Significant Empirical Findings – Spring 2009

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CRITICAL FACTORS DRIVING CAPITAL CASES – the “trifecta”

► The Viciousness of the Crime

► The Defendant’s Perceived Future Dangerousness

► The Defendant’s Remorse
HOW BAD WAS IT?

► Juror’s perceptions of how bad the crime is often the most important factor in their sentencing decision.
  ▪ The more intentional jurors think the crime is, the more vicious they think it is.
  ▪ Race influences juror’s perception of viciousness

► Many jurors (approximately 1/3) believed the law required them to impose the death penalty if the crime was vicious or heinous
HOW DANGEROUS IS HE?

► Future Dangerousness is always on juror’s minds

► Perceptions of future dangerousness are driven by:
  ▪ How bad the crime was
  ▪ Parole eligibility
    ► Jurors do not believe LWOP
    ► Jurors are not particularly concerned about violence in prison
  ▪ Race

► Concerns about future dangerousness drive life leaning jurors to vote for the death penalty
IS HE SORRY?

► Remorse (and lack thereof) can make a difference

► Juror perceptions of remorse are driven by
  ▪ The facts of the crime
  ▪ Acceptance of responsibility
  ▪ Client demeanor
    ► Jurors watch clients very closely. Some descriptions include, “blase,” “cocky,” “bored,” “arrogant,” “proud”
  ▪ The ability to empathize with the client
  ▪ Race
MITIGATION MATTERS!

► Mental retardation is very mitigating.
  ▪ Even in cases where they do not find MR it is still mitigating

► Other very important mitigating factors are:
  ▪ Mental illness
  ▪ Child abuse
  ▪ Residual doubt (but it is VERY hard to prove)

► Other types of mitigation still resonate with some jurors
  ▪ Alcoholism
  ▪ Institutional failure
WHY MITIGATION MAY BE DISCOUNTED.

Factors which may lead a juror to discount mitigation:

- Lack of acceptance of responsibility/remorse
- Lack of corroboration and support
- Race
  - White jurors less likely to empathize
  - White jurors more likely to misuse mitigation
THINKING ABOUT MITIGATION IN LIGHT OF THESE FINDINGS

► Lesson 1 – You are not selling your mitigation package to the jury but to jurors.
► Lesson 2 – Beware of the residual doubt case
► Lesson 3 – Voir Dire is critical
► Lesson 4 - Education in the “language of life” is critical
► Lesson 5 – Packaging is everything.
LESSON 1 -- IT’S JURORS NOT JURY

- There is virtually no mitigating evidence which will resonate with all twelve jurors. You should think about what might resonate with a cluster of jurors.
  - On the other hand, it has to be coherent (See Lesson 5)
- Mitigation is a “tool” which you give to a “life-leaner” juror to get out of the jury room with their life vote intact.
  - It is a response to the “killers.”
If the trial defense is “wrong guy-did not do it,” and the jury finds the defendant guilty, then:
- Almost all mitigation will be discounted as yet another attempt by the defendant to avoid responsibility for his actions.

Jurors in real cases do not distinguish between guilt beyond a reasonable doubt and residual doubt.
- If they find him guilty, in their minds there is no residual doubt.

This works best in
- Multiple defendant cases where the issue is not who, but who did what and
- Cases where intentionality is the issue.
Voir Dire is critical because the empirical evidence clearly reveals that many jurors who actually sat in capital cases think the death penalty is the only acceptable punishment or is legally required if:

- Murder was planned or premeditated (57%);
- More than one person was killed (52%);
- Police Officer is killed (48%);
- Murder is accompanied by another crime (23%);
- The defendant poses a future danger (32%);
- The defendant’s conduct was heinous (41%).
LESSON III -- VOIR DIRE IS CRITICAL -- RACE

Voir Dire is critical because it is important to select a racially diverse jury.

- 2/3 of white jurors vote for death on the “first vote,” compared to 1/3 of black jurors
- The “white male” effect
  - 5+ white males = death
  - White males are more likely to believe the defendant is dangerous and not remorseful and are least able to identify with the defendant. The opposite is true of black males.
Jurors do not understand key “language of life” sentencing phase concepts. Many jurors think:

- They must sentence the defendant to death if the jury determines that the murder is intentional or vicious (1/3);
- A mitigating factor must be proven beyond a reasonable doubt (60%+);
- All jurors must agree on the existence of a mitigating factor (50%+);
- They can only consider statutory mitigating circumstances (25%).
Confusion leads to death

- When jurors do not understand the instructions they are more likely to vote for death.
  - The jury’s aggregate knowledge of the relevant procedural law regarding aggravation and mitigation directly correlates with a life sentence.
- Race discrimination is most pronounced when jurors are confused.
LESSON V – PACKAGING IS EVERYTHING

Jurors tend to dismiss mitigation that is based primarily on the testimony of post-crime retained defense experts.

- “Hired guns” who will say anything

“Lay” experts and historical witnesses are more convincing to jurors and also make the retained expert more credible.
LESSON V – PACKAGING IS EVERYTHING

Jurors do not log in the evidence like a computer. They create a story from the evidence about both the crime and the defendant.
Jurors believe that life in prison is easy. Prisoners have:

- Television
- Free meals
- And they don’t have to work.

These views can impair their ability to view a life sentence as the appropriate punishment for murder.
The evidence is mixed as to how much effect jurors give VIE.

- Some mock juror studies report that the less respectable the victim, the more significance jurors gave mitigating evidence.
- The Capital Jury Project data does not indicate a particularly strong correlation between VIE and death sentences.

A stronger effect is found in how readily a juror can identify with the victim and her activities at the time of the killing.
OTHER EMPIRICAL FINDINGS --

deliberation

► Deliberation is not your friend.
  ▪ If as many as 3/4 of the jurors initially agree that the defendant should be sentenced to death, that will almost always be the verdict.

► Premature deliberation is pervasive.
  ▪ Nearly half the CJP jurors had determined what the appropriate punishment should be before the sentencing phase began.