CAPITAL PUNISHMENT:
RACE, POVERTY & DISADVANTAGE

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Class Nine - Part Four:
Jury Instructions and Deliberations

Jury Instructions

Consideration of Aggravating and Mitigating Circumstances

Boyde v. California, 494 U.S. 370 (1990). The Court held that the Eighth Amendment is not violated by a penalty phase instruction that if the jury concludes that aggravating circumstances outweigh mitigating circumstances, it "shall" impose a sentence of death. The Court also held that in light of other instructions also given to the jury, there was no "reasonable likelihood" that jurors construed an instruction to consider circumstances which "extenuate the gravity of crime" in a way that prevented the consideration of relevant mitigation evidence.

Tuilaepa v. California, 512 U.S. 967 (1994). Under California law, a person is eligible for death penalty if found guilty of first-degree murder accompanied by one or more statutorily enumerated "special circumstances." At the penalty phase, the jury is instructed to consider other statutory factors – including the circumstances of the crime, the defendant's prior record, and the defendant's age – in deciding whether to impose death. The Court held that the fact that jury is not instructed how to weigh the sentencing factors does not render the California process unconstitutional.

Consideration of Mitigating Circumstances

Blystone v. Pennsylvania, 494 U.S. 299 (1990). The Court held that an instruction that the jury could consider whether the defendant was under the influence of "extreme" duress or was "substantially" impaired did not unconstitutionally preclude the jury from considering lesser degrees of duress or impairment where jury also instructed that it could consider "any other matter."

Buchanan v. Angelone, 522 U.S. 269 (1998). The Court upheld the death sentence even though the trial court failed to instruct on mitigating circumstances. The Court held that the Eighth Amendment does not require that a capital jury be instructed on the concept of mitigating evidence generally, nor that any definitional instruction be given on any particular statutory mitigating circumstances.

California v. Brown, 479 U.S. 538 (1987). The Supreme Court held that a jury instruction, given at the penalty phase, stating that jurors "must not be swayed by mere . . . sympathy" or by mere sentiment, conjecture, passion, prejudice, public opinion or public feeling does not violate the Eighth and Fourteenth Amendment requirement that the sentencer be allowed to consider any relevant mitigating evidence regarding the defendant's character or record and the circumstances of the offense.

Weeks v. Angelone, 528 U.S. 225 (2000). The jurors asked the trial judge during deliberations whether they were required to impose the death penalty if they found that an aggravating factor had been proved beyond a reasonable doubt. The trial court referred the jury to a relevant portion of a constitutionally valid jury instruction it had given earlier. The Court held this was sufficient

and that there was no duty to give additional clarifying instructions.

Unanimity with regard to mitigating circumstances

In ***Mills v. Maryland***, 486 U.S. 367 (1988), the Court considered whether a state could require jurors to be unanimous with regard to whether a mitigating circumstance has been established. The argument was illustrated by a hypothetical situation quoted by the Court in its opinion:

> If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate.

The Court concluded "that there is a substantial probability that reasonable jurors, upon receiving the judge's instructions in this case, and in attempting to complete the verdict form as instructed, well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance. Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not risk."

In ***McKoy v. North Carolina***, 494 U.S. 433 (1990), the Court held that North Carolina's death penalty statute which required sentencing juries to find a mitigating factor unanimously before it can consider it violated *Mills*.

In ***Smith v. Spisak***, 130 S.Ct. 676 (2010), the Court reversed a decision of the Sixth Circuit that had found a *Mills* violation. The trial court had instructed the jury that, in order to imposed death it must find, unanimously and beyond a reasonable doubt, that each of the aggravating factors outweighed any mitigating circumstances. Neither the instructions or the verdict forms said anything about how – or even whether – the jury should make individual determinations that each particular mitigating circumstance existed. Unlike *Mills*, the instructions did not say that the jury must determine the existence of each individual mitigating factor unanimously. They focused only on the overall balancing question. And the instructions repeatedly told the jury to "conside[r] all of the relevant evidence."

The Court held that the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the circumstance that *Mills* found critical, namely, a substantial possibility that jurors may have thought they were precluded from considering any mitigating evidence unless all 12 agreed. Accordingly, it concluded that state court's decision upholding the instructions and verdict forms was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" in *Mills.* 28 U.S.C. §2254(d)(1).

No requirement to instruct jury on consequences if its members do not agree

Jones v. United Stated, 527 U.S. 373 (1999). In this case involving the federal death penalty, the defendant, Louis Jones, requested that the trial judge give an instruction explaining the various possible outcomes if the jury could not reach a unanimous verdict. Most importantly, Jones sought to convey that if the jurors did not agree on death, then the only sentencing option, for jury or judge, would be life without possibility of release. The trial court refused and instead, instructed the jury that it could recommend death, life without possibility of release, or a lesser sentence, in which event the court would decide what the lesser sentence would be. Jones was sentenced to death after long jury deliberations.

Jones challenged his conviction and death sentence on the basis that the jury was not properly informed of the consequences of deadlock. He argued that the court's charge led jurors to believe that a deadlock would result in a court-imposed lesser sentence. The Supreme

Court affirmed his sentence and held that the Eighth Amendment does not require that a jury be instructed as to the consequences of their failure to agree.

In an opinion by Justice Thomas, the Court declined to exercise its supervisory powers over the federal courts and require an instruction regarding jury deadlock. The Court held that such an instruction has no bearing on the jury's role in the sentencing process and might well undermine the object of the jury system: to secure unanimity and have the jury express the conscience of the community on the ultimate life or death question. The Court also determined that in Jones's case, there was no reasonable likelihood that the jury was led to believe that he would receive a court-imposed sentence less than life imprisonment in the event they could not recommend unanimously a sentence of death or life imprisonment without the possibility of release.

Parole Eligibility if Not Sentenced to Death

Simmons v. South Carolina, 512 U.S. 154 (1994). Jonathan Dale Simmons, tried in South Carolina in 1990, was ineligible for parole under South Carolina law because of his criminal history. During jury selection, the trial court forbade defense counsel from mentioning parole, and expressly prohibited the questioning of prospective jurors as to whether they understood the meaning of a "life" sentence under South Carolina law.

During the penalty phase of Simmons' trial, the State urged the jury to consider his future dangerousness when deciding whether to sentence him to death or life imprisonment. The prosecution argued to the jury that a verdict for death would be "a response of society to someone who is a threat . . . an act of self-defense." The court refused to give the defendant's proposed instruction that under state law he was ineligible for parole. When asked specifically by the jury whether life imprisonment carried with it the possibility of parole, the court instructed the jury not to consider parole in reaching its verdict and that the terms life imprisonment and death sentence were to be understood to have their plain and ordinary meaning.

The Supreme Court reversed. Justice Blackmun wrote the plurality opinion holding that, where future dangerousness is an issue, and the only alternative to a death sentence is life imprisonment without the possibility of parole, due process requires that a sentencing jury be informed that the defendant is parole ineligible. The plurality found that the jury in Simmons' case may have believed that he would be released on parole if he were not executed:

> To the extent that this misunderstanding pervaded its deliberations, it had the effect of creating a false choice between sentencing him to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility, and by the State's repeated suggestion that petitioner would pose a future danger to society if he were not executed.

Justices Scalia and Thomas dissented.

Shafer v. South Carolina, 532 U.S. 36 (2001). South Carolina amended its capital sentencing statute in 1996 to require capital juries to first decide whether the State has proved beyond a reasonable doubt the existence of any statutory aggravating circumstance. If the jury fails to find an aggravating factor, it makes no sentencing recommendation and the trial judge sentences the defendant to either life imprisonment or a mandatory minimum term of 30 years. If the jury finds a statutory aggravating circumstance, it must then recommend one of two sentences – death or life imprisonment without the possibility of parole.

In Wesley Aaron Shafer's case, the trial court judge refused to instruct the jury about Shafer's ineligibility for parole if sentence to life imprisonment by the jury and refused to allow defense counsel to inform the jury in his closing

argument. Instead, the judge twice instructed the jury that life imprisonment meant "until the death of the defendant," quoting from the statute. Three hours and twenty-five minutes into its sentencing deliberations, the jury sent a note to the trial judge containing two questions:

> 1) Is there any remote chance for someone convicted of murder to become eligible for parole?
>
> 2) Under what conditions would someone convicted for murder be eligible?

In response, the trial court judge refused defense counsel's motion to read the capital sentencing statute to the jury. The statute made clear that any person sentenced to life imprisonment was ineligible for parole. Instead, the judge instructed the jury again that life imprisonment means until the death of the offender, and further directed, "parole eligibility or ineligibility is not for your consideration." The jury returned 80 minutes later. It unanimously found an aggravating factor beyond a reasonable doubt and imposed the death penalty.

The South Carolina Supreme Court affirmed Shafer's death sentence, holding that the presence of three possible sentences in the new sentencing scheme – death, life imprisonment without parole, or thirty years mandatory minimum – meant that the *Simmons* rule did not apply and that jurors did not need to be instructed on the defendant's parole ineligibility. The United States Supreme Court reversed, finding that the new law presented the same situation as in *Simmons*.

> Only if the jury finds an aggravating circumstance does it decide on the sentence. And when it makes that decision, as was the case in *Simmons,* only two sentences are legally available under South Carolina law: death or life without the possibility of parole.

The Court also rejected the state's two additional arguments: that even if the Court found the *Simmons* rule to apply, the trial court's instructions fulfilled the *Simmons* requirement and that the State did not argue future dangerousness. Justices Scalia and Thomas dissented.

Kelly v. South Carolina, 534 U.S. 246 (2002). One year later, the Supreme Court again reversed a South Carolina death sentence because of a failure to instruct the jury of the defendant's ineligibility for parole. During the sentencing phase of William Kelly's trial, the State introduced evidence of that Kelly had made a knife while in prison and taken part in an escape attempt with plans to hold a female guard hostage.

The prosecutor's cross-examination of a psychologist brought out evidence of Kelly's sadism at an early age and his current desires to kill anyone who irritated him. In his closing argument, the prosecutor spoke of Kelly as a "dangerous" "bloody" "butcher," and said to the jury, "I hope you never in your lives again have to experience what you are experiencing right now. Being some thirty feet away from such a person. Murderer." The trial court refused to give an instruction regarding parole ineligibility because it found the State's evidence went to Kelly's character and characteristics, not to future dangerousness. The South Carolina Supreme Court affirmed.

The United States Supreme Court reversed, finding that the *Simmons* required that the jury be informed of Kelly's true parole status. The Court also held that the fact that the jury did not ask during deliberation for further clarification regarding Kelly's eligibility for parole, as juries in other cases had done, did not matter for the purposes of finding error.

Ramdass v. Angelone, 530 U.S. 156 (2000). The Court held that Bobbie Lee Ramdass was not entitled to an instruction of his ineligibility for parole because a final judgement had not been entered with regard to one of the convictions which rendered him ineligible. The jury had returned a verdict finding him guilty, but under Virginia law, a conviction does not become final until the judge enters a final judgment of conviction. At the time of his capital murder trial, Ramdass had two other criminal felony cases: one

armed robbery for which he had been convicted by a jury and a final judgment of conviction had been entered, and one armed robbery for which he had been convicted by a jury but no final judgment of conviction had yet entered.

In between the jury verdict and the final judgment in the second armed robbery case, the jury in Ramdass' murder trial recommended death. Soon after, the final judgment of conviction entered in the second robbery case, making Ramdass a three-strike, or three time felony offender, and rendering him ineligible for parole if given a sentence of life imprisonment in the capital murder trial.

The judge in the capital case held a hearing before entering a final judgment of conviction to consider whether to impose the recommended sentence. At that hearing, Ramdass argued for a life sentence because the jury in his case had not known that he would be ineligible for parole based on his three-strike offender status. The court sentenced Ramdass to death, and the Virginia Supreme Court affirmed.

Soon thereafter, *Simmons* was decided and Ramdass' case remanded for reconsideration in light of *Simmons*. On remand, the Virginia Supreme Court declined to apply *Simmons* because it concluded that Ramdass was not parole ineligible when the jury was considering his sentence because the jury verdict in the second armed robbery case did not count as a final conviction for purposes of the three-strikes law. Ramdass sought relief in federal court. Ultimately, the Supreme Court affirmed the decision of the Virginia Supreme Court in *Ramdass v. Angelone*.

The Supreme Court held that Ramdass was not entitled to a jury instruction regarding his parole eligibility. The Court refused to extend *Simmons* to cases where parole ineligibility has not been technically established at the time of jury deliberations, and deferred to the state courts on the issue:

> extending *Simmons* to cover situations where it looks like a defendant will turn out to be parole ineligible is neither necessary nor workable, and the Virginia Supreme Court was not unreasonable in refusing to do so. Doing so would require courts to evaluate the probability of future events in cases where a three-strikes law is the issue.

Instruction on Commutation Power

California v. Ramos*,* 463 U.S. 992 (1983). California law requires the trial judge in a capital case to inform the jury that a sentence of life imprisonment without the possibility of parole may be commuted by the Governor to a sentence that includes the possibility of parole. (The instruction is called the "Briggs Instruction" because it was proposed by a legislator named Briggs and adopted by referendum). At the penalty phase of Marcellino Ramos's trial, the judge's instructions included the Briggs Instruction. The jury returned a verdict of death.

The California Supreme Court affirmed Ramos' conviction but reversed the sentence, holding that the Briggs Instruction was unconstitutional because it injected an entirely speculative element into the capital sentencing decision. The California court further concluded that because the instruction does not also inform the jury that the Governor possesses the power to commute a death sentence to life, it leaves the jury with the mistaken belief that the only way to incapacitate the defendant is to condemn him to death.

The United States Supreme Court reversed in *California v. Ramos*, holding that the Briggs Instruction did not encourage the jury to overly rely on speculative elements. The Court found that the instruction merely focused the jury on a defendant's future dangerousness, which the Court had already deemed acceptable in *Jurek v. Texas* (1976). Justice O'Connor, writing for the Court, explained that "[b]y bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to

society."

The Court also decided that the fact that under the Briggs Instruction, jurors were only made aware of the Governor's ability to commute a life sentence, even though he was equally empowered to commute a sentence of death, did not mislead the jury or create any false impressions. Neutrality would not be returned to a jury's deliberations, the Court held, if jurors were made aware of the Governor's ability to commute death sentences, and in fact, such information might lead jurors to "to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers."

Justices Marshall issued a dissenting opinion which Justices Brennan and Blackmun joined. He found the Briggs Instruction unconstitutional because it was misleading, it invited speculation and guesswork, and it injected into the capital sentencing process a factor that bore no relation to the nature of the offense or the character of the offender.

The Louisiana Supreme Court reached a different conclusion under its state constitution. It held that a statutory requirement to instruct jurors on the governor's power to grant pardon or commutation of sentence was "arbitrarily severe, unnecessarily cruel and disproportionate" because it imposed a reason for the death sentence other than the direct "penalty" and was therefore an unconstitutional violation of the defendant's due process right to a fair trial and to humane treatment under the Louisiana Constitution. *State v. Jones*, 639 So. 2d 1144, 1154 (La. 1994).

Jury Deliberations

Turner v. Louisiana

The Supreme Court held that Wayne Turner had been denied right to fair trial by an impartial jury when the two deputy sheriffs who gave key testimony leading to Turner's conviction of murder was in charge of jury during the three-day trial and fraternized with them outside the courtroom during performance of their duties. *Turner v. Louisiana*, 379 U.S. 466 (1965). The deputies swore that they had not talked to the jurors about the case, but the Court nonetheless held that, "even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association * * *." *Id*. at 473.

DEMARCUS ALI SEARS
v.
THE STATE

Supreme Court of Georgia
514 S.E.2d 426 (1999)

Note: Angel Fisher was the only African-America on the jury in this case. Demarcus Sears is also African-American.

THOMPSON, Justice.

A jury convicted Demarcus Ali Sears of kidnapping with bodily injury and armed robbery, and imposed a sentence of death. The evidence adduced at trial showed that Sears and Phillip Williams kidnapped the victim, Gloria Wilbur, as she left a supermarket in Cobb County, Georgia; that Sears assaulted Ms. Wilbur with brass knuckles, put her in her car and drove north; that Sears raped Ms. Wilbur in Tennessee; and that he killed her in Kentucky by stabbing her with a knife.

* * *

1. After deliberating for approximately six hours in the sentencing phase, the jury sent the

trial court a note announcing that it was deadlocked eleven to one in favor of the death penalty, and asking how it should complete the verdict form. Over Sears' objection, the trial court responded to the note as follows:

> You all have been deliberating on this case for six hours. I would like you all to consider continuing your deliberations and see what you can do with the case. I'm not putting any pressure on you to [do] anything one way or another. Whatever your decision is, that's [your] decision. But I feel like you need to deliberate on the case longer.

The jury resumed its deliberations and continued deliberating for another three hours. At that point, the jury sent a second note which read:

> We have reviewed the case from start to finish and we are still deadlocked eleven to one in favor of the death penalty. All twelve jurors agree that there is a hopeless deadlock with no hope of resolution. Deliberations have ceased. What do we do now? All minds are closed.

Sears urged the trial court to accept the jury's "verdict" and impose a life sentence. The court declined to do so. Instead, it charged the jury, in part, as follows:

> I believe it's appropriate to give you some further instructions at this time. You've been deliberating a while, and I deem it proper to advise you further in regards to the desirability of agreement, if possible. This case has been exhaustively and carefully tried by both sides. It has been submitted to you for a decision and verdict, if possible. While the verdict must be the conclusion of each juror, and not a mere acquiescence of the jurors in order to reach agreement, it is still necessary for all of the jurors to examine the issues and questions submitted to them with candor and fairness and with proper regard and deference to the opinion of each other. A proper regard for the judgments of others will greatly aid us in forming our own judgments. Each juror should listen to the arguments of other jurors. If the members of the jury differ in their views of the evidence, or the mitigating or aggravating circumstances, such differences of opinion should cause them all to scrutinize the evidence more closely and to re-examine the grounds of their opinion. It's your duty to decide the issues that have been submitted to you, if you can conscientiously do so. Do not hesitate to change an opinion if you become convinced it's wrong. However, you should never surrender honest convictions or opinions in order to be congenial or reach a verdict solely because of the opinions of other jurors.

The jury was then excused for the evening. It reconvened the following morning and resumed its sentencing phase deliberations. After an hour and a half, the trial court informed counsel that one of the jurors had been sitting in the jury room with a Sony Walkman on her head; and that she had been asked to give it to the bailiffs "so she could participate in the deliberations." The court also told counsel that the foreman had asked the bailiffs to remove all magazines and reading material from the jury room. In addition, the court stated that it had received two notes from the jury: one from the foreman and another from juror Angel Fisher. The note from the foreman, which contained blanks instead of personal pronouns to "protect the gender of the juror" in question, read:

> In the jury selection process, each juror was read the charges in this case. Murder was not one of the charges. The reason that the juror who has steadfastly maintained [ ] position from the outset of deliberations has given for [ ] decision is that [ ] cannot vote on the death penalty because the Defendant was not convicted of murder. Can you provide the jury with a transcript of the questions and answers as to their position on the death penalty? We need to know what questions were asked and how the jurors responded. We would also like for you to provide to the jury a definition of perjury and the penalty for the commission of perjury.

The note from Fisher read:

> I am concerned about the actions of the foreman of this jury. This letter is in reference to the foreman's most recent letter to you. [The foreman] wrote this letter prior to our jury deliberations today. He informed us that he was submitting the letter to you whether we wanted him to or not. I don't think this type of behavior is appropriate for a foreman. I will not sit on a jury where I am singled out. I am not being treated fairly in this deliberating process. I am also being singled out by the foreman, also he is overstepping his boundaries as a foreman of a jury. To my understanding, a foreman should be a leader, not a dictator. Please explain the duties and responsibilities of a jury foreman. Should he be able [to] question a juror's response to the Court during jury selection?

The trial court brought the jury in and said it had received notes from the foreman and Fisher. It summarized the contents of the notes, and stated that the jury should recall the previous instructions as to the imposition of the death penalty, aggravating circumstances, and mitigating evidence. It then informed the jury that it would not read the voir dire transcript and it would not define perjury. The court went on to clarify the role of a foreman by stating that, although the foreman is responsible for leading the deliberations, "in matters of voting, all jurors stand the same." Finally, the court added:

> A juror is responsible to deliberate in the jury deliberations. A juror is supposed to listen to his or her fellow jurors. A juror is supposed to vote their ideas and positions. A juror is supposed to participate. It is inappropriate for any juror to do anything other than fully participate in jury deliberations.

The jury was sent back to deliberate further. Then, after two and a half hours of additional deliberations, the jury announced that it had reached a verdict. The jury entered the courtroom and returned its verdict, finding the alleged statutory aggravating circumstances beyond a reasonable doubt, and sentencing Sears to death. The jury was polled and each juror stated that the verdict was his or her verdict and that it was freely and voluntarily rendered.

Sears contends the trial court coerced the jury to render a verdict of death. * * * An examination of the totality of the circumstances leads us to conclude that the verdict was not coerced by the trial court.

The jurors deliberated for more than fourteen hours over a period of three days before reaching their verdict. Each of the jurors stood by that verdict, announcing, upon being polled, that they rendered it freely and voluntarily in the jury room, and that it was still their verdict. * * * [I]t cannot be said that [the instruction to the jury to try to reach a verdict] was coercive. The court made it clear that, although the jurors should consider the opinions of other jurors, they must never surrender their honest opinions for the sake of expediency.

The trial court's other instructions, urging the jury to reach a consensus, and to participate in the deliberations, were not coercive either. * * *

Although the jury twice stated that it was at an eleven to one "deadlock," the trial court was not bound by those pronouncements. * * * On the contrary, the trial court, in the exercise of a sound discretion, was required to make its own determination as to whether further deliberations were in order.

The jury first indicated it was deadlocked after only six hours of deliberation. And it announced it was deadlocked again, after just another three hours. We cannot say that the trial court abused its discretion in requiring the jury to deliberate further, especially since, after the second announcement of a "deadlock," the jury deliberated more than five hours before reaching a verdict. * * * Moreover, it cannot be said that the verdict was coerced simply because the trial court gave [the instruction about trying to reach a verdict] after the jury revealed its numerical

division (11-1 in favor of the death penalty).[1]

Sears contends the testimony of juror Fisher, adduced upon remand, demonstrates that the actions of the trial court had a coercive effect upon her verdict. In this regard, Sears points out that Fisher testified she was afraid of being prosecuted for perjury, and she believed the trial court wanted her to change her vote because it singled her out by name and urged the jury to continue deliberating when it knew the nature of the jury's numerical division.

We cannot accept this contention.

Fisher, a school teacher, had a bachelor's degree in criminal justice and had attended graduate school. She was the lone holdout for a life sentence – until she changed her mind. Although she testified that she felt bullied by the threat of perjury, she knew that she had not lied under oath. She felt intense pressure from the other jurors. ("I remember being yelled at basically because I was – they were angry at me. They wanted me to change my mind. So they were insulting my character and things like that.") Ultimately, she gave in to that pressure. ("I changed my mind because they had – I mean I was ostracized. And I was just – I was basically made to change my mind by the other jury members.") Viewing Fisher's testimony as a whole, it is clear that she voted for the death penalty because she felt pressured to do so only as a result of the "normal dynamic of jury deliberations."

3. Sears asserts he was denied a fair trial because of two instances of alleged juror misconduct in the jury room: * * * (b) the foreman's statement that juror Fisher should be prosecuted for perjury.

(b) As the deliberations became more heated, the foreman stated that juror Fisher must have been lying when she responded to voir dire questions concerning her willingness to impose the death penalty, and that she should be prosecuted for perjury. These statements do not amount to juror misconduct. Compare *People v. Redd*, 561 N.Y.S.2d 439, 440 (AD 1 Dept. 1990) (threats and belligerent exchanges in the course of deliberations often accompany the heightened atmosphere in the jury room and are insufficient to upset the verdict) with *People v. Lavender*, 502 N.Y.S.2d 439 (AD 1 Dept. 1986) (new trial warranted where court takes no action after it is apprised that juror was trying to physically attack co-juror).

* * *

FLETCHER, Presiding Justice, dissenting.

Because the trial court's instructions to the jury during its deliberations in the sentencing phase were improperly coercive, I dissent.

* * *

These final two notes revealed a serious personal conflict within the jury room, which the evidence on remand confirmed. The foreman's note strongly suggests a threat of a perjury prosecution against the holdout juror based on her responses during voir dire. Fisher's note reveals that she was aware of the foreman's concerns regarding her voir dire answers and was seeking some assistance from the court. The other jurors were also made aware of the perjury threat and against whom it was made when the trial court revealed the contents of the notes in open court before the whole panel and identified the holdout juror by name.

The most troubling aspect of this case is that the trial court ignored the specter of a perjury prosecution while forcing continued deliberations. The trial court has a duty to respond to jury questions and provide guidance when jurors' threats to one another come to its attention. Here the trial court did nothing to inform the jury that it should not concern itself with perjury or other extraneous issues or that a juror's response to voir dire questions was irrelevant to the current deliberations regarding a sentence. The statements the trial court did make provided little guidance to the jury. The explanation of a foreman's duties

1. Trial courts should not, of course, inquire as to the nature of a jury's numerical division. And we encourage them to inform jurors not to reveal that information.

was open-ended and did nothing to dispel the threat of a perjury prosecution against juror Fisher. The trial court's response could not have prevented Fisher "from abandoning an honest conviction for reasons other than those based upon the trial or the arguments of other jurors." Fisher's testimony on remand confirms that Fisher changed her vote not because of the arguments of the other jurors related to the evidence and the applicable law but because of the perjury threat and personal insults.

Additionally, even though the final two notes were the third declaration of a deadlock by the jury, the trial court returned the jury to its deliberations without making an inquiry as to whether the jury had made any progress since its first declaration of an 11-1 split for death. The record reveals that the trial court also failed to consider whether the jurors believed that further deliberations would be of assistance, whether the jury was so exhausted that the minority might be induced to vote for a verdict that they did not truly support, or the length and complexity of the trial. Instead the trial court required further deliberations without any instruction that each juror listen to and consider the views of the others and that a juror should not surrender honest convictions in order to be congenial or to reach a verdict solely because of the opinions of the other jurors. The failure to include these cautionary statements weighs in favor of a finding of coercion.

Another relevant circumstance is that the jury revealed the nature of its division and the trial court reiterated the precise division in its comments to the jury. In *Brasfield v. United States,*[13] the United States Supreme Court held that it was reversible error for a trial court to ask a jury the nature of its split. A rationale for this rule is that the jury's knowledge of the judge's awareness of the exact division will color the jury's understanding of any of the judge's instructions. This danger is present even when the jury volunteers its division, as in this case. Fisher's testimony on remand is illustrative of this problem. She testified that because the judge kept sending them back for more deliberations when the judge knew the vote was 11-1 for death, she (Fisher) believed the judge wanted her to vote for death.

Another circumstance to consider is that after the court responded to the final two notes, the jury reached its verdict in less than four hours, which included a lunch break. This time period of approximately three hours is not long enough to dispel any concerns regarding coercion, especially in view of the fact that the jury's deliberations for the previous 10 1/2 hours over three days had produced no signs of progress.

Considering the totality of these circumstances, I conclude that the trial court's failure to address directly the threat against the holdout juror coupled with its insistence that the jury continue deliberating without meaningful guidance resulted in a coercive effect and I would reverse and remand for a retrial of the sentencing phase.

* * *

Lone Holdout Jailed For Contempt

Curtis Flowers has had six capital trials for the murders of four people at a furniture store in Winona, Montgomery County, Mississippi. The population of the county is just over 12,000. The county is 45 percent African American.

The first three times he was sentenced to death, the Mississippi Supreme Court overturned the guilty verdicts because of prosecutorial misconduct. In his third trial in 2004, the prosecutor exercised all 15 of his peremptory strikes to remove African Americans. The Mississippi Supreme Court reversed, finding that the prosecutor had violated *Batson v. Kentucky. Flowers v. State*, 947 So.2d 910 (Miss. 2007).

Flowers was tried a fourth time in 2007. The prosecution did not seek the death penalty and, without the exclusion of jurors who were conscientiously opposed to the death penalty

13. 272 U.S. 448 (1926).

during jury selection, five blacks were selected for jury service. The jury was unable to reach a verdict with regard to guilt, splitting along racial lines with the seven white jurors voting to convict and the the five black jurors voted to acquit. A mistrial was declared.

Flowers was tried again in 2008 before a jury of 11 whites and one African American. Again, the jury was unable to reach a verdict with regard to guilt, splitting along racial lines with the 11 whites voting to convict and the one African American, a retired school teacher, Vietnam veteran, and football referee, James Bibbs, voting to acquit.

After a mistrial was declared, Bibbs was hauled in front of the judge, harangued, threatened, arrested, led away in handcuffs, charged with perjury and jailed for the night with bond set at $20,000.

Bibbs, who was in his early 60s, was shocked. "The judge got real loud, and he said 'you are lying, you committed perjury'. I was disappointed, all these years you do all these things for the community, then you are called a liar like that out in the public, it was degrading."

The perjury charge was set for trial in July, 2009, but was continued at that time and later quietly dropped.

Flowers was tried a sixth time in the summer of 2010 before a jury of 11 whites and 1 black. He was convicted and sentenced to death.

Sources: Account by Katherine Oberembt, then a Yale Law School student, who graduated in 2012, who worked on the case for the Mississippi Capital Defender; BBC report, Nov. 26 2009; Associated Press, *Perjury trial postponed in Flowers case,* JACKSON (MS.) CLARION LEDGER, July 26, 2009. *See also Six Capital Trials and Still No Justice for Curtis Flowers in Mississippi,* www.secondclassjustice.com/?p=209.

Derrick A. POWELL and Eugenia POWELL, Petitioners,
v.
ALLSTATE INSURANCE COMPANY, Respondent.

Supreme Court of Florida
652 So.2d 354 (1995)

ANSTEAD, J.

* * * This case arose from an automobile collision between the Powells and another motorist (tortfeasor), in which Mr. Powell was injured. Allstate Insurance Company (Allstate) insured the Powells with underinsured motorist coverage. After recovering the liability insurance policy limits of $10,000 from the tortfeasor, the Powells brought an action against their own underinsured motorist coverage carrier, Allstate, seeking to recover their remaining damages which they claimed to exceed $200,000.

Following a jury trial, Mr. Powell was awarded $29,320 in damages and Mrs. Powell nothing. The next day one of the jurors, Karen Dowding (Dowding), contacted both the Powells' attorney and the trial judge to inform them that other members of the jury had made numerous racial jokes and statements about the Powells throughout the trial proceedings and during jury deliberations. Mr. and Mrs. Powell are black citizens of Jamaican birth. All of the jurors are white.[1]

Based upon this disclosure, the Powells requested a new trial or, alternatively, an interview of the entire jury panel. The trial court held an in-court interview of Dowding, which was attended by both parties' attorneys. Dowding testified that various jurors made racial remarks and jokes and she believed the verdict was the

1. The jurors were questioned during voir dire as to whether they could give the Powells, as Jamaican natives, a fair trial and they agreed they could.

result of racial bias.[2] The trial court denied both motions. On appeal, * * * in a five-to-four decision, the Fifth District * * * affirmed the trial court's decision * * *

Discussion

* * *

In *State v. Hamilton*, 574 So.2d 124 (Fla.1991), we adopted the test used by the Fifth Circuit in *Rodriguez y Paz v. United States*, which limits the trial court's inquiry in jury misconduct cases to

> objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the [trial] court must then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant. . . . Though a judge lacks even the insight of a psychiatrist, he must reach a judgment concerning the subjective effects of objective facts without benefit of couch-interview introspections. In this determination, prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the Government to demonstrate the harmlessness of any breach to the defendant.

* * *[3] In applying this test, courts must take into account Florida's Evidence Code which forbids any judicial inquiry into the emotions, mental processes, or mistaken beliefs of jurors. In relevant part, this section states as follows:

> Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.

Notwithstanding this evidentiary rule,[4] we have permitted jurors to testify about "'overt acts which might have prejudicially affected the jury in reaching their own verdict.'" * * *

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2. * * * Dowding testified that various jurors had made a number of racial jokes and statements to each other during the trial. They laughed and participated in the jokes, although when challenged by her in the jury room, they denied they meant anything by their "jokes," or that they were, in fact, prejudiced against Powell because of his race.

For example, Dowding testified that the juror, who was later elected to be foreman of the jury, told an old "saw" of a joke: "There's a saying in North Carolina, hit a nigger and get ten points, hit him when he's moving, get fifteen." The alternate female juror supposed that because the Powells had their grandchildren living with them, their children were "probably drug dealers. And, everybody was like, yeah, yeah. And they were laughing."

Two men on the jury laughed about Johnson's [a witness and friend of the Powells] testimony at the trial. They pointed to the book Dowding was carrying (Through A Window by Jane Goodall) which had a picture of chimpanzees on the cover, and made some sort of reference to Johnson. One said: "[a]nd Mr. Johnson got out of the car and laid down on the pavement." They went into hysterics.

Another juror, who had worked for IBM, told the others that the turnover rate for black employees with the company was twenty-five percent but only two percent for whites. He concluded blacks "didn't work for us as well." Powell's loss of wages and earning power were issues in this case. Another concluded Powell "just wants to retire."

3. We first announced this rule in *McAllister Hotel, Inc. v. Porte*, where we said:

> [T]he law does not permit a juror to avoid his verdict for any reason which essentially inheres in the verdict itself, as that he "did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast."

4. Numerous public policy reasons have been advanced for this rule: (1) "litigation will be extended needlessly if the motives of jurors are subject to challenge," (2) "'preventing litigants or the public from invading the privacy of the jury room,'" (3) shielding jurors from harassment by lawyers; and (4) finality of verdicts.

* * * [I]n light of the strong public policy against going behind a verdict to determine if juror misconduct has occurred, "an inquiry is never permissible unless the moving party has made sworn factual allegations that, if true, would require a trial court to order a new trial using the standard adopted in *Hamilton*." * * *

> Similarly, any receipt by jurors of prejudicial nonrecord information constitutes an overt act. Accordingly, it is subject to judicial inquiry even though that inquiry may not be expanded to ask jurors whether they actually relied upon the nonrecord information in reaching their verdict. * * * [T]he case law on this topic allows inquiry only into objective acts committed by or in the presence of the jury or a juror that might have compromised the integrity of the fact-finding process.

Under this test:

> [T]he moving party first must establish actual juror misconduct in the juror interview. Once this is done, the party making the motion is entitled to a new trial unless the opposing party can demonstrate that there is no reasonable possibility that the juror misconduct affected the verdict.

* * *

* * * At issue is whether [statements of racial or ethnic bias made by jurors] fall into the category of overt juror misconduct which may be the subject of inquiry after a verdict is returned, or whether such conduct "inheres in the verdict" as a "matter resting alone in the juror's breast."

In the instant case, we find the alleged racial statements made by some of the jurors to constitute sufficient "overt acts" to permit trial court inquiry and action. * * * [I]t would be improper, after a verdict is rendered, to individually inquire into the thought processes of a juror to seek to discover some bias in the juror's mind, like the racial bias involved here, as a possible motivation for that particular juror to act as she did. Those innermost thoughts, good and bad, truly inhere in the verdict.

But when appeals to racial bias are made openly among the jurors, they constitute overt acts of misconduct. This is one way that we attempt to draw a bright line. This line may not keep improper bias from being a silent factor with a particular juror, but, hopefully, it will act as a check on such bias and prevent the bias from being expressed so as to overtly influence others.

We also find the conduct alleged herein, if established, to be violative of the guarantees of both the federal and state constitutions which ensures all litigants a fair and impartial jury and equal protection of the law.

The issue of racial, ethnic, and religious bias in the courts is not simply a matter of "political correctness" to be brushed aside by a thick-skinned judiciary. Rather, we agree with Judge Tuttle's opinion in *United States v. Heller*, 785 F.2d 1524 (11th Cir.1986), regarding this issue:

> Despite longstanding and continual efforts, both by legislative enactments and by judicial decisions to purge our society of the scourge of racial and religious prejudice, both racism and anti-Semitism remain ugly malignancies sapping the strength of our body politic. The judiciary, as an institution given a constitutional mandate to ensure equality and fairness in the affairs of our country when called on to act in litigated cases, must remain ever vigilant in its responsibility. The obvious difficulty with prejudice in a judicial context is that it prevents the impartial decision-making that both the Sixth Amendment and fundamental fair play require. A racially or religiously biased individual harbors certain negative stereotypes which, despite his protestations to the contrary, may well prevent him or her from making decisions based solely on the facts and law that our jury system requires. The religious prejudice displayed by the jurors in the case presently before us is so

> shocking to the conscience and potentially so damaging to public confidence in the equity of our system of justice, that we must act decisively to correct any possible harmful effects on this appellant.

We can hardly improve on this commentary.

The founding principle upon which this nation was established is that all persons were initially created equal and are entitled to have their individual human dignity respected. This guarantee of equal treatment has been carried forward in explicit provisions of our federal and state constitutions. It is not by chance that the words "Equal Justice Under Law" have been placed for all to see above the entrance to this nation's highest court. If we are to expect our citizens to treat one another with equal dignity and respect, the justice system must serve as the great example of maintaining that standard. And while we have been far from perfect in implementing this founding principle, our initial declaration and our imperfect struggle and efforts have served as a beacon for people around the world.

It is with great dismay then that we must acknowledge, more than two hundred years after declaring this truth to the world, that there are still those among us who would deny equal human dignity to their brothers and sisters of a different color, religion, or ethnic origin. The justice system, and the courts especially, must jealously guard our sacred trust to assure equal treatment before the law. We attempt to uphold that trust today.

Accordingly, we approve the *Sanchez* opinion and quash the Fifth District's decision and remand with instructions for the trial court to conduct an appropriate hearing to ascertain whether racial statements were made as asserted. If the trial court determines that such statements were made, it shall order a new trial.

Other Decisions Regarding Racial Prejudice of Jurors

A Florida Court of Appeals applied *Powell* the same year it was decided in *Wright v. CTL Dist., Inc.*, 679 So.2d 1233 (Fla. Dist. Ct. App. 1995). In that case, a juror contacted counsel and disclosed racial bias during jury deliberations. The trial court denied a retrial and, in the alternative, juror interviews. The Court of Appeals remanded the case for further inquiry, which revealed some corroboration of the racist comments and jokes that were made in deliberation. Upon a second appeal, the Court of Appeals reversed and remanded the case for a new trial, noting "the judiciary can, should, and indeed must take action to ensure that . . . individuals do not feel free to openly express such biases and prejudices, and to thereby infect the fairness of the very process which it is their sworn duty to uphold." *Id*. at 1235.

In *People v. Estella*, 874 N.Y.S.2d 353 (N.Y. Crim. Ct. 2009), the Assistant District Attorney reported after trial that one juror told her that he "guessed he 'based his decision on race.'" The court conducted a hearing where the evidence reveled that the juror had an alcohol problem that inhibited his ability to competently sit on the jury. The verdict was set aside and a retrial ordered.

Johnny Bennett, an African American who was sentenced to death in South Carolina, petitioned the South Carolina Supreme Court for review the application for state post-conviction relief that is based on one juror's statement that Bennett had committed the crime "because he was just a dumb nigger." In a hearing before the trial court, the juror admitted using the racial slur as well as using it with "dumb" on previous occasions.[5]

The trial judge, in an order prepared by the Assistant Attorney General representing the State, rejected the claim, finding that Bennett failed to

5. Petition for Certiorari to the South Carolina Supreme Court in *Bennett v. State*, No. 2006-CP-32-3221 (Oct. 7, 2010) at 3-4, 8-9.

establish that the juror "was actually biased when he was a member of the jury" and downgrading the racist epithet to "a poor choice of words."[6]

There were other racial issues in Bennett's trial as well. He was sentenced to death by a mixed race jury in 1995, but that sentence was reversed on appeal. He was sentenced to death a second time by an all-white jury in 2000. The same prosecutor represented the State at the two trials, but took a very different approach in the second trial before the all-white jury. In the second trial, the prosecutor called Bennett an animal and resorting to other dehumanizing references.[7] He also called five witnesses to describe a fight involving Bennett and two young white men. The witnesses did not refer to the fighters by name, but by race, referring to the "white males" seventeen times and the "black male" thirteen times.[8]

6. *Id*. at 4-6.

7. *Id*. at 14-20.

8. *Id*. at 16.