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THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF FREMONT

STATE OF IDAHO, Plaintiff, v. LORI VALLOW DAYBELL, Defendant.	))))))))))	Case No.: CR22-21-1624 MOTION TO DECLARE THE DEATH PENALTY UNCONSTITUTIONAL AND TO PRECLUDE ITS APPLICATION IN THIS CASE BECAUSE EMPIRICAL RESEARCH HAS ESTABLISHED THAT THE MODERN DEATH PENALTY IS AS UNGUIDED, ARBITRARY, AND CAPRICIOUS AS THE SYSTEM OF CAPITAL PUNISHMENT STRUCK DOWN BY *FURMAN v. GEORGIA*

Come now the attorneys for the defendant, and move this Court to declare Idaho's death penalty scheme unconstitutional and preclude the prosecution from seeking the death penalty in this case because empirical research has established that the death penalty, in practice, fails to meet the minimum standards set forth in *Furman v. Georgia*, 408 U.S. 238 (1972), *Gregg v. Georgia*, 428 U.S. 153 (1976), and their progeny. Defendant files this motion pursuant to the Fourth, Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Idaho Const. art. I, secs. 6, 7, 8 and 13, as well as the other authorities cited below.

As grounds for his motion, defendant states as follows:

I. Introduction

1. Since 1972, the United States Supreme Court has been "tinkering with the machinery of death." *See Callins v. Collins*, 510 U.S. 1141, 1145 (Blackmun, J., dissenting from denial of certiorari). For almost forty years the Court has examined, teased apart, and ruled on a difficult maze of procedural and substantive constitutional questions addressed to various provisions of the Sixth, Eighth, and Fourteenth Amendments, raised in the context of dozens of factually challenging cases in which inmates on death row have contested their sentences on a broad variety of grounds. The Court has spent an inordinate amount of time and resources on the difficult task of deciphering and articulating precisely what the Constitution requires for a lawfully composed jury to lawfully return a sentence of death in any given capital murder trial.

2. The first part of this motion sets forth the constitutional standards articulated by the U.S. Supreme Court, organized into three general decisional areas: the ***Furman/Gregg*** line, which requires the elimination of arbitrary and capricious decision-making and its replacement with a system of criteria-based guided discretion; the ***Woodson/Lockett*** line of cases, which recognize the 8th Amendment's *per se* proscription against mandatory death sentences or the notion that death can ever be the only appropriate penalty for a capital offender - irrespective of the nature of the crime or the background of its perpetrator - and which require, instead, an individualized determination of sentence based upon a meaningful consideration of all that the defendant has to offer in mitigation; and the ***Morgan*** line of cases, which requires capital juries to be genuinely

open to considering and giving effect to the defendant's case in mitigation even after having convicting her of first degree murder.

3. The second section of this motion examines whether, in practice, capital juries are able to meet these constitutional standards. Do modern capital juries, in practice, live up to what modern death penalty law requires or do they fall short? And if they are not performing as the law requires them to, how far short of the law's requirements do they fall and on what kinds of measures? Are these minor flaws we can chalk up to human frailties? Or do these failures go right to the heart of what our system of justice has repeatedly and consistently emphasized as its most fundamental constitutional prerequisite for a lawful death sentence: The elimination of arbitrary and capricious decision-making, replaced by capital decision-making that is "directed and limited," "channeled" "by clear and objective standards" that provide "specific and detailed guidance" that "make rationally reviewable" the "reasoned" "process for imposing a sentence of death," if the death penalty itself is to survive. *Gregg v. Georgia*, 428 U.S. 153, 189, 206, 207 (1976); *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989).

4. The answers provided in the second part of this motion derive from an examination of a substantial body of peer-reviewed, validated, and reliable social science data, focusing mostly on research conducted and analyzed by social scientists working with the Capital Jury Project (CJP)—a nationwide National Science Foundation-funded research group. The CJP was formed by the scientific community in response to *Lockhart v. McCree*, 476 U.S. 162 (1986) and *McCleskey v. Kemp,* 481 U.S. 279 (1987), two cases in which the Court rejected studies of juror behavior because they did not involve the study of "real" capital jurors.

5. The CJP has spent two decades thoroughly analyzing how real capital juries actually go about making real capital sentencing decisions, and comparing their findings to the Supreme Court's pronouncements reviewed in the first section of this motion. The CJP research confirms the findings from previous studies, and provides additional sobering and incontrovertible evidence of:

(1) premature decision-making, *i.e.* decisions for death being made prior to hearing or considering mitigation;

(2) bias in jury selection;

(3) juror 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.

6. These conclusions were drawn from interviews conducted with actual jurors, who received the same type of instructions that the jurors in this case would receive. These are jurors that have been instructed, advised and selected, supposedly in accordance with constitutional norms.

II. Overview of United States Supreme Court Capital Jurisprudence

A. Principles from the *Furman/Gregg* Line of Cases

7. The modern death penalty era began on June 29, 1972, with the Supreme Court's decision in *Furman v. Georgia,* 408 U.S. 238 (1972). *Furman* did not hold that the death penalty itself, as a form of punishment, was unconstitutional. Rather, the Court found fault with the ***manner*** in which the decision to sentence any particular offender to death was then being

administered in America. At the time, the law granted capital juries complete and total discretion to impose the death penalty on whomever the jury saw fit according to the jury's own standards. Exercising unfettered discretion to sentence capital defendants to die had resulted in a jury decision-making system that was so freakishly wanton, so arbitrary and capricious, and so unreviewable on appeal, that the Court was compelled to intervene and hold that the ***process*** by which the decision to impose death was being made violated the Cruel and Unusual Punishment clause of the Eighth Amendment.

8. The *Furman* decision rendered every death penalty system in America unconstitutional. Beyond this immediate effect, however, trying to understand what the Court actually held in *Furman* presented no easy task. The *per curiam* opinion itself, which is only one paragraph long, is in reality a complex patchwork of overlapping concurring and dissenting opinions totaling 231 pages. But in the four decades since the Court issued the *Furman* opinion, it has had many occasions to articulate precisely what it intended. In short, the Court intended for States to eliminate the standardless sentencing power that capital juries had previously enjoyed to impose a sentence of death, because the exercise of unrestrained discretion by capital jurors to impose death inevitably leads to arbitrary and capricious decision-making in violation of the Eighth Amendment. As the Court stated in *Woodson v. North Carolina*, 428 U.S. 280, 302, 303 (1976):

> Central to the holding in *Furman* was the conviction that the vesting of standardless sentencing power in the jury violated the Eighth and Fourteenth Amendments. …*Furman*'s basic requirement [is] replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death.

9. In *Furman*, the Court held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Gregg v. Georgia*, 428 U.S. 153 (1976) reaffirmed this holding: "Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189.

10. This means that if Idaho wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. It must channel the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia,* 446 U.S. 420, 427-428 (1980); *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988).

11. The primary concern that the Court sought to address in *Furman* was a capital decision-making process that reflected no more than the standardless personal beliefs of the individual jurors. "Left unguided, juries imposed the death sentence in a way that could only be called freakish." *Gregg, supra*, 428 U.S. at 206. Capital juries did what they wanted, not according to any rule of law; not according to specifically enumerated criteria; but according to their own personal and subjective belief systems. Death sentences thus embodied the height of jury arbitrariness and caprice.

12. A separate but related question spawned by the concerns over unregulated and arbitrary decision-making expressed in *Furman* was whether constitutional defects of this nature were even capable of being corrected. After all, the fly in the constitutional ointment was the

process by which ordinary people went about deciding something as out of the ordinary as whether to take, or spare, another human being's life.

13. Adding to this dilemma was the fact that only a year before the *Furman* decision, Justice Harlan, writing for a majority of the Court in *McGautha v. California*, 402 U.S. 183, 204 (1971), had expressed considerable doubt on the question of whether legislatures were capable of writing capital sentencing laws that could both be understood by ordinary citizens and serve to eliminate these same citizens' arbitrary and capricious decision-making:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

14. Despite the reservations expressed by the Court in *McGautha* in 1971, on July 2, 1976, nearly four years to the day after issuing its decision in *Furman*, the Court took on the task of ruling on the constitutionality of five different States' legislative responses to *Furman*, finding that three of them—at least "on their face"—"seem[ed] to satisfy the concerns of *Furman*."[1] G*regg, supra,* 428 U.S. at 198.

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[1] The three death penalty schemes that the Court found valid on their face were from Georgia, Florida, and Texas; presented in the cases of *Gregg v. Georgia,* 428 U.S. 153 (1976), *Profitt* v. *Florida*, 428 U.S. 242 (1976), and *Jurek v. Texas*, 428 U.S. 262 (1976). The mandatory death penalty systems of the other two states – North Carolina and Louisiana – were ruled unconstitutional in *Woodson v. North Carolina,* 428 U.S. 280 (1976) and *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976), discussed *infra*.

15. The three capital sentencing schemes which facially seemed to address *Furman*'s concerns with arbitrariness represented three different approaches to how the penalty decision would now be made—a "weighing" approach (Florida), a "threshold" approach (Georgia), and a "directed" approach (Texas)—but all three shared four essential features in common. These four core features are what distinguish a facially valid death penalty system from an unconstitutional one. These core features include:

a. A rational statutory mechanism for narrowing the class of death-eligible offenders;

b. A bifurcated proceeding—separate and apart from the guilt determination—for deciding the separate question of which of these death-eligible defendants the jury should sentence to death, and which should be spared;

c. A statutory and instructional scheme that channels the sentencer's discretion with clear and objective standards that provide specific and detailed guidance for the jurors, and in a manner that is understandable by them and that makes rationally reviewable the process by which they impose a sentence of death; and

d. State appellate review adequate to ensure that the jury's decision was arrived at by means that comport with what the Constitution requires of them.

It is the second and third of these four cornerstones that are the primary focus of this motion.

16. In the years following its decision in *Gregg* and its companion cases, the United States Supreme Court began to address with some regularity the constitutional problem that arises from vague sentencing criteria that permit imposition of death through arbitrary application. Death sentences made pursuant to vague criteria are not objectively reviewable on appeal because there is no way to determine on what statutory bases the jury made its decision.

17. Beginning in 1980, with the case of *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Court began to address this problem of illusory guidance by employing the Eighth Amendment's prohibition against factors in aggravation that are void for vagueness. In *Godfrey,* the Court found Georgia's "outrageously or wantonly vile, horrible, and inhuman" aggravator failed to provide any

meaningful guidance to the jury. The Court found that a jury making decisions according to these vague criteria was as unconstrained in its sentencing choices and as free to return a sentence of death as it would have been in the era before *Furman.*

18. In *Maynard v. Cartwright*, 486 U.S. 356 (1988), decided eight years later, the Court declared Oklahoma's "especially heinous, atrocious, or cruel" standard unconstitutional on the same grounds. This followed the federal trend of cases in which the Supreme Court invalidated those parts of state death penalty laws which failed to give the jury clear guidance and criteria for making decisions.

19. In *Stringer v. Black,* 503 U.S. 222 (1992), the United States Supreme Court ruled on yet another case in which the jury had been instructed to make the decision based on whether they found the killing "heinous, atrocious, and cruel." In *Stringer*, the Court explained that these sorts of vague non-standards violate the Constitution both because they fail to serve the purpose of genuinely guiding the jury's decision, and because the failure to genuinely guide the capital decision-making process has the effect of skewing the decision in favor of death:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance… [T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty.

Id. at 235-36; *see also Sanders v. Brown*, 546 U.S. 212 (2006).

20. In addition to the problem of vague aggravating circumstances, under *Furman/Gregg*, the criteria by which the decision is made cannot leave the jurors with false,

inaccurate, or misleading impressions that force the jurors to impose a sentence of death based on their fears and not on reality. The decision cannot be influenced by factors which the law prohibits from playing a role in any aspect of judicial decision-making, such as race.

21. As to the issue of race, the Supreme Court has acknowledged that capital punishment cannot be based upon racial considerations. In *Turner v. Murray,* 476 U.S. 28 (1986), the Court stated:

> In a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'…
>
> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected…
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. 'The Court, as well as the separate opinions of a majority of the individual Justices, has recognized, that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'

Id., at 33-35.

22. In *Simmons v. South Carolina,* 512 U.S. 154 (1994), the Court was presented with the question "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of a state trial court to instruct the jury in the penalty phase of a capital trial that under state law the defendant was ineligible for parole." *Id*. at 156. In South Carolina, at the time of trial in that case, the jury had two available sentencing choices: the death penalty or life without possibility of parole. However, pursuant to state law a capital jury in South Carolina was not informed that a life sentence meant life without the possibility of parole. They were simply told that their

sentencing choices were between a verdict of death, and a sentence of life in prison. Consistent with South Carolina law, the prosecutor successfully moved to preclude any mention of parole ineligibility by defense counsel at any point in the trial. *Id*. at 156-57.

23. The prosecutor proceeded to argue to the jury that they needed to return a death sentence as the only way to keep themselves and their communities safe from the possibility of Mr. Simmons committing additional violent crimes against them some time in the future. The Court agreed with Simmons' counsel that "the trial judge's refusal to provide the jury accurate information regarding his parole ineligibility violated the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment." *Id.,* at 160-161. The Court explained:

> In this case, the jury reasonably may have believed that petitioner could be released on parole if he were not executed. To the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration. This grievous misperception was encouraged by the trial court's refusal to provide the jury with accurate information regarding petitioner's parole ineligibility.

Id. at 161-62.

24. Seven years after *Simmons*, the Court revisited the issue in *Shafer v. South Carolina,* 532 U.S. 36 (2001). In *Shafer,* the jury was uncertain as to what a life sentence meant, so they asked, sending in several notes asking for clarification on the question of whether a South Carolina sentence of life in prison meant the defendant would be eligible for release on parole at some point in time. The questions made sense given the widespread, popular belief in America that a life sentence *never* means life. Defense counsel was prevented from arguing in closing that Shafer would never get out of prison and was even prevented from reading the statute to the jury. *Id.*, at 42.

25. In finding Shafer's death sentence unconstitutional, the Court focused in part on *Simmons'* admonition that a capital jury's choice to sentence someone to death not ever be premised upon false, misleading, or inaccurate beliefs about parole eligibility precisely because these erroneous beliefs have the effect of forcing the jury to choose death to make sure that the defendant is never released. With respect to jury misconceptions about life sentences and parole eligibility, the Court went on to state what should have been obvious to the South Carolina courts: "[C]ommon sense tells us that many jurors might not know whether a life sentence carries with it the possibility of parole." *Id*. at 52.

B. Principles Established by the *Woodson*/*Lockett* Line of Cases

26. On the same day the Supreme Court facially approved the guided-discretion death penalty laws of Florida, Georgia, and Texas, the Court held unconstitutional the mandatory death penalty laws of North Carolina and Louisiana. In *Woodson v. North Carolina,* 428 U.S. 280 (1976), the Supreme Court "addresse[d] for the first time the question whether a death sentence returned pursuant to a law imposing a *mandatory* death penalty for a broad category of homicidal offenses constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments." *Id*. at 287. In answering that question in the affirmative, the Court gave birth to a notion which is now an integral part of the Court's Eighth Amendment jurisprudence: the capital defendant's right to an ***individualized determination*** of his/her sentence. The Court stated in *Woodson*:

> In *Furman*, members of the Court acknowledged what cannot fairly be denied -- that death is a punishment different from all other sanctions in kind rather than degree . . . . A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors

> stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death…
>
> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development. While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 303-05.

27. In *Woodson*, the Court held that North Carolina's death penalty laws, which required the execution of anyone convicted of a broad range of homicide offenses, violated the Eighth Amendment. Was it possible, however, that consistent with the Eighth Amendment a state could legislate death as the only appropriate penalty if the state were to narrow either its category of mandatory-death offenses or its class of mandatory-death offenders? In the cases of *Roberts (Stanislaus) v. Louisiana,* 428 U.S. 325 (1976), *Roberts (Harry) v. Louisiana,* 431 U.S. 633 (1977), and *Sumner v. Shuman,* 483 U.S. 66 (1987), the Court answered these questions with an emphatic "***No***," and made it unmistakably clear that no matter how terrible the crime and no matter how

horrific the perpetrator's criminal background, the Constitution does not ever permit death to be the *only* appropriate sentence.

28. In the first of these three cases, *Roberts (Stanislaus) v. Louisiana,* the Court invalidated Louisiana's mandatory death penalty scheme, even though it (unlike North Carolina's very broad death penalty law) applied to only a narrowly drawn class of first-degree murders which the State had designated "capital murders." The Court held that death can never be the only appropriate penalty, even when the murder at issue is described by a specific statute directed at protecting a special category of victim, as in Roberts' case, the murder of an on-duty police officer. The *Roberts (Harry)* Court reasoned:

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.
>
> As we emphasized repeatedly in *Stanislaus Roberts* and its companion cases decided last Term, it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional.

431 U.S. at 636-37.

29. Ten years later, in a case involving a convicted murderer who was already serving a sentence of life without the possibility of parole when he threw lighter fluid onto another inmate

and set him on fire, killing him, the Court expressly and conclusively put an end to the premise that there might exist either some special category of murder or some very limited category of offender for whom the Constitution would permit death as the only appropriate penalty. In *Sumner v. Shuman,* 483 U.S. 66 (1987), the Court declared Nevada's mandatory death penalty statute unconstitutional, again returning to the touchstone of *Furman*:

> It is important to examine once again the establishment of the individualized capital-sentencing doctrine in this Court's opinions issued in 1976 and the development of that doctrine in the ensuing decade, before determining whether an exception is justified in the present case. In each of the five death-penalty cases decided in 1976, the Court's judgment rested on a joint opinion of Justices Stewart, Powell and Stevens. Those five opinions, reflecting the views of the only Members of the Court to vote in support of all five judgments, drew a critical line between post-*Furman* statutes that could survive constitutional scrutiny and those that could not. In the three cases upholding the guided-discretion statutes, the opinions emphasized the fact that those capital schemes permitted the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual. In the two cases striking down as unconstitutional mandatory capital-sentencing statutes, the opinions stressed that one of the fatal flaws in those sentencing procedures was their failure to permit presentation of mitigating circumstances for the consideration of the sentencing authority…
>
> The constitutional mandate of individualized determinations in capital-sentencing proceedings continued to guide this Court's review of capital-punishment statutes in the ensuing decade. It led the Court to invalidate another aspect of Louisiana's mandatory statute the following year . . . . It has had a significant impact on our decisions in cases where the sentencing authority's consideration of mitigating circumstances had been restrained in some manner... Not only did the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen to that evidence.'…
>
> The constitutional mandate of heightened reliability in death-penalty determinations requires individualized-sentencing procedures. Having reached unanimity on the constitutional

> significance of individualized sentencing in capital cases, we decline to depart from that mandate in this case today.

Id. at 73, 75-76, 85, referring to *Lockett v. Ohio,* 438 U.S. 586 (1978).

30. The corollary to *Woodson*'s holding - that under the Constitution death can never be the only appropriate penalty for a convicted capital murderer no matter how terrible the crime nor how horrific the perpetrator's background - is the Court's recognition that the Constitution requires an individualized determination of sentence. In the wake of *Woodson,* other questions about the role of mitigation arose: Under a system that recognizes the right to an individualized determination of sentence, can jurors nevertheless refuse to listen to, or give effect to, a capital defendant's evidence in mitigation if the case is particularly egregious? Can a State carry out a sentence of death rendered by jurors who believed that the responsibility for imposing a death sentence rested not with them, but elsewhere?

31. Between 1978, when the Court decided the case of Sandra Lockett, condemned to die by a jury in Ohio, and 1990, when the Court ruled on the case of Dock McCoy, Jr., condemned to die by a jury in North Carolina, the Court answered all of these questions in a manner that made it clear that the defendant's right to an individualized determination of sentence is a multi-faceted right that lies at the very core of what distinguishes a constitutional death sentence from an unconstitutional one.

32. In *Lockett v. Ohio,* 438 U.S. 586 (1978), a case in which the State of Ohio limited the presentation of mitigating evidence to certain specifically enumerated categories, none of which adequately reflected what Sandra Lockett wanted her jury to consider, the Court held:

> We conclude that the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis

> for a sentence less than death. We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. A variety of flexible techniques -- probation, parole, work furloughs, to name a few -- and various postconviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Id. at 604-05.

33. Four years after the *Lockett* decision, the Court ruled on the case of *Eddings v. Oklahoma,* 455 U.S. 104 (1982). In *Eddings,* the trial court, which sat as the sentencing body pursuant to Oklahoma law at the time, permitted Eddings to present a broad range of evidence at a sentencing hearing. However, the judge refused to consider the "young man's violent background" because he believed he was precluded from doing so under the law, and imposed the death penalty. *Id.* at 109. Reversing Eddings' death verdict, the Court held:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, ***neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence***. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. ***But they may not give it no weight by excluding such evidence from their consideration***.

Id. at 114-15 (emphasis added).

34. Likewise, in *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), the Court reiterated:

> *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider *and* give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human being.'

Id. at 319 (internal citations omitted).

35. In 1986, the Court decided *Skipper v. South Carolina*, 476 U.S. 1 (1986). Skipper had attempted to introduce evidence of his good behavior in the county jail over the seven months which preceded his trial so that he could argue that he would be able to adjust to prison without posing a threat to guards or inmates should the jury return a life sentence. The trial court precluded Skipper from introducing this evidence on the grounds that it was not relevant to the penalty decision in that it did not excuse, explain, or reduce Skipper's culpability for the underlying crime. Reversing Skipper's death sentence on *Lockett/Eddings* grounds, the Supreme Court held:

> There is no disputing that this Court's decision in *Eddings* requires that in capital cases 'the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.' These rules are now well established, and the State does not question them. Accordingly, the only question before us is whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment. It can hardly be disputed that it did…
>
> Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than

> death.' Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.' The Court has therefore held that evidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing . . . . Likewise, evidence that the defendant would not pose a danger if spared, but incarcerated, must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration…
>
> A defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination. Evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination.

Id. at 4-5, 7 (internal citations omitted).

36. Two years after *Skipper*, the Court was faced with a challenge to Maryland's death penalty scheme that required jurors to unanimously agree on whether the defendant had proven any of a number of specifically enumerated categories of mitigating evidence before they could move on to the next step in their decision-making process, i.e. weighing the mitigation which they had unanimously found against the State's evidence in aggravation.

37. Under Maryland's death penalty laws a capital defendant could face a situation where eleven jurors believed that the defendant had proven mitigation - even mitigation deserving of a life sentence - but if even one juror disagreed, the jury was left with no choice but to indicate that they had not unanimously found any mitigation, which in turn left them with no choice but to return a sentence of death. In holding that Maryland's death penalty law violated the capital defendant's right to an individualized determination of death under *Lockett/Eddings/Skipper* the Court held:

> It is beyond dispute that in a capital case 'the sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence' is equally well established." *Ibid.* (emphasis added), quoting *Eddings,* 455 U.S. at 114, 102 S.Ct., at 877.
>
> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute***,*** *Lockett v. Ohio*, *supra*; *Hitchcock v. Dugger*, 481 U.S. 393 (1987); ***by the sentencing court***, *Eddings v. Oklahoma*, *supra*; ***or by an evidentiary ruling***, *Skipper v. South Carolina*, *supra*. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause the conclusion would necessarily be the same. The sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*…
>
> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case.

Mills v. Maryland, 486 U.S. 367, 374-375, 383 (1988).

38. The following year, in *McKoy v. North Carolina,* 494 U.S. 433 (1990), the Court found a similar unanimity requirement in North Carolina's death penalty laws unconstitutional. The requirement prevented the jury from considering any mitigating factor that the jury does not find unanimously when deciding whether to impose the death penalty. The Court held that this unanimity requirement was unconstitutional under *Mills*:

> The Constitution requires States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall. As we stated in *Mills*: "Under our decisions, it is not

> relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, [*Lockett, supra; Hitchcock v. Dugger, supra*]; by the sentencing court, [*Eddings, supra*]; or by an evidentiary ruling [*Skipper, supra*]. Whatever the cause, the conclusion would necessarily be the same. The sentencer's failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*.

Id. at 442.

39. Like the United States Supreme Court, Idaho courts have consistently upheld the bedrock constitutional principle that a capital sentencing scheme must allow the sentencing body to consider any relevant mitigating evidence regarding the defendant's character and background and the circumstances of the offense. *See, e.g., State v. Osborn*, 102 Idaho 405, 415 (1981)(" the concept of mitigation is broad"); *State v. Creech*, 105 Idaho 362 (1983)("[t]he open ended allowance of mitigating evidence provides the defendant with the opportunity to present every possible justification for a sentence of less than death."); *Sivak v. State*, 112 Idaho 197, 200, (1986)("A review of the record and the precedent of the United States Supreme Court on the critical importance of mitigation evidence to the imposition of the death sentence, leads this Court to the inexorable conclusion that it was error of the district judge to refuse to hear any of the defendant's mitigation evidence [regarding his conduct in prison]").

40. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the United States Supreme Court described yet another side to the capital defendant's right to an individualized determination that death is the appropriate sentence in his or her case - the right to have each juror understand that he or she, alone, is responsible for his or her sentencing decision. *Caldwell* was a case in which the prosecutor argued in rebuttal at the penalty phase that the defense lawyer's attempts to make the

jurors understand that the decision to sentence Caldwell to death was theirs, and theirs alone, was both unfair and misleading. *Id.* at 325.

41. In reversing the death sentence in *Caldwell*, the Supreme Court established yet another fundamental component of what the right to an individualized determination of death entails - the right to have the jury imposing the sentence understand that the responsibility for their decision rests with them alone. "This Court has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.'" *Id*. at 341.

> It is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who believes that the responsibility for determining the appropriateness of the defendant's death rests elsewhere… The uncorrected [belief] that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Id. at 328, 333.

42. The cases examined above describe the nature and extent of a capital defendant's multi-faceted Eighth Amendment right to an individualized determination of sentence. In a system of law in which rights are inevitably bound up with duties, the next logical question is: Above and beyond the duties imposed on the trial court and the trial jury discussed above, does the capital defendant's Eighth Amendment right to an individualized determination of sentence impose any special Sixth or Fourteenth Amendment duties upon trial counsel?

43. In *Williams v. Taylor,* 529 U.S. 362 (2000), the Court answered that question with a clear "Yes," holding that, precisely because a capital defendant has an Eighth Amendment right to present an individualized case in mitigation, the Sixth Amendment imposes a corresponding duty on counsel to competently investigate, locate witnesses and information, and present that

case. The failure to do so supports a claim of ineffective assistance of counsel and renders the resulting sentence unconstitutional.

> In the instant case, it is undisputed that Williams had a right—indeed, a constitutionally protected right—to provide the jury with the mitigating evidence that his trial counsel either failed to discover or failed to offer.

Id. at 393.

44. The principles articulated by the *Woodson/Lockett* line of cases can be summarized as follows: Death can never be the only appropriate penalty for a convicted capital murderer, regardless of the crime, who the victim was, and defendant's criminal background. Instead, the Eighth Amendment confers onto every capital defendant the right to an individualized determination of sentence. This right to an individualized determination of sentence means that neither the State nor the trial court can restrict the defendant's ability to present evidence in mitigation. Whatever evidence the defendant wishes to offer which may tilt the scales away from death is admissible as mitigating evidence, regardless of whether it acts to excuse the crime, lessens the defendant's culpability for it, or can serve as a basis for a sentence of less than death in some other way.

45. The right to an individualized determination of sentence means that the jury that will decide the defendant's fate must be able to consider and give effect to a defendant's mitigation. A juror who refuses to listen to, consider, or give effect to the defendant's case in mitigation is functioning outside the law in a manner at odds with the Eighth Amendment. Whatever the cause—statute, instruction, a particular juror's belief system, or a particularly egregious crime—the Constitution tolerates no barrier to the jury's duty to listen to, consider, and give effect to the defendant's evidence in mitigation.

46. The right to an individualized determination of sentence also means that the defendant is entitled to the individual opinions of each member of the jury. There can be no requirement for unanimity with respect to mitigation. The jury cannot make its decision on the basis of false or misleading assumptions, or feel "forced" to choose death so as to avoid a falsely-held fear regarding its sentencing choices.

47. In a similar vein, the jury cannot make decisions that are influenced by improper factors such as race. Moreover, the jurors must understand that they and they alone are responsible for their sentencing decision. Neither the law, nor the judge, nor the availability of appellate review can be used by the jurors to avoid responsibility for a decision which only they can make.

48. Finally, the Eighth Amendment right of a capital defendant to an individualized determination that death is, or is not, the appropriate sentence in his or her case imparts a Sixth Amendment duty to trial counsel to adequately investigate, analyze, and present a case in mitigation.

C. The Evolving Standards for Jury Qualification and Jury Service: From *Witherspoon/Witt* to *Morgan*

49. Just as the constitutional standards that govern how a capital jury must (and must not) exercise its decision-making power have changed dramatically over the course of the past four decades, the constitutional standards governing what qualifications a potential juror must have to be able to lawfully serve as a capital juror have likewise changed dramatically.

50. Prior to the Supreme Court's decision in *Witherspoon v. Illinois,* 391 U.S. 510 (1968), written in a decade in which support for the death penalty was at an all-time low, *see id*. at 520, fn. 16, many trial courts and prosecutors were preoccupied with keeping "life-scrupled" jurors from serving on any death penalty case. State prosecutors, whose challenges for cause were

sanctioned by state trial judges, routinely removed any juror who expressed even the slightest hesitation about returning a verdict of death. In Mr. Witherspoon's case, for example, the tone was set when the trial judge said early in the *voir dire*, "Let's get these conscientious objectors out of the way, without wasting any time on them." *Id.* at 514.

51. In ruling on that part of Witherspoon's challenge to his death sentence predicated upon the Illinois prosecutor having caused the dismissal of every potential juror who expressed any conscientious scruples against the death penalty, the Court held:

> A State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected. Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.

Id. at 522-23.

52. The standard for juror qualification (or more properly, the standard for disqualifying a juror) that emerged from *Witherspoon* is as follows: Jurors who made it "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 of the case 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" were properly removed for cause. *Id*. at 522, fn. 21.

53. Seventeen years after *Witherspoon*, the Court decided *Wainwright v. Witt*, 469 U.S. 412 (1985). In *Witt*, the Court was asked "to examine once again the procedures for selection

of jurors in criminal trials involving the possible imposition of capital punishment." *Id*. at 414. The Court ultimately abandoned the "unmistakably clear" standard of *Witherspoon* in favor of a standard that many saw as implicitly applicable not only to life-scrupled jurors, but to death-biased jurors as well.[2] Under *Witt*, the standard for jury disqualification established by the Court was "whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id*. at 424.

54. Seven years after its decision in *Witt*, the Court expressed the standard in the context of the constitutional problem presented by death-biased jurors. In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Court declared the death verdict unconstitutional because the trial court had precluded Mr. Morgan's attorneys from examining the potential jurors about their attitude towards the death penalty within the contours of the evidence they would be receiving in that particular case.

55. The Court in *Morgan* responded to the issues before it in four ways. First, the Court explained the importance of an adequate *voir dire* to ensuring a capital defendant's right to an impartial jury. *Morgan*, 504 U.S. at 729-30 ("Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."" (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion)). *See also id.* at 724, n. 3 ("Indeed, given the type of scrutiny capital cases receive on review, one would think trial courts would go out of

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[2] The *Witt* Court did not specifically address itself to jurors whose views were biased in favor of death. Despite the fact that by 1985 support for the death penalty was higher than it had ever been in the twentieth century, prosecutors and courts continued to focus their attention on life-scrupled jurors.

their way to afford a defendant every possible safeguard."). In this ruling, the Court was echoing what it had consistently ruled in the past, with respect to permitting meaningful voir dire on racial issues in capital cases.[3]

56. *Morgan*'s second substantial holding was its description of the term "impartial," as it relates to the constitutional underpinnings for its new standard for capital jury service:

> The right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . . In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b . . . It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 U.S. 145, 155 (1879).' *Reynolds v. United States*, 98 U.S. 145, 155 (1879)." *Irvin v. Dowd*, 366 U.S. 717, 721-22 (1961) (footnote omitted). . . .

Id. at 727.

57. Third, the Court set forth its new standard for life qualification, describing its requirements thoroughly for the benefit of trial judges. In *Morgan*, the United States Supreme Court specifically identified the trial court's refusal to allow Derrick Morgan's lawyers to *voir dire* his jury on their penalty attitudes as they related to the specific facts of the case before them. The Court made clear to the appellate courts what they must do if any jurors were seated who did not meet the Constitution's requirements for service on a death penalty case:

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[3] *See e.g. Rosales-Lopez v. United States,* 451 U.S. 182, 188-89 (1981) ("Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled…The obligation to impanel an impartial jury lies in the first instance with the trial judge."); *Turner v. Murray*, 476 U.S. 28, 36 (1986) ("[W]e find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized. By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner's constitutional right to an impartial jury.")

> A juror who will automatically vote for the death penalty [in the case before him or her] will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. . . . .
>
> Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

Id. at 729, 739. Therefore, a potential capital juror who has formed an initial opinion for death if the defendant is convicted, based, for example, on the characteristics of the charged crimes or their surrounding circumstances, is not as "indifferent as he stands unsworne" on the question of penalty. A juror for whom "mitigating factors are irrelevant" must be removed for cause by the trial judge.

58. The principles from the *Morgan* line of cases can thus be summarized as follows. A potential capital juror who is not "as indifferent as he stands unsworne," one who has "formed an opinion" on the question of the death penalty for a person convicted of the charged crimes, is not qualified to be seated as a juror. A potential capital juror for whom "mitigating factors are irrelevant," or who "will fail in good faith to consider the mitigating evidence" is not qualified to be seated as a juror. "If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Morgan*, 504 U.S. at 729.

59. Separate and apart from the question of applying the *Morgan* standards to life-qualify potential capital jurors, trial courts must ensure that a capital defendant is given the

opportunity to conduct the kind of *voir dire* which genuinely permits trial counsel to identify jurors who will not be able to live up to their obligation to listen to, consider, and give effect to, the defendant's case in mitigation -- and do so in the context of the evidence that the juror is likely to receive. It is the trial judge's responsibility to make sure that more than mere lip service is paid to this right, for only through an adequate *voir dire* can the trial court assure the vindication of the defendant's constitutional right to be judged by impartial jurors. A juror who decides the case before it is finally submitted is not qualified to continue as a juror and should be removed from service.

60. The role of a capital juror is an especially difficult one. Lay people who have never been exposed to the graphic and detailed presentation of courtroom evidence and testimony required to prove a capital murder beyond a reasonable doubt must confront matters that are undeniably tragic and horrific. It may very well be that these constitutionally driven imperatives present real life jurors with "tasks which are beyond present human ability." *McGautha v. California,* 402 U.S. 183, 204 (1971). That question -- whether the law asks more of the capital juror than he or she is capable of living up to -- is explored and answered in the next section of this motion.

III. Empirical Research Has Established That Jurors Who Serve on Capital Cases Are Incapable of Giving Effect to the Principles Undergirding the United States Supreme Court's Eighth Amendment Jurisprudence in a Manner that is not Arbitrary and Capricious.

61. In light of the well-established rules that govern the process by which capital jurors are qualified to serve and which they are required to follow in making their sentencing decisions, a reasonable question to ask now is: Are modern capital juries actually comprised of *Morgan* life-

qualifiable impartial jurors who make their sentencing decisions according to the rules required by *Furman/Gregg* and *Woodson/Lockett*?

A. Social Science and the Law – the Era before the Capital Jury Project

62. For many years, social science research into capital jury dynamics was limited to "mock jury" studies. This research was rejected by the United States Supreme Court, which had "serious doubts about the value of these studies in predicting the behavior of ***actual*** jurors." *Lockhart v. McCree*, 476 U.S. 162, 171 (1986) (emphasis added). The Supreme Court faulted the studies done from artificial research settings, rather than "actual jurors sworn under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant." *Id*. In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court expressed similar doubts about the value of social science research that did not address itself to how *real* jurors serving on *real* cases facing the same *real* issues as those being raised in the defendant's case.

63. The message to social scientists from the *Lockhart* and *McCleskey* decisions was fired like a clear shot across the bow. The courts were demanding more relevant data on the question of whether there exists a statistically meaningful disparity between what the law ***says*** it requires of jurors in the capital decision-making process, and how ordinary people serving as capital jurors actually go about deciding whom to kill and whom to spare. The courts were demanding that the research community remove itself from the laboratory and address itself to how real capital jurors serving in real death penalty cases made their decisions.

64. Social scientists from around the country who were interested in the scholarly truth about capital jury decision-making responded to the challenge raised by the Court's decisions in *Lockhart* and *McCleskey*, beginning their work with real capital jurors who had served on real capital cases in Florida, California, and Oregon. Professors Bowers, Fleury-Steiner, and Antonio

describe this initial round of post-*Lockhart/McCleskey* field work in their publication, "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction," (chapter 14 in Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, Carolina Academic Press, 2d ed., 2003). The following passage, while lengthy, is a concise and powerfully relevant summary of the next stage of the social science research, and the seeds of the national Capital Jury Project:[3]

> Shortly after the *McCleskey* decision, researchers undertook studies based on in-depth interviews with persons who had served on capital juries in Florida, California, and Oregon. These interviews focused on how jurors actually made their decisions and whether, or to what extent they were guided by the capital statutes in their respective states. The questioning was largely an open ended inquiry into what factors influenced the sentencing decision, and whether jurors' decision making was being guided by statutory provisions and the Court's conception of the sentencing decision as a reasoned moral choice.
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> In Florida, Geimer and Amsterdam (1987-88) interviewed some 54 jurors from 10 trials, five in which the jurors voted for death, and five in which they voted for life. They asked jurors to explain the reasons for their life or death sentencing decisions and to evaluate the role or influence of Florida's statutory aggravating and mitigating considerations on their decisions. Two out of three jurors (65%) indicated that Florida's statutory aggravating and mitigating guidelines had "little or no influence" on their sentencing decisions.
>
> From jurors' explanations of how they did make their decisions, Geimer and Amsterdam identified what they called the "operative factors" that actually shaped jurors' sentencing decisions. While most of the jurors who voted for death (64%) cited the "manner of the killing" as an operative factor, more than half (54%) gave the impermissible "presumption of death" as a factor, the constitutionally forbidden belief that the death penalty was the correct or appropriate punishment, unless they could be persuaded

[3] Bowers, Fleury-Steiner, Antonio, "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction" (chapter 14 from Acker, Bohm, Lanier, *America's Experiment With Capital Punishment* (2d ed., 2003)).

otherwise (at 41). As one juror bluntly put it, "[o]f course he got death. That's what we were there for" (at 45-46). Next in line as influential operative factors in the death decision were "defendant's demeanor" and "defense attorney performance" (32% and 21% of the jurors in death cases, respectively). The former was illustrated by a juror's comment that the "[defendant] seemed callous, indifferent. Nobody saw a heartbeat of regret. He didn't move a muscle except for crossing his legs. By the time of the penalty phase, the jury was not inclined to feel sorry for him. Minds were already colored" (at 52).

Likewise, Geimer and Amsterdam identified operative factors among the jurors who voted for life. Most common (65%) was "lingering doubt" about the capital murder verdict. An example of this explanation was "we found him guilty, there wasn't anybody else to put it on....But we didn't want to execute him because some evidence might come out in the future about the other guy" (at 29). Concerning the defense attorney's performance, a juror said, "I shouldn't say it, but I feel it in my heart and always have, his lawyer left a lot to be desired. I realize he was hired by the state to do a job and probably not paid much... I didn't mention it at the jury room but I think he was not determined enough. He didn't try enough and that affected the jury" (at 53).

In California, Sontag (1990) interviewed 30 jurors drawn from one death and one life case in each of five counties throughout the state. In Oregon, Costanzo (1990) interviewed 27 jurors from five death and four life cases from a single urban county responsible for the majority of Oregon's capital trials. The findings of these two studies are reviewed and contrasted in Haney, Sontag, and Costanzo (1994).

Under California's statute, which lists "factors in aggravation and factors in mitigation" without specifying whether those factors are to be considered as aggravating or mitigating, and without indicating how the factors are to be weighed in deciding on the defendant's punishment, juries seemed quite confused about how to make the sentencing decision. Sontag found that California juries deliberated with much broader and less coherent agendas, and took approximately three times longer to reach a sentencing verdict than did the Oregon juries studied by Costanzo. Many California jurors tended to search for a key factor that would make the decision clear-cut. They typically narrowed the decision by focusing almost exclusively on the crime and on issues which had already come up in the guilt phase of the trial. Haney et al. (1994) reported that "fully

one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a presumption in favor of death" (at 162) -- quite comparable to what Geimer and Amsterdam identified as the most common operative factor among Florida jurors who voted for death.

This tendency to reduce the complex question of life or death to one decisive point among California jurors is illustrated in the comments of a few jurors. For example, one death-jury member recalled the nature of the penalty decision as a matter of determining premeditation: "[A]ccording to the instructions, the main thing was, was it premeditated? Did he deliberately, did he intend to kill these people? If so, then we should give him the death penalty. If not, then we should give life without the possibility of parole" (at 162). Another juror confused the penalty decision with the legal standard of insanity: "I think the bottom line was, at the time he was committing [the crimes], did he know what he was doing? Did he know right from wrong? That's the whole thing." (at 162).

Oregon's directed statute, modeled on that of Texas, made the life or death sentence rest heavily upon jurors' answers to a single question: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Oregon juries, compared to those in California, appeared more coherent in their decision-making but were much more constricted in the range of information they considered. The directed statutes used in Oregon and Texas have been challenged for discouraging the consideration of mitigating evidence. In this connection, Costanzo reported that many of the jurors' comments underscored the narrowing effect of the directed statute on the range of issues they considered: "We just had to stick to those four [sic] basic criteria. We couldn't deviate with this mitigating circumstance, or testimony of people that had spoken on his behalf or against him. We just had to go by those guidelines that they give you when you make that decision" (at 165-166).

Oregon jurors relied upon the sentencing instructions not only to narrow the scope of the evidence they considered but also to minimize their responsibility for the outcome of their deliberations: "We are not sentencing him to death--we are just answering these questions. We talked about it. We are just answering these questions--to get a clear mind so as not to feel guilty that I sentenced him to die. That's how the law has it--just answer these questions" (at 161-167). Oregon jurors also generally underestimated how long convicted defendants who were not given the death penalty would

spend in prison before returning to society, and fully one-half of the Oregon jurors did not believe that the death penalty would actually be carried out.

Concerning both the California and Oregon studies, the investigators observed that "there was a tendency among jurors from both samples to shift or abdicate responsibility for the ultimate decision--to the law, to the judge, or to the legal instructions--rather than to grapple personally with the life and death consequences of the verdicts they were called upon to render" (Haney et al. 1994:160). In addition, the researchers concluded:

> Capital penalty instructions fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake. They seem to imply that death sentencing involves nothing more than simple accounting, an adding up of the pluses and minuses on the balance sheet of someone's life (at 172).
>
> These studies raised serious questions about the operation of post-*Furman* capital statutes. Jurors appear to understand sentencing instructions poorly, especially their obligation to give effect to mitigation. Many appear to presume that death is the appropriate punishment for capital offenses without regard for mitigation. They seem to focus narrowly on a single issue to simplify decision making and to reach consensus on punishment. In explaining the decision to impose the death penalty, they invoke guilt related considerations as if the sentencing process was merely a replay of the guilt decision. These soundings were ***sufficiently ominous to justify a more extensive investigation of the capital sentencing process***, one that would take a more systematic look into the black box of jury decision making.

Bowers, Fleury-Steiner, Antonio, "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction: (chapter 14 in Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, Carolina Academic Press, 2d ed., 2003) at 8-11, citing Geimer, Amsterdam, *Why Jurors Vote Life Or Death: Operative Factors In Ten Florida Death Penalty*

Cases (1988) 15 Am. J. Crim. Law 1 and Haney, Sontag, Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* (1994) 50 Journal of Social Science Issues 149.

B. The Capital Jury Project

65. The more "extensive investigation of the capital sentencing process" which these early studies justified came in the form of the Capital Jury Project. The Capital Jury Project (hereinafter CJP) was created in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (grant NSF SES-9013252) that was extended in 2006. It is a national program of research on the decision-making of capital jurors conducted by a consortium of university-based researchers. Over 70 articles and book chapters based on the CJP data have been published since the project's inception.

66. The nationally renowned social scientist, Professor William J. Bowers, served as the CJP's founder, director, and principal investigator until his death in early 2017. Dr. Bowers wrote numerous articles and texts on capital punishment and on jury decision-making in capital cases. Two of his texts, *Executions In America* (1974), and *Legal Homicide: Death As Punishment In America, 1864-1982* (1984), have been cited with approval in more than half a dozen United States Supreme Court decisions, including the Court's landmark decision in *Woodson v. North Carolina, supra*. Articles he has written, based on the data collected and analyzed by CJP researchers, have played a substantial role in such Supreme Court decisions as *Simmons v. South Carolina, supra*, which decried as unconstitutional a capital juror's decision to sentence a capital defendant to die because the juror harbored false beliefs with respect to whether and/or when a life-sentenced inmate would be eligible for release on parole.

67. As described by Bowers in an early law review article on the subject, the objective of the CJP was to examine "the extent to which jurors' exercise of capital sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in *Furman v. Georgia*, and the extent to which the principal kinds of post-*Furman* guided discretion statutes are curbing arbitrary decision-making--as the Court said they would in *Gregg v. Georgia* and its companion cases." William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995).

68. The findings of the CJP are based on in-depth interviews with persons who have actually served as jurors in capital trials. The CJP initially interviewed over 1200 jurors who actually made the life or death sentencing decision in over 350 capital trials in 14 death penalty states.[3] As of January 1, 2013, those 14 states were responsible for 77.8% of the 3,125 persons on death row, and for 76.7% of the 1,338 persons executed between 1977 and June 28, 2013.[4] The interviews chronicle the jurors' experiences and decision making over the course of the trial,

[3] 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 three-plus hour personal interviews. The sample was designed to include (1) states with "threshold," "balancing," and "directed" statutory guidelines for the exercise of sentencing discretion; (2) states with "traditional" and "narrowing" statutory definitions of capital murder; and (3) states that make the jury sentencing decision binding and those that permit the judge to override the jury's decision. The fourteen states are: Alabama, California, Florida, Georgia, Kentucky, Louisiana, Indiana, Pennsylvania, New Jersey, North Carolina, Tennessee, Texas, South Carolina, and Virginia. For further details about sampling states, *see* Bowers, 70 Ind. L. J. at 1077-79.

[4] *See* William J. Bowers, Christopher E. Kelly, Ross Kleinstuber, Elizabeth Vartkessian, and Marla Sandys, *The Life or Death Sentencing Decision: It's at Odds with Constitutional Standards, is it Beyond Human Ability*?, in America's Experiment with Capital Punishment: Reflections on the Past, Present and Future of the Ultimate Penal Sanction (James Acker et al., eds., 3d ed. 2014).

identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.[5]

69. In 2006, an extension of the initial CJP research was undertaken with National Science Foundation support by investigators in seven states to obtain more recent and more detailed information on jurors' punishment decision-making. In each state, a sample of eight cases divided equally between those with death and life outcomes was sought. The target sample of jurors to be interviewed was increased from four to six jurors per case, the focus of questioning was widened to learn more about the interpersonal dynamics among jurors during the decision-making process, and trial transcripts were reviewed for perspective on the crime, the evidence presented in court, and the presentations and arguments of prosecution and defense. One of the principal focuses of this later phase of CJP research was "to learn more about how jurors deal with the matter of 'giving effect' to mitigation, how they understand this responsibility and whether

[5] The research is based on a common core of data collected in the participating states. The investigators cooperatively developed a core juror interview instrument and enhanced the usefulness of this instrument in their respective states by adding to the information gathered in the core interviews, conducting additional interviews in selected cases of special interest, and incorporating additional case-specific data from other sources. The juror interviews obtained data on some 700 variables through structured questions used in all states, and also included open-ended questions that called for detailed narrative accounts of the respondents' experiences as capital jurors. Advanced law and social science students working under the supervision of the various faculty investigators carried out much of the interviewing and other data collection in the respective states. All jurors selected for interviews were guaranteed confidentiality. The preparation of the interview data for state-level and project-wide statistical analyses was carried out at the College of Criminal Justice, Northeastern University under the direction of William J. Bowers, Principal Investigator of the CJP. *See* Bowers, *supra,* 70 Ind. L. J. at 1082, n. 206 for further information on the interview questions and methods used.

they can and do in fact follow the constitutional requirement to make the life or death sentencing decision a 'reasoned moral choice.'"[6]

70. The CJP data reveals profound discrepancies between what the federal and state constitutions require and how capital jurors actually make their decisions. These discrepancies exist on every measure which the federal and Idaho constitutions imposes, both in terms of what jurors are required to do, and in terms of what jurors are prohibited from doing. The data summarized in this section of the motion establishes the following:

a. Rampant premature decision-making which renders the penalty proceeding meaningless;

b. The failure of jury selection to remove large numbers of death-biased jurors, and the overall biasing effect of the selection process itself;

c. The pervasive failure of death-qualified jurors in actual cases to comprehend and/or follow penalty instructions;

d. The wide-spread belief amongst jurors that sat on capital trials that death is required;

e. Wholesale evasion of responsibility for the punishment decision;

f. The continuing influence of race discrimination on juror decision-making; and

g. Significant underestimation of the alternative to death.

71. In 2010, the CJP undertook an exhaustive cross-analysis of its data to determine if the findings of the CJP are a scientifically reliable indication that jurors are failing to comport with constitutional standards in making their capital sentencing decision. Bowers, Foglia, Ehrhard-Dietzel, and Kelly, *Jurors' Failure to Understand or Comport with Constitutional*

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[6] William J. Bowers, Christopher E. Kelly, Ross Kleinstuber, Elizabeth Vartkessian, and Marla Sandys, *The Life or Death Sentencing Decision: It's at Odds with Constitutional Standards, is it Beyond Human Ability*?, *supra* note 4.

Standards in Capital Sentencing: Strength of the Evidence, 46 No. 6 Crim. Law Bulletin ART 2. After a comprehensive scientific analysis, the investigators concluded that "[r]emarkably, not one of the jurors interviewed by CJP investigators was compliant with constitutional requirements in all six domains." *Id.*[7]

72. Next, this motion will review the results for each of the deficiencies in juror decision-making that were found by the Capital Jury Project:

(a) Premature Decision-Making

73. Nearly half (49.2%) of all capital jurors make their sentencing decision before the penalty phase begins. These jurors feel strongly about their decision, and do not waver from it over the course of the trial. Premature decision making occurred in every state studied by the CJP. Thus, bifurcation and instructions have little effect in guiding capital jurors on their sentencing decision:

> 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.

Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing,* 39 Crim. Law Bulletin 51, 56 (2003).

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[7] The six domains were: (1) premature decision making, (2) pro-death disposition, (3) misunderstanding sentencing instructions, (4) believing death penalty is mandatory, (5) underestimating death penalty alternative, and (6) evading punishment responsibility. *Id.*

74. Approximately 30% of all capital jurors, nationwide, made the decision that the defendant should receive the death penalty while evidence was still being introduced at the guilt-phase of the trial. Thus, an admonition such as one that is commonly given in capital cases in Idaho—that jurors should keep an open mind and not decide the sentence to be imposed until the entire matter has been completed and submitted—are of questionable effectiveness. The chart below shows the results:

Percentage of Capital Jurors Taking Each Stand on Punishment Before Sentencing Stage of the Trial in 13 States				
States	**Death**	**Life**	**Undecided**	**Number of Jurors**
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108
Missouri	28.8	16.9	54.2	59
North Carolina	29.2	13.9	56.9	72
Pennsylvania	33.8	18.9	47.3	74
South Carolina	33.3	14.4	52.3	111
Tennessee	34.8	13.0	52.2	46
Texas	37.5	10.8	51.7	120
Virginia	17.8	31.1	51.1	45

All States	30.3%	18.9%	50.8%	1135

75. The evidence establishes that most early pro-death jurors do not even wait for guilt-phase deliberations to begin before deciding the penalty. Pro-death jurors prejudge the penalty decision during the guilt phase, long before they have even had the opportunity to discuss it with any of their fellow jurors or heard any of the capital defendant's mitigating evidence. Bowers, Fleury-Steiner, Antonio, *supra,* at 17.

76. Many of these early pro-death jurors cite convincing proof of guilt as the reason for their early pro-death stands:

> FL: When I was convinced he was guilty - when we were going through the hard evidence.
>
> NC: After the pathologist report, after I was convinced he was the one who did it.
>
> FL: When I knew in my heart that he was guilty ... This was after hearing the forensic evidence from prosecution.
>
> TX: Uh, before we actually voted, before we went in there. I was pretty sure, I mean, I was absolutely sure, because I truly believe in what the Bible says and I think I told them this when they chose me.

Ibid.

77. For some jurors, it was the grotesque or gruesome nature of the crime that convinced them that death should be the punishment:

> KY: Once guilt was established that [the defendant] had committed this gruesome crime. I had no problem at all determining what punishment was applicable.
>
> MO: Um, I'd say probably right when the prosecutor made the statement. She was stabbed twenty-two times.

SC: When they started to talk about the brutality of the crime.

Id. at 17-18.

78. Many jurors stressed the role of physical evidence, especially photographs or video tapes, as critical in their punishment decisions:

> AL: When the D.A. handed us the pictures.
>
> CA: Video tape portion of the trial. [When the jury viewed a video tape of the killing that a store monitoring system had recorded.]
>
> KY: After I saw pictures and hair and semen analysis.
>
> MO: [After] looking at the pictures and seeing you know, the crime, the autopsy photos.
>
> FL: During the evidence - when [I] saw the pictures of the victim.
>
> MO: After I knew, when they showed us the photographs of [the victim] and how he had been murdered. I knew [the defendant] had done it by the video tape but I didn't know how severe and how gruesome it was.

Id. at 18.

79. In a few instances they gave vivid accounts of how photo or video evidence had affected them:

> NC: During the trial. I can tell you ... when we saw pictures of this woman's body, burned .... Where her feet were burned off .... Horrible, horrible pictures of this. That convinced me.
>
> CA: Just sitting there watching [a video tape of the killing from a store monitoring system]. I've seen a lot [of] stuff, but I never .... Even Arnold Schwarzenegger movies didn't affect me like that, you know? This wasn't make-believe, watching that video tape. The video tape was very powerful.

Ibid.

80. Thus, many jurors attribute their early stands for death to unquestionable proof of guilt, heinous aspects of the crime, and physical evidence, especially in photographs and audio or video tape. In addition to the nature of the crime and the evidence of guilt, some early pro-death jurors focused on the defendant to explain what caused them to take a stand for death during the guilt stage of the trial. These accounts typically concerned the demeanor of the defendant and the juror's perception of his future dangerousness if not sentenced to death:

> CA: Once I was convinced that he did it, I was convinced that he was kind of cold-blooded and didn't have any feelings, basically.
>
> KY: I can't explain to you how he looked but I guess that's when I knew .... the way he sat there.
>
> TX: I think this feeling came about over days of watching him and knowing he could do something like that again.

Ibid.

81. The defendant's likely future dangerousness is an especially prominent theme - the likelihood that "he could do something like that again," in the words of the juror just quoted:

> SC: When we heard all of the evidence I thought he would be dangerous if he got out and in thirty years he might still be dangerous.
>
> CA: I feel he's like a dangerous snake. I feel that he might be a threat.
>
> TX: Well while he was in jail waiting to go to trial for this he got in a fight. And I could see that to me, or it looked like somebody, he wasn't going to change. And if he was let back into society he would continue with his path of crimes.
>
> CA: ...we didn't want him to get back out on the street again.

Id. at 18-19.

82. The United States Supreme Court has noted the important distinction that must be made when jurors view "future dangerousness" as an aggravator, even though it is *not* an aggravator under the state law. *See Uttecht v. Brown*, 551 U.S. 1, 21 (2007) (potential juror excused on the State's motion, without objection from the defense, showed bias by stating in *voir dire* that he would "treat[] the risk of recidivism as the sole aggravating factor, rather than treating lack of future dangerousness as a possible mitigating consideration."). It is certainly not a matter of common sense that "future dangerousness" is not an aggravator, but is a non-mitigator. The fact is, "future dangerousness" is one of the primary reasons that CJP jurors decide early and decisively in favor of death, even before evidence supporting the "mitigator" of "non-dangerousness" has been presented to them.

83. Early pro-death jurors found the fact of guilt and the nature of the crime compelling. They believe death is called for when the crime is egregious, the evidence is explicit, the defendant appears unrepentant, or seems apt to repeat his crime. Heinousness of the crime and the dangerousness of the defendant may be relevant to the punishment decision in some states. However, *Lockett* and its progeny mandate that a decision should not be made before jurors hear any mitigation.

84. In terms of how strongly early pro-death jurors felt about the decision they made to impose the death penalty, and in terms of how consistently they adhered to their early decision, the CJP data establishes that 97.4% of all early pro-death jurors "felt strongly about their early pro-death stance," with 70.4% indicting they were "absolutely convinced" and 27% indicating they were "pretty sure" about their decision. Bowers, Foglia, *Still Singularly Agonizing…., supra,*

at 57.[8] The mandate of *Eddings*, that the sentencer must be able to both hear and give effect to mitigation, is not met given these findings:

> 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.

Ibid. Thus, while it may not be surprising to learn that even properly-instructed jurors from real capital cases behaved in this way, it is a chilling result that leaves no doubt that the Supreme Court's prerequisite to a constitutional death penalty system – the mandate for meaningful and individualized consideration of mitigation system – is a dismal failure.

(b) The Failure of Jury Selection to Remove Large Numbers of Death-Biased Jurors and the Overall Biasing Effect of the Selection Process.

85. To understand why so many jurors prematurely decide to impose death, CJP researchers investigated the possibility that jury selection procedures, even when conducted pursuant to the *Witt* or *Morgan* standards, fail to identify jurors for whom death is the only appropriate penalty for the cases on which they served. The jurors were presented with the following question/matrix:

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[8] The CJP tested the possibility that early pro-death or pro-life jurors were exposed to different kinds of crimes or evidence than the jurors who remained undecided. However, "the extensive data jurors provided on the characteristics of the crime and on the evidence of guilt reveal no sizable or consistent differences between early death or early life decision-makers and those who, in accord with the law, waited until the sentencing stage of the trial to make their punishment decisions. Hence, the evidence indicates that early pro-death decision-making did not occur because jurors served on cases with more aggravated kinds of killings, more convincing evidence of guilt, or more dangerous defendants than did those who remained undecided or took a pro-life stand at guilt." Bowers, Fleury-Steiner, Antonio, *supra*, at 17-19.

> 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.

Bowers, Foglia, *Still Singularly Agonizing…., supra,* at 62, fn. 60.

The results of this investigation are astounding, and are summarized on the following chart:

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

State	**Prior murder conviction**	**Planned premeditated murder**	**Multiple victims**	**Killing police or prison guard**	**Murder by drug dealer**	**Murder during another crime**	**Number of jurors**
Alabama	66.7	54.4	57.9	37.5	46.4	36.8	5
California	58.6	41.4	41.1	41.4	33.6	17.8	151
Florida	77.6	64.1	62.1	51.3	52.6	19.7	115
Georgia	70.8	54.8	46.6	51.4	47.2	23.6	72
Indiana	74.7	54.5	55.6	44.4	52.5	23.2	99
Kentucky	71.2	56.7	50.5	46.6	48.5	18.1	103
Missouri	75.4	54.1	52.5	45.9	38.3	19.7	61
N. Carolina	73.8	68.8	55.0	58.8	45.0	12.5	79
Pennsylvania	71.8	65.4	62.8	55.1	47.4	28.2	78
S. Carolina	76.3	61.4	54.4	43.0	49.1	26.5	113
Tennessee	78.3	67.4	58.7	54.3	43.5	30.4	46
Texas	76.9	57.3	59.5	58.6	48.7	35.3	116
Virginia	55.6	46.7	40.0	48.9	42.2	15.6	45
All States	**71.6**	**57.1**	**53.7**	**48.9**	**46.2**	**24.2**	**1164**

86. As the national data from the table above indicate, the CJP survey results documented profound deviations between what capital jurisprudence requires and what actual capital jurors believe. Many jurors who had been ostensibly screened and qualified as capital jurors under *Morgan* standards, and who decided an actual capital case, approached this task believing the death penalty was the only appropriate penalty for many of the kinds of murder typically tried as capital offenses. In effect, mandatory death penalty laws, while banned by the

Supreme Court under *Woodson*, are applied by jurors despite the procedural safeguards of *Morgan* and discretionary statutory schemes on which jurors were instructed:

> 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 was 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 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.[9]

In addition to identifying large numbers of jurors who enter the jury box with their own personal mandatory death penalty belief system to guide them -- as opposed to the court's instructions -- researchers identified to a statistical certainty that there was a direct relationship between taking a strong premature stance for death and being identified as juror for whom death is the only appropriate sentence.

87. A juror who believes that death is the only appropriate penalty for murdering more than one person or for committing a planned, premeditated murder, is invariably going to decide -- once guilt is determined -- that death is the only appropriate sentence. Thus, there is no individualized determination of sentence as the Constitution requires. As many of the jurors interviewed have expressed, the penalty phase was nothing but a complete waste of time:

> 'I thought it [the penalty trial] was kind of silly, to be perfectly honest. A rotten childhood is not the question we had to answer.'... 'Character witness didn't really seem relevant to the issue ... Everything went back to what he had done and I think everyone had their mind made up before the penalty phase started.'[10]

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[9] Bowers, Foglia, *Still Singularly Agonizing…., supra,* at 62.

[10] Haney, Sontag, Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* 50 Journal of Social Science Issues 166 (1994). *See*

88. A juror who believes that death is the only acceptable punishment for certain categories of murder can hardly give "meaningful consideration," much less "effect," to evidence in mitigation. Such a juror "will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." *Morgan*, 504 U.S. at 729. It is for that reason that the *Morgan* Court went on to say that "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id*.

89. The process of capital jury selection, itself, produces the worst possible group of jurors precisely when a criminal defendant should have a right to the most qualified jurors. The studies demonstrate that the process negatively impacts the guilt/innocence phase of the capital trial in several ways.

90. First, by questioning potential jurors extensively about their attitudes towards the death penalty, a substantial number of jurors believe both that the defendant must be guilty, and that apparently they are going to be asked to sentence him to death. After all, if the judge and the lawyers were not operating on the assumption he was guilty and that death was the likely sentence, then why are they spending so much time talking about what his punishment should be? Many jurors believe that the sub-text of a capital trial *voir dire* is not about whether the defendant

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also Sandys, McClelland, *Stacking the Deck for Guilt and Death, The Failure of Death Qualification to Ensure Impartiality*, (2003) (chapter 13 in Acker, et al., *supra*); Blume, Johnson, Threlkeld, *Probing Life Qualification through Expanded Voir Dire*, 29 Hofstra Law Review 1209 (2001).

committed the murder, it is about what punishment he should receive. Moreover, many jurors, after seeing which jurors stay and which leave, believe that if selected, it is understood that they *will* find the defendant guilty, and that they *will* sentence him or her to death.[11]

91. In addition to the bias towards guilty verdicts and death sentences, death-qualifying *voir dire* results in the least representative jury criminal defendants face. Early studies which have been validated by the CJP established rather obvious phenomena. People's attitudes towards capital punishment do not exist in a vacuum. One's attitudes about this very controversial topic, over which Americans have very divergent views, are strongly associated with a whole constellation of attitudes about the criminal justice system. These studies established, for instance, that people who support the death penalty -- and who not only support it, but are able to tell the lawyers and the judge in the courtroom that they would be able to impose it -- hold a number of other views about the criminal justice system that work strongly against the capital defendant.

92. The data demonstrates that these jurors, much more strongly than non-death-qualified jurors, believe that if a defendant does not testify in his or her own defense, that the failure to do so is affirmative proof of guilt. Death-qualified jurors do not believe in the presumption of innocence. They believe much more strongly that "where there is smoke, there is fire." They are extremely distrustful of defense lawyers and view everything they have to say with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and

[11] *See* Haney, *On the Selection of Capital Juries. The Biasing Effects of the Death-Qualification Process* 8 Law & Human Behavior 121 (1984); Haney, *Examining Death Qualification. Further Analysis of the Process Effect,* 8 Law & Human Behavior 133 (1984). Haney, Hurtado, Vega*, "Modern" Death Qualification: New Data On Its Biasing Effects* 18 Law & Human Behavior 619 (1994).

its witnesses -- especially police officers -- and believe what they tell the jurors. They do not believe in Due Process guarantees, such as requiring the prosecution to bear the burden of proof beyond a reasonable doubt. They are highly suspicious of experts called by the defense. In short, death qualified jurors are the jurors least representative of the community as a whole and are the jurors least likely to give a criminal defendant the benefit of the doubt.[12]

(c) Capital Jurors Fail to Comprehend and/or Follow Instructions.

93. The CJP research demonstrates that capital jurors fail to understand and/or follow the instructions given in capital trials. This is consistent with pre-CJP and non CJP data and conclusions that significant numbers of capital jurors fail to understand the concept and role of mitigation in capital cases.[13] The studies show that contrary to the *Woodson/Lockett* line of authority, significant numbers of capital jurors fail to understand that they are not only ***allowed*** to consider mitigation before deciding the penalty, but they are ***required*** to do so even if it does not excuse or lessen the capital defendant's culpability for the murder. Thus, the commands of *Lockett* are being ignored.

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[12] *See* Cowan, Thompson, Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberations* (1984) 8 Law & Human Behavior 53; Fitzgerald, Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes* (1984) 8 Law & Human Behavior 31.

[13] *See* Haney, Lynch, *Comprehending Life and Death Matters* (1994) 18 Law & Human Behavior 411; Haney, Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments* (1997) 21 Law & Human Behavior 575; Lynch, Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Human Behavior 337; Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?* (1995) 1995 Utah L. Rev. 1; Eisenberg, Wells, *Deadly Confusion: Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1; Sandys, McClelland, "*Stacking the Deck….*", *supra*, at 26-32.

94. A huge percentage of the CJP jurors -- 66.5% -- failed to understand that the jury did not have to be unanimous about individual mitigating factors before they were allowed to consider them. Bowers and Foglia, *Still Singularly Agonizing*, *supra,* at 68. Moreover, 44.6% failed to understand that they could consider any mitigating evidence presented. *Ibid.* Almost half thought that mitigation had to be proven beyond a reasonable doubt, while 29.9% did not understand that aggravation had to be proven beyond a reasonable doubt. *Id*. at 67-69.[14] In states where the jurors were specifically instructed that the only aggravating factors they could consider were the enumerated statutory factors, the majority of actual jurors -- 63.5% in one state and 50.6% in the other -- failed to realize that.

95. The reason for this massive misunderstanding of the rules which are supposed to guide and channel capital jury decision-making is the lack of familiarity with the dynamics that underlie a capital sentencing decision -- *i.e.*, the total absence of any culturally normative experience with the unique kind of decision capital jurors are called upon to make. Americans are very familiar with a jury's role as fact-finder. This role is a longstanding part of our culture. On the other hand, Americans are *not* familiar with the role a capital jury has in making the decision as to whether the capitally accused should live or die -- a moral decision, not a factual one.[15]

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[14] In two of the CJP study states, mitigation must be proven by a preponderance of the evidence, and the pattern jury instructions so state. However, in those two states, Pennsylvania and North Carolina, respectively, an alarming percentage of actual jurors still believed that mitigation had to be proven beyond a reasonable doubt -- 32% in Pennsylvania and 43% in North Carolina. *Id*. at 67-70.

[15] *See* Haney, Lynch, *Comprehending Life and Death Matters, supra*; Haney, Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments, supra*; Lynch, Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* (2000) 24 Law & Human Behavior 337.

96. American jurors are accustomed to finding facts such as whether a weapon was used, whether a taking of property was a theft, or whether a driver was legally intoxicated. For these types of factual findings, they have skills and experience from their everyday lives. However, jurors have no normative experience when it comes to "weighing" dysfunction, disorder, or evidence of alcoholism or addiction. They do not know how to "value" or "weigh" a capital defendant's dysfunctional childhood or a serious psychiatric disorder or brain damage, and "measure" it against a violent murder. Capital jurors have to resort to their own rules because terms like "mitigation" and "aggravation" have no meaning to them:

> [CA juror:] The first thing we asked for after the instruction was, could the judge define mitigating and aggravating circumstances. Because the different verdicts that we could come up with depended on if mitigating outweighed aggravating, or if aggravating outweighed mitigating, or all of that. So we wanted to make sure. I said: "I don't know that I exactly understand what it means." And then everybody else said, "No, neither do I," or "I can't give you a definition." So we decided we should ask the judge. Well, the judge wrote back and said, "You have to glean it from the instructions."
>
> [CA juror:] I don't think anybody liked using those terms because when we did use them, we got confused ... They were just confusing and I had never really used them before in anything. So, yeah, they sit there and throw these stupid words at you and I'm like, "Well, what do they mean?" I get so confused "cause they sound the same." I'm thinking, "Now which one was that again?" you know. And it totally confused me.

Haney, Sontag, Costanzo*, Deciding To Take A Life…., supra,* at 168-169.

The following chart summarizes some of the CJP findings on juror misunderstanding:

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

State	Jurors who did not understand that they could consider any mitigating evidence	Jurors who did not understand that they need not be unanimous on mitigating evidence	Jurors who did not understand that they need not find mitigation beyond a reasonable doubt	Jurors who did not understand that they must find aggravation beyond a reasonable doubt	Number of jurors *
Alabama	54.7	55.8	53.8	40.0	52
California	24.2	56.4	37.6	41.7	149
Florida	49.6	36.8	48.7	27.4	117
Georgia	40.5	89.0	62.2	21.6	73
Indiana	52.6	71.4	58.2	26.8	97
Kentucky	45.9	83.5	61.8	15.6	109
Missouri	36.8	65.5	34.5	48.3	57
N. Carolina	38.7	51.2	43.0	30.0	79
Pennsylvania	58.7	68.0	32.0	41.9	74
S. Carolina	51.8	78.9	48.7	21.9	113
Tennessee	41.3	71.7	46.7	20.5	44
Texas	39.6	72.9	66.0	18.7	47**
Virginia	53.3	77.3	51.2	40.0	43
All States	**44.6%**	**66.5%**	**49.2%**	**29.9%**	**1185**

* 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 by others while the interviewing in Texas was underway.

97. Bowers and Foglia describe the impact upon these findings on the constitutional requirements of *Gregg* and progeny as follows:

> 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.

Bowers and Foglia, *Still Singularly Agonizing*, *supra*, at 71. The net effect of these misunderstandings is that capital jurors are skewed toward a sentence of death.

(d) Jurors' Widespread Belief They Are Required to Return a Verdict of Death

98. In no state are jurors free of the misconception that the law requires the death penalty if the evidence establishes that the murder was "heinous, vile or depraved" or the defendant would be "dangerous in the future." Idaho has both a 'heinous, vile or depraved' aggravating factor, *see* I.C. §19-2515(e)("The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity"), and a 'future dangerousness' aggravating factor, *see* I.C. §19-2515(i)("The defendant, by his conduct, whether such conduct was before, during or after the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society.

99. The CJP research demonstrates that actual capital jurors, even in states that have neither aggravator, believe that these two factors are *always* aggravators, and that death is *required* if either is present.[1] The numbers of overall jurors who nevertheless believed that they were *required* to return a verdict of death based on these two factors—regardless of whether the factor actually exists in the state's laws—is staggeringly high.

[1] *See* Blume, Garvey, Johnson, *Future Dangerousness in Capital Cases: Always "At Issue"* 86 Cornell L. Rev. 397 (2001).

100. For example, in Indiana, which does not have either of these two aggravators, over a third (34.4%) of all Indiana capital jurors interviewed believed that the death penalty was required if they found the murder "heinous, vile, or depraved." And, nearly the same proportion (36.6%) believed that they had to return a verdict of death if they believed that the defendant would be dangerous in the future. Similarly, in California, which has neither aggravator, nearly one-third of all capital jurors interviewed believed that the death penalty was required if they found the crime heinous, vile, or depraved (which more than 80% did). And more than one in five California jurors (20.4%) believed that he or she had to return a verdict of death if they believed that the defendant would be dangerous in the future.[2] The results of the research follow:

Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was "Heinous, Vile, or Depraved"

State	**Death Required if Defendant's Conduct is Heinous, Vile, or Depraved**	**Death Required if Defendant would be Dangerous in the Future**	**Number of jurors ***
Alabama	56.3	52.1	48
California	29.5	20.4	146
Florida	36.3	25.2	111
Georgia	51.4	30.1	72
Indiana	34.4	36.6	93
Kentucky	42.7	42.2	109
Missouri	48.3	29.3	58
N. Carolina	67.1	47.4	76
Pennsylvania	56.9	37.0	73
S. Carolina	31.8	28.2	110
Tennessee	58.3	39.6	48
Texas	44.9	68.4	117
Virginia	53.5	40.9	43
All States	**43.9%**	**36.9%**	**1136**

* 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.

[2] Bowers and Foglia, *Still Singularly Agonizing…*, *supra*, at 72; Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death* 49 Stan. L. Rev. 1447, 1469-1470 (1997).

101. These mistaken beliefs -- and others which will be explored at a hearing on this motion -- result in a jury which is much more likely to return a verdict of death.

(e) Evasion of Responsibility for the Punishment Decision

102. Contrary to the United States Supreme Court's pronouncement in *Caldwell v. Mississippi*, almost no capital jurors view themselves as most responsible for the decision they make. The overwhelming majority place primary responsibility elsewhere:

> 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 ...

Bowers and Foglia, *Still Singularly Agonizing…, supra,* at 74-75. These findings invalidate the very assumption on which the Supreme Court's death penalty jurisprudence is based: "Belief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with -- and indeed as indispensable to -- the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell*, 472 U.S. at 330.

103. Death penalty statutes are not effectively guiding discretion when jurors misunderstand the instructions, mistakenly believe death is required by law, and do not appreciate their responsibility for the sentence imposed. The CJP finding that a large majority of jurors believe the law is "primarily responsible for the sentence is particularly ironic considering their lack of understanding of the law." Bowers and Foglia, *Still Singularly Agonizing…, supra,* at 75.

104. The assumption that jurors take awesome personal responsibility for their death verdict is false. Judicial assumptions cannot stand when confronted with hard data that contradicts them. Capital sentencing jurors, despite all the instructions and assumptions to the contrary, do not even understand the personal, moral decision that is being asked of them -- let alone how to go about making that decision. The death penalty can no longer be "assumed" to be constitutional, nor can a death verdict be "assumed" to be the personal moral decision of each juror.

(f) The Continuing Influence of Race on Juror Decision-Making

105. CJP data demonstrates that in all 14 states, the process of capital jury decision-making is influenced, not only by the race of the defendant and the race of the victim, but by both the racial composition of the jury and the race of the individual jurors. CJP data demonstrates that along gender lines, the outcome of a capital jury's verdict is greatly dependent on how many white males make it on to the jury, and whether any African American males serve as jurors.

106. The data demonstrates, for instance, that white male capital jurors (generally speaking) do not experience lingering doubt about the defendant's guilt. They see the defendant as remorseless and are unable to put themselves in either the defendant's shoes or his family's shoes. They believe that the defendant will be dangerous in the future unless executed.

107. On the other hand, African American male capital jurors (generally speaking) frequently have at least some doubts about the evidence of guilt. They are able to see the defendant as someone who is sorry for what he has done. They are able to put themselves in the defendant's situation and understand what it must be like for the defendant's family. And, they do not see the defendant as someone who will hurt other people in the future.

108. Bowers and Foglia explain:

> The most striking differences occur between white and black male jurors. Over half the black males said lingering doubt 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.

Bowers and Foglia, *Still Singularly Agonizing…, supra,* at 79 (internal footnotes omitted).

109. It would be difficult to imagine a more arbitrary circumstance than having to depend on the racial composition of the jury for a life sentence. Nevertheless, the data demonstrate that the outcome of a capital case is greatly dependent on the race of the individual jurors and on the overall racial composition of the jury as a whole.[3]

(g) Underestimation of the Alternative to a Death Sentence

110. The first section of this motion discussed the *Simmons* and *Shafer* decisions, in which the Supreme Court held unconstitutional a death sentence returned by a jury that was "forced" to impose a sentence of death because of its false belief that a life-sentenced defendant

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[3] *See* Bowers, Steiner, Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition* (2001) U. Pa. J. Const. L. 171.

would be eligible for release on parole (when in reality the sentence was one of life without possibility of parole -- LWOP.) Both of those cases came out of South Carolina where the jury is not specifically instructed that "life" means life without possibility of parole. But in California, and in other states where the jury is so instructed, do jurors still find themselves "forced" to choose death based upon enduring, but false assumptions? The CJP data answer that question with an emphatic *yes*:

> 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 . . . .
>
> 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.

Bowers, Foglia, *Still Singularly Agonizing…, supra,* at 80, 82. *Accord*, Bowers, Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing* (1999) 77 Texas L. Rev. 605, 645-670.

111. Many jurors do not believe judges when they are told there is no parole from a life sentence. Even in California, where jurors are expressly instructed by the trial judge that a sentence of LWOP means that the defendant will never be eligible for release on parole, substantial numbers of jurors refuse to believe it. The field data demonstrate that real capital jurors who have actually decided real capital cases in California gave a median estimate that a defendant sentence to LWOP will be released from prison in an average of 17 years. Bowers, Foglia, *Still Singularly Agonizing…, supra,* at 82. In the other three LWOP states in the CJP study, jurors gave the following median estimates of the number of years that a defendant would actually serve in prison

if not given the death penalty: Alabama, juror median estimate of 15 years; Missouri, juror median estimate of 20 years; and Pennsylvania, juror median estimate of 15 years. *Ibid*.

112. Informing jurors that life without parole sentence actually prohibits future release thus appears to do little good. In the interviews from 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. Bowers, Foglia, *Still Singularly Agonizing…, supra,* at 80, 82. *Accord*, Bowers, Steiner, *Death By Default…, supra,* at 697-700. *See also* Steiner, Bowers, Sarat, *Folk Knowledge As Legal Action: Death Penalty Judgments And The Tenet Of Early Release In A Culture Of Mistrust And Punitiveness* (1999) 33 Law & Society Rev. 461; Foglia, *They Know Not What They Do: Unguided And Misguided Discretion In Pennsylvania Capital Cases* (2003) 20 Justice Quarterly 187; and Blume, Garvey, Johnson, *Future Dangerousness in Capital Cases: Always "At Issue," supra*.

113. The data reveals that this juror distrust of the system and unwillingness to set aside popular misconceptions regarding early release drives juror decision-making toward death, particularly late in the decision-making process:

> ...these unrealistically low estimates [of actual time that would be served on a life sentence if the death penalty were not imposed] 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' accounts 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.

See Bowers and Foglia, *Still Singularly Agonizing…, supra,* at 82-83 (footnotes omitted). The CJP Research reveals that juror decisions for the death penalty are related to their mistaken belief

in very early release for LWOP prisoners, even when provided explicit instructions to the contrary by trial judges. Bowers and Steiner call this the "hegemonic myth of early release that infects the capital sentencing decision." Bowers, Steiner, *Death By Default…, supra,* at 716.

IV. Conclusion

114. This Court is bound to review and receive the evidence, and rule accordingly. In doing so, this Court is not bound by precedent based on these untrue assumptions, but should instead apply the undisputed facts to the constitutional principles upon which death penalty jurisprudence has been based. This Court should acknowledge what is now a sobering but undeniable reality: in the real world of capital trials, real capital jurors are not making sentencing decisions consistent with state and federal constitutional mandates.

115. Both the United States Supreme Court and the Idaho Supreme Court have rested the constitutionality of the death penalty upon certain assumptions about actual juror understanding and behavior. For decades, assumptions have been piled upon assumptions, to the point that the entire system depends upon their truth. Now incontrovertible, hard scientific evidence reveals those assumptions to be nothing more than false hopes.

116. There can no longer be any doubt that across all variables, the death penalty sentencing system in this country is not being applied in compliance with constitutional mandates of the lines of cases identified herein as *Furman/Gregg*, *Woodson/Lockett*, and *Morgan*, and indeed, is incapable of being applied in a manner that complies with these lofty constitutional mandates. The application of the death penalty in the United States is presently just as arbitrary and capricious as it was when the United States Supreme Court declared it unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), and violates the Eighth and Fourteenth Amendments

to the United States Constitution, as well as the corresponding provisions under the Idaho Constitution.

Defendant files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Idaho Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article I, sections 6, 7, 8, and 13 of the Idaho Constitution.

Dated: November 23, 2022 _/s/______________________
R. James Archibald

Dated: November 23, 2022 _/s/______________________
John Thomas

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served a true and correct copy of this document on the party listed below, in the manner indicated.

Lindsey A. Blake, Esq. efile and serve

Robert H Wood, Esq. efile and serve

Dated: November 23, 2022 _/s/______________________
R. James Archibald