Public Hearing

before

NEW JERSEY DEATH PENALTY STUDY COMMISSION

"Testimony concerning whether the selection of defendants for capital trials is arbitrary, unfair, or discriminatory; whether there is unfair, arbitrary, or discriminatory variability in the sentencing phase or at any stage of the process; and whether there is a significant difference in the crimes of those selected for the punishment of death as opposed to those who receive life in prison"

LOCATION: Committee Room 4
State House Annex
Trenton, New Jersey

DATE: September 27, 2006
1:00 p.m.

MEMBERS OF COMMISSION PRESENT:
Reverend M. William Howard Jr., Chair
James P. Abbott
James H. Coleman Jr.
Edward J. DeFazio
Kathleen Garcia
Kevin Haverty
Eddie Hicks
Thomas F. Kelaher
Boris Moczula
Senator John F. Russo
Rabbi Robert Scheinberg
Yvonne Smith Segars
Miles S. Winder III

ALSO PRESENT:
Gabriel R. Neville
Commission Aide
Miriam Bavati
Counsel

Hearing Recorded and Transcribed by
The Office of Legislative Services, Public Information Office,
Hearing Unit, State House Annex, PO 068, Trenton, New Jersey
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REVEREND M. WILLIAM HOWARD JR. (Chair): Good afternoon, good afternoon.

We’re calling, now, the third public session -- third public hearing-- This is the opening of the third public hearing of the New Jersey Death Penalty Study Commission. On behalf of my colleagues-- I’m Bill Howard, Chair of the Commission; and on behalf of my colleagues, I’d like to welcome you and thank you for coming.

For those of you who will bring testimony today, we especially appreciate the time that you’re taking for preparing your remarks and for addressing us. We are going to try-- We have a number of persons coming to testify today. So with your forbearance, we’re going to have each person come and address us for 10 minutes. And as a Pastor, I reserve the right to allow a little grace. But don’t take advantage of me, now.

But because we do have some time limitations, we’d like to try and hear the testimony of persons within the 10-minute frame. And then we’ll invite members of the Commission to pose questions for a brief period.

I’m going to announce the first two persons -- I think we can accommodate two persons -- who will testify here, today: Mr. James Wells and Mr. Nate Walker. You are urged to come swiftly to the table and take your seat.

And let me just--

Are you Mr. Wells?

JAMES WELLS: Yes, I am.

REVEREND HOWARD: Mr. Walker is coming.
Let me ask you, when you speak, to please kindly touch the red button. This is being recorded. And, also, we want to make sure that persons in the audience can hear well.

Persons in the back, are you able to hear what is being said? (negative responses) Oh, my. Can you hear now? (negative responses) So it doesn’t matter how loudly I speak. Somehow--

MS. SMITH SEGARS: No, go closer to your mike.

REVEREND HOWARD: Oh, okay.

MS. SMITH SEGARS: You have to lean into your mike.

REVEREND HOWARD: Now, can you hear me? Can you hear me there now? (affirmative responses) There is a problem here with the system, because I’m almost shouting.

And the gentleman standing-- You can’t hear me very well, can you?

UNIDENTIFIED SPEAKER FROM AUDIENCE: No.

REVEREND HOWARD: So I don’t know what to say.

SENATOR RUSSO: Bill, get real close.

REVEREND HOWARD: Very close?

SENATOR RUSSO: Yes, real close.

REVEREND HOWARD: Can you hear me now? (negative responses) Wow.

I will certainly do that. It doesn’t hurt.

You can hear me now? (affirmative responses) Better.

Okay. Mr. Wells, we’re going to start with you. Remember now, 10 minutes. And you can say a lot in 10 minutes. Please.

MR. WELLS: Good afternoon, everyone.
My name is James Wells. I am the National Chairman of the National Association of Black Law Enforcement Officers. I recently retired from the Port Authority of New York-New Jersey, a month ago.

This is a statement I have prepared.

Dear Reverend Howard and members of the Commission: I am the President of the New Jersey Chapter of the National Association of Black Law Enforcement Officers, which I will refer to as NABLEO -- also known as NABLEO. I am here to share with you NABLEO’s position on the death penalty.

I am also the father of a murder victim. My son, Jafari, was shot and killed only months ago. I share my painful reality with you, because I want you to know that I speak with the knowledge of what it is like to experience the most terrible of losses, the death of a child to senseless murder. I believe my personal experience more fully informs this testimony.

NABLEO’s mission is to establish and secure the enhancement and promotion of ideals and goals of the black law enforcement officers throughout the country for education, political advancement, and charitable endeavors. As part of that goal, we advocate on issues that directly impact the services of the men and women of color in the communities that they serve.

As law enforcement officers, our primary goal is to protect the public. We all agree that convicting and punishing offenders is critical to achieving that goal. But on one extreme form of punishment, the death penalty, we have different views. Some of us have no moral opposition to the death penalty and believe that it may have a place in society. Others
oppose it for sincere ethical or moral reasons. We share, however, great concern about the way in which the death penalty is actually applied. After careful consideration, NABLEO members have concluded that it should replace -- it should be replaced with the sentence of life without parole.

The death penalty is an exorbitantly expensive punishment that saps financial and human resources. Countless millions of dollars have been spent since New Jersey reinstated the death penalty in 1982. One estimate places that figure at more than $250 million in the pursuit of the death penalty for a handful of murderers. These resources could have been used to hire more police officers or to fund other critical needs such as gun violence prevention programs, drug and mental health programs, youth and family services, and education.

The death penalty has been applied in an arbitrary and unfair manner, resulting in disparate and uneven results across geographic, and racial, and economic lines. Its unfair application is of great concern, because disparity in sentencing, especially in death sentencing, undermines the public’s confidence in the criminal justice system.

Finally, we acknowledge that innocent people have been sentenced to death in our nation. Here in New Jersey, there have been recent cases of wrongful convictions for serious crimes, such as murder. These serious mistakes underscore the risk of someday executing an innocent person.

We are deeply concerned about violent, crime and are committed to the goals of protecting the public and bringing offenders to justice. But the death penalty is not an effective law enforcement tool in
practice. It is a distraction from justice. Life without parole is a serious punishment that will keep our citizens safe from violent offenders.

Thank you.

REVEREND HOWARD: Thank you very much.

And would you just remain there in your seat? And when we’ve heard the testimony from Mr. Walker, we might entertain questions from the Commission.

MR. WELLS: Yes, sir.

REVEREND HOWARD: And would you join me in turning off your mike? Thank you.

Mr. Walker, you’re going to have to, now, put on your mike.

N A T E   W A L K E R: Okay.

Yes, thank you, Chairman Howard and the honorable members of this committee.

My name is Nate Walker. I am an innocent man who spent years of my life in prison for something I didn’t do.

In 1974, a woman picked me out of a lineup as the man who had raped her. I had been at work at the time. I had evidence that I had been at work, but no one believed me. I had a car theft on my record. I had stolen an old car for racing. So I became a suspect right away. But I never hurt anyone.

I hired an attorney -- a black attorney from Plainfield, New Jersey. I don’t know why, but I thought that that would be best. I thought he would be better than a public defender, since the person who testified against me was white. But it didn’t do anything for me. He could have asked for a blood test, but he didn’t. They didn’t have DNA back at that
time. But they could have ruled me out through a simple blood test. The prosecution thought that they had the right person, so they didn’t order one, since the woman said I was the man. I don’t know why my lawyer didn’t order a blood test. He just didn’t. I don’t know enough -- I didn’t know enough to insist on one.

I thought I would never be convicted. I knew I hadn’t raped that woman. I had my time cards to prove that I had been -- wait one second -- I had my time cards to prove that I had been at work at the time. The personnel manager for Phillips Dodge (phonetic spelling) company, for which I worked, also testified. I expected the system to work for me. I expected people to believe the truth.

But the system failed me. I was innocent, but I was convicted. I was sentenced to life plus 50 years in prison. And I spent the next 10 years of my life in prison. I missed a lot while I was in prison. I missed family birthdays, holidays. I missed my wife and my son. But my family stayed with me. It was really hard for me, but they stayed with me. So did a lot of my friends. I was a very lucky person.

I was freed in 1986. I am happy to be free. I don’t have any grudges against anyone. In fact, I was very lucky that I met Jim McCloskey, a Centurion Minister. He believed in my innocence. He got the court to allow blood tests for me, which should have been done from the beginning.

I was very lucky, because the evidence wasn’t destroyed while I was in prison. I was lucky that the blood tests came back. The prosecutor joined with my lawyer to ask the judge for my freedom. I was grateful for that, and for him and Jim’s help.
I was lucky that when the evidence that showed my innocence came back, I was still alive to be released. I wonder sometimes what would have happened if I had the death penalty -- if they had had the death penalty back in New Jersey at that time. I think about that a lot of times. If the evidence had been lost-- I think about all that. I have a hard time when I think about that, but I can’t help it. I still have nightmares thinking about what happened to me.

I am here to tell you what happened here. I am living proof that New Jersey can send an innocent person to death row. An eyewitness picked me out of a lineup, and that was good enough to send me to prison for the rest of my life. I am here to tell you that I am lucky, but I worry about others who are innocent. We all are only human, and we make mistakes. I think the death penalty is very risky. We can’t count on every innocent person having the good luck like I had.

Thank you.

REVEREND HOWARD: Thank you very much.

Now, the Chair would like members of the Commission-- If you have questions of these persons, please raise them now. (no response)

Hearing none, then I’d like to thank you for coming.

MS. SMITH SEGARS: Excuse me, Reverend Howard.

REVEREND HOWARD: Yes.

MS. SMITH SEGARS: I’m sorry.

Sir, how many years were you in custody in total? I’m sorry, I wasn’t clear.

MR. WALKER: Twelve years.

MS. SMITH SEGARS: Twelve years.
MR. WALKER: Yes, ma’am.

MS. SMITH SEGARS: And when were you released?

MR. WALKER: In 1986.

MS. SMITH SEGARS: In 1986.

MR. WALKER: Yes, ma’am.

MS. SMITH SEGARS: Thank you.

MR. WALKER: You’re welcome.

REVEREND HOWARD: Are there other questions? (no response)

If not, again, thank you very much.

MR. WELLS: Thank you.

MR. WALKER: Thank you.

REVEREND HOWARD: Now the Chair would like to invite forward Ms. Jennifer Thompson and Mr. David Kaczynski.

Ms. Thompson, we invite you to speak first. Thank you.

JENNIFER THOMPSON: Thank you.

I’d first like to thank the New Jersey Death Penalty Study Commission for having me here.

My name is Jennifer Thompson, and I am from Winston Salem, North Carolina. You may be wondering, what’s a woman from Winston Salem, North Carolina, doing in New Jersey. I’m here because I believe my experience, my one-time certainty in a situation, is uniquely relevant if this Commission, and any of its members, are certain that New Jersey is incapable of executing an innocent person. I would gladly travel to dispel that myth. Allow me to explain.
In 1984, I was raped at knifepoint. I did not know whether I would live or die that night. I have always been a determined person, and so I decided that if God should be so kind as to let me live, I would do everything in my power to memorize my attacker’s face. Throughout the course of the rape, I struggled to look into the face of the person who was destroying my life. I needed to know what his hair looked like. Was his skin dark or light? Did he have any scars, tattoos, piercings, things he could not alter later? His voice, his age, weight, and height all mattered -- information the police would need.

I survived that night, as did his second victim, who he raped one hour later less than a mile from my house. My hate for him was secondary to my need to find him and to get him off the streets.

Ronald Cotton became the primary suspect. And in January of 1985, the state of North Carolina convicted him of first degree rape, first degree sexual offense, and first degree breaking and entering. He received life and 50 years. It was an amazing moment for me. It was the criminal justice system at its best. The good guy gets justice, the bad guy gets punished. This is the way it is supposed to work. Ronald Cotton would never touch his mother again. He would never find love. He would never get married. He would not know the joy of parenthood or the taste of freedom again. I hated him with a blind hate. I prayed daily to my God to please have Ronald Cotton killed in prison, but before he dies, let him know the incredible fear of being raped, to have your soul and your spirit from you taken and crushed before your eyes. This all but consumed me.

As the years went by, my life took on a steadiness. I graduated college and fell in love, got married, and gave birth to triplets in the Spring
of 1990. Life was good, and I was busy. By the Spring of 1995, I was informed that Ronald Cotton was requesting a DNA test to be performed. My blood sample from 1984 had disintegrated. Would I give a new blood sample? I did not hesitate, as I knew what the test was going to show. It would show what I knew all along: Ronald Cotton was the monster who had raped me. I went that day to the lab, and I had a blood test drawn.

By June the results were in. And standing in my kitchen, the news was delivered. We had been wrong. Ronald Cotton was innocent. A man named Bobby Poole was the rapist -- a serial rapist. The shame was oppressive. The guilt was heavy. I was afraid of revenge, retaliation, and vengeance.

A full two years later, and after intense suffering, I met with Ronald Cotton to ask for forgiveness. Without hesitation, he gracefully forgave me. With mercy, he held my hand, and he told me not to be afraid of him. He gave me healing that night. He is now my friend. And without him, I would still be broken and fractured. He taught me that I should not allow that one terrible act to control my life. Bobby Poole does not deserve that kind of power or control.

Three years later, in the year of 2000, I was invited to speak at a press conference on behalf of a man named Gary Graham, who was to be executed by the state of Texas. Graham’s lawyers said he was innocent.

My immediate response to the request was, “No, of course I cannot come. I am an ardent supporter of the death penalty. After all, this is America. We do not execute our fellow citizens unless we know, not beyond a shadow of a doubt, but without any doubt, that they are guilty. I believe that if you take a life, you should be prepared to give up your own.”
I was assured that I was entitled to my opinion and all that was needed from me was to tell my story. The following day, I boarded a plane to Houston and began to read about the Graham case. And I was immediately alarmed at the description of the eyewitness evidence. There were some serious red flags in this case. Fear shot through me like a bolt of lightning. This could be an innocent man. I was challenged for the first time in my life about my belief in the death penalty. I began to wonder how many other cases might involve human error, as mine did. Certainly, it seemed wrong to execute this man if the account I was reading was accurate, and I believe that it was.

In Texas, I met 12 others there on Gary Graham’s behalf, men and women, black and white. They had been wrongfully convicted. One man was Kirk Bloodsworth, here today. I urge you to read his book, or at least a summary of his case, which is a stunning example of how the system can get it wrong.

Some say that death row exonerations are rare enough that we should not end the death penalty because of innocence. Some say that with the proper procedures for eyewitness lineups and other precautions against wrongful convictions, you can reduce the risk to an acceptable rate. But I ask you: What is acceptable? I cannot look at Kirk Bloodsworth and support the death penalty. I just can’t. His life is too valuable.

Please allow me a word on eyewitness identification procedures. They are critically important to the criminal justice system. And I know that New Jersey is a leader in that regard, and you should feel very proud of that. I wish every state was like New Jersey. The fact that you are here today examining an issue that many states won’t examine because of
politics or indifference speaks to this State’s desire for justice. I know that law enforcement here embraced the new lineup procedures. I know you have an excellent and well-funded Public Defender’s office. I know that your courts carefully review death cases. But I am here to tell you what I know is true. You can reduce, but you cannot eliminate, the risk of error in the death penalty system. No set of procedures can completely guard against human error. Believe me, I was certain Ronald Cotton was the man who raped me -- certain.

I have thought about this issue more than most. I could have been murdered that night I was raped. Here is what I have concluded. I believe, as I have always believed, we should reserve no sympathy for killers. None. They choose to kill and should be held responsible for their choice. But this is not 1960, or even 1990, this is 2006. In 2006, we know that innocent people are sometimes sentenced to death. In 2006, we know of at least four cases of executed persons who might have been innocent. In 2006, we know of several state scandals involving crime labs.

And I ask you: How can you know that no one in a New Jersey lab will ever act with sinister intentions or do sloppy work? You can’t know, of course. We are not perfect. We are human, we make mistakes. And some of us even act with malice. To deny that would be criminal.

This Commission should find that human error is inevitable in all criminal justice systems, and that the execution of an innocent person is also inevitable if the death penalty continues as a policy.

Thank you for your time.

REVEREND HOWARD: Thank you very much.
And, please, if you don’t mind, remain there and allow us an opportunity to talk with you.

Let me say, it might be useful if I tap on the -- with the gavel -- it means you have two minutes left; just to give you a clue.

Thank you.

Mr. Kaczynski.

DAVID KACZYNSKI: I have always been opposed to the death penalty.

REVEREND HOWARD: Excuse me, sir. Would you join me in turning off (sic) your mike? That’s good. That helps the amplification, we’ve learned.

MR. KACZYNSKI: I have always been opposed to the death penalty. Although I do not believe that killing a human being is inherently immoral, I do believe that taking a human life can only be justified by necessity -- self defense, a just war, or the use of lethal force by police to stop a violent criminal. If we can protect society by incarcerating murderers, including life imprisonment without the possibility of parole, then we should not use the legal system to carry out a program of unnecessary killing.

My view is consistent with the faith-based positions against capital punishment adopted by most American religious denominations. The Roman Catholic Church, for one, has articulated a clear link between its moral and practical reasons for opposing the death penalty. It teaches that the death penalty is fundamentally wrong whenever non-lethal means, such as long-term incarceration, are available to protect society. On his visit to the United States, Pope John Paul II pleaded for the elimination of
capital punishment, calling the death penalty, and I quote, “cruel and unnecessary.” He expressed concern not only that it inflicts damage on the condemned person but, more importantly, that it causes moral damage to society.

Up until 1995, my views on capital punishment were purely theoretical. I never imagined that one day I’d have a personal confrontation with the capital punishment system. But that fateful day came in September of 1995, when my wife Linda suggested that my estranged older brother, Ted, might be the notorious Unabomber.

At first, I simply couldn’t believe that Ted was capable of harming anyone. Although I believed that he was disturbed, and he was eventually diagnosed with schizophrenia, I’d never seen any signs of violence in him. However, as Linda and I poured over the Unabomber’s published manifesto, I began to confront the reality that my brother, Ted Kaczynski, might be the Unabomber.

We soon found ourselves facing a terrible dilemma where any choice we made could easily result in someone’s death. If we did nothing, Ted might kill again. On the other hand, if we handed my brother over to the FBI, he could be executed. I had to ask myself what it would be like to go through life with my own brother’s blood on my hands.

At the time, it disturbed me greatly that the price of doing the right thing might be my brother’s execution. I wanted to make a life-affirming choice, but the death penalty put me in a position where any choice I made could lead to someone’s death. In order to protect innocent life, I had to potentially sacrifice the life of my mentally ill brother. I also had to grapple with the effect of the death penalty on someone else I loved.
very much, our elderly mother, Wanda. I experienced firsthand what the murderer and the executioner both fail to see, that the person who is killed is usually survived by family members who suffer much, much more. I feel deeply grateful, and almost tremendously lucky, that Ted did not get the death penalty. But I can tell you with absolute certainty that if he had been executed, he would not have been the person who suffered the greatest agony. That person would have been our mother, Wanda.

Our decision to turn in Ted was based on the belief that we were morally obliged to do whatever we could to stop the violence. We held onto a desperate hope that Ted might be exonerated by the FBI’s investigation. But we were resolved to stop the violence no matter what.

Ten years later, we stand by our decision. It brought an end to the Unabomber’s 17-year reign of terror which left three people dead and many others injured. We probably saved lives. We would also like to believe that we set a positive example for other families who might face similar dilemmas in the future.

Over the next two years, I witnessed firsthand how the criminal justice system actually works. The U.S. Justice Department promised to protect our privacy. Instead, we were swamped with media attention on the day of Ted’s arrest and for months afterwards. And personal information we shared in strict confidence with the FBI ended up in the New York Times. Prosecutors solemnly promised to make a -- and I quote -- “fair and impartial” evaluation of my brother’s mental condition. Instead, they used a notorious “hired gun” legal expert to provide psychiatric testimony in my brother’s case. Fortunately, my brother will spend the rest of his natural life in prison. But Ted’s life was not spared because he’s any sicker than 100 or
so seriously mentally ill people that our government has executed since 1992. His life was spared because he had great lawyers.

I began to see the criminal justice system for what it is: an imperfect system run by fallible human beings. From the moment of a suspect’s arrest, to the condemned man’s final breath, the process is influenced by so many variables and so many subjective judgements that inconsistent results are practically guaranteed. The entire judicial system presumes a level playing field but, too often, justice gets lost in the shuffle. As a result, we have a death penalty that disproportionately impacts the poor, the black, and the mentally challenged.

For me, it is a real honor to testify with my dear friend Bill Babbitt, whose testimony you will hear later. His story will open your ears and, I hope, your eyes as well. Our personal experiences are practically identical, except for one thing: the outcome of that long and agonizing judicial process. My brother is alive, and Bill’s brother was executed.

It’s probably an empty exercise to debate whether capital punishment is ever justified. I do believe that reasonable people can disagree about this philosophical question. But no reasonable person who truly understands how the current system works can, in my opinion, claim that it represents justice. Who lives and who dies should not depend on one’s wealth, one’s given mental ability, one’s ethnicity or race, or anyone’s personal whim or bias.

Do we want a death penalty that is applied unfairly and risks executing the innocent? A perfect system is unattainable. But a marginally better system would cost much more and execute fewer people. Doesn’t it make more sense to put our limited resources into effective law
enforcement? Do we want more lawyers arguing in court, or more cops on the street? Do we want longer trials, or better victim services? Do we want to kill an unlucky few -- not necessarily the worst -- or do we want to help troubled kids before they end up hurting someone? In the real world, these are the choices we must make. These are the choices you, as members of this Commission, face through your long and careful deliberations.

Bill Babbitt and I made our choices when we turned in our brothers to the authorities. In doing so, we made difficult yet responsible, life-affirming choices. The same deeply held ethical values that guided those choices now prompt us to speak against the death penalty. We made sacrifices to protect people we didn’t know. In doing so, we also made a statement about the kind of world we want to leave to future generations, a world where violence is truly a last resort, a world where decency and humanity come first.

REVEREND HOWARD: Thank you very much.

Now I’m going to invite members of the Commission to raise whatever questions they may have.

Yes, Mr. Hicks.

MR. HICKS: Ms. Thompson, first of all, I really feel sorry for the horrible crime that was committed against you. And I thank you very much for making the long trip up here today.

But I actually have two questions for you. The first question is: How did they identify Ronald Cotton? How did you identify Ronald Cotton? Was it through a lineup, was it through photographs? How did you determine -- or assume that he was the person?
The second question is: How did the police officers or the system determine that it was actually Bobby Poole? Was it run through CODIS or some other means?

MS. THOMPSON: Thank you for asking that question.

What led to my determination that it was Ronald Cotton was through a series of what I call -- and I lot of experts on eyewitness identification call -- contamination of memory. And it began through doing something called a composite sketch, where you look through different ears, and noses, and eyes, and you try to put together a face that resembles the person who attacked you. And when I did that, immediately, subconsciously, my memory becomes contaminated. Because in actuality, Ronald Cotton’s, or my rapist’s, eyes, ears, nose, hairline were not in the availability of choices. So once I did the composite sketch, the composite sketch ran through the newspaper. And a phone call came in that it resembled a man named Ronald Cotton.

When they brought me into the police department to do a photo lineup using simultaneous lineups -- which I know that you all have gotten away from-- It was eight photographs. Subconsciously, what you do is natural selection. You discount four of them. You limit it down to another four. You come up with your best choice. And the best choice became Ronald Cotton -- choosing a photograph that had been taken in 1981.

And my actual perpetrators face was not in the lineup. I was given instructions not to feel compelled to choose anyone. But I felt in my heart that I wouldn’t be there unless the police had a suspect.
When I picked out the photograph of Ronald Cotton, several days later I was taken to do a physical lineup. And, of course, Ronald Cotton was in the physical lineup. And, again, I did the same process. You choose someone who most closely resembles the photograph, who most closely resembled the composite sketch, most closely resembled my memory.

By the time I went to trial in 1985, my memory now had made Ronald Cotton my rapist. Ronald Cotton was then convicted in 1985.

There was a second trial in ’87. In those two years, Ronald was serving time in Central Prison, in Raleigh. And another man, by the name of Bobby Poole, was brought in -- a convicted rapist. And Ronald recognized his face from the composite sketch. And Bobby Poole became someone he felt convinced was the actual rapist. And in 1987, when they brought-- The second trial came in ’87. They brought Bobby Poole in to me, under a voir dire, in the trial, and I had absolutely no recognition of him whatsoever. Because that’s the way your memory works. And my memory had cemented Ronald Cotton’s face in my memory, and there was no way you were ever going to convince me it was Bobby Poole. And if it hadn’t been for the fact that DNA had survived -- not because of the system, but because the detective in my case felt this was a case that was going to haunt him forever. Those were his words. And the state of North Carolina only required you to keep DNA for six years. Eleven years later he had kept it. And a fragment of a sperm had survived.

So it was not necessarily the system working, it is what I like to consider serendipity at its very best. And that’s how the process worked for me.
MR. HICKS: Thank you.

MS. SMITH SEGARS: Thank you, Ms. Thompson, for coming.

I had the benefit of seeing the film *After Innocence*. In fact, it was shown to my Public Defender’s Office at our conference. *After Innocence* -- you’re depicted in the film, along with Mr. Cotton -- and the picture of Bobby Poole. And I should say they eerily look alike.

But I, one, would ask--

Chairman Howard, it might be a good idea if we can get copies of the film *After Innocence*, and share those DVDs with members of the Commission. I think it would be useful. And if members of the public get the opportunity-- I know that it’s going to be airing for the first time on HBO in the near future.

But I ask you a question: In your travels -- because I’ve seen the two of you on film, and I know that you toured. Are you inundated with people that come to you and say, “This was my experience,” or, “I made that mistake,” or, “I was”-- Just share with us your experience, and how that happens to you -- or what people have shared with you in your travels.

MS. THOMPSON: One of the alarming things that I find in my travels is, first of all, the incredible number of rape victims that are out there. I never, ever leave a conference without several women coming up to me and saying, “I was raped when I was 15, and we never caught the guy,” or, “I was raped when I was 17, and I’ve never told anybody.” And that, to me, is alarming, it’s startling.
But I often have people come up to me, also, to talk to me about being a victim of a mugging, or being a victim of a robbery, or something to that effect. And they always say to me, “You know, I don’t think I could pick someone out of a lineup. I don’t think that I could do that.” And what I often try to illustrate to people is-- I’m sure all of you have mothers. You could not sit down and do a composite sketch of your mothers’ faces, because memory doesn’t compartmentalize our features on our faces.

So why I try to illustrate that is, when you try to do something like a physical lineup or a photo lineup, the memory doesn’t work the way we think it works. And so therefore, contamination -- or making erroneous eyewitness identifications -- is so prevalent, it’s so easy. And I consider myself well above average in intelligence. And I got a very good look at my perpetrator’s face that night. I spent a great deal of time memorizing those features, and I still got it wrong.

And my case highlights one of the cases where, even given the very best intentions -- having a detective who was trying to do the right thing, a prosecutor who had no malice, a great defender for Ronald Cotton’s case -- we still messed it up. And 11 years of a man’s life was gone. And I can’t give it back, no matter how hard I try.

MS. SMITH SEGARS: Thank you.

REVEREND HOWARD: Justice Coleman.

JUSTICE COLEMAN: Mine is simple comment.

We appreciate your presence today. And if you have not already read the New Jersey Supreme Court decision in *State v. Cromedy*, because many of the facts that you referred to seem almost identical to
what happened there. That has occurred in New Jersey and led the Court to write an opinion creating a new rule of law on cross-racial identification, for many of the reasons you’ve indicated. It’s C-R-O-M-E-D-Y, if you have not read it.

MS. THOMPSON: Thank you very much.
Just to highlight, it will be- The movie you’re talking about is highlighting -- premiering on Showtime--

MS. SMITH SEGARS: On Showtime. I said HBO.
MS. THOMPSON: --on October 19. And it’s a phenomenal film that highlights six exonerees and their aftermath. And it's compelling.
MS. SMITH SEGARS: It’s powerful.
REVEREND HOWARD: Rabbi Scheinberg.
RABBI SCHEINBERG: A question for Mr. Kaczynski: Since New Jersey, like a number of states, has a system of proportionality review, -- whose objective is to eliminate capriciousness in the avocation of the death penalty-- And I take it from your testimony that you feel like such a system would not be adequate to eliminate capriciousness in the death penalty. Why?

MR. KACZYNSKI: Again, I think it’s the issue of a system that’s so complicated, that has so many moving parts. We can see that inconsistency is apparent in the results. Nationally, and in New York State -- where I live -- we have had a tremendous correlation between the race of the victim and who gets the death penalty. If your victim is a white person, nationally you’re four times more likely to get the death penalty than if your victim is a person of color.
I think you also have to do an analysis proportionality that looks at key decision makers within the system. I know in New York we have had a serious problem with the lack of representation of people of color on juries throughout the state, among the ranks of district attorneys, prosecutors, and defense attorneys. We’re expecting the system to work perfectly, and yet it’s apparent it’s not. It’s almost as if you’ve got--

I’m sure you may be aware of the U.S. Supreme Court case of McCleskey v. Kemp, which basically stated that bias and discrimination are realities in society. And they felt that the court system could not eliminate-- It should not be the role of the court system to try to eliminate bias. But it charged legislators with trying to do that. I think proportionality review is a first step. But I think it needs to be very, very carefully done; and look at all of the variables, which are many.

I think there is also a number of issues. We’ve noticed, for example, in New York, a tremendous problem with geographic disparity -- that who gets the death penalty depends on what county you’re from, much more so than on the gravity of the crime that you’ve committed. And so there are elements of disparity that involve race, but there are elements of disparity that involve social class, that involve geography, jury pools.

If you’re going to have an ultimate punishment, and you’re going to call it ultimate justice, I think it has to be applied in a way that’s ultimately fair. I think that means it has to be evenly applied. And I don’t think anybody has found a way to evenly apply the death penalty anywhere in America. And until we do, I think it’s unjust.

REVEREND HOWARD: Are there further questions from members of the Commission? (no response)
If not, we’d like to thank you once again for your excellent testimony and for the time you’ve taken.

Thank you very much.

The Chair would now like to invite Mr. Bill Babbitt and Mr. Jack Callahan.

And I’m going to ask, Mr. Callahan, if you would begin. Because I understand you are under some time constraints. We invite you to speak to us first; followed by Mr. Babbitt, who we’re happy to welcome, as well.

**JOHN CALLAHAN:** Thank you, Reverend Chairman and members of this Commission.

It’s nice to be home again. I spent many years in this Legislature, and I retired 10 years ago from it.

I’m currently Chair of the New Jersey Governor’s Advisory Council on Volunteerism and Community Service. But I’m coming here as an individual based on my personal journey with the death penalty, which began just prior to my retirement from the Legislature in 1996.

At that time, I was requested by a Senator to provide the cost of the death penalty process in New Jersey. I really was having ambivalent feelings on the death penalty, seeing individuals being released from prison and killing once again. I also saw the grief of loved ones with the loss of a family member. And in the early 1980s, I stood intently in the Senate Chamber, listening to Senator Russo describe his own grief and personal loss due to the murder of a family member on New Year’s Eve.

When we began the research and study of the issue, I expected to see that the costs of incarceration of 30, 40, or 50 years would be much
greater than putting someone to death. However, when my intern gave me some initial findings, I was astounded to see the amount of money being spent on the entire death penalty process, and additional research only confirmed these findings.

Although our own judiciary was not able to provide any cost data before the completion of the study, I was able to find -- from an Illinois State University study in 1996 -- that New Jersey’s death penalty process annually costs the State an additional $22.8 million over and above the costs of life imprisonment. Very sobering statistics on the use of taxpayer dollars. I am sure that figure is much higher with more recent studies.

After retirement from the Senate, I began to study other factors than costs in my role as Chairman of New Jersey’s Justice Fellowship, and prepared a white paper on the subject, which I presented in 1997 to the National Task Force of Justice Fellowship, in Washington.

Some of these facts included the issue of deterrence, randomness, and inconsistency in the application of the death penalty; innocence and the inevitability of error, arbitrariness, representation, current public opinion, and effect on victims’ families.

I am sure that you have had, or will have, individuals more expert than me on each of these subjects -- and we’ve already heard some aspects of that today -- so I will not bore you with my findings over the period of my research and involvement from 1996 through 2003.

However, there is one finding which has changed my mind on the effect of victims’ families, and much of that has to do with my meeting Lorry and June Post, whose daughter was stabbed when she was 29 years of age. There are numerous family members of victims who say that you
cannot really have closure until one can walk on the grave of the killer after an execution. However, Lorry said it best, and I’m quoting him, “I do not wish to dishonor the memory of my daughter by killing another person in her name.” Let’s face it, there is really never any closure on the loss of a loved one, especially for a family who must continue to return to court and revisit the circumstances each time there is a new hearing or appeal based on new evidence.

Now, a student and a researcher in public policy-- All the studies led me to one conclusion: that there is no rational basis for the death penalty as a matter of public policy. I repeat that. There is no rational basis for the death penalty as a matter of public policy, I found.

Therefore, based on all of the above factors, I came to the conclusion, in 1999, that we must, as a state and as a people, come up with an alternative to the death penalty. And I believe it was, and still is, life imprisonment without any possibility of parole -- and let me repeat, no possibility of parole. This is truly a relational intervention, based on factors taken as a whole. You can take one factor and chew it apart a little bit. But when you take all these factors, they lead to but one rational conclusion, and that is: there is a viable alternative.

So in my concluding remarks today, I would ask you to consider the following three points as you deliberate this vital matter: First, the application of the death penalty seems to be an emotional response, adding to the violence in our society. We know, from the movie *Munich*, violence begets violence, begets more violence. And I believe we need an intervention into the violence in our society. I believe that is the reason almost all countries have done away with its application.
Further, those who argue that the death penalty is supported by the Bible have only read half of the Bible, namely the Old Testament. And in no way is it supported by the other half of the Bible, or the New Testament, in my opinion.

Secondly, there are many instances where one has been taken off of death row, or prior to their execution, has helped others to turn their lives around, such as Karla Faye Tucker, in Texas, who, before her execution, was making tapes to the outside world for young people to view; and the man from San Quentin, who was nominated for the Nobel Peace Price for his writings and efforts to gang members to change their lives.

I’ve had two such personal experiences. One was having the opportunity of spending an afternoon on death row, here at New Jersey State Prison, and listening to each individual through a small opening, finding some who were writing letters to their outside relatives and friends attempting to influence young people to turn their lives from bad to good.

The second was a weekend in Illinois, as part of a prison ministry group, meeting two men whose crimes were so outrageous I will not describe here -- in Chicago. I found these two men had undergone a spiritual regeneration, where their heart was changed from evil. The two had no ulterior motive, for their terms were fixed by law and neither would ever see the outside world again. But these two men spent their time with younger men who would, someday, be paroled, helping them to turn their lives around. By restoring the death penalty, we are taking away those opportunities for individuals to remain in prison -- but to change not only their lives, but also, importantly, other lives. And there are many examples, which I will not go into.
The third and final point is best described by an illustration. And it’s a very practical point. If you were driving down the road, and saw in front of you that the road ahead had many obstacles on it, and there were people rioting and laying in the middle of the street-- And just say you saw an alternative bypass to that road. You would undoubtedly take the bypass.

I believe we are at the same juncture with the return of the death penalty. You have probably already observed and had legislators tell you that their faxes are being jammed and have phone calls galore by one or more of the lobbying groups. Imagine, if you will, the human outcry if a date were announced for the first execution in New Jersey over 40 years, and imagine the hysteria and media attention on the day of the execution. Frankly, New Jersey has enough problems without having to undergo all of that pain and disruption, especially when we have a very rational alternative, which is less costly and provides all the protections to those on both sides of the issue.

I truly thank you for your time and participation on this panel, and for the work of staff -- especially Miriam Bavati, who I’ve known for over 10 -- 11 years, in working on this. And I would ask each of you to thoughtfully and prayerfully consider these thoughts in your deliberations in the coming weeks. And I certainly will join you in prayer.

Thank you for the opportunity of speaking before you today.

REVEREND HOWARD: Thank you very much.
And I’d like to invite-- Since you have the time constraints, we might ask questions of you so you might be able to be excused.
Are there questions of Mr. Callahan?
MR. MOCZULA: Mr. Callahan, as I understand your remarks, you had mentioned something about going -- doing cost studies or evaluation, and that you could find no information in New Jersey, but you found an Illinois study which estimated that the cost was--

MR. CALLAHAN: Yes.

MR. MOCZULA: --approximately $22 million over and above life imprisonment.

MR. CALLAHAN: Yes, that’s correct.

MR. MOCZULA: Was there then some attempt made to gather the information that was referred to in the Illinois that apparently existed in New Jersey?

MR. CALLAHAN: I tried, at that time, to get information from our judiciary. I was not able to get any information. And I’m not sure of the reasons. But they-- Each time I called, they said they did not have the information, or they were developing it. And we were against a time line -- not only because of the Senator’s schedule, but because of my impending retirement. So we were not able to get the cost from the judiciary.

Now, I understand that there are costs that have been developed that could be available to this committee -- or may have been presented to this committee. But at that time, the only thing I had was a very short study from Illinois State University, which was very brief.

MR. MOCZULA: And do you know what they relied on, what type of numbers or of information for New Jersey?

MR. CALLAHAN: No, they did not-- It was a study in which I was told they did not save the raw data on it. And I tried to do a good deal
of research on that but could not find that, unfortunately. So we had to just go with that particular statement.

MR. MOCZULA: Okay. And just one more question in regard to that study.

MR. CALLAHAN: Sure.

MR. MOCZULA: Your comments mentioned that it’s $22.8 million over and above the cost of life imprisonment.

MR. CALLAHAN: Right.

MR. MOCZULA: Does that mean life imprisonment without parole or-- What specifically are you referring to?

MR. CALLAHAN: They took the average of the people that were in prison -- how old they were, how many years they lived, and whatnot, and took the aggregate and said this figure was $22.8 million over the aggregate of years of that sample that they took.

MR. MOCZULA: So we’re not talking about, necessarily, life without parole.

MR. CALLAHAN: No.

MR. MOCZULA: You’re talking just general prison population.

MR. CALLAHAN: Right.

MR. MOCZULA: Whether it’s three years or--

MR. CALLAHAN: Right.

MR. MOCZULA: --or five years--

MR. CALLAHAN: That’s correct.

MR. MOCZULA: --or 10 years.

MR. CALLAHAN: It’s not life without parole.
MR. MOCZULA: Thank you.

REVEREND HOWARD: Hearing no further questions from the Commission, then you may be excused.

Thank you very much.

MR. CALLAHAN: Thank you very much.

REVEREND HOWARD: Now the Commission invites Mr. Bill Babbitt to bring his testimony before us at this time.

BILL BABBITT: My name is Bill Babbitt. I’m on the Board of Directors of Murder Victims’ Families for Human Rights.

Thank you, Chairman Howard and members of the Commission.

I’m here to tell the story of my younger brother, Manny Babbitt. When he was 17 years old, Manny decided to join the Marine Corps to serve his country. He could not pass the Marine Corps entry exam, but the Marines needed gung-ho kids like him, so they gave him the answers to the test. Manny would go to war.

After boot camp, Manny was sent to Khe Sanh Combat Base. During the 77-day siege of Khe Sanh, Manny was credited with saving a life, was wounded, and mistaken for dead. He was thrown into a helicopter and awoke on a pile of dead Marines. Manny was patched up and returned to the war. He signed up for a second tour in Vietnam and fought in five major campaigns. He was awarded the Vietnamese Cross of Gallantry and the Presidential Unit Citation by President Johnson.

Upon returning from the war, his wife could not deal with his war demons, and his marriage fell apart. Not able to hold onto a job, he
became homeless, living in a cardboard box on the streets of Providence, Rhode Island, and on the roads of Cape Cod, Massachusetts.

Manny soon found himself on the wrong side of the law. His apparent mental condition was noticed, and he ended up in a mental hospital. And it became Manny’s home for the next three years. Ask me about that hospital. He was eventually released, despite several suicide attempts and the protest of his doctors. His three years was up. The psychiatrists diagnosed him with paranoid schizophrenia and post-traumatic stress disorder.

I was 4,000 miles away, making a life for myself in California. One day I got a telephone call from my brother Charlie, in Providence. He said that Manny needed a change, and could he come to California and live with me and my wife until he got on his feet. I was delighted. Now I’ll have a brother in Sacramento.

In October 1980, Manny showed up at my job at the railroad. After several weeks, my wife Linda and I noticed his strange side. “Why does he keep talking about the war? Where does he go at night?” He alarmed our mother. “Why does he act that way,” she would ask.

One day the newspaper reported the murder of an elderly woman not far from our home. An intruder had broken into the apartment of Leah Schendel, and had severely beaten her. Manny had smoked PCP-laced marijuana and had a flashback. She would have survived her wounds, but she had a weak heart and died. The cause of death was listed as a heart attack. Still, after reading about it in the Sacramento Bee, I certainly hoped they would apprehend the perpetrator. I was worried for my mother’s safety, who lived not too far away.
It was not until a few days later that something woke me in the middle of the night. The news reports of Leah Schendel’s murder had planted seeds of another worry in my mind. “Where’s Manny?” I wondered. I got out of bed, and went to the family room, and turned on the light where Manny slept. No Manny. The next day, while dusting in the family room, I picked up my choo-choo piggy bank off the TV and discovered it was jammed full of nickels. I’d read that Leah Schendel had been to Reno the day before her murder, playing the nickel slots. Next, I went to the hallway closet where Manny kept his sea bag, seeking answers to this horrible riddle. An old cigarette lighter fell out of an old coat that bore the engraved initials “L.S.” After checking the old newspaper, the terrible truth hit me. Manny had blood on his hands. “Where’s Manny now,” I thought. I was very scared.

I immediately woke Linda and told her of my terrible discovery. We prayed about it. If we gave him a bus ticket and sent him away, we would have blood on our hands. We did what we felt we had to do: We called the police. If Manny was responsible for Leah Schendel’s death, I had to get him off the streets.

The police came and picked me up, and brought me to the police station where I sat down with investigators. I cried a lot. I cried for the poor woman, I cried for Manny, I cried for my family. I told the police about Manny’s war record, and that he had brought Vietnam back with him. Could Manny get the help -- mental treatment that he needed? Was the death penalty in his future? The Sacramento Police promised me Manny would not get the death penalty. It was a promise made and a promise broken.
Although I felt badly about turning Manny in, I really thought it would be great if I could protect society and at the same time get my brother the help he so desperately needed. I asked the officers to let me help them arrest Manny. “Please don’t kill him if he runs,” I begged. I did not want Manny to die that day. I watched as they loaded their guns. But I helped, and in the end the cops didn’t even have to draw their guns. They kept their word.

I didn’t know what was going -- that it was going to be a capital case until I went to Manny’s arraignment. There I heard the district attorney say that she was seeking the death penalty against my brother.

You’ve already heard about the wonderful attorneys who defended my brother David Kaczynski’s brother Ted, and saved his life. I prayed that Manny would get the same consideration. You see, I still thought it couldn’t really happen. My mentally ill brother would not get the death penalty. Not in America, not after I had helped authorities solve the crime, not when he was so ill. This was the land of liberty and justice for all. I trusted that the system would work. Maybe I trusted the system too much.

There were definitely some glimmers of hope. I rejoiced when a great attorney named Chuck Patterson -- himself a Khe Sanh veteran -- took on Manny’s appeal. I rejoiced again when David Kaczynski and his wife stood side-by-side with me and my wife to call attention to the injustice in Manny’s case. I was overjoyed when the country’s foremost expert on post-traumatic stress disorder filmed a deposition to explain that Manny, in all likelihood, was in a disassociated state when he attacked Leah Schendel. I was deeply touched when so many Marines and Vietnam vets spoke on
Manny’s behalf. They understood only too well what Manny had endured during the war.

There was another Vietnam vet who didn’t understand, and that was California Governor Gray Davis. He had had a desk job in Vietnam. He carried a brief case, not a M16. He had a promising political career, not a cardboard box, waiting for him upon his return from Vietnam. He campaigned for governor by promising to speed up the pace of executions in California. He rejected Manny’s clemency.

In closing, on May 3, 1999 -- ironically, the date of Manny’s 50th birthday -- I went to San Quentin prison to attend my brother’s execution. My mother and sisters joined a prayer vigil outside, Ma wrapped up in a thick blanket to keep her warm in the chilly San Quentin night. At 37 minutes after midnight, I watched as the state of California put my brother to death by lethal injection, several weeks after he received his Purple Heart medal for wounds he suffered in 1980. Until that moment, I could not bring myself to believe that that execution would actually take place. I watched them kill Manny. I have to live with that memory.

I don’t think I’m going to be able to get through this.

My family was devastated. They became a new set of victims that night. I’ll never forget Ma’s stricken face and my sister throwing up on the side of the road as we left San Quentin Prison. If you want to reflect on what an execution means in human terms, please hold that image in your mind.

Thank you, sir. Thank you, kindly.

REVEREND HOWARD: Thank you very much for that very compelling story.
I would like for you to be available now for the Commission to ask questions, if you’re agreeable.

MR. BABBITT: Yes, sir.

REVEREND HOWARD: You’ve been perfectly clear.

I think Rabbi Scheinberg does have a question.

RABBI SCHEINBERG: Can you speak to some of what you believe makes the story of your brother different from the story of Mr. Kaczynski’s brother?

MR. BABBITT: Yes.

Am I on here? (referring to PA microphone)

REVEREND HOWARD: Press your red-- Yes.

MR. BABBITT: Up until 1980-- I came to California in 1966. They had just executed an African-American by the name of Aaron Mitchell for killing a police officer in Sacramento. That was in 1966, when I moved to California from Cape Cod, Massachusetts.

The next person to die in Sacramento County -- from Sacramento County -- was Manny Babbitt, who had just moved there in 1999. My math tells me that’s 33 years. Sacramento County has a larger population than Providence, Rhode Island.

Up until 1980, I believed in the death penalty. I supported the politicians who promised that -- “Vote for me, and I’ll speed up executions.” So I believed in the death penalty, as long as it was somebody else’s brother. I didn’t think twice if the death penalty came knocking on somebody else’s door. But when it came knocking on my door, I got an education on the death penalty. And I got to feel what it feels like to be a family member of the executed.
I had in my mind— I thought about Leah Schendel’s family and how they must have been suffering. They needed to know who it was. And I thought about it. “Send Manny back East. Send him back to Massachusetts. And bring him back to the Bridgewater State Hospital for the Mentally Ill,” where Manny served his three years. That’s the home of the “Titicut Follies” documentary. If I had brought Manny back to Massachusetts and somehow got him into Bridgewater, then probably Massachusetts would not have extradited Manny to California. And maybe he would be alive today. But if I had sent Manny back East, maybe he would have killed someone else’s grandmother, and I’d have blood on my hands.

Yes, sir.

REVEREND HOWARD: Please.

MR. HICKS: A couple questions, Mr. Babbitt.

Do you blame yourself for, maybe, partially being responsible for your brother’s execution? And, also, how has this affected the rest of your family— your mother, your sisters, and whoever else may be surviving?

MR. BABBITT: Thank you, sir.

Am I on? (referring to PA microphone)

MS. SMITH SEGARS: There you go.

MR. BABBITT: When Manny was placed in the automobile— in the police cruiser— I tricked him into coming out of my sister’s house. I said, “Come on, let’s go play some pool.” And the cops were waiting outside. Because Manny was at my sister’s house, and she had several young children; and I didn’t want anybody else to die that day. And they arrested Manny without incident.
I started my crying then. It was already raining outside, cats and dogs that day. Two detectives -- two automobiles full of detectives, and they never pulled their guns. And when they put Manny in the car, I said, “Brother, you’re going to be all right now. You’re going to get the help you need. We’re going to chase away the demons.” And I asked Manny-- They asked me if I wanted to sit in the car with Manny. I couldn’t. I didn’t have control over myself, and I didn’t want to upset Manny and make it more difficult for the officers. And I went back to the police station in a separate automobile.

But I looked at Manny. I said, “Manny, I’m sorry. I love you. Please forgive me, brother.” He said, “Brother Billy, I’ve already forgiven you. You’re doing the right thing.” Now, as far as my family is concerned, I have had two nephews that have cursed me. I have had family members who have turned their backs to me when I attended funerals for two other brothers -- whose funerals took place in Providence, Rhode Island -- including Manny’s funeral, that took place in Cape Cod, Massachusetts. They let me know that they hate me. I’m not saying that my sisters hate me in Sacramento. My mother told me-- She tells me she loves me.

But I see David Kaczynski, who lives in Schenectady, New York, more than I see my sisters. I’m the oldest brother now. Besides Manny, I lost two other brothers. And I miss them. I miss my cousins in Oakland. I have five cousins in Oakland who have the name Babbitt, B-A-B-B-I-T-T. They don’t call me anymore, because the newspapers were writing stories about my father, about him being an alcoholic and worthless, about my mother talking to pear trees. Those were all lies. But I had to
permit those stories to go forth, because we were appealing to the people to save Manny. But guess what? I miss the love and respect of my family.

I’m honored to come here today, all the way from California, to be a part of New Jersey’s history. Let me tell you about California folks, sir, ladies and gentlemen. California does not primarily try to execute the worst of the worst. On my birthday, I was there at Tookie’s funeral. You might as well say--It was on my birthday, December 12--his execution. I’ve attended every vigil execution since.

So now, what started as a mission to save Manny’s life, has turned into a commission from on high. I am convinced, any time a backsliding Christian -- and you’ll pardon me for this -- anytime a backsliding Christian falls to his knees and prays to Jesus for help -- “Help me save Manny” -- and I get a Buddhist -- David Kaczynski -- who comes out of a hole in the desert, where he had his tent pitched, to stand by my side, that has to be a commission from on high.

Thank you.

REVEREND HOWARD: Thank you very much.

And thank you for coming.

SENATOR RUSSO: Bill.

REVEREND HOWARD: Yes. I’m sorry, Senator.

SENATOR RUSSO: Just one question.

MR. BABBITT: Yes, sir.

SENATOR RUSSO: You tell a really compelling story about the treatment by the Sacramento Police -- and if those facts are true -- and I accept them. You say they are. It’s a horrible thing and shouldn’t be tolerated.
But aside from that, are you aware, Mr. Babbitt, that the condition of your brother, as you described it -- if that was his condition -- his mental illness and so forth -- he would not have been the subject of the death penalty in New Jersey, where you are testifying? Are you aware of that?

MR. BABBITT: No, I’m not aware of that. The thing about it is, I didn’t live in New Jersey, sir. And they didn’t have the death penalty in Massachusetts or Providence, Rhode Island. I had the opportunity to go back to my home state of Massachusetts and twice speak out against the death penalty in Massachusetts. We kicked it in the mud. This is my second time in New Jersey speaking. I spoke before the Department of Corrections hearing on lethal injection.

Let me tell you this. Manny was ill. And the police did make that promise, because the cassette tapes were available by the state public defender’s office in Sacramento County. They tried to deny it. But maybe I was naïve. And maybe I should have realized it wasn’t the cops determination to send Manny to the gas chamber or not. And I do say this: I believed them. I had every reason to believe, because knowing my brother Manny and his history at Bridgewater State Hospital, that he was mentally ill. And I never thought, up until the last half-hour, that they would actually execute Manny. I never thought it would happen.

RABBI SCHEINBERG: I’d just like to ask a clarification on Senator Russo’s question.

Was your brother found-- Was there a determination that your brother was not mentally ill and that’s the reason why he was executed, or
was there agreement that he was mentally ill, and nevertheless, he was executed.

MR. BABBITT: Well, I know my brother was ill.

But let me tell you this. Manny’s attorney— The first attorney that my wife and I went and put a-- We went and borrowed some money against our home. And I think we scraped up about $1,500. And we went and got a private attorney. And we gave him $1,500. He sat us in his office for about an hour. He said, “Well, they did get some palm prints. And this is a capital case.” And then, when we went to the arraignment, he begged out. He asked the judge to excuse him, because he had other commitments. And he took our $1,500 and ran.

The next attorney we got was a court-appointed attorney. And this court-appointed attorney had never tried a death penalty case before. He drank repeatedly -- and from testimony from his own staff. He used the N word around an African-American woman who was a member of his staff -- and that’s part of the information that was presented to the courts. And he told me himself, when I asked him-- I said, “Where are the -- how come no African-Americans or black people are being on Manny’s trial?” He said, “Because I don’t really trust them. I’ve had bad experiences with black jurors. I want somebody who shows up, who understands the complexities of this case.” And he admitted -- that he submitted to the courts that he did a poor job. He was later--

REVEREND HOWARD: Mr. Babbitt, would you speak to the issue of whether there was any kind of evaluation of your brother’s mental state? I think that’s--

MR. BABBITT: Yes. I’m sorry. I apologize.
Yes, there was. Manny was examined. But the prosecution said that the man who examined Manny was just prostituting a bag of tricks. In other words, they downplayed the mental problem with Manny. And they said it was just poppycock, and that-- As a matter of fact, at one point, the prosecutor said -- and this is a matter of record -- “Why don’t we just find him innocent -- not guilty by reason of insanity -- and send him home.” And I think that was inappropriate.

So there was evidence that Manny was ill. But Manny’s lawyer did not bring forth adequate evidence. And the prosecution downgraded this evidence.

REVEREND HOWARD: Thank you.
Are there further questions from the Commission?
Yes.

MR. MOCZULA: Mr. Babbitt, you have the unique experience of having been on both sides of the issue. You testified that you were in favor of the death penalty for a while, and then your opinion changed.

I’m not clear exactly on when you were in California. But were you in California at the time that the California Supreme Court reversed close to 60 death sentences in a row, and the public outcry that occurred which resulted in a change of the membership of the Court?

MR. BABBITT: Yes, I was, sir.

MR. MOCZULA: Could you give us a sense of what the mood was at the time in response of the Court’s actions?

MR. BABBITT: Yes, that was during the tenure of Rose Bird. And what happened was, Rose Bird was looking at these cases that came in front of her. She actually reviewed Manny’s case. But the politicians--
had become a political act to get rid of Rose Bird. And they were trying to
tell the people in California that, “We need to execute these people to make
the community safer.” So when Manny’s-- By the time Manny’s case came
up, Rose Bird had been removed.

A family member of the victim compared Manny -- she urged
Governor Gray Davis to execute Manny so that they could -- as a deterrent
-- to people like Sirhan Sirhan, Charles Manson, and John Hinckley. Well,
all those people, currently, are alive today. So Manny died as a result. And
I feel that it became a political issue. It wasn’t a-- They were not looking at
the case as it was.

MR. MOCZULA: Was the Rose Bird court’s decision -- that
period of time -- perceived as political agenda, as well?

MR. BABBITT: Well, I think Rose Bird did what she was
supposed to do, as a public servant -- and then look at the truth and make a
determination of the truth, not based on her political aspirations, but just
do what it right. And she looked at a lot of things.

What my understanding is, she looked it over, and she saw too
many mistakes. And she saw too many errors being committed. And that’s
why she overturned it, I believe.

MR. MOCZULA: And in California, the justices are, I believe,
elected as opposed to appointed. Is that correct?

MR. BABBITT: Repeat, please.

MR. MOCZULA: In California, the justices are elected as
opposed to appointed. So she was not elected until--

MR. BABBITT: Well, I believe this. I believe that the justices
are appointed.
MR. MOCZULA: Appointed.

MR. BABBITT: They’re appointed by the governor. And if I’m the governor, and I have an agenda to speed up executions, and you’re one of the judges that I put on that supreme court—Well, guess what? I’m going to replace you with somebody who’s going to perform in a manner that I see fit.

MR. MOCZULA: Thank you.

MR. BABBITT: That’s if I was governor.

REVEREND HOWARD: Again, allow me to thank you for being with us today, for taking the time, and for offering your personal account—your own family experience.

Thank you very much.

MR. BABBITT: This is a great honor.

Thank you, sir.

REVEREND HOWARD: The Chair would like to then invite to testify Mr. Kirk Bloodsworth and Ms. Wanda Foglia.

Let me remind you that as you approach the two-minute limit of your testimony—I mean 10-minute limit, I will give you a two-minute warning. But we hope you’re able to complete testimony in the allotted time.

Thank you.

KIRK BLOODSWORTH: Ladies first.

REVEREND HOWARD: If you say so.

Thank you.

WANDA D. FOGLIA, Ph.D.: Good afternoon.
My name is Wanda Foglia, and I’m a Professor of Law and Justice Studies and Coordinator of the Master’s Program in Criminal Justice at Rowan University. I am a former prosecutor and police academy instructor. And I currently teach students who will be working in the criminal justice system.

And as I tell my students, I believe it is crucial that the system provide justice for the victims of crime and their families. I also believe that the system itself must be just and operate in accordance with the law. The Capital Jury Project research my colleagues and I have done, on the way jurors make their decisions in death penalty cases, shows that in practice, jurors are not following the law. This research helps explain why mistakes are made at the trial and sentencing phase of the process.

The law says that the death penalty is only constitutional if the jury’s sentencing decision is guided by certain legal standards. The Capital Jury Project, or CJP, is a study funded by the National Science Foundation that looks at whether jurors are following these standards. The research involved interviewing 1,198 jurors, from 353 trials, in 14 states. Jurors were questioned by trained interviewers who followed a script of neutrally worded questions.

Over 40 different articles have been published using this data, and this research has been cited by courts throughout the country, including the U.S. Supreme Court. I will talk mostly about the seven different problems which are summarized in the article we submitted, that I wrote with Dr. Bowers. I also will mention the results described in another article that we submitted, which shows that serving as a capital juror is traumatic for many jurors.
Our results are consistent with findings from prior research that show premature decision making, bias in jury selection, failure to comprehend instructions, erroneous beliefs that death is required, evasion of responsibility for the punishment decision, the influence of race on the process, and underestimation of the non-death penalty alternative.

I want to emphasize at the outset that the vast majority of the jurors took their responsibility very seriously and tried hard to do what they thought was right. However, it is a complicated process and an extremely difficult decision. And many, sometimes most, did not understand or follow the rules that are supposed to make sure the process is not arbitrary.

Premature decision making was the most obvious problem. We asked our jurors if they thought they knew what the punishment should be at four different points in the process. Close to half the jurors said they knew what the punishment should be at the earliest point, after the guilt phase but before the sentencing phase had even begun. Thirty percent said they had already decided the punishment should be death. Most of these jurors said they were absolutely convinced about the punishment. Most of the early pro-death jurors never wavered from this position. So nearly one out of three jurors are deciding the sentence should be death before they have heard the sentencing instructions or the sentencing evidence. So the statutes are not guiding their discretion, and they cannot be giving meaningful consideration to the mitigating evidence presented during the sentencing phase.

The second problem, or more accurately set of problems, involves the selection of the jury. Here we are focusing on the beginning of a capital proceeding, commonly called death qualification, when jurors are
asked a series of questions to make sure they are willing to impose the death penalty. There are really three distinct problems here.

First, the death qualification process eliminates potential jurors who do not believe in the death penalty, so the resulting jury is composed of people that are more conviction-prone and punishment-prone than the general population.

The second problem is called a process effect, because it identifies the biasing effect of going through the process itself. Approximately one in 10 jurors were conscious of and willing to admit that the questions during jury selection made them think the defendant must be, or probably was, guilty; and that the most appropriate punishment must be, or probably was, death.

Finally, the jury selection process is not very effective at eliminating jurors who believe so strongly in the death penalty that they are unwilling to consider mitigation, as the law requires. A substantial number -- for some crimes, over half -- of the jurors say they consider death the only acceptable punishment for six different types of murder that would cover nearly all capital cases. They cannot give meaningful consideration to mitigating evidence if they believe that death is the only acceptable punishment.

The third problem is, many jurors do not understand the guidance they are supposed to be following. Nearly half the CJP jurors failed to understand they were allowed to consider any relevant mitigating evidence. Over two out of three jurors failed to understand they did not have to be unanimous on findings of mitigation. Nearly half the jurors thought they had to find mitigating evidence existed beyond a reasonable
doubt, although no state requires that. On the other hand, aggravating evidence does have to be proven beyond a reasonable doubt. And close to a third of the jurors failed to understand that part of the instructions. The statutes cannot be effectively guiding juror discretion when substantial portions of the jurors do not understand the instructions.

The fourth problem is that many jurors erroneously believe death is required once certain facts are proven. Over one out of three jurors wrongly believed death was required by the law if the defendant’s conduct was heinous, vile, or depraved, or if the defendant would be dangerous in the future. This is especially troubling when one considers that most of the jurors believed that the evidence proved that the defendant’s conduct was heinous, vile, or depraved, and/or that the defendant would be dangerous in the future.

A fifth problem is that jurors fail to understand their responsibility for the defendant’s punishment. Less than 10 percent of the jurors said the individual juror, or the jury as a whole, were most responsible for the defendant’s punishment. When asked about how responsibility was allocated among the jury, the trial judge, and the appellate judges, only 30 percent believed the jury was strictly responsible.

A sixth problem is that race influences the process, especially when the defendant is African-American and the victim is white. We looked at interracial homicides, where we had interviews from both African-American and white jurors on the same case, and found that the racial composition of the jury made a difference.

The chance of a death penalty was 30 percent when there were less than five white male jurors, but more than doubled when there were
five or more white male jurors. Having even one African-American male on the jury reduced the chances of a death sentence substantially when the defendant was African-American.

We found striking differences between the way African-American men and white men viewed the same cases. African-American males were much more likely to be affected by lingering doubt about guilt when deciding the punishment. They were much more likely to think the defendant was sorry and identify with the defendant or the defendant’s family. White males were more likely to believe the defendant was dangerous, and to erroneously believe defendants not given death would be out of prison in less than 10 years.

As a 55-year-old -- excuse me, 54-year-old black man, who actually voted for death, said, “There is always racial overtones.” And I’m quoting here. “Because he’s black, it was ‘automatic’. You got six blacks, and you got six whites out there, and somebody in authority already told you the black man has done it. So automatically he’s done it. I don’t think black folks think that way until they hear it. White folks have a tendency that, once the charges are read, ‘he did it.’”

In another case where both the defendant and victim were African-American, the repeated references to race made by a 58-year-old white male juror suggested that he might have been influenced by racial stereotypes. Although he claimed to be objective, he admitted, “I have this thing about the black Muslim,” and went on to reference innocent people being hurt at some unrelated incident. Although none of the other jurors interviewed from the case mentioned race, he mentioned it repeatedly and, at different points, compared the defendant to an animal, a gorilla, and
Rodney King. He went on to say, “It just illustrates what’s going on in this country right now. I’m not going to be racial about it, but you have to state the facts. The blacks are killing the blacks. And you don’t do it gently, it’s just brutal.”

The CJP evidence adds to the previous research evidence of how race has a biasing impact in the capital process.

The last of the constitutional problems is that capital jurors underestimate how long someone not sentenced to death would spend in prison. And the lower their wrong estimates, the more likely they were to vote for death. In every state, most of the jurors believed the defendants would be released before they were even eligible for parole, even in the states like New Jersey that had life without parole at the time of the interviews. The CJP data showed that it is difficult to convince jurors that the defendant really will not be released on parole.

One juror in a death case said he believed defendants usually get released in 15 years, even though he observed that officially they say the sentence is life imprisonment, but, “Even though now it says without possibility of parole, we were still concerned that some day he’d get out on parole. We didn’t want him out again at all.” Another juror who ultimately voted for death said, “I was undecided. I had a personal problem with the life sentence. But then the judge explained to me that if he gets a life sentence, there was absolutely no chance that he would get out. I thought he might get out. I still don’t trust anybody about it.” It is very difficult to convince jurors that life really means life, because of the widespread distrust of the criminal justice system.
In addition to the constitutional problems, we find that serving on a capital jury is traumatic for the jurors. Forty-five percent of the jurors we interviewed talked about how emotionally upsetting they found the experience. More than one in four described specific problems such as not being able to sleep, having nightmares, feeling paranoid, breaking down in tears, indigestion and vomiting, tension in their personal relationships, and feeling haunted by the experience.

As one male juror in a death case said, “I equated that decision that I was having to make with the same crime he had done. He killed someone. Just because it’s legal doesn’t make it right. That’s the problem I had.”

In summary, interviews with jurors who actually decided capital cases show that many jurors are not following the guidance that the U.S. Supreme Court says -- guidelines that the U.S. Supreme Court says are necessary to make the death penalty not arbitrary, and that the experience is emotionally traumatic for many of them.

JUSTICE COLEMAN: Ms. Foglia, in your research, did you become familiar with the percentage of cases in New Jersey in which the case goes to the jury as a death penalty case? Did you become familiar with the percentage of instances in which the jury returns the death penalty?

DR. FOGLIA: No, I did not look into that. New Jersey actually wasn’t part of our national sample -- as I explain more fully in the written testimony I submitted -- because the person who was doing the research in New Jersey changed the instrument. So we didn’t have answers to a lot of the questions.
JUSTICE COLEMAN: If I were to tell you that the juries returned the death penalty in fewer than 50 percent of the cases, how would that jive with your findings?

DR. FOGLIA: Unfortunately, I didn’t look at the percentages in each state where the jury returns a death verdict, because we deliberately chose our cases so we would get approximately half with death verdicts and half with whatever alternative the law provided in those states. So we weren’t looking for how often jurors came back with the death sentence. We were looking at how jurors in death and life cases decide the case. And I’m not familiar with the nationwide percentages for what percent of jurors come back with a death verdict.

JUSTICE COLEMAN: Are there other questions?

MR. HAVERTY: Dr. Foglia, is there any reason, based upon your research, to believe that jurors in New Jersey would be less affected by these types of problems in understanding their responsibilities, and understanding the law, and what they’re supposed to do than the jurors in other states?

DR. FOGLIA: No, there’s no reason to think that New Jersey jurors would be any different. In fact, in my written testimony, where we did have percentages for some of these questions in New Jersey, I included them. And they’re generally very similar to what we found in the national sample.

Plus, when you look in the article at the percentages we found in different states, there’s remarkable consistency in all the states. And these states were chosen to get a good geographic mix and also a good mix
of the different types of statutes out there. And we were finding the same problems in every state.

MR. HAVERTY: These problems are essentially inherent problems in the system then?

DR. FOGLIA: Yes, I think it’s a very complicated process. And it’s just very difficult for the jurors to follow all these rules they’re supposed to be following.

MR. HAVERTY: Thank you.

MR. MOCZULA: Professor, I just wanted to clarify. Did you or did you not interview jurors who imposed the death sentence in New Jersey?

DR. FOGLIA: Yes, we did. And in my written testimony I supply some statistics from New Jersey, where we had them. But it’s not included in the national sample, because we didn’t have answers to a lot of the questions, because it was a different interview instrument used in New Jersey.

MR. MOCZULA: And there were-- I guess there was about three areas in your written testimony where you cite to New Jersey, as well. One of those areas is the alternative if the death sentence is not imposed. Did you factor in the peculiarities of this State’s law with regard to what jurors are told, should they not return a death sentence -- what the alternate would be, which I don’t believe is the case in other jurisdictions? Meaning, did you adjust any of the responses based on New Jersey-based law -- the requirements of the Supreme Court of New Jersey, as imposed on the prosecution of capital cases?

DR. FOGLIA: I’m not sure I understand.
I can say this-- I’m not sure I understand the question.

I can say this: We asked, “How long do you think somebody who doesn’t receive the death penalty spends in prison?” And I’m not sure how that would relate to what they’re actually told at the trial. We did have four cases in our sample that -- where the alternative was life without parole, as it is in New Jersey.

MR. MOCZULA: The alternative was life without parole?

DR. FOGLIA: Yes, four of the states in our sample had life without parole at the time we did the interviews. Now most of them do. But at that time, four of them did.

MR. MOCZULA: My question was more geared towards a specific instruction to the jury -- a requirement that jurors, at the sentencing phase, be advised of exactly what the alternative is, what will happen should the death penalty not be imposed on a particular defendant, which I think is-- I’m not sure how many other jurisdictions, if any, have it, but it is something more peculiar to New Jersey’s death penalty procedures.

DR. FOGLIA: I didn’t do the interviews in New Jersey, and I can’t remember every question that was asked in New Jersey. But the percentage that I quoted in the written testimony was just simply the response to the question: “How long do you think they’ll spend in prison if they don’t get death?”

Now, of course -- as you’re saying -- they heard whatever instruction you’re referring to. And it was after hearing that instruction they gave these estimates.

MR. MOCZULA: Thank you.
REVEREND HOWARD: Since we’ve begun, we have not heard from the second witness. But since we have begun, why don’t we proceed with this witness?

Mr. Haverty, yes.

MR. HAVERTY: Are you blocking me out, Reverend Howard?

(refering to PA microphone) (laughter)

REVEREND HOWARD: Pardon?

MR. HAVERTY: Are you blocking me out?

REVEREND HOWARD: Sorry. My apologies.

MR. HAVERTY: I just wanted to follow up on that. You identified there were seven areas of problems with the death penalty sentencing and the jurors’ reactions to that. Are they-- In other words, if you were able to correct one of those areas, would it affect the other seven areas -- or six areas of problems that you might have?

DR. FOGLIA: No, they really are independent problems, although they exacerbate each other in some cases.

MR. HAVERTY: Thank you.

REVEREND HOWARD: Yes, Mr. Hicks.

MR. HICKS: Do I understand this right? Even when the judge gives instructions to the jury that they have the alternative of life without parole -- that some of the jurors may not either believe it, or might have a problem with understanding exactly what life without parole is?

DR. FOGLIA: Yes, that’s what the quotes indicated. They came right out and said, “The judge told us it was life without parole, but we didn’t believe him.” And as I said, in four of the states in our sample, life without parole was the alternative. But we still had substantial--
MR. HICKS: So even a state like New Jersey, where it is beyond (indiscernible) of the choice of life without parole, some of the jurors may not even believe it anyway or understand it.

DR. FOGLIA: Yes.

MR. HICKS: I’m just putting it out there.

DR. FOGLIA: What happens is, they hear--

REVEREND HOWARD: Please press your speaker there.

DR. FOGLIA: Jurors hear media accounts of people who were released after being convicted of murder. And that’s what they remember. And they just don’t trust the system. And they don’t realize that those people who got released -- perhaps they were sentenced under old laws, or they weren’t sentenced for first degree murder or capital murder. But they trust their memory of what they saw on TV, not what the judge says, because they really don’t trust the system.

REVEREND HOWARD: Ms. Garcia.

MS. GARCIA: Doctor, I’ve was wondering if you’ve conducted -- or you’re aware of -- any research regarding the impact that these cases being overturned, or not -- the sentence not actually being carried out, here in New Jersey -- what impact that has on the surviving family members.

DR. FOGLIA: I haven’t done any research with surviving family members.

REVEREND HOWARD: Mr. DeFazio.

MR. DeFAZIO: Professor, are you familiar, in New Jersey, with Judge Baime’s report concerning the lack of racial discrimination in the imposition of the death penalty? Are you familiar with his work?
DR. FOGLIA: No, I am not. I did my research in Pennsylvania, actually.

MR. DeFAZIO: Okay. Because you-- Correct me if I’m wrong now. You are making it clear that your study has found that there is racial bias -- demonstrable racial bias in the death penalty area, correct?

DR. FOGLIA: My study has found that there is bias in interracial cases, where the defendant is African-American and the victim is white.

MR. DeFAZIO: Okay. But I--

DR. FOGLIA: And then we also see differences in the way black jurors and white jurors view the same case.

MR. DeFAZIO: But none of that work emanates from the New Jersey study, or any study in New Jersey-- is that correct? In that area.

DR. FOGLIA: The Capital Jury Project data doesn’t look at that. I’m familiar with research that Professor Baldus has done in both Pennsylvania and New Jersey; and also in the research that was quoted in the McCleskey v. Kemp case, where they did find evidence of bias, strongly -- most strongly when the victim was white, the defendant was more likely to get death.

But in New Jersey and Pennsylvania, they also found that when the defendant was African-American, regardless of the race of the victim, the defendant was more likely to get death.

MR. DeFAZIO: But you’re not familiar with the work of Judge Baime?

DR. FOGLIA: No, I’m not familiar with his work.

MR. DeFAZIO: Thank you.
REVEREND HOWARD: I’m going to ask Commissioner DeFazio, would you elaborate a little bit on what you are trying to communicate? It might help.

MR. DeFAZIO: Judge Baime, who is the special master appointed by the New Jersey Supreme Court, has found that there is no -- not any demonstrable racial discrimination in the death penalty in the State of New Jersey.

Now, as you know, Chairman, we are going to hear from Judge Baime in closed session next month. So I don’t want to speak for Judge Baime, but that’s the way I understand the conclusion of his various findings over the years.

REVEREND HOWARD: Thank you.

Justice Coleman, you want to speak, right?

JUSTICE COLEMAN: Yes.

SENATOR RUSSO: Hit it hard. (referring to PA microphone)

JUSTICE COLEMAN: I’ll elucidate on that just a bit further.

I’m familiar with the studies that Judge Baime has performed for each proportionality review case. The court always gets an update, meaning -- plug in all of the cases that have been heard and all of the cases that were death eligible since the prior proportionality review study was conducted.

And Professor Baldus was one of the consultants that the Supreme Court hired in helping to formulate the death penalty proportionality configuration. And before Judge Baime submits his report to the court, as the standing master, he continues to consult with Professor Baldus to deal with, as you pointed out, all of the numerous variables that
go into trying to determine those decisions. And so far, it appears, with the few cases in the universe that have been looked at, that there may not be racial discrimination. But it appears, more recently, there may be some intercounty discrimination. And that will involve other types of discussion. But that’s what he means.

MR. DeFAZIO: Thank you, Justice.

REVEREND HOWARD: Thank you very much.

And let me, on behalf of the Commission, thank you for your testimony.

And you have submitted a written addition we will review. And there has been a record of the give and take.

Thank you very much.

DR. FOGLIA: Thank you.

REVEREND HOWARD: And you may be excused, because you have been questioned.

And we’re going to ask Mr. Bloodsworth, if you would--

And I’m going to ask-- I’m going to alert Mr. James Harris and Mr. Lawrence Hamm to be on the alert for testimony following this witness.

Mr. Bloodsworth.

MR. BLOODSWORTH: I want to thank the New Jersey Study Commission for having me today; and the Chairman, and other members of this Commission.

I just want to first start out by saying that I am a big fan of this state. My father-- Before I get into my story, my father was, and is -- has sold seafood up and down the Jersey Shore, from Cape May to Long Beach Island. I’ve been coming to this state. And I’m quite fond of the people
here since I was a little boy, since 10 years old, when jitneys were going 
through Atlantic City, before even a casino was ever brought. So I come 
here as a friend from Maryland. And that is one of the biggest reasons I’m 
here today. My father has been selling seafood in the state for, like, 40 
years. So I’ve been coming across on the ferry since I was 10.

But, first off, I want to tell you this story of my life. And it’s 
detailed in a book called Bloodsworth, and it’s written by Tim Junkin. If any 
members, of all of you -- I will be glad to see that each one of you get a 
copy. It’s been out 10 years. It’s out in paperback now.

As I said, my name is Kirk Bloodsworth. I am the first death 
row inmate to be exonerated by DNA evidence, after spending almost nine 
years in prison for a crime I didn’t commit.

I am here to tell you my story in order to stress to you, as a 
human system, the death penalty will always be prone to mistake. In 
matters of life and death, one mistake is one too many. I could just as 
easily be dead today had the right set of circumstances not come about to 
ensure the truth to come out.

In 1984, my life changed dramatically. I was a newly 
discharged, honorably discharged, former Marine. And I was arrested for a 
brutal rape and murder of a 9-year-old little girl by the name of Dawn 
Hamilton. And to say that this murder was horrendous would be an 
understatement.

I think I should add this to the committee -- that she was found 
naked from the waist down, bludgeoned. And her throat was stepped on so 
forcefully that the imprint from the sneaker was imprinted into her throat. 
And the ultimate horror placed upon this child was a stick was inserted into
her body and passed through the mucosa of her rectum. That is what I was accused of.

As I said, I was a former Marine. I had no criminal record, no criminal history whatsoever. Up until this point, I had never been arrested for anything in my life. But I resembled a composite sketch that was made of the last person seen with Dawn Hamilton. The police came and interviewed me. I cooperated fully with their investigation and allowed them to take a picture of me, obtain hair samples and the like. My picture was selected by five eyewitnesses; and a lineup had proceeded, as I was picked out as the last person seen with 9-year-old Dawn Hamilton.

At trial, several witnesses against me identified me as being with her, despite testimony from family and friends that I was with them at the time of the murder. I had over 10 alibi witnesses.

Words cannot describe the emotions that I felt when the courtroom erupted in applause. Only then did I start to realize that this was not a dream, but a real-life nightmare that I was facing: execution for a crime that I did not commit.

Because the prosecution did not fully disclose exculpatory evidence to my attorneys -- evidence about other suspects, one who I would pick out as, saying, suspect number one -- being a man was 187 feet, physically, from Dawn Hamilton’s body, saying he was rolling newspapers up in the car; helped in the search; and actually found her clothes, in the tree nearby her body, that were discarded. He was a newspaper man. He said he was on his lunch break rolling newspapers. And yet, when they found him, he had no ink on his hands. They searched his car. He had a pair of little girls’ panties in the console of his automobile. They asked him
where he got those items -- the police did -- and he said he found them in the same woods she was murdered in two days before. And when these items were found, he vomited outside his car. This was the evidence that the state said was not exculpatory, because this individual was two inches shorter and had longer hair.

The two main witnesses in this case, Commission, were an 8 and 10-year-old boy, who-- The description is as follows: six-foot-five, curly blond hair, tan skin, and skinny. I think any of you looking at me now can honestly say that I was not skinny -- or I am not skinny. My hair is red. Certainly, I did not weigh the robust weight of 300 pounds, as I do now, then. But I weighed 230 pounds-plus, and I was a discus thrower in the Marine Corps. I had long sideburns and other issues -- a missing tooth, and things. None of these things were questioned. And the exculpatory evidence was not given to me to give to a jury.

My trial was overturned by the court of appeals of Maryland because of *Brady v. State*. At my second trial, I chose to be sentenced by the judge, who sentenced me to two consecutive life sentences. Although there was some relief that I would not be executed, the thought of spending the rest of my life in prison for a crime I didn’t commit was horrific. I appealed my second conviction and lost.

I stated earlier my life had changed dramatically when I was 23. I was facing, first, execution, or then spending the rest of my life in prison. I was separated from my family and friends. And I was branded a child rapist and killer.

I have to tell each and every one of you here today, and those listening, that being accused of a child rape and murder, in any state, is one
of the most horrible things you can possibly imagine. You are branded something that you would probably scrape off the bottom of your shoe and go about your day. My life was hard. I got hit in the back of the head with a sock full of batteries so hard it split my skull open. I got stabbed in the calf with a welding rod. And I was constantly being attacked, and being yelled at, and being persecuted for a crime I did not commit. To say that it is a hard place to be-- Prison life is worse than the death penalty.

I have to tell you something now that-- I’ve been talking about this for over 13 years. This whole thing started in 1984. Now it’s 22-years-old in my life.

My mother, before the DNA test was made, passed away. And she never got to see me when I got out. I can tell you I had to go there with handcuffs and shackles for five minutes to see her to say my goodbyes.

On April 27, 1993, I was told that my DNA test was back. I talked to my attorney on the phone, and he said, “It’s not you.” And I politely told him, “I knew that the whole time.” I spent a total of eight years, 11 months, and 19 days behind bars. Without the DNA testing evidence in my case, I would still be behind bars.

In September of 2003, nearly 10 years later, after my release, Maryland’s state attorney, Ann Brobst, and others matched, from CODIS database, a person who had committed the crime. And this person was Kimberly Shay Ruffner -- and he was not 6’5”, he was 5’8” and 170 pounds -- who had been released two weeks earlier for another attempted rape and murder of two little girls in the Fell’s Point area.

I am one of 123 exonerated people from death row; one of 176 who have been exonerated by DNA. Clearly, this system makes mistakes. I
am living proof of that. I was wrongly convicted not once, but twice. This system makes mistakes, and I am living proof.

And I was wrongly convicted in Maryland -- like New Jersey, is not known for having use of the death penalty.

I just have one little -- sir.

There’s no state or judicial system that is above the reality that human beings are imperfect. And the risk of error never goes away. Our entire criminal justice system, prosecutors, victims, families, prisoners, and most of all the public, is poorly served by a system that not only gets it wrong, but makes mistakes that are deadly.

Thank you very much.

REVEREND HOWARD: Thank you, Mr. Bloodsworth.

Would you be willing to receive some queries from our Commission members?

MR. BLOODSWORTH: Indeed.

REVEREND HOWARD: Thank you.

Are there persons--

Yes, Chief Abbott.

MR. ABBOTT: Just out of curiosity, the DNA match -- was that the same individual that was in the car rolling the newspapers?

MR. BLOODSWORTH: No, it was not. He was an entirely different individual.

Actually, there were four suspects in this case. The idea behind Brady -- and I think the Justice can talk about this -- that you were entitled to that evidence. And I think we’re playing gamesmanship. The judge in my case said this wasn’t a game, this was about truth. And the fact that
they didn’t give me that evidence, and they buried it in a file -- or actually pulled it -- for two years while I sat on death row, really attests to that.

But he was not the guy.

MR. ABBOTT: Thank you.

MR. BLOODSWORTH: Yes.

REVEREND HOWARD: Mr. Hicks.

MR. HICKS: Thank you very much for coming, Mr. Bloodsworth.

I’ve read your book. As a matter of fact, I know you personally. And I’ve heard your story before. And I heard the complete story. I know it’s impossible for you to really get the whole story out in the short period of time you have here today.

But I will suggest to anybody who has an opportunity to get the book, to get the book. And you will be really amazed at some of the mistakes that were made in this case.

I already know, but just for the sake of the other people who are here, can you, maybe briefly, tell us what your family had to go through to try to get you out of death row in prison?

MR. BLOODSWORTH: Well, my father-- As I was telling you in the beginning, I do have a connection here in New Jersey. He worked very hard. He was a waterman, like myself. I’m a commercial fisherman by trade. He had made money up until this point. And we had a modest house. I would have to say, I guess we were middle-class. But he didn’t have the thousands of dollars. And my first lawyer was a public defender. We actually believed that this man was going to save the day and
prove that I was innocent. But as it turned out, he was the one that didn’t really do a lot of investigation.

This whole case, behind Ruffner and myself, could have been solved by a blood test. I think Nate Walker was talking about his blood test. It didn’t even really need DNA. But the lawyer’s ineptitude in the beginning caused me to have to spend all that time in.

They spent every money they had, Mr. Hicks. They spent every single penny, mortgaged their house. And my mother—She was 5’3” tall, and as hard as a 10-penny nail. And it took her life, it just ate her alive.

All my friends, all my family, anybody who knew Kirk Bloodsworth at the time knew what kind of person I was. I was a good human being. I never— I’m certainly not going to sit here and tell this committee I was an angel. My book will tell you that. But I wasn’t a deviant type of person. I was a good man. And I served my country, and I wanted to do what was right in life.

And they were forfeited this, just like Dawn Hamilton was forfeited her life. And it still affects me and my father. My mother is gone. And it affects our life today--even today--22 years later.

REVEREND HOWARD: If there--

Ms. Garcia, did you want to speak?

MS. GARCIA: Just real quickly, the term *exonerated* is tossed around very loosely, unfortunately. And from what I know of your case, you’re very justified in using that term. And if people aren’t going to take the time to read your book, I would suggest they watch that show on HBO
(sic) too. It’s worth seeing both sides of just this issue within the last two hearings.

And I just wanted to thank everybody for coming here today to testify.

Thank you.

MR. BLOODSWORTH: Thank you.

REVEREND HOWARD: And it is Showtime, I think.

MS. SMITH SEGARS: Showtime.

REVEREND HOWARD: Showtime, not HBO.

MS. GARCIA: Oh, sorry.

REVEREND HOWARD: I would like to ask you a question.

MR. BLOODSWORTH: Sure.

REVEREND HOWARD: And I’d like to have your brief response, if that’s not an unfair request.

Having given us your personal experience, which is horrific, what-- How would you summarize, in one sentence, what you would like to leave with us? What one lesson, what one point would you like to make?

MR. BLOODSWORTH: You need to fix the mikes. (laughter)

Well, Mr. Chairman, I have to say -- and I get this all the time. That experience that I talked to you about -- in prison, and what it’s like in prison, to be charged with this offense--

And I talk to Republicans-- And by the way, every member of the Senate in the U.S. Senate has a copy of my book. I passed it out personally. And I will give each and every one of you a copy to read.
Now, I have to say that that punishment, in itself, is far greater than letting them off the hook -- I think we let people off the hook with the death penalty. And I’ll tell you why, briefly, as you want.

Their suffering is over. My suffering continues. Kimberly Shay Ruffner was given life imprisonment. And this was from me -- my request -- and from Dawn Hamilton’s father. Because we both know what a lot of people don’t know -- that that life is a far greater life -- punishment than have to be ended. We all have to stay here with what people do. So should they.

REVEREND HOWARD: Thank you.
On behalf of all of us, we thank you for your patience and for your witness.

MR. BLOODSWORTH: Thank you.
REVEREND HOWARD: Thank you.

Now, Mr. Harris and Mr. Hamm will come next.

And as they come, let me just say that Mr. Ken Wolski has submitted written testimony for the Commission. He does not request to speak. And Ms. Marilyn Zdobinski will also submit written testimony and does not desire to speak.

Again, let me remind you, we have 10 minutes of spoken testimony. At the point where you have two minutes left, the Chair will give you the gavel.

Mr. Harris.

JAMES HARRIS: Good afternoon.

Mr. Honorable Chairman and members of the Commission, my name is James Harris. I’m here today representing the New Jersey State
Conference of the National Association for the Advancement of Colored People. The National Association for the Advancement of Colored People is the oldest and largest civil rights organization in New Jersey, and I speak on behalf of 40 branches -- including a prison branch at Trenton State Prison -- 14 youth councils, and six college chapters.

Almost 20 years ago, the United States Supreme Court Justice William J. Brennan was confronted with a case -- *McCleskey v. Kemp* -- that explicitly challenged the role of race in death penalty sentencing. While the majority of the court found no constitutional error in the capital punishment system that condemned blacks who killed whites substantially more often than other race of defendant/race of the victim combination, Justice Brennan disagreed. In doing so, he theorized the painful reality of an honest conversation between a defendant attorney and his African-American, capitally charged client:

“At some point in the case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to his question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of Mr. McCleskey’s past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged in killing white victims [are far more] likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey’s victim would determine whether he received a death sentence... Finally, the assessment would not be complete without the information that cases involving black defendants and white defendants
are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp the essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.”

Despite numerous efforts at reform, today a New Jersey capital defense attorney would be compelled to give his capitationy charged African-American client virtually the same tragic assessment.

As of April 2006, there were over 3,000 people on America’s death rows. Despite comprising only 12 percent of the national population, almost half of these death sentence prisoners are African-Americans. One-third of these -- of persons executed since the death penalty’s 1976 reinstatement were African-Americans. Although it might be easy to believe that these statistics are the products of a phenomenon solely reserved to the Deep South, it is clear that our State of New Jersey fairs no better. Although African-Americans comprise 14.5 of New Jersey’s population, two-thirds of our death row prisoners are African-American.

There are many reasons for this disproportionate representation of African-Americans on our death rows. Perhaps most notably, however, are the studies that show how race subtly infects the decision making of the most critical players in the capital punish system -- jurors and prosecutors.

Scientific studies have long-documentcd the existence of a psychological association between race and criminality. This perceived link is nothing short of deadly in the capital punishment context. For example, a recent study in the journal of Psychological Science found that, in cases involving a white victim, the more stereotypically black a defendant was
perceived to look, the more likely that person was to be sentenced to death. Similarly, a six-year study of the sentencing practices of jurors in our neighboring Philadelphia, Pennsylvania, found that controlling for other factors, African-American defendants were almost four times more likely to receive the death penalty than similarly suited whites. One need look no further than our state’s recent experience with racial profiling on the New Jersey Turnpike to observe the belief that skin color is an accurate indicator of criminal activity, and that guilt is not limited to capital jurors. We cannot therefore be surprised to find these same stereotypes also infect the hearts and minds of other New Jerseyans -- i.e., prosecutors, judges, defense lawyers -- who are involved in life-and-death decision making.

Prosecutors affected by such conscious or unconscious bias can be powerfully influenced -- the capital punishment system -- by controlling the racial identity of the victims for whom death is sought as punishment, and the racial makeup of the life-and-death decision makers -- i.e., the jury. It goes without saying that a racially diverse jury is substantially less likely to make a sentencing decision based on race. For this reason, it is disturbing to note that throughout the country, prosecutors have excluded otherwise qualified African-Americans from service on capital juries. Indeed, just last year, the United States Supreme Court reversed two death penalty cases because the state improperly excluded potential African-American jurors based on race.

Additionally, in nearby Philadelphia, Pennsylvania, it was recently revealed that a prosecutor was videotaped instructing young lawyers that it was imperative to keep African-Americans off of juries. In that tape, the prosecutor gave such admonitions as, “Young black women
are very bad,” “You know, in selecting blacks, you don’t want the real educated ones,” and “There are blacks from low-income areas...you don’t want those people on your jury.”

Similar biases can be found in the decisions about homicide cases that warrant death penalties. Studies throughout the country have noted that the odds of a prosecutor seeking and/or sentencer imposing a death sentence was increased where the victim was white. For example--

What is that -- two minutes? Okay.

In February of 1990, the study of the United States General Accounting Office found that, “In 80 percent of the studies reviewed, race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found more likely to be sentenced to death then those who murdered blacks.” More recently, Professors Baldus and George Woodworth found that, taking into account all of the states with prisoners on death row, 93 percent of the states showed evidence that race of the victim was a predictor of whether a death sentence would be given. These statistics equate to lives, all told, of approximately 1,000 persons who have been executed since the death penalty was reinstated in 1976. Eighty percent were executed for killing white victims.

In New Jersey, only one-third of the persons on death row are there for killing black victims, notwithstanding the fact that, as of 2004, over half of the homicide victims in New Jersey were black.

These statistics, of course, do not tell the whole story. Innumerable examples, in state after state, reveal the complex ways in which race can effect the capital punishment system. In 1998, the Kentucky
Legislature was moved to pass a racial justice act after a study found that every death sentence up to March 1996 was for the murder of a white victim, despite over 1,000 black murders -- victims were -- held during the same period.

In 1999, a former Cook County, Illinois, prosecutor revealed that during his tenure in office there was an ongoing competition among prosecutors to be the first to convict defendants who weighed a total of 4,000 pounds. Because most of the defendants were African-Americans, the competition was described between the prosecutors as “Niggers by the pound.” In California, Melvin Wade was sentenced to death after being represented by an attorney who used defamatory language against African-Americans, including Mr. Wade himself, and asked in his closing to the jury that Mr. Wade be put to death.

The NAACP is opposed to the death penalty, and we believe that that is not the proper way for the State to administer the criminal justice system.

Thank you.

REVEREND HOWARD: Thank you very much, Mr. Harris.

Please, if you don’t mind, I hope you will remain so that following Mr. Hamm’s presentation you will be available for questions.

Mr. Hamm.

L A W R E N C E   H A M M: Thank you, Mr. Chairman.

Mr. Chairman and members of the Commission, I thank you for this--

REVEREND HOWARD: Press your--
MS. SMITH SEGARS: Your mike is not on. (referring to PA microphone) Press the button.

REVEREND HOWARD: Press the red button.

MR. HAMM: Thank you very much, Mr. Chairman and members of the Commission. My name is Lawrence Hamm. I’m here today to represent People’s Organization for Progress, which is a grassroots organization, an all-volunteer organization; an organization made up predominantly, but not exclusively, of African-Americans, but certainly working and poor people.

I just came today to say for the record that the People’s Organization for Progress opposes the death penalty. We have basically a core set of reforms: 12 reforms that we’ve worked toward, and among them is the abolition of the death penalty. We oppose the death penalty because too often innocent people have died because they have been unjustly sentenced to death. We believe the price of error is too high and the price of vengeance is too high, because the imposition of the death penalty has been shown not only to be unjust, but to be unfair. And, as my colleague Mr. Harris has so ably pointed out, that there are provable racial disparities in the imposition of the death penalty.

We believe that in a criminal justice system such as our own, nationally as well as here in the state, rife with racial inequities, the imposition of the death penalty will be most likely applied in a manner that is racially unjust. In the community, the people feel that the death penalty has historically been applied in an unfair manner and that African-Americans have died at disproportionately higher rates because of the death penalty. We believe that evidence of racial discrimination in capital
punishment continues to be found. We think it is all too evident that blacks are more likely to receive the death penalty than whites.

But not only is race a factor for the defendants, more so, it also seems to be a factor for the victims of murder. Those who murdered whites are found more likely to be sentenced to death than those who murdered blacks, showing that black life -- that less value is placed on black life.

The imposition of the death penalty is racially biased. Every day when we pick up the newspapers we see example after example of black men, who were convicted on death row or sentenced to life, who have now been freed because of DNA testing. The death penalty is a failure. It has been proven not to be a deterrent to crime. In fact, murder in the United States grows at astronomical rates every year and right here in our communities in New Jersey.

The death penalty is a faulty instrument by which to achieve justice. The murder of innocent people is too high a price to pay. We believe that the death penalty should be abolished. It’s interesting to note that the United States, a decade or so ago, campaigned against the country of South Africa -- the Apartheid regime -- because of its human rights policies. But today the new South Africa has no death penalty. But here in the United States, we still have a death penalty.

We support the moratorium. We support the work of this Commission, and we call for the abolition of the death penalty in our state and nation.

And let me just say, on a personal note, that I’m not a person who was always opposed to the death penalty. I grew up in a very tough community. I grew up in the Central Ward of Newark, New Jersey. And it
was our code that if anybody put their hands on you, you were to fight back. If anybody were to hurt you, you were to hurt them back. If anybody was to break in your house and hurt a member of your family, you had a right to take their life. So for years, I was not opposed to the death penalty.

But it was only in the last decade, when I began to come into contact -- not necessarily with those who were unjustly convicted of crimes they did not commit -- but when I came into contact with the family members who lost loved ones as a result of murder-- A man who had lost his wife because she was murdered by someone else. Even more recently, the situation -- the example of the family of Amiri Baraka, who lost his daughter that was murdered. And I have seen people who lost loved ones that were murdered come to a realization that they could not support the death penalty. That is, in fact, what helped me to turn my position around. If those people who lost loved ones can come to that position, then it’s even easier for me, who has not lost anyone as a result of murder, to come to that position.

So we call for the abolition of the death penalty.

Thank you very much.

REVEREND HOWARD: Thank you, Mr. Hamm, Mr. Harris.

Our Commission now is cordially invited to ask questions of these witnesses in any way you see fit. Are there questions? (no response)

Well, thank you very much. Yes. Thank you for your testimony.

And that concludes this public hearing of witnesses.
And again, on behalf of all of us, we’d like to thank you for being here today, for preparing your testimony, and presenting it. We also want to thank those who have prepared written testimony for your willingness to share with us. And I assure you, it will be a part of our official record.

Thank you very much.

(HEARING CONCLUDED)
New Jersey Death Penalty Study Commission Testimony  
September 27, 2006  
Bill Babbitt – 916-224-1720

I'm here to tell the story of my younger brother, Manny Babbitt. When he was 17 years old, Manny decided to join the Marine Corps to serve his country. Manny could not pass the Marine Corps entry exam but the Marines needed Gung-Ho kids like him so they gave him the answers to the test. Manny would go to war.

After boot camp, Manny was sent to Khe Sanh Combat Base. During the 77 day Siege of Khe Sanh, Manny was credited with saving a life, was wounded and mistaken for dead. He was thrown into a helicopter and awoke on a pile of dead Marines. Manny was patched up and returned to the war. He signed up for a 2nd tour in Vietnam and fought in 5 major campaigns. He was awarded the Vietnamese Cross of Gallantry, and The Presidential Unit Citation.

Upon returning from the war his wife could not deal with his war demons and his marriage fell apart. Not able to hold on to a job, he became homeless, living in a cardboard box on the streets of Providence, R.I.

Manny soon found himself on the wrong side of the law. His apparent mental condition was noticed and he ended up in a mental hospital and it became Manny's home for the next three years. He was eventually released despite several suicide attempts and the protest of his doctors. The psychiatrists diagnosed him with paranoid schizophrenia and post-Traumatic Stress Disorder.

I was four thousand miles away, making a life for myself in California. One day I got a telephone call from my brother Charlie in Providence. He said that Manny needed a change and could he come to California and live with me until he got on his feet. I was delighted, now I'll have a brother in Sacramento. In October, 1980, Manny showed up at my job at the Rail Road. After several weeks, my wife Linda and I notice his strange side. Why does he keep talking about the war? Where does he go at night? He alarmed our mother: "Why does he act that way, she would ask."

One day the newspaper reported the murder of an elderly woman not far from our home. An intruder had broken into the apartment of Leah Schendel and had severely beaten her. Manny had smoked PCP laced Marijuana and had a flashback. She would have survived her wounds but she had a weak heart and died. The cause of death was listed as a heart attack. Still, after reading about it in the Sacramento Bee, I certainly hoped they would apprehend the perpetrator. I was worried for my mother's safety who lived not too far away.

It was not until a few days later that something woke me in the middle of the night. The news reports of Leah Schendel's murder had planted seeds of another worry in my mind. "Where’s Manny?" I wondered. I got out of bed and went to the family room and turned on the light. No Manny. The next day, while dusting in the family room, I
picked up my choo-choo piggy bank off the TV and discovered that it was jammed full of nickels. I'd read that Leah Schendel had been to Reno the day before her murder playing the nickel slots. Next, I went to the hallway closet where Manny kept his sea bag seeking answers to this horrible riddle. An old cigarette lighter fell out of an old coat that bore the engraved initials "L.S." After checking the old newspaper, the terrible truth hit me. Manny has blood on his hands, Where's Manny now I thought, I was very scared.

I immediately woke Linda and told her of my terrible discovery. We prayed about it. If we give him a bus ticket and send him away we will have blood on our hands. We did what we felt we had to do: we called the police. If Manny was responsible for Leah Schendel's death, I had to get him off the streets.

The Police came and picked me up and brought me to the police station where I sat down with investigators. I cried alot, cried for the poor woman and cried for Manny, cried for my family. I told the Police about Manny's war record and that he brought Vietnam back with him. Could Manny get the mental treatment that he needs? Was the death penalty in his future?

The Sacramento police promised me Manny would not get the Death Penalty- It was a promise made and a promise broken.

Although I felt badly about turning in Manny, I really thought it would be great if I could protect society and at the same time get my brother the help he so desperately needed. I asked the officers to let me help them arrest Manny. Please don't kill him if he runs, I begged. I did not want Manny to die that day. I watched as they loaded their guns but I helped and in the end the cops didn't even have to draw their guns.

I didn't know that it was going to be a Capital Case until I went to Manny's arraignment. There, I heard the district attorney say that she was seeking the death penalty against my brother.

You've already heard about the wonderful attorneys who defended David Kaczynski's brother and saved his life. I prayed that Manny would get the same consideration. You see, I still thought it couldn't really happen. My mentally ill brother would not get the death penalty. Not in America. Not after I had helped authorities solve the crime. Not when he was so ill. This was the land of liberty and justice for all. I trusted that the system would work. Maybe I trusted the system too much.

There were definitely some glimmers of hope. I rejoiced when a great attorney named Chuck Patterson—himself a Khe Sanh veteran—took on Manny's appeal. I rejoiced again when David Kaczynski and his wife Linda stood side by side with me and my wife to call attention to the injustice in Manny's case. I was overjoyed when the country's foremost expert on Post Traumatic Stress Disorder filmed a deposition to explain that Manny, in all likelihood, was in a dis-associated state when he attacked Leah Shendel. I was deeply touched when so many Marines and Vietnam vets spoke up on Manny's behalf. They understood only too well what Manny had endured during the war.
There was one Vietnam vet who didn’t understand, and that was California Governor Gray Davis. He had had a desk job in Vietnam, he carried a brief case not a M16. He had a promising political career, not a cardboard box waiting for him upon his return from Vietnam. He had campaigned for governor by promising to speed up the pace of executions in California. He rejected Manny’s plea for clemency.

On May 3, 1999 – ironically, the date of Manny’s 50th birthday – I went to San Quentin prison to attend my brother’s execution. My mother and sisters joined a prayer vigil outside, Ma wrapped up in a thick blanket to keep her warm in the chilly San Quentin night. At 37 minutes after midnight, I watched as the State of California put my brother to death by lethal injection several weeks after he received his Purple Heart Medal. Until that moment, I couldn’t bring myself to believe that the execution would actually take place. I watched them kill Manny. I have to live with that memory.

My family was devastated. They became a new set of victims that night. I’ll never forget my ma’s stricken face or my sister throwing up on the side of the road as we left San Quentin Prison. If you want to reflect on what an execution means in human terms, please hold that image in your mind.

I don’t begrudge one bit the acclaim that David Kaczynski has received since his brother’s arrest. Ted’s prosecutor called David "a true American hero" on national television. I have more reason than most to appreciate David’s courage, as well as his kindness to our family. David is more than a friend to me; he’s my brother, and I don’t use that term lightly. But yet again, there was a different standard in effect for the Babbitt family. I was never thanked for turning Manny in – not by the police, not by the prosecutors, not by anyone. It pains me to say so, but I have some family members who consider me responsible for Manny’s death.

It’s been a seven-year struggle for me to forgive those who sought my brother’s death, as well as those who blame me for it. But I’m making progress. Manny asked me to always keep the family of Leah in my heart and to understand their anger and feelings about the death penalty. I do. I know they suffered the first loss. I know they suffer still.

I’m also standing firm in the belief that I did the right thing. If we as members of the human family do not show concern for one another, then who will? And if we don’t, then what kind of a world will we leave to our children? I had to make sure that no one else got hurt because of my brother’s illness. Manny knew of my pain from the decision I made and from my failure to protect him. He knew of my self imposed guilt. He also recognized that I was struggling with anger and that I felt deeply wounded. He said, "Billy, let go of your anger. I’m at peace now. Keep working against the death penalty, but not for my sake. Do it for the sake of my friends who are left behind. But Billy, always take the high road. Take the high road. There’s no other way."

Manny’s words continue to guide me to this day.
I believed in the death penalty until it came knocking on the door. Now I understand its full impact. My ma’s pain; my sister’s pain. My pain; David’s pain. That pain is part of its full impact.

As you ponder the difficult and weighty matters before this commission – matters of crime and punishment, truth and justice, humanity and compassion – I urge you, please take the high road. There's no other way.
My name is Kirk Bloodsworth, and I am the first death row inmate to be exonerated by DNA evidence after spending almost nine years in prison for a crime I did not commit. I thank you for the opportunity to speak here today.

I am here to tell you my story in order to stress to you that as a human system, the death penalty will always be prone to mistake. In matters of life and death, one mistake is one too many. I could just as easily be dead today had the right set of circumstances not come about to ensure that the truth came out.

In 1984, my life changed dramatically. I was arrested for the brutal rape and murder of nine-year-old Dawn Hamilton. I was only 23-years-old, I was newly married, I was working full-time, and I had served four years in the United States Marine Corps. I had never been arrested before in my life.

In the summer of 1984, Dawn Hamilton was tragically raped and murdered in Baltimore County, Maryland. I had never met Dawn or her family and knew nothing about the crime. Unfortunately, I resembled the composite sketch of the last man seen with Dawn, and the police came to interview me. I cooperated fully with their investigation and allowed them to take a
picture of me, obtain hair samples, and the like. My picture was selected by witnesses, and I was identified in a line-up as the man last seen with the victim.

At trial, several witnesses again identified me as the man last seen with the victim. Despite testimony from family and friends that I was with them at the time of the murder, the jury convicted me in March of 1985. Words cannot describe the emotions I felt when the courtroom erupted in applause at my conviction. Only then did I start to realize that this was not a dream, but a real-life nightmare. I was then facing execution for a crime I knew I did not commit.

Because the prosecution did not fully disclose exculpatory evidence to my attorneys, my conviction was overturned by the Maryland Court of Appeals, and I was granted another trial. At the second trial, the prosecution presented many of the same witnesses, and I was once again convicted of the rape and murder of Dawn Hamilton. At my second trial, I chose to be sentenced by the judge, who sentenced me to two consecutive life sentences. Although there was some relief that I would not be executed, the thought of spending the rest of my life in prison for a crime I didn’t commit was horrific. I appealed my second conviction, and lost.

As I stated earlier, my life changed dramatically when I was 23. I was facing first execution and then spending the rest of my life in prison. I was separated from family and friends, and I was branded a child rapist and killer. I cannot describe to you how difficult of an ordeal this was to endure. Perhaps the worst part of it was that my mother, whom I loved and who stood beside me the whole time, died while I was in prison. I did not attend her funeral, but I was allowed to
view her body, in handcuffs and shackles. She knew and believed the entire time that I could not have committed this crime.

At the time of my first trial, DNA testing was not very advanced. However, by 1992, DNA testing was breaking new ground. My attorneys requested that the evidence from my case be released for testing, and the Baltimore County prosecutors agreed. In May of 1993, a laboratory found that the semen stain on Dawn Hamilton’s underwear could not possibly have come from me. The FBI confirmed those results a month later. I was eventually released on June 28, 1993, after spending 8 years, 11 months, and 19 days behind bars. Without the testing of DNA evidence in my case, I would still be behind bars.

In September of 2003, nearly ten years after my release, the Maryland State’s Attorney found a match to the DNA evidence in my case. It matched a man I had served time with. He has since been convicted and sentenced for the rape and murder of Dawn Hamilton.

Unfortunately, I am one of the lucky ones. To date, of the over 100 people sentenced to die and later exonerated, less than 10% of them have had DNA testing available in their cases. The truth is, most murders do not involve any biological evidence to be tested. Even worse, we now know that even DNA is not foolproof. Just last week a man was exonerated of a rape and murder in New York, and the DNA evidence that exonerated him was known by the jury at the time of his trial. The jury knew that the DNA didn’t match, but they convicted him anyway. It took 17 years for the prosecution to retest the DNA and find a match.
It would be easy to say that my case is an isolated case, or that mistakes happen elsewhere but not here in New Jersey. But I am one of 123 people exonerated from death row, and one of 176 people who have been exonerated by DNA. Clearly, this is a system that makes mistakes—I am living proof of that. I was wrongfully convicted not once, but twice. And I was wrongfully convicted in Maryland—a state that, like New Jersey, is not known for reckless use of the death penalty. There is no state or judicial system that is above the reality that human beings are imperfect, and the risk of error never goes away. Our entire system of criminal justice—prosecutors, victims’ families, prisoners and, most of all, the public—is poorly served by a system that not only gets it wrong, but whose mistakes are deadly.

Thank you very much for the opportunity to speak here today.
Presentation to New Jersey Death Penalty Study Commission

I am Wanda Foglia, Professor of Law and Justice Studies at Rowan University and Coordinator of the Masters in Criminal Justice Program. Thank you for allowing me to present testimony here today. I am a former prosecutor and policy academy instructor, and I currently teach students who will be working in the criminal justice system. As I tell my students, I believe it is crucial that the system provide justice for the victims of crime and their families. I also believe that the system itself must be just and operate in accordance with the law. The research my colleagues and I have done on the way capital jurors make their decisions in death penalty cases shows that in practice jurors are not following the rules that have been established to try to make the death penalty process fair.

In *Furman v. Georgia*, the U.S. Supreme Court held that the death penalty was unconstitutional as applied because they found that jury decisions were arbitrary and capricious. The problem was that the juries were not getting any guidance on how to make their penalty decision. States all over the country then passed statutes that attempted to guide the jury’s discretion, and the Supreme Court decided *Gregg* and companion cases that held the death penalty could be constitutional if the process followed certain rules. Subsequent cases established additional rules designed to make the process fair. The Capital Jury Project is a 14 state study that attempted to determine whether jurors are following these rules.

The methodology is described in more detail in the articles submitted, but I will start by briefly explaining what we did. This research was funded by the National Science Foundation and coordinated by Dr. William Bowers who was at Northeastern University at the time. I coordinated the data collection for Pennsylvania. Fourteen states were chosen to include different parts of the country and different types of death penalty statutes. Within each state, between 20 and 30 capital cases were chosen to get approximately half that had resulted in a sentence of death and half in whatever alternative the state provided. Jurors were chosen randomly in an attempt to get four jurors from each case. Jurors were questioned by trained interviewers who followed a script of neutrally worded questions laid out in the interview instrument. The final sample is interviews from 1198 jurors from 353 trials in 14 states.

New Jersey is not included in the national sample because the researcher in New Jersey changed the interview instrument so that we do not have answers to all the questions for New Jersey. However, I will refer to numbers from New Jersey when we do have that information, just to show that the responses are similar to what we found in other states.

There are over 40 different articles that have been published using this data, and this research has been cited by courts throughout the country, including the U.S. Supreme Court. The website www.cip.neu.edu lists the articles and cases and makes some of the articles available full text. I will talk mostly about the seven different problems with the way juries make their decision which are summarized in the article I wrote with Dr. Bowers that has been submitted to you. I also will mention the results described in another article that we submitted which shows that serving as a capital juror is traumatic for many jurors. I will round off the numbers in my testimony, but the more exact numbers are included in the written report of my testimony and the articles submitted.
Constitutional Problems with Capital Juror Decision-Making

Our interviews with people who actually served on death penalty cases show that there are problems throughout the process, from jury selection through the sentencing phase. Our findings replicate findings from prior research that show:

1) premature decision-making
2) bias in jury selection
3) failure to comprehend instructions
4) erroneous beliefs that death is required
5) evasion of responsibility for the punishment decision
6) the influence of race on the process, and
7) underestimation of the non-death penalty alternative

I want to emphasize at the outset that the vast majority of the jurors took their responsibility very seriously and tried hard to do what they thought was right. However, it is a complicated process and an extremely difficult decision and many, sometimes most, did not understand or follow the rules that have been established to make sure the process is not arbitrary or unfair.

Premature Decision-Making

Starting with the most obvious problem, many jurors cannot be following the standards that are supposed to be guiding their decision because they are deciding the punishment before they even hear the standard they are supposed to apply and the evidence they are supposed to consider. As you probably know, every state uses a two phase process where by the jury decides guilt in the first phase and the penalty in the second phase. We asked our jurors if they thought they knew what the punishment should be at four different points in the process:

1) after the guilt phase but before the sentencing phase
2) after the sentencing instructions but before deliberations
3) at first vote
4) at final vote

Close to half the jurors (49.2%) said they knew what the punishment should be at the earliest point, after the guilt phase but before the sentencing phase had even begun. Thirty percent said they had already decided the punishment should be death. Most of them said they were absolutely convinced (70.4%) about the punishment and nearly all said absolutely convinced or pretty sure (another 27%). Most of the early pro-death jurors never wavered from this position and maintained that the punishment should be death at all four points about which we inquired. These patterns confirm what social psychology research and common experience tells us: that once people form an opinion they tend to interpret subsequent information to support their position. Nearly one out of three jurors are deciding the sentence should be death before the sentencing phase even begins so the statutes are not guiding their discretion and they cannot be giving meaningful consideration to the mitigating evidence presented during the sentencing phase.

Bias in Jury Selection

The second problem, or more accurately set of problems, involves the selection of the jury. Here we are focusing on the beginning of a capital proceeding when jurors
are asked a series of questions to make sure they are willing to impose a death penalty. This is commonly called the death qualification process, although legally it also should “life qualify” jurors, or insure that they are willing to consider mitigation as the law requires. There are really three distinct problems with the jury selection process.

First, the death qualification process eliminates potential jurors who do not believe in the death penalty so the resulting jury is composed of people that are more conviction and punishment prone than the general population. This is called a composition effect. There are numerous studies, some of which are cited in the article that I supplied, that compare people who would make it through jury selection with those who would be struck from a capital jury. Considering that recent polls show that close to 40% of the public does not believe in the death penalty, a sizable portion of the population would not be allowed to sit on a capital jury. Those who would make it on to a jury are more likely to support punitive attitudes, are more likely to find defendants guilty, are less likely to find certain factors mitigating, and are more likely to vote for death compared to those that would be excluded.

The second problem with the jury selection process is called a process effect because it identifies the biasing effect of going through the death qualification process itself. The CJP interviews confirm results from prior studies that show that all the questions about the death penalty at the beginning of the jurors’ experience have a biasing effect. We asked jurors whether these questions made them think the defendant was guilty and should be sentenced to death. In response to both questions, approximately 1 in 10 jurors were conscious of and willing to admit that all those questions about the death penalty had an influence on them. When asked about the impact of these questions, 11.3% of the jurors said the questions made them think the defendant “must be” or “probably was” guilty, and almost as many, 9.2%, said the questions made them think the appropriate sentence “must be” or “probably was” the death penalty. The numbers for New Jersey jurors were similar, although the second was a little higher (10.3% and 17.2%, respectively).

Finally, the jury selection process is not very effective at eliminating jurors who believe so strongly in the death penalty that they are unwilling to consider mitigation as the law requires. Although the process should also “life qualify” jurors or insure that jurors would be willing to consider mitigation, it seems to be more effective at death qualifying. CJP results show that large numbers of our jurors make it on to capital juries even though they say they consider “death the only acceptable punishment” for six different types of murder that would cover nearly all capital cases. They cannot give meaningful consideration to mitigating evidence if they believe death is the only acceptable punishment. More than half the jurors said that death was the only acceptable punishment for planned, premeditated murder, murder by a defendant with a prior murder conviction, or a murder with multiple victims.

Failure to Understand Instructions:

The CJP interviews confirm results from prior studies that show that many jurors do not understand the guidance they are supposed to be following. Some of the guidelines will differ under various state statutes, but in every state jurors have to be able to consider any relevant mitigating evidence because of the United States Supreme Court case Locket v. Ohio. Nearly half (44.6%) of the CJP jurors failed to understand this. There is also United State Supreme Court case law that says jurors do not need to
be unanimous on findings of mitigation, but over 2 out of 3 jurors (66.2%) failed to understand they did not need to agree on whether evidence was mitigating. The percentage in New Jersey not understanding they did not have to be unanimous on findings of mitigation was 51.7%. No state requires that mitigation be found beyond a reasonable doubt, but nearly half the jurors (49.2%) thought they had to apply that standard of proof to mitigating evidence. The New Jersey jurors were much less likely to make this mistake, but there still were 27.6% who thought the reasonable doubt standard applied to mitigating evidence. On the other hand, aggravating evidence does have to be proven beyond a reasonable doubt, and close to a third (29.9%) of the jurors failed to understand that part of the instructions. Here the New Jersey jurors were more likely to be incorrect with 51.7% failing to realize the reasonable doubt standard applied to aggravating factors. The statutes cannot be effectively guiding juror discretion when substantial portions of the jurors do not understand the jury instructions.

Erroneous Beliefs that Death is Required:

Another indication that jurors are not understanding the guidance they are given is that they erroneously believe death is required once certain facts are proven, although the United States Supreme Court has said that the law can never require death without consideration of mitigation. Jurors were asked whether, after hearing the sentencing instructions, the law required them to impose death if the defendant's crime was "heinous, vile, or depraved," or if the defendant would be "dangerous in the future." In each case, over 1 out of 3 jurors wrongly believed death was required. For the total sample, 43.9% thought death was required if the defendant's conduct was "heinous, vile, or depraved," and 36.9% thought death was required if the defendant would be "dangerous in the future." This was true even in states where these factors were not even listed as aggravating circumstances. These erroneous beliefs are especially troubling when one considers that in most of the cases the jurors believed that the evidence did prove that the defendant's conduct was "heinous, vile, or depraved" (81.5%) and/or that the defendant would be "dangerous in the future" (78.2%).

Evading Responsibility for the Punishment Decision:

Yet, another indication that many jurors did not understand the sentencing process is their failure to understand their responsibility for the defendant's punishment. The United States Supreme Court warned in *Caldwell v. Mississippi* (1985) that jurors would be reluctant to accept responsibility and that the sentence would be unreliable if jurors believed the ultimate responsibility rested with others. Over 80% of the jurors interviewed said the defendant (49.3%) or the law (32.8%) was primarily responsible for the defendant's punishment. In contrast, only 5.6% said the individual juror and only 8.9% said the jury as a whole were most responsible. In New Jersey the numbers were similar with 6.9% each saying the individual juror or the jury as a whole were most responsible. Another question in the national sample asked about how responsibility was allocated among the jury, trial judge, and appellate judges and in the 10 states where the jury decision was binding on the judges, only 29.8% believed the jury was strictly responsible.

Influence of Race:

Prior research, some of which has already been mentioned at these hearings and/or is cited in the article I supplied, has found evidence that the defendant is more
likely to get the death penalty if the victim is white or if the defendant is African American. The impact of race is especially prominent when both are true, that is, in inter-racial crimes where the defendant is African American and the victim is white. When we looked at interviews from such inter-racial crimes we found that the race of the jurors also had an impact.

We looked at inter-racial homicides in cases where we had interviews from both African American and white jurors. The racial composition of the jury was strongly related to the outcome of the cases. The chances of a death penalty was 30% when there were less than five white male jurors, but more than doubled (70.7%) when there were five or more white male jurors. The presence of white males did not have this effect in cases where both the defendant and the victim were from the same race. Having an African American male on the jury reduced the chances of a death sentence from 71.9% to 37.5 percent when the defendant was African American and the victim was white, and from 66.7% to 42.9% when both the defendant and victim were African American. The presence of a black male did not have any impact when both defendant and victim were white.

When jurors’ responses in these inter-racial crimes were broken down by race and gender, we found striking differences between the way African American men and white men viewed the same cases. African American males were over 7 times more likely to be affected by lingering doubt about guilt when deciding the punishment (53.4% v. 6.9%) and nearly 6 times more likely to think the defendant might not be the one who was most responsible (60.0% v. 10.3%). They were much more likely to think the defendant was sorry (80.0% v. 14.8%), and imagine themselves in the defendant’s situation (53.3% v. 26.7%) or in the defendant’s family’s situation (80.0% v. 30.0%). White males were more than twice as likely to say “dangerous to other people” described the defendant very well (63.3% v. 26.7%) and nearly four times as likely to erroneously believe defendants not given death would be out of prison in less than ten years (30.0% v. 7.7%).

This difference in perspectives is also reflected in the jurors’ narrative accounts of their experience. As a 54 year old black man who actually voted for death said:

...there is always racial overtones. Because he’s black, it was "automatic," You got six whites, six blacks and you got six whites out there and somebody in authority already told you what the black man has done, so automatically, he’s done it. I don't think blacks think that way until they hear. White folks have a tendency, that once the charges are read - "he did it."

In another case where both the defendant and victim were African American, the repeated references to race made by a 58 year old white male juror suggested that he might have been influenced by racial stereotypes. Although he claimed to be objective, he admitted "I have this thing about the black Muslim," and went on to reference innocent people being hurt at some unrelated incident. Although none of the other jurors interviewed from the case mentioned race, he mentioned it repeatedly and referred to the defendant as an animal and a gorilla, and compared him to Rodney King. He went on to say:
It just illustrates what's going on in this country, right now.
I'm not going to be racial about it, but you have to state the
facts. The blacks are killing the blacks. And you don't do it
gently, it's just brutal.

I was asked to do an analysis of Pennsylvania data for the Supreme Court of
Pennsylvania's Committee on Racial and Gender Bias in the Justice System and found
similar race linked patterns as those found in the national sample. I analyzed all the
cases together because the smaller sample size made it impossible to just look at inter-
racial cases. In Pennsylvania I found that juries dominated by white males were more
likely to impose death, jurors were more likely to prematurely decide on death when the
defendant was African American, jurors were more likely to have lingering doubt when
the defendant was white, and were more likely to be very concerned about the
defendant killing again when the defendant was black. As in the national data, black
jurors were more likely to see the defendant as remorseful. In Pennsylvania CJP cases,
over two-thirds of the black defendants were sentenced to death compared to half of the
non-black defendants. An analysis of the case characteristics did not reveal any
differences other than race that would explain this contrast in outcomes. The CJP
evidence on the impact of the race of the defendant, the racial composition of the jury
and the race of individual jurors adds to the previous research evidence of how race has
a biasing impact in the capital process.

Underestimating the Death Penalty Alternative:

Early CJP data showed that the capital jurors grossly underestimated how long
someone not sentenced to death would spend in prison, and the lower their wrong
estimates, the more likely they were to vote for death. In every state, most of the jurors
believed the defendants would be released before they were even eligible for parole,
even in the states that had Life Without Parole (LWOP) at the time of the interviews.
The United States Supreme Court cited some of this CJP research in Simmons v. South
Carolina where it held that if the alternative to death was LWOP and the prosecution
argued the defendant would be dangerous in the future, than the jury must be informed
that the defendant could not be paroled. Now all but one state provide LWOP, as does
New Jersey, for at least some capital offenses, and all but two require that the jury be
told parole is not an option. However, the early CJP data show that it is difficult to
convince jurors that the defendant really will not be released on parole.

In interviews with California jurors who were told that a life sentence meant the
defendant would not be paroled, some jurors said they simply did not believe what the
judge told them. One juror in a death case said he believed defendants usually get
released in fifteen years even though he observed that officially they say the sentence is:

Life imprisonment, but even though now it says without
possibility of parole, we were still concerned that some day
he'd get out on parole. We didn't want him out again at all.

Another juror who ultimately voted for death said:

I was undecided. I had a personal problem with the life
sentence, but then the judge explained to me that if he
gets a life sentence there was absolutely no chance that
he would get out. I thought he might get out. I still don’t trust anybody about it.

In Pennsylvania, which also had LWOP when the CJP interviews were done, 38.6% of the jurors who actually voted for death said they would have preferred life without parole if it had been an alternative, as indeed it was in the cases they decided. Jurors are influenced by memories of media accounts of murderers who have been released from prison, and do not realize that these may have been people sentenced under prior laws or people who had not been convicted of capital murder. It is very difficult to convince jurors that life really means life because of the widespread distrust of the criminal justice system.

**Negative Impact on Jurors:**

Serving on a capital jury is traumatic for the jurors. Our interviews confirmed findings from prior research showing that jurors found it very stressful to have to wrestle with whether another human being should live or die. Forty five percent of the jurors (534), talked about how emotionally upsetting they found the experience. More than one in four (327 jurors) described specific problems such as not being able to sleep, having nightmares, feeling paranoid, breaking down in tears, indigestion and vomiting, tension in their personal relationships, and feeling haunted by the experience. While a small number, 18 jurors, said the experience was exciting and that they enjoyed it, the majority of jurors said they did not want to serve on a capital case again.

Jurors reported feeling upset at different times and about different aspects of the experience. A relatively small number said they were upset during the trial but fine afterwards. Viewing the pictures shown during the trial and making the punishment decision were the primary causes of their stress. One of these jurors, a male juror in a death case, said:

> I equated that decision that I was having to make with the same crime he had done, he killed someone. Just because it’s legal doesn’t make it right. That’s the problem I had.

Other jurors reported breaking down immediately after the trial because they were upset from having to go through such an ordeal or relieved that it was over. Most of the jurors who reported that they were upset said that it impacted them long after the trial ended. Some jurors suffered from mental and emotional problems for weeks or months after the trial, while others reported that it left lasting changes on their relationships or lifestyle. One juror said that she and her fellow jurors called these problems after the trial the “post jury blues.”

The lasting impact involved several different themes. Like the juror I just quoted, many jurors were troubled by having had to decide whether the defendant should live, and some felt regret over their decision. Other jurors said they feared the defendant or retaliation from either the defendant’s family or the victim’s family. The failure of the system to give jurors enough information about the defendant’s background to make the right decision, or to provide jurors with counseling after their jury service upset other jurors. Another troubling aspect of the capital system is this stress it places on ordinary
citizens who must determine whether another person deserves to live or die.

Summary Statement:

Interviews with jurors who actually decided capital cases show that many jurors are not following the guidelines that the United States Supreme Court says are necessary to make the death penalty process constitutional, and that the experience is emotionally traumatic for many of them.
Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing

William J. Bowers* and Wanda D. Foglia**

In their classic 1966 study, The American Jury, Harry Kalven and Hans Zeisel found substantial evidence of arbitrariness in the sentencing of capital jurors. Six years later, in Furman v. Georgia, the U.S. Supreme Court ruled that the arbitrariness of capital sentencing rendered all existing capital statutes unconstitutional. States responded with new capital statutes intended to guide jurors in the exercise of their sentencing discretion, and in Gregg v. Georgia (1976), the Court held that “(o) their face these procedures seem to satisfy the concerns of Furman.” Despite the reforms inspired by Furman and approved in Gregg, research now demonstrates that jurors are not deciding who deserves the death penalty in the way the U. S. Supreme Court has held the constitution requires. These are the findings of the Capital Jury Project (CJP), which has interviewed some 1,201 jurors who actually made the life or death sentencing decision in 354 capital trials in 14 different states.

The American Jury was the first systematic effort to learn about jury decision making, albeit through the eyes of trial judges. The research strategy was to compare jury verdicts in criminal trials with how judges indicated they would have decided the cases. With information from judges on 3,576 criminal trials, Kalven and Zeisel sought to determine how often and why jury decisions departed from the verdicts judges would have rendered. They

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4 Id. at 198.

5 The Capital Jury Project started in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252. William J. Bowers initiated the CJP and has served as Principal Investigator.

6 A list of the publications reporting these findings can be found at http://www.cjp.neu.edu (visited December 9, 2002), which is periodically updated and includes the full text of some articles.
found that the judge and the jury agreed on a guilty verdict in about two-out-of-three cases (64%). In a third as many (22%) the judge and jury disagreed; in most of these instances the jury acquitted while the judge would have convicted (19% vs. 3%).\textsuperscript{7} According to the investigators' analyses of judges' accounts,\textsuperscript{8} roughly two-out-of-three disagreements were "marked by some jury response to values."\textsuperscript{9}

While The American Jury examined jury decisions in a wide variety of criminal cases,\textsuperscript{10} one chapter was devoted exclusively to the 111 capital cases in the sample. The findings in that chapter draw a sharp contrast between the determination of guilt in criminal trials and the determination of punishment in capital cases. In the capital cases, judge and jury seldom agreed on the death penalty; in fact, they disagreed more often than they agreed. In only 14 of the 111 capital cases (13%) did both judge and jury believe that the defendant deserved to die. In 21 cases (19%) one party would impose death and the other would not; the judge chose death over prison in 14 cases and the jury opted for death for 7 defendants. In other words, of the 35 cases in which at least one of the decision makers would impose death, the judge and jury were at odds about the defendant's fate half again as often as they were in agreement on the death penalty (21 vs. 14).\textsuperscript{11}

This failure of judges and juries to agree on the death penalty was enigmatic because of the difficulty in accounting for the difference. At the heart of the evidence of arbitrariness was the finding that many of the murder cases in which judge and jury disagreed "appear(ed) no less heinous than those in which they agree(d)."\textsuperscript{12} Relying on judges' explanations of jury decision making, Kalven and Zeisel found that it was not differences in the character of the crimes but in the value judgments involved in deciding whether a person deserves to die that seemed to account for the lack of agreement about which defendants deserved the death penalty. They surmised from judges' responses that deciding who should get the death penalty, a determination based on the ultimate value judgment, was "singularly agonizing."\textsuperscript{13} Kalven and Zeisel end their chapter on the death penalty with

\textsuperscript{7} Kalven & Zeisel, supra note 1, at 58. In the remaining 14% of the cases the judge and jury agreed that the defendant should be acquitted. Id.

\textsuperscript{8} In the two different surveys that were used, the judges answered questions probing reasons for why the jurors disagreed with them. Kalven and Zeisel analyzed the judges' responses to these questions, and reported patterns they detected from responses to other questions. Id. at 92. See id. at 527-34, Appendix E, for the Questionnaires.

\textsuperscript{9} Id. at 494-95.

\textsuperscript{10} Id. at 67, Table 17 (providing a breakdown of the crimes charged in the 3,576 criminal trials included in the sample, ranging from traffic offenses to murder).

\textsuperscript{11} Id. at 436.

\textsuperscript{12} Id. at 439.

\textsuperscript{13} Id. at 448.
the assertion that: "The discretionary use of the death penalty requires a
decision which no human should be called upon to make."17

Humans are, nonetheless, charged with making that decision in the forty
U.S. jurisdictions that currently have the death penalty.18 Since the Chicago
Jury Project, a body of federal and state law has evolved that purports to
guide jurors' death sentencing decisions. The CJP is the first national
study of jury decision making since the Chicago Jury Project. It deals exclusively
with decision making in capital cases, and is designed to assess the efficacy
of this new body of law in guiding jurors' exercise of sentencing discretion.
Interviews were conducted with capital jurors in fourteen states, chosen for
geographical diversity and for coverage of the different types of capital
statutes now in effect.19

The U.S. Supreme Court has provided a substantial body of law intended
to govern the decision of when to take a human life in the name of justice. In
Gregg v. Georgia,17 and its companion cases, the Court approved a two-
phase capital trial procedure in which the jury first decides guilt and later
decides punishment at a second, separate stage of the trial.18 Subsequent
thereeto the Court elaborated on aspects of the bifurcated approach. The Court
held in Wainwright v. Witt20 and Morgan v. Illinois21 that jurors must be will-
ing to give effect to both aggravating and mitigating evidence. In Lockett v.
Ohio21 the Court held that the law cannot limit what mitigating evidence a
jury can consider. In Mills v. Maryland22 and McKoy v. North Carolina23 the
Court made it clear that a juror can consider evidence he or she finds mitigat-
ing without the concurrence of other jurors. The principal that jurors must
never impose the death penalty without consideration of mitigation was
established in Roberts v. Louisiana24 and Woodson v. North Carolina,25
where the Court rejected mandatory capital statutes. Caldwell v. Missis-

14 Id. at 449.
15 Thirty-eight states plus the United States Government and United States
Military currently have the death penalty. See Death Penalty Information Center,
firstpage.html (visited August 12, 2002).
16 The objectives of the research and the sample design are discussed in more
detail infra at notes 32 to 34 and accompanying text.
18 Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); Proffitt
21 Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), reaff-
(1999).
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stipulated the importance of jurors appreciating their responsibility for determining the appropriate punishment. *Turner v. Murray* recognized the need to prevent the influence of conscious and unconscious racism in cases with black defendants and white victims. Finally, in *Simmons v. South Carolina* and *Shafer v. South Carolina* the Court attempted to prevent jurors from voting for death based on false assumptions about available non-death sentencing alternatives, requiring that the jury be told about the lack of parole eligibility under some circumstances. The CJP demonstrates that these rules are not working in practice.

In the following pages, we will briefly introduce the CJP and review seven different problems with the capital jury decision making process. We will describe how the CJP results replicate findings from prior studies and provide additional evidence of: (1) premature decision-making; (2) bias in jury selection; (3) failure to comprehend instructions; (4) erroneous beliefs that death is required; (5) evasion of responsibility for the punishment decision; (6) racial influence in juror decision making; and (7) underestimation of non-death penalty alternatives. The number of problems and the abundance of evidence limit the amount of detail that can be provided in this article, but additional information can be found in the references cited herein and in transcripts of courtroom testimony describing CJP findings and related research.

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This article deals with many of the same issues covered in William J. Bowers, et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in America’s Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (James R. Acker et al. eds., 2nd edition [forthcoming]) [hereinafter Bowers et al., Legal Fiction]. Here we self consciously present the issues from a legal perspective, in terms intended to communicate more directly to legally trained as compared to lay readers (and the referencing here conforms to conventions familiar to persons trained in law). In particular, the presentation of data here is typically broken down by state to permit comparisons that might reflect differences owing to statute, case law, or legal practice by jurisdiction.

60 The most exhaustive courtroom presentation of CJP data, as of this writing, can be found in the testimony of Wanda D. Foglia in support of the defense’s pre-trial challenges to the death penalty in Kansas v. Carr, Case No. CR2978 (2002). Contact Dr. Foglia for a copy of the transcript.
The Capital Jury Project

The CJP has collected a wealth of information about jury decision making from in-depth interviews with jurors who have actually served in capital trials around the nation. States were chosen for the study to represent the principal variations in capital sentencing statutes.\(^{32}\) Juror interviews were conducted in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

Within each state, researchers selected twenty to thirty capital trials to include both cases resulting in the death penalty and cases resulting in life or whatever alternative term of imprisonment applied under state law. Jurors were chosen randomly from those cases in an attempt to interview four jurors per trial.\(^{32}\) The questionnaire used for these in-depth interviews required an average of three-and-one-half hours to administer. It probed issues such as what assumptions jurors make when deciding the penalty, how and when they make their decision, what factors they considered, and their understanding of the jury instructions. Interviews were completed with 1,201 jurors from 354 trials in fourteen states.\(^{34}\)

Constitutional problems with the capital punishment process were found in every state in the study. This consistency indicates that the problems are fundamental, not specific to the laws or procedures of particular states. Additionally, the CJP results are consistent with evidence from previous studies using different methodologies, including surveys and mock juries. The CJP findings, based on interviews with jurors who actually sat through an entire capital case and decided a defendant’s sentence, cannot be dismissed with the argument that the context was artificial or the jurors’ experience was unrealistic.

\(^{32}\) The sample includes states with “threshold,” “balancing,” and “directed” statutory guidelines for sentencing discretion. It also includes states with “traditional” and “narrowing” definitions of capital murder and states in which the jury decisions are binding and those in which the judge currently can override the jury recommendations. Further details about the sampling procedure can be found in William I. Bowers, The Capital Jury Project: Rationale, Design, and a Preview of Early Findings, 70 Ind. L. J. 1043, 1077-79 (1995)[hereinafter Bowers, Preview].

\(^{33}\) Difficulties locating jurors or obtaining their consent resulted in fewer than four jurors being interviewed in some cases, and more than four jurors in others in order to obtain sufficient numbers or to get additional information about issues raised in earlier interviews.

\(^{34}\) Many of the issues discussed here have been addressed in three earlier publications based on the juror interviews available at the time: Bowers, Preview, supra note 32; William J. Bowers, et al., Foreclosed Impartiality in Capital Sentencing: Jurors’ Predispositions, Gull-Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476 (1998) [hereinafter Bowers et al., Foreclosed Impartiality]; and William J. Bowers, & Benjamin D. Steiner, Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing, 77 Texas L. Rev. 605 (1999) [hereinafter Bowers & Steiner, Death By Default]. In this article, findings and statistical tabulations first presented in these earlier publications have been updated utilizing the complete sample.
Premature Punishment Decision Making

Evidence of rampant premature decision making makes it clear that if anything can be done to ameliorate some of the constitutional flaws in the capital punishment process it would have to be done early in the proceedings, before jurors make up their minds about the penalty. In every jurisdiction with the death penalty, the proceeding is bifurcated into two phases so that jurors decide guilt in the first phase and, if the defendant is found guilty of a capital crime, they decide the sentence in the second phase. Requirements such as bifurcating the trial, allowing presentation of mitigation evidence during the sentencing phase, and the use of jury instructions aimed at guiding sentencing discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the penalty phase evidence or received the instructions on how they are supposed to make the punishment decision.

In the CJP interviews, jurors were asked what they thought the punishment should be at four different points in the proceedings: (1) after the guilt phase but before the sentencing phase, (2) after the sentencing instructions but before deliberations, (3) at first vote, and (4) at final vote. The results from 864 interviews in eleven of the CJP states were reported and discussed extensively by Bowers, Sandys, and Steiner in a 1998 article. Those results showed that approximately half the jurors indicated that they decided what the punishment should be before the sentencing phase had even begun.

Table 1 presents updated responses from 13 states to the question: "After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [defendant's name] should be given: a death sentence, a life sentence, [or were you] undecided?" Looking at the average for all thirteen states, the 49.2% of jurors who were premature decision makers consisted of 30.3% who had decided the penalty should be death and 18.9% who had decided the sentence should be life. Premature decision making is present in every state, and the percentage taking an early pro-death stance is

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86 Ring v. Arizona, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (U.S. 2002) held that statutes in Arizona, Colorado, Idaho, Montana, and Nebraska allowing judges to determine the sentence in capital trials are unconstitutional. In four other states, Florida, Alabama, Indiana, and Delaware, there is a second phase in which the jury decides the sentence, but its decision is only a recommendation and the judge makes the final determination. The rationale of Ring may be used to invalidate these statutory schemes as well, but that issue has yet to be decided by the U. S. Supreme Court.

87 Bowers, et al., Foreclosed Impartiality, supra note 34.

88 Louisiana is not included in breakdowns by state in any of the tables herein because there are too few interviews with Louisiana jurors (N=29) for reliable percentages. In all other participating states, interviews were completed with a sample of at least forty jurors from a minimum of ten capital trials.
within five points of the average in nine states. Virginia is the only state in which the percentage differs more than 10 points from the average, and its percentages are least reliable because it has the smallest sample size (n=45).

Table 1

<table>
<thead>
<tr>
<th>States</th>
<th>Death</th>
<th>Life</th>
<th>Undecided</th>
<th>No. of jurors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>21.2</td>
<td>32.7</td>
<td>46.2</td>
<td>52</td>
</tr>
<tr>
<td>California</td>
<td>26.1</td>
<td>16.2</td>
<td>57.7</td>
<td>142</td>
</tr>
<tr>
<td>Florida</td>
<td>24.8</td>
<td>23.1</td>
<td>52.1</td>
<td>117</td>
</tr>
<tr>
<td>Georgia</td>
<td>31.8</td>
<td>28.8</td>
<td>39.4</td>
<td>66</td>
</tr>
<tr>
<td>Indiana</td>
<td>31.3</td>
<td>17.7</td>
<td>51.0</td>
<td>96</td>
</tr>
<tr>
<td>Kentucky</td>
<td>34.3</td>
<td>23.1</td>
<td>42.6</td>
<td>108</td>
</tr>
<tr>
<td>Missouri</td>
<td>28.8</td>
<td>16.9</td>
<td>54.2</td>
<td>59</td>
</tr>
<tr>
<td>North Carolina</td>
<td>29.2</td>
<td>13.9</td>
<td>56.9</td>
<td>72</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>33.8</td>
<td>18.9</td>
<td>47.3</td>
<td>74</td>
</tr>
<tr>
<td>South Carolina</td>
<td>33.3</td>
<td>14.4</td>
<td>52.3</td>
<td>111</td>
</tr>
<tr>
<td>Tennessee</td>
<td>34.8</td>
<td>13.0</td>
<td>52.2</td>
<td>46</td>
</tr>
<tr>
<td>Texas</td>
<td>37.5</td>
<td>10.8</td>
<td>51.7</td>
<td>120</td>
</tr>
<tr>
<td>Virginia</td>
<td>17.8</td>
<td>31.1</td>
<td>51.1</td>
<td>45</td>
</tr>
<tr>
<td>All States</td>
<td>30.3%</td>
<td>18.9%</td>
<td>50.8%</td>
<td>1135</td>
</tr>
</tbody>
</table>

Answers to other questions indicate that these premature stances were not tentative conclusions. When jurors were asked how strongly they felt about their decision, 70.4% of those who had taken a premature stance for death indicated that they were "absolutely convinced." When the 27% who said "pretty sure" are included, nearly all (97.4%) indicated that they felt strongly about their early pro-death stance, leaving only 2.6% of those who took a premature stance for death indicating that they were "not too sure."**

Most of these early pro-death jurors (59.5%) never wavered from their initial stance for death when questioned at the three subsequent points in the process. Presenting mitigating evidence during the penalty phase cannot be very effective when so many jurors declare that they were already "absolutely convinced" that the defendant deserved death before they heard any mitigation evidence. Given the human proclivity to interpret information in a way that is consistent with what one already believes,** it is not surprising that most jurors never waver from their premature stance. Judging from juror comments, most of the 20.1% who changed their position from death

** Updating Bowers et al., Foreclosed Impartiality, supra note 34, at 1490, Table 2.

to life at the final vote did so to avoid a hung jury, not because they were persuaded by the mitigating evidence they were supposed to be considering.\footnote{Updating Bowers et al., Foreclosed Impartiality, supra note 34, at 1492, Table 3. For further evidence and discussion of jurors changing vote from death to life to avoid a hung jury, see Marla Sandys, Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Limus Test for Sentencing Guidelines, 70 Ind. L. J. 1183, 1196-97,1207. (1995).}

Finding that most jurors who prematurely decided the punishment should be death were absolutely convinced and never changed their minds suggests that they were reaching conclusions about what the punishment should be based on the guilt evidence, and that they had already closed their minds to mitigating evidence that would be presented in the sentencing phase. Answers to a question concerning how they made their decision support this suspicion.\footnote{The actual question was: “Some jurors feel that the decisions about guilt and punishment go together once they understand what happened and why; others feel these are separate decisions based on different considerations. Which comes closest to the approach you took?” Updating Bowers et al., Foreclosed Impartiality, supra note 34, at 1493, Table 4.} Jurors who took an early stance for death were over twice as likely as undecided jurors (40.9% vs. 19.1%) to admit they decided guilt and sentence at the same time and on the same grounds.\footnote{See infra notes 60 to 67 and accompanying text.}

Additional insight into the tendency to take an early stance for death comes from responses to questions about whether jurors considered death as an acceptable punishment for six different types of murder. As discussed at length later,\footnote{Updating Bowers et al., Foreclosed Impartiality, supra note 34, at 1506-07.} most of the jurors considered death to be the “only acceptable punishment” for three different types of murder, and nearly half did so for two additional types. The data show that people who almost certainly should have been disqualified as automatic death penalty (ADP) jurors were nevertheless seated on capital juries. These findings are relevant here because jurors who think death is the only acceptable punishment naturally would be inclined to decide the sentence should be death as soon as they heard the facts of the crime during the guilt phase of the trial. As expected, prematurely choosing death and considering death the only acceptable alternative were associated. Among those who believe death is the only acceptable punishment for all of these kinds of killings, early pro-death stances are five times as common (52.2% vs. 10%) as among those who said it was the only acceptable punishment for none of these offenses.\footnote{Updating Bowers et al., Foreclosed Impartiality, supra note 34, at 1506-07.} In view of the large percentages that thought only death was acceptable for various crimes that would include most types of capital cases, it is not surprising that a substantial percentage decided the penalty should be death after hearing about the crime. These results suggest that many jurors come to the trial
predisposed to vote for death, and hence inclined to decide the sentence before they even hear the instructions or evidence of mitigation they are supposed to consider.

These early decisions that the defendant deserves death violate the holdings of Gregg, Lockett, Eddings, Penry and Morgan. Jurors who decide the sentence should be death before the sentencing phase even begins cannot possibly be heeding the guided discretion mandated by Gregg. They also cannot be fully considering the mitigating evidence that will not be presented until the sentencing phase of the trial as Lockett, Eddings, Penry, and Morgan mandate. Responses of early pro-life jurors were somewhat similar to early pro-death jurors, but they have not been given as much attention because their premature stance does not present the same constitutional problems. Lockett and its progeny indicate that any relevant evidence, including what is presented at the guilt phase, can be considered as mitigating against a sentence of death.

Sandy's analysis of CJP interviews from Kentucky and Bentele and Bowers' examination of jurors' narrative responses from death cases in six CJP states provide further evidence of early decisionmaking. Interviews with capital jurors that were not part of the CJP also confirm that prematurely deciding the defendant deserves death is a pervasive problem. According to Costanzo and Costanzo, 26% of Oregon jurors interviewed said that they did not need to hear the evidence at the penalty phase because after hearing about the crime they had already decided the defendant deserved to die. When Geimer and Amsterdam tried to determine the operative factors that actually influenced those who voted for death in their early study of capital jurors in Florida, they found that most jurors relied on factors that made the

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46 Because jurors were asked their opinions about the appropriate punishment after the trials, it is possible that these views were a result of their experience as capital jurors rather than any predispositions they brought to the trial. In Bowers et al., Foreclosed Impartiality, supra note 34, the authors address this possibility in Appendix A where they show that views on death as the only acceptable punishment were more strongly associated with early stands on punishment than with the position jurors took later in the proceedings. If views regarding acceptable punishment were a result of jurors' experience the association should have become stronger rather than weaker as the trial progressed.

47 Compared to early pro-death jurors, early pro-life jurors were a little less likely to be absolutely convinced of their stance (70.4 vs. 57.7%) and a little less likely to say they made their guilt and punishment decisions on the same bases (40.9 vs. 30.0%). Updating Bowers et al., Foreclosed Impartiality, supra note 34, at 1490-93.

48 Sandys, supra note 40; see also Ursula Bentele & William J. Bowers, How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse, 66 Brooklyn L. Rev. 1011 (2001) [hereinafter Bentele & Bowers, No Excuse].

sentencing phase irrelevant.\textsuperscript{49} Sixty four percent said that the manner of killing influenced their decision and 54\% thought that death was the mandatory or presumed penalty once the defendant was found guilty of first-degree murder.\textsuperscript{60}

Craig Haney has identified aspects of the capital trial process he calls “structural aggravation” that make jurors more likely to prematurely decide that the penalty should be death and close their minds to mitigating evidence.\textsuperscript{61} He observed that because the often shocking guilt phase evidence comes first it forges a powerful and persistent picture of aggravation that resists alteration. After days, weeks, or even months of hearing the defendant dehumanized and described as deviant, different, and dangerous, “jurors’ attitudes and impressions have crystallized and rigidified” before any attempt is made to humanize the defendant in the punishment phase.\textsuperscript{62} He also describes how widespread lack of understanding of the social causes of crime and the lives of the typical capital defendant leaves jurors predisposed to punish harshly.\textsuperscript{63}

\textbf{Bias in Jury Selection}

Jury selection procedures at the outset of a capital trial yield a jury that is more inclined to impose the death penalty than a representative group of citizens.\textsuperscript{64} This pro-death inclination of capital juries can be built into the standards for jury service as it was under \textit{Witherspoon v. Illinois} (1968) or it can be the product of the misapplication of neutral standards as it has been since \textit{Wainwright v. Witt} (1985).\textsuperscript{65} The faulty application of jury selection standards yields a disproportionately guilt-prone and death-prone jury in two

\begin{itemize}
\item \textsuperscript{50} Id. at 40, Table 3.
\item \textsuperscript{62} Id. at 1456.
\item \textsuperscript{63} Id. at 1457.
\item \textsuperscript{64} For a recent review of jury selection in capital cases see Marla Sandys & Scott McClelland, \textit{Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality}, in America’s Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (James R. Acker et al. eds., 2nd ed.) (forthcoming).
\item \textsuperscript{65} Witherspoon v. Illinois, 391 U.S. 510 (1968) established a two-prong standard aimed at ensuring that a potential juror’s opposition to the death penalty would not interfere with his or her ability to apply the law. Potential jurors could be excluded if they “made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.” Id. at 569-10 n.21. Because the \textit{Witherspoon} standard only eliminated those at one end of the spectrum of public opinion, it would naturally result in a jury that was more conviction/punishment prone than the general population. Sources cited in
\end{itemize}
ways: (1) it "over-excludes" by barring jurors who would be able to impose the death penalty under appropriate circumstances despite reservations, and (2) it "under-excludes" by failing to dismiss "automatic death penalty" (ADP) jurors who would not give effect to mitigation in making their sentencing decisions. The consequence is that those on the more prosecution-oriented end of the public opinion spectrum are over-represented on capital juries relative to both the population at large and to correctly selected capital juries.88

Evidence of over-exclusion comes from mock jury studies that show some potential jurors would be excluded from capital juries because they initially expressed opposition to the death penalty in the abstract, even though they should not have been excluded because they indicated that they would actually impose death in some cases when subsequently given specific hypothetical crime scenarios.89 There is a long line of evidence demonstrating that people who would be excluded are less prosecution oriented, less

note 88 infra discuss research that has demonstrated this biasing effect. The standard subsequently enunciated in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) was worded neutrally and could thus exclude both those whose extreme opposition or support would prevent them from following the law. Probably in part because of the earlier standard's emphasis on making sure jurors were capable of imposing death, or "death qualified," the Court had to return to this issue in Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). In Morgan, the Court explained that Witt also required the exclusion of jurors who favored the death penalty so strongly that they would automatically impose it in a capital case without regard to mitigating evidence. Thus jurors have to be "life qualified" as well.

88 A correct application of jury selection standards would lead to a more death-prone jury than would a random selection of jurors from the population if more life-prone than death-prone jurors were properly excludable. This disproportion would be compounded if death-prone jurors were under-excluded and life-prone jurors were over-excluded owing to the misapplication of the standards for capital jury service.

89 Robert J. Robinson, What Does "Unwilling" to Impose the Death Penalty Mean Anyway? Another Look at Excludable Jurors, 17 Law & Hum. Behav. 471 (1993) and Michele Cox & Sarah Tanford, An Alternative Method of Capital Jury Selection, 13 Law & Hum. Behav. 167 (1989) found that 60% and 65%, respectively, of college students surveyed that answered questions that would make them excludable because of their expressed opposition to the death penalty actually would impose the death penalty in response to some of the hypothetical crime scenarios they were subsequently given. The authors argue that saying you are opposed to the death penalty in the abstract is different from being willing to apply it in specific situations, and as long as jurors would vote for death under some circumstances they should not be excluded. Both studies used the standard from Witherspoon because it is easier to operationalize, but the problem of over-exclusion is likely to be worse under the current standard established in Wainwright because it tends to exclude even more people than the more stringent Witherspoon standard.
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punitive, and more supportive of due process as opposed to crime control than those who ultimately serve as capital jurors.\textsuperscript{58}

Prior research,\textsuperscript{60} as well as CJP interviews with former capital jurors, provide evidence of under-exclusion. Jurors' responses to a question\textsuperscript{60} on what they thought was the appropriate punishment for six different types of murder reveal that many of the jurors who survived death qualification and decided capital cases probably should have been excluded as ADP jurors. Many of those who become capital jurors said they believe death is "the only acceptable punishment" for the kinds of murder most commonly tried as capital offenses. Over half of the CJP jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim is killed (53.7%). Close to half could accept only death as punishment for the killing of a police officer or prison guard (48.9%), or a murder committed by a drug dealer (46.2%). A quarter of the jurors thought only death was acceptable as punishment for a killing committed during another crime (24.2%), i.e., a felony murder. Nearly three out of ten jurors (29.1%) saw death as the only acceptable punishment for all of these crimes, except felony murder; 17.1% saw death as the only acceptable punishment for all six including felony murder.

In stark contrast, very few of these jurors believed that the death penalty was unacceptable as punishment for these crimes ("unacceptable death penalty" or UDPs). For the first five offenses, between 2.3% and 3.4% said death was unacceptable punishment; for felony murder the percent saying unacceptable rose to 6.9%; doubt about the defendant's intention to kill may have caused a few more jurors to reject the death penalty for felony murder. Quite clearly, the jury selection process eliminated nearly all persons who thought the death penalty was unacceptable as punishment for these crimes.

\textsuperscript{58} Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980) discusses much of the social science evidence of conviction/punishment prone capital juries that was subsequently rejected by the Supreme Court in Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). Examples of more recent research that uses the Witt standard and addresses some of the issues raised by the court opinions are discussed in Sandys & McClelland, supra note 54.


The actual question was: "Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes?" "Murder by someone previously convicted of murder," "A planned, premeditated murder," "Murders in which more than one victim is killed," "Killing of a police officer or prison guard," "Murder by a drug dealer," and "A killing that occurs during another crime."
and failed to remove a great many who believed death was the only acceptable punishment for these offenses.\footnote{The vast difference between the “unacceptables” (UDP)s and the “only acceptables” (ADP)s among capital jurors may reflect a far greater difficulty of identifying ADPsis than UDPsis at voir dire. The UDPs’ opposition to the death penalty may often be an unconditional matter of moral conscience, one that is self-conscious and easy to detect in voir dire questioning. The ADPs’ position may more often be a matter of personal conviction grounded in the particulars of the specific kind of crime, and free of any conscientious objection to the alternative, a life sentence. Without having a clear understanding of what constitutes mitigation or even what the term means, and without any prior experience in making such a decision, ADPs may be unlikely to believe or say that they would not be able to follow the judge’s instructions, especially given the presumption of many jurors that voir dire is basically a test of whether they can vote for a death sentence. For a further discussion of the difficulties in identifying ADP prospective jurors, see Sandys & McClelland, supra note 54.}

Table 2

Percentages of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State

<table>
<thead>
<tr>
<th>States</th>
<th>By defendant with prior murder conviction</th>
<th>Planned premeditated murder</th>
<th>Murder with multiple victims</th>
<th>Killing police or prison guard</th>
<th>Murder by drug dealer</th>
<th>Murder during another crime</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>66.7%</td>
<td>54.4%</td>
<td>57.9%</td>
<td>37.5%</td>
<td>46.4%</td>
<td>36.8%</td>
</tr>
<tr>
<td>California</td>
<td>58.6%</td>
<td>41.4%</td>
<td>41.1%</td>
<td>41.4%</td>
<td>33.6%</td>
<td>17.8%</td>
</tr>
<tr>
<td>Florida</td>
<td>77.6%</td>
<td>64.1%</td>
<td>62.1%</td>
<td>51.3%</td>
<td>52.6%</td>
<td>19.7%</td>
</tr>
<tr>
<td>Georgia</td>
<td>70.8%</td>
<td>54.8%</td>
<td>46.6%</td>
<td>51.4%</td>
<td>47.2%</td>
<td>23.6%</td>
</tr>
<tr>
<td>Indiana</td>
<td>74.7%</td>
<td>54.5%</td>
<td>55.6%</td>
<td>44.4%</td>
<td>52.5%</td>
<td>23.2%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>71.2%</td>
<td>56.7%</td>
<td>50.5%</td>
<td>46.6%</td>
<td>48.5%</td>
<td>18.1%</td>
</tr>
<tr>
<td>Missouri</td>
<td>75.4%</td>
<td>54.1%</td>
<td>52.5%</td>
<td>45.9%</td>
<td>38.3%</td>
<td>19.7%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>73.8%</td>
<td>68.8%</td>
<td>55.0%</td>
<td>58.3%</td>
<td>45.0%</td>
<td>21.5%</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>71.8%</td>
<td>65.4%</td>
<td>62.8%</td>
<td>55.1%</td>
<td>47.4%</td>
<td>28.2%</td>
</tr>
<tr>
<td>South Carolina</td>
<td>75.3%</td>
<td>61.4%</td>
<td>54.4%</td>
<td>43.0%</td>
<td>49.1%</td>
<td>26.5%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>78.3%</td>
<td>67.4%</td>
<td>58.7%</td>
<td>54.3%</td>
<td>43.5%</td>
<td>30.4%</td>
</tr>
<tr>
<td>Texas</td>
<td>76.9%</td>
<td>57.3%</td>
<td>59.5%</td>
<td>58.6%</td>
<td>48.7%</td>
<td>35.3%</td>
</tr>
<tr>
<td>Virginia</td>
<td>55.6%</td>
<td>46.7%</td>
<td>40.0%</td>
<td>48.9%</td>
<td>42.2%</td>
<td>15.6%</td>
</tr>
<tr>
<td>All States</td>
<td>71.6%</td>
<td>57.1%</td>
<td>53.7%</td>
<td>48.9%</td>
<td>46.2%</td>
<td>24.2%</td>
</tr>
</tbody>
</table>

* The number of subjects answering each question varied slightly, and the number (\(N\)) for each state is the lowest number of subjects answering any of the questions.

Is this failure to detect and remove jurors who see the death penalty as the only acceptable punishment for various kinds of potentially capital murder a failing of some states and not others? Or, like premature punishment decision making, is it a widely pervasive unrelieved failing of the capital punishment system? The data in Table 2 address this question with the
breakdown of jurors' "only acceptable" responses for the six potentially capital crimes by state.

Again, as in the case of premature decision making, there is relatively little variation by state. Seven of the thirteen states are within ten points of the sample-wide percentage saying death is the only acceptable punishment on each of the six offenses. Three states, North Carolina, Tennessee, and Texas, depart from the sample-wide figure by as much as ten points on only one type of crime. Alabama is above the sample wide percentage on one crime and below on another by ten points. California and Virginia are the only two states that show consistent departures from the sample-wide figures. Virginia is lower on three of the six crimes; however, as in the case of premature decision-making, the small Virginia sample makes these differences relatively unreliable. California jurors are ten points below the "only acceptable" level for all states on four of the six crimes, suggesting a greater effort to detect and remove ADP jurors, than elsewhere. In fact, judicial decisions in California noted the importance of life qualification before it became effective in other states. Yet the four-to-six-of—ten California jurors who see death as the only acceptable punishment for most of the potentially capital crimes means that despite California's earlier commitment to life qualification, many ADP jurors continue to serve on California juries.

Jurors who believed death is the only acceptable punishment could not have given meaningful consideration to the mitigating evidence, as the law mandates. Wainwright v. Witt held that a potential juror must be excluded if his or her strong feelings about the death penalty would "prevent or substantially impair the performance of his (sic) duties as a juror in accordance with his instructions and his oath . . ." This standard was neutrally worded and could be used as a basis for excluding individuals at both ends of the opinion spectrum, both those who would never impose death and those who would always impose death for a given offense. Morgan v. Illinois made it unmistakably clear that excluding ADPs was constitutionally required "under the standard enunciated in Witt." In Morgan the court reiterated this view, which it had announced previously in Ross v. Oklahoma.

The Morgan Court reasoned that people who would automatically vote for death once the defendant was found guilty should be excluded as ADP jurors because they will fail to give the constitutionally required good faith consideration to the aggravating and mitigating circumstances.

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

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88 See Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P. 2d 1301 (1980).
STILL SINGULARLY AGONIZING

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. 86

The CJP data make it clear that many such jurors are surviving jury selection and deciding capital cases, and that their predisposition to see death as the only acceptable punishment makes them more likely to take a premature pro-death stand. 87

The CJP indicates further that the jury qualification process itself creates a bias toward death. Not only does jury selection over-exclude and under-exclude, thus leaving a jury that is disproportionately pro-conviction and pro-punishment owing to faults in the filtering process, as discussed previously, but there also is evidence that the questioning during voir dire itself prejudices jurors toward finding the defendant guilty and imposing a death sentence.

Among the 1200 jurors from 14 states interviewed by the CJP, approximately 1 in 10 were both conscious of and willing to admit the prejudicial impact on them of the jury selection process. The jurors were asked outright whether the voir dire questions made them think the defendant was guilty and should be sentenced to death: Of these jurors, 11.3% said that the voir dire questions made them think the defendant “must be” or “probably was” guilty. Almost as many, 9.2%, indicated that the voir dire questions made them think that the most appropriate punishment “must be” or “probably was” the death penalty. These pro-conviction and pro-death biases outstrip contrary influences by a 10-1 margin; that is, 0.6% and 0.9%, respectively gave the corresponding “must not be” or “probably was not” responses. Although most jurors claimed not to be prejudiced by the voir dire questioning, many of them may have experienced such an influence but were not conscious of it. In addition, among those who were conscious of such an influence, a good many may have been unwilling to acknowledge it in response to these few quite simple questions.

An experiment comparing mock jurors who had been exposed to death qualifying voir dire with those not so exposed showed that the former were more likely to think the defendant was guilty and to choose a death sentence as opposed to life imprisonment. 88 A meta-analysis of 14 studies on how death penalty attitudes affect the probability of conviction showed greater effects when the subjects were exposed to death qualification, which also sug-

86 Morgan, 504 U.S. at 729.
87 For evidence of the link between the predisposition to see death as the only acceptable punishment and the tendency to take a stand on the defendant’s punishment at the guilt stage of the trial, see supra note 43 to 45 and accompanying text.
suggests that the process itself creates a bias. Haney argues that hearing all those questions about the death penalty, and seeing the dismissal from service of other potential jurors who express grave doubts, seems to send the message that the judge and the lawyers - the authority figures in the courtroom - think this defendant is guilty and deserves death. He emphasizes that this is especially problematic because jury selection occurs at the very beginning of the process and thus creates a powerful first impression.

In Lockhart v. McCree the Court was concerned that the subjects in previous research had not had the experience of being jurors in actual capital trials. The CJP addresses this concern, however, by interviewing people who served on actual death penalty cases. The responses of the CJP jurors confirm, as mock jury studies found, that the jury selection process itself tends to convey the impression that the defendant is guilty and that death is the appropriate punishment. What is more, by examining the beliefs of persons who were actually selected and served as capital jurors, it also shows that jury selection fails to exclude persons who see the death penalty as the only acceptable punishment for the kinds of killings likely to be tried capitaly, and that this failure contributes to the tendency of jurors to make premature punishment decisions contrary to the constitutional requirement set forth in Morgan.

Failure to Understand Instructions

The assumption that newly formulated post-Furman capital statutes will guide jurors' exercise of discretion and thus remedy the arbitrariness condemned in Furman v. Georgia was the key to the Gregg v. Georgia holding that the death penalty could be constitutional. Yet, research shows that many jurors do not understand the jury instructions that are supposed to guide their discretion. Studies using mock juries and survey methods repeatedly show that individuals do not understand death penalty instructions. It may be argued, however, that in a real capital trial the jurors are educated by their lengthy experience in court, and put more effort into understanding sentencing instructions when they are in the position of actually deciding a defendant's fate. The CJP data answer this argument by revealing how jurors in actual capital cases understood their sentencing instructions. They show that a great many people who actually served as capital jurors did not understand the instructions they were supposed to be following.

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73 Haney, supra note 68, at 128-29.


Jury instructions vary from state to state owing to differences in capital statutes. Most states, including 8 of the 14 CJP states, use "balancing" statutes that require jurors to determine that aggravating factors outweigh mitigating factors to return a death verdict. Four of the CJP states represent an alternative approach reflected in what are commonly called "threshold" statutes. Under these statutes, jurors must find at least one aggravating factor and must consider mitigating evidence. They are then free to decide whether a death sentence is warranted without further guidance. Two CJP states use "directed" statutes that require all jurors to answer specific questions in the affirmative before they can impose the death penalty.

Statutes also differ in what factors may be considered in aggravation, when unanimity is required, and what standards of proof apply. Different treatment for aggravating and mitigating circumstances is required by U.S. Supreme Court caselaw and state statutes.

CJP jurors were asked three questions about aggravating factors and three about mitigating factors designed to learn whether jurors understood the way, and particularly differences in the way, they were supposed to approach aggravating and mitigating evidence. The questions asked about (1) restrictions on the specific factors jurors could consider, (2) the applicable standard of proof, and (3) whether unanimity was required before a factor could be considered. The wording of the questions was identical except for whether they referred to mitigating or aggravating evidence. The responses to the three questions on mitigation and the one on aggravation where the law requires uniform treatment in every state are summarized in Table 3.

Mitigating Evidence. The U.S. Supreme Court has held capital statutes cannot limit the mitigating factors that jurors may consider and cannot require unanimity for findings of mitigation. The CJP data show, however, that close to half of those who served as capital jurors failed to realize that they were allowed to consider mitigating factors that were not listed in the statute. Overall, 44.6% failed to understand that they were allowed to consider any mitigating evidence. Moreover, this failure is relatively uniform by state. In 11 of the 13 states the percentage of jurors failing to understand that they could consider any relevant evidence that they believed was

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73 The eight CJP states with balancing statutes are California, Louisiana, North Carolina, Pennsylvania, and Tennessee, where the jury decides the sentence; and Alabama, Florida, and Indiana, where the jury makes a recommendation but the judge decides the sentence. See Bowers, Preview, supra note 32, for additional details.

74 The CJP states with "threshold" statutes are Georgia, Kentucky, South Carolina, and Missouri. See id. for additional details.

75 Texas and Virginia are the two CJP states that require jurors to answer specific questions in the affirmative before imposing the death penalty. The Virginia statute also lists mitigating factors that the jurors are instructed to consider before deciding the penalty. See Bowers, Preview, supra note 32, for additional details.


mitigating is less than 10 percentage points from the figure for all states; in Alabama, it barely exceeds ten points. The two greatest departures from this uniformity are a low of 24.2% in California and a high of 58.7% in Pennsylvania, differences of 20.4 and 14.1 points, respectively, from the overall figure.

Table 3

Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

<table>
<thead>
<tr>
<th>States</th>
<th>Could consider any mitigating evidence</th>
<th>Need not be unanimous on mitigating evidence</th>
<th>Need not find mitigation beyond reas. doubt</th>
<th>Must find aggravation beyond reas. doubt</th>
<th>N*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>54.7%</td>
<td>55.8%</td>
<td>53.8%</td>
<td>40.0%</td>
<td>52</td>
</tr>
<tr>
<td>California</td>
<td>24.2%</td>
<td>56.4%</td>
<td>37.6%</td>
<td>41.7%</td>
<td>149</td>
</tr>
<tr>
<td>Florida</td>
<td>49.6%</td>
<td>36.8%</td>
<td>48.7%</td>
<td>27.4%</td>
<td>117</td>
</tr>
<tr>
<td>Georgia</td>
<td>40.5%</td>
<td>89.0%</td>
<td>62.2%</td>
<td>21.6%</td>
<td>73</td>
</tr>
<tr>
<td>Indiana</td>
<td>52.6%</td>
<td>71.4%</td>
<td>58.2%</td>
<td>26.8%</td>
<td>97</td>
</tr>
<tr>
<td>Kentucky</td>
<td>45.9%</td>
<td>83.5%</td>
<td>61.8%</td>
<td>15.6%</td>
<td>109</td>
</tr>
<tr>
<td>Missouri</td>
<td>36.8%</td>
<td>65.5%</td>
<td>34.5%</td>
<td>48.3%</td>
<td>57</td>
</tr>
<tr>
<td>North Carolina</td>
<td>38.7%</td>
<td>51.2%</td>
<td>43.0%</td>
<td>30.0%</td>
<td>79</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>58.7%</td>
<td>68.0%</td>
<td>32.0%</td>
<td>41.9%</td>
<td>74</td>
</tr>
<tr>
<td>South Carolina</td>
<td>51.8%</td>
<td>78.9%</td>
<td>48.7%</td>
<td>21.9%</td>
<td>113</td>
</tr>
<tr>
<td>Tennessee</td>
<td>41.3%</td>
<td>71.7%</td>
<td>46.7%</td>
<td>20.5%</td>
<td>44</td>
</tr>
<tr>
<td>Texas</td>
<td>39.6%</td>
<td>72.9%</td>
<td>66.0%</td>
<td>18.7%</td>
<td>47**</td>
</tr>
<tr>
<td>Virginia</td>
<td>53.3%</td>
<td>77.3%</td>
<td>51.2%</td>
<td>40.0%</td>
<td>43</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>All States</th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Could consider any</td>
<td>Need not be unanimous on</td>
<td>Need not find mitigation</td>
<td>Must find</td>
</tr>
<tr>
<td></td>
<td></td>
<td>mitigating evidence</td>
<td>mitigating evidence</td>
<td>beyond reas. doubt</td>
<td>aggravation</td>
</tr>
<tr>
<td></td>
<td>44.6%</td>
<td>66.5%</td>
<td>49.2%</td>
<td>29.9%</td>
<td>beyond reas. doubt</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1185</td>
</tr>
</tbody>
</table>

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

** The number of Texas jurors is reduced in this table because these two questions were replaced with others while the interviewing in Texas was underway.

With regard to unanimity about mitigation, most jurors did not realize that they could consider any factor in mitigation that they personally believed to be proven regardless of whether other jurors agreed. Table 3 shows that two-thirds (66.5%) of the jurors in all 14 states failed to realize that unanimity was not required for findings of mitigation. Again, the misunderstanding was evident in every state, but the variation between and among states was far wider than in the case of what factors could be considered as mitigating. Jurors' responses were within ten points of the overall figure in only five states, more than ten points above in four states and more than ten points
below in four states. They ranged from a low of 36.8% in Florida to a high of 89% in Georgia.

The Supreme Court has not ruled on the burden of persuasion or the standard of proof applicable to mitigating evidence, and most state statutes do not address these issues. While no jurisdiction requires the defendant to prove mitigation beyond a reasonable doubt, the CJP data reveal that almost half of all CJP jurors (49.2%) erroneously assumed that this heightened standard of proof was applicable. This mistaken assumption is more uniform by state than the one that unanimity is required for findings of mitigation but less consistent than the misunderstanding that the scope of mitigation evidence is limited by statute. Jurors in 7 of the 13 states are within 10 points of the figure for all states; only Pennsylvania at 32% and Texas at 66% are more than 15 points from the sample-wide figure.

In two of the CJP states, jury instructions explicitly articulate a standard of proof the defendant must meet to establish the existence of mitigating factors. Pennsylvania and North Carolina require that mitigation be proven by a preponderance of the evidence. The CJP data show that a substantial number of jurors in these two states did not know the standard, even though it is explicitly articulated in the pattern jury instructions of both states. The percentage of jurors mistakenly assuming the beyond a reason-

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78 The low percentages in Florida, and to a lesser extent in Alabama, are probably attributable to the fact that they are the two CJP states that do not require unanimity for a jury recommendation of death. Jurors in other states are subject to the widely known unanimity requirement for guilt and sentencing decisions, which probably makes them more likely to assume it applies to mitigating evidence as well.


81 Pennsylvania Death Penalty, Instructions Before Hearing, 15.2502E (Crim), Section (2) (“Aggravating circumstances must be proven by the Commonwealth beyond a reasonable doubt while mitigating circumstances must be proven by the defendant by a preponderance of the evidence, that is, by the greater weight of the evidence.”); Death Penalty, Process of Decision and Verdict Slip, 15.2502H (Crim), Section (3)(“Remember, the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt while the defendant only has to prove any mitigating circumstance by a preponderance of the evidence.”).

82 North Carolina Pattern Instructions -Crim. Section 150.10, at 27(“The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you -not beyond a reasonable, but simply satisfy you -that any mitigating circumstance exists. A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors.”). As James Lugnibuhl & Julie Howe, Discretion in Capital Sentencing Instructions: Guided or Misguided?, 70 Ind. L.J. 1161 (1995) points out, although these instructions appear clear on their face, they occur two-thirds of the way through lengthy instructions in one paragraph, and the difference between how to handle aggravation and mitigation evidence is not emphasized.
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able doubt standard, though relatively low compared to the other states, is nearly one third or more: 32% in Pennsylvania and 43% in North Carolina.

Aggravating Evidence. Most states with the death penalty have a statutory list of aggravating factors, and the Supreme Court has ruled that the constitution requires the jury to find at least one of the factors to impose the death penalty. In reaching its punishment decision, the jury is not constitutionally barred from considering other aggravating factors not designated in the state statute. Statutes in effect when the CJP data were collected in Pennsylvania and North Carolina did, however, limit jurors to considering only factors on the statutory list as a basis for the death penalty. Yet, even when the instructions explicitly limit the jurors to aggravating circumstances delineated in the statute, most jurors did not realize that they were only to consider enumerated factors. In Pennsylvania, 63.5% of the jurors failed to realize that they were limited to the statutory list of aggravating circumstances, and in North Carolina the percentage incorrect was 50.6%.

Although the Supreme Court has not ruled on whether unanimity is required for aggravating circumstances, Pennsylvania and North Carolina do have explicit language in their statutes requiring unanimity. Although most of the jurors realized unanimity was required for findings of aggravation in these two states, a substantial minority did not understand the statutory mandates. The percentage failing to understand the unanimity requirement was 17.8% in Pennsylvania and 22.2% in North Carolina.

The capital statutes of most states explicitly require that aggravating circumstances be proven beyond a reasonable doubt, but in five states the statutes list aggravating factors for the jury to consider without specifying the required standard of proof. Florida is the only CJP state in which the statute completely neglects to address the standard of proof for the factors.

84 Id. at 878-79.
86 Id.
87 James R. Acker and C.S. Lanier, Capital Murder From Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death, 29 Crim. Law Bull. 291 (1993) reports that five states (Arizona, Connecticut, Florida, Montana, and Nebraska) have statutes that do not specify a burden of proof for aggravating circumstances. However, Acker and Lanier point out that caselaw may interpret the statute to require proof beyond a reasonable doubt, as in State v. Joubert, 224 Neb. 411, 399 N.W.2d 237, 247 (1986). The Supreme Court has not ruled on the issue, but the rationales of In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) and Ring v. Arizona, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (U.S. 2002) could be used as a basis for arguing that proof beyond a reasonable doubt is constitutionally required for aggravating factors. Acker and Lanier explain the argument based on In re Winship. Acker & Lanier, supra, at 310 n.78. Ring held that aggravating factors were the functional equivalent of an element of a greater offense and thus the Sixth Amendment right to a jury applied. Treating aggravating factors...
STILL SINGULARLY AGONIZING

upon which a death sentence may be based. One CJP state, California, does not distinguish between aggravating and mitigating factors, but merely gives jurors a list of factors to consider. Although caselaw requires a heightened standard of proof when other crimes are used as aggravating factors, there is no standard of proof for establishing other aggravating circumstances in California. In the two CJP states with directed statutes, Texas and Virginia, the specific issues the jurors are directed to address are analogous to aggravating circumstances in that they serve as the basis for a death sentence, and the prosecution must prove them beyond a reasonable doubt.

Table 3 shows that overall 29.9% of the jurors did not think they had to find aggravation beyond a reasonable doubt. Seven of the states were within ten points of this figure and two more barely exceeded a ten point difference. Missouri at 48.3% is the greatest departure from the figure for all states; no other differences are as great as 15 points. The percentage not understanding the standard is substantial whether it is explicitly required by statute, as it is in 12 of the CJP states, or the statute is silent on the issue, as in Florida and California.

The misunderstandings reflected in these incorrect responses on the questions regarding how to handle mitigating and aggravating evidence all make a death sentence more likely. It is more difficult to find mitigating evidence than the law contemplates when jurors think they are limited to enumerated factors, must be unanimous, and need to be satisfied beyond a reasonable doubt. The CJP data show that nearly half (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to consider any mitigating evidence. Two-thirds (66.5%) failed to realize they did not have to be unanimous on findings of mitigation. Nearly half (49.2%) of the jurors incorrectly thought they had to be convinced beyond a reasonable doubt on findings of mitigation. Misunderstandings were not as severe regarding aggravation, but a substantial portion of jurors did not understand the protections for the defendant that state statutes attempt to provide. In states that limited jurors to enumerated aggravating factors and required unanimity for aggravation, most failed to realize they were confined to the list and a substantial minority did not realize unanimity was required. Even when the statutes of most states explicitly required proof beyond a reasonable doubt for findings of aggravation over one quarter (29.9%) of the jurors failed to realize the higher standard of proof applied. The constitutional mandate of Gregg and companion cases designed to guide jurors’ exercise of sentencing discretion is not being satisfied when jurors do not understand the guidance.

like elements of an offense suggests that the beyond a reasonable doubt standard should apply.

88 One author explains that People v. Davenport, 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861 (1985) establishes the heightened standard of proof for other crimes in California and that 33 of 39, or 84.6%, of the jurisdictions with capital punishment require that aggravating factors be proven beyond a reasonable doubt. Palmer, supra note 80, at 76-7.
Erroneous Beliefs that Death is Required

Beyond the foregoing bases for confusion, there is another way in which jurors fail to understand their responsibility for the punishment decision. A substantial number of jurors wrongly believed that if certain aggravators were proven the law required them to impose the death penalty. The Supreme Court made it clear in Woodson v. North Carolina that no state can require the death penalty solely on the grounds that specific aggravating circumstances have been established. It held that the constitution requires that the jurors always be allowed to consider mitigating factors. Yet, half of the jurors believed the death penalty was required if either of two commonly found aggravating circumstances were established.

The CIP jurors were asked whether the evidence in their case established that the defendant’s crime was “heinous, vile or depraved” and whether the defendant would be “dangerous in the future.” For each of these questions, virtually four-of-five jurors answered “yes” (81.5% and 78.2%, respectively). Jurors were then asked whether, after hearing the judge’s sentencing instructions, they thought the law required them to impose death if the defendant’s crime was “heinous, vile or depraved” or if the defendant would be “dangerous in the future.” The substantial percentage of jurors who wrongly believed the law required the death penalty when either of these circumstances was proven is shown for all jurors, by state, in Table 4.

Table 4

Percentages of Jurors Thinking Law Required Death if Defendant’s Conduct was Heinous, Vile or Depraved, or Defendant “Would be Dangerous” in Future by State

<table>
<thead>
<tr>
<th></th>
<th>DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED</th>
<th>DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE</th>
<th>N*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>56.3%</td>
<td>52.1%</td>
<td>48</td>
</tr>
<tr>
<td>California</td>
<td>29.5%</td>
<td>20.4%</td>
<td>146</td>
</tr>
<tr>
<td>Florida</td>
<td>36.3%</td>
<td>25.2%</td>
<td>111</td>
</tr>
<tr>
<td>Georgia</td>
<td>51.4%</td>
<td>30.1%</td>
<td>72</td>
</tr>
<tr>
<td>Indiana</td>
<td>34.4%</td>
<td>36.6%</td>
<td>93</td>
</tr>
<tr>
<td>Kentucky</td>
<td>42.7%</td>
<td>42.2%</td>
<td>109</td>
</tr>
<tr>
<td>Missouri</td>
<td>48.3%</td>
<td>29.3%</td>
<td>58</td>
</tr>
</tbody>
</table>

89 Updating Bowers, Preview, note 32 supra.
STILL SINGULARLY AGONIZING

<table>
<thead>
<tr>
<th>State</th>
<th>Death Required If Defendant’s Conduct Is Heinous, Vile Or Depraved</th>
<th>Death Required If Defendant Would Be Dangerous in Future</th>
<th>N*</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Carolina</td>
<td>67.1%</td>
<td>47.4%</td>
<td>76</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>56.9%</td>
<td>37.0%</td>
<td>73</td>
</tr>
<tr>
<td>South Carolina</td>
<td>31.8%</td>
<td>28.2%</td>
<td>110</td>
</tr>
<tr>
<td>Tennessee</td>
<td>58.3%</td>
<td>39.6%</td>
<td>48</td>
</tr>
<tr>
<td>Texas</td>
<td>44.9%</td>
<td>68.4%</td>
<td>117</td>
</tr>
<tr>
<td>Virginia</td>
<td>53.5%</td>
<td>40.9%</td>
<td>43</td>
</tr>
<tr>
<td><strong>All States</strong></td>
<td><strong>43.9%</strong></td>
<td><strong>36.9%</strong></td>
<td><strong>1136</strong></td>
</tr>
</tbody>
</table>

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering either of the questions.

For each of these aggravating circumstances, roughly four-of-ten jurors mistakenly believed that the death penalty was mandatory. A few more (43.9%) thought death was required when the defendant’s conduct was "heinous, vile or depraved," and a few less (36.9%) thought death was required if they found that the defendant "would be dangerous in the future." Fully half (50.3%) of the jurors thought the death penalty was required by one or the other of these two circumstances.\(^{31}\)

In no state are jurors free of the misconception that the law requires the death penalty when these circumstances are found. In fact, jurors in seven states are within ten points of the sample-wide figure on each aggravator. Concerning the heinous, vile or depraved aggravator, only one state, North Carolina at 67.1%, departed by as much as 15 points from the sample-wide percent. On the future dangerousness aggravator, three states are at least 15 points from the overall percentage; Alabama at 52.1% is 15.2 points above, California at 20.4% is 16.5 points below, and by far the greatest departure comes with Texas which at 68.4% is 31.5 points above the figure for all

\(^{31}\) For narrative descriptions of how jurors made their punishment decisions that provide additional evidence of jurors' belief that the law required them to impose the death penalty, see Bentele & Bowers, *No Excuse*, supra note 40, at 1031-53.

\(^{39}\) Some 45% of the jurors believed the evidence proved a factor they thought required death. As indicated in the text, 81.5% said the evidence proved that the defendant's crime was "heinous, vile, or depraved," and 78.2% said it proved that the defendant would be "dangerous in the future." Some 84.7% believed that the evidence in their case proved at least one of these two aggravating circumstances. When jurors' beliefs about whether the death penalty was required for each circumstance are considered in conjunction with their reports about whether each circumstance was proven by the evidence in their case, 44.6% of the capital jurors embarked upon deliberations with the misimpression that the death penalty was required by law in their case. (This represents the percent of jurors who believed that the death penalty was required for one or the other of these two factors, a factor they also believed was established by the evidence.)
Evading Responsibility for Punishment Decision

Another indication that many jurors misunderstand the sentencing process as contemplated by the law can be seen in their failure to appreciate their responsibility for the defendant’s punishment. In Caldwell v. Mississippi, the Supreme Court reasoned that a sentence is unreliable if it is imposed by a jury that believes “that the responsibility for any ultimate determination of death will rest with others.” The preceding discussion of the tendency to mistakenly believe the law requires death provides some indication of how jurors seek to shift the responsibility from their own shoulders. Answers to direct questions about whom or what is responsible provides additional evidence.

CJP jurors were asked to rate the items listed in Table 5 from most to least responsible for the defendant’s sentence, using 1 for most responsible and 5 for least responsible. The vast majority of jurors did not see themselves as most responsible for the sentence. Over 80% assigned primary responsibility to the defendant or the law, with 49.3% indicating the defendant and 32.85% indicating the law was most responsible. In contrast, only 5.5% thought the individual juror was most responsible, and only 8.9% believed the jury as a whole was most responsible.

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85 A 1991 change in the Texas statute made the consideration of mitigating circumstances an explicit component of the decision process. A comparison of cases tried before and after this change gives no indication that the change improved jurors’ understanding of the requirement that a finding of dangerousness did not mandate the death penalty; 67.3% of 98 jurors whose cases were tried prior to the change said the law required death if the evidence proved that the defendant would be dangerous in the future compared to 73.7% of the 19 jurors whose cases were tried under the revised statute.


87 This table updates Bowers, Preview, supra note 32, at 1094, Table 10.

88 When the choices for first and second most responsible are added together, the law becomes the most important factor. Approximately three of four jurors claim the law is either most or second most responsible.
STILL SINGULARLY AGONIZING

Table 5

Percent Ranking Five Sources or Agents of Responsibility for the Defendant's Punishment from Most "1" to Least "5" Responsible

<table>
<thead>
<tr>
<th>MOST RESPONSIBLE</th>
<th>LEAST RESPONSIBLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>the defendant because his/her conduct is what actually determined the punishment</td>
<td>49.2</td>
</tr>
<tr>
<td>the law that states what punishment applies</td>
<td>32.8</td>
</tr>
<tr>
<td>the jury that votes for the sentence</td>
<td>8.9</td>
</tr>
<tr>
<td>the individual juror since the jury's decision depends on the vote of each juror</td>
<td>5.6</td>
</tr>
<tr>
<td>the judge who imposes the sentence</td>
<td>3.5</td>
</tr>
</tbody>
</table>

* Percentages are based on the 1,095 jurors who ranked all five options (i.e., ranks sum to 15).

In response to another question about how responsibility was allocated among the jury, trial judge, and appellate judges, only 29.8% thought the jury was strictly responsible in the 10 states where the jury decision was binding on the judge. Nearly one in five (17%) thought the responsibility was mostly in the hands of the judges. The research evidence demonstrates that the Caldwell Court's fears about how the possibility of appellate review might make it easier for reluctant jurors to vote for death were well founded.

The law is not effectively guiding discretion when jurors fail to understand the instructions, mistakenly think the death penalty is required by law, and do not appreciate their responsibility for the sentence. Finding that the overwhelming majority of jurors claim that the law is primarily responsible for the sentence is particularly ironic considering their lack of understanding of the law.

Influence of Race

Racism has stalked the history of capital punishment in America and racial disparities in capital sentencing have survived the post-Furman
reforms. Studies have repeatedly found sentencing disparities by race of victim, race of defendant, and most prominently by race of both defendant and victim, i.e., the death penalty is most likely in inter-racial black defendant/white victim cases. In 1987, the Supreme Court narrowly rejected a constitutional challenge based on defendant/victim racial disparities in capital sentencing in *McCleskey v. Kemp*.

Since then a further dimension of racial bias in capital sentencing has been documented, namely jurors’ race. The work of Baldus and his associates has shown the effect of jury racial composition with data from Philadelphia, and the CJP has demonstrated with the data from capital jurors in 14 states that both the racial composition of the jury and the race of individual jurors influence capital sentencing decisions. The Supreme Court acknowledged in *Turner v. Murray* that there is an especially high risk of jurors being influenced by conscious and unconscious racism in black defendant/white victim (hereinafter B/W) cases. The CJP specifically addressed this issue with information on the decision making of black and white jurors in B/W cases.

The large sample of trials from which jurors were interviewed by the CJP made it possible to examine how the racial composition of the jury in conjunction with race of defendant and victim influenced sentencing outcomes, and the target sample of four jurors per case made it possible to compare the perspectives of black and white jurors who served on the same cases. Bowers, Steiner, and Sandys provided a detailed examination of how

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the racial composition of the jury and the race of individual jurors affected
the decision-making process.108

The racial composition of the jury had the most dramatic impact on
sentencing outcomes in B/W cases, precisely where the Turner court
believed the risk was greatest. In these inter-racial homicides there were
large differences in the percentage of death sentences depending on the
number of white male and black male jurors on the jury.104 In the 74 B/W
cases, the percentage of death sentences was 30% when there were less than
five white male jurors, but rose to 70.7% when there were five or more white
male jurors on the jury. This “white male dominance” effect did not occur
in the 165 white defendant/white victim (W/W) or 60 black defendant/black
victim (B/B) cases. Having a black male on the jury reduced the probability
of a death sentence from 71.9% to 37.5% in the B/W cases, and from 66.7%
to 42.9% in the B/B cases. This “black male presence” effect was not found
in W/W cases.104

The punishment stands of black and white jurors in the same B/W cases
became more divergent as the trial progressed. As indicated earlier, jurors
were asked about their punishment stand at different points in the trial. At
the end of the guilt phase, but before the punishment phase had even begun,
white jurors were three times more likely than black jurors to take a pro-
death stance in B/W cases (42.3% vs. 14.7%). After hearing the sentencing
instructions the difference was approximately four-to-one (58.5% vs. 15.2%),
and by first vote the difference had reached seven-to-one (67.3% of the white
jurors voted for death compared to 9.1% of the black jurors).106 The posi-
tions of black and white jurors thus become more polarized as they listen to
the very same evidence.

Jurors’ answers to other questions provide insights into how their own
race influences their interpretation of the evidence and arguments. The data
show that in B/W cases black and white jurors’ perspectives diverge dramati-
cally on (a) whether they have lingering doubt about the defendant’s guilt,
(b) their impressions of the defendant’s remorsefulness, and (c) their views
regarding the defendant’s future dangerousness. Table 6 presents the differ-
ces in these three punishment-related considerations by jurors’ race and
gender in those B/W cases where both white and black jurors were
interviewed.108

108 William J. Bowers et al., Death Sentencing in Black and White: An Empirical
Analysis of the Role of Jurors’ Race and Jury Racial Composition, 3 U. Pa. J.
Constit. L. 171 (2001) [hereinafter Bowers et al., Black and White].
104 Id. at 191-97.
104 The white male dominance and black male presence effects were highly sig-
ificant by statistical standards. Using Kendall’s taub as the measure of association,
the probability of getting such results by chance are .002 and .0055 respectively. Id.
at 193 n.103.
108 Id. at 197-203.
108 This Table, along with additional details, appears in id. at 203-25, as Table 7.
Elements of (a) Lingering Doubts (b) the Defendant’s Remorse and Identification, and (c) Dangerousness and Early Release by Jurors’ Race And Gender in Black Defendant-White Victim Cases

<table>
<thead>
<tr>
<th></th>
<th>JURORS’ RACE AND GENDER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>White Males</td>
</tr>
<tr>
<td><strong>(A) LINGERING DOUBTS</strong></td>
<td></td>
</tr>
<tr>
<td>1. Importance of lingering doubts about the defendant’s guilt for you in deciding on punishment</td>
<td></td>
</tr>
<tr>
<td>VERY</td>
<td>0%</td>
</tr>
<tr>
<td>FAIRLY</td>
<td>6.9%</td>
</tr>
<tr>
<td>NOT VERY</td>
<td>6.9%</td>
</tr>
<tr>
<td>NOT AT ALL</td>
<td>86.2%</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(29)</td>
</tr>
<tr>
<td>2. When considering punishment, do you think the defendant might not be the one most responsible of the killing?</td>
<td></td>
</tr>
<tr>
<td>YES</td>
<td>10.3%</td>
</tr>
<tr>
<td>NO</td>
<td>86.2%</td>
</tr>
<tr>
<td>NOT SURE</td>
<td>3.4%</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(29)</td>
</tr>
<tr>
<td><strong>(B) REMORSE AND IDENTIFICATION</strong></td>
<td></td>
</tr>
<tr>
<td>1. How well does “Sorry for what s/he did” describe the defendant?</td>
<td></td>
</tr>
<tr>
<td>VERY WELL</td>
<td>7.4%</td>
</tr>
<tr>
<td>FAIRLY WELL</td>
<td>7.4%</td>
</tr>
<tr>
<td>NOT SO WELL</td>
<td>33.3%</td>
</tr>
<tr>
<td>NOT AT ALL</td>
<td>51.9%</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(27)</td>
</tr>
<tr>
<td>2. Did you imagine yourself in the defendant’s situation?</td>
<td></td>
</tr>
<tr>
<td>YES</td>
<td>26.7%</td>
</tr>
<tr>
<td>NO</td>
<td>73.3%</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(20)</td>
</tr>
<tr>
<td>3. Did you imagine yourself in the defendant’s family’s situation?</td>
<td></td>
</tr>
<tr>
<td>YES</td>
<td>30.0%</td>
</tr>
<tr>
<td>NO</td>
<td>60.0%</td>
</tr>
<tr>
<td>NOT SURE</td>
<td>10.0%</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(20)</td>
</tr>
<tr>
<td><strong>(C) DANGEROUSNESS AND EARLY RELEASE</strong></td>
<td></td>
</tr>
<tr>
<td>1. “Dangerous to other people” describes the defendant</td>
<td></td>
</tr>
<tr>
<td>VERY WELL</td>
<td>63.3%</td>
</tr>
<tr>
<td>FAIRLY WELL</td>
<td>30.0%</td>
</tr>
<tr>
<td>NOT SO WELL</td>
<td>3.3%</td>
</tr>
<tr>
<td>NOT AT ALL</td>
<td>3.3%</td>
</tr>
<tr>
<td>(No. of jurors)</td>
<td>(20)</td>
</tr>
<tr>
<td>2. How long do you think someone not given the death penalty for a capital murder in this state usually spends in prison?</td>
<td></td>
</tr>
<tr>
<td>0-9 YEARS</td>
<td>30.0%</td>
</tr>
<tr>
<td>10-19 YEARS</td>
<td>30.0%</td>
</tr>
<tr>
<td>20+ YEARS</td>
<td>40.0%</td>
</tr>
</tbody>
</table>
The most striking differences occur between white and black male jurors. Over half the black males said lingering doubts about the defendant’s guilt were very or fairly important to them in making their punishment decision (26.7 + 26.7 = 53.4%), whereas only 6.9% of the white males said it was very or fairly important and 86.2% said not at all important. Sixty percent of the black males said they thought the “defendant might not be the one most responsible for the killing” compared to only 10.3% of the white males. Similar differences are seen on the questions about remorse and identification. The vast majority of the black males thought the defendant was remorseful (46.7 + 33.3 = 80%), compared to 14.8% of the white male jurors. The black male jurors were more able than the white male jurors to imagine themselves in the defendant’s situation (53.3% vs. 26.7%) and the defendant’s family’s situation (80% vs. 30%). This greater sense of identification might have made the black male jurors more sensitive to signs of remorse. The black male jurors also were much less likely than white males to say “dangerous to other people” described the defendant very well (26.7% vs. 63.3%). Black male jurors also were more accurate in their estimates of how long someone not given the death penalty spends in prison. Most of the black male jurors gave estimates of 20 years or more (61.5%) as compared to 40.0% for the white male jurors, and only 7.7% of the black male jurors estimated 0-9 years compared to 30% of the white males. The females of both races were less polarized in each of these respects.

State specific analyses of CJP data also demonstrate the affect of race on the capital sentencing process. Eisenberg, Garvey, and Wells report that in South Carolina white jurors were more likely to vote for death than black jurors at first vote, but that race of juror matters less by final vote because of the pressure of the white majority. Another analysis of South Carolina jurors reports that white jurors are more likely to feel anger towards the defendant, less likely to imagine being in the defendant’s situation, and less likely to find the defendant likeable as a person. An analysis of Pennsylvania jurors prepared for the Supreme Court of Pennsylvania’s Committee on Racial and Gender Bias in the Justice System found that black defendants were more likely to get the death penalty than white defendants, and many of the race-linked patterns found in B/W cases by Bowers, Steiner, and

107 Non-CJP research providing evidence that race affects jurors’ ability to empathize can be found in Mona Lynch & Craig Haney, Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty, 24 Law & Hum. Behav. 337 (2000); Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 Harv. L. Rev. 1261 (2000).


Sandys were found in both inter-racial and intra-racial cases in Pennsylvania.\footnote{Wanda D. Foglia, Report on Capital Juror Decision-Making in Pennsylvania, prepared for the Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System (2001) (on file with author). The smaller number of jurors in Pennsylvania compared to the national sample made it impossible to compare black and white jurors within B/W cases. However, many of the race linked patterns observed by Bowers et al., Black and White, supra note 102, in the national sample also were found in the analysis of the 74 Pennsylvania jurors. Juries dominated by white males were more likely to impose death, jurors were more likely to prematurely decide on death when the defendant was black, jurors were more likely to have lingering doubt when the defendant was white, and were more likely to be very concerned about preventing defendant from killing again when the defendant was black. One difference based on race of juror observed was that black jurors were more likely to see the defendant as sorry or remorseful, as in the national data. Over two-thirds of the black defendants in Pennsylvania CJP cases were sentenced to death, compared to half of the non-black defendants. An analysis of the case characteristics failed to reveal differences other than race that would explain this disparity in sentencing outcomes.}

The CJP thus adds to the troubling picture of how race influences who gets the death penalty by demonstrating that the racial composition of the jury and the race of the individual juror affect sentencing outcomes. In the B/W cases, where the Supreme Court in\cite{Turner} warned that the risk of prejudice is greatest, the CJP shows that the chances of a death sentence increase when there are five or more white males on the jury; they decrease when there is at least one black male on the jury. Jurors become more polarized as they experience the capital trial, and black and white male jurors have very different perspectives regarding lingering doubt, defendant's remorsefulness, and defendant's future dangerousness. These results provide disturbing evidence of how the capital sentencing process is contaminated by race.

**Underestimating the Death Penalty Alternative**

Early findings of the CJP indicated that jurors' capital sentencing decisions were influenced by mistaken assumptions about the death penalty alternative. The data revealed that most capital jurors grossly underestimated the amount of time a defendant would serve in prison if not sentenced to death, and that the sooner jurors believed (wrongly) a defendant would return to society if not given the death penalty, the more likely they were to vote for death.\footnote{Bowers & Steiner, Death by Default, supra note 34, at 645-70.} Citing early CJP research on jurors' erroneous assumptions of early release,\footnote{William J. Bowers, Capital Punishment and Contemporary Values: People's Misgivings and the Court’s Misperceptions, 27 Law & Soc'y Rev.157, 169-70 (1995); Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1 (1993).} the U.S. Supreme Court in\cite{Simmons} the U.S. Supreme Court in Simmons v. South Carolina.\footnote{Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).}
sought to curb the pernicious effects of jurors misunderstanding the punishment options available to them. The Court reasoned that capital jurors should not be making a “false choice”: that is, choosing between death and an incorrect or false understanding of the alternative. It held that jurors should be informed about legal restrictions on parole, but it limited this requirement to cases where the sentencing alternative was life without parole (LWOP), and where the prosecution argued the defendant would be dangerous in the future—a limitation that severely circumscribed Simmons’ repudiation of false choice.

Laws have changed in recent years, and now 35 of the 38 states with the death penalty, as well as the federal and military jurisdictions, offer LWOP as a sentencing alternative for at least some capital offenses. Moreover, the law in every state except Pennsylvania and South Carolina requires that the jury be told there is no possibility of parole when the alternative to death is LWOP. In some states LWOP is the mandated alternative for all capital convictions that do not result in a sentence of death, but in others LWOP only applies to capital offenses committed under specified circumstances. Yet, the work of Bowers and Steiner suggests that convincing jurors that life really means life is a “formidable” challenge, and thus that some jurors may still be basing their decisions on erroneous assumptions even when they are told there is no parole.

The extent and pervasiveness of the tendency to underestimate the death penalty alternative is shown state-by-state and for the entire sample in Table 7. For the sample as a whole, “15 years” is the median estimate of jurors who were asked, “How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?” In every state the median estimate of the time usually served was less than the mandatory minimum for parole eligibility in that state. This means that most jurors in each state thought that such defendants would usually be back

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114 Kansas, New Mexico, and Texas are the three states with the death penalty that do not have LWOP.
117 Of course, jurors’ erroneous assumptions of early release will be unaffected in the three states without LWOP, and in cases where LWOP is not mandated as the alternative to the death penalty. Particularly, in Pennsylvania and South Carolina, jurors will not be told the defendant is ineligible for parole even though the sentence is LWOP, unless the prosecution argues future dangerousness and triggers the Simmons requirement.
118 Bowers & Steiner, Death By Default, supra note 34, at 710-16.
119 Updating id., Table 1.
120 Id.
121 Four of the thirteen states had LWOP as the death penalty alternative at the time the trials from which jurors were interviewed (Alabama, California, Missouri, and Pennsylvania).
on the streets well before they first become eligible for parole, which is of course earlier than they actually are paroled, on average.

Table 7

Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

<table>
<thead>
<tr>
<th>State</th>
<th>Median estimate*</th>
<th>(N)</th>
<th>Mandatory minimum**</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>15.0</td>
<td>(35)</td>
<td>LWOP</td>
</tr>
<tr>
<td>California</td>
<td>17.0</td>
<td>(98)</td>
<td>LWOP</td>
</tr>
<tr>
<td>Florida</td>
<td>20.0</td>
<td>(104)</td>
<td>25</td>
</tr>
<tr>
<td>Georgia</td>
<td>7.0</td>
<td>(67)</td>
<td>15</td>
</tr>
<tr>
<td>Indiana</td>
<td>20.0</td>
<td>(75)</td>
<td>30</td>
</tr>
<tr>
<td>Kentucky</td>
<td>10.0</td>
<td>(74)</td>
<td>12, 25***</td>
</tr>
<tr>
<td>Missouri</td>
<td>20.0</td>
<td>(47)</td>
<td>LWOP</td>
</tr>
<tr>
<td>North Carolina</td>
<td>17.0</td>
<td>(77)</td>
<td>20</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>15.0</td>
<td>(63)</td>
<td>LWOP</td>
</tr>
<tr>
<td>South Carolina</td>
<td>17.0</td>
<td>(99)</td>
<td>30</td>
</tr>
<tr>
<td>Tennessee</td>
<td>22.0</td>
<td>(42)</td>
<td>25</td>
</tr>
<tr>
<td>Texas</td>
<td>15.0</td>
<td>(106)</td>
<td>20</td>
</tr>
<tr>
<td>Virginia</td>
<td>15.0</td>
<td>(36)</td>
<td>21.75</td>
</tr>
<tr>
<td>All states</td>
<td>15.0</td>
<td>(943)</td>
<td></td>
</tr>
</tbody>
</table>

* Median estimates exclude "no answers" and unqualified "life" responses but include responses indicating "life without parole" or "rest of life in prison."
** These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.
*** Kentucky gave capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives (See Bowers & Steiner 1999, supra at 646 n.198).

Both statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death. Jurors who gave low estimates were more likely to take a pro-death stand on the defendant's punishment at each of the four points in the decision process. By the final sentencing vote the difference was 25 percentage points; 71.5% of the jurors who believed release would come in less than 10 years voted for death, compared to 46.4% of those who estimated 20 or more years. The fact that this divergence became most pronounced at the end of the process, together with jurors' ac-

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128 As indicated earlier, jurors were asked what they thought the punishment should be 1) after the guilt phase but before sentencing had begun, 2) after sentencing instructions but before deliberations, 3) at first vote, and 4) at final vote.
129 Updating Bowers & Steiner, Death by Default, supra note 34, at 654-55, Table 3.
counts of the prominent role of the defendant's future dangerousness and his return to society late in their decision-making, suggests that fear of early release became an especially important issue toward the end of jury punishment deliberations.\textsuperscript{124}

Many of the CJP jurors volunteered that they believed they had to vote for death to ensure that the defendant would not get back on the streets. In response to a question about whether they would support the death penalty if they knew the defendant would really serve a life sentence, 42.2\% of jurors answered that they would prefer life without parole to the death penalty. A disturbing example is provided by Pennsylvania, where 38.6\% of those who actually voted for death said that they would have preferred life without parole if it had been the alternative, as it indeed was in the cases they decided. Jurors are actually voting for death because of their mistaken assumption that it is the only way to keep people they see as dangerous out of society. When the law does not require that jurors be told about parole, as it does not when LWOP is not the alternative, or when there is no state statute and future dangerousness is not argued, jurors are still going to be making "false choices" and voting for death because they underestimate the alternative.

But even more troublesome is the evidence that some jurors do not believe judges when they are told there is no parole from a life sentence. In interviews with California jurors who were told that a life sentence meant there would be no parole, some jurors claimed that they did not believe the judge.\textsuperscript{125} In a section entitled "The Challenge is Formidable," Bowers and Steiner previously noted how difficult it is to overcome "culturally embedded perspectives on crime and punishment, selective media coverage and reporting of crime, political posturing on the crime problem, and the sheer inaccessibility of factual information."\textsuperscript{126} They provide some suggestions for how to more effectively inform jurors about parole,\textsuperscript{127} but are pessimistic about the system's ability to overcome the "hegemonic myth of early release

\textsuperscript{124} The influence of concerns about early release also can be seen by reviewing results from surveys of the general public. Although national polls 1982-1998 showed between 70 and 76\% of the public supported the death penalty, surveys consistently showed a 15-20\% decline in support for the death penalty when life without parole was the alternative. Samuel R. Gross, \textit{Update: American Public Opinion on the Death Penalty-It's Getting Personal}, 83 Cornell L. Rev. 1448 (1998); see also William J. Bowers et al., \textit{A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer}, 22 Am. J. Crim. L. 77 (1994).

\textsuperscript{125} Bowers & Steiner, \textit{Death by Default}, supra note 34, at 697-700.

\textsuperscript{126} Id. at 710.

\textsuperscript{127} Bowers and Steiner maintain that getting jurors to understand and believe what they are told about parole, would, at a minimum, require:

(1) the presentation to the jury of an official state report on the parole of murderers that indicates how long capital murderers not sentenced to death, as compared to first degree, and second (or lesser) degree murderers, usually spend in prison before being paroled; (2) the appearance before the jury of an expert on the parole report who can clearly explain both the substance of the report and the meaning of language or terms used to describe its contents; and (3) the opportunity for jurors to question the expert about parole practices, the meaning of
that infects the capital sentencing decision." Research revealing widespread distrust of the criminal justice system and how readily subjects dismiss evidence that contradicts their assumptions regarding early release of offenders points to the formidable difficulties of convincing jurors who have misgivings about the criminal justice system that those sentenced to life really will not be paroled.

**Summary and Conclusion**

The empirical evidence demonstrates that the capital punishment process is riddled with problems. Other sources provide convincing evidence of wrongful capital convictions and death sentences revealed by DNA analysis, and evidence of a "broken system" reflected in racial bias, prosecutorial misconduct, and inadequate defense representation from research on the appellate process. The CJP data, as discussed here, reveal that the constitutionally mandated requirements established to guide juror discretion and to eliminate arbitrary sentencing are not working. Despite numerous U.S. Supreme Court decisions and state statutes aimed at channeling juror decision making, evidence of how the process actually works suggests that Kalven and Zeisel were prescient when they said deciding who should die is a "decision which no human should be called upon to make." The Supreme Court's working assumption that the law and its interpretation in the courts have cured fundamental flaws in the capital sentencing process is a legal fiction.

The problems begin at the very outset of the capital trial process. Jurors come to the courtroom with predispositions that result in nearly half of them deciding the penalty before they even hear the evidence or legal standards they are supposed to be considering. Most jurors claimed they were absolutely convinced of their premature decisions and maintained their position throughout the proceedings. The death qualifying voir dire fails to eliminate jurors who believe death is the only acceptable punishment and who thus cannot give meaningful consideration to mitigating evidence. This problem is compounded by the tendency of the death qualification process to eliminate jurors who actually could impose death even though they have some reservations about capital punishment, and to leave an especially conviction-prone and punishment-prone group of individuals to decide

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Id. at 713.

128 Id. at 716.


132 Kalven and Zeisel, supra note 1, at 449.
capital cases. In fact, the death qualifying voir dire leaves one in ten jurors conscious of and willing to admit that the jury selection process made them think the defendant was probably guilty and probably deserved death.

The sentencing instructions jurors receive during the punishment phase of the trial fail to solve the problem. Juror understanding of the instructions on how to handle mitigating evidence is woeful. Most jurors fail to understand the constitutional mandate that they are not limited to consideration of mitigating factors enumerated in the statute or factors they unanimously agreed were mitigating in the case. A substantial minority failed to understand the different standards of proof that applied to aggravating and mitigating evidence. Many jurors failed to understand the guidance on how to handle aggravating evidence even when statutes explicitly provided that jurors should be limited to enumerated aggravating circumstances and that such aggravating evidence must be proven beyond a reasonable doubt. A lack of understanding also is reflected in evidence that over a third of the jurors wrongly believed the death penalty was required when certain common aggravators were established, and that the vast majority denied that the jury itself was primarily responsible for the sentence handed down.

The CJP research on how race affects who gets the death penalty provides especially disturbing evidence of the failure of statutory and case law to take the arbitrariness out of the sentencing process. The impact of race is clearly evident in cases involving black defendants and white victims. The legal guidelines cannot be effectively channeling juror discretion when the presence of five or more white male jurors doubles the chances of a death sentence, and the presence of one or more black male jurors reduces the probability of a sentence of death almost as much. Striking differences between the way white male and black male jurors react to the same evidence in the same cases suggests it is virtually impossible to eliminate arbitrariness, with respect to the impact of race.

Efforts to curb arbitrariness have been aided by CJP evidence. For instance, CJP research was instrumental in the successful challenge of false choice in sentencing by carefully documenting jurors’ exaggerated assumptions of early release and systematically demonstrating the role of such assumptions in biasing jurors’ choice of punishment toward death. Yet even here the success in curbing arbitrariness is far from complete. Supreme Court caselaw now requires that the jury be told the defendant is ineligible for parole when the sentence is LWOP and the prosecution argues the defendant will be dangerous in the future, but mistaken views about release on parole still will be rampant in other cases where the jury is not given information about parole. And, even when they are told the defendant will not be paroled, research reveals that many jurors do not believe what they are told because of firmly entrenched preconceived notions and mistrust of the criminal justice system.

Like the earlier work of Kalven and Zeisel, the CJP has plumbed the usually hidden process of jury decision making. Unlike Kalven and Zeisel, who used trial judges to learn about jury decision making, the CJP has gone directly to the jurors themselves for evidence of how they make their
decisions. In addition, unlike Kalven and Zeisel, who worked in the pre-
Furman era when death penalty litigation was largely unregulated by
constitutional norms, the CJP has sought to assess how jury behavior and
sentiment squares with the constitutional requirements imposed by the
Supreme Court.

To carry out its jury-focused work, the CJP has had to penetrate the veil
of secrecy that otherwise shrouds the decision making of juries.188 By
interviewing former jurors about their experiences and decision making in
particular cases-without directly observing the jury at work in a given case
or bringing such information to bear in challenging a particular sentence-the
CJP has built upon the groundbreaking empirical inquiry initiated by Kalven
and Zeisel. By focusing on capital jurors the CJP has been able to confirm
doubts The American Jury raised about the feasibility of taking arbitrariness
out of deciding who deserves to die. Each one of the problems revealed by
the CJP reflects a fundamental flaw in the system; viewed altogether the evi-
dence of system failure is overwhelming.

Recent developments suggest that the courts may be ready to give
meaningful consideration to this evidence that the process is failing to meet
constitutional standards. Public support for the death penalty has fallen to its
lowest level in twenty years, and most people now prefer life without parole
rather than the death penalty for convicted first degree murderers.184 In At-
kins v. Virginia185 and Ring v. Arizona,186 decided in 2002, the U.S. Supreme
Court released inmates from death row and curbed future use of the death
penalty. The Capital Jury Project is continuing to compile a wealth of find-
ings and insights that, in conjunction with prior research, make the evidence
of problems with the capital sentencing process compelling. Surely this evi-
dence of how capital jurors actually decide who must die will soon convince
our lawmakers that America’s post-Furman experiment with capital pun-
ishment has failed, and that it is futile to keep tinkering with the machinery of
death.

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188 Ironically, the work of Kalven and Zeisel prompted lawmakers to block the
direct observation of real juries for research purposes. Following the disclosure in
1955 of the audio taping of jury deliberations in connection with their research, the
U.S. Attorney General publicly censured “eavesdropping” on jury deliberations.
Congress and more than 30 states responded by enacting statutes prohibiting jury
taping. Id. at xv. Such barriers have occasionally been relaxed for media interests
(e.g., the airing of video taped deliberations of a Wisconsin criminal jury on the PBS
“Frontline” program, April 11, 1986 and of four Arizona juries on a two-hour NBC
Special aired on April 16, 1997).

184 See Death Penalty Information Center, http://www.deathpenaltyinfo.org/
Polls.html (visited October 5, 2002).

(reversing position and holding that execution of the mentally retarded violates the
Eighth Amendment).

186 Ring v. Arizona, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (U.S. 2002) (holding that
Sixth Amendment right to jury trial bars judge-made death sentences).
"I DIDN'T KNOW IT'D BE SO HARD"

JURORS' EMOTIONAL REACTIONS TO SERVING ON A CAPITAL TRIAL

by MICHAEL E. ANTONIO, Ph.D.

Interviews with jurors who served on capital murder cases revealed that many experienced significant stress and suffered extreme emotional setbacks. "They felt some party would be offended." In general, jurors' concerns included a "sense of anxiety for their own safety and well-being" and fear and paranoia about being watched by people inside the courthouse, including the defendant's family.

The modern capital punishment system has been challenged by critics on numerous fronts. Much less has been written, however, about the psychological and physical impact that murder cases have on capital jurors. These individuals, who are called upon by the state to make the ultimate decision about whether the defendant should live or die, will surely be affected, in one way or another, by this experience. This article presents evidence about the severe emotional and psychological duress jurors struggle with as a result of their jury service as revealed through extensive in-depth interviews with jurors who made the critical life or death decision in capital cases.

The anxiety a juror feels as a result of jury service can come from multiple sources. Jurors have expressed anger at the criminal justice system and the law for making it difficult "to arrive at a fair decision" and also mentioned frustration at having to reach a decision in which I would like to thank William J. Bowers and Danielle Dignan for their helpful comments and contributions to this article.


As to particular stresses on capital jurors, see M. Swope, About jurors scared by trials: Experiences from death penalty cases can stay with jurors deciding the outcome for a long time, Sarasota Herald-Tribune, December 4, 2005; S. Eaton & J. Silvers, For jurors, a lifetime sentence: Stress of death-penalty cases often lingers beyond trial, Fort Wayne Journal Gazette, March 21, 2004.

These heightened feelings of anxiety and stress could lead to a variety of health problems. Indeed, researchers studying criminal cases have identified "one or more physical and/or psychological symptoms that could be related to jury duty." These included recurring thoughts about the trial that would keep the jurors awake at night or nightmares about the crime and the defendant, stomach pains, nervousness, tension, shaking, headaches, heart palpitations, sexual inhibitions, depression, anorexia, faintness, numbness, chest pain, and hives.

Research also has shown differing levels of stress depending upon the case. Jurors who served on traumatic cases (i.e., murder, aggravated kidnapping, aggravated sexual assault, aggravated assault, and child abuse) were more likely to experience symptoms associated with depression than were jurors serving on non-traumatic trials. Researchers in one study found that jurors in murder cases were particularly upset by the photographs of the victim, the blood tainted physical evidence from the crime scene, and having to sentence the defendant to death. Other research has compared differences in Post Traumatic Stress Disorder (PTSD) symptoms among jurors in capital cases who made the life or death decision. Findings showed "jurors whose jury panel rendered a death penalty did sustain greater PTSD symptoms than did jurors whose jury panel rendered a life sentence."

Overall, these findings indicate that capital jurors experience significant stress when faced with the task of imposing the ultimate punishment of death, whereas jurors in non-capital trials are spared such physical and emotional stress. Critics of the death penalty have only begun to examine the impact that serving on a capital trial has on jurors who must make the decision of whether the defendant should live or die. What other aspects of a capital murder trial have jurors found stressful, how do they cope with this stress, and how has their experience affected their lives?

This article analyzes data gathered from the Capital Jury Project (CJP), a national study of the exercise of sentencing discretion in capital cases. The focus of this analysis is an examination of jurors' narrative accounts to determine how serving as a capital juror affected them both emotionally and physically. The findings raise important questions about the personal costs jurors endure. Should ordinary citizens be put in situations where they may be forced to view gruesome photographs of victims' bodies, hear horrifying stories of how a person was murdered, and be called upon to sentence a person to death? Moreover, do average citizens have the capacity and fortitude to withstand the stress and pressure associated with serving on capital trials, and what is the responsibility of the state for helping jurors cope with their experiences?

The Capital Jury Project

The CJP is a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers with the support of the National Science Foundation. The findings of the CJP are based on in-depth interviews with persons who have actually served as jurors in capital trials. The interviews chronicle the jurors' experiences and decision making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

The CJP has interviewed capital jurors in 14 states. States were chosen to reflect the principal variations in guided discretion capital statutes. Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. From each trial, a target sample of four jurors was systematically selected for in-depth individual interviews. Interviewing began in the summer of 1991. Each juror inter-
view lasted approximately three to four hours. The present CJF working sample includes 1,198 jurors from 353 capital trials in 14 states. Since 1998, approximately 40 articles reporting the findings of the CJF have been published in scholarly journals, and some of this research has been cited in U.S. Supreme Court decisions.

During the CJF interview, jurors were asked two questions about their experience serving on a capital trial. Jurors were asked to respond "Yes" or "No" to the following questions, "Did you find the experience emotionally upsetting?" and "During the trial or right after it, did you have any trouble sleeping, any bad dreams or nightmares, or lose your appetite?" Jurors were given the opportunity to elaborate or further explain their answer.

A total of 554 jurors explained, in varying detail, how emotionally upsetting their experience was and 327 jurors elaborated about specific troubles they had during and after the trial. From the juror narratives, specific themes emerged. Overall, 25 percent of jurors' comments about being emotionally upset and 28 percent about other specific troubles were considered.

The following analysis presents these themes, while selecting the most comprehensive and detailed narratives.

Juror narrative accounts
Several jurors reflected favorably upon their jury experience. Eighteen jurors (9 males, 4F, 5L; 9 females, 3D, 6L) reported enjoying serving on a capital case and described their experiences as "...quite exciting and really enjoyed it," "a learning experience," and "very rewarding, educational." These individuals liked the jury experience because it helped them come to terms with their feelings about the death penalty. This was best described by a male juror in a death case,

...I felt like I was part of it, it wasn't like watching TV or reading about it. I was actually involved in it...I finally had to admit; how I felt about it and was surprised that I could impose it with no guilt. It was personally enlightening for me and helped me to resolve some of the philosophical questions I had had about the death penalty.

A large majority of jurors, however, reflected negatively upon this experience. Indeed, 49 jurors (22 males, 12D, 10L; 27 females, 15D, 12L) found serving on a capital jury "emotionally upsetting." Many attributed their negative emotional states to having to decide whether the defendant should live or die, although this was true more so for men than women. A male juror from a death case said he felt emotionally upset

...because of the seriousness of taking the life of another individual. While I felt I had a duty to do it, under any circumstances, whenever you're responsible for taking the life of another individual it's a very serious thing and that's emotionally upsetting; it's hard to do, you wrestle with it a lot. As to whether or not that's really the thing you might have to do. Because once you've taken that individual's life, there's absolutely no chance for any change whatsoever. That person's eternal fate is sealed at that time and you wrestle with that—that's an emotional thing—and you think—am I really doing the right thing? It's a hard decision to make, but it's a decision somebody's got to do ...the most serious issues in my opinion are life and death decisions and they're hard.

Feeling the impact
While female jurors also mentioned feeling emotionally upset at having to make a punishment decision, they were more likely than men to admit that their emotional states led to crying. The female jurors also were more likely to describe when they first felt impacted by such emotion or stress, either during or after the trial. From the responses given by jurors, we can show when the stress or pressure associated with serving on a capital trial initially affected them. Jurors' responses were categorized into one of three groups relating to when the stress impacted them: 1) during the trial, 2) immediately after the punishment decision was announced, or 3) in the days, weeks, or months after the trial ended.

During the trial
Only a few of the jurors reported that the impact of their jury experience was felt while the trial was occurring. Six (2 males, 2D; 4 females, 1D, 1L) mentioned being upset during the trial, but then felt relatively fine afterward. There are no apparent distinctions between males and females; both mentioned being upset about the pictures shown during the trial and that making the punishment decision was the main cause of their stress. One of the female jurors from a death case commented,

The penalty phase was very hard, emotionally difficult. I think part of the reason it was so difficult is you couldn't talk to anybody you knew, couldn't talk to your husband, wife, anybody about the case and it was very hard...it was just hard because you thought about it all the time and you knew because you were so...and it went for so many months...once a decision was made it was okay. It was just during the process that was very hard.

Two male jurors from separate death cases both discussed the difficulties they had during the trial. One commented, "Yes, during the trial I would wake up and, well, I would have dreams of the pictures and all that you would see and I would wake up in the middle of the night seeing that." The second male juror noted,
I did at the time, but not now guess that’s what it means, I did at the time. It's just trying to decide if it's right to take someone's life and I equated that decision that I was having to make with the same crime he had done, he killed someone. Just because it's legal doesn't make it right. That's the problem I had.

the courthouse after the trial had ended,

I mean they release you...we went through the circus and everything...you go down to the garage in the car, you jump in your car and drive home...and I was on (the) freeway...and it just hit me...what the importance of what we had just done. I was kind of in a fog 'cause I don't remember much driving from the garage at (the) Courthouse...but just these realizations. Just suddenly realized the importance of what had happened. My vote with 11 other people...that some man is going to die. It didn't really hit that much until then.

Days, weeks, or months after the trial

By far, most of the jurors talked about how the stress of serving as a capital juror impacted them long on vacation afterwards up to New England, and I'd see a rock in a field and I would burst into tears...it has been kind of a nightmare thing."

Another female juror from a death case discussed the lingering effects her experience as a capital juror had on her:

"...the next morning I felt the same way as you do after death—just severely, emotionally drained. For a long time I would think about both of them. They would be the last thing I thought about...and I was sleeping and the first thing I thought of when I got up. I don't know if it's like that on other trials, but for capital murders it's very profound. You do get very involved with them and their families. It's like a forced intimacy. Just because trial is over they don't disappear out of your head right away."

Although significantly fewer male jurors reported symptoms of "post jury blues" there were a few that did experience long-term effects as a result of serving on a capital case. The majority of these responses involved persistent thoughts of the trial. One male juror from a death case mentioned,

I had emotional indigestion for a while. I kept recycling this thing in my mind over and over. I wondered what I could have done to keep this from happening. What could society have done to prevent this? I couldn't do anything. I finally had to accept our decision.

One juror in a death case noted, "Um, I kept seeing recurrences of the crime. (Interviewer: While you were sleeping?) Yes, and uh during the day too. I would think back to the trial. I probably did that for a few months afterwards." Another juror from a death case commented that he, "...had trouble sleeping a couple days...afterwards, not during. Just wanted to forget, but it's hard to do. Next day trying to forget about (it)—you go to work and someone says, 'you fried the S.O.B.' Want to get it out of your mind, but it's kind of hard to do that."

Impact on personal lives

Given the lasting effects of their experience serving as a capital juror, it is not unexpected that the jurors' personal lives, and those close to
them, would be affected as well. Several women talked about how their experience as a capital juror was a major cause of tension between themselves and their spouses. A few mentioned how not being able to discuss the case with their spouses actually threatened their marriages, while others reported the fact that they could not talk about the trial caused stress among their friends and co-workers. A juror from a death case noted,

I had a very difficult time, my husband, we almost separated over it. (Interviewer: How did your husband feel when you were called to jury duty?) He wanted me to get out of it. I was so depressed. I felt out of control. I would thrash in my sleep, I had to move out of my bedroom. I was so helpless, I finally just left it and I stopped talking.

Another female juror from a life case reported how her experience affected her professional life:

After the trial, uh, the first day that I went back to work, somebody came up and said, 'Hi, how ya doing?' and I just cut loose crying and I cried for an hour solid, and my boss was in the office that day, just on a routine visit, and that poor man didn't know what to do [He] kept saying, 'She's got to get some help!' I thought I was having a nervous breakdown, but I mean, it was just, it had to come out somewhere. I guess...I thought about it all the time, ya know.

For many the stress and anxiety of serving as a capital juror manifested itself in a variety of ways. Altogether, 25 jurors (7 male, 4D, 3L; 18 female, 10D, 8L) reported specific dreams or nightmares concerning the manner in which the victim was killed or ones relating to the crime scene. The nature of their dreams or nightmares, however, varied in scope and intensity. General findings showed that women were more likely than men to report dreaming about acts of reprisal from the defendant, with women in life cases to be twice as likely to do so compared to women in death cases. Jurors in death cases (both male and female) were more likely to report having dreams about photographs shown during the trial to document the crime scene or to show the victim's body.

Physiological symptoms
In addition to the sleeping problems that some capital jurors experienced during and after the trial, others reacted to their jury experience with physiological symptoms. Eleven jurors (1 male, 1D; 10 female, 5D, 5L) reported feeling or getting "sick" after the trial. A female juror from a death case explained how the stress and the burden of being a capital juror affected her:

I couldn't sleep and I got physically sick, you know, vomiting. (Interviewer: How long did that last as? I mean days, months, weeks?) Days, but still, I mean it's better now, but for awhile, a few years it really did disturb me just thinking about and anytime I'd hear his name or even see the building where the restaurant was located...

Jurors in cases that resulted in life who reported feeling sick as a result of their jury service. One female juror from a life case responded similarly about the trial process and the physical effects it had on her, "...I took it to heart and I really wanted to do the right thing. I put too much into it and got sick. I never want to be on another one—too much stress. I take it all too seriously and when it's over, I let it all out. I tried so hard to be fair and do the right thing."

Feeling regret
When the jury's final punishment decision is read inside the courtroom, the trial has officially ended. Jurors are allowed to return to their families and may finally talk about their experiences and the decision they reached. Altogether 12 jurors (3 males, 3D; 9 females, 5D, 4L) expressed regret at their final punishment decision. Two jurors on death cases and three on life cases stated that the wrong punishment was reached. The jurors who wanted to give a death sentence were angry at the life verdict, "I don't know that I have ever in my life felt something so strongly and not been able to follow through on it. That the death penalty was called for and that's what we should've given and we didn't."

The second juror added that the "horror of the crime says with me. I feel a just punishment wasn't given."

The jurors who wanted a life sentence, however, did not speak as confidently as their counterparts. They tended to express their belief through regret and guilt rather than anger or strong comments. One female juror commented, "It's a very heavy burden to decide the death penalty. I have doubts about whether that was the right or best solution. The best answer, the best punishment."

Other jurors who felt that life was an appropriate punishment, expressed guilt that they conformed to pressure from other jurors, "...part of the group recommended an execution that I don't believe was appropriate, I questioned whether I stand up for what I believe. I feel almost like I was brainwashed (by the others). I believed their projection of me that I was not a valuable juror." Finally, one male juror expressed his regret by saying, "I was right, but didn't stick with my decision. I changed my vote when I didn't believe in what I was doing."

Fear
While these jurors left the courtroom feeling personal regret for the way the trial ended, others went away with a great sense of fear for what they had just done. Fear has been a common theme reported among jurors who served on capital trials. Often the defendant's physical appearance or presence inside the courtroom served as a general source of fear for the jurors. Indeed, 11 jurors (2 males, 2D; 9 females, 7D, 2L) reported being afraid of the defendant. As one stated, "Um, he scared me. It put me, you know, at different times, at first he scared me, and then pretty soon it didn't. I mean, I looked at him and he was trying to intimidate us. 'He'd pick one person and just stare at them almost the whole trial.'"

An additional 12 jurors (2 male, 1D, 1L; 10 female, 5D, 5L) were
afraid that the defendant would seek revenge against them, even though half of these jurors did not seek the ultimate punishment of death, but rather sentenced the defendant to a lesser punishment of life imprisonment. Was this fear due to the fact that the defendant might one day be released from prison and attempt to

Five jurors (1 male, 4 female) expressed concerns about reprisal from the defendant’s or the victim’s families. They expressed fear about being physically harmed by these family members,

After the trial was over, there was a lot of fear in the jury about the family—like they would be out there waiting when we got out if we sentenced him to death. So we asked the sheriff’s department to bring the security people in when we gave down the sentence and keep the people in the courtroom until we were all out of the building. You never know. You don’t know the family."

One juror expressed concern about the awkwardness she would feel if she encountered any of the defendant’s family members outside of the trial. She thought she would

"I really wanted to do the right thing. I put too much into it and got sick."

harm the jurors? One female jurors from a death case noted,

We were afraid to go home. It was late at night when we got finished and (the defendant) was going to spend the night in our county jail and I knew that he had previously broken out of jail. The sheriff kept us all in his office until the entire premises was vacated and then he saw that each juror was escorted to his or her car and offered to follow us home. He saw how upset we were, we were so upset that we were still standing there crying about 90 minutes after our punishment decision. I don’t know if it was due to being a long, stressful day, or what. I did have them walk me to my car. All the way home I was like, afraid to stop at a stop sign. If there was a light, I was afraid to stop at it. I did, but I would look and see what was around me. It made you feel like you were being watched or followed. I had to come home to an empty house because my husband was working midnight. I couldn’t stay there, so I went to my sister-in-law’s house to visit.

members of their own community. They were uncertain how their friends, neighbors, coworkers, etc. would react to their sentencing decision. They were afraid that their “friends” would judge them or not understand how the jury could have reached the decision it did. One juror mentioned talking about his jury experience at work and feeling the need to defend his decision, “I was a little upset or worried about a coworker who was black that I liked. I thought he might think I was a racist.”

“Don’t call me”
The majority of the jurors interviewed did not want to serve on another capital case. Often the jurors’ comments were brief, but direct. One male juror from a death case, who refused to serve on another capital jury noted, "...I told the judge, if you get another case like this, don’t call me."

The comments from female jurors in life cases all indicated that they were unwilling to serve on a capital case in the future: “Never want to be on another one—too much stress..." "I don’t want to do it again. It was a very gory murder..." and “It was an experience I will never forget and I’ll never do again. They even call me again, I’ll check into a mental ward first.”

System failures
As this last juror’s comment “...I’ll check into a mental ward...” suggests, the experience of being a capital juror was both psychologically and emotionally disturbing. Eight jurors (3 males, 5 females) specifically expressed the need for counseling after the trial had ended. Most of those responding about the need for post-trial counseling thought that it should be made available to the jurors by the courts after the end of their jury service, while the other half admitted that they themselves had received counseling on their own (i.e. with a minister, spouse, or a psychiatrist) in the absence of the court’s willingness to provide it. There are no apparent significant differences

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20. Responding to the question, whether or not they came to the trial, did you have any thoughts or feelings about defendant’s family?
21. Responding to the question, how much have you talked to others about this experience as a juror?
among the jurors’ responses about the need for counseling between male or female jurors or those who served on life or death cases.

One of the male jurors from a life case who wanted to be counseling after the trial ended was angry at the court’s apparent lack of concern for the jurors’ emotional or mental well-being. He noted,

...I also think it sucks that they do not offer counseling to the jury for all this bullshit, you know. But if it was offered, I definitely would have taken them up on it. In fact this (the juror interview) helps therapeutic to go through and work through some of this. This really gives me better closure to it. That’s another thing the system is lacking in. It’s like okay, thank you, goodbye. You know. I’ve just given you 4 months of my life and now you’re just kicking me out.

While this juror was commenting about the failure of the judicial system to account for jurors’ psychological well being, seven other jurors (5 male, 1D; 2 female, 1D, 1L) voiced more specific complaints about failures in trial procedures including rules governing evidence presented during the trial. One male juror was frustrated about the trial attorneys’ behavior inside the courtroom, observing

...(they) turned the courtroom into a theater instead of a place for facts in defense of a person’s life or the prosecuting of it. They didn’t allow us to be smart enough to know anything...Both attorneys tried to manipulate the jury into seeing what they wanted them to see, instead of presenting the facts as they were...

Four other jurors (3 males, 1 female), all from life cases, talked about the lack of hard facts that were brought out during the trial and the need for more information about the crime and the defendant in order to come to the appropriate decisions. Two female jurors served on the same capital case in Florida and were concerned about the evidence presented during the trial. One noted, “I was extremely upset that the justice system failed. I felt it failed by not bringing out all of the factors that influenced (the defendant’s) commission of this crime. It still bothers me to this day. He needs to be in an institution where he can get help.”

The second juror also was upset.

During the first part of this case, when they couldn’t bring up his mental stability, so much of it was left for us to really (decide). It wasn’t clearcut. He they often dreamt about the defendant seeking revenge upon them. In general, both male and female jurors from life cases commented about a fear of retribution from the victim’s family, while jurors in death cases were concerned about retribution from the defendant’s friends or family.

For many of the themes that emerged in this analysis, however, the responses given by males and females in life and death cases were indistinguishable. Indeed, many jurors found the photographs of the crime scene and murder victim(s) horrifying, experienced trouble sleeping because of nightmares or recurrent thoughts, sought counseling or therapy, were angered and frustrated by the crim-

"I told the judge, ‘If you get another case like this, don’t call me.”

inal justice system, and were unwilling to serve on another capital trial.

These findings open the door for debate about changes to public policy. For example, are courts responsible for warning jurors they might be seriously impacted (both physically and emotionally) because of their experience serving on a capital case; do courts have the ability to limit the type and nature of evidence presented at trial for the purposes of reducing the harmful effects on capital jurors and, if so, how would this impact the legal rights of litigants; and should courts try to determine what is an acceptable level of stress that jurors can reasonably tolerate?

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Statement to the New Jersey State Legislative
Death Penalty Study Commission - Hearing September 27, 2006

Almost twenty years ago, United States Supreme Court Justice William J. Brennan was confronted with a case – *McCleskey v. Kemp*\(^1\) – that explicitly challenged the role of race in death penalty sentencing. While the majority of the Court found no constitutional error in a capital punishment system that condemned blacks who kill whites substantially more often than any other race of defendant/race of victim combination, Justice Brennan disagreed. In so doing, he theorized the painful reality of an honest conversation between a defense attorney and his African-American, capitaly charged client:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims [are far more] likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence ... Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.\(^2\)

Despite numerous efforts at reform, today a New Jersey capital defense attorney would be compelled to give his capitaly charged African American client virtually the same tragic assessment.

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As of April 2006, there were over three-thousand people on America’s death rows. Despite comprising only 12% of the national population, almost half of these death sentenced prisoners are African-American.\(^3\) One-third of the persons executed since the death penalty’s 1976 reinstatement were African-American.\(^4\) Although it might be easy to believe that these statistics are the product of a phenomenon solely reserved for the deep south, it is clear that our own state of New Jersey fares no better: although African-Americans comprise only 14.5% of New Jersey’s population, two thirds of our death row prisoners are African-American.

There are many reasons for this disproportionate representation of African-Americans on our death rows. Perhaps most notable, however, are the studies that show how race subtly infects the decision-making of the most critical players in the capital punishment system: jurors and prosecutors.

Scientific studies have long documented the existence of a psychological association between race and criminality.\(^5\) This perceived link is nothing short of deadly in the capital punishment context. For example, a recent study in the journal *Psychological Science* found that, in cases involving a white victim, the more stereotypically black a defendant was perceived to look, the more likely that person was to be sentenced to death.\(^6\) Similarly, a six-year study of the sentencing practices of jurors in our neighboring Philadelphia, Pennsylvania, found that, controlling for other factors, African-American defendants were almost four times more likely to receive the death penalty than similarly-situated whites.\(^7\) One need look no further than our state’s recent experience with racial profiling on the New Jersey Turnpike to observe that the belief that skin-color is an accurate indicator of criminal activity and guilt is not limited to capital jurors. We cannot, therefore, be surprised to find that these same stereotypes also infect the hearts and minds of the other New Jerseyans — e.g., prosecutors, judges, defense lawyers — who are involved in life-and-death decision-making.

Prosecutors affected by such conscious or unconscious biases can powerfully influence the capital punishment system by controlling the racial identity of the victims for whom death is sought as punishment and the racial make-up of the life-and-death decision-makers (e.g., the jury). It goes without saying that a racially diverse jury is substantially less likely to make a sentencing decision based on race. For this reason, it is


disturbing to note that throughout the country, prosecutors have excluded otherwise qualified African-Americans from service on capital juries. Indeed, just last year, the United States Supreme Court reversed two death penalty cases because the state improperly excluded potential African-American jurors based on race.\textsuperscript{8} Additionally, in nearby Philadelphia, Pennsylvania, it was recently revealed that a prosecutor was videotaped instructing young lawyers that it was imperative to keep African-Americans off of juries. In that tape, the prosecutor gave such admonitions as "young black women are very bad," "you know, in selecting blacks, you don’t want the real educated ones" and "there’s the blacks from the low-income areas . . . you don’t want those people on your jury."\textsuperscript{9}

Similarly, bias can be found in the decisions about which homicide cases warrant the death penalty. Studies throughout the country have noted that the odds of a prosecutor seeking and/or a sentencer imposing a death sentence are increased where the victim is white. For example, a February 1990 study by the United States General Accounting Office found that, "[i]n 82\% of the studies [reviewed], race of the victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, \textit{i.e.}, those who murdered whites were found more likely to be sentenced to death than those who murdered blacks."\textsuperscript{10} More recently, Professors Baldus and George Woodworth found that, taking into account all of the states with prisoners on death row, 93\% of the states showed evidence that race of the victim was a predictor of whether a death sentence would be given.\textsuperscript{11} These statistics equate to lives: all told, of the approximately 1000 persons who have been executed since the death penalty was reinstated in 1976, 80\% were executed for killing white victims.\textsuperscript{12} In New Jersey, only one-third of the persons on death row are there for killing black victims notwithstanding the fact that, as of 2004, over half of all homicide victims in New Jersey were black.\textsuperscript{13}

These statistics, of course, do not tell the whole story: innumerable examples, in state after state, reveal the complex ways in which race can infect the capital punishment system. In 1998, the Kentucky legislature was moved to pass a Racial Justice Act after a study found that every death sentence up to March 1996 was for the murder of a white

\textsuperscript{8} See Miller-El v. Dretke, 545 U.S. 231 (2005); Johnson v. California, 545 U.S. 162 (2005).
\textsuperscript{10} See Death Penalty Information Center, supra n.4.
\textsuperscript{12} See Death Row USA, Spring 2006, supra n.3.
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As stated by Justice Brennan,

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It is tempting to pretend that minorities on death row share a fate in no way connected to our own, that our treatment of them sounds no echoes beyond the chambers in which they die. Such an illusion is ultimately corrosive, for the reverberations of injustice are not so easily confined. [T]he way in which we choose those who will die reveals the depth of moral commitment among the living.\textsuperscript{17}
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Members of ethnic minority groups are faced daily with the sense that our skin color impacts the way we will be treated by the criminal justice system. Here in New Jersey, the recent exoneration of Larry Peterson is just one of a series of falsely convicted persons who are overwhelmingly ethnic minorities. Justice Brennan’s remarks remain relevant. It is incumbent that we ask ourselves – that this Commission ask itself – whether we are willing to continue sentencing people to death where the possibility of racism infecting the process remains so great. It is my view that we cannot preserve a system which is so subject to the influence of race. Abolition of the death penalty in New Jersey is a solution that will serve the ends of justice, and thereby serve us all.

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\item Maurice Possley and Ken Armstrong, \textit{The Flip Side of a Fair Trial}, Chicago Tribune (January 11, 1999).
\item \textit{McCleskey}, 481 U.S. 344 (Brennan, J., dissenting).
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Almost twenty years ago, United States Supreme Court Justice William J. Brennan was confronted with a case—McCleskey v. Kemp1—that explicitly challenged the role of race in death penalty sentencing. While the majority of the Court found no constitutional error in a capital punishment system that condemned blacks who kill whites substantially more often than any other race of defendant/race of victim combination, Justice Brennan disagreed. In so doing, he theorized the painful reality of an honest conversation between a defense attorney and his African-American, capitaly charged client:

At some point in this case, Warren McCleskey doubtless asked his lawyer whether a jury was likely to sentence him to die. A candid reply to this question would have been disturbing. First, counsel would have to tell McCleskey that few of the details of the crime or of McCleskey's past criminal conduct were more important than the fact that his victim was white. Furthermore, counsel would feel bound to tell McCleskey that defendants charged with killing white victims [are far more] likely to be sentenced to death as defendants charged with killing blacks. In addition, frankness would compel the disclosure that it was more likely than not that the race of McCleskey's victim would determine whether he received a death sentence ... Finally, the assessment would not be complete without the information that cases involving black defendants and white victims are more likely to result in a death sentence than cases featuring any other racial combination of defendant and victim. The story could be told in a variety of ways, but McCleskey could not fail to grasp its essential narrative line: there was a significant chance that race would play a prominent role in determining if he lived or died.2

Despite numerous efforts at reform, today a New Jersey capital defense attorney would be compelled to give his capitaly charged African American client virtually the same tragic assessment.

2 Id. 321 (Brennan, J., dissenting).
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5 Karen Juanita Carillo, Race Still a Factor in Death Penalty Cases, Amsterdam News (June 13, 2006).


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\textsuperscript{17} \textit{McCleskey}, 481 U.S. 344 (Brennan, J., dissenting).
844 Spruce St.
Trenton, NJ 08648

September 13, 2006

Re: Death Penalty Opposed

To Whom It May Concern:

I recently retired from the State of New Jersey after working for over 22 years for the New Jersey Department of Corrections (NJDOC). I worked in some of the toughest prisons in the state, including East Jersey State Prison at Rahway, the Edna Mahan Correctional Facility for Women at Clinton, and the New Jersey State Prison at Trenton. At the latter facility I had contact with the inmates on the Capital Sentencing Unit, or Death Row.

My experience with the NJDOC has led me to become a strong opponent of the death penalty.

The disproportionate minority confinement in the NJDOC (approximately 80% of the inmates are Black and Hispanic) is clear evidence that our entire criminal justice system is broken and in need of a complete overhaul. The system is riddled with institutionalized classism and racism. This is not a system that should be carrying out the death penalty.

The sincere yet mistaken testimony of eyewitnesses has led to many wrongful convictions. Heaven forbid that our state should execute an innocent man, yet I am certain that many states have done so already.

New Jersey’s current method for carrying out the death penalty, lethal injection, is a quasi-medical procedure that corrupts the notion of medicine and corrupts any health care practitioners who are even remotely associated with it.

The Administrator of New Jersey State Prison is required to possess Controlled Dangerous Substances for the purpose of execution. This is a violation of the spirit of the Controlled Substances Act and morally questionable in its own right, especially when the prison registers with the Drug Enforcement Administration (DEA) as a “research facility”. Even the pharmaceutical companies that make these substances seek to distance themselves from this use of their products.

Capital punishment is no deterrent to murder. It is an insult to logic for the government to kill someone because it disapproves of murder. Corrections professionals understand that the behavior that is shown towards inmates is the behavior can be expected from them in return. NJDOC staff attempt to treat all inmates with dignity and respect. This is a lesson society needs to learn.

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September 27, 2006

The New Jersey Death Penalty Study Commission
Trenton, New Jersey

To the Chairman and Members of the Commission:

Re: THE WORST OF THE WORST

Yes, there are some people for whom the “ultimate penalty” is the right penalty. As one expert questioned, how do we know that these are the worst of the worst. I do hope that the panel members have become familiar with the crimes of those nine men who are now on Death Row. The death of Megan Kanka at the hands of Jesse Timmendequas is perhaps familiar to many across this country. But do you know about the murder of Latasha Goodman? She was six years old.

One Sunday after church, Latasha and her family had dinner at the parish hall because they were too poor to have a good dinner. It was a warm summer afternoon. After dinner, the family visited with relatives. While the adults sat on the front porch, the children played in the fenced-in back yard. A man, stood in the shrubs and watched the children at play for a while. He then approached the children asking would one of them like a quarter? Six year old Latasha said she would go with the defendant. He lifted her over the fence and led her away by the hand. Her seven year old cousin was yelling "Don't go Tasha, you are going to get kidnapped". The cousin immediately ran around to the front porch and a search was instigated. The family called the police and neighbors were asked to help find the child. Several hours later the police found the body of the child under a porch of an abandoned building. The defendant had left her body naked from the chest down, one shoe off, in the rubble of the porch. He walked off after boarding up the entrance to the underside of the porch.

The defendant, David Cooper, later advised the police that he had heard people standing on the sidewalk in front of the porch calling the child's name. We do not know
if she was alive to hear her family calling her or not. Cooper raped her both vaginally and anally, using a condom so that he would not leave any evidence in or on the body. Cooper returned to the scene to watch the police working at the scene. He then went out for a beer.

Is there any question of his innocence? He left some money and i.d. at the scene. He was identified by the seven year old cousin. DNA matched him to the victim. He also confessed to the crime. His "defense" was that he didn't mean to kill her; he strangled her by accident.

And the effects of his crime on the little girl's family? The father of the child died of a heart attack six months after the murder. The mother later started using drugs. The family was destroyed. This was a very poor family on the lowest economic scale of our community. The father worked on a garbage truck. The mother was slow, unemployed, probably handicapped. The media never gave this case any attention and the family was poorly qualified to fight for justice for their daughter and the family.

Every one of the following names has a similar story: grief, loss, and permanent damage extending far beyond the actual murder.

Cheryl Alson
Carol Peniston
Irving Flax
Theresa Dempster
David Yul
Anna Duval
Gary Marsh
Sofia Fetter
Irene Schnaps
Latasha Goodman
Kristin Huggins
Keith Donaghy
Richard Pine

Megan Kanka

Richard Hazzard

Shirley Hazzard

You will notice that there are sixteen people on this list. Most of the names won’t be familiar to you. They are the sixteen people murdered by the nine men on death row. No, not suspected of murdering. These nine capital murderers stand convicted of killing these sixteen people. All nine murderers were found to be deserving of the death penalty by juries composed of twelve citizens of this state. No one, I repeat, no one has come before this Commission to suggest that any of them are innocent.

The worst of the worst? In this state, we have juries to answer that question.

Very truly yours,

Marilyn G. Zdobinski