


1997

The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony

Scott E. Sundby

University of Miami School of Law, ssundby@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

 Part of the [Criminal Procedure Commons](#), [Law and Psychology Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1997 (1997).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE JURY AS CRITIC: AN EMPIRICAL LOOK AT HOW CAPITAL JURIES PERCEIVE EXPERT AND LAY TESTIMONY

Scott E. Sundby*

When a psychologist or psychiatrist testifies during a defendant's competency hearing, the psychologist or psychiatrist shall wear a cone-shaped hat that is not less than two feet tall. The surface of the hat shall be imprinted with stars and lightning bolts. Additionally, a psychologist or psychiatrist shall be required to don a white beard that is not less than eighteen inches in length, and shall punctuate crucial elements of his testimony by stabbing the air with a wand. Whenever a psychologist or psychiatrist provides expert testimony regarding the defendant's competency, the bailiff shall . . . dim the courtroom lights and administer two strikes to a Chinese gong.

Proposed amendment to bill in New Mexico Senate setting licensing requirements for psychologists and psychiatrists.¹

Some of 'em were like psychiatrists and stuff . . . there just to give their opinion in a psychiatry, psychiatric way.

Juror describing expert testimony at death penalty trial.²

* Professor of Law, Washington & Lee School of Law. Funding for the Capital Jury Project was provided by National Science Foundation Grant SES 90-13252. The research and writing of this Article was supported by the Frances Lewis Law Center. I would like to thank Professors David Faigman, Chris Slobogin, John Monahan, Richard Bonnie, Brian Murchison, William Geimer, and William Bowers for their comments on earlier drafts of the Article and participants in faculty workshops at the University of Florida School of Law and Washington & Lee School of Law. I also am very grateful to the large number of students, too numerous to name individually, at Hastings College of the Law and Washington & Lee who spent endless hours doing logistical work, helping conduct the interviews, and processing the mountain of data. Most of all, I thank those jurors who invested the time and emotion in helping us begin to understand how juries make their decisions.

¹ S. Floor Amend. 1 to S.B. 459, 42d Leg., 1st Sess. (N.M. 1995).

² Capital Jury Project (California) ("the Project"), Juror M₁D₁. For an explanation of codes used for jurors and methods of quotation, see *infra* note 33.

I. INTRODUCTION

IF one wants to spark a debate, few flints are as effective as the issue of expert witnesses and their proper role. Whether it is a solemn gathering of law professors or a television talk show, almost everyone has an opinion about the escalating use of expert testimony, especially if it focuses on psychological theories that have been popularly dubbed by some critics as "the abuse excuse."³ Unlike even a decade ago, few law students now graduate without having crossed paths in the normal course of their studies with a number of legal defenses based upon social science evidence.⁴ And, courtesy of the media's coverage of high profile trials like that of the Menendez brothers, non-lawyers also are likely to be conversant with expert testimony on matters such as battered woman or abused child trauma syndrome. The increasing reliance on what Professors Walker and Monahan have termed "social framework evidence"⁵—social science evi-

³ See Alan M. Dershowitz, *The Abuse Excuse* 38 (1994) (describing the problem of "psychobabble" and arguing "we must not be seduced by the jargon of experts, particularly 'experts' who are really advocates for a particular political position or worldview"); George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* 234 (1995) (calling testimony of Menendez trial expert "pretentious babble" that would be "laughable" except "there is a serious risk that when an expert takes the stand, recites her qualifications, and the judge 'qualifies' her as someone who can speak with authority, she can influence a jury's deliberations"). But see Richard J. Bonnie, *Excusing and Punishing in Criminal Adjudication: A Reality Check*, 5 *Cornell J.L. & Pub. Pol'y* 1, 7-9 (1995) (arguing that the perceived trend of abuse excuse is "unadorned hyperbole" if one closely examines the cases and their facts).

⁴ Consider, for example, that as recently as 1988, a survey found that only one of seven leading criminal law textbooks included materials on battered woman syndrome. Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 *J. Legal Educ.* 101, 105 (1988). Today, a criminal law casebook would be considered woefully inadequate if it did not cover battered woman syndrome. Moreover, the casebook is now likely to include materials on issues such as battered child syndrome and defenses predicated on psychological disorders. See, e.g., Sanford H. Kadish & Stephen J. Schulhofer, *Criminal Law and Its Processes* 834-35, 1028-32 (6th ed. 1995) (excerpting battered child syndrome case and reviewing psychological disorder defenses); John Kaplan et al., *Criminal Law* 765-72 (1996) (examining post-traumatic stress syndrome, postpartum psychosis, premenstrual syndrome, and gambling disorder).

⁵ Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 *Va. L. Rev.* 559, 563-70 (1987). While Professors Monahan and Walker believe that social framework evidence generally is proper for jury consideration, they advocate that social framework evidence be presented to the jury through jury instructions rather than by expert testimony. *Id.* at 592-98.

dence used to provide a jury a context within which disputed factual issues may be understood—has intensified an already long-standing dispute over the proper use of expert testimony. Indeed, a burgeoning academic cottage industry has arisen over when expert testimony, especially that concerning the “softer sciences” such as psychiatry, should be allowed into evidence.⁶

Yet surprisingly, despite the extensive debate, we know relatively little about how an expert witness’s primary audience—the jury—perceives expert testimony and uses it in its decision-making. Studies have been done to assess the impact of expert witness testimony pertaining to matters such as eyewitness reliability,⁷ battered woman syndrome,⁸ and rape trauma syndrome,⁹

⁶ Professors David Faigman and Stephen Morse have best articulated the arguments against the introduction of social science evidence that has not been scientifically validated. See, e.g., David L. Faigman, *To Have and Have Not: Assessing the Value of Social Science to the Law as Science and Policy*, 38 *Emory L.J.* 1005 (1989) (proposing that social science evidence be subjected to a test of scientific validity); Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 *Va. L. Rev.* 971 (1982) (challenging the validity and value of much of the behavioral science used in criminal cases).

The seminal piece outlining the argument for the admission of such testimony is Richard J. Bonnie & Christopher Slobogin, *The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation*, 66 *Va. L. Rev.* 427 (1980) (proposing that if adequate standards are maintained for the training and practice of mental health professionals, such experts have a proper role in criminal trials for providing behavioral explanations to assist the fact finder). See also Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 *Md. L. Rev.* 1 (1993) (making comprehensive argument of how psychological character evidence can help achieve “individualized justice”).

⁷ See, e.g., Steven D. Penrod & Brian L. Cutler, *Eyewitness Expert Testimony and Jury Decisionmaking*, *Law & Contemp. Probs.*, Autumn 1989, at 43 (simulated trial studying effects of expert testimony on jurors’ perception of eyewitness identification).

⁸ See, e.g., Regina A. Schuller & Neil Vidmar, *Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature*, 16 *Law & Hum. Behav.* 273, 274 (1992) (finding “substantial gaps in our knowledge” of how jurors use battered woman evidence); Neil J. Vidmar & Regina A. Schuller, *Juries and Expert Evidence: Social Framework Testimony*, *Law & Contemp. Probs.*, Autumn 1989, at 133, 151-55 [hereinafter Vidmar & Schuller, *Juries and Expert Evidence*] (discussing Regina Schuller, *The Impact of Expert Testimony Pertaining to the “Battered Woman Syndrome” on Jurors’ Information Processing and Decisions* (1990) (unpublished doctoral dissertation, University of Western Ontario) (mock jury experiments using expert evidence on battered woman syndrome)).

⁹ See, e.g., Nancy Brekke & Eugene Borgida, *Expert Psychological Testimony in Rape Trials: A Social-Cognitive Analysis*, 55 *J. Personality & Soc. Psychol.* 372 (1988) (mock juror study on effect of rape trauma syndrome evidence); Patricia Frazier &

but they tend to rely upon mock juries and simulated trial settings. As Professors Vidmar and Schuller noted after a comprehensive review of the literature:

There have been no attempts to interview real jurors who have served in trials involving matters where social framework evidence might be relevant. Particularly when expert evidence has been tendered, the reactions and observations of jurors could provide much insight about the impact of such testimony. . . . There [also] has been an unwarranted emphasis on the responses of individual jurors when the actual focus of concern is how twelve . . . men and women pool their insights to reach a decision. . . . Yet most empirical researchers have only made inferences about the deliberations from the variables manipulated in the experiments and from the resulting verdicts.¹⁰

Thus, numerous questions remain about how actual juries react to expert testimony: Do juries simply defer to the expert's credentials and abdicate their fact-finding responsibilities? How do juries react to "battles of the experts"? Can juries understand and properly integrate expert testimony into their decisionmaking process? How do jurors react to professional expert testimony compared to testimony from other types of witnesses, such as lay experts?¹¹

This Article attempts to provide some initial empirical answers to these questions by looking at how jurors in capital cases view and use different types of witness testimony presented during the guilt and penalty phases. Specifically, it draws upon the findings of the Capital Jury Project ("the Project"), a project funded by the National Science Foundation to study the decisionmaking process of capital juries nationwide.¹² The data for this Article come from the California segment of the Project,¹³ in

Eugene Borgida, 12 *Law & Hum. Behav.* 101 (1988) (comparing expert and non-expert understandings of rape trauma syndrome).

¹⁰ Vidmar & Schuller, *Juries and Expert Evidence*, *supra* note 8, at 175-76.

¹¹ See generally David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 *Or. L. Rev.* 19, 33, 88 (1987) (noting lack of empirical data on how jurors process expert testimony concerning nontraditional psychological evidence).

¹² See generally William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *Ind. L.J.* 1043 (1995) (describing the Project's purposes and procedures).

¹³ The author was the Principal Investigator of the California segment of the Project.

which 152 jurors were interviewed. These jurors had served on 36 cases in which the defendant was convicted of first-degree murder and the jury was then asked to return a sentence of death.¹⁴ Of the 36 cases, 18 resulted in a death sentence, 17 led to a sentence of life without parole, and one case ended in a hung jury over the penalty.¹⁵ Each juror participated in an extensive interview,¹⁶ answering questions designed to elicit both qualitative and quantitative data regarding how her jury deliberated and what factors influenced its decision. The data used in this Article are drawn both from questions specifically about expert witnesses and more general questions aimed at exploring the jury's deliberative process and how the juror-interviewees arrived at their individual decisions.

Before proceeding with this Article's findings on jurors' perceptions of different witnesses' testimony, several methodological matters should be noted. First, capital jurors do not completely mirror all potential jurors, because jurors cannot serve on a capital jury if they are opposed to the death penalty and their opposition would affect their ability to render a fair verdict.¹⁷ Likewise, jurors are prohibited from serving if they can-

¹⁴The 36 cases were tried during the years 1988-92, and the interviews were conducted during 1991-92. The cases were drawn from a geographic area of six counties in the middle one-third of the state. For a case to qualify for the study, the trial had to have taken place within three years, with priority given to interviewing jurors from the more recently decided cases. Cases were selected so as to maintain a balance between life and death outcomes and with an effort to obtain a mix of trials based on factors such as region and type of offense. See generally Bowers, *supra* note 12, at 1077-81 (explaining the Project's sampling methodology).

¹⁵As allowed under California law, Cal. Penal Code § 190.4(b) (West 1988), the penalty phase of this case was retried before a different jury. The retrial resulted in a death sentence and is one of the 18 death cases from which jurors were interviewed.

¹⁶Interviews ranged in time from two to twelve hours, averaging from three to four hours. The questionnaire was a 50-page document that the interviewer filled out as the interviewee orally responded to the questions. If the interviewee agreed, as most did, the interview was tape-recorded; otherwise, the interviewer wrote down the juror's responses.

¹⁷A juror may be excluded for cause if the juror's views would "prevent or substantially impair" their ability to follow the state's statutory scheme governing the death penalty. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)). The questions that jurors are asked regarding whether their views on capital punishment would affect their ability to be impartial are known as the "Witherspoon questions." See *Witherspoon v. Illinois*, 391 U.S. 510, 520-23 &

not fairly consider mitigation evidence arguing against a death sentence and, therefore, would always impose a death sentence for first-degree murder.¹⁸ Consequently, individuals who are at one end or the other of the spectrum in their attitudes on the death penalty will not be reflected in the jury sample.¹⁹

Second, all of the jurors in the sample voted to convict the defendant at the guilt stage. Thus, while the sample reflects the full spectrum of jury verdicts at the penalty phase—approximately half of the jurors served on juries that returned death sentences and half sat on juries that imposed life sentences—the attitudes of jurors whose juries acquitted at the guilt stage are not reflected. As a result, a possibility exists that jurors who acquit at the guilt stage of capital trials may have different attitudes towards witnesses and expert testimony than the interviewed jurors.²⁰

What the Project does offer is a rich opportunity to contrast how jurors perceive, use, and compare different categories of witnesses and testimony. This is because the typical capital trial, especially the penalty phase, involves a wide variety of witnesses giving extensive testimony on subjects ranging from DNA to eth-

n.21 (1968) (limiting dismissal of capital *venire* members to those who indicate they could never impose the death penalty).

¹⁸ *Ross v. Oklahoma*, 487 U.S. 81, 83-85 (1988) (noting that juror must be removed for cause if he would automatically vote for the death penalty if the defendant was found guilty).

¹⁹ Research has indicated that the exclusion of individuals who could not impose a death sentence makes the resulting "death-qualified" jury more conviction-prone at the guilt stage. See Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 *Law & Hum. Behav.* 77 (1991); Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 *Law & Hum. Behav.* 53 (1984). One study found that while death-qualified jurors were more likely to reject an insanity defense based upon a nonorganic brain disorder, they were not significantly less likely to believe psychiatric testimony than those who were excludable because of opposition to the death penalty. Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 *Law & Hum. Behav.* 81, 88-89 (1984).

In *Lockhart v. McCree*, 476 U.S. 162 (1986), the Supreme Court criticized the methodologies of studies finding death-qualified juries to be more conviction-prone. *Id.* at 168-73. The Court further held that even if skewing does occur, it does not violate the Constitution. *Id.* at 173.

²⁰ For a general methodological critique of the Project, see Christopher Slobogin, *Should Juries and the Death Penalty Mix?: A Prediction About the Supreme Court's Answer*, 70 *Ind. L.J.* 1249, 1254-56 (1995).

nic rage. Consequently, if one wants to examine whether jurors react differently to expert and non-expert testimony and determine how they perceive so-called "abuse excuse" defenses, capital trials offer a fairly wide-open window into the jury room.

This Article will explore what a look through that window reveals. Its principal finding is that the messenger is often as important as the message in presenting evidence to the jury. In a setting such as a capital case where the lawyer has a variety of choices of how to communicate information to the jury, the jury will have biases for and against different types of witnesses that must be taken into account. For instance, far from being overawed by experts' credentials, this Article will demonstrate that juries tend to view experts as "hired guns" who are cloistered from the real world, rather than as objective authorities who understand what is really happening on the streets. By contrast, juries find certain types of lay witnesses particularly persuasive precisely because they are seen as trustworthy and full of worldly knowledge.

Even these generalizations, however, are too simplistic, because much turns on context and how the different testimony is orchestrated. Indeed, this Article's findings suggest that it would be beneficial for the trial attorney to think of the presentation of evidence as comparable to composing a musical score, with much depending on how the different witness types are harmonized. Each type of witness can make a contribution to the symphony, but some witness types are better used as accompanists rather than as soloists. And it falls most importantly to the trial attorney, as the composer, to ensure that the various witnesses are used so as to minimize dissonance and enhance harmony. But before we see how the symphony-goers, the jurors, view the different instrumental arrangements, one needs to understand the structure of a capital trial and the variety of witnesses who testify.

II. THE CAPITAL TRIAL AND THE ROLE OF DIFFERENT TYPES OF WITNESSES

A. Presenting the Capital Case: Experts, Lay Experts, and "Family and Friends"

To become eligible for imposition of the death penalty in California, a jury first must find that the defendant is guilty of first-degree murder²¹ and that at least one additional statutory condition, called a "special circumstance,"²² exists. As a general matter, the jury decides both the first-degree murder charge and the existence of any special circumstances as part of the same proceeding.²³ The statutory list of special circumstances is rather lengthy and is an attempt to identify those aggravating factors that characterize the most egregious murders.²⁴ The jury, for instance, may be asked to determine if the defendant intentionally targeted a particular type of victim, such as a prosecutor or judge,²⁵ or whether the killing occurred during a particular type of felony, such as robbery or rape.²⁶ Even with the additional re-

²¹ Cal. Penal Code §§ 189, 190.2(a) (West Supp. 1997) (defining first-degree murder as a premeditated killing or a killing during the course of an enumerated felony).

²² Id. § 190.2.

²³ Id. § 190.1(a) (West 1988). The only statutory exception to having the jury determine both first-degree murder and special circumstances in the same proceeding is if the special circumstance is a prior murder. In that case, to avoid prejudicing the defendant, the jury does not hear about the prior murder or deliberate on it as a special circumstance until after the defendant is convicted of first-degree murder. Id. § 190.1(b).

²⁴ Id. § 190.2. This narrowing of who is eligible for the death penalty is constitutionally required by the Supreme Court. *Zant v. Stephens*, 462 U.S. 862, 877 (1983) (stating that factors making defendant death-eligible "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder"). See generally Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. Rev. 1147, 1162-64 (1991) (describing the Court's requirement of a bifurcated decisionmaking process to accommodate the need for both "guided discretion" and "individualized consideration" in capital sentencing).

²⁵ Cal. Penal Code § 190.2(11)-(12) (West Supp. 1997).

²⁶ Id. § 190.2(17). At one time the California Supreme Court had interpreted the felony-murder circumstance as requiring an intent to kill. *Carlos v. Superior Court*, 672 P.2d 862, 877 (Cal. 1983) (en banc). The court, however, later held that an intent to kill for the felony-murder circumstance is only required where the defendant was

quirement of finding special circumstances, though, the guilt stage of a capital case largely resembles that of any first-degree murder case: Each side calls lay witnesses to dispute whether certain historical facts occurred, and expert testimony focuses on traditional legal issues such as premeditation, insanity, or self-defense.

Once the jury finds the defendant guilty and identifies one or more special circumstances at the guilt phase, the only two possible penalties under California law are life without parole or the death penalty.²⁷ If the prosecutor seeks the death penalty, a penalty trial is held during which the prosecution can present aggravating evidence arguing for a death sentence (such as a defendant's history of violent crime) and the defense can present mitigating evidence arguing for a sentence of life without parole.

The penalty phase is a much more open evidentiary affair than the guilt phase. Under the United States Supreme Court's holding in *Lockett v. Ohio*,²⁸ a defendant constitutionally must be allowed to present "any aspect of [his] character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."²⁹ The focus at this stage of the legal proceedings is on the defendant's overall moral culpability, and the defense is no longer limited to formal legal defenses.³⁰ Consequently, testimony at the penalty phase often will be more far-reaching than that presented at the guilt phase, both as to the testimony's subject matter in general and as to explanations for the defendant's behavior in particular. For example, the jury may hear about the defendant's upbringing, his artistic abilities, his ability to adjust to prison, or possible psychological reasons for his criminal act.³¹

an accomplice and not the actual killer. *People v. Anderson*, 742 P.2d 1306, 1325 (Cal. 1987). The study's cases took place after the *Anderson* decision.

²⁷ Cal. Penal Code § 190.2(a).

²⁸ 438 U.S. 586 (1978).

²⁹ *Id.* at 604 (plurality opinion).

³⁰ See Sundby, *supra* note 24, at 1162-64 (discussing scope of mitigating evidence under *Lockett*).

³¹ For a thorough and at times moving look at mitigating factors common to capital defendants, see Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 Santa Clara L. Rev. 547 (1995).

As the range of subject matter eligible for jury consideration broadens significantly at the penalty phase, the potential sources for conveying such information likewise expand. One need not have a Ph.D. to explain to the jury how the defendant was abused as a child, nor must one be an expert on prisons to describe how the defendant has adapted to incarceration. As a general proposition, penalty-phase witnesses fall into three categories: professional experts, lay experts, and "family and friends" witnesses.

Professional experts are those who profess an expertise based upon training and study beyond the knowledge of the average juror. They usually have no preexisting connection to the defendant, but appear in the case for a fee because of their particular expertise. Their knowledge of the defendant is obtained specifically for the purpose of assisting in the case either by advising the attorney, by giving testimony, or both. Although there are many different types of professional experts, the classic expert in a capital case is a psychiatrist or psychologist who has conducted a mental evaluation of the defendant, has examined the defendant's background in looking for medical and psychological explanations for the defendant's behavior, and is prepared to explain to the jury why the defendant may have behaved in a criminal fashion.

A lay expert is someone who has particular knowledge of the defendant's situation through the lay expert's own experiences and who has insights to offer because of those experiences. The experiences may come from prior interaction with the defendant himself (for example, having been the defendant's prison guard), from having lived the same experiences as the defendant (having been the victim of incest herself), or both. As a general matter, even if acquainted with the defendant prior to the case, the lay expert is someone who would not be perceived as having a personal bias for the defendant. She usually is not paid for her testimony, nor does she have a personal relationship with the defendant. Thus, the lay expert still offers "expertise" to the jury in the sense that she can inform the jury of matters about the defendant or the defendant's circumstances that the jury otherwise would not know, but her expertise is derived directly from her experiences with the defendant or his situation rather than from professional training or study.

The final category of "family and friends" is self-defining: At the penalty phase, the defendant's parents, siblings, and friends frequently testify before the jury in mitigation. The nature of the testimony, however, can be quite diverse, ranging from raw emotional appeals for sparing the defendant's life to a detailed accounting of the defendant's childhood. The distinctive mark of this category of testimony, of course, is the intensely personal nature of the defendant's relationship with the witness.

B. The Prominent Role of Experts in Capital Trials

Given the variety of potential witnesses, the trial attorney's critical task is choosing the witnesses who will be most effective in communicating with the jury. A mitigation case centered on the defendant's history as a victim of incest, for example, could be presented through a professional expert such as a psychiatrist, a lay expert such as an incest victim who now counsels other victims, family members who knew of the incest (including perhaps the perpetrator himself), or a combination of such witnesses.³² While the cases in the Project varied widely in their use of lay experts and family witnesses, one striking aspect was the prevalent use of expert witnesses, especially at the penalty phase.

In 30 of the 36 cases (83%), the defense called a professional expert to testify at the penalty phase. The prosecution likewise relied heavily upon professional experts at the penalty phase, presenting its own expert testimony in 27 of the 36 cases (75%). The proportion of cases involving expert testimony is even greater when one accounts for two cases that were "uncontested" at the penalty phase; in these two cases, the prosecution did not pres-

³² The mitigation case at Susan Smith's trial for driving a car into a lake and killing her two small children, for example, largely was built around the psychological effects she suffered as an incest victim. In presenting the mitigation case, Smith's attorneys presented a wide array of witnesses, among whom were a psychiatrist at the guilt phase, *State v. Smith*, Nos. 94-GS-44-906 and 94-GS-44-907, 1995 WL 578226, record at *19 (S.C. Ct. Gen. Sess. July 21, 1995), and then, at the penalty phase of the trial: a number of family members and friends, *Smith*, 1995 WL 702707, record at *15 (July 26, 1995); *Smith*, 1995 WL 789246, record at *9, *20, *23, *26, *28, *78 (July 27, 1995); a corrections officer, *id.*, record at *42; family and pastoral counselors, *id.*, record at *37, *69; a social worker, *Smith*, 1995 WL 702707, record at *22; a chaplain, *Smith*, 1995 WL 789246, record at *71; and a letter her stepfather wrote to her and read in court apologizing for molesting her, *id.*, record at *65-*69.

ent any aggravating evidence but simply relied on the guilt-stage evidence, while the defense attorneys, in turn, did not put on any witnesses but only made closing arguments to the jury.³³ In a third case, the defense did not call an expert witness because the defendant appeared *pro se* at the penalty phase. He told the jury that it had wrongly convicted him and, therefore, they might as well give him the death penalty. The jury acceded to his wishes. Thus, if one excludes the two uncontested cases and the *pro se* case, the defense actually relied upon professional expert testimony in 30 of the 33 fully contested cases (90%), and the prosecution used expert testimony in 27 of the 33 (81%). It is evident that conventional practice at the penalty phase involves presenting an expert to the jury at some point—in many cases more than one—who will testify based upon an expertise gained through training and study.

Expert witnesses play such a prominent role in capital cases for several reasons. First, they are readily available. Courts naturally tend to be more solicitous of defense requests for state-funded experts in capital cases given the grave consequences at stake and the greater potential for appellate reversal in capital cases.³⁴ The Supreme Court gave constitutional reinforcement

³³ While the prosecutor formally asked for the death penalty in these two cases, the jurors in both cases did not see the prosecution as really wanting a death sentence. Jurors in those cases remarked along the lines that the "prosecution didn't really push for the death penalty," (F₁L₁), and the "prosecutor was not terribly invested in what the punishment would be," (F₂L₂).

To protect the anonymity of the interviewed jurors, as has been done with other articles on the Project, quoted jurors are identified by "M" and "F" to indicate their gender, followed by a sequentially assigned number based upon when the juror is first quoted in the Article. The second designation indicates whether the jury in the case returned a life sentence ("L"), death sentence ("D"), or hung on the sentence ("H"), followed by a sequentially assigned number for the case.

All of the quotations in this Article have been checked for accuracy and corrected against the primary source (i.e., the tape or interviewer's notes) by the Author. The Article's descriptions of cases and witnesses are based on the jurors' recollections of the trial. Bracketed material has been used where necessary to protect anonymity or to clarify the context of a quotation. All materials are on file with the Author so as to preserve confidentiality.

³⁴ The estimated reversal rate for death penalty cases between 1976-91 was 60%. James S. Liebman, More than "Slightly Retro": The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in *Teague v. Lane*, 18 N.Y.U. Rev. L. & Soc. Change 537, 541 n.15 (1990-91). As a comparison, the reversal rate in federal non-capital criminal

to this tendency in *Ake v. Oklahoma*,³⁵ holding that an indigent defendant is entitled under due process to the appointment of a psychiatrist for both the guilt and penalty phases if the defendant shows that his mental health at the time of the offense will be an issue at trial.³⁶ Indeed, some states now statutorily provide for the appointment of a mental health expert for a capital defendant as a matter of course in preparation for trial.³⁷ Moreover, most courts have read *Ake* as extending beyond psychiatric experts and have appointed a wide range of experts under the holding's aegis.³⁸ The guilt phase of a capital trial, therefore, often involves expert testimony on issues such as the fallibility of eyewitness identifications or whether the use of crack cocaine would have precluded the defendant from premeditating a killing.³⁹ And, as one would expect under *Lockett*,⁴⁰ the role of experts is even more expansive at the penalty phase and may touch on subjects ranging from ethnicity to the defendant's adaptability to prison life.⁴¹

Ready access to experts alone might be enough to make capital litigation expert-oriented, but the allure of the expert witness is particularly powerful for a defense attorney appointed to represent a capital defendant. A capital defense attorney, especially one new to death penalty litigation, can easily become

judgments that were appealed was 6.5%. *Id.* (citing Jack Greenberg, Capital Punishment as a System, 91 Yale L.J. 908, 918 (1982)).

³⁵ 470 U.S. 68 (1985).

³⁶ *Id.* at 83.

³⁷ See, e.g., Va. Code Ann. § 19.2-264.3:1 (Michie Supp. 1997) (entitling an indigent capital defendant to court appointment of "one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition").

³⁸ See *Rey v. State*, 897 S.W.2d 333, 338 n.4, 339 (Tex. Crim. App. 1995) (en banc) (reviewing cases extending *Ake* to non-psychiatric experts and holding that *Ake* gives defendant a right to appointment of a pathologist).

³⁹ See, e.g., *infra* notes 62-63, 79 and accompanying text (discussing juror reactions to experts on eyewitness identification and crack cocaine).

⁴⁰ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁴¹ See, e.g., *infra* notes 61, 80-85 and accompanying text (discussing juror reactions to experts on ethnic background and prison life). See C. Robert Showalter & Richard J. Bonnie, Psychiatrists and Capital Sentencing: Risks and Responsibilities in a Unique Legal Setting, 12 Bull. Am. Acad. Psychiatry L. 159, 160 (1984) ("By requiring the states to individualize the capital sentencing process, the Supreme Court virtually has assured routine participation by psychiatric (or other clinical) experts.").

paralyzed with the daunting nature of the task that lies before her: the emotional weight of knowing that someone's life largely rests in her hands, a body of state and federal law governing capital punishment that makes the Internal Revenue Code look simplistic, the need to file endless motions to ensure that no potential issue is defaulted, and the necessity of preparing for essentially two trials—one on guilt and the other on the death penalty.⁴² To learn, therefore, that the appointment of an expert witness in a capital trial requires only the filing of a motion can offer a great sense of relief and enable the attorney to feel as if she is moving forward.⁴³

While the extensive use of experts in capital trials is understandable and certainly helpful for one studying jurors' views of experts, the question remains whether such heavy reliance on expert testimony is an effective trial strategy. Do juries find experts to be persuasive witnesses? Can expert testimony in fact hurt one's case? How do juries view experts compared to other types of witnesses? These are the questions to which we now turn.

III. JURORS' PERCEPTIONS OF DIFFERENT TYPES OF WITNESSES

A complete picture of how juries react to various types of witnesses can only emerge from a full review of the jurors' descriptions of what factors influenced them and the nature of the jury's deliberations. An initial snapshot of how jurors assess different types of witnesses, however, can be obtained by looking at responses to several questions designed to determine which witnesses the juror found most influential, both positively and negatively. Specifically, the jurors were asked whether, for the prosecution or defense, any guilt-phase witnesses were particularly hard to believe, what evidence or testimony was most in-

⁴² William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. Rev. L. & Soc. Change 273, 280 (1990-91) ("[P]reparing to present [a theory of mitigation] requires extensive research and investigation far exceeding anything conducted in preparation for non-capital trials. Yet even the basics of this task can confound capital defense counsel.").

⁴³ This observation is based in part on the Author's experiences as Co-Director of the Virginia Capital Case Clearinghouse (1992-93, 1995-96), a law school clinic which provides pretrial assistance to attorneys appointed to represent capital defendants.

fluent at the penalty phase, and whether any penalty-phase evidence "backfired." These questions, therefore, tended to elicit recollections of the most memorable witnesses from the trial—those witnesses who left either a very positive or negative impression on the jurors such that they immediately responded to the interview questions with a response of, "You should have heard"

The data⁴⁴ indicates that professional expert witnesses were viewed negatively in a significant portion of the cases, especially experts called by the defense. Indeed, professional experts accounted for two-thirds of all juror references to defense witnesses as backfiring or being hard to believe, but for only about one-fifth of juror references to defense witnesses as positively influential. Roughly speaking, jurors' impressions of defense expert witnesses were more than twice as likely to be negative rather than positive.⁴⁵ Nor was it simply a few experts generating the negative impressions, as jurors negatively cited 27 different defense experts in 18 cases at either the guilt or penalty stages. By contrast, only 9 defense experts in a total of 8 cases were identified as positive influences at either the guilt or penalty phases.⁴⁶

Further perspective on the difficulties juries have with defense experts can be gained by comparing the negative to posi-

⁴⁴ This data does not include "fact witnesses" at the guilt stage whom the attorneys had no choice but to call, such as eyewitnesses. For instance, in a case involving one prisoner's killing of another prisoner, both the prosecution and defense had to call prisoners to testify about the killing because no other types of witnesses were available. The jury was not impressed with the inmate witnesses for either side, as they were highly uncooperative. This section focuses on where the attorneys voluntarily elected to put on a certain type of witness—expert, lay expert, or family/friend—to establish a proposition.

⁴⁵ Of 56 references to defense witnesses as backfiring, 38 were to professional expert witnesses. Of 69 references to defense witnesses as being influential in a positive manner, 15 were to professional experts. The number of negative references to experts (38) thus was more than twice as great as the number of positive references (15).

⁴⁶ Six of the "positive" and "negative" cases overlap in that jurors identified, in the same case, both a positively influential defense expert and a backfiring defense expert (making 20 cases overall where defense experts were identified as positive and/or negative influences). Interestingly, in only four instances was the same expert characterized by one or more jurors as a positive witness and by a different juror or jurors as a negative witness. Jurors within a given jury thus tended to agree on whether a particular expert was a "good" or "bad" witness.

tive ratio for the defense's professional experts to the other two categories of witnesses. The professional experts come out far worse. "Family and friends" witnesses, for instance, were named as a positive influence for the defense case 39 times and as backfiring witnesses only 15 times, a ratio that is almost the mirror opposite of the ratio for experts (15 positive references, 38 negative references). And although not used as witnesses as often as were professional experts or family and friends, lay experts enjoyed an even more favorable positive to negative impression ratio, as jurors named them as among the most influential witnesses 15 times and saw them as backfiring on only 3 occasions.

Thus, the good news for defense experts is that their testimony tends to be remembered (jurors mentioned a defense expert witness as memorable in 20 of the 30 cases in which experts testified); the bad news is that they tend to be remembered for *not* being credible. But before jumping to the conclusion that professional experts inherently make a negative impression, it is fruitful to take a look at two more sets of data.

First, positive impressions of defense experts at the penalty stage correlated with a subsequent life sentence. Indeed, of the six cases in which a defense expert at the penalty phase was cited favorably by the jurors, all resulted in a life sentence.⁴⁷ While this is not to say that a favorably received expert is a prerequisite to obtaining a life sentence,⁴⁸ it does suggest—even accounting for a "halo effect" in which the expert's image benefits from the existence of other strong mitigation evidence⁴⁹—that

⁴⁷ Even then, however, in two of the six cases, the same defense expert was also recalled negatively by at least one juror.

⁴⁸ That a favorably received expert is not essential to receiving a life sentence can be seen in the fact that a life sentence was returned in seven of the contested cases where a defense expert was not identified as influential and in two cases where the defense expert was cited only as being a negative influence. By contrast, in the 15 contested life cases, 13 involved family witnesses who were viewed as influential in a favorable manner. Lay experts were cited in five of the contested life cases as highly influential. This last number is misleadingly low, however, because lay experts, unlike professional experts and family members, were not widely utilized and were rarely seen as "backfiring" when they did testify.

⁴⁹ Likewise, there appears to be a possibility of a "pitchfork effect," by which a defense expert's image suffers from a weak defense case. Of the 14 cases where a defense expert at the penalty phase was perceived as backfiring, ten resulted in a death sentence and only four came back with life sentences. It may be that the

positively received expert testimony heightens the chance of a life sentence.

The second set of figures pertains to prosecution witnesses. Here, the jurors' reactions were not nearly so negatively skewed against professional experts. Of the 12 prosecution witnesses cited negatively, only 3 were professional experts, while 14 of the 50 witnesses who were viewed as most influential were experts. The professional experts called by the prosecution, therefore, enjoyed a far better positive to negative ratio than did the defense experts. Why would this be so?

While it is possible the prosecution obtains better expert witnesses, a more likely explanation lies in the differences between how the prosecution's expert witnesses and the defense's experts are used in capital cases. Most of the prosecution experts identified as positive influences were used primarily as rebuttal witnesses to neutralize the defendant's case rather than to advance independent theories about the defendant.⁵⁰ That is, the prosecution expert's role as a witness was to explain to the jury how the defense experts' theories were not true—for example, the defendant *did* know the difference between right and wrong—and why, therefore, the defense expert should not be believed. The importance of this difference in the expert witness's role becomes far more understandable if one moves beyond the numbers to the substance of what jurors said about the expert testimony they heard.

A. The Jurors' Critique of Expert Testimony

In analyzing jurors' comments, three consistent criticisms of professional expert testimony emerge: (1) experts are viewed as "hired guns"; (2) jurors are skeptical of experts and their ability to explain human behavior; and (3) experts often fail to draw a link between their testimony and the defendant's specific situation. Each theme will be looked at in turn.

experts were viewed negatively in part because the jury was rejecting the defendant's case in mitigation and, in the process, forming negative impressions of those who presented it.

⁵⁰ In addition to these rebuttal-type expert witnesses, the favorably viewed prosecution experts included those who testified at the guilt stage of the trial about the facts of the killing—medical examiners, forensic experts, and a DNA expert.

1. Experts as "Hired Guns"

Textbook strategy for cross-examining professional expert witnesses is to question them about their fees in an effort to show bias,⁵¹ and it appears the strategy often works. Jurors commonly believed that experts would skew their testimony for "whoever is paying for their testimony." (F₃L₂).⁵² Some jurors used the phrase "professional witness" to describe derogatorily expert witnesses who testified: "He was the kind of psychologist that's just in there testifying for the money. . . . He was a professional witness for [the] defense or whatever, whoever needed him." (F₄D₂). "A defense psychiatrist was discredited and shown to have been a professional witness." (F₅D₃).⁵³ As one juror explained with a bit more gusto:

Juror: There didn't seem to be any conflicting evidence except for the expert witnesses. Well, they were just on opposite sides and opposite opinions. And they were evasive in their answers to the opposing attorney.

Interviewer: And these were all of them?

⁵¹ As Francis Busch has observed:

Showing that an expert witness is being paid a substantial fee for his services undoubtedly subjects his testimony to some discount. . . . [A]n alert cross-examiner will usually follow [up a general question on direct examination of whether the expert is being paid] with a sharply put question: "How much do you expect to be paid?"

Francis X. Busch, *Law and Tactics in Jury Trials: The Art of Jury Persuasion* 636 (1949). See also Samuel R. Gross, *Expert Evidence*, 1991 Wis. L. Rev. 1113, 1168 (cross-examination of experts about fees has "special bite"). If, on the other hand, a defense expert will not financially benefit from her testimony, a wise defense strategy is to highlight that fact for the jury. See *State v. Smith*, Nos. 94-GS-44-906 and 94-GS-44-907, 1995 WL 578226, record at *26, (S.C. Ct. Gen. Sess. July 21, 1995), during which a defense expert for Susan Smith explained that, as a salaried employee, his fee of \$150 an hour would be remitted directly to his employer. This fact enabled defense counsel to ask rhetorically, "So if you had said, 'No, thank you,' when I asked to you [sic] handle this case, you would not have made a penny less?" The expert replied, "That's correct." *Id.*

⁵² For an explanation of codes used for jurors and methods of quotation, see *supra* note 33.

⁵³ The juror continued, "He looked like he was testifying solely for the money. . . . They asked him how much money he makes for his testimony and that totally discredited him." (F₅D₃). Another juror in the same case similarly characterized the expert, noting that the "D.A. brought out that he testified frequently for the defense in the past, he did it for money." (F₆D₃).

Juror: All of them. And like I said, if it was my kid I woulda slapped him upside the head and told him, "Go to your room."

Interviewer: The experts?

Juror: Sure, when they were being cross-examined they were very evasive. Because they want to collect their fee, you know. They get paid for doing it. One guy, it was his full time job. He was terrible. It's just, his main source of income was being a part-time worker at a university and a professional witness.

Interviewer: Quite a living, huh?

Juror: You're not kidding. (M₂L₄).

The jurors' perceptions of experts as "professional witnesses" were sometimes further inflamed by the large fees collected by the experts. One juror, for instance, referred to the defense experts as "two high-priced doctors," (F₇D₁), and another juror remembered very specifically the sum charged by the expert:

The final witness was [Dr. X], a practicing clinical psychologist and teacher, who was hired by the defense to put together a psychological profile It was rather exasperating that at \$200 per hour for over 240 hours of his time—which equates to \$48,000 of taxpayer dollars—he really didn't tell us anything we hadn't learned already from witnesses and family members. (F₈L₅).

The perception is exacerbated by the fact that the defendant is already seen by many jurors as having an abundance of resources, such as two attorneys.⁵⁴ A parade of defense experts can only add fuel to that notion:

⁵⁴ Because of the difficulty of preparing for both the guilt and penalty phases of a capital case, the standard and necessary practice for almost all capital trials is to have two defense attorneys. See Cal. Penal Code § 987(d) (West Supp. 1997) (authorizing appointment of second attorney in capital case by trial judge); *Keenan v. Superior Court*, 640 P.2d 108, 113 (Cal. 1982) (holding that trial judge abuses discretion in not appointing second attorney "[i]f it appears that a second attorney may lend important assistance in preparing for trial or presenting the case"). See also American Bar Ass'n, American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 41 (1989) ("In cases where the death penalty is sought, two qualified trial attorneys should be assigned . . ."); *id.* at 41-44 (noting reasons why at least two attorneys are necessary to represent competently a capital defendant).

Some jurors, however, viewed the presence of two defense attorneys negatively. One juror felt, for instance, that it was unfair for "both of them [the two defense attorneys] to gang up against this real top gun prosecutor." (F₇D₄).

Interviewer: Is there anything about this case that sticks in your mind, or that you keep thinking about?

Juror: [W]e spend so much money to defend a person like that. He had all kinds of defense—he had two lawyers, he had even a psychological test that was even recognized by the court . . . it cost a great deal of money. And why spend all that money on that awful criminal? He had never been good for anything anyway. So that really stuck with me forever. I tried to figure out the amount and it's really tremendous. (F₁₀D₅).

Because jurors largely believe that the experts are testifying primarily to collect their fees, any perceived conflict of interest is especially likely to be looked at unforgivingly. In one case, for instance, the defense called experts who had used a "brain mapping machine" to conduct tests on the defendant.

Interviewer: Why did you find [the brain expert's] testimony hard to believe?

Juror: Because he owned the machine, [and was] trying to justify it. (M₃D₆).

Another juror described the same testimony as backfiring, first noting:

One of the witnesses did some kind of special test, it was kind of like a brain mapping test. . . . The girl that ran the test and one of the doctors that spoke for the defendant—turns out they own like twenty-five percent ownership of this machine. Little bit of interest here. (M₄D₆).

Then, the juror turned more blunt, calling the experts "partners in crime" and concluding that "one of the psychologists was totally unbelievable. He was part owner of the machine. . . . He was just a dishonest person—a weasel." (M₄D₆). This same juror had stated earlier that he did not trust experts because "you could hire experts to say whatever you want them to say," so he was perhaps particularly open to being convinced of a conflict of interest.

The perception of expert witnesses as "hired guns" will, as a general rule, be most disadvantageous to the defense, because most prosecution experts—pathologists, ballistics experts, psychiatrists, and the like—are on the government payroll as regular employees and are not paid specifically for their work in the

case before the jury. And while a government employee certainly qualifies as someone with a potential bias for the prosecution, the jurors' comments strongly indicate that it does not have the same pyrotechnic effect as bringing out on cross-examination that a defense expert charged the taxpayers a hundred dollars an hour or more. Indeed, only one juror made comments indicating an acceptance of the fact that there is a role for paid professional experts:

[The prosecutor asked the defense psychiatrist] how many times do you testify for the defense and how many times do you testify for the prosecuting attorney. Well, he testified a lot more times for the defense. . . . My thing was maybe that's good. That people commit crimes for good reasons, and he's helping, and it didn't shock me like, "He's a paid defense witness expert." . . . [However, the others] felt he was very unprofessional (F₁₁D₃).

Perhaps not coincidentally, this sole juror was a nurse and thus used to working with doctors.⁵⁵

Interestingly, the jurors' distrust of defense experts coincides with studies of jurors' attitudes towards experts in civil cases. Interviews of jurors in antitrust, asbestos, and medical malpractice litigation all found jurors skeptical of the economic, medical, and actuarial experts who had testified.⁵⁶ As with this Article's jurors, the skepticism that the civil jurors expressed was in

⁵⁵ This juror's familiarity with the medical profession might also explain her different reaction to the psychiatrist's billing practices compared to the other jurors:

The other jurors thought he was very unprofessional, he didn't have knowledge of the exact amount of money that he charged the court for his expertise. . . . He said, "Oh, is that important? All right," opened his briefcase and got out his calculator [and said], "I'll figure it for you." So they thought that was very unprofessional . . . and I just thought, well geez, probably he has an accountant or a secretary who handles all the billing and makes his appointments. (F₁₁D₃).

⁵⁶ See Arthur D. Austin, *Complex Litigation Confronts the Jury System: A Case Study* 82 (1984) (finding jurors with strongly "negative feelings" toward an expert witness—an economist—in antitrust case); Molly Selvin & Larry Picus, *The Debate over Jury Performance: Observations from a Recent Asbestos Case* 27 (1987) (concluding that "jurors [in an asbestos case] were . . . generally skeptical if not negatively disposed toward many of the medical experts who testified"); Vidmar & Schuller, *Juries and Expert Evidence*, *supra* note 8, at 171 ("One of the most striking findings from these interviews [of jurors in medical malpractice cases] is the skepticism that jurors displayed toward experts.").

part because they believed that "experts are chosen to testify because their opinions favor the party that calls them."⁵⁷ But while in the civil context the view of experts as hired guns is applied against both parties, since both are paying for their expert testimony, in the criminal context, this skepticism of experts as hired guns appears to work most harshly against the defendant as the party most clearly "paying" for the expert testimony.

The bias against defense experts as "professional witnesses" may also be explained by the fact, as developed in the next Section, that the prosecution expert's testimony is more likely to be in accord with the jurors' preconceptions of human behavior. Consequently, to the extent the defense experts are testifying to matters that do not sound "right" to the juror, the testimony may simply reinforce the juror's predisposition to believe that the defense experts are only saying such things because they are being paid.

2. Jurors as Skeptics

Juror skepticism of expert testimony arises from several sources. First, jurors may find a particular expert untrustworthy or not credible. Not surprisingly, given that jurors already harbor a suspicion that most experts are hired guns, jurors tend to seize upon any perceived weaknesses in an expert's testimony. One suspects that it is not coincidental that in describing experts whom they saw as falling apart on cross-examination, the jurors' word choice conveyed an unusually zestful delight laden with vivisectionist terminology: defense experts were variously "picked apart," (F₉D₄); "ripped . . . to threads," (F₁₂D₄); "chopped up," (M₅L₆); "chewed up," (M₆D₇); "blow[n] . . . out of the box," (M₇D₄); "cut down to size," (F₈L₅); and had "their balls cut off—[the prosecutor] sent them off bleeding," (M₇D₄).

Specific shortcomings cited by the jurors focused on credentials, manner, and preparation. Sounding a bit like a tenure review committee, jurors unfavorably took note of matters such as the "last time [the expert] had written anything was fifteen years ago," (M₈D₈), or that the expert "got [his] Ph.D. from [a] mail

⁵⁷ Vidmar & Schuller, *Juries and Expert Evidence*, supra note 8, at 171.

order college," ($F_{13}D_2$).⁵⁸ Some comments indicated that the expert had not communicated well with the jury, having come across as a "self-centered egotist," (M_9D_3), or as "foggy and unclear and just pompous," (M_3D_6). In one case, an expert witness who testified at the guilt phase about the defendant's mental impairment was seen as having impressive credentials, but her testimony was hampered by poor communication skills:

This was one of her first trials and it was obvious. The D.A. did a good job of chewing her up. . . . I didn't find a lot of her testimony to be credible. She tried to make, I think, things that are not proven . . . as fact. Not that she was a social scientist, although she had a background, like she had every possible degree. But I did not, you know, I believed some of the things she said, but I didn't find her exceptionally believable. . . . She was not a skilled witness. Even the judge showed some, you know, some doubt. . . . [S]he would answer something and we'd just, you know, I would roll my eyes and I would see [the judge] rolling his eyes. . . . [Her testimony] took so long. (M_5L_6).

The most frequent comments, however, picked up on perceived failures in preparation or on actions that the jurors saw as confirming their suspicions of experts as "professional witnesses." In one case, for instance, the defense psychologist stated on cross-examination that he had destroyed his recordings of interviews and his original notes. This struck the jury as incredible and led the jury to conclude that the "psychological expert guy kind of shot himself in the foot. . . . He was the guy who burned his tapes or otherwise disposed of the hard raw data from his interviews." ($M_{10}L_5$). More common was skepticism about how the expert could spend a small amount of time with the defendant and then testify authoritatively: "One of the psychologists had spent only two hours with [the] defendant and came up with this thick report and in-depth diagnosis. So the jury didn't give her much credibility." ($F_{14}L_7$).⁵⁹ The juror in that

⁵⁸ The expert's credentials, or more accurately lack thereof, apparently were highlighted, as another juror in the same case noted, "He had very dubious credentials." She described the school he attended as a "store-front type." (F_4D_2).

⁵⁹ A juror in a different case who stated that "[t]he worst witness . . . for the defense . . . was the psychiatrist," was particularly upset that the psychiatrist had not

case was particularly struck by the fact that the prosecution's psychologist had spent more time evaluating the defendant than the defendant's own expert. In another case, even a juror whose comments evinced an understanding of the role of professional experts and the demands of their schedules was given pause by the defense psychiatrist's lateness in performing his evaluation:

[O]ne of the things the prosecuting attorney asked was, "When did you talk to the family, when did you talk to the defendant?" Well he had talked to the defendant two days earlier, and he talked to the members of the family yesterday. The prosecuting attorney goes, "Yesterday!" . . . I thought it was quite humorous. Sure it would be ideal if the psychiatrist had been talking earlier in the case, but people are busy, people have schedules. [But], um, you know it seems a little odd that they were talking only several days before. I mean, this was a life and death matter. I mean, I was sort of like, geez. (F₁₁D₃).

A second source of skepticism transcends particular witnesses and encompasses a generalized suspicion of experts. Experts are often seen as "not in touch with reality," (M₈D₈), and "hard to believe," (F₁₆D₆).⁶⁰ Intriguingly, the label "expert" to which so many people aspire was considered by some jurors to be almost a pejorative term. One juror, for instance, savaged a psychiatrist:

They're the dumbest people in the world when it comes to substance [abuse] and knowledge of it. They're worse than doctors and they're the dumbest ones. . . . [Lawyers] bring in expert witnesses, they're not experts. They're just human beings and they get labeled this way and they're so ridiculous, you know. . . . I don't know where they come up with the expert witnesses. (M₁₁L₈).

spent as much time interviewing the defendant and the defendant's family as he had first claimed:

[A] lot of his testimony proved to be false under cross examination. . . . He said that he spent X amount of hours with [the defendant]. That proved to be false. The whole testimony just proved to be so false that later, you couldn't believe anything he said. Also he talked about questioning [the defendant's] family, spending time with his family—that proved to be false. (F₁₅D₃).

⁶⁰ Cf. Rita James Simon, *The Jury and the Defense of Insanity* 163-65 (1967) (finding jurors in simulated experiment viewed psychiatric testimony with skepticism).

In contrast, the same juror was very impressed with a psychologist "who had done more practical work with people." Tellingly, in the juror's mind, the psychologist was more impressive precisely because she was not presented as an expert: "Anyway, this guy, this psychiatrist was labeled as an expert witness. The psychologist was just brought in as a witness. She was not considered an expert."

Moreover, the experts' theories are often seen as Trojan horses against which the jury must be on guard. Jurors frequently responded to the interviewer's questions about whether a particular defense was raised with answers such as, "they tried that . . . they tried to pull that," (M₁₂D₉), or "[t]he defense kept trying to tell us that," (M₁₃L₆). One juror, in response to an anthropologist's testimony that the defendant's ethnic background made him prone to violence when he discovered that someone else had fathered his daughter, exclaimed, "Give me a break! Like we're supposed to believe it was just one of those macho things." (M₆D₇).⁶¹

The potential for jurors to react in a hostile fashion to what most lawyers and academics accept as valid expert testimony can be seen in one jury's reaction to an eyewitness identification expert who testified at the guilt phase.⁶² The jury found the testimony "insulting," because in testifying about how people misperceive events, the expert "obviously . . . was talking about us. . . . I mean it was a real tricky thing. I don't think they should have done it." (F₁₈H₁). A different juror called the expert a "charlatan" because the expert had said that "you can't trust your own perceptions." (F₁₉H₁). She further explained:

⁶¹ The fear of being tricked can also be seen in a juror's comments based on her participation on a jury where the defense psychiatrist told the jury that the defendant had the emotional development of a twelve-year-old and the jury imposed a life sentence as a result. After sentencing, the defendant was quoted in a newspaper and, much to the juror's dismay, "He came out in the paper not sounding like an emotional twelve-year-old at all." (F₁₇L₃).

⁶² The research establishing the potential unreliability of eyewitness testimony is now quite large and persuasive. See Michael J. Saks & Reid Hastie, *Social Psychology in Court* 191 (1978) (describing the "vast number of threats to the accuracy and completeness" of eyewitness accounts); see generally *id.* at 167-91 (reviewing studies and encouraging the use of expert testimony to explain to the jury the potential problems with eyewitness testimony).

There was a little bit of talk about how we felt manipulated by the defense attorneys because of their so-called expert. We felt that they were, it was a manipulation-type thing. It was not truly casting doubt. They tried and failed to cast doubt on the [store] clerk [witness] by having this guy say you can't trust yourself to identify anybody. And so, because of that, because they failed so miserably, and it was such a miserable thing, several of us felt manipulated by them and didn't believe them much. . . . That one was an incredible, blatant stupidity on their part.⁶³

This strong negative reaction to the expert's testimony on eyewitness reliability, which was targeted at discrediting witnesses' identifications of the defendant, but which the jury took more broadly as suggesting that people (i.e., the jurors themselves) cannot trust their own perceptions, becomes even more understandable when one identifies a third source of jury skepticism—the jurors' own personal experiences and theories of human behavior.⁶⁴ Professors Bonnie and Slobogin have suggested that the prosecution has a significant advantage when the defendant is claiming the existence of a behavioral abnormality, because "[t]he factfinder is likely to view with considerable skepticism the defendant's claim that he did not function as would a normal person under the circumstances."⁶⁵

⁶³ The jury's reaction may not be that surprising given the research that has indicated that laypersons' perceptions of eyewitness reliability vary substantially from those of experts. See Kenneth A. Deffenbacher & Elizabeth F. Loftus, Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?, 6 *Law & Hum. Behav.* 15, 17, 24 (1982); A. Daniel Yarmey & Hazel P. Tressillian Jones, Is the Psychology of Eyewitness Identification a Matter of Common Sense?, in *Evaluating Witness Evidence* 13 (Sally M.A. Lloyd-Bostock & Brian R. Clifford eds., 1983). Other research, however, has indicated that expert testimony on eyewitness identification, especially if tailored to the specific issues in the case, can increase the likelihood of a more favorable verdict for the defendant. See Vidmar & Schuller, *Juries and Expert Evidence*, supra note 8, at 160-66 (reviewing mock jury studies on eyewitness expert testimony).

⁶⁴ Victor Gold, Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom, 65 *N.C. L. Rev.* 481, 492 (1987) ("To psychologists . . . the unbiased juror does not exist. Jurors, like all other human decision-makers, cannot evaluate evidence as if it were *sui generis* but must always relate it to past experiences and preconceived beliefs about the world: the knowledge structures they have accumulated over a lifetime." (footnote omitted)).

⁶⁵ Bonnie & Slobogin, supra note 6, at 477.

If anything, Bonnie and Slobogin may have underestimated the extent of the prosecution's advantage. In part this is because many jurors had doubts whether factors usually thought of as mitigating really do excuse behavior. This was true whether the factor was drug abuse,⁶⁶ intoxication,⁶⁷ a bad childhood,⁶⁸ or even severe mental illness.⁶⁹ One juror captured the reluctance of many to view such factors as mitigating:

They tried to play it off at the trial though that [he] had such a bad childhood. His father was a bad influence, and his mother didn't fill in the gaps and all this. When it gets down to the bottom line, when you get [to be] nineteen years old you have to still know right from wrong. I don't care what Mommy did or Daddy didn't do and all this. You still know right from wrong. You may have some anger and bitterness and frustrations and all that about your life and the way it's been and where it's going, but does that mean you turn around and mistreat other people? Especially you sit around and coldly scheme killing somebody. You don't care who it is; if they're in the way of you getting that money—what you thought was \$5000—that's tough. Too bad, they got to go. That's the way it came out at the trial. (M₁₅L₁₀).⁷⁰

⁶⁶ "[B]y the same token, he shouldn't have used drugs in the first place." (F₂₀D₇).

⁶⁷ "People are still responsible for their actions. Just because they are drunk, you just can't say you had a bad night." (F₂₁L₉).

⁶⁸ "[A]t one point I began crying . . . [H]e got a raw deal starting off, [but] he had many, many chances." (F₂₂D₁₀).

⁶⁹ "He used [mental illness] as a defense—which he had—but [he] still know what he was doing and that it was wrong." (M₁₄D₃). Whether the defendant knew right from wrong despite his mental illness clearly would be relevant to an insanity defense at the guilt phase, but the juror here was rejecting his mental illness even as a mitigating factor arguing for a life rather than death sentence. For further discussion of this case, see *infra* Section IV.A.

⁷⁰ One juror found that the willingness to consider mitigating evidence in her jury was influenced by gender:

How much weight to give his background was an issue. That one divided probably a little more on male/female lines, which is, I think, almost is to be expected. . . . Most people can come up with some kind of a sob story. Does that mean that you don't hold people accountable for their actions? And how, when does that accountability kick in, and when do you say, "Okay, yeah, you had a rough life but, you know, you're 21 years old now, it's time for you to be accountable." . . . So it was just this question of when and to what extent do we hold people accountable for their behavior? (F₂₃L₁₀).

Most jurors' working assumption appeared to be that although the defendant may have had a difficult past, if at some juncture he had an opportunity to take the "high road" (for example, living with a caring aunt or receiving counseling), then by committing crimes he had in some sense chosen the "low road." In fact, many juries created time lines for the defendant's life, sometimes literally drawing them out, in an effort to decipher how events in the defendant's life had played out: Had he ever had that opportunity to escape the effects of what everyone would admit was a horrible childhood? One juror's comments illustrate how the free-will notion could trump even emotionally compelling mitigating evidence:

He had a pretty bad childhood. . . . The mother blew her brains out in front of him, he was a very young kid. The mom was a drug addict. . . . [S]he would stay up all night and sleep all day. . . . So the sister who was just a couple of years older than he—she did all the cooking, she did all the cleaning. And I remember at one point I began crying because I had two little kids and I just, it just tore my heart out that the sister made his lunches, his first day at kindergarten, his sister, just two years older, took him to school and stood in line for him to get into kindergarten. It just tore me up. I just thought he got a raw deal starting off. [But h]e had many, many chances, okay, he chose this road because he had his own business, he had a nice wife . . . and he chose to take that path. (F₂₂D₁₀).

The prosecutorial advantage, however, is sometimes powered by more than just the presumption in favor of personal responsibility that many jurors bring to the jury deliberations. While one would expect some jurors to bring an expertise into the jury room based upon their work or training,⁷¹ a surprising number

⁷¹ In one case, for instance, one of the jurors was a doctor who became something of an ombudsman for the other jurors in understanding testimony regarding drug use: "[W]e listened to some testimony over again. It . . . was one of the psychologists or psychiatrists about [the defendant's drug use]. We didn't understand a lot, and we had a doctor. It was helpful to have intelligent people because they could translate some of these things to us." (F₂₄D₇). In another case, a highway patrol officer effectively quashed the doubts of some jurors concerning ballistics testimony: "Well, it's funny, the women disagreed with the ballistics. They couldn't see how that could prove itself. We had a highway patrolman, [he] was the chairman of the jury and he said there was no doubt about it." (M₁₆H₁). Similar functions were served in other

of jurors or their close relatives had been involved with or had been a victim of the same mitigating circumstances being put forward by the defendant for excusing his behavior. The reaction of these jurors, by and large, as they listened to an expert tell about the defendant's hardships, was "Yeah, well, I went through that and I didn't end up a killer." Thus, the jurors themselves sometimes became self-appointed experts, offering themselves or family members as Exhibit A as to why an allegedly mitigating factor was not valid:

Juror: [The expert] talked about methamphetamines and that they can make you not aware of your doings and such. . . . I thought it was a crock, because when I was in college . . . I did this stuff. . . .

Interviewer: Have you used methamphetamines?

Juror: Yeah, yeah so when I was sitting there listening to this drug expert I was thinking, "Have you ever done this stuff?" Do you actually know what was, I mean, is this all just textbook knowledge? Because he knew nothing. . . . I had done this stuff, I know, and everything he was saying was just so far-fetched. I wondered where he got all this from.

Interviewer: Did you share that with the jury?

Juror: Oh yeah. Because there was another girl in there too, she was a former addict and . . . a recovering alcoholic, and she told the jury too, "I've done this stuff . . ." We both told the jury, "I've used it, I've done it, and I would no more go out and say, 'Let's go kill somebody today and let's get cash and get more drugs.'" I never was up for four or five or six days as he apparently was. Even so, when you do the drugs you know it's illegal, you know it's wrong, so I just believe you're responsible for your actions. (F₂₂D₁₀).⁷²

Intriguingly, when asked on voir dire if she had ever used drugs, the juror had openly discussed her drug use, including what kinds of drugs she had used. One suspects that the defense attorney, upon hearing the juror's voir dire responses, thought

cases by a probation officer, (F₂₃L₁₀), a correctional officer, (M₁₇L₁₁), and a social worker, (F₂₅L₄).

⁷² In a different case, another juror explained how she had convinced the other jurors not to excuse the defendant because she, the juror, also had "been through the drug thing" and had been raised by an alcoholic father, so she knew it was no excuse. (F₁₃D₂).

that she was getting someone on the jury who would empathize with the defendant's drug problem. Instead, the attorney ended up with the defendant's harshest critic during deliberations.

Similarly, a juror in a different case, when asked, "Did the defendant remind you of someone?," responded, "Myself," and then talked about how, like the defendant, his own upbringing was marked by great adversity. ($M_{18}D_8$). Again, though, instead of making the juror empathetic to the defendant's plight, his reaction to the defendant's situation was one of anger: "[I was m]ad because of the choices the defendant had made. He did have a choice to do the things he did," ($M_{18}D_8$)—just as the juror had made his own choices.

Finally, although not a frequent subject of comment, some jurors cited the conflicting testimony of the defense and prosecution's experts as creating skepticism about all of the expert testimony: "[The expert witnesses] were just on opposite sides and opposite opinions." (M_2L_4).⁷³ These jurors resolved the "battle of the experts" by viewing the experts as "cancel[ing] each other out," ($F_{25}L_4$), and making it "a little easier to discount them both," ($M_{19}L_{10}$). In one case, for instance, the defense presented expert testimony that the defendant's brain was dysfunctional, a proposition rebutted by a prosecution expert. Because the "testimonies conflicted," the juror explained that she simply threw out the testimony of both experts and proceeded to make her decision on what she "thought was reasonable." ($F_{16}D_6$).⁷⁴

⁷³ A juror in a different case, struggling with whether to excuse the defendant because of the effects of drug use, used the conflicting expert testimony as a partial justification for deciding the issue against the defendant: "I find it hard to believe that he was so much under the influence of drugs that he didn't know what he was doing. Even when you get experts together, they don't always agree either." ($F_{20}D_7$). At least where psychiatric evaluation of the defendant is involved, conflicting expert testimony is almost inevitable given the wide range of theoretical views and the realities of the adversarial system. See Saks & Hastie, *supra* note 62, at 147-48.

⁷⁴ The tendency of jurors faced with a "battle of the experts" to treat experts' conflicting testimony as canceling each other out has been noted in other research. See Jane Goodman et al., What Confuses Jurors in Complex Cases, *Trial*, Nov. 1985, at 65, 68 (finding that juries may resolve "battle" by finding that "conflicting experts . . . cancel each other's influence"); Vidmar & Schuller, *Juries and Expert Evidence*, *supra* note 8, at 159-60 (discussing Nancy Brekke, *Expert Scientific Testimony in Rape Trials* 27, 31-32 (1985) (unpublished Ph.D. dissertation, University of Minnesota)).

In sum, experts' explanations of human behavior that run contrary to notions of free will are hard to sell to the jury.⁷⁵ Jurors drew heavily upon their own experiences and outlooks on personal responsibility and concluded that most experts were looking at the world through the perspective of a textbook rather than that of real life. Not unexpectedly, this skepticism about clinical testimony had the greatest impact on the defense experts, because they were the ones generally espousing theories in conflict with the jurors' notions of human behavior and responsibility. The prosecution's experts, on the other hand, were called as witnesses precisely because they believed the defendant should *not* be excused for his behavior.⁷⁶ Their testimony, therefore, was far more likely to paint a worldview in accord with the beliefs that the jurors brought into the jury box at the start of the trial,⁷⁷ beliefs that tended toward Old Testament fire and brimstone.

3. Playing a Discordant Tune: The Failure to Tie Up

What becomes evident after reviewing the jurors' comments is that trial attorneys must be acutely aware that juries are strongly disinclined to accept an expert witness's theory or analysis simply because the testimony is coming from an expert. The expert who believes that her testimony will be revered by the jury based

⁷⁵ Professor Michael Perlin refers to juror skepticism of mental disability defenses as "sanism," an irrational bias against and fear of the mentally ill. Michael L. Perlin, *The Sanist Lives of Jurors in Death Penalty Cases: The Puzzling Role of "Mitigating" Mental Disability Evidence*, 8 Notre Dame J.L. Ethics & Pub. Pol'y 239, 240-41 (1994). Professor Haney has argued that it is both psychologically and legally fallacious to justify a death sentence on the grounds that not everybody who experiences the defendant's mitigating circumstances (e.g., child abuse and drug dependency) ends up a killer. Haney, *supra* note 31, at 600-02; see *id.* at 601-02 (the "not everybody" argument fails to account for how factors interact and for individualized responses).

⁷⁶ Professor Ken Nunn has argued that the prosecution has the advantage of being perceived as the repository of the moral sense throughout the criminal trial. Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 Am. Crim. L. Rev. 743, 786-88 (1995).

⁷⁷ In some cases, this tendency may cause jurors to give a prosecution expert's testimony too much weight, given the limits of psychiatric expertise. See Showalter & Bonnie, *supra* note 41, at 165 (cautioning that because juries are already likely to believe a defendant poses a future danger, they will tend to overvalue expert predictions that confirm such beliefs).

upon the dazzle of her credentials, the glitter of her academic appointments, and the sophistication of her analysis would be in for a rude shock if she could hear the jury deliberate. As was suggested earlier, it is helpful for the attorney to think of the presentation of a capital case, especially at the penalty phase, as comparable to composing a musical score with each type of witness—professional expert, lay expert, and family witness—making a contribution to the orchestration. To extend the symphony analogy further, if an expert plays a solo that does not seem to relate to the other evidence and witnesses, the jury is far more likely to tune the expert out rather than defer to her purported expertise.⁷⁸

Sometimes the expert's failure to blend into the overall orchestration was due to causes as shockingly simple as not demonstrating that her testimony applied to the defendant's situation. In one case, a juror at first favorably noted that the defense psychiatrist was "educational. [We] learned a lot about crack," but then proceeded to classify that very same testimony as backfiring because there was no evidence presented at the trial that the defendant had been using crack at the time of the offense. Thus, the juror concluded, the expert's testimony was a "futile effort, [and] the prosecutor picked up on it." (M₂₀D₁₁).⁷⁹

More often, the testimony failed because it was presented in an evidentiary vacuum and did not strike the jurors as revealing particularly helpful information about this defendant. For ex-

⁷⁸ Ron Allen and Joseph Miller have done much to articulate the concern that jurors will defer to experts rather than using the expert testimony to enhance the rationality of their decision. See Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 Nw. U. L. Rev. 1131, 1131 (1993) (arguing that the key to resolving the debate over experts is answering the "deeper question . . . whether fact finders are to be educated by or to defer to experts"); Ronald J. Allen & Joseph S. Miller, *The Expert as Educator: Enhancing the Rationality of Verdicts in Child Sex Abuse Prosecutions*, 1 Psychol. Pub. Pol'y & L. 323, 335 (1995) (arguing that courts should show "proper concern for guaranteeing that an expert assist, rather than supplant, the jury in comprehending the evidence presented"). The Project's findings suggest that placing experts in an assisting rather than supplanting role not only may be a good evidentiary policy, but a wise tactical use of expert testimony as well.

⁷⁹ Remarkably, a similar failure occurred in a different case, with the juror noting that the "psychologist talked about how he may have done [the killing] under the influence but this was never mentioned at [the] guilt phase. No proof of this at all." (M₂₁D₈).

ample, in one case, a psychiatrist described the defendant's tragic loss of his brother and how it traumatized the defendant at the time. But, according to the jurors, neither the expert nor the defense attorney then made an effort to weave the event into other aspects of the defendant's life story. Consequently, the jury did not know how to make use of it in assessing the defendant's actions.

Juror: I think they were trying to paint a picture of getting our sympathy for this defendant because he had this traumatic experience in his life. But it was sort of like, okay, well, what do we do with that? It was very hard . . . hard for us to hear that. All the other jurors had great empathy for this thirteen-year-old boy who lost his brother, and we had a lot of feeling for it, but we didn't know what to do with it! . . .

Interviewer: So you would say the other jurors did feel empathy for the brother's death, but they didn't know where to go with it?

Juror: Very much. It wasn't enough to make sense. Like if we could somehow tie it in, and say it was so damaging psychologically, you know, in some way make us realize that that could permanently affect a person.

Interviewer: So he basically testified as to the trauma of the incident, but not as to what was ongoing? And did the defense attorney take that thread?

Juror: No, it ended.

Interviewer: So basically you ended up with this traumatic experience that everybody agreed was traumatic . . .

Juror: And then the rest [of the jurors] kind of just disregarded it because, you know, "So what?" You know that's real sad, but it wasn't enough to erase this long string of crime. You couldn't make sense of why, why wasn't he able to overcome that. You had a traumatic experience, you know, you lost a baby when your wife had a miscarriage, you know it didn't ruin you life. So why, how come he didn't get over it? (F₁₁D₃).

Another juror in the same case had a similar reaction, describing the psychiatrist's testimony as actually "hurt[ing]" the defendant's case in mitigation because, without further context and given his other crimes, "I was asking myself, you are crazy to blame his past. . . . As a justification for his lifestyle, just forget it." (M₂₂D₃).

Similarly, while juries frequently find individualized evidence to be very powerful as to why the defendant in their case will adapt well to prison life and not pose a danger,⁸⁰ general evidence presented by "prison experts" was often seen as irrelevant and even harmful to the defendant's case.⁸¹ After hearing general testimony concerning prison life, the jurors' usual reactions were not that incarceration was severe punishment, but that "it's a pretty good life." (F₂₆D₁₂).⁸² A prison warden called by the defense as a prison expert, for example, was seen as backfiring "because he painted a picture of a pretty decent life in prison. We were like, 'Wait a minute.'" (M₆D₁).⁸³ Tellingly, one juror first remembered a prison expert as a prosecution witness before later remembering that the expert was a defense witness whose testimony, in her view, backfired:

Well, I thought, for the prosecution, I thought that the prison expert was pretty good. . . . But I can't remember if the prison expert was brought in by the defense or prosecution. It could've been the defense [the juror later remembered he was a defense expert]. He was saying, he was showing pictures of what the prison looked like and what the daily routine is and that was the only time that [the defendant] really looked interested in what was going on. He just kind of brightened up at the prospect of being able to have a TV in his room and having a job in the prison and the exercise yard and he looked pretty happy. That was very interesting to him. That was the only time I ever saw him show any interest in the whole proceeding. And I think it was supposed to show the jurors that life in prison was

⁸⁰ See *infra* notes 91-92 and accompanying text; *infra* text accompanying note 93.

⁸¹ One study on how decisionmakers use statistical evidence in predicting the likelihood of recidivism similarly found that the more explicitly the evidence was associated with the individual whose behavior was being predicted, the more likely the decisionmaker was to rely upon it. John S. Carroll, *Judgments of Recidivism Risk: The Use of Base-Rate Information in Parole Decisions*, in *New Directions in Psycho-legal Research* 68, 82 (Paul D. Lipsitt & Bruce Dennis Sales eds., 1980).

⁸² A predisposition to come to this conclusion might be seen in the juror's comments leading up to the above-quoted statement: "I think they have amenities available, they have access to law books, they have access to the telephone. *They do have very limited freedoms. . . . They do have to be chained every time they leave*, but it's a pretty good life." (F₂₃D₁₂) (emphasis added).

⁸³ Another juror in the case used almost the same words to describe the testimony's effect: "[The p]rison official's testimony backfired because he painted too lenient of a picture of life in prison." (F₂₇D₇).

going to be a miserable existence, but to me it didn't seem like it was bad enough for what he had done (F₃L₃).⁸⁴

In another case, a juror recalled the prison expert testifying that the defendant "could be a doughnut maker," which made the juror think the testimony "was a crock—why should he be allowed to make doughnuts for the rest of his life when he has murdered somebody?" (F₂₂D₁₀).⁸⁵

Most damaging of all is when the expert's testimony not only stands apart from the other mitigating evidence or defenses but actually creates conflicts within the evidence. Although unusual, a vivid example occurred in a case where the defense first put on evidence that the defendant wrote poetry as a means of showing that he was a model prisoner. The defense then called a neurologist who testified that the defendant had neurological damage that might impair his ability to tell the difference between right and wrong. The prosecutor, at least from the jury's perspective and to their fascination,⁸⁶ was able to use the poetry evidence to impeach the neurologist's testimony, because the area of the brain used to determine right from wrong was the same area that allowed the defendant to write poetry.⁸⁷

⁸⁴ The juror did note that "many of the other jurors disagreed" with her that prison life would be too plush. (F₃L₃).

⁸⁵ The importance of choosing one's examples carefully also can be seen in one attorney's closing argument at the penalty phase where, according to one juror:

The defense attorney said some stupid things [in arguing that life imprisonment was sufficient punishment]; the fact that [the defendant] would never be able to have barbecues again. I mean he went into so much stupid detail, "[The defendant] will never be able to have Grey Poupon again." I mean really stupid! (Laughs) Every time I see a commercial [for it], I think of this. (F₂₈D₁₂).

⁸⁶ One juror described the expert as "from a well-known hospital . . . [who] was supposed to be one of the country's foremost [experts]." From this juror's viewpoint, however, the expert "totally blew it," leading the juror to rather colorfully note that the prosecutor had the expert "by the balls and he squeezed." (M₇D₄).

⁸⁷ The juror commented:

They tried to say that psychologically he had a problem differentiating the difference between right and wrong in certain situations. And that side of the brain that makes these decisions, you could never write poetry. . . . The experts, they totally blew it. This told us that all of their reasoning that he had a mental problem in making his decision between right and wrong under certain circumstances, it was repudiated because this guy wrote poetry. (M₇D₄).

This juror may have been especially delighted that the poetry evidence backfired against the expert, because he had been less than impressed that the defendant wrote

More typically, the defense may not even be aware that they have created a conflict that will play itself out in the jury room. In a case that involved what normally would be thought of as compelling mitigating evidence—the defendant suffered from a severe mental illness—the defense’s understandable effort to document the defendant’s psychiatric history raised a different concern with the jury. A psychiatrist explained that the defendant’s violent behavior could be attributed to his mental illness when he did not take his medication. But while this fact provided a mitigating explanation for the defendant’s behavior, it also created a “fear that he would be released and kill again or kill someone in prison.” (F₂₉D₅). Consequently, although satisfied that the defendant “was very, very ill,” ultimately “what we decided was that regardless of his illness, if he was a danger to society, then the only solution would be the capital punishment,” (F₂₉D₅).⁸⁸

As with the other concerns jurors raised about experts, these juror reactions do not mean that experts cannot play an important and effective role. What they do emphasize, though, is the risk of having the expert play a leading rather than supporting role in developing the defense’s case. If the expert performs as a soloist, presenting theories unsupported by facts established by more credible witnesses who are free of the suspicions attached to experts, the testimony is likely to be discounted at best or have a negative spillover effect at worse. If, on the other hand, the expert takes the role of accompanist and helps harmoniously explain, integrate, and provide context to evidence presented by others, the jury is far more likely to find the expert’s testimony useful and reliable. And, as the jurors’ comments make evident, the testimony most likely to be trusted is that coming from lay experts.

poetry. Serving the role of self-appointed expert, see *supra* note 72 and accompanying text, the juror stated that “most people in prison [write poetry]. My wife was in jail for five years. They’re all very artistic and poetic because they’ve got nothing else to do. They get profound when they’ve got a lot of time to think.” (M₇D₄).

⁸⁸ Although in California the only statutory alternative to the death penalty is life without parole, juries often were still very concerned with the defendant’s future dangerousness because of uncertainty over the defendant’s potential actions while in prison as well as a general skepticism as to whether life without parole really meant the defendant would never be released. See *infra* note 119.

B. Jurors' Perceptions of Lay Experts

Once it is understood why juries often distrust professional experts, it is not difficult to fathom why, by comparison, juries find lay experts credible: They bring to the witness stand almost the exact opposite attributes of the professional expert. They generally are not being paid for their testimony, so they are not susceptible to the label of "hired gun." Their testimony derives from their own experiences and often from their direct interaction with the defendant. As a result, their testimony is not based on a two-hour interview with the defendant in preparation for trial, but carries the power and truth of personal observation. Finally, because the testimony is grounded in facts relevant to this defendant and this case, their observations will be seen by the jury as relevant and helpful in understanding the defendant's actions.⁸⁹

One case in particular highlights the jury's contrasting views of professional and lay experts. The interviewed jurors roundly condemned the defense expert, a clinical psychologist, as embodying all of the negative traits associated with professional experts—he had destroyed his original notes, had billed the taxpayers \$48,000, and to add insult to injury was seen as not being particularly insightful (one juror called him a "total bozo," adding that "since he was hired by the defense . . . it just made [the defense counsel] look foolish" (F₃L₅)). On the other hand, the jurors spoke with great admiration of another defense witness, a woman who knew the defendant growing up, who had engaged in many of the same destructive behaviors as the defendant's mother, and who had turned herself around and now was a clergywoman running a rehabilitation center. One juror kept a journal and her entry describing the witness's impact conveys almost a sense of reverence:

⁸⁹ See Geimer, *supra* note 42, at 293 ("Lay witnesses can powerfully communicate impairment."); Deana Dorman Logan, *Is it Mitigation or Aggravation?: Troublesome Areas of Defense Evidence in Capital Sentencing*, Cal. Att'y's for Crim. Just. F., Sept.-Oct. 1989, at 14, 18 ("Counsel should carefully prepare witnesses to tell their stories through anecdotes and specific acts rather than through generalizations and the use of character or reputation evidence. Such anecdotes not only make the testimony more vivid but are also more likely to avoid opening the doors to deadly rebuttal.").

Several witnesses . . . really clinched my decision [for life]. One woman took the stand and stated that her current line of work is director for a facility of [a rehabilitation center] for recovering substance abusers. She was very articulate and intelligent, and nicely dressed. What surprised all of us was that she used to be a hooker, a junkie and a drug dealer, and was a close friend of [the defendant's] mother. . . . A few years ago she became a Christian, turned her life around, and is now successful. Two of her three children also became Christians and followed in their mother's footsteps. One son is still doing a prison sentence. As she pointed out, all children want to emulate their parents, whether they're doctors, lawyers, etc. or pushers and pimps. All a child knows is that if their parent does it, then they must follow suit. Her children followed her into drugs and crime just as [the defendant] followed his mother and her boyfriend. He didn't know any other way. Then when this woman turned around and gave them something good and positive to emulate, they followed her into the brighter side of life. I admired her for all the above reasons, but also because she remained calm and cool and spoke with such a sureness and strength about her. (F₈L₅).

The witness thus provided context and tied together for the jury the evidence that they had previously heard concerning the defendant's rough childhood, while also giving them reason to believe that he might still achieve some goodness in life. As the juror noted during her interview,

He didn't know any other way. I mean that doesn't make it right, and we weren't, none of us on the jury thought that it was right. But, it was just, you know, this poor kid. He didn't grow up like I did. . . . What impressed me was that she used to be at rock bottom yet she picked herself up and turned her life around. So, just because she came from a poor background doesn't mean that she's always, or anyone who comes from a poor background, doesn't mean that they have to stay or they're always going to stay there. (F₈L₅).

And one cannot envy the prosecutor trying to anticipate how to cross-examine such a witness, someone who is testifying based upon personal experiences and personal knowledge of the defen-

dant.⁹⁰ On the other hand, the same juror noted that the clinical psychologist was "cut down to size" on cross-examination. (F₈L₅).

While the clergywoman may at first appear unusual in the degree of her effectiveness, jurors cited a number of other lay experts who swayed their votes. Especially effective were those witnesses who were perceived to be testifying counter to their usual inclinations or who would not normally be seen as supportive of the defendant. For instance, in contrast to general "prison experts," jurors tended to react favorably to the testimony of prison employees who had dealt with the defendant and testified that he would do well in jail. A tendency to find such a witness credible makes sense, as a prison employee is unlikely to be seen as "soft" on someone with whom they or fellow prison employees will have to deal in the future. Indeed, the common assumption based on movie and book depictions, whether true or not, is that prisoner-prison employee relationships are hostile.

In one case, for example, a nurse at a prison where the defendant had been previously incarcerated made a powerful impression on a number of the jurors in part because her testimony made clear that she did not have a bleeding heart:

She is a strong, strong proponent of the death penalty. . . . But she did not think the death penalty was appropriate for [the defendant] . . . based on her relationship, interviews, knowledge over the last seven years of what he's like. And that weighed, you know. Here was a professional who deals with these types of people all the time, who is pro-death penalty, [and] who doesn't think he's a good candidate for the death penalty. That weighed in my mind. (M₅L₆).⁹¹

And, in another case, a juror specifically noted that it was a jail guard's testimony and not the expert witnesses' testimony that

⁹⁰ Imagine, for instance, a cross-examination of the just-described defense witness: "And how do you know that such a family background can affect an individual?" "Because I was the mother in such a family." "Well how do you know the defendant was so affected?" "Because I knew his family well when he was growing up." "But what makes you think he could ever change?" "Because I have transformed myself through faith and now spend my life helping others do the same." "Oh."

⁹¹ Four of the five jurors interviewed in the case cited the prison nurse as highly influential, and her testimony was later instrumental in swaying the jurors holding out for death to agree instead to a life sentence. See *infra* note 155 and accompanying text.

persuaded the jury that the defendant really would adjust well to prison life, a proposition about which the jury originally had been quite skeptical. (F₂₃L₁₀).⁹²

Similarly, testimony on the defendant's prospects for making a positive contribution while incarcerated generally was received far more warmly when related through a lay witness than through a professional expert. Contrast, for example, the derisive view of the prison expert who had offered the insight that the defendant could be productive as a "doughnut maker" while in prison,⁹³ with a juror's view of lay testimony by prison guards:

[The defendant] was generally a very helpful person. He was a good influence in the prison, and that was one of the defense's big points, was to show that he would be a contributor to prison. . . . He was seen as a bridge between the races. I perceive that he was helpful to the guards. He was helpful in keeping order in the prison, and I think he squealed on someone who had weapons. . . . I think he was, in ways, a giving person. (M₅L₆).

Anticipating and counteracting what might be seen as bias on the lay expert's part can be particularly critical, as seen in a case where two prison preachers testified about how the defendant had become an active member of the prison's religion program. Although the prosecutor tried to argue that the defendant's newfound religion was "hogwash [and] poppycock," (M₂L₄), the interviewed jurors found the clergymen very persuasive, in part because they "said they [had] never testified for the defense at trial before because they had seen too many people find Jesus right before trial," (M₂₃L₄). As a consequence, the jury found the ministers to be "very credible," (F₂₅L₄), and accepted the defense's

⁹² In one of the cases studied, jurors ended up convinced that prison was not a country club life after they went to the prison as part of the guilt phase so that they could see where the killing took place (the defendant was an inmate accused of killing another inmate). Between the prison tour and hearing the testimony at the guilt stage of numerous inmates for both the prosecution and defense, the jury came away convinced that a life sentence in prison was not cutting the defendant any slack. (M₂₆L₁₃).

⁹³ See *supra* text accompanying note 85.

argument that the defendant "had found his place in society—that he could live responsibly in prison if not outside," (F₂₅L₄).⁹⁴

Lay experts also can be invaluable in bringing facts to life that otherwise might not make a full impression on the jury. In one case, part of the mitigation defense was that the defendant had been wrongfully incarcerated in an adult prison for a minor crime he committed while still only a juvenile. Interestingly, the defense presented this incident in part through the testimony of a judge who had helped secure the defendant's release from the wrongful detention:

Interviewer: Any other evidence for the defense at this trial that was

Juror: A good reason not to kill anyone? . . . A judge. I can't remember her name. A very flamboyant, articulate judge who literally, while she was on the stand took over [Judge A's] courtroom.

Interviewer: What was she testifying about?

Juror: She was one of the judges that upon hearing what had happened to [the defendant] being incarcerated for stealing a bicycle at fourteen, was [instrumental] in getting him released from prison at age twenty-five. He spent ten years in federal prison for stealing a bicycle and doing a childish prank at some girl's house that he had this infatuation with. And she literally took over [Judge A's] courtroom.

Interviewer: How did she impress you?

Juror: She just brought up enough information and we saw she was sincere, she was very articulate.

Interviewer: And how did it help you? How did it help [the defendant]?

Juror: She was pressing the fact that [when the defendant was growing up,] black, [rural,] working-class [families], they were basically screwed by society. These were the outcast people. She did a lot to bring that to life. . . . [Now] we look at . . . how backwards white society was in regards to the black role. [But w]here [was] the civil rights movement of Martin Luther King [when the defendant was a boy]? We didn't really know what was going on. These people sat out at their farm and that's about all we knew at that time. And that's exactly what

⁹⁴ One juror noted that the prosecutor tried to "discredit . . . them, but it didn't work." (M₂L₄).

she presented happened to this man. Up until he spent ten years for petty theft. And if his next door neighbor had been a white boy, would he have gotten ten years for stealing a bicycle? No.

Interviewer: Ten years for stealing a bike?

Juror: Yeah. In the full-blown penitentiary. You just can't comprehend that such a thing would happen. But when this judge actually was there and was explaining it . . .

Interviewer: If she hadn't been there, would you not have believed it happened?

Juror: Not that I would have doubted it, but she added such, such—what's the word—when something is so positive it's so undeniable, it's such . . . reality. (M₁₃L₆).

The defense was thus able to present forcefully through the judge—a witness who would be viewed as both credible and impartial—the fact of the defendant's youthful imprisonment and its injustice. The jury found this evidence highly persuasive in helping to establish the defendant's overall mitigation theme that the defendant had been victimized by factors beyond his control. It is unlikely that a professional expert's testimony about the general effects of improper incarceration on a juvenile defendant would have had the same effect. After all, here was a judge detailing how the very system that she helps run failed this defendant as a child simply because he was young, poor, and black.

This is not to say that lay expert testimony is always uncritically accepted by juries. The testimony still must prove to be credible and consistent with the mitigation theme or it may backfire. Normally, for example, a defense attorney might assume that calling sheriff's deputies to establish that the defendant was made a "trustee" of the jail would make a positive impression on the jury. But where the jury had already heard about the defendant's violent past, the prosecution was able to turn the testimony against the defendant by using it to establish that the defendant was ruthless: "On cross-exam, [the deputies] were asked what the criteria was in order for an inmate to be a trustee—they testified he had to be an individual who absolutely could not be intimidated by anyone, [this] showed what kind of person [the defendant] was." (M₂₄D₁₃). Instead of establishing that the defendant had the potential to make constructive contributions to prison society if incarcerated for life, the evidence confirmed in the jury's

mind that the defendant was someone who would do whatever was necessary to further his own self-interests.

As a general rule, however, it was the lay experts—the teacher, the prison guard, the Marine colonel—whom the jurors remembered in detail as being credible and helping them understand the context of the defendant's background and character. Because these witnesses were testifying from personal experience and knowledge, the prosecutor effectively was denied cross-examination (unless the witness had not told the "full story" on direct examination, in which case the less flattering facts brought out on cross-examination could be highly damaging).⁹⁵ Moreover, because the lay witness was drawing upon her own unique background, the prosecution was unable to neutralize her testimony by calling a rebuttal witness and creating a "battle of the experts" as is frequently done to counter professional experts who testify for the defense. Consequently, although they are the most difficult type of defense witness to locate, knowledgeable lay experts created relatively risk-free opportunities for the jury to see the defendant favorably through the eyes of a credible witness who could provide real-life punctuation to the defense's mitigation story.

C. Jurors' Perceptions of "Family and Friends" Testimony

"The mother had the mother role." (F₂₉D₅).

The obvious credibility problem with family and friends witnesses is their inherent bias in favor of the defendant. As would be expected, jurors frequently noted that such testimony was predictable: "I knew that his family and friends were going to

⁹⁵ In one case, the defense called a homeowner who had written a letter to the defendant's prison warden during an earlier incarceration in a "fire-fighting camp." The letter praised the defendant for helping as part of a prison work crew to save the homeowner's house from a fire. On cross-examination, however, it came out that the defendant had asked the homeowner to write the letter. For the juror, the fact that the defendant "had 'fished' for the letter" backfired, because it further painted the defendant as a manipulator. It also was very damaging that a corrections officer from the fire-fighting camp—the incarceration experience that the defense was trying to use to establish that the defendant worked well in prison—testified that the defendant had caused trouble at the camp and had to be removed. (M₆D₃).

say what a wonderful guy he was." (F₃L₃). Yet, despite the predictability of such testimony, jurors rarely held it against a defendant; to the contrary, they frequently identified family witnesses as among the most favorable defense witnesses. Indeed, probably because such testimony is expected, it was the *absence* of such testimony that was unfavorably noted: "After it was all over, I asked [the defense attorney], I said, 'Couldn't you find in this man's life one person as a character witness?'" (F₃₀D₁₄).⁹⁶

A review of jurors' statements regarding family and friends testimony reveals both an emotional and a factual component to its effectiveness. At the most basic level, from an emotional viewpoint, the testimony shows that someone cares about the defendant and believes that he has some redeeming value.

Interviewer: Is there anything about this case that sticks in your mind, or that you keep thinking about?

Juror: During the penalty phase, the public defender brought a character witness, [someone] who was [the defendant's] legal guardian at the time he was a child. I remember her because of her sincerity and the way she was like a mother to [him]. She really cared about the guy. She just seemed very believable. [She] was a good character witness for the defense. She was talking about [his] life, when he was a little kid, and after she went through that, she was pleading for him not to be given the death penalty. (M₂₅L₁₂).⁹⁷

At first, it may seem odd that such a basic point must be made with the jury. But in a capital case, before the defense presents its case in mitigation, the jury will have heard evidence that is overwhelmingly negative: the brutal details of the murder for which they have convicted the defendant, the defendant's past history of violent crime, and often testimony from victims of the defendant's other crimes. The jury is likely to be leaning heav-

⁹⁶ In another case, the defendant's mother and brother testified, but it was the father's absence which intrigued the jury. The jury "felt it odd that the father never came to testify. I think he was ashamed or something because he had a good job and everything—the father." (F₁₀D₅).

⁹⁷ Significantly, this statement by the juror was in response to a question very early in the interview, long before being asked specifically about the trial and various witnesses. The preliminary questions were designed simply to see, at the start of the interview, what it was that the juror kept thinking about after the trial.

ily towards a death sentence,⁹⁸ and it may be extremely important and come as something of a surprise to the jury that the defendant has people who care enough about him to be there on his behalf. Such testimony may present the first sliver of an insight that there is good in the defendant, as well as evil.⁹⁹

Moreover, listening to a parent or sibling talk about the defendant—how he added to their lives, how they feel responsible for the way he turned out, how they will feel a loss if he is sentenced to death—almost always has an emotional impact on the jury. The juror interviews are replete with statements about how such testimony was “nerve-bending,” (M₁₂D₉), and how, as the jury listened to the testimony, “it got sort of shaky in there,” (F₃₂D₁₅). And while some jurors found the emotional reaction hard to handle (“How can you not feel for the poor woman? I almost wish they didn’t bring her in.” (M₂₆L₁₃).),¹⁰⁰ they did not appear to

* See Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 Ind. L.J. 1183, 1193-95 (1995) (discussing the Project’s findings on jurors’ leanings prior to penalty phase); see *id.* at 1193 (“[A] substantial proportion of the jurors stood ready to make a commitment to vote for death, even before hearing evidence regarding aggravating or mitigating factors.”).

⁹⁹ In one case, the defendant’s uncle made a particular impression on a juror mainly through his constant presence and the fact that he cared about the defendant. The juror often noticed the uncle in the hall reading a Bible (the uncle was also a pastor) and at one point saw him crying.

Interviewer: [Of the p]eople the defense called, was there any of those people, one or two, that stand out as influential in your mind?

Juror: Only the uncle. . . . He was trying to help his nephew.

Interviewer: And why did he stand out?

Juror: Why did he stand out? Because just being there and trying to help, like I said, trying to help his nephew.

Interviewer: Well, they all were trying to help.

Juror: Yeah.

Interviewer: Or was it because . . .

Juror: I think he was there everyday. He really put a lot of himself into this.

Interviewer: So when he testified you felt it was heartfelt because he put so much of himself into it. Is that fair to say? I don’t want to be putting words in your mouth. I’m just trying to understand.

Juror: That’s all I can say about it.

Interviewer: What was he saying?

Juror: What a good fellow he was in his eyes and how his parents brought him up, which were the grandparents. (F₃₁L₃).

¹⁰⁰ Another juror in the same case remarked, “There was a lot of emotional stuff brought forth. I had enough emotional problems dealing with myself that I didn’t need everyone else’s input.” (M₂₇L₁₃). It should be noted that although these jurors

hold it against the defendant. One juror's description of a mother testifying conveys the potential emotional power of such testimony:

[The mother] was up there, and the defense attorney was telling her, you know, he said, "Are you aware that your son was found guilty of first degree murder and robbery?" She said, "Yes." He goes, "Do you realize we are going through the penalty phase right now [when] we are determining whether . . . the jurors should give him the death penalty or life in prison without the possibility of parole?" And she said, "Yes." Then he goes, "Do you have anything to say about that?" And she started crying. I had a big old lump in my throat. She was going, "Please God protect my child," and I'm going, "Oh God." You know, it's his mom, you know. (F₃₃L₁₄).

Part of the emotional impact appears to stem from the jurors' ability to relate to the parent or the sibling in a way that they simply cannot to the defendant who has committed this horrible crime.¹⁰¹ Moreover, to the extent family members are viewed sympathetically, it also brings other individuals into the picture who will be affected by the decision of whether to execute the defendant. In one case, the distinct turning point in favor of life was a sister's testimony, testimony that every juror interviewed characterized as highly influential and emotional. The sister, at first, had come across to the jury as the "strong" person in the family, articulately portraying the defendant's upbringing and problems. Then, however, she broke down sobbing on the stand and begged the jury to spare her brother's life.

The testimony's effect was profound. One juror kept coming back to the sister's testimony because it brought the case to a "personal level"; the juror stated that the family members' testimony was the only mitigating factor that made her much less

did not like having to hear such emotional testimony, the jury in the case did return a life sentence, and the juror interviews highlighted the mother and brother's testimony as highly influential.

¹⁰¹ Mothers often struck emotional chords with the jurors: "His mom reminded me of my own mom in some ways. Just from the sadness she was going through. I know if my mom had to go through that she would have been hurt. . . . [His mother] was very hurt, begging for his life." (M₂₈L₁₄). "The mother reminded me of sort of a stereotypical mother, and my heart went out to her. And I know stereotypical—there are lots of stereotypical mothers—but she just reminded me of a 'mom.' She just broke my heart. I felt very sorry for her." (F₃D₃).

likely to vote for death, ($F_{34}L_{10}$). Another juror, who had been a holdout for death because of the circumstances of the crime, identified the family members' testimony and the effect the death penalty would have on them as what persuaded him to vote for life without parole rather than a death sentence: "I think that was the most mitigating thing that would lead us away from the death penalty—just how it was devastating to [the defendant's family]. That basically, having him put to death is just going to create more victims" ($M_{19}L_{10}$). For this juror, the decision had come down to balancing the manner of killing, which for him warranted a death sentence, against "compassion and mercy . . . for the family," ($M_{19}L_{10}$); in the end, compassion for the family won out.

Not all jurors were emotionally swayed by such testimony. One juror, for instance, discounted such witnesses precisely because they "were really for sympathy rather than factual input," ($M_{14}D_5$), and another juror questioned the family witnesses' credibility, noting that the family's testimony "was to be expected," (M_3D_6). One juror gave a different reason for discounting such testimony, stating that at first he was moved by the testimony of the defendant's mother when she "pleaded for life without parole so she could have some time to call him and write to him." ($F_{30}D_{14}$). The juror observed, however, that the testimony of the defendant's mother was largely negated by the victim's mother, who said, "'That was not thought about when they killed [my son]. I can't talk to him. I can't write to him.' The battle between the two mothers was real dramatic as far as I was concerned." In the end, therefore, although this juror "felt sorry" for the defendant's mother, "it really did not influence us. We had to go by the facts." ($F_{30}D_{14}$).¹⁰²

Even the disavowals, however, suggest that the family testimony had some effect. At the risk of over-psychoanalyzing those jurors

¹⁰² The juror's statements suggest that the emotional impact of the testimony of the defendant's family in mitigation may be dampened through the prosecution's use of victim impact statements. Many of the study's cases were tried at a time when victim impact statements were constitutionally banned from capital cases, *Booth v. Maryland*, 482 U.S. 496, 501-02 (1987), or when the use of such statements was uncertain following the Supreme Court's overruling of *Booth* in *Payne v. Tennessee*, 501 U.S. 808, 830 (1991). Consequently, victim impact statements were not a factor in most of the study's cases.

who insisted that family testimony did not influence them, one cannot resist noticing the ambivalence that permeates many of their statements. Recall, for instance, the juror who "had a big old lump in her throat" as the defendant's mother pleaded for his life. When asked if the testimony affected her decision, she responded:

Yeah it did. No, not [in] the decision. I just felt for her. I didn't feel for him. I felt for his mother, you know, because she was a church-goer and all that. He was just a bad seed. Because the other kids were not like that. (F₃₃L₁₄).

Similarly, a juror in a different case, after talking about how the defendant's mother "got very emotional on the stand" and saying that the "mother . . . cast a lot of doubt in my mind about his need for capital punishment," proceeded to state that the testimony "didn't have anything to do with my decision." (F₂₉D₅). It may be many jurors believe that such emotion should not play a role in their decision but, at the same time, they cannot fully escape its effects.¹⁰³ Such an effect can be seen in one juror's reaction to the mere presence of the defendant's children at trial (they did not testify). When asked if she ever imagined herself in the situation of the defendant's family, the juror stated:

I mean sure, there was a fleeting glance. I mean, you can imagine those kids and their mother's going through this! I mean yes, I did that, but I didn't dwell on it. I mean as a school teacher I look at the ten- and twelve-year-old and go, "Oh!" (F₃₅L₂).

As powerful as it may be, the emotional impact of family testimony is but one aspect of the testimony's influence. The testimony also can provide critical first-hand factual input by providing a context for understanding the defendant's actions. Especially valuable in this sense is the family historian, the individual who can tell the stories, both good and bad, that help the jurors picture what life was like for the defendant. In one case, for in-

¹⁰³ While the United States Supreme Court has held that it is constitutional to instruct the jury that they cannot consider sympathy at the penalty phase, *California v. Brown*, 479 U.S. 538, 543 (1987), the California practice during the time the study's cases were tried was that "anti-sympathy" instructions "should never be given in a capital penalty trial." *People v. Hamilton*, 756 P.2d 1348, 1365 n.7 (Cal. 1988) (en banc) (quoting *People v. Brown*, 726 P.2d 516, 529 n.7 (Cal. 1985) (en banc)).

stance, the defendant had been subjected to horrific child abuse by the father. While the defendant's child abuse also was documented through neutral sources like court documents, it was the sisters' stories that every interviewed juror consistently remembered. Perhaps as remarkable as the sisters' testimony is how distinctly and in what detail the jurors remembered the testimony even several years after the trial:

It was an exceptionally horrid upbringing . . . severe, acute child abuse, child neglect, child torture. . . . His father, this was essentially the reason why I decided for life. . . . The child abuse stories were from his sisters and neighbors. . . . [The father] raped all the daughters and we heard graphically about the daughters' experiences with their father. He would be at the kids mercilessly. He would tie [the defendant] up for a day, two days at a time. He would have his girlfriend over. He would make the daughters wait on him while he was having sex with his girlfriend, with the mother downstairs. The only thing that [the defendant] ever loved was a dog and a rabbit. One day the father killed the rabbit and tried to make the dog eat the rabbit. The dog wouldn't do it so he killed the dog. He was drunk all the time. Whatever food there was he'd take and give the kids nothing [but] chicken feet. He would beat the mother up and got into fights at bars, was antagonistic, was hateful. He hated [the defendant] because he was the darkest skin[ned]. In those days dark black skin was considered less desirable and the father was light skin[ned]. He always told [the defendant] he wasn't his kid. One time he locked them all in a bureau, for over twenty-four hours, all five kids hunched up, while he was drunk. He beat them with razor straps. One time [he] poured alcohol on them. He had them tied up, was beating them with straps and poured alcohol on them to see them writhe with more pain. He chased the girls, they would run to the car. He had sex with them continuously from when they were four to about sixteen. He would make the girls, when they went on a car trip . . . he made them sit with their legs spread open with a mirror on the floor of the car so he could look up their dresses. . . . We graphically heard from the sisters how he beat them, neglected them, the acute child abuse. (M₅L₆).

One of the sisters testified that the only reason she went to her father's funeral was "to make sure the son-of-a-bitch was dead." (M₁₃L₆).

Stories such as those that the sisters told, stories that made the jurors visualize the defendant as a small child watching his pets, his only sources of love in a hate-filled home, killed in front of him by a monstrous father, are the verbal pictures that are worth a thousand clinical words.¹⁰⁴ With such background, the jury can look at a picture of the defendant "in his little sailor suit [when] he was only four or five years old," (F₃₇L₆), and, for at least a moment, see the defendant as someone other than the adult sitting twenty feet away on trial for two repulsive torture murders. Without such a context, though, the introduction of childhood pictures is more likely to be seen as just an effort to play on the jury's emotions.¹⁰⁵

Sometimes, the family witnesses themselves became evidence for the jury to consider. In several cases, for instance, in which a parent testified about neglecting or abusing the defendant, jurors clearly were studying the parent's demeanor as well as listening to what she was saying. Some jurors responded to such witnesses by transferring their hostility from the defendant to the parent:

[The mother's] manner was harsh and annoying, but may have ultimately helped [the] defendant, because [the] jurors transferred hostility towards defendant to [the] mother for her failures. . . . I mean everybody voiced the same statement, that the party that deserved to be on trial was the mother. . . . She raised more emotion among the jurors than the defendant did. (M₃₀L₁₅).

Several jurors had a similar reaction in another case in which the defendant's alcoholic father testified about his abuse of the defendant as a child. The jurors said that while they had felt "anger and rage" towards the defendant at the guilt stage, at the

¹⁰⁴ A juror in a different case made a similar observation:

Interviewer: What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

Juror: His mom's. . . . I think basically we got a little more understanding of what a rotten childhood the guy had. Which I guess made you understand how he could do what he did. (F₃₆L₁₅).

¹⁰⁵ As a juror said in another case, "They introduced photos of [the defendant] when he was a little kid. Some of the people on the jury resented the idea of trying to present the defendant as an innocent little child." (M₂₅D₁₃).

penalty phase they now felt the "anger and rage" on behalf of the defendant towards his parents. (F₂₅L₄; M₂L₄). Other jurors, while upset with the father, also felt sorry for him as he cried and pleaded for mercy. (M₃₁L₄).¹⁰⁶ Interestingly, in the same case, the defendant's testimony proved critical, but not just because of the substance of what he said. After observing the defendant testify, the jury really did believe that he was as mentally impaired as the experts and family had claimed.¹⁰⁷

Thus, the testimony of family witnesses, testimony somewhat unique to capital cases in terms of its permitted breadth, generally had a more positive influence on the jury than one might first expect given its inherent bias problems. The favorable impact may result, in part, from the difficulty of cross-examining a witness on matters such as their love or remorse ("*You don't really love your son, do you?*") or on delicate factual matters such as abuse suffered by the defendant and his siblings ("*Now, those whippings with the electrical cord were not really that severe, were they?*"), especially if the jury has become emotionally protective of the witness.¹⁰⁸ Consequently, it is very difficult for a

¹⁰⁶ Similarly, in another case where the parents testified about how they had abused the defendant, all of the interviewed jurors said they were moved by the parents' testimony. One juror singled out the father's testimony as the most influential because "he was broken up and he was remorseful for what had happened, how he had treated him, what [the defendant] had done, and his role in creating who [the defendant] was. He was crying for most of his testimony. It... had the most impact." (M₃₃D₁₄). In this case, however, the jury still returned a death sentence.

¹⁰⁷ Interestingly, the defendant's difficulty in testifying articulately was interpreted by one juror as showing remorse ("Sometimes he found it difficult to speak, he was so remorseful." (M₂L₄)), and by others as evidence of his mental impairment ("[He was] just not very intelligent. Like a kid emotionally." (M₂₃L₄)). But with either reaction, it worked in making the jury sympathetic: "Like I said, he wasn't very bright. They wanted us to see his lack of intelligence, they wanted us to pity him. That's why they put him on the stand, and it worked." (M₂₃L₄).

¹⁰⁸ Jurors generally understood why a prosecutor would not strenuously cross-examine a family witness:

One of the things that stood out was when the sisters were on the stand, the prosecutor did not go after them or try and dispute what they said like a lot of us thought that he might. He pretty much let it in... The defense witnesses... you could see were visibly, emotionally shaken by the testimony. He seemed to be very receptive to that and didn't go after them [like he did the expert witnesses in the first phase]. (M₃₃L₆).

Another juror in the same case also noted the prosecutor's approach and thought it

prosecutor to cast doubt on such testimony other than to point out the witness's relationship to the defendant, a relationship which, in many cases, adds to the emotional impact of the testimony.

This is not to say that a witness cloaked with familial or friendship ties automatically will be embraced by the jury. Not surprisingly, witnesses of dubious character, such as fellow inmates, made very negative impressions.¹⁰⁹ And even a normally sympathetic witness, such as a mother, may backfire if she does not play the "mother's role" properly. In one notable example, a juror explained:

This may sound weird, but his mother . . . seemed to hurt him, not help him. . . . She just didn't seem that concerned about it,

astute . . . not to cross-examine the sisters too much. He tried to show that all the kids didn't go out murdering people. There wasn't a whole lot he could do. The main thing he tried to point out was that "I'm not going to deny there was abuse, but it still doesn't justify the behavior." (M₅L₆).

When a prosecutor did try to discredit a defendant's mother, one juror in particular strongly objected (the juror otherwise had only admiration for the prosecutor):

His mother, like I said, reminded me [of mine]. And that's the only time I really got mad at the prosecutor, the way he was talking to her. . . . Of course, he was just doing his job. The way he was asking her questions though! The woman was up there pleading for her son's life. (M₉D₃).

The juror returned to the topic later:

During the [mother's] testifying, they went into great detail, that's where I felt that the prosecuting attorney was browbeating the mother. . . . It was more like a leering or a sneering-like "attitude" towards her. She was there trying to defend her son . . . and I don't think she was lying about his background. But he tried to make us believe that she was "piling it on," just his general attitude towards her. I mean, he wasn't really being disrespectful to her, but it was just, I think it was just, overkill. (M₉D₃).

¹⁰⁹ What is surprising is that such witnesses were called in the first place. These were not fact witnesses at the guilt phase, such as eyewitnesses, where the attorneys must take their witnesses as they find them, see *supra* note 44, but witnesses called to testify as to the defendant's character. As character witnesses, their reception was uniformly negative:

"I mean, to have people in prison uniforms be your character witnesses? I mean come on! I mean they're saying what a great guy he was." (M₃₄D₁₆).

"There was a couple [of witnesses] that they brought from jail—inmates. . . . It was as if they were afraid to talk almost. You know, they would start to and then one didn't want to talk. . . . I just didn't believe them. . . . [They testified about] what type of person he was." (F₂₈D₁₂).

"[The defense] brought out all of these so-called character witnesses. They were friends of his . . ." (M₃₅L₉). (The friends were not inmates, but the jury thought from the friends' appearance and testimony that they were of dubious character.)

it seemed like she practically had to work up emotion for him. This one brother was back there crying. They should have had him testify. But he didn't. Her testimony was about arguments with him, there were a ton of them. (F₂₄D₇).

Another juror in the same case had an almost identical reaction when asked if any defense testimony backfired:

I'd say the mother's testimony. I think because we had to go through an interpreter it lost a lot of its emotional impact that it might have had. She talked about the father dying, you know, they were very poor. How [the defendant] wanted to take over and be the man of the family. . . . And then when she remarried he had a hard time getting along. She said stuff like he was a good boy. People, I guess, were expecting her like to plead for his life, you know. She didn't really get into doing any of that. He had her bring in photographs and she showed photographs of when he was younger and growing up. I'd say maybe due to having to go through a translator, the impact of her testimony was maybe lost. (F₂₇D₇).

And, most devastatingly, in rare instances family members or close friends actively testify against the defendant ("[When] somebody who loves you like a mother testifies against you, yuck! It doesn't say much for you at all." (F₃₈D₁₀)).¹¹⁰ or, though called as defense witnesses, ask the jury to impose the death penalty.¹¹¹

Finally, family and friends testimony was effective only when presented in sufficient detail so as to present a coherent and full factual picture of the defendant. Without such a factual backdrop, the jury was likely to view such character testimony derisively, as an effort to manipulate them:

It seemed that the reasons they gave [as to why the defendant was of a good character] . . . actually there were two, were very lame. Like as a character reference this one kid who went to

¹¹⁰ This witness was called by the prosecution as a fact witness at the guilt phase.

¹¹¹ This occurred in only one case and none of the interviewed jurors were certain whether this was a defense strategy or was unexpected. The defendant's brother, a police officer, testified about his love for the defendant but then "pleaded" for a death sentence because being locked up for life would be worse than the death penalty. (F₃₉D₆). His sisters, on the other hand, pleaded for life. The jurors uniformly described the brother's testimony as "very emotional" and stated that it made a powerful impression. The jury voted for death.

school with [him], part of the high school while he was there, said "Oh, he was such a good student; he was very good at writing, not writing stories, just good penmanship." That [was] the only thing, maybe he was nervous or something, but that's all he actually said—everybody liked him and he had very good penmanship. It was lame. And then the other one, whatever reasons or examples that he gave were unbelievable to me. It was something about what a great guy that he spent his whole weekend camping running around pulling Volkswagens out of ditches. We just thought, when you're camping, how many Volkswagens are in ditches? How wonderful was this for a character reference? That was just to prove what a wonderful person he was. (F₂₁L₉).

That such testimony would be viewed as feeble hardly can be surprising. For some reason, when measured against the defendant's grisly murder, good penmanship just does not seem very weighty. But even this type of testimony might have carried some weight if the defense had a larger factual context within which such testimony could be considered. For example, if the defendant had come from a highly abusive background or had very limited mental abilities,¹¹² the jury might view as noble or worthy any efforts by the defendant to succeed or help others, even if such efforts were fairly modest. Without such a context, though, random descriptions of a defendant's "good deeds" are likely to seem almost insultingly trivial to the jury when contrasted with the defendant's crime.¹¹³

¹¹² This is not to suggest that the defense attorneys failed in this case. Indeed, the jury sentenced the defendant to life, but mainly because they viewed the victim, a woman who the defendant "picked up" at a biker's bar, as putting herself in a vulnerable situation. The attorneys may have been hindered by a lack of mitigating evidence from developing a factual background. In most capital cases, however, investigation usually will reveal a fairly compelling personal story. See generally Haney, *supra* note 31, at 562-602 (describing variety of mitigating factors commonly affecting capital defendants).

¹¹³ A number of jurors noted what they believed were defense efforts to overlay insignificant acts as being important. One juror's comment typifies the reaction: "The girlfriend I'm speaking of had a little boy and [the defendant] liked the little boy, so that's why they thought he was a nice guy. See, that was for him, character, for him." (M₁D₁). In a different case, a juror stated:

"[The defendant] was a wimp, I mean he was a nothing that was going, operating on false steam. He came in with all these character witnesses that were testifying to what a wonderful man he was. It was all forty years ago, when he

IV. WRITING THE COMPLETE SCORE

For the attorney composing the presentation of her case, the jurors' responses to the various types of witnesses make it evident that each witness category has its own benefits and liabilities. Professional experts can offer an overall perspective as to how events and disabilities might have led to the defendant's actions, but the jury will view their testimony with a hefty dose of skepticism because of the experts' lack of extensive interaction with the defendant and their perceived role as a "hired gun." Lay experts, on the other hand, avoid the negative connotations of being a hired gun and can offer a "real life" perspective on the defendant's life and potential, but may not be able to offer a larger context within which to understand the defendant's situation. Family and friends witnesses serve both an emotional and factual role: They make the jury realize that the defendant is a person about whom others care and are able to sketch a picture of the defendant's life as only someone close to the defendant could. The jury, though, approaches family testimony cautiously given the strong bias for the defendant, and sometimes discounts it as a defense ploy to play upon their emotions.

Because each category of testimony has its intrinsic strengths and weaknesses, the most successful defense cases tended to use a combination of different types of testimony to create a coherent defense theme. To return to the symphony analogy, the most successful presentations of evidence were those where each type of witness, while playing a different melody, was orchestrated to be in harmony with each other.

Bringing together different witness types can be especially effective, because the strengths and weaknesses of the different witness types are largely complementary. For example, the jurors' primary criticisms of the professional expert (a lack of substantive knowledge of the defendant and being a hired gun) are the perceived strengths of the lay witnesses (a real life perspective on the defendant and lack of bias). And, of course, the weakness of the lay expert (lack of a wider context within which to understand the defendant's actions) is what the professional ex-

went to high school, when he lived . . . with his family, when he was in the Navy." (M₁₁L₈).

pert can best explain based upon her training and education. Family members' testimony similarly interlocks with the other types of testimony. Family testimony can provide emotional input and detailed facts that the professional and lay experts normally cannot, but it suffers from credibility problems based on bias. Lay and professional experts, therefore, may be invaluable in bolstering the family testimony by providing objective verification of the family testimony concerning the defendant's background, traits, and the like. The complementary effect, however, will only be achieved if the witnesses' testimony unites to tell a comprehensive and compelling story.

Noting the complementary strengths and weaknesses of the different types of witnesses does not, of course, mean that an attorney will always be able to orchestrate a convincing case by picking and choosing among a smorgasbord of witnesses. Cases vary in the strength of their mitigating and aggravating factors and in the availability and persuasiveness of their witnesses—not all mothers are able to bring a tear to the jury's eye.¹¹⁴ Indeed, cases may arise in which the aggravating factors are so heinous and the availability of mitigating evidence so limited that even the most talented and energetic attorney could not compose a compelling case in mitigation. The findings do suggest, however, that an attorney can maximize the persuasive value of her case by searching out different types of witnesses and ensuring that the testimony they present harmonizes as much as possible.

Two cases in particular illustrate how juries are likely to respond when the different types of witnesses harmonize in orchestrated form and when they do not. These cases were chosen in part because their results, although not startling, were not necessarily preordained. In both cases, the defense had a fair amount of mitigation evidence with which to work in shaping its case, but the facts of the crime were so highly disturbing that the jury was predisposed towards a death sentence after the guilt-innocence phase. How the jury perceived the case in mitigation, therefore, was crucial to how they responded.

¹¹⁴ See *supra* notes 110-111 and accompanying text.

A. Case Study: A Failure to Harmonize

In the first case, the jury returned a death sentence in the face of what would normally be thought of as highly persuasive mitigating evidence: The defendant had a long-standing battle with a severe mental disorder. At first blush, such a disorder would seem to be a particularly persuasive mitigating circumstance because it reinforces the theme to which jurors respond most favorably, that the defendant had no real control over his actions.¹¹⁵ Moreover, the defendant had no prior criminal history, a factor that usually weighs heavily towards a life sentence.¹¹⁶ So why did the jury return a death sentence?¹¹⁷

The answer lies largely in the need to recognize that a particular line of defense will have a number of different effects on a jury, all of which must be addressed. Severe mental illness in particular, although appearing to be a compelling mitigating circumstance, raises a number of collateral issues that may lead the jury to vote for a sentence of death rather than life.¹¹⁸

¹¹⁵ See Geimer, *supra* note 42, at 289 (stressing importance of defense counsel proving at penalty phase "an impairing event . . . over which [the defendant] had no control and for . . . which she cannot justly be held responsible").

¹¹⁶ When asked if the lack of a prior criminal history would make them less likely to impose a death sentence, one-half of the Project's California jurors said it would make them much less likely (20%) or slightly less likely (30%). Moreover, on the aggravation side of the equation, a history of violent crime made the jurors much more likely (31%) or slightly more likely (40%) to impose the death penalty.

¹¹⁷ The analysis of the case is not meant to suggest that the defense attorneys were ineffective or provided less than excellent representation. The critique is presented solely from the jurors' perspective as to why they were not persuaded by the defendant's case in mitigation. It is an effort to explore how the jurors' concerns might have been counteracted by different types of witnesses and stories—if they were available. It may be that the only witnesses and stories that existed were those presented by the defense and that they simply were not sufficiently compelling to overcome the prosecution's very strong case in aggravation.

It should also be noted that the defendant in this case was African-American and the victims were white, a factor that has been identified as increasing the possibility of a death sentence. See *infra* note 130.

¹¹⁸ See James M. Doyle, *The Lawyers' Art: "Representation" in Capital Cases*, 8 *Yale J.L. & Human.* 417, 444-45 (1996) (noting difficulties of presenting mental illness as mitigation evidence); Ellsworth et al., *supra* note 19, at 88-89 (experiment found that the 19 "death-qualified" mock jurors were significantly less likely to accept schizophrenia, compared to organic brain disorder, as basis for insanity defense; experiment did not address use of mental disease in deciding between life without parole and

In this case, for instance, the jury understandably was highly concerned about the defendant's future dangerousness both to society and to the prison population.¹¹⁹ The defendant had brutally murdered randomly chosen victims. The defense called a number of psychiatric experts who testified about the defendant's history of mental illness and how it might have affected his actions. But the psychiatrists' testimony, while convincing the jury that the defendant was mentally ill, also raised grave concerns about whether the defendant might kill in prison or escape. Indeed, part of the psychiatric history focused on how the defendant had been released from hospitals (one juror used the term "escaped"), stopped taking his medication, and then had psychotic episodes.¹²⁰ As one juror explained her decision to change her vote from life to death:

death penalty); Perlin, *supra* note 75, at 245-49 (noting studies suggesting that mental illness is not an effective mitigating factor because of juror attitudes).

While a severe mental illness mitigation theme poses a number of presentation problems for counsel, a significant majority of the Project's California jurors (75%) stated that if the defendant had "a history of mental illness," they would be at least slightly less likely to vote for death (24% said "much less likely" and 51% said "slightly less likely").

¹¹⁹ Other than the facts of the crime itself, the defendant's future dangerousness and the need to prevent the defendant from ever killing again tend to be the most discussed topics in deliberations. See Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 *Cornell L. Rev.* 1, 4-6 (1993) (reviewing Project data from South Carolina). Even in California, where the jury is told that the only alternative sentence to death is life without parole, juries in the Project focused heavily on future dangerousness either out of a concern that the defendant in fact would be paroled at some time or that he would kill in prison: 52% of California jurors said keeping the defendant from ever killing again was a "very" great concern in making their decision, and an additional 20% stated it was a "fairly" important concern. Moreover, despite the life-without-parole instruction, 50% of the California jurors were concerned that the defendant "might get back into society someday" if not given the death penalty (23% were "greatly" concerned, 15% were "somewhat" concerned, and 12% were "slightly" concerned).

¹²⁰ Consider the following juror's comments:

Juror: Well, they all, everyone who testified, the doctors were—it seems to me—and the way the law was at the hospitals that they could not keep him restricted in the hospital without, unless they thought he would be a harm to himself or to someone else. It seems to me the defense brought that up, I can't remember whether it was [the] prosecution or defense. Under the law, they had to release him when maybe they shouldn't—when definitely they should not have. Because the doctors could not come up with conclusive evidence that he was a danger to himself or to society. They gave him medication, and said he could be released with medication.

Interviewer: And how did this [evidence] backfire [on the defendant]?

We discussed that if he were given life he would be in an eight by eight cell for the rest of his life but might be, with good behavior, released for exercise and have to be around other prisoners and that could be dangerous. . . . What we decided was that regardless of his illness, if he was a danger to society, then the only solution would be the capital punishment. (F₂₉D₅).

Consequently, the defense's mitigation evidence of mental illness was a double-edged sword that needed to be addressed.¹²¹ While admittedly speculative, having prison officials or psychiatric personnel testify about the treatment of mentally ill inmates might have helped dull the dangerousness edge of the sword and allay the safety concerns inadvertently raised by the doctors' testimony.¹²² Some assurance that the defendant would be in a highly controlled environment may have persuaded the jurors that the risk of further violence was minimized. Along these same lines, the presentation of lay expert testimony (such as a teacher, social worker, or pastor) that the defendant functioned well when on medication might have further bolstered the jury's sense that the defendant could safely be sentenced to life without parole.

The jurors also expressed an interest in hearing more regarding the defendant's illness and its effects. While the family's testimony was emotionally powerful and several friends testified, some jurors wondered why they had not heard from more lay witnesses about the illness's effects on the defendant, causing them to question some of the family's and friends' testimony. The jurors also could not relate any particularly memorable anecdotes about the defendant's struggles with mental illness be-

Juror: He killed some people. He didn't take the medication, that type of mental illness—it's well known that people [with the defendant's mental illness] do not want to take their medication. (F₂₉D₅).

¹²¹ As one juror succinctly put it when asked about the strongest factors for and against the death penalty: "For: His incurability. Against: His illness." (F₂₉D₅). For a discussion of the "two-edged sword" problem, see Ralph Reisner & Christopher Slobogin, *Law and the Mental Health System: Civil and Criminal Aspects* 580-83 (2d ed. 1990).

¹²² I have found it somewhat surprising, both with cases in which I have been involved and with cases in the Project, how cooperative prison officials generally have been in capital cases in testifying about the security of their facilities and their ability to handle difficult prisoners. This fact may be a result of professional pride—"no one is escaping under my watch"—or just representative of the fact that prisons, on the whole, tend to be quite secure.

yond the testimony concerning the defendant's stays in mental hospitals and a general disintegration in his behavior.¹²³ They did not recall, for instance, any vivid stories from lay experts, like teachers or ministers, that painted for them a picture of an "innocent" youth succumbing to a mental disease beyond his control. The lack of anecdotal images of how the defendant's mental illness affected him, assuming such anecdotes existed, could be seen as particularly detrimental if the studies are correct which suggest that jurors respond to mental illness defenses only when the defendant exhibits an extreme disorder.¹²⁴

The lack of vivid imagery was likely compounded by the fact that the defendant was heavily medicated during the trial. While the defendant's drugged state was explained to the jury, his flat emotional state and demeanor meant that they had no real sense of the defendant except through the defense witnesses. As with other capital jury studies, the jurors in the Project paid great attention to the defendant's demeanor and whether he gave any indications of remorsefulness.¹²⁵ And, in this case, their descriptions made clear that they had been observing him: They described him as "catatonic," ($M_{36}D_5$); "show[ing] no emotion . . . ambivalent," ($M_{14}D_5$); and "detached . . . totally withdrawn," ($F_{29}D_5$).¹²⁶

¹²³ Recall, for example, the vivid tales of child abuse that jurors remembered in other cases. See *supra* Section III.C. In contrast, the one tidbit that a juror recalled from the testimony of the defendant's brother was that the "brother said that when [the defendant] was young, he could take a motorcycle apart and put it back together." ($F_{29}D_5$).

¹²⁴ See Perlin, *supra* note 75, at 266-67.

¹²⁵ See William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 *Am. J. Crim. L.* 1, 51-52 (1987-88) (finding that some jurors gave great weight to remorse in deciding whether to impose death sentence); Perlin, *supra* note 75, at 277-78 (noting difficult choices of defense attorney as to what to tell jury when defendant is heavily drugged on antipsychotic medicine). Cf. *Riggins v. Nevada*, 504 U.S. 127, 142-43 (1992) (Kennedy, J., concurring) (noting the weight jurors place on demeanor, the behavioral side effects of many antipsychotic drugs, and the resulting due process problems involved in involuntary administration of such drugs to criminal defendants).

¹²⁶ One juror, despite acknowledging that the defendant was drugged, stated, "If he would have spoken, even only in fragments, [it] would have helped in determining if he really was mentally ill or could kill again. It seemed to be a disputable factor as to whether he was putting it on or if he really heard voices telling him to do things." ($F_{29}D_5$). Cf. *Riggins*, 504 U.S. at 135-37 (holding that unless there are no less intrusive alternatives, forced medication of defendant in capital case violates due process because it impairs defendant's ability to present defense at trial and alters his outward appearance to jury).

In fact, according to one juror, some of the family and friend testimony did more harm than good by creating a perceived inconsistency in the mitigation story:

Juror: A friend of his had, there's something that just really struck us that negated some of the evidence that they were trying to put forward. Didn't look like he had been well coached. Something about going out and doing some drinking. . . . [T]he particular witness, who was a friend of [the defendant], did appear to negate some of the weak evidence they had presented. . . . Their main defense line was the insanity or that he didn't have mental capacity. That was established as their main line of defense and this guy, I think, had . . . inadvertently torpedoed a little bit of that. . . . [In talking about the defendant's competency, this friend noted the defendant said,] "Let's go out and get a drink." That was during one of the evenings he was supposed to be totally "wacko" according to the defense line. That one evening, I think [the defendant] said, "Hey, let's go out and have a beer." That struck me as being very inconsistent with the general line of defense that this guy was supposed to be in outer space.

Interviewer: So he had gone out social drinking?

Juror: Yeah, like he was normal. (M₃₆D₅).

Although difficult to anticipate, testimony about the defendant's behavior often creates perceived holes in the mitigation story, and jurors, shocked by the brutality of the crime, often will be waiting to spot inconsistencies as evidence that the defense is trying to fool them. Yet these testimonial offshoots are less likely to be viewed as inconsistent if placed in context by a professional expert or a lay expert. In this case, for example, a social worker who helps place mentally ill individuals in jobs might have been able to explain that people with severe mental illnesses often have lucid moments interspersed with psychotic episodes. Indeed, such lucid moments might provide the jury a basis for hope that, if properly treated, the defendant could control himself in prison and perhaps even be productive.

Keeping in mind that attorneys are limited by the material they have available, this was a case in which the different types of testimony did not come together to form a persuasive theme for the jury. While some jurors questioned the severity of the defendant's illness, the jury as a whole believed that he was

mentally ill and even the prosecution's psychiatrist conceded mental illness.¹²⁷ But after hearing the penalty evidence, the jury seemed uncertain of how to use it and was pulled in different directions by its implications. To the extent they believed the doctors as to the severity of the defendant's illness, the physicians' testimony seemed to suggest that the defendant would be highly dangerous in prison. And while they found the mother's testimony emotionally powerful, they also felt as if they had relatively little factual background on the defendant's character change, which caused some of the jurors to question the defense psychiatrists' testimony about the illness's severity. There were no lay experts to bridge the factual and credibility gaps or explain how mentally ill individuals can be successfully integrated in structured settings. As a result, the jury tossed and turned with the decision, but ultimately resolved the conflicts in favor of death—some because of dangerousness, some because they believed the brutality of the crime outweighed his illness, and some for both reasons.¹²⁸

B. Case Study: Three-Part Harmony

The second case involved an extremely brutal and senseless murder of a young woman with whom the defendant was casually acquainted. She had invited him over to her apartment after he telephoned her and said that he needed to speak with her. Once in the apartment, the defendant gagged the victim with her own clothing, violently raped her, bound her hands, strangled her to death with a towel, and then wiped the scene clean of fingerprints.¹²⁹ The jury heard evidence establishing the de-

¹²⁷ The prosecution expert, however, maintained that the defendant knew the difference between right and wrong, a conclusion that the jury accepted in rejecting the defendant's insanity defense at the guilt phase. ($F_{10}D_5$).

¹²⁸ One juror in particular was troubled by the verdict. The juror broke down crying shortly into the interview and later turned out to have at first voted for life without parole. The rest of the jury finally convinced the juror, however, that the jury instructions required him to weigh aggravating and mitigating factors, and the balance tilted in favor of death because the "[o]verwhelming aggravating circumstances [of the brutal multiple killings] could not be overcome. I tried to find a way but couldn't." ($M_{36}D_5$).

¹²⁹ One juror, responding to a question about whether he continued to think about anything from the trial, hauntingly replied: "Images. . . Photos of the crime scene

fendant's extensive criminal history of violent crime, including first-hand testimony from a prior rape victim. Indeed, the defendant had been connected with the murder only because he was caught during a later crime spree that involved a violent assault of one victim, the rape of another, and a bank robbery. In terms of overall aggravating evidence, the case was extreme. The case also involved an African-American defendant and white victim, a combination that prior studies have found disproportionately results in a death sentence.¹³⁰

Nevertheless, the jury returned a life sentence. And while one must be careful in attributing the verdict to particular factors, the interviewed jurors were all strongly persuaded by the defendant's case in mitigation, a case that involved the effective integration of all three types of witness testimony. It became clear that by the conclusion of deliberations, the jury had agreed upon a distinctive picture of the defendant, his background, and his potential to adapt to prison.

Family testimony was critical in establishing that the defendant had a "hideous" childhood, one that it was "amazing [the defendant] survived." (M₃₇L₁₂). His sister and aunt were the primary witnesses for describing his childhood, and their testimony included a number of stories that the jury remembered, including most vividly that the defendant as a teenager had been a witness to the rape and murder of his own mother. The testimony about the physical abuse, the family's drug use, and the mother's prostitution had a powerful impact on certain jurors. One juror, who after hearing the horrors of the guilt phase and the details of the defendant's other crimes had been "pretty sure" that the death penalty should be imposed, came away with a different understanding after hearing the mitigation evidence:

and of the victim. I fairly well remember the brutality aspect: the bruising, tightness of the clothing used to tie her up with . . . the bruising and the brutality of it." (M₃₈L₁₂).

¹³⁰ See, e.g., David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in *Handbook of Psychology and Law* 251, 259 (D.K. Kagehiro & W.S. Laufer eds., 1992) (presenting statistical research that an African-American defendant who kills a white victim has a significantly greater likelihood of receiving the death sentence). Cf. *McCleskey v. Kemp*, 481 U.S. 279, 297, 299, 317-19 (1987) (finding that, even if statistically accurate, the "Baldus Study" did not establish an Equal Protection or Eighth Amendment violation).

The family was very polarized, I would say. They had some very—let's use the word bad—evil—some real bad—evil people in that family. And they had some really nice people who were really struggling to get along in that situation and ultimately succeeded or failed to some degree, but they really had some real polar personalities in that family. So some of those people I did legitimately feel bad for and some of them I thought—actually thought a few of the family members were the people who should have been on trial. (M₃₇L₁₂).

Similarly, another juror repeatedly talked of her sense of "rage" towards the defendant's parents and her desire to "have them brought in and hung." (F₄₀L₁₂). Moreover, as sometimes happens with family testimony, some jurors saw the sister who testified as corroborating evidence that the defendant's background had indeed affected him: "His sister just kind of reinforced how he was . . . an alcoholic, which is so typical of people in this kind of social situation." (F₄₀L₁₂).¹³¹

As noted earlier, family testimony also can impress the jury just by the very fact that someone cares about the defendant. One juror stated that the testimony of such a witness formed the most lasting impression she took away from the trial:

During the penalty phase, the public defender brought a character witness . . . who was [the defendant's] legal guardian at the time he was a child. I remember her because of her sincerity and the way she was like a mother to [him]. She really cared about the guy. She just seemed very believable. That was a person who was a good character witness for the defense. She was talking about [his] life, when he was a little kid, and after she went through that, she was pleading for him not to be given the death penalty. (M₂₅L₁₂).

From the family testimony, therefore, the jury obtained a vivid factual picture of the defendant's childhood, as well as its first sense that the defendant had some personal attributes that might allow him to make a positive contribution in prison.

This emerging picture of the defendant was critically reinforced by the testimony of two lay experts whom the jury found

¹³¹ Another juror also remembered that "his family was heavily into drugs and a sister was a prostitute." (M₃₈L₁₂).

highly credible and influential. One was a Marine colonel under whom the defendant had served. The colonel testified about how the defendant had distinguished himself as a member of the Corps, had an exemplary record, and could function positively in a highly-structured setting. (M₃₇L₁₂). A juror even noted that the defendant uncharacteristically showed emotion when the colonel testified, providing an unconscious emphasis to the colonel's testimony that this was someone whom the defendant respected. The fact that the colonel, an impressive individual in his own accomplishments, could testify from first-hand knowledge about the defendant and give such a positive report made him a highly effective witness, with at least one juror declaring "the Marine's testimony . . . the most influential." (M₃₇L₁₂). One cannot help but think of the diminished impact if the defense had introduced the defendant's military service simply through his military records.

In a similar vein, a corrections officer testified that the defendant had been a model prisoner and had adapted well to a prison setting. As with the Marine colonel, the jurors noted that the corrections official knew the defendant and, therefore, was able to talk about what sentencing the defendant to life without parole would mean in *his* case:

[He] knew him well because [the defendant] had been incarcerated before. He was a model prisoner. He testified not only about what life without parole was like, but also what kind of prisoner he had been in the past This guy was very credible. (F₄₀L₁₂).¹³²

Coupled with the Marine colonel's testimony, the corrections official reinforced the emerging theme of the defendant as an individual who "when he was institutionalized, no matter what the area—military or prison—he was a role model. Whenever he was in a structured environment, he did very well." (F₄₀L₁₂). These lay experts also were able to offer a hope that "he would probably be able to be a productive human being inside the in-

¹³² A different juror similarly noted: "[The corrections official] described what [life without parole] was about law-wise and what it meant in reality. He also said the best he could say how it fit in [the defendant's] case." (M₂₅L₁₂).

stitution," without which, the same juror said, she would have voted for a death sentence. (F₄₀L₁₂).¹³³

The importance of the lay experts' testimony cannot be overestimated given the prosecution's case for future dangerousness. The evidence of the defendant's past crimes, especially the testimony of the prior rape victim, had convinced the jury that the defendant was extremely dangerous in society-at-large:

There was a gal that he had previously raped in an apartment building he was in. He used the same method on her as he did the one that he actually murdered. And she suffered a lot of physical and mental pain after the episode was over. It was influential because to know that in fact what she was talking about was true, it was not really if it was believable or not, it was true. It just goes to show that the person, if I had a sense of pity towards him, it's that he would never learn. That he was dangerous. That he did it once, and he would do it again and again. So it was influential from the standpoint that I thought to myself that this guy cannot be out. (M₂₅L₁₂).¹³⁴

But the Department of Corrections witness was able to counter this concern by providing a realistic picture of the defendant's confinement if sentenced to life without parole and by calming any fears that the defendant would ever be released.¹³⁵ His testimony, along with the Marine colonel's assurances, convinced the jury that the defendant's violence and misbehavior would not carry over into the structured setting of a prison:

He was a good model prisoner. He was a good military guy, but in society he was not a good functioning human being. I would have not wanted him to have had the option to be released from prison. So I would have considered heavily the

¹³³ "[The strongest factor against a life sentence would have been] if we didn't think that [he] really would do anything constructive in prison." (F₄₀L₁₂).

¹³⁴ A different juror described a similar reaction to the prior criminal history evidence:

During the sentencing, it came up that he had past crimes. That was important for me to know, because it shows me that there was a trend. It was important for me to make sure if this trial was not going to put him away, then it would allow him to be out in society again. That means that in all probability he would commit another crime. (M₃₉L₁₂).

¹³⁵ See Eisenberg & Wells, *supra* note 119, at 4-6 (defendant's future dangerousness is most discussed factor by jury other than facts of the crime).

death penalty [if parole had been a possibility]. We were instructed that there would be absolutely no way that he'd be able to be released or pardoned. (F₄₀L₁₂).

Importantly, the lay experts' testimony also enabled the defense to pursue aggressively, through professional expert testimony, the theme that the defendant's background had essentially turned the defendant into a "ticking bomb." (M₃₇L₁₂). For unlike the previous case, where the more the defense emphasized that the defendant's dangerous behavior resulted from his mental disease, the more the jury worried about his release or actions while in prison, here, the lay experts had persuasively assured the jury that the defendant would be held in a highly secure facility and would adjust to it well.

Aided by this testimonial backdrop, the professional expert, a psychiatrist, was able to weave together the family testimony and the defendant's actions, including his violent past, into an evidentiary tapestry that made sense to the jury. And, at least from the jurors' perspectives, the professional expert's testimony made sense of how the defendant's past influenced his present actions.¹³⁶ Critically for the defense, every interviewed juror described the defendant's life and behavior in a way that reflected an acceptance of the expert's testimony that the defendant's criminal behavior was a product of his upbringing: "[His] background, upbringing . . . childhood abuse. . . . What he learned was that violence is acceptable." (M₃₈L₁₂). "He found himself in a situation where I guess he was forced into doing what he did." (M₃₉L₁₂). "[H]e was at this point in his life where somehow probably his definition of being good is a lot different than your or my definition. . . . I don't think he was a good person, not at all." (M₃₉L₁₂). "He had been programmed for this kind of behavior. He was a ticking bomb. He had several incidents of varying degrees of severity of this kind of behavior. It's unfortunate that the pattern was not spotted so that he could be removed from that situation." (M₃₇L₁₂). "The defendant's life story—[it was] almost inevitable that the defendant's childhood

¹³⁶ "The psychiatrist . . . built a basis for the defense that established mitigating circumstances with regard to [the defendant's] upbringing, family, home environment." (M₃₈L₁₂).

led to a mental state where he would rape and kill women he knew." (M₂₅L₁₂). One juror went so far as to state:

There are . . . hundreds, thousands of people just like him who have not been given social skills as young children but are thrown into an environment like this. I mean there is a lot of anger, and rapes are very legitimate outbursts of anger, legitimate in the way they've been brought up as a response to their environment and their upbringing. (F₄₀L₁₂).

Thus, unlike in many cases, the professional expert was seen as very effective. Tellingly, however, they found him persuasive because his testimony was consistent and interwoven with the other evidence—both the prosecution's and defense's—and it struck the jurors as being in accord with their common sense ("[T]he psychological background of [the defendant]—that testimony *reinforced* how I felt." (F₄₀L₁₂) (emphasis added).). The expert's testimony was important not only in providing affirmation for those jurors inclined to take a more generous view of the defendant's life, but also by giving those jurors something concrete to point to during the jury deliberations to convince the death-leaning jurors that the defendant's background did indeed matter.¹³⁷

It was in the jury deliberations that the effective orchestration of the family, lay expert, and professional expert testimony became most apparent. As happened in several of the cases, once the jurors retired to the jury room they tried to put all of the evidence together by making a time chart of the defendant's life. For two-and-a-half days, the jury went through "the chronology of [the defendant's] life." (M₃₈L₁₂). The interplay of the different types of evidence, especially the role of the professional expert as an accompanist rather than a soloist, is strikingly brought together by one of the juror's narratives:

We started a chronology of [his] life. We started and discussed . . . basically [from] infancy to being a small child to being an adolescent and up to the home and the environment he lived in having to do with the role models: his father and mother.

¹³⁷ One juror commented, "[T]he lack of understanding of his childhood was . . . disputed. . . . Some people didn't have any sympathy and didn't have any understanding. There were experts . . . there that testified, so that helped." (F₄₀L₁₂).

In this case, [he] did not have a good role model for a father. . . . And his mother was not a good role model. She slept with multiple men in his presence, with his knowledge, and was doing drugs. His sister was a prostitute. Crime was prevalent in his family at all levels, his mother, sister, brother. . . . We took into consideration his performance in high school, both in athletics and academics, as well as his performance in the more meaningful things he did in his life. And that was the service. He was exemplary. He was one of the elite Marines. . . . We also considered [his] prior criminal record and his state of mind leading up to just prior to the incident. We considered the act of the murder. . . . [T]he brutality and extent of which he inflicted pain and suffering on his victim. And then, ultimately, his confession and of course a couple of crimes he did even after the event. And we did all that from the perspective of [the defendant], what he achieved and the interaction of people throughout his life. *Then we separately reviewed as we did this, we related expert testimony and how they [explained] the events in [his] life and how they might have contributed to the crime.* (M₃₈L₁₂) (emphasis added).

And although not all of the jurors were initially inclined to vote for life, eventually, after the jurors discussed all the evidence and their differing views as to the "story" of the defendant and his crime,¹³⁸ a consensus emerged that life was the most appropriate penalty.

While one cannot ignore that an attorney is limited by the quality of the witnesses and evidence available, the case does illustrate how attorneys can harmonize the strengths and weaknesses of each type of witness into an effective mitigation theme despite an extremely strong case in aggravation. Interestingly, while each of the five interviewed jurors was impressed by every

¹³⁸ One juror observed:

[I began developing a story] as soon as they started presenting the case. I used the evidence as it was being presented, as well as later discussion during jury deliberations to create a story. I had my own version of the story when the jury started deliberating, but after discussion with the jury, the members, I was able to kind of maybe adjust my conclusions of some certain facts. I did not have [a] complete definite story to my satisfaction until just before the jury did its final voting. (M₃₉L₁₂).

witness type,¹³⁹ each juror also named a different witness—an aunt, a legal guardian, the Marine colonel, the corrections official, the psychiatrist—as the most influential in his or her decision, reaffirming the idea that it was the entire case in mitigation, not just one aspect or witness, that swayed the jury to decide on a life sentence. Even the defense attorney was pulled into the equation by at least one juror who noted, “She was almost like one of the character witnesses—her believability about her faith in the case and that [the defendant] should not be sentenced to death seemed completely believable and sincere.” (M₂₅L₁₂). In sum, because the defense paid attention to how the different mitigation witnesses’ themes sounded when played together, the jury was far more receptive to the harmonized mitigation defense than it otherwise might have been.

V. FINAL OBSERVATIONS

A. Experts as Storytellers

Considerable scholarly effort has been devoted to trying to determine how juries make decisions. One model views juries as using storytelling techniques to understand and evaluate evidence presented at trial.¹⁴⁰ In developing the story that they will use in arriving at a verdict, jurors rely heavily upon their own life experiences. Professors Pennington and Hastie have described the process as consisting of three stages: Stage one involves the jurors’ using their worldview to produce a plausible story from the evidence they have heard; in stage two, the jurors take the judge’s legal instructions and create categories of fea-

¹³⁹ Not all witnesses, however, were effective with the jury. The defense called a friend of the defendant as a witness whom at least one juror found less than credible as “overplay[ing]” his testimony and appearing to have been “coached.” (M₃₇L₁₂).

¹⁴⁰ Vidmar & Schuller, *Juries and Expert Evidence*, supra note 8, at 146 (storytelling model “most widely accepted model” of jury decisionmaking). See generally Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 Nw. U. L. Rev. 863 (1996) (using storytelling as means of analyzing criminal trials, especially the use of victim impact evidence and the role of the public as voyeurs). The storytelling model has also been suggested as a means for understanding how capital juries make their decisions. Valerie P. Hans, *Death by Jury*, in *Challenging Capital Punishment: Legal and Social Science Approaches* 149, 161-63 (Kenneth C. Haas & James A. Inciardi eds., 1988). The jurors in the Project even occasionally used storytelling terminology to describe their thought processes. See supra note 138.

tures for the verdict alternatives; and during stage three, the jurors find the best correlation between the stories that have been developed and the categories determining the verdict alternatives.¹⁴¹

Although Pennington and Hastie did not apply their storytelling framework to expert testimony, several efforts have been made in the area. Professors Vidmar and Schuller, for example, looked at a number of simulated and mock jury studies involving social framework evidence to see how it might affect the stories that jurors devise.¹⁴² They concluded that jurors will generally accept social framework evidence and use it in formulating their stories, but the effect of such evidence varies according to context.¹⁴³ Most noticeably, for example, the studies indicated that the impact of such evidence is significantly heightened when it is directly linked to the case and facts being decided.¹⁴⁴ This Article's findings certainly reinforce that hypothesis: Experts who did not integrate their testimony with a case's specific facts and the other testimony were far less likely to be seen as persuasive than those who intertwined their testimony with the other evidence presented. Vidmar and Schuller's review also concluded that jurors "do not appear to suspend their own judgment in deference to the expert,"¹⁴⁵ nor do they use such evidence to "substitute for their own judgments about the credibility of a lay witness."¹⁴⁶ Again, these conclusions are consistent with this Article's findings of great juror skepticism regarding experts and of jurors using their own beliefs and attitudes to evaluate expert testimony.

Professor Lempert likewise has thought about expert witnesses as storytellers, speculating that they can be seen as telling stories in different ways: An expert can tell the key part of the story (the disputed part of the story); an expert might fill in the "gaps"

¹⁴¹ Nancy Pennington & Reid Hastie, Evidence Evaluation in Complex Decision Making, 51 J. Personality & Soc. Psychol. 242, 243-45 (1986). See also Reid Hastie and Nancy Pennington, The O.J. Simpson Stories: Behavioral Scientists' Reflections on *The People of the State of California v. Orenthal James Simpson*, 67 U. Colo. L. Rev. 957 (1996) (applying storytelling principles to O.J. Simpson trial).

¹⁴² Vidmar & Schuller, Juries and Expert Evidence, *supra* note 8, at 148-71.

¹⁴³ *Id.* at 172.

¹⁴⁴ *Id.* at 166, 172.

¹⁴⁵ *Id.* at 173.

¹⁴⁶ *Id.* at 174.

of a larger story; the expert may provide a story plot for the jury to make sense of the evidence it has heard; or, the expert can provide a story plot that helps explain the testimony of a particular witness.¹⁴⁷ The cases discussed in this Article included all four types of expert storytelling.

Most evident, at least in the death penalty context, is that where the expert tries to tell a key part of the story alone, relying on deference to her expertise to make the story persuasive, juries are unlikely to be moved.¹⁴⁸ The professional expert witness generally was seen as an unreliable storyteller, one likely to spin a tale for her own gain rather than for the enlightenment of the jury. And, with only their own experience and beliefs through which to judge the story's veracity, jurors tended to discredit defense experts' testimony as being at odds with their worldview. The lay expert, in contrast, was far more likely to be perceived as a storyteller without a hidden agenda and, consequently, juries were far more receptive to the story she had to tell.

Juries became more interested in the professional experts' stories when their testimony shifted into the other types of storytelling. Indeed, keeping with the storytelling motif, it may be helpful to think of the expert as most effective when acting primarily as a narrator providing a plot line within which to understand the story's twists and turns.¹⁴⁹ This type of expert testi-

¹⁴⁷ Richard Lempert, *Experts, Stories, and Information*, 87 Nw. U. L. Rev. 1169, 1175-78 (1993).

¹⁴⁸ This fact may be less true in a case such as the one Lempert uses to illustrate the category: a DNA expert called by the prosecutor in a rape case. *Id.* at 1175. In such a case, the underlying evidence—the DNA test—may be seen as less susceptible to manipulation by an expert, especially one presented by the prosecution. Among the most favorably received experts in the study, for instance, were prosecution experts testifying to matters such as DNA tests and pathology reports. See *supra* note 50.

¹⁴⁹ See generally Taslitz, *supra* note 6, at 94-98 (discussing importance of "narrative fidelity" in jury's evaluation of alternative stories). The lawyers in a capital trial, of course, also must play the role of narrator and artist. See Doyle, *supra* note 118, at 417-34 (discussing capital defense lawyer's role as "artist" who must create a compelling "representation" of the defendant for the sentencer); Michael E. Tigar, *Voices Heard in Jury Argument: Litigation and the Law School Curriculum*, 9 Rev. Litig. 177, 192-93 (1990) (discussing how listening to the "voices heard in jury argument" is critical for lawyers presenting their case to the jury). For an interesting perspective on the need for capital defense attorneys to tell narratives not only to juries and judges but also to a larger societal audience, see Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 Harv. C.R.-C.L. L. Rev. 353, 373-81 (1996).

mony was significantly more effective because the jury now had a means of judging the expert's narrative apart from the expert's status as storyteller. The jurors could look to what they had heard from the other storytellers (lay experts and family members) in whom they had far greater confidence, and see whether the expert's story plot made sense. If the narrative did harmonize with the other testimony and evidence, then the narrative itself became reinforced by the other stories that the jury had heard.¹⁵⁰

One case in particular illustrates how juries take an expert's narrative and test whether it fits with the other stories they have heard. The jury had heard extensive, heart-wrenching stories from family members about the defendant's terribly abusive father, vivid testimony about how the defendant had been unlawfully incarcerated as a juvenile for a minor offense, and persuasive evidence from several other lay experts on how the defendant adapted well to prison. It was against this testimonial background that the defense psychiatrist explained the effects of child abuse to the jury, an explanation the jury found more persuasive than the prosecution expert's opinion because the defense expert's narrative made more sense:

Juror: [Dr. A, who] was a child abuse expert and then some, [said] that [this is] one of the worst cases of child abuse and neglect she had ever seen and he never had a chance. . . . She was really, like I said, she helped us so much . . . understanding what caused him to do what he did and [the effects of the] child abuse.

Interviewer: Did the [prosecution] psychiatrist try to suggest that he did have control? That [the child abuse] wouldn't have affected him?

Juror: Yes.

Interviewer: And why did you find [Dr. A's] testimony more influential than [the prosecution's experts]?

¹⁵⁰ The study, therefore, would appear to validate Lempert's prediction that when an expert fills in gaps of a larger story, her credibility is enhanced because "a story based largely on other case facts lends credence to an expert's claims." Lempert, *supra* note 147, at 1176. Similarly, where the expert is providing an alternative story about the evidence or a particular witness (for example, an eyewitness expert placing an identification into context), Lempert argues that "[i]f juries evaluate both cases and witnesses by story fitting, then every expert witness will want to embed her conclusion in a story that plausibly explains it." *Id.* at 1178.

Juror: *Because we had all the other witnesses plus her.* (F₃₇L₆).¹⁵¹

The defense expert's credibility as a storyteller, already heightened because her story fit best with the other evidence, was further enhanced because, as several jurors noted, she often testified for the prosecution and was an advocate of the death penalty. As a result, they placed even greater confidence in her narrative because they knew it was one that she did not often tell.¹⁵²

Because the child abuse expert's narrative was found credible, the jury then used it to help place the other witnesses' testimony into a broader context of understanding. Her testimony filled in any "gaps" as to the likelihood that the abuse the jury had heard about from family and lay experts would have affected the defendant.¹⁵³ She explained that the defendant's abuse was one of

¹⁵¹ The prosecution psychiatrist apparently did acknowledge that child abuse victims commit a greater proportion of crimes than those without a history of abuse. A different juror, when asked if any of the prosecution's testimony backfired, replied:

I think the [prosecution's] doctor, the child abuse expert, sort of almost laid some ground work out. You know . . . the prosecution was saying not everybody abused commits murder, which is true you know, but there is a higher degree of . . . people who do commit crimes or murder are child abuse victims. So I, I think it sort of laid a little ground work for the defense, because that was basically their case. (M₄₀L₆).

¹⁵² This fact was recounted in several of the juror interviews: "One of [the child abuse experts] incidentally, who was working for the defense, co-authored an article in a book with the D.A., which his defense used very well. [It] was an article on child abuse, the impact child abuse has . . . on adults." (M₅L₆). In making a similar observation, another juror pointed to the expert's importance:

Juror: "There was one particular [psychiatrist] that was always for the death penalty, except for this one case.

Interviewer: Oh, really? That's pretty convincing, I'm sure.

Juror: Yeah, it was. In fact, that was the one person's testimony that broke our vote 'cause we were really locked between the death penalty and life without parole. (M₄₀L₆).

Defense counsel pursued a similar strategy in the Susan Smith case, having the defense psychiatrist testify on direct how he had also been an expert witness for the prosecution in prior cases. The expert further bolstered his credibility by stressing the limits of psychiatric expertise and explaining that he had testified before Congress about the need to ensure that experts do not exceed the proper scope of their expertise in testimony. *State v. Smith*, Nos. 94-GS-44-906 and 94-GS-44-907, 1995 WL 578226, record at *24-*26 (S.C. Ct. Gen. Sess. July 21, 1995) (testimony of Dr. Seymour Halleck).

¹⁵³ See generally David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel*

the worst cases she had ever seen—sufficiently severe that it led her to abandon her usual advocacy of the death penalty.¹⁵⁴ As one juror stated, “The psychologists were able to give us the best indicator of [his] thought processes. . . . [R]ationales for some of his behaviors.” (M₅L₆). And, in the end, when the jury was deadlocked with two holdouts for the death penalty, the jury asked to rehear the testimony of the child abuse expert. When asked what changed the holdouts’ minds, a juror replied:

Juror: The actual listening to the tape of the doctor, the one that was really insistent on the death penalty except for this case because of the two factors—because of both the child abuse and the imprisonment together. It was just like the kid never had a chance, would not even had a chance to expand his capabilities.

Interviewer: So listening to the tape of the psychiatrist really changed [the holdout’s] mind?

Juror: It changed his mind and so he voted life without parole and then [the other holdout] went along with him (M₄₀L₆).

Without the child abuse expert’s testimony to fill in the gaps in the story and provide an overall convincing narrative, the jury would have lacked the overall story line that proved essential to their final decision: the understanding of how the defendant’s abuse and unlawful imprisonment as a juvenile could have played a role in his development.¹⁵⁵

Thinking about expert testimony as a form of storytelling highlights the fact that juries attach great importance to the storyteller’s identity and whether the story she is telling is consis-

Psychological Evidence, 77 J. Crim. L. & Criminology 1, 34 (1986) (noting that “[t]o most people the topic of child sexual abuse is unfamiliar and mysterious”).

¹⁵⁴ This point stuck with the jurors:

This one doctor, this one psychiatrist that . . . had written books on it, I guess, and she said she was for the death penalty, but in this case she wasn’t. . . . [This was b]ecause of the severe child abuse [and] the fact that he was in prison as a youth in an adult facility for stealing a bicycle, for seven years (M₄₀L₆).

¹⁵⁵ Another juror, in describing how the rehearing of the expert and nurse’s testimony persuaded the holdout, told how the testimony gave the other jurors an ability to point to statements in the testimony and say, “See . . . here is where [there is] again another explanation for his behaviors.” (M₁L₆). This use of expert testimony in jury deliberations as a way of persuading holdouts is similar to how jurors described the use of testimony in the rape-murder case discussed in Section IV.B.

tent with everything else they heard during the trial.¹⁵⁶ At least in capital cases, this Article's findings suggest that responsibly presented expert testimony may be helpful to the jury in understanding the overall significance of the different stories they have heard. But, as the jurors' often sarcastic comments made clear, when the expert attempts to tell only her story, the jury is unlikely to listen.

B. Lessons for Effective Assistance of Counsel in Capital Cases

This Article began by noting the various factors that have led to experts playing a pervasive role in capital litigation.¹⁵⁷ As the Project's findings were explored, though, it became evident that among the different types of witnesses who testify at a capital trial—professional experts, lay experts, and family members—the jury is likely to be most skeptical of the professional expert's testimony. It is fitting, therefore, to conclude by coming back full circle and asking, given this Article's findings, what are the legal and ethical implications for defense attorneys who rely so

¹⁵⁶ In fact, the type of expert testimony that is most effective in practice may bridge the chasm between the two sides of the debate over the proper role of expert testimony in the "soft sciences." See *supra* note 6. Professors Bonnie and Slobogin, for instance, while supporting the admission of mental health expert testimony as "informed speculation," also strongly advocate better data collection and training. Bonnie & Slobogin, *supra* note 6, at 496-522; cf. Christopher Slobogin, The "Ultimate Issue" Issue, 7 *Behav. Sci. & L.* 259, 265 (1989) (cautioning that much opinion testimony should be admitted only if subject to rigorous adversarial testing). These reforms not only make good policy sense but, as the jurors' comments make clear, are critical if a jury is to find the expert testimony credible.

On the other side of the debate, even the critics of such testimony acknowledge that mental health experts are "acute observers of behavior and can therefore efficiently provide . . . rich behavioral data." Morse, *supra* note 6, at 983. The critics, however, would limit the testimony by not allowing the experts to go a step further and present "[d]iagnostic and other conclusory labels" for such behavior. *Id.* at 1068.

Whether or not one agrees with the legal argument in support of such limits, avoiding diagnostic and conclusory labels constitutes sound guidance for the type of expert testimony that juries are most likely to respond to favorably: testimony heavy on facts and unencumbered by "textbook" terms and theories. Thus, the most persuasive expert testimony is likely to be a combination of the reform proposals made by both sides: experienced professionals adept at gathering relevant stories and facts and presenting them so that jurors can understand in a commonsense fashion how the testimony they are hearing fits in with the other evidence they have heard.

¹⁵⁷ See *supra* Section II.B.

heavily upon professional experts as they prepare and present their cases to the jury?¹⁵⁸

A clear first lesson is that defense counsel must view the obtaining of an expert as merely a preliminary step in the investigation of the defendant's case. A defense strategy that revolves solely or even primarily around professional expert testimony, especially psychological or psychiatric testimony, is likely to meet with failure.¹⁵⁹ Indeed, experienced capital litigators often advise that only lay testimony be presented at the penalty phase, in part because it reduces the prosecution's ability to introduce damaging rebuttal evidence.¹⁶⁰ At a minimum, the study's findings suggest that if an expert is to be used, the expert's testimony must be effectively integrated with persuasive lay testimony. To invoke the symphony analogy one last time, the defense attorney must actively assume the role of composer and seek to write a full instrumental score using a complement of witnesses whose testimony harmonizes into a coherent mitigation theme.

Such a role for defense counsel, however, requires extensive investigative time and effort. Unlike professional experts, family members and lay experts do not readily appear upon the filing of a motion. They are likely to be found only after extensive

¹⁵⁸ As Professor Bonnie has consistently noted since *Lockett v. Ohio*, 438 U.S. 586 (1978), the expanded role of experts in capital sentencing also has important ethical implications for the mental health experts themselves. See Richard J. Bonnie, Foreword: Psychiatry and the Death Penalty: Emerging Problems in Virginia, 66 Va. L. Rev. 167, 187-89 (1980); *id.* at 189 (noting that clinicians acting as experts in capital cases must be "sensitive both to the significance of their role and the limits of their knowledge"); Showalter & Bonnie, *supra* note 41, at 161 (noting that while the broad role of "psychiatric input at the sentencing phase" creates an important role for experts, "it also allows for the unfortunate venturing into a more speculative level of opinion . . . that may not reach a threshold of either clinical or legal significance").

¹⁵⁹ This Section primarily focuses on the use of expert testimony at the penalty phase of the capital trial. While jurors showed some skepticism towards experts used at the guilt phase who testified on matters such as ballistics and DNA evidence, their harshest criticisms generally were directed at penalty-phase experts testifying about behavioral theories.

¹⁶⁰ See Geimer, *supra* note 42, at 291-92; *id.* at 291 (arguing that because expert testimony "opens the door to damaging cross-examination and rebuttal," lay witnesses and closing argument should be used instead of an expert except in unusual instances); see also Logan, *supra* note 89, at 18-19 (cautioning against using only traditional psychiatric testimony at penalty phase but seeing role for other mental health testimony).

research into the defendant's background and after talking to a number of individuals involved with the defendant.¹⁶¹ Even family members, who at first might appear to be readily available as witnesses, may prove to be reticent. The types of information that the defense is trying to uncover—stories of drug abuse, child abuse, incest, and the like—are often viewed as “family secrets” that will be revealed, if at all, only once the attorneys have gained the family's trust. Sometimes the defendant himself proves to be an obstacle. He may be reluctant to reveal such information or to identify family and friends who could testify, because he wants to avoid involving his family or feels shame over what has occurred.¹⁶² Consequently, the family and friend witnesses whom the jurors recalled as the most effective, those with powerful and memorable stories, usually will be found only after extensive and repeated interviewing of a wide range of acquaintances.

The witness type that jurors identified as the most effective overall, the lay expert, is apt to prove the most elusive of all. At least with the family members, the attorney has the family tree to guide her search for witnesses and information. Discovering lay experts, on the other hand, requires extensive sifting through the defendant's background to uncover the teacher, the employer, the prison guard who can knowledgeably and persuasively testify about the defendant's background and character. Thus, while the lay expert may be the most effective witness for weaving together the different strands of the defense, finding such a witness and fully exploring how she fits into the defense's theme will be a time-consuming challenge.

Given the horror stories about defense attorneys who have represented capital defendants—attorneys who did no investigation prior to the penalty phase, fell asleep during trial, aban-

¹⁶¹ Geimer, *supra* note 42, at 290 (“Investigation for the penalty trial must be comprehensive, requiring counsel to learn about the client's life from pre-birth to the present.”).

¹⁶² Indeed, the fact pattern giving rise to the Supreme Court's decision on what constitutes ineffective assistance of counsel, *Strickland v. Washington*, 466 U.S. 668 (1984), largely revolved around defense counsel's inaction brought on by a sense of “hopelessness” because the defendant was uncooperative. The defendant kept rejecting counsel's advice by confessing to the crime, pleading guilty, and waiving a jury. *Id.* at 672.

doned their clients before the jury, or represented their clients while drunk¹⁶³—it may seem odd at first to sound a cautionary note of concern that attorneys may be relying too heavily on expert witnesses in capital cases. But the study makes clear that overreliance on expert testimony, even if mixed in with a scattershot of testimony from family members, does not develop a coherent mitigation story that is likely to succeed before a jury.¹⁶⁴ Consequently, as sympathetic as one might be to the time pressures of capital defense work and the cascade of motions that an attorney must file and respond to, effective capital representation requires counsel to develop the case beyond simply traveling the statutory avenue of obtaining experts and relying upon their findings as the mitigation case.¹⁶⁵

It would be particularly disturbing if *Ake's* right to an expert¹⁶⁶ became a de facto rubber stamp for courts to affirm death penalties by finding effective assistance of counsel simply because expert testimony was presented at the trial. Some courts have shown a shocking reluctance to find ineffective assistance even

¹⁶³ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 835, 1841-49 (1994) (reviewing particularly egregious attorney malfeasance in capital cases); William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 Wm. & Mary Bill Rts. J. 91, 150-61 (1995) (citing examples of lawyers ineffectively assisting capital defendants).

¹⁶⁴ Certainly, given that presenting mitigating evidence through lay witnesses is generally more desirable, the fact that an expert's confidential report contains aggravating information, as well as mitigating, does not justify defense counsel's presentation of no mitigating evidence at all. A recent Fourth Circuit opinion addressing such a fact pattern is therefore troubling. In *Stout v. Netherland*, Nos. 95-4008 and 95-007, 1996 WL 496601, at *1 (4th Cir. Sept. 3, 1996) (per curiam), the district court had granted federal habeas relief because defense counsel had presented "'virtually no case in mitigation'" despite the availability of "'overwhelming'" mitigating evidence. *Id.* at *9 (quoting unpublished district court opinion). The district court "discredited" defense counsel's claim that he had not presented mitigating evidence because the psychiatrist's report included an assessment that the defendant had an anti-social personality disorder. *Id.* at *6. The district court pointed out that the evidence could have been provided by family members rather than through the psychiatrist. *Id.* The Fourth Circuit reversed the district court using a "very deferential standard" towards defense counsel's strategic decisions. *Id.* at *11.

¹⁶⁵ See James J. Clark & Edward C. Monahan, *The Mental Health Expert: Eight Steps to Integrating a Specialist Into Your Case*, *Crim. Just.*, Spring 1996, at 2 (stressing need for lawyers to manage expert witnesses and effectively integrate their use with other witnesses and evidence).

¹⁶⁶ See *Ake v. Oklahoma*, 470 U.S. 68 (1985).

where there is no pretense of lawyerly skill: In one recent case, a court made the incredible suggestion that a lawyer allowing his co-counsel to remain asleep at the counsel table may have been "a strategic move" to win sympathy from the jury.¹⁶⁷ If a lawyer's nodding off can be seen as effective trial strategy, think how much easier it is for a court to give a quick nod of approval to a lawyer's representation where that lawyer at least presented some type of expert testimony. It would be a tragic irony if *Ake*, a case making a significant step forward in giving defendants the resources to defend against the death penalty, became just a veneer to affirm death penalties because the courts and defense counsel did not understand that experts are only one of many tools necessary to build an effective case in mitigation.

¹⁶⁷ *McFarland v. State*, 928 S.W.2d 482, 505 n.20 (Tex. Crim. App. 1996). The sleeping lawyer candidly admitted at the motion for a new trial that, "I'm 72 years old. I customarily take a short nap in the afternoon." *Id.* at 505 n.19.