidence, I find it helpful to first review what elements or claims the State was required to prove in order to obtain a constitutional conviction on the charged crime. As noted, the charged crime was felony murder, the definition of which is located in the first-degree murder statute and requires "the killing of a human being committed . . . in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in K.S.A. 21-3436 and amendments thereto." K.S.A. 21-3401(b). In this case, the State alleged that the underlying felony was an attempt to commit aggravated robbery upon Walenta. "Robbery is the taking of property from the person or presence of another by force or by threat of bodily harm." K.S.A. 21-3426. That crime is an aggravated robbery if the robber is armed with a dangerous weapon or inflicts bodily harm upon a person during the robbery. "An attempt is any overt act toward the perpetration of a crime done by a person who intends to commit such crime but fails in the perpetration thereof or is prevented or intercepted in executing such crime." K.S.A. 21-3301(a).

But the State did not allege that J. Carr killed Walenta or that he attempted to rob her. Rather, the State's felony-murder prosecution of J. Carr was based on the theory that he aided and abetted his brother, R. Carr, who was the person that killed Walenta while attempting to rob her. K.S.A. 21-3205(1) provides that "[a] person is criminally responsible for a crime committed by another if such person *intentionally* aids, abets, advises, hires, counsels or procures the other to commit the crime." To be criminally responsible, a defendant must aid and abet the principal either before or during the commission of the crime and, most importantly, the aider and abettor must possess the intent to promote or assist in the commission of the charged crime. Mere association with the principal who actually committed the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider and abettor. In other words, one is not criminally responsible for accidentally aiding and abetting the commission of a crime; the defendant has to know that the principal is going to commit the charged crime and possess the same criminal intent as the principal in order to be convicted of that crime as an aider and abettor.

With the foregoing in mind, the prosecutor's theory of prosecution in this case required the State to prove to the jury beyond a reasonable doubt that J. Carr intentionally drove R. Carr to the site of the crime, with the intent to promote or assist R. Carr in taking property from Walenta by force or by threat of bodily injury while armed with the handgun that J. Carr may or may not have provided, and that during the armed robbery attempt, R. Carr killed Walenta.

The obvious first hurdle for the prosecution was that it had absolutely no proof that R. Carr was attempting an aggravated robbery

when he shot Walenta, rather than attempting a kidnapping or even murder. If his brother was not attempting an aggravated robbery, then J. Carr could not have been criminally responsible for felony murder based on aiding and abetting a nonexistent underlying felony. Nevertheless, I will continue the analysis as if R. Carr was attempting an aggravated robbery.

At this point, it might be helpful to briefly discuss the difference between circumstantial evidence and direct evidence. The dictionary definition of "direct evidence" is particularly germane here because it also places the term in the context of an inference or presumption, to-wit: "Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." Ironically, the majority provides an excellent example of the difference.

After describing Walenta's personal observation that the gunman emerged from the passenger seat of a light-colored car which pulled away from its parking place immediately after the shooting, the majority declares that "[a] juror need only make one inference from these facts to arrive at a finding that there was another person driving the car that followed her." Slip op. at 36. Walenta's statement of what she personally knew from her own observation was direct evidence of the following facts: The gunman exited from the passenger side of a vehicle; the vehicle was light-colored; and the vehicle pulled away from its parking place immediately after the shooting. One need draw no inference or make any presumption for those facts to be established. But the conclusion that someone other than the gunman was the driver of the vehicle is circumstantial evidence. It is only proved by inferring or presuming from Walenta's direct testimony that if the gunman was the only person in the vehicle, it could not have pulled away without the gunman being in the vehicle.

But, of course, the direct evidence from Walenta does not establish the elements of felony murder against J. Carr. The only other persons who were in a position to personally observe the crime and have personal knowledge of any fact that would not require an inference or presumption for proof are the gunman and vehicle driver, alleged to be R. Carr and J. Carr. Neither brother testified or gave a statement admitting that J. Carr drove the car to assist R. Carr in an armed robbery. Even the permissible inference from direct evidence that the majority points out—that someone other than the shooter was driving the car—is insufficient to prove the elements of felony murder outlined above. To get to the elements of the crime, one will need more circumstantial evidence from which to draw reasonable inferences.

In my view, a circumstance that was absolutely essential for the prosecution to establish to permit a rational jury to convict J. Carr of felony murder based upon the State's theory of prosecution was that J. Carr was driving the light-colored car that Walenta observed. But that circumstantial evidence—that J. Carr was driving the light-colored car—was not established with proven facts. There was no witness that identified J.

Carr as the vehicle driver. No witness even saw the driver to be able to provide a description that could be matched against J. Carr.

The only way to establish that J. Carr was driving the car used in the crime is to presume that circumstance based upon other circumstantial evidence. For instance, Tronda Adam's testimony placing J. Carr with R. Carr not long after Walenta was shot is not direct evidence that they were together during the shooting. Contrary to the majority's characterization, that testimony was circumstantial because Adams did not personally observe the brothers commit the crime together. To be relevant to J. Carr's prosecution for felony murder, the jury had to infer that, if the brothers were together after the shooting, they must have been together during the shooting. Then, from the circumstance that the brothers were together during the shooting, the jury would need to infer that J. Carr was driving the light-colored car at the scene of the crime. From the circumstance that J. Carr was driving the vehicle at the scene of the crime, the jury would have to infer that he was doing so in order to knowingly promote or assist his brother in the commission of a crime. And because the State said so, the jury would need to infer or presume that the intended crime was aggravated robbery, rather than some other crime such as kidnapping. If that is not inference-stacking, I must confess that the concept must be incomprehensible to me.

Likewise, the testimony describing the vehicle the brothers were using the day of the shooting required further presumptions and inference-stacking by the jury, notwithstanding the majority's emphatic denial that it did. Adams did not see the brothers in the car together at the scene of the Walenta killing. Therefore, her testimony did not prove a fact that was relevant to the felony-murder elements without a further inference or presumption, i.e., it was not direct evidence. Pointedly, no witness provided information, such as a license tag number, from which the owner of the light-colored car at the crime scene could be determined. No one even described the make and model of the car carrying the gunman. All the jury could do with Adams' testimony was to speculate that the light-colored car observed by Walenta was the same car that Adams saw the brothers in at other times and further infer that the brothers were still together in that car at the crime scene, and further presume that the unseen driver of the light-colored car at the scene of the crime was J. Carr, who presumably was knowingly assisting his brother in committing an aggravated robbery.

Likewise, Adams' testimony about the gun does nothing to boost the State's case. Her "direct observations" about what transpired with the weapon at times other than the shooting, provides absolutely no insight into the elements of the felony-murder charge, unless the jury simply guesses that J. Carr must have given the weapon to R. Carr and then presume that, in doing so, J. Carr knew that R. Carr was planning to use the weapon to commit an aggravated robbery.

Even if one eschews the term "inference-stacking," I cannot find that the jury had

sufficient proven circumstances and established facts to justify an inference that J. Carr aided and abetted the felony murder of Walenta. Without sufficient competent evidence to support a constitutionally valid conviction, this court has no choice but to reverse the conviction.

Before concluding, however, I want to briefly discuss my worst nightmare, i.e., that our inference-stacking, guilt-by-association, character-propensity-reasoning decision in *State v. McBroom*, would be applied beyond its facts as establishing precedent for upholding convictions based upon insufficient evidence. The majority cites to *McBroom* to support its declaration that "the evidence against J. Carr on the Birchwood incident would naturally have reinforced the evidence on the Walenta incident." Slip op. at 37. Why do I find that reasoning faulty? Let me count the ways.

First, I would find that it would be quite unnatural for the jury to use the evidence on one charge to reinforce or influence its decision on another charge, because the trial judge specifically told the jurors not to do that. PIK Crim. 3d 68.07, which the judge followed in jury instruction No. 3, instructs a jury as follows:

> "Each crime charged against the defendant is a separate and distinct offense. You must decide each charge separately on the evidence and law applicable to it, uninfluenced by your decision as to any other charge. The defendant may be convicted or acquitted on any or all of the offenses charged. Your finding as to each crime charged must be stated in a verdict form signed by the Presiding Juror."

Second, as noted above, mere association with a principal actor is insufficient to establish criminal responsibility as an aider and abettor, even if the defendant is also merely present at the crime scene. Accordingly, guilty-by-association at another crime scene cannot comport with the constitutional requirement for the State to prove each and every element of the charged crime beyond a reasonable doubt.

Third, we at least pay lip service to the notion that juries should not be permitted to convict a defendant based upon character propensity reasoning

> "In the criminal context, the State cannot present evidence that a defendant committed a specific bad act on another occasion solely to establish a bad character propensity as proof that the defendant must have committed the currently charged crime, i.e., defendant did bad before, therefore defendant must have done bad now."

That is precisely the reasoning the majority is using; J. Carr did bad at the Birchwood incident so he must have done bad at the Walenta incident.

Fourth, "[u]nder our theory of criminal jurisprudence in this nation, the defendant is clothed with a presumption of innocence until he is proven to be guilty beyond a reasonable doubt by the State." Allowing the State to use evidence of one crime to "reinforce" its proof of another crime

denigrates the defendant's presumption of innocence. In other words, presuming that a defendant did the charged crime because there is evidence that he committed another crime sounds more like bad people are clothed with a presumption of guilt.

Fifth, as I noted above, the State is constitutionally required by the Fourteenth Amendment to prove each and every element necessary to constitute the charged crime beyond a reasonable doubt. Allowing the State's proof of the charged crime to rely on its having proved another crime reduces its constitutional burden of proof and violates the defendant's right to due process.

Finally, it is no answer to say that the jury has spoken and an appellate court should not interfere with that decision. To the contrary, our failure to interfere when presented with a constitutional violation is an abdication of our role in the justice system. The jury is a factfinder; it is not charged with the responsibility (or authority) to decide constitutional questions. Where the jury's factfinding exceeds constitutional boundaries, such as where it convicts a defendant for the charged crime based upon evidence that the defendant committed another crime, this court must rectify the violation.

In sum, the defendant's conviction for felony murder was unsupported by substantial competent evidence and should be reversed.

* * *

BILES, J., concurring in part and dissenting in part: I agree Jonathan Carr's sentencing must be reversed and remanded for new proceedings because the district court failed to sever the cases following the convictions. I write separately to note my disagreement with the majority's dicta in which it adopts a section in Reginald Carr's opinion entitled "P10. Burden of Proof on Mitigating Factors." The majority holds J. Carr's sentence was imposed in violation of the Eighth Amendment to the United States Constitution because the district court failed to explicitly instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt. I disagree.

As noted in more detail in my dissent in *State v. Gleason*, the majority's conclusion defies the United States Supreme Court's established Eighth Amendment jurisprudence and lacks any persuasive analysis articulating why the circumstances in this case justify a departure from that precedent. The issue for Eighth Amendment purposes is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." The majority's conclusion is that a per se violation of the Eighth Amendment occurs if a jury instruction correctly states that the State bears the burden of proving aggravating circumstances beyond a reasonable doubt but fails to affirmatively state that mitigation evidence need not be proven beyond a reasonable doubt.

But this alone cannot justify reversal under controlling Eighth Amendment precedent.

The next step must be to decide in the absence of the instruction whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. The majority is wrong when it cuts the analysis short and concludes the failure to simply instruct the jury on mitigation forces an automatic reversal.

The Eighth Amendment does not compel our directive in *State v. Kleypas*, that any mitigating circumstance instruction must inform the jury that mitigating circumstances need not be proven beyond a reasonable doubt. A finding that J. Carr's jury instructions did not conform to the *Kleypas* requirement is not an adequate basis for concluding J. Carr's federal Eighth Amendment rights were violated and reversal is required.

I dissent from that portion of the opinion.

MORITZ, J., joins the dissenting portion of the foregoing concurring and dissenting opinion.

* * *

MORITZ, J., concurring in part and dissenting in part: I write separately for several reasons, all of which are fully explained in the Reginald Carr appeal, *State v. Carr*. Rather than repeat that full explanation here, I will simply summarize those points on which I concur with and dissent from the majority opinion.

First, I concur because while I agree with the majority's decision to affirm Jonathan Carr's convictions, including one capital murder conviction, I disagree with the majority's conclusion that the district court abused its discretion in refusing to sever the defendants' guilt phase trial. Even considering the joinder as error, however, I believe the majority properly finds any errors in the conviction phase harmless and Jonathan Carr's cumulative error argument unpersuasive. Therefore, I concur with the majority opinion affirming Jonathan Carr's convictions, including one capital murder conviction.

Second, and more significantly, I dissent from the majority's decision to reverse and remand Jonathan Carr's death sentence. I would find the district court did not err in refusing to sever the defendants' penalty phase trial. But even considering a joinder error in the penalty phase, I would affirm the jury's imposition of the death penalty for Jonathan Carr. As more fully detailed in my concurring and dissenting opinion in Reginald Carr's appeal, I am convinced the mitigating evidence simply pales in comparison to the aggravating circumstances. I would hold beyond a reasonable doubt that the jury's decision to impose the death penalty was not attributable to any joinder error below.

Additionally, I join that portion of Justice Biles' separate opinion dissenting from the majority's "alternative" holding that the district court erred in failing to instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt.

Ultimately, I am convinced Jonathan Carr received a fair trial and the jury imposed a sentence of death because it understood that the horrendous circumstances called for that sentence. Because I would affirm Jonathan Carr's death sentence, I dissent.

"Carr Brothers' Death Sentences to be Reviewed By U.S. Supreme Court"

Associated Press
Roxana Hegeman
March 30, 2015

The U.S. Supreme Court agreed Monday to hear Kansas' appeal seeking to reinstate death sentences for Jonathan and Reginald Carr, brothers convicted of robbing, sexually assaulting and shooting five people in a Wichita soccer field in 2000.

The court also agreed to review a separate Kansas Supreme Court decision overturning the death sentence of a man convicted of killing a couple in Great Bend in 2004.

The justices said they will review the Kansas high court's rulings that threw out the sentences for the Carr brothers and for Sidney Gleason. The Kansas court hasn't upheld a death sentence since a new capital punishment law was enacted in 1994. The state's last executions, by hanging, took place in 1965.

The U.S. Supreme Court will consider instructions given to jurors in the sentencing phase of capital trials about evidence favorable to the defendants as well as whether sentencing the Carr brothers together violated their rights.

Sedgwick County District Attorney Marc Bennett said the Carr case is "important to us, important to the victims, important to this community. In terms of legal importance, well, I guess that is in the eye of the beholder. The U.S. Supreme Court obviously thought it merited their attention."

Sarah Johnson, an attorney with the state capital appellate defender's office who represents Gleason and Jonathan Carr, said they were "honestly a little surprised" that the court agreed to hear the cases.

"We don't think this is an issue that really is worthy of the U.S. Supreme Court's time and attention, but we are confident that once they get into it, they will recognize that the Kansas Supreme Court acted well within its discretion," Johnson said.

The Kansas Supreme Court in July upheld one conviction of capital murder with respect to the Carr brothers but overturned their death sentences. That same month, the court also upheld Gleason's conviction but reversed his death sentence.

"We have carefully analyzed the opinions of the Kansas Supreme Court and we do not believe they have correctly applied the U.S. Constitution," Kansas Attorney General Derek Schmidt said Monday in a statement. "I am encouraged the U.S. Supreme Court has agreed to review the cases."

The Carr brothers broke into a Wichita home in December 2000 and forced the five people there to have sex with each other and later to

withdraw money from ATMs. All five later were taken to a snow-covered soccer field and shot.

Four of them – 29-year-old Aaron Sander, 27-year-old Brad Heyka, 26-year-old Jason Befort and 25-year-old Heather Muller – died. One woman survived a gunshot wound to the head and ran through the snow to seek help.

Gleason was convicted for the 2004 murders of Mikiala Martinez and her boyfriend, Darren Wornkey. Martinez was a potential witness against Gleason in an earlier crime.

The cases will be argued in Washington in the fall.

Even if the Kansas Supreme Court decision stands, the Carrs remain convicted of murder and other crimes that will keep them in prison for decades, Bennett said last summer following the state Supreme Court's decision.

"Best case scenario, we're talking 70, 80 years from now before either would see a parole board," he said.

The most important issue in the case, Bennett said at the time, is whether the judge caused an unfair situation by trying the brothers together instead of separately.

"Our argument would be however you would have tried it, however it was done, the evidence was such that it would have made no functional difference, (that) any jury, however it was empaneled, would have reached the same conclusion," Bennett said.

"How the 'Wichita Massacre' Became a Factor in the Kansas Gov's Race"

The National Review
Ryan Lovelace
October 22, 2014

One of the most horrendous crimes in Kansas's history has become an issue in the state's hard-fought gubernatorial race. Jonathan and Reginald Carr received death sentences from the state more than a decade ago for a crime spree that involved rape, robbery, and murder, and culminated in the "Wichita Massacre" killings of four people and a dog. When the Kansas Supreme Court overturned the brothers' death sentences in a 6–1 decision earlier this summer, the reprieve drew the ire of Republican governor Sam Brownback, who's now running for reelection.

At a debate on Tuesday, Brownback cited the case as an example of the importance of judicial appointments. "[Democratic gubernatorial candidate] Paul Davis wants to continue to appoint liberal judges to that court; I want to appoint judges who will interpret the law, not rewrite it as they choose to see it to be," Brownback said. "One of the supreme-court justices [involved in the case] even hosted a fundraiser for Paul Davis in her home. I find that wrong. It's something that shouldn't happen."

That fundraiser was held at the home of Justice Carol Beier, who was appointed to the court in 2003 by former Democratic governor Kathleen Sebelius. Beier was actually the lone dissent from the Carr brothers' death sentences, but only because she thought the death-penalty reprieve didn't go far enough — she wanted a reversal of their convictions.

Brownback released an ad before Tuesday's debate hitting Davis for siding with the liberal justices.

At the end of the debate, Davis pushed back against Brownback's claim. "When I decided to get into this race I knew that Governor Brownback would run an ugly campaign of personal attacks, but I didn't think the ads could get any sleazier," Davis said. "I turned on my television this morning and I saw an ad that is running linking me to the Carr brothers' murders. I knew one of the victims of the Carr brothers. Governor, you trying to exploit that terrible tragedy to help get reelected is disgraceful."

Brownback has faced criticism for his own judicial choices: In August, he appointed Caleb Stegall, a first-year state court-of-appeals judge, to Kansas's highest court. Stegall previously worked as general counsel for Brownback and for conservative group Americans for Prosperity, leading Davis to knock the pick as an example of Brownback's rewarding a political ally over choosing someone with more judicial experience.

Much of the race has focused on debates over conservative policy choices, on taxes and

social issues, that Brownback has made during his first term as governor.

“Kansas Court Overturns Brother’s Death Sentences”

CBS
July 25, 2014

The Kansas Supreme Court on Friday overturned the death sentences of two brothers convicted of capital murder in a crime spree in Wichita in 2000 including robbery, rape, forced sex and four fatal shootings in a snow-covered soccer field.

The court also struck down three of the four capital murder convictions each against Jonathan and Reginald Carr. It upheld one capital murder conviction for each of them.

Their cases will return to Sedgwick County District Court for further hearings.

The court's majority overturned their death sentences because the presiding judge did not hold separate proceedings for each man. In overturning most of their capital convictions, the majority said the instructions to jurors were flawed.

The justices on Friday issued a separate ruling for each brother.

The Carr brothers' crimes are among the most notorious in the state since the 1959 slayings of a western Kansas family that inspired the classic book, "In Cold Blood."

The victims in the December 2000 attacks that culminated in a bloody scene in a snowy field were: Aaron Sander, 29; Brad Heyka, 27; Jason Befort, 26; and Heather Muller, 25. Another woman who was shot in the head survived and ran naked through the snow to seek help, becoming a key witness at the brothers' trial.

Prosecutors said the five friends were in a Wichita home when two armed intruders forced them to engage in sex with each other and later made them withdraw money from automatic teller machines. The two women were raped repeatedly before the five were taken to the soccer field and shot while they were kneeling.

The Carr brothers also were convicted of first-degree murder in connection with the fatal shooting of a 55-year-old cellist, Ann Walenta of Wichita, only days before the spree that left four dead.

Jonathan Carr, now 34, and Reginald Carr, 36, were in their early 20s when the crimes occurred. Together, they were convicted of 93 crimes, including rape, aggravated kidnapping and aggravated robbery and sentenced to death. The Supreme Court upheld a total of 57 convictions against them.

Five other convicted murderers, all men, remain on death row in Kansas. The state Supreme Court last week overturned the death sentence of Sidney Gleason in the killings of a Great Bend couple in 2004. Last year it ordered a new trial for Scott Cheever in the shooting of the Greenwood County sheriff in 2005, though the U.S. Supreme Court later ordered the Kansas court to reconsider.

Kansas' last legal executions were in 1965, by hanging. The current capital punishment law was enacted in 1994, but the state's highest court has yet to approve any death sentences, which has led to criticism from legislators and other officials who support the death penalty.

Montgomery v. Louisiana

14-7505

Ruling Below: *State v. Montgomery*, 141 So.3d 264 (La. 2014), *cert granted*

Henry Montgomery has been incarcerated since 1963. Montgomery is serving a mandatory life sentence for a murder he committed just 11 days after he turned seventeen years of age. In light of *Miller v. Alabama*, which holds that mandatory sentencing schemes "requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole"…violate the Eighth Amendment's ban on cruel and unusual punishment, Montgomery filed a state district court motion to correct his illegal sentence. The trial court denied Montgomery's motion, and on direct writ application, the Louisiana Supreme Court denied Montgomery's application, citing *State v. Tate*, which held that *Miller* is not retroactive on collateral review to those incarcerated in Louisiana.

Question Presented: Whether *Miller* adopts a new substantive rule that applies retroactively on collateral review to people condemned as juveniles to die in prison?

State of LOUISIANA
Plaintiff
v.
Henry MONTGOMERY
Defendant

19th Judicial District Court, Parish of East Baton Rouge

January 30, 2013

[Excerpt; some footnotes and citations omitted.]

Having considered Defendant's Motion to Correct an Illegal Sentence filed in the above numbered and captioned cause,

It is ordered that the motion is DENIED.

The defendant was convicted of the murder of Charles Hurt in February of 1964. At the time of the offense, the defendant was seventeen years of age. The defendant was granted a new trial in 1969, but was found guilty again in February of 1969 and was sentenced to life imprisonment.

In *Miller v. Alabama*, the Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In order for a new rule to overcome the bar to retroactivity on collateral review, one of the two *Teague* exceptions must be met. *Teague v. Lane*. The first exception applies when a new rule

completely removes a particular punishment from the list of punishments that can be constitutionally imposed on a class of defendants.

Therefore, it does not satisfy the first exception for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles. *Miller* bars only those sentences made mandatory by a sentencing scheme.

The second exception applies to "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." The holding in *Miller* does not qualify as a "watershed rule," and therefore, does not satisfy the requirements of the second exception of *Teague*.

Therefore, for the reasons stated above, the present case does not overcome the general bar to retroactivity and the Defendant's motion is DENIED.

“The Supreme Court Takes One More Look at Life Sentences for Teens”

Bloomberg
Matt Stroud
March 23, 2015

The U.S. Supreme Court added a case to its docket on Monday that will determine whether juveniles sentenced years ago to life without parole should be re-sentenced. The latest case, *Montgomery v. Louisiana*, comes in the wake of a 2012 ruling that sentences of life without parole for juveniles are unconstitutional. About 1,500 people in the U.S. remain incarcerated under such sentences.

The U.S. had, until recently, been the only developed country in the world in which people under 18 could be punished with life in prison without the possibility of parole (a sentence known as juvenile life without parole, or JLWOP). For almost a decade, the Supreme Court has written opinions that have chiseled away at laws allowing—and in some cases, mandating—that kids convicted of certain crimes such as murder must serve the rest of their lives behind bars.

In the 2012 case, *Miller v. Alabama*, the Supreme Court found JLWOP unconstitutional and barred future sentences. But the justices did not offer guidance as to whether the 1,500 prior JLWOP convicts should be re-sentenced. That left a question on the table: Should the Miller decision be retroactive? Should people who have already been sentenced to JLWOP be re-sentenced to less severe penalties?

The Supreme Court decided late last year to hear arguments about this question in a case called *Toca v. Louisiana*. But after the high court agreed to hear the case, the local district attorney offered a deal to the plaintiff, George Toca: Plea to a lesser charge and be released. Toca, who has maintained his innocence, had been behind bars more than three decades in the notoriously brutal Louisiana State Penitentiary known as Angola. He took the deal and was freed from prison.

That was good news for him, but it led to his Supreme Court case being dropped, leaving the question of retroactivity up in the air. The Supreme Court's decision to hear *Montgomery v. Louisiana* promises to take things out of limbo.

The case involves Henry Montgomery, a 17-year-old 10th grader who shot and killed a Baton Rouge deputy in 1963 while playing hooky from school. The Supreme Court will hear arguments in Montgomery's case this fall.

"U.S. Supreme Court to Consider Baton Rouge Case to Re-Evaluate Life Sentences for Murders by Juveniles"

The Acadiana Advocate
Joe Gyan Jr.
March 25, 2015

Becky Wilson forgave Henry Montgomery years ago for the 1963 murder of her father, East Baton Rouge Parish sheriff's deputy Charles H. Hurt, but that doesn't mean she wants him to go free.

Montgomery, 17 years old when Hurt was gunned down in a Scotlandville field, has been locked up since the day after the killing. Next fall, the U.S. Supreme Court will hear arguments to decide whether Montgomery, now 68, should have a chance to leave prison. The justices will weigh whether their June 2012 decision banning automatic life terms for juveniles convicted of murder should apply to older cases.

For Wilson, who lost her father when she was 9, the answer is clear.

"Unfortunately, our sentence has no way of being overturned or commuted. We live with this forever," Wilson, 60, said from Hope, Arkansas. "My mother served a life sentence without her husband; my brother, sister and I have served a life sentence without our father; my children, nieces and nephews have served a sentence of never knowing their grandfather."

Montgomery was convicted and sentenced to death in 1964, then retried in 1969 and convicted and sentenced to life in prison without parole.

"I don't feel vindictive toward the man. I feel like he got two fair trials," Wilson said. "I'm not upset the death sentence was overturned."

Montgomery, who escaped for just a few hours with seven others from the East Baton Rouge Parish jail in 1966, has been denied release four times — in 1971, 1995, 1999 and 2001, she added.

"They had more than enough time to consider his background," Wilson said.

In its 2012 ruling, the U.S. Supreme Court said by a 5-4 vote that states can no longer automatically sentence juveniles convicted of murder to life in prison without parole without first holding a sentencing hearing to consider the defendant's youth, upbringing, circumstances of the crime and other factors.

The court found that "youth matters for purposes of meting out the law's most serious punishments." In an opinion written by Justice Elena Kagan, the court said that children simply don't have the same mental capacity as adults, so they should be treated differently. The decision noted "children's diminished culpability and heightened capacity for change."

The ruling, in a case called Miller v. Alabama, did not ban juvenile life sentences altogether; the high court only outlawed the automatic imposition of the sentence. Judges

must consider each defendant's case individually, taking into consideration the child's home life and ability to be rehabilitated.

The high court, however, did not say whether the decision applied retroactively to inmates across the country serving life terms for killings they committed when they were under 18.

Louisiana Department of Public Safety and Corrections spokeswoman Pam Laborde said Tuesday that as of April 2013, there were 332 offenders in state custody who were sentenced to life without parole as juveniles for various crimes, including first- and second-degree murder and aggravated rape. The bulk of them were sentenced before the Supreme Court's ruling.

Courts in various states have split on whether the Miller ruling should be retroactive.

Supreme courts in Louisiana, Minnesota, Pennsylvania and Michigan have ruled that the U.S. Supreme Court's 2012 decision should not be applied to cases prior to the decision. Intermediate appeals courts in Florida and Michigan have ruled the same way.

The Louisiana high court, in a 5-2 decision in November 2013, concluded that federal law only makes a new ruling from the U.S. Supreme Court apply retroactively when there is a "substantive" issue decided, such as the banning of a kind of punishment entirely or a crime deemed unconstitutional. An example would be the 2005 abolition of the death penalty for juvenile offenders.

The state Supreme Court found that the Miller decision was a procedural one, so it does not apply to past cases.

The Louisiana case centered around Darryl Tate, who was 17 when he robbed a man of 40 cents and shot him in the chest.

Tate pleaded guilty in Orleans Parish in 1981 to second-degree murder and was sentenced, automatically under state law, to spend the rest of his life in prison without hope for parole.

In the Montgomery case, the Louisiana Attorney General's Office — which is handling the arguments for the East Baton Rouge Parish District Attorney's Office — emphasizes that the Miller decision does not bar life sentences without the possibility of parole. Instead, it replaced an automatic mandate with the requirement to hold a hearing.

Attorney General's Office spokeswoman Laura Gerdes Colligan said the fact that Montgomery killed Hurt is not in dispute.

"The Court did not grant review in this case because of anything wrong with the underlying murder conviction, but instead to resolve an important legal question," she said. "The Attorney General's Office and the East Baton Rouge Parish District Attorney's Office will vigorously defend the murder conviction and sentence in this case, which has been final for 45 years."

Mark Plaisance, who will argue at the U.S. Supreme Court on Montgomery's behalf for the East Baton Rouge Parish Public Defenders Office, said he will make the

argument that what the high court did in June 2012 represented a substantive change in the law.

“Since it’s a substantive change it should apply to everyone in that class,” he said.

The highest courts in Iowa, Mississippi and most recently Florida, as well as midlevel courts in Illinois and New Hampshire, have decided that Miller v. Alabama does apply retroactively, and the U.S. Department of Justice has agreed.

Federal circuit courts have also divided on the issue, with some tossing out previously imposed life sentences and others upholding them.

The U.S. Supreme Court will ultimately have to settle the confusion.

In direct response to the high court’s 2012 ruling, the Louisiana Legislature approved a measure during the 2013 regular session requiring a sentencing judge to hold a hearing to determine whether the sentence should be imposed with or without parole eligibility. If a sentence is imposed with eligibility for parole, the legislation gives incarcerated offenders a shot at freedom after serving 35 years for first- or second-degree murder, according to the legislation that the governor signed into law.

The Louisiana Supreme Court concluded in its 2013 decision that state lawmakers never intended the law to be read to apply to those already sentenced.

In a dissenting opinion joined by Justice Jeff Hughes, Chief Justice Bernette Johnson wrote, “Fundamental fairness in the administration of justice requires that these new laws apply to Darryl Tate, and all defendants who are similarly situated in Louisiana.”

The U.S. Supreme Court had agreed last fall to decide about retroactivity in the New Orleans case of George Toca, which was to be heard at the high court later this month. But Toca was released from prison earlier this year under a plea deal in which he agreed to drop his innocence claim in exchange for pleading guilty to two counts of armed robbery and manslaughter. His sentence was equal to the time he had served.

Toca, who was barely 17 at the time of a fatal 1984 stickup, spent 31 years in prison.

In legal filings in that case about the retroactivity issue, Orleans Parish District Attorney Leon Cannizzaro’s office argued it would be nonsensical to ask local judges decades after a crime was committed to evaluate a juvenile’s capacity to change.

Advocates for juvenile lifers countered that judges could instead look at an inmate’s record while behind bars.

Charles Hurt was 41 and living in Baker when he was fatally shot by Montgomery, a black Scotlandville High School 10th-grade student who was described at the time as answering to the nickname “Wolf Man.” Montgomery told authorities he “panicked” and shot Hurt on Nov. 13, 1963, with a stolen .22-caliber pistol after the white officer confronted him playing hooky in a wooded field near the Anna T. Jordan Recreation Center in Scotlandville.

A news article in The Morning Advocate printed the day after the killing described Hurt as the first law enforcement officer in East Baton Rouge Parish shot to death in three decades. The authorities implemented roadblocks and rounded up and jailed more than 60 black men during the manhunt. The article described the men as being "booked for investigation."

Defense witnesses at Montgomery's trials characterized him as being quiet, withdrawn and a habitual thief. He was described as having subnormal intelligence. He pleaded not guilty by reason of insanity.

Wilson said her father was a gentle man who had a great rapport and reputation with both white and black people.

She said her family received a condolence letter from President John F. Kennedy after her father was killed. Kennedy was fatally shot a week later in Dallas.

"Supreme Court to Weigh Retroactivity of Mandatory JLWOP"

Juvenile Justice Information Exchange
Gary Gately
April 5, 2015

A U.S. Supreme Court decision could forever alter the landscape of sentences of mandatory juvenile life without parole, potentially leading to resentencing hearings for some 2,100 convicted murderers.

The high court agreed on March 20 to hear a case that could set a precedent on whether its landmark 2012 Miller v. Alabama ruling applies to cases decided before that ruling.

In the 5-4 Miller ruling, the court did not specify definitively whether the decision should apply retroactively, and lower federal courts and state courts have been divided on the issue.

If the Supreme Court decides Miller should be applied retroactively, those sentenced before the ruling to mandatory life without parole for murders committed as juveniles could receive sentence reviews. Depending on the state, they could still be sentenced to life without parole, to life with parole eligibility after a specified number of years or be released, likely for time served, said Emily Keller, a staff attorney at the Juvenile Law Center in Philadelphia.

Opponents of mandatory juvenile life without parole (JLWOP) hailed the Supreme Court's decision to take up the retroactivity issue on a Louisiana case, Montgomery v. Louisiana, expected to be heard this fall.

"We're really hopeful that the Supreme Court will rule that Miller applies retroactively and that the thousands of individuals serving these unconstitutional sentences will have an opportunity for new sentencing hearings," Keller said.

Of the court's decision to take up the case, Keller said: "It's a very hopeful sign; it's a signal that the court thinks this is an important issue that needs to be addressed, and we're hopeful that they'll rule that Miller does apply retroactively and that everyone does get a chance to receive a constitutional sentence."

Florida just became the 10th state whose Supreme Court ruled Miller v. Alabama should apply retroactively. (The other states are Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, South Carolina, Texas and Wyoming.)

Courts in five states — Alabama, Louisiana, Michigan, Minnesota and Pennsylvania — have ruled Miller does not apply retroactively.

Keller said it's patently unfair – and unconstitutional – to allow when and where a conviction took place to determine whether someone gets a resentencing hearing.

"I believe it's a matter of fairness and justice, and whether or not you're forced to serve an unconstitutional sentence shouldn't depend

on the arbitrary date that your conviction became final or the state where you reside," she said.

Heather Renwick, litigation counsel for the Washington-based nonprofit Campaign for the Fair Sentencing of Youth, also cited the split among state court rulings on retroactivity.

"It's inconsistent treatment across the U.S., depending on what state you're in," Renwick said. "So we're hoping the U.S. Supreme Court will hold that Miller v. Alabama is retroactive so that every child sentenced under a mandatory sentencing scheme to die in prison will be afforded a second chance to demonstrate rehabilitation and the capacity to re-enter the community."

In Miller, the U.S. Supreme Court ruled mandatory JLWOP violated the Eighth Amendment's prohibition against "cruel and unusual punishment."

Renwick said that if mandatory JLWOP was found to be cruel and unusual by the highest court in the land, the standard should apply to juveniles sentenced before the ruling.

Pennsylvania has the highest number of prisoners serving mandatory JLWOP sentences in the country, with some 500 inmates serving such sentences, including Kenneth C. Crawford III (see related story). The state's juvenile lifers had their hopes for a resentencing hearing dashed when the Pennsylvania Supreme Court ruled 4-3 in October 2013 against applying Miller retroactively.

In its ruling in Commonwealth of Pennsylvania v. Ian Cunningham, the Pennsylvania high court stated: "Significantly, for present purposes, the Miller majority did not specifically address the question of whether its holding applies to judgments of sentence for prisoners, such as Appellant, which already were final as of the time of the Miller decision. As such, the opinion does not set out the principles governing the High Court's retroactivity jurisprudence."

In Michigan, too, with nearly 350 inmates serving terms of mandatory JLWOP, the state Supreme Court ruled 4-3 in July that Miller does not apply retroactively.

On the day the ruling was handed down, Michigan Attorney General Bill Schuette said in a statement: "Today the Michigan Supreme Court upheld the rights of crime victims and their families. This ruling should bring a measure of peace to the many families who struggled with the possibility of painful resentencing hearings for cases successfully prosecuted decades ago."

In Montgomery v. Louisiana, the appellant in the case, Henry Montgomery, received a sentence of mandatory JLWOP for murdering a police officer in 1963 less than two weeks after his 17th birthday.

A Montgomery v. Louisiana petition to the U.S. Supreme Court cited a lower federal court ruling and argued that the Miller decision is "a substantive constitutional rule that mandates courts to implement a new procedure in the sentencing of juveniles."

In Miller, the U.S. Supreme Court pointed to research showing adolescents' brains are not fully developed and that youths are more susceptible than adults to peer pressure, more reckless and impulsive, more likely to take risks and less likely to consider long-term consequences.

The court said life circumstances, including trauma, must be taken into account in sentencing — and, notably, also found juveniles are amenable to rehabilitation, a finding often cited by opponents of mandatory JLWOP.

Mishi Faruqee, juvenile justice policy strategist at the American Civil Liberties Union, noted the United States is the only country in the world to sentence juveniles to life without parole. (The United Nations special investigator on torture, Juan E. Méndez, condemned juvenile life without parole in a report last month.)

"A child should never be sentenced to die in prison; I mean, they always have that capacity for change," Faruqee said.

"Part of the nature of being a child is you're still growing and developing who you are, and so I think it's absolutely unacceptable to condemn a child to spend the rest of their life in prison. And that's something that the whole world has recognized except the United States."

"Lives Hang in Limbo: SCOTUS to Hear Case on Whether Ruling Prohibiting Mandatory Life Sentences for Juveniles Applies Retroactively"

Louisiana Law Review
Allison B. Kingsmill
April 13, 2015

On March 23, 2015, the United States Supreme Court granted certiorari in *Montgomery v. Louisiana* to decide whether its ruling in *Miller v. Alabama*, prohibiting mandatory life-without-parole sentences for juveniles convicted of murder, applies retroactively—that is, to inmates convicted before the decision was issued.

In *Montgomery*, Henry Montgomery was convicted of murdering a deputy sheriff when he was 17 years old and was automatically sentenced to life in prison without the possibility of parole as required by Louisiana law. Consequently, Montgomery was sentenced to spend the rest of his life in prison without any consideration of his youth, the circumstances of the crime, or any other mitigating facts. In his petition to the Supreme Court, Montgomery claims that his sentence subjects him to cruel and unusual punishment, which violates the Eighth Amendment and the previous Supreme Court decision in *Miller v. Alabama*.

In *Miller*, the Supreme Court reviewed the cases of two 14 year olds who were convicted of murder and sentenced to statutorily mandated punishments of life without parole. The Court held that the Eighth Amendment's prohibition of cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders. The Court emphasized that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." Without considering the mitigating facts relevant to youth, the Court concluded that "such a scheme poses too great a risk of disproportionate punishment." As a result, the Court did not categorically bar juvenile life sentences without parole but indicated that "occasions for sentencing juveniles to this harshest possible penalty will be uncommon."

In light of the *Miller* decision, Montgomery filed a motion to correct his illegal sentence, arguing that he is entitled to a new sentencing hearing with the possibility of parole.[However, the state district court denied Montgomery's motion. Moreover, the Louisiana Supreme Court denied Montgomery's writ application, refusing to apply Miller retroactively.

The United States Supreme Court has not decided whether to apply Miller retroactively. As a result, following *Miller*, the retroactivity issue has divided state and federal courts across the country. The question before the Court in *Montgomery* is whether *Miller* applies retroactively to

defendants who received statutorily mandated life-without-parole sentences before the *Miller* decision was handed down. Most state courts, as well as six federal circuit courts, have applied *Miller* retroactively, interpreting it as a substantive rule banning mandatory life sentences for juveniles. In contrast, only four states—Louisiana, Michigan, Minnesota, and Pennsylvania—have ruled against retroactivity, viewing *Miller* as merely an announcement of a new procedural rule.

In determining the retroactivity of Supreme Court decisions, courts apply the standards established by *Teague v. Lane*. In *Teague*, the Court held that a new rule will be applied retroactively if (1) it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or (2) creates a procedure "implicit in the concept of ordered liberty." Courts holding in favor of retroactivity have concluded that *Miller* falls within *Teague*'s first exception, because it "explicitly forecloses the imposition of a certain category of punishment—mandatory life in prison without the possibility of parole—on a specific class of defendants: those individuals under the age of 18 when they commit the crime of murder."

On the other hand, courts ruling against retroactivity have reasoned that *Miller* mandated only that a court consider an offender's youth before imposing a particular penalty and therefore "simply altered the range of permissible methods for determining whether a juvenile could be sentenced to life imprisonment without parole."

Amidst the division among states and the need for uniformity, the United States Supreme Court granted review of Montgomery's case and thereby decided to end the uncertainty of *Miller*'s application. The Supreme Court originally agreed in December 2014 to consider the issue of retroactivity in another Louisiana case, *Toca v. Louisiana*. Similar to Montgomery, George Toca received a mandatory-life-without-parole sentence when he was a juvenile. However, after years of incarceration, Toca accepted a plea deal with prosecutors and was released from prison. Consequently, his petition became moot before the Supreme Court and was automatically dismissed.

Montgomery and Toca's petitions represent a recurring issue before the Supreme Court and present a critical question for juvenile offenders already sentenced to life without parole: Should they be resentenced?[Prisoners sentenced to life as juveniles receive new sentencing hearings across the nation, while convicted juveniles like Montgomery remain condemned to spend the rest of their lives in prison. As a result, whether *Miller* should be applied retroactively is an important question that must be resolved as soon as possible.

Whether the Court will apply *Miller* retroactively remains uncertain. However, if the Court finds in favor of retroactivity, Louisiana, Michigan, Minnesota, and Pennsylvania will be most heavily impacted, as they will have to review all previously mandated life-without-parole sentences for juvenile offenders.

Luis v. United States
14-419

Ruling Below: *United States v. Luis*, 564 Fed. Appx. 493 (11th Cir. Fla. 2014)

This case presents an opportunity for the Court to resolve a circuit split on a question of fundamental importance to the adversarial system of justice: whether the restraint of *untainted* assets needed to retain counsel of choice in a criminal case violates the Fifth and Sixth Amendments. The Fourth Circuit in *United States v. Farmer* has expressly held that "[w]hile *Caplin* [*& Drysdale, Chtd*.] made absolutely clear that there is no Sixth Amendment right for a defendant to obtain counsel using tainted funds, [a defendant] still possesses a qualified Sixth Amendment right to use wholly legitimate funds to hire the attorney of his choice."

Addressing a pretrial restraint under 18 U.S.C. § 1345, the Eleventh Circuit in this case upheld a preliminary injunction that currently restrains all of petitioner's assets, including undisputedly untainted funds needed by her to engage private counsel in her criminal case. Ignoring the Fourth Circuit's holding in *Farmer* and the important and historical distinction between tainted and untainted assets, the Eleventh Circuit interpreted *Caplin* to "foreclose" petitioner's constitutional challenge to the pretrial restraint of legitimate, untainted funds she needs to retain counsel of choice.

Question Presented: Does the pretrial restraint of a criminal defendant's legitimate, untainted assets (those not traceable to a criminal offense) needed to retain counsel of choice violate the Fifth and Sixth Amendments?

UNITED STATES of America
Plaintiff - Appellee
v.
Sila LUIS
Defendant – Appellant

The United States Court of Appeals for the Eleventh Circuit

Decided on May 1, 2014

[Excerpt; some footnotes and citations omitted]

Per Curium:

A federal grand jury in the Southern District of Florida indicted Appellant Sila Luis ("Luis") for her role in an alleged Medicare fraud scheme that included kickbacks paid to patients who enrolled with her home healthcare companies. In addition to charging Luis with substantive offenses, the indictment included forfeiture allegations

pursuant to the general criminal forfeiture statute. The government brought this civil action to restrain Luis's assets, including substitute property of an equivalent value to that actually traceable to the scheme, before her criminal trial.

Federal law grants district courts the authority to restrain, pretrial, the assets of those accused of certain kinds of fraud. This includes the authority to restrain "property of equivalent value" to that actually traceable to the alleged fraud. Among the enumerated offenses is a "Federal health care offense," defined elsewhere to include conspiracy to defraud the United States and to commit an offense against it, in violation of 18 U.S.C. § 371, and conspiracy to commit healthcare fraud, in violation of 18 U.S.C. § 1349.

In this separate civil case, the government moved to restrain Luis's assets pretrial, to include substitute assets not directly traceable to the alleged fraud. After granting a temporary restraining order, the district court held a hearing on a motion for preliminary injunction and ultimately granted the motion. Luis appeals that order, arguing she needs her funds to pay her criminal defense lawyer and that restraining those funds pretrial violates her constitutional rights.

Though we generally review a district court's grant of a preliminary injunction for abuse of discretion, we review questions of law, such as a statute's constitutionality and whether a preliminary injunction violates an individual's constitutional rights, de novo.

After reviewing the record, reading the parties' briefs and having the benefit of oral argument, we affirm the district court's order granting the government's motion for a preliminary injunction. The district court conducted an evidentiary hearing where it heard arguments and testimony and found, based on the hearing and the indictment, that there was probable cause to believe that Luis committed an offense requiring forfeiture, that she possessed forfeitable assets, and that she was alienating those assets. The arguments made by Luis in this appeal are foreclosed by the United States Supreme Court decisions in *Kaley v. United States*; *Caplin & Drysdale Chartered v. United States*; *United States v. Monsanto*; and *United States v. DBB, Inc*. Accordingly, we affirm the district court's order granting the government's motion for a preliminary injunction.

AFFIRMED.

“Supreme Court to Decide Whether Criminal Defendants Have Right to Hire Lawyers With Frozen Assets”

The Huffington Post
Samantha Lachman
June 8, 2015

The Supreme Court took up a case Monday concerning whether the government can deny criminal defendants untainted money they need to hire an attorney of their choice.

The case, *Sila Luis v. United States*, will be heard in the court's next term starting in the fall. Luis was indicted in 2012 on fraud charges involving $45 million in allegedly illegal Medicare payments. The FBI said that Luis, as president of a health care provider, paid kickbacks and bribes to Medicare patient recruiters and submitted false claims for work done on behalf of the beneficiaries.

When federal prosecutors froze her assets, Luis sued, arguing that not all her assets were connected to the charges and that she needed money to hire an attorney. Both a federal district judge and federal appeals court ruled in the government's favor, saying Luis did not have a constitutional right to the funds.

The Justice Department has argued that the government could freeze the funds. In its case against Luis, the government said it was putting assets on hold that would be forfeited after the defendant was convicted, because she had already spent the tainted money on travel and luxury goods. The government has argued it was making a forfeitable versus nonforfeitable calculation, rather than a tainted versus untainted one.

In petitions urging the Supreme Court to take up the case, legal experts argued that the justices should consider whether Luis' Sixth Amendment right to hire counsel of her choice should outweigh prosecutorial efforts to recover the full value of the alleged fraud.

Last year, the court's justices ruled that indicted defendants do not have a right to challenge the forfeiture of their assets at a hearing in order to hire attorneys to defend them.

In a dissenting opinion to that decision, Chief Justice John Roberts appeared to foreshadow Luis' argument.

“Few things could do more to undermine the criminal justice system’s integrity than to allow the government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice,” Roberts wrote. Such a move, he explained, would be “fundamentally at odds with our constitutional tradition and basic notions of fair play.”

Asset forfeiture is increasingly becoming a bipartisan cause of concern in Congress, though the focus has been more on civil forfeiture practices in states and local communities.

"High Court to Eye 'Untainted' Asset Freezes in Criminal Suits"

Law360
Jessica Corso
June 8, 2015

The U.S. Supreme Court will decide whether the government can prevent criminal defendants from using funds earned outside the scope of an alleged crime to hire private defense counsel, agreeing Monday to hear a dispute over a Florida woman's alleged $45 million Medicare fraud scheme.

The nation's highest court took up an appeal of an Eleventh Circuit decision that Sila Luis could not free up funds frozen by the government that she says she earned fair and square, to hire private attorneys for her criminal suit.

Luis has been accused of committing Medicare fraud and violating the Anti-Kickback Statute by paying patients who used her two at-home health companies so that she could bill the government for unnecessary or unprovided for services.

The criminal case has been put on hold, however, while the government wrangles with Luis' attorneys over just how much money they can prevent Luis from accessing. The government has frozen Luis' assets to the tune of $45 million — the amount they claim her companies earned in the scheme — so that they can recoup the full amount should she be found guilty.

Luis' attorneys say that she does not have access to that amount of money and that to make up for it, the government is digging into millions of dollars she earned from private insurers. The restraining order thus violates the Fifth and Sixth amendments by allowing the government to restrain an individual's ability to pay for the best defense possible in a criminal trial, her Supreme Court petition said.

"The government has no limit on how much money it can spend to prosecute someone," Luis' attorney Howard Srebnick of Black Srebnick Kornspan & Stumpf PA told Law360 on Monday. He noted that the case outcome will impact not only his client but the entire criminal defense bar, which might have difficulty finding paying clients should the Supreme Court uphold earlier rulings by the Eleventh Circuit and the Florida district court.

When U.S. District Court Judge Paul C. Huck ruled in June 2013 that the government could freeze so-called untainted assets in case it wins restitution, he used the example of a bank robber who already spent the $100,000 he stole from the bank.

Say the bank robber has access to another $100,000 he earned independently from the robbery, Judge Huck posited.

"Should his decision to spend the $100,000 he stole mean that he is free to hire counsel with the other $100,000 when Congress has authorized restraint of those substitute

assets?" he asked. "The reasonable answer is no."

Monday's decision to consider that same question comes a year after the Supreme Court ruled that **the government could prevent defendants from accessing funds** that allegedly were obtained in the process of a crime while their criminal suits are ongoing.

"If a Defendant Must Forfeit All Assets, Is Her Right To Counsel Violated?"

The Christian Science Monitor
Warren Richey
May 14, 2015

The US Supreme Court is being asked to take up a case testing whether federal prosecutors are entitled to freeze all the assets of a criminal defendant – even when some of those assets are not tainted by any crime and the funds are needed to pay for a defense lawyer.

The question is whether the defendant's Sixth Amendment right to hire counsel of choice should outweigh efforts by prosecutors to recover the full value of an alleged fraud on the government.

A petition urging the high court to examine the issue is expected to be considered at the justices' private conference on Thursday. An announcement of whether they will hear the case could come as early as Monday.

The issue is significant because the government is increasingly using forfeiture as a potent weapon to ensure – literally – that crime doesn't pay. For example, in a 15-month period in 2012 and 2013, the Justice Department seized $1.5 billion and returned those assets to 400,000 crime victims, including to the US Treasury.

Most forfeitures involve government claims on stolen property or proceeds directly traceable to criminal activity. But a growing segment of seizures involves using civil statutes to freeze financial and other assets that are not proceeds of criminal activity or otherwise tainted by crime.

In such cases, prosecutors are seeking to freeze – and thus, preserve – untainted, substitute assets that the government will be able to claim at a later time in the event of a conviction.

Here's the problem: If that freeze occurs before a criminal trial, the defendant may be rendered broke and unable to hire a lawyer.

Critics say such heavy-handed tactics raise fundamental questions about fairness, property rights, and the right to use one's own money to hire an effective defense lawyer.

Chief Justice John Roberts touched on this issue in a dissenting opinion last year.

"Few things could do more to undermine the criminal justice system's integrity than to allow the government to initiate a prosecution and then, at its option, disarm its presumptively innocent opponent by depriving him of his counsel of choice," Chief Justice Roberts wrote.

Such a move, he added, would be "fundamentally at odds with our constitutional tradition and basic notions of fair play."

The issue arises in a Miami Medicare fraud case.

In October 2012, Sila Luis, president of two heath-care companies, was indicted on charges that she and others defrauded the Medicare program of $45 million during a six-year period.

Investigators said bribes and kickbacks were paid to prospective patients who agreed to sign up for home health care they did not need or never received.

On the same day as the indictment, prosecutors filed a civil action against Ms. Luis asking a federal judge to immediately freeze all her assets up to $45 million.

Luis's net worth was far less than $45 million, so the asset freeze effectively rendered her broke.

In the space of a few hours, the federal government had accused Luis of a major crime and then ensured that she would be unable to use her own money to pay lawyers to defend her.

Luis's lawyers argued that of the $45 million in Medicare payments her companies had received, she'd retained $4.5 million after paying operating costs and other expenses. They added that her companies had also generated more than $15 million in revenues unrelated to any Medicare payments.

Nonetheless, the judge determined that under the civil forfeiture statute, prosecutors were entitled to freeze not only tainted assets linked directly to the alleged Medicare fraud, but also untainted assets that could later be substituted in any future forfeiture order if Luis was convicted of the Medicare fraud.

"By freezing even a defendant's untainted assets before trial, the government not only cripples a defendant's ability to retain private counsel, but also takes from her the funds she would otherwise invest in her defense for the best and most industrious investigators, experts, paralegals, and law clerks, to at least attempt to match the litigation support available to the United States Attorney's Office," her lawyer argued, urging the federal judge to reject the government's freeze request.

The judge disagreed. He issued a restraining order, effectively freezing all of Luis's assets.

Luis appealed the ruling. A panel of the Atlanta-based Eleventh Circuit Court of Appeals upheld the judge's decision.

In taking their case to the US Supreme Court, lawyers for Luis argue that the lower court decisions raise significant constitutional issues about the right to obtain counsel in the face of aggressive government forfeiture tactics.

"The restraint of untainted assets needed to retain counsel poses a serious threat to the constitutional right to counsel of choice and the balance of forces in a criminal case," Miami lawyer Howard Srebnick writes in his petition urging the high court to take up the case.

"A statute that dispossesses a presumptively innocent defendant of her untainted assets before trial – denying her the financial ability to retain counsel – should be of great concern to this court," he said.

In response to the petition, US Solicitor General Donald Verrilli said the high court's review of the Luis case was unwarranted.

"A statutorily authorized restraint on a defendant's assets does not violate the Constitution if the government has shown probable cause to believe that those assets are forfeitable," Mr. Verrilli said.

The solicitor general said that the high court had established in prior cases that there is a strong governmental interest in obtaining full recovery of federal funds obtained through fraud. He said that strong interest "trumps any Sixth Amendment interest in permitting criminals to use assets adjudged forfeitable to pay for their defense."

Verrilli said the key distinction is not whether assets are tainted or not tainted. The key distinction is whether they are forfeitable or nonforfeitable, he said.

He said Luis's untainted assets could be frozen because the judge in the case had found probable cause to believe that she had spent some of the proceeds of the alleged Medicare fraud on luxury items and travel.

"Petitioner's desire to spend the substitute assets to hire counsel does not trump the strong governmental interest in obtaining full recovery of all forfeitable assets," Verrilli said.

"If petitioner's position were adopted, then a defendant could effectively deprive her victim of any opportunity for compensation simply by dissipating her ill-gotten gains," he said.

In response, Mr. Srebnick says the government has it backward: The Sixth Amendment protects the right of a defendant to use her untainted assets to hire a lawyer without interference from prosecutors seeking to render her broke and resourceless on the eve of a criminal trial.

In a friend-of-the-court brief urging the justices to take up the case, appellate lawyer William Olson said asset forfeiture is growing exponentially as an abusive crime-fighting tool.

"Asset forfeiture has become the tip of the spear wielded by prosecutors against Americans in a federal criminal justice system designed to extract guilty pleas and collect financial awards," he wrote.

"Giving the federal government the power to seize tainted assets of a defendant ... is a fearsome power, but can be understood if the assets seized are the fruits of the crime," he said.

"It is quite another to grant the government the power to seize the assets of a defendant which are unrelated to the crime," Mr. Olson wrote.

He said it is unseemly and unjust for the government to impoverish those it prosecutes in order to disable their defense at trial.