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IN THE SUPREME COURT OF FLORIDA

IN RE: STANDARD CRIMINAL JURY INSTRUCTIONS IN CAPITAL CASES **CASE NO.: SC17-583**

_____/

NOTICE OF SUPPLEMENTAL AUTHORITY

Judge James C. Hankinson, faculty member for the Handling Capital Cases course, submits as supplemental authority the following federal statutes and cases, copies of which are attached to this notice:

Title 18, United States Code, section 3592.
Title 18, United States Code, section 3593.
United States v. Chandler, 996 F. 2d 1073, 1087 (11th Cir. 1993), cert. denied, 512 U.S. 1227 (1994).
United States v. Jackson, 549 F. 3d 963, 982 (5th Circuit 2008), cert. denied 559 U.S. 828 (2009).
United States v. Bernard, 299 F. 3d 467, 485 (5th Circuit 2002), cert. denied 539 U.S. 928 (2003).
United States v. Paul, 217 F. 3d 989, 1000 (8th Circuit 1999); cert. denied 534 U.S. 1156 (2002).

The supplemental authority is pertinent to the issue of jury findings on individual mitigating circumstances.

Respectfully submitted this 1st day of March, 2018.

s/ Judge James C. Hankinson_____
The Honorable James C. Hankinson
Circuit Judge, Second Judicial Circuit
Leon County Courthouse, Room 301F
301 South Monroe Street
Tallahassee, Florida 32301

Florida Bar Number: 274739
HankinsonJ@leoncountyfl.gov

CERTIFICATE OF SERVICE AND FONT

I HEREBY CERTIFY that a copy of this Notice of Supplemental Authority has been typed using Times New Roman 14 and has been sent by email through the portal to Judge Debra Riva at DRiva@jud12.flcourts.org; Rex Dimmig at rdimmig@pd10.org; Peter Mills at pmills@pd10.org; Karen Gottlieb at kgottlie@fiu.edu; Sonya Rudenstine at srudenstine@yahho.com; Luke Newman at luke@lukenewmanlaw.com; William Ponall at bponall@PonallLaw.com; Robert Berry at attyrobertberry@aol.com; Arthur Jacobs at aijacobs@comcast.net; and Penny Brill at pennybrill@miamisao.com; this 1st day of March, 2018.

s/ Judge James C. Hankinson
The Honorable James C. Hankinson
Circuit Judge, Second Judicial Circuit
Leon County Courthouse, Room 301F
301 South Monroe Street
Tallahassee, Florida 32301
Florida Bar Number: 274739
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§ 3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified

(a) Mitigating factors.--In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following:

(1) Impaired capacity.--The defendant's capacity to appreciate the wrongfulness of the defendant's conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a defense to the charge.

(2) Duress.--The defendant was under unusual and substantial duress, regardless of whether the duress was of such a degree as to constitute a defense to the charge.

(3) Minor participation.--The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(4) Equally culpable defendants.--Another defendant or defendants, equally culpable in the crime, will not be punished by death.

(5) No prior criminal record.--The defendant did not have a significant prior history of other criminal conduct.

(6) Disturbance.--The defendant committed the offense under severe mental or emotional disturbance.

(7) Victim's consent.--The victim consented to the criminal conduct that resulted in the victim's death.

(8) Other factors.--Other factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.

(b) Aggravating factors for espionage and treason.--In determining whether a sentence of death is justified for an offense described in section 3591(a)(1), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Prior espionage or treason offense.--The defendant has previously been convicted of another offense involving espionage or treason for which a sentence of either life imprisonment or death was authorized by law.

(2) Grave risk to national security.--In the commission of the offense the defendant knowingly created a grave risk of substantial danger to the national security.

(3) Grave risk of death.--In the commission of the offense the defendant knowingly created a grave risk of death to another person.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(c) Aggravating factors for homicide.--In determining whether a sentence of death is justified for an offense described in section 3591(a)(2), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Death during commission of another crime.--The death, or injury resulting in death, occurred during the commission or attempted commission of, or during the immediate flight from the commission of, an offense under section 32 (destruction of aircraft or aircraft facilities), section 33 (destruction of motor vehicles or motor vehicle facilities), section 37 (violence at international airports), section 351 (violence against Members of Congress, Cabinet officers, or Supreme Court Justices), an offense under section 751 (prisoners in custody of institution or officer), section 794 (gathering or delivering defense information to aid foreign government), section 844(d) (transportation of explosives in interstate commerce for certain purposes), section 844(f) (destruction of Government property by explosives), section 1118 (prisoners serving life term), section 1201 (kidnapping), section 844(i) (destruction of property affecting interstate commerce by explosives), section 1116 (killing or attempted killing of diplomats), section 1203 (hostage taking), section 1992 (wrecking trains), section 2245 (offenses resulting in death), section 2280 (maritime violence), section 2281 (maritime platform violence), section 2332 (terrorist acts abroad against United States nationals), section 2332a (use of weapons of mass destruction), or section 2381 (treason) of this title, or section 46502 of title 49, United States Code (aircraft piracy).

(2) Previous conviction of violent felony involving firearm.--For any offense, other than an offense for which a sentence of death is sought on the basis of section 924(c), the defendant has previously been convicted of a Federal or State offense punishable by a term of imprisonment of more than 1 year, involving the use or attempted or threatened use of a firearm (as defined in section 921) against another person.

(3) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.--The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or a sentence of death was authorized by statute.

(4) Previous conviction of other serious offenses.--The defendant has previously been convicted of 2 or more Federal or State offenses, punishable by a term of imprisonment of

more than 1 year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(5) Grave risk of death to additional persons.--The defendant, in the commission of the offense, or in escaping apprehension for the violation of the offense, knowingly created a grave risk of death to 1 or more persons in addition to the victim of the offense.

(6) Heinous, cruel, or depraved manner of committing offense.--The defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim.

(7) Procurement of offense by payment.--The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

(8) Pecuniary gain.--The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value.

(9) Substantial planning and premeditation.--The defendant committed the offense after substantial planning and premeditation to cause the death of a person or commit an act of terrorism.

(10) Conviction for two felony drug offenses.--The defendant has previously been convicted of 2 or more State or Federal offenses punishable by a term of imprisonment of more than one year, committed on different occasions, involving the distribution of a controlled substance.

(11) Vulnerability of victim.--The victim was particularly vulnerable due to old age, youth, or infirmity.

(12) Conviction for serious Federal drug offenses.--The defendant had previously been convicted of violating title II or III of the Comprehensive Drug Abuse Prevention and Control Act of 1970 for which a sentence of 5 or more years may be imposed or had previously been convicted of engaging in a continuing criminal enterprise.

(13) Continuing criminal enterprise involving drug sales to minors.--The defendant committed the offense in the course of engaging in a continuing criminal enterprise in violation of section 408(c) of the Controlled Substances Act (21 U.S.C. 848(c)), and that violation involved the distribution of drugs to persons under the age of 21 in violation of section 418 of that Act (21 U.S.C. 859).

(14) High public officials.--The defendant committed the offense against--

> **(A)** the President of the United States, the President-elect, the Vice President, the Vice President-elect, the Vice President-designate, or, if there is no Vice President, the officer next in order of succession to the office of the President of the United States, or any person who is acting as President under the Constitution and laws of the United States;

(B) a chief of state, head of government, or the political equivalent, of a foreign nation;

(C) a foreign official listed in section 1116(b)(3)(A), if the official is in the United States on official business; or

(D) a Federal public servant who is a judge, a law enforcement officer, or an employee of a United States penal or correctional institution--

(i) while he or she is engaged in the performance of his or her official duties;

(ii) because of the performance of his or her official duties; or

(iii) because of his or her status as a public servant.

For purposes of this subparagraph, a "law enforcement officer" is a public servant authorized by law or by a Government agency or Congress to conduct or engage in the prevention, investigation, or prosecution or adjudication of an offense, and includes those engaged in corrections, parole, or probation functions.

(15) Prior conviction of sexual assault or child molestation.--In the case of an offense under chapter 109A (sexual abuse) or chapter 110 (sexual abuse of children), the defendant has previously been convicted of a crime of sexual assault or crime of child molestation.

(16) Multiple killings or attempted killings.--The defendant intentionally killed or attempted to kill more than one person in a single criminal episode.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

(d) Aggravating factors for drug offense death penalty.--In determining whether a sentence of death is justified for an offense described in section 3591(b), the jury, or if there is no jury, the court, shall consider each of the following aggravating factors for which notice has been given and determine which, if any, exist:

(1) Previous conviction of offense for which a sentence of death or life imprisonment was authorized.--The defendant has previously been convicted of another Federal or State offense resulting in the death of a person, for which a sentence of life imprisonment or death was authorized by statute.

(2) Previous conviction of other serious offenses.--The defendant has previously been convicted of two or more Federal or State offenses, each punishable by a term of imprisonment of more than one year, committed on different occasions, involving the importation, manufacture, or distribution of a controlled substance (as defined in section 102

of the Controlled Substances Act (21 U.S.C. 802)) or the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

(3) Previous serious drug felony conviction.--The defendant has previously been convicted of another Federal or State offense involving the manufacture, distribution, importation, or possession of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) for which a sentence of five or more years of imprisonment was authorized by statute.

(4) Use of firearm.--In committing the offense, or in furtherance of a continuing criminal enterprise of which the offense was a part, the defendant used a firearm or knowingly directed, advised, authorized, or assisted another to use a firearm to threaten, intimidate, assault, or injure a person.

(5) Distribution to persons under 21.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 418 of the Controlled Substances Act (21 U.S.C. 859) which was committed directly by the defendant.

(6) Distribution near schools.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 419 of the Controlled Substances Act (21 U.S.C. 860) which was committed directly by the defendant.

(7) Using minors in trafficking.--The offense, or a continuing criminal enterprise of which the offense was a part, involved conduct proscribed by section 420 of the Controlled Substances Act (21 U.S.C. 861) which was committed directly by the defendant.

(8) Lethal adulterant.--The offense involved the importation, manufacture, or distribution of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), mixed with a potentially lethal adulterant, and the defendant was aware of the presence of the adulterant.

The jury, or if there is no jury, the court, may consider whether any other aggravating factor for which notice has been given exists.

§ 3593. Special hearing to determine whether a sentence of death is justified

(a) Notice by the government.--If, in a case involving an offense described in section 3591, the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice--

(1) stating that the government believes that the circumstances of the offense are such that, if the defendant is convicted, a sentence of death is justified under this chapter and that the government will seek the sentence of death; and

(2) setting forth the aggravating factor or factors that the government, if the defendant is convicted, proposes to prove as justifying a sentence of death.

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information. The court may permit the attorney for the government to amend the notice upon a showing of good cause.

(b) Hearing before a court or jury.--If the attorney for the government has filed a notice as required under subsection (a) and the defendant is found guilty of or pleads guilty to an offense described in section 3591, the judge who presided at the trial or before whom the guilty plea was entered, or another judge if that judge is unavailable, shall conduct a separate sentencing hearing to determine the punishment to be imposed. The hearing shall be conducted--

(1) before the jury that determined the defendant's guilt;

(2) before a jury impaneled for the purpose of the hearing if--

(A) the defendant was convicted upon a plea of guilty;

(B) the defendant was convicted after a trial before the court sitting without a jury;

(C) the jury that determined the defendant's guilt was discharged for good cause; or

(D) after initial imposition of a sentence under this section, reconsideration of the sentence under this section is necessary; or

(3) before the court alone, upon the motion of the defendant and with the approval of the attorney for the government.

A jury impaneled pursuant to paragraph (2) shall consist of 12 members, unless, at any time before the conclusion of the hearing, the parties stipulate, with the approval of the court, that it shall consist of a lesser number.

(c) Proof of mitigating and aggravating factors.--Notwithstanding rule 32 of the Federal Rules of Criminal Procedure, when a defendant is found guilty or pleads guilty to an offense under section 3591, no presentence report shall be prepared. At the sentencing hearing, information may be presented as to any matter relevant to the sentence, including any mitigating or aggravating factor permitted or required to be considered under section 3592. Information presented may include the trial transcript and exhibits if the hearing is held before a jury or judge not present during the trial, or at the trial judge's discretion. The defendant may present any information relevant to a mitigating factor. The government may present any information relevant to an aggravating factor for which notice has been provided under subsection (a). Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury. For the purposes of the preceding sentence, the fact that a victim, as defined in section 3510, attended or observed the trial shall not be construed to pose a danger of creating unfair prejudice, confusing the issues, or misleading the jury. The government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The government shall open the argument. The defendant shall be permitted to reply. The government shall then be permitted to reply in rebuttal. The burden of establishing the existence of any aggravating factor is on the government, and is not satisfied unless the existence of such a factor is established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless the existence of such a factor is established by a preponderance of the information.

(d) Return of special findings.--The jury, or if there is no jury, the court, shall consider all the information received during the hearing. It shall return special findings identifying any aggravating factor or factors set forth in section 3592 found to exist and any other aggravating factor for which notice has been provided under subsection (a) found to exist. A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established. A finding with

respect to any aggravating factor must be unanimous. If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.

(e) Return of a finding concerning a sentence of death.--If, in the case of--

(1) an offense described in section 3591(a)(1), an aggravating factor required to be considered under section 3592(b) is found to exist;

(2) an offense described in section 3591(a)(2), an aggravating factor required to be considered under section 3592(c) is found to exist; or

(3) an offense described in section 3591(b), an aggravating factor required to be considered under section 3592(d) is found to exist,

the jury, or if there is no jury, the court, shall consider whether all the aggravating factor or factors found to exist sufficiently outweigh all the mitigating factor or factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factor or factors alone are sufficient to justify a sentence of death. Based upon this consideration, the jury by unanimous vote, or if there is no jury, the court, shall recommend whether the defendant should be sentenced to death, to life imprisonment without possibility of release or some other lesser sentence.

(f) Special precaution to ensure against discrimination.--In a hearing held before a jury, the court, prior to the return of a finding under subsection (e), shall instruct the jury that, in considering whether a sentence of death is justified, it shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim and that the jury is not to recommend a sentence of death unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. The jury, upon return of a finding under subsection (e), shall also return to the court a certificate, signed by each juror, that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or any victim was not involved in reaching his or her individual decision and that the individual juror would have made the same recommendation regarding a sentence for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or any victim may be.

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WESTLAW

Part: 1 of 2

Overruling Recognized by U.S. v. Rodriguez, D.N.D., July 29, 2005

U.S. v. Chandler
Original Image of 996 F.2d 1073 (PDF)
United States Court of Appeals, Eleventh Circuit. July 19, 1993 996 F.2d 1073 62 USLW 2083 39 Fed. R. Evid. Serv. 304 (Approx. 53 pages)

996 F.2d 1073
United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
David Ronald CHANDLER, a/k/a Ronnie Chandler, Defendant–Appellant.

Nos. 91–7466, 91–7577.
July 19, 1993.
As Modified Sept. 30, 1993.
Rehearing and Suggestion for Rehearing En Banc Denied Sept. 30, 1993.

Synopsis

Defendant was convicted in the United States District Court for the Northern District of Alabama, No. CR 90–H–266–E, James Hughes Hancock, J., of conspiracy to possess with intent to distribute and distribution of marijuana, engaging in continuing criminal enterprise, murder while engaged in continuing criminal enterprise, aiding and abetting use or carrying of firearm in relation to drug trafficking crime, and money laundering, and defendant was sentenced to death. Defendant appealed. The Court of Appeals, Birch, Circuit Judge, held that: (1) under Anti-Drug Abuse Act, District Court had power to sentence defendant if jury did not recommend death; (2) District Court was not required to inform jury of possible sentences defendant might face if jury did not recommend death; (3) failure to inform jury of its option of returning written findings of mitigating factors in connection with death sentence was harmless error; and (4) District Court was not required to instruct jury on consequences of its ability to reach unanimous verdict.

Vacated in part; affirmed in part.

Edmondson, Circuit Judge, concurred in the result.

West Headnotes (66)

Change View

1 Sentencing and Punishment Manner and effect of weighing or considering factors
Sentencing and Punishment Killing while committing other offense or in course of criminal conduct
For purposes of section of Anti-Drug Abuse Act establishing as capital offense intentional killing of person in connection with commission of continuing criminal enterprise, jury which finds aggravating factors present must weigh those factors against mitigating factors to determine whether to recommend sentence of death rather than life imprisonment without possibility of release or some other lesser sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408 (k), as amended, 21 U.S.C.A. § 848(k); U.S.C.A. Const.Amends. 5, 8.

2 Criminal Law Instructions
Sentencing and Punishment Instructions
Proposed instruction, in connection with sentencing under Anti-Drug Abuse Act, that if jury did not recommend death sentence, responsibility for imposition of

SELECTED TOPICS

Criminal Law
Review
Error Adversely Affected Right of Defendant
Sentencing and Punishment
The Death Penalty
Jury Recommendation of Either Life Imprisonment or Imposition of Death Penalty
Aggravating Circumstance of Death Penalty Statute

Secondary Sources

s D10 Death Penalty

Crim. Offenses and Defenses in Alabama § D10 (3d ed.)

...Code of Ala. 1975, §§ 13A-5-39 through 13A-5-59. In 1980, the United States Supreme Court, in Beck v. Alabama, struck down Alabama's death penalty statute. The current capital punishment act enumerates...

s 856. The Plain Error Rule

3B Fed. Prac. & Proc. Crim. § 856 (4th ed.)

...Rule 52(b) provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. This is a restatement of prior law. Justice St...

s 152. Capital murder

2 Wharton's Criminal Law § 152 (15th ed.)

...In 1972, in Furman v Georgia, the United Stales Supreme Court ruled that "the imposition and carrying out of the death penalty" constitutes "cruel and unusual punishment in violation of the Eighth and ...

See More Secondary Sources

Briefs

RESPONDENT'S CONSOLIDATED BRIEF ON THE MERITS

1994 WL 137067
Tuilaepa (Paul Palalaua) v. State of California; Proctor (William Arnold) v. State of California
Supreme Court of the United States
Feb. 25, 1994

...FN* Counsel of Record for Respondent On the night of April 21, 1982, Petitioner, William Proctor, murdered 55-year-old Bonnie Stendal, a widow who taught first grade at the Burney Elementary School in ...

Brief for Petitioner

2015 WL 3654290
STATE OF KANSAS, Petitioner, v. Jonathan D. CARR and Reginald Dexter CARR, Jr., Respondents.
Supreme Court of the United States
June 08, 2015

...The decisions of the Kansas Supreme Court are reported, State v. R. Carr, 331 P.3d 544 (Kan. 2014), State v. J. Carr, 329 P.3d 1195 (Kan. 2014), and are reproduced as appendices to the respective Petit...

Brief for the United States

2008 WL 5268417

nondeath sentence rested with district court was incorrect statement of law, and, thus, defendant invited district court's error in instructing jury that it should not be concerned with what sentence defendant would receive if jury did not recommend death sentence; jury should have been instructed that it determined whether death sentence should be imposed rather than sentence of life imprisonment without possibility of release or other lesser sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(k), as amended, 21 U.S.C.A. § 848(k); U.S.C.A. Const.Amends. 5, 8.

5 Cases that cite this headnote

3 **Statutes** Purpose and intent; unambiguously expressed intent
If language of statute is clear, that language controls any interpretation of statute absent legislative intent to contrary.

2 Cases that cite this headnote

4 **Statutes** Design, structure, or scheme
Courts look to language and design of statute as whole in interpreting language at issue.

1 Case that cites this headnote

5 **Pardon and Parole** Sentence provisions; judge's recommendations
Sentencing and Punishment Effect of recommendation
Anti-Drug Abuse Act grants district court discretion to sentence defendant to life without parole if death sentence is not recommended; district court has power to sentence defendant where jury does not recommend death. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(k), as amended, 21 U.S.C.A. § 848(k); U.S.C.A. Const.Amends. 5, 8.

4 Cases that cite this headnote

6 **Criminal Law** Extent of punishment
Jury Assessment of punishment
Sentencing and Punishment Proceedings
There is no single correct way to structure death sentencing procedure, and there is no constitutional requirement that jury be allowed to participate in capital sentencing.

7 **Criminal Law** Review De Novo
Jury instructions are reviewed de novo to determine if they misstate law or mislead jury to prejudice of objecting parties when viewed as whole in context of trial record.

17 Cases that cite this headnote

8 **Criminal Law** Duty of judge in general
Error in jury instruction occurs only if there is reasonable likelihood that jury applied instruction in improper manner.

32 Cases that cite this headnote

9 **Sentencing and Punishment** Instructions
Under Anti-Drug Abuse Act, jury did not have to be informed of what sentence defendant might receive if jury did not impose death sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 408, 408(k), as amended, 21 U.S.C.A. §§ 848, 848(k).

1 Case that cites this headnote

10 **Criminal Law** Matters of law in general
In sentencing under Anti-Drug Abuse Act, jury did not have to be informed of possibility that defendant would receive life sentence without parole if jury did not recommend death, as requirement that defendant introduce evidence relating to

Supreme Court of the United States
Dec. 17, 2008
...The opinion of the court of appeals (Pet. App. 1) is reported at 505 F.3d 377. The judgment of the court of appeals was entered on October 23, 2007. A petition for rehearing was denied on December 4, 2...

See More Briefs

Trial Court Documents

State v. Jones

2005 WL 6514621
State of Alabama, Plaintiff, v. Jeremy Bryan JONES, Defendant.
Circuit Court of Alabama.
Dec. 01, 2005
...The Defendant, Jeremy Bran Jones, was indicted by a Mobile County Grand Jury on four counts of capital murder. Count one alleged the intentional murder of Lisa Marie Nichols during the course of first-...

James v. State

2004 WL 5866020
Joe Nathan JAMES, Petitioner, v. State of Alabama, Respondent.
Circuit Court of Alabama.
Oct. 28, 2004
...The Court, having considered the second amended petition for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., filed on behalf of the Petitioner, the State's response, and the evidence and a...

State v. Morris

2008 WL 8086901
State of Alabama, Plaintiff, v. Alfonso MORRIS, Defendant.
Circuit Court of Alabama.
June 20, 2008
...The Defendant in this case, Alfonso Morris, was charged by indictment by the Grand Jury of the Tenth Judicial Circuit of Alabama, in and for Jefferson County, Alabama, with a two-count indictment. Coun...

See More Trial Court Documents

mitigating factors did not include range of possible sentences defendant might receive if death was not recommended. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 408, 408(k), as amended, 21 U.S.C.A. §§ 848, 848 (k).

3 Cases that cite this headnote

11 **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review
Requested instruction that jury be informed that defendant lacked criminal record and that equally culpable defendant would not receive death penalty did not preserve for appeal issue of whether district court should have required jury to return written findings of mitigating factors that it did or did not find to exist before sentencing defendant under Anti-Drug Abuse Act. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.; Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 408, 408(k), as amended, 21 U.S.C.A. §§ 848, 848(k).

3 Cases that cite this headnote

12 **Criminal Law** Necessity of Objections in General
Finding of plain error requires showing that there is error, that error is clear or obvious, and that error affects substantial rights; error affects substantial rights if error affected outcome of proceedings before district court or if it affects basic protection of criminal trial without which trial cannot reliably serve its function. Fed.Rules Cr.Proc.Rule 52(b), 18 U.S.C.A.

3 Cases that cite this headnote

13 **Criminal Law** Necessity of Objections in General
If plain error has occurred, reviewing court has discretionary power to correct error which seriously affects fairness, integrity, or public reputation of judicial proceeding.

1 Case that cites this headnote

14 **Sentencing and Punishment** Findings and Statement of Reasons
Under Anti-Drug Abuse Act, for purposes of determining whether death sentence is appropriate, jury has option of returning written findings of mitigating factors. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 408, 408(k), as amended, 21 U.S.C.A. §§ 848, 848(k).

15 **Sentencing and Punishment** Instructions
Sentencing and Punishment Findings and Statement of Reasons
Because jury has option of returning written findings of mitigating factors in connection with imposing death sentence under Anti-Drug Abuse Act, instruction which precluded returning written findings was error. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 408, 408(k), as amended, 21 U.S.C.A. §§ 848, 848(k).

16 **Criminal Law** Instructions as to punishment
Failure to instruct jury, in connection with consideration of death sentence under Anti-Drug Abuse Act, that jury had option to return written findings of mitigating factors was not plain error, as it did not affect outcome of sentencing hearing where jury had been properly instructed on how to find mitigating factors and role of mitigating factors in decision-making process. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(k, *l*), as amended, 21 U.S.C.A. § 848 (k, *l*).

1 Case that cites this headnote

17 **Criminal Law** Matters of law in general
Under Anti-Drug Abuse Act, for purposes of imposing death sentence, district court was not required to instruct jury on consequences of its inability to reach unanimous verdict; judge did not have to instruct that failure to reach unanimity

would result in defendant receiving nondeath sentence as determined by court. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(*l*), as amended, 21 U.S.C.A. § 848(*l*).

10 Cases that cite this headnote

18 **Sentencing and Punishment** Other offenses, charges, or misconduct
Evidence relating to disappearance of persons allegedly connected with drug trafficking was admissible during sentencing of defendant under Anti-Drug Abuse Act as it related to aggravating factors prosecution had to prove in order to sentence defendant to death, and Anti-Drug Abuse Act allowed presentation of any information relevant to aggravating circumstances as long as probative value was not substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading of jury. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e), (h)(1)(B), (j), as amended, 21 U.S.C.A. § 848(e), (h)(1)(B), (j).

2 Cases that cite this headnote

19 **Sentencing and Punishment** Other offenses, charges, misconduct
Evidence concerning disappearance of persons connected with alleged drug trafficking was admissible in sentencing defendant under Anti-Drug Abuse Act as that evidence had a tendency to prove intent to kill murder victim and to prove defendant's substantial planning of that murder; fact that defendant threatened to eliminate persons he believed were stealing from him tended to prove that he was willing to harm someone who threatened his marijuana enterprise. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e), (h)(1)(B), (j), as amended, 21 U.S.C.A. § 848(e), (h)(1)(B), (j).

1 Case that cites this headnote

20 **Criminal Law** Homicide, mayhem, and assault with intent to kill
Evidence that defendant had made threats against persons who had since disappeared was admissible in connection with defendant's prosecution for murder under Anti-Drug Abuse Act as public statements indicating that one of those persons was dead, and another would be next, revealed defendant's conscious actions to protect his operation. Fed.Rules Evid.Rule 401, 28 U.S.C.A.

21 **Sentencing and Punishment** Instructions
Failure of district court to instruct jury in connection with sentencing under Anti-Drug Abuse Act that it was required to find that aggravating circumstances sufficiently outweighed any mitigating factors either beyond reasonable doubt or by clear and convincing evidence before sentencing defendant to death was not error as there was no language to suggest that the weighing process was governed by a burden of proof; if Congress had intended to govern jury's weighing process with a burden of proof, it could have done so. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j, k), as amended, 21 U.S.C.A. § 848(j, k).

13 Cases that cite this headnote

22 **Sentencing and Punishment** Validity
Sentencing scheme is constitutional even if it does not require that specific burden of proof govern jury's weighing process.

1 Case that cites this headnote

23 **Sentencing and Punishment** Instructions
Instructions in connection with sentencing hearing under death penalty sections of Anti-Drug Abuse Act which indicated to jury that it had to find that aggravating factors, when balanced against mitigating factors, justified death sentence were adequate even though district court omitted word "sufficiently" in connection with showing whether aggravating factors outweighed mitigating factors; jury form that each juror signed stated that aggravating factors "sufficiently" outweighed any

mitigating factor. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(j, k), as amended, 21 U.S.C.A. § 848(j, k).

3 Cases that cite this headnote

24 **Sentencing and Punishment** Narrowing class of eligible offenders
Death penalty statute is constitutional only if statute genuinely narrows class of persons eligible for death penalty and reasonably justifies imposition of more severe sentence on defendant compared to others found guilty of murder.

1 Case that cites this headnote

25 **Sentencing and Punishment** Manner and effect of weighing or considering factors
Sentencing and Punishment Intent of offender
Sentencing and Punishment Unanimity
For purposes of imposing death sentence under Anti-Drug Abuse Act, jury at guilt phase determines whether defendant intentionally killed or commanded or procured intentional killing of individual while engaging or working in furtherance of continuing criminal enterprise and at sentencing must unanimously find that government has proved beyond reasonable doubt existence of required aggravating factors; jury then considers whether aggravating factors sufficiently outweighed mitigating factors, and, if no mitigating factors are found, jury considers whether aggravated factors are sufficient alone to justify death sentence. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 408, 408(e), as amended, 21 U.S.C.A. §§ 848, 848(e).

1 Case that cites this headnote

26 **Sentencing and Punishment** Aggravating or mitigating circumstances
As long as death penalty statute narrows class of persons subject to death penalty at guilt phase of trial, fact that jury may find aggravating factor that duplicates finding made at guilt phase does not render capital statute unconstitutional.

2 Cases that cite this headnote

27 **Sentencing and Punishment** Procedure
Section of Anti-Drug Abuse Act allowing imposition of death penalty applied only to those who committed murder in connection with continuing criminal enterprise and thus statute sufficiently narrowed class of death eligible defendants at guilt phase, required that jury find at least one other aggravating factor before imposing death penalty, and required jury to consider mitigating circumstances. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e), (n)(2–12), as amended, 21 U.S.C.A. § 848(e), (n)(2–12).

4 Cases that cite this headnote

28 **Sentencing and Punishment** Instructions
In connection with imposing death sentence under Anti-Drug Abuse Act, jury was adequately instructed that it should not reach decision based on number of aggravating or mitigating factors. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e), (n)(2–12), as amended, 21 U.S.C.A. § 848(e), (n)(2–12).

29 **Criminal Law** Statements as to Facts and Arguments
For purposes of determining whether prosecutorial misconduct occurred, court considers whether remarks were improper and whether remarks prejudicially affected substantial rights of defendant.

30 **Criminal Law** Matters Not Sustained by Evidence
Criminal Law Credibility and Character of Witnesses; Bolstering
Prosecutor's remarks are improper if they attempt to bolster credibility of witness based on government's reputation or allude to evidence not formally before jury.

2 Cases that cite this headnote

31 **Criminal Law** Comments on Failure of Accused to Testify
Prosecutor's statement improperly comments on defendant's right not to testify if, when taken in context in which statement was made, statement was manifestly intended or was of such a character that jury naturally and necessarily would take it to be comment on failure of defendant to testify.

1 Case that cites this headnote

32 **Criminal Law** In particular prosecutions
Prosecutor's statement in connection with prosecution for murder and sentencing under Anti-Drug Abuse Act that a witness involved in murder, who admitted his wrongdoing, was not as culpable as defendant was not improper comment on defendant's right to refuse to testify; argument was based on facts solicited from accomplice's testimony, and not based on defendant's failure to testify.

2 Cases that cite this headnote

33 **Sentencing and Punishment** Arguments and conduct of counsel
Statement by prosecutor that jury was responsible for evaluating evidence and determining whether defendant's actions in connection with murder merited death sentence under Anti-Drug Abuse Act did not attempt to dilute jury's sense of responsibility; prosecutor stated that recommending death penalty was form of self-defense for society.

2 Cases that cite this headnote

34 **Criminal Law** Comments on character of offense charged
Prosecutor may properly argue that under facts of offense and character and history of particular defendant, jury should not extend mercy to that defendant.

1 Case that cites this headnote

35 **Constitutional Law** Sentencing and Imprisonment
Sentencing and Punishment Validity of particular retroactive applications
Where defendant had been sentenced to death under Anti-Drug Abuse Act but no federal statute prescribed method for carrying out federal death sentences, future congressional legislation specifying method of execution would not violate defendant's rights under ex post facto clause; there was clear notice that one who violated law under which defendant was sentenced might be sentenced to death so that future legislation would not increase punishment but only provide method for carrying out punishment. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401 et seq., 401(a)(1), 406, 408(e), as amended, 21 U.S.C.A. §§ 841 et seq., 841(a)(1), 846, 848(e); U.S.C.A. Const. Art. 1, § 9, cl. 3.

1 Case that cites this headnote

36 **Sentencing and Punishment** Hearing
Sentencing and Punishment Mode of execution
Fact that defendant sentenced to death under Anti-Drug Abuse Act did not know when or how death sentence would be carried out, as no federal statute currently provides method for carrying out death sentence, did not subject defendant to cruel and unusual punishment; majority of convicted murderers in death row do not know when they will be executed. U.S.C.A. Const. Art. 1, § 9, cl. 3.

37 **Indictment and Information** Homicide and felonious assaults
Indictment for murder while engaging and working in furtherance of continuing criminal enterprise was sufficient to support conviction for murder and sentencing to death under Anti-Drug Abuse Act as indictment did require connection between continuing criminal enterprise and murder; indictment tracked language of statute as written by Congress. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e), (e)(1)(A), as amended, 21 U.S.C.A. § 848(e), (e)(1)(A).

2 Cases that cite this headnote

38 **Indictment and Information** Language of Statute
Indictment may track language of statute as long as words in statute of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all elements necessary to constitute offense intended to be punished.

2 Cases that cite this headnote

39 **Sentencing and Punishment** Instructions
Instruction which informed jury that murder charge was "built upon" continuing criminal enterprise charge and that there had to be connection between murder and continuing criminal enterprise clearly conveyed to jury that it had to find connection in order to convict for murder and sentence to death under Anti-Drug Abuse Act. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e)(1), as amended, 21 U.S.C.A. § 848(e)(1).

2 Cases that cite this headnote

40 **Criminal Law** Endorsing or listing witnesses
Failure of prosecution to include witness' name on list furnished defendant at least three days before commencement of trial was harmless error as it did not undermine basic reliability of trial process or affect outcome of case; testimony of police officer to establish chain of custody for introduction of piece of evidence did not affect outcome of case. 18 U.S.C.A. § 3432.

7 Cases that cite this headnote

41 **Criminal Law** Grade or Degree of Offense; Included Offenses
Government may not statutorily preclude defendant from seeking lesser included offense instruction, if evidence could support finding of guilt on lesser offense.

4 Cases that cite this headnote

42 **Criminal Law** Grade or Degree of Offense; Included Offenses
Defendant who faces possibility of death sentence has constitutional right to have lesser included offense instruction read to jury.

5 Cases that cite this headnote

43 **Criminal Law** Grade or degree of offense
Criminal Law Effect of failure to object or except
Where defendant did not request instruction or object to omission of instruction for lesser included offense of murder for hire, in connection with prosecution for murder under Anti-Drug Abuse Act, district court did not err by failing to give lesser included offense instruction sua sponte.

11 Cases that cite this headnote

44 **Controlled Substances** Validity
Section of Anti-Drug Abuse Act setting forth elements of crime, intent, and separate penalty sufficiently defined offense and was valid despite defense argument that section of statute was merely sentencing provision authorizing death penalty; statute referred to "any person engaged in continuing criminal enterprise who procures the intentional killing of an individual," required intent, and provided penalty of 20 years imprisonment to life, or death penalty. 18 U.S.C.A. § 1958; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(e), (e)(1)(B), (g-j, n, p), as amended, 21 U.S.C.A. § 848(e), (e)(1)(B), (g-j, n, p).

3 Cases that cite this headnote

45 **Sentencing and Punishment** Counsel
District court's failure to inform defendant of his right to have second attorney appointed to him on his behalf in prosecution for murder in connection with continuing criminal enterprise did not violate statute allowing defendant to have

second attorney appointed on his behalf where defendant did not request appointment of counsel after superseding indictment was returned. 18 U.S.C.A. § 3005; Comprehensive Drug Abuse Prevention and Control Act of 1970, § 408(q)(4), (q)(4)(A), as amended, 21 U.S.C.A. § 848(q)(4), (q)(4)(A).

3 Cases that cite this headnote

46 **Criminal Law** Homicide, mayhem, and assault with intent to kill
Criminal Law Conspiracy, racketeering, and money laundering
Evidence concerning defendant's threats against persons connected with drug trafficking enterprise, although uncharged conduct, was relevant to charges of murder in connection with continuing criminal enterprise and supervision of continuing criminal enterprise; evidence that defendant had personal stake affected by marijuana thefts of those other parties was not prohibited propensity evidence. Fed.Rules Evid.Rules 401, 404, 28 U.S.C.A.

47 **Criminal Law** Interwoven occurrences in general
Evidence of criminal activity other than charged offense is admissible if uncharged offense arose out of same transaction or series of transactions as charged offense, was inextricably intertwined with evidence regarding charged offense, or was necessary to complete story of crime of trial. Fed.Rules Evid.Rules 401, 404, 28 U.S.C.A.

2 Cases that cite this headnote

48 **Criminal Law** Evidence calculated to create prejudice against or sympathy for accused
Exclusion of evidence which has probative value substantially outweighed by danger of unfair prejudice, confusion of issues, or misleading affect on jury should occur only sparingly as exclusion allows trial court to remove concededly probative material. Fed.Rules Evid.Rule 403, 28 U.S.C.A.

6 Cases that cite this headnote

49 **Criminal Law** Necessity of objections at trial
Raising *Batson* claim in motion for new trial filed one week after trial was untimely and resulted in waiver of claim; defendant did not object to prosecutor's strike on black jurors during voir dire.

3 Cases that cite this headnote

50 **Jury** Bias and Prejudice
Party challenging juror for cause must show that juror in question exhibited actual bias by showing either express admission of bias or facts showing such close connection that present case of bias had to be presumed.

16 Cases that cite this headnote

51 **Jury** Punishment prescribed for offense
Juror who would automatically vote for death penalty in every case must be removed for cause as juror will fail to consider aggravating and mitigating evidence as instructed by court.

52 **Jury** Punishment prescribed for offense
Responses by potential jurors that they were proponents of death penalty did not require their removal from prosecution for capital murder absent showing that vote for death penalty would be automatic.

1 Case that cites this headnote

53 **Jury** Bias and Prejudice
Statement by potential juror in connection with capital murder prosecution to other jurors that "the way to get off this case is to say the defendant looks guilty" did not show bias required to permit challenge for cause; most jurors were aware they could avoid jury duty by claiming lack of impartiality.

2 Cases that cite this headnote

54 Jury Personal relations in general
Testimony by potential juror that his son-in-law was in jail as result of marijuana did not show that potential juror would be biased against defendant prosecuted for marijuana distribution, for purposes of challenge for cause.

55 Jury Punishment prescribed for offense
Potential juror's statement that defendant's age and past criminal history would not affect recommendation for or against death sentence did not require dismissal for cause as jurors were not expected to know law prior to being improperly instructed, particularly where potential jurors stated that she would follow district court's instructions in arriving at her decision.

5 Cases that cite this headnote

56 Criminal Law Preliminary proceedings
District court's denial of motion for recusal is reviewed for abuse of discretion.

57 Judges Determination of objections
Judge should disqualify himself for lack of impartiality if objective, disinterested, lay observer fully informed of facts on which recusal was sought would entertain significant doubt about judge's impartiality, although bias must be personal and extrajudicial and derived from something other than that which judge learned by participating in case. 28 U.S.C.A. § 455(a).

29 Cases that cite this headnote

58 Judges Statements and expressions of opinion by judge
District judge's comment concerning relative culpabilities of defendant and accomplice involved in murder in connection with continuing criminal enterprise did not show bias requiring judge's recusal. 28 U.S.C.A. § 455(a).

4 Cases that cite this headnote

59 Criminal Law Change of venue
Criminal Law Issues related to jury trial
Denial of motion for change of venue and for sequestration of jury is reviewed for abuse of discretion.

60 Criminal Law Particular offenses
Defendant prosecuted for capital murder in connection with continuing criminal enterprise is not entitled to change of venue or sequestration of jury absent showing that publicity surrounding trial was such that jurors were prejudiced.

61 Criminal Law Merger of offenses
Defendant convicted and sentenced for drug trafficking conspiracy and for murder in connection with criminal enterprise under Anti-Drug Abuse Act had two offenses merged and thus conviction and sentence of lesser included drug conspiracy count would be vacated.

1 Case that cites this headnote

62 Weapons Parties to crime; aiding and abetting
Evidence that defendant recruited another to transport marijuana and provided car to recruit for that purpose together with recruit's testimony supported finding that defendant aided and abetted use or carrying of firearm during drug trafficking offense. 18 U.S.C.A. § 924(c); Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401, 403(b), 406, 408(a), as amended, 21 U.S.C.A. §§ 841, 843(b), 846, 848(a).

4 Cases that cite this headnote

63 **Weapons** Parties to crime: aiding and abetting
Evidence that defendant gave accomplice weapon at time accomplice was given marijuana to transport supported finding that firearm was part of drug trafficking as necessary to convict for aiding and abetting in possession of weapon in connection with drug trafficking offense.

1 Case that cites this headnote

64 **Criminal Law** Error in Instructions Cured by Withdrawal or Giving Other Instructions
Incorrect statement by district court during instructions that property involved in alleged money laundering was located in particular county was not reversible error where court corrected itself and indictment which jury had in its possession accurately identified location.

65 **Currency Regulation** Money laundering
Conviction for money laundering was supported by evidence that defendant had stated he purchased property even though defendant's father had paid money to sell or to receive title to land and that defendant exercised control over that property by growing and cultivating marijuana on it and having others guard tracks.

66 **Sentencing and Punishment** Quantity of drugs and drug-related matter
Testimony and notebook seized from coconspirator supported finding that defendant's drug activity in connection with conspiracy and criminal enterprise included more than 3,000 but less than 10,000 marijuana plants.

Attorneys and Law Firms

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Frank W. Donaldson, U.S. Atty., Harwell G. Davis, Asst. U.S. Atty., Birmingham, AL, Robert J. Erickson, Deputy Chief, Appellate Section, Criminal Div., U.S. Dept. of Justice, Washington, DC, for plaintiff-appellee.

Appeals from the United States District Court for the Northern District of Alabama.

Before FAY, EDMONDSON and BIRCH, Circuit Judges.

Opinion

BIRCH, Circuit Judge:

This appeal challenges the first death sentence imposed under the Anti–Drug Abuse Act of 1988, 21 U.S.C. § 848(e) *et seq.* The defendant Ronald David Chandler appeals both his conviction and sentence on the capital charge as well as his convictions and sentences on other related counts. We **VACATE** Chandler's conviction and sentence *1080 for conspiracy. We **AFFIRM** all other convictions and sentences, including Chandler's death sentence.

I. BACKGROUND

On May 8, 1990, Charles Ray Jarrell Sr. and Marlin Shuler drove to Snow's Lake in Piedmont, Alabama. At the lake, Jarrell and Shuler engaged in target practice with two pistols that Jarrell had brought along. Jarrell turned his gun at Shuler and then shot and killed him.

Later that year the State of Alabama indicted Jarrell, Jarrell's son Billy Joe, and Chandler for the murder of Shuler. These indictments were ultimately dismissed, but the state prosecutor handling those charges was appointed Special Assistant United States Attorney and assisted in this prosecution.

The United States issued a superseding indictment on January 9, 1991. Count One of the indictment charged Chandler, Jarrell and 14 other individuals with conspiracy to possess with intent to distribute and with distribution of over 1,000 kilograms of marijuana and 1,000 marijuana plants, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Chandler was also indicted

on eight other counts: Count Two, engaging in a continuing criminal enterprise, in violation of 21 U.S.C. § 848(a); Count Three, murder while engaged in and working in furtherance of a continuing criminal enterprise, in violation of 21 U.S.C. § 848(e); Counts Four and Five, aiding and abetting the use or carrying of a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c); and Counts Six, Seven, Eight, and Nine, money laundering in violation of 18 U.S.C. § 1956.

On January 17, 1991, Jarrell entered into a plea agreement with the government. Jarrell pleaded guilty to the conspiracy charge in Count One of the indictment and agreed to testify on behalf of the government at Chandler's trial. In exchange, Jarrell received immunity from prosecution for Shuler's murder from the State of Alabama and the United States.

On January 30, 1991, the government served notice, pursuant to 21 U.S.C. § 848(h)(1), of its intention to seek the death penalty against Chandler for the murder of Shuler under Count Three. The notice stated that the government would attempt to prove the following aggravating factors as the basis for the death penalty: (1) Chandler did intentionally kill Shuler; (2) Chandler did intentionally engage in conduct intending that Shuler be killed; (3) Chandler procured the murder of Shuler by payment and promise of payment of money; and (4) Chandler committed the murder after substantial planning and premeditation.

Chandler's trial was severed from the other co-conspirators' trials and commenced on March 19, 1991. The government's evidence consisted of over 40 witnesses, including a number of indicted and unindicted co-conspirators. Their testimony described the following events.

During the years of 1988 to 1990, Chandler developed an extensive marijuana growing and distribution operation that was centered in northeast Alabama, but operated in both Alabama and neighboring states. Chandler developed his supply of marijuana through the local farming of thousands of marijuana plants in northeast Alabama and the importation of marijuana from as far away as Texas. Chandler then used an extensive distribution network to generate substantial profits from his illegal activities. The profits were used in part to fund the growth of his operation and in part to purchase land and property.

The size of Chandler's operation was significant. In 1989 and again in 1990, Chandler helped prepare and cultivate over 100 plots of land dedicated solely to marijuana plants. In 1989, Chandler harvested most of the several thousand marijuana plants that were originally planted. In 1990, the harvest was disturbed by government raids that seized over 500 marijuana plants from Chandler's plots. In overseeing this operation, Chandler was not only actively involved in the cultivation of the plants, but he also hired several people to guard the plots during the growing season.

Chandler also arranged for supplies of marijuana from other locations, including a major source in Texas. In a four month ***1081** period in 1990, Chandler engaged Jarrell as a courier to import approximately 245 pounds of marijuana from Texas in four deliveries. A fifth delivery was thwarted when a different courier was arrested with $106,000. Chandler also obtained supplies of marijuana in neighboring states.

Chandler developed a distribution system of couriers and dealers to facilitate his sale of marijuana. On occasion, Chandler gave his couriers firearms to provide protection for his marijuana. It was a perceived threat to this dealer network that caused Chandler to resort to murder.

One of Chandler's dealers was Donna Shuler, the half-sister of both Chandler's wife and Jarrell. On March 2, 1990, state law enforcement officers executed a search warrant on Donna Shuler's home in Piedmont, Alabama, and uncovered several bags of marijuana totaling approximately one kilogram. The search warrant was based upon the affidavit of the local police chief. In the affidavit, the police chief stated that Shuler, the former husband of Donna Shuler, had complained on at least three occasions that Donna Shuler was dealing drugs from her home. Following the search, Donna Shuler was charged with drug trafficking.

Donna Shuler's attorney, Bill Broome, waived the formal preliminary hearing in exchange for the opportunity to look through the local district attorney's file, including the police report. On April 27, 1990, Broome made copies of the search warrant and the police chief's affidavit and supplied copies of them to Donna Shuler. A subsequent search of Chandler's residence on September 21, 1990, found a slip of paper which contained the words "Bill Broome" and "copy of police report."

Following the search of Donna Shuler's apartment, Chandler approached another of his dealers, Raymond Pointer, and asked him if he "was interested in making a little bit bigger

money." RVII–75. Chandler told Pointer that he would pay him $5,000 to kill Shuler because Shuler "had gone and busted somebody in Piedmont." RVII–77. Chandler then opened a briefcase containing packets of hundred dollar bills and a nine millimeter pistol. Chandler also advised Pointer that he would pay him even more money if Pointer would kill the Piedmont Chief of Police. Pointer, however, declined Chandler's offer.

On the morning of May 8, 1990, Chandler arrived at Jarrell's house. Also present at the house was Shuler. Upon seeing Shuler, Chandler warned Jarrell, "He's going to cause me and you a whole lot of trouble," and "You need to go on and take care of him and I still got that $500.00." RVII–10. Jarrell understood Chandler to be referring to a conversation Jarrell had with Chandler in January, 1990. In that conversation, which occurred before the search of Donna Shuler's home, Chandler announced that Jarrell should eliminate Shuler due to all of the problems that Shuler had caused for Jarrell and his family, declaring that he would pay Jarrell $500 if Jarrell accomplished the task. At that time, Jarrell thought that Chandler was joking.

Chandler then left Jarrell's house and Jarrell and Shuler spent the morning drinking heavily. The two then drove to Snow's Lake where they engaged in target practice with two guns Jarrell had brought: a .380 pistol owned by Jarrell and a nine millimeter pistol that Chandler had placed in Jarrell's car the previous evening. Jarrell then turned the nine millimeter pistol on Shuler, shot twice and killed him. Jarrell drove directly to Chandler's home and advised Chandler that he had killed Shuler. Jarrell then returned to Snow's Lake accompanied by Chandler, carried Shuler's body to the other side of the mountain bordering Snow's Lake, and buried the body near an abandoned moonshine still. Jarrell asked for the $500, but Chandler did not pay him.

At approximately the same time that Shuler was murdered, Chandler was also attempting to protect his operation from individuals who were stealing his marijuana crop. Chandler suspected that two individuals, Patrick Burrows and Jeffrey McFry, were stealing his marijuana. Chandler warned several people that he would kill McFry and Burrows if they continued to steal marijuana. Chandler later announced to one of his dealers that Burrows was dead and that McFry ***1082** would be next if McFry did not quit stealing Chandler's marijuana. Neither Burrows nor McFry were seen after September 1990.

The defense argued that while Chandler may have been involved in individual marijuana transactions, he was not involved in a conspiracy with the 16 other individuals as charged in the superseding indictment. Further, under no interpretation of the evidence was Chandler the head of a continuing criminal enterprise.

The defense also introduced evidence that there was a history of animosity between Jarrell and Shuler that gave Jarrell an independent reason to kill Shuler. Donna Shuler, the half-sister of Chandler's wife and Jarrell, was once married to Shuler. The couple lived for a time with Donna's mother. During their marriage Shuler repeatedly abused his wife and his mother-in-law. Jarrell and his sons frequently came to their defense and would argue and fight with Shuler. In 1989, during an argument between Shuler and Jarrell, Jarrell told Shuler that he was going to kill him, pointed a pistol at Shuler's head, and pulled the trigger. Although the gun was loaded, it failed to fire.

Defense counsel also attacked the putative gaps in the government's case. Chandler's counsel emphasized that a number of the government's key witnesses had entered into plea agreements in which testimony was exchanged for a recommendation of a lesser sentence.

On April 2, 1991, the jury found Chandler guilty on all nine counts. As provided under 21 U.S.C. § 848(i)(1)(A), the district court on the next day conducted a death penalty sentencing hearing before the same jury. The government resubmitted all of the evidence used at the guilt phase that was relevant to the death of Shuler or to the presence of aggravating or mitigating factors. The government and Chandler stipulated that Chandler had no prior convictions on any felony or drug charge and that state murder charges against Jarrell and Jarrell's son in connection with the Shuler murder had been dismissed and that neither the United States nor Alabama would prosecute either one for murder. Chandler's mother and wife testified for the defense.

Following detailed instructions from the district court, a unanimous jury found that the government had established two aggravating factors: (1) Chandler intentionally caused the death of Shuler and (2) Chandler procured the murder by promising the payment of money. The jury unanimously recommended that Chandler be sentenced to death. On May 14, 1991, the district court sentenced Chandler to life imprisonment on Counts One and Two,

two consecutive five year sentences on Counts Four and Five, and six years of imprisonment on Counts Six, Seven, Eight and Nine. Based on the jury recommendation, the district court sentenced Chandler to death on Count Three as mandated by 21 U.S.C. § 848(*l*).

Chandler moved for a new trial as to both phases of his trial. These motions assigned numerous errors to both the guilt and sentencing phases of the trial. Some arguments renewed previous attacks and others were made for the first time. The district court denied the motions, but stayed enforcement of the capital sentence pending appeal. Chandler filed two appeals to this court. The first challenged the capital sentence under Count Three. The second contested his conviction on Count Three and his convictions and sentences on the non-capital counts. We consolidated the two appeals under 21 U.S.C. § 848(q)(1).

II. THE STATUTORY SCHEME

A. *Overview Of Section 848*

The Anti–Drug Abuse Act of 1988 establishes as a capital offense the intentional killing of a person in connection with the commission of a continuing criminal enterprise. The Act details procedures to be followed before a defendant may be sentenced to death.

Initially, the government must serve notice "a reasonable time before trial" of its intent to seek the death penalty. 21 U.S.C. § 848(h)(1). If a defendant is found guilty of violating Section 848(e)(1)(A), a separate sentencing hearing must be conducted, generally before the same jury that determined guilt. 21 U.S.C. § 848(i)(1)(A). The purpose of the ***1083** hearing is to permit consideration of any aggravating and mitigating factors relevant to whether the defendant should be sentenced to death. 21 U.S.C. § 848(j). The information presented at sentencing need not conform to the Federal Rules of Evidence, so long as the district court is convinced that its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading to the jury. *Id.*

The process by which a jury is to consider sentencing factors is specific. The government must prove beyond a reasonable doubt and to the unanimous satisfaction of the jury at least two of the aggravating factors expressly set forth in the statute. 21 U.S.C. § 848(j), (k). It must advise the defendant a reasonable time before trial of those aggravating factors it intends to prove. 21 U.S.C. § 848(h)(1). One of these must be from among the four listed in Section 848(n)(1). The other must be from among those listed in Section 848(n)(2)–(12). Absent a finding of these aggravating factors, a jury cannot impose the death penalty. 21 U.S.C. § 848(k).

If a jury makes the required findings of aggravating factors, it then considers any mitigating factors established by the defendant. 21 U.S.C. § 848(k), (m). Mitigating factors need only be established by a preponderance of the evidence, and any juror persuaded of a mitigating factor may consider it in reaching a sentencing decision; unanimity as to what factors are mitigating is not required. 21 U.S.C. § 848(j), (k).

A jury that finds the required aggravating factors must consider whether these factors so outweigh any mitigating factors as to justify a sentence of death. 21 U.S.C. § 848(k). Absent any mitigating factors, a jury must still unanimously find that the aggravating factors are themselves sufficient to justify a sentence of death. *Id.* Invidious factors, such as race or sex, cannot influence a jury's recommendation of the death penalty. Each juror must sign a certificate attesting that neither the defendant's nor the victim's "race, color, religious beliefs, national origin, or sex" played any part in the deliberations. 21 U.S.C. § 848(o)(1).

Although a jury cannot vote for the death penalty absent the required findings just detailed, a jury is never *required* to impose a death sentence even if it finds sufficient grounds to do so under the applicable law. Indeed, a court must specifically so instruct the jury. 21 U.S.C. § 848(k). Although the statute denominates a jury's finding in favor of the death penalty a "recommendation," it is determinative, for upon such a "recommendation" the trial court "shall sentence the defendant to death." 21 U.S.C. § 848(*l*).

Appellate review of a death sentence is expressly provided by the statute. 21 U.S.C. § 848 (q)(1). Such appeal may be consolidated with a challenge to the judgment of conviction, and the case is to be given priority on the appellate docket. *Id.*

B. *Standard Of Review*

Section 848 contains two provisions that address our review of death sentences imposed under Section 848(e). Section 848(q)(2) states:

> On review of the sentence, the court of appeals shall consider the record, the evidence submitted during trial, the information submitted during the sentencing hearing, the procedures employed in the sentencing hearing, and the special findings returned under this section.

Section 848(q)(3) provides:

> The court shall affirm the sentence if it determines that—
>
> (A) the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (B) the information supports the special finding of the existence of every aggravating factor upon which the sentence was based, together with, or the failure to find, any mitigating factors as set forth or allowed in this section.

There is nothing in these sections altering our ordinary standards of review. Instead, these sections serve to emphasize the serious nature of capital cases and the importance of careful review.

*1084 III. DISCUSSION

A. *Challenges To The Death Sentence*

1. Jury power to recommend a sentence other than death

1 Section 848(k) provides that, if the jury finds certain aggravating factors, the jury must then weigh the aggravating factors against any mitigating factors to determine whether to recommend "that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence." At Chandler's sentencing, the district court instructed the jury that, in the event that it did not recommend a sentence of death, it should not be concerned with the question of what sentence he might receive. The district court also stated that the judge alone would decide Chandler's sentence if the jury did not recommend death.

2 Chandler contends that the district court violated Section 848(k) as well as the Fifth and Eighth Amendments by withholding from the jury the authority to impose a sentence other than death. However, at a pre-sentencing hearing, Chandler's counsel asserted that "I don't think they [the jurors] make a recommendation of a sentence if they don't recommend death." XIV–40. The proposed jury instructions submitted by Chandler advised that, if the jury did not recommend a death sentence, the responsibility for imposition of a non-death sentence rested with the district court. Because Chandler both argued for and submitted jury instructions stating that the district court alone was responsible for sentencing Chandler if the jury did not recommend death, Chandler invited the alleged error and cannot now, on appeal, complain that the instruction was erroneous. *Leverett v. Spears*, 877 F.2d 921, 924 (11th Cir.1989).

3 4 Had Chandler not invited the instruction, the district court properly construed Section 848(k). When the language of a statute is clear, the language controls any interpretation of the statute absent a legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981); *Harper v. Better Business Servs., Inc.*, 961 F.2d 1561, 1563 (11th Cir.1992). We must look to the language and design of the statute as a whole in interpreting the language at issue. *McCarthy v. Bronson*, 500 U.S. 136, ——, 111 S.Ct. 1737, 1740, 114 L.Ed.2d 194 (1991).

5 The language of Section 848(k) is not perfectly clear, and the legislative history of the Anti–Drug Abuse Act of 1988 consists of only a few debates on the Senate floor. Nevertheless, Section 848(k) can be confidently interpreted when it is read in the context of the statute as a whole. Several provisions of Section 848 suggest that Chandler's interpretation is flawed. Section 848(*l*) provides:

> Upon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death. Otherwise the court shall impose a sentence, other than death, authorized by law.

The second sentence of this section instructs that the district court determines the sentence if the jury does not recommend death. Similarly, Section 848(p) provides:

> If a person is convicted for an offense under subsection (e) of this section and the court does not impose the penalty of death, the court may impose a sentence of life imprisonment without the possibility of parole.

Thus, the statute grants the district court the discretion to sentence a defendant to life without parole if a death sentence is not recommended. These sections preclude an interpretation of Section 848(k) that gives the jury the authority to impose a non-death sentence. Correspondingly, the responsibility for sentencing has historically resided with the trial court. In the absence of clear language in a statute to lodge the sentencing responsibility with the jury, we are reluctant to interpret the statute in a strained manner to reach that result. Hence, we find that Section 848 grants the district court the power to sentence the defendant where the jury does not recommend death.

Chandler next insists that our interpretation of Section 848(k) violates the Fifth and Eighth Amendments. Chandler relies on *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). In *Beck*, the ***1085** Court held that a jury in a capital case must be permitted to consider a verdict of guilty on a lesser included non-capital offense where the evidence would support such a verdict. The jury will thus not be put in a position of choosing between guilt on a capital offense and acquittal. Chandler argues that the jury at his sentencing was put in a similar position.

However, *Beck* is not directly applicable in capital sentencing hearings. *California v. Ramos*, 463 U.S. 992, 1007–09, 103 S.Ct. 3446, 3457, 77 L.Ed.2d 1171 (1983). In Chandler's case, prior to sentencing the jury found Chandler guilty of murder in connection with a continuing criminal enterprise. Therefore, the jury was not choosing between guilt of a capital crime and acquittal. It was choosing between a penalty of death and some other sentence yet to be determined by the trial judge.

Chandler also invokes *Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). In *Hicks*, the Court held that due process requires that a jury must be informed of all sentences that the statute allows it to impose when exercising sentencing power. *Id.* at 346, 100 S.Ct. at 2229. In *Hicks*, the jury was vested with the power to *determine* the defendant's sentence, capital or otherwise. In this case, *Hicks* provides no guidance. The issue before us is whether Section 848 gives the jury the power to *recommend* a sentence other than death. Unless that question is answered in the affirmative, *Hicks* provides no guidance.

6 The Court has ruled that there is no single correct way to structure a death sentencing procedure. *Morgan v. Illinois*, 504 U.S. 719, ——, 112 S.Ct. 2222, 2228, 119 L.Ed.2d 492 (1992); *Spaziano v. Florida*, 468 U.S. 447, 464, 104 S.Ct. 3154, 3164, 82 L.Ed.2d 340 (1984). Indeed, there is also no constitutional requirement that juries be allowed to participate in capital sentencing. *Id.* at 459, 104 S.Ct. at 3161–62. Accordingly, there is nothing unconstitutional with the procedure Congress established in Section 848. The jury has the sole power to recommend a sentence of death. If the jury does not recommend a death sentence, the trial judge has the responsibility to impose a sentence other than death. *Hicks* is inapplicable to Chandler's case because the jury, in this case, was instructed on the full range of its sentencing power; that is, the power to recommend a death sentence.

2. Jury should have been informed of other sentences

7 8 Chandler contends that even if the jury did not have the power to recommend a sentence other than death, under Section 848(k) and applicable precedent, the jury should have been informed of the possible sentences Chandler would face if the jury did not recommend death. We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party. *United States v. Myers*, 972 F.2d 1566, 1572 (11th Cir.1992), *cert. denied*, 507 U.S. 1017, 113 S.Ct. 1813, 123 L.Ed.2d 445 (1993). The instructions must be viewed as a whole in the context of the trial record. *Cupp v. Naughten*, 414 U.S. 141, 146–47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973); *Peek v. Kemp*, 784 F.2d 1479, 1492 n. 13 (11th Cir.1986), *cert. denied*, 479 U.S. 1047, 107 S.Ct. 912, 93 L.Ed.2d 862 (1987). Further, an error occurs only when there is a reasonable likelihood that the jury applied the instruction in an improper manner. *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *see Estelle v. McGuire*, 502 U.S. 62, ——, 112 S.Ct. 475, 482 n. 4, 116 L.Ed.2d 385 (1991).

9 Initially, Chandler asserts that Section 848(k) requires that the jury be informed that he would face some other sentence, including the possibility of a life sentence without parole, if the jury did not recommend the death penalty. Section 848(k) instructs that after weighing the aggravating and mitigating factors and determining that the aggravating factors sufficiently outweigh the mitigating factors, the jury may then exercise its option to

> recommend that a sentence of death shall be imposed rather than a sentence of life imprisonment without possibility of release or some other lesser sentence.

*1086 At sentencing the district court instructed the jury:

> In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence. That is a matter for me to decide in the event you conclude that a sentence of death should not be recommended.

RXV–85. The district court also instructed:

> If you do not make such a recommendation, the court is required by law to impose a sentence other than death, which sentence is to be determined by the court alone.

RXV–87. Chandler's argument, in effect, is that the district court's instruction was inadequate because it did not inform the jury that the "sentence other than death" included the possibility of life without parole.

We find that the district court's instructions adequately informed the jury under Section 848 (k). The statutory scheme created by Section 848 provides that the jury alone has the power to recommend a sentence of death. If the jury does not make such a recommendation, the district court sentences the defendant. Nothing in Section 848 requires the jury to be informed of what sentence the defendant might receive in the absence of death. The district court's instructions were proper.

10 Chandler also suggests that applicable precedent, mandating that a defendant be allowed to introduce evidence relating to mitigating factors, requires that the jury be informed of the possibility that Chandler would receive a life sentence without parole if death was not recommended. The Supreme Court has defined mitigating factors as "any aspect of a defendant's character or record and any of the circumstances of the offense." *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); *see Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1670–71, 90 L.Ed.2d 1 (1986). The range of possible sentences that Chandler might receive in the event the jury did not recommend death does not fall within this definition. Accordingly, the district court was not required to inform the jury of the possible sentences Chandler might face.

3. Return of mitigating findings

11 Chandler urges us to rule that the district court should have required the jury to return written findings of mitigating factors it did or did not find to exist. At no time, however, did Chandler request that the jury be instructed to return written findings of mitigating factors or object to the lack of such an instruction. Chandler did submit proposed jury charges that instructed the jury that they should find two mitigating factors: (1) that Chandler lacked a criminal record, and (2) that an equally culpable defendant would not receive the death penalty. These requested instructions did not adequately bring to the district court's attention the issue now presented on appeal. Thus, we review for plain error. Fed.R.Crim.P. 52(b).

12 13 The finding of plain error is a three step process: (1) there must be an error, (2) the error must be plain, i.e. clear or obvious, and (3) the error must affect substantial rights. *United States v. Olano,* 507 U.S. 725, ——, 113 S.Ct. 1770, 1777–78, 123 L.Ed.2d 508 (1993). In most cases, the third prong of this test is met only when the defendant demonstrates that the error affected the outcome of the proceedings before the district court. *Id.* at ——, 113 S.Ct. at 1778. If, however, the error affects the basic protections of a criminal trial without which a criminal trial cannot reliably serve its function, an effect on the outcome will be presumed. *Id.; see Arizona v. Fulminante,* 499 U.S. 279, ——, 111 S.Ct. 1246, 1264–65, 113 L.Ed.2d 302 (1991) (distinguishing between trial type errors and errors which undermine the entire trial). If the defendant satisfies all three prongs, then we have the discretionary power to correct an error which seriously affects the fairness, integrity or public reputation of judicial proceedings. *Olano,* 507 U.S. at ——, 113 S.Ct. at 1778–79.

14 15 We first determine whether an error occurred. We disagree with Chandler's interpretation of Section 848 that the jury is required to return written findings of mitigating factors that the jury has either found to exist or found not to exist. Instead *1087 we interpret Section 848 as providing the jury with the *option* of returning written findings of mitigating

factors. Because the district court's instructions and verdict form foreclosed the jury's exercise of this option, the district court committed error.

Section 848(k) is entitled "Return of Findings." It provides that the jury "shall return special findings identifying any aggravating factors set forth in subsection (n) of this section, found to exist." The section also states:

> A finding with respect to a mitigating factor may be made by one or more of the members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such a factor established for purposes of this subsection, regardless of the number of jurors who concur that the factor has been established.

The statute mentions special findings only in relation to aggravating factors. Also, the permissive language concerning the return of written mitigating factors, "may be made," contrasts with the mandatory language concerning the return of written aggravating findings, "shall." The jury is required to return aggravating findings and is permitted to return mitigating findings. Therefore, we find that Section 848 requires that the jury be instructed that it has the option to return written findings of mitigating factors if it so chooses, but that it does not require the return of such findings.

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WESTLAW

Disagreed With by U.S. v. Broussard, 5th Cir.(La.), February 1, 2012

Original Image of 549 F.3d 963 (PDF)

U.S. v. Jackson
United States Court of Appeals, Fifth Circuit. November 17, 2008 549 F.3d 963, 77 Fed. R. Evid. Serv. 1538 (Approx. 29 pages)

549 F.3d 963
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
David Lee JACKSON, Defendant–Appellant.

No. 06–41680.
Nov. 17, 2008.

Synopsis

Background: Defendant, a federal prisoner, was sentenced by the United States District Court for the Eastern District of Texas, Marcia A. Crone, J., to death for murder of fellow inmate. Defendant appealed.

Holdings: The Court of Appeals, Jerry E. Smith, Circuit Judge, held that:
1 district court did not clearly err in ruling that defendant was unable to show that prosecutorial delay prejudiced his defense, and there was no need for evidentiary hearing to determine whether his Fifth Amendment due process or Sixth Amendment speedy trial rights were violated;
2 Federal Death Penalty Act (FDPA) was constitutional;
3 district court properly excluded two venirepersons for cause;
4 district court did not abuse its discretion by allowing special investigator at prison to testify that inmates typically removed their shirt, as victim did, before fistfights but not knife fights;
5 district court properly limited admission of victim's prison disciplinary records;
6 district court did not abuse its discretion or commit constitutional error when it refused, on basis of unfair prejudice, to allow defendant to impeach government witness with evidence of prior conviction for sexual assault;
7 district court correctly allowed government to impeach defense witness with capital murder convictions that were vacated on appeal;
8 jury did not have to be instructed at sentencing that it could consider "residual doubts" about defendant's guilt;
9 special verdict on mitigating factors was consistent with evidence presented at trial; and
10 defendant was not entitled to new trial on basis of jury confusion about possibility of his early release if he were sentenced to life without parole.

Affirmed.

West Headnotes (30)

Change View

1 Criminal Law — Review De Novo
Criminal Law — Questions of Fact and Findings
District court's factual findings are reviewed for clear error, and its legal conclusions *de novo*.

3 Cases that cite this headnote

2 Criminal Law — Selection and impaneling
Criminal Law — Failure to instruct
Criminal Law — Reception and Admissibility of Evidence

SELECTED TOPICS

Criminal Law

Review
Abuse of Discretion Standard for District Court Decision
Admission of Expert Testimony of Forensic Toxicologist
Consideration of Defendant Speedy Trial Claim

Secondary Sources

s 73.1. Commentary-Jury trials

7A Tex. Prac., Criminal Forms and Trial Manual § 73.1 (11th ed.)

...The document citation is not available at this time.

Prejudice Resulting from Unreasonable Delay in Trial

7 Am. Jur. Proof of Facts 2d 477 (Originally published in 1975)

...A person accused of a crime has the right to a speedy trial, which right is guaranteed by various sources and is considered fundamental in nature. This right exists regardless of whether the person is ...

s 960. Admissibility of expert opinion on truthfulness

25 Tex. Jur. 3d Criminal Procedure: Trial § 960

...Expert testimony in a criminal case involving a child victim does not assist the jury, as required for admissibility, if it constitutes a direct opinion on the truthfulness of a child victim's allegati...

See More Secondary Sources

Briefs

Brief of Respondent-Appellee

2006 WL 6225345
Corbie Dale GRIMES, Petitioner-Appellant, v. Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee. United States Court of Appeals, Fifth Circuit 2006

...FNa. Lead Counsel. FN1. "R" refers to the record on appeal followed by the page number. FN2. "RR" refers to the reporter's record in Grimes' state trial court proceedings, preceded by the volume number...

BRIEF FOR THE UNITED STATES

1991 WL 533755
Doggett (Marc Gilbert) v. U.S.
Supreme Court of the United States
May 29, 1991

...The opinion of the court of appeals (Pet. App. 64-105) is reported at 906 F.2d 573. The order of the district court (Pet. App. 62-63) adopting the report and recommendation of the magistrate (Pet. App...

Brief for the United States

2018 WL 365946
Florencio ROSALES-MIRELES, Petitioner, v. UNITED STATES OF AMERICA.
Supreme Court of the United States
Jan. 10, 2018

...The opinion of the court of appeals (J.A. 32-38) is reported at 850 F.3d 246. The

Criminal Law New Trial
Court of Appeals reviews for abuse of discretion district court's decision to exclude jurors, evidentiary decisions, rulings regarding trial orderliness, refusals to give requested jury instructions, and denials of new trials.

3 Criminal Law Prejudice or absence of prejudice
Defendant did not demonstrate that delay in his prosecution prejudiced his defense insofar as potential witness who remained unfound could have impeached government witness, missing video tapes might have exculpatory information, and summit among groups in prison could have produced more witnesses for the defense; those examples of prejudice were nothing more than mere speculation of lost witnesses, faded memories or misplaced documents and did not demonstrate actual loss of evidence that would have aided defense and that could not be obtained from other sources.

6 Cases that cite this headnote

4 Criminal Law Prejudice or absence of prejudice
Defendant who was sentenced to death for murder of fellow inmate failed to demonstrate prejudice from prosecutorial delay insofar as his mother died, thereby depriving him of her testimony at sentencing; while defendant indicated that his mother was "the one witness whose testimony may have caused the jury to spare [his] life," he did not explain what testimony she could have offered.

5 Constitutional Law Neglect or delay
Criminal Law Prejudice or absence of prejudice
District court did not clearly err in ruling that defendant was unable to show that lengthy prosecutorial delay had caused an actual, substantial prejudice to his defense, and there was no need for evidentiary hearing to determine whether his due process rights were violated. U.S.C.A. Const.Amend. 5.

1 Case that cites this headnote

6 Criminal Law Accrual of right to time restraints
Sixth Amendment protection of right of accused to speedy and public trial attaches when defendant has been formally indicted or actually restrained accompanying arrest. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

7 Criminal Law Successive, amended, or reinstated charges; successive trials
Period between withdrawn indictment and reindictment does not count for Sixth Amendment speedy trial purposes; instead, when no indictment is outstanding, only actual restraints imposed by arrest and holding to answer criminal charge engage particular protections of speedy trial provision of Sixth Amendment. U.S.C.A. Const.Amend. 6.

3 Cases that cite this headnote

8 Criminal Law In general; balancing test
Court evaluates speedy trial claims by considering four factors, length of delay, reason for delay, defendant's assertion of right, and prejudice to defendant, in two-step process; at first step, it examines length of delay, and if delay raises presumption of prejudice, it moves to second step, at which length of delay, reason for delay, and defendant's diligence in asserting his or her rights is weighed against prejudice to defendant. U.S.C.A. Const.Amend. 6.

4 Cases that cite this headnote

9 Criminal Law Delay caused by accused
Criminal Law Subsequent to accusation
Criminal Law Presumptions and burden of proof

judgment of the court of appeals was entered on March 6, 2017. The petition for a writ of certiorari was filed on June ...

See More Briefs

Trial Court Documents

The Texas Taxpayer & Student Fairness Coalition v. Williams

2014 WL 4254969
THE TEXAS TAXPAYER & STUDENT FAIRNESS COALITION, et al; Calhoun County ISD, et al; Edgewood ISD, et al; Fort Bend ISD, et al.; Texas Charter School Association, et al., Plaintiffs, Joyce COLEMAN, et al., Intervenors, v. Michael WILLIAMS, Commissioner of Education, in his Official Capacity; Susan Combs, Texas Comptroller of Public Accounts, in her Official Capacity; Texas State Board of Education, Defendants.
District Court of Texas.
Aug. 28, 2014

...Based on the testimonial and documentary evidence in the record, this Court makes the following findings of fact and conclusions of law: This Court held a forty-five day trial between October 22, 2012 ...

State v. Perry

2015 WL 1019398
STATE of Texas, v. James Richard "Rick" PERRY
District Court of Texas.
Feb. 23, 2015

...TO THE HONORABLE JUDGE OF SAID COURT: Comes now, JAMES RICHARD "RICK" PERRY, by and through his counsel of record, and pursuant to the Texas Code of Criminal Procedure, the Constitution of the United S...

Herbert HARRIS, v. J.B. HUNT TRANSPORT, INC., the J.B. Hunt Transport Services Health and Welfare Appeals Committee, Providence Insurance & Administrative Services, the J.B. Hunt Texas Injury Benefit Plan, and Blue Cross / Blue Shield of Texas.

2005 WL 3935573
Herbert HARRIS, v. J.B. HUNT TRANSPORT, INC., the J.B. Hunt Transport Services Health and Welfare Appeals Committee, Providence Insurance & Administrative Services, the J.B. Hunt Texas Injury Benefit Plan, and Blue Cross / Blue Shield of Texas.
District Court of Texas.
Dec. 27, 2005

...Plaintiff asserts a cause of action governed by ERISA. Specifically, plaintiff sues to recover benefits provided by The J.B. Hunt Texas Injury Benefit Plan ("Plan") for on-the-job injuries. Prior to su...

See More Trial Court Documents

Although defendant did not receive trial until nearly three years after his indictment, any delay caused by his own requests for continuances would be discounted for Sixth Amendment speedy trial purposes, and delay of six months was not presumptively prejudicial. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

10 **Criminal Law** Hearing and determination
Because district court did not clearly err when it concluded that defendant suffered no prejudice during entirety of prosecutorial delay it had no obligation to conduct inquiry into factors other than whether delay was presumptively prejudicial, including reason for delay, and it properly rejected defendant's Sixth Amendment speedy trial claim without holding evidentiary hearing. U.S.C.A. Const.Amend. 6.

11 **Sentencing and Punishment** Death penalty as cruel or unusual punishment
Death penalty is not cruel and unusual punishment in violation of Eighth Amendment. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 et seq.

1 Case that cites this headnote

12 **Indictment and Information** Matter of aggravation in general
Sixth Amendment does not require that any nonstatutory aggravating factors used to support death sentence under Federal Death Penalty Act be alleged in indictment. U.S.C.A. Const.Amend. 6; 18 U.S.C.A. § 3591 et seq.

1 Case that cites this headnote

13 **Jury** View of capital punishment
Jury Punishment prescribed for offense
Sentence of death cannot be carried out if jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to death penalty or expressed conscientious or religious scruples against its infliction; nonetheless, potential jurors may be excused where they have indicated either that (1) they would automatically vote against imposition of capital punishment without regard to any evidence that might be developed at trial of case before them or (2) their attitude toward death penalty would prevent them from making impartial decision as to defendant's guilt.

1 Case that cites this headnote

14 **Jury** Punishment prescribed for offense
In capital murder prosecution of federal inmate, district court did not err in excluding for cause two venirepersons based on their objections to death penalty. 18 U.S.C.A. § 3591 et seq.

15 **Criminal Law** Personal identity and characteristics
In death penalty prosecution of federal inmate who fatally stabbed another inmate, purportedly in self-defense, during argument between them, district court did not abuse its discretion when it permitted special investigator at prison to testify that inmates typically removed their shirts, as victim did, before fistfights but not knife fights; testimony was rationally related to what witness observed as prison official and was not mere conjecture regarding what victim was thinking, but rather background information about prison fights that jury could consider or disregard.

2 Cases that cite this headnote

16 **Criminal Law** Evidence as to intent, belief, or feelings of accused or other person
District court may admit testimony about potential homicide victim's state of mind, although in ordinary circumstances court does not permit witnesses to speculate about defendant's state of mind or intent.

1 Case that cites this headnote

17 **Criminal Law** Necessity of Objections in General
To prove" plain error," defendant must show (1) there was error that (2) was plain, (3) affected his substantial rights, and (4) seriously affected fairness, integrity or public reputation of judicial proceedings.

19 Cases that cite this headnote

18 **Criminal Law** Opinion evidence
In death penalty prosecution of federal inmate who fatally stabbed another inmate, purportedly in self-defense, any error from district court's admission of statements of special investigator at prison as lay rather than expert testimony was not plain. Fed.Rules Evid.Rules 701, 702 28 U.S.C.A.

3 Cases that cite this headnote

19 **Homicide** Character and Habits of Victim
In death penalty prosecution of federal inmate who fatally stabbed another inmate, victim's propensity for violence was pertinent trait of character because it supported defendant's argument the victim was the first aggressor and district court thus properly allowed extensive testimony on victim's reputation in the prison community. Fed.Rules Evid.Rules 404(a)(2), 405, 28 U.S.C.A.

1 Case that cites this headnote

20 **Homicide** Previous hostile acts or conduct of victim
In death penalty prosecution of federal inmate who fatally stabbed another inmate in which defendant claimed he acted in self-defense, district court properly refused to admit victim's prison disciplinary records unless defendant could prove he had knowledge of specific acts described by those records. Fed.Rules Evid.Rules 404(a), 405(b), 28 U.S.C.A.

21 **Criminal Law** Witnesses
Any error from district court ruling that allowed only defense lawyer who had conducted direct examination of witness to object during that witness's cross-examination was not plain.

2 Cases that cite this headnote

22 **Witnesses** Conviction, Acquittal, and Pardon
In death penalty prosecution of federal inmate who fatally stabbed another inmate, district court did not abuse its discretion when it refused to allow defendant to impeach government witness with evidence of prior conviction for sexual assault, given potentially severe prejudice that could have resulted from admitting conviction and its mostly cumulative probative value. Fed.Rules Evid.Rules 403, 609(a)(1), 28 U.S.C.A.

1 Case that cites this headnote

23 **Criminal Law** Cross-examination and impeachment
In death penalty prosecution of federal inmate who fatally stabbed another inmate, district court did not violate defendant's Sixth Amendment right to cross-examine when it refused to allow defendant to impeach government witness with evidence of prior conviction for sexual assault, given potentially severe prejudice that could have resulted from admitting conviction and its mostly cumulative probative value. U.S.C.A. Const.Amend. 6; Fed.Rules Evid.Rules 403, 609(a)(1), 28 U.S.C.A.

1 Case that cites this headnote

24 **Witnesses** Pendency or possibility of appeal; posttrial motions
In death penalty prosecution of federal inmate who fatally stabbed another inmate, district court correctly allowed government to impeach one of defendant's witnesses with two convictions for capital murder that were the result of a single

killing; neither stayed mandate of Court of Appeals panel vacating convictions nor pending certiorari petition affected admissibility of witness's convictions. Fed.Rules Evid.Rule 609(e), 28 U.S.C.A.

1 Case that cites this headnote

25 Sentencing and Punishment Actual or potential punishment
Criminal defendant in capital case does not possess constitutional right to make unsworn statement of remorse before jury that is not subject to cross-examination.

5 Cases that cite this headnote

26 Courts Number of judges concurring in opinion, and opinion by divided court
One panel of Court of Appeals may not overrule decision of prior panel.

1 Case that cites this headnote

27 Sentencing and Punishment Instructions
Death penalty defendant's Eighth Amendment rights were not violated by court's failure to instruct jury at sentencing that if it had "residual doubts" about defendant's guilt it should not sentence him to death. U.S.C.A. Const.Amend. 8.

4 Cases that cite this headnote

28 Sentencing and Punishment Special issues
In death penalty prosecution of federal inmate who with the help of another inmate fatally stabbed a third inmate, special verdict unanimously finding only one of 60 possible mitigating factors, 50 of which received zero support, was consistent with evidence presented at trial; jurors appeared to have properly and conscientiously carried out their duties, and their findings were not beyond the bounds of reason or inconsistent with government's stipulations.

29 Criminal Law Statements, Affidavits, and Testimony of Jurors
Juror's affidavit may not be received on matter about which the juror would be precluded from testifying, and juror may testify regarding only three aspects of events surrounding deliberations, (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was mistake in entering verdict onto verdict form. Fed.Rules Evid.Rule 606(b), 28 U.S.C.A.

4 Cases that cite this headnote

30 Criminal Law Misconduct of or Affecting Jurors
Criminal Law Statements, Affidavits, and Testimony of Jurors
Defendant sentenced to death for murder of fellow federal inmate was not entitled to new trial based on jury's erroneous belief, despite district court's explicit instruction to the contrary, that even if defendant were sentenced to life without parole it was still possible he could be released before end of his life; affidavit of investigator who contacted jurors after trial which stated that number of them believed that defendant could be released early was inadmissible, and defendant presented no other evidence of jury confusion.

1 Case that cites this headnote

Attorneys and Law Firms

*967 Traci Lynne Kenner, Asst. U.S. Atty. (argued), Tyler, TX, Joseph R. Batte, Asst. U.S. Atty., Beaumont, TX, for U.S.

*968 Douglas Milton Barlow (argued), Barlow Law Firm, Beaumont, TX, Robert A. Morrow, Spring, TX, for Jackson.

Appeal from the United States District Court for the Eastern District of Texas.

Before SMITH, WIENER, and HAYNES, Circuit Judges.

Opinion

JERRY E. SMITH, Circuit Judge:

David Jackson was sentenced to death for murder. He appeals, arguing that (1) the district court refused to conduct a hearing to determine whether his due process rights were violated by prosecutorial delay; (2) the Federal Death Penalty Act ("FDPA") is unconstitutional; (3) the district court improperly dismissed two jurors during *voir dire*; (4) the court allowed improper testimony; (5) the court incorrectly excluded certain pieces of evidence; (6) the court unconstitutionally restricted counsel's ability to object; (7) the court erred by not allowing Jackson to impeach a government witness with evidence of a prior conviction for sexual assault; (8) the court incorrectly allowed the government to impeach one of Jackson's witnesses with a non-final conviction; (9) Jackson should have been allowed to allocute; (10) the jury should have been instructed at sentencing that it could consider "residual doubts" about Jackson's guilt; (11) the verdict is inconsistent; and (12) the district court incorrectly denied a motion for new trial. Finding no reversible error, we affirm.

I.

Jackson, a federal prisoner, began arguing with another inmate, Daryl Brown, while a third inmate, Arzell Gulley, watched. A fight broke out, the details of which are disputed: Jackson claims that Brown pulled out a shank, [1] but the government contends that Brown was unarmed and only attempted to begin a fistfight. In any case, the confrontation culminated with all three running from the yard where the argument started and through one of the prison units into a cell, where Jackson or Gulley allegedly held Brown as the other attacked him with a shank. After approximately thirty seconds, Jackson and Gulley left the cell walking in opposite directions. Brown, bleeding profusely, collapsed and was soon pronounced dead.

Jackson was apprehended with Brown's blood on his clothes and an injury to his palm consistent with recent use of a shank. While held by security, he tried to flush gambling paraphernalia down the toilet. When guards tried to place another inmate in the special housing unit with him, he allegedly told officials that he would kill the inmate if the inmate were not removed, saying "if you don't believe me, look at the [security] tapes, I'll kill again."

A grand jury indicted Jackson and Gulley for murder and possession of a dangerous weapon in prison. The district court granted a motion to sever their trials, and Jackson was separately reindicted, convicted on both counts, and sentenced to death.

At sentencing, the government presented evidence of Jackson's other convictions, including multiple counts of armed robbery and various firearms charges, and testimony about his poor disciplinary record in prison. An expert witness for the government who had conducted psychiatric evaluations of Jackson testified that there was a high probability that he would commit violent crimes in the future.

Jackson presented evidence of a poor home life growing up, low intelligence, post-traumatic stress disorder, and institutionalization. ***969** He also noted that the government had not sought the death penalty against Gulley, and he submitted an apology he had written for his most recent armed robbery. Jackson also apologized to Brown's family, though he blamed Brown for starting the fight. Jackson explained, "I just wanted to stab [Brown]. I didn't want to kill him."

II.

1 2 The district court's factual findings are reviewed for clear error; its legal conclusions, *de novo*. *United States v. Avants*, 367 F.3d 433, 441 (5th Cir.2004). We review for abuse of discretion the decision to exclude jurors, *United States v. Fields*, 483 F.3d 313, 357 (5th Cir.2007), *cert. denied*, 552 U.S. 1144, 128 S.Ct. 1065, 169 L.Ed.2d 814 (2008); evidentiary decisions, *United States v. Marrero*, 904 F.2d 251, 260 (5th Cir.1990); rulings regarding trial orderliness, *United States v. Redd*, 355 F.3d 866, 876–77 (5th Cir.2003); refusals to give requested jury instructions, *United States v. Arnold*, 416 F.3d 349, 356 (5th Cir.2005); and denials of new trials, *United States v. Rivera*, 295 F.3d 461, 470 (5th Cir.2002).

A.

Jackson raises Fifth and Sixth Amendment challenges to the lengthy delays in his prosecution. The murder occurred in December 1999, but the government did not charge Jackson until November 2003, and then only for possession of a prohibited object, the shank

used to stab Brown. That charge was dismissed without prejudice in February 2004. In April 2005, the government charged Jackson again, this time for capital murder and possession of a dangerous weapon. He finally received a trial in October 2006 and was convicted a month later.

Jackson argues that the delays violated his Fifth Amendment right to due process. In the alternative, he claims that the case should be remanded for a hearing with discovery on the government's motives for the delays.

A panel of this circuit recently addressed both arguments in Gulley's appeal, *United States v. Gulley*, 526 F.3d 809, 819–20 (5th Cir.2008), *cert. denied*, 555 U.S. 867, 129 S.Ct. 159, 172 L.Ed.2d 116 (2008). The *Gulley* panel noted that under Fifth Circuit law, the defendant bears the burden of proving that the pre-indictment delay caused "substantial, actual prejudice" and was "intentionally undertaken by the government for the purpose of gaining some tactical advantage over the accused ...." *Id.* at 820 (quoting *United States v. Crouch*, 84 F.3d 1497, 1514 (5th Cir.1996) (en banc)). To demonstrate prejudice, "the defendant must offer more than mere speculation of lost witnesses, faded memories or misplaced documents; he must show an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources." *Id.* (citation omitted).

The panel noted that district courts should usually "carry a motion to dismiss for pre-indictment delay with the case, and make the determination of whether actual, substantial prejudice resulted from the improper delay in light of what actually transpired at trial." *Id.* (quoting *Crouch*, 84 F.3d at 1516). Because the defendant must prove both bad faith and prejudice, a court need not hold a hearing on the government's motives for the delay where the court has determined that no prejudice resulted from it. *Id.*

The primary question, then, is whether the district court clearly erred in ruling that Jackson "is unable to show that the delay has caused an actual, substantial prejudice to his defense at this point in ***970** time." To demonstrate prejudice, Jackson argues that (1) there is a "potential witness who remains unfound" that could have impeached a government witness; (2) there are missing video tapes that might have exculpatory information; (3) there was a "summit" among groups in prison that could have produced more witnesses for the defense; and (4) his mother died, thereby depriving him of her testimony at sentencing.

3 The first three proffered examples of prejudice are nothing "more than mere speculation of lost witnesses, faded memories or misplaced documents" and do not demonstrate "an actual loss of evidence that would have aided the defense and that cannot be obtained from other sources." *Id.* On appeal, Jackson provides no information about the "potential witness," whom that witness could have impeached, or how.[2] Jackson also has yet to produce evidence that the video tapes ever existed or that the "summit" actually occurred, nor has he adequately explained why these pieces of evidence were important beyond non-specific explanations that they "could easily have yielded more witnesses, more connections, [and] more depth to the understanding of this incident." "[B]ecause actual, substantial prejudice to the defense at trial is required, a showing of mere potential or possible trial prejudice does not suffice." *Crouch*, 84 F.3d at 1523 (emphasis omitted).

4 The final proffered prejudice is more plausible. The fact that Jackson's mother died and thus could not testify is not as speculative as his other examples—we at least know who she is and that she existed. He has not explained, however, what testimony she could have offered. Instead, in the motion to the district court and his brief on appeal, he indicates only that his mother was "the one witness whose testimony may have caused the jury to spare [his] life." He does not give any hint as to what her testimony would have been, let alone demonstrate that other, available witnesses could not have provided the same information.[3]

5 The district court therefore did not clearly err when it concluded that Jackson was not prejudiced by the prosecution's delay. There was no need for an evidentiary hearing.

Jackson also argues that the delays violated his Sixth Amendment right to a speedy trial, because he did not receive a trial until nearly three years after his 2003 indictment. He concedes, however, that any delay caused by his own requests for continuances should be discounted. According to Jackson, then, the relevant delay for Sixth Amendment purposes runs from November 2003, the date of his initial ***971** charge, to July 2005, the date of his first request for a continuance.

6 7 The Sixth Amendment protects the right of "the accused ... to a speedy and public trial." U.S. CONST. amend. VI. This protection attaches when "the defendant has been formally indicted or actually restrained accompanying arrest." *Dickerson v. Guste*, 932

F.2d 1142, 1144 (5th Cir.1991). Additionally, the period between a withdrawn indictment and a reindictment does not count for Sixth Amendment purposes. Instead, "when no indictment is outstanding, only the actual restraints imposed by arrest and holding to answer a criminal charge ... engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States v. Loud Hawk*, 474 U.S. 302, 310–11, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) (citations and internal quotations omitted).

8 We evaluate speedy trial claims by considering four factors—the length of delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to him—in a two-step process. At the first step, we examine the length of the delay, which is "to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker v. Wingo*, 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). "A delay of less than one year will rarely qualify as 'presumptively prejudicial' for purposes of triggering the *Barker* inquiry." *Cowart v. Hargett*, 16 F.3d 642, 646 (5th Cir.1994) (concluding that where prejudice could not be presumed, "we need not even consider the other factors in order to deny [defendant]'s speedy trial claim"). If the delay raises a presumption of prejudice, we move to the second step, at which "the length of the delay, the reason for the delay, and defendant's diligence in asserting his or her rights is weighed against the prejudice to the defendant." *United States v. Bergfeld*, 280 F.3d 486, 488 (5th Cir.2002) (citation omitted).

9 Because Jackson did not suffer a prejudicial delay, his Sixth Amendment claim fails to pass the threshold inquiry. We note that the government vigorously disputes that Jackson's first indictment triggered his speedy trial right. We need not resolve that disagreement, however, because even assuming the first indictment is the correct triggering date, Jackson cannot demonstrate presumptively prejudicial delay.

The first indictment was withdrawn in February 2004, and from then until the second indictment, Jackson was not subject to any "actual restraints imposed by arrest and holding to answer a criminal charge," *Loud Hawk*, 474 U.S. at 310, 106 S.Ct. 648, in connection with Brown's murder.[4] Jackson has therefore suffered, at most, six months of delay: three months from November 2003 through February 2004 and three months from April 2005 through July 2005. A six-month delay is too short to raise a presumption of prejudice.[5]

10 Further, as already discussed, the district court did not clearly err when it concluded that Jackson suffered *no* prejudice during the entirety of the prosecutorial delay. The court therefore had no obligation to conduct an inquiry into other ***972** *Barker* factors—including the reason for the delay—and properly rejected Jackson's Sixth Amendment claim without holding an evidentiary hearing.

B.

11 Jackson makes at least two separate arguments that the FDPA is unconstitutional.[6] First, he submits that the death penalty is cruel and unusual in violation of the Eighth Amendment. Second, he contends that the Fifth and Sixth Amendments require that any non-statutory aggravating factors used to support the death sentence be alleged in the indictment. Neither claim is supported by law.

Jackson concedes that "this Court must reject [the Eighth Amendment] claim based on binding Fifth Circuit precedent ...." He is correct.[7]

12 The claim based on the Fifth and Sixth Amendments is similarly precluded.[8] "[I]t [is] neither constitutional nor statutory error for the non-statutory aggravating factors to be omitted from the indictment." *United States v. Bourgeois*, 423 F.3d 501, 507–08 (5th Cir.2005).

In response, Jackson argues that *Bourgeois* is undermined by *Cunningham v. California*, 549 U.S. 270, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007), which addressed a California sentencing system whereby most criminal offense statutes prescribed three tiers of punishment; the sentencing judge was required to impose the middle term unless he found aggravating or mitigating circumstances by a preponderance of the evidence. The Court invalidated the arrangement because, under the Sixth Amendment, "[f]actfinding to elevate a sentence ... falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." 127 S.Ct. at 870. Jackson claims that "the statutory scheme invalidated in *Cunningham* is indistinguishable from the FDPA fact-finding and weighing procedures" and that "the FDPA is even more structured, and thus more suspect."

Jackson's reliance on *Cunningham* is misplaced. The Sixth Amendment deficiencies identified in the California plan are not present in the FDPA. First, the factfinding in the present case was performed by a jury, not a judge. Second, the FDPA requires aggravating factors to be proved beyond a reasonable doubt. 18 U.S.C. § 3593(c). Because *Cunningham* is not on point and does not undermine ***973** *Bourgeois,* which remains the controlling authority in this circuit, we reaffirm the constitutionality of the FDPA.

C.

Jackson argues that the court improperly excluded for cause two veniremen, Janice Epps and Barbara Lee. According to Jackson, they were erroneously excluded based on objections to the death penalty that did not affect their ability to serve as jurors.

13 Under *Witherspoon v. Illinois,* 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." Nonetheless, potential jurors may be excused where they have indicated either "(1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." *Id.* at 522 n. 21, 88 S.Ct. 1770.

In *Wainwright v. Witt.* 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court clarified that the "standard is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath .... [T]his standard ... does not require that a juror's bias be proved with unmistakable clarity" (internal quotations omitted). The Court specified, in *Uttecht v. Brown.* 551 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007), that a trial court removing a potential juror "makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts." Further, "when there is ambiguity in the prospective juror's statements, 'the trial court, aided as it undoubtedly [is] by its assessment of [the venireman's] demeanor, [is] entitled to resolve [the question] in favor of the State.' " *Id.* at 2223 (quoting *Witt,* 469 U.S. at 434, 105 S.Ct. 844).

14 Jackson argues that Epps should not have been excused. Though he acknowledges that "[a]fter stating her position over and over [she] finally just shut down and said she wouldn't vote for death," he contends that her *voir dire* as a whole demonstrated otherwise and that the prosecutor's badgering led to the statements used to justify her exclusion for cause.

We disagree. In Epps's questionnaire, she answered that "I don't believe I have the right to say if someone should live or die." Under questioning, she admitted that she could accept the death penalty for those that kill children or "for just no reason at all." The court asked for additional questioning as to her ability to follow juror instructions in cases where death might result, which led to her statement that "I would have to vote against the death penalty," and then she was excused.

The court observed Epps's demeanor and heard her answers. Those answers were inconsistent for a time, which alone might have been ground to excuse her. Ultimately, however, she stated that she would not vote for death. In light of the deference owed, the court did not abuse its discretion.[9]

***974** It is just as evident that the district court did not err as to Lee. During government questioning, she agreed that even if the evidence pointed in the direction of a death sentence, she might not be able to vote that way, "because I'm not sure if I can live with myself if I do." Later, as with Epps, Lee vacillated somewhat during questioning by the defense. Finally, under instruction to give a yes or no answer, she was asked whether her feelings about the death penalty would substantially impair her ability honestly to answer the questions presented, and she said yes. The district court properly relied on that statement and excused her.

D.

Before the fight with Jackson began, Brown took off his shirt. Jackson argues that the court improperly allowed a government witness to speculate about what Brown was thinking when he did that.

Jackson sought to demonstrate that he acted in self-defense and that Brown initiated the confrontation by pulling a shank on him. The government contends instead that Brown was

unarmed and initiated only a fistfight, from which he attempted to withdraw when Jackson drew his own shank.

The government presented Derric Wilson, a special investigator at the prison, who testified that inmates typically remove their shirts before a fistfight, because otherwise opponents may be able to "grab onto" their clothes. But in a knife fight, Wilson said, "it has been my experience that inmates have typically padded their clothing," with some even going "so far as to improvise protective vests out of newspapers and magazines and make improvised body armor." Jackson objected, saying that was "pure speculation as to what [was] in the mind of an inmate when he takes his shirt off."

15 Jackson urges that the court abused its discretion in permitting the testimony, which he claims was inadmissible because it was an "unfounded opinion based upon mere conjecture." Alternatively, he contends that if witnesses cannot testify as to what was in a *defendant's* mind, they should not be able to say what was in a potential *victim's* mind.

Wilson's testimony was rationally related to what he observed as a prison official and was helpful for understanding prison fights. He indicated both that he had not observed the yard fight between Brown and Jackson and that his testimony was founded on unrelated investigations he had conducted. [10] Accordingly, his testimony was not "mere conjecture" regarding what Brown was thinking, but rather background information about prison fights that the jury could consider or disregard.

16 Moreover, a district court may admit testimony about a potential victim's state of mind. "[I]n the ordinary circumstance[,]" we do not permit witnesses to speculate about a "defendant's state of mind or intent," *United States v. Chavis*, 772 F.2d 100, 107 (5th Cir.1985), because intent is one of the ultimate issues for the jury. By contrast, the prejudice to a defendant is both less direct and less substantial where a witness is testifying about what someone other than the defendant thought. Therefore, even assuming *arguendo* that Wilson testified as to Brown's ***975** state of mind, the court did not abuse its discretion.

Jackson argues that even if the testimony was admissible, the court erred when it allowed Wilson to testify as a lay witness under Federal Rule of Evidence 701. [11] He claims that some of Wilson's testimony improperly crossed the line into expert testimony governed by Federal Rule of Evidence 702. [12]

17 Jackson did not raise this issue in the district court, so we review only for plain error. To prove plain error, he must "show (1) there was error, (2) the error was plain, (3) the error affected his 'substantial rights,' and (4) the error seriously affected 'the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Jones*, 489 F.3d 679, 681 (5th Cir.2007) (quoting *United States v. Olano*, 507 U.S. 725, 732, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

The "distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." *United States v. Sosa*, 513 F.3d 194, 200 (5th Cir.2008) (citations and internal quotations omitted). To be considered expert, testimony must involve more than "common sense or the officer's past experience formed from firsthand observation." *Id.*

18 Wilson indicated that his testimony was based on his "investigat[ion of] various assaults and fights with knives and fights with fists[.]" He represented that he was "familiar with the clothing that inmates typically wear when they're fighting with knives" and "aware of how inmates go about fist-fighting[.]" Based on those predicates, it appears that Wilson testified only as a lay witness drawing from his "past experiences formed from firsthand observation" as an investigative agent. Accordingly, any error in admitting his statements as lay rather than expert testimony was not plain.

E.

To demonstrate that he acted in self-defense, Jackson tried to introduce Brown's prison disciplinary records into evidence. The district court barred the evidence, ruling that it should be admitted only if Jackson could prove that he had knowledge of the specific acts described by the records. Jackson contends that that ruling was improper and deprived him of the ability to present a complete defense.

Under Federal Rule of Evidence 404(a), character evidence is generally not admissible "for the purpose of proving action in conformity therewith on a particular occasion ...." The rules make an exception, ***976** however, and permit the introduction of "[e]vidence of a pertinent

trait of character of the alleged victim of the crime offered by an accused ...." FED. R. EVID. 404(a)(2). Federal Rule of Evidence 405 provides that such a "trait of character" may always be demonstrated to the jury by presenting evidence of the victim's reputation. On the other hand, testimony about "specific instances of conduct" may be used only if the "character or a trait of character of a person is an *essential element* of a charge, claim, or defense ...." FED. R. EVID. 405 (emphasis added).

19 The district court was correct to limit Jackson's ability to present Brown's disciplinary records. Brown's propensity for violence is a pertinent trait of character, because it supports Jackson's argument that Brown was the first aggressor. Accordingly, the court allowed extensive testimony on Brown's reputation in the prison community.

20 The disciplinary records that Jackson attempted to introduce, however, involved specific instances of conduct. Under rule 405, such evidence is admissible only if Brown's violent character was "an essential element of [Jackson's] defense." In *Gulley*, addressing the same issue, we held,

> ... Brown's prior specific acts were not admissible to prove his alleged propensity for violence. First, as recognized by the Seventh, Eighth, and Ninth Circuits, the plain language of Rule 405(b) limits the use of specific instances of conduct to prove essential elements of a charge or defense. Second, Brown's character was not an essential element of the self defense claim in the "strict sense" because a self defense claim may be proven regardless of whether the victim has a violent or passive character.

Gulley, 526 F.3d at 819 (internal citations and quotations omitted).

Jackson attempts to avoid *Gulley* by citing *Holmes v. South Carolina*, 547 U.S. 319, 321, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006), which addressed the constitutionality of an "evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict." The Court noted that evidentiary rules are given wide latitude unless they "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.* at 324, 126 S.Ct. 1727 (citation and internal quotations omitted). The Court concluded that the evidentiary rule was unconstitutional, because it was "arbitrary in the sense that it does not rationally serve the end that the ... rule[was] designed to further." *Id.* at 330–31, 126 S.Ct. 1727 (internal quotations omitted).

Jackson does not argue with any specificity why rules 404(a) and 405 are "disproportionate" or "arbitrary," "*i.e.*, [that they are] rules that exclude[ ] important defense evidence but that [do] not serve any legitimate interests." *Id.* at 325, 126 S.Ct. 1727. By limiting the admissibility of specific acts, rules 404 and 405 serve the legitimate interest of ensuring that juries do not acquit or convict on impermissibly prejudicial grounds, but those rules allow limited exceptions where more context is necessary in the interest of justice. [13] This *977 careful balance is hardly disproportionate or arbitrary, and Jackson provides no argument to the contrary beyond assertion.

Jackson also claims that the government "opened the door" to the records. Defense witness Darrell Evans, one of Jackson's fellow inmates, testified that Brown "always have big knives and it be hanging out of his pocket ...." On cross-examination, the government expressed some skepticism and asked, "Are you saying that if you're walking around with a shank hanging out of your pocket, that a guard is not going to notice that?" Based on that question, Jackson again sought to admit the disciplinary records, this time to rebut the impression that "Brown did not possess shanks because the guards did not notice it."

This argument is equally unavailing. First, the witness immediately clarified his testimony by explaining that the knives would hang out of Brown's pockets only when he was sitting down in his cell, not walking around in plain view of the guards. Second, the court correctly noted that the disciplinary records would not be even arguably relevant unless they demonstrated that the guards had in fact caught Brown with a shank.

Of the records even remotely related to violence, [14] only two came from the prison; one documents an incident in which Brown threw hot coffee on a guard, and the other reports that he threatened to stab a guard. The remaining records came from other prisons, and even there, only two involved shanks. Any relationship between the subject of cross-examination and the proffered evidence was tenuous at best, and the court did not abuse its discretion in excluding it.

F.

21 Jackson avers that the district court violated his Sixth Amendment right to counsel when it allowed only the lawyer that had conducted the direct examination of a witness to object during that witness's cross-examination. Because Jackson did not object to that ruling and so did not preserve the issue for appeal, [15] we review only for plain error.

" 'Plain' is synonymous with 'clear' or 'obvious,' and at a minimum, contemplates an error which was clear under current law at the time of trial .... Under plain error, if a defendant's theory requires the extension of precedent, any potential error could not have been plain." *United States v. Garcia–Rodriguez*, 415 F.3d 452, 455 (5th Cir.2005) (citing *United States v. Hull*, 160 F.3d 265, 271–72 (5th Cir.1998)) (internal quotations omitted).

Any error here is not plain. Although Jackson correctly notes that federal law allows him to have two attorneys, he can point to no caselaw that requires both of them to be permitted to object at the same *978 time; instead, Jackson argues for an extension of our existing Sixth Amendment jurisprudence. The government, meanwhile, admits that it can find no authority on the issue; it cites general precedent acknowledging the discretion a district court is afforded to control the trial. [16] Because this is a question of first impression and the law was not obvious at the time of trial, any error was not plain.

G.

22 Jackson argues that the district court erred when it forbade him from impeaching government witness Victor Richards with evidence that Richards is a registered sex offender. Richards, an inmate, testified that Jackson and Gulley chased Brown into a cell and stabbed him. In the 1980's, Richards was convicted of sexual assault, sentenced to two years of probation, and required to register as a sex offender.

Federal Rule of Evidence 609 establishes two relevant restrictions relevant regarding impeachment by prior criminal convictions. First, under rule 609(a)(1), the impeachment evidence is subject to Federal Rule of Evidence 403, which says that even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." FED.R.EVID. 403. Second, under rule 609(b), evidence of a conviction may not be used "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date ...." FED.R.EVID. 609 (b).

The district court excluded the evidence on both grounds, finding that the conviction was too old and unfairly prejudicial. On appeal, Jackson raises three arguments: First, the conviction's probative value is significant; second, because Richards is still required to register as a sex offender, he has not yet been "release[d] ... from the confinement imposed"; and third, excluding the impeachment evidence violated Jackson's Sixth Amendment right to cross-examine.

Jackson argues the evidence was probative because Richards was "a registered sex offender, a result of his felony conviction[, and so] he likely may also be untruthful." Further, because he was subject to an ongoing legal obligation to register as a sex offender, he might have "potential bias ... to testify for the government, thereby staying in the 'good graces' of those who could prosecute him should he ever fail to comply with his registration requirements."

As Jackson admits, however, registration as a sex offender is a "scarlet letter." So although the jury might have considered Richards more likely to be untruthful if it had known of his conviction, there is a significant danger that it would have instead improperly discounted his testimony because of personal revulsion for sex offenses. Moreover, there was ample reason for the jury to find Richards untrustworthy without introducing the prejudicial evidence—the jury already knew that (1) Richards had been convicted of several other crimes (including burglary and theft); (2) he was currently in prison for a 1999 bank robbery; (3) the government would attempt to get his bank robbery *979 sentence reduced in exchange for his testimony; and (4) he had a history of mental issues and drug abuse. Given the potentially severe prejudice that could have resulted from admitting the conviction and its mostly cumulative probative value, the district court did not abuse its discretion. [17]

23 The court also did not commit constitutional error. Evidentiary rules generally are upheld unless they "infringe upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve" (citation and internal quotations omitted). *Holmes*, 547 U.S. at 324, 126 S.Ct. 1727. "[W]ell-established rules of evidence

permit trial judges to exclude evidence if its probative value is outweighed by certain other factors *such as unfair prejudice,* confusion of the issues, or potential to mislead the jury. *See, e.g.,* FED. R. EVID. 403." *Id.* at 326, 126 S.Ct. 1727 (emphasis added). The decision to exclude the evidence because of its prejudicial value was therefore constitutionally permissible.

H.

24 Defense witness Shannon Agofsky testified that Brown had a knife and said he was going to assault Jackson. The government impeached Agofsky under Federal Rule of Evidence 609 with evidence that Agofsky had been convicted of two counts of capital murder. Agofsky's case has an unusual procedural history, however, that leads Jackson to question whether Agofsky was improperly impeached with non-final convictions.

Agofsky's convictions for capital murder were the result of a single killing. In July 2006, in *United States v. Agofsky,* 458 F.3d 369 (5th Cir.2006), we held that the Double Jeopardy Clause forbade convicting Agofsky of both counts, because the charges amounted to the same offense.[18] *Id.* at 371–72. We nonetheless concluded that one of the two death sentences could stand. *Id.* at 372–73. Accordingly, we vacated the convictions "to prevent double jeopardy" and remanded with instruction to impose, "at the Government's election, a guilty verdict and death sentence for either Federal Murder or Murder by a Federal Prisoner." *Id.* at 375.

Agofsky petitioned for writ of certiorari; because of the pending petition, the Fifth Circuit stayed the mandate in August 2006. After the Court denied certiorari in January 2007, *Agofsky v. United States,* 549 U.S. 1182, 127 S.Ct. 1149, 166 L.Ed.2d 998 (2007), the Fifth Circuit lifted the stay of the mandate, which finally issued in February 2007. Agofsky testified at Jackson's trial in October 2006—after the *Agofsky* panel had rendered its opinion but before the Court denied certiorari and the mandate issued.

On appeal, Jackson argues that Agofsky should not have been impeached with either conviction. The question now is whether, at the time of the impeachment, Agofsky had two convictions (per the original district court verdict), zero convictions (per the panel order vacating the convictions), or one conviction (per the instruction that the district court reimpose one of the two original convictions on remand). We conclude that he was correctly impeached with both convictions.

***980** This court's decisions are "not final until we issue a mandate." *Charpentier v. Ortco Contractors,* 480 F.3d 710, 713 (5th Cir.2007). In *Charpentier,* we rejected the argument that an award ceased to exist "on the date we issued our opinion [vacating the award]." *Id.* Similarly, Agofsky's convictions did not cease to exist when the panel opinion vacating them was entered. Because the mandate had not yet issued, the original district court judgment remained in effect; Agofsky was still convicted of both crimes at the time of his testimony.[19]

Further, under rule 609(e), "[t]he pendency of an appeal therefrom does not render evidence of a conviction inadmissible." Accordingly, neither the stayed mandate in this court nor the pending certiorari petition[20] affected the admissibility of Agofsky's convictions.[21] We note, however, that the rules permitted Jackson to present information about Agofsky's appeal to ameliorate the impeachment. FED. R. EVID. 609(e) ("Evidence of the pendency of an appeal is admissible."). Jackson declined to do so despite being reminded of the option by the district court.

I.

25 Jackson argues that, as a matter of constitutional right, he should have been allowed to submit a statement of allocution to the jury.[22] The district court denied Jackson's request to allocute, citing *United States v. Hall,* 152 F.3d 381, 396 (5th Cir.1998) ("We conclude that a criminal defendant in a capital case does not possess a constitutional right to make an unsworn statement of remorse before the jury that is not subject to cross-examination."), *abrogated on other grounds by United States v. Martinez–Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000).

26 ***981** Jackson's brief does not even mention *Hall,* let alone attempt to distinguish it. This panel may not overrule the decision of a prior panel. *Teague v. City of Flower Mound,* 179 F.3d 377, 383 (5th Cir.1999). Accordingly, we follow *Hall* and uphold the district court's order.

J.

27 Jackson contends that the district court violated his Eighth Amendment rights when it failed to instruct the jury at sentencing that if it had "residual doubts" about his guilt, it should

not sentence him to death. Binding Supreme Court precedent, however, forecloses this argument.

In *Franklin v. Lynaugh*, 487 U.S. 164, 174, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), Justice White, writing for four Justices, first noted that "[t]his Court's prior decisions, as we understand them, fail to recognize a constitutional right to have [residual] doubts considered as a mitigating factor." [23] Even if the Eighth Amendment guaranteed such a right, mere denial of a jury instruction did not impair the right, because the "trial court placed no limitation whatsoever on [defendant]'s opportunity to press the 'residual doubts' question with the sentencing jury." *Id.* The Court also rejected the argument that jurors needed to be told they could consider residual doubt. Accordingly, "even if petitioner had some constitutional right to seek jury consideration of 'residual doubts' about his guilt during his sentencing hearing—a questionable proposition—*the rejection of petitioner's proffered jury instructions did not impair this 'right.'*" *Id.* at 175, 108 S.Ct. 2320 (emphasis added). Justice O'Connor, for herself and Justice Blackmun, went further and wrote that "the Eighth Amendment does not require [consideration of residual doubt by the sentencing body]." *Id.* at 187, 108 S.Ct. 2320.

The Fifth Circuit has also addressed the issue. Although there is a "difference between rules relating to *what* mitigating evidence the jury may consider and rules relating to instructing the jury *how* to consider such evidence," a criminal defendant is "not constitutionally entitled to instruct the jury to consider ... residual doubt ...." *Smith v. Black*, 904 F.2d 950, 968–69 (5th Cir.1990), *vacated on other grounds*, 503 U.S. 930, 112 S.Ct. 1463, 117 L.Ed.2d 609 (1992).

We find no error in the denial of Jackson's request for a jury instruction on residual doubt. First, neither the Supreme Court nor the Fifth Circuit has held that a defendant is entitled to such an instruction. [24] Second, even if we assume some right to consideration of residual doubt, the "trial court placed no limitation whatsoever on [Jackson]'s opportunity to press the 'residual doubts' question with the sentencing jury." Jackson was able to argue self-defense at sentencing, and the court explicitly instructed the jury that it could consider "[a]ny other [factors] you may find from the evidence" and "anything else about the commission of the crime ... that would mitigate against imposition of the death penalty." Following *Franklin* and *Smith*, we therefore conclude that any ***982** right to consideration of residual doubt was not impaired.

K.

As part of rendering its sentencing verdict, the jury completed a special verdict form that included an extensive sixty-item list of potential mitigating factors. Only one of those factors was found by all twelve jurors, [25] and fifty of them received zero support.

28 Jackson argues that the verdict is inconsistent with the evidence presented at trial. He claims that in one case, the verdict contradicted an explicit government stipulation. Elsewhere, he claims that the jury failed to find factors that had been demonstrated at trial "beyond all doubt." He concludes that "[n]o rational juror could have viewed the evidence and then answered the questions regarding the mitigating factors in such a manner without violating his oath as a juror."

As an initial matter, we have expressed doubt that a special verdict on mitigating factors is reviewable. [26] "Assuming, *arguendo*, that we possess the authority to review the jurors' special findings regarding mitigating factors, we must accept the jurors' factual determinations unless no reasonable juror could have arrived at the conclusion reached by the juror in question." *Hall*, 152 F.3d at 413. Further, verdict inconsistencies are generally tolerated. *See Agofsky*, 458 F.3d at 375. [27]

Jackson's strongest claim that the verdict is inconsistent involves Gulley. The government stipulated that Gulley did not receive the death penalty, but on the special verdict form, only one juror found that to be a proven mitigating factor. Jackson argues that in making that finding, "[e]leven of the twelve jurors found an uncontroverted, stipulated, written in stone fact, not to be a fact."

Jackson's argument overstates his case. The special verdict form asked whether ***983** the jury found that "[a]n *equally culpable* defendant, Arzell Gulley, did not receive a sentence of death as a result of the offense" (emphasis added). The government stipulated only that Gulley did not receive a sentence of death; the jury, meanwhile, could have rationally concluded that he was not equally culpable. Jackson testified that Gulley "didn't help me kill the man" and in fact yelled "[l]et's get out of here" after the first stab. Thus, the jury's finding is neither inconsistent with the government's stipulation nor irrational.

The other findings that Jackson cites as inconsistent all relate to factors that the government did not stipulate to be true, e.g., Jackson's head injury as a baby, low I.Q. score, possible retardation,[28] bad home life, good behavior in prison, and diligence in teaching himself to read. Jackson argues that "the evidence overwhelmingly established those factors without controversion by the government."

This mitigation evidence, however, could rationally be called into question. Much of it was provided by Jackson's childhood and current girlfriend, whom the jury was free to disbelieve,[29] and the government used cross-examination to cast doubt on the reliability of Jackson's expert witnesses. Likewise, despite Jackson's claims to good behavior and educational achievement, the jury, upon learning that he ran a gambling operation in prison, reasonably could have concluded that his rehabilitation was not going well.

Further, and more fundamentally, the jury was not required to find that a factor was mitigating, even if it believed the factor's factual predicate to be true. All the law requires is that jurors be aware that they *can* consider a factor to be mitigating. *See Bernard,* 299 F.3d at 485–86. For example, no juror found that Jackson "experienced persistent falling when trying to walk until he was 5 years old and this factor is mitigating." In reaching that conclusion, the jurors could have believed Jackson experienced problems walking but that the factor did not weigh against a sentence of death.

The jury did not merely rubber-stamp the prosecution's request for a death sentence. Four jurors found that Jackson's father was abusive and that the abuse was mitigating. Every juror found it mitigating that Jackson had no positive role model. Six found it mitigating that he was in prison for a non-violent offense. Ten found it mitigating that he was not actively looking to kill someone. Nine found it mitigating that he was the first aggressor. Eight found it mitigating that there are prisoners with worse records who are not sentenced to death.

In short, the jurors appear to have properly and conscientiously carried out their duties. We cannot conclude that their findings are beyond the bounds of reason or are inconsistent with the government's stipulations.

L.

Jackson argues that the court erred in denying him a new trial or at least a hearing regarding his new trial motion. He contends the jury erroneously believed that even if he were sentenced to life ***984** without parole, it was still possible he could be released before the end of his life—despite the district court's explicit instruction to the contrary. To support this contention, Jackson offered an affidavit of an investigator who contacted jurors after the trial. The affidavit stated that a number of them believed that Jackson could be released early, as had happened with a cooperating witness who testified at trial.

29 A juror's affidavit "may not be received on a matter about which the juror would be precluded from testifying." A juror may testify regarding only three aspects of the events surrounding deliberations: "*(1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror,* or (3) whether there was a mistake in entering the verdict onto the verdict form." FED. R. EVID. 606(b) (emphasis added).

In *United States v. Jones,* 132 F.3d 232, 245–46 (5th Cir.1998), a death penalty case like Jackson's, we unambiguously stated that "[r]ule 606(b) has consistently been used to bar testimony when the jury misunderstood instructions" and that " 'outside influence' refers to a factor originating *outside of normal courtroom proceedings* which influences jury deliberations, such as a statement made by a bailiff to the jury or a threat against a juror" (emphasis added). *Jones* is on point,[30] and the proffered affidavit should not be received. The affidavit does not provide evidence that "*extraneous* prejudicial information was improperly brought to the jury's attention" or that "any *outside* influence was improperly brought to bear upon any juror." At most, it indicates that some jurors apparently misunderstood what Jackson concedes was the court's explicit instruction. Any misunderstanding was seemingly caused by the testimony of a government witness, which came as a valid part of his direct examination during "normal courtroom proceedings."

30 Because the investigator's affidavit was inadmissible, and Jackson presented no other evidence of jury confusion, the district court was well within its discretion to deny a new trial. Moreover, given that Jackson had not proffered any admissible evidence, the court properly denied the motion to hold an evidentiary hearing.[31]

For the reasons stated, we AFFIRM the conviction and sentence.

All Citations

549 F.3d 963, 77 Fed. R. Evid. Serv. 1538

Footnotes

1 A shank is a homemade knife.

2 Jackson gives no citations to this information in the trial record. *See* FED. R.APP. P. 28(a)(9)(A) (noting need to include "contentions and the reason for them, with citations to the authorities and parts of the record on which the appellant relies").

3 Jackson's mother presumably would have testified regarding Jackson's background and upbringing, but Jackson presented other witnesses on that same topic, including a childhood friend who had personally witnessed much of the abuse Jackson suffered. And although Jackson suggests that his mother could have effectively pleaded for her son's life, the district court properly ruled that general pleas for mercy would not be permitted. *See Kelly v. Lynaugh*, 862 F.2d 1126, 1133 n. 12 (5th Cir.1988) (noting that stepfather's request that jury spare defendant's life is not mitigating evidence required to be admitted under Eighth Amendment); *see also Jackson v. Dretke*, 450 F.3d 614, 617–18 (5th Cir.2006) (holding that state court's decision to exclude execution impact testimony by defendant's family and friends did not contradict Supreme Court governing law and was not unreasonable application of Supreme Court precedent).

4 He was held on unrelated matters, including an arrest for bank robbery.

5 *See, e.g., United States v. Maizumi*, 526 F.2d 848, 851 (5th Cir.1976) (finding that a delay of 10 ½ months was not presumptively prejudicial).

6 Jackson appears to raise a third argument that the due process clause is violated where aggravating factors are treated differently from elements of a crime. He neither explains that contention nor cites any law but instead attempts to incorporate arguments made to the district court "by reference as if fully set out for this Court's consideration."

> Argument by reference is not permitted; an appellant who requests "the adoption of previously filed legal and factual arguments ... abandon[s those] arguments by failing to argue them in the body of his brief." *Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir.1993) (citing FED. R.APP. P. 28(a)(4), now FED. R.APP. P. 28(a)(9), which requires a brief to contain "appellant's contentions and the reasons for them"). This argument—if it even is a separate argument—is waived.

7 *See, e.g., United States v. Jones*, 132 F.3d 232, 242 (5th Cir.1998) ("We are bound by Supreme Court precedent which forecloses any argument that the death penalty violates the Constitution under all circumstances.").

8 The government disputes whether this issue was raised in the district court. If it was raised and preserved, we would review the legal question *de novo*; otherwise, we would review only for plain error. *United States v. Vontsteen*, 950 F.2d 1086, 1089–90 (5th Cir.1992) (en banc). We need not decide whether the issue was adequately raised, however, because we affirm even under *de novo* review.

9 *See United States v. Bernard*, 299 F.3d 467, 474–75 (5th Cir.2002) (affirming dismissal of potential juror who indicated on her questionnaire that she did "not feel [she] ha[d] the right to judge whether a person lives or dies" and then wavered during questioning).

10 As Jackson's brief acknowledges, "[t]he government made no effort to connect these other unrelated incidents to either Jackson nor [*sic*] the deceased."

11 Rule 701 provides,

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences

> which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

12 Rule 702 provides,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

13 As the advisory committee notes to rule 405 explain,

> Of the three methods of proving character provided by [rule 405], evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue.

FED.R.EVID. 405 advisory committee's note.

14 The majority of the records describe simple acts of mischief (e.g., falsely triggering fire sprinklers) or insubordination (e.g., refusing to follow instructions from prison officials).

15 The issue arose when one of Jackson's lawyers, Mr. Barlow, objected during the cross-examination of a witness that Jackson's other lawyer, Mr. Morrow, had directly examined. After questioning was complete and the jury had been excused, the judge ordered, "I don't want one of you objecting and then the other one. That was Mr. Morrow's witness. Mr. Barlow, don't object if he's the person responsible for the witness." Jackson's counsel responded by saying only "Yes, your honor."

16 The government cites, for example, *United States v. Pace*, 10 F.3d 1106, 1114 (5th Cir.1993) (stating that the court of appeals " must determine whether the trial court imposed unreasonable limits on cross-examination such that a reasonable jury might have received a significantly different impression of a witness' credibility had defense counsel pursued his proposed line of cross-examination") (citation and internal quotations omitted).

17 Because we affirm the decision to exclude the evidence as unfairly prejudicial under rule 403, we need not address its ruling that the conviction was too old to be admissible under rule 609(b).

18 He was convicted of both premeditated, first degree murder and premeditated, first degree murder by a federal prisoner serving a term of life imprisonment.

19 The existence of the convictions did not automatically make them admissible. Rule 609(a)(1) states that convictions for crimes that do not involve acts of dishonesty are admissible subject to rule 403, which allows the district court to exclude evidence where the "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury ...." FED.R.EVID. 609(a)(1). Because Jackson did not raise a rule 403 challenge at trial or on appeal, we do not review the district court's decision on the matter.

20 In Agofsky's case, the Supreme Court was acting as an "appellate" court. *See* U.S. CONST. art. III, § 2. Agofsky's certiorari petition is therefore included in rule 609(e)'s reference to "pendency of an appeal."

21

Jackson argues that the "obvious purpose" of rule 609(e) is to respect the "presumption of correctness which ought to attend judicial proceedings" and that that purpose is not served by respecting a conviction that a court of appeals has reversed while certiorari is pending. That argument is unavailing under the peculiar circumstances of this case.

> Agofsky's conviction was not reversed on the merits—indeed, the district court was ordered to re-enter the conviction on one count. Further, rule 609 (e) is pellucid, and we must follow it. "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004) (internal quotations and citations omitted); *see also, e.g., Garcia v. Gloor*, 618 F.2d 264, 268 (5th Cir.1980) ("[W]e start with [the statute's] plain words without pausing to consider whether a statute differently framed would yield results more consonant with fairness and reason.").

22 A statement of allocution is "[a]n unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence." BLACK'S LAW DICTIONARY 83 (8th ed.2004).

23 The Court recently reiterated this aspect of *Franklin* in *Oregon v. Guzek*, 546 U.S. 517, 525, 126 S.Ct. 1226, 163 L.Ed.2d 1112 (2006). The *Guzek* Court, noting that "*Franklin* did not resolve whether the Eighth Amendment affords capital defendants such a right [to consideration of residual doubt]," concluded that "we once again face a situation where we need not resolve whether such a right exists ...." *Id.*

24 The lengthy list of cases that Jackson cites suggest, at most, that a defendant is permitted to argue residual doubt. None stands for the proposition that the Eighth Amendment compels a jury instruction on residual doubt.

25 Factor # 15: "[Jackson] had no positive role model in his life as a child and this factor is mitigating."

26 *See United States v. Hall*, 152 F.3d 381, 413 (5th Cir.1998) ("[W]e question whether the jurors' failure to find a particular mitigating factor constitutes a proper subject of review for this court."), *abrogated on other grounds by United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); *see also United States v. Bernard*, 299 F.3d 467, 485 (5th Cir.2002) ("This court has previously expressed doubt regarding its authority to review jury findings relating to mitigating factors. [*United States v.*] *Hall* questions whether a jury's failure to find the existence of a mitigating factor is subject to appellate review, since the FDPA does not require the jury to make special findings of the existence of, or degree of jury unanimity upon, mitigating factors.") (internal citation omitted).

27 As explained in *United States v. Powell*, 469 U.S. 57, 67, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984),

> [W]ith few exceptions [involving crooked members of the venire panel or improper outside influences on the jury during trial], once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

(Internal citations omitted.) The case Jackson cites repeatedly as contrary persuasive authority, *Getsy v. Mitchell*, 456 F.3d 575 (6th Cir.2006), was vacated by the en banc court, *Getsy v. Mitchell*, 495 F.3d 295, 300, 309 (6th Cir.2007) (en banc) (noting that "[p]erhaps some day the Supreme Court will hold that ... inconsistent verdicts ... are unconstitutional[, b]ut this is not the law of the land today ..."), *cert. denied*, 552 U.S. 1244, 128 S.Ct. 1475, 170 L.Ed.2d 299 (2008).

28 Jackson alludes to *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (barring executions of the mentally retarded), but he does not make an *Atkins* claim.

29 *See, e.g., Hall*, 152 F.3d at 413 ("In support of his claim that he experienced an upbringing that militated against the imposition of the death penalty, Hall offered only the testimony of two of his family members, *which the jury was free to believe or disbelieve.*") (emphasis added).

30 To avoid the impact of *Jones*, Jackson mischaracterizes the order denying a new trial as a misstatement of the law. He seizes on the court's statement that "because the jury charge did not directly address or even allude to the possibility of future sentence reductions, the jury cannot be accused of explicitly disregarding the court's instructions ...." He argues that the court incorrectly focused on the correctness of its instructions rather than the jury's violation of them.

Jackson overlooks the final sentences in the paragraph, in which the court properly explained it was concerned only with influences external to the trial: "Moreover, so long as any misunderstanding regarding the jury charge was not the result of an improper outside source or extraneous influence, the district court need not grant a new trial" (citing *Jones*, 132 F.3d at 245–46). The court then explained that Jackson had failed to offer any evidence that showed that the jury's erroneous understanding of what life without parole meant had originated outside of the trial.

31 *See, e.g., Tanner v. United States*, 483 U.S. 107, 127, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987) ("[T]he District Court did not err in deciding, based on the inadmissibility of juror testimony and the clear insufficiency of the nonjuror evidence offered by petitioners, that an additional post-verdict evidentiary hearing was unnecessary.").

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Disagreed With by U.S. v. Sampson, D.Mass., August 26, 2004

Original Image of 299 F.3d 467 (PDF)

U.S. v. Bernard
United States Court of Appeals, Fifth Circuit. July 19, 2002. 299 F.3d 467 (Approx. 27 pages)

299 F.3d 467
United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Brandon BERNARD and Christopher Andre Vialva, Defendants-Appellants.

No. 00-50523.
July 19, 2002.

Synopsis

Defendants were convicted in the United States District Court for the Western District of Texas, Walter S. Smith Jr., J., of murder and sentenced to death. On appeal, the Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) dismissal of prospective juror for cause was not abuse of discretion; (2) failure to *sua sponte* sever one defendant's case from that of co-defendant at penalty phase of trial was not plain error; (3) failure to hold hearing on issue of jury taint was not abuse of discretion; (4) victim impact evidence was generally admissible; (5) evidence supported finding that defendant's conduct was especially heinous, cruel or depraved; (6) evidence supported finding that defendant posed future danger to others; (7) lack of evidence to support "pecuniary gain" aggravating factor did not invalidate death sentences; (8) jury was entitled to find that age was not mitigating factor; (9) prosecutor's closing argument was not improper; and (10) any error in failure of indictment to allege existence of mental state and statutory aggravating factors required for imposition of death penalty was harmless.

Affirmed.

West Headnotes (30)

Change View

1 Jury Punishment prescribed for offense
Court may excuse prospective juror for cause because of his or her views on capital punishment if those views would prevent or substantially impair performance of his or her duties as juror in accordance with instruction and oath.

2 Cases that cite this headnote

2 Jury Punishment prescribed for offense
Prospective juror who would automatically vote against the death penalty in every case must be dismissed for cause.

3 Jury Bias and Prejudice
District court has discretion to excuse juror for cause when court is left with definite impression that prospective juror who would be unable to faithfully and impartially apply law.

2 Cases that cite this headnote

4 Jury Punishment prescribed for offense

SELECTED Research

Criminal Law

Specific Trial Right of One of the Defendants in Joint Trial

Sentencing and Punishment

The Death Penalty
Sentence Murder Defendant
Proceedings
Deprivation of Capital Murder Defendant of Fair Trial or Fair Sentencing Determination

Secondary Sources

Representing Criminal Defendants At Sentencing Hearings

44 Am. Jur. Trials 459 (Originally published in 1992)

...Criminal defense attorneys are often presented with cases in which a trial is not desirable because guilt is obvious. When a client has pled or been found guilty, counsel's major role is to minimize th...

s 152. Capital murder

2 Wharton's Criminal Law § 152 (15th ed.)

...In 1972, in Furman v Georgia, the United States Supreme Court ruled that "the imposition and carrying out of the death penalty" constitutes "cruel and unusual punishment in violation of the Eighth and ...

Victim impact evidence in capital sentencing hearings--post-Payne v. Tennessee

79 A.L.R.5th 33 (Originally published in 2000)

...This annotation collects and discusses the modern capital cases in which the courts have considered the validity, construction, and application of victim impact statutes and the admissibility of victim...

See More Secondary Sources

Briefs

Brief for Petitioner

2015 WL 3654290
STATE OF KANSAS, Petitioner, v. Jonathan D. CARR and Reginald Dexter CARR, Jr., Respondents.
Supreme Court of the United States
June 08, 2015

...The decisions of the Kansas Supreme Court are reported, State v. R. Carr, 331 P.3d 544 (Kan. 2014), State v. J. Carr, 329 P.3d 1195 (Kan. 2014), and are reproduced as appendices to the respective Petit...

Brief for Petitioner

1976 WL 194473
Charles William PROFFITT, Petitioner, v. STATE OF FLORIDA, Respondent.
Supreme Court of the United States
Feb. 26, 1976

...The opinion of the Supreme Court of Florida affirming Petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 315 So.2d 461 (Fla. 1975). The written decisio...

Brief for the United States as Amicus Curiae Supporting Petitioner

2015 WL 3877684
STATE OF KANSAS, Petitioner, v. Jonathan D. CARR. STATE OF KANSAS, Petitioner, v.

Dismissal of prospective juror for cause, based on concern that her opposition to capital punishment would impair her ability to abide by her oath as juror, was not abuse of discretion; although she retracted her initial, categorical opposition to death penalty, and stated that she would consider it in appropriate case, she also stated that she remained unsure.

1 Case that cites this headnote

5 **Criminal Law** Necessity of Objections in General
Reversal may occur under demanding plain error standard only if there was (1) clear or obvious (2) error that (3) affected defendant's substantial rights, and (4) failure to correct error seriously affects fairness, integrity or public reputation of judicial proceedings.

3 Cases that cite this headnote

6 **Criminal Law** Discretion of court
Criminal Law Discretion in general
Decision to sever lies in trial court's discretion.

7 **Criminal Law** Prejudice; fair trial
Severance should be granted only if there is serious risk that joint trial would compromise specific trial right of one defendant.

3 Cases that cite this headnote

8 **Criminal Law** Limiting effect of evidence competent only as against one of several defendants
Court's limiting instructions will often cure any prejudice resulting from joint trial.

1 Case that cites this headnote

9 **Criminal Law** Grounds for Severance or Joinder
Trial court in capital case must be especially sensitive to existence of inherent tension between efficiency factors favoring joinder and each defendant's constitutional entitlement to individualized capital sentencing decision.

1 Case that cites this headnote

10 **Criminal Law** Preliminary proceedings
Failure to *sua sponte* sever one capital murder defendant's case from that of co-defendant at penalty phase of trial was not plain error, though co-defendant offered evidence of his Christian conversion and defendant lacked comparable mitigating evidence; co-defendant's evidence did not prejudice defendant, and jury was instructed to consider each defendant's punishment separately.

5 Cases that cite this headnote

11 **Criminal Law** Issues related to jury trial
Criminal Law Reception of evidence
District court's decision that jury was not improperly tainted by extrinsic evidence is reviewed under clearly erroneous standard; its choice of methods to investigate possibility of extrinsic taint is reviewed for abuse of discretion.

4 Cases that cite this headnote

12 **Criminal Law** Communications between judge and jury
Criminal Law Objections and disposition thereof
Court's ex parte discussion with juror concerning comment made by crowd member, rather than holding evidentiary hearing, was not abuse of discretion, in capital murder trial; statement was minimally prejudicial, and its effect would have been greatly outweighed by disruption and prejudice of evidentiary hearing.

1 Case that cites this headnote

Criminal Law Communication between jurors and third persons

Reginald Dexter CARR, Jr.
Supreme Court of the United States
June 15, 2015

...This case presents the question whether the Eighth Amendment entitled respondents to reversal of their capital sentences because the trial court conducted a joint penalty proceeding, rather than granti...

See More Briefs

Trial Court Documents

State v. Garcia

1999 WL 34884781
The State of Texas, v. Juan Martin GARCIA.
District Court of Texas
Dec. 16, 1999

...TO THE HONORABLE JUDGE OF SAID COURT: COMES NOW, JUAN MARTIN GARCIA, Defendant, by and through his attorneys of record, and files this his Motion to Preclude Prosecution from Seeking the Death Penalty,...

State v. Hyde

1995 WL 17856127
State of Texas, v. Cesilee Joanna HYDE.
District Court of Texas
Nov. 08, 1995

...COMES NOW the Defendant by and through her counsel of record and respectfully moves the Court to order the State of Texas to make available and to permit the Defendant by and through her attorney to in...

State v. Garcia

2002 WL 34396503
The State of Texas, v. Joseph C. GARCIA.
District Court of Texas
May 21, 2002

...TO THE HONORABLE JUDGE OF SAID COURT: COMES NOW, JOSEPH C. GARCIA, Defendant in the above-cause, by and through counsel and pursuant to the 5, 6, 8 and 14 Amendments to the United States Constitution a...

See More Trial Court Documents

13 Trial court's conclusion, in capital murder case, that jury was not improperly tainted by crowd member's comment that "someone is going to die in that trial today" was not clearly erroneous.

14 **Sentencing and Punishment** Victim impact
Victim impact evidence is admissible as aggravating factor in penalty phase of capital murder trial unless it is so unduly prejudicial that it renders trial fundamentally unfair. U.S.C.A. Const.Amend. 14; 18 U.S.C.A. § 3593(a)(2).

9 Cases that cite this headnote

15 **Sentencing and Punishment** Victim impact
References in victim impact statements to murder victims' religious beliefs and activities were not unduly prejudicial, in penalty phase of capital murder trial; jury was already aware of such contextual facts. 18 U.S.C.A. § 3593(a)(2).

3 Cases that cite this headnote

16 **Sentencing and Punishment** Victim impact
References in victim impact statements to victims' parents' reliance on their religious beliefs for comfort were not unduly prejudicial, in penalty phase of capital murder trial; statements were relevant to impact of crimes on victims' families. 18 U.S.C.A. § 3593(a)(2).

3 Cases that cite this headnote

17 **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review
Admission of victim impact statement, in which mother of murder victim called on defendants to put their faith in Jesus and to ask for forgiveness of their sins, in penalty phase of capital murder trial, was not plain error; although arguably irrelevant, statements were not relevant to jury's sentencing decision, and thus did not inflame or prejudice jury against defendants. 18 U.S.C.A. § 3593(a)(2).

6 Cases that cite this headnote

18 **Sentencing and Punishment** Harmless and reversible error
Capital murder defendant was not denied fair trial by admission of co-defendant's mother's testimony urging jurors to reject death penalty because "Jesus wouldn't do lethal injection"; statement generated no specific prejudice to defendant.

19 **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review
Plainly erroneous admission of portions of victim impact statements, in penalty phase of capital murder trial, which characterized defendants and their crime, did not warrant reversal absent showing that they unduly prejudiced jury; inadmissible portions of statements were short and mild compared to horror of crimes and pathos of admissible impact on victims' parents, and jurors were instructed not to be swayed by passion, prejudice or sympathy. 18 U.S.C.A. § 3593(a)(2).

6 Cases that cite this headnote

20 **Sentencing and Punishment** Vileness, heinousness, or atrocity
Finding of aggravating factor in penalty phase of capital murder trial, that defendant's conduct was especially heinous, cruel or depraved, was supported by evidence; although defendant was not present or responsible for every act of cruelty, he accompanied gang as they drove victims to the murder scene, poured lighter fluid all over victims' car while they were alive, locked in trunk, and set car ablaze after co-defendant had shot victims. 18 U.S.C.A. § 3592(c)(6).

5 Cases that cite this headnote

21 **Sentencing and Punishment** Dangerousness
Finding of aggravating factor in penalty phase of capital murder trial, that defendant posed future danger to others, was supported by evidence of

defendant's participation in charged offense, his gang membership and prior criminal activities, and his propensity for violence in prison.

13 Cases that cite this headnote

22 **Sentencing and Punishment** Personal or pecuniary gain
"Pecuniary gain" aggravating factor, for purpose of sentencing in capital murder case, is limited to situations where pecuniary gain is expected to follow as direct result of murder. 18 U.S.C.A. § 3592(c)(8).

14 Cases that cite this headnote

23 **Sentencing and Punishment** Personal or pecuniary gain
Sentencing and Punishment Escape or other obstruction of justice
Finding of aggravating factor in penalty phase of capital murder trial, that defendants committed crime for pecuniary gain, was not supported by evidence; motive for murders was not pecuniary gain, but rather to prevent victims from reporting robbery to police. 18 U.S.C.A. § 3592(c)(8).

14 Cases that cite this headnote

24 **Sentencing and Punishment** Effect of applying invalid factor
Sentencing and Punishment Personal or pecuniary gain
Lack of evidence to support "pecuniary gain" aggravating factor did not invalidate death sentences imposed in capital murder case; given jury's valid findings as to existence of multiple other aggravating factors, and lack of mitigating factors, it would have imposed same sentence even if it had not considered invalid factor.

8 Cases that cite this headnote

25 **Sentencing and Punishment** Age
Capital murder defendants' constitutional rights were not violated by jury's finding that their ages at time of crime, eighteen and nineteen, respectively, were not mitigating factors at sentencing, absent showing that jurors mistakenly believed that they were precluded from considering whether such evidence mitigated defendants' culpability.

2 Cases that cite this headnote

26 **Sentencing and Punishment** Harmless and reversible error
Any error in exclusion of capital murder defendant's mother's mitigation testimony, during penalty phase, about single incident of childhood racial harassment, was harmless; mother was allowed to testify extensively about racial tension in defendant's life, and psychiatric testimony regarding effect of racial harassment on defendant was admitted.

1 Case that cites this headnote

27 **Criminal Law** Comments on defense counsel
Prosecutor's closing argument in capital murder trial, characterizing defense attorneys' closing as desperate attempt to mislead jurors, was not reversible error; argument attacked strength of defense on merits, not integrity of defense counsel, court instructed jurors not to consider attorney argument as evidence, and evidence of defendants' guilty was strong.

26 Cases that cite this headnote

28 **Criminal Law** Statements as to Facts, Comments, and Arguments
Improper prosecutorial comments constitute reversible error only where defendant's right to fair trial is substantially affected.

8 Cases that cite this headnote

29 **Criminal Law** Statements as to Facts, Comments, and Arguments
Factors relevant to determining whether improper prosecutorial statements constitute reversible error are: (1) magnitude of prejudicial effect of statements;

(2) efficacy of any cautionary instructions; and (3) strength of evidence of defendant's guilt.

5 Cases that cite this headnote

30 Criminal Law Indictment or information in general
Any error in failure of indictment to allege existence of mental state and statutory aggravating factors required for imposition of death penalty was not plain, given overwhelming evidence of their existence. 18 U.S.C.A. § 3592(c).

4 Cases that cite this headnote

Attorneys and Law Firms

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Appeals from the United States District Court for the Western District of Texas.

Before JONES, WIENER and PARKER, Circuit Judges.

Opinion

EDITH H. JONES, Circuit Judge:

Brandon Bernard and Christopher Andre Vialva were jointly tried, found guilty and sentenced to death for the murders of Todd and Stacie Bagley on the property of Fort Hood, Texas. *See* Federal Death Penalty Act ("FDPA") of 1994, 18 U.S.C. § 3591 *et seq.* Bernard and Vialva now appeal their convictions and sentences. Finding no reversible error, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On June 20, 1999, Christopher Andre Vialva, Christopher Lewis and Tony Sparks, members of a gang in Killeen, Texas, met to plan a robbery.[1] The three gang members decided on the following plan: they would ask someone for a ride, get in the car and pull a gun on the victim, steal the victim's money and personal effects, obtain the pin number for the victim's ATM card, force the victim into the trunk of the car and drive somewhere to abandon the car with the victim locked in the trunk.

The following day, Vialva, Lewis and Sparks enlisted two fellow gang members, Brandon Bernard and Terry Brown, to assist in the carjacking plan. Initially, the group only had one gun, a "tiny .22 pistol" that they considered "too small to frighten anyone." The group decided that a second gun was necessary. Bernard owned a Glock .40 caliber handgun that he had lent to Gregory Lynch. Vialva, Bernard, Lewis, Sparks and Brown drove to Lynch's house and obtained Bernard's gun. The group then set out in search of a victim.

Sometime after 2:00 p.m. on the afternoon of June 21, Bernard drove Vialva, Brown, Lewis and Sparks to a local supermarket to find a victim. Having had no luck there, the group continued their search by driving around parking lots at other local stores. The search ended at a convenience store in Killeen, where they found Todd Bagley using a pay phone.

Todd Bagley and his wife, Stacie, were youth ministers from Iowa. Before moving to Iowa, Todd had been stationed at Fort Hood, where the couple attended Grace Christian Church and worked with the youth group. About a week before their deaths, the Bagleys returned to Killeen to visit friends and to attend a revival *472 meeting at the church. On Sunday, June 21, they attended a morning worship service and had lunch with friends. Afterward, Todd stopped at "Mickey's" convenience store to use the payphone, while Stacie waited for him in their car.

Lewis and Sparks approached Todd and asked him for a ride to their uncle's house. Todd agreed. Vialva, who was standing nearby, got in the backseat of the Bagleys' car with Lewis and Sparks.[2] Todd and Stacie occupied the front seat. Vialva gave Todd directions, and then pulled out the .40 caliber gun, pointed it at Todd and told him that "the plans have changed." At the same time, Sparks pointed the .22 handgun at Stacie. On Vialva's orders,

Todd stopped the car, and the Bagleys got out. The gang stole Todd's wallet, Stacie's purse and the Bagleys' jewelry. Vialva demanded the pin numbers for the Bagleys' ATM cards, and then forced the Bagleys into the trunk of their car.

After locking the Bagleys in the trunk, Vialva drove around for several hours. He went to ATM machines to withdraw money from the Bagleys' account, but was largely unsuccessful because the Bagleys had less than one hundred dollars on deposit. Vialva drove to a "Wendy's" where Lewis and Sparks used the Bagleys' money to purchase some food. Vialva then attempted to pawn Stacie's wedding ring, and stopped at a tobacco store to purchase cigars and cigarettes.

While they were locked in the trunk, the Bagleys spoke with Lewis and Sparks through the rear panel of the car. Lewis testified that the Bagleys asked them questions about God, Jesus and church. The Bagleys told Lewis and Sparks that they were not wealthy people, but that they were blessed by their faith in Jesus. The Bagleys informed Lewis and Sparks about the revival meeting at Grace Christian, a church which Lewis said he had attended. Urging them to have faith, the Bagleys advised Lewis and Sparks that God's blessings were available to anyone. After this conversation, Sparks told Vialva he no longer wanted to go through with the crime. Vialva, however, insisted on killing the Bagleys and burning their car to eliminate the witnesses and the gangs' fingerprints.

Vialva drove to his house. While he was inside, the Bagleys had another conversation about God with Lewis and Sparks. By this time, the victims had been locked in the trunk for several hours. The Bagleys pleaded with Lewis and Sparks for their lives.

Vialva returned to the car with a ski mask and some additional clothing. Vialva, Lewis and Sparks then met Bernard and Brown, and Vialva repeated that he had to kill the Bagleys because they had seen his face. Bernard and Brown set off to purchase fuel to burn the Bagleys' car.

Vialva, Bernard, Lewis and Brown[3] drove to an isolated spot in the Belton Lake Recreation Area on the Fort Hood military reservation. Vialva parked the Bagleys' car on top of a little hill. Brown and Bernard poured lighter fluid on the interior of the car while the Bagleys sang and prayed in the trunk.

According to Brown, Stacie's last words were "Jesus loves you" and "Jesus, take care of us." Vialva crudely cussed at her in reply. Vialva put on his mask, and told Lewis to open the trunk. Vialva then shot Todd in the head with the .40 caliber gun, ***473** killing him instantly. Vialva shot Stacie in the right side of her face, knocking her unconscious, but not killing her. Bernard set the car on fire. An autopsy later revealed that Stacie died from smoke inhalation.[4]

Vialva, Bernard, Lewis and Brown ran down the hill to Bernard's car. Their getaway was foiled when the car slid off the road into a muddy ditch. Local law enforcement officers, informed of a fire, arrived at the scene while the assailants were trying to push the car out of the ditch. When firemen discovered the bodies in the trunk of the Bagleys' burning car, the four were arrested.

A grand jury in the Western District of Texas indicted appellants Vialva and Bernard for the following crimes: carjacking and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 2119 ("Count One"); conspiracy to commit murder in violation of 18 U.S.C. §§ 1111, 1117 ("Count Two"); the murder of Todd Bagley, within the special maritime and territorial jurisdiction of the United States, and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 1111 ("Count Three"); and the murder of Stacie L. Bagley, within the special maritime and territorial jurisdiction of the United States, and aiding and abetting the same in violation of 18 U.S.C. §§ 2, 1111 ("Count Four"). The government gave notice it would seek the death penalty.

On June 1, 2000, a jury found Vialva and Bernard guilty on all four counts of the indictment. Testimony in the punishment phase of the trial began on June 8 and lasted four days. On June 13, the jury recommended a sentence of death against Vialva on Counts One, Three and Four, and a sentence of death against Bernard on Count Four. The district court sentenced Vialva to life imprisonment on Count Two and death on the remaining counts. The court sentenced Bernard to life imprisonment on Counts One, Two and Three and death on Count Four. Bernard and Vialva filed timely notices of appeal.

II. DISCUSSION

In this direct appeal, Bernard and Vialva challenge their convictions and sentences on the following grounds:

A. The district court violated Vialva's Due Process rights by improperly dismissing a prospective juror for cause;

B. The district court violated Vialva's Due Process rights and Fed.R.Civ.P. 14 by failing to order a severance and a mistrial *sua sponte* in the punishment phase of trial;

C. The district court failed to conduct an adequate investigation into alleged communications between a third party and jurors;

D. The district court violated Appellants' First Amendment, Eighth Amendment and Due Process rights and 18 U.S.C. § 3593(c) and § 3593(f) by admitting victim impact statements containing improper references to religion and improper characterizations of Appellants and their crimes;

E. The district court improperly defined certain aggravating factors in its instructions to the jury, and the evidence is legally insufficient to support the jury's findings regarding three aggravating factors;

F. Appellants' death sentences violate the Eighth Amendment and ***474** 18 U.S.C. § 3595 (c)(2)(A) because the jury arbitrarily found that Appellants' ages were not mitigating factors;

G. The district court violated Vialva's Eighth and Fourteenth Amendment rights and 18 U.S.C. § 3593(c) by excluding mitigating testimony concerning a childhood incident of racial harassment;

H. Prosecutorial statements in closing argument denied Vialva a fair trial and violated his Due Process rights.

I. The cumulative impact of errors in the punishment phase of trial denied Vialva a fair trial.

J. Bernard's sentence violates the Fifth, Sixth and Eight Amendments because the "mental state factors" and "statutory aggravating factors" were not found by the grand jury or alleged in the indictment.

We address each of these issues in turn.

A. Dismissal of a prospective juror for cause.

Vialva contends that the district court erred by sustaining the government's challenge to prospective juror Dana Pate on the basis of her inability to consider the penalty of death. In her initial questionnaire, the prospective juror stated, "I do not feel I have the right to judge whether a person lives or dies. I could not do that." When asked about this statement during voir dire, however, the prospective juror indicated that she had changed her mind about the death penalty. She explained to the court, "this is a real hard thing for me ... I've talked to some people, and we've talked about [the death penalty], and I still don't know if I'm right or not, but if the facts were such that they were proven that the defendant would need that verdict, then I would give it." The government made and the district court sustained a for-cause objection to Ms. Pate on the basis of her inability to adequately consider the death penalty. Vialva argues that the district court erred because the prospective juror expressed a willingness to consider the death penalty in appropriate cases.

1 2 3 "A court may excuse a prospective juror for cause because of his views on capital punishment if those views would prevent or substantially impair the performance of his duties as a juror in accordance with the instruction and oath." *United States v. Webster*, 162 F.3d 308, 340 (5th Cir.1998) (citing *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)). A prospective juror who would "automatically vote against the death penalty in every case" must be dismissed. *Id.* (citing *United States v. Flores*, 63 F.3d 1342, 1355 (5th Cir.1995)). Additionally, the district court has discretion to excuse a juror for cause when the court "is left with the definite impression that a prospective juror who would be unable to faithfully and impartially apply the law." *Id.*, (quoting *Witt*, 469 U.S. at 426, 105 S.Ct. 844). While the district court's dismissal of a prospective juror on this basis is reviewed for abuse of discretion, we give the court "considerable deference [ ] because such decisions are based on face-to-face credibility assessments." *Webster*, 162 F.3d at 340.

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The record supports the district court's decision. Ms. Pate's initial questionnaire revealed unequivocally that she could not sentence another person to death. When questioned during voir dire, the potential juror explained that under limited circumstances she would be able to sentence another person to death, but she also stated "I cannot be sure.... I cannot be sure about this." These statements and others in the record support the district court's conclusion that the prospective *475 juror's bias regarding the death penalty substantially impaired her ability to abide by her oath as a juror. The district court did not abuse its discretion in dismissing Ms. Pate.

B. Severance

Vialva urges that the trial court should have severed his case from Bernard's at the penalty phase of trial. See Fed. R. Crim P. 14. According to Vialva, evidence of Bernard's religious conversion and Christian upbringing implicitly prejudiced the jury against Vialva, who lacked comparable mitigating evidence. Vialva contends that Bernard's mitigating evidence regarding his Christianity violated Vialva's right to exclude consideration of religion during 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. *United States v. Misher*, 99 F.3d 664, 669 (5th Cir.1996). [5]

5 Reversal may occur under the demanding plain error standard only if there was (1) clear or obvious (2) error that (3) affected Vialva's substantial rights, and (4) failure to correct the error seriously affects the fairness, integrity or public reputation of the judicial proceedings. *United States v. Olano*, 507 U.S. 725, 730-37, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Vialva cannot satisfy the standard.

6 7 8 No clear error attached to the district court's failure *sua sponte* to sever and grant a mistrial when Bernard offered a bit of evidence of his Christian conversion. The decision to sever lies in the trial court's discretion. Severance "should" be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants." *Zafiro v. United States*, 506 U.S. 534, 539, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993). A court's limiting instructions will often cure any prejudice resulting from a joint trial. *Id.* Further, defendants charged with capital murder under federal statutes have been tried jointly in both the guilt and penalty phases of trial. *See United States v. Causey*, 185 F.3d 407 (5th Cir.1999); *United States v. Tipton*, 90 F.3d 861 (4th Cir.1996).

9 While acknowledging that efficiency factors support joint trials even in capital cases, we share Vialva's concern over the inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing decision. A trial court must be especially sensitive to the existence of such tension in capital cases, which demand a heightened degree of reliability. *Lowenfield v. Phelps*, 484 U.S. 231, 238-39, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988); *see generally Tipton*, 90 F.3d at 891-92 (discussing problems posed by joinder in the penalty phase of a federal capital case, but noting that since the federal statute requires the sentencing decision to be made by the jury that tried the defendants' guilt, severance during the penalty phase is impractical.) Nevertheless, the pro-Bernard mitigating evidence of which Vialva complains was not sufficiently "mutually antagonistic" or "irreconcilable" to him to suggest, much less compel, severance at the penalty phase.

10 Bernard's mitigating evidence was admissible and not subject to challenge by *476 Vialva. Viewed objectively, however, Bernard did not offer strong proof of his religious conversion. One friend testified briefly that Bernard had "found the Lord" while in jail for these crimes. And Bernard's mother, pleading for her son's life, testified that she tried to instill in Bernard Christian principles. Considering the circumstances of the crime, her plea appears desperate. None of this evidence tarred Vialva directly or indirectly, particularly since it was evident that Vialva was not responsible for the fractured home life of his youth. The evidence generated no "specific and compelling" prejudice to Vialva.

Finally, the court repeatedly instructed the jury to consider each defendant's punishment separately, and he instructed them, as required by the FDPA, not to consider the religious views of the defendants or victims. This instruction refutes Vialva's complaint that the court should have issued an additional, *sua sponte* instruction that evidence of Bernard's religious upbringing or conversion should not be considered in assessing Vialva's punishment. This court must presume that the jury heard, understood and followed the district court's instructions. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S.Ct. 1702, 95 L.Ed.2d 176 (1987). The district court's instructions sufficiently addressed the risk of prejudice resulting from the joint trial. The court did not plainly err by failing to order severance during the punishment phase of trial.

C. Alleged Third-Party Communication with Jurors

Before closing arguments in the guilt-innocence phase of trial, the district court told counsel: "a juror said as they came past where some people were out on the sidewalk this morning, and some person they described as a 'Black lady,' said to them, 'Someone is going to die in that trial today.' So, if you notice some extra security or something today, that will be the reason." The record reflects no response from any of the parties. Bernard now contends that the court conducted an insufficient inquiry into this alleged incident, and the court erred in believing that the jury had not been tainted by the third-party communication

11 12 We review the court's decision that the jury was not improperly tainted by extrinsic evidence under the clearly erroneous standard, and we review the court's choice of methods to investigate the possibility of extrinsic taint for abuse of discretion. *United States v. Cantu*, 167 F.3d 198, 201 (5th Cir.1999) (citations omitted).[6] Bernard argues that the district court abused its discretion by discussing this alleged communication with the juror *ex parte*. Relying on *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954), and other jury tampering cases, Bernard argues that the district court committed reversible error by failing to conduct a hearing to investigate this incident.

This court has explained, however, that district courts are not required to conduct a " 'full-blown evidentiary hearing in every instance in which an outside influence is brought to bear upon a petit jury.' " *Cantu*, 167 F.3d at 201-02 (quoting *United States v. Ramos*, 71 F.3d 1150, 1153 (5th Cir.1995)); *see also, United States v. Sylvester*, 143 F.3d 923, 932 n. 5 (5th Cir.1998). To determine whether a hearing is *477 necessary, the district court "must balance the probable harm resulting from the emphasis such action would place upon the misconduct and the disruption involved in conducting a hearing against the likely extent and gravity of the prejudice generated by the misconduct." *Ramos*, 71 F.3d at 1153 (5th Cir.1995).

13 In this case, the passing statement of a crowd member was minimally prejudicial, even if it is assumed to have been intended to influence the jury. The effect of her statement would have been greatly outweighed by the disruption and prejudice of an evidentiary hearing. This conclusion is underscored by the absence of any request for further investigation or a request for a mistrial. The district court's failure to investigate further or differently was not an abuse of discretion. Likewise, its conclusion that the jury was not improperly tainted is not clearly erroneous. Bernard's argument is without merit.[7]

D. Victim Impact Statements

Appellants next contend that the district court erred by admitting certain parts of the victim impact statements in the penalty phase of trial. Not only do they allege that the victim impact statements were unduly prejudicial, in violation of their Due Process rights, but also that they contained improper references to religion and improper characterizations of the perpetrators and their crimes. Bernard and Vialva concede that since they did not object to the victim impact statements at trial, this court's review is for plain error. *See, e.g., Jones v. United States*, 527 U.S. 373, 387-88, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

The FDPA provides for the submission of an aggravating factor "concerning the effect of the offense on the victim and the victim's family [which] may include oral testimony, a victim impact statement ... and any other relevant information." 18 U.S.C. § 3593(a)(2). Victim impact evidence is relevant to the jury's sentencing decision. Accordingly, testimony concerning the effect of the murders on the victims and their parents was offered in support of this aggravating factor.

14 In *Payne v. Tennessee*, the Supreme Court held that victim impact evidence is admissible "to show [ ] each victim's uniqueness as an individual human being." 501 U.S. 808, 823-27, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). "Victim impact evidence is [a] method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities." *Id.* at 825, 111 S.Ct. 2597. Evidence "about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* at 827, 111 S.Ct. at 2609. Victim impact evidence is admissible unless it "is so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's Due Process rights. *Id.* at 825, 111 S.Ct. 2597; *see also, Jones v. United States*, 527 U.S. 373, 401-02, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).[8]

*478 The Government offered five victim impact statements in the sentencing phase of trial. The four parents' statements were admissible under *Payne* to show the impact of the

murders on the victims' families. 501 U.S. at 827, 111 S.Ct. at 2609. The fifth statement was made by a friend and former coworker of the Bagleys and demonstrated their "uniqueness as [ ] individual human being[s]." *Id.* at 823, 111 S.Ct. at 2607. The statements in this case are similar to those held admissible in other cases. *See, e.g., United States v. Hall,* 152 F.3d 381, 404-05 (5th Cir.1998), *abrogated on other grounds by, United States v. Martinez-Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000); *United States v. McVeigh,* 153 F.3d 1166, 1218-19 (10th Cir.1998).

Bernard's and Vialva's multiple challenges to the victim impact statements resolve analytically into two issues: whether the witnesses' religious statements and references deprived appellants of a fair trial; and whether portions of the victim impact statements went beyond the limits of *Payne* by injecting into evidence irrelevant and prejudicial characterizations of the crime and the Appellants. [9]

1. Religious Statements in the Victim Impact Testimony

Appellants argue that religious references in the victim impact testimony violated their First Amendment, Eighth Amendment and Due Process rights and contravene provisions of the FDPA prohibiting the introduction of unduly prejudicial testimony. 18 U.S.C. §§ 3593(c) and 3595(c)(2)(A). Four types of religious references appear in the testimony: (1) descriptions of the religious beliefs and activities of Todd and Stacie Bagley; (2) the bereaved parents' statements that they relied on their own religious beliefs to find comfort from the pain caused by the murders; (3) a religious plea by Stacie's mother directed at Appellants; and (4) religious remarks by Thelma Bernard, appellant's mother, when pleading for her son's life.

15 *479 With regard to the first category of religious statements, we find no error in the introduction of testimony regarding the victims' religious activities. *Payne* holds that a court must consider the victims of an offense as it finds them, not in the light most favorable to the defendant. Indeed, concurring in *Payne*, Justice Souter described the "serious practical problems" caused by the *Booth* standard with a hypothetical illustration of a minister killed by a stranger while running an errand to his church. *Payne*, 501 U.S. at 840-42, 111 S.Ct. at 2616-17 (Souter, J., concurring). Justice Souter explained:

> The jury will not be kept [at the guilt phase] from knowing that the victim was a minister, with a wife and child, on an errand to his church ... because the usual standards of trial relevance afford factfinders enough information about surrounding circumstances to let them make sense of the narrowly material facts of the crime itself. No one claims that jurors in a capital case should be deprived of such common contextual evidence....

Id. In this case, testimony regarding the religious activities of the Bagleys is "common contextual evidence." The Bagleys were youth ministers who were attending a revival meeting at their former church on the day that they were murdered. These contextual facts are not inadmissible simply because they concern religion.

In addition to being relevant contextual evidence, the fact that Todd and Stacie Bagley were "deeply religious and harmless individual[s] who exhibited [their] care for [their] community by religious proselytization ... was relevant to the community's loss at [their] demise." *Gathers,* 490 U.S. at 821, 109 S.Ct. at 2216 (O'Connor, J., dissenting). [10] Because religion played a vital role in Todd and Stacie Bagleys' lives, it would be impossible to describe their "uniqueness as individual human beings" without reference to their faith. *See Pickren v. State,* 269 Ga. 453, 500 S.E.2d 566, 568-69 (1998) (finding description of victim's "faith and church activities an essential part of a 'glimpse into his life.' ") (citations omitted). We find no error in admitting statements regarding the religious beliefs and activities of the victims.

16 The second category of religious statements includes the parents' reliance on their religious belief for comfort and relates to the harm caused by the Appellants' crime. Stacie Bagley's father, for example, explained that the only thing that made his daughter's tragic death bearable was his belief that he would see her again someday in heaven. Such statements are relevant to the impact of the Appellants' crimes on the victims' families. Thus, the statements are admissible under *Payne*.

17 We are troubled, however, that Stacie Bagley's mother, Donna McClure, addressed Bernard and Vialva personally during the course of her victim impact statement, warned them that heaven and hell are real, and called on them to put their faith in Jesus Christ for the forgiveness of their sins. Since these admonitions neither describe Todd and Stacie nor relate to the harm inflicted on Ms. McClure by appellants' crime, they were irrelevant and might have been excluded upon timely objection. Nevertheless, Appellants have failed to

demonstrate that the admission of this testimony affected *480 their substantial rights for purposes of the third prong of the plain error test. Unlike cases finding religious statements inadmissible, neither McClure nor any of the witnesses in this case nor, most important, the prosecutor urged the jurors to use a religious standard in reaching their verdict. *See, e.g., Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir.2000) (stating that prosecutorial invocation of a "higher law or extra-judicial authority" in argument to jury violates the Eighth Amendment). In this case, the witness urged Appellants to put their faith in God. Precisely because such statements are not relevant to the jury's sentencing decision, we do not believe they could have inflamed or prejudiced the jury against appellants, they were not designed to do so, and in sum, such statements do not constitute plain error.

18 Vialva also complains that his right to a fair trial was violated when Bernard's mother, in mitigating testimony, urged the jurors to use a religious standard in their deliberations. This is the fourth type of religious reference complained of by Vialva. Bernard's mother, testifying on Bernard's behalf in the punishment phase, urged the jury to reject the death penalty because "Jesus wouldn't do lethal injection." As noted earlier, Bernard's mitigating evidence of his religious conversion was admissible. These statements generated no specific prejudice to Vialva, however, as Bernard's mother urged the jury to reject the death penalty. Furthermore, the court's instructions to the jury sufficiently addressed the risk of prejudice. The jurors also signed a certification, as required by the FDPA, that religion played no part in their sentencing decision. The statements of Bernard's mother did not deny Vialva a fair trial.

2. Characterization of the defendants and their crime

19 Appellants also argue that portions of the victim impact testimony impermissibly characterized the Appellants and their crime. In *Booth*, the Supreme Court held inadmissible victim impact testimony which "set[s] forth the family members' opinions and characterizations of the crimes and defendant [s]." 482 U.S. at 508-09, 107 S.Ct. at 2535-36. The Court reasoned that "the formal presentation of [family members' opinions and characterization of the crime] can serve no other purpose than to inflame the jury and divert it from deciding the case on relevant evidence concerning the crime and the defendant." *Id.* This portion of the holding in *Booth* was not overruled by the Supreme Court in *Payne*. *See Payne*, 501 U.S. at 830 n. 2, 111 S.Ct. at 2611.

In her written statement to the jury, Stacie Bagley's mother directed the following statement to the Appellants: "I'm sorry for you, for your heart to be so hard, you couldn't even see the innocence of the two you've killed." Stacie Bagley's father testified:

> I truly believe that on June 21st, 1999, our children were tragically and recklessly stolen from us. There was no profit to be gained, no angry exchange, it was just a useless act of violence and a total disregard of life. Stacie and Todd saw a chance to witness to two young people placing themselves in harm's way.

These statements characterize the Appellants, and offer opinions about the nature of their crime. We are bound by *Booth* to find such evidence inadmissible. Furthermore, the error in admitting such testimony was plain. However, Appellants have not demonstrated that the error affected their substantial rights. These brief statements did not alone unduly prejudice the *481 jury. *Cf. Payne*, 501 U.S. at 832, 111 S.Ct. at 2612 ("[S]urely this brief statement did not inflame [the jury's] passions more than did the facts of the crime....") (O'CONNOR, J., concurring). Furthermore, any prejudice that did result from the statements was mitigated by the district court's instructions to the jurors not to be swayed by passion, prejudice or sympathy. We reiterate that we presume that the jury followed its instructions. *U.S. v. Tomblin*, 46 F.3d 1369, 1391 (5th Cir.1995). Taken in context, this inadmissible portion of the victim impact testimony was short and mild compared to the horror of the crimes and the pathos of the admissible impact on the parents.

E. Challenges to the Aggravating Factors

Appellants next challenge several of the aggravating factors submitted to the jury: (1) that "the defendant[s] committed the offense in an especially heinous, cruel or depraved manner in that it involved torture or serious physical abuse of the victim," set forth in 18 U.S.C. § 3592(c)(6); (2) that Bernard "is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others," a non-statutory aggravating factor; and (3) that "the defendant[s] committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value," set forth in 18 U.S.C. § 3592(c)(8). We address each of the aggravating factors in turn, noting at the

outset that the jury found additional aggravating factors as to each defendant, and that these factors were all found unanimously.

1. "Especially heinous, cruel or depraved" crime

Bernard first argues, solely to preserve the issue for further review, that the statutory "especially heinous, cruel or depraved" aggravating factor was too broadly defined in the jury instructions. He concedes that the instructions submitted to the jury on this aggravating factor are virtually identical to the comprehensive instructions approved by this court in other cases. *See Hall,* 152 F.3d at 414. Bernard's overbreadth argument is without merit.

20 Bernard also contends that the evidence is legally insufficient to support the jury's finding regarding the "especially heinous, cruel or depraved" aggravating factor. As with any criminal verdict, we review jury findings of aggravating factors by asking whether, after viewing the evidence in a light most favorable to the government, any rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *See Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Tipton,* 90 F.3d 861, 896 (4th Cir.1996) (applying *Jackson* "rational trier of fact" standard to challenges to jury findings regarding aggravating circumstances); *United States v. McCullah,* 76 F.3d 1087, 1107 (10th Cir.1996) (same).

Bernard contends that his participation in the crime was not as a matter of law "especially heinous, cruel or depraved" because he "was neither present nor responsible for *most* of the acts and events which the Government and its witnesses urged as a basis for an affirmative finding of this factor." *Bernard's Brief* at 50 (*emphasis added*). It is true that Bernard was not present or responsible for every act of cruelty in this criminal episode. However, the record provides ample basis for a rational juror to conclude that Bernard engaged in actions that were "especially heinous, cruel or depraved" as defined by the ***482** district court. Knowing what was to be done with them, Bernard bought two cans of lighter fluid from a convenience store, and he voluntarily accompanied the gang as they drove the Bagleys to the murder scene. Bernard poured lighter fluid all over the Bagleys' car while they were alive, locked in the trunk. He set the car ablaze with Stacie Bagley unconscious, but still alive, in the trunk. Viewing the evidence in the light most favorable to the government, a rational trier of fact could find the existence of this aggravating factor beyond a reasonable doubt.

2. "Future Dangerousness"

21 Bernard also argues that the evidence is legally insufficient to support the jury's finding that he is likely to commit criminal acts of violence in the future that would be a threat to the lives and safety of others. Relying in part on *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), Bernard contends that the fact of mandatory long-term incarceration alone weighs heavily against a finding of "dangerousness" in the absence of some evidence that the defendant will continue to be violent even in prison. Further, given the limited nature and extent of his personal role in the murder of the Bagleys and his lack of any substantial prior criminal history, Bernard disputes that a rational jury could find him a future danger to society. Under the above-quoted limited test for sufficiency of evidence on appeal, we find no merit in these arguments.

Simmons does not hold that future dangerousness is irrelevant to a jury's sentencing decision when the defendant will be imprisoned indefinitely, but instead requires that this aggravating factor be explained to the jury in the context of the defendant's ineligibility for parole. 512 U.S. at 169, 114 S.Ct. 2187. *Simmons* was applied correctly here, since the jury was informed that Bernard would be ineligible for parole. Moreover, the Eighth Circuit, sitting *en banc,* rejected a similar *Simmons* argument in *United States v. Allen,* 247 F.3d 741, 788 (8th Cir.2001) (en banc) ("[Appellant] argues that the government asserted only that he would be a danger to society but not that he would be a danger in prison. Because the jury was informed of his ineligibility for parole, we find no basis for drawing such a distinction.") In any event, the government offered proof not only of Bernard's past record but also of his potential for violence in prison. At the sentencing hearing, Dr. Richard Coons, a forensic psychiatrist, testified concerning Bernard's propensity for violence in prison. [11] Based on Dr. Coons's testimony, the horrific facts of Bernard's participation in the crimes, and ample evidence of Bernard's gang membership and criminal activities, including his participation in at least two dozen burglaries, a rational juror could find that Bernard posed a serious threat of future harm to others.

3. "Pecuniary Gain"

a.

A far more difficult question is presented by both appellants' challenge to this *483 aggravating factor. Appellants contend that the statutory "pecuniary gain" aggravating factor, *see* 18 U.S.C. § 3592(c)(8), does not apply to this case and that the evidence is legally insufficient to support the jury's findings on this factor. [12]

The district court followed the language of § 3592(c)(8) when it instructed the jury to determine whether each "defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of anything of pecuniary value." The court further instructed the jury that "[t]he phrase 'pecuniary value' means anything of value belonging to Todd A. Bagley or Stacie L. Bagley in the form of money, property or anything having economic value." The jury unanimously found the existence of this factor as to Bernard and Vialva.

Citing *United States v. Chanthadara*, 230 F.3d 1237, 1263 (10th Cir.2000), Appellants argue that Congress intended to reserve application of the "pecuniary gain" factor to "scenarios where the expectation of pecuniary gain is from the actual killing [i.e., a murder-for-hire scenario] and not just the underlying felony [i.e., a robbery]." Appellants argue that Congress did not intend for the "pecuniary gain" factor to apply in every case in which the defendant acquires something of pecuniary value as a result of his involvement in a homicide. Instead, application of the "pecuniary gain" factor is limited to situations where "the murder itself was committed as consideration for, or in the expectation of, anything of pecuniary value." *Chanthadara*, 230 F.3d at 1263, 1264 (finding jury instruction erroneous where it "failed to specify the 'offense' to which it referred was the homicide, not the underlying robbery, and thereby failed to impose a necessary limitation.").

22 We agree with Appellants, and the Tenth Circuit, that the application of the "pecuniary gain" aggravating factor is limited to situations where "pecuniary gain" is expected "to follow as a direct result of the [murder]." *Chanthadara*, 230 F.3d at 1263 (citation omitted). Thus, this aggravating factor is only applicable where the jury finds beyond a reasonable doubt that the murder itself was committed "as consideration for, or in the expectation of" pecuniary gain. *See Woratzeck v. Stewart*, 97 F.3d 329, 334 (9th Cir.1996) (discussing analogous "pecuniary gain" factor under Arizona death penalty statute, and explaining that "[t]he State needs to prove at sentencing that the killing was done with the expectation of pecuniary gain. Even if it is true that under many circumstances a person who kills in the course of a robbery is motivated to do so for pecuniary reasons, that is not necessarily so.").

23 In light of this limitation, the evidence is legally insufficient to support application of the "pecuniary gain" factor in this case. Appellants were not hired to commit the offense of murder, and they did not commit the offense "as consideration for" pecuniary gain. Nor did Appellants commit the offense of murder "in expectation of pecuniary gain." The government argues that the murders in this case were a "necessary step in finishing the car-jacking plan," and were therefore committed "in expectation of pecuniary gain." The motivation for the murders, however, was unrelated to pecuniary gain. Instead, Appellants sought to prevent the Bagleys from reporting their crimes to the police. Since no pecuniary gain was expected *484 to flow directly from the homicide, this aggravating factor should not have been considered by the jury in weighing whether to impose the death penalty. The evidence is insufficient to support application of the "pecuniary gain" factor on the basis of the facts presented by this case.

b.

24 We must next consider the effect of the invalid "pecuniary gain" aggravating factor on Appellants' death sentences. The FDPA provides that courts of appeals cannot vacate death sentences on the basis of errors that are harmless beyond a reasonable doubt. 18 U.S.C. § 3595(c)(2). "Harmless-error review of a death sentence may be performed in at least two different ways. An appellate court may choose to consider whether absent an invalid factor, the jury would have reached the same verdict, or it may choose instead to consider whether the result would have been the same had the invalid factor been precisely defined." *Jones v. United States*, 527 U.S. at 402, 119 S.Ct. at 2109 (citations omitted). [13] Applying the first of these methods, we conclude that the error is harmless beyond a reasonable doubt. [14]

Elimination of the invalid pecuniary gain factor from consideration leaves two statutory aggravating factors as to Bernard and three statutory aggravating factors as to Vialva. The jury unanimously found the existence of the "especially heinous, cruel or depraved" and "substantial planning and premeditation" aggravating factors in their consideration of Bernard's sentence. 18 U.S.C. § 3592(c)(6) and (9). In addition to these, the jury unanimously found the existence of the "single criminal episode" aggravating factor in regard to Vialva's sentence. 18 U.S.C. § 3592(c)(13). The jury also unanimously found three non-

statutory aggravating factors for both appellants: that they were likely to commit future acts of violence; that they caused injury, harm and loss to the families of the victims; and that they murdered the Bagleys for the purpose of preventing the victims from providing information to the police regarding the crime. In the government's closing argument to the jury in the sentencing phase, the pecuniary gain aggravating factor received less attention than any of the other aggravating factors. During the sentencing phase testimony, the government focused on the "especially heinous, cruel or depraved" nature of Appellants' crime and the harm done to the victims' families. Again, the pecuniary gain factor was not emphasized. The jury's findings of at least five other aggravating factors regarding each appellant, and hardly any mitigating factors, [15] compel ***485** the conclusion that the erroneous submission of the pecuniary gain factor was harmless beyond a reasonable doubt. We are confident that the jury would have imposed the same sentences even if the pecuniary gain factor had not been submitted for their consideration.

F. Challenges to the Mitigating Findings

Appellants next challenge the jury's findings regarding their ages as mitigating factors. At trial, it was undisputed that Bernard was eighteen and Vialva was nineteen at the time of the murders. The jurors, instructed to determine "the existence of each particular mitigating factor by a preponderance of the evidence," unanimously found that Appellants failed to prove that their age was a mitigating factor. [16] Based on *Eddings v. Oklahoma* [17] and related cases, Appellants argue that their sentences violate the Eighth Amendment because the jury arbitrarily and capriciously refused to acknowledge the existence of a mitigating circumstance that clearly existed.

This court has previously expressed doubt regarding its authority to review jury findings relating to mitigating factors. *See Hall,* 152 F.3d at 413. *Hall* questions whether a jury's failure to find the existence of a mitigating factor is subject to appellate review, since the FDPA does not require the jury to make special findings of the existence of, or degree of jury unanimity upon, mitigating factors. *Id.* Assuming, however, that we have such authority, we find no constitutional error in the jury's determination that Appellants' relative youthfulness was not a mitigating factor.

25 "Neither the FDPA nor *Lockett* and *Eddings* require a capital jury to give mitigating effect or weight to any particular evidence ... There is only a constitutional violation if there exists a reasonable likelihood that the jurors believed themselves precluded from considering mitigating evidence." *United States v. Paul,* 217 F.3d 989, 999-1000 (8th Cir.2000) (citing *Boyde v. California,* 494 U.S. 370, 386, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). In *Paul,* the Eighth Circuit found no constitutional error where six jury members refused to find the defendant's age a mitigating factor although it was undisputed that the defendant was eighteen at the time of his offense. *Id.* ("The jury was certainly not precluded from considering Paul's youthful age as a mitigating factor [and] Paul has not cited authority for the proposition that a jury is somehow *required* to give mitigating effect to any factor, let alone this one.").

Appellants contend that *Paul* is inapposite, because the form of the verdict here ***486** misled the jurors by allowing them to find-irrationally-that neither defendant was chronologically 18 or 19 at the time of the offense, and by then preventing them from considering youthfulness as a mitigating factor. We do not read the verdict form this way, and in any event, appellants did not object to the jury instructions or verdict form regarding this mitigating factor. The jury instruction accompanying the list of mitigating factors clearly tells the jury to consider whether each listed circumstance mitigates the defendant's culpability. Thus, they were instructed to write down the number of jurors, if any, who found that the fact that Christopher Vialva was nineteen at the time of the offense was mitigating as to Vialva, and likewise for Bernard. The government plainly explained the impact of these questions in its closing argument.

The jurors necessarily decided that these appellants' ages were not mitigating, as they were entitled to do. While the defendants' tender years may lead a jury to exercise clemency, it need not do so. The jury had ample evidentiary basis to believe that these appellants' acts climaxed a pattern of gang activities and made them older, criminally, than their chronological ages. The jury did not have to balance youthfulness, since they did not regard it as mitigating, against the aggravating factors.

G. Exclusion of Potentially Mitigating Evidence

26 Vialva contends that the district court impermissibly prevented him from introducing relevant mitigating testimony about a childhood incident of racial discrimination. Vialva's mother, Lisa Brown, testified extensively regarding her personal background and Vialva's

childhood experiences. Ms. Brown described her sheltered childhood, her troubled and often abusive relationships with men and her difficult pregnancy with Vialva. She also discussed Vialva's childhood illnesses, his attention deficit disorder and Vialva's difficult familial relationships with his Mother's partners. Ms. Brown also testified about Vialva's struggle with his racial identity resulting from his having one black and one white parent and various conflicts Vialva faced due to his mixed racial background.

Vialva now challenges the district court's rulings in the following exchange, which occurred after the testimony described above:

> Q: Is [Vialva] getting into fights?
>
> A: Yes.
>
> Q: And are those fights, you believe, the result of his mixed racial background?
>
> A: Yes. There were kids that called him "zebra".
>
> MR. FRAZIER: I'm going to object to that, Your Honor. This witness wouldn't have-
>
> THE COURT: It's speculation. Sustain the objection.

R.V.24 at 2949-50.

Vialva contends that the district court violated his constitutional right to introduce relevant mitigating testimony by excluding Ms. Brown's testimony regarding this single incident of childhood racial harassment. Vialva relies on *Skipper v. South Carolina,* [18] and related authority, arguing that the district court erred by precluding the sentencing jury "from considering, as a mitigating factor, any aspect of the defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." *Skipper,* 476 U.S. at 3, 106 S.Ct. 1669. Vialva also ***487** asserts that the district court violated the FDPA by excluding Ms. Brown's testimony on the basis of speculation, because the FDPA provides that the rules of evidence cannot be used to exclude relevant mitigating information. 18 U.S.C. § 3593(c).

The district court's exclusion of Ms. Brown's speculative statements, even if error, is harmless beyond a reasonable doubt. As explained above, the district court allowed Ms. Brown to testify at length about the racial tension in Vialva's life. Additionally, the district court admitted expert testimony regarding the effect of racial harassment on Appellant. [19] In closing argument, Vialva's counsel, relying on the evidence of racial harassment, argued that Vialva's childhood racial experiences mitigated his moral culpability for his crime. The jury was not, therefore, precluded from considering racial discrimination and harassment as a potential mitigating factor in Vialva's background. In light of substantial evidence in the record regarding Vialva's racial background, any arguable error in the exclusion of one instance of childhood harassment was harmless. *See Hitchcock v. Dugger,* 481 U.S. 393, 398-99, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987) (exclusion of relevant mitigating evidence invalidates death sentence unless such exclusion was harmless beyond a reasonable doubt).

H. Prosecutorial Misconduct

27 Vialva next contends that he was denied Due Process and a fair trial by repeated inappropriate comments by the prosecutor in his closing argument to the jury. During his closing argument to the jury, the prosecutor stated:

> But because the investigation was so thorough, it did not leave either be [sic] these Defendants or their attorneys with anything to work with. You heard the evidence. You heard the corroboration. You saw the physical evidence and the scientific evidence.... It left them with nothing, because the evidence is so overwhelmingly and so positive and so true as to the guilt of both of these Defendants for the crimes they've been charged with.
>
> So, what were they left to do? Defense Counsel were left with the opportunity-with-with nothing, so they had to try to create a doubt where one did not exist. And [defense counsel] spent, for the last hour to hour and a half, trying to convince you any way they can, any possibility, no matter how remote or extreme it would be, to try to get someone on this jury to follow down a rabbit ***488** trail and take a red herring and somehow say, "Oh, I've got a doubt." Not based on facts, but based purely on conjecture and speculation. Ladies and gentlemen, if these guys had another hour, they'd be trying to convince you it's midnight outside right now.

The prosecutor continued to argue that defense counsel made up an "outrageous theory" out of desperation in an attempt to mislead the jurors. Vialva contends that the prosecutor's statements amount to an improper personal attack on defense counsel, denying Vialva a fair trial. Because Vialva's counsel failed to preserve error regarding most of the prosecutor's statements, he bears the burden of demonstrating that, all told, the prosecutor's statements constitute plain error. *United States v. Gallardo-Trapero*, 185 F.3d 307, 321 (5th Cir.1999).

28 29 Improper prosecutorial comments constitute reversible error only where "the defendant's right to a fair trial is substantially affected." *United States v. Andrews*, 22 F.3d 1328, 1341 (5th Cir.1994) (citation omitted). "A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone. The determinative question is whether the prosecutor's remarks cast serious doubt on the correctness of the jury's verdict." *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir.1989). The factors relevant to this inquiry are: "(1) the magnitude of the prejudicial effect of the statements; (2) the efficacy of any cautionary instructions; and (3) the strength of the evidence of the defendant's guilt." *Andrews*, 22 F.3d at 1341 (citation omitted).

Vialva has failed to demonstrate error, much less plain error. The prosecutor's arguments, properly understood, attacked the strength of the defense on the merits, not the integrity of defense counsel. Moreover, the prosecutor had some latitude because the defense counsel accused the government of "paying for" some of its witnesses. Finally, the court instructed the jury twice not to consider the statements, arguments or questions by the attorneys as evidence. Given the strength of the prosecution's case against Vialva, these remarks could not have denied him a fair trial.

I. Cumulative Error

Vialva contends that he was denied a fair trial by the cumulative impact of errors in the punishment phase. Vialva's argument is based primarily on the district court's failure to properly instruct the jury on the pecuniary gain aggravating factor. As explained above, the error in applying the pecuniary gain factor is harmless beyond a reasonable doubt, and Vialva was not denied a fair trial. Vialva's cumulative impact argument is without merit.

J. Sufficiency of the Indictment

30 In supplemental briefing before this court, Bernard alleges that his sentence is unconstitutional because the grand jury did not find, nor did the indictment allege, the existence of mental state and statutory aggravating factors required by the FDPA for imposition of the death penalty. Bernard did not object at trial on this ground, and concedes that review is for plain error. The alleged error in the indictment is plain, according to Bernard, because *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) extended *Apprendi v. New Jersey*[30] to aggravating factors in capital cases. *Ring* did not hold that indictments in capital cases must allege aggravating and mental state factors. *See Ring*, 122 S.Ct. at 2437 n.4 ("Ring does not contend that his indictment ***489** was constitutionally defective."). Even if *Apprendi* were applicable to this case, the alleged error in the indictment does not amount to plain error. *See United State v. Cotton*, 535 U.S. 625, 122 S.Ct. 1781, 1786-87, 152 L.Ed.2d 860 (2002) (explaining that *Apprendi* error in an indictment failing to allege a drug quantity was not plain error because the evidence of the drug quantity was "overwhelming").

CONCLUSION

For the foregoing reasons, we find no reversible error in the convictions or capital sentences. Accordingly, we AFFIRM the judgments of the district court.

All Citations

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Footnotes

1 Most of the facts concerning the events of June 20-21 were testified to by Christopher Lewis and Terry Brown, who pled guilty to various offenses in exchange for truthful testimony.

2 Bernard and Brown were playing video games in a nearby store. They rejoined Vialva later in the day.

3 Sparks was no longer with the group. He was dropped off earlier in the evening to avoid missing his curfew.

4 An autopsy revealed soot in Stacie's larynx, trachea and bronchi indicating her inhalation of smoke. A toxicologic examination of Stacie's blood revealed a high level of carbon monoxide, the product of breathing smoke carbon monoxide gas from the burning car.

5 Vialva, but not Bernard, moved to sever the trials at the outset of the proceedings and again during jury selection. The motions were denied. We are not faced with any broad question concerning the advisability of joint trials in federal capital cases, but we note that the Federal Death Penalty Act contains no special rules regarding joinder of codefendants.

6 Because Bernard failed to object to the district court's announcement and did not move for a mistrial, plain error review might be appropriate. Nevertheless, because we find no clear error or abuse of discretion, it is unnecessary to determine whether the plain error standard is required.

7 Bernard further inaptly asserts that his counsel had a right to be present at the court's "ex parte conference" with the juror. The context of the court's statement to counsel suggests that a juror simply mentioned the passerby's comment to him. Again, the fact that no attorney present responded to the court's announcement strongly indicates the triviality of the incident.

8 Prior to its opinion in *Payne*, the Court had held victim impact statements inadmissible on the basis that they created an "impermissible risk that the capital sentencing decision [would] be made in an arbitrary manner" in violation of the Eighth Amendment. *Booth v. Maryland*, 482 U.S. 496, 505, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); *see also, South Carolina v. Gathers*, 490 U.S. 805, 810, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989) (extending *Booth* to prosecutorial arguments concerning the character of the victim or the impact of the crime on the victim's family). The holdings of *Booth* and *Gathers* rested on the reasoning that victim impact evidence is "wholly unrelated to the blameworthiness of a particular defendant." *Booth*, 482 U.S. at 505, 107 S.Ct. 2529.

In *Payne*, the Court determined that *Booth* had "unfairly weighted the scales in a capital trial" in favor of the defendant. *Payne*, 501 U.S. at 822, 111 S.Ct. 2597. "By turning the victim into a 'faceless stranger at the penalty phase of a capital trial,' *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Id.* at 825, 111 S.Ct. at 2608. Overruling *Booth* and *Gathers* to this extent, the Court explained that victim impact evidence is relevant to the defendant's moral culpability, and it counterbalances the defendant's mitigating evidence with evidence that humanizes the victim. *Id.*

9 Appellants also challenge Todd Bagley's father's statement that described the emotional harm resulting from his observation of the trial, which revealed the brutality of the crime. Appellants argue that Bagley's statement was irrelevant to the harm caused by the Appellants. This single short paragraph of Mr. Bagley's statement "did not inflame [the jury's] passions more than did the facts of the crime.... In light of the jury's unavoidable familiarity with the facts," we cannot conclude that Mr. Bagley's brief statement deprived Appellants of Due Process. *Payne*, 501 U.S. at 832, 111 S.Ct. at 2612 (O'Connor, J., concurring).

10 In *Gathers*, the Court had held inadmissible a prosecutorial argument containing numerous references to the religious beliefs and activities of the victim. *Gathers*, 490 U.S. at 810-11, 109 S.Ct. at 2210-11. By overruling *Gathers*, the Court has accepted Justice O'Connor's view that evidence relating to the victim's religious activities is relevant to the sentencing decision.

11 Specifically, Dr. Coons testified as follows:

A: If [a person] is a gang member on the outside [of prison], they'll be a member of a gang inside.

Q: All right. And being a member of a gang inside the prison, does that lead itself or lend itself to even more acts of violence?

A: Yes. Gangs [ ] band together for two reasons, basically, protection and control. The members of the gang will be asked to participate in criminal acts and violent acts. I mean, that's just the facts.

R.V. 24 at 3162-63.

12 Appellants filed written objections to the proposed charge in the district court arguing that the "pecuniary gain" factor should not be submitted to the jury. Appellants argued that "the plain meaning of this aggravator is that the defendant must commit the offense because he exchanged his act of 'murder' for a promise of something of 'pecuniary value.' "

13 In *United States v. Webster*, 162 F.3d 308, 324 (5th Cir.1998), decided a few months prior to the Supreme Court's decision in *Jones*, this court applied a slightly different test: "Our duty when the jury finds an invalid aggravating factor is to strike the factor and either reweigh the remaining factors or apply harmless error review.... In conducting a harmless error review [ ] we may inquire into whether, beyond a reasonable doubt, either (1) the death sentence would have been imposed had the invalid aggravating factor been properly defined in the jury instructions or (2) the death sentence would have been imposed absent the invalid aggravating factor."

14 In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court has held that a jury must determine the existence of aggravating factors that would increase a sentence from imprisonment to the death penalty. *Ring* explicitly states, however, that the Court was not considering the state supreme court's authority to reweigh the aggravating and mitigating circumstances after it struck an aggravating factor. *See Ring*, 122 S.Ct. at 2437 n. 4.

15 The jury found no mitigating factors regarding Bernard. Ten of the twelve jurors found Vialva's abused childhood to be a mitigating factor. However, the jury rejected all other mitigating factors that were submitted regarding Vialva.

16 The Special Findings Form submitted to the jury stated:

IV. PART FOUR-MITIGATING FACTORS

Instructions: For each of the following mitigating factors, indicate the number of jurors who find the existence of each particular mitigating factor by a preponderance of the evidence; if none of the jurors find by a preponderance of the evidence that a particular mitigating factor exists, write the number "0" in the blank provided:

...

IV(C) Christopher Vialva was nineteen at the time of the offense.

Number of jurors who so find, if any _____

IV(C) Brandon Bernard was eighteen at the time of the offense.

Number of jurors who so find, if any _____

In response to both questions, the jurors wrote "0" in the blank.

17 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

18 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).

19 Dr. Mark Cunningham, a forensic psychiatrist, testified as follows:

Q: Doctor, another thing that occurred in "Chris' " life-or Mr. Vialva's life was the fact that he was-considered himself of mixed race, and was confused about that in his childhood. Did you identify that as a risk factor in this case?

A: Yes, I did, that there was significant confusion, and at different times in his childhood, he identified himself as being white, and then later mixed, and then later black, and the psychological records showed evidence of

a lot of turmoil and confusion about that very essential who am I kind of question.

Q: How does that affect a person?

A: Well, when it was accompanied by some bigotry that he experienced early in childhood and by some peer rejection, then that aggravated the effects of it, that there was not a peer group that he easily blended with, and that's a separate risk factor ... In [Vialva's] case, he experienced some active peer rejection. When he's six years old and the other kids are calling him names and throwing rocks at him ... then it isn't just that he feels different, although that's part of it, but that he is actively being discriminated against....

R.V.24 at 3061-62.

20 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

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Disagreed With by U.S. v. Sampson, D.Mass., August 26, 2004

Original Image of 217 F.3d 989 (PDF)

U.S. v. Paul 217 F.3d 989
United States Court of Appeals, Eighth Circuit. June 27, 2000 217 F.3d 989 (Approx. 26 pages)

United States Court of Appeals,
Eighth Circuit.

UNITED STATES of America, Appellee,
v.
Jeffrey William PAUL, Appellant.

No. 98-3497.
Submitted: Dec. 13, 1999.
Filed: June 27, 2000.
Rehearing and Rehearing En Banc Denied Aug. 30, 2000.

Synopsis

Defendant was convicted in the United States District Court for the Western District of Arkansas, Jimm L. Hendren, J., for aiding and abetting murder and knowing use of a firearm during a crime of violence, and was sentenced to death, and he appealed. The Court of Appeals, Beam, Circuit Judge, held that: (1) though instruction as to intent required for defendant to be death penalty eligible did not follow the language of the Federal Death Penalty Act (FDPA), the jury's penalty-phase findings together with its guilt-phase conclusions were sufficient to satisfy the requirements of the FDPA; (2) prosecutor did not rely upon factually inconsistent theories to obtain murder convictions by arguing both at codefendant's trial and at defendant's trial that the defendant on trial pulled the trigger; (3) instruction was not plain error on theory it allowed only those jurors who found the existence of a mitigating factor to consider that factor; (4) capital jury is not required to give mitigating effect or weight to any particular evidence; (5) instruction which erroneously labeled "intent" as an aggravating factor did not require reversal of death sentence; (6) any error in the use of "pecuniary gain" as a statutory aggravator at the eligibility stage of death penalty case, in addition to being an element of the underlying offense, was harmless; (7) "heinous, cruel and depraved" aggravating factor was not unconstitutionally vague; (8) prosecutor's authority under the FDPA to define non-statutory aggravating factors is a constitutional delegation of Congress' legislative power; and (9) there was no error as to challenges for cause.

Affirmed.

Heaney, Circuit Judge, filed a dissenting opinion.

West Headnotes (36)

Change View

1 Criminal Law Construction and Effect of Charge as a Whole
A conviction will not be reversed due to allegedly erroneous jury instructions unless, viewed in their entirety, the instructions fail to correctly state the law.

3 Cases that cite this headnote

2 Criminal Law Construction and Effect of Charge as a Whole
Criminal Law Custody and conduct of jury
Jury instructions are evaluated in the context of the entire charge and a jury is presumed to follow all instructions.

10 Cases that cite this headnote

SELECTED TOPICS

Sentencing and Punishment

The Death Penalty
Eighth Amendment Culpability Analysis of Imposition of Death Penalty
Special Circumstances Phases of Capital Murder Prosecution
Proceedings
Deprivation of Capital Murder Defendant of Fair Trial or Fair Sentencing Determination

Secondary Sources

Representing Criminal Defendants At Sentencing Hearings

44 Am. Jur. Trials 459 (Originally published in 1992)

...Criminal defense attorneys are often presented with cases in which a trial is not desirable because guilt is obvious. When a client has pled or been found guilty, counsel's major role is to minimize th...

APPENDIX I - FEDERAL STATUTES

FDA Enforcement Man. Appendix I

...Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or...

s 98:19. Mitigating factors

3A Trial Handbook for Arkansas Lawyers § 98:19 (2017-2018 ed.)

...The following is a nonexclusive list of mitigating factors that may be used as reasons for departure: (A) While falling short of a defense, the victim played an aggressive role in the incident or provo...

See More Secondary Sources

Briefs

Brief for Respondent Reginald Dexter Carr, Jr.

2015 WL 4624622
STATE OF KANSAS, Petitioner, v. Reginald Dexter CARR, Jr., Respondent.
Supreme Court of the United States
Aug. 03, 2015

...FN* Admitted only in New York; supervised by members of the firm The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inf...

RESPONDENT'S CONSOLIDATED BRIEF ON THE MERITS

1994 WL 137057
Tuilaepa (Paul Palalaua) v. State of California; Proctor (William Arnold) v. State of California
Supreme Court of the United States
Feb. 25, 1994

...FN* Counsel of Record for Respondent On the night of April 21, 1982, Petitioner, William Proctor, murdered 55-year-old Bonnie Stendal, a widow who taught first grade at the Burney Elementary School in ...

Appellant's Opening Brief and Attachments

2007 WL 2437220
Donald Lee GILSON, Petitioner-Appellant, v Marty SIRMONS, Warden, Oklahoma State

3 Sentencing and Punishment Instructions
The best way for jury instruction to comply with the provision of the Federal Death Penalty Act (FDPA) as to intent required for defendant to be death penalty eligible is to actually use the language of the statute in the instruction. 18 U.S.C.A. § 3591 (a)(2).

4 Sentencing and Punishment Sufficiency
Though instruction as to intent required for defendant to be death penalty eligible did not follow the language of the Federal Death Penalty Act (FDPA), but required only that defendant intentionally aided and abetted in the killing, the jury's penalty-phase findings together with its guilt-phase conclusions were sufficient to satisfy the requirements of the FDPA, as, under the aiding and abetting instruction at the guilt phase, the jury found that defendant intentionally committed an act which he knew would kill victim; if anything, this required greater awareness than merely "contemplating" that a life will be taken, as provided in the FDPA. 18 U.S.C.A. § 3591(a)(2), (a)(2)(C).

5 Sentencing and Punishment Intent of offender
Within provision of the Federal Death Penalty Act (FDPA) as to intent required for defendant to be death penalty eligible, "contemplate" for purposes of contemplating that the life of a person would be taken means "to have in view as a future event," as opposed to "know," meaning "to perceive or understand as fact or truth; to apprehend clearly and with certainty." 18 U.S.C.A. § 3591(a)(2)(C).

1 Case that cites this headnote

6 Sentencing and Punishment Extreme or reckless indifference
The constitutional intent requirement for imposition of the death penalty is satisfied when the defendant is a major participant in either the killing, or an underlying felony in the case of felony murder, and is recklessly indifferent to human life. U.S.C.A. Const.Amend. 8.

7 Sentencing and Punishment Scope of inquiry
The constitutional intent element for imposition of death penalty can be satisfied at the sentencing phase of trial. U.S.C.A. Const.Amend. 8.

8 Sentencing and Punishment Extent of offender's personal participation
The requirement in subsection of the Federal Death Penalty Act (FDPA) that the victim died as a direct result of defendant's act was satisfied by the jury's findings that either defendant or codefendant or both shot victim, that the gunshot wound was the cause of victim's death, and that defendant aided and abetted in that act. 18 U.S.C.A. § 3591(a)(2)(C).

9 Constitutional Law Prosecutor
Criminal Law Assertion of theory inconsistent with theory previously asserted
Defendant's trial was not unfair or in violation of due process on theory prosecutor relied upon factually inconsistent theories to obtain murder convictions by arguing at both trials that the defendant on trial pulled the trigger; the theory that either defendant, or both, shot victim, was not factually irreconcilable and was supported by the evidence, defendant could have been convicted of aiding and abetting in the murder under either theory, and evidence at the different trials was not factually inconsistent and irreconcilable. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2.

26 Cases that cite this headnote

10 Criminal Law Assertion of theory inconsistent with theory previously asserted
When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the

Penitentiary, Respondent-Appellee.
United States Court of Appeals, Tenth Circuit.
July 18, 2007

...Attachment 1:0 Memorandum Opinion, Gilson v. Sirmons Case No. CIV-01,-1311 -C L1-2 Attachment 2: Judgment, Gilson v. Sirmons Case No. CIV-01-1311-C L1-2 Attachment 3: Gilson v. State of Okla. P.3d 683...

See More Briefs

Trial Court Documents

McGehee v. Hobbs

2014 WL 9862595
Jason MCGEHEE, et al., v. Ray HOBBS, et al.
Circuit Court of Arkansas.
Feb. 21, 2014

...In this declaratory judgment action Jason McGehee, Stacey Johnson, Jack Jones, Bruce Ward, Kenneth Williams, Marcel Williams, Andrew Sasser, Don Davis, and Terrick Nooner (hereafter "Plaintiffs"), chal...

State of Arkansas, v. Lee MILLSAP,

1998 WL 35151600
State of Arkansas, v. Lee MILLSAP,
Circuit Court of Arkansas.
May 08, 1998

...Now on this 8 day of May, 998, after hearing arguments by both the State of Arkansas and the defendant, this Court doth enter the following order from the omnibus hearing of April 27, 1998, on this mat...

U.S. v. Cowley

2000 WL 35626278
UNITED STATES OF AMERICA, v. Shane COWLEY
United States District Court, S.D. West Virginia.
Aug. 22, 2000

...THE DEFENDANT: pleaded guilty to count (s) _ pleaded nolo contendere to count(s) which was accepted by the court. X was found guilty on count(s) one, two, three and four of the four count indictment a...

See More Trial Court Documents

prosecution's argument at both trials that the defendant on trial pulled the trigger is not factually inconsistent.

16 Cases that cite this headnote

11 **Sentencing and Punishment** Presentation and reservation in lower court of grounds of review
Instruction to jury that "each of you must weigh any mitigating factors that you individually find to exist" was not plain error on theory it allowed only those jurors who found the existence of a mitigating factor to consider that factor; at most, the instruction was ambiguous, and in the context of all the instructions, it did not violate either the Constitution or the Federal Death Penalty Act (FDPA), where jury was instructed that, regardless of its findings on aggravating and mitigating factors, it was "never required to recommend a death sentence." U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 et seq.

7 Cases that cite this headnote

12 **Sentencing and Punishment** Special issues
The Federal Death Penalty Act (FDPA) does not require the jury to return special findings showing which mitigating factors the jury found to exist or the number of jurors who found a particular mitigator. 18 U.S.C.A. § 3592.

3 Cases that cite this headnote

13 **Sentencing and Punishment** Manner and effect of weighing or considering factors
Neither the Federal Death Penalty Act (FDPA) nor *Lockett* and *Eddings* require a capital jury to give mitigating effect or weight to any particular evidence; there is only a constitutional violation if there exists a reasonable likelihood that the jurors believed themselves precluded from considering relevant mitigating evidence. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 et seq

10 Cases that cite this headnote

14 **Sentencing and Punishment** Sentence or disposition of co-participant or codefendant
The Federal Death Penalty Act (FDPA) and the Constitution were not violated because the jury which imposed death sentence failed to unanimously find and consider as a relevant mitigating factor that codefendant only received a life sentence, where the jury was allowed to consider codefendant's life sentence, which was introduced at the penalty phase of the trial, and there was support for the finding that defendant was more culpable than codefendant, though there was also evidence to the contrary. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 et seq.

2 Cases that cite this headnote

15 **Sentencing and Punishment** Age
The failure of six jury members to find defendant's age as a death penalty mitigating factor was not error though defendant was only 18 when he committed the murder, where the jury was not precluded from considering defendant's youthful age as a mitigating factor. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3591 (a)(2).

2 Cases that cite this headnote

16 **Sentencing and Punishment** Harmless and reversible error
Instruction which erroneously labeled "intent" as an aggravating factor did not require reversal of death sentence where the error was not repeated in the special verdict form, wherein the mental state inquiry was separate from the aggravating and mitigating factors inquiry.

1 Case that cites this headnote

17 **Sentencing and Punishment** Aggravating circumstances in general

To withstand constitutional scrutiny, an aggravating factor which makes the defendant eligible for the death penalty must not apply to every defendant convicted of a murder, but instead only to a subclass of murder defendants, and it must not be unconstitutionally vague. U.S.C.A. Const.Amend. 8.

2 Cases that cite this headnote

18 **Sentencing and Punishment** Manner and effect of weighing or considering factors
Sentencing and Punishment Degree of proof
During the eligibility phase of death penalty case, the jury makes the requisite age and intent findings, and the government must prove beyond a reasonable doubt at least one of the statutory aggravating factors set forth in the Federal Death Penalty Act (FDPA), and if the government meets this burden, the jury then moves on to the selection decision, and must consider all of the aggravating and mitigating factors and determine whether the former outweigh the latter. 18 U.S.C.A. § 3592.

2 Cases that cite this headnote

19 **Sentencing and Punishment** Harmless and reversible error
Any error in the use of "pecuniary gain" as a statutory aggravator at the eligibility stage of death penalty case, in addition to being an element of the underlying offense, was harmless, where the jury found two other aggravators beyond a reasonable doubt, either of which would have made defendant death eligible. 18 U.S.C.A. § 3592.

20 **Sentencing and Punishment** Instructions
The statutory "heinous, cruel and depraved" death penalty aggravating factor was not unconstitutionally vague where the instruction on that factor was given with a limiting instruction extensively defining those three terms. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3592.

5 Cases that cite this headnote

21 **Sentencing and Punishment** Aggravating or mitigating circumstances
Sentencing and Punishment Endangering or creating risk to others
Sentencing and Punishment Escape or other obstruction of justice
Sentencing and Punishment Remorse and actual or potential rehabilitation
There was no unconstitutional vagueness in statutory "victim vulnerability" death penalty aggravating factor or in the non-statutory aggravating factors of lack of remorse, success in eluding capture by the FBI, and victim-impact. U.S.C.A. Const.Amend. 8; 18 U.S.C.A. § 3592.

5 Cases that cite this headnote

22 **Sentencing and Punishment** Dual use of evidence or aggravating factor
The "heinous, cruel and depraved" death penalty aggravating factor and the "vulnerability of the victim" factor are not duplicative of one another on theory they allow a jury to find two separate factors from identical facts, as one factor addresses the quality of defendant's violence while the other factor speaks to the frailty of the victim. 18 U.S.C.A. § 3592.

3 Cases that cite this headnote

23 **Sentencing and Punishment** Sufficiency
Evidence supported both the "heinous, cruel and depraved" death penalty aggravating factor and the "vulnerability of the victim" factor; the evidence of beating, which included the fact that defendants followed victim as he set off into a park for a walk, and then beat him severely enough to almost knock his eye out of its socket, was sufficiently heinous, cruel and depraved, whatever the age of the victim, and because the victim was 82 years old and less physically able to resist his attackers, the jury could additionally find the vulnerability of the victim to

be an aggravating factor separate from the heinous, cruel and depraved nature of the crime. 18 U.S.C.A. § 3592.

9 Cases that cite this headnote

24 **Criminal Law** Homicide, mayhem, and assault with intent to kill
Criminal Law Other particular offenses
Criminal Law Sufficiency
The district court did not abuse its discretion in allowing testimony in murder prosecution about plans to rob a liquor store, because this evidence was relevant to establish that defendant had access to a gun, when the gun used in the murder was never found, and was also relevant as similar in kind and close in time to the charged robbery and murder, and testimony on this matter was sufficient to prove by a preponderance of the evidence that there was a plan to rob a liquor store. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

25 **Criminal Law** Other Misconduct as Evidence of Offense Charged in General
Prior bad act evidence may be admitted if it is: (1) relevant to a material issue, (2) proved by a preponderance of the evidence, (3) greater in probative value than prejudicial effect, and (4) similar in kind and close in time to the offense charged. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

26 **Criminal Law** Discretion of court in general
Criminal Law Other offenses
A district court has broad discretion when deciding whether to admit or exclude prior bad act evidence, and Court of Appeals will disturb a district court's decision only if it finds that the evidence has no bearing on the case. Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

27 **Sentencing and Punishment** Harmless and reversible error
Any error in using as a death penalty aggravating factor prior criminal activity that did not result in a criminal conviction was harmless where the jury did not find that the prior activity was an aggravating factor.

28 **Constitutional Law** Evidence and witnesses
Sentencing and Punishment Victim impact
The volume and emotional impact of the victim impact evidence offered at the sentencing phase of murder trial, which resulted in death sentence, did not violate defendant's due process rights, where it was clearly admissible and defendant was also able to present extensive mitigating evidence through the testimony of his mother. U.S.C.A. Const.Amends. 5, 8.

29 **Sentencing and Punishment** Sentencing proceedings
The Eighth Amendment is not violated when the government uses victim impact evidence at the penalty phase because this evidence is relevant to the jury's decision about whether the death penalty should be imposed, and such evidence may be challenged on due process grounds only if evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair. U.S.C.A. Const.Amends. 5, 8.

1 Case that cites this headnote

30 **Constitutional Law** Prosecutors
Sentencing and Punishment Aggravating or mitigating circumstances
The prosecutor's authority under the Federal Death Penalty Act (FDPA) to define non-statutory aggravating factors is a constitutional delegation of Congress' legislative power. 18 U.S.C.A. § 3591 et seq.

13 Cases that cite this headnote

31 Criminal Law Selection and impaneling
Jury Discretion of court
The district court has wide latitude over the conduct of voir dire and Court of Appeals reviews for an abuse of discretion only.

32 Jury Punishment prescribed for offense
Jurors who had indicated on the previously filled-out juror questionnaire that they did not believe a sentence of life without parole was a sufficient penalty for an intentional killing were not subject to challenge for cause where they were individually questioned by defense counsel and by the trial judge, and during questioning, at some point, each one said that he or she could fairly consider a sentence other than death for an intentional killing, and in any event the Sixth Amendment guarantee to a fair trial was not violated because those jurors did not end up sitting on the jury. U.S.C.A. Const.Amend. 6.

33 Jury Punishment prescribed for offense
A defendant subject to the death penalty may properly challenge for cause any juror who will automatically vote for the death penalty in every case and who will not consider aggravating and mitigating circumstances as required by the instructions.

3 Cases that cite this headnote

34 Jury Peremptory Challenges
A defendant's right to exercise peremptory challenges is not denied or impaired when the defendant chooses to remove jurors who arguably should have been removed for cause.

2 Cases that cite this headnote

35 Jury Punishment prescribed for offense
The district court did not abuse its discretion by removing for cause in death penalty case jurors who indicated they could not fairly consider imposing the death penalty as a possible sentence, regardless of the instructions from the court.

3 Cases that cite this headnote

36 **Sentencing and Punishment** Determinations based on multiple factors
Death sentence for aiding and abetting murder was not imposed under the influence of passion, prejudice, or any other arbitrary factor, where the jury found, beyond a reasonable doubt, the existence of several statutory and non-statutory aggravating factors, and also considered many mitigating factors. 18 U.S.C.A. § 3595(c)(1).

4 Cases that cite this headnote

Attorneys and Law Firms

*994 Margaret P. Griffey, U.S. Dept. of Justice, Washington, DC, P.K. Holmes III, U.S. Atty., Western AR, argued (Steven N. Snyder, William Cromwell, Asst. U.S. Attys., Western AR, on the brief), for appellee.

Robert L. McGlasson, Decatur, GA, argued (Steven D. Oliver, Hot Springs, AR, on the brief), for appellant.

BEFORE: BEAM, HEANEY and HANSEN, Circuit Judges.

Opinion

BEAM, Circuit Judge.

In this direct criminal appeal, Jeffrey William Paul seeks reversal of his conviction for aiding and abetting murder under 18 U.S.C. §§ 2 and 1111(a); and for the knowing use of a firearm

during a crime of violence under 18 U.S.C. § 924. He also appeals his death sentence under the Federal Death Penalty Act (FDPA), codified at 18 U.S.C. §§ 3591 *et seq.* We affirm.

I. BACKGROUND

Paul was convicted of aiding and abetting the murder of Sherman Williams on federal land, Hot Springs National Park. The evidence adduced at Paul's trial established that on June 22, 1995, Paul and an acquaintance, Trinity Ingle, followed Williams, an eighty-two-year-old man, from downtown Hot Springs, Arkansas, to a walking trail in Hot Springs National Park. Paul and Ingle robbed and beat Williams and then shot him in the head and shoulder. They attempted to hide the body by pulling it about thirty feet off the trail. Williams' body was found on June 26, 1995, by a hiker, who found it under logs and rocks, with hands and ankles tightly bound by duct tape. A piece of duct tape around Williams' neck was presumed to have once been around Williams' mouth. The Deputy Coroner testified that Williams' head was nearly detached from his spine and there was a large open wound at the right temple above the jaw. Further, a State of Arkansas medical examiner testified that the body had gunshot wounds to the head and chest. The medical examiner testified that Williams died as a result of the wound to the head.

FBI agents testified that Williams' wallet was later found in the park near his body. A few days later, Williams' vehicle was found 150 feet down in a pit in a remote area of the park. Trinity Ingle's latent fingerprint was recovered from inside of the vehicle.

Several of Paul's acquaintances testified that Paul confessed his involvement in the crime to them. Each of these witnesses gave similar accounts of what Paul had told them about the offense. Chris Rogers testified that Paul said that he and Ingle murdered an old man after following him into the park because he looked like an "easy target" to rob. Rogers testified that Paul stated when Williams resisted the robbery, they began beating him, including kicking him in the head hard enough to knock his eye out of its socket. Paul also told Rogers that because Williams was not *995 yet dead following the beating, he shot him, and then Ingle shot him. Paul and Ingle then dragged the body into the woods and covered it up, according to what Paul told Rogers.

Rogers testimony was corroborated by several other witnesses. Christine Lapaglia testified that Paul told her he had killed someone when he kicked him and broke his neck. Cindy Wallace testified that Paul told her he had a recurring dream about following an old man, taking his money, and beating him so severely his eye came out of the socket. Paul told Wallace the old man begged for his life, but fearing that he would talk, Paul shot him in the head. Dan Coughlin testified Paul said that he and another Arkansas man had robbed an old man for his vehicle, then shot and killed him. Paul's brother also testified that he saw Paul and Ingle driving a car which matched the description of Williams' car.

Paul left Arkansas shortly after the murder and evaded authorities for a little more than one year. He was arrested in August 1996, and confessed his involvement in the crime to FBI Agent John La Voie. Paul's statement to La Voie was consistent with the accounts given by Paul's acquaintances, except Paul told La Voie that only Ingle had shot Williams.

The jury found Paul guilty of both counts, and the same jury then proceeded to the penalty phase of the trial. At the penalty phase, the victim's two daughters and a co-worker gave victim-impact statements. Paul's mother testified about various aspects of Paul's unsettled childhood. Paul also offered a tape-recorded jailhouse conversation in which Ingle implicated two people named "Bob" and "Andy" [1] in Williams' murder.

Following penalty-phase deliberations, the jury unanimously found that Paul was eighteen years or older at the time he committed the offense and that he intentionally aided and abetted in the killing. The jury also unanimously found several statutory and non-statutory aggravating factors. [2]

No jurors found any statutory mitigating factors. Some members of the jury found several non-statutory mitigating factors, which mostly related to Paul's upbringing and family life, and also took into account the fact that Paul was youthful at the time of the offense and had witnessed violent acts in the past. No jurors, however, found that Paul's participation in the offense was minor, that his prior history of criminal conduct was insignificant, that he committed the offense while experiencing emotional disturbance, that Ingle was equally culpable and did not receive the death penalty, or that Paul reversed parental roles with his mother. After balancing these aggravating and mitigating factors, the jury unanimously decided to impose a death sentence.

In this appeal, Paul raises several grounds for relief. Pursuant to the FDPA, this court "shall address all substantive and procedural issues raised on the appeal of a sentence of death." *See* 18 U.S.C. § 3595(c)(1). Further, the statute mandates that "[t]he court of appeals shall ***996** state in writing the reasons for its disposition of an appeal of a sentence of death under this section." *See id.* at § 3595(c)(3). Thus, we address each of Paul's contentions in some detail.

II. DISCUSSION

A. Jury's Finding on Intent

Paul argues that the jury was instructed improperly because it was not required to make the "requisite finding of intent" at the penalty phase of the trial. For Paul to be death penalty eligible under the FDPA, the government had to prove beyond a reasonable doubt that Paul either:

> (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act....

18 U.S.C. § 3591(a)(2).

At the penalty phase, the jury was instructed:

> Before you may consider the imposition of the death penalty, you must first unanimously find beyond a reasonable doubt that the defendant intentionally aided and abetted in the killing of Sherman Williams.

Paul asserts this instruction authorizes a death sentence on a finding of intent to aid and abet, and not intent to cause death. He argues the instruction does not satisfy any of the four intent requirements of the FDPA. In its brief, the government counters that Paul did not object to this instruction in the punishment phase on this basis, and thus plain error analysis applies. However, at oral argument, counsel for the government conceded that failure to utilize the language of the statute was plain error, but argued that it did not affect Paul's substantial rights. *See United States v. Olano*, 507 U.S. 725, 735, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (three prongs to plain error analysis: there must be error, which is plain, *and* it must affect substantial rights).

The government argues that, considering the totality of the instructions given to the jury, together with the jury's actual finding in the guilt phase that Paul aided and abetted in the killing, the jury had to have found the requisite conduct and mental state necessary to satisfy any statutory or constitutional intent requirement. Specifically, the government argues that the definition of aiding and abetting in the guilt-phase instructions encompasses the language required by at least one of the four statutory factors in 18 U.S.C. § 3591(a)(2). The guilt-phase instructions were included with the penalty-phase instructions in the notebooks the jurors took into the jury room.[3] According to the government, when the instructions from each phase of the trial are read together, it is obvious that the jury was given sufficient instructions on the issue of intent to ***997** fulfill the requirements of section 3591(a)(2). Therefore, because the jury actually found in the guilt phase of the trial that Paul aided and abetted the killing, the government contends that Paul's substantial rights were not affected by any instructional error.

1 2 A conviction will not be reversed due to allegedly erroneous jury instructions unless, viewed in their entirety, the instructions fail to correctly state the law. *See United States v. Webster*, 162 F.3d 308, 322 (5th Cir.1998). Further, jury instructions are evaluated in the context of the entire charge and a jury is presumed to follow all instructions. *See Jones v. United States*, 527 U.S. 373, 391 & 394, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999).

3 4 The best way to comply with section 3591(a)(2) is to actually use the language of the statute in the jury instruction. Because the language of the statute was not used here, we must review the totality of the jury instructions to decide whether the jury made a finding of intent adequate to satisfy the requirements of section 3591(a)(2). In the guilt phase, the

jurors were instructed that to aid and abet in the commission of a crime, the person must know the crime was being committed or going to be committed, and that the person knowingly acted to cause, encourage, or aid in the commission of the crime. The instructions further stated that merely being present is not enough, instead, the person must know the crime is occurring.

We hold that the jury's penalty-phase findings together with its guilt-phase conclusions are sufficient to satisfy the requirements of the FDPA. The jury found that Paul intentionally committed an act (aided and abetted), which he knew would kill Sherman Williams. This finding clearly satisfies section 3591(a)(2) because it closely tracks the language of subsection (C) of section 3591(a)(2) requiring that Paul "intentionally participated in an act, contemplating that the life of [Sherman Williams] would be taken." 18 U.S.C. § 3591(a)(2)(C).

5 If anything, to *know* that a life will be taken requires greater awareness than merely *contemplating* that a life will be taken. The dictionary definition of "know" which most closely corresponds to this situation is "to perceive or understand as fact or truth; to apprehend clearly and with certainty." WEBSTER'S UNABRIDGED DICTIONARY 1064 (Random House 2d ed.1997). The definition of "contemplate" most analogous to this situation is "to have in view as a future event." *Id.* at 438.

6 7 Under the aiding and abetting instruction at the guilt phase, the jury made a finding that Paul knew with certainty that his acts would take the life of Sherman Williams. The jury was then again instructed at the penalty phase that it must unanimously find that Paul intentionally aided and abetted in the killing of Sherman Williams. When the two instructions are viewed together, it is manifest that the jury was satisfactorily instructed on the intent requirements of the FDPA. Accordingly, we hold that Paul's substantial rights were not affected by the district court's failure to use the express language of section 3591(a)(2).[4] *See, e.g.,* ***998** *Jones*, 527 U.S. at 394–95, 119 S.Ct. 2090 (assuming the jury was erroneously instructed that the defendant would receive less than a life sentence if the jury could not unanimously agree on either a sentence of death or life in prison, this arguably "plain" error did not affect the defendant's substantial rights).

8 It is also clear that Williams died as a direct result of Paul's acts. The medical examiner testified the cause of Williams' death was a gunshot wound to the head. The evidence showed, as will be discussed in greater detail in the next section, that either Paul or Ingle, or both men shot Williams. Either way, the evidence established, and the jury agreed, Paul aided and abetted in the shooting of Williams. Because the gunshot wound was the cause of Williams' death and the jury found that Paul aided and abetted in that act, the requirement in section 3591(a)(2)(C) that "the victim died as a direct result of the act" is satisfied by the jury's findings.

B. Inconsistent Prosecutorial Arguments

9 Paul asserts that the prosecutor argued at both Paul and Ingle's trials that the defendant on trial pulled the trigger, and argues the prosecution cannot take such inconsistent actions. Again, the government points out that there was no objection to this argument at trial and that review is for plain error. This court has recently issued an opinion addressing a similar argument. In *Smith v. Groose*, 205 F.3d 1045 (8th Cir.2000), we granted habeas relief to a petitioner because the prosecutor had relied upon factually inconsistent theories to obtain murder convictions in separate trials for the same murder. *See id.* at 1052–53. In *Smith*, we held that Smith's trial was fundamentally unfair and he was deprived of due process because the state relied upon factually inconsistent and irreconcilable evidence at the two trials, and because Smith could not have been convicted of felony murder under both theories. *See id.*

Here, the theory that either Paul or Ingle, or both, shot Williams, was not factually irreconcilable and was supported by the evidence. Paul stated to both Chris Rogers and Cindy Wallace that he shot Williams. In addition, Paul told Rogers that Ingle also shot Williams after Paul did. The defense admitted the evidence was in conflict during closing argument at the guilt phase, stating: "I think throughout the testimony we heard three things; that Jeffrey shot Mr. Williams, that Trinity shot Mr. Williams, that Jeff and Trinity shot Mr. Williams. It is never a consistent story as to who shot Mr. Williams." More importantly, Paul could have been convicted of aiding and abetting in the murder of Sherman Williams under either theory. *See United States v. Clark*, 980 F.2d 1143, 1146 (8th Cir.1992) ("To convict under the aiding and abetting statute, 18 U.S.C. § 2, the government need only prove that [each] defendant associated himself with the unlawful venture, participated in it as

something he wished to bring about, and by his action sought to make the activity succeed.").

10 Finally, Paul only argues that the prosecutor made inconsistent *arguments* at the two trials, but cannot point to the use of evidence at the different trials which was factually inconsistent and irreconcilable. At the guilt-phase closing argument in Paul's trial, the prosecutor also conceded there were three possible scenarios with regard to the shooting.[5] When it cannot be determined which of two defendants' guns caused a fatal wound and either defendant could have been convicted under either theory, the prosecution's argument at both trials that the defendant on trial pulled the trigger is not factually ***999** inconsistent. *See Nichols v. Scott.* 69 F.3d 1255, 1268–69 (5th Cir.1995) (regarding the analogous felony murder situation). Thus, because there was evidence that supported both theories, and since Paul could have been convicted of aiding and abetting under either theory, we find no error.

C. Sentencing Phase Instructions for Mitigating Factors

11 Paul next asserts that a sentencing-phase instruction allowed only those jurors who found the existence of a mitigating factor to consider that factor, and that jurors who did not find that factor to be mitigating were precluded from considering it. The instruction states:

> All of you must weigh any aggravating factors that you unanimously found to exist, whether statutory or non-statutory, and each of you must weigh any mitigating factors that you individually find to exist.

Paul argues this language precluded Juror A from considering a mitigating factor found by Juror B, if Juror A had not also found that factor mitigating. Again, Paul did not object to the above instruction and thus our review is for plain error. At most, we find the instruction was ambiguous because it did not go on to state that Juror A *may* consider a mitigating factor found by Juror B even if not found by Juror A. *See Jones,* 527 U.S. at 377, 119 S.Ct. 2090 (jury may consider a mitigating factor in its weighing process so long as one juror accepts the factor by a preponderance of the evidence). However, viewed in the context of all the instructions, we find the challenged instruction does not violate either the Constitution or the FDPA. *See id.* at 391, 119 S.Ct. 2090 (instructions that may be ambiguous in the abstract cured when read in conjunction with other instructions).

The jury was instructed at the penalty phase that regardless of its findings on aggravating and mitigating factors, it was "never required to recommend a death sentence." Thus, even if Juror A felt somehow precluded from considering a mitigating factor found by Juror B, Juror A was also instructed that regardless of the outcome of the aggravating and mitigating balancing, there was never a requirement to recommend a death sentence. Again, because the jury is presumed to have followed all instructions, we find no error.

D. Co-defendant's Life Sentence as Mitigating

12 13 14 Paul next argues that his rights under the FDPA and the Constitution were violated because the jury failed to unanimously find and consider as a relevant mitigating factor that Ingle only received a life sentence.[6] He argues that under *Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (requiring sentencer *be able* to give independent mitigating weight to aspects of defendant's circumstances), and *Eddings v. Oklahoma,* 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (relevant mitigating evidence must not be *excluded* from consideration), no rational trier of fact could have concluded that Paul was more culpable than Ingle, who received a life sentence. Neither the FDPA nor *Lockett* and *Eddings* require a capital jury to give mitigating effect or weight to any particular evidence. *See ***1000** Boyde v. California,* 494 U.S. 370, 377, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (holding that the Constitution requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by the defendant). There is only a constitutional violation if there exists a reasonable likelihood that the jurors believed themselves precluded from considering relevant mitigating evidence. *See id.* at 386, 110 S.Ct. 1190. Here, the jury was certainly allowed to consider Ingle's life sentence, because this evidence was introduced at the penalty phase of the trial. Further we find support for the finding that Paul was more culpable than Ingle, because there was evidence that Paul, and not Ingle, shot Williams. Although there was also evidence that Ingle shot Williams, the jury was not required to credit this evidence. Accordingly, we find no error.

E. Paul's Youth as Mitigating Factor

15 Paul argues that the failure of six jury members to find his age as a mitigating factor was error because he was only eighteen when he committed the offense. While we again express doubt about the propriety of reviewing the jury's findings in this regard, we find no

constitutional violation. The jury was certainly not precluded from considering Paul's youthful age as a mitigating factor. *See Boyde,* 494 U.S. at 386, 110 S.Ct. 1190. During the penalty phase, Paul's birth certificate was offered into evidence. It established that Paul was only eighteen at the time of the murder. The FDPA prohibits administering the death penalty to a defendant younger than eighteen at the time the offense was committed. *See* 18 U.S.C. § 3591(a)(2). Thus, the statute has a built-in guarantee that a minor will not be given the death penalty. However, Paul has not cited authority for the proposition that a jury is somehow *required* to give mitigating effect to any factor, let alone this one. Accordingly, we find no constitutional violation.

F. Aggravating Factors Duplicative of the Offense

1. Intent

Paul argues the district court erroneously instructed the jury that Paul's intent to kill Williams was a statutory aggravator to be weighed in the selection phase of the jury's sentencing determination.[7] Paul also argues that as an aggravating factor, the intent finding does not serve to narrow the class of people eligible for the death penalty.

16 The government concedes that this instruction erroneously labeled "intent" as an aggravating factor, but argues that the error was not repeated in the special verdict form wherein the mental state inquiry was separate from the aggravating and mitigating factors inquiry. After reviewing the special verdict form, we agree that the jury was not led to believe that intent was to be treated by the jury as a statutory aggravator. The special verdict form starts with roman numeral one, which is the jury's required finding that Paul was eighteen, and then numeral two, which contains the "REQUISITE MENTAL STATE" intent finding. Roman numeral three is labeled "STATUTORY AGGRAVATING FACTORS" and contains the three statutory aggravating factors used in this case. This clear separation of the mental state from the aggravating factors did not lead the jury to believe that "intent" was a statutory aggravating factor. We therefore need not address Paul's argument that "intent" as a statutory aggravator did not adequately narrow the class of people eligible for the death penalty.

***1001** **2. Pecuniary Gain**

17 Paul also argues that because "pecuniary gain" was an element of the offense of robbery, and also was used as a statutory aggravating factor, the class of people eligible for the death penalty was not sufficiently narrowed. To withstand constitutional scrutiny, an aggravating factor which makes the defendant eligible for the death penalty must not apply to every defendant convicted of a murder, but instead only to a subclass of murder defendants, and it must not be unconstitutionally vague. *See Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994).

18 There is a difference between the eligibility determination and the selection determination in death penalty cases. *See Jones,* 527 U.S. at 377, 119 S.Ct. 2090. During the eligibility phase, the jury makes the requisite age and intent findings, and the government must prove "beyond a reasonable doubt *at least one* of the statutory aggravating factors set forth at § 3592." *Id.* (emphasis added). If the government meets this burden, the jury then moves on to the selection decision, and must "consider all of the aggravating and mitigating factors and determine whether the former outweigh the latter." *Id.*

19 Pecuniary gain was used as a statutory aggravating factor at the eligibility stage, in addition to being an element of the underlying offense. However, the jury found two other aggravators beyond a reasonable doubt, either of which would have made Paul death eligible.[8] Thus, any error in the use of "pecuniary gain" as a statutory aggravator was harmless.

G. Improper Aggravating Factors

20 21 Paul next argues that the statutory "heinous, cruel or depraved" and the "victim vulnerability" factors are vague, and that several non-statutory factors are also vague.[9] The "heinous, cruel and depraved" instruction was given with a limiting instruction extensively defining those three terms. With such an extensive limiting instruction, we find that this statutory aggravating factor is constitutional. *See United States v. Hall,* 152 F.3d 381, 414 (5th Cir.1998), *abrogated on other grounds by United States v. Martinez-Salazar,* —— U.S. ——, ——, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000). In fact, the instruction given by the district court in this regard was nearly identical to the instruction given in *Hall.* We have considered Paul's remaining arguments regarding aggravating factors and find no unconstitutional vagueness.

22 23 Paul also alleges the "heinous, cruel and depraved" factor and the "vulnerability of the victim" factor are duplicative of one another because they allow a jury to find two separate factors from identical facts. Each of these factors is directed to entirely distinct aspects or components of the offense, i.e. one factor addresses the quality of Paul's violence while the other factor speaks to the frailty of the victim, and therefore, we find the factors are not duplicative. We find that the evidence of the beating, which includes the fact that Paul and Ingle followed Williams as he set off into the park for a walk, and then beat him severely enough to almost knock his eye out of its socket, is sufficiently heinous, cruel and depraved, whatever the age of the victim. Because Williams was eighty-two years old and less physically able to resist his attackers, the jury could additionally find the vulnerability of the victim to be an aggravating factor *1002 separate from the heinous, cruel and depraved nature of the crime. Accordingly, we find no error.

H. Unadjudicated Offense Evidence

24 Paul next argues that the prosecution relied upon unadjudicated bad act evidence at trial and at sentencing, in violation of Paul's statutory and constitutional rights. This evidence involves statements by Paul about a possible liquor store robbery. Chris Rogers testified that Paul had given him a gun and talked about using it to rob a liquor store and kill the owners. The government did not produce any other evidence concerning this alleged plan. Paul argues the evidence was inadmissible under Rule 404(b).

25 26 Rule 404(b) of the Federal Rules of Evidence prohibits the admission of evidence of the defendant's prior bad acts if the evidence is offered to show that the accused acted in conformity with prior bad acts, but does permit the admission of bad acts if the evidence is offered for a purpose "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404 (b). We employ a four-factor test for assessing the admissibility of Rule 404(b) evidence. Prior bad act evidence may be admitted if it is (1) relevant to a material issue, (2) proved by a preponderance of the evidence, (3) greater in probative value than prejudicial effect, and (4) similar in kind and close in time to the offense charged. *See United States v. Molina*, 172 F.3d 1048, 1054 (8th Cir.1999). Further, "[a] district court has broad discretion when deciding whether to admit or exclude prior bad act evidence, and this court will disturb a district court's decision only if we find that the evidence has no bearing on the case." *Id.*

We find the district court did not abuse its discretion in allowing testimony about the plans to rob the liquor store because this evidence was relevant to establish that Paul had access to a gun, as the gun used in the murder was never found. This evidence was also relevant to show Paul's plan to perform a robbery only two weeks before the robbery and murder of Williams, and thus was similar in kind and close in time to the robbery and murder of Williams. Further, Rogers' testimony on this matter was sufficient to prove by a preponderance of the evidence there was a plan to rob a liquor store.

27 Paul also argues this evidence was improperly used as an aggravating factor, because the FDPA requires that an aggravator related to prior criminal activity be based upon a criminal conviction. However, we note that the jury did not find that the attempted liquor store robbery was an aggravating factor. Therefore, any error in using this evidence as an aggravating factor was harmless.

I. Emotional Victim Impact Evidence

28 29 Paul argues that the volume and emotional impact of the victim impact evidence offered at the sentencing phase violated his constitutional rights. The Eighth Amendment is not violated when the government uses victim impact evidence at the penalty phase because this evidence is relevant to the jury's decision about whether the death penalty should be imposed. *See Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Such evidence may be challenged on due process grounds only if "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825, 111 S.Ct. 2597. We find the evidence in this case was clearly admissible under *Payne*, 501 U.S. at 827, 111 S.Ct. 2597, and note that Paul was also able to present extensive mitigating evidence through the testimony of his mother. Therefore, we find no constitutional error.

J. Guilt Phase Evidence about Victim's Habits and Family

Paul next argues that the government presented unnecessary and prejudicial testimony *1003 during the guilt phase of the trial regarding the victim's personal life. Paul argues this evidence should have been excluded under Rule 403 of the Federal Rules of Evidence because its only purpose was to unfairly create sympathy for the elderly victim. Rule 403 provides "Although relevant, evidence may be excluded if its probative value is substantially

outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We have reviewed the record and find the district court did not commit plain error by admitting such evidence.

K. FDPA's Authorization for Non-statutory Aggravating Factors

30 Paul argues that the FDPA allows the government to arbitrarily and creatively choose as many non-statutory aggravating factors as it wishes, in violation of the separation of powers doctrine. Paul argues the statute improperly delegates this inherently legislative authority to the executive branch. The only other circuit to consider this argument rejected it. *See United States v. Jones,* 132 F.3d 232, 239–40 (5th Cir.1998), *affirmed,* 527 U.S. 373, 119 S.Ct. 2090, 144 L.Ed.2d 370 (1999). The Fifth Circuit reasoned that the prosecution was adequately limited in its power to define non-statutory aggravators by the notice provisions in the FDPA, the Supreme Court death penalty jurisprudence, the district court functioning as a gatekeeper against impermissibly prejudicial information, and the FDPA's requirement that at least one statutory aggravating factor be found by the jury before it moves on to non-statutory factors. *See id.* Thus, the prosecution is sufficiently guided by "intelligible principles" to constitutionally exercise the delegated authority to define non-statutory aggravating factors. *See id.* at 240. We agree with the Fifth Circuit that the prosecutor's authority to define non-statutory aggravating factors is a constitutional delegation of Congress' legislative power.

L. Prosecutor's Closing Argument

Paul asserts error in several respects about prosecutorial closing argument at both phases of trial. Again, Paul did not object during arguments at trial, and thus the prosecutor's arguments are subject to review for plain error. We have reviewed the record and find no error in the closing arguments and certainly no error which affected Paul's substantial rights.

M. Voir Dire Errors

31 Paul argues the district court should have allowed the defense individual and sequestered voir dire. He also argues the district court impermissibly shortened voir dire and made the process prejudicial to Paul and impaired his ability to exercise peremptory challenges. Paul made no objection during voir dire and we review for plain error. Voir dire in this case took approximately two days, and several jurors were questioned individually while sequestered from the rest of the venire. The district court has wide latitude over the conduction of voir dire and we review for an abuse of discretion only. *See United States v. Granados,* 117 F.3d 1089, 1092 (8th Cir.1997). We find the district court did not abuse its discretion and conducted voir dire in a way that protected Paul's Sixth Amendment right to a fair trial. *See id.*

32 33 34 Paul also argues the district court improperly ruled on several challenges for cause, alleging that three jurors who were too pro-capital punishment were not dismissed, and that three jurors with anti-capital punishment views should not have been dismissed. With regard to the three jurors allegedly favoring capital punishment, the record shows that all three had indicated on the previously filled-out juror questionnaire that they did not believe a sentence of life without parole was a sufficient penalty for an intentional killing. However, all three of these jurors ***1004** were individually questioned by defense counsel and by the trial judge, and during questioning, at some point, each one said that he or she could fairly consider a sentence other than death for an intentional killing. A defendant subject to the death penalty may properly challenge for cause any juror "who will automatically vote for the death penalty in every case" and who will not consider aggravating and mitigating circumstances as required by the instructions. *Morgan v. Illinois,* 504 U.S. 719, 729, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992). That is not the case here. Each juror expressed a good-faith ability to consider a sentence of life without parole if Paul were convicted of the underlying charges. Furthermore, none of the three jurors actually sat on the jury. A defendant's right to exercise peremptory challenges is not denied or impaired when the defendant chooses to remove jurors who arguably should have been removed for cause. *See United States v. Martinez–Salazar,* —— U.S. ——, ——, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000). Furthermore, the Sixth Amendment guarantee to a fair trial is not violated in this situation because those jurors did not end up sitting on the jury. *See id.* at 781–82.

35 Paul also asserts that three jurors should not have been removed for cause because of their views in opposition to the death penalty. All three jurors indicated an opposition to the death penalty in open court in response to initial questioning by the trial court. Upon reading the transcript of the first juror's individual questioning by defense counsel and by the

trial court, we find that this juror could not set aside her views against capital punishment. She stated unequivocally several times that she could not impose the death penalty. Further, Paul voiced no objection when the court dismissed her for cause.

The second juror, in response to extensive questioning by both attorneys and the trial court, once stated that she could consider, with difficulty, the death penalty, but at the close of her individual questioning, she stated unequivocally that she could not impose the death penalty. This time, defense counsel even agreed this juror be dismissed for cause, stating to the judge, "[y]ou don't have any choice."

The third juror was also not willing to set aside her views against capital punishment and follow the law. The closest this juror came to saying that she could even consider the death penalty was to say that if someone were to kill one of her own children, she "may want to pull the switch" herself. However, this juror obviously was not sitting on a jury for the trial of her child's killer. She made it clear that in reality, she could not fairly consider the death penalty, despite instructions from the court. Again, defense counsel did not object when this juror was dismissed for cause.

Each of these three jurors indicated they could not fairly consider imposing the death penalty as a possible sentence, regardless of the instructions from the court. As such, the district court did not abuse its discretion by removing them for cause. *See Morgan*, 504 U.S. at 729, 112 S.Ct. 2222.

N. Death Sentence Result of Passion and Arbitrariness

36 Paul's final argument is that the cumulative effect of the preceding alleged errors demonstrate that the verdict and death sentence reflect clear arbitrariness. Because we have dismissed all of Paul's allegations of error, we need not consider their cumulative effect. However, under the FDPA, we are *required* to "consider whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." *See* 18 U.S.C. § 3595(c)(1). We find Paul's sentence in this case was not imposed under such arbitrary conditions. The jury found, beyond a reasonable doubt, the existence of several statutory and non-statutory aggravating factors, and also considered many mitigating factors. This is exactly the process the jury ***1005** was to complete. In light of the substantial evidence supporting the aggravating factors found by the jury, we cannot say that the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor.

III. CONCLUSION

Accordingly, as we have reviewed [16] and rejected all substantive and procedural issues raised in Paul's appeal, we affirm the judgment and sentence of the district court.

HEANEY, Circuit Judge, dissenting.

I believe the jury's guilt-phase and penalty-phase findings are insufficient to overcome the district court's plainly erroneous instruction and satisfy the requirements of the federal death penalty statute. Accordingly, I respectfully dissent.

The district court's guilt-phase instructions included the following instruction on aiding and abetting:

> A person may be found guilty of any crime even if he only aided and abetted the commission of that crime. In order to have aided and abetted the commission of a crime, a person must before or at the time the crime was committed,
>
> One: Have known the crime was being committed or was going to be committed, and
>
> Two: Have knowingly *acted in some way for the purpose of causing, encouraging, or aiding* in the commission of the crime.
>
> For you to find the defendant guilty of any crime by reason of aiding and abetting, the Government must prove beyond a reasonable doubt that all of the essential elements of the crime were committed by some person or persons and that the defendant aided and abetted the commission of the crime.
>
> You should understand that merely being present at the scene of the event or merely acting in the same way as others or merely associating with others does not prove that a person has become an aider or abetter. A person who has no knowledge that a crime is being committed or about to be committed, but who happens to act in a way which advances some offense, does not merely become and aider and abetter.

(Tr. Vol. IV at 848–49 (emphasis added).)

The majority holds that the above definition of aiding and abetting, coupled with the jury's penalty-phase finding that Paul "intentionally aided and abetted in the killing of Sherman Williams," is sufficient to meet the standard set forth in § 3591(a)(2)(C). According to the majority, "the jury found that Paul intentionally committed an act (aided and abetted), which he knew would kill Sherman Williams." *Ante*, at 996. The majority's rendition of the jury's findings, however, is nowhere to be found in the instructions the jury received.

Stated precisely, using the language of the jury instruction itself, the jury found that Paul "knowingly acted in some way for the purpose of causing, encouraging, or aiding in the commission of the crime." It ***1006** is this finding that must be squared against § 3591 if Paul's death sentence is to be upheld.

As the majority notes, § 3591(a)(2)(C) requires in part that the jury find Paul "intentionally participated in an act, contemplating that the life of a person would be taken." In addition to this mens rea standard, however, the statute requires a finding that "the victim died as a direct result of the [defendant's] act." The additional language is critical, because it requires a close causal nexus between the defendant's act and the victim's death. The majority apparently considers this portion of § 3591(a)(2)(C) to be superfluous. This nexus requirement was not addressed—explicitly or implicitly—by the court's jury instructions.

In particular, the nexus requirement is not satisfied by the guilt-phase instruction that the jury consider whether Paul "knowingly acted in some way for the purpose of causing, encouraging, or aiding" in Williams' murder. This is because aiding and abetting, as defined in the guilt-phase instruction encompasses several different degrees of connection between the defendant's acts and the victim's death. One who has caused, encouraged, or aided in a murder is not necessarily a direct cause of the victim's death.

Where a life hangs in the balance, this court should not permit a district court to improvise its own standard for imposing the death penalty. The ultimate punishment requires more than an instruction that "closely tracks" the standard set forth by Congress. Rather, that the jury must grapple with the propriety of the death penalty for Paul according to the precise criteria set forth in § 3591. Because that has not yet happened in this case, Paul is entitled to be resentenced. I respectfully dissent.

All Citations

217 F.3d 989

Footnotes

* Chief Judge Roger L. Wollman, Judge Theodore McMillian, Judge Richard S. Arnold, and Judge Diana Murphy would grant the petition.

1 Although it is not completely clear from the record, it would seem that both sides think that "Bob" and "Andy" were code names for either Jeffrey or Trinity or both.

2 The jury found the following statutory aggravating factors: (1) the offenses were committed in an especially heinous, cruel, or depraved manner involving torture or serious physical abuse; (2) the offenses were committed in the expectation of receiving something of pecuniary value; and (3) that the victim was particularly vulnerable due to old age. The jury also specified the following non-statutory aggravating factors: (1) the defendant would be a continuing threat to society; (2) the defendant had attempted to commit another act of violence prior to this; (3) the defendant successfully eluded capture; (4) the defendant exhibited a lack of remorse; (5) the victim was killed to conceal evidence of the robbery; (6) the victim had personal characteristics as a human being; and (7) the family of the victim suffered injury and loss as a result of the victim's death.

3 Prior to penalty-phase deliberations, the jury was instructed:

> I will call to your mind the fact that we have this jury instruction booklet which you utilized in the first phase. There have been added to it certain things. Y'all notice at the front, the index has changed. The index now shows not only the 26 instructions that you had at the outset, but also

> Number 27 which is the Court's preliminary instruction that I gave you prior to this Phase 2. And there are also additional instructions, instruction numbered 29 through 44 inclusive, which will be your instructions in this Phase 2. I have put those instructions in the booklet and tabbed it with a yellow tab that says Phase 2, if that can be of any assistance to you in helping you locate where they begin.

4 Paul also argues that the instructions did not comport with the constitutional requirements of *Enmund v. Florida,* 458 U.S. 782, 798–99, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which requires specific intent to kill for imposition of the death penalty in a felony murder case. However, the constitutional intent requirement is satisfied when the defendant is a major participant in either the killing, or an underlying felony in the case of felony murder, and is recklessly indifferent to human life. *See Tison v. Arizona.* 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987); *Roberts v. Bowersox,* 137 F.3d 1062, 1067 (8th Cir.1998). Here, the evidence shows that Paul was a major participant in the killing of Sherman Williams and was recklessly indifferent to human life. Furthermore, the intent element can be satisfied in a later stage of trial, such as the sentencing phase, as here. *See Hopkins v. Reeves,* 524 U.S. 88, 100, 118 S.Ct. 1895, 141 L.Ed.2d 76 (1998). Finally, this is an aiding and abetting case, not a felony murder case, and therefore distinguishable from *Enmund.* Thus, the constitutional claim is without merit.

5 The prosecutor stated, "Then, depending on which version you believe, Jeff Paul either shot first, they both shot him, or Trint Ingle shot him."

6 We question whether we are able to review the jury's findings regarding the number of jurors who found a particular mitigator because the FDPA does not require the jury to return special findings showing which mitigating factors the jury found to exist or the number of jurors who found a particular mitigator. *See United States v. Hall,* 152 F.3d 381, 413 (5th Cir.1998), *abrogated on other grounds by United States v. Martinez–Salazar.* —— U.S. ——, ——, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000) (which held, contrary to *Hall,* that Constitution not violated when defendant required to use peremptory challenge to remove jurors who should have been removed for cause if the jurors do not eventually sit on the jury). Because this argument is easily disposed of on its merits, we will address it.

7 The instruction states:

> The process of weighing aggravating and mitigating factors against each other or weighing aggravating factors alone, if there are no mitigating factors, in order to determine the proper punishment is not a mechanical process.... In this regard, you may note that the statutory aggravating factor concerning the defendant's intent duplicates the intent element of the offense.

8 The special verdict form instructed the jury that if it answered "YES" to *one* or more of the statutory aggravating factors, it could continue its deliberations in accordance with the instructions. If it answered "NO" to all three, however, deliberations were to cease.

9 Specifically, Paul argues that lack of remorse, success in eluding capture by the FBI, and the victim-impact factor are vague.

10 Pending with our consideration of the merits of the case is a Motion to Correct the Record on Appeal, filed by appellant on April 23, 1999. Appellant has argued that some transcripts of the numerous pretrial proceedings in this case were not provided to him on appeal, and that he could not effectively brief his case without these volumes. The United States Attorney responded that some of the missing proceedings were ex parte communications between appellant's trial counsel and the trial judge. Further, any other missing proceedings, according to the United States Attorney, were held in front of the magistrate judge, who has a different court reporter than the district court. We note that our docket sheet reflects that five more volumes of transcripts were filed with this court following this motion. We further note that our consideration of the issues raised in this appeal was not impeded by an incomplete record.

Because the record has been supplemented with these transcripts, and because appellant was able to provide the court with over 185 pages of briefing, we deny the motion.

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