No. 14-449 and 14-450

In The
Supreme Court of the United States

State of Kansas,
Petitioner,
v.
Jonathan D. Carr,
Respondent.

State of Kansas,
Petitioner,
v.
Reginald Dexter Carr, Jr.,
Respondent.

On Writs Of Certiorari
To The Supreme Court of Kansas

Amicus Brief Of The Promise of Justice Initiative In Support of Respondents

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The Promise of Justice Initiative (PJI) is a non-profit law office dedicated to upholding constitutional integrity. PJI addresses issues concerning, among others, the fairness of the administration of capital punishment.

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[1] Pursuant to this Court's Rule 37, *Amicus* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties gave universal consent to the filing of amicus briefs.

INTRODUCTION

The Kansas Supreme Court held that respondents' death sentences violated the Eighth Amendment because the trial court failed to sever the penalty phase of the underlying capital trial. The state Supreme Court expressed concern that the denial of severance, under the circumstances of that particular case, created an unnecessary risk that the penalty phase determination would be unreliable. The most unusual aspect of the proceedings may have been that the trial court had not made the same determination. This *Amicus Brief* notes the broad and consistent trajectory away from joined capital proceedings as a component of the evolving standards of decency.

SUMMARY OF ARGUMENT

In the majority of states, no death sentence has been imposed as a result of a joint trial since before *Furman*.[2] *See* Appendix I. Though this national trend towards individualized sentencing dates back over a century, it has increased as society (and this Court) has embraced the need for individualized determinations of moral culpability. Even in the federal system, where the majority of joint trials occur, courts have increasingly

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[2] *Furman v. Georgia*, 408 U.S. 238 (1972).

employed separate—or at the least, sequential—capital trials. *See* Appendix II. [3]

Thus, in light of the infrequent resort to this procedural rule, and the concomitant concern regarding the unreliable imposition of the death penalty, this Court's role is to "examine [this] capital sentencing procedure against evolving standards of procedural fairness in a civilized society." *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *see also Hall v. Florida*, 134 S. Ct. 1986, 1990–98 (2014) (invalidating Florida's "rigid rule" for "determining intellectual disability both because, it "creates an unacceptable risk that persons with intellectual disability will be executed" and "strong evidence of consensus" demonstrated that "our society does not regard this strict cutoff as proper or humane"). Ultimately, this case does not require the Court to determine that severance is required in every capital case, but merely whether the Kansas Supreme Court

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[3] The information included in Appendix II is drawn from the data secured from the Federal Death Penalty Project Resource Counsel. The Federal Death Penalty Resource Counsel Project was established in 1992 by the Administrative Office of the United States Courts, Defender Services Division (now the Office of Defender Services). *See* www.capdefnet.org/fdprc/. The Project monitors all federal death penalty cases, maintaining data on every potentially capital federal prosecution. Project statistics, including information on all federal capital cases tried jointly or severed is available at https://capdefnet.org/FDPRC/pubmenu.aspx?menu_id=98&folder_id=2494.

properly exercised restraint in deciding that the need for a reliable determination of death, based upon an individualized determinations of moral culpability, warranted severance of the penalty phases in this case.

ARGUMENT

I. The Decades-Long Progression Towards Reliable And Meaningfully Individualized Determinations of Moral Culpability Supports The Kansas Supreme Court's Decision to Order Severance in This Capital Case

A joint penalty phase proceeding in a capital trial creates a risk of wrongful execution by undermining the process for obtaining reliable, individualized determinations of moral culpability. Presumably for these reasons, despite whatever efficiency may be secured in joint proceedings, contemporary norms disfavor the practice.

A. The Evolving Standards of Decency Support the Decision to Require Individualized Determinations of Moral Culpability in this Case

The United States asserts "joint trials have been recognized as a fair means of adjudicating criminal cases, including capital cases, since the Founding Era." Br. of The United States 14; *id*. at 17 (noting that the Court has affirmed joint trials in an "unbroken line of cases dating back to the Founding Era"). Though historically accurate, the

argument overlooks the Eighth Amendment's commitment to the evolving standards of decency.

In the Founding Era, capital and non-capital trials were functionally indistinguishable. For a broad range of offenses, a guilty verdict carried an automatic death sentence. Thus, at the Founding, and for decades thereafter, a finding that a defendant committed the crime sufficed to reflect sufficient culpability to warrant a death sentence.

Certainly by 1932, courts had recognized the benefits of separate trials in capital cases. Dissenting from the decision in *Powell v. Alabama*, Justice Butler provided the parsimonious observation that it was sufficient that the nine defendants had been tried in four separate trials. 287 U.S. 45, 74 (1932) ("Nine defendants including Patterson were accused in one indictment, and he was also separately indicted. Instead of trying them *en masse*, the State gave four trials and so lessened the danger of mistake and injustice that inevitably attends an attempt in a single trial to ascertain the guilt or innocence of many accused."). But this accolade for four joint trials in the *Powell v. Alabama* dissent essentially establishes the point: the evolving standards of decency would no longer tolerate the process given the *Scottsboro Boys*.[4]

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[4] See Dan T. Carter, *Scottsboro: A Tragedy of the American South* 22 (Rev. Ed. 2007) ("Circuit Solicitor Bailey had expected the defense lawyers to request a severance for all nine of the defendants but Roddy told the court he was willing

By the mid-1900s, mandatory death sentences had gone out of fashion. *See Williams v. New York*, 337 U.S. 241, 247 (1949) ("This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions."); *id.* ("The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."). Indeed, when a handful of states reenacted mandatory death sentencing schemes in the wake of *Furman v. Georgia*, the Court invalidated those statutes as "unduly harsh," "unworkably rigid," and contrary to societal standards of decency. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

"The fundamental respect for humanity underlying the Eighth Amendment," *Woodson* found, "requires consideration of the character and record of the individual offender." *Id.* at 304. Such consideration is necessary "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

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to have all nine tried at the same time. Bailey, however, for reasons which later became clear, moved to try Clarence Norris, Charley Weems, and Roy Wright.").

Thus, over time, evolving standards of decency required the death penalty "be limited to those offenders who commit a narrow category of the most serious crimes *and* whose extreme culpability makes them the most deserving of execution." *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (emphasis supplied). Today, in every jurisdiction that retains the death penalty, capital trials have two discrete phases. The first phase, where guilt or innocence is decided, reflects many of the same interests as non-capital trials do (and that capital trials did in the Founding Era). The second phase, however, is different. The goal in that part of a capital trial is to assign moral, not factual, guilt. *See Brown,* 479 U.S. at 545 (O'Connor, J., concurring) (penalty phase judgment must reflect "a reasoned *moral* response to the defendant's background, character, and crime.") (emphasis in original). Thus, the second phase of the capital trial, the penalty phase, ensures that the jury does not impose a death sentence "in spite of factors which may call for a less severe penalty." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Despite the discrete goals of the two phases of a capital trial, the United States asserts that joint sentencing proceedings promote fairness by facilitating more accurate assessments of relative culpability, minimizing the risk of inconsistent verdicts, and ensuring that capital punishment is not applied in an arbitrary or capricious fashion. Br. of The United States 15. However, the United States' claim that joint trials prevent "arbitrary or capricious" capital sentencing is, at best,

unfounded. *Furman*'s prohibition on arbitrary capital sentencing has never been interpreted to require that co-defendants receive the same sentences. In fact, the opposite is true.[5]

Indeed, courts have made clear that there is no independent interest in "consistency" of sentencing between co-defendants; at the least it is an invalid justification for undermining a defendant's right to an individualized sentencing determination. Complaints concerning disparate sentencing of co-defendants are not only insignificant; many courts have found it irrelevant to a proper sentencing determination.[6] To the

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[5] *See e.g.*, *Getsy v. Mitchell*, 495 F.3d 295, 306 (6th Cir. 2007) (death penalty not unconstitutionally arbitrary or disproportionate because co-defendant received a life sentence); *Beardslee v. Woodford*, 358 F.3d 560, 579–81 (9th Cir. 2004) (rejecting the argument that "different sentences for equally culpable co-defendants violate the prohibition against arbitrary imposition of the death penalty in Furman"); *Bush v. Singletary*, 99 F.3d 373, 375 (11th Cir. 1996) (defendant's death sentence not arbitrary or disproportionate because codefendant's death sentence had been vacated on appeal); *Hatch v. Oklahoma*, 58 F.3d 1447, 1466 (10th Cir. 1995) (rejecting the defendant's claim that the Constitution required "a proportionality review of his sentence relative only to his co-defendant"), overruled in part on other grounds by *Daniels v. United States*, 254 F.3d 1180, 1188 n. 1 (10th Cir. 2001).

[6] *See*, *e.g.*, *Postelle v. State*, 267 P.3d 114, 140–41 (Okla. 2011) (life sentence imposed on co-defendant was not relevant or admissible in penalty phase of capital trial); *People v. Moore*, 253 P.3d 1153, 1181 (Cal. 2011) (evidence concerning co-participants' sentences is properly excluded from penalty

extent a defendant has an interest in presenting evidence that an equally or more culpable co-defendant will not be sentenced to death, that mitigating evidence can be presented at a sequential or severed penalty phase.[7]

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phase of capital trial because such evidence is irrelevant); *Meyer v. Branker*, 506 F.3d 358, 375–76 (4th Cir. 2007) (because a co-perpetrator's sentence is "neither an aspect of the defendant's character or record nor a circumstance of the offense," court may exclude evidence as irrelevant); *Saldano v. State*, 232 S.W.3d 77, 100 (Tex. Crim. App. 2007) (evidence of co-defendant's conviction and punishment is not relevant and admissible because it does not relate to the defendant's own circumstances); *Commonwealth v. Williams*, 896 A.2d 523, 524 (Pa. 2006) (rejecting argument that criminal disposition of defendant's cohorts has any relevance in mitigation to defendant's own punishment); *Beardslee*, 358 F.3d at 579 (co-defendant's sentences were irrelevant to defendant's proper punishment); *State v. Jaynes*, 549 S.E.2d 179 (N.C. 2001) (fact that codefendant was allowed to plead to second degree murder and receive sentence of life in prison was irrelevant in penalty phase of capital trial); *State v. Charping*, 508 S.E.2d 851, 855–56 (S.C. 1998) (co-defendant's sentence is not relevant mitigating evidence and presentation encourages proportionality review by the jury, which is a task reserved for the courts); *Brogdon v. Blackburn*, 790 F.2d 1164, 1169 (5th Cir. 1986) (*Lockett* does not require trial court to allow capital defendant to introduce evidence not relevant to his character, prior record or circumstances of his offense; evidence of co-defendant's life sentence is relevant only to task of comparing proportionality of defendant's sentence to sentences of others similarly situated, a function assigned by statute to Louisiana Supreme Court).

[7] See *United States v. Sablan*, No. 00-CR-00531 (D. Colo. 2006) (penalty phase life verdict for William Sablan issued on

Moreover, because "death is qualitatively different from a sentence of imprisonment, however long, . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson*, 428 U.S. at 305; *Lockett*, 438 U.S. at 604 (finding that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

The goal of consistent verdicts based on the nature of the crime is *at best* of secondary significance to the goal of ensuring that each defendant, regardless of the heinousness of the crime committed, possesses sufficient moral and personal culpability to warrant the death penalty.[8]

April 6, 2007. Penalty phase verdict for Rudy Sablan issued May 23, 2008, in which seven jurors found as a mitigating factor that "William Sablan, equally culpable in the crime, will not be punished to by death.") The penalty phase verdict forms for Rudy and William Sablan are available at the Federal Death Penalty Resource Counsel web page, located at https://www.capdefnet.org/FDPRC/pubmenu.aspx?menu_id=803&folder_id=5633.

[88] Courts have recognized that jury-comparison of the sentences of co-defendants is improper because it shifts the sentencing determination away from the defendant's culpability and character, thereby undermining the requirement of individualized sentencing. *See State v. Gamble*, 63 So. 3d 707, 728 (Ala. Crim. App. 2010) (consideration of co-defendant's sentence violated requirement that individualized sentencing is focused on the defendant); *State v. Schneider*, 736 S.W.2d 392, 397 (Mo. 1987) (consideration of co-defendant's sentence, an "extraneous

Since two people with wildly different abilities "to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses," *Atkins v. Virginia*, 536 U.S. 304, 320 (2002), sometimes work together to commit the same heinous crime, a consistent verdict based on the offense does not translate into a consistent verdict based on the moral culpability of the defendants. In this sense, consistent verdicts based on crime characteristics *increase rather than reduce* the arbitrary and capricious application of the death penalty.

In *Kennedy v. Louisiana*, this Court noted the "32 years articulating limiting factors that channel the jury's discretion to avoid the death penalty's arbitrary imposition." 554 U.S. at 440. Kansas and her *amici* focus on "one approach" that "has been to insist upon general rules that ensure consistency in determining who receives a death sentence." *Id.* at 436. However, in doing so, they ignore the other: that "the Court has insisted, to ensure restraint and moderation in use of capital punishment, on judging the 'character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Id.*

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fact[] unconnected to the individual defendant and his offense would not be consistent with the jury's duty under the Missouri murder statute").

Because the need for consistency does not apply with equal force to the penalty phase of a capital trial, the question becomes one of the degree to which joint penalty phase proceedings risk jeopardizing the ability of "a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006). Unfortunately, as the penalty phase of Jonathan and Reginald Carr's capital trial illustrates, joinder creates an intolerable risk that jurors will be unable to reliably gauge whether a defendant possesses sufficient moral culpability for death to be an appropriate punishment.

The Court has recognized that certain mitigating evidence "can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, 536 U.S. at 321. As the Kansas Supreme Court recognized, the prejudice here is greater still: evidence presented by each brother was aggravating to the other *without* providing any corresponding benefit. The State's purported interest in consistency is insufficient to justify such prejudice. And the Kansas Supreme Court was correct to proceed with caution when facing these risks.

B. The Kansas Supreme Court Decision Directing Severance in This Capital Case is Consistent with Trend Towards Individualized Determinations of Culpability Guaranteed by the Eighth Amendment.

There is a clear trend away from joint trials. Twenty jurisdictions (nineteen states and the District of Columbia) have abolished the death penalty. See Appendix I.[9] In those jurisdictions, neither Jonathan nor Reginald Carr could face a penalty phase trial—joint or otherwise. *See Hall*, 134 S. Ct. at 1997 (counting abolitionist states among those who rejected Florida's strict IQ cutoff because a person in Hall's position could not be executed even without a finding of intellectual disability).

In addition to those twenty jurisdictions, three states provide for severance in capital cases. Mississippi flatly prohibits joint trials in capital cases. *Smith v. State*, 729 So. 2d 1191 (Miss. 1998) ("a defendant in a capital case has an absolute right to a separate trial from that of a co-defendant); Miss. Code Ann. § 99-15-47 ("Any of several persons jointly indicted for a felony may be tried separately on making application therefor, in

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[9] On May 27, 2015, the State of Nebraska abolished the death penalty. Prior to its abolition, Nebraska had countenanced a joint capital proceeding on a single occasion. *State v. Ryan*, 444 N.W.2d 610, 628 (Neb. 1989) ("Defendant was not prejudiced by the joinder of his trial with the trial of Dennis Ryan.").

capital cases."). Ohio employs a strong presumption against joint trials. Ohio Rev. Code Ann. § 2945.20 ("When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately."). Georgia law, adopted after *Furman v. Georgia*, provides "if the state is seeking the death penalty, Code Ann. § 27-2101 gives any defendant so electing the absolute right to be tried separately." *Reaves v. State*, 250 S.E.2d 376, 382 (Ga. 1978); *See* Ga. Code Ann. § 17-8-4 ("When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the state shall waive the death penalty.").

In two other states—New Hampshire and Wyoming—amicus could not find evidence of any joint trial in a capital case in the modern era. *See State v. Best*, 12 P.2d 1110 (Wyo. 1932); *State v. Doolittle*, 58 N.H. 92 (1877). Moreover, as noted in Appendix I (C), a significant number of jurisdictions have long since abandoned joint trials in capital cases. In Louisiana, there is no record of a joint capital trial proceeding to an actual verdict. See *State v. Laymon*, 97-1520 (La. App. 4 Cir 3/15/00); 756 So.2d 1160 (involving the only case identified by amicus in which a severance in a capital case was denied; ending in a mistrial and a retrial on second degree murder). Montana's only joined capital trials occurred prior to this Court's ruling in *Ring v. Arizona*, where the sentencing phase occurred before a judge only. *State v. Gollehon*, 864 P.2d 249 (Mont. 1993); *State v. Turner*, 864 P.2d 235 (Mont. 1993). Virginia has no appellate record

of a joined capital proceeding resulting in a death verdict. Washington and Idaho have not had joined capital proceedings in over thirty years.[10]

Here, amicus does not suggest that this case requires a categorical rule imposing severance in capital cases. However, it is apparent that, in the majority of jurisdictions, individualized determinations of culpability are the norm. The Kansas Supreme Court decision was in step with the judgment of this majority of jurisdictions.

As the United States details in its Brief, the federal death penalty presents something of a counter-point to the national norm disfavoring joint penalty phase trials.[11] Br. of The United States at 20 (identifying "19 capital trials since 2000" with joint penalty phase proceedings and "16 capital trials during that time in which district courts exercised their discretion to grant a severance of capital defendants at either the guilt or penalty phase"). *But see United States v. Ayala Lopez*, 319 F. Supp. 2d 236, 240 (D. P.R. 2004) ("in the majority of federal death penalty cases some type of severance has been granted."). The Brief of the

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[10] *State v. Grisby,* 647 P.2d 6, 15 (Wash. 1982) ("Frazier argues the failure of the trial court to sever the penalty phase of the trial denied his constitutional right to confront his accusers."); *State v. Caudill*, 706 P.2d 456, 462 (Idaho 1985).

[11] The widespread use of joined trials in federal cases arises from the presumption for joint trials in conspiracy cases. *See, e.g.*, *United States v. Reavis*, 48 F.3d 763, 767 (4th Cir. 1995).

United States omits a number of cases involving joined cases as well as those where severance has appeared to be granted. See Appendix II (B) (numbers 17-29); Appendix II (A) (numbers 19-25). Regardless, it is hard to know what to make of those numbers. First, as noted above, the numbers provided by the Government appear to under-represent a number of cases where federal district courts have severed capital proceedings or required sequential penalty phase proceedings to prevent the prejudice associated with joint penalty phase trials. Second, the Government does not note whether the defendants in each of those nineteen (19) (or, as corrected in Appendix II (A), twenty-five (25)) joint trials requested severance. *See, e.g.*, *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002) ("Vialva urges that the trial court should have severed his case from Bernard's at the penalty phase of trial. . . . Vialva concedes that this issue must be reviewed for plain error, since he did not object to Bernard's evidence and failed to renew an unsuccessful pretrial motion for severance."); *id.* ("Vialva, but not Bernard, moved to sever the trials at the outset of the proceedings").[12] Third, the

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[12] Similarly, in *United States v. Coonce*, No. 10-CR-03029 (W.D. Mo. 2014), the district court denied the severance requested by defendant-Coonce because it was objected to by defendant-Hall. Both were sentenced to death. Whatever one infers from this sequence of events, the failure to sever (or hold sequential proceedings, as other federal courts have done, see *United States v. Lewis*, No. 07-CR-00550 (E.D. Pa. 2013) (5/14/2013); *United States v. Aquart*, 2010 U.S. Dist. LEXIS 82877 at *25–26, to ensure that one defendant receives

data provided by the United States is at best misleading. Indeed, in at least one of the nineteen cases that the United States cites as an example of joined capital proceedings – *United States v. Lecco*, No. 05-CR-00107 (S.D. W. Va. 2007) – the matter was ultimately severed after a reversal of both defendants' death sentences. *See United States v. Lecco,* 2009 U.S. Dist. LEXIS 79799 (S.D. W. Va. Sept. 3, 2009). During the subsequent severed re-trial proceedings, one defendant received a life sentence and the other pled to a sentence less than life. This hardly provides support for the principle that joint proceedings are regularly conducted, let alone confidence that the two death sentences initially imposed in the joint proceeding provided a reliable determination of culpability. Regardless, when more than half of the federal capital cases identified are severed or tried sequentially, it provides further support for amicus's contention that the decision of the Kansas Supreme Court comported with the national consensus.

C. Joint Penalty Phase Proceedings Can Create An Unacceptable Risk That A Person Will Be Executed Despite Factors That Warrant Leniency

Joint penalty phase proceedings create an unacceptable risk that defendants – entitled to

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the mitigating evidence in his co-defendant's case but the other defendant is not prejudiced by the comparable evidence) hardly gives confidence in the reliability of the joined process.

individualized determinations of culpability – will be punished in concert. As noted in Appendix II (A), the disquieting reality is that defendants tried together receive the same punishment in the vast majority of the cases (whether death or life imprisonment). *See* Appendix II (A) (noting that every single defendant tried together received the same punishment). The Governmental interest in "consistent penalties" is at its nadir where defendants with widely divergent levels of culpability both receive the same sentence. The assurance of Petitioner and her amicus the United States, that juries are readily able to differentiate the moral culpability of jointly tried defendants is undermined by the apparent circumstance that no joint trial identified in Appendix II (A) resulted in distinct or different punishments. What are the odds, we ask, that every joined penalty phase trial involved defendants of distinctly the same culpability, so much so that jury returned the very same sentence? Or does the circumstance of the same verdicts in these joined penalty phases connote an unnecessary risk that defendants tried together will receive the same sentence despite distinct levels of culpability?

Many federal courts facing the issue have decided, similar to the decision of the Kansas Supreme Court, to avoid the risk of an unreliable death sentence. Recognizing that joinder was generally presumed, the district court in *United States v. Lecco* nevertheless observed:

> [T]he gravity of the sentence sought especially implicates the societal interest in convicting only the guilty. The dual-prosecutor quandary is a particular concern in this regard. In any capital proceeding, an accused convicted of the crimes charged is next faced with offering the best possible case in mitigation so as to avoid the ultimate sanction.
>
> In assuring that only those most deserving of a capital sentence actually receive it, society benefits from allowing a defendant to make the best case in mitigation possible to a fact finder who has under consideration that defendant alone. This one-on-one adversarial approach more faithfully implements the apparent intention of the FDPA, and the jurisprudence of the Supreme Court, that a capital defendant receive from the jury an individualized decision concerning the propriety of the ultimate sanction.

Lecco, 2009 U.S. Dist. LEXIS 79799 at *9–10. Similarly, in *United States v. Johnson, Jones Sr. and Smith*, the district court observed:

> Under the Eighth Amendment, a capital defendant is entitled to an individualized hearing to prevent the

> arbitrary and capricious imposition of the irrevocable punishment of the death. . . . The Court finds that a joint penalty phase in this case would necessarily dilute the focus from one individual in the eyes of the jury and prejudicially blur the two defendants' arguments with respect to mitigation. To the extent that both Defendants argue the same theory of mitigation, the reasonably anticipated effect could be to undermine the integrity of the individualized hearing and be less persuasive by virtue of the repetition.

United States v. Johnson, Jones Sr. and Smith, 04-cr-00017 (Doc. 1630) (E.D. La. 06/23/2005) (citing *United States v. Green*, 324 F. Supp. 2d 311, 326 (D. Mass. 2004) ("virtually every argument for mitigation made by one defendant will be in effect an argument against mitigation as to the other defendant if that defendant cannot claim the same attribute.")). In some instances, federal courts have attempted to reduce the prospect of prejudice to a penalty phase determination by ordering sequential penalty phases. *See United States v. Aquart*, 2010 U.S. Dist. LEXIS 82877 at *25–26 (D. Conn. Aug. 13, 2010) (noting "if a joint penalty trial were held, Azibo could be at risk that the jury's conclusion of Azikiwe's lesser culpability, based on his not being the leader of the Aquart Enterprise, could support a jury's conclusion that Azibo is comparatively more deserving of the death penalty."); *id.* ("risk will be

largely mitigated by holding separate penalty trials, with Azibo's to be held first").

These cases do not stand for the proposition that severance is always required in capital cases; only that—as the Kansas Supreme Court appeared to find—the government's interest in joinder in capital cases must sometimes yield to the Eighth Amendment's requirement of individualized determinations. *See also Williams v. Superior Court*, 683 P.2d 699, 707 (Cal. 1984) ("A final consideration in our analysis is that since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance issue with a higher degree of scrutiny and care than is normally applied in a noncapital case.").

These opinions reflect a consistency with the considered judgment of the Kansas Supreme Court, as well as the insights of social science research.

Social science research suggests that jurors deciding the penalties for jointly tried capital codefendants are (i) less likely to consider individually a capital defendant's mitigating evidence; (ii) more likely to offer identical sentences based on similar reasoning for each codefendant; and (iii) more likely to arrive at a death sentence.

Several studies suggest the existence of an assimilation effect undermining the interest in individualized determinations of culpability. Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce, *Jury*

Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 PSYCH. PUB. POL. AND L. 622, 672 (2001) ("Three studies suggest the existence of an assimilation effect wherein juries perceive less distinction among defendants in joined trials than in separate trials."). *See also* Lois Heaney, *Severance Motions: Successful Application of Social Science Evidence*, 15 CACJ FORUM 20 (1988) (detailing research conducted by the National Jury Project that found related co-defendants tended to be less candid with counsel, and that "family and friends of the defendants agonized that their testimony although favorable as to one defendant would damage the other, if only by faint praise. . . . As a result defendants were often deprived of witnesses essential at either the guilt or penalty phase and the attorneys were left to argue theories of mitigation with little supporting evidence."); Edward Bronson, *Severance of Co-defendants in Capital Cases: Some Empirical Evidence*, 21 CACJ FORUM 52 (1994) (noting that "difficulties arise if the penalty phase mitigation is similar for each defendant; equally intractable problems may arise if defense counsel choose different approaches to the penalty phase," and identifying study that determined that in a joined trial "jurors would have great difficulty considering separately the guilt evidence and each individual defendants mitigating penalty-phase evidence").

CONCLUSION

For the reasons developed herein, *Amicus* respectfully suggest that this Court uphold the decision of the Kansas Supreme Court.

Respectfully submitted,

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APPENDIX I

Appendix I (A) – Jurisdictions that do not impose the death penalty (20)

Alaska
District of Columbia
Connecticut
Hawaii
Illinois
Iowa
Maine
Maryland
Massachusetts
Michigan
Minnesota
Nebraska
New Jersey
New Mexico
New York
North Dakota
Rhode Island
Vermont
West Virginia
Wisconsin

Appendix I (B) – Jurisdictions that prohibit joint capital trials (3)

Georgia: Ga. Code Ann. § 17-8-4(a) (allowing automatic severance upon election by any defendant in a capital trial)

Mississippi: Miss. Code Ann. § 99-15-47 (allowing automatic severance upon application by any defendant for any felony)

Ohio: Ohio Rev. Code Ann. § 2945.20 (allowing automatic severance unless good cause can be shown).[1]

Appendix I (C) – Jurisdictions that have no appellate decision reflecting a joint capital sentencing phase with a jury (12)

Arizona
Colorado
Louisiana
Idaho
Missouri
Montana
New Hampshire
Oregon
South Dakota
Utah
Virginia
Wyoming

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[1] Even with this theoretical allowance of joinder, no joint capital penalty phase has occurred before a jury in Ohio.

Appendix I (D) – Jurisdictions that have had a joint capital sentencing phase with a jury and last reported decision

Alabama[2] – latest reported trial in 1995: *Hardy v. State*, 804 So. 2d 247 (Ala. Crim. App. 1999)

Arkansas – latest reported trial in 1994: *Echols v. State*, 936 S.W.2d 509 (Ark. 1996); *Echols v. State*, 902 S.W.2d 781 (Ark. 1995)

California – latest reported trial in 1996: *People v. Valdez*, 281 P.3d 924 (Cal. 2012)

Delaware – latest reported trial in 1998: *Barrow v. State*, 749 A.2d 1230 (Del. 2000) (no severance requested)

Florida[3] – latest reported trial in 2007: *Jackson v. State*, 25 So. 3d 518 (Fla. 2009)

Indiana – latest reported trial in 1990: *Roche v. State*, 690 N.E.2d 1115 (Ind. 1997); *Roche v. State*, 596 N.E.2d 896 (Ind. 1992).

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[2] Alabama sentencing juries return only advisory verdicts. Judges retain final decision on sentencing. Ala. Code § 13A-5-46; Ala. Code § 13A-5-47 ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.").

[3] Florida sentencing juries return only advisory verdicts. Judges retain final decision on sentencing. Fla. Stat. § 921.141 ("Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death. . . .").

Kentucky – latest reported trial in 2000: *Caudill v. Commonwealth*, 120 S.W.3d 635 (Ky. 2003)

Nevada – latest reported trial in 2006: *Chartier v. State*, 191 P.3d 1182 (Nev. 2008)

North Carolina – latest reported trial in 2001: *State v. Bell*, 603 S.E.2d 93 (N.C. 2004); State v. Sims, 588 S.E.2d 55 (N.C. Ct. App. 2003)

Oklahoma – latest reported trial in 2004: *Lay v. State*, 179 P.3d 615 (Okla. Crim. App. 2008) (no severance requested)

Pennsylvania – latest reported trial in 2010: *Commonwealth v. Floyd*, 2013 Pa. Super. Unpub. LEXIS 2368 (Pa. Super. Ct. 2013); *Commonwealth v. Warner*, 2013 Pa. Super. Unpub. LEXIS 2353 (Pa. Super. Ct. 2013)

South Carolina – latest reported trial in 1986: *State v. Howard*, 369 S.E.2d 132 (S.C. 1988); *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997)

Tennessee – latest reported trial in 1999: *State v. Graham*, 2001 Tenn. Crim. App. LEXIS 241 (Tenn. Crim. App. Mar. 29, 2001)

Texas – latest reported trial in 1985: *Barrientes v. State*, 752 S.W.2d 524 (Tex. Crim. App. 1987); *Barrientes v. Johnson*, 221 F.3d 741 (5th Cir. 2000) (no severance requested)

Washington – latest reported trial in 1978: *State v. Grisby*, 647 P.2d 6 (Wash. 1982); *State v. Grisby*, 2004 Wash. App. LEXIS 1135 (Wash. Ct. App. June 1, 2004)

APPENDIX II

Appendix II (A) – Federal Capital Trials Involving Joint Penalty-Phase Proceeding **(bold = information not provided by the United States of America as Amicus)**

1. *United States v. Coonce*, No. 10-CR-03029 (W.D. Mo. 2014) (Wesley Paul Coonce, Jr. and Charles Michael Hall) **(death, death)**; **(Offered sequential trial; rejected by one defendant);**

2. *United States v. Salad*, No. 11-CR-00034 (E.D. Va. 2012) (Ahmed Muse Salad, Abukar Osman Beyle, and Shani Shiekh Abrar) **(life, life, life)**;

3. *United States v. Snarr*, No. 09-CR-00015 (E.D. Tex. 2009) (Mark Isaac Snarr and Edgar Baltazar Garcia) **(death, death)**;

4. *United States v. Mills*, No. 02-CR-00938 (C.D. Cal. 2007) (Wayne Bridgewater and Henry Michael Houston) **(life, life)**;

5. *United States v. Dinkins*, No. 06-CR-00309 (D. Md. 2009) (James Dinkins and Melvin Gilbert) **(life, life)**;

6. *United States v. Varela*, No. 06-CR-80171 (S.D. Fla. 2009) (Ricardo Sanchez, Jr. and Daniel Troya) **(death, death)**;

7. *United States v. Lecco*, No. 05-CR-00107 (S.D. W. Va. 2007) (George M. Lecco and Valerie Friend) **(death, death)**; **(Severance granted on retrial) (on retrial, life, and less than life);**

8. *United States v. Mikhel*, No. 02-CR-00220 (C.D. Cal. 2007) (Iouri Mikhel and Jurijus Kadamovas) **(death, death)**;

9. *United States v. Mills*, No. 02-CR-00938 (C.D. Cal. 2006) (Barry Byron Mills and T.D. Bingham) **(life, life)**;

10. *United States v. Williams*, No. 01-CR-00512 (E.D. Pa. 2006) (Vincent Williams, Jamain Williams, and Andre Cooper) **(life, life, life)**;

11. *United States v. James*, No. 02-CR-00778 (E.D.N.Y. 2005) (Richard James and Ronald Mallay) **(life, life)**;

12. *United States v. Rivera*, No. 04-CR-00283 (E.D. Va. 2005) (Oscar Antonio Grande and Ismael Juarez Cisneros) **(life, life)**;

13. *United States v. Williams*, No. 00-CR-01008 (S.D.N.Y. 2005) (Elijah Bobby Williams and Reverend Michael Williams) **(life, life)**;

14. *United States v. Quinones*, No. 00-CR-00761 (S.D.N.Y. 2004) (Alan Quinones and Diego B. Rodriguez) **(life, life)**;

15. *United States v. Breeden*, No. 03-CR-00013 (W.D. Va. 2004) (Shawn Arnette Breeden and Michael Anthony Carpenter) **(life, life)**;

16. *United States v. Foster*, No. 02-CR-00410 (D. Md. 2004) (Keon Moses and Michael Lafayette Taylor) **(life, life)**;

17. *United States v. Matthews*, No. 00-CR-00269 (N.D.N.Y. 2003) (Lavin Matthews and Tebiah Shelah Tucker **and Christopher McMillian**)

(life, life, life); **(McMillian excluded from death due to intellectual disability)**

18. *United States v. Gray*, No. 00-CR-00157 (D.D.C. 2003) (Kevin Gray and Rodney Moore) **(life, life)**;

19. *United States v. Vialva*, No. 99-CR-00070 (W.D. Tex. 2000) (Christopher Andre Vialva and Brandon Bernard) **(death, death);**

20. *United States v. Tipton*, No. 3-92-CR-68 (E.D. Va. 1992); aff'd, 90 F.3d 861 (4th Cir. 1996) (Richard Tipton, James Roane, and Corey Johnson) (death, death, death);

21. *United States v. Oscar*, No. 93-CR-131 (E.D. Va. 1993); 67 F.3d 297 (4th Cir. 1995) (Jean Claude Oscar, Frantz Oscar, and Arnold Mark Henry) (life, life, life);

22. *United States v. Walker*, No. 94-CR-328 (N.D.N.Y., 1994) (Tyrone Walker and Walter Diaz) (life, life);

23. *United States v. Moore*, No. CR 94-00194-01-12-CR-W-9 (W.D. Mo. 1994) (Dennis Moore, Sr. and Kevin Wyrick) (life, life); (sequential jury determinations, death withdrawn as to Wyrick after Moore's life sentence);

24. *United States v. Jordan*, No. 04-CR-58-ALL (E.D. Va. 2004) (Peter Jordan and Lorenzo Gordon) (life, life);

25. *United States v. Bodkins*, No. 4:04-CR-70083-JLK-ALL (W.D. Va. 2004) (Lanny Benjamin Bodkins and Antoine Plunkett) (life, life).

Appendix II (B) – Federal Capital Trials Involving Severed Guilt- Or Penalty-Phase Proceedings **(bold = information not provided by the United States of America as Amicus)**

1. *United States v. Lewis*, No. 07-CR-00550 (E.D. Pa. 2013) (Steven Northington and Kaboni Savage) **(life, death) (sequential sentences by same jury, not severed)**;

2. *United States v. Eye*, No. 05-CR-00344 (W.D. Mo. 2008) (Gary Eye and Steven Sandstrom) **(life, life)**;

3. *United States v. Sablan*, No. 00-CR-00531 (D. Colo. 2006) (William Concepcion Sablan and Rudy Cabrera Sablan) **(life, life)**;

4. *United States v. Caraballo*, No. 01-CR-01367 (E.D.N.Y. 2005) (Gilberto Caraballo and Martin Aguilar) **(life, life)**;

5. *United States v. Johnson*, No. 04-CR-00017 (E.D. La. 2005) (John Johnson, Joseph Smith, and Herbert Jones, Jr.); **(death, life, died before trial) (Johnson's death sentence was reversed due to government misconduct and he was ultimately sentenced to life; Smith received exemption from capital punishment due to intellectual disability);**

6. *United States v. Catalan-Roman*, No. 02-CR-00117 (D.P.R. 2005) (Lorenzo Vladimir Catalan-Roman and Hernardo Medina-Villegas) **(life, life)**;

7. *United States v. Payne*, No. 98-CR-00038 (M.D. Tenn. 2004) (Eben Payne, Jamal Shakir, and Donnell Young) **(charges dismissed, life, plea deal)**;

8. *United States v. Fulks*, No. 02-CR-00992 (D.S.C. 2004) (Chadrick E. Fulks and Branden L. Basham) **(death, death)**;

9. *United States v. Perez*, No. 02-CR-00007 (D. Conn. 2004) (Wilfredo Perez and Fausto Gonzalez) **(life, life)**;

10. *United States v. Ostrander*, No. 01-CR-00218 (W.D. Mich. 2003) (Robert Norman Ostrander and Michael Paul Ostrander) **(life, life)**;

11. *United States v. Taylor*, No. 01-cr-00073 (N.D. Ind. 2003) (Styles Taylor and Keon Thomas) **(life, life)**;

12. *United States v. Hyles*, No. 01-CR-00073 (E.D. Mo. 2003) (Tyrese D. Hyles and Amesheo D. Cannon) **(life, life)**;

13. *United States v. Henderson*, No. 00-CR-00260 (N.D. Tex. 2002) (Julius Omar Robinson and L.J. Britt) **(death, life)**;

14. *United States v. Cooper*, No. 01-CR-00008 (S.D. Miss. 2002) (Billy D. Cooper and James Edward Frye) **(life, life)**;

15. *United States v. Hage*, No. 98-CR-01023 (S.D.N.Y. 2001) (Mohamed Rashed Daoud Al-'Owhali and Khalfan Khamis Mohamed) **(life, life)**;

16. *United States v. Church*, No. 00-CR-00104 (W.D. Va. 2001) (Walter Lefight Church and Samuel Stephen Ealy). **(acquittal, life);**

17. *United States v. Mikhel*, No. 02-CR-00220 (C.D. Cal. 2007) (Iouri Mikhel, Jurijus

Kadamovas and Petro Krylov) (death, death, life);

18. *United States v. Cooper*, No. 89-CR-580 (N.D. Ill. 1990) (Alex Cooper and Darnell (Anthony) Davis) (life, life);

19. *United States v. Hutching*, No. 1:92-032-S (E.D. Okl. 1992); (10th Cir. No. 93-7118) (James Norwood Hutching, Ramon Medina Molina, and John Javilo McCullah) (life, life, death);

20. *United States v. Holloway*, No. 4:94-CR-121-Y-1 (N.D. Tex. 1994) (Bruce Webster and Orlando C. Hall) (death, death);

21. *United States v. Nguyen*, 94-10129-01 (D. Kan. 1994) (Phouc H. Nguyen and Bountaem Chanthandara) (life, death); (death sentence vacated on appeal, Chanthandara sentenced to life);

22. *United States v. McVeigh*, No. M-95-98-H (W.D. Okl. 1995) on change of venue to (D. Col. No. 96-CR-68-M) (Timothy James McVeigh and Terry Lynn Nichols) (death, life);

23. *United States v. Johnson*, No. 96 CR 379 (N.D. Ill. 1996) (Darryl Alamont Johnson and Quan Ray) (death, life); (death sentence vacated in 2255, defendant sentenced to life)

24. *United States v. Holder*, No. 4:97-CR-0141 ERW (TCM)) (E.D. Mo. 1997) (Billie Jerome Allen and Norris G. Holder) (death, death);

25. *United States v. Kehoe*, No. LR-CR-97-243 (E.D. Ark. 1997) (Daniel Lee and Chevy Kehoe) (death, life);

26. *United States v. Stewart*, No. 4:99-CR-11- M (W.D. Ky. 1999) (Billy Joe Lyon and Charles Stewart) (life, life (death penalty struck prior to trial for Stewart);

27. *United States v. Cruz*, No. 8:05-CR-00393-DKCALL (D. Md. 2005) (Antonio Argueta and Juan Carlos Moreira) (life, life);

28. *United States v. Aquart*, 3:06-CR-160 (PCD) (D. Ct. 2006) (Azibo Aquart and Azikiwe Aquart) (death, life).