

## Legal Sidebar

# Justice Antonin Scalia's Last Opinion

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Justice Antonin Scalia wrote his last opinion for the Court in a capital punishment case, [Kansas v. Carr](#). There, the Court reversed two decisions of the Kansas Supreme Court and held that “the Eighth Amendment [does not] require . . . capital-sentencing courts to instruct the jury that mitigating circumstances need not be proved beyond a reasonable doubt.” It also held that the Eighth Amendment did not require separate trials for two of the defendants in one of the Kansas cases.

The defendants in [one](#) of the cases, the Carr brothers, were convicted of “4 counts of capital murder, 1 count of attempted first-degree murder, 5 counts of aggravated kidnaping, 9 counts of aggravated robbery, 20 counts of rape or attempted rape, 3 counts of aggravated criminal sodomy, 1 count each of aggravated burglary and burglary, 1 count of theft, and 1 count of cruelty to animals” as part of one crime spree. Reginald Carr was also convicted of kidnaping, aggravated robbery, aggravated battery, and criminal damage to property committed on another occasion. Both Reginald and Jonathan Carr were convicted of first-degree felony murder in connection with yet a third episode. The defendant in the [second](#) case, Gleason, was convicted of two counts of capital murder, aggravated kidnaping, aggravated robbery, and criminal possession of a firearm.

Defendants in both cases were sentenced to death, and in both cases the Kansas Supreme Court vacated their sentences on Eighth Amendment grounds. The Kansas court’s [Gleason](#) decision acknowledged an apparent conflict with U.S. Supreme Court precedent, which it thought distinguishable. It found constitutionally insufficient the trial court’s jury instructions that left the jury “to speculate as to the correct burden of proof for mitigating circumstances, and [under which] reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt.” The Kansas court reiterated that view in its [Carr](#) decision, in which it also “concluded that R. Carr’s Eighth Amendment right to an individualized sentencing determination was fatally impaired by [the] failure to” separate the capital sentencing proceeding of the two brothers, who were thought to have antagonistic death penalty mitigating defenses.

Justice Scalia’s [opinion](#) for the Court simply rejected the Kansas court’s characterization of the jury instructions. “[N]o juror would reasonably have speculated that mitigating circumstances must be proved by any particular standard, let alone beyond a reasonable doubt. . . . The instructions repeatedly told the jurors to consider any mitigating factor, meaning any aspect of the defendants’ background or the circumstances of their offense. Jurors would not have misunderstood these instructions to prevent their consideration of constitutionally relevant evidence.”

The Carrs’ severance argument fared no better. As Justice Scalia phrased it, “[t]he Kansas Supreme Court agreed with the defendants that, because of the joint sentencing proceedings, one defendant’s mitigating evidence put a thumb on death’s scale for the other.” Yet, the trial court had impressed on the jury the importance of judging the defendants individually. More to the point, vacating the death sentence required a showing that joint proceedings had been fundamentally unfair. “Only the most extravagant speculation would lead to the conclusion that the supposedly prejudicial evidence rendered the Carr brothers’ joint sentencing proceeding fundamentally unfair.” Justice Scalia explained that the slight prospect of relatively greater or lesser culpability paled next to graphic evidence of the level of equally shared responsibility. “What these defendants did – acts of almost inconceivable cruelty and depravity – was described in excruciating detail by [a surviving victim], who relived with the jury, for two days, the Wichita Massacre. The joint sentencing proceedings did not render the sentencing proceedings fundamentally unfair.”

Justice Sotomayor, the sole dissenting member of the Court, [objected](#) that the Court should have left the cases where they found them and deny certiorari. Instead, the Court had overturned a state high court ruling, not because of a breach of any federal constitutional right, but because the state court had applied the law more generously than would have the highest federal court.

Justice Scalia [responded](#) that had the Kansas Supreme Court decisions been grounded in state law they would indeed have been “none of our business.” On the other hand, he said, “what a state court cannot do is experiment with our Federal Constitution and expect to elude this Court’s review as long as victory goes to the criminal defendant. Turning a blind eye in such cases would change the uniform ‘law of the land’ into a crazy quilt.”

Not long ago, Justice Scalia, who regularly expressed the view that capital punishment is constitutional, [speculated](#) that a majority of the Court might soon decide otherwise. Should that occur, it would be ironic if it happened that Justice Scalia had written the last opinion upholding the death penalty before its demise.

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