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MULTIPLE DEFENDANT CASES: WHEN THE DEATH PENALTY IS IMPOSED ON THE LESS CULPABLE OFFENDER

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ABSTRACT

When more than one person is involved in a crime resulting in death, in most jurisdictions the felony murder doctrine operates to render everyone equally responsible for murder. Lay people often find it surprising, and somewhat disturbing, that the “lookout” is exposed to the same range of penalties, generally including life sentences, as the person who actually pulled the trigger. The stakes are even higher in jurisdictions with the death penalty. The Supreme Court has limited application of capital punishment in the felony murder context to “major participants” in the felony who displayed at least “reckless indifference to the value of human life.” Nonetheless, the triggerman may well receive a life sentence, or even a term of years, while another participant is sentenced to death. Indeed, the person against whom the evidence is the strongest has the greatest incentive to agree to enter a guilty plea and testify against his accomplices in exchange for a prosecutor’s promise not to seek a death sentence. The facts of cases as described in court opinions at times suggest that accomplices who testify minimize their own role so as to enable the prosecution to secure a death sentence against another participant. Accordingly, defendants may be executed based on unreliable accomplice testimony while the more culpable participant in the events leading to the victim’s death receives a lesser penalty. Interviews with jurors who deliberated on cases involving accomplices confirm the difficulties of sorting out the relative culpability of various participants. This Essay suggests that multiple defendant capital cases pose particular challenges for fair and even-handed application of capital punishment that warrant more careful scrutiny than they have so far received.

INTRODUCTION

In the ongoing death penalty debate, attention has recently focused on the risk that an innocent person could be,² and perhaps has been,³ executed. That concern is obviously a valid one,

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and one that, as I have argued elsewhere, calls into question whether the death penalty can continue to be imposed within constitutional bounds.⁴ Ensuring that the person being put to death by the state is in fact guilty of the crime for which he or she was convicted is not, however, the only prerequisite for a capital punishment regime to satisfy constitutional norms. As interpreted by the Supreme Court, the Eighth Amendment reserves the ultimate penalty for “the worst of the worst,” those within the category of capital defendants for whom death constitutes a “reasoned moral response” to the gravity of the crime and the character and background of the defendant.⁵ This demand that a death sentence be proportionate, and reflect a judgment that a particular category of defendants is more deserving than others who committed a death-eligible crime, is fundamental to the moral underpinning of continued use of capital punishment in this country.

In recent years, the Court has determined that the death penalty is a disproportionate punishment for the mentally retarded,⁶ for juveniles (those under 18 years of age at the time the crime is committed),⁷ and for those who have raped a child.⁸ The Court has also excluded from capital punishment minor participants in felonies resulting in murder who did not display reckless indifference to the value of human life.⁹ It is this last category that raises serious questions about whether capital punishment is indeed being applied to “the worst of the worst.” In most jurisdictions, accomplice liability principles render all those who participate in a felony, where death results, equally guilty of capital murder.¹⁰ The Eighth Amendment has been interpreted, however, to limit the most severe penalty to those who actually killed, intended or attempted to kill, or recklessly risked death while playing a major role in the felony.¹¹

The restrictions placed on imposition of the death penalty by the Supreme Court all correspond to factors that in some way mitigate a defendant’s culpability, rendering the extreme sanction disproportionate to the characteristics of the offender or the circumstances of the crime. Even if a defendant does not fit within the category for which capital punishment is entirely prohibited under the Eighth Amendment, constitutional principles demand that he or she be permitted to introduce evidence relating to these factors. Accordingly, evidence of mental impairment not amounting to mental retardation, youth (though the defendant is over 18), and relatively minor participation in a felony murder, must all be allowed to be introduced by a defendant seeking to persuade the judge or jury that a death sentence is not warranted.

² Since 1973, 138 people in 26 states have been removed from death row because of evidence that they might be innocent. Death Penalty Information Center, *Innocence and the Death Penalty*, Oct. 27, 2010, <http://www.deathpenaltyinfo.org/innocence-and-death-penalty> (last visited April 16, 2011).

³ See David Grann, *Trial by Fire: Did Texas execute an innocent man?*, THE NEW YORKER, Sept. 7, 2009, available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann (last visited April 16, 2011).

⁴ See Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV. 1359 (2004).

⁵ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (“Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution’” (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))).

⁶ See *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁷ See generally, *Roper*, *supra* note 5.

⁸ See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

⁹ See *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

¹⁰ The felony murder rule that authorizes this result is itself one of the most criticized doctrines of American criminal law. See Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59 (2004).

¹¹ The final category, established by the Court in *Tison v. Arizona*, has been characterized as a malleable concept that fails to provide meaningful guidance to decision-makers, in addition to its problematic application to permit execution of accomplices in violation of proportionality principles. See Michelle A. Guina, *Killing the Non-Killer: An Examination of Arizona’s Approach to Executing Accomplice Felony-Murderers and Proposals for Reform*, 42 ARIZ. ST. L.J. 439 (2010).

The Supreme Court has not insisted, as a constitutional matter, on proportionality review among defendants whose crimes make them “eligible”¹² for the death penalty.¹³ Nonetheless, based on the principles set forth in cases setting limits to imposition of the death penalty in the felony murder context, the most culpable defendant, generally the person who in fact caused or intended the victim’s death, would appear to be most deserving of the extreme penalty. Death sentences imposed on each of two or three defendants for a single crime might be unfair given their different degrees of involvement. On the other hand, if one person receives a death sentence and the others, equally culpable, are spared, that may also be unfair. Yet more troublesome is the situation where the most culpable participant is offered a plea in return for testimony against others, with the result that the death penalty is imposed on one who is in fact less blameworthy. In at least one jurisdiction, the appellate court, in conducting its proportionality review, regularly reverses death sentences imposed on co-participants when an equally or more culpable accomplice has received a lesser penalty.¹⁴ Concern about this type of disparity has also played a role in the way governors and parole boards exercise their clemency powers. Among the reasons given for clemency in recent years, apart from wholesale clearing of death rows by governors, the inequity of executing a defendant whose accomplice(s) received lesser punishment ranks quite high.¹⁵

Review of felony murder cases in which the death penalty has been imposed on one of several participants reveals a striking number of instances in which accomplices who played a smaller role are in fact sentenced to death, or significant doubt exists about who was the more culpable defendant. This Essay examines these cases to try to determine the reasons for this phenomenon and to evaluate whether disparities in multiple defendant capital cases raise constitutional concerns.

Several Supreme Court landmark cases interpreting the Eighth Amendment, as well as cases developing important principles of criminal procedure, involve multiple defendant felony murders. Two cases which set forth the defining law prohibiting mandatory, or near-mandatory, capital punishment for a subset of murders featured defendants who concededly had not in fact killed, attempted to kill, or intended to kill.¹⁶ The first part of this Essay will discuss the facts of those cases, along with similar cases in other courts, which illustrate common characteristics that tend to recur in such cases. First, at times the triggerman has been offered a plea that takes the death penalty off the table for that person in exchange for testimony through which other participants are exposed to a possible death sentence. Second, the prosecution may secure death sentences against two participants by presenting inconsistent theories to different juries trying the different defendants. Third, the testimony of the accomplice is frequently inconsistent and self-serving. Finally, despite the questionable nature of the testimony, some juries and judges are willing to accept even implausible narratives of how the crime occurred.

¹² I use this curious term, which is generally applied to positive consequences (we hope to be eligible for that promotion) and surely not to something we all face (death), only because it is the way capital punishment jurisprudence describes the issue.

¹³ See *Pulley v. Harris*, 465 U.S. 37 (1984).

¹⁴ See *Puccio v. State*, 701 So.2d 858 (Fla. 1997).

¹⁵ Of the 60 clemency grants under the modern capital punishment regime that were not part of a general grant to all death row inmates in a particular state, nine were explicitly based on the disparity of punishment among co-defendants. See Death Penalty Information Center, *Clemency*, <http://www.deathpenaltyinfo.org/clemency>.

¹⁶ See *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978). Because these cases preceded *Enmund* and *Tison*, no constitutional bar yet existed against imposition of a death sentence on such defendants.

Part II will take a close look at how decisions are made in capital cases involving more than one defendant, using information obtained by the Capital Jury Project.¹⁷ That project has provided new insights into how actual jurors go about deliberating on the ultimate question of life or death. The data provides some evidence that juries in multiple defendant cases are more reluctant, in general, to impose the death penalty than in cases with only one perpetrator. Yet in a number of cases, the pattern of one or more accomplices taking the stand after securing a plea prevails, and some jurors are willing to accept such testimony in support of a decision in favor of death. Two cases studied in detail, one resulting in the defendant's execution and the other in a life sentence, provide a look inside the jury room to observe how jurors in multiple defendant capital cases struggle to arrive at their conclusions regarding the appropriate punishment. The Conclusion suggests some possible solutions to the problems described.

I. ONE FELON GETS A DEAL; AN ACCOMPLICE IS SENTENCED TO DEATH

James Tyrone Woodson was, by all accounts, seated in a car with Johnnie Lee Carroll outside the store that was robbed by Luby Waxton and Leonard Tucker.¹⁸ Tucker and Carroll were permitted to plead guilty to lesser charges in exchange for their testimony against Woodson and Waxton.¹⁹ According to Tucker, Waxton shot the store clerk point blank and took the cash drawer out of the register, handing it to Tucker as they left the store.²⁰ Waxton, who had asked to be given the same deal as Tucker, testified that it was actually Tucker who shot both the clerk and a customer.²¹ All agreed that Woodson remained in the car throughout the robbery.²² Nonetheless, based on Tucker's testimony and principles of accomplice liability, Woodson was convicted of capital murder and sentenced to death.²³

Similarly, Sandra Lockett was indisputably sitting in a car some distance from the pawnshop being robbed by three men: her brother, Al Parker and Nathan Earl Dew.²⁴ Al Parker's finger was on the trigger of the gun that killed the owner of the shop.²⁵ When Parker was apprehended, he was charged with capital murder and aggravated robbery. Before trial, however, he pleaded guilty to the murder charge and agreed to testify against Lockett, her brother, and Dew.²⁶ In exchange for his plea, the aggravated robbery charge was dropped, along with the specifications to the murder charge that would have authorized a death sentence.²⁷ Based largely on Parker's testimony, Lockett was convicted of felony murder and sentenced to death.²⁸

¹⁷ The Capital Jury Project (CJP) is a National Science Foundation-supported study of the decision making of capital jurors conducted under the leadership of Principal Research Scientist Dr. William J. Bowers. The CJP has conducted interviews with some 1,198 capital jurors from 353 trials in 14 states. The interviews are designed to chronicle jurors' experiences and decision making over the course of the trial, to identify points at which various influences may come into play, and to reveal the ways in which jurors reach their final sentencing decisions. Jurors were asked both structured questions with designated response options and open-ended questions seeking detailed narrative accounts of their experiences as capital jurors. Transcripts of the taped interviews quoted in this Essay are on file with the author.

¹⁸ *Woodson*, 428 U.S. at 283-84.

¹⁹ *Id.* at 282.

²⁰ *Id.* at 283.

²¹ *Id.* at 284.

²² *Id.* at 283.

²³ *Id.* at 284.

²⁴ *Lockett*, 438 U.S. at 590.

²⁵ *Id.*

²⁶ *Id.* at 591.

²⁷ *Id.*

²⁸ *Id.* at 593.

In both of these seminal cases, major participants in the fatal robberies were permitted to plead guilty to avoid the possibility of a death sentence, while accomplices who were less actively involved in the conduct leading to the victim's death ended up on death row. The Supreme Court did reverse both Woodson's and Lockett's death sentences, but in neither case did the Court base its decision on the lack of proportionality of the various participants' sentences. In *Woodson* the Court declared North Carolina's mandatory capital punishment statute unconstitutional,²⁹ and in *Lockett*, the Court decided that, under the Eighth Amendment, the sentencer must be permitted to consider any evidence regarding the defendant's character, background, or the nature of the offense that might call for a lesser sentence.³⁰

Starting with his concurring opinion in *Lockett*, Justice White's view that the death penalty was disproportionate for an offender who had not killed or intended for death to occur soon became the majority.³¹ The Court found that "[i]t is clear from recent history that the infliction of death under circumstances where there is no purpose to take life has been widely rejected as grossly out of proportion to the seriousness of the crime."³² This conclusion is in keeping with commonly held beliefs about reserving capital punishment to those who actually killed, attempted to kill, or intended to kill.³³ Yet confronted with a particularly brutal set of killings five years later, the Court retreated from this position to permit death as a possible punishment for a major participant in a felony who displays reckless indifference to the value of human life.³⁴

Under more recent Eighth Amendment law, Woodson and Lockett themselves might not be eligible for death. If the prosecutor could prove, however, that they were major planners in the robberies and displayed reckless indifference to the value of human life, they would still likely be at risk. Moreover, even under the current regime, although a person who has neither actually killed, attempted to kill, nor intended to kill is eligible for the death penalty. Eighth Amendment law still regards the participant in a felony resulting in death who physically did the killing as the most culpable.³⁵ Therefore, many multiple defendant capital cases come down to accusations and counter-accusations amongst the defendants regarding who inflicted the fatal wound. As the participants may well be the only available witnesses, it is not uncommon for the stories presented in court to sound rather implausible. For example, when a gun can be tied through other evidence to a particular defendant, the "owner" is likely to claim that he lent his weapon to another participant. Or, when the person given the deal is the more experienced and articulate participant, their account tends to be believed regardless of the fact that self-interest should significantly undermine the witness's credibility. Yet at times, when it serves the prosecution's purpose to accept these versions, they become the "facts" of the case.

The landmark case in which the Supreme Court decided that the death penalty is a disproportionate punishment for the mentally retarded³⁶ involved two defendants, Atkins and Jones,

²⁹ *Woodson*, 428 U.S. at 305.

³⁰ *Lockett*, 438 U.S. at 604.

³¹ See generally, *Enmund*, *supra* note 9.

³² *Lockett*, 438 U.S. at 625 (White, J., concurring in part).

³³ See, e.g., Norman J. Finkel & Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme*, 27 LAW & SOC'Y REV. 129 (1993); Norman J. Finkel & Kevin B. Duff, *Felony-Murder and Community Sentiment: Testing the Supreme Court's Assertions*, 15 LAW & HUM. BEHAV. 405 (1991); Norman J. Finkel, *Capital Felony-Murder, Objective Indicia, and Community Sentiment*, 32 ARIZ. L. REV. 819 (1990); Joshua Dressler, *The Jurisprudence of Death by Another: Accessories and Capital Punishment*, 51 U. COLO. L. REV. 17 (1979).

³⁴ *Tison*, *supra* note 9.

³⁵ See *Enmund*, 458 U.S. at 798.

³⁶ At the time *Atkins* was decided, the term "mentally retarded" was routinely applied to those with serious cognitive and functional limitations. Currently, the preferred terminology is "intellectually disabled." See Department of Health and

accused of killing a man after forcing him to withdraw money from his bank account.³⁷ Both men testified at the guilt phase, describing the crime in similar ways except that each accused the other of committing the actual murder.³⁸ In this jurisdiction, only the “triggerman” could be sentenced to death.³⁹ The jury credited the version provided by Jones, who had been permitted to plead guilty and avoid a possible death sentence in exchange for his testimony.⁴⁰ Despite evidence that Atkins was mentally retarded and much more likely to be a follower of the more experienced Jones, the jury sentenced Atkins to death.⁴¹

The case was remanded to the Virginia courts for a new penalty phase in light of the Supreme Court’s conclusion that the mentally retarded should be exempt from capital punishment.⁴² Upon remand, the circuit court conducted a hearing on the defense’s allegation that the police and prosecutors had in fact coached Jones when his initial account failed to match the known facts.⁴³ The court found that indeed the Commonwealth Attorney had persuaded Jones to change his testimony about facts that would have been “problematic” for the case against Atkins, and on this basis, vacated Atkins’ death sentence.⁴⁴

In another significant capital case decided by the Supreme Court, serious questions were raised about the role of the various participants in the robbery and killing of an armored van driver.⁴⁵ The jury failed to convict Timothy Ring of intentional murder, but found him guilty of felony murder, although the evidence did not prove that he was a major participant in the robbery or that he was even at the scene.⁴⁶ At the sentencing hearing before the judge, one of the accomplices who pled guilty, with a guaranteed prison sentence, in exchange for his cooperation with the prosecution, testified that Ring was the actual shooter.⁴⁷ Based in part on that testimony, Ring was sentenced to death.⁴⁸ His death sentence was vacated only because the Court extended the jury trial guarantee to factual findings necessary to expose the defendant to a possible death sentence.⁴⁹ Accordingly, the judge’s findings regarding aggravating factors were held insufficient.⁵⁰

In the cases discussed so far, the defendants sentenced to death who may have played minor roles in a felony murder were, for various reasons, removed from death row. Tommy David Strickler arguably presents an example of someone who has been executed despite serious questions about whether he was the more culpable offender. At the Supreme Court level, Strickler’s case revolved around the issue of whether the prosecution’s withholding of extensive evidence that could have been used to impeach the key witness against Strickler prejudiced his defense.⁵¹ Although the Court found that it did not, careful reading of the majority and dissenting opinions leave grave

Human Services, Centers for Disease Control and Prevention, Developmental Disabilities, *Intellectual Disability: About Intellectual Disability*, October 29, 2005, <http://www.cdc.gov/ncbddd/dd/ddmr.htm>.

³⁷ *Atkins*, 536 U.S. at 307.

³⁸ *Id.*

³⁹ See Va. Code Ann. § 18.2-18

⁴⁰ *Id.* at 307, n.1.

⁴¹ *Id.* at 309.

⁴² *Id.* at 321.

⁴³ See *In Re Commonwealth of Virginia*, 278 Va. 1 (2009).

⁴⁴ *In Re Commonwealth of Virginia*, 278 Va. at 15-16.

⁴⁵ See *Ring v. Arizona*, 536 U.S. 584 (2002).

⁴⁶ *Id.* at 591-92.

⁴⁷ *Id.* at 594-95.

⁴⁸ *Id.* at 595.

⁴⁹ *Id.* at 609.

⁵⁰ *Id.*

⁵¹ See *Strickler v. Greene*, 527 U.S. 263 (1999). Although ultimately ruling against Mr. Strickler, the Court found that his claim, despite being procedurally defaulted, could be heard in light of his reliance on the prosecution’s open file policy and issued important clarifications of the prosecution’s obligation to disclose exculpatory evidence.

doubt about whether, had the jury been exposed to the withheld evidence, it would have arrived at the same verdict at sentencing.

Given that the role a person plays in the crime significantly affects the punishment decision, it is crucial to determine in the most reliable manner what that role was. The dissenting justices in Strickler's case emphasized that the witness whose testimony was severely undermined by the withheld material gave critical evidence purporting to show Strickler as the unquestioned leader and initiator of the brutal crime.⁵² As Justice Souter noted, the witness, Anne Stoltzfus, was the first to describe Strickler in any detail, thus providing the frame for the remainder of the story the prosecution presented to the jury.⁵³ From the start of Stoltzfus's testimony, Strickler was "Mountain Man" and his male companion "Shy Guy," labels whose repetition more than a dozen times (by the prosecutor as well as by Stoltzfus) must have left the jurors with a clear sense of the relative roles that Strickler and Henderson played in the crimes that followed Stoltzfus's observation. According to Stoltzfus, when she first saw Strickler she "just sort of instinctively backed up because [she] was frightened."⁵⁴ Unlike retiring "Shy Guy," Strickler was "revved up."⁵⁵ The withheld materials showed, however, that Stoltzfus mentioned none of these details, which she confidently recalled on the stand, when the police initially interviewed her.⁵⁶ Indeed, at first she did not even remember being at the mall at the time of the crime, and her "recollection" of the description of the two men and their relative roles in the crime came only after extensive follow-up conversations with detectives as well as with the victim's boyfriend.⁵⁷

The Court's conclusion, that no single juror might have been swayed had the credibility of Stoltzfus's powerful narrative been impeached, resulted in Strickler's execution, while his co-defendant, Ronald Henderson, was convicted of non-capital murder.⁵⁸ The Capital Jury Project⁵⁹ conducted interviews with three of the jurors who decided Strickler's fate.⁶⁰ In response to the question: Now, I'd like you to tell me about the crime. In your own words, give me the details I need to understand what happened and why, one juror volunteered:

Young lady black person was abducted by a white male, who, according to the most important witness had been disruptive at the mall in Harrisonburg who had noticed on 2 prior occasions his violent behavior. During the time she was at the mall and then as she was going out of the mall she saw what appeared to be an abduction by this white male whom she had no trouble identifying.

Asked, among the topics you did discuss, what was the single most important factor in the jury's decision about defendant's guilt? This juror responded: "Establishing that he was the motivating force of the whole event. He established the abduction and obviously participated in the murder. Some said that the mere fact that he initiated it made him as guilty as you can get. I had a little

⁵² *Strickler*, 527 U.S. at 302 (Souter, J., dissenting).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Strickler*, 527 U.S. at 301-02 (Souter, J., dissenting) (record references omitted).

⁵⁶ *Id.* at 273-74.

⁵⁷ *Id.* at 304 (Souter, J., dissenting).

⁵⁸ *Id.* at 266.

⁵⁹ See CJP, *supra* note 17.

⁶⁰ Except where otherwise indicated, all information about the jurors' statements is contained in transcripts of interviews on file with the author.

trouble with that.”⁶¹ Another juror was asked: What do you remember about the judge's instructions to the jury for deciding what the punishment should be? He told the interviewer:

Something about “don’t look to me for advice.” It was strictly up to us. Participation meant involvement and therefore could have gotten the death penalty. They did apprehend the other man involved in this, a man by the name of Henderson, and when Henderson was apprehended and put on trial he proceeded before a different judge. And the judge took a different part. The judge ruled that participation wasn’t enough for conviction. It had to be proven that he did cause the actual murder. That he was the only one. And that was a little different than what Judge Wood had told us. And as a result, at Henderson’s trial he was not convicted of capital murder. And that throws a little discouragement on me. I resent being in the middle when evidence applies to some and not the other. As a juror I don't think I'll ever serve again.⁶²

These words by jurors who had been tasked with making the decision about life or death highlight the significant and understandable additional anxiety that can be produced in multiple defendant cases.

The concern about disparate treatment of the various participants in a single capital crime is reflected in opinions by courts throughout the country. Particular attention has been paid to cases in which prosecutors use inconsistent factual theories to secure death sentences against more than one defendant.⁶³ In one such case, the Supreme Court ordered a new penalty hearing where the prosecutor had insisted that the actual shooter was Defendant A at his trial, while claiming in Defendant B’s trial that B had fired the fatal shots.⁶⁴ In another case, the Supreme Court, with three justices dissenting, refused to stay the execution of a defendant whose responsibility for the killing the prosecution had later disavowed when seeking a death sentence against an accomplice.⁶⁵ Some commentators have suggested that due process or estoppel principles should prevent prosecutors from advancing such inconsistent positions.⁶⁶ The focus in this Essay is not specifically on the obligations of prosecutors, but rather on highlighting the concern raised by disparate outcomes among participants regardless of how they may have come about.

Three cases from state courts further illustrate the problem. Two men, Williams and Nichols, both armed with guns, entered a deli in Houston to commit a robbery.⁶⁷ When they pointed their weapons at the clerk, he bent down to reach for his own gun.⁶⁸ He was killed by a single

⁶¹ *Id.*

⁶² *Id.*

⁶³ See A. B. Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CALIF. L. REV. 1423 (2001) (noting the surprising frequency of prosecutorial inconsistency; suggesting that the law of party admissions and estoppel should be used to preclude prosecutors from switching positions; and proposing that relief should be granted on due process grounds where the inconsistency is discovered after conviction); S. Shatz & L. Whitt, *The California Death Penalty: Prosecutors' Use of Inconsistent Theories Plays Fast and Loose with the Courts and the Defendants*, 36 U.S.F. L. REV. 853 (2002) (describing six pairs of cases in which prosecutors used inconsistent factual theories against perpetrators tried separately).

⁶⁴ See *Bradshaw v. Stumpf*, 545 U.S. 175, 187 (2005).

⁶⁵ See *Jacobs v. Scott*, 513 U.S. 1067 (1995) (Stevens, J., dissenting from denial of cert.).

⁶⁶ See Shatz, *supra* note 63.

⁶⁷ *Nichols v. Scott*, 69 F.3d 1255, 1259 (5th Cir. 1995).

⁶⁸ *Id.*

gunshot.⁶⁹ Williams pled guilty to capital murder and was sentenced to death.⁷⁰ Nichols was also charged with capital murder; his defense was that he did not cause the death of the victim, a defense confirmed by Williams. The prosecutor argued at Nichols' trial, however, that Williams' admission to firing the fatal shot was not credible, and that in any event, under the Texas law of parties, it did not matter who physically caused a death during a felony murder.⁷¹ The jury convicted Nichols, but was unable to agree at the penalty phase on the answers to questions that would have determined a life or death sentence.⁷² The prosecutor learned from speaking to the jurors afterwards that they were reluctant to impose a death sentence in light of their uncertainty about who was the triggerman.⁷³ At the new trial, the same prosecutor strongly argued that Nichols had fired the fatal shot.⁷⁴ In federal habeas proceedings, a district court granted relief on the basis that the state had violated due process by securing two death sentences when in fact a single bullet had caused the victim's death.⁷⁵ The Court of Appeals for the Fifth Circuit reversed, finding that the district court had relied on a new rule that should have been unavailable in habeas proceedings.⁷⁶ Both Williams and Nichols were executed.⁷⁷

In another Texas case, Ricardo Aldape Guerra was sentenced to death in 1982 for killing a police officer.⁷⁸ Guerra, with a companion, Roberto Carrasco Flores, was driving through a lower middle class Mexican-American neighborhood in Houston when a police officer pulled up.⁷⁹ During this traffic stop, the officer, as well as a passing motorist, was killed. In the manhunt that followed, Carrasco was himself killed.⁸⁰ The gun that caused the death of the police officer belonged to Carrasco, and was found near his body.⁸¹ In the state proceedings, the prosecution asserted that in fact Guerra was the killer, having picked up his companion's gun by mistake before the shooting and switched weapons again during their flight.⁸²

Guerra spent more than 15 years on death row before a federal court determined that the prosecution's theory constituted implausible speculation.⁸³ This case illustrates another phenomenon

⁶⁹ *Id.* at 1260.

⁷⁰ *Id.* at 1260-61.

⁷¹ *Id.* at 1261-62.

⁷² Under the Texas statute then in effect, after a jury convicted a defendant of a capital crime, it was asked three questions: 1. Was the killing deliberate, 2. Was there a reasonable possibility that the defendant would engage in future acts of violence, and 3. Was the conduct of the defendant an unreasonable response to any provocation by the deceased. If the jury responded in the affirmative, the defendant would be sentenced to death. *See Jurek v. Texas*, 428 U.S. 262 (1976).

⁷³ *Nichols*, 69 F.3d at 1262.

⁷⁴ In federal habeas proceedings, the district court quoted the prosecutor's summations in the two trials. *Williams Trial*: "Willie Williams is the individual who shot and killed Claude Shaffer. That is all there is to it. It is scientific. It is consistent. It is complete. It is final, and it is in evidence." "There is only one bullet that could possibly have done it and that was Willie Williams." *Nichols Trial*: "Willie could not have shot him." "And I submit to you from this evidence. [Nichols] fired the fatal bullet and killed the man in cold blood and he should answer for that." At the punishment phase: "Is it fair and equal for Willie Williams to sit up there on death row when this man planned the whole thing and fired the shot." *Nichols*, 802 F. Supp. 66.

⁷⁵ *See Nichols*, 802 F. Supp. at 74.

⁷⁶ *Nichols*, 69 F.3d at 1273-74.

⁷⁷ *See* Death penalty information center, available at www.deathpenaltyinfo.org/executions_database (Last visited April 16, 2011). Williams was executed on January 31, 1995; Nichols on March 7, 2007.

⁷⁸ The "facts" are taken from opinions in the state and federal courts. *See Guerra v. State*, 771 S.W.2d 453 (Tex. Crim. App. 1988); *Guerra v. Collins*, 916 F. Supp. 620 (S.D. Tex. 1995).

⁷⁹ *Guerra v. State*, 771 S.W.2d at 457.

⁸⁰ *Id.*

⁸¹ *Id.* at 457-58.

⁸² *Guerra*, 916 F. Supp. at 633.

⁸³ *Id.*

shared by a number of multiple defendant cases. When the principal actor is killed during or after the crime, it seems that law enforcement feels the need to prosecute someone for the innocent victim's death. *Tison*⁸⁴ exemplifies this phenomenon; would the state have been so eager to prosecute the sons if their father, a convicted killer who had previously escaped from prison, had not died in the desert?

A third case, from Tennessee, also follows the pattern of state acceptance of questionable testimony provided by an accomplice against whom the evidence was strong. Danny Price had been released from federal prison ten days before participating in the robbery and murder for which his accomplice, James David Carter, was sentenced to death.⁸⁵ He agreed to testify against Carter in exchange for a 35-year sentence. Price had six previous felony convictions: four for forgery, one for larceny after trust, and one for assault with intent to commit murder.⁸⁶ Price was arrested in the truck they stole from the victim, and he was in possession of the gun that was conclusively identified as the murder weapon.⁸⁷ Yet in Price's version of the events, he fingered Carter as the person who physically pulled the trigger, which the jury and the Tennessee courts on appeal accepted.⁸⁸

As these cases illustrate, the potential application of the death penalty can seriously distort the truth seeking process when more than one suspect is involved in a killing. The possibility of execution can provide a powerful incentive for defendants to agree to testify against their accomplices in order to save themselves from death. At times, this is a position that is leveraged by the prosecution, and at others it is simply a realization reached by a defendant or his attorney.

With the death penalty on the table for multiple participants, they point the finger at each other and paint separate pictures of who masterminded the crime. The prosecution dangles plea agreements before them hoping to get one defendant to testify against the other in exchange for the state not seeking a death sentence. Ironically, the defendant against whom the evidence is strongest is most likely to find the prosecution's offer irresistible, thereby not subjecting the most culpable participant to the death penalty.

Trial testimony by an accomplice who has avoided execution through such a plea agreement should be viewed with considerable suspicion, yet it is often the lynchpin of the prosecution's case. In many cases the multiple statements that accomplices make to the police are plagued with inconsistencies and largely unsupported by corroborating evidence. The reliability of such testimony is put further in doubt when the individual proffering the testimony is an experienced criminal, one who knows how the system works, what the police want to hear, and what he needs to tell them in order for them to make the agreement allowing him to receive a lesser sentence.

Testifying accomplices creatively tell stories in which the extent of their own participation is skillfully tailored. Their role in the crime is enough to be able to provide the prosecution with a solid case, while at the same time minimizing their individual culpability so as to encourage the prosecutor to offer them a plea. The tendency of such stories to be told by experienced criminals who weave carefully crafted tales raises serious concerns about how the death penalty is applied in cases involving multiple defendants.⁸⁹ Most troublesome is the tendency of these stories to be so readily

⁸⁴ See *Tison*, *supra* note 9.

⁸⁵ *State v. Carter*, 714 S.W.2d 241 (Tenn. 1986).

⁸⁶ *Id.* at 244.

⁸⁷ *Id.*

⁸⁸ Carter avoided execution only because the federal courts found his attorney to have provided ineffective assistance at the penalty phase of his trial. See *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000).

⁸⁹ The mere fact that the testifying accomplice has spent time in jail evidences several things. First, the testifying accomplice is familiar with the system; second, the testifying accomplice is familiar with the elements of the crime and the potential penalty; and third, the testifying accomplice knows how to get the prosecutor to offer a plea. Citation needed Familiarity with the criminal justice system is an advantage for the testifying accomplice. Citation needed The

accepted by the many players in the criminal justice system at every level, right up to the United States Supreme Court.

II. THE JURY STRUGGLES TO DO JUSTICE IN MULTIPLE DEFENDANT CASES

The difficulties identified in the previous section should cause concern about the administration of capital punishment in multiple defendant cases. Until the Capital Jury Project⁹⁰ began its research, it was not possible to know how jurors trying these cases react to the problems raised. Now, through the work of this project, transcripts of interviews with jurors who made decisions in such cases confirm the struggles taking place in the jury room to arrive at their verdicts. Two factually similar cases involved a number of men convicted of raping and killing the female victim. In the first, the defendant was executed based on the testimony of accomplices; in the second, because a single holdout juror would not agree to the death penalty in light of questions about his relative culpability, the defendant was sentenced to life.⁹¹ The different result in the two cases came about through the happenstance that hesitant jurors in the first case went along with the majority, while in the second, a juror was so troubled by the disparities in treatment of accomplices as to cause a hung jury, resulting in a life sentence.

Jimmie Egan,⁹² born abroad to a white father and a Hispanic mother, was executed for the murder and rape of Jane Madeira, a young Hispanic woman. 26-year-old Mr. Egan, who possessed a limited IQ that caused him to be the butt of jokes in the tough East Austin housing project where he grew up, had fallen in with a group of motorcycle men who wore their bicycle chains as belts. One evening they were having a tailgate party in the driveway of Ralph Emilio, one of the leaders of the motorcycle gang. Ms. Madeira, a young woman acquainted with Dave Hollis, who also attended the party, was walking by and decided to join the group. She had several beers, some hard alcohol, and cocaine. She engaged in oral sex with Ralph in his bathroom—whether this sex was consensual is not clear. Eventually Jane, by this time quite intoxicated, decided to leave, accompanied by Dave. Several men, including Ralph and Jimmie, followed the pair. What happened next is disputed, but it appears that Jane was carried into the woods, where one or more of the men engaged in sex with her. Again, whether she consented, or was capable of consent, or whether she resisted, is unclear. At some point, perhaps because she threatened to go to the police, she was fatally beaten with a motorcycle chain.

Of the four men who took part in the activities that culminated in her death, only one, Jimmie Egan,⁹³ was charged with capital murder and sentenced to death. Two men, Dave and Ralph, who were the first to be arrested, received highly favorable plea agreements in return for their

courts recognize this in their use of familiarity as a factor considered in the totality of the circumstances test to determine whether a confession was coerced. Citation needed A testifying accomplice who is more familiar with the criminal justice system is less likely to be intimidated by police questioning. Citation needed The accomplice with a criminal record is also likely to be familiar with the penalties for murder, particularly felony murder. Citation needed As such, an accomplice deciding whether or not to enter a plea agreement with the prosecution is more likely aware that the prosecutor will place greater weight on particular factors in deciding whether or not to seek a death penalty, and thereby, the accomplice can tailor his story accordingly. This realization by an experienced criminal capable of tailoring a story creates a great incentive for him to do just that. Citation needed

⁹⁰ See CJP, *supra* note 17.

⁹¹ Unless otherwise noted, all information about the jury's deliberations is contained within the transcript of interviews on file with the author.

⁹² Please note that names have been changed, as well as some of the details of the crime, in order to protect the anonymity of jurors.

⁹³ The facts described here are from the opinions in the case on appeal. The citation, on file with the author, is omitted in order to protect the jurors' anonymity.

testimony at Egan's trial. Although their testimony was in some respects conflicting, both men said that Egan was the last person with Jane, and Ralph testified that he actually observed Egan beating her around the head, arms and back with a motorcycle chain. Yet the chain apparently belonged to Ralph, and Ralph admitted that he threw his clothing into the washer as soon as he came home. With regard to Dave's testimony, although he asserted that he left before anyone started beating Jane, Dave had blood splatter on his shoes when he was arrested. Apparently, the police apparently believed Dave's story claiming the blood was his own, and resulted from a fight which occurred two months earlier.

Questions about who played what roles in the crime were not lost on the jurors in the Egan case. Several of the interviewed jurors expressed grave doubts about the veracity of the accomplices' testimony, and some harbored deep anger about the lenient treatment afforded to the other participants in the crime. Ralph Emilio, in particular, seemed to have played a central role in the events, having admitted to sex with Jane, conceding that he was in the woods where she died, and claiming ownership to the motorcycle chain used to kill her.

One juror, thirty six years of age, and president of a not-for-profit organization, was particularly outspoken about his doubts regarding the testimony of the accomplices. When asked about the circumstances of the crime, this juror stated:

I have a feeling there was a lot of lying going on. (How so?) Well the guy who turned state's witness, I mean he was, as far as I am concerned he was equally as culpable. He got, I think he got 10 years for ratting on his buddy, I had a problem with that. In fact I wrote the judge a letter and told him I had a problem with that.

He elaborated on the accomplice testimony later in the interview:

I had some problems with the state witness, I really did. Of course, he wasn't on trial, but I had some real problems with the murder weapon which was a motorcycle chain which was used as a belt. . . .the murder weapon actually belonged to the state witnesses, I think, and there were some big holes. But we were pretty sure that the guy had done it and the state and probably the state witnesses had either witnessed it or was an ongoing participant. I had some bad feelings about the state witness. Yeah I'd like to talk to the state witness today and find out what really happened because I have a feeling that we didn't hear the whole truth and nothing but the truth.

Concerns over the veracity of the state's witness remained dominant in this juror's mind when discussing what factors were most important in understanding the jury's punishment decision. He expressed strong reservations about the unequal punishments imposed on the men, and the disparities in their treatment by the prosecution. Finally, in response to an inquiry about how the jury made its punishment decision, this juror said that the jury, to a major extent, used the evidence to develop a "story" about what happened. Noting that there was concern about missing evidence or evidence that didn't seem to fit into their story, he focused on the ownership and retrieval of the murder weapon. Asked how the jury dealt with the discrepancy, he responded:

We glossed right over it. I had some problems with that. With the belt, because the belt did not belong to him, it belonged to the state witness and the prosecution had to place it in his possession and then it had to reappear at some point and I kind of felt the state witness had a hand in all that. That's why I was a little pissed off and had wrote the judge about my concerns about the complicity in the crime of this

other person that they only gave 10 years probation to. . . . The way that the murder weapon resurfaced. I had a problem with that which led me to believe that the state witness was a lot more involved in the crime than he testified about being and I kind of feel like the prosecution was willing to look the other way a little bit in return for a And the way it showed up I had a real problem with that.

Another juror, a software engineer and programmer, also had some suspicion about other participants who turned state's evidence. When asked whether he found any of the witnesses for the prosecution or the defense hard to believe, he said that the participants were "trying to put themselves in the best light." He was skeptical about whether their testimony was "absolutely true, word for word."

According to a third juror, a 41-year-old financial analyst, three people were responsible for the victim's death, and he noted that a couple of jurors needed to be convinced that Egan was primarily responsible. Ultimately, however, the jury voted unanimously to impose a death sentence on Egan.

By contrast, jurors in a factually similar case from South Carolina, were unable to reach a unanimous verdict on penalty, primarily due to a single holdout who refused to agree to a death sentence for the defendant in light of the life sentences imposed on his confederates.⁹⁴ The victim was abducted from the parking lot of a mall by three men and taken to a nearby isolated area, where she was raped, robbed, and shot to death. Two co-defendants testified at the third defendant's trial, admitting that they participated in the crimes, but asserting that it was the third defendant who actually shot the victim. The third defendant did not testify. The co-defendants were sentenced to life. One of the jurors who deliberated at the penalty phase told the interviewer:

The biggest area of disagreement was "guilty by association." Q: Some jurors didn't buy into that? A: No, they didn't think it was fair that the other two got life and that he could get the death penalty. Without the credibility of the accomplice, how much can you believe him. And the fact that if they are guilty by association, all of them should have gotten the death penalty, not just him. . . . At sentencing deliberations, the hardest thing was that the other two were keeping life sentences. Because we couldn't actually place the gun in his hand at the time. . . .

The juror who held out for a life sentence noted:

The prosecutor didn't care who he got, but he was going to get one person for capital punishment. . . . He was bound and determined that he was going to nail somebody for this crime as a capital punishment. . . . He picked [this defendant] because he was the most intelligent of the three. The other two, I wouldn't say they were retarded, they were not very bright. . . . Those three were the only ones who knew who pulled the trigger and the prosecutor made a plea bargain deal with one of them to say [the defendant] did it.

She continued:

⁹⁴ At the first trial, the jury did sentence the defendant to death, but that conviction was reversed in light of the court's instructions inviting the jury to deliberate on the case before it was submitted to them. The case citation is on file with the author.

If they were going to give everybody capital punishment, then so be it, but you couldn't pick one of the three and say he did it. . . . They had no credibility as witnesses to say who had done what. How could this prosecutor bring these people here and expect us to believe them?

The holdout juror appeared to think that the prosecutor could have persuaded the accomplices to say anything: "If [the prosecutor] had told those two to stand on their heads and testify, they would have said *yesuah, yesuah, yesuah* [with a heavy mimic of southern black dialect]. I can just see [him] saying, 'listen hear boy if you do dat den I'll... but boy you better do what I tell you.'"

The distinctive perspective provided by the juror interviews conducted by the Capital Jury Project contributes immeasurably to an understanding of how jurors go about making the decision between life and death. In multiple defendant cases, jurors' sensitivity to the importance of equal treatment of equally culpable participants (and different treatment of those not as blameworthy), as well as their skepticism of self-serving testimony by defendants offered an attractive deal to cooperate with the prosecution, should teach valuable lessons about the potential for injustice in these cases.

CONCLUSION

Reported accounts of the facts in multiple defendant capital cases raise serious questions about whether the death penalty is being imposed and carried out against the most culpable participant in felony murder cases. Given that the Supreme Court's interpretation of the Eighth Amendment permits a death sentence to be imposed on defendants who were major participants in the felony and displayed reckless indifference to the value of human life,⁹⁵ a broad range of behavior can subject a participant to possible execution. Moreover, the incentives are strongest for defendants against whom the evidence is most damning to agree to a plea sparing them from death in exchange for testimony against accomplices. Interviews with jurors confirm that such scenarios present grave challenges for making the decision about whether a death sentence is warranted.

Various approaches could be used to reduce the likelihood that less culpable offenders are subject to execution. Legislatures concerned about the possible execution of those convicted of felony murder who did not actually kill, intend to kill or attempt to kill, might consider returning to the pre-*Tison* principle barring the death penalty for participants in felony murder with the less culpable mental state of reckless indifference. More jurisdictions could adopt the approach used in Florida, where the courts refuse to affirm a death sentence when an accomplice has received a lesser sentence, unless clear evidence demonstrates that defendant's greater culpability.⁹⁶ In addition, various mechanisms might be put into place to reduce the number of cases in which a less culpable participant is sentenced to death. As others have suggested, due process principles should be extended to prevent prosecutors from taking inconsistent positions in order to secure death sentences,⁹⁷ and more stringent oversight of prosecutors' decisions whether to offer a plea to participants in felony murder cases might be in order. Finally, courts should take a skeptical look at death sentences secured primarily through the testimony of accomplices. It goes without saying, of course, that the ultimate and fail-safe solution to the problem of disproportionate death sentences in felony murder cases would be the one recently adopted by Illinois -- abandoning capital punishment altogether.

⁹⁵ See *Tison*, *supra* note 9.

⁹⁶ See *Puccio*, *supra* note 14.

⁹⁷ See Poulin, *supra* note 63.