Capital Jurors, Mental Illness, and the Unreliability Principle

Can Capital Jurors Comprehend and Account for Evidence of Mental Illness?

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Abstract:

Recent U.S. Supreme Court opinions have given rise to the question of whether persons suffering from a severe mental illness should be categorically exempt from the death penalty. This article presents a brief overview of relevant U.S. Supreme Court cases and the empirical evidence relevant to this question. We then present our findings on how actual capital jurors respond to and discuss engaging with evidence of mental illness, as drawn from in-depth interviews collected as part of the Capital Jury Project (CJP). Existing research reveals that in the controlled situation of an experiment, evidence of mental illness is associated with votes for life rather than death. Similarly, actual capital jurors in our study reported *anticipating* that evidence of mental illness would make them less likely to vote for death. However, those jurors who dealt with mental illness in their case appeared to be less sensitive: they describe such evidence as having been overshadowed by the brutality of the crime; as indicative of the defendant's future dangerousness; as being confusing, especially as presented by experts; and as a manipulative attempt on the part of the defendant to trick the jurors. The findings suggest that capital jurors cannot reliably comprehend and account for evidence of mental illness and thus offer a compelling reason for the Court to exempt those suffering from a mental illness from the death penalty.

On July 20, 2012, James Holmes committed one of the nation's deadliest mass shootings. Armed with multiple guns, he detonated a canister of tear gas and then opened fire in an Aurora, Colorado movie theater, killing 12 people and wounding 70 more (Cabrera, Botelho, & Ford, 2015). As the case against Holmes proceeded, his mental status became the focal point. Jurors in the case dismissed the defense's plea of insanity and decided that Holmes, while mentally ill, knew right from wrong. The State went on to seek a sentence of death but the jury was deadlocked, with holdouts for life pointing to Holmes' mental illness as a key consideration (Steffen, 2015). For some jurors in this case, while Holmes' mental condition did not rise to the level of a defense for his crime, it did mitigate his punishment.

The question of how a defendant's mental illness should come into play in capital cases has received increased public, professional and scholarly attention of late, in part due to cases like Holmes'. Traditionally, evidence of a defendant's mental illness for those not pursuing an

insanity defense[1] is presented as part of mitigation[2] during the penalty phase of a capital trial.[3] Given recent U.S. Supreme Court opinions and concerns by professional associations[4], however,

[1] The insanity defense is a claim that would be raised during the guilt phase of a capital trial. Most states adopt variations of the M'Naghten standard or the *Model Penal Code* in defining insanity (Borum & Fulero, 1999). The M'Naghten standard holds that at the time of the criminal act, the defendant either did not understand what they were doing or did not understand that it was wrong (i.e. criminally punishable). Under the *Model Penal Code*, "a person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law" (American Law Institute [ALI], 1985/1962, §4.01). If a defendant is found to meet the applicable insanity standard, they are considered not criminally responsible for their behavior; these individuals are not typically released but instead sent to a psychiatric facility following civil commitment.

[2] Qualifying circumstances are articulated by state statute, though the Supreme Court of the United States has ruled that mitigation includes any evidence about the crime or the defendant that support a sentence of less than death (*Lockett v. Ohio*, 1978). In other words, mitigation is designed to provide the opportunity for reducing sentencing severity for the already-convicted defendant.

[3] As Cheng (2010) notes, however, "frontloading mitigating sentencing factors into the guilt phase [is] a trial technique that defense advocates have long recognized and deliberately sought to refine as a tactical strategy" (p. 41).

[4] The Position Statement on Moratorium on Capital Punishment in the United States by the American Psychiatric Association states: "(P)sychiatrists, due to their involvement in and familiarity with the criminal justice system, have become increasingly aware of the weaknesses and deficiencies of the current capital sentencing process including considerations in regard to the mentally ill and developmentally disabled; The American Psychiatric Association endorses a moratorium on capital punishment…(American Psychiatric Association, 2000/2007/2014)." Similarly, the call for a moratorium on the death penalty by the American Psychological Association (2001) notes "that mitigation factors, e.g., the defendant's previous life circumstances, mental and emotional difficulties and age, have little or no relation to penalty phase verdicts…" More generally, representatives of the American Bar Association, the American Psychological Association, the American Psychiatric Association,

the question arises as to whether persons who suffer from severe mental illness[5] should be categorically exempt from facing a sentence of death.[6] This article begins to answer that

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the National Association for the Mentally Ill, and the National Mental Health Association formed the Task Force on Mental Disability and the Death Penalty, ultimately recommending that "defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences, or wrongfulness of their conduct; (b) to exercise rational judgement in relation to conduct; or (c) to conform their conduct to the requirements of the law" (Recommendations of the American Bar Association Section of Individual Rights and Responsibilities Task Force on Mental Disability and the Death Penalty, 2005).

[5] The American Bar Association has proposed Recommendation 122A calling for a categorical exclusion from the death penalty for defendants suffering from a severe mental disorder at the time of the crime. According to the Recommendation, "Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law." The Recommendation goes on to define "severe mental disorder" as Axis I diagnoses of "schizophrenia and other psychotic disorders, mania, major depressive disorder, and dissociative disorders" but also additional conditions that may rise to the level of "severe" (the Recommendation notes, for example, that borderline personality disorder can manifest in "psychotic-like symptoms … during times of stress" and thus should be included). (see https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.authcheckdam.pdf, last accessed October 13, 2017).

[6] There also has been activity at the state level to exempt persons with severe mental illness from the death penalty. For example, in 2017, bills were proposed to exempt people with severe mental illness from the death penalty in eight state legislatures: Arkansas, Indiana, North Carolina, Ohio, South Dakota, Tennessee, Texas, and Virginia (see: https://www.americanbar.org/groups/crsj/projects/death_penalty_due_process_review_project/serious-mental-

question. The first part of this article presents a brief overview of the U.S. Supreme Court cases that provide the foundation for considering whether persons who suffer from a severe mental illness should be exempt from the death penalty. Second, we review the empirical evidence that addresses that same issue. We then present findings from the current study, an exploration of how actual capital jurors respond to and discuss engaging with evidence of mental illness. Finally, the article concludes by addressing the implications of our findings to the question of whether persons who suffer from severe mental illness should be categorically exempt from facing a sentence of death.

Foundational U.S. Supreme Court Cases

Over the past two decades, the U.S. Supreme Court has granted categorical exemptions from the death penalty to both juveniles (*Roper v. Simmons*, 2005) and persons who are intellectually disabled (*Atkins v. Virginia*, 2002). The types of evidence and rationales used to arrive at those decisions were similar and resulted in an important follow-up question: Are there other categories of individuals with similar "diminished capacities" (*Atkins v. Virginia,* 2002, p. 318) that the Court might find exempt from the death penalty? Quickly, the attention of legal experts focused on persons who are severely mentally ill as one such possible category of people. In this section, we review the types of evidence and rationales offered by the Justices in reaching their decisions to exempt specific categories of individuals from the death penalty.

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illness-initiative-/resources0.html, last accessed August 7, 2017). Though the details of this activity are beyond the scope of this article, it is worth noting the trend toward exemption from the death penalty for the severely mentally ill is gaining momentum within the legislative branch, a key consideration of the Court's Eighth Amendment analysis of the constitutionality of the death penalty for specific categories of individuals.

Criteria for Exemption

In both *Roper* and *Atkins*, the Supreme Court conducted an Eighth Amendment analysis to determine whether the execution of juveniles (*Roper*) and persons who are intellectually disabled (*Atkins*) was "excessive," constituting cruel and unusual punishment.[7] The Court has long recognized that such an analysis is dynamic, that its interpretation of excessive must "draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (*Trop v. Dulles*, 1958, p. 101). To make that determination, the Court applied a two-step proportionality test, considering first objective factors, and second its own independent judgment.

In both *Roper* and *Atkins*, the Justices agreed that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" (citing *Penry v. Lynaugh,* 1989, p. 331). Where the Justices disagreed was with regard to the relevance of other forms of objective factors. For instance, in *Atkins* the majority opinion referenced *Amici Briefs* from representatives of the European Union, professional organizations, representatives of various religions, as well as polling data as pertinent to their decision. The dissent took issue with the relevance of this information, noting that "…the Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal (deservedly relegated to a footnote) to the views of assorted professional and religious organizations, members of the so-called 'world community,' and respondents to opinion polls." (*Atkins*, Justice Scalia dissenting, p. 347). Instead, Chief Justice Rehnquist's dissent identified

[7] Slobogin (2003) makes a compelling argument "that people with mental illness are similar to people with mental retardation and juveniles in terms of relative culpability and deterrability is very relevant to Equal Protection analysis" (p. 298) as opposed to the Eighth Amendment analysis discussed here.

another potential objective factor for consideration: the sentencing behavior of capital juries. He remarked on the majority's failure to take "notice of the fact that neither petitioner nor his *amici* have adduced any comprehensive statistics that would conclusively prove (or disprove) whether juries routinely consider death a disproportionate punishment for mentally retarded offenders like petitioner" (*Atkins,* p. 324). In other words, exactly which objective factors beyond legislative initiatives were worthy of the Court's consideration was left unsettled: while members of the majority were willing to give weight to the opinions of professional organizations and to public opinion polls, Justice Rehnquist's dissent dismissed these forms of evidence while calling for statistics on actual capital jurors.

For the second step of the analysis, the Court engaged in its own independent judgment, concluding that executing juveniles or persons who are intellectually disabled would not advance either of the two previously endorsed justifications for a system of capital punishment, namely retribution or deterrence. Again, given the presumed "diminished capacities" of these two groups of defendants, their ability to effectively connect the crime with the punishment and/or for others so afflicted to desist from future criminality upon learning of a death sentence was considered compromised. Further, the Court's independent analyses in both cases pointed to the (in)ability of sentencers to give appropriate effect to mitigating circumstances as a concern. For example, Justice Kennedy suggested that jurors might treat age as aggravating: "An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him" (*Roper v. Simmons,* 2005, p. 573). Likewise, Justice Stevens noted that for defendants who

are intellectually disabled, there may be an "enhanced" risk of sentencers imposing death "in spite of factors which may call for a less severe penalty" (*Atkins*, p. 320, citing *Lockett v. Ohio*, 1978, p. 605)). Specifically, the Court pointed to "the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation" (p. 320) due to their decreased ability to express remorse, be effective witnesses, provide meaningful assistance to their attorney, and the double-edged nature of intellectual disability as it relates to future dangerousness.

Those in dissent took issue with the categorical exemptions decided by the majority and expressed trust in the ability of the sentencer to give proper consideration to the mitigation. For example, Justice O'Connor's dissent in *Roper* (2005) explained that a blanket exemption was misguided because "… an especially depraved juvenile offender may nevertheless be just as culpable as many adult offenders considered bad enough to deserve the death penalty" (*Roper*, O'Connor dissent, p. 600). In other words, general developmental trends regarding the cognitive functioning of juvenile defendants do not justify excluding every individual juvenile from capital punishment; sentencers may conclude that some children are more adult-like and thus more death-worthy than others. A similar rationale was articulated by Justice Scalia in his dissent in *Atkins*: "… only the sentencer can assess whether [the defendant's] retardation reduces his culpability enough to exempt him from the death penalty for the particular murder in question" (p. 351). Hence, those who disagreed with the categorical exemptions pointed to the ability of the sentencer to engage in individualized sentencing determinations that take into consideration, as a mitigator, the immaturity of juveniles and the defendant's intellectual abilities.

Across both the *Atkins* and *Roper* decisions, the one objective factor the Justices agreed was pertinent to their analysis was legislative initiatives. However, the majorities also pointed to briefs from professional organizations and opinion polls to support their position, while those in

the dissent viewed such evidence as "inconclusive" (*Roper*, p. 605) or representative of a "faulty count" (*Atkins*, p. 343). The Court's independent judgments, in contrast, engaged with evidence regarding the ability of offenders in those defined groups to be deterred or to appreciate the retributive nature of their sentence. Those in the majority concluded that the goals of deterrence or retribution could not be achieved due to the very characteristics of being either a juvenile (*Roper*) or intellectually disabled (*Atkins*). Those in dissent disagreed that blanket exclusions should apply, concluding that a case-by-case assessment was more appropriate. Implicit in this latter conclusion is that the sentencer – typically the juror and/or jury – is capable of evaluating the evidence offered in mitigation and reaching a reliable assessment thereof.

Sundby (2014) writes persuasively that a closer read of the *Atkins* and *Roper* decisions reveals that there is more to the Court's analysis than the conventional two-step proportionality analysis of objective factors and independent judgement. He suggests that the two-step analysis is secondary to the Court's concern about a jury's ability to reliably consider evidence in mitigation. In other words, Sundby argues that the *Atkins* and *Roper* decisions say more about how (in)effectively sentencers deal with evidence supporting a penalty of less than death than most observers of the Court have presumed.

As Sundby explains, from the Court's earliest rejection of mandatory sentencing (in *Woodson v. North Carolina*, 1976) through *Roper*, the Court has held "that the death penalty categorically cannot be imposed if too great a risk exists that constitutionally protected mitigation will not be properly comprehended and accounted for by the sentencer" (Sundby, 2014, p. 505): This provision is what Sundby refers to as The Unreliability Principle. In effect, the Principle is the manifestation of the Court's long-held requirement that a sentence of death can be imposed only after the defendant receives "individualized consideration" of the mitigating

evidence offered (Sundby, 2014, p. 497, citing *Roper*, 2005, p. 572). The key question is not whether jurors endorse a potential mitigator in the abstract but rather whether jurors "can reliably apply the mitigator in practice (Sundby, 2014, p. 512). Hence, if a sentencer is incapable of providing full individualized consideration to the defendant -- cannot "reliably apply the mitigator in practice" -- due to the nature of the mitigating evidence, then a sentence of death cannot be an option:

> If a category of mitigation is constitutionally protected because it is necessary to individualized consideration but the sentencer is unable to reliably assess and consider the mitigation, then categorical exclusion is constitutionally required (Sundby, 2014, p. 528).

Thus, according to Sundby's (2014) analysis of the *Atkins* and *Roper* decisions, the primary reason why both juveniles and persons who are intellectually disabled are now exempt from a sentence of death is because the sentencer is incapable of reliably understanding, interpreting and giving effect to such evidence in mitigation. Sundby's argument raises an important empirical question: are capital jurors, the usual sentencers, capable of what the Court expects, or are some forms of evidence "simply beyond the ken of the capital sentencer" (Sundby, 2014, p. 492)? We now turn to what is known about a (mock) jury's ability to consider evidence of mental illness, the specific form of mitigation under consideration here, as a first step toward answering that question.

(Mock) Juror Responses to Mental Illness

When the Supreme Court reinstated the death penalty in 1976 (*Gregg v. Georgia*), one of its stipulations was that sentencing decisions be based on a consideration of aggravating and

mitigating circumstances. The specific circumstances to be considered were left to the states, although two years after *Gregg* the Court held that jurors must consider "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). Every state with the death penalty lists at least one mental health-related circumstance as a statutory mitigator (usually whether the crime was committed while the defendant was under the influence of an extreme mental disturbance or that his capacity to appreciate the wrongfulness of his actions was impaired) (Acker & Lanier, 1994), and even when such circumstances are not listed *Lockett* allows the defense to introduce evidence about them. Nonetheless, there are relatively few empirical studies[8] that look directly at the influence of mental health evidence on (mock) jurors' sentencing decisions.

The few studies that have looked directly at the influence of mental illness on sentencing preferences of mock jurors have obtained somewhat inconsistent results. Boots, Cochran, and Heide (2003) employed a factorial survey design and found that participants, i.e. persons called for jury duty, were significantly less likely to endorse a sentence of death when the offender was described as severely mentally ill than when he was described as of "normal mental capacity" (p. 559). Findings by Barnett and her colleagues are similar (Barnett, Brodsky & Davis, 2004;

[8] To be sure, there is a wealth of information on jurors' receptivity to an insanity defense (Butler & Wasserman, 2006; Ellsworth, Bukaty, Cowan & Thompson, 1984; Kivisto & Swan, 2011). While related to our question here, again, the insanity defense focuses on the initial guilt/innocence phase of the trial, not the sentencing phase. Similarly, there is a substantial body of work, most notably by Edens and his colleagues (Edens, Colwell, Desforges & Fernandez, 2005; Edens, Davis, Fernandez Smith, & Guy, 2013), that looks at jurors' interpretations of a diagnosis or symptoms of psychopathy. Again, while related to the issue at hand, that work speaks more to jurors' interpretations of evidence of psychopathy and its relationship to determinations of future dangerousness.

Barnett, Brodsky, & Price, 2007). In their first study (Barnett et al., 2004), college students read a series of vignettes, some of which referenced potential mitigators. The vignette with the highest percentage of votes for life was that of someone "previously diagnosed as schizophrenic, currently not taking his medication, and suffering from severe delusions and hallucinations" (92.7%, p. 756), followed by a vignette wherein "the defendant was diagnosed as borderline mentally retarded and placed in special services classrooms throughout his education" (71.4% life sentences, p. 761). These same circumstances were again seen as some of the strongest mitigators when both college students and community members were asked to indicate if they would be more lenient, harsher, the same, or did not know, in their sentencing recommendation if a defendant experienced a variety of circumstances (Barnett et al., 2007). Of the 10 circumstances presented, the one deemed most mitigating was "mental retardation" (by 64% of respondents), followed by hospitalization for mental illness (41% of respondents). The defendant being schizophrenic was seen as mitigating by 35% of respondents, which was more than that for defendants who had been physically abused as a child (21%), although less than for defendants with no prior criminal record (40%, p. 42).[9]

The research presented thus far suggests that mock jurors are inclined to treat mental illness as a mitigator; votes for death are fewer when the defendant is described as suffering from a mental illness than when defendants are not described as such. White (1987), however, found the opposite: Mock jurors exposed to a mental illness explanation were more punitive than those

[9] Caution is warranted in interpreting the degree to which these circumstances are seen as mitigating. A separate component of Barnett et al. (2004) demonstrated the importance of providing context to potential mitigators. That is, merely stating a mitigator was often less compelling to participants than the same mitigator expounded upon in a vignette.

exposed to an anti-death penalty plea. Further, there was no statistically significant difference between any of the three tested strategies (mental illness explanation, anti-death penalty plea, and social history) and the absence of an explanation for the crime. Finally, participants who read about the most heinous offense were most likely to vote for a sentence of death, regardless of the strategy.

In contrast to both Barnett's and White's findings, Reardon, O'Neil and Levett (2007) found that the effect of evidence about mental illness depended on the severity of the mental health problems[10]: mock jurors who read about the less severe mental health problems were less likely to vote for death when they also read about the more heinous crime whereas mock jurors who read about the more severe mental health problems were more likely to vote for death in the more heinous crime condition. As these authors note, "[t]his suggests that a combination of heinousness and severe mental disorder may provoke concerns of future dangerousness in mock jurors" (p. 555). In other words, while less severe mental health problems may serve as effective mitigation, evidence of the defendant's severe mental health problems might be interpreted as aggravating by (mock) jurors.

Another way in which researchers have studied the relationship between mental illness and sentencing preferences in capital cases is to look at actual cases. One such avenue of research involves an analysis of trial transcripts, sentencing orders, appellate opinions and the like to determine the kinds of evidence that is associated with life and death decisions. For instance, McPherson (1995) reviewed 166 judicial sentence opinions from Ohio (54 life and 112

[10] The primary focus of Reardon et al.'s (2007) was "mental retardation", though in their second study they manipulated "mental retardation" (more/less severe) compared to mental illness (more/less severe). However, some of their findings refer to mental problems, not the finer distinction between illness and disability.

death cases) and coded them for the presence of statutory mitigators, including evidence pertaining to "mental disease or defect". In the death cases, McPherson further coded whether the factor mentioned was considered mitigating or whether it was mentioned and discounted by the judge.[11] After youthfulness, the most frequently cited statutory mitigator was mental disease or defect. Judges were equally likely to mention this mitigator in support of a life case (n=19, 38%) as they were to acknowledge the factor and then dismiss it as a mitigator (n=19, 38%).[12] In sum, McPherson's work suggests that judges may treat mental illness as mitigation less often than one might expect from the mock jury research.

Relying on data from The North Carolina Sentencing Project, Bjerregaard and her colleagues conducted a series of studies designed to understand how specific mitigators are associated with sentencing outcomes in capital cases (Bjerregaard, Smith, & Fogel, 2005; Bjerregaard, Smith, Fogel, & Palacios, 2010; Gillespie, Smith, Bjerregaard, & Fogel, 2014). The Project involves a wealth of data culled from trial and appellate records, the Department of Corrections, the Medical Examiner's office, and other publicly available sources of information that allows for control of a multitude of factors. Of particular importance to this series of studies is information gleaned from the "Issues and Recommendation as to Punishment" forms that capital juries are required to complete. The form asks the jury, as a collective unit, to

[11] According to McPherson, a total of 81% of the sentencing opinions from death cases that were reviewed and coded were the result of jury trials.

[12] McPherson (1995) notes that "personality disorders and depression were cited as qualifying" (p. 292) though it is not clear what percentage of the cases met those criteria as opposed to the criteria for intellectual disability, which also was included in this category.

acknowledge in writing either their acceptance or rejection[13] of each aggravating and mitigating circumstance submitted at trial. The first of these studies focused on North Carolina's two statutory mental health mitigators,[14] collectively referred to by the authors as diminished capacity. When evidence of diminished capacity was accepted, the probability of a sentence of death decreased. However, when such evidence was presented and rejected, it was associated with an increased probability of a sentence of death (Bjerregaard et al., 2005). A subsequent study found that a specific mental illness or disorder was presented in just under one-third (29.7%, n = 248) of the 834 cases in this North Carolina sample (Gillespie et al., 2014). Such evidence of a specific mental illness or disorder tended to be accepted by the jury (68.5%, n = 170). At the bivariate level, juries were significantly less likely to vote for death when they accepted (38.2%) as compared to rejected (82.1%) evidence of a specific mental illness or disorder. When subjected to multivariate analyses with multiple controls for both case characteristics and demographics,[15] however, acceptance of a specific mental illness or disorder was no longer significantly associated with a reduction in death sentences; rejection of a specific

[13] This is coded as a dichotomous variable, i.e. each jury was coded for each aggravating and mitigating circumstance in the state statute as "not submitted or rejected" or "accepted" per the "Issues and Recommendation as to Punishment" form (Gillespie et al., 2014, p. 706).

[14] According to Bjerregaard et al. (2005), the two statutory mitigators were: "The capital felony was committed while the defendant was under the influence of mental or emotional disturbance" and "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired" (p. 120).

[15] According to the authors, case characteristics included "whether the offense included multiple victims, of the defendant was clearly the triggerman…the total number of aggravators accepted" while demographic characteristics included factors such as the defendant's and victim's respective sex, age, and race (706).

mental illness or disorder remained significantly associated with an increased probability of a sentence of death. In fact, the analysis found that it was worse for the defendant to present and then have a jury reject evidence of mental illness than to refrain from presenting such evidence at all.

Stites and Dahlsgaard (2015) looked at the influence of mental health mitigators in federal capital cases. The statutory scheme of federal cases is similar to that of the states in that the case is to be decided based on a consideration of aggravating and mitigating circumstances. One area where federal cases differ from those in the states is that the prosecution and defense must first present their case to a U.S. Attorney General's committee, and ultimately the U.S. Attorney General must decide whether to authorize seeking a sentence of death. Thus, Stites and Dahlsgaard (2015) looked at the influence of mental health mitigators on both case outcomes and on the U.S. Attorney General's decision whether to authorize proceeding with a capital case. They found that there was no direct effect of the mental health mitigators on either decision. Rather, Stites and Dahlsgaard found that cases with mental health evidence differed significantly from cases without such evidence (those with mental health evidence were "more likely to have physical evidence, increased heinousness of the underlying offense, and commission of underlying offenses against strangers", p. 692) and that those case characteristics correlated positively with more severe outcomes. As the authors note, it is unclear how the juries interpreted the evidence, and, more generally, how the attorneys presented evidence of mental illness. Further, their measure of mental health evidence combined measures of low IQ with a diagnosis of mental illness and thus any effect may be muted by that combination. Regardless, Stites and Dahlsgaard's work reiterates that mental health evidence does not axiomatically serve as mitigation.

The final way in which researchers have looked at the influence of mental illness on capital case outcomes is by analyzing interviews of the jurors who served on such cases. Garvey (1998), Jochnowitz, (2014), and Sandys and McClelland (2003) each relied on data from The Capital Jury Project[16] (CJP) in their analyses. Garvey analyzed findings from the 153 capital jurors interviewed for South Carolina portion of the CJP. The jurors were asked how "the defendant had a history of mental illness" either did or would make them more or less likely to vote for death.[17] Over half, 56.2% (n = 82), of the jurors responded that the defendant having a history of mental illness did/would make them less likely to vote for a sentence a death. Slightly less, 40.4% (n = 59), indicated that such evidence would have no effect, i.e. would make them no more or less likely to vote for death. In comparison, 73.8% (n = 110) of jurors said that the defendant being "mentally retarded" -- and 41.5% (n = 61) said the defendant being under 18 at the time of the crime-- would make them less likely to vote for death.

Sandys and McClelland (2003) found the same pattern of findings when looking at the entire CJP dataset. Rather than combining responses from jurors who served on a case where evidence of these mitigators was presented with those for where it was not, Sandys and McClelland presented the findings for only those jurors for whom the factors were not present in their case. That is, the findings present how these former capital jurors anticipated such evidence would have influenced their voting preferences had it been a factor in their case. Evidence of

[16] For more information on the method of the Capital Jury Project, see Bowers (1995).

[17] Jurors were first asked if "the defendant had a history of mental illness" was a factor in the case on which they served (among many other factors). If the juror indicated that it was a factor, they were asked to indicate how it affected their decision-making. If the juror indicated that it was not a factor, the juror was asked to anticipate how it would have affected their decision-making in another case.

"mental retardation" was anticipated to be mitigating by 80.7% (n = 980) of these jurors; the defendant having a history of mental illness was expected to be mitigating by 67.8% (n = 894) of these jurors; and the defendant being under 18 years of age at the time of the crime was anticipated to mitigating by 43.8% (n = 975) of these jurors. Collectively, these findings suggest that former capital jurors did or would treat evidence of mental illness as more mitigating than the defendant being a juvenile—the latter a categorical exclusion the Court has already handed down in *Roper*. According to this study, then, actual jurors interviewed as part of the CJP but for whom mental health evidence was not a factor anticipate being more sensitive to mental health mitigation than mock jury research predicts.

Rather than focusing on the quantitative portion of the CJP, Jochnowitz (2014) conducted an in-depth qualitative analysis of two cases, one death and one life, where evidence was presented that the defendants suffered from personality disorders. She supplemented the juror interview data with trial transcripts. In both cases, the defense presented two experts who testified to the defendant's psychological condition. Even though one case resulted in death and one in life, the reasons appeared to have little to do with jurors' serious consideration of the evidence regarding the defendant's psychological condition. In the death case, Jochnowitz' (2014) review of the juror interviews concluded that the infrequent references to mental health evidence were that the defendant "was crazy or mad in a pejorative sense" (p. 365), but not in a way that was mitigating. In the life case, "no juror discussed the psychological testimony directly" (p. 377) but rather focused on evidence that the defendant was abused as a child.

The way in which (mock) jurors respond to evidence of mental illness is complicated. In the controlled situation of an experiment, evidence of mental illness, especially that presented through a description of symptoms rather than only a diagnosis, is associated with votes for life

(Barnett et al., 2004; Barnett et al., 2007). Similarly, actual capital jurors anticipate that evidence of mental illness would make them less likely to vote for death (Garvey, 1998; Sandys and McClelland, 2003). In the context of actual cases, however, the specter of disbelief enters the equation. That is, evidence of mental illness is presented and discounted (McPherson, 1995), presented and ignored (Jochnowitz, 2014; Stites and Dahlsgaard, 2015), or presented, rejected and treated as an aggravator (Gillespie et al, 2014). Aside from the couple of cases presented in Jochnowitz, we do not know how actual capital jurors qualitatively interpret or discuss evidence of mental illness. Further, we do not know, on a large scale, if the ways in which capital jurors engage with evidence of mental illness is consistent with the expectations of the law, or namely, if concerns about Sundby's aforementioned Unreliability Principle prevail, i.e. that jurors are indeed ill-equipped to deal with such evidence. The remainder of this article is devoted to filling that gap in knowledge, to further understanding how actual capital jurors engage with evidence of mental illness.

The Current Study

The data for this study come from the CJP, which was designed as a consortium of researchers, including faculty of law and the social sciences, who utilized the same core protocol to interview former capital jurors. The first phase of this project, from which the data presented here come, involved 14 states representing different geographical regions of the country and statutory provisions. In each state, the goal was to interview approximately equal numbers of jurors who ultimately decided for life and death, targeting four jurors per jury. Interviews were conducted face-to-face and lasted, on average, between three and four hours. The first phase of the project resulted in a total of 1198 interviews with jurors, representing 353 different capital trials, 43% of whom served on life and 57% of whom served on death cases. The interviews

chronicle the juror's experience with the entire trial process, starting with jury selection, the guilt phase evidence and deliberation, the sentencing phase evidence and deliberation, attitudes toward the criminal justice system in general and capital punishment in particular, followed by items about post-trial experiences.

The CJP protocol includes a series of closed-ended items that allow for an investigation of how jurors treat evidence of mental illness. As indicated earlier in describing the Sandys and McClelland study (2003), part of a list of potential aggravators and mitigators, jurors were asked whether the defendant having "a history of mental illness" was a factor in their case.[18] Jurors who said "yes" were then asked whether the defendant having a history of mental illness made them much "more likely to vote for death, slightly more likely to vote for death, slightly less likely to vote for death, much less likely to vote for death, or no more or less likely to vote for death." In contrast, jurors for whom the defendant having a history of mental illness was not a factor in their case were instead asked a hypothetical comparison question: "In another case, if the defendant had a history of mental illness, would that make you much more likely to vote for death, slightly more likely to vote for death, slightly less likely to vote for death, much less likely

[18] Jurors were not provided with specific definitions or diagnoses of "mental illness" when presented with this item. We thus cannot account for how each individual juror conceptualized the term ("mental illness"). This could mean that jurors who were presented with evidence related to mental illness failed to recognize and report it as such ("false negatives"); if all jurors interviewed on a case responded in this way, they would not be represented in our subsequent qualitative data. This could also mean that jurors who were not presented with evidence related to mental illness reported inaccurately that they were so-exposed ("false positives"); those jurors will be represented in the thematic quotes below. Ultimately, this item serves to capture the juror's impressions of whether the defendant had a "history of mental illness." Future research should compare actual accounts of what mental health evidence was presented to the jury with the jurors' interpretations thereof.

to vote for death, or not more nor less likely to vote for death?" Hence, this series of questions provides information on both how jurors *think* they would treat evidence of mental illness in the abstract as well as how jurors claim to have *actually* evaluated evidence of mental illness.

In contrast to the Sandys and McClelland study, this study looks at the response of jurors who said evidence of mental illness was a factor in their capital case. Just under 10% of the jurors (9.3%, n = 107) answered "yes," that the defendant had a history of mental illness was a factor in their case. These 107 jurors served on 70 different cases, basically half of which resulted in a sentence of life (48.6%, n = 34) and half in a sentence of death (51.4%, n = 36).[19] .

To test whether there was a significant relationship between reporting that a history of mental illness was or was not a factor in the case and the influence of that factor on voting for a sentence of death, a Chi-square test was conducted, the result of which was highly significant (15.264, p = .004). As presented in Table 1, jurors who reported that mental illness was a factor in their case were both more likely to treat it as aggravation (9.1% vs. 2.6%), and less likely to treat it as mitigation (52.0% vs. 67.7%) than jurors who reported that mental illness was not a factor (i.e. those anticipating their reaction in another case). That is, jurors who said they had actually grappled with evidence of mental illness in their case were less sympathetic than jurors who said they had not; they were less likely to treat it as mitigating and more likely to treat it as an aggravator. Moreover, sizable proportions of both groups (i.e. jurors for whom mental illness

[19] Given that the target number of jurors to be interviewed on each case was four (with some resulting in more and some resulting in fewer juror interviews per case, Bowers & Foglia, 2003, fn. 33, p. 55), it is clear that not all jurors on the same case agreed when a history of mental illness was a factor in the case. That is, when faced with the same evidence, some jurors do and some jurors do not believe that a history of mental illness is a factor in the case.

was a factor in their case as well as jurors answering hypothetically) indicated that evidence of mental illness either did not (39%) or would not (29.7%) make them more or less likely to vote for death, respectively: For these jurors, therefore, mental illness either was or would be irrelevant to their sentencing decision.

Table 1 about here

The question becomes, how exactly do jurors engage with evidence of mental illness? To address this question, we reviewed the narrative accounts of the jurors. As indicated previously, the 107 jurors who said a history of mental illness was a factor on their case served on 70 cases: We located transcribed interviews for 63 of these cases. The interviews of all jurors who served on those cases, 205 jurors in total, were then read. By reading all interviews on the case, we were able to capture the ways in which evidence of mental illness was and was not understood by the jurors. All transcribed interviews were then reviewed for any reference to the role of mental illness in the case. Any and all references to mental health issues, broadly defined, were extracted and copied into a separate Word file, along with the question that prompted the reference.

A general qualitative approach was applied to guide coding of the data. Specifically, the analytic process drew heavily from Strauss's (1987) description of three distinct and sequential phases of qualitative data analysis and coding: open coding, axial coding, and selective coding. Open coding is characterized by an initial sweep of the data wherein the researcher begins to develop concepts or common themes. Axial coding constitutes a second look at the data using the initial concepts and themes as a roadmap; researchers shift focus to attend to the scope and/or variety of data that support these concepts and themes. Lastly, selective coding is the process

whereby researchers winnow out illustrative moments in the data that best speak to these concepts and themes for presentation of the analysis. Ideally, these selections from the data articulate the generalized themes and concepts as well as the nuances among them. Thus, the goal was not to count the number of entries to a particular theme or to compare case outcomes to the discussion of mental health evidence. Rather, the goal was to gain an understanding of how jurors talk about engaging with evidence of mental illness. We now turn to a presentation of the ways in which jurors did so, organized by the themes that emerged from the interviews.

Brutal nature of the crime: Does it "overshadow" the defendant? For some jurors, the facts of the crime are simply so horrific that any mitigation, including evidence of mental illness, becomes irrelevant to their decision-making:

> Almost the act which he committed, I don't know how anybody can do that and be rational and sane at the time you do it but I don't know if that absolves you [from the] responsibility of it (IN 451).

A juror on a different Indiana case discussed the impact of the crime on the other jurors:

> It was strictly a perception on my part, of bias on the jury, bias toward the prosecution from the time that the pictures were shown and the horror [when] the crime was revealed. I also felt that we as a jury were underestimating the significant mental capacity of [the defendant] (IN 527).

For some of the jurors, therefore, the facts of the crime become the primary focus of their sentencing decisions. For example, a juror in Texas noted that "even though there was some discussion about his personality and his character, somewhat of his background, stuff like that, most of the discussion returned to the crime itself. So there was consideration for him as a

person but it didn't overshadow the crime itself" (TX 1586). A juror from California noted that the initial vote at sentencing was split, which led the jurors to discuss:

> "…the crime some more, review the evidence and look at the pictures some more to see how vicious and vile the crime really was. Once we decided that the crime met the legal definition of heinous, we began deliberating over his mental capability and whether he was temporarily insane. We concluded he knew what he was doing because he was so calculated and had planned the crime by purchasing his gun, test firing it, and planning an escape route" (206).

Similarly, a juror in Louisiana (771) pointed to the "cold bloodedness" of the crime as the strongest factor in favor of a sentence of death, noting that the victim was "trying to help [the defendant] , and then he shoots him …" Thus, the characteristics of the crime itself can eclipse serious consideration of the defendant's mental health.

Mental illness as a double-edged sword: Illness is Danger. Research demonstrates a tendency for people to believe that mental illness is associated with violent behavior (Link, Phelan, Bresnahan, Stueve, & Pescosolido, 1999; Phelan & Link, 1998). The jurors here were no different, often expressing concern about the defendant's future dangerousness. In particular, they pointed to the unlikely success of rehabilitation efforts as a reason to treat mental illness as an aggravator. For example, a Kentucky juror described the major disagreements during the penalty phase deliberations as such:

> Whether or not he could be helped. And be able to function in society when he got out. And then there were those who said, no, he doesn't deserve to be back in society. They all thought he was mentally ill, that he needed help and they would help him. And I said,

> the defense's own doctor got up there and said that he could refuse the treatment. I said, doesn't that mean anything to you? That he could manipulate, that's what that doctor said, that [the defendant] was smart enough to manipulate the other psychologist. (KY 718)

A juror from Georgia pointed to a similar theme in response to the question asking about the strongest evidence: "The defense attorney's psychiatric evaluation of [the defendant]… [The prosecutor] asked him point blank, [and he] said, if he were released today and he hadn't had the proper counseling or help he needed, he'd probably commit the same crimes again." (GA 358). The concern that the defendant would not receive the proper treatment and thus his illness was more of an aggravator than a mitigator was shared by a juror in Tennessee (TN 2014): "… even that one gal was like, he might rehabilitate and it's not right to keep him locked up. I was like, that's true but he might not and I felt more responsibility to the people he might hurt by letting him out." When asked specifically what the most serious area of disagreement was, this juror went on to say, "it would have to be on the possibility for rehab [sic] how much weight does that have?"

When the possibility for rehabilitation is perceived to be lacking, mental illness is viewed as an aggravator. For instance, a juror in North Carolina noted that the defendant's "mental problems" were the strongest factor for a life sentence. However, this juror's view of the strongest factor against a life sentence was that the defendant "will be walking the streets still mentally deranged. Some don't want to get better" (NC 1120). That same tension held for a California juror (CA 23) who noted that the strongest factor against a life sentence was that the defendant was "not likely to be rehabilitated and if released, would commit the crime again." Another juror on this case (CA 24) echoed the same sentiment: "We discussed what would

happen if he was released from prison or parole, what would happen to the other prisoners if he were in prison for life, that if he were given life he would be in an 8 x 8 cell for the rest of his life so it might be with good behavior, released for exercise and have to be around other prisoners and that could be dangerous. So we came to the decision that he should receive capital punishment."[20] This juror was initially reluctant to vote for a sentence of death but changed his view, noting s/he "had to work in my mind through his illness to determine whether he did these things because he's ill or the voices did tell him to do this. So what we decided was that *regardless of his illness*, if he was a danger to society then the only solution would be capital punishment" (CA 24, emphasis added). The importance of future dangerousness to the ultimate sentencing decision was stated succinctly by a Texas juror (TX 1588): "There is no way of knowing at that time what [the] future is. Even if there was a lot of mitigating evidence you still would have that big question of whether he would still be dangerous to society." In sum, jurors often interpret the defendant's mental illness as the potential for dangerousness that converts mitigation to aggravation (e.g. Haney, Sontag, & Costanzo, 1994).

(Lack of) Desirable Courtroom Behavior. Jurors appear struck by the defendant's (in)actions in court. That attention is not without consequence. As Sundby (1998) notes: "Above all else, however, the defendant's demeanor and behavior during the actual trial shaped the jurors' perceptions of the defendant's remorse" (pp. 1561-1562). More often than not, those

[20] This juror's concern with the mentally ill defendant's potential for violence in prison may be yet another indicator of Sundby's Unreliability Principle in practice; findings suggests that offenders suffering from mental illness are only modestly more likely to engage in misconduct, including violence, while incarcerated (Cunningham, Reidy, & Sorensen, 2008; James & Glaze, 2006).

perceptions are influenced by myths about mental illness, especially "that a mentally ill defendant comport with…visual images of 'craziness'" (Perlin, 1989, p. 724).

Jurors often pointed to the defendant's *lack* of emotion and interpreted it as a lack of remorse rather than a possible symptom of illness. For instance, when asked directly how the defendant appeared in court, jurors offered the following responses:

"He showed no emotion whatsoever" (GA 359)

"Cold, calculating, no emotion" (KY 624)

"It seemed to me he didn't care. He looked [like] he really didn't care" (KY 724)

"He just seemed so calm. If you [are] going to plead for your life, you think he'd be crying. He was so calm" (VA 1660)

"I couldn't believe that he didn't show any emotion at all… he was almost as if he wasn't there. Nothing seemed to have any effect on him" (VA 1664)

"He did not show remorse at all… he didn't even look like it mattered" (NC 1136)

"Just totally staring into space; he didn't even look anybody in the eye. He had his face down all of the time" (MO 3066)

The defendant's lack of emotion was occasionally attributed to the effects of drugs: "He seemed childlike, like he wasn't aware of surroundings… drugged up, sedated at times, when he was off medication was when he lost [it]" (NC 1120). The defendant appearing sedated was mentioned by a couple of California jurors as well: "He was almost sedated throughout the trial. He always had a blank stare on his face like he wasn't in the room. His body was there but his

mind was somewhere else. Even when he testified, the words just came out like they were rehearsed. He just wasn't there." (CA 131). Similarly, a juror on a different California case said that the defendant appeared "sedated, [he] sat there like a mummy, like he was given medication to keep him quiet" (CA 163). Whether jurors interpreted this behavior in a way that hurt the defendant is unclear.

However, the defendant's 'stare,' as referenced above, is sometimes viewed with more sinister motives: "From the defendant's actions and appearance, he tried to idolize Charles Manson. He would pick out a juror and would stare at them. He stared at me and I would stare back, refused to let him stare me down." (KY 622). An Alabama juror (1807) mentioned that he kept thinking about "the way [the defendant] would stare at the jury, particularly the women on the jury." Another Alabama juror (1836) noted that the defendant in his case "had a glare in his eye when he would look at you."

While it is often the defendant's lack of emotion that captures the jurors' attention, outward expressions of emotion are also viewed negatively by the jurors. Several of the jurors noted that the defendant "smiled" or "laughed," though those references were not presented as a positive reflection of the defendant. In contrast, defendants who cried were, on occasion, viewed with sympathy: "After the guilty verdict, he sort of broke down, he cried a lot. His mother and family cried and he sort of looked more hopeless than he did before… He didn't look as cold as he did before the verdict, he looked soft, like he was falling, not as distant" (KY 671).

What becomes apparent is that the jurors are looking at the defendant and only on rare occasions do they see a glimpse of the familiar: "The only thing that I saw him do that I would consider normal was he did pour a glass of water for one of his lawyers, who happened to be a

woman, when her glass was empty" (MO 3066). All told, references to the defendant's appearance and demeanor typically focused on his disconnectedness, perceived lack of remorse, or threatening nature – none of which typically resulted in positive perceptions for jurors.

Malingering: Feigned Illness and Tricked Doctors. Jurors also indicted a broad distrust of the defendant's illness and a feeling that the defendant was trying to outsmart the court. For instance, the defendant was seen as "playing a mental game" (KY 624), as "putting on a show, tried to commit suicide" (KY 601), as having "tried to act insane, I think it was a show; he went all limp, had to carry him out of the courtroom" (SC 1237). More specifically, there was a sense that the defendant was lying: "I don't know if it's incompetence, it's a slickness, whatever you want to call it, just outsmart you, the lying" (IN 526); "I think that during his testimony, there were times when he appeared to be kind of a cunning individual, and not one that is an individual that can't understand right and wrong. He knew perfectly well what he was doing" (KY 725); "He didn't testify, but his body language, his aura, kind of gave of aura that he's smarter than anyone else in the room" (TX 1588). Even when the defendant is seen as sincere at first blush, a tinge of doubt can creep in: "We got him on the stand one time he seemed fairly sincere then, but not really, I felt like he was faking it" (GA 381).

The idea that the defendant was faking mental illness to escape punishment is often accompanied by skepticism and mistrust of the mental health system and professionals. A case out of Georgia is particularly illustrative of this trend. The defendant had been found incompetent to stand trial; he spent several years in a mental institution until he was found competent and stood trial in front of these jurors. One of the jurors who noted that mental illness was not a factor in the case also mentioned that the defendant had been in a mental institution awaiting trial. The juror went on to say that the defendant "had made statements in jail and in

the hospital that he knew how to fake being crazy and he'd done it before and he'd do it again to get out of this thing" (GA 308). Another juror on this case pointed to the "state psychiatrist" as offering testimony that was hard to believe: the psychiatrist "spent 15-20 minutes per month analyzing [the defendant]. When asked if you could get to know someone over 20 minutes per month, said, 'oh yes,' said, 'if someone walked through door now and sat down, I could analyze them before they sat down.' I said, these people are in charge of our mental wards in prisons?" (GA 306). The state's expert gave the jurors an opening through which to discount his testimony; they could not believe his ability to get to know a patient in 20 minutes per month. In contrast, another juror on this same case pointed to the prosecution's "doctors who testified" as offering the most important or influential testimony because they "testified that [the defendant] wasn't so much insane, but [had] taken drugs in [the] past that caused some of the problems mimicking insanity or something" (GA 305). Thus, here is a case where the defendant's competency was front and center – jurors were aware that he had been found incompetent to stand trial and spent substantial time in a mental institution – and yet several of the jurors dismissed its relevance to their consideration of the appropriate sentence. Rather, they believed the defendant's statement that he could (and evidently in the minds of the jurors did) fake mental illness.

The Role of Experts: Clarification or Confusion? Doubtless, this is the theme expressed most often by the jurors. Even when jurors on the same case disagreed on whether mental illness was a factor, they often discussed the substance and believability of expert testimony regarding the defendant's mental health. Thus, mental illness became irrelevant to some jurors at least in part due to their perceptions about mental health experts generally or what the mental health experts either said or failed to say during their testimony.

The lack of exactness in, or more generally the inconsistency of, the testimony of mental health experts was a recurring theme that emerged in the interviews. For example, an Indiana juror noted that "there were three psychiatrists that were court appointed, that testified for the prosecution. There was a defense psychiatrist that got up and said exactly an opposite thing. So, that left us with a question of who to believe, whether to go with sheer numbers? And it meant that information on a very critical area was fairly fuzzy" (IN 527). A juror on a different Indiana case echoed the same sentiment: "The big decision was is the guy sane or insane? And it's almost like a shot in the dark there. You do not know what the guy is thinking at the time he does something. You could have all the psychiatrists in the world up there for as long as you want and still you're the one calling the shot" (IN 451).

A similar quandary was mentioned by a California juror when asked if they found any testimony hard to believe: "I found it hard to believe, medical testimony of psychiatrists for both defendant and plaintiff since the testimonies conflicted. I just decided who I thought was reasonable" (CA 71). A Texas juror also pointed to the conflicting testimony: "The psychiatrist, or someone of that nature. I think the defense and the prosecution tried to counter each other with the medical professionals, to say that yes, he is dangerous and another saying no, he wasn't. It was sort of a trade-off there" (TX 1586). A juror in Kentucky discussed how he dealt with that trade-off: "The prosecution brought up their doctors, their psychologist that said this boy's ill, and the other one says no, he's not. And [the jurors are] saying, the doctor said he's ill, so he's ill. And I said, they're paying him. They're going to pay whoever they can find that will say that boy's mentally ill. Just because they said, they didn't tell us how to deal with conflicting testimony… one [doctor] said he is [mentally ill] and one said he isn't. Who's to say who's the smarter doctor? It's not my place to say. So I went with the majority. Is that wrong?" (KY

718). When asked if there was anything else that was important in understanding the jury's decision, this juror said, "We weren't told how to handle conflicting testimony. I thought that was important" (KY 718). Another juror on this case also seemed less than impressed by the expert testimony: "They got those shrinks up there, the psychiatrists and psychologists and they just kept rattling on and on and on. They said stuff that had no need to even be said" (KY 719).

Jurors also expressed doubts about the relevance of expert testimony that spoke to the history of the defendant rather than their current state. A jury in Tennessee was exposed to a defendant who was committed to a (mental) state hospital when he was a juvenile. The psychologist who treated the defendant when he was in that mental institution testified at the current trial. One of the jurors interviewed appreciated the doctor's perspective but was not overly impressed: "I know psychology is not an exact science and it would be difficult on this kind of thing, but he seemed a little wishy washy, but he gave us more insight because you see, he had seen [the defendant when he was a juvenile] and had seen him in the Emergency Room [at the time of the current crime]. He had about 10 years of focus on him, history is maybe the word, of what was going on and very dysfunctional situation, bad situation" (TN 2014). However, another juror on this same case dismissed the 'history' of dysfunction and difficulty: "To me, [the defendant] wasn't mentally defective. A mentally defective person's got some problems and to me he wasn't because he was out" (TN 2015). Hence, once the defendant left the mental institution, his mental status was no longer in question, even though one of the jurors noted that the defendant's mother "took him out against medical advice" (TN 2014).

Experts' financial or professional incentives were a further concern for jurors attempting to weed through conflicting evidence, as described by a California juror (CA 72):

> [T]here was [an expert]… that had done something called brain wave mapping. The process where they can actually… have a printout of the brain wave[s]… (Interviewer: Why did you find testimony hard to believe?) Cause he owned the machine, trying to justify [the] process, [expert was a] professional witness."

Positive statements about the testimony of mental health experts in furtherance of mitigation were hard to come by. Rather, jurors often pointed to the mental health expert's testimony regarding a particular point as a reason why the defendant *should* receive a sentence of death. For instance, jurors noted that the defendant knew right from wrong and thus did not meet the legal definition of insanity. Such jurors did not readily move from that position in the penalty phase despite the more lenient standards applied there: It was as if once the insanity defense was rejected in the guilt phase, so too was any mental health evidence offered by the defense at the penalty phase[21].

For example, when asked what prosecution evidence or witness at the punishment stage of the trial was most important or influential, an Indiana juror (IN 526) responded:

> To me, the most convincing was the first part, at that stage, it may have been the psychiatrist or the doctor… because you got a better explanation of how the medication [that the defendant] had supposedly been on since he was a child and the effects of it, and that it did not cause him not to know right from wrong.

Likewise, a California juror (CA 205) noted that the "psychiatrist's testimony" was most important because "he talked about [the defendant's] mental condition, but he also stressed that

[21] While discussed here in the context of expert testimony, this pattern of jurors deciding mental health evidence strictly in terms of guilt-phase criteria, rather than as a sentencing consideration, may be yet another indicator of Sundby's Unreliability Principle in practice.

the defendant knew the difference between right and wrong, that there was no question of incompetence as far as that was concerned." Similarly, a juror on a different California case explained that the defense "did not deny his guilt at all. They tried to make us believe that he was not functioning properly, he was partly insane or something, that he didn't know what he was doing but that was not so; he knew exactly what he was doing" (CA 215). And a juror on yet another California case (CA 23) appeared to struggle with the defendant's mental health status and how it should figure into his decision-making: "That man was… evidently deranged, but he knew right from wrong and that's what I had to learn during the procedure. You know, someone can be deranged but yet know right from wrong and that's [why] we didn't find the motive really." Then, when asked how well "the work of a madman" described the defendant, this juror responded with: "I don't know about this one because he was evidently insane but not insane enough [that] he didn't know right from wrong … Evidently you have to be mad in a way to do something like that [though] you can be sane and do something like that but yet he knew the difference, he knew." Clearly, the critical point for this juror was coming to the belief that the defendant knew right from wrong. Another juror on this case echoed the importance of the defendant knowing right from wrong as critical to the jury's decision. When asked if the jurors discussed, during the guilt deliberations, whether the defendant would or should get the death penalty, this juror responded yes and then went on to convey that the jurors said that the defendant "knew right from wrong. There was proof. He was a danger to others" (CA 24). This juror then went on to say that he never knew, "until [he] was a juror, that you can be insane but if you knew right or wrong" then death was still an option.

The extent to which the defendant knowing right from wrong is pivotal to jurors' decision-making is also reflected in a South Carolina juror's response to a question about

whether any defense witness' testimony backfired. The juror noted that, in response to the prosecutor's question, the defense's expert said that the defendant "definitely knew at the time of the murders, right from wrong, and he said it so emphatically, as though he wasn't, I mean he was just being truthful. So that just told me he wasn't insane… I think it's sick what he did but if he was mentally sick and just, you know, outta control, beyond anything he could do about it, then no, I wouldn't seek the death penalty for someone that's sick and can't help themselves, only for someone that's sick in the sense of being mean, that kinda sick" (SC 1250). This juror then went on to say that he might have changed his mind on sentencing "[i]f they had proven that he was mentally ill and didn't know right from wrong at time crime was committed" (SC 1250). Hence, the key issue in determining if a defendant suffers from mental illness becomes whether he knows right from wrong, an indicator of insanity that is determined during the guilt-innocence phase. If the defendant does have such capacity in the juror's estimation, then mental illness does not exist and it becomes lost as a potential mitigator, despite the fact that, as a legal matter, mental problems short of incapacity to know the act was wrong, can be mitigating.

A variation of the 'knowing right from wrong' theme emerged when jurors pointed to particular aspects of the crime itself as proof that the defendant was not insane. That is, if the defendant really was insane, jurors reason, he would not have had the wherewithal to cover his tracks, to hide a weapon, or more generally to engage in rational behavior. For example, for a Kentucky juror, the fact that the defendant was "reasoning" during the crime was sufficient evidence that insanity was not an issue:

> …[the victim] wouldn't do other things that [the defendant] wanted to do with her and that's when he got mad and decided that if you won't do these things, I'll kill you and that's what he did. At that point, if he was rational enough to know that he wasn't getting

> his desires satisfied and he was going to take vengeance because he couldn't get satisfied, that's where I put the premeditation and put the insanity completely out because he was reasoning, just like you and I (KY 624).

Similarly, an Alabama juror mentioned that "if [the defendant] was insane when he got the gun he wouldn't have come up behind the house and snuck up on the [victim]" (AL 1805). Another juror on this case mentioned that the jury focused on "whether or not [the defendant] was thinking" (AL 1807) as they decided on the punishment. Likewise, a Tennessee juror (TN 2017) noted that there was "some conversation [between the defendant and the accomplice] about who was going to shoot who, so that he was in himself enough to know what he was doing and how he was doing it." Similarly, a juror from South Carolina responded that the single most important factor in his guilt decision was that the defendant "was mentally competent enough to hide his acts" (SC 1312). This juror then went on to say that "the jurors weren't experts and couldn't really decide mental illness." And then, when asked about the major points on which jurors disagreed, this juror answered "mental retardation in relation to knowing right and wrong." In all of these cases, the jurors pointed to a particular aspect of the crime, something that suggested to them that the defendant could not have been insane. Again, once that determination was made, jurors rarely engaged further with any evidence concerning the defendant's mental health and its impact as a mitigator.

The final sub-area to emerge in this general theme of experts is related to jurors' confusion regarding references to mental health issues. One South Carolina juror (SC 1312), for instance, used the concepts of competency, mental illness, knowing right from wrong, and intellectual disability ("mental retardation") interchangeably. As some of the other quotations provided above indicate, he was not alone. A review of the interviews reveals that jurors rarely

discuss specific mental illnesses; only a handful of jurors mentioned specific diagnoses such as schizophrenia or post-traumatic stress disorder. Rather, the jurors offer their own descriptions of the defendant's mental health:

> I think he was paranoid in society (NC 1093)
>
> It wasn't contended he was mentally ill, he was mentally disturbed (LA 772)
>
> Mentally ill like 'had a bad day' (SC 1147)
>
> His brain had deteriorated; a peculiar little man but not a mad person who has no control over self; he was mentally defective, he was not retarded but he was mentally defective (NC 1153)
>
> I don't think he was crazy; they wanted it to appear that he was mentally unstable to a certain degree; they didn't say mental illness, they said mental instability (SC 1224)
>
> They didn't plead insanity but I think they thought they put enough doubt in our minds for us to think that he was dysfunctional to the point of insanity or dysfunctioning as far as his mental capabilities (KY 671).
>
> [The defense] used his insane, I guess it would be mental, and they did use that, his mental capacity, I think that's what they used, it's like poor judgement (IN 526).
>
> Showed the defendant had a character problem. If he couldn't control his behavior during retrial, we talked about that, right here when his life is on the line he acts out. (TX 1588)

Jurors thus invoked their own definitions and explanations of mental health evidence, and rarely concluded that it proved a serious illness. The descriptions above also reflect an amalgamation of constructs ranging from issues of sanity to mental illness to intellectual disability, and fail to distinguish between evidence presented in support of a defense and evidence designed to speak to mitigation in sentencing.

Conclusion

When faced with evidence of mental illness, the jurors in this study were significantly more likely to see it as aggravating and less likely to see it as mitigating than was anticipated by jurors for whom mental illness was not a factor in their case. This disconnect raises the question of whether the experience of serving on a capital case somehow influences the ways in which jurors engage with and evaluate evidence of mental illness. It further raises the question of whether our current system of selecting capital jurors adequately accounts for this apparent transformation. A key component of capital voir dire involves ensuring that jurors are not "mitigation impaired," that they are able to consider evidence in mitigation in accordance with extant case law (*Morgan v. Illinois*, 1992). If jurors, during voir dire, cannot accurately anticipate whether they would view evidence of mental illness as an aggravator or a mitigator, attorneys are forced to select jurors who should never have been qualified to serve on a capital case.

The jurors' accounts of the role of mental illness suggested several themes. Notably, the jurors pointed to a lack of meaningful assistance from expert witnesses. Recently, the U.S. Supreme Court, in *McWilliams v. Dunn* (2017), recognized that the defense would be disadvantaged without "assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively assist in evaluation, preparation, and

presentation of the defense" (internal citations omitted, slip op. at 14). The Court went on to note that the lower court "did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense … would have mattered. There is reason to think that it could have" (*McWilliams v. Dunn*, 2017, slip op. at 16). One of the ways that such assistance could matter, according to the Court, is by explaining that "purported malingering was not necessarily inconsistent with mental illness" (*McWilliams v. Dunn*, 2017, slip op. at 15). That possible connection appears to have been lost on the jurors in this study, who often mentioned that they thought the defendant was faking mental illness and had somehow tricked the doctors to believe the same.

In another, somewhat contradictory opinion, the U.S. Supreme Court has ruled that Arizona's prohibition on expert psychiatric testimony regarding mens rea is constitutional due to "a real risk that an expert's judgement in giving capacity evidence [as opposed to insanity evidence] will come with an apparent authority that psychologists and psychiatrists do not claim to have" (*Clark v. Arizona*, 2006, p. 779). Here, the concern appears to be that factfinders, jurors, will be overly influenced by the opinions of experts. The data presented in this study suggest that concern is unwarranted. Instead, the jurors' accounts convey that conflicting mental health testimony is treated as "a trade-off" between adversarial sides, ultimately decided by "majority" rule in the jury room.

The challenge becomes whether to "tinker" (*Callins v. Collins*, 1994, Blackmun, J., dissenting, p. 1130) with the way in which evidence of mental illness is presented to a capital jury or to determine that this type of evidence is "beyond a sentencer's reliable evaluation" (Sundby, 2014, p. 511). The usual response is to rely on instructions as curative. Interestingly, however, such an option was not discussed when the Court created its exceptions to the death

penalty in *Atkins* or *Roper*, rightfully so because understanding of instructions is notoriously poor, especially as it pertains to mitigation (Bowers, Kelly, Kleinstuber, Vartkessian & Sandys, 2014; Smith & Haney, 2011).

At a minimum, this study suggests that independent experts who can assist the defense in presenting their case are needed. Whether their involvement would increase the reliability of juror sentencing decisions is questionable, however, because the findings here lend strong support to Sundby's (2014) Unreliability Principle. As noted earlier, his review of *Atkins* and *Roper* outlined several factors that the Court noted as indicators of unreliability affecting a sentencer's interpretation of mitigation: that the defendant's "demeanor would make them appear to be remorseless," that such mitigation "poses the risk that it will be improperly turned into aggravation," that complex and contrary expert testimony is "likely to generate confusion and misunderstanding among the jurors," and that "the sheer 'brutality' of the crime will preclude jurors from properly considering the mitigation" (p. 511). Nearly all of the concerns articulated by the Court, using Sundby's read of the *Atkins* and *Roper* decisions[22], are expressed by actual capital jurors who grapple with evidence of mental illness. While the Court has yet to extend these concerns and precedents to cases involving capital defendants who suffer from mental illness, the analysis presented here offers a compelling rationale for doing so.

[22] Sundby (2014) discussed two additional factors, that defendant's mental illness may impair "cooperation with his lawyer and the lawyer's ability to prepare a defense" or that mental illness may "distort the defendant's thinking processes that are likely to produce bad [strategic] decisions [related to presenting his defense]" (p. 515). These are consequential issues, though not issues jurors are necessarily privy to in their role at trial and thus it is not surprising that they are not reflected in our data.

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Table 1: History of Mental Illness and Voting for Death

Was the defendant's history of mental illness a factor in the case?	Yes, it was a factor and it made me…		No, it was not a factor, but it would have made me…	
	%	(#)	%	(#)
Much more likely to vote for death	2.6%	(2)	0.4%	(4)
Slightly more likely to vote for death	6.5%	(5)	2.2%	(20)
No more or no less likely to vote for death	39.0%	(30)	29.7%	(266)
Slightly less likely to vote for death	31.2%	(24)	43.6%	(391)
Much less likely to vote for death	20.8%	(16)	24.1%	(216)
Total:	100.1	(77)	100	(897)