STATE OF INDIANA	)	IN THE ALLEN SUPERIOR COURT
	)SS:	
COUNTY OF ALLEN	)	CAUSE NO: 02D06-1609-MR-10
STATE OF INDIANA	)	
	)	
vs.	)	
	)	
MARCUS DANSBY	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DECLARE INDIANA'S CAPITAL SENTENCING STATUTE UNCONSTITUTIONAL

Defendant Marcus Dansby, by counsel, Michelle F. Kraus and Robert Gevers, respectfully submits this Memorandum in Support of his Motion to Declare Indiana Capital Sentencing Statute Unconstitutional.

Introduction

Two recent opinions issued from the United States Supreme Court, *Glossip v. Gross*, Case No. 14-7955 (Slip Opinion, p. 61) decided June 29, 2015. J. Breyer, dissenting, and *Hurst v. Florida*, No. 14-7505 (Slip Opinion), decided January 12, 2016, clearly suggest that Indiana's four (4) decade experiment with the death penalty is a constitutional failure.

Precedents over the past four decades have established a number of procedural and substantive federal and state constitutional safeguards for application of the death penalty and life without parole ["LWOP"]. Sections I thru VIII discuss this capital jurisprudence and why a constitutional death or LWOP sentence is impossible under Indiana's current capital sentencing scheme.

A substantial body of research conducted over the past two and a half decades exists which examines how the death penalty statutes are applied by jurors. Most of this data comes

from actual capital jurors through the Capital Jury Project ["CJP"].[1] In Section IX, the constitutional mandates of the U.S. Supreme Court are outlined and discussed in light of the jury research which persuasively demonstrates that capital jurors are not applying capital sentencing statutes in a manner consistent the relevant statutes, or the state and federal constitutions.

I. The Death Penalty is Imposed Arbitrarily and Capriciously, with an Inappropriately High Risk of Discrimination and Mistake, in Violation of the Eighth and Fourteenth Amendments to the United States Constitution and Art. I §§ 16 & 18 of the Indiana Constitution.

In 1973, the Supreme Court struck down the various death penalty schemes then in existence. *Furman v. Georgia*, 408 U.S. 238 (1972). The decision was 5-4 and each justice wrote an opinion. The freakish nature in which the death penalty was being applied by the states was a driving force behind the *Furman* decision. Justice Brennan described it in this manner;

> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed it smacks of little more than a lottery system.
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> * * * *
>
> When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison.

Furman at 293-94 (Brennan, J., concurring).

[1] The Capital Jury Project ["CJP"] began in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (NSF grant SES-9013252).

Justice Stewart likened the death penalty to being struck by lightning and held that it was unconstitutional because it was so "wantonly and freakishly imposed." *Id*. at 310. Justice White found the Eighth Amendment was violated because there was "no meaningful way of distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id*. at 313.

Death penalty statues were quickly rewritten by Indiana and other states in an attempt to solve the constitutional problems the *Furman* Court found. These statutes were supposedly fashioned to weed out the worst of the worst crimes and murderers for application of the death penalty. Likewise, the United States Supreme Court sought to make the "application of the death penalty less arbitrary by restricting its use to the "worst of the worst." See, *Glossip v. Gross*, Case No. 14-7955 (Slip Opinion, p. 61) decided June 29, 2015, J. Breyer, dissenting, quoting J. Souter, *Kansas v. Marsh*, 548 U. S., at 206 (dissenting opinion); see also *Roper v. Simmons*, 543 U. S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution" (internal quotation marks omitted)); *Kennedy v. Louisiana*, 554 U. S. 407, 420 (2008) (citing *Roper*, *supra*, at 568).

However, as Justice Harry Blackmun[2] concluded twenty years after *Furman*, these new capital sentencing schemes did not solve the problems:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia*, and despite the efforts of the States and courts to devise legal formulas and precise rules to meet

[2] Justice Blackmun dissented in *Furman*, voting to uphold the death penalty.

> this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake.

Callins v. Collins, 510 U.S.1141 (1994) (Blackmun, J., respecting the denial of certiorari).

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia*, and despite the efforts of the States and courts to devise legal formulas and precise rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake.

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Justice O'Connor, long a swing vote in death penalty cases, expressed her reservations about the death penalty in a speech to a lawyer's group in Minnesota. O'Connor said there are "serious questions" about whether the death penalty is fairly applied in the United States and suggested that "the system may well be allowing some innocent defendants to be executed." Bakst, B., Associated Press, "Justice O'Connor Says Innocent People May Be Going to Death Row", 7/3/2001.

In October 2009, the American Law Institute (ALI) voted to withdraw the death penalty section from the Model Penal Code, in light of the "current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment." The action taken by the ALI and reflections of these jurists underscore the continuing constitutional deficiencies of the current death penalty system. The death penalty is no less arbitrarily and capriciously applied today as it was in the years before *Furman*.

A comparison of the number of capital cases filed and executions in Indiana with the number of murders, show the relative infrequency of the death penalty and executions. Table I below documents the number of murders and non-negligent manslaughters in Indiana, as

reported in the FBI Uniform Crime Reports, the number of times the death penalty was sought, and the number of actual executions in Indiana for the years 1990-2013.

Table I

Year	# of Murders or non-negligent manslaughters	# of DPs sought	# of executions
1990	344	23	0
1991	423	26	0
1992	454	11	0
1993	430	9	0
1994	453	17	1
1995	460	16	0
1996	420	10	1
1997	430	8	1
1998	454	16	1
1999	391	6	1
2000	352	11	0
2001	413	6	2
2002	362	4	0
2003	341	3	2
2004	316	6	0

2005	356	6	5
2006	369	6	1
2007	356	0	2
2008	327	4	0
2009	310	0	1
2010	292	3	0
2011	284	1	0
2012	275	3	0
2013	319	1	0
2014	330	6	0
2015	373	1	0
Total	**9634**	**203**	**18**

It is unknown how many of the reported homicides were death-eligible. However, as these numbers reveal, over the twenty-six years from 1990 thru 2015, the death penalty was requested in only 1 out of every 47 reported homicides. During the first 10 years of this period the rate was 1 in every 32 homicides. More recently – from 2006 thru 2015 – the infrequency of death requests has risen to 1 out of every 129 homicides. In addition, very few executions actually occurred in Indiana over this twenty-six year period. Actual executions occurred in only one out of every 535 homicides.

A. The Worst Murderers and Worst Murders Do Not Result in Death Sentences.

One might speculate that with so few capital cases being filed and so few death sentences being entered, prosecutors are engaging in a careful winnowing process to identify the "worst of the worst" offenders and offenses for capital charging. However, surveys conducted by several organizations and anecdotal evidence convincingly proves otherwise. The worst of the worst are not being sentenced to death and executed.

In October 2001, seven leading newspapers in Indiana published the results of a yearlong collaborative investigation into Indiana's use of the death penalty.[3] The title for the week-long series of articles is quite telling – "Death Penalty: Indiana's Other Lottery." One of the articles began, "In a life-and-death decision that is supposed to have some level of uniformity, Indiana's county prosecutors seem as divided as the general public about the death penalty." R. Shawgo, "Prosecutors' Death Penalty Views Divergent: Survey Indicates Capital Punishment Favored By Majority But Opinions Differ On When To Pursue It", Ft. Wayne Journal Gazette, October 22, 2001. Another of the articles described the death penalty as unpredictable.

> Whether someone lives or dies can depend not only on the circumstances of the crime, but the county where it occurs, the costs involved, the victim's family, the prosecutor, the judge, the jury and a lengthy appeals process that has focused on a single word in overturning a death sentence.

M. Galbraith & B. Dolan, "Who Gets Sentenced To Death? In Indiana, It's Impossible To Predict Which Defendants Will Receive The Ultimate Punishment", South Bend Tribune & Northwest Indiana Times, October 21, 2001.

[3] The newspapers involved were the *South Bend Tribune*, Evansville *Courier & Press*, Fort Wayne *Journal Gazette*, Muncie *Star Press*, Munster *Times of Northwest Indiana*, Terre Haute *Tribune-Star*, and *Hoosier Times,* and the series ran from October 21–28, 2001.

In February 2007, a report assessing Indiana's capital sentencing system was commissioned under the guidance of the American Bar Association's Death Penalty Moratorium Implementation Project. This report recommended a moratorium on executions in Indiana, in part, because of the inconsistencies in the way the death penalty is carried out in the state. The Executive Summary of this study states:

> Despite the best efforts of a multitude of principled and thoughtful actors who play roles in the criminal justice process in the State of Indiana, our research establishes that at this point in time, the state cannot ensure that fairness and accuracy are the hallmark of every case in which the death penalty is sought or imposed. Basic notions of fairness require that all participants in the criminal justice system ensure that the ultimate penalty of death is reserved for only the very worst offenses and defendants. Unfortunately, hundreds of Hoosiers are murdered under a variety of heinous circumstances every year. Despite this, only a few of these cases result in a prosecutor seeking a death sentence, fewer still result in the imposition of a death sentence by a jury or judge, and only a handful over the past three decades have resulted in the execution of a defendant.
>
> By way of illustration, we offer five examples of murder cases and their various outcomes:
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> (1) Gary Burris was left in a trash can as a baby and raised in a house of prostitution before being declared a ward of the county at age twelve due to neglect. At age twenty three, Burris was convicted of killing a taxicab driver in the course of a robbery along with two accomplices. One of the accomplices testified at trial against him in exchange for a sentence of fifteen years. Burris was sentenced to death and executed.
>
> (2) Zachariah Melcher strangled his wife, who was eight months pregnant, and their eleven-month old son. He then stuffed their bodies in a plastic storage container. Fifteen months after being charged with capital murder, Melcher was offered a plea agreement to life imprisonment.
>
> (3) Arthur Baird strangled his wife, who was six months

pregnant, and later stabbed both of his parents to death with a butcher knife. Mental health experts testified that Baird, who had no criminal history, suffered from delusions and believed that someone else was controlling his actions, but because he was able to appreciate the wrongfulness of the murders, a jury rejected his insanity defense at trial. Baird was sentenced to death, a decision that was affirmed by judges in several different cases and courts over the course of two decades. His sentence was commuted to life imprisonment without parole by Governor Daniels in 2005.

(4) Darryl Jeter, who was on probation and driving a stolen car, killed a state trooper who came to his aid when his vehicle was stopped alongside the highway. The trooper's wife was pregnant with their first child. Upon the recommendation of a Lake County jury, Jeter was sentenced to life imprisonment without parole.

(5) Three men, Roger Long, Jerry Russell and John Redmond, kidnaped a 44-year-old mentally disabled woman walking to the grocery store, confined her in an attic for two weeks, repeatedly forced her to perform oral, anal and vaginal intercourse, then beat her to death with a baseball bat and left her body in a wooded area. Long, Russell and Redmond were never charged with capital murder. Each is currently serving a sentence of life without parole, plus additional sentences for criminal deviate conduct, criminal confinement, and conspiracy to commit murder.

Of these [seven] men, only Gary Burris, who had been abandoned in a trash can as a baby and became a ward of the county after being raised in a house of prostitution, was executed. Although his offense of murder in the course of robbery is certainly a very serious one, it is difficult to conclude that either Gary Burris or his offense is the worst of the eight defendants or offenses presented here. The seemingly random process of charging decisions, plea agreements, and jury recommendations is just part of a death penalty system that has aptly been called Indiana's "other lottery." Although escaping the death penalty may be a prize bestowed upon some defendants, we are deeply troubled that it is not imposed in a fair or consistent manner upon only the very worst offenders who have committed the very worst of offenses.

Executive Summary of Evaluating Fairness and Accuracy in State Death Penalty Systems: The Indiana Death Penalty Assessment Report, pp. VII-VIII (footnotes omitted), available at http://www.abanet.org/moratorium/assessmentproject/ indiana/executivesummary.pdf

This pattern continues since the release of the Assessment Report. The worst murderers and worst murders do not result in death sentences or executions. Desmond Turner was convicted in the 2006 murder of seven people, four adults and three children. He was sentenced to LWOP in 2009. *Turner v. State*, 953 N.E.2d 1039 (Ind. 2011). The victims in Turner were shot multiple times by an assault rifle. The children ranged in age from 5 to 11. There were numerous charged aggravators: the murder of children under 12, intentional felony murder, multiple murders, and murder while released on parole. The crime scene photographs were gruesome and depicted the carnage caused by someone using an assault rifle like ones used in today's wars.

In 2009, David Flores, a twice-convicted rapist, raped and stabbed two sisters. After stabbing them he then covered them with bedding and set the bedding on fire while the women were still alive. He had been released from prison seven weeks earlier. A Lake county judge sentenced Flores to LWOP.

In 2010, Ronald Davis was convicted for murdering four people, 2 adult women and the 2 babies they were holding at the time of the murders. Again, there were multiple aggravators charged. A Marion county judge sentenced Davis to a term of years.

Kenneth Allen murdered his grandparents and mother in their homes in December 2004 a month after being released from prison. He dismembered and buried their bodies in cement in the basement of his grandparents' home. There were multiple charged aggravators. A Marion county

judge sentenced Allen to three life sentences.

In 2005, Chad Cottrell murdered his wife and her 10 and 12-year-old daughters in their Parke County home. He sexually assaulted the two children before murdering them. A Hamilton county judge sentenced Cottrell to LWOP following a bench trial sentencing.

Danny Ray Wilkes murdered his girlfriend and her 8 and 13-year-old daughters in 2006 in Vanderburgh County. Wilkes killed them after he was kicked out of his girlfriend's when she learned he had molested the 13-year-old daughter. He was sentenced to death by the trial judge after a jury deadlocked on the appropriate sentence. The Indiana Supreme Court upheld his death sentence on direct appeal. *Wilkes*, 917 N.E.2d 675 (Ind. 2009). However, the judge who imposed the death sentence vacated Wilkes' death sentence on post-conviction and imposed LWOP.

On February 17, 2010, Michael Stayer was sentenced to 43 years in Boone County for killing his ex-wife a few months after their divorce. Stayer pled guilty to voluntary manslaughter. It is undisputed that Stayer bludgeoned his ex-wife with a hammer in her own home. The Stayers' five-year-old son was inside the home during this brutal slaying. There was a question of whether Stayer's entry into the house to kill his ex-wife was legal, but there can be little doubt that Strayer brutally killed his ex-wife.

In 2011, Barney Chamorro was sentenced to LWOP by Boone county judge for the stabbing murders of three people, his father, brother and his father's girlfriend. All three victims were repeatedly stabbed.

B. Geography, Quality of Defense Representation and Race Determine Who Is Sentenced to Death.

The point is this: all of these examples are horrible; too many, beyond comprehension.

So, how can anyone objectively compare one to the other? If the death penalty is reserved for the worst of the worst, how can anyone objectively decide which defendant or murder are the worst of the worst? These examples demonstrate that the decisions to seek and/or impose the death penalty are as random as lightning. All too often the decision on who is capitally charged, sentenced to death, and executed are based on factors that should not be controlling, such as the strength of the State's proof, quality of defense representation, race or ethnicity, gut reaction, religious belief or practice, or in which county of Indiana the case is filed.

1. *Geography*

Justice Breyer in his dissenting opinion in *Glossip*, *supra*, acknowledges how geography plays a significant role in who is sentenced to death and who is not:

> Geography also plays an important role in determining who is sentenced to death. See id., at 1253–1256. And that is not simply because some States permit the death penalty while others do not. Rather within a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Smith, The Geography of the Death Penalty and its Ramifications, 92 B. U. L. Rev. 227, 231–232 (2012) (hereinafter Smith); see also Donohue, supra, at 673 ("[T]he single most important influence from 1973–2007 explaining whether a death-eligible defendant [in Connecticut] would be sentenced to death was whether the crime occurred in Waterbury [County]"). Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. Smith 233. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for all death sentences imposed nationwide. DPIC, The 2% Death Penalty: How A Minority of Counties Produce Most Death Cases At Enormous Costs to All 9 (Oct. 2013).

Glossip at 62.

Justice Breyer's supposition about the role of geography in who is chosen to be executed is documented by what has happened in Indiana over past few years. Of the 16 capital cases

brought since from 2010, 14 have been filed in four Ohio River counties, Floyd, Clark, Harrison & Vanderburgh, and in the two most populous Indiana counties, Marion and Lake. The four Ohio River counties have accounted for nearly half of these 16 capital filings. Three of the four death sentences imposed during that same time were imposed by juries from Clark[4], Floyd[5], and Lake[6] counties. The fourth death sentence was imposed by a Floyd county judge. Sadly, it appears that like the price of a house, "location, location, location" is the most determining factor on what murder defendants are capitally charged and sentenced to death.

2. *Quality of Defense Representation*

The death penalty continues to be applied in an arbitrary and capricious manner, despite the procedures established in the post-*Furman* era that were supposed to end this problem. A variety of irrelevant and improper factors, other than the circumstances of the offense and the character and background of the defendant, continue to influence the likelihood of a defendant being capitally charged and sentenced to death. One factor often noted is the quality of defense representation. In a speech at the University of the District of Columbia in 2001, Justice

[4] Jeffrey Weisheit was originally charged in Vanderburgh County, but the death sentence was imposed by a Clark county jury. *Weisheit v. State*, 26 N.E.2d 3 (Ind. 2015).

[5] William Clyde Gibson charged in Floyd county, but sentenced to death by a jury chosen from Dearborn County. *Gibson v. State*, 2015 Ind. Lexis 828 (Ind. 2015). Gibson's second death sentence was imposed by the judge of the Floyd Superior Court.

[6] Kevin Charles Isom was charged in Lake county and sentenced to death by a Lake county jury. *Isom v. State*, 31 N.E.3d 469 (Ind. 2015).

Ginsburg said, "People who are well represented at trial do not get the death penalty. I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial." A. Gearan, Associated Press, "Supreme Court justice supports death penalty moratorium", April 10, 2001.

Governor Joe Kernan commuted the death sentence of Michael Daniels in part because of the poor representation he received at trial. In his clemency statement, Kernan wrote:

> By a 3-2 vote, with Justices Boehm and Rucker dissenting, the Indiana Supreme Court agreed that the judicial system could not address the inadequacy of Daniels' representation. The majority found that principles of waiver precluded the second post-conviction court from vacating Daniels' death sentence despite the poor performance of both trial and first post-conviction counsel. The dissenters said, however, "the majority places too high a premium on finality and discounts evidence that suggests Daniels may not have been the perpetrator of these horrendous crimes." Justices Boehm and Rucker identified a substantial amount of evidence casting doubt on Daniels' role in the crimes that was not brought forth by trial or first post-conviction counsel. They called some of trial counsels' failures "incomprehensible." They similarly noted that the first post-conviction counsel was an inexperienced, overworked public defender who failed to fulfill his role with minimal adequacy. Justices Boehm and Rucker would have vacated the death sentence because it "may have been imposed not for the defendant's acts, but for counsel's oversights."

State and federal courts have reversed seventeen other post-*Furman* Indiana death sentences due to ineffective assistance of counsel (IAC).[7] Some of these cases prompted the Indiana Supreme Court to adopt Criminal Rule 24, which created standards for the appointment

[7] *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir. 1984); *Smith v. State*, 547 N.E.2d 817 (Ind. 1989); *Burris v. State*, 558 N.E.2d 1067 (Ind. 1990); *Brewer v. Aiken*, 925 F.2d 850 (7th Cir. 1991); *Roark v. State*, 573 N.E.2d 881 (Ind. 1991); *Averhart v. State*, 614 N.E.2d 924 (Ind. 1993); *Spranger v. State*, 650 N.E.2d 1117 (Ind. 1995); *State v. Van Cleave*, 674 N.E.2d 1293 (Ind. 1996); *State v. Moore*, 678 N.E.2d 1258 (Ind. 1997); *Games v. State*, 684 N.E.2d 466 (Ind. 1997), reh'g granted in part 690 N.E.2d 211 (Ind. 1997); *Rondon v. State*, 711 N.E.2d 506 (Ind. 1999); *Ben-Yisrayl v. State*, 738 N.E.2d 253 (Ind. 2000); *Prowell v. State*, 741 N.E.2d 704 (Ind. 2001); *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001); *Roche v. Davis*, 291 F.3d 473 (7th cir. 2002); Canaan v. McBride, 395 F.3d 376 (7th Cir. 2005); *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007).

and compensation of death penalty defense counsel for indigent defendants. However, this action has not eliminated the problem of poor defense representation since the problem of IAC persists in capital cases.

Two of the seventeen IAC reversals involved cases which were tried after CR 24 took effect in January, 1992, and in which CR 24-qualified counsel represented the defendants. In *Prowell v. State*, 741 N.E.2d 704 (Ind. 2001), trial counsel failed to comply with the caseload restrictions of CR 24. In *Stevens v. McBride*, 489 F.3d 883 (7th Cir. 2007), CR 24-qualified defense counsel presented mental health expert without preparing the expert to testify at the jury penalty phase. The expert had generated a very damaging report. Despite this, counsel then called the same expert at the sentencing hearing before the judge. The Seventh Circuit wrote that the expert "stun[ned] defense counsel by revealing to the jury that Stevens had engaged in necrophilia after the murder, he also gave the prosecution a gift by expressing his belief in Stevens's future dangerousness – a subject that the prosecution itself is not permitted to argue as an aggravating circumstance under Indiana law." *Id*. at 898.

Another troubling problem with today's death penalty sentencing schemes are the wrongful convictions and sentences that have occurred. According to records kept by the Death Penalty Information Center, nearly 156 individuals have been exonerated after being wrongly convicted and sentenced to death in this country in the post-*Furman* era. Death Penalty Information Center, "The Innocence List", http://www.deathpenaltyinfo.org/innocence-list-those- freed-death-row (last visited 1/13/2016). These wrongful convictions have occurred in twenty-six states, including two in Indiana – Larry Hicks in Lake County and Charles Smith in Allen County. *Id*.

3. *Race*

One of the concerns expressed by the *Furman* Court was that, in the absence of meaningful guidance in determining which convicted murderers deserved the death penalty, improper factors such as racial bias have an impact. At the time *Furman* was decided, the death penalty was imposed much more frequently on Blacks than on Whites. See, *Furman*, 409 U.S. at 364 (Marshall, J., concurring).

Three studies have found that the death penalty in Indiana is imposed at a greater rate on those convicted of killing White victims. The first, conducted on behalf of Gregory VanCleave in preparation for his post-conviction review proceedings, focused on homicides in Marion County from 1979 – 1989. The researchers identified 187 solved, capital-eligible homicides during this period in which victims were either Black or White. They found that the odds of the death penalty being requested in a case involving a White victim were 3.8 times higher than the odds of the death penalty being requested in a case involving a Black victim.

In 2002, as part of a study commissioned by former Indiana Governor Frank O'Bannon, researchers at the Indiana Criminal Justice Commission examined all defendants convicted of murders committed between July 1, 1993 and August 10, 2001. They found that offenders convicted of killing at least one White victim were more likely to receive the death penalty than those convicted of killing only non-White victims. M. Ziemba-Davis and B. Myers, "Sentencing Outcomes for Murder in Indiana: Initial Findings, in Indiana Criminal Justice Institute", "The Application of Indiana's Capital Sentencing Law: Findings of the Indiana Criminal Law Study Commission", p. 123- I-J (2002), available at http://www.in.gov/cji/files/ law_book.pdf (last visited 7/12/2013). The researchers noted that further analysis was needed to determine whether

this racial disparity might be explained by other, race-neutral case factors.

In 2007, as part of "The ABA Indiana Death Penalty Assessment Report", *supra*, researchers Glenn Pierce, Michael L. Radelet, and Raymond Paternoster studied race and death sentencing in Indiana, looking at both capital and non-capital murder cases from 1981 – 2000. Because death penalty requests have dropped significantly in Indiana with each succeeding decade, the researchers did both a full twenty-year analysis and two separate ten-year analyses. To determine whether racial disparities were merely the result of legally relevant, race-neutral factors, the researchers identified statutory aggravating factors in each case and compared like cases. What they found was that,

> during the 1980s and 1990s in Indiana, the odds of a death sentence among homicides with a similar level of aggravation were 16 times higher for cases where whites were suspected of killing whites than are the odds of a death sentence for cases in which blacks are suspected of killing blacks.

"The ABA Indiana Death Penalty Assessment Report", *supra*.

The Assessment Report also found that the impact of race is lessened as more aggravating factors are present, and greater in cases that are less aggravated and present a closer case for prosecutors and jurors. *Id*. at p. R. The presence of White victims always places a thumb on the scale in favor of death.

Race may also play a role in a prosecutor's charging or plea negotiation decisions, even when it is not motivated by racial animus. For example, in sworn testimony at the 1985 sentencing hearing for Johnny Townsend and Phillip McCollum, Lake County Prosecutor Jack Crawford acknowledged that the race of the victims was one of the criteria affecting his decision not to authorize plea negotiations with either Townsend or McCollum. Crawford explained that

he was aware of nationwide studies indicating that murders of White victims were significantly more likely to result in death sentences than murders of Black victims. He was concerned about perpetuating such disparities. Both the victims and the defendants in the Townsend and McCollum case were Black.

The charging and plea negotiation decisions in the *Townsend* and *McCollum* were essentially affirmative action plans. By increasing the number of capitally charged defendants where the victims are Black prosecutor Crawford thought defendants could not continue to make claims based on the racial disparity of the victims. See, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (See, *Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (Capital defendant claims constitutional violation based on statistical study showing higher rate of death sentences for defendants convicted of killing white persons.) However, our state and federal constitutions mandate "race neutrality" in criminal prosecutions. U.S. Const. Amends. V & XIV; Ind. Const. Art. I, §§ 12,13, & 23; See, *Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (Defendant exercise of peremptory challenges based on race violate the constitutional principle of *Batson v. Kentucky*, 476 U.S. 79 (1986) because the Constitution mandates "race neutrality.")

Evidence also suggests that subtle, even unconsciously held, racial beliefs have an impact on decision making at all levels in these cases. A body of research has developed which indicates that racial bias and race-based fears may be completely unconscious. They may even be in conflict with an individual's explicitly held attitudes and beliefs. Researchers refer to these unconscious biases as "implicit bias." In 1998, researchers introduced the Implicit Association Test (IAT), which provided a framework for testing and measuring implicit biases of all kinds,

and established "Project Implicit," a website devoted to this research.[8]

Researchers have used IATs to study unconscious or implicit racial biases in a wide range of situations, many of which have implications for the criminal justice system. In one study, conducted by University of Hawaii Law Professor Justin Levinson and members of the school's Psychology Department, research results consistently showed that White participants have strong implicit associations between "White and Good," "Black and Bad," and "Black and Guilty." See, Levinson, Cai, and Young, "Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test" (September 10, 2009). Ohio State J. Crim. L., Forthcoming.

Professor Joshua Correll, at the University of Chicago, created a video game to measure how quickly and accurately participants were able to determine whether the object in a depicted subject's hand was a gun or an innocuous object and in turn decide whether to shoot at the subject. The results indicate a bias among all participants, and particularly among White participants, to shoot at unarmed Black subjects and not to shoot at armed White subjects. Correll, Urland, & Ito, "Event-related potentials and the decision to shoot: The role of threat perception and cognitive control", 42 J. Experimental Social Psych. 1, 120-128 (2006).

This bias against black people is evident in the phenomenon of police action shootings, which are now coming to the public's attention in the news on almost weekly basis. The statistics show that the color of a person's skin may determine whether they are shot during confrontations with police:

> When adjusted to accurately reflect the US population, the totals indicate that black people are being killed by police at more than twice the rate of white and Hispanic or Latino people. Black

[8] https://implicit.harvard.edu/implicit/ (last visited 1/6/2016)

> people killed by police were also significantly more likely to have been unarmed. which have which seem to appear in news on a weekly basis.

http://www.theguardian.com/us-news/2015/jul/01/us-police-killings-this-year-black-americans.

Implicit racial bias has also been detected in research using brain-imaging technology. Researchers at the Social Cognitive Research Library at UCLA have used functional magnetic resonance imaging (fMRI) technology to measure the level of amygdala activity of participants after seeing White and Black faces. The amygdala is a region of the brain that generates emotional responses, including responses to perceived threats. The researchers, led by Professor Matthew Lieberman, found that amygdala activity in both White and Black participants was heightened and more prolonged when shown a Black face versus a White face. The researchers concluded that the most plausible explanation for this universal increase was likely due to the activation of the "Black-threat" stereotype. See, Lieberman, Hariri, Eisenberger & Bookheimer, "An fMRI Investigation of Race-Related Amygdala Activity in African-American and Caucasian-American individuals", 8 Nature Neuroscience 6, pp. 720 – 22 (June 2005).

Research led by Professor Jennifer Eberhardt at Stanford University focuses even more directly on the effect of implicit racial bias on capital sentencing outcomes. For instance, one study used David Baldus' data-set of 600 death-eligible defendants in Philadelphia between 1979 and 1999, of which 44 were Black defendants convicted of killing White victims. The researchers had participants rate photographs of these 44 defendants in terms of stereotypical Blackness (e.g., thick lips and wide nose). Participants were not told that these men had been charged with a crime. The researchers then determined whether each defendant had been sentenced to death, controlled for six non-racial factors known to affect death-sentencing

outcomes, and calculated the degree to which stereotypical Black appearance correlated with the likelihood of being sentenced to death. Those defendants whose photographs were rated in the top half of the group for stereotypical Black appearance were more than twice as likely to have been sentenced to death. See, Eberhardt, Davies, Johnson, & Purdie-Vaugns, "Looking Death worthy: Perceived Stereo typicality of Black Defendants Predicts Capital-Sentencing Outcomes", (2006).[9]

How does implicit racial bias affect juror decision-making? Research suggests that it is not a simple matter of unconscious bias causing jurors to favor White defendants or disfavor Black defendants. Rather, the unconscious stereotypes and cognitive associations cause jurors to misremember evidence, or to have wholly false memories regarding evidence. These inaccurate facts in turn affect the jurors' decision-making process, as they process both correct and incorrect facts together to determine both guilt-innocence and degree of culpability or death-worthiness. See, Levinson, "Forgotten Racial Equality: Implicit Bias, Decision-making, and Misremembering", 57 Duke L. J. 345 (2007).

To make matters worse, new research suggests that the availability of the death penalty as a possible sentence may itself taint a juror's decision making. Research at the University of California, Berkeley, Goldman School of Public Policy using a randomized nationally representative sample of mock jurors suggests that the availability of death as a sentence has a significant impact on the guilt-innocence verdict. Mock jurors were significantly more likely to convict a Black defendant than a White defendant in that circumstance.

[9] posted at Scholarship@Cornell Law: A Digital Repository; http://scholarship.law. cornell. edu/lsrp_papers/41 (last visited 1/6/2016)

Participants were presented with a summary of a triple murder trial. Researchers told some jurors that life without parole was the maximum penalty available, while telling other jurors that the death penalty was available. The defendants in some of the summaries were given a stereotypical Black name, while in others the defendants were given a stereotypical White name. Mock jurors who were told that LWOP was the maximum penalty found Black and White defendants guilty in nearly equal proportions – voting to convict 67.7% of Black defendants compared to 66.7% of White defendants. However, those who were told that death was a possible punishment voted to convict 80% of the Black defendants, compared to 55.1% of White defendants.

The research suggests that these results "provide evidence that capital punishment may be more than another *domain* of racial disparities; it may actually be a *cause*." Glaser, Martin & Kahn, "Possibility of Death Sentence Has Divergent Effect on Verdicts for Black and White Defendants", available at http://ssrn.com/ abstract=1428943 (last visited 7/12/2013). In an interesting side-note, the researchers questioned the mock jurors in order to categorize them as either "death-qualified" or opposed to the death penalty. There was no significant difference in the performance of these distinct groups of mock jurors.

Implicit racial bias is pervasive and has a powerful affect on how jurors hear and recall evidence and ultimately decide guilt-innocence and penalty. There is research, however, indicating that the effects of implicit bias on jury decision making are mitigated when the make-up of the jury is racially diverse. Research conducted by Professor Sam Sommers at Tufts University, using 200 mock jurors grouped into all-White juries of six and juries composed of four White jurors and two Black jurors, indicated that "racially diverse groups may be more

thorough and competent than homogeneous ones. Sommers, "On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations", 90 J. Personality & Social Psych. 4, pp. 597-612, 608 (2006). The mock jury groups were shown a 30-minute video summary of the trial of a Black defendant for sexual assault.

Professor Sommers found that the diverse groups discussed more case facts, had fewer factually inaccurate statements left uncorrected, and more frequently discussed the impact of race, including its possible effect on eyewitness accuracy. *Id*. at 605. The subject of race was raised more often by White jurors in the racially diverse groups, more so than by Black jurors or by White jurors in all-White juror groups, indicating that racial diversity not only improved the breadth of information exchange, but also increased the willingness, or perhaps decreased the unwillingness, of White jurors to openly discuss the issue of race and its impact.

All of the factors discussed above show the impossibility of objectively identifying the "worst of the worst." A pattern akin to lightning continues to determine which murder defendants are capitally charge and sentenced to death. Indiana's death penalty scheme violates the state and federal constitutional guarantees against cruel and unusual punishment, due process, and equal protection of the laws.

II. The Death Penalty Is Disproportionate and Vindictive in Violation of Art. I §§ 16 & 18 of the Indiana Constitution because it has No Deterrent Effect

It has now been nearly 44 years since the death penalty in America was halted after *Furman v. Georgia*, 409 U.S. 238 (1972) and 39 years since the Supreme Court sanctioned new statutory schemes that reinstated it in *Gregg v. Georgia*, 428 U.S. 153 (1976). In *Gregg*, the Court not only upheld Georgia's death penalty procedures, it again addressed the issue of

whether the death penalty was so devoid of any legitimate penological purpose that it violated the Eighth Amendment. The two purposes advanced by the state were retribution and deterrence. While acknowledging that statistical studies of the deterrent effect of capital punishment were "inconclusive," the Court wrote that, "We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent." *Id*. at 185-86.

As noted in *Gregg*, empirical research into the deterrent effect of the death penalty has long been divided, and therefore inconclusive. Social scientists – psychologists, sociologists and criminologists – have conducted statistical studies that generally support a finding that the death penalty does not deter murderers. Economists have studied deterrence using econometric models to predict the effect of the death penalty, and have almost uniformly found the death penalty to serve as a deterrent. Each group criticizes the methodologies and conclusions of the other. See, e.g., A. Liptak, "Does Death Penalty Save Lives? A New Debate", N. Y. Times, November 18, 2007.

Early research in both fields used data for the entire country, over a prolonged period, all lumped or aggregated together. Later researchers suggested that this approach led to skewed results. In 1978, a National Academy of Sciences panel convened to study this early research concluded that new research should be conducted using "disaggregated data" that looked at smaller geographic units, rather than the nation as a whole, and looked at shorter time periods. Later research, particularly a new wave of research in the past decade, has responded to this suggestion. Still, however, the research generally breaks into two types – social science research

and econometric research – reaching opposite conclusions. See, Liptak, *supra*.

Joanna Shepherd, an Emory University Law Professor with a doctorate in Economics who co-authored three of the econometric studies in the last decade which found the death penalty to have a deterrent effect, has taken still another approach in an effort to accommodate the differences in the way the death penalty is applied in different states. J.M. Shepherd, *Deterrence Versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 U. Mich. L. Rev. 203 (2005). Professor Shepherd used the same data sets that she and other researchers had used, but rather than combining the country's data sets to arrive at a national average deterrence rate, she looked individually at each of the twenty-seven states that had conducted an execution between 1977 and 1996. She did this because she suspected that the large number of executions in a few states was affecting the results so as to mask the actual effect in any one state. She also calculated results using six different variations on her econometric model, based on the six models most common in the research literature. Professor Shepherd's results indicated that the death penalty served as a deterrent in only six of the twenty-seven states. However, it had no discernable effect in eight states, and *actually increased* the number of murders committed in thirteen states of the twenty-seven states, *including Indiana*. J.M. Shepherd, *supra*, 104 U. Mich. L. Rev. at 230-31.

Professor Shepherd attempted to explain this disparate impact in the different states. She conducted further analysis to assess whether a number of factors, including the publicity surrounding the executions, the characteristics of the executed individuals, and the method of execution, played any role, but found that these factors did not correlate with deterrence or non-deterrence in any statistically significant way. *Id*. at 235-36. The one factor that seemed to

make a difference was the number of executions each state conducted. All six states in which Professor Shepherd found a deterrent effect in states that had conducted nine or more executions during the twenty-year period she studied. The thirteen states such as Indiana, in which she found the reverse effect of increasing the number of murders, and the eight states in which she found no discernible effect, conducted fewer than nine executions during the period. *Id*. at 237. To confirm her findings, Professor Shepherd performed the same analysis using two other data sets – a monthly state-level data set from 1977 to 1999, and an annual, state-level data set from 1960 to 2000. *Id*. at 242. She found the same three different effects, and each time, she found Indiana among the states in which the death penalty actually *increased the number of murders committed*, rather than deterring or reducing murders. *Id*. 242–246.

Professor Shepherd then theorized why these three effects, seemingly dependent on the number of executions conducted, might occur. She reasoned that her results tend to confirm the "brutalizing effect," of executions, something that other researchers and scholars have long suggested. According to this theory, executions set an example that devalues human life and "demonstrate[s] that it is correct and appropriate to kill those who have gravely offended us." *Id*., at 240, quoting W. Bowers and G. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 Crime & Delinq. 453, 346 (1980). See also, J. Cochran et al., *Deterrence or Brutalization? An Impact Assessment of Oklahoma's Return to Capital Punishment*, 32 Criminology 107 (1994); W. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 Criminology 711 (1998); J. Sorenson et al., *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 Crime & Delinq. 481 (1999).

Professor Shepherd's results, with a deterrent effect apparent only in the six states that execute the most individuals, suggest that it is only when a state conducts a large number of executions that any deterrent effect outweighs the brutalizing effect of the executions themselves. In states like Indiana, which keep the death penalty "on the books" but use it only rarely, only the brutalizing effect is achieved, inducing additional murders in which innocent victims are killed. Recent experience bears this out.

In 2005, a year that was outside either data set used by Professor Shepherd, Indiana executed five men as the result of a backlog of cases emerging from federal habeas corpus review. That year, the number of murders and non-negligent homicides in Indiana, as reported in the FBI Uniform Crime Reports, rose by 40 or nearly 13%. The number homicides continued to be elevated through 2007 with the high-water mark occurring in 2006 with 369 murders. In 2009, the number of murders finally dropped below the 2004 number. See, Table I, *infra*.

Other data support the conclusion that the death penalty does not deter murders. For example, in a study of homicide rates from 1980 to 2000, the rate in states with the death penalty ranged from 48 to 101 per cent higher than in states without the death penalty. Further, the study found that over that period, "homicide rates had risen and fallen along roughly symmetrical paths in the states with and without the death penalty," suggesting that the presence or absence of the death penalty has little, if any, effect on homicide rates. R. Bonner & F. Essenden, "States with No Death Penalty Share Lower Homicide Rates", N.Y. Times, September 22, 2000, at A1.

There is substantial evidence that capital punishment as applied in Indiana has no deterrent effect. As a result, its continued imposition by the State to serves only the interests of vindictiveness and retribution. Article I §16 of the Indiana Constitution states, in pertinent part,

"all penalties shall be proportioned to the nature of the offense." Article I §18 states that the "the penal code shall be founded on principles of reformation, and not of vindictive justice." If there is no deterrent effect from the death penalty in Indiana, then it serves only the interests of vengeance and vindictiveness. It cannot stand under the Indiana Constitution.

III. Indiana's Death Penalty Scheme Violates Due Process of the Law as Required by the Fifth & Fourteenth Amendments to the United States Constitution and the Eighth Amendment Prohibition Against Cruel and Unusual Punishment Because the Indiana Supreme Court Has Failed to Develop a Rational and Uniform Analysis for the Appellate Review of Death Sentences.

The U.S. Supreme Court "emphasized repeatedly the *crucial* role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1991) (emphasis added; other citations omitted). The Indiana Supreme Court recognizes their responsibilities to provide meaningful appellate review. *Cooper v. State*, 540 N.E.2d 1216, 1218 (Ind. 1989) (part of what makes our statute constitutional is the "thoroughness and relative independence of this Court's review.").

This requirement is built into the statute itself. IND.CODE § 35-50-2-9 (j). Appellate review of death sentences is "part and parcel of the sentencing process." *Cooper* at 1218. Appellate review is so integral to the death penalty scheme that, unlike nearly every other constitutional right, it cannot be waived, even by a defendant who desires that the sentence be carried out. See, *Smith v. State*, 686 N.E.2d 1264 (Ind. 1997); *VanDiver v. State*, 480 N.E.2d 910 (Ind. 1985); *Judy v. State*, 416 N.E.2d 95 (Ind. 1981).

A. Appellate Review of Jury Override Was Erratic and Irrational.

One need look no further than the Indiana Supreme Court's review afforded in jury override cases as an example of our court's erratic review of death penalty cases and decision

making in selecting which murderers should suffer death. In the post-*Furman* era there have been nine murderers sentenced to death by trial judges despite a unanimous jury recommendation for life.[10] Because of the jury's pivotal constitutional role, one would expect these cases to receive the most stringent and consistent appellate review. Yet, it is this area of Indiana's death penalty jurisprudence, which was the most chaotic for years. The standard of review changed like the wind.

In *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983) [Schiro I], the first override case to reach the Indiana Supreme Court, the court was asked to apply a higher standard on review than it would in cases where the jury recommends the death penalty. The court declined the invitation: "While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial court and jury disagree about the imposition of the death penalty." 451 N.E.2d at 1058.

Six years later the court abruptly reversed course. A higher standard for override cases was adopted in *Martinez Chavez v. State*, 534 N.E.2d 731 (Ind. 1989): In order to sentence a defendant to death after the jury has recommended against death, the facts justifying a death sentence should be so clear and convincing that virtually no reasonable person could disagree that death was appropriate in light of the offender and his crime. A trial court cannot override the jury's recommendation unless the facts meet this standard. 534 N.E.2d at 735, aff'd. on reh'g., 539 N.E.2d 4. Martinez Chavez's death sentence was reversed and he was sentenced to a term of years.

[10] Those persons are: Thomas Schiro, Eladio Martinez Chavez, Donald Jackson, Stuart Kennedy, William Minnick, Dennis Roark, Christopher Peterson, J.R. Thompson, and Bennie Saylor.

In the years that followed *Martinez Chavez*, a unanimous jury recommendation for life proved difficult to override. See, *Roark v. State*, 644 N.E.2d 565 (Ind. 1994) (death sentence reversed); *Kennedy v. State*, 620 N.E.2d 17 (Ind. 1993) (same); *Jackson v. State*, 597 N.E.2d 950 (Ind. 1992) (same).[11] On the other hand, for reasons that are not entirely clear, because his lawyers did not brief the issue, the Supreme Court addressed sua sponte the override of Minnick's life jury verdict and affirmed his death sentence a second time. *Minnick v. State*, 544 N.E.2d 471 (Ind. 1989)

Despite the application of *Martinez Chavez* to overturn the judicial death sentences of Jackson, Kennedy, and Martinez Chavez, the court determined in 1994 that the *Martinez Chavez* standard was incompatible with the statutory requirement that the trial court make an independent determination of sentence and that the trial court not be bound by the jury's recommendation. *Roark v. State*, 644 N.E.2d 565 (Ind. 1994). "We have come to the conclusion that to require the trial court to test a jury's recommendation against death by the *Martinez Chavez* standard interferes with the trial court's statutory freedom from being bound by the jury's recommendation." *Id*. at 570. However, the court retained the *Martinez Chavez* standard as its standard in conducting appellate review of the sentence:

> [T]his Court will apply the *Martinez Chavez* test as our standard of appellate review. Before we affirm a sentence of death, it must appear to us that all the facts available in the record point so clearly to the imposition of the death penalty that the jury's recommendation is unreasonable. [citation omitted].

Id. at 571.

[11] J.R. Thompson's sentence was reversed on other grounds. *Thompson v. State*, 492 N.E.2d 264 (Ind. 1986).

In August of 1996, on a third petition for post-conviction relief, the Indiana Supreme Court reversed the death sentence imposed upon Schiro. The court stated:

> In *Chavez* and *Roark*, this court granted that which it had specifically denied to Schiro in 1983. Therefore, we conclude that Schiro is now entitled to that which he sought: appellate review of his sentence of death by application of the *Chavez/Roark* approach.

Schiro v. State, 669 N.E.2d 1357, 1358 (Ind. 1996) [*Schiro* IV].

Four months after granting Schiro the protections afforded by *Chavez/Roark*, the Indiana Supreme Court inexplicably abolished this standard of review. *Peterson v. State*, 674 N.E.2d 528 (Ind. 1996). Peterson was denied the protections afforded Schiro even though his death sentence followed Schiro's by years. The *Peterson* court held that it would henceforth only review the death sentence to determine the "appropriateness of the penalty for the offender and the offense" without any standard of review based on the jury's recommendation of life. *Id*. at 541. Without the benefit of a *Chavez/Roark* standard, Peterson's death sentence was affirmed, even though his jury returned a unanimous recommendation to the contrary, just as Schiro's had years earlier. *Id*. Likewise, Bennie Saylor's death sentence was affirmed without benefit of the standard that had allowed Schiro to avoid death. *Saylor v. State*, 686 N.E.2d 80 (Ind. 1997).

When one considers the timing of the decisions in the override cases it becomes clear that the results are unprincipled and arbitrary. Schiro received the benefit of the *Martinez Chavez* standard even though the standard did not exist at the time his conviction and death sentence were entered and reviewed on direct appeal.[12] Conversely, both Saylor and Peterson, who were

[12] Subsequently, the court claimed in *Schiro* IV that it had applied the "appropriateness" standard of *Peterson* and not the *Martinez Chavez* standard. *Peterson v. State*, 674 N.E.2d at 540. This conclusion is questionable for three reasons. First, in *Schiro* IV the court explicitly stated it was conducting appellate review "by application of the *Chavez/Roark* approach." 669 N.E.2d at 1358. Second, *Schiro* IV was an appeal from the denial of a successor post-conviction action. Thus, Schiro first had to seek permission of the Indiana supreme

convicted and sentenced to death and filed their appeals while both the *Martinez Chavez* and *Roark* standards were in effect. Yet, they were denied the protection afforded Schiro. Their death sentences were reviewed by a standard so completely deferential to the trial court's ruling that their death sentences were easily upheld. It is likely that both Peterson and Saylor would have obtained relief had the court applied the same standard as Schiro. Peterson and Saylor presented a plethora of mitigating evidence which rendered the jury's decision reasonable.

A federal district court concluded that "the way in which the Supreme Court of Indiana has dealt with death penalty cases where a judge imposes that penalty in the face of a contrary jury recommendation raises serious equal protection issues under the Fourteenth Amendment." *Minnick v. Anderson*, 151 F.Supp.2d 1015 (N.D.Ind. 2000). The federal court vacated Minnick's death sentence on equal protection grounds. The State appealed this ruling.

Ultimately, Minnick, Saylor, and Peterson's death sentences were vacated. However, it is not because the Indiana Supreme Court perceived any arbitrariness in its appellate review of capital cases. Rather, it was prompted by the ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) and the 2002 amendments to Indiana's death penalty statute. The court decided Saylor's death

sentence could not stand because it would not stand if he were sentenced to death under today's

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court to file the petition. Rule P.C. 1, § 12. The court granted permission to file a successive petition based upon the following question: "Whether Schiro is entitled to reversal of his death sentence in light of *Martinez Chavez* [citation omitted]?" 669 N.E.2d at 1357. Third, under the appropriateness standard the "issue is not whether in [the supreme court's] judgment the sentence is unreasonable, but whether it is clearly, plainly, and obviously so." *Prowell v. State*, 687 N.E.2d 563, 568 (Ind. 1997). Such a showing requires that the sentence be "clearly apparent to the sight or understanding; obvious" and "readily perceived by the eye or the understanding; evident, obvious; apparent; plain." *Id*. Before the state court reversed Schiro's death sentence, his case had been reviewed by that court once on direct appeal and twice on in post-conviction. *Schiro v. State*, 451 N.E.2d 1047 (Ind. 1983), cert. den., 464 U.S. 1003 (1983); *Schiro v. State*, 479 N.E.2d 556 (Ind. 1985), cert. den. 475 U.S. 1036 (1986); *Schiro v. State*, 533 N.E.2d 1201 (Ind. 1989), cert. den. 493 U.S. 910 (1989). He had also received full federal court review, including merits review by the United States Supreme Court. *Schiro v. Farley*, 510 U.S. 222 (1994); *Schiro v. Clark*, 963 F.2d 962 (7th Cir. 1992); *Schiro v. Clark*, 754 F.Supp. 646 (N.D. Ind. 1990).

standards:

> In sum, Saylor is one of only three individuals currently under a death sentence despite a jury's recommendation to the contrary. By virtue of the 2002 amendments to the death penalty statute, no future executions will take place without a jury recommendation. Under these circumstances, it is inappropriate to carry out a death sentence that could not be imposed today. Accordingly, we revise the sentence to a term of imprisonment. It remains to fix that term.

Saylor v. State, 808 N.E.2d 646, 651 (Ind. 2004).

B. Deferential Federal Habeas Review Has Often Found Indiana's Appellate Review in Capital Cases Erroneous, Unreasonable, and Contrary to Federal Constitutional Law.

Evidence of the defects in Indiana's appellate review of capital cases is also demonstrated by the decisions of the federal courts that have examined the cases Indiana's death sentenced inmates. The Federal Courts have repeatedly granted habeas corpus relief in Indiana death penalty cases, even in the years since the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 ["AEDPA"]. This is significant because of the showing which must made under the AEDPA.

Under the AEDPA, federal courts are precluded from granting the writ of habeas corpus if there is merely a showing that a constitutional violation occurred that prejudiced the petitioner. The federal courts may only act only to invalidate a death sentence where the Indiana Supreme Court's adjudication "(1) resulted in a decision that was *contrary to*, or involved an *unreasonable application* of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an *unreasonable determination* of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254 (d) (emphasis added); see also, *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000) (interpreting the meaning of §2254(d)).

What this means is that mere error by the Indiana Supreme Court does not allow the federal court to disturb the result. A federal court must find the Indiana Supreme Court applied a rule contradicting a case of the U.S. Supreme Court cases or reached a decision different from the U.S. Supreme Court on facts that are materially indistinguishable from those of a decision of that Court. *Id.* at 405-06. Under the "unreasonable application" clause, the federal court can only act to invalidate if the Indiana Supreme Court applied U.S. Supreme Court precedent in objectively unreasonable way. *Id.* at 406-09. An "incorrect" application of that precedent is not enough. *Id.* at 410-11. Thus, "a federal habeas court may not issue the writ simply because the court concludes that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.*

Despite this highly deferential standard of review, the federal habeas courts have repeatedly granted the Writ for federal constitutional violations in Indiana capital cases and invalidated death sentences where our Indiana Supreme Court found no federal constitutional violation or left the violation unremedied.

In *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001), a panel of Easterbrook, Posner, and Ripple, found that the Indiana Supreme Court's decision that Miller's trial counsel was not ineffective was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984). The Court found Miller's trial counsel's performance so deficient that it referred the matter "to the Indiana attorney disciplinary authorities for consideration of whether [counsel's] deficient representation of Miller at his trial warrants disciplinary proceedings." *Id*. at 460. Miller's conviction and sentence were vacated on the basis of the grant of the Writ.

The Indiana Supreme Court again misapplied *Strickland* in *Roche v. Davis*, 291 F.3d 473

(7th Cir. 2002). Our supreme court held that counsel's failure to object to Roche's shackling at trial did not constitute deficient performance because he was "careful about preventing the jury from seeing his client's ankle restraints when Roche took the stand to testify." *Id*. at 483, quoting *Roche v. State*, 690 N.E.2d 1115, 1123 (Ind. 1997). However, a panel of Coffey, Kanne, and Rovner, granted the habeas writ to vacate Roche's death sentence because the evidence at the post-conviction hearing clearly indicated that Roche's shackles were "readily visible" to the jury as he sat at the defense table throughout the trial. *Id*. According to this Seventh Circuit panel,

> While the Indiana Supreme Court considered counsel's efforts to ensure that the jury would not see Roche's shackles when Roche testified, counsel's failure to do so while Roche was sitting at counsel's table during trial and during the sentencing hearing was not addressed. Therefore, given that the key inquiry in shackling cases is whether the shackles were "readily visible" to the jury, *Fountain*, 211 F.3d at 435, we hold that in this case, the Indiana Supreme Court's determination that counsel was not deficient was unreasonable.

Id.

In *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2003), the Seventh Circuit granted the Writ to invalidate Canaan's death sentence after finding that his trial counsel had been constitutionally ineffective in failing to consult with Canaan about testifying at the penalty phase. The court refused to accord state court findings the deference required by the AEDPA because the Indiana Supreme Court did not even adjudicate the claim that had been clearly presented in his appeal:

> The record in this case gives no indication that the Indiana courts were aware that Canaan had presented to them a claim of ineffective assistance of counsel based on the failure to consult ground. Although he squarely presented this argument to the Indiana Supreme Court, its decision makes no mention of this
>
> issue, even to reject it on procedural grounds or to indicate that it found no need to discuss the remaining issues in the case.

Id. at 382.

The Seventh Circuit held that the Indiana Supreme Court's opinion was an unreasonable application of clearly established federal law regarding judicial bias in *Harrison v. McBride*, 428 F.3d 652 (7th Cir. 2005). The Indiana Supreme Court's view of due process protection under the federal constitution was too narrow:

> More fundamentally, the Supreme Court of Indiana's adjudication of Mr. Harrison's judge bias claim was contrary to "clearly established Federal law, as set forth by the Supreme Court." 28 U.S.C. § 2254(d)(1). The Supreme Court of Indiana reviewed the due process claim only for a "clear abuse of discretion." *Harrison*, 644 N.E.2d at 1249. In its view, that abuse of discretion only occurs when there is "an undisputed claim of prejudice" or when "the trial court expresses an opinion on the merits of the controversy." *Id*. However, the due process protection, as guaranteed by the federal Constitution, indisputably is much broader.

Id. at 666 - 67.

In *Aki-Khuam v. Davis*, 328 F.3d 366 (7th Cir. 2003), a panel of Bauer, Rovner, and Wood, found that the Indiana Supreme Court unreasonably applied yet another area of clearly established federal law. The Indiana Supreme Court "significantly deviated" from *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny with respect to selection of the jury that convicted and sentenced Aki-Khuam. The Writ was granted and both Aki-Khuam's convictions and death sentence were invalidated.

The Seventh Circuit found that the Indiana Supreme Court made "an unreasonable determination of the facts in light of the evidence" in *Ben-Yisrayl v. Davis*, 431 F.3d 1043, 1049 (2005). The state court unreasonably determined "that the jury in Ben-Yisrayl's case could not have reasonably interpreted the prosecutor's comments as a suggestion to infer guilt from the

defendant's silence" *Id*. The argument at issue was the prosecutor's exhortation to the jury in final argument to "let the defendant tell you" why he confessed to the charged murders if he did not commit them. The Indiana Supreme Court interpreted this explicit statement from the prosecutor as an invitation to defense counsel to provide an explanation for the confession in their own final argument. *Ben-Yisrayl v. State*, 690 N.E.2d 1141, 1148, n.7. According to the Seventh Circuit, clear and convincing evidence establishes that a reasonable juror would indeed interpret "Let the Defendant tell you" as a reference to Ben-Yisrayl personally, and not as one referring to his attorney. The Writ was granted because this violated the clearly established law of *United States v. Robinson*, 485 U.S. 25 (1988).

In *Stevens v. McBride*, 489 F.3d 819 (7th Cir. 2007), the Seventh Circuit found that the Indiana Supreme Court again unreasonably misapplied *Strickland*, and granted the Writ invalidating Indiana's authority to execute Stevens. The federal court found trial counsel to be ineffective at the penalty phase with respect to a defense mental health expert. Trial counsel hired a mental health defense expert, received a very negative report from him, determined that he was a "quack," and failed to investigate mental health evidence any further. They did not question the expert before putting him on the stand to determine what his testimony would be. Instead, they unreasonably called him to the stand at both the penalty phase and judicial sentencing.

Another example of our supreme court's failure to reasonably apply the clearly established constitutional law is *McManus v. Neal*, 779 F.3d 634 (7th Cir. 2015). According to the Seventh Circuit, "the Indiana Supreme Court did not adequately vindicate the federal due-process interests at stake" because it subjected an inadequate trial court decision on

McManus' competency to deferential review. *Id*. at 659. In addition, our supreme court cited the correct due process standard to be applied to McManus' competency claim, but it never actually applied this standard in reviewing the claim. The Seventh Circuit found this to be "unreasonable error" committed by the Indiana Supreme Court. *Id*.

The history of unreasonable application of clearly established Federal law as found in all of these cases and erratic review of jury override cases all indicate that appellate review is not being conducted in the meaningful and careful manner mandated by the death penalty statute and the Constitution. Our court is committing unreasonable errors in its review. The statute is unconstitutional as applied because of the absence of meaningful appellate review in Indiana.

IV. The Death Penalty Statute Is Unconstitutional on its Face and as Applied because it fails to Require Jury Finding of the Weighing Factor Beyond a Reasonable Doubt.

In *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court held that every factor necessary for exposure to a death sentence is the functional equivalent of an element of capital murder. As a result, the Sixth and Fourteenth Amendments require that these elements (factors) be submitted to a jury and found beyond a reasonable doubt. This result was dictated by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Apprendi/Ring* principles dictate that the "weighing factor" of Indiana's death penalty statute, IND. CODE § 35-50-2-9(l)(2), is the functional equivalent of an element of capital murder in Indiana, and as such, must be proven to a jury beyond a reasonable doubt.

At this point, the Indiana Supreme Court has held otherwise. See, *Ritchie v. State*, 809 N.E.2d 258, 268 (Ind. 2004) (Jury finding beyond a reasonable doubt of weighing factor not required because it is not an "eligibility factor" for a death sentence or LWOP); *State v. Barker*, 809 N.E.2d 312, 314-15 (Ind. 2004), reh'g denied, 826 N.E.2d 648 (Ind. 2005) (Weighing is not

a "fact" requiring jury finding beyond a reasonable doubt.); see also, *Wilkes v. State*, 917 N.E.2d 675 (Ind. 2009) (Judge may impose death or LWOP sentences in the absence of a unanimous jury finding of weighing factor beyond a reasonable doubt).

The holding of the Supreme Court in *Hurst v. Florida*, *supra*, suggests that *Ritchie* and *Barker* were wrongly decided. The *Hurst* Court struck down Florida's death penalty statute because it allowed a judge to impose a death sentence upon a finding of the statutory aggravation and Florida's weighing factor. Thus, the *Hurst* decision suggests that all the statutory preconditions to a death sentence, including Indiana's weighing element, must be found by a jury beyond a reasonable doubt. The current capital sentencing statute as interpreted by the Indiana Supreme Court violates these constitutional mandates.

The holding in *Ritchie* rests upon three erroneous conclusions: (1) that the weighing factor is not a "fact" which can be subjected to a standard of proof; (2) that the weighing factor is not an "eligibility factor;" and (3) that the weighing factor's only function is to determine the appropriate sentence. *Ritchie*, 809 N.E.2d at 268. The Indiana Supreme Court's analysis ignores the inquiries required under *Apprendi/Ring* and the clear structure and language of Indiana's death penalty statute.

Under *Apprendi*, "the relevant inquiry is one not of form, but of effect - does the required finding *expose* the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 493 (emphasis added). Labels do not control. "If a State makes an increase in the defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Ring*, 526 U.S. at 602.

The linchpin of a proper analysis under *Apprendi/Ring* is the statute itself. Legislatures

retain the authority to define capital murder. *Apprendi/Ring* doctrine does not instruct as to what factors a legislature must identify before a defendant is exposed to a sentence of death or LWOP. Instead, *Apprendi/Ring* instruct that once a legislature defines the factors required for exposure to the maximum sentence of death or LWOP, *Apprendi* constitutional guarantees attach to those factors, regardless of their labeling.

The analysis in *Ritchie* and *Barker* are illusory. Instead of examining the effect of the statutory weighing provision, the Court focused on irrelevant questions: (1) Whether weighing is a "fact" that can be subject to a standard of proof; and (2) Whether the weighing factor is only relevant to the question of what is the appropriate sentence. Nowhere do the *Apprendi* and *Ring* Courts engage in such an analysis. The correct analysis rests solely upon the effect that a factor has under the structure of the statute.

The General Assembly by the clear language of IND. CODE § 35-50-2-9(l) establishes two factors which a jury must "find" before there is exposure to the maximum sentences of death or LWOP:

> *Before a sentence may be imposed under this section*, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), *must find* that:
>
> (1) the state has proven beyond a reasonable doubt at least one (1) of the aggravating circumstances listed in subsection (b) exists; *and*
>
> (2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(emphasis added).

From the time the Indiana Supreme Court first reviewed a death sentence imposed under this statute, the Court has recognized that both of these findings are prerequisites to a death

sentence.

> The jury may recommend the death penalty only if it unanimously finds beyond a reasonable doubt that at least one of the aggravating circumstances exists, and that the mitigating circumstances, if any, do not outweigh the aggravating circumstances.

Judy v. State, 275 Ind. 145, 416 N.E.2d 95, 106 (1981).

The Court never deviated from this statutory interpretation until *Ritchie* and *Barker*. See, e.g., *Brown v. State*, 783 N.E.2d 1121, 1144 (Ind. 2003) (Sentencer must find at least one aggravator and "find mitigating circumstances are outweighed by the aggravating circumstances, before it may impose death."); and *Stevens v. State*, (Ind. 1997) (Jury and court must find statutorily prescribed aggravator exists beyond a reasonable doubt and "likewise must find the aggravating circumstance(s) outweigh the mitigating circumstances.") The *Ritchie* court departs from these precedents and judicially rewrites the statute as if subsection (l)(2) is not unconnected to the requisite findings under subsection (l).

According to the *Ritchie* court, it is the aggravating circumstance "alone, that, if proven beyond a reasonable doubt, enable[s] the jury to proceed to the second step of weighing any mitigating circumstances against the aggravating factors." *Id*. at 265. The weighing factor "fixes the punishment," and the statute's placement of the weighing process with the jury "does not convert the weighing process into an eligibility factor" *Id*. This reading ignores the clear language of subsection (l).

In essence, *Ritchie* and *Barker* rest their conclusion that weighing need not be found by a jury beyond a reasonable doubt on Eighth Amendment jurisprudence. This analysis mixes apples with oranges. "Eligibility" as the term is used in the context of Eighth Amendment jurisprudence does not have the same meaning in the context of the Sixth and Fourteenth Amendments. In the

Eighth Amendment context the term "eligibility" merely means that the defendant has been "convicted of a crime for which the death penalty is a *proportionate punishment*." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994) (emphasis added).

As *Tuilaepa* makes clear, legislatures are free to choose what factors go into the eligibility decision, though there are two Eighth Amendment limitations. The eligibility factors must "genuinely narrow the class of persons eligible for the death penalty." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). These factors cannot apply to every defendant convicted of murder. *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988). Eligibility factors under the Eighth Amendment cannot be unconstitutionally vague. *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980).

The selection decision under Eighth Amendment jurisprudence defines the stage where the "sentencer determines whether a defendant who is in fact eligible for the death penalty should in fact receive that sentence." *Tuilaepa*, 512 U.S. at 972. "[T]he jury then is free to consider a myriad of factors [aggravating and mitigating] to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983). The sentencer has "unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty." *Tuilaepa*, 512 U.S. at 979, quoting, *Zant*, 462 U.S. at 875.

Using Eighth Amendment analysis and terminology from *Tuilaepa* and *Harris* to resolve an *Apprendi/Ring* question is improper. *Ring* is merely an application of *Apprendi*'s Sixth Amendment analysis to death penalty cases. Neither *Apprendi* nor *Ring* relies on this Eighth Amendment jurisprudence in their analyses. In fact, the *Ring* Court expressly rejects the contention that Eighth Amendment jurisprudence plays a role in determining whether *Apprendi*

safeguards apply to "facts increasing punishment beyond the maximum authorized by a guilty verdict." 536 U.S. at 605. Arizona argued that its statutory aggravators should be accepted from *Apprendi* because they are creatures of Eighth Amendment constraints. The Court disagreed:

> The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

Ring, 536 U.S. at 606-07 [citation omitted]. The Indiana Supreme Court's reliance on *Tuilaepa*'s description of how capital sentencing statutes must be structured to ensure proportionality and appropriateness under the Eighth Amendment is misplaced in resolving this Sixth Amendment issue.

Similarly, the Court's later reliance on a post-*Ring* case regarding whether the death penalty selection decision process enacted by the State of Kansas complies with the Eighth Amendment is misplaced. The supreme court cites of *Kansas v. Marsh*, 548 U.S. 163 (2006) in rejecting an *Apprendi/Ring* claim in *Kubsch v. State*, 866 N.E.2d 726, 738-39 (Ind. 2007). The *Kubsch* court states that the majority decision in *Marsh* was "led by the very justices who have championed *Blakely* and *Booker*." *Id*. Later, in *Treadway v. State*, 924 N.E.2d 621 (Ind. 2010), again rejecting an *Apprendi/Ring* claim, the Indiana Supreme Court describes *Marsh* as "holding that the United States Constitution does not require aggravating circumstances to outweigh mitigating circumstances beyond a reasonable doubt." *Id*. at 627 n. 3.

It is true that the *Marsh* Court held that the Eighth Amendment does not impose this requirement. However, neither the Sixth Amendment nor *Apprendi* principles were at issue in *Marsh*. The Kansas Supreme Court had reversed Marsh's death sentence after holding that the

Kansas statute violated the Eighth Amendment's requirement of individualized sentencing. The question before the Supreme Court in *Marsh* was whether the Kansas statute violated the Eighth Amendment because it required the jury to impose a death sentence if it found that aggravating circumstances were not outweighed by mitigating circumstances. *Id*.

The Supreme Court reversed the holding of the Kansas Supreme Court. The Court reasoned that the Kansas statute did not make the death penalty *mandatory* upon conviction, but rather allowed the jury to consider all mitigating circumstances and make an individualized sentencing determination, thus satisfying Eighth Amendment requirements. The Court wrote that it's holding was dictated by *Walton v. Arizona*, 497 U.S. 639 (1990), which the Court describes as "overruled on other grounds" by *Ring v. Arizona*.

The Eighth Amendment does not prohibit the General Assembly from enacting a statute like the Kansas statute. The General Assembly could write a statute to that a jury may impose a sentence of death or life without parole if it found that mitigating circumstances did not outweigh aggravating circumstances. However, this is not how Indiana's statute reads. Indiana's statutory language is mandatory: neither death nor life without parole may be imposed unless the jury makes the two findings set out subsection (l). Because both findings must be made before a defendant is exposed to these extreme penalties, the Sixth and Fourteenth Amendments require that both factors be submitted to a jury and unanimously found beyond a reasonable doubt. See, *Hurst*, *supra*, at p. 7 (Court reasons that because the Florida death penalty statute requires the trial court to find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances," before it may impose a death sentence, Florida cannot "now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires" under the Sixth

Amendment.)

The Supreme Court has consistently rejected the idea that *labels* control the application of Sixth and Fourteenth Amendment safeguards. *In re Winship*, 397 U.S. 358 (1970) holds that states cannot avoid the constitutional requirements of proof beyond a reasonable doubt of all elements of an offense by labeling proceedings "juvenile." *Id*. at 359. Likewise, the Indiana Supreme Court's labeling of "weighing" as a balancing process, see, e.g., *Barker*, *supra*, 809 N.E.2d at 314-15, does not move it outside the requirements of *Winship* and *Apprendi/Ring*.

Regardless, weighing is not a process unique to capital sentencing. Weighing is one of the primary duties for all jurors. Jurors are instructed to determine whether the State has proven the essential elements of the crime, not the "facts" of the crime. They are instructed to determine whether they are firmly convinced of guilt based on the evidence presented:

> The government has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you [should] find [him/her] guilty. If on the other hand, you think there is a real possibility that [he/she] is not guilty, you [should] give [him/her] the benefit of the doubt and find [him/her] not guilty.

Winegeart v. State, 665 N.E.2d 893, 902 (Ind. 1996).

The language of the Death Penalty statute is unambiguous. The General Assembly conditions the imposition of the maximum sentences of death and LWOP on a finding of both a

statutory aggravator and the weighing factor. The Indiana Supreme Court cannot remove the later factor from the requirements of *Winship* based upon a label.

The *Ritchie* court reasoned that the statutory weighing factor is outside the requirements of *Apprendi/Ring* because the weighing "fixes the punishment within the eligible range" as established by the finding of the statutory aggravator. *Ritchie*, 809 N.E.2d at 268. This conclusion ignores the plain language and structure of the statute. The statute does not state the jury may impose the Death or LWOP if one statutory aggravator is found. he statute clearly states the jury must also find that the aggravator outweighs the mitigator before it may impose Death or LWOP. IND. CODE § 35-50-2-9(e) & (l). No matter the label, the weighing factor is the functional equivalent of an element for capital murder. For these reasons, the weighing factor too must be found by a jury beyond a reasonable doubt. Since our courts have ruled otherwise, the statute is unconstitutional.

V. Death Penalty Statute Violates Indiana Constitutional Guarantees to a Jury Empowered to Determine the Law and the Facts.

The Indiana Constitution guarantees that "an accused shall have the right to a public trial, by an impartial jury." Ind.Const. Art I, § 13. "The weighing of testimony and testing of credibility of witnesses is solely a task for the trier of fact and neither [the appellate] court nor the trial court may usurp the jury's fact finding function." *Dean v. State*, 177 Ind.Ct.App. 1, 4, 377 N.E.2d 420, 421 (1978), citing, *Dew v. State*, 268 Ind. 17, 373 N.E.2d 138 (1978).

The Indiana Constitution further guarantees that an Indiana jury has power beyond being the final arbiter of the facts. An Indiana jury is also the final arbiter of the law. Ind. Const. Art. I, § 19; *Moore v. State*, 273 Ind. 268, 269, 403 N.E.2d 335, 336 (1980).

Under Indiana's death penalty statute, the narrowing of that class of defendants who may be subject to the death penalty or life without parole ["LWOP"] occurs during the penalty phase. It is not simply the proof of the aggravating circumstance that determines this. It is also determined by whether the aggravating circumstance(s) outweigh the mitigating circumstance(s). See, *Brown v. State*, 698 N.E.2d 1132, 1144 (Ind. 1998) ("Our death penalty statute requires the sentencer to find at least one aggravating circumstance beyond a reasonable doubt, to consider and evaluate any mitigating factor it may find to exist, and to weigh the aggravators and mitigators, finding that the mitigating circumstances are outweighed by the aggravating circumstances, before it may impose death. It is "[t]his scheme which adequately structures and channels the discretion of the jury and the and satisfies the ruling in *Lowenfield v. Phelps* [484 U.S. 231 (1988)].")[13]

[13] See also, *Burris v. State*, 642 N.E.2d 961, 967 (Ind.1994) ("The aggravating circumstance concerning appellant's intent throughout the entire episode was a matter to be determined upon fixing the sentence. The United States Supreme Court has held that a capital sentencing procedure will satisfy the narrowing requirement as long as it 'narrows the class of death eligible murders and then at the sentencing phase allows for the consideration of mitigating circumstances and the exercise of discretion.'"); *Schiro v. State*, 451 N.E.2d 1047, 1053 (Ind. 1983) (The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case.); *Judy v. State*, 275 Ind. 145, 168, 416 N.E.2d 95, 108 (Ind. 1981) (sentencing authority's discretion as exercised by the jury and trial court, "is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.")

Juxtaposed to the capital sentencing scheme is the Indiana Constitution's guarantee that all factual and legal findings must be made by a jury. The two cannot stand together. In effect, Indiana's death penalty statute usurps the power of the capital jury to determine both the facts and the law in the penalty phase. Yet, a capital sentence imposed that does arise from application of law of Indiana death penalty statute violates other the state and federal constitutional protections. Admittedly, the Indiana Supreme Court rejected a claim that Indiana's death penalty scheme violates these state constitutional guarantees. See, *Peterson v. State*, 674 N.E.2d 528, 541 (Ind. 1996) (Capital defendant's jury trial rights are not violated by a statutory scheme "under which the trial judge, not a jury, determines the facts for sentencing"). The precedents the *Peterson* court cites as support for this proposition, *Williams v. State*, 271 Ind. 656, 395 N.E.2d 239 (1979); and *Skelton v. State*, 149 Ind. 641, 49 N.E. 901 (1898), do hold there is no state constitutional right to have the jury fix the punishment.[14] However, neither case holds there is no state constitutional right to have a jury determine the ceiling or maximum sentence that a defendant is eligible for as a result of a guilty verdict.

Most importantly, *Peterson*'s continuing validity is questionable given the change in the legal landscape following the 2003 amendments to the death penalty statute which were prompted by *Ring v. Arizona*, 536 U.S. 584 (2002). When *Peterson* was decided juries had no constitutionally mandated role under *Walton v. Arizona*, 497 U.S. 639 (1990). The Supreme Court overruled this aspect of *Walton* in *Ring*. Capital juries now have a constitutionally required role in capital sentencing. That role was reinforced by the Supreme Court's holding in *Hurst v.*

[14] *Williams* involves a claim that the state constitutional jury right is violated when the jury is not instructed on the "sentences under the relevant offenses" being deliberated. 395 N.E2d at 245. Thus, the questions in *Williams* and *Skelton* involved the question of whether the jury has a constitutionally mandated role in fixing the punishment, not whether there is a state constitutional right to have the jury determine the maximum ceiling of the sentence that could legally be imposed based on the verdict.

Florida, No. 14-7505, decided January 12, 2016 (Slip Opinion). *Peterson* should be revisited because we now know that the jury's verdict determines the maximum punishment a defendant may receive and fixes the punishment under the Sixth Amendment.

In addition, under *Ring*, sentencing factors are the equivalent of elements of capital murder. "Proof of guilt is synonymous with proof of each essential element of the substantive crime as defined by statute." *Finch v. State*, 454 N.E.2d 856, 857 (Ind. 1983). The *Peterson* court acknowledged that the right to trial by jury under the Indiana Constitution unquestionably extends to the question of whether the State has proven the essential elements beyond a reasonable doubt. 674 N.E.2d at 541, citing, *Miller v. State*, 149 Ind. 607, 49 N.E. 894 (1898). Because the death penalty statute empowers a judge and not a jury to make these findings in Section (f), it violates Article I, § 13 of the Indiana Constitution. Ind.Code §35-50-9-2-9(f) ("If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.")

Another change in the legal landscape arising from precedents in habitual offender proceedings suggests that another aspect of *Peterson* is no longer good law. *Peterson* holds that Article I, § 19 does not apply to sentencing proceedings. Thus, the court reasoned that this provision does apply to the penalty phase of a capital trial because a capital jury only considers "sentencing factors." *Peterson*, 674 N.E.2d 528, 542. However, the Indiana Supreme Court expressly held that Section 19 does apply to habitual offender proceedings, which are in fact sentencing proceedings:

> [T]he legislature has mandated that a defendant is entitled to a trial by jury where the standard of proof is "beyond a reasonable doubt" - the same as that required in the determination of guilt - a defendant is entitled to an instruction similar to that given during

> the guilt phase of a trial, i.e. that the jury is entitled to determine the law and the facts. [citations omitted].

Seay v. State, 698 N.E.2d 732, 736, n. 8 (Ind. 1998).

In light of this change and the constitutional character of a capital jury's findings under *Ring*, and now *Hurst*, there can be no principled reason for excluding capital sentencing from the reach of Article I, § 19. The elements of capital murder carry precisely the same consequences that the Indiana Supreme Court deemed determinative in applying this constitutional right to habitual proceedings under IND. CODE § 35-50-2-8. Application of Article I § 19 as interpreted in *Seay* renders Indiana current death penalty statute unconstitutional on its face.

In the habitual context, the Indiana Constitution requires two jury findings beyond a reasonable doubt that: (1) the defendant has two prior unrelated felony convictions; and, (2) the defendant should be sentenced as a habitual offender. The judge cannot make the second habitual finding in the absence of a jury finding. More importantly, the first jury finding does not dictate the second:

> In *Seay*, we definitively established that Art. I §19, is applicable during habitual offender proceedings, and thus the jury has the power in such circumstances to determine both the law and the facts. [citation omitted]. Encompassed within the power is the jury's independent and separate authority to determine whether the defendant is a habitual offender after it has concluded that the State has properly proven two prior felonies.

Parker v. State, 698 N.E.2d 737, 742 (Ind. 1998).

Thus, the jury's decision as to whether the defendant should be sentenced as a habitual offender is integral to its work in habitual proceedings:

> [E]ven where the jury finds the facts of the prerequisite prior felony convictions to be uncontroverted, the jury still has the unquestioned right to refuse to find the defendant to be a habitual

offender at law.

Seay, 698 N.E.2d at 734.

The jury's exclusive province to determine whether the defendant should be sentenced as a habitual offender, even with uncontroverted evidence of two prior unrelated felonies, renders verdict forms that exclude this option unconstitutional. *Seay*, 698 N.E.2d at 735 (reversing list of cases providing otherwise). An Indiana trial judge cannot impose a habitual sentence absent a unanimous jury verdict that the defendant is an habitual offender.

This same rationale must be applied to Indiana's death penalty statute. There must be unanimous jury findings of a least one aggravating circumstance, that this aggravating circumstance(s) outweighs mitigation [the "weighing factor"], and that a sentence of death or LWOP be imposed.

In *Wilkes v. State*, 917 N.E.2d 675 (Ind. 2009), the Indiana Supreme Court concluded that Indiana's statutory capital sentencing process complies with *Ring v. Arizona*, 536 U.S. 584 (2002) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). According to the *Wilkes* court, the special verdict forms[15] on statutory aggravators and the statute's language that the "court shall sentence the defendant accordingly" solved the constitutional defect in the statute. However, the Indiana Supreme Court's interpretation of this provision and of the deadlocked jury provision makes it clear that Indiana's legislative *Ring* remedy runs afoul of the state constitutional jury

[15] Before *Wilkes*, the Indiana Supreme Court repeatedly rejected use of special verdicts in capital cases based on the prohibition contained in T.R. 49. *Holmes v. State*, 671 N.E.2d 841, 856 (Ind. 1996); see also, *Wrinkles v. State*, 690 N.E.2d 1156, 1168 (Ind. 1997); *Harrison v. State*, 644 N.E.2d 1243 (Ind. 1995), rev'd on other grounds by, *Harrison v. Anderson*, 300 F. Supp. 2d 690 (S.D. Ind. 2004). The result in *Wilkes* cannot be harmonized with these decisions and other precedents of the court. See, *State ex. rel. Gaston v. Gibson Circuit Court*, 462 N.E.2d 1049 (Ind. 1984) (Trial rules are procedural, rather than substantive. Separation of powers doctrine requires that court rules control over statutes.) This also demonstrates the erratic and irrational nature of the Indiana supreme court's review in capital cases. See, Section III, *supra*.

rights as interpreted in *Seay* and the U.S. Supreme Court's Sixth Amendment holding in *Hurst v. Florida*, *supra*.

Under *Wilkes*, it matters not that the jury deadlocked on the weighing factor and a recommendation. If a jury returns a special verdict finding at least one statutory aggravator, the judge may proceed to impose a death or LWOP sentence without further jury proceedings. The judge exercises the LWOP and capital "sentencing function 'as if' the entire case had been tried without a jury." *Id*. at 688. The judge may "independently find the aggravating circumstances" and the weighing factor without regard to jury findings of this factors. *Id*.

In essence, this means the defendant's state and federal constitutional jury rights are forfeited by operation of the statute. *Wilkes* permits the judge to "independently" find aggravators not found by the jury, which may then be considered in the weighting process and the determination of the appropriate sentence. There are no state constitutional precedents that sanction forfeiture of the jury trial right by operation of statute.

Additionally, the fact that the judge may independently find, consider and weigh factors not found by the jury is problematic under the Federal Constitution. "[C]ourts are not free to revise the basis on which a defendant is convicted" by a jury simply because the evidence presented proves the alternative basis beyond a reasonable doubt. *Dunn v. United States*, 442 U.S. 100, 107 (1979), citing, *Cole v. Arkansas*, 333 U.S. 196 (1948). It is also clear following *Hurst* that this statutory scheme violates the Sixth Amendment. Because the amended statute explicitly allows a death sentence to be imposed without the requisite determinations by a jury or based on findings other than those determined by a jury, the statute is unconstitutional on its face.

VI. Indiana's Death Penalty Statute Is Unconstitutional as Applied because it fails to Require That the Trier of Fact Consider All Relevant Mitigating Evidence Proffered in Violation of the Eighth & Fourteenth Amendments to the United States Constitution and Art. I, §§ 13 16, 18 & 23 of the Indiana Constitution.

The trier of fact may not be precluded from considering any relevant mitigating evidence proffered. *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). *Lockett* defines "mitigating factor[s]" as "*any aspect* of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 504 (emphasis added).

A sentence of death is "unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153 (1976). For this reason, the Eighth Amendment requires reliability in the sentencing determination, so that the death penalty is not imposed "arbitrarily or capriciously." *Furman v. Georgia*, 408 U.S. 238 (1972). "In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case' [citation omitted], the jury must be able to consider and *give effect* to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime." *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (emphasis added); see also, *Smith v. State*, 547 N.E.2d 817, 822 (Ind. 1989).

Moreover, some weight *must* be assigned to evidence proffered; it may not be given no weight and hence excluded from consideration. *Eddings v. Oklahoma*, *supra* (emphasis added); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986). Consideration of all proffered mitigation evidence is a "constitutionally indispensable part of the process of inflicting the penalty of death." *California v. Brown*, 479 U.S. 538 (1987) [internal citation omitted].

IND. CODE § 35-50-2-9(c) fails to require that the trier of fact consider all mitigating evidence, saying only that they "may" consider it. Absent an instruction from this court that the jury "must" consider mitigation evidence, the statute violates the Eighth and Fourteenth amendments to the United States Constitution and Article 1 §§ 13, 16, 18, and 23 of the Indiana Constitution.

Similarly, Indiana's trial court judges routinely fail to consider mitigating evidence proffered. In a dissenting opinion, Justice DeBruler commented on this trend:

> There is a nagging doubt, arising from this court's frequent confrontation in reviewing death sentences with the finding of absolutely no mitigating circumstances, that the mitigating circumstances search required by the death statute is either being misunderstood, misapplied, or not reflected in sentencing court findings. In my opinion it needs to be reiterated and emphasized for the guidance of judges and lawyers that a finding of the existence of a mitigating circumstance does not preclude a positive death decision.

Wallace v. State, 486 N.E.2d 445, 465 (1985); accord, *Lowery v. State*, 478 N.E.2d 1214, 1232-33 (Ind. 1982) (DeBruler, J., dissenting); *Williams v. State*, 430 N.E.2d 759, 770-71 (Ind. 1982) (DeBruler, J., dissenting).

The trend by trial courts to give short shrift to mitigation evidence continues to the present day despite Justice DeBruler's prophetic admonitions. See generally, *Harrison v. State*, 644 N.E.2d 1243, 1263 (Ind. 1995) (trial court failed, among other things, o "set forth specific facts and reasons which lead the court to find the existence of each . . . mitigating circumstance"); *Lambert v. State*, 643 N.E.2d 349 (Ind. 1994) (case remanded for consideration by trial court as to whether intoxication was a mitigating circumstance entitled to weight in assessing penalty); *Benirschke v. State*, 577 N.E.2d 576, 579 (Ind. 1991) (trial court did not make

"independent judgments as required and had not sufficiently indicated the evaluation given to mitigating circumstances").

Additionally, the Indiana Supreme Court has not been uniform in its application of these important Eighth Amendment mandates. For example, in *Smith v. State*, 547 N.E.2d 817, 821-22 (Ind. 1989), the court discussed the above principles with approval and acknowledged that mitigating circumstances "may include virtually anything favorable to the accused, or of evidence to rebut the existence of the charged aggravating factors". *Id*. at 822; see also, *Schiro v. State*, 669 N.E.2d 1357 (Ind. 1996) (reversing death sentence and finding approximately 6 non-statutory mitigating factors).

But in *Wallace v. State*, 640 N.E.2d 374 (Ind. 1994), the court noted that evidence of Wallace's mistreatment as a child "is no license to commit a crime." *Id*. at 376. The court said that "[t]he real question whether it be the ability to form intent to commit a crime or a mental condition which should be considered as a mitigating factor is the mental condition of the defendant at the time the crime is committed." *Id*. The court continues to depreciate evidence of troubled childhood in particular, continuing to write that it need not be considered as a mitigating circumstance. See, e.g., *Coleman v. State*, 741 N.E.2d 697, 700 (Ind. 2000) ("[T]his court has consistently held that evidence of a difficult childhood warrants little, if any, mitigating weight."); *Daniels v. State*, 741 N.E.2d 1177, 188 n.12 (Ind. 2001). ("Trial courts are not required to treat evidence of a troubled childhood as a mitigating circumstance, see, *Lowery v. State*, 547 N.E.2d 1046, 1059 (Ind. 1989), cert denied, 498 U.S. 881 (1990), and Daniels does not explain how his social background is relevant to his culpability.); and *Penick v. State*, 659 N.E.2d 484 (Ind. 1995) (upholding the trial court's determination that the defendant's "horrible, chaotic, abusive, violent life" explained his crime, but neither justified nor excused that crime.")

Under *Lockett* and its progeny, evidence need not rise to the level of "license to commit a crime," nor to justification or excuse, to constitute mitigating circumstances. A causal connection or link between the mitigating circumstances is not a prerequisite to the consideration of a circumstance as mitigating. See generally, *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (reversing death sentence in part based upon "the difficult circumstances of [defendant's] upbringing, his potential for rehabilitation, and his voluntary surrender to authorities"); see also, *Williams v. Taylor*, 529 U.S. 362 (2000) (nightmarish childhood, surrender to authorities, borderline mental retardation). All that is required is that the evidence be relevant to the defendant's "background" or "character". *Penry v. Lynaugh*, supra. The Indiana Supreme Court explained in *Bivins v. State*, 735 N.E.2d 1116, 1126 (2000) that a mitigating circumstance need not have any "particular causal connection to the crime in order to be entitled to mitigating effect," but that "the extent to which there is a causal connection may well affect the weight it is given." In practice this seems to be a distinction without a difference.

Similarly, although *Lockett* and IND. CODE § 35-50-2-9(c)(8) require the fact finder to consider *anything* proffered by the defendant for a sentence less than death, the court has routinely failed to consider whether particular evidence establishes a non--statutory mitigator and has routinely assessed such evidence solely in terms of whether the evidence rises to the level of a statutory mitigating factor. See generally, *Brown v. State*, 577 N.E.2d 221, 234 (Ind. 1991) (assessing mental health mitigation solely in terms of whether it rose to the level of statutory mitigation without considering whether, even if it did not rise to level specified there, it was nevertheless non-statutory mitigation under (c)(8)); *Lowery v. State*, 547 N.E.2d 1046, 1059 (Ind. 1989) (same), but see, *Evans v. State*, 598 N.E.2d 516 (Ind. 1992) (even though defendant's

psychiatric disturbance did not qualify for consideration as statutory mitigation, based on its long-standing, documented history, it must be considered as non-statutory mitigation).

This pattern of failing to assign any weight whatsoever to relevant, constitutionally valid mitigating circumstances demonstrates the unconstitutional application of IND. CODE § 35-50-2-9(c). The pattern of Indiana's trial and appellate courts is contrary to the specific language of *Lockett*, *Eddings*, *Hitchcock*, and *Skipper*.

VII. The Statute's Advisory Language Violates *Caldwell v. Mississippi* because it Diminishes the Jury's Role in Capital Sentencing and is Misleading.

The death penalty statute retains the advisory description of the jury's role. Five times the statute references the jury's duty as making a "recommendation". IND. CODE § 35-50-2-9(d-f). The statute is consistent on this point; nowhere does it state or suggest the jury's role is anything other than advisory. The recommendation role statutorily assigned to the jury has previously been held by the Indiana Supreme Court to be of sufficient magnitude that it trumped facially unambiguous language in former subsection (l), which appeared to require a jury finding of aggravation prior to imposition of an LWOP sentence. *Farber v. State*, 729 N.E.2d 139, 140 (Ind. 2000) ("statute must be read as a whole to avoid excessive reliance on the strict literal meaning of selective reading of individual words.") As argued above, the jury's role cannot be advisory any longer under the Sixth Amendment. See also, *Hurst v. Florida*, *supra* (Florida's death penalty statute violates *Ring v. Arizona* and the Sixth Amendment.)

"[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985). Diminished responsibility combined with instructions that mislead the jury as to

their role constitute a constitutional violation. *Romano v. Oklahoma*, 512 U.S. 1, 14-15 (1994) (J. O'Connor, concurring). "An accurate description of the jury's role - even one that lessened the jury's sense of responsibility – would have been constitutional." *Id*. [citation omitted].

The Indiana statute inaccurately describes the jury's sentencing decision as advisory, yet the Indiana Supreme Court in *Stroud v. State*, 809 N.E.2d 274 (Ind. 2004) found the jury's role is not advisory. The recommendation language of IND. CODE § 35-50-2-9 can do nothing but mislead a jury. The Indiana Supreme Court rejected this argument in *Treadway v. State*, 924 N.E.2d 621 (Ind. 2010), but it is raised here to preserve it for federal review.

VIII. Indiana's Death Penalty Statute Is Unconstitutional on its Face and as Applied Because it Fails to Guide the Sentencer's Discretion in Choosing Between a Sentence of Death and a Sentence of Life Without Parole Promoting Arbitrary and Disproportionate Sentences in Violation of the Eighth Amendment to the United States Constitution and Art. I § 16 of the Indiana Constitution.

IND. CODE § 35-50-2-9 fails to guide the sentencer's discretion in choosing between a sentence of death and a sentence of life without parole. The statute is unconstitutional on its face, and as applied, in violation of the federal and state constitutions. U.S. CONST. amends. V, VI, VIII & XIV; IND. CONST. Art. I §§ 15, 16, 18, 19 & 23.

The most important decision a sentencer can be called upon to make is the decision whether or not to impose a death sentence. Since *Furman v. Georgia*, 408 U.S. 238 (1976), the Court has consistently and uniformly held that "the penalty of death is qualitatively different

from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), (opinion of Stewart, Powell, and Stevens, J.). A capital punishment scheme must guide and channel the sentencer's discretion if it is to pass constitutional muster. *Gregg v. Georgia*, 428 U.S. 153 (1976).

Because death is unique in its severity, finality, and irrevocability, a death sentence may not be imposed "under sentencing procedures that [create] a substantial risk that it would be inflicted in an arbitrary and capricious manner." *Gregg* at 188, quoting *Furman*, *supra*. Where a sentencing body is given discretion on the question of life or death, "that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id*. at 189. Where the jury is the sentencing body, the jury must be given clear guidance in its sentencing decision. *Id*. at 193. "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Id*.

Indiana's capital sentencing statute provides no guidance to the sentencer in making the crucial distinction between death and LWOP. Both sentences require the exact same factual findings: (1) statutory aggravator(s); and (2) statutory aggravator(s) outweigh mitigating circumstances. IND. CODE § 35-50-2-9 (e). There is no other guidance or distinction provided in the statute. The absence of this guidance brings the statute in conflict with the constitutional commands set forth in *Furman* and its progeny.

Before LWOP was added as a sentencing option, the jury could legally recommend death only if it made the above findings. IND. CODE § 35-50-2-9 (e) (1992). The former statute drew a sharp distinction between death and a sentence less than death. This distinction provided the

constitutionally required guidance to the capital sentencer. Such a distinction no longer exists, and the statute provides no guidance.

The Indiana Supreme Court has rejected similar claims with regard to the Indiana death penalty statute's failure to channel discretion between death and life without parole, see, e.g., *Corcoran v. State*, 739 N.E.2d 649 (Ind. 2000). However, the claim is presented here to preserve it for reconsideration and further review by the Federal courts.

IX. Empirical Studies of Capital Jurors Demonstrate that they are Imposing Sentences of Death in Violation of the Minimum Constitutional Requirements Set Forth in *Furman*, *Gregg*, *Lockett*, *Caldwell*, *Witherspoon*, *Simmons*, and Their Progeny

A. Constitutional Principles Established Since Furman

1. *Jury's Discretion Must Not Be Arbitrary*

The modern death penalty era began when *Furman v. Georgia*, 408 U.S. 238 (1972) struck down capital sentencing statutes as applied by the States. The *Furman* Court concluded that capital punishment was being applied in an unconstitutional manner. Capital jury decision-making was so freakishly wanton, so arbitrary and capricious, and so unreviewable on appeal, that it violated the Cruel and Unusual Punishment Clause of the Eighth Amendment.

Four years after *Furman*, the Court made it clear that the "vesting of standardless sentencing power in the jury violates the Eighth and Fourteenth Amendments." *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976). A capital jury's sentencing discretion must be channeled by clear and objective standards. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988). There must be specific and detailed guidance for the jury so that the capital sentencing process may be rationally reviewed. *Id*.

In 1976 the Court found that three types of statutory capital sentencing schemes appeared

to address the constitutional concerns expressed in *Furman*. See, *Gregg v. Georgia*, 428 U.S. 153 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The three different schemes – Florida's weighing approach, Georgia's threshold approach, and the Texas directed approach – had four essential features in common which the Court concluded would meet the constitutional concerns expressed *Furman*:

> (1) A rational mechanism for narrowing the class of death-eligible offenders;
>
> (2) Bifurcated proceedings separating the guilt determination from sentencing;
>
> (3) Instructions that channel the sentencing jury's discretion with clear and objective standards which purport to provide guidance for capital jurors that are understandable and allow for rational review the capital sentencing process; and,
>
> (4) Appellate review that is adequate to ensure the sentencing decisions comport with constitutional mandates.

2. *Standards Must be Clear and Objective*

In the years that followed, the requirement of clear and objective standards to guide capital jurors led the Court to strike down vague statutory criteria that cannot be reviewed objectively on appeal. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), Georgia's outrageously or wantonly vile, horrible, and inhuman aggravator was invalidated. The Court held it was so vague that it failed to provide any meaningful guidance to the jury. *Id*. A capital jury making a decision on such a factor was as unconstrained as juries were under the capital sentencing schemes invalidated in *Furman*. *Id*.

Oklahoma's "especially heinous, atrocious, or cruel" standard was struck down on this same basis in *Maynard v. Cartwright*, 486 U.S. 356 (1988). The *Maynard* Court reaffirmed that "that the channeling and limiting of the sentencer's discretion in imposing the death penalty

is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id*. at 362.

In *Stringer v. Black*, 503 U.S. 222 (1992) the Court concluded that the presence of a vague aggravator in the weighing process creates a greater risk of arbitrariness:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance ... [T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty.

Id. at 235-36.

Thus, the Supreme Court's jurisprudence makes clear that capital sentencing decisions must be made according to criteria that are sufficiently clear to permit ordinary citizens to understand and apply them.

3. *Decision Must Not Be The Result Of False Or Misleading Information*

A corollary of the ban on vagueness is the constitutional prohibition on false, inaccurate, or misleading information in capital sentencing. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Court held that the Due Process Clause of the Fourteenth Amendment is violated when a capital sentencing decision is made on the basis of false, inaccurate, or misleading information. The jury, which sentenced Simmons to death, may have reasonably believed he could be paroled if he were not sentenced to death. According to the Court, such a misunderstanding "had the effect of creating a false choice between sentencing [Simmons] to death and sentencing him to a limited period of incarceration." *Id*. at 162.

Shafer v. South Carolina, 532 U.S. 36 (2001) reaffirmed the principles established in *Simmons*. A capital jury's choice to impose death cannot be premised upon false, misleading, or inaccurate beliefs about parole eligibility. Such erroneous beliefs have the effect of forcing a capital jury to choose death to make sure that the defendant they convicted of murder is never released.

4. *Race Can Play no Part in Decision*

Race is another improper consideration for a capital sentencing jury. Race cannot play any role in a capital jury's decision-making.

> In a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" ...
>
> Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected ...
>
> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."

Turner v. Murray, 476 U.S. 28, 33-35 (1986).

Safeguards to minimize the risk of race infecting capital sentencing must be followed. For this reason, capital defendants accused of an interracial crime are entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. *Id*. In addition, the Supreme Court outlawed the use of peremptory strikes that are motivated by race. *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Batson v. Kentucky*, 476 U.S. 79 (1965).

5. *Death Can Never Be The Only Appropriate Penalty*

Beginning with *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court has repeatedly made it clear that capital jurors must be permitted to consider a wide range of mitigating circumstances in deciding whether death is the appropriate sentence. This principle flows from earlier holdings invalidating capital sentencing statutes in which death was the mandatory punishment for certain murders. *Woodson v. North Carolina*, 428 U.S. 280 (1976). In *Roberts v. Louisiana*, 431 U.S. 633 (1977), the Court makes it clear that death can never be the only appropriate penalty, even where a law enforcement officer is the victim:

> To be sure, the fact that the murder victim was a peace officer performing his regular duties may be regarded as an aggravating circumstance. There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.
>
> As we emphasized repeatedly in *Stanislaus Roberts* and its companion cases decided last Term, it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense. Because the Louisiana statute does not allow for consideration of particularized mitigating factors, it is unconstitutional.

Id. at 636-37.

6. *Jury Must Be Able To Consider And Give It Effect To Mitigation*

The Eighth and Fourteenth Amendments dictate that there be an individualized

determination of the appropriate sentence. *Lockett*, *supra*. This means that the statutory scheme cannot preclude consideration of mitigating evidence. *Id.* It also means "the sentencer [may not] refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). Simply allowing the mitigating evidence to be admitted is not enough. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); see also, *Skipper v. South Carolina*, 476 U.S. 1 (1986) ("Evidentiary ruling excluding relevant mitigating evidence of defendant's adjustment to prison setting violates *Eddings*); *Mills v. Maryland*, 486 U.S. 367 (1988) (Requirement of unanimous jury finding on mitigating factors created unconstitutional barrier to consideration of relevant mitigating evidence). Only when the capital juror is free to consider and give effect to all mitigating evidence is there an assurance of an individualized sentencing determination. *Lockett*, *supra*.

7. *Jurors Must Understand Their Ultimate Responsibility*

Capital jurors must not be misled so as to diminish their sense of responsibility for imposition of a death sentence. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Each juror must understand that he or she alone is responsible for his or her sentencing decision. Uncorrected juror beliefs that "responsibility for any ultimate determination of death will rest with others" create a possible bias toward a death sentence. *Id*. at 333.

Jurors unconvinced that death is the appropriate punishment, "might nevertheless wish to 'send a message' of extreme disapproval for the defendant's acts" and vote for death on the assumption that the ultimate sentencer will correct any error. *Id*. at 332. Jurors who believe the ultimate responsibility lies elsewhere may vote death because they understand any decision to "delegate' responsibility" for a sentence of death "can only be effectuated by returning" a death

sentence. *Id*.

8. *Death Scrupled Jurors Not Automatically Disqualified*

Potential jurors who have scruples about the death penalty are not automatically disqualified from serving on a capital jury. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). A death sentence returned by a jury biased toward death because of the erroneous exclusion of death scrupled persons violates the Constitution:

> A State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected ... Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.

Id. at 522, 523.

Only potential jurors whose scruples about the death penalty are likely to "prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath" may be disqualified. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). Indiana law, IND. CODE § 35-37-1-5(a)(3), sets a "higher bar" for the disqualification of death-scrupled jurors than *Witt*. *Dye v. State*, 717 N.E.2d 5, 17 (Ind. 1999). A prospective juror may only be removed for cause if his or her conscientious opinions about capital punishment "preclude his [or her] recommending that the death sentence be imposed." IND. CODE § 35-37-1-5(a)(3). This statutory exclusion only applies if "the prospective juror's conscientious opinions preclude[] him from recommending the death penalty in this case." *Dye* at 18. Likewise, "[a] juror's willingness to recommend a death sentence under other circumstances is

irrelevant to [the *Witt*] inquiry." *Id*. at 17. In other word, impartiality on the question of the death penalty is case specific.

9. *Jurors Unwilling To Consider Mitigation Are Disqualified*

Witherspoon's prohibition against a capital jury biased toward death was extended to require the disqualification of death-biased jurors in *Morgan v. Illinois*, 504 U.S. 719 (1992). Potential jurors who would automatically impose a sentence of death, without regard to mitigating circumstances, are constitutionally disqualified from serving:

> A juror who will automatically vote for the death penalty will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. *If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence*.
>
> * * * *
>
> Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has formed an opinion concerning the merits of the case without basis in the evidence developed at trial.

Id. at 729 (emphasis added).

Morgan is significant because the Court made it clear that attorneys must not be precluded from examining potential jurors about their ability to consider the mitigating evidence likely to be presented in the case being tried. Adequate voir dire on these subjects "plays a critical function" of insuring that the jury is not skewed toward a verdict of death. *Dye* at 730. The Constitution requires an individualized determination of the appropriate sentence based on the character and background of the capital defendant, no matter how horrible the murders.

In a capital case, "impartial" means the juror has formed no opinion about the appropriate punishment in the capital case to be tried:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136 (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, *a juror must be as 'indifferent as he stands unsworn*.' Co. Lit. 155b. His verdict must be based upon the evidence developed at the trial. This is true, *regardless of the heinousness of the crime* charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). '*The theory of the law is that a juror who has formed an opinion cannot be impartial*.' *Reynolds v. United States*, 98 U.S. 145, 155 (1879)."
>
> * * * *
>
> Thus it is that our decisions dealing with capital sentencing juries and presenting issues most analogous to that which we decide here today, [citations omitted], have relied on the strictures dictated by the Sixth and Fourteenth Amendments to ensure the impartiality of any jury that will undertake capital sentencing.

Id. at 727-28, (emphasis added); accord, *Ward v. State*, 810 N.E.2d 1042 (Ind. 2004).

The holdings in *Witt* and *Morgan*, as well as *Dye* and *Ward*, teach that potential capital jurors must be indifferent on the question of the appropriate penalty as the trial proceeds. Moreover, the real question for potential jurors regarding their views about capital punishment is whether those views would prevent or impair the juror's ability to return a verdict of a term of years, life without parole, or death in the actual case being tried, not in some hypothetical case. If a fact or circumstance specific to the case would cause the potential juror to invariably vote for death, regardless of the strength of the mitigating evidence the defense might present, then the juror's partiality is constitutionally impaired and he or she should be excused for cause. See,

Dye v. State, 784 N.E.2d 469 (Ind. 2003) (Death sentence and convictions reversed because, among other things, juror lied about her predisposition to impose death penalty and would have been subject to removal for cause based had she been truthful.)

B. Jury Studies Before and After the Capital Jury Project

Social scientists have been conducting research on the twin questions of how capital jurors make decisions and what impact the capital voir dire process has on their decision-making over the past four and half decades.[16] Since *Witherspoon*, litigants have presented the Supreme Court with evidence of social science studies of juror behavior in an effort to provide objective evidence on particular jury issues. The Court initially rejected such studies because the field of study was too new and there was insufficient data to support the conclusions asserted. See, *Witherspoon v. Illinois*, 391 U.S. 510, 517 (1968) (The three studies offered to support claim that death-qualified juries were guilt-prone juries rejected as "too tentative and fragmentary" to support per se constitutional ruling).

As the field of jury study gained acceptance, the Court rejected the conclusions of jury studies because the data relied upon did not come from "actual jurors sworn under oath to apply the law to facts of an actual case involving the fate of an actual capital defendant." *Lockhart v. McCree*, 476 U.S. 162, 171 (1986). The Court concluded that data from an artificial settings is unpersuasive, even when drawn from scientifically constructed testing. See, *McCleskey v. Kemp*, 481 U.S. 279 (1987) (Studies showing race influences capital decision-making do not answer question of how jurors eligible for service in McCleskey's case are likely to approach issues when sworn).

The message from *Lockhart* and *McCleskey* is that the Court would reject studies based

[16] See, e.g., Kalven & Zeisel, *The American Jury* (University of Chicago Press, 1966).

on artificial scientific constructs. In other words, the persuasiveness of social science research on capital juries depends on data obtained from actual jurors who served on capital juries. In response, studies based on in-depth interviews of actual capital jurors were conducted in Florida, California and Oregon. These studies showed that capital jurors were not following the constitutional guidelines established by the Supreme Court's post-*Furman* jurisprudence:

> Shortly after the *McCleskey* decision, researchers undertook studies based on in-depth interviews with persons who had served on capital juries in Florida, California, and Oregon. These interviews focused on how jurors actually made their decisions and whether, or to what extent they were guided by the capital statutes in their respective states. The questioning was largely an open ended inquiry into what factors influenced the sentencing decision, and whether jurors' decision making was being guided by statutory provisions and the Court's conception of the sentencing decision as a reasoned moral choice.
>
> * * * *
>
> These studies raised serious questions about the operation of post-*Furman* capital statutes. Jurors appear to understand sentencing instructions poorly, especially their obligation to give effect to mitigation. Many appear to presume that death is the appropriate punishment for capital offenses without regard for mitigation. They seem to focus narrowly on a single issue to simplify decision-making and to reach consensus on punishment. In explaining the decision to impose the death penalty, they invoke guilt related considerations as if the sentencing process was merely a replay of the guilt decision. These soundings were *sufficiently ominous to justify a more extensive investigation of the capital sentencing process*, one that would take a more systematic look into the black box of jury decision making.

Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, Chapter 14 "The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction," (Carolina Academic Press, 2d ed., 2003) (emphasis added).

The constitutional failures of the post-*Furman* capital sentencing schemes has now been

further substantiated by the data collected by the Capital Jury Project ["CJP"]. The CJP began in 1990, with funding from the Law and Social Sciences Program of the National Science Foundation (NSF grant SES-9013252). The CJP researched the decision-making of actual capital jurors by collecting date from them. The CJP's juror interviews chronicle the jurors' decision making over the course of the trial and identify those matters, which actually influence juror decision-making. The CJP study reveals what actually affects capital juror decisions and juror reasoning in returning a sentencing verdict.

The CJP began in eight states, but grew to encompass data from fourteen states, including Indiana. States were chosen for CJP research so as to reflect the variations in capital sentencing statutes. Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. From each trial, a target sample of four jurors was selected and subject to in-depth three to four hour personal interviews. Interviewing began in the summer of 1991.

The CJP data is drawn from interviews of 1,201 jurors from 354 capital trials in 14 states. The 14 states were the venues of 76.1% of the 3,718 persons on death row as of June 1, 2002. Moreover, these states were the locations of 79.0% of the 795 persons who were executed between 1977 and September 1, 2002.

A number of articles summarizing the findings of these studies have been published since the CJP collected this data.[17] Data collected and analyzed by CJP researchers, played a

[17] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51; Bowers, Sandys, Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making* (1998) 83 Cornell L. Rev. 1476; Bentele, Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse* (2001) 66 Brooklyn L. Rev. 1011; Bowers, Fleury-Steiner, Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction*, Chapter 14 from Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, (2d ed., 2003); Bowers, Steiner, *Choosing Life Or Death: Sentencing Dynamics In Capital Cases*, Chapter 12 from Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, (1st, ed., 1998); Bowers, Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing* (1999) 77 Texas L. Rev. 605; Bowers, Steiner, Sandys, *Death Sentencing In*

substantial role in the *Simmons v. South Carolina* decision. Since 1993, some 30 articles discussing the findings of the CJP have been published.[18]

The CJP data reveal profound discrepancies between how actual capital jurors make their sentencing decisions and the constitutional requirements established by the Supreme Court. These discrepancies exist as to each of the federal constitutional requirements discussed in the previous section of this memorandum. The CJP data shows that:

(1) Capital jurors decide on the appropriate sentence prematurely so that the penalty phase of the capital trial is rendered meaningless;

(2) Jury selection procedures fail to remove large numbers of death-biased jurors and create a biasing effect for the death penalty;

(3) Substantial numbers of capital jurors fail to comprehend and/or follow penalty phase instructions;

(4) Substantial numbers of capital juror believe death is the required punishment;

(5) Capital jurors believe ultimate responsibility for the punishment decision lies elsewhere;

(6) Race continues to affect decisions of capital jurors; and

(7) Substantial numbers of capital jurors underestimate term of imprisonment that will result if a sentence of death is not chosen.

Black And White: An Empirical Analysis Of The Role Of Jurors' Race And Jury Racial Composition (2001) 3:1 U. Pa. J. Const. L. 171; and, Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of Early Findings* (1995) 70 Ind. L. J. 1043.

[18] See, the Capital Jury Project Website at www.albany.edu/scj/13194.php (last visited 1/20/16) for an updated listing of CJP related articles, commentaries, and doctoral dissertations.

C. Substantial Numbers of Capital Jurors Prematurely Decide Death in the Appropriate Sentence

Nearly half (49.2%) of capital jurors surveyed made their sentencing decision before the penalty phase even began. These jurors felt strongly about their decision, and did not waver from it over the course of the trial.[19] Premature decision-making occurred in every state studied by the CJP. This means that bifurcation and instructions fail to provide any guidance whatsoever to such capital jurors in deciding their sentencing verdict during penalty phase deliberations:

> Requirements such as bifurcating the trial, allowing presentation of mitigation evidence during the sentencing phase, and the use of jury instructions aimed at guiding sentencing discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the penalty phase evidence or received the instructions on how they are supposed to make the punishment decision.

Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) Crim. Law Bulletin 51, 56.

To make matters worse, approximately 30% of all capital jurors make the decision that the defendant should be sentenced to death *while evidence was still being introduced in guilt phase of the capital trial*. The data In Indiana is consistent with this finding.

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[19] See, Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51 ; Bowers, Sandys, Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making* (1998) 83 Cornell L. Rev. 1476 ; Bentele, Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse* (2001) 66 Brooklyn L. Rev. 1011; Bowers, Fleury-Steiner, Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction*, Chapter 14 from Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, (2d ed., 2003); Bowers, Steiner, *Choosing Life Or Death: Sentencing Dynamics In Capital Cases*, Chapter 12 from Acker, Bohm, Lanier, *America's Experiment With Capital Punishment*, (1st, ed., 1998) ; and Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of Early Findings* (1995) 70 Ind. L. J. 1043.

Table 2[20]:	Capital jurors' stand on punishment at the guilt stage of the trial before sentencing in 13 states			
States	Death	Life	Undecided	No. of jurors
Alabama	21.2%	32.7%	46.2%	52
California	26.1%	16.2%	57.7%	142
Florida	24.8%	23.1%	52.1%	117
Georgia	31.8%	28.8%	39.4%	66
Indiana	**31.3**%	**17.7**%	**51.0**%	**96**
Kentucky	34.3%	23.1%	42.6%	108
Missouri	28.8%	16.9%	54.2%	59
North Carolina	29.2%	13.9%	56.9%	72
Pennsylvania	33.8%	18.9%	47.3%	74
South Carolina	33.3%	14.4%	52.3%	111
Tennessee	34.8%	13.0%	52.2%	46
Texas	37.5%	10.8%	51.7%	120
Virginia	17.8%	31.1%	51.1%	45
All States	30.3%	18.9%	50.8%	1135

The evidence establishes that most early pro-death jurors do not even wait for guilt-phase deliberations before deciding the penalty. Pro-death jurors prejudge the penalty decision during

[20] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 57.

the guilt phase, well before they hear any mitigating evidence and the subject of penalty is even relevant to deliberations. Many cite the convincing proof of guilt in explaining why they chose death prematurely:

> FL: When I was convinced he was guilty - when we were going through the hard evidence.
>
> NC: After the pathologist report, after I was convinced he was the one who did it.
>
> FL: When I knew in my heart that he was guilty ... This was after hearing the forensic evidence from prosecution.
>
> TX: Uh, before we actually voted, before we went in there. I was pretty sure, I mean, I was absolutely sure, because I truly believe in what the Bible says and I think I told them this when they chose me.[21]

For some jurors, the grotesque or gruesome nature of the crime is cited as the reason they decided on death before hearing the penalty phase evidence:

> KY: Once guilt was established that (the defendant) had committed this gruesome crime. I had no problem at all determining what punishment was applicable.
>
> MO: Um, I'd say probably right when the prosecutor made the statement. She was stabbed twenty-two times.
>
> SC: When they started to talk about the brutality of the crime.[22]

For other jurors in the category of premature death deciders, the role of physical evidence, especially photographs or video tapes, were critical in their punishment decisions:

> AL: When the D.A. handed us the pictures.

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[21] Bowers, Fleury-Steiner, Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction,* Chapter 14, p. 17 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (2d ed., 2003).

[22] *Id*. at pp. 17-18.

CA: Video tape portion of the trial. (When the jury viewed a video tape of the killing that a store monitoring system had recorded.)

KY: After I saw pictures and hair and semen analysis.

MO: (After) looking at the pictures and seeing you know, the crime, the autopsy photos.

FL: During the evidence - when (I) saw the pictures of the victim.

MO: After I knew, when they showed us the photographs of (the victim) and how he had been murdered. I knew (the defendant) had done it by the video tape but I didn't know how severe and how gruesome it was.[23]

Still others in this category gave vivid accounts of how photo or video evidence had affected their premature penalty decision:

NC: During the trial. I can tell you ... when we saw pictures of this woman's body, burned .... Where her feet were burned off .... Horrible, horrible pictures of this. That convinced me.

CA: Just sitting there watching (a video tape of the killing from a store monitoring system). I've seen a lot (of) stuff, but I never .... Even Arnold Schwarzenegger movies didn't affect me like that, you know? This wasn't make-believe, watching that video tape. The video tape was very powerful. [24]

Another factor that premature death deciders cite as the basis for their penalty decision is their perception of the defendant's appearance during proceedings and his future dangerousness if not sentenced to death:

CA: Once I was convinced that he did it, I was convinced that

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[23] *Id*. at p. 18.

[24] *Id*.

he was kind of cold-blooded and didn't have any feelings, basically.

KY: I can't explain to you how he looked but I guess that's when I knew.... the way he sat there.

TX: I think this feeling came about over days of watching him and knowing he could do something like that again.[25]

The defendant's likely future dangerousness is an especially prominent theme for this subcategory of premature death deciders:

SC: When we heard all of the evidence I thought he would be dangerous if he got out and in thirty years he might still be dangerous.

CA: I feel he's like a dangerous snake. I feel that he might be a threat.

TX: Well while he was in jail waiting to go to trial for this he got in a fight. And I could see that to me, or it looked like somebody, he wasn't going to change. And if he was let back into society he would continue with his path of crimes.

CA: ...we didn't want him to get back out on the street again.[26]

Premature death deciders find the fact of guilt and the nature of the crime compelling. They decide on death where the crime is egregious, the evidence is explicit, the defendant appears cold and unrepentant, or seems apt to repeat his crime. The nature and circumstances of the crime and the dangerousness of the defendant may be relevant to the punishment decision. However, *Lockett* and its progeny dictate that capital jurors hear and consider the mitigation before making a penalty decision.

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[25] *Id*.

[26] *Id*. at pp. 18-19.

The evidence from the CJP demonstrates that premature death deciders are effectively deaf to the evidence and instructions of the penalty phase. These jurors consistently stick to their premature decision to impose death. The CJP found that 97.4% of all early pro-death jurors "felt strongly about their early pro-death stance." Nearly all these jurors began the penalty phase of their capital trials certain or nearly certain that the penalty should be death. Some 70.4%, indicate that they were "absolutely convinced" while 27% indicate they were "pretty sure" about their premature death decision. This leaves a mere 2.6% of these jurors who may have considered and given effect to the capital defendant's mitigation at the penalty phase.[27]

This evidence demonstrates that the mandate of *Eddings*, which requires the capital sentencer to be able to both hear and give effect to mitigation, is not being met.

> Presenting mitigating evidence during the penalty phase cannot be very effective when so many jurors declare that they were already "absolutely convinced" that the defendant deserved death before they heard any mitigation evidence. Given the human proclivity to interpret information in a way that is consistent with what one already believes, it is not surprising that most jurors never waver from their premature stance.[28]

If the partiality of these premature death deciders could be exposed during jury selection, error arising from allowing such a juror to decide the penalty is correctable. "If even one [partial] juror is empaneled and the death penalty imposed, the State is disentitled to execute the sentence." *Ward v. State*, 810 N.E.2d 1042, 1050 (Ind. 2004) quoting, *Dye v. State*, 784 N.E.2d 469, 476 (Ind. 2003). However, the CJP findings demonstrate that approximately four capital

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[27] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) Crim. Law Bulletin 51, 57.

[28] *Id*.

jurors in every Indiana capital trial are not impartial about the question of penalty before they begin the penalty phase. There is no procedure to remove these jurors once the capital trial begins. Their partiality to death goes undetected and death sentences are imposed based on their votes in penalty phase deliberations. A death penalty scheme that allows this to happen, does not comply with the mandates of *Lockett* and *Eddings*.

D. Jury Selection Fails to Remove Large Numbers of Death-Biased Jurors and Creates a Bias Toward Imposition of a Death Sentence

As discussed in the preceding section, the findings on premature death deciders suggests that jury selection is failing to ferret out jurors who are unable to follow the instructions to reserve judgment on penalty until the penalty phase evidence is presented. The CJP researchers, in fact, investigated capital jury selection procedures in an effort to understand why this was happening. They found that even when conducted pursuant to the *Witt* or *Morgan* standards, jury selection fails to identify substantial number of jurors for whom death is the only appropriate penalty.

The CJA jurors were presented with the following question/matrix:

Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes? Murder by someone previously convicted of murder; A planned, premeditated murder; Murders in which more than one victim is killed; Killing of a police officer or prison guard; Murder by a drug dealer; and, A killing that occurs during another crime.[29]

[29] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 62 n. 60.

Table 3[30]	Percentages of Jurors Considering Death Only Acceptable Punishment for Six Types of Murder by State						
State	prior murder conviction	Planned premed-itated murder	Murder with multpl. victims	Killing police/ prison guard	Murder by drug dealer	Murder during other crime	N
AL	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56
CA	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
FL	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
GA	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
IN	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
KY	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
MO	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
NC	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
PA.	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
SC	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
TN	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
TX	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
VA	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
ALL	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

[30] *Id*. at p. 63.

As the Table above indicates, the CJP documents profound deviations between reality and what capital jurisprudence under *Morgan*, *Witt*, and *Dye* require. Many jurors who had been screened as capital jurors under *Morgan* standards approached the sentencing task believing the death penalty was the only appropriate penalty for many of the categories of capital murder. In effect, a mandatory death penalty is the reality for substantial numbers of capital jurors, even though banned by the Supreme Court in *Woodson*, and despite application of the jury selection safeguards of *Morgan* and the discretionary statutory schemes upon which jurors are instructed.

> Over half of the CJP jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim was killed (53.7%). Close to half could accept only death as punishment for the killing of a police officer or prison guard (48.9%), or a murder committed by a drug dealer (46.2%). A quarter of the jurors thought only death was acceptable as punishment for a killing during another crime (24.2%), i.e., a "felony murder." Nearly three out of ten jurors (29.1%) saw death as the only acceptable punishment for all of these crimes.[31]

In addition, the CJP data show a direct relationship between jurors with a death bias and jurors prematurely deciding death is the only appropriate sentence. Jurors who believe that death is the only appropriate penalty for certain types of murders invariably decide that death is the only appropriate sentence once a capital defendant's guilt is determined. Thus, there is no individualized determination of sentence by such jurors as the Constitution requires under

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[31] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 62; accord, Bowers, Sandys, Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making* (1998) 83 Cornell L. Rev. 1476; Bentele, Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse* (2001) 66 Brooklyn L. Rev. 1011; Bowers, Fleury-Steiner, Antonio, The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction (chapter 14 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (2d ed., 2003)); and, Bowers, Steiner, Choosing Life Or Death: Sentencing Dynamics In Capital Cases (chapter 12 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (1st, ed., 1998).

Lockett and *Eddings*. As many of these jurors expressed, the penalty phase was nothing but a complete waste of time.[32]

A juror who believes that death is the only acceptable punishment for certain categories of murder cannot give meaningful consideration to mitigating evidence. "Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." *Morgan* at 729. It is for that reason that the *Morgan* Court went on to say that "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence. *Id*.

Significantly, the very capital jury selection process that supposedly safeguards the rights secured by *Witt* and *Morgan*, in effect, produces a guilt-biased group of jurors. The CJP data shows that questioning potential jurors extensively about their attitudes towards the death penalty leads substantial numbers of capital jurors to believe that the defendant must be guilty. Jurors conclude that the judge and the lawyers are operating on the assumption that the defendant is guilty and that death was the likely sentence. Jurors reach this conclusion because the judge and lawyers are spending much of their voir dire talking about what the defendant's punishment should be. Moreover, after seeing which jurors stay and which leave, many jurors believe that if selected it is understood that they will find the defendant guilty and sentence him or her to death.[33]

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[32] "I thought it (the penalty trial) was kind of silly, to be perfectly honest. A rotten childhood is not the question we had to answer."... "Character witness didn't really seem relevant to the issue ... Everything went back to what he had done and I think everyone had their mind made up before the penalty phase started." Haney, Sontag, Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* (1994) 50 Journal Of Social Science Issues 149, 166.

[33] See, e.g., Haney, *On The Selection Of Capital Juries: The Biasing Effect Of The Death-Qualification Process* (1984) 8 Law & Human Behavior 121; Haney, *Examining Death Qualifications: Further Analysis Of The Process Effect* (1984) 8 Law & Human Behavior 133; and, Haney, Hurtado, Vega, *"Modern" Death Qualification:*

Other studies have demonstrated that the death qualifying process of *Witt* results in a less representative jury. Persons who support the death penalty and are able to tell the judge in the courtroom that they would be able to impose it hold views about the criminal justice process that are contrary to the fundamental procedural safeguards applicable to every criminal trial. These people strongly believe that if a defendant does not testify it is proof of guilt. They do not believe in the presumption of innocence, and instead, believe where there is smoke, there is fire.[34]

Persons who would be death-qualified jurors under *Witt* are extremely distrustful of defense lawyers and view everything they say with great skepticism. On the other hand, they are extremely receptive to the prosecution and its witnesses – especially police officers – and believe them. They do not believe in Due Process guarantees like requiring the prosecution to bear the burden of proof beyond a reasonable doubt. And, they are highly suspicious of experts called by the defense. In short, so-called "death qualified jurors," are less likely to accord a capital defendant the benefit of fundamental constitutional safeguards in the guilt phase.[35]

E. Capital Jurors do not Understand and/or Follow Penalty Phase Instructions

The CJP research demonstrates that capital jurors fail to understand and/or follow the instructions given in capital trials. This is consistent with pre-CJP and non-CJP studies that

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New Data On Its Biasing Effects (1994) 18 Law & Human Behavior 619.

[34] Cowan, Thompson, Ellsworth, *The Effects Of Death Qualification On Jurors' Predisposition To Convict And On The Quality Of Deliberation* (1984) 8 Law & Human Behavior 53; Fitzgerald, Ellsworth, *Due Process vs. Crime Control: Death Qualification And Jury Attitudes* (1984) 8 Law & Human Behavior 31.

[35] *Id*.

found significant numbers of capital jurors fail to understand the concept and role of mitigation in capital cases.[36]

As the following Table shows, a substantial number of capital jurors fail to understand the most basic of constitutional rules that apply in a capital sentencing:

Table 4[37]	Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence				
JURORS WHO FAILED TO UNDERSTAND THAT THEY . . .					
State	Could consider any mitigation evidence	Need not be unanimous on mitigation evidence	Need not find mitigation evidence beyond reasonable doubt	Must find aggravator beyond reasonable doubt	N*
AL	54.7%	55.8%	53.8%	40.0%	52
CA	24.2%	56.4%	37.6%	41.7%	149
FL	49.6%	36.8%	48.7%	27.4%	117
GA	40.5%	89.0%	62.2%	21.6%	73
IN	**52.3%**	**71.4%**	**58.2%**	**26.8%**	**97**
KY	45.9%	83.5%	61.8%	15.6%	109
MO	36.8%	65.5%	34.5%	48.3%	57

[36] See, e.g., Haney, Lynch, *Comprehending Life And Death Matters* (1994) 18 Law & Human Behavior 411; Haney, Lynch, *Clarifying Life and Death Matters: An Analysis Of Instructional Comprehension And Penalty Phase Closing Arguments* (1997) 21 Law & Human Behavior 575; Lynch, Haney, *Discrimination And Instructional Comprehension: Guided Discretion, Racial Bias, And The Death Penalty* (2000) 24 Law & Human Behavior 337; Tiersma, *Dictionaries And Death: Do Capital Jurors Understand Mitigation?* (1995) 1995 Utah L. Rev. 1; Eisenberg, Wells, *Deadly Confusion: Juror Instructions In Capital Cases* (1993) 79 Cornell L. Rev. 1; and Sandys, McClelland, *"Stacking The Deck For Guilt And Death: The Failure Of Death Qualification To Ensure Impartiality"* (2003), Chapter 13, pp. 26-32, in Acker, et al's *America's Experiment With Capital Punishment* (2d ed.)

[37] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 68.

NC	38.7%	51.2%	43.0%	30.0%	79
PA	58.7%	68.0%	32.0%	41.9%	74
SC	51.8%	78.9%	48.7%	21.9%	113
TN	41.3%	71.7%	46.7%	20.5%	44
TX	39.6%	72.9%	66.0%	18.7%	47**
VA	53.3%	77.3%	51.2%	40.0%	43
ALL	44.6%	66.5%	49.2%	29.9%	1185

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.
** The number of Texas jurors is reduced in this table because these two questions were replaced by others while the interviewing in Texas was underway.

As this Table demonstrates, nearly half of capital jurors fail to understand that they are required to consider mitigation even if it does not excuse or lessen the capital defendant's culpability for the murder. In Indiana, the numbers of capital jurors failing to follow the commands of *Eddings* and *Lockett* is greater than half.[38]

Nearly three quarters (71.4%) of Indiana capital jurors did not understand that mitigating factors did not need to be found by all the jury for them to be considered in weighing aggravation and mitigation. Moreover, more than half of Indiana capital jurors (58.2%) think mitigating factors have to be proven beyond a reasonable doubt before they may be considered.[39] The reasons for this massive misunderstanding of the rules is the lack of familiarity with the capital

[38] *Id*.

[39] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 66-71.

sentencing process – i.e., the total absence of any culturally normative experience with the unique kind of decision capital jurors are called upon to make.[40]

Americans are very familiar with a jury's role as fact-finder. This role is a longstanding part of our culture. On the other hand, Americans are unfamiliar with the role capital juror has in making the decision as to whether the capitally charged defendant should live or die.[41] They are accustomed to finding facts such as whether a weapon was used, whether a taking of property was a theft, or whether a driver was legally intoxicated beyond a reasonable doubt. They are unaccustomed to deciding the weight[42] given a capital defendant's dysfunctional childhood, serious psychiatric disorder, or brain damage for capital sentencing. The CJP data shows that capital jurors apply rules from the guilt phase to their penalty phase deliberations. They express confusion over the basic terms of mitigation and aggravation:

> [CA juror:] The first thing we asked for after the instruction was, could the judge define mitigating and aggravating circumstances. Because the different verdicts that we could come up with depended on if mitigating outweighed aggravating, or if aggravating outweighed mitigating, or all of that. So we wanted to make sure. I said: "I don't know that I exactly understand what it means." And then everybody else said, "No, neither do I," or "I can't give you a definition." So we decided we should ask the judge. Well, the judge wrote back and said, "You have to glean it from the instructions.

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[40] *Id*.

[41] See, Haney, Lynch, *Comprehending Life And Death Matters* (1994) 18 Law & Human Behavior 411; Haney, Lynch, *Clarifying Life and Death Matters: An Analysis Of Instructional Comprehension And Penalty Phase Closing Arguments* (1997) 21 Law & Human Behavior 575; and, Lynch, Haney, *Discrimination And Instructional Comprehension: Guided Discretion, Racial Bias, And The Death Penalty* (2000) 24 Law & Human Behavior 337.

[42] See, *Ritchie v. State*,809 N.E.2d 258, 266 (Ind. 2004) ("[D]etermination of the weight to be accorded the aggravating and mitigating circumstances is not a 'fact'").

> [CA juror:] I don't think anybody liked using those terms because when we did use them, we got confused ... They were just confusing and I had never really used them before in anything. So, yeah, they sit there and throw these stupid words at you and I'm like, "Well, what do they mean?" I get so confused "cause they sound the same." I'm thinking, "Now which one was that again?" you know. And it totally confused me.[43]

The net effect of these misunderstandings is that capital jurors are biased toward a sentence of death:

> The misunderstandings reflected in these incorrect responses on the questions regarding how to handle mitigating and aggravating evidence all make a death sentence more likely. It is more difficult to find mitigating evidence than the law contemplates when jurors think they are limited to enumerated factors, must be unanimous, and need to be satisfied beyond a reasonable doubt. The CJP data show that nearly half (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to consider any mitigating evidence. Two-thirds (66.5%) failed to realize they did not have to be unanimous on findings of mitigation. Nearly half (49.2%) of the jurors incorrectly thought they had to be convinced beyond a reasonable doubt on findings of mitigation ... The constitutional mandate of *Gregg* and companion cases to guide jurors' exercise of sentencing discretion is not being satisfied when jurors do not understand the guidance.[44]

The misunderstanding of mitigation, unanimity on mitigation, and the burden of proof expressed by the capital jurors in the CJP are prejudicial. The constitutional principles of *Lockett*, and *Eddings* are not being applied by these capital jurors. There cannot be individualized sentencing if the mitigating nature of capital defendant's background is given no effect because jurors misunderstand its relevancy to the weighing factor. Likewise, if eight jurors in every

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[43] Haney, Sontag, Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* (1994) 50 Journal Of Social Science Issues 149, 168-169.

[44] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) Crim. Law Bulletin 51, 71.

capital jury believe that mitigation has to be agreed to by all 12 jurors, then the principles of *Mills v. Maryland* are not being applied. The net effect of these misunderstandings is that mitigation is not being fairly considered when capital jurors are weighing mitigation and aggravation to fix the punishment. Inevitably, the thumb is on the scale favoring death because most capital jurors never understand the constitutional rules surrounding mitigation.

F. Jurors' Believe they are Required to Return Death Verdict

Jurors in every state are tainted by the misconception that the law requires the death penalty if the evidence establishes that the murder was "heinous, vile or depraved" or the defendant would be "dangerous in the future."[45] Indiana has no statutory aggravator similar to these factors. Yet, as shown in the following Table, Indiana capital jurors nevertheless believe they are required to return a verdict of death if the evidence shows either of these aggravators are present:

Table 5[46]	Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was "Heinous, Vile or Depraved," or Defendant "Would be Dangerous" in Future by State		
	Death required if defendant's conduct is heinous, vile or depraved	Death required if defendant would be dangerous in future	N*
Alabama	56.3%	52.1%	48
California	29.5%	20.4%	146
Florida	36.3%	29.3%	111

[45] See, Blume, Garvey, Johnson, "Future Dangerousness In Capital Cases: Always 'At Issue'" (2001) 86 Cornell L. Rev. 397 (supports the proposition that future dangerousness is always at issue in the minds of capital jurors regardless of whether it is defined as a statutory aggravator).

[46] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 72-73.

Georgia	51.4%	30.1%	72
Indiana	**34.4%**	**36.6%**	**93**
Kentucky	42.7%	42.2%	109
Missouri	48.3%	29.3%	58
North Carolina	67.1%	47.4%	76
Pennsylvania	56.9%	37.0%	110
South Carolina	31.8%	28.2%	110
Tennessee	58.3%	39.6%	48
Texas	44.9%	68.4%	117
Virginia	53.5%	40.9%	43
All State	43.9%	40.(%	1136
* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.			

Thus, over a third (34.4%) of all Indiana capital jurors interviewed believed that the death penalty was required if they found the murder "heinous, vile, or depraved." Nearly the same proportion (36.6%) of Indiana jurors believed death was the required sentence if they believed that the defendant would be dangerous in the future.[47] These mistaken beliefs result in capital juries that violate *Roberts v. Louisiana*, 431 U.S. 633 (1977). Death is never the only appropriate sentence for certain murders.

Moreover, in Indiana these factors are legally and constitutionally irrelevant under Indiana's capital sentencing scheme. See, *Corcoran v. State*, 738 N.E.2d 649 (Ind. 2000) (Death sentence vacated because there was a "significant possibility" sentencing judge considered

[47] *Id*.

non-statutory aggravator of future dangerousness in deciding to impose death sentence); see also, *Bivins v. State*, 642 N.E.2d 928 (Ind. 1994) (consideration of non-statutory aggravator in deciding appropriateness of death sentence violates Indiana Constitution, Art. I, § 16); *Bellmore v. State*, 602 N.E.2d 111 (Ind. 1992) (Death sentence vacated because sentencing judge considered aggravator not available under Indiana death penalty statute).

A capital juror must consider the appropriateness of each available sentence. And, he/she may not assume a death sentence is required with respect to those capital defendants whom may be dangerous in the future or have committed heinous, vile or depraved murders.

G. Belief that Responsibility for the Punishment Decision Rests Elsewhere

As the Court explained in *Caldwell v. Mississippi*, "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view the sentencer discretion as consistent with – and indeed as indispensable to – the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" 472 U.S. at 330. CJP data demonstrates that this assumption is false.

Almost no capital jurors view themselves as most responsible for the decision they make. They place ultimate responsibility elsewhere:

> The vast majority of jurors did not see themselves as most responsible for the sentence. Over 80% assigned primary responsibility to the defendant or the law, with 49.3% indicating the defendant and 32.85% indicating the law was most responsible. In contrast, only 5.5% thought the individual juror was most responsible, and only 8.9% believed the jury as a whole was most responsible ...[48]

[48] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 31 Crim. Law Bulletin 51, at 74-75.

Death penalty statutes are not effectively guiding discretion when jurors misunderstand the instructions, mistakenly believe death is required by law, and do not appreciate their responsibility for the sentence imposed. The CJP finding that a large majority of jurors believe the law is "primarily responsible for the sentence is particularly ironic considering their lack of understanding of the law."[49]

H. The Continuing Influence of Race on Juror Decision-making

CJP data demonstrates that in all 14 states, the process of capital jury decision-making is influenced, not only by the race of the defendant and the race of the victim, but by both the racial composition of the jury and the race of the individual jurors. CJP data demonstrates that along gender lines, the outcome of a capital jury's verdict is greatly dependent on how many white males make it on to the jury, and whether any African American males serve as jurors.[50]

The data demonstrates, for instance, that white male capital jurors (generally speaking) do not experience lingering doubt about the defendant's guilt. They see the defendant as remorseless and are unable to put themselves in either the defendant's shoes or his family's shoes. They believe that the defendant will be dangerous in the future unless executed.[51]

On the other hand, African American male capital jurors (generally speaking) frequently have at least some doubts about the evidence of guilt. They are able to see the defendant as someone who is sorry for what he has done. They are able to put themselves in the defendant's situation and understand what it must be like for the defendant's family. And,

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[49] *Id*. at 75.

[50] Bowers, Steiner, Sandys, *Death Sentencing In Black And White: An Empirical Analysis Of The Role Of Jurors' Race And Jury Racial Composition* (2001) U. Pa. J. Const. L. 171.

[51] *Id*.

they do not see the defendant as someone who will hurt other people in the future.[52]

It would be difficult to imagine a more arbitrary circumstance than having to depend on the racial composition of the jury for a life sentence. Nevertheless, the data demonstrate that the outcome of a capital case is greatly dependent on the race of the individual jurors and on the overall racial composition of the jury as a whole.

I. Underestimation of the Alternative to a Death Sentence

As *Simmons* and *Shafer* hold, a death sentence returned by a jury that imposes a death sentence because of mistaken belief that a life sentenced defendant will be eligible for release on parole is unconstitutional. Of course in Indiana, the jury is instructed that life in prison means without possibility of parole. However, in Indiana, and in other states where the jury is so instructed, jurors continue to deliberate the penalty upon the mistaken belief that the defendant will be released even if sentenced to LWOP:

> The data revealed that most capital jurors grossly underestimated the amount of time a defendant would serve in prison if not sentenced to death, and that the sooner jurors believed (wrongly) a defendant would return to society if not given the death penalty, the more likely they were to vote for death...
>
> Both statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death. Jurors who gave low estimates were more likely to take a pro-death stand on the defendant's punishment at each of the four points in the decision process.[53]

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[52] *Id*.

[53] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 31 Crim. Law Bulletin 51, 80, 82.

Despite instructions to Indiana capital jurors about what LWOP means, substantial numbers of jurors refuse to believe it. The field data demonstrate that they estimate that a defendant sentenced to LWOP will be released from prison in an average of 20 years. CJP data from other states with LWOP show that the mistaken assumption that LWOP does not mean the defendant will never be released is common in other states with LWOP.[54]

TABLE 6[55]	Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

YEARS IN PRISON IF NOT GIVEN DEATH

State	Median Estimate*	N	Mandatory minimum**
Alabama	15.0	(35)	LWOP
California	17.0	(98)	LWOP
Florida	20.0	(104)	25
Georgia	7.0	(67)	15
Indiana	**20.0**	**(75)**	**30**
Kentucky	10.0	(74)	12.25***
Missouri	30.0	(47)	LWOP
North Carolina	17.0	(77)	20
Pennsylvania	15.0	(63)	LWOP
South Carolina	17.0	(99)	30

[54] See Steiner, Bowers, Sarat, *"Folk Knowledge As Legal Action: Death Penalty Judgments And The Tenet Of Early Release In A Culture Of Mistrust And Punitiveness"* (1999) 33 Law & Society Rev. 461.

[55] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51, 82.

Tennessee	22.0	(42)	25
Texas	15.0	(106)	20
Virginia	15.0	(36)	21.75
All States	15.0	(943)	

*Median estimates exclude "no answers" and unqualified "life" responses but include responses indicating "life without parole" or "rest of life in prison."
**These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.
***Kentucky gave capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives.

These studies demonstrate that instructions are not preventing these mistaken assumptions from influencing death verdicts. They represent another instance where there is a thumb on the scale in favor of death in violation of constitutional standards despite clear instructions from the court.

Conclusion

A constitutional death or LWOP sentence is impossible under Indiana's capital scheme as it has been applied and interpreted by the Indiana Supreme Court. To date, no research has been produced or presented to contradict the findings from the CJP that actual capital jurors in Indiana and other states do not, and cannot, apply the death penalty statutes and schemes in compliance with the constitutional and statutory mandates.

For the reasons set forth herein and those presented in the motion Mr. Dansby respectfully moves the Court for an order finding that the death penalty statute is unconstitutional and dismiss the State's request that he be sentenced to death in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 30th day of October 2018, I electronically filed the foregoing document using the Indiana E-fling system (IEFS). I also certify that on the 30th day of October 2018, the foregoing document was served up the following person by IEFS: Tom Chaille.

/s/ Michelle F. Kraus