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**WHETHER THE BRIGHT-LINE CUT-OFF RULE AND THE
ADVERSARIAL EXPERT EXPLANATION OF ADAPTIVE
FUNCTIONING EXACERBATES CAPITAL JUROR
COMPREHENSION OF THE INTELLECTUAL DISABILITY** ¹

Leona Deborah Jochnowitz ²; May 30, 2018 ³

“Whether *Atkins* reflects good legal reasoning or—as Justice Scalia called it in his dissent—‘nothing but the personal views of its members,’ it is poor psychiatric thinking for [these] reasons. First, *Atkins* implicitly assumes that persons with mental retardation comprise a discrete psychiatric category of individuals who are readily and naturally distinguishable from other persons, when, in fact, the opposite is the case: mental retardation is a classification defined by arbitrary statistical boundaries.”⁴

¹ This article is dedicated to the memory of the author’s advisor and mentor, Dr. William J. Bowers, who passed away in 2017. It is impossible to write about capital jury research without thinking deeply about his contributions and mentorship, and about how he has provided insight and might have continued to advise me on the findings here.

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⁴ Douglas Mossman, M.D., *Atkins v. Virginia, A Psychiatric Can of Worms*, 33 N.M. L. REV. 255, 256 (2003) (quoting *Atkins v. Virginia*, 536 U.S. 304, 338 (2004) (Scalia, J., dissenting)).

“[T]he cut-off of 70 represents a statistical convention more than a natural boundary between two groups of individuals.”⁵

ABSTRACT

This paper examines a sample of Capital Jury Project (CJP 1) cases with available trial transcripts in which jurors were presented with mitigating intellectual disability evidence and may have been confused by issues of proof, definitions, and extralegal factors. It tests the hypothesis that jurors' receptivity to mitigating intellectual disability (ID) was limited by their difficulties with the adversarial mental proof and clinical definitions needed to establish it. Further the juror decision-making may have been obscured by distractions from extralegal factors, unrelated to the evidence like premature decision-making and heuristic shortcuts, pro-death bias, and racial prejudice. It also examines whether the bright line cut-off rule, followed in some sample states prior to the Supreme Court decision in *Hall v. Florida* (2014), exacerbated jurors' understanding of the disability, and encouraged popular stereotypes and misconceptions about intellectual disability. In Kentucky, a state with the bright line cut-off rule, at the time these cases were decided, jurors were confused about a range of IQ scores and intellectual declines during developmental years. “IQ was perhaps not above what we consider a moron? I think they were contending that he had an IQ of 70 or 76 or so, had been tested as high as the 80s I recall.” (CJP KY death case #531, juror #725). Even in non-bright line sample States like South Carolina, with no ID exemption at the time, jurors misunderstood the range of numerical IQ evidence. The study concludes that juror assessment of intellectual disability (ID) is variable. Some jurors view ID as a more “organic” sympathetic disorder than other mental disorders, and they seem to understand it in practical, lay terms. Yet, capital juror decision making is marred by extra-legal factors that impair consideration of the mitigating evidence. The study concludes that juror misunderstanding regarding mitigating evidence has stubbornly persisted throughout the history of the Capital Jury Project and arises from shortcomings in human cognition which impede jurors' moral consideration of intellectual disability evidence. In light

⁵ MICHAEL CHAFETZ, INTELLECTUAL DISABILITY: CIVIL AND CRIMINAL FORENSIC ISSUES 92 (2015) (citing Mossman, *supra* note 4, at 256. Intelligence is measured by an intelligence quotient (or IQ) with the average being 100.

of these flaws, it may be impossible to avoid the unacceptable risk that persons with intellectual disability will be executed. This study suggests that mildly intellectually disabled persons were indeed executed because jurors misunderstood the ID evidence and were persuaded by extralegal racial biases and premature decision making.

I. INTRODUCTION

This paper examines a convenience sample of Capital Jury Project (CJP 1) cases with trial transcripts in which jurors were presented with mitigating intellectual disability evidence and may have been confused by issues of trial proof, clinical definitions, and extralegal factors. This is an exploratory study of capital juror receptivity to mitigating intellectual disability (ID) evidence in thirty-eight death penalty trials, comparing the trial transcripts and 1990s CJP post-trial juror interviews. It tests the hypothesis that jurors' receptivity to mitigating intellectual disability (ID) evidence was limited by their difficulties with the adversarial mental proof and clinical definitions, as well as distractions from extralegal factors, unrelated to the evidence like premature decision-making and heuristic shortcuts, pro-death bias, and racial prejudice. The study builds on findings in the capital jury literature that jurors misunderstand key concepts and instructions. The death sentencing process has failed to meet the guided standard of a reasoned and individualized moral response required by *Furman v. Georgia*,⁶ *Gregg v. Georgia*,⁷ and their progeny.

The capital sentencing process is plagued with what appear to be insurmountable problems. These include the pro-death dispositions jurors bring with them to trial, their inclination to make premature pro-death sentencing decisions, their misunderstandings of instructions about making the punishment decision, and the host of other pro-death inclinations. . . . They also include the systematically rooted adversarial provocation of prosecutors to disparage and debunk mitigation not specifically linked to the crime. . . .

⁶ 408 U.S. 238 (1972).

⁷ 428 U.S. 153 (1976).

Having a new jury impaneled and rigorously instructed, or perhaps some other selective and trained group of citizens or experts serve at the penalty stage to make the sentencing decision be “a reasoned moral response,” might conceivably enable the capital sentencing decision to comport with constitutional standards. Without such a radical transformation of the death penalty’s administration, though, having the punishment decision be a reasoned moral judgment appears doomed to failure, given the numerous and intractable problems plaguing capital sentencing. . . .⁸

The study also examines whether the bright line cut-off rule defining intellectual disability by a fixed number, followed in some sample states prior to the Supreme Court decision in *Hall v. Florida*,⁹ exacerbated jurors’ understanding of the disability, and encouraged jurors’ stereotypes and popular misconceptions about intellectual disability. In a Kentucky case in the sample, where the bright line cutoff rule of an IQ score of 70 was operative, jurors were confused about a range of defendant’s IQ scores and his intellectual declines over time. Jurors were quoted as saying:

There was a lot of testimony on the grounds that his IQ was perhaps not above what we consider a -- what, a moron?-- I think that is the term they used. . . . I think *they were contending that he had an IQ of 70 or 76 or so, had been tested as high as the 80s I recall*.¹⁰

This life and death dispute over a few points of IQ demonstrates that the bright line cut-off of 70 may represent a misleading artificial statistical convention and is part of the “can of worms” and poor psychiatric thinking discussed by Mossman.¹¹ Even in non-bright line sample States like South Carolina, with no ID exemption at the time, jurors misunderstood the range of numerical

⁸ William J. Bowers et al., *The Life or Death Sentencing Decision: It’s at Odds with Constitutional Standards; Is it Beyond Human Ability?*, in JAMES ACKER ET AL., *AMERICA’S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION* 425, 489-90 (3d ed. 2014).

⁹ 134 S. Ct. 1986 (2014). See also Leona D. Jochnowitz, *Book Review*, 51 No. 4 CRIM. L. BULLETIN ART 11 (2015).

¹⁰ CJP KY death case #531, juror #725. See also KY. REV. STAT. ANN. § 532.025 (2)(b)(7) (LexisNexis 1990).

¹¹ Mossman, *supra* note 4, at 256.

IQ evidence.¹² One concern is that the pre-*Hall* bright line rule played into jurors' stereotypes and misconceptions about intellectual disability. This was discussed by the Supreme Court in *Moore v. Texas*,¹³ where the Court endorsed clinical rather than popular stereotypes for defining ID. This empirical research on capital juror receptivity to intellectual disability evidence is important because of the need to avoid the risk of execution for intellectually disabled persons, admonished by *Moore*.

In *Moore v. Texas*, the U.S. Supreme Court stated that when judges and jurors use lay common-sense stereotypes to define intellectual disability, there is a high risk of "under-inclusiveness" and the unacceptable risk that persons with mild levels of intellectual disability will be executed.¹⁴ Only medical professional standards can counter lay stereotypes of the intellectually disabled.¹⁵ Yet, this research together with other CJP literature conclude that capital jurors often reject professional jargon and interpret mental evidence in practical ways and distrust experts as hired guns.¹⁶

This is one of the underlying paradoxes in capital juror studies, that while the law requires sophisticated definitions, jurors interpret psychological evidence in lay terms, and abhor vague, contested professional jargon. Yet, scholars and practitioners state that mitigating evidence does resonate with jurors through the "orchestration" of lay witnesses with experts who evaluated the defendant before the crime, and through a humanizing developmental life history.¹⁷

This study concludes that juror assessment of intellectual disability (ID) is variable because some jurors view ID as a more

¹² In SC life case #930, the pro-death exasperated foreman #1319 erroneously estimated defendant's IQ at the upper end of the expert testimony, in the low 80s and not 70s. "He came from a background of violence and had an *IQ in the low 80s*." S.C. CODE ANN. § 16-3-20 (C) (b) (10) (Westlaw 1994).

¹³ 137 S. Ct. 1039, 1051-52 (2017).

¹⁴ *Id.* at 1044.

¹⁵ *Id.* at 1051-52.

¹⁶ John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1041 n.24 (2008) (citing Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123-26 (1997)).

¹⁷ Sundby, *supra* note 16, at 1123-26; Sean D. O'Brien and Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751, 780 n.166 (2015); Deborah Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493, 527 n.289 (2015).

“organic” sympathetic disorder, which they seem to interpret in lay terms, than inscrutable contested personality and other mental disorders. Yet, capital jurors were also distracted by threshold extra-legal factors like pro death bias, racial bias and premature decision making that chilled dissent among holdout jurors and served as a distracting “counterweight” to the proper moral consideration of the evidence. Juror misunderstanding regarding mitigating evidence is ageless and has stubbornly persisted throughout the history of the Capital Jury Project. It arises from shortcomings in human cognition and rational decision-making which impede jurors’ moral consideration of intellectual disability and psychological evidence. In light of these flaws, it may be impossible to avoid the unacceptable risk that persons with intellectual disability will be executed. This study suggests that mildly intellectually disabled persons were indeed executed because jurors misunderstood the ID evidence and were persuaded by extra-legal racial biases and premature decision making.

II. CAPITAL JURY RESEARCH

The struggles of experts to define and diagnose intellectual disability and the difficulty of lay jurors in evaluating the expert and lay evidence are linked. There is a relationship between what forensic psychologists say about the ever-changing complexity and unreliability of an intellectual disability psychiatric diagnosis and the findings that jurors cannot understand or are unwilling to be receptive to testimonial evidence about the disorder.

Soon after the decision in *Atkins v. Virginia*,¹⁸ exempting otherwise death-penalty eligible intellectually disabled persons from execution, forensic psychological scholars began calling the ruling a “*psychiatric can of worms*.”¹⁹ They said that one of the reasons for the ongoing difficulties was the arbitrariness implicit in the definition of intellectual disability which adopted a mere statistical convention to categorize intellectually disabled individuals in a “discrete psychiatric category.”²⁰ The cut-off of 70 represents an artificial statistical convention more than a natural boundary between two groups of individuals, and it provides no functional explanation of the

¹⁸ 536 U.S. 304 (2002).

¹⁹ CHAFETZ, *supra* note 5, at 92 (citing Mossman, *supra* note 4, at 256) (emphasis added).

²⁰ Mossman, *supra* note 4, at 256.

disability.²¹ Another complication was that *Atkins* associated the psychiatric diagnosis of intellectual disability with the equivalent of moral desert, and that this stigmatized disabled persons as “morally inferior.” Mossman noted that the *Atkins* decision could lead courts to associate the reduced blameworthiness with other psychiatric disabilities, which opened up a “psychiatric can of worms.”²² Yet, Slobogin has stated that the idea of scientizing the clinical concept of psychological culpability in *Atkins* and *Hall* might lead positively to expanding protections to persons with other mental disabilities like the mentally ill under a clinically scientific *stare decisis*.²³

The three-phase Capital Jury Project research (CJP 1-1991 to 1995 and CJP 3-2004) involved trials spanning the periods from the 1990s to the 2000s. The first phase of Capital Jury Project research, (CJP I), conducted extensive structured interviews of 1,198 actual jurors in 353 capital trials in 14 States in the mid-1990s.²⁴ The CJP I data from juror interviews and the data from the coded trial transcripts are used in this paper. By phase 3 in 2004, after *Atkins*, CJP researchers concluded that despite reforms in the law and culture over the phases of the research, juror decision-making was consistently marred by immutable human cognitive tendencies and heuristic short-cuts, extra-legal attitudes towards race relations, pro-death bias and premature decision-making.²⁵ The bifurcated capital trial and structures developed to preserve the defendant’s rights

²¹ CHAFETZ, *supra* note 5, at 92 (citing Mossman, *supra* note 4, at 256); Leona D. Jochowitz, *Book Review*, PEGGY M. TOBOLOWSKY, EXCLUDING INTELLECTUALLY DISABLED OFFENDERS FROM EXECUTION. THE CONTINUING JOURNEY TO IMPLEMENT ATKINS (Carolina Academic Press, 2014) and MICHAEL CHAFETZ, INTELLECTUAL DISABILITY: CIVIL AND CRIMINAL FORENSIC ISSUES (Oxford University Press, 2015), 52 No. 6 CRIM. L. BULLETIN ART 10 (2016).

²² Mossman, *supra* note 4, at 287 nn.190-91.

²³ Christopher Slobogin, *Scientizing Culpability: The Implications of Hall v Florida and the Possibility of a “Scientific Stare Decisis,”* 23 WM. & MARY BILL RTS. J. 415, 425 (2014) (“A second category of individuals who could be exempted from the death penalty based on clinical constructs might encompass offenders who were actively psychotic at the time of their offense. . . . For instance, in the death penalty context, the mental health profession might be able to identify other categories of people who should be exempted from execution. . . . A Hall-like approach to the issue would require, per the DSM-5, that at the time of the offense the person demonstrated at least two of the following symptoms: ‘delusions,’ ‘hallucinations,’ ‘disorganized speech,’ or ‘grossly disorganized . . . behavior.’”).

²⁴ Bowers, *supra* note 8, at 430.

²⁵ Bowers, *supra* note 8, at 425.

against arbitrariness did not conform to the cognitive realities of juror decision-making.

CJP researchers examined juror receptivity to mitigating evidence introduced at the penalty phase of trial, including mental illness, intellectual disability and extreme mental and emotional distress (EMED), which was a statutory defense found in Model Penal Code States in the sample, (e.g., Kentucky, Missouri).²⁶ Relevant to this study, the researchers found that intellectual disability cases were unique because jurors were both confused about the various levels of ID and skeptical. “*Jurors reconcile their confusion by erring on the side of skepticism, with the result being disbelief that defendant is mentally retarded.*”²⁷ Jurors understood the importance of intellectual disability in “stories,” but failed to apply the receptivity in practice. For *intellectual disability* there was a 30% reduction of influence in practice as compared to the hypothetical responses, the greatest fall from principle to practice and twice the reduction from other mental mitigators such as mental illness and extreme emotional distress. The researchers suggested that one reason for the discrepancy might be that subtle psychiatric definitions and contested institutional histories impeded jurors’ ability to concretely apply abstract mitigating factors to the case before them. “It was difficult to apply subtle psychiatric distinctions concerning mental illness and definitions of *mental retardation* that may impede or inhibit jurors’ application of these factors in their cases.”²⁸

²⁶ Leona D. Jochnowitz, Receptivity of Capital Jurors to Mitigating Factors of Mental Illness, Intellectual Disability, and Situational Impairments in Death Penalty Decisions: The Capital Trial Analyzed as a Mitigating ‘Weight and Counterweight’ to Premature Decisions and Pro-Death Bias (Feb. 22, 2015) (Ph.D. dissertation, University at Albany) (UMI Number: 3680787 Dissertation Publishing Proquest 2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568455. [Note: page numbers indicate the ordinal actual page numbers of the dissertation, omitting roman numerals from the introductory pages from the pagination].

²⁷ Marla Sandys et al., *Taking Account of the “Diminished Capacities of the Retarded”*: Are Capital Jurors up to the Task?, 57 DEPAUL L. REV. 679, 691-93 (2008) (“These data suggest that capital jurors are unable to distinguish among various levels of mental retardation and that they confuse the task of evaluating evidence of mild mental retardation as a mitigator (a penalty phase consideration) with the standard necessary to determine sanity (a guilt-phase defense) . . . [J]urors reconcile their confusion by erring on the side of skepticism, with the result being disbelief that defendant is mentally retarded.”) (emphasis added).

²⁸ BOWERS, WILLIAM J. ET AL., WHO SHOULD DIE: HOW JURORS MAKE THE LIFE OR DEATH SENTENCING DECISION, CHAPTER 1: AGGRAVATING AND MITIGATING SENTENCING

This sets the investigation of mental mitigation and the subset of intellectual disability as being virtually unique. Other decision-making flaws included premature decision making.²⁹ The race of the defendant, victim and the jurors affected receptivity to mitigating evidence.³⁰ CJP researchers found that jurors distrusted expert psychiatrists, whom they viewed skeptically as hired guns. One way to help mitigating evidence resonate with jurors was to combine the narratives of lay persons who knew the defendant, experts who had evaluated the defendant before the crime, and experts who evaluated the defendant for trial using a process of “orchestration” of witnesses. Experts who were “retained ‘after the fact’” would “simply parrot[] what defendant’s lawyers have retained them to say. . . . [T]he most effective expert testimony often comes from someone who had some connection with the defendant before the crime.”³¹

Jury research shows that decision makers respond differentially to the types of mental evidence. Consistent with the instant study, jurors were more receptive to so-called “organic” disorders like intellectual disability, involuntary epilepsy and brain impairments, and less responsive to amorphous personality disorder defenses or purely “psychological impairments.”³² Before current

CONSIDERATIONS n.46 and accompanying text (2013), not published, (on file with author) (emphasis added).

It was difficult to apply subtle psychiatric distinctions concerning mental illness and definitions of *mental retardation* that may impede or inhibit jurors’ application of these factors in their cases. Such designations often depend upon complicated institutional records and upon complex and difficult to apply testimony of experts. For such reasons mental disabilities may lose some of the influence they are presumed to have in principle when it comes to applying them in practice.

Id. (emphasis added).

²⁹ About half of the CJP jurors said they had decided on what the punishment should be during the guilt stage of the trial. William J. Bowers, Marla Sandys, Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing, Jurors’ Predispositions, Guilt-Trial Experience, and Premature Decisions-Making*, 83 CORNELL L. REV. 1476 (1998).

³⁰ Psychiatric problems, a history of child abuse, and drug abuse were perceived as less mitigating for black defendants. Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias and the Death Penalty*, 24 L. & HUM. BEHAV. 337, 355 (2000).

³¹ John H. Blume et al., *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation*, 36 HOFSTRA L. REV. 1035, 1041 (2008) (citing Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123–26 (1997)).

³² Phoebe Ellsworth et al., *The Death Qualified Jury and the Defense of Insanity*. 8 L. & HUM. BEHAV. 81-93 (1984); Phoebe Ellsworth, *Some Steps Between Attitudes and Verdicts*,

notions of biological causality in modern psychological research, these researchers suggested that specifically death qualified jurors with “crime control” orientations were more receptive to mental mitigating evidence that experts testified had an organic cause. The death qualified jurors viewed “pure” psychological conditions as an excuse or loophole. Now, with greater knowledge about the organic, neurological, chemical, genetic, and hormonal basis of psychological abnormalities, jurors may find proof of some defendants’ mental illness more credible and disabling.

III. THE LAW AS IT APPLIES TO THE CASES IN THIS STUDY

In 2002, after the initial trials in this study, the Supreme Court, in *Atkins v. Virginia*, prohibited the execution of intellectually disabled capital offenders (then identified as “mentally retarded”),³³ because of a growing national consensus that intellectually disabled defendants were “categorically less culpable than the average criminal.”³⁴ The offenders “have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”³⁵ Executing an intellectually disabled person served no penological purpose, and weakened the integrity of the trial process through wrongful executions, false confessions, poor testimony and poor conferral with counsel. While *Atkins* found that there was a consensus against the execution of the intellectually disabled, it noted that there was “serious disagreement” over who was intellectually disabled.³⁶ It left

in REID HASTIE, *INSIDE THE JUROR* 42 (Cambridge University Press 1993); Lawrence White, *Juror Decision Making in the Capital Penalty Trial: An Analysis of Crimes and Defense Strategies Capital Trials*, 11 L. & HUM. BEHAV. 113-30 (1987); Lawrence White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411 (1987). “Our intuition was that it is the concept of purely mental illness that troubles those with strong crime control orientation, and raises suspicions of malingering or willful refusal to conform to the most fundamental norms of society. . . . Whereas people who feel that the insanity defense is a ‘loophole’ may be willing to regard a ‘real’ medical problem as an excuse, they may feel that they have to draw the line at so-called ‘diseases’ of the imagination. . . . They fail to believe that the defendant really has anything wrong with him.” Ellsworth et al., *supra* note 32, at 84, 91.

³³ The Supreme Court in *Hall v. Florida* adopted the nomenclature intellectual disability to describe the “identical phenomenon” of mental retardation. *Hall*, 134 S. Ct. at 1990.

³⁴ *Atkins*, 536 U.S. at 316.

³⁵ *Id.* at 318.

³⁶ *Id.* at 317.

to the States the job of identifying and defining the protected persons, which was the focus of the Court's adoption of clinical standards in *Hall v. Florida* and *Moore v. Texas*.

Atkins overruled *Penry v. Lynaugh*,³⁷ (*Penry I*), a Texas case, which held that intellectual disability was just one statutory mitigating factor against death sentencing, which jurors must consider and give effect to, but not an exemption. The cases in this study, from the States, Kentucky, South Carolina and Missouri, were first tried when the governing rule on intellectual disability was *Penry v. Lynaugh*, but the juror responses to intellectual disability evidence continue to serve as a reference point and baseline for modern cases.³⁸ After 1990, Kentucky narrowly exempted defendants with ID from execution, which it operationalized with a rigid bright line cutoff rule of 70 IQ.³⁹ The rigid rule was meant to judicially identify pre-trial which defendants were exempt. A defendant's right to raise mitigating evidence of intellectual disability at trial was preserved by statute, even after a pre-trial decision, and this was the basis for the evidence in the Kentucky CJP trials in this sample.⁴⁰

Missouri and South Carolina in this sample were not exemption states and had no bright line rule. Missouri did not exempt "mentally retarded" persons from execution until 2000-2001. South Carolina was one of five states that were still executing offenders possessing a known IQ less than 70 at the time of *Atkins*.⁴¹ "Borderline mental retardation" seems to have been used to designate

³⁷ 492 U.S. 302 (1989).

³⁸ Lisa Kan, Boccaccini, McGorty & Noland, Lawson, *Presenting Information about Mental Retardation in the Courtroom: A Content Analysis of Pre-Atkins Capital Transcripts from Texas*, 33 L. & PSYCHOL. REV. 1, 23 (2009); Valerie Hans, John Blume et al., *The Death Penalty: Should the Judge or the Jury Decide Who Dies*, Cornell Legal Studies Research Paper No. 15-02 (2015), <https://ssrn.com/abstract=2513371> (using Delaware data jury data from the years 1977-2007). Both of these articles suggest that more research should be done using updated data regarding modern cases, and this author agrees.

³⁹ KY. REV. STAT. ANN. §§ 532.140 (1), 532.130, 532.025 (2)(b)(7) (West 1990).

⁴⁰ Kentucky *exempted* intellectually disabled persons from execution in 1990, defining "mental retardation" (ID) as a numerical intelligence quotient (IQ) of seventy (70) or below and set up procedures for the pre-trial judicial determination of the exemption (1990 c 488 § 3, Ky. Legis S.B. 172, eff. 7-13-90). The judicial pre-trial determination denying exemption did not preclude the defendant from raising mitigating legal defenses at trial. KY. REV. STAT. ANN. § 532.025 (2)(b)(7) (West 1990); Ky. death #531, tried 1/10/1994]; *Bowling v. Kentucky*, 163 S.W. 3d 361 (Ky. 2005). This legal framework was overruled in *Hall v. Florida*, which may retroactively apply.

⁴¹ The intellectually disabled defendant in South Carolina case B/W Life case #930 was executed for a second related murder.

mitigating conditions in the non-exempt trials, with defendants' developmental history, abuse and school functioning woven in with the numerical measurements of IQ. Several states in the sample also designated statutory *mitigation* for intellectually disabled persons.⁴² An EMED defense was adopted as a statutory mitigating circumstance in Model Penal Code states in the sample (Kentucky, Missouri),⁴³ and this was coordinated with intellectual disability and mental illness defenses. As in present day cases, evidentiary issues arose in all the sample cases about defining intellectual disability, the co-morbidity of personality disorders, and defendant's ability to perform simple tasks or plan the crime.

IV. MODERN ID CASES: THE ERRONEOUS EXECUTION STANDARD

As in the modern ID cases, the cases in this study also raise issues regarding the defendant's ability to plan the crime, defendant's ability to perform simple skilled tasks like playing cards, and co-morbid symptoms of anti-social personality disorder. Therefore, this overview of modern day ID cases is presented not so much for the conclusions of law by the courts, but to suggest that death penalty jury decision making may not have changed despite reforms in the law. The complex facts of the post-*Atkins* cases, which were first tried under the rule of *Penry*, continue to confuse jurors who continue to show enduring patterns of premature and biased decision-making. Many of the same evidentiary issues arise in these and in the pre-*Atkins* cases.

The CJP jurors did not deliberate under the guidance of *Hall* and *Moore*, but the flawed decision-making might not be different under the newer guidelines. While courts are changing the law, these changes may not affect how jurors respond to the evidence or influence the arbitrariness of the decisions. Persons with ID can still confuse lay decision makers by exhibiting seemingly normal skills in practical chores, driving, shopping.⁴⁴ Prosecutors often exploit ID

⁴² BOWERS, *supra* note 28, at 23 n.43 (citing S.C. CODE ANN. § 16-3-20 (C) (b) (10) (Westlaw 1994); KY. REV. STAT. ANN. § 532.025 (2)(b)(7) (LexisNexis 1990)).

⁴³ BOWERS, *supra* note 28, at 23-24 n.44 (citing the Model Penal Code and South Carolina law) ("The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.").

⁴⁴ In the South Carolina case SC Life # 930 B/W discussed below, the prosecutor argued that the defendant's card playing and big vocabulary words showed he was not intellectually disabled.

offenders' inability to learn from their mistakes, labeling them as anti-social and subjecting them to aggressive interrogations. These offenders exhibit co-morbidity with psychiatric illnesses, drug and alcohol dependence, depression and obsessive disorders.

Relevant here, Foglia & Sandys recently stated that capital juror misunderstanding of the role of mitigation for CJP 1 (1990s) & 3 (2000s) was unchanged.⁴⁵

The empirical evidence demonstrates that whether you are looking at capital jurors who decided cases in the late 1980s and early 1990s or cases from the first decade of the new millennium, substantial percentages are misunderstanding how to handle mitigating evidence in ways that make it harder to find mitigation than it would be if jurors were following the law.⁴⁶

This raises the question of how or whether death penalty litigation can be reformed to address many of the deep-seated problems jurors have with applying mitigating psychological evidence. Some CJP scholars indicate that juror death penalty decision-making cannot be repaired by these legal, constitutional fixes. These scholars suggest that the death penalty legal process regulated by the Supreme Court is “doomed” and should be abandoned with the death penalty.⁴⁷ Yet other capital practitioners have suggested rescue techniques that might alleviate juror skepticism with expert mitigation witnesses. Sean O'Brien and Kathleen Wayland state that the well accepted Supreme Court rule and ABA guidelines for using mitigating evidence which includes the defendant's developmental life story is an effective way to counter “dehumanizing” and “prejudicial psychiatric labels” and battles of the

⁴⁵ Wanda D. Foglia & Marla Sandys, *The Capital Jury and Sentencing, Neither Guided Nor Individualized*, in *ROUTLEDGE HANDBOOK ON CAPITAL PUNISHMENT* 364, 375 (Robert M. Bohm & Gavin Lee, eds., 2018). Foglia and Sandys discussed CJP-3 and CJP-1 jurors' misunderstanding about the standard of proof (beyond a reasonable doubt) and the assumed unanimity requirement for their considering and finding mitigating evidence. *Id.* at 375.

⁴⁶ *Id.*

⁴⁷ “The conclusion that jurors and judges do not consider contextual, environmental factors in their sentencing decisions suggest that no matter what changes are made to the law, it is unlikely that the death penalty can be cured of its arbitrariness.” ROSS KLEINSTUBER, *HEGEMONIC INDIVIDUALISM AND SUBVERSIVE STORIES IN CAPITAL MITIGATION* 106 (Routledge Publishing, Taylor & Francis eds., 2014); *Glossip v. Gross*, 135 S. Ct. 2726, 2756 (2015), (Breyer, J. and Ginsburg, J., dissenting); Bowers, *supra* note 8, at 489-90.

experts.⁴⁸ Deborah Denno concludes that that advocates should not shy away from potentially double-edged psychological evidence.⁴⁹ Sundby concluded the orchestration of lay and expert witnesses could mitigate juror disbelief.⁵⁰

Hall v. Florida overturned the “bright line cut off rule” used to define intellectual disability in nine States: Florida, Kentucky, Virginia, Alabama, Arizona, Kansas, North Carolina, Washington and Idaho, which identified ID strictly as a numerical IQ, usually at 70. Freddie Lee Hall, who was first tried at the time of *Penry*, was described as being “somewhat retarded” with learning difficulties, a speech impediment, and he suffered an abusive developmental history.⁵¹ His IQ was measured at various times on a range from 71, 73 to 80, like the cases in this study, but the trial court felt the commission of the crime was too complex for a “psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person . . . to formulate a plan whereby a car was stolen and a convenience store was robbed.”⁵² Evidence of Hall’s developmental history of abuse and school failure was not permitted to explain the numerical measure of IQ. Yet, Hall’s siblings testified, in lay terms, that there was something “very wrong” with him as a child, and he was slow with speech and learning. His mother beat and punished him for his slowness, and his upbringing exacerbated his adaptive deficits.⁵³

The Supreme Court in *Hall* stressed the importance of the developing clinical definitions of intellectual disability, stating that

⁴⁸ Sean D. O’Brien & Kathleen Wayland, *Implicit Bias and Capital Decision-Making: Using Narrative to Counter Prejudicial Psychiatric Labels*, 43 HOFSTRA L. REV. 751 (2015); Kathleen Wayland & Sean O’Brien, *Deconstructing Prejudicial Psychiatric Labels: A Guidelines-Based Approach*, 42.1 HOFSTRA L. REV. (2013), *forthcoming*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2279547##; ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines on the Mitigation Function of Defense Teams in Death Penalty Cases.

⁴⁹ Deborah Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493 (2015).

⁵⁰ Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123-26 (1997). John Blume et al., *Presenting Mitigation: Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us about Mitigation*. 36 HOFSTRA L. REV. 1035, 1041 n.24 (2008). Charles S. Lanier, Ph.D., *The role of experts and other witnesses in capital penalty hearings: The views of jurors charged with determining “the simple sentence of death”* (University at Albany, 2004) (750 pages, AAT 3135668 ProQuest).

⁵¹ *Hall v. State*, 742 So. 2d 225, 230 (Fla. 1999).

⁵² *Hall v. State*, 109 So. 3d 704, 713 (Fla. 2012).

⁵³ *Id.* at 719 (Perry J., dissenting).

an IQ score should take account of the test's standard error of measurement (SEM), indicating a range of scores, rather than a fixed number, (IQ 66-76).⁵⁴ The Court also permitted the presentation of information about defendant's social and cultural adaptive functioning, stating that the disability was a "condition [and] not a number."⁵⁵ The three clinical prongs of the intellectual disability evaluation merged clinical science (DSM-5)⁵⁶ with law. Intellectual disability⁵⁷ is defined to include three criteria: 1.) Significantly sub-average intellectual functioning; 2.) Concurrent deficits in adaptive function, which include the inability to learn basic skills and adjust behavior to changing circumstances; and 3.) The onset of these deficits during the developmental period or "age of onset," age eighteen.⁵⁸

In *Brumfield v. Cain*,⁵⁹ also first tried under *Penry*, evidence had been presented of defendant's advanced planning of the crime by acquisition of a car and weapons. The Court, (J. Sotomayor), held that neither the defendant's ability to plan the crime nor the presence of co-morbid personality disorders precluded a diagnosis of intellectual disability for purposes of the *Atkins* exemption.⁶⁰ The defendant's act of planning the crime could provide only some but not definitive evidence of his cognitive ability to plan and adaptive skills. Intellectually disabled persons may have "strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation," as in advanced planning of the crime.⁶¹ The fact that the defendant had been diagnosed with "an anti-social personality" was "not inconsistent with adaptive impairment deficits

⁵⁴ *Hall*, 134 S. Ct. at 1995.

⁵⁵ *Id.* at 2001.

⁵⁶ *Id.* at 1990. In defining ID, the Court followed clinical science at the time as set forth in the American Psychiatric Association "Diagnostic and Statistical Manual of Mental Disorders, one of the basic texts used by psychiatrists and other experts; the manual is often referred to by its initials 'DSM,' followed by its edition number, e.g., 'DSM-5.'"

⁵⁷ *Id.* at 1990. The Supreme Court in *Hall* adopted the nomenclature intellectual disability. "Previous opinions of this Court have employed the term 'mental retardation.' This opinion uses the term 'intellectual disability' to describe the identical phenomenon." *Id.*

⁵⁸ *Hall*, 134 S. Ct. at 1994 (citing *Atkins*, 536 U.S. at 308 n.3); see also DSM-5 (2013); U.S.C. 124 Stat. 2643 (2010).

⁵⁹ 135 S. Ct. 2269 (2015).

⁶⁰ *Id.* at 2281.

⁶¹ *Id.*

or with intellectual disability more generally.”⁶² According to the DSM IV and AAMR,⁶³ the diagnosis of ID does not include exclusion criteria. Defendant’s sociopathic tendencies and personality disorders did not rule out a co-morbid ID. Scholars have suggested that some persons with ID may repeat anti-social and criminal behavior due to the failure to learn from prior mistakes.⁶⁴

In *Moore v. Texas*, the U.S. Supreme Court rejected the 1992 non-clinical second and third Texas Court of Criminal Appeals (CCA) *Briseno* factors, which the CCA had applied in evaluating defendant’s adaptive functioning, with regard to the defendant’s criminal and non-criminal planning ability.⁶⁵ The *Briseno* factors are non-clinical measurements, developed judicially in 1992 by the Court of Criminal Appeals in Texas (CCA) because it found the standard adaptive functioning measures to be too subjective.⁶⁶ In 1980, twenty-year-old Bobby James Moore shot and killed a grocery store clerk, during the course of a robbery. Moore was mildly intellectually disabled. Moore’s IQ score of 74 was adjusted for the standard error of measurement, to be a range of 69 to 79. At age 13, Moore could not identify the days of the week and had difficulty reading and writing. He dropped out of school in the ninth grade and was thrown out of his home, eating garbage on the streets, where he contracted

⁶² *Id.* at 2280.

⁶³ *Id.* at 2274. In defining ID, the Court followed the clinical definitions at that time of the American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* (10th ed. 2002) (AAMR), and American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (rev. 4th ed. 2000) (DSM-IV)).

⁶⁴ Weisberg states that the acceptance of psychopathy as a death-penalty prototype is misinformed. Antisocial personality disorders and soft affective deficits unfairly magnify a defendant’s responsibility and just desert for the death penalty. Weisberg (2011). *The Unlucky Psychopath as Death Penalty Prototype*; Book Review by Leona D. Jochnowitz, *Criminal Justice Review*, December, 2012).

⁶⁵ *Moore*, 137 S. Ct. at 1046 n.6; *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). Some of the “*Briseno* factors” the court considered were: “Did those who knew the person best during the developmental stage—his family, friends, teachers, employers, authorities—think he was mentally retarded at that time, and, if so, act in accordance with that determination?” and “[h]as the person formulated plans and carried them through or is his conduct impulsive?” *Briseno*, 135 S.W.3d at 8–9.

⁶⁶ *Briseno*, 135 S.W.3d at 8. *Briseno* factors include: 1. The ability to formulate plans in contrast to claims about defendant’s impulsivity; 2. Defendant’s leadership in contrast with claims about his gullibility; 3. Defendant’s rational responses to stimuli, such as evasive behavior; 4. Defendant’s coherent responses to questions versus mental wandering; 5. Defendant’s ability to lie or deceive in his or her self-interest; 6. Whether the offense required forethought and complexity. PEGGY M. TOBOLOWSKY, *EXCLUDING INTELLECTUALLY DISABLED OFFENDERS FROM EXECUTION. THE CONTINUING JOURNEY TO IMPLEMENT ATKINS* 54 (Carolina Academic Press, 2014).

food poisoning. The CCA found the medical standards to be “exceedingly subjective,” and relied mostly on evidence provided by the testimony by family, friends, teachers, employers, and authorities. The CCA concluded that Moore had adaptive strengths which included “living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison.”⁶⁷ The defendant was able to earn money to avert hunger for himself and his siblings, and he displayed leadership while in prison custody.

Justice Ginsburg, in an opinion joined by five justices, indicated that “underinclusive” and non-clinical definitions of intellectual disability raised by the *Briseno* factors created “an unacceptable risk that persons with intellectual disability will be executed.”⁶⁸ The Court rejected *Briseno*’s advancement of lay perceptions of intellectual disability by family, friends, and teachers. Persons with mild levels of intellectual disability which lay persons did not recognize could especially fall prey to “underinclusiveness.” Medical clinical standards would counteract lay stereotypes of the intellectually disabled, and avert the risk of executing persons with mild intellectual disability. The Supreme Court followed the current diagnostic standards which had been relied on by the lower State habeas court, the 11th edition of the American Association on Intellectual and Developmental Disabilities (AAIDD) clinical manual and the 5th edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM–5), published by the American Psychiatric Association (APA).⁶⁹ “[T]he medical profession has endeavored to counter lay stereotypes of the intellectually disabled.”⁷⁰

The Court indicated that instead of lay perceptions of defendant’s strengths, the standard guide for intellectual disability is

⁶⁷ *Moore*, 137 S. Ct. at 1047, *rev’g Ex Parte Moore*, 470 S.W.3d 481 (Tex. Crim. App. 2015) (citing *Ex Parte Moore*, 470 S.W.3d at 528 (Alcala, J., dissenting)).

⁶⁸ *Moore*, 135 S. Ct. 1051 (quoting *Hall*, 134 S. Ct. at 1990 and *Atkins*, 536 U.S. at 320, regarding the risk “that the death penalty will be imposed in spite of factors which may call for a less severe penalty.”).

⁶⁹ *Moore*, 137 S. Ct. at 1045; *Ex Parte Moore*, 470 S.W.3d 481, 485 (Tex. Crim. App. 2015) (reversing the state habeas court decision).

⁷⁰ *Id.* at 1052. “Mild levels of intellectual disability, although they may fall outside Texas citizens’ consensus, nevertheless remain intellectual disabilities. . . . *Briseno* advanced lay perceptions of intellectual disability. . . [b]ut the medical profession has endeavored to counter lay stereotypes of the intellectually disabled.” *Id.* at 1051-52.

a measure of defendant's "adaptive deficits."⁷¹ Therefore, defendant's ability to plan the crime was just one feature of his adaptive functioning. An intellectually disabled person might have strengths in one aspect of adaptive skill but show overall limitations.⁷² The Court also rejected the CCA finding that Moore's adaptive deficits might have been caused by child abuse, personality and learning disorders, racial harassment, drug abuse, and not solely intellectual functioning. These factors were "traumatic experiences" and "risk factors" for intellectual disability.⁷³ They were co-morbid with and not inconsistent with ID adaptive impairments.

Since the *Moore* decision, the principles of "underinclusiveness" and "unacceptable risk" have become a key part of the intellectual disability exclusion under the Eighth Amendment analysis.⁷⁴ The standard would be to reject any inappropriate practice that increased the risk of erroneously executing persons with intellectual disabilities. Tobolowsky interpreted *Atkins* admonition "avoiding the unacceptable risk that persons with intellectual disability will be executed," to go beyond the unreliability of the bright line numerical definitions of ID, rejected by *Hall* and the *Briseno* factors rejected in *Moore*.⁷⁵ She suggested that one

⁷¹ *Id.* at 1050. "The medical community focuses the adaptive-functioning inquiry on adaptive *deficits*. See, e.g., AAIDD-11, at 47 ("significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills"); DSM-5, at 33, 38 (citing *Brumfield v. Cain*, 135 S. Ct. 2269, 2281 (2015) ("[I]ntellectually disabled persons may have 'strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation.'")).

⁷² "There is a very common stereotype and misunderstanding that if somebody has strengths, they are not intellectually disabled," 11/29/16; p. 21, argument transcript of Clifford M. Sloan for petitioner.

⁷³ "Many intellectually disabled people also have other mental or physical impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism," which co-occur and are higher than in the general population. *Moore*, 137 S. Ct. at 1051 (citing Brief for American Psychological Association, APA, et al. as *Amici Curiae* 19). "The existence of a personality disorder or mental-health issue, in short, is 'not evidence that a person does not also have intellectual disability.'" *Id.* (citing Brief for AAIDD as *Amici Curiae* 20 and n.25).

⁷⁴ Clinton M. Barker, *Substantial Guidance without Substantive Guides: Resolving the Requirements of Moore v. Texas and Hall v. Florida*. 70 VAND. L. REV. 1027, 1031 (2017) ("Relying on neither the 'objective indicia' of the states nor on the Court's own 'independent judgment' of penological purposes, *Moore* elevated 'unacceptable risk' to a core Eighth Amendment principle that could supply an independent reason for striking a state's practice as unconstitutional."). See also *id.* at 1033; *id.* at 1064 n.232.

⁷⁵ TOBOLOWSKY, *supra* note 66, at 196, 241, 253. "Although *Hall* specifically addressed the implementation of the intellectual disability definition, its rationale logically extends to

inappropriate action included jurisdictions that refused to recognize the “Flynn effect.” That effect involved a general increase in IQ in the population over time, and it necessitated that assessment instruments reflect a downward adjustment to IQ scores.⁷⁶ Other inappropriate actions which might lead to erroneous executions include Georgia’s imposition of beyond the reasonable doubt standard of proof on the defendant, and restrictions on habeas hearings under AEDPA.⁷⁷

This paper focuses on what the juror interviews might tell us regarding some of the central contemporary concerns such as IQ variability over time, the Flynn effect, and the role of adaptive deficits in clinical decision making. Although the Supreme Court has rejected the use of lay common-sense stereotypes to define intellectual disability as being under-inclusive for mildly disabled persons, it is not surprising that capital jury literature concludes that lay perceptions of intellectual disability resonate most strongly with jurors. The “erroneous execution standard” developed by the Court may fail by its own standards. This study concludes that executions did in fact occur in cases of the mildly intellectually disabled, in violation of the erroneous execution standard.

High numbers of offenders are affected, and the stakes are high, as the imposition of the harshest penalty of death is at issue. In the general population, intellectual disability is estimated at 1-2%, but from 2-3% of incarcerated offenders are intellectually disabled.⁷⁸ When offenders with IQs ranging from 71-74 are added, under the

jurisdictions’ *Atkins* procedures that might create a similar risk of constitutionally ‘inappropriate’ executions.” Jochowitz, *supra* note 21.

⁷⁶ The *Flynn effect* is an IQ based factor showing that IQ scores increase overtime, 0.3 points per year. Current standards require that assessment instruments should reflect the *Flynn effect* general increase in IQ over time, according to the AAIDD and APA. This adjustment would result in the downward adjustment of IQ scores. Yet some Circuit courts have refused to require the application of the *Flynn effect*. *Hill v. Humphrey*, 662 F.3d 1335, 1349 (11th Cir. 2011). “For example, this circuit has recognized that the statistical phenomenon known as the Flynn Effect and the Standard Error of Measurement of plus or minus 5% can be applied by a test administrator to an individual’s raw IQ test score when arriving at a final IQ score.” *Id.* at 1373 n.15 (citing *Thomas v. Allen*, 607 F.3d 749, 753, 757–58 (11th Cir. 2010)).

⁷⁷ One commentator discusses the reasonable doubt standard of proof for intellectual disability. Lauren Sudeall Lucas, *An Empirical Assessment of Georgia’s Beyond a Reasonable Doubt Standard to Determine Intellectual Disability*, 33 GA. ST. U. L. REV. 553 (2017); *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011).

⁷⁸ CHAFETZ, *supra* note 5, at 141 (citing Karen L. Salekin et al., *Offenders with Intellectual Disability: Characteristics, Prevalence, and Issues in Forensic Assessment*, 3 Journal of Mental Health Research in Intellectual Disabilities 97-116 (2010)).

SEM definition of intellectual disability, the percent rises to 6-9%.⁷⁹ The mean IQ scores of death row inmates are estimated to be in the average to low range, generally consistent with the general prison population with 27% of the death row sample in one state having IQ scores below 74.⁸⁰ Intellectually disabled persons suffer disproportionately from the structural failure of basic criminal justice rights, including failed *Miranda* comprehension, dubious competency to stand trial, failure to assist counsel and testify at trial, higher levels of gullibility to police interrogations, and false confessions.⁸¹ This structural failure of rights for persons with ID in the system, seen in this study, also implicates the high risk of erroneous execution.

V. METHODS

This exploratory study examines the trial transcripts and CJP juror interviews in a convenience sample of 38 Capital Jury Project (CJP 1) (13 life; 25 death) cases to ascertain whether jurors that were presented with mitigating intellectual disability evidence may have been confused by issues of trial proof, clinical definitions, and extra-legal factors.⁸² This paper tests the hypothesis, familiar to CJP research, that jurors' receptivity to mitigating intellectual disability (ID) evidence was limited by their difficulties with the adversarial mental clinical definitions, as well as distractions from extra-legal

⁷⁹ CHAFETZ, *supra* note 5, at 141.

⁸⁰ FRANK R. BAUMGARTER ET AL. DEADLY JUSTICE, A STATISTICAL PORTRAIT OF THE DEATH PENALTY 341 (2018); Cunningham & Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 BEHAV. SCI. LAW. 191-210 (2000).

⁸¹ CHAFETZ, *supra* note 5, at 141 (citing Salekin et al., *supra* note 78, at 98-99). Only about a third of the defendants claiming "mental retardation" have succeeded, encountering resistance by States. Only small numbers of offenders sentenced to death at the time of *Atkins* have had their death sentences commuted, despite it being retroactive. John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689 (2009); Sheri Lynn Johnson et al., *An Empirical Look at Atkins v. Virginia and its Application in Capital Cases*, 76 TENN. L. REV. 625 (2009); Adam Liptak, *Line drawn in one case dissolves another*, N.Y. TIMES: SIDEBAR (Nov. 23, 2009), <http://www.nytimes.com/2009/11/24/us/24bar.html>.

⁸² The C.J.P. rules do not permit identifying the defendant, due to the requirement to protect the confidentiality of jurors' identities in CJP studies. The cases are not identified, nor are the juror interviews which may contain identifiers publicly available. For more complete excerpts of the juror interviews in the cases cited in this study, as well as excerpts from the trial transcripts, see Jochnowitz, *supra* note 26. The research in this dissertation was approved by scholars with access to the full data.

factors, unrelated to the evidence.⁸³ The 38 cases and interviews, tried in the mid-1990s, were included in the sample from 7 states because these were the only cases for which the Capital Jury Project-I had available capital trial transcripts. The study first provides an overview of patterns in the data in the 38 cases, using preliminary coding and a cross tabulation analysis. It then specifically focuses on the 6 intellectual disability cases from a subset of 12 intensively coded cases from Kentucky, Missouri and South Carolina.

The study poses research questions which go to the heart of the effectiveness of the bifurcated capital trial in providing jurors with guided discretion to consider the difficult proof and definitions required to analyze intellectual disability mitigating evidence. What is the extent to which jurors “consider” and “give effect” to evidence bearing on a defendant’s mental disabilities, (intellectual disability), for sentencing purposes in capital trials?⁸⁴ What explains why jurors may or may not be receptive to mitigating factors of mental and intellectual disability in determining the appropriateness of the death penalty? Was capital jurors’ consideration limited by their difficulties with the adversarial mental proof and definitions like the bright line cut off rule? Were jurors distracted by extra-legal factors; premature decision-making, pro-death bias, racial prejudice?

The study combines two important data sources; real-life post-trial juror interviews from the Capital Jury Project I and available trial transcripts which might authenticate juror statements. The cases were from 7 states, Missouri (19), South Carolina (8), Florida (5), Kentucky (3, video transcripts), California (1), North Carolina (1), and Texas (1).⁸⁵ The analysis consisted of two steps. A cross tabulation analysis of the 38 cases for the relationship between trial evidence and juror closed-ended responses to explore what mental defenses were presented at trial and whether jurors acknowledged them as sentencing factors. The percentages demonstrated patterns in the data for juror receptivity to the different types of mental evidence presented at trial (psychoses, personality disorders, intellectual disability, learning disorders).⁸⁶ The second

⁸³ Sandys et al., *supra* note 27, at 691-93.

⁸⁴ *Penry*, 492 U.S. at 307.

⁸⁵ Jochnowitz, *supra* note 26, at n.76

⁸⁶ While the sample size was too small in some cells for chi-square significance testing to generalize the relationships to the death penalty population, a cross-tabulation and percentages demonstrated patterns in the data, regarding what mental defenses were presented at trial and whether jurors acknowledged them as sentencing factors.

step involved the intensive coding of a subset of 12 cases to examine the mental evidence in trial transcripts and the jurors' open-ended interview responses. This subset of 12 qualitative cases from the Kentucky, South Carolina and Missouri (6 life/ 6 death) were selected based on preliminary criteria of having provided: 1.) The strongest evidence of a variety of mental defenses, 2.) A full set of 4 juror responses, 3.) Enhanced access to jury selection/voir dire processes; and 4.) The unique female offender and child murder cases. Out of 12 qualitatively coded cases, there are six intellectual disability cases, which are analyzed here.⁸⁷

The six ID cases discussed in this study include three cases where intellectual disability or borderline retardation was the primary defense, with various racial mixes, (South Carolina B/W Life case #930; Kentucky W/ 2W Death case #531; and Missouri B/B life without parole (LWOP) case # 1418 ID). There were 3 other cases related to intellectual disability, attention deficit disorder (ADD), and organic brain damage (meningitis). Missouri B/B Life case #1402 and Missouri B/W Death case #1408 were child murder cases which were tried before the same judge in the same month and raised related issues of ADD and brain damage from meningitis. Kentucky W/5 W Death case #517, recorded on video transcript, involved the joint trial of two female gay co-defendants where the issue of intellectual disability was raised.⁸⁸

⁸⁷ The subsample represented a strong assortment of different types of mental factors including personality disorders, intellectual disability and drugs, as well as similarly situated cases for female defendants and child murders. The cases were coded into five categories: 1.) personality disorders, 2.) intellectual disability, 3.) drugs, 4.) female defendants, and 5.) child victims. The mental defenses of ID, female defendants, and child victims and others overlapped.

⁸⁸ 1.) South Carolina B/W Life case #930; juror racial composition affected outcome. Jurors responded to intellectual disability but rejected mental illness defenses. Offender was tried separately with different juries for two killings and executed for the second case despite ID.

2.) Kentucky W/ 2W anomalous Death case #531, Intellectual disability during developmental stages and drop in IQ raised red flag to clinician, but jurors were very distracted regarding outside evidence.

3.) Missouri B/B LWOP case # 1418 ID; jury racial composition affected deliberations. There was a culpable codefendant.

4.) Missouri B/B Life case #1402; ADD; brain damage; ID –first of two child murder, sexual assault cases, tried in same month, same judge, same jurisdiction; Racial composition of jury-Black jurors caused dissent.

5.) Missouri B/W Death case #1408; ADD; brain damage; ID – second of two child murder, sexual assault cases, tried in same month, same judge, same jurisdiction; All white jury plus premature decisions.

VI. CROSS-TABULATION FINDINGS

Consistent with the above literature, in the cross-tabulation analysis, juror receptivity to evidence of intellectual disability and borderline disability was substantial and favorable, but responses to associated learning disabilities were negative.⁸⁹ When evidence of subnormal intelligence (intellectual disability and borderline IQ) was presented at trial, a higher percent of jurors (21%) said intellectual disability was a factor in their sentencing decision than when intelligence evidence was not presented (1%). However, overall, jurors were generally unreceptive to the evidence. In cases where intellectual disability was presented, a high percentage of jurors, 76.3%, answered that it was not a sentencing factor. Juror receptivity for just border-line intellectually disabled defendants was only 11.8%. Jurors also responded more strongly to evidence of psychoses than to evidence of personality disorders. Jurors associated *subnormal intelligence* with *future dangerousness*: 86.5% versus 63%.

Evidence of ADD/learning disabilities was presented in all intellectual disability and many other cases. They were challenged vigorously by the prosecution. The results for ADD and learning disabilities were slightly aggravating and made jurors more inclined to vote for death.⁹⁰ Where learning disability was presented, fewer (4.2%) jurors stated *mental illness* was a factor than when not presented (9.8%). But more jurors, 32% versus 11%, thought defendant's status was emotionally disturbed when learning disability was presented. Jurors associated evidence of learning disability/ADD with dangerousness leading to a decision tilting towards death. The strongly contested evidence of learning disability/ADD may have

6.) Kentucky W/5 W Death case #517. Two female gay co-defendants, jointly tried; one death/ one life sentence. The initial sample of 38 cases showed that there were 10 of 38 cases which raised an intellectual disability issue, 1418-MO (life); 1409-MO (death); 1408-MO (death); 1402-MO (life); 930-SC (life); 922-SC (death); 921-SC (death); 904 (death); 531-KY (death) and 517-KY (death). Six of these cases were in the sample of 12 intensively coded cases raised intellectual disability issues, discussed here.

⁸⁹ Tables 1-7 with cross tabulation results are available in the Appendices of Jochowitz, *supra* note 26, at 214.

⁹⁰ Originally, it was anticipated that ADD would be treated as a mental illness factor, but the transcripts show that the evidence was logically presented in the context of intellectual disability defenses.

been aggravating because the disabilities were perceived as being common and jurors did not believe the evidence was extenuating.⁹¹

VII. SIX INTENSIVELY CODED INTELLECTUAL DISABILITY CASES

The qualitative analysis provided information like juror interpretation not available in the closed ended survey questions, and helped explain the cross-tabulation results. Analysis revealed that jurors disregarded intellectual disability as a sentencing factor because they were confused and thrown off course by adversarial evidence. Threshold extra-legal factors other than the mental evidence distracted jurors from giving effect to and urging the consideration of mitigating evidence in the deliberations process. Premature decision making plus racial and pro-death bias and parole considerations mounted cumulatively as a “counter-weight” to the proper weighing of the evidence. These qualitative results help to explain why intellectual disability evidence was not more persuasive in influencing juror decisions in 76% of cases, in the cross-tabulation analysis. Facts in these sample cases raise many of the contentious issues regarding the attributes of intellectual disability discussed above, in trials from the same era. The decision-makers struggled with definitions for intellectual and adaptive functioning deficits, evidence of the defendant’s ability to plan the crime, the comorbidity of ID and anti-social personality disorders, and defendant’s ability to perform simple skilled tasks like driving a car and playing cards.

Jurors were more receptive to intellectual disability and “organic” brain impairments, than to purely psychological impairments, and temporal dissociative, borderline and personality disorders, consistent with research.⁹² Still, jurors got stuck on the contested and difficult definitions of intellectual disability, and

⁹¹ ADD is a common disability both inside and out of the Criminal Justice system. In MO life #1418 (child human shield case), the prosecution claimed that ADD was common and most sufferers were not murderers. “Three percent of the population has ADD. Do they kill people?” The expert responded, “80% of juvenile delinquents have learning disabilities which inhibit the ability to function socially.”

⁹² Ellsworth, et al., *supra* note 32, at 81-93; Ellsworth, *Some Steps Between Attitudes and Verdicts*, *supra* note 32, at 42; White, *Juror Decision Making in the Capital Penalty Trial*, *supra* note 32, at 113-30; White, *The Mental Illness Defense in the Capital Penalty Hearing*, *supra* note 32, at 411; Leona D. Jochowitz, *Does Mental Health Mitigating Evidence of Personality Disorders Make a Difference to Jurors in Capital Sentencing Decisions?*, 50 No. 2 CRIM. L. BULLETIN ART 7 (2014).

questioned its effect as mitigating evidence. Jurors argued skeptically over a few points of IQ. Intellectual disability evidence almost always caused some disagreement. Jurors debated issues of intent, cool reflection and culpability, but they focused mainly on upbringing and family issues. Jurors were skeptical of learning disabilities and attention deficit disorders (ADD). ADD was perceived as common. “80% of juvenile delinquents have learning disabilities,” but most learning disabled persons do not kill people.⁹³ Overall, jurors interpreted contested expert testimony in lay terms, based on their own experiences. They focused on proxy family and child abuse history. They disliked experts and favored family and other witnesses. Jurors acted like armchair amateur psychologists. “He was described as mildly retarded but from my observations he seemed to be very intelligent and manipulative.”⁹⁴

A. Comparing Intellectually Disabled Defendant Murder Cases; South Carolina Life Case #930 B/W; jurors #1318-1321; Kentucky Death Case #531 W/W; jurors #723-728; Missouri LWOP Case #1418 B/B, jurors #3069-3072

This section examines jurors’ receptivity to intellectual disability mitigating evidence set forth by the experts and lay persons under the various legal frameworks. At the time of these 1990s intellectual disability cases, jurors were debating issues of intent and culpability. In light of these evolving positive attitudes, this review critically examines the anomalous result of KY Death #531, which had very strong extra-legal issues. One defendant (SC Life #930) was described as “mentally retarded” (IQ 72), and two defendants (KY Death #531; MO Life #1418), were described as “border-line mentally retarded” (IQ in 70s). However, the defendants’ IQs were similar. All defendants suffered from learning disabilities which were interpreted as failures in defendants’ adaptive functioning and inability to learn basic skills. Defendants’ childhood deprivation caused developmental impairments and vacillating or declining IQ scores, and this confounded experts and confused jurors. Since the bright line cut-off rule of IQ 70 applied in Kentucky at the time, KY Death #531 case adds insight into whether jurors were misled over a

⁹³ Jochowitz, *supra* note 26, at 98.

⁹⁴ Jochowitz, *supra* note 26, at 173.

few points of fluctuating IQ and the artificial statistical conventions. Even in non-bright line sample States like South Carolina, jurors overestimated the range of numerical IQ evidence.⁹⁵ The confusing definitions of intellectual disability may have limited CJP jurors' ability to transition from applying hypothetically mitigating factors from principle to practice.⁹⁶

***1. South Carolina Life Case #930 B/W; jurors
1318- 1321 (9/21/1987-9/28/1987)***

Initially, the defendant was tried, convicted and sentenced to death in a consolidated trial for two consecutive sexually predatory murders committed during his escape from a work detail.⁹⁷ On retrial of these cases, separately, defendant received a death sentence for the B/BF case and then a life sentence for the B/WF case.⁹⁸ He was executed for the first case, despite having ID. Reporting the crime, while escaping, defendant asked bizarrely for the officer in charge of "dead bodies."⁹⁹ He told police he wanted to remain "anonymous."¹⁰⁰ The prosecution argued that, despite his low IQ, defendant had significant life skills including the ability to play cards and the use of large vocabulary words.¹⁰¹

CJP Interviews for the life case took place in July 1992, five years after the 1987 trial. The CJP panel was diverse and included two active prolife black females and two white males, with an exasperated white male foreman.¹⁰² Jurors raised contentious issues about the defendant's cognitive ability to form capital intent, and about the reduced culpability of retardation for the death penalty.¹⁰³ The life verdict was a result of a fractious guilt phase deliberations and a trade-off at the guilt phase for life in exchange for "guilty, but

⁹⁵ In SC life case #930, juror #1319 erroneously stated, "He came from a background of violence and had an *IQ in the low 80s*." Jochnowitz, *supra* note 26, at 81.

⁹⁶ BOWERS, *supra* note 28, at n.43.

⁹⁷ Jochnowitz, *supra* note 26, at 82-88.

⁹⁸ Jochnowitz, *supra* note 26, at 73.

⁹⁹ Jochnowitz, *supra* note 26, at 74.

¹⁰⁰ Jochnowitz, *supra* note 26, at 76.

¹⁰¹ Jochnowitz, *supra* note 26, at 76.

¹⁰² Jochnowitz, *supra* note 26, at 88-93.

¹⁰³ Jochnowitz, *supra* note 26, at 82-83.

not mentally ill.”¹⁰⁴ Juror racial diversity enhanced the power of the pro-life dissenters. It is important that even pro-life jurors could agree on the mitigating nature of retardation, but they strongly rejected the contested defense of schizoid or schizotypal personality disorder.

One of the interviewed black jurors #1321 (BF) was a leading pro-life advocate, beginning at the guilt phase. She said that she had been a former student teacher of intellectually disabled children and she relied on this experience to advocate initially for a guilty but mentally ill verdict, a verdict which jurors did not understand. Another WM juror #1318 was strongly pro-life, and he reiterated the defendant’s diminished competence to understand right from wrong. The pro-life jurors mentioned a voting block of 3 holdout jurors for life, who argued prematurely at the guilt phase for a bargain of a life sentence, as a trade-off for capital guilt.

#1321 (BF): IV17. “I used to teach and take care of mentally retarded children when I was in college during the summer. I connected the children and the retardation together, and I couldn’t separate this from defendant. I figured that it wasn’t his fault. That’s why I decided on a life sentence. I was trying to get everyone else to see that. Only two other jurors in there were willing to listen to me. Everybody else was totally against me.”¹⁰⁵

Juror WM #1318 openly described the crass premature guilt “trade-off” process: IIC15B, IV12: “We will go along with guilt but there won’t be a death sentence. It’s like a trade-off. You give us guilty but not mentally ill, we’ll give you life.”¹⁰⁶

The guilt phase deal was based principally on dissenting jurors thinking it would mean sending a mentally retarded man to death.

1321 (BF): “We felt we didn’t want to put a mentally retarded person to death.” #1318 (WM): “The reason

¹⁰⁴ Jochowitz, *supra* note 26, at 79. “We will go along with guilt but there won’t be a death sentence. It’s like a trade-off. You give us guilty but not mentally ill, we’ll give you life.”

¹⁰⁵ Jochowitz, *supra* note 26, at 81.

¹⁰⁶ Jochowitz, *supra* note 26, at 79.

it took four days was if they found him guilty, they were scared of the punishment. What if this guy was really mentally ill and we find him guilty?"¹⁰⁷

Yet jurors rejected the charge of guilty but mentally ill and were confused about the legal definition of knowing right and wrong. Juror #1320 (BF) stated that two of the holdout jurors originally thought defendant was insane. But they agreed on guilty (and *not* guilty but mentally ill) because they were afraid that defendant would eventually be released from a mental institution, a speculative parole-like issue. The exasperated foreman #1319 complained that the dissenters prematurely decided the punishment, and misunderstood mental competence. He erroneously estimated defendant's IQ at the upper end of the expert testimony, in the low 80s and not 70s. "He came from a background of violence and had an *IQ in the low 80s*."¹⁰⁸ He accused the dissenting jurors of violating their oaths.

While jurors seemed certain that mental retardation was a significant mitigating factor, they concluded that the contested schizoid or schizotypal personality disorder mental illness was not credible. They speculated that mental illness was not an incurable permanent disability, but that retardation could not be treated (Jurors 1318 and 1321). Mental illness or "temporary insanity" was a scapegoat excuse for murder, unlike retardation, and jurors were not qualified to evaluate it. "*Mental illness could be cured while mental retardation could not. . . . Mental illness or temporary insanity seems like such a scapegoat.*"¹⁰⁹ There was not enough scientifically known about mental retardation to explain the defendant's full limitations in knowing right from wrong.¹¹⁰ To grasp the legal and psychological jargon about knowledge of right and wrong and schizoid personality disorder, jurors translated defendant's mental illness into lay terms. They emphasized his abuse history. There was "*something definitely wrong with the defendant. I didn't really think he was all there.*"¹¹¹

The most salient aspect of this life decision in a brutal Southern, B/W murder case was the premature guilt phase bargaining over guilty but not mentally ill led by a leading African American

¹⁰⁷ Jochnowitz, *supra* note 26, at 80.

¹⁰⁸ Jochnowitz, *supra* note 26, at 80.

¹⁰⁹ Jochnowitz, *supra* note 26, at 81-82.

¹¹⁰ Ellsworth et al., *supra* note 32, at 81-93.

¹¹¹ Jochnowitz, *supra* note 26, at 82.

female juror with personal experience teaching intellectually disabled students. The significant factor in convincing the small cadre of two other holdouts flowed from that juror's personal experiences as a teacher, and not from the confusing expert testimony on mental and intellectual disability. The poignant outcome shows the importance of decision-makers' individual attributes and of differing legal strategies (guilty but mentally ill, GBMI). The case is also uniquely important because it juxtaposes juror responses to intellectual disability, mental illness, abuse, personality and antisocial disorders. Jurors were more receptive to intellectual disability as a mitigating factor, but more skeptical about whether mental illness was a "permanent incurable disability." Still defendant was arbitrarily executed for the companion murder case, despite his ID.

**2. Kentucky Death Case #531 W/W; Jurors 723-728.
(1/10/1994-2/2/1994)**

Defendant (white male) was accused of murdering a white couple who had been on a date when they inadvertently blocked the defendant's hidden vehicle.¹¹² He had impulsively escaped with his girlfriend and friend from the local jail, even though he awaited his imminent release to shock probation, expected in about four days.¹¹³ The prosecutor falsely suggested that the victims had been sexually assaulted, but the defense argued that the victims had been on a lovers' tryst. Some jurors later remembered this as a possible issue. "He raped them."¹¹⁴ (#723 WF foreman).

At the penalty phase in this case, the social worker and psychologist noted that that defendant's decline in IQ score from 86 (verbal 76) at age 7 in 1960, to 73 at age 14, was an "*extraordinary symptom*," and a red flag. Defendant's multiple placements, and chaotic family caused impulsive behavior, and a breakdown in judgment triggered by stress.

The drop in IQ was a very unusual occurrence, *a red flag to a clinician*, which showed trauma, disrupted development, and stress. It was attributable to moving

¹¹² Jochnowitz, *supra* note 26, at 83.

¹¹³ Jochnowitz, *supra* note 26, at 83.

¹¹⁴ Jochnowitz, *supra* note 26, at 84.

from house to house, abandonment, family violence, food deprivation, and neglect.¹¹⁵

Total penalty phase deliberations were 14 hours over two days. After the first eight hours of penalty phase evening deliberations on February 2, 1994, the jurors declared they had reached a standstill and were having difficulties. The foreperson 723 (female) attributed the standstill to two holdouts who thought the abuse history (a possible proxy for mental disability) mitigated against death. In contrast, the guilt deliberations had lasted only 4.5 hours.

There were signs of juror misconduct and extra-legal decision making which impeded the penalty deliberations. The premature and automatic death decision making together with juror errors regarding erroneous verdict forms, news-leaks, and parole considerations skewed the decision towards a death verdict. After jurors were told at selection that defendant had admitted the murder, juror #724 felt “anybody guilty should get the electric chair.”¹¹⁶ Juror #728, who had denied reading the article about the accidental killing of a police officer in the cornfield at *voir dire*, stated under subpoena, that he had prematurely decided the case during closing arguments. “*My mind was already made up and it didn’t affect me.*” The defense objected: “*This jury was divided. People changed their votes.*”¹¹⁷ There is suggestion that jurors were hiding the improper media influence. “*Some people that just didn’t know when to shut up.*”¹¹⁸

CJP juror #727 WM, one of two pro-life holdouts, confirmed that he felt pressured into the vote on death. He stated that he and another male pro-life hold-out sympathized with the mitigating evidence about defendant’s upbringing, and wanted to consider the defendant’s deprived environment, a possible proxy for intellectual disability. The pro-death cohort failed to accept the role of environment in human development. Juror #727 identified that he was coerced into devaluing the mitigation.

But to say that you’re not a product of your environment is one of the dumbest things I’ve ever heard said. . . . [Y]ou can separate identical twins at

¹¹⁵ Jochnowitz, *supra* note 26, at 86.

¹¹⁶ Jochnowitz, *supra* note 26, at 91.

¹¹⁷ Jochnowitz, *supra* note 26, at 88.

¹¹⁸ Jochnowitz, *supra* note 26, at 88.

birth and raise them completely apart, and they turn out the same. . . . Me and this other fellow thought that the question of his upbringing, while it may not be reason enough to not give him the death penalty, at least deserved consideration and discussion.¹¹⁹

Juror #725 stated that he undermined the bargaining power of the pro-life faction. He claimed he had gotten juror #727 to change his vote, by cajoling and threatening a mistrial. He had sent a note to the judge about the two pro-life holdouts.¹²⁰

Two men focused on defendant's abuse history and his upbringing. Then the rest of us said, there comes a time in everybody's life that you have to take care of your own responsibilities. . . . They sent note to judge that *we had a hung decision because two were not going along with the rest of us*.¹²¹

There was deep disagreement and confusion over a few points of IQ, which were within the current SEM range, beginning at the bright line cut-off of 70, followed in Kentucky, and vacillating up to 80. CJP juror #725 derisively called the defendant a "moron," but also disputed that defendant's IQ as 70, 76 or 80. The derogatory term "moron" is not mentioned in the trial transcript, and seems to have been a lay term used by the juror.

Juror #725: IIIA 6 H: "There was a lot of testimony on the grounds that his IQ was perhaps not above what we consider a -- what, a moron?-- I think that is the term they used. . . . I think *they were contending that he had an IQ of 70 or 76 or so, had been tested as high as the 80s I recall*.¹²²

Foreperson # 723: IVB20: "He had a low IQ, but *that doesn't make you mentally retarded*. . . . I remember it

¹¹⁹ Jochnowitz, *supra* note 26, at 92.

¹²⁰ Jurors #725 and #723 in KY #531 are also discussed in Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1013 (2001). "There comes a time in everybody's life when you have to take care of your own responsibilities and you know right from wrong, and we just thought that he did." *Id.* at 1051 (citing, KY #723).

¹²¹ Jochnowitz, *supra* note 26, at 92.

¹²² Jochnowitz, *supra* note 26, at 90.

being brought up by his attorney. . . . At some point as an adult, you have to take responsibility for your actions.”¹²³

Professional testimony by the social worker was rejected. Pro-death juror #725 stated that the social worker’s testimony was “misleading” because she stated that anyone who moves from home to home is going to turn out like the defendant. “Every abused person does not commit murder.”¹²⁴ Juror #724 stated that once he heard at *voir dire* that defendant had admitted the murder, this was evidence of capital guilt which required a death verdict. “Anybody guilty should get the electric chair.”¹²⁵

The failure of jurors to make a reasoned decision about capital guilt at the guilt phase cascaded into a series of premature and automatic death penalty decisions. Errors at the guilt phase may have locked in a premature decision for death at the penalty phase. There were extra-legal considerations of the defendant’s eligibility for parole at the penalty phase deliberations by the pro-death faction (#723; #725).¹²⁶ The pro-death voters stated that the parole issue was what convinced the two pro-life jurors to change their votes, but this was ridiculed by pro-life holdout #727. IID8B: “They didn’t want him out on the street. I disagreed with their reasoning: let’s give him the death penalty; that’s the only way to be sure that he stays in prison.”¹²⁷

This dual murder death case, with other medium level aggravators, and strong mitigation, stands out because jurors were not receptive to evidence of defendant’s intellectual disability. Instead, jurors acknowledged defendant’s abusive upbringing, a “red flag” surrogate for stunted intellectual development. The contested adversarial portrayal of psychological evidence about the range of the defendant’s cognitive abilities, undermined the credibility of the evidence and made jurors skeptical of the EMED and cognitive defenses. A juror in this bright line state called the defendant a “moron,” but felt that defendant’s IQ vacillated in a range of 70-76,

¹²³ Jochowitz, *supra* note 26, at 90.

¹²⁴ Jochowitz, *supra* note 26, at 90. “I was pretty firm that what the social worker was saying was that she was trying to mislead these people.”

¹²⁵ Jochowitz, *supra* note 26, at 91.

¹²⁶ William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51-86 (2003).

¹²⁷ Jochowitz, *supra* note 26, at 94.

(within the current SEM range). This caused juror skepticism about defendant's culpability over a few points of IQ. Pressure by pro-death jurors, plus the automatic premature death decision-making, undermined the bargaining power of the pro-life faction. This may explain why an intellectually disabled man was anomalously sentenced to die, contrary to literature that jurors are receptive to intellectual disability defenses.¹²⁸

3. *Missouri LWOP case #1418 B/B; Jurors 3069-3072 (4/20/1993-4/30/1993)*

Defendant testified at the guilt phase, showing deep intellectual limitations in language and understanding. Defendant's testimony affected jurors' perceptions of defendant's culpability, much more strongly than the expert witnesses, and this assisted in the LWOP verdict. The case involved the B/B murder of a nine-year old neighborhood child bystander, on a theory of transferred intent, because the intended target used the boy as a human shield during a drug shootout. The "transferred intent" issue created lingering doubt about defendant's level of participation in the case. CJP jurors wondered why the death penalty had been sought at all in the case. In CJP research, lingering doubt was the unresolved guilt phase factor which carried over to sentencing and surpassed all other mitigating factors at the penalty phase.¹²⁹ Lingering doubt was most persuasive with African American jurors.¹³⁰

The penalty expert stated defendant was under EMED at the time of the killing. She stated that defendant's ADD had made it hard to coolly reflect in periods of high stress and anxiety. "By nature of defendant's learning disability, the hyperactivity, it makes it almost impossible for him, particularly in periods of high stress and anxiety,

¹²⁸ Phoebe Ellsworth et al., *The Death Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81-93 (1984).

¹²⁹ William J Bowers et al., *Foreclosed Impartiality in Capital Sentencing, Jurors' Predispositions, Guilt-Trial Experience, and Premature Decisions-Making*, 83 CORNELL L. REV. 1476 (1998); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998).

¹³⁰ Benjamin D. Steiner et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 171-274.

to coolly reflect.”¹³¹ The prosecution claimed that ADD was common and that most sufferers were not murders. “Three percent of the population has ADD. Do they kill people?”¹³² The expert responded, “80% of juvenile delinquents have learning disabilities which inhibit the ability to function socially.”¹³³ The judge disparaged ADD. “This guy could have designed a bomb to blow up the dealer’s house, and she legally can provide a history of him being inattentive.”¹³⁴ The defendant began crying visibly in the courtroom during the psychologist’s testimony. Defendant’s simple act of crying affected the jurors.

In deliberations, jurors were influenced by both the lingering doubt and transferred intent problem of the capital sentence and the intellectual disability issues. They focused on the defendant’s ability to form capital intent and his level of participation in the killing in relation to the other dealer. Exposure to evidence of defendant’s intellectual disability made jurors debate issues of intent and culpability. Jurors were sympathetic to the defendant and they described him as the second victim in the case (#3069).¹³⁵ Although defendant was responsible for the murder, jurors felt that it was really the fault of the dealer who pulled the child in as a human shield, and that he deserved death. Jurors wondered why the prosecutor sought the death penalty at all. Defendant’s guilt phase testimony convinced jurors that the defendant was intellectually disabled or in lay terms something was mentally wrong with him. Yet, expert evidence confused them.

#3071: IID12B : “Jurors were confused over why this was a capital punishment case in the first place; why the prosecution even went for the death penalty. The prosecutor was unable to prove that defendant had the mental ability to know what he was doing.”¹³⁶

One female black juror (not interviewed) had led the guilt phase deliberations and raised premature pro-life issues regarding LWOP punishment. She shared her personal experiences with the

¹³¹ Jochnowitz, *supra* note 26, at 97.

¹³² Jochnowitz, *supra* note 26, at 98.

¹³³ Jochnowitz, *supra* note 26, at 98.

¹³⁴ Jochnowitz, *supra* note 26, at 98.

¹³⁵ Jochnowitz, *supra* note 26, at 99.

¹³⁶ Jochnowitz, *supra* note 26, at 103.

panel about growing up in the same St. Louis urban neighborhood. She stated that the defendant had no choice; drug dealing and violence were a part of his life. This dissenter not only believed that the defendant did not coolly reflect, but also persisted in raising contentious pro-life sentencing issues prematurely at the guilt phase. Jurors (#3072) had to convince her that defendant was guilty of intended murder, and that the penalty would be decided later. Juror #3071 stated that this BF holdout juror finally realized she had won her point that there never would be a unanimous decision on death, and so she agreed to first degree murder. The case illustrates how racially and culturally diverse jurors shared their experiences with jurors who did not have these experiences.

3071 (WF): “And I think she realized that we realized that we would never ever get a unanimous decision on death. So, I think that’s why she felt . . . that none of us would go for death. I think she finally realized that she probably had won her point and that’s why she agreed on first degree.”¹³⁷

#3071: WF IIB3A: “She grew up in an area just like this and knew drug dealers, and she was afraid we were going to give him the death penalty.”¹³⁸

#3069: WM IIB3B: “We all felt a tremendous sympathy for him and knew he was acting out the way he had learned to act, that this is how he was raised, this is how you exist. . . . We had an African-American jurist on our panel. She was very well spoken, saying that this guy’s just done what he knows to do. This really made us all think about that. She really brought it to our attention that this guy is *a victim too*. There really was a lot of sympathy on the jury for defendant. [Lucky Guy] Mm-Huh.”¹³⁹

#3069 WM: IID: “*We felt very strongly that defendant was as much a victim as the child. . . . He*

¹³⁷ Jochowitz, *supra* note 26, at 101.

¹³⁸ Jochowitz, *supra* note 26, at 101.

¹³⁹ Jochowitz, *supra* note 26, at 101.

was very confused, mixed up, and very possibly a mentally retarded guy who shouldn't be "murdered", uh, executed.¹⁴⁰

Although jurors felt the defense psychologist was not credible, they observed the defendant's testimony at the guilt phase as laypersons. "There was something not right about him."¹⁴¹ MO #3069 WM stated that defendant couldn't answer questions. He was terribly uneducated. He was slow; he had "mental retardation" and hyperactivity. His simple act of crying during the psychologist's testimony also struck a chord with jurors. Juror # 3071 stated that defendant had "the mental capacity of a child himself . . . and should not be held accountable as an adult."¹⁴²

In contrast to jurors' lay feelings about the defendant's problems, jurors ridiculed the expert psychologist as a paid witness. "She got too technical, too long and towards the end none of us, we didn't even want to hear her. *We tuned this person out.*" (#3072).¹⁴³ Yet the case is rare in jurors accepting the penalty expert testimony that defendant had Attention Deficit Disorder, a symptom which jurors found aggravating in the cross-tabulation analysis. #3070: IIC13: "Defendant had Attention Deficit Disorder, couldn't focus on things and was really confused. . . . #3071: The psychologist made us aware of defendant's IQ, which was very low and verified his *learning disabilities.*"¹⁴⁴

Early exposure to the IQ issues and defendant's own guilt phase testimony made jurors debate whether the defendant could form the cool reflection and the culpability to deserve the death penalty. Jurors were skeptical about adversarial expert testimony. "*We tuned this person out.*"¹⁴⁵ (#3072). However, defendant's own testimony showed the jurors that was something wrong with him intellectually in lay terms. The racial and cultural diversity of the panel influenced the outcome. Jurors seemed more persuaded by the personal experiences of the sole black female hold out juror who

¹⁴⁰ Jochnowitz, *supra* note 26, at 102.

¹⁴¹ Jochnowitz, *supra* note 26, at 97. Defendant's own awkward words led several jurors to conclude that defendant was uneducated. Defendant described being pistol whipped by the dealer on the morning of the crime, using street slang. "My friend said he was going to *squash it* with the drug dealer from the morning."

¹⁴² Jochnowitz, *supra* note 26, at 103.

¹⁴³ Jochnowitz, *supra* note 26, at 102.

¹⁴⁴ Jochnowitz, *supra* note 26, at 103.

¹⁴⁵ Jochnowitz, *supra* note 26, at 102.

prematurely bargained for life than by the expert testimony regarding intellectual disability. She stated that drug trade and gang wars were a way of life for youth in the neighborhood, and defendant had no choice about his life style (#3069). The importance of lingering doubt regarding defendant's level of participation in the case in relation to the other dealer, transferred intent issues, and defendant's mental limitations led jurors to conclude that the case had been overcharged.

In the above three cases, intellectual disability was often heavily contested by the prosecution, causing skepticism among jurors over a few IQ points. Yet the evidence almost always caused some dissent, possibly due to the fact that intellectual disability was an early statutory mitigator in the States. Jurors debated issues of intent, cool reflection and culpability, and they focused on upbringing and family issues. Jurors preferred lay explanations of intellectual limitations. Other important elements included the important role of racial and cultural diversity. The premature holdouts in both life cases were Black females. Jurors focused more attention on the cultural awareness of the holdout jurors than on any expert evidence of mental retardation. Jurors were more receptive to defendant's diagnosis of "organic" intellectual disability, which they understood in lay terms, but they were less receptive to mental illness defenses. The anomalous Kentucky death case is compelling because the high levels of juror errors like premature and automatic death decision-making may have skewed the bargaining power of pro-life holdouts. Kentucky's bright line cut off rule of 70, developed initially to support a state exemption from the death penalty, actually worked as a misleading artificial statistical convention leading jurors to make life or death decisions based on a few points of ill measured IQ. Even in non-bright line States like South Carolina, juror #1319 erroneously estimated defendant's IQ at the upper end of the expert testimony, in the low 80s and not 70s.

Intellectual Disability Claims in Racially Contested Child Murder Cases and Female Cases

The last set of three cases analyzed here address specific issues found in racially contested child murder cases and female gender cases distinguished by the sympathetic quality of the victim

and the race and gender of the accused. These cases also raise similar intellectual disability defenses and problems discussed above.

B. Comparing Missouri Child Sexual Assault/ Murder Cases Life #1402 (jurors: 3004-3007) B/B; Missouri Death #1408 (jurors 3028-3031) B/W

This section examines juror receptivity to mental defenses in two similar cases where the murder is aggravated by an extremely sympathetic and vulnerable child victim, but the defendant/victim racial mix and the urban/rural venire varies. Sometimes the punishment for the most brutal crimes as in child murders is moderated by other factors, unrelated to the vulnerable, sympathetic victim, and related to extra-legal factors such as the race of the offender and victim and the racial composition of the jury or urban versus rural venire. Two child victim sexual assault/murder cases were tried back to back in the same month, July-August, 1995, by the same judge, with different life/death sentencing verdicts and race issues. At the time, St. Louis was suffering from an outbreak of child disappearances. These two cases, one B/B murder of a known victim (life), case #1402, and one B/W stranger murder (death), Case #1408, presented natural laboratories for comparison regarding issues found in the literature like receptivity to ID mitigation, interracial crimes, and jury racial composition. Analyzing cases which included the B/W child murder case in this sample, MO #1408, but not B/B #1402, Bowers et al. concluded that B/W cases with all white male dominated juries had “relatively little disagreement,” while mixed juries had more dissenters and holdouts.¹⁴⁶ Yet the shared attributes of time, place, judge and child victim of B/W case #1408 and B/B case #1402 have not previously been compared. Although there were other differences in these cases besides race, including a hyper-aggressive prosecution and defendant’s graphic and damaging confession to police in #1408, the interracial murder and the racial homogeneity of the jurors may have distracted from the receptivity to mental mitigation.

Case 1 #1402 (B/B) was tried in St. Louis County before a mixed-race urban jury, with 2 Black males and an Asian male.

¹⁴⁶ William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1523 (2004).

Because of substantial pre-trial publicity, the jury in Case 2 #1408 was selected from an all-white venire in rural Springfield, Clayton Co., but tried in St. Louis. Only three of the 90-person venire in Springfield were black, and the jury selected was all white, following peremptory challenges, *Batson* motions, and death qualification. The strategic decision by the defense in case #2 to move the venire out of urban St. Louis, combined with the B/W defendant/victim racial mix, may have backfired.

Mental defenses were similar in both cases, with testimony from a developmental psychologist in Case #1402 (B/B), and from a neuropsychologist and child psychologist in Case #1408 (B/W). Both defendants suffered from childhood meningitis, which caused brain damage, and from early abuse and neglect. The defendant in #1408 (death) had more serious mental problems, including borderline intellectual disability, than the defendant in #1402 (life) (ADD), but jurors were more insensitive to the defense. Case #1408 (B/W) also included emotional disturbances in the courtroom by the victim's mother about defendant's confession. The defendant told police that the child had pulled down her pants and asked for sex. The weeping prosecutor at penalty closing repeatedly banged the murder weapon bed slat which had crushed the child's skull. By contrast, the female prosecutor in the #1402 (B/B) seemed more deliberately subdued. Further, the defendant in the #1402 (B/B) provided a denial defense, which raised lingering doubt among holdout Black jurors. Lingering doubt was the "guilt phase" factor which surpassed in importance, in jurors' minds, all other mitigating factors at the penalty phase, especially among Black jurors.¹⁴⁷

**1. Missouri Life Case 1 #1402 (jurors: 3004-3007)
(7-17-95 thru 7-24-95) B/B**

The killing of the twelve-year-old girl occurred January 18, 1994. She lived in the Northern Limits neighborhood of St. Louis County, and had been stabbed in her home 25 times. Her oldest sister was dating the defendant. The judge, out of the jury's presence,

¹⁴⁷ William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing, Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557, 1577-78, 1582, 1589 (1998).

expressed personal shock over the brutality of the murder. “Here’s a 12 year old girl, never in trouble before, an honor student, on the choir at church, certainly her life is worth more than that, and a shit bum on trial for her murder. . . .”¹⁴⁸

Defendant’s mother testified that she had failed to follow doctors’ recommendations to give him Ritalin to control his childhood ADD.¹⁴⁹ The prosecutor emphasized that the expert psychologist was not medically qualified to diagnose the brain damage and meningitis. Jurors (3005) vividly remembered the expert’s lack of medical qualifications, and also ridiculed how childhood meningitis *occurring 28 years earlier* could have a nexus to the crime.

The CJP panel, interviewed two months after trial in September, 1995, had three White females (3004), (3006), (3007-foreperson) and one pro-death Black male (3005). There was racial strife on the panel. The jury included two Black and one Chinese male pro-life holdouts, who were not interviewed. Jurors 3004 and 3006 disparaged the Chinese juror, stating that this engineer had extremely impaired language skills and was pro-life. At the guilt phase, the jurors were initially split along racial grounds on the lingering doubt issue, as defendant denied the killing, and regarding defendant’s level of intent. They ultimately found that repeatedly stabbing a child 25 times showed deliberation and intent. At the penalty phase the same dissenters rejected a capital aggravator because the defendant had not committed mass murder.

3006: IIB3C “There were a couple of the Black guys who never thought he was guilty until the very end. They worried, the jury will think we are just saying he’s not guilty because we are Black and defendant is Black. The *Black and White thing*....”¹⁵⁰

¹⁴⁸ Jochnowitz, *supra* note 26, at 161.

¹⁴⁹ Jochnowitz, *supra* note 26, at 162.

¹⁵⁰ Jochnowitz, *supra* note 26, at 163. 3006: IIB3C: “There were a couple of the Black guys who never thought he was guilty until the very end. They worried, the jury will think we are just saying he’s not guilty because we are Black and defendant is Black. The *Black and White thing*. . . . We had one woman, I’d be talking about guilt and she’d be shaking her head. When the jury was polled she said ‘I don’t think he’s guilty.’ It caused dissension and it turned into an argument. 3005: IIB3A: The biggest point of disagreement at the guilt phase was: “The proof beyond a reasonable doubt. Some people thought they had enough proof. Others didn’t. How many times he stabbed the victim was a really big issue. I thought

While jurors acknowledged the mental evidence presented regarding meningitis, brain damage and child abuse, jurors doubted whether a childhood sickness had any nexus to the crime 28 years later. #3005: “That he had meningitis. It was really weak. *28 years later they say this is why he does it.*” Jurors also doubted the veracity of the psychologist following cross-examination that she was not an MD and could not diagnose brain damage from meningitis (#3005/#3007).

3005: IIC7: “The psychiatrist. She made statements that could really only be done by a doctor, I found that kind of jarring. There were some things that really only a doctor could answer. She thought she could answer those. But the prosecution played that up.” IIB10N: Weakest part? “That he had meningitis. It was really weak. *28 years later they say this is why he does it.*¹⁵¹

They felt more strongly about defendant’s deprived upbringing and dysfunctional family than his mental status. The expert testimony was discounted. WF #3004 indicated disparagingly in lay terms that there was something “wrong” with defendant. He was a “psycho.”

At the penalty phase the pro-death supporters felt that the pro-life dissent was due to racially-charged educational limitations. Juror 3004 WF expressed that the education gap with jurors with only high school diplomas had caused the lack of unanimity because they did not understand the issues and acted out of “ignorance.” The final division at the penalty phase involved two black male guilt phase dissenters and one *white* female, who the CJP jurors stated would have conceded, but was emboldened by the two male jurors. They felt aggravation would have to be a mass murder, or a WWII-style genocide.

“There was an educational gap. It’s obvious that they are picking a common man for jury duty, and they are not picking all college educated people. This was a

it was a really major factor.” IIB61A: Less than capital murder: Some people felt there wasn’t enough proof beyond a reasonable doubt.” Jochowitz, *supra* note 26, at 163.

¹⁵¹ Jochowitz, *supra* note 26, at 164.

jury of peers. . . .” (referring to the Black defendant).¹⁵²

Pro-death jurors 3004 and 3006 used racial descriptors to explain the dissension at the guilt phase. The Black holdout jurors at the guilt phase were “nutso, and annoying.” (3004). They expressed frustration with a pro-life Chinese engineer who had impaired English language skills. “He had a very strong accent and chopped up his words. He was one of those people who were against the death penalty.”¹⁵³

The disagreement at the penalty phase had its seeds in the dissent among two black jurors in the guilt phase, who raised issues of lingering doubt/level of participation/intent, following defendant’s denial defense. The dissenters felt that the killing had not been a serial murder, and that the repeated stabbings could have been a loss of control, a compulsion. The jurors failed to agree unanimously on a threshold aggravator, and never balanced the aggravating and mitigating factors, like defendant’s childhood deprivation and mental factors. Therefore, the deliberations centered implicitly on racial differences, and not on the mental disability mitigation. White pro-death jurors doubted the veracity of the psychologist and the mitigating effect of childhood meningitis. They accepted that defendant’s family was “a miserable lot,” and labeled defendant pejoratively a *psycho*. Defendant’s denial defense at the guilt phase helped form residual doubt in the minds of the racially diverse pro-life leaning dissenters, who pre-decided the case. The white pro-death jurors used racial descriptors and interpreted the dissent as ignorance and lack of education, stating that the holdouts had violated their juror oaths. Race was the strongest extra-legal factor in the verdict, showing arbitrariness.

2. Missouri Death Case 2 #1408 (jurors 3028-3031) (7/31/95- 8/10/95) B/W

Defendant was accused of the murder of a ten-year-old fifth grade neighborhood girl at his residence on 12-1-1993, by crushing her skull with a wooden bed board. The victim was walking up the street to a friend’s house, after returning home from school, and may

¹⁵² Jochnowitz, *supra* note 26, at 165.

¹⁵³ Jochnowitz, *supra* note 26, at 165.

have been abducted. She carried an alarm to be used if she was in trouble, which was later found broken on the street. He hid the decomposing body in the basement behind the furnace for a week. The defendant confessed to police that after the child entered the basement, he tried to rape her, but he was unable to do so.¹⁵⁴

The theatrical trial tactics of the prosecutor may have complicated the racial undertones for this interracial child murder trial before an all-white jury. At the penalty closing, the prosecutor brought his kids to court, and cried. Weeping, the prosecutor repeatedly banged the murder weapon bed slat which had crushed the child's skull.

“This guy chased this little baby around the basement trying to kick her clothes off while he is beating her with a stick. He crushed this little baby's skull—five times.”¹⁵⁵

There were emotional disturbances in the courtroom by the victim's mother which jurors vividly recalled. The defendant told police that the child had pulled down her pants soliciting sex. After hearing this taped confession, the mother began screaming in court and had to be removed, an episode recalled by jurors. “You son of a bitch. I hope you fry in Hell!” (#3031).¹⁵⁶ The jury deliberated only 1.5 hours in both guilt and penalty phases.

The prosecutor argued that defendant's IQ numerical score was not intellectually disabled. “Defendant is not mentally retarded is he (IQ. 69-71)? Your score was 78. The DSM score for borderline-retardation is 71-84.”¹⁵⁷ Jurors stated, “He was described as mentally retarded, but from my observation he seemed quite intelligent and manipulative.”¹⁵⁸

Jurors were interviewed in October, 1995, just two months after the August, 1995 trial. The jury panel was all white, 6 males and 6 females, and this homogeneity, Bowers, Sandys and Brewer observed, led to low disagreement on sentencing.¹⁵⁹ There was only

¹⁵⁴ Jochowitz, *supra* note 26, at 168.

¹⁵⁵ Jochowitz, *supra* note 26, at 169.

¹⁵⁶ Jochowitz, *supra* note 26, at 173.

¹⁵⁷ Jochowitz, *supra* note 26, at 169.

¹⁵⁸ Jochowitz, *supra* note 26, at 170.

¹⁵⁹ William J. Bowers, Marla Sandys & Thomas W. Brewer, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497, 1523 (2004).

one WF first vote life dissenter who focused on the reliability of defendant's confession, a lingering doubt issue, and on his childhood history of abuse, a mitigation issue. But on the second vote, she decided that the abuse was not an "excuse" from punishment for the crime. Juror #3028 WF: "She decided whether he had a deprived background. We all agreed that he did—but that didn't *excuse* him from punishment for what he did."¹⁶⁰ Another sympathetic juror (CJP #3030) described her consideration of the defendant's upbringing, but this may have been suppressed by the panel's premature decision making plus the racial homogeneity. In a diverse environment friendlier to a life verdict, these first vote life holdouts may have prevailed.

Jurors downplayed mitigating mental and child abuse history. Jurors felt that the lay teacher defense witness's testimony backfired, and that it depicted the young defendant as manipulative. Race was not mentioned.

3028: IIB1V: "*In trial he was described as mildly retarded but from my observations he seemed to be very intelligent and manipulative.*" (3031). IIC7: "School teacher mentioned how manipulating defendant had been as a child." IIC8A: She was supposed to be showing what a deprived childhood he came from, but she gave another reason of why defendant couldn't be trusted."¹⁶¹

The jurors recalled the damaging cross examination of both defense psychologists, describing the defendant pejoratively as "crazy." "A psychologist who in my mind was proven incompetent of her assessment. The prosecution just tore that poor lady apart. He had her in tears." IIA 2I: *The defense tried to make the client out to be 'crazy.'*¹⁶² Juror #3028 recalled that defendant wrote on an employment application that he had finished the eleventh grade, and

¹⁶⁰ Jochnowitz, *supra* note 26, at 173.

¹⁶¹ Jochnowitz, *supra* note 26, at 172.

¹⁶² Jochnowitz, *supra* note 26, at 172. Juror 3029: IIC8A : "Yeah-The psychologist...Dr's testimony 'got torn apart'..." Also the cross examination of expert #2 backfired; Juror 3030: IIC8A : "Psychologist. She was analyzing a story defendant had written. It showed that 'defendant wasn't all there'. But the prosecution ripped her testimony open." Juror 3031: IIC8A : A psychologist who in my mind was proven incompetent of her assessment. The prosecution just tore that poor lady apart. He had her in tears." IIA 2I: The defense tried to make the client out to be "crazy." Jochnowitz, *supra* note 26, at 172.

that he had passed a driver's test. Only WF #3030 said she felt sorry for the defendant (IIB7I). She described the defendant as being "mildly retarded" (IIA 4C), and she showed sensitivity to defendant's mental factors and family background (IV17).¹⁶³ These small doubts about defendant's guilt related to defenses about intent, impulsivity, and level of participation, were important given the other jurors' feeling that the guilt issue had been predetermined by defendant's confession.

The early confession and the frontloading of mitigation had a detrimental unintended effect on pro-death jurors, because they pre-decided the penalty with guilt. Jurors stated chillingly that after the admission of guilt, the question of capital guilt was pre-decided, before deliberations. #3029 WM: "*Because of the admission, the defense lawyer could have been one of the jurors . . . we didn't even have to go into the jury room.*"¹⁶⁴ Juror #3031 WM chillingly stated that defendant's confession meant that he had *pled* guilty. He had decided the case after hearing the admission in the *opening* statements. Had there been a more diverse jury in this case, and less premature automatic death decision making, some of the feelings of juror #3030 and the first vote life hold out juror to understand and feel sorry for defendant might have been reinforced and they may have been stronger pro-life holdouts. The effect was race "plus" these errors.

The short 1.5 hour deliberations proceeded with little dissent. Only one first vote life holdout juror and one ambivalent juror (3030) focused briefly on defendant's confession, a lingering doubt issue, and on his childhood history of abuse, a mitigation issue. Although the jurors conceded that defendant had a deprived childhood, they felt that this would not *excuse* the defendant from punishment. Jurors doubted the intellectual disability diagnosis. Pro-death jurors viewed the defendant's confession in the opening statement as prematurely resolving any lingering doubts they had of capital guilt, and ignored the defendant's mental intent. The racial homogeneity plus the automatic and premature decision making limited the power of ambivalent jurors to voice doubt about mitigation.

In these similarly situated child murder cases, the punishment for the most brutal crimes as in child murders was less related to the

¹⁶³ Jochowitz, *supra* note 26, at 173.

¹⁶⁴ Jochowitz, *supra* note 26, at 172.

vulnerable, sympathetic victim, and more related to extra-legal factors such as the races of the offender and victim and the racial composition of the jury. The differing verdicts demonstrate the arbitrariness of death penalty sentencing. There were other differences in these cases besides race, including a hyper-aggressive prosecution and defendant's graphic and damaging confession to police in #1408. The interracial murder and the racial homogeneity of the jurors may have also distracted from the receptivity to mental mitigation.

C. Capital Jurors' Receptivity to Mental Mitigation for Female Defendants with Non-Stereotypic Gender Behavior (Kentucky Death #517 W/5 W) (jurors: 666-667), Trial dates: 2/24/1987-3/9/1987.

In the capital jury literature, female defendants were typically treated more sympathetically in death penalty trials, but only if they fell within the cultural stereotype of female characteristics, and they were treated more harshly if they presented more aggressive non-stereotypic gendered behavior, such as being, "unemotional and hard-driving."¹⁶⁵ Analyzing clinical testimony, disorder type, and female gender, White found that jurors tended to believe the psychological defenses of females over males.¹⁶⁶ Jurors are more receptive to female defendant's psychological defenses, possibly because women are more credible and sympathetic or they are stereotypically viewed as more unstable than men.¹⁶⁷ Often judges treat women in a paternalistic way, with more lenient sentences, but if they act aggressively or non-stereotypically less feminine and less emotional, they get much harsher treatment. Scholars have written that the decision to execute female murderers like Karla Faye Tucker in Texas raise not only the issue of the unfair gendering of the death penalty with respect to women, but also the issue of the unfairness

¹⁶⁵ Victor L. Streib, *Gendering the Death Penalty: Countering Sex Bias in a Masculine Sanctuary*, 63 OHIO ST. L.J. 433, 437 n.13 (2002) (citing Joan W. Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 WIS. L. REV. 1345, 1350 (1994)).

¹⁶⁶ See Lawrence White, *The Mental Illness Defense in the Capital Penalty Hearing*, 5 BEHAV. SCI. & L. 411 (1987).

¹⁶⁷ *Id.*

and senselessness of the death penalty for death row inmates of all races, “whether illiterate, ugly, miserable or frightening.”¹⁶⁸

This Kentucky multiple-murder five victim case involved two gay female co-defendants, tried jointly. Co-defendants, A and B, were charged with capital murder for the killings of five victims (2 female/3 male), while on a cocaine binge. Both A and B had been free basing and injecting crack cocaine for four days before the murders, and were seeking cash for another fix. While both defendants were involved to varying degrees in the multiple murders, A received a death verdict, and B, who claimed battered partner syndrome, received a life verdict. Notwithstanding A’s more severe mental problems, jurors were preoccupied with the relative culpability between these women, and not their individualized histories. A was resentenced to life, following appeal.¹⁶⁹

One of the defendants, “A,” suffered from intellectual disability, but she was embarrassed about the condition, and limited that testimony in court. Chafetz has written that malingering in ID testing includes the possibility that some intellectually disabled persons are embarrassed by the stigma of intellectual disability, and may deliberately hide information.¹⁷⁰ Jurors perceived A (death), who had a more severe mental and abuse history, as aggressive, threatening, remorseless and cold, but they perceived “B” (life) to be the less culpable battered partner, acting under duress from her accomplice. Jurors here were relatively unreceptive to A’s borderline personality disorder, sexual abuse and cocaine dependence, and emphasized her non-stereotypic aggressiveness, coldness, and lack of remorse. “Lots of people grow up under terrible circumstances, but they don’t go out and kill people.”¹⁷¹ “A was the more aggressive of

¹⁶⁸ Joan W. Howarth, *Executing White Masculinities, Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 229 (2002); Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 OHIO N.U. L. REV. 581, 599 (2000) (“Karla Faye Tucker asked the Governor of Texas and the people of the United States to spare everybody on death row because they were human beings like herself and those who heard her”); Victor L. Streib, *Rare & Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 618 (stating that often the type of crime women typically commit, the types of aggravators, and even the type of mitigating evidence might result in the death penalty being applied less frequently for women).

¹⁶⁹ Jochnowitz, *supra* note 26, at 146.

¹⁷⁰ MICHAEL CHAFETZ, *INTELLECTUAL DISABILITY. CIVIL AND CRIMINAL FORENSIC ISSUES* 150 (Oxford University Press 2015).

¹⁷¹ Jochnowitz, *supra* note 26, at 152.

the two women.”¹⁷² The defense attorney told the judge at voir dire, outside of jury presence: “My concern is that there is an undercurrent in this community that these girls should burn.” In B’s case, surprise jailhouse letters were disclosed showing A’s complicated emotions and threats to B. “Remember if you mess with me, even if we are sent to different penitentiaries, I will plan your extermination.”¹⁷³

There were gender differences among the jurors, with female jurors uncharacteristically voting more harshly in response to A’s threatening behavior. Juror #666 claimed she was probably the softest, and some of the other women were “harsh.” Juror #667 (Foreman) stated that the women were more upset than the men. Juror #667 (WM foreperson) indicated that jurors focused comparatively on whether “both women were equally guilty.” The strongest factor was that A was the more “aggressive” of the two women.

One of the important factors in reaching the death sentence was A’s threats to kill B in prison, and jurors’ beliefs that she would be dangerous and would kill again in prison (#666). Jurors acknowledged A’s abuse history, but minimized its importance as an excuse rather than mitigation. “*Lots of people grow up under terrible circumstances, but they don’t go out and kill people the way A did.*”¹⁷⁴ The most important factor was that A showed “no sorrow or regret,” and she seemed cold, a factor which distinguished her culpability from B. “She showed no remorse.”¹⁷⁵

In this trial, co-defendant A presented with more severe mental abnormalities than B, but jurors underplayed the mental mitigation as an excuse. Both co-defendants suffered from intellectual disability and anti-social disorders, but the issue of ID

¹⁷² Jochowitz, *supra* note 26, at 151.

¹⁷³ Jochowitz, *supra* note 26, at 150. Venire persons, not selected, were stunned that women had been responsible for the brutal crime. “*I can’t believe that two women would have committed such a brutal crime, here in Lexington. I can’t believe they were women.*” Jochowitz, *supra* note 26, at 147. After testimony about the family violence, jurors approached the bench and asked the judge *where A’s father was and why hadn’t he come to court*. A’s counsel called B’s jailhouse informants perjurers, and suggested that the jail witnesses would benefit with a ‘buffet of leniency’ in exchange for their testimony. “Are there any women in the County jail who have not testified in this trial?” Response: “No they are all here.” Jochowitz, *supra* note 26, at 151.

¹⁷⁴ Jochowitz, *supra* note 26, at 152.

¹⁷⁵ Jochowitz, *supra* note 26, at 153. 667: IIC11A : “She showed no sorrow or regret, and that’s what made her so cold. I tell you, people were upset. Everybody was upset. . . . She showed no remorse. Jochowitz, *supra* note 26, at 153.

was barely referenced by the professionals and jurors. A refused to admit evidence of IQ due to embarrassment, but her own taped testimony to her psychiatrist at the penalty phase suggested she was hiding her IQ. Jurors compared the relative culpability of the defendants, and they focused almost entirely on A's jailhouse letters revealing a complex array of threats, love, and sexual desire. A was perceived as "aggressive," "cold," and without remorse, while B was perceived as passive, battered, and under the control of her accomplice. Jurors acknowledged but minimized the importance of A's history of sexual abuse, stating it was an excuse. The jurors underplayed the fact that B was actively involved in at least four of the five murders. It is possible that jurors penalized A in this 1990s' trial for playing a more aggressive role in a gay relationship. The non-stereotypic gender behavior encouraged jurors to view A more harshly in assessing her comparative culpability with B.¹⁷⁶ Compatible with the hegemonic individualism theory, jurors failed to contextualize life history and engaged in "individualistic guilt centered question of culpability."¹⁷⁷

VIII. DISCUSSION AND CONCLUSION

This study supports the cases discussed above that when jurors apply lay common-sense stereotypes to define intellectual disability, there is a high risk of "underinclusiveness" and unacceptable risk that persons with mild levels of intellectual disability will be executed. Although in *Moore v Texas*, the Supreme Court held that only the medical professional standards could counter lay stereotypes of the intellectually disabled, the capital jury research demonstrates that jurors respond more strongly to lay testimony and evidence of intellectual disability than to psychological evidence. The anomaly in capital juror studies is that while the law requires technical explanations, jurors interpret the evidence in practical terms. MO. LWOP #1418; juror #3069 WM: "There was something not right about him."¹⁷⁸ "The defendant couldn't answer questions.

¹⁷⁶ Streib, *supra* note 168, at 618.

¹⁷⁷ Ross Kleinstuber, "We're All Born with Equal Opportunities": Hegemonic Individualism and Contextual Mitigation Among Delaware Capital Jurors, 1 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 152 (2013).

¹⁷⁸ Jochnowitz, *supra* note 26, at 100.

He was terribly uneducated. He was slow; he had ‘mental retardation’ and hyperactivity.”¹⁷⁹

From this it is possible to infer that legal standards and medical definitions will not succeed in avoiding the unacceptable risk that persons with intellectual disability will be executed. These cases show that juror sentencing is marred by structural problems related to premature decision making, pro-death bias, extra-legal racial considerations and by skepticism about the adversarial evidence. Jury reforms would seem to contradict what is reported here—juror heuristic cognitive tendencies like “simplification, dissonance reduction . . . and strain towards consistency.”¹⁸⁰ Flaws “include the systematically rooted adversarial provocation of prosecutors to disparage and debunk mitigation not specifically linked to the crime.”¹⁸¹ Decision makers fail to consider evidence related to the defendants’ upbringing, culpability, social experience.¹⁸² Palliative measures like orchestration (Sundby 1997) designed to transcend the battle of the experts (O’Brien and Wayland 2015) or double-edged mitigation (Denno 2015) are frail in the face of structural flaws.¹⁸³

The CJP I jurors did not deliberate under the guidance of the Hall and Moore reforms, but the flawed decision-making might not vary under the newer guidelines. Changes in the law may not affect how jurors respond to the evidence or influence the arbitrariness of the decisions. Persons with ID may still confuse lay decision makers by exhibiting seemingly normal skills in practical chores, driving, shopping, (SC Life #930 B/W). Prosecutors will continue to exploit ID offenders’ inability to learn from their mistakes, labeling them as anti-social and subjecting them to aggressive interrogations. Offenders with ID will continue to exhibit confusing comorbidity with events of childhood abuse, learning disorders, drug and alcohol

¹⁷⁹ Jochnowitz, *supra* note 26, at 102.

¹⁸⁰ William J. Bowers, *The Capital Jury Project: Rationale, Design and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

¹⁸¹ William J. Bowers et al., *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 430, 490 (Carolina Academic Press, James Acker et al., eds., 3d ed. 2014).

¹⁸² Ross Kleinstuber, HEGEMONIC INDIVIDUALISM AND SUBVERSIVE STORIES IN CAPITAL MITIGATION 106 (2014).

¹⁸³ Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1123-26 (1997); O’Brien & Wayland, *supra* note 48; Denno, *supra* note 49.

dependence, and personality disorders, confusing to jurors and exploited by prosecutors.

In the study, individual juror receptivity to the psychological evidence played a backseat role to the dynamics of the group deliberations. The unanimity rule was a catalyst for compromise, and an emboldening agent for dissenting holdouts. Diversity on a twelve-member jury panel allowed jurors from a cross section of the community to invoke their experience in arriving at a verdict. Conversely, juries which lacked diversity diminished the power of any dissent to consider mental mitigating evidence, Mo. B/W #1408. Premature decision making chilled the power of holdout dissenters to urge the consideration of mitigation.

The “erroneous execution standard” can add insight when analyzing these failures. This study concludes that executions did in fact occur in cases of the mildly intellectually disabled, in violation of the erroneous execution standard. Jurors were skeptical of the ID evidence and pre-decided the sentence before even hearing the evidence based on biases.

The erroneous execution standard applies to the Kentucky cases in this sample which followed the failed bright line cut-off rule, rejected in *Hall v Florida*. The life and death dispute over a few points of IQ in KY Death case #531 demonstrates that Kentucky’s bright line cut-off of 70 unconstitutionally represented a misleading artificial statistical convention and part of the can of worms and poor psychiatric thinking discussed by Mossman.¹⁸⁴ Jurors were confused by defendant’s IQ range of 70-80, although current definitions might permit an SEM range of 65-75. Juror #725 derisively called the defendant a “moron.” “*They were contending that he had an IQ of 70 or 76 or so, had been tested as high as the 80s I recall.*” Jurors neither considered or gave effect to evidence of defendant’s intellectual disability, but acknowledged defendant’s abusive upbringing, a proxy for stunted intellectual development. The contested adversarial portrayal of psychological evidence made jurors skeptical of the mental defenses. The extra-legal factors of premature decision making, pro-death bias, and parole considerations skewed the bargaining power of the pro-life faction towards an anomalous death verdict.

¹⁸⁴ Mossman, *supra* note 4, at 256.

The “erroneous execution standard” can add insight in a case like South Carolina B/W Life ID #930 and its companion murder case where the same defendant was executed despite his intellectual disability. The outcome of the life case was more related to the personal special education teaching experiences of a Black female holdout juror than to the confusing mental defenses. Jurors distrusted the contested expert testimony and relied on their own personal instincts. The life verdict resulted from premature guilt phase bargaining by a lead BF juror and two other holdouts. While jurors considered intellectual disability as a mitigating factor, they were doubtful about whether mental illness was a permanent incurable disability. Jurors stated they were not qualified to practically apply the psychiatric distinctions and definitions. Juror #1319 estimated defendant’s IQ at the upper end of the range, in the low 80s and not 70s.

The “erroneous execution standard” adds insight in Missouri LWOP case #1418 B/B. Although jurors debated whether the defendant could form the cool reflection and culpability, they seemed more persuaded by the personal experiences of the sole black female hold out juror who prematurely bargained for life than by the expert testimony regarding intellectual disability. The holdout convinced jurors that drug trade and gang wars were a way of life and not a choice for youth in the neighborhood. Jurors were skeptical about adversarial expert testimony, but defendant’s own testimony showed there was something wrong with him intellectually.

The “erroneous execution standard” is also shown in the opposite verdicts in similar child murder cases Missouri B/B Life case #1402 and Missouri B/W Death case #1408, tried in the same month before the same Judge, with the primary difference being race of the defendant and victim and racial composition of the jury. Mental, cognitive, meningitis and neglect defenses were similar in both cases. The punishment for the most brutal crimes of child murders was less related to the vulnerable, sympathetic victim, and more related to extra-legal factors. The life verdict in #1402 resulted from factors not directly related to the consideration of and giving effect to mitigation, but to dissent among Black jurors. Jurors dismissed mitigation evidence of childhood brain damage stating it was unrelated to the adult crime. “That he had meningitis. It was

really weak. *28 years later they say this is why he does it.*¹⁸⁵ The defendant in #1408 (death) had more serious ID and mental problems, but jurors there felt that mitigation was not an excuse for the child murder. “He was described as mildly retarded but from my observations he seemed to be very intelligent and manipulative.” Racial homogeneity and premature death decision making discouraged dissent and impaired the power of two ambivalent jurors to voice their doubts. There were other differences in these cases besides race, including a hyper-aggressive prosecution and defendant’s graphic and damaging confession to police in #1408, but the interracial murder and the racial homogeneity of the jurors in case #1408 distracted from the jurors’ receptivity to mental mitigation.

The “erroneous execution standard” is shown in the dissimilar outcomes of the jointly tried female gay defendants in case Kentucky W/5 W Death case #517, where gender stereotyping was operative. Jurors failed to give effect to the defendant’s mitigating mental history of borderline personality disorder, caused by sexual abuse and cocaine dependence. The issue of intellectual disability was abandoned by the defendants, professionals, and jurors due to embarrassment, but defendant's own testimony suggested she was hiding her IQ. The jurors acknowledged and minimized A’s abuse history as an excuse. “Lots of people grow up under terrible circumstances, but they don’t go out and kill people.”¹⁸⁶ The jurors failed to contextualize life history and engaged in “individualistic guilt centered questions of culpability.”¹⁸⁷ Jurors perceived A as aggressive, threatening and cold, and B to be the relatively less culpable battered partner.¹⁸⁸

This research begins with the difficulties and misunderstandings jurors and experts have in defining intellectual disability, over decades. It includes juror structural thinking difficulties such as racial bias, pro-death dispositions and premature sentencing decisions. It discusses adversarial provocation of prosecutors to disparage and debunk mitigation. Mildly intellectually disabled persons were indeed executed in this study because jurors misunderstood the ID evidence and were persuaded by extralegal racial biases and premature decision making. Even cases with life

¹⁸⁵ Jochowitz, *supra* note 26, at 164.

¹⁸⁶ Jochowitz, *supra* note 26, at 152.

¹⁸⁷ Kleinstuber, *supra* note 177, at 176.

¹⁸⁸ Streib, *supra* note 168, at 618.

verdicts showed evidence of juror confusion and distraction. The study concludes with a reexamination of options which include highly flawed “reforms” or the demise of the death penalty, under the “erroneous execution standard” in failed intellectual disability cases.

Foglia & Sandys (2018) recently confirmed that juror misunderstanding regarding the role of mitigating evidence is ageless and has stubbornly persisted throughout the history of the Capital Jury project from the 1980s through the 2000s.¹⁸⁹ Court reforms to ensure that capital jurors engage in individualized, reasoned, moral decision-making have resulted in insignificant changes. This lack of improvement points to deep human flaws in juror decision-making impeding the appreciation and consideration of psychological and intellectual disability evidence. It may be impossible to avoid the unacceptable risk that persons with intellectual disability will be executed.

¹⁸⁹ Foglia & Sandys, *supra* note 45.