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Beyond Compare: A Codefendant's Prison Sentence as a Mitigating Factor in Death Penalty Cases

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BEYOND COMPARE? A CODEFENDANT'S PRISON SENTENCE AS A MITIGATING FACTOR IN DEATH PENALTY CASES

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Abstract

This Article addresses whether the U.S. Constitution requires courts to permit capital defendants to submit, during sentencing, the mitigating factor that a codefendant for the same murder was sentenced to prison instead of to death.

The U.S. Supreme Court has repeatedly stressed the importance of mitigating factors in capital cases. For the most part, litigation since the reintroduction of capital punishment in the 1970s has clarified what circumstances are to be weighed as mitigating. But the Court has not addressed the current divide among lower courts regarding whether the Eighth Amendment requires courts to allow juries to consider a codefendant's sentence as mitigating evidence.

This Article begins with the Supreme Court decisions regarding mitigating factors and proportionality, noting how the Court has stressed the importance of fairness in death penalty cases. This Article additionally examines how courts are currently split on the issue of whether a codefendant's prison sentence should be weighed as a mitigating factor. Several state courts have treated this factor as mitigating while others have not. Although some U.S. courts of appeals have upheld lower court decisions rejecting this mitigating factor, most of those appellate court decisions were applying a deferential habeas corpus standard of review to uphold the lower court decision. Thus, the issue itself remains unresolved. This Article concludes by explaining why logic and Supreme Court precedent dictate that courts should allow capital defendants to present this mitigating factor to juries. Jurors should be able to weigh the evidence and use it to make a decision when they are choosing between a sentence of death and a sentence of life in prison.

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INTRODUCTION

Courts have long struggled with the question of how to give out the death penalty in a fair and non-arbitrary manner. And if there is more than one capital defendant in the same case, issues of disparity are put into even sharper focus. When equally culpable codefendants are given radically different sentences for the same murder—or a more culpable defendant is given a prison sentence while a less culpable codefendant is given a death sentence—such results damage the public's faith in the criminal justice system.[1]

1. For purposes of this Article, the term "codefendant" is used to include accomplices and anyone involved in the same capital crime as the defendant, whether or not their cases are tried together, tried separately, or the codefendant agrees to a plea bargain.

For example, Great Britain executed nineteen-year-old Derek Bentley in 1953 while sparing his accomplice, who had done the killing.[2] Bentley had shouted, "Let him have it!" to his robbery accomplice, who then shot and killed a police officer.[3] During the trial, lawyers debated whether Bentley's exclamation meant that his accomplice should give the gun to the officer or whether Bentley was encouraging his accomplice to shoot.[4] Bentley was convicted and executed; the young accomplice who shot the officer received a prison sentence.[5] Questions about the fairness of the outcome, where the shooter avoided the death penalty while the accomplice was executed, are one of the reasons that Great Britain later abolished the death penalty.[6]

In one of the most famous U.S. Supreme Court death penalty cases, the Supreme Court twice upheld the death sentence of Warren McCleskey, who was ultimately executed in 1991.[7] Although the Supreme Court did not consider issues relating to the codefendants in McCleskey's case, some of the arguments in the lower courts centered on questions about his accomplices' role in a robbery that resulted in a police officer being killed.[8] Because no witnesses saw which one of the robbers shot the police officer, the claim of one of McCleskey's codefendants—that McCleskey later admitted to the killing—constituted a key piece of evidence against McCleskey.[9] The other participants in the crime received varying sentences, and all three were eventually released from prison, while the state executed McCleskey in the electric chair.[10] But up until his execution, McCleskey claimed that he did not kill the police officer during the robbery.[11]

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2. JAMES B. CHRISTOPH, CAPITAL PUNISHMENT AND BRITISH POLITICS 98–100 (1962).

3. Vivian Rakoff, *The Death Penalty and Youth*, 35 FAM. PRAC. NEWS, May 15, 2005, at 10.

4. *Id.* Fifteen minutes before the police officer was killed by Bentley's robbery accomplice, Bentley was taken into custody. *See* CHRISTOPH, *supra* note 2, at 98.

5. It is still debated today whether Bentley meant for his accomplice to shoot or to give up the gun. Rakoff, *supra* note 3.

6. *See* Donald S. Connery, *You, Me and the Death Penalty*, HARTFORD COURANT (Jan. 9, 2005), https://www.courant.com/news/connecticut/hc-xpm-2005-01-09-0501090490-story.html [https://perma.cc/WP4C-BZV4]. In 1991, Bentley's story was made into a movie called LET HIM HAVE IT (British Screen Productions 1991), and in 1993, Bentley received a royal posthumous pardon; after a rehearing on appeal in 2001, his conviction was quashed. Frederick C. Millett, Note, *Will the United States Follow England (and the Rest of the World) in Abandoning Capital Punishment?*, 6 PIERCE L. REV. 547, 572 (2007).

7. *See* JEFFREY L. KIRCHMEIER, IMPRISONED BY THE PAST: WARREN MCCLESKEY AND THE AMERICAN DEATH PENALTY 179, 190–92 (2015).

8. *Id.* at 15–16.

9. *Id.* at 18–19.

10. *See id.* at 305–06.

11. Mark Curriden, *'I Deeply Regret a Life Was Taken,'* ATLANTA J.-CONST., Sept. 21, 1991, at A12. When his execution date approached, a reporter asked McCleskey what sentence

Another execution that took place amidst questions about a codefendant occurred when Texas executed Shareef Ahmad Abdul-Rahim on December 7, 1982, in the first use of lethal injection in the United States.[12] Abdul-Rahim had been convicted, with Woody Loudres, of the crimes of kidnapping and murder. Jurors initially found both Abdul-Rahim and Lourdes guilty of killing a man during an attempted car theft while both defendants were intoxicated and high on heroin.[13] Neither Abdul-Rahim nor Loudres said who fired the lethal shot.[14] After both defendants were initially sentenced to death, Loudres was granted a new trial and accepted a plea bargain under which he could be released in six-and-a-half years.[15] The prosecutor from Abdul-Rahim's trial supported the condemned man's appeal, asserting that it was unfair to execute him while Loudres would not be executed.[16] And on appeal, Abdul-Rahim argued that his sentence was disproportional to Loudres's sentence.[17] But the court rejected this argument.[18] Abdul-Rahim, convicted under his birth name, Charles Brooks Jr., became the first black man executed in the United States since 1967.[19]

In a more recent example of disparity in sentencing codefendants, in Ohio, Timothy Mosley accepted a plea deal for a sentence of life without parole in exchange for his testimony against Austin Myers, who was sentenced to death.[20] Mosley had stabbed the victim to death while nineteen-year-old Myers held the victim.[21] Myers's attorney argued that Myers's death sentence was unfair in comparison to Mosley's life

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he should have received. *Id.* He replied, "The appropriate punishment should be what the other codefendants got—life in prison." *Id.*

12. Rob Warden & Daniel Lennard, *Death in America Under Color of Law: Our Long, Inglorious Experience with Capital Punishment*, 13 NW. J.L. & SOC. POL'Y 194, 246 (2018).

13. *See* FREDERICK DRIMMER, UNTIL YOU ARE DEAD: THE BOOK OF EXECUTIONS IN AMERICA 71 (1990); Dick Reavis, *Charlie Brooks' Last Words*, TEX. MONTHLY (Feb. 1983), https://www.texasmonthly.com/articles/charlie-brooks-last-words/ [https://perma.cc/DDN5-6NTN]. Woodie (aka "Woody") Loudres served eleven years in prison and was released on parole in 1989. Jon Roberts, *A Matter of Principle: Why Conservatives Should Oppose the Death Penalty*, TEX. OBSERVER (Feb. 17, 2010, 5:27 P.M.), https://www.texasobserver.org/a-matter-of-principle-why-conservatives-should-oppose-the-death-penalty/ [https://perma.cc/KDU9-P6Y3].

14. DRIMMER, *supra* note 13.

15. *Id.*

16. *Id.* at 72.

17. Warden & Lennard, *supra* note 12, at 247.

18. *Id.*

19. DRIMMER, *supra* note 13, at 72.

20. *See* Lawrence Budd, *Ohio Supreme Court Questions Lawyer Arguing for Clayton Man's Life*, DAYTON DAILY NEWS (Dec. 5, 2017), https://www.mydaytondailynews.com/news/crime--law/ohio-supreme-court-questions-lawyer-arguing-for-clayton-man-life/yYmSqh2armiPLmMHtHGn3J/ [https://perma.cc/CFS2-Z74H].

21. State v. Myers, 114 N.E.3d 1138, 1154 (Ohio), *cert. denied*, 139 S. Ct. 822 (2019) (mem.).

sentence.[22] But in 2018, the Ohio Supreme Court upheld Myers's death sentence, concluding that Ohio's statute mandating proportionality review only required such review to compare Mosley's case to "similar cases," and that a codefendant who did not receive a death sentence at trial did not fall into the category of "similar cases" for comparison.[23]

Not all disparate sentences end with executions. In 1977, Georgia became the first state to exercise clemency powers in the modern death penalty era. The Georgia Pardons Board, under Governor George Busbee, granted clemency to Charles H. Hill because his sentence was disproportionate to his codefendant's.[24] Hill had been sentenced to death in 1975 even though the actual killer in the case had received a life sentence.[25] Eventually, Hill was paroled in 2008.[26]

Of course, murder accomplices may have different levels of culpability in crimes, and they may have different mitigating circumstances, so fairness does not dictate that they should always receive the exact same sentence. But courts in recent years have struggled with the issue of whether, in death penalty cases, a jury should be allowed to consider the sentence of another defendant who participated in the same murder. Although early Supreme Court cases discussed a proportionality component of the Eighth Amendment of the United States Constitution, the main area of debate regarding codefendants is whether the Constitution requires that juries be permitted to weigh a codefendant's sentence as a mitigating factor at sentencing.

This Article explores whether a defendant has a constitutional right to use evidence of a codefendant's non-death sentence as mitigating evidence in a capital sentencing hearing. Courts are divided on the issue.

In Part I, this Article begins by exploring the Supreme Court's jurisprudence that provides a foundation for the debate. This discussion considers the Court's modern death penalty structure and how the Court has evaluated arguments that the Eighth Amendment includes a requirement that a defendant's death sentence be proportionate to punishments for similar crimes. Part II addresses the Court's landmark cases on mitigating factors, including how the Court defines "mitigation" and when defendants have a constitutional right to submit evidence as mitigating. Part III provides an overview of state and federal court cases

22. Budd, *supra* note 20.

23. *Myers*, 114 N.E.3d at 1185. Additionally, the Ohio Supreme Court noted Mosley's role in instigating and planning the murder. *Id.*

24. *See Clemency*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/clemency [https:// perma.cc/AE6X-F8EZ] (last updated July 20, 2018); Alan Judd, *Death Row Mystery: Why Some Inmates Get Mercy*, ATLANTA J.-CONST. (Oct. 1, 2015), https://www.ajc.com/blog/investigations/death-row-mystery-why-some-inmates-get-mercy/IO5PdLyyKbjZ0oetKpE53L/ [https://perma.cc/L4C9-QW9D].

25. Judd, *supra* note 24.

26. *Id.*

that have addressed the codefendant issue and the reasons they have reached different results. Then, Part IV evaluates whether, based upon the Court's prior cases, the Eighth Amendment requires trial courts to permit capital defendants to use a codefendant's sentence as mitigating evidence. Part IV also considers how lower courts have treated the issue, concluding that in light of the Court's concerns about fairness and the role of mitigating factors, courts should allow juries to weigh such evidence.

I. THE SUPREME COURT'S DEATH PENALTY JURISPRUDENCE ON FAIRNESS AND PROPORTIONALITY

After the U.S. Supreme Court held in 1972 that existing death penalty laws that gave complete discretion to sentencing jurors in capital cases violated the Eighth Amendment, the Court evaluated new death penalty statutes in 1976.[27] These statutes and the Court's subsequent decisions created the modern death penalty approach. From the inception of the modern death penalty, the Supreme Court was concerned with creating a fair death penalty that is not imposed arbitrarily and treats similar defendants in similar ways. The Justices wished to prevent the arbitrary application of the death penalty and ensure fairness by allowing juries to consider individual characteristics of defendants and their crimes. But the question regarding how best to limit arbitrariness while also achieving fairness remained, even as some judges and scholars concluded such a task was impossible.[28] Such a struggle goes back to the early days of the country's criminal justice system.

During the early years of the United States, all states followed the English common law practice of using an automatic death penalty, whereby courts would impose the death penalty automatically for people found guilty of certain offenses.[29] Subsequently, states began to limit the number of crimes that made a defendant eligible for the death penalty.[30]

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27. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 196–206 (1976) (plurality opinion).

28. *See, e.g.*, John D. Bessler, *Tinkering Around the Edges: The Supreme Court's Death Penalty Jurisprudence*, 49 AM. CRIM. L. REV. 1913, 1941 (2012); Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 346 (1998); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963-2006*, 107 COLUM. L. REV. 1, 31 (2007).

29. Woodson v. North Carolina, 428 U.S. 280, 289, 301 (1976) (citing H. BEDAU, THE DEATH PENALTY IN AMERICA 5–6, 15, 27–28 (rev. ed. 1967)) (holding that a mandatory death penalty system violates the Constitution). In the thirteenth century, English common law made all criminal homicides "prima facie capital, but all were subject to the benefit of clergy, which after 1350 came to be available to almost any man who could read." McGautha v. California, 402 U.S. 183, 197 (1971) (emphasis omitted).

30. *Woodson*, 428 U.S. at 289–90.

Generally, though, jurisdictions automatically imposed the death penalty for first-degree murders.[31] These mandatory death penalty systems did not allow for consideration of defendants' individual characteristics.[32]

Eventually, though, many jurisdictions became concerned about problems with such a mandatory death penalty system. For example, if jurors found a defendant guilty but did not believe the defendant should be executed, the jury might vote to acquit the defendant as the only way to save the accused's life.[33] So, around the mid-1800s, states began moving toward having discretionary death penalties.[34] The justification for the change was that it would limit jury nullification and create a fairer death penalty system that allowed jurors to consider mercy based on individual characteristics of capital defendants and their crimes.[35] But historians note that southern states were also motivated to give jurors discretion because all-white juries would be more lenient toward white defendants and harsher toward African-American defendants.[36]

Still, by the 1960s, the federal government, and every state that used juries (as opposed to judges) for capital sentencing, allowed the jurors to use their discretion in deciding whether to impose capital punishment.[37] However, this shift to allow jurors to use their discretion created another problem. Because the laws gave so much discretion to jurors, defense attorneys raised challenges asserting that this discretion made the use of the death penalty more arbitrary.[38] The issue eventually made it to the Supreme Court.

In 1972, in *Furman v. Georgia*,[39] a majority of the Supreme Court Justices in a *per curiam* opinion held that the death sentences in the three cases at issue violated the Eighth and Fourteenth Amendments.[40] With each of the nine Justices writing separate opinions, several of the Justices in the majority focused on the arbitrary use of the punishment.[41] For example, Justice Douglas stressed that the capital punishment laws before the Court were "pregnant with discrimination" against minorities and the

31. *See id.* at 289; *McGautha*, 402 U.S. at 198.

32. *Woodson*, 428 U.S. at 304.

33. *See, e.g.*, KIRCHMEIER, *supra* note 7, at 58.

34. *Id.*

35. *See id.*

36. *Id.*

37. *Id.*

38. *See* WILLIAM J. BOWERS ET AL., LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 174 (1984).

39. 408 U.S. 238 (1972).

40. *Id.* at 239–40.

41. *Id.* at 240; *cf.* McGautha v. California, 402 U.S. 183, 196 (1971) (holding that the Fourteenth Amendment is not violated when a capital sentencing jury is not given guiding factors), *vacated sub nom.* Crampton v. Ohio, 408 U.S. 941 (1972).

underprivileged.[42] Justice Stewart analogized the process of selecting the condemned to the randomness of a lightning strike.[43] Although the Justices in the majority did not agree on a specific reasoning, the Court concluded that the death penalty statutes were unconstitutional,[44] effectively putting a halt to all executions in the United States.[45]

In response to *Furman*, states began writing new death penalty laws that legislators hoped would avoid the constitutional problems implicated by statutes that gave jurors complete discretion.[46] These new statutes generally took one of two approaches. Some made the death penalty mandatory for defendants convicted of specific capital crimes.[47] Others were designed to leave some discretion to the capital sentencing jurors while giving them questions or factors to provide guidance.[48] Most of these "guided discretion" statutes permitted jurors or sentencing judges to weigh specific aggravating factors, which support a death sentence, against mitigating factors.[49]

Then, in 1976, the Court addressed cases from states that had enacted these new death penalty laws. In one group of cases, a majority of the Court found the mandatory death penalty statutes unconstitutional.[50] In other cases, a majority of the Justices upheld the guided discretion statutes.[51]

In *Gregg v. Georgia*,[52] one of the guided discretion statute cases, the Court examined Georgia's law featuring a bifurcated system that contained specific aggravating and mitigating factors for a jury to consider.[53] The Plurality concluded that Georgia's law provided jurors

42. *Furman*, 408 U.S. at 257 (Douglas, J., concurring).

43. *Id.* at 309–10 (Stewart, J., concurring). Justice Stewart concluded that the Eighth Amendment does not permit capital punishment "to be so wantonly and so freakishly imposed." *Id.* at 310.

44. *See id.* at 239–40.

45. *See* FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 37 (1986) ("The Justices entered similar orders in 120 other death penalty appeals pending before the Court and effectively prevented the execution of all prisoners on death row at the time.").

46. BOWERS ET AL., *supra* note 38.

47. *Id.*

48. *Id.*

49. *See id.*

50. *See, e.g.*, Roberts v. Louisiana, 428 U.S. 325, 336 (1976); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

51. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206–07 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262, 276 (1976); Proffitt v. Florida, 428 U.S. 242, 259 (1976). The Court also held that the death penalty per se does not violate the Eighth Amendment. *Gregg*, 428 U.S. at 169.

52. 428 U.S. 153 (1976).

53. *Id.* at 164–65 (plurality opinion).

with adequate guidance through "clear and objective standards."[54] On the same day, in *Jurek v. Texas*[55] and *Proffitt v. Florida*,[56] the Court upheld other guided sentencing statutes.[57]

Subsequent cases clarified and continue to clarify the roles of aggravating and mitigating factors in capital cases. More recently, in 2016, the Supreme Court in *Kansas v. Carr*[58] held that the Constitution does not require judges to inform juries about the burden of proof for mitigating circumstances.[59] Justice Scalia reasoned that whether a fact is mitigating is not a factual finding but "largely a judgment call (or perhaps a value call)" where weighing aggravating and mitigating circumstances involves "mostly a question of mercy."[60] Yet, even as the Court continues to fine-tune capital punishment doctrine, the 1976 cases laid out the basic constitutional requirements for capital sentencing that provide the main procedures used in U.S. courts today.

At the heart of the Court's Eighth Amendment analysis in *Furman* and the landmark 1976 cases lies the concept that the death penalty should be applied fairly. Underlying the procedural requirements surrounding the use of aggravating and mitigating circumstances, the Court has often stressed that capital punishment should be proportional to the crime and the individual.

For example, the Supreme Court held in *Enmund v. Florida*[61] in 1982 and in *Tison v. Arizona*[62] in 1987, that in some situations the death penalty is not a proportional punishment for felony murderers.[63] In *Enmund*, the defendant served as a getaway driver during a robbery-murder, and the trial judge, following a jury's recommendation, sentenced the defendant to death.[64] The Supreme Court held that the death sentence violated the Eighth Amendment because the State did not prove that the felony-murder defendant killed, attempted to kill, or "intended or contemplated that life would be taken."[65]

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54. *Id.* at 197–98 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

55. 428 U.S. 262 (1976). Texas's scheme was somewhat unique in that the statute provided three questions for jurors to answer when they were determining whether to sentence a capital defendant to death. *See id.* at 269 (plurality opinion).

56. 428 U.S. 242 (1976).

57. *Jurek*, 428 U.S. at 276 (plurality opinion); *Proffitt*, 428 U.S. at 259 (plurality opinion).

58. 136 S. Ct. 633 (2016).

59. *Id.* at 642–43.

60. *Id.* at 642. In the majority opinion, Justice Scalia noted, "[i]n the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve." *Id.*

61. 458 U.S. 782 (1982).

62. 481 U.S. 137 (1987).

63. *See id.* at 158; *Enmund*, 458 U.S. at 801.

64. *Enmund*, 458 U.S. at 784–85.

65. *Id.* at 801.

In its Eighth Amendment analysis, the *Enmund* Court considered whether society accepts the use of the death penalty for defendants who did not kill. It did so by weighing decisions by legislatures, juries, and prosecutors.[66] Additionally, the Court evaluated whether the execution of such defendants serves the punishment goals of deterrence and retribution.[67] Ultimately, the Court stressed that the punishment must be proportionate to the defendant's crime and required courts to do additional analysis before imposing a death sentence on defendants who did not actually kill.[68] The Court concluded that the felony-murder defendant's "criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt."[69]

In another Eighth Amendment felony-murder case about culpability, the Court in *Tison v. Arizona* expanded upon *Enmund's* proportionality requirement. The Court addressed the death sentences of two brothers who had helped their father and another inmate escape from prison.[70] While the group was on the run, they abducted a family.[71] After getting water to leave with the abducted family in the desert, the brothers watched their father and the other escapee kill the family.[72]

As in *Enmund*, the *Tison* Court considered state capital punishment statutes to assess "the state legislatures' judgment as to proportionality in these circumstances" where a felony-murder defendant did not actually kill anyone.[73] The Court also again considered the importance of individual mental culpability in assessing the appropriateness of the death penalty.[74] Ultimately, the Court found "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[75]

Similarly, the Court has held that the death penalty is not a proportionate punishment for crimes like rape where the victim is not

66. *Id.* at 789–96.

67. *Id.* at 798.

68. *Id.* at 801.

69. *Id.*

70. Tison v. Arizona, 481 U.S. 137, 138–39 (1987).

71. *Id.* at 140.

72. *Id.* at 141.

73. *Id.* at 152. The *Tison* Court evaluated the number of states that allowed the death penalty for felony-murder cases. *Id.* at 152–54. It concluded that "substantial and recent legislative authorization of the death penalty for the crime of felony murder regardless of the absence of a finding of an intent to kill powerfully suggests that our society does *not* reject the death penalty as grossly excessive under these circumstances." *Id.* at 154.

74. *Id.* at 156–57.

75. *Id.* at 158.

killed. In *Coker v. Georgia*,[76] a plurality held in 1977 that the use of the death penalty for the rape of an adult woman "is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[77] Three decades later in *Kennedy v. Louisiana*,[78] the Court reinforced that conclusion by holding that the Eighth Amendment does not permit the use of the death penalty for the crime of raping a child where the crime did not result, and was not intended to result, in the death of the child.[79]

In these proportionality cases, the Court stressed that the punishment of the death penalty must be proportional in relation to the crime generally.[80] But the Court did not state that the Constitution requires strict proportionality between the punishment of death and an individual's crime. Thus, one proportionality issue left open by the 1976 death penalty cases was whether the Eighth Amendment required appellate courts to compare an individual capital defendant's case to other capital and noncapital cases to determine whether the death penalty was proportional to that individual and the individual's crime.[81]

States, interpreting Supreme Court precedent, struggled with this issue. Since *Furman* had stressed that it was important that the death penalty be applied fairly, some states included proportionality review in their new death penalty statutes. In *Gregg*, the three-Justice plurality and the three-Justice concurring opinion both emphasized that Georgia's system had a statutorily required comparative proportionality review.[82] Similarly, the Justices in *Proffitt* noted that in Florida, case law required reviewing courts to do a comparative proportionality review to ensure a defendant's sentence was consistent with sentences in similar cases.[83]

Despite the emphasis on state-required proportionality review in those 1976 cases, the Court has not held that individual proportionality review

76. 433 U.S. 584 (1977).

77. *Id.* at 592.

78. 554 U.S. 407 (2008).

79. *See id.* at 421. The Court stressed "that 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."'" *Id.* at 420 (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)).

80. *See, e.g.*, *id.* at 445–46.

81. Although the process may vary by jurisdiction, in jurisdictions that perform a proportionality review, a court must define the group of cases that are part of the review, then it must select the cases similar to the case being appealed, and finally, it must determine whether the case being appealed is proportional when compared to the pool of similar cases. *See* Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 794 (2004).

82. Gregg v. Georgia, 428 U.S. 153, 198, 204–06 (1976) (plurality opinion); *id.* at 222–23 (White, J., concurring).

83. Proffitt v. Florida, 428 U.S. 242, 250–51 (1976).

is required for a constitutional death penalty system.[84] Additionally, in *Jurek*, the Court upheld Texas's sentencing scheme, which did not contain a comparative proportionality review.[85]

Eventually, the Court addressed the issue more directly. In 1984, in *Pulley v. Harris*,[86] the Supreme Court evaluated whether the Eighth Amendment requires states to include a proportionality review in their death penalty review process.[87] In examining the 1976 cases, the Court recalled that it had approved Texas's death penalty even though the state did not have comparative proportionality review.[88] The Court also noted that in *Zant v. Stephens*[89] the Court had considered proportionality review "to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required."[90]

Thus, the Court in *Harris* concluded that comparative proportionality review by an appellate court is not required in every death penalty case.[91] The Court did leave open the possibility that the Eighth Amendment might require a state appellate court to conduct a proportionality review if the state's death penalty system is not otherwise constitutionally sufficient.[92] But addressing the California death penalty, the Court held that the Constitution does not additionally require appellate proportionality review under that state's existing capital punishment system.[93]

Although California's system did not have such review, Justice Brennan pointed out in his dissenting opinion that more than thirty states required some form of comparative proportionality review, either by

84. *See* Pulley v. Harris, 465 U.S. 37, 44–48 (1984).

85. Jurek v. Texas, 428 U.S. 262, 268–69 (1976); *see also Harris*, 465 U.S. at 48.

86. 465 U.S. 37 (1984).

87. *Id.* at 43–44.

88. *Id.* at 48.

89. 462 U.S. 862 (1983).

90. *Harris*, 465 U.S. at 50.

91. *Id.* at 50–51 ("There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it.").

92. *Id.* at 51 ("Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort.").

93. The Court noted that the California statute did not describe the nature of the appeal for a death penalty case, but the statute contained other procedures at sentencing that protected the rights of capital defendants. *Id.* at 53. These procedures included the requirement that at trial special circumstances must be proved beyond a reasonable doubt, that at the sentencing stage the trier of fact considers aggravating and mitigating circumstances, that upon motion the trial judge will review a jury's sentence of death, and that if the death sentence is upheld there is an automatic appeal. *Id.* at 51–53.

judicial decision or by statute.[94] In looking at the cases reversed on proportionality grounds in those states, Justice Brennan responded to the majority that such review helps "to eliminate some, if only a small part, of the irrationality that currently infects imposition of the death penalty by the various States."[95]

Although *Harris* only directly addressed the death penalty procedures in California, the decision had a broader impact. State courts that had been performing proportionality review in capital cases soon began abandoning or watering down the practice.[96]

Yet, some jurisdictions still do require a form of comparative proportionality review. As such, sometimes the issue arises as to whether a codefendant's sentence should be evaluated as some sort of proportionality review instead of the issue of whether it should be weighed as a mitigating factor. This Article mainly focuses on the mitigating factor aspect, but it is worth noting that a codefendant's sentence may have constitutional significance for a court's proportionality analysis too.[97]

After *Harris*, states still were free to implement the extra protections of comparative proportionality review even if the Eighth Amendment did not require such review.[98] For example, by statute, states such as Tennessee require proportionality review as part of a direct appeal of a death sentence.[99] And, in jurisdictions like Idaho that mandate

94. *Id.* at 71 (Brennan, J., dissenting).

95. *Id.* at 73.

96. *See* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "the Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 150–51 (1996); *see also* Bidish Sarma, Furman*'s Resurrection: Proportionality Review and the Supreme Court's Second Chance to Fulfill* Furman*'s Promise*, 2009 CARDOZO L. REV. DE NOVO 238, 242, http://cardozolawreview.com/wp-content/uploads/2018/07/SARMA_2009_238.pdf [https://perma.cc/F97B-RHMB] (indicating that state courts are moving "away from robust proportionality review").

97. Another argument for why a jury or a court should evaluate a codefendant's sentence is that the Eighth Amendment, common law, or both prohibit inconsistent jury verdicts. *See, e.g.*, Getsy v. Mitchell, 456 F.3d 575, 591–92 (6th Cir. 2006) (holding that the death sentence for a person who had been hired to commit the murder violated the Eighth Amendment when the person who hired him was sentenced to prison), *vacated*, No. 03-3200, 2006 U.S. App. LEXIS 32577 (6th Cir. Nov. 22, 2006). For more on the rule of consistency, see United States v. Powell, 469 U.S. 57, 66 (1984); Hartzel v. United States, 322 U.S. 680, 682 n.3 (1944); Morrison v. California, 291 U.S. 82, 87–90 (1934).

98. *See* State v. Lafferty, 20 P.3d 342, 376 (Utah 2001) ("[C]ase-by-case proportionality review is not required under the United States or Utah Constitution."), *denial of post-conviction relief aff'd*, 175 P.3d 530 (Utah 2007).

99. *See* TENN. CODE ANN. § 39-13-206(c)(1)(D) (2018) (stating that the appellate court is to consider whether each death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant"). Washington and Delaware have a similar proportionality provision in their state statutes, although the death

proportionality review by statute, courts have considered codefendants' sentences in determining whether a death sentence is disproportionate or unjust.[100] The Montana Supreme Court has similarly weighed codefendants' sentences as part of a state statutory proportionality review.[101]

Some decisions on proportionality review, however, have pointed out that it is the role of the appellate court, not the jury, to perform such review. For example, the Court of Appeals of Virginia has noted that "[u]nder the mandated statutory review of capital cases, the Supreme Court must compare the sentence in a particular case to similar cases, but a jury has no such responsibility."[102]

During the time that New Jersey had the death penalty, the state had one of the most rigorous proportionality review systems in the country. Like many other states, when New Jersey passed a new death penalty law after *Furman*, its law required the state supreme court, in every death penalty case, to determine whether the sentence was disproportionate to the punishment in similar cases.[103] Although the New Jersey Legislature eventually attempted to weaken the importance of such review, in 1991

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penalties in those states were recently held to be unconstitutional for unrelated reasons. *See* DEL. CODE ANN. tit. 11, § 4209(g) (2019) (stating that the Delaware Supreme Court should determine "[w]hether, considering the totality of evidence in aggravation and mitigation . . . the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases arising under this section"), *invalidated by* Rauf v. State, 145 A.3d 430 (Del. 2016); Clark v. State, 672 A.2d 1004, 1010–11 (Del. 1996) (en banc) (applying the proportionality review required by Delaware's statute). Although Washington state's death penalty recently was found unconstitutional in *State v. Gregory*, 427 P.3d 621, 626 (Wash. 2018), when Washington had the death penalty, a state statute required proportionality review. *See* WASH. REV. CODE § 10.95.130(2)(b) (2018) (requiring the Washington Supreme Court to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"), *invalidated by Gregory*, 427 P.3d 621.

100. *See* State v. Hoffman, 851 P.2d 934, 943–44 (Idaho 1993) (holding that the defendant's death sentence was not disproportionate or unjust in light of a codefendant's sentence); State v. McKinney, 687 P.2d 570, 576 (Idaho 1984) (noting that under proportionality review required by statute, the differences in the sentences between the defendant and codefendant were "justified by the varying degrees of involvement in the crime"), *dismissal of post-conviction relief aff'd*, 992 P.2d 144 (Idaho 1999), *and denial of post-conviction relief aff'd*, 291 P.3d 1036 (Idaho 2013), *and dismissal of post-conviction relief aff'd*, 396 P.3d 1168 (Idaho 2017).

101. *See, e.g.*, State v. Smith, 705 P.2d 1087, 1108 (Mont. 1985).

102. Walker v. Commonwealth, 486 S.E.2d 126, 134 (Va. Ct. App. 1997), *abrogated by* Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000); *see also* Lewis v. Commonwealth, 593 S.E.2d 220, 227 (Va. 2004) ("[U]pon our prior determinations of excessiveness and disproportionality, we have rejected efforts by defendants to compare their sentences with those received by confederates." (quoting Murphy v. Commonwealth, 431 S.E.2d 48, 53 (Va. 1993))).

103. 1982 N.J. Laws 555, 558 (codified as amended at N.J. STAT. ANN. § 2C:11-3 (West 2018)).

the New Jersey Supreme Court began a Proportionality Review Project that created "the most elaborate statistical proportionality review process in the nation."[104] Through the years, proportionality review by the New Jersey Supreme Court helped reduce the number of death sentences, and it likely contributed to the state ultimately abolishing the death penalty.[105] Other states have yet to follow New Jersey's history of extensive analysis in death penalty cases of comparing capital and noncapital cases.

Further, even in states that perform a proportionality review, courts stress that there is no requirement that defendants and codefendants be sentenced alike.[106] Different defendants may have different culpabilities, and courts may be reluctant to engage in comparing sentences without going into a detailed analysis of the codefendants' mitigating and aggravating factors.[107] A further question is whether juries are capable of doing that type of analysis when weighing mitigating factors.

II. THE SUPREME COURT AND THE IMPORTANT ROLE OF MITIGATING CIRCUMSTANCES IN CAPITAL CASES

In 1976, when the Supreme Court upheld the death penalty statutes in *Gregg*, *Jurek*, and *Proffit*, the Court also struck down mandatory death penalty statutes as violating the Eighth Amendment in *Woodson v. North Carolina*[108] and in *Roberts v. Louisiana*.[109] The *Woodson* and *Roberts* cases stressed the importance of individualized sentencing and the role of mitigating factors presented by capital defendants.[110]

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104. Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1197–98 (2001).

105. George W. Conk, *Herald of Change? New Jersey's Repeal of the Death Penalty*, 33 SETON HALL LEGIS. J. 21, 33–41 (2008).

106. *See, e.g.*, State v. Gamble, 63 So. 3d 707, 726 (Ala. Crim. App. 2010). The court noted that Alabama has a statute requiring appellate courts to do proportionality review in capital cases. *Id.* at 728–29. But, "[t]he law does not require that each person involved in a crime receive the same sentence." *Id.* at 726 (quoting *Ex Parte* McWhorter, 781 So. 2d 330 (Ala. 2000)).

107. *See* Issa v. Bradshaw, No. 1:03-cv-280, 2008 U.S. Dist. LEXIS 121867, at *88–90 (S.D. Ohio Nov. 5, 2008) (finding the fact that defendant received a death sentence and the actual shooter only received life imprisonment was not contrary to or an unreasonable application of federal law on habeas review); Harlow v. State, 70 P.3d 179, 203–05 (Wyo. 2003) (finding that the defendant's sentence was not disproportionate to his two codefendants' sentences), *denial of post-conviction relief aff'd*, 105 P.3d 1049 (Wyo. 2005); *see also* Hopkinson v. State, 664 P.2d 43, 63 (Wyo. 1983) ("Accomplices in crime need not be sentenced alike; a sentence should be patterned to the individual defendant.").

108. 428 U.S. 280 (1976).

109. 428 U.S. 325 (1976).

110. *See Woodson*, 428 U.S. at 304. In *Roberts*, the plurality explained that the crime of intentional murder of a police officer could not result in a mandatory death sentence. *Roberts*, 428 U.S. at 335–36. More than ten years later, as in *Woodson* and *Roberts*, the Court struck down a mandatory death penalty statute in *Sumner v. Shuman*, 483 U.S. 66, 85 (1987).

The *Woodson* plurality noted that historically, mandatory death sentences created problems—including jury nullification.[111] Thus, the Court reasoned that in death penalty cases the Eighth Amendment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[112] Individualized sentencing in capital cases is required because there is an increased need for reliability: "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long."[113] To ensure individualized sentencing, the Court concluded that a defendant has a constitutional right to present mitigating evidence to jurors.[114] *Woodson* and *Roberts*, however, did not clarify how broad the command was, only that courts had to allow defendants to present at least some mitigating factors.[115]

Subsequent cases clarified the constitutional significance of mitigating circumstances. In *Lockett v. Ohio*,[116] the Supreme Court found Ohio's death penalty statute unconstitutional because it limited the mitigating factors a capital jury could weigh.[117] Echoing language from *Woodson*, the *Lockett* plurality concluded that a sentencing jury should "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[118]

The Supreme Court further stressed the broad command from *Lockett* in subsequent cases. For example, in *Skipper v. South Carolina*,[119] the Court included evidence unrelated to the crime in the definition of "mitigating evidence" when it held that a trial court could not exclude evidence that the defendant had adjusted to incarceration.[120] The Court noted that from such evidence a jury might have "drawn favorable inferences" with respect to the defendant's character and probable future conduct.[121] Thus, "[a]lthough it is true that any such inferences would not

111. *Woodson*, 428 U.S. at 294 n.29.

112. *Id.* at 304.

113. *Id.* at 305.

114. *Id.* at 304.

115. *Roberts*, 428 U.S. at 333–34; *Woodson*, 428 U.S. at 304.

116. 438 U.S. 586 (1978).

117. *Id.* at 608.

118. *Id.* at 604.

119. 476 U.S. 1 (1986).

120. *Id.* at 4 ("Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982))).

121. *Id.*

relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'"[122]

Similarly, in *Eddings v. Oklahoma*,[123] the Court found other evidence not directly related to the crime to be mitigating. In that case, the Court found that evidence of a capital defendant's troubled youth must be admitted for consideration during sentencing.[124] Therefore, death penalty statutes must allow for the consideration of mitigating circumstances about the offense and the defendant's character. Further, statutes and judges cannot limit consideration of the factors.[125] Sentencers must be permitted to consider any information about "the circumstances of the offense together with the character and propensities of the offender."[126]

The Supreme Court has consistently used broad language to define what circumstances constitute mitigating factors.[127] For example, in *McKoy v. North Carolina*,[128] the Court stressed that evidence is mitigating and cannot be constitutionally barred "if the sentencer could

122. *Id.* at 4–5 (citation omitted) (quoting *Lockett*, 438 U.S. at 604). The Court added that "[c]onsideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." *Id.* at 5.

123. 455 U.S. 104 (1982).

124. *Id.* at 115.

125. *See* Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987) (holding that the trial judge's instruction that did not allow the advisory jury to weigh nonstatutory mitigating factors violated the Constitution); *see also* Sumner v. Shuman, 483 U.S. 66, 77–78 (1987) (clarifying that even in a situation where a life-sentenced prisoner commits murder, mitigation still must be considered during a capital sentencing hearing).

126. *Eddings*, 455 U.S. at 112 (quoting Pennsylvania v. Ashe, 302 U.S. 51, 55 (1937)).

127. Yet, the Court has implied that there might be some limits on what mitigation a sentencer is required to consider under the Constitution. In *Johnson v. Texas*, 509 U.S. 350 (1993), the Court evaluated Texas's capital sentencing statute that presented special questions to jurors instead of a list of aggravating and mitigating factors. *Id.* at 354 (noting that the trial court instructed the jury to answer two issues in conformity with TEX. CODE CRIM. PROC. ANN. art. 32.071(b) (West 1981), including whether "the conduct of the Defendant . . . that caused the death of the deceased" was "committed deliberately and with the reasonable expectation that the death of the deceased or another would result," and whether there is "a probability that the Defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society"). At the time, Texas's death penalty statute did not specifically provide for mitigating factors to be considered outside of these questions. *Id.* Johnson, who was nineteen at the time of the murder, argued that the sentencing questions did not allow the jury to consider youth as a mitigating factor. *Id.* at 353, 358, 366. The Court, however, held that *Lockett* only requires that a jury be permitted to weigh mitigating evidence and that the jury does not have to "be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Id.* at 372. Thus, the Court upheld the death sentence because the mitigating factor of youth could be considered in at least one way—how it affected the defendant's future dangerousness. *Id.* at 371, 373.

128. 494 U.S. 433 (1990).

reasonably find that it warrants a sentence less than death."[129] In that case, the Court approvingly cited the following definition from the North Carolina Supreme Court Chief Justice: "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."[130] Further, evidence may still be relevant to mitigation even if it does not excuse a defendant's conduct.[131]

Generally, death-penalty states' sentencing statutes list some mitigating factors. But because the Constitution does not allow states to preclude consideration of mitigating factors,[132] lower courts are often asked to consider what factors are mitigating under the Supreme Court's jurisprudence. The Supreme Court has not provided definitive guidance as to what specific factors should be mitigating or why some factors are mitigating. Thus, on a case-by-case basis, lower courts have further developed the law of mitigating circumstances.

In making the legal and moral determination of whether a defendant should be executed, jurors consider certain mitigating factors presented by the defendant and approved by the trial court. And as discussed above, the Supreme Court has stated that a sentencer must "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[133]

The definition is broad, although occasionally courts find that specific evidence does not constitute a mitigating circumstance.[134] Still, courts

129. *Id.* at 441 (first citing Skipper v. South Carolina, 476 U.S. 1 (1986); and then citing *Eddings*, 455 U.S. 104).

130. *Id.* at 440 (quoting State v. McKoy, 372 S.E.2d 12, 45 (N.C. 1988) (Exum, C.J., dissenting)).

131. *Eddings*, 455 U.S. at 113–16.

132. Many state statutes explicitly incorporate the command of *Lockett* that all mitigating evidence must be considered by including a catch-all provision among the list of specific statutory mitigating circumstances. *See, e.g.*, CAL. PENAL CODE § 190.3(k) (West 2018) ("Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."); COLO. REV. STAT. 18-1.3-1201(4)(*l*) (2018) ("Any other evidence which in the court's opinion bears on the question of mitigation."); FLA. STAT. § 921.141(7)(h) (2018) ("The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty."); IND. CODE § 35-50-2-9 (c)(8) (2018) ("Any other circumstances appropriate for consideration."); N.C. GEN. STAT. § 15A-2000(f)(9) (2018) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value.").

133. Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis omitted).

134. Below are some examples of cases where courts found evidence did not constitute a mitigating factor. *See, e.g.*, Madison v. State, 718 So. 2d 90, 96 (Ala. Crim. App. 1997) (holding that evidence from a defense expert that the defendant suffered from delusional and thought disorders was insufficient to support the mitigating circumstance of extreme mental or emotional disturbance), *aff'd sub nom. ex parte* Madison, 718 So. 2d 104 (Ala. 1998), *denial of post-*

and legislatures have found a significant number of factors that should be considered mitigating in capital cases.

Generally, mitigating factors may be grouped into four categories: (1) mitigating circumstances unrelated to the crime that show that the defendant has some good qualities; (2) mitigating circumstances that show less culpability, that help explain why a defendant committed the crime, or both; (3) mitigating circumstances that show the defendant had a lesser involvement with the murder; and (4) mitigating circumstances related to the legal proceedings.[135]

The first category, regarding a defendant's good qualities, is used to illustrate the defendant has done some good, revealing that the defendant is a human being who is worth saving from the death penalty.[136] The second category includes factors that help explain why the defendant might be less culpable or that might evoke sympathy.[137] A defendant who suffered severe abuse as a child is not excused for later committing a crime, but that fact might provide some context as to why the defendant ended up committing crimes. Like all mitigating factors, these do not mean that the defendant should not be punished; they merely support that the punishment should be life in prison instead of the death penalty.[138]

The third category focuses on the circumstances of the crime.[139] For example, it would be mitigating if a defendant had codefendants who were more culpable in the murder. One might argue that the defendant should be sentenced to life in prison because of that defendant's lesser

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conviction relief aff'd, 999 So. 2d 561 (Ala. Crim. App. 2006); State v. Timmendequas, 737 A.2d 55, 115 (N.J. 1999) (holding that a capital defendant's alleged offer to plead guilty in exchange for a life sentence was not a mitigating factor), *aff'd in part and rev'd in part*, 2011 WL 2326967 (N.J. Super. Ct. App. Div. June 14, 2011); State v. Morton, 715 A.2d 228, 270 (N.J. 1998) (holding that parole ineligibility is not a mitigating factor); State v. Torres, 713 A.2d 1, 18 (N.J. Super. Ct. App. Div. 1998) (holding that a sixteen-year-old defendant's age was not a mitigating factor because the crime was not of a nature consistent with youth), *denial of post-conviction relief aff'd*, 2007 WL 2005047 (N.J. Super. Ct. App. Div. July 12, 2007), *and denial of post-conviction relief aff'd*, No. A-2225-15T4 A-5597-15T4, 2018 WL 1056252 (N.J. Super. Ct. App. Div. Feb. 7, 2018); State v. Clark, 990 P.2d 793, 805–06 (N.M. 1999) (holding that the fact that the former governor had commuted prior death sentences to life imprisonment was not a mitigating factor, that the opinions of friends or relatives of the defendant that defendant should not be sentenced to death are not mitigating circumstances, and that the testimony of religious leaders and lawyers as to the propriety of the death sentence was not relevant mitigating evidence).

135. *See, e.g.*, Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 658–87 (2004) (categorizing mitigating factors from around the United States).

136. *Id.* at 664–65.

137. *Id.* at 671.

138. *See id.* at 664.

139. *Id.* at 665–72.

involvement in the murder. Similarly, other circumstances surrounding the crime might support arguments for a lesser sentence than death.[140]

Finally, the fourth category of mitigating factors includes factors that are based on aspects of the capital prosecution that go toward making the prosecution fairer.[141] For example, some courts have found that a recommendation of life in prison by a prosecutor or by the victim's family is mitigating.[142]

For another example of a factor related to legal proceedings, some judges have suggested that a difference in jurisdiction that would affect the sentence should be mitigating. In *United States v. Gabrion*,[143] a defendant was prosecuted under federal law because the victim's body was found in a national forest.[144] But had the body been outside the forest, the defendant would not have been eligible for the death penalty because under Michigan state law there is no death penalty.[145] Initially, the U.S. Court of Appeals for the Sixth Circuit held that a capital jury should have been allowed to consider the mitigating factor that the state did not have the death penalty.[146] The appeals court later granted a rehearing and reversed the earlier decision, but Judge Karen Moore's dissent reasserted, "When the location of the crime is what makes a defendant eligible for

140. *See id.*

141. *Id.* at 672–73. In addition to the factors discussed above, two other factors that might fit in this category are the factors of whether the defendant is ineligible for parole and the length of legal proceedings. Regarding parole ineligibility, at least in cases where the prosecution has placed the defendant's "future dangerousness" at issue, the Due Process Clause of the Fourteenth Amendment gives the defendant the right to inform the jury that she or he is ineligible for parole if sentenced to life in prison. Shafer v. South Carolina, 532 U.S. 36, 51 (2001); Simmons v. South Carolina, 512 U.S. 154, 171 (1994). The factor is listed here, though arguably it is not a mitigating factor, but more like rebuttal to the aggravating factor of future dangerousness. Regarding the length of legal proceedings factor, in *State v. Adamson*, 665 P.2d 972 (Ariz. 1983) (en banc), while upholding a death sentence, the court considered the length of the legal proceedings in the case as a mitigating factor. *Id.* at 989.

142. *See, e.g.*, Jeffers v. Ricketts, 627 F. Supp. 1334, 1357–59 (D. Ariz. 1986) (noting that the prosecutor offered a plea bargain that did not involve a death sentence), *aff'd*, 38 F.3d 411 (9th Cir. 1994); State v. White, 982 P.2d 819, 825, 831 (Ariz. 1999) (affirming the death sentence but holding that the trial judge erred by not finding a mitigating circumstance that the two prosecutors did not believe that death was the appropriate sentence); *see also* Ferguson v. State, 814 So. 2d 925, 959 (Ala. Crim. App. 2000) (noting that the trial court found the nonstatutory mitigating factor that the jury recommended a sentence of life imprisonment without the possibility of parole), *aff'd sub nom. ex parte* Ferguson, 814 So.2d 970 (Ala. 2001), *dismissal of post-conviction relief aff'd*, 13 So.3d 418 (Ala. Crim. App. 2008).

143. 648 F.3d 307 (6th Cir. 2011), *vacated*, No. 02-1386/1461/1570, 2011 U.S. App. LEXIS 23290 (6th Cir. Nov. 17, 2011), *and reh'g en banc* 719 F.3d 511 (6th Cir. 2013).

144. *Id.* at 316.

145. *Id.*

146. *Id.* at 323–24.

the death penalty in the first place, the location becomes a 'circumstance of the offense' that could justify a sentence less than death."[147]

A final mitigating factor, which could belong in either the third or the fourth category, is the topic of this Article: that a codefendant has received a life sentence. This factor arguably relates to the fairness of the criminal proceeding and to the circumstances of the crime. Courts are divided on whether this factor should be mitigating, with some courts concluding that the factor does not qualify under the Supreme Court's definition of a mitigating factor: "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[148] The next part discusses how states and lower courts have addressed this issue.

III. DOES THE EIGHTH AMENDMENT REQUIRE JURIES TO CONSIDER A CODEFENDANT'S SENTENCE AS A MITIGATING CIRCUMSTANCE?

The Supreme Court has not expressly addressed whether the Eighth Amendment requires that a defendant be allowed to introduce a codefendant's non-death sentence as a mitigating factor in a capital case. As noted above, however, the Court often has used broad language in favor of allowing juries to consider anything that might be mitigating.

In at least one instance, the Court arguably implied approval of considering a codefendant's non-death sentence as a mitigating factor. In *Parker v. Dugger*,[149] the Court held that the Florida Supreme Court did not properly review a capital sentence because the state court incorrectly found that the trial judge had not found any nonstatutory mitigating factors.[150] The U.S. Supreme Court concluded that the trial court must have found some nonstatutory mitigating factors even if the trial court's order was ambiguous.[151] In making its conclusion, the Court noted that the defendant's attorney had argued several mitigating factors at the sentencing hearing, including that none of the accomplices were sentenced to death.[152]

In analyzing how the state courts had evaluated mitigating circumstances, the Supreme Court noted that the defendant's "nonstatutory mitigating evidence—drug and alcohol intoxication, more lenient sentencing for the perpetrator of the crime, character and background—was of a type that the Florida Supreme Court had in other

147. *Id.* at 540 (Moore, J., dissenting).
148. Lockett v. Ohio, 438 U.S. 586, 604 (1978).
149. 498 U.S. 308 (1991).
150. *Id.* at 322–23.
151. *Id.* at 314–15.
152. *Id.* at 314.

cases found sufficient to preclude a jury override."[153] The Court further explained, "The trial judge must have at least taken this evidence into account before passing sentence."[154]

By listing the sentencing of another person as a factor that the trial judge must have considered, the Court's reasoning seems to support its approval of the mitigating circumstance. On the other hand, one might argue that the Court was only recognizing that the factor was mitigating under state law.[155] Thus, the decision in *Parker* gives some insight into the Court's view, but it does not definitively resolve the issue.

Although the Supreme Court has not expressly addressed whether courts must weigh a codefendant's non-death sentence as mitigating, some legislatures and several lower courts have addressed the issue. Indeed, regardless of the U.S. Constitution, states—through statutes or through interpretation of a state constitution—may require that a defendant be able to use such mitigating evidence.

But, because *Lockett* held that states may not prevent a defendant from presenting evidence that is mitigating, the issue remains whether states are required to allow evidence of a codefendant's sentence to be considered as a nonstatutory mitigating factor. The courts are not uniform on the issue.

A. *Jurisdictions Holding that a Codefendant's Sentence Is Mitigating Evidence*

As the U.S. Court of Appeals for the Third Circuit has noted, courts are divided on the issue of whether the Eighth and Fourteenth Amendments dictate that a defendant may submit evidence of a codefendant's sentence as mitigation. In *Frey v. Fulcomer*,[156] in evaluating an ineffective assistance of counsel claim for counsel's failure to attempt to introduce a codefendant's sentence as mitigating, the court recognized that Pennsylvania law did not allow such mitigating evidence.[157] But "[i]t remains less clear whether the federal constitution (specifically the Fifth, Eighth, and Fourteenth Amendments) requires that codefendants' sentences must be admitted as mitigating evidence in a

153. *Id.* at 315.

154. *Id.*

155. The Supreme Court in *Parker*, however, did note that the state court could not decline to consider mitigating evidence as a matter of "both federal and Florida law." *Parker*, 498 U.S. at 315.

156. 974 F.2d 348 (3d Cir. 1992).

157. *Id.* at 366.

death penalty hearing."[158] The court, however, reasoned that it did not need to resolve the mitigating issue for the case before it.[159]

In contrast to federal courts,[160] several state courts have allowed a capital defendant to use a codefendant's sentence as a mitigating factor, including courts in Arizona,[161] Colorado,[162] Delaware,[163] Florida,[164]

158. *Id.* The court did note that *Parker v. Dugger* did not require consideration of such evidence as part of proportionality review. *Id.* at 366 n.22.

159. *Id.* at 366. Notably, the federal capital sentencing statute allows consideration of a codefendant's sentence when the defendant and codefendant are "equally culpable." 18 U.S.C. § 3592(a)(4) (2012).

160. As discussed in the next part, generally federal courts have declined to require that courts allow a defendant to present a codefendant's sentence as mitigating. *See infra* Part III.B. In many of those cases, though, that result is at least partly due to deferential review of state death penalty cases on habeas corpus review. *See infra* Part III.B.

161. *See, e.g.*, State v. Bearup, 211 P.3d 684, 694–95 (Ariz. 2009) (en banc); State v. Schurz, 859 P.2d 156, 167 (Ariz. 1993) (en banc).

162. *See, e.g.*, Woldt v. People, 64 P.3d 256, 260 n.8 (Colo. 2003) (en banc) (noting the panel considered the mitigating factor of the codefendant's life sentence).

163. *See, e.g.*, Garden v. State, 844 A.2d 311, 317 (Del. 2004) (agreeing that a codefendant's life sentence has long been viewed as a relevant sentencing factor), *superseded on other grounds by statute*, 74 Del. Laws 174 (2003), *as recognized in* Starling v. State, 882 A.2d 747, 759 (Del. 2005); State v. Ferguson, 642 A.2d 1267, 1267–68 (Del. Super. Ct. 1992) (holding that a codefendant's sentence is a mitigating circumstance that is admissible at a sentencing hearing); *see also* Rauf v. State, 145 A.3d 430, 433–34 (Del. 2016) (finding Delaware's death penalty unconstitutional).

164. Florida trial and appellate courts often consider comparable codefendant sentences in capital cases as part of proportionality review. *See, e.g.*, Jeffries v. State, 222 So. 3d 538, 548 (Fla. 2017) (finding that trial court applied the correct law regarding relative culpability of codefendants); Sexton v. State, 775 So. 2d 923, 935–36 (Fla. 2000) ("Florida case law is clear—a defendant may not be sentenced to death if a more culpable co-defendant has been sentenced to life imprisonment or less. This reasoning probably also extends to equally culpable co-defendants."), *denial of post-conviction relief aff'd*, 997 So. 2d 1073 (Fla. 2008). Because of the state's concern about proportionality in capital cases, courts sometimes extend that concern and cite those cases in weighing whether to allow juries to consider codefendant sentences as a mitigating factor. *See* Gonzalez v. State, 136 So. 3d 1125, 1165 (Fla. 2014) (concluding that because the trial court found that the defendant's death sentence was not disproportional to that of his codefendants, "[t]he trial court committed no error in rejecting the disparate sentences of the codefendants as a mitigating circumstance"), *denial of post-conviction relief aff'd*, 253 So. 3d 526 (Fla. 2018); *see also* Messer v. State, 330 So. 2d 137, 141–42 (Fla. 1976) (holding that a sentencing jury was entitled to know that the codefendant negotiated a plea to second degree murder and was sentenced to thirty years in prison); Slater v. State, 316 So. 2d 539, 542 (Fla. 1975) (finding that under *Furman v. Georgia*, the disparity between the death sentence for the accomplice defendant and a life in prison sentence for the "triggerman" was not equal justice under the law).

Illinois,[165] Kansas,[166] Maryland,[167] and Ohio.[168] Some jurisdictions specifically mention this mitigating factor in their capital sentencing statutes. For example, the federal death penalty statute allows consideration of the codefendant factor.[169] Similarly, New Hampshire's death penalty statute offers the following mitigating factor: "Another defendant or defendants, equally culpable in the crime, will not be punished by death."[170] Legislators in these jurisdictions have determined that the information is relevant and included the mitigating factor as a policy choice, whether or not there is a constitutional mandate for the factor.

Many state courts have stressed the relevance of the sentence of an equally culpable codefendant for sentencing a capital defendant.[171] As noted earlier, jurisdictions can require consideration of a codefendant's sentence as a mitigating factor by statute or under the state constitution.[172]

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165. *See, e.g.*, People v. Gleckler, 411 N.E.2d 849, 858–61 (Ill. 1980) (vacating a sentence of death based in part upon an accomplice's life sentence). Illinois, however, abolished the death penalty in 2011. *See* Kevin M. Barry, *The Law of Abolition*, 107 J. CRIM. L. & CRIMINOLOGY 521, 530 (2017).

166. State v. Deiterman, 29 P.3d 411, 423 (Kan. 2001) (considering the mitigating factor of the sentences of coconspirators).

167. *See, e.g.*, Bryant v. State, 824 A.2d 60, 78 (Md. 2003) ("[T]he sentencing authority has broad discretion to consider the disproportionate sentence of a co-defendant . . . but there is no legislative requirement it do so."); Johnson v. State, 495 A.2d 1, 17 (Md. 1985) (stating that a jury is given broad discretion to conclude that a codefendant's sentence is a mitigating factor or to disregard the information).

168. *See, e.g.*, State v. Dean, 54 N.E.3d 80, 146 (Ohio 2015) (noting that a codefendant's lesser sentence should be considered as a nonstatutory mitigating factor but finding in that case the factor did not deserve significant weight); State v. Getsy, 702 N.E.2d 866, 892 (Ohio 1998) (finding command for the treatment of a codefendant's sentence as mitigating in Supreme Court precedent), *dismissal of post-conviction relief aff'd*, No. 98-T-0140, 1999 WL 1073682 (Ohio Ct. App. Oct. 22, 1999), *denial of habeas corpus aff'd sub nom.* Getsy v. Mitchell, 495 F.3d 295 (6th Cir. 2007).

169. *See* 18 U.S.C. § 3592(a)(4) (2012) (requiring the jury to consider as a mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death"); *see also* 21 U.S.C. § 848(m)(8) (2000) (repealed 2006) ("Another defendant or defendants, equally culpable in the crime, will not be punished by death."); United States v. Simoy, 50 M.J. 1, 3 (C.A.A.F. 1998) (Sullivan, J., concurring) (reasoning in part based on the Federal Death Penalty Act that the trial court erred in not allowing evidence of a codefendant's sentence); *id.* (Gierke, J., concurring) (concluding the same with similar reasoning to Judge Sullivan's).

170. N.H. REV. STAT. ANN. § 630:5(VI)(g) (2018).

171. *See, e.g.*, Lowery v. State, 547 N.E.2d 1046, 1059 (Ind. 1989); State v. Clark, 990 P.2d 793, 806 (N.M. 1999).

172. Similarly, the Alabama Supreme Court has relied upon a state statute requiring death sentences not be excessive or disproportionate to the punishment in similar cases to hold that a trial court did not give proper mitigating weight to the fact that the defendant was the only one of

Regarding statutes, the circumstance may be listed specifically, or courts may find it as part of interpreting a catchall provision in the state's death penalty statute.[173] Some jurisdictions provide for appellate courts to consider a codefendant's sentence as part of a proportionality review.[174] And in other jurisdictions, a codefendant's sentence may be considered both by a jury as a mitigating factor at trial and during appellate proportionality review.[175] The open question, though, is whether, in jurisdictions without statutes requiring that a codefendant's sentence be considered as a mitigating factor, the United States Constitution requires jurors to weigh the factor.

The highest courts in Arizona, Delaware, and Florida have concluded that the life sentence of an equally culpable codefendant is relevant as mitigating evidence for a jury to consider.[176] For example, the Arizona

six participants in the crime who was prosecuted. *Ex parte* Burgess, 811 So. 2d 617, 628 (Ala. 2010) (citing ALA. CODE § 13A-5-53(b)(3) (2010)).

173. *See* State v. Green, 609 N.E.2d 1253, 1263 (Ohio 1993) (concluding that a codefendant's sentence should be considered under the catchall section of state's statute); *see also* N.C. GEN. STAT. § 15A-2000(f)(9) (2018) ("Any other circumstance arising from the evidence which the jury deems to have mitigating value."); Flanagan v. State, 810 P.2d 759, 762 (Nev. 1991) (holding that the prosecutor's introduction of information about the sentences of codefendants was admissible under a statute allowing "any other matter which the court deems relevant" (quoting NEV. REV. STAT. § 175.552 (1991))), *vacated*, 503 U.S. 931 (1992), *and vacated sub nom*. Moore v. Nevada, 503 U.S. 930 (1992); State v. Roseboro, 528 S.E.2d 1, 8 (N.C. 2000) (stating that although a codefendant's sentence is not relevant to the defendant's character or the circumstances of the crime, an accomplice's sentence may still be considered as a mitigating circumstance under the state statute's catchall mitigating factor provision); *cf.* State v. Smith, 532 S.E.2d 773, 793–94 (N.C. 2000) (citing State v. Williams, 292 S.E.2d 243, 261–62 (N.C. 1982)) (holding that an accomplice's punishment is not part of the defendant's character nor a mitigating factor).

174. *See, e.g.*, McWhorter v. State, 781 So. 2d 257, 329 (Ala. Crim. App. 1999) (considering a codefendant's sentence during proportionality review), *aff'd sub nom. Ex parte* McWhorter, 781 So. 2d 330 (Ala. 2000), *denial of post-conviction relief aff'd*, 142 So. 3d 1195 (Ala. Crim. App. 2011); State v. Stokes, 352 S.E.2d 653, 667 (N.C. 1987) (considering a codefendant's life sentence during proportionality review).

175. *See, e.g.*, Riley v. State, 496 A.2d 997, 1026 (Del. 1985) (noting, while conducting proportionality review, that a codefendant's sentence was also submitted as a mitigating factor); Ray v. State, 755 So. 2d 604, 611–12 (Fla. 2000) (holding that a defendant's sentence was disproportionate when a codefendant received a life sentence).

176. *See, e.g.*, Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990) (stating that trial courts should consider the mitigating factor of disparate treatment of similar codefendants), *abrogated by* Trease v. State 768 So.2d 1050 (Fla. 2000). Also, in *Messer v. State*, the trial court had allowed a sentencing jury to know that a codefendant was sentenced to thirty years in prison even though the codefendant had negotiated a plea. Messer v. State, 403 So. 2d 341, 347 (Fla. 1981); *see also* Slater v. State, 316 So. 2d 539, 542 (Fla. 1975) (overruling a death sentence and holding that a codefendant's sentence was a mitigating factor even though the codefendant had pleaded nolo contendere). In Florida, the state's statute does not specifically list a codefendant's sentence as a mitigating factor, although the statute contains the mitigating factor that "[t]he defendant was an

Supreme Court, in *State v. Marlow*,[177] weighed a codefendant's sentence in changing a defendant's sentence from death to life in prison.[178] The court found that the "dramatic disparity" between the defendant's death sentence and his codefendant's four-year prison sentence was a mitigating factor that the trial court failed to consider.[179] The court further explained that even though the codefendant had accepted a plea deal, because both defendants were originally charged with murder in the first degree, "[i]t makes no difference whether the dramatic disparity in sentences created by the prosecutor's plea offer resulted from tactical considerations at trial or from who won the race to the prosecutor's door."[180]

Courts have found the sentencing disparity as a mitigating factor in other cases where the codefendant pleaded guilty and did not go to trial. For example, in *State v. Cabrera*,[181] a Delaware Superior Court recognized that a codefendant had received a lighter sentence as the result of a plea bargain for assisting the State in its case against the defendant.[182] But the court, noting that the codefendant's involvement in the crime was still significant, reasoned that the capital defendant could still use the sentence disparity as mitigating evidence.[183]

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accomplice in the capital felony committed by another person and his or her participation was relatively minor." FLA. STAT. § 921.141(7)(d) (2018).

177. 786 P.2d 395 (Ariz. 1989) (en banc).

178. *Id.* at 402. While Arizona is among the jurisdictions that have required consideration of this mitigating factor, in other ways Arizona has generally been restrictive on mitigating factors. Arizona courts held for fifteen years that defendants had to show a causal nexus between mitigating factor and crime. McKinney v. Ryan, 813 F.3d 798, 803 (9th Cir. 2015) (en banc). In 2015, in *McKinney v. Ryan*, the Ninth Circuit held this practice was unconstitutional. *See id.* at 803–05 (holding that the Arizona Supreme Court applied a causal nexus rule to mitigating evidence contrary to *Eddings v. Oklahoma* in a number of cases); *see also* Styers v. Ryan, 811 F.3d 292, 298–99 (9th Cir. 2015) (discussing the procedures for the Arizona Supreme Court to review cases with claims based upon *McKinney v. Ryan*).

179. *Marlow*, 786 P.2d at 401–02. Arizona's death penalty sentencing statute does not specifically list a codefendant's sentence as a mitigating factor, so the basis for the court decisions requiring it must be from the U.S. Constitution, the Arizona constitution, or both. *See* ARIZ. REV. STAT. ANN. § 13-751(G) (2018).

180. *Marlow*, 786 P.2d at 402.

181. No. 9703012700, 1999 WL 41630 (Del. Super. Ct. Jan. 21, 1999), *aff'd on other grounds*, 747 A.2d 543 (Del. 2000).

182. *Cabrera*, 1999 WL 41630, at *11. In 2016, the Supreme Court of Delaware held that the state's death penalty statute violated the U.S. Constitution because it allowed a judge instead of a unanimous jury to find aggravating circumstances. *See* Rauf v. State, 145 A.3d 430, 433 (Del. 2016).

183. *Cabrera*, 1999 WL 41630, at *11. The codefendant held the elderly victim as the defendant worked to smother the victim. *Id.* at *10–11. Additionally, the codefendant helped dispose of the body. *Id.* at *11. Although the codefendant was remorseful and had testified against the defendant, the court considered the fact that the codefendant "was permitted to plea to Second

If a capital defendant has the sentence disparity mitigating factor, it does not automatically mean that the defendant will receive a life sentence. Courts that evaluate the mitigating circumstance often weigh the relative culpabilities of the capital defendant and the codefendant to assess whether their involvement in the murder justifies a disparate sentence.[184] In these cases, courts often perform significant analyses comparing the culpability of the defendant and the codefendant. In *State v. Bearup*,[185] the Arizona Supreme Court reasoned that codefendants' sentences were mitigating, but in that case the factor only carried limited weight because the disparity in the sentences resulted from the fact that the codefendants made plea bargains, and also because the defendant had additional aggravating factors.[186]

In *Bearup*, the court first discussed the importance of whether the disparity in sentences can be explained. It stressed, "A disparity in sentences between codefendants and/or accomplices can be a mitigating circumstance if no reasonable explanation exists for the disparity."[187] Therefore, "[o]nly the unexplained disparity is significant."[188] The court added, though, that "even [an] unexplained disparity has little significance" in some cases where a jury finds the aggravating circumstance that the murder was "especially cruel, heinous or depraved."[189]

Degree Murder as a mitigating circumstance." *Id.* at *10–11. As in Arizona, in Delaware the existence of the mitigating factor is not based on a state statute listing the mitigating circumstance. *See* DEL. CODE ANN. tit. 11, § 4209 (2019), *invalidated by* Rauf v. State, 145 A.3d 430 (Del. 2016). Note, however, that the Delaware Supreme Court subsequently found Delaware's death penalty unconstitutional for reasons unrelated to this mitigating factor. *See* Rauf v. State, 145 A.3d 430, 433–34 (Del. 2016) (finding Delaware's death penalty unconstitutional).

184. *See Marlow*, 786 P.2d at 402; State v. Gerlaugh, 659 P.2d 642, 644 (Ariz. 1983) (Cameron, J., concurring); *see also* Arthur v. State, 711 So. 2d 1031, 1096–97 (Ala. Crim. App. 1996) (holding that the disparity of treatment between the appellant and his accomplices was a nonstatutory mitigating circumstance), *aff'd sub nom. Ex parte* Arthur, 711 So. 2d 1097 (Ala. 1997).

185. 211 P.3d 684 (Ariz. 2009).

186. *Id.* at 695–96. Although *Bearup* and other Arizona cases hold that a codefendant's sentence may constitute a mitigating circumstance in some situations, some earlier Arizona cases stressed the importance of such evidence for proportionality purposes. *See id.*; *see, e.g.*, State v. Lambright, 673 P.2d 1, 15 (Ariz. 1983) ("We must remind prosecuting attorneys that the favorable treatment accorded to an accomplice can, under different facts, be given weight in considering the proportionality of a capital sentence."), *overruled on other grounds by* Hedlund v. Sheldon, 840 P.2d 1008 (Ariz. 1992).

187. *Bearup*, 211 P.3d at 695 (quoting State v. Kayer, 984 P.2d 31, 47 (Ariz. 1999)).

188. *Id.* (quoting State v. Ellison, 140 P.3d 899, 923 (Ariz. 2006)).

189. *Id.* (quoting *Ellison*, 140 P.3d at 923); *see also Lambright*, 673 P.2d at 13–14 (affirming a defendant's death sentence because of the cruel, heinous and depraved nature of the defendant's offense outweighed the mitigating factors presented by the defendant, including the immunity granted to an accomplice); *Gerlaugh*, 659 P.2d at 644 (Cameron, J., concurring) (holding that the

In its analysis, the Arizona Supreme Court then proceeded to compare *Bearup*'s facts to other cases involving sentencing disparities.[190] It concluded that the mitigating circumstance should carry only limited weight "in light of the reasonable explanations for the disparity," which included that the defendant had an extensive criminal history, the defendant was older than the nineteen-year-old codefendant, the codefendant had a "more limited role in the crimes," and the codefendant's testimony helped the case against the defendant.[191]

Jurisdictions that hold that a codefendant's prison sentence may be mitigating often do not discuss why such evidence is mitigating or why the U.S. Constitution requires consideration of the specific mitigating circumstance.[192] Generally, at most, a court may briefly find support for the conclusion that a codefendant's sentence is a nonstatutory mitigating factor based on implications from Supreme Court precedent.[193] But even if courts do not delve into the reasoning for the legal principle, they often do extensive analysis of the facts, as in the *Bearup* case, comparing the culpability of the defendants and codefendants, while also considering other reasons that might justify the disparity.[194] Thus, in these cases, the

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different sentences of a defendant and an accomplice were proportionate in light of the accomplice's mitigating circumstances and the defendant's aggravating circumstances). Although the *Bearup* court noted that an "unexplained disparity [may have] little significance" in cases where "the murder [was] especially cruel, heinous, or depraved," the court proceeded to discuss its decision in *Marlow*, a case where a "dramatic disparity in sentences [was] sufficient to require reduction" of a death sentence to a life sentence despite the aggravating circumstances of the defendant's offense. *Bearup*, 211 P.3d at 695 (quoting *Ellison*, 140 P.3d at 923) (citing *Marlow*, 786 P.2d at 402).

190. *Bearup*, 211 P.3d at 695–96.

191. *Id.*

192. *See, e.g.*, State v. White, 982 P.2d 819, 827 (Ariz. 1999) ("Unexplained disparity between the sentences of a defendant and codefendant may be a mitigating factor in a capital case."); State v. Schurz, 859 P.2d 156, 167 (Ariz. 1993) ("This court has on occasion considered as a mitigating factor the disparity between the sentence of a defendant sentenced to death and a codefendant or accomplice sentenced to some term of imprisonment."); Heath v. State, 648 So. 2d 660, 665–66 (Fla. 1994) (explaining how a sentencing court balanced the relative culpability of a defendant and a codefendant); Williams v. State, 622 So. 2d 456, 464, 465 (Fla. 1993) (upholding the trial judge's override of the jury's recommendation of a life sentence, in part because a disparity in a codefendant's sentence in the case would not justify a life sentence for the defendant).

193. For example, the Supreme Court of Ohio found that "[i]n *Parker v. Dugger*, the United States Supreme Court implicitly recognized that a codefendant's sentence could be considered a nonstatutory mitigating factor." State v. Getsy, 702 N.E.2d 866, 892 (Ohio 1998) (citation omitted) (citing Parker v. Dugger, 498 U.S. 308 (1991)).

194. *See Bearup*, 211 P.3d at 695–96; *see also* State v. Lynch, 357 P.3d 119, 142 (Ariz. 2015) (finding that where the defendant "was the killer, and [the codefendant] received a life sentence as a result of a plea agreement," the "[s]entencing disparity [was] not a mitigating circumstance"), *rev'd on other grounds*, Lynch v. Arizona, 136 S. Ct. 1818 (2016); State v. Carlson, 48 P.3d 1180, 1197, 1198 (Ariz. 2002) (finding that a sentencing disparity was mitigating

information regarding the mitigating factor provides jurors with detailed insight into the case and the defendants.

B. *Jurisdictions Holding that a Codefendant's Sentence Is Not Mitigating Evidence*

By contrast, several jurisdictions have held that the U.S. Constitution does not require sentencing juries to weigh a codefendant's sentence as a mitigating factor.[195] In these decisions, courts generally base their conclusion on one reason. They rely upon the Supreme Court language defining a mitigating factor as an aspect of the defendant's character or record or any of the circumstances of the offense.[196] From that definition, these courts then conclude that the codefendant factor does not fit within any of those categories.

Federal courts from the Fourth, Fifth, Eighth, and Ninth Circuits generally have found that the Eighth Amendment does not mandate that a capital defendant may introduce evidence of a codefendant's sentence as mitigating.[197] But recent federal decisions reviewing state court

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where the defendant who hired the killer was sentenced to death and the actual killer received a life sentence).

195. *See, e.g.*, State v. Koskovich, 776 A.2d 144, 202–03, 204 (N.J. 2001) (holding that "the trial court correctly chose not to instruct the jury about [a codefendant's] sentence as an independent mitigating factor under [New Jersey's death penalty statute]" and upholding the constitutionality of that statute "under the Eighth Amendment to the federal Constitution" (quoting State v. Ramseur, 524 A.2d 188 (N.J. 1987))); State v. Brown, 651 A.2d 19, 55, 56 (N.J. 1994) (rejecting a defendant's claim that a sentencing jury should be allowed to consider an accomplice's sentence as a mitigating factor and holding that such consideration is not required under the U.S. Constitution), *overruled on other grounds by* State v. Cooper, 700 A.2d 306, 331 (N.J. 1997); State v. Smith, 532 S.E.2d 773, 793–94 (N.C. 2000) (holding that a trial court properly barred the jury from considering a codefendant's sentence because an "accomplice['s] punishment is not an aspect of the defendant's character . . . nor a mitigating circumstance of the particular offense" (quoting State v. Williams, 292 S.E.2d 243, 261–62 (N.C. 1982))); State v. Berry, 650 N.E.2d 433, 443 (Ohio 1995) (rejecting, without explanation, an appellant's argument that an accomplice's life sentence should be considered as mitigation); Commonwealth v. Frey, 554 A.2d 27, 33 (Pa. 1989) ("The sentence received by a co-conspirator [was] not a mitigating circumstance . . . ."); State v. Charping, 508 S.E.2d 851, 856 (S.C. 1998) ("The trial court properly excluded evidence of [a codefendant's] convictions and sentence."); *cf.* State v. Henley, 774 S.W.2d 908, 918 (Tenn. 1989) (citing State v. Carter, 714 S.W.2d 241, 251 (Tenn. 1986)) (holding that a rational basis for a sentencing disparity existed when a codefendant received a lesser penalty than the defendant because the codefendant did not initiate the crimes and participated out of fear for his life).

196. *See, e.g.*, *Brown*, 651 A.2d at 55.

197. *See, e.g.*, Meyer v. Branker, 506 F.3d 358, 375 (4th Cir. 2007); Beardslee v. Woodford, 358 F.3d 560, 579 (9th Cir. 2004) ("Although a trial court is not necessarily precluded from allowing consideration of co-defendant sentences, a trial court does not commit constitutional error under *Lockett* by refusing to allow such evidence."); Schneider v. Delo, 85 F.3d 335, 342 (8th Cir. 1996) (agreeing with the Missouri Supreme Court's holding that the codefendant's thirty-

decisions apply a deferential federal habeas corpus standard of review under the Antiterrorism and Effective Death Penalty Act of 1996[198] (AEDPA).[199] Thus, under AEDPA, a federal habeas court may only issue the writ in cases "where there is no possibility fair-minded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents."[200]

Because of the deferential review standard, federal courts therefore generally do not reverse a state decision precluding the admission of a codefendant's sentence. Still, several federal courts have stated that the codefendant factor does not appear to meet the definition of relevant mitigating evidence. For example, in *Meyer v. Branker*,[201] the U.S. Court of Appeals for the Fourth Circuit upheld a North Carolina Supreme Court decision preventing a defendant from introducing his codefendant's sentence into evidence.[202] The Court of Appeals reasoned, "Since a co-perpetrator's sentence is neither an aspect of the defendant's character or record nor a circumstance of the offense, . . . it is within 'the traditional authority of a court to exclude' such evidence as 'irrelevant'" under *Lockett*.[203] The court explained that it was holding only that the U.S. Constitution did not require the admission of such evidence and that states were at liberty to adopt their own guidelines requiring the factor.[204]

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year prison term "had nothing to do with [the defendant's] 'character or record' or with the 'circumstances of the offense'" (quoting State v. Schneider, 736 S.W.2d 392, 395–97 (Mo. 1987))); Brogdon v. Blackburn, 790 F.2d 1164, 1169 (5th Cir. 1986) (stating that a codefendant's life sentence is not a relevant mitigating factor). *But see* Morris v. U.S. District Court, 363 F.3d 891, 897 (9th Cir. 2004) (Ferguson, J., concurring specially) (noting an exception to allow for consideration of a codefendant's sentence as a mitigating factor where the prosecutor concedes that a harsher penalty was selected for the defendant while also conceding that the codefendant was equally as guilty).

198. Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended 28 U.S.C. § 2254 (2012)).

199. 28 U.S.C. § 2254(d); *see* Harrington v. Richter, 562 U.S. 86, 102, 113 (2016). Federal habeas corpus courts applying pre-AEDPA law reviewed legal questions and mixed questions of law and fact with a de novo standard of review. *See, e.g.*, JAMES S. LIEBMAN & RANDY HERTZ, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 30.2, at 956–57 (2d ed. 1994); Chris Hutton, *The "New" Federal Habeas: Implications for State Standards of Review*, 40 S.D. L. REV. 442, 463 (1995); Note, *Rewriting the Great Writ: Standards of Review for Habeas Corpus Under the New 28 U.S.C. § 2254*, 110 HARV. L. REV. 1868, 1869–70 (1997). *See generally* Moore v. Dempsey, 261 U.S. 86 (1923) (applying the same standard of review in habeas corpus to state court decisions of mixed question of law and fact and of questions of law).

200. Postelle v. Royal, No. CIV-12-1110-F, 2016 WL 4597629, at *5 (W.D. Okla. Sept. 2, 2016) (alteration in original) (emphasis omitted) (quoting *Harrington*, 562 U.S. at 102), *aff'd sub nom.* Postelle v. Carpenter, 901 F.3d 1202 (10th Cir. 2018).

201. 506 F.3d 358 (4th Cir. 2007).

202. *Id.* at 375.

203. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 604 n.12 (1978)).

204. *Id.* at 375–76.

Similarly, in a pre-AEDPA case, the U.S. Court of Appeals for the Fifth Circuit in *Brogdon v. Blackburn*[205] reasoned that a codefendant's life sentence was not relevant to the defendant's "character, prior record, or the circumstances of his offense."[206] The *Brogdon* court did note, however, that the codefendant's life sentence was relevant to an analysis of the proportionality of the defendant's sentence compared to the sentences of others, an analysis required by state statute in Louisiana.[207]

Following the Fifth Circuit precedent, the U.S. District Court for the Western District of Texas in *Cordova v. Johnson*[208] also concluded that a codefendant's life sentence was not "constitutionally relevant mitigating evidence" because it did not relate to the defendant's "character or background or the circumstances of the crime."[209] The court, however, laid out a questionable restrained view of mitigating evidence, limiting it to "evidence that establishes (1) the defendant suffered from a uniquely severe permanent handicap with which the defendant is burdened through no fault of his own and (2) the defendant's criminal act was *attributable* to this severe permanent condition."[210] Considering a codefendant's sentence, the court reasoned that "[t]he happenstance that a different sentencing authority, or . . . a different prosecutor, chose to display mercy toward [a codefendant] based on the peculiarities of [the codefendant's] own character, background, record, and role in the offense, bears no relevance to the propriety of the petitioner's sentence."[211]

Recently, the District Court for the Western District of Oklahoma reported in *Postelle v. Royal*[212] that most federal cases "indicate that a trial court does not violate *Lockett* or any other clearly established federal law by excluding evidence of a co-defendant's sentence."[213] Thus,

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205. 790 F.2d 1164 (5th Cir. 1986).

206. *Id.* at 1169 (quoting *Lockett*, 438 U.S. at 604 n.7).

207. *Id.*

208. 993 F. Supp. 473 (W.D. Tex. 1998).

209. *Id.* at 502–03.

210. *Id.* at 502.

211. *Id.*; *see also* McGehee v. Norris, No. 5:03-CV-143JMM, 2008 WL 11450875, at *1 (E.D. Ark. Feb. 28, 2008) (concluding that evidence of a codefendant's lesser sentence was not a mitigating factor because it did not go toward the defendant's character or culpability).

212. Postelle v. Royal, No. CIV-12-1110-F, 2016 WL 4597629 (W.D. Okla. Sept. 2, 2016), *aff'd sub nom.* Postelle v. Carpenter, 901 F.3d 1202 (10th Cir. 2018).

213. *Id.* at *19. In *Postelle*, the district court noted that it could not find any published Tenth Circuit decisions on the issue of whether *Lockett* requires admission of a codefendant's sentence, although decisions from the Fourth, Fifth, and Ninth Circuits found that *Lockett* does not require admission of such evidence. *Id.* The *Postelle* court reasoned that the decisions from those circuits were consistent with *Lockett's* definition of mitigation regarding a defendant's character or record or the circumstances of the crime because a codefendant's sentence "is an extrinsic consideration." *Id.* Ultimately, applying the deferential habeas corpus standard of review, the *Postelle* court found that the state court did not err by excluding evidence of the codefendant's

applying AEDPA's deferential standard of review, the district court found that the state court's decision to preclude such evidence "was not contrary to or an unreasonable application of clearly established federal law."[214] Affirming that decision on appeal, the U.S. Court of Appeals for the Tenth Circuit recognized that "a legitimate controversy regarding the relevance of a codefendant's sentence . . . indicates the *Lockett* line of cases does not answer the question."[215] But, like the lower court, the court of appeals upheld the state court's exclusion of the mitigating factor under the federal habeas corpus deferential standard of review.[216]

Although recent federal court decisions provide limited insight into the issue because of the habeas standard of review,[217] several state courts have concluded, on the merits, that the U.S. Constitution does not require a court to permit a jury to consider a codefendant's sentence as mitigating evidence.[218] For example, in the California case of *People v. Dyer*,[219] the defendant wanted to introduce, during his penalty phase, evidence of the

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sentence because it was "not contrary to or an unreasonable application of clearly established federal law." *Id.*

214. *Id.* The district court explained, "This conclusion is consistent with *Lockett's* direction to allow mitigating evidence about a defendant's character, record, or the circumstances of the crime. A co-defendant's sentence does not fall into any of those categories. Instead, it is an extrinsic consideration." *Id.*

215. *Carpenter*, 901 F.3d at 1223.

216. *Id.*

217. Additionally, the constitutional issue does not arise in federal death penalty trials because the federal death penalty statute expressly allows the mitigating circumstance. *See* 18 U.S.C. § 3592 (a)(4) (2012) (requiring the jury to consider as a mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death").

218. *See, e.g.*, Simpson v. State, 6 S.W.3d 104, 108–09 (Ark. 1999); Crowder v. State, 491 S.E.2d 323, 325 (Ga. 1997) ("[W]e are not persuaded at this time that a certified copy of a co-defendant's life sentence is a mitigating circumstance for the jury to consider."); Edwards v. State, 200 S.W.3d 500, 510–11 (Mo. 2006) (en banc) (holding that appellate counsel was not ineffective for arguing a codefendant's life sentence was mitigating evidence because case law indicated the defendant did not have a constitutional right to present such evidence); Commonwealth v. Williams, 896 A.2d 523, 547 (Pa. 2006) (holding that a codefendant's sentence does not fall into the state's definition of mitigating evidence); State v. Charping, 508 S.E.2d 851, 855 (S.C. 1998) (holding that a codefendant's life sentence was not relevant to the circumstances of the crime and therefore the court was not required to admit the evidence as mitigating); Joubert v. State, 235 S.W.3d 729, 734 (Tex. Crim. App. 2007) (holding that evidence related to a codefendant's punishment is not a mitigating circumstance that a defendant has a constitutional right to present). Some of these states, however, do allow consideration of a codefendant's sentence during proportionality review. *See, e.g.*, State v. Gilmore, 681 S.W.2d 934, 946–47 (Mo. 1984) (en banc) (considering a codefendant's sentence during proportionality review); Commonwealth v. Zook, 615 A.2d 1, 18 (Pa. 1992) (noting that information about codefendants is to be considered for proportionality review); Sheppard v. Commonwealth, 464 S.E.2d 131, 138 (Va. 1995) (holding that the court was not required to compare a defendant's sentence to a codefendant's sentence as part of proportionality review).

219. 753 P.2d 1 (Cal. 1988) (en banc).

non-death sentences imposed in separate trials of two other participants in the murder.[220] After the trial court ruled that such evidence was irrelevant, the Supreme Court of California agreed.[221]

The *Dyer* court noted U.S. Supreme Court precedent that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a *defendant's* character or record and any of the circumstances of *the offense* that the defendant proffers as a basis for a sentence less than death.[222]

The court reasoned that the codefendant evidence did not relate to these aspects of the defendant or to the circumstances of the offense.[223] Additionally, the court explained that the jury would not know the evidence submitted in the other cases because they had separate trials: "Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury . . . ."[224]

California courts have continued to follow *Dyer's* reasoning.[225] In the 2011 case of *People v. Moore*,[226] the Supreme Court of California noted that other jurisdictions held to the contrary but reasserted, "We have consistently held that evidence concerning coparticipants' sentences is properly excluded from the penalty phase of a capital trial because such evidence is irrelevant."[227]

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220. *Id.* at 26.

221. *Id.* at 26–27.

222. *Id.* (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)). Similarly, the court noted that under California law mitigating evidence includes evidence of a defendant's characteristics, such as background and mental condition. *Id.* at 26.

223. *Id.* at 27. Additionally, the court rejected the defendant's "fairness" argument and declined to adopt a proportionality review that would take into account the other defendants' sentences. *Id.* at 27–28.

224. *Id.* at 27. The court's conclusion that a jury would not be familiar with the evidence submitted in a codefendant's case is at odds with the practice of other courts; jurisdictions that allow sentencing juries to consider a codefendant's sentence allow those juries to compare the mitigating and aggravating factors in the defendant's case to the mitigating and aggravating factors in the codefendant's case. This would not be possible if the sentencing jury did not know what evidence the codefendant's jury had considered. *See, e.g.*, State v. Bearup, 211 P.3d 684, 691 (Ariz. 2009).

225. *See, e.g.*, People v. Salazar, 371 P.3d 161, 190 (Cal. 2016) (stating that evidence about what a different jury found regarding a different defendant "provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate" (quoting People v. Benmore, 996 P.2d 1152 (Cal. 2000))).

226. 253 P.3d 1153 (Cal. 2011).

227. *Id.* at 1181 (citing People v. Brown, 73 P.3d 1137 (Cal. 2003)); People v. McDermott, 51 P.3d 874, 912 (Cal. 2002); People v. Beardslee, 806 P.2d 1311, 1335 (Cal. 1991); People v.

A number of state courts have come to the same conclusion. For example, the Texas Court of Criminal Appeals has concluded that a codefendant's punishment is not a mitigating factor because such punishments relate "neither to appellant's character, nor to his record, nor to the circumstances of the offense."[228] The Oklahoma Court of Criminal Appeals similarly concluded that a codefendant's sentence is not a mitigating factor because it "has no bearing on the defendant's character or record and is not a circumstance of the offense."[229]

In jurisdictions that perform some sort of proportionality review, courts have reasoned that evidence about a codefendant's sentence is better considered by appellate courts for that type of review rather than by juries as a mitigating circumstance.[230] In *Edwards v. State*,[231] the Missouri Supreme Court concluded that the U.S. Supreme Court's decision in *Parker v. Dugger* on proportionality review does not mandate that a codefendant's sentence be admitted as mitigating evidence.[232]

Johnson, 767 P.2d 1047, 1075–76 (Cal. 1989), *overruled by* People v. Gutierrez, 395 P.3d 186 (Cal. 2017). The court recognized that 18 U.S.C. § 3592(a)(4) provides for the contrary and also that Florida courts held to the contrary. *Moore*, 253 P.3d at 1181.

228. Joubert v. State, 235 S.W.3d 729, 735 (Tex. Crim. App. 2007) (quoting Morris v. State, 940 S.W.2d 610, 613 (Tex. Crim. App. 2007)); *see also* State v. Williams, 292 S.E.2d 243, 261–62 (N.C. 1982) ("[An accomplice's] punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense."); State v. Hughes, 521 S.E.2d 500, 505 (S.C. 1999) (holding that a codefendant's sentence is not a mitigating circumstance because it is not relevant to the defendant's character, the defendant's record, or the circumstances of the offense); Saldano v. State, 232 S.W.3d 77, 100 (Tex. Crim. App. 2007) (finding that evidence of a codefendant's punishment is not mitigating evidence that a defendant has a constitutional right to present because such evidence does not relate to the defendant's own circumstances); *Morris*, 940 S.W.2d at 614 ("We do not see how the conviction and punishment of a co-defendant could mitigate appellant's culpability in the crime." (quoting Evans v. State, 656 S.W.2d 65, 67 (Tex. Crim. App. 1983))). Texas also does not perform comparative proportionality review, so its courts do not consider a codefendant's sentence at either stage. *See* McFarland v. State, 928 S.W.2d 482, 499 (Tex. Crim. App. 1996), *abrogated by* Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1988).

229. Wackerly v. State, 12 P.3d 1, 15 (Okla. Crim. App. 2000) (quoting Brogie v. State, 695 P.2d 538, 547 (Okla. Crim. App. 1985)). Also, in *Postelle v. State*, 267 P.3d 114 (Okla. Crim. App. 2011), the court held that the trial court was correct in finding that the accomplice's sentence was not relevant and that the defendant was the more culpable party. *Id.* at 140–42. The court reasoned that relevant mitigating evidence includes only evidence that relates to the defendant's personal circumstances or blameworthiness. *Id.*

230. But then, in states without such proportionality review, such evidence would never otherwise be considered by the court. *See supra* Part IV.B.

231. 200 S.W.3d 500 (Mo. 2006) (en banc).

232. *Id.* at 510 (citing Parker v. Dugger, 498 U.S. 308 (1991)); *see also* Edwards v. Roper, No. 4:06-CV-1419 (CEJ), 2009 WL 3164112, at *14 (E.D. Mo. Sept. 28, 2009) (finding, on habeas review, that the decision of the Missouri Supreme Court was not contrary to or an unreasonable application of *Parker v. Dugger*); *cf.* State v. McIlvoy, 629 S.W.2d 333, 341–42

Similarly, in *State v. Schneider*,[233] the Missouri Supreme Court stressed that a request to submit a codefendant's sentence as mitigating is actually a request for a jury to conduct a proportionality review.[234] The court explained that the argument to consider such evidence as mitigating "is flawed by its assumption that the jury may properly engage in a proportionality review which takes into consideration sentences awarded other defendants."[235] And the court concluded that such a task is assigned by statute to the Missouri Supreme Court, not the jury.[236]

Similarly, the Mississippi Supreme Court has stressed that proportionality review by an appellate court is the proper method for considering a codefendant's sentence.[237] Therefore, in Mississippi, which does have statutorily required proportionality review, the Mississippi Supreme Court has considered codefendants' sentences as a part of proportionality review.[238] Further, according to that court, the same evidence is not mitigation to be considered by sentencing jurors because such evidence does not relate to a defendant's character, prior record, or circumstances of the offense.[239]

Another court found a different way to admit such evidence. In *State v. Roseboro*,[240] the Supreme Court of North Carolina asserted that evidence of a codefendant's sentence is not a mitigating circumstance under Supreme Court precedent because such evidence is "not relevant to a defendant's character or record or to the circumstances of the killing."[241] But the court concluded that the evidence could still be

(Mo. 1982) (en banc) (finding a death sentence disproportionate to the crime because the defendant was a follower of a codefendant who had received a life sentence).

233. 736 S.W.2d 392 (Mo. 1987) (en banc).

234. *Id.* at 397.

235. *Id.*

236. *Id.*; *see also McIlvoy*, 629 S.W.2d at 341–42 (finding a death sentence disproportionate to the crime because the defendant was a follower of a codefendant who had received a life sentence).

237. *See* Stewart v. State, 662 So. 2d 552, 563 (Miss. 1995); Johnson v. State, 477 So. 2d 196, 218 (Miss. 1985).

238. *See, e.g.*, Pitchford v. State, 45 So. 3d 216, 259–60 (Miss. 2010) (holding that a defendant's death sentence was not disproportional or excessive compared to a sixteen-year-old accomplice's lesser sentence in light of the circumstances of the crime); Jordan v. State, 918 So. 2d 636, 658–59 (Miss. 2005) (holding that the defendant's death sentence was not disproportionate when compared to other death penalty cases or when compared to his codefendant's sentence); Branch v. State, 882 So. 2d 36, 67 (Miss. 2004) (holding that a death sentence was not excessive or disproportionate to a codefendant's life sentence); Smith v. State, 877 So. 2d 369, 386–87 (Miss. 2004) (holding that a defendant's death sentence was not disproportionate to a codefendant's lesser sentence due to the defendant's role in the crime and his criminal history).

239. *See Stewart*, 662 So. 2d at 562.

240. 528 S.E.2d 1 (N.C. 2000).

241. *Id.* at 8.

considered as mitigating evidence under the state's "catchall" mitigating circumstance provision in the state's statute: "Any other circumstance arising from the evidence which the jury deems to have mitigating value."[242] Thus, the court found that such evidence meets the statutory definition of "mitigating circumstances" but not the constitutional definition, although it was unclear why and how the two differed.[243] In an unusual aspect of the case, the prosecution was the party raising the evidence, and the court held that it was proper for the prosecution to address the codefendant's sentence while arguing in opposition to the "catchall" mitigating circumstance.[244]

Finally, although most cases involving a codefendant's sentence feature a defendant wanting to use a codefendant's prison sentence, in *Commonwealth v. Lesko*[245] the defendant sought to introduce mitigating evidence that his codefendant was sentenced to death.[246] The defendant claimed that the codefendant's death sentence supported the argument that the codefendant was more culpable than the non-triggerman defendant.[247] The Pennsylvania Supreme Court, however, stated that the codefendant's sentence was irrelevant to the jury's task to weigh the circumstances related to the defendant.[248]

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242. N.C. GEN. STAT. § 15A-2000(f)(9) (2018); *see Roseboro*, 528 S.E.2d at 8.

243. One might argue that the *Roseboro* court is splitting hairs to say that evidence of a codefendant's sentence is not "mitigating" under a constitutional definition while it is "mitigating" in the way the general term is used in the statute. Subsequent cases in the state have further distinguished the statutory "catchall" provision from the constitutional definition by stating that the use of such evidence under the "catchall" provision limits it to cases "where evidence of the co-defendant's sentence is already before the court, such as where the co-defendant testified at trial and evidence of a plea bargain was presented by way of impeachment." State v. Roache, 595 S.E.2d 381, 426 (N.C. 2004) (citing State v. Gregory, 459 S.E.2d 638, 667 (N.C. 1995)). In the *Roache* case, however, the court held that the defendant had waived the mitigating factor argument on appeal. *Id.* at 426.

244. *Roseboro*, 528 S.E.2d at 8.

245. 15 A.3d 345 (Pa. 2011).

246. *Id. at* 398–99.

247. *Id.* at 398.

248. *Id.* at 399. Note, however, that the Pennsylvania Supreme Court's statement about the evidence was dicta in the post-conviction appeal because the court first found that the claim had been waived. *Id.* at 398–99; *see also* Commonwealth v. Romero, 938 A.2d 362, 389–90 (Pa. 2007) ("[E]ven the 'catch-all' mitigating circumstance would not encompass evidence of co-conspirators' sentences because such evidence has nothing to do with 'the character and record of the defendant' or 'the circumstances of his offense.'" (quoting Commonwealth v. Lopez, 854 A.2d 465, 470–71 (Pa. 2004))); Commonwealth v. Williams, 896 A.2d 523, 547 (Pa. 2006) (rejecting the argument that codefendants' criminal cases are relevant to mitigation for a defendant); Commonwealth v. Haag, 562 A.2d 289, 298 (Pa. 1989) (stating that the outcome of the cases against the codefendants had "no bearing" on the defendant's sentence); Commonwealth v. Frey, 554 A.2d 27, 33 (Pa. 1989) ("Sentencing is a highly individualized matter, and we have

Jurisdictions that do not require courts to allow juries to consider evidence regarding an accomplice's sentence create a division across the country. Some jurisdictions allow the mitigating factor, some do not, and some conclude that the evidence is relevant as a part of appellate proportionality review.

IV. WHY CAPITAL DEFENDANTS SHOULD HAVE A CONSTITUTIONAL RIGHT TO INTRODUCE A CODEFENDANT'S SENTENCE AS A MITIGATING FACTOR

Although courts around the country are divided on the issue, the courts that hold that the Eighth and Fourteenth Amendments requires trial courts to allow juries to consider a codefendant's sentence as mitigating are correct for several reasons.[249] First and foremost, the Supreme Court's broad treatment of mitigating factors, stressing the importance of individualized sentencing, dictates that juries be able to consider this mitigating factor.

Second, such a mitigating factor also is supported by the Supreme Court's discussion about the importance of proportionality and fairness. Third, the Supreme Court's emphasis on the policies supporting the constitutionality of the death penalty are served by this mitigating factor. Finally, courts that have denied defendants the right to submit a codefendant's sentence as mitigating evidence have read the Supreme Court cases too narrowly.

A. *A Codefendant's Sentence Reflects on Both the Circumstances of the Crime and the Character of the Defendant*

The main point of contention between the jurisdictions that allow the admission of a codefendant's sentence as mitigating evidence and those that do not is the question of whether such evidence fits within the description of mitigating circumstances laid out by the U.S. Supreme Court. One argument against a constitutional requirement that a sentencer consider a codefendant's sentence is that the Court has defined mitigating factors as ones that reflect the "circumstances of the crime or the character of the defendant."[250] One might argue, as some courts have reasoned, that the sentence of another person has nothing to do with the character of the defendant or the circumstances of the crime. Therefore, they explain, such evidence does not help achieve the Constitution's goal of an individualized sentence for a capital defendant.

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already ruled that the cases against [the codefendants] are not similar to [the defendant's] case for purposes of proportionality review.").

249. Even without clarity on the constitutional issue, it would be good policy for states to adopt this mitigating circumstance as a statutory factor for many of the reasons stated in this Article.

250. Gregg v. Georgia, 428 U.S. 153, 198 (1976).

Thus, one argument against allowing a jury to consider the sentence of a codefendant is that such information is about the codefendant and does not really say anything about the character of the defendant. Additionally, one might argue that the codefendant's jury may have determined that the defendant was more culpable and thus sentenced the codefendant to a lesser sentence.

In reality, however, evaluating the sentence of a codefendant does help the defendant's jury evaluate both the character of the defendant and the circumstances of the crime, especially the latter. The extent of the codefendant's involvement and the appropriate punishment for that codefendant arguably convey information about the character of the defendant. How the two codefendants interacted and the relative culpability, as assessed by another jury, provide details about the defendant.

Even more so than demonstrating character, though, a codefendant's sentence provides the jury with information about the circumstances of the crime. If another jury has determined that a perpetrator of the exact same crime deserves a sentence less than death, then the defendant's jury should weigh what that decision says about the circumstances of the crime. Such information may mean more to a jury and tell a jury more about the crime than a defendant's adjustment to incarceration, which the Supreme Court found to be a mitigating circumstance in *Skipper v. South Carolina*.[251]

Additionally, Congress has indicated that it considers evidence of a codefendant's sentence as evidence fitting within a "defendant's background, record, or character or any other circumstance of the offense."[252] The sentencing statute for the federal death penalty states: "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: . . . Another defendant or defendants, equally culpable in the crime, will not be punished by death."[253] The statute's language includes a codefendant's sentence as a "mitigating factor,"[254] supporting reasoning that the factor fits within the constitutional definition.

Of course, a statute may provide more mitigating factors than are required by the Constitution. But the federal statute goes on to also include a catchall provision: "Other factors in the defendant's

251. 476 U.S. 1, 4–5 (1986).

252. 18 U.S.C. § 3592(a)(8) (2012).

253. *Id.* § 3592(a)(4).

254. The six other specifically listed mitigating factors in addition to the sentences of equally culpable codefendants include impaired capacity, duress, minor participation, no prior criminal record, disturbance, and victim's consent. *Id.* § 3592(a).

background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence."[255] The catchall provision, therefore, incorporates the definition of mitigating evidence used by the Supreme Court's constitutional analysis. And, importantly, the phrasing of the language of this catchall provision indicates that the specifically listed mitigating factors, including the codefendant's sentence, also fall into the constitutional definition of other factors within "the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence."[256] Although the Supreme Court's interpretation of the U.S. Constitution is not bound by Congress's interpretation of the same language, Congress's assessment does provide guidance as a reasonable interpretation.

Most importantly, the Supreme Court has long used broad language to define mitigating evidence because the requirement for individualized sentencing when a defendant's life is at stake is an important constitutional right. For example, in *Abdul-Kabir v. Quarterman*,[257] the Court further "emphasized the severity of imposing a death sentence and that 'the sentencer in capital cases must be permitted to consider *any* relevant mitigating factor.'"[258] In *Payne v. Tennessee*,[259] the Court noted that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."[260] Similarly, in *Skipper*, the Court explained that even though

> favorable inferences from [testimony about the defendant's adjustment to incarceration] . . . would not relate specifically to [the defendant's] culpability for the crime[,] . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'[261]

The Court has noted that for a piece of mitigating evidence to be admitted, it need not be overwhelmingly persuasive for a life sentence,

255. *Id.* § 3592(a)(8).

256. *Id.*

257. 550 U.S. 233 (2007).

258. *Id.* at 248 (quoting Eddings v. Oklahoma, 455 U.S. 104, 112 (1982)).

259. 501 U.S. 808 (1991).

260. *Id.* at 822–23 (addressing the admission of victim impact evidence by the prosecution); *see also* Kansas v. Marsh, 548 U.S. 163, 171 (2006) (stating that the Court has noted that "as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation").

261. Skipper v. South Carolina, 476 U.S. 1, 4–5 (1986) (citation omitted) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

and jurors must be allowed to consider evidence that might be relevant. There is a "low threshold for relevance" regarding mitigating evidence in capital cases.[262] "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value."[263] A fact finder could reasonably determine that the fact that a codefendant received a life sentence tends to support the conclusion that a defendant should also be sentenced to something less than death.[264]

Although the Court has stated that in the context of mitigating circumstances, "the Eighth Amendment does not deprive the State of its authority to set reasonable limits upon the evidence a defendant can submit, and to control the manner in which it is submitted,"[265] this language reflects on how such evidence is considered. The Court's limiting language on mitigating factors permits lower courts to limit how mitigating evidence is assessed. But the Court's decisions otherwise have shown the Justices are reluctant to allow limits on what factors are actually mitigating.

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262. Smith v. Texas, 543 U.S. 37, 44 (2004) (quoting Tennard v. Dretke, 542 U.S. 274, 285 (2004)) (noting that there is a low relevance threshold for mitigating factors); *Tennard*, 542 U.S. at 284–85 (stating that the meaning of "relevance" is the same for mitigating evidence as in any other context).

263. McKoy v. North Carolina, 494 U.S. 433, 440 (1990) (quoting State v. McKoy, 372 S.E.2d 12, 45 (N.C. 1988) (Exum, C.J., dissenting)); *see also Tennard*, 542 U.S. at 285 ("[A] State cannot bar 'the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death.'" (alteration in original) (quoting *McKoy*, 494 U.S. at 441)). Note that in *Tennard*, the issue related to the relevance of the defendant's evidence of a low I.Q., not whether the factor could be mitigating. *Id.* at 284.

264. By contrast, the U.S. District Court for the Western District of Oklahoma in *Postelle v. Royal* precluded evidence of a codefendant's sentence by rejecting the petitioner's argument that any evidence that gives some reason to impose a sentence less than death is constitutionally required mitigating evidence. Postelle v. Royal, No. CIV-12-1110-F, 2016 WL 4597629, at *19 (W.D. Okla. Sept. 2, 2016), *aff'd sub nom.* Postelle v. Carpenter, 901 F.3d 1202 (10th Cir. 2018). The court countered that it could think of a number of facts that might give "*some* reason" not to impose the death penalty, "[b]ut many of those facts would be completely irrelevant to the actual case that the jury must resolve." *Id.* Similarly, in *United States v. Gabrion*, 719 F.3d 511 (6th Cir. 2013), the Court of Appeals for the Sixth Circuit contemplated that a broad reading of the Supreme Court's language on mitigating factors "would compel admission of evidence regarding the positions of the planets and moons at the time of the defendant's offense—so long as he can show that at least one juror is a firm believer in astrology." *Id.* at 522. The argument in this Article, however, is not that anything that "might" give a reason for a lesser sentence is mitigating. Instead, there is a reasonableness element to the definition of mitigating evidence in that it must be something that a factfinder could reasonably determine has mitigating value. *See McKoy*, 494 U.S. at 440.

265. Oregon v. Guzek, 546 U.S. 517, 526 (2006). The Court's discussion in that case was about the power of a state to "structure and shape consideration of mitigating evidence." *Id.* (quoting Boyde v. California, 494 U.S. 370, 377 (1990)); *see also* Johnson v. Texas, 509 U.S. 350, 362 (1993).

Thus, in light of the Court's language about the importance of mitigation as well as the low standard for relevance, logic dictates that a codefendant's sentence fits within the definition of constitutionally required mitigating evidence. A number of case decisions, as well as Congress's understanding of the constitutional requirement for mitigating evidence, support this conclusion.

B. *The Supreme Court's Concerns About Fairness and Proportionality Support that a Codefendant's Sentence Should Be a Mitigating Factor*

As discussed above, the Supreme Court has long been concerned that the death penalty be applied fairly.[266] While it has not mandated proportionality review, the Court has noted that such analysis might be an issue if cases with death sentences are not distinguished from cases with lesser sentences.[267] This fairness and proportionality concern supports allowing juries to consider a codefendant's sentence as a mitigating factor.[268] In many situations, no case will be more comparable than the case of an accomplice to the same murder.

Some jurisdictions, though, use the proportionality argument to argue against allowing codefendants' sentences to be used as a mitigating factor. These courts conclude that the codefendant's sentence is better weighed by an appellate court as part of proportionality review than by a jury during sentencing.[269] They reason that the amount of evaluation required to compare different defendants is better done by an appellate court.

There is some appeal to the argument that the comparison of cases is complicated and better left to the appellate courts. But these cases in jurisdictions that require such proportionality review by state statute ignore that not all states require such a proportionality review. The mitigating circumstance question instead focuses on whether the Eighth Amendment requires all jurisdictions to allow defendants to present such evidence to juries.

These courts that advocate for such evidence only to be evaluated by an appellate court still conclude that such evidence is important.[270] But if

266. *See supra* Part I.

267. *See supra* text accompanying notes 60–96.

268. *See* State v. Getsy, 702 N.E.2d 866, 892 (Ohio 1998) (reasoning that the U.S. Supreme Court in *Parker v. Dugger* implied that a codefendant's life sentence can be weighed as a nonstatutory mitigating circumstance). *But see* Edwards v. State, 200 S.W.3d 500, 510 (Mo. 2006) (en banc) (concluding that *Parker* made no such conclusion about the use of a codefendant's sentence under the U.S. Constitution).

269. *See supra* notes 102–05 and accompanying text.

270. The Supreme Court might consider a middle approach, holding that the Constitution requires such codefendant evidence to be weighed at least once. So such evidence would have to be considered as a mitigating circumstance or for proportionality review (by the trial judge, an

the Constitution does not require courts to admit evidence of a codefendant's sentence as mitigation, then in some jurisdictions, courts may never consider the significance of a codefendant's sentence before a defendant is executed.[271]

Additionally, the proportionality review done by appellate courts differs from the weighing done by jurors. For proportionality review, an appellate court compares a defendant's sentence against other cases to determine whether the defendant's sentence is excessive or disproportionate in comparison to them.[272] By contrast, at sentencing, generally, a jury weighs all of the mitigating evidence together against the aggravating factors.[273] So, even in a case where an appellate court might conclude that a defendant's death sentence is not excessive compared to other cases, a jury might see a codefendant's lesser sentence as enough of a mitigating factor to tip the balance in favor of a life sentence. In this way, the issue of mitigation is separate from whether there is proportionality review.

Furthermore, the mitigating factor would allow jurors to focus on comparing the defendant's case to any accomplices and their role in the homicide. By contrast, proportionality review is a much broader examination of all similar cases. Thus, the codefendant mitigating factor works differently from appellate proportionality review while still serving the proportionality policy goals.

C. *Allowing a Codefendant's Sentence as a Mitigating Factor Serves the Death Penalty Goals of Retribution and Deterrence*

On several occasions, the Supreme Court has stressed the importance of the fact that capital punishment may serve the criminal justice policies of retribution and deterrence. Allowing juries to weigh disparate sentences among accomplices to the same murder will further serve those goals of the criminal justice system.

In upholding the constitutionality of the death penalty in *Gregg v. Georgia*,[274] the plurality reasoned that it was constitutionally significant that a state legislature may determine that death is an appropriate

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appeals court, or both). While such a compromise would ignore the Court's strong language regarding mitigating circumstances, it would help address the Court's concerns about fairness in capital sentencing.

271. In such jurisdictions, not only is there no check on disparate sentences, but there is no way to deter prosecutors from using conflicting theories in different trials involving codefendants. *See* Bradshaw v. Stumpf, 545 U.S. 175, 182 (2005) (raising due process concerns about prosecutors using conflicting theories in related cases).

272. *See supra* note 81 and accompanying text.

273. *See supra* Part II.

274. 428 U.S. 153, 184–86 (1976) (plurality opinion).

punishment for murder because the punishment serves the goals of retribution and deterrence.[275] The conclusion was important because the Eighth Amendment requires that a punishment not "be so totally without penological justification that it results in the gratuitous infliction of suffering."[276] Thus, the death penalty is only constitutional if a legislature may reasonably determine that the death penalty serves the goals of retribution and deterrence.

Capital punishment may serve the goals of retributive policy as "an expression of society's moral outrage at particularly offensive conduct."[277] Retributive policy also requires that a defendant's sentence be proportionate to the crime.[278] As noted above, in assessing proportionality, it is useful to consider how other similar defendants are treated. If equally culpable defendants are given different sentences, retributive goals are not served by the unequal treatment. And the system fails to serve the basic retributive goal of proportionality when two or more equally culpable defendants in the same case are treated differently. Because not all jurisdictions have appellate proportionality review, it is essential that jurors assess a codefendant's sentence to ensure the death penalty serves basic retributive goals.

Similarly, for a punishment to be a deterrent to others, it must be applied in a fair and predictable manner.[279] If a punishment appears random or unequal when equally culpable codefendants receive widely different sentences, its deterrent value will be lessened.[280] Therefore, assuming capital punishment is more of a deterrent than a life sentence, that deterrent value is undermined if a potential murderer would not believe that an arbitrarily applied death penalty would be a possible punishment.

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275. *Id.* at 186–87 ("[T]he moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.").

276. *Id.* at 182–83.

277. *Id.* at 183.

278. *Id.* at 187 ("Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed."). While the *Gregg* plurality spoke of proportionality in the relation between the punishment and the crime, as discussed earlier, in other cases the Court's jurisprudence on proportionality has included a comparison of crimes and defendants.

279. *See, e.g.*, Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 612–18 (1999) (explaining that prosecutors have special obligations, which allows them to "seek justice" through specific professional obligations).

280. *See, e.g.*, United States v. Martinez, 184 F. Supp. 3d 1209, 1235–36 (D.N.M. 2016) (citations omitted) (discussing a range of literature on deterrence and concluding that "[s]tudies universally find that certainty of punishment has a far greater deterrent effect than severity of punishment").

Thus, to ensure that the death penalty serves the goal of deterrence, as well as retribution, equally culpable defendants—and especially codefendants for the same crime—should receive similar punishments. Or, at the least, a jury should consider and weigh the mitigating power of a codefendant's sentence. The Supreme Court has repeatedly stressed the important role that juries play in capital sentencing.[281] For jurors to be able to fully serve their role as the conscience of the community in ensuring that capital punishment serves its constitutional goals,[282] they need information such as if an equally culpable codefendant received a sentence less than death.

D. *A Constitutional Requirement for the Codefendant Mitigating Factor Will Not Overly Broaden the Definition of Mitigating Factors and Is Not Inconsistent with* Oregon v. Guzek

Opponents of the use of evidence of a codefendant's sentence may argue that allowing such evidence as mitigating will overly broaden what is defined as "mitigating." Lower courts have rejected some factors that one may argue are similar to a codefendant's sentence.[283] For example, some defendants are prosecuted under federal law in states that do not have the death penalty.[284] So some federal capital defendants have attempted to argue that the fact that the state does not have the death penalty should be a mitigating circumstance in federal court.[285] And, as noted earlier, the U.S. Court of Appeals for the Sixth Circuit rejected the state's lack of capital punishment as a mitigating factor.[286]

Still, a court should not preclude a codefendant's sentence from being mitigating out of fear that it might overly broaden the definition of

281. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) ("[O]ne of the most important functions any jury can perform in making . . . a selection [between life imprisonment and death for a defendant convicted in a capital case] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

282. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring) (stressing the importance of jury sentencing in death penalty cases to prevent arbitrariness).

283. *See, e.g.*, Beardslee v. Woodford, 358 F.3d 560, 579 (9th Cir. 2004).

284. *See, e.g.*, United States v. Gabrion, 719 F.3d 511, 522 (6th Cir. 2013).

285. *See, e.g.*, *id.*

286. *Id.* ("That Michigan lacks a death penalty has nothing to do with . . . [the defendant's] background or character."). By contrast, the dissent argued that the evidence regarding the location of the crime does seem to fit within the Supreme Court's definition of mitigating evidence as a "circumstance of the offense." *Id.* at 540–41 (Moore, J., dissenting) ("A juror may have been less inclined to impose the death penalty for a crime committed in Michigan if he knew that the United States's ability to prosecute the crime and impose a sentence of death was determined by a distance roughly the length of a hockey rink."); *see also supra* note 143 and accompanying text (discussing the location of the crime in *Gabrion*).

possible mitigating factors. As noted earlier, the Supreme Court has repeatedly used broad language in defining "mitigating circumstances" in light of what a jury might "reasonably find . . . warrants a sentence less than death."[287] So, allowing such evidence would be consistent with the Court's precedent and not broaden it.

Additionally, in arguing that a co-participant's sentence is not constitutionally required as a mitigating factor, one might compare this potential mitigating factor to the "residual doubt" mitigating factor. One of the rare times the Supreme Court arguably limited what constitutes a mitigating factor is the Court's treatment of the factor of "residual doubt," sometimes called "lingering doubt."[288] In residual doubt cases, defendants have argued that during capital sentencing they should be able to try to persuade jurors not to impose a death sentence on the basis that they are not completely sure that the defendant is guilty of the murder.[289]

Some Supreme Court language implies that there is no constitutional requirement to consider "residual doubt" as a mitigating circumstance.[290] In *Oregon v. Guzek*,[291] the Supreme Court found that the Constitution did not require that courts allow capital defendants to introduce new evidence at sentencing to support a mitigating argument of residual doubt about a capital defendant's guilt.[292] In *Guzek*, during the sentencing hearing, the defendant wished to introduce new alibi evidence from the defendant's

287. Tennard v. Dretke, 542 U.S. 274, 285 (2004) (quoting McKoy v. North Carolina, 494 U.S. 433, 441 (1990)).

288. Jennifer R. Treadway, *'Residual Doubt' in Capital Sentencing: No Doubt It Is an Appropriate Mitigating Factor*, 43 CASE W. RES. L. REV. 215, 215–16 (1992).

289. Advocates of this mitigating circumstance argue that while a jury may convict someone of murder "beyond a reasonable doubt," society should not execute a defendant unless a higher degree of guilt is established. *See, e.g.*, *id.* (arguing residual doubt should be a mitigating factor); *see also* Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41, 111–12 (2001) (arguing that requiring jurors to find guilt on a stronger standard than proof beyond a reasonable doubt before proceeding to a capital penalty phase would lower the risk of wrongful executions).

290. In *Franklin v. Lynaugh*, 487 U.S. 164 (1988), the Court noted in dicta that a capital defendant may not have a constitutional right to an instruction telling the jury to consider a lingering doubt about the defendant's guilt as mitigating. *Id.* at 172–73. The Court reasoned that such doubts are not part of a defendant's "'character,' 'record,' or a 'circumstance of the offense.'" *Id.* at 174. But because the jury instructions in the case did not completely prohibit such consideration, the Court did not resolve the issue. *Id.* at 175. Similarly, in *Oregon v. Guzek*, 546 U.S. 517 (2006), in addressing the right to present residual doubt evidence as a mitigating factor, the Court clarified that it was not completely resolving the issue. *Id.* at 525.

291. 546 U.S. 517 (2006).

292. *Id.* at 526–27. Justice Scalia, however, wrote a concurring opinion joined by one other Justice saying he would reject that the Eighth Amendment allows residual-doubt claims during capital sentencing. *Id.* at 528 (Scalia, J., concurring).

mother.[293] Although Oregon law allowed a defendant to introduce any transcript evidence at the sentencing, the defendant argued he should also be allowed to introduce new testimony of innocence.[294] The Supreme Court concluded that the Eighth and Fourteenth Amendments do not give a defendant the right to introduce new evidence to cast "residual doubt" on the defendant's guilt.[295]

The Court framed much of its analysis around allowing the state to structure consideration of mitigating evidence rather than around prohibiting a mitigating factor, stressing that "[s]tates are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'"[296] Although the Court did not find a constitutional right that allowed the defendant in *Guzek* to introduce his new alibi evidence, the Court based its reasoning on three aspects of the case.[297] First, the Court emphasized that sentencing generally does not focus on questions of guilt.[298] Second, the Court noted that the residual doubt evidence addressed an issue that was already addressed, that is, guilt.[299] Third, the Court noted that defendants in Oregon are not harmed by a prohibition on new residual doubt evidence at sentencing because Oregon law allows defendants to present to the sentencing jury the evidence of innocence from the original trial.[300] Thus, because Oregon still allowed innocence evidence from trial to be argued at sentencing, the Court's decision did not resolve the issue of whether the Constitution ever requires courts to allow residual doubt as a mitigating factor.[301]

Some lower courts have gone further to hold that once guilt is established beyond a reasonable doubt, the Constitution does not require that a defendant be allowed to argue the mitigating circumstance of residual doubt.[302] Similarly, in *Holland v. Anderson*,[303] the U.S. Court of Appeals for the Fifth Circuit held that a Mississippi capital defendant

293. *Id.* at 520.

294. *Id.* at 526–27 (quoting OR. REV. STAT. § 138.012(2)(b) (2003)).

295. *Id.* at 527.

296. *Id.* at 526 (quoting Boyde v. California, 494 U.S. 370, 377 (1990)).

297. *Id.* at 526–27.

298. *Id.* at 526.

299. *Id.*

300. *Id.* at 526–27.

301. *Id.* at 525. The *Guzek* Court noted that "we once again face a situation where we need not resolve whether such a right exists, for, even if it does, it could not extend so far as to provide this defendant with a right to introduce the evidence at issue." *Id.*

302. *See, e.g.*, Homick v. State, 825 P.2d 600, 609–10 (Nev. 1992) (affirming a death sentence and holding that the trial court did not err in refusing the defendant's requested jury instruction listing residual doubt as a mitigating circumstance because there is no constitutional mandate); *see also* McKenna v. State, 968 P.2d 739, 749 (Nev. 1998) (same).

303. 583 F.3d 267 (5th Cir. 2009).

could not introduce new testimony from a pathologist at sentencing to rebut guilt evidence from the trial.[304]

If one were to read *Guzek* broadly,[305] one might argue that *Guzek* limits *Lockett* and *Eddings* and justifies allowing states similarly to preclude codefendant evidence from a sentencing hearing. Arguably, residual doubt is more relevant to a defendant's character than a codefendant's sentence is, so if the Supreme Court allows the exclusion of residual doubt evidence, then excluding evidence of a codefendant's sentence would not violate the Eighth and Fourteenth Amendments.

The reasoning of *Guzek*, however, does not support a conclusion that a state may preclude evidence of a co-participant's life sentence. The Court's conclusion in *Guzek* was based on the reasoning that guilt evidence is litigated at trial, and thus jurors already have access to that information.[306] In allowing states to preclude new evidence of innocence, the Court reasoned that the harm to a defendant was minimal because of the other opportunities to present evidence of innocence.[307]

By contrast, a capital defendant's sentencing hearing may be the only opportunity where a defendant can present evidence about a codefendant's sentence. Generally, the evidence will not already be presented to a jury.[308] Thus, the reasoning of *Guzek*, the rare case where the Supreme Court rejected a mitigating factor, does not apply to support banning evidence of a codefendant's sentence as a mitigating factor. The harm to a defendant is not minimal when a jury is not allowed to consider and weigh the mitigating power of evidence of a co-participant's sentence.

E. *It Is Not Impractical to Permit the Co-Participant Mitigating Factor*

Another argument against allowing a co-participant's sentence as a mitigating factor is that such evidence has the potential to complicate the defendant's sentencing hearing. If a court provides a capital sentencing jury with information that a co-participant received a life sentence, the

304. *Id.* at 280. Unlike Oregon, Mississippi did not have a statute that allowed the admission of evidence of innocence from trial. *Id.* at 278. Still, the *Holland* court concluded that under *Guzek*, a defendant "does not have the right to present evidence at resentencing that is inconsistent with the verdict of the guilt-phase jury." *Id.* at 280.

305. In contrast to *Holland*, one might reason that *Guzek* is a narrow decision, limited to the situation in the case. There, the Court allowed a state to prohibit new evidence of innocence during a sentencing hearing in a situation where the state already allowed the sentencing jury to consider evidence of innocence submitted during the guilt trial. *Guzek*, 546 U.S. at 526–27. Thus, on the facts and reasoning of the case, *Guzek* is a narrow holding, limited to where the jury knew of some evidence of innocence already. *See id.* at 526–27.

306. *Id.*

307. *Id.*

308. One rare exception would be where all of the defendants are tried and sentenced together.

issue arises whether or not the jury would also have to evaluate differences between the co-participant and the defendant to evaluate whether there are differences that justify the different sentences.

Courts may deal with this issue in a number of ways. One approach would be to simplify the process. A jury could be presented with the fact that a codefendant received a life sentence, and a judge may merely instruct the jurors that they should recognize that each defendant is an individual with individual circumstances, but the jury may consider the sentence as mitigating if the jury wishes to do so.

Another approach is to allow parties to argue the differences once a defendant presents a codefendant's sentence as mitigating. In most cases, the debate would not be complicated. Prosecutors could explain that a disparity is justified because a codefendant was less responsible for the murder due to different actions or different mental capabilities due to mental illness or age. Prosecutors could also point out that a codefendant had other mitigating factors that would justify a different sentence. And a defense attorney could respond to the arguments. In fact, Arizona courts have been able to use a system that allows juries to consider a codefendant's sentence when there is an "unexplained disparity" between the sentences of the codefendant and the defendant on trial.[309]

Often, much of the evidence about a codefendant's role in a crime would already be presented at the guilt phase to show the facts of the crime. And, while one may argue that these arguments add other factors to the sentencing process, it would not be a bad thing. Furthermore, the Court already permits evidence that can similarly complicate a sentencing hearing, such as a prosecutor's introduction of victim impact evidence.[310]

Considering the Eighth Amendment goals of eliminating arbitrariness and instilling some thoughtful process in sentencing, it would be useful to have the jury consider mitigation in concrete terms, comparing defendants and evaluating how to balance different factors in determining whether a defendant should live or die. Thus, any "complications" added by allowing introduction of a mitigating circumstance would in fact make sentencing more thoughtful and less arbitrary.

More importantly, every mitigating factor adds further complications to the sentencing process. Facts about a defendant's background often result in the addition of a minitrial. So even if the mitigating factor of a codefendant's sentence adds more evidence for the jury to evaluate, that fact does not justify eliminating the mitigating factor, especially when the factor helps make the process more concrete and less arbitrary.

309. State v. Bearup, 211 P.3d 684, 695 (Ariz. 2009) (en banc) (quoting State v. Ellison, 140 P.3d 899, 923 (Ariz. 2006)).

310. Payne v. Tennessee, 501 U.S. 808, 822–23 (1991) (holding that the Constitution does not prohibit the prosecution from introducing evidence about the victim during sentencing if state law allows it).

A final response to concerns about complicating the process is that there is proof that the sentencing system can work with the use of evidence of a codefendant's sentence. Jurisdictions that already allow the mitigating factor are able to allow the evidence without overburdening the system. While two states that often consider this factor—Arizona and Florida—have in the past had greater involvement of judges in capital sentencing than many other states,[311] there is no reason that jurors are not able to effectively balance this mitigating factor, and jurors have done so in practice.

There are some additional arguments one may make to support the conclusion that courts should not be required to permit the introduction of a codefendant's sentence as mitigation. For example, one might argue that if such evidence may be submitted by a defendant, then a prosecutor should be able to introduce evidence that a codefendant was sentenced to death. Such an argument neglects the constitutional mandate surrounding mitigating evidence. Under *Lockett* and other cases, the Eighth Amendment gives a defendant the right to introduce mitigating evidence.[312] There is no similar constitutional right for prosecutors to submit anything that is aggravating. Thus, the constitutional requirement applies only to a defendant's introduction of mitigating evidence.

An additional argument against the requirement for such mitigating evidence is that in a case of two codefendants tried separately, the defendant tried first would not be able to use as mitigating the fact that the defendant tried second received a life sentence. Therefore, the argument goes, whether one may get the benefit of this mitigating factor may arbitrarily depend on which defendant is tried first.

Jurisdictions with proportionality review have also addressed the timing issue in that context, allowing whatever evidence is available at the time of review. In *Griffin v. State*,[313] the Florida Supreme Court explained that

> "[e]ven when a codefendant has been sentenced subsequent to the sentencing of the defendant seeking review on direct appeal, it is proper for this Court to consider the propriety of the disparate sentences in order to determine whether a death

311. Until relatively recently, Arizona had judges do the sentencing in capital cases, while judges in Florida impose sentences after juries recommend the appropriate sentence. *See, e.g.*, Maria T. Kolar, *"Finding" a Way to Complete the* Ring *of Capital Jury Sentencing*, 95 DENV. L. REV. 671, 681, 683 (2018).

312. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 608 (1978).

313. 114 So. 3d 890 (Fla. 2013).

> sentence is appropriate given the conduct of all participants in committing the crime."[314]

More importantly, the possibility of such a timing situation is not a reason to deny a defendant the constitutional right to submit any available mitigating evidence. The Supreme Court has acknowledged that mitigating evidence may develop after a defendant is sentenced to death, and that such a development does not create a constitutional problem.[315] Thus, it would not create a constitutional problem if one defendant were not able to use such evidence and another one were. Further, even assuming there is some level of nonconstitutional unfairness, such a possibility does not undermine the other reasons the Constitution demands that a defendant be able to submit such evidence. Additionally, a defendant who was tried first and sentenced to death would be able to use a co-participant's later life sentence for arguments during clemency proceedings, retrials, and resentencing hearings.[316]

Some may argue that it is unfair to consider a codefendant's life sentence as mitigating when the codefendants may have been less culpable. But a jury could still consider those facts. The issue is not how mitigating a codefendant's sentence should be, but whether it should be mitigating at all. The answer to the latter question is that a jury should be able to consider a co-participant's non-death sentence as mitigating, and from there the jury may consider how mitigating it should be.

Finally, one problem remains even if the Supreme Court concludes that the Constitution requires jurors to consider a co-participant's sentence as a mitigating factor. Each juror brings their own beliefs to the jury room, so that how much weight a mitigating factor receives may vary drastically from juror to juror. One study by the Capital Juror Project found that jurors generally give different weight to different mitigating factors.[317] The study found that only about a fifth of jurors would give

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314. *Id.* at 910 (alteration in original) (quoting Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992)).

315. *See* Evans v. Virginia, 471 U.S. 1025, 1028–29 (1985) (Marshall, J., dissenting). While the development of new mitigating evidence after sentencing may not justify a new sentencing hearing on its own, such evidence would be admitted if a new sentencing hearing were granted on other grounds. *Id.* Wilbert Evans was sentenced to death based on the aggravating factor of future dangerousness and was eventually executed. *Id.* While on death row, he had saved the lives of prison personnel when other inmates had attempted to escape, and he later asked courts to consider his post-sentence actions. *See, e.g.*, Meghan Shapiro, *An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Capital Defendants and Undermines the Rationale for the Executions It Supports*, 35 AM. J. CRIM. L. 145, 180–81 (2008).

316. Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 18–19 (2014).

317. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1539 (1998).

mitigating weight to the fact that a codefendant received a life sentence.[318]

So, one may argue that admitting evidence of a co-participant's sentence may make little difference. Or if it does make a difference, it will be arbitrary when it does make a difference.

These arguments, however, may apply to the use of any mitigating factor or the introduction of almost any piece of evidence at trial. Jurors will weigh evidence based on their own understandings, intelligence, and experience. That fact is not a reason to exclude evidence or to interpret the Constitution one way or the other. And, the study still found that a significant portion of jurors do give as much weight to evidence of a codefendant's sentence as they do for other mitigating factors currently allowed.[319] Thus, the empirical evidence further supports that a factfinder could reasonably deem evidence of a codefendant's sentence to have mitigating value.

Concluding that the Constitution requires trial judges to permit the use of a co-participant's sentence as a mitigating circumstance is not the same as requiring a jury to reduce a defendant's sentence. In our current jury system, we must trust jurors to weigh the value of a co-participant's sentence after hearing arguments by both the defense attorney and the prosecutor. It is the same faith that allows jurors to weigh other mitigating factors like the relevance of a defendant's abuse as a child, or a capital defendant's depression, or that the defendant suffered from borderline personality disorder.[320] In more egregious cases, such evidence about a co-participant likely will make little difference. And, if there is clearly a difference in the culpability between a defendant and a codefendant, a jury may downplay the different sentences. But in cases where the culpability of the defendant and codefendant are very similar or where the codefendant is more culpable, the jury should be allowed to weigh whether, along with other mitigating and aggravating factors, the evidence should affect the defendant's sentence.

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318. *Id.* at 1562–65.

319. *Id.* As in the case of the mitigating factor of a codefendant's life sentence, only one-fifth of jurors said they would give weight to the mitigating factors of lack of a criminal record and that the crime was committed under the influence of alcohol or drugs. *Id.*

320. As noted earlier, the Court has sanctioned a broad range of mitigating factors. *See, e.g.*, Bobby v. Van Hook, 558 U.S. 4, 10–11 (2009) (allowing evidence of borderline personality disorder); Brewer v. Quarterman, 550 U.S. 286, 289–90 (2007) (allowing evidence of depression); Wiggins v. Smith, 539 U.S. 510, 525 (2003) (allowing evidence that the defendant lived in many foster homes and was sexually abused as a child); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (allowing evidence of youth and abusive family history).

CONCLUSION

While the Supreme Court's jurisprudence on mitigating factors focuses on the concept of individualized sentencing and not proportionality, the concept of proportionality has been important to the Court since the beginning of the modern death penalty era. And if the Court does not mandate—and some states decline to adopt—proportionality review, juries may help make the death penalty fairer if they consider evidence regarding a co-participant's sentence.

More importantly, in a capital case, the Constitution requires that juries be permitted to consider evidence of a codefendant's sentence. Although "[c]ourts determine whether evidence is constitutionally relevant, . . . that evidence is relied upon by the jury to make a reasoned moral judgment."[321] The Court has consistently found that the constitutional command and the definition of "mitigating circumstances" is broad. Evidence regarding a codefendant's sentence does tell the jury important information about the crime at issue and about the defendant's role, as it reflects the relative culpability of the codefendant and the defendant. Additionally, such evidence tells a jury how others have weighed some of that information. Such evidence provides a jury with evidence that a factfinder could reasonably deem to have mitigating value.

Although several jurisdictions do not require courts to consider such evidence, the Supreme Court should clarify that the Eighth and Fourteenth Amendments do require courts to permit juries to weigh evidence of a codefendant's prison sentence when a capital defendant submits such evidence as a mitigating factor. Beyond the constitutionality of the factor, a number of courts have already illustrated that not only is the use of such evidence helpful, but it is possible for jurors to evaluate such evidence without causing confusion or overburdening the legal system.

Since the modern death penalty era began in the 1970s, the Court has continued to struggle to create a fairer and less arbitrary death penalty system out of the requirements of the Constitution. Arbitrariness remains.[322] And while the law may never achieve perfect fairness in the way the death penalty is distributed, it should allow jurors to use every piece of relevant information that helps them use their moral judgment to move the system nearer toward that goal.[323]

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321. United States v. Gabrion, 719 F.3d 511, 541 (6th Cir. 2013) (Moore, J., dissenting).

322. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 302 (1987) (explaining that where discretion is afforded, it must minimize the risk of wholly arbitrary and capricious action).

323. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 170 (1994) (holding that due process requires jurors have access to information about what constitutes a life sentence).