Chapter 8

Death Penalty Sentencing in Joint Crimes: The Teresa Lewis Case

Author: Seth Gurgel
Translator: Kuangyi Liu

I. Introduction

A. The Brookings Case: Death for one defendant, life for the second, and immunity for the third?

In Florida, a mother, desperate to protect her son from conviction in a criminal trial, hires a man and his girlfriend to kill a witness who holds damning evidence against her son. The crime goes off without a hitch, and the police cannot crack the case. One year later, the girlfriend is incarcerated on an unrelated charge. While in prison, she asks her attorney to approach the state to obtain a “deal” for her. The deal negotiated is that she will testify at trial against her former boyfriend who pulled the trigger, killing the witness, in exchange for complete immunity from prosecution for her role in the killing. Upon her information, the boyfriend and the mother who hired them are arrested and charged with the murder. The mother pleads guilty to a lesser charge in exchange for a life sentence and her testimony against the boyfriend. (After testifying at the triggerman’s trial she files a motion to mitigate her sentence and it is reduced to twenty years in prison.) The mother and girlfriend testify against the boyfriend at trial. He is convicted and is about to be sentenced, either to death or life in prison.

At sentencing, where the jury already heard evidence about the deals made with the mother and girlfriend during the trial on the issue of the triggerman’s guilt or innocence, should the jury be allowed to consider the fact that the other two parties to the crime received, respectively, a life sentence and complete immunity, and the reasons why they might have received these lesser sentences? The trial judge in this case allowed the sentencing jury to consider this type of information but then overturned the jury’s life sentence and imposed a death sentence instead. On appeal, the Florida Supreme Court upheld the life sentence recommended by the jury and approved jury consideration of the sentencing deals of testifying co-felons in the sentencing phase of the capital trial. This clarified that Florida law allowed the consideration of such evidence at sentencing in capital cases. In the United States generally, however, there is currently no consensus on this issue, even though in capital cases this is literally a matter of life and death. In Brookings, the defendant ultimately escaped a death sentence because he happened to be tried in a state where the jury had the right to consider the co-defendants’ sentences at sentencing.

How can we make sense of the disparity among U.S. jurisdictions on the propriety of consideration of this seemingly critical information in the sentencing decision? This chapter attempts to unpack the competing justice interests that surround the decision to allow the sentencer to consider the sentences a defendant’s partners in crime have received when determining the defendant’s own sentence. It is also about the limits and rationale of proportionality tests in death penalty cases, wherein appellate courts review the constitutionality, legality and “reasonableness” of a capital sentence by gauging whether it

1 Brookings v. State, 495 So.2d 135 (Fla. 1986) (vacating death sentence imposed via judge-overrule of the jury’s recommendation of life in prison and remanding for imposition of sentence of life in prison without parole; it was reasonable for jury at sentencing to consider sentences of accomplices). The Florida Supreme Court’s answer to that question in this case was “yes.”
falls within a range of cases and sets of facts for which the death penalty has been imposed in the past.

Examining the great divergence among jurisdictions on these issues—and the problems that might arise because of that divergence—provides a useful perspective for the discussion of the more abstract issues raised in our earlier chapters on arbitrariness, bifurcation of trials, and standards of proof. Supreme Court case law “narrowing the class” of those eligible for the death penalty to the “worst of the worst” offenders seems fairly straightforward: to be death eligible in a crime against an individual, a defendant must be convicted of committing a crime that resulted in death and must meet a minimum threshold mens rea developed by the Supreme Court over time, outlined in Chapter 4.

However, the fact that many death-eligible crimes are jointly committed complicates the justice concerns balanced in the seminal death penalty decisions: even if the details of the crime itself are sufficient to place it within the pool of death-eligible offenses, it is often exceedingly difficult to determine the extent of individual culpability with exactitude, as prosecutors habitually rely on co-participants to testify against their partners to the crime. It may be relatively easy to understand why co-defendants who agree to cooperate with the government or simply plead guilty should receive lesser sentences, but it is potentially problematic (both for justice, writ large, and for the appearance of justice) when a co-defendant of lesser or equal culpability receives a death sentence when others do not, especially when those that did not provided part or all of the evidence leading to the conviction of the defendant. And yet, while many find this scenario intuitively problematic, it is has proven difficult to find agreement on the jurisprudential reasons that explain this intuition, and this has resulted in vastly divergent case law and practice among jurisdictions.

While the Supreme Court has left it up to each jurisdiction to determine for itself whether a co-defendant’s lesser sentence should be considered by the sentencer at the penalty stage or by an appellate court on some sort of proportionality review, three other issues decided by the Court (and discussed in previous chapters) come to a head here and complicate the debate: 1) the Supreme Court’s allowance for the possibility of sentencer mercy in death penalty sentencing (which makes proportionality review problematic), 2) the fact that most states have reserved the ultimate sentencing decision for juries, rather than judges, and therefore other sentencers and appellate courts have far less detailed death penalty sentencing decisions to review than they would typically have were a judge to make these decisions, and 3) the Supreme Court’s requirement of individualized sentencing and the debate about what that does and does not entail, especially the issue of whether a co-defendant’s sentence and its procedural context are relevant “circumstances of the offense.”

We hope that this chapter’s examination of some of the normative problems that arise when complications with joint crimes cases intersect with the difficulties the U.S. has had in reforming its death penalty system will enable the reader not only to better grasp the problem at hand in this chapter, but also to gain a better understanding of the frustrations of the entire “death penalty project” in which the U.S. courts and legislatures have been involved since Furman v. Georgia.2

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B. Complications in Death Penalty Sentencing from the Prosecution of Joint Crimes

As became obvious in our chapter on limiting arbitrariness, there are strong disagreements about how much room there is for variations in punishment for similarly-situated defendants. We know, for instance, that the mere presence of a disparity in sentencing between two defendants found guilty of similar crimes—even the same crime—is not unconstitutional.3 Juries are allowed to choose to whom they “show mercy,” even though the cumulative result of this benevolence can lead to statistical disparity in who lives and dies for any particular fact pattern. At the same time, statistical proof of disparate sentencing between different classes of people (white and black, men and women, etc.) is not sufficient to void a particular sentence unless there is evidence of untoward bias in the individual case appealed.4 The emphasis seems to be largely justice done vis-à-vis the individual.

The idea that an individual should receive the punishment he or she deserves regardless of the relative severity or mercy bestowed on another defendant appeals to one notion of justice common to many cultures: in criminal justice theory this is called “just desserts.”5 And yet, complications in the myriad procedures and strategies that are used to investigate, prosecute, and defend joint crimes may require a recalibration of the “just desserts” equation. It has, at least, for some jurisdictions. For example, the defendant in the Brookings case, above, was given a life sentence rather than death, presumably because the jury deemed it unfair that his confederates would receive lesser sentences while he alone would be left to pay the ultimate price.

Joint crimes cases allow for a dizzying array of procedural and investigative permutations. Consider, for instance, the potential variations in dispositional scenarios in co-defendant and other accomplice cases.

In any particular case, defendants may be tried in: 1) separate trials for separate defendants in a case involving accomplice liability where no accomplices testify,6 2) one trial for all defendants simultaneously where no accomplices testify,7 3) one trial for one defendant at which one or more accomplices testify in exchange for a plea/immunity deal, 4) one trial for one defendant where no accomplices testify but one or more have already plead guilty in exchange for a lesser sentence, 5) a case where the relevant defendant on appeal actually pled guilty at trial but still argued for a lesser sentence (in a death penalty or non-death penalty case) and then appealed the sentence regardless of the plea to the charge.8

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4 McCleskey v. Kemp, 481 U.S. 279 (1987). However, with regard to selective enforcement of the laws (as opposed to sentencing) in criminal cases, based on race or another impermissible or arbitrary factor, in some jurisdictions, state supreme courts have determined that evidence of statistical bias in the enforcement of a law gives rise to an inference of bias in the individual case, and is sufficient to allow bias-related discovery or to meet the defendant’s initial burden and shift the burden to the prosecution to provide a race-neutral explanation in those courts’ jurisdictions. See, e.g., State v. Ballard, 752 A.2d 735 (N.J. Super. Ct. App. Div. 2000); Commonwealth v. Lora, 451 Mass. 425, 426 (2008).
5 Note this statement by the dissenting justice in Brookings v. State, at 144: “One who gets what he deserves under the law has no standing to complain that someone else has received more or less than he or she deserves.”
6 This may be due to a successful motion to sever in a case that involves no plea or immunity offers, for example.
7 For instance, in a case with no plea or immunity offers, perhaps due to mandatory minimum sentences or lack of incentive for prosecutors to reduce charges.
8 This would have an effect on the standard of review, making it more deferential to the findings of the lower court and
Each one of these permutations may result in a different set of incentives influencing the behavior of those involved in the case, be they judges, prosecutors, lawyers, defendants or co-defendants. They may certainly result in vastly different sentences for defendants of similar culpability—or at least, where each defendant’s culpability level makes him or her eligible for the death penalty—as illustrated by the Brookings case.

Just how relevant is the particular permutation—or its results—to the determination of an individual defendant’s sentence? Should the sentencer or an appellate court reviewing the case be allowed to consider how the motivations and machinations of the parties to a particular case were affected by the procedural posture of that case? Should they be allowed to consider the “justice implications” of one defendant who saves her own life by agreeing to testify against another, but is then sentenced to death? Moreover, should statutes or case law dictate that sentencers or appellate courts not simply be “allowed” to consider these factors, but actually be required to consider them?

These are the very real, pressing, and controversial considerations implicit in the two central questions that we will examine in this chapter: First, should appellate courts be permitted to review co-participants’ sentences for relative proportionality? Second, should a sentencer be allowed to consider co-defendants’ sentences as aggravating or mitigating factors in death penalty sentencing?

II. The Teresa Lewis Case and Appellate Proportionality Tests


A. Appellate Proportionality Tests

Proportionality tests are extra-constitutional mechanisms. Even though the Gregg line of cases required a narrowing of the class of death-eligible crimes, mandated a ratcheting up of the procedural protections due individuals, especially at sentencing, and relied on the existence of proportionality review in upholding certain states’ death penalty law regimes, Gregg and its progeny have not been read to constitutionally require proportionality tests in death penalty cases. All that is required in death penalty cases is that state procedures fulfill a “necessary narrowing [of the class of cases] function.”

However, some states and the federal jurisdiction still mandate a type of “proportionality review” of death penalty sentences within their own systems.

Proportionality review, when done, is never easy. As might be expected, experienced jurists can make strong arguments both for and against the “similarities” of any group of cases. Even so, one might...
think that the easiest type of proportionality review would be the comparison of the sentences handed out for joint criminal endeavors. After all, these cases normally center on the exact same facts. However, as we will see with a recent Virginia case, the federal Constitution does not require that death-eligible defendants – even to the same crime – necessarily receive the same punishment, with occasionally controversial results, as we will see in the cases below.

Let us examine a case decided in Virginia, which does provide for automatic appellate review of death sentences and proportionality review across cases, but does not allow consideration of co-defendant sentences in its sentencing analysis at either the trial or appellate stages. While you read the case, consider whether the Virginia court’s analysis is thorough, and whether the defendant’s sentence may have differed had the case occurred in a different jurisdiction, where such analysis is permitted.

B. The Theresa Lewis Case - Background

Teresa Lewis was convicted of masterminding the murder of her husband and her step-son with the intention of collecting hundreds of thousands of dollars in insurance money – money Teresa and the two hit-men she hired (one of whom was her lover) would split after the fact. However, while all involved pled guilty, and all were sentenced without a jury and by the same judge, Ms. Lewis was sentenced to death even as the two hit-men received life in prison without parole.

The most riveting part of this case came to light after Ms. Lewis’s sentence was imposed. If Ms. Lewis had indeed been the clear mastermind behind the crime, as the sentencing court’s version of the facts suggested, the above result would not have been too surprising, at least to members of the bar (many media reports suggested that those who had actually pulled the trigger should be held more culpable). And yet, post-sentencing admissions concerning all three defendants called into question just who, exactly, had concocted the scheme in the first place and pressed for its manifestation. Over time, Teresa was cast by the press as a far more pitiable character than her sentencing findings of fact had disclosed: she was construed as a barely lucid, psychologically needy woman with an IQ (Intelligence Quotient) lower than Forest Gump’s.

These revelations and the resultant public pressure that stemmed from them put the Virginia criminal justice system under the microscope, replete with celebrity actors and writers (including John Grisham) calling for Ms. Lewis’s sentence to be reduced to life in prison, the same as her co-conspirators. For our purposes, this created an excellent crucible for legal analysis, as the Teresa Lewis case represents the nexus of many issues in modern death penalty jurisprudence; indeed, many of the issues we have covered thus far in our text played key roles as the legal drama unfolded. Most pointedly, it may be an excellent exercise to postulate whether, under any set of facts (those found by the court or those of opinion. Consider, for example, this report critical of the Virginia Supreme Court’s proportionality review, which does not require comparison of a particular death sentence with life imprisonment sentences imposed on other defendants for similar crimes. In this case, the majority used the nature of the offense as a comparator, while the dissenting minority used the age of the offender. Potential problems with this method were “most evident in the case of a 16-year old defendant who was sentenced to death for the capital murder and robbery of his victim. When the Virginia Supreme Court held that the sentence was not excessive, one member dissented. This judge’s dissent was formed after he conducted a proportionality review by comparing the defendant and his crime to other 16-year old defendants who were charged with capital murder. The dissenting justice noted that every other 16-year old defendant who was tried for capital murder, based on far more egregious offenses than in the case at bar, was sentenced to life in prison.”
claimed by supporters of Ms. Lewis), and in any jurisdiction (those that allow co-conspirators’ sentences to be taken into account as a mitigating factor and those, like Virginia, that reject proportionality claims based on coconspirator sentences), the resulting sentencing verdict in Lewis’s case would have been any different.

1. Other issues in the Lewis trial

Apart from that issue, the following are other issues at stake in the Lewis case.

a. Teresa Lewis was only the twelfth woman to be executed since the Gregg cases allowed the reintroduction of the death penalty in the United States, while 1,226 people have been executed nationwide. Although around ten percent of all homicide arrests in the U.S. are committed by women, they account for only around two percent of death sentences and 1.1 percent of executions nationwide. Moreover, at the time of the Lewis case, no woman had yet been executed in Virginia this century.

b. Ms. Lewis was also substantially mentally handicapped, with an IQ tested between seventy and seventy-nine. Although she was deemed mentally competent enough to understand her actions and to plead guilty, Lewis’s IQ placed her right at the lower bound of the Supreme Court’s Atkins approximation (an IQ of seventy) of mental retardation for the purposes of exclusion from capital punishment, covered in our Chapter 5 on mental disorders and the death penalty. As mentioned in that chapter, while the Court claimed that mental retardation exists “approximately” at an IQ of seventy, it left it to individual states to construct their own rules on mental retardation determinations. Since Atkins, there have already been a number of defendants with IQ scores in the sixties sentenced to death after courts found that they were not mentally retarded under the standard of the local jurisdiction.

c. Lewis’s case never went to trial. Her lawyers advised her to plead guilty, believing that certain gruesome and licentious facts of the case would pit the local jury against her, and that she would almost certainly receive the death penalty in a jury trial. For example:

   Attorney Furrow pointed out to Lewis the “particularly gruesome” photographs of the bodies of Julian and C.J. as “among the worst I have seen” due to “[t]he use of small caliber ammunition.” He also advised Lewis that they fully expected the prosecutor to engage in the dramatic tactic of “rack[ing] the [pump] shot gun” while showing the photographs, a particularly effective technique which counsel had personally witnessed in another case. Counsel also discussed the murder-for-hire and profit facts and the expected testimony by Lewis’ minor daughter that Lewis “sat in the car next [to her] while she was having sex with an adult black male,” which counsel believed would “have a

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15 Lewis v. Wheeler, 609 F.3d 291, 297 (4th Cir. 2010) (affirming Federal District Court’s denial of habeas corpus relief).
horrible impact on the jury both among white[s] and blacks, men and women."\textsuperscript{16}

d. Under Virginia law, pleading guilty waived Lewis’s right to a jury’s participation in any segment of the sentencing phase as well.\textsuperscript{17} Her attorneys knew that the judge who would handle her case had just given one of her co-conspirators, Fuller, a life sentence on a plea of guilty in exchange for his promise to testify against Lewis and Shallenberger, and believed that the judge would give Lewis life in prison as well. Moreover, this judge had \textit{never issued} a death sentence before. (Indeed, the same judge would later give the other co-conspirator a life sentence as well, citing equitable grounds.\textsuperscript{18})

e. Finally, there had been only two “murder for hire” cases in Virginia where the hiring party had received the death penalty.\textsuperscript{19} And Lewis was a woman who had no history of violent crime, in a state that had not executed a woman since 1912.\textsuperscript{20}

Overall, based on the information provided in the appeal decision by the Fourth Circuit in \textit{Lewis v. Wheeler}, there appears to have been a general feeling among Lewis’s lawyers\textsuperscript{21} that if they could remove the drama from the case by forgoing a jury trial in which the prosecution could continually refer to the gruesome pictures and sexual taboos in the case, she would have a better chance of obtaining a lighter sentence. Ms. Lewis’s defense team’s thinking may have been that she would be better off depending upon the cool, more rational mind of the judge. This turned out to be of no avail. “The court stated that the defendant’s sentences of death were based upon the statutory vileness predicate because her acts reflected a depravity of mind” and rejected her arguments regarding her lesser culpability as compared with that of her co-defendants who actually fired the shots that killed the victims.”\textsuperscript{22}

The case then went to the Supreme Court of Virginia for mandatory death penalty review.

\textsuperscript{16} \textit{Id.} at 312.
\textsuperscript{17} \textit{Id.} at 308; Va. Code Ann. § 19.2-257.
\textsuperscript{18} \textit{Lewis v. Wheeler}, at 311: “Based upon their knowledge of typical juries in the area, and available information regarding the assigned trial judge, counsel believed that a death sentence by a jury was a virtual certainty and that Lewis stood a better chance of being sentenced to life imprisonment by the trial judge. Of particular note, counsel was aware of no cases in which the trial judge had imposed a death sentence and, as a result of a cooperation deal between the prosecution and Fuller, knew that the trial judge would sentence Fuller to life imprisonment for his role as an actual triggerman in the murders.”
\textsuperscript{19} \textit{Lewis v. Wheeler}, at 312.
\textsuperscript{21} \textit{Lewis v. Wheeler}, at 297 (shortly after \textit{Lewis} was charged, the trial court appointed two defense attorneys to represent Ms. Lewis, both of whom had experience in capital murder cases).
\textsuperscript{22} \textit{Lewis v. Commonwealth}, at 222.
C. The Supreme Court of Virginia Decision

1. Case Facts

Below is a summary of the basic facts of the case, paraphrased from the findings of the Supreme Court of Virginia in its review of the case:

Teresa Lewis was found to have married one of the victims, her husband, for his money. Thereafter, she was found to have planned to kill him and her stepson so that she could acquire his assets, and proceeds from her stepson’s life insurance policy. She established contact with two men, engaged in sexual relations with both of them, involved her sixteen-year-old daughter in those relations as well, and eventually made plans for those two men to kill her husband. She made a prior unsuccessful attempt on her husband’s life along with two other co-conspirators, and, when that plan failed, she initiated another plan. She involved her sixteen-year-old daughter in the plan to kill the victims. Lewis also paid for the shotguns and ammunition used to kill her husband and stepson. The two murderers that the defendant hired to kill the two men then came to the husband’s house and shot her husband and stepson as they lay asleep in their home; however, the defendant waited at least forty-five minutes before she reported the shootings, all while her husband remained alive, and he bled to death after the police arrived on the scene.23

2. The Court’s Decision

After a long recounting of the facts of the case, the Virginia Supreme Court maintained that Lewis was the “mastermind” of the crime, as the lower court had held. The defense had tried to assert that she was merely the “hirer” of the two triggermen (a term with less agency than “mastermind”), a nomenclature that the Court did not adopt. The Court then proceeded to address the other defense claims as well as to conduct a proportionality review of the sentence imposed by the lower court. The Court rejected all of Lewis’s claims, including an appeal based on her argument that it was excessive and disproportionate to execute a woman, because Virginia had so rarely executed women, and had “never executed a female who (i) lack[ed] a violent criminal history, (ii) accepted responsibility for her offenses, (iii) merely contracted for the murders giving rise to the offenses, and (iv) observed co-defendants receive life sentences, despite their roles as actual triggermen.” The Court dismissed arguments based on the defendant’s gender out of hand as these would involve a “discriminatory” analysis, whereas “all criminal statutes [in Virginia] must be applied without regard to gender.”24

Most critically for our purposes here, the Virginia Supreme Court rejected Lewis’s claim that her sentence was disproportionate to that of her co-conspirators, instead finding Virginia precedent, unlike Florida’s, to mandate only a comparison of “sentences generally imposed by other sentencing bodies in

24 Lewis v. Commonwealth, at 225-6. Below, in Section II., B., we discuss the fact that even though females account for around ten percent of homicide defendants, they receive death sentences at a far lower rate. With that in mind, consider which way the argument that “Virginia had so rarely executed a woman” cuts for Lewis. In some ways, it would seem that the government could argue that this rarity is itself a type of discriminatory treatment, with respect to the victims of female defendants.
this Commonwealth for crimes of a similar nature considering the crime and the defendant.”

The Court first outlined the standard it would use to gauge proportionality.

[Virginia statutory law] requires that this Court consider and determine “whether the sentences of death [are] excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” The test of proportionality that we apply is whether “juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.”

In conducting this review, this Court considers the records of all capital murder cases reviewed by this Court, including cases in which the defendant received a life sentence. (emphasis added). In conducting the proportionality review, it is not the function of this Court to understand why the trier of fact imposed the sentence of life instead of the sentence of death. Rather, “the purpose of our comparative review is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty. We cannot insure complete symmetry among all death penalty cases, but our review does enable us to identify and invalidate a death sentence that is “excessive or disproportionate to the penalty imposed in similar cases.” Simply stated, this Court’s proportionality review enables this Court to identify and invalidate the aberrant sentence of death. (emphasis added). And, we emphasize that in making the determination whether a sentence of death is aberrant, this Court must consider the penalty imposed in similar cases, considering both the crime and the defendant.

Before moving on to the Court’s analysis of the merits of Lewis’s claims, it may be worthwhile to consider some of the difficulties of using this proportionality standard in death penalty cases. Many of these difficulties stem again from the fact that appellate judges are doing a comparative survey of mostly jury sentencing decisions, not decisions made by judges. Juries do not always give reasons for their decisions—although they are often required to list the aggravating and mitigating factors they have found—and, as explored in other chapters, they are permitted to “show mercy” to defendants who have been determined eligible for and might seem like proper recipients of capital punishment. This creates a problem with the sample, in a manner of speaking. Because of this, the Court is careful to qualify that it does not try to ascertain “why the trier of fact imposed the sentence of life instead of death…” but rather “to reach a reasoned judgment” about what cases deserve the death penalty, considering “both the crime and the defendant.”

26 Whether the Supreme Court of Virginia has been consistent in reviewing both death and life sentences in conducting its proportionality review is a matter of debate. While the Court claims that it does so here, the Virginia Joint Legislative Audit and Review Commission found that since Furman, the Virginia Supreme Court has reviewed both prior death and life sentences in only fifty-five percent of its cases, albeit in increasing numbers in the past twenty years. Joint Legislative Audit and Review Commission, Review of Virginia’s System of Capital Punishment 69 (2002). The Virginia Attorney General’s Office disputes that claim in its response at the end of the Commission’s Review. Available at http://jlarc.state.va.us/reports/rpt274.pdf.
27 Lewis v. Commonwealth, at 226.
This appears to be a sound idea, and may be a reasonable rule for engaging in this type of analysis (indeed, this may be superior to the rules in many states which do not explicitly require judges to examine cases involving both death and life sentences for similar crimes). However, when one considers just how a judge will reach a reasoned judgment about what cases deserve the death penalty after considering both the crime and the defendant (a phrase the mirrors the death penalty eligibility and selection decisions highlighted in the chapter on bifurcated trials), it is difficult to imagine that appellate courts will not have to consider “why” any particular defendant was sentenced to death. At the same time, courts are more restrained than juries, and may not explicitly consider certain topics that are unconstitutional bases for such decisions. For example, statistics suggest that juries tend to sympathize with female defendants more than male defendants, but, as stated above, judges are not allowed to consider this in their decision-making, either at the first instance or the appellate level.

Finally, it is not clear that courts or juries are adequately guided in what comparators they are to use when doing proportionality review: for example, should the Virginia Supreme Court be looking for cases involving crimes similar to those of Teresa Lewis, for cases involving defendants like Ms. Lewis (a woman of very low IQ with no prior violent episodes, etc.), or cases that “seem similar” in a gestalt sense? As noted in a footnote above, the Virginia Supreme Court has been criticized for another proportionality review wherein the majority found that the defendant, who was sixteen years old, had committed a crime for which Virginia had traditionally sentenced defendants to death, ignoring the fact that that the defendant’s age might also be a valid comparator, a position that was taken by the dissent in that case.

Because the result of a proportionality review will often depend on the comparator(s) chosen, and because standards for choosing comparators may be quite ambiguous, lawyers for the government and for the defense must be adept at persuading judges to accept their arguments on the comparators they believe to be both just and best for their position. It is not difficult, then, to see why it is important to have an effective, persuasive lawyer at appeal.

D. The Court’s Reasoning and Virginia Case Law on Consistency of Sentencing for Co-defendants

With those thoughts in mind, let us now review the Lewis Court’s reasoning. Notice that the Court gives short shrift to Lewis’s claim that her co-defendants received life sentences—only five paragraphs. This is because of Virginia’s case law on the subject, which the Court considers “settled law.” We will examine that case law along with the Lewis case reasoning.

The defendant argues that her sentences are excessive and disproportionate when compared to similar cases. She states that she “did not physically engage in conduct giving rise to the deaths;” rather, she was convicted of capital murder because she was the employer of the men who committed the actual murders. Continuing, she contends there is no reported case in which this Court approved the death penalty for a “mere hirer” due to the vileness predicate alone.

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We have examined the records of all capital murder cases reviewed by this Court when, as here, the death penalty was based upon murder for hire. [The Court then listed the names of six death penalty cases it had previously reviewed since 1979] Even though the facts in all capital murder cases differ, we are confident that given the special heinousness associated with the murder for hire in this particular case, emphasizing that the defendant was the mastermind of the plan to kill her husband and stepson solely for greed and monetary gain, the sentences of death are neither excessive nor disproportionate to sentences generally imposed by other sentencing bodies in this Commonwealth for crimes of a similar nature considering the crime and the defendant.

The defendant also argues that her punishment is excessive or disproportionate because her accomplices, Shallenberger and Fuller, did not receive a sentence of death. However, as we have repeatedly stated, “upon our prior determinations of excessiveness and disproportionality, we have rejected efforts by defendants to compare their sentences with those received by confederates.” Accordingly, we reject the defendant’s effort to make a similar comparison here.28

The reader will have no doubt noticed that little if any of the proportionality review was spent examining the fates of the co-conspirators, who both received life in prison without parole. While the Virginia Supreme Court rejected Lewis’s claim that this was disproportionate almost out of hand, earlier, post-Gregg Virginia cases discussed below had dealt with the question of whether “confederates” should have their sentences reviewed if there were gross differences between them without similar gross differences in the underlying facts. Close examination of those cases shows the evolution of the Virginia Supreme Court’s reasoning, which is not dissimilar from the California court’s reasoning cited later in this chapter.

In the 1979 *Coppola v. Commonwealth* decision, a seminal Virginia case on comparative sentencing in capital cases, the Virginia Supreme Court dealt with the issue of differing sentences for co-conspirators for the first time since *Gregg*. It first tried to distinguish the behavior of the defendant who had received the harshest sentence from the others: “The evidence leads to the conclusion that Coppola was not only a joint murderer of Mrs. Hatchell but that he was also the leader in organizing and directing the group to commit the armed robbery. His conduct towards Mrs. Hatchell, however, culminating in her death, appears from Mills’s testimony to have been more violent and vicious than that of Miltier, and thus distinguishable.” However, the Virginia Supreme Court continued with additional reasoning, logic that would prove ascendant over simple arguments about who was “more culpable.”

Moreover, we do not believe that a co-defendant is necessarily entitled to commutation of a death sentence because an equally culpable confederate, on substantially the same evidence, has been sentenced to life imprisonment. In *Gregg v. Georgia*, the Georgia death penalty statutes, similar to our own, requiring a bifurcated proceeding, were approved. The Supreme Court recognized that some degree of discretion inheres in our criminal justice process, noting particularly that the trial jury “may choose to convict a defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict.”

Interestingly, immediately following this passage was an extended unpacking of what *Gregg* meant for proportionality review, and more critically, recognizing the judicial system’s deference to the unpredictability of the jury trial, which it implies most often represents mercy in the system.

A jury’s decision not to recommend the death sentence where the evidence would support such a sentence does not change the applicable statewide standard. “Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.”

The Supreme Court approved the principle … that under the similarity standard it would be assumed that no death sentence will be affirmed unless in similar cases … the death penalty has been imposed generally.

We construe *Gregg* to permit a death sentence against one defendant to be upheld when a sentence of life imprisonment, or less, has been imposed upon a codefendant, provided the death sentence is in accord with the general statewide standard. A jury may decide to impose a death sentence, or life imprisonment, or a lesser punishment for a lesser included offense, or to acquit altogether. Accordingly, comparisons between the penalties imposed upon codefendants may be unproductive. A determination of proportionality of punishment requires only that a defendant’s death sentence not be incommensurate with his conduct, measured by other jury decisions, on a statewide standard.

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30 Id. at 807.
basis, involving similar conduct. If juries generally in this jurisdiction impose the death sentence for crimes comparable with Coppola’s, then Coppola’s death sentence is not excessive or disproportionate, although [his codefendant’s] punishment was fixed at life imprisonment.  

Likewise, in *Stamper v. Commonwealth*, the Virginia Supreme Court further elaborated on its opinion in *Coppola*.

We cannot fairly determine whether a death sentence is excessive or disproportionate by comparing it with sentences imposed upon convictions for lesser included offenses, reached perhaps by compromise verdicts, even where there may be similarities in the evidence. The test is not whether a jury may have declined to recommend the death penalty in a particular case but whether generally juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant. We have no hesitancy in holding that the commission of multiple murders during an armed robbery is as heinous and horrifying as the commission of single rape-murders for which the death penalty was affirmed in [three other cases]. Therefore, juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes. Accordingly, we hold that, considering the crimes and Stamper’s background and history, the death sentence imposed upon him in each case is not excessive or disproportionate to sentences imposed in similar cases.

It is because the Virginia Court considers these cases to be settled law that it did not dig too deeply into Lewis’s claim that it was unjust for her to be sentenced to death when her co-conspirators each received sentences of life in prison.

**E. Is Virginia’s Reasoning Persuasive? Issues for Consideration**

Do you find Virginia’s case law persuasive on the issue? Is its insistence on only conducting proportionality review that focuses on similarly situated defendants in similar crimes in other capital murder cases a wise judicial choice? Consider that while the Supreme Court of Virginia has overturned decisions based on trial error, from 1977 to 2001 its proportionality review has never found a death sentence excessive or disproportionate. This shocking fact might lead one to question the efficacy or the point of the review in the first place. Does it mean that the review itself is jurisprudentially flawed, or that Virginia’s system has succeeded in only punishing the “worst of the worst?” Consider also that this is a substantive review, largely accepting the trial court’s finding of facts, and is distinct from review for procedural error and error caused by “passion or prejudice” (typical domains of U.S. appellate courts).

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31 *Coppola v. Commonwealth*, at 807-808.
33 *Id.* at 824.
34 *Review of Virginia’s System of Capital Punishment*, at IV; 55. The Review was a strong critique of Virginia’s system. It pointed out that Virginia used a very narrow definition of proportionality as well as narrow procedural grounds for review. Perhaps most importantly, the Virginia Supreme Court maintained a comparative death penalty case database used for proportionality analysis, but the Report pointed out that it does not include any jury-imposed life sentences that were not appealed.
Finally, and most critically to the discussion in this chapter, while the Virginia Court may have carved out case law that is permissible under Supreme Court death penalty jurisprudence, is this a normatively attractive line of cases? Einstein is rumored to have quipped that “A scientific theory should be as simple as possible, but no simpler.” Assuming that this logic applies to jurisprudence in general, and to this area of law in particular, how would Einstein’s theory cut in this case? Is the idea that sentencers in joint criminal endeavors should not consider confederates’ sentences “as simple as possible,” staying close to an intuitive justice concern that one should accept the punishment deserved, regardless of what others receive; or is it “simpler,” and therefore too simple, because it is neglecting the potential problems of relative culpability that arise in joint crime scenarios? Moreover, is there another concern present here: not only that a judicial system is “just,” but also that it appears so?

This last concern is especially apparent in the following section, in which we present the argument made by a famous novelist who took issue in an opinion-editorial article, not only with the facts of the Lewis case as found by the trial court, but also with the fact that Lewis was sentenced to death at all while her confederates were given sentences of life in prison. While the op-ed was written by a fiction writer and not a legal scholar, it was certainly adept at pointing out the bases of a widely-perceived injustice.

III. Popular Response to “New Facts” in the Lewis Case

One of the reasons the Lewis case became so well-known was that the facts as found in plea proceedings in the lower court (Lewis pled guilty, thus waiving her right to a jury or bench trial and stipulating to the essential facts), and recited by the Supreme Court of Virginia, later came under intense public scrutiny, with one of the most famous writers in the United States, John Grisham, uncharacteristically writing a non-fiction op-ed summarizing competing versions of the facts of the case that had been introduced into the public sphere by the media. For our purposes, we cannot assume that Grisham’s summary is closer to the truth than the facts established in court or that courts should necessarily permit their decisions to be affected by alleged facts not proven in court. But Grisham’s op-ed, based on news reports, letters and affidavits, and released just prior to Lewis’s final appeal, is still a valuable angle from which to view the case and to test the proportionality review standard as stated by the Virginia Supreme Court. Note that Grisham particularly emphasizes the prisoner’s dilemmas faced by the confederates to the case, relying on both facts and inferences from those facts that the courts did not appear to have had before them or to have considered explicitly. As you read, it may be a useful exercise to consider whether Lewis would still be deemed deserving of the death penalty under Grisham’s compilation of the fact pattern as culled from sources that were not introduced before the courts. In addition, you might consider what the result might be if she were tried in a state such as Florida, which does allow jurors to consider co-defendant sentences as a mitigating factor (see section IV. C., below).
A. John Grisham’s Version of the Facts:  

The Commonwealth of Virginia already has a serious relationship with its death penalty. In the past three decades, only Texas has executed more inmates. But on Sept. 23, the Old Dominion will enter new territory when it executes a female inmate for the first time in nearly a century.

Her name is Teresa Lewis, she is the only woman on death row at the Fluvanna Correctional Center for Women, and her appeals have all but expired. If she is executed, she will become another glaring example of the unfairness of our death penalty system.

Lewis is not innocent. She confessed to the police, pled guilty to the judge and for almost eight years has expressed profound remorse for her role in two murders.

As with most violent crimes, a recitation of the facts of this case would fill pages; still, a brief summary drawn from news reports, letters and affidavits is useful. In 2002, Lewis, then 33, lived with her second husband in a mobile home in a rural area near Danville. She was having an affair with a man named Matthew Shallenberger, who, though nothing more than a common thug, had ambitions. He was looking for seed money to establish a distribution ring for illicit drugs, but his real dream was to become an accomplished hit-man, Mafia-style. He reasoned that if he could build his résumé, his reputation would spread all the way to New York, and he could somehow join the big leagues of contract killing.

Shallenberger had a partner named Rodney Fuller, and it is not clear if he was also afflicted with these grand ideas. What is clear is that the three -- Shallenberger, Fuller and Lewis -- participated in a scheme to kill Lewis’s husband for his money. At some point, the plans broadened to include the murder of her 25-year-old stepson, a National Guard member with a life insurance policy.

On the night of Oct. 30, 2002, Lewis left a door unlocked, got into bed with her husband and waited. Shallenberger and Fuller entered through the unlocked door, as planned. Shallenberger blasted the husband with a shotgun while, at the other end of the trailer, Fuller shot the stepson. Needless to say, the crime scenes were gruesome.

Lewis initially claimed that the killings were the work of an intruder, but the authorities suspected otherwise. After being confronted, she broke down, confessed and fingered Shallenberger and Fuller. All three were arrested and charged with capital murder.

Fuller’s lawyers were quick off the mark. They realized the futility of a defense and advised their client to cut a deal -- to plead guilty and promise to testify against his two co-conspirators in exchange for life without parole.

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Lewis’ lawyers likewise wanted no part of a jury trial. The evidence of their client’s guilt was overwhelming, and they felt strongly that, after hearing all the facts and seeing the color photos from the crime scene, any jury would be in a hanging mood. They advised Lewis to plead guilty and to take her chances with the trial judge who would determine her sentence. They believed this judge would give her life in prison because he had just sentenced Fuller to the same. Furthermore, Lewis had no criminal record and no history of violence. She had cooperated with the authorities. And no woman had received the death penalty in Virginia since 1912.

But Lewis was sentenced to die.

Up last was Shallenberger, who in the middle of his trial changed his plea to guilty. The trial judge (the same who had sentenced Fuller and Lewis) sentenced him to life in prison. Prosecutors had already promised life to Fuller, and it wouldn’t be fair, the judge reasoned, to give one of the triggermen death when the other got life.

The judge’s rationale in giving Lewis a death sentence was that she was more culpable than the men, who shot their victims as they slept. The killings were her idea, the judge reasoned; she was the mastermind; she recruited Shallenberger and Fuller to do the dirty work; she wanted the money; and so on.

Although much of this went unchallenged at Lewis’s sentencing hearing, it has since been challenged on appeal. Lawyers for Lewis have presented evidence that:

1. She has an IQ of just above 70 -- borderline retarded -- and as such lacks the basic skills necessary to organize and lead a conspiracy to commit murder for hire;

2. She has dependent personality disorder and therefore complied with the demands of those upon whom she relied, especially men;

3. Because of a long list of physical ailments she had developed an addiction to pain medications, and this adversely affected her judgment; and

4. She had not a single episode of violent behavior in the past.

Her lawyers have also argued that Shallenberger, who committed suicide behind bars in 2006, masterminded the murders. They have pointed to evidence that he had an IQ of 113 and was known to be intelligent and manipulative.

They have cited the sworn affidavit of a private investigator who interviewed Shallenberger in prison in 2004. This investigator said Shallenberger described Lewis as not very bright and as someone who could be easily duped into a scheme to kill her husband and stepson for money. According to the investigator, Shallenberger said: “From the moment I met her I knew she was someone who could be easily manipulated. From the moment I met her I had a plan for how I could use her to get some money.”
Lewis’s lawyers have also cited a letter Shallenberger sent to a girlfriend shortly after he was sentenced, in which he wrote, “I figured why go to New York for $20,000 a hit when I could do just one and make $350,000 off of it.” In the same letter he said of Lewis: “She was exactly what I was looking for.”

In addition, they have cited a 2004 affidavit by Shallenberger’s fellow assassin, Fuller, who said this: “As between Mrs. Lewis and Shallenberger, Shallenberger was definitely the one in charge of things, not Mrs. Lewis.”

Under Virginia law, Lewis, Fuller and Shallenberger are all guilty of murder.

Why, then, did the triggermen get life without parole while Lewis received a sentence of death? Ostensibly, it is because she was the ringleader and thus more culpable. But what could make a killer more culpable than repeatedly shooting a sleeping victim?

Lewis has appealed her case to the U.S. Supreme Court, but her chances do not look good. Her lawyers have also filed a petition for executive clemency with Gov. Bob McDonnell’s office; they are, as of this writing, awaiting a decision.

In this case, as in so many capital cases, the imposition of a death sentence had little to do with fairness. Like other death sentences, it depended more upon the assignment of judge and prosecutor, the location of the crime, the quality of the defense counsel, the speed with which a co-defendant struck a deal, the quality of each side’s experts and other such factors...

Such inconsistencies mock the idea that ours is a system grounded in equality before the law.  

Grisham’s summary of the facts is quite compelling, as one would expect from one of the most prolific crime novel writers of his generation. His final statement is also interesting. It is an eloquent exposition of the problem of arbitrariness in the American legal system, the problem the Supreme Court set out to rectify forty years ago. What is disheartening, of course, is that Grisham’s critique here is not that different from the claim of the defense in Furman v. Georgia, which first reached the Supreme Court on the question of the arbitrariness of the American death penalty system. Have none of the reforms succeeded? Are joint criminal cases particularly a lost cause in terms of substantive justice because of the potential for gamesmanship in trial and guilty plea negotiation strategy and disposition? These are questions that have yet to be answered either affirmatively or negatively. They are certainly worth considering as one wonders whether Lewis would still have been sentenced to death or even found death-eligible by the Virginia Supreme Court had the prosecution stipulated to Grisham’s version of the story.

And yet, is it true that the imposition of Lewis’s death sentence had “litte to do with fairness?” Or rather, is it that different jurisdictions have balanced competing fairness concerns in different ways?

Grisham may put forward a strong argument, but does his critique do justice to the rulings and reasoning in Virginia and other states adopting the same type of analysis? Is this a matter of Virginia and those other states simply having “bad law,” or just a different law, premised on an equally valid conception of justice?

IV. Consideration of Co-Defendant Sentences

A. Does consideration of co-defendants’ sentences guide—or mislead—the sentencer and reviewing court?

We now turn our attention squarely to the question of whether or not sentencers at the trial stage, and reviewing courts at the appellate stage, should be allowed to consider the sentences that co-defendants have received as either mitigating or aggravating factors in the capital sentencing of a given defendant. In Chapter 3, we discussed the fact that death penalty jurisprudence has established that sentencing, although governed by robust rules and procedures, is a more normative, moral consideration compared to determinations of guilt. Or, to put it another way, although a court always retains the responsibility to “guide the discretion” of the sentencer through adherence to procedural and evidentiary laws, the “individualized consideration” that is required by Supreme Court case law is a far more normative assessment than are the determinations of culpability and death-eligibility, with relatively lax procedural and evidentiary thresholds, as we have seen in previous chapters. This individualized consideration is quite broad, and, as stated in the Supreme Court’s 1978 Lockett v. Ohio case, “in all but the rarest kind of capital case, [the sentencer should] not be precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”(emphasis in original)37 And yet, the Supreme Court, in a footnote to this quotation, said the following: “Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.”38 Therefore, the only time a mitigating factor presented by the defense can be excluded is when it is irrelevant to the defendant’s character, record, or the circumstances of his offense.

In later Supreme Court cases interpreting the requirements of the Eighth and Fourteenth Amendments with respect to the consideration of mitigating factors in death penalty cases,39 the Court makes it clear that the trial court in every death penalty case must instruct the jury at sentencing that evidence of any (statutory or non-statutory) mitigating factors put forward by the defense can be considered, as long as it relates to one of the three topics mentioned above – the defendant’s character, record, or the circumstances of the offense. States cannot preclude mitigation related to these three topics via statute, and they cannot allow the jury to not be informed of its authority to consider all such information. The question of whether or not co-defendant sentences can be considered, then, is analyzed within this context, just as any other type or category of mitigating evidence would be. The issue, as concerns consideration of co-defendant sentences, is whether confederates’ sentences are relevant or irrelevant to “the circumstances of [the defendant’s] offense” (or, conceivably, to the character or prior record of

38 Id. at n.12.
defendant). It is here that jurisdictions such as Florida (as in the Brookings case) and Virginia (as in the Lewis case) diverge. Florida allows the sentencer at the trial stage to consider co-defendant sentences as a non-statutory mitigating factor; Virginia law does not.

The issue, however, is, in fact, more complex than that. As is often the case, different American jurisdictions maintain widely divergent statutory and case law on this subject, with laws and procedures that allow for permissible or mandatory consideration of certain aspects of a co-defendant’s crime and sentence, to varying degrees.

B. Appellate Analysis of Sentence Disparities under Federal Non-Capital Statutory Provision

While this is not a casebook on general criminal procedure in non-capital cases, it may be worth examining how federal criminal sentencing procedure handles a non-capital defendant’s request that her sentence be reduced because a co-defendant received a lesser sentence. Although there are significant differences between general sentencing procedures and death penalty procedures (most notably the fact that juries, not judges, tend to be the sentencers in death penalty cases), this examination may yet prove a useful reference point as we explore American death penalty practice and praxis. The reader should note, however, that because American death penalty sentencing decisions are normally made by juries, they will not be asked to conduct a proportionality analysis of the same nature that a federal judge might undertake in a non-capital sentencing decision or that an appellate court might perform in a death penalty decision (i.e., the proportionality review the Virginia Supreme Court performed in the Lewis case).

The sentence proportionality comparison mandated by federal statutory law in non-capital cases requires a sentencing court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” In Gall v. United States, the Supreme Court in December, 2007, approved a federal district court’s decision to give the defendant, Gall, a lesser sentence specifically than those of his co-conspirators, where Gall was considered less culpable than (and therefore not similarly situated to) his co-conspirators under the relevant federal sentencing statute. Nevertheless, some Federal Circuit Courts, both before and after the Gall case, have held that only a comparison of “national disparities among the many defendants with similar criminal backgrounds convicted of similar criminal conduct” are appropriate under this statute, and that comparison with the sentences of co-defendants in the same case is permissible but discretionary as opposed to mandatory under the statute. This focus on national, rather than in-case, sentencing disparities, in some ways mirrors the mandatory proportionality review that many states require in their death penalty sentencing procedures. One may posit that the emphasis on analyzing “national disparities” in sentences for similar crimes and defendants is premised on the idea that a large sample size gives judges a more reliable pool of cases from which to assess the reasonableness of any particular sentence. Indeed, this seems to be the reasoning from the case cited above, which continued its explanation of federal law on this issue (prior to the Gall decision) in the following:

42 United States v. Simmons, 501 F.3d 620, 623(6th Cir. 2007) (discussing 18 U.S.C. § 3553(a)(6)).
[The federal statute governing this review] is not concerned with disparities between one individual’s sentence and another individual’s sentence, despite the fact that the two are co-defendants. Instead, [it] is there to ensure nationally uniform sentences among like offenders so as to leave room to depart downward for those defendants who are truly deserving of leniency. [This] national concern has been noted by a great majority of the circuits…

A district judge, however, may exercise his or her discretion and determine a defendant’s sentence in light of a co-defendant’s sentence. That action, however, would be a discretionary one because the district court is not required to consider that type of disparity.43

If the law does not require review of disparities between co-defendants’ sentences, why would a judge want to do that analysis? Because there may still be circumstances in which a disparity between co-defendants is unjust or gives such a dramatic appearance of injustice that a judge feels compelled to use his discretion to lower that defendant’s sentence below the Federal Sentencing Guidelines’ recommended sentence. To put it another way,

[The Seventh Circuit has] clarified…that [the same federal statute] also permits a judge to reduce one defendant’s sentence based on a low sentence given to a co-defendant (even if it does not require the judge to do so). The court found that this conclusion was inescapable after Gall, which had endorsed a district court’s consideration of the need to ‘avoid unwarranted disparities, but also unwarranted similarities among other coconspirators’ when calculating a reasonable sentence.”44

The question of what exactly is an “unwarranted” disparity or similarity may, in large part, be a sort of gestalt judgment, made based on concerns of fairness after a searching consideration not only of “similar criminal conduct” but also of co-defendants of “similar criminal backgrounds.” Such judicial discretion may be necessary in light of the reality that there is often controversy over just what roles a defendant and his co-defendant (testifying against him or not) played in a particular crime. For instance, a large number of cases are “cracked” via the use of informants and co-defendants who have chosen to cooperate with the government, not always because they feel true remorse but largely out of self-interest. One can see obvious “prisoners’ dilemma” problems that might result from this phenomenon: for example, a principal in a crime may confess and plead guilty first to avoid harsh punishment, and then finger an accomplice as the principal; the prosecutor may find himself unduly willing to believe this assertion (even if questionable), as it makes his job easier. In this circumstance, a judge—who sees many hundreds of cases a year—might exercise her discretion to lower a defendant’s sentence if she believes sentences meted out to co-defendants are inequitable, even if the defendant was

duly convicted.45

But what about juries in death penalty cases -- do they have sufficient training and prior knowledge to exercise this type of discretion? Juries are certainly not expected to comb the law and conduct a proportionality determination based on prior decisions across their jurisdiction, as are federal judges, but many states do make the consideration of confederate sentences a statutory or non-statutory mitigating factor, effectively permitting the jury to consider justice and fairness concerns similar to those “unwarranted similarities or differences” that federal judges might examine.

C. Analysis of Co-defendant Sentence Disparities under Federal and State Death Penalty Statutes and Cases

Meticulously detailing “unwarranted similarities or differences” may be outside the scope of this chapter, but what is highly relevant are the choices a jurisdiction must make when determining whether or not to allow a jury or appellate court to consider co-defendant sentences at a capital defendant’s sentencing.

In individual jurisdictions, the relevant choices include:

1. Is consideration of co-defendant sentences as mitigating factors required? If so, is it required by the first instance court or only by the reviewing court? For example, some jurisdictions make consideration of co-defendant sentences a statutory mitigating factor, meaning the sentence has no choice but to consider this factor.

2. If not required, is consideration of co-defendant sentences as mitigating factors nevertheless allowed? If so, is it allowed in the first instance court (whether or not allowed or required by appellate court)? Is it allowed in the appellate court (regardless of whether allowed in the first instance)?

   a. If consideration of co-defendant sentences is required or allowed, how much weight is given to these as mitigating factors? (Different states and courts may assess this differently, even depending upon the factual and procedural circumstances of the individual case, which may or may not be categorized to assist the lower courts.)

   b. Are there other mitigating factors (statutory or otherwise) besides co-defendant sentences that address the issue of relative culpability (especially in imputed intent cases)? For example: can lesser participation in a crime (as opposed to the extent of

45 But consider this dissenting Florida Supreme Court Justice’s opinion in Brookings v. State on this type of consideration (albeit in a capital case decided under state law, rather than a federal non-capital case decided under the law at issue in Gall and Simmons): “Bargains offered or struck, leniency granted for testimony or otherwise, questionable prosecutorial determinations of relative culpability, these and other factors relating to the treatment of accomplices to capital felonies have no bearing on the circumstances of the offense or the character of the offender. One who gets what he deserves under the law has no standing to complain that someone else has received more or less than he or she deserves...[C]onsideration of the leniency given to equally guilty co-participants ‘contributes not to consistency’ in capital sentencing, ‘but to inconsistency. The capital offender who commits his crime in concert with others has a better chance for a life sentence, based on the leniency afforded his accomplices, than does the offender who acts alone.’” Brookings v. State, at 145 (Boyd, J., concurring in part and dissenting in part).
participation of co-defendants) be used as a mitigating factor when it is not a legal defense to the charge, and criminal liability can be imputed to the defendant based on co-defendants’ actions? What should be made of the fact that providing testimony against one’s co-defendant(s) can be a mitigating factor in death penalty cases? Are there special concerns of relative culpability in imputed intent cases? Are these different from the concerns present in hirer-triggerman cases? Are they different again in cases where a defendant pleads guilty to a lesser charge in exchange for testimony against a defendant who pleads not guilty and goes to trial? And do scenarios in which co-defendants all go to trial in severed cases, each before a different judge or jury, present yet another set of concerns?

3. Finally, as in Virginia, co-defendant sentencing information can be precluded as a mitigating factor. Is this preferable, in certain types of cases, or in all cases, to a system that merely permits consideration of co-defendant sentences?

If you were to craft a standard, which standard would you choose, and why?

One group of states and the federal system allow juries in capital cases to consider co-defendant sentences as mitigating factors at the trial stage. Federal death penalty law even makes consideration of co-defendants’ sentences an explicit statutory mitigating factor (meaning its consideration is required, not optional), as does New Hampshire’s death penalty statute (although no one has been executed in New Hampshire since 1939).

A number of other states, whose laws resemble to Florida case law in this regard, have developed a non-statutory mitigating factor for the consideration of co-defendants’ sentences through their own case law. This chapter’s opening fact pattern (the case of the mother who hired a pair of lovers to kill a witness in her son’s trial) came from a Florida murder case (Brookings v. State). In that case, after having heard the facts during the “guilt stage” of the trial, the Florida jury was allowed to consider the facts that the defendant’s partner in the murder received complete immunity from prosecution and that the woman who hired him received only a sentence of life in prison for their respective roles in the murder. The jury recommended life imprisonment for the defendant triggerman, even though the judge preferred the death penalty and overruled the jury’s recommendation. On appeal, the appellate court sided with the jury, finding that the jury was clearly influenced by the disparity in co-defendant sentencing, and was reasonable in mitigating the sentence accordingly (and therefore, under Florida law, the judge did not have proper grounds to override the jury’s decision). In a way, the jury was also intuiting an “unwarranted disparity” the same way federal judges do in non-capital cases, even though they were not required to state their reasons for doing so.

46 18 U.S.C. § 3592(a)(4): “Equally culpable defendants. Another defendant or defendants, equally culpable in the crime, will not be punished by death.” Another, related, statutory mitigating factor in this federal capital sentencing statute is found in 18 U.S.C. § 3592(a)(3): “Minor participation. The defendant is punishable as a principal in the offense, which was committed by another, but the defendant’s participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.”
Finally, a third group of states does not even allow evidence of co-defendant sentencing disparities to be presented to the jury in capital cases. California case law explains one of the reasons why some states have refused to follow Florida and allow evidence of co-defendant sentences at the penalty phase:

Although … other jurisdictions provid[e] for the jury’s consideration of such evidence in mitigation, such as, for example… the United States Code [18 U.S.C. 3592(a)(4)], decades ago we acknowledged that the Florida courts similarly had adopted a contrary view, but we found unpersuasive the reasoning supporting that position. As we stated in [a previous case,] “the fact that a different jury under different evidence, found that a different defendant should not be put to death is no more relevant than a finding that such a defendant should be sentenced to death. Such evidence provides nothing more than incomplete, extraneous, and confusing information to a jury, which is then left to speculate: ‘Why did that jury do that? What was different in that case? What did that jury know that we do not know?’” Any attempt to answer these questions is further stymied by the normative nature of a jury’s penalty decision under California law.49

Note that the California Court’s concern is not simply that a jury, not a judge, is making this decision, but that the jury will have little to go on in its review of co-defendant sentences besides the sparse details present in other jury decisions regarding co-participants in the same crime who are tried separately (or the stipulated facts and sentence of a plea bargain).

Moreover, jury decisions are also supposed to be individualized and “normative” in nature, as was discussed in detail in Chapter 3. Courts in jurisdictions that disfavor the introduction of co-defendant sentencing information during sentencing hearings are obviously concerned that the moral, normative aspect of death penalty decisions (i.e., the allowance for mercy) could mean that introduction of co-defendant sentencing information might result in unreliable decisions, at best, and could perhaps even lead a jury to make a more severe sentencing decision than it might otherwise make. The Third Circuit explained this in the following way, “[The] line of cases holds that accomplices’ sentences may be excluded because [they are] not material to the defendant’s character or record or to the circumstances of the defendant’s crime, and because the same logic might require admission of coconspirators’ death sentences.”50

V. Conclusion and Questions

1. In the end, Teresa Lewis’s petitions for habeas corpus relief (based on procedural claims including much of the new, substantive information to which John Grisham referred in his op-ed) were ultimately denied, with each court finding that she had been assisted by effective, experienced defense counsel and had no other legitimate legal basis to overturn her death sentence. While ostensibly ruling on procedural matters, each court decision did obliquely answer the question in the back of many people’s minds: “What if she had not been the mastermind? What then? Is this a fair result?” The courts hearing her habeas appeals were uniform in their reply: regardless of her

49 People v. Moore, 253 P.3d 1153, 1181 (Cal. 2011).
exact role and exact mental level in comparison to her confederates, it was deemed clear that she was still mentally culpable of a murder, the nature of which generally incurred the death penalty in Virginia. Was that a fair standard, or do you think the Virginia Court, in its proportionality review, should have used a comparator of “substantially mentally impaired masterminds of murders for hire?” Why or why not?

2. The Lewis case’s brusque treatment of Teresa Lewis’s claim for “inter-confederate proportionality” evidences a galvanization of the Virginia Supreme Court’s logic in Coppola and Stamper, case decisions for which the Supreme Court of the United States has denied certiorari, choosing not to rule on the constitutionality of those decisions. In Virginia and many other states, appellate courts will not look (explicitly) to the differences between co-conspirators’ sentences, but will only consider whether or not the individuals’ particular set of facts was one for which “sentences are generally imposed by other sentencing bodies in this [state] for crimes of a similar nature considering the crime and the defendant.” But is this a sophisticated reading of precedent?

a. Assuming that the judges who authored the Coppola and Stamper decisions read the Gregg case correctly, should a different standard be applied when co-conspirator cases are decided via bench trial or plea bargaining? Or, at least, when the same judge sentences all three confederates? Should jurisdictions, in crafting their laws, be forced, at a minimum, to consider how the procedural posture and disposition of confederates’ trials and sentencing may affect the justice concerns in each case? Or, to quote the California court, does “[s]uch evidence provide nothing more than incomplete, extraneous, and confusing information to a jury” or sentencing judge?

b. Do the results in the Lewis case argue more strongly for judges or juries as preferable sentencing authorities? Would your answer change depending on the perspective (defense or prosecution, micro or macro) from which you viewed the question? Or, perhaps, is the ubiquity of plea bargaining and its corresponding incentive structure the most glaring problem in this case?

3. What is the most equitable means of conducting a proportionality test? Over the past thirty years in the U.S. justice system, various types of tests – both broad and narrow – for proportionality, have been rejected by the courts, and deemed irrelevant to judicial decisions.

a. For example, the Supreme Court has determined that even a well-documented statistical probability proving arbitrariness in the imposition of the death penalty is too broad a brush to lead to a remedy for a specific defendant: in McCleskey v Kemp, the Court ruled in a five-to-four decision that evidence of general racial bias in the application of the death penalty (specifically in the race of the defendant) was not sufficient to carry the defendant’s burden if explicit racial discrimination could not be proven in the case at hand. (Interestingly, and apropos of the Lewis case, later studies have shown that the gender of the victim also leads to disproportionate use of the death penalty, with defendants convicted of the murder of women more likely to receive the death penalty than those convicted of murdering men. Many feel

\[51\] See McCleskey v. Kemp.

\[52\] M. R. Williams, et al., Understanding the influence of victim gender in death penalty cases: The importance of victim
that the gender of the defendant also plays a large role in determining who will receive a death sentence, perhaps a far larger role than that of the race of the defendant, pointing to evidence that around ten percent of those arrested for murder are women, but that women account for a much smaller percentage of death sentences and executions.53

b. On the other hand, as we have seen in Lewis, parsing the logic behind inconsistent sentences in joint criminal endeavors has proven too narrow a ground for proportionality analysis in many jurisdictions: proof that two confederates to the same crime have similar levels of culpability but vastly different sentences has also been deemed an irrelevant consideration for some courts, but a mitigating factor for others, although the exact weight given to this factor is up to the jury or judge.

c. Can you find a certain logic to the state and federal courts’ jurisprudence here? How much of it is an argument for “justice” writ large, or an attempt to balance many competing “justice interests” among the manifold death penalty cases? How much of it is an appeal to utility or efficiency?

4. It is especially interesting to read John Grisham’s op-ed in conjunction with the recent debate in China on the proper role of public participation and opinion in death penalty cases. Part of the power of Grisham’s piece is that it is rather rare to have such a well-known figure so blatantly disagree with a court’s findings of the facts of a case. This is changing, however. Thanks to groups like the Innocence Project, there are now many journalists, lawyers, and scholars who have increasingly used the power of the media, in conjunction with difficult and innovative post-appellate litigation in the courts, to call into question cases that may have been wrongly or poorly decided.

a. It should also be noted that Grisham’s op-ed would not have been submitted to the U.S. Supreme Court for review; the Justices were probably not even aware that he had written it. However, Grisham no doubt desired that his contribution to the public dialogue would provide some help and support to Lewis’s lawyers in their attempts to reopen the case. Moreover, it was clear that Grisham hoped to put pressure on the governor of Virginia to commute Lewis’s sentence to be the same as those of her confederates, something that the highest ranking official in the executive branch of government in each jurisdiction has a right to do, through executive clemency, to some degree, in every American jurisdiction.

b. Is there a benefit to allowing for public pressure to be placed on “political branches” of government which have the power to show leniency but no power to convict, while at the same time keeping the judicial branch relatively immune from public opinion, save for the voice of the jury? Is this type of division possible in China?

\[\text{\textit{race, sex-related victimization, and jury-decision-making}, 45 Criminology 865, 870 (2007).}\]
\[\text{\textit{Rivkind & Shatz, at 306, citing Streib (2007).}}\]