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COMPETENT CAPITAL REPRESENTATION: THE NECESSITY OF KNOWING AND HEEDING WHAT JURORS TELL US ABOUT MITIGATION

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I. INTRODUCTION

At the conclusion of the penalty phase—after the evidence is heard, the closing arguments given and the instructions read—the jurors enter the jury room faced with a binary choice: each juror must decide whether the defendant should live or die. Unlike the decision the jurors made during the guilt-or-innocence phase of the proceedings, however, this decision is not, at its core, a determination of fact, for example, did the defendant “do it,” but a moral and normative choice—does he deserve to die?¹ While there are antecedent factual determinations jurors must make, including the existence of a statutory aggravating circumstance, the final decision the jurors must make is not factual in nature. As the courts have noted, this is an “awesome responsibility,” and the jury must make a “reasoned *moral*” decision whether life imprisonment without the possibility of parole or the death penalty is the appropriate punishment.²

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1. We use the masculine pronoun advisedly; almost all persons facing the death penalty are men.

2. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (“[T]he sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant’s background, character, and crime”); *Caldwell v. Mississippi*, 472 U.S. 320, 329-30 (1985)

It is also an awesome responsibility to shape the defendant's case for life. The job of defense counsel is to provide the jury with the most sympathetic facts and the most persuasive interpretation of the relevant facts. Our understanding of how this task can be accomplished has changed remarkably in the last twenty-five years, in large part because of the data that is now available about how juries think about the question of penalty. The defense bar, as well as the courts that review the performance of defense counsel, have gradually come to recognize the components of competent capital representation, and the 2003 revision of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*³ ("ABA Guidelines") attempts to comprehensively address minimal standards for effective assistance in capital cases.

This emerging understanding of what constitutes effective assistance in death penalty cases goes far beyond eliminating the "abysmal lawyer" from capital representation. The "abysmal lawyer" cases—tales of sleeping lawyers, drunk lawyers, racist lawyers, or lawyers literally doing nothing—have highlighted the critical need for competent capital defense attorneys, but the developing consensus has turned not on the avoidance of various species of misconduct, but on the necessity of undertaking certain fundamental investigative steps. The *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*⁴ ("Supplementary Guidelines") are a significant step in capturing for courts and lawyers what have emerged as the professional norms for preparing a capital case.

By adopting a "multi-faceted and multi-disciplinary" approach that stresses the need for a capital defense team to think broadly, creatively, and deeply about mitigation, the Supplementary Guidelines are on firm empirical ground. Indeed, a rather rich store of empirical data on mitigation exists and there is much that it can teach us. This Article draws upon the data to explore the nature of mitigation and how it relates to capital representation in three basic steps. In Part II, we examine what the studies teach us about how a case in mitigation should

(quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)) (noting that "'jurors [are] confronted with the truly awesome responsibility of decreeing death'").

3. ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (rev. ed. 2003), in 31 HOFSTRA L. REV. 913 (2003) [hereinafter ABA GUIDELINES]. The ABA GUIDELINES are also available online at <http://www.abanet.org/deathpenalty/resources/docs/2003Guidelines.pdf>.

4. See SUPPLEMENTARY GUIDELINES FOR THE MITIGATION FUNCTION OF DEFENSE TEAMS IN DEATH PENALTY CASES, in 36 HOFSTRA L. REV. 677 (2008) [hereinafter SUPPLEMENTARY GUIDELINES].

be investigated to ensure that all of the pieces for a defendant's "case for life" are uncovered and fully developed. Part III looks at the empirical findings to see how a capital defense team might best fit together the pieces of mitigation based on what themes and which witnesses the studies show are best received. Finally, in Part IV we look at mitigation in light of who ultimately will be reacting to and using the mitigation—jurors—and what the empirical studies reveal about how different types of jurors respond to mitigation and are likely to use mitigating evidence in their deliberations.

II. INVESTIGATING AND DEVELOPING THE CASE FOR LIFE

When faced with the moral and normative choice—does the defendant deserve to die—it is wrong to dismiss the role of facts entirely. Facts do count, but they count in different ways than they do in the guilt phase. The empirical information—primarily the Capital Jury Project ("CJP") studies—reveals that many jurors make the life or death decision based on a misunderstanding of the law. Most significantly, many jurors believe—despite the judge's instructions—that they must impose the death penalty if the crime was premeditated, or "heinous," or intentional.⁵ But even aside from the lawless ways the facts sometimes count, they also matter in important ways that are consistent with the law of the relevant jurisdiction. The empirical studies reveal that three primary considerations drive juror decision-making at the penalty phase of a capital trial. First, many jurors' penalty determination is based on their perception of how "bad" the crime was.⁶ Second, many jurors make the life or death decision based on how dangerous they think the defendant is.⁷ Finally, jurors choose the appropriate penalty based on their assessment of the defendant's remorse (or the lack thereof).⁸

5. See John H. Blume, Theodore Eisenberg & Stephen P. Garvey, *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 144, 159-61 (Stephen P. Garvey ed., 2003); see also William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 (1995); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1542 (1998) [hereinafter Garvey, *Aggravation and Mitigation*].

6. See, e.g., Mark Constanzo & Sally Constanzo, *Jury Decision Making in the Capital Penalty Phase*, 16 LAW & HUM. BEHAV. 185, 188-89 (1992); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 46 (1988).

7. See John H. Blume, Stephen P. Garvey & Sheri Lynn Johnson, Study, *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398 (2001); Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1542.

8. See Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry?: The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1631-33 (1998); Stephen P.

A skeptical reader might ask, “What do any of those three issues have to do with mitigation?” The considerations appear to be driven by the facts of the underlying crime. But the skeptic would be wrong. Each consideration, the empirical studies also show, can be substantially influenced by the evidence in mitigation. Successfully humanizing the defendant through the mitigating evidence, for example, leads jurors to believe that the crime was not as heinous. It also makes jurors less likely to view the defendant as dangerous, and less likely to see him as remorseless.⁹ A comprehensive, consistent, coherent, and credible presentation of mitigation evidence can—and often does—influence a juror’s determination on all three issues.

Thus “facts,” as properly understood for the life or death sentencing determination, encompass much more than the “facts” as understood in non-capital trials. The juror’s life or death decision will hinge on whether the information that has been presented in aggravation and in mitigation has persuaded an individual juror as to which of the two punishments is the appropriate punishment.¹⁰ In short, credibly telling the defendant’s story can make the difference between life and death.¹¹

The CJP studies reveal that many different types of mitigation resonate with jurors. Low intelligence, mental illness, child abuse, extreme poverty, remorse, lack of a significant prior record, and lesser culpability are just some of the categories of mitigation that, in a particular case, can lead jurors to choose life over death.¹² As one researcher put it:

Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 58-59 (2000) [hereinafter Garvey, *Emotional Economy*]; Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1560 (1998).

9. See Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1539, 1561-66.

10. This is not meant to downplay the importance of thoroughly investigating the facts of the crime. That investigation is also critical, especially given that more than one hundred death sentenced inmates have been wrongfully convicted. Innocence and the Death Penalty, <http://deathpenaltyinfo.org/article.php?did=412> (last visited Apr. 5, 2008). But regardless of the defense team’s assessment of the likelihood of an acquittal, a thorough investigation into all possible avenues of mitigation is essential. This is true for a variety of reasons. First, if the case goes to trial, most defendants will be found guilty. And while residual doubt is a powerful mitigating circumstance in the abstract, once jurors conclude the defendant is guilty, they rarely harbor any residual doubt at the sentencing phase of the trial. See Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1563. Second, the investigation for the penalty phase can not wait until the defense team is able to make an intelligent decision as to the prospects of an acquittal. A meaningful mitigation investigation is a labor intensive process and must begin as soon as counsel is appointed. Third, the mitigation investigation will frequently uncover information that is supportive of an overall defense theory that the client was not guilty or is less culpable than other persons charged in the offense.

11. See Garvey, *Emotional Economy*, *supra* note 8, at 63.

12. Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1539, 1564-66.

Telling a defendant's story does appear to have its intended emotional effect. . . . If a juror believed that 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 . . . was a loner in the world, or had generally gotten a raw deal in life, the usual response was sympathy or pity.¹³

But, as with everything else in death penalty litigation, it is not quite that simple. It is not enough to present a case in mitigation; the defense case for life must resonate with jurors. It must be comprehensive, consistent, coherent and credible.¹⁴ For example, a juror in a capital case will frequently reject a "half-baked" case of mental illness, a consideration which—in the abstract—is considered by jurors to be highly mitigating. On the other hand, a truly compelling case of drug addiction tied to events in the defendant's life and its role in the crime can result in a juror deciding that life without parole is the appropriate punishment.¹⁵ In short, the devil is in the details.

It is essential, therefore, that the defense team—and it must be a team effort¹⁶—approach the search for mitigation with an open mind. One of the most serious mistakes the defense team can make is to decide on a theory of the case too quickly. A persuasive theory of the case—including the defense theory at both guilt-or-innocence and the penalty phases of capital trial—can only be determined after a comprehensive investigation has been conducted. While other contributors to this volume will explain the process of conducting the investigation in more detail, this point cannot be overemphasized. The defense team must gather the full picture of the client's life and background and the circumstances of the crime. In short, "the good, the bad and the ugly" must be fully pursued on a multi-generational level.

13. Garvey, *Emotional Economy*, *supra* note 8, at 57 (footnotes omitted); see also Michelle E. Barnett et al., *When Mitigation Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials*, 22 BEHAV. SCI. & L. 751, 754, 762-65 (2004) (using ten different vignettes to demonstrate that factors such as severe abuse as a child and mental retardation mitigated the likelihood of a death sentence).

14. See John H. Blume & Pamela Blume Leonard, *Principles of Developing and Presenting Mental Health Evidence in Criminal Cases*, CHAMPION, Nov. 2000, at 63, 63.

15. See Barnett et al., *supra* note 13, at 762, 765; see also Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003, at 32 (telling the story of a jury which ultimately decided to give a drug addicted defendant a life sentence over the death penalty).

16. SUPPLEMENTARY GUIDELINES, *supra* note 4, at Guideline 4.1.

This process includes interviews with multiple informants and obtaining any and all social history documents.¹⁷ Without a comprehensive investigation, the defense team cannot choose or present the most persuasive theory of the case. The defendant's family members, neighbors, friends, teachers, coaches, jailers and correctional officers, treating physicians or mental health professionals—among others, depending on the defendant's life history—must be identified and interviewed.¹⁸ The team must gather all available social history records including, but often not limited to, birth records, family medical records, school records, social services records, military records, and prison records.¹⁹ In short, the defendant's life must be examined from a variety of perspectives with the benefit of multiple sources.²⁰ Without this searching investigation, the empirical studies demonstrate that a juror is much more likely to embrace the prosecution's theory of the case, which is invariably the same: the defendant is a dangerous, remorseless sociopath who has committed a vile crime—and must die.

This process must include the gathering of "stories" or "vignettes" for the purpose of making the mitigation real. The juror interviews conducted as part of the CJP make this clear. A specific story of a particular horrific instance of abuse, for example, resonates with jurors more than general assertions that the defendant was abused. The same is true of most other forms of mitigation including mental illness, low intellectual functioning, and good character evidence. A picture—even a word picture—speaks a thousand words. The defense team must search for these vignettes in interviews, documents and records.²¹ These

17. See *id.* at Guideline 10.11.

18. See *id.*; see also John H. Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, *ADVOC.*, Aug. 1995, at 3.6; Blume & Leonard, *supra* note 14, at 64-65.

19. Blume & Leonard, *supra* note 14, at 64.

20. See *id.* at 64-65.

21. A good example of the search for records making a difference can be found in *Williams v. Taylor*, 529 U.S. 362, 395-98 (2000). In concluding that trial counsel's investigation was both unreasonable and prejudicial, the Court relied upon the following excerpt from Williams's juvenile records:

The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty, and none of them had on under-pants. Noah and Lula [Williams' parents] were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey.

Id. at 395 n.19.

vignettes are also important in the way in which jurors decide cases. Jurors resort to a story-telling model, and the smaller stories about a defendant's life aid jurors in creating a larger more "defendant-friendly" counter story to the prosecution's story about the crime.²²

There are other essential components to a constitutionally adequate investigation. First, the defense team must secure appropriate expert assistance, primarily from mental health experts.²³ It is important to approach the issue of expert selection in an informed manner. It is critical that experts not be retained until the initial social history investigation is completed or at least well underway. Deciding too quickly on an expert can be as crippling to the development of an effective mitigation case as deciding too quickly on a theory of the case. Experts must be selected with an eye towards their expertise in the particular themes of the case. A generalist is often of little use. In that regard, it is also essential that counsel not base their case on experts who do appear to have a "stake" in a particular outcome. The empirical evidence reveals that jurors are skeptical of an expert witness who is retained "after the fact," for example, after the client has committed the murder and is in jail awaiting trial. Some jurors view such experts as "hired guns" who are simply parroting what the defendant's lawyers have retained them to say.²⁴ This is not to say that expert witnesses retained after the fact are not useful to the defense; they can be—if they are used correctly. Experts of this nature can be useful in several ways. First, they can be invaluable in guiding counsel to other potential sources of information that support the overall case in mitigation. They can also be effective witnesses if—as will be discussed later—their testimony is corroborated by other witnesses and documents bolstering their conclusions.²⁵ But the most effective expert testimony often comes from someone who had some connection with the defendant before the crime. For example, if a defendant has a history of mental illness, and was treated by a mental health professional before the crime, that individual

22. See Daniel A. Krauss & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing*, 7 PSYCHOL. PUB. POL'Y & L. 267, 273-74 (2001); Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 46-47 (1999).

23. However, it is essential that the core defense team also have at least one member who is qualified by training and expertise in identifying and documenting and interpreting symptoms of mental disorders and impairments. SUPPLEMENTARY GUIDELINES, *supra* note 4, at Guideline 5.1.

24. Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123-26 (1997).

25. See *id.* at 1163-64.

will have more credibility with the jury.²⁶ This trial reality highlights the need for a full and complete investigation.

One issue which arises at the investigation stage in many cases is whether the defense team should utilize neuroimaging. This question does not have a one-size-fits-all answer. The upsides are significant. If, for example, a theme of the mitigation case is brain damage or neurological impairment, an MRI scan demonstrating an abnormal brain can be very effective. The empirical evidence indicates that jurors are persuaded by this type of evidence. On the other hand, many types of brain dysfunction are not detectable through neuroimaging. A “normal” brain scan can negate other clinically sound evidence of brain dysfunction detected through sophisticated neuropsychological testing. Jurors are more likely to dismiss this evidence if the “picture” of the brain does not “reveal” the impairment.²⁷ Thus, there is no easy solution. The only possible generalization is that the defense team should proceed *very* cautiously and *only* utilize brain imaging after the investigation is complete, neuropsychological testing has been conducted, and an appropriate expert—usually a neurologist—has advised counsel that there is a substantial likelihood of a “positive” result.

Finally, the defense team must be creative and, to an extent, visionary. The legal definition of mitigation is perhaps the best one: it is anything which might lead a reasonable juror to find that there exists “a basis for a sentence less than death.”²⁸ The empirical evidence supports this broad definition. Many different types of information resonate with jurors and a mitigation theme that “works” in one case may not work in another. The key is to develop an overall case which will resonate with the “average” juror. Our knowledge of what is mitigating is not yet complete. Times change, scientific and medical knowledge changes, and our understanding of what jurors deem mitigating should grow as well. This is evidenced by the recent rise in defense-based victim outreach. Just a few years ago, many defense teams made little effort to reach out to victims’ surviving family members. The conventional wisdom was that these individuals were the prosecution’s witnesses. But, that has changed (fortunately) and now a competent mitigation investigation includes reaching out to the victim’s family. It may not prove fruitful in a particular case, and it is difficult to embark upon, particularly for

26. *See id.* at 1126-30.

27. Blume, *supra* note 18.

28. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

attorneys who are not used to approaching victims' family members, but it is a necessary component of the trial preparation.

In sum, the defense team must conduct a comprehensive investigation of the defendant's life with no preconceptions, and then diligently and methodically follow the resulting leads. There is no cookie-cutter approach. Defendants are unique and, for that reason, each mitigation investigation will be unique.

III. PUTTING TOGETHER THE CASE FOR LIFE

While it is crucial in the investigation phase not to allow one potential theory of the case to curtail the development of facts, it is equally critical at trial not to simply throw an assortment of mitigating facts at the jury. Because jurors—like everyone else—make meaning of the world through the use of stories, the question of whether to sentence the defendant to death or to life imprisonment often depends upon whether the prosecution story or the defense story is more compelling.²⁹ Of course, what kinds of stories are compelling depend upon the listener as well as the storyteller, and it seems likely that defense lawyers will hear mitigation stories differently than will the typical juror. Fortunately, the CJP data, along with mock jury studies, offer significant insights into both the question of what stories are compelling and the question of how best to tell a given story to the kind of audience who will be making the life or death decision.

The objective evidence adds much to three topics that defense lawyers in the immediate aftermath of *Gregg v. Georgia*³⁰ could only guess at: the relationship between guilt and penalty phase stories; the aspects of the state's case for death to which it is most important to respond; and the way to structure the presentation of mitigation evidence.

A. Integrating the Guilt and Penalty Phase Stories

It is tempting for lawyers to think of the guilt and penalty phases as two trials, since different legal questions are resolved in each. Some lawyers operationalize this vision of two trials by assigning one lawyer responsibility for each phase. Unless, however, those lawyers work very closely with each other, this is a bad division of labor, and it certainly

29. See Ursula Bentele & William J. Bowers, *How Jurors Decide Death: Guilt Is Overwhelming; Aggravation Requires Death; and Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1053-55 (2001); Krauss & Sales, *supra* note 22, at 273-74.

30. 428 U.S. 153 (1976) (upholding the constitutionality of the death penalty).

reflects an inaccurate perception of how—and when—the jury will resolve the question formally assigned to the sentencing phase.

The disheartening news is that most jurors enter the penalty phase with their minds already made up as to the appropriate sentence.³¹ Thus, the defense team that delays presentation of all its mitigating evidence until the penalty phase does not merely struggle with the prosecution over whose story is most persuasive; it fights an uphill battle to dislodge the decision already entrenched in the minds of many of the jurors.³² Therefore, competent defense counsel have long recognized the importance of foreshadowing or frontloading mitigation themes in the guilt phase, either through cross-examination aimed at eliciting facts that mitigate either the heinousness of the defendant's role in the crime or his responsibility for his actions, or by the presentation of evidence relevant to some aspect of the mitigation theory case.³³ To be clear, we are not suggesting that counsel should frequently raise a mental health defense, for example insanity, at the first phase; that is often a risky proposition and should be done only in a handful of cases, but a creative defense team can almost always find a way to present the mitigation themes in the first phase.³⁴

This is always difficult to do, but it is especially difficult when the defense is actively contesting guilt. Contesting guilt has an obvious value at the guilt phase, but it also has potential value at the penalty phase, because residual doubt about guilt is a strong predictor of life sentences.³⁵ The value of actively contesting guilt, however, must be weighed against the frequency with which jurors are angry at defendants who deny their involvement when evidence of guilt is strong. A denial defense at the guilt or innocence phase is more than twice as likely to result in a death sentence as compared to cases where the defendant acknowledges his guilt from the start, particularly when the defendant

31. See Bentele & Bowers, *supra* note 29, at 1019.

32. See Wanda D. Foglia, *They Know Not What They Do: Unguided and Misguided Discretion in Pennsylvania Capital Cases*, 20 JUST. Q. 187, 198 (2003) (of the jurors who chose death before the sentencing phase began, seventy-five percent never wavered from their choice).

33. ABA GUIDELINES, *supra* note 3, at Guideline 10.10.1 & commentary.

34. An excellent example of frontloading took place in the trial of Susan Smith. Ms. Smith was on trial for the murder of her two children. The prosecution presented evidence that Ms. Smith's motive for killing her children was to pave the way for her marriage to a rich local businessman with whom she was sexually involved. To rebut the alleged motive, the defense called an expert witness who detailed Smith's history of sexual abuse, depression, and suicidality and opined that Smith intended to kill herself and her children while suffering from major depression. Ms. Smith was found guilty, but at the sentencing phase the jury promptly returned a life verdict. *Life Term Given Mother Who Drowned 2 Sons*, L.A. TIMES, July 30, 1995, at A6.

35. See Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1563.

has taken the stand and testified to his innocence.³⁶ In such cases, jurors frequently dismiss the case in mitigation as just another attempt by the defendant to avoid responsibility for his actions. In the juror's eyes, the defense team tried to fool them at the first phase by denying his guilt, and now he is trying to fool them again with the mitigation evidence to cheat the executioner.

Sometimes the tension between contesting guilt and acknowledging responsibility can be bridged by partial defenses; a defendant may contest his mental state, or his role in a multi-defendant crime without necessarily incurring the jury's wrath when he "switches" to a focus on mitigation in the penalty phase.³⁷ Likewise, a defense that acknowledges involvement in the killing but denies that the defendant was guilty of capital murder appears to escape this backlash, at least where the defense is plausible on the facts.³⁸

To flag the importance of beginning the presentation of the mitigation story in the guilt phase and the (related) importance of consistency between guilt and penalty phase stories obviously does not resolve the tensions between "running for the roses" at guilt, and giving the defendant the best chance at a life sentence. What the empirical evidence does do is to suggest how important it is to coordinate the presentations at each phase so that the story the jury hears from the defense is internally coherent and consistent.³⁹

B. Combating the Prosecution's Case for Death

In a very real sense, the "end" to the story is written by the jurors. But what is the right end? Because a capital trial is a struggle between competing stories, the prosecution story is scripted to lead to the conclusion that the correct end to the story is a death sentence for the defendant, and the defense story to the conclusion that the only right end is a life sentence. To win the battle of stories requires considering what the elements of the prosecution's story are and how to undercut the persuasiveness of those elements, as well as how to weave the best story for life.

While every aggravation case is slightly different, we know from the CJP data that there are three stock elements to those stories, elements

36. Sundby, *supra* note 8, at 1575.

37. *See id.* at 1585.

38. *Id.* at 1593.

39. *See id.* at 1593-94 (asserting that jurors are likely to perceive the defendant who fails to take any responsibility in the guilt phase as continuing to deny responsibility in the sentencing phase if he then offers mitigation focusing on child abuse, substance abuse, or other impairments).

that every capital defense team must attempt to combat. As discussed above, because the best predictors of a death sentence are vileness of the crime, future dangerousness, and lack of remorse, putting together the case for life should always include attempts to undercut these factors.⁴⁰

1. Vileness

The more vile the jury perceives the crime to be, the more likely the defendant is to be sentenced to death.⁴¹ At first blush, this sounds pretty discouraging: in many cases not very much can be done about the facts of the crime. Moreover, in most cases, some prosecutor has already decided that the underlying crime was vile enough to get the death penalty, so the defense attorney rarely is confronting a case that the factory worker, the clerk at the convenience store, or the stay-at-home mom will hear about and say, “Oh, that’s not so bad!”

Nonetheless, at the margin, the juror’s estimation of the vileness of a case can be shifted upward or downward. We know that photographs increase perceptions of vileness.⁴² For this reason, even in jurisdictions that have very expansive views of when the probative value outweighs the prejudicial effect, it is worth objecting to the introduction of photographs; one can never be certain the trial judge will not exclude them. In the alternative, moving for the exclusion of repetitive photographs, or the exclusion of color photographs, or the exclusion of autopsy photographs may be fruitful; such photographs contribute no additional information to the jury, but are very likely to be inflammatory.

We also know that perceptions of vileness are influenced by some attributes of the victim. Generally, it is not a good strategy to attack the victim, or deprecate his place in life; it does not appear that jurors respond differently to the killing of a gas station attendant than to the killing of a bank vice president. However, jurors do view a crime as less vile—and less deserving of death—when a victim’s own actions at the time of the crime put him or her at risk, or in some other way were morally blameworthy.⁴³ Thus, introducing evidence that the victim had a

40. ABA GUIDELINES, *supra* note 3, at Guideline 10.11(G)-(I).

41. Geimer & Amsterdam, *supra* note 6, at 46-47.

42. See *id.* at 49; William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1498 (1998).

43. See Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 364 (2003); see also Michael J. Songer & Isaac Unah, *The Effect of Race, Gender, and Location on Prosecutorial Decisions to Seek the Death Penalty in South Carolina*, 58 S.C. L. REV. 161, 193 (2006) (stating that defendants accused of killing

drinking problem is likely to backfire, but testimony that he was drinking heavily on the night of his murder may be helpful.⁴⁴

We also know that victim impact testimony increases the likelihood of a death sentence,⁴⁵ probably because jurors think the crime is worse when they have more details of its effects on the living. This is not the place to dispute the merits of *Payne v. Tennessee*,⁴⁶ but it is the place to note that the increased likelihood of a death sentence that results from victim impact testimony warrants vigilant efforts to prevent the expansion of the “brief glimpse” into the victim’s life authorized by *Payne*.⁴⁷

Finally, perceptions of vileness are clearly influenced by beliefs that the defendant acted in a premeditated way, and decreased by beliefs that the defendant was “crazy” or was mentally impaired.⁴⁸ Of course, in mounting an affirmative mitigation story, the defense often has other reasons to portray the defendant as either impulsive or crazy, but the evidence that perceptions of vileness vary with lack of premeditation and mental abnormality underscore the importance of presenting evidence of these impairments early on, in a persuasive way—and with explicitly *tying those impairments to the crime itself*.

2. Future Dangerousness

We know that future dangerousness is the second big predictor of death sentences, even in jurisdictions that do not mandate a finding of future dangerousness or even statutorily authorize its consideration in the death calculus.⁴⁹ Jurors are also more likely to impose a sentence of

strangers are six times more likely to face capital prosecution as offenders who kill friends or family members in the same manner).

44. Both mock jury studies and empirical studies of the death penalty suggest that race is an exception to the rule that status does not predict death sentences. One might respond that the victim’s race is an unalterable fact, and thus might as well be ignored in the preparation of the case for life. But it may be that some of the effects of the victim’s race can be diminished by presenting white witnesses who can testify that the execution of the defendant would be a loss to them. Or one might consider either expert testimony on the phenomenon or a “race-switching” instruction, for example, an instruction asking the jurors to consider whether their decision would be the same if the races of the victim and the defendant were reversed.

45. Bryan Myers & Edith Greene, *The Prejudicial Nature of Victim Impact Statements: Implications for Capital Sentencing Policy*, 10 PSYCHOL. PUB. POL’Y & L. 492, 498 (2004).

46. 501 U.S. 808 (1991).

47. ABA GUIDELINES, *supra* note 3, at Guideline 10.11, commentary & nn.304-07.

48. See Costanzo & Costanzo, *supra* note 6, at 188-89; Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1539.

49. See Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1559-60; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7 (1993); Blume et al., *supra* note 7, at 398.

death when they believe that the defendant will not actually remain in prison his whole life; indeed, the shorter their estimation of the time the defendant will be incarcerated prior to release should they not sentence him to death, the more likely they are to sentence him to death.⁵⁰ That is, jurors may not really prefer to execute the defendant, but they prefer his execution to his continued threat to the safety of the community.

Now here is some good news, because in most jurisdictions, a capital defendant not sentenced to death will be imprisoned for life, and even in the rare jurisdiction where he will eventually be released, his release will be significantly later than jurors believe it will be. So the truth will, if not set the capital defendant free, at least increase the likelihood that he will live. Repetition of the truth of incarceration for life—as well as its incorporation into jury instructions—matters.⁵¹ Witnesses should be encouraged to explicitly refer to the alternative of *life imprisonment without the possibility of parole*, and lawyers should train themselves to use the entire phrase whenever speaking of the decision before the jury.

Of course, even if they believe that the alternative to death is a *sentence* of life imprisonment, a juror may be worried that the defendant will escape. Here, the testimony of prison officials, or more often, *former* prison officials concerning security conditions for inmates sentenced to life imprisonment and the success of the applicable security measures in the past may be necessary.⁵²

Some jurors may also be concerned about the defendant's potential for violence in prison. If left to judge this issue solely by inference from the crime, most jurors will conclude that the defendant is likely to be violent while incarcerated.⁵³ That conclusion, however, would usually be

50. Eisenberg & Wells, *supra* note 49, at 7.

51. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 373 (2001) (where life without parole is the alternative to the death penalty, jurors often do not know about it or do not believe it means the defendant will never be released on parole). We surmise that jurors sometimes are skeptical that the sentence is life without parole because they read in the newspapers or hear on television news reports about a defendant sentenced to life who is granted parole or is coming up for parole. The jurors do not understand that those inmates were sentenced prior to the time the jurisdiction adopted life without parole as the alternative sentence to capital punishment. Counsel should consider asking the judge to inform the jurors that the law has changed and that life without parole means just that. Indeed, due process may require that this instruction be given if requested, see *Shafer v. South Carolina*, 532 U.S. 36, 39 (2001), and counsel must be imaginative and aggressive in the pursuit of other legal theories that might lead to the same result. See ABA GUIDELINES, *supra* note 3, at Guideline 10.11, commentary & n.290.

52. See ABA GUIDELINES, *supra* note 3, at Guideline 10.11, commentary & nn.291, 309-11.

53. *But cf.* 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

wrong. Many defendants who cannot make the choices required to stay out of trouble in the free world respond well to a structured environment. An expert on adaptability to confinement (who often can also provide the testimony on the security of the state's prisons) can disabuse the jury of the belief that behavior on the outside predicts behavior on the inside, and substitute a more accurate (and generally more favorable) assessment of likely behavior while incarcerated based upon prior behavior while incarcerated, or in some cases, while in a mental institution, or even in the army.

The defense must also be prepared for a new hammer in the prosecution's future dangerousness tool kit: the expert who employs the psychopathy checklist. Nothing sounds more dangerous than a psychopath, and jurors may be swayed by the apparently objective nature of the scoring process.⁵⁴ But the psychopathy checklist is junk science,⁵⁵ and its purveyors are demonstrably mercenary, so it behooves every defense attorney to prepare to exclude this "expert" testimony, or to debunk it should exclusion fail.

3. Lack of Remorse

Another fatal factor is perceived lack of remorse. When the jury believes the defendant is not remorseful, they are angry, and they also see little of value in the defendant that is worth saving.⁵⁶ Jurors often find evidence of a lack of remorse in the defendant's demeanor at trial,⁵⁷ in his denial of guilt,⁵⁸ or in his failure to express regret for what he has done.⁵⁹ So what is a defendant to do? Take the stand and say how sorry he is? No, because jurors are generally doubtful of the sincerity of the defendant who takes the stand to declare for the first time how sorry he is. "Yes, he's sorry now," they think. "Sorry he got caught, and sorry he is going to fry."

So the answer to combating the story of a vile, dangerous, remorseless killer lies at least in part in presenting evidence early in the

(1989) (concluding that the prisoners in one study were not a threat to society and performed well in prison).

54. See John F. Edens et al., *The Impact of Mental Health Evidence on Support for Capital Punishment: Are Defendants Labeled Psychopathic Considered More Deserving of Death?*, 23 BEHAV. SCI. & L. 603, 618 (2005).

55. See *id.* at 617-18.

56. See Eisenberg et al., *supra* note 8, at 1631-33; Garvey, *Aggravation and Mitigation*, *supra* note 5, at 1560; Sundby, *supra* note 8, at 1560.

57. Eisenberg et al., *supra* note 8, at 1617; Geimer & Amsterdam, *supra* note 6, at 51-52; Sundby, *supra* note 8, at 1561-62.

58. Sundby, *supra* note 8, at 1575.

59. See Eisenberg et al., *supra* note 8, at 1617.

trial that the defendant was remorseful. Most, though not all, defendants *are* remorseful; the job is to show the defendant's remorse to the jury in a way that convinces jurors that is genuine. Some defendants can be convinced that they do not need to display a tough exterior; building the trust that this is so takes time. The demeanor of mentally ill defendants, whether medicated or unmedicated, is particularly likely to convey a false impression of the defendant's feelings about his crime, and with such defendants, coaching may be impossible.⁶⁰ In such cases, expert testimony as to the causes (whether the mental illness itself or the prescribed medications) of the defendant's appearance and its misleading nature are likely to be helpful.

Equally important, the jury should not first hear of the defendant's remorse when he pleads for his life. Such timing replays a very old and well-known stock story plot: the child who apologizes for his misbehavior to get out of the punishment a parent has assigned, or is about to assign. It is much better to elicit evidence of remorse from the police officer who took the defendant's statement, or the minister who has been seeing the defendant since his arrest, or the sister who cried about it with the defendant. With this preparation, a jury may be more receptive to the defendant's own statements. Moreover, with such evidence already before the jury, the lawyer can evaluate with less desperation whether the defendant's own testimony is likely to help or hurt him.⁶¹

C. Telling the Story that Creates a Reason to Choose Life

As discussed above, whether the defense's presentation during the penalty phase convinces the jury that a life verdict is the just end to the trial depends in part on how it fits with the story told by the defense during the first phase and in part by the extent to which the defense has been able to call into doubt the prosecution's story of a vile, dangerous, and remorseless defendant. But it also depends on three aspects of the mitigation story itself: the significance to the jury of its component parts, the persuasiveness of the presentation of those parts, and the compellingness of the themes uniting those parts.

60. See *Riggins v. Nevada*, 504 U.S. 127, 137 (1992) ("It is clearly possible that such side effects [from defendant's antipsychotic medication] had an impact upon not just [defendant's] outward appearance, but also the content of his testimony on direct or cross examination, his ability to follow the proceedings, or the substance of his communication with counsel.").

61. See ABA GUIDELINES, *supra* note 3, at Guideline 10.11, commentary & nn.289-94.

1. Facts that Mitigate

The Supreme Court has now declared that the execution of persons with mental retardation violates the Constitution.⁶² But prior to that decision, it was clear that evidence of mental retardation was highly mitigating.⁶³ This data suggests that evidence of borderline mental retardation or other forms of cognitive impairments are important in many cases even though the mental retardation threshold is not satisfied.⁶⁴

Evidence that the defendant was under the influence of extreme emotional disturbance or mentally ill at the time of the crime is also mitigating to almost half of all jurors.⁶⁵ Almost a third of jurors found exposure to serious child abuse mitigating, and a like number found childhood poverty mitigating.⁶⁶ One could, of course, state those findings in the opposite form, noting that a majority find neither mental illness nor child abuse mitigating, but this emphasis would be misplaced, given the requirement of unanimity.⁶⁷ The one mitigating factor that must be viewed with caution, however, is drug addiction, which more jurors found aggravating than mitigating.⁶⁸ Of course, if evidence of the defendant's drug use is going to be presented to the jury anyway, it behooves the defense lawyer to present it as sympathetically as possible. Moreover, not all drug dependence is viewed in the same way; defendants who have battled alcoholism are likely to create sympathy.⁶⁹

Finally, personality and pity matter. The more sympathy a juror feels for the defendant, the more likeable he finds the defendant to be, and the more able he is to imagine himself in the defendant's situation, the more likely a juror is to vote for life.⁷⁰ Conversely, fear of the defendant drives votes for death. Thus, witnesses who can make the

62. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

63. *Garvey, Aggravation and Mitigation*, *supra* note 5, at 1564.

64. *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (borderline intellectual functioning inherently mitigating). Similarly, the Supreme Court has now precluded the execution of juveniles, and again, prior to that decision, jurors found being under the age of eighteen very mitigating. *Garvey, Aggravation and Mitigation*, *supra* note 5, at 1564. It may be that the defendant's youth, especially when contrasted with the maturity of co-defendants, may prove an effective organizing theme for some mitigation.

65. *Garvey, Aggravation and Mitigation*, *supra* note 5, at 1564-65.

66. *Id.* at 1565.

67. *See Williams v. Taylor*, 529 U.S. 362, 373 n.5 (2000) (noting the fact that the Virginia Supreme Court felt that mitigation evidence of the defendant's "difficult childhood" and "limited mental capacity" would have "barely . . . altered the profile" of the defendant).

68. *Garvey, Aggravation and Mitigation*, *supra* note 5, at 1565.

69. *See Garvey, Emotional Economy*, *supra* note 8, at 57.

70. *Id.* at 63 tbl.10.

defendant appear likeable or pathetic must be sought out, and conversely, any witness whose testimony creates fear of the defendant—even if it is in some other way favorable—must be viewed very skeptically.

2. Persuasive Presentation of Mitigating Facts

How the facts are presented matters almost as much as the available facts. Capital jurors often have a negative reaction to the defense's expert witnesses. Indeed, expert witnesses accounted for two-thirds of the negative responses from jurors who felt that defense witnesses "backfir[ed] or were hard to believe".⁷¹ According to the jurors, defense experts were often nothing more than "hired guns," often failed to draw a specific link between their testimony and the defendant's specific impairments or actions, and often claimed to be able to explain human behavior when they could not really do so.⁷²

On the other hand, when jurors did react favorably to a defense expert called in the penalty phase, a life sentence was substantially more likely.⁷³ The lesson from these jurors is that defense experts need to be integrated with lay testimony. "If . . . 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 expert's testimony . . . to be trusted."⁷⁴ Thus, if an expert's testimony explains the significance of the facts recounted by family members, this is far more valuable than either general theories or statistical information.⁷⁵ Moreover, as mentioned previously, it is sometimes possible to counter suspicion of paid experts by utilizing the testimony of experts who were not retained, such as psychologists who had previously treated the defendant, or teachers who had observed his academic struggles.

3. Themes that Link Mitigating Facts and Persuade Jurors to Vote for Life

Understanding that jurors make sense of the world through the creation of stories requires the competent trial lawyer to do more than

71. Sundby, *supra* note 24, at 1123. Sundby adds that "jurors' impressions of defense experts were twice as likely to be negative rather than positive." *Id.*

72. *Id.* at 1125.

73. *Id.* at 1124.

74. *Id.* at 1144.

75. See ABA GUIDELINES, *supra* note 3, at Guideline 10.11, commentary & nn.284-86; Krauss & Sales, *supra* note 22, at 278 (examining the shortcomings of statistical information compiled by expert witnesses).

throw handfuls of mitigation at the jury, hoping someone will catch something. A theme, or a set of related themes, is critical. Choosing a theme requires understanding juries, and trying out various themes on audiences that resemble juries more than do most law offices.⁷⁶ Maybe this defendant, even while in prison, is still capable of making a contribution to others (or, more minimally, can really benefit from a structured environment). Sometimes the most persuasive picture just shows him as a human being, one who has done good and bad, and is sorry for the bad, one who loves and is loved, someone for whom hope is still possible. Or maybe he was never loved, never had a chance to take the high road, never even was shown there was a high road (or maybe he was so impaired from birth he could not see it, despite being shown).

Without knowing the facts or the audience, no one can say which of these stock stories is most likely to persuade, which brings us back to the importance of a full investigation of the facts, as discussed in Part II, and forward to the importance of selecting a jury who can hear the facts with an open mind, as addressed below.

IV. GIVING EFFECT TO MITIGATION IN THE JURY ROOM

The final stage in piecing together a successful story for life is to ensure that the twelve individuals who hear the case in mitigation will be as receptive as possible to the defense's case for life. As social psychology teaches us, even when we try to resolve factual disputes in an objective and impartial fashion, we inevitably resolve ambiguity and conflicts in a manner consistent with our defining values.⁷⁷ This lesson is particularly important in the death penalty context because no choice in the legal system draws more heavily upon a juror's values and moral judgment than the choice between life and death verdicts. Who is sitting in the jury box, therefore, inevitably will influence how the story for life is presented and debated in the jury room, and this means the defense lawyer's challenge does not end with the pretrial preparation of a compelling case for life. The lawyer must also be adept at identifying

76. Defense teams would be wise to conduct focus groups. If funding is not available in the relevant jurisdiction for this purpose, the defense team would still be wise to assemble a representative group from their friends, friends of friends, neighbors, and others.

77. See generally Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense* (Cultural Cognition Project, Working Paper No. 36, 2008), available at <http://ssrn.com/abstract=1012967> (discussing social psychology findings on cognition in explaining how individuals evaluate and resolve controversial self-defense fact patterns, such as battered woman's syndrome, depending upon their world views).

those potential jurors who will be most inclined to accept the premise that a punishment less than death will satisfy the needs of justice based on their defendant's story for life.⁷⁸

A. *The Importance of the First Ballot*

In thinking about picking a jury that will be most receptive to the case for life, it is critical for the defense attorney to realize at the outset that *every* juror chosen matters. An understandable tendency exists to think of a jury as a whole where twelve jurors must be persuaded at a time, but analysis of first-vote thresholds reveals quite a different phenomenon. At the penalty phase, if only five jurors—less than a majority of the jury—vote for life on the first ballot, a life verdict is almost certain to result. That is the good news for defense attorneys. The bad news is that if nine or more jurors cast their ballots for death on the first ballot, a death sentence frequently follows. The up-for-grabs situation is where there are eight votes for death, with the final outcomes splitting roughly 60/40 in death and life outcomes.⁷⁹

This data highlights how many cases would be altered if only a single juror had been persuaded to vote differently on the first ballot. Only three votes for life or undecided on the first ballot? A death verdict is very likely. Add one more vote for life or undecided? The odds of a life verdict shoot up from almost nil to even. Add two votes for life or undecided? The verdict will have swung from an almost guaranteed death sentence to a life sentence as the number of votes for death falls below eight. The unmistakable lesson for defense counsel is that if better jury selection adds one or two more jurors sympathetic to the defendant's case for life—indeed, adds one or two more jurors who will simply vote “undecided” rather than for death—the dynamics of the jury deliberation may be fundamentally altered and result in a life sentence.⁸⁰

78. See ABA GUIDELINES, *supra* note 3, at Guideline 10.10.2, commentary.

79. See Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 304 (2001) (analyzing South Carolina data of CJP); see also Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 TEX. L. REV. 1929, 1936 (2006) (discussing the effect of first ballot juror votes on sentence outcomes). However, there are a number of documented cases where one juror was able to hold out for life despite the fact that the other eleven jurors were committed to the death penalty.

80. Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity* (forthcoming, on file with author) (exploring how life and death juries persuade holdouts to join the majority).

B. *The Demographics of Life*

The challenge then lies in identifying those potential jurors who will be most open to the case for life from among the pool of death-qualified jurors. Ideally, from defense counsel's perspective, one could identify such jurors through a demographic profile. In a recent article, Professors Eisenberg and Garvey analyzed the CJP data in an attempt to identify the characteristics of the "merciful" juror, those jurors who were most inclined to give "mercy" a role in his or her sentencing decision.⁸¹ After analyzing the data, the authors determined that "high mercy jurors" comprised about one-fifth (nineteen percent) of all the capital jurors in their study.⁸² On the whole, these "high mercy jurors" were more likely to believe that a sentence less than death could be an appropriate punishment for intentional murder,⁸³ were more likely to feel sympathy for the defendant,⁸⁴ and were more likely to downplay considerations such as the retributive principle of an eye for an eye and a tooth for a tooth.⁸⁵

Attitudes such as these could be expected to make "high mercy jurors" more receptive to the defense's case in mitigation, and this is borne out in the first votes cast at the penalty phase: while eighty percent of "low mercy jurors" cast their first ballot for death, only forty-four percent of the "high mercy jurors" voted for death on their first ballot.⁸⁶ Critically, therefore, the presence of more "high mercy jurors" on a jury appears to significantly decrease the likelihood that the first ballot will reach the critical threshold of eight votes necessary to make a death

81. Theodore Eisenberg & Stephen P. Garvey, *The Merciful Capital Juror*, 2 OHIO ST. J. CRIM. L. 165 (2004). To identify a juror's mercy index, the study used questions centering on whether the juror believed "mercy" was a proper part of his or her decision. *Id.* at 180.

82. The majority of jurors (52%) were identified as middle-level mercy jurors and 29% were low-level mercy jurors. *Id.* at 182 tbl.2.

83. *Id.* at 184-85.

84. *Id.* at 185.

85. *Id.* at 186 tbl.5.

86. *Id.* at 191 tbl.7. That almost half of the "high mercy" jurors cast their votes for death might at first be surprising, but even "high mercy" jurors have said they could vote for death or they could not sit on a capital jury. What qualifies as "high mercy" in a pool of capital jurors, therefore, might be different than for jurors generally. And, while almost half of high mercy jurors voted for death, that is still far lower than the eight of ten low-mercy jurors who voted for death. Similar differences were seen in terms of how first ballots were cast for life, with 44% of "high mercy" jurors voting for life compared to 9% of the "low mercy jurors" (11% of both the high- and low-mercy jurors voted "undecided" on the first ballot). *Id.* The first ballot percentages for those jurors whom the authors identify as "middle mercy jurors" were, as would be expected, in between the high- and low-mercy jurors: 50% for death, 37% for life and 12% undecided. *Id.*

sentence possible, let alone the nine votes that almost always yields a death sentence.

So what are the distinguishing characteristics of “high mercy jurors”? The authors were able to use multiple regression analysis to identify two factors that were statistically significant. First, the study found that the likelihood of a juror being high-mercy rose along with the juror’s level of education; thus those jurors who had a high school education or less were the most likely to fall in the low-mercy group, while jurors with a college degree or higher were the most likely to be high-mercy.⁸⁷ In addition to education, the regression analysis revealed that the likelihood of a juror falling in the high-mercy category was positively correlated with regular attendance at religious services; the key factor, at least for the group of South Carolina jurors studied, was regular attendance of church services rather than denomination.⁸⁸

An additional demographic observation must be added when it comes to first votes. Although the study just mentioned did not find a correlation between race and the tendency to be a “high mercy juror,”⁸⁹ studies have found a correlation between race and first vote tendencies. Specifically, African Americans jurors are more likely to cast their first votes for life than jurors of other races.⁹⁰ Given the critical nature of the first-vote tally, it does not matter of course why a particular juror is voting for life or “undecided,”⁹¹ but simply whether his or her vote might preclude the prosecution from reaching the eight-vote threshold necessary to make a death sentence possible.

This potential for a juror’s race to affect the dynamic of the jury room, especially in certain types of cases, is strongly reinforced by a study conducted by Professor William Bowers and his colleagues. Examining the full CJP data base, the study found that in cases involving an African American defendant accused of killing a white victim, the seating of one African American male dramatically reduced the chances

87. *Id.* at 189 & n.61.

88. *Id.* at 190. The study controlled for membership in the Baptist, Southern Baptist, and Methodist churches and found no statistical significance beyond the basic fact of attending religious services regularly. Interestingly, though, in looking at likelihood of jurors casting their first vote for life, Southern Baptists, although as “merciful” as regular churchgoers of other denominations, were more likely to vote for death than members of other denominations. *See* Eisenberg et al., *supra* note 79, at 284-86.

89. In fact, African American male jurors were on balance less likely to be merciful than other demographic groups, although not to a statistically significant level. Eisenberg & Garvey, *supra* note 81, at 189. The study also found no correlation between gender and level of mercy. *Id.*

90. Eisenberg et al., *supra* note 79, at 298.

91. *See generally* Sundby, *supra* note 80 (surveying the various reasons why more jurors may be voting for “life” on capital juries).

of a death sentence; juries with one African American male juror returned death sentences in 42.9% of such cases compared to 71.9% of the cases where no African American males were on the jury.⁹²

It was not only the seating of African American male jurors, however, that proved important. The number of white males on the jury also proved to be an important predictive factor independent of whether African American jurors were on the jury. Juries that heard cases involving a black-on-white killing and had four or fewer white males on the jury returned a death sentence in 30% of the cases; in striking contrast, if the jury included five or more white males the chances of a death sentence increased “dramatically,” with 70.7% of such cases resulting in death sentences.⁹³

While the Bowers study highlights the potential role of race in the death penalty decision, the findings also reinforce the need to understand that in any particular case the crucial question is how a juror’s attitude will match up with the case in mitigation being presented. The study discovered, for instance, that the difference in the death sentence rate reflects the fact that African American male jurors (and to a lesser extent African American female jurors) were more likely in black-on-white killings⁹⁴ to see the defendant as remorseful, to believe that the defendant’s background had adversely influenced his life, to have lingering doubts about the defendant’s role in the crime, and to believe that the defendant did not pose a future danger if given a life sentence.⁹⁵ Thus, although as a group African American male jurors are not particularly “merciful” when asked about mercy in the abstract,⁹⁶ as a group they exhibited attitudes apart from “mercy” that in certain types of cases made them more receptive to the case in mitigation than jurors with different demographics.

Studies of capital jurors, therefore, provide some general demographic insights into which jurors are most likely to vote for life on the first ballot: jurors with higher levels of education, those who frequently attend religious services, and African American male jurors where there is a black-on-white killing and the defendant’s background is a key part of the mitigation case. The importance of these findings,

92. William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 193 (2001).

93. *Id.*

94. *Id.* at 241–44. These differences in perception existed in all cases, but were particularly noticeable when a black defendant was accused of killing a white victim.

95. *Id.* at 215–26.

96. See *supra* notes 89-91 and accompanying text.

however, is not that they can serve as a concrete guide to jury selection. *They cannot*; in many cases, the strongest voice for death in the jury room was a juror who possessed one or more of those characteristics.

Rather, their importance is in highlighting that individual jurors will have attitudes and a world view that will influence how receptive they are to the defendant's case for life. The key, therefore, is to find the "merciful" juror, whether she has earned a high school degree or a doctorate, or the juror who will be open to the idea that the defendant's background shaped his life, whatever her race or religious views. Certain demographic groups may on average subscribe more to these views than other groups, and this makes aggressive *Batson*⁹⁷ challenges to prosecution strikes of African Americans crucial. Nonetheless, juries are comprised of individuals and not averages, and knee-jerk responses to a juror's race are as dangerous as ignoring such responses by the prosecution.

C. *Life-Qualifying Jury Selection*

When it comes to selecting a jury most receptive to a case for life, defense attorneys must think not only in terms of whom they want seated on the jury, but also whom they must avoid seating. The CJP has found that a number of death qualified jurors who have served on juries appear to view the death penalty as the only acceptable punishment for an intentional murder.⁹⁸ If such jurors truly are unable to give full consideration to a life sentence, then their service is contrary to the law, as the Supreme Court has held that jurors "who will automatically vote for the death penalty in every case" cannot sit on capital cases.⁹⁹

The uncovering of jurors who cannot give full consideration to life sentences (sometimes referred to as "reverse-*Witherspoon* excludables"), however, is not as easy as it may first appear. This is in part because the voir dire may not be sufficiently probing to uncover that a potential juror should in fact be excluded. A cursory question to the potential juror of whether she automatically would impose the death penalty for capital murder, for example, may lead to the honest response that she would

97. *Batson v. Kentucky*, 476 U.S. 79 (1986) (prohibiting racially motivated exercise of peremptory challenges).

98. See John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1220-24, 1237 (2001) (citing data from South Carolina and Kentucky showing that some jurors who have actually served in capital cases hold the view that the death penalty is the only acceptable punishment upon a murder conviction).

99. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

not. If the venireperson was asked further, however, to describe the type of case in which she would not impose the death penalty, some would give examples such as cases involving self-defense, accident, or insanity. The problem is that the venireperson is not a lawyer, and quite understandably does not know that such cases would never qualify for a capital murder conviction; consequently, some are *honestly* answering the question that they would not impose the death penalty for all murder without realizing that their examples would never qualify as capital murder in the first place. If capital murder were fully defined and explained, so that possibilities like self-defense were clearly excluded, then reverse-*Witherspoon* jurors would better be able to be identified by their answers to whether they would be unable to fully consider the possibility of a life sentence.¹⁰⁰

More thorough questioning on the definition of capital murder by itself, however, does not ensure that jurors will be chosen who can give effect to a case's mitigating evidence. Again, the problem is not the disingenuous or dishonest venireperson, but the individual who can imagine a specific type of "mitigation" that would lead them to impose a sentence of life—for example, brain damage—but would not accept as mitigating the actual evidence that the defense will offer, such as child abuse or substance addiction. Consequently, although such jurors might at first sound like they can sit on the jury since they are stating that they are capable of considering mitigating evidence, in the case they must actually decide, their attitudes will preclude them from considering mitigating evidence.¹⁰¹

The necessity of screening for jurors who cannot give effect to the defense's mitigating evidence makes plain how vital it is for defense counsel to utilize a number of tools for meaningful voir dire.¹⁰² Techniques essential to ensuring adequate voir dire include: 1) questionnaires; 2) individual, sequestered voir dire; 3) judicial phrasing of voir dire that makes clear the nature of mitigation; and 4) questioning that inquires into the juror's ability to give consideration to the specific type of mitigation evidence upon which the defense's case for life is built.¹⁰³

100. See Blume et al., *supra* note 98, at 1244-45 (discussing the misconceptions of jurors as to the meaning of "murder" under the law and how this prevents effective voir dire).

101. See *id.* at 1228-31.

102. See ABA GUIDELINES, *supra* note 3, at Guideline 10.10.2(B).

103. Blume et al., *supra* note 98, at 1247-64 (proposing a variety of techniques essential to ensuring adequate voir dire of potential capital jurors).

Defense counsel's need to engage in effective voir dire, however, extends beyond simply finding those venirepersons who should be excluded for cause. As we have stressed from the outset, the normative, moral judgment that is required of the jurors in choosing between life and death will bring into direct play their world views and values in evaluating the evidence. Interviews with capital jurors have consistently found that attitudes on certain issues are more likely to lead a juror to favor a death sentence. The attitudes predisposing a juror towards death include: a strong belief in free will, an emphasis on personal responsibility, and a skepticism about the criminal justice system's ability to deal with prisoners (including a belief that life without parole does not guarantee a defendant will not be released).¹⁰⁴ Similarly, if a juror identifies with the victim in the case and perceives the defendant as remorseless, the juror is more likely to favor a death sentence.¹⁰⁵

Perhaps most influential, though, is the tendency of jurors who strongly favored the death penalty to subscribe to a fundamental belief that, for certain types of crimes, the only way to right the "moral balance" given the victim's loss of life is to take the defendant's life.¹⁰⁶ This viewpoint, not surprisingly, led such jurors to find little of merit in the mitigating evidence, to have difficulty even recalling the details of the case for life, and even to see themselves as the victim's advocate in the jury room; jurors of a religious bent who represented this spectrum of capital jurors were the ones most likely to express their views through the recitation of the principle of "an eye for an eye."¹⁰⁷ The fewer the jurors holding such views that are seated, the greater the chance that the defendant's mitigating evidence will receive full consideration in the jury room.

On the other end of the spectrum of death qualified jurors are those whose attitudes make them more receptive to the idea of mitigation.

104. See SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 125-30 (2005) (discussing attitudes common among jurors who favored a death sentence); Blume et al., *supra* note 7, at 404 (discussing the effects of juror beliefs on the length of time defendant will be imprisoned); 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, 716-17 (1999) ("There is a pervasive misimpression among jurors that convicted first-degree murderers not given the death penalty will be released on parole well before they actually are . . .").

105. See generally Eisenberg et al., *supra* note 8 (discussing the correlation between a defendant's remorse and the sentence imposed by the jury); Sundby, *supra* note 8 (exploring the effect of a defendant's remorse on capital jurors); Sundby, *supra* note 43 (discussing the role of victims and the effect of defendant's remorse on sentencing).

106. See Sundby, *supra* note 79, at 1959-61.

107. SUNDBY, *supra* note 104, at 125-30 (describing attitudes of "fundamentalist" jurors).

These jurors tend to see individuals as shaped, at least in part, by their environment and the events of their lives; as a general proposition, such jurors were more open to expert testimony suggesting that the defendant's actions had been influenced by mental illness or life events. They also tend to be more open to the idea that people can change for the better, including positively adapting to prison, and also tend to believe that an individual may still do some good in the world even after causing great harm. While not necessarily religious, jurors who exhibited strong inclinations towards a life sentence often expressed their views in terms of "redemption"; such jurors could be characterized as "hope jurors," because the idea of "hope" was a theme that ran through many of their interviews.¹⁰⁸ This group of jurors, not surprisingly, was the most open to the idea that the "moral balance" could be regained by a sentence of less than death, especially if they thought the defendant was still capable of achieving some good while serving the rest of his life in prison.

The need to think through carefully how the mitigation evidence will be received by a potential juror is emphasized by a particular subset of jurors: those who share on some level the defendant's mitigation history. As a first reaction, this group of jurors might seem like an audience that would be empathetic to the defendant's case for life. This reaction would be wrong, though, as such jurors consistently were among the strongest advocates for death in the jury room. Upon further reflection this finding may not be so surprising once it is remembered that a consistent theme in many penalty phase deliberations is whether, despite the facts in mitigation, the defendant could still have exercised his "free will." Jurors who identified with the defendant often saw themselves as living proof that the defendant had made a "free choice" to go down the road that led to the murder, and, as a result, were often highly critical of the defense's suggestion that the defendant was influenced by events beyond his control. One juror's reaction to a drug expert presented by the defense both illustrates this tendency of jurors to negate the defendant's evidence based on their own experiences and their skepticism of professional experts suggesting otherwise:

Juror: [The expert] talked about methamphetamines and that they can make you not aware of your doings and such. . . . I thought it was a crock, because when I was in college . . . I did this stuff

Interviewer: Have you used methamphetamines?

108. *Id.* at 73-74 (describing attitudes of "hope" jurors).

Juror: Yeah, yeah so when I was sitting there listening to this drug expert I was thinking, "Have you ever done this stuff?" Do you actually know what was, I mean, is this all just text book knowledge? Because he knew nothing. . . . I had done this stuff, I know, and everything he was saying was just so far-fetched. I wondered where he got all this from.

Interviewer: Did you share that with the jury?

Juror: Oh yeah. Because there was another girl in there too, she was a former addict and . . . a recovering alcoholic, and she told the jury too, "I've done this stuff. . . ." We both told the jury, "I've used it, I've done it, and I would no more go out and say, 'Let's go kill somebody today and let's get cash and get more drugs.'" I never was up for four or five or six days as he apparently was. Even so, when you do the drugs you know it's illegal, you know it's wrong, so I just believe you're responsible for your actions.¹⁰⁹

On the other hand, jurors who identified not with the defendant but with a sympathetic figure in the defendant's life—like a well-meaning mother or father—were far more open to the idea that an individual might be led astray by others. A juror who was married to an alcoholic, for instance, is likely to be open to a mother's testimony that the defendant had been beaten and raised in a dysfunctional home because the father was an abusive alcoholic; a juror who like the defendant's father struggled to keep his son out of a gang in an area where gang membership was rampant may be particularly receptive to the idea that social pressures can be powerful influences.¹¹⁰ The broad lesson of findings such as these is that the defense constantly must be thinking about which jurors are most likely to be open to consideration of the defendant's story for life. The finest Picasso will not be appreciated by someone who believes abstract art is not really art, no matter how many art experts extol the painting's virtues. In short, the audience matters, and an integral part of being an effective lawyer is conducting jury selection in a manner that ensures that the mitigation evidence will be heard by a group of jurors capable of giving the evidence its fullest effect.¹¹¹

109. Sundby, *supra* note 24, at 1137 (alteration in original).

110. SUNDBY, *supra* note 104, at 114-15.

111. See Blume et al., *supra* note 98, at 1258-59.

D. Empowering the Jurors to Give Life

After choosing a jury that is properly selected to be open to mitigating evidence, defense counsel needs to give the jurors the ability to act upon the evidence. On the most basic level this means explaining the concept of mitigating evidence and its role in the penalty decision. This may sound unnecessary given that the jury will be provided with jury instructions, but the CJP has found that confusion over jury instructions abounds for critical topics like burdens of proof and future dangerousness.¹¹² Perhaps of greatest concern for our purposes is that jurors consistently express uncertainty as to what they could consider as mitigation and how it was to play into their decision; more than one juror has stated that they were even uncertain what the word “mitigating” meant.¹¹³

It is critical, therefore, that defense counsel explain early and often, in ways that the average juror can understand, the nature of the death penalty decision and what use should be made of the mitigation evidence they have heard. Words that lawyers do not even think twice about—like “mitigation” or “heinous”—may be completely foreign to jurors who do not deal with the law or complete the *New York Times* crossword puzzle. Counsel must repeatedly stress that jurors never have to impose the death penalty and that they can always choose life imprisonment without parole as the appropriate sentence. It is also important that counsel make sure that jurors understand that whether a particular piece of evidence is mitigation, as well as how much weight to give that evidence, is completely up to the individual juror and it does not matter whether other jurors agree with their assessment. Indeed, given that the role of mitigating evidence should be explored thoroughly at voir dire,¹¹⁴ the education of jurors should begin even prior to trial on the role of mitigating evidence if the case proceeds to the penalty phase.¹¹⁵

Anticipating the difficulties that jurors may have with form jury instructions, defense counsel can propose elaborations of standard

112. See Eisenberg & Wells, *supra* note 49, at 9-12; see, e.g., U.S. *ex rel.* Free v. Peters, 806 F. Supp. 705 (N.D. Ill. 1992) (summarizing research of Hans Zeisel); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 224 (1996); James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203, 217 (1992); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1169 (1995).

113. SUNDBY, *supra* note 104, at 166-67.

114. See *supra* notes 101-03 and accompanying text.

115. See ABA GUIDELINES, *supra* note 3, at Guideline 10.11(L).

instructions based on supporting case law.¹¹⁶ This may be especially important given that the jury instructions—no matter how poorly worded—are likely to be a centerpiece of the jury’s deliberations as they attempt to puzzle out the law’s requirements. In some jurisdictions mitigating evidence also may be listed in some manner, either through statutory mitigating factors or proposed mitigation findings. While the listing has the benefit of making clear to the jury that what the defense has presented is “evidence” they can legitimately consider, defense counsel must guard against letting the statutory mitigating factors “drive” their case in mitigation and in the process diverting their focus from the necessity of weaving all of the mitigating evidence—statutory and non-statutory—into a convincing overall story for life.¹¹⁷

Verdict forms can also play a critical role in structuring how the jury approaches the mitigating evidence. At a minimum, therefore, defense counsel must make sure that the verdict forms are a proper representation of the legal process and are not susceptible to an inadvertent interpretation that denigrates the proper role of the mitigating evidence. Finally, defense counsel must be prepared to protect their mitigating evidence by explaining to the jury in closing argument how they are allowed to use the mitigation in reaching their verdict.

In choosing the wording of proposed jury instructions, the structure of verdict forms, and which closing arguments to present, defense

116. See ABA GUIDELINES, *supra* note 3, at Guideline 10.11(K). In one study, revised instructions aimed at making the instructions on mitigation clearer did improve comprehension from 52% to 67% (and with improved comprehension, the jurors were more likely to vote for life). Even a 67% rate, however, means that almost one-third of those tested were still applying the law incorrectly. Diamond & Levi, *supra* note 112, at 230-31. Virginia’s rules provide that a judge is obligated to give a requested jury instruction if based on judicial authority. VA. CODE ANN. § 19.2-263.2 (2004).

117. In other words, establishing statutory mitigating factors alone will not tell the compelling story for life that needs to be presented to the jury. Just as an author could not write a novel by telling isolated vignettes about a character, the lawyer must make sure that the mitigating factors come together in a manner that the jury will understand and respond to in making their decision. See *supra* notes 10-15 and accompanying text. Statutory mitigating factors also can carry the danger of being phrased in a way that the mitigating evidence does not quite fit, and the jury may not understand they are still allowed to consider it as non-statutory mitigation, or may erroneously believe that the evidence is not as important because it is not within the statute (and thus the jury instructions). Florida, for example, uses a typical statutory mitigating factor that the crime “was committed while . . . under the influence of extreme mental or emotional disturbance.” FLA. STAT. ANN. § 921.141(6)(b) (West 2006). The danger exists that some jurors will focus on the statutory language that the disturbance be “extreme” and dismiss as invalid or as legally unimportant any evidence that in their view does not reach the level of “extreme.” Yet, such evidence may be an important part of the defense’s overall case for life (such as a depressive state), even if not “extreme.”

counsel must think about how the mitigating evidence is likely to be used by the juror in the jury room. Juries often respond to the monumental decision with the conflicting claims that confront them by making lists and charts. One type of chart is a “time line” of the defendant’s life, where the jury is looking for any perceived opportunities for the defendant to have taken the high road.¹¹⁸ This is the situation where the defense’s coherent story for life can play a critical role in shaping the time line so that the jury will understand the murder as part of a complex tableau of forces and events.

A second type of chart commonly employed is a “list” or “weighing” chart where the jury will list the aggravating factors on one side and mitigating factors on the other side.¹¹⁹ Consequently, defense counsel should anticipate that their case for life will likely be represented in list form at some point and thus try to shape how that list looks. Equally important, they should realize how this kind of chart is likely to be used by those jurors arguing for a death sentence: The most common (and powerful) argument made by jurors favoring death to those jurors favoring life is that they are being too emotional and not following the law. In making this argument, pro-death jurors are likely to use the list as a way to be “objective” and take the emotion out of the weighing process. The fact is that much of what may be powerful mitigation—for instance, the hope of redemption or having suffered a traumatic event as a child—does not necessarily list well on a chart, especially when there is a long list of crimes on the other side of the list.

It is absolutely critical, therefore, that defense counsel make clear, beginning with voir dire and throughout the trial, that the law embraces as mitigation the type of evidence that they will present in the defendant’s case. Defense lawyers must anticipate that those jurors who will be arguing for life in the jury room are likely to be challenged by other jurors as not “following the law” because they are reacting “emotionally” to the mitigating evidence. And if the lawyers anticipate this argument, they can empower jurors by helping them understand that just because they find it difficult to articulate precisely why they believe the evidence is mitigating, or just because a reason does not “list” well, does not make their reaction to it “emotional” or “unlawful.” Rather, mitigating evidence is at the core of how our legal system structures the death penalty decision, and a juror who gives it voice is not only operating within the law, but with the law’s blessing.

118. Sundby, *supra* note 24, at 1136; Sundby, *supra* note 80.

119. SUNDBY, *supra* note 104, at 50-51.

V. CONCLUSION

Preparing the defense of a capital case is an “awesome responsibility”—and an awful lot of work. The capital defense team not only must gain command of an intricate and demanding body of case law, but must be able to construct a “story for life” that appeals to a juror’s normative and moral sense. The wealth of empirical data on the nature of mitigation strongly reinforces the ABA Guidelines’ fundamental premise: the construction of an effective case in mitigation can only be accomplished through a painstaking and detailed investigation of every aspect of the defendant’s life from a multi-disciplinary perspective. Moreover, the empirical studies reveal that the uncovering of mitigation is only the first step in effective capital representation. The defense team also must understand how the jury is likely to respond to different types of themes and evidence, both so that they will shape the presentation of their narrative in the most effective way, and so that the jury is composed of people for whom the narrative has the greatest chance of resonating. While much remains to be done to ensure that capital defendants receive adequate representation, both the ABA Guidelines and the Supplementary Guidelines constitute an important step in reaffirming those minimal standards necessary to give mitigation its full role at a capital trial, and to assure the capital defendant the representation promised to him by the Sixth Amendment.