

FATAL DISTRACTION: DOES THE TEXAS
CAPITAL SENTENCING STATUTE
DISCOURAGE THE CONSIDERATION OF
MITIGATING EVIDENCE?

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ABSTRACT

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Whether the capital sentencing statute in Texas provides a vehicle for jurors to give effect to mitigation evidence has been a critical factor when the United States Supreme Court has sought to determine its constitutionality. Unlike the majority of other American jurisdictions which maintain capital punishment as a penalty, Texas utilizes a particularly unique scheme which places an assessment of the defendant's dangerousness at the center of the sentencing decision. Using data gathered from personally conducted interviews with forty-six former capital jurors and trial transcripts from each trial in which they served, this thesis demonstrates how the current sentencing scheme in Texas fails to provide jurors with an adequate vehicle for considering mitigation evidence. Beginning with an analysis of the process of jury selection this study examines the various ways in which the sentencing scheme is explained to potential jurors by the judge, prosecution, and defense attorneys. Of crucial importance is how the mitigation instruction is reconstituted by trial judges and prosecutors into an extension of the defendant's potential future dangerousness. Emerging from this analysis is the central role that the interpretation of the sentencing statute by legal actors play in determining how jurors view the evidence presented throughout the trial, as well as what factors they believe they are legally permitted to consider in sentencing. The findings of this study strongly suggest that the focus of the sentencing scheme on the defendant's dangerousness inhibits jurors' ability to view mitigation evidence unrelated to the crime as mitigating. Thus, the Texas capital sentencing statute in its application appears to prevent jurors from giving effect to personal mitigation, an essential element of a constitutionally satisfactory death penalty statute.

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Chapter I. Introduction

1. Research Motivation

Between November 2004 and October 2007, immediately prior to beginning my DPhil at Oxford, I was employed as a ‘mitigation specialist’¹ for a non-profit law office in Houston, Texas. As a member of a capital defense team, a mitigation specialist is charged with the task of investigating a defendant’s life-history in an effort to develop ‘empathy-evoking evidence that attempts to humanize the accused killer in death penalty cases.’² Although some mitigation specialists dedicate their practice solely to cases that have yet to go to trial or to cases in which a death sentence has already been imposed, my practice included pre-trial and post-conviction cases. While investigations I conducted in both pre-trial and post-conviction cases involved interviewing my client, their family members and acquaintances, post-conviction investigations also included interviewing the jurors who had listened to the evidence at trial and sentenced the defendant to death.

I was most intrigued by the information I gathered from capital jurors, particularly the details about why they felt the defendant in their case deserved a sentence of death. Whether the juror had advocated for a death sentence from the beginning of the trial or reluctantly changed their vote from life to death at the final moment, each account reflected ambivalence towards condemning another person to death. Jurors typically expressed a mixture of emotions during these interviews – guilt, righteousness, sorrow, and anger, to name but a few. Some jurors also

¹ Mitigation specialists possess clinical and information-gathering skills essential to the development of penalty phase evidence and play an important role in maintaining close contact with the defendant and her family while the case is pending. *See* American Bar Association, ‘Guidelines for Performance of Defense Counsel in Death Penalty Cases’ (2003) <<http://www.americanbar.org/content/dam/aba/migrated/legal services/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf>> accessed 20 June 2011

² Russell Stetler, ‘The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing’ (2008) 11 *Journal of Law and Social Change* 237

expressed frustration at having been part of a process in which they felt compelled to deliver a death sentence. In most cases I had the impression, and was expressly told in numerous instances, that many jurors did not want to sentence the defendant to death, but did not know *how* to sentence the defendant to life. Their expressions of powerlessness and their perception of being without agency signaled an important area for inquiry.

As a mitigation specialist I learned much about the lives of my clients – those facing the possibility of a death sentence or those who were already sentenced to death – through researching their bio-psycho-social histories. The information I collected ranged from such horrors as one client’s mother forcing him to eat his own feces while he was housed in a cage, another witnessing the rape of his mother, and another who, at the age of ten, having been abandoned by his alcoholic mother, was forced to steal food regularly from local grocery stores for himself and his younger brother. I found it difficult to understand how jurors could condemn to death defendants who had experienced such extreme abuse, neglect, or exposure to traumatic life experiences. While recognizing that such a background does not excuse murder, I did believe that it could provide an important framework for understanding how someone’s life course could be permanently altered and culminate in the commission of such a terrible offense. When interviewing jurors at the post-conviction stage it became apparent that they had not learned of the experiences and histories of my clients. Many would say that had they been given such information they would have been more likely to sentence the defendant to life rather than death. In my post-conviction capital work I had no reason to ever speak with jurors who had sentenced a capital defendant to life in prison. I wondered whether those jurors had

been exposed to such narratives and also what other differences might exist between jurors who had sentenced defendants to life and those who had chosen death.

Beyond the workings of the death penalty at the trial level, I also questioned why Texas meted out death sentences at such high rates. Although most of my cases originated from Texas, several were in other Southern and Midwestern states, so I learned about the administration of the death penalty in surrounding jurisdictions. I also traveled around the United States attending training sessions as a student and teacher, which provided an opportunity to speak with other capital defense practitioners about the workings of the death penalty in their states. Everyone agreed that there appeared to be something unique about Texas that created a momentum whereby death sentences were the likely outcome of a capital trial, and provided different explanations for why this might be. As many jurors had told me that they had voted for a death sentence despite their doubts about whether it was the most appropriate punishment, I was convinced that capital juror decision-making in Texas trials should be subjected to rigorous empirical study. Thus, I began my DPhil with the aim of understanding the operation of the capital sentencing system in Texas by speaking to the decision-makers who had gone through a capital trial and in some instances voted for a life sentence and in others voted for a death sentence.

I already had some knowledge of the population I wanted to investigate – capital jurors in Texas – and particular attributes within this population that I wanted to focus on, namely jurors who sentenced the defendant to death versus those who had sentenced the defendant to life. Given my background as a mitigation specialist, I had a working hypothesis about what I thought the key difference between the two groups might be, specifically that jurors who voted for life sentences had been exposed to thoroughly developed mitigation evidence. However, I did not know whether this

would be supported by empirical evidence, and even if it was, whether this told the whole story. Although a wealth of information existed about capital jurors' decision-making (see Chapter 2), research which focused on the differences between life and death juror decision-making processes had not been fully developed.

In addition, relatively little empirical work had focused on the operation of capital punishment in Texas – a critical death penalty state. As discussed further in the following section, Texas continues to be a leader in its use of capital punishment in America. Annually, the state leads the nation in overall numbers of executions³ and is consistently among the states which deliver the greatest number of death sentences each year.⁴ It also utilizes a particularly idiosyncratic capital sentencing scheme, which has been singled out by the United States Supreme Court as being potentially unconstitutional.⁵

My intention when I began the DPhil in October 2007 was to investigate how defense teams in Texas constructed and presented mitigation evidence in trials through conducting interviews with some jurors who had sentenced the defendant to life and some who had sentenced the defendant to death. I intended these interviews to focus on jurors' impressions of mitigation evidence. After about six months I realized the enormity of the task I had set out to do, a task exacerbated by the financial implications of conducting research in a different country with no funding. I therefore reached out to academics in Texas who I thought would be interested in collaborating with my research. All those I spoke with agreed that the research was

³ Texas executed the greatest number of inmates, seventeen in 2010. See Death Penalty Information Center <<http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>> accessed 15 December 2010

⁴ Death Penalty Information Center <<http://www.deathpenaltyinfo.org/death-sentences-united-states-1977-2008>> accessed 15 December 2010

⁵ As explained later in this chapter, the Supreme Court has expressed constitutional concern about the Texas death penalty statute in several cases beginning with *Penry v Lynaugh* 492 US 302 (1989). See also *Penry v Johnson* 532 US 782 (2001); *Tennard v Dretke* 542 US 274 (2004)

necessary, as no previous study had looked specifically at juror receptivity to mitigation evidence, but no funding was available. I cast my net wider and contacted researchers around the country. Eventually, I reached out to the principle investigator of a national capital jury study, Dr. William Bowers.

Dr. Bowers has been the principal investigator for the Capital Jury Project (CJP) since it began in 1991.⁶ I was familiar with the publications produced by the CJP and had noted that although Texas had been included in past data collection efforts, none of the subsequent articles based on the data had focused on jurors in Texas. I was fortunate that Dr. Bowers had similar research interests to mine and was one-year into a three-year project that centered on many of the issues I wished to explore. He was determined to include Texas in the project, but had not yet found someone to take responsibility for data collection in the state. By April 2008 we had worked out a way for me to be involved with the CJP while simultaneously collecting the data I was seeking, thus securing a pragmatic solution to facilitate my research goals. I began data collection efforts for my dissertation and the CJP in June 2008 (see Chapter 3).

2. The Decision to Focus on Capital Cases in Texas

The decision to focus this study on capital jurors in Texas was both personally and academically motivated. Personally, most of my practice as a mitigation specialist had focused on capital cases in Texas, providing me with substantial background and insight into the operation of capital sentencing within the state.

⁶ The CJP is an ongoing research project supported by the National Science Foundation. Through a consortium of university based researchers, scholars and academics, capital jurors in fourteen states have been interviewed about their experiences. The initial investigation interviewed 1198 jurors from 353 trials in fourteen states, and has yielded more than fifty publications in law and social science journals, a dozen doctoral dissertations, numerous Supreme Court citations, and testimony in some twenty-five capital trials in twelve states. *See* Capital Jury Project (CJP) <<http://www.albany.edu/scj/CJPhome.htm>> accessed 15 December 2010

Academically, Texas is a critical site for death penalty scholarship and one that has been remarkably neglected.⁷

Unlike other American states Texas uses capital punishment frequently. The state boasts the most overall executions for any single jurisdiction (464 of the 1,234) since the death penalty was reinstated in 1976 after a brief moratorium.⁸ Annually Texas leads the nation in executions, typically accounting for 35-40% of all state-sanctioned killings.⁹ Additionally, between 75-80% of convicted capital defendants whose cases are brought to trial in Texas are eventually sentenced to death,¹⁰ meaning that Texas also accounts for high numbers of death verdicts every year.¹¹

Recent developments in other states also signal a greater divide between Texas' use of capital punishment and the rest of America. New Jersey, New Mexico and most recently Illinois have each legislatively abolished the death penalty.¹²

Repeal legislation has been introduced around the country in Kansas, Maryland,

⁷ Research in Texas has focused mostly on issues related to the reliability of predictions of a defendant's future dangerousness, historical accounts regarding the administration of capital punishment within the state, and constitutional issues related to the unique sentencing scheme. See Mark Cunningham and Jonathan Sorensen, 'Capital Offenders in Texas Prisons: Rates, Correlates and an Actuarial Analysis of Violent Misconduct' (2007) 31 *Law and Human Behavior* 553; (Historical accounts) James Marquart, Sheldon Eklund-Olson and Jonathan Sorensen, *The Rope, the Chair and the Needle: Capital Punishment in Texas 1923-1990* (University of Texas Press 1998); (Constitutional issues related to the sentencing scheme) Peggy Tobolowsky, 'What Hath Penry Wrought?: Mitigating Circumstances and the Texas Death Penalty' (1992) 3 *American Journal of Criminal Law* 348. Research has yet to be conducted exclusively on the process of the capital trial in Texas and its effect on jurors' sentencing decisions.

⁸ Death Penalty Information Center <<http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf>> accessed 19 January 2011

⁹ Death Penalty Information Center <<http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf>> accessed 19 January 2011

¹⁰ Jonathan Sorensen and James Marquart, 'Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases' (1990) 18 *New York University Review of Law and Social Change* 743, 772 (showing that capital juries returned death sentences in 77% of all cases between 1974-1988). My own data suggest a similar sentencing ratio of 80% (See Chapter 3). The data are incomplete on this point with respect to Texas and other states – however it has been suggested that other jurisdictions such as California experience closer to a 50% return of death verdicts from capital trials (See Brent Newton, 'A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994' (1993) 1 *Texas Forum on Civil Liberties and Civil Rights* 1, n 38)

¹¹ Death Penalty Information Center <<http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf>> accessed 19 January 2011

¹² Jeremy Peters, 'Death Penalty Repealed in New Jersey' *New York Times* (New York, 17 December 2007); Associated Press, 'New Mexico Abolishes Death Penalty' *CBS* (18 March 2009); Ariane De Vogue and Barbara Pinto, 'Illinois Abolishes the Death Penalty; 16th State to End Executions' *ABC World News* (9 March 2011)

Colorado, New Hampshire, Nebraska and Connecticut.¹³ In some instances the measures failed by a single vote¹⁴ or gubernatorial veto.¹⁵ Public opinion appears to be roughly split between those supporting the death penalty and those who prefer life without the opportunity for parole as a punishment for murder.¹⁶ The number of exonerations from death row continues to grow¹⁷ and yet, even with recently discovered evidence in several Texas cases which suggest that the state has executed an innocent person, the use of capital punishment continues in earnest.¹⁸

Although some may question this study's focus on a single state utilizing capital punishment, the Texas sentencing scheme is fashioned from constitutionally-approved guided discretion models. As explained below, each state which elects to have capital punishment must employ a sentencing scheme which conforms to several standards. Though Texas and Oregon utilize a particularly distinctive scheme, which places a determination of the defendant's future dangerousness at the center of the jury's punishment decision¹⁹ (see below), the essential elements of capital statutes are

¹³ Alice Popovici, 'Maryland Considers Death Penalty Repeal' *National Catholic Reporter* (27 February 2009); citing bills in Nebraska, Colorado, New Hampshire, Washington and Kansas

¹⁴ Jessica Fender and Lynn Bartels, 'Bid to Repeal Death Penalty Fails in Senate' *The Denver Post* (Denver, 6 May 2009); noting that the legislation failed to pass in the Denver Senate by a vote of 18 to 17

¹⁵ Associated Press, 'Rell Vetoes Measure to End Death Penalty' *New Haven Register* (New Haven, 5 June 2009); noting the Governor of Connecticut's veto of the legislation

¹⁶ The poll shows that those interviewed preferred life without the opportunity for parole plus restitution for victim survivors more than the death penalty. Only 33% of respondents said that they preferred the death penalty as opposed to other sentencing options. Death Penalty Information Center <<http://www.deathpenaltyinfo.org/pollresults>> accessed 23 June 2011. Gallup Polls also indicate similar splits in preference when asking respondents whether they prefer the death penalty or life without the opportunity for parole for a convicted murderer. See Gallup <<http://www.gallup.com/poll/1606/Death-Penalty.aspx>> accessed 23 June 2011

¹⁷ 138 death row exonerations have occurred since 1973. Of those, twelve are from Texas. Death Penalty Information Center <<http://www.deathpenaltyinfo.org/innocence-and-death-penalty>> accessed 23 June 2011

¹⁸ Cameron Todd Willingham was executed in 2004 for the deaths of his children in a house fire and maintained his innocence until his execution. He was convicted with questionable evidence from an arson expert. See David Grann, 'Did Texas Execute an Innocent Man?' *The New Yorker* (New York, 7 September 2009). The case of Claude Jones also illustrates problems with forensic evidence. New DNA evidence has shown that a strand of hair – the only evidence placing Jones at the murder – has no connection to him. See David Mann, 'New Results Shows that Claude Jones was put to Death on Flawed Evidence' *The Texas Observer* (Austin 11 November 2010)

the same throughout the country. Though some differences exist between states, previous cross-jurisdictional research has shown similar deficiencies in guided discretion statutes across fourteen states studied (including Texas), illustrating that the problems detected were not due to statutory differences between jurisdictions but rather endemic to the practice of capital sentencing in the United States.²⁰ An analysis of the operation of capital sentencing in Texas therefore both highlights specific structural deficiencies in the operation of the death penalty in the state and informs and advances scholarly debate about the administration of capital punishment across America.

3. Consideration of Mitigation Evidence in Capital Cases

In 1972 concerns over the application of the death penalty led the United States Supreme Court to rule it unconstitutional in the landmark decision of *Furman v. Georgia*.²¹ In the wake of *Furman* thirty-five states passed new capital sentencing statutes designed to address the Court's concerns regarding arbitrary and discriminatory death sentencing.²² Prior to *Furman* jurisdictions which allowed for the death penalty were not required to provide the jury sentencing guidelines, thus leaving the decision to the jury's total discretion. After *Furman*, states' attempts to construct statutes which would pass constitutional muster took two forms. The first form was the removal of discretionary sentencing entirely by providing for the

¹⁹ Of the thirty-four states which continue to use capital punishment, Oregon is the only other state which utilizes a similar sentencing scheme. OR. REV. STAT. ANN. §163.150 (West 2009)

²⁰ William Bowers and Wanda Foglia, 'Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing' (2003) 51 Criminal Law Bulletin 51

²¹ *Furman v Georgia* 408 US 238 (1972). The fractured majority in *Furman* advanced numerous reasons for declaring capital punishment unconstitutional, but central to their concern was the perceived randomness of capital sentencing. The one definitive statement made in *Furman* was that for a capital sentencing scheme to be constitutional the administration of the death penalty had to be fair, equitable, and consistent. See Daniel Polsby, 'The Death of Capital Punishment? *Furman v Georgia*' [1972] *The Supreme Court Review* 1

²² John Poulos, 'The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment' (1986) 28 *Arizona Law Review* 143

automatic imposition of a death sentence upon conviction of an eligible crime. By a narrow majority of five to four the Court struck down these mandatory death penalty statutes.²³ Although a mandatory death sentence upon a conviction for capital murder would theoretically eliminate discrimination in sentencing, the Court ruled that such statutes failed to promote individual consideration of the defendant's moral culpability in determining punishment. In essence, the Court acknowledged that while some defendants may be factually guilty of the crime, they might still not deserve a death sentence based on the unique facts of the case or aspects of their background or character. The Court argued that this was particularly important in capital sentencing due to the qualitative difference of death as an extreme and irreversible punishment. As the Court explained in *Woodson v. North Carolina*:

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.²⁴

The second form which statutes took attempted to rationalize and regulate capital punishment. These statutes limited the types of murder punishable by death to particularly aggravated forms, bifurcated the capital proceeding into guilt and punishment phases, provided the jury standards meant to guide their sentencing discretion, and afforded convicted defendants automatic state post-conviction review.²⁵ The Supreme Court found such statutes constitutional and thus jurisdictions which elected to have the death penalty adopted schemes employing variations of these components.²⁶ However, the Court did not delineate how states should define or

²³ *Woodson v North Carolina* 428 US 280 (1976); *Roberts v Louisiana* 428 US 325 (1976)

²⁴ *Woodson* 428 US 280, 305 (1976)

²⁵ *Gregg v Georgia* 408 US 238 (1976); *Jurek v Texas* 428 US 262 (1976); *Proffitt v Florida* 428 US 242 (1976)

²⁶ Currently thirty-four states, the federal government and the United States military have capital punishment as a potential penalty for some types of aggravated murder. See Death Penalty Information Center

treat relevant sentencing factors, leaving individual legislatures to determine the scope and treatment of aggravating and mitigating factors.

Since allowing for the resumption of capital punishment, the Supreme Court has struggled to strike a balance between consistency in sentencing and fairness to the individual defendant in assessing punishment.²⁷ The Court has emphasized the importance of limiting the death penalty to the most deserving offenders through the identification of aggravating factors,²⁸ but has also signaled the central importance of providing wide latitude in presenting mitigating evidence in order to assess a defendant's moral blameworthiness. Although the Court has not articulated a precise definition of mitigating evidence, jurisprudential theory provides the following guidance: mitigating evidence is anything related to the circumstances of the offense, the defendant's background, character, or life which could provide a juror a reason to vote for a sentence less than death.²⁹ Such evidence need not relate specifically to a defendant's culpability for a crime³⁰ and cannot be restricted by capital statutes.³¹

<<http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>> accessed 12 August 2011. When speaking about capital statutes I use the term 'states' since states make up the majority of jurisdictions which use capital punishment.

²⁷ Scott Sundby, 'The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing' (1991) 38 University of California at Los Angeles Law Review 1147; Jordan Steiker, 'The Limits of Legal Language: Decision-making in Capital Cases' (1996) 94 Michigan Law Review 2590

²⁸ Aggravating factors are typically additional felony acts committed during the course of the murder or the killing of a person in a protected group. For instance, this would include murders committed during arson, multiple murders committed in the course of the same criminal transaction, murder committed during a kidnapping, and so forth. Killings of children under a specified age and law enforcement officials including prison guards are often considered aggravating factors. Most statutes also include an extremely broad category of aggravation such as crimes which are thought to be especially heinous, atrocious, or cruel. For a list of states' statutory aggravating factors, see Death Penalty Information Center <<http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state>> accessed 26 July 2011

²⁹ *Lockett v Ohio* 438 US 586 (1978); later Court decisions would refine and entrench capital mitigation as an essential component of constitutional capital sentencing. See *Eddings v Oklahoma* 455 US 104 (1982) (limitations cannot be placed on what can be considered mitigating evidence and the sentencer cannot refuse to consider, *as a matter of law*, any relevant mitigating evidence); *Penry v Lynaugh* 492 US 302 (1989) (sentencing schemes must allow for evidence to be given mitigating effect); *Williams v Taylor* 529 US 362 (2000), *Wiggins v Smith* 539 US 510 (2003), *Rompilla v Beard* 545 US 374 (2005) (trial counsel was found to have provided ineffective assistance of counsel for failing to conduct a thorough mitigation investigation). For a thorough discussion of Supreme Court jurisprudence concerning the centrality of capital mitigation see Craig Haney, 'Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation' (2008) 36 Hofstra Law Review 835

³⁰ *Skipper v South Carolina* 476 US 1 (1986); *Tennard v Dretke* 542 US 274 (2004)

Thus, there are ‘potentially infinite mitigators’³² which could form a basis for a sentence less than death. The Court has placed a premium on allowing any evidence which could form a basis for a sentence less than death to be presented at trial. As such, mitigating evidence has come to take a central and evolving role in maintaining a constitutional system of capital punishment.³³

4. The Capital Sentencing Scheme in Texas

The capital sentencing statute originally proposed by members of the Texas state legislature in 1973 called for a mandatory death sentence upon conviction of a death-eligible crime.³⁴ Concern over whether such a statute would pass constitutional muster however led to the bill being amended.³⁵ The conference committee bill sponsor intended to draft a statute in which jurors would have ‘little or no discretion to dispense mercy in view of traditional mitigating circumstances’.³⁶ Thus, the resulting scheme deviated from other legislative proposals around the country in its approach to guiding sentencing discretion. While other states that opted against mandatory statutes had designed statutory systems which identified aggravating and mitigating factors and instructed the jury to weigh or balance one side against the other, the approved Texas statute did not speak of mitigating factors at all. Rather the statute instructed the jury to answer the following three ‘special issue’ questions in order to determine the defendant’s punishment:

³¹ *Lockett v Ohio* 438 US 586 (1978)

³² *Ayers v Belmontes* 549 US 7 (2006)

³³ Craig Haney, ‘Evolving Standards of Decency: Advancing the Nature and Logic of Capital Mitigation’ (2008) 36 *Hofstra Law Review* 835

³⁴ Michael Kuhn, ‘House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas’ (1973) 11 *Houston Law Review* 410, 416-420

³⁵ Eric Citron, ‘Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty’ (2006) 25 *Yale Law and Policy Review* 143, 162-174

³⁶ Brent Newton, ‘A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994’ (1993) 1 *Texas Forum on Civil Liberties and Civil Rights* 1

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.³⁷

When the Texas Court of Criminal Appeals heard the first case to call into question the constitutionality of the statute several judges voiced misgivings about the compulsory yet vague nature of the scheme.³⁸ Ultimately, however, the statute survived and would eventually be one of the five schemes considered by the Supreme Court in determining whether any newly crafted system could adequately address the concerns voiced in *Furman*.³⁹ As mentioned, although the Court ruled schemes which would impose a mandatory death sentence upon conviction unconstitutional, it did not strike down the Texas statute noting instead that the constitutionality of Texas' statute hinged 'on whether the enumerated questions allow consideration of particularized mitigating factors.'⁴⁰ Though the Court ruled in *Jurek v. Texas* that the second special issue concerning the defendant's future dangerousness did allow for consideration of particularized mitigating factors,⁴¹ in 1989 in *Penry v. Lynaugh* the Court found the sentencing scheme in operation in Texas to be constitutionally inadequate because jurors could not consider and give mitigating effect to relevant evidence in determining the defendant's sentence.⁴²

³⁷ TEX. CODE CRIM. PROC. ANN. art. 37.0711 § 3(b) (West 2009)

³⁸ *Jurek v State* 522 SW 2d 934, 939-940 (Tex. Crim. App. 1975)

³⁹ *Furman v Georgia* 408 US 238 (1972)

⁴⁰ *Jurek v Texas* 428 US 262, 272 (1976)

⁴¹ *Jurek v Texas* 428 US 262 (1976)

⁴² *Penry v Lynaugh* 492 US 302 (1989)

In particular, the Supreme Court identified the potential for mitigating evidence to be reinterpreted as aggravating based on the phrasing of the special issue questions. As Justice O'Connor pointed out in the majority opinion, some mitigation evidence such as the defendant's mental retardation and history of abuse can act as a double-edged sword – diminishing moral blameworthiness while indicating potential future dangerousness.⁴³ Thus, the Court held that jurors were constrained by the narrowness of the questions and were potentially induced to consider the defendant's evidence of mental retardation and abuse as aggravating, consequently sanctioning a sentence of death. Accordingly, it was this restriction of jurors' ability to consider and give effect to mitigating factors which rendered the capital sentencing scheme in Texas potentially unconstitutional.⁴⁴ Although the Court did not find the Texas statute unconstitutional in *Penry*, their decision highlighted serious problems in the application of the statute which subsequently led to the reversal of a number of death sentences in Texas.⁴⁵

In the wake of *Penry* the Texas legislature amended the capital sentencing scheme, removing the first and last special issue questions. Although the special issue question relating to the defendant's dangerousness remained,⁴⁶ the amended statute

⁴³ *Penry v Lynaugh* 492 US 302, 324 (1989)

⁴⁴ *Penry v Johnson* 532 US 782 (2001) (*Penry II*); *Smith v Texas* 543 US 37 (2004)

⁴⁵ See e.g. *Abdul-Kabir v Quarterman* 418 F3d 494 (2007); Chris Moran, 'Death Row Inmates to Get Chance at Life in Retrials' *The Houston Chronicle* (Houston 7 February 2011) <<http://www.chron.com/disp/story.mpl/metropolitan/7417443.html>> (citing sixteen *Penry* reversals from Harris County) accessed 20 June 2011

⁴⁶ As discussed in later chapters, the dangerousness issue is the threshold determination for which convicted capital defendants are eligible for the death penalty in Texas. Such a requirement has been controversial as substantial research indicates a prediction of a defendant's dangerousness is only weakly correlated to whether or not they will actually commit future acts of violence. See Mark Cunningham and Jonathan Sorensen, 'Capital Offenders in Texas Prisons: Rates, Correlates, and an Actuarial Analysis of Violent Misconduct' (2007) 31 *Law and Human Behavior* 553; Mark Cunningham, Jonathan Sorensen and Thomas Reidy, 'Capital Jury Decision-making: The Limitations of Predictions of Future Violence' (2009) 15 *Psychology, Public Policy, and Law* 223; Mark Cunningham and Jonathan Sorensen, 'Improbable Predictions at Capital Sentencing: Contrasting Prison Violence Outcomes' (2010) 38 *Journal of the American Academy of Psychiatry and the Law* 61

included an instruction to consider mitigating evidence.⁴⁷ The special issue questions that jurors in Texas have been instructed to follow after the legislature amended the statute in response to the Court's decision in *Penry* read as follows:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and

(2) whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment without parole rather than a death sentence be imposed.⁴⁸

As discussed throughout this study, both the future dangerousness and the mitigation issue are problematic. Noticeably, each issue contains ambiguous terms. In the first question, the terms 'probability',⁴⁹ 'criminal acts of violence',⁵⁰ and 'society',⁵¹ are vague and are left statutorily undefined.⁵² Likewise, in the second special issue question the terms 'moral culpability' and 'sufficient' are similarly open to interpretation.⁵³ As discussed in the next chapter, previous empirical research regarding juror comprehension of capital sentencing statutes has revealed poor levels

⁴⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b)(1), 2(e)(1) (West 2009)

⁴⁸ TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b)(1), 2(e)(1) (West 2009)

⁴⁹ See *Murphy v State* 112 SW 3d 592, 596 (Tex. Crim. App. 2003) ('Although we have held that the term "probability" need not be defined, we have also held that the term means "more than a mere possibility"')

⁵⁰ See *Ladd v State* 3 SW 3d 547, 572 (Tex. Crim. App. 1999); *Feldman v State* 71 SW 3d 737, 757 (Tex. Crim. App. 2002). The Texas Criminal Court of Appeals has repeatedly held that 'criminal acts of violence' is not unconstitutionally vague and that jurors are presumed to understand the phrase without instruction.

⁵¹ See *Smith v State* 898 SW 2d 838, 846 (Tex. Crim. App. 1995). Although court decisions have effectively defined society as inclusive of prison and non-prison populations, such a distinction is not codified in the sentencing statute.

⁵² See *Ladd v State* 3 SW 3d 547, 572 (Tex. Crim. App. 1999); *Feldman v State* 71 SW 3d 738, 757 (Tex. Crim. App. 2002); *Murphy v State* 112 SW 3d 592, 604 (Tex. Crim. App. 2003)

⁵³ See *Penry v Johnson* 532 US 782 (2001); *Smith v Texas* 543 US 37 (2004). The statute instructs the Judge to charge the jury that they 'shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.' See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(4) (West 2009)

of understanding in various states studied.⁵⁴ Despite such concerns, jurors in Texas are presumed to understand these pivotal terms without statutory instruction.⁵⁵

As previously mentioned, capital trials are bifurcated and thus conducted in two phases with the same jury making the determinations of guilt and punishment. If the defendant is found guilty during the first phase of the trial the proceeding enters the penalty phase to determine sentencing. At the conclusion of the penalty phase jurors are provided instructions by the judge. In other states, this is typically a list of aggravating and mitigating factors enumerated by statute and instructions for how to determine the defendant's sentence. For example, jurors might be directed to weigh existing aggravating and mitigating factors (enumerated by statute) against each other in order to reach a final sentencing decision.⁵⁶

In comparison, at the conclusion of the punishment phase of a Texas capital trial, jurors are provided less statutory guidance and simply instructed to answer the special issue questions to determine the defendant's sentence. As Figure 1 illustrates, the jurors are directed to answer the questions *in that order* by indicating a 'yes' or 'no' response to each.⁵⁷ If they answer 'yes' to the first special issue question they are prompted to consider the second special issue question, and if they answer 'no' to this second question the defendant will receive a death sentence. A jury must answer

⁵⁴ Theodore Eisenberg and Martin Wells, 'Deadly Confusion: Juror Instructions in Capital Cases' (1993) 79 Cornell Law Review 1; Craig Haney, Lorelei Sontag, and Sally Costanzo, 'Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death' (1994) 50 Journal of Social Issues 149; James Luginbuhl and Julie Howe, 'Discretion in Capital Sentencing Instructions: Guided or Misguided?' (1995) 70 Indiana Law Journal 1161

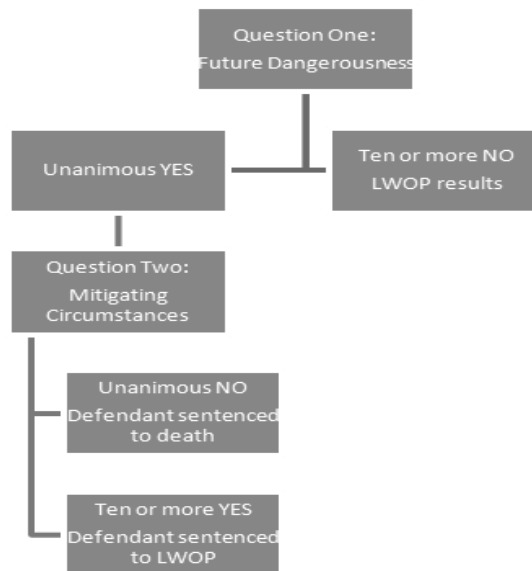
⁵⁵ The Texas Criminal Court of Appeals explains that their hesitation to define the key statutory words stems from the legislature's direction that words not be 'specially defined' and shall be understood in their ordinary sense. *See Camacho v State* 864 SW 2d 524, 536 (Tex. Crim. App. 1993)

⁵⁶ *See e.g.* COLO. REV. STAT. §18-1.3-1302 (2004) Instructing the jury to not render a verdict of death unless it finds and specifies in writing that at least one aggravating factor has been proved and there are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved.

⁵⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b)(2), 2(e) (West 2009). In cases where the defendant has been found guilty as a party for a capital crime the jury will answer an additional question prior to answering 2(e). The third party question reads, 'whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.'

each question unanimously for a death sentence to result. However, to reach a life verdict only ten of twelve jurors need to vote ‘no’ to the first question (thus never reaching the second special issue question) or if the jury votes ‘yes’ unanimously to the first question, a life sentence can still result if at least ten jurors vote ‘yes’ to the second special issue question. The different ways of answering the special issue questions and the resulting sentence are explained to the jurors during jury selection or voir dire⁵⁸ by the judge, prosecutor, or defense attorney (or a combination of all three – see Chapter 4). Critically, the jury is not informed about the sentence a defendant will receive if they fail to reach an answer to one of the special issue questions.

Figure 1 – Flow chart of sentencing outcome based on answers to the special issue questions



5. The Development and Emergence of Research Aims and Questions

As I explain in Chapter 3, my aim in interviewing capital jurors was to understand the meanings which they ascribed to key events in the trial. Although

⁵⁸ See David Suggs and Bruce Sales, ‘The Art and Science of Conducting Voir Dire’ [1978] *Professional Psychology* 367. Voir dire is the process whereby jurors are questioned by the judge, prosecution and defense attorneys to determine whether the juror is qualified to serve in a particular case.

after completion of the interviews I was able to identify several issues which this thesis sheds light on, these questions were neither a ‘starting point’ for this research nor ‘a primary determinant of the research design’.⁵⁹ Indeed, I began my data collection efforts with a broad interest in exploring how jurors understood the evidence presented in capital cases. More specifically, I wanted to better understand how jurors who had sentenced a defendant to life and those who sentenced a defendant to death interpreted mitigation evidence. I was interested in determining whether any evidentiary patterns existed in cases which resulted in a sentence of life and those which resulted in a sentence of death. For instance, I wondered whether mitigation evidence had been presented throughout the trial in cases which resulted in life verdicts rather than just at the penalty phase. Similarly I questioned if there were patterns in the types and numbers of witnesses who testified, in the records used as exhibits, and in the methods of presentation used to explain mitigation evidence. Thus, while I began with loosely defined interests concerning the *process* that the jurors went through and what they experienced, I was also interested in analyzing data regarding variables within each case in order to identify any patterns in the mitigation presentation.

Hoping to gather information on both the process the jurors went through and the presentation of the evidence, I collected data from two sources – trial transcripts and juror interviews. I used the transcripts to prepare for the juror interviews and as a source of data themselves. I applied a coding scheme which enabled me to compare noteworthy factors in the trials which resulted in life sentences and those which resulted in death sentences, such as the number of prosecution and defense witnesses presented at the guilt and punishment phases, the types of records the prosecution and

⁵⁹ Joseph Maxwell, *Qualitative Research Design: An Interactive Approach* (2nd edn, Sage 2005) 65

defense presented throughout the trial and so forth. I also coded portions of the transcripts for descriptions of the defendant, trial process, and victim by the judge, prosecution and defense attorneys.

Between 2008 and 2010 I conducted forty-six interviews with former capital jurors across eight capital trials,⁶⁰ four of which resulted in a sentence of life without the opportunity for parole (LWOP) and four of which resulted in a sentence of death. These semi-structured interviews took place mostly at the homes or offices of jurors, lasting between three and eleven hours and averaging approximately six hours each.⁶¹ During the interviews I administered a sixty-page questionnaire which combined both fixed-choice and open-ended questions. The interviews focused on exploring participants' understanding of the evidence presented in court and the process of the jury's private deliberations, particularly in the punishment phase. Though the trial transcript provided an available record of the proceedings from jury selection through to the punishment verdict, jury deliberations are conducted in private and are not recorded or witnessed by anyone outside the jury.⁶² Given this, I paid particular attention to acquiring as many details as possible about that dynamic process.

By December 2008 I had reviewed five trial transcripts and conducted eighteen juror interviews. Based on the data I had collected I sharpened my research interests further to include questions concerning how capital jurors in Texas understood mitigating and aggravating factors, and in particular what aspects of the trial shaped jurors' interpretation and consideration of such evidence. As I began to immerse myself in the digital audio recordings of the interviews I conducted between September and November 2008, I noted the central role that the special issue

⁶⁰ See Chapter 4 for a description of data collection including case selection

⁶¹ The median time for interviews was five hours and twenty-eight minutes, which is not significantly different to the mean of five hours and fifty-two minutes.

⁶² TEX. CODE CRIM. PROC. ANN. art. 36.215 (West 2003)

questions appeared to play in framing jurors' interpretation of the evidence presented, especially mitigation evidence. This realization further narrowed my research to focus on *how* the special issue questions guide jurors' interpretation of the evidence and their deliberations. Thus, this study investigates the operation of the special issue questions in jurors' consideration of evidence and in their guilt and punishment deliberations.

6. Moral Disengagement and the Special Issue Questions

To guide my analysis of the interview and transcript data, I utilized a conceptual framework advanced by social psychologist Craig Haney. Haney describes the capital trial as a process which encourages 'moral disengagement' from the questionable task of deciding to kill another human being.⁶³ He identifies several structural components exclusive to the capital trial process that tend to intensify such disengagement. Of immediate concern to Haney is the idiomatic process of death-qualification at jury selection which requires repeated inquiry into a potential juror's ability to consider sentencing the defendant to death.

As will be explained in later chapters, all capital jurors must be death-qualified, and therefore able to sentence the defendant to death, in order to serve on a capital trial. In Texas, the process of jury selection allows for potential jurors to be questioned by both the prosecution and defense outside the presence of other potential jurors.⁶⁴ The purpose of this private questioning is to ascertain whether the juror could apply the death penalty under certain circumstances, but does not feel

⁶³ Craig Haney, *Death by Design: Capital Punishment as a Social Psychological System* (Oxford University Press 2005)

⁶⁴ Not all jurisdictions which allow for the death penalty utilize individualized voir dire in capital cases, with some conducting voir dire in panels of potential jurors. Questioning in panels produces an additional biasing effect of which Haney is especially critical. See Craig Haney, 'Examining Death Qualification' (1984) 8 *Law and Human Behavior* 133; Craig Haney, 'On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process' (1984) 8 *Law and Human Behavior* 121

compelled to do so in every case. Thus, jurors who would always impose a sentence of death or always refuse to impose a death sentence are not eligible to serve on a capital jury.⁶⁵ To determine whether a potential juror would be open to imposing either sentence, the questions asked during individual voir dire focus on the juror's ability to understand and answer the special issue questions. To this end, jurors are typically provided an explanation of the special issue questions from the judge, followed by an extensive elaboration from the prosecutor and defense. Although both sides will provide an explanation for how the juror could answer the questions neither the prosecutor nor defense attorney are allowed to 'commit' jurors to answering questions about the facts of their particular case. Thus, both sides offer examples which utilize some aspects of the case as well as hypothetical elements of crimes.

The first special issue question asks the jury to assess the probability that the defendant would commit a criminal act of violence in the future. During voir dire attorneys for the State frequently provide examples of how jurors could use the evidence they might be presented to answer this question affirmatively. For instance, a prosecutor may advise the potential juror to look at a defendant's previous criminal record, history of mental illness, drug or alcohol abuse and so on as evidence of possible future dangerousness. In contrast, the defense attorney may provide information about the context in which elements of a previous crime could be seen as mitigating, for example a hypothetical fact pattern of a defendant who has low intellectual functioning, took part in a crime and then received a harsher punishment than his co-defendants because they all blamed him. The defense lawyer may

⁶⁵ See *Morgan v Illinois* 504 US 719, 729 (1992) in which the Supreme Court determined that jurors who could not give effect to mitigation evidence could be struck for cause. ('A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.')

question the juror about concepts such as mercy, inquire about the juror's own background, and try to reeducate the juror to understand potential evidence as mitigating and not aggravating.

Similar questioning takes place with respect to the second special issue question. The prosecutor may spend time explaining to the juror that a factor that could typically be viewed as mitigating, such as a defendant's youth, could actually be interpreted by some as aggravating, arguing for instance that since the defendant has become so violent at such a young age he is unlikely to change, making him more dangerous to others. Likewise, other factors which could typically be viewed as mitigating such as mental illness, poverty, abuse, neglect and so forth are deconstructed and redefined as aggravating.

What the juror experiences during voir dire therefore is not simply a discussion regarding her ability to follow the law, but also instruction on how to *interpret* the evidence. In this way, the sentencing statute invites the prosecution to utilize the special issue questions as a mechanism for explaining how mitigation evidence can be reinterpreted as aggravating evidence in disguise, with the defense left to promote a life sentence through a reeducation of jurors on the law and an attempt to show how the same evidence cited by the prosecutor can be viewed as potentially mitigating. The Texas capital sentencing statute is especially vulnerable to facilitating the conversion of mitigating evidence into aggravating evidence since the statute neglects to identify any evidence, such as a defendant's lack of a criminal history or youth, as inherently mitigating. The statute does however immediately draw jurors' attention to the notion of the defendant's dangerousness, which anchors the State's case and preoccupies jurors.

By applying Haney's concept of moral disengagement to the capital sentencing scheme in Texas we can observe the subversive influence of the special issue questions on juror decision-making. As Haney explains:

Mechanisms of moral disengagement serve to distort the human context in which capital jurors operate... These mechanisms also minimize jurors' sense of personal agency and awareness of the full range of consequences that flow from their actions. Mechanisms of moral disengagement undermine the compassionate impulses that might otherwise be evoked as human beings learn about the often profound challenges and struggles to which many capital defendants have succumbed. In this sense, these mechanisms limit the effect of mitigating testimony that might influence jurors to spare the capital defendant's life in a capital penalty trial.⁶⁶

The perceived dangerousness of the defendant is a powerful mechanism of disengagement enabling jurors to rationalize their death sentencing decision while simultaneously blunting juror receptivity to mitigating evidence. Thus, early exposure to the concept of dangerousness serves to frame all of the evidence presented – including defense offered mitigation evidence – through a coercive lens making a death sentence not only inevitable, but for many jurors effectively mandatory.

7. Chapter Outlines

Empirical research on capital punishment has often been undertaken in response to decisions handed down by the United States Supreme Court. This unusual dialogue between law and social science has created a relatively clear path of inquiry for researchers interested in understanding the efficacy of modern capital statutes. As discussed in the next chapter, previous research has identified copious deficiencies in all existing capital sentencing statutes. These deficiencies include concerns regarding the subtle yet coercive process of death-qualification, invidious racial considerations in the administration of capital punishment, and widespread

⁶⁶ Craig Haney, *Death by Design: Capital Punishment as a Social Psychological System* (Oxford University Press 2005) 143

juror misapprehension of sentencing instructions. Research conducted by the CJP has been especially important in identifying the myriad ways in which jurors are failing to meet the constitutional standards set out by the Supreme Court in determining a defendant's sentence. Although the findings of the CJP have been particularly helpful in identifying areas in which jurors are failing to conform to constitutional standards, the research has yet to identify mechanisms which help to explain why jurors are failing to comply with constitutional mandates at such high rates.

In Chapter 3 I describe my involvement in the most recent data collection efforts of the CJP. I explain how working in cooperation with a national study meant agreeing to several project-wide provisions such as using the core survey instrument in conducting interviews, targeting a specified number of cases and interviews to allow for a cross-jurisdictional analysis of the data, and utilizing the project-wide sampling methods for the selection of jurors to interview.⁶⁷ Beyond those criteria I was not restricted in any way in following up on my own research interests.⁶⁸

Fortunately, my personal approach to research coincided well with the design of the CJP. I was interested in understanding the totality of jurors' personal experiences throughout the trial. The survey instrument sought to capture such a comprehensive picture by inquiring about each phase of the proceeding (a juror's personal knowledge of the incident before jury selection, jury selection, both guilt and punishment phase evidence, jury deliberation at each stage, and the juror's personal experiences after the conclusion of the trial), as well as about the juror's perceptions of the legal actors (the judge, prosecutors, and defense attorneys), and their opinions

⁶⁷ As will be explained in Chapter 4, there was flexibility in terms of following up on specific research interests by adding probes and additional fixed-choice questions to the instrument.

⁶⁸ I created a three page addendum of questions to include in my interviews. These questions asked whether the defense presented specific types of mitigation evidence, such as the defendant's educational, mental health, and employment records. I also added open-ended questions which sought to determine what mitigation evidence jurors thought they did not need to see or hear in order to reach their punishment decision. The addendum was made available to other researchers on this project for use in their respective states.

regarding general criminological topics. In addition, numerous probes and open-ended questions were woven throughout the instrument as a means of acquiring additional thoughts and reactions from the juror concerning the trial and their experiences.

I begin my analysis of the data collected in Chapter 4 by examining the process of jury selection in the eight cases included in this study. Through a coding analysis of the trial transcripts and interview data I identify and describe four mechanisms used by attorneys for the State which expand the future dangerousness issue and limit juror understanding of mitigating evidence: 1) flipping or converting mitigating evidence into aggravating evidence, 2) arguing that mitigation is irrelevant to the jury's sentencing decision, 3) erroneous instructions or arguments suggesting that mitigating evidence must have a relationship or 'nexus' to the crime, and 4) enumerating specific examples of mitigating evidence that are not applicable to the particular case being decided. All four of these particular tactics occurred in each of the eight cases included in this study and appeared to deaden juror receptivity to mitigating evidence. The experiences of jurors during voir dire thus provide the framework for how jurors understand the evidence presented throughout the trial, ultimately shaping the direction of the deliberations at both guilt and punishment phases.

Chapter 5 analyzes the second critical stage in the capital trial process – the conviction of the defendant of a capital crime. In this chapter I highlight aspects of the guilt phase evidence and deliberations which are especially relevant to jurors' final sentencing decision. In particular, this chapter illustrates how the concept of dangerousness influences jurors' interpretation of guilt phase evidence. The data presented in the chapter underscore how the early exposure to the sentencing scheme

as interpreted by legal actors during voir dire aids in channeling the juror towards conviction and eventually towards a death sentence.

Jurors enter the penalty phase exposed to the sentencing statute – focused on the defendant’s dangerousness – and having convicted the defendant of a death eligible homicide. In Chapter 6, I examine the presentation of evidence in the penalty phase. While the chapter analyzes how mitigation evidence is presented and interpreted by both the State and the defense, much of the focus of the chapter is necessarily on how the prosecution deconstructs and redefines defense offered mitigation evidence. The data presented illustrate how the sentencing statute enables the conversion of mitigating evidence into aggravating evidence based on the statutory focus on dangerousness and the ambiguity of the mitigation issue. Thus, the chapter demonstrates how jurors are advised to view mitigation evidence as a reason to sentence the defendant to death, rather than to life.

Chapters 7 and 8 discuss the punishment phase deliberations in trials which resulted in a sentence of death and those which resulted in a sentence of LWOP respectively. Although jury deliberations had much in common regardless of the final outcome, the slight differences necessitated separate analysis. In Chapter 7, concerning trials which resulted in a sentence of death, the analysis focuses on three areas: how the special issue questions encourage jurors to avoid responsibility for the defendant’s sentence; the centrality of the defendant’s dangerousness in deliberations; and jurors’ misunderstanding of the mitigation special issue question. While jurors who sentenced the defendant to LWOP described focusing on similar areas during deliberations, Chapter 8 details several noteworthy differences amongst those trials. In particular, the chapter develops the importance of mitigating evidence related exclusively to the commission of the crime in jurors’ minds as opposed to mitigating

evidence regarding the defendant's background or character. Such a limited view of relevant mitigation evidence illustrates the inadequacy of jurors' understanding of the sentencing scheme even in cases which result in a sentence of LWOP.

The final chapter concludes with a synopsis of the research, reflecting on what the study of these jurors has revealed about the capital sentencing system in Texas. I suggest that the Texas legislature whose obligation is to create laws which are fair – in theory and in application – should remove the special issue questions, as their effect on the process of capital sentencing serves to undermine the delicate balance sought by the Supreme Court. Although the Court has been hesitant to embrace the results of empirical studies on capital juror decision-making, I hope that the findings revealed in these pages will encourage critical thinking about the efficacy of the special issue questions in promoting a constitutional death penalty in Texas. The burden bestowed on ordinary men and woman in a capital case is extraordinary and as such, policy makers and judges ought to consider their experiences when making decisions about the adjudication and constitutionality of the death penalty.

Chapter II. Learning Lessons from Previous Research

1. Initial Attempts to Study Capital Juries

In his keynote address to symposium participants gathered at Indiana University's Maurer School of Law to discuss the early contributions of the Capital Jury Project, Professor David Baldus remarked on the nature of dialogue between the courts and researchers. He explained, 'The law, by articulating its assumptions and justifications, sets the research agenda for social scientists.'⁶⁹ Indeed, the United States Supreme Court did precisely that when it endorsed guided discretion statutes as having the capacity to rationally regulate and determine who amongst those eligible were the most deserving of a death sentence.⁷⁰

Over thirty years of Supreme Court decisions have yielded much in the way of research directives regarding the administration of capital punishment in America. As the dialogue progressed researchers have demonstrated problems with the application of capital punishment at all levels of the criminal justice process – from initial charging decisions,⁷¹ to the poor quality of indigent defense,⁷² ineffective vetting of jurors who would automatically impose a death sentence upon conviction of a capital crime,⁷³ and juror misapprehension of sentencing requirements,⁷⁴ to name but a few.

⁶⁹ David Baldus, 'Keynote Address: The Death Penalty Dialogue Between Law and Social Science' (1995) 70 *Indiana Law Journal* 1033, 1033

⁷⁰ See *Gregg v Georgia* 428 US 153 (1976); *Jurek v Texas* 428 US 262 (1976); *Proffitt v Florida* 428 US 242 (1976)

⁷¹ David Baldus, George Woodward, and Charles Pulaski, *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1st edn, Northeastern University Press 1990); David Baldus and others, 'Race Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia' (1997) 83 *Cornell Law Review* 1638

⁷² Raymond Paternoster, 'Race of Victim and Location of the Crime: The Decision to Seek the Death Penalty in South Carolina' (1983) 74 *Journal of Criminal Law and Criminology* 754; Ashley Rupp, 'Death Penalty Prosecutorial Charging Decisions and County Budgetary Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?' (2003) 71 *Fordham Law Review* 2735

⁷³ William Geimer and Jonathan Amsterdam, 'Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases' (1998) 15 *American Journal of Criminal Law* 1

Despite the pantheon of empirical findings produced in the last three decades, the majority of which confirm the same failings across different methodologies, the Supreme Court has remained steadfast in its preservation of capital punishment. When confronted with specific failings with guided discretion statutes, the Court has often determined the failings to be unproven in the defendant's particular case⁷⁵ or that the noted problems amount to 'harmless error'.⁷⁶ Essentially, in these cases the Court concedes a failing may have occurred, but determines the problem to be not so great as to have influenced the defendant's sentence, thus declaring the defendant's penalty appropriate. The notion that a failure within a capital sentencing scheme must be shown to have a direct impact on a particular defendant's final sentence is difficult to prove in a specific case and contrary to what is known about the capital sentencing process.

Thus the Supreme Court and researchers alike have often limited the scope of constitutional consideration of the death penalty to a single, isolated aspect of the proceedings, rather than considering the cumulative effect of deficiencies in the context of the entire trial. For instance, much research regarding the administration of capital punishment has focused on a particular aspect of the proceeding – charging decisions, jury selection, jury instructions, and appellate review. Although such

⁷⁴ William Bowers and others, 'Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence' (2010) 46 Criminal Law Bulletin 1147

⁷⁵ This was the reasoning applied by the Supreme Court in *McCleskey v Kemp* 481 U.S. 279 (1986). The Court was presented a study of Georgia's capital sentencing system which found that black defendants convicted of killing white victims were 4.3 times more likely to receive a sentence of death than similarly situated defendants whose victims were black. Although the Court conceded that the study was valid and statistically sound the majority explained that for claims of racial discrimination to be persuasive the defendant would need to show discrimination had influenced the sentencing decision in her particular case. See David Baldus and George Woodworth, 'Race Discrimination and The Death Penalty' in James Acker, Robert Bohm, and Charles Lanier (eds) *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press 2003)

⁷⁶ Black's Law Dictionary (6th Ed.1990) 718 ('An error is "harmless" if reviewing court, after viewing entire record, determines that no substantial rights of defendant were affected and that error did not influence, or had only very slight influence on verdict.');

James Scoville, 'Deadly Mistakes: Harmless Error in Capital Sentencing' (1987) 54 University of Chicago Law Review 740; Linda Carter, 'Harmless Error in the Penalty Phase of a Capital Case: A Doctrine Misunderstood and Misapplied' (1994) 28 Georgia Law Review 125

focused inquiry provides significant insight into acute deficiencies with capital punishment in America, it ignores the process juries go through to reach their sentencing decision and fails to show just how formidable the shortcomings are in application. Thus, one advance this study makes to the literature is its documentation of the aggregate effect of the Texas sentencing statute on juror decision-making.

After capital punishment resumed in the United States in 1976,⁷⁷ researchers quickly began investigating the efficacy of the newly formed guided discretion schemes the Supreme Court had deemed constitutional. The first studies looked at the practice of death-qualification during jury selection as a potentially biased requirement of the capital sentencing system, due to concerns about the impartiality of jurors who, by the nature of the selection process, necessarily support capital punishment.⁷⁸ Concerned that death-qualified jurors were less connected with due process values,⁷⁹ social scientists utilized experimental, quasi-experimental, and survey designs to investigate whether death-qualified jurors were more conviction prone than their non-death-qualified counterparts. By 1980 around a dozen studies had investigated the influence of death-qualification on sentencing outcomes.⁸⁰

⁷⁷ See *Gregg v Georgia* 428 US 153 (1976); *Jurek v Texas* 428 US 262 (1976); *Proffitt v Florida* 428 US 242 (1976)

⁷⁸ The growth of research on death-qualification stemmed from the 1968 case of *Witherspoon v Illinois* 391 US 510 (1968). William Witherspoon was convicted of murder and sentenced to death in Illinois. At the time, the Illinois statute allowed for the dismissal of any juror with 'conscientious scruples' against capital punishment. At Witherspoon's trial, the prosecution removed nearly half of the prospective jurors claiming they had reservations about capital punishment. Witherspoon maintained that the remaining jurors 'would too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts and return a verdict of guilt'. Three studies had been offered to the Court as evidence that death-qualified juries were biased in favor of conviction. Agreeing with Witherspoon, the Supreme Court concluded that only those potential jurors who could not impose a death sentence could be excluded. However, the Court was not convinced by the three unpublished studies offered as evidence, referring to them as 'tentative and fragmentary'. The Court acknowledged that additional research 'might still attempt to establish that the jury was less than neutral with respect to guilt'.

⁷⁹ See Herbert Packer, *The Limits of the Criminal Sanction* (1st edn, Stanford University Press 1968). Packer argues that there are at least two sets of competing values held by those administering sanctions – the 'due process' model which emphasizes strict adherence to legal rules and an adversarial process; and a 'crime control' model that tends to minimize individual rights in the pursuit of convictions.

⁸⁰ David Bositis and Douglas Steinel, 'A Synoptic History and Typology of Experimental Research in Political Science' (1987) 9 *Political Behavior* 263, 265. The authors counted twenty-one experimental studies on jury behavior conducted by the mid-1980s.

2. First Studies Focusing on Death-Qualification

The first group of death-qualification studies utilized experimental and quasi-experimental designs to address the differences in conviction rates and sentencing behavior between death-qualified jurors and non-death-qualified (i.e. excludable) jurors. This allowed investigators to control the immediate environment of participants while being able to manipulate aspects of the jury selection process which were of interest to the researchers. Additionally, since most of the studies utilized a random assignment of eligible participants to either the experimental or control group, researchers were able to observe attitudinal effects on conviction and sentencing rates of death-qualified and excludable jurors.

The findings of the death-qualification studies signaled a number of concerns. A study by Fitzgerald and Ellsworth noted that death-qualified jurors were significantly more conviction prone than excludable jurors.⁸¹ Likewise Cowan, Thompson, and Ellsworth also found death-qualified jurors more likely to find the defendant guilty and less vigorous and thorough in deliberations.⁸² Similarly structured research also indicated that death-qualified jurors were more likely to

⁸¹ Robert Fitzgerald and Phoebe Ellsworth, 'Due Process vs Crime Control: Death Qualification and Jury Attitudes' (1984) 8 *Law and Human Behavior* 31. The authors conducted a phone survey on a sample of 811 participants who were jury eligible. The study distinguished between excludable jurors unwilling to impose a death sentence in any case and those who were unwilling to impose a death sentence but able to be impartial in determining a defendant's guilt.

⁸² Claudia Cowan, William Thompson, and Phoebe Ellsworth, 'The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation' (1984) 8 *Law and Human Behavior* 53. The study involved a sample of both death-qualified and excludable jurors who were asked to watch a two and a half hour videotape of a homicide trial including the judge's instructions and provide an initial verdict. Jurors were then asked to deliberate in groups – some entirely consisting of death-qualified jurors and others composed of death-qualified and excludable jurors.

believe prosecution witnesses, such as police officers,⁸³ and less inclined to believe a defendant's insanity defense in cases involving schizophrenia.⁸⁴

A particularly influential study by Haney investigated the effects of the death-qualification process on prospective jurors' views regarding conviction and sentencing. Eligible capital jurors in California were randomly assigned to two groups and viewed a videotape of a simulated voir dire. Jurors in the experimental group watched an additional segment which included death-qualification questioning. The results indicated that jurors in the experimental group tended to believe that the defendant was guilty, that he would be convicted of capital murder, and that death was likely to be the appropriate sentence.⁸⁵ Haney's study thus demonstrated that the process of questioning potential jurors about their ability and willingness to impose a sentence of death created bias against the defendant.⁸⁶

In addition to experimental research, early survey research by Fitzgerald and Ellsworth examined attitudes towards crime and punishment in sample populations of potential jurors. The results provided a profile of the attitudes and values typically held by death-qualified and excludable jurors. Amongst other findings, the survey data established that death-qualified jurors tended to be more inclined towards harsher punishments, to view a defendant's decision not to testify on her own behalf as implying guilt, and to believe that the insanity defense was a legal loophole for

⁸³ William Thompson and others, 'Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts' (1984) 8 *Law and Human Behavior* 95

⁸⁴ Phoebe Ellsworth and others, 'The Death-Qualified Jury and the Defense of Insanity' (1984) 8 *Law and Human Behavior* 81

⁸⁵ Craig Haney, 'On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process' (1984) 8 *Law and Human Behavior* 121

⁸⁶ *See Hovey v Superior Court* 28 Cal. 3d 1 (1980). After the California Supreme Court reviewed the studies it ordered jury selection to be conducted individually rather than in panels of potential jurors.

defendants, rather than a legitimate explanation for having committed a crime.⁸⁷ The survey data also revealed that minority populations were disproportionately excluded from service, with the groups most affected being women, African-Americans, Jews, atheists, agnostics, and individuals from lower income levels. The authors concluded that, ‘death qualification systematically distorts the attitudes of the jury in a direction that discriminates against the defendant and undermines the protections of due process’.⁸⁸

The findings of both the experimental and survey data indicated that death-qualified jurors appeared to be increasingly willing to convict and apply harsher punishments than excludable jurors, and that the process of qualification had a biasing effect towards conviction and a sentence of death. Although some might criticize both methodologies as being limited given the use of simulated conditions and hypothetical situations, the results of these studies do support findings from studies which have collected data from actual capital jurors (see below). In addition, since the studies discussed in this section focus on death-qualification, and those standards, there is little reason to believe that participants’ personal views differ significantly from actual jurors.

3. Research on Personal Characteristics of the Defendant and Victim

Unease about the influence of race on sentencing outcomes received substantial empirical attention in the 1980s. Several studies utilized statistical analysis of variables in order to determine the probability a defendant would receive a death sentence based on various combinations of the race of the defendant and/or

⁸⁷ Phoebe Ellsworth and others, ‘The Death-Qualified Jury and the Defense of Insanity’ (1984) 8 *Law and Human Behavior* 81; Robert Fitzgerald and Phoebe Ellsworth, ‘Due Process vs Crime Control: Death Qualification and Jury Attitudes’ (1984) 8 *Law and Human Behavior* 31

⁸⁸ Robert Fitzgerald and Phoebe Ellsworth, ‘Due Process vs Crime Control: Death Qualification and Jury Attitudes’ (1984) 8 *Law and Human Behavior* 31, 48

victim. One of the earliest studies collected data on eligible capital cases in Florida, Georgia, Texas, and Ohio in the five years following the Supreme Court's decision in *Furman v. Georgia*.⁸⁹ The data showed that black defendants convicted of killing white victims were more likely to receive a death sentence than other racial combinations of offenders and victims. In addition, the researchers identified several points throughout the capital trial process where potential discrimination might operate – such as the prosecutorial decision to seek a death sentence. The data further demonstrated that differential treatment of capital defendants by race persisted after the new guided discretion statutes were implemented and appeared across states which utilized different sentencing schemes.

Later research conducted in South Carolina yielded similar results.⁹⁰ Statistical analysis of homicide data collected from investigative reports demonstrated that the prosecutorial decision to seek death in a particular case was significantly related to the race of the victim and to the location of the crime. Research conducted by Radelet in Florida noted the importance of the race of victims in determining the likelihood that a defendant would face capital punishment and subsequently receive the death penalty.⁹¹

Perhaps the most comprehensive and widely cited race study during this period was the investigation of Georgia's capital sentencing system conducted by Baldus, Pulaski, and Woodworth (commonly referred to as the Baldus study). Analyzing over 2,000 murder cases which occurred in Georgia in the 1970s, the researchers employed multiple regression analysis to evaluate over two-hundred case

⁸⁹ William Bowers and Glenn Pierce, 'Arbitrariness and Discrimination Under Post-Furman Capital Statutes' (1980) 26 *Crime and Delinquency* 563

⁹⁰ Raymond Paternoster, 'Race of Victim and Location of the Crime: The Decision to Seek the Death Penalty in South Carolina' (1983) 74 *Journal of Criminal Law and Criminology* 754

⁹¹ Michael Radelet, 'Racial Characteristics and the Imposition of the Death Penalty' (1981) 46 *American Sociological Review* 918

related variables, which could have explained racial disparities in sentencing. After controlling for the case related variables researchers determined that ‘defendants whose victims were white faced, on average, odds of receiving a death sentence that were 4.3 times higher than similarly situated defendants whose victims were black.’⁹²

Critically, data from the Baldus study were used as evidence in the 1987 Supreme Court case of *McCleskey v. Kemp*.⁹³ McCleskey, a black man, had been convicted of killing a white police officer during an armed robbery of a furniture store in Fulton County, Georgia. McCleskey argued that invidious racial discrimination in Georgia’s capital sentencing scheme created unconstitutional bias against black defendants who were accused of the murder of a white victim. McCleskey claimed that the data from the study proved that, after controlling for the level of aggravation, he was more likely than other defendants to receive a death sentence based on the defendant-victim race combination. Although the Supreme Court found the study to be reliable and valid, it concluded that without clear proof that the actual jurors in McCleskey’s case acted in a discriminatory manner, such claims of wide-spread racial discrimination would not have merit.⁹⁴

Though numerous studies across jurisdictions had found the race of the victim to be significant in both charging and sentencing decisions, such quantitative methods were criticized for struggling to control for the presence of relevant considerations in

⁹² David Baldus and George Woodworth, ‘Race Discrimination and The Death Penalty’ in James Acker, Robert Bohm, and Charles Lanier (eds) *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press, Durham 2003) 518

⁹³ *McCleskey v Kemp* 481 US 279 (1987)

⁹⁴ Kentucky was the first state to pass a Racial Justice Act allowing those facing the death penalty to present statistical evidence of racial bias in court. See Death Penalty Information Center <<http://www.deathpenaltyinfo.org/node/98>> accessed 5 July 2011. In 2009 North Carolina’s state legislature passed a similar Racial Justice Act. The Act has been controversial and has been challenged as unconstitutional in state courts. Nearly every inmate on North Carolina’s death row is currently litigating racial bias in their case under the Act. See also Nathan Koppel, ‘N.C.’s Racial Justice Act Survives (At Least for Now)’ *The Wall Street Journal Law Blog* (New York 17 June 2011) <http://blogs.wsj.com/law/2011/06/17/n-c-s-racial-justice-act-survives-at-least-for-now/?mod=google_news_blog> accessed 20 June 2011

accounting for the differences in sentencing outcomes. Prosecutors maintain unfettered discretion in charging decisions and are not required to provide reasoning for their choice.⁹⁵ Thus, while the race studies looked at the characteristics of defendants and the crime, researchers were limited by the availability of data collected. For instance, it could be the case that family members of white victims are more likely to express their desire for the State to seek the death penalty than the family members of black victims. Prosecutors – who are elected officials – might acquiesce to such demands if a family is especially vocal and/or influential. Such reasons are unlikely to be documented in any court record. Notwithstanding such concerns, the regression analysis utilized in the Baldus study provided an incredibly grim picture of the influence of race on capital case disposition.

4. A Focus on the Process of Capital Jurors' Decision-Making

In response to the comments of the Supreme Court in *McCleskey* researchers began conducting interviews with former capital jurors. The most extensive interview data from former capital jurors has been gathered by the Capital Jury Project (CJP).⁹⁶ The CJP began data collection in 1991 and has since interviewed over 1,198 former capital jurors from over 300 capital trials in fourteen states.⁹⁷ The data collection for the CJP employed a common in-depth interview instrument administered in-person by trained interviewers. The sample of states represented each type of guided discretion statutes in order to compare the results across jurisdictions and to facilitate

⁹⁵ See Kenneth Davis, *Discretionary Justice: A Preliminary Inquiry* (1st edn, Louisiana State University Press 1969); James Vorenberg, 'Decent Restraint for Prosecutorial Power' (1981) 94 *Harvard Law Review* 1521

⁹⁶ William Bowers, 'The Capital Jury Project: Rationale, Design, and Preview of Early Findings' (1995) 70 *Indiana Law Review* 1043. The CJP originally included eight states for which the target sample of jurors in each location was four participants in fifteen trials that resulted in life verdicts and four jurors in fifteen cases which resulted in death verdicts. An additional six states were added to the project and the target goal for those states were slight lower – four jurors per ten cases that resulted in life verdicts and four jurors per ten trials that resulted in death verdicts.

⁹⁷ Capital Jury Project <<http://www.albany.edu/scj/CJPwhat.htm>> last accessed 10 May 2011

generalization of the results.⁹⁸ Stratification of cases was achieved by selecting both life and death verdicts in each state.⁹⁹

Broadly, data from the CJP demonstrate seven areas in which juror decision-making fails to comply with constitutional requirements: premature punishment decision-making, pro-death predisposition of jurors, failure to understand sentencing requirements, mistakenly believing that the death penalty was required by law, evasion of personal responsibility for the defendant's ultimate sentence, failing to appreciate the sentencing alternative (typically life without the opportunity for parole), and race as a factor in jury decision-making.¹⁰⁰ The findings demonstrate that these failures in capital sentencing schemes begin immediately during jury selection as there is a significant failure to purge jurors who are predisposed to applying a death sentence.¹⁰¹ Due to the standards of jury selection being incorrectly applied there is an over-inclusion of 'automatic death penalty' (ADP) jurors – those who would not consider mitigating evidence in making their sentencing decision – and over-

⁹⁸ William Bowers, 'The Capital Jury Project: Rationale, Design, and Preview of Early Findings' (1995) 70 *Indiana Law Review* 1043, 1078. Bowers delineates three types of guided discretion statutes – threshold, balancing, and directed. The states that participated in the study representing threshold statutes were Georgia, Kentucky, South Carolina, and Virginia. Florida, Indiana, and Alabama represented states with balancing requirements but with an advisory recommendation of punishment by the jury to be confirmed or overruled by the presiding judge. North Carolina, Pennsylvania, New Jersey, California, Louisiana, and Tennessee represented balancing statutes with binding jury sentences. Finally, Texas represented the directed discretion statutes. Within each group of states were representations of various methods for separating aggravated murders from simple homicides. Thus, among the states included in the sample, all configurations of constitutional capital sentencing statutes were represented. *See also* William Bowers and Benjamin Steiner, 'Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing' (1999) 77 *Texas Law Review* 605, 613. The Georgia's threshold statute requires jurors to find beyond a reasonable doubt at least one aggravating factor from a statutory list before imposing a death sentence. Once jurors find an aggravating factor they are free to impose life or death without further statutory guidance; Florida's balancing statute requires jurors to weigh statutory aggravating factors against statutory mitigating factors; Texas's directed statute restricts the death penalty to those convicted of capital murder – murder plus an aggravating circumstance proscribed by statute – then directed to answer special issue questions at the penalty phase.

⁹⁹ William Bowers, 'The Capital Jury Project: Rationale, Design, and Preview of Early Findings' (1995) 70 *Indiana Law Review* 1043

¹⁰⁰ William Bowers and others, 'Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence' (2010) 46 *Criminal Law Bulletin* 1147

¹⁰¹ William Bowers, Marla Sandys and Benjamin Steiner, 'Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience and Premature Decision Making' (1998) 83 *Cornell Law Review* 1476; William Bowers and Wanda Foglia, 'Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing' (2003) 51 *Criminal Law Bulletin* 51

exclusion of jurors who would be able to impose the death penalty under appropriate circumstances despite reservations. This practice results in the over-representation of conviction-prone jurors on capital juries relative to both the population at large and to correctly selected capital jurors.¹⁰² As previously cited studies indicated, jurors who are predisposed to sentence a convicted defendant to death appear to be more conviction-prone, less likely to attach significance to due process, less likely to take into consideration mitigating evidence at the penalty phase of the trial, and to associate more with a vengeful retributive philosophy of punishment.

CJP data revealed that ‘death-prone’ jurors typically came to a decision about punishment prematurely (prior to the beginning of the penalty phase) and were more convinced of their punishment decision at an earlier stage in the proceedings. Thus, for many jurors, by the time mitigation evidence is presented it is unlikely to be influential.¹⁰³ Moreover, the data also revealed that jurors often discussed the defendant’s punishment during guilt deliberations in order to secure a guilty verdict.¹⁰⁴ Even though jurors are instructed by the judge to limit their deliberations of guilt to the evidence presented during the guilt phase, and not to discuss the possible punishment if the defendant is found guilty, some jurors who did not think that the defendant was guilty of capital murder would agree to find the defendant

¹⁰² William Bowers and Wanda Foglia, ‘Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing’ (2003) 51 *Criminal Law Bulletin* 51, 61. It is estimated that 28% of those seated as capital jurors would automatically vote for death if they convicted the defendant.

¹⁰³ William Bowers, Benjamin Fleury-Steiner, and Michael Antonio, ‘The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction’ in James Acker, Robert Bohm, and Charles Lanier (eds) *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press 2003). The standard proceeding in a capital case is for evidence related to the factual guilt of the defendant to be introduced during the guilt phase, and evidence related to the personal moral guilt of the defendant to be presented only if the defendant is found guilty and enters a punishment phase, although mitigation evidence can be entered into evidence during the guilt phase if it is relevant to factual guilt.

¹⁰⁴ William Bowers, Benjamin Fleury-Steiner, and Michael Antonio, ‘The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction’ in James Acker, Robert Bohm, and Charles Lanier (eds) *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press 2003) 434-436

guilty if other jurors would agree not to impose the death penalty.¹⁰⁵ This finding echoes previous research demonstrating the short-comings identified with bifurcation.¹⁰⁶ It also signals that in a number of cases defendants have received a sentence which is likely to be significantly higher than what should have been given, or in the case of an innocent defendant a conviction and long prison term for a crime that they did not commit.

The Supreme Court has reiterated that a capital sentencing decision should be the result of a moral response to the cumulative evidence presented and one made with ample guidance from the law.¹⁰⁷ Early research investigating juror comprehension of instructions in non-capital cases indicated that jurors often failed to understand key terms within instructions (such as ‘reasonable doubt’).¹⁰⁸ Likewise, research has determined significant levels of juror incomprehension regarding capital sentencing instructions. Using CJP data from South Carolina, Eisenberg and Wells found widespread confusion about the standard of proof in assessing aggravating and mitigating evidence.¹⁰⁹ These findings confirm the results of similar data collected from a survey of college students in California by Haney, which demonstrated low levels of instructional comprehension – especially with respect to the mitigation instruction.¹¹⁰

¹⁰⁵ William Bowers, Benjamin Fleury-Steiner, and Michael Antonio, ‘The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction’ in James Acker, Robert Bohm, and Charles Lanier (eds) *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press 2003) 436

¹⁰⁶ Jesse Cheng, ‘Frontloading Mitigation: The “Legal” and “Human” in Death Penalty Defense’ (2010) 35 *Law and Social Inquiry* 39

¹⁰⁷ *Penry v Lynaugh* 492 US 302, 319 (1989)

¹⁰⁸ Laurence Severance and Elizabeth Loftus, ‘Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions’ (1982) 17 *Law and Society Review* 153

¹⁰⁹ Theodore Eisenberg and Martin Wells, ‘Deadly Confusion: Juror Instructions in Capital Cases’ (1993) 79 *Cornell Law Review* 1

¹¹⁰ Craig Haney and Mona Lynch, ‘Comprehending Life and Death Matters: A Preliminary Study of California’s Capital Penalty Instructions’ (1994) 18 *Law and Human Behavior* 411

Many jurors also mistakenly underestimate the alternative sentence to the death penalty, resulting in what the Supreme Court has referred to as a ‘false choice’ in favor of a death sentence.¹¹¹ CJP data showed that even in states which had life without the opportunity for parole (LWOP) as the mandatory sentencing alternative to the death penalty, jurors believed that defendants would be released from prison at some point in the future if a death sentence was not imposed.¹¹²

The belief that a death sentence is required by law or that the alternative is not sufficient for the crime creates an environment where jurors need not take primary responsibility for the defendant’s death sentence.¹¹³ CJP findings illustrated that a significant majority of jurors did not believe they were primarily responsible for the defendant’s sentence. The data revealed that over 80% of jurors assigned primary responsibility for the resulting sentence to the defendant (49%) and the law (33%). Indeed, only 5.5% of respondents thought that the *individual* juror was most responsible for the defendant’s punishment, while 9% believed the jury as a whole was most responsible.¹¹⁴

Building on the findings of the Baldus study, CJP data confirmed the importance of race as a significant variable when weighing aggravating and mitigating factors. CJP data established that it is not just the race of the defendant and the victim that increases the probability of the defendant receiving a death sentence, but also the race and gender of the jury members themselves.¹¹⁵ Data from the CJP

¹¹¹ *Simmons v South Carolina* 512 US 154, 171 (1994)

¹¹² William Bowers and Benjamin Steiner, ‘Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing’ (1999) 77 *Texas Law Review* 605

¹¹³ See Joseph Hoffman, ‘Where’s the Buck? Juror Misperception of Sentencing Responsibility in Death Penalty Cases’ (1995) 70 *Indiana Law Review* 1137; William Bowers and Wanda Foglia, ‘Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing’ (2003) 51 *Criminal Law Bulletin* 51

¹¹⁴ William Bowers and Wanda Foglia, ‘Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing’ (2003) 51 *Criminal Law Bulletin* 51, 74

illustrated the prominent effect of race on the sentencing outcome, a phenomenon which Bowers and his colleagues refer to as the ‘white male dominance’ effect and the ‘black male presence’ effect.¹¹⁶ Using data from cases involving a black defendant and a white victim, a pattern emerged which demonstrated that the number of white males on a capital jury considerably increased the likelihood a defendant will receive a death sentence. Of particular significance was the presence of five or more white males on a capital jury which increased the chances of a defendant receiving death from 23% to 63%.¹¹⁷ Conversely, the presence of a single black male on a capital jury reduced the likelihood of a defendant receiving a death sentence from 72% to 43%.¹¹⁸

CJP data also demonstrated how jurors’ perceptions of the defendant, the victim, and witnesses influence determinations of guilt and punishment. The data show that jurors who believe the defendant to be remorseful are less likely to vote for a death sentence.¹¹⁹ Victim characteristics also factored into jurors’ sentencing decision. Jurors who thought the victim to be an innocent bystander who was in the wrong place at the wrong time were more likely to select death as a punishment.¹²⁰

¹¹⁵ William Bowers, Marla Sandys, and Benjamin Steiner, ‘Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition’ (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 171; William Bowers, Marla Sandys and Thomas Brewer, ‘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’ (2003) 53 *DePaul Law Review* 1497

¹¹⁶ William Bowers, Marla Sandys, and Benjamin Steiner, ‘Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition’ (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 171, 192

¹¹⁷ William Bowers, Marla Sandys, and Benjamin Steiner, ‘Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition’ (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 171, 193

¹¹⁸ William Bowers, Marla Sandys, and Benjamin Steiner, ‘Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition’ (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 171, 193

¹¹⁹ Scott Sundby, ‘The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty’ (1998) 83 *Cornell Law Review* 1557

¹²⁰ Theodore Eisenberg, Stephen Garvey, and Martin Wells, ‘Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases’ (2003) 88 *Cornell Law Review* 306

The results support the principle that jurors find random murder more disturbing and thus tend more frequently to sentence defendants in such cases to death. In terms of types of witnesses, jurors also appeared to find lay witnesses more credible than expert witnesses.¹²¹ Again, this finding underscores how jurors tend to think of expert witnesses as ‘hired-guns’ for either side and are thus increasingly skeptical of their motivations for providing testimony.

The CJP utilized a multi-level sampling strategy, initially selecting a sample of states representing the principal capital sentencing schemes. Within the selected states an equal number of life and death cases were chosen. Using the jury lists from the selected trials, juror names were coded and four jurors were then sampled to be interviewed in each case. Procedures were applied to ensure a random selection of jurors in order to maintain the integrity of the sample.¹²² Although interviewing four jurors for each case is not sufficient to generalize the findings for the entire jury, comparing juror responses adds a check of reliability to the jurors’ recollection of the trial. The reliability of each interview was also assessed by the consistency of the juror’s responses throughout the discussion.

Although the CJP has added much to the collective understanding of the difficulties encountered by capital jurors in determining an appropriate punishment, concerns about the representativeness and accuracy of the data have been noted. Despite the fact that the CJP employed a systematic sampling procedure for selecting jurors within each trial, subjects were able to refuse to participate or replaced if they were unable to be located, resulting in the potential for unrepresentativeness in the sample. This is a particular concern for harder to reach populations such as younger

¹²¹ Scott Sundby, ‘The Jury as Critic: An Empirical Look at How Jurors Perceive Expert and Lay Testimony’ (1997) 83 Virginia Law Review 1109

¹²² William Bowers, ‘The Capital Jury Project: Rationale, Design, and Preview of Early Findings’ (1995) 70 Indiana Law Review 1043, 1081

jurors who may have moved out of the area or jurors of lower socio-economic status who may be equally transient. In a recent publication researchers from the CJP addressed this issue directly with an analysis of seventeen variable categories (such as education, income, gender, age) and found relatively little variation in departures from constitutional standards by social background characteristics, ‘most differences are less than five percentage points’.¹²³ Notwithstanding those results, it is difficult to assess how dissimilar the response of individuals who did not participate might be.

Another concern is the accuracy of juror responses. Jurors’ memory of the events of the trial may have diminished over time and it is possible that a juror might experience a degree of hindsight bias.¹²⁴ However, unlike other events one might experience in life, the experience of serving as a juror in a capital trial is a particularly unique and therefore salient one. Psychological literature indicates that individuals are more likely to recall significant events with greater clarity and precision than ones which have less personal relevance.¹²⁵ The emotional potency of an event tends to enhance a person’s memory of the essential facts of the incident.¹²⁶ In addition, CJP researchers also assessed the degree of non-response rates for the questions included in the survey instrument. In most instances 95% or more of participating jurors answered all but one question related to the constitutional failures identified earlier.¹²⁷

¹²³ William Bowers and others, ‘Jurors’ Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence’ (2010) 46 *Criminal Law Bulletin* 1147, 1158

¹²⁴ See Jonathan Casper, Kennette Benedict, and Jo Perry, ‘Juror Decision-Making, Attitudes, and Hindsight Bias’ (1989) 13 *Law and Human Behavior* 291, 293. Hindsight bias is a process which appears to involve the integration of outcome information into one’s understanding of a story influencing judgments about the inevitability of an outcome.

¹²⁵ See e.g. John Wixted and Ebbe Ebbesen, ‘On the Form of Forgetting’ (1991) 2 *Psychological Science* 409

¹²⁶ Alafair Burke, Friderike Heuer, and Daniel Reisberg, ‘Remembering Emotional Events’ (1992) 10 *Memory and Cognition* 277

¹²⁷ William Bowers and others, ‘Jurors’ Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence’ (2010) 46 *Criminal Law Bulletin* 1147, 1171. The question which yielded a higher non-response rate appeared to reflect jurors’ tendency to be reluctant to give a specific numerical estimate

5. Advancing the Literature

A review of the extant literature on juror decision-making and juror comprehension of capital sentencing instructions suggests a number of deficiencies within the functioning of the American death penalty. While no single study discussed in this chapter is without limitations, taken together the collection of empirical findings across methodologies demonstrates a capital sentencing system fraught with problems. Although the research discussed in this dissertation confirms much of the previous empirical work highlighted in this chapter it advances scholarship on capital juror decision-making in several notable ways.

A unique advance has been the acquisition of trial transcripts for each case included in this study. Importantly, the transcript data support juror recollection of the events of the trial, enhancing the reliability of the findings. In addition, the transcripts are used as a separate data source in order to show how judges, prosecutors, and defense attorneys interpret the meaning of the sentencing scheme as well as what evidentiary examples they provide to jurors as a reference for their sentencing decision. The transcript data thus provide a record of how jurors were *instructed* to apply trial evidence to their sentencing decision. In turn, the interview data show how jurors actually *understood* the sentencing scheme in relation to the evidence presented at trial. The acquisition and analysis of the trial transcripts in conjunction with the data collected through intensive interviews with capital jurors is distinct to much of the previous research conducted with former capital jurors.

Drawing on two complementary data sources enables an analysis which can address both the process and the cumulative effect of the sentencing scheme on jurors' determination of guilt and punishment. As noted at the start of this chapter,

to the question, 'how many years convicted murderers not sentenced to death would usually stay in prison' and suggests that jurors were keen to provide accurate information.

research on the administration of capital punishment has mostly focused on investigating a single aspect of the trial – such as jury selection – and determining what factors appear to play a role in shaping the eventual sentencing outcome. The data presented in this study takes a holistic view of the trial process, analyzing how legal actors breathe meaning into the sentencing statute, how they shape arguments around their framing of the statute, and how these interactions appear to influence jurors’ perception of evidence and eventually their sentencing decision.

Finally, regional differences in the use of capital sentencing and execution rates highlight the importance of carrying out empirical work in a variety of jurisdictions. The Texas capital sentencing system has not been the focus of much empirical investigation. This is significant in that Texas leads all states in numbers of executions and has one of the largest death rows in America.¹²⁸ Most studies cited in this chapter originate from other Southern states such as Georgia or Florida, which in the recent past have not approached the numbers of capital sentences imposed or executions conducted in Texas. Other key studies on jurors’ attitudes and deliberations have investigated Californian juries. Although California has the largest death row in the nation, currently housing over 700 prisoners, it has only executed thirteen inmates since 1976.¹²⁹ As Texas both employs a constitutionally distinctive sentencing scheme and is an anomaly in its persistent use of the ultimate punishment, it does not seem appropriate to speak about the operation of the death penalty in America without a thorough empirical analysis of capital punishment within the state. The data presented in this study squarely contributes such findings to the academic literature.

¹²⁸ Death Penalty Information Center (Statistics on death row and executions in Texas) <<http://www.deathpenaltyinfo.org/texas-1>> accessed 20 June 2011

¹²⁹ Death Penalty Information Center (Statistics on death row and executions in California) <<http://www.deathpenaltyinfo.org/california-1>> accessed 20 June 2011

Chapter III. Methods and Data

1. Introduction

Capital jurors are exposed to an array of evidence, argument and visual cues which they interpret, ascribe meaning to, and determine the weight of based on their own personal perspectives.¹³⁰ As such, in order to fully understand their experiences, rather than begin with a testable hypothesis my initial approach to data collection was more exploratory. I aimed to collect data which would enable to me understand how jurors go about determining a defendant's sentence – what evidence and arguments they were exposed to, how they interpreted what they observed and what considerations were especially important to them in determining the defendant's penalty. Given the complexity of the capital sentencing decision, and my interest in understanding how legal and extra-legal factors come together to form the basis for such a determination, I considered a qualitative approach to be the superior method.¹³¹

The data I collected for this analysis come primarily from two sources; trial transcripts and responses from forty-six interviewed jurors to a sixty-page survey instrument which I administered. The survey instrument utilizes both structured questions, with designated response options, and open-ended questions, which invited the juror to provide a narrative response. The questions trace the juror's experience from jury selection through to the final punishment verdict. Both the structured and open-ended questions were concerned with trying to enhance understanding of capital

¹³⁰ Herbert Bulmer, *Symbolic Interactionism: Perspective and Method* (1st published 1969 Prentice Hall, paperback reprint University of California Press 1986) 2 ('Symbolic interactionism rests in the last analysis on three simple premises. The first premise is that human beings act toward things on the basis of the meanings that the things have for them. Such things include everything that a human being may note in his world – physical objects, other human beings, institutions, guiding ideals, activities of others and such situations as an individual encounters in his daily life. The second premise is that the meaning of such things is derived from, or arises out of, the social interaction that one has with one's fellows. The third premise is that these meanings are handled in, and modified through, an interpretative process used by the person in dealing with the things he encounters.')

¹³¹ See Robert Weiss, *Learning from Strangers: The Art and Method of Qualitative Interview Studies* (1st edn, Free Press 1994) 10 ('Qualitative interviewing enables us to learn about perceptions and reactions known only to those to whom they occurred' [citation omitted])

jurors' experiences of the trial through acquiring detailed descriptions, which are in some instances quantifiable. Thus, while most of the data presented in this study are jurors' own comments and reflections about their experiences, I support a number of assertions with frequencies calculated from the entire sample of jurors interviewed.

The survey instrument used in this study is a slightly modified version of the questionnaire utilized in the first two rounds of the Capital Jury Project's (CJP) data collection efforts. The original CJP instrument began as a two hour interview in which the first hour was designated for the questionnaire and the second hour for the investigator to follow up with state specific questions. Through initial juror interviews, meetings, and regular communication between the researchers involved, the survey instrument was expanded to systematically accommodate topics that came up in many interviews.¹³² During the earlier stages of the survey design researchers applied pre-tests and reliability checks to ensure adequate survey reliability. Non-response rates for individual questions have also been tracked during the eighteen years of the instrument's use. Accordingly, modifications to the survey have been made which have increased juror response rates and the instrument's overall validity and reliability.

The second data source used in this study is the trial transcripts from each case. The acquisition and review of trial records is a unique advance in this study and served several useful purposes. The transcripts provide objective data regarding the events of the trial as well as serving as an important tool for interview preparation. Prior to conducting interviews I reviewed the trial record, typically around 2,000 pages per case, noting the order of witnesses, evidence, and argument. This close reading of the record provided me rich details about the trial. For example, in one

¹³² William Bowers, 'The Capital Jury Project: Rationale, Design, and Preview of Early Findings' (1995) 70 *Indiana Law Review* 1043, 1082 n 208

case, during the penalty phase the victim's daughter gave testimony regarding the impact her mother's death had on her family.¹³³ During direct questioning by the prosecution she described the effect:

A: Every day we see something that reminds us of mother or we think of something that we say, mother would have liked that or I know when the – the – flowers come out pretty soon in the nurseries and they'll have those pansies, those purple pansies, those are her favorites. And we won't – I mean, I'll look at them and remember her and think about them.

Q: Purple was her favorite color?

A: Yes, sir, purple was her favorite color.¹³⁴

Later that same day, during closing arguments at the penalty phase the prosecutor made reference to the daughter's testimony by directing the jury to observe those in the gallery wearing purple:

[The victim] lived a life of giving and love. She died surrounded by hate and greed at the hands of that man right there. And she deserved better. All those people you see out there in purple deserved better. They deserved to live out their lives to have her life lived out with them the way it was meant to be. She deserved better.¹³⁵

Noting this distinctive reference, I made a point of asking jurors who did not spontaneously mention it to me whether they recalled the statement, noticed people in the gallery wearing purple, and if so what thoughts they had about observing community support for the victim.¹³⁶ Thus, the transcript provided an independent

¹³³ See *Payne v Tennessee* 501 US 808 (1991). There is no constitutional bar prohibiting a capital sentencing jury from considering 'victim impact' evidence relating to the deceased's personal characteristics and the emotional impact of the murder on the victim's family, or precluding a prosecutor from presenting such evidence at a capital sentencing hearing.

¹³⁴ TX01D. All cited transcripts, interview recordings and completed survey instruments are personally maintained in locked files and password protected formats. In order to ensure the highest degree of confidentiality I use a general citation to the case rather than specifically reference the trial, volume and page numbers of transcripts.

¹³⁵ TX01D

¹³⁶ See Robert Weiss, *Learning from Strangers: The Art and Method of Qualitative Interview Studies* (1st edn, Free Press 1994) 130 ('Asking about concrete events are likely to result in more accurate information than asking a question about general perceptions. While questions about concrete incidents – such as "what happened when you and your sister were last together?" – may be answered from more than one perspective, they are less likely to be

source of verification as well as assisting in the collection of the richest possible data from jurors.

I also used the transcripts as a data source in themselves. As explained below I applied a coding scheme to statements by the judge, prosecution, and defense relating to their interpretation of the sentencing statute, legal definitions and guilt and penalty phase evidence. I created an inventory for the order and type of witnesses called to give evidence at both the guilt and punishment phases of the trial. I catalogued the items of evidence admitted or shown to the jury throughout the trial, such as the crime scene photos, video confession from the defendant, the autopsy pictures, the murder weapon, and so on. Finally, I noted the length of the testimony of prosecution and defense witnesses and created a table containing the number of pages each witness spoke for. I recorded the length of the opening statements and closing summations given by both the prosecution and defense. Coding the transcripts in such a way not only prepared me for the interviews with jurors, it also provided me a record of witnesses, evidence, statements, notable events from the trial, and general indicators of prosecutorial and defense effort.

In addition to these data, I found that the opportunity to read the trial transcript provided valuable insights regarding what jurors had experienced. From reading the transcript I was able to form some impression of the intensity of the trial, noting factors such as the difficulties in maintaining engagement with technical or complex testimony, the exhaustion felt by exposure to graphic details provided in medical evidence about the killing, and the tangible suffering expressed by members of the victim's and defendant's family during their testimony at the punishment phase. This

modifiable by the interviewing context. Thus, we will obtain more reliable information and information easier to interpret if we ask about concrete incidents than we will if we asked about general states or opinions.')

allowed me to engage in a more meaningful way with jurors in interviews than would otherwise have been possible.

I approached the interviews as semi-structured conversations rather than a routine administration of a questionnaire. As such, I asked numerous follow up questions throughout the interview, acquiring additional information about the trial from each juror interviewed. Earlier interviews in a case drew my attention to particular areas of inquiry and, building on this previous data collection, I took the opportunity to further explore particular topics in later interviews.¹³⁷ I worked with the transcripts while simultaneously conducting interviews, maintaining a constant connection with both sources of data.¹³⁸

While conducting the interviews I was aware that my presence, knowledge, and responses to the jurors could affect their responses. Although it is difficult to say what influence my personal style of interviewing (as well as my age, race, gender, and other personal characteristics) had on the responses jurors gave to the questions asked, I found the jurors I interviewed to be extremely conscientious. Participating jurors offered a great deal of unsolicited information about the trial and their experiences, which is a likely indicator of what the juror would have said had I not been present or if someone else conducted the interview.¹³⁹ Though it is difficult to assess the extent to which our interaction influenced jurors' responses, as Holstein and Gubrium note:

Meaning is not merely elicited by apt questioning, nor simply transported through respondent replies; it is communicatively assembled in the interview encounter. Respondents are not so much repositories of experiential

¹³⁷ See Antony Bryant and Kathy Charmaz, 'Introduction: Grounded Theory Research, Methods and Practice' in Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage 2007) 1

¹³⁸ See Antony Bryant and Kathy Charmaz, 'Introduction: Grounded Theory Research, Methods and Practice' in Antony Bryant and Kathy Charmaz (eds), *The Sage Handbook of Grounded Theory* (Sage 2007) 1

¹³⁹ Howard Becker, 'Problems of Inference and Proof in Participant Observation' (1958) 23 *American Sociological Review* 652 (spontaneous statements are more likely to indicate what would have been said had the researcher not been present)

information as they are constructors of knowledge in collaboration with interviewers.¹⁴⁰

The participating jurors were thoughtful about their responses, elaborating on topics, clarifying the meaning of their answers, and correcting me when I misinterpreted something that they said. While my interviewing style and approach surely guided the discussions, based on the firmness with which jurors recounted their experiences, I believe their answers to the questions would have been similar even with a different interviewer.

During the interviews I would often repeat explanations given by a juror in order to make sure I had fully understood them. Many times they would qualify their statements or correct me if I had misunderstood what was said. Even when responding to the multiple choice questions jurors often provided explanations for why they selected a particular response option. I found that most jurors appeared very mindful about accurately describing their experience. In this sense, there was not a clear divide between the closed and open-ended questions.

After each interview, when I had parted company with the juror, I would note my impressions of the juror's responses. I took care to make a record of areas of the interview that the juror had difficulty discussing due to memory problems or because they felt anxious or distressed. While many jurors had trouble recollecting exact details of the trial, I rarely had the impression that jurors felt uncomfortable discussing topics with me. Although some topics generated initial reluctance – for example when we discussed the other members of the jury – as interviews progressed participants tended to relax and speak quite candidly. A review of my field-work notes supports my lasting impression that most jurors were very considerate and candid about their experiences.

¹⁴⁰ James Holstein and Jaber Gubrium, *The Active Interview* (Sage 1995) 4

Although I believe that capital jurors are the ultimate authority for assessing the functioning of the Texas capital sentencing scheme, relying on data collected from juror interviews, even with the trial record available to verify a participant's recollection, has its limitations. As professor Valerie Hans wrote of early results of CJP research in 1995, 'Jurors' memories will deteriorate and change over time. They are likely to be influenced by hindsight bias. And they will experience pressures to present themselves in socially desirable ways to the interviewer' [citations omitted].¹⁴¹ While it is important for a researcher to be cognizant of the limitations of employing such a method of data collection there is still (as Hans also concludes) 'much to gain' from interviews with capital jurors.¹⁴²

2. Data Collection

As mentioned previously, this study was carried out in cooperation with the CJP,¹⁴³ an ongoing research project supported by the National Science Foundation.¹⁴⁴ The data collection efforts for this dissertation are part of the third round of the CJP (CJP-3) research.¹⁴⁵ Along with other university based researchers, scholars, and academics in ten additional states, I have interviewed capital jurors utilizing a project-wide survey instrument especially focused on understanding jurors' experiences in the punishment phase of a capital proceeding.¹⁴⁶

¹⁴¹ Valerie Hans, 'How Jurors Decide Death: The Contributions of the Capital Jury Project' (1995) 70 *Indiana Law Review* 1233, 1234

¹⁴² Valerie Hans, 'How Jurors Decide Death: The Contributions of the Capital Jury Project' (1995) 70 *Indiana Law Review* 1233, 1235

¹⁴³ Capital Jury Project <<http://www.albany.edu/scj/CJPhome.htm>> accessed 20 June 2011

¹⁴⁴ National Science Foundation <<http://www.nsf.gov/about/>> accessed 20 June 2011

¹⁴⁵ By entering into the CJP cooperative I was able to provide participating jurors with a \$50.00 honorarium for their participation. The CJP also agreed to reimburse some related research costs (copies, stamps, mileage, and over-night hotel fees) and provided transcription support. All the audio recorded interviews were transcribed by a retired professional transcriber hired by the CJP.

¹⁴⁶ See Chapter 2 for a discussion of the results of prior research conducted by the CJP

The interviews in all participating states are conducted with the same carefully worded sixty-page interview instrument. The investigators in individual states are free to add questions to this core instrument which may serve any specific research interest not sufficiently addressed by the survey. I chose to include a three-page addendum of additional questions designed to serve my research interests with Texas jurors.¹⁴⁷

In addition to utilizing the standardized survey instrument, CJP investigators also agreed on targets for the number of cases and jurors to be included in the study in each state. Researchers conducting the third round of data collection established a target of eight capital trials for study in each of the participating states. Though the number of cases could be adjusted in each state, the shared target of eight capital trials meant that all contributing states would have similar numbers of capital juror interviews. This approximate equivalence in the number of interviews was intended to aid a project-wide cross-jurisdictional analysis of the data.

Investigators also placed a premium on interviewing jurors in their states who had deliberated on capital cases tried to completion in more recent trials. This project-wide recommendation had been put in place to minimize the effects of memory degeneration over time. In Texas, an important change occurred to the capital sentencing statute in 2005 with the introduction of life without the opportunity for parole (LWOP) as the alternative sentence to death.¹⁴⁸ In order for my analysis to

¹⁴⁷ The addendum included fixed-choice questions regarding records presented as evidence of mitigating factors such as medical records, mental health records, educational records, employment records and so on. I also included open-ended questions asking about the evidence jurors felt they needed to hear in order to determine the defendant's punishment. I added options to some of the pre-existing fixed choice questions as well as including additional probes. The addendum was made available to other CJP researchers for use in their states.

¹⁴⁸ See R.G. Ratcliffe, 'House Votes to Give Texas Juries Life-Without-Parole Option' *The Houston Chronicle* (Austin 24 May 2005). A sentence of LWOP replaced a sentence of life with the opportunity of parole after forty years as the alternative to a death sentence. The change went into effect for all capital crimes committed on or after September 1, 2005. The article notes that at the time of passage only Texas and New Mexico (which abolished the death penalty shortly afterwards) were the only two states with capital punishment that did not offer LWOP as a sentencing alternative to the death penalty.

be responsive to this development I restricted my sample for data collection in this study to cases tried after the new statute took effect. Thus, the cases included in this study were tried to completion between February 2007 and June 2008 with the interviews all taking place between September 2008 and June 2010.

The change in the capital sentencing statute from the alternative punishment of life with the opportunity for parole after forty years to LWOP was important for several reasons. As discussed in Chapter 2, previous empirical research strongly suggests that jurors who believe the alternative sentence to death is less than LWOP will often vote for a death sentence due to concerns that the defendant may be paroled after a number of years in prison.¹⁴⁹ Additionally, many jurors believe that a sentence that is less than LWOP is not a proportionate punishment for someone convicted of capital murder. In such instances, a juror may not believe that the death penalty is the most appropriate punishment, but will sentence the defendant to death anyway because they perceive the alternative to be insufficiently severe. Public opinion polling also indicates that the American public – from which jurors are drawn – is increasingly satisfied with LWOP as an alternative to a death sentence for those convicted of capital murder.¹⁵⁰ Although the effects of instituting LWOP as the sentencing alternative to death have yet to be thoroughly examined, available information suggests that its introduction has resulted in fewer capital trials and death sentences.¹⁵¹

¹⁴⁹ William Bowers and Benjamin Steiner, 'Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing' (1999) 77 *Texas Law Review* 605

¹⁵⁰ See Death Penalty Information Center <<http://www.deathpenaltyinfo.org/national-polls-and-studies#rasjune>> accessed 11 May 2011 (citing the last Gallup Poll to ask about alternatives to the death penalty in which more participants stated that they preferred LWOP as a sentencing option to a death sentence – 48% versus 47% respectively)

¹⁵¹ Note, 'A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment' 119 *Harvard Law Review* (2006); Lise Olsen, 'Harris County Loses State Lead in Executions: Texas Prison Records Show Effect of 2005's Life-Without-Parole Option' *The Houston Chronicle* (Houston, 28 December 2009); David McCord, 'What's Messing with Texas Death Sentences?' 43 *Texas Tech Law Review* (2011)

(a) Case Selection

The CJP sampling strategy provided for comparable numbers of trials in which convicted capital defendants were sentenced to death and LWOP in each participating state. This was intended to facilitate the analysis of differences between cases resulting in sentences of death and those resulting in sentences of LWOP within states and to allow a project-wide analysis of such differences. Stratifying the sample by sentencing outcome also allows for comparisons between states with different statutory provisions for capital punishment independent of differences in the distribution of sentences amongst these states. For instance, in earlier analyses of CJP data restricting the case sampling by sentencing outcome allowed researchers to determine that apart from whatever differences there may be in the frequency of sentencing outcomes by state, the extent of departures from constitutional standards were similar across states and between states with different capital statutes.¹⁵²

There is no readily available list of capital cases that have been tried to completion in Texas either within a state institution or the federal government. To create an exhaustive list of capital trials tried to completion under the LWOP statute I utilized several online resources such as the Texas Criminal Court of Appeals (TX CCA)¹⁵³ and the Texas Courts Online¹⁵⁴ websites, which post electronic copies of the charge and disposition papers in many capital cases. All capital trials which resulted in a death sentence are listed on these websites after they have been assigned a new case number for automatic direct appeal. The capital cases which resulted in LWOP are not automatically appealed and therefore may not appear on these websites. To ensure I did not overlook a capital case which resulted in a sentence of LWOP and

¹⁵² William Bowers and Wanda Foglia, 'Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing' (2003) 51 Criminal Law Bulletin 51

¹⁵³ Texas Criminal Court of Appeals <<http://www.cca.courts.state.tx.us/>> accessed 20 June 2011

¹⁵⁴ Texas Courts Online <<http://www.courts.state.tx.us/oca/jurycharges.asp?>> accessed 20 June 2011

would not be appealed I contacted post-conviction attorneys in Texas who personally maintain a similar list on all capital cases.

Between September 2005 and June 2008, seventeen capital cases had gone to trial and come to verdict in Texas under the new sentencing statute. Of these seventeen cases twelve resulted in death sentences, four resulted in sentences of LWOP, and one resulted in a deadlocked jury at the guilt phase of the trial.¹⁵⁵ I included all four of the LWOP cases in this study. In order to select the remaining four cases which resulted in a death sentence for inclusion in this study I adopted two criteria. First, priority was given to a case which originated from the same county as a trial that resulted in a sentence of LWOP. Trials which resulted in a sentence of LWOP originated from three separate counties – Harris County (Houston), Bexar County (San Antonio), and Tarrant County (Forth Worth). Of the twelve cases which resulted in a sentence of death I was able to find at least one which originated from each of these three counties. This was ideal for facilitating a comparative analysis between the LWOP jurors and the death jurors. Secondly, the trial transcript needed to be completed (or nearly completed) and available for me to review. Trial transcripts are often not available for about a year after the conclusion of the trial. Since the majority of cases I wished to review had been tried quite recently two cases which could have been included in this study were excluded because the transcripts were unavailable. Thus, I included two death cases from Harris County, one from Bexar County, and one from Tarrant County.

I interviewed jurors from the eight cases prior to the completion of direct appeal. As it is standard practice for jurors in cases which result in a sentence of death to be interviewed during the post-conviction investigation I am confident that

¹⁵⁵ See Brent Newton, 'A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994' (1993) 1 Texas Forum on Civil Liberties and Civil Rights 1. Historical trends in Texas show similarly high rates of death sentencing.

some of the jurors who participated in this study are likely to be asked to participate in interviews in the future. According to interviewed jurors, most had not been contacted by the State or defense after the trial for interviews. In only one case did it happen that the defense conducted brief interviews with a few members of the jury immediately after the trial. Two jurors from that case who participated in this study reported having briefly discussed the punishment deliberations with the trial attorney.

In terms of case variables, two of the eight cases involved the killing of a police officer; three were robberies/burglaries in which a single victim was killed; and the final three cases involved multiple murder victims. Of the eight defendants four were Hispanic, two were African-American, and two were Caucasian. The cases included equal number of African-American and Hispanic victims, two Caucasian victims, and one Asian victim. I gathered data regarding defendant and victim race from jurors and Internet searches of websites which often identify the race of the parties. Table 3.1 provides a summary of the location of each trial and the defendant/victim race combination within each case.

Table 3.1 Geographic location of cases and defendant/victim race

County	Defendant	Victim
Harris County (LWOP)	Hispanic	Black
Harris County (Death)	Black	White
Harris County (Death)	Black	Black and Black
Bexar County (LWOP)	Hispanic	Asian
Bexar County (LWOP)	Hispanic	White
Bexar County (Death)	Hispanic	Hispanic and Hispanic
Tarrant County (LWOP)	White	Hispanic
Tarrant County (Death)	White	Black and Hispanic

(i) Transcripts

The trial transcripts are public records which can be copied for a fee or reviewed at the county courthouse. Although I copied and reviewed the trial transcripts in seven of the eight cases selected for this study, one case which resulted in a sentence of LWOP would not be appealed and therefore a complete record would

not be prepared for that trial. For that case, I reviewed the contents of the District Clerk's file at the courthouse. The Clerk's file included – all unsealed motions filed by the State and the defense; exhibits entered into evidence at trial such as the autopsy and crime scene photos; *curriculum vitae* of testifying experts; and the court's docket which provides a brief description of the daily events of the trial (including a list of the witnesses, items introduced into evidence, and rulings made by the court). From a review of the Clerk's file I was able to develop a picture of the events of the trial including some of the defense mitigation themes (which focused on the defendant's mental health). I also contacted the court reporter and obtained transcripts of jury selection for the twelve empanelled jurors, closing arguments at the penalty phase, and several evidentiary hearings conducted prior to trial. However, given that I did not have a complete record, I was unable to code the entire trial transcript as I did for the other seven cases.

Perhaps the most challenging aspect of the data collection I encountered when attempting to gather transcripts were interactions with 'gatekeepers'¹⁵⁶ or those 'people who, metaphorically, have the ability to open or close the gate to the researcher seeking access into the setting'.¹⁵⁷ It was particularly difficult to negotiate with the records clerks who were the gatekeepers of the electronic transcripts I sought. Acquiring copies of the trial transcripts is costly (typically costing \$1.00 per page, resulting in a full record costing several thousand dollars). The CJP could not afford to pay for each transcript and so I had to try to secure some without payment. In dealing with records clerks, I typically feigned ignorance about the fact that people had to pay for transcripts and explained that I could not afford to come to the

¹⁵⁶ See C McGee, 'Researchers and Gatekeepers: No Common Ground?' in Bob Broad (ed), *The Politics of Social Work Research and Evaluation* (Birmingham, Venture Press 1999)

¹⁵⁷ Lisa Given (ed), *The Sage Encyclopedia of Social Science Research*, Volume 1 (2008) 2

courthouse every day to review the entire record. I was reluctant to say that I was conducting research since I did not want to draw any attention to the study. However, when asked directly I was forthcoming with the records clerks as I did not want anyone to say I had misled them. Although it took a great deal of time and negotiation with various people, I was eventually able to collect copies of the seven available trial records.

(ii) Preparing for interviews

From the transcripts I identified the twelve deliberating jurors, which in Texas, are a matter of public record. I ordered these alphabetically and drew my sample from the odd numbered jurors on the list. Some jurors were initially difficult to identify, especially those with common names. In such cases I went to the courthouse and reviewed the Clerk's file where more information on jurors, such as their middle name or initial, is typically included than in the trial transcript. Reading the individual voir dire portion of the transcript also provided helpful identifying information in the search for the correct juror such as occupation, marital status, age, religious affiliation, educational history, and any previous experience with the criminal justice system.

I also conducted Internet searches on each case and on each juror. In several instances jurors had discussed the case with local media after the conclusion of the trial. Media descriptions of such jurors supplied additional identifying information, such as whether they served as the foreperson of the jury. Occasionally Internet sources also provided a videotaped interview or photographs of the juror.

To locate jurors' addresses and telephone numbers I initially used free Internet sites,¹⁵⁸ telephone books, and other sources of public information. In cases where

¹⁵⁸ See e.g., White pages < <http://www.whitepages.com/> > accessed 24 June 2001

jurors had unlisted phone numbers or addresses in free sources I used an Internet research tool compiled and operated by LexisNexis called Accurint¹⁵⁹ which is available for private use for a subscription fee and payment per search. These websites are entirely legal in the United States and collate information from public record sources.

I sent an initial contact letter to all twelve jurors (both sample and replacement) which introduced the study and explained that the case in which they deliberated had been selected for inclusion in a national research project. The letter explained that the research was being conducted as part of a multi-state project designed to understand how capital jurors make their difficult life or death decisions. The letter also expressed a guarantee of confidentiality and apprised jurors that they would receive \$50.00 for their participation. Jurors were given my contact details and informed that I would contact them by phone within a few days to invite them to participate in an interview. Forty-four of the participating jurors received \$50.00 for their involvement in the study, while two jurors who were interviewed towards the end of data collection received \$75.00.¹⁶⁰

As I mentioned, I was inclined not to draw unnecessary attention to myself or the study. Although there is no legal restriction in Texas regarding contacting jurors after their service is complete, I was aware from my previous work experience, and from listening to the stories of interviewed jurors, that the trial judge or prosecutors often discourage jurors from speaking to defense teams or researchers. I was concerned that if a juror contacted the trial judge or the prosecutor from their case

¹⁵⁹ Accurint <<http://www.accurint.com/index.html>> accessed 11 May 2011

¹⁶⁰ As my data collection efforts were drawing to a close, Dr. Bowers suggested offering a larger incentive for participation in order to reach the target of interviewed jurors. Additionally, since my interviews were lasting much longer than originally anticipated, we believed jurors ought to receive more compensation for their time if possible.

those professionals might attempt to discourage their participation. Having managed to avoid attracting undue attention from legal actors while collecting transcripts, I continued to be wary that prosecutors or judges might be contacted by a juror after they had received the initial contact letter and that this could compromise the research.¹⁶¹ During the first round of data collection one juror did contact a prosecutor, who in turn contacted Dr. Bowers (the principal investigator on the project) to discuss how the juror names had been located. I was never told which juror had contacted the prosecutor's office and therefore remain uncertain as to the effect, if any, their conversation with the prosecutor had on their decision to participate in the study.

During my second trip to Texas for data collection, several jurors, all from the same case, contacted the judge who had presided over the trial. A juror (on behalf of the other members of the jury) and the presiding judge contacted me, in turn, directly. Again, both were concerned about how the juror names had been located. After I explained that the names were taken from public records both appeared to be satisfied. While the judge on the case did not contact me again, I did manage to interview the juror. However, this was the only case in the sample in which I could not meet the interview target of six jurors and only managed to interview four.

I was constantly aware that the jurors could quite easily reach out to each other, the judge, or the prosecutor and decide for various unknown reasons not to participate. Although I had difficulties at times with collecting electronic copies of the trial transcripts, I could always travel to the court house and review the record there. However, when trying to arrange interviews with jurors, I did not have any other way to obtain the information I sought. For that reason, I had to be patient but

¹⁶¹ Although I was equally concerned about the defense taking steps to prevent the interviews from taking place, jurors do not often contact the defense when receiving communication about their service.

persistent when reaching out to jurors. When I had phone numbers for jurors I would leave a message for them and follow up with another phone call a few days later. I sent follow up letters to jurors who had not contacted me to see whether they had decided to participate. When I did reach a juror on the phone I tried hard to fully answer any questions they might have about the study. Typically they wanted to know how I found their names and addresses. I would explain the laborious process I had gone through to collect this information and reassure them of the confidential nature of the study. I also took this initial phone conversation as an opportunity to explain the scientific nature of the study, the fact that that they would be provided an informed consent statement prior to beginning the interview, and that they could decide to stop the interview at any point or refuse to answer questions they found objectionable. I also mentioned that many jurors who had participated in the study had found the experience to be beneficial as it gave them the chance to discuss their unique experiences in a private and confidential setting.

Although most jurors that I reached by phone agreed to participate in the study several did not. Some who refused did so immediately, without allowing me the chance to discuss the details of the study. Others stated that the experience of serving as a juror on a capital case had been the most difficult and upsetting event in their life and they simply did not believe that they had the emotional resources to discuss it. One juror spoke to me on the phone for fifteen minutes, recounting how she had cried every day of the trial and some days had even been moved to physical sickness. It was apparent to me that some jurors had been deeply traumatized by their experiences and although I knew that discussing their feelings might well have been helpful for them, at the same time I did not want to risk further straining their emotions and therefore did not attempt to persuade them to cooperate.

Jurors who agreed to participate were given the opportunity to select the location for the interview, typically from four choices: their house; their place of work; my hotel; or study space at the University of Houston's Law Center where I was affiliated as a visiting scholar or a public library when I was traveling away from Houston. I was flexible about the interview location so long as we could meet in a private place where we could speak without too much distraction or disruption. This was not possible for the third juror I interviewed who insisted on meeting at a public café. Agreeing to this was a poor decision on my part as this public venue was incredibly distracting and compromised my attempts to build rapport. Learning from that experience, I took steps to accommodate jurors' wishes when they wanted to meet in a public place. This prompted me to begin offering to meet at public or university libraries where private study rooms are available. In total, I conducted six interviews in libraries, twenty-five in jurors' homes, five at jurors' offices, and eight in my hotel – either in the lobby, an empty conference room or in my room. I conducted one interview in a hospital room and another in a coffee shop.

My preference was to meet jurors in their homes as the location of their residence was a source of data in and of itself. For instance, the juror homes I went to were typically located in the suburbs of cities in middle class, primarily white neighborhoods. They tended to be well-kept, family homes with manicured front lawns, thoughtfully placed ceramic pots and quaint welcome mats greeting visitors at charmingly painted front doors. This was in stark contrast to the homes I had entered when conducting mitigation interviews, which were often located in dilapidated apartment complexes, inner-city project blocks or small houses in low-income city neighborhoods with poorly maintained streets, over-grown grass, and littered front

yards. The juxtaposition between the neighborhoods of defendants and jurors revealed the gap in daily experiences between the two.

I collected data in three rounds. My first round of data collection in Texas occurred over ten weeks between September and November 2008, my second trip over six weeks between March and April 2009, and my final efforts occurred between July 2009 and June 2010. Each period of data collection presented unique challenges. For instance, within days of my arrival in Houston in September 2008 a hurricane hit the city causing widespread damage and the loss of power for most occupants.¹⁶² This made access to the courthouse and post offices impossible, and contact with jurors by phone very difficult. In my first month of data collection difficulties locating jurors in one case led me to replace that case entirely. Although I had already invested over a month of preparation reviewing the trial transcript and taking notes on this case, I decided that it was not prudent to include a trial in which I could not reasonably expect to reach my target sample of six juror interviews.

(iii) Juror characteristics

During the first round of data collection I began to notice occurrences which, although I could not say were patterns at such an early stage, were certainly interesting and suggestive. I noticed that minority jurors appeared to be the hardest jurors to locate and the most likely to refuse to participate. During the first round of data collection only three jurors refused to participate in the study. Of those jurors, one was identified by the other members of the jury as a female African-American, while another was said to be a Hispanic female. The third person to refuse was identified as a white male. Interestingly, the white male and the African-American

¹⁶² See Demian McLean and Tom Korosec, 'Hurricane Ike Robs Houston of Drinking Water – Prompts Curfew' *Bloomberg* (15 September 2008) <<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGeLyVV6wO2Y&refer=home>> accessed 11 May 2011

female were also identified as the only potential hold-outs¹⁶³ for a sentence of LWOP on two juries which eventually sentenced the defendant to death. The female African-American hold-out was the only African-American on an otherwise all-white jury. In four cases which resulted in a sentence of death there was only one African-American (the female hold-out) and one Hispanic juror. The rest of the jurors were white.¹⁶⁴

However, in the trials which resulted in a sentence of LWOP there were a total of five African-American jurors and fourteen Hispanic jurors. While the information I gathered about the racial composition of the juries is clearly inadequate for drawing conclusions about the influence of juror race on sentencing outcomes, it is in line with previous data which suggest a prominent effect of race on sentencing outcomes.¹⁶⁵

Table 3.2 provides a summary of the defendant/victim/juror racial combinations in each trial by location and sentencing outcome.

Table 3.2 Victim/defendant race and racial composition of juries

Case location (outcome)	Defendant race	Victim race	White jurors	Black jurors	Hispanic jurors
Harris County (Death)	Black	White	12	0	0
Harris County (Death)	Black	Black and Black	11	1	0
Bexar County (Death)	Hispanic	Hispanic and Hispanic	12	0	0
Tarrant County (Death)	White	Hispanic and Black	11	0	1
Harris County (LWOP)	Hispanic	Black	7	3	2
Bexar County	Hispanic	Asian	5	1	6

¹⁶³ A potential hold-out is a juror who advocates for a different sentence from the majority of jurors.

¹⁶⁴ I collected information regarding juror race from four sources – juror self-identification, juror identification of other jurors, Internet searches, and Accurant reports which includes race information. Race is an admittedly fluid personal characteristic and thus difficult to accurately assess. See Henry Louis Gates Jr. (ed) “Race,” *Writing, and Difference* (University of Chicago Press 1986); F. James Davis, *Who Is Black? One Nation’s Definition* (Pennsylvania State University Press 1991); Maria Root (ed), *Racially Mixed People in America* (Sage, 1992). This information is provided strictly for context and description.

¹⁶⁵ William Bowers, Marla Sandys, and Benjamin Steiner, ‘Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors’ Race and Jury Racial Composition’ (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 171; William Bowers, Marla Sandys, and Thomas Brewer, ‘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’ (2003) 53 *DePaul Law Review* 1497

(LWOP)					
Bexar County (LWOP)	Hispanic	White	6	0	6
Tarrant County (LWOP)	White	Hispanic	11	1	0

Of the interviewed jurors, thirty-six were white, six were Hispanic, three indicated ‘other’,¹⁶⁶ and one was black.¹⁶⁷ Twenty-one jurors were male and twenty-five female. Participating jurors ranged in age from twenty to sixty-nine, the average age being forty-six. Most jurors (29) were married and living with their spouse. The majority of jurors (33) had children (biological, step and/or foster). Virtually all jurors had completed at least a high school education (one juror reported less than a high school degree). The greatest proportion of jurors were college educated (17 college graduates and 12 who had attended some college classes, comprising 63% of the sample). About 20% of participating jurors had attended graduate or professional school. Over half of the interviewed jurors earned a yearly household income of over \$50,000. A full 37% of the sample (17) reported an annual household income of \$100,000 or more. Practically all (44) participating jurors owned their home. A little over three-quarters (78%) of jurors were engaged in full-time work outside of the home. Jurors expressed a variety of religious affiliations; the most commonly reported being Roman Catholic (7), Baptist (5), and Methodist (5). Only 13% of jurors (6) reported no religious affiliation. Just under 20% of jurors (8) had served in the United States military. Just under half (48%) of participating jurors reported being politically conservative with just over a third (35%) identifying themselves as

¹⁶⁶ I have categorized these three jurors as white according to US Census data. *See* <<http://www.prb.org/Articles/2009/questionnaire.aspx>> accessed 17 May 2011. The interviewed jurors are slightly over-representative of white jurors as 75 out of 96 (78%) of total deliberating jurors were white while interviewed white jurors accounted for 85% of the sample. There is only slight underrepresentation of Hispanic jurors which constituted 16% of total deliberating jurors but only 13% of interviewed jurors. Black jurors were comparatively the least well represented as they comprised 6% of all deliberating jurors but only 2% of interviewed jurors.

¹⁶⁷ Twenty-eight jurors who participated in this study comprised the target jurors (61%) while eighteen were replacement jurors (39%).

being moderate. Thus, jurors displayed relatively homogenous characteristics in terms of education, income, and political beliefs.

Similar data are not available regarding the backgrounds of the defendants and victims. Nevertheless, some conclusions can be drawn about their backgrounds given the information available in the trial records. All eight defendants in this study were considered indigent and provided court-appointed counsel, indicating a low level of income and financial security. Five of the eight defendants did not have an established residence at the time they were arrested for the capital crime – they were staying in homeless shelters, with acquaintances or living in temporary accommodation. Half of the defendants had received less than an eighth grade education, two had started high school but dropped out early on, and two had taken some college or vocational classes. Defendants were often raised in struggling single parent households, where primary caretakers were addicted to drugs, abusive and/or absent.

Victim characteristics fell somewhere between the jurors and defendants. About half of the victims worked in jobs which indicated a degree of financial security (two police officers, one nurse, one school teacher, and one administrative assistant). Nearly all of the victims were employed or retired (one victim was a pregnant teenager, one victim was homeless, and two victims were likely unemployed and earning money through illegal channels). Of the eleven victims, only one did not have an established residence (although it is possible that two of the victims who were likely earning money through illegal means also did not have permanent accommodation). Most victims were on average better educated than defendants, although not as well educated as jurors.¹⁶⁸ Therefore, although it is likely that jurors

¹⁶⁸ I have inferred that seven victims had at least a high school education given their occupations (*e.g.* police officers, school teachers, nurses) and it is also likely that several had some college education.

did not share all of the characteristics possessed by victims, they appeared to share much less with defendants.

(iv) Interviewing jurors who sentenced the defendant to LWOP

During my second trip to Texas the difficulty I experienced in trying to arrange interviews with jurors who had sentenced the defendant to LWOP was especially pronounced. Although I was surprised by the resistance I experienced from these jurors, I am able to identify some possible explanations for this.

Notably, in two cases which resulted in a sentence of LWOP, during informal post-sentencing debriefing with the judge and prosecuting attorneys, jurors were told of evidence which they were not permitted to hear during the trial concerning potential links between the defendant and gangs. Through the interviews I learned that jurors were especially concerned about the operation of such groups in their area and, given what they had been told in the debriefings, several jurors believed that the defendant in their case could be connected to such gangs. Thus, jurors' alarm at what they learned during these post-sentencing sessions turned into skepticism of the research project.

Jurors in cases which resulted in a sentence of death were also typically not told that their names were a matter of public record or that they could be contacted in the future. Thus, many jurors who had sentenced the defendant to LWOP were concerned about the defendant's ability to locate them as well. I found that jurors who had sentenced the defendant to LWOP were much more likely to be aggressive and angry at me for contacting them than jurors in cases that resulted in a sentence of death. When jurors who had sentenced the defendant to LWOP did finally agree to participate, they were also less likely to allow me to meet them at their home. Several wished to verify my identity or the project before agreeing to speak with me. One

juror who had sentenced the defendant to LWOP failed to come to our arranged meeting and never returned any of my calls asking to reschedule. Out of the seven interviews I conducted during my second trip to Texas, three jurors cancelled interviews just a few minutes before our scheduled appointments. Many jurors who sentenced a defendant to LWOP were relatively wary of me. Thus, I found it more difficult to build rapport with them than jurors who had sentenced the defendant to death.

Especially interesting was the fact that jurors who sentenced the defendant to LWOP appeared overall more timid in their initial explanation of their sentencing decision and more defensive than their counterparts who had sentenced the defendant to death. Indeed, the one case which I could not reach the target number of six interviews was a trial which resulted in a sentence of LWOP. Through the four interviews I conducted I discovered that the jurors had been promised by the trial judge that their names would be sealed and unavailable to the public. As this was not the case, jurors were alarmed when I contacted them and most who I reached by phone were hostile and refused to speak to me. The jurors who did agree to participate provided limited insight into why others from the jury might be reluctant. They mentioned potential gang links the defendant may have had, but they also mentioned the community response to their sentencing decision. While the data are only suggestive, their descriptions implied that in Texas it is assumed that a jury on a capital case will and should give a death sentence. Thus, when a jury delivers a verdict of LWOP jurors feel they are going against the community's expectations and are thus less likely to feel comfortable discussing their experience.

(b) Conducting interviews

Although conducting face-to-face interviews unaccompanied at the home of a stranger raises issues of personal safety I never felt my welfare was at risk. Prior to the interview I had read the juror's voir dire testimony which often provided employment information, descriptions of their families, previous experiences with the criminal justice system, and so on. I knew that several jurors were nurses or worked in medicine, many were quite religious and attended church more than once a week, some were retired, several had served in the military, and other jurors had families with younger children. Jurors are selected from a narrowed pool (potential juror names are taken from drivers' licenses or voter registration, narrowing the jury pool to a class of people who are less likely to have a criminal history and more likely to be more engaged in civic activities, have a steady income, etc.) and can only include: American citizens residing in the county in which they are called to serve, persons over the age of 18, persons who are able to read and write, those of sound mind and body, and those who have 'not been convicted of, or be under indictment or other legal accusation for, misdemeanor theft or a felony'.¹⁶⁹ Many counties also disqualify potential jurors who are on probation or deferred adjudication for a felony or for any type of theft and persons who are under indictment for a felony or under criminal charges for any type of theft.¹⁷⁰ Since the vetting process is quite extensive for jurors on capital cases (as I knew from my previous work experience) and I had information about the jurors (and had also conducted extensive media searches about them on the Internet) I felt comfortable going to their homes.

I also took sensible and standard precautions when leaving for juror interviews. Dr. Bowers was aware of the dates I had arranged meetings. I always

¹⁶⁹ Texas Courts Online <<http://www.courts.state.tx.us/tjc/juryinfo/qualification.asp>> accessed 21 June 2011

¹⁷⁰ Lone Star Fully Informed Jury Association <<http://www.juryduty.org/officialjuryinfo.htm>> accessed 21 June 2011

informed someone locally of when I would be going to a juror's home. I carried my cell phone with me at all times and checked in with my local point person as soon as I left the interview.

I was mindful of initial judgments that jurors would make about me from the moment the door opened; judgments based on my gender, age, race, style of dress, and so forth. I dressed the same way for every interview, neatly but understated and fairly conservative. I always wore pressed jeans, tennis shoes, a button down long sleeve shirt, and a corduroy jacket. I wanted to look professional, but accessible. I brought my backpack with me to every interview.

I began each interview by providing jurors with a copy of the informed consent form which they were asked to read. After addressing any questions they may have had, I told them that if they fully understood why I wished to interview them and were happy to participate in the study they should sign and date the form. Occasionally, a juror wanted clarification about whether anyone could have access to the information they were going to give, such as defense teams, or how the files would be stored. After I answered any questions they had the juror signed two consent forms – one which I left for their records and the other which I took with me. At that point I would present the honorarium, a copy of the survey instrument so they could follow along, and a numbered list of their fellow jury members. I explained at that stage that there would be questions in the survey about how the jury selected the jury foreperson or the like and described how other jurors had found having a list of names helpful when discussing such details. When discussing other jurors, participants were asked to refer to the number on the list, not to another juror by name.

I also introduced the short addendum of questions which did not appear in their copy of the survey instrument. At that stage I explained that a few supplementary questions had been added for further follow up or clarification. After conducting these preliminary tasks I would turn the audio recorder on and begin our conversation by reading the following paragraphs, which constitute the introduction to the survey instrument:

As you may remember from our earlier letter to you, this is a project about your experience of serving on a capital trial. This project is being conducted in ten states and hundreds of jurors are being interviewed. This means that we had to design an interview that would apply to all those different cases. Consequently, some of the questions that I ask you may not apply to your case: that is fine, just tell me that and we'll move on. I do have to ask you every question, however, so that all jurors who are being interviewed are treated the same way.

To prepare for this interview, I reviewed the trial transcript to familiarize myself with the case. Some of the questions that I will ask come from my reading of the transcript. Those questions are not meant to test your memory, but to get your views and reactions to the evidence and testimony. There are no right or wrong answers to the questions, only what is true of your experience as a juror.

I am here to learn from you, what your experience was like as a capital juror. As such, you should interrupt as we go along to make things clear and to tell me what you think is important. Do not hesitate to bring up anything you think will help us understand what it was like for you as a juror on this case.¹⁷¹

All participants allowed the interview to be tape recorded. The interviews I conducted lasted between three and eleven hours, averaging nearly six hours (five hours and fifty-two minutes). As previously stated, my focus during the interviews was to get the juror to express in as much detail as possible their thoughts, feelings, interpretation, understanding, and reaction to various aspects of the trial. In this way, I used the survey as a means to keep conversation going when the juror appeared to have nothing else to offer on a topic. In order to guard against leading the juror, I was cautious to administer the questions on the survey as they were written and not to clarify questions in the survey which some jurors thought ambiguous. When jurors

¹⁷¹ Capital Jury Project Questionnaire. The survey instrument is personally maintained.

had a hard time deciding between choices in a selection question I would often encourage them to talk to me about why they were undecided between two answers. Typically, these explanations helped clarify their thoughts while simultaneously revealing additional data.

I utilized interviewing techniques I learned as a mitigation specialist to probe for additional information. In many ways, I thought of the survey instrument as providing a broad brush picture of capital jurors' experiences and my follow up questions as more refined touches essential to any complete representation. I utilized active listening techniques, repeating the respondent's language in formulating my questions and looping back to points which had been mentioned but not fully developed. Early on in interviews I did not want jurors to be aware of how much I knew about the trial from previous interviews, especially the deliberations. However, when a juror expressed reluctance at disclosing particular information I would reveal some of the knowledge I had.¹⁷² In this way I hoped the juror would understand that they were not betraying confidences but clarifying their interpretation of the events of the trial.

The section of the instrument which collected data regarding other jurors elicited the most hesitation. Jurors appeared reluctant to speak about the other members of the jury. This was possibly due to recognizing their own inability to fully understand other jurors' motivations, the realization that others jurors would talk about them, or the knowledge or belief that what transpired in the jury room was private. Since I knew information about the members of the jury from either my review of the transcript or from having conducted previous interviews with jurors on

¹⁷² This approach is referred to as selective competence. See John Lofland and others, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (4th edn, Thompson 2006) 70 ('In other settings and with other groups, it may be beneficial to reveal a degree of insider knowledge, skill or understanding – if you have any – in order to make informants feel comfortable and more connected with you.')

the same case, I would offer some information to the juror so they would not feel as if they were revealing any secrets. For instance, when there was a hold-out on a jury, I often felt initial hesitation from other jurors in indicating who that person was. I would ask whether they remembered if it was the school teacher or the engineer, whether it was the much older lady, or if it was the very young male juror, and so on. This approach appeared to relax jurors considerably.

When discussing guilt and penalty deliberations jurors were initially given broad scope to describe the process they experienced:

In your own words, tell me what the jury did to reach its decision about the defendant's guilt? How did the discussion get started; what did different people say; what did they agree and disagree about; how did they finally reach agreement? Start at the beginning and tell me all you can remember. Give me a step-by-step account.¹⁷³

As conversation about the deliberations continued the respondent was directed to describe how the members of the jury interacted with one another throughout the process. Participants were asked to identify 'how many jurors talked a lot, how many almost never talked, and how many were between these extremes'? They were also asked to identify which jurors were most influential in helping the jury reach a final decision. Throughout their responses jurors were asked to elaborate on what each individual juror said during both the guilt and penalty phase deliberations. Only one juror refused to utilize the list during our discussions of the jury, stating that the members of the jury had promised not to speak about one another, but that juror did agree to discuss the deliberations and indicated who the hold-out and cross-over¹⁷⁴ jurors were.

¹⁷³ Capital Jury Project Questionnaire. The survey instrument is personally maintained.

¹⁷⁴ Cross-over jurors are those that change their vote to join the majority. See Marla Sandys, 'Cross-Overs – Capital Jurors Who Change Their Minds About Punishment: A Litmus Test for Sentencing Guidelines' (1995) 70 *Indiana Law Review* 1183

Building a relationship with jurors was critical for ensuring collection of the richest possible data. I made every effort to be flexible with the topics jurors raised and not to interrupt them simply to get back to the survey instrument. I allowed pregnant pauses, letting silence settle in the room and giving the respondent time to think and answer before moving on. I tried hard not to appear judgmental, even when jurors made comments about ‘rounding up all murderers and gassing them to death’ or having nightmares after the trial in which the defendant’s ‘big black eyes and big black face’ featured in the dream.¹⁷⁵ For example, the juror who made the comment about gassing all murderers followed up this statement with what I perceived as a self-conscious comment about how I must have thought he was crazy for saying such a thing. Rather than address that statement directly, I drew from my own experiences of being raised by a father who believed in corporal punishment and commented that there are lots of different views regarding appropriate penalties.

Although comments like the ones noted above were upsetting for me to hear, what I found hardest to listen to were descriptions of defendants as ‘animal-like’, ‘evil’, ‘dangerous’, and ‘worthless’. I was also deeply troubled by some of the descriptions of the defense teams, for instance one juror’s comment that the lead defense lawyer on the case ‘looked like a crack addict’. Another juror from a different trial stated that the most effective part of the defense lawyer’s performance was that ‘he showed up’ and stayed awake during the proceedings. Jurors described defense lawyers as ‘disheveled’, ‘dirty’, ‘unprepared’, and ‘disengaged’ during a trial in which someone’s life was on the line. When jurors talked about how the defense’s performance was appalling I could feel myself getting irritated. Many jurors

¹⁷⁵ See John Lofland and others, *Analyzing Social Settings: A Guide to Qualitative Observation and Analysis* (4th edn, Thompson 2006) 68 (‘Thus, one of the first guidelines to keep in mind in developing viable fieldwork relationships is to be as nonthreatening as possible. We are not referring to threat in any physical sense, of course, as there is no rationale for exercising such threat within the context of research. Instead, we refer to more subtle threats, like those to the beliefs, practices, existing social arrangements, and even self-esteem, that are communicated by argument, ridicule sarcasm, gestures or disinterest, and so forth.’)

explained to me that they were told afterwards by the judge and/or prosecutor that such ineffective defense was a strategic move, or that the lawyer was actually very skillful, but in this particular case simply had nothing to work with. Although I had not worked with any of the attorneys in trials which resulted in a sentence of death I knew from media accounts that one attorney was being investigated by the Texas Bar Association for failing to meet deadlines in capital murder cases, and thus, at least for that particular attorney such a categorization of performance as being strategic seemed possibly inaccurate.¹⁷⁶ Regardless, I knew that for the sake of the interview I could not comment or show any facial reaction to what the respondent was saying although it was at times exasperating to hear.

Many jurors were emotional throughout the interview, with several crying during their descriptions of the deliberations. When this happened I gave them time to vent their feelings and to gain composure. Typically, by the time we turned to the punishment deliberations, I had been with the juror for several hours. If they did become emotional during the discussion, I would try to be supportive and gentle in my responses. I would comment that I couldn't imagine how difficult such a decision was or that I had conducted numerous interviews with jurors and regardless of the case or the outcome, jurors often expressed similar feelings afterwards. I'd ask the juror if they'd like a break; some time to walk around or get some fresh air. Many jurors seemed to find it cathartic to cry and to release the tension caused by recalling and describing their experience. The jurors who cried gave various reasons for their distress – some felt grief about the murder and the sentence; some felt guilty about their sentencing decision; others felt saddened by the pain and suffering caused to the

¹⁷⁶ I worked with one attorney who represented one defendant included in this study. I did not participate in any investigative work in preparation for that trial. See Lise Olsen, 'Death Row Lawyers Get Paid While Messing Up: Attorneys Who Continue to Miss Appeal Dates are Still Getting Cases' *The Houston Chronicle* (Houston, 20 April 2009) <<http://www.chron.com/disp/story.mpl/6381687.html>> accessed 1 August 2011

victim and their family. One juror seemed to be particularly agitated when discussing the punishment deliberations and at that time I did not probe for further information, as I was wary of causing further distress. I made decisions throughout individual interviews about whether to push onwards through sensitive areas, even when interviewees were showing signs of stress, or to move on to the next topic. In every interview I offered breaks to the juror at the start of a new section and was alert for signs of fatigue. Mindful not to patronize a juror, when I felt someone was upset or tired, I would ask for a break, telling them I could use a break for a few moments.

It was sometimes difficult to know how best to end the interviews. When the discussion had lasted most of the day, the juror and I had engaged in long and sometimes intimate conversations and emotions had run high, it felt as if a relationship had developed, albeit a temporary one. It is not easy in such circumstances to simply thank someone and leave. I often directed the conversation to the future of the research in order to draw a line under our long discussion about the case and the juror's role in it. Some jurors expressed an interest in reading about my results and I encouraged them to contact me for further information on the progress of the study. I was careful not to promise anything, such as updates on my progress, but I did assure jurors that if they contacted me in the future I would be happy to hear from them and I would respond. Some jurors had questions about the defendant, such as wanting to know who was working on his appeal or in which prison he was housed. In those instances I explained to jurors that this information was publicly available online and how they could find it.

3. Review of the Data in Preparation for Analysis

I began reviewing the data I was collecting almost immediately after I started interviewing jurors, conducting multiple readings of the trial transcripts and reviews

of the audio data as I continued to carry out other interviews. I immersed myself in the trial records, taking notes as I read. My notes were initially broad, summarizing whatever I thought legal actors were describing (for instance, in my notes I would write, ‘providing a definition of a legal concept’ and note the concept such as ‘standard of proof – beyond a reasonable doubt’) or jotting down any thoughts I had about how the attorneys performed (for example, when an attorney didn’t question potential jurors I would write ‘ineffective’ or ‘not even trying to vet’). Based on my initial review of the records I created hundreds of pages of notes. From those notes I began to group my observations together into loosely constructed topics or themes.¹⁷⁷

I applied a similar method to my initial review of the transcribed interview data. I began working with the data in audio form, taking notes on what I heard without the benefit of having the interviews fully transcribed. However, by February 2010, I began receiving transcriptions of the interviews.¹⁷⁸ As such, I continued to listen to the audio recording of the interviews but also began reading the transcripts, making broadly based observations as I went. By reading and reviewing the audio records of the interview data, I sought to verify the accuracy of the transcription and to note any important information which was not transcribed (such as when jurors cried, hesitated, were animated in their descriptions, paused at length, and so on).

I utilized both inductive and deductive reasoning in theory generation.¹⁷⁹ I viewed the data through the framework of Haney’s theory of moral disengagement.¹⁸⁰ In this way, I approached the data with an interest in identifying what forces appeared

¹⁷⁷ See Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing 1967)

¹⁷⁸ All of the interviews I conducted were transcribed by a retired professional transcriber hired by the CJP. I sent her photocopies of the completed instruments and digital recordings of the taped interviews.

¹⁷⁹ See Barney Glaser and Anselm Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing 1967)

¹⁸⁰ Craig Haney, *Death by Design: Capital Punishment as a Social Psychological System* (Oxford University Press 2005)

to shape jurors' sentencing decisions and with focused attention on structural elements that constrained or propelled their ability to determine the defendant's sentence. At the same time I let my observations guide the development of my ideas. Returning to my original notes after reviewing the trial and interview data, I began to note the centrality of the special issue questions in framing jurors' interpretation of the evidence and guiding the deliberations, in particular at the punishment phase.

In coding the data, I utilized thematic analysis to develop categories of classification and implement my system. Such a method is designed to 'minimally organize and describe [the] data set in rich detail.'¹⁸¹ I identified patterns within the transcripts using a 'semantic approach' to the analysis, taking the words spoken by the legal actors and jurors at face value and coding broadly for the topics explicitly discussed.¹⁸² Given the volume of data collected, I coded the transcript and interview data as a means to organize the material and retrieve segments of the data which shared a common code.¹⁸³ In this way I was able to generate concepts about the illustrative statements made by legal actors throughout the proceedings. Thus, the codes represent both factual references about the information presented to the jurors and descriptive statements regarding identifiable techniques employed by legal actors during the trial.

Finally, the quantitative data collected from the fixed-choice questions included in the survey were entered by research assistants for the CJP into a statistical software program (SPSS). As mentioned previously, I utilized frequency distributions in order to determine what portion of participating jurors responded in the same way

¹⁸¹ Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 79

¹⁸² Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77, 84-86

¹⁸³ Amanda Coffey and Paul Atkinson, *Making Sense of Qualitative Data: Complementary Research Strategies* (Sage 1996) 28

to questions related to my analysis of the influence of the special issue questions on jurors' final sentencing determination. Although much more can be done with these data, I limited their use in this study to supplying additional descriptive data to my analysis. Where I have included such data, I have noted the non-response rates when they are above nil.

(a) Credibility of qualitative data

There are challenges to the credibility of qualitative data, just as there are to quantitative data. As most of the data contained within this study derive from jurors' recollection of events, I applied three different measures to detect and assess indications of jurors' faulty memory: (a) jurors' self-reports of how well they remembered the various stages of the trial; (b) my assessment of whether and to what extent their recall was faulty during the interview; and (c) the elapsed time between the trial and the interview. Furthermore, although not a formal measurement of the juror's memory, the trial transcript also served as an independent verification of the events of the trial and assisted me in assessing whether the juror's recall was faulty.

Jurors were asked directly to assess their recollection of the events at five separate stages of the trial: (1) the selection of the jury; (2) hearing evidence about the defendant's guilt; (3) jury deliberations about the defendant's guilt; (4) hearing evidence about what the defendant's punishment should be; and (5) jury deliberations about the defendant's punishment. Jurors indicated their memory of each stage by selecting 'very well,' 'fairly well,' 'not so well,' or 'not at all.'

Table 3.3 Juror self-reports of memory of the trial

Trial part	Very well	Fairly well	Not so well	Not at all
Jury selection	43%	50%	7%	0%
Guilt evidence	33%	65%	2%	0%
Guilt deliberations	43%	55%	2%	0%
Penalty evidence	39%	57%	4%	0%
Penalty deliberations	54%	46%	0%	0%

As the results in Table 3.3 indicate, the majority of jurors believed they had a fairly good recollection of the events of the trial. This assessment is consistent with a review of the trial transcripts and my debriefing notes. Although the deliberations are not recorded, the jurors appeared to recall this part of the process best, perhaps because that was when they were allowed to discuss the evidence and make arguments for how to interpret what had been presented.

As mentioned above, after each interview I completed a debriefing sheet in which I noted any problems that might have arisen in the course of the interview. The vast majority of my debriefing notes confirm minimal interruptions during interviews, limited difficulty on the part of jurors in recalling the events of the trial and ample effort put forward to provide clear and accurate information. Below are several excerpts which provide a fair representation of the majority of debriefing assessments:

We took a couple of bathroom breaks – one at page thirteen and another at page seventeen. Her husband came home towards the end of the interview. Throughout the visit she had to let her dogs out occasionally and feed them once. I felt like she was very honest and direct. Her memory was pretty good. She missed some punishment phase witnesses and mixed up or blurred together some of the culpability and punishment events, but for the most part her memory was good. I didn't feel like there were any problems with this interview. The juror was honest and I felt like we had developed good rapport.¹⁸⁴

A second debriefing sheet describes similar occurrences:

We took one restroom break at section IID and a dog break at page fifteen. Occasionally her dogs would bark or her husband would enter the kitchen. The question about number of children was awkward for the juror – her son had passed away. She couldn't recall specifics well. She blended the phases of the trial together. She appeared to be putting her best efforts forward. The problems in this interview were minimal and mainly to do with weak recall of specific witnesses.¹⁸⁵

A third summary confirms comparable experiences:

¹⁸⁴ TX08L

¹⁸⁵ TX01D

We took a few breaks. At the start of the section about juror's experiences (page 39) the library shut and we had to finish the interview at a nearby Starbucks. She was emotional about the defendant's punishment and at one point she cried. She didn't think he should be executed, but felt like she had to (in some way), give him a death sentence. She had a hard time answering questions about why she sentenced him to death – except for repeating the same response which was like her mantra. She was honest and thought long and hard before giving an answer. She had a hard time distinguishing between the culpability and punishment phases. She also didn't speak much about the second victim. There weren't many issues with this interview, but I felt like she had a hard time articulating why she changed her vote from LWOP to death. I felt like maybe she wasn't as honest about the impact others had on her final decision – or maybe she didn't recall how forceful a few of the personalities on the jury were. She didn't really remember the other jurors though so maybe that had a part in it.¹⁸⁶

The most common difficulties jurors displayed were recalling detailed witness testimony, the timing of an event (e.g. whether the witness testified at guilt or punishment), and remembering exactly what other jurors said about the evidence. As discussed in later chapters, jurors often based their sentencing decision on the same factors they used to determine the defendant's guilt. As such, it is not necessarily surprising that participants reported difficulty in distinguishing between the two phases.

Finally, in keeping with the project-wide commitment to include cases which had been tried most recently, all the interviewed jurors had deliberated on cases in which the trial ended between four to thirty-three months (two years and nine months) before the interviews took place. A review of debriefing sheets between the first and last juror interviews conducted reveal little variation in terms of recall of the events of the trial amongst jurors from the same case. In addition, the various data collected served as an informal check on the data gathered from individual juror interviews. The transcript data, corroboration of the events of the trial and deliberations provided by other jurors from the same case, the amount of detail jurors provided in their descriptions, and my own impression of jurors' candor support the truthfulness of juror accounts and their

¹⁸⁶ TX03D

statements are therefore credible.¹⁸⁷ Thus, while no single study is without methodological limitations, the data presented in this study are reliable.

¹⁸⁷ Howard Becker, 'Problems of Inference and Proof in Participant Observation' (1958) 23 *American Sociological Review* 652

Chapter IV. Channeling Factors in Voir Dire¹⁸⁸

1. The Texas Special Issue Questions, Voir Dire, and Channeling

Potential capital jurors in the United States experience a unique selection process intended to determine whether they would be fair, impartial, and able to follow the applicable law in a specific case. Since the applicable law in a capital case may include determining the punishment if the defendant is found guilty, jurors are routinely asked about their views on the death penalty. In order to gauge a juror's ability to follow the law – in particular the law that instructs jurors about how to determine the defendant's sentence if convicted of a capital crime – the judge, prosecutor and defense attorneys explain the nature of the capital sentencing scheme to potential jurors. As mentioned in Chapter 1, the Texas capital sentencing statute differs markedly from other schemes used throughout the United States.¹⁸⁹ As opposed to providing jurors with a list of statutory aggravating and mitigating factors which the jury is routinely asked to weigh or balance, the Texas scheme provides the jury with two questions:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and

(2) whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence be imposed.¹⁹⁰

¹⁸⁸ Portions of this chapter have been previously published by the *Quinnipiac Law Review*, see Elizabeth Vartkessian, 'Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to be Unreceptive to Mitigation Evidence' (2011) 29 *Quinnipiac Law Review* 237. Permission to use all previously published materials has been given by the *Quinnipiac Law Review*.

¹⁸⁹ See Russell Stetler, 'The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing' (2008) 11 *Journal of Law and Social Change* (2008) 237, 237-238

¹⁹⁰ TEX. CODE CRIM. PROC. ANN. art. 37.071, §§ 2(b)(1), 2(e)(1) (West 2009). There is the potential for up to four special issue questions to be included depending on the facts raised by the case. If the defendant is convicted of a capital crime as a party to the event, the following question will be provided to the jury 'whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.' See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(2) (West 2009). The other special issue question which might be presented to the jury concerns

Noticeably, the first question is singularly focused on the defendant's possible future dangerousness while mitigating factors are made ancillary. Various ambiguous terms in each question ('probability', 'criminal acts of violence', 'society', 'moral culpability', and 'sufficient') are not further statutorily defined. As such, the explanation of the sentencing scheme given by legal actors provides the framework for how jurors come to interpret and understand the questions, and in turn, how they will view the evidence presented in relation to determining the defendant's punishment.

An analysis of voir dire¹⁹¹ in the cases included in this study shows that almost a third (32%) of individual voir dire,¹⁹² is spent discussing with potential jurors how to understand and answer the special issue questions. In each case the jurors were asked questions by the judge, prosecutor, and defense in that order.¹⁹³ Although the extent of the questioning differed between each of these legal actors, what was constant was the jurors' exposure to extensive and repeated questioning about the

whether the defendant is a person with mental retardation. In the event that this issue is raised by the evidence, the mental retardation special issue question would appear first, before the future dangerousness special issue. This is owing to the fact that a finding of mental retardation is a categorical bar against receiving a death sentence. The mental retardation special issue question is not codified in the Texas Code of Criminal Procedure. As such, the judge has some latitude in how she may instruct the jury on this issue. In only one trial included in this study was the issue of the defendant's intellectual functioning raised. In that case the judge provided the jury with the following instruction, 'Do you find by a preponderance of the evidence that the defendant is a person with mental retardation?' See *Ex Parte Briseno* 135 SW 3d 1 (Tex. Crim. App. 2004)

¹⁹¹ I distinguish between panel and individual sequestered voir dire throughout this chapter. Panel or general voir dire is conducted with groups of potential jurors by the judge. Individual sequestered voir dire is conducted by the judge, prosecuting, and defense attorneys one-on-one with an individual perspective juror outside the presence of other potential jurors. See Michael Nietzel and Ronald Dillehay, 'The Effects of Variations in Voir Dire Procedures in Capital Murder Trials' (1982) 6 *Law and Human Behavior* 1

¹⁹² In order to determine how much time was spent during individual questioning discussing the special issue questions, for each of the forty-six jurors included in this study I counted the number of pages in which legal actors talked about the special issue questions. I then added all these pages together and divided them by the total number of pages of individual voir dire for all eight cases included in the study.

¹⁹³ Jury selection need not be conducted first by the state then the defense, but it is routinely carried out in that order. See TEX. CODE CRIM. PROC. ANN. art. 35.17(2) (West 1991) ('In a capital felony case in which the State seeks the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court.')

special issue questions and their ability to consider a death sentence.¹⁹⁴ The legal rationale for this process is that such repeated questioning, combined with the attorneys' use of challenges,¹⁹⁵ makes for a jury selection process that achieves a fair and impartial venire able to follow the applicable law in the specific case.

The questioning of potential jurors during voir dire, does not therefore, simply ascertain a juror's fitness to serve, but also provides an opportunity for legal actors to shape how jurors will come to view the evidence and their role in determining the defendant's sentence. This side-effect occurs easily because explanations which aim to extract information from jurors are connected to those which attempt to persuade.¹⁹⁶ Attorneys recognize the opportunity to begin framing the evidence in relation to the sentencing statute and actively attempt to educate, persuade, or indoctrinate jurors to their side's perspective of the special issue questions during the selection process.¹⁹⁷

Not surprisingly, jurors are influenced by the information they receive during voir dire. Of the forty-six jurors interviewed for this study, a mere seven (15%) had

¹⁹⁴ While it is true that legal actors did question potential jurors about their ability to consider a life sentence, the data presented in this chapter demonstrate an imbalance between questions aimed at determining whether a juror could sentence the defendant to death as opposed to life.

¹⁹⁵ See TEX. CODE CRIM. PROC. ANN. art. 35.15 (West 1991). The use of challenges to 'strike' jurors from the jury pool may take one of two forms. The first is the exercise of challenges for cause, which are limitless in nature and seek the juror's removal for statutory reasons relating to their inability to serve on the jury. In the context of a capital case, the Texas statute dictates that the prosecution can seek a challenge for cause if the juror has 'conscientious scruples in regard to the infliction of the punishment of death for crime', while the defense can seek a challenge for cause if the juror 'has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefore'. The second method for removing jurors from the panel is through exercise of a preemptory strike. The Texas statute allows each side in a capital case fifteen preemptory strikes. No reason need be given for the exercise of a preemptory strike. It is typically the case that for tactical reasons each side will first attempt to have an unfavorable juror struck for cause and only use a preemptory strike if that challenge was unsuccessful.

¹⁹⁶ David Suggs and Bruce Sales, 'The Art and Science of Conducting Voir Dire' [1978] *Professional Psychology* 367, 372 ('The boundary between questions that merely seek information and questions that seek to implant an idea or value in the mind of a juror can be quite flexible.')

¹⁹⁷ See Matthew Rubenstein, 'Overview of the Colorado Method of Jury Selection' [November 2010] *The Champion* 18. The Colorado Method is a method of jury selection frequently used by capital defenders which endorses educating potential jurors about the unique differences between guilt and punishment determinations in capital cases.

previously served on juries, and only six jurors (13%) had experienced a criminal trial in any capacity prior to their capital jury service.¹⁹⁸ Thus, most jurors not only had no previous experience of jury selection, they also had limited experience of the criminal justice system as a whole. Moreover, presiding as a juror on a capital case is a uniquely serious event and one which no juror in this study had previously experienced. As such, jurors understandably look to authority figures such as the judge and the attorneys for guidance.¹⁹⁹ Jurors accept their role with limited relevant experience and are anxious to be told how they should go about making such a grave decision.²⁰⁰

Through an analysis of the process of jury selection the central role played by the special issue questions can be discerned. In this chapter I begin this analysis by documenting how the special issue questions are presented to jurors by the judge, prosecutors, and defense attorneys. I identify techniques used to educate or indoctrinate jurors about legal concepts, drawing out examples of how the process of training jurors in voir dire to view mitigation evidence as aggravating is a crucial first step in channeling the defendant's sentence in the direction of death. In this way I examine how early orientation to the special issue questions can be understood as perhaps the most critical phase in shaping jurors' perception of the evidence at trial, especially the punishment phase evidence.

¹⁹⁸ Jurors were first asked about their earlier service on juries, both criminal and civil. Participants were then asked whether they had ever attended a criminal trial in some other capacity before the case and then asked to select all instances which applied; as a spectator, a witness, or a defendant.

¹⁹⁹ A wealth of social psychology literature exists on this point, but perhaps the most noteworthy is Stanley Milgram, *Obedience to Authority: An Experimental View* (Harper and Row 1974).

²⁰⁰ The United States Supreme Court acknowledged the weight of judicial statements in *Boyd v California* 494 US 370, 384 (1990) ('[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.')

2. Analysis of Panel Voir Dire Conducted by Judges

Judges often explain the special issue questions at the outset of jury selection, and therefore lay the foundation for the questioning conducted by the State and the defense. As such, it is important to examine how judges explain these questions to prospective jurors as their comments can influence those made by the State and the defense later on in jury selection.

In all eight trials, general voir dire was conducted prior to individual sequestered questioning. During general voir dire all eight judges explained the proceedings, introduced the indictment against the defendant, discussed prospective juror questionnaires,²⁰¹ introduced the prosecuting and defense attorneys, and described statutory excuses from jury service. Although the topics of discussion sound perfunctory, there were noticeable differences between the remarks made by judges presiding on cases which resulted in a sentence of life without the opportunity for parole (LWOP) and those which resulted in a sentence of death. Though the number of cases in this study is too small to provide a generalization for all capital cases, the remarks by judges in voir dire in trials which resulted in a sentence of death had four common aspects that the cases which resulted in a sentence of LWOP did not.

(a) Treatment of the Special Issue Questions

The judge's description of the special issue questions is critical because judges maintain the highest status in the courtroom, are presumed to be impartial, and to possess the most knowledge about the law. Jurors are more likely to accept a judge's

²⁰¹ Questionnaires are often provided to prospective jurors in death penalty cases in order to expedite jury selection. The surveys typically include question which assess death penalty attitudes and general fitness for service. Although some jurisdictions have standard questionnaires which ask general questions about whether the juror can be impartial and follow the applicable law, other jurisdictions allow for both the State and defense to provide their own questions to be included. Questionnaires were not available for review in any case included in this study.

remarks as fact, whereas when an attorney explains a legal concept, jurors are generally aware of the attorney's adversarial role, and are inclined to be skeptical.

The judges conducting voir dire in cases which resulted in a sentence of death provided broad descriptions of the terms related to the future dangerousness question. For example, one judge gave the following fairly typical statement:

I cannot give you a definition of criminal acts of violence. You must decide. The law is clear, though, it can be a criminal act of violence against a person. It need not be a person it could be a criminal act of violence against property. Arson, that's a criminal act of violence against property. So it doesn't have to be against a person necessarily. But you believe there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society... Now, the law is also clear that you don't have to hear that the person has a long extensive history of prior criminal history in order to find that there is a probability of him committing criminal acts of violence. The law says that the offense itself is enough for you to decide whether or not you believe based on the offense for which you now found him guilty, remember, that that is enough to make you believe beyond a reasonable doubt that he indeed would have a probability to commit acts of violence against persons or property in society.²⁰²

In an effort to assist jurors in thinking about the evidence with which they may be presented, this judge provides an expansive description and understanding of a key term – criminal acts of violence – within the first special issue question. 'Criminal acts of violence' is a phrase that is not defined in the sentencing statute,²⁰³ but the judge nevertheless provides an extremely broad interpretation with examples of what it could mean. By implying that the juror could answer the question affirmatively if convinced that the defendant was likely to commit a crime against property, the judge effectively overrides the narrowing function of the question.²⁰⁴ As previously mentioned, in order for a capital sentencing scheme to be constitutional, it must

²⁰² TX01D

²⁰³ TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (West 2009). The Texas Criminal Court of Appeals has held that those terms are not unconstitutionally vague and presumes that the jury will understand each phrase without instruction. *See Murphy v State* 112 SW 3d 592, 607 (Tex. Crim. App. 2003)

²⁰⁴ *See* William Berry III, 'Ending Death by Dangerousness: A Path to De Facto Abolition of the Death Penalty' (2010) 52 Arizona Law Review 889

restrict the use of the death penalty to a limited group of eligible offenders. The first special issue question is intended to create such a group, namely defendants who are so violent as to make it unlikely that they can be safely housed in prison.²⁰⁵ By stating the dangerousness question includes all potentially violent acts against persons or property, the judge distorts the function of the dangerousness issue, which is to meaningfully narrow the class of death-eligible capital defendants. Additionally, as discussed later in this chapter, this expansive definition is often echoed by prosecutors during jury selection, thus giving their words the implicit endorsement of the court.

Another ambiguous term in the dangerousness special issue question is the word ‘society’. This term has become particularly controverted following the passage of the LWOP sentencing statute in 2005. Again, no definition or elaboration exists within the sentencing statute to clarify to what ‘society’ is intended to refer.²⁰⁶ The following exchange illustrates the effect that judicial interpretation can have on a juror’s understanding of such a key term. The exchange originates from a case in which the defendant received a death sentence and in which the judge administered a lengthy panel voir dire. The juror was being questioned by the State during individual sequestered voir dire about his ability to answer the first special issue question regarding the defendant’s future dangerousness:

Q: Continued – constituting a continuing threat to society. Again, no definition of society. When you think of society, what do you think of?

A: Well, until the other day I thought of those of us not in prison so that – but now, I mean, I’ve given some thought to what the judge said the other day about society being the individual society. But I guess – my

²⁰⁵ Eric Citron, ‘Sudden Death: The Legislative History of Future Dangerousness and the Texas Death Penalty’ (2006) 25 *Yale Law and Policy Review* 143, 162-174 (discussing the legislative history surrounding the inclusion of the future dangerousness issue)

²⁰⁶ TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2009). Although court decisions have effectively defined society as inclusive of prison and non-prison populations, such a distinction is not codified in the sentencing statute. See *Smith v State* 898 SW 2d 838, 846 (Tex. Crim. App. 1995)

own personal belief is society was just everybody that's out in and about – you could bump elbows out on the street.

Q: And listening to the judge and considering what he said the other day in voir dire, are you open to considering other subgroups as a society, as well?

A: Yeah. I mean, I guess until the other day I would have thought, you know, assuming that the person was out in my public, like, you know, what would happen in that society. But I've kind of reformed that after the other day to know that there is some little sub-societies that could be the – that could go toward that part of the question.

Q: And are you open to considering society as a prison society, as well?

A: Now I am.²⁰⁷

The above exchange shows that the juror had his own individual and legitimate interpretation of the term 'society'. The judge's definition, however, supplanted and significantly expanded the juror's definition to include anyone with whom the defendant may come into contact in prison. Although the judge's comments are not a misstatement of the law, it is a rather particular way to view the term. As the sentencing statute itself remains silent on what the proper interpretation of 'society' ought to be, the juror is not bound to view society as inclusive of prison. However, jurors believe that the explanation they are provided by the judge is the only way to understand the term. Thus, during punishment deliberations jurors will insist that society refers to those in prison.

(b) Treatment of Mitigation

Just as the judge's interpretation of the key terms above has the potential to significantly impact jurors' views, so too does judicial interpretation of the term 'mitigation'. Examples used by judges of possible mitigation in cases which resulted in death sentences were often the antithesis of the mitigation actually put forward in the case. For example, one case involved a middle-aged African-American defendant

²⁰⁷ TX01D

accused of killing an elderly Caucasian female. The potential juror to whom the judge's remarks below are directed had expressed her inability to consider any mitigation whatsoever. The following is the judge's attempt to rehabilitate²⁰⁸ this juror:

Suppose he'd been an Iraqi veteran, won a congressional medal of honor, saving of his fellow soldiers, was a war hero and was working in an orphanage. I mean, it's out there. I've got to open your mind. He was working in an orphanage for children with AIDS. That wouldn't move your meter one way or the other?²⁰⁹

The mitigation presented on the defendant's behalf in this case did not in fact involve any good deeds by the defendant, but rather focused on his tortured childhood and experiences of familial sexual abuse. The fact that this description was given by the judge as an example of possible mitigation evidence to the entire venire could have easily shifted jurors' understanding of what constituted relevant mitigation.

Similarly, judicial interpretation of what jurors could conceive of as mitigating evidence also tended to focus on culpability-related mitigation, as illustrated by the following judicial example:

The defendant's character and his background. Anything you may have heard about his character, either from the State, which would not be good or, of course, from the defense, which hopefully would be good. His character and his background. The State introduces evidence that he dropped out of the eighth grade. Is that mitigating or aggravating? I don't know. The defense again gives you evidence that he was sexually abused as a child... And the personal moral culpability of the defendant. Once again, how personally involved was he in what happened? Was he sitting outside in a getaway car while this all went on inside? Or was he right there doing it or right there saying, do it, do it, do it...Strictly up to you to decide – is there mitigation or is there not.²¹⁰

²⁰⁸ Scott Campbell, 'The Multiple Functions of the Criminal Defense Voir Dire in Texas' (1972) 1 American Journal of Criminal Law 255 (referring to efforts made to salvage a juror who indicates that they might not be able to follow the law)

²⁰⁹ TX01D

²¹⁰ TX01D

Given the weight that jurors tend to give to the judge's comments, the description provided above is extremely problematic. Rather than focusing on the need for jurors to be open-minded to all forms of mitigation, including both factors related to the crime and those related to the defendant's background, the judge provides limited examples of mitigation and focuses on details relating to the crime. Implicit in such a description is a direction to view personal mitigation as perhaps not of equal value as crime-related mitigation evidence or even not as mitigation evidence at all.

Additionally, 'moral culpability' is presumably the statute's attempt to allow jurors to give effect to mitigating evidence related to the defendant's background. Speaking of moral culpability only in terms of mitigation relating to the crime inhibits jurors from viewing the statute as broadly as is constitutionally required.

The judge also provided the jury a first glimpse of how they could dismiss mitigating evidence entirely from the sentencing decision:

You may hear that he was abused as a child. Ten of you may say "That's mitigating, sufficiently mitigating to warrant a reduction in punishment". Two of you say, "Well that's not really mitigating enough. Just because you were abused as a child, sexually abused or abused, you got beat all the time by a drunken parent, that's just not enough". Two of you may say, "Well, he was a drug addict since he was, you know, fifteen years old". Some of you on the jury may say, "Well, that's not mitigating, that's aggravating". Some of you say, "No, if you're just a kid and you get in that drug syndrome, that's mitigating". So you don't have to agree. You all have to agree that there is something there mitigating to the extent that you find that it reduces his sentence to death – from death to life, but you don't all have to agree to what it is. Does that make sense to us? And at the end of the day you have to answer this question "yes" or "no".²¹¹

Rather than focusing on the constitutional importance of being open-minded to any mitigation evidence which might be presented the judge provides jurors implicit guidance for dismissing mitigation from their sentencing consideration altogether.

Although the special issue questions leave jurors open to viewing evidence as

²¹¹ TX01D

mitigating or aggravating the judge's comments are a matter of interpretation which will, again, subsequently be endorsed by the prosecution. The judge's comments, however, regarding unanimity of jurors in finding mitigation evidence is a misstatement of the law. Jurors need not unanimously agree that there is sufficient mitigating evidence for a life sentence. Only ten jurors need to determine mitigating factors are sufficiently present in order for LWOP to result. Although the judge in this case eventually explains the vote requirement to the jury it is unlikely to have clarified the legal requirements.

It is perhaps noteworthy that in two of the four cases that resulted in sentences of LWOP, the judge never mentioned the special issue questions during voir dire, merely stating that the case would be one in which the State was seeking the death penalty. In the two other trials which resulted in sentences of LWOP, the judge read the questions to the jurors but did not provide hypothetical examples of what mitigation evidence could be or how to interpret it.²¹² In those cases, the judges refrained from explaining the questions and in one case the judge actually allowed the prosecutor and defense attorneys to say a few words about the statute, giving both sides the opportunity to frame the questions from their perspective without judicial endorsement. Thus, in cases which resulted in a sentence of LWOP, the venire was unlikely to be influenced by judicial input concerning the special issue questions.

(c) Vetting of the Jury Pool

Jurors who served on cases which resulted in the defendant being sentenced to LWOP also experienced less panel questioning of the jury pool than their death counterparts. The transcripts from trials which resulted in a sentence of LWOP

²¹² A transcription of panel voir dire administered by the judge in TX05L was not completed because the case would not be appealed. A review of the individual voir dire, publicly available court records, and comments from interviewed jurors indicate that the judge in that case did not administer a lengthy panel voir dire.

confirm that judges in those cases did not discuss jurors' ability or inability to give a death sentence or engage in judicial questioning on this topic in front of the entire jury panel.²¹³ However, judges in cases which resulted in a sentence of death conducted widespread vetting of jurors on the topic of the death penalty in panels.

As Haney's research on the process of death-qualification in capital jury selection demonstrates, questioning jurors about their views on the death penalty in panels can have a prejudicial or biasing effect.²¹⁴ Haney attributes this to the indirect conditioning jurors may experience as a result of observing exchanges between legal actors and other potential jurors. For example, below is an exchange between the judge and jurors who felt unable to set aside their feelings about the death penalty, conducted in front of the general panel of potential jurors:

Q: Anybody else says I couldn't determine guilt or innocence in a case. I might not want to. I don't want to be here. I don't want to have anything to do with this case, but if you put me in the jury box I'll follow my oath. I'll do my very best to render a verdict. Yes, ma'am – number one. Please, what are you thinking? Please?

A: He'll – I've had a personal situation where my twin sister was murdered and I don't think I could honestly sit there and do justice to the case.

Q: Okay. So you're saying – I think what I think you're saying – you can't be fair to the defendant?

A: Yeah.

Q: That you might find him guilty if you did not think he was guilty?

A: Well, no. I've been listening to everything you say and it means a lot, but based on what's happened to me – a personal situation – I'm very much for the death penalty. I'm very much for finding somebody guilty who is guilty. Whether or not that that's good or bad. I don't

²¹³ A juror's ability to give a death sentence can be used as the basis for a challenge for cause by either the state or the defense. Judges in cases which resulted in a sentence of LWOP did not address jurors' feelings about the death penalty, but limited discussions in front of the jury panel to statutory disqualifications or exemptions from jury service. *See* TEX. GOV'T CODE ANN. § 62.102 (West 2005) (jury qualifications); TEX. GOV'T CODE ANN. § 62.106 (West 2009) (list of recognized exemptions)

²¹⁴ Craig Haney, *Death by Design: Capital Punishment as a Social Psychological System* (Oxford University Press 2005) 117

know. But that's the way – I'm adamant about this. I mean, I've suffered so much myself about – through losing somebody to murder.

Q: It might bias your objectivity?

A: Yes, very much.

Q: Somebody else?

A: I'm completely opposed to the death penalty and I couldn't sentence somebody, find anybody guilty knowing they'd be sentenced to death.

Q: I understand that. And as I said, actually, juries don't actually sign a paper. There is not – if you get into the punishment phase – we'll talk about this. There is not something on there that [is] circle A or B, death or life, we agree to that. You're basically –

A: Knowing it's capital murder.

Q: I understand. And I appreciate. That's why we have so many people.²¹⁵

Although in all cases some jurors were excused at the conclusion of the panel voir dire, jurors in cases which resulted in sentences of LWOP only observed other panel members being dismissed for claims of statutory exemptions to service²¹⁶ and not because of their ability to give a death sentence. Such directed judicial questioning can have the effect of focusing jurors' attention on the defendant's potential punishment before any determination of their guilt or innocence has taken place.

Additionally, in each trial which resulted in a death sentence the judge conducting voir dire provided descriptions of the kind of juror who would be qualified to serve on a capital case:

We do not want jurors who go back in the jury deliberation room and say, "I think he deserves a life sentence. Therefore, I'm going to answer the questions in such a way that I know a life sentence would result." And we don't want jurors who go back in that jury room and say, "I think he deserves

²¹⁵ TX01D

²¹⁶ See TEX. GOV'T CODE ANN. § 62.106 (West 2009). These include reasons such as being over the age of seventy, being the sole caretaker of an invalid person or being enrolled and in actual attendance at an institution of higher education.

a death sentence. Therefore, I'm going to answer those questions in such a way that I know the death penalty would result".²¹⁷

The judge from another trial explained:

In other words, we don't want anybody on the jury that would say – "I don't care what I hear – I don't care what the circumstances are – I don't care what the facts are – I would never vote in favor of assessing the penalty of death".²¹⁸

Critically, the focus of these descriptions tended to be on removing jurors from the panel who might not be able to consider a death sentence and not removing jurors who would not consider imposing a life sentence. For instance, the judge quoted in the second example neglected to tell the panel for the first 81 of 116 transcribed pages of jury selection (70% of the panel voir dire) that jurors who would always give a death sentence, regardless of evidence presented in mitigation, are also ineligible for service. That particular judge spent a considerable amount of time ensuring the removal of panel members who expressed reservations about their ability to give a death sentence, but neglected to remove jurors from the pool who would automatically vote for the death penalty upon finding the defendant guilty.²¹⁹

The four judges who conducted voir dire in the cases that resulted in death sentences implicitly provided automatic death penalty jurors with a way of answering the questions they would be asked by attorneys that would ensure they would not be disqualified. For example:

You've got to be open to mitigation. You don't have to agree that there is mitigation, but you've got to say, "I've got an open-mind and there is possibly something I hear might mitigate this, reducing this offense from capital to life in prison". So you can't say, "Nothing, nothing. I don't care what it is. He

²¹⁷ TX02D

²¹⁸ TX01D

²¹⁹ The Supreme Court ruled that mandatory death sentences are unconstitutional in *Woodson v North Carolina* 428 US 280 (1976) and *Roberts v Louisiana* 428 US 325 (1976). As such jurors must be able to consider both aggravating and mitigating factors in determining a defendant's sentence. A juror whose views on the death penalty are so strong that they would be unable to consider mitigation evidence is often referred to as an automatic death penalty (ADP) juror. See John Blume, Sheri Lynn Johnson and Brian Threlkeld, 'Probing "Life Qualification" Through Expanded Voir Dire' (2001) 29 Hofstra Law Review 1209

was tortured from the day he was born until the day this happened”. You cannot say that. Doesn’t mean you have to find mitigation. It says I’ll keep an open-mind and if there is something out there I could consider mitigation and possible I could consider mitigation.²²⁰

Such free-form comments given to jurors during panel voir dire can have a two-fold effect. Firstly, it can encourage potential jurors who are life-leaning but open to considering a death sentence to identify themselves as incapable of rendering a death sentence. Their removal from the jury pool leaves only jurors who are more than simply capable of considering death as a possible punishment, but rather, are actively in favor of the death penalty for any person convicted of capital murder. Secondly, through such comments the judge equips the remaining jurors with a response that can satisfy nearly any questions posed by either the State or defense during individual voir dire, making it harder to detect automatic death penalty jurors. Likewise, the emphasis placed on jurors to be open-minded by the judge has the potential to produce inaccurate responses from jurors due to the social desirability of following the judge’s directives.²²¹ As a result, extensive judicial questioning in front of the panel can cause jurors to mask their true feelings about the death penalty, making them appear more open-minded than they actually are.

(d) Use of Judicial Examples

A final aspect of note in cases in which the defendant was sentenced to death and in which judges had conducted a more extensive voir dire was the appropriation of judicial examples by the prosecution throughout individual jury selection.

Although prosecutors may not have made a conscious decision to draw on judicial examples in their individual questioning of jurors, this practice can have the effect of

²²⁰ TX01D

²²¹ Research suggests that prospective jurors are less likely to respond to social desirability concerns when being questioned by attorneys. See Susan Jones, ‘Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor’ (1987) 11 Law and Human Behavior 1

aligning the judge and prosecutor. The defense is unable to conduct voir dire in a similar fashion, since the judicial explanations tend to be favorable to the prosecution.

One clear example of this occurred in a case which involved a defendant accused of murdering two victims after an argument. Although the prosecution presented no motive for the crime at trial, they did present evidence that the defendant was a known drug-dealer who was implicated in several other murders in the neighborhood. The judge gave the following hypothetical example to the panel regarding the first special issue question:

Did anybody ever read the book, 'A Time to Kill,' or see the movie, John Grisham's novel? [I]t was the story about a young African-American girl who two yahoo guys, beer drinking, pickup truck, you know, stopped on the side of the road and basically kidnapped her, sexually assaulted her, hung her in the tree, left her for dead and she was found still alive. And her father found out about it and he led an honorable life and was a fine upstanding member of that small community. And when the sheriff came to tell him about what had happened to his daughter and that she was in the hospital, the sheriff told him that when they arrested the two guys, they were drinking beer in a bar and laughing about it. Well, two days later they showed up in the courthouse for their arraignment and the defendant, the father, had found his way into the courthouse and he shot both of them. Now, we can come up, again, with lots and lots of different fact situations, but my point is this. Does everybody understand that the answer to Special Issue No. 1 could be yes or no depending upon what the evidence is?²²²

The judge's attempt to illustrate a situation in which a person could have committed a double murder but not be seen to be a future danger is very limited, and as with the mitigation example noted previously, bears no relation to the facts that would be presented in the case. During subsequent questioning, the prosecutor drew on this same example, reinforcing the limited view of an instance in which a convicted capital defendant might not be a future danger:

All right. Because, you know, you have on one hand you could have 'A Time to Kill' example the Judge gave you. And I'm not asking you to tell me what you would answer. Okay? Where the guy kills two people who horribly abused and almost killed his little girl. I mean, in some ways that's a once in a

²²² TX02D

lifetime situation you would hope that someone would ever be placed in versus Ted Bundy.²²³

Based on the likelihood that jurors will be more receptive to the explanation provided by the judge, this similarity between the judge's and prosecutor's remarks in voir dire will align them in the eyes of the jurors, making the State's interpretation of the sentencing statute more legitimate than the defense's.

The descriptions provided by judges in this study to aid and prepare jurors for the serious and difficult decision that they had to make may have been given with little thought as to how jurors would understand their role and the potential evidence. Alternatively, since seven of the eight judges in this study had worked as prosecutors prior to being elected to the bench²²⁴ it is possible that their own views regarding what *should* be relevant to the sentencing decision are not as expansive as what the Supreme Court requires. Regardless, the judges' more detailed and lengthy elaborations in trials which resulted in a death sentence provided jurors with extreme examples of mitigation, which may encourage jurors to look unsympathetically at the mitigation evidence subsequently presented by the defense.

3. Individual Voir Dire in Cases which Resulted in a Sentence of Death

As detailed above, juries in trials which resulted in a sentence of death were comprised of jurors who had already been exposed to a significant amount of judicial vetting and interpretation of key terms before being questioned by either the prosecutor or defense. Critically, there are also significant differences between how prosecutors and defense attorneys conducted individual voir dire in these cases. Prosecutors spent more time speaking with jurors during voir dire than defense attorneys in each trial. In cases which resulted in a sentence of death, attorneys for

²²³ TX02D

²²⁴ Judicial employment history is a matter of public record.

the State questioned empanelled jurors for an average of twenty-six transcript pages per juror, while defense attorneys questioned each juror an average of seventeen pages.²²⁵ Importantly, prosecutors devoted 41% of those pages to discussing the special issue questions with jurors while the defense spent only 24% of their questioning discussing the sentencing statute. Thus, not only did attorneys for the State question each individual juror for a greater period, they also dedicated more time to educating jurors about the sentencing statute. Coupled with the fact that jurors in these cases experienced a lengthy and detailed panel voir dire by judges, jurors who sentenced the defendant to death experienced overall greater levels of conditioning and exposure to the capital sentencing statute than their LWOP counterparts.

Prosecutorial questioning varied little from juror to juror across all trials. Each juror was exposed to identical explanations of the law, evidence, and the special issues. Greater variation in questioning existed amongst defense attorneys in cases which resulted in a sentence of death, with the defense often appearing to change their approach with each juror. Perhaps one of the most noticeable differences between prosecutors and defense attorneys who conducted juror selection in trials which resulted in a death sentence was the absence of any discussion regarding the special issue questions. As opposed to developing an alternate sentencing framework for jurors to consider, defense attorneys spent time focusing on guilt related issues or discussing concepts such as 'fairness'. From a review of the trial transcripts in cases that resulted in the death penalty, defense attorneys expended comparatively greater efforts attempting to ingratiate themselves to jurors, devoting 23% of their

²²⁵ The trial records did not include any indication of the amount of time spent questioning jurors. As such, the best estimate can be reached by noting the number of transcript pages that voir dire examination comprised. I totaled the number of pages of individual voir dire for every interviewed juror. In the cases which resulted in a sentence of death, voir dire totaled 1,030 pages of which questioning by the prosecution comprised 625 pages or roughly 156 pages per trial. The defense questioned jurors for a total of 405 pages or just over 101 pages per trial. Taking the number of pages per trial and dividing each by six resulted in the average number of pages spent questioning each juror by the state and defense attorneys in the cases which resulted in a sentence of death. I applied the same method for cases which resulted in a sentence of LWOP.

questioning to discussing common hobbies, family, and the juror's personal attitudes or beliefs. In contrast, the prosecution spent only about 12% of their questioning on such topics. As one juror from a case that resulted in a sentence of death recalled about both the prosecution and defense during her individual questioning:

I don't know what the defense saw [in me as a potential juror]. I don't really remember what the defense asked me in my one-on-one. I think he asked me where I went to school, college wise, which was a liberal arts school north of Austin here in Texas. They weren't really – the prosecution seemed much more – are you able to, do you know you could hand down a verdict of murder – I guess because they have the burden of proof. The defense didn't seem that hardcore really.²²⁶

Another juror from the same trial commented:

The prosecution was more concerned about the objectivity of people; do you understand the process. Do you understand if you answer this question this way – they were much more into this is the process of how the trial is and can you be objective in answering this sort of question. The defense was more concerned about who I was like, oh you go to this church, what was your family upbringing like. I don't recall them asking anything about the trial. It was more personal. I think [the defense attorney] was just trying to make himself likeable.²²⁷

The special issue questions can be especially effective in facilitating a death sentence if the defense fails to employ tactics to counter the focused nature of the statute.

However, as discussed below, the special issue questions provide an automatic advantage to the prosecution in several ways, which is difficult to counter, regardless of defense efforts.

As noted throughout this study, the questions narrow a juror's focus to two areas, the potential dangerousness of the defendant and possible mitigation in support of a sentence of LWOP. For the juror to be able to answer these questions, they must be able to interpret the information presented in terms that allow them to determine a 'yes' or 'no' answer. As such, voir dire is an opportunity for the prosecution to

²²⁶ TX01D

²²⁷ TX01D

instruct jurors on how they can understand the evidence as firstly being supportive of the defendant's dangerousness and then of the finding that there are insufficient mitigating factors for the defendant's life to be spared.

(a) Focus on process – simply answering two questions

Prosecutors made sure that jurors were immediately oriented to what was involved in the process of making a decision which could result in the defendant being sentenced to death. Indeed, the first tactic the vast majority of prosecutors engaged in was to immediately frame the trial as a 'death penalty case', therefore insinuating that sentencing, rather than the defendant's guilt or innocence, would be the most important determination in the proceeding. Eighty-eight percent of prosecutors' individual voir dire in cases which resulted in a death sentence began by drawing the juror's attention to the death penalty in either the first or second statement they made.²²⁸ In one trial the prosecutor routinely went a step further in obtaining an immediate commitment from jurors about their willingness to participate in the process:

Now, what I want to do is make it very real. And look over here at [defendant] in the white shirt. He's a real, thinking, living, breathing person. And you know and I know that if I'm successful in convincing you beyond a reasonable doubt that he's guilty of capital murder and that the answer to issues number one should be "yes" and the answer to issues number two should be "no" and you reach a verdict that way, he is going to die based on that verdict.²²⁹

Confronting jurors in this manner at the very outset of jury selection before anything else is discussed prepares jurors for thinking about the defendant's execution.

Psychological studies suggest that imagining an event as a possibility increases an

²²⁸ This occurred in 21 out of 24 individual jury selections as opposed to 15 out of 22 in LWOP cases.

²²⁹ TX02D

individual's potential for expecting that event to occur.²³⁰ The prosecutor above not only asks the juror to imagine the possibility of sentencing the defendant to death, but also suggests the juror has made an agreement to do so if certain circumstances occur. This approach also helps the prosecutor identify jurors who are likely to be strongly in favor of the death penalty and those who are reluctant.

After obtaining a commitment from jurors that they can sentence the defendant to death, prosecutors then describe a series of decisions which can be made logically and without emotion, as in the following example:

The way that the judge will know which of these options is to be the sentence is a result of two questions that the jury must answer. We call them special issues. But the jury must answer two questions, and the first deals with whether or not the person is likely to be dangerous in the future. And that's my shorthand way of saying it. I will show you what the question is in just a moment. And the second question deals with mitigation, that is, is there some reason despite the guilty and despite the fact that he is a future danger, is there some reason to spare his life. But it's those two questions that must be answered in a particular way before a death sentence is a result.

Through the use of the special issue questions the prosecutor is able to distill the punishment decision down to the simple task of answering two questions. In particular, prosecutors are able to capitalize on the ordering of the questions in the statute, alerting jurors to the fact that they must first decide whether the defendant is dangerous. As the quotation above illustrates, prosecutors are then able to discuss the mitigation question as something that the juror considers *in light of* the fact that they have found the defendant to be dangerous in the future. The ordering of the questions is especially important given that a juror is likely to find dangerousness as a strong

²³⁰ John Carroll, 'The Effect of Imagining an Event of Expectations for the Event' (1978) 14 Journal of Experimental Social Psychology 88

aggravating factor, but a defendant's lack of dangerousness as only moderately mitigating.²³¹

In another trial, attorneys for the State also focused on following the process in order to yield the correct result:

And in a death penalty case, there are really three issues you are going to be looking at before you get to whether the ultimate punishment will be life or death. And all of these issues are single and distinct. The first is guilty or not guilty. That's the first decision that has to be made. Not guilty, you are done. Guilty, you move to the next step. In the punishment phase we don't ask jurors to take out a sheet of paper and write "death" or "life". We have these two very special issues. And you are nodding your head.²³²

An intended function of bifurcating the trial into guilt and penalty phases is to safeguard the distinctive type of decision jurors are called upon to make when determining whether the defendant should live or die.²³³ That decision is not a factual determination – there is no right or wrong. Rather, it is meant to be a personal response by each juror to the cumulative evidence presented. However, explaining the decision-making process in this way prepares the juror for three 'yes' or 'no' decisions, which implies that the special issue questions can be approached and answered in the same way as the determination of guilt or innocence. By doing so, the prosecutor is able to conflate the guilt and penalty decisions, thereby confusing jurors of the purpose of the penalty phase.

The above quotation also illustrates another approach used by the prosecution, namely pointing out that the jury will not have to decide whether the defendant deserves to live or die for his crime, but more simply, the jury will only have to answer questions. This distinction may become especially important to jurors who

²³¹ Texas Defender Service, 'Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness' (2004) 46 n 217 <<http://02f2fd4.netsolhost.com/tds/images/publications/DEADLYSP.pdf>> accessed 21 June 2011

²³² TX04D

²³³ See *Sumner v Shuman* 483 US 66, n 13 (bifurcation 'tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other')

were life-leaning, but eventually sentence the defendant to death. As discussed in later chapters, focusing exclusively on answering the special issue questions allows jurors to by-pass direct responsibility for the defendant's fate. Jurors recalled this aspect of the questioning quite clearly:

All I had to do was answer questions – do you believe beyond a reasonable doubt that he's guilty? And then the second of the first two questions was if you found that he was guilty beyond a shadow of a doubt, then you went down to another question that said was he a continuing menace to society. Then the second question was if he had any redeeming value.²³⁴

Another juror from a different trial explained:

We went through the three questions. The prosecutor's whole thing was, and this was probably more show than anything because I knew they wanted the death penalty, but if you find him guilty and you know that "yes", "yes", "no" he gets the death penalty, would you try to influence it either way to get out of it or not to get out of it.²³⁵

Many jurors described their sentencing decision mechanically, as answering a series of questions, with death a potentially inevitable result.

(b) Fear-mongering: how to understand future dangerousness

Through the special issue questions, the prosecution is able to immediately draw jurors' attention to dangerousness as the principal factor in determining the defendant's punishment. Jurors are then presented a variety of hypothetical situations to consider with regard to whether a convicted capital defendant will be dangerous in the future. The lack of definition within the special issue question allows prosecutors to define future dangerousness in such an expansive way as to make an affirmative answer to the question virtually automatic.

As with judges, prosecutors also suggest to jurors ways to think about three of the key phrases in the question. Prosecutors in cases which resulted in a sentence of

²³⁴ TX04D

²³⁵ TX04D

death and those which resulted in a sentence of LWOP both began by defining ‘probability’. Although the term is not statutorily explained, the majority of prosecutors instructed jurors to view the word as meaning ‘more likely than not’.²³⁶

For instance, in one case the prosecutor explained the term to a juror as follows:

Is there a probability – and this word doesn’t have a legal definition, it’s whatever you think probability is, but it’s more than possibly and less than certainly. Because it doesn’t say – will the defendant do something again, right? Is there a probability that the defendant would commit criminal acts of violence? I don’t have to show you he’ll kill again. I just have to show you that there’s this probability that he will commit a criminal act of violence that would constitute a continuing threat to society.²³⁷

Importantly, the prosecutor’s final use of the term ‘probability’ in the example is precisely how someone would use the word ‘possibility’ – the syntax is ill-fitting for the term probability and serves to indicate an equivalence between the words which is incorrect. Such a loose definition of the term enables the expansion of the dangerousness issue.

Perhaps more contentious is how prosecutors explained the phrase ‘criminal acts of violence’, providing a spectrum of examples, including the use of profanity towards a prison guard, causing property damage to a prison cell, using a bat to strike a car or house window, and setting a fire. Regardless of what examples were provided, prosecutors were consistently clear about the fact that they did not have to prove that the defendant would kill again. In one case, the prosecutor stated:

I never have to prove to you he would kill again or that he would rape somebody or that he would stab somebody. It could be setting a fire in a prison cell. It could be threatening to assault a guard over and over. It could be tearing up the cell or tearing up facilities.²³⁸

A prosecutor from another trial explained:

²³⁶ *Murphy v State* 112 SW 3d 592, 600 (Tex. Crim. App. 2003) (‘Although we have held that the term “probability” need not be defined, we have also held that the term means “more than a mere possibility”’) (quoting *Hughes v State* 878 SW 2d 142, 148 (Tex. Crim. App. 1992))

²³⁷ TX03D

²³⁸ TX02D

Again, criminal acts of violence, not defined for us and so we look at the common meaning of those words. Criminal acts of violence. So they are crimes that involved some violence. It might not be a murder, another murder, it might not be another robbery. It might not be any of those types of offenses. It might be an assault. It might be a crime involving violence to property. Kicking in a door, knocking out a window to gain entry to a home. Are those the sorts of things that you can keep an open-mind to consider as being criminal acts of violence?²³⁹

The prosecution's use of these examples, coupled with the submission that a probability means more likely than not, suggests to jurors that they should interpret the first special issue as whether the defendant would be more likely than not to kick in a door, verbally threaten a guard, knock out a window to gain entry to a home, or set a fire in a prison cell.

The prosecution completes its version of the framework for understanding the first special issue question by describing the term 'society' as anyone who may interact with the defendant in prison. In one case the prosecutor stated:

But there's also a society in prison. There's also people that are in constant contact with the prisoners who are in our prisons. So, for instance, the guards, the chaplains, the medical personnel, the visitors, and all of those constitute, for the purposes of this law, a secondary society thing. Basically, that's a subculture.²⁴⁰

In another trial the State explained:

There are a lot of people who think society is just those of us on the outside. That if we were just to lock people up, that life without parole, then we're all safe, then we're fine. My argument has always been what about people that work in the prisons, guards, nurses, cafeteria workers, custodians, plumbers, A/C repairmen, wardens, all those people? What about other inmates? I mean, even people who may have committed a crime to get themselves in that place, whether it be drugs, murder, aggravated robbery, rape, whatever it is, are they still part of society, though, part of all of us?²⁴¹

By elaborating on certain statutory language, the prosecution succeeds in reframing the future danger question as asking the juror to determine whether it is more likely

²³⁹ TX01D

²⁴⁰ TX03D

²⁴¹ TX02D

than not that the defendant will commit a violent act *of any kind*, including, for example, destroying her prison cell, against anyone or anything in prison. This is an overbroad interpretation of the question and supplies jurors with an extremely low threshold for answering ‘yes’ to the first special issue question.

One juror recollected the prosecution’s treatment of the future danger issue during her individual questioning as follows:

[The prosecutor] explained the question aspect of what we would have to answer to deal with as far as the death penalty. They went over, over, and over it. They explained individual words and used explanations to explain individual words, and broke it down like we were seventh graders, which I guess is what you would need to do too because you have to put everybody on the same playing field. Your first question is – are they a threat to society and the second question is any mitigating evidence to spare them. [A juror could use] the evidence from the trial, from what you learned at the trial – that’s the sentencing phase so they were already jumping to the sentencing phase before we even started the trial, but any part of the trial itself as well as the sentencing portion – are they a threat to society. There were a lot of large words in it that could be interpreted so they just made sure to explain what those were so if somebody didn’t understand the large words, it would be very clear.²⁴²

Although the juror could not recall the specific words the prosecutor explained, her interpretation of the process underscores the influential nature of the questioning.

This juror recognized that the key words within the first special issue question were undefined and that the prosecutor’s explanation provided jurors the interpretation they ought to use in answering the first special issue question.

As the quote from the juror above shows, prosecutors emphasized that the facts of the crime learned in the guilt phase can be used to answer the future danger question. In this way, attorneys for the State are able to call into question the impact of factors which are characteristically mitigating – such as a defendant’s lack of a criminal record:

²⁴² TX04D

- Q: The law says that there are some crimes that are so bad, that that in and of itself tells you the answer to this is “yes”. Do you agree or disagree with that?
- A: Yeah. Boy, I don’t know.
- Q: That’s tough?
- A: It is a tough question. Some crimes are pretty bad.
- Q: Yeah.
- A: Yeah, I would think that if you’re able to commit that serious of an offense once, there’s always going to be at least the possibility.
- Q: Sure, of doing it again.
- A: Yeah.
- Q: In other words, let’s say you’re – you’re in a trial and the defendant doesn’t have a criminal record, per se. I can’t show you that they have ever been arrested or not, but I can show you a particularly horrific crime. The law says that if you believe from that crime this possibility – or probability of danger exists, that you can answer that question “yes”.²⁴³

Interestingly, as with earlier examples, the prosecutor in this instance associates the term probability with mere possibility. The exchange signals to the juror that they are able to consider only the capital crime itself in determining whether the defendant might be dangerous in the future. As the juror notes, ‘some crimes are pretty bad’.²⁴⁴ In order for a murder to be considered a capital crime, by definition it must be a homicide accompanied by another felony (such as arson, rape, etc.). Arguably then, virtually any capital murder can qualify as a ‘pretty bad’ crime. Thus, attorneys for the State are able to use the vagueness of the dangerousness special issue question to make it virtually impossible for jurors not to answer ‘yes’.

As shown above, attorneys for the State are also able to use the question to preempt a defendant’s lack of a criminal record from being used by the defense as an

²⁴³ TX03D

²⁴⁴ TX03D

effective mitigating factor. In several instances, the State adopted hypothetical examples of crimes the defendant might commit in the future, such as escape from prison, reminding jurors of the infamous Texas Seven escape in 2000.²⁴⁵ One prosecutor explained:

So we ask you to consider that, as well as the fact that there's always the possibility of escape. I mean you never know. You hear about the Connally Seven that escaped from prison and committed future acts of violence. So you just never know. It's not just prison society, it's free society. Does that make sense?²⁴⁶

In addition to preempting the mitigating potential of a defendant's lack of a criminal record by drawing attention to their potential for escape, other prosecutors have used the question to insinuate that the defendant's lack of a criminal record is likely due to his ability to evade arrest or commit crimes undetected.

Jurors are therefore asked if they could answer the future danger issue in the affirmative in a variety of contexts. Many of these contexts expand the meaning of the question beyond jurors' original interpretation of it to include acts such as verbal assaults, hitting another person, or destroying state property. Even for those defendants who do not have a criminal record, the data show that the question can be interpreted so broadly as to ask jurors to consider a potential future escape from prison or the possibility that the defendant may have been committing criminal acts long before the capital crime, but has just not been caught. Permitting the future dangerousness question to incorporate such wide-ranging definitions renders it virtually meaningless as a method of separating out the most violent offenders who are most deserving of the death penalty. Indeed, such an expanded interpretation of the future dangerousness question enables jurors to answer this first special issue

²⁴⁵ Gary King, *The Texas 7: A True Story of Murder and a Daring Escape* (St. Martin's Press 2001)

²⁴⁶ TX06L

question affirmatively in any case regardless of the defendant's criminal history, character, or background.

(c) Teaching jurors to view mitigation as irrelevant, aggravating, or only related to the crime

How a juror understands the final question regarding mitigation will have significant consequences for the capital defendant. The question asks the jury:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment without parole rather than a death sentence be imposed.²⁴⁷

Prosecutors explain the mitigation question to jurors in a number of ways that encourage them to reframe and reinterpret mitigating evidence. Below, I draw upon prosecutorial statements and arguments in voir dire to identify four commonly used narrowing techniques that encourage jurors to view mitigating evidence as either aggravating evidence, irrelevant to their sentencing decision, limited to crime-related circumstances, or, alternatively, distract jurors with examples that are antithetical to the mitigation that will actually be presented in the case. As with the future danger question, the State is able to exploit the ambiguous terms in the question as a means of narrowly framing the jurors' interpretation of mitigation evidence.

i. Flipping

A technique that prosecutors commonly used in this study was to 'flip' possible mitigation into evidence of aggravation, a phenomenon described by Haney as 'converted mitigation'.²⁴⁸ Without statutory guidance, mitigation evidence presented in an effort to spare the defendant's life may also be used in support of

²⁴⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071 Sec. 2(e)(1) (West 2009)

²⁴⁸ Craig Haney, Lorelei Sontag, and Sally Costanzo, 'Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death' (1994) 50 Journal of Social Issues 149

ending his life – what the United States Supreme Court has referred to as the ‘two-edged’ nature of mitigation evidence.²⁴⁹ Since the mitigation question does not specify what types of evidence can or should be considered in mitigation of the sentence, prosecutors are able to alert jurors to its double-edged nature. One prosecutor used the example of drug abuse:

Like drug abuse, the defense might argue, “Hey, this person is a drug addict, and so they shouldn’t be to blame. They were crazy, they were high on drugs when they committed this crime, that should lessen their personal blameworthiness.” Whereas the State might argue, for instance, “Huh-uh, nobody forced him to take drugs. That’s actually an aggravating factor, it makes the crime worse.”²⁵⁰

Another spoke regarding impairment due to drugs and alcohol:

You hear all kinds of things during the course of a trial. One juror might say, “Hey, I heard evidence of the defendant being high on drugs or alcohol at the time of the offense. I consider that to be a mitigating circumstance”. Another juror might say, “Not me. Many, many people have drug or alcohol problems but they are not out committing capital murders. So I don’t consider that to be mitigating. And, furthermore, I don’t consider it to be sufficiently mitigating to warrant a life sentence rather than a death sentence.”²⁵¹

A third prosecutor discussed family background:

I think you’re always going to be presented something mitigating. Okay. Because I think as a lawyer we could make arguments for something mitigating about everybody, including the worst of the worst. Okay? Grew up in a great home with a great family. Grew up in a horrible home, broken. There’s two sides to that coin.²⁵²

Focusing jurors’ attention on the fact that mitigation can be easily flipped or converted to support a death sentence provides them with a way of effectively disregarding it. This line of questioning also provides jurors who may not be open to considering mitigation with a means of answering voir dire questions in such a way as to maintain the appearance of being open to such evidence when this is not in fact the

²⁴⁹ *Penry v Lynaugh* 492 US 302, 324 (1989); *Atkins v Virginia* 536 US 304 (2002)

²⁵⁰ TX03D

²⁵¹ TX01D

²⁵² TX02D

case. Presenting mitigation evidence as a double-edged sword allows such jurors to express how they can recognize that evidence *could* be taken into account as mitigation while privately holding the belief that they would never *actually consider* such evidence as mitigating.

ii. Dismissing as irrelevant

The mitigation special issue can also be interpreted broadly enough to enable jurors to completely dismiss mitigation evidence proffered by the defense, as illustrated by the following example:

So there's evidence put out there that the defendant was abused as a child. Now, the defense may argue yes, it should, because he had a horrible childhood and all these things happened to him, and that should lessen his blame. The State may argue about that exact same piece of evidence, that doesn't lessen his blame. There are tons of people in this world who have had atrocious things happen to them as children, way worse than this guy, and they have turned out to be upstanding law-abiding citizens. It's not at all mitigating or blame-lessening. Or you may decide it is just flat-out neutral.²⁵³

In this example the State describes a process that the juror may use in deciding what weight, if any, to give to mitigation put forward by the defense. The prosecutor describes how mitigation may be flipped into aggravating evidence, but also suggests that the evidence may be 'neutral', providing no support to the defendant. The juror is therefore told that mitigation can be dismissed as aggravating or alternatively dismissed as irrelevant to their sentencing decision.

Given the broad language of the sentencing statute and its lack of guidance, the State is also able to imply that personal mitigation is tantamount to an attempt by the defendant to escape responsibility for the crime. The concept of personal responsibility is used as a device to enable jurors to disregard potential mitigation evidence:

²⁵³ TX03D

Do you believe no matter where you came from or your background that at some point in life, no matter whether you came from a good background or a bad background, though, you have to be held responsible for your actions at some point in time? As an adult you're responsible for your own behavior?²⁵⁴

In this instance, the prosecutor implies that to hold the defendant responsible for his actions the juror must disregard mitigation evidence. Irrespective of the defendant's personal experiences and background, because the defendant is an adult, the juror should hold him responsible by sentencing him to death. This is presumably not the reasoned, moral decision-making that the Supreme Court highlighted as a vital component in any continued use of capital punishment.²⁵⁵ It is instead the ultimate dismissal of mitigation, as it frames the entire concept as an excuse for one's actions and implies that no amount of mitigating evidence would be sufficient to escape a death sentence.

iii. Nexus to the crime

The Supreme Court has ruled that there is no requirement for there to be a link or 'nexus' between the defendant's crime and the mitigation presented for such evidence to be relevant to the jury's sentencing decision.²⁵⁶ Despite this ruling, prosecutors in each trial which resulted in a death sentence provided examples of mitigation evidence that were closely related to the circumstances of the crime. Although the mitigation question does direct jurors to consider such circumstances when determining a defendant's sentence, a focus on mitigation that is only related to the crime drastically narrows jurors' perception of what is relevant mitigating evidence. For example, one prosecutor stated:

His personal moral culpability. How responsible is he for the crime? An example I might give is if it was capital murder where someone was killed

²⁵⁴ TX02D

²⁵⁵ *Penry v Lynaugh* 492 US 302, 324 (1989); *Atkins v Virginia* 536 US 304 (2002)

²⁵⁶ *Tennard v Dretke* 542 US 274 (2004)

during a bank robbery. You have two people involved in the robbery and the murder, but one pulls the trigger and one just demands the money.²⁵⁷

A prosecutor from a different trial likewise explained:

And really that goes to how much did this defendant have to do with this particular crime. And kind of the example we've been using all day long is if you have two people who go to commit a robbery and they both know what's going to happen, they know that somebody – that one of them is going to go in and shoot the clerk, or – and take the money, and the other one is going to be the getaway driver. So guy number one goes in and shoots the clerk, takes the money, and guy number two drives the car, picks him up and they leave. Now, in the trial of the driver, the defense attorneys may say, "Hey, our guy was only the driver. Yeah, he was part of it, but he wasn't the triggerman, and we think that in some way lessens his personal moral culpability." So that's kind of what that third thing goes to.²⁵⁸

Each example illustrates the narrowing effect of interpreting the mitigation question as being related to the circumstances of the offense. Additionally, in the two cases from which these examples were drawn there was no evidence that any other perpetrators other than the defendant were involved in the crime. From the above remarks, a juror could easily interpret the example given as the only relevant mitigation they should be looking for. When it then becomes clear to the juror that there is no one else who could have been involved in the commission of the crime, they could reach the conclusion that there is no relevant mitigation to consider, and therefore they must answer the question 'no', and sentence the defendant to death.

The State also uses the mitigation issue as an opportunity to invite jurors to revisit the events of the crime and contemplate the defendant's remorse. Since nothing is expressed as inherently mitigating within the special issue, and there is no limitation on what factors jurors can consider when deciding how to answer it, the State is able to use the mitigation issue as a vehicle to give effect to additional aggravating information. One prosecutor stated:

²⁵⁷ TX02D

²⁵⁸ TX03D

Basically, at this point, again, you are taking into account all the evidence that you've heard throughout the case in both phases of the trial. You're looking at the circumstances of the offense, what happened before the offense, what happened during the offense, what kind of scene are you looking at, what happened after the offense, is this a defendant who in some way immediately regretted what was done, tried to help the victim, tried to make amends, or is this someone who callously just walked off? You look at all those things.²⁵⁹

A prosecutor from another trial described the mitigation special issue as follows:

What it asks you to do is, hey, take into consideration all the evidence, everything you have heard at guilt/innocence, what you heard about the crime itself, including the circumstances of the offense. How it was committed, where it was committed, you know, who the victim was, all those sorts of things. Every single fact that has to do with that offense, you take that into consideration, those circumstances.²⁶⁰

Another prosecutor noted:

So, basically, in this part of the trial, you guys in the jury should be looking at the circumstances of the offense, what happened before, what happened during, what kind of offense was it, how was it committed, what did the defendant do afterwards, look at the actual circumstances of the offense, how awful was it.²⁶¹

Providing jurors examples of mitigation evidence that are expressly linked to the crime has a strong effect on how jurors view punishment phase evidence. For instance, when jurors were asked to describe what they understood the term 'mitigation' to mean, most jurors recalled the prosecution's interpretation of the mitigation issue. Jurors often described mitigation as whether the murder was a crime of passion,²⁶² whether the defendant was the most responsible for the killing,²⁶³ or 'other factors out of the defendant's control that caused him to do what he did'.²⁶⁴

²⁵⁹ TX03D

²⁶⁰ TX01D

²⁶¹ TX03D

²⁶² TX04D

²⁶³ TX02D

²⁶⁴ TX02D

iv. Red-herring arguments

The final technique used to condition jurors to be unreceptive to mitigation evidence is to provide them examples of mitigation that are not relevant to the case at hand. Although the following descriptions of mitigation evidence may appear to be fairly expansive, they were actually the opposite of the mitigation that was presented in the penalty phase of the case from which the quotes are drawn. The prosecution is often aware of what mitigation evidence is likely to be presented by the defense.²⁶⁵ This allows them to use voir dire as a means of distracting jurors from the actual mitigation in the case.²⁶⁶ When jurors are not presented the mitigation that has been flagged by the prosecution during jury selection, they often hold this against the defendant:

I mean, you may hear in the punishment phase of the trial also that the defendant was an altar boy, was a straight-A student, served with distinction in the military, was the pillar of his society, his neighborhood, was always doing good acts. And this act of capital murder might stand out like a sore thumb on an otherwise perfect life. Those are the kinds of things you can hear in punishment.²⁶⁷

The mitigation evidence in this case did not involve any positive acts by the defendant, but rather focused on his personal background, which was filled with experiences of sexual abuse, physical torture, homelessness and early contacts with the criminal justice system. Jurors in this trial did not hear anything resembling what the State suggested they might hear as mitigating evidence in the punishment phase and therefore could dismiss the evidence they were presented as irrelevant to their sentencing decision.

²⁶⁵ In the same way that the judge may be privy to some of the potential mitigation the defense may present, the prosecution may have access to many of the defendant's records and will often have received information in pre-trial hearings and motions regarding potential mitigation.

²⁶⁶ This phenomenon might be accounted for if a judge interpreted *Morgan v Illinois* 504 US 719 (1992), to say that jurors could only be asked about hypothetical situations and not particular aspects of the case. The trial transcripts, however, show questions about hypothetical and particular factors related to the case being asked by both the State and defense throughout voir dire.

²⁶⁷ TX01D

Each distinctive method used by the prosecution to educate jurors assists in framing mitigating evidence as irrelevant, leaving no room for jurors to actually give consideration to such sentencing evidence. If jurors adopt the prosecution's interpretation of the second special issue question, they will therefore fail to give consideration to relevant mitigating evidence in deciding the defendant's sentence.

iv. Educating automatic death penalty jurors

A final tactic effectively used by attorneys for the State is to 'rehabilitate' jurors who should be ineligible for service in a capital case because of their willingness to sentence a defendant to death without giving consideration to mitigating evidence after conviction. As mentioned previously, potential jurors complete a questionnaire prior to beginning individual voir dire. Interviewed jurors in each case stated that the survey included questions which probed their feelings toward capital punishment. As the State has the opportunity to question potential jurors before the defense, they are in a position to teach jurors who are strongly in favor of capital punishment how to respond to questions in a way that ensures they remain eligible for service. The main lesson jurors receive is to avoid automatic responses to the special issue questions.

For instance, in the following example the juror had indicated on his questionnaire that he believed the death penalty should be given to every convicted murderer except in cases where innocence could be an issue. The prosecutor noted the juror's preference during questioning, stating that he had read the juror's comments from the questionnaire and proceeded to educate the juror about the importance of not thinking of a death sentence as automatically linked to the guilt decision. As such, the prosecution provides the juror the answers he would need in order to survive jury selection:

There are three questions that you answer throughout the entire trial. The first is guilty or not guilty. If you say guilty, then you go on to the punishment phase. And in the punishment phase there are two questions. The reason that I have put this graphic up here is to show you that these are, even though they are all questions in the same case, in the same trial, they are all separate and distinct from each other... The reason I am stressing that – I know that sounds insanely simple, and the reason I am making such a big deal out of it is that it's important *that you don't say*, okay I found that he's dangerous in the future. It can't be that progression. It has to be I found him guilty now let's look to see if he's dangerous in the future, now let's look to see if there's any mitigation. [Emphasis added]²⁶⁸

After additional questioning by the State, the juror offered his perspective on relevant mitigation:

I guess if there was like a five percent chance that I thought he was innocent or, you know, five percent chance of something being wrong, then I might shy away from the death penalty. But if I was within that percent or two, then you know, then I would probably say no. I mean, if there was just an unbelievable amount of circumstances there.²⁶⁹

The prosecutor then reminded the juror that if he is faced with the mitigation question he would have already found the defendant guilty and dangerous, and that the final question is concerned with whether there is any other evidence which would be sufficient to spare the defendant's life. The juror responded by saying he is interested in 'justice being served', to which the prosecutor responded that the defendant will die in prison either way. After a lengthy exchange the prosecutor inquired of the juror:

If you got to this point in the trial and this is the last question in the trial, would you be able to answer this question either way, that is yes, spare the life, or no, give him a death sentence, depending on the facts of that are presented in the trial?²⁷⁰

The juror acquiesced and stated he would be able to consider answering the mitigation issue either way. Although the juror above eventually agreed to view mitigating evidence as relevant to sentencing it is highly unlikely that – given the strength of his

²⁶⁸ TX04D

²⁶⁹ TX04D

²⁷⁰ TX04D

opinion about sentencing convicted murderers to death – he would actually experience a change of position. It is far more likely that the juror would maintain his personal beliefs and determine the defendant’s punishment when he determined the defendant’s guilt.

It is worth noting that the juror in this example was selected and served as the foreman of the jury – the juror who presides over the deliberations. The foreman is often responsible for keeping the jury’s discussion on topic, mediating the discussion amongst jurors, and creating some kind of order in which the deliberations will proceed. All jurors who served as foremen in cases that resulted in a death sentence were interviewed and all four self-identified as automatic death penalty jurors. Though only three of the four presiding foremen in cases which resulted in a sentence of LWOP were interviewed, only one of the three identified as an automatic death penalty juror. Although the data are only suggestive, the influence of the jury foreman in directing deliberations toward a particular sentencing outcome can therefore be significant.

4. Individual Voir Dire in Cases Which Resulted in a Sentence of Life Without the Opportunity for Parole

Although prosecutors continued to apply the tactics described above in trials which resulted in a sentence of LWOP, defense attorneys in these cases were increasingly proactive in employing identifiable strategies to reframe the special issue questions. Though defense attorneys in these cases spent a similar amount of time on average questioning jurors (approximately 20 pages per juror compared to 17 pages per juror in cases that resulted in a sentence of death), the substance of their examination differed dramatically. For one, defense attorneys in cases which resulted in a sentence of LWOP reviewed the same topics (the juror’s ability to listen to the

evidence, the special issue questions, and so on) in an organized manner with every juror. These attorneys employed preemptive tactics similar to those utilized by attorneys for the State to orientate jurors toward an alternative view of the evidence. In contrast to defense attorneys in cases which resulted in a death sentence, defense attorneys in trials which resulted in a sentence of LWOP also ‘frontloaded’ personal mitigation evidence – a technique which involves ‘suggesting at least part of the defense’s theme for life’ at an early stage of the trial.²⁷¹ By utilizing preemptive and frontloading strategies, defense attorneys in trials which resulted in a sentence of LWOP were better positioned to identify and remove automatic death penalty jurors.

(a) Reframing the special issue questions

Defense attorneys in cases that resulted in a sentence of LWOP began advancing their interpretation of the special issue questions immediately by not simply waiting until it was their turn to question jurors, but instead, objecting to the prosecution’s framing of the issues:

- Q: In other words, you could consider whether or not a person is a future danger to society if there was no other evidence but the evidence provided at the guilt/innocence portion of the trial?
- D: Judge, I’m going to object. That’s not a requirement of answering these special issues. The issue is, if it’s proven beyond a reasonable doubt, can he answer it “yes”; if it’s not proven beyond a reasonable doubt can he answer it “no”.²⁷²

The above objection is particularly important since the defendant in this case did not have a criminal history. The State’s question was therefore an attempt to commit the juror to only using the facts of the case to answer the dangerousness issue.

²⁷¹ Welsh White, *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* (University of Michigan 2006) 106

²⁷² TX06L

Attorneys for the State tended to define the special issue questions in ways that drew jurors' attention to the facts of the crime and the defendant's role in it, his potential dangerousness and his lack of remorse. However, defense attorneys in cases which resulted in a sentence of LWOP began their questioning by drawing jurors' attention to the ambiguity of the statute:

Not everything is in the statute. The law will not tell you how to make these decisions. The law doesn't tell you what a sufficient mitigating circumstance is either. There is nothing in here that says, "Sufficient mitigating circumstances are the following twenty-five things". I'm trying to give you the framework for how you decide what a sufficient mitigating circumstance is or is not because the law doesn't give you any guides. The law does not say, "If you find one of the following ten things, that is, under the law, a sufficient mitigating circumstance and a life sentence must be imposed..." It might be helpful to give you more guidance as a juror, but what happens here is that the law turns you loose in a certain way there to use your personal moral judgment to look at all the evidence, all the facts, everything you know about and make a decision based on that.²⁷³

The defense in this case recognized the utility of providing jurors with a distinct roadmap to help jurors reach a sentencing decision. Since the sentencing statute lacks such guidance, the defense proceeded to provide jurors information to assist them.

Defense attorneys also took steps to reeducate jurors, providing an alternative interpretation of the key phrases within the dangerousness question:

Now, I want you to know that [the first special issue] has the word probability in there. I'm sure you, like everyone else here, has heard the weatherman, for example, say there's an X percent chance, probability of rain tomorrow, and then there's no rain. Now, I just want to make sure that that probability, this idea that the guy would commit criminal acts of violence in the future, that because it says a continuing threat to society. I want to make sure you understand that has to be proved to you beyond a reasonable doubt. Do you think that would be difficult to do? Do you see how difficult that would be? And so then on probability you could say that it's from possible, possibility, to certainty, right? Just a spectrum generally. Well to some individuals you may say, well you know what? Before I answer that special issue yes, I need a 99% probability and that would be ok because no one is going to define probability for you. You could say because the stakes are so high and the answer to those questions are going to amount to a life or a death sentence,

²⁷³ TX05L

you could tell yourself, I need a 99% probability and no one could say you're wrong. Do you understand that?²⁷⁴

The defense attorney challenges the interpretation of 'probability' given by the State by suggesting a higher burden to the juror. The State had suggested the term to mean 'more likely than not', but the defense is able to equip the juror with another valid interpretation – something closer to a certainty. As the following example taken from another trial demonstrates, defense attorneys in cases which resulted in a sentence of LWOP reminded jurors that they must require the state to prove the defendant's dangerousness beyond a reasonable doubt:

The reason for that is there is a burden of proof. The State has got to prove to you not just a little bit, not just with some evidence, not with just probable cause to believe it, not with just clear and convincing evidence to believe, not with a preponderance of the evidence to believe it, they've got to surmount the highest burden of proof that the law in the United States of America allows. And that is proof beyond a reasonable doubt. It is the highest burden imposed by law and they have to convince you with evidence that is so overwhelming in nature that it erases from your mind any reasonable doubt whatsoever that more probably than not, this guy is going to commit criminal acts of violence that will constitute a continuing threat to society. Now, they have that burden. So you have to presume that he's not going to be committing criminal acts of violence in the future unless they can show you evidence to the contrary.²⁷⁵

The defense is therefore able to suggest an entirely different understanding of the dangerousness issue by redefining each phase the prosecution has focused on. For instance:

The first question says, or inquires of the jury, is there a probability – and that is not just some fleeting chance or some mere possibility, but an absolute probability – that the defendant would do what? That he will commit criminal acts, and that doesn't mean just a single act – that means multiple acts and those have to be things that are violent. In our system of law, violent crimes are crimes that are assaultive against others, crimes that use weapons, crimes that cause people death or serious bodily injury. A continuing, which means an ongoing, threat to society. Not an isolated, one-time threat, but it doesn't stop. So, [the prosecutor] mentioned this, we have to look at the penitentiary. What's he going to do there? And first off, got to think, is the penitentiary such that they cannot contain violent people? This person has to be so

²⁷⁴ TX06L

²⁷⁵ TX05L

incurrable that if they go to the penitentiary they will commit criminal acts of violence, I guess against other inmates, other guards, other staff, other everything, and it's got to be such the penitentiary can't deal with it. The person must be so incurrable that you believe beyond a reasonable doubt that he is going to constitute a continuing threat in the penitentiary in order to answer that yes.²⁷⁶

As with the previous example, the defense attorney in this case redefines the key phrases of the first special issue question, offering an alternative framework through which the juror can view the evidence. This attorney proposes a standard for the juror to consider – that a person must be so violent that prison officials are unable to deal with him.

Defense attorneys in cases which resulted in a sentence of LWOP similarly reframed the mitigation instruction emphasizing that jurors must consider the mitigation presented:

Now, when you're at that [last] special issue – the law says that you must consider mitigating factors. So, whether it be mental retardation, whether it be diminished capacity, mental capacity. Whether it would be poverty, substance abuse of that individual, whatever, it might be of that individual, that is presented in court, the law says you must consider those mitigating factors.²⁷⁷

The same defense attorney continued:

But there's sometimes we disagree as lawyers just on words and things. For example, the State has told you that a factor if someone may see it as mitigating, someone may see it as aggravating, and someone may see it as irrelevant. Well, the way the rules of evidence work, if you've heard it, it's relevant because you're only supposed to get relevant evidence in a case.²⁷⁸

In this trial the prosecutor had educated jurors to view defense offered mitigation as irrelevant to their sentencing decision. Noting this, the defense speaks directly to that interpretation, reminding each juror that they cannot dismiss defense offered

²⁷⁶ TX08L

²⁷⁷ TX06L

²⁷⁸ TX06L

mitigation evidence as irrelevant to their decision as anything presented during the trial is by nature germane to sentencing.

Finally, defense attorneys in cases which resulted in a sentence of LWOP inquired about jurors' genuine ability to consider mitigating factors when determining the defendant's sentence:

Q: Would you – if you convicted him of capital murder, would there be a situation where you would look at evidence, for example, just hypothetically, they talked about, you know, oh you may find he's an Eagle Scout, never been in trouble, all this is is an aberration. I'm asking you, would it be – would you consider things like that in making those determinations? Like what they asked you? I think you said you would when they asked you.

A: I would consider all of the information that was provided to me, yes.

Q: And would you consider it all, his family background, for example?

A: I would consider anything that was provided to me.

Q: Okay. When you use the word "consider" I could say, ma'am I want you to consider lighting the podium on fire and turning circles three times.

A: I would consider that and I would say, no that's against the law and I would get in a lot of trouble and I won't do it.

Q: Precisely. That's precisely the point. So when you say you can consider you can consider almost anything. But the law requires more than just having things flow in one ear and out the other, you have to give meaningful consideration of it, and it has to be able to move you. Does any of that stuff move you?²⁷⁹

This line of questioning allowed the defense to clarify not only the concept of mitigation, but also the juror's role in determining the defendant's sentence. Through this exchange the attorney explained that he was not simply asking the juror to sit quietly throughout the testimony, observe the defense witnesses, and then dismiss the

²⁷⁹ TX05L

evidence, but rather stressed that the juror must honestly be open to being persuaded by such evidence.²⁸⁰

(b) Frontloading mitigation

Due to the bifurcated structure of the capital trial into guilt and punishment phases, jurors in capital cases do not usually hear potentially mitigating evidence about the defendant until after they have already found him guilty of capital murder.²⁸¹ As previously stated, earlier research shows that many jurors are unable to contextualize the crime in relation to the defendant's life story once they have found her guilty.²⁸² Data from this current sample show that 39% of jurors had made their sentencing decision before any punishment phase evidence had been presented.²⁸³ Of the 39% of jurors who had reached a premature punishment decision, nearly two-thirds (61%) had already concluded that the defendant deserved a death sentence.

If jurors are to give consideration to mitigation as the law requires them to do, it appears vital that personal mitigation be introduced to jurors as early as possible. Indeed, capital defense teams are routinely encouraged to incorporate mitigation themes into their guilt case.²⁸⁴ Even when such information cannot be introduced in the guilt phase, however, defense attorneys are still able to question jurors about mitigation evidence in voir dire. This strategy serves a dual purpose – it allows the

²⁸⁰ See Matthew Rubenstein, 'Overview of the Colorado Method of Jury Selection' [November 2010] *The Champion* 18

²⁸¹ See Jesse Cheng, 'Frontloading Mitigation: The "Legal" and "Human" in Death Penalty Defense' (2010) 35 *Law and Social Inquiry* 39, 47

²⁸² William Bowers and Wanda Foglia, 'Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing' (2003) 51 *Criminal Law Bulletin* 51, 57 Table 1

²⁸³ Jurors were asked the following question: 'After the jury found the defendant guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think the defendant should be given: a death sentence, a life sentence, or were you undecided?' Thirty-nine percent of participating jurors in this study determined the defendant should be sentenced to death or life prior to entering the penalty phase.

²⁸⁴ Jesse Cheng, 'Frontloading Mitigation: The "Legal" and "Human" in Death Penalty Defense' (2010) 35 *Law and Social Inquiry* 39, 41

defense to ‘life-qualify’²⁸⁵ the juror, and simultaneously educates the juror about relevant mitigating factors that are unrelated to the crime.

Defense attorneys in cases which resulted in a sentence of LWOP described mitigation evidence the juror would learn about during the trial. For example, one defense attorney spoke of the defendant’s low intellectual functioning and referenced good deeds he conducted for his grandmother:

And so to you it may be that the guy’s not very smart. It could be that he helped his grandmother. It could be anything. What it is to you.²⁸⁶

In this case the defense witnesses at the punishment phase included the defendant’s grandmother who testified about his life as a young child. The defendant had limitations in intellectual functioning and thus, the defense presented evidence that the defendant was a person with mental retardation. As such, the defense also questioned jurors about their perception of individuals with developmental disabilities:

Q: Now, let me ask you, we talked some about mental retardation. When you hear that phrase, what do you think?

A: I guess it – to me it seems someone’s just a little below average that was figured out by some smart people who said, okay, this is – this is where the person should be in their cognitive and just general thinking and processing, and they’ve been determined to be below the lower end of that range.

Q: I just wanted to make sure, because sometimes people think that someone’s mentally retarded only if they have like Down’s Syndrome or Mongoloidism or something like that. So you understand it can include people that look normal?²⁸⁷

²⁸⁵ Jurors who are life qualified are able to consider mitigation evidence in determining a defendant’s sentence. John Blume, Sheri Lynn Johnson and Brian Threlkeld, ‘Probing “Life Qualification” Through Expanded Voir Dire’ (2001) 29 Hofstra Law Review 1209, 1211

²⁸⁶ TX06L

²⁸⁷ TX06L

Jurors often hold misconceptions about individuals with mental retardation.²⁸⁸ This exchange illustrates how defense attorneys in cases which resulted in a sentence of LWOP utilized open-ended questions to assist in unpacking juror beliefs about difficult topics. Such a dialogue allows the attorney and juror to discuss what preconceived notions the juror may have about relevant mitigation.

In one trial the defense mitigation strategy relied heavily on evidence of the defendant's positive character. The defendant had worked very hard to provide for his wife and daughters. He was also a man of faith who had been raised in a Catholic family, fell away from religion, and became religious again while awaiting trial. The defense first introduced these themes during jury selection:

It might also be character – that they are a hard worker; that they're a loved father or husband; that they have a sincere faith. Anything about their character and background. The Court will instruct you that mitigation is whatever you say it is. Yes, it's based on what you learn from the witness stand, evidence that's presented, but evidence could be simply for one juror that they see a spark of humanity in someone. It could be simply that person's positive character traits.²⁸⁹

In the above instance, the defense chose to draw the juror's attention to the positive mitigation that would be presented. Although the defense also questioned the juror about her ability to be receptive to potentially double-edged evidence, such as a traumatic brain injury or the defendant's substance abuse, the introduction of purely positive characteristics as relevant mitigating evidence helps convey the expansive nature of relevant mitigating evidence. Specifically, such questioning demonstrates to the juror that relevant mitigating evidence is not limited by statute and need not be related to the crime.

²⁸⁸ Marcus Boccaccini and others, 'Jury Pool Members' Beliefs About the Relation Between Potential Impairments in Functioning and Mental Retardation: Implications for *Atkins*-Type Cases' (2010) 34 *Law and Psychology Review* 1

²⁸⁹ TX05L

(c) Rehabilitating life-leaning jurors

Given the emphasis placed on jurors' ability to sentence a defendant to death, those who are open to considering LWOP may mistakenly believe their views prevent them from being qualified to serve. When jurors indicate openness or partiality towards mitigation evidence, attorneys for the State will typically cease educating the juror and instead begin attempting to have them removed.²⁹⁰ In LWOP cases, after the prosecutor's challenge for cause,²⁹¹ defense attorneys mounted successful attempts to confirm jurors' ability to be fair and impartial despite their inclination to be moved by mitigating circumstances.

For instance, a juror in one case expressed concerns that his religious views made him lean towards a life sentence. The prosecutor promptly ceased educating the juror and instead restated his views in an effort to form a successful challenge for cause. Throughout his questioning the prosecutor rephrased the juror's comments to suggest that he would create mitigating factors outside the evidence in order to be able to impose a life sentence, and then challenged him for cause. The defense rehabilitated the juror:

Now what I thought I heard you say, and you can correct me if I'm wrong, is you said, well if there was anything, I would probably find that sufficient mitigating circumstances. What I am asking you is, like you wouldn't invent something. Like you wouldn't say "Well, I'm going to pretend like someone came in and testified that he was a good son to his mom then I'm going to find sufficient mitigating circumstances". Or you're going to invent evidence that he was a choir boy or that he helped his grandmother. But you would – what you're saying is you're inclined to find mitigating factors, which is okay. Because no one can tell you, not her, not me, no one can tell you what is sufficient mitigation. That's for you to know only. You know to one juror it could be, well he was a choirboy and that's sufficient for me not to impose the death penalty. Or maybe he was good to his mom. Or maybe you find that he

²⁹⁰ Defense attorneys in cases which resulted in sentence of LWOP also switched the tenor of their questioning when they identified a juror who appeared to be unable to consider mitigating evidence in determining the defendant's sentence. However, defense attorneys in cases which resulted in a death sentence did not and were therefore more likely to agree to allow a potential juror to serve on the case who could not actually consider relevant mitigation evidence when considering the defendant's punishment.

²⁹¹ See TEX. CODE CRIM. PROC. ANN. art. 35.15 (West 1991)

helped mentally retarded kids, whatever, but it was in evidence. And so the question is – let’s say there is a case that there is nothing at all. You’re not telling us that you would invent stuff? And so if there was none, imagine Bin Laden or Hitler. There is not mitigation. The true answer based on the evidence is that you do not find any and therefore the guy will get death. That’s the honest answer. That’s what the evidence showed you.²⁹²

The defense attorney emphasizes that the juror’s view of mitigation evidence is not beyond what the law allows. Instead, the attorney identifies the actual legal issue raised by the State – whether the juror would base his decision on factors that exist outside the evidence presented. The defense attorney also took this opportunity to advance the mitigation that would be presented. Drawing on the themes which would be developed in the penalty phase, the attorney provides tangible examples of relevant mitigating evidence upon which the juror can base his sentencing decision. Finally, the defense attempts to contextualize the defendant’s alleged crime in relation to other individuals such as Osama Bin Laden. This technique situates the defendant’s crime in comparison to a notorious figure who many believe is responsible for a mass killing, and is therefore, almost certainly more deserving of a death sentence than the defendant on trial. By rehabilitating jurors in this way the defense provides the concepts and language jurors may need to justify their punishment decision to other members of the jury.

(d) Educating jurors about their rights

The severity of the decision capital jurors must often make, coupled with the stress they are likely to experience by the nature of their service, mean that punishment deliberations have the potential to be challenging and difficult.²⁹³ Indeed, some jurors may find themselves in an arduous position as a hold-out juror – a juror

²⁹² TX06L

²⁹³ Leigh Bienen, ‘Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials’ (1993) 68 *Indiana Law Journal* 1333

whose sentencing decision is at odds with the majority.²⁹⁴ In this situation, after weeks of emotional stress, a fatigued and beleaguered hold-out may give in to the pressure and cross-over to the majority decision, despite their personal belief to the contrary. Defense attorneys in cases which resulted in sentences of LWOP addressed this potential situation:

You send a note out to the judge. The judge will prepare a note to respond to you. She'll send back an instruction that has every bit as much power and authority as her previous instructions, and I don't have the exact words here, but what she essentially will say to members of the jury, thank you for your note, please continue your deliberations to try and reach a verdict if you can do so. There is no reason to think that some other jury will be more capable than you, but do not do violence to your conscience, will be the last sentence she will say. This means don't go change your mind just to change it. You can send a note right back out to her once you deliberate a little further, say, we tried again, Your Honor, haven't made any progress, don't reasonably anticipate we will, and that's just as appropriate as anything else the jury does. They are entitled to do that. And that is kind of what this fourth right is, right to be able to stand by your own opinion, and we hope that we realize no one has a right to tell people how or what to think.²⁹⁵

The defense uses this scenario to promote two arguments – every juror has a right to their own individualized opinion and a note can be sent out informing the judge of a deadlock. If a juror subsequently assumes the position of a hold-out such questioning provides instructions for how they can navigate the situation. Conversely, if a juror is in the majority, but not everyone agrees on the sentence, it is possible this exchange will help diffuse any additional pressure directed towards the hold-out. Thus, the defense aim to ensure that jurors will respect the rights of others and not try to intimidate any juror into changing their position.

In another trial the defense likened the sentencing decision to other personal moral decisions a person might make:

²⁹⁴ See Scott Sundby, 'War and Peace in the Jury Room: How Capital Juries Reach Unanimity' (2010) 62 Hastings Law Journal 103

²⁹⁵ TX08L

- Q: Were you aware that as a juror in a capital murder case, you also have rights and responsibilities? You have the right to return your individual verdict and have that respected. Did you know that?
- A: Actually I did, yes.
- Q: You have a responsibility to respect the verdict of the other eleven jurors.
- A: Yes.
- Q: And particularly because we're talking about someone's reasoned moral response, the other jurors may have a different take on the question as you do. So when you're back there deliberating, just as you have a right to have your reasoned moral judgment respected, all of the other eleven do as well. You understand that. And when we're talking about people's moral responses or reasoned moral judgments, it would be really way out of bounds to try to talk somebody out of their moral judgment, wouldn't it?
- A: Yes.
- Q: For instance, I mean, this is a pretty serious decision. Can you think of another decision as serious as this one?
- A: No, I can't.
- Q: In your personal life when you make moral decisions such as who to marry, where to go to school, where to send your kids to school, that's a decision that is very personal to you, isn't it?
- A: Yes, it is.
- Q: One of those decisions that different people come up with different answers, don't they?
- A: Yes, they do.
- Q: And each of their answers are right for them, although they may not be right for you.
- A: Uh-huh.
- Q: So, it would be way out of line to try to argue with someone, "You're marrying the wrong person, you're going to the wrong school." You wouldn't do that, would you?
- A: No.

Q: And, similarly, you wouldn't try to tell someone that they're exercising their moral judgment, that they're making the wrong judgment?²⁹⁶

Providing an analogous decision-making construct enables the juror to view the punishment decision – specifically the mitigation instruction – not as a factual determination, but as a moral determination. The defense is therefore able to describe how there is not necessarily a correct answer to the question. This approach helps to clarify that the decision to sentence a defendant to death is never automatic and thus, never required.

5. Conclusion

Jury selection can be seen as possibly the most critical aspect of the trial. It not only presents both the State and the defense with the opportunity to empanel a fair and impartial jury, but it also offers each side the chance to educate potential jurors concerning the facts of the case from their unique perspective. As outlined above, the similarity between the examples typically used by judges and prosecutors aligns the State's interpretation of the issues with the judge's, thereby validating it to the jurors who are likely to see the judge as the fairest and most impartial figure in the proceeding. Although the defense can still present an alternative understanding of the special issue questions, the accord between the interpretations given by the judge and the State is a significant hurdle to overcome. Indeed, as the data from jury selection in cases which resulted in sentences of LWOP illustrate, defense attorneys must provide jurors with substantial guidance in understanding how to give effect to the mitigation evidence presented.

Because the language of the special issue questions does not provide any meaningful statutory guidance regarding the purpose of mitigation evidence, jurors are easily led in the direction of a death sentence before any guilt or penalty phase

²⁹⁶ TX05L

evidence is presented. Thus, the defense must work exceptionally hard to combat the inherent advantages provided to the State by the use of the special issue questions. Once jurors have gone through voir dire they are aware of what to look for in anticipation of answering the special issue questions. Due to the focus on the defendant's future dangerousness, jurors are likely to evaluate all the evidence they are presented through that lens.

Having considered the evidence through the framework of dangerousness in anticipation of answering the first special issue question, jurors are then likely to find it difficult to shift their thinking away from the crime and the defendant's dangerousness to the issue of mitigation. Further complicating jurors' ability to properly consider mitigation is the mitigation question itself. The question directs jurors who have convicted a capital defendant of murder and found him to be dangerous in the future to consider the circumstances of the offense, the defendant's background, and personal moral culpability in deciding whether sufficient mitigating factors exist. As I demonstrate in later chapters, jurors commonly interpret the second question as only permitting consideration of mitigating factors related to the crime. Thus, for those jurors who view defendants as unquestionably guilty, the mitigating instruction is unlikely to enable the consideration of personal mitigating factors.

Chapter V. The Guilt Phase: An Inherent Focus on the Defendant's Dangerousness

Having been exposed to the statutory scheme during voir dire, jurors are aware that if they convict the defendant of capital murder the trial will enter a penalty phase.²⁹⁷ Since the special issue questions place the defendant's dangerousness at the heart of that decision it is reasonable for jurors to think about how the evidence presented in the guilt phase may indicate the defendant's dangerousness. Unlike the defense's case in mitigation, which cannot typically begin until the start of the punishment phase,²⁹⁸ the State can begin to prove the defendant's dangerousness immediately as evidence used to prove the defendant's guilt is also fundamentally aggravating with respect to punishment. In determining guilt, jurors sit for several days or weeks watching a procession of witnesses and evidence which confirm the heinousness of the crime, the pain and suffering of innocent family members, and subsequently, the guilt of the defendant. As discussed in this chapter, with the seeds of dangerousness having been planted in their minds jurors will tend to view the guilt phase evidence through that framework. Indeed, the evidence jurors are presented during the guilt phase works in tandem with the concept of dangerousness to engender fear in jurors. Thus, evidence of the crime will inevitably be viewed as supporting the defendant's guilt and dangerousness simultaneously.

As mentioned, the defense's case in mitigation is not able to commence as quickly. Due to the bifurcation of capital trials into two phases – a reform to the capital process brought about to ensure the guilt and punishment decisions would be made separately – the defense is legally unable to present evidence regarding the

²⁹⁷ Ninety-eight percent of jurors stated that as the trial was about to begin they were aware that the jury would decide what the punishment should be if it found the defendant guilty of capital murder.

²⁹⁸ *But see*, Jesse Cheng, 'Frontloading Mitigation: The "Legal" and "Human" in Death Penalty Defense' (2010) 35 *Law and Social Inquiry* 39

defendant's background unless it is related to the question of guilt.²⁹⁹ In practice, this means that the defense will often not present a single witness during the guilt phase, leaving the jury to focus entirely on the State's case. With the special issue questions immediately framing the evidence presented in terms of the defendant's dangerousness, this structural limitation serves to further disadvantage the defense. The State is therefore able to put forward evidence in the guilt phase which will influence the jury's consideration of the special issue questions long before the punishment phase commences, and often absent any counter argument from the defense.

Given that guilt phase evidence works in tandem with the concept of dangerousness, this chapter presents data that demonstrate how jurors sense the connection between guilt phase evidence and its ability to prove the defendant's dangerousness. Owing to that connection, jurors often begin discussing evidence related to the defendant's possible dangerousness during guilt deliberations. Such focus on a single aspect of the defendant's character serves to push jurors who are undecided about the defendant's guilt toward conviction while also determining – prior to the punishment phase – the defendant's sentence.

1. The State's Case Always Supports Dangerousness

It is the job of the State to offer evidence which persuades the jury that the capital murder occurred and that the defendant is responsible. As such, the evidence presented in the guilt phase regularly includes testimony from law enforcement (e.g. first responders, homicide detectives), testimony from crime scene experts (concerning subjects such as the murder weapon, blood-spatter evidence, ballistics tests), testimony from medical examiners, eye-witness testimony, DNA evidence,

²⁹⁹ TEX. CODE CRIM. PROC. ANN. art. 38.36 (West 2003)

fingerprint analysis, testimony of co-defendants, testimony by other inmates in jail who the defendant may have confessed to, crime scene and autopsy photos, family member testimony concerning the victim and video or audio taped interrogations of the defendant.³⁰⁰ Although the State must provide such evidence of the crime in order to establish the defendant's guilt, such evidence is also paramount in persuading the jury to view the defendant as dangerous. Jurors understandably have an immediate emotional response to much of the guilt phase evidence. It is the first time they will hear details of the murder, listen to witnesses and victims, and observe the person allegedly responsible for the commission of the capital crime. Though it is difficult to pinpoint exactly what kind of evidence is especially formative in jurors' overall assessment of the defendant as dangerous, I briefly discuss three areas which appear to create strong emotional reactions with respect to jurors' views of the defendant in the guilt phase – evidence about the victim and her family, evidence of the crime, and observations of the defendant.

(a) Victims and their families

In each of the eight cases in this study a victim's family member or loved one identified the victim, provided statements about their last contact with them, and/or gave testimony regarding their feelings on learning about the murder.³⁰¹ Such testimony often occurred during the first day of trial and immediately stirred jurors. For instance, one juror described how testimony by the victim's wife on the first day of trial moved several jurors to tears:

Yes, it was really hard to see the autopsy pictures and to listen to [the victim's family] was torture. There were tears some of them when [the victim's] wife

³⁰⁰ This list comprises the broad categories of evidence presented to the jury in the guilt phases of the eight cases in this study.

³⁰¹ Strictly speaking, victim impact testimony is not permitted in the guilt phase. Nevertheless, the testimony of family members at this stage is implicitly related to the punishment decision as jurors observe the pain and suffering of family members who testify during this stage.

talked about how she was called to the hospital and all that. I mean it was hard. Even some the guys were crying – I mean not like bawling, but tears running down their faces and sniffing. Yeah, it was tough – real hard. We started off that way the very first day.³⁰²

In another trial which resulted in a death sentence, moving evidence was given by the victim’s stepfather about discovering the victim lying in a pool of blood on the kitchen floor. Jurors recalled the emotional impact of his testimony during the guilt phase:

Most of the girls, we kind of had a hard time with [the stepfather’s testimony]. I think that there was even a couple of guys that walked out of there a little teary eyed. We had a bathroom right there and all three of us were sitting in our own stalls, well [another female juror] and I were sitting in our own stall just crying like little two year olds...I mean the mom was hard to watch but at least she, you know, was a little put together, but the dad, he was just crazy, it was like “Look what you did to my baby. I was supposed to be able to protect her and I couldn’t protect her against this.” I think that’s when they were asking questions like what did this do to your family and because the father was the one that came in the door and found her they had to put him up there.³⁰³

Although the relevance of the stepfather’s testimony in relation to the defendant’s guilt was in establishing a time-line of events, jurors recalled little of his testimony beyond the emotional impact of his presentation and his belief that the defendant had committed the crime. As the above juror described, aspects of the stepfather’s testimony noticeably departed from evidence strictly related to issues regarding the defendant’s guilt – specifically his comments about failing to protect his daughter. These types of comments, as well as the physical discomfort displayed by witnesses, are difficult for jurors to separate from what relevance their testimony may have in relation to the question of the defendant’s guilt. Such displays of raw emotion reveal the palpable suffering of the victim’s family at the outset of the trial and serve to distract jurors from evidence strictly related to an assessment of guilt.

³⁰² TX05L

³⁰³ TX03D

(b) Crime scene photos

In addition to testimony provided by victims' family and friends, each trial included the presentation of colored crime scene photographs as evidence. Jurors recalled the color pictures as 'vivid' and 'impactive.' One juror described how such photographic evidence helped the jury to understand the brutality of the crime – 'I think [seeing the crime scene photos] was crucial to see how they suffered. It was just brutal.'³⁰⁴ Though such evidence may be necessary to establish that the murder occurred, it also has the effect of inflaming jurors' emotions and shaping their view of the defendant as someone capable of acting in the most horrific ways. For example, in one trial the victims were shot at close range numerous times with an assault weapon which caused a great deal of damage to their bodies. One juror described the lasting impression of the photos:

Seeing all of that is tough. Those things don't disappear. Neither do the facts and graphics, they don't. They're there. They imprint on your mind. They imprint on you. You know seeing [the victims]... or the blood spatter all over the walls – remembering [one victim] crawling away on his forearm and being continually shot as I said, the pictures of [the other victim] with her breasts blown off and the exit wounds, those don't leave you.³⁰⁵

Research suggests that jurors respond more punitively in cases in which they have been exposed to violent images.³⁰⁶ Although it is not clear to what extent the introduction of such photographic evidence had on the eventual outcomes in these trials, such emotionally charged evidence does elicit powerful responses from jurors who, in turn, observe a defendant who jurors perceive to be unmoved by the same

³⁰⁴ TX02D

³⁰⁵ TX02D

³⁰⁶ Kevin Douglas, David Lyon and James Ogloff, 'The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?' (1997) 21 Law and Human Behavior 485; David Right and Jane Goodman-Delahunty, 'Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making' (2006) 30 Law and Human Behavior 183

graphic images. The defendant's perceived lack of response confirms, in their eyes, his guilt, remorselessness and lack of humanity:

[I was convinced of the defendant's guilt] after I saw – and it was testified to me – the brutality. The gruesome pictures, the smug look on his face afterwards, that told me he was guilty.³⁰⁷

Another juror from the same trial commented:

[The defendant] seemed to be real cocky. It was like he really thought he was some kind of stud and he was just kind of sitting there like “oh, I'm just going to get away with this” and it really wasn't all the time it was just a couple of times I caught him doing that and he'd get this smile on his face like “yeah, you guys got no clue how bad I really am” you know. It was just an impression, but he didn't seem remorseful.³⁰⁸

Jurors appeared to expect the defendant to respond in the same way as they did to the crime scene photos. When the defendant did not react in a way in which the jurors thought appropriate it confirmed his guilt and even, as the juror alluded to in the second quote, his satisfaction at having committed the crime. The jurors' personal response to the photographs, as well as their observations of the defendant's reactions to the evidence, is therefore significant to the guilt decision. After having viewed the photographs, jurors begin to form an opinion of the defendant as emotionless, inhuman, and dangerous at an early point in the trial.

(c) Observations of witnesses and the defendant

A number of jurors reported watching the defendant closely throughout the trial and were mindful of his non-verbal cues. Jurors often perceived a lack of response from the defendant which they considered as evidence of his guilt and dangerousness. For example, in one trial jurors perceived ‘fear’ in two eye-witnesses to the murder who testified in the guilt phase. This became a pivotal factor for determining the defendant's guilt:

³⁰⁷ TX02D

³⁰⁸ TX02D

The preponderance of the evidence, combined with the circumstance, combined with the real and honest fear, particularly of [one witness]. [The two eye-witnesses] were both very fearful, very afraid, not a little afraid, they were maximum afraid that this guy was going to kill them.³⁰⁹

The juror above credited the eye-witnesses' testimony because she believed each witness was fearful of the defendant. In fact, the juror expressly stated that she found the defendant guilty for two reasons – the brutality of the crime and the look on the defendant's face³¹⁰ – in particular, his ability to provoke fear in each witness by simply being present in the courtroom.

Jurors reported scrutinizing the defendant's body language and facial expressions closely throughout the trial, looking for any reaction. Despite such attentiveness, significant numbers of jurors believed that the defendant exhibited no emotion whatsoever during the course of the proceedings, indicating him to be cold, unfeeling and ultimately remorseless. As Table 5.1 below indicates, a high percentage of jurors strongly agreed with such characterizations of the defendant.

Table 5.1
Percentages of jurors' responses to the question: In your mind how well do the following words describe the defendant:

Prompt	Very Well	Fairly Well	Cumulative Percent
Dangerous to other people	52.2	39.1	91.3
Had no sense of regret	56.5	21.7	78.2
Showed no emotion	47.8	28.3	76.1
Cold as ice, hard as a stone	30.4	26.1	56.5
Someone who lacks a conscience ³¹¹	31.1	40	71.1

Previous research suggests that jurors are more likely to sentence a defendant to death if they think him to be emotionally uninvolved in the trial.³¹² Jurors in this study who

³⁰⁹ TX02D

³¹⁰ TX02D

³¹¹ This question has one missing case (n=45). Percentages listed are valid percentages.

³¹² Michael Antonio, 'Arbitrariness and the Death Penalty: How the Defendant's Appearance During Trial Influences Capital Juror's Punishment Decision' (2006) 24 Behavioral Sciences and the Law 215

decided that the defendant was emotionally distant during the trial were easily able to relate such a conclusion to the defendant's dangerousness. This provides yet another method the State can use to influence the jury's consideration of the special issue questions in the guilt phase before the punishment phase has commenced.

(d) A note about defense evidence in the guilt phase

The defense called witnesses to give evidence in the guilt phase in three of the eight cases included in this study. As with the evidence presented by the State, the defense's guilt phase evidence was germane to both the jury's guilt and punishment decisions. The introduction of such evidence was allowed because the defendants in two of the trials advanced arguments related to their mental state at the time of the crime.³¹³ Presenting defense witnesses in the guilt phase provided jurors a counter-narrative to the State's case.

For example, in one trial the defendant was accused of killing a police officer. The murder of a police officer in Texas is a death-eligible crime if the defendant knows that the individual is a peace officer.³¹⁴ The defense in this case argued that the defendant did not realize the victim was a peace officer, thus making the murder a non-capital offense. As the defense explained in their opening statements to the jury at the guilt phase, the defendant was on parole for having committed the crime of unauthorized use of a motor vehicle. Upon his release he returned to the town where he was raised and secured a job. He set about attempting to enforce an order for child visitation with his ex-wife. The defendant – previously addicted to drugs – had stopped using narcotics, was working, and taking active steps toward rebuilding his scattered life. However, several months after his release his efforts to enforce

³¹³ In the other case, a defense witness was called in an attempt to impeach one of the State's eye-witnesses. This witness provided testimony only about the veracity of the eye-witnesses' testimony and provided no information about the defendant.

³¹⁴ TEX. PENAL CODE ANN. §19.03(a)(1) (West 2005)

visitation with his son continued to be unsuccessful. Eager to resolve the matter the defendant filed for court action. A pivotal event took place after one court appearance when the defendant was driving home and his ex-wife's husband threatened him with a gun. In response to this event the defendant purchased a firearm – in violation of his parole – and began a rapid descent back into drugs. He became involved with members of a white supremacist group – who eventually attempt to murder him. Thus, the defendant was wary about his personal safety and worried that people were trying to kill him. The defendant's state of mind was critical in this case because the officer who was shot was not wearing a police uniform when he appeared at a trailer home where the defendant had been hiding.

The defense called a total of four witnesses during the guilt phase. Two of those witnesses spoke about the defendant's attempts to reinstate visitation with his son after being released from prison. The second witness, the defendant's sister, had accompanied him to the critical court hearing. During direct examination she spoke about the defendant's attempts to get his life in order:

Q: And did you have contact with him when he was released from the penitentiary?

A: Yes, sir.

Q: Where did he live?

A: He was living at my mother's.

Q: And he was working, correct?

A: Yes, sir.

Q: You are aware that he had a son; is that correct?

A: Yes, sir.

Q: And you were aware that [the defendant] initiated a lawsuit so he could get visitation with his son?

A: Yes, sir.

Q: That was shortly after he was released?

A: Yes, sir.

Q: Okay. And from February to June, did you have various kinds of contact with your brother?

A: Yes, sir.

Q: What was your opinion of how he was doing during that period of time?

A: He was doing well. He was, you know, trying to get his son so he could see him. He was acting right. He was working. He was doing good.

She then described the events of the car chase and her fear of the man who had pointed the gun at her brother:

Q: On June 13th of 2005, did you accompany your brother to a hearing?

A: Yes, sir.

Q: Why did you go with [the defendant] to the hearing?

A: Support.

Q: To support your brother?

A: To support my brother, uh-huh.

Q: Did something kind of unusual happen while you were driving home to your mother's from the courthouse?

A: Yes, sir.

Q: What happened?

A: [The defendant's ex-wife's husband] and [the defendant] were driving down – we were leaving the courthouse and got on the interstate. We were driving back to my mom's, and [the ex-wife's husband] and [the defendant] started acting crazy.

Q: What do you mean by "started acting crazy"?

A: In the cars, kind of chasing one another down the interstate, just speeding, you know, one behind the other, passing each other.

Q: Just kind of jacking with each other?

A: Yes, sir.

Q: What happened when y'all pulled off?

A: We pulled off and [the defendant's ex-wife and husband] pulled into Dairy Queen, and we pulled into the tire center right next door. [He] got out of the car and come around to the back of the car and started cussing at [the defendant] and proceeded to pull a handgun on him.

Q: How far were you and [the defendant] in your car from [the defendant's ex-wife and husband]?

A: From about me to you right now.

Q: And [he] got out with a handgun?

A: Yes, sir.

Q: What did he do with the handgun?

A: He pointed it at [the defendant].

Q: Did he scare you?

A: Yes, sir.

Q: Did it scare [the defendant]?

A: Yes, sir.

Q: What did y'all do?

A: We started walking back toward the car and called the police, called 9-1-1. And when we were on the phone is when [they] left, got in his car and left then.

Q: Do you remember if [he] yelled anything or said anything when he pointed that handgun?

A: Yes, sir, he did, but I don't remember the exact words.

Q: Okay. And did y'all call the police?

A: Yes, sir.

Q: And there was a police report made?

A: Yes, sir.³¹⁵

Through this testimony the defense was able to portray the defendant as a loved brother, struggling father, anxious potential victim, and someone who was fundamentally not malicious. In this vignette the defendant appears scared, possibly even weak, but certainly not fiendish, depraved, or wicked. Furthermore, the sister's testimony sets the stage for the final two defense witnesses, two crime scene experts, who testified that the bullet trajectories from the defendant's gun appeared random – meaning that the defendant didn't appear to be aiming at the victim, but rather fired excitedly. One expert described how the fatal bullet had actually ricocheted off the door frame, striking the victim in the head.

Through these guilt phase witnesses the defense was able to supply an alternate portrayal of the defendant to counter the likely inclination of jurors to view the defendant as dangerous. The defense were also able to offer an alternative explanation for the crime, which while not enough to persuade the jury to reach a verdict of not-guilty, certainly impacted their understanding of the events of the crime and of the defendant. Although the data are only suggestive, the two cases in which the defense called witnesses to testify in the guilt phase about the defendant and his mental state resulted in sentences of life without the opportunity for parole (LWOP). Thus, this is an important indication of the value in presenting defense evidence which is both relevant to the defendant's guilt and advances mitigation – both personal and crime related – in the guilt/innocence phase.

2. Guilt Deliberations

As Table 5.2 shows, an overwhelming majority of jurors entered the guilt deliberations having already decided the defendant was guilty (89%). Moreover, 80%

³¹⁵ TX08L

of jurors had concluded that he was guilty of capital murder. Thus, very few jurors entered deliberations undecided (11%) or believing the defendant to be not guilty of capital murder (4%).

Table 5.2

Jurors' responses to the question: after hearing the judge's instructions to the jury, but before you began deliberating with the other jurors, did you then think that the defendant was...

Juror Response	Frequency	Percent	Cumulative percent
Guilty of capital murder	37	80.4	80.4
Guilty but not of capital murder	2	4.3	84.7
Not guilty	2	4.3	89.0
Undecided	5	11.0	100.0
Total	46	100.0	100.0

One jury began deliberations by discussing the evidence presented during the guilt phase eventually reaching a consensus about the final verdict. However, in the seven remaining trials juries began deliberations with an initial vote³¹⁶ in order to gauge individual opinions about the defendant's guilt. As one juror described:

I think we first of all went around the table and everybody talked about how they felt about [the defendant's guilt] and whether or not they had made a decision, if you were still unsure. If you were sure what you were leaning towards. Each person made a comment and they discussed it while it was their turn. They discussed any and everything they wanted to.³¹⁷

Jurors in each case reported that at least one member of the jury was either 'undecided' or not quite convinced of the defendant's guilt at the beginning of deliberations. The data indicate that jurors who were in the majority helped focus the discussion on factors which would persuade those who were undecided. Since each

³¹⁶ Juries who conducted initial votes did so in one of three ways. Some juries conducted formal votes – either by secret ballot or a show of hands. Other juries went around the room, allowing each person to explain their position on guilt. While the second, less formal method did not ask jurors to take a firm position on the defendant's guilt immediately, jurors inevitably expressed their opinion providing a de facto vote. The single case which did not take a vote began deliberation with a review of evidence and discussion of the standard of proof for guilt. Each method is consistent with previous research which has classified deliberations in two categories – verdict-driven or evidence-driven. Verdict-driven deliberations begin with a public ballot, are guided by verdict positions of individual jurors, and engage in frequent polling. Evidence-driven deliberations are categorized by public balloting late in deliberations. Jurors in evidence-driven deliberations are not closely associated to a specific verdict. See Reid Hastie, Steven Penrod, and Nancy Pennington, *Inside the Jury* (Harvard University Press 1983) 163-165

³¹⁷ TX02D

trial involved a majority of jurors who believed the defendant to be guilty, this always included an extended review of the crime scene photos. As one juror explained:

We actually put [the crime scene photos] up on a board. First of all we started a list of things we had questions about and tried to eliminate them and or go through them... We looked at [the male victim] and how he fell and moved forward and I think that is when I discovered his hand prints in blood where he actually tried to crawl away and we don't know that he ever said anything but it appeared he was begging...³¹⁸

The deliberations therefore provided a chance for juries to retrace the State's case concerning aggravating factors in some detail. Jurors often inferred specifics from the evidence about what the victim may have experienced in their final moments, as the quotation above illustrates. Although it is expected that jurors will and should discuss issues such as the defendant's motive, responsibility for the killing, the role of an accomplice, the strength of witness testimony, the judge's instructions to the jury, and whether jurors agree on the meaning of the standard of proof, much of jurors' deliberations also focused on topics outside of the defendant's guilt, such as the defendant's dangerousness, the brutality of the murder, the defendant's appearance in court, and the suffering of the victim (see Appendix A for a complete list of juror responses to topics discussed during guilt deliberations).

The emphasis placed by other jurors on the defendant's dangerousness when deliberating on his guilt proved to be especially moving to jurors who were undecided. As one initially undecided juror described:

Q: You said that there were roughly eight people who felt like he was guilty and they really didn't have any questions. So, I want to know how they explained to you and the other folks who were still needing a little bit of clarification on stuff – what did they say? What were their arguments to you?

A: They were saying, o.k., look at the pictures. Look at the brutality of the pictures. The gruesomeness down the line. The fact that he had an assault weapon and one [victim] did not have a weapon – one did have

³¹⁸ TX02D

a weapon. His demeanor. Gosh – there were so many questions – but they were proving them – proving them by what they were bringing up.³¹⁹

Another juror from the same trial commented:

The crime scene photos were asked for to kind of reinforce the fact that it wasn't about this one person [the defendant]. It was about these two other people. That in my mind was the reason that we asked for those pictures to be brought back in. They were horrible and nobody wanted to look at them, but it's like, we've got to look to remember that these people had lives. They were moving on and becoming good members of society. They weren't perfect – like none of us are, but they didn't deserve this bloodbath and it was a bloodbath.³²⁰

This juror's observations are evocative of comments more often made by jurors when describing the penalty phase – not the guilt phase. Rather, this juror seems to ignore the intention of the guilt phase, which concerns the defendant's actions and whether he is legally responsible for the crime for which he stands accused. Instead, this juror is so moved by the graphic pictures that she focuses on holding someone responsible for the terrible crime, rather than making an individual determination regarding the defendant's guilt.

Given the tenor of guilt deliberations it is not surprising that high numbers of jurors reported discussing whether the defendant would be dangerous and what punishment they thought he deserved. Although the jury is directed by the judge not to discuss the potential punishment during the guilt phase, nearly two-thirds of jurors (65%) reported some premature discussion of the defendant's punishment, while the same percentage also reported discussing the defendant's dangerousness. As one juror explained:

³¹⁹ TX02D

³²⁰ TX02D

Well, we knew though that those questions, if we made a decision, how we had to answer those or what we would have to think about so it did kind of come into part of our decision.³²¹

Indeed, half of the jurors indicated that during the guilt deliberations they even discussed whether the defendant would ever be executed. Finally, almost a quarter of jurors (22%) reported some discussion about how soon the defendant would get out of prison if he was not given a sentence of death. This final topic is especially interesting given that all cases included in this study were tried after LWOP became the sentencing alternative to death. As discussed in later chapters, some jurors were skeptical of the guarantee given by a sentence of LWOP. They believed that the defendant could escape, would be released on some unforeseeable technicality, or could be set free after a legislative change in the future. This concern tended to be framed by jurors' belief that the defendant was dangerous, and is yet another way in which this concept appeared to influence both jurors' guilt and punishment decisions.

Regardless of whether jurors openly discussed the appropriate punishment for the defendant, their accounts indicate that much of deliberations were spent discussing evidence and testimony presented during the guilt phase of the trial which stirred their emotions. These discussions tended to center on the jurors' feelings about the victim, the victim's family, their observations of the defendant, and their feelings towards him. Nearly all the jurors (93.5%) reported discussing the brutal or vile manner of the killing, while 91% reported some discussion about the suffering of the victim. An overwhelming majority of jurors (78%) discussed their feelings for the family of the victim, while 74% discussed their feelings toward the defendant. Finally, 87% of jurors reported some discussion of the defendant's appearance or manner in court

³²¹ TX02D

during the guilt deliberations. For instance, one juror commented, ‘We discussed that he never blinked. He never showed any sign of remorse’.³²²

These conversations appeared to shape jurors’ views about the defendant’s character, helping to create a picture of the defendant as dangerous and in some cases, as evil. Thus, even juries who did not discuss the defendant’s sentence explicitly were in essence deliberating upon the answer to the first special issue question regarding the defendant’s dangerousness before any punishment phase evidence had been presented. In fact, many jurors did not recall a difference between the future dangerousness question and the mitigation question, indicating that discussions which implied that the defendant was dangerous in turn served to shape jurors’ understanding of the defendant’s character and background. Jurors who both believed the defendant to be dangerous and did not distinguish between the dangerousness and mitigation issues were therefore able to determine an answer to both questions prior to the presentation of any penalty phase evidence.

Of particular importance were those occasions when jurors were uncertain about the defendant’s guilt. In those instances candid jury discussions focused not on delivering a not-guilty verdict, but on the appropriate punishment.³²³ As Table 5.3 shows, 15% of the jurors in this study reported that at least one member of their jury said they would join the majority’s vote to convict the defendant of capital murder,

³²² TX03D

³²³ Jurors in this situation did not necessarily believe that the defendant was factually innocent, but rather some jurors did not think the offense should have been eligible for capital punishment. For instance, in one case the jury believed the defendant was present during a burglary-homicide. However, no evidence was presented to confirm the defendant was the triggerman. While the jury was convinced the defendant had participated in the burglary they were not sure he was responsible for the murder and thus did not want to find him guilty of the capital crime. In only one trial was the issue of the defendant’s factual innocence raised during guilt deliberations. One member of the jury was not convinced the defendant had committed the double murder for which he was accused. That jury eventually sentenced the defendant to death.

but would refuse to impose a sentence of death due to doubts about his guilt.³²⁴

Clearly, doubts about the defendant's guilt should not result in a lighter sentence, but rather in the acquittal of the defendant for the capital offense. When jurors decide to convict a defendant of a capital crime despite some misgivings, it necessarily calls into question the validity of the conviction.

Table 5.3

Jurors' response to the question: Did any members of the jury say they would vote guilty of capital murder but would not vote for the death penalty?

Juror Response	Frequency	Percent	Cumulative percent
No	39	84.8	84.8
Yes	7	15.2	100.0
Total	46	100.0	

Jurors who negotiated the defendant's sentence during guilt deliberations used either the special issue question related to a defendant's participation in the capital murder as a party to the crime³²⁵ or the mitigation special issue question as the statutory mechanism for expressing residual doubt about the defendant's responsibility.³²⁶ In three of the four cases which resulted in sentences of LWOP members of the jury used evidence related to the crime (e.g. the defendant was not necessarily the person who shot the victim, the victim's actions were partly to blame for the capital crime, or the defendant didn't necessarily mean to kill the victim) as the reason to spare the defendant's life. Jurors who were leaning towards a life sentence often cited such

³²⁴ The seven jurors who reported a member of the jury saying that they would vote guilty of capital murder, but would not vote for the death penalty originated from five separate trials. Three of those trials resulted in sentence of LWOP while two resulted in sentences of death. See Scott Sundby, 'The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty' (1998) 83 Cornell Law Review 1557 (noting that residual doubt is a strong mitigating factor in cases with multiple defendants and circumstantial evidence)

³²⁵ TEX. CODE CRIM. PROC. ANN. art. 37.071 Sec. 2(a)(2) (West 2009). In cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under sections 7.01 and 7.02 of the Texas Penal Code, the jury will be instructed to answer the following special issue question; 'whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.' This special issue follows the dangerousness special issue question and precedes the mitigation special issue question.

³²⁶ See Scott Sundby, 'The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty' (1998) 83 Cornell Law Review 1557; Stephen Garvey, 'Aggravation and Mitigation: What Do Jurors Think?' (1998) 98 Columbia Law Review 1538

guilt related issues as the reason they believed that the defendant should be given a life sentence.

3. Premature Punishment Decisions

Having gone through guilt deliberations that often focus on the defendant’s dangerousness, it is not surprising that nearly a quarter of jurors reported having determined the defendant’s punishment in favor of a death sentence prior to the commencement of the punishment phase. Table 5.4 shows that 24% of jurors in this study had decided that the defendant should be sentenced to death and 15% had decided he deserved LWOP before the presentation of any punishment phase testimony. Though legally required not to determine the defendant’s penalty before the punishment phase starts, only 61% of jurors reported being undecided at the beginning of the penalty phase.

Table 5.4
Jurors’ punishment decision after the guilt decision but before the juror heard punishment testimony:

Juror Response	Frequency	Percent	Cumulative percent
Death	11	23.9	23.9
Life	7	15.2	39.1
Undecided	28	60.9	100.0
Total	46	100.0	

Perceptions about the defendant’s dangerousness were central to jurors’ premature determination of a death sentence. The following juror explained why they felt the defendant should be sentenced to death before hearing any punishment phase evidence:

Because he was just brutal. He didn’t show any remorse. He just seemed like he didn’t value anyone else’s life and I just felt that if he were to be let out he’d kill again, he’d kill someone else. He just point blank shot, you know, several times and you could see where [the male victim] was dragging himself to get away from [the defendant] and [the defendant] just kept shooting him and the girl too in the car. I mean he just point blank at close range just shot her and it wasn’t like he just shot them once or twice and ran. He shot them,

what, twenty – seventeen times? I can't see anybody just doing something like that.³²⁷

As the foreman of a different jury who sentenced the defendant to death stated:

I'll be quite frank with you. After the first day [of the culpability phase] just those pictures and the attitude of this guy – he could have spared his own life if he shed a tear. I was absolutely convinced that he should be sentenced to death after the first day of testimony because, this is my own personal feeling, because of his lack of emotion, his lack of sorrow I guess, and the nature of the crime. The pictures; they spoke a million words. They were just horrendous.³²⁸

Jurors who decided that the defendant should receive a death sentence were clearly unable to understand how the defendant could do what they believed he did. In other words, the chasm between the defendant and the juror is significant and will continue to widen in the punishment phase as the State presents additional aggravating evidence even as the defense puts forward mitigation. This chasm is referred to by Haney as an 'empathic divide', which can be understood as:

...the cognitive and emotional distance between [jurors and the defendant] that makes genuine understanding and insight into the role of social history and context in shaping a capital defendant's life course so difficult to acquire. The recognition of basic human commonality – an opportunity for capital jurors to connect themselves to the defendant through familiar experiences, common moral dilemmas, and recognizable human tragedies – is the starting point for compassionate justice. But the empathic divide stands in the way of that kind of understanding. Its roots are deep but not difficult to trace. Precisely because the harm for which the defendant has been held responsible is so great, and the typical capital defendant is perceived by jurors as truly different from themselves (made so by his behavior if nothing else), there is always a gap in understanding that must be overcome.³²⁹

For these jurors, and many of those who reported being undecided at this point, the mitigation presented in the next part of the trial will do little to bridge this gap. The momentum towards a sentence of death will only become stronger as jurors are presented defense mitigation evidence and reminded of the methods they were taught

³²⁷ TX02D

³²⁸ TX02D

³²⁹ Craig Haney, 'Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide' (2004) 53 DePaul Law Review 1557

by the State for converting it into aggravating evidence or dismissing it entirely from their sentencing decision.

Jurors who made a premature decision to sentence the defendant to LWOP also engaged in discussions about the defendant's dangerousness, but determined an early decision to sentence him to death due to factors related to the commission of the crime. Specifically, a number of early deciders for a sentence of LWOP had reached that decision in order to go along with the majority verdict at guilt. As the following juror expressed:

I gave in that he was guilty because of the way the law's written, but I will not give in that he will have the death penalty. Even if he's dead in there. I'm not going to be responsible for actually knowing that he got the death penalty.³³⁰

Other premature deciders for a sentence of LWOP did not actually determine the sentence early, but rather maintained a clearer understanding of the standard of proof required for a defendant to be sentenced to death:

I went into [the penalty phase] expecting a life sentence. [The State] had to prove beyond a reasonable [doubt] – you had to answer all those other questions so you err on the side of life until you answer those questions – so to me a reasonable person you feel like life is expected basically and then then you seek the death penalty or imagine the death penalty.³³¹

Thus, for jurors like the one quoted above, they did not determine the defendant's sentence in advance of the punishment phase, but rather entered the next part of the trial prepared to hold the State to the correct standard of proof before deciding whether a death sentence was appropriate.

4. Conclusion

Jurors in Texas are told before any evidence is presented to anticipate a time when they will need to determine whether the defendant is a danger to society. Given

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³³¹ TX05L

that dangerousness is clearly the focus of the sentencing statute, and is a theme which can easily be advanced by the State's guilt phase evidence, it is unsurprising that jurors appear to be preoccupied with this concept. Dangerousness appears to color how jurors interpret the evidence advanced in support of the defendant's guilt and is a central focus, both explicitly and implicitly, of jurors during their guilt deliberations.

By providing jurors with the concept of dangerousness as the central focus for their sentencing decision, dangerousness permeates how jurors perceive the defendant. As jurors learn more about the defendant and his life, the evidence presented in the penalty phase tends to supplement the narrative of dangerousness that many jurors have created, making it easy for them to view mitigation evidence as providing further reason for why the defendant's life should not be spared. The data indicate that an overwhelming number of jurors make their decision concerning the defendant's guilt and punishment before any penalty phase evidence is presented. Thus, the statutory focus on the defendant's dangerousness proves to be instrumental in facilitating premature decision-making.

Chapter VI. Mitigation Evidence Presented in the Punishment Phase

1. Introduction

While evidence presented in the guilt phase is supposed to be limited to matters which pertain directly to a defendant's guilt or innocence, the scope of evidence allowed in the punishment phase is much more expansive. Similar to other states which retain capital punishment as a penalty for certain crimes, during the capital sentencing phase in Texas both the prosecution and the defense are able to present any evidence which the judge deems relevant to the issue of sentencing.³³² As discussed in Chapter 1, the United States Supreme Court has held that such relevant mitigating information cannot be limited to the circumstances of the crime, and can include evidence of the defendant's age³³³ or mental impairments³³⁴ as well as evidence regarding factors such as the defendant's positive adjustment to incarceration³³⁵ and evidence of good character.³³⁶ The prosecution is likewise able to present additional evidence to the jury concerning the defendant's criminal history, victim impact testimony,³³⁷ and evidence of extraneous crimes or bad acts by the defendant which have 'not resulted in a final conviction in a court of record or a probated or suspended sentence'.³³⁸

The evidence presented by the prosecution in the punishment phase is singularly focused on further developing the narrative of the defendant's

³³² TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(3)(e)(1) (West 2009)

³³³ *Eddings v Oklahoma* 455 US 104 (1982)

³³⁴ *Penry v Lynaugh* 492 US 302 (1989)

³³⁵ *Skipper v South Carolina* 476 US 1, 8-9 (1986)

³³⁶ *Boyde v California* 494 US 370, 381-382 (1990)

³³⁷ *Payne v Tennessee* 501 US 808 (1991)

³³⁸ TEX. CODE CRIM. PROC. ANN. art. 37.07 § 2(g) (West 2009). The State is able to present the jury with any bad act alleged against the defendant, so long as they can provide the location and victim of the alleged crime.

dangerousness and generally fits into one of three categories – the defendant’s criminal acts (including the capital murder itself, previous criminal history, and allegations of bad acts³³⁹), victims (the pain caused to the victim’s family, testimony from victims of other crimes committed or allegedly committed by the defendant, and evidence of the defendant’s remorselessness), and, finally, institutional witnesses who speak about the defendant’s conduct in a correctional setting (both actual conduct and projected conduct). The narrative of dangerousness therefore provides a straightforward structure for the State’s presentation of evidence.

The evidence presented by the defense is more difficult to categorize. At its core, mitigating evidence is a bio-psycho-social history of a particular life; it is information about everything that makes a person who they are. It is deeply personal and specific to an individual, to allow for the individualized assessment of punishment necessary to maintain the death penalty’s constitutionality. Thus, no two defendants will have precisely the same mitigating evidence to present to a jury. Beyond this, the sentencing statute does not provide the defense with any equivalent theme it can focus on or shape its evidence around. In other words, while the State has the theme of dangerousness to anchor its evidence, the defense does not have a singular statutory theme such as ‘mercy’ to which it may attach mitigating evidence. Mitigation must therefore be multi-themed, spanning generations, and detailed in order to accurately depict the life of the defendant.³⁴⁰

³³⁹ The term ‘bad act’ refers to evidence of bad behavior. It encompasses any unadjudicated criminal act alleged against the defendant as well as any conduct, active or passive, verbal and nonverbal. Such evidence is admissible in the penalty phase of a capital trial. Much has been written about the legality of admitting evidence of the defendant’s prior bad acts. *See e.g.* William Roth, ‘Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach’ (1981) 9 *Pepperdine Law Review* 297; David Culberg, ‘The Accused Bad Character: Theory and Practice’ (2008) 84 *Notre Dame Law Review* 1343

³⁴⁰ *See* American Bar Association, ‘Guidelines for Performance of Defense Counsel in Death Penalty Cases’ (2003) <<http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/deathpenaltyguidelines2003.authcheckdam.pdf>> accessed 20 June 2011

Although this chapter analyzes how mitigation evidence is presented and interpreted by both the State and the defense, much of the focus will necessarily be on how the prosecution deconstructs defense mitigation. With this in mind, the intention of this chapter is not to castigate the State for attempting to diminish defense evidence. On the contrary, the sentencing statute invites the prosecution to use such techniques because it allows all mitigating evidence to be potentially viewed as double-edged. The concern is that the special issue questions give the State the ability to usurp defense evidence in a way that the defense cannot do with the State's penalty phase evidence. Moreover, because the theme of dangerousness has permeated the entire trial, attempts by the defense to advance mitigation evidence which is unrelated to the crime will often appear irrelevant to jurors. As a result, defense mitigation can often back-fire, meaning that jurors view mitigation evidence as a reason to sentence the defendant to death, rather than to life. Indeed, as Table 6.1 shows, 63% of jurors in this study reported that some evidence or testimony presented by the defense in the punishment phase backfired. This is in sharp contrast to the 15% of jurors who reported the State's evidence having such an effect on their case.

Table 6.1
Percentages of jurors' response to whether any evidence presented in the punishment phase backfired or actually hurt the case

Attorney	Yes	No
Prosecution	15%	85%
Defense	63%	37%

Many jurors felt angry about defense attempts to use personal mitigation to press for a sentence of life without the opportunity for parole (LWOP). This is in part due to their experiences during voir dire. During the selection process jurors were mainly provided examples of mitigation related to the crime, not mitigation related to the defendant's background or character. Due to the ambiguity of the mitigation issue,

many jurors could not understand the relevance of such personal mitigation evidence to their sentencing determination. Moreover, the sentencing statute does not direct jurors to credit personal mitigation in favor of the defendant, but it does allow for jurors to convert mitigation evidence into aggravating evidence. Given that the current sentencing scheme provides no statutory mechanism for safeguarding defense evidence as properly mitigating, jurors were often frustrated by defense arguments in the penalty phase and inclined to use defense offered mitigation evidence as a reason to sentence the defendant to death.

As previously indicated 61% of jurors entered the penalty phase undecided as to their punishment decision. Of these, the vast majority then reached a decision by the conclusion of the punishment phase, but before final deliberations began. Table 6.2 shows that overall 85% of jurors reached their penalty phase decision before punishment deliberations began. Of those, over half had decided that the defendant should be sentenced to death, with just over a quarter having decided to sentence the defendant to LWOP.

Table 6.2
Jurors' sentencing decision at the end of the penalty phase, but before punishment deliberations began:

Response	Frequency	Percent	Cumulative Percent
Death	26	56.5	56.5
Life without the opportunity for parole	13	28.3	84.8
Undecided	7	15.2	100.0

Previous research shows a significant relationship between the jury's first ballot in their punishment phase deliberations and the final sentencing verdict – in nine out of every ten instances a jury's punishment decision follows the outcome of the jury's initial majority vote.³⁴¹ Although research indicates that in capital cases a simple

³⁴¹ Scott Sundby, 'War and Peace in the Jury Room: How Capital Juries Reach Unanimity' (2010) 62 *Hastings Law Journal* 103, 108

majority of jurors advocating for a death sentence at the outset of the punishment phase deliberations does not necessarily result in one,³⁴² it is likely that the greater the number of jurors who enter deliberations having decided the same penalty, the greater chance that penalty will result. For the majority of jurors who had not determined the defendant's punishment prior to the commencement of the penalty phase, the evidence presented is therefore vital to determining the defendant's ultimate sentence.

This chapter proceeds in two parts. The first section looks closely at the punishment phase evidence in a single case which resulted in a death sentence. Examining all four cases which resulted in death sentences presents difficulties due to the lengthy testimony of witnesses and the variety of topics presented by the defense across all of the cases. Examining a single case enables a more focused analysis of how each side may structure their evidence in the penalty phase. Recognizing however the potential for this one case to be viewed as an anomaly, the second part of the chapter examines the closing arguments of all the trials included in this study. The closing arguments summarize the testimony of punishment phase witnesses and illustrate how jurors are encouraged to apply the evidence presented in their case to their sentencing decision. As such, an analysis of the final summations in the punishment phase is an ideal juncture to observe how defense offered mitigation evidence is reconstituted into aggravating evidence.

2. Case Study

The following case was selected as the focus of this section because it enables a clear examination of how the structure of a capital case works against the presentation of mitigation evidence. The defense in this case called numerous witnesses, all of whom testified to personal mitigation concerning the defendant's

³⁴² Scott Sundby, 'War and Peace in the Jury Room: How Capital Juries Reach Unanimity' (2010) 62 *Hastings Law Journal* 103, 108

background as opposed to crime related mitigation (i.e. the possibility that the defendant may be innocent, may not have intended to commit the crime, or might not have planned the crime). In addition to mitigating testimony regarding the poverty, neglect, and psychological abuse of the defendant, this case also involved the presentation of evidence concerning substance abuse, a sentencing factor which is widely acknowledged to be potentially double-edged.³⁴³

The defendant in this trial was found guilty of capital murder and received the death penalty for committing a double murder. Although no motive for the homicides was ever explicitly advanced, jurors believed that the murders were the result of a ‘turf war’ surrounding the sale of narcotics. The murders occurred around 11 p.m. near an apartment complex in a part of town known for drug dealing. The evidence used to link the defendant to the crime included the testimony of two eye-witnesses who observed the crime from a nearby apartment deck. Though the murder weapon was not recovered, the State presented testimony that the defendant was known to carry a gun similar to the murder weapon, an assault rifle. A medical examiner testified concerning the cause of death. A ballistics expert testified regarding the bullet trajectories and that the numerous rounds located at the scene had been fired from the same weapon. Law enforcement personnel testified about their initial response to the crime scene and the investigation that followed. Finally, the mothers of the victims identified their children from photographs.

The punishment phase began immediately after the defendant was found guilty. The State’s case opened with testimony regarding two shootings in which the defendant had been implicated, bringing the number of murders for which the

³⁴³ John Blume, Sherri Lynn Johnson and Scott Sundby, ‘Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation’ (2008) 36 Hofstra Law Review 1035; Margret Stevenson, Bette Bottoms, and Shari Diamond, ‘Jurors’ Discussion of Defendant’s History Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations’ (2010) 16 Psychology, Public Policy and Law 1

defendant may have been responsible to five.³⁴⁴ The first victim died after one month in hospital. The second victim survived and identified the defendant as the person who shot him. He testified that the defendant shot him in the back after accusing him of stealing drugs. The victim ran away and collapsed in front of police officers that had been called to respond to the shooting. While recovering in hospital the victim identified the defendant as the shooter from a photo array. The State called a total of nine witnesses before they rested that same day. The defense's case began the following morning.

(a) Converting mitigation

The defense called sixteen witnesses in the penalty phase, most of whom were family members of the defendant. These witnesses explained that the defendant was raised in a family of drug dealers, going back to his maternal grandfather. His father was absent and his mother abused crack-cocaine and engaged in prostitution to support her addiction. The defendant had a very unstable upbringing in which he was constantly moved from one drug dealing or drug using family member to another. He began using PCP at the age of twelve.³⁴⁵ Defense witnesses testified that the defendant's father had provided the PCP to the defendant when he was a child and that they used drugs together. At the time of the trial the defendant was twenty-six years old and had been in prison three times previously for drug offenses.

³⁴⁴ During the guilt phase the defense questioned a witness during cross-examination about several other murders the defendant was implicated in committing. Their questioning allowed the State to introduce evidence of those other murders to the jury during the guilt phase. Thus, during the guilt phase the jury heard evidence related to the capital murder (double-murder) and three other murders the defendant was implicated in committing. During the penalty phase additional evidence from those murders were presented to the jury, in addition to evidence of an attempted murder the defendant was alleged to have committed.

³⁴⁵ PCP is a hallucinogenic drug originally used as an anaesthetic. According to the National Institute on Drug Abuse, PCP 'distorts perceptions of sight and sound and produces feelings of detachment (dissociation) from the environment and self.' Numerous adverse reactions to PCP are known and include hallucinations, delusional thought, and paranoia. National Institute on Drug Abuse
<<http://www.drugabuse.gov/infofacts/hallucinogens.html>> accessed 21 June 2011

The defendant's estranged father was the first defense witness. He testified about his relationship with the defendant's mother. Though they had been married for twelve years they had been estranged for the last seven of these. The defendant was the oldest of their four children. Although the father could remember that one of their children, a daughter, had died before she was six months old, he could not recall her name. The defendant's father had been arrested eleven times by the time of the defendant's sixteenth birthday. Their three other children had all been incarcerated at some stage. Including relationships with other women, the witness had fathered twelve children.

The defense questioning attempted to show that the defendant had been raised without positive role models or familial support. The testimony also provided the jury a first glimpse of the lack of nurturing provided to the defendant during his formative years. The defense began their questioning by asking the witness about some of his children:

Q: And of those three children that you had with [the defendant's mother] do you know where they are today?

A: I found out the other day, yes.

Q: Where are they?

A: They're in jail.

The defense continued onto questions regarding the witness's own criminal record:

Q: Now, you yourself, between the time, say, [the defendant] was two and the time he was a teenager, you spent some time in jail yourself, didn't you?

A: Yes, I did.

Q: So let's say from 1982 to 1996, from the time [the defendant] was one until the time he was sixteen you believe you were only arrested twice?

A: No, I was probably arrested more than that.

Q: Would eleven times sound more like an accurate figure?

A: That may be accurate.

Q: What sort of things were you arrested for during that time?

A: Unauthorized use of a motor vehicle, assault, driving with a suspended license.

Q: And compelling prostitution?

A: Yes.

After establishing the defendant's father's criminal history, the defense attorney inquired about his involvement in the defendant's life:

Q: Did you pay attention to – did you find out how the children were doing in school?

A: I did one time. I went by and checked.

Q: Where did you go check?

A: One of the schools, elementary school.

Q: What school was that?

A: I don't remember the name of it. It's right down the street from their aunt's house.

Q: You went by there once?

A: Yes.

Q: Who did you talk to?

A: I don't know.

Q: I'm not asking the name. Was it a teacher? Was it an administrator? Was it a –

A: I think it was an administrator.

Q: What did you ask?

A: Well, I wanted to find out what they were doing in school.

Q: And what did you find out?

A: No, they wasn't going.

Q: They weren't going to school?

A: No.

Q: What did you do about that?

A: Well, nothing.

The attorney continued:

Q: During – during all of the children's lives, have you been worried about them and whether they're learning any trade or skill or help them get through life?

A: Yes, I worried about them.

Q: What have you done about that?

A: Nothing.

Finally, the defense questioned the witness about supplying his young son with drugs:

Q: Do you – are you familiar with the drug called PCP?

A: Yes.

Q: What is it?

A: It's something like embalming fluid, something.

Q: Do you smoke PCP?

A: I have.

Q: When did you smoke PCP?

A: It's been a long time ago.

Q: You don't smoke it anymore?

A: No.

Q: Did you smoke PCP with [the defendant]?

A: I don't think so.

Q: You don't think so? Is that what you're saying?

A: Yeah.

Q: You don't remember is what you're saying?

A: Yeah, I don't remember.

Q: You may have smoked PCP with your son?

A: May have.³⁴⁶

Presumably, the defense intended and expected the jury to view the father's testimony as properly mitigating. The father acknowledged that the defendant was raised with little or no parental support or assistance. Furthermore, he accepted the possibility that he provided narcotics to his children, something that the defendant's brother later testified had occurred. Testimony such as this is often put forward by the defense in a punishment phase to support a claim of lesser moral culpability on the part of the defendant.³⁴⁷

During cross-examination of the defendant's father, however, the State flipped the focus of the witness's testimony from what he did (i.e. was a bad influence in his son's life) to what he didn't do (i.e. he didn't teach the defendant to kill people). Counsel for the State reminded jurors to recall the defendant's lack of remorse; a perception noted by those jurors interviewed in this case as reason for both finding him guilty and sentencing him to death:

Q: Would you have hunted someone down and shot them because you were mad at them?

A: I don't know.

Q: You might have?

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³⁴⁷ Commentators suggest that it is not enough for such evidence to simply be presented to the jury, but that the defense must link the mitigation to how it is relevant to lessening a defendant's moral blameworthiness and what the jury is meant to do with this type of evidence. *See* John Blume, Sheri Lynn Johnson, and Scott Sundby, 'Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation' (2008) 36 Hofstra Law Review 1035. Empirical work also suggests that such evidence has the effect of lessening juror's belief that the defendant is dangerousness. *See also* Stephen Garvey, 'Aggravation and Mitigation in Capital Cases: What Do Jurors Think?' (1998) 98 Columbia Law Review 1538

A: I don't know.

Q: Would you do it now?

A: I don't know.

Q: If someone made you mad, would you pull out a gun and kill them?

A: No, I don't think so.

Q: When you say "I don't know," what circumstances would you kill somebody, other than self-defense?

A: Self-defense.

The prosecutor continued:

Q: Certainly, you're not saying or implying to this jury that somehow you taught your son to grow up to be a killer, did you?

A: I didn't say that.

Q: You didn't, did you?

A: No, I didn't.

Q: When other – when you went to jail or left the family, other family members stepped up and raised him, didn't they?

A: I guess so.³⁴⁸

Finally, the prosecutor seeks to use the witness's estranged relationship with the defendant to highlight the defendant's lack of remorse:

Q: Have you talked to your son since he's been arrested and charged for killing five people?

A: No.

Q: Not one time?

A: No.

Q: So would it be safe – has he ever written a letter?

A: No.

³⁴⁸ TX02D

Q: So would it be fair to say that since his arrest he's never expressed remorse, sorrow for anything that he's done to you, has he?

A: I don't know.

Q: He's never reached out to you and told you, "Dad, I'm sorry for what I did," did he?

A: No.³⁴⁹

This extract highlights the prosecutor's uses of several methods to convert mitigation evidence put forward by the defense into aggravating evidence. First, he compares the defendant's criminal history to those of his family members. By drawing the distinction between this witness's criminal history and that of the defendant, the prosecutor is able to imply that the defendant was not taught to become a killer, therefore suggesting that his actions are not the inevitable result of his circumstances.³⁵⁰ This narrative of individualism both portrays the defendant as someone who was capable of overcoming the environment in which he was raised and assigns responsibility squarely to the defendant for his path in life, thus diminishing the importance of personal mitigation in the determination of an appropriate sentence. The prosecutor also notes that while the witness may have spent much of the defendant's childhood locked up, other family members were available to care for him. Finally, through this witness's testimony the prosecutor is also able to remind jurors about the defendant's lack of remorse.

Although the above example demonstrates the ease with which mitigation evidence can be converted to aggravating evidence under the Texas scheme, it also

³⁴⁹ TX02D. The defense chose to re-direct the witness asking half a dozen questions which suggested that the defendant's father did not want testify – that he only agreed to provide evidence after being threatened with arrest.

³⁵⁰ As Dunn and Kaplan elaborate, individualism in the United States is fundamental to the political ideology and is thus unlikely to be questioned. It creates a tendency to blame the victim who is properly viewed as master over himself, capable of transcending any situation despite the context. *See* Kerry Dunn and Paul Kaplan, 'The Ironies of Helping: Social Interventions and Executable Subjects' (2009) 43 *Law and Society Review* 337; Benjamin Fleury-Steiner, 'Narratives of the Death Sentence: Toward a Theory of Legal Narrativity' (2002) 36 *Law and Society Review* 549

illustrates how simple it is for prosecutors to deconstruct personal mitigation evidence into factors which they can argue are irrelevant to the jury's sentencing decision. In the absence of clear direction for jurors to view such life-history evidence as inherently mitigating, the prosecution is able to reduce the father's testimony into a single statement – the neglect and drug abuse didn't cause the defendant to kill and is thus not relevant to the sentencing decision. This line of questioning suggests that certain types of personal mitigation evidence are being advanced in an attempt by the defendant to avoid responsibility for his crime. Indeed, the prosecution in this case had previously advanced this argument to potential jurors during voir dire:

Do you think that there comes a point in time when an adult has to be responsible for their own actions no matter where they come from, whether it's rich, poor, broken home, not broken home, pampered, ignored, whatever it is?³⁵¹

Many jurors who participated in this study felt that the mitigation issue required a connection or 'nexus' between the proffered evidence and the crime. Jurors' misapprehension of the question is one critical reason why many felt unable to consider the mitigation evidence with which they were presented as a basis to spare the defendant's life.

(b) Red-herring: The defendant is an anomaly in his own criminal family

The second defense witness to testify was the defendant's maternal grandfather who gave evidence about his own criminal history. He was a drug dealer who had been to prison three times. He explained that nearly everyone in his family had been to prison for drug related crimes, with the exception of one disabled son who was bound to a wheelchair.

Q: And from – you've been to the penitentiary, haven't you?

A: Yes, sir.

³⁵¹ TX02D

Q: How many times?

A: Twice.

Q: Did you first go in 1987?

A: Yeah.

Q: And do you remember what your sentence was at that point and what you were convicted of?

A: Yes, sir.

Q: What was that?

A: I was convicted of drugs and I stayed – I was convicted of drugs and I stayed down there three months and five days.

Q: Did you get a four-year sentence?

A: Right.

Q: Were you convicted again in 1994 for delivery of cocaine?

A: Right.

Q: Do you remember what your sentence was then?

A: I stayed five years and nine months, four days.

Q: Did you also get a conviction out of [another] County?

A: Right.

Q: For 35 years?

A: Right.

Q: What was that for?

A: Same thing.

Q: Selling drugs?

A: Right.

Q: Now, your eldest son is he disabled in some way?

A: Yeah.

- Q: How is that?
- A: Well, you know, he had polio when he was a kid.
- Q: So he's been disabled since he was a child?
- A: Right.
- Q: He's confined to a wheelchair; is that right?
- A: Right.
- Q: And of all of the children you've had besides [the disabled son] who has not been to the penitentiary?
- A: Nobody.
- Q: They've all been to the penitentiary?
- A: As far as I know, yeah.
- Q: All your children, right, except for [the disabled son]?
- A: Except for [the disabled son], that's right.³⁵²

Through this witness the defense attempted to show that the defendant was exposed to criminality throughout his life, surrounded by family members who were in and out of prison and using and selling narcotics, raised without any support or structure, and that eventually – and, by implication, inevitably – he too engaged in criminal activities. In other words, the defense sought to suggest that the defendant's prospects, like those of the other members of his family, were significantly restricted. However, during cross-examination, the prosecutor distinguished the defendant's actions from those of his family members:

- Q: You just said that your whole family has been to prison at some point in time, right?
- A: Right.
- Q: My understanding, however, is no one in your family has been to prison for murder except the defendant, right?

³⁵² TX02D

A: Right.

Q: And in the family business or the business you were in, in addition to trucking, was dealing drugs, you testified; is that correct?

A: Right.

Q: The family business certainly wasn't murder, was it?

A: No.

Q: Would this – would murder be out of character for your family?

A: Right.³⁵³

The prosecutor clearly drew a distinction between the behavior of the defendant's family and that of the defendant himself. Portraying the defendant as an anomaly in his own family helped the jurors to view the defendant as inherently different and especially dangerous. It also served both to distract jurors from giving consideration to the evidence of the defendant's unstable upbringing and to minimize the likely impact of such a life on his behavior and potential. This interpretation of defense mitigation was central to the jury's sentencing determination. As the foreman of the jury described:

During the jury deliberations one of the main conclusions that we came to was look you know all his other family members had the same terrible background, had the same drugs and everything else and none of them killed.³⁵⁴

By pointing out that members of the defendant's family did not teach the defendant to kill other people, the State is again able to diminish the importance of the mitigation evidence presented and convert it into aggravating evidence.

The defendant's brother provided similar testimony during the penalty phase. He explained to the jury that their father, the defense's first witness, had in fact supplied drugs to them as children. He believed his mother to have been a good

³⁵³ TX02D

³⁵⁴ TX02D

parent, until she became addicted to crack-cocaine and was sent to prison. After her arrest the defendant and his siblings were taken to their aunt's house where they lived with eleven other children. All the members of the household sold drugs and eventually the children had begun selling drugs as well. The defendant's brother testified that he and his siblings were extremely poor; they did not have shoes or clothes and were expected to pay fifty dollars a week in rent to their aunt. Beyond the financial difficulty the young boys experienced, they also witnessed their mother engaging in prostitution in the neighborhood after her release from prison. The defendant's brother testified to seeing his mother 'hop in and out' of different cars in the neighborhood.³⁵⁵

During cross-examination, the prosecutor focused on the defendant's family background by emphasizing that the witness and the defendant had similar experiences, yet he had not committed murder. By conflating their experiences the prosecutor sought to minimize the significance of the defendant's mitigating evidence:

Q: Now, earlier last week we went through your criminal history at length. There's nothing violent in your criminal history, is there?

A: No.

Q: All for theft and drugs and failure to [show] ID to the police, right?

A: Yes.

Q: And you grew up in the same house and the same conditions as your brother does, right?

A: Yes.

Q: In fact, y'all are about a year apart in age?

A: Yes.

³⁵⁵ TX02D

Q: You're even younger than him, right?

A: Yes.

Q: So more of your life was spent with your mom out in the streets and addicted to drugs than was your brother's, right?

A: It's the same.

Q: And yet you've never gone off and killed anybody, right?

A: No.³⁵⁶

Again, the prosecutor deconstructs this mitigation evidence using similar methods to those he used with the defendant's grandfather's testimony. The fact that no other members of the defendant's family had committed murder became of central importance to jurors in this case. Conceptualizing defense mitigation in such a way resulted in the jurors using the mitigation presented *against* the defendant, as expressed by the foreman of the jury:

The defense was [asking us] to look at where the guy came from, that he didn't have a chance, but all they did to me was kind of hurt their case more than helped it. All they did during the penalty phase was bring out a bunch of family members and stuff and tell us more about where he came from and what his family life was like and yada, yada, yada, you know. None of the family witnesses helped the defense if anything, they hurt him because we found out they were all the same kind of characters that he was, but as far as we know they hadn't killed anybody.³⁵⁷

In the mind of this juror at least, the mitigation evidence presented by the defense supported the State's narrative illustrating how, absent an instruction which, at a minimum, directs jurors to view evidence of psychological abuse, neglect, and poverty as properly mitigating, jurors can be entirely dismissive of defense mitigation or actually view such mitigation as aggravating evidence.

³⁵⁶ TX02D

³⁵⁷ TX02D

(c) Mitigation is present but is not sufficient for a sentence of life without the possibility of parole

The defense also called the defendant's stepfather as a witness in the penalty phase. He had lived on and off with the defendant's mother from the time the defendant was five until he was aged ten. During their relationship the stepfather had witnessed the defendant's mother's crack-cocaine addiction and helped her enter a rehabilitation program. Although she remained drug-free for a period of time after completing rehabilitation, she eventually started using drugs again, was arrested, and went to jail. The witness and the defendant's mother had one child together. The stepfather testified that after their relationship ended he took their child to live with him. He had wanted to take the other children but could not since they were not legally his children. He testified regarding his concern over the defendant and his siblings and to the fact that his son, the one he took with him, had never been in trouble with the police.

The State's attorney was able to curb the potential impact of the stepfather's testimony by capitalizing on the ambiguity of the word 'sufficient' in the mitigation instruction during his cross-examination of the witness:

Q: And certainly although [the defendant's mom is] not on trial here, at some point her life took a different direction, correct?

A: Yes.

Q: And those are choices that she made on her own?

A: Yes.

Q: But even in the choices that she made, it wasn't that she was violent, was it?

A: No.

Q: She had a drug addiction, correct?

A: Yes.

Q: And that drug addiction caused her to shoplift to support it, correct?

A: I think so. Maybe so, yeah.

The prosecutor continued to minimize the defendant's horrific upbringing by noting some other traumatic life-experiences he had avoided:

Q: But what I'm trying to get at is the – is that the surroundings and the family that [the defendant] had through [his mother], it wasn't like she was teaching him to be a drug dealer or teaching him to be a killer?

A: No.

Q: She was trying to teach him – give them the best life she could under the circumstances, correct?

A: Probably so, yes.

Q: And as we all are familiar that when families have drugs enter into a family situation and certainly if money is tight, there are a lot of people that are raised in really horrible, horrible homes these days, aren't there?

A: Yes, it is.

Q: There's sexual abuse, there's physical abuse, kids turned out on the streets with no roof over their heads. You would agree with me that that can very much come into play if you've got a family that has drugs and poverty?

A: Yes.

Q: But what you had with [the defendant's aunt] was making sure that there was a roof over [the defendant] and even on the occasions that your own son was with them, she was doing everything she could to give him a stable background, correct?

A: Yes.

Q: And you did, too?

A: Yes.

Q: And sometimes a person just becomes an age where they have to take responsibility for their own actions, don't they?

A: Yes, at one point.

Q: Nobody has led a perfect or an ideal life?

A: No.³⁵⁸

The above extract demonstrates how the prosecutor is able to minimize the defendant's experiences by dismissing the psychological trauma experienced by a child who loses the one positive influence in their life and diminishing the long term effects experienced by a child who witnesses their primary caretaker prostituting for drugs. Since the mitigation question uses the word 'sufficient' to qualify the weight of the evidence which can support a life sentence, the State is able to counter any defense mitigation with the argument that the defendant's life could have been worse (e.g. because he was not sexually abused). This diverts jurors' attention from the purpose of the sentencing phase – to determine what punishment is most appropriate for this particular defendant in light of the life experiences he has had. As one juror from this case commented:

I mean people have raw deals in life and they pick themselves up and they go and they make themselves better. Grant you, he has had some bad things happen in his life while he was growing up, but the rest of his family or most of his family did something about their life and made things better so he had other influences showing that you can dig out of the gutter and go do something more to make yourself better.³⁵⁹

Although the juror does acknowledge the mitigation presented she does not appear to give the evidence mitigating effect. While the United States Supreme Court has held that a statute cannot mandate the weight to be given to mitigating evidence,³⁶⁰ this description illustrates how personal mitigation evidence under the current sentencing scheme is not protected as a legitimate consideration in its own right which enables its conversion into aggravating evidence. The statute's lack of guidance appears to

³⁵⁸ TX02D

³⁵⁹ TX02D

³⁶⁰ *Morgan v Illinois* 504 US 719 (1992)

deaden jurors' ability to be receptive to mitigation evidence – or at least to give such evidence mitigating effect – and thereby promotes a death sentence.

(d) The defendant's life-experience confirms that he is dangerous

A final way in which the ambiguity of the mitigation instruction prevents jurors from considering personal mitigation evidence is illustrated by the deconstruction of both lay and expert testimony regarding the defendant's early behavior from his fifth grade art teacher and school counselor, a medical doctor familiar with the effects of PCP use on the brain, a forensic psychologist, and a child and adolescent psychiatrist. Each witness provided testimony about how the defendant's early life experiences shaped his future actions.

The defendant's former school teacher testified concerning her observations of the defendant, the neighborhood in which he was raised and the availability of positive role models to the defendant:

Q: When did you have him as a student?

A: I had him in fifth grade as one of my art students and then I went to the other school for a year and came back as a counselor and I was his counselor.

Q: Do you remember what years that would have been?

A: His sixth grade year should have been 1992 to 1993. And I went away in 1993, 1994. And I believe I came back for 1994 to 1995 – or I'm off a year.

Q: Did you look at some records to refresh your memory about this? Did I provide you with some records?

A: Yes, sir, you did.

Q: Okay. How – what do you remember about [the defendant]?

A: [The defendant] was – he was a challenge. He was – he was one of the challenges. He had a winning grin and he was very, very active. He was in trouble a lot. He didn't do real well at school.

Q: And was anything done to – to solve those problems at school, to deal with those problems?

A: We worked – we worked with him. We called home. When I came back as a counselor, I know that teachers referred him for testing for special education, both academic and psychological testing. I remember we went through that process. I don't believe that he qualified.

Q: So he was not placed in special education?

A: I don't think so.

Q: Are you familiar with the [an apartment complex]?

A: Yes, sir. [The witness recites the address].

Q: What is different about those apartments and what specifically was different back when [the defendant] was in the sixth grade?

A: When [the defendant] was in – was at [those] apartments, it was a very rough area. It was a very rough part of town. It's [government subsidized] housing and we knew that – I knew – that's why I can still remember that address. We knew that address. Most of the places didn't – most of the homes didn't have phones where we could get a hold of people. We sent letters most of the time. The kids were – were pretty much, they were street kids. They –

Q: They dressed differently?

A: They dressed differently. Well –

Q: How so?

A: I mean, our demographics were – were very widespread. That they didn't have as nice as clothes. The clothes were often dirty. They were – the kids were rough. We knew when their bus arrived at school. We knew they were there. They were louder because they basically ran the streets at night a lot of the times. That's what they would tell us. And they – it was hard to get a hold of people to get help from the homes to help them out.

Q: Were these kids that were being raised by responsible parents or were these kids that were raising themselves?

A: They were for the most part raising themselves, raising each other. Their role models – they had people in their lives that they looked up to that were drug dealers.

Q: Now, there's a lot of talk in our society about people bringing themselves up from their bootstraps and getting out of a socioeconomic level by working hard and following a work ethic. How is that translated into your line of work and the kids that you teach?

A: Some of them do and some of them don't. I have had students who have come through very difficult situations and are doing just fine. They just seem to keep themselves – they keep themselves going. But a lot of kids, I used to believe in prejudices based on many different things, but the differences are really socioeconomic. That's where the prejudices really come in. The kids with the lower socioeconomics don't have the same opportunities that the students with the higher socioeconomics do. They come to – they come to the schools not having been around books and newspapers and measuring cups and rulers. And some of them are able to pull it together and be successful and a lot of them aren't.

Q: When – did you see anything about [the defendant] on T.V. when the news of this originally broke?

A: I did.

Q: Did you recognize him then?

A: I did.

Q: What was your reaction?

A: My first thought was, "Oh, my gosh, I know him. He was one of my students." And then I kind of thought, "Well, he didn't have much of a chance." That's – I mean, it wasn't just a – it wasn't a giant surprise.³⁶¹

Benefiting from the future dangerousness issue and the ambiguity of the mitigation question, in cross-examination the prosecutor was able to reconstruct the teacher's testimony into evidence of the defendant's propensity for violence:

Q: This isn't going to take long. I think you described that the defendant was in trouble a lot –

A: Yes.

Q: – in school. And when he would get in trouble in school, would the school or you specifically work with him and try to explain to him what he did wrong and why it was wrong?

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- A: Yes, sir.
- Q: And what types of things was he in trouble for that you remember?
- A: I remember he was very active, that he wouldn't sit down. He wouldn't sit down and do his work. Seems like he got in a few fights.
- Q: So you remember him getting in a few fights as far back as 1992, 1993, 1994 and 1995?
- A: Yes, sir.
- Q: What percentage of your students, even those from the poor socioeconomic background, went on to be serial killers?
- A: Very low.
- Q: Can you recall any others that went on to killing multiple people out of all your years?
- A: Not multiple people. I have had others that had killed other people.
- Q: Okay. My question is, what percentage, though, did you have over all those years over there that went on to do a killing spree and killing multiple people?
- A: [The defendant] is the only one that I'm aware.
- Q: So he's it. Even with all those other socioeconomic problems that are legitimate that you saw, he's the only one that went that far down the path?
- A: Yes, sir.
- Q: Would you agree with me that based on what you saw when he was a child and ending up where we are today would show an increasing and escalating pattern of violent behavior?
- A: I would say yes.³⁶²

The above exchange illustrates the ease with which mitigating evidence can be turned against the defendant by the prosecution and used as a reason to view the defendant as dangerous and to therefore sentence him to death. Previous research indicates that the conversion of mitigating evidence into aggravating evidence is symptomatic of capital

³⁶² TX02D

statutes general failure to clearly frame or acknowledge the unique moral decision-making constitutionally required to determine the defendant's penalty.³⁶³ However, the Texas statute's broad language imposes no limit to converting mitigating evidence as the statute fails to identify any evidence as mitigating. Thus, the State is able to demonstrate how every factor offered by the defense in mitigation can be used to justify a death sentence.

By the conclusion of the punishment phase evidence jurors have been exposed to the statutory theme of dangerousness from jury selection through the entire trial. The central focus on the defendant's dangerousness coupled with the deficiencies in the mitigation question as it is interpreted and applied, creates a sentencing statute which operates as a vehicle for both preventing jurors from considering mitigation as a reason to give the defendant a life sentence and encouraging jurors to view personal mitigation evidence as justification for a death sentence.

During the closing arguments in this case, the State explained in some detail how the jury could apply all the evidence they have heard throughout the trial to the special issue questions:

I would submit to you that there are four words that you need to remember as you go back there and deliberate. *No hope and no excuse.*

If you look at special issue number one – “Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?” And the evidence demands and it has shown you time and time again that the answer to this question is a resounding “yes” because there is no hope that he wouldn't. *No hope.* You're not talking about a hot-headed eighteen, nineteen year-old kid here. Folks, you're not talking about a kid that was sexually abused or physically abused. You're not talking about a kid that didn't have a roof over his head every night. He had a family support structure that was there for him, whether it was ideal or not. It wasn't ideal. Were there problems with it? Yes. But the bottom line is, at the end of the day, that every day he had a place to sleep.

³⁶³ Craig Haney, Lorelei Sontag, and Sally Costanzo, 'Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death' (1994) 50 *Journal of Social Issues* 149

And he was still an anomaly. A serial-killing anomaly. He started this when he was twenty-six years old. He is escalating. He's gone from the troubled kid in school to [a] mass murderer.

The second question you have to answer – “Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant’s character and background and the personal moral culpability of the defendant, that there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?”

And the key term there is sufficient. So that parade of all of his cousins and his aunts and his mother and psychiatrists and psychologists, none of it, none of it rises to the level to excuse five dead bodies and one wounded.

And that’s not difficult because the evidence shows that there is no excuse for any of this. [Emphasis added]³⁶⁴

As this prosecutor powerfully describes, there is nothing more for the jury to consider in their determination of the defendant’s sentence. In a word, the defendant is hopeless. Members of the jury agreed with this sentiment, finding from the evidence presented about the defendant’s life that he was irredeemable:

This person was just unsalvageable. You know not unlike a doctor who’s in a life and death process in a war zone, a doctor has to make a decision whether he can spend four hours operating on this body that’s still going to be a mess or he can go to others. [The defendant] was unsalvageable.³⁶⁵

Furthermore, even if the jury were to be moved by the defendant’s background, the prosecutor implies that jurors must only think about mitigation relating to the crime. It is important to note that the defendant had not been tried or convicted of any of the other murders the State alleged he had committed. Regardless, the prosecutor argues that the mitigation presented is not sufficient when weighed against five murders. As mentioned, the Texas scheme is not one which instructs the jury to weigh mitigation against aggravation in order to determine the defendant’s sentence. The jury does not have to find mitigation present to such a degree. Rather, a juror need only determine

³⁶⁴ TX02D

³⁶⁵ TX02D

what constitutes a sufficient amount of mitigation to them personally. The State was able in this case however to imply that weighing mitigation is appropriate in deciding a defendant's sentence when such a requirement does not in fact exist.

In their closing arguments in the punishment phase, the defense attempted to connect the personal mitigating evidence presented to the concept of values:

During voir dire I counted up – and I think I got the right number. I'm not sure. My addition may be wrong. I think amongst all of you there are twenty-three children. Now, how fast, how quickly, how soon would you rush to get your child out of the environment that he grew up in learning the values that he learned? Do you think your child could pull himself up out of that environment and be a productive person in our society? And if he didn't, would you want to make – what kind of judgment would you want to make about that child? How strict would you want to be about that child?

The bad decisions have been inflicted on him all his life. Every choice that has been made that has shaped his character has been a bad choice. And if your choice today isn't motivated by value, but is motivated by anger, resentment, sadness, revenge, it's not being motivated by values. It's being – it's not the kind of choice you want to make for a lifetime about values of who you are.

You've seen the *dramatis personae* from his past that tells the story about him and that should be enough, just seeing these people and who they are and the way they come across in this courtroom, the characters, the PCP smoking pimp that's his father and the crack-head whore that's his mother. Those are the people that gave him the roof over his head that we want to consider to be the important facets of his life.

The aunts and uncles who all went to the penitentiary for using drugs. [Names one of the defendant's aunts], his mother, they can't even remember criminal records of times they were in the penitentiary, the times they were on drugs and the times they weren't on drugs.

Now, [the prosecutor] wants to say there's a time in life when you're accountable no matter what your background is. And that's true. And this system is holding him accountable. Nobody sits in that chair and hears that charge read to them by the court to the jury that hasn't been held accountable. Nowhere does it say you have to have an excuse for what you did. Nowhere does it say you have to show you didn't know right from wrong. Nowhere is there a compared responsibility where it says, "Oh, what about all the other people that had the same circumstances that didn't commit murder?" The key word in there is circumstance. That's the key word that's at issue in both of these issues.

Is he a future danger? You must decide. I'm going to assume, though I hope not, that you're going to answer that question "yes". But then it comes down to just one question that determines whether or not you can save [the defendant's] life.

And that's mitigation circumstances. And no matter what the State says, mitigation means something or the question wouldn't be there. Is there something about this man's life that says you can save him even if he killed twenty people?

Put yourself in his shoes and tell me you may not be there. Because we all are talking now about the individual. This is what the State has been asking for you and this is what we've really been talking about, the individual. The choices that they make, the responsibilities that they have and the consequences they have.

The individual we're talking about is [the defendant], who had to go get his mama out of the crack house, who had to beg his mama to get off the street, who was tossed and turned and brought before two or three or four different aunts who all sold dope, except one, who all used drugs, including their children, except one.³⁶⁶

One juror poignantly stated that the defendant was 'ingrained' in his environment and that this end – his conviction for murder and death sentence – 'was destined to be' due to his family.³⁶⁷ Despite this recognition, the evidence the defense attempted to use to argue for a life sentence was instead used by jurors to justify his death sentence. Jurors in this case who wished to give effect to the mitigation presented believed there was no way for them to do so. As the foreman of the jury explained, the wording of the mitigation issue forced the juror holding out for a life sentence to change her mind:

Well, what it came down to was the way the second question was worded. It presumes that you have to find the death penalty. Let me back up. The way the question is worded he is deserving of the death penalty unless you find mitigating circumstances, sufficient mitigating circumstances, to give him life. That's just the way the question is worded in this state, it presumes that he, that this crime, is receiving the death penalty unless you find sufficient mitigating circumstances for life in prison.

³⁶⁶ TX02D

³⁶⁷ TX02D

So then the question is what mitigating circumstances do we find that override his behavior. The final discussion by everybody was no because all those other family members had the exact same background as him and they never killed anybody so why would that background be a mitigating factor to him? So that's really why we answered question two "no".³⁶⁸

The above quote illustrates how this case came full circle. Prospective jurors were taught to view the evidence they might be presented through the framework of dangerousness in voir dire. The evidence presented in the guilt phase supported the State's narrative of dangerousness, by which stage a number of jurors had already made a decision about the defendant's penalty. Mitigation evidence presented by the defense in the punishment phase was easily stripped of its import because the second special issue question is deficient in two ways; it does not explain what factors are inherently mitigating nor does it explain how jurors should apply the evidence to their sentencing decision. The data in this section demonstrate that the defendant's troubled background was turned against him in the determination of the appropriate sentence. Thus, the special issue questions restrict the jury's consideration of mitigation, facilitate its conversion into aggravating factors, and direct the jury's sentencing decision towards death.

3. Closing Arguments – Future Dangerousness

The closing arguments at the penalty phase both reinforce and explicitly remind jurors of their earlier education received during jury selection. As the prosecutor in the following case notes, each juror was informed during voir dire of the chance that they would be faced with this sentencing decision. Now that they are, they can reflect on what they were taught during the selection process:

And based on the evidence, ladies and gentlemen, you already know the answers to these questions. Some of you may have heard me talk to you during the jury selection process. And I mentioned that it's kind of like a

³⁶⁸ TX02D

hallway. You start at the beginning of the hallway and now we know for sure there are four doors. At the end of the hallway is the death penalty.³⁶⁹

The prosecution's closing arguments during the penalty phase serve to reaffirm the trumping nature of the dangerousness issue and cast aside any mitigation presented by the defense. As previously discussed, the prosecution is able to dismantle and reconstitute the mitigation issue into an extension of the future dangerousness issue. Thus, an examination of what jurors are told about the penalty phase evidence in relation to the dangerousness issue is vital to understanding the operation of the mitigation instruction.

(a) Dangerousness based on the capital crime

Not surprisingly, the State's main argument for a death sentence in each of the eight cases included in this study was that the defendant is dangerous. As discussed in the previous chapter, one readily available piece of evidence which can be presented as confirmation of the defendant's dangerousness is the capital crime for which the defendant was convicted. As the State has previously explained to jurors during voir dire, the circumstances of the offense alone are sufficient reason to view the defendant as dangerous:

Y'all have to answer two questions and the answers to these two questions – and it's in your jury charge, it will be your guide – we talked to you about this extensively during the jury selection process. The first question that y'all have to answer is [reads the future dangerousness question]... let's go through [the crime] briefly because it goes to the special issue here of when someone is a future threat to society... If you didn't think that putting six shots in the back of a police officer wasn't evidence that he would commit future danger, then shooting at the next person who comes up seals the deal.³⁷⁰

In another trial, attorneys for the State explained:

Special issue number one, the future danger issue. We told you at voir dire that there are some cases where you can answer that question "yes" based only

³⁶⁹ TX06L

³⁷⁰ TX05L

on the facts of the case that you hear. This is one of those cases, ladies and gentlemen. Make no mistake. Special issue number one can be answered “yes” on the basis of the facts of this case alone. Because how this happened and what happened to [the victim] tells you everything, you know, you need to know about this man sitting right here, [the defendant] and what he is capable of.³⁷¹

In a third case the prosecutor described:

The second door is marked future danger. Once again, look to the evidence, all the evidence. What you know about the capital murder. What you know about the home invasion. The evidence is there. That man is a future danger. You walk through the second door because you look at the evidence and nothing else.³⁷²

Likewise, in a fourth trial the prosecutor noted:

If you remember during jury selection we talked to you about the fact that sometimes the circumstances of the crime itself tells you everything that you need to know about a person and in this case [the defendant] himself answers this question for you and he did it by the way he carried out this crime.³⁷³

During voir dire jurors learned that in some cases the circumstances of the capital murder itself are sufficient for jurors to determine the defendant’s future dangerousness. Interestingly, this argument was advanced in all eight cases.

Although jurors are legally permitted to base their findings of the defendant’s dangerousness on the facts of the crime alone, allowing such a determination can undermine the distinction between the guilt and penalty decisions. The modern American death penalty is structured around attempts to safeguard the separation, as illustrated by the bifurcation of capital proceedings for the express purpose of maintaining a clear division between two inherently different types of decisions. By allowing jurors to use the evidence in the guilt phase to answer the dangerousness issue, the special issue questions distort this constitutionally vital separation. The ability of jurors to successfully separate their guilt and punishment decisions is

³⁷¹ TX01D

³⁷² TX06L

³⁷³ TX05L

significantly reduced when they are told that they can base their dangerousness determination solely on the evidence presented during the guilt phase. Indeed, a full 42% of jurors in this study stated that they determined the defendant's guilt and punishment on the basis of similar considerations.

The evidence presented by the State during the penalty phase is often an extension of the evidence presented in the guilt phase. As such, the defense can do little to break up the narrative put forward by the State. Although bifurcation is preferable to a unitary trial which would place the defense in the position of arguing that the defendant did not commit the crime and should be spared the death penalty simultaneously, the special issue questions weaken this distinction. Thus, the bifurcation of the proceeding into two parts under the Texas statute appears to restrict the defense, but not the prosecution. While the sentencing scheme's focus on the defendant's future dangerousness allows the State to successfully argue this point continuously from jury selection throughout the trial, the defense is limited in how they can argue for a life sentence throughout the proceeding. Although the defense can attempt to frontload mitigation and educate jurors about the meaning of reduced culpability, the Texas sentencing scheme as it is applied, appears tilted towards a death sentence.

(b) A finding of dangerousness precludes any possibility of rehabilitation

Beyond simply asking the jury to find that the defendant is dangerous, the dangerousness special issue question invites the State to argue that the defendant is incapable of changing, beyond rehabilitation. The State can argue that the defendant is evil, damaged beyond repair, remorseless, and generally lacks any positive character, even when evidence is presented which may show otherwise. As the

following example highlights, the expansiveness of the dangerousness issue is especially important in cases where the defendant has no previous criminal record.

The defendant in this case had no previous criminal record prior to the capital proceeding and did not receive a single disciplinary infraction in the year he awaited trial in the county jail. Lacking evidence other than the crime to support their argument that the defendant would be a future danger, the State focused on the defendant's evil nature, shown by his commission of the crime, to persuade jurors:

The State in this case has proven future danger. The defense can jump up and down and they can wave the disciplinary record and say he didn't act up in jail all they want to, but it doesn't matter. Because what we see flowing from that character, from that bedrock foundation inside of him, is evil upon evil upon evil upon evil.³⁷⁴

The State is also able to use the commission of the crime to argue that the defendant lacks basic human instincts, such as the capacity to be remorseful and empathetic, and is therefore not like a normal human being. Rather, the absence of such qualities means the defendant must be someone who will be dangerous in the future:

The State has proven to you that [the defendant] will stop at nothing, that there's nothing he won't do. That at his heart and his character level, there's an absolutely dead conscience, a lack of repentance, a lack of remorse, a lack of anything, to be perfectly honest with you, and that that is what makes him a continuing threat to society.³⁷⁵

In this example, the State argued that the defendant's conscience is *dead*, implying that he will never regain the ability to behave properly. Thus, regardless of his lack of a criminal record, because the defendant, according to the State, lacks a moral compass, he will always be a future danger.

³⁷⁴ TX03D

³⁷⁵ TX03D

(c) Danger to 'society'

As mentioned previously, in 2005 the alternative punishment to a death sentence in Texas became LWOP.³⁷⁶ Despite this change, the first special issue question simply encourages the jury to think about the defendant's dangerousness in relation to 'society' without specifying whether that means free society or prison society. The State has been successful in using this ambiguity to preempt arguments a juror may have against finding the defendant to be a future danger. Aware that a juror may only be thinking about society in terms of those outside prison, this first example demonstrates how the State draws the jury's attention to civilians in prison with whom the defendant will have contact:

And those people who are in that prison system, you know, we may say, "Okay, well, let's disregard the safety of the inmates, they are crummy people that are in there anyway", okay? If you want to do that, that's fine. But you cannot disregard the people who live and work in our county, who live and work in our state, the people who give their lives to minister, to care for, to protect us, and say, "Eh, they are no big deal. Who cares if they are in danger?"³⁷⁷

As this example illustrates, the State is able to use the ambiguity of the term 'society' to remind jurors of those who work within an institutional setting. In this way the jury can come to view prison society as a logical extension of society at large.

By allowing the meaning of 'society' to include those in prison, including other prisoners, the dangerousness issue also enables the State to argue that LWOP will not sufficiently protect society:

Folks, some might say just lock him up and throw away the key and put him in jail. That's what [the victim] thought. [The victim] thought if you put him in the backseat of a patrol car, secured in the backseat of a patrol car, he thought if he had him handcuffed he wouldn't pose a threat. It's as simple as this. If you are a threat locked in the back seat of a patrol car with your hands handcuffed behind you, you're capable of doing what he did. He forever will be a threat. Have you thought about a twenty-two year old prison guard down

³⁷⁶ See TEX. PENAL CODE ANN. § 12.31(a)(1) (West 2009)

³⁷⁷ TX03D

the road who will not know what he's capable of as he ushers him into a cell block? Have you thought about another inmate who may disrespect him the same way that [the victim] disrespected him? This is the easy question.³⁷⁸

The prosecutor is able to urge the jury to view LWOP as an insufficient punishment due to the danger the defendant might pose to others who work or are incarcerated in prison. Since 'society' is left statutorily undefined, the State is at once able to argue that prison society should be included in how the term is understood, but also that the jury may consider the possibility that the defendant might successfully escape from the penitentiary and thereby become part of free society again.

The defendant in the following example had no history of attempting to escape from an institutional setting and maintained an unblemished record while awaiting trial in the county jail. While a good record of behavior is typically considered a factor which shows the defendant as capable of behaving in prison, the prosecutor in the case was able to use the ambiguity of the dangerousness issue to introduce expert testimony concerning escapes from prison:

Special issue number one [reads the question]. [Our future danger expert] talked to you about the fact that there are escapes from all parts of the prison, that people get out and commit new crimes. He talked to you about the huge numbers of violence within the prison itself. And the numbers are on your chart and you will see that when you add up assault against inmates and assaults against guards, you are talking about more than 20,000 assaultive offenses that are committed in prison.³⁷⁹

As the dangerousness issue fails to specify what jurors should properly view as 'society' when evaluating the defendant's dangerousness, the State is permitted to introduce a wide range of speculative evidence.³⁸⁰

³⁷⁸ TX05L

³⁷⁹ TX03D

³⁸⁰ The Supreme Court has ruled that the State is permitted to call witnesses to render clinical opinions by answering hypothetical questions regarding the defendant's future dangerousness. The American Psychiatric Association submitted an *amicus curiae* brief urging that such testimony be inadmissible. See *Barefoot v Estelle* 463 US 880 (1983). Such evidence is routinely offered in Texas capital trials and is often a motivating factor in the jury's decision to sentence a defendant to death. See also The Washington Times, "Texas "Dr. Death" Retires

4. Closing Arguments – Mitigating Factors

The way a juror understands the legal relevance of mitigation evidence will have a profound effect on the defendant's ultimate punishment. As the first part of this chapter demonstrated, the State is able to diminish the import of defense witness testimony in the penalty phase by applying techniques they taught to jurors in voir dire. This section focuses on how the State continues to advance arguments in their closing speeches that encourage jurors to dismiss mitigation evidence from their sentencing decision.³⁸¹

(a) Flipping mitigation into aggravation

In every case included in this study the prosecution alerted jurors to the 'double-edged' nature of mitigation evidence during voir dire, arguing that some evidence presented by the defense as possibly mitigating could also be viewed as aggravating. Accordingly, evidence about the defendant's life – such as his addiction to drugs or alcohol, his experiences with victimization, poverty, lack of mental acuity, age, and so forth – could be converted into a reason to take the defendant's life, rather than spare it. By the end of the penalty phase attorneys for the State in each case moved from giving hypothetical examples of how mitigation evidence might operate to emphasizing its aggravating effect. The following comments of the lead prosecutor, taken from a case which resulted in a sentence of LWOP, exemplify such a conversion:

Now let's look at what the defense has brought you for mitigation. Sufficient mitigating circumstances. I will urge you to use the same three-step process that we talked about in individual voir dire. First, do you believe the evidence? Second if you believe the evidence, do you find it mitigating or do some of you find it aggravating? And third, if you find it mitigating, is it

after 167 Capital Case Trials' (Dallas, 20 December 2003)
<<http://www.washingtontimes.com/news/2003/dec/20/20031220-113219-5189r/>> accessed 21 July 2011

³⁸¹ Some of the techniques I describe in this section are the same as those I identified as used by the State in voir dire in Chapter 4.

sufficiently mitigating? Is it enough to reduce the defendant's moral blameworthiness for what he's done in this capital murder and for everything else he's done in his life to warrant a sentence of life without parole as opposed to the death penalty? Is it enough? Well, let's go through what the defense has brought you in regards to mitigation. The defense argues it should be mitigating because when he was young, his brother died and his brother-in-law died. We learn that both of those deaths were the result of a crime. Result of what the family thought were violent crimes. And how does the defendant react? He becomes the criminal and he causes the death of another individual. That is complete role reversal. And ladies and gentlemen, I find that completely aggravating. The psychologist says that [the defendant] loves his family. The defendant has a strong family, but what does he do? He destroys [the victim's family]. He destroys it in a matter of minutes. What the defendant holds so dear, he destroys it for others. That is aggravating.³⁸²

In this instance, evidence about the defendant's own familial loss, which he experienced as a child, is used against him. Contrary to the adage violence begets violence, the State's attorney argues that the jury should not be swayed by any effect these events in the defendant's life might have had on his future behavior, but rather should view these experiences as making him more culpable. The prosecutor therefore explicitly directs the jury to view these events as a reason to sentence him to death. Although the defendant in this case did not receive the death penalty, a number of jurors were persuaded by the State's arguments. However, the jury eventually sentenced the defendant to LWOP due to circumstances surrounding the offense. The victim resisted the defendant's attempt to rob the store where he worked as a clerk, trying to fight the defendant off with a bat and spraying his co-defendant in the face with mace. Jurors believed that had the victim given the money to the defendant the robbery would not have escalated into murder.

Drug addiction is often a sentencing consideration which can be both mitigating and aggravating.³⁸³ Indeed, as the following extract from a case which

³⁸² TX06L

³⁸³ See Michelle Barenett, Stanley Brodsky, and Cali Manning Davis, 'When Mitigating Evidence Makes a Difference: Effects of Psychological Mitigating Evidence on Sentencing Decisions in Capital Trials' (2004) 22 Behavioral Sciences and the Law 751; Marla Sandys, Heather Pruss, and Sara Walsh, 'Aggravation and Mitigation: Findings and Implications' (2009) The Journal of Psychiatry and Law 189

resulted in a sentence of death illustrates, the defendant's addiction to illegal drugs is easily converted into aggravating evidence by the State:

They have suggested, now against his wishes, but the defense has suggested that drugs, drugs, his drug addiction is somehow mitigating. That something happened to [the defendant], something that he couldn't control, and it ruined his life. Well, you know, drugs, drugs didn't shoot [one victim] in the back of the head. And drugs didn't shoot [another victim] three times, and then drag his body down the service road till the bones stick out of his feet, and then drag them both over and throw them in the ditch like trash. Drugs didn't do that. [The defendant] did that. And drugs, drugs did not cause his 85-year-old grandmother to have to come hobbling in here after traveling 300 miles, take that stand and beg a bunch of strangers not to kill her child, her baby. Drugs didn't break her heart again. That was [the defendant]. And it is an obscenity, an obscenity that they drag what few happy memories this family has through this courtroom in an effort to get you to let this killer go free – or go to prison instead of death row. That is wrong. We talked in voir dire about how to answer – to find mitigation. The rules are pretty much up to you. Very few rules. It's up to you to decide what is mitigation, but there is one very important rule. It must be based on the evidence. What did you hear? That he had family who loved him? Do you really want that seventeen year-old boy who's never known a father, even though he has desperately cried out for one, do you really want that seventeen year-old boy visiting his father for the rest of his life in the penitentiary? Is that what he's going to do? Is that any good?³⁸⁴

Several important issues arise in this example. The first is the focus on the defendant's responsibility for his path in life, including his drug abuse. As mentioned previously, the narrative of individualism is often used as an effective argument against mitigation and is applied here to the testimony of the defendant's grandmother. Recognizing the emotional impact of the defendant's elderly grandmother's appearance in court, the prosecutor attempts to redirect any feelings of sadness the jury may have for her into feelings of anger toward the defendant. The testimony of the defendant's son is similarly handled. The defense argued that if given a sentence of LWOP the defendant could continue to have a relationship with his family. However, the State's attorney flips this argument around and instead uses the defendant's relationship with his son against him. The prosecutor intonates that

³⁸⁴ TX04D

the defendant's son is better off without his father and is certainly better off without visiting his father in the penitentiary for the rest of his life. In a total reversal, the son's testimony is used as a reason to execute the defendant, not to spare his life.

(b) Dismissal of mitigation evidence as irrelevant to sentencing

Due to the lack of definitional guidance in the Texas capital sentencing statute, the special issue questions can be interpreted broadly enough to allow for the complete dismissal of mitigating evidence. The following example provides a vivid illustration of the State's case culminating in the complete dismissal of defense mitigation evidence:

Special issue number two, [reads the question] I want to break it down. It has been over two months since I met the first one of you and we've gone through the whole trial not really talking about these issues. You've got to consider all of the evidence. You don't just look at that he lived in a crowded house and his mom got on cocaine and that he wasn't rich, he was poor. You've got to look at everything, including the circumstances of the offense. And to me what was so telling about the circumstances of the offense, on the double murder alone, twenty-seven shots into those young bodies. That's evidence of a killing. The defendant's character and background – who he is and where did he come from. And not only do you consider what they presented, but remember what has he continued to do in his adult years; deal drugs, carry guns; kill and shoot people. [All the defense witnesses] admitted that he was not sexually abused as a child, he wasn't physically abused as a child, and the rest of the family didn't turn out like him.³⁸⁵

The prosecutor above not only reminds the jury of the defendant's crime, but also reiterates that no one else in his family committed murder. The implication of this argument is that the mitigation evidence presented by the defense is not even sufficient to warrant the jury's consideration. As such, the State is able to subtly advise the jury about how to dismiss the personal mitigating evidence offered by the defense.

The next excerpt shows the prosecution drawing on the circumstances of the offense as a vehicle for dismissing defense offered mitigation:

³⁸⁵ TX02D

It was a little bit more than a month ago, that we were all gathered in the central jury room, and back then [the judge] held up those same special issues. So at this point, these special issues have become kind of like your old friends, because each one of you, when you came in individually to talk to us, we talked about those special issues. So, by now everybody's clear what those special issues are and that if you decide to give a death sentence, the special issue answers are "yes" to special issue number one and "no" to special issue number two. Now, on the question number two, the mitigation question, taking all evidence into consideration, circumstances of the offense, well, what are the circumstances of this offense? It's about as horrific as it could be, right? When you take all those things into consideration, does the defendant deserve the death penalty? Was there any reason why you should give him life without parole instead? And the answer to that is "no".³⁸⁶

The photographic evidence in this case caused a strong emotional reaction in many of the jurors. As such, the State's attorney was able to explain to the jurors how they could focus on the 'horrific' nature of the crime to answer the mitigation issue. Since the special issue question invites the jury to revisit the circumstances of the offense, the prosecutor's argument has a basis within the statutory framework.

(c) Nexus to the crime

As the following excerpt aptly illustrates, attorneys for the State often argue that defense offered mitigation evidence cannot be said to have been the cause for the offense and as such, should be dismissed as superfluous to the jury's sentencing determination:

What else do we hear from the aunts? We kept hearing about the PCP use. We heard over and over from cousins, from aunts that the defendant used PCP. That he started using PCP at a young age. They put [a medical doctor] up here to talk about the effects of PCP. Not one time, not one time, did they show a nexus between PCP use and these murders. Not one witness came in here to say the Defendant was high on PCP... there's no evidence that PCP caused him to commit any of these murders.³⁸⁷

³⁸⁶ TX03D

³⁸⁷ TX02D

The Supreme Court clearly stated in *Tennard v. Dretke* that there is no nexus requirement for mitigation to be relevant to sentencing.³⁸⁸ *Tennard*, a case originating from Texas, underscores the breadth of relevant mitigating factors, reiterating that any issue which might serve as a basis for a sentence less than death is permissible in determining a capital defendant's sentence. Despite the Supreme Court's holding in *Tennard*, the wording of the Texas special issue questions permits the prosecution to categorize mitigation evidence in a way which leads jurors to believe that the only relevant mitigation evidence they are able to consider are factors which establish a cause to the crime. Thus, allowing the State to use this method as a means of persuading the jury to discard mitigation evidence appears to be constitutionally suspect.

(d) Red-herring

This is perhaps the most prominent method used by the State to diminish mitigation evidence. This chapter has included numerous illustrations of how the special issue questions, broadly construed, allow for extraneous arguments to be made. For example, in the detailed case study presented at the start of this chapter, we observed what would ultimately become a persuasive argument against defense mitigation in the form of the State's comparison of the defendant's criminal activity to others in his family. Although the mitigation evidence clearly showed that the defendant was raised by a family of drug users and dealers, most of whom had been incarcerated several times, the prosecutor was able to divert the jurors' attention to why the defendant appeared as an anomaly in his own family. Jurors became so focused on this single line of argument that the powerful evidence of the defendant's upbringing faded into the background.

³⁸⁸ *Tennard v Dretke* 542 US 274 (2004)

Likewise, red-herring arguments can be used to divert the jury's attention to the absence of mitigation witnesses:

Who was the aunt that had the most contact with him? Who was the one that was in charge in the house? [The defendant's aunt]. Who was the one they didn't call? [The defendant's aunt]. The one that had the most day-to-day contact with the defendant, the one that was most responsible for raising him after his mother got hooked on the crack-cocaine was [the defendant's aunt]. We know she's available because [the defense expert] interviewed her.³⁸⁹

In another trial, attorneys for the State argued:

And you know when the defense talks about family members and what a good family man he is, where are the step-daughters to tell you what a great dad he was? Where is his wife to tell you what a great husband he is? Those are the most telling things.³⁹⁰

In a third trial the jurors were told:

So you heard from the guards. You heard that he's a good worker. You heard from his mom about how she tried to raise him right. He had a good background and a good family. But interestingly, you didn't hear from his sister talking about that he's a good person, he has good character. You heard from his sister that in June of 2005, he was acting like a fool. You didn't hear anything from his sister [names another sibling], from his brother [names another sibling], from his natural dad and I wonder why. I know people's lives are busy, schedules are tight, but don't you think if your brother or your son was on trial for capital murder, that if you had something good, even one good thing to say about him, that maybe you could make room in your schedule for that? And what about friends? Most people in forty-one years of life develop some friends. They make some friends along the way. Did we hear from one friend of his to say, "You know, he's a good guy. Really, really. I know what he did was a terrible thing, but basically he has a good heart and a good character." No, you didn't because he doesn't have a good heart and a good character.³⁹¹

These three examples demonstrate how the State can encourage jurors to think about issues unrelated to the evidence that has been presented at trial. Since speculation is permitted by the special issue questions, it is difficult for the defense to curtail such arguments. Although this particular technique is unlikely to be a phenomenon only

³⁸⁹ TX02D

³⁹⁰ TX05L

³⁹¹ TX08L

seen in Texas, it is given validity by the Texas special issue questions. Jurors can come to the conclusion that the absence of witnesses indicates character flaws which support finding that the defendant is dangerous or, alternatively, that without the testimony of those witnesses the mitigating evidence presented at trial was not sufficient for a sentence of LWOP.

Beyond speculating about the absence of mitigation witnesses, there are numerous other examples of red-herring arguments employed to distract jurors from the mitigation evidence with which they have been presented. Below I include the two examples which occur most frequently and appear especially difficult for the defense to counteract.

i. Defendant's life could have been worse

The mitigation issue asks the jury to decide whether there are sufficient mitigating circumstances to warrant a sentence of LWOP. Due to the existence of the qualifying word 'sufficient' the State is always able to argue that there is not enough mitigation to warrant a life sentence. Much of the mitigation evidence presented by the defense will focus on the defendant's difficult life. Such evidence allows the State to argue that things could have been worse for the defendant:

Look, I'm not going to sit here and lose my credibility that I hope I have gained with you by saying that we would want [the defendant's mother] to be our mom. That would be a lie. However, on the flip side I want you to remember that he's twenty-six. And from a young age up until his adult years, he's out there on the streets slinging drugs and selling it and selling it and selling it and selling it. And yet this is a man who personally grew up with what drugs can do to a family. And as he got older he continued to engage in behavior that he knew would have other moms in crack houses, would leave other children alone, and even with his background he didn't care... We also talked on voir dire that a lawyer – as lawyers we could find something mitigating in all of us. We've all had something bad happen to us in our life. Some way more than others. Agreed? And that's why the law recognizes that it has to be sufficient. And can growing up in a poor home with a bad mother be sufficient in light of five deaths?³⁹²

³⁹² TX02D

The State's argument implies that the defense has presented nothing about the defendant's life which would outweigh the crime for which he has been convicted. As previously mentioned, this tactic entreats the jury to weigh the defendant's life against the crime, which is not in fact a requirement of the sentencing statute. Moreover, juxtaposing defense offered mitigation evidence with the crime is a distraction from the intended function of the sentencing phase – an inquiry into the moral blameworthiness of the defendant or rather the best punishment for this particular offender based on the unique circumstances of his life.

ii. Focus on the victim not the defendant

Finally, a frequently used line of argument for why the defendant should be sentenced to death is to focus on what he has perpetrated against the victim:

And I want to talk about the evidence, the evidence from this case. [The defense attorney], when he talks to you about what this charge says and the words in it, you're instructed that you're not to be swayed by mere sentiments, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all of the evidence before you as it relates to special issues that you're going to be called upon to answer. But what is the evidence in this case? Part of the evidence in this case is what you heard person after person after person tell you about [the victim] and what a fine, decent human being she was. That's part of the evidence in this case, who [the defendant] killed, who he murdered, whose life he took away. And so when you go through these special issues and when you start considering the facts in this case, the evidence in this case and how you should answer those special issues, be guided by the evidence. And that includes who [the victim] was.³⁹³

Although victim impact testimony is allowed to be presented during the punishment phase³⁹⁴ and therefore permits such evidence to be used in the determination of the defendant's sentence, it is arguably used as a way to divert attention away from the defendant. Much has been written about the prejudicial effects of allowing victim

³⁹³ TX01D

³⁹⁴ *Payne v Tennessee* 501 US 808 (1991)

impact statements into evidence in the penalty phase of a capital trial.³⁹⁵ The data in this study similarly confirm that allowing the State to focus on victim attributes during the penalty phase further propels the jury's decision in the direction of death.

5. Conclusion

Throughout the trial both the State and the defense present evidence which they hope will persuade jurors to answer the special issue questions in a particular way. However, what the data in this chapter demonstrate is that the special issue questions function as a vehicle for increasing the jury's focus on one particular sentencing factor, namely the defendant's dangerousness, while allowing (and in some instances compelling) them to cast aside relevant sentencing information concerning mitigating factors. The second special issue question itself does little to promote the jury's consideration of such mitigating factors. Jurors are not directed to view evidence of age, mitigation relating to the crime and personal mitigation such as the defendant's mental health history, experiences of physical, mental and emotional abuse, limited intellectual functioning which does not rise to a diagnosis of mental retardation, employment history, military service, poverty, religiousness, positive character traits, alcohol or drug addiction, and positive adjustment to incarceration as factors which should be relevant to their sentencing decision. As these factors are not statutorily designated as inherently mitigating, arguments by the prosecution which trivialize and diminish their importance or even use them to justify a harsher punishment are in fact authorized by the special issue questions.

³⁹⁵ See James Luginbuhl and Michael Burkhead, 'Victim Impact Evidence in a Capital Trial: Encouraging Votes for Death' (1995) 20 *American Journal of Criminal Justice* 1; Susan Bandes, 'Empathy, Narrative and Victim Impact Statements' (1996) 63 *University of Chicago Law Review* 361; Amy Phillips, 'Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing' (1997) 35 *American Criminal Law Review* 93; Bryan Myers and Edith Greene, 'The Prejudicial Nature of Victim Impact Statements' (2004) 10 *Psychology, Public Policy and Law* 492

The way in which the special issue questions function also highlights the inequity created for defendants by the Texas capital sentencing statute. Due to the bifurcation of the trial, there are limitations on what evidence the defense is allowed to present to the jury in the guilt phase. Whereas the State is able to immediately begin presenting evidence in support of imposing a death sentence, the defense often has to wait until the penalty phase to begin their case for why the defendant should receive a life sentence. Although there are some methods which can be used by the defense to combat this, such as frontloading mitigation evidence, the defense is clearly more restricted than the State. Though bifurcation is applied in capital cases in every jurisdiction, the Texas special issue questions exacerbate bias towards a death sentence by placing the defendant's dangerousness at the center of the jury's determination. Mitigation evidence is therefore made a secondary consideration, if indeed it is considered at all.

Chapter VII. Punishment Deliberations in Cases Resulting in a Death Sentence

The majority of jurors (70%) who participated in this study entered punishment deliberations believing that a death sentence was *required* if they thought that the evidence presented suggested that the defendant was likely to be dangerous in the future. This percentage is similar to earlier Capital Jury Project (CJP) findings which found that 68% of Texas jurors believed a death sentence was required if the defendant was found to be a future danger.³⁹⁶ In fact, previous CJP findings demonstrated that Texas jurors were twice as likely to have this mistaken belief as jurors from the other thirteen states included in the initial study. The consistency between the results of previous CJP research and the current study are striking and especially significant given that the Texas statute changed in response to the United State Supreme Court's decision in *Penry v. Lynaugh* in which the Court concluded that the original questions – which lacked any mention of mitigating evidence – were not constitutionally broad enough to allow the jury to give mitigating effect to the defendant's evidence of abuse and mental retardation.³⁹⁷ If the current statute provided an adequate vehicle for presenting mitigation evidence as the Supreme Court intended, one would expect that jurors who served in more recent cases to respond differently. However, the data show that is not the case. Thus, it remains more likely that jurors in Texas will believe that once the jury has determined the defendant to be a future danger, a death sentence must be imposed. This erroneous belief violates a central component of the constitutionality of capital punishment – that a death sentenced is never mandatory or required.

³⁹⁶ William Bowers and Wanda Foglia, 'Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing' (2003) 51 Criminal Law Bulletin 51, 73 Table 4

³⁹⁷ *Penry v Lynaugh* 492 US 302 (1989)

As discussed below, many participating jurors explained that their jury did not deliberate about the mitigation question once they had decided the defendant was a future danger. For those jurors who did, the discussion tended to focus exclusively on mitigation evidence related to the crime. In cases where the defense only presented mitigation evidence related to the defendant's background, such evidence was nearly always dismissed by the jury as irrelevant to their sentencing decision. Although some jurors were simply not open to considering personal mitigation as relevant to their sentencing decision, a number believed they *could not* consider such evidence based on their interpretation of the special issue questions. Given the ambiguity of the capital sentencing statute, jurors utilized the interpretation of the special issue questions they were provided during voir dire, specifically the interpretation advanced by the judge and prosecution.³⁹⁸ The State's interpretation of the sentencing statute extends the dangerousness issue to comprise any aggressive behavior in prison, including the destruction of prison property, while limiting relevant mitigating evidence to factors related to the crime (see Chapter 4). As Chapters 5 and 6 demonstrated, the State is easily able to reinforce throughout the trial the explanation they provided to jurors at voir dire as to how evidence should be applied to the special issue questions. Though steps can be taken by the defense to try to limit the effect of the special issue questions, the statutory focus on dangerousness, coupled with the ambiguity of the statute, tips the balance in the State's favor and in the direction of a death sentence. Although four cases in this study did result in a sentence of life without the opportunity for parole (LWOP), three of those did so because of mitigation related to the circumstances of the offense (see Chapter 8). Thus, only one

³⁹⁸ As mentioned previously, jurors are inclined to view the elaborations provided by the judge as the only interpretation of the sentencing statute. Previous research shows that death-qualified jurors are also more inclined to view the prosecution as trustworthy and therefore believe that their explanations are more accurate than defense counsel of whom jurors appear to be especially mistrustful. See Robert Fitzgerald and Phoebe Ellsworth, 'Due Process vs Crime Control: Death Qualification and Jury Attitudes' (1984) 8 *Law and Human Behavior* 31

of the eight cases included in this study resulted in a sentence of LWOP as a direct result of mitigating evidence related to the defendant's personal background.³⁹⁹

This chapter examines how jurors in the four cases in this study which resulted in a sentence of death reached a punishment decision. In particular, the analysis focuses on three areas: how the special issue questions encourage jurors to avoid responsibility for the defendant's sentence; the trumping nature the defendant's dangerousness occupies in deliberations; and jurors' misunderstanding of the mitigation special issue question. Importantly, this analysis demonstrates how jurors uncritically adopted the language and reasoning provided by prosecutors (and at times judges) during voir dire and throughout the trial virtually verbatim in an effort to explain why they found mitigation irrelevant or unworthy of consideration. The data demonstrate that jurors have taken the interpretation of the special issue questions provided by the State's attorneys as the *only* permissible interpretation. As such, jury deliberations at the penalty phase highlight how the four mechanisms delineated by the prosecution during jury selection – 'flipping' mitigating evidence into aggravating evidence, focusing exclusively on mitigation that is directly related to the crime, dismissing all other mitigating evidence as irrelevant to the jury's sentencing decision, and utilizing arguments which distract from the moral decision the jury is meant to make – are eventually applied to the jurors' final sentencing decision. Although the focus of this chapter will be on cases that resulted in a death sentence, many LWOP jurors held the same mistaken beliefs about how to interpret evidence. Those jurors' reasons for sparing the defendant will be discussed in the next chapter.

³⁹⁹ All trials which resulted in a sentence of LWOP during the eighteen month period in which the sample was drawn were included in this study. See Chapter 3 for a thorough discussion of case selection.

1. Special Issue Questions Enable Jurors to Avoid Responsibility for the Punishment They Impose

As discussed in Chapter 4, jurors are often told during voir dire that they will never be asked to decide whether the defendant lives or dies, but rather they will only be instructed to answer a series of questions, the answers to which will dictate the defendant's penalty.⁴⁰⁰ Jurors frequently recalled this rationalization when discussing their role in sentencing the defendant. For instance, the juror quoted below recalled how attorneys for the State explained at voir dire that she would not be sentencing the defendant to death, but simply answering a series of questions:

They asked my view on the death penalty, if I could be fair about that, if I was completely against it and of course my answer was it depends. I did say it would be extremely hard for me to make that decision – I don't know if I could make it. Then they clarified – I think the prosecution did it this way – you're not actually saying "death". You're answering the question and the punishment is set by law. You're not saying – you're not making the final decision. You're just answering the questions. I guess it's a way to make me feel better about it.⁴⁰¹

Once this juror had expressed reservations about her ability to condemn the defendant to death, the State provided her with a way to distance herself from the defendant's fate. This 'instructional distance', as Haney describes, is instrumental in priming jurors to view the sentencing decision as a process outside of their control.⁴⁰²

Especially important is the fact that this juror explained that the jury as a whole might not have been able to sentence the defendant to death without the instructional distance provided by the special issue questions:

Q: You mentioned you liked the questions because it sort of simplifies the process. What would happen if there weren't any questions and it was just a matter of going back there and saying, "We think this guy

⁴⁰⁰ This appears to be a potential violation of the Supreme Court's ruling in *Caldwell v Mississippi* where the Court held that it is constitutionally impermissible to mislead capital sentencers into thinking that responsibility for determining the defendant's penalty rests elsewhere. See *Caldwell v Mississippi* 472 US 320 (1985)

⁴⁰¹ TX04D

⁴⁰² Craig Haney, 'Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death' (1997) 49 *Stanford Law Review* 1447, 1475-1481

deserves life – we think this guy deserves death”)? What do you think would have happened in your deliberations?

A: I think it would have been heated. I know of one juror that was very much against the death penalty...I just think having the questions puts it in perspective. It alleviates juror guilt. Not like you should feel guilty, but the possibility of you know – I didn't kill him.

Q: Do you think the resulting punishment would have been the same if the questions were not there?

A: I don't know, because I'm not sure on everybody's beliefs on the death penalty and I know there was a wide variety in that room.⁴⁰³

Importantly, the juror recognized that had the questions been different she could not be sure whether the jury would have come to the same punishment decision.

Critically, this juror acknowledged that if the jury had been confronted simply with the options 'life' or 'death' it is possible they would not have been able to impose the death penalty. The juror expressed this view at the end of the interview:

When the trial was all over and there were some emails and one of the emails when I got back to work was “Well, did you hang him?” That's not – I just don't view – I like the idea of the questions because it is not really in my hands as far as life and death. It's in his hands because he is the threat to society. Well, did the prosecution prove that he was a threat to society, yes. Are there mitigating circumstances, did the defense prove there were any mitigating circumstances in the crime, no. We answered the questions which results in a death penalty. It's not me saying, hang him. It somewhat takes away from the jury... Maybe the questions make it easier and I could be wrong, but I think if we had to go back there – and I go back to my first experience [as a juror on another case] writing “life”. That was hard and that was the right punishment for that man, but it was hard. I think maybe that's why more people are sentenced to death in Texas, because it is more factual. It was not my personal opinion. It was looking at the facts and answering the questions...Just writing that word or saying that word – that's hard.⁴⁰⁴

Here the juror concludes that the death sentence was the defendant's fault because he was, in her mind, a future danger. Tellingly, she misstates the mitigation issue as limited to evidence only related to the commission of the crime. Finally, the juror concludes that the special issue questions are indeed more 'factual' than a mere

⁴⁰³ TX04D

⁴⁰⁴ TX04D

determination of whether the defendant ought to live or die. The questions therefore compel her to sentence the defendant to death, and allow her to side-step any responsibility for her actions.

Another juror from the same trial provided a rich description of how the special issue questions narrowed the jury's sentencing decision:

I was able to just kind of box them separately and that's how I got over it in my mind. I think a lot of jurors were able to do that and they understood that even though that's what the final decision would be that there are two separate questions. We were thinking how the questions were worded – that's how we have to answer. So, I think the way the questions were helped a lot of jurors. I think most of us, well I don't know. If it were to be put in front of me – life or death – I mean he would be punished having life and it would be hard for me to choose death, unless it was something very much like the words you have on here – heinous, vile, depraved, which he didn't. He just shot. It was cold-blooded, yes, but that's different. So, it would have been hard for me, between those two to say, o.k. he's going to die. I don't know if I could make that decision if it was that straightforward.⁴⁰⁵

This juror's account suggests that, despite the commonly held belief amongst jurists and legislators, statutorily undefined words do not have a commonly understood meaning that all jurors can access and agree on.⁴⁰⁶ The juror speculates that if the statute instructed her to think about whether the defendant should be sentenced to life or death she might not have been able to sentence the defendant to death. She also suggests that had the statute adopted the phrase 'heinous, vile, or depraved' like a number of other states,⁴⁰⁷ she would have been less likely to sentence the defendant to death. However, if the statute included the phrase 'cold-blooded', she would lean in the direction of a death sentence. This level of nuanced interpretation is the hallmark

⁴⁰⁵ TX04D

⁴⁰⁶ See *Johnson v Texas* 509 US 350, 368 (1993) (quoting *Boyde v California* 494 US 370, 381 (1990)). ("In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would with a "commonsense understanding of the instructions in the light of all that has taken place at the trial."")

⁴⁰⁷ Some states use a combination of these terms or ones which are functionally equivalent as statutory aggravating factors. See e.g. KAN. STAT. ANN. § 21-6624(f)(1)-(7) (West 2010). For a list of State's statutory aggravating factors, see the Death Penalty Information Center < <http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state>> accessed 26 July 2011

of arbitrariness in decision-making. There can be little doubt that the sanitized language of the special issue questions matters greatly and thus how jurors understand, interact with, and interpret the questions has a clear impact on their ultimate sentencing decision.

The judge lacks any sentencing discretion and must sentence the defendant to the penalty determined by the jury. However, jurors considered their answers to the special issue questions as distinct from the process of actually sentencing a defendant to death. Indeed, as the following jurors explained, for those jurors who may be reluctant to sentence a defendant to death under a different sentencing scheme, the special issue questions enabled them to do so:

When we were asked to look at the questions, when we were given the instructions and read the questions again, it wasn't – I don't look at it like I gave him the death sentence. I look at it like – I was given two questions to answer and I answered the questions and from those questions that is the result.⁴⁰⁸

When jurors expressed reservations about sentencing the defendant to death during deliberations, other members of the jury encouraged them to view the sentencing process mechanically. The foreman of one jury which sentenced the defendant to death described how a lone juror who wished to sentence the defendant to LWOP expressed reservations about being responsible for the defendant's death:

It's a burden on you if you feel like you're condemning somebody to death so people said – aired their feelings about that. It was probably me and a couple others, but me that said look that's not really what we're doing here. We know the consequences of the way we're answering these questions but our charge is just to answer these questions and it is up to the judge and there's automatic appeals and it's up to a lot of other people you know whether that ever happens or not. Our charge is just to answer this question and let the chips fall where they may. I did try to emphasize that that isn't our responsibility.⁴⁰⁹

⁴⁰⁸ TX04D

⁴⁰⁹ TX02D

In this way, the foreman of the jury was able to successfully persuade the juror who expressed reservations about sentencing the defendant to death to distance herself from the punishment decision. She eventually joined the other eleven jurors in sentencing the defendant to death.⁴¹⁰

Similarly, the foreman from another jury who sentenced the defendant to death described how the special issue questions enabled him to steer deliberations away from considering defense offered mitigation evidence regarding the defendant's troubled upbringing:

We started with prayer – started with perspective again. Even though the consequence was a death penalty we weren't judging his life. We were answering the questions that led to the death penalty. We tried to keep it off the real emotional point of life... The process that was given to us was something that we could complete. I mean it made it – I think the process made it all possible and that process includes the three questions, the instructions, how you go about it. It's an enabler, the process is an enabler. If you didn't have the process I think you'd have a hard time getting to the decision, you'd be all over the place or very subjective in terms of why he should get it. It brings specificity to it, clarity at least that's what it did for me, 'cause I'm answering those three questions, I'm not sentencing someone to death even though that's the end result.⁴¹¹

Throughout his interview the juror quoted above described how the special issue questions allowed the jury to 'transcend' judging the defendant's life. This belief that the questions enabled the jury to avoid a determination of whether the defendant's life should be spared expressly contradicts the purpose of the penalty phase of a capital trial. Although jurors are expected to render a moral decision regarding the defendant's death-worthiness at the penalty phase, the data show that Texas jurors are approaching this decision as a purely factual determination. This approach to sentencing diminishes jurors' responsibility for the defendant's sentence and

⁴¹⁰ This phenomenon was reported in earlier cases analyzed by the Capital Jury Project. See Ursula Bentele and William Bowers, 'How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse' (2001) 66 Brooklyn Law Review 1011, 1039

⁴¹¹ TX01D

constrains their ability to exert agency in deciding the defendant's punishment. As the juror below described, the jury in his case would likely not have been able to sentence the defendant to death without the special issue questions:

I really don't think we make the decision *per se*. It's not like we go, ok give him the death penalty. I think the questions they give us, I think those help to frame it in a way to where it is justice – it is not always fair. A lot of times innocent people go to jail. I don't think that was the case in this situation, but I think if it had been a case of we go, and we do this trial, and then there were no more questions and we just had to go ok do we put him in prison forever or do we give him the death penalty, I don't think any of us could have walked out of that room and given him the death penalty. I think the questions are there to help people.⁴¹²

The majority of jurors who participated in this study did not believe they were ultimately responsible for the defendant's sentence. As Table 7.1 illustrates, when participating jurors were asked to rank a series of five actors as being most to least responsible for the defendant's sentence, 82% of jurors said the defendant was most responsible for the sentence. As one juror expressed:

There's a young man sitting down there waiting to die and you were sitting on the jury that – you didn't put him there, he put himself there, but still you still feel the twinge of it simply because he is young, he really didn't have a good shot, it's sad.⁴¹³

Critically, not a single juror from the forty-six interviewed believed that the individual juror was most responsible for the defendant's punishment, while nearly a quarter of jurors (24%) viewed themselves as the least responsible party for the defendant's punishment. In addition, jurors were also asked who they believed to be ultimately responsible for whether the defendant lived or died. While 61% of jurors responded that the defendant's fate would be strictly the jury's responsibility, 22% of jurors claimed only partial responsibility while a full 17% claimed no responsibility at all.

⁴¹² TX02D

⁴¹³ TX02D

Table 7.1

Percentages of ranking order for who is most responsible for the defendant's punishment

Actor	Most responsible	Least responsible
The defendant	82.2 %	8.9 %
The law	10.9 %	0.0 %
The judge who imposes the sentence	0.0 %	67.4 %
The jury that votes for the sentence	6.5 %	0.0 %
The individual juror	0.0 %	24.4 %

Psychological research reveals that creating ‘social and cognitive processes that distance people from the moral implications of their actions’ is a central component of the death penalty’s continued use.⁴¹⁴ Such mechanisms enable jurors to feel less responsible for the defendant’s ultimate penalty. The special issue questions undoubtedly allow jurors to side-step the moral implications of their responses by formulating the decision to take the life of another human being into a factual determination. Interestingly, an earlier study conducted with capital jurors in California and Oregon found that many participants in Oregon described a similar instructional distance.⁴¹⁵ As mentioned previously, since the reinstatement of capital punishment Oregon has maintained a capital sentencing scheme modeled on the Texas statute.⁴¹⁶ The study noted that since jurors in California were not directed to answer questions, but rather asked to weigh factors for or against a sentence of death, it was more difficult for Californian jurors to avoid responsibility for their sentencing decision.⁴¹⁷

⁴¹⁴ Craig Haney, ‘Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death’ (1997) 49 *Stanford Law Review* (1997) 1447, 1449

⁴¹⁵ Craig Haney, Lorelei Sontag, and Sally Costanzo, ‘Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death’ (1994) 50 *Journal of Social Issues* 149

⁴¹⁶ OR. REV. STAT. ANN. §163.150(1)(b)(A)-(D) (West 2009)

⁴¹⁷ OR. REV. STAT. ANN. §163.150(1)(b)(A)-(D) (West 2009)

2. Centrality of Dangerousness

Jurors in Texas are instructed to answer the special issue questions in a particular order. This is statutorily required because the first special issue question – whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society⁴¹⁸ – is the mechanism by which Texas narrows the class of murders that are eligible for a death sentence. While other states instruct jurors that they must find other aggravating factors relating to the murder in order for the defendant to be eligible for a death sentence,⁴¹⁹ Texas positions the defendant’s future dangerousness as the threshold requirement for eligibility.⁴²⁰ Thus, a convicted capital murderer who is not viewed as a future danger will automatically receive a sentence of LWOP.

Given that the dangerousness issue serves as a gatekeeper to a defendant’s eligibility for a death sentence in Texas, the interpretation of this special issue question becomes critical to juror deliberations and ultimately to the defendant’s sentence. Jurors in cases which resulted in a sentence of death discussed the meaning of key phrases within this special issue question during their deliberations with reference to the guidance they had received from the judge and the prosecution during voir dire:

I don’t remember if it was the judge or the prosecution, I’m sure it was probably the judge that pointed out to us the fact that we could not just think about society, out in the quote, unquote, “real-world”, but that we had to also consider if he’d be a danger to other inmates depending on where he was sent.⁴²¹

⁴¹⁸ TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (West 2009)

⁴¹⁹ See e.g. CONN. GEN. STAT. ANN. § 53a-46a (West 2001). For a list of State’s statutory aggravating factors, see also Death Penalty Information Center <<http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state>> accessed 26 July 2011

⁴²⁰ See William Berry III, ‘Ending Death by Dangerousness: A Path to De Facto Abolition of the Death Penalty’ (2010) 52 Arizona Law Review 889

⁴²¹ TX02D

Another juror from the same trial explained:

One of the things that kept coming up was would he be a threat to society and one of the things we had to keep remembering, somebody, maybe it was the judge in her, when she spoke to us and said society means the people in the prison also there's guards and there's other people there, so we kept coming back to whether or not he'd be a threat to society. Also we had to remember that prison was also a society so would he be a threat there.⁴²²

The jury foreman from the same case stated:

If I remember correctly, [the first question] loosely paraphrased is do you feel like the defendant would be a continuing serious threat to society or something like that. We discussed what that meant. I mean, it could be the prison society of being inside the prison, and being if he's not locked down all the time it could be a danger to both fellow inmates and guards and whoever else.⁴²³

Jurors across all eight cases discussed aspects of the defendant's future dangerousness during deliberations. Although various topics were discussed in all eight cases during penalty deliberations, in cases which resulted in a death sentence, discussions of the defendant's future dangerousness eclipsed all other topics.

(a) An expansive interpretation of future dangerousness

A central feature of the channeling effect of the special issue questions is the expansion of the meaning of the dangerousness issue to include any aggressive activity which the defendant might engage in while incarcerated. In cases where the defendant did not have a previous criminal history, prosecutors were quick to educate jurors about the possibility of their escape from prison and/or provide arguments which focused on the defendant's evil nature as a reason to support a finding of dangerousness (see Chapters 4 and 6).

As discussed in Chapter 4, attorneys for the State taught jurors during jury selection to view 'society' as those with whom the defendant would necessarily come

⁴²² TX02D

⁴²³ TX02D

into contact in prison – such as guards, nurses, visitors, and other inmates, especially those convicted for less serious offenses. Jurors recalled this and in punishment deliberations made references to the examples that attorneys for the State had provided:

We started talking about what it said, if he was going to be a danger in the future and we kind of started talking about you know, him being in prison and how he could you know, you could have somebody in there who's not a murderer or something maybe in there for a DWI and they get into a conflict and he kills them or even a guard. We talked about other prisoners and even though they were prisoners, they were still people, and then again the guards. You know people get into confrontations about things and he just seemed to be someone who wasn't going to back down from somebody.⁴²⁴

This juror utilized examples provided by the prosecution during jury selection and in closing arguments which expand the meaning of the dangerousness issue. Critically, this juror's understanding of prison society and the defendant's possible behavior had also been supported by the testimony of one of the State's witnesses in the penalty phase, a 'future dangerousness expert'. Such expert witnesses are typically psychologists, psychiatrists, or employees within the prison system who provide information about prison classification, assaults in prisons, and speculate about the defendant's future behavior based on hypothetical questions regarding the behavior of inmates in general. These experts do not evaluate the defendant personally.⁴²⁵ The admission of such expert testimony is controversial as jurors are prone to interpreting speculative testimony as scientific fact.⁴²⁶ Notably, the same dangerousness expert testified in three of the four cases included in this study that resulted in a sentence of

⁴²⁴ TX02D

⁴²⁵ Texas Defender Service, 'Deadly Speculation: Misleading Texas Capital Juries with False Predictions of Future Dangerousness' (2004) <<http://02f2fd4.netsolhost.com/tds/images/publications/DEADLYSP.pdf>> accessed 21 June 2011

⁴²⁶ See *Barefoot v Estelle* 463 US 880 (1983) (holding that the testimony of a psychiatric expert which concludes that the defendant will probably be a future danger based on hypothetical questions is admissible)

death. The following juror expressed the significant impact this expert's testimony had on the jury's decision:

Something that guy said was one of things we thought of – that he was going to be in general population and there was always going to be someone somewhere that he could manipulate because he was very good at that and that's how we primarily – how we determined that he potentially would be a threat.⁴²⁷

A juror from a different trial likewise explained:

[His testimony] was very influential for me because I would have never known that if you give somebody life in prison they are out with the general public in prisons. They are not in secluded holdings or whatever. I do remember something being brought up about the differences between if you are on death row – that death row inmates are secluded. They have only one hour of outside the cell freedom and that's for everything...Listening to him and not knowing and then having him explain all of that – it definitely changed my mind 'cause I'm not sure if I had my mind made up at that point, but I was like – wait a minute.⁴²⁸

The state presented a future dangerousness expert in only one of the cases which resulted in a sentence of LWOP and this expert – a different person to the one who testified in three of the cases which resulted in a sentence of death – was rigorously cross-examined by defense counsel. As a result, jurors in that case were persuaded that inmates sentenced to LWOP for capital crimes were fairly restricted within the prison compared to those serving LWOP for non-capital crimes. For instance, one juror from that trial recounted how the State's examination of the future dangerousness expert focused on how much freedom the defendant would have within the prison while the defense's cross-examination differentiated the levels of restriction experienced by inmates serving a life sentence:

[The prosecutor] made it [seem like the defendant] is not going to be in solitary confinement for the rest of his life which was a concern for some of the jurors. You know they felt like if he's not getting the death penalty he should stay in solitary confinement for the rest of his life. Some of the jurors did not like that fact. Then the prosecution turned it against the defense to

⁴²⁷ TX03D

⁴²⁸ TX01D

make it show like so he'll be out in the general population right. The defense used it to show that he won't be able to do like work release programs and stuff, which was – that was an important fact to know – that he would never actually get to leave the prison and be out in the public. [The defense also] talked about levels of population. The lower levels can leave and go to work program and [the defendant] wouldn't be able to do that. And then the middle level second level is in the general population but they just can't leave the prison and stuff. I think that's where they said he would be – that's where lifers were. The next level I guess is people that can't be put with other people and then there's solitary confinement so I don't remember exactly but yeah [the defense] did describe a lot of it.⁴²⁹

This description of the classification process was one that jurors in cases resulting in a death sentence either did not receive or understand.

Despite the testimony of a future dangerousness expert, in one case which eventually resulted in a sentence of death not all jurors believed that the defendant posed a serious threat to others in prison. A juror from this case described the arguments made by a lone hold-out juror against finding the defendant dangerous:

[The hold-out juror] hung up himself on the criminal violence part that was where we were not in agreement. He was not sure that fighting in prison constituted a criminal act, that just because he got in a fight in prison that's not a criminal act and that's what he kept just coming after. I think that's where we were all like – because we didn't understand to be honest. I was baffled by it – where he was confused. I think he was thinking criminal more like you had to have gone out and shoot somebody kind of thing he didn't, I don't think he was thinking on the side that if you got in a fight in prison oh sorry you hit somebody too hard the wrong way they could die from that it's still a crime accidental or not intentional. I think he was thinking more of an intentional kind of aspect, or that just because you punched somebody that's not, he didn't think of that as a criminal act. I think he was trying too hard to make it need to be more severe than just getting into a fight, cutting somebody.⁴³⁰

Since the dangerousness question functions as the gatekeeper to eligibility for a death sentence, jurors must be convinced of the defendant's dangerousness 'beyond a reasonable doubt'. Thus, the hold-out described above was justified in his view and did not need to change his stance to conform to the law. However, due to pressure from the eleven other members who had come to view the State's interpretation of the

⁴²⁹ TX05L

⁴³⁰ TX01D

dangerousness issue as the only procedure for sentencing, the hold-out eventually joined with the other jury members in sentencing the defendant to death.

Hold-out jurors who did not believe the defendant would be dangerous in prison described how their beliefs were quickly met with resistance in deliberations from the majority of jurors, who utilized prosecutorial arguments to support their point of view:

Well, they brought in like a guard you know. What if he would kill a guard while the guard's at work or another inmate? Like, if he did this could you live with it? You're going to send him here but he could still kill somebody else. That came into play. They also talked about how [the capital murder] was just downright malicious.⁴³¹

A juror from a different case similarly described the arguments used by other members of the jury against a lone hold-out who was not convinced the defendant was a future danger:

She was saying, how do we know he's going to be a danger to society? There's no way to prove that he's going to be a danger to society and we went back over and discussed what he did to all those girls and the way he sat there and didn't care about it for the last week. Like I said, if he would have just gotten much more sympathy – had he just done something. She, in her mind at first wanted definite proof that he would be a menace and there's really no way to absolutely guess what somebody's going to do later on down the road. We laid out all the evidence again – look at this picture [from the crime scene]. Anybody who could do this even one time I wouldn't want them to be in a room with anybody I know.⁴³²

The two quotes above illustrate the type of arguments made by jurors during penalty deliberations in order to convince less certain members of the jury of the defendant's future dangerousness. Interestingly, much of the argument used to persuade hold-outs to vote 'yes' to the dangerousness issue involved conjecture – jurors arguing that they could not be certain of the defendant's behavior, but preferred to err on the side of caution. Given that jurors were told by the prosecution – and at times the judge – that

⁴³¹ TX02D

⁴³² TX03D

they could consider the circumstances of the offense when determining the defendant's dangerousness – it is not necessarily surprising that jurors utilized guilt phase evidence to persuade less committed jurors. Thus, evidence presented in the guilt phase (in particular, crime scene and autopsy photos) was often revisited by the jury during their penalty deliberations.

In many instances, jurors focused entirely on the facts of the capital crime to determine the defendant's punishment. The foreman of one jury described how he argued in favor of finding the defendant dangerous due solely to the facts of the crime:

Being the jury foreman I took a quick vote to see where we were at and I think we had three or four of us – or them – were against and they wanted life and I was not going to let this guy off. And I just kept hammering – in fact, I ended up getting very verbal almost to the point where I think one of them accused me of being verbally abusive, if I'm not mistaken, because I thought they were stupid. Because it's like here's the case, here's the evidence, here's the young lady – the victim, the young fetus unborn, the puncture wounds – the way I look at it today I've got three daughters of my own and how would I feel if that was my daughter? I know you're not supposed to bring in your personal emotions into it, but you do. I asked each of the members of the jury – what if that was your daughter?⁴³³

As mentioned previously, 39% of jurors had reached a punishment decision prior to the beginning of the penalty phase. Jurors who were 'premature' decision-makers, like the foreman quoted above, frequently focused exclusively on evidence related to the commission of the capital crime in the penalty deliberations.

(b) Converted mitigation: flipping mitigation into aggravating evidence

As earlier chapters demonstrate, jurors were prepared to view all possible mitigation evidence as aggravating evidence – what has been referred to in previous

⁴³³ TX03D

research as flipping or ‘converting’ mitigation.⁴³⁴ As the special issue questions do not direct jurors to view any factors that might be presented as inherently mitigating, all mitigating evidence presented by the defense can be flipped into aggravating evidence. Such converted mitigation evidence finds expression in the dangerousness issue.

For example, traditionally a defendant’s lack of criminal history is viewed as a mitigating factor in sentencing.⁴³⁵ However, the emphasis in the Texas capital sentencing statute on the defendant’s future dangerousness, coupled with the lack of explanation provided about relevant mitigating evidence, means that jurors are able to use such evidence against the defendant. In one case defense counsel presented evidence regarding the defendant’s lack of a criminal record and his previous work history. In addition to working as a youth pastor, the defendant had also worked in a college library. His supervisor from that job testified about his ability to work well with others. During deliberations, jurors converted this evidence of good behavior into evidence which established his dangerousness:

There will always be somebody who is weaker than him and he will always be able to find that person if he’s allowed to walk around. Not only that, but if he behaves himself like he’s been doing – yeah, he’s behaving himself. He’s in prison and he knows if he doesn’t there’s consequences. He knows in order for himself to get a job in the library, for instance, guess what he’s going to have to be a good boy to do that. He’s not stupid. He knows he’s going to get over around the librarian. We already know he can win over one librarian so now what is he going to be able to talk these people into helping him get out of prison? What about if he has to go to the infirmary because he’s sick one day? What if he fakes being sick and stabs a nurse, you know if he doesn’t break out he’s hurt somebody.⁴³⁶

⁴³⁴ Craig Haney, Lorelei Sontag, and Sally Costanzo, ‘Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death’ (1994) 50 *Journal of Social Issues* 149

⁴³⁵ See Sandra McPherson, ‘Psychosocial Investigation in Death Penalty Mitigation: Procedures, Pitfalls and Impact’ in Graham Davies and others (eds) *Psychology, Law, and Criminal Justice: International Developments in Research and Practice* (Walter De Gruyter Inc 1996) 292

⁴³⁶ TX03D

This juror created an elaborate, but ultimately entirely theoretical argument about the future dangerousness of the defendant based on his impression that the defendant is manipulative. The prosecution in this case had devoted considerable attention in the penalty phase to demonizing the defendant's character, as the following excerpt from their closing statement highlights:

And he will not hesitate to lie to anyone in that prison that he thinks it will benefit him. Those crimes show you that he is a master manipulator, someone who can con authority figures, someone who will easily be able to con wardens, guards, anybody into thinking that he is what he appears to be, a true, a sincere man of God.⁴³⁷

Attorneys for the State also described the defendant as a 'wolf in sheep's clothing' during the closing arguments:

A little bit more than a week ago, where I got up here in front of you in opening statements and I told you that we expected the evidence to show that [the defendant] was a wolf in sheep's clothing. Since I said that, you've heard the evidence that's shown that that's true. And that type of danger is a danger that parents can't protect their children from.⁴³⁸

These arguments enabled attorneys for the State to circumvent the fact that the defendant had no previous criminal record and maintained a positive work history. The prosecution argued that his dangerousness could be deduced not through his past actions, but through his intelligence and capability to blend-in, making him the worst kind of criminal – the kind that cannot be seen. The juror quoted above went on to use the same phrase in her final explanation of why the jury had sentenced him to death – 'It's like one of those little wolves in a cartoon – he lured these people in and took advantage of them.'⁴³⁹ This line of reasoning was especially persuasive to the jury foreman, who applied the State's logic to argue for a death sentence:

⁴³⁷ TX03D

⁴³⁸ TX03D

⁴³⁹ TX03D

If we give this guy life he's gonna be in general population. He's going to get his own little group of cronies going and I told him everybody in prison finds God. He's already a man of God. Before you know it he's going to get a couple of guards on his side and he's either going to break out or reduce his sentence at some point in time even though they always say they can't, but that's bull. You know they can. They always go in ten years down the road and have a hearing for reduction of sentence.⁴⁴⁰

Interestingly, in addition to applying the State's reasoning in favor of finding the defendant to be a future danger, this juror also expressed an inherent mistrust in the guarantee that the defendant would never be paroled. As mentioned previously, attorneys for the State had instructed the jury to consider the possibility of a prisoner escaping or receiving a pardon when explaining the special issues questions to jurors during voir dire. Taken together, jurors' comments about the defendant's ability to manipulate anyone around him, coupled with an application of the prosecution's reasoning, provided sufficient 'evidence' for the jurors to believe that there was a 'possibility he could do harm'.⁴⁴¹ Additionally, even if jurors believe that the defendant might not necessarily do harm in prison, the State advances arguments to indicate that there is no guarantee that the defendant will stay in prison for life. This is a drastic departure from the statutory iteration of the first special issue question.

3. Dangerousness Compels Instinctive Responses

Jurors included in this study often expressed fear when discussing the defendant. Though it is difficult to determine the level of concern engendered in jurors during the trial, several participants directly expressed their fear of the defendant and the impact this had on their sentencing decision:

They scared the holy shit out of me – excuse the expression... I wasn't [in favor of the death penalty] at first, but for the heinous, brutal – I don't care – no sympathy, no remorse – I agree for it, 'cause I don't think you can

⁴⁴⁰ TX03D

⁴⁴¹ TX03D

rehabilitate those. Before I believed there was always hope for everybody. He made me look at it differently. Yes, I fear for my safety, my family's safety. Upsetting that I had to go in my inner soul and decide what I needed to do.⁴⁴²

The same juror repeated later in our discussion:

I was against the death penalty. I did not believe in the death penalty until I got through this trial and after what I saw in that trial and what happened I didn't want him on the street no more. All I could think of was who was who's his next victim?⁴⁴³

The comments by this juror serve to crystalize a fundamental problem with the Texas statute. Focusing on the defendant's possible dangerousness throughout the entire trial serves to inflame jurors' reactions to the evidence. It is clear that the juror quoted above was terrified of the defendant. Such a visceral response to the State's evidence arguably leaves no room for personal mitigation to be effective. The belief that the defendant is a future danger thus eclipses all other non-nexus mitigating factors, making it easier to set aside the defendant's life experiences and personal history.

The juror quoted above also expresses concern that the defendant could be out on the 'street', despite the fact that the alternative sentence to death is LWOP.⁴⁴⁴ Prior studies show jurors are often skeptical of the meaning of LWOP.⁴⁴⁵ In addition, research confirms that jurors who are concerned about the defendant's dangerousness and lack confidence in the guarantee of a life sentence will often opt for death – not because they believe the defendant necessarily deserves that punishment, but because

⁴⁴² TX02D

⁴⁴³ TX02D

⁴⁴⁴ TX02D

⁴⁴⁵ Anthony Paduano and Clive Stafford-Smith, 'Deadly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty' (1987) 18 Columbia Human Rights Law Review 211

they are afraid of any prospect that the defendant will be released in the future.⁴⁴⁶ The results of this study confirm similar findings. Furthermore, participating jurors also indicated that their skepticism of the guarantee provided by a sentence of LWOP was derived in part from prosecutorial arguments related to the prospect that the defendant might escape from prison or receive a gubernatorial pardon. Thus, the future dangerousness special issue question appears to promulgate jurors' mistrust of the assurance meant to be provided by a sentence of LWOP.

Similarly, a juror from another trial in which the defendant was sentenced to death discussed how fear of escape was especially salient in her mind during deliberations. The juror describes a defensive sentencing decision – the defendant could be dangerous and therefore he must be killed in order to protect society:

Truthfully, I believe that part of the testimony was that he could earn more freedom in jail as time went on and be able to do certain things, not having a security guard watch him all the time. At first he would be confined, but as he earned – I don't know what they actually call it – as he, I guess showed a history of good behavior they would allow him to have a little bit more freedom with access to the outside – still in prison, but on the grounds he would be able to do things.⁴⁴⁷

Another juror from the same trial discussed how in the face of the evidence, which confirmed in the jury's mind the dangerousness of the defendant, there was simply no other option than to sentence the defendant to death:

A: I think that there were some of us who were upset, but we all thought it was the right decision.

Q: When you say some of you were upset, can you tell me what was going on?

A: Just the fact that we were sentencing a man to die.

Q: Did you all talk about that?

⁴⁴⁶ William Bowers and Benjamin Steiner, 'Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing' (1999) 77 Texas Law Review 605

⁴⁴⁷ TX04D

A: Yeah.

Q: And you said that you all felt like it was the right decision. So, you were upset and you feel it is the right decision. So how did you get to the point —

A: Nobody wants to – you don't want to kill anybody and just – that was the right decision in the end. We answered the questions to get that; life or death. You just look back at all the evidence and I guess it just ended up being that way, just the right decision. The other option was not an option, I guess.

Q: I want to understand why for you and for this jury life wasn't an option.

A: We didn't think he was the so-called "model prisoner". He would be a threat to other people in the general population, that he would try to escape and if he was successful, he would hurt someone else over something trivial.⁴⁴⁸

Especially interesting in this account is the tension articulated by the juror in making what she refers to as 'the right decision' to sentence the defendant to death. She believed that the defendant would be dangerous in the future and thus, death was the only possible sentencing option. Despite her belief that the defendant would be dangerous in the future she still expressed misgivings about taking the life of another person – crying as she described her sentencing decision and referring to the defendant as rather likeable. Notwithstanding this, the juror did not believe that she *could* have sentenced the defendant to life if she thought him to be a future danger.

(a) Dangerousness facilitates dehumanization

Haney describes the process of dehumanization as something which cognitively separates people from the implications of their actions.⁴⁴⁹ Again, focusing on the defendant's dangerousness is instrumental in facilitating emotional distancing between the juror and defendant. As the following juror recounted:

⁴⁴⁸ TX04D

⁴⁴⁹ Craig Haney, 'Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death' (1997) 49 Stanford Law Review 1447

I know a couple of times something would be said and I'd look over there and one time he looked at me and that really bothered me – he caught me looking at him. I just didn't want to have that personal contact with him – and then I caught him. I guess that happened once or twice and I turned and looked and he was looking at me and I thought – oh crap – don't look at me. I – actually – that happened a couple of times. I had a real bad dream one night, about his face in my face and his big black eyes scared me – woke me up. My husband said it woke me up a lot. I've had a lot of nightmares. [The dreams] were all different. Two of them was someone breaking into my house and I was here by myself and I had to think about what I was going to do. It was scary – you walk into your house and there is a stranger and you know what could happen so it scares the hell out of you. It changed my life, somewhat. I wish I had never known about that kind of life.⁴⁵⁰

The depth of fear expressed by this juror is palpable. Her unease about the defendant and her wish to distance herself from him was so great that the thought of making eye contact with him filled her with anxiety. Additionally noteworthy is the fact that this juror was middle-aged and white, while the defendant was young and black. Existing literature points to especially pronounced fear responses in white individuals to black men.⁴⁵¹ Given the historical complexity of race-relations in America and the likelihood that white jurors are prone to viewing black defendants as particularly dangerous, it is possible that such a statutory focus can have a substantial biasing effect for black male defendants.⁴⁵²

4. Misunderstanding Mitigation

The jury's persistent focus on the defendant's dangerousness often overshadows any mitigation evidence with which they may have been presented. As such, a number of jurors explained that the jury did not discuss the mitigation evidence offered by the defense after the dangerousness question was answered:

⁴⁵⁰ TX02D

⁴⁵¹ Frantz Fanon, *Black Skin, White Masks* (Grove Press 1967) (discussing the black man as a 'stimulus to anxiety') 151; Wesley Skogan, 'Crime and the Racial Fear of White Americans' (1995) 539 *Annals of the American Academy of Political and Social Science* 59

⁴⁵² See William Bowers, Benjamin Steiner, and Marla Sandys, 'Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition' (2001) 3 *University of Pennsylvania Journal of Constitutional Law* 171

The next question, the mitigation issue, I don't think that held any of us up by any stretch. I think that was a done deal – quick too. I don't think there was much discussion about it. It was pretty much that none of us felt that there were any circumstances not to give him – or however the question is worded – none of us ever thought that what the defense provided us with was any sort of excuse. We were all clear on the circumstances and everybody kind of [said] yes I don't think it's a good enough reason. There was no lengthy discussion.⁴⁵³

A juror from another trial likewise described:

We talked about the first question. The second question there was no conversation. We all were in agreement on the second question and I like the idea of the questions – it was to me, we're not giving him death we are answering questions.⁴⁵⁴

A juror from the same trial similarly explained:

I think we did a vote on the first question that was around the room and I know that was a tally [we] voiced that and it was a tally which was also unanimous and then I don't think any more discussion went on after that. I think it was just o.k. this is the first vote. We went ahead and did that and then let's go ahead and take a vote – if there is any differences of opinion we will start from there, but there wasn't. [There was] just the one vote. We just voted and the paperwork was filled out and we went back out.⁴⁵⁵

The jury's failure in a number of capital trials to consider or even discuss any mitigation evidence presented during the penalty deliberations reveals yet another inadequacy of the Texas capital sentencing scheme. The focused nature of the statute inevitably results in penalty deliberations which are extremely focused on determining an answer to the special issue questions. As many jurors in this study perceived the mitigation special issue question to be an extension of the future dangerousness special issue question it is understandable how deliberations could simply cease at that point. In contrast, jurors in other jurisdictions who are instructed to determine from a list the existence of aggravating and mitigating factors must discuss the mitigating and aggravating factors presented. Jurors who determine a capital

⁴⁵³ TX01D

⁴⁵⁴ TX04D

⁴⁵⁵ TX04D

defendant's penalty in other states need to confer about whether mitigation outweighs the aggravation presented. Thus, in other states which do not utilize the special issue questions, there is simply no way for jurors who attempt to follow the sentencing statute to avoid discussing mitigation evidence. As discussed below, jurors who did discuss the mitigating evidence presented often advanced arguments similar to those expressed by the State for how to understand mitigating evidence. These arguments often diverted attention from their mandate of determining the defendant's moral blameworthiness.

(a) Nexus is required to consider mitigation

Attorneys for the State encourage jurors to view relevant mitigation evidence as solely that which provides a link or 'nexus' to the commission of the crime. Critically, jurors serving on cases which resulted in a sentence of death construed the mitigation issue as excluding all other mitigation evidence. Interestingly, many of those jurors were also less inclined to see a distinction between each phase of the trial. For instance, when asked to explain what defense arguments were presented for finding the defendant not guilty one juror stated, 'because of his upbringing'.⁴⁵⁶ Such responses were common amongst jurors in cases resulting in a death sentence.

Jurors described how the mitigation issue enabled them to disregard mitigation unrelated to the crime. For instance, the following juror described how the formulation of the sentencing scheme into questions which required a 'yes' or 'no' response permitted the jury to put aside personal mitigating evidence and approach the sentencing decision systematically:

Systematic, and I hate to use the word scientific method, but it really was systematic and approached – very much that way. I mean, I think the point here is this; if you don't approach it that way, the way I just described to you, then you're opening the door for emotion to come in. For cultural background

⁴⁵⁶ TX02D

to come in, for ethnicity, background, all factors, remorse, you're opening the door for all those unmeasurable qualities to come in. By doing it the way we did it you're really not allowing those qualities to interrupt your judgment.⁴⁵⁷

As the juror described, this interpretation of the special issue questions allowed jurors to avoid considering evidence presented by the defense that related to the defendant's personal background. This particular juror had been presented exclusively with mitigation related to the defendant's circumstances and no mitigation related to the commission of the crime. Fully endorsing the State's interpretation of the mitigation issue, the juror felt obliged to discount the evidence the defense had presented to illustrate the defendant's troubled background.

Other jurors from the same trial struggled to understand how the defendant's background alone could be a reason to spare the defendant's life. One juror described how the majority was able to convince the lone hold-out for a sentence of LWOP that the personal mitigating evidence presented wasn't sufficient to warrant a sentence of LWOP:

I think we disagreed that we couldn't use his childhood as part of our decision making 'cause some of them still wanted to talk about that. It wasn't enough. His childhood – what happened in his childhood – actually could not come into play in this decision – you could not use it because there wasn't enough.⁴⁵⁸

Although the mitigation special issue question does instruct the jury to consider whether there is a 'sufficient mitigating circumstance or circumstances'⁴⁵⁹ to warrant a sentence of LWOP – jurors need not agree to the type of evidence they feel sufficient for a life sentence. The hold-out in this trial would have been within the law to deliver a sentence of LWOP due to the personal mitigation evidence presented even though the majority of jurors believed it was not sufficient. However, this

⁴⁵⁷ TX02D

⁴⁵⁸ TX02D

⁴⁵⁹ TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(1) (West 2009)

important distinction is not made clear in the sentencing scheme and thus, jurors often misunderstand the ability to give mitigating effect to such evidence.

Additionally, jurors from this trial also believed that the only evidence which could be considered in mitigation were factors directly related to the commission of the crime. As one juror from the same trial commented:

I think because each one of us felt this way to a degree, that there had been so many mitigating circumstances, not in this particular crime, but in [the defendant's] life, and I think that is where [the hold-out juror] was having a really difficult time is that his life sucked. It did. I mean reading the most horrible, saddest novel of your entire life and I don't know how you read more than one, but *if we could have taken all that in*. But to me, to my way of thinking, that was not mitigating circumstances as to why this crime happened...And they were thinking about mitigating circumstances outside of the crime so once we were able to focus back in and make sure that we all understood that *mitigating circumstances had to have been committed within the crime* then at that point everybody was ok. [Emphasis added]⁴⁶⁰

As the jurors above explained, the hold-out in their case wanted to give weight to the mitigating evidence offered by the defense and sentence the defendant to LWOP.

However, the other members of the jury had been sufficiently persuaded by the State at jury selection to enforce a limited view of the mitigation special issue question.

Consequently, these jurors argued against considering mitigating evidence on the basis that it was unrelated to the crime and therefore could not be counted. Likewise, a juror from another trial summarized the mitigation special issue question as follows:

It's worded and I can't remember the specifics – it's of the crime. It's not mitigating circumstances in your life or society – it's mitigating circumstances of that crime of this situation.⁴⁶¹

Such a fundamentally incorrect interpretation of the mitigation special issue was common amongst jurors. The data indicate this confusion derives from the techniques used by attorneys for the State to educate jurors at voir dire and throughout the trial.

The result is a sentencing scheme which fails to provide the jury with adequate

⁴⁶⁰ TX02D

⁴⁶¹ TX04D

guidance or an available method for endorsing the mitigating effect of much of the evidence offered by the defense in the penalty phase.

(b) Mitigation evidence dismissed as irrelevant

Some jurors, due to their inability to consider mitigating evidence as a reason to sentence the defendant to LWOP, should not have been permitted to serve in a capital case. However, as discussed previously, several factors allow such automatic death penalty (ADP) jurors to survive jury selection. ADP jurors adopt a particularly retributive view regarding punishment and are only concerned with whether the defendant is guilty of the crime when considering an appropriate sentence.

Notably, all of the jury foremen from cases which resulted in a sentence of death self-identified as automatic death penalty (ADP) jurors. As the following quote from one of the foremen highlights, ADP jurors frequently dismiss mitigating arguments as offensive and preposterous:

We couldn't care less about his loved ones – not at all. He didn't give any consideration to *her* loved ones. I'm a serious eye for an eye guy. In fact, I really felt like they should have killed him the same way he killed her.⁴⁶²

Beyond the constitutional issues involved with allowing an ADP juror – like the one quoted above – to determine the defendant's moral blameworthiness, such jurors often disparage legitimate mitigation, making it difficult for jurors who do see the value in such evidence to advance arguments in favor of a sentence of LWOP, particularly if the ADP juror is serving as the jury foreman. Moreover, because an ADP juror can see no value in considering mitigation evidence related to the defendant's background they are more likely to be exasperated by defense offered mitigation evidence. The following ADP juror, whose partner had been murdered when she was eighteen years old, described how she felt about the defense evidence offered in the penalty phase:

⁴⁶² TX03D

You just can't blame something like that on your upbringing, because you have choices in life. I guess [I was] annoyed. Just kind of annoyed that – why – that's their whole thing was focused on his upbringing and his family and it was almost like a circus to be honest. It really was.⁴⁶³

Thus, the survival of ADP jurors from the jury selection process serves to facilitate the dismissal of defense offered mitigation evidence as irrelevant during deliberations. These jurors only view relevant mitigation evidence as that related to the circumstances of the crime and are therefore poised to argue vigorously that any personal mitigation evidence should be rejected. The fact that the special issue questions fail to provide statutory guidance validates such extreme arguments against mitigation evidence.

Non-ADP jurors were however also susceptible to misunderstanding what evidence could be viewed as relevant to the jury's sentencing decision. The following juror believed that only evidence related to the defendant's mental state could be considered as legitimate mitigation evidence:

I understand that you have the emotional connection. You have all of that. My heart went out to [the defendant] having to endure that and see someone begging for him than it did for the people that were up there basically begging for us not to put him to death. But as far as whether or not it had any influence on the decision we made, it was irrelevant because it came down to you still haven't proven that there's something wrong with him. There's no mental defect... If you could have come up there during the emotion part of it that there was something physically or mentally that made him that way – made him defective in that way – then it would have been a life sentence.⁴⁶⁴

This juror – a self-identified opponent of the death penalty – dismissed evidence of the impact the defendant's execution would have on his family as outside the scope of relevant mitigation evidence. As another juror from this case explained:

I just don't think putting the family members to beg for his life – because that's not what the jury does. *We don't go in there and decide whether or not he lives or dies.* We answer two questions and it's decided that way. I don't

⁴⁶³ TX02D

⁴⁶⁴ TX04D

know [what I was supposed to do] with that that information. That's why I didn't think it was necessary. [Emphasis added]⁴⁶⁵

The above quotation highlights an important function of the channeling effect of the special issue questions. Viewing the statute as a process of mechanically answering questions facilitates the dismissal of mitigation evidence related to mercy. Given that the decision to be merciful is not a factual determination but a moral prerogative, this juror is simply unable to understand how such evidence can be compatible with the sentencing scheme. This perceived incompatibility led some jurors to feel resigned to their task:

We wanted to find that his home situation, his family situation, his buddies, that his parental situation [or] lack thereof, we wanted to find that those were responsible for his behavior. We just couldn't.⁴⁶⁶

Whether a juror was never able to consider mitigation evidence as relevant to their sentencing decision, or whether they simply did not believe that such consideration was permissible, under the sentencing scheme, the data demonstrate that many jurors did not afford the defendant with an individualized sentencing determination as required by law.

(c) Red-herring arguments against mitigation

Red-herring arguments against mitigation evidence took several forms throughout the trials studied. For instance, during jury selection a common method used by the prosecution was to provide the juror examples of mitigation which were antithetical to the actual mitigation that would be presented in the case. Throughout the trial attorneys for the State also promoted narratives which focused on the defendant's free will and minimized the difficult circumstances the defendant had encountered throughout his life. Such narratives included arguing that the defendant

⁴⁶⁵ TX04D

⁴⁶⁶ TX02D

could have changed his life course at any time, that many people experience abuse, neglect, and poverty and do not commit murder, or that the defendant knows the difference between right and wrong. Red-herring arguments are deliberate distractions from the main purpose of the sentencing phase – to determine the defendant’s moral blameworthiness, taking into consideration their unique life history.

Throughout deliberations jurors utilized similar digressions to argue against relevant mitigation evidence. As the following juror explained, despite the fact that the jury did recognize the defendant’s troubled background and low intelligence, no amount of evidence concerning such matters could defy ‘common-sense’:

We know he had a bad life, we know he was on drugs, we know he had low intelligence, we know all those things, but you know what? There is a commonality in common sense that says – you did it. You need to be punished for it! I don’t think people are that stupid, and they don’t fall for the b.s. that’s in [drugs] made him do it or you know the devil made him do it or he didn’t read the right things in church.⁴⁶⁷

Rather than thinking about the defendant’s mitigation evidence of low intellectual functioning and a challenging upbringing in an effort to determine the most appropriate punishment, this juror argued that common-sense considerations mandate a death sentence. This type of fallacious argument distracts jurors from the intended purpose of the penalty phase deliberations as an opportunity to decide what punishment is deserved for a particular offender for a specific crime.

Other jurors were distracted by arguments which centered on whether the defendant understood the difference between right and wrong. As expressed by the following juror, no matter how bad life might be, or what circumstances might have conspired to result in an individual committing a capital crime, so long as the

⁴⁶⁷ TX02D

defendant understands the basic difference between right and wrong he should be sentenced to death:

I think he knew right from wrong. There was some testimony where he went to church as a kid and with his family, with his relatives and all that kind of stuff, but one of the main – during jury deliberations and one of the main things that we came as jurors, we came to that conclusion was look you know all his other family members had the same terrible background, had the same drugs and everything else and none of his other family members killed. So he knew right – I think he knew right from wrong.⁴⁶⁸

Rather than looking at the defendant's moral blameworthiness for the capital crime, the juror shifts the focus to the defendant's ability to discern between right and wrong. This type of red-herring argument has two effects. First, it devalues the terrible life the defendant was born into by arguing that minimal exposure to religion should have been enough to prevent the defendant from embarking on a life of crime. Second, it closes off the possibility that the juror can view the defendant as able to understand and differentiate between right and wrong but still not be deserving of a death sentence based on his distinctive life experiences.

A final example of a red-herring argument cited by jurors describing their sentencing deliberations was a commitment to make an example of the defendant, rather than a determination of what punishment the defendant deserved:

I remember [the prosecution] specifically kept saying the value of this crime deserves the death penalty. They said that a couple of times. That's the only conclusion that we – if we weighed it all out – that's the only conclusion we could come up with.⁴⁶⁹

Although there are various legitimate sentencing aims, the function of the penalty phase in capital sentencing is not to simply hand down a punishment as an example to others – to serve general deterrent aims. The aim of the penalty phase is to afford the defendant an opportunity to be judged individually, taking into consideration a variety

⁴⁶⁸ TX02D

⁴⁶⁹ TX04D

of factors. By invoking narrowly focused arguments about the deterrent aim of the sentencing decision jurors are provided another way to avoid any genuine engagement with mitigating evidence.

5. Conclusion

The penalty deliberations in cases which resulted in a sentence of death were plagued with fundamental misunderstandings about the sentencing scheme. First, jurors mistook the nature of the penalty phase decision as a factual determination rather than a distinct moral determination, a foundational misunderstanding aided by jurors' experiences in voir dire. At voir dire jurors were educated by attorneys for the State, and at times the judge, to view the special issue questions as mechanical and provided numerous topics that further distort the sentencing statute. Thus, by the time jurors in this study began penalty deliberations, many were already committed to ignoring defense offered mitigation evidence. Instead, they discussed the dangerousness issue – the question that appears more factual – at length and simply ignored or dismissed any question of mitigation.

Although some jurors had determined the defendant's punishment far in advance of the penalty deliberations, others who had yet to reach a decision felt bound to ignore defense offered mitigation evidence. When jurors did take into consideration such evidence presented it was typically considered relevant only in connection with the defendant's dangerousness. These problems were not confined to jurors in cases which sentenced the defendant to death. As the next chapter discusses, many jurors who sentenced the defendant to LWOP also misunderstood their sentencing instructions.

Chapter VIII. Punishment Deliberations in Cases Resulting in Life Without the Possibility of Parole

Seventeen death eligible cases went to trial in Texas during the eighteen month period from which the sample of cases for this study was drawn. Of these seventeen trials, four resulted in sentences of life without the opportunity for parole (LWOP), twelve resulted in a sentence of death, and one concluded in a mistrial at the guilt phase. Such a high proportion of cases resulting in a death sentence appears consistent with the historical trend in Texas.⁴⁷⁰ Given that capital trials are increasingly rare⁴⁷¹ and that the likely outcome of such trials in Texas is a death sentence, the four trials resulting in a sentence of LWOP – all included in this study – are somewhat extraordinary.

Data presented in earlier chapters have demonstrated the biasing effect of the special issue questions in capital trials in Texas. Indeed, the data presented in the previous chapter showed how the special issue questions effectively direct jury deliberations towards a death sentence. However, nearly half of the data included in this study originate from jurors who did not sentence the defendant to death,⁴⁷² which raises several important questions. Although some differences at each stage of proceedings existed between cases that resulted in a death sentence and those which resulted in a sentence of LWOP, all jurors included in this study operated under the same sentencing statute and were similarly exposed to the mechanisms which the prosecution used to expand the dangerousness issue and encourage the dismissal of

⁴⁷⁰ This figure (76%) is in keeping with previous data collected in Texas. See Deon Brock, Jonathan Sorenson, and James Marquart, 'Tinkering with the Machinery of Death: An Analysis of the Impact of Legislative Reform on the Sentencing of Capital Murders in Texas' (2000) 28 *Journal of Criminal Justice* 343 (citing four out of five (80%) of capital cases tried in Texas end in a sentence of death)

⁴⁷¹ See Allan Turner and Mike Tolson, 'Death Sentences Plunge in Texas: Foes Cite New Law, DNA Testing; Backers Blame Judges, Delays in Executions' *The Houston Chronicle* (Houston, 13 December 2010) <<http://www.chron.com/disp/story.mpl/metropolitan/7337893.html>> accessed 21 June 2011

⁴⁷² Twenty-four jurors who deliberated in cases which sentenced the defendant to death were interviewed, while twenty-two jurors who deliberated in cases which sentenced the defendant to LWOP were interviewed. See Chapter 3 for a discussion of the selection of jurors.

mitigating evidence. Though jurors discussed in this chapter did not sentence the defendant to death, a substantial number were equally as mistaken as jurors in death cases about their role in determining the defendant's sentence and their understanding of how to apply the evidence to the special issue questions. Similarly to jurors who sentenced the defendant to death many jurors in trials which resulted in a sentence of LWOP determined the defendant's penalty in violation of constitutional principles and not because they understood or followed the Texas capital sentencing statute.

Deliberations in cases which resulted in a sentence of LWOP are difficult to discuss as a group because unlike their death counterparts each jury was rather unique in its approach and reasons for sparing the defendant. Indeed, the decision to sentence a defendant to LWOP often hinged on a single distinctive aspect of the case relating to the defendant's guilt. Such mitigating evidence is by nature much more variable than aggravating evidence. Thus, persuasive mitigation in trials which resulted in sentence of LWOP differed significantly between trials and at times perceptions of what was sufficiently mitigating varied between jurors. That being said, this chapter will analyze several areas where enough overlap between the four cases exists to draw limited conclusions about the effect of the special issue questions in cases that resulted in a sentence of LWOP.

This chapter proceeds in four parts, beginning with a discussion of two cases in which the jury did not follow the Texas sentencing scheme as a guide for determining the defendant's sentence. These two juries discussed the available sentences, the crime, and determined the appropriate punishment, only answering the special issue questions after they had reached their punishment decision. The second section of this chapter analyzes how all four juries discussed the issue of the defendant's dangerousness. Although every jury answered 'yes' to the dangerousness

special issue question, these data show that jurors in cases that sentenced the defendant to LWOP were not necessarily convinced of the defendant's dangerousness beyond a reasonable doubt. In addition, jurors who sentenced the defendant to LWOP sought verification of the meaning of 'life without the opportunity for parole' from the judge during deliberations. In this way, jurors who sentenced the defendant to LWOP were both convinced the defendant would not be released from prison and less concerned about his behavior within the penitentiary. The third section examines the evidence which jurors used to sentence the defendant to LWOP. A number of jurors misunderstood how evidence related to the defendant's background could be used to determine punishment, and in three of the four trials jurors in fact sentenced the defendant to LWOP largely based on mitigation exclusively related to the crime. It appears therefore that a jury sentenced the defendant to LWOP based primarily on mitigating evidence related to the defendant's background in only one capital case out of the seventeen tried in Texas in an eighteen-month period. The final section of this chapter will look at what personal mitigating evidence jurors did find persuasive, and focus on the evidence presented in the single case in which jurors reached their decision to sentence the defendant to LWOP based solely on personal mitigation. Overall, the findings presented in this chapter underscore the formidable biasing effect of the Texas capital sentencing statute even though jurors in cases which resulted in LWOP ultimately chose to spare the defendant from a death sentence.

1. Lack of Statutory Focus

It is presumed that jurors will follow the judge's instructions and limit their deliberations to the issues listed in the statute. However, in two of the four trials to result in a sentence of LWOP jurors did not strictly adhere to the special issue questions. For example, one juror described punishment deliberations which began

with an open discussion regarding the defendant's sentence and then addressed the special issue questions:

We kind of answered [the special issue questions] after we did all our deliberating to make sure that we had covered what we needed to, but it was more just open discussion with everybody. We went around at some point just asking people's opinions. After we had pretty much put it out there I don't know it was just [the foreman] everybody was kind of saying, what do you think – what do you think. We wanted to make sure everybody was heard, we really wanted to.⁴⁷³

Similarly, another juror from the same trial described how the special issue questions did not determine the defendant's sentence, but rather the jury's general discussion did:

I remember going through [the special issue questions], but I don't specifically remember the questions as actually determining [the sentence]. There was more discussion than actually just answering the questions. We followed the questions somewhat, we did them, but there was a great deal of discussion. After people voiced their opinions on the questions there was a lot of discussion after that. I'd say that [the special issue questions] were not just the focus of the discussion. They guided it, but they were not the focus.⁴⁷⁴

This juror's comment highlights two important points. First, as opposed to most jurors who sentenced the defendant to death, this juror did not hold the special issue questions solely responsible for the defendant's fate. As discussed in the previous chapter, significant numbers of jurors who sentenced the defendant to death described the special issue questions as enabling personal detachment – separating the act of answering each issue from the resulting sentence given to the defendant. By discussing whether the defendant should live or die instead of moving directly to the sentencing statute, this jury actively engaged in a debate about a moral issue instead of mechanically answering a series of questions.

The juror's comment also emphasizes an important distinction between the operation of the special issue questions during this jury's penalty deliberations and

⁴⁷³ TX08L

⁴⁷⁴ TX08L

deliberations in cases which resulted in a death sentence. Juries that sentenced the defendant to death were wedded to the special issue questions and uncritically endorsed the State's interpretation of the statute. Taken together, these two factors induced jurors to disregard defense offered mitigating evidence. In this case however, by setting aside the special issue questions and allowing for a discussion focused on the 'death-worthiness' of the defendant, this jury easily incorporated the mitigating evidence into deliberations.⁴⁷⁵ Although the jury in this particular case voted to sentence the defendant to LWOP primarily due to mitigating factors related to the crime, mitigating evidence related to the defendant's background did enter into their deliberations in a way that was absent from discussion in cases which resulted in a sentence of death.

Deliberations in the second trial in which jurors disregarded the sentencing statute focused immediately on whether the defendant should receive a death sentence. As one juror recounted, upon entering the jury room vocal members of the jury began expressing a strong preference for a death sentence:

I don't know why and I can't say whether [the special issue questions] were even pertinent to the whole thing. All I know is that this guy did this crime, he was guilty of this crime, and everybody at that point was just like good it's over and whoever decided, I believe it was our strong speakers, when we walked back in that room I hardly got my butt in the seat before people started saying "death". "You got a problem with death"? I got a problem with death. No, let's just get this over with and it was almost like in the [guilt phase] it was kind of fast but the closer to the end it got even faster. It's like oh god and we're gonna be out of here in fifteen minutes if we can just get this paper signed.⁴⁷⁶

This juror described how a number of his peers were prepared to sentence the defendant to death without any discussion. He, however, was especially uneasy about sentencing the defendant to death, believing that there were mitigating circumstances

⁴⁷⁵ See Phyllis Crocker, 'Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases' (1997) 66 Fordham Law Review 21

⁴⁷⁶ TX07L

relating to the crime – the victim had attacked the defendant with a bat during an attempted robbery – which, in his view, warranted a sentence of LWOP. After he expressed his view, the jury quickly decided to sentence the defendant to LWOP. There was virtually no discussion of the evidence presented throughout the penalty phase. The juror wondered why the other members of the jury changed their positions so quickly:

I still say today I don't know if people changed their mind 'cause they didn't want to sit and have a discussion or didn't want to argue with me, or whether they changed their mind because of my story, that I thought could possibly be a reason why this guy didn't deserve to die.⁴⁷⁷

This juror's comment brings into focus the original concern expressed in *Furman v. Georgia*⁴⁷⁸ – juries who determine a defendant's sentence without formal guidelines exhibit little uniformity in how they might determine a penalty – enabling an unacceptable amount of arbitrariness into the decision-making process. Indeed, the juror's description of the randomness involved in the deliberations in which he participated is reminiscent of flipping a coin, or in the United States Supreme Court's own words 'being struck by lightning'.⁴⁷⁹ Thus, the tension identified prior to the inception of the modern American death penalty has not been entirely eradicated even with the introduction of guided discretion statutes.

2. Dangerous by Default

A central component of modern capital statutes is that they must provide a meaningful approach to narrowing the eligible class of offenders to those who are most deserving of the ultimate penalty. The Texas capital statute performs this

⁴⁷⁷ TX07L

⁴⁷⁸ *Furman v Georgia* 408 US 238 (1972)

⁴⁷⁹ *Furman v Georgia* 408 US 238 (1972) 309-310. ('These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968 many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed')

function in two stages. The first stage limits the crimes which are eligible for capital prosecution to aggravated forms of murder. As previously mentioned, such crimes include killing during the commission of another felony such as rape or arson, and the murder of a member of a protected class of people such as a peace officer or a child under the age of six.⁴⁸⁰ If a defendant is convicted of a death eligible crime then the next stage in the narrowing process is a determination of the defendant's dangerousness. The dangerousness issue is the mechanism that selects those capital murderers that are most deserving of a death sentence based on the probability that they will commit future acts of violence against society. Thus, the dangerousness issue must be proven to jurors beyond a reasonable doubt before a defendant is eligible for the death penalty.

All four juries that sentenced the defendant to LWOP answered 'yes' to the dangerousness issue. However, the data demonstrate that a number of these jurors were not necessarily persuaded beyond a reasonable doubt that the defendant would be a danger in prison. As Table 8.1 indicates, 64% of jurors who sentenced the defendant to LWOP believed there was a 50-50 chance or less that the defendant would kill again in prison, while over half (55%) of jurors in these trials believed there to be a 50-50 chance or less that the defendant would commit a violent criminal act of any kind in prison. Over two-thirds (68%) of jurors in trials that resulted in a sentence of LWOP also said that there was a 50-50 chance or less that the defendant would kill again if let out of prison while over one-third (36%) also believed there was a 50-50 percent chance or less that the defendant would commit a violent criminal act of any kind outside of prison.

⁴⁸⁰ TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2009)

Table 8.1

Likelihood that the defendant would commit future criminal acts by sentencing outcome:

<i>How likely did you think it was that the defendant would kill again if let out of prison?</i>					
Sentence	Very likely	Likely	50-50 chance	Unlikely	Very unlikely
Death	15 (62.5%)	4 (16.7%)	5 (20.8%)	0	0
LWOP	6 (27.3%)	1 (4.5%)	8 (36.4%)	4 (18.2%)	3 (13.6%)
<i>How likely did you think it was that the defendant would kill again in prison?</i>					
Sentence	Very likely	Likely	50-50 chance	Unlikely	Very unlikely
Death	11 (45.8%)	3 (12.5%)	8 (33.3%)	0	0
LWOP	4 (18.2%)	4 (18.2%)	4 (18.2%)	9 (40.9%)	1 (4.5%)
<i>How likely did you think it was that the defendant would commit a violent criminal act of any kind if let out of prison?</i>					
Sentence	Very likely	Likely	50-50 chance	Unlikely	Very unlikely
Death	21 (87.5%)	2 (8.3%)	1 (4.2%)	0	0
LWOP	9 (40.9%)	5 (22.7%)	5 (22.7%)	3 (13.6%)	0
<i>How likely did you think it was that the defendant would commit a violent criminal act of any kind in prison?</i>					
Sentence	Very likely	Likely	50-50 chance	Unlikely	Very unlikely
Death	17 (70.8%)	5 (20.8%)	2 (8.3%)	0	0
LWOP	5 (22.7%)	5 (22.7%)	7 (31.8%)	4 (18.2%)	1 (4.5%)

Given that the majority of jurors who deliberated in cases which resulted in a sentence of LWOP were not necessarily convinced beyond a reasonable doubt that the defendant would kill or commit a violent criminal act, their responses to the future dangerousness issue are somewhat confusing. However, as one juror explained, the low standard implied by the word ‘probability’ makes the dangerousness question incredibly easy to answer:

I think we probably looked at “probability” and we could agree that yes if he killed a police officer that way there’s a probability that he could commit future acts of violence and I think I was probably convinced by that word “probably”. It didn’t say will commit or ninety nine percent likely, it said probably and I could vote for that.⁴⁸¹

As another juror from the same case described, jurors were also equally persuaded by the ambiguity of the term ‘society’. Though several members of the jury did not think

⁴⁸¹ TX05L

that the defendant would be dangerous in prison, the State's interpretation of the term made it difficult to argue against:

The first question everybody mostly agreed – that the defendant would be a future danger – *could* be a future danger. But we kept saying, but if he's in prison, you know, we don't feel like he could be a future danger there because he will be well guarded and stuff. So when we talked about society we were talking about prison society. We're not talking about general society for him, you know, so a lot of people agreed on that, but there were one or two. [Emphasis added]⁴⁸²

Another juror from the same trial explained:

Would he be a continuing threat to society? That was the first hot topic we came up against because that's the first question. Some of us felt like he didn't shoot at [a witness]. He said he was still shooting at [the victim]. Why would he say "Well, I was killing [the victim] and not [trying to kill the witness]"? I mean, it was just my reasoning but it didn't matter. I had to cave anyway. And then I'm thinking well, if you're incarcerated for the rest of your life how are you going to be a threat to society? But then they did testify that prison system is part of society so that was the first [question].⁴⁸³

Although the jurors above did not necessarily believe the defendant would pose a threat to others in prison, they each eventually 'caved in' to answering the question 'yes' due to the State's expanded interpretation of the question.

Jurors in another case freely expressed their belief that the defendant did not pose a threat to others in prison:

We thought that yes he was dangerous as long as he's out in society but if he's in jail, and in there for life, then we didn't feel like he was a danger and, in fact, at one point we asked a question when we were deliberating in the punishment phase if he would ever be allowed – if there was any chance of parole any chance he would ever be back out in society. We were told no. We were also told that he was held away from the main population in the jail because there was some issues in the trial about him being involved with the Aryan Brotherhood. So that was another question that came back and said no, that he's held away from the general population.⁴⁸⁴

Another juror from the same trial likewise described:

⁴⁸² TX05L

⁴⁸³ TX05L

⁴⁸⁴ TX08L

I remember the defense attorney saying they literally slide his food through a steel door that just has an opening, that he would virtually have no contact with any human being pretty much for the rest of his life, except of course if it came up for appeal. So there was discussion about whether he would be dangerous to other inmates and we felt no, because he's not going to be in contact with any other inmates.⁴⁸⁵

These comments illustrate how jurors feel that they are unable to answer 'no' to the dangerousness issue even when they believe that the defendant would not be dangerous to others. Although the Texas statute does initially limit death eligible offenses to murders which have been committed during the course of another felony – the dangerousness issue is the statutory mechanism that identifies which offenders from the class of eligible defendants are most deserving of a death sentence. As one commentator noted:

[A]mong all of the possible murderers that could receive the death penalty, Texas chooses those which its juries deem to be the most likely to be dangerous in the future to receive the death penalty, and gives those perceived not to be as dangerous a lesser sentence.⁴⁸⁶

Thus, as a result of the question's expanded interpretation, the instruction no longer sufficiently provides the legislatively intended narrowing mechanism as is constitutionally required.

(a) Assurances

Importantly, jurors who sentenced the defendant to LWOP sought assurances during deliberations about the meaning of life without the opportunity for parole. As noted in the previous chapter, a number of jurors who sentenced the defendant to death were highly skeptical of the guarantee promised by a sentence of LWOP. As Table 8.2 highlights, nearly all jurors (86%) who served in cases which resulted in a sentence of LWOP were not at all concerned about whether the defendant would be

⁴⁸⁵ TX08L

⁴⁸⁶ William Berry III, 'Ending Death by Dangerousness: A Path to De Facto Abolition of the Death Penalty' (2010) 52 Arizona Law Review 889, 896

released from prison in the future, compared to less than half of jurors (42%) who sentenced the defendant to death.

Table 8.2

Juror concern about defendant's release by sentencing outcome:

<i>Were you at all concerned that the defendant might get back into society someday if not given a death sentence?</i>				
Sentence	Greatly	Somewhat	Slightly	Not at all
Death	5 (20.8%)	4 (16.7%)	5 (20.8%)	10 (41.7%)
LWOP	0	2 (9.1%)	1 (4.5%)	19 (86.4%)

Critically, well over a third of jurors (38%) who deliberated in trials in which the defendant received a death sentence were at least somewhat concerned about whether the defendant would reenter society someday if not given a death sentence, citing the possibility of him escaping or being pardoned. Conversely, jurors who sentenced the defendant to LWOP genuinely believed that the defendant would never be eligible for parole:

We clarified the fact that he would never get out of prison. We wanted to make sure that a life sentence was a true life sentence. I mean again we went into deliberation knowing that should we choose life that he virtually would have no contact.⁴⁸⁷

Jurors in this case discussed the meaning of a life sentence as well as the conditions of confinement the defendant would be subject to in prison. A juror from another trial described how the judge's response to the jury's inquiry about the meaning of a life sentence confirmed that the defendant would never get out of prison. The judge's response in this case was especially significant since a majority of jurors entered deliberations advocating for a death sentence:

There was something to do with somebody wanting to know if life without parole really meant life without parole. If we give this guy life without parole does that mean he has no way of getting out of prison? And we had it clarified so people could move on and that was probably after the four of us decided we weren't sure we wanted to give him the death sentence and everybody wanted to know well if we don't give him the death sentence is there a possibility this

⁴⁸⁷ TX08L

cat's gonna get out of prison if we give him life without parole. Sometimes you give fifteen years and it's only seven or something like that, so they just wanted to verify it meant what it meant. I think the Judge's response was this guy would never get out. There's no way of getting parole hearings 'cause he wouldn't qualify for it.⁴⁸⁸

Such confirmation from the judge is especially important to jurors' understanding of the law. Jurors who might lean towards a sentence of death are especially concerned about 'technicalities'⁴⁸⁹ that might result in the defendant's release and thus, place a premium on the judge's response to the question of what life without parole actually means.⁴⁹⁰ The judge's verification also curtails speculation about the sentencing alternative to death. Previous research confirms that jurors who believe a life sentence includes parole eligibility are often persuaded into sentencing the defendant to death.⁴⁹¹ Thus, the belief that the defendant could possibly be released from prison appears to tip the sentencing decision in the direction of death.

3. Mitigation Related to the Crime

In three cases jurors sentenced the defendant to LWOP based mainly on circumstances related to the commission of the crime. As Table 8.3 demonstrates, jurors who sentenced the defendant to LWOP were much more likely to consider the defendant's guilt when determining the appropriate sentence. Over half of jurors (55%) in life cases were at least somewhat concerned about whether the defendant

⁴⁸⁸ TX07L

⁴⁸⁹ Susan Bandes, 'The Role of Media in Covering and Shaping the Death Penalty' (2004) 1 *Ohio State Journal of Criminal Law* 585

⁴⁹⁰ John Blume, Stephen Garvey and Sheri Lynn Johnson, 'Future Dangerousness in Capital Cases: Always "At Issue"' (2001) 86 *Cornell Law Review* 397, 400. The authors describe the trial of nineteen-year-old Wesley Shafer who was convicted for murder and sentenced to death in South Carolina. During the penalty phase deliberations the jury sent out several questions to the judge asking whether there was 'any remote chance for someone convicted of murder to become eligible for parole?' When the judge directed the jury back to their instructions, failing to answer their question directly, the jury returned a verdict of death. Although jurors who might lean towards a life sentence are also concerned with technicalities previous empirical work demonstrates such unresolved concern tends to result in a sentence of death rather than life.

⁴⁹¹ William Bowers and Benjamin Steiner, 'Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing' (1998) 77 *Texas Law Review* 605

had planned, intended, or wanted to kill the victim. Although jurors who sentenced the defendant to death also exhibited some reservations about the defendant's culpability for murder, they did so significantly less than their 'life' counterparts.

Murder as defined by the Texas Penal Code requires that the defendant 'intentionally or knowingly' caused the death of the victim.⁴⁹² The data show that a majority of jurors who sentenced the defendant to LWOP did not in fact necessarily believe that the defendant intentionally or knowingly killed the victim. This raises questions about how the juries in three cases even reached their decision to convict the defendant of capital murder.

Table 8.3

Jurors' consideration of the defendant's guilt during the punishment decision by trial outcome:

<i>Were you at all concerned that the defendant might be altogether innocent, a case of mistaken identity?</i>				
Sentence	Very much	Somewhat	Not much	Not at all
Death	0	0	1 (4.2%)	23 (95.8%)
LWOP	0	1 (4.5%)	0	21 (95.5%)
<i>Were you at all concerned that the defendant definitely had planned or intended to kill the victim, but might not be the one who did so?</i>				
Sentence	Very much	Somewhat	Not much	Not at all
Death	0	2 (8.3%)	1 (4.2%)	21 (87.5%)
LWOP	2 (9.1%)	0	3 (13.6%)	17 (77.3%)
<i>Were you at all concerned that the defendant definitely killed the victim, but might not have planned, intended or wanted to do so?</i>				
Sentence	Very much	Somewhat	Not much	Not at all
Death	1 (4.2%)	7 (29.2%)	6 (25.0%)	10 (41.7%)
LWOP	7 (31.8%)	5 (22.7%)	4 (18.2%)	6 (27.3%)
<i>Were you at all concerned that the defendant might not be the one most responsible for the killing?</i>				
Sentence	Very much	Somewhat	Not much	Not at all
Death	0	0	2 (8.3%)	22 (91.7%)
LWOP	5 (22.7%)	1 (4.5%)	1 (4.5%)	15 (68.2%)

The first of the three cases in which circumstances relating to the commission of the crime played a key role in the jury's sentencing decision involved a defendant and accomplice who attempted to rob a convenience store shortly before closing-time.

⁴⁹² TEX. PENAL CODE ANN. § 19.01 (West 1994)

The attempted robbery and homicide were captured on video. Jurors watched the video, which showed the defendant and accomplice demanding money from the clerk. The jurors then saw the clerk fight back, first spraying the accomplice in the face with mace and then attempting to attack the defendant with a baseball bat. The defendant shot the victim and fled the scene. Jurors were critical of the victim's role in the crime during their penalty deliberations:

I don't know if everybody else even agrees with what I'm about to say but the jury was swinging to a death sentence until I think it was me and [another juror] and we said what would have occurred if [the victim] had not put up a fight. So that's the way I was thinking. That's the way he was thinking and so what we did is we sat down and said look if [the defendant] would have come into that store with that shotgun and told [the victim] to give him the money out of that register and [the victim] would have done exactly what he was told would this crime had escalated to this point? And I said that the crime should have never occurred, but since it did occur I believe it escalated by [the victim] and not because [the victim] was shot and he grabbed something and tried to defend himself but because [the victim] started the whole thing by spraying the mace and grabbing the bat... Believe it when I tell you, I felt that this was a crime of violence. I felt that this was a robbery, but I think it was an escalated crime to the point where it wasn't [the victim's] no way I'm not blaming [the victim] for anything but I was saying had [the victim] not done all this it's a possibility that he could still be alive today... [The defendant] was a sad individual. He committed a crime, a crime that he had no intention of killing anyone, but because of escalation of the incident he did actually kill someone. So it wasn't an accident, but it wasn't like he was going after [the victim] with the gun and said I'm gonna go kill [the victim]. So it wasn't anything planned [or] premeditated. It was just something that went down wrong.⁴⁹³

Another juror from the same trial commented:

[The victim] contributed to his own death. It sounds terrible, but that's the way I felt. Again it goes back to – here was this wonderful man that everybody liked that did a less than smart thing at the wrong time so everybody's got this romanticized glow about him and then if you came up and say excuse me but he was really stupid for grabbing a baseball bat and chasing a guy with a shotgun.⁴⁹⁴

Likewise, a third juror from the same case noted:

⁴⁹³ TX07L

⁴⁹⁴ TX07L

Another thing they brought up was that the [victim] himself was fighting the robbery and it probably didn't help matters. You don't want to say that he's responsible for it, but he did play a part in kind of how everything went down.⁴⁹⁵

These jurors provide a clear explanation for the role the victim's actions played in the jury's final sentencing decision. Significantly, while the video footage was cited by all jurors as the most important factor in finding the defendant guilty of capital murder, it was also the most important factor in the jury's final sentencing decision. Such use of guilt phase evidence to determine the defendant's punishment was common amongst life jurors. As Table 8.4 shows jurors who sentenced the defendant to LWOP often reached a premature punishment decision by the time they had made their decision concerning the defendant's guilt.

Table 8.4

Jurors' sentencing decision at the end of the guilt phase by sentencing outcome:

<i>After the guilt decision but before you heard any punishment phase testimony did you think the defendant should be given</i>			
Sentence outcome	Death	LWOP	Undecided
Death	6 (25.0%)	1 (4.2%)	17 (70.8%)
LWOP	5 (22.7%)	6 (27.3%)	11 (50.0%)

Jurors in LWOP cases were more likely to have reached a sentencing decision by the conclusion of the guilt phase than their death counterparts. This finding confirms that a number of jurors in cases which resulted in a sentence of LWOP reached their decision based on evidence related exclusively to the commission of the crime.

The second case involved a young man and three accomplices who burglarized the home of an old acquaintance. The defendant and two of his relatives went into the victim's house intending to steal various items. During the burglary, the victim returned home and was shot once through the head. Although physical evidence placed the defendant at the scene of the crime no such evidence was

⁴⁹⁵ TX07L

presented to establish that he shot the victim. The jury's uncertainty about who was the actual 'triggerman' significantly mitigated the crime:

When I first – before I even went in there without knowing about mitigation I had it in my mind I don't care what any of these people say. I don't care what arguments they make. I know that I saw no gun. I saw no fingerprints on the gun. I don't know if he was actually the triggerman so no killing. I'm not going to do that. Before I went in there I had pretty much made up my mind it's just that they were for different reasons at different points.⁴⁹⁶

In a similar way to a number of other jurors, this juror reached his sentencing decision prematurely, before the start of the punishment phase. Likewise, another member of the jury described how he too reached a decision prior to jury deliberations:

When the judge read the instructions to the jury at that point I could see that we're not going to go past this point 'cause the prosecution did not prove the one thing – he either had to have pulled the trigger or he had to have prior knowledge that a gun would be used and since [the victim] wasn't home how could he have prior knowledge that the gun was going to be used when they thought the house was empty and obviously they never proved that he pulled the trigger so that was that.⁴⁹⁷

Critically, the Texas Penal Code provides that co-conspirators may be criminally responsible for the commission of any additional felony committed by an accomplice during the original offense 'if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy'.⁴⁹⁸ In relation to this particular case, the defendant's participation in the burglary during which the murder was committed was enough for him to face capital murder charges, even if he did not actually commit the murder. In such capital cases involving co-conspirators the jury receives an additional special issue question in the punishment phase which asks:

⁴⁹⁶ TX06L

⁴⁹⁷ TX06L

⁴⁹⁸ TEX. PENAL CODE ANN. § 7.02(b) (West 1994)

Whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased, but intended to kill the deceased or another, or anticipated that a human life would be taken.⁴⁹⁹

The jury in this trial answered this issue ‘no’ resulting in a sentence of LWOP, and therefore never reached the mitigation special issue question.

A number of jurors in this case were strong advocates for capital punishment for defendants who could be shown to have actually committed murder. Although those jurors were convinced the defendant was present during the burglary/homicide and convicted him of capital murder, they were not as sure about whether the defendant had actually killed the victim or whether one of his co-defendants was responsible. As one juror described, he could not even understand the purpose of much of the penalty phase evidence presented by the prosecution since it was not related to the defendant’s guilt:

If he [the prosecutor] – if you can’t prove to us that he did it, you know, why waste our time trying to [get a death sentence]? It’s like this is the gun and there’s no fingerprints on it, you brought the gun even though there ain’t no fingerprints. I’m pretty sure someone got a fingerprint off of it. I want to hear if someone got a fingerprint off of it. The forensic scientist can easily say “Hey, this isn’t his fingerprint right”, so then why waste our time with that. It’s cool, that I mean it’s not cool but they brought the murder weapon but that murder weapon wasn’t directly linked to our case you know. So it was just kind of like they wasted some of our time.⁵⁰⁰

Like many jurors who sentenced the defendant to death, evidence unrelated to the commission of the crime presented in the penalty phase was simply immaterial to this juror.

The final case involved the murder of a police officer in the line of duty. The victim and several other officers went to a trailer home and attempted to serve the defendant with an arrest warrant. Upon entering the trailer gunshots were fired and the victim was struck once in the head. The defendant escaped through a window, ran

⁴⁹⁹ TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2 (West 2009)

⁵⁰⁰ TX06L

to a nearby home and took a woman hostage before eventually surrendering. Neither eye-witness testimony nor forensic evidence could conclusively prove that the defendant had aimed directly at the police officer:

You know we still had the thing [mock-up of the trailer with bullet trajectories marked] sitting in front of us, so we were still referring back to the way the shots went and how a lot of them were random but centered, but yet not specifically shooting at [the victim]. [The defendant] was shooting at all the officers. He wasn't trying to kill one individual.⁵⁰¹

It is possible that in addition to doubts over the defendant's intent, jurors in this case were less willing to sentence the defendant to death because the victim was a police officer. While this sentiment was only expressed by a single juror, two of the four cases which resulted in a sentence of LWOP involved law enforcement agents who were killed in the line of duty. Although too little data exist on this point to draw any conclusions, this particular juror did offer insight into the possibility that the jury did not vote for a death sentence because, in part, they did not agree that the murder of an officer should elevate the defendant's potential penalty to death:

I felt like a person is a person and if they're murdered no matter what they do for a living everyone is equal and just because someone is a police officer that doesn't mean their life was worth more.⁵⁰²

Jurors were on the whole cautious about how they spoke of victims during interviews. As such, it is difficult to know the extent to which such considerations factored into their sentencing decisions.

4. Persuasive Personal Mitigating Evidence

Although the most important mitigating evidence cited by jurors in these three cases related to the commission of the crime, in every trial which resulted in a sentence of LWOP evidence related to the defendant's background and upbringing

⁵⁰¹ TX08L

⁵⁰² TX08L

was presented. Though this evidence was not persuasive to many members of the jury, who instead concentrated on mitigating circumstances related to the offense, such evidence was meaningful to some jurors. In particular, evidence which supported a positive work history was especially persuasive to jurors in two trials:

There was a lot of support there for the death penalty for an individual that truly had no conscience – that the discussion this is for the worst of the worst, the serial rapist, the people who go out and intentionally target an individual for the purpose of killing that person, and we did not see that in this case whatsoever, although [the defendant] had been abusive. When he had been in jail it seemed like when he wasn't on drugs he had a conscience – he was a good person even – and he held a job – he was a good worker. It seemed like the drugs were the primary, not cause, but led him to be a different person. But even that person was not so so horrible as, like I said, someone with absolutely no conscience. And again it came down to the fact of the majority of the individuals, including me, thinking that the death penalty is for the worst of the worst and he just didn't quite fit that category. We didn't feel he was that person and again I'll throw out that word stupid, he was just stupid. He got himself backed into a corner and instead of thinking it through he just acted very stupidly.⁵⁰³

A juror from a different trial likewise recalled, 'The fact that he was employed and he worked hard and supported a family was an important thing to me. He wasn't a deadbeat'.⁵⁰⁴ Evidence of a positive employment history can demonstrate the defendant's ability to behave responsibly. It can also indicate something positive about the defendant's character – an aspect of his life with which the juror can identify. In this way, such positive mitigation evidence served to lessen the divide between jurors and the defendant while supporting pleas by the defense for a sentence of LWOP.

Evidence of a troubled background and traumatic upbringing was equally important to a number of jurors. As one juror expressed:

[T]he way he grew up. He saw his brother got killed, I believe in front of his eyes. If I'm not mistaken pretty much I think before that time I think he was a pretty good kid. It's not an excuse because there are people that grow up in

⁵⁰³ TX08L

⁵⁰⁴ TX05L

bad neighborhoods and done o.k. I think sometimes when you're lost and you need help and there's nobody there you do crazy things outside.⁵⁰⁵

The mitigation presented in this case served to contextualize the defendant's life in relation to the crime. As the juror noted, such evidence is not an excuse for the crime, but rather an explanation for the defendant's behavior. As another juror simply stated:

I found him very sympathetic. I don't know why because I think he's capable of killing again. I just felt like what a terrible start in life he had.⁵⁰⁶

Providing such an explanation for a defendant's behavior is particularly important given that jurors answer the mitigation issue after the dangerousness question.

In addition to mitigation presented about the defendant's positive work history and difficult upbringing, jurors were also persuaded by evidence from a defendant's family members regarding his personal struggles, such as his experience with substance abuse and the fact that he was easily led astray by others:

I don't think he was a volatile violent person typically and that's because of them presenting the wife and the children at the age he was when he married her, and her family. I just had this impression that, you know, it was sad, so I think he probably definitely used drugs and alcohol out of peer pressure or just being part of the crowd and his environment made him ... if he had any acts of violence it was probably suppressed anger, I don't think it was something that came from the crime itself.⁵⁰⁷

Such evidence was critical in aiding the jury to form an alternative view of the defendant as human and fallible, rather than evil or damaged beyond repair, and therefore ultimately as someone who was deserving of mercy.

⁵⁰⁵ TX07L

⁵⁰⁶ TX06L

⁵⁰⁷ TX06L

(a) Personal mitigation as the sole reason to sentence the defendant to life without the opportunity for parole

Although the defense in each trial included in this study presented evidence about the defendant's background, only one jury determined the defendant's penalty primarily on such evidence. The defendant, who had been stopped for a traffic violation, was convicted of shooting a police officer numerous times in the back of the head in the officer's patrol car. When police arrived at the scene the defendant was still in the back of the vehicle.

In addition to the extensive voir dire conducted by the defense (see Chapter 4), the defense was able to present mitigating evidence to the jury in the guilt phase because the defendant had pleaded not guilty by reason of insanity. During the first part of the trial the defense presented evidence about a traumatic brain injury the defendant had sustained as a youth. Although the jury found the defendant guilty, several members did believe that the defendant had suffered a brain injury. In the punishment phase, the defense presented collateral evidence related to the defendant's injury, but also presented a number of family members and friends who testified to the defendant's positive character traits and his alcoholism. As one juror summarized:

The main theme of the witnesses was [the defendant] is a hard working person, very flawed with a record of big mistakes, but also loving to his wife and step-daughters, damaged by the early childhood injury and abusive parents. [The defendant] was clinically alcoholic to just an extraordinary degree – just gallons of alcohol per day, who believed at the moment of his arrest that he was going to be executed and reacted in a state of insane panic when he killed [the victim]... The defense attorneys knew their job was to show the humanity of [the defendant], his complex flawed character, and to try their best to humanize him. They were very gentle with the witnesses... They waited their turn and they were very thorough with each witness trying to elaborate on his injury, physical abuse by the dad, and even by the mom, apparent moments of what looked like seizure or meltdown during school days, you know that might have been caused by brain injury. They really dug into those issues just day after day... I was moved. [B]ut it was just a long string of witnesses from his home, you know, which is in that kind of small

town in Mexico and it was as if they just swept them up and brought them [here] and we – I – was convinced of their love for [the defendant].⁵⁰⁸

The account provided by this juror details a variety of mitigating themes presented by the defense in the penalty phase of this case. Critically, each distinct theme provided the basis for a persuasive narrative about the defendant's background. Given the diversity of topics presented by the defense, jurors often cited different aspects of the personal mitigation advanced which led them to a sentence of LWOP. As one juror from this trial explained:

Everybody could find how [the defendant's] life had some value, be it, let's see [one juror] never said how his life had value, she just changed her vote and moved on and I definitely never said anything. [The foreman] didn't say anything other than he just didn't feel like he deserved to die. [Another juror] thought that he was devout enough in his faith that he knew he'd done wrong. [Another juror said] he could help other prisoners and he had family that loved him and that was just really the bottom line for her. [One juror], bless his heart, he just couldn't bring himself to do anything other than what he was doing, then [two others said] his life has value in and of itself.⁵⁰⁹

A second juror commented:

Everybody had their own mitigating circumstances really. I think because [the defendant] had family that cared about him, I think that was a recurring theme for a lot of people. That was a lot of people's mitigating circumstances but it was mitigation that saved him.⁵¹⁰

A number of jurors were able to point to the defendant's family and the value of life as the primary reason to spare him, indicating that a majority of the jury was collectively moved to sentence the defendant to LWOP for various reasons unrelated to the capital offense.

⁵⁰⁸ TX05L

⁵⁰⁹ TX05L

⁵¹⁰ TX05L

Notably, not all jurors in that trial agreed that there were sufficient mitigating circumstances to sentence the defendant to LWOP.⁵¹¹ Such jurors viewed the crime as ‘cold-blooded, senseless, and unprovoked’.⁵¹² Despite the differences in opinion and reaction to the evidence, jurors in this case understood their role in the process, the standard of proof required to find the defendant dangerous, that a death sentence was never required, and that the decision to sentence the defendant to LWOP could be based on any evidence presented and could include the decision to be merciful. Indeed, the data from this trial emphasizes the importance of guiding jurors’ understanding of the sentencing scheme in order that they should make their decision in a way which complies with the standards articulated by the Supreme Court. In this case such guidance was provided mainly by the defense. However to achieve a capital sentencing scheme which limits arbitrariness, such critical assistance should be provided to jurors through the sentencing statute.

5. Conclusion

The Texas capital statute encourages jurors to view relevant mitigation evidence as only related to the circumstances of the offense. In three of the four cases which resulted in a sentence of LWOP such mitigating factors were present. Many jurors from those trials did not understand how mitigating evidence related to the defendant’s background could be used to determine the defendant’s punishment. Although these trials did not end in a sentence of death, this is more a matter of providence than the result of any deeper understanding of the sentencing statute on the part of jurors.

⁵¹¹ This trial did not result in a unanimous jury. As mentioned in Chapter 1, a sentence of LWOP can result with ten out of twelve jurors agreeing to that sentence. The final vote in this case was in fact, ten jurors who found sufficient mitigating evidence to warrant a sentence of LWOP and two who did not.

⁵¹² TX05L

Given that an essential component of the constitutionality of a capital sentencing scheme is that the jury be able to render an individualized punishment based on factors related to the defendant's background, the Texas capital sentencing scheme appears incapable of allowing such a consideration, except in the rarest of cases.

Chapter IX. Conclusions: Death by Default

Since the modern American death penalty began with constitutionally-approved guided discretion statutes, Texas has surpassed most other states in numbers of death sentences and executions.⁵¹³ While commentators have suggested various cultural and political reasons for the state's persistent use of the death penalty,⁵¹⁴ this study has identified deficiencies within the Texas capital statute and its application which appear to facilitate death sentences irrespective of whether the jury believes such a sentence is truly deserved. As one juror who sentenced a defendant to death expressed:

I think he should have gotten life. I just didn't think that the felony behind this was, you know, it just seemed again like more *form over substance*. If we're ok with giving murders life in prison and he steals \$300 worth of stuff and her car why does that all of a sudden make it death? I can't think of much less that you would have to do to get the death penalty than this. *I think he should have been given life*, but I am o.k. with the fact that he got death because that's the way the system is right now. I was pretty sure that if it was me, by myself and I didn't have three questions to ask – a follow up question that I don't have an answer for is if we had to decide without the three questions because I really don't know how our jury would have come out. The questions were pretty easy to answer which is why I have said a couple of times that if you are convicted of capital murder the *default is the death penalty* it seems. [Emphasis added]⁵¹⁵

Since the sentencing decision in Texas is limited to only two factors – the defendant's future dangerousness and whether there are any mitigating factors which warrant a sentence less than death – and jurors are left without any statutory guidance to help define the precise scope and purpose of each issue, jurors ultimately rely on the interpretation of the statute by legal actors. Guidance – which the United States

⁵¹³ See Death Penalty Information Center 2010 <<http://www.deathpenaltyinfo.org/documents/2010YearEnd-Final.pdf>> accessed 9 July 2011

⁵¹⁴ See Franklin Zimring, *The Contradictions of American Capital Punishment* (Oxford University Press, Oxford 2003). Zimring argues that there is a distinct relationship between areas in America which witnessed high numbers of lynchings and those which leader in their use of capital punishment. Others, such as David Garland, attribute the continued use of capital punishment to a series of political and legal decisions which have entrenched the practice in particular jurisdictions. See also David Garland, 'Capital Punishment and American Culture' (2005) 7 *Punishment and Society* 347

⁵¹⁵ TX02D

Supreme Court endorsed as essential to a constitutional death penalty – is therefore not provided by a legislatively approved statute, but rather is delivered by the judge, prosecutors, and defense attorneys.

The data presented in this study are especially important in helping to determine whether the legislative changes to the sentencing scheme in the aftermath of *Penry v. Lynaugh*⁵¹⁶ have had the intended effect of providing jurors a meaningful vehicle for considering mitigating evidence. The data strongly suggest that the statutory changes have had little influence in this regard. Rather, the special issue questions as currently applied facilitate the opposite response – they enable the dismissal of mitigating evidence by overemphasizing the defendant’s dangerousness in the determination of an appropriate sentence. This effect is assisted by the cumulative nature of the State’s evidence presented against the defendant throughout the trial. Evidence used to prove the defendant’s guilt simultaneously provides evidence of the defendant’s dangerousness. Thus, as the data show, jurors conflate these matters and begin to discuss the dangerousness special issue question during guilt phase deliberations in violation of the law requiring that guilt and punishment decisions be made separately. The concept of dangerousness is therefore dominant in jurors’ minds and extremely difficult to displace.⁵¹⁷

1. Lessons From this Study

A number of areas have been addressed in this study, most notably how the special issue questions compel jurors to disregard non-nexus or personal mitigating evidence and vote to sentence the defendant to death. Through an analysis of jury selection we see the central importance of voir dire, which provides an opportunity to

⁵¹⁶ *Penry v Lynaugh* 492 US 302 (1989)

⁵¹⁷ John Blume, Stephen Garvey, and Sheri Lynn Johnson, ‘Future Dangerousness in Capital Cases: Always “At Issue”’ (2001) 86 Cornell Law Review 397

both vet the jury and educate potential jurors about the sentencing requirements. Jurors are primed to begin viewing the evidence through a specified lens at this early stage. In Texas, since the sentencing statute is focused on the defendant's dangerousness, jurors enter the trial aware that the defendant's potential dangerousness is at issue and begin to view culpability phase evidence in that light. When the defense fails to advance any witnesses who call into question the defendant's culpability or provide an alternative narrative of the circumstances surrounding the crime, jurors are left to dwell on the aggravating features of the murder in deliberations. Jurors who question the defendant's guilt during deliberations are presented with emotional evidence as a means of persuading them to find the defendant guilty. This often involves repeated viewings of the crime scene and autopsy photos.

Thus, for jurors, the punishment phase serves as a continuation of the guilt phase. The theme of dangerousness functions as an anchor for all of the evidence the State will present and as a mechanism for dismantling defense offered mitigation. As the current sentencing statute does not provide the defense any equitable area around which to structure their case, jurors are often perplexed by the type of evidence presented by the defense at the punishment phase. Consequently, high numbers of jurors actually view defense-advanced punishment phase evidence as backfiring and ultimately view it as aggravating.

Although the defense in cases included in this study took steps to limit the deficiencies with the Texas statute, they cannot resolve them. It is true that defense teams in trials which resulted in a sentence of life without the opportunity for parole (LWOP) were more effective in reframing some aspects of the special issue questions. The defense in those four cases applied similar methods to the State during jury

selection, educating potential jurors to a particular interpretation of the special issue questions. The defense attorneys in trials which ended in a sentence of LWOP were better positioned to remove jurors who would not consider personal mitigation in determining the defendant's sentence because they asked open-ended questions regarding jurors' ability to give meaningful consideration to mitigating evidence and followed up with more pointed questions when potential jurors gave unclear responses. By engaging in more thorough questioning these defense attorneys were able to educate jurors and frontload mitigation evidence. Nonetheless, in three of those cases which resulted in a sentence of LWOP their success was due, in part, to the available mitigating evidence related to the crime. The data therefore show not only that jurors who sentenced the defendant to death found personal mitigating evidence less pertinent, but also that an overall majority of jurors, regardless of the trial outcome, failed to understand the purpose and value of such evidence and ultimately deemed it irrelevant to their sentencing decision.

Although some jurors in this study appeared far more willing than others to sentence the defendant to death for his crimes, a fair number were less committed to that sentencing outcome but did so in spite of their personal misgivings. Jurors, like the one quoted at the start of the chapter, who have been taught to view the State's interpretation of the sentencing scheme as the only one which is permissible do not understand a central tenet of the modern American death penalty – that a death sentence is never required. This confusion – that the Texas statute appears to require a death sentence if the defendant is found to be a future danger – is exacerbated by the special issue questions and is likely a central reason that 80% of capital trials in Texas result in sentences of death.⁵¹⁸

⁵¹⁸ Jonathan Sorensen and James Marquart, 'Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases' (1990) 18 *New York University Review of Law and Social Change* 743, 772 (citing capital juries

Coupled with the unique liabilities of the Texas capital sentencing scheme is the structural aggravation present in all capital trials. Some of these aggravating features which are found in all capital sentencing schemes are due to the bifurcation of the trial into two phases. Although bifurcation has alleviated the problems associated with unitary proceedings, where defendants were forced to deny guilt while simultaneously asking for a sentence less than death, bifurcation appears to fail as a mechanism for limiting arbitrariness. This is likely due to its administration, as Sandys and McClelland note:

Bifurcation does little to reduce arbitrariness in capital sentencing if the current practice simply physically separates, but does not keep psychologically separate, these difficult and distinct decisions to be made by the jury. True bifurcation of proceedings requires that considerations of penalty do not contaminate decisions of guilt.⁵¹⁹

Jurors are unlikely to be able to easily dissociate guilt and punishment decisions, as illustrated by the high rates of premature decision-making identified by this and earlier studies.⁵²⁰ It is clear that the introduction of the defendant's dangerousness as the central component of the sentencing determination further diminishes the psychological separation between the two decisions. In practice, the State's case for proving the defendant's dangerousness begins immediately, at the start of jury selection. Bifurcation limits the defendant's ability to present mitigating evidence thus creating a structural inequity which serves to invite arbitrariness into the

returning death sentences in 77% of all cases between 1974-1988). My own data show a similar sentencing ratio of 80% (see Chapter 3)

⁵¹⁹ Marla Sandys and Scott McClelland, 'Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality in James Acker, Robert Bohm, and Charles Lanier (eds) *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press 2003) 408

⁵²⁰ William Bowers, Marla Sandys and Benjamin Steiner, 'Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Evidence and Premature Decision-Making' (1998) 83 *Cornell Law Review* 1476

sentencing decision.⁵²¹ The weaknesses of bifurcation could be significantly reduced with the removal of the dangerousness special issue question from the sentencing statute.⁵²²

In addition, the nature of legal proceedings frequently privilege ‘logical’ determinations over legitimate emotional responses to the defendant and the evidence.⁵²³ The formulation of the sentencing scheme into two questions which appear as ‘factual’ inquiries serves only to further the divide between jurors and the defendant. The special issue questions enable jurors to extract themselves from the purpose of the sentencing phase and relinquish responsibility for the defendant’s ultimate fate.⁵²⁴ In this way, jurors are able to rationalize their decision as adhering to the law, although, as the evidence presented in this study underscores, they are in fact likely to misunderstand it.

The analysis of deliberations between juries that sentenced the defendant to death and those that sentenced the defendant to LWOP are especially revealing in that jurors appeared to have a great deal in common. Through the analysis of the cases which resulted in a sentence of LWOP it is clear that in most trials the defendant’s life was not spared due to personal mitigating evidence presented by the defense, but

⁵²¹ See Jesse Cheng, ‘Frontloading Mitigation: The “Legal” and “Human” in Death Penalty Defense’ (2010) 35 *Law and Social Inquiry* 39

⁵²² Commentators have offered a couple of solutions to the problems created by bifurcation. One suggestion is to empanel a jury that is not death-qualified to determine guilt, then, if the defendant is found guilty, empanel a second separate death-qualified jury to determine punishment. Although this might appear to alleviate some of the shortcomings of bifurcation this method would prevent the defendant from benefiting from highly persuasive mitigating evidence related to the crime such as residual doubt. A second suggestion is to impanel a non-death-qualified jury with the maximum number of alternates. If the jury finds the defendant guilty they will be death-qualified after the guilt phase but before the presentation of penalty phase evidence. Although this second method allows for the jury to hear potentially relevant mitigating evidence related to the crime, it risks empaneling jurors who are committed to sentencing the defendant to death in the particular trial, as opposed to death-qualifying a juror generally. See Richard Salgado, ‘Tribunals Organized to Convict: Searching for a Lesser Evil in the Capital Juror Death-Qualification Process in *United States v Green*’ [2005] *Brigham Young University Law Review* 519

⁵²³ See Susan Bandes, ‘Repellant Crimes and Rational Deliberation: Emotion and the Death Penalty’ (2009) 33 *Vermont Law Review* 489

⁵²⁴ The Supreme Court has held that it is constitutionally impermissible to mislead capital sentencers into thinking that responsibility for determining the defendant’s penalty rests elsewhere. See *Caldwell v Mississippi* 472 US 320 (1985)

rather than questions about the defendant's relative culpability swayed the jury away from the death penalty. Though only suggestive, it is noteworthy that two of the juries that sentenced the defendant to LWOP did not strictly adhere to the special issue questions, but rather determined whether the defendant should 'live' or 'die' and then answered the questions in such a way to produce that result. Especially intriguing is the difference in the nature of the discussion in those two cases – jurors did not simply address the defendant's dangerousness, but rather engaged in a wide-ranging discussion of the evidence presented.

Equally important, however, is the trial in which personal mitigating evidence did persuade the jury to spare the defendant's life. In that case the defense were especially active in questioning jurors during voir dire, educated the venire to an alternative interpretation of the sentencing statute, frontloaded mitigating evidence, called witnesses in the guilt phase to testify to the defendant's brain damage and integrated various mitigating themes throughout the entire trial. Jurors in that trial displayed the greatest command of the sentencing scheme out of all the juries in this study. For instance, jurors understood that the verdict for LWOP did not need to be unanimous, as evidenced by the fact that only ten jurors found sufficient mitigating factors to warrant a sentence of LWOP.

2. Proposals for Reform

The principal findings of this study confirm the constitutional shortcomings of the Texas capital sentencing scheme. Given the abundance of empirical findings which indicate the arbitrary administration of capital punishment in the United States, I am reluctant to provide any proposals for reform to the Texas capital sentencing system, short of its repeal. I am inclined to conclude, like many others before, that there is no perceptible way to ensure fairness in the determination of capital sentences

and limit arbitrariness in the application of the death penalty. Ultimately, I echo Justice Harlan's comments in *McGautha v. California*, where he described the impossibility of channeling the sentencing decision in capital cases:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.⁵²⁵

However, as convincing as the data are which show the failures of guided discretion models to properly direct sentencing discretion in capital cases, it is likely that America (and certainly Texas) will allow capital punishment to continue for some time. It is only due to that likelihood that I provide proposals for ways to reform the current sentencing statute in Texas in an effort to dilute the particularly egregious failures of the scheme.

The first recommendation is that the Texas legislature eliminate the special issue questions altogether, opting instead for a sentencing scheme that includes standardized, plainly-worded jury instructions explaining how the penalty decision differs from the culpability verdict. The standardized instruction should delineate factors to be considered properly aggravating and those which are inherently mitigating. This is critical in order to curb the current practice of converting mitigation evidence into aggravating evidence. Importantly, the instructions should require the trial judge to include descriptions of the punishment phase evidence that has been presented in a particular case. Thus, if a case involved the presentation of mitigation evidence related to the defendant's age, mental health history, experiences of physical, mental, and emotional abuse, limited intellectual functioning that does not

⁵²⁵ *McGautha v California* 402 US 183, 204 (1971)

rise to a diagnosis of mental retardation, employment history, military service, poverty, religiousness, positive character traits, alcohol or drug addiction, and positive adjustment to incarceration,⁵²⁶ the judge would be required to indicate those factors to the jury as mitigating. Outside of these factors, jurors should also be made aware that they are able to make the decision to grant the defendant mercy and that they are never required to sentence the defendant to death. The instructions should also emphasize that the default punishment for a defendant convicted of capital murder in Texas is LWOP and as such, it is a sentence with which the State is satisfied. Although such an instruction may not eliminate every potential issue regarding the jury's ability to understand what factors can be considered in determining the defendant's sentence, it would provide much more clarity to jurors than is currently available.

Alternatively the legislature should alter the special issue questions, beginning at least with the removal of the dangerousness special issue question. The dangerousness special issue question is extremely problematic – not only in that it appears to trump jurors' consideration of mitigating evidence, but also in that predictions of dangerousness are especially inaccurate. Ample empirical work demonstrates that determinations of future dangerousness appear to over-include many defendants.⁵²⁷ Given that the Court has assigned heightened scrutiny to death penalty cases due to its qualitative difference as an irreversible penalty allowing a

⁵²⁶ Given the limitations in utilizing an instruction that applies a catch-all mitigation category, it is critically important to provide ample examples of mitigating factors. *See* Craig Haney and Mona Lynch, 'Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions' (1994) 18 *Law and Human Behavior* 411 (noting that data suggest widespread inability to accurately define the central concepts of aggravation and mitigation in use in virtually every state that currently has a death penalty statute); Craig Haney and Mona Lynch, 'Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments' (1997) 21 *Law and Human Behavior* 575 (noting that attorney arguments appear unlikely to significantly reduce confusion among capital jurors)

⁵²⁷ *See e.g.* James Marquart, Sheldon Ekland-Olson, and Jonathan Sorensen, 'Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?' (1989) 23 *Law and Society Review* 449; Megan Shapiro, 'An Overdose of Dangerousness: How "Future Dangerousness" Catches the Least Culpable Defendants and Undermines the Rationale for the Executions it Supports' (2008) 35 *American Journal of Criminal Law* 101

determination of the defendant's dangerousness to be placed at the center of the capital sentencing decision appears at odds with the 'death is different'⁵²⁸ doctrine. Indeed, the inclusion of the future dangerousness special issue question appears to invite arbitrariness into the capital sentencing decision.

With the removal of the dangerousness special issue question the mitigation instruction could remain and be followed by a second question which asks the jury 'whether the defendant should receive life without the opportunity of parole or a death sentence'.⁵²⁹ Critically, the judge should be required to explain to the jury that the presumptive sentence is LWOP and that they are not required to sentence the defendant to death nor must they provide a reason for deciding to sentence the defendant to LWOP.⁵³⁰ A problem with the current mitigation special issue question is that it employs sanitized language which further detaches jurors from the result of their sentencing decision. The inclusion of a question which brings into focus the ultimate purpose of their deliberations – whether the defendant ought to live or die – might help lessen some of the instructional distancing which currently exists.⁵³¹ As the Supreme Court expressly held in *Caldwell v. Mississippi*, jurors must understand that they are the ultimate arbitrators of the defendant's fate.⁵³² As such the addition of

⁵²⁸ See Jeffery Abramson, 'Death-is-Different Jurisprudence and the Role of the Capital Jury' (2004) 2 Ohio State Journal of Criminal Law 117

⁵²⁹ Since the Texas statute performs the narrowing function in two parts – first through limiting death eligible offenses to particular types of aggravated murder and secondly through the identification of offenders who will likely pose a danger to others in the future – the removal of the future dangerousness issue would not strip the Texas statute of the constitutional requirement to limit the application of the death penalty since it would still only be available for statutorily aggravated forms of murder.

⁵³⁰ Jurors in this study expressed that they would not have been able to sentence the defendant to death if there was a question directly asking them to do so. However, if the question were to ask jurors whether the defendant should receive a sentence of LWOP, it seems that the gravity of the decision might be lessened. As such, it is critical that the judge's instructions which accompany the special issue questions make it clear that the presumptive sentence is always LWOP and that the State is satisfied with such a result.

⁵³¹ This question is similar to the fourth special issue question utilized in Oregon's capital sentencing statute which asks 'whether the defendant should receive a death sentence'. See OR. REV. STAT. ANN. §163.150(1)(b)(D) (West 2009)

⁵³² *Caldwell v Mississippi* 472 US 320 (1985)

a direct instruction which brings the result of their decision into focus should be included. Furthermore, given that the default punishment in Texas for a convicted capital defendant is LWOP, jurors should understand that the decision to sentence the defendant to death is truly an exceptional punishment, which is why the question ought to be formulated in a direct manner and limited to an inquiry about the ‘death-worthiness’ of the defendant.

If the legislature kept the special issue questions as currently worded, yet another recommendation would be to invert the order of the special issue questions – asking the mitigation special issue question first followed by the future dangerousness special issue question. Since the dangerousness issue eclipses the mitigating instruction it is possible that simply reversing the order of the issues would alleviate some of the contaminating effect of the dangerousness instruction. The current ordering of the questions limits jurors’ time and ability to meaningfully consider mitigating evidence. Jurors are told that they must answer the dangerousness issue first, *before* they are to consider mitigating factors. As explained, jurors – made aware that the defendant’s dangerousness is at issue – will interpret all the evidence looking forward to whether it supports the dangerousness special issue question. It is only after that determination that jurors then must look back and reconsider all of the same evidence to determine whether there is anything mitigating. This second step means that mitigation evidence will not receive the same consideration as evidence of the defendant’s dangerousness since jurors are instructed not to consider mitigation until dangerousness is determined. Thus, by inverting the questions mitigating evidence will become central to the penalty phase decision – a result which is closer to what the Supreme Court envisioned when it sanctioned guided discretion models.

Outside of recommendations concerning the Texas capital statute itself, there are several areas of reform which would enhance jurors' ability to follow the current law. One such recommendation is to reform the state-wide system of appointment of indigent counsel in capital cases in Texas. As one commentator noted, defending a capital case:

[R]equires mastery of a plethora of legal, criminological, medical and psychological concepts; a commitment of investigative resources that is unprecedented in the annals of criminal defense work; and a level of expert assistance that is largely unknown in non-capital criminal cases.⁵³³

Most individuals who face the death penalty in Texas are provided court appointed lawyers who are ill-equipped to handle the complexity of a capital case or are simply incompetent.⁵³⁴ As there is no state-wide public defender system, it is not surprising that seven out of the eight lead defense attorneys were solo-practitioners who handle a variety of criminal cases, did not have the benefit of in-house investigators or mitigation specialists, and were unlikely to be versed in the literature regarding best practices. In only one case – the trial which resulted in a sentence of LWOP based solely on personal mitigating evidence – was the lead attorney working in a law office dedicated exclusively to capital defense. It appears that the high quality of representation in this single case was assisted, in part, by the lawyer's specialization in capital defense work. The data presented in this study substantiates what is known about the poor quality of indigent capital defense in Texas.⁵³⁵ As such, the

⁵³³ Douglas Vick, 'Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentence' (1995) 44 Buffalo Law Review 329, 332

⁵³⁴ Stephan Bright, 'Even Sleeping Lawyers Allowed by Courts in Texas Capital Cases' (*Second Class Justice*, 26 October 2010) <<http://www.secondclassjustice.com/?p=196>> accessed 26 July 2011

⁵³⁵ Data presented show that defense attorneys in cases which resulted in a sentence of death engaged in less vigorous questioning during jury selection. From my reading of the transcripts, defense attorneys in cases which resulted in a death sentence appeared less prepared and less engaged, failing to object throughout the trial, not following up with witnesses when given the opportunity for cross-examination, etc. Jurors were also asked to rate the performance of the defense and prosecution on a one to ten scale. Jurors answered a number of questions concerning the effectiveness of each side's overall performance, whether jurors thought they were prepared for the guilt phase and the penalty phase, whether they thought each side fought hard at the guilt and penalty phase and whether they viewed the team as competent and professional. Regardless of trial outcome, the defense received

introduction of a state-wide public defender system for capital trials would provide capital defense attorneys to poor defendants who had resources and training commensurate with what is currently provided to the State.

Another recommendation is that judges discontinue the practice of providing jurors with lengthy, free-form elaborations of the special issue questions during voir dire. In four of the cases included in this study, the judges did not provide the jury with any explanation for how to understand the key words in the sentencing statute. Although the sample is admittedly small, there was a noticeable pattern among the judicial comments made in cases which resulted in a sentence of death versus those which resulted in a sentence of LWOP. Judges who presided over cases which resulted in a death sentence administered a lengthy panel voir dire, providing prospective jurors with examples of mitigation evidence which often echoed the examples later provided by prosecutors. Conversely, the judges who presided over cases which resulted in a sentence of LWOP did not provide extensive remarks to potential jurors. Instead, the judges simply mentioned the sentencing scheme and left elaborations of the special issue questions up to the attorneys.

Each scenario is problematic. One failure of the current scheme is that it allows for multiple interpretations of the sentencing statute when there should be only one. In the event that judges wish to discuss the special issue question during panel voir dire, they should be provided a standardized statement. Such a statement should incorporate a thorough description of the type of decision-making involved in the determination of the defendant's sentence. It should provide clear language explaining what is meant by a 'reasoned moral decision' and how the capability of

lower average scores in every category compared to the prosecution. However, defense teams in cases which resulted in a sentence of death received the lowest average scores in all categories.

jurors to be persuaded by personal mitigation related to the defendant's background and life-history is central to such a determination.

A further recommendation would be to change the ordering of the questioning during jury selection. In fairness and to limit the effects of framing the special issue questions in a particular way, each side could take turns – the defense questioning one juror first, the State questioning the following juror first, and so forth. This would constrain the framing of the special issue questions currently facilitated by the alignment between judicial and State descriptions of the sentencing scheme. Since the law in Texas does not mandate an order for the questioning this is an easy remedy which would offset some of the issues identified with current practices during voir dire.

A final recommendation would be for more training to be provided to judges and prosecutors regarding the best way to assist jurors in their understanding of the evidence that will be presented. As mentioned in Chapter 4, seven of the eight judges who presided in the cases included in this study were at one time prosecuting attorneys. As such, they are likely to be less sensitive to the impact that their examples of legitimate mitigation evidence have on jurors. Although it is not the judge's job to assist the defense in their efforts, it is the judge's responsibility to ensure that the empanelled jury is one which is able to follow the law and consider the evidence fairly. A juror's ability to be receptive to mitigation evidence is a critical component to the constitutionality of capital punishment. At the same time, it is the responsibility of prosecution and defense attorneys to assist the jurors in understanding the sentencing statute by conducting a voir dire that both educates and vets prospective jurors.⁵³⁶ Given the consistency noted in the techniques prosecutors

⁵³⁶ See American Bar Association, 'Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases' (2003) 31 Hofstra Law Review 913, 962

from various jurisdictions use, which appear to distort the spirit of the special issue questions, it seems necessary for prosecutors to receive training which emphasizes their role as a minister of justice, not just as an advocate. As the model rules of professional conduct published by the American Bar Association state, prosecutors have an obligation to see that the defendant is ‘accorded procedural justice’.⁵³⁷ This is most important in capital cases where the defendant’s life can literally turn on the interpretation of a single word. Finally, judges in capital cases must be especially attentive in thinking about the impact prosecutorial examples have on dismantling the constitutional requirements of the Texas capital sentencing scheme and take steps to limit such occurrences.

3. Conclusion

Texas exists as an anomaly in its routine application of capital punishment when compared to other American jurisdictions which allow for the death penalty. This study strongly suggests that a major contributing factor to the high rate of death sentencing within the state concerns problems with the structure and language of the current sentencing statute. Although the Supreme Court has found the Texas statute facially constitutional, it appears that the statute in application does not allow for the consideration of much mitigation evidence. In particular, the Texas capital sentencing scheme encourages jurors to cast aside mitigating evidence unrelated to the commission of the crime. Thus, a number of jurors included in this study labored under a misperception that mitigating evidence, unrelated to the crime, was irrelevant to their sentencing decision. Such a failure to consider relevant sentencing evidence clearly violates the Court’s capital punishment jurisprudence and calls into question

⁵³⁷ American Bar Association, ‘Model Rules of Professional Conduct Advocate Rule 3.8 Special Responsibilities of a Prosecutor – Comment’ (2002)
<http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/comment_on_rule_3_8.html> accessed 3 August 2011

the legality of the sentences handed down to defendants under the current sentencing scheme.

It appears that in some cases capital defendants were not sentenced to death because their jury believed that to be the most appropriate punishment, but rather because their jury did not understand how to sentence defendants to LWOP. This peculiar problem can be addressed and limited in various ways. While many suggestions have been offered in an effort to minimize the faults within the current sentencing scheme it is clear that changes to the Texas capital sentencing system must be enacted in order to limit arbitrariness in capital sentencing and provide defendants with the constitutional protections they are guaranteed.

As a society, we ask much from the men and women who serve as jurors, especially those who deliberate in a capital case. Regardless of the outcome of the trial it is essential that jurors make a decision based on a clear understanding of the law. As the jury is meant to be the voice of the community, the instrument by which our collective feeling about a harm done to society is expressed, it is inappropriate to allow jurors to make a life and death decision under such grave misconceptions of what is required by law.

Appendix A

Part A: Juror responses to topics discussed by the jury during its guilt deliberations:
outside the defendant's guilt

Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's background or upbringing	Great deal	5	10.9	10.9
	Fair amount	15	32.6	43.5
	Not much	19	41.3	84.8
	Not at all	7	15.2	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's history of crime and violence	Great deal	6	13.0	13.0
	Fair amount	20	43.5	56.5
	Not much	13	28.3	84.8
	Not at all	7	15.2	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's dangerousness if ever back in society	Great deal	8	17.4	17.4
	Fair amount	10	21.7	39.1
	Not much	12	26.1	65.2
	Not at all	16	34.8	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Pain and suffering of the victim	Great deal	14	31.1	31.1
	Fair amount	13	28.3	60.0
	Not much	14	30.4	91.1
	Not at all	4	8.7	100.0
	Total	45	97.8	
	Missing	1	2.2	
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Loss and grief of the victim's family	Great deal	16	34.8	34.8
	Fair amount	12	26.1	60.9
	Not much	10	21.7	82.6
	Not at all	8	17.4	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent

Brutal or vile manner of the killing	Great deal	20	43.5	43.5
	Fair amount	18	39.1	82.6
	Not much	5	10.9	93.5
	Not at all	3	6.5	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's appearance or manner in court	Great deal	6	13.0	13.0
	Fair amount	18	39.1	52.2
	Not much	16	34.8	87.0
	Not at all	6	13.0	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
The ways the attorneys presented their cases	Great deal	11	23.9	23.9
	Fair amount	20	43.5	67.4
	Not much	10	21.7	89.1
	Not at all	5	10.9	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Jurors' feelings for the family of the victim	Great deal	7	15.2	15.2
	Fair amount	11	23.9	39.1
	Not much	18	39.2	78.3
	Not at all	10	21.7	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Jurors' feelings toward the defendant	Great deal	2	4.3	4.3
	Fair amount	14	30.4	34.8
	Not much	18	39.1	73.9
	Not at all	12	26.1	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Jurors' feelings about the right punishment	Great deal	6	13.0	13.0
	Fair amount	15	32.6	45.7
	Not much	9	19.6	65.2
	Not at all	16	34.8	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Jurors' attitudes about being a 'hung jury'	Great deal	0	0	0
	Fair amount	2	4.3	4.3

	Not much	9	19.6	23.9
	Not at all	35	76.1	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Likelihood the defendant would ever be executed	Great deal	4	8.7	8.7
	Fair amount	5	10.9	19.6
	Not much	14	30.4	50.0
	Not at all	23	50.0	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
How soon the defendant would get out of prison if not given death	Great deal	3	6.5	6.5
	Fair amount	4	8.7	15.2
	Not much	3	6.5	21.7
	Not at all	36	78.3	100.0
	Total	46	100.0	

Part B: Juror responses to topics discussed by the jury during its guilt deliberations: related to the defendant's guilt

Topic	Response	Frequency	Percent	Cumulative Percent
The meaning of 'proof beyond a reasonable doubt'	Great deal	13	28.3	28.3
	Fair amount	20	43.5	71.7
	Not much	8	17.4	89.1
	Not at all	5	10.9	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
That the defendant might be guilty of murder but not capital murder	Great deal	4	8.7	8.7
	Fair amount	8	17.4	26.1
	Not much	11	23.9	50.0
	Not at all	23	50.0	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
The possibility that the defendant is altogether innocence and someone else did it	Great deal	3	6.5	6.5
	Fair amount	3	6.5	13.0
	Not much	6	13.0	26.1
	Not at all	34	73.9	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative

				Percent
The judge's instructions to the jury	Great deal	16	34.8	34.8
	Fair amount	18	39.1	73.9
	Not much	9	19.6	93.5
	Not at all	3	6.5	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Believability of certain witnesses	Great deal	15	32.6	32.6
	Fair amount	20	43.5	76.1
	Not much	5	10.9	87.0
	Not at all	6	13.0	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Role and blameworthiness of an accomplice	Great deal	5	10.9	10.9
	Fair amount	7	15.2	26.1
	Not much	8	17.4	43.5
	Not at all	26	56.5	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's motives or reasons for the crime	Great deal	18	39.1	39.1
	Fair amount	14	30.4	69.6
	Not much	13	28.3	97.8
	Not at all	1	2.2	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's role or responsibility in the crime	Great deal	38	82.6	82.6
	Fair amount	4	8.7	91.3
	Not much	3	6.5	97.8
	Not at all	1	2.2	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Defendant's mental condition or sanity	Great deal	9	19.6	19.6
	Fair amount	7	15.2	34.8
	Not much	18	39.1	73.9
	Not at all	12	26.1	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Alcohol as a factor in	Great deal	1	2.2	2.2

the crime	Fair amount	7	15.2	17.4
	Not much	8	17.4	34.8
	Not at all	30	65.2	100.0
	Total	46	100.0	
Topic	Response	Frequency	Percent	Cumulative Percent
Drugs as a factor in the crime	Great deal	5	10.9	10.9
	Fair amount	10	21.7	32.6
	Not much	13	28.3	60.9
	Not at all	18	39.1	100.0
	Total	46	100.0	

Appendix B

Frequencies of jurors' projected criminal behavior of the defendant by sentencing outcome

Topic	Response	Death	LWOP	
How likely was it that the defendant would kill again if let out of prison?	Very likely	15	6	
	Likely	4	1	
	50-50 chance	5	8	
	Unlikely	0	4	
	Very unlikely	0	3	
	Total	24	22	46
Topic	Response	Death	LWOP	
How likely that the defendant would kill again in prison?	Very likely	11	4	
	Likely	3	4	
	50-50 chance	8	4	
	Unlikely	2	9	
	Very unlikely	0	1	
	Total	24	22	46
Topic	Response	Death	LWOP	
How likely that the defendant would commit a violent criminal act of any kind if let out of prison?	Very likely	21	9	
	Likely	2	5	
	50-50 chance	1	5	
	Unlikely	0	3	
	Very unlikely	0	0	
	Total	24	22	46
Topic	Response	Death	LWOP	
How likely that the defendant would commit a violent criminal act of any kind in prison	Very likely	17	5	
	Likely	5	5	
	50-50 chance	2	7	
	Unlikely	0	4	
	Very unlikely	0	1	
	Total	24	22	46
Topic	Response	Death	LWOP	
How likely that the defendant would try to get revenge against members of the jury if let out of prison?	Very likely	3	0	
	Likely	0	1	
	50-50 chance	4	4	
	Unlikely	5	8	
	Very unlikely	12	9	
	Total	24	22	46

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