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The Complexities of Conscience: Reconciling Death Penalty Law with Capital Jurors' Concerns

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The Complexities of Conscience: Reconciling Death Penalty Law with Capital Jurors' Concerns

MEREDITH MARTIN ROUNTREE & MARY R. ROSE†

ABSTRACT

Jurors exercise unique legal power when they are asked to decide whether to sentence someone to death. The Supreme Court emphasizes the central role of the jury's moral judgment in making this sentencing decision, noting that it is the jurors who are best able to "express the conscience of the community on the ultimate question of life or death."¹ Many

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1. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

lower courts nevertheless narrow the range of admissible evidence at the mitigation phase of a capital trial, insisting on a standard of legal relevance that interferes with the jury's ability to exercise the very moral judgment the Supreme Court has deemed essential.

Combining moral theory and original empirical evidence, this Article breaks new ground by linking these to a legal framework that gives full effect to the Supreme Court's vision of the jury. Aided by a novel dataset of federal capital jury verdict forms, this Article focuses on three types of evidence frequently excluded in state and federal courts: the impact of the defendant's execution on loved ones, co-participant sentences, and the government's negligent facilitation of the murder.

The data show that jurors consistently find all three forms of evidence highly relevant to their mitigation deliberations. Further, two of these—execution impact evidence and co-participant sentences—have a statistically significant correlation with the jurors' sentencing decision. This Article's empirical and moral account of juror behavior strongly supports expanding the admissibility of this evidence to reflect the Supreme Court's evolution in defining the relevance of mitigating evidence as a moral—rather than legalistic—question, appropriately recognizing the jury's normative role.

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INTRODUCTION

The death penalty is a legal criminal punishment in most American states, as well as in the American military and federal jurisdictions.² All together, more than 2,500 men and women presently await execution on death rows across the country.³ The federal government recently reinvigorated its use of the death penalty, executing twelve men and one woman between July 2020 and January 2021⁴ after a seventeen-year hiatus.⁵ Perhaps politically invigorated by the federal executions, a new confidence that execution methods will pass constitutional muster, or an apparent slowing of the COVID-19 pandemic, states have returned to scheduling executions, some for the first time in a while.⁶

2. See DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., *DEATH ROW U.S.A.* 1 (Spring 2021) https://www.naacpldf.org/wp-content/uploads/DRUSA_Spring2021.pdf.

3. *Death Row Overview*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Dec. 30, 2021).

4. *Federal Execution Updates*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/stories/federal-execution-updates> (last visited Dec. 30, 2021).

5. Madeleine Carlisle, *What to Know About Lisa Montgomery, The First Woman Executed by the Federal Government in Nearly 70 Years*, TIME (Jan. 13, 2021, 11:26 AM), <https://time.com/5914533/lisa-montgomery-execution-coronavirus-death-penalty/>; Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Federal Government to Resume Capital Punishment After Nearly Two Decade Lapse (July 25, 2019), <https://www.justice.gov/opa/pr/federal-government-resume-capital-punishment-after-nearly-two-decade-lapse>.

6. Lauren Castle, *Arizona Ready to Execute Death Row Inmates, Corrections Director Says*, ARIZ. REPUBLIC (Mar. 5, 2021, 8:46 PM), <https://www.azcentral.com/story/news/local/arizona/2021/03/05/arizona-ready-resume-death-row-executions-corrections-chief-says/4599281001/> (first effort to resume executions since 2014); *Missouri Execution Date Set for Ernest Johnson*, ASSOCIATED PRESS (June 29, 2021), <https://apnews.com/article/mo-state-wire-michael-brown-executions-b8c1a45c6436382c32d382cad0fbd451> (Missouri's last execution was in May 2020); Ken Ritter, *Judge in Vegas OK's Setting Late-July Nevada Execution Date*, ASSOCIATED PRESS (June 7, 2021), <https://apnews.com/article/nv-state-wire->

While popular enthusiasm for the death penalty has diminished over the past twenty years,⁷ it remains an important and distinctive part of American criminal punishment with over one hundred prisoners executed in the past five years.⁸ The United States is the only Western industrialized country to retain the death penalty.⁹ Further, the United States is alone in relying on jurors to decide whether to sentence a person to death.¹⁰ The continued

nevada-executions-government-and-politics-8c50959d97d45d065c44dc500439d59c (Nevada's last scheduled execution in 2018); Catherine Welch, *South Carolina Prepares to Bring Firing Squads to Death Row*, WFAE 90.7 (July 14, 2021, 6:00 AM), <https://www.wfae.org/south-carolina-news/2021-07-14/south-carolina-prepares-to-bring-firing-squads-to-death-row> (ten year pause in South Carolina for executions because of problem accessing lethal injection chemicals); Steven Hale, *Tennessee Is Seeking an Execution Date for the Only Woman on the State's Death Row*, NASHVILLE SCENE (June 8, 2021), https://www.nashvillescene.com/news/citylimits/tennessee-is-seeking-an-execution-date-for-the-only-woman-on-the-state-s-death/article_46f6ca2e-b4bf-56c2-b39f-30f2d2e965e2.html (Tennessee paused executions because of pandemic; first woman scheduled for execution in more than a decade.); *Alabama, Mississippi Take Preparatory Steps to Resume Executions*, DEATH PENALTY INFO. CTR. (Aug. 11, 2021), <https://deathpenaltyinfo.org/news/alabama-mississippi-take-preparatory-steps-to-resume-executions>.

7. Frank R. Baumgartner, *If Biden Abolishes the Federal Death Penalty, He'll Have More Support Than You Think*, WASH. POST (Aug. 3, 2021, 7:00 AM), <https://www.washingtonpost.com/politics/2021/08/03/if-biden-abolishes-federal-death-penalty-hell-have-more-support-than-you-think/>; *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/Death-Penalty.aspx> (last visited Dec. 20, 2021) (showing Americans' support for the death penalty decline from 1936 to 2019); Mark Berman, *Most Americans Now Favor Life in Prison over the Death Penalty for Convicted Murderers*, WASH. POST (Nov. 25, 2019), https://www.washingtonpost.com/national/most-americans-now-favor-life-in-prison-over-the-death-penalty-for-convicted-murderers/2019/11/24/921b7a64-0d4d-11ea-97ac-a7ccc8dd1ebc_story.html.

8. *Executions in the United States*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/executions/executions-overview> (last visited Dec. 20, 2021).

9. DAVID GARLAND, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION* 11 (2012). In 2019, the United States executed twenty-two prisoners, putting it in sixth place of executing countries after China, Iran, Saudi Arabia, Iraq, and Egypt. AMNESTY INT'L, AMNESTY INTERNATIONAL GLOBAL REPORT: DEATH SENTENCES AND EXECUTIONS 2019, at 52 (2020).

10. At this time, all American death penalty jurisdictions except for Montana and Nebraska give defendants the right to have a jury make all decisions related to death sentencing. Maria T. Kolar, *"Finding" a Way to Complete the Ring of*

salience of the death penalty underscores the need to understand how jurors make these sentencing decisions.

Jurors are central figures in the American death penalty. The Supreme Court has made clear that, as the death penalty is qualitatively different from sentences of incarceration in its harshness and finality, jurors' connection to community values makes them an essential part of death sentencing. The Eighth Amendment guarantees capital jurors can consider a wide range of information as they generate their "reasoned moral response"¹¹ to evidence in sentencing a particular individual. But while mitigating evidence is recognized as a cornerstone of capital trials and the Supreme Court's Eighth Amendment jurisprudence, what constitutes evidence relevant to mitigation remains contested in both state and federal courts.

These jurisprudential debates over what is "relevant" to capital jurors at sentencing are devoid of systematic empirical evidence,¹² while empirical scholarship on what matters to jurors in sentencing has not connected the data to the legal question of relevance.¹³ That is what this Article

Capital Jury Sentencing, 95 DENV. L. REV. 671, 721–22 (2018). While China is expanding lay participation in criminal adjudication, these participants are not solely responsible for deciding whether to sentence a defendant to death. Guodong Du & Yanru Chen, *Does the Jury Exist in China?*, CHINA JUST. OBSERVER (Feb. 21, 2020), <https://www.chinajusticeobserver.com/a/does-the-jury-exist-in-china>.

11. *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989), *abrogated on other grounds* by *Atkins v. Virginia*, 536 U.S. 304 (2002), *and holding modified* by *Boyd v. California*, 494 U.S. 370 (1990), *and Saffle v. Parks*, 494 U.S. 484 (1990).

12. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 608 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 113–15 (1982); *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986); *Tennard v. Dretke*, 542 U.S. 274, 288–89 (2004).

13. For overviews of social science research on capital jury decision-making, see Dennis J. Devine & Christopher E. Kelly, *Life or Death: An Examination of Jury Sentencing with the Capital Jury Project Database*, 21 PSYCH. PUB. POL'Y & L. 393, 394–96 (2015); Leona D. Jochowitz, *How Capital Jurors Respond to Mitigating Evidence of Defendant's Mental Illness, Retardation, and Situational Impairments: An Analysis of the Legal and Social Science Literature*, 47 CRIM. L. BULL. 839, 839–40 (2011). Articles directed toward a legal audience have concentrated on urging structural, voir dire, and jury instruction reforms. *See*,

does. It presents unique data regarding juror concerns in capital sentencing and links it to a legal framework for deciding whether to admit proposed mitigating evidence.

This Article argues that, to take seriously the essential and special role of the jury in death sentencing, both state and federal trial courts must reframe their definition of relevant evidence to reflect the complexity of the jury's normative vision. Rather than ask whether evidence is relevant to the defendant or the offense—categories the Supreme Court articulated over forty years ago in striking down mandatory death sentences¹⁴—these courts should recognize how the Court's view of mitigation has evolved over the past four decades. This evolution requires courts to ask instead whether the evidence is relevant to the jury's moral decision-making with respect to that defendant. What may seem like a nuanced distinction is in fact a substantial one.

We make not simply a theoretical argument, but also an empirical one, as we marshal evidence from actual jury deliberations. Using an original dataset of 211 capital trial verdict forms from 176 juries, this Article analyzes capital jurors' responses to three specific areas of evidentiary contestation—execution impact evidence, non-death sentences for co-participants in the crime, and government action or inaction that facilitated the murder—using the verdict forms jurors completed in the course of their deliberations. Federal capital verdict forms, unlike most jurisdictions, generally list all mitigating factors and ask

e.g., Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1061–62 (2001); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1538 (1998); *see also* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1036–37 (2008) (arguing for improvements in capital defense practices); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 54 (1988) (pointing out the impossibility of a constitutionally administered death penalty).

14. *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976).

jurors to indicate their numerical vote on each. Here is an example:¹⁵

14. Lashaun was sent to live in Puerto Rico with his grandmother at age 13, and experienced difficulty on many levels adjusting to life in Puerto Rico.

____ 9 ____ jurors so find

15. Lashaun suffered from depression.

____ 0 ____ jurors so find

16. At the time of the offense, there is no evidence to suggest that Lashaun knew the victim was a police officer; rather, the evidence suggests that he thought Mr. Lizardi was a drug dealer.

____ 6 ____ jurors so find

17. Lashaun's family and loved ones will suffer grief and loss if he were executed.

____ 7 ____ jurors so find

If the defendant were tried in one of the many jurisdictions that exclude, for example, evidence of execution impact on his family,¹⁶ the jury would not have the opportunity to formally discuss and reflect on this information in deciding on the sentence, as Lashaun Casey's jury did in Item 17.

At the end of the mitigation section, many forms¹⁷ also provide juries with opportunities to write in their own mitigating factors. In the following example, the entire jury wrote in as an "additional mitigating factor" the fact that the Government sought to execute the defendant, Steven Northington, while permitting a co-participant, Lamont

15. Special Verdict Form at 7, *United States v. Casey*, Crim. No. 05-277 (ADC) (D.P.R. Apr. 11, 2013).

16. Most states and two federal circuits exclude this evidence. *See infra* Section IV.A.1.

17. As discussed *infra* Section I.B, seventy-three verdict forms contained mitigators the jury had written onto the form.

Lewis, to escape this fate.¹⁸

Additional Mitigating Factor: Lamont Lewis will not be sentenced to death
 Number of Jurors who so find: 12 for eleven premeditated
murders.

Because these verdict forms are so detailed with respect to aggravation and mitigation, they offer an unparalleled window into what the jury valued. In addition to this remarkable detail, these data are exceptional insofar as they constitute direct evidence of jury decision-making, unlike prior capital jury research that relies on indirect measures of jurors' reactions to mitigating evidence, either through post-trial interviews with a subset of jurors,¹⁹ archival coding of sentence predictors,²⁰ or mock jury research.²¹ By examining

18. Special Verdict Form for Penalty Phase at 14, *United States v. Northington*, Crim. Action No. 07-550-05 (E.D. Pa. June 13, 2013).

19. The Capital Jury Project (CJP) is by far the most common source of data regarding jurors' thoughts about mitigation. The CJP conducted lengthy post-trial interviews with approximately four jurors from each capital case. For examples of CJP scholarship, see Bentele & Bowers, *supra* note 13, at 1017; Garvey, *supra* note 13, at 1540. Post-trial interviews can be biased by who opts to participate, jurors' lack of insight into the factors that influenced them, and their desire to minimize doubt and/or justify their final result. See Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 LAW & HUM. BEHAV. 185, 190–91 (1992). Further, because the law allows jurors to consider (and weigh) mitigation independently of other jurors, interviews with a subset of jurors may not reflect how non-interviewed jurors viewed mitigation. See *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990) (striking down jury instruction requiring jurors to be unanimous in finding certain evidence mitigating).

20. See, e.g., David C. Baldus, George Woodworth, Catherine M. Grosso & Aaron M. Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486 *passim* (2002). In addition to statistical issues, see generally Richard Berk, Azusa Li & Laura J. Hickman, *Statistical Difficulties in Determining the Role of Race in Capital Cases: A Re-Analysis of Data from the State of Maryland*, 21 J. QUANTITATIVE CRIMINOLOGY 365 (2005). This work presents a largely static portrait of mitigation, telling us whether, for example, the totality of mitigation predicts verdicts but not how jurors react to evidence on a more granular level.

21. See, e.g., Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 LAW

actual jurors' responses to mitigation, this dataset helps answer the question courts have only guessed at: what information do jurors think is mitigating as they decide on a sentence? Not only do we identify that jurors find evidence of execution impact, co-participant sentences, and government negligence mitigating, but, as discussed *infra* in Section I.C, we also find that the first two types of evidence correlate with outcomes. The inclusion of this evidence on the verdict form is significantly associated with a greater likelihood of life sentences as compared to death sentences.

Empirical data alone, however, cannot resolve the constitutional question.²² Indeed, as we discuss below, the simple fact that a juror may be swayed by a particular piece of information should not be the standard for relevance in a capital sentencing. Instead, we emphasize that these are patterns of juror responses across cases that resonate with important normative intuitions, with the "ordinary moral thought,"²³ that we need jurors to bring to bear. Jurors' fine-tuned appreciation of what matters when we punish is precisely the democratic function the Framers intended.²⁴ While some courts persist in applying a legalistic analysis that we contend is out of step with the Supreme Court's

& HUM. BEHAV. 337, 337 (2000); Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 481 (2009); Margaret C. Stevenson, Bette L. Bottoms & Shari S. S. Diamond, *Jurors' Discussions of a Defendant's History of Child Abuse and Alcohol Abuse in Capital Sentencing Deliberations*, 16 PSYCH. PUB. POL'Y & L. 1, 1 (2010). Mock jury research allows researchers to observe participants' deliberation. One may fairly ask whether people pretending to sentence someone to death will ever approach the task the way actual jurors do. Costanzo & Costanzo, *supra* note 19, at 188, 191.

22. Cf. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (Objective evidence does not obviate need for Court to bring its own judgment to bear in deciding whether the Eighth Amendment permits the death penalty for defendants with intellectual disability.).

23. Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1137 (2013).

24. See *United States v. Haymond*, 139 S. Ct. 2369, 2375–76 (2019); discussion *infra* Part II.

jurisprudence,²⁵ our data show that jurors embrace the full complexity of the moral decision they are making.

The Article proceeds in five parts. It first describes our novel dataset of capital trial verdicts, as well as the legal context of the federal death penalty. It then analyzes juror responses to execution impact evidence, co-participants' non-death sentences, and government negligence. Part II explains the jury's central constitutional function in criminal cases generally and capital sentencing particularly. Part III traces the evolution of the Supreme Court's cases explaining the role and content of mitigating evidence in a death penalty trial. Part IV explains specifically why some courts refuse to admit the three contested categories of evidence based on their interpretation of the Supreme Court's jurisprudence. It then contextualizes jurors' responses to this evidence with theories of moral decision-making. In Part V, we outline a path forward, specifying the principles courts should use in admitting this evidence and proposing rules in step with the Supreme Court caselaw, jurors' moral decision-making, and juries' essential, constitutional normative role.

I. FEDERAL DEATH PENALTY CASES AS A UNIQUE WINDOW INTO WHAT JURORS FIND MITIGATING

Mechanically, jurors in death penalty cases make two decisions. First, they determine whether the defendant is guilty of capital murder. Then, if the jury finds the defendant guilty, it decides, after a separate evidentiary proceeding and argument, whether the defendant should be executed or sentenced to life in prison.²⁶ In reaching this decision, jurors consider evidence for the death penalty ("aggravating evidence") and against the death penalty ("mitigating evidence") in that particular case.

25. See also Emad H. Atiq & Erin L. Miller, *The Limits of Law in the Evaluation of Mitigating Evidence*, 45 AM. J. CRIM. L. 167, 170 (2018).

26. 18 U.S.C. § 3593.

Even the most conservative jurists read the Supreme Court's cases to require the admission of evidence of "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."²⁷ (Based on the cases that announced this principle, we call this the *Lockett/Eddings* paradigm.) The evolution and legal limits of mitigating evidence is described in Part III. In this Part, we outline only how jurors consider mitigating evidence in federal death penalty cases on our way to describing our dataset. We then present our results regarding how actual jurors have responded to evidence involving execution impact, a co-participant's sentence, and government negligence. These results demonstrate the richness of the data.

A. Mitigation and the Modern Federal Death Penalty

While most death sentences in the United States stem from convictions in state courts, a growing number have been imposed in federal court for violations of federal criminal law.²⁸ In the modern death penalty era, which began in 1976 when the Supreme Court found the death penalty could be administered constitutionally,²⁹ two federal statutes govern the federal death penalty, the 1988 Continuing Criminal Enterprise (CCE) statute³⁰ and the 1994 Federal Death

27. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (Burger, C.J., a Nixon nominee, joined by three fellow Justices in part III of the decision, discussing the constitutionality of Ohio's death penalty statute). As discussed *infra* Part III, a majority of the Court embraced this rule in *Eddings v. Oklahoma*, 455 U.S. 104, 109 (1982).

28. *Growth in Federal Death Row Population*, FED. CAP. HABEAS PROJECT, <https://2255.capdefnet.org/General-Statistics/Growth-Federal-Death-Row-Population> (Dec. 20, 2021) (showing federal death row grew from one to sixty-two prisoners between 1991 and 2018).

29. See *Gregg v. Georgia*, 428 U.S. 153, 190 (1976).

30. Continuing Criminal Enterprise Statute, Pub. L. No. 100-690, § 7001(a), 102 Stat. 4181, 4387 (codified as 21 U.S.C. § 848(r) (1988)).

Penalty Act (FDPA).³¹ The CCE statute targets so-called “drug kingpins,” directors of large-scale drug operations³² who “intentionally kill[] or . . . cause[] [an] intentional killing.”³³ The FDPA both created new offenses that could be punished with the death penalty³⁴ and expanded the sentencing options for existing federal offenses.³⁵

Federal death prosecutions generally conform to Supreme Court precedent with respect to, for example, bifurcated proceedings and mens rea,³⁶ but the punishment verdict forms are distinctive. The form asks the factfinder—ordinarily the same judge or jury who found the defendant guilty³⁷—to make essentially two types of decisions before

31. Federal Death Penalty Act, Pub. L. No. 103-322, 108 Stat. 1796, 1959 (reprinted in 1994 U.S.C.C.A.N. 1801). For a detailed comparison of the two statutes, see Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 392–405 (1999).

32. Specifically, the statute applies where there is a “continuing series of violations” of federal narcotics laws, committed by the defendant “in concert with five or more other persons,” with whom the defendant “occupies a position of . . . management,” and from which the defendant obtains “substantial income or resources.” 21 U.S.C. § 848(c).

33. 21 U.S.C. § 848(e)(1).

34. For example, drive-by shootings could now be punishable by death if the person “in furtherance or to escape detection of a major drug offense and with the intent to intimidate, harass, injure, or maim, fires a weapon into a group of 2 or more persons” commits first degree murder. 18 U.S.C. § 36.

35. See, e.g., 18 U.S.C. § 2119(3) (adding death penalty option to existing carjacking prohibition).

36. The FDPA permits the death penalty for two non-homicidal offenses, namely for defendants charged with extensive drug dealing or participating in very extensive continuing criminal enterprises who have only “attempt[ed]” to kill. 18 U.S.C. § 3591(b)(1)–(2). These provisions are suspect in light of the Court’s decisions in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that punishing the rape of an adult woman with the death penalty violates the Eighth Amendment’s proportionality requirement) and *Kennedy v. Louisiana*, 554 U.S. 407, 418 (2008) (holding the same for child rape where the crime did not result, and was not intended to result, in the death of the child). So far, the Department of Justice has not sought the death penalty under either provision. The recklessness mens rea is also arguably higher than that required by the Court in *Tison v. Arizona*, 481 U.S. 137, 157–58 (1987). Little, *supra* note 31, at 394 n.255.

37. 18 U.S.C. § 3593(b). We refer only to the jury, as that is the focus of this

determining the sentence. First, the jurors must unanimously agree that the government has proven certain factors beyond a reasonable doubt. Second, they must review and vote on a series of statements regarding the mitigating evidence.

The sentencing decision is structured by the verdict forms, which generally start by asking the jury to decide whether the defendant was at least eighteen years old at the time of the crime and acted with the requisite mental state.³⁸ If the jury agrees (again, unanimously), it next considers aggravating factors established in the FDPA, such as whether the defendant's conduct was "heinous, cruel, and depraved," or whether the crime involved "substantial planning and premeditation."³⁹ If it cannot agree the government has proven at least one statutory aggravating factor beyond a reasonable doubt, the jury is instructed to end its deliberations.⁴⁰

When the jury is persuaded unanimously with respect to age, mens rea, and at least one statutory aggravating factor, it may consider aggravating factors not in the statute, such as the defendant's substantial criminal record, lack of

study.

38. See, e.g., *infra* Appendix (Verdict at 1–3, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)).

39. See *id.* (Verdict at 4, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)). See also 18 U.S.C. § 3593(d).

40. See *infra* Appendix (Verdict at 5, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)). In finding the government has proven a statutory aggravator, the jury has found the defendant "eligible" for the death penalty. After it finds the defendant eligible for the death penalty, it then "selects" the appropriate sentence based on its assessment of the mitigating evidence. *Zant v. Stephens*, 462 U.S. 862, 878–79 (1983). The Court has explained that the eligibility determination "channel[s] and limit[s] the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, [the Court has] emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Buchanan v. Angelone*, 522 U.S. 269, 275–76 (1998).

remorse, or future dangerousness.⁴¹ Regardless of its findings regarding non-statutory aggravation, the jury then proceeds to consider mitigating factors, which must be proved by only a preponderance of the evidence and which are not subject to any unanimity requirement.⁴²

The FDPA lists seven types of mitigation, as well as a “catch-all,” that the jury “shall consider” in sentencing.⁴³ The Sixth Circuit divided these factors into three domains: the defendant’s culpability,⁴⁴ the defendant’s background,⁴⁵ and a “catch-all”—“other factors in the defendant’s background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence.”⁴⁶

The federal capital verdict form guides the jury’s deliberation by specifically directing jurors to consider and vote on a series of mitigating factors in reaching their decision.⁴⁷ While some asked jurors to vote “yes” or “no” on each mitigating factor, most⁴⁸ forms in our study asked jurors to indicate the number of juror votes per each mitigating factor. In addition, as noted in the Introduction,

41. See *infra* Appendix (Verdict at 6, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)).

42. See *id.* (Verdict at 8, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)).

43. 18 U.S.C. § 3592(a).

44. These are “[i]mpaired capacity[;]” “unusual and substantial duress;” “the defendant’s participation was relatively minor;” “[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death;” “[t]he defendant committed the offense under severe mental or emotional disturbance[;]” and “[t]he victim consented to the criminal conduct that resulted in the victim’s death.” United States v. Gabrion, 719 F.3d 511, 524 (6th Cir. 2013) (quoting 18 U.S.C. § 3592(a)(1)–(4), (6)–(7)).

45. *Id.* (quoting 18 U.S.C. § 3592(a)(5) (“The defendant did not have a significant prior history of other criminal conduct.”)).

46. *Id.* (quoting 18 U.S.C. § 3592(a)(8)). This language mirrors the Supreme Court’s language in *Lockett* and *Eddings*, discussed *infra* Part III.

47. See *infra* Appendix (Verdict at 8–13, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)).

48. Of the verdict forms that reached mitigation, 93% asked jurors to record numerical votes for each mitigating factor rather than a “yes” or “no.”

at the end of the mitigation section, many forms⁴⁹ provided juries with opportunities to write in their own mitigating factors by including in the verdict form blank lines immediately after instructions that jurors may offer their own factors.⁵⁰

After going through and voting on all the mitigating factors, jurors are asked to vote on the sentence. To sentence to death, the jury must be unanimous.⁵¹ The jury may also vote unanimously for a sentence of life in prison without the possibility of parole. If the jury cannot come to a unanimous decision, the sentence automatically defaults to a sentence of life in prison without the possibility of parole.⁵²

B. *Description of Dataset*

As mentioned above, the federal capital verdict forms offer exceptional, direct evidence of jury decision-making, especially in a capital context. Further, with rare exception,⁵³ prior studies have also not asked about jurors' reactions to the types of mitigating evidence we explore here.

By including both jurors' numerical votes on mitigators, as well as jurors' own proffered factors via any written-in factors, the data provide a direct measure of what concepts constitute mitigation in the jurors' eyes. We can analyze the level of support jurors give to the categories of evidence some courts have rejected as irrelevant or immaterial and also see whether jurors endorse these factors as mitigating by raising

49. As discussed *infra* Section I.B, 84% of forms offered this opportunity; seventy-three verdict forms contained mitigators the jury had written onto the form.

50. Special Verdict Form for Penalty Phase at 14, United States v. Northington, Crim. Action No. 07-550-05 (E.D. Pa. June 13, 2013).

51. 18 U.S.C. § 3593(e).

52. See *infra* Appendix (Verdict at 15–17, United States v. Richardson, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012) (showing sentencing options)).

53. See Breanna Boppre & Monica K. Miller, *How Victim and Execution Impact Statements Affect Mock Jurors' Perceptions, Emotions, and Verdicts*, 9 VICTIMS & OFFENDERS 413, 427–28 (2014).

these issues on their own. The data further permit us to ask if these areas of mitigation generate substantially less support than mitigation that is not legally contested, namely that relating to the background of the defendant or circumstances of the crime. This illuminates whether jurors make same distinctions some courts make in deciding what information qualifies as mitigating and what does not. The “write-in” information provided by jurors is particularly rich insofar as it reflects the jurors’ decision that certain information not included in the verdict form merited specific mention.

The Federal Death Penalty Resource Counsel website has verdict forms from almost all federal capital trials held between 1991 and 2018.⁵⁴ We downloaded all verdict forms available on the site, totaling 223 files representing verdict forms for 226 defendants (in three cases, juries assessed mitigation for two different defendants on one verdict form). We eliminated forms that did not reflect jury verdicts, did not list the factors jurors were asked to consider, or in which jurors did not reach mitigation.⁵⁵ This left 211 verdict forms.⁵⁶ Because some crimes involved multiple defendants,

54. *Penalty Phase Verdict Forms*, FED. DEATH PENALTY RES. COUNS., <https://fdprc.capdefnet.org/verdict-forms> (last visited Dec. 20, 2021). Where courts have ordered verdict forms filed under seal, those are not posted on the website. Email from Barry J. Fisher, Fed. Cap. App. Res. Couns., Fed. Cap. Res. Couns. (Mar. 29, 2019, 4:41 PM) (on file with authors). As September 29, 2021, the federal government has prosecuted 239 trials of 305 defendants. *Current Statistics re Use of Federal Death Penalty*, FED. DEATH PENALTY RES. COUNS., <https://fdprc.capdefnet.org/doj-activity/statistics/current-statistics-re-use-of-federal-death-penalty-february-2017> (last visited Dec. 20, 2021).

55. One form (for Oklahoma City bomber Terry Nichols) was a guilt/innocence verdict form, rather than a sentencing form; two involved bench trials; three had no mitigators on the form; and in nine trials, the jury did not reach mitigation because it made factual findings that determined the sentence (e.g., it did not find a necessary statutory aggravator). See *Penalty Phase Verdict Forms*, FED. DEATH PENALTY RES. COUNS., <https://fdprc.capdefnet.org/verdict-forms> (last visited Dec. 20, 2021).

56. For six of these, the jury reached mitigation but did not provide any specific mitigation votes. (In four verdict forms, the instructions permitted jurors to not disclose these votes; two forms did not provide lines to report votes.)

there are more forms than juries: 211 forms come from 176 unique juries. All told, these verdict forms provided jurors with 7,842 mitigating factors to vote on, 5,017 of which were unique and not repeated across multiple counts.

Jurors also had the opportunity to write in their own mitigating factors in 178 forms from 150 unique juries (84% of the total forms, 85% of all juries).⁵⁷ Four-in-ten juries took advantage of the opportunity to add their own mitigating factors, writing in 149 mitigators that were non-redundant across multiple counts.⁵⁸

Trained coders reviewed the mitigating factors on each form and classified the content of the factor the jury considered into categories we developed. These reflected broad domains of mitigation (e.g., childhood/background factors, mental state factors, and other contextualizing factors) and sub-categories within each of those broad domains (e.g., parental physical abuse, parental neglect, limited schooling).⁵⁹

C. Results and Discussion

In analyzing the jury verdicts, we focused on jurors' reactions to evidence of execution impact, co-participant

Because we cannot guess which mitigators these juries would have endorsed, in analyses that rely on information about votes, results reflect only the 205 cases that had vote information. Otherwise, we use the full 211 cases. We indicate whether the presence or absence of these six cases changes our analyses.

57. We define "opportunity" as blank lines appearing in the form with instructions that jurors may offer their own factors. *See, e.g., supra* text accompanying notes 17–18; *infra* Appendix (Verdict at 12–13, *United States v. Richardson*, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012)). Seven of the "no opportunity" juries had a line of mitigation that said, commonly, "Other mitigating factor(s) found by at least one juror" (precise wording varied), and these seven juries indicated "0" votes. This suggests these groups likely would not have written in a factor, even given an opportunity.

58. Seventy-three verdict forms contained write-ins, i.e., 41% of the 178 forms provided an opportunity for write-in. If we include the seven cases that were not provided with blank lines to write in a mitigator, but that voted "0" for "other," the proportion is 39.4%.

59. The codebook is available from the authors upon request.

sentencing, and government negligence for two reasons. First, as discussed in Part IV, they are sites of significant legal contestation (especially execution impact and co-participant sentences). Second, they raise normative questions of justice beyond the defendant's individual moral culpability, thereby bringing our central contention into focus.

Our data show jurors endorsed mitigators in each of the contested domains. Not only did they vote for these items on the verdict form, but in some instances, they wrote them onto the form, suggesting this information was particularly salient to the jurors who voted for that mitigator.

1. Execution Impact Evidence

"Execution impact" evidence (EIE) generally consists of witnesses (usually family members) who testify to the harm they would suffer if the defendant were executed. Our coding identified two types of execution impact: "Effect of death sentence on defendant's children" or "Others (besides children) would be strongly negatively affected (e.g., traumatized) by defendant's death (e.g., spouse/girlfriend, parents)." Jurors voted on execution impact mitigating factors in more than half (111 out of 211) of the cases we analyzed.

Execution impact mitigators notably tended to garner more votes than other mitigating factors. The mean vote for non-EIE mitigators was 5.2 votes, while for EIE mitigators, the mean was 7.95, a statistically significant difference.⁶⁰ Recognizing that an individual jury may be generally more (or less) receptive to mitigation, and that each jury records multiple votes on mitigation on the completed verdict form, we ran regression models to account for this structure of the data.⁶¹ Accounting for this aspect of the data did not change

60. Based on a t-test of means, $t = 9.81$ ($p < .0001$).

61. Social scientists refer to this as a "nested structure," i.e., multiple mitigators are contained, or nested, within the same jury and therefore are not

the result: mitigators describing EIE continued to garner more votes, on average, 1.6 more votes than non-EIE mitigators.⁶² This difference was also statistically significant ($p < .0001$).

Not only do jurors tend to be more supportive of execution impact mitigators generally, cases with EIE have higher votes on mitigation. We calculated the overall mean votes on mitigation in all cases, and then compared the mean votes in cases in which jurors considered EIE and those where they did not. Cases that presented EIE mitigators to the jurors had higher mean votes per mitigator. Individual mitigators in cases that did not ask jurors to vote on execution impact evidence had a mean of 4.99 votes per mitigator, while cases that did ask them to vote on EIE had a mean of 6.44 votes per mitigator. Again, this difference is statistically significant ($p < .0006$). It is possible that cases that have and do not have EIE mitigators differ in some other way, but we cannot rule out the possibility that EIE mitigation leads jurors to see other mitigating factors in a different light.

Jurors also wrote in execution impact mitigators on their own. Table 1 indicates what they wrote in, the number of votes the write-in attracted, and the extent to which this write-in was prompted by mitigators already on the verdict form.

statistically independent. *See generally* STEPHEN W. RAUDENBUSH & ANTHONY S. BRYK, *HIERARCHICAL LINEAR MODELS: APPLICATIONS AND DATA ANALYSIS METHODS* (2d ed. 2002).

62. The results are essentially the same (1.61 more votes) when we control for the other contested mitigators, i.e., co-participant non-death sentences and government negligence.

TABLE 1. Execution Impact Evidence Write-ins

Defendant	Write-In (# votes)	Related to other mitigators on form? (# votes)
Lashaun Casey	"Lashaun is the only biological parent alive for Christine, his daughter." (7)	"Lashaun's life has value to his family and loved ones." (4) "Lashaun can continue his family relationships even while serving a sentence of life imprisonment without the possibility of release." (7) "Lashaun's family and loved ones will suffer grief and loss if he were executed." (7) ⁶³
James Dinkins	"Impact of death sentence on defendant's family." (6)	"James Dinkins, while incarcerated, maintains a positive and supportive role in his family." (7) ⁶⁴
Marvin Gabrion	"Loss of defendant's life will be significant to his family." (12)	New. Not associated with other factors on the form. ⁶⁵
Kristen Gilbert	"Defendant's sister will be adversely affected if she is executed." (12)	Impact on different people identified: "Defendant is the mother of two children, who will be adversely affected if the defendant is executed." (12) "Defendant's parents and grandparents will be adversely affected if she is executed." (12) ⁶⁶

63. Special Verdict Form at 6–8, *United States v. Casey*, Crim. No. 05-277 (ADC) (D.P.R. Apr. 11, 2013).

64. Verdict Form at 10, *United States v. James Dinkins*, No. 09-4668 (D. Md. June 30, 2009).

65. Penalty Phase Special Verdict Form at 8, *United States v. Gabrion*, No. 1:99-CR-76 (W.D. Mich. Mar. 18, 2002).

66. Special Verdict Form: Penalty Phase, Part II, at 4–5, *United States v.*

Melvin Gilbert	"Impact of death sentence on defendant's family." (4)	New to this defendant, but case tried with James Dinkins, whose form included family impact mitigators. ⁶⁷
Oscar Grande	"Oscar Antonio Grande's family will be adversely affected if he is executed." (7)	"That the execution of Oscar Antonio Grande will have a negative impact upon the life of and directly cause emotional trauma to his niece Tatiana Flores." (6) ⁶⁸
Kenneth Lighty	"The effect of the sentence on Nancy Westfield (Grandmother)" (10)	New. Not associated with other factors on the form. ⁶⁹
Steven Northington	"A sentence of death would adversely impact the Northington family." (12)	"Mr. Northington has maintained a relationship with his family." (9) ⁷⁰
David Runyon	"Mark Runyon, brother of David A. Runyon will suffer emotional harm if his brother is executed." (12)	"David Anthony Runyon, Jr., son of David Anthony Runyon, will suffer emotional harm if his father is executed." (12) "Suk Cha Runyon, the mother of David Anthony Runyon, will suffer emotional harm if her son is executed." (12) ⁷¹

Gilbert, No. 98-CR-30044-MAP (D. Mass. Mar. 26, 2001) (identical votes across counts recorded at 6–9).

67. Verdict Form at 28–29, *United States v. Gilbert*, No. 09-4669 (D. Md. June 30, 2009). Tried by the same jury, co-defendant James Dinkins's verdict form (but not Gilbert's) asked about the effect of execution on his family. Verdict Form at 10, *United States v. James Dinkins*, No. 09-4668 (D. Md. June 30, 2009).

68. Special Verdict Form at 21–22, *United States v. Grande*, 353 F. Supp. 2d 623 (E.D. Va. 2005) (No. 1:04CR283-A).

69. See Special Verdict Form at 8–9, *United States v. Lighty*, No. PJM-03-457 (D. Md. Nov. 10, 2005).

70. Special Verdict Form for Penalty Phase at 10, 13, *United States v. Northington*, Crim. Action No. 07-550-05 (E.D. Pa. June 13, 2013).

71. Special Verdict Form – Selection Phase at 4, *United States v. Runyon*, 667 F. Supp. 2d 648 (E.D. Va. 2009) (Crim. No. 4:08cr16).

Christopher Wills	“Crystal Wills will be adversely affected due to the loss of all paternal contact if Christopher Andaryl Wills is executed.” (10)	“Christopher Andaryl Wills’ fiancée, siblings, aunts and uncles, nieces and nephews and friends will be adversely affected if he is executed.” (10) “Christopher Andaryl Wills is the father of two children, his daughter, Crystal, and his step-daughter, Nykia, both of whom will suffer greatly if he is executed.” (11) “Christopher Andaryl Wills was active in his daughter Crystal’s life and her education as he constantly asked her teacher what he could do to help with her studies and came to school to see her.” (10) ⁷²
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Their votes show strong support for execution impact evidence, as does the fact that jurors took the time during deliberations to formulate their own mitigators in writing and then vote on them. Sometimes they even shifted from statements that related to the defendant (i.e., Northington “maintained a relationship with this family,” for example) to statements that focused on the family’s experience (i.e., “A sentence of death would adversely impact the Northington family.”). The fact that they sometimes used the opportunity to refine the EIE mitigators presented on the verdict form further demonstrates how salient they found this evidence.

Not only did jurors find it salient, but these data also correlated with outcomes. As displayed in the chart below, where juries were not asked to consider execution impact evidence, they voted unanimously for death in 44.55% of cases and unanimously for life in 36.63% of cases. In 18.81% of cases, juries were unable to reach a unanimous decision. For those that were asked to consider EIE, 30.91% returned unanimous death verdicts; 35.45% returned unanimous life

72. Special Verdict Form at 6–8, *United States v. Wills*, No. 99-396-A (E.D. Va. Oct. 4, 2001).

verdicts; and 33.64% were unable to reach a unanimous decision. Across these categories, the relationship between the presence of EIE and verdict outcomes is statistically significant.⁷³

TABLE 2. Execution Impact Evidence and Sentencing Outcomes.

	Unanimous death verdict	Unanimous LWOP verdict	Non-unanimous verdict (with LWOP as default sentence)
No EIE mitigators	44.55% (45 cases)	36.63% (37 cases)	18.81% (19 cases)
EIE mitigator(s)	30.91% (34 cases)	35.45% (39 cases)	33.64% (37 cases)

We conducted further tests to determine whether the proportions of the outcomes changed when EIE mitigation was (or was not) presented to the jury. We compared each outcome to the combination of the other two—for example, the likelihood of a death sentence versus any other non-death verdict (i.e., combining unanimous and non-unanimous life sentences), or the likelihood of a hung verdict versus any other outcome (i.e., combining death sentences and unanimous life sentences). As the patterns in the above chart suggest, there is no difference in the likelihood that juries will return a unanimous life imprisonment without parole (LWOP) verdict among those cases that have EIE mitigators and those that do not, compared to all other sentence outcomes ($p < .86$). However, a death sentence is significantly less likely ($p < .05$) when a jury has at least one EIE mitigator (30.91%) compared to when it does not (44.55%). Likewise, a hung verdict (which results in a LWOP sentence) is

73. Based on a chi-square test of association, χ^2 (df = 2, N = 211) = 7.00 ($p < .05$). When we omit the six cases where jurors did not report the number of votes for each mitigator, the effect is slightly weaker, χ^2 (df = 2, N = 205) = 5.80 ($p < .06$).

significantly more likely when the jury can vote on EIE evidence (33.64%) than when it does not (18.81%).⁷⁴ Again, these findings show only associations between EIE evidence and outcomes. However, the patterns are intriguing and suggest the impact of the defendant's death sentence on others is relevant to jurors.

2. Co-Participant's Non-Death Sentence

The federal death sentencing statute explicitly identifies a co-participant's sentence as relevant. As a result, many federal capital sentencing verdict forms ask jurors to consider the mitigating value of a co-defendant's non-death penalty sentence. Therefore, federal capital sentencing verdicts permit us to ask whether jurors in fact find a co-participant's non-death sentence mitigating.

Jurors considered mitigating factors coded as "[o]thers who committed this particular crime have not been punished/punished as harshly" frequently: 258 times⁷⁵ across 137 different cases, i.e., in 65% of all cases. Jurors generally found this consideration mitigating. Of those verdict forms asking for numerical votes, 71% had non-zero votes.⁷⁶

Jurors treat information about sentences for co-participants no differently than they treat other mitigating factors. Unlike execution impact mitigators, the co-participant mitigation did not attract a distinctly higher level of support, but neither was it significantly lower. The mean number of votes for mitigators that informed the jury that the co-participant had been sentenced to prison was 5.48

74. χ^2 (df = 1, N = 211) = 4.19 ($p < .05$) for death sentence analysis and χ^2 (df = 1, N = 211) = 5.94 ($p < .05$) for a non-unanimous outcome. When we omitted the six cases the effect was weaker only in death-sentenced cases ($p < .07$).

75. These are repeated across counts. Including co-participant statements that were redundant across counts, jurors responded to this mitigator 447 times.

76. Of the small number of verdict forms that asked jurors to record only yes/no votes, fifteen of the twenty-two co-participant statements (or 68%) got a "yes" vote and seven got a "no" vote.

(SD = 4.72), while the mean for all other mitigating factors was 5.32 (SD = 4.83).⁷⁷ Thus, we see that juries consider this issue in the way they consider other factors directly related to the characteristics of the defendant or circumstances of the offense.

As with execution impact evidence, jurors also wrote in mitigators regarding disparate sentencing.

TABLE 3. Co-Participant Sentences Write-Ins

Name	Write-In (# votes)	Related to other mitigators on form? (# votes)
Vincent Basciano	“There are other members of organized crime that have admitted to an equal or greater number of serious crimes that are not facing the death penalty, much less incarcerated.” (10)	“Dominick Cicale, Michael Mancuso, and/or Anthony Aiello are/is equally culpable in the murder of Randolph Pizzolo, and will not be punished by death.” (12) ⁷⁸

77. This is not a statistically significant difference ($t = 0.74$, $p < .47$). This reflects the 224 instances where the verdict form indicated the number of votes in support of these particular mitigating factors and excludes mitigators with no answer or with only yes/no votes. Results are the same if we control for case-level nesting as described *supra* note 61.

78. Special Verdict Form at 5–6, *United States v. Basciano*, 763 F. Supp. 2d 303 (E.D.N.Y. 2011) (No. 05-CR-060 (NGG)).

Alexis Candelario	“Wilfredo Sanpritt-Santone (Rato) fired shots at La Tómbola and testified to his participation on the racketeering enterprise and is not currently facing any charges.” (6)	Others mentioned along similar lines but not this person: “David Oquendo Rivas will not face the death penalty for his role in the murders at La Tómbola.” (4) “Braulio Ortiz Rodriguez (Menor), who did not participate in La Tómbola murders, was not charged along with Alexis Candelario Santana in Count 1, as a member of the racketeering enterprise. (Count 1 is not death penalty eligible.)” (0) ⁷⁹
Donna Moonda	“Damian Bradford only received 17 1/2 yrs with a possibility of early release.” (12)	“[T]here was an equally culpable defendant, Damien Bradford, who will not be punished by death.” (12) ⁸⁰
Steven Northington	“Lamont Lewis will not be sentenced to death for eleven premeditated murders.” (12)	“Lamont Lewis, an equally culpable codefendant, will not be punished by death for any of the eleven premeditated murders he committed and may be freed after serving forty years for the premeditated murders he committed.” (0) ⁸¹

79. Special Verdict Form at 10–11, *United States v. Candelario-Santana*, 929 F. Supp. 2d 24 (D.P.R. 2013) (No. 09-427 (JAF)).

80. Special Verdict Forms at 9, 11, *United States v. Moonda*, No. 1:06 CR 395 (N.D. Ohio July 18, 2007) (juror votes identical in two other counts at 22–37).

81. Special Verdict Form for Penalty Phase at 13–14, *United States v. Northington*, Crim. Action No. 07-550-05 (E.D. Pa. June 13, 2013).

These write-ins highlight the jurors' attentiveness to this issue of relative punishment. In two instances, jurors used the write-in to expand and name those other culpable persons besides those listed for them on the form. In the other two instances, the jurors' write-ins stated the inequity of the situation more precisely than they saw it presented in the verdict form. For example, with respect to Donna Moonda's equally culpable co-defendant, Damian Bradford, the jury specifically identified his seventeen-and-a-half-year sentence accompanied by the possibility of early release. For Steven Northington, the jury rewrote the existing mitigator to keep the portion about another person escaping the death penalty for his eleven premeditated murders and delete the speculative statement regarding that individual's potential release in forty years. The jury's rewrite highlighted the essential, specific unfairness of the co-participant's sentence: someone else who premeditated eleven deaths will not get a death sentence. The rewrite had the support of every juror in the case.

Again, we see not only support, but also jurors' attention to equally culpable others. On this topic, as with execution impact, they offered their own take on sentence disparities. This is evidence that jurors are troubled by sentencing inequities and find those inequities relevant to their sentencing task.

Finally, although co-participant mitigators were not voted as significantly more (or less) mitigating than other factors presented on the verdict form, the presence of at least one co-participant mitigator on the verdict form proved to have a significantly strong relationship with verdict outcomes.⁸²

82. χ^2 (df = 2, N = 211) = 21.35 (p < .0001). None of these analyses changed substantially when we omitted the six cases that did not provide votes on mitigators. See *supra* note 56.

TABLE 4. Co-Participant Sentence Evidence and Sentencing Outcomes

	Unanimous death verdict	Unanimous LWOP verdict	Non-unanimous verdict (with LWOP as default sentence)
No co- participant mitigators	57.53% (42 cases)	20.55% (15 cases)	21.92% (16 cases)
Has co- participant mitigator(s)	26.81% (37 cases)	44.20% (61 cases)	28.99% (40 cases)

As the chart above indicates, juries that evaluated verdict forms containing at least one co-participant mitigator were more than twice as likely to return a unanimous LWOP verdict than those juries that did not have such a factor as a mitigator (44.20% vs. 20.55%). Likewise, juries with co-participant mitigators were far less likely to return a death sentence (26.81% vs. 57.53%). We do not claim that co-participant mitigation causes this outcome. There may be other factors in the case that the above analysis does not capture.⁸³ Nonetheless, together with results regarding

83. For instance, jurors might be more lenient to defendants who did not act alone. We attempted to account for defendants with co-participants by including the criminal docket number as an effect in a model that predicted the likelihood of a given sentence outcome (i.e., death vs. other, life vs. other). This controlled for any effects due to juries hearing about the same case but for different defendants within our dataset. Even with this control, we still observed a significant effect for the presence of a mitigating factor related to the outcome for a co-participant. We recognize this analysis may not fully capture whether the defendants acted alone. We do not have access to case files that would tell us accurately whether the defendants in our data did or did not have co-participants. We know only whether there are multiple verdict forms from the same case, which is an imperfect measure of whether people acted alone or not. (For example, Dzhokhar Tsarnaev acted in concert with his older brother to commit the Boston Marathon bombing; but because his brother died without being tried, we do not have this observation in the dataset.) Generally, however, given the fact that the federal death sentencing statute permits co-participant sentences to

write-ins, we view this type of mitigation as a salient and significant signal to jurors about the morality of the ultimate sentence.

3. Government Negligence

The verdict forms in the dataset reveal several ways in which governmental agencies may have contributed to the defendant becoming the kind of person who would commit capital murder. Admission of evidence of government action or inaction, such as ignoring the abuse of a defendant when he was a child, would generally not be challenged, because it involves the uncontroversial category of evidence pertaining to the characteristics of the offender. We noticed that the verdict form write-ins, however, direct attention to the *government*, seemingly separately from how its conduct illuminates the defendant's character or the circumstances of the offense. Jurors specifically blamed a government entity in nineteen of the written-in mitigators—schools, social agencies, courts, prisons—for failing the defendant in some capacity. Indeed, they typically used some version of the word “fail.” Here are some examples:

- John Bass's conduct was *caused in part by an inadequate social service system* (i.e. Child Protective Services) (9 votes)⁸⁴
- *[F]ailure of the State of Pennsylvania* social and mental health services to effectively intervene in his childhood abuse and to treat or address his early antisocial behavior (10 votes)⁸⁵
- Several *government* sponsored support systems, including education and probation, *failed* to intervene in Billy's downward spiraling path (5

be presented to the jury in mitigation, we would expect that, if there were a non-death sentenced co-participant, the existence of that person would be reflected in the verdict forms.

84. Special Findings Form at 55, *United States v. Bass*, No. 97-CR-80235 (E.D. Mich. Aug. 14, 2003) (emphasis added).

85. Special Verdict Form at 14, *United States v. Fell*, 372 F. Supp. 2d 786 (D. Vt. 2005) (Crim. No. 2:01-CR-12-01) (emphasis added).

votes)⁸⁶

- The *system failed* Mr. Candelario-Santana after his previous convictions in 2003 by: not applying appropriate punishment; not adequately managing his incarceration; applying rehabilitation programs ‘just to get it out of the way’; and not properly following up to him during probation process. (6 votes)⁸⁷
- *The following Government agencies didn’t show active involvement [sic] and any corrective action to their inhuman conditions of the family....* (12 votes)⁸⁸
- *Inadequate action from the Department of Education regarding [defendant’s] specialized needs....* (12 votes)⁸⁹
- Defendant was *failed by the court system* when psychological treatment was not forthcoming in 1997, when ordered by a judge (12 votes)⁹⁰
- The *Philadelphia School District failed* to identify [defendant] as a candidate for intervention at an early age (12 votes)⁹¹
- *Social services failed* to follow up on Annette Northington’s parental negligence (12 votes)⁹²

86. Special Verdict Form at 14, *United States v. Allen*, No. 4:97 CR 141 ERW (E.D. Mo. Mar. 10, 1998) (emphasis added).

87. Special Verdict Form at 11, *United States v. Candelario-Santana*, 929 F. Supp. 2d 24 (D.P.R. 2013) (No. 09-427 (JAF)) (emphasis added).

88. Special Verdict Form at 7, *United States v. Jimenez-Bencevi*, 934 F. Supp. 2d 360 (D.P.R. 2013) (Crim. No. 12-221(JAF)) (emphasis added).

89. *Id.*

90. Special Verdict Form for Murder of Jack Norris at 11, *United States v. Lyon*, No. 4:99CR-11-M (W.D. Ky. Aug. 2, 2001) (emphasis added); Special Verdict Form for Murder of James Nichols at 11, *United States v. Lyon*, No. 4:99CR-11-M (W.D. Ky. Aug. 2, 2001) (emphasis added).

91. Special Verdict Form for Penalty Phase at 14, *United States v. Northington*, Crim. Action No. 07-550-05 (E.D. Pa. June 13, 2013) (emphasis added).

92. *Id.* (emphasis added).

In addition to receiving substantial support, most of these write-ins we coded as “new,” (i.e., the write-in did not elaborate on an issue already on the form).⁹³ Again, the gist of this evidence is well within the *Lockett/Eddings* framework, but the moral thread is distinct. The evidence tells the jury something important about how the defendant became someone who would commit murder, but the jury focused on the government’s fault.

We observed a separate form of government negligence more proximate to the criminal event itself. We explore this distinct dynamic of government blaming as mitigation through the cases involving homicides in the Bureau of Prisons (BOP). These cases frequently feature a range of prison issues as mitigation, but we focus specifically on government negligence that contributed to the defendant’s ability to commit the offense, a type of evidence that courts have sometimes excluded from the jury’s consideration.⁹⁴ To assess jurors’ reactions to this form of government negligence, we analyzed the twenty-three federal capital prosecutions involving BOP homicides.

In eight cases, the verdict form asked the jury specifically about BOP’s negligence in contributing to the circumstances of the offense. For example, in *United States v. Garcia*, the jury voted on the following items:⁹⁵

93. Seven of these nine write-ins were new. One jury rewrote an existing mitigator to sharpen the focus on the government’s failure. *Compare* Special Verdict Form for Murder of Jack Norris at 9, *United States v. Lyon*, No. 4:99CR-11-M (W.D. Ky. Aug. 2, 2001) (“Billy Joe Lyon suffers from psychological impairments which were identified and which could have been treated when he was a child and adolescent.”), *with* Special Verdict Form for Murder of James Nichols at 11, *United States v. Lyon*, No. 4:99CR-11-M (W.D. Ky. Aug. 2, 2001) (“Billy Joe Lyon was failed by the court system when psychological treatment was not forthcoming in 1997, when ordered by a judge.”).

94. *See infra* Section IV.C.1.

95. Special Verdict Form at 14, *United States v. Garcia*, No. 1:09-CR_15(2) (E.D. Tex. 2010).

73. The BOP Beaumont facility employees failed to properly shackle Edgar Baltazar Garcia.

Number of jurors who so find 7.

74. The BOP Beaumont facility employees failed to properly escort Edgar Baltazar Garcia.

Number of jurors who so find 10.

75. The BOP Beaumont facility failed to keep Edgar Baltazar Garcia separate from the other inmates.

Number of jurors who so find 4.

76. The failure of the BOP Beaumont facility employees to follow proper policies contributed to the occurrence of the offense.

Number of jurors who so find 5.

Across the BOP cases, jurors considered whether a specific BOP failure mitigated the offense thirty-eight times.⁹⁶ We saw no evidence that jurors reject these ideas outright. In fact, the opposite was true. Nearly two-thirds (63%) of specific prison negligence mitigators received at least one vote.

In all cases, jurors' reactions resembled what we described for co-participant sentences: they considered these factors just as mitigating as factors that fall under the *Lockett/Eddings* paradigm. Looking at cases in which jurors considered mitigators involving BOP failure alongside *Lockett/Eddings* mitigators, mitigators about BOP responsibility had vote totals that were consistent with other mitigators on the form (2.92 votes vs. 2.46 votes, respectively, not a statistically significant difference, $p < .47$).⁹⁷

96. We separately coded mitigators regarding general BOP negligence, such as an overall failure to maintain a safe environment, from those involving specific failures that facilitated the offense.

97. Again, we removed the contested categories—here, EIE and co-participant sentences—to underscore how jurors are looking beyond the initial *Lockett/Eddings* categories.

In any individual case, however, jurors could be more receptive to mitigation related to government failure than to *Lockett/Eddings* evidence of personal moral culpability. Only 8% of mitigators relevant to Edgar Garcia's personal background garnered any juror votes at all; forty-nine out of fifty-three mitigators had zero votes.⁹⁸ By contrast, the five mitigators that cited specific government failures averaged 5.6 votes, with the lowest attracting two votes, and the highest attracting ten votes.⁹⁹ While the jurors may not have found his background mitigating, we see in Garcia's case how the government's conduct emerged as a conceptually different kind of mitigation.¹⁰⁰ We saw this in the juror write-ins as well, as shown in Table 5.

98. Forty-nine of his *Lockett/Eddings* mitigators won zero votes; four of his mitigators have one, three, four, and eight, respectively. *See* Special Verdict Form at 11, *United States v. Garcia*, No. 1:09-CR_15(2) (E.D. Tex. 2010).

99. *See id.* at 10–11. In addition to those presented in the text, two jurors voted for the mitigator, "The offense would not have occurred if the BOP Beaumont facility had followed proper policies." *See id.* at 11.

100. We note that Garcia's jury was specifically asked to decide whether a particular factor existed *and* was mitigating. *See id.* at 2–11.

TABLE 5. BOP Negligence Write-Ins

Name	Write-In (# votes)	Related to other mitigators on form? (# votes)
Rudy Sablan	“The BOP didn’t do their job by faulty logic of putting William and Rudy in the same cell.” (8)	“Upon William Sablan’s arrival at the United States Penitentiary-Florence, the Bureau of Prisons (‘BOP’) placed him in cell 124 of the Special Housing Unit along with Rudy Sablan and Joey Estrella, despite the fact that the cell was designed to house only two people.” (1) ¹⁰¹
Rudy Sablan	“Joey died because the guards failed to do 30 minute rounds.” (7)	New. The closest mitigator was: “The circumstances that led to Joey Estrella’s death existed, at least in part, because of failure(s) by BOP officials to properly do their job(s), by allowing alcohol and weapons in the cell.” (2) ¹⁰²
Ulysses Jones	“BOP lack of consideration for his previous crimes for housing placements.” (6)	New. Not associated with other factors on the form. ¹⁰³

Compared to what was presented to them, these write-ins use stronger language about the BOP than the jury form offered. Rudy Sablan’s jury said directly, “BOP didn’t do their job,” eschewing the more anodyne and bureaucratic language offered in the verdict form mitigator. Jurors also added additional failures (i.e., officers’ failure to make rounds) to

101. Special Findings Form at 6, 9, *United States v. Sablan*, No. 00-CR-00531-WYD (D. Colo. May 20, 2008).

102. *Id.*

103. See Special Verdict Form for Count One (Murder in the First Degree in the Death of Timothy Baker) and Count Two (Murder by a Federal Prisoner in the Death of Timothy Baker) at 10–16, *United States v. Jones*, No. 10-03090-01-CR-S-DGK (W.D. Mo. Oct. 16, 2017).

the verdict form mitigator.¹⁰⁴ For Ulysses Jones (who killed his cellmate), the jury raised BOP's housing placement on its own.¹⁰⁵ A strong majority of write-ins about governmental failures (74%) were coded as new, further indicating that this was a distinct way that juries considered mitigation.¹⁰⁶

In the next Part, we discuss why the Constitution requires us to care about these findings.

II. JURIES, DEATH SENTENCING, AND THE VOICE OF THE NORMATIVE COMMUNITY

The jury has long been recognized as integral to the American democratic project. In *Democracy in America*, Tocqueville wrote, "The institution of the jury places the real direction of society in the hands of the governed, and not in that of the government. [It] invests the people, or that class of citizens, with the direction of society."¹⁰⁷ Justice Scalia was more specific: "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control of the judiciary."¹⁰⁸

In criminal trials, Judge J. Harvie Wilkinson III of the

104. See Special Findings Form at 6, 9, *United States v. Sablan*, No. 00-CR-00531-WYD (D. Colo. May 20, 2008).

105. Special Verdict Form for Count One (Murder in the First Degree in the Death of Timothy Baker) and Count Two (Murder by a Federal Prisoner in the Death of Timothy Baker) at 10–16, *United States v. Jones*, No. 10-03090-01-CR-S-DGK (W.D. Mo. Oct. 16, 2017).

106. Unlike with EIE and co-participant evidence, we did not see a significant relationship between government negligence in BOP cases and sentence outcomes. Further, this sample, at twenty-three cases, is too small to generate valid statistics.

107. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 293–94 (Philip Bradley ed., Vintage Books 1945) (1835), *quoted in* J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1157 (2014).

108. *Blakely v. Washington*, 542 U.S. 296, 306 (2004); *see also* *United States v. Haymond*, 139 S. Ct. 2369, 2375 (2019) ("Just as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions.").

United States Court of Appeals for the Fourth Circuit notes jury verdicts “legitimize the criminal justice system,” because they “anchor[] convictions and punishment in the defendant’s community.”¹⁰⁹ The juries’ normative beliefs connect to a dominant philosophy of punishment: retribution. “In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to the community’s moral sensibility . . . because they reflect more accurately the composition and experiences of the community as a whole.”¹¹⁰

This community representation is particularly important in death penalty cases, and jurors’ special role courses through the Court’s death penalty decisions. In *Witherspoon v. Illinois*, the Court characterized “one of the most important functions any jury can perform” in choosing “between life imprisonment and capital punishment” is “to maintain a link between contemporary community values and the penal system.”¹¹¹ They are “best able to express the conscience of the community on the ultimate question of life or death.”¹¹² In *Woodson v. North Carolina*, the Court quoted *Witherspoon* on the way to striking down a statute that, by requiring the death penalty for certain murders, bypassed the crucial exercise of the jury’s discretion.¹¹³

The bifurcated structure of the capital trial reinforces the normative decision jurors make at sentencing. During the guilt/innocence phase, the jury decides facts. It must decide if a crime was committed by assessing, e.g., the

109. Wilkinson, *supra* note 107, at 1160.

110. *Ring v. Arizona*, 536 U.S. 584, 615 (2002) (Breyer, J., concurring) (citations and internal punctuation omitted).

111. 391 U.S. 510, 519 & n.15 (1968).

112. *Spaziano v. Florida*, 468 U.S. 447, 470 (1984) (Stevens, J., concurring in part and dissenting in part) (citation and internal quotations omitted), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (holding that juries, not judges, must make sentencing decisions).

113. *See Woodson v. North Carolina*, 428 U.S. 280, 295 (1976) (quoting *Witherspoon*, 391 U.S. at 519 & n.15).

credibility of an alibi witness and the severity of that crime by evaluating the defendant's intent at the time he¹¹⁴ committed the homicide. During the sentencing phase, the jury hears evidence about whether to sentence the defendant to death. This bifurcation serves two purposes. It solves an evidentiary problem; some of the defendant's best evidence for sparing him from the death penalty may also help prove his guilt.¹¹⁵ But it also signals the jury's qualitatively different inquiry when it decides on the sentence to impose on the defendant: what is a *just* punishment in this case?¹¹⁶

Not only does the jury ensure the retributive justification for the death penalty,¹¹⁷ but it also functions as a kind of procedural protection against excessive punishment and reflects evolving standards of decency. Its "severity and irrevocability" make the death penalty "qualitatively different from any other punishment," requiring "unique

114. Of 2,508 death row prisoners on April 1, 2021, 51 are women. For simplicity, we use the masculine pronouns. See *Death Row Overview*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/overview> (last visited Dec. 21, 2021); see also *Women*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/women> (last visited Dec. 21, 2021).

115. See *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (plurality opinion) ("Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question."). Evidence of poor impulse control caused by brain injury, for example, may make the defendant seem more likely to have committed the murder, while also mitigating his moral culpability.

116. See *Satterwhite v. Texas*, 486 U.S. 249, 261 (1988) (Marshall, J., concurring). ("Unlike the determination of guilt or innocence, which turns largely on an evaluation of objective facts, the question whether death is the appropriate sentence requires a profoundly moral evaluation of the defendant's character and crime."); cf. *Kansas v. Marsh*, 548 U.S. 163, 180 (2006) (Weighing aggravators and mitigators is a "measured, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant."); *United States v. Gabrion*, 719 F.3d 511, 533 (6th Cir. 2013) (In federal capital sentencing, "the judgment is moral—for the root of 'justify' is 'just.'"); *United States v. Runyon*, 707 F.3d 475, 516 (4th Cir. 2013) (Weighing aggravating and mitigating factors is "a complex moral judgment."); *United States v. Hager*, 721 F.3d 167, 207 (4th Cir. 2013) (same).

117. *Gregg*, 428 U.S. at 183 (1976) (plurality opinion) (Death penalty's two principal social purposes are retribution and deterrence, and "capital punishment is an expression of society's moral outrage.").

safeguards to ensure that it is a justified response to a given offense.”¹¹⁸ The jury is one of those safeguards. Justice Stevens explained, “I am convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official.”¹¹⁹

In *Gregg v. Georgia*, the Court identified the jury’s normative importance as a matter of Eighth Amendment law: “Jury sentencing has been considered desirable in capital cases in order to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society.”¹²⁰

We elaborate below how the Court has translated this broader idea of the jury’s normative role into its specific task as capital sentencers. One thing is clear, however: “[C]apital punishment rests on not a legal but an ethical judgment.”¹²¹

As Joshua Kleinfeld has observed:

[U]nlike most juries, the capital jury cannot even by the thinnest of fictions be said to confront a purely factual question. The question it confronts is a moral one: once a defendant’s guilt is settled and aggravators and mitigators found, the jury’s final task is to decide what sentence is just. Thus capital juries are an agent of ordinary

118. *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part), *overruled by* *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) (holding that juries, not judges, must make sentencing decisions).

119. *Id.* at 469.

120. *Gregg*, 428 U.S. at 190 (plurality opinion) (internal quotation marks omitted); *see also id.* at 173 (The Eighth Amendment’s prohibition on cruel and unusual punishment “draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society.” (quoting *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958))); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (Eighth Amendment draws its meaning from “basic mores of society” because “standard of extreme cruelty . . . necessarily embodies a moral judgment.”).

121. *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part); *see also Caldwell v. Mississippi*, 472 U.S. 320, 352 n.7 (1985) (describing sentencing decision as “highly subjective and “largely a moral judgment of the defendant’s desert”).

moral thought in criminal law.¹²²

Not only is the punishment decision a moral one, but the moral significance of particular mitigating evidence is also a “value call.”¹²³ We discuss the Court’s treatment of specific types of mitigating evidence in the next Part.

III. INDIVIDUALIZED SENTENCING AND THE EVOLVING DEFINITION OF “MITIGATION”

In *Woodson v. North Carolina*¹²⁴ and then in *Lockett v. Ohio*,¹²⁵ the Supreme Court established the individualization of the defendant as a bedrock principle of capital sentencing. In *Woodson*, the Supreme Court rejected North Carolina’s mandatory death penalty for all capital offenses.¹²⁶ Because of the qualitative difference between life and death sentences—as the Court observed, “[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two”¹²⁷—and consequently heightened need for reliability, capital sentencing proceedings must allow the jury to understand the defendant as an individual.¹²⁸ In condemning North Carolina’s mandatory death sentencing, the Court explained that the sentencer had to have the opportunity to consider “relevant facets of the character and record of the individual offender or the circumstances of the particular offense,” because it had to be able to reflect on

the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. [A mandatory death sentence] treats all persons convicted of a designated offense not as

122. Kleinfeld, *supra* note 23, at 1137.

123. *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016).

124. 428 U.S. 280, 304 (1976) (plurality opinion).

125. 438 U.S. 586, 602–05 (1978) (plurality opinion).

126. *Woodson*, 428 U.S. at 305 (plurality opinion).

127. *Id.*

128. *See id.*

uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.¹²⁹

Such nuanced decision-making was not simply consistent with traditional sentencing practice, it was constitutionally compelled: “[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.”¹³⁰

A plurality of the Court reaffirmed the centrality of the individualization requirement in *Lockett v. Ohio*.¹³¹ While North Carolina excluded mitigating evidence at sentencing, Ohio limited the kind of evidence the trial court could consider. In Ohio, the sentencing judge was required to impose the death penalty unless the judge found the defendant had proven one of three legal excuses or defenses.¹³² The judge could consider only whether “(1) the victim had induced or facilitated the offense, (2) it was unlikely that Lockett would have committed the offense but for the fact that she was under duress, coercion, or strong provocation, or (3) the offense was primarily the product of Lockett’s psychosis or mental deficiency.”¹³³

Lockett argued that the Ohio statute unconstitutionally prohibited the judge from considering information she considered mitigating, namely, “her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime.”¹³⁴ The Supreme Court struck down

129. *Id.* at 304.

130. *Id.*

131. 438 U.S. at 605 (plurality opinion).

132. *Id.* at 593–94 (majority opinion).

133. *Id.* (internal punctuation omitted).

134. *Id.* at 597 (plurality opinion).

the Ohio statute, concluding that

the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.¹³⁵

Lockett's plurality opinion became the majority rule in *Eddings v. Oklahoma*, when the Court held the Eighth Amendment's individualization requirement compelled trial courts to admit evidence of the defendant's "unhappy upbringing and emotional disturbance" at sentencing.¹³⁶

The Court went on to refine the sentencer's role to distinguish the punishment decision from the guilt/innocence decision. While the latter finds legal culpability, the former reflects the defendant's "personal culpability."¹³⁷ This personal culpability requires "an individualized assessment of the appropriateness of the death penalty."¹³⁸ For example, "defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be [viewed as] less culpable than defendants who have no such excuse."¹³⁹ Only if the sentencer has the opportunity to consider and give effect to this kind of evidence can the sentencer make "a reliable determination that death is the appropriate sentence" and impose a sentence that "reflect[s] a reasoned *moral* response to the defendant's background, character, and crime."¹⁴⁰

135. *Id.* at 604.

136. 455 U.S. 104, 109, 112, 117 (1982).

137. See *Penry v. Lynaugh*, 492 U.S. 302, 319, 323 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002), and *holding modified by Boyd v. California*, 494 U.S. 370 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990).

138. *Id.* at 319.

139. *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

140. *Penry*, 492 U.S. at 319 (quoting first *Woodson v. North Carolina*, 428 U.S. 280, 304, 305 (1976); then *Brown*, 479 U.S. at 545).

A. *Expanding Mitigation Beyond Evidence of Defendant's Moral Culpability for the Crime*

In *Skipper v. South Carolina*, the Supreme Court confronted another limit on mitigating evidence.¹⁴¹ South Carolina prevented defendant Skipper from introducing testimony that he had “made a good adjustment” to jail during his pretrial incarceration.¹⁴² As far as South Carolina was concerned, Skipper’s conduct in jail (and any inference about his future conduct in prison) was irrelevant: “[A]ny such inferences would not relate specifically to petitioner’s culpability for the crime he committed.”¹⁴³

The Supreme Court reversed. It first cited *Eddings* and then continued: “Equally clear is the corollary rule that the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence.”¹⁴⁴ The Court concluded, “there is no question but that such inferences [about Skipper’s ability to adjust peacefully to prison life] would be ‘mitigating’ in the sense that they might serve ‘as a basis for a sentence less than death.’”¹⁴⁵ While not relevant to why he committed the homicide, Skipper’s ability to adjust to prison was important information to a jury considering his future dangerousness.¹⁴⁶ As such, it “must be considered potentially mitigating,” and must be admitted.¹⁴⁷

The Supreme Court thereby redirected the inquiry from Skipper’s personal culpability for the crime to a different question—the fundamental one: what sentence should be imposed on Skipper? The Supreme Court extended *Eddings*’s narrow focus on the defendant in relation to the offense to a

141. 476 U.S. 1, 3 (1986).

142. *Id.*

143. *Id.* at 4.

144. *Id.* (internal punctuation and citation omitted).

145. *Id.* at 4–5 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)).

146. *Id.* at 8.

147. *Id.* at 5.

more comprehensive view of what a sentencer might consider relevant to sentencing.

That the Court was extending *Lockett* and *Eddings* is made plain from the concurrence's complaint:

The Court unnecessarily abandons [a] narrow [alternative] ground of decision for a broader one, holding that the proffered testimony was mitigating evidence that must be admitted under the Eighth Amendment. . . .

. . . Such evidence has no bearing at all on the "circumstances of the offense," since it concerns the defendant's behavior after the crime has been committed. Nor does it say anything necessarily relevant about a defendant's "character or record," as that phrase was used in *Lockett* and *Eddings*.

Those decisions clearly focus on evidence that lessens the defendant's culpability for the crime for which he was convicted. . . . In this case, for the first time, the Court classifies as "mitigating" conduct that occurred *after* the crime and after the accused has been charged. Almost by definition, such conduct neither excuses the defendant's crime nor reduces his responsibility for its commission. It cannot, therefore, properly be considered "mitigating evidence" that the sentencer must consider under the Constitution.¹⁴⁸

Over the next few years, the Court made clear it was charting a new direction, reiterating that jurors should be able to consider "evidence if the sentencer could reasonably find that it warrants a sentence less than death."¹⁴⁹ In *Payne v. Tennessee*, in which the Court found that evidence of the impact of the murder on the survivors was not constitutionally barred, the Court pointed to the wide range of evidence defendants can introduce in mitigation. It observed, "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty."¹⁵⁰

148. *Id.* at 11–12 (Powell, J., concurring); see also *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 248 (2007) ("While Chief Justice Burger's opinion in *Lockett* was joined by only three other Justices, the rule it announced was endorsed and broadened in our subsequent decisions in *Eddings* and *Skipper*." (internal citations omitted)).

149. *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990).

150. 501 U.S. 808, 824 (1991).

B. *The Crooked Line from Skipper to Tennard*

Skipper's more holistic understanding of mitigation offered the Court a pathway to resolve years of tortured litigation over the Texas death penalty statute.¹⁵¹ While ostensibly addressing the question of whether this statute enabled Texas juries to take certain mitigating evidence into account in reaching its sentencing decision, this Texas-specific litigation simultaneously reaffirmed the Court's expanding vision of mitigation.

The death penalty statute Texas enacted after *Furman* asked jurors to answer certain questions (so-called "special issues") whose answers would trigger either a death or life sentence.¹⁵² The defendant would be sentenced to death if the State persuaded the jury beyond a reasonable doubt that the defendant's conduct was "deliberate[]," that it was probable "that the defendant would commit criminal acts of violence" constituting "a continuing threat to society," and, if raised by the evidence, that the defendant's conduct "was an unreasonable response to the provocation, if any, by the deceased."¹⁵³ Texas death-sentenced prisoners argued for decades that the statute prevented defendants from presenting—and jurors from considering and giving effect

151. Jordan M. Steiker, *Penry v. Lynaugh: The Hazards of Predicting the Future*, in JOHN H. BLUME, JORDAN M. STEIKER, DEATH PENALTY STORIES 277, 297–310 (2009).

152. *Jurek v. Texas*, 428 U.S. 262, 268–69 (1976). The sentencing statute, Tex. Pen. Code. §19.03 (1947) changed in 1991. See TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 2019). Prosecutions of offenses committed prior to September 1, 1991, are governed by article 37.0711. TEX. CODE CRIM. PROC. ANN. art. 37.0711 (West 2019). Until 2005, life sentences for capital murder in Texas included the possibility of parole. See TEX. PENAL CODE ANN. § 12.31(a) (West 2019) (current statute).

153. *Jurek*, 428 U.S. at 268–69; TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (West 2007). The constitutionality of this statute was upheld in *Jurek*, 428 U.S. at 268–69, a companion case to *Gregg v. Georgia*, 428 U.S. 153 (1976). See also David McCord, *What's Messing with Texas Death Sentences?*, 43 TEX. TECH. L. REV. 601, 605 (2011); Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY, 717, 755 n.55 (2009).

to—mitigation evidence routinely admitted elsewhere.¹⁵⁴

In *Penry v. Lynaugh*, the Court agreed that the questions posed to the jury did not enable the jurors to “consider and give effect” to evidence of the defendant’s intellectual disability as mitigation.¹⁵⁵ As a result, the jury was denied “a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision.”¹⁵⁶ After *Penry*, however, the Supreme Court deflected challenges to the Texas statute. The jury in *Boyde v. California* was instructed to consider in sentencing “[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.”¹⁵⁷ The defendant argued this prohibited the jury from considering mitigating evidence about his background and character.¹⁵⁸ The Court noted that while the Eighth Amendment entitles the defendant to have the sentencer hear his mitigating evidence, States remain “free to structure and shape consideration” of that evidence so long as they do not prevent consideration altogether.¹⁵⁹ The Court found there was “no reasonable likelihood” that the jury interpreted the instruction to keep it from considering this evidence.¹⁶⁰ It

154. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 310–11 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002), and *holding modified by Boyde v. California*, 494 U.S. 370 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990); *Graham v. Collins*, 506 U.S. 461, 465 (1993); *Johnson v. Texas*, 509 U.S. 350, 366 (1993); *Tennard v. Dretke*, 542 U.S. 274, 276 (2004); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 237 (2007); *Brewer v. Quarterman*, 550 U.S. 286, 288 (2007); *Smith v. Texas*, 550 U.S. 297, 311 (2007). Margulies, Blume, and Johnson document the cases of 90 Texas prisoners who were executed after courts rejected their *Penry* claims prior to *Tennard*. Joseph Margulies, John H. Blume & Sheri Lynn Johnson, *Dead Right: A Capital Punishment Cautionary Tale*, 53 COLUM. HUM. RTS. L. REV. 60, 73–78, 122–126 (2021).

155. *Penry*, 492 U.S. at 328.

156. *Id.*

157. *Boyde*, 494 U.S. at 373–74.

158. See *id.* at 378, 382 n.5.

159. *Id.* at 377.

160. *Id.* at 381.

would subsequently use *Boyde* to limit *Penry* to defendants with intellectual disability.¹⁶¹

Over a decade later, the Supreme Court substantially resolved the dispute over Texas's special issues in *Tennard v. Dretke*,¹⁶² while also clarifying what constitutes mitigating evidence. Robert Tennard complained that the Texas death sentencing statute did not give the jury the opportunity to consider and give effect to evidence of his low intellectual functioning.¹⁶³ The only information the jury had been provided was his IQ score of sixty-seven.¹⁶⁴ The Fifth Circuit had rejected his claim, ruling that the IQ evidence was not "constitutionally relevant," based on its own gloss on the Supreme Court's decision in *Penry v. Lynaugh*.¹⁶⁵ The Fifth Circuit interpreted *Penry* to require Tennard to demonstrate his low IQ was "constitutionally relevant" mitigating evidence, i.e., "evidence of a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own" and to which "the criminal act was attributable."¹⁶⁶

The last condition has been described as a "nexus requirement,"¹⁶⁷ as it requires a relationship between the proffered mitigating evidence and the offense. Since Tennard's trial counsel never established how Tennard's low IQ related to his commission of the offense, it failed the nexus

161. *Johnson v. Texas*, 509 U.S. 350, 367–69 (1992) ("The standard against which we assess whether jury instructions satisfy the rule of *Lockett* and *Eddings* was set forth in *Boyde*. . . . We decide that there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of petitioner's youth."); see also *Graham v. Collins*, 506 U.S. 461, 491–92, 497 n.10 (1993) (Thomas, J., concurring).

162. *Tennard v. Dretke*, 542 U.S. 274, 288 (2004).

163. *Id.* at 277.

164. *Id.*

165. *Id.* at 283–84.

166. *Id.* at 281 (quoting *Tennard v. Cockrell*, 284 F.3d 591, 595 (5th Cir. 2002), *vacated*, 537 U.S. 802 (2002)).

167. See, e.g., *Smith v. Texas*, 543 U.S. 37, 45 (2004).

test.¹⁶⁸ The Fifth Circuit therefore concluded that it did not matter that the jury could not give effect to this mitigation in answering the sentencing questions.¹⁶⁹

The Supreme Court squarely rejected the Fifth Circuit's reasoning: "The Fifth Circuit's test has no foundation in the decisions of this Court."¹⁷⁰ It reminded the Fifth Circuit that, in its prior opinions discussing the relevance standard for mitigating evidence, it "spoke in the most expansive terms."¹⁷¹ "[A] State cannot bar the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death."¹⁷² The Court quoted *Payne*: "We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death," and that "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances."¹⁷³

It also repeatedly returned to *Skipper*.¹⁷⁴ In rejecting the Fifth Circuit's complex test for "constitutional relevance," the Court reaffirmed *Skipper*'s central holding, its "corollary rule" to *Eddings* and *Lockett*: "[T]he question is simply whether the evidence is of such a character that it 'might

168. *Tennard*, 284 F.3d at 597.

169. *Id.* at 596–97 ("Even assuming arguendo for purposes of this appeal that Tennard has rebutted with clear and convincing evidence the state court's finding of no evidence of [intellectual disability], his claim must fail because he made no showing at trial that the criminal act was attributable to this severe permanent condition. . . . A petitioner must show there is a nexus between the severe permanent condition (here, alleged [intellectual disability]) and the capital murder." (emphasis omitted)).

170. *Tennard*, 542 U.S. at 284.

171. *Id.*

172. *Id.* at 285 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990)).

173. *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (citation omitted)).

174. *Id.* at 285–88.

serve as a basis for a sentence less than death.”¹⁷⁵

A few years later, the Court observed in *Abdul-Kabir v. Quarterman* that

[a] careful review of our jurisprudence in this area makes clear that . . . sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.¹⁷⁶

In a companion case, the Court underscored the extent to which the contemporary definition of mitigating evidence has evolved from *Lockett* and *Eddings*: “[W]e have long recognized that a sentencing jury must be able to give a ‘reasoned moral response’ to a defendant’s mitigating evidence—particularly that evidence which tends to diminish his culpability—when deciding whether to sentence him to death.”¹⁷⁷ The “particularly” signals that, while the Court has generally focused on evidence that diminishes the defendant’s culpability, it is not limited to that.

In sum, *Lockett* and *Eddings* pointed to characteristics of the defendant or circumstances of the crime in the narrowest sense: How substantial was the defendant’s role in the crime? How serious was his criminal history? Did he, as the Court in *Eddings* put it, “suffer[] from severe psychological and emotional disorders, [such] that the killing was in actuality an inevitable product of the way he was raised”?¹⁷⁸ *Skipper* loosened the link between evidence that bears on the moral culpability of the defendant for the crime and mitigating evidence, shifting focus from the crime to the

175. *Id.* at 287 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)).

176. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

177. *Brewer v. Quarterman*, 550 U.S. 286, 289 (2007) (citing *Penry v. Lynaugh*, 492 U.S. 302, 323 (1989), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002), and *holding modified by Boyde v. California*, 494 U.S. 370 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990)).

178. *Eddings v. Oklahoma*, 455 U.S. 104, 109 (1982) (quoting *Eddings v. State*, 616 P.2d 1159, 1170 (Okla. Crim. App. 1980)).

punishment. Whether the defendant could live peaceably in prison in the future was relevant information to the jury in deciding on the sentence. Then *Tennard*'s broad language affirmed the importance of enabling the jury to make a holistic moral assessment of the punishment appropriate for this particular individual.

Emad Atiq and Erin Miller argue that, given this shift, "individualized moral consideration of mitigating factors requires that the sentencer's reasoning not be cabined by artificial legal constraints."¹⁷⁹ What unites *Lockett*, *Eddings*, *Tennard*, and *Smith* is the Court's effort to "elicit[] moral consideration . . . by removing legal constraints on [the sentencer's] ability to consider the evidence from a purely moral point of view."¹⁸⁰ It is therefore "unconstitutional for sentencers to limit the moral principles under which they consider mitigating evidence for *legalistic* reasons."¹⁸¹ Not only do we believe this is correct as a matter of law, but also that it is inevitable in reflecting on the dynamics of capital jury decision-making.¹⁸² What we see in the Court's progression from *Lockett* to *Tennard* is the Court's efforts to articulate a legal standard that acknowledges the jury's peculiarly normative, and fundamentally non-legal, task.

179. Atiq & Miller, *supra* note 25, at 189 (emphasis omitted).

180. *Id.* at 191.

181. *Id.* at 189.

182. See Costanzo & Costanzo, *supra* note 19, at 190, 197.

C. *Challenges to this Understanding of the Court's Jurisprudence*

Despite the Court's description of its jurisprudence as "clear,"¹⁸³ the road to *Tennard* suggests that this definition of mitigation was not inevitable, consistently advanced by the Court, nor uniformly accepted. A post-*Tennard* brief filed by the government in a federal death penalty case, for example, quoted from a number of cases in which the Supreme Court used some variant of the "characteristics of the offender or circumstances of the crime" locution to describe mitigation.¹⁸⁴ The same brief also rejects our reading of *Skipper*, highlighting language in the opinion that describes evidence of Skipper's adjustment to jail as helping the jury "consider[] all relevant facets of the character and record of the individual offender."¹⁸⁵ Under this view, the Court may have loosened the connection to the crime, but not from the focus on the defendant.

The en banc Sixth Circuit also expressed skepticism that *Tennard* represented a shift in the Court's definition of mitigating evidence, finding that, while the Court did write

183. *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007).

184. Brief for the United States in Opposition to Petition for Certiorari at 20, *Garcia v. United States*, 571 U.S. 1195 (2014) (No. 12-10821) (filed Jan. 6, 2014 in opposition to Petition for Certiorari) ("The Court's decisions following *Woodson*, *Lockett*, and *Eddings* have repeatedly relied on the *Lockett* plurality's definition of constitutionally required mitigating evidence, and the Court has never indicated that the required evidence extends beyond that definition's two broad categories." (first citing *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990); then *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989); then *Mills v. Maryland*, 486 U.S. 367, 374 (1988); and then *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986))).

185. *Id.* at 8–9 (emphasis added). The government also noted other cases in which the Supreme Court limited evidence that might fit into this more holistic approach. *Id.* at 21. For example, in *Oregon v. Guzek*, the Supreme Court held the capital defendant was not entitled to introduce at sentencing new "innocence-related evidence," where he could have presented it during the guilt/innocence phase of the trial, as it "sheds no light on the manner in which he committed the crime for which he has been convicted." 546 U.S. 517, 519, 523, 526–27 (2006). Because we focus solely on evidence relevant to the moral decision of sentencing a guilty person, *Guzek* is not relevant to our argument.

that mitigation was anything “the sentencer could reasonably find . . . warrants a sentence less than death,” one had to “read [the phrase] in the context of the rest of the Supreme Court’s mitigation-evidence caselaw.”¹⁸⁶ This led the Sixth Circuit to conclude that “that passage simply refers to evidence relevant to a reasoned moral response to the defendant’s background, character, and crime.”¹⁸⁷ Agreeing that the sentencing decision was a moral decision, the Sixth Circuit found that the Supreme Court had designated only two “morally significant bins”—“broadly stated, culpability and character”—into which evidence must fall to be admissible.¹⁸⁸ To interpret the decision otherwise would be to understand the Eighth Amendment to “compel admission of evidence regarding the positions of the planets and moons at the time of the defendant’s offense—so long as he can show that at least one juror is a firm believer in astrology.”¹⁸⁹

As we have argued, the Court’s evolving definition of mitigating evidence is better understood to extend beyond “culpability and character” to the full complexity of moral decision-making, a task wholly other than astrology. In the following Part, we explain why some courts have excluded execution impact evidence, a co-participant’s non-death sentence, and evidence of government negligence, and then discuss the moral, not idiosyncratic, relevance of this evidence.

186. *United States v. Gabrion*, 719 F.3d 511, 522 (2013) (quoting *Tennard v. Dretke*, 542 U.S. 274, 285 (2004)).

187. *Id.* (quoting *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *abrogated on other grounds* by *Atkins v. Virginia*, 536 U.S. 304 (2002), and *holding modified* by *Boyde v. California*, 494 U.S. 370 (1990), and *Saffle v. Parks*, 494 U.S. 484 (1990)).

188. *Id.* at 523.

189. *Id.* at 522.

IV. CONTESTED MITIGATION AND MORAL DECISION-MAKING

As we mentioned above, we focused on capital juries' assessments of evidence of execution impact, co-participant sentencing, and government negligence, because these categories of evidence are legally contested, but also because they are relevant to frameworks of moral decision-making. In this Part, we describe both the legal debate and relevant moral perspectives.

A. *Exclusion of Execution Impact Evidence*

1. Legal Debate

As discussed above in Section I.C.1, "execution impact" evidence (EIE) generally consists of witnesses (usually family members) who testify to the harm they would suffer if the defendant were executed. Some courts have permitted EIE to the extent that it demonstrates the defendant's good character, that he is someone who can be loved. By contrast, testimony about how someone would suffer as a result of the defendant's execution is more contested.

The California Supreme Court explained in approving the admission of execution impact evidence: "A defendant may offer evidence that he or she is loved by family members or others, and that these individuals want him or her to live. [This] evidence is relevant because it constitutes indirect evidence of the defendant's character."¹⁹⁰ The court contrasted this relevance with the defendant's family's experience: "[S]ympathy for a defendant's family is not a matter that a capital jury can consider in mitigation."¹⁹¹

190. *People v. Ochoa*, 966 P.2d 442, 505–06 (Cal. 1998).

191. *Id.* at 506; *see also* *People v. Gonzales*, 281 P.3d 834, 880 (Cal. 2012) ("We distinguish[] between 'evidence that [a defendant] is loved by family members or others, and that these individuals want him or her to live . . . [and evidence about] whether the defendant's family deserves to suffer the pain of having a family member executed.' . . . [T]he latter improperly asks the jury to spare the defendant's life because it 'believes that the impact of the execution would be

One trial court limited witness testimony accordingly:

As Defense counsel stated at oral argument, [the witness] may testify to the effect “that he has been a good enough person to build a relationship with someone to the point that that person will say I care that he’s going to be executed and I don’t want to see him executed.”¹⁹²

The Fourth and Fifth Circuits have notably held that the defendant has no right to present execution impact evidence.¹⁹³ The Fourth Circuit, citing *Lockett*, rejected execution impact evidence in *United States v. Hager* because “to allow evidence about the impact the execution will have upon a third party goes beyond testimony about the defendant’s character, prior record, or the circumstances of

devastating to other members of the defendant’s family.” (quoting *Ochoa*, 966 P.2d at 505–06)); *State v. Dickerson*, 716 S.E.2d 895, 906–07 (S.C. 2011) (holding EIE admissible only insofar as it illuminates defendant’s character).

192. *United States v. Williams*, 18 F. Supp. 3d 1065, 1071–72 (D. Haw. 2014) (citation omitted).

193. Many states have also rejected execution impact evidence. *See, e.g.*, *Albarran v. State*, 96 So. 3d 131, 204–06 (Ala. Crim. App. 2011) (holding execution impact testimony should not be considered as a mitigating circumstance); *Woods v. State*, 13 So. 3d 1, 33–34 (Ala. Crim. App. 2007) (holding execution impact evidence is not a valid mitigating circumstance and is irrelevant in the penalty-phase of a capital-murder trial “because it does not relate to a defendant’s character or record or the circumstances of the crime”); *State v. Chappell*, 236 P.3d 1176, 1185 (Ariz. 2010) (Eighth Amendment does not limit “the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.” (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 n.12 (1978))); *State v. Anderson*, 996 So. 2d 973, 1014 (La. 2008) (holding no right of defense to elicit impact testimony); *State v. Nicholson*, 558 S.E.2d 109, 136 (N.C. 2002) (EIE properly excluded, because evidence does not “bear[] on the defendant’s character, prior record, or the circumstances of his offense.”); *Commonwealth v. Harris*, 817 A.2d 1033, 1054 (Pa. 2002) (same); *State v. Dickerson*, 716 S.E.2d 895, 906–07 (S.C. 2011) (holding defendant’s cousin’s testimony about effect defendant’s execution would have on family properly excluded as bordering on opinion as to proper sentence); *Jackson v. State*, 33 S.W.3d 828, 834 (Tex. Crim. App. 2000) (upholding exclusion of execution impact testimony); *Gallo v. State*, 239 S.W.3d 757, 778–79 (Tex. Crim. App. 2007) (EIE is not admissible, “because it does not pertain to appellant’s background, character, or record, or the circumstances of the offense.”); *see also* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 32–33 (2000) (noting that admission of such evidence is a minority position).

the crime.”¹⁹⁴ Execution impact evidence is “improper,” because it “in no way reflects on the defendant’s culpability.”¹⁹⁵

Quoting from *Coleman v. Saffle*,¹⁹⁶ a pre-*Tennard* case, the Fourth Circuit explained why execution impact evidence is not mitigating evidence:

The only way they could be considered to bear on [the defendant’s] character is to assume that a wife or sister-in-law would not love him unless he had some good character traits. We doubt that a mother’s love is given only to those children who deserve it; we doubt that a wife (or even a sister-in-law) expresses love only for a husband who deserves it. And even if the statement of love implies some good character traits, it does not identify what they are. Thus, we hold that the statements here do not constitute “relevant mitigating evidence” on which a jury could base sympathy.¹⁹⁷

The Fifth Circuit in *Jackson v. Dretke* similarly used pre-*Tennard* law as its touchstone, concluding that execution impact evidence “is not relevant either to the degree of harm Jackson’s crime caused or to Jackson’s moral culpability for the crime.”¹⁹⁸ In dissent, Judge Dennis reviewed the development of mitigation law since *Lockett*, citing *McKoy*, *Payne*, and *Skipper*, and argued:

Execution impact testimony easily satisfies this sentencing relevance test—it is testimony as to the value of the defendant’s life and cost of his death to family and friends, and this value or cost could serve as a basis for the sentencer to determine that the death penalty should not be imposed.¹⁹⁹

194. *United States v. Hager*, 721 F.3d 167, 194–95 (4th Cir. 2013).

195. *Id.*; see also *State v. Stenson*, 940 P.2d 1239, 1281 (Wash. 1997); *People v. Sanders*, 905 P.2d 420, 459 (Cal. 1995).

196. *Coleman v. Saffle*, 869 F.2d 1377, 1393 (10th Cir. 1989).

197. *Hager*, 721 F.3d at 195; see also *Lawlor v. Zook*, No. 2:15-CV-113, 2016 WL 9132935, at *44–45 (E.D. Va. Aug. 26, 2016), *rev’d on other grounds*, 909 F.3d 614 (4th Cir. 2018).

198. *Jackson v. Dretke*, 450 F.3d 614, 618 (5th Cir. 2006); see also *United States v. Snarr*, 704 F.3d 368, 401 (5th Cir. 2013) (quoting *Jackson*, 450 F.3d at 618).

199. *Jackson*, 450 F.3d at 620 (Dennis, J., dissenting).

Judge Dennis noted the Supreme Court in *Payne* found defendants' expansive rights to present mitigating information to the jury to be a basis for expanding victim survivors' right to present evidence about the impact of the murder on their lives. Judge Dennis reversed the equation: "If the value of the victim's life is permitted to be brought before the jury, however, then I see no option under Supreme Court jurisprudence but to permit the defendant to counter this evidence with evidence of the value of his own life."²⁰⁰ One argument for admitting execution impact evidence, therefore, is that it is simply fair, given the fact that the victim's family has the right to testify about the impact of the loss of the victim on them.

2. Justice Requires Protecting Innocents

While Judge Dennis drew on ideas of equity and fair play as a reason to admit the evidence, jurors may see the evidence as essential to assessing the moral stakes of their decision. This evidence

powerfully conveys to the jurors that their death verdict will affect other members of their community. EIE permits jurors to recognize in a visceral way that their capital decision does not occur in a vacuum—that the life they may decide to take perhaps has had, and perhaps will continue to have, some positive effect on others.²⁰¹

Not only does EIE permit the jury to appreciate the defendant's positive impact on his loved ones, but also these loved ones' suffering. As a juror who participated in the

200. *Id.* at 621.

201. Logan, *supra* note 193, at 52. Logan also notes this consideration of the defendant's family arises in non-capital contexts. *Id.* at 50–51 & n.266 (first citing *People v. Meyer*, 680 N.E.2d 315, 317 (Ill. 1997) (imposition of probationary term rather than prison because of family impact); then *Edgecomb v. State*, 673 N.E.2d 1185, 1199 (Ind. 1996) (hardship of incarceration on children mitigating); and then *State v. Mirakaj*, 632 A.2d 850, 851 (N.J. Super. Ct. App. Div. 1993) (reversing non-capital sentence because lower court failed to consider impact on defendant's children)). Oral histories of individuals affected by the death penalty and the execution of a friend or family member can be found at *The Texas After Violence Project* website, <https://shelteringjustice.texasafterviolence.org/>.

Capital Juror Project explained, “I think that was the most mitigating thing that would lead us away from the death penalty—just how it was devastating to [the defendant’s family]. That basically, having him put to death is just going to create more victims.”²⁰²

Joshua Kleinfeld reflects on the very problem of creating more victims in articulating his principles of democratic criminal justice. He identifies the importance of “prosocial punishment” that “protect[s], repair[s], and reconstruct[s] the normative order violated by a crime while at the same time minimizing the damage to the normative order caused by punishment itself.”²⁰³ Part of our normative order is our reluctance to hurt innocent people.²⁰⁴ In discussing Capital Jury Project research, Kleinfeld observes that jurors’ attention to the innocent “evinces not just a sentiment or emotion, but a certain kind of moral position”;²⁰⁵ namely that it is wrong to hurt innocent people.

Jurors would hardly be alone in reflecting on the impact of punishment on others. While empiricism rather than moral philosophy drive this research, “Focal Concerns” theorists have explored the ways in which judges integrate considerations other than the traditional punishment frameworks of retribution, deterrence, and incapacitation.²⁰⁶ The defendant’s blameworthiness—the crime’s seriousness, the defendant’s prior criminal history, role in the crime, background of victimization by parents or others—and his future dangerousness to the community are certainly important to judges. In addition, however, empirical

202. Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1155 (1997).

203. Joshua Kleinfeld, *Three Principles of Democratic Criminal Justice*, 111 NW. U. L. REV. 1455, 1479 (2017).

204. Kleinfeld, *supra* note 23, at 1094, 1099.

205. *Id.* at 1139.

206. See, e.g., Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 767 (1998).

research indicates that judges also consider the “practical constraints and consequences” of sentences.²⁰⁷ These may include how a sentence might affect a defendant’s children or other family members.²⁰⁸ When jurors bring to deliberations their interpretations of local norms and community concerns, they are, of course, fulfilling their constitutional role. Both theory and data indicate that a common, and commonsense, norm is to consider the effects of a sentence on others.

B. *Exclusion of Co-Participant’s Non-Death Sentence*

1. Legal Debate

Sentences received by other participants in the crime are also often excluded from capital sentencing hearings. State courts and the federal circuits are divided with respect to the admissibility of a co-participant’s non-death sentence in the

207. *Id.*; see also Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Sentencing Outcomes in U.S. Federal Courts: Who is Punished More Harshly?*, 65 AM. SOCIO. REV. 705, 709 (2000). These “practical constraints and consequence” concerns include judicial preoccupations (such as the impact of a sentence on their relationships within the court community of prosecutors, defense attorneys, and judges, and the judge’s career concerns). Darrell Steffensmeier & Stephen Demuth, *Ethnicity and Judges’ Sentencing Decision: Hispanic-Black-White Comparisons*, 39 CRIMINOLOGY 145, 151 (2001). These concerns would not be shared by the jurors as they are not repeat-players. See Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 100 (1974). For a discussion of how jurors share at least some of judges’ focal concerns, see Mary R. Rose & Meredith Martin Rountree, *The Focal Concerns of Jurors Evaluating Mitigation: Evidence from Federal Capital Jury Forms*, LAW & SOC’Y REV. (forthcoming) (on file with authors).

208. Steffensmeier & Demuth, *supra* note 207, at 709. Because execution impact evidence is a kind of focal concern, and because Focal Concerns theorists highlight the fact that these concerns contribute to racial stratification in sentencing, we analyzed our data for a race effect. We found no evidence that jurors are more likely to have EIE presented in cases involving White defendants. Race of the defendant shows only a marginally significant relationship to whether jurors consider EIE in the case ($p < .06$), with patterns suggesting that it is the “Other Race” category that were more likely to have at least one EIE mitigator (i.e., 52% of all cases had EIE, but 70% of cases with a non-Black or non-White defendant had EIE). The majority of defendants in the “Other Race” category were Latino ($n = 29$ of 37 defendants).

trial of another co-participant.²⁰⁹ Proponents of this evidence argue that this information provides essential information about how another jury assessed the crime and gauged the interactions of the participants.²¹⁰ The United States Congress believed this was sufficiently relevant to sentencing that it listed it as a “Mitigating Factor” the jury “shall consider” in sentencing.²¹¹

The conventional argument against admitting evidence of a co-participant’s sentence is that “each capital defendant is unique, and the jury is called upon to render a sentencing decision unique to that defendant.”²¹² Evidence about others’ sentences merely serve to distract the jury from its proper function to determine which sentence this defendant should receive.²¹³

While state or federal law may permit the introduction of the co-participant’s more lenient sentence, whether the Eighth Amendment compels its admission is a different question. Eighth Amendment arguments for admitting this evidence stem from *Parker v. Dugger*, in which the Supreme Court characterized a co-participant’s lenient sentence as mitigating evidence.²¹⁴ Opponents of this evidence have argued the Supreme Court simply drew on Florida law in *Parker* and did not adjudicate the Eighth Amendment

209. See Jeffrey L. Kirchmeier, *Beyond Compare? A Codefendant’s Prison Sentence as a Mitigating Factor in Death Penalty Cases*, 71 FLA. L. REV. 1017, 1038 (2019) (collecting cases admitting and excluding co-participant non-death sentences).

210. *Id.* at 1054.

211. 18 U.S.C. § 3592(a)(4) (“In determining whether a sentence of death is to be imposed on a defendant, the finder of fact shall consider any mitigating factor, including the following: . . . Another defendant or defendants, equally culpable in the crime, will not be punished by death.”).

212. David McCord & Mark W. Bennett, *The Proposed Capital Penalty Phase Rules of Evidence*, 36 CARDOZO L. REV. 417, 448 (2014).

213. *Id.*

214. 498 U.S. 308, 315 (1991).

question.²¹⁵

The argument against admissibility tracks familiar lines. The Texas Court of Criminal Appeals, for example, rejected the relevance of this evidence, stating:

We do not see how the conviction and punishment of a *co-defendant* could mitigate *appellant's* culpability in the crime. Each defendant should be judged by his *own* conduct and participation and by his *own* circumstances. If evidence of a co-defendant's convictions and punishment were admissible, why not the convictions in all other capital murders and the punishment in those cases? We do not believe this is what the right to present mitigating circumstances to the jury was meant to include. The law contemplates evidence personal to the accused, not comparisons with the convictions and punishments of other defendants.²¹⁶

By this logic, if the evidence does not relate directly to the defendant, it is not relevant to his sentence.

2. Fairness Requires Equitable Sentencing

A just sentence can require attention to consistency in punishment, including whether similarly or more culpable people have not been punished as severely as the government seeks to punish the defendant in his particular case. Jeffrey L. Kirchmeier argues that, not only should a co-participant's sentence be admitted because it is a "circumstance of the offense," but also because it sounds in the Supreme Court's concerns regarding retribution, deterrence, proportionality,

215. See, e.g., *Edwards v. State*, 200 S.W.3d 500, 510 (Mo. 2006), *as modified on denial of reh'g* ("Parker holds that any mitigating evidence that is admitted under state law must be considered and weighed against the aggravating factors found. The United States Supreme Court does not say that an accomplice's sentence is constitutionally required mitigating evidence; rather, the Court says that if that evidence is admitted under state law, then it must be considered by the sentencer."); *Morris v. State*, 940 S.W.2d 610, 614 (Tex. Crim. App. 1996); *State v. Ward*, 449 S.E.2d 709, 737 (N.C. 1994) (same); *People v. Mincey*, 827 P.2d 388, 434 (Cal. 1992).

216. *Evans v. State*, 656 S.W.2d 65, 67 (Tex. Crim. App. 1983); see also *Joubert v. State*, 235 S.W.3d 729, 735 (Tex. Crim. App. 2007) (quoting *Morris*, 940 S.W.2d at 613).

and fairness in sentencing.²¹⁷ “[H]orizontal equity,” where comparable offenders receive comparable punishment, is just.²¹⁸

Co-participants’ sentences can also implicate more than just a circumstance of the offense and proportionality. Sentence disparities reflect the sometimes unseemly horse-trading involved in multi-party prosecutions. The co-participant’s lower sentence might be more attributable to the nitty-gritty of criminal prosecutions, where someone’s lower sentence might reflect his cooperation with law enforcement or his lawyer’s ability to make a better deal with the prosecutor, than to his own culpability.²¹⁹ We return to the jurors’ interest in the prosecution in the next Section.

C. *Exclusion of Government Negligence*

1. Legal Debate

While a less discrete area of litigation, our data indicated striking juror support for government negligence mitigation.²²⁰ Verdict forms contained essentially three types of evidence regarding government negligence. Most common was evidence involving the government’s failure to, for example, remove the defendant from his abusive home or

217. Kirchmeier, *supra* note 209, at 1045–53.

218. Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1269–70 (2005).

219. See, e.g., R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About A Prosecutor’s Ethical Duty to “Seek Justice”*, 82 NOTRE DAME L. REV. 635, 654 (2006) (“[P]lea bargaining in criminal cases is almost completely unregulated as a matter of professional responsibility.”); Daniel Richard Stockmann, *Understanding the Process of Defending Gang Crime Cases*, in STRATEGIES FOR DEFENDING GANG CRIMES *9 (Thompson Reuters/Aspatore 2013), 2013 WL 2727658 (Cooperating co-defendant “may be . . . giving information the officers want to hear just to strike a deal or even because they were threatened if they failed to cooperate.”); Daniel A. Hochheiser, *Strategy, Tips, and Tactics: Defending Gang Crime Cases*, in STRATEGIES FOR DEFENDING GANG CRIMES *4 (Thompson Reuters/Aspatore 2013), 2013 WL 2727655.

220. See *supra* Section I.C.3.

put him in special education classes. Defense efforts to admit this evidence are unlikely to provoke much resistance from the prosecution or the court. These failures clearly help jurors understand the defendant's childhood and how he became someone who could commit the crime for which they just convicted him. This evidence is in the heartland of *Lockett* and *Eddings*. Developing and presenting this evidence is an essential part of competent capital defense representation.²²¹

We saw another theory of government negligence that implicates the defendant's mens rea for the crime. In Kenneth Wilk's unusual case, the jury considered whether the police conduct during a raid on Wilk's home might have contributed to Wilk's shooting a law enforcement officer.²²² They were asked to vote on the following assertion: "Although not sufficient to establish self-defense, the following factors may have contributed to Mr. Wilk's reaction when the police forcibly entered his home," followed by a range of considerations, such as the defendant's hearing loss, prior experience with harassment at his home, poor visibility inside the home, but also the fact that "the entry team was not in full police uniform."²²³ As an additional mitigating factor, jurors wrote in (and ten voted for): "The manner in which the search & arrest warrants were planned & carried out."²²⁴ As with the information about the defendant's childhood, whether to admit evidence supporting the contention that government conduct contributed to the homicide is not controversial. This is evidence of the "circumstances of the offense," contemplated by *Lockett*, that reduces personal culpability.

221. See Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Def. Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1021-26 (2003).

222. Special Verdict Form at 7, *United States v. Wilk*, No. 04-60216-CR (S.D. Fla. Apr. 19, 2005).

223. *Id.*

224. *Id.* at 10 (Item F).

The most intriguing type of government negligence evidence involves mitigators that have little to nothing to do with the defendant's personal culpability, instead focusing on the role government action or inaction played in permitting the crime to happen. This latter type of evidence is legally more contested.

In one case, the defendant sought to present evidence that the U.S. Army shared responsibility for the death of his daughter, because it was aware that he had previously abused his daughter. The district court rejected his argument. Not only, the court held, is third-party negligence not listed as a mitigator in the Federal Death Penalty Act, but the catch-all provision, "any other circumstance of the offense that mitigate[s] against imposition of the death sentence,"²²⁵ was also inapt.

[T]hat the U.S. Army had notice of [the victim's] abuse is not a "circumstance" of Defendant's offense of child abuse murder and murder That is, the U.S. Army was not involved in the offense conduct, and its notice of any abuse does not in any way lessen and/or explain Defendant's conduct in carrying out the offense.²²⁶

In another case, the defense sought to present evidence that the defendant had called the FBI to tell them that he felt "out of control."²²⁷ He said that he was wanted by law enforcement and he not only proposed a time and place to surrender, but he actually showed up at that time and place.²²⁸ The FBI, however, failed to respond.²²⁹ The trial court found these "allegations of 'contributory negligence' by third parties" not relevant as mitigation: "[T]he Court is not

225. 18 U.S.C. § 3592(a)(8).

226. *United States v. Williams*, Crim. No. 06-00079 JMS/KSC, 2014 WL 2436199, at *4 (D. Haw. May 30, 2014).

227. *United States v. Sampson*, Crim. Action No. 01-10384-LTS, 2016 WL 11573524, at *5 (D. Mass. May 13, 2016).

228. *Id.*

229. *Id.* The defendant's call reportedly dropped, and the FBI employee who took the call did not pass the defendant's information along. *Id.*

persuaded such facts are reasonably viewed as mitigating or diminishing [Defendant's] culpability for his crimes.”²³⁰

Governmental responsibility for creating the specific circumstances that may have given rise to a crime is particularly relevant to homicide cases occurring in prisons, an environment the government tightly controls. While the federal verdict forms discussed above allow us to see how jurors respond to evidence about government failings, not all jurors have the opportunity to consider it. In one federal prosecution of a prison homicide, for example, the government asked the court to “preclude the defendants from offering evidence or argument regarding any violation of any official BOP policy or procedure that may have contributed to the defendants’ ability to carry out the assault”²³¹ on the victim. The district court granted the government’s motion in part, stating that “merely because the killing of [the victim] was made feasible by perceived deficiencies in BOP policies or personnel has no bearing on the guilt of the Defendants. Hence, Defendants will not be permitted to use alleged BOP employee negligence as a smokescreen.”²³²

This issue has also arisen in state court cases. The trial court in *Eaglin v. Florida*²³³ denied the defendant the opportunity to introduce “evidence of security lapses and supervision and systems failures at the prison as mitigation.”²³⁴ The Florida Supreme Court upheld the trial court’s decision, finding the prison’s negligence did “not reduce the moral culpability of Eaglin for the murders.”²³⁵ In *Williams v. State*, the defendant argued the court should

230. *Id.*

231. Gov’t’s Response to Defs.’ Motion for Admissibility of Evidence in Civ. Law Suit & Motion in Limine at 3, *United States v. Cramer*, No. 1:16-CR-26, 2018 WL 3819992 (E.D. Tex. May 30, 2018).

232. *Id.*

233. 19 So. 3d 935 (Fla. 2009).

234. *Id.* at 943.

235. *Id.* at 944.

allow him to present evidence of the Arkansas Department of Correction's negligence in handling him.²³⁶ The Arkansas Supreme Court disagreed, reciting the *Lockett/Eddings* framework:

Where the offered evidence of mitigation has nothing to do with a criminal defendant's character, record, background, history, condition, or the circumstances of his crime, it is not relevant on the issue of punishment. Williams's argument is essentially that because the Department of Correction knew he was a violent man, it should have protected him against himself by assuring he did not escape and that somehow the alleged negligence of the Department of Correction diminished Williams's responsibility for the carnage he wreaked upon his escape.²³⁷

The court concluded that because the evidence "does not have any tendency to diminish Williams's responsibility," it was not mitigating and therefore not admissible.²³⁸

2. Blaming Requires Moral Standing

The uneasiness with prosecutorial ethics we raised with respect to co-participant sentencing raises a subtler moral consideration that is squarely presented by evidence of government negligence. In these cases, the facts in no way excuse the defendant's own actions. Instead they raise the question whether the government's "unclean hands" compromised its "moral authority to hold another person wholly responsible for a wrongful act."²³⁹

Victor Tadros has addressed the power of the State to blame (and punish) those individuals it has failed generally.²⁴⁰ His theory can help us understand the possible

236. 67 S.W.3d 548, 562 (Ark. 2002).

237. *Id.* at 563.

238. *Id.*

239. Atiq & Miller, *supra* note 25, at 187–89 (punctuation and emphasis omitted); see also Gustavo A. Beade, *Who Can Blame Whom? Moral Standing to Blame and Punish Deprived Citizens*, 13 CRIM. L. & PHIL. 271, 277–78 (2019).

240. See generally Victor Tadros, *Poverty and Criminal Responsibility*, 43 J. VALUE INQUIRY 391 (2009).

reasoning underlying jurors' votes on specific State failures. Tadros observes that "[i]t is one thing to say about a person that she is responsible for the action she performs. It is another thing to say that we are entitled to hold her responsible for her actions."²⁴¹ Tadros frames this entitlement to blame as the blamer's "standing." The blamer's entitlement to blame is diminished where it "is in some way at fault for the occurrence of the wrongful conduct."²⁴²

R.A. Duff approached the question by reflecting on how blaming relates to the normative community: "Blame requires a suitable relationship between blamer and blamed, as fellow members of a normative community whose business the wrong is: it is an attempt at moral communication, appealing to values by which blamer and blamed are, supposedly, mutually bound."²⁴³ Duff compares being reproached by a friend and by a stranger. We take the friend's reproach more seriously than the stranger's, because we share a normative community with our friend. By contrast, we don't have to explain or justify ourselves to strangers.²⁴⁴

Taking the analysis a step further, Duff poses the hypothetical where Ian has stolen money from his and Hilda's roommate, but Hilda gave him the idea. If Hilda subsequently allies herself with the roommate and seeks to call Ian to account, Ian may bridle. Ian does not "deny wrongdoing, or claim that Hilda's behaviour justified or excused his; his claim is, rather, that it calls into question her standing to call him to answer to her for his wrongdoing."²⁴⁵ Since she had a role in his actions, however

241. *Id.* at 394.

242. *Id.* at 399.

243. R. A. Duff, *Blame, Moral Standing and the Legitimacy of the Criminal Trial*, 23 *RATIO* 123, 125 (2010).

244. *See id.* at 125.

245. *Id.* at 126–27.

passively, she compromised her moral authority to blame him. She may regain it by acknowledging her own failures, however.²⁴⁶

Capital sentencing, fundamentally a proceeding in which the government seeks to demarcate the defendant—the blamed—as someone so outside the normative community that he must be executed, inevitably forces the jury to ask, “who are you to make this claim?” In this instance, we see the community as the roommate who needs to confront Hilda (the government) for enabling thieving Ian (the defendant). It is crucial for the government to share with the jury a normative community, a sense of values and morality, so that the jury can trust it when it says the defendant must be expelled from it. The government can regain its moral authority by acknowledging its role. In failing to do that, it fails to be part of the normative community. Put another way, the jurors may see the government failure as a kind of contributory fault, as if the jury were saying: “Because the government contributed to what happened, it’s not fair for it to then seek the ultimate penalty against the defendant.”

These moral intuitions—about protecting the innocent, ensuring equitable and proportionate punishment, and insisting on the moral standing of the prosecution—help explain the federal verdict data and also emphasize the stakes of the legal question. The data show that jurors identify the *moral* relevance of this kind of evidence. This evidence is vital for the jurors to perform their constitutional normative role.

V. THE PATH FORWARD

In this Part, we propose rules for admitting this evidence that rely on general principles for considering the moral relevance of purported mitigation. The evidence is relevant if it is specific to the defendant and his situation and maps

246. *See id.* at 127–29.

onto larger normative ideas of justice and fairness. Where a juror could reasonably find the proffered evidence carries moral weight, that evidence is mitigating. In articulating what we believe courts should consider, however, we must also be clear that our proposal is not an invitation to arbitrariness, impermissible sympathy, or caprice. Instead, it increases justice by enabling jurors to bring to bear the fullness of their moral decision.

Acknowledging moral commitments to justice and fairness that are consistent with coherent theories of moral decision-making is not an invitation to arbitrariness.²⁴⁷ In fact, it is harmonious with the Court's interest in reducing arbitrariness.²⁴⁸ As Chad Flanders recently argued, the Court's concern with arbitrariness in death sentencing is best understood as an effort to reduce the number of people who should not be sentenced to death who nevertheless are.²⁴⁹ As "the Court has shown its preference for avoiding giving the death penalty to a person who *may* deserve it,"²⁵⁰ it follows that it also favors expanding the scope of information available to the jury to consider in mitigation.

247. While the Court has generally characterized the eligibility determination as ensuring the death penalty is not meted out in an arbitrary and capricious way, it has also discussed it in the context of jury instructions for the selection decision. *See* *Buchanan v. Angelone*, 522 U.S. 269, 275–76 (1998); *Saffle v. Parks*, 494 U.S. 484, 484 (1990) (citing *California v. Brown*, 479 U.S. 538, 545 (1987)) ("The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice.").

248. *See* Chad Flanders, *What Makes the Death Penalty Arbitrary? (And Does It Matter If It Is?)*, 55 WISC. L. REV. 55, 87–102 (2019) (describing how the Supreme Court has sought to reduce arbitrariness by requiring jury to find aggravating factors, structuring jury decision-making to require consideration of mitigation as well as aggravation, and prohibiting the death penalty for non-homicidal crimes, and for offenders under 18 years old, with intellectual disability, or acting with less than reckless mens rea).

249. *See id.* at 80–83, 90; *see also id.* at 98 ("If there is a risk of arbitrarily overprotecting, this is better than a risk of arbitrarily underprotecting. Intrinsic arbitrariness says: do not give the jury the possibility of assessing the death penalty to someone who does not deserve it.")

250. *Id.* at 88.

The Court in *McCleskey v. Kemp* specifically contrasted “the carefully defined standards that must narrow a sentencer’s discretion to *impose* the death sentence,” with the constitutionally mandated “limits [on] a State’s ability to narrow a sentencer’s discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.”²⁵¹

Nor do the principles of moral decision-making we discuss trade in “mere sympathy.”²⁵² In *California v. Brown*, the Court upheld jury instructions that told the jury “it must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.” The instruction appropriately reminded jurors to focus on the evidence rather than “extraneous emotional factors.”²⁵³ Justice O’Connor in her concurrence contrasted the impermissible “emotional response to the mitigation evidence” with the jurors’ “moral inquiry” into the defendant’s culpability.”²⁵⁴ This Article promotes only the latter.

In another challenge to an anti-sympathy instruction, the Court explained that while *Lockett* and *Eddings* “place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made,”²⁵⁵ the prisoner wanted something different. Rather than asking to expand “*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision,” he wanted to prohibit “*how* it must consider the mitigating evidence.”²⁵⁶ Our argument for providing the jurors with evidence regarding execution impact, sentence equity, and government negligence or malfeasance falls

251. *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987).

252. *See California v. Brown*, 479 U.S. 538, 542 (1987).

253. *Id.* at 543.

254. *Id.* at 545 (O’Connor, J., concurring).

255. *See Saffle v. Parks*, 494 U.S. 484, 490 (1990).

256. *Id.*

squarely within the “what,” rather than the “how,” the Court permits.

Finally, the evidence discussed in this Article does not cater to jurors’ “whims or caprice.”²⁵⁷ Our reading of the Court’s *Lockett* cases would not compel admission of evidence based on a juror’s beliefs in, for example, astrology, “an empty concept to be filled by whatever a lawyer or court thinks might persuade a single juror in a particular case.”²⁵⁸ The linchpin of our argument is that a reasoned moral response requires attention to how we reason about moral decisions. Our data make clear that the kinds of evidence we discuss here do not speak to empty concepts or the single idiosyncratic juror or case. Instead, the data show patterns of significant juror support across cases that signal a more complex—and morally indispensable—reasoning at work. Instead of “transform[ing] mitigation from a moral concept to a predictive one,”²⁵⁹ our interpretation of the cases *reinvigorates* the moral content of the jury’s decision.

A. *Admit Execution Impact Evidence*

In formulating this proposal, we take our guidance from the data. The jurors are telling us that they care about the effects of the defendant’s execution on his loved ones. The moral considerations we outlined, however—the moral resistance to hurting innocents—could at least theoretically apply far beyond the friends and family of the defendant. Should jurors be able to hear from correctional officers, wardens, reporters, and others whose contact with the death

257. *Id.* at 493.

258. *United States v. Gabrion*, 719 F.3d 511, 522 (6th Cir. 2013); *see also* *United States v. Fell*, 531 F.3d 197, 219 (2d Cir. 2008) (“[Constitutional and] evidentiary standards do not mean that the defense has *carte blanche* to introduce any and all evidence that it wishes.” (citing *United States v. Purkey*, 428 F.3d 738, 756 (8th Cir. 2005))).

259. *Gabrion*, 719 F.3d at 522.

penalty will distress them in general?²⁶⁰ We believe they should not. Our argument regarding admissibility is guided by the conjunction of moral principle and empirical data but is also informed by Court's concern for individualization. Admitting testimony from these witnesses because a juror might find them compelling threatens to turn capital sentencing proceedings into trials about the morality of the death penalty in general. The juror's role in the post-*Gregg* era is to decide the morality of the death penalty *for this individual*. Therefore, execution impact evidence should be limited to evidence about how the execution of this specific person will affect them. The defendant must play a concrete role in that prospective witness's life.²⁶¹ This rule parallels victim impact evidence: although we might weep for the victim of a murder we do not know, we cannot testify at trial, no matter how acutely we may feel the loss of the victim. For both those affected by the murder and by the execution, only the "specific harm caused" should be admitted.²⁶²

B. *Inform Juries of Co-Participant Sentences*

As mentioned above, admitting evidence of a co-participant's sentence could turn the defendant's sentencing into a mini-trial on the co-participant's just deserts. Further, the co-participant's just desert may be wholly irrelevant to the defendant's role in the crime. For example, what if the co-participant received a non-death sentence because of his

260. See, e.g., Jim Dwyer, *Death Penalty Can Be Hard on Those Who Carry It Out*, <https://www.pulitzer.org/article/death-penalty-can-be-hard-those-who-carry-it-out> (last visited Dec. 21, 2021).

261. Courts should recognize, however, how being in custody shapes relationships. The stringent limits jails and prisons place on relationships mean that people have to rely on different ways to connect. Powerful relationships can be forged through correspondence and occasional visits. The courts' role is not to assess the bonds between the defendant and another person, but only to determine that a personal connection specific to this particular defendant exists.

262. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991).

intellectual disability?²⁶³ (People with intellectual disabilities are excluded from the death penalty.)²⁶⁴ That co-participant received that lower sentence because he is “less morally culpable”²⁶⁵ in a way that is wholly irrelevant to the defendant’s own culpability.

In responding to these concerns, we borrow from the practice of written victim impact statements, which prosecution and defense lawyers commonly negotiate and courts review.²⁶⁶ This co-participant sentencing statement would simply tell the jury what sentence the co-defendant received and the parties would have the opportunity to supply the jury—in this written statement—a concise description of the relevant evidence. This would be the prosecution’s opportunity to state that the co-participant’s sentencer considered, for example, any intellectual disability, and the defense’s chance to describe evidence regarding the co-participant’s actions and any benefits the co-participant might have received in exchange, for example, for his cooperation. Reducing the account of the co-participant’s sentencing to a sentencing statement addresses concerns regarding the potential for a mini-trial and allows both parties to advance their arguments about what constitutes justice in this case.²⁶⁷ The prosecution and

263. We thank Jordan M. Steiker for this reminder.

264. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

265. *Id.* at 320.

266. *See, e.g.*, *Bush v. Carpenter*, 926 F.3d 644, 658 (10th Cir. 2019), *cert. denied sub nom.* 140 S. Ct. 2770 (2020); *United States v. Henderson*, 485 F. Supp. 2d 831, 849 (S.D. Ohio 2007); *United States v. McVeigh*, 958 F. Supp. 512, 514–15 (D. Colo. 1997).

267. Courts have generally found that defendants do not have a right to confront witnesses against them during the so-called “selection” phase of the trial. *See State v. Martinez*, 303 P.3d 627, 630–31 (Idaho Ct. App. 2013) (noting that federal circuit courts and most state courts find Confrontation Clause does not apply to sentencing); *United States v. Fields*, 483 F.3d 313, 325–26 (5th Cir. 2007) (“Confrontation Clause does not operate to bar the admission of testimony relevant only to a capital sentencing authority’s selection decision.”); *United States v. Umana*, 750 F.3d 320, 348 (4th Cir. 2014) (similar observation); *see also McCord & Bennett, supra* note 212, at 493 (“[T]he eligibility phase presents a

defense can each argue why the co-participant's sentence is or is not a meaningful signal regarding the defendant's just deserts.

C. Admit Evidence of Government Negligence

As we note above, most evidence relating to government failures is admitted as part of the defendant's background. If a person acted out because the government failed to provide them with adequate educational or health services, for example, the evidence would fall well within the *Lockett/Eddings* framework. Whether this failure "lessen[s] and/or explain[s] Defendant's conduct in carrying out the offense"²⁶⁸ or "diminish[es] [his] culpability"²⁶⁹ should not be the test, however. The write-ins, but especially the BOP cases, enable us to tease out government failure as a distinct form of juror reasoning. We propose that evidence that the government's acts or omissions contributed to the offense should be admissible, just as evidence relating to the government failures shaping the defendant's background is admissible. Therefore, where, as in Naeem Williams's case, the U.S. Army knew he was abusing the child he would later kill, the jury should be informed of the government's knowledge.²⁷⁰ This in no way excuses Williams's conduct, but one can readily see how a jury could question the government's moral standing to seek the ultimate punishment.

traditional legal issue of proof of an aggravating circumstance which is quite amenable to requiring compliance with the Confrontation Clause, while the selection phase ultimately presents a moral issue of what sentence the defendant deserves.").

268. *United States v. Williams*, Crim. No. 06-00079 JMS/KSC, 2014 WL 2436199, at *4 (D. Haw. May 30, 2014).

269. *United States v. Sampson*, Crim. Action No. 01-10384-LTS, 2016 WL 11573524, at *3 (D. Mass. May 13, 2016) (quoting *United States v. Gabrion*, 719 F.3d 511, 524 (6th Cir. 2013)).

270. *Williams*, 2016 WL 11573524, at *4.

CONCLUSION

We contend the Supreme Court's Eighth Amendment jurisprudence does and should permit introduction of evidence that does not speak directly to the offender or his offense but relates instead to the complex moral decision capital jurors make. This position emerges from our understanding of the Court's definition of mitigation as one that emphasizes a broader "reasoned moral" decision rather than one tied narrowly to the *Lockett/Eddings* focus on the offender and the offense. It is consistent with the direction of the Court's mitigation decisions and the appropriate role of the jury. The Court's insight in *Woodson*—that mandatory sentencing wreaks unfairness because it fails to acknowledge the complexity and variety of human experiences and "frailties"—has gradually expanded to comprehend a broader definition of mitigation to meet the Court's commitment to the jury's normative role.

The kinds of mitigation that some courts have rejected—execution impact evidence, sentences for co-participants, and governmental negligence—reflect principles that legal and social scientific scholars have identified as part and parcel of moral determinations, particularly sentencing. They are calling on "alternative moral principles"²⁷¹ to those permitted by those courts who read *Lockett* and *Eddings* as fixing the boundaries of relevant mitigation. The federal jury verdicts forms provide a singular perspective onto what matters to jurors and demonstrate there is more at stake in sentencing than a defendant's individual culpability. Our data demonstrate jurors attend to more complex aspects of the sentencing decision than simply the characteristics of the offender and the circumstances of the offense. Lower courts err when they cling to a conceptually outdated and unduly restrictive definition of relevance, one which our data show is out of step with jurors' moral sensibilities.

271. Atiq & Miller, *supra* note 25, at 170.

Our empirical findings are particularly striking, given what we know about the process through which capital jurors are selected. The procedure, commonly called “death qualification,” ensures that only those who could sentence someone to death are seated as jurors.²⁷² So-called “death-qualified” jurors are less likely to be women, people with low incomes, people of color, Jews, and Catholics.²⁷³ They are also more likely to be punitive, harbor prejudiced attitudes, and identify more with victims and less with defendants (about whom they hold unfavorable attitudes).²⁷⁴ With respect to how they approach the questions they must specifically consider in a capital trial, death-qualified jurors are more likely to endorse aggravating factors and find them more aggravating than non-death-qualified jurors. In addition, not only are they less likely to endorse mitigators, they also find them less mitigating—and sometimes even find them aggravating—when compared to non-death-qualified mock jurors.²⁷⁵ In other words, capital jurors are not bleeding-heart liberals. There is no reason to believe these jurors would be unusually open to, or solicitous of, mitigating evidence. In fact, just the opposite. These underlying attitudes make the jurors’ expansive moral vision particularly noteworthy.

With respect to EIE, it is plain that the defendant’s family matters to capital jurors. But this attention to EIE should not be seen as simply an add-on to the question of the defendant’s moral blameworthiness. In considering a co-participant’s sentence, jurors reflect on the appropriate punishment for the defendant before them and weigh the prospect of unfair disparities in sentencing. Government

272. Logan A. Yelderman, Monica K. Miller & Clayton D. Peoples, *Capitalizing Jurors: How Death Qualification Relates to Jury Composition, Jurors’ Perceptions, and Trial Outcomes*, in *ADVANCES IN PSYCHOLOGY AND LAW* 28 (B.H. Bornstein & M.K. Miller eds., 2016).

273. *Id.* at 35–36.

274. *Id.* at 37–38.

275. *Id.* at 38.

failures such as those we see in the BOP cases do not diminish the defendant's culpability. Does it really make us think better of the defendant to know that he took advantage of organizational dysfunction and incompetence? Yet jurors do find this information mitigating, as if the jury were saying the government is morally estopped from now claiming that justice requires executing the defendant.

We have proposed principles and rules for admitting this evidence that demonstrate that admitting this evidence poses no insuperable logistical impediment. We believe these will assist courts who confront evidence other than that which we address here. Courts currently consider whether a particular piece of evidence sheds light on the defendant's moral culpability insofar as that informs his sentence. We shift the question only slightly to whether the evidence sheds light on the justice of a death sentence for that defendant. This shift enables courts to foreground the jury and how it reaches its decision about what constitutes a just sentence. Again, how it reaches its decision is not simply an empirical matter. It cannot be enough that nine of ten mock jurors respond to particular evidence. Why they find it important in sentencing—what are the moral principles at stake as they decide what is just—is the crucial inquiry.

Kent Scheidegger recently proposed a dramatic revision of the Supreme Court's mitigation jurisprudence. The defendant should be permitted to present to the jury only the facts of the crime, his lack of significant criminal history, and his youth.²⁷⁶

For everything else, restore to the people the ability to decide through the democratic process which mitigating circumstances have enough probative value to be worth the burden of litigating them and then litigating whether defense counsel presented well enough. The real Constitution does not transfer this decision from the people to the judiciary, and it is high time to give back to the

276. Kent Scheidegger, *Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism*, 17 OHIO ST. J. CRIM. L. 131, 166 (2019).

people the authority that is rightfully theirs.²⁷⁷

While Mr. Scheidegger refers to the democratic process of the legislature,²⁷⁸ he overlooks the democratic contribution of the jury. Our data demonstrate that the jurors took broad view of what constituted mitigating evidence, taking far more into account more than the facts of the crime, the defendant's criminal history, and his age. Indeed, they looked beyond the defendant and his personal blameworthiness. Instead, they brought a more nuanced view of the defendant as a person embedded within a larger social context.

The judiciary, at least in some jurisdictions, may well be taking power away from the jury,²⁷⁹ but the relevant power here, the "authority that is rightfully theirs," is the capital jurors' authority in sentencing individual defendants. Taking the jury seriously requires taking their normative commitments seriously.

277. *Id.*

278. *Id.* at 133, 162.

279. See generally SUJA A. THOMAS, *THE MISSING AMERICAN JURY* (2016) (arguing legal mechanisms such as motions for summary judgment and plea agreements diminish the role of the jury).

APPENDIX²⁸⁰

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

BRIAN RICHARDSON

CRIMINAL ACTION
NO. 1:08-CR-139 (CC)

VERDICT

Part I. FINDINGS ON AGE OF DEFENDANT

(A) We the jury unanimously find beyond a reasonable doubt that the defendant, Brian Richardson, was at least 18 years-old on July 8, 2007.

Foreperson

OR

(B) We the jury unanimously find beyond a reasonable doubt that the defendant, Brian Richardson, was not at least 18 years-old on July 8, 2007.

Foreperson

(If you do find that the government has not proven that Mr. Richardson was at least 18 years-old on July 8, 2007, report this to the Court and your deliberations are concluded.)

280. Verdict, *United States v. Richardson*, No. 1:08-CR-139 (N.D. Ga. Apr. 26, 2012) (full form reproduced here in Appendix with juror names redacted).

Part II. FINDINGS ON INTENT

- (A) We the jury unanimously find beyond a reasonable doubt that the defendant, Brian Richardson, intentionally killed the victim.

Foreperson

OR

- (B) We the jury unanimously find beyond a reasonable doubt that the defendant, Brian Richardson, intentionally inflicted serious bodily injury that resulted in the death of the victim.

Foreperson

OR

- (C) We the jury unanimously find beyond a reasonable doubt that the defendant, Brian Richardson, intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act other than one of the participants in the offense, and the victim died as a direct result of the act;

Foreperson

OR

- (D) We the jury unanimously find beyond a reasonable doubt that the defendant, Brian Richardson, intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act.

Foreperson

OR

(E). We the jury DO NOT unanimously find beyond a reasonable doubt any of A, B, C or D above.

Foreperson

(If you do find E, report the decision to the Court and your deliberations are concluded.)

PART III. STATUTORY AGGRAVATING FACTORS

(to be proved by the government beyond a reasonable doubt)

1. The Defendant has previously been convicted of offenses punishable by imprisonment for a term exceeding one year which involved the use, attempted use, or threatened use of a firearm.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☒ No ☐

2. The Defendant has previously been convicted of two or more offenses punishable by imprisonment for a term exceeding one year, committed on different occasions, involving the infliction of, or attempted infliction of, serious bodily injury or death upon another person.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☐ No ☒

3. The Defendant committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture to the victim.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☒ No ☐

4. The Defendant committed the offense after substantial planning and premeditation to cause the death of a person.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☒ No ☐

5. The Defendant committed the offense upon a victim who was particularly vulnerable due to old age and infirmity.

Proved beyond a reasonable doubt to the jury's
unanimous satisfaction

Yes ☒ No ☐

(You may only continue with your deliberations if you have found at least one listed aggravating circumstance proved to the jury's unanimous satisfaction and beyond a reasonable doubt. If you do not find the aggravating factor or factors to have been proven, report this to the Court and your deliberations are concluded.)

PART IV. NON-STATUTORY AGGRAVATING FACTORS

(to be proved by the government **beyond a reasonable doubt**)

1. Future Dangerousness of the Defendant. The Defendant represents a continuing danger to the lives and safety of other persons. The Defendant has committed the acts alleged in the capital offense charged in the indictment and in the statutory and non-statutory aggravating factors contained in this Notice, and, in addition, has committed and exhibited acts and characteristics including, but not limited to, the following:
 - (a) Specific threats of violence;
 - (b) Continuing pattern of violence;
 - (c) Specific admissions of violence;
 - (d) Low rehabilitative potential;
 - (e) Lack of remorse;
 - (f) Risk of further acts of violence in custody;
 - (g) Risk of escape;
 - (h) Risk of directing others to commit acts of violence in any setting.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☒ No ☐

2. Participation in Additional Uncharged Attempted Murders or Other Serious Acts of Violence. The Defendant has committed several uncharged serious acts of violence and attempted murder while incarcerated.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☒ No ☐

3. The Defendant has caused the death of another individual. On or about February 1, 2008, the Defendant did convince another inmate to commit suicide by hanging himself.

Proved beyond a reasonable doubt to the jury's unanimous satisfaction

Yes ☐ No ☒

(Regardless of the finding you have made as to these non-statutory

PART V. MITIGATING FACTORS

For each of the mitigating factors below, indicate in the space provided the number of jurors who have found the existence of that mitigating factor to be proved by a preponderance of the evidence. In addition, you may find that a mitigating factor exists which is not listed below. In that event, in the space provided below you should write each mitigating factor so found and the number of jurors who concur in the finding of that mitigating factor.

Your vote with respect to a mitigating factor need not be unanimous. A finding with respect to a mitigating factor may be made by one or more of the members of the jury. Any member of the jury who finds the existence of a mitigating factor may consider such a factor in considering whether or not a sentence of death shall be imposed, regardless of the number of other jurors who agree that the factor has been established.

1. Brian Richardson suffers from mental illness.

Number of jurors who so find 7

2. At the time of the offense, Brian Richardson was not medicated with any psychiatric medications.

Number of jurors who so find 12

3. Dr. Victor Gonzalez, the prison psychiatrist who has treated Brian Richardson since the day of the offense, believed that Brian Richardson was so mentally ill at the time of the offense that if he were on the street he would have needed to be institutionalized.

Number of jurors who so find 10

4. Brian Richardson has been taking Prolixin, an anti-psychotic medication, since December, 2008.

Number of jurors who so find 12

5. Brian Richardson has not committed an act of physical violence since being given the correct psychiatric medications in December, 2008.

Number of jurors who so find 12

6. Brian Richardson has not received a disciplinary write up since being given the correct psychiatric medications in December, 2008.

Number of jurors who so find 12

7. Brian Richardson has demonstrated a strong commitment to following his psychiatric medication regime.

Number of jurors who so find 8

8. Brian Richardson's childhood included chaos, violence, and abuse.

Number of jurors who so find 9

9. Brian Richardson witnessed one or more of his siblings suffer from chaos, violence, and abuse.

Number of jurors who so find 7

10. Brian Richardson's mother had a series of unstable relationships with men when he was growing up.

Number of jurors who so find 12

11. One or more of Susan Upton's children was sexually abused.

Number of jurors who so find 10

12. Brian Richardson's car accident in 1982 was one of the major turning points in his life that led to his addiction to prescription, narcotic pain killers and subsequent criminal conduct in Alabama.

Number of jurors who so find 10

13. Brian Richardson has suffered one or more head injuries.

Number of jurors who so find 12

14. Brian Richardson has a history of substance abuse and addiction.

Number of jurors who so find 12

15. The risk factors in Brian Richardson's life outweighed the protective factors and contributed to his criminal conduct.

Number of jurors who so find 6

16. Brian Richardson's criminal conduct in California was fueled by drug addiction.

Number of jurors who so find 12

17. Brian Richardson is no longer addicted to drugs.

Number of jurors who so find 0

18. Brian Richardson went into the Alabama Prison system when he was 20 years old.

Number of jurors who so find 12

19. Brian Richardson has spent almost his entire adult life in some of the most brutal and overcrowded prisons in the United States.

Number of jurors who so find 12

20. Brian Richardson was subject to constitutionally inadequate mental health support while in the California state prison system.

Number of jurors who so find 8

21. Brian Richardson has spent most of his adult life in prison, yet he has not become a member of a prison gang.

Number of jurors who so find 12

22. Brian Richardson's experiences in prison and his exposure to the convict code and prison culture of various prisons explains, in part, his fatal attack on Steven Obara.

Number of jurors who so find 12

23. The circumstances that led to Steven Obara's death existed, at least in part, because BOP officials put Brian Richardson and Mr. Obara in the same cell when they should not have been housed together.

Number of jurors who so find 4

24. This crime never would have happened if the BOP had paid proper attention to the cell assignments of Brian Richardson and Mr. Obara or if Brian Richardson had been properly medicated prior to the offense.

Number of jurors who so find 1

25. Steven Obara was a sexual predator who molested his young daughter.

Number of jurors who so find 12

26. Brian Richardson would have been targeted for violence if others in prison learned that he was housed with a child molester and failed to take action.

Number of jurors who so find 11

27. The abuse that Brian Richardson and his siblings suffered as children explains, in part, his emotional reaction to child molesters and his attack on Mr. Obara.

Number of jurors who so find 5

28. Brian Richardson's execution would cause others, including his brother Danny Upton, his brother Allen Dusseau, or his sister Christa Upton to suffer grief and loss.

Number of jurors who so find 12

29. Brian Richardson's outlook on life changed for the better after he reconnected with his family after years without contact.

Number of jurors who so find 12

30. Throughout Brian Richardson's life, he has suffered the absence of one or more individuals through death, loss, or abandonment, such as his sister Lisa Dusseau, his brother Allen Dusseau, his father David Richardson, his stepfather Bert Bright, his pastor Pete Crim, his boxing coach Buddy League, the two close

friends who were killed in the car accident, and his sister Amy Bright.

Number of jurors who so find 12

31. If not sentenced to death, Brian Richardson will spend the rest of his life in federal prison without any possibility of release.

Number of jurors who so find 12

32. If sentenced to life in federal prison without release, Brian Richardson will be sent to ADX where he will live in solitary confinement with limited human contact.

Number of jurors who so find 9

33. Brian Richardson can be managed with a combination of medication and secure confinement that will minimize the risk of future dangerousness.

Number of jurors who so find 12

34. BOP staff members who have interacted with Brian Richardson for four years have noticed a positive behavioral change in Brian Richardson since he has been properly medicated.

Number of jurors who so find 11

35. BOP staff members who have interacted with Brian Richardson for four years believe that he can be housed safely, securely, and in a manner that will not pose a danger to others.

Number of jurors who so find 10

36. The evidence does not establish Brian Richardson's guilt of first degree murder with sufficient certainty to justify the imposition of a death sentence.

Number of jurors who so find 0

List any additional Mitigating Factors:

Additional Factor: N/A

Number of jurors who so find _____

Additional Factor: _____

Number of jurors who so find _____

Additional Factor: _____

Number of jurors who so find _____

Additional Factor: _____

Number of jurors who so find _____

(Additional mitigating factors may be handwritten on this form.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
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FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

BRIAN RICHARDSON

CRIMINAL ACTION

NO. 1:08-CR-139 (CC)

DECISION FORM FOR

UNANIMOUS SENTENCE OF DEATH

We, the jury, as to BRIAN RICHARDSON, unanimously find that BRIAN RICHARDSON shall be sentenced to death.

FOREPERSON

Date _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

BRIAN RICHARDSON

CRIMINAL ACTION

NO. 1:08-CR-139 (CC)

DECISION FORM FOR

UNANIMOUS SENTENCE OF

LIFE WITHOUT RELEASE

We, the jury, as to BRIAN RICHARDSON, do unanimously agree that BRIAN RICHARDSON should be sentenced to life imprisonment without possibility of release. Therefore, we hereby decide that BRIAN RICHARDSON should be sentenced to life imprisonment without possibility of release.

FOREPERSON

Date _____

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA)

v.)

BRIAN RICHARDSON)

CRIMINAL ACTION

NO. 1:08-CR-139 (CC)

DECISION FORM FOR

NON-UNANIMOUS SENTENCE OF

LIFE WITHOUT RELEASE

We, the jury, having considered and evaluated the evidence presented in light of the instructions of the Court, are not unanimously persuaded on the appropriate sentence.

4/26/2012
Date