CAPITAL CASE
No. 10-1302

IN THE
Supreme Court of the United States

CARL PUIATTI,
Petitioner,

v.

EDWIN G. BUSS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND DR. EDWARD J. BRONSON IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the Center for Constitutional Rights (the "Center") and Dr. Edward J. Bronson, Professor Emeritus, Political Science, Public Law, University of California State, Chico hereby request leave to file the accompanying *amici curiae* brief. This brief is submitted in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit. Petitioner Carl Puiatti ("Mr. Puiatti") has consented to the filing of this brief. Respondent State of Florida has withheld consent.

Amici are presenting relevant social science research demonstrating that joint capital penalty phase proceedings substantially interfere with the ability of jurors to satisfy constitutional standards for the imposition of the death penalty. This case implicates the Eighth and Fourteenth Amendments to the United States Constitution as they apply to the sentencing of capital defendants. The Eighth and Fourteenth Amendments guarantee capital defendants an individualized determination of sentence so that mitigating evidence can be given full effect and meaningful consideration. In contrast to the Fourth and Fifth Circuits, the Eleventh Circuit wrongly determined below that there were no Eighth Amendment implications "whatsoever" in a joint penalty phase of a capital proceeding and that joint proceedings were "quite compatible" with the constitutional guarantee that defendants in capital cases have individualized sentencing determinations. (Petition for Writ of Certiorari, 63a and 70a).

As set forth in the accompanying brief, the Center is a non-profit legal advocacy organization that is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center last term joined an *amici curiae* brief in *Graham v. Florida* and *Sullivan v. Florida* (Eighth Amendment cruel and unusual punishment clause applied to juveniles, who commit non-homicidal crimes, and are sentenced to life without parole) a case in which the Court's majority opinion relied in part on arguments advanced in the Center's *amici* brief.

Accordingly, the Center and Dr. Bronson respectfully requests leave to file the accompanying *amici curiae* brief.

Respectfully submitted,

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CAPITAL CASE
QUESTION PRESENTED

Does a joint capital penalty phase implicate a defendant's Eighth and Fourteenth Amendment rights to an individualized sentencing determination; if so, are those rights violated when a trial court fails to sever a joint capital penalty proceeding despite a likelihood of prejudice and confusion, and never clearly instructs the jury to consider the aggravating and mitigating evidence separately as to each defendant, and to return different sentences if the evidence so warrants.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are the Center for Consitutional Rights ("the Center") and Dr. Edward J. Bronson. The Center is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center is a non-profit legal advocacy organization based in New York. The issue before the Court is one of special importance to the rights and protections afforded by the United States Constitution. Joining this brief is Dr. Edward J. Bronson, Professor Emeritus, Political Science, Public Law, University of California State, Chico.[2] *Amici* submits this petition in support of Mr. Puiatti.

This Court's precedents under the Eighth and Fourteenth Amendments establish that a capital defendant is guaranteed an individualized sentencing determination and that sentencing proceedings must allow juries to give "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a

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[1] Pursuant to Rule 37.2(a), *amici* has given notice of intent to file this brief to all parties more than 10 days before this brief was filed. Consent was granted by petitioner and withheld by respondent.

Pursuant to Rule 37.6, *amici curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] Dr. Bronson obtained his J.D. from the University of Denver, an L.L.M. from New York University and a Ph.D. in Political Science from the University of Colorado.

particular individual." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007). As the social science research discussed in this brief demonstrates, joint capital penalty proceedings can substantively interfere with jurors' ability to weigh individualized sentencing considerations.

This case provides this Court with the opportunity to ensure courts provide adequate safeguards to secure the right of jointly tried capital defendants to individualized sentencing determinations as guaranteed by the Eighth and Fourteenth Amendments. Empirical data demonstrate that jurors sitting in joint capital penalty proceedings are less likely to consider individualized mitigating evidence, more likely to make collective sentencing decisions about codefendants, and are more likely to sentence defendants to death. This Court should grant this petition to resolve the split among the Circuits and ensure that joint penalty proceedings operate with adequate safeguards so that capital defendants involved in such proceedings receive the individualized sentencing determinations guaranteed by the Constitution.

SUMMARY OF ARGUMENT

Empirical social science research demonstrates joint penalty proceedings impair a capital defendant's constitutionally protected right to an individualized sentencing determination. Research demonstrates with statistical significance that when capital defendants are tried jointly at the penalty phase, jurors are: (i) less likely to consider individually a capital defendant's important mitigating evidence; (ii) more likely to impose the same sentence and

reasoning for jointly tried codefendants; and (iii) more likely to arrive at a death sentence.

The circumstances surrounding Mr. Puiatti's joint penalty phase proceeding demonstrate he was not afforded an individualized consideration of his sentence.

For all of these reasons the Court should grant the petition.

ARGUMENT

I. Research Demonstrates Joint Capital Penalty Phase Proceedings Substantially Interfere With The Ability Of Jurors To Satisfy Constitutional Standards For The Imposition Of The Death Penalty

A. The Law Governing Capital Penalty Phase Proceedings

Capital defendants are entitled to an individualized sentencing determination, one that allows "the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (plurality opinion). In *Woodson* the Court noted that the Constitution requires "consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Id.* at 304. Capital penalty proceedings must be conducted with the "precision that individualized consideration demands." *Stringer v. Black*, 503 US 222, 231 (1992). Such considerations ensure that "each defendant in a capital case [is treated]

with that degree of respect due the uniqueness of the individual." *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

To ensure that capital defendants receive individualized sentencing determinations, this Court recently held that "sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir*, 550 U.S. at 246. Mitigating evidence is those "facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less then death." *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (O'Connor, J., concurring) (citations omitted). Any sentencing process that impairs the jury in giving meaningful consideration to this important information should not pass constitutional muster. *See Abdul-Kabir*, 550 U.S. at 252.[3]

[3] As petitioner notes, the Fourth and Fifth Circuits have recognized the "inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing determination," *United States v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002); *see also United States v. Tipton*, 90 F.3d 861, 892 (4th Cir. 1996). The Eleventh Circuit's decision below incorrectly found that there was no Eighth Amendment implication in a joint capital penalty phase proceeding, but noted *Bernard*'s recognition of potential tension. (Petition for Writ of Certiorari, 63a and 70a).

B. Research Demonstrates A Joint Capital Penalty Phase Can Impermissibly Impair Jurors From Making Individualized Determinations

Research demonstrates that joinder of defendants during capital sentencing substantively impacts the jury's recommendation. Dr. Edward J. Bronson, Professor Emeritus, Political Science, Public Law, University of California State, Chico, conducted extensive studies on the impact of joinder of capital defendants at the penalty phase. In studying jury pool members and students from three California counties, Professor Bronson's studies proved that jurors deciding the penalties for jointly tried capital codefendants are (i) less likely to consider individually a capital defendant's mitigating evidence; (ii) more likely to offer identical sentences based on similar reasoning for each codefendant; and (iii) more likely to arrive at a death sentence. The district court below cited one of Professor Bronson's studies when holding that Mr. Puiatti's joint penalty proceeding denied him his constitutional right to an individualized sentencing determination. (Petition of Writ for Certiorari, 92a-93a, n. 5).[4]

Professor Bronson conducted three studies on joinder of capital defendants employing the same methodology in each of Fresno, Butte, and San Diego counties.[5] Participants in Professor Bronson's studies

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[4] The Eleventh Circuit did not address Professor Bronson's studies.

[5] Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, Cal. St. U., Chico, DISCUSSION PAPER SERIES NO. 94-1 (1994); *also published in* 21 FORUM 52 (1994). The data from all three studies have been described in previous declarations and in testimony. *See*, *e.g.*, Decl. of

were either on jury pool registries or were local college students eligible to sit as a juror on a capital trial.[6] All participants were "death qualified," *i.e.*, willing to impose either the death sentence or life in prison without parole ("LWOP").

In each study, participants were provided with one of a series of related questionnaires describing a different multiple defendant violent crime scenario. Participants were told that during the guilt phase described in the study, the jury unanimously found all defendants guilty of a violent crime with special circumstances under California law and were instructed to impose either LWOP or the death penalty.[7]

Edward J. Bronson, *United States v. McIntosh*, 2:02-cr-00938-VAP (C.D. Cal. Apr. 23, 2007), No. 4906-4.

Almost all data showed statistically significant results, except in two instances mainly due to smaller sample sizes.

In an earlier, preliminary study, Professor Bronson's research demonstrated that when a second defendant was added to penalty considerations, participants drew negative inferences about the first defendant from negative facts about the second defendant. *Id*. (citing Lois Heaney, *Severance Motions: Successful Application of Social Science Evidence*, FORUM 20 (July/August 1988)).

[6] The Fresno study was composed of 295 qualified participants, 193 students and 102 jury pool members. In the Butte study there were 241 qualified participants, 167 students and 74 jury pool members. The San Diego study was composed of 148 qualified participants, all college students from California State University, San Diego, and from California State University, Chico.

[7] The Fresno study described a murder-rape scenario involving three defendants. The Butte study described a murder-robbery-burglary involving three defendants. The San Diego study

Each questionnaire also described the penalty phase and the process for deciding between death and LWOP, and then instructed participants on the meaning of aggravating and mitigating circumstances. The participants were provided a lengthy description of both the aggravating and mitigating evidence for each defendant, including such factors as the brutality of the crime, the role of each defendant in the crime, and prior criminal and social history.

Each study employed "composite" and "severed" questionnaires. Composite, or joint, penalty questionnaires, provided to a subset of participants, included an explanation that, "[t]he judge instructs the jury that it must decide the punishment for each defendant separately and that the defendants need not necessarily receive the same punishment." The subset was then instructed to ascertain a penalty for each defendant. All other participants were provided with a "severed," or separate, questionnaire and were asked to sentence only the one defendant.[8]

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described a murder-robbery-burglary involving two defendants, a father and son.

[8] In total there were four different questionnaires in the studies conducted in Fresno and Butte when accounting for the composite version and a unique severed version for each of the three defendants. Because the San Diego fact pattern involved two defendants that study employed three different questionnaires.

1. Jurors in Joint Capital Penalty Proceedings Are Less Likely to Consider, or They View More Negatively, Mitigating Evidence of Social History

Review of participants' comments demonstrated that jurors in joint penalty proceedings are less likely to consider a defendant's mitigating evidence of social history. Yet, in the capital penalty phase, defense attorneys use social history, which personalizes and humanizes the defendant, as a core defense.[9]

In the Fresno and Butte studies, participants answering the questionnaire where sentences were determined separately, were much more likely to consider the defendant's social history (43.9% v. 22.7%, and 61.9% v. 35.4%, respectively).[10] The data suggest that participants considered defense counsel's social history arguments more heavily in a severed scenario.

Moreover, participants' responses indicated that jurors in joint penalty proceedings considered a capital defendant's social history less favorably to the defendant. Participants who considered social history in the Fresno and Butte studies were more likely to return LWOP when sentencing a

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[9] Presentation of the social history "has become the primary vehicle," with which defense attorneys educate the jury. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation,* 35 SANTA CLARA L. REV. 547, 559-60 (1995). A jury's failure to consider the affects of social history impairs its ability to provide an individualized sentencing determination.

[10] Professor Bronson did not track participants' responses regarding their consideration of defendant's social history in the San Diego study.

single defendant (40.8% v. 26.5% and 55.0% v. 40.6%, respectively).

If jurors are less likely to consider, or will view more negatively, mitigating evidence of social history during a joint penalty proceeding, their ability to provide an individualized sentencing determination is impaired.

2. Jurors Participating in Joint Penalty Proceedings Are More Likely to Offer Similar Sentencing Rationales

Participants sentenced jointly tried codefendants to the same punishment more often. Analysis of the Fresno severed questionnaires (where sentences were decided separately) indicated that those participants would choose the same verdict, either LWOP or death, for all three defendants in the joined scenario only 27.95% of the time. In contrast, participants answering the questionnaire where sentences were determined jointly, selected the same verdict a remarkable 75.83% of the time.[11] The explanations of participants for their decisions indicated that many viewed defendants collectively.[12]

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[11] In the Butte study participants answering the questionnaire where sentences were determined jointly chose the same sentence for all three defendants 55.38% of the time, but analysis of the severed questionnaires would suggest that they would choose the same verdict only 20.78% of the time.

[12] In the Fresno and Butte studies, in respectively 19 of 72 and 23 of 65 instances, study participants gave very similar or exactly the same comment in supporting their decision for each defendant.

These results suggest jurors make collective judgments when considering jointly tried codefendants and demonstrate that jurors in joint capital penalty proceedings are less likely to achieve the Constitution's guarantee of an individualized sentencing determination.

3. Studies Demonstrate That Jurors Participating In Joint Penalty Proceedings Are More Likely To Rule In Favor Of Death

In all three studies, participants responding to the questionnaire for a joint sentencing were more likely to sentence defendants to death than those participants sentencing defendants in a severed version. (Fresno: 77.8% v. 61.3%; Butte: 65.1% v. 47.2%; San Diego: 58.5% v. 45.5%).

When the data are broken out individually into differentiated penalty verdicts for each hypothetical defendant, the Fresno study produced the following results:

- Defendant 1: 76.4% favored death in a joint phase v. 60.8% favored death in a severed phase;
- Defendant 2: 83.3% favored death in a joint phase v. 62.9% favored death in a severed phase; and
- Defendant 3: 73.6% favored death in a joint phase v. 60.8% favored death in a severed phase.

Similarly, in the Butte study:

- Defendant 1: 43.1% favored death in a joint phase v. 31.8% favored death in a severed phase;

- Defendant 2: 80.0% favored death in a joint phase v. 71.7% favored death in a severed phase; and
- Defendant 3: 72.3% favored death in a joint phase v. 42.1% favored death in a severed phase.

Finally, in the San Diego study:

- Defendant 1: 72.3% favored death in a joint phase v. 50.0% favored death in a severed phase; and
- Defendant 2: 44.7% favored death in a joint phase v. 40.8% favored death in a severed phase.

Moreover, all three defendants in the Fresno study were nearly three times more likely to receive death sentences when tried jointly then when tried separately (66.11% v. 23.25%). Participants in the Butte study were four times more likely to issue a death verdict when considering defendants jointly (36.92% compared to 9.60%). The San Diego study defendants were over twice as likely to receive death sentences in joint trials (44.7% v. 20.4%).

II. Mr. Puiatti's Joint Penalty Proceeding Did Not Afford Him An Individualized Sentencing Consideration And Caused Him Prejudice

Research studies support the conclusion that under most circumstances joinder in a capital penalty phase leads to (i) a less favorable consideration of mitigating evidence by jurors; (ii) a less individualized consideration of codefendants' sentences; and (iii) a higher percentage of death sentences. This is what occurred with Mr. Puiatti's penalty proceeding.

A. The Joint Penalty Proceeding Impaired Mr. Puiatti's Ability To Present All Of His Mitigating Evidence For Full And Meaningful Consideration By His Sentencing Jury

This Court has stated that juries must give "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." *Abdul-Kabir*, 550 U.S. at 246. Mr. Puiatti's sentencing jury was impaired and unable to provide meaningful consideration of his mitigating evidence.

1. Mr. Puiatti's Counsel Was Unable to Present an Opening Statement to the Penalty Phase Only Because the Proceedings Were Jointly Conducted

The penalty phase proceeding was held on a Saturday morning. Prior to the jurors entering the courtroom, Mr. Puiatti's counsel asked to make an opening statement. The prosecutor did not object, but counsel for Mr. Robert Glock, Mr. Puiatti's codefendant, asked the court to proceed without opening statements. The sentencing court agreed with Mr. Glock's counsel and did not allow any opening statements. (A-10/2216-17). As a result of participating in a joint penalty proceeding, Mr. Puiatti lost a crucial opportunity to frame his critical mitigating evidence through an opening statement, which would have helped humanize Mr. Puiatti and counter the state's aggravating evidence.

2. Mr. Puiatti's Mitigating Evidence Was Impaired When Presented In Conjunction With His Codefendant's Mitigating Evidence

The mitigating evidence that Mr. Puiatti's counsel presented was impaired because it was presented in a joint proceeding. Mr. Puiatti and Mr. Glock offered competing mitigation theories. Mr. Puiatti's expert, Dr. Delbeato, supported the assertion that Mr. Puiatti acted under the substantial domination of another person, a mitigating factor at sentencing under Florida law. Dr. Delbeato testified that Mr. Puiatti was easily influenced and that he would not have committed the offense acting alone (A-10/2244 and A-10/2251). In contrast, Mr. Glock's expert testified that there was a "destructive association" between the defendants and the murder was "atypical behavior" of Mr. Glock that could "only happen if he is with someone else." (A-10/2342 & 2348-49). The testimony of the two experts left the jury with competing "follower" theories, essentially cancelling out each other, leaving only the state's theory of the case to resonate with the jury.

Additionally, because of the joint proceeding, Mr. Puiatti's expert was cross-examined by Mr. Glock's counsel and as a result was subjected to additional "prosecution." The zealous representation by Mr. Glock's counsel impaired Mr. Puiatti's submission of mitigating evidence. Effectively, Mr. Puiatti came under attack by two prosecutors: the state and his codefendant's counsel.

Mr. Puiatti's case was also prejudiced when Mr. Glock chose to testify and expressed his remorse to the sentencing jury. (A-10/2359). Mr. Puiatti, who had prior convictions, exercised his Fifth Amendment

right not to testify to avoid impeachment by his prior convictions. The relative comparison of Mr. Puiatti's silence to the remorse expressed by Mr. Glock may have led the jurors to draw negative inferences from Mr. Puiatti's "refusal" to testify.

As the penalty phase proceeded, each defendant's right to present all mitigating evidence and his constitutional right to be individually considered was undermined as each defendant's mitigating defenses conflicted with those of the other defendant. If the court had severed the proceeding, the mitigating evidence of the two defendants would not have conflicted and been impaired. The jury would have been able to properly evaluate the aggravating and mitigating evidence for each defendant individually.

B. Mr. Puiatti Was Sentenced In A Confusing Joint Penalty Proceeding

The record of Mr. Puiatti's proceedings demonstrates a high likelihood that the jury was confused about its constitutional obligation to arrive at an individualized sentencing determination.

1. The Sentencing Court Was Confused and Misattributed the Codefendants' Characteristics

The state court's language in *Puiatti* demonstrates that even the judge confused the identities of the codefendants. As the district court noted below, the judge actually confused Mr. Glock and Mr. Puiatti in his opinion. (Petition for Writ of Certiorari, 92a & A-2/349). Also, the trial court's sentencing order referred to the codefendants as a pair, equating similarities that did not exist between their backgrounds and upbringings. (Petition for Writ of Certiorari, 91a & A-2/346, A-2/348). Any joint capital penalty

proceeding where the court confuses the identities of the codefendants calls into question whether each defendant received the "degree of respect due the uniqueness of the individual." *Lockett*, 438 U.S. at 605. The fact that even the judge confused the defendants suggests that jurors also were likely confused about the evidence attributable to each defendant.

2. The Jury Was Also Confused

Jurors who sentenced Mr. Puiatti to death were primed to view the defendants jointly rather than as individuals, leading to confusion. The jury was both implicitly and explicitly encouraged to view the codefendants as one unit deserving of a single identical sentence.

a. The Prosecutor's Closing Penalty Phase Argument Encouraged the Jury to View the Defendants As A Single Unit

The prosecutor's penalty phase closing argument confused the jury about the codefendants' individual characteristics, hindering the jury's ability to consider each defendant's aggravating and mitigating evidence separately. The prosecutor referred to the codefendants "as alike as two peas in a pod" and emphasized that Mr. Glock and Mr. Puiatti had a "symbiotic relationship" that in combination enabled the pair to commit the crime. (A-11/2482-83). This argument made it easier for the jurors to apply stereotypes and return the same death sentence for both defendants. The argument impaired the jury's ability to issue an individualized sentencing determination, which impermissibly prejudiced Mr. Puiatti.

In light of the prosecutor's closing argument, the court's confusion and its inadequate instructions, the jury could not adequately satisfy its constitutional obligation to consider each defendant's sentence individually. The identical 11-1 verdicts in favor of death strongly suggest that jurors impermissibly collectively considered the defendants' punishment.

These circumstances are the exact danger that the Eighth and Fourteenth Amendments are intended to protect against. The Constitution prohibits jurors from treating jointly tried codefendants "as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." *Woodson*, 428 U.S. at 304. Mr. Puiatti's joint penalty proceeding led to that result.

b. The Trial Court's Instructions Emphasized A Single Punishment And Never Instructed The Jury To Weigh The Mitigating Evidence

Although the Eleventh Circuit below quoted in isolation part of the trial court's instructions, stating that the court had instructed the jury separately about the potential sentences for the defendants, (Petition for Writ of Certiorari, 62a-63a n.29), those instructions could not cure the underlying issue. The trial court never instructed the jury to consider separately each defendant's aggravating and mitigating evidence or return different sentences for the defendants if the evidence warranted. (A-11/2525-2526).

Considering the entire record shows that the sentencing court gave the jurors imprecise and erroneous instructions. The court explained to the jury that it was "now your duty to advise the court as to ***what***

punishment should be imposed upon Mr. Glock ***and*** Mr. Puiatti for the crime of murder in the first degree." (A-11/2521) (emphasis added). The court's instructions deindividualized the codefendants, encouraging the jurors to return a single, identical sentence.

III. Courts Must Impose Safeguards to Prevent Joint Defendants In Capital Penalty Phase Proceedings From the Heightened Risk of Losing Their Right To An Individualized Sentencing Determination

The circumstances of Mr. Puiatti's joint penalty proceeding are not unique. As recognized by the Fourth and Fifth Circuits, whenever defendants are joined there is an "inherent tension between joinder and each capital defendant's constitutional entitlement to an individualized sentencing determination." *Bernard*, 299 F.3d at 475; *see also Tipton*, 90 F.3d at 892.

A joined defendant's risk of prejudice will vary with the facts. *Cf. Zafiro v. United States*, 506 U.S. 534, 539 (1993).[13] Joined defendants can be prejudiced in several ways: (i) a defendant's mitigating evidence may be impaired by the presence of his codefendant's mitigating evidence;[14] (ii) one codefendant's evidence

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[13] Although *Zafiro* related to the issue of severance in a jury's determination at the guilt phase, the risks to joint defendants discussed therein are equally applicable to the risks codefendants face in penalty phase proceedings.

[14] *See, e.g.*, *United States v. Catalán-Román*, 376 F. Supp. 2d 96, 106-07 (D.P.R. 2005) (severing penalty phase of capital proceedings after recognizing dilution of mitigating evidence).

and theories could prejudice the other codefendant;[15] (iii) a sentencing jury may consider otherwise inadmissible evidence;[16] (iv) codefendants may blame each other;[17] (v) a codefendant's evidence may cause a negative spillover effect encouraging jurors to make negative inferences;[18] and (vi) jury confusion.[19]

The Constitution requires that courts conducting joint penalty proceedings "consider several alternatives to cure any possible prejudice to the defendants [to safeguard] their right to individual sentencing determinations." *United States v. Catalán-Román*, 354 F. Supp. 2d 104, 106 (D.P.R. 2005). Effective

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[15] For example, competing or antagonizing theories of mitigation can cause prejudice. *See Zafiro*, 506 U.S. at 538-39 (recognizing that district courts must fashion relief as the risk of prejudice arises, although mutually antagonistic defenses are not *per se* prejudicial).

[16] This Court has also recognized that "a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant." *Id.* at 539. The constitutional right of a defendant is violated if a confessing defendant's statement is used against a non-confessing defendant at their joint trial. *Bruton v. United States*, 391 U.S. 123, 126 (1968).

[17] This results in the defense attorneys acting as additional prosecutors against other defendants as they try to shift blame away from their client. *See, e.g., United States v. Tootick*, 952 F.2d 1078, 1082 (9th Cir. 1991) ("Defendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant.")

[18] With respect to guilt phase proceedings, this Court has already recognized that "evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty." *Zafiro*, 506 U.S. at 539.

[19] *Cf. id.*

safeguards include: (i) curative instructions;[20] (ii) severing the penalty phase proceedings; (iii) holding sequential penalty phase proceedings using one jury; or (iv) empanelling a separate jury for each codefendant but still holding a single proceeding. *See, e.g.*, *Bernard*, 299 F.3d at 476 (court repeatedly instructed jurors to consider each defendant's punishment separately so that it "sufficiently addressed the risk of prejudice resulting from the joint trial"); *Tipton*, 90 F.3d at 892-93 (satisfied with the court's frequent instructions to jurors to consider individually each defendant's case and adding that the government must "be specific" and make individualized arguments); *United States v. McVeigh*, 169 F.R.D. 362 (D. Co. 1996) (severing trials at the guilt phase); *Catalán-Román*, 376 F. Supp. 2d at 107 (severance in the form of sequential penalty hearings); *see also United States v. Henderson*, 442 F. Supp. 2d 159, 162 (S.D.N.Y. 2006) (finding that courts more often order sequential penalty phase proceedings "where one defendant has mitigating evidence of such

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[20] Curative instructions, however, are not always effective because jurors either fail or are unable to follow instructions. James S. Farrin, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMP. PROBS. 325, 333-36 (1989) (concluding that "curative instructions, as used by the courts today, are insufficient to counter the prejudicial effects of joinder"). *See also*, *e.g.*, Jonathan D. Casper, et al., *Juror Decision Making, Attitudes, and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291 (1989); Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberation of Simulated Juries*, 18 CRIM. L.Q. 235 (1976); William C. Thompson, et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95, 98 (1984).

force that it places his co-defendant at a unique disadvantage").

None of these safeguards were employed in Mr. Puiatti's case. As a result Mr. Puiatti's sentence was in violation of his Eighth and Fourteenth Amendment right to an individualized sentencing determination. This Court should grant Mr. Puiatti's Petition for Certiorari to redress that constitutional failure.

CONCLUSION

Accordingly, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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