Aggravation and mitigation: Findings and implications

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Sentencing decisions in capital cases are to be guided by a consideration of aggravating and mitigating circumstances. This article presents a review of the literature on what mock jurors and actual capital jurors find aggravating and mitigating. Although there is relatively little empirical research available that addresses those issues directly, what does exist is relatively consistent, especially as it pertains to aggravation. Jurors are most persuaded for death by evidence and even mere perceptions of a defendant’s future dangerousness particularly when couched in terms of psychopathy. Likewise, defendants who are perceived as suffering from or experiencing traumatic life events that are out of their control are more likely to receive a sentence of life. The article concludes with a review of the research on how jurors respond to evidence presented in different modes that could help explain receptivity to aggravation and mitigation.

KEY WORDS: Sentencing, aggravation, mitigation, psychopathy, trauma.

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The modern era of capital punishment is marked by the U.S. Supreme Court’s decision in *Gregg v. Georgia* (1976) and companion cases. The *Gregg* Court endorsed guided discretion statutes as the remedy to the arbitrary and capricious imposition of the death penalty found four years prior in *Furman v. Georgia* (1972). Although such statutes vary somewhat by state, a general principle embedded in all guided discretion statutes is that the sentencing decision is to be guided by a consideration of aggravating and mitigating circumstances. The focus of this article is on the kinds of evidence and testimony presented at the penalty phase of a capital trial. In particular, we address the question of what type of evidence is presented, in what manner, and with what effect? We begin by placing that question in its legal context. We then move to a presentation of the research on both mitigating and aggravating circumstances. The next section is devoted to issues related to modes of presentation, including the effectiveness of presenting evidence in actuarial versus clinical modes and as general or case-specific. We conclude this article with general observations and suggestions for those experts called to testify at a capital sentencing hearing.

**The legal context**

The *Furman* court’s finding that the manner in which capital punishment was imposed was unconstitutional ultimately had a minimal impact on the availability of capital punishment across the nation: “only two states with capital statutes in effect at the time of *Furman*—Massachusetts and Kansas—did not return to the death penalty before *Gregg*” (Bowers, Pierce, & McDevitt, 1984, p. 181). Those laws enacted between *Furman* and *Gregg* followed one of two general patterns, either a mandatory sentence of death for those found guilty of a death-eligible offense, or guided discretion statutes. As indicated previously, only guided discretion statutes survived. The underlying rationale of these statutes is that there must be individualized sentencing; the sentencer must take into
consideration the circumstances of both the offense and the offender in deciding on the appropriate penalty, including both those circumstances that make death the more appropriate penalty (aggravating circumstances) and those that make life the more appropriate penalty (mitigating circumstances).

Although the Gregg court did not limit the kinds of evidence that could be considered in mitigation, it was not until the case of Lockett v. Ohio (1978) that the Court stated explicitly that the defense could not be precluded from presenting any evidence in mitigation: “the sentencer, in all but the rarest kind of capital case, [can] not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” (Lockett v. Ohio, 1978, pp. 604-605). In effect, the ruling left the concept of mitigation to the discretion of the defense; both positive and negative prior life experiences could conceivably count as mitigation.

Lockett and its progeny maintain the right of the defense to present any evidence in mitigation. It was not until the case of Williams v. Taylor (2000), and expanded upon in Wiggins v. Smith (2003), however, that the high court found that counsel’s failure to investigate and to present mitigating evidence could result in reversible error. As the Court noted in Wiggins:

Given both the nature and the extent of the abuse petitioner suffered, we find there to be a reasonable probability that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form (p. 535) . . . We further find that had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence (p. 536) . . . We thus conclude that the available mitigating evidence, taken as a whole, “might well have influenced the jury’s appraisal” of Wiggins’ moral culpability (p. 538).

Thus, courts can no longer rely on the argument of a strategic decision as acceptable practice for an attorney not presenting mitigation; defense attorneys must, if nothing else, conduct a
thorough investigation into their client’s life history. It is within that context that we present the findings on what is evaluated as aggravating and mitigating.

**Jurors’ understanding of the concepts of aggravation and mitigation**

Although the primary focus of this article is on the types of evidence presented as aggravation and mitigation, a preliminary issue must be addressed. If jurors are to base their sentencing decisions on a consideration of aggravators and mitigators, it stands to reason that they should understand what those terms mean; the research suggests that is not the case. For example, Haney and Lynch (1994) read the standard California judicial instructions used in all capital cases to upper-division college students three times. They then asked the participants to define the terms “aggravation” and “mitigation” as they were used in the context of the instructions. The results were not encouraging: only 8% of these college-educated students provided definitions of both terms that were legally correct. In comparison, 17% provided responses that were totally incorrect and an additional 3% were unable to even guess at a response. Almost two-thirds (64%) of the participants provided partially correct definitions of aggravation compared to 47% for mitigation.

An additional component to Haney and Lynch’s (1994) study required participants to categorize a series of factors as either aggravation or mitigation. Included in this series of items were those mitigating circumstances listed specifically in the statute, as well as unenumerated mitigators. Given the *Lockett* court’s finding that the defense can offer basically anything in mitigation, most state statutes include a generic catchall category as a possible mitigator. For example, the Indiana statute lists seven specific mitigators (e.g., no significant history of prior criminal conduct, the defendant was under the influence of extreme mental or emotional disturbance when
the murder was committed) as well as a catchall category that reads: “Any other circumstances appropriate for consideration” (Indiana Code 35-50-2-9(c)). When Haney and Lynch asked their participants to categorize the catchall category, a full 36% evaluated it as aggravating, rendering it the least understood mitigator. Thus, to the extent that it is supported by the evidence, testimony offered in support of mitigating circumstances should be framed and discussed in the context of statutory mitigators. Moreover, given the general nature of these findings, it cannot be assumed that jurors will understand or interpret evidence presented in support of aggravation or mitigation as intended by law. And even if they do, additional research reveals that jurors often do not understand the judge’s instructions. For example, Bentele and Bowers (2001) found that an alarming number of capital jurors “erroneously assume that [the presence of] aggravating factors require[s] a death sentence to be imposed” (p. 1013), though Gregg mandates that this is never the case.

Although it is certainly possible to improve the comprehensibility of a judge’s instructions, the level of understanding, especially as it pertains to mitigating circumstances, often remains questionable. For instance, Otto, Applegate, and Davis (2007) presented subjects with either Florida’s pattern penalty phase instructions or the same instructions supplemented with a clarification of common misunderstandings. For example, the pattern instruction pertaining to the burden of proof for mitigating factors was supplemented with the following explanation:

Many jurors mistakenly believe that because other elements of a criminal proceeding must be proven beyond a reasonable doubt that the defense must prove a mitigating factor beyond a reasonable doubt. This is not the case. You need only be reasonably convinced that a mitigating factor exists in order to consider it established (p. 508).

Although the level of comprehension was substantially improved in the instructions plus clarification condition, the percentage correct on the burden of proof required for
mitigating factors was still only 45% (compared to 31% for the pattern instruction only condition). The same pattern emerged for participants’ understanding of nonenumerated mitigating factors (those as part of the catchall category): the highest percentage of correct responses here was only 58.8% with the instructions plus clarification compared to 38.1% with pattern instructions only. Therefore, it is not merely a matter of presenting evidence and tagging it to the instructions; attorneys must take every opportunity to explain what the evidence means and what the juror is supposed to do with that evidence, how it is to inform their decision making.

A note on methodology

Research on jurors or juries tends to follow one of two basic approaches, mock jury research or post-trial interviews of actual jurors. To be sure, there is a multitude of other research methods that can be and indeed are used to study juror or jury behavior. For instance, Levine (1996) makes a compelling argument for the importance of conducting case studies, whereby a researcher analyzes everything that can be learned about one particular case, as a means of understanding unexpected verdicts and for generating hypotheses. Similarly, researchers may conduct archival research where they review transcripts of cases and analyze jury verdicts. For the most part, however, research on jurors/juries tends to follow either a mock jury or post-trial interview protocol with concomitant advantages and disadvantages.²

Mock jury research, at its most basic level, is characterized by the use of participants who are asked to assume the role of a juror when participating in a research study. The participants may be college students participating in the study for course credit, community residents, juror eligible citizens, or perhaps even persons called for jury duty. Mock jury studies are the preferred method when the researcher is most concerned with evaluating the causal effect of a particular issue. The study
referred previously by Otto et al. fits this design: some of the participants received pattern instructions whereas others received pattern instructions plus clarification in an attempt to discern whether the clarifications improved comprehension. The major benefit to a mock jury study is that it allows the researcher to control the situation, to keep all factors constant aside from the one(s) under consideration to determine causal relationships between variables. Thus, it is possible to expose hundreds of participants to the exact same facts while manipulating only those issues of concern at the time. In the language of research methods, mock jury studies are strong in internal validity. That major benefit, control over the situation to the extent of being able to manipulate only a particular issue, also happens to be the greatest challenge levied against mock jury studies: jurors in (criminal) cases are charged with deciding the guilt or innocence of an actual defendant after evaluating evidence presented by both the prosecution and the defense. Thus, any one issue is evaluated in the context of a particular trial, yet no two trials are exactly alike, and therefore the question becomes how will actual jurors, in actual cases, respond to the evidence? To address that question, some researchers opt to study actual jurors. In so doing, researchers are able to learn from the jurors themselves what they believed to be most important during the trial. Again, in the language of research methods, such studies are strong in external validity: we hear from actual jurors in actual cases what was most important. Obviously, such an approach is not without challenges of its own. If the researcher does not have control over the situation—in this case, an actual trial—how can she draw conclusions about causal relationships between evidence and outcome when the evidence in two cases will never be exactly the same?

Ultimately, the decision as to which approach to use, mock jury or post-trial interviews with actual jurors, should depend on the research question being addressed by the researcher. To be sure, both approaches inform our understanding of juror/jury behavior.
Mitigators

If a capital trial ends up at the penalty phase, it means that a death qualified jury has found the defendant guilty of the death-eligible offense. The research suggests that almost half of capital jurors in that situation have already made up their minds about the penalty though they should have been instructed not to. According to Bowers and Foglia (2003), only 50.8% of 1135 former capital jurors interviewed as part of the Capital Jury Project indicated that they remained undecided on what the penalty should be after they found the defendant guilty of the capital offense but before they heard any evidence or argument regarding what the penalty should be: an additional 30.3% of these jurors were in favor of a death sentence and 18.9% favored a life sentence at this early stage of the trial (p. 56). Consequently, defense attorneys tasked with finding a way to convince a jury to spare their client’s life routinely face a less than receptive audience: they must somehow find the evidence that speaks to jurors in a way that convinces them to vote for life. Haney (2005) writes eloquently on this challenge faced by capital defense attorneys, conceptualizing it as a need to navigate jurors through the “‘empathic divide’—a cognitive and emotional distance between [capital jurors and the defendant] that acts as a psychological barrier, making genuine understanding and insight into the role of social history and context in shaping a capital defendant’s life course difficult to acquire” (p. 203). Thus, for jurors to treat evidence as mitigating, they have to come to understand the defendant’s life, to see him as a genuine human being, as someone much more complicated than the violent act that resulted in him facing death.

In addition to guiding jurors through the empathic divide, defense attorneys must provide jurors with the information and tools with which to consider mitigation in accordance with the law. Most prospective jurors that come into court with knowledge of a trial do so based on what they learn from the media, information of questionable accuracy and
with even less direct relevance to capital cases. For instance, prospective jurors likely are aware that juries in criminal cases are charged with deciding the guilt or innocence of the accused and that to find guilt, the jury must be unanimous and that guilt must be proven beyond a reasonable doubt. Whereas those requirements hold true for the guilt phase, they do not apply to the tasks required of jurors in the penalty phase of a capital trial. In particular, the task changes from one of determining criminal responsibility (guilt phase) to one of deciding on the appropriate punishment by assessing the defendant’s moral culpability. The law requires jurors to decide for themselves, not a group, “the extent to which the background and circumstances of the defendant influenced, predisposed, or diminished the defendant’s moral sensibilities and that exercise of volition or free will” (Cunningham, 2007, p. 215). This distinction in tasks is often difficult for jurors to appreciate and thus they incorrectly revert to considerations of criminal responsibility when charged with deciding on moral culpability, thereby diminishing the importance and relevance of mitigation.

Mock jury research

Given the prominence of mitigation in the law governing capital punishment and its supposed role in sentencing decisions, the lack of empirical evidence on what is most persuasive to capital jurors is somewhat surprising. There are, of course, notable exceptions. For example, Barnett, Brodsky, and Davis (2004) conducted a study of mock jurors’ evaluations of different types of possible mitigators. Their subjects, college students, read 10 different vignettes and indicated whether they would vote for the death penalty or life in prison in each case. Four of the vignettes were control conditions where there was no evidence presented in mitigation. The remaining six vignettes included one of the following potential mitigating circumstances:

- The defendant was previously diagnosed as schizophrenic, currently not taking his medication, and suffering severe delusions and hallucinations
The defendant was a drug addict and had engaged in drug use at the time of the murder.

The defendant had recurrent migraine headaches through adolescence and adulthood.

The defendant was diagnosed as borderline mentally retarded and placed in special services classrooms throughout his education.

The defendant was severely physically and verbally abused by his parents during childhood.

The defendant had several periods of homelessness during adulthood.

In addition, the subjects completed a 26-item Mitigating Circumstances Questionnaire designed specifically for this study. Each item presented a possible mitigating circumstance, such as “the defendant had been badly beaten by parents as a child,” “the defendant was mentally retarded,” “the defendant had no prior criminal record,” and “the defendant had been psychiatrically hospitalized” (pp. 756-757). The subjects were instructed to assume that they had just finished hearing the evidence in a trial and that on a scale from 1-9 of sentence severity, they had chosen level 5. Then, for each item, they were asked to indicate whether the new information would make them “likely to go easier, tougher, or stay the same,” again using the scale from 1-9, anchored by 1 = easier in sentencing and 9 = tougher in sentencing. The participants also answered a standard jury selection type item (based on Witherspoon v. Illinois, 1968) so that the findings are based on only persons who said that they would be willing to consider voting for death, as is required of jurors who serve on capital cases.

All told, Barnett et al. found that there were significantly more preferences for life in prison associated with the vignettes with mitigating information than those without. When the particular vignettes were evaluated, only two—the defendant had recurrent migraine headaches and the defendant had several periods of homelessness—resulted in
proportions of life sentences that were not significantly
different from the number of life sentences in the no
mitigation evidence scenarios. Stated differently, subjects
were significantly more likely to vote for life in prison when
they read about the defendant’s schizophrenia, drug use,
mental retardation, or abuse as a child than when they read
about no mitigation at all: there was no difference in penalty
preferences in response to vignettes with no mitigation and
those with either recurrent migraine headaches or periods of
homelessness.

Several of the items of the Mitigating Circumstances
Questionnaire also revealed potential as mitigators, especially
those related to abuse experienced as a child and psychiatric
illnesses. The conditions that were not viewed as mitigating,
and in fact were perceived as aggravating, were those related
to drugs and alcohol, and the defendant’s involvement in a
gang. Thus, the participants were not always consistent in
their evaluations of the potential mitigators. For instance,
when evidence of illegal drug use was read as part of the
vignette, the participants evaluated that information as
mitigating; when the same kind of information was
encountered as part of the Mitigating Circumstances
Questionnaire, the participants indicated that it would make
them choose a tougher sentence. Barnett et al. (2004) suggest
a variety of explanations for the inconsistency, including the
possibility that the vignette provided the context in which to
interpret the possible mitigators; they also note, however, that
“it is quite possible that weak mitigating evidence
[operationalized in their study as the questionnaire] in the
context of a capital murder is worse than no mitigation at all”
(p. 765). All told, however, the authors found that several
should-be mitigators were perceived as aggravators among
their subjects.

A more recent study by Barnett and her colleagues (Barnett,
Brodsky, & Price, 2007) asked participants (both students and
participants in a statewide survey) to indicate how, if at all,
specific circumstances about the defendant would influence their sentencing decisions. The authors found that the defendant circumstances or history most likely to result in more lenient sentences were mental retardation, prior hospitalization for mental illness, no prior criminal record, major head injuries, or a diagnosis of schizophrenia. To a lesser extent, defendants who had been either physically or sexually abused as children also were more often given lenient sentences. In contrast, when participants were asked about a “defendant who was drunk or under the influence of illegal drugs when the crime took place” or a “defendant [who] was an alcoholic or addicted to illegal drugs,” substantial proportions, 52% and 38% respectively, of the participants indicated that those circumstances would make them harsher in their sentencing. Most of the remaining participants indicated that those circumstances would not impact their sentencing. Overall, the findings are remarkably similar to the earlier work by Barnett et al. (2004): the most persuasive mitigators pertain to mental retardation and mental illness whereas evidence regarding alcohol and drug use or abuse were more likely to be interpreted as aggravators, or to increase the severity of sentence preferences.

Although Barnett et al.’s (2004; 2007) studies provide support for the importance of mitigation in mock jurors’ evaluations of information and sentencing preferences, the question remains whether their findings are consistent with actual capital jurors’ behavior. To address that question, we now turn to a couple of articles based on the Capital Jury Project (CJP). The CJP, funded by the National Science Foundation, is designed to gain a better understanding of the experience of serving as a juror on a capital case, especially the decision making of the jurors. The protocol calls for face-to-face interviews with a target sample of four jurors per case, with interviews of approximately equal numbers of jurors who served on life and death cases within each state. The interviews cover all facets of the trial experience, including
pretrial publicity, jury selection, the guilt and penalty phases, perceptions of court actors, general attitudes, and the like; the interviews take, on average, between three and four hours to complete. To date, 1198 interviews have been conducted with capital jurors representing 353 juries from fourteen states.

Garvey’s (1998) analysis is based on the South Carolina portion of the CJP that includes interviews with 153 former capital jurors who sat in forty-one capital murder cases. His work focuses on the section of the interview devoted to jurors’ evaluations of possible aggravating and mitigating factors. If the factor in question was a circumstance in their case, the jurors were asked if the factor made them much more likely, slightly more likely, slightly less likely, much less likely to vote for death or did it make them no more or no less likely to vote for death? Alternatively, if the factor in question was not a circumstance in their case, the jurors were asked whether, in another case where the factor was present, would it make them much more likely, slightly more likely, slightly less likely, much less likely to vote for death, or would it make them no more or no less likely to vote for death? Garvey’s presentation combines responses to both these questions because, as he notes, separating juror responses “generally leave[s] unchanged the basic patterns observed in the data” (p. 1551). The only general distinction found is that jurors who served on death cases were more likely than jurors who served on life cases to respond that the particular circumstance had/would have no effect on their sentencing decision. As Garvey notes, however, we do not know if the difference is due to the jurors themselves, that life and death case jurors actually view aggravators and mitigators differently, or whether jurors who served on death cases were more likely to see their decisions as “inevitable” and thus nothing could have changed their minds.

Garvey (1998) discusses four general categories of mitigating evidence: residual doubt, proximate culpability, remote culpability, and relative culpability. The most powerful
mitigator, according to Garvey, is residual doubt over the defendant’s guilt. This finding is consistent with earlier research on this issue, namely Geimer and Amsterdam’s (1988) finding that residual doubt is the top operative factor in capital jurors’ sentences for life.

One must be careful about the interpretation of the importance of residual doubt to jurors’ sentencing decisions. Although it is certainly a powerful mitigator when it exists, relatively few jurors acknowledge its existence, only 28 jurors in Garvey’s (1998) study. Moreover, the actual item used to assess the mitigating effect of residual doubt in the CJP was: “although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that the defendant was the actual killer.” Thus, it may be that the lingering doubt experienced by these jurors concerns the extent of the defendant’s involvement in the crime, rather than his complete lack of involvement in the offense. That distinction is important for attorneys as they move from a guilt phase plea of “not guilty” to a penalty phase explanation of how their client came to be involved in the offense.

Garvey refers to the next most powerful category of mitigators as proximate reduced culpability factors, evidence that reduces jurors’ evaluations of the defendant’s moral culpability due to factors beyond his control. For example, the most powerful mitigator in this category is a condition that now renders persons ineligible for a sentence of death, namely mental retardation (see Atkins v. Virginia, 2002). Another powerful mitigator in this category is the defendant’s youthfulness. And although the U.S. Supreme Court has ruled that persons must be at least 18 years old to be eligible for the death penalty (see Roper v. Simmons, 2005), the concept of youthfulness goes beyond mere biological age: “The qualities that distinguish juveniles from adults do not disappear when an individual turns 18” (p. 574). There are, however, additional mitigators in this category, most notably that the killing occurred while the defendant was under the influence
of an extreme mental or emotional disturbance, or that the defendant had a history of mental illness. Each of these circumstances was evaluated in support of a sentence less than death, thereby viewed as lessening the defendant’s moral culpability. What are not seen as powerful mitigating factors in this category are those circumstances that result in a lack of control by the defendant’s own choice. For example, only approximately 18% of the jurors in Garvey’s study viewed the circumstances that the killing occurred while the defendant was under the influence of either drugs (18.5%) or alcohol (18.3%) as mitigating, as supporting a sentence of less than death. Thus, when the lack of control is perceived as due to the defendant’s own choice, as under his control, the jurors were less inclined to view the circumstances as mitigating. This finding is supported by more recent research by Higgins, Heath, and Grannemann (2007) on mock jurors’ evaluation of “type of excuse defense.” In their study, juror eligible participants—both undergraduates and persons recruited from senior citizen independent living centers—read a brief scenario of an attack as well as information from a court-appointed psychologist who testified that the defendant suffered from either a Cocaine Dependency Disorder (a “highly self-inflicted” condition) or Post-Traumatic Stress Disorder brought on by combat experience (a less self-inflicted condition). Consistent with Garvey’s (1998) analysis, respondents exposed to the defendant with greater perceived control for his condition, the Cocaine Dependency Disorder condition, were more likely to endorse a longer sentence than respondents who read about the defendant with Post-Traumatic Stress Disorder.

The next most powerful group of mitigators according to Garvey are referred to as remote culpability factors, “circumstances over which the defendant had no control and that may have helped form (or misform) his character” (p. 1565). The most powerful mitigator in this category is “the fact that the defendant had been in state institutions but had never received any ‘real help or treatment’ for his problems”
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Additional mitigators in this category, albeit less persuasive, include such experiences as the defendant having been seriously abused as a child or raised in extreme poverty.

The final (potential) mitigating category discussed by Garvey (1998) is relative culpability. Specifically, the jurors were asked what effect, if any, it would have on their sentencing decision if the “defendant was convicted with evidence from an accomplice who testified against the defendant in return for a reduced charge or sentence.” All told, jurors do not appear to be swayed by the prospect that accomplices might be treated differently: a little over two-thirds of the jurors said that they would be no more or no less likely to vote for death when an accomplice testified in exchange for a reduced charge or sentence.

In sum, Garvey’s (1998) findings, based on actual capital jurors, suggest that jurors are most persuaded by evidence that leaves questions about the extent of the defendant’s involvement in the crime, as well as factors beyond his control. Subsequent analyses of other aspects of the CJP data reveal, however, that evaluations of potential mitigators are much more complex and nuanced, as Garvey himself anticipated. In effect, Garvey’s analysis suggests the categories of evidence that jurors are most likely to perceive as mitigation; work by Bentele and Bowers (2001) elaborates on the ways in which such evidence is actually relied on by jurors in their decision making.

Bentele and Bowers (2001) also base their work on data from the CJP. Their analyses, however, focus primarily on jurors’ responses to the following open-ended question: “In your own words, can you tell me what the jury did to reach its decision about [the defendant’s name] punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements and how were they resolved?” Their sample consists of 240 juror interviews in a total of 58 cases from six states (California, Kentucky,
Missouri, North Carolina, South Carolina, and Texas). Their general finding regarding mitigation is that it appears to “play a disturbingly minor role in jurors’ deliberations about whether a defendant should be sentenced to death” (p. 1040). Furthermore, even when mitigation is considered, many jurors are confused about how they are to evaluate such evidence, and more often than not, it appears to be interpreted in light of a guilt phase defense rather than a penalty phase explanation; this is especially true regarding evidence of psychological impairment where jurors appear to believe that evidence short of establishing an insanity defense is irrelevant to sentencing decisions and is a veiled attempt to evoke what is seen as the abuse excuse: “the mitigating circumstances focused on ‘[the defendant’s] background, he was abused, . . . he was neglected, a drug addict, abandoned by his mother, etc. In my opinion he was very much a product of his environment, but [the] psychologist who testified said he knew the difference, right from wrong’” (North Carolina juror, Bentele and Bowers, p. 1048). Sandys, Trahan, and Pruss (2008) found a similar theme among CJP jurors who served on cases where they believed that the defendant was mentally retarded: “The defense tried to portray him as semi-retarded . . . [but the psychiatrists] also concluded that he knew right from wrong, so if he was retarded in any way, that wasn’t a factor as far as we were concerned” (Kentucky juror, p. 692). Here are two examples of jurors who mistakenly dismiss mitigation, evidence presented to assist them in their determination of the defendant’s moral culpability, because they see it as inconsistent with evidence in support of the defendant’s responsibility for committing the offense.

The research presented thus far suggests that there are general categories of evidence that jurors are inclined to interpret as mitigating. The most compelling evidence in mitigation is that which speaks to the defendant’s reduced involvement in committing the crime—lingering doubt—as well as factors beyond his control. To the extent that the defendant’s behavior can be understood in terms of
physiological and perhaps to a lesser degree psychological influences, jurors appear to be more receptive to its mitigating influence. In both the mock jury research and the work of the CJP, evidence of psychiatric illness, when understood in its proper context, was evaluated as relatively strong mitigation by the respondents. However, as will be addressed in the next section, research also suggests that evidence of mental illness is sometimes interpreted as an aggravator through its perceived relationship to future dangerousness.

Evidence of child abuse appears to be evaluated as a mitigator as well: however, mock jurors appeared to be more sympathetic to such evidence than the actual jurors. Crimes committed while the defendant was under the influence of illegal drugs or alcohol were seen as much weaker mitigators, and sometimes as aggravators, by both mock and actual jurors. Thus, although jurors appear receptive to many issues of mitigation, defense attorneys face the daunting task of figuring out how to present the evidence in a compelling way that not only moves jurors to vote for life but also explains how evidence of mitigation differs from a defense for the crime and how it is offered as an explanation of, not an excuse for, the defendant’s actions. To the extent that the evidence presented helps jurors bridge the empathic divide (Haney, 2005), a life sentence is more likely. However, if jurors do not believe the mitigation, do not know how to evaluate its influence on the defendant, and believe that the defendant merely lacked the character to make the correct decisions, a sentence of death is more likely.

**Aggravators**

As noted previously, jurors who reach the penalty phase of a capital trial are far from ambivalent. Their receptivity to both mitigation and aggravation at this stage in the trial is invariably influenced by the evidence presented at the guilt phase of the trial, in addition to their own life experiences. Not only do approximately half of the jurors already have their minds made up (Bowers & Foglia, 2003), but current
Future dangerousness and remorse (or lack thereof)

Ever since the reinstatement of capital punishment in *Gregg v. Georgia* (1976) and companion cases, the issue of a defendant’s likely future dangerousness has been incorporated into the calculus to determine the appropriate sentence. In its response to *Furman v. Georgia* (1972), the Texas Legislature attempted to individualize sentences by requiring capital jurors to unanimously and affirmatively agree that “there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” before deciding on death as the appropriate sentence. The U.S. Supreme Court, in *Jurek v. Texas* (1976), upheld this requirement as constitutional and many jurisdictions have since incorporated the concept of future dangerousness into capital sentencing procedures. Though permissibility varies by state, allegations of future dangerousness can enter the proceedings in several ways: (1) as a statutory aggravator; (2) as a non-statutory aggravator; and (3) as a rebuttal to defense claims that the defendant lacks future dangerousness. Additionally, in some jurisdictions lack of future dangerousness may be alleged as a statutory mitigator on behalf of the defense (Dorland & Krauss, 2005). Moreover, Blume, Garvey, & Johnson (2001) find that future dangerousness is always on
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the minds of capital jurors, regardless of whether or not they are explicitly asked to consider it.

Although there is little doubt about the importance of future dangerousness to discussions of capital sentencing decisions, there is concern about the lack of a shared understanding of what future dangerousness actually means. As Cunningham and Sorensen (2007) ask, which convicted capital offender would not be considered dangerous? Thus, rather than asking about future dangerousness, these authors argue that the critical question that should be asked is what is the probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? From this perspective, it is conceivable that a convicted murderer could be considered dangerous, yet still possess a low probability of engaging in future criminal acts of violence. Furthermore, by framing the question in terms of probability, it allows for an empirically-based answer whereas framing the question in terms of dangerousness without an agreed upon clear operationalization of the concept does not. Unfortunately, much of the research fails to make this important distinction.

Previous research shows that the most compelling evidence in aggravation is that which pertains to the defendant’s future dangerousness (Costanzo & Costanzo, 1994), though the evidence used by jurors to develop perceptions of future dangerousness may take various forms (Garvey, 1998; Eisenberg, Garvey, & Wells, 1998, Blume et al, 2001). The most explicit example of an appeal to influence jurors’ perceptions of the defendant’s future dangerousness is through the state’s use of an expert witness, a practice based on evidence of questionable accuracy (Cunningham & Reidy, 1999) but substantial influence on jurors (Krauss & Sales, 2001; Dorland & Krauss 2005; Krauss & Lieberman 2007). Research also suggests that a number of more implicit circumstances contribute to jurors’ perceptions of the defendant’s future dangerousness. These factors include
perceptions of the defendant’s lack of remorse, his mental capacities, or more concrete facts about the case such as the perceived viciousness of the crime itself or the age of the victim(s). However, as Cunningham and his colleagues have found, these factors—lack of remorse, mental capacities, viciousness of the offense, and age of the victim—do not predict the likelihood of serious violence in prison (See Cunningham, 2006; Cunningham & Reidy, 2002; Cunningham & Sorensen, 2007) and thus fail to provide the evidence needed to make valid predictions of the offender’s likelihood of continuing to be a threat to society.

Admittedly, case facts provide the context for jurors to develop their perceptions of the defendant generally and thus it is often difficult to separate the circumstances of the crime from perceptions of the defendant. For example, Garvey (1998), as described previously, found that murders that were especially brutal and murders that involved child victims were highly aggravating to capital jurors, as were jurors’ perceptions of the defendant’s future dangerousness and lack of remorse. As to future dangerousness more specifically, most (57.9%) “jurors would be at least slightly more likely to impose death if the defendant had a history of violent crime, with over a quarter (37.9%) being much more likely” (p. 1559). Likewise, 57.9% of jurors reported being more likely to vote for death given the circumstance that a “defendant might be a danger to society in the future” (p. 1559). However, whereas future dangerousness appears to serve as a strong aggravator, lack of future dangerousness has only a moderate mitigating effect; absence of future dangerousness (measured here as lack of violent criminal history and perceptions that a defendant “would be a well-behaved inmate”) did little to convince these former capital jurors they should spare a defendant’s life (p. 1560).

With respect to jurors’ perceptions of lack of remorse, Garvey (1998) found that “39.8% of the jurors were at least slightly more likely to vote for death if the defendant
expressed no remorse for his offense" (p. 1560). In fact, Garvey found only prior history of violent crime and future dangerousness to be more aggravating than lack of remorse. Sundby (1998) further substantiates the importance of perceptions of remorse in his work with the California portion of the CJP, noting that jurors “identified the perceived degree of the defendant’s remorse as one of the most frequently discussed issues in the jury room” (p. 1560) and lack of remorse as an integral reason for jurors’ votes in favor of death.

Eisenberg, Garvey, and Wells (1998) took a closer look at the specific role of remorse in South Carolina capital jurors’ sentencing and attempted to answer the following questions: What persuades capital jurors to believe that a defendant is remorseful? Does belief in a defendant’s remorse affect the jury’s final judgment? Relying on the same CJP data set as Garvey (1998), Eisenberg et al. (1998) found that “the more jurors saw the crime as being vicious, the less inclined they were to believe in a defendant’s remorse.” In effect, heinousness of the crime renders remorse irrelevant. Also, jurors who thought the defendant’s crime required planning or calculation did not consider the defendant remorseful. A defendant’s behavior and demeanor at trial influenced juror perceptions of remorsefulness, as well; a defendant who looks “uncomfortable or ill at ease,” exhibits changes in “mood or attitude” after the guilty verdict, or a defendant who speaks on their own behalf is more likely to be perceived as remorseful whereas a defendant who looks bored, for instance, is not (p. 1617). These findings begin to explain the complicated nature of the relationship between juror perceptions of dangerousness and perceptions of remorse (or lack thereof) when placed alongside other variables such as the facts of the case and observations from trial.

Perhaps even more telling of the connections between interpretations of the crime and dispositional attributions toward the defendant is the inverse relationship between
perceptions of dangerousness and remorse. Eisenberg et al. (1998) found that if jurors perceive the defendant as dangerous, they are unlikely to think the defendant is truly sorry (p. 1619). Conversely, if jurors think the defendant will not be dangerous in the future, they are more likely to perceive the defendant as remorseful (p. 1619). To the extent that the defendant is perceived as dangerous, therefore, the research suggests that he will not be perceived as remorseful and that votes for death are more likely. In contrast, if the defendant is not seen as posing a danger in the future, he is more likely to be perceived as remorseful and ultimately to receive a sentence of life. Thus, it appears that the perception of future dangerousness is the lens through which capital jurors perceive a defendant’s remorsefulness or lack thereof, and that these evaluations are closely linked to jurors’ ultimate sentencing decisions.

Perceptions of future dangerousness are clearly important to capital jurors’ decision making during sentencing. What remains to be determined is the impact, if any, of expert testimony on (mock) jurors’ considerations of future dangerousness. The small body of empirical research that explores this issue provides fairly consistent findings. For instance, Krauss and Sales (2001) found that expert testimony characterizing the defendant as a future danger indeed increases mock juror ratings of dangerousness. Similarly, Blume et al. (2001) found that CJP jurors report future dangerousness concerns as not only a major part of deliberations, but as having a significant impact upon their voting decision, even when the prosecution made little to no mention of this issue. In contrast, however, Montgomery et al. (2005) found expert testimony to have a negligible impact on prior capital jurors’ impressions of dangerousness. Specifically, these authors found that CJP jurors’ ratings of the defendant’s dangerousness did not correlate with the presence of state psychiatric testimony. Rather, the only consistent predictors of jurors’ perceptions of dangerousness were the defendant’s criminal history and a proxy for crime.
AGGRAVATION AND MITIGATION

seriousness (e.g., viciousness). The lack of support for the influence of expert testimony in this study could, however, be explained by the implication of both Cunningham and Sorensen (2007) and Blume et al. (2001) that capital jurors might perceive all capital defendants as dangerous regardless of what expert testimony asserts.

A still larger question is whether this evidence is appropriate. The debate regarding the appropriateness of psychiatric and psychological professionals’ predictions of future dangerousness was spurred by the works of Shah (1978) and Monahan (1981), who were the first to question the accuracy of these predictions and to raise ethical considerations regarding its use; however, the controversies remain and thus the debate continues (Krauss & Lieberman, 2007; Edens, Buffington-Vollum, Keilin, Roskamp, & Anthony, 2005; Guy & Edens, 2003; Krauss & Lee, 2003; Krauss & Sales, 2001; Cunningham & Reidy, 1999). More recently, Cunningham and Reidy (2002) argue that the “application of group statistical methodology and data... moves these gravest of determinations toward the ‘greater degree of reliability’” that the Court has called for (p. 512-13). In other words, according to these authors, actuarial models—when designed appropriately—perform well in predicting acts (or absence) of future violence for those imprisoned and when these models are applied to death row inmates they illustrate that future acts of violence are relatively rare. Accordingly, since the late 1990s, actuarial methods have dominated expert testimony regarding future dangerousness at federal death penalty trials. Any expert called to testify regarding future dangerousness, whether on behalf of the state or the defense, should be aware of the methodological issues associated with this contentious and possibly prejudicial category of evidence.

Cunningham and Reidy (1999) provide an overview of the common pitfalls associated with predictions of violence by expert witnesses. The first error that these authors identify is the “failure to anchor individual violence risk assessments to
the base rate of violence in the estimated group” (p. 23). The base rate is the “statistical prevalence of a particular behavior over a set period of time” (p. 23); without taking this into account, a prediction would be skewed since there is no basis for comparison of a given individual to “average” propensities for violence. The use of appropriate base rates is crucial to achieving accuracy, especially if the group is that of incarcerated individuals. Second, the authors discuss how failure to consider context can be problematic with respect to violence predictions. Researchers cannot reliably assume that violent behavior in the community predicts violent behavior in prison. Further, Cunningham and Reidy express concern that some predictions fail to conceptualize violence as the result of a conglomeration of situational factors. These authors go on to explore several other potential sources of error in attempts to predict future violence, including failure to detect illusory correlations, methodological variations in the measurement of violence, misapplication of psychological testing, faulty implications of antisocial personality disorder and psychopathy, misuse of patterns of behavior, basing predictions on insufficient data, and ignoring the effects of aging upon the likelihood of violent behavior. In addition, the authors point to the neglect of preventative measures as problematic; considering what can be done on behalf of the institution to decrease the risk for violence is often overlooked. Cunningham and Reidy (1999) also point to failures to express risk estimates in probabilistic terms and an overreliance on clinical interviews as problematic (see “Modes of Presentation” below). The authors make a persuasive argument as to how each of these methodological considerations can be missed completely, misapplied, or misunderstood: As such, it is not surprising that they urge caution when presenting evidence about future dangerousness.

Cunningham and Reidy (1999) also express concern about experts called to testify who erroneously imply that a diagnosis of psychopathy necessarily evidences a defendant’s increased risk for future violent behavior. Whereas research indicates that
a general link exists between psychopathy and risk for violent behavior in a community setting (Hemphill, Hare, & Wong, 1998), this link has not been found for those incarcerated (Cunningham, Sorensen, & Reidy, 2005). Accordingly, some find the introduction of allegations of psychopathy too prejudicial to justify their limited probative value (for an extensive discussion of the methodological shortcomings of a diagnosis of psychopathy as related to increased violence risk, see Cunningham and Reidy, 1998; Edens, Desforges, Fernandez, & Palac 2004; Edens et al. 2005).

Edens and his colleagues conducted a series of studies to examine mock jurors' ability to distinguish between psychological diagnoses and predictions of future dangerousness. In particular, Edens et al. (2004) had 238 undergraduates read a capital case summary in which prosecution testimony regarding the presence versus absence of a mental disorder (psychopathy, psychosis, or no disorder) was offered alongside an expert's estimation of the defendant's risk level (high or low risk for future violence). They found that defendants labeled as psychopathic received higher ratings of future dangerousness than did defendants labeled as having no disorder, even after rebuttal testimony contradicted the diagnosis. When both the prosecution and defense categorized a psychopathic defendant as low risk, dangerousness ratings remained significantly higher than those for the defendant with no disorder. Defendants described as psychotic were just as likely to be perceived as dangerous as defendants diagnosed as psychopathic. These findings suggest that diagnoses of either psychopathy or psychosis can serve as a means through which jurors come to believe in the defendant's future dangerousness and thus possibly in turn have an aggravating effect on capital jurors.

A subsequent and related study by Edens et al. (2005) looked beyond jurors' reported perceptions of the defendant's dangerousness and instead focused on the impact that the two conditions (psychopathic and psychotic, compared to no
mental disorder) have on jurors’ likelihood to vote for death. These authors found that the majority of mock jurors (60%) supported a death sentence for a defendant who was described as psychopathic. In comparison, only 38% of the mock jurors in the control condition supported a sentence of death. Interestingly, it appears that psychosis had a mildly mitigating effect, because only 30% of the mock jurors in this condition indicated a preference for a sentence of death. Thus, whereas a diagnosis of psychosis increases juror perceptions of dangerousness (Edens et al., 2004), this does not necessarily translate to a higher likelihood of a death sentence. Also, whether (mock) jurors were assigned to the high or low risk condition, their ratings of how psychopathic they perceived the defendant to be predicted their support for a sentence of death. In other words, perceptions of psychopathy are devastating to a capital defendant, regardless of testimony of either high or low risk for future violence. Given the actual tentative relationship between violence risk and psychopathy, the fact that violence risk testimony linked to psychopathy appears more influential to mock jurors than assessments not so linked is troubling. All told, a capital defendant who by virtue of his mental illness is incapable of exhibiting remorse (a characteristic of psychopathy) stands a greater chance of both being perceived as a likely danger in the future and receiving a sentence of death. However, a diagnosis of psychosis, although sometimes associated with increased evaluations of future dangerousness, is not always associated with preferences for a sentence of death. It may be that jurors are indeed capable of distinguishing between mental illnesses and that what determines whether they interpret such evidence as aggravation or mitigation is whether they perceive the defendant’s behavior as within (e.g., psychopathy) or beyond (e.g., psychosis) his control.

In sum, the research indicates that the most persuasive aggraver is juror perceptions of the defendant’s future dangerousness; whether these perceptions stem from the brutality of the crime itself, the defendant’s apparent lack of
remorse, allegations of psychopathy, or some combination of these factors, the evidence is convincing that a capital defendant whom jurors fear poses a continuing threat to society, however conceived, is more likely to receive a sentence of death. Whether the law allows it or not, the issue of future dangerousness is the crux of a juror’s preference for death. Responsible experts who find themselves called to testify about future dangerousness must carefully consider the methodological and ethical issues outlined above. An awareness of the common mistakes associated with predictions of future dangerousness is helpful, but research has shown (Krauss & Sales, 2001) that most jurors fail to engage with such testimony even when it is most accurately presented (actuarial testimony based on statistical probabilities). Accordingly, it is to issues of juror cognition and decision making that we now turn.

Modes of presentation

In this section we move from a consideration of jurors’ interpretations of aggravating and mitigating factors to a discussion of the most persuasive modes of presentation. Much of the research in this area focuses on two broad issues: 1) Actuarial versus clinical expert testimony, and 2) The presentation of general research findings compared to expert testimony focused on case specifics. We then turn the discussion to the decision makers: What does the research tell us about how jurors process, and what they attend to when exposed to, expert testimony? It is through addressing these issues that we begin to gain a better understanding of why different types of evidence are more or less persuasive.

Actuarial predictions, as defined by Krauss and Sales (2001) are “any estimation method that uses combinations of empirically verified risk factors taken from research on large groups of dangerous individuals” (p. 269). Clinical predictions on the other hand are predictive assessments
based on the individual expert’s expertise and relevant personal experiences in the field (p. 278).

Mock jurors rate clinical opinion as equally scientific, more persuasive and more influential than actuarial testimony (Krauss & Sales, 2001). Clinical predictions of dangerousness, however, have been demonstrated to be unreliable (Melton, Petrila, Poythress, & Slobogin, 1997), and less accurate than actuarial predictions of dangerousness (Gardner, Lidz, Mulvey, & Shaw, 1996; Harris, Rice, & Cormier, 2002; Mossman, 1994). Though actuarial instruments designed to predict future dangerousness have improved the accuracy of predictions (Rice & Harris, 1995) and have repeatedly been found to outperform clinical assessments (Gardner et al., 1996; Grove & Meehl, 1996; Mossman, 1994), individuals continue to believe that clinicians are more capable of predicting future dangerousness than empirical studies suggest that they are (Krauss & Sales, 2001). Furthermore, although both types of testimony were found to be influential, clinical opinion expert testimony was found to be more influential than actuarial testimony on mock jurors’ evaluations of dangerousness in capital sentencing (Krauss & Sales, 2001).

The greater influence of clinical opinion over actuarial testimony appears to persist even after exposure to adversary manipulations—i.e., cross examination, designed to reduce influence. Krauss and Sales (2001) found only limited support for mock jurors’ ability to discount unreliable clinical expert testimony on the basis of adversarial procedures. Though adversarial procedures lowered dangerousness ratings in both conditions, this influence was significantly less on the clinical opinion testimony than the actuarial testimony (Krauss & Sales, 2001). However, Kovera, Levy, Borgida & Penrod (1994) found no effect on the impact of expert testimony as a function of the strength of cross examination.
Why is it that actuarial testimony, testimony that is more reliable, is less persuasive than clinical testimony? Evidence suggests that jurors underuse statistical evidence and place less weight on such evidence than on other types of evidence, especially clinical evidence (Kaye & Koehler, 1991; Thompson & Schumann, 1987). Research also suggests that jurors may be unable to differentiate junk science from valid research (Huber, 1993; McAuliff & Kovera, 2008). Moreover, whereas jurors have been found to be sensitive to overt variations in the weight/conclusiveness of statistical testimony (Smith, Penrod, Otto, & Park, 1996), they appear less sensitive to the quality of the evidence on which the testimony is based (Koehler, 2001a). For example, Bornstein (2004) found that mock jurors gave greater weight to anecdotal evidence based on a very small sample than to experimental findings based on much larger sample.

In general, jurors appear to underuse probabilistic evidence testimony and to have difficulties with complex and statistical information. For example, although statistics framed in the language of probability are mathematically identical to those framed in the language of frequencies, they are not psychologically identical; jurors reason differently with probabilities than with frequencies. For example, when DNA match statistics are framed in the language of frequencies (e.g., 1 in 1,000 other people could match), jurors are less persuaded of guilt than when the same DNA match statistics are framed in the language of probability (e.g., 0.1% or one-tenth of one percent of other people could match) (Koehler, 2001a; 2001b). In the former case, when the match is described in terms of frequencies, the description encourages the target to think about the number of individuals other than the defendant who also could have committed the crime, which in turn leads to reduced estimations of guilt (Thompson & Schumann, 1987). For instance, even if the match was one in 1,000, in a city of 50,000 that still translates into 50 potential correct matches. In contrast, the language of probabilities does not encourage
people to think of others who could match the criteria but rather presents the likelihood of error as almost nonexistent; the probability of there being another suspect is still just one-tenth of one percent. Thus, whereas both types of presentation—frequencies and probabilities—are technically correct, jurors do not interpret them in the same way. It is therefore the responsibility of the expert to be aware of the ways in which their data may be interpreted.

Hence, it appears that the language of science and in particular the use of numbers is not fully understood by jurors. It may be that such evidence is perceived as too remote, less accessible, and ultimately less relevant to the case at hand.

Research has found that expert testimony is more influential when it is directly linked to the case at hand rather than more generally summarizing relevant research findings (Brekke & Borgida, 1988; Fox & Walters, 1986; Gabora, Spanos, & Joab, 1993; Kovera, Gresham, Borgida, Gray, & Regan, 1997; Kovera et al., 1994; Krauss & Sales, 2001; Schuller, 1992). In interviews with actual capital jurors Sundby (1997) established that jurors found experts more credible and influential when they made a direct connection between their testimony and the facts of the case. Thus, experts who make explicit the implications of psychological research for evaluating the trial evidence and/or the defendant have a greater potential to influence jurors. Experts who do not integrate their testimony with a case’s specific facts and with the other testimony are far less likely to be seen as persuasive (see Vidmar & Schuller, 1989).

Researchers have also found that expert evidence that deals with anecdotal, individual, or case history data is more influential than abstract, experimental findings (Bornstein, 2004) or probability data (Kovera et al., 1994). Bornstein (2004) found that when the expert presented anecdotal rather than experimental evidence s/he was perceived as more
creditable and slightly less difficult to understand. Generally, experts are most influential when presenting concrete information (specific instances) (Bornstein, 2004; Gabora et al., 1993). Overall, the most effective testimony appears to be individualized to the case at hand with a causal explanation (Maass, Brigham, & West, 1985). Moreover, information that is accessible to jurors - that they can readily interpret and tie directly to the case at hand, is likely to be most persuasive.

Heuristic models suggest that persuasiveness is usually a product of the quality of the argument, but that when a message is complicated or complex jurors use cognitive shortcuts (heuristics) to evaluate and understand the testimony (Cooper, Bennett, & Sukel, 1996) and thus rely on information other than the message to decide how much weight to give the testimony. The heuristic model holds that the more complex the testimony is perceived to be, the more likely it is to be cognitively processed in a peripheral way. In other words, when evidence is too complicated, jurors may fail to adequately engage with the information, and instead may simply rely on heuristics or perhaps turn to preexisting beliefs (such as belief that actuarial instruments are incapable of predicting violent behavior, that clinicians are more accurate, or that clinical information is favorable to actuarial information) to garner meaning (Krauss & Sales, 2001). The heuristic that is used for complicated information focuses the juror on the communicator rather than the message. Thus, heuristic models suggest that clinical opinion is more persuasive because it allows jurors to focus on the message, rather than the communicator. In contrast, actuarial testimony, with its greater reliance on complicated statistical measures, is associated with jurors’ reliance on the expert’s credentials and identity rather than content of the testimony (Cooper et al., 1996).

Confronted with complex and confusing information jurors tend to evaluate expert witness credibility on the basis of personal characteristics (Selvin & Picus, 1987) and general impressions of character (Vidmar & Diamond, 2000). For instance, Cooper
et al. (1996) found that when testimony was less complex jurors relied primarily on the content of the message, but when the testimony was highly complex jurors were more persuaded by the strength of the expert witness’s credentials. Thus, jurors will be especially, perhaps even unduly, influenced by the credentials of the expert rather than the quality of the testimony (Cooper et al., 1996) when presented with actuarial (or statistical) testimony. When jurors turn to credentials there is a fairly strong bias in favor of medical (M.D.) credentials (Greenberg & Wursten, 1988), which could help to explain why jurors appear to be more persuaded by mitigation that is perceived as physiologically-based.

An expert’s credentials may have less of an influence on jurors with strong prior beliefs. For example, Greenberg and Wursten (1988) found that expert testimony did not do much to change the attitudes and final decisions of jurors who held strong beliefs prior to trial, but that those jurors with strong beliefs prior to trial were also less likely to engage in heuristic processing and thus an expert’s credentials had less effect on their biases. Prior beliefs may also be relied on when jurors are presented with conflicting expert testimony. Jurors may resolve the difficulty of conflicting testimony by ignoring both experts or accepting the one that fits with their prior beliefs (Brekke & Borgida, 1988). Prior beliefs are of special concern in death penalty cases where the uncommonly strong values that jurors bring to the case may limit the potential impact of the expert witness (Ivkovic & Hans, 2003).

When faced with complex testimony, jurors tend to focus more on attributes and characteristics of the expert than the content of the message. Some studies indicate that the gender of an expert witness influences the impact of the testimony as well (Schuller, Terry, & McKimmie, 2001). Male experts are largely regarded as more credible than female experts, and have a greater impact on juror decision making. However, in topic areas that are perceived as more “gender appropriate”—where more women work in the field or are presumed more
expert on (children, women, etc.) findings suggest jurors are more receptive to testimony from a female expert witness (Schuller & Cripps, 1998; Swenson, Nash, & Roos, 1984), though one study found that there were no significant differences in the perception of male and female experts (Memon & Shuman, 1998). Schuller, Terry and McKimmie (2005) examined the use of gender as a heuristic cue for evaluating expert evidence and found that jurors may use gender differently depending on their ability to process the information in the testimony. Male experts were more persuasive than female experts when testimony was of high-complexity, but female experts had an advantage when the testimony was of low-complexity (Schuller et al., 2005).

Jurors are further influenced by the fit of the expert’s testimony with the juror’s preexisting views and life experiences. The story model suggests that “jurors construct stories about cases based on the fit between the expert’s testimony, the juror’s preexisting views, and the juror’s final story and that this determines the weight that should be granted” (Krauss & Sales, 2001, p. 301). The story model holds that the juror fits the content of the expert testimony with their own preexisting beliefs, in effect creating a “story” used by the juror to determine the weight given to the expert testimony as part of the juror’s decision making: “(j)uries attach great importance to the storyteller’s identity and whether the story she is telling is consistent with everything else they heard during the trial” (Sundby, 1997, p. 1184). The story model also helps to explain the greater persuasiveness of clinical as compared to actuarial testimony: clinical opinion testimony may be easier for jurors to fit into the story of the case and thus more influential (Krauss & Sales, 2001).

**Credibility and trustworthiness**

Jurors are generally skeptical of expert witnesses, particularly those that are well paid. This skepticism is exacerbated by conflicting expert testimony. Research on jurors who served on civil cases found that they expressed disapproval for expert witnesses who were perceived to be “hired guns”
(Sanders, 1993), who were friendly with the defendant (Ivkovic & Hans, 2003), or who testified frequently (Cooper & Neuhaus, 2000). Mock jurors were least convinced by and least likely to trust an experienced expert with high pay (Cooper & Neuhaus, 2000). Champagne, Shuman and Whitaker (1992) found that 35% (n = 118) of the jurors they interviewed stated that payment to the expert meant they could not be trusted to be unbiased. Ivkovic and Hans (2003) noted that only 1 in 10 jurors disagreed with the statement “lawyers can always find an expert who will back up their client’s point of view no matter what it is” (Ivkovic & Hans, 2003, p. 452). Sundby (1997) found that capital jurors are no different, they generally perceive expert witnesses as “hired guns” rather than objective authorities—in contrast to lay witnesses that are seen as worldly and trustworthy.

Though jurors may discount practiced and highly paid experts as “hired guns,” an expert’s credentials and reputation have been noted as influential (Champagne et al., 1992; Shuman, Whitaker, & Champagne, 1994). Ivkovic and Hans (2003) examined jurors’ impressions of expert witnesses in interviews with jurors who served on civil cases. They found that jurors are affected by both personal characteristics of the experts and aspects of the testimony. Jurors associate credible testimony with a “lack of bias; good credentials; a pleasant personality; a clear, objective, focused, not overly long presentation that utilizes diagrams and models; use of lay terms; a presentation that is complete, consistent, and not too complex; knowledgeability in the area of expertise; and familiarity with the case” (Ivkovic & Hans, 2003, p. 458). Though jurors do not always report being influenced by an expert’s personality or appearance (Champagne et al., 1992; Shuman et al., 1994), other studies suggest that an expert’s confidence in his/her conclusions appears to increase the influence, perceived clarity, and believability of the expert testimony (Rogers, Bagby, & Chow, 1992).

Clarity of presentation is critically important (Ivkovic & Hans, 2003) and the best expert witness is one who comes
across as a good teacher, “someone who knows how to make a presentation” (Ivkovic & Hans, 2003, p. 470). Vocabulary should be adjusted for a lay audience and be in non-technical terms. Juries appreciate visual aides during the presentation and were displeased when the testimony was perceived as unclear, boring, long, or tedious (Ivkovic & Hans, 2003). Though the duration of the expert testimony does not appear to affect the influence of the testimony on the jurors (Brekke & Borgida, 1988), it does appear that repetitive testimony may render jurors more receptive to the witness’s message (Kovera et al., 1997). In sum, jurors—like students—appreciate good pacing, brevity, directness, enthusiasm, and visual aides (Ivkovic & Hans, 2003) from an expert they perceive as competent, unbiased, and knowledgeable.

Summary and conclusion

Sentencing decisions in capital cases are to be guided by a consideration of aggravating and mitigating circumstances. Results of the Capital Jury Project suggest that basically half of the jurors do not wait until the penalty phase, the time that they are to hear the evidence in aggravation and mitigation, to make a sentencing decision. This early decision making may be explained in terms of a negativity bias. Research indicates that our impressions are more heavily influenced by the negative as opposed to the positive information that we are provided about others (Skowronski & Carlson, 1989; Klein, 1991; Vonk, 1993). Consequently, undesirable characteristics are perceived as most distinguishing and thus most often used to develop our impressions of others. The guilt phase of the trial, if not the jury selection portion, may therefore serve to trigger the negativity bias, resulting in jurors either deciding on death at that early stage or rendering them more receptive to aggravating circumstances presented at the penalty phase of the trial.

As to specific aggravating circumstances, our review of the literature suggests that jurors’ sentencing decisions are
closely tied to their perceptions of the defendant’s future dangerousness: defendants who are perceived as posing a threat in the future are more likely to receive a sentence of death. Perceptions of future dangerousness are also closely associated with perceptions of remorse. As one might surmise, to the extent that a defendant is seen as posing a continuing threat to society, he is also seen as lacking remorse for the current offense. The intriguing aspect of the importance of perceptions of future dangerousness to capital sentencing decisions is not necessarily that the relationship exists, but rather that it exists regardless of whether the state presents evidence pertaining to future dangerousness (Blume, 2001). Thus, jurors who find a defendant guilty of a capital offense need little additional evidence or encouragement to focus on future dangerousness as a core factor in support of a sentence of death.

The findings regarding mitigation are less clear cut. Although jurors, both mock and actual, are generally receptive to evidence in mitigation, the extent of the influence appears to be less robust than for aggravation. Moreover, the influence is more sensitive to and dependent upon the context in which it is presented. As Garvey (1998) found, the determining factor is whether jurors perceive the explanation as beyond the defendant’s control. It appears that allegations of mental illness are especially prone to this calculation. As Edens and his colleagues (2004; 2005) found, (mock) jurors are more receptive, as a mitigator, to a diagnosis of psychosis than psychopathy. Thus, merely mentioning a defendant’s diagnosis or previous traumatic experiences with the belief that will be sufficient for jurors to understand why that information should be considered a mitigator is likely a failed strategy. Rather, jurors need to be educated repeatedly on not only the specific mitigators evident in the defendant’s life but also why those circumstances are indeed mitigators and why they should, in keeping with the law, be considered in support of a life sentence.
The evidence suggests that jurors are most persuaded by clinical opinion testimony—even following cross-examination—and evidence that is tied specifically to the facts of the case at hand. Jurors’ preference for clinical over actuarial evidence may be best understood from within the story model of decision making. If, as the evidence suggests, jurors reach their sentencing decisions through the process of developing a story, it appears likely that clinical evidence is more readily adapted into that story than is actuarial data. Moreover, clinical evidence, regardless of whether it supports a sentence of life or death, lends itself to testimony of compelling examples of the particular defendant’s life experiences, examples that jurors are more likely to rely on when deciding on the appropriate sentence. However, one must be cognizant of the greater accuracy associated with actuarial as opposed to clinical opinion testimony. Thus, to the extent possible, the most accurate and effective testimony is likely to be that which incorporates aspects of both actuarial and clinical opinion.

Much of the research discussed in this article focuses on what might be considered traditional or standard aggravating and mitigating circumstances. With recent advances in medical sciences, however, a new wave of evidence, neuroimaging (Barth, 2007; Greene and Cohen, 2004), is making its way into the penalty phase of capital cases (Snead, 2007). Although the particulars of the procedures and the complexity of its implications are far beyond the scope of this article, the basic premise is that abnormalities in the brain—abnormalities that can be captured on a scan—can be linked to specific behaviors, including violent behavior. The greater credence accorded medical experts, coupled with the greater weight given to physiologically-based types of mitigation, suggest that this type of evidence has the potential to be exceptionally powerful. The questions that remain, of course, are ones of application and accuracy. Just as we saw advances in DNA testing result in increasing sensitivity, what will similar advances in neuroimaging mean for clients facing
death now and those in the future? Moreover, just as human error impacts DNA testing, it likely will impact neuroimaging as well: How will those errors be uncovered and subsequently resolved? Furthermore, if indeed a person’s behavior is caused by physiological processes beyond their control, what does that mean for considerations of criminal responsibility and moral culpability? Clearly, there are no easy answers to these questions though we suspect that attorneys, jurors, and judges will be grappling with them for years to come.

Notes

1. In *Ring v. Arizona* (2002) the Court held that the jury, not a judge alone, must find the aggravating factor that would make death a possible punishment. Accordingly, most states, though not all, now place capital sentencing solely in the hands of a jury.

2. See Kerr and Bray (2007) for a thorough review of strengths and weaknesses of different research designs to study juror/jury decision making.

3. One remedy to this challenge is to collect a large enough sample that allows you to control statistically for various aspects of the trial across numerous cases.

4. Several other articles based on the CJP data speak to jurors’ perceptions of aggravation or mitigation, though not as the primary focus of the work (e.g., see Table 12, p. 1535, of Bowers et al. (1998)), or necessarily in terms of which specific circumstances jurors found to be aggravating or mitigating. For example, Brewer (2004) developed an index of jurors’ receptivity to mitigation and found that differences in receptivity vary as a function of juror race and the racial combination of defendants and victims; differences in receptivity to mitigation were attributed primarily to African American jurors who served on cases where an African American defendant was charged with killing a white victim. A most recent article by Blume et al. (2008) reviews the literature on mitigation in light of what it means for effective representation. For more information on the CJP generally and to see a list of publications based on the data, go to http://www.albany.edu/scj/CJPhome.htm.

5. It should be noted, however, that Montgomery et al. (2005) did find that capital jurors were more likely to evaluate defendants as “crazy” and “emotionally unstable or disturbed” in cases where the defense included expert psychiatric testimony at the penalty phase of the trial. The authors concluded that such testimony assists jurors in the
evaluation of the defendant's mental health, issues that are designed to speak to mitigation though there was no attempt to discern whether the jurors did indeed evaluate the evidence as mitigating.

6. Ivkovic and Hans (2003) found that in regard to credentials, jurors usually mentioned the specialty or profession of the expert, and often recalled the institution the expert was affiliated with. These former jurors generally viewed formal education in positive light and many recalled the experts' professional activities (Ivkovic & Hans, 2003). However, Ivkovic and Hans (2003) noted that providing an excessively long list of credentials made some jurors suspicious of the expert's efforts to impress the jury as a qualified witness. For a comprehensive review of research on deliberating juries see Devine, Clayton, Dunford, Seying, & Price (2001).

7. Although only a minority of jurors report that an expert's style of dress influenced their decision (Champagne et al., 1992), the expert witness should dress to conform to the juror's stereotype of the professional image (Melton et al., 1997). Experts should take into account the trial setting, location and the social class status of the community and dress conservatively if there are doubts (Hess, 2006; Singer & Nievod, 1987).

References


Indiana Code 35-50-2-9(c) Death penalty sentencing procedure.


