

**AN OVERVIEW OF SIGNIFICANT FINDINGS FROM THE CAPITAL
JURY PROJECT AND OTHER EMPIRICAL STUDIES OF THE DEATH
PENALTY RELEVANT TO JURY SELECTION, PRESENTATION OF
EVIDENCE AND JURY INSTRUCTIONS IN CAPITAL CASES**

JOHN H. BLUME
CORNELL LAW SCHOOL
110 MYRON TAYLOR HALL
ITHACA, NY 14853-4901
(607) 255-1030
JOHN-BLUME@LAWSCHOOL.CORNELL.EDU
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Introduction

The Capital Jury Project Studies--and other less comprehensive empirical and mock juror studies--provide extraordinarily useful information for lawyers involved in capital litigation. In this memorandum, I will provide an overview of selected, significant empirical findings, and, in some instances, offer suggestions as to how these findings may be used by capital defense lawyers.

There is a temptation to ignore these studies, in part because some of the information contained in them is not encouraging or goes against the "conventional wisdom." I am convinced, however, that we are better off confronting the information, and making fresh assessments about appropriate responses. This is not to say that there aren't methodological problems with some of these studies, nor is it to deny that any individual study fail to capture the complexity of capital litigation. But there is valuable information here, particularly about what can go wrong, and what can be done to avoid some well-established pitfalls. I hope that this memorandum will facilitate the discussion and implementation of creative strategies leading to more effective representation of both clients facing the death penalty and those who have been sentenced to death. Additionally, if you have ideas for empirical research projects in your state that may be of interest to the Cornell Death Penalty Project, please do not hesitate to contact me.

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Summary of Studies

I. JURY SELECTION

Meaningful voir dire is absolutely essential to a capital defendant's ability to obtain a fair trial. If, as a last resort (since all cases should be negotiated if at all possible) a case proceeds to trial, it will often be won or lost during jury selection. The cold, hard facts are that a substantial number of jurors who actually serve in capital cases are not qualified under existing law either because (1) they will automatically vote for death if the defendant is found guilty of murder (ADP jurors); (2) once the defendant is convicted of murder these jurors will shift the burden to the defendant to prove that the death penalty is not the appropriate punishment (burden shifters); or because (3) they can not (or will not) consider particular types of mitigating evidence (mitigation impaired jurors). It does not, however, appear that significant numbers of *Witherspoon*-excludables actually sit on capital juries. Moreover, the voir dire process itself adds to the problem as it implies to many jurors that death is the appropriate verdict. Race and religion also matter. Black jurors are less likely to vote for the death penalty than are white jurors, and white fundamentalist jurors are most likely to vote for the death penalty. Additionally, many juror's attitudes are impervious to evidence or information; in other words, their views about the death penalty are fixed. Thus it is critical that counsel determine B during voir dire B what those views are.

A. Many Jurors Believe the Death Penalty is Mandatory for Murder

1. John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the Capital Jury Project*, Chapter 5 in BEYOND REPAIR? AMERICA'S DEATH PENALTY, Duke University Press, 144-77 (2003).
 - 14% of South Carolina jurors who actually sat in capital cases believed that the death penalty was the only acceptable punishment for any murder. 70% of South Carolina jurors who actually sat in capital cases believed that the death penalty was the only acceptable punishment for someone previously convicted of murder. 57 % believed the death penalty was the only acceptable punishment for a planned, premeditated murder. 48 % believed the death penalty was the only acceptable punishment for killing a police officer or prison guard. 22 % believed the death penalty was the only acceptable punishment when an outsider to the community kills an admired and respected member of the community. 23 % believed the death penalty was the only acceptable punishment for a killing that takes place during the commission of another crime. *Id.* at 151-52.
2. Theodore Eisenberg, Stephen Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 279 (2001).
 - We also find evidence that juror's with strong dispositions towards death sentences, so strong as to probably disqualify many of them

from capital case jury service, regularly sit on juries.

3. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 38 (2000).
 - A substantial percentage of jurors believed the death penalty is the only appropriate punishment for convicted murderers.
4. William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosing Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L.REV. 1476, 1504 (1998).
 - Astonishingly, more than half of the jurors said that they personally felt death is the only appropriate punishment for repeat murder, premeditated murder and multiple murder. Nearly half believed that the death penalty was the only acceptable punishment for the killing of a police officer or prison guard, or for murder by a drug dealer. Almost a quarter of the jurors said that death is the only acceptable punishment when an outsider kills an admired and respected member of the community, for a killing that occurs during the commission of another crime, and for a rape with permanent injury to the victim.
5. Ronald C. Dillehay & Marla R. Sandys, *Life under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 LAW & HUM. BEHAV. 147 (1996).
 - As many as 30% of persons who serve as capital jurors may not be qualified for such service because they would automatically vote for death.
6. Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 188-89 (1992).
 - The more certain the jurors are that the killing was intentional, the more willing they are to render a death sentence.
7. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM. J. CRIM. L.1, 40 (1989).
 - A significant number of jurors in death penalty cases believed that the death penalty was mandatory or presumed for first degree murder.

B. Many jurors believe the death penalty is mandatory if they perceive the murder to have been “vicious” or “heinous,” or if they believe the defendant poses future danger.

1. John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the*

Capital Jury Project, Chapter 5 in BEYOND REPAIR? AMERICA'S DEATH PENALTY, Duke University Press, 144 -77 (2003).

- 32% of jurors believed that the law required them to impose the death penalty if they believed the defendant would be dangerous in the future and 41% believed that they would be required by law to impose death if they believed the evidence proved the defendant's conduct was heinous, vile or depraved.
2. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do jurors think?* 98 COLUM. L. REV. 1538, 1542 (1998).
 - Many jurors wrongly think they must return a death sentence if they find the defendant's crime was especially heinous, or the defendant is especially likely to present a risk of future danger. Furthermore, jurors who sat on death sentences tended to be less moved by aggravating and mitigating circumstances across the board.
 3. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996).
 - "Nearly one-third of the jurors were under the mistaken impression that the law required a death sentence if they found heinousness or dangerousness, a result replicated in the multi-state study of the interview data." *Id.* at 360.
 4. William S. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L. J. 1043, 1091, n. 32 (1995).
 - Many jurors believe that the death penalty is mandatory if the crime is heinous or vicious.
 5. Constanzo & Constanzo, *Life or Death Decisions: An analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151, 154 (1994).
 - These findings are confirmed by pre-Jury Project studies which reveal that "death sentences are strongly correlated with the heinousness of the murder."

C. Many jurors presume that a guilty verdict mandates the death penalty.

1. William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosing Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L. REV. 1476, 1497-98 (1998).
 - There appears to be a presumption that clear unequivocal proof of guilt justifies the death penalty. A number of early pro-death jurors declare that the law or their own personal views required

them to impose death. Unquestionable guilt suffices. A few sample responses make this point:

- “When I knew in my heart he was guilty. . .as I knew he was guilty, I knew he should get death.” (FL juror).
- “We found him guilty, and I again believed in the death sentence, believe in it so in my mind I knew what my vote would be.” (KY juror)
- “After the jury voted guilty. The weight of the fact that all twelve individuals believed the defendant to be guilty, made me lean toward death.” (CA juror)
- “We knew if we voted capital, then he would be put to death.” (AL juror)

2. Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1992).

- There is a “presumption of death.” *Id.* at 12. “[Our] data suggest that the sentencing phase of a capital trial commences with a substantial bias in favor of death . . . This is not in and of itself an indictment of the death trial phase. But the tilt towards death suggests that a defendant with a confused jury may receive the death sentence by default, without having a chance to benefit from the legal standards deigned to give him a chance for life.” *Id.* at 38, n.12.
- “Indecision tends to be resolved in favor of death. When jurors report pre-deliberation indecision about either guilt or sentence, the undecided jurors tend to vote for death.” *Id.* at 12. “[T]here is less holdout activity by those favoring life in death cases. These findings confirm that, in capital sentencing deliberation, death is the norm.” *Id.* at 13.
- “[A] defendant on trial for his life at the punishment phases has one foot in the grave. The defendant needs affirmative action by jurors to pluck him from the crypt, action that is likely to annoy other jurors, at least initially.” *Id.* at 14.

3. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM.J.CRIM. L. 1 (1989).

- In the cases in which the jury recommended death, over half of the jurors believed that “death was to be the punishment for first degree murder, or at least that death was to be presumed appropriate unless defendant could persuade the jury otherwise.” *Id.* at 41.

D. Many potential jurors understand the voir dire process to imply that the law actually requires a death verdict.

1. Williams J. Bowers, *Still Singularly Agonizing: Laws Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM L. BULL. 51, 61 (2003).
 - One researcher argues that hearing all those questions about the death penalty, and seeing the dismissal from service of other potential jurors who express grave doubts, seems to send the message that the judge and the lawyers - the authority figures in the courtroom - think this defendant is guilty and deserves death. He emphasizes that this is especially problematic because jury selection occurs at the very beginning of the process and thus creates a powerful first impression.
2. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1482 (1997).
 - When jurors are repeatedly asked whether they can "follow the law" and impose the death penalty, they begin to believe that the law actually requires them to reach death verdicts. Death qualification becomes a kind of "obedience drill" in which jurors feel they are voluntarily relinquishing the power to deviate from the outcome the law seems to favor. The personal characteristics of many death qualified jurors render them especially receptive to arguments that they must follow the implicit promise made to the court.

E. Preformed beliefs based on faith and racism matter. A major factor leading to a life sentence is the jurors pre-trial "scruples" about the death penalty. Conversely, jurors' pre-trial support of the death penalty means the jurors are much more likely to in fact vote for the death penalty at trial.

1. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification* 59 CASE W. RES. L. REV. 87 (2008-2009).
 - "African-Americans as a class may be disproportionately excluded from jury service by virtue of the group's disproportionate view of the inappropriateness of capital punishment. Moreover, researchers categorize jurors in capital cases as 'demographically unique' in that they tend to be both white and male. This disproportionate exclusion of blacks appears to have a significant impact on the outcome of capital cases." *Id.* At 122.
2. Theodore Eisenberg, Stephen Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 307 (2001).
 - Often it is jurors' attitudes about capital punishment that determine the reasons they do (or do not) support the death penalty. For many Americans, a position on capital punishment is an aspect of self-identification.

3. Theodore Eisenberg, Stephen Garvey & Martin Wells, *The Deadly Paradox of Capital Jurors*, 74 S.CAL.L.REV.371 (2001).
 - Support for the death penalty tends to be symbolic or ideological. That is it tends to be relatively immune to evidence and argument that run contrary to a respondent's initial position. *Id.* at 377-78.

4. John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the Capital Jury Project*, Chapter 5 in *ABEYOND REPAIR? AMERICA'S DEATH PENALTY*, Duke University Press, 144-77 (2003).
 - The more strongly a juror believed death was the only acceptable punishment for defendants convicted of murder, the more likely she was to cast her first vote for death. *Id.* at 169.

5. Samuel Gross, *Update: American Public Opinion on the Death Penalty - It's Getting Personal*, 83 CORNELL L.REV.1448, 1472 (1998).
 - "Death Penalty Attitudes are about killing. Most Americans favor the death penalty because they feel that killing is wrong; their favorite explanation is 'a life for a life.' A minority oppose the death penalty because they believe that killing by the state is wrong. . . ."

6. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative factors in Ten Florida Death Penalty Trials*, 15 AM. J.CRIM. L. 1 (1989).
 - The other major factor explaining jury decisions for life was "scruples about application of the death penalty." *65 percent of the jurors in life cases* named it as a substantial determinant. *Id.* at 34.

7. Williams J. Bowers, *Still Singularly Agonizing: Laws Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51,62-64 (2003).
 - Evidence of over-exclusion comes from mock jury studies that show some potential jurors are excluded from capital juries because they initially express opposition to the death penalty in the abstract, even though they indicate that they would actually impose death in some cases when subsequently given specific hypothetical crime scenarios.
 - The CJP indicates further that the jury qualification process itself creates a bias toward death. Not only does jury selection over-exclude and under-exclude, thus leaving a jury that is disproportionately pro-conviction and pro-punishment owing to faults in the filtering process, as discussed previously, but there also is evidence that the questioning during voir dire itself prejudices jurors toward finding the defendant guilty and imposing a death sentence.

8. Dennis J. Devine, et al, *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. OF EMPIRICAL LEGAL STUDIES, 273-303 (2007).
 - The foreperson's initial verdict stance (i.e., pro-acquittal, undecided, pro-conviction) was very strongly related to jury verdicts, with convictions considerably more likely for all three of the most serious charges when the foreperson initially favored "guilt."
 - Juries were still much more likely to convict when the foreperson initially favored guilt, and much less likely when a clear pro-acquittal faction leader emerged during deliberation.

9. Jamie L. Flexon, *Cognitive predisposition to Prejudice and Discrimination on Capital Juries: Can Race be Ignored in the Jury Room?*, 67 DISSERTATION ABSTRACTS INTERNATIONAL, A: THE HUMANITIES AND SOCIAL SCIENCES 2329 (2006).
 - There is a correlation between holding racially biased beliefs and supporting capital punishment.

F. A juror's race, religion and sex matter a lot. A juror's age may matter, but to a much lesser extent.

1. Theodore Eisenberg, Stephen Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277, 286 (2001).
 - Nearly two-thirds of white jurors vote for death on the first vote, compared to about one third of black jurors. 80% of Southern Baptist Jurors vote for death on the first vote compared to about 50 % of other jurors. . . . Non-Southern Baptists are four times more likely to cast a first vote for life than are Southern Baptists. By the final vote, however, a juror's race or religion has much less predictive power, because the pressure of the majority overwhelms these factors.

2. Theodore Eisenberg, Stephen Garvey & Martin Wells, *The Deadly Paradox of Capital Jurors*, 74 SO.CAL.L. REV. 371 (2001).
 - In all statistical models, black jurors are significantly more likely to oppose the death penalty than are white jurors. *Id.* at 385.

3. William Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST.L. 171 (2001).
 - There is a clear "white male effect" in capital sentencing in cases with black defendants and white victims. The presence of 5 or more white males on the jury dramatically increased the likelihood

- of a death sentence. *Id.* at 192.
- The presence of black male jurors in the same cases, by contrast, substantially reduced the likelihood of a death sentence. *Id.* 193.
 - White male jurors are more likely to believe that a black defendant is dangerous and not remorseful, and are the least likely to be able to identify with the defendant in a black defendant/white victim case. Black male jurors, on the other hand, are most likely to believe the defendant is not dangerous, is sorry, and best able to identify with the defendant. In black victim cases, it flips around. *Id.* at 212-222.
4. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).
 - "First, white jurors were more likely than black jurors to have felt anger toward the defendant. Second, white jurors were less likely than black juror to have imagined being in the defendant's situation. Third, white jurors were less likely than black jurors to have found the defendant likeable as a person." *Id.* at 46. Black jurors on the other hand appeared more willing to separate the sin from the sinner. *Id.* at 47.
 5. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW & HUM. BEHAV. 337 (2000).
 - This mock juror study found that white jurors were more likely to impose the death penalty on a black defendant than a white defendant. *Id.* at 349.
 6. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV.L.REV. 1261 (2000).
 - Juror ethnicity influences juror's perceptions of guilt-or-innocence. White jurors are more likely to believe that minority defendants were the aggressor in arguable self-defense situations, that minority defendants are lying and that they are guilty of the charged offense. This results in a higher rate of conviction. *Id.* at 1292. The presence of minority jurors on juries, on the other hand, can assist in translating the "cultural meaning of acts and words" which otherwise would work to the defendant's detriment. *Id.* at 1285.
 7. Theodore Eisenberg, Stephen Garvey & Martin Wells, *The Deadly Paradox of Capital Jurors*, 74 SO.CA.L.REV. 371 (2001).
 - Older jurors continue to be more sure of the death penalty's appropriateness as compared to their younger counterparts. *Id.* at 383.

8. William J. Bowers, Thomas W. Brewer, & Marla Sandy, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L.REV.1497, 1531-32 (2004).
 - Statistical evidence reveals that white male jurors were far more likely than African-American male jurors to think of the African-American defendant as dangerous to others and far less apt than their black counterparts to see the defendant as sorry for what he did. White women were much less likely than black women to acknowledge the defendant's emotional disturbance. Concerning the tendency to identify with the defendant, African-American male jurors were significantly more likely than others to imagine themselves in the situation of the defendant's family, to imagine themselves as a member of the defendant's family, to be reminded of someone by the defendant, and less likely than others to see the defendant's family as different from their own. And, evidence shows that white jurors of both genders are much less receptive to arguments and evidence of mitigation than African-American jurors who served on the same black-defendant/white-victim cases.

9. William J Bowers, Benjamin D. Steiner, & Michael E. Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or legal Fiction*, Chapter 14 in AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION (2nd Ed.), Durham, NC: Carolina Academic Press, 413-67 (2003).
 - Race is the greatest influence in capital sentencing where there is a black defendant and a white victim. *Id.* at 459.
 - At the guilt phase, whites were three times more likely than blacks to take a pro death stand on punishment. *Id.* at 451.
 - Black jurors were far more likely than their white counterparts to have lingering doubts about the defendant's guilt when making their punishment decisions. *Id.* at 451.
 - Black jurors were much more likely than their white counterparts in black/white cases to see the defendant as remorseful. *Id.* at 451.
 - White jurors were more likely than their black counterparts to see the defendant in black on white cases as dangerous and to regard his dangerous as a reason for the death penalty. *Id.* at 451-452.
 - Both black and white jurors in these cases reported that a great deal of discussion during punishment deliberations focused on the defendant's likely dangerousness. But white jurors believe that in the absence of a death sentence, such defendants will usually be back on the streets far sooner than do black jurors. *Id.* at 452.
 - Black males were the most likely, and white males were the least likely, to have lingering doubts about the defendant's guilt, chiefly about the extent the defendant's involvement in or responsibility

- for the crime. *Id.* at 452.
- Black males were the most likely, and white males the least likely, to see the defendant as remorseful, and to identify with the defendant's family's situation. *Id.* at 452.
 - The death penalty is more than twice as likely for the defendant in a black defendant/white victim case who draws five or more white male jurors as for a defendant who draws fewer than five. A life sentence is almost twice as likely for the defendant who draws a black male juror than for the one who fails to do so. *Id.* at 458.
10. John Blume, Sheri Johnson & Brian Threlkeld, *Probing Life Qualification Through Effective Voir Dire*, 29 HOFSTRA L. REV. 1209, 1248 (2001).
- Many jurors believe that prison life is easy because prisoners have televisions, free meals and do not have to work for a living. This impairs their ability to view a life sentence as the appropriate punishment for murder.
11. Benjamin Steiner, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenant of Early Release in a Culture of Mistrust and Punitiveness*, 33 Law & Soc'y Rev. 461, 464 (1999).
- A myth of crime and punishment exists according to which many people view the criminal justice system as excessively lenient, and for that reason, is itself the cause of crime.
12. Crystal Beckham et Al, *Jurors' Locus of Control and Defendants' Attractiveness in Death Penalty Sentencing*, 147 Journal of Social Psychology 285 (2007).
- "Men of all ages, with the exception of the youngest men (those approximately 20–30 years old), were more likely to choose the death penalty than were women. Approximately 49.1% and 65.1% of men and women, respectively, chose the death penalty. . . . Younger and older men (those approximately 20–40 years old, and 70+ years old, respectively) were less likely to choose the death penalty than were men approximately 40–60 years old. Young women in the age range of early 20s to late 30s were more likely to sentence the defendants to death than were older women. As age increased after 40 years, the probability of a woman choosing the death penalty gradually decreased."
13. John K. Cochran and Mitchell B. Chamlin, *The Enduring Racial Divide in Death Penalty*, 34 JOURNAL OF CRIMINAL JUSTICE 85 (2006).
- "Whites consistently reported higher levels of support for capital punishment than did Blacks. Moreover, while levels of support among both Blacks and Whites had gradually risen over time, the gap in death penalty support between Blacks and Whites remained

relatively even, suggesting parallel trend lines. These parallel trends, in turn, supported the claim that Black and White levels of death penalty support might be responding equally to the same influences.”

14. Monica Robbers, *Tough-Mindedness and Fair Play: Personality Traits as Predictors of Attitudes toward the Death Penalty-an Exploratory Gendered Study*, 8 PUNISHMENT & SOCIETY 203 (2006).

- Extroversion has a positive effect on attitudes toward the death penalty, indicating that more outgoing people are more likely to be pro-death penalty.
- There is a positive, though weak, relationship between conscientiousness and attitudes toward the death penalty. In examining the items that make up this variable, conscientiousness is characterized by dutifulness and paying attention to detail. In the criminal justice realm, this may translate to focusing on facts and focusing on legal issues in sentencing hearings, rather than emotions.
- The other two personality traits – openness and agreeableness – are significant predictors of unfavorable attitudes toward the death penalty. Agreeableness and conscientiousness are more important for females in predicting attitudes toward the death penalty than they are for males.
- Older males were less likely to support the death penalty. Religious salience was also associated with less support for the death penalty among males, suggesting that a belief in a consistent life ethic may be in play among this group.

15. James Unnever & Francis T. Cullen, *Reassessing the Racial Divide in Support for Capital Punishment: The Continuing Significance of Race*, 44 JOURNAL OF RESEARCH IN CRIME & DELINQUENCY 124 (2007)

- African Americans were significantly more likely to oppose the death penalty than Whites. Respondents with more years of education, who resided in the central city, and often attended church were significantly less likely to support the death penalty, and males and Americans who feared being victimized were significantly more likely to support the death penalty.
- Respondent’s social class, as measured by his or her income, was related to support for the death penalty. Respondents with higher incomes were more likely to support capital punishment. Race had a greater influence on support for the death penalty than class. Indeed, race was the most robust predictor of support for capital punishment.
- Political conservatives and people who fear being victimized were significantly more likely to support the death penalty, and respondents with more years of education and those who attended

church often were significantly less likely to support the death penalty.

G. The race and gender of jurors impact jurors' receptivity to mitigation.

1. Thomas W. Brewer, Race and Jurors' Receptivity to Mitigation in Capital Cases: The Effect of Jurors', Defendants', and Victims' Race in Combination, 28 LAW & HUM. BEHAV. 529 (2004).
 - "Female jurors were consistently more receptive to mitigation than their male counterpart on the jury." *Id.* at 539.
 - "Black jurors are significantly more receptive to mitigation than their white counterparts and more receptive overall." *Id.* at 539.
 - "All jurors were significantly more receptive in [b]lack victim cases." *Id.* at 540.
 - "Both [b]lack and [w]hite jurors are more receptive to mitigation in cases where a same-race defendant is charged with killing an other-race victim." *Id.* at 540.

H. Age and gender has an effect on a juror's willingness to select the death penalty.

1. Crystal M. Beckham, Beverly J. Spray & Christina A. Pietz, Jurors' Locus of Control and Defendants' Attractiveness in Death Penalty Sentencing, 147 J. SOC. PSYCHOL. 285 (2007).
 - "Men, with the exception of the youngest men, were more likely than women to choose the death penalty. Additionally, young women were more likely than older women to select the death penalty." *Id.* at 285.

I. Pretrial publicity has an impact on potential jurors.

1. Brooke Butler, *The Role of Death Qualification in Jurors' Susceptibility to Pretrial Publicity*, 37 J. APPLIED SOC. PSYCHOL. 115 (2007).
 - "[D]eath-qualified participants were better able to correctly identify the defendant, recognize most of the factual details of the case, think that the defendant was guilty, and recommend the death penalty." *Id.* at 115.
2. Christine Ruva, Cathy McEvoy & Judith Becker Bryant, *Effects of Pre-Trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors*, 21 APPLIED COGNITIVE PSYCHOL. 45 (2007).
 - "[J]urors in the exposed PTP conditions were significantly more likely to vote guilty than jurors in the non-exposed conditions." *Id.* at 53.

- “[J]urors in the exposed conditions who found the defendant guilty gave significantly longer sentences than did non-exposed jurors who found the defendant guilty.” *Id.* at 53.
- Pre-trial publicity “had a significant effect on verdicts with jurors in the exposed conditions being significantly more likely to find the defendant guilty than jurors in the non-exposed conditions.” *Id.* at 55.
- “[J]urors in the exposed conditions were significantly more likely than jurors in the non-exposed conditions to attribute information presented only in the PTP to either the trial or both the trial and the pre-trial publicity.” *Id.* at 56.
- “Jurors in the non-exposed conditions accurately identified significantly more of the trial items as coming from the trial than did the exposed jurors.” *Id.* at 56.
- “[J]urors exposed to pre-trial publicity perceived the defendant as less credible than jurors in the non-exposed conditions. There was also a significant effect of collaboration on perceived credibility of the defendant, with nominal jurors perceiving the defendant as more credible than did collaborating jurors.” *Id.* at 57.

J. Race, education level, political affiliation, and religious beliefs affect potential jurors’ attitudes towards criminal punishment.

1. Christopher Bader & Byron Johnson, *Divine Justice: How Images of God Impact Attitudes towards Criminal Punishment*, Conference Papers, American Society of Criminology, 2007 Annual Meeting.
 - “White respondents are more likely to advocate the harsher treatment of criminals than non-whites. Those with higher education are more lenient on criminals, while the married and Southerners are more punitive.”
 - “Political affiliation is a significant predictor of punitive attitudes, with Republicans more likely to support harsher treatment of criminals. Those who trust in the police are also more likely to advocate for harsher treatment, but higher levels of trust of other races was significantly and negatively related.”
 - “[T]here is some evidence that Evangelicals are more punitive with regards to criminal punishment. Mainline Protestants, Jews, those of other religions and those with no religion were all significantly less supportive of the harsher treatment of criminals than Evangelicals. Catholics and Black Protestants, however, were not significantly different from Evangelicals.”
 - “Those who attend church with greater frequency are less supportive of the harsher treatment of criminals but those who view the Bible in more literal terms are significantly more punitive.”

- “[H]aving a judgmental and/or angry view of God are significant predictors of holding more punitive attitudes regarding criminal punishment. In fact, an angry image of God is one of the strongest effects in the model, far surpassing the effects of all other religion measures except attendance.”
 - “Older people and non-whites were significantly less supportive of capital punishment.”
2. Monica K. Miller & R. David Hayward, *Religious Characteristics and the Death Penalty*, 32 LAW & HUM. BEHAV. 113 (2008).
- “Men were more likely than women to favor the death penalty, while age and race were not related to death penalty attitudes.” *Id.* at 117.
 - “Those who favor the death penalty were more likely to believe that the Bible represents the literal word of God, while doubters’ attitudes toward the death penalty were more strongly rooted in their religious beliefs. There were no significant differences between the groups in terms of how forgiving and merciful they perceived God to be toward criminals. However, those who favor the death penalty agreed more that God supports and requires the death penalty for murderers.” *Id.* at 117.
 - “Results indicate that significant predictors of favoring the death penalty include being Protestant, higher fundamentalism scores, literal interpretism, and the beliefs that God supports, or requires the death penalty for murderers. Significant predictors of doubt about the death penalty include being [f]emale, higher evangelism scores, and the extent to which one’s opinion about the death penalty is based on religion.” *Id.* at 118.

K. The racial composition of the jury impacts jurors’ interaction with each other and the deliberation process.

1. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).
- “Deliberation analyses supported the prediction that diverse groups would exchange a wider range of information than all-White groups. This finding was not wholly attributable to the performance of Black participants, as Whites cited more case facts, made fewer errors, and were more amenable to discussion of racism when in diverse versus all-White groups. Even before discussion, Whites in diverse groups were more lenient toward the Black defendant, demonstrating that the effects of diversity do not occur solely through information exchange. The influence of jury selection questions extended previous findings that blatant racial issues at trial increase leniency toward a Black defendant.” *Id.* at 597.

What can we make of these findings? The take home message is simple: whether a client is ultimately sentenced to life or death is frequently determined during voir dire. The attitudes people bring with them to court play a critical role in the sentencing decision, both for life and for death. More significantly, while prosecutors *are* identifying *Witherspoon*-excludables, capital defense attorneys are not identifying and eliminating ADP jurors, burden shifting jurors or mitigation impaired jurors. Somewhere from 30 to 50% of the jurors who actually sit in capital cases are not qualified to serve under the *Wainwright v. Witt*, 469 U.S. 412 (1985) because their views on capital punishment impair their ability to follow the law in one or more ways. These include the juror who will always vote for the death penalty if the defendant is found guilty of an intentional murder; the juror who will require the defendant to prove why he should be sentenced to life imprisonment rather than the death penalty ; and the juror who will not give meaningful consideration to evidence the Supreme Court has declared is mitigating in fact, e.g., child abuse, mental illness or intoxication. This, in turn, means that much more attention must be devoted to teaching defense lawyers effective voir dire techniques; to "strip away" the boilerplate answers most jurors give to questions about the death penalty, create a common language and thus probe potential jurors' true feelings about the death penalty. And, based upon this data, defense counsel should question jurors under the assumption that the juror will vote for death. Counsel should require the juror to prove to counsel's satisfaction that the juror can in fact legitimately consider voting for life, rather than assuming from the juror's occupation, educational level or other personal characteristics that he will be sympathetic. By learning and further developing effective voir dire techniques, more "killer" jurors can be identified. They are certainly out there. Furthermore, trial counsel should use these findings to challenge limitations on voir dire. Many jurors who say they can "follow the law" are in truth ADP jurors, and, unfortunately, the voir dire process itself often contributes to this perception. These studies should be aggressively used to fight for meaningful voir dire. The voir dire currently utilized in many jurisdictions is clearly not adequate to identify legally unqualified jurors. For a more detailed discussion of strategies for ensuring a properly constituted jury *see*, John Blume, Sheri Johnson & Brian Threlkeld, *Probing Life Qualification Through Effective Voir Dire*, 29 Hofstra Law Review 1209 (2001).

The fact that race and gender seem to matter does not detract from the need to probe individual black and female jurors' attitudes about the death penalty. What it does counsel is vigorous assertion of *Batson* claims, backed up by data on the racial and gender breakdown of the prosecutor's strikes in other cases. And this is true in white defendant cases as well as black defendant cases. What we also have to think about is how to hold on to those minority black and female jurors who initially vote for life, but whom we lose during the deliberating process to the majority. Similarly, the fact being a Southern Baptist strongly predicts an initial vote for death does not mean that individual voir dire of such jurors is unnecessary (particularly where you have lots of them), but it is worth remembering that the Supreme Court has not held that religiously motivated strikes violate the constitution.

II. PRESENTATION OF EVIDENCE

Issues surrounding juror's perceived viciousness of the crime, the defendant's future dangerousness, lack of remorse, acceptance of responsibility, etc. dominate both capital juries' deliberations and individual juror's decisions. Furthermore, juror's perceptions of what is

aggravating and what is mitigating are, at times, at odds with conventional legal definitions of aggravation and mitigation. However, it is clear that mitigation resonates with a significant number of jurors, and mitigation is a powerful tool because it provides those jurors who are for life, or leaning towards life, with ammunition to combat the arguments of the ADP or presumptive death jurors. Finally, counsel should be aware of the fact that jurors often make their decisions about punishment during the guilt-or-innocence phase of the proceedings.

A. One of the most important factor leading to a death sentence is the jurors perceived viciousness of the crime, i.e., the manner of the killing. In making that determination, photographs and other visual exhibits play an important role.

1. William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L.REV.1476, 1498 (1998).
 - Many of the jurors' accounts stress the influential role of photographs and video or audio tapes as critical to their decision making for death at the guilt-or-innocence phase of the proceedings.
2. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials*, 15 AM. J.CRIM. L.1 (1989).
 - "The most often recurring explanation for the death recommendation was the manner of the killing." *Id.* at 46. 64% listed it as a substantial explanatory factor. In this regard, the photos of the bodies and the scene etc. play a very important role: "We found the impact of photographs to be a significant component in attributing a recommendation to the manner of the killing." *Id.* at 49. Most of the jurors who were in the presumptive death category are the ones who attributed the verdict to the manner of the killing. *Id.* at 50.

B. Jurors are always evaluating a defendant's potential for future violence. Evidence of future dangerousness is highly aggravating. Racial considerations also effect the future dangerousness inquiry

1. John M Scheb II & Kristina A. Wagers, *Racial Discrimination in the Death Penalty in Tennessee: An Empirical Assessment* 5 TENN. J. L. & POL'Y 9, 17 (2008-2009).
 - "Three or more felony convictions greatly increase the chances of a defendant receiving a death sentence. This is influenced more by jury behavior as opposed to prosecutorial decision making. When the prosecution sought the death penalty against

the individuals with no prior criminal history, juries were least likely to sentence such defendants to death.” *Id.* At 24.

2. Mark D. Cunningham, Jon R. Sorensen & Thomas J. Reidy, *Capital Jury Decision-Making: Limitations of Predictions of Future Violence* 15 PSYCH., PUB. POL’Y AND L. 223 (2009).
 - Jury anticipation of future violence by a capital defendant played a role in a substantial proportion of the 1158 executions carried out in the United States between 1976 and April 2009. Such determination was made in all 436 executions carried out by Texas, was the sole aggravating factor in 24 of Virginia's 103 executions, was one of the aggravating factors in 50 others and was an aggravating factor in 65 of 89 of the cases ending in execution in Oklahoma. These three jurisdictions lead the nation in executions during the modern era, accounting for about half of the post-*Furman* executions in the United States.
 - In a study of the predictive accuracy of violence risk determinations made by capital juries for the future violence of federal capital offenders, death verdicts occurred in over 80% of the federal cases where the jury found that future prison violence was likely. Scientific findings, however, demonstrate very low rates of serious prison violence among capital offenders. Thus, a disturbing intersection results: Capital verdicts are substantially shaped by juror determinations that future serious violence in prison is likely when violence predictions of capital juries have very high rates of error.
3. Meghan Shapiro, *An Overdose of Dangerousness: How “Future Dangerousness” catches the Least Culpable Capital Defendants and Undermines the Rationale for the executions it Supports* 35 AM. J. CRIM. L. 145 (2008).
 - “Future dangerousness can have the effect of shifting jurors’ attention entirely away from a measured culpability judgment, displacing two traditional and essential components of capital sentencing: aggravation and mitigation. This is problematic because it may cause a jury to ignore weaknesses in the state’s case for culpability based death-worthiness and because it may divert a juror’s attention away from thorough consideration of culpability-based aggravation that might legitimately support a death sentence under a retributive rationale.” *Id.* 168-9.
 - Based on large scale data collection of the behavior of various categories of prison inmates, risk assessment reports experts report that “the estimated likelihood of violence being committed by a newly received capital murderer over the next 40 years is 16.4% and the probability that a capital murderer will kill over a period of 40 years is 2%.” By contrast, one study indicates that capital jurors believe that an 85% likelihood exists that a capital

- defendant will exhibit violence, and a 50% likelihood that he or she will commit homicide while in prison.
- Prison violence rates reveal capital murderers to be among the most docile and trustworthy of inmates in the institution.
4. John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L.REV. 397 (2001).
 - Future dangerousness is on the minds of most jurors in most cases. This is true regardless of whether the prosecutor argues future dangerousness explicitly. *Id.* at 398.
 5. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 COLUM. L. REV.1538, 1559 (1998).
 - Future dangerousness is highly aggravating. Over half of the jurors interviewed said they were more likely to impose the death sentence if the defendant had a history of violent crime, with almost 30% being much more likely to do so. 60% were more likely to vote for death if they believed that the defendant might be dangerous in the future.
 6. Constanzo & Constanzo, *Life or Death Decision: An analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework,* 18 Law & Hum. Behav. 151, 154 (1992).
 - "[N]early all [Oregon] jurors also offered the observation that the penalty decision hinged on the issue of whether the defendant will pose a continuing threat to society." *Id.* at 160.
 7. Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase,* 16 Law and Hum.Behav. 185 (1992).
 - Many early studies on mock and real jurors indicate that a death sentence is most likely when the defendant was tried by a highly competent prosecutor, believed to present a danger to society, and perceived as choosing to murder. The more certain the jurors are that he killing was intentional, the more willing they are to render a death sentence. *Id.* at 188-89.
 8. Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases,* 79 CORNELL L. REV. 1 (1992).
 - "[O]ver three-quarters of the jurors believe that the evidence in their case established that the defendant would be dangerous in the future. And the more the jurors agree on this fact, the more likely they are to impose a death sentence." *Id.* at 7.
 - "Not surprisingly, jurors assessing dangerousness attach great weight to the defendant's expected sentence if a death sentence is not imposed. Most importantly, jurors who believe the alternative to death is a relatively short time in prison tend to sentence to

death. Jurors who believe the alternative is longer tend to sentence to life.” *Id.* at 7...Jurors who sentence to death believe the alternative actual time in jail will be shorter than jurors who sentence to life. *Id.* at 9.

9. Kim Taylor Thompson, *Empty Votes in Deliberations*, 113 HARV. L. REV. 1261 (2001).
 - Citing studies that demonstrate that juror perceptions of aggressiveness, dangerousness, etc., are effected by racial considerations.
10. James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L.REV. 5 (1989).
 - Even though almost 70% of the commuted capital murderers and rapists committed no acts of serious institutional violence during the 15 years of follow up in the general prison setting, juries greatly overestimated levels of future violence and found that only a small percentage of convicted capital offenders do not pose a future threat.

C. As a corollary matter, how long a juror thinks an individual sentenced to life imprisonment will actually serve is directly relevant to whether the juror votes for death.

1. William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999).
 - “Capital Jurors greatly underestimate the period of incarceration...in every state most jurors think offenders will be out of prison even before they become legally eligible for parole.” *Id.* At 32. Furthermore, jurors thinking about the alternatives comes to the fore early in the sentencing deliberations especially among undecided jurors. *Id.* at 45. Undecided jurors are the most affected by their perceptions of what the alternatives to the death penalty is, and they tend to be pushed towards death.
 - “It is how soon jurors erroneously think such offenders usually return society, not simply whether they will be released, that matters.” *Id.* at 52. And this is true regardless of whether dangerousness is “formally” an issue. *Id.* at 55.
2. Austin Sarat, *Violence, Representation and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.REV. 1109, 1133 (1995).
 - Jurors sometimes vote for death not because they think the person will actually be executed but because, as one juror stated, “we all pretty much knew that when your vote for death you don’t

necessarily or even usually get death. Ninety-nine percent of the time they time they don't put you to death. You sit on death row and get old."

3. Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided ore MisGuided?*, 70 IND. L. J. 1161 (1995).
 - "The jurors we interviewed who had sentenced a defendant to death had a strong belief that defendants who have murdered and are not sentenced to death spend relatively short time in prison." Three-fourths of those who sentenced to death believed that the defendant would spend less than 20 years in prison. *Id.* at 1178.
4. Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1992).
 - "Not surprisingly, jurors assessing dangerousness attach great weight to the defendant's expected sentence if a death sentence is not imposed. Most importantly, jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death. Jurors who believe the alternative is longer tend to sentence to life." *Id.* at 7...Jurors who sentence to death believe the alternative actual time in jail will be shorter than jurors who sentence to life. *Id.* at 9.
5. Eisenberg & Garvey, *The Deadly Paradox of Capital Jurors*, 74 SO.CA. L. REV. 371 (2001).
 - Where LWOP is the alternative to the death penalty, jurors either do not know about it, or do not believe it really means the defendant will, in fact, never be released on parole. *Id.* at 373.

D. Juror's perceptions of the presence or absence of remorse plays a pivotal role in juror's decisions to vote for life or death.

1. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).
 - A juror was apt to respond to the remorseful defendant not only with good will, but also without fear or disgust, both of which tended to recede in the face of the defendant's remorse. *Id.* at 59.
2. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 COLUM L. REV. 1538, 1560 (1998).
 - Lack of remorse is highly aggravating. Almost 40% of jurors were more likely to vote for death if the defendant expressed no remorse for his offense. "Indeed, in terms of aggravation, lack of remorse was second only to the defendant's prior history of violent crime and future dangerousness." Jurors key in on this without prompting from the State.

3. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Mitigation Means Having to Say You're Sorry: The Role of Remorse in Capital Sentencing*, 83 CORNELL L.REV.1599, 1617 (1998).
 - “All things being equal, remorse does make a difference.” “Aside from the seriousness of the crime and the defendant’s future dangerousness, no other factor plays a greater role in capital sentencing than remorse. In short, jurors show no mercy to those who show no remorse.” “If jurors believed the defendant was sorry for what he’d done, they tended to sentence him to life imprisonment, not death.” And, conversely, “if jurors think the defendant has no remorse they are more apt to sentence him to death.”
 - The more preparation, and planning, premeditation etc. jurors thought went to the crime, the less likely they are to believe that the defendant is sorry and the less likely they are to believe “belated expressions of remorse.” Not surprisingly, jurors are more likely to believe a defendant is remorseful if the defense he mounts emphasizes his minor role in the crime or otherwise reduces his responsibility. The less planning, the more remorse, etc. Jurors were more likely to think a defendant was remorseful if he appeared “uncomfortable or ill at ease.” The same is true if the jurors detect a change in his mood or attitude after the guilty verdict. But, if the defendant looks bored, jurors are not likely to think the defendant is sorry.
 - And, while having the defendant speak is often dangerous, “in general jurors are more likely to think a defendant is remorseful if he speaks on his behalf than they are if he says nothing.” Jurors who think a defendant “went crazy” are more likely to believe the defendant was remorseful. But jurors who believe the defendant is dangerous are quite unlikely to think he is sorry. If jurors expresses strong views in favor of the death penalty on either deterrence or retributive grounds, they tended not to think the defendant was remorseful.

4. Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty*, 83 CORNELL L.REV.1557 (1998).
 - Based on the California juror interviews, the defendant’s degree of remorse was a significant factor for juries imposing the death penalty. Jurors identified the degree of the defendant’s remorse as one of the most frequently discussed issues in the jury room at the penalty phase. Overall, 70% of the jurors raised lack of remorse as a reason they voted for the death penalty, often citing it as one of the most compelling reasons. Moreover, it was a theme in every one of the death cases. The primary source of the juror’s perceptions concerning the defendant’s remorse. . . appeared to be

the defendant's demeanor and behavior during trial. What repeatedly struck jurors was how unemotional the defendants were during the trial, even as horrific depictions of what they had done were introduced into evidence. Defendants were described as "blase," "bored," "unconcerned," "arrogant," "proud," "nonchalant," "showing no emotion," "cocky." One juror said "we would have liked to have spoken to him because he showed so little emotion and so little remorse. We just wanted to kind of figure out, are you human? We were kind of looking for anything, anything to find remorse."

- However, in the life cases, the jurors also, by and large, noted a lack of remorse, although in general it was to a lesser degree than in the death cases. Only one-third of the jurors in the life cases believed that their defendant was truly sorry for his crime. But in most of the life cases, at least one juror noted some remorse on the defendant's behalf.

5. Constanzo & Constanzo, *Life or Death Decisions: An analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM.BEHAV. 151 (1994).

- A significant number of jurors considered the fact [in sentencing to death] that the "defendant displayed no remorse for his crime." *Id.* at 161.

6. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative factors in Ten Florida Death Penalty Trials*, 15 AM. J. CRIM. L. 1 (1989).

- Thirty-two percent of the jurors mentioned the demeanor of the defendant as a contributing factor in the decision to recommend the death penalty. *Id.* at 52. Generally what the jurors were referring to was absence of remorse. *Id.* Defendants were described as "remorseless" and "emotionless."

E. A defendant's degree of remorse may be largely a measure of whether the defendant is at least acknowledging the killing or whether he is refusing to accept any responsibility for the killing.

1. Scott Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty*, 83 CORNELL L.REV.1557 (1998).

- A denial defense at the guilt-or-innocence phase of the proceedings was more than twice as likely to result in a death sentence, compared to admission cases. This was even more so in cases where the defendant took the stand and testified to his innocence. Such an all or nothing strategy increases the likelihood of a death sentence with one significant exception: if the case involves multiple defendants and only circumstantial evidence exists as to

which defendant was the ringleader. Of the denial defense cases in which the defendant did receive a life sentence, 80% were crimes perpetrated by more than one defendant and the prosecution's case was primarily circumstantial in nature. While the juries rejected the defendant's claim that he was completely uninvolved, they did harbor doubts as to whether the defendant was the trigger-man, his participation or his intent.

- Unlike the total denial defense cases, a defense that the defendant was involved with the killing but not guilty of capital murder did not appear to invite a backlash if the defense was plausible based upon the facts. Thus doubt as to the perpetrator's intent was more persuasive than doubt as to whether the defendant was the actual perpetrator. The earlier in the proceedings the defendant personally expresses some type of acceptance, the greater likelihood that the jury will be receptive to later claims of regret for the killing.
- Finally, jurors are likely to perceive defendants who fail to take any action to acknowledge complicity (especially in the fact of strong evidence) as a person likely to manipulate the system in the future if given the opportunity, and therefore, a future danger. Additionally, without some prior acceptance of responsibility, the jurors are more likely to cynically view a mitigation case focusing on childhood abuse, substance abuse, etc. as a continuing effort to deny responsibility altogether.

F. One frequently cited reason jurors vote for life imprisonment is "Alingering" or residual doubt. However, the caveat mentioned in Sundby's article above must be taken in to account.

1. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 COLUM. L.REV. 1538, 1563 (1998).
 - Residual doubt over the defendant's guilt is the most powerful mitigating factor. 77% of jurors were less likely to impose death if they had lingering doubts. However, it should be noted that it is very difficult to convince jurors that there residual doubt exists, especially in a single defendant case.
2. William Bowers, Benjamin Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Juror's Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171 (2001).
 - Black male jurors are most likely to have lingering doubt about the defendant's guilt in black defendant/white victim cases, followed by black females. *Id.* at 232.

G. Mitigation does matter. Mental retardation and mental illness are perceived as highly mitigating. Other traditional types of mitigation, e.g., child abuse

also carried weight. Furthermore, while more jurors thought drug use was aggravating than thought it was mitigating, it still had some mitigating effect. Jurors were not, by and large, impressed with the fact that a defendant had no prior record or that the co-defendant escaped the death penalty by pleas bargaining. But, as noted above, acceptance of responsibility was thought to be mitigating. Jurors are more receptive to mitigation evidence when they see the attorney and defendant as having a “warm and friendly” relationship rather than a “close working relationship.” The race and gender of the jurors, defendant and victim impact jurors’ receptivity to mitigation.

1. Margaret C. Stevenson, Bette K. Bottoms & Shari S. Diamond, *Jurors’ Discussions of a Defendant’s History of Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations* 16 PSYCH., PUB POL’Y AND L. 1 (2010).
 - Based on data from a study in Illinois, the authors concluded the following:
 - Jurors were more likely to use child abuse directly as a mitigating factor than to use it directly as an aggravating factor.
 - Similarly, jurors were more likely to use alcohol abuse as a directly mitigating than as a directly aggravating factor. However, they were more likely to discount alcohol abuse as a mitigating factor or to actually use it against the defendant as an aggravating factor than they were to use it as a mitigating factor as the defense had intended.
1. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).
 - Telling the defendant’s story does appear to have its intended emotional effect. If a juror believed the defendant experienced the torment of abuse as a child, labored under the burden of a mental defect or mental retardation, was emotionally disturbed, battled with alcoholism (but not drug addiction), was a loner in the world, or had generally gotten a raw deal in life, the usual response was sympathy or pity. *Id.* at 57.
2. Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think?* 98 COLUM. L.REV. 1538 (1998).
 - Evidence of mental retardation is highly mitigating B 44.3% said it would make them much less likely to vote for death, and 29% would make them slightly less likely (for a total of 73.8%). That the defendant was under the age of 18 is also mitigating, but not as mitigating as mental retardation. *Id.* at 1564.
 - A little more than half said they would be at least slightly less likely to vote for death if the killing was committed while the defendant was under the influence of extreme metal or emotional disturbance, and 25% said it would make them much less likely.

Similar numbers responded favorably to a history of mental illness. *Id.*

- Having a dirty record gets a defendant a lot of negative points, but having a clean record gets him few positive ones. *Id.* at 1556.
 - More jurors thought drug addiction was aggravating than thought it was mitigating. *Id.* at 1565.
 - 30.7% would attach some mitigating weight to the fact that the defendant had been seriously abused as a child, but 61.6% would give it no weight. The response to evidence that defendant grew up in extreme poverty is similar. But if you can show that the defendant had been in state institutions but had never received any real help, about half of the jurors are less likely to vote for death. *Id.* at 1539.
 - The more a juror reported having felt sympathy or pity for the defendant, having found the defendant likeable as a person, and having imagined being in the defendant's situation, the more likely she was to cast her first vote for a sentence of life imprisonment. Conversely, fear drives jurors towards the death penalty; a juror was more likely to cast his final vote for death if he was afraid of the defendant.
 - Many jurors were not impressed with relative culpability. In other words, the fact that one defendant plea bargained and escaped death by and large had little effect. (17.2%) said they would be less likely to vote for death if an equally responsible defendant escaped the death penalty by plea bargaining.
3. Bentele, Urusla and William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L.REV.1013 (2002).
- The jurors' decision that the defendant should be sentenced to death seems to reflect their opinion, as expressed in the interviews, that mitigating circumstances such as abuse during childhood or mental impairment simply do not provide an excuse of the killing. *Id.* at 1046.
 - One juror put it...
 - a. They was coming up with some disorder that he had that was brought on, that was induced by his mother's drinking during pregnancy, and he was brought up in an abusive home... [the defense] tried to pawn off on defendant's family and upbringing... bipolar disorder. *Id.* at 1047.
 - Another juror said...
 - a. Everyone's got a rough childhood. Everyone's abused now.... The defense tried to say the was abused, all that standard nonsense.... *Id.* at 1046.
 - The jurors seemed to believe that psychological impairment had to rise to the level of insanity to warrant a lesser sentence. *Id.* at

4. John H. Montgomery, J. Richard Ciccone, Stephen P. Garvey, & Theodore Eisenberg, *Expert Testimony in Capital Sentencing: Juror Responses*, 33 J Am Acad Psychiatry Law 509 (2005).
 - “Psychiatric/psychologic expert witness testimony significantly influenced the jurors’ views of the usually mitigating factor of a defendant’s mental abnormality.”
 - “Our results suggest that psychiatric expert testimony does not have significant impact on the jurors’ impressions of a defendant’s likelihood to engage in future violence. When focusing on the mitigating factor of a defendant’s mental abnormality, psychiatric testimony becomes more influential. The model...show a strong, statistically significant relation between the presence of defense psychiatric testimony and jurors’ increased likelihood of perceiving the defendant as “crazy” at the time of the offense. Presence of a defense expert witness during the sentencing phase, while accounting for several other independent variables, including the testimony of a prosecution psychiatric expert during the sentencing phase, has a significant association with the jurors’ impression that the defendant’ ...went crazy when he committed the crime.”
 - “When both sides introduced psychiatric testimony, the state effect disappears. State psychiatric testimony loses significance.”
5. Michelle E. Barnett, *When mitigation evidence makes a difference: effects of psychological mitigating evidence on sentencing decisions in capital trials*, 22 BEHAVIORAL SCIENCES AND THE LAW 751 (2004).
 - “Mitigating evidence such as the defendant was suffering severe delusions and hallucinations, the defendant had engaged in drug use at the time of the murder, the defendant was diagnosed as borderline mentally retarded and placed in special services classrooms throughout his education, and the defendant was severely physically and verbally abused by his parents during childhood yielded a proportion of life sentences statistically greater than would be expected had no mitigating evidence had been presented.”
 - “Participants assigned the lowest sentence severity ratings, indicating the highest level of mitigating evidence, for items containing the following evidence: defendant had been badly beaten by parents as a child, defendant had been psychiatrically hospitalized, defendant had no prior criminal record, and defendant was mentally retarded.”
 - “Participants viewed drug and alcohol use and intoxication as aggravating circumstances in the context of this questionnaire. This would yield several possible interpretations. First, it indicates

that participants did not have difficulty overriding previous mental sets, nor felt obligated to make the same decision when presented with the evidence a second time. Second, it may suggest that when presented with such evidence in the context of the crime, jurors are likely to view the evidence as mitigating, but when presented with the evidence without a context, they are likely to view it as aggravating. Finally, it may suggest that jurors actually view this type of evidence as aggravating, and possibly some other factor within the vignette that presented the drug addiction/influence evidence was responsible for the previously noted mitigating effect. The evidence regarding sleep deprivation and rejection by a fiancé could be explained in a similar manner as that of the recurrent migraine headaches contained in Vignette 3. It is quite possible that weak mitigating evidence in the context of a capital murder is worse than no mitigation evidence at all.”

6. Thomas W. Brewer, *The Attorney-Client Relationship in Capital Cases and Its Impact on Juror Receptivity to Mitigation Evidence*, 22 JUST. Q. 340 (2005).
 - Jurors “were more receptive to mitigation evidence when they viewed the relationship between the attorney and client as warm and friendly, but less receptive when they reported the attorney–client as having a close working relationship.” *Id.* at 340.
7. Thomas W. Brewer, *Race and Jurors’ Receptivity to Mitigation in Capital Cases: The Effect of Jurors’, Defendants’, and Victims’ Race in Combination*, 28 LAW & HUM. BEHAV. 529 (2004).
 - “Female jurors were consistently more receptive to mitigation than their male counterpart on the jury.” *Id.* at 539.
 - “The more heinous the crime was perceived to be, the less respondents considered mitigation.” *Id.* at 539.
 - “Black jurors are significantly more receptive to mitigation than their white counterparts and more receptive overall.” *Id.* at 539.
 - “All jurors were significantly more receptive in [b]lack victim cases.” *Id.* at 540.
 - “Both [b]lack and [w]hite jurors are more receptive to mitigation in cases where a same-race defendant is charged with killing an other-race victim.” *Id.* at 540.

H. Many jurors do not understand what they are supposed to do with aggravating and mitigating evidence.

2. Margaret C. Stevenson, Bette K. Bottoms & Shari S. Diamond, *Jurors’ Discussions of a Defendant’s History of Child Abuse and Alcohol Abuse*

in Capital Sentencing Deliberations 16 PSYCH., PUB POL'Y AND L. 1 (2010).

- Jurors were more likely to make uncontrollable attributions about the consequences of the defendant's alcohol abuse (i.e. his intoxication explains why he committed the crime) than controllable attributions (i.e. his intoxication does not explain why he committed the crime). In contrast, jurors were more likely to make controllable attributions about the cause of his alcohol abuse (i.e. he chose to drink) than uncontrollable attributions (i.e. he was an alcoholic and could not control his drinking behavior).
- Jurors were more likely to believe that the defendant would never be rehabilitated from alcoholism than they were likely to believe that he could recover.
- As with child abuse, controllable and stable attributions about alcohol abuse were more likely to be made in the context of prosecution statements than in the context of pro-defense statements. In addition, uncontrollable and unstable attributions about alcohol abuse were more likely to be made in the context of pro-defense statements than in the context of pro-prosecution statements.

1. Katie Morgan, *Information Overload and the Capital Jury*, 17 WM & MARY BILL RTS J., 1089, 1126-7 (2009).

- Information overload theory tells us that, ultimately, overloaded jurors will instead of attempting to process and weigh the aggravating and mitigating evidence as instructed by the court choose to disengage from the process or arbitrarily make a life or death decision. The impact of information overload on the capital jury may cause each affected juror to opt out of the decision-making process. Each juror may set an "aspiration level," meaning the juror, consciously or subconsciously, decides that once the prosecutor proves a certain number of aggravating factors, or the defendant presents a certain amount of mitigating evidence, the juror will arbitrarily pick death or life.

2. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1013 (2002).

- In the relatively rare instance when mitigating evidence is mentioned, jurors either seem not to understand what they are to do with such evidence or they dismiss it out of hand as no excuse for the murder. *Id.* at 1042.
- In their response to question about how the jury arrived at the decision to sentence the defendant to death, jurors often asserted that the law, or the judge's instructions made, clear that if an aggravating factor was present the proper sentence would be death.

Id. at 1031.

- Some jurors expressed confusion about the proper function of mitigation in making a capital sentencing decision. *Id.* at 1044.
- When jurors do discuss evidence presented in mitigation, they often reject it because it does not measure up to what they would consider an adequate excuse- a viable guilt defense. *Id.* at 1052-1053.

3. David Barron, *I Did Not Want to Kill Him But Thought I Had To: In Light of Penry II's Interpretation of Bystone, Why the Constitution Requires Jury Instructions on How to Give Effect to Relevant Mitigating Evidence in Capital Cases*, 11 J.L. & POL. 207 (2002).

- To further support the proposition that jurors do not understand the concept of aggravation and mitigation, researchers compiled a list of instructions from actual death penalty cases, along with questions asked by jurors while deliberating in capital cases. Based on this list, and in conjunction with general constitutional principles pertaining to mitigation, researchers posed questions to a random sampling of the population. The results were astounding. The first question asked whether jurors could spare a person's life if they found a mitigating factor not mentioned by the judge. An overwhelming sixty-four percent of the people polled incorrectly believed this was insufficient to prevent the imposition of a death sentence. The second question used an instruction that was given in a capital trial in reference to a weighing statute. The people polled were asked whether they had to impose a death sentence if they reached the conclusion that the mitigating evidence outweighed the aggravating evidence, but felt they were unable to find a mitigating factor that was sufficient to preclude the death penalty. An overwhelming fifty-eight percent of the people wrongly believed a death sentence had to be imposed. *Id.* at 244-245.
- Statistical analysis and responses to actual instructions and issues from real cases indicate a disturbing trend among juries in capital cases: an inability to follow the law that is based on a clear misunderstanding of what the law requires. *Id.* at 246.
- In many cases juries have asked the judge to define aggravation and mitigation or took it upon themselves to consult a dictionary. At least one Supreme Court justice has found this problematic because “mitigating evidence is a term of art, with a constitutional meaning that is unlikely to be apparent to a lay jury” The majority of the Supreme Court, however, has held that aggravation and mitigation are ordinary words that do not have to be defined. *Id.* at 244.

I. Humanizing the defendant matters too.

1. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).
 - The more a juror reported having felt sympathy or pity for the defendant, having found the defendant likeable as a person, and having imagined being in the defendant's situation, the more likely she was to cast her first vote for a sentence of life imprisonment. *Id.* at 63.
2. Scott E. Sundby, *The Capital Jury and Empathy: the Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343 (2003).
 - A review of the Capital Jury Project data from California suggests that capital juries are influenced by victim evidence, at least to the extent that the evidence pertains to the victim's actions leading up to the crime. A randomly chosen victim appears to tilt the jury towards a death sentence, both because juries see a defendant who preys upon a randomly chosen victim as the most dangerous and depraved of criminals, and because jurors are most likely to empathize with a victim who is engaged in everyday activities. By contrast, a victim who is engaged in high-risk or anti-social behavior leading up to the crime is less likely to invoke an empathetic response from the jury or to provoke a sense of outrage, which, in turn, appears to make the jury less inclined to impose a sentence of death. These findings suggest, therefore, that even without the formal admission of Victim Impact Evidence (VIE) at the penalty phase, victim evidence from the guilt phase will play a role in the sentencing decision.

J. Victim impact evidence may adversely effect the defendant's right to a fair and reliable determination of the appropriate sentence.

1. Edith Greene, Heather Koehring & Melinda Quiat, *Victim Impact Evidence in Capital Cases: Does the Victim's Character Matter?* 28 Journal of Applied Social Psychology, No. 2 (1998).
 - This mock jury study revealed that jurors' willingness to consider mitigating evidence was affected by the level of respectability of the victim. The less respectable the victims was, the more likely the mock jurors were to accord weight to mitigating factors.
2. Edith Greene, *The Many Guises of Victim Impact Evidence and Effects on Juror's Judgments*, 5 Psychol.Pub. Pol'y & L. 331 (1999).
 - Mock juror study concludes that jurors may be influenced in different ways by different types of victim impact evidence and that victims portrayed as assets to their families and their communities may be perceived differently than victims portrayed in less glowing terms. *Id.* at 345.

3. Janice Nadler & Mary Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L.REV. 419 (2003).
 - Laypersons are more punitive when the outcome of the crime reflects greater emotional harm to the victim... the punishment is more severe when the victim is psychologically less able to deal with the crimes aftermath. *Id.* at 436.
4. Bryan Myers, Edith Greene, *The Prejudicial Nature of Victim Impact Statements, Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL'Y & L. 492 (2004).
 - “When VIS (victim impact statements) information was present, 51% of participants voted for the death penalty, whereas only 20% did so when it was absent. This effect was more pronounced for mock jurors who were neutral toward or moderately in favor of the death penalty than for those who strongly favored it.” *Id.* at 508.

K. Capital jurors may have a negative reaction to defense expert witnesses if the testimony is not buttressed by other contemporaneous information and witnesses supporting the expert’s opinion. However, when the jury has a positive reaction to defense expert witnesses, the defendant is more likely to be sentenced to life imprisonment.

1. Scott Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997).
 - “The data indicates that professional expert witnesses were viewed negatively in a significant portion of the cases, especially those called by the defense.” *Id.* at 1123. In fact, 2/3 of all the witnesses that jurors thought “backfired” were defense expert witnesses. Reactions were more than twice as likely to be negative than positive. *Id.* at 1123. But, it is important to note that when the jurors *did* react favorably to a defense experts called at the penalty phase, a life sentence was more likely. *Id.* at 1124. There were three main criticisms: (1) experts were viewed as hired guns; (2) jurors asked skeptical of experts ability to explain human behavior; (3) experts often fail to draw a link between their testimony and the defendant’s specific situations. *Id.* at 1125.
 - “What they [the questionnaires] do emphasize though, is the risk of having the expert play a leading rather than supporting role in developing the defense case. If the expert performs as a soloist, presenting theories unsupported by facts established by more credible persons who are free of any of the suspicions attached to experts, the testimony is likely to be discounted at best or have a negative spillover effect at worse. If, on the other hand, the expert takes the role of accompanist and helps harmoniously explain, integrate, and provide context to evidence presented by others, the

jury is far more likely to find the experts's testimony most likely to be trusted is that coming from lay experts." *Id.* at 1144.[Sundby defines a lay expert as someone who has particular knowledge of the defendant's situation through the lay expert's own experience and who has insights to offer because of those experiences, e.g., a prison guard. *Id.* at 1118.]

- "A defense strategy that revolves solely or even primarily around professional expert testimony is likely to meet with failure." *Id.* at 1185.
2. Krauss and Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 *Psychol.Pub. Pol'y & L.* 267 (2001).
 - Expert testimony specifically linked to the facts of a case is more influential than more general expert testimony. *Id.* at 276. Jurors also have a bias towards case specific information over more statistical information. *Id.* at 278.

L. Prejudicial prosecutorial arguments do effect juror's decisions.

1. Judy Platania and Gary Moran, *Due Process and the Death Penalty: The Role of Prosecutorial Misconduct in Closing Argument in Capital Trials*, 23 *Law & Hum. Behav.* 471, 483 (1999).
 - This mock jury study revealed that individuals exposed to improper statements made by the prosecutor in closing argument recommended the death penalty significantly more often than those not exposed to the statements.

M. A juror's race will effect how they interpret the evidence presented.

1. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 *N.Y.U. L. REV.* 26 (2000).
 - "First, white jurors were more likely than black jurors to have felt anger toward the defendant. Second, white jurors were less likely than black juror to have imagined being in the defendant's situation. Third, white jurors were less likely than black jurors to have found the defendant likeable as a person." *Id.* at 46. Black jurors on the other hand appeared more willing to separate the sin from the sinner. *Id.* at 47.
2. Joseph Rand, *The Demeanor Gap: Race, Lie Detection, and the Jury*, 33 *CONN. L. REV.* 1,63 (2000).
 - White jurors are more likely - erroneously - to believe that black defendants and black witnesses are lying based on demeanor.
3. Mona Lynch and Craig Haney, *Discrimination and Instructional*

Comprehension: Guided Discretion, Racial Bias, and the Death Penalty, 24 *Law & Hum. Behav.* 337 (2000).

- In this mock juror study, white jurors were significantly more likely to undervalue, disregard, and even improperly use mitigating evidence in a black defendant case as opposed to those who sentenced a white defendant. *Id.* at 353.
4. Samuel R. Sommers and Phoebe C. Ellsworth. *How much do we Really Know about Race and Juries? A review of Social Science Theory and Research*, 78 *CHI-KENT L. REV.* 997 (2003).
- Jurors have stereotypes about the types of crimes that people of different races tend to commit. For example, they found that white jurors viewed white-collar crimes - such as counterfeiting and embezzlement - as consistent with a stereotype of white criminals. On the other hand, more violent crimes such as assault and robbery were associated with black criminal stereotype... This data suggest that the stereo typicality of a crime influences whether or not jurors demonstrate racial bias. *Id.* at 1007.
 - Racial composition of the jury influences the content and scope of the discussions in deliberation. Compared to all-white juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial. Racially mixed juries were also more likely to discuss racial issues such as racial profiling during deliberations, and more often than not, Whites on these heterogeneous juries were the jurors who raised these issues. *Id.* at 1028.

N. Almost half of the jurors who sat in capital cases believed that they knew what the punishment should be before the sentencing phase of the trial began.

1. William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 *CORNELL L.REV.* 1476 (1998).
- Interviews with some 1,000 capital jurors in 11 states reveal, however, that half of them believed that they knew what the punishment should be before the sentencing phase of the trial, before hearing any evidence or arguments concerning the appropriate punishment or the judge's instructions for making the sentencing decision. Moreover, most of the jurors, who felt they knew what the punishment should be at the guilt phase of the trial, said they were absolutely convinced of their early stand on punishment and most of them adhered to their initial stands throughout the course of the trial. For the pro-death jurors, the presentation of the guilt phase evidence was for the most part where they made up their mind (55%). For the pro-life jurors, they

tend to finalize their stands on punishment during the discussion about whether (or on what charge) the defendant is guilty. Most of the pro-death jurors who changed their minds only did so to avoid being on a hung jury, rather than because they were convinced that life was the appropriate punishment.

2. William S. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L.J. 1043, 1093 (1995).
 - A “good many” of the jurors were “absolutely convinced” of the appropriate punishment - usually death - before the sentencing phase even begins.
3. Marla Sandys, *Cross-Over Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L. J. 1183, 1222-21 (1995).
 - The majority of jurors reach their decisions about guilt and punishment at the same time - prior to the penalty phase of the trial. This prevents jurors from making their decision about punishment on an evaluation of the aggravating and mitigating factors. “[O]ne-half of the jurors had actually made up their minds (were “absolutely convinced” or “pretty sure”) about the appropriate penalty once they had convicted the defendant at the guilt phase. *Id.* at 1228.

O. Capital jurors have many mistaken views about the death penalty.

1. Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STANFORD L. REV. 1447, 1479 (1997).
 - Capital jurors are beset with misinformation about the death penalty. They mistakenly believe that it deters murder, that it is always administered in a way that is racially fair, and that it is less expensive than life imprisonment. . . . Yet the law not only does nothing to proactively disabuse them of their mistaken beliefs before a death sentence can be contemplated, but it also precludes defense attorneys from doing so. Thus many capital jurors leave their life-and-death deliberations completely uninformed about the realities of either of the punishments between which they have chosen and quite confused about the consequences.
2. Krauss & Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psychol. Pub. Pol’y & L. 267 (2001).
 - Jurors overly weigh an expert’s ability to predict future dangerousness.

P. Jurors weave a story from the evidence

1. Krauss and Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 Psychol.Pub. Pol’y & L. 267, 279 (2001).
 - Jurors construct stories about cases based on the fit between the expert testimony, the juror’s pre-existing views, and the juror’s final story.
2. Ursula Bentele and William J. Bowers, *How Jurors Decide Death: Guilt is Overwhelming, Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011 (2001).
 - Jurors resort to a story model. In a criminal trial, the prosecution’s story is the central story; it goes first and is presented with much fanfare. For any hope of a life sentence, the defense must present a strong counter story to dislodge this kind of imagery, a picture crying out for the ultimate punishment. Yet the defendant’s life story of mitigation has the initial disadvantage of being the side story, hardly a competing story. It follows rather than precedes the prosecution’s story.
3. Wayne Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J. L. REFORM 1 (2000).
 - The critical role of narrative emerges from the Capital Jury Project Data. As one juror explained: “I began developing a story as soon as they started presenting the case. I used the evidence as it was being presented as well as later discussions during jury deliberations to create a story.”
4. Scott E. Sundby, *The capital jury and empathy: The problem of worthy and unworthy victims*. 88 CORNELL L.REV. 343, 381 (2003).
 - How readily a juror can identify with the victim and her activities at the time of the killing thus appears to be a powerful influence on how jurors make their sentencing decision.

Q. Geography is a significant factor.

1. Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases* 51 ARIZ. L. REV. 305 (2009).
 - This article investigates prosecutorial discretion in death penalty prosecution in Missouri in an empirical analysis of all intentional-homicide cases from 1997-2001. The analysis demonstrates that the large racial disparities found are a product of geographic disparities. Unlike race-based differences, however, geography

does not result in differential treatment that consistently disfavors the same group: depending on the particular region studied, sometimes defendants in urban communities are treated more harshly, while in other regions, defendants in rural communities are treated more harshly.

- Prosecutors in St. Louis City and Jackson County (metropolitan counties) filed capital charges much less frequently than prosecutors in the rest of the state. In St. Louis City, prosecutors charged capital in 6.5% of the intentional-homicide cases; in Jackson, the comparable figure was 1.3%. But in the rest of the state, prosecutors charged capital in roughly 20% of the intentional-homicide cases. On a related point, prosecutors in St. Louis City and Jackson County also obtained capital convictions far less frequently than their counterparts in the rest of the state. St. Louis prosecutors obtained capital convictions in less than one-half of 1% of intentional-homicide cases. Jackson prosecutors produced no capital convictions in more than 200 cases. In contrast, prosecutors in the rest of Missouri obtained capital convictions in about 4.5% of all intentional-homicide cases.
 - The odds that a defendant in Jackson County faces a capital charge are sixteen times less than the odds for a baseline case. No death sentences were imposed in Jackson County during the period of the study. Prosecutors in St. Louis City are slightly less likely to file capital charges and pursue capital trials than prosecutors in the baseline case.
 - However, juries reject capital charges in St. Louis City at very high rates. A defendant has a much smaller risk of a death sentence in St. Louis City--the odds of receiving a death sentence are twenty-five times smaller than the odds of receiving a death sentence in a baseline county.
 - Cases from metropolitan counties with small minority jury pools (0-10%) also demonstrate this pattern: juries reject capital charges at a rate 28.4 times greater than the baseline rate. This suggests that metropolitan counties with small minority jury pools, or very large minority jury pools (Jackson and St. Louis City) impose death sentences less frequently than other counties in Missouri.
2. Richard Willing, Gary Fields. *Geography of the Death Penalty*. USA Today, December 20, 1999.
- The willingness of the local prosecutor to seek the death penalty turned out to be the most significant factor in determining who will eventually be sentenced to death and county-by-county disparities in death penalty. Even though urban counties with large minority populations have higher murder rates, they have fewer people on death row. Suburban counties near large cities produce large numbers of death sentences.

3. John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 299 (2002).
 - A Ten of South Carolina's forty-six (22%) counties have never produced a death sentence. Other counties, even though they are relatively large and have, at least comparatively speaking, significantly more murders, produce very few death sentences. By contrast, more than one-third of the death sentences imposed in the last ten years arose from two of the state's sixteen Judicial Circuits. Twenty-four of the sixty-two (39%) persons sentenced to death from January 1993 to the present came from either the First Judicial Circuit (Calhoun, Dorchester, and Orangeburg counties) or the Eleventh Judicial Circuit (Edgefield, Lexington, and Saluda counties). However, these counties do not have higher homicide rates than other counties. In fact, while Lexington County is the fifth most heavily populated county in the state, it ranks twelfth in the number of homicides. From 1977 to 1998, there were 255 murders, which resulted in twenty-eight death sentences. Thus, Lexington County's death sentencing rate of 11% is approximately five times greater than the national average and seven times the South Carolina average of 1.6%. Based on currently available data, Lexington County has the highest death sentencing rate of any large county in the United States. Lexington County also has a high reversal rate; error was found in 18 of the 30 cases arising from Lexington County (60%), with more reversals likely on the horizon."

R. The defendant's age plays a significant role in sentencing.

1. James W. Marquart & Jonathan R. Sorensen, *Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743 (1990-91).
 - The weapon used, the presence of co-defendants, the killing of multiple victims, and the relationship between victim and offender did not have significant effect on the sentence.
 - However, the offender's age played a significant role in sentencing. "Individuals twenty-five years of age or older received a death sentence more often than individuals seventeen to twenty-four." *Id.* at 772. This result may be partially attributed to another related finding, that offenders with "lengthy criminal histories, especially offenders with histories that include violence, are far more likely to be sentenced to death than offenders with limited criminal histories," in that older offenders have a greater chance of having a lengthy criminal history. *Id.* at 771.

S. Jurors are unable to understand DNA evidence.

1. Scott B. Morris & Dale A. Nance, Juror Understanding of DNA Evidence: An Empirical Assessment of Presentation Formats for Trace Evidence with a Relatively Small Random-Match Probability, 34 J. Legal Stud. 2, (2005).
 - Jurors tend to undervalue match evidence with a quantifiable RMP, a measured by plausible Bayesian norms, and the extent of the undervaluation can be reduced significantly by testimony explaining RMP and the probative value of the match in light thereof. Incorporating lab error estimates in the testimony can actually increase the probative value that jurors attribute to the match testimony. This occurs when “both the lab error estimate and the random-match probability are communicated to the jury, the testimony then combines the lab error rate with the random-match probability to obtain a measure of the combined risk, and the probative value, under Bayes’ rule associated with the combined measure is illustrated for the jury with an appropriate chart.”

Again, the question is what to make of these findings for trial practice. First, counsel must begin the education process of the “Language of life” and the importance of mitigation in voir dire, and thoroughly question jurors about their ability to consider many types of mitigating evidence. Believe it because it is true; many jurors are mitigation impaired. Second, we need to find more ways to empower those jurors who are not mitigation impaired, so that they will not be overwhelmed by the majority. Third, more thought needs to be given to establishing that a defendant is not a future danger. Obviously, accurate instructions about parole ineligibility both in life without parole and jurisdictions where defendants are not eligible for parole for thirty or forty years are very important. The data clearly indicates that jurors believe most inmates are eligible for parole, often after a relatively short term of imprisonment. Evidence indicating the defendant does not pose a future danger is also potentially very important. The truth is that most inmates are not a danger in prison, and evidence of this sort allows counsel to drive home to jurors that LWOP is really LWOP. The data also emphasizes the need for accurate, reliable, competent mental health evaluations. For a more detailed discussion of this topic see John H. Blume, *The Elements of a Competent and Reliable Mental Health Evaluation*, THE ADVOCATE (August 1995). Persuasive evidence of mental retardation, mental illness, child abuse will convince many jurors that life imprisonment is the appropriate punishment; this means that expert testimony needs to be bolstered by that of lay witnesses. Counsel must make every effort to have mental health evidence be competent, credible, comprehensive and comprehensible. See John H. Blume and Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, THE CHAMPION (Nov. 2000). Furthermore, counsel must be aware that the jurors are closely scrutinizing the defendant, how he reacts to the evidence, and his demeanor in assessing remorse and dangerousness; two very important concepts. Someone should be working with the client *before* trial on demeanor and behavior. Finally, counsel must be aware of the fact, and take into account in formulating case strategy, that many jurors will be considering whether to vote for the death penalty or life imprisonment early in the proceedings,

before any mitigation is ever presented.

The main variables influencing the life/death decision are juror perceptions of: a) the viciousness/heinousness of the offense; b) the defendant's future dangerousness; and, c) the defendant's remorse. The three often, obviously, work together. But, whatever can be done at trial to reduce the seriousness of the offense, alter juror perceptions of dangerousness (at least outside of prison) and to convince jurors the defendant is genuinely remorseful, should be tasks of the first order for capital trial counsel.

III. JURY INSTRUCTIONS AND EVIDENCE

It is clear that jurors are hopelessly confused by the sentencing phase instructions. The critical concepts of aggravation and mitigation are lost on them. They do not understand who has the burden of proof, what the burdens are or whether they must agree on certain key sentencing concepts. Why is juror comprehension so poor? The length and generally boring nature of the instruction. Luginbush & Howe, *Discretion in Capital Sentencing Instructions: Guided or MisGuided?*, 70 Ind. L. J. 1161, 1169 (1995). Capital instructions typically use complex language, unfamiliar words, one-sentence definition of terms, and any sentences with double negatives. This makes it hard for jurors to understand them and explains why jurors are confused. 1169. Without explanation jurors fall back on their own knowledge, but have little with respect to many of the concepts in a capital sentencing trial, especially mitigation.

A. Jurors do not understand the sentencing phase instructions.

1. Ursula Bentele and William J. Bowers, *How Jurors Decide Death: Guilt is Overwhelming, Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV.1011 (2001).
 - Jurors do not understand the term mitigation and thus it often dismissed. Unless the jurors believe that the evidence in mitigation either proves that the killing was not deliberate or furnishes an excuse for the killing, such as insanity or duress, it does not provide adequate reason to impose a life sentence. In the absence of an understanding of how to take mitigation into account, jurors naturally turn to the analogy provided for by the guilt trial, namely defenses that serve as a justification or excuse.
2. James Frank and Brandon K. Applegate, *Assessing Juror Understanding of Capital Sentencing Instructions*, 44 Crime and Delinquency No. 3 (1998).
 - A mock jury study revealed that juror comprehension of sentencing instructions is limited, especially with regard to instructions dealing with mitigation. The defendant is typically disadvantaged by the misunderstandings. However, juror comprehension can be improved by rewriting the instructions and by giving jurors copies of the instructions.

3. Richard Weiner, *The Role of Declarative Knowledge in Capital Murder Sentencing*, 28 *Journal of Applied Psychology*, No. 2 (1998).
 - A mock jury study indicated that juror comprehension was low both in relation to procedural knowledge and declarative knowledge. The less the jurors understand the mitigation instructions, the more likely they are to impose the death penalty.

4. Marla Sandys, *Cross-Overs: Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 *IND. L. J.* 1183, 1220-1221 (1995).
 - The decision making process is “governed by confusion, understanding and even chaos. Jurors decide life-and-death questions laboring under numerous misconceptions about the utility and operation of capital punishment - sometimes unclear about the import of certain kinds of evidence (including something as basic as whether the evidence is aggravating or mitigating), almost always confused over the meaning of the all important capital instructions, in some instances wrong about the decision rules by which they are to reach a sentencing verdict, and unclear about (or highly skeptical of) the ultimate consequences of the very alternative between which they must choose.” *Id.* at 1225. Furthermore, jurors who are misled by the capital instruction into believing that the judicial formulas dictate a certain outcome in their deliberations usually have the outcome of death in their mind.” *Id.* at 1226.

5. Constanzo & Constanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 *Law & Hum. Behav.* 185 (1992).
 - Mock jurors do not fully understand the meaning of the most critical legal terminology used in the sentencing phase instructions, especially the terms aggravation and mitigation. *Id.* at 188.

6. Scott E. Sundby. *The capital jury and empathy: The problem of worthy and unworthy victims*. 88 *CORNELL L. REV.* 343-81 (2003).
 - When asked in the abstract, the vast majority of jurors state that their decision would not be swayed even slightly by whether the victim was a sterling member of the community or someone with a criminal past. The only victim type that seems to make a significant difference to jurors is that of a child, in part because a child victim would reflect on the defendant’s culpability in choosing a vulnerable victim.

7. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 *BROOK. L. REV.* 1013 (2002).

- The very word mitigation is foreign to most jurors and indeed a number of the jurors who were interviewed did not understand, at times actually confusing it with aggravation. *Id.* at 1044.
- 8. Richard Weiner, Melanie Rogers, & Ryan Winter, *Guided Jury Discretion in Capital Murder Cases*, PSYCHOL. PUB. POL'Y & L. 1004, Vol. 10, No. 4, 516-576.
 - Common basic mistakes even after receiving approved instructions include confusing mitigation with aggravation or the belief that the judge, not the jury, is primarily responsible for actually passing sentence. The only variable that predicted the likelihood of a life sentence was the jury's aggregate knowledge of procedural law; greater knowledge increased the likelihood of this sentence. When jurors received simplified instructions, accuracy increased in declarative state and declarative constitutional law and in procedural state and procedural constitutional law. Flowcharts also improved accuracy. There was a strong correlation between understanding procedural law and a life sentence, even controlling for the type of instructions.

B. A significant number of jurors believe that the death penalty is mandatory for an intentional or vicious or heinous murder.

1. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996).
 - “Nearly one-third of jurors were under the mistake impression that the law required a death sentence if they found heinousness or dangerousness, a result replicated in the multi-state study of the interview data.” *Id.* at 360.
2. William S. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L. J. 1043, 1091, n. 32 (1995).
 - Many jurors believe that the death penalty is mandatory if the crime is heinous or vicious.
3. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative factors in Ten Florida Death Penalty Trials*, 15 AM. J. CRIM. L. 1 (1989).
 - A significant number of jurors in death penalty cases believed that the death penalty was mandatory or presumed for first degree murder. In the death recommendation cases, over half of the jurors believed that “death was to be the punishment for first degree murder, or at least that death was to be presumed appropriate unless defendant could persuade the jury otherwise.” *Id.* at 41.

- Of the Florida jurors interviewed, over half attributed little or no significance to the aggravating circumstances and mitigating circumstances presented. *Id.* at 24. To the extent it was important, it was important for the wrong reasons. “Some jurors indicated that the list may have helped confirm their understanding that death was the mandatory or expected recommendation.” *Id.* at 24. One juror said: “We were all ready to hang him, but we went over the list so we would be within the law...to get it right...” “It seemed that the State of Florida called for the death penalty. There didn’t seem to be any choice.” *Id.* at 25.

C. A significant number of jurors do not comprehend that aggravating circumstances must be established beyond a reasonable doubt.

1. Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993).
 - Twenty per cent of the jurors on death juries believe that an aggravating factor can be established by preponderance of the evidence or only to a juror’s personal satisfaction. *Id.* at 10.
2. Judge Leonard B. Sand & Danielle Rose, *Proof Beyond a Reasonable Doubt: Is There a Need For A Higher Burden of Proof When the Sentence May Be Death*, 78 CHI.- KENT L. REV. 1359 (2003).
 - Reasonable doubt may represent less than 95% certainty in the minds of many jurors and although judges ask jurors to be convinced that the defendant is guilty prior to convicting him, empirical data suggest that jurors may not apply as rigorous a standard as desired. *Id.* at 1366.

D. Many jurors believe that they must unanimously agree that a mitigating circumstance is present in the case before it can be considered.

1. John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the Capital Jury Project*, Chapter 5 in *ABEYOND REPAIR? AMERICA’S DEATH PENALTY*, Duke University Press 144-77 (2003).
 - 66% of South Carolina jurors and 42% of North Carolina jurors believed that all jurors had to agree on the existence of a mitigating circumstance before the jury could consider that factor in reaching a decision. *Id.* at 158.
2. Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or MisGuided?* 70 IND. L. J. 1161 (1995).
 - Juror comprehension is worse when mitigating factors are considered. Jurors were confused about the burden of proof and unanimity was poor. Almost half (49%) thought unanimity was required for mitigating circumstances and 41% thought the

standard of proof for mitigating factors was beyond a reasonable doubt. *Id.* at 1167.

3. Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV.1 (1993).
 - “The great majority of jurors-in excess of sixty percent in both life and death cases-erroneously believe that jurors must agree unanimously for mitigating circumstances to support a vote against death.” *Id.* at 225.

E. Many jurors also believe that mitigating circumstances must be established beyond a reasonable doubt and a disturbing percentage of jurors did not understand that they could consider any factor in mitigation.

1. John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the Capital Jury Project*, Chapter 5 in *ABEYOND REPAIR? AMERICA’S DEATH PENALTY*, Duke University Press, 144-77 (2003).
 - 41 % of North Carolina and 51% South Carolina jurors believed that the defendant was required to prove the existence of a mitigating factor beyond a reasonable doubt. *Id.* at 158.
2. Luginbuhl & Howe, *Discretion in Capital Sentencing Instructions: Guided or MisGuided?*, 70 IND. L.J. 1161 (1995).
 - Jurors were confused about the burden of proof and unanimity was poor. Only 59% understood that they could consider any evidence they desired as a mitigating factor. 70 Ind. L. J. at 1167. 41% thought the standard of proof for mitigating factors was beyond a reasonable doubt. *Id.* at 1167.
3. Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993).
 - Almost half the jurors thought that mitigating circumstances must be proven beyond a reasonable doubt. Less than a third understood that a mitigating circumstance must be proven only to the juror’s satisfaction. *Id.* at 11.
4. Shari Diamond & Judith Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996).
 - Very few [Illinois] jurors understood that they could consider in mitigation factors not specifically enumerated by the trial judge. *Id.* at 225.
5. William J Bowers, Benjamin D. Steiner, & Michael E. Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or legal Fiction*, Chapter 14 in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND*

FUTURE OF THE ULTIMATE PENAL SANCTION (2nd Ed.), Durham, NC: Carolina Academic Press 413-67 (2003).

- Half of former jurors in the CJP wrongly believed that a mitigating factor had to be proved beyond a reasonable doubt, and even more mistakenly believed that jurors had to agree unanimously on a mitigating factor for it to be considered in mitigation. *Id.* at 437.
- Many jurors fail to appreciate that the decision rules are different for evidence of mitigation, probably because they do not realize that they are being called upon not for a finding of facts but for a reasoned moral judgment. They do not understand that for such a reasoned moral choice the Constitution requires that each capital juror independently decide whether mitigation is sufficient to reject a death sentence, whatever the aggravation, and whatever the punishment decisions of other jurors. *Id.* at 439.

F. Many jurors do not assume responsibility for the capital sentencing decision

1. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).
 - A number of jurors believed that they shared responsibility with trial or appeals court for the defendant's sentence. *Id.* at 38.
 - Most jurors do not believe that persons sentenced to death will actually be executed. *Id.* at n. 40.
2. Austin Sarat, *Violence, Representation and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L. J. 1137 (1995).
 - Sarat states that in cases that he reviewed "jurors...know or believed that [their decision] would be reviewed by the judge who presided over the trial and/or by an appellate court." Most thought that the courts were as likely to accept the death penalty as they were to reject it. *Id.* at 1130.
 - Jurors sometimes vote for death not because they think the person will actually be executed but because, as one juror stated, "we all pretty much knew that when you vote for death you don't necessarily or even usually get death. Ninety-nine percent of the time they don't put you to death. You sit on death row and get old." *Id.* at 1133.
3. Joseph L. Hoffman, *Where's the buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L. J. 1137 (1995).
 - "During the jury deliberations, most jurors found ways to overcome, or avoid confronting, their sense of personal moral responsibility for the defendant's fate. Some turned to God, others to the bottle, and still others somehow interpreted the trial judge's instructions as saying the "the law" dictated a particular outcome."

70 Ind. L. J. at 1156. “Faced with the awesome responsibility of recommending either a death or life sentence (which might greatly disappoint, and possibly endanger the juror’s entire community) or death sentence (which will, at least in theory, lead to the killing of another person), many jurors seek, and manage to find, ways to deny their personal moral responsibility for the sentencing decision.” *Id.* at 1157.

4. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996).
 - “On the whole, jurors imply that they do not believe that defendants will ever be executed. A clear majority say that ‘very few’ death sentenced defendants will ever be executed, and about 70 percent of jurors believe that ‘less than half’ or ‘very few’ will be executed.” *Id.* at 363. “A substantial and disturbing minority of jurors do not accept role responsibility for the sentence they impose; a substantial minority of jurors (erroneously) report that they are required to impose death if they find that the defendant’s act was heinous or the defendant himself was a future danger...” *Id.* at 368.
 - “A modest correlation thus exists between rejection of responsibility and sentencing to death. Jurors who assign sentencing responsibility to the judges are more likely to impose death. *Id.* at 377. The more the jurors liked the judge, the more likely they were to assign more responsibility to him or her.
5. Constanzo & Constanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 Law & Hum. Behav. 151, 154 (1994).
 - “[M]any jurors were able to discount their own sense of responsibility for the sentence.” *Id.* at 162.
6. William J. Bowers et al, *The Decision Maker Matters: An Empirical Examination of the Way The Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASHINGTON AND LEE LAW REVIEW 931 (2006).
 - Jurors in states where the judge has the ability to override the jury in sentencing are more likely than others to deny responsibility for the defendant’s punishment, to misunderstand sentencing instructions, and to rush to judgment.

G. When jurors do not understand the instructions, they are more likely to vote for the death penalty.

1. Shari Diamond & Judith Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 231 (1996).
 - This mock juror study indicated that jurors who received revised more comprehensible sentencing instruction were less likely to lean towards death than jurors who received the pattern instructions.
2. Richard Weiner, *Comprehensibility of Approved Jury Instruction in Capital Murder Cases*, 80 Journal of Applied Psychology 455 (1995).
 - Mock juror study determined that the less jurors were confused about the jury instruction, the less likely they were to sentence the defendant to death. *Id.* at 463.

H. Similarly, racially discriminatory effects are most pronounced when juror comprehension of instructions is lowest.

1. Robert A. Palmer, *Motivating and Mitigating Factors in the Commission of Homicide*, Dissertation-Abstracts-International-Section A: Humanities and Social Science, Vol. 60 (7-A): 2865 (Feb. 2000).
 - Discriminatory effects in conviction and sentencing were concentrated among participants whose comprehension was lowest.
2. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law & Hum. Behav. 337 (2000).
 - This mock juror study found that white jurors were more likely to impose the death penalty on a black defendant than a white defendant when there was a general lack of comprehension of sentencing instructions. *Id.* at 349.

I. Deliberation is not your friend.

1. Mona Lynch & Crain Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension and Discrimination* 33 L. HUM. BEHAVIOR 481 (2009).
 - This article discusses the results from a study examining whether jury deliberations and the opportunity to discuss capital sentencing instructions as a group helped them overcome any punitive tendencies and racial bias identified in many experimental studies of individual juror-level sentencing behavior.
 - There was no evidence at all that the opportunity to discuss the instructions and apply them collectively to a set of case facts improved the jurors' comprehension overall.
 - Individual jurors were more likely to become punitive than lenient when placed in a group deliberation setting, shifting 12 percentage

points in their verdict preferences in favor of death verdicts (from 54 to 66%).

- The size of the punitive shift varied not only by racial dynamics, but also as a function of the make-up of the juries themselves: White and male jurors started out more in favor of death before deliberations, and became somewhat more in favor of death once deliberations had occurred. However, although women and non-White jurors initially were less in favor of death, and remained so in their final verdicts, they were more likely to shift toward death verdicts in post-deliberation votes.
 - The post deliberation shift toward death verdicts that occurred overall was greatest in the two conditions where there was a Black defendant and smallest in the condition in which a White defendant was convicted of killing a Black victim.
 - Jurors tended to give mitigation less weight toward life overall for Black defendants. Jurors were also more likely to discount mitigation evidence in cases where the victim was White compared to when the victim was Black.
2. Norbert Kerr, Keith Niedermeier & Martin Kaplan, *Bias in Jurors v. Bias in Juries: New Evidence from the SDS perspective*, 80 *Organizational Behavior and Human Decision Processes* 70, 73 (1999).
 - Studies indicate that jury decision making in criminal cases is a high-order majority primary scheme: if as many as two thirds of the jurors in a jury initially agree on a verdict, that will be the jury's ultimate verdict.
 3. Theodore Eisenberg, Stephen Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 *J. Legal Stud.* 277 (2001).
 - According to the South Carolina Data, juries with a first vote of more than 75 percent for death almost always impose death sentences.

J. Positive jury group dynamics more often return death verdicts.

1. Nadine Marie Connell, *Does the Group Make a Difference? A Look at the Factors that Impact Perceptions of Group Deliberations and Sentencing Outcomes in Capital Trials* (Aug. 2, 2006) (unpublished Ph.D. Dissertation, University of Maryland) (on file with University of Maryland).
 - Group climate is the strongest predictor of sentencing outcome, with juries that have more positive perceptions of group climate more likely to return the death penalty. Older jurors and Baptist jurors are more likely to have a positive perception of group climate, whereas Jewish jurors and jurors who perceive a great amount of mitigation evidence are more likely to have a negative

perception of group climate. “[I]n a trial where a Black juror sits in judgment of a Black defendant, Black jurors have a more negative perception of group climate.” *Id.* at 129.

K. Premature decision making runs rampant.

1. William J Bowers, Benjamin D. Steiner, & Michael E. Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or legal Fiction*, Chapter 14 in *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION* (2nd Ed.), Durham, NC: Carolina Academic Press, 413-67 (2003).
 - Premature decision making is pervasive. The tendency of most jurors who take an early stand on punishment to be absolutely convinced of their position and to stick with it thereafter strongly suggests that their minds were closed to evidence and arguments presented later in the trial. *Id.* at 428.
 - Despite the insistence that guilt and punishment considerations be kept apart, most jurors reported that during guilt deliberations they did discuss the legally irrelevant and likely confounding matter of the defendant’s punishment. *Id.* at 435.
 - In some of these cases, jurors with doubts, about a capital murder verdict agree to vote guilty of capital murder in exchange for an agreement with early pro-death jurors to abandon their pursuit of the death penalty. *Id.* at 436.
2. Wanda D. Foglia, *They Know Not What They Do: Unguided and Misguided Decision-Making in Pennsylvania Capital Cases*, 20(1) *Justice Quarterly* 187 (2003).
 - CJP interviews with 916 jurors from 257 trials in 11 states revealed that nearly half the jurors (48.3%) said they had decided what the punishment should be before the sentencing phase had begun... Of those who chose death before the punishment phase even began, 75% never wavered from their initial choice. *Id.* at 192.
3. Williams Bowers, *Still Singularly Agonizing: Laws Failure to Purge Arbitrariness from Capital Sentencing*, 39 *Criminal Law Bulletin* 51 (2003).
 - Given the human proclivity to interpret information in a way consistent with what one already believes, it is not surprising that most jurors never waver from their premature stance. Judging from jurors’ comments, most of the 20.1% who changed their position from death to life at the final vote did so to avoid a hung jury, not because they were persuaded by mitigating evidence they were supposed to be considering. *Id.* at 57.

L. Fear of the defendant, i.e., concerns about future dangerousness, drives many undecided or “life leaning” jurors into voting for the death penalty.

1. Theodore Eisenberg, Stephen Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Legal Stud. 277 (2001).
 - Fear drives first vote life jurors towards the death penalty. The favorable effects of having a black juror sit on the defendant’s jury are generally lost by the final vote.
2. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26 (2000).
 - Jurors who voted in the end to sentence the defendant to death were generally more afraid of the defendant than were juror who voted for life. Undecided jurors who finally voted for death were substantially more afraid of the defendant than any other group. *Id.* at 67.
3. John Blume, Theodore Eisenberg, Stephen P. Garvey, *Lessons from the Capital Jury Project*, Chapter 5 in *ABEYOND REPAIR? AMERICA’S DEATH PENALTY*, Duke University Press, 144-77 (2003).
 - Future Dangerousness appears to exert its greatest influence on jurors who are undecided at the first vote, prompting them in the end to case their final vote for death. *Id.* at 167.
 - A juror who believes the defendant presents a substantial risk of danger is more apt to vote for death than is one sees him presenting a lesser, or no such risk. *Id.* at 165.
 - The more serious a juror thought the crime was, the more likely he was to cast his first vote for death. *Id.* at 163.
4. Dorlan, Mitzi & Krauss, Daniel. *The Danger of Dangerousness in Capital Sentencing: Exacerbating the Problem of Arbitrary and Capricious Decision-making*. 29 Law & Psychol. Rev. 63, Spring 2005.
 - The results of the mock juror study showed that the mean juror ratings of future dangerousness increased after any sort of expert testimony. Mock jurors were more influenced by clinical opinion expert testimony than actuarial expert testimony. The study contends that there is a very real possibility that jurors are more influenced in their decision making by less accurate and less scientific expert testimony on future dangerousness than they are by more accurate expert information. He also presented a study that “most often, the weapon used, the presence of codefendants, the killing of multiple victims, and the relationship between victim and offender did not have an effect on the sentence.” In another study, it was found that the criminal backgrounds of former death row inmates and those who were sentenced to life were similar,

suggesting that juries' decision to sentence offenders to life or death were not based primarily on the defendants' prior record. *Id.* at 85-96.

M. The victim's role in society does little to influence the sentencing process.

1. Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*. 88 CORNELL L. REV. 343 (2003).
 - Jurors may not care in the abstract whether the victim was a banker or a welfare recipient. They do care, however, if the banker was murdered while cruising a seedy adult bookstore late at night instead of during a robbery while honorably carrying out his duties at the bank...The only victim type that seems to make a significant difference to jurors is that of a child, in part because a child victim would reflect on the defendant's culpability in choosing a vulnerable victim. *Id.* at 344- 49.

Can more effective jury instructions be devised? Yes, read Garvey, Johnson & Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell Law Review 627 (2000), but much work needs to be done. The concepts of aggravation and mitigation are often counter-intuitive to jurors, and the present language is arcane and confusing. So, the take home message is that if there are legal concepts and principles which are important to your client's chance of obtaining a life sentence, you must educate the jurors. You must explain the concepts early (remember jurors decide early) and often (jurors are very confused). You must give jurors the knowledge they need to get out of the jury room with their initial life vote. In particular, if the jury asks a question, an directly responsive answer is better than giving them the same instructions they failed to understand in the first place (*see Correcting Deadly Confusion*).

One first step may be to begin pressing for affirmative instructions from the court telling the jury prior to the time evidence is presented at the sentencing phase that the death penalty is not the presumptive punishment (in fact, there is a presumption that life imprisonment is the appropriate penalty), and that the jury is never required to sentence the defendant to death (this may be tricky in some jurisdictions). A similar instruction should be give regarding the jury's responsibility for the sentencing decision. Furthermore, the jury should be probably be instructed about mitigation, the burdens of proof, non-unanimity for mitigating circumstances, etc. *before* the sentencing phase evidence is presented and earlier in the final instructions. In many jurisdictions, by the time the court begins to discuss mitigation, the jurors are hopelessly confused. We also need to conduct studies with new, clearer instructions to see if juror comprehension can be enhanced. We also need to collect good instructions that address these issues which have been given in other cases.

IV. DETERRENCE STUDIES

A. The new deterrence studies indicating capital punishment deters murders are not reliable.

1. Michael L. Radelet & Traci L. Lacoek. *Recent Developments: Do Executions Lower Homicide Rates?: The Views of Leading Criminologists* 99 J. CRIM. L. & CRIMINOLOGY 489 (2009).
 - Only a small minority of top criminologists—10% or less, depending on how the question is phrased—believes that the weight of empirical research studies supports the deterrence justification for the death penalty above that of long-term imprisonment.

2. Randi Hjalmarsson. *Does Capital Punishment Have a “Local” Deterrent Effect on Homicides?* 11 N2 American Law and Economics Review 310, 312 (2009).
 - The authors test for a short-term deterrence effect with geographically and temporally disaggregated data. Specifically, they use daily homicide and execution data from Houston, Dallas, and San Antonio.
 - They found “minimal evidence that executions have a short-term deterrent effect on homicides. If there is any evidence of deterrence, it is with respect to capital murders; however, this evidence is weakened by inconsistencies across specifications and/or cities. Thus, there is little indication that executions have any short-term impact on how much a potential offender fears executions.” *Id.* at 332.

3. John J. Donohue & Justin Wolfers. *Estimating the Impact of the Death Penalty on Murder* 11 American Law and Economics Review 249 (2009).
 - The authors assess the latest literature on death penalty statistics with a view to understanding why different researchers have reached such divergent conclusions while frequently relying on the same U.S. homicide data. They conclude that cross-sectional studies are ill suited for estimating the causal impact of executions because they cannot easily account for the large and persistent, unexplained differences in crime rates across states. Specifically, the cross-sectional analysis cannot address the unobserved heterogeneity that underlies the fact that in the United States murder rates tend to be substantially *lower* in non-executing states than in high execution states. It is now widely recognized that panel data models with state and year fixed effects, while not foolproof, are more likely to identify the causal impact of a legal or policy change, such as the death penalty, than time-series or cross-section models.

4. Jeffrey Fagan. *Deterrence and the Death Penalty: A Critical Review of New Evidence*. Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction. January 21, 2005.
 - First, the new studies allegedly finding a deterrent effect are based on a few outlier jurisdictions, like Texas. Second, the studies do not address the availability of life without the possibility of parole sentences; Third, since most studies rely on the same data, data from Bureau of Justice Statistics of the U.S. Department of Justice and FBI, there are same gaps in most of the studies and are most likely to be heavily biased. For example, the FBI's data for Florida is missing four years in 1980s and another four years in 1990.

5. Robert Weisberg. *The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny*. *Annu. Rev. Law Soc. Sci.* 1:151-70 (2005).
 - This article focuses on the many flaws in recent deterrence studies. The article points out that there are holes in the data and too many ways to manipulate the data to completely rely on new studies.

6. Richard Berk, *New Claims about Execution and General Deterrence: Deja vu All Over Again?* 2 *Journal of Empirical Legal Studies* 303, (July 2005).
 - This paper is a response to the recent articles claiming to show that executions deter serious crime. The main criticism is that the results of the earlier papers suffer from the problem of "influence," where a small, atypical fraction of the data dominate the statistical results. In this and previous studies, 99% of the data was observations of years in which a state had 5 executions or less. Given that the alleged deterrent effect comes from such a small group of observations, which themselves lack credible evidence of deterrence, it would be poor policy to generalize from them to the larger United States. The result is that serious questions exist about whether anything useful can be learned from an observational study with the data likely to be available. The problem of influence may not be solvable in this type of data, rendering analysis highly suspect.

7. John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 *STAN. L. REV.* 791, 843 (2005).
 - "The U.S. data simply do not speak clearly about whether the death penalty has a deterrent or anti deterrent effect. The only clear conclusion is that execution policy drives little of the year-to-year variation in homicide rates. As to whether execution raise or lower the homicide rate, we remain profoundly uncertain."

8. John Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, the Economist's Voice, April 2006, www.beesxpress.com/ev.
 - “The view that the death penalty deters is still product of belief, not evidence. The reason for this is simple: over the past half century the U.S. has not experimented enough with capital punishment policy to permit strong conclusions. Even complex econometrics cannot sidestep this basic fact. The data are simply too noisy, and the conclusions are too fragile. On balance, the evidence suggests that the death penalty may increase the murder rate although it remains possible that the death penalty may decrease it. If capital punishment does decrease the murder rate, any decrease is likely small.”

B. The death penalty does not deter.

1. Arnold. H. Loewy. *The Death Penalty in a World where the Innocent are Sometimes Convicted* 41 TEX. TECH. L. REV. 187, 193 (2008-2009).
 - States that do not have capital punishment have, on average, lower murder rates than states that do. Comparing neighboring states with similar demographics, but for the presence or absence of capital punishment, shows virtually no differences. For example, comparing Kentucky, New Hampshire, and South Dakota (states with capital punishment) to West Virginia, Vermont, and North Dakota (states without capital punishment), respectively, reveals virtually no distinctions in murder rates.
2. Dawinder S. Sidhu. *On Appeal: Reviewing the Case Against the Death Penalty* 111 W. VA. L. REV. 453, 490 (2008-2009).
 - The infrequent imposition of the death penalty diminishes any deterrent effect.
 - “The threat of even the severest punishment will not discourage those who expect to escape detention and arrest. Most capital crimes are committed during moments of great emotional stress or under influence of drugs or alcohol, when logical thinking has been suspended. A criminal, especially a murderer, may not be particularly mindful of his eventual punishment . . . whether the punishment is imprisonment, solitary confinement or death. One may even go so far as to suggest that some individuals may not be aware of the punishments governing certain crimes.” *Id.*
 - “In response to the contention that capital punishment saves the lives of inmates and prison guards, empirical data shows that the threat to these members of our prisons is greater in states *with* capital punishment statutes.” *Id.*

- Studies counter the claim that the death penalty is a greater deterrent than the death penalty: Death penalty states as a group do not have lower rates of criminal homicide than non-death-penalty states. During the early 1970's death-penalty states averaged an annual rate of 7.9 criminal homicides per 100,000 population; abolitionist states averaged a rate of 5.1.
3. Jeffrey Fagan, Amanda Geller & Franklin E. Zimring, *Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty*, 84 TEX. L. REV. 1803 (2006).
 - The authors found that where the risk of execution went up in a death penalty state, the death-eligible cases where that risk should make a difference did not decline more than the non-eligible cases. In addition, the proportion of all homicides that risk capital sanctions in death states was not smaller in those states than it was in states without any death penalty. There was no visible evidence of the marginal deterrent impact of the death penalty on death-eligible killings.

V. RACE AND GENDER EFFECTS

A. The death penalty is sought most frequently in capital cases with white victims.

1. Hilary Potter & Michael L. Radelet, *Race, Gender, Region, and Death Sentencing in Colorado, 1980-1999*, 77 U.COLO. L. REV. 549, 577-78 (2006).
 - Even though white female victims made up 17.9% of all homicide victims, 34.5% of the cases in which the death penalty was sought. White male victims made up 36.1% of the state's homicide victims and 47.3% of homicides cases where death penalty was sought. However, black males accounted for 13.8% of all homicide victims and made up only 3.6% of capital case victims. Similarly, black female victims accounted for 3.9% of total homicide victims and accounted for only 2.7% of capital cases. Thus, the death penalty is most likely to be sought in Colorado for homicides with white female victims. In addition, the probability of death being sought is 4.2 times higher for those who kill whites than for those who kill blacks.
2. Glenn L. Pierce, Michael L. Radelet, *The Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides*, 46 SANTA CLARA L. REV. 1 (2005).
 - "Defendants convicted of killing non-Hispanic white victims receives the death penalty at rate of 1.75 per 100 hundred victims, compared to a rate of .47 for defendants convicted of killing non-Hispanic African American victims." *Id.* at 20.

- “It shows that the probability of a death sentence for those who kill non-Hispanic whites is 3.09 times higher than those suspected of killing non-Hispanic African Americans and 4.33 times higher than those suspected of killing Hispanics.” *Id.* at 22.

B. There is no pattern explaining why certain women are sentenced to death and executed.

1. Victor L. Streib, *Rare and Inconsistent: the Death Penalty for Women*, 33 FORDHAM URB. L. J. 609, 627 (2006).
 - The practice of imposing the death penalty on women has been rare and inconsistent. There were no patterns explaining why certain women are sentenced to death and others are not and what criteria we use to select the women to be actually executed from those sentenced to death.”

C. For black male defendants, appearances matter.

1. Jennifer L. Eberhardt, Paul G. Davies, Sheri Lynn Johnson & Valerie J. Purdice-Vaughns, *Looking Deathworthy: Perceived Stereotypicality of Black Defendant Predicts Capital-Sentencing Outcomes*, 17 Psychological Science 5 (2006).
 - Among black defendants accused of killing white victims, the more stereotypically black a defendant was perceived to be, the more likely that person was sentenced to death, even controlling for other appropriate variables. The study found that 24.4% of defendants who appeared less stereotypically black received a death sentence, while 57.5% of those who appeared more stereotypically black received a death sentence. However, in a similar examination of black defendants accused of killing black victims, the more stereotypically black defendants and less stereotypically black defendants were sentenced to death at nearly identical rates (45% and 46.6%, respectively).

D. Prosecutors’ decisions to seek the death penalty are arbitrary.

1. Michael Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decision to Seek the Death Penalty in South Carolina*, 58 S. Carolina L. Rev. 161 S. C. L. REV (2006).
 - Defendants accused of killing strangers are six times as likely to face capital prosecutions as offenders who kill friends or family members in an identical manner.
 - South Carolina prosecutors are three times more likely to seek the death penalty in white victim cases than in black victim cases.

E. Prosecutors' decisions to seek and jurors' decisions to impose the death penalty are affected by the race of the defendant and victim.

1. Isaac Unah, *Choosing Those Who Will Die: The Effect of Race, Gender and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina* 15 MICH. J. RACE & L. 135 (2009).
 - Between 2003 and 2007, Durham County prosecutors processed 34 White murder-victim cases and sought the death penalty in 23.5% of them. By contrast there were 111 Black murder-victim cases processed during that time and in only 10.8% did prosecutors seek the death penalty.
 - Despite the high number of Black murder victims, Durham County prosecutors seek the death penalty in only 9.3% of the cases in which Blacks murder other Blacks.
 - Black murder suspects are nearly twice as likely to face the death penalty as White murder suspects. Prosecutors seek the death penalty in 13.28% of the 128 death eligible murders committed by Black offenders. White suspects registered 14 death eligible murder offenses and prosecutors seek the death penalty in 7.14% of these.

2. Dawinder S. Sidhu. *On Appeal: Reviewing the Case Against the Death Penalty* 111 W. VA. L. REV. 453, 475-479 (2008-2009).
 - Racial minorities, especially African-Americans, are disproportionately represented on death row given their percentage of the general population.
 - A study conducted by the Bureau of Justice Statistics found that “since the revival of the death penalty in the mid-1970’s, about half of those on death row at any given time have been black.” Id at 476.
 - “Of the prisoners on death row in 1996, 40% were black, yet according to recent census data, African-Americans comprise only 12% of the general American population.” Id at 476-7.
 - “In Southern states where racial tension is ostensibly higher than in other regions of the country, the figures can be even more disturbing . . . African Americans make up 25 percent of Alabama’s population, yet of Alabama’s 117 death row inmates, 43 percent are black.” Id at 477.

3. Raymond Paternoster & Robert Brame, *Reassessing Race Disparities in Maryland Capital Cases*, 46 CRIMINOLOGY 971 (2008).
 - Data collected in Maryland indicates that black defendants who kill white victims (BD–WV cases) are more likely to receive by adverse treatment than similarly situated non- BD–WV defendants.
 - Black offenders who killed white victims in Maryland over the a certain time period were more likely than offenders in cases that

involved other racial combinations to have the local prosecutor charge them with a capital offense given that the case was death eligible and statistically more likely to be death noticed and death sentenced when compared with other cases.

4. Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807 (2008).
 - The statistics in this article are based on findings from studies conducted in California, Colorado, Georgia, Kentucky, Maryland, Mississippi, Nebraska, New Jersey, North Carolina, Philadelphia and South Carolina.
 - The District Attorney “pursued a death trial against 27% of white defendants, 25% of Hispanic defendants, and 25% of black defendants; a death sentence was imposed against 21% of white defendants, 19% of Hispanic defendants, and 19% of black defendants.” *Id.* at 829-30.
 - The District Attorney “pursued a death trial on behalf of 30% of white victims and 26% of Hispanic victims, but just 23% of black victims; a death sentence was imposed on behalf of 23% of white victims and 21% of Hispanic victims, but just 18% of black victims” *Id.* at 830.
 - The District Attorney “pursued death against black defendants and white defendants at the same rate despite the fact that black defendants committed murders that were less serious along several dimensions, meaning murders that were less likely to include the features that tend to lead to a death trial. Put differently, the bar appears to have been set lower for pursuing death against black defendants.” *Id.* at 833-34.
 - The District Attorney “pursued death less on behalf of black victims than white victims despite the fact that black victims were killed in more serious murders with multiple victims.” *Id.* at 834.
 - “[J]urors attenuate the differential treatment of blacks and whites: the odds of a death trial are 1.75 times higher against black defendants than white defendants, but drop to 1.49 times higher for a death sentence; the odds of a death trial are 43% lower on behalf of black victims relative to white victims, but drop to 38% lower for a death sentence.” *Id.* at 834.
5. John M Scheb II & Kristina A. Wagers, *Racial Discrimination in the Death Penalty in Tennessee: An Empirical Assessment* 5 TENN. J. L. & POL’Y 9 (2008-2009).
 - “Contrary to conventional wisdom, prosecutors were more likely to seek death penalty against white defendants and juries were more likely to return death sentences in cases involved white defendants.” *Id.* At 15. 50% of defendants convicted of first degree murder were white and 45% were black.

- “The story is somewhat different, however, with respect to the race of the murder victims . . . Prosecutors were considerably more likely to seek the death penalty in cases where victims were white. *Id.* At 15. 18% of defendants who killed white victims were sentenced to death while only 10% of defendants whose victims were black received the death penalty.
- Prosecutors were also much more likely to seek the death penalty when victims were white, irrespective of the race of the accused. However, juries were significantly more likely to return death penalty sentences in cases involving black defendants and white victims.
- White defendants whose victims were white were almost twice as likely as any other defendants to receive the death penalty.

F. Racially biased jurors are more likely to serve on death penalty cases.

1. Robert L. Young, Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment, *Delaware Behavior*, 25: 151-167, 2004.
 - Multivariate analysis of data for the 1990 and 1996 General Social Surveys suggest that those who are more likely to be allowed to serve on death penalty cases are not only more likely to harbor racially prejudicial attitudes, but also are more likely to favor the conviction of innocent defendants over letting guilty ones go free.

G. The race and gender of the jurors, defendant and victim impact jurors’ receptivity to mitigation.

1. Thomas W. Brewer, *Race and Jurors’ Receptivity to Mitigation in Capital Cases: The Effect of Jurors’, Defendants’, and Victims’ Race in Combination*, 28 LAW & HUM. BEHAV. 529 (2004).
 - “Female jurors were consistently more receptive to mitigation than their male counterpart on the jury.” *Id.* at 539.
 - “The more heinous the crime was perceived to be, the less respondents considered mitigation.” *Id.* at 539.
 - “Black jurors are significantly more receptive to mitigation than their white counterparts and more receptive overall.” *Id.* at 539.
 - “All jurors were significantly more receptive in [b]lack victim cases.” *Id.* at 540.
 - “Both [b]lack and [w]hite jurors are more receptive to mitigation in cases where a same-race defendant is charged with killing an other-race victim.” *Id.* at 540.

H. Age and gender has an effect on a juror’s willingness to select the death penalty

1. Crystal M. Beckham, Beverly J. Spray & Christina A. Pietz, Jurors' Locus of Control and Defendants' Attractiveness in Death Penalty Sentencing, 147 J. SOC. PSYCHOL. 285 (2007).
 - “Men, with the exception of the youngest men, were more likely than women to choose the death penalty. Additionally, young women were more likely than older women to select the death penalty.” *Id.* at 285.

I. The racial composition of the jury impacts jurors’ interaction with each other and the deliberation process

1. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006).
 - “Deliberation analyses supported the prediction that diverse groups would exchange a wider range of information than all-White groups. This finding was not wholly attributable to the performance of Black participants, as Whites cited more case facts, made fewer errors, and were more amenable to discussion of racism when in diverse versus all-White groups. Even before discussion, Whites in diverse groups were more lenient toward the Black defendant, demonstrating that the effects of diversity do not occur solely through information exchange. The influence of jury selection questions extended previous findings that blatant racial issues at trial increase leniency toward a Black defendant.” *Id.* at 597.

J. The Cost of the Death Penalty

1. Philip J. Cook *Potential Savings from Abolition of the Death Penalty in North Carolina* 11 American Law and Economics Review 498 (2009).
 - Despite the long-term decline in the number of death sentences and the lack of executions, the cost of the death penalty in North Carolina remains high.
 - In an empirical analysis focusing on a recent two-year period, (comparing actual costs associated with capital proceedings, with likely costs in the absence of the death) it is concluded that the state would have spent almost \$11 million less each year on criminal justice activities (including appeals and imprisonment) if the death penalty had been abolished.
2. California Commission on the Fair Administration of Justice Report (2008).
 - The additional cost of confining an inmate to death row, as compared to the maximum security prisons where those

sentenced to life without possibility of parole ordinarily serve their sentences, is \$90,000 per year per inmate.

- The annual costs of the present (death penalty) system are \$137 million per year.
- The cost of a system which imposes a maximum penalty of lifetime incarceration instead of the death penalty would be \$11.5 million per year.

3. John Roman, Aaron Chalfin, Aaron Sundquist, Carly Knight & Askar Dardenov, *The Cost of the Death Penalty in Maryland* RESEARCH REPORT, THE URBAN INSTITUTE (March 2008).

- The authors studied the lifetime costs of all homicides eligible to receive the death penalty where the homicide occurred between 1978 and 1999.
- An average capital-eligible case in which prosecutors did not seek the death penalty will cost Maryland taxpayers more than \$1.1 million, including \$870,000 in prison costs and \$250,000 in costs of adjudication.
- A capital-eligible case in which prosecutors unsuccessfully sought the death penalty will cost \$1.8 million, \$700,000 more than a comparable case in which the death penalty was not sought. Prison costs are about \$950,000, and the cost of adjudication is \$850,000, more than three times higher than in cases which were not capitally prosecuted.
- An average capital-eligible case resulting in a death sentence will cost approximately \$3 million, \$1.9 million more than a case where the death penalty was not sought. In these cases, prison costs total about \$1.3 million while the remaining \$1.7 million are associated with adjudication.
- Between 1978 and 1999 there were 56 cases resulting in a death sentence, and these cases will cost Maryland citizens \$107.3 million over the lifetime of these cases. In addition, the 106 that did not result in a death sentence are projected to cost Maryland taxpayers an additional \$71 million.
- In addition, the Maryland Capital Defender's Division cost \$7.2 million. Thus, it was forecasted that the lifetime costs of capitally-prosecuted cases will cost Maryland taxpayers \$186 million.

4. New Jersey Death Penalty Study Commission Report (2007).

- A study in New Jersey estimated that eliminating the death penalty would save the office of the public defender alone \$1.59 million.

5. Washington State Bar Association Report (2007)

- Analyzing the differential cost of capital and non-capital cases, and relying on prosecutors and public defenders' estimates on the extra cost to their organizations of trying a capital case, the Association estimates an additional cost of \$480,300 per trial.
6. Tennessee Comptroller of the Treasury Report (2005), *Tennessee's Death Penalty: Costs and Consequences*.
 - This report documented the results of 240 capital eligible cases and surveyed attorneys and judges to estimate the differential cost of a capital trial. The study estimated \$16,000 in additional costs in the trial phase. The sample was large (53 capital cases, 39 LWOP cases, and 159 life cases), but significant portions of case processing were not included, such as defense attorney costs for life without parole cases, voir dire, and some appellate processing.
 7. State of Connecticut Commission on the Death Penalty Report (2003).
 - The Commission estimated the excess cost of a death sentence versus life in prison at about \$430,000 or \$200,000 more than life imprisonment.
 8. Report of the Judicial Conference of the United States (1998).
 - The Conference conducted a budget analysis which was able to identify hours billed into hearing time, trial time, client time, and research time for both the defense and prosecution. They found capital cases billed more than ten times the hours of noncapital cases and that, contrary to other widely cited studies, prosecution costs (including law enforcement) were greater than defense costs. For the trial phase alone, they estimated costs of \$277,000 for a death notice, \$71,000 for no death notice cases, and \$185,460 for cases in which the death notice was filed and then retracted.

VI. OTHER RELEVANT EMPIRICAL STUDIES

1. John M Scheb II & Kristina A. Wagers, *Racial Discrimination in the Death Penalty in Tennessee: An Empirical Assessment* 5 TENN. J. L. & POL'Y 9, 17 (2008-2009).

- Based on a study conducted in Tennessee, there appears to be an inverse relationship between the frequency of a type of homicide and the likelihood that it will result in a death sentence.
- Nearly 40% of first-degree murder convictions involved killings committed in conjunction with burglaries or robberies, yet less than 20% of these convictions result in death sentences.
- Spousal or domestic killings account for 17% of first-degree murder convictions but only 12% of such convictions result in capital punishment.
- The infrequent occurrence of prison killings (less than 1% of first-degree murder cases in the sample pool) result in half of the defendants convicted being sentenced to death.
- There is also a relationship between the “atrociousness” and capital punishment. Homicides involving sexual assaults on children and the elderly are more than four times more likely to result in death sentences than are drug-related killings and gang-related killings.
- Murders to escape apprehension or punishment, for sexual gratification or to silence a witness are much more likely to result in the death penalty. Conversely, homicides motivated by racial or religious beliefs and / or bias, or hatred of the victim are least likely to result in the death penalty sentence.
- The method of killing is also relevant. Shooting (most common method of killing) is much less likely to result in the death penalty than most other methods of killing. Killing by drowning and throat slashing are most likely to result in capital punishment.
- The location of the killing appears important to juries and prosecutors. “Murders committed in a field, the woods or some rural area and those committed at the victim’s workplace are most likely to result in death sentences. Homicides committed on the street and in vehicles are least likely receive capital punishment.” *Id.* At 22.
- The number of victims has a “substantial impact” on both the prosecutor’s decision to seek capital punishment and the jury verdict. “When there are three or more victims, the convicted murderer is roughly twice as likely to receive the death sentence than when there are only one or two victims.” *Id.* at 23.