

**Summary of SC89833, State of Missouri v. Brian Joseph Dorsey**

Appeal from the Boone County circuit court, Judge Gene Hamilton  
Argued and submitted March 16, 2010; opinion issued July 16, 2010

**Attorneys:** Dorsey was represented by Janet M. Thompson of the public defender's office in Columbia, (573) 882-9855, and the state was represented by Shaun J. Mackelprang and Robert Ahsens of the attorney general's office in Jefferson City, (573) 751-3321.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** A man appeals his death sentences for the murders of his cousin and her husband. In a decision written by Judge Richard B. Teitelman, the Supreme Court of Missouri unanimously affirms the death sentences. In a joint concurring opinion, Chief Justice William Ray Price Jr., Judge Mary R. Russell and Judge Zel M. Fischer write separately to note their continued disagreement that this Court's proportionality review must include cases resulting in a sentence of life in prison without the possibility of probation or parole; the cases requiring such review now are final and must be followed.

**Facts:** One evening in December 2006 after paying drug dealers who were in his apartment, Brian Dorsey stayed at the home of his cousin and her husband. His cousin's four-year-old niece also stayed at their home. At some point after the victims had gone to bed, Dorsey took a single-shot shotgun from the garage, fatally shot his cousin in the jaw, reloaded the shotgun, fatally shot her husband in the head at close range and then engaged in sexual intercourse with his cousin's body. He then took her social security card from a wallet and scattered the rest of the wallet's contents next to her body. He poured bleach over her torso, genitals and thighs; stole various items of personal property from the home; and left the home in her vehicle. He later met with a woman from whom he had borrowed money to buy drugs and tried to pay her using items later determined to belong to the victims. The next afternoon, his cousin's parents went to check on her and Ben and found the niece watching television and the victims dead on their bed in their locked bedroom. During the ensuing police investigation, testing revealed that sperm cells recovered from the cousin's body contained DNA consistent with Dorsey. Dorsey subsequently surrendered to police and admitted he was "the right guy" concerning the victims' deaths. He was charged with two counts of first-degree murder, to which he pleaded guilty in March 2008. Following a separate penalty phase trial, the jury assessed sentences of death for each murder, and the trial court sentenced Dorsey accordingly. Dorsey appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The trial court did not commit reversible error in instructing the jury.

(a) The trial court erred in submitting Instruction No. 10 because it referenced both murder counts rather than repeating the instruction for each count, but this error did not prejudice Dorsey. The jury properly was instructed that, for each murder, it had to find one or more statutory aggravating circumstance beyond a reasonable doubt. It further was

instructed that, as to each count, it had to determine whether circumstances in mitigation of punishment outweighed those in aggravation of punishment. Finally, there were two separate verdict-mechanics instructions instructing the jury about the decision-making process that had to be applied to both counts.

(b) The court did not err in submitting the instructions regarding the “weighing step” in which the jury assesses the relative strength of the aggravating and mitigating evidence in the case. Contrary to Dorsey’s assertions, the jury’s weighing of aggravation and mitigation evidence is not subject to proof beyond a reasonable doubt because it is not a factual finding that increases the potential range of punishment. Further, this Court repeatedly has rejected the claim that the admission in the penalty phase of unadjudicated bad acts violates due process because the state is not required to prove those acts beyond a reasonable doubt. Finally, this Court previously has held that the same mitigating evidence instruction at issue here does not shift the burden of proof improperly.

(c) The statutory aggravating circumstances submitted to the jury were not duplicative. With regard to the husband’s murder, although the first and third aggravators related to the fact that Dorsey killed two people, they emphasized different aspects of the murders and, therefore, were sufficiently differentiated. With regard to the cousin’s murder, although the third and fourth aggravators related to the fact that Dorsey had sexual intercourse with his cousin, they emphasized different aspects of the crimes and, therefore, were not duplicative.

(2) Dorsey’s argument that there was insufficient evidence to support the aggravating circumstance that he forcibly raped his cousin is without merit. The evidence showed that Dorsey used deadly force to overcome her resistance and then engaged in sexual intercourse with her; that DNA testing revealed the existence of sperm cells that almost certainly came from Dorsey or another man from his paternal lineage; that there was no other man besides Dorsey present at the victims’ home who fit this profile; and that Dorsey poured bleach over his cousin’s body in an attempt to remove physical evidence of the rape.

(3) The trial court did not commit plain error in permitting certain statements by the prosecutor during jury selection and closing argument. The prosecutor’s use of the term “warrant,” though not in the current version of the applicable statute, accurately conveyed to prospective jurors the basic decision-making process that would be required of the jury. As to the prosecutor’s comments that Dorsey bore the burden of proving that mitigating evidence was stronger than evidence of aggravating circumstances, these comments are a correct statement of the law. As to the prosecutor’s discussion of what the jurors would have to find unanimously, the prosecutor clearly specified to prospective jurors that a non-unanimous jury would be required to assess a life sentence. The prosecutor’s remaining comments during closing argument were permissible, and the trial court did not commit plain error in permitting them.

(4) The trial court did not abuse its discretion in admitting certain crime scene photographs. One showed the close position of the two bodies, which was relevant to the state’s theory that the murders were related and that Dorsey planned to kill both victims contemporaneously. A second showed the pour marks on the cousin’s body and the contents of her wallet around her body,

which were relevant to prove that Dorsey committed the murders to obtain money or items of value from the victims and that Dorsey raped his cousin while committing the murders. The third and fourth were autopsy photographs depicting the wounds the victims suffered, which was relevant to assist the jury in understanding the medical examiner's testimony about the nature and location of the wounds.

(5) Dorsey's death sentence is not excessive or disproportionate. Because Dorsey's allegations of trial error lack merit, as discussed above, he cannot establish that these alleged errors resulted in a death sentence imposed because of passion, prejudice or any other arbitrary factor. The evidence supports each of the aggravating circumstances the jury found. Dorsey's death sentence is not disproportionate when compared with other cases in which the Court upheld the death penalty in which there was more than one murder or in which the defendant raped a victim at the time of the murder. A majority of this Court has held that the proportionality review mandated by section 565.035.3, RSMo, requires consideration of all factually similar cases in which the death penalty was submitted to the jury, including those resulting in a sentence of life in prison without the possibility of probation or parole. Dorsey only can point to one case – which may be an aberration – involving multiple homicides and additional aggravating factors in which the jury declined to impose a death sentence. Therefore, Dorsey's death sentence is not disproportionate to other similar cases.

**Joint concurring opinion by Chief Justice Price and Judges Russell and Fischer:** The authors agree with all points in the principal opinion – including the finding that Dorsey's death sentences are proportional to his crimes – except as to the Court's proportionality analysis. They continue to disagree that "similar" cases for proportionality review analysis requires consideration of cases that resulted in a sentence of life in prison without the possibility of parole. But because the principal opinions' proportionality analyses in *State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010); *State v. Anderson*, 306 S.W.3d 529 (Mo. banc 2010); and *State v. Davis*, \_\_\_ S.W.3d \_\_\_ (Mo. banc 2010)(No. SC89699, decided June 29, 2010), now are final, the authors note they must follow these decisions.