CAPITAL CASE
No. 10-___

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

PETITION FOR A WRIT OF CERTIORARI

ARDITH BRONSON
WEIL, GOTSHAL
& MANGES LLP
100 Federal St., Floor 34
Boston, MA 02110
(617) 772-8300

STEVEN ALAN REISS
Counsel of Record
MIRANDA S. SCHILLER
ADAM B. BANKS
WEIL, GOTSHAL &
MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
steven.reiss@weil.com

Attorneys for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

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.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below are as set forth in the caption of the case.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES — Page

IN THE

Supreme Court of the United States

No. 10-____

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Carl Puiatti respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 626 F.3d 1283. The order of the court of appeals denying rehearing en banc (Pet. App. 126a) is unreported. The opinion of the district court (Pet. App. 71a) is reported at 651 F. Supp. 2d 1286.

STATEMENT OF JURISDICTION

The opinion of the court of appeals was entered on November 29, 2010. The court of appeals denied a timely petition for rehearing en banc on January 21, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

1. a. Petitioner Carl Puiatti and his co-defendant, Robert Glock, were indicted in October 1983 for kidnapping, robbing, and murdering Sharilyn Ritchie in Pasco County, Florida. Before trial, Puiatti moved to sever his case from Glock's, citing material differences between confessions he and Glock made while in custody, and arguing that a joint trial would prejudice not only the jury's determination of guilt but also its decision to recommend a life or death sentence. (A-2/203-05).[1] The severance motion was denied. After a two-day trial in which neither defen-

---

[1] References to the record ("A-," followed by volume and page number) are designated according to the index filed with the district court. See No. 8:92-cv-539-T-EAK (M.D. Fla.) Docket No. 97.

dant presented any witnesses, the jury convicted both of all charges.

b. Citing both the special concerns of a capital sentencing proceeding and the increased risk of antagonism between the codefendants, Puiatti renewed his motion to sever the sentencing proceeding after the guilty verdicts were rendered. (A-9/2191-92). Puiatti's counsel argued that the court had "seen a flavor in the trial of the possible result in a joint trial, namely, that Mr. Puiatti may face another accuser besides the State in being tried, and I think this problem becomes even more important in the penalty phase." (A-9/2191). The trial court denied the motion.

One of Puiatti's mitigation theories was that he acted under the substantial domination of Glock. *See* Fla. Stat. § 921.141(6)(e). He introduced testimony from a forensic psychologist, Dr. Donald DelBeato, who testified that Puiatti suffered from brain dysfunction (A-10/2238-39), was "easily influenced" (A-10/2244), "very easily manipulated" (A-10/2249), and that the offense was not something Puiatti would have done if he were alone (A-10/2251). The jury also heard from psychiatrist Dr. Richard Meadows, who testified that Puiatti suffered from "several mental illnesses" (A-10/2409), had right-side brain damage that caused him "poor judgment" and "poor impulse control" (A-10/2412), functioned at the emotional level of a 10- or 11-year-old (A-10/2424), and suffered from "avoidance personality," making him "suggestible or influenced easily by other people." (A-10/2410-11). Dr. Meadows testified that "it is in [Puiatti's] nature to be easily influenced" and that at the time of the crime, "he was being leaned on rather heavily by" Glock. (A-10/2425). Dr. Meadows concluded by agreeing that Puiatti had been acting

under the substantial domination of Glock at the time of the offense. (A-10/2425).

The principal attack on Puiatti's mitigation case came not from the State, but from Glock, who cross-examined Puiatti's witnesses—in fact, only Glock's counsel cross-examined Dr. Meadows—and advanced an antagonistic mitigation theory. Glock contended that he, not Puiatti, was the one who was easily influenced. Accordingly, Glock called clinical psychologist, Dr. Gerald Mussenden, who testified that it was *Glock* who was "easily influenced" and "could certainly be exploited." (A-10/2329). Dr. Mussenden testified that Glock was neither hostile nor antisocial (A-10/2337) and "would not normally have done" something like this if "he had not had this . . . really bad, destructive association" with Puiatti. (A-10/2392). In direct contradiction to Puiatti's mitigation theory, both Glock's mother and sister testified that Glock was a "follower." (A-10/2323; A-10/2356).

Glock also took the stand to testify on his own behalf. Immediately before his testimony, Puiatti's counsel objected. Unlike Glock, Puiatti could not have testified because, had he done so, he would have been impeached with two prior convictions. Renewing the motion to sever, Puiatti's counsel argued:

> [Glock's testimony] places Mr. Puiatti in a position, namely, that no instruction is going to cure. This is an inescapable impression in front of the jury that [Puiatti's] avoiding something by not testifying, that he's not willing to face up to it. The instruction is not going to compensate. He's really stuck. Your Honor knows that if I put him on the stand he's going to be impeached on two prior convictions. If I don't put him on the stand, how can I compensate for this? This is placing

> me in an inescapable position. I would renew the motion for severance.

(A-10/2358). The court denied the motion and offered no protective or curative instruction. Glock went on to testify that he "feels a lot of remorse" for the crime and that he was "sorry about what happened [and] [i]f there was anything I could do to bring her back, I would do it." (A-10/2359, 2362). Puiatti was never able to make any similar statement to the jury.

At the close of testimony, Puiatti's counsel again renewed her motion to sever, joining Glock's counsel in arguing that it was "clear" he was "not only being pursued by the State, but by his co-defendant." (A-10/2433). The trial court denied the motion, concluding that "[i]f there are no overriding reasons for separating them like [*Bruton v. United States*, 391 U.S. 123 (1968)] testimony or something like that, I really am convinced even more so now than at the time I made the ruling that the denial of the motion to sever was correct." (A-10/2433).

Before closing arguments began, the trial judge framed the decision before the jury in the singular: "[A]s I told you yesterday, you now have the evidence with which you will be expected to decide on *an advisory sentencing verdict*." (A-11/2466) (emphasis added). During his closing arguments to the jury, the prosecutor also repeatedly described Puiatti and Glock as one unit, rather than separate individuals: "these guys are like—two peas in a pod—the old cliché, as alike as two peas in a pod." (A-11/2482). The prosecutor argued that Puiatti and Glock should be treated no differently from each other at sentencing because of their "symbiotic relationships," arguing that neither "one of these [would] have been

likely to do this crime by themselves . . . so . . . there's no reason to treat them any differently." (A-11/2483).

The trial judge then gave his final charge to the jury. The judge never instructed the jury to consider the aggravating and mitigating evidence as to each defendant separately or individually. Nor did he expressly explain that the jury could return different advisory sentences for the two defendants. Rather, he repeatedly referred to returning a *single* sentence, thereby suggesting that the jury should return the same sentences for both Glock and Puiatti:

> It is now your duty to advise the court as to what *punishment* should be imposed on Mr. Glock and Mr. Puiatti. . . .
>
> [Y]our advisory *sentence* should be based . . . .
>
> The *sentence* that you recommend to the Court must be based upon the facts . . . .
>
> [Y]our advisory *sentence* must be based upon these considerations . . . .
>
> [I]t is not necessary that *the* advisory *sentence* of the jury be unanimous. . . .
>
> [Y]ou should bring to bear your best judgment in reaching your advisory *sentence*.

(A-11/2521, 2522, 2524-25) (emphasis added). The judge concluded: "[Y]ou will now retire then to consider your *recommendation*. When seven or more of you are in agreement as to what *sentence* should be recommended to the court, *that form* of recommendation should be signed by your foreman and returned to the Court." (A-11/2528) (emphasis added).

The jury voted to recommend death for both Puiatti and Glock by the same margin: 11-1. The judge entered a single order sentencing both defendants to death. In entering joint findings in support of the sentences, the trial judge, who, not only heard the testimony during both phases of the trial, but also presided over months of pre-trial proceedings and had the benefit of counsel's briefs, confused the two defendants several times. For example, he stated that both defendants came from middle class backgrounds, when in fact Glock was abandoned and institutionalized. (A-2/346). The judge also attributed Puiatti's mental health evidence to Glock. (A-2/348).

2. a. The Florida Supreme Court, which *sua sponte* consolidated Puiatti's direct appeal with Glock's, affirmed Puiatti's conviction and sentence. The court rejected Puiatti's arguments that the joint penalty phase was prejudicial because, *inter alia*, he and Glock presented antagonistic mitigating defenses, and that the joint proceeding violated his constitutional rights. *Puiatti v. State*, 495 So. 2d 128 (Fla. 1986). Puiatti petitioned this court for certiorari. This Court granted the petition, vacated the Florida Supreme Court's decision, and remanded for reconsideration in light of *Cruz v. New York*, 481 U.S. 186 (1987). See *Puiatti v. Florida*, 481 U.S. 1027 (1987). On remand, the Florida Supreme Court reaffirmed Puiatti's conviction and sentence, *Puiatti v. State*, 521 So. 2d 1106 (Fla. 1988), and Puiatti's subsequent petition for certiorari was denied. *Puiatti v. Florida*, 488 U.S. 871 (1988).

b. Puiatti then sought post-conviction relief in state court. Puiatti filed a Florida Rule of Criminal Procedure 3.850 motion, which was denied. Puiatti

appealed that denial and filed an original petition for habeas corpus in the Florida Supreme Court. In a consolidated opinion, the Florida Supreme Court affirmed the denial of the 3.850 motion and denied Puiatti's state habeas petition. *Puiatti v. Dugger*, 589 So. 2d 231 (Fla. 1991). However, two justices stated in a special concurrence that although the court had already denied Puiatti's claim regarding severance, they "would reconsider Puiatti's penalty phase claim that he did not receive the individualized sentencing hearing he is entitled to under the constitution." *Id.* at 236 (Barkett and Kogan, JJ., specially concurring).

3. On April 23, 1992, before the effective date of the Anti-terrorism and Effective Death Penalty Act ("AEDPA"), Puiatti filed a 28 U.S.C. § 2254 petition for habeas corpus in the United States District Court for the Middle District of Florida. Several times over the ensuing years, the district court administratively stayed the proceedings pending the outcome of various other state or federal proceedings.

On August 14, 2009, the district court granted in part and denied in part Puiatti's petition. Pet. App. 71a. The district court denied four of Puiatti's challenges to his conviction, but granted relief as to one of his penalty phase claims. The court held that the joint penalty phase "severely impaired Puiatti's ability to present [mitigating] evidence." Pet. App. 93a. The court found that "[m]any of [Puiatti's] mitigating witnesses were directly contradicted by Glock's witnesses; each of [Puiatti's] witnesses was subject to double cross-examination; Glock's testimony highlighted Puiatti's failure to testify; and the prosecutor used the joint nature of the proceedings to further de-individualize the defendants." Pet. App. 93a. "Together," the court held, "these circumstances

effected a crippling blow to Puiatti's individual identity in the eyes of the judge and jury, and violated his rights under the Eighth and Fourteenth Amendments." Pet. App. 93a. The district court vacated Puiatti's death sentence and ordered a new sentencing hearing. In light of this holding, the district court determined that Puiatti's remaining challenges to his death sentence were moot. Pet. App. 93a-94a.

4. The court of appeals reversed and remanded. Pet. App. 1a.[2] The court held that joining codefendants in the same capital penalty phase raised *no* Eighth Amendment implications "whatsoever," and instead found that joinder is "quite compatible" with individualized sentencing. Pet. App. 63a, 70a. The court held that the joint sentencing proceeding did not violate Puiatti's right to an individualized sentencing determination and was not prejudicial, reversed the district court's grant of relief, and remanded for consideration of Puiatti's remaining challenges to his death sentence. Pet. App. 70a. On January 21, 2011, the court denied Puiatti's petition for rehearing en banc. Pet. App. 126a.

---

[2] The court of appeals also denied Puiatti a certificate of appealability to appeal from the denial of his habeas challenges to his conviction. See Pet. App. 43a n.12.

REASONS FOR GRANTING THE PETITION

This case presents the question of whether, and to what extent, a joint capital penalty phase implicates a defendant's "well-established" Eighth and Fourteenth Amendment rights to an individualized sentencing determination. For decades, this Court has recognized that a capital defendant is entitled to an "individualized" sentencing decision that is based not only on the circumstances of the offense, but also on the defendant's unique characteristics and background. See, *e.g.*, *Lockett v. Ohio*, 438 U.S. 586 (1978). Among other things, the right to an individualized sentencing determination requires that the jury be able to consider and give meaningful effect to all evidence offered in mitigation that could warrant imposing a sentence less than death.

Although this Court has never squarely considered whether the Eighth and Fourteenth Amendments are implicated when two defendants are joined in the same capital sentencing proceeding, two courts of appeals have held that the tension between joinder and individualized sentencing is "inherent" and present in every case involving multiple capital defendants. See *United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002); *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996). The Eleventh Circuit below, however, concluded that there were *no* Eighth Amendment implications of joint capital sentencing "*whatsoever*," and that joinder was "quite compatible" with individualized sentencing.

The courts of appeals are thus at odds concerning an exceptionally important issue that this Court has yet to fully consider. Although this Court has discussed joinder and severance of criminal defendants in ordinary criminal proceedings, see, *e.g.*,

Zafiro v. United States, 506 U.S. 534 (1993), it has never directly considered the extent to which the Eighth and Fourteenth Amendments constrain a court's discretion to join defendants in the same *capital sentencing* proceeding, or whether the trial court in a joint proceeding must *clearly* instruct the jury to consider the aggravating and mitigating evidence separately as to each defendant, and to return different sentences if the evidence so warrants.

There are significant reasons why a joint capital penalty phase implicates a defendant's Eighth and Fourteenth Amendment rights, including preserving the jury's ability to impartially consider and give effect to a defendant's individual mitigating evidence. Among other things, a joint proceeding invites the jury to weigh one defendant's mitigating evidence against the other's, and allows one defendant's case in mitigation to be negated by the codefendant's evidence, including evidence that would have been inadmissible in a severed proceeding. A joint proceeding also shifts the jury's attention from the individual background of the defendant to the defendants' common acts in committing the offense. Without clear instructions, the jury is left with the implication arising from the joint guilt/innocence trial that, having convicted both defendants of the same offense, it should impose the same sentence on each. That implication, however, collides head on with *Lockett* and its command that a sentencer must give attention to the defendant's individual background *in addition to the circumstances of the offense.*

Finally, the decision of the court of appeals that Puiatti's penalty phase proceeding did not violate his right to an individualized sentencing determination

is incorrect. Glock's presence, and the adversarial role of his counsel in the joint trial, effectively negated Puiatti's case in mitigation. Puiatti's mitigation evidence, including testimony that he was acting under the substantial domination of Glock, was directly contradicted, not by the State, but by Glock, who pursued an irreconcilable mitigating theory and presented testimony, some of which could not have been introduced in a severed proceeding. Moreover, the taint of Glock's testimony of remorse—contrasted with Puiatti's silence—essentially introduced another aggravator: the jury was left free to infer that Puiatti shared no such remorse, and it was never told not to hold it against him. There also was a significant likelihood that the jury confused the defendants' mitigating evidence, as even the trial judge could not keep straight which witnesses testified on which defendant's behalf.

The trial judge declined to sever the penalty phase, mistakenly believing that if no severance was required under the Sixth Amendment at guilt/innocence, there was no need to consider severance at penalty. Moreover, rather than attempting to minimize the risk of prejudice from the joint trial with clear instructions, the trial judge's instructions to the jury compounded the problem: He *never* told the jury to individually and separately consider the defendants' mitigation cases, and instead left the jury with the inescapable impression that it was to return a single sentence for both defendants.

The court of appeals repeated these errors: It held that if severance is not required at guilt/innocence, *a fortiori*, no severance is required at penalty; and it sanctioned a flawed jury instruction that only exacerbated the prejudice of the joint proceeding.

I. WHETHER, AND TO WHAT EXTENT, A JOINT CAPITAL PENALTY PHASE IMPLICATES A DEFENDANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO AN INDIVIDUALIZED SENTENCING DETERMINATION IS A RECURRING ISSUE OF EXCEPTIONAL IMPORTANCE

1. For more than thirty years, this Court has recognized the bedrock principle that treating "each defendant in a capital case with that degree of respect due the uniqueness of the individual" is a "constitutional requirement in imposing the death sentence." *Lockett*, 438 U.S. at 605 (plurality opinion). A core component of this basic principle is that the sentencer must be able to take into account both the circumstances of the offense *and* the unique background of the individual offender: "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1982); see also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[T]he fundamental respect for humanity underlying 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."); *Stringer v. Black*, 503 U.S. 222, 230 (1992) (observing the "well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases").

Thus, this Court has held that the capital sentencing process cannot restrict the jury's ability to consider and give full meaningful effect to a defendant's individual mitigating evidence. See, *e.g.*, *Abdul-Kabir v. Quaterman*, 550 U.S. 233, 263-64 (2007) ("Our cases following *Lockett* have made clear that when the jury is not permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence—because it is forbidden from doing so by statute or a judicial interpretation of a statute—the sentencing process is fatally flawed.").[3] This Court has also held that the jury is precluded from performing its obligation to render an individualized sentencing determination when it is misled about its role in the sentencing process by, for example, instructions that minimize its sense of responsibility for fixing the sentence. See *Caldwell v. Mississippi*, 472 U.S. 320, 330-31 (1985) (plurality opinion).

2. This Court has not squarely addressed whether, and to what extent, this "well-established" right to an individualized sentencing determination is implicated when two defendants are joined together in the same capital sentencing proceeding. Although this

---

[3] See also *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994) ("States must ensure that capital sentencing decisions rest on an individualized inquiry under which the character and record of the individual offender and the circumstances of the particular offense are considered.") (internal citations, alterations and quotation marks omitted); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002) ("*Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982),] makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing [the] sentence.").

Court has addressed joinder and severance of criminal defendants *generally*, see, *e.g.*, *Zafiro*, 506 U.S. at 534; *Richardson v. Marsh*, 481 U.S. 200 (1987), it has never directly considered the ramifications of joinder and severance at the capital penalty phase, a proceeding that requires individualized consideration as a constitutional imperative.

The goal of a capital sentencing proceeding is not to determine guilt or innocence, but to select, based on a reasoned moral judgment, who from among the class of those eligible for the death penalty are the most deserving of the ultimate punishment. See, *e.g.*, *Zant*, 462 U.S. at 878-79. This life or death determination, this Court has held, demands a heightened degree of reliability as compared to ordinary criminal proceedings. See, *e.g.*, *Lowenfield v. Phelps*, 484 U.S. 231, 238-39 (1988) (citing *Lockett*, 438 U.S. at 604). Accordingly, elevated concerns to protect against prejudice and to ensure fairness to the accused attend the decision to join two defendants in a capital penalty phase relative to other criminal proceedings, including the guilt/innocence phase of a murder trial.

Among such concerns is the degree to which a joint penalty phase disrupts the jury's ability to consider and give effect to each defendant's separate and individual mitigating evidence. For example, a joint proceeding can invite the jury to weigh one defendant's mitigating evidence against the other's,[4] or permit one defendant to introduce mitigating

---

[4] See, *e.g.*, *United States v. Green*, 324 F. Supp. 2d 311, 326 (D. Mass. 2004) (Where there are differences in the defendants' mitigating evidence, "virtually every argument for mitigation made by one defendant will be in effect an argument against mitigation as to the other defendant if that defendant cannot claim the same attribute.").

evidence that contradicts or negates the other defendant's evidence; such evidence is particularly problematic where it would have been inadmissible in a severed proceeding.[5] Joint proceedings also increase the likelihood that the jury will be confused as to which aggravating and mitigating evidence is relevant to which defendant, and joint proceedings inherently divert the jury's focus from each individual's background to the common acts of the pair.

Moreover, interests favoring joinder generally apply with far less force at the capital penalty phase. For example, because the proceeding must focus on the individual character and backgrounds of the defendants, the efficiency gains of a joint proceeding are reduced because the government must individualize its case against each defendant separately. As to the interest in avoiding "inconsistent verdicts," see *Richardson*, 481 U.S. at 210, this Court has recognized that two defendants who are equally complicit in the commission of an offense may be entitled to different punishments if individual differences in their circumstances so warrant: "The rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Joint trials can divert the jury's attention away from those individual differences by focusing on the shared acts underlying the crime. Finally, there is evidence that the decision to join defendants in a capital

---

[5] See, *e.g.*, *Foster v. Commonwealth*, 827 S.W.2d 670, 683 (Ky. 1992) ("The respective evidence in mitigation offered by the appellants to the jury was antagonistic to each other. The penalty phase as to Foster was unfairly tainted by the appearance of Powell's counsel acting as a second prosecutor.").

sentencing trial has substantive effects on the jury's recommendation.[6]

In sum, this case presents the Court with an opportunity to consider whether, and to what extent joint capital penalty proceedings implicate concerns not present in other criminal proceedings, and to determine when severance or other precautions are necessary to protect against undue prejudice.

3. The question presented is recurring and has wide ranging significance. Because of the constitutional sensitivity of joint capital penalty phases, three states allow joint proceedings only in rare circumstances, if at all.[7] In the remainder of the states employing the death penalty, and in the federal system, joint capital proceedings are not uncommon.[8] Courts in these jurisdictions have

---

[6] In research cited by the district court, prospective jurors "voted for death 65.1% of the time" when defendants were joined, and only "47.2% of the time when the defendant was tried alone." Pet. App. 93a (citing Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, Cal. St. U., Chico Discussion Paper Series No. 94-1 (1994)).

[7] See, *e.g.*, Ga. Code § 17-8-4(a) ("When two or more defendants are jointly indicted for a capital offense, any defendant so electing shall be separately tried unless the state shall waive the death penalty."); Ohio Rev. Code § 2945.20 ("When two or more persons are jointly indicted for a capital offense, each of such persons shall be tried separately," unless the court specifically orders otherwise.); *Smith v. State*, 724 So. 2d 280, 306 (Miss. 1998) (holding that in capital cases, "if a motion for severance is filed, the trial court has no discretion and instead must grant the requested severance").

[8] There have been at least 70 federal death penalty trials involving multiple defendants. See Motion for Guilt and/or Penalty Proceedings and Deliberations and Verdicts Separate from the Co-Defendant on Retrial, Ex. A at 2, *United States v. Lecco*, No. 05-CR-107 (S.D. W. Va.), 2009 WL 6669944.

encountered, and will undoubtedly continue to encounter, multiple-defendant capital trials. And, as explained *infra*, they have approached the constitutional issues involved in varying ways. This Court's guidance on whether, and the extent to which the Eighth and Fourteenth Amendments constrain a judge's discretion to join capital defendants in the same sentencing proceeding is therefore warranted.

4. Neither AEDPA nor *Teague v. Lane*, 489 U.S. 288 (1989), bar this Court from considering the question presented. Because Puiatti filed his petition *before* the effective date of AEDPA, the requirement that the relevant state-court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established" Supreme Court law does not apply. See 28 U.S.C. 2254(d)(1). Both courts below so held. Pet. App. 64a & n.30; Pet. App. 78a. Moreover, the State has waived any reliance on *Teague* by failing to raise a *Teague* objection as to this claim in its response to Puiatti's habeas petition.[9] See, *e.g.*, *Danforth v. Minnesota*,

---

Many of these courts have been sensitive to the implications of joint proceedings and have invoked some form of severance; however, a fair number of joint trials have proceeded. Providing guidance on this issue would aid those courts grappling with joint capital trials.

[9] The State raised *Teague* in response to the habeas petition as to two of Puiatti's other claims, but did not raise a *Teague* objection to his individualized sentencing claim. The State first raised a *Teague* objection in a Rule 59(e) motion to alter or amend the judgment filed *after* the district court had granted relief. "An issue presented for the first time in a motion pursuant to Federal Rule of Civil Procedure 59(e) generally is not timely raised; accordingly, such an issue is not preserved for appellate review." *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999).

552 U.S. 264, 289 (2008) ("States can waive a *Teague* defense, during the course of litigation, by expressly choosing not to rely on it . . . or by failing to raise it in a timely manner.") (citations omitted).[10]

II. THE COURTS OF APPEALS ARE DIVIDED ON WHETHER JOINT CAPITAL PENALTY PROCEEDINGS ARE IN TENSION WITH THE EIGHTH AMENDMENT

1. Acknowledging the special concerns attending capital proceedings, the majority of the courts of appeals that have considered the question have held that there is "inherent" tension between a joint capital penalty proceeding and the Eighth Amendment right to an individualized sentencing determination. The Fifth Circuit has recognized the "inherent tension between joinder and each defendant's constitutional entitlement to an individualized capital sentencing decision." *Bernard*, 299 F.3d at 475. The Fifth Circuit explained that "[a] trial court must be especially sensitive to the existence of such tension in capital cases, which demand a heightened degree of reliability." *Id.*

Similarly, the Fourth Circuit has held "that trial court discretion as to severance in the capital-penalty phase must be considered so constitutionally constrained at its outer limits" by "the Supreme Court's 'individualized consideration' jurisprudence as embodied in *Gregg v. Georgia*, 428 U.S. 153 (1976) . . . and its progeny." *Tipton*, 90 F.3d at 892. Indeed, the Fourth Circuit recognized that the threat to a capital defendant's right to an individualized

---

[10] Puiatti argued in the court of appeals that the State waived reliance on *Teague*, and the court of appeals' decision neither cites nor relies on *Teague*.

sentencing determination will be present "in *any* case involving multiple defendants." *Id.* (emphasis added).

Moreover, the Fourth Circuit noted that although some of the same concerns favoring joint trials—such as efficiency and fairness to the Government—are also "at play" at the penalty phase, "more important of course than any consideration of inconvenience or possible unfairness to the Government from sequential separate trials are the possibilities of unfairness to the accused persons from a joint penalty-phase trial—specifically the threat posed to individualized consideration of their situations." *Id.*

Several federal district courts also have recognized the Eighth Amendment implications of joint capital sentencing proceedings. The court in *United States v. Aquart*, No. 3:06cr160 (JBA), 2010 WL 3211074 (D. Conn. Aug. 13, 2010), observed that "under the Eighth Amendment, a capital defendant is entitled to an '*individualized* determination' of his penalty" and held that "even if severance is not required for the liability trial, the individualized determination objective can be largely achieved by holding sequential, separate penalty trials for each defendant." *Id.* at *7; see also *United States v. Lecco*, No. 05-CR-107, 2009 U.S. Dist. LEXIS 79799, at *11-12 (S.D. W. Va. Sept. 3, 2009) ("In assuring that only those most deserving of a capital sentence actually receive it, society benefits from allowing a defendant to make the best case in mitigation possible to a fact finder who has under consideration *that defendant alone*.") (emphasis added).[11]

---

[11] See also *United States v. Catalan-Roman*, 376 F. Supp. 2d 96, 97 (D.P.R. 2005) (ordering severed, sequential penalty phase

Where severance is not mandated, these courts have recognized that clear jury instructions are required to minimize the potential for de-individualizing the defendants. For example, in *Tipton*, the Fourth Circuit concluded that it was "satisfied that the court's *frequent* instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk [of de-individualization] to acceptable levels." 90 F.3d at 892 (emphasis added); accord *Bernard*, 299 F.3d at 476 (upholding a joint proceeding where "the court *repeatedly* instructed the jury to consider each defendant's punishment separately") (emphasis added).

Moreover, where district courts have declined to sever joint penalty proceedings, they have recognized that sufficient and repeated jury instructions about the need to treat the defendants individually were necessary to mitigate some of the prejudice of the joint trial. See, *e.g.*, *Taylor*, 293 F. Supp. 2d at 899 ("[T]he Court will take every reasonable opportunity in this case to instruct the jury to consider each defendant separately."); *United States v. Rivera*, 363 F. Supp. 2d 814, 824 (E.D. Va. 2005) ("The Court finds that appropriate jury instructions emphasizing

---

hearings "to protect both defendants' 8th amendment right to an individualized sentence"); *Green*, 324 F. Supp. 2d at 326 (joining defendants would raise "Eighth Amendment concerns about individualized treatment at the punishment phase"); *United States v. Taylor*, 293 F. Supp. 2d 884, 891 (N.D. Ind. 2003) ("The Court's discretion with respect to severance is constrained to some degree by the fact that this is a capital case. Because a defendant's life hangs in the balance, Eighth Amendment jurisprudence dictates that a capital case has a heightened need for reliability and requires vigilant protection of each defendant's constitutional right to an individualized sentencing decision.").

the importance of the constitutional rights of a defendant to individualized sentencing will effectively safeguard the defendant's rights to an individualized assessment during the joint penalty phase.").[12]

2. By contrast, the Eleventh Circuit held that a joint capital penalty phase does not have "any Eighth Amendment implications *whatsoever*." Pet. App. 63a (emphasis added). A capital defendant's right to an individualized sentencing determination, the Eleventh Circuit held, is "quite compatible with a joint [penalty phase] trial," and any tension between a joint capital penalty phase and individualized sentencing is, at most, "arguable." Pet. App. 70a.

Unlike the Fourth and Fifth Circuits, the Eleventh Circuit recognized no heightened constitutional concerns attending the joint capital penalty phase, and instead relied entirely on case law and reasoning applicable to joinder and severance of ordinary criminal trials. Pet. App. 51a-54a; 65a-69a (citing *Zafiro* and *Richardson*). Because *Lockett* and its progeny did not involve joinder or severance, the court reasoned, the underlying principle of individualized consideration recognized in those cases has no applicability to joint capital sentencing proceedings. Departing from the views of the other courts, the Eleventh Circuit held that the right to an individualized sentencing determination imposes *no* additional constraints on a trial judge's decision to join two defendants in the same sentencing proceeding.

---

[12] This Court's decision in *Zafiro*, which did not concern the heightened need for reliability in death penalty cases, notes that appropriate jury instructions "often will suffice to cure any risk of prejudice" in a joint trial. 506 U.S. at 539.

Moreover, relying on *Richardson*, which did not involve a joint penalty phase, the Eleventh Circuit reasoned that joint penalty phase trials "avoided the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments," and agreed that this case is a "classic example of why joint defendants ought to be tired together to get justice." Pet. App. 69a (internal quotation marks and citations omitted). But the Eleventh Circuit did not recognize, as the other circuits have, that although such considerations of efficiency and fairness to the government remain "in play" at penalty, they must yield to heightened concerns regarding individualized sentencing and fairness to the accused.[13] Laboring under the opposing view that the right to individualized sentencing described in *Lockett* and its progeny does not implicate joinder at capital sentencing, the Eleventh Circuit essentially concluded that if there are no reasons to sever a capital case at the outset of the guilt/innocence phase of the trial, then, *a fortiori* there is no need to consider severance at penalty.

Finally, as explained in more detail *infra*, the Eleventh Circuit endorsed the use of a jury charge that never instructed jurors to consider each defendant's mitigating evidence separately and individually. By

---

[13] For example, as explained *infra*, at the capital-penalty phase, any purported advantage a defendant would get from going second and "previewing" the State's case is minimal, because the State's penalty phase evidence, to the extent it presents any, should properly be *individualized* as to each defendant. Moreover, here, there was virtually no efficiency to be realized in the joint penalty proceeding because the State introduced no evidence.

contrast, the Fourth and Fifth Circuits affirmed joint capital sentencing proceedings in large part because the trial courts "repeatedly" instructed jurors to "give each defendant's case individualized consideration," and took other precautions to protect against the risks of prejudice and confusion that are attendant to joint sentencing proceedings. *Tipton*, 90 F.3d at 892; see also *Bernard*, 299 F.3d at 476. The Eleventh Circuit condoned an instruction that consistently referred to the defendants' sentences and the jury's task in the undifferentiated singular. Indeed, the trial court's concluding instruction told the jury to consider its advisory "sentence" and to return one "form of recommendation" to the Court. These instructions stand in marked contrast to the instructions given in *Tipton* that "reduce[d] the risk [of de-individualization] to acceptable levels." 90 F.3d at 892.

3. There are no procedural hurdles preventing the Court from deciding the question presented and resolving the disagreement among the circuits. As the district court correctly found, Puiatti advanced the factual and legal basis for this claim on direct appeal, arguing that the joint penalty phase was prejudicial, and the Florida Supreme Court decided it on the merits. See Pet. App. 81a; *Puiatti v. State*, 495 So. 2d 128, 131 (Fla. 1986) (stating that Puiatti "claims that the trial court's denial of a severance in the penalty phase prejudiced him").[14]

Puiatti also raised the claim in state collateral proceedings, and again the Florida Supreme Court denied Puiatti's claim on the merits, without relying

---

[14] The Eleventh Circuit assumed that Puiatti exhausted this claim and denied it on the merits. See Pet. App. 49a n.15.

on a state procedural rule to bar consideration of his claim. See *Puiatti v. Dugger*, 589 So. 2d 231, 234 (Fla. 1991) (rejecting Puiatti's argument that "the trial court denied Puiatti his right to an individualized sentencing by joining his penalty hearing with that of his codefendant"). Indeed, then-Justice Barkett "acknowledge[d] that the [Florida Supreme] Court ha[d] previously addressed Puiatti's claim concerning severance," and stated that "[h]aving recently refocused on the problems associated with joint *penalty* phases, however, [she] would *reconsider* Puiatti's penalty phase claim that he did not receive the individualized sentencing hearing he is entitled to under the constitution." *Id.* at 236 (Barkett and Kogan, JJ., specially concurring) (second emphasis added). Accordingly, there can be no procedural bar to consideration of this claim: "the last state court to be presented with [the] particular federal claim reach[ed] the merits." *Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991).

III. THE ELEVENTH CIRCUIT'S DECISION THAT THE JOINT PENALTY PHASE DID NOT DEPRIVE PUIATTI OF HIS RIGHT TO AN INDIVIDUALIZED SENTENCING DETERMINATION IS INCORRECT

As both the Fourth and Fifth Circuits have recognized, a joint capital penalty phase directly implicates a defendant's constitutional right to an individualized sentencing determination. The Eleventh Circuit's decision to the contrary holds that because *Lockett* and its progeny did not involve severance, the Eighth and Fourteenth Amendment rights to an individualized sentencing determination underpinning those cases has *no* application to joint sentencing proceedings whatsoever. Accordingly,

the Eleventh Circuit erroneously concluded, if two defendants were properly joined in the guilt/innocence phase of a trial, nothing constrains a judge's discretion to join them in the same penalty phase, despite the heightened constitutional concerns present when a jury is considering whether to sentence a defendant to death.

As this case illustrates, however, the central teachings of the *Lockett* line of cases—including that the jury must be able to give "meaningful consideration and effect" to the defendant's case in mitigation, *Abdul-Kabir*, 550 U.S. at 246—collide with the risk of prejudice faced by defendants in a joint capital penalty proceeding. The Eleventh Circuit ignored these considerations, relying instead on the interest in "avoiding inconsistent verdicts," and its view that Puiatti and Glock were equally complicit in the commission of the offense and thus should be sentenced together in order to get "justice." This Court's cases are to the contrary: The focus of a penalty phase is on individualized consideration of the defendant's background and character, and different sentences for codefendants are not only permissible, but *required*, where differences in the defendants' circumstances warrant. Finally, the Eleventh Circuit erred in concluding that the jury instructions ensured that Puiatti would get individualized attention. The instructions never expressly told the jury that it could return different sentences for both defendants, and instead left it with the clear impression that it was expected to return the same sentence for each.

1. The joint sentencing proceeding undoubtedly undermined Puiatti's ability to present his individual case in mitigation: Glock's rigorous pursuit of his

mitigating theory effectively negated Puiatti's mitigating evidence; Glock's testimony turned Puiatti's silence into an aggravator before the jury; and the joint proceeding resulted in confusion of the defendants' mitigating evidence.

First, contrary to the Eleventh Circuit's conclusion, Puiatti and his codefendant did present contradictory mitigating theories, as the district court correctly held. Puiatti presented evidence demonstrating that he was acting under the substantial domination of Glock, and that he would not have committed the crime but for Glock's encouragement.[15] (A-10/2425) ("It's in [Puiatti's] nature to be easily influenced" and Puiatti "was being leaned on rather heavily by" Glock.). Glock advanced the directly contradictory theory that he, not Puiatti, was a "follower" (A-10/2313, 2356), and that Glock would not have committed the crime but for the "really bad, destructive association" he had with Puiatti. (A-10/2342).

Glock's pursuit of his mitigation theory thus effectively nullified Puiatti's mitigation case. Glock's counsel cross-examined Puiatti's witnesses and pursued cross-examination on issues ignored by the State—indeed, *only* Glock's counsel cross-examined Puiatti's expert mental health witness who testified that Puiatti was acting under the substantial domination of Glock at the time of the crime. In addition, to counter Puiatti's mitigation evidence, Glock introduced evidence about his own mental condition that would have been *in*admissible in a severed proceeding against Puiatti alone. The mitigating evidence

---

[15] Acting "under the substantial domination of another person" is a statutory mitigating factor in Florida. See Fla. Stat. § 921.141(6)(e).

presented by Glock cancelled out Puiatti's mitigating evidence and amplified the State's case against Puiatti. See, *e.g.*, *Catalan-Roman*, 376 F. Supp. 2d at 107-08 (granting penalty-phase severance where one defendant's mitigating evidence would dilute the codefendant's evidence).[16]

The Eleventh Circuit concluded that the codefendants' mitigating strategies were "similar" but not antagonistic. See Pet. App. 65a. But it is their very similarity that made the two theories mutually exclusive: Each blamed the other as the instigator of the crime and each claimed he would not have done it but for the other. In reality, the joint proceeding impelled the jury to weigh Puiatti's mitigating case against his codefendant's, drastically diminishing the jury's ability to give Puiatti's own mitigating evidence the "meaningful effect" required under the Eighth Amendment.

Second, although Puiatti exercised his constitutional right not to testify, Glock took the stand during the penalty phase to testify as to his own remorse for the crime. There can be no question that this testimony was extraordinarily prejudicial to Puiatti, as the jury inevitably contrasted Puiatti's silence with

---

[16] In addition, Glock, and not Puiatti, was able to take advantage of the mitigating factor of no prior criminal history. In fact, because Puiatti had waived consideration of that factor, the jury would not have been exposed to it in a severed trial. But both Glock's counsel and the prosecutor highlighted that factor—and its absence for Puiatti—in their statements to the jury. The prosecutor urged the jury to compare the two, arguing: "[Y]ou know who has a criminal history and who doesn't." (A-11/2474). By inviting the jury to make such a comparison, the prosecutor turned the absence of a mitigating factor for Puiatti into an aggravating one.

his codefendant's display of remorse. Not only would the jury have likely inferred that Puiatti did not share in that remorse, or had something to hide, but it also likely viewed Puiatti's silence as aggravating. *Taylor*, 293 F. Supp. 2d at 899 (finding that one defendant's "remorse expressed during his allocution at sentencing or other cooperation may highlight another defendant's decision to exercise his Fifth Amendment right to remain silent or not to cooperate, and may work to convert that silence or non-cooperation into self-incriminating evidence in the eyes of the jury").[17]

Critically, although counsel warned that such testimony was likely to be highly prejudicial to Puiatti—indeed, she argued that no instruction could cure the prejudice—the state trial judge allowed Glock to testify, and gave *no* cautionary or limiting instruction whatsoever. Cf. *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that a trial judge must instruct a jury that no adverse inference can be drawn from a defendant's failure to testify). The jury was never told that it should not compare the two defendants' decisions to testify, nor was it told that it should consider Glock's testimony separately and only in consideration of Glock's punishment. Instead, the jury was left free to draw the obvious adverse

---

[17] The Eleventh Circuit held that Puiatti was not prejudiced by Glock's testimony because he was able to introduce evidence of his remorse through the testimony of other witnesses. Pet. App. 68a. But the testimony of others, for example, Puiatti's mother, is no substitute; if anything, Puiatti's silence in the face of Glock's display of remorse led the jury to discredit these other witnesses because Puiatti could not take the stand and express his remorse himself.

inference: Glock was sorry for his actions, but Puiatti was not.[18]

Third, it is clear that the joint proceeding introduced extraordinary confusion, preventing jurors from considering each defendant's mitigating evidence separately. The trial judge's sentencing order itself reflects that he could not distinguish between the two defendants, as it repeatedly confused one defendant's mitigating evidence for the other's. For example, the trial judge found that Glock came from a middle class background, when in fact he was abandoned and sent to an orphanage. (A/2-346). The trial judge also confused the two defendants' mental health evidence. (A-2/348).[19] If the trial judge, who lived with the case for months, confused the two

---

[18] During the *guilt/innocence* phase, when neither defendant testified, the jury was instructed not to hold their decisions to remain silent against them or to view the defendants' silence "as an admission of guilt." (A-2/262). But the jury was not told to apply this or any similar requirement at the *penalty* phase, when guilt had already been determined. And, critically, at no time was the jury instructed to draw no adverse inferences from comparing one defendant's decision to testify with the other's silence.

[19] One possible source of the confusion is that the penalty phase witnesses were presented in a disjointed order: One of Puiatti's mental health experts testified first, followed by all of Glock's witnesses and then the remainder of Puiatti's case. This order was adopted to accommodate the schedule of Puiatti's first expert. But rather than allow Puiatti to put on the rest of his case following that expert's testimony, the trial judge agreed to Glock's request to put on all of his case before Puiatti could conclude his.

defendants' mitigating evidence, it is highly likely the jury did as well.[20]

2. The Eleventh Circuit failed to recognize the Eighth Amendment implications underlying a joint capital penalty phase, relying instead exclusively on reasoning applicable to ordinary criminal proceedings. The court focused on the efficiency gains arising from joint trials generally, but never appreciated that the efficiency gains here, like many joint penalty phases, were nil. See *Taylor*, 293 F. Supp. 2d at 900 ("[T]he mitigating factors to be presented by each defendant are likely to be different for each defendant based on that defendant's particular background and circumstances. Thus, with one exception, the presentation of these factors will be extremely individualized and will not be highly repetitive in separate hearings."). The state put on no penalty phase evidence as to either defendant, and the joint proceeding lasted two days. Severed, sequential proceedings—two, one-day trials—would have taken the same amount of time.

---

[20] Although opening statements could have reduced confusion and aided the jury in its consideration of each defendant's individual evidence, particularly given the disjointed order of witnesses, the court denied Puiatti's counsel's request to make an opening statement before the penalty phase, sustaining Glock's objection. (A-10/2216-17). The State had no objection to an opening statement; thus, but for Glock's opposition, Puiatti's counsel could have given one. Opening statements can have crucial and lasting impact on juries throughout the trial. See, *e.g.*, T. Pyszczynski & L. S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial*, 11 J. Applied Soc. Psychol. 301-13 (1981); V. A. Stone, *A Primacy Effect in Decision Making by Jurors*, 19 J. Comm'n 239-47 (1969).

Moreover, the Eleventh Circuit concluded that the joint penalty phase here was "particularly appropriate" because it prevented the jury from reaching "inconsistent verdicts." Pet. App. 69a. In reaching that conclusion, the court relied solely on the facts of the crime—*e.g.*, that the defendants' planned and effected the crime together, and that they had both confessed. *Id.* But the Constitution requires that the sentencer consider not only the circumstances of the offense, *but also* the individual backgrounds and unique characteristics of the defendants. See, *e.g.*, *Zant*, 462 U.S. at 879. The Eleventh Circuit misunderstood that the focus of a penalty proceeding is not to ensure that joint offenders receive the same sentence, but instead to evaluate each defendant's individual case in mitigation. "A consistency produced by ignoring individual differences is a false consistency." *Eddings*, 455 U.S. at 112.

3. The trial court's jury instructions exacerbated, rather than mitigated, the inherent prejudice of the joint capital penalty proceeding. The trial court *never* instructed the jury to consider each defendant's mitigating evidence "separately" or "individually." Nor did the trial court *ever* instruct the jurors to consider the aggravating and mitigating evidence relevant to each defendant only as to their advisory sentence for that defendant. Such instructions are commonplace in criminal trials generally, but were completely absent in the joint penalty phase here.[21]

---

[21] The judge's instructions may have reflected his belief that the defendants *should* receive the same sentence. In a prior capital case, the same trial judge overrode a jury's life sentence recommendation where a codefendant received a death sentence. See *Miller v. State*, 415 So. 2d 1262 (Fla. 1982).

The jury charge the trial court did give left the jury with the inescapable conclusion that it was expected, if not required, to return the same sentence for both defendants. Compared to the charge given in *Tipton*, 90 F.3d at 892, which the Fourth Circuit concluded "reduced the risk of [de-individualization] to acceptable levels," the charge given here was woefully inadequate, repeatedly telling the jury to return a single advisory sentence:

- At the outset of the penalty phase in *Tipton*, "the court—obviously aware of the special risk—admonished the jurors that they 'must consider each defendant individually.'" 90 F.3d at 892-93. Here, the judge began his charge to the jury by instructing the jurors to "advise the court as to what *punishment* should be imposed on Mr. Glock and Mr. Puiatti" and "render to the court *an* advisory sentence." (A-11/2521) (emphasis added).
- In *Tipton*, the court reminded the prosecution to "'be specific'" and to "'do it individually,' whenever objections were made to Government counsels' references to the defendants collectively." 90 F.3d at 893. Here, when the prosecutor told the jury to treat the defendants "symbiotically" and like "two peas in a pod," (A-11/2482), the trial judge said nothing.
- In *Tipton*, the court reminded the jury to "make a decision regarding each defendant and each capital case." 90 F.3d at 893. Here, the judge told the jury to determine "*the* advisory sentence" of death or life imprisonment that should be imposed "in *this* case." (A-11/2524-25) (emphasis added).

Indeed, the trial judge here concluded his charge to the jury as follows: "you will now retire then to consider your *recommendation*. When seven or more of you are in agreement as to what sentence should be recommended to the court, *that form* of recommendation should be signed by our foreman and returned to the Court." (A-11/2528) (emphasis added). Not surprisingly, the jury here returned the same 11-1 verdict for both. This stands in marked contrast to *Tipton*, where the jury returned three different sentences, splitting their votes in different ways for each defendant, thereby reflecting their individualized treatment. See 90 F.3d at 893.

The Eleventh Circuit cited what it thought was the "pertinent part" of the jury instruction, Pet. App. 62a n.29, but that excerpt ignores the instruction's overall theme, and actually highlights the inadequacy of the jury charge.[22] It is the only portion that separately discusses Puiatti and Glock, telling the jury that it must recommend two sentences. But the judge does nothing to dispel the clear implication that the jury, having convicted both defendants of the same crime, must impose the same sentence on each. The jury was simply never told that it must consider the aggravating and mitigating evidence separately and individually as to each defendant, and never expressly instructed that it need not recommend the same sentence for both defendants.

---

[22] In fact, the trial judge only strengthened the impression that the jury was to recommend the same sentences for both defendants. The instruction grouped the jury's task according to the *punishment*, not the defendant, telling the jury to consider death for both defendants and "on the other hand" consider life sentences for each. See Pet. App. 62a n.29.

In sum, prejudice pervaded the joint proceeding: The jury heard only from one of the two co-defendants, and was left free to infer that the silent defendant felt no remorse for the crime; Puiatti's mitigation theory was defeated not by the State's questioning or evidence, but by evidence introduced by his codefendant that would largely have been inadmissible in a severed proceeding; and the trial judge's instructions only amplified the risk of prejudice from the joinder of the defendants. Together, these factors deprived Puiatti of his right to an individualized sentencing decision. The Eleventh Circuit's decision that the Eighth and Fourteenth Amendments were not even implicated by the joint proceeding is incorrect.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the Eleventh Circuit.

Respectfully submitted,

ARDITH BRONSON
WEIL, GOTSHAL
& MANGES LLP
100 Federal St., Floor 34
Boston, MA 02110
(617) 772-8300

STEVEN ALAN REISS
Counsel of Record
MIRANDA S. SCHILLER
ADAM B. BANKS
WEIL, GOTSHAL &
MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000
steven.reiss@weil.com

Attorneys for Petitioner

Blank Page