

APPLYING THE CAPITAL JURY PROJECT FINDINGS TO  
COURT-MARTIAL PRACTICE

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MASTER OF MILITARY ART AND SCIENCE  
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by

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## ABSTRACT

APPLYING THE CAPITAL JURY PROJECT FINDINGS TO COURT-MARTIAL PRACTICE, by LTC Eric R. Carpenter, 86 pages.

Starting in 1991, a consortium of criminologists, social psychologists, and law school professors began researching how jurors in capital cases come to their decisions. This body of work, called the Capital Jury Project (CJP), found several trends related to what motivates jurors to either vote for life or death; how jurors interact with one another and what dynamics influence their social relationships; whether jurors understand the law; and whether jurors accept responsibility for their decisions. No such research has been conducted on military panel members. Can military justice practitioners look to the CJP to guide them in framing issues for the panel members? Is there any historical evidence that panel members in capital cases follow the same trends identified by the CJP? How should military practitioners interpret and apply the military-specific procedural rules in light of the CJP findings? This thesis surveys the CJP findings, identifies examples of the CJP findings in military cases, and then argues that military justice practitioners should modify their practice to reflect what the Capital Jury Project has revealed about juror beliefs about aggravation and mitigation; jury dynamics; juror confusion; jury decision making; and juror responsibility.

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## ACRONYMS

A.C.M.R.	Army Court of Military Review
A.F. Ct. Crim. App.	Air Force Court of Criminal Appeals
A. Ct. Crim. App	Army Court of Criminal Appeals
CAAF	Court of Appeals for the Armed Forces
CJP	Capital Jury Project
C.M.A.	Court of Military Appeals
Fed. R. Crim. P.	Federal Rules of Criminal Procedure
LWOP	Life Without Parole
MCM	Manual for Court Marshall
Mil R. Evid	Military Rule(s) of Evidence
MJ	Military Judge
MRE	Military Rule(s) of Evidence
N.M.C.M.R.	Navy-Marine Court of Military Review
RCM	Rule(s) for Courts-Martial
UCMJ	Uniform Code of Military Justice

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## CHAPTER 1

### INTRODUCTION

What exactly happens in the deliberation room of a capital trial? What are the jurors thinking as they make their decisions? Because of the closed and secretive nature of jury deliberations, we might look to Hollywood portrayals to shape our understanding of what happens inside the deliberation room.<sup>1</sup> For example, in the movie *12 Angry Men*,<sup>2</sup> an 18-year old man is put on trial for killing his father; if he is convicted, he will be given a mandatory death sentence. The movie is set almost entirely in the deliberation room. The premise is that the audience gets to see the jury reach a verdict and therefore get a glimpse of jury dynamics. Quickly we see that eleven of the jurors want to vote for guilt and only one juror, Juror Number 8, played by Henry Fonda, wants to vote for acquittal. That one holdout juror then slowly and deliberately, through the use of reason, is able to change the minds of the other jurors until the jury reaches a unanimous vote for acquittal. In many ways, this portrayal shows how society hopes jurors “should” act--rationally and bravely.<sup>3</sup> But is that how they really act?

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<sup>1</sup>At least two projects have filmed actual jury deliberations. Frontline filmed a jury as it deliberated a case involving jury nullification, *Frontline: Inside the Jury Room* (PBS television broadcast, 8 April 1986); and ABC News filmed five juries as they deliberated five separate cases, including one capital case, *In the Jury Room* (ABC television broadcast, 10 August 2004).

<sup>2</sup>*12 Angry Men* (Orion-Nova Productions 1957). The movie was based on the teleplay and play by Reginald Rose, and was remade as a television show in 1997.

<sup>3</sup>William J. Bowers describes this as, “The legal formulation of guilt determination has always been understood as an ideal or normative description of how jurors should decide cases, not necessarily a description of what they actually do.” William J. Bowers, “The Capital Jury Project: Rationale, Design, and Preview of Early Findings,” *Indiana Law Journal* 70, no. 4 (Fall 1995): 1068.

Research suggests that people in group settings do not act that way. In the 1950s, Solomon Asch ran a series of experiments sponsored by the U.S. Navy that revealed the dynamic of social conformity, which is essentially the fear of disagreeing with the majority in a public setting.<sup>4</sup> The examiner would bring a subject into a classroom along with seven to nine other people, all of whom were in on the experiment (only the subject was not).<sup>5</sup> As an example, the examiner would give a card to the subject with a line on it, along with another card that had three lines on it, as shown in figure 1.<sup>6</sup> The subject's task was to match the line on the left to either line 1, 2, or 3 on the right. The examiner would then ask one of the other people who were in on the experiment for the answer, and the person would deliberately give an "incorrect" answer, say, 1. The examiner would ask another person, and that person would also give that same incorrect answer, and on down the line until he reached the subject. The examiner would then ask the subject for the answer, which the subject would have to state in front of everyone else.<sup>7</sup>

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<sup>4</sup>S. E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments, in Group, Leadership, and Men: Research in Human Relations*, ed., Harold Guetzkow (Pittsburg, PA: Carnegie Press, 1951), 177; Solomon E. Asch, *Social Psychology* (Upper Saddle River, NJ: Prentice Hall, 1952); Solomon E. Asch, "Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority," *Psychological Monographs* 70, no.9 (1956). For simple and easy to find explanations of these experiments, see Gregory Burns, *Iconoclast: A Neuroscientist Reveals How to Think Differently* (Boston, MA: Harvard Business Press, 2008), 88-92; See also Scott E. Sundby, *A Life and Death Decision: A Jury Weighs the Death Penalty* (New York: Palgrave MacMillan, 2005), 81-84.

<sup>5</sup>Asch, *Effects of Group Pressure*, 178.

<sup>6</sup>Asch, *Social Psychology*, 452.

<sup>7</sup>Asch, *Effects of Group Pressure*, 178-79.

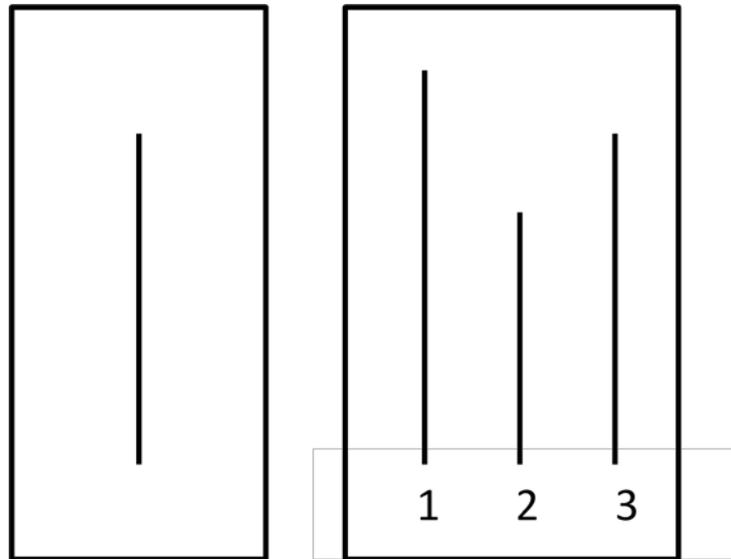


Figure 1. Sample Experiment Card

Source: Solomon E. Asch, *Social Psychology* (Upper Saddle River, NJ: Prentice Hall, 1952), 452.

The results of the experiment are amazing: for each individual question, the subjects would go along with the group and give the wrong answer to this simple question nearly one-third of the time, and during the series of the testing, one-fourth of the subjects would miss at least one question.<sup>8</sup> Compare that to when the subjects were alone when they did the task: the subjects would get the right answer on all of the questions 95 percent of the time.<sup>9</sup> The force of social conformity primarily arose when three or more people gave the wrong answer first; had some influence when two people gave the wrong answer first; and had little influence when only one gave the wrong

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<sup>8</sup>Asch, *Effects of Group Pressure*, 181-82; Asch, “A Minority of One,” 9.

<sup>9</sup>Asch, *Effects of Group Pressure*, 181; Asch, *Social Psychology*, 457; Asch, “A Minority of One,” 9-10.

answer first.<sup>10</sup> If just one other person went against the majority, the power of the group pressure was greatly reduced, but if that “partner” later changed his answer to the incorrect answer, the power of social conformity returned with full force.<sup>11</sup>

Based on Asch’s experiments, one should expect that Juror Number 8 almost certainly would have folded and the defendant would have been sentenced to death. Juror Number 8 would have given in to group pressure.

But can one look to that research to draw conclusions about how jurors and panel members act? Other than public embarrassment,<sup>12</sup> not much was on the line during these experiments. Does this phenomenon translate to capital jury deliberations, and therefore to Juror Number 8, when someone’s life is on the line? And in Asch’s experiments, the subjects were dealing with facts (the length of lines). Do these results also occur when people are dealing with norms or values, like whether someone should live or die? Finally, in the Asch experiments, no requirement existed for the group return a unanimous group answer--the experiment dealt with a series of individual answers. Do these results occur in settings that require a unanimous answer?

Modern research shows that the answer to these questions is yes. Capital jurors, dealing in norms or values, faced with the requirement to produce a unanimous answer, are affected by group pressure--even when someone’s life is on the line. Unlike the Asch findings, adding one partner (having a minority of two) is not enough to overcome that

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<sup>10</sup>Asch, *Effects of Group Pressure*, 188.

<sup>11</sup>*Ibid.*, 186.

<sup>12</sup>Asch, “A Minority of One,” 65. When the subjects did not have to announce their answers in public, the majority effect diminished markedly.

pressure. For example, during the first vote on sentence, if 25 percent or less of the jurors vote for life, those jurors will “almost always” change their votes and the verdict will be death; if 33 percent or more vote for life, those jurors will almost always preserve their vote and the verdict will be life; if the vote falls between 25 percent and 33 percent, the verdict can go either way.<sup>13</sup> In a capital system that requires a unanimous vote at several stages<sup>14</sup> --and where holdout juror can stop the process--this is a critical dynamic for capital attorneys to understand.

That dynamic is only one of many uncovered by the Capital Jury Project (CJP). Started in 1991, the CJP is a research project supported by the National Science Foundation and headquartered at the University of Albany’s School of Criminal Justice.<sup>15</sup> The people doing the work are “a consortium of university-based investigators--chiefly criminologists, social psychologists, and law faculty members--utilizing common data-gathering instruments and procedures.”<sup>16</sup> The CJP investigators conduct in-depth interviews with people who have served on jurors in capital cases, “randomly selected from a random sample of cases, half of which resulted in a final verdict of death, and half

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<sup>13</sup>John H. Blume, Theodore Eisenberg, and Stephen P. Garvey, *Lessons From the Capital Jury Project*, in *Beyond Repair? America’s Death Penalty*, ed. Stephen P. Garvey (Durham, NC: Duke University Press, 2003), 144, 173.

<sup>14</sup>Manual for Court-Martial (MCM), United States, R.C.M. 1004 (2008).

<sup>15</sup>School of Criminal Justice, “What is the Capital Jury Project,” <http://www.albany.edu/scj/CJPwhat.htm> (accessed 2 May 2010).

<sup>16</sup>Bowers, “Capital Jury Project,” 1043.

of which resulted in a final verdict of life imprisonment.”<sup>17</sup> So far, the CJP has conducted interviews with 1,198 jurors from 353 capital trials in 14 states.<sup>18</sup>

Trained interviewers administered a fifty-one page survey and then conducted a three to four hour interview.<sup>19</sup> The interviews “chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.”<sup>20</sup> When coming to their findings, the researchers draw upon both the statistical data that results from the surveys and interviews and the narrative accounts given by the jurors.<sup>21</sup>

Military counsel who find themselves assigned to capital cases need to be familiar with the CJP's findings. However, military capital attorneys are drawn from a pool of general criminal trial advocates, most of whom have no experience in capital litigation,<sup>22</sup> and so are not aware of this project. Very few courts-martial are referred with a capital instruction, and military attorneys frequently rotate through both locations and legal

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<sup>17</sup>Blume, Eisenberg, and Garvey, *Lessons From the Capital Jury Project*, 147.

<sup>18</sup>School of Criminal Justice, “What is the Capital Jury Project,” <http://www.albany.edu/scj/CJPwhat.htm> (accessed 2 May 2010).

<sup>19</sup>Blume, Eisenberg, and Garvey, *Lessons From the Capital Jury Project*, 147.

<sup>20</sup>School of Criminal Justice, What is the Capital Jury Project.

<sup>21</sup>*Ibid.* For an in-depth discussion of the sampling design and data collection methods, see Bowers, “Capital Jury Project,” 1077-84.

<sup>22</sup>The Court of Appeals for the Armed Forces has noted that “there is no professional death penalty bar in the military services.” *United States v. Kreutzer*, 61 M.J. 293, 299 n.7 (C.A.A.F. 2006).

fields.<sup>23</sup> Therefore, military capital attorneys find themselves operating in an area of the law that they are unfamiliar with.

They are in the world of Unknown Unknowns, as Donald Rumsfeld would say. Take a look at his famous quote, cleverly adapted by Hart Seely (without changing the order of any words) to a poem titled *Unknown*:

As we know,  
There are known knowns.  
There are things we know we know.  
We also know  
There are known unknowns.  
That is to say  
We know there are some things  
We do not know.  
But there are also unknown unknowns,  
The ones we don't know  
We don't know.<sup>24</sup>

When an attorney can spot the issue and know the answer right off, she is operating in the world of the Known Knowns. When she can spot the issue but still needs to look up the answer, she is operating in the world of Known Unknowns. When she has no idea what the issues are, she is in the world of Unknown Unknowns: she does not even know what it is she should be looking up.

Attorneys generally accept the following statement as a fundamental principle, almost as a truism: attorneys must know their audience. Capital attorneys who are not

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<sup>23</sup>“Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice,” (May 2001), 10-11, [http://www.wcl.american.edu/nimj/documents/cox\\_comm\\_report2.pdf?rd=1](http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1) (accessed 2 May 2010).

<sup>24</sup>Hart Seely, “The Poetry of D.H. Rumsfeld: Recent Works of the Secretary of Defense,” posted 2 April 2003, <http://www.slate.com/id/2081042/> (accessed 2 May 2010).

familiar with the CJP do not know their audience. One may well build a case that most lawyers will think is persuasive but research has shown that the audience will not. And, one may not litigate the issues that will play a significant role in jury deliberations or set oneself up to conduct capital-specific voir dire. By studying the CJP--start with Scott E. Sundby's book, *A Life and Death Decision: A Jury Weighs the Death Penalty*<sup>25</sup>--one will recognize what themes matter and will build evidence and a case around those themes.<sup>26</sup> And for defense counsel at least, one will gain some of the insight into capital litigation that is required to avoid becoming what Sundby calls "the lawyer who does just enough to get his client executed."<sup>27</sup>

Because the lawyer presented some mitigation evidence the courts will say that the lawyer was "effective" and allow the death sentence to stand, but the attorney, by having failed to engage in the intensely thorough construction of a case for life that is required in a capital trial, never gave his client a true chance.<sup>28</sup>

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<sup>25</sup>Sundby, *A Life and Death Decision*. Sundby introduces the broad themes of the CJP within the study of a single jury. Much of the work on the CJP is dry--heavy on statistical analysis and not easy to digest. Sundby cuts straight to the findings in a compelling and easy to read narrative. *A Life and Death Decision* should be mandatory reading for all capital attorneys, but should only serve as the first step in studying the CJP findings. Any trial advocates interested in jury dynamics ought to read it, too.

<sup>26</sup>The CJP data has generated a tremendous amount of writing. For lists of articles related to the CJP, see School of Criminal Justice, "Publications," <http://www.albany.edu/scj/CJPpubs.htm> (accessed 2 May 2010), and Cornell University Law School, "Articles," <http://www.lawschool.cornell.edu/research/death-penalty-project/Articles.cfm> (accessed 2 May 2010). Sundby also includes a list of articles and books related to the CJP in Sundby, *A Life and Death Decision*, 213-15.

<sup>27</sup>Sundby, *A Life and Death Decision*, 137.

<sup>28</sup>*Ibid.*

One of the primary purposes of this thesis is to shrink somewhat, for the military capital attorney, the world of the Unknown Unknowns--particularly as it relates to understanding how capital jurors think and act.

But can or should the CJP findings be applied to military practice? This paper will conduct a survey of the primary CJP findings related to aggravation and mitigation; the timing of decision making; juror dynamics; juror confusion; and juror responsibility. Within each section, this paper will then identify how the findings can be applied to military practice and, for some sections, provide evidence that panel members do behave in ways consistent with the CJP findings. A review of the appellate records of capital courts-martial shows that in at least three of the fourteen modern capital cases, panels behaved in ways consistent with the CJP findings. Finally, this paper will recommend that military justice practitioners adopt a particular method of voir dire to address the issues raised by the CJP.

## CHAPTER 2

### AGGRAVATION

The CJP findings should help trial attorneys develop their themes and then develop the evidence needed to support those themes. The CJP has shown that jurors focus on certain aggravating factors that relate to the defendant when deciding to impose the death penalty. These factors are fear, loathing, and remorse.<sup>29</sup> The first aggravating factor is “fear,” that is, the degree to which the defendant poses a risk of future danger. Jurors would rather have the defendant’s blood on their hands than the blood of another victim. Interestingly, jurors are not just concerned about the safety of other members of the public--they are concerned about their personal safety. Jurors expressed fear that the defendant might somehow get out of jail and come after them.<sup>30</sup>

The second aggravating factor is “loathing,” that is, how much the jurors hate the defendant for the crime he committed or are disgusted by him. For this, the facts of the case often speak for themselves.

The third aggravating factor is “remorse,” or really, the defendant’s lack thereof. The CJP has shown that what lawyers think “remorse” means--has the defendant said he is sorry--is not really what jurors consider it to mean. Jurors do not make their decisions based on whether the defendant gets up in court and says he is sorry--first, because it

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<sup>29</sup>Blume, Eisenberg, and Garvey, *Lessons From the Capital Jury Project*, 162; Stephen P. Garvey, “The Emotional Economy of Capital Sentencing,” *New York University Law Review* 75, no. 1 (2000): 26; Stephen P. Garvey, “Aggravation and Mitigation in Capital Cases: What do Jurors Think?,” *Columbia Law Review* 98, no. 6 (October 1998), 1538; Sundby, *A Life and Death Decision*, 31.

<sup>30</sup>Sundby, *A Life and Death Decision*, 36.

rarely happens (particularly when the defendant is claiming factual innocence) and second, because jurors do not believe the defendant when he does make an in-court apology.<sup>31</sup>

Rather, jurors look to the moment of the crime and the period immediately following the crime for indications of a lack of remorse--things like whether the defendant shouted obscenities at the victim as he killed her, or bragged about it to his friends.<sup>32</sup> And the more cold-blooded and vicious the crime, the less likely jurors are to believe that the defendant is remorseful.<sup>33</sup> However, the more a crime looks like it was driven by the circumstances that surrounded the defendant--circumstances that suggest self-defense, provocation, lack of intent, accident or mistake, or mental illness, even if the evidence is not strong enough for a successful defense--the more likely the jurors are to find remorse.<sup>34</sup>

To assess remorse, jurors also look at the defendant's demeanor in the courtroom, and often pay more attention to the defendant's demeanor than they do to the evidence being presented.<sup>35</sup> Jurors described that when the defendant looked clean-cut in court, he seemed to be trying to manipulate them--particularly when they compare that clean-cut

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<sup>31</sup>Scott E. Sundby, "The Intersection of Trial Strategy, Remorse, and the Death Penalty," *Cornell Law Review* 83, no. 6 (September 1998): 1568-69.

<sup>32</sup>*Ibid.*, 1561.

<sup>33</sup>Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, "But Was He Sorry? The Role of Remorse in Capital Sentencing," *Cornell Law Review* 83, no. 6 (September 1998): 1609-15.

<sup>34</sup>*Ibid.*

<sup>35</sup>*Ibid.*

image to the street image captured in his post-arrest mug shot.<sup>36</sup> If the defendant appears nonchalant or arrogant, or tries to smile at or make eye contact with jurors, the jurors regard that as showing no remorse.<sup>37</sup> Jurors expect the defendant to show emotion (as in, cry) at the emotionally tense portions of the trial; if the defendant does not, jurors interpret that as having no remorse.<sup>38</sup>

This presents a serious challenge to the military defense counsel who represents an accused that has a mental health issue that causes the accused to have a restricted or flat affect, or who has low intelligence and so might not have a full grasp of what is going on around him. The defense counsel is going to have to find a way to let the panel members know that the accused looks the way he does because of his illness or handicap and not because he is unremorseful. The defense counsel can do this either through an instruction or testimony from a mental health professional that will explain the accused's demeanor and the reasons behind it.

Jurors also look to whether the defendant has a loving relationship with his family when assessing remorse: "Jurors perhaps think that defendants who are capable of showing love to their families also have the capacity to experience remorse."<sup>39</sup>

But more importantly, jurors assess remorse based on whether the defendant has accepted responsibility for the crimes and has owned up for his actions.<sup>40</sup> One way to

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<sup>36</sup>Sundby, *A Life and Death Decision*, 31.

<sup>37</sup>*Ibid.*, 32.

<sup>38</sup>Sundby, *A Life and Death Decision*, 32; Sundby, "The Intersection," 1561-64.

<sup>39</sup>Eisenberg, Garvey, and Wells, *But Was He Sorry?*, 1621.

<sup>40</sup>Sundby, "The Intersection," 1573-74.

show this might be through expressions of remorse that are not associated with the trial--any statements made when the defendant does not have a self-serving reason to make them.<sup>41</sup> Another way to show this is through an admission defense.<sup>42</sup> Admission defenses “admit that the defendant committed the acts charged, but also assert that she lacked the requisite intent to be held criminally liable for the offense charged. Provocation, self-defense, insanity, diminished capacity, and lack of specific intent are all examples of admission defenses.”<sup>43</sup> With an admission defense, the defendant accepts some responsibility for the underlying crime; the panel members perceive the defendant as remorseful; and the panel members are therefore more likely to vote for life.

As Sundby explains, “a death penalty trial is no ordinary criminal trial and invoking one’s presumption of innocence can prove deadly.”<sup>44</sup> If the defendant denies involvement in the crime, the jurors may perceive that the defendant is saying to everyone, “Oh, yeah? Prove it,” and therefore is unremorseful. And when the evidence shows that the defendant did do it, the defense loses credibility and looks hypocritical and inconsistent in the penalty phase, particularly when the defense then presents mitigation evidence to explain why the defendant may have done the crime that he earlier denied committing.<sup>45</sup> Presenting an admission defense does not involve those inconsistencies.

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<sup>41</sup>Ibid., 1586.

<sup>42</sup>Ibid., 1584.

<sup>43</sup>Gary Goodpaster, “The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,” *New York University Law Review* 58 (1983): 299-362.

<sup>44</sup>Sundby, *A Life and Death Decision*, 33.

<sup>45</sup>Ibid., 33-35.

The defendant is not saying he did not do the underlying actions; rather, he is saying he is not as culpable as the government is trying to say he is.<sup>46</sup>

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<sup>46</sup>Granted, some defendants will not want to pursue an admission defenses, either because he did not do the crime, or, when faced with two unpleasant options--life without parole or death--would rather pursue the chance of an acquittal, however small the chance.

CHAPTER 3  
MITIGATION

The CJP’s findings related to mitigation are extraordinary. Most of the factors that attorneys think of as mitigation turn out not to be very mitigating. Look at this table of “classically mitigating factors” and ask, before looking at the results, whether the factor appears to be mitigating. Compare that to the percentage of jurors who “do not.” Notice that many jurors think mental illness and mental retardation are not mitigating--those conditions may make jurors think that the defendant presents an “even greater” danger to the public if he is ever released.

Table 1. Percentages of Jurors Who Do Not See Classically Mitigating Factors as Mitigating

Defendant Was a Drug Addict	90.3%
Defendant Was an Alcoholic	86.3%
Defendant Had a Background of Extreme Poverty	85.0%
Defendant’s Accomplice Received Lesser Punishment in Exchange for Testimony	82.9%
Defendant Had No Previous Criminal Record	80.0%
Defendant Would be a Well-Behaved Inmate	73.8%
Defendant Had Been Seriously Abused as a Child	63.0%
Defendant Was Under 18 at the Time of the Crime	58.5%
Defendant Had Been in Institutions But Was Never Given Any Real Help	51.8%
Defendant Had a History of Mental Illness	43.9%
Defendant Was Mentally Retarded	26.2%

*Source:* John H. Blume, Sheri Lynn Johnson, and A. Brian Threlkeld, “Probing ‘Life Qualification’ Through Expanded Voir Dire,” *Hofstra Law Review* 29 (December 2001): 1229.

The CJP has revealed mitigation that does work.<sup>47</sup> The best mitigating factor is residual or lingering doubt about the defendant's guilt, either doubt about the defendant's factual guilt or doubt about his legal guilt<sup>48</sup> (whether he had the full intent required for the capital offense, for example).<sup>49</sup> Shared culpability, either through the victim's role in the crime, because society at large might have been able to prevent the crime but failed to act on signals, or because the defendant sought help but was not given any, is also mitigating. Reduced culpability because of an impairment or circumstance out of the defendant's control, like mental health problems or low intelligence (that might not rise to the level of a defense or exclusion from the death penalty), is also mitigating. Here, mental illness and mental retardation are mitigating not simply because the defendant simply suffers from one or the other, but because the impairment played a direct role in the crime.

Testimony from family members is also mitigating for several reasons. One reason, as shown above, is that the testimony can help jurors assess remorse. Jurors find the impact of a possible execution on the family members to be mitigating. And, the

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<sup>47</sup>Garvey, *Aggravation and Mitigation*, 1561-67.

<sup>48</sup>Sundby, "The Intersection," 1585. The power of residual doubt probably helps explain some of the unusual results we see in courts-martial for sexual assaults, where a tough merits case leads to a guilty finding, but the sentence is too light, in a normative sense, for that offense. One or two jurors probably agreed to vote for guilt, but were concerned enough about their doubts that they could not hand out a tough punishment.

<sup>49</sup>In addition to being used as a vehicle to show remorse, admission defenses also help to focus the jurors or panel members on credible arguments that the defendant lacked the mental state that the government is required to prove. A fully-contested admission defense may not lead to a vote for not guilty of the greater capital offense, but might leave one or two jurors or panel members with a lingering doubt about the defendant's guilt to the greater capital offense.

testimony might be the only evidence from which jurors can conclude that the defendant “might have some good in him as well as evil.”<sup>50</sup> This combination of mitigating effects leads to “the dark humor saying of capital defense attorneys that just learning that the defendant has a mother reduces the chances of a death sentence by half.”<sup>51</sup>

By looking at what is mitigating and what is not, certain beliefs seem to regularly come in conflict. The first conflict is between the belief that the defendant is solely responsible for committing the crime through the exercise of free will and the belief that people are complex and can be shaped by their environments in ways they cannot control. Jurors tend to look at tales of hardship as running counter to their understanding of free will: “There he goes again, placing blame on everyone but himself.”<sup>52</sup> Many jurors “very much shared the belief that individuals control their own destiny and generally should be seen as capable of making their own choices even under adverse circumstances.”<sup>53</sup> Counter to belief this runs the idea that people are shaped by their environment. People are “human supercolliders, their personalities buffeted and shaped in unseen ways by the numerous events, people, and influences that they come in contact with.”<sup>54</sup>

The second conflict of beliefs is between the belief in an eye-for-an-eye (“you take somebody’s life, you pay with yours”)<sup>55</sup> against the belief in “the power of

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<sup>50</sup>Sundby, *A Life and Death Decision*, 46.

<sup>51</sup>*Ibid.*, 47.

<sup>52</sup>*Ibid.*, 35.

<sup>53</sup>*Ibid.*, 43.

<sup>54</sup>*Ibid.*, 70.

<sup>55</sup>*Ibid.*, 17.

redemption and [the] essential hope that people could become better.”<sup>56</sup> Those who believe in an eye-for-an-eye tend to be less receptive to mitigation evidence than those who believe in redemption.

An interesting finding related to these conflicts in beliefs (and that is contrary to the belief of many trial attorneys) is that jurors who personally identify with the defendant (say, by having also come from the same bad background) generally “will not” side with the defendant.<sup>57</sup> If the juror came from that same background and overcame his circumstances to succeed in life, then that juror will not be sympathetic to claims that the defendant’s background is mitigating.<sup>58</sup> “If I could do it, then so could he.” However, for someone who recognizes that one of his family members is like the defendant--a brother, son, or father--“the reaction often is a shared sense of helplessness with the defendant’s family members who had tried so hard to keep the defendant from slipping into a life of crime.”<sup>59</sup> This lesson is not limited to capital cases: prosecutors should try to keep jurors who identify closely with the defendant, while defense counsel should try to keep jurors who identify closely with the defendant’s family members. A counsel defending a drug addict does not necessarily want the reformed drug addict to sit on the jury; however, the defense counsel does want the mother of a drug addict.

With this understanding of how jurors think about mitigation, one can make some sense of the surprising findings about “classically mitigating factors.” Mitigation

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<sup>56</sup>Ibid., 73.

<sup>57</sup>Ibid., 112-14.

<sup>58</sup>Ibid.

<sup>59</sup>Ibid., 114.

evidence needs to show that the defendant lost control of the situation. Evidence of a life of abuse standing alone does not help much (remember, “there he goes again”). Rather, the evidence needs to show that this abuse led to reduced or altered brain functioning or a distorted fight or flight response or something else along those lines, and the resulting impairment “was directly related to commission of this crime.”

This is the meeting point between free will and environmental shaping. Someone with impaired executive functioning or a mental illness or a very low IQ is limited in how he can exercise free will in a way that a person with normal brain and average mental health or intelligence is not. Other mitigation evidence then needs to supplement this by showing some good in the defendant to counterbalance the evil that radiates from the crime. Those themes drive the jurors’ reasoning processes.

These broad lessons from the CJP can be applied to non-capital military justice practice. Military practitioners use the words extenuation and mitigation. Matters in extenuation are those things that “explain the circumstances surrounding the commission of the offense, including those reasons for committing the offense which do not constitute a legal justification or excuse.”<sup>60</sup> Matters in mitigation are those things that “lessen the punishment to be adjudged by the court-martial.”<sup>61</sup> From the discussion above, one can see that extenuation is really a subset of mitigation: extenuating matters are those that show “why” the accused committed the crime and therefore will mitigate or lessen the punishment. From the discussion above, we see that extenuation is more powerful than

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<sup>60</sup>MCM, R.C.M. 1001(c)(1)(A).

<sup>61</sup>MCM, R.C.M. 1001(c)(1)(B).

free-standing mitigation because this evidence directly addresses the conflict between free will and environment.

If one looked in most defense counsel's strategy books, one would probably find that free-standing classically mitigating factors dominate the pages. Defense counsel present the accused's life problems but might not show the relationship between that problem and why the accused did what he did. Rather, defense counsel should work to convert free-standing classically mitigating factors (the defendant suffers from this or that, or grew up in this environment) into causal extenuating factors by tying them into the reasons why the accused committed the offense. Defense counsel should concentrate on rebutting the proven aggravators (fear, loathing, and lack of remorse) and bolstering the proven mitigators (extenuation; reduced and shared culpability; acceptance of responsibility; impact on the family of the sentence; and evidence of "good" in the accused). Classically mitigating factors that do not otherwise address free will may not do much on their own.

## CHAPTER 4

### THE TIMING OF DECISION MAKING

Although jurors are supposed to wait until the conclusion of the sentencing hearing before deliberating on and then deciding on punishment, the CJP findings indicate that one-half of jurors choose the punishment for the crime during the presentation of evidence on the merits and merits deliberation.<sup>62</sup> Further, almost all of these jurors were absolutely convinced or pretty sure of their decision,<sup>63</sup> and six in ten of these jurors held fast to that belief through the sentencing phase.<sup>64</sup> Further, even though jurors are not supposed to talk about sentences until after the evidence in the penalty phase, jurors talk about their positions well before then: “Three to four of every ten jurors (33.6 percent to 45.7 percent) indicated [their preference] during guilt deliberations.”<sup>65</sup> More importantly, some jurors “start negotiating the death penalty vote during the merits deliberations”:

For some jurors, guilt deliberations became the place for negotiating or for forcing a trade off between guilt and punishment. One or more jurors with some doubts, possibly reasonable doubts, about a capital murder verdict nevertheless

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<sup>62</sup>Bowers, “Capital Jury Project,” 1089-90.

<sup>63</sup>Bowers, “Capital Jury Project,” 1089-90; Marla Sandys, “Cross Overs--Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines,” *Indiana Law Journal* 70, no. 4 (Fall 1995): 1183-1221.

<sup>64</sup>William J. Bowers, Marla Sandys, and Benjamin D. Steiner, “Foreclosed Impartiality in Capital Sentencing: Juror’s Predispositions, Guilt-Trial Experience, and Premature Decision Making,” *Cornell Law Review* 83, no.6 (September 1998): 1491-92.

<sup>65</sup>*Ibid.*, 1519.

may have agreed to vote guilty of capital murder in exchange for an agreement with pro-death jurors to abandon the death penalty.<sup>66</sup>

When one combines those findings with the findings on mitigation, the value of frontloading the mitigation case into the merits phase of trial--and of using an admission defense to accomplish this--becomes clear. If a defense counsel waits until the sentencing hearing to put on the sentencing evidence, the counsel may have missed the opportunity to persuade more than half of the panel members with the mitigation evidence. Further, an admission defense also makes evidence relevant that might not otherwise appear to be relevant on the merits.<sup>67</sup> Evidence of the defendant's low intelligence may show that he could not have come up with the complex premeditated plan that the government alleges he came up with. Evidence that the defendant's impoverished upbringing impaired his development or that he had a mental illness might show that he acted impulsively and so did not premeditate.

An admission defense also gives a defense counsel the opportunity to help shape the sentencing negotiations that are likely going on during the merits phase. For example, in a premeditated murder case, the defense counsel might introduce mental health evidence with two goals in mind. The first would be for a finding of not guilty by lack of mental responsibility, understanding that that is an extremely rare finding: the accused has to have a severe mental disease or defect, and that defect had to cause the

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<sup>66</sup>Bowers, Sandys, and Steiner, "Foreclosed Impartiality in Capital Sentencing," 1527; Sandys.

<sup>67</sup>The Army Court of Criminal Appeals has recognized that frontloading mitigation evidence into the merits case is a legitimate trial strategy. *United States v. Kreutzer*, 59 M.J. 773, 781 n.9 (A. Ct. Crim. App. 2004).

accused to be unable to appreciate the nature and quality or wrongfulness of his acts.<sup>68</sup>

The defense counsel may not even be able to get anyone to seriously argue that position for her in the panel room.

The second purpose would be to get one panel member to agree with a fall-back theory based on partial mental responsibility, and then to possibly negotiate off his position by committing to a life vote. Partial mental responsibility falls into two main categories. The first is partial mental responsibility as a true defense, whereby if the defendant proves to a sufficient standard that he has the right degree of mental illness, then the fact finder can reduce culpability from first-degree murder to manslaughter, much like the way the defense of heat of passion operates.<sup>69</sup> The second is partial mental responsibility as an evidentiary rule, where in some jurisdictions evidence of mental illness may be admitted to explain that the defendant could not or did not form the specific intent that is required for any specific intent crime; in some jurisdictions, that evidence is admissible in murder cases only; and in some jurisdictions, in no cases at all.<sup>70</sup> The military uses partial mental responsibility in the second sense--as an evidentiary rule. Evidence of mental illness may be admitted to show that the accused could not form a certain intent,<sup>71</sup> or to explain that he formed some other intent than the one charged.

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<sup>68</sup>MCM, R.C.M. 916(k)(1).

<sup>69</sup>Joshua Dressler, *Understanding Criminal Law*, 5th ed. (Albany, NY: Matthew Bender and Co., 2009), § 26.03A.

<sup>70</sup>*Ibid.*, § 26.02B.

<sup>71</sup>Headquarters, Department of the Army, Pamphlet 27-9, *Military Judges' Benchbook* (Washington, DC: Headquarters, Government Printing Office, 2003), paras.

Many trial advocates, military judges, and appellate judges focus on whether an accused's mental health problem made him unable to plan the murder.<sup>72</sup> Yet an accused's mental health problem, even if extraordinarily severe, may not affect his ability to plan at all. People with severe mental health problems may have no problem with planning events: they can wake up and plan to go to the grocery store, or plan to go to their parents' house, or plan to go to the park. A person who is fully psychotic, who believes that God is telling him to murder his wife and children to save their souls (and who might satisfy the lack of mental responsibility defense) can still plan the murders. This fully psychotic person can still write down what he plans to do, then get a gun from a storage unit, load it, drive to his home, and knock on the door. He may satisfy the lack of mental responsibility defense, and still be able to plan.

And, planning does not equal premeditation. Premeditation requires more than just planning to do the murder or thinking about it for some short period of time before

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5-17 and 6-5; MCM, RCM 916(k)(2) and discussion. The *Military Judges' Benchbook* instruction contains a note that says that military judges should only read the instruction if evidence has raised the lack of mental responsibility defense and some of that evidence tends to negate the *mens rea* element. *Military Judges' Benchbook*, para. 6-5. This instruction contains language on the burden of proof that is favorable for the defense, so defense counsel who want this instruction to be read to the panel should position themselves for a lack of mental responsibility defense by providing notice of the lack of mental responsibility defense under MCM, R.C.M. 701(b)(2), in addition to providing notice of its intent to introduce expert testimony on the accused's mental condition. If the defense counsel chooses not to provide notice of the lack of mental responsibility defense or to pursue the defense to the degree needed to trigger this instruction, the defense counsel can still rely on *Military Judges' Benchbook*, para 5-17.

<sup>72</sup>United States v. Murphy, 67 M.J. 514, 529-30 (A. Ct. Crim. App. 2008); United States v. Dock, 26 M.J. 620, 629 (A.C.M.R. 1988) (De Giulio, S.J., dissenting).

the act. Premeditation requires a cooling-off period or “reflection by a cool mind.”<sup>73</sup> The Court of Military Appeals has described what thought process is required: “The deliberation part of the crime requires a thought like, ‘Wait, what about the consequences? Well, I’ll do it anyway.’”<sup>74</sup>

Defense counsel should focus on how the accused’s mental illness impacts that aspect of premeditation, not whether the accused could plan. For example, the defense counsel might argue that because of the mental disease or defect--say, some sort of impulse disorder or impairment in executive functioning--the accused did not have the ability to calm down and contemplate the impact of his actions before he took them. If the accused becomes enraged, and because of his mental disorder, stays enraged for the ten minutes that it took him to get his gun from the barracks room and return to the day room to kill the victim, then he has not reflected on the crime with a cool mind and so has not premeditated. If his mental disorder prevented him from thinking through the fallout or consequences of his act, then he has not premeditated.

The mental health condition can also provide evidence that the accused’s intent was something other than what the government charged. The accused’s mental disorder may provide the context for the panel member to see that he was engaged in a “suicide by cop,” where he was trying to set in motion events that would lead to his death. He may have shot at police officers fully knowing that he was likely to hit and kill some of them, but he may not have actually cared if he “did” kill any of them. In that case, he would not

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<sup>73</sup>United States v. Viola, 26 M.J. 822, 829 (A.C.M.R. 1988); United States v. Loving, 41 M.J. 213, 279 (C.A.A.F. 1994).

<sup>74</sup>United States v. Hoskins, 36 M.J. 343, 346 (C.M.A. 1993).

have had the specific intent to kill required for premeditated murder.<sup>75</sup> Instead, a panel member could vote to find him guilty of a lesser murder charge, like wanton disregard murder, where the specific intent required matches what he was thinking: “That the accused knew that death or great bodily harm was a probably consequence of the act.”<sup>76</sup>

When presenting this mitigating mental health evidence, the defense counsel’s goal is to have a single panel member agree with her and either hold on to his vote or to negotiate off of that vote by committing to a vote for life early in the process--maybe even in the merits deliberation. If the defense counsel waits until the presentencing hearing to put on her sentencing evidence, she will miss the opportunity to contribute to these negotiations--and many of her panel members will likely be foreclosed to her evidence by this point, anyway.

Maybe defense counsel should use the admission defense much more often--not just in capital cases. In the military, defense counsel tend to be conservative with guilty pleas. If a client has a mental health problem that will not lead to a good chance of a finding of not guilty only by reason of lack of mental responsibility, and if the client is facing a high likelihood of conviction, the defense counsel understandably tries to resolve the case. Note what happens to that mental health evidence: from the defense perspective, the mental health evidence has become a “liability.” The defense counsel now becomes afraid that the military judge will bust the providence inquiry because of the client’s problem, or will reopen the providence inquiry if the defense counsel introduces

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<sup>75</sup>Uniform Code of Military Justice, (UCMJ) Article 118(1), 2008; Headquarters, Department of the Army, Pamphlet 27-9, para, 3-43-1.

<sup>76</sup>UCMJ, Article 118(3), 2008; Headquarters, Department of the Army, Pamphlet 27-9, para, 3-43-3.

extenuating or mitigating evidence during the presentencing proceeding that might raise the lack of mental responsibility defense.

Because of this, the defense counsel often has the client minimize the degree of those problems when going through the providence inquiry with the military judge: “I was depressed, your honor, but I could still form the intent to do the crime; I meant to do the terrible thing I did, I really, really did; I was not affected by my depression; my depression played no role in this crime; In fact, I just a little down.” When the defense counsel does that, she deflates what would have been a great extenuation and mitigation case. The defense case is now inconsistent--the defense has told the judge that mental health problems had nothing to do with anything, but now wants to come in during the presentencing proceeding and say how extenuating and mitigating the mental health problems are--if she even risks introducing the evidence at all.

Defense counsel do not have to do that. Consider frontloading mitigation in an average case. Put on the merits case and show where the client’s actions were caused by his mental illness. Overtly, the counsel argues the military’s test for lack of mental responsibility; in the background, she knows she will not win on the defense but is hoping that the panel will instinctively apply the irresistible impulse or causation tests--both of which help to frame mitigating evidence--during their deliberations on the sentence. The defense will lose on the merits, but now has a fully developed extenuation and mitigation case. And the defense do not have to worry about the judge busting anything.

## CHAPTER 5

### JUROR DYNAMICS

In the introduction, one of the most important aspects of jury dynamics, the force of social conformity, particularly when the minority voting block is 25 percent or less, was discussed. In the preceding section, two belief conflicts were discussed: free will versus environmental shaping, and eye-for-an-eye versus redemption. Generally, those who vote for death side with the free will, eye-for-an-eye arguments, and those who vote for life side with environmental shaping and redemption arguments. After the evidence of aggravation and mitigation comes in and the jurors take their initial positions, what causes jurors to abandon those beliefs and change their minds? What causes those in the 25 percent or less to fold?

One of the first interesting findings is that, even if jurors were not that committed to their position before they cast their first vote, they quickly harden to them:

“Psychologists have discovered that when groups deliberate and an initial disagreement exists, group members tend “not” to move toward a ‘middle’ position, but actually become even more extreme or polarized in the direction of their original leanings.”<sup>77</sup> As

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<sup>77</sup>Sundby, *A Life and Death Decision*, 51. Asch describes something similar, where the subject “adopts the majority estimates.” Asch, *Effects of Group Pressure*, 182. Adopting the majority estimate increases the person’s confidence in his response. Further, “[G]roup decisions are generally more extreme than are individual decisions.” Steven J. Sherman, “The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law,” *Indiana Law Journal* 70, no. 4 (Fall 1995): 1246. Sherman continues, “[D]ifferent individuals may have different reasons for their individual decision. When each person is then exposed to other supporting arguments by the other group members who share their decision outcome, they become even more polarized. Research clearly demonstrates that jury deliberations produce this polarization effect.”

members of the majority argue their points to the minority, the members of the majority become cemented in their attitudes<sup>78</sup> and approach the minority as teachers “trying to lead students to the right answer”<sup>79</sup> or as “devoutly religious individuals proselytizing to nonbelievers.”<sup>80</sup> The middle ground quickly disappears.

As the minority whittles down to a holdout,<sup>81</sup> the pressure increases. Frustration and anger rise because the majority feels that the holdout can essentially hold the entire group’s decision hostage to his views.<sup>82</sup> The holdout is under constant pressure from all angles and cannot take any mental breaks:

The worst part was that [the holdout] could not easily opt out of the active deliberations as some other jurors had done. [The holdout] had become the focus of the deliberations, and in some sense every question and every comment was directed at her, asking her to justify how she could still be voting life now that eleven were for the death penalty.<sup>83</sup>

The members of the majority can take turns. They can daydream or go to the bathroom while someone else takes the lead. The holdout has no relief.

Sundby discusses two other aspects of jury dynamics: the juror who plays the role of the victim’s advocate, and the juror who acts like a bully. Sometimes, these roles are played by the same juror. The victim’s advocate believes that “it is up to them personally

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<sup>78</sup>Sundby, *A Life and Death Decision*, 51-52.

<sup>79</sup>*Ibid.*, 21.

<sup>80</sup>*Ibid.*, 52.

<sup>81</sup>*Ibid.*, 81-84. Sundby includes an interesting discussion of the Asch’s experiments related to this process.

<sup>82</sup>*Ibid.*, 55.

<sup>83</sup>*Ibid.*, 85.

to act as the victim's voice in the jury room"<sup>84</sup> and "that 'they didn't want to run into the victim's parents and feel like they didn't do the right thing by the victim and parents.'"<sup>85</sup> Often, in civilian trials, the deliberations will become contentious, with one juror assuming the role of a bully. The bully may resort to sarcasm, belligerence, name calling, and demeaning comments.<sup>86</sup> The bully may believe that his role is to serve as the "bad cop:" "He sensed that the others expected him to be brusque, to raise the arguments that they were too polite to make or were not worldly enough to fully comprehend."<sup>87</sup> Deliberations can become loud and angry,<sup>88</sup> and jurors are often reduced to tears.<sup>89</sup>

Jurors will use subtle pressure to get the holdout to move off his position, like cutting off his questions, talking to him in a patronizing tone, or sighing.<sup>90</sup> Members of the majority will challenge the holdout with whether he had been honest in voir dire when asked if he could vote for death (or life, if holding out the other way).<sup>91</sup> According to Asch, this withdrawal of social support is a powerful component of group pressure.<sup>92</sup>

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<sup>84</sup>Ibid., 128.

<sup>85</sup>Ibid., 129.

<sup>86</sup>Ibid., 122.

<sup>87</sup>Ibid.

<sup>88</sup>Ibid., 123.

<sup>89</sup>Ibid., 56.

<sup>90</sup>Ibid., 66-68.

<sup>91</sup>Ibid., 23.

<sup>92</sup>Asch, *Effects of Group Pressure*, 188.

Eventually, the holdout changes his vote, not because he now believes is the rightness of the other side's position, but because he has reached emotional exhaustion and simply acquiesces.<sup>93</sup> Sundby remarks,

[T]he powerful pull of conformity can be observed readily, whether on the playground or in the workplace. And, of course, such pressures come into play in the jury room. For those of us who have whispered to ourselves that we would play Henry Fonda's role in the jury room, the sobering reality is that many of us would not live up to our hopes and expectations.<sup>94</sup>

Some of these dynamics may appear in a capital courts-martial. Like civilian trials (capital and non-capital), capital courts-martial require unanimous votes. Before a death sentence may be imposed, a panel must have a unanimous finding of guilt on a capital offense,<sup>95</sup> a unanimous vote on the existence of an aggravating factor,<sup>96</sup> a unanimous vote that extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances,<sup>97</sup> and a unanimous vote that death is the appropriate sentence.<sup>98</sup> As it turns out, the RCM include provisions that should work against the force of social conformity at all of these voting junctures except for the final vote on life or death.

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<sup>93</sup>The jury filmed for the Frontline project, displays many of these dynamics. Interestingly, the holdout is arguing for a conviction where the law clearly requires a conviction (the case is about jury nullification). The Asch dynamic works against him, and he eventually joins the vote for acquittal--not because he believed the defendant was not guilty, but because he did not want to prevent the others from reaching *their* decision.

<sup>94</sup>Sundby, *A Life and Death Decision*, 84.

<sup>95</sup>MCM, R.C.M. 1004(a)(2).

<sup>96</sup>MCM, R.C.M. 1004(b)(4)(B).

<sup>97</sup>MCM, R.C.M. 1004(b)(4)(C).

<sup>98</sup>MCM, R.C.M. 1006(d)(4)(A).

To see this, we need to look at the rules for the voting procedure. Looking first at the rules for the merits phase, the rules are strict: the junior member collects and counts the ballots, the president announces the result, and that result is the finding.<sup>99</sup> The vote is taken by secret written ballot,<sup>100</sup> so one of the primary drivers of the force of social conformity (announcement in public) has been removed.

Most importantly, after the initial secret ballot on the finding, the finding can only be reconsidered under the procedure outlined in Article 52 of the Uniform Code of Military Justice (UCMJ) and RCM 924.<sup>101</sup> Note that a non-unanimous vote for guilt “may not” be reconsidered:<sup>102</sup> An 11-1 vote for guilt is a finding and cannot be revisited in an effort to get a unanimous vote on a capital offense. The rules themselves preserve the minority. For the merits vote, the majority “never gets a chance” to apply pressure to the minority. In the military, this procedure increases the value of an admission defense: if a single panel member agrees with the defense theory, then the availability of the death sentence can be withdrawn before reaching the presentencing proceeding.

Turning to the capital presentencing proceeding, some of the rules also protect the minority. The votes are also by secret, written ballot.<sup>103</sup> The junior member collects and

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<sup>99</sup>MCM, R.C.M. 921(c)(6).

<sup>100</sup>MCM, R.C.M. 921(c)(1).

<sup>101</sup>MCM, R.C.M. 924(b) and discussion.

<sup>102</sup>UCMJ, Article 52(c), 2008; MCM, R.C.M. 924(b), R.C.M. 922(b)(2) discussion; MCM, R.C.M. 922 analysis, A21-70.

<sup>103</sup>MCM, R.C.M. 1004(b)(7), 1006(d)(2). The rules expressly call for a secret, written vote on the aggravating factors gate, but do not expressly call for a secret, written vote on the balancing gate. However, the Court of Appeals for the Armed Forces advises military judges to require that this vote be reduced to writing. *United States v. Curtis*, 44

counts the ballots and the president announces the result.<sup>104</sup> For the first two gates--the vote on the aggravating factor and the vote on the balancing test--the first vote is the “finding”<sup>105</sup> and may not be reconsidered because there are no reconsideration procedures for these votes.<sup>106</sup> If a single member votes that no aggravating factor exists, or that the extenuating and mitigating factors are not substantially outweighed by the aggravating circumstances, then the deliberations on those gates are over, and those votes cannot be revisited. For these three findings gates (the guilt finding, the aggravating factors finding, and the balancing test finding), defense counsel should object to any request that “straw votes” be allowed and should ask the military judge to instruct that no “straw votes” may be taken.<sup>107</sup>

When we reach the vote on the sentence, the rules no longer protect the minority to the same degree. The proposed sentences are ranked from least to most severe, and

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M.J. 106, 159 (C.A.A.F. 1996). Complying with that directive, Army judges provide an instruction that calls for a secret, written vote on the balancing decision. Department of the Army, Pamphlet 27-9, para. 8-3-40.

<sup>104</sup>MCM, R.C.M. 1006(d)(3).

<sup>105</sup>MCM, R.C.M. 1004(b)(4).

<sup>106</sup>MCM, R.C.M. 1004(b)(4)(C) and (b)(7), 1006.

<sup>107</sup>While straw polls are not specifically prohibited in the Uniform Code of Military Justice or Manual for Courts-Martial, the Court of Military Review has said that “we do not believe that this practice merits encouragement,” *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983), primarily because straw polls circumvent the voting reconsideration rules, remove anonymity, and allow superiority of rank considerations to enter the deliberation room. In *Lawson*, the panel asked the military judge whether they could conduct straw votes on the findings (not on the sentence, where the rules allow for revoting without using reconsideration rules), and the military judge said they could. *Ibid.*, 40. Importantly, the defense counsel did not object. *Ibid.*, 40. The court indicated that this procedure would not be allowed over defense objection. *Ibid.*, 41.

then voted and re-voted as necessary until enough votes for a sentence are reached.<sup>108</sup> The vote requirements are three-fourths for life<sup>109</sup> (which is the mandatory minimum for premeditated murder and felony murder),<sup>110</sup> three-fourths for life without parole,<sup>111</sup> and unanimous for death.<sup>112</sup> Unlike the earlier votes on findings, which could only be voted on once, here the panel can continue to vote.

We should expect the force of social conformity to play a major role in deliberations. Even though the votes are still by secret, written ballot,<sup>113</sup> everyone will be able to recognize who the holdout is because he is the one making the arguments for life.<sup>114</sup> And, the president of the panel, in his discretion, can keep the deliberations open until he or she feels that the debate is done,<sup>115</sup> which could mean keeping the vote open until the holdout comes around.

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<sup>108</sup>MCM, R.C.M. 1006(d). In a note to the hung jury instruction, the *Military Judges' Benchbook* states that, "In capital cases, only one vote on the death penalty may be taken." Headquarters, Department of the Army, Pamphlet 27-9, para. 2-7-18. However, that note is not supported by the rules or case law.

<sup>109</sup>UCMJ, Article 52(b)(2), 2008.

<sup>110</sup>UCMJ, Article 118(4), 2008.

<sup>111</sup>UCMJ, Article 52(b)(2), 2008.

<sup>112</sup>UCMJ, Article 52(b)(1), 2008.

<sup>113</sup>MCM, R.C.M. 1006(d)(2).

<sup>114</sup>In *United States v. Lawson*, 16 M.J. 38 (C.M.A. 1983), the court recognized that, "Typically there will be some discussion among court members as to the facts of a case, and it is hard to imagine how, in speaking about the facts, a member could completely conceal his views." *Ibid.*, 40.

<sup>115</sup>MCM, R.C.M. 502(b)(1), 1006; *United States v. Accordino*, 20 M.J. 102, 105 (C.M.A. 1985).

The panel continues in this voting loop until one of two things happens. First, enough votes for a particular sentence exist. At that point, a sentence has been “adopted.”<sup>116</sup> Second, the panel can hang. In the courts-martial system, panels cannot hang on the merits--if there are not enough votes for a guilty finding when the ballot count is announced, then the accused is acquitted. Panels can hang on the sentencing decision, though.<sup>117</sup> If the panel cannot agree on a sentence, the military judge will declare a mistrial on the sentence only (the findings still stand) and the case is returned to the convening authority to either order a rehearing on the sentence only, or order that no punishment be imposed.<sup>118</sup>

While the rules for voting on a sentence provide room for the force of social conformity to operate, two ancillary rules could be used to counter that force. The first rule is the hung jury instruction from the U.S. Army’s Military Judges’ Benchbook, which explains to the panel members that they do not have to agree:

[Y]ou each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence . . . You should pay proper respect to each other’s opinions . . . [Y]ou are not to yield your judgment simply because you may be outnumbered or outweighed. If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.<sup>119</sup>

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<sup>116</sup>MCM, R.C.M. 1006(d)(6).

<sup>117</sup>MCM, R.C.M. 1006(e); Headquarters, Department of the Army, Pamphlet 27-9, para. 2-7-18.

<sup>118</sup>MCM, R.C.M. 1006(e).

<sup>119</sup>Headquarters, Department of the Army, Pamphlet 27-9, para. 2-7-18.

This language explains to the holdout in a public setting that he does not have to move from a moral, conscientious decision simply because he is outnumbered. He just needs to deliberate for a reasonable period of time.

The issue for the defense counsel is how to inform the panel of this instruction. The directions in the instruction state that it should be read “[w]henver any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory”<sup>120</sup> or if the panel “has been deliberating for an inordinate length of time.”<sup>121</sup> If, after deliberating, the panel asks the military judge a question about the effect of a non-unanimous vote on the death penalty, or if the panel has been deliberating for a few days, the defense counsel should ask the military judge to read this instruction to the panel. And, the defense counsel should work this instruction into her voir dire of the panel.

If the panel does adopt a sentence, another rule exists which could work to counter the force of social conformity--the reconsideration provisions for adopted sentences outlined in RCM 1009.<sup>122</sup> To reconsider an adopted sentence of death with an eye toward lowering the sentence to life, only one member needs to vote to reconsider.<sup>123</sup> The rules also require that the panel go to the judge for more instructions before they can

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<sup>120</sup>Ibid.

<sup>121</sup>Ibid.

<sup>122</sup>MCM, R.C.M. 1009.

<sup>123</sup>MCM, R.C.M. 1009(e)(3)(B). To reconsider the sentence with a view toward increasing the sentence from life to death requires a majority vote, MCM, R.C.M. 1009(e)(3)(A), but that would require a significant number of life voters to change to death voters and is unlikely to happen.

reconsider the sentence.<sup>124</sup> This would give the opportunity for the military judge to read the hung jury instruction, which then might work against the force of social conformity and enable the holdout member to preserve his vote. While this procedure only applies to sentences that have been adopted (which means that the holdout member has already given up, at least temporarily) and not to the votes taken as the panel tries to reach an adopted sentence, it does serve as a final opportunity for a holdout member to return to his original vote. After asking for reconsideration, the panel member would be instructed that the law does not expect him to change a firmly held moral belief--he only needs to negotiate with an open mind for a reasonable amount of time.

This discussion of the voting rules<sup>125</sup> suggests that defense counsel should refine their arguments on the aggravating factors and on the balancing test--both of which have rules that will protect against the force of social conformity. Defense counsel will often have to find novel approaches to the aggravating factors since the aggravating factors are often not in controversy, especially when there are two or more murder victims.<sup>126</sup>

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<sup>124</sup>MCM, R.C.M. 1009(e)(1).

<sup>125</sup>The force of social conformity could also manifest in non-capital courts-martial sentencing where the vote does not have to be unanimous. Uniform Code of Military Justice, Article 52(b)(2-3), 2008. From the CJP, we know that minority votes below 25 percent will usually fold; minority votes above 33 percent will usually preserve their votes; and in between, the vote can go either way. Looking at the guilt phase, by setting the two-thirds vote requirement for guilt, Uniform Code of Military Justice, Article 52(a)(2), Congress has taken some of this dynamic out of the picture. If the initial acquittal vote comes in at 25 percent or less, we should expect those votes to fold anyway, so no harm, no foul. But the military accused might be convicted in some cases where the initial vote falls between 25 percent and 33 percent: in that range, the minority members might (or might not) preserve their votes. Perhaps Congress should set the threshold for guilt at three-fourths, as well as the threshold for all sentences. See MCM, R.C.M. 1009(e)(3).

<sup>126</sup>MCM, R.C.M. 1004(c)(7)(J).

However, the balancing vote (that any extenuating circumstances are substantially outweighed by any aggravating circumstances)<sup>127</sup> is always in controversy. If the defense counsel properly educates the members in voir dire and the military judge clearly instructs the members on the voting rules for the balancing gate, a potential holdout juror will recognize that he can anonymously end the debate on life versus death by voting against death at the balancing gate.

#### Evidence of these Dynamics in Capital Courts-Martial

One of the important CJP findings is that most juries do start deliberations with at least some jurors who support a life sentence.<sup>128</sup> The CJP studies also found that during the first vote on sentence, if 25 percent or less of the jurors vote for life, those jurors will almost always change their votes and the verdict will be death; if 33 percent or more vote for life, those jurors will almost always preserve their vote and the verdict will be life; if the vote falls between 25 percent and 33 percent, the verdict can go either way.<sup>129</sup> At least three capital courts-martial appear to reflect this phenomenon. A review of the appellate opinions of the modern capital courts-martial that have resulted in approved death sentences<sup>130</sup> reveals two cases where, at some point in deliberations, at least one

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<sup>127</sup>MCM, R.C.M. 1004(b)(4)(C).

<sup>128</sup>Bowers, Sandys, and Steiner, 1491-96; Sandys.

<sup>129</sup>Blume, Eisenberg, and Garvey, *Lessons From the Capital Jury Project*, 144,173.

<sup>130</sup>Colonel Dwight H. Sullivan, "Killing Time: Two Decades of Military Capital Litigation," *Military Review* 189 (Fall 2006), 17-19.

panel member voted for life. And, news reports of a recent capital court-martial indicates that at least one panel member voted for life before changing his or her vote to death.

In *United States v. Loving*,<sup>131</sup> possibly the most recognized capital case in the military, the initial vote on a proposed sentence was seven votes for death and one for life.<sup>132</sup> In addition to serving as an example where a minority of 25 percent or less changing votes, the *Loving* case also demonstrates an important aspect of jury dynamics that can influence minority voters to change their votes. While one should not expect to find overt bullies in a court-martial deliberation room, the military does have a dynamic that resembles that pressure: the dynamic of rank in the deliberation room. Overt use of rank within the deliberation room is a form of unlawful command influence and is impermissible.<sup>133</sup> Panel members understand that, and rarely will one see an example of the senior-ranking member looking at the junior-ranking member and telling him, “You will vote this way.” The real problem is subtle or even unintended influence.

During deliberations, the members will learn where the other members generally stand on the issues; therefore, even though the voting is secret, the junior member will generally know where the senior member stands, and vice versa. The Court of Military Review said as much in *United States v. Lawson*:<sup>134</sup>

[W]e cannot deny that considerations of rank may have, at least, an unconscious effect upon the deliberations of a court-martial. Typically there will be some discussion among court members as to the facts of the case, and it is hard to

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<sup>131</sup>*United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994).

<sup>132</sup>*Loving*, 41 M.J., 234-35.

<sup>133</sup>*United States v. Accordino*, 20 M.J. 102, 104 (C.M.A. 1985).

<sup>134</sup>16 M.J. 38 (C.M.A. 1983).

imagine how, in speaking about the facts, a member could completely conceal his views . . . Obviously, if [verbal “straw polls” were taken], the danger would be enhanced, because each member’s position--albeit, a tentative position--is clearly revealed to the others; and junior members might be influenced to conform to the expressed positions of their seniors.<sup>135</sup>

While one should not expect that anyone on a panel will resort to name-calling or other bully tactics, the respect given to rank might achieve the same result--a junior panel member who is holding out for life may change his vote when eleven other senior members in the military, including a president who is most likely a colonel, are telling him, albeit politely or through stares, that a life vote is inappropriate. And, the president of the panel, in his discretion, can keep the deliberations open until he or she feels that the debate is done,<sup>136</sup> which a president could do until he feels that holdout vote has come around.

This dynamic may have influenced the panel in *Loving*. The *Loving* opinion contains three affidavits from panel members,<sup>137</sup> giving us a rare, though short, glimpse into the deliberation room of a capital court-martial. Again, the initial vote in *Loving* was seven votes for death and one for life.<sup>138</sup> After listing the various safeguards that exist to prevent rank from entering the deliberation room, in the dissenting opinion, Justice Wiss stated:

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<sup>135</sup>Lawson, 16 M.J., 40-41.

<sup>136</sup>MCM, R.C.M. 502(b)(1), 1006; *United States v. Accordino*, 20 M.J. 102, 105 (C.M.A. 1985).

<sup>137</sup>The dissenting opinion in *Loving* contains all three affidavits in their entirety. *Loving*, 41 M.J., 331-33 (Wiss, J., dissenting).

<sup>138</sup>*Ibid.*, 234-35.

Regrettably, the specter [of unlawful command influence] has been raised that this carefully designed structure of procedures broke down in this case--and critically, that it did so entirely because the superior-ranking member of the court unilaterally imposed his own short-cut toward a sentence rather than follow the clear path carefully mapped out. . . .<sup>139</sup>

In this case, under the president's guidance, the panel did not vote on aggravating factors;<sup>140</sup> appears not to have voted on the balancing gate;<sup>141</sup> the members did not nominate sentences (the president, a colonel, told them that they need to vote between the two options, life and death);<sup>142</sup> the junior member did not count the votes but passed them to the president to count instead;<sup>143</sup> and the panel did not vote on the lightest sentence first.<sup>144</sup> Justice Wiss concluded:

It was not within [the president's] authority or discretion . . . to divine his own personally preferred procedural path toward a death sentence . . . Unlawful command influence? I think so . . . [These affidavits] portray a scenario in which the senior-ranking member, solely by the virtue of his rank, successfully imposed a procedure that was unlawful.<sup>145</sup>

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<sup>139</sup>Ibid., 273 (Wiss, J., dissenting).

<sup>140</sup>Ibid., 275 (Wiss, J., dissenting).

<sup>141</sup>Ibid., 233-35.

<sup>142</sup>Ibid., 275 (Wiss, J., dissenting).

<sup>143</sup>Ibid.

<sup>144</sup>Ibid., 276 (Wiss, J., dissenting).

<sup>145</sup>Loving, 41 M.J., 278-79 (Wiss, J., dissenting). Justice Wiss contrasts the president's ability and power to modify the procedures with the inability of a second lieutenant on the panel to do the same thing. "Can it be more than rhetorical to ask whether anyone except the most senior ranking person on the court could have unilaterally imposed on all of the other, presumably intelligent, officer members a procedure of his own handiwork that was in marked deviation from that which clearly and in detail was prescribed by the military judge? I am not so naïve as to believe that a second lieutenant . . . could have been so possessed of nature leadership that he so effectively could have led astray a whole panel of his colleagues." Loving, 41 M.J., 279 n.1 (Wiss, J., dissenting).

In the context of the discussion about juror dynamics, the president's explanation of what happened takes on new meaning. Here is what he said:

The judge had explained before we adjourned that the death penalty required a unanimous vote . . . . After another 1 1/2 hours of review, I asked if everyone was prepared to vote again. They said they were . . . . The second vote resulted in the following: 8 votes [for death].<sup>146</sup>

The language the president used is important, particularly when viewed from the perspective of whoever was Panel Member Number 8 in this case. Panel Member Number 8 is certain that the colonel wants death--Panel Member Number 8 knows that he voted for life and is the only life vote, so the colonel necessarily voted for death. The colonel has just said that in order to impose the death penalty, everybody needs to vote for death: he did not say, "Or three-fourths of us can vote for life, or we can be a hung jury, all three of which are acceptable options." The implied message to the holdout is, "You need to change your vote." Panel Member Number 8 is the one during deliberations that mentioned that life might be appropriate, so everyone on that panel, including Panel Member Number 8, must have know that the colonel was speaking to Panel Member Number 8.

In *Loving*, Panel Member Number 8 changed his vote--possibly because of the social conformity dynamic and because of the subtle pressure of rank in the deliberation room.<sup>147</sup> Even if the panel member genuinely changed his or her mind (and not just his

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<sup>146</sup>*Loving*, 41 M.J., 331-33 (Wiss, J., dissenting). His account was confirmed by two junior members on the panel who also provided affidavits. *Ibid.* Sundby documents very similar language was used against a holdout. Sundby, *A Life and Death Decision*, 90.

<sup>147</sup>The court in *Loving* resolved the issue by ruling that the affidavits provided by the panel members were not admissible under Manual for Court Martial, United States, Mil R. Evid. 606(b) (1984). *Loving*, 41 M.J., 239. The majority declined to hold that the

vote) based on the deliberations, the key is to recognize that there is a real potential for these dynamics to exist.

The capital case of *United States v. Thomas*<sup>148</sup> (Thomas I) also contains portions of post-trial depositions given by panel members. These depositions indicate that multiple votes were taken on the finding of guilt, with at least some votes for acquittal.<sup>149</sup> After receiving instructions on the findings from the military judge, the panel president asked how many times the panel could vote on the verdict before they announced their finding.<sup>150</sup> The military judge essentially told him that if that issue came up, to come back to the military judge.<sup>151</sup> Based on that question, the defense counsel asked the military judge to ask the panel how many times they voted on the finding, and the military judge denied that request.<sup>152</sup> After the trial, the appellate defense counsel called the junior member of the panel, who told him (and another appellate defense counsel) that the panel voted multiple times on the finding of guilt.<sup>153</sup> The appellate defense

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information included in the affidavits rose to the level of unlawful command influence necessary to satisfy one of the exceptions in Mil R. Evid. 606(b). *Loving*, 41 M.J., 237-38.

<sup>148</sup>39 M.J. 626 (N.M.C.M.R. 1993).

<sup>149</sup>*Thomas*, 39 M.J., 637.

<sup>150</sup>*Ibid.*, 628.

<sup>151</sup>*Ibid.*

<sup>152</sup>*Ibid.*

<sup>153</sup>*Ibid.*

counsel provided affidavits to the Navy-Marine Court of Military Review, which ordered depositions of the panel members.<sup>154</sup>

Of these nine panel members, three said that the initial vote on guilt included votes for not guilty, with probably two panel members voting for not guilty; five said that there was only one vote (including the president, and the junior panel member that the appellate defense counsel had interviewed earlier); and one had retired and refused to answer questions.<sup>155</sup> The difference in the way the panel members remember the voting process is interesting. Very likely, the two panel members who voted not guilty are among the three that remember the multiple votes. They would have been the ones that the group dynamics worked against and would have felt a high degree of stress--resulting in a memorable event.

By this reasoning, the president of the panel was very likely in the majority block that was voting for guilt. He remembered only one vote.<sup>156</sup> This president, like the president in Loving, did not follow the rules and may have unintentionally invited the subtle pressure of rank into the deliberation room. Had the president followed the rules, no further deliberations would have been allowed on the merits. The accused would not have received a death sentence.

Last, in the recent capital court-martial of Master Sergeant Timothy Hennis, the panel asked a question that indicated that at least one panel member voted for life during

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<sup>154</sup>Ibid., 629.

<sup>155</sup>Ibid., 628, 637.

<sup>156</sup>Ibid., 637.

the sentencing deliberations.<sup>157</sup> After more than seven hours of debate, the panel asked the military judge, “If one person votes against imposing a death sentence, are subsequent ballots automatically for a life sentence?”<sup>158</sup> The reasonable inference from this is that at least one person in the panel room voted for life, and to his credit, the president of the panel returned to the judge for guidance. The military judge told them to following the rules for voting on a sentence: to keep deliberating and voting until the panel reached enough votes to adopt a sentence (three-fourths for life or unanimous for death).<sup>159</sup> The military judge did not, however, read them the hung jury instruction.<sup>160</sup> After another six hours of deliberation, the panel adopted a sentence of death.<sup>161</sup> Had the military judge read the hung jury instruction, the minority voter may have found assurances in the language and hung on to his vote.

These cases indicate that panel members in capital cases face the same dynamics when deliberating cases that civilian jurors face. In each of these cases, at least one panel member changed a vote that could have prevented the imposition of the death penalty, but changed that vote--as the research on social conformity would predict. Asch stated that, “A theory of social influences must take into account the pressures upon persons to

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<sup>157</sup>Paul Woolverton, “Hennis Jurors Extend Debate,” *Fayetteville Observer*, <http://www.fayobserver.com/Articles/2010/04/14/991074> (accessed 15 April 2010).

<sup>158</sup>*Ibid.*

<sup>159</sup>*Ibid.*

<sup>160</sup>*Ibid.*

<sup>161</sup>Paul Woolverton, “Hennis Sentenced to Death for 1985 Eastburn Murders,” *Fayetteville Observer*, <http://www.fayobserver.com/Articles/2010/04/15/991361> (accessed 16 April 2010).

act contrary to their beliefs and values.”<sup>162</sup> Asch was not a pessimist, however, and continued, “[A]t the same time they may reveal forces, perhaps no less powerful, that individuals can mobilize to resist coercion and threats to their integrity.”<sup>163</sup> Defense counsel can work to counter the social conformity dynamic through voir dire and by litigating the instructions, as will be discussed below.

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<sup>162</sup>Asch, *Social Psychology*, 450-51.

<sup>163</sup>*Ibid.*, 451.

## CHAPTER 7

### JUROR CONFUSION

Another of the major findings of the CJP is the striking degree to which jurors do not understand the law or the instructions. For example, even after hearing the instructions and sitting through a capital trial, 63 percent of jurors in one study thought that the law “required” them to impose the death sentence if they found that the crime was heinous, atrocious, or cruel;<sup>164</sup> 43 percent thought the same if they found the defendant would pose a future danger;<sup>165</sup> 41 percent thought the standard of proof on mitigating factors was beyond a reasonable doubt;<sup>166</sup> 42 percent thought unanimity was required on mitigating factors;<sup>167</sup> only one-third understood that life was the required sentence if the mitigating factors outweighed the aggravating factors;<sup>168</sup> and when given six basic questions about the process to answer, less than 50 percent were able to answer more than half of the questions correctly.<sup>169</sup>

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<sup>164</sup>James Luginbuhl and Julie Howe, “Discretion in Capital Sentencing Instructions: Guided or Misguided?,” *Indiana Law Review*, 70, no.4 (Fall 1995): 1174.. See also Theodore Eisenberg, and Martin T. Wells, “Deadly Confusion: Juror Instructions in Capital Cases,” *Cornell Law Review* 79 (1993): 1-17; Stephen P. Garvey, Sheri Lynn Johnson, and Paul Marcus, “Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases,” *Cornell Law Review* 85, no. 3 (March 2000): 627-655.

<sup>165</sup>Luginbuhl and Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 1174.

<sup>166</sup>*Ibid.*, 1167.

<sup>167</sup>*Ibid.*

<sup>168</sup>*Ibid.*, 1173.

<sup>169</sup>*Ibid.*, 1168.

One of the main reasons for this is that instructions are written by trial lawyers for appellate lawyers--and not for jurors. Even when provided with the written instructions, jurors find them long, boring, and confusing, “like the undecipherable user’s manual that comes with a new computer, written by one technician for another.”<sup>170</sup> The process for seeking clarification from the judge is overwhelming, intimidating, and time consuming. If a juror has a question, the court has to get the lawyers, get the defendant from a holding cell, and formally march everyone into the courtroom.<sup>171</sup> The response from the judge is often to simply re-read the same instruction that the jurors found was confusing.<sup>172</sup> After doing that once, jurors figure out that the process is not worth it and try to solve the problems on their own--often incorrectly.<sup>173</sup>

For those who think that a military panel filled with college-educated professionals will have no problem following the instructions or the law, look again at Loving.<sup>174</sup> According to affidavits provided by three panel members, to include the president (a colonel), the panel did not vote on the aggravating factors,<sup>175</sup> violating RCM 1004(b)(7).<sup>176</sup> The panel did not vote on whether the aggravating factors substantially

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<sup>170</sup>Sundby, *A Life and Death Decision* 49; Luginbuhl and Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 1169.

<sup>171</sup>Sundby, *A Life and Death Decision* 49-50.

<sup>172</sup>Garvey, Johnson, and Marcus, “Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases.”

<sup>173</sup>Sundby, *A Life and Death Decision*, 50.

<sup>174</sup>United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994).

<sup>175</sup>*Ibid.*, 234

<sup>176</sup>MCM, R.C.M. 1004(b)(7) (1984).

outweighed the extenuating and mitigating factors,<sup>177</sup> violating RCM 1004(b)(4)(B).<sup>178</sup> The panel did not vote in order of least severe sentence to most severe sentence,<sup>179</sup> violating RCM 1006(d)(3)(A).<sup>180</sup> The junior member did not count the votes (the president did),<sup>181</sup> violating RCM 1006(d)(3)(B).<sup>182</sup>

The military judge did not give incorrect instructions (he instructed the panel on the aggravating factor gate and the balancing gate) but he did give incomplete instructions (he did not instruct that only one vote could be taken on those gates and those votes could not be revisited).<sup>183</sup> While at least one of the aggravating factors (multiple murders)<sup>184</sup> was not an issue, the holdout panel member might have voted against the balancing gate had a vote actually been taken on that gate. If the holdout panel had properly educated and instructed on the rules, and then if the panel had followed those rules, the minority voter may very well have voted against death at the balancing gate--and no one might even know about this case.

Likewise, in Thomas I, both the panel members and the military judge appeared confused about the rules. After the military judge read the instructions at the conclusion

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<sup>177</sup>Loving, 41 M.J., 275 (Wiss, J., dissenting).

<sup>178</sup>MCM, R.C.M. 1004(b)(4) (B) (1984).

<sup>179</sup>Loving, 41 M.J., 234-35.

<sup>180</sup>MCM, R.C.M. 1006(d)(3)(A) (1984).

<sup>181</sup>Loving, 41 M.J., 275 (Wiss, J., dissenting).

<sup>182</sup>MCM, R.C.M. 1006(d)(3)(B) (1984).

<sup>183</sup>Loving, 41 M.J., 233.

<sup>184</sup>Loving, 41 M.J., 267.

of the merits case, the president of the panel asked: “I want to say, your instructions on reconsideration, if I understood correctly, we can have several ballots on the issue? We can reconsider at anytime up until the findings has been announced; and then, additionally, before the sentence has been announced?”<sup>185</sup> The correct response should have been:

Do not worry about sentencing right now.

Once you have finished deliberating, you will vote by secret, written ballot. The junior member will collect and count those votes. You will then check that count and announce the results.

If the president informs the panel that the finding is not guilty, then if a majority of you would like to reconsider the finding to seek a guilty verdict, let me know and I will give you further instructions.

If the president informs the panel that the finding is guilty, then if more than one-third of you would like to reconsider to seek a not guilty verdict, then let me know and I will give you further instructions.

However, if the president informs the panel that the finding on the capital offense is guilty, but one of you has voted for not guilty on the capital offense, you may not reconsider that vote for the purpose of seeking a unanimous vote in order to authorize a capital sentencing rehearing. You may only reconsider that vote to seek a not-guilty finding.

Compare that to the military judge’s response: “If it comes up--if anybody wants to raise the issue that, “Hey, I want to talk about this, reconsider it,” let me know and I’ll give you the instructions on it.”<sup>186</sup> Provided with this incomplete response, the panel then revoted the finding of guilt on the capital offense in order to raise a seven-two vote to a unanimous vote, which ultimately led to an adopted sentence of death.

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<sup>185</sup>Thomas, 39 M.J., 628.

<sup>186</sup>Thomas, 39 M.J., 628.

In both *Loving* and *Thomas I*, the military judges provided incomplete but not patently incorrect instructions on the specified issues. In *United States v. Simoy*,<sup>187</sup> the military judge issued a patently incorrect instruction: he told the panel to vote on death before voting on life.<sup>188</sup> The Court of Appeals for the Armed Forces reversed, stating:

The instructions to the members should make [clear that] . . . they may not vote on the death penalty first if there is a proposal by any member for a lesser punishment, *i.e.*, life in prison. Some of those members who voted for the death penalty in this case might have agreed with life in prison. Thus, unless they held out on their vote for the lesser punishment of life, three-fourths might very well have agreed on life in prison rather than death. Thus, it was important for the members to understand that, because of requirements for unanimous votes, any one member at any stage of the proceeding could have prevented the death penalty from being imposed.<sup>189</sup>

The court's reasoning is in concert with the CJP's findings: a properly educated and instructed panel member might decide to hold on to his or her vote for life.<sup>190</sup> In *United*

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<sup>187</sup>46 M.J. 592 (A.F. Ct. Crim. App. 1996).

<sup>188</sup>*Simoy*, 46 M.J., 613-14.

<sup>189</sup>*United States v. Simoy*, 50 M.J. 1, 2-3 (C.A.A.F. 1998). The statement "any one member at any stage of the proceeding could have prevented the death penalty from being imposed" should be read to mean that at the first three gates, one vote can prevent death from being considered as a sentence, and on the sentencing vote, one vote can prevent death from being imposed by hanging the jury.

<sup>190</sup>The interesting contrast with *Loving* and *Thomas I* is that if the panel members do the same thing--vote out of order or do not vote on gates at all--but do that without a faulty instruction and instead because they are confused or choose not to follow the rules, the appellate courts will let those votes stand by finding that the evidence of that improper voting does not satisfy MCM, Mil. R. Evid. 606(b). The courts will not consider the evidence, or, they will "hear no evil, see no evil." See *Loving*, 41 M.J. 237-38; *Thomas*, 39 M.J., 636. If, however, the military judge issues an incorrect instruction, even without evidence that the panel did vote improperly, the courts will find those verdicts untrustworthy. *Simoy*, 50 M.J., 2-3; *Thomas*, 46 M.J., 312. That seems to be a paradox within due process, but one sanctioned by the Supreme Court. See *Tanner v. United States*, 483 U.S. 107 (1987).

States v. Thomas<sup>191</sup> (Thomas II), the Court of Appeals for the Armed Forces dealt with an error in the military judge's instructions that had not been raised in Thomas I, and found that the military judge's instructions that the panel should vote on death first was reversible error.<sup>192</sup> One should not be surprised that panel members are confused when these rules confuse military judges, too.

Juror confusion also extends into the effect of becoming a hung jury. One of the primary concerns of jurors is to avoid becoming a hung jury.<sup>193</sup> In his case study, Scott Sundby described what happened when the holdout juror suggested that the jury deadlock on the sentencing decision.<sup>194</sup> One of the jurors read the instructions and thought that if the jurors deadlocked, that the defendant would automatically get life without parole.<sup>195</sup> The instruction actually said that all that would happen is that a new jury would reconsider the sentence. After incorrectly decoding the instructions, the rest of the jurors became increasingly upset with the idea that this one juror "would now dictate the result."<sup>196</sup> This holdout juror eventually changed his vote.

Something similar happened in Thomas I. Asked why the panel took multiple votes during the guilt deliberations, a panel member "said that they voted more than once to avoid being a 'hung jury.'" He had understood that a hung jury was "a jury that has not

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<sup>191</sup>46 M.J. 311 (C.A.A.F. 1997).

<sup>192</sup>Thomas, 46 M.J., 315-16.

<sup>193</sup>Sandys, 1195-96, 1199, 1203, 1205-08.

<sup>194</sup>Sundby, *A Life and Death Decision*, 90.

<sup>195</sup>Ibid.

<sup>196</sup>Ibid., 91.

reached a unanimous conclusion.’’<sup>197</sup> The military judge did not instruct the members that they could not reconsider a nonunanimous finding of guilt,<sup>198</sup> so had the panel members returned to the instructions to find the answer, they would not have found it. Instead, they would have found the standard instructions, which are themselves confusing enough that sometimes military judges cannot get them right.<sup>199</sup> The panel continued to deliberate and revote, eventually convicting the accused by a unanimous vote of a capital offense.

In addition to confusion about the rules themselves, another area of significant confusion is the meaning of a life sentence and the meaning of a death sentence. Jurors generally do not believe that a life sentence, either with or without parole, means that the defendant will actually spend his life in prison.<sup>200</sup> Rather, jurors tend to believe that if the defendant does not get the death penalty, he will be back on the street in fifteen years-- even in jurisdictions that have life without parole.<sup>201</sup>

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<sup>197</sup>Thomas, 39 M.J., 638.

<sup>198</sup>Thomas, 39 M.J., 646 (Jones, S.J., dissenting).

<sup>199</sup>See Simoy, 50 M.J. 1; Thomas, 46 M.J. 311.

<sup>200</sup>William J. Bowers and Benjamin D. Steiner, “Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,” *Texas Law Review* 77, no. 3 (1999): 605; Benjamin D. Steiner, “Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness,” *Law and Society Review* 33 (1999): 461; Theodore Eisenberg, Stephen P. Garvey, and Martin T. Wells, “Jury Responsibility in Capital Sentencing: An Empirical Study,” *Buffalo Law Review* 44 (1996): 339, 340; Theodore Eisenberg, Stephen Garvey, and Marvin Wells, “The Deadly Paradox of Capital Jurors,” *Southern California Law Review* 74, no. 2 (January 2001) 373.

<sup>201</sup>Bowers and Steiner, “Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,” 645-48.

Considering that future dangerousness is one of the determining factors in a juror's decision to vote for death, this issue is no small matter. Jurors are more likely to vote for death when they believe that the alternative to death will result in the defendant's release from prison.<sup>202</sup> Those who underestimate the parole date are more likely to vote for death, more so as the trial progresses:<sup>203</sup>

[J]urors who underestimate the alternative are more likely to vote for death, whether the alternative does or does not permit parole. In fact, it is when jurors think the defendant will return to society in less than twenty years, regardless of how much longer he will actually serve, that they are substantially more likely to vote for death.<sup>204</sup>

If the panel members use their "folk knowledge" about when murderers are paroled, they may be making uninformed or misinformed decisions about whether someone should live or die.

Understandably, this is a critical issue to jurors and they often ask the trial judge what a life sentence really means—"If we sentence the defendant to live, will he ever be paroled?" The trial judge usually says that "life means life" or simply rereads the instructions. This is the rule in the military. In *United States v. Simoy*,<sup>205</sup> the offense occurred before 1997, which was the year that Congress authorized life without parole

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<sup>202</sup>Bowers and Steiner, "Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing," 655.

<sup>203</sup>*Ibid.*

<sup>204</sup>Bowers and Steiner, "Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing," 671; Eisenberg and Wells, "Deadly Confusion: Juror Instructions in Capital Cases," 1.

<sup>205</sup>46 M.J. 592 (A.F. Ct. Crim. App. 1996).

(LWOP) as a punishment for premeditated murder.<sup>206</sup> Therefore, the only options for the panel were life with parole and death.<sup>207</sup> The panel asked the military judge whether the accused could be paroled if sentenced to life, and the judge gave the “life means life” response, telling them that whether or not the accused could be paroled was collateral to the sentencing decision and not something that they should consider.<sup>208</sup> In the recent capital court-martial of Master Sergeant Timothy Hennis, the panel was faced with the same issue because the charged offense occurred before LWOP was an option.<sup>209</sup> The panel asked the military judge if the accused could be paroled if given a life sentence and the military judge replied with the “life means life” instruction.<sup>210</sup>

However, jurors take that response to mean that the judge is hiding the fact that the defendant can be paroled.<sup>211</sup> And when jurors remain confused about the meaning of life, they revert to using their folk knowledge.<sup>212</sup>

The result of this confusion is that jurors or panel members may choose death not because it is the appropriate punishment, but because it is the least inappropriate of the

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<sup>206</sup>UCMJ, Article 56a(a) (2008).

<sup>207</sup>Simoy, 46 M.J., 614.

<sup>208</sup>Simoy, 46 M.J., 614.

<sup>209</sup>Woolverton, “Hennis Jurors Extend Debate.”

<sup>210</sup>Ibid..

<sup>211</sup>Bowers and Steiner, “Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,” 673-77.

<sup>212</sup>Ibid.

alternatives that exist--particularly when LWOP is not an option. Commentators call this a “forced choice.”<sup>213</sup>

Some jurors who voted for death say that the defendant did not deserve to die, but deserved a true life sentence. They say that they did not believe death was the appropriate punishment, that they wanted LWOP, but that death was their only option in view of what they knew about parole. They say the defendant deserved life; the jury wanted life; but that was not an option.<sup>214</sup>

They may even solve the problem by deciding that, because of endless appeals and the rarity of executions, “death” does not mean “death”--it means life spent on death row until the defendant dies of a heart attack.<sup>215</sup> If the jurors believe that the defendant might one day be paroled if given a life or life without parole sentence, but will not be paroled if given a death sentence, and will not actually be executed, then jurors may vote for death to punish the defendant with a sort of super-life without parole.<sup>216</sup>

Some jurors who voted for death did so in the belief that this was the way to come closest to an LWOP sentence, that it was the only way to keep the defendant in prison for the rest of his life. They became convinced that sentencing the defendant to death would not really mean his execution, but would ensure that he stays in prison for life.<sup>217</sup>

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<sup>213</sup>Bowers and Steiner, “Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,” 605. This “forced choice” may be unconstitutional.

<sup>214</sup>*Ibid.*, 677.

<sup>215</sup>Sundby, *A Life and Death Decision*, 38-39.

<sup>216</sup>*Ibid.*, 39.

<sup>217</sup>Bowers and D. Steiner, “Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing,” 678.

The military has a long appellate process, high rate of overturning death sentences, and has not executed anyone since 1961.<sup>218</sup> One can reasonably believe that some panel members believe death does not equal death and so will follow this reasoning process.<sup>219</sup>

Based on this, military defense counsel who are defending capital cases where LWOP is not an option should seek to fully inform the panel about the parole process. For example, under Army regulations, an Army service member convicted of murder can only be paroled if the Secretary of the Army or his designee approve.<sup>220</sup> Panel members who are considering voting for life can be reasonably confident that no Secretary of the Army is going to take the political risk of signing the parole paperwork for someone who has committed the kind of a crime that many people feel warrants a death sentence.

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<sup>218</sup>Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 1.

<sup>219</sup>In the recent capital court-martial of Master Sergeant Timothy Hennis, the husband of one of the murder victims expressed that reasoning: the death penalty will “keep him there until that sentenced is carried out or until he dies a natural death, which I think is a just punishment,” [the widower] said, and it doesn’t matter to him whether Hennis is executed.” Woolverton, “Hennis Sentenced to Death for 1985 Eastburn Murders.”

<sup>220</sup>Headquarters, Department of the Army, Army Regulation 15-130, *Army Clemency and Parole Board* (Washington, DC: Government Printing Office, 1998), 4-2b. While an Army service member sentenced to life with parole cannot be paroled from a military prison without approval of the Secretary of the Army or his designee, the service member could be transferred to a federal prison, where he would fall under federal parole regulations rather than Army parole regulations. Headquarters, Department of the Army, Army Regulation 15-130, para. 3-1e(9). If that happened, the Secretary of the Army would lose his veto authority over any subsequent parole decision. However, the decision to transfer an Army prisoner to a federal prison is wholly the Army’s to make. Headquarters, Department of the Army, Army Regulation 190-47, *The Army Corrections System* (Washington, DC: Government Printing Office, 2006), para. 3-3. If the Secretary of the Army wants to prevent someone who has committed a heinous crime but who has been sentenced to life in prison with parole from ever leaving prison, the Secretary of the Army can do that by preventing the service member from being transferred to a federal prison and then vetoing any recommendation for parole that comes before him.

And, the defense should seek to counter the folk knowledge by presenting evidence that no one under similar circumstances has been paroled, making it more likely that this accused will never be paroled. If defense counsel seek the “life means life” instruction, the CJP findings suggests that the panel will assume that the judge is hiding the fact that the accused can be paroled, and will then follow the reasoning outlined above. Trial counsel, however, should seek the “life equals life” instruction, with nothing more.

In the military, this problem should be reduced for those cases with offenses committed after the 1997 change to Article 50(a) which authorized LWOP. The CJP findings indicate that many jurors find LWOP to be an appropriate alternative to the death penalty.<sup>221</sup> However, the problem still exists, even in LWOP cases:

[E]ven when the law does in fact provide for LWOP or LWOP+, jurors and members of the general public are unaware of it, or, if they are aware of it, they do not believe it. Instead, they wrongly think the alternative to death is some term of imprisonment short of LWOP. Reality is one thing; perception is another.<sup>222</sup>

To complicate this problem, in the military, LWOP does not mean LWOP. The convening authority can reduce that sentence at action,<sup>223</sup> the President can pardon the accused,<sup>224</sup> and after the accused serves 20 years in prison, the Service Secretary can remit the sentence to life with parole.<sup>225</sup> If the panel asks the military judge whether an

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<sup>221</sup>Eisenberg, Garvey, and Wells, “The Deadly Paradox of Capital Jurors,” 391.

<sup>222</sup>Ibid., 395-96.

<sup>223</sup>UCMJ, Article 56a(b)(1)(A) (2008).

<sup>224</sup>UCMJ, Article 56a(b)(3) (2008).

<sup>225</sup>MCM, R.C.M. 1108(b) (2008).

accused can ever get out of jail if given life without parole, what should the military judge say? Here, the defense counsel would only want the basic instruction to be read,<sup>226</sup> while the trial counsel would want the panel to know about these other rules.

All military attorneys in the court room--trial counsel, defense counsel, and the military judge--should be committed to ensuring that the panel understands the law and the rules of the deliberative process. All should be committed to drafting clear instructions. So far, in at least three of the fourteen modern military capital convictions, panels have not followed the rules or the military judge has issued improper deliberation instructions. Yet the laws and rules ensure a reliable sentence, and reliability in the verdict is the lynchpin of death penalty jurisprudence.<sup>227</sup> Getting the rules right should be easy to accomplish. The tougher problem is how to deal with those things that the lawyers do not want the panels to think about, but which the panels will think about regardless of what the lawyers say--like the panel members concerns about parole.

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<sup>226</sup>Department of the Army, Pamphlet 27-9, *Military Judges' Benchbook*, the only guidance is for the military judge to say, "confinement for life without eligibility for parole." Ibid., para. 8-3-40.

<sup>227</sup>*Furman v. Georgia*, 408 U.S. 238, 286 (1972).

## CHAPTER 8

### JUROR RESPONSIBILITY

We have already touched upon an issue related to juror responsibility: the belief held by some jurors that if they vote for death, the defendant will never be executed. If a juror believes that the defendant will never be executed, then the juror will not really feel that he is responsible for his decision because it will never be carried out. The general theory of juror responsibility is that:

[T]he decisions of people who feel personally responsible for an outcome differ from the decisions where the individual assumes no such responsibility . . . particularly when the decision involves consequences to the welfare of another person . . . Given that a life or death decision during the sentencing phase of a capital trial is as important a consequence to another person as there can be, it follows that the degree of responsibility experienced by a jury would impact on capital decisions.<sup>228</sup>

The CJP provides evidence that some jurors do shift responsibility:<sup>229</sup> “Most jurors accept role responsibility, though a disquietingly large minority do not.”<sup>230</sup> The degree to which jurors feel responsible for the sentencing decision appears to be modestly correlated to the final vote: “[W]e find limited evidence that jurors who impose life sentences accept more responsibility than do jurors who impose death sentences.”<sup>231</sup>

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<sup>228</sup>Steven J. Sherman, “The Capital Jury Project,” 1242.

<sup>229</sup>Joseph L. Hoffman, “Where’s the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases,” *Indiana Law Journal* 70, no. 4 (Fall 1995): 1138.

<sup>230</sup>Eisenberg, Garvey, Wells, “Jury Responsibility in Capital Sentencing,” 349.

<sup>231</sup>*Ibid.*, 341, 376-77.

Theodore Eisenberg, Stephen Garvey, and Martin Wells further refine juror responsibility into role responsibility and causal responsibility.<sup>232</sup> Role responsibility is “the obligations one has flowing from a role one has assumed . . . [I]n the capital sentencing context, role responsibility focuses on whether jurors understand and accept the primary responsibility they have for the defendant’s sentence in the role they have assumed as sentence.” A juror might believe that someone other than himself is really making the decision, or that he is carrying out the decision on behalf of someone else. Jurors might shift responsibility for their decision to any number of places, to include the law, if, as we have seen, the jurors incorrectly believe that the law requires a death sentence;<sup>233</sup> to the judge;<sup>234</sup> to the community;<sup>235</sup> or to the other jurors, through de-individualization and group dynamics, as we have also seen.<sup>236</sup>

Causal responsibility is “whether or not, and how strongly, someone or something figures in the causal chain leading to some outcome . . . [including] all of the factors that might be responsible for the defendant’s sentence, including, most importantly, the conduct of the defendant himself.”<sup>237</sup> If a juror (understandably) believes that the defendant is primarily responsible for his own sentence, that lessens the juror’s feeling of

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<sup>232</sup>Ibid., 340.

<sup>233</sup>Sherman, “The Capital Jury Project,” 1244.

<sup>234</sup>Ibid.

<sup>235</sup>Ibid., 1245.

<sup>236</sup>Ibid., 1246.

<sup>237</sup>Eisenberg, Garvey, Wells, “Jury Responsibility in Capital Sentencing,” 340-41. See also Sherman, “The Capital Jury Project,” 1244.

personal responsibility for the sentence--and the CJP findings indicate that jurors do shift responsibility to the defendant.<sup>238</sup> Another significant factor in causal responsibility is the belief held by some jurors that the defendant will never be executed--the "death does not mean death" belief.<sup>239</sup> "A clear majority say that 'very few' death-sentenced defendants will ever be executed, and about 70 percent of jurors believe that 'less than half' or 'very few' will be executed."<sup>240</sup>

Of the ways that jurors can shift responsibility, some may not apply to any degree in courts-martial--judges do not play a role in the military's capital sentencing scheme, for example. Some may apply as well to courts-martial as they do in civilian trials--shifting responsibility to the law by mistakenly believing that the law sometimes requires the death penalty; to the defendant; or to other jurors through group dynamics. Some may apply with even greater force--we can reasonably assume that a court-martial panel member will have more confidence that the accused will not be executed than a juror on a Texas panel will have that the defendant will not be executed.

One may have special significance in the military: the shift of responsibility to the community. Steven Sherman describes the shift to the community in the civilian context like this:

Jurors are informed that they have been chosen as representatives of the community, and that they must represent the moral values of that community. In a capital case, there is often outrage and anger in the community-at-large about the murder. Cries for retribution and a death sentence are common. Believing that

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<sup>238</sup>Eisenberg, Garvey, Wells, "Jury Responsibility in Capital Sentencing," 341.

<sup>239</sup>Ibid., 340. See also Sherman, "The Capital Jury Project," 1245.

<sup>240</sup>Eisenberg, Garvey, Wells, "Jury Responsibility in Capital Sentencing," 363.

they are simply conduits for the expression of community values can greatly diminish the jurors' personal sense of responsibility.<sup>241</sup>

In the military context, we add to this the special role of the convening authority, both before and after the court-martial.

Capital cases are unique in that these are the only courts-martial where the convening authority, by the very act of referral, has communicated to the panel what he thinks is the appropriate sentence in that case. The panel members can reasonably assume that the convening authority believes that death is the appropriate sentence; otherwise, the convening authority would not have referred the case with a capital instruction. In the military, this problem is analyzed using the framework for unlawful command influence<sup>242</sup> (and maybe this is a form of unintended but *per se* unlawful command influence), but for a capital defense counsel, this referral process presents additional problems. If the panel member believes, or even just thinks, that he is simply a conduit for the expression of the convening authority's values, then he may shift responsibility for his decision to the convening authority.

Another problem exists: the panel members may shift responsibility to the convening authority in the way that civilian jurors might shift responsibility to an appellate court. Panel members who are aware that a convening authority can reduce a sentence (and we should assume that panel members know this) may opt for a higher sentence believing that if they miss the convening authority's target, the convening authority will reduce the sentence later. This is not a fanciful problem. In *United States v.*

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<sup>241</sup>Sherman, "The Capital Jury Project," 1245.

<sup>242</sup>Convening authorities cannot tell panel members what the appropriate punishment is for an accused. *United States v. Baldwin*, 54 M.J. 308 (C.A.A.F. 2001).

Dugan,<sup>243</sup> the convening authority had held meetings where he discussed military justice issues in an inappropriate way, essentially saying that there was no room in the military for drug users.<sup>244</sup> The military judge allowed voir dire on this issue, but that was not good enough--apparently, the remaining panel members were still concerned about what the convening authority would think of their sentence. According to a letter filed by the junior member of the panel, "a couple of the panel members expressed the notion that a Bad Conduct Discharge was a 'given' for a person with these charges,"<sup>245</sup> and "[A] panel member reminded us that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message."<sup>246</sup> This was a not a capital case, but still shows that panel members think--and even talk--about what the convening authority will think about their sentence. This process shifts responsibility away from the panel member and onto the convening authority.

To ensure panel members retain responsibility for their decisions, defense counsel should litigate for instructions that "instruct jurors that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgment will be final."<sup>247</sup> Counsel should explore in voir dire what the panel

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<sup>243</sup>58 M.J. 253 (C.A.A.F. 2003).

<sup>244</sup>58 M.J., 254.

<sup>245</sup>Ibid., 255.

<sup>246</sup>Ibid. The court took the unintended unlawful command influence issue seriously and returned the case for a fact finding hearing: "it is exactly this type of command presence in the deliberation room--whether intended by the command or not--that chills the members' independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial." Ibid., 259.

<sup>247</sup>Eisenberg, Garvey, Wells, "Jury Responsibility in Capital Sentencing," 379.

members think about the fact that the convening authority referred the case with a capital instruction. And counsel should explore with the panel members in voir dire whether they might shift responsibility for their individual decisions to the panel as a whole by changing their vote not because they had a genuine change in heart, but because of group dynamics.

CHAPTER 9  
COLORADO VOIR DIRE

The CJP has influenced one of the major revolutions in capital trial work--the development of the Colorado voir dire method. One of the CJP findings is that most juries start deliberations with at least some jurors who support a life sentence.<sup>248</sup> David Wymore recognized that the key for defense counsel was to find a way to preserve those potential votes.<sup>249</sup> Essentially, he set out to find a way around the force of social conformity that Asch documented. Asch described the subject's quandary as this:

The subject knows (1) that the issue is one of fact; (2) that a correct result is possible; (3); that only one result is correct; (4) that the others and he are oriented to and reporting about the same objectively given relations; (5) that the group is in unanimous opposition at certain points with him."<sup>250</sup>

If the juror knows that: (1) his decision is a moral--not factual--decision; (2) that more than one result is possible; (3) and that it is okay to be in opposition to the majority, then the force of social conformity might be defused. If Asch had told his subjects that more than one result was possible and that the majority might have it wrong, the results of his experiment would likely have been much different.

David Wymore solved this problem by pioneering a new method of voir dire for use in capital cases that, among other things, seeks to reduce the force of social

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<sup>248</sup>Bowers, Sandys, and Steiner, "Foreclosed Impartiality in Capital Sentencing, 1491-96; Sandys.

<sup>249</sup>*The Life Penalty and Colorado Jury Selection: Selecting a Colorado Jury--One Vote for Life* (Videotape: Wild Berry Productions 2004), <http://www.thelifepenalty.com/> (accessed 3 May 2010).

<sup>250</sup>Asch, *Social Psychology*, 461.

conformity. The method is designed to get the life votes out of the deliberation room. Called the Colorado voir dire method (Wymore was practicing in Colorado when he developed this method), the method has two basic parts.<sup>251</sup> The first is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges and to build grounds for challenges for cause.<sup>252</sup> The second is designed to address the Asch findings on group dynamics, and focusing on teaching the juror the rules for deliberation, that he is making an individual moral decision,<sup>253</sup> that he needs to respect the decisions of others, and that he is entitled to have his individual decision respected by the group. Looking back at this overview, notice that the Colorado method covers most of the dynamics or issues described. The goal is not to teach Juror Number 8 to change everyone else's mind--the goal is to teach Juror Number 8 how not to fold, and to teach the other jurors to respect Juror Number 8's opinion.

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<sup>251</sup>This is a very simplified description of the method. The method is generally taught over a three or four day hands-on seminar. The National Association of Criminal Defense Lawyers generally offers one training seminar on the Colorado Method every year. See <http://www.criminaljustice.org/>. One of these seminars has been captured on video and is available for training. *Selecting a Colorado Jury--One Vote for Life*. See generally Richard S. Jaffe, "Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty," *The Champion* (January/February 2001): 35.

<sup>252</sup>Under the Colorado method, defense counsel exercise their peremptory challenges based only on the juror's death views. The method uses a ranking system based on juror responses. This portion--the wise use of the peremptory challenge) plays less of a role in the use of this method in courts-martial. In the federal system, the defense gets 20 peremptory challenges in a capital case. Fed. R. Crim. P. 24(b). However, in the military, the accused in a capital case only gets one. MCM, R.C.M. 912(f)(4). In the military, defense counsel should focus on building grounds for challenge for cause.

<sup>253</sup>See generally *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

The method is grounded in constitutional law<sup>254</sup> and fits within the framework of the military's liberal grant mandate. The liberal grant mandate is a response to the unique nature of the military justice system, "because in courts-martial peremptory challenges are much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere."<sup>255</sup> Because the convening authority can hand pick the panel members, in fairness the defense counsel should be able to conduct voir dire of the panel members and then the military judge should give them the benefit of the doubt on challenges when an issue arises.

Defense counsel should also litigate any issues that might implicate jury dynamics, understanding that she will not receive the direct remedy, but will receive a different, valuable remedy: the ability to voir dire the panel members on that issue. For example, the defense counsel should file motions to: have the junior member appointed as the president; require random panel member selection; find *per se* unlawful command influence in the referral process; change the place of trial based on pretrial publicity; trifurcate the trial into a merits, aggravating factor, and guilt phase because of potential juror confusion;<sup>256</sup> allow an opening statement in the presenting proceeding to reduce

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<sup>254</sup>See John H. Blume, Sheri Lynn Johnson, and A. Brian Trelkeld, "Probing 'Life Qualification,' Through Expanded Voir Dire," *Hofstra Law Review* 29 (2001).

<sup>255</sup>United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005). See also United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002); United States v. Glenn, 25 M.J. 278, 279 (C.M.A. 1987).

<sup>256</sup>Donald M. Houser, "Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation," *Washington and Lee Law Review* 64, no. 1 (Winter 2007): 349-389.

juror confusion; request certain instructions; request additional peremptory challenges and limit government peremptory challenges and challenges for cause; allow parole rules and statistics as mitigation; etc. The military judge will not likely grant the requested relief (for example, set aside the capital referral) but should allow the defense counsel to explore the issue with the panel.

For the military defense counsel who is detailed to a capital case, training in the Colorado method is the most important capital-specific training to receive.<sup>257</sup> If the counsel in *Thomas I* had known of and used the Colorado method, the outcome at trial would have been different. Had the panel members been educated on the rules, the case would not have reached the presentencing proceeding with death as an authorized punishment.<sup>258</sup> Likewise in *Loving*, the outcome at trial may have been different had the holdout panel member voted against the balancing gate.<sup>259</sup> Teaching the members

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<sup>257</sup>Prior to the passage of Article 52a in 2001, which requires twelve members in a capital court martial, capital courts-martial only required the same number of panel members that are required in any general court-martial--five. UCMJ, Article 16(a)(A), 52a (2008). Some cases that originated before this change suggested to defense counsel that they should not strike members from panels in order to raise the total number of panel members from five to something much larger, which would therefore increase the odds that one panel member might be seated who would eventually vote for life. See *United States v. Simoy*, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring). Now that the minimum number of panel members is twelve, that advice is inapplicable. The CJP findings show that that advice may have been to no avail, anyway: even if the panel grew to a size where one potential life vote were seated, if he were the only life vote, he would change his vote anyway. See *Loving*, 42 M.J. 213; *Thomas*, 39 M.J. 626.

<sup>258</sup>To be fair to the defense counsel, in 1988, when the sentence was adjudged, the Colorado method was not yet developed. *Thomas*, 39 M.J. 626. *Thomas*' death sentence was set aside in *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997).

<sup>259</sup>To be fair to the defense counsel, in 1988, when the sentence was adjudged, the Colorado method was not yet developed. *Loving*, 41 M.J. 213. *Loving* is still faces the death penalty. *United States v. Loving*, 68 M.J. 1 (C.A.A.F. 2009).

techniques to withstand group pressure may have helped to preserve the votes. In both cases, the minority voters fell in the range where the minority block will fold (in Loving, one of eight voters, or 12 percent; in Thomas I, two of nine voters, or 22 percent). Getting the president of the panel to commit to following the rules may have helped to preserve the votes: the subtle influence of rank in the panel room may have played a role in Loving, and after making some inferences, may have played the same role in Thomas I.

With proper instructions and thorough voir dire, the defense counsel can address all of these dynamics--the force of social conformity, the subtle pressure of rank in the deliberation, juror confusion, voting rules, the parole problem, juror responsibility. Using the Colorado method will not ensure a life sentence--some crimes may warrant the death penalty from a qualified panel--but using this method should help ensure a reliable sentence, where every member voted his or her conscience rather than the group's opinion.

## CHAPTER 10

### CONCLUSION

The CJP findings are indeed relevant to the practice of military justice. The CJP findings on aggravation and mitigation reveal ways in which counsel should structure their cases to properly frame the issues to the panel members. The findings about the timing of decision making, juror dynamics, juror confusion, and juror responsibility also should shape how counsel approach their cases. In addition, a review of appellate records and reports of capital courts-martial shows that in at least three of the fourteen modern capital cases, panels behaved in ways consistent with the CJP findings. Panel members do follow the trends outlined in the CJP, and military justice practitioners need to be aware of those trends.

After having reviewed the CJP, perhaps the outstanding question is, why has no one conducted research on military panels? Probably the first reaction is that the rules say people cannot talk to panel members. But do they? Almost all of the rules that one points to deal with whether “evidence” of what happened in the deliberation room can be admitted “in court”.<sup>260</sup> Those rules do not prohibit a panel member from talking to a researcher. The apparent prohibition comes from an unlikely source--the oath given to panel members. The text of the oath is not mandated by the Uniform Code of Military Justice; rather, Article 42(a) simply states that the service secretaries shall prescribe the form of oaths.<sup>261</sup> The Secretary of the Army did so in Army Regulation 27-10, directing

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<sup>260</sup>Manual for Court-Martial, United States, Mil. R. Evid. 509 and 606; R.C.M. 923 discussion; R.C.M. 1007(c) (2008).

<sup>261</sup>UCMJ, Article 42(a) (2008).

that this oath be used: “that you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law.”<sup>262</sup> The primary purpose behind the rules, and presumably, this oath, is to protect freedom of deliberation, protect the stability and finality of verdicts, protect panel members from harassment and embarrassment, and to prevent unlawful command influence.<sup>263</sup>

A well-crafted research project could ask questions that prevent a panel member from violating this oath (say, by not identifying any particular member) while still respecting the values underlying the MREs and RCMs--and these rules would govern any statements made by a panel member to a researcher if someone wanted to introduce them in the particular court-martial of which one of these panel members was a member. Properly-conducted research could call into question many of our assumptions about whether rank plays a roll in the deliberation room or whether panel members follow instructions. Properly conducted research could cause us to reexamine the legal fictions that are littered throughout the common law. Properly conducted research could shed

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<sup>262</sup>Headquarters, Department of the Army, Army Regulation 27-10, *Military Justice* (Washington, DC: Government Printing Office, 2005), para. 11-8c. This is the same as the suggested oath found in Manual for Court Martial, United States, R.C.M. 807(b)(2) discussion (2008). As a practical matter, the oath given in all Army courts-martial is that found in Department of the Army, Pamphlet 27-9, *Military Judges’ Benchbook*, para. 2-5, which is the same as that in Army Regulation 27-10 and R.C.M. 807(b)(2) discussion except that the parenthesis were dropped. At the end of the members’ service, the trial judge is supposed to give this instruction: “If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from *discussing your deliberations with anyone*, to include stating any member’s opinion or vote, unless ordered to do so by a court.” *Ibid.*, para. 2-5-25 (emphasis added). That is an incorrect statement--the oath is much narrower.

<sup>263</sup>See Loving, 41 M.J., 235-37.

light on how our panels approach sexual assault cases. And most importantly, properly conducted research can help those who are involved in military justice to fully understand the audience so that they can present cases to them in ways that will allow them to solve the difficult problems that the system gives them to solve. Military justice can certainly benefit from that.

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