

Miller v. State: **[motion to suppress]** The warrantless search of appellant's home was justified pursuant to Rule 14.3 of the Arkansas Rules of Criminal Procedure. **[jury-selection process]** The trial court did not abuse its discretion in the jury-selection process of appellant's trial. **[competency to stand trial]** Because appellant's competency to stand trial was never in dispute, and because appellant acknowledged his competency at trial, the trial court did not err in failing to rule on appellant's competency. **[mental retardation]** Substantial evidence supported the trial court's determination that appellant had not proven his mental retardation by a preponderance of the evidence and that a fact question for the jury existed. **[admission of photographs]** The trial court did not abuse its discretion when it admitted certain photographs into evidence. **[Rule 703]** The trial court did not abuse its discretion when it admitted into evidence certain expert testimony pursuant to Rule 703 of the Arkansas Rules of Evidence. **[jury instruction]** The trial court did not err by giving the jury the voluntary intoxication jury instruction. **[victim-impact evidence]** The trial court erred by allowing two victim-impact witnesses to tell the jury that they wanted appellant to receive the death sentence. **[model instruction on mitigating factors]** The trial court did not err when it submitted the model instruction on mitigating circumstances to the jury. **[mitigating circumstances]** The jury did not err by failing to conclude that a certain mitigating circumstance existed. **[death penalty; jurors]** The prosecutor's questions to the prospective jurors concerning their ability to impose a death sentence in accordance with Arkansas law did not violate appellant's Sixth Amendment rights. (Cox, J.; CR 08-1297; 1-7-10; Corbin).

Gibson v. State: **[witness testimony]** The trial court did not abuse its discretion when it permitted the prosecutor to ask leading questions during the testimony of a child victim. (Henry, D.; CACR 09-543; 1-13-10; Brown).

Cain v. State: **[motion to suppress]** The trial court did not err by denying appellant's motions to suppress evidence that was obtained during several traffic stops. (Storey, W.; CACR 09-152; 1-13-10; Gladwin).

Nguyen v. State: **[sentencing]** The trial court did not abuse its discretion by sentencing appellant to imprisonment after he violated the conditions of his probation by possessing controlled substances. (Green, R.; CACR 09-562; 1-13-10; Pittman).

Fowler v. State: **[motion to suppress]** Because appellant was questioned in the context of a custodial interrogation and was not read his *Miranda* rights prior to the questioning, his statements to his parole officer were illegally obtained. Accordingly, the trial court erred when it denied appellant's motion to suppress the statements. (Clawson, C.; CACR 09-426; 1-13-10; Vaught).

Bryant v. State: **[sufficiency of the evidence; rape; second-degree sexual assault]** There was substantial evidence to support appellant's convictions. **[suppression of statement]** Because statements made by appellant were made after he knowingly, voluntarily, and freely waived his right to remain silent, the trial court did not err in admitting the statements into evidence. **[admission of evidence]** The trial court did not abuse its discretion when it admitted into evidence letters that appellant wrote and sent to his wife during his incarceration. **[pedophile exception]** The trial court properly admitted testimony from two witnesses regarding appellant's prior bad acts pursuant to the pedophile exception to Rule 404(b) of the Arkansas Rules of Evidence. (McCorkindale, R.; CR 08-1033; 1-14-10; Gunter).

Waller v. State: **[sufficiency of the evidence; possession of methamphetamine with intent to deliver; possession of marijuana with the intent to deliver; possession of drug paraphernalia; furnishing prohibited articles]** There was substantial evidence to support appellant's convictions. **[continuance]** Appellant did not exercise due diligence when he sought a continuance on the day of his trial. Accordingly, the trial court did not abuse its discretion in denying appellant's request for a continuance. **[jury instructions]** Because there was no evidence to support the giving of a jury instruction on the defense of justification, the circuit court did not err in refusing to give the requested instruction. (Hudson, J.; CACR 09-825; 1-20-10; Hart).

Ward v. State: **[sentencing]** The sentences imposed upon appellant were not illegal. (Storey, W.; CACR 09-741; 1-27-10; Gladwin).

Jordana v. State: **[motion to suppress]** Because appellant's statement was voluntarily given and was not the product of coercion, the trial court did not err when it denied appellant's motion to suppress the statement. (Wright, H.; CACR 09-692; 1-27-10; Hart).

Pogue v. State: **[sufficiency of the evidence; manufacturing methamphetamine; being a felon in possession of a firearm; simultaneous possession of drugs and a firearm]** There was substantial evidence to support appellant's convictions of manufacturing methamphetamine and being a felon in possession of a firearm. However, because the firearm that was found in appellant's home was not "readily accessible for use," there was not substantial evidence to support appellant's conviction of simultaneous possession of drugs and a firearm. (Yeargan, C.; CACR 09-516; 1-27-10; Pittman).

McClanahan v. State: **[statute of limitations; abuse of a corpse]** The beheading and dismembering of a corpse and the subsequent dumping of the body parts into a pond falls within the prohibited conduct in Arkansas's abuse-of-a-corpse criminal statute. The concealment of body parts is not a continuing offense pursuant to Arkansas's abuse-of-a-corpse criminal statute. Thus, the trial court erred when it failed to dismiss the abuse-of-a-corpse charge against appellant because it was not filed until after the statute of limitations had run. (Danielson, E.; CR 09-761; 1-28-10; Hannah).

Cases in which the Arkansas Court of Appeals concluded that there was substantial evidence to support the appellant's conviction(s):

Lee v. State: (fleeing; second-degree battery) Proctor, W.; CACR 08-1484; 1-6-10; Henry.

Moseby v. State: (maintaining a drug premises) Wright, H.; CACR 09-683; 1-6-10; Gladwin.

Trice v. State: (computer child pornography) Medlock, M.; CACR 09-721; 1-6-10; Robbins.

Nelson v. State: (aggravated robbery) Hearnberger, M.; CACR 09-461; 1-20-10; Baker.

Edwards v. State: (delivery of a controlled substance) Singleton, H.; CACR 09-751; 1-20-10; Gladwin.

Freeman v. State: (manslaughter) Storey, W.; CACR 09-652; 1-27-10; Brown.

Haire v. State: (breaking or entering; theft of property; criminal trespass; criminal mischief) Langston, J.; CACR 09-592; 1-27-10; Brown.

Watkins v. State: (disorderly conduct) Halsey, B.; CACR 08-1285; 1-27-10; Glover.

Pack v. State: (rape; sexual assault in the second degree) Green, R.; CACR 09-869; 1-27-10; Kinard.

Saxton v. State: (residential burglary; attempted theft of property; third degree battery) Hughes, T.; CACR 09-866; 1-27-10; Robbins.

CIVIL

All Creatures Animal Hospital v. Finova Capital Corp. **[lease/summary judgment]** The tenant failed to offer any proof as to what the interest rate was at the time of the contract. An affidavit that is equivocal or uncertain is insufficient to create an issue of fact so as to preclude summary judgment. (Williams, L.; CA 09-435; 1-6-10; Brown)

Elder Construction Co. v. Ivey Lane, LLC: **[specific performance]** Contract was severable, and it was proper to order specific performance to sell individual lots as opposed to the whole tract. (Lindsay, M.; CA09-63; 1-6-10; Gruber)

DeSoto Gathering Co. v. Smallwood: **[leasehold/mineral rights]** Natural gas driller did not commit trespass because it entered the land pursuant to a valid right-of-way and in accordance with the mineral lessee's right to a reasonable use of the surface for development and production of the minerals.

Occupant of the surface rights, a lifetime leasehold interest, did not have to consent to the right-of-way. (Mills, W.; SC 09-386; 1-14-10; Corbin)

Archer v. Sigma Tau Gamma Fraternity: [**liability/alcohol consumption**] Under section 16-126-106, fraternity could not be held liable for car accident that was caused by a guest, who attended a fraternity sponsored party, and was legally intoxicated. Statute provides that a social host who does not hold an alcoholic beverage vendor's permit and who provides alcohol cannot be the proximate cause of damages that may result from the acts of a guest of the party. There is no basis to claim that fraternity should have obtained a vendor's permit and be treated as if it was a retailer. (Capeheart, T.; SC 09-531; 1-14-10; Danielson).

Farm Bureau Ins. v. Gadbury-Swift: [**forum non conveniens**] It was error to transfer a declaratory judgment action filed by the insurer in Pulaski County (where the insurer's principal place of business was located) to Logan County where insured's property was located. Under the venue statute, the suit was properly filed in Pulaski County. Doctrine of forum non conveniens cannot be used to usurp the General Assembly's power to establish venue. (Proctor, W.; SC 09-462; 1-14-10; Brown)

Higgins v. Higgins: [**constructive trust**] Based on the facts of the case, the trial court properly imposed a constructive trust on the property. (Moody, J.; CA09-546; 1-20-10; Brown)

Tri-Eagle Enterprises v. Regions Bank: [**contract/ambiguity**] Contract language is ambiguous and disputed extrinsic evidence presents a fact question. [**expert witness**] Trial court abused its discretion in excluding the experts' testimony. The witnesses possessed knowledge, training, and experience that would have aided the jury. Judge's problems with the witnesses went to the weight of their testimony and not to its admissibility. There was no requirement for a peer review or Daubert assessment because the opinions were based on experience within the banking field and not on methodology. (Fitzhugh, M.; CA09-271; 1-10-10; Kinard)

Carr v. Nance: [**finality**] Appellate court is without subject matter jurisdiction because there was not a final order. Parties were orally dismissed from the case but there was not the entry of written orders of dismissal. (Logan, R.; SC 09-290; 1-21-10; Corbin)

Provence v. National Carriers, Inc. [**forum selection clause**] Contract provided that venue would be in Kansas, and it is enforceable. Allegation that fraud induced the contract does not operate to invalidate an otherwise valid forum selection clause. There must be the allegation that fraud induced the specific forum selection clause. (Smith, K.; SC 09-636; 1-21-10; Brown)

Rosenow v. Alltel Corp. [**class certification**] Trial court abused its discretion by denying class certification in suit by customer against telephone company over imposition of early termination fees. In analyzing the requirements of commonality, predominance, and superiority, court utilized an improper merits-based analysis. The court focused on possible damages sustained by the defendant and not the claim alleged by the plaintiff on behalf of the class. [**expert witness**] Expert witness' testimony should have been struck because it was not relevant to the issue of class certification, and the opinion violated Rule 704 as it contained conclusions that invaded the role of the circuit court. (Phillips, G.; SC09-463; 1-21-10; Corbin)

Carter v. Crawford: [**judgment**] Factual issue exist to preclude summary judgment on whether payment of judgment was voluntary. Question is whether the deposit of funds into the registry of the court was voluntary or at the judge's direction. (Epley, A.; CA 09-380; 1-27-10; Hart)

Steele v. Blankenship: [**adverse possession**] Court properly found adverse possession was established based upon the enclosure of the disputed tract with a fence and activities that occurred on the tract, including camping, hiking, and brush clearing. A landowner has a duty to inform himself as to any adverse occupancy of his property. (Lindsay, M.; CA 09-797; 1-27-10; Glover)

Landmark Novelties, Inc. v. State Board of Pharmacy: [**administrative appeal**] State Board of Pharmacy's decision to suspend company's license to sell List 1 chemicals for a three-year period and to impose a civil penalty was affirmed. Statute was not vague and evidence supported Board's finding

that company failed to report suspicious transactions involving the chemicals and stored them in an unlicensed and inappropriately equipped facility. (Piazza, C.; SC 08-543; 1-18-10; Corbin)

DOMESTIC RELATIONS

Wise v. Wise: [**divorce; real property--marital property; repayment of expenditures on nonmarital property**] The Court of Appeals affirmed the trial court's finding that the appellant and appellee gave their respective sons six acres each of their marital property during their marriage. Two of the sons had taken possession and made valuable improvements to the property which the court said constituted a valuable consideration. The possession and the valuable improvements constituted a part performance which obviated the statute of frauds. Although the court had the authority to determine that the property had passed out of the marital estate and had been gifts to the sons, the Court of Appeals said the trial court exceeded its authority in ordering the parties to deed the property to the three sons, who were not parties to the action, without making them parties. On a second point, the trial court found that appellant wife owed the appellee husband for expenditures made for her duplex, which was nonmarital property, but reduced the amount found by the trial court. The trial court erred in including expenditures made for personal property the parties purchased together and money the appellee paid for the mortgage on the property while his daughter and her family lived there. (McGowan, M.; No. CA 09-558; 1-6-10; Glover).

Gilbow v. Travis: [**child support--arrearage**] Issue of first impression--whether a trial court has the authority to order that an arrearage resulting from a retroactive increase in child support be placed in an account in the noncustodial parent's name to provide for the future needs of the children. The court held that, as in *Smith v. Smith*, 341 Ark. 590, 19 S.W.3d 590 (2000), there is no authority that would allow a court to order that a retroactive amount resulting from an increase in child support be placed in an interest-bearing account. On a second issue, the court held that the trial court did not abuse its discretion in deviating downward from the child support chart in setting the amount of support. (Duncan, X.; No. SC 09-438; 1-14-10; Wills).

Duncan v. Duncan: [**divorce; Ark.R.Civ.P 64--withdrawal of counsel**] The trial court allowed appellant's attorney to withdraw from representing her in a divorce action within two weeks of the final hearing. She had no notice of the hearing and no notice of the withdrawal of counsel. Rule 64 of the Ark. Rules of Civil Procedure governs the withdrawal of counsel. The section is aimed at protecting a client's interests. Here, the client had no reasonable notice and the client's interests were not protected. The case was reversed and remanded. (Hannah, C.; No. CA 09-22; 1-20-10; Robbins).

Morehead v. Morehead: [**marital property; contempt**] The Court of Appeals affirmed the trial court's judgment in a contempt action that ordered the appellant to pay a sum from a marital bank account, but amended to correct the amount so that it was payable based upon the amount in the account on the date of the parties' separation rather than a date one week later. (Landers, M.; No. CA 09-251; 1-20-10; Baker).

Hanna v. Hanna: [**change of custody; parental alienation; relocation**] The Court of Appeals affirmed the trial court's change of custody from the appellant mother to the appellee father. The court found that the trial court did not err in considering evidence in its finding that parental alienation had occurred, in finding that the appellee rebutted the presumption in favor of the appellant's relocation to Florida, in not finding the issue of relocation to be precluded from consideration by res judicata, and in removing the appellant from the courtroom when the parties' two children testified. (Gunn, M.A.; No. CA 09-214; 1-20-10; Hart).

Barker v. Avery: [**child support**] Appellant stopped paying child support at the end of the school year in May of 2007, after the child had turned eighteen in February of 2007. The trial court found that appellant's child-support obligation continued until the child's graduation in May of 2008. The law in effect in May of 2007 provided that the duty to pay child support automatically terminated by operation of law when the child reached eighteen or graduated from high school, whichever occurred later. The child support order in this case did not say when it terminated. Appellant argued that it terminated by operation of law in May of 2007 because the child would have graduated in that year had she not repeated kindergarten because of early learning difficulties. The appellee's testimony at the

hearing was that the parties had discussed holding the child back and the appellant consented to the decision. The court cited a 2000 case involving the identical issue in which it held that the child's actual graduation date was when she "should have graduated" because the child-support obligor in the case had consented to holding the child back to repeat a grade. Under the circumstances of this case, the trial court did not err in finding that the child "should have graduated" when she actually graduated in May of 2008. (Medlock, M.; No. CA 09-650; 1-20-10; Pittman).

Lawhead v. Harris: [**child custody**] The Court of Appeals affirmed the trial court's granting a directed verdict to the appellee mother at the end of the hearing in this case. The trial court found, among other things, that no material change in circumstances had occurred to justify changing custody. (Singleton, H.; No. CA 09-274; 1-27-10; Hart).

Pianalto v. Pianalto: [**marital property; stock options**] The trial court decided in a declaratory judgment action that the appellant's unexercised stock options were marital property, subject to division at the time of divorce. The trial court found which stock options were exercisable and vested and what percentage of those options would be divided with the appellee. The Court of Appeals affirmed the circuit court's decision. (Gunn, M.A.; No. CA 09-289; 1-27-10; Gladwin).

Easley v. Easley: [**marital debt**] The circuit court found that the appellee's student loan was marital debt. Based upon the evidence before the court, it decided that only 15% of the \$88,000 loan was used for the appellee's education and that the remainder was used to supplement the parties' income. The court ordered the appellee to repay the 15% portion used for her education. Of the remaining 85%, the court ordered the appellant to pay 40% and the appellee to pay the remainder. The court based its allocation upon the age, health, station in life, occupations, amount and sources of income, and employability of the parties. (Williams, C.; No. CA 09-630; 1-27-10; Vaught).

PROBATE

In Re: The Estate of Mary Elizabeth Reimer, incompetent: [**guardianship; attorney's fees; appellate jurisdiction**] An attorney represented a ward in an action to terminate a guardianship of her person and her estate. The ward argued that she was never notified of an earlier proposed change of guardian (from her husband to her daughter) or of the expansion of the guardianship from only her person to include her estate. She contended that she no longer needed a guardian. After an emergency hearing seeking a TRO against the daughter/guardian, the trial court denied the TRO and left the guardian in place. The guardian then filed an amended petition to be appointed guardian of both the ward's person and estate to cure the deficiencies alleged in the motion to terminate. After a hearing on the motion to terminate and the guardian's amended petition, the trial court left the guardianship in place for both the person and the estate. The attorney for the ward moved for attorney's fees, which the court denied. The attorney appealed the denial of her motion for fees and "generally from 'all of this [c]ourt's rulings that shaped the judgment.'" The appeal did not mention orders about the merits of the guardianship. The Court of Appeals said that it lacked jurisdiction over two-thirds of the appeal. It was the attorney, not the client ward, who appealed from the judgment. The order was two sentences denying the attorney's motion for fees, with nothing else being mentioned or decided. The appeal was of that specific order and nothing else. The notice failed to include two earlier orders on the merits of the guardianship. Therefore, the only issue before the appellate court was the denial of attorney's fees. Although generally only parties to a circuit court case may appeal, one of two exceptions to this general rule is where an appellant, though not a party, has a pecuniary interest affected by the court's disposition. The Court of Appeals said that the attorney had standing to argue the fee issue on appeal. However, she lacked standing to pursue guardianship issues on appeal, even had she appealed those issues correctly. The parties, not the lawyers, have an interest in those decisions. The attorney could have appealed the guardianship issues on behalf of her client, but she did not. The circuit court's denial of attorney fees was affirmed because, with certain exceptions not applicable here, attorney's fees may not be awarded unless authorized by statute. No Arkansas statute allows attorney's fees under the circumstances here. Therefore, the circuit court did not abuse its discretion by denying the attorney's motion for fees. (Pierce, M.; No. CA 09-770; 1-13-10; Marshall).

Nunnenman v. Estate of Grubbs, et al.: [**IRA-beneficiary**] The trial court found that the decedent's mother, the executrix of her son's will, was the beneficiary of his IRA, which named the appellant as the beneficiary. The court's decision was based upon a handwritten note the mother claimed she had

found in the decedent's Bible months after his death. The decedent had made and executed a will while in the hospital, six days before he died. The will did not mention the IRA. The decedent's IRA application and agreement included the method of changing the beneficiary of the IRA by revoking the one named and submitting a new beneficiary designation. That was not done here. The decedent's will named his mother the sole beneficiary of all of his estate and property. The IRA was not listed specifically. The court said the provision in the will leaving his property to his mother is unambiguous. However, assuming the note was authentic, it was not adequate to effect the change for which the mother argued. (Switzer, D.; No. CA 09-451; 1-27-10; Pittman).

JUVENILE

Dozier v. Arkansas Dept. of Human Servs.: [TPR] TPR affirmed where appellant argued that there was insufficient evidence to support termination. Appellant argued that he met all the terms of the case plan, but needed more time to develop skills necessary to parent and bond with his child. The appellate court held that what matters is whether completion of the plan achieved the intended result of making the parent capable of caring for the child.

The trial court specifically found that appellant received minimal benefit from services provided by DHS. In addition, his history of domestic violence, diagnosis of personality disorder and borderline functioning, his wife's paranoid schizophrenia, and two therapist's testimony was evidence that appellant was not capable of parenting his child. (Branton, W.; CA 09-790; 1-6-2010; Baker).

Haynes v. Arkansas Dept. of Human Servs.: [TPR] TPR reversed due to lack of evidence of child's adoptability. The record showed no consideration of the child's adoptability as part of the best interest analysis and no evidence was introduced at the hearing. The statute requires consideration and consideration requires evidence. (Johnson.; CA 09-744; 1-13-2010; Hart)

Banks v. Arkansas Dept. of Human Servs.: [TPR] TPR affirmed where appellant argued that there was insufficient evidence to support termination. Appellant first argued there was no evidence of potential harm in placing his child in his custody. The appellate court held that potential harm is one of many factors in the best interest analysis and that the court is not required to find that actual harm would result. Appellant's lack of stable home and failure to pay child support are contrary to the child's best interest. The appellate court also noted that the trial court could have also concluded that appellant's history of drug use, violence, and failure to sever ties with the child's mother, whose rights had been terminated, constituted a potential harm. Appellant also argued that there was insufficient evidence as to the grounds. Appellant's failure to pay child support, despite the apparent means to do so, is a ground to terminate. Appellant's failure to comply with court orders, "in particular maintain weekly contact with DHS and provide proof of income, demonstrate that factors arose during that case that evidenced his indifference or incapacity to rehabilitate his circumstances." Other evidence supportive of this ground also included failure to acquire appropriate housing, continued contact with the child's mother, and failure to produce evidence that appellant complied with the court's ordered counseling. (Zimmerman, S.; CA 09-958; 1-20-2010; Vaught)

A.I. v. State, [Transfer] Denial of juvenile transfer affirmed. Appellant was charged with aggravated robbery, felony kidnaping, felony fleeing, and criminal use of a prohibited weapon. Appellant argued that since he was requesting an EJJ designation the burden of proof was preponderance of the evidence, not clear and convincing evidence. The burden of proof at a transfer hearing is clear and convincing evidence. There is no EJJ designation, unless the case is already in juvenile division or is transferred from criminal to juvenile division. Appellant then argued that under either standard of proof the court erred in denying the transfer. The circuit court specifically addressed each of the statutorily required factors and made written findings and was not in error. The court made findings that there were rehabilitation facilities available. However, the court also found the alleged offense were serious and against persons not property; the alleged crimes were committed in an aggressive, willful and premeditated manner; that appellant evaded capture in a sophisticated manner and was slow to cooperate; appellant participated in planning the crime. Note: *J.S. v State*, 2009 Ark. App. 710 (2009) affirmed denial of transfer case of one of appellants co-defendants with same arguments before the appellate court. (Finch, J.; CA 09-211; 1-27-2010; Gruber).

EIGHTH CIRCUIT

PRM Energy Systems v. Kobe Steel, Ltd.: **[arbitration]** A nonsignatory defendant may compel a signatory plaintiff to arbitrate claims under a valid arbitration agreement where the relationship between the parties is based on the concerted misconduct of the defendant and a different signatory. Claims were within the scope of the arbitration agreement. (W.D. Ark.; # 08-1987; 1-8-10)

Brawner v. Allstate Indemnity Co.: **[insurance]** District court did not err in denying plaintiffs' post-trial motion for judgment as a matter of law as a reasonable jury could find that plaintiffs made material misrepresentations during the course of defendant's investigation of the loss. (E.D. Ark.; # 08-3544; 1-8-10)

McCoy v. Augusta Fiberglass Coatings: **[Torts]** District court did not err in declining to allow the jury to apportion a percentage of fault to a company not a party to the suit. Jury instructions concerning intervening events were not erroneous. Even if the district court erred in excluding an occupational therapist's report, defendant has failed to show how it was prejudiced by the error. (W.D. Ark.; No. 08-2818; 1-26-2010)

U. S. SUPREME COURT

Smith, Warden v. Spisak: **[mitigating factor/criminal jury instructions]** After the Ohio courts sentenced respondent Spisak to death, he eventually filed a federal habeas petition claiming that, at his trial's penalty phase, the instructions and verdict forms unconstitutionally required the jury to consider in mitigation only those factors that it unanimously found to be mitigating.

Held:

Because the state court's upholding of the mitigation jury instructions and forms was not "contrary to, or ... an unreasonable application of, clearly established Federal law," the Sixth Circuit was barred from reaching a contrary decision.

The Court of Appeals erred in holding that the instructions and forms contravened *Mills* in which this Court held that the jury instructions and verdict forms at issue violated the Constitution because, read naturally, they told the jury that it could not find a particular circumstance to be mitigating unless all 12 jurors agreed that the mitigating circumstance had been proved to exist. The instructions and forms used here differ significantly from those in *Mills*. They made clear that, to recommend a death sentence, the jury had to find unanimously that each of the aggravating factors outweighed any mitigating circumstances, but they did not say that the jury had to determine the existence of each individual mitigating factor unanimously. Nor did they say anything about how—or even whether—the jury should make individual determinations that each particular mitigating circumstance existed. They focused only on the overall question of balancing the aggravating and mitigating factors, and they repeatedly told the jury to consider all relevant evidence. Thus, the instructions and verdict forms did not clearly bring about, either through what they said or what they implied, the constitutional error in the *Mills* instructions. (# 08-724; 1-12-10)