A multi-defendant penalty phase in a capital jury trial is constitutional.

Defendant argues that "a joint sentencing trial will inevitably lead to a denial of each defendant's rights under the Fifth, Sixth, and Eighth Amendments to the US Constitution." The thrust of Defendant's argument is that a jury that hears different evidence as to aggravation and mitigation for each defendant will be "unable to clearly view" the evidence as it applies to each defendant. Defendant cites the battle of multiple constitutional rights as the reason why a multi-defendant penalty phase in a capital jury trial is necessarily unconstitutional.

Defendant's argument fails for a number of reasons. Primarily, the arguments raised by Defendant have already been addressed and rejected in other jurisdictions.

For example, in *People v. Mahaffey*, 651 N.E.2d 174 (1995), *cert. denied*, *Illinois v. Mahaffey*, 493 U.S. 873 (1989), in rejecting a defendant's ineffective assistance of counsel claim, the Illinois Supreme Court also rejected his claim that he had a constitutional right to have an individualized sentencing hearing severed from that of his co-defendant. The Court noted that generally, defendants jointly indicted should be jointly tried. *Id.* at 187. Such joint trials promote "economy, reliability, and consistency in the judicial process." *Id.* The Court noted that:

> In a joint trial, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trial. From this perspective, the jury may be able to determine more reliably the guilt or innocence of a particular defendant and to assign more fairly the respective responsibilities of each defendant in the sentencing.

Id. (citations omitted.)

The Court went on to disagree with the defendant's argument that joint death sentencing would not allow for the required individualized treatment of each defendant. The

Court further found that proper jury instructions were given, and the jury was presumed to have followed those instructions. *Id.*

The Florida Supreme Court reached the same conclusion in M*axwell v. Wainright*, 490 So.2d 927 (Fla. 1986), *cert. denied*, *Maxwell v. Florida*, 479 U.S. 972 (1986), finding that:

> Where co-defendants are tried together on a capital charge, there being no ground for a severance of the guilt or innocence phase of the trial, it is proper for the court to proceed with a joint sentencing trial so that the same jury that heard all the guilt phase evidence can consider and weigh the relative roles and culpability of the offenders.

Id. at 933.

And in *Hardy v. State*, 804 So.2d 247 (Ala. Crim. App. 1999), *cert. denied*, *Hardy v. Alabama*, 534 U.S. 1043 (2001), the Alabama Court of Criminal Appeals held that “the same considerations that favor joint trials in the guilt phase also apply in the sentencing phase” of a capital trial. *Id.* at 263. While an individualized sentencing determination is required, a joint sentencing hearing does not preclude that individualized determination. *Id.*

The federal courts agree. In *U.S. v. Bernard*, 299 F.3d 467, 475 (5th Cir. 2002), *cert. denied*, *Bernard v. U.S.*, 123 S.Ct. 2572 (2003), the Court pointed out that "defendants charged with capital murder under federal statutes have been tried jointly in both the guilt and penalty phases of trial. See *U.S. v. Causey*, 185 F.3d 407 (5th Cir. 1999); *U.S. v. Tipton*, 90 F.3d 861 (4th Cir. 1996)."

In *Tipton*, *cert. denied*, *Tipton v. U.S.*, 520 U.S. 1253 (1997), the court analyzed arguments from a defendant who argued that the trial court erred in denying his severance motion in the capital penalty phase. Specifically, the Defendant argued that “joint capital penalty trials necessarily reduce the jury's ability to give individualized consideration to aggravating and mitigating factors", much like the argument in the present case. The reviewing court held otherwise, after weighing all considerations:

> The concerns raised by appellants are legitimate ones. But there are countervailing considerations that properly may be weighed in the discretionary balance. Because the relevant statutory provision, § 848(i)(1)(A), requires that, except in situations not present here, the penalty hearing shall be conducted before the same jury that determined guilt, severance here would have required three separate, largely repetitive penalty hearings before this jury. The same considerations of efficiency and fairness to the Government (and possibly the accused as well) that militate in favor of joint trials of jointly-charged defendants in the guilt phase, *see Lockhart v. McCree,* 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986); *Richardson v. Marsh,* 481 U.S. 200, 210, 107 S.Ct. 1702, 1708-09, 95 L.Ed.2d 176 (1987), must remain generally in play at the penalty phase. The district court was therefore entitled to weigh those considerations in the balance.
>
> More important of course than any consideration of inconvenience or possible unfairness to the Government from sequential separate trials are the possibilities of unfairness to the accused persons from a joint penalty-phase trial--specifically the threat posed to individualized consideration of their situations, and in particular the quite different mitigating factors relevant to each. While such a potential risk was certainly present here, as it will be in any case involving multiple defendants, it could not of course have been entirely removed by conducting three sequential, largely repetitive hearings before the same jury. More critically, we are satisfied that the court's frequent instructions on the need to give each defendant's case individualized consideration sufficed to reduce the risk to acceptable levels.
>
> *Id.* at 893.

Simply put, the issues raised by Defendant have been considered and rejected by other courts after careful analysis. This Court should do the same.

Additionally, this Court may not ignore the right of the victims to a fair and speedy trial. Among the rights afforded to crime victims by the Arizona Constitution is the right to a speedy trial. Ariz. Const. Art. 2, § 2.1(A) (10). The courts are obligated by the Arizona Constitution to attempt to protect the rights of the victims of crime, including the right to a speedy trial or disposition. *State v. Mata*, 185 Ariz. 319, 337, 916 P.2d 1035, 1053 (1996), *cert. denied*, *Mata v. Arizona*, 518 U.S. 1045, 117 S.Ct. 20, 135 L.Ed.2d 1114.

By severing the trial in this matter, the Court would be unnecessarily subjecting the victims to two lengthy ordeals, rather than the one they currently face. Because separate

trials are not constitutionally required, such a severance would unnecessarily and unfairly burden the victims.

Conclusion

Because separate trials are not constitutionally required, and a severance would unduly and unfairly burden the victims, this Court should deny the motion to sever.