

FUTURE DANGEROUSNESS IN TEXAS DEATH PENALTY:
A CONTENT ANALYSIS

by

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ABSTRACT

Future dangerousness in Texas death penalty cases was analyzed through content analysis of 18 transcripts from Texas capital cases from 2005 to 2015. A jury must determine whether the defendant is a future danger. The findings from extant literature guided the factors studied in the current research (i.e., heinousness of instant offense, terminology from special issue 1, guidance provided to jurors, expert witness testimony on future dangerousness, and mitigating and aggravating evidence). Two sets of cases were examined and compared; the first set consisted of the only nine cases in Texas resulting in a finding of no future danger during the specified decade. The second set of cases resulted in a finding of future danger and subsequently, a death sentence. This group of cases was matched to the first group using case characteristics. The primary assumption of this research was that salient factors, if any were found, would be different between the two groups of cases. Ultimately, the goal of the research was to assess whether the Texas death penalty scheme provided guided juror discretion and individualized sentencing, as mandated by *Furman* (1972).

The results provided some support for the conclusion that the current Texas death scheme involves guided juror discretion and individual sentencing as mandated in *Furman* (1972). It is important to note, however, that for *most* factors examined in relationship to guided juror discretion and individual sentences revealed no substantive differences between cases that did and did not result in a finding of future danger. Thus,

whether the differences between these two sets of cases warrant a declaration that “the process is fair” is subjective and beyond the scope of this study; rather, it is simply concluded that some evidence exists, that at least in some death penalty cases, guided juror discretion and individual sentences were obtained.

I. INTRODUCTION

Despite 1,438 executions in the United States since 1976 (Death Penalty Information Center, 2016), the death penalty remains a heavily debated and divisive issue. Indeed, after 40 years of litigation over the fair administration of the death penalty, Justice Breyer, joined by Justice Ginsburg, urged the U.S. Supreme Court to revisit its fundamental constitutionality (*Glossip v. Gross*, 2015). Breyer’s dissent, relied on multiple empirical studies of exonerations, disproportionate and geographically disparate sentencing, and procedural error, among other issues. While the Justices have not yet specifically addressed Justice Breyer’s challenge, the Court plainly remains concerned about the administration of the death penalty. The U.S. Supreme Court has recently declared the Florida death penalty scheme unconstitutional because it violates the Sixth Amendment—which requires a jury, not a judge, to impose a death sentence (*Kansas v. Carr*, 2016). In *Foster v. Chatman*, the Court reversed a death sentence where the State excluded jurors based on race, which was in violation of *Batson v. Kentucky* (*Foster v. Chatman*, 2016). Currently pending before the Court are *Buck v. Davis* and *Moore v. Texas*. In *Buck*, the condemned complains that his sentence was the product of racial bias because an expert witness testified that Buck’s race increased the likelihood of his “future dangerousness.” In *Moore*, the Court must decide what standard states should use in determining whether someone has an intellectual disability and is, therefore, exempt from a death sentence.

While the Supreme Court has not yet revisited the question of the death penalty constitutionality as a form of punishment, execution and sentencing data suggest a trend that involves moving away from death sentences. In 2015, only 27 executions took place

in the U.S., this was the lowest number of executions since 1991. Moreover, 19 states and the District of Columbia do not have a death penalty; 11 states currently have a moratorium, three states have a hold on executions due to procedural issues, and 9 states continue to execute people (Arizona, Texas, Missouri, Virginia, Mississippi, Alabama, Georgia, South Carolina, and Florida) (Death Penalty Information Center, 2016; National Coalition to Abolish the Death Penalty, 2015).

Since the reinstatement of the death penalty by the U.S. Supreme Court in 1976, 538 inmates have been executed in Texas, which accounts for more than one-third of all the executions in the U.S. (Death Penalty Information Center, 2016). As of July, 2016, 244 inmates were housed on death row in Texas (Texas Department of Criminal Justice, 2016). There are several possible explanations why Texas remains the leader in executions: the culture of the South, the Texas capital scheme is working well, or Texas elects judges at the trial and appellate level that may prejudice the environment in favor of death penalty sentences (Marquart, Ekland-Olson, & Sorensen, 1994; Vartkessian, 2012).

Capital punishment in Texas warrants a critical examination because offenders in Texas are executed at the highest rate and has a unique sentencing structure that has been debated since its inception. In Texas, the jury must determine whether it is probable that the defendant will commit future acts of violence (Texas Code of Criminal Procedure, Art. 37.01) before imposing a death sentence. Oregon is the only other state that requires a finding of future violence as a condition of a death sentence. Since 1976, only two inmates have been executed in Oregon, with the most recent one occurring nearly 20 years ago (Death Penalty Information Center, 2016). Also, Oregon currently has a

moratorium and has since 2011. Though Texas and Oregon are the only two states that require a determination of future danger, several other states' death penalty scheme allow future danger to be considered an aggravating factor (Death Penalty Information Center, 2016).

The first case to challenge Texas' new death penalty statute after the U.S. Supreme Court ruled that the death penalty was being applied arbitrarily and capriciously in *Furman v. Georgia* (1972) was *Jurek v. Texas* (1976). It was argued in *Jurek* that it is not possible to predict future violence. The dissenting Justices agreed with *Jurek*, that the future dangerousness issue was too vague to be constitutional; additionally, "probability" was not defined by the statute and could be defined by the jurors, which could always end in a "yes" answer to the question (Otero, 2014). It was decided by the judges of the Texas Court of Criminal Appeals that jurors are supposed to know these common meanings. This is not legal language, but common daily language: a probability, criminal acts of violence, and continuing threat to society. Furthermore, this statute was created prior to Texas' 2005 adoption of Life without Parole (LWOP), and it has never been explicitly clarified whether a defendant convicted of capital murder would receive only death or LWOP. Prior to 2005, a capital murder defendant could receive a life sentence and be paroled back into society. After the addition of LWOP in Texas, therefore, the defendant's "society" would only be an institution (Shapiro, 2008). The dangerousness special issue allows subjective interpretation of several terms: *a probability, criminal acts of violence, and society*

Context of Current Research

For 40 years, Texas Code of Criminal Procedure, Article 37.071 has been challenged and modified, but the requirement that the jury predict future dangerousness has remained constant. Of all of the capital cases in Texas that went to trial from 2005 to 2015, only nine defendants were found to pose no future threat of violence and sentenced to LWOP. In contrast, 104 defendants were found to be a future danger and received a death sentence. This study involves an examination of 18 cases, the nine that resulted in a negative finding of future dangerousness and nine matched cases that resulted in a positive finding of future dangerousness (further discussed in Chapter 3). The trial transcripts were analyzed to assess patterns of legal factors that may have contributed to a negative finding of future dangerousness or a positive finding of future dangerousness. Finally, this study compares and contrasts relevant themes to identify the extent that the legal factors contribute to the different findings of future dangerousness. Whether certain legal factors in future dangerousness cases that do not exist in non-future dangerousness cases was assessed. Furthermore, whether more guidance was given by the judge, prosecutor, or defense in future dangerousness cases compared to non-future dangerousness cases was examined.

First, an overview of the Texas capital punishment scheme is provided along with the case law history of the death penalty in the U.S., and specifically in Texas, as it explains the legal factors that are examined in this research. Second, the relevant literature on future dangerousness, mitigating evidence, and juror guidance is examined. This study seeks to find the similar and dissimilar patterns between the two groups of cases, relying upon the characteristics of the cases, guidance from the judge, prosecutor,

and defense, definitions of terminology from the judge, prosecutor, and defense attorney, and testimony from witnesses during the sentencing phase of the trial.

Additionally, this study examines the heinousness of the instant offense and the mitigating and aggravating evidence presented in the punishment phase. Mitigating evidence is not supposed to be considered until after the jurors determine future dangerousness; however, it is not possible to know if that rule is followed. It is more likely that jurors incorporate all of the information they have heard in their determination of future dangerousness, therefore, all of the evidence is assessed.

Statement of Problem

Since 1976, abolitionists have continued to seek the end of the death penalty. Many judges, attorneys, and academics have attempted to show the arbitrariness of the application of the death penalty in Texas, to no avail (see American Psychiatric Association *Amicus Curiae*, 1983; *Barefoot v. Estelle*, 1983; Beecher-Monas, 2003; Blume, Garvey & Johnson, 2001; Cunningham, Reidy, & Sorensen, 2008; DeLisi & Munoz, 2003; Edens, Buffington-Vollum, Keilen, Roskamp, & Anthony, 2005; Edens, Desforges, Fernandez, & Palac, 2004; Price & Byrd, 2008; Sorensen & Marquart, 1990). The only way to be sentenced to death in Texas is for the jury to unanimously find that the defendant is a future danger. Research has shown that accurate predictions of future dangerousness are impossible, even by professionals in the field of psychiatry (American Psychiatric Association *Amicus Curiae*, 1983; Texas Defender Service, 2004); yet, the Texas death penalty scheme requires people without specialized knowledge (jurors) to make this determination. Nearly 800 defendants have been found to be a future danger in Texas since 1976 (538 executed and 244 currently on death row), while a limited number

of defendants have been found to pose no future danger (Death Penalty Information Center, 2016; TDCJ, 2016).

This study assesses whether differences exist between cases in which jurors determined the defendant was a future danger compared to those defendants the jurors determined were not a future danger. If the research does not reveal distinct differences between the two sets of cases, a possible explanation is arbitrary application of future dangerousness, which equates to arbitrary application of the death penalty.

Statement of Purpose and Research Questions

This research examines sentencing transcripts to assess patterns related to the terminology of special issue 1, which is the Texas statute that requires jurors to answer two questions prior to sentencing a defendant to death. Additionally, the sentencing transcripts are examined to assess patterns related to guidance given to jurors, expert testimony regarding future dangerousness, and mitigating and aggravating evidence in the nine “no finding” cases and compares them to nine matched cases that did find future dangerousness. The primary research question guiding this research is: **What salient factors, if any, are associated with negative and positive findings of future dangerousness in death penalty cases in Texas from 2005 to 2015?**

The subsequent research questions that inform the primary research question are:

- (1) To what extent is the heinousness of the instant offense associated with negative and positive findings of future dangerousness?
- (2) To what extent is the terminology from special issue 1 associated with negative and positive findings of future dangerousness?

- (3) To what extent is guidance given to jurors associated with negative and positive findings of future dangerousness?
- (4) To what extent is expert testimony on future dangerousness associated with negative and positive findings of future dangerousness?
- (5) To what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?

Research Approach

The trial transcripts from the punishment phase of 18 death penalty cases in Texas between 2005 and 2015 are assessed through content analysis. Similarities and differences in terminology from special issue 1, juror guidance, expert testimony on future dangerousness, and mitigating and aggravating evidence are relied upon to determine whether legal factors impact how defendants are sentenced to death in Texas. These factors have been determined from case law and extant literature regarding the imposition of the death penalty and future dangerousness.

The capital trial scheme is conducted in two phases, the guilt/innocence phase and the punishment phase. The purpose was to present aggravating evidence in the guilt phase and subsequently present mitigating evidence in the punishment phase, which theoretically allowed for guided juror discretion (Mandery, 2012). Only the punishment phase of the trial transcripts was examined in this study, as this is the phase in which jurors hear evidence specifically pertaining to future dangerousness and evidence that could mitigate a death sentence.

Assumptions. The central assumption for this study is that legal factors determine who receives a death penalty. Extraneous factors are mentioned in the literature review,

described in individual cases, and reviewed cumulatively in each group of cases. The extraneous factors are controlled for in the current study and assumed not to determine who receives a death penalty because the U.S. Supreme Court has ruled it unconstitutional. As the research cited in the literature review below makes clear, the U.S. Supreme Court's concerns regarding non-legal considerations remain justified. This study, however, assumes that examining the punishment phase of trial transcripts reveals the evidence the jurors relied upon to make their determination. A final assumption is that the more heinous crimes result in the harsher sentence, the death penalty.

Texas Death Penalty Scheme

In the wake of *Furman* (1972), on May 10, 1973, the Texas House of Representatives passed a bill on a new death penalty structure. It is believed that House Bill 200, Texas' death penalty scheme, was passed on the last day of session in June 1973 because the Texas legislature meets every other year and Texans did not want to wait two years to reinstate the death penalty (Citron, 2006). Texas prosecutors and courts were already using the procedures that were codified (Otero, 2014). The new Texas statute did not mention mitigating evidence at all; instead it offered three special issue questions that the jurors had to decide before sentencing:

- (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result
- (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society and
- (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. (Texas Code Criminal Procedure § 37.071)

The Texas Court of Criminal Appeals heard the first case (*Jurek v. State*, 1975) and Judges Odom and Roberts were not supportive of the new statute. The case was affirmed, but both Judges wrote dissents with harsh language regarding the constitutionality of the new Texas statute. The defendant then sought *certiorari*, and the U.S. Supreme Court heard *Jurek* as part of the *Gregg* cases (1976).

The U.S. Supreme Court upheld *Jurek* stating that the Texas statute narrowed the death eligible cases; the special issue questions provided guided juror discretion, and mitigating evidence could be heard regarding the special issue (*Jurek v. Texas*, 1976). Several years later, the U.S. Supreme Court identified the potential for mitigating factors to be interpreted as aggravating factors from the special issue questions—a double edge sword in *Penry v. Lynaugh* (1989). For example, mental retardation could be viewed as a mitigating factor because it reduced the defendant’s moral culpability. Mental retardation, however, could also be perceived as an aggravator because there was no way to “fix” the issue. The Court determined that the Texas instructions could restrict the jurors’ consideration of mitigating evidence. The Texas death penalty scheme, therefore, was found unconstitutional. Subsequently, the statute was modified to allow for consideration of any mitigating factors (Citron, 2006). This change allowed jurors to find the defendant a future danger, but still give a life sentence. Prior to this law change, if a defendant was found to be a future danger, the defendant received a death sentence automatically. Thus, mitigating evidence could not influence a lesser sentence. The new section of the statute read:

(e)(1) The court may instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b), it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed. (Texas Code of Criminal Procedure § 37.071)

After *Penry II*, the word “may” was changed to “shall.” The court shall instruct the jury... Because mitigating evidence and future dangerousness are related in the Texas statute, both issues need to be examined. The three special issue questions were reduced to two questions because the first question regarding intent was answered in the guilt/innocence phase of the trial.

An illustration of the Texas death penalty scheme is presented in Figure 1. The Texas death penalty scheme is a bifurcated process. During the first phase, the jury determines guilt or innocence. If the defendant is found not guilty, he is free to go home. If the defendant is found guilty, the second phase, known as the penalty phase or the punishment phase, begins. Jurors hear testimony from both the prosecution and the defense in this phase; the testimony includes aggravating evidence from the prosecutor to establish future dangerousness and mitigating evidence from the defense for the purpose of militating a sentence less than death, but typically not evidence about the instant offense. After the jurors have heard all of the evidence, the first question they must deliberate is: does the defendant pose a future danger? If the answer is “no,” jury service is complete and the defendant receives a sentence of LWOP. If the answer is “yes,” the defendant poses a future danger, the second question is: does the evidence you have heard mitigate a death sentence? If the answer is “yes,” the defendant receives a LWOP sentence. If the answer is “no,” the defendant receives a death sentence. In answering the

first question—does the juror pose a future danger—the jury must answer “yes” unanimously; and to answer the questions “no” there must be a minimum of 10 jurors in agreement. To answer the second question,—does the mitigating evidence outweigh a death sentence—there, however, must be a minimum of 10 jurors to answer “yes” and 12 jurors to answer “no.” The jurors do not have to agree on what mitigating evidence is substantial enough to warrant a LWOP conclusion (Texas Code of Criminal Procedure, Art. 37.071).

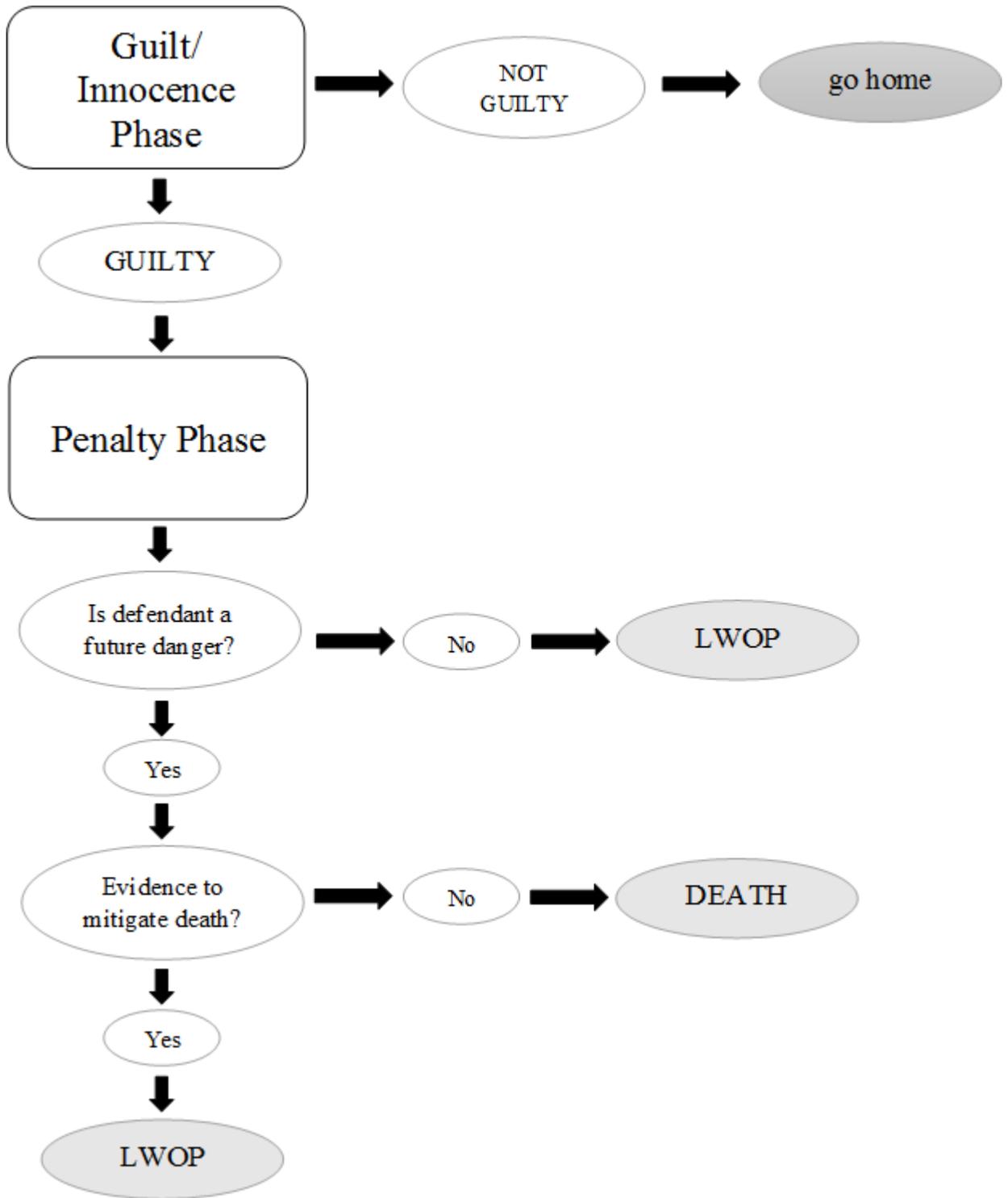


Figure 1. Texas Death Penalty Process. This figure illustrates the different paths of a capital trial in Texas, the different outcomes, and where the special issue questions are relevant.

II. CURRENT STUDY

There have only been nine capital cases in Texas in the past decade (2005-2015) that juries have returned a verdict finding the defendant would not be a future danger (i.e., a “No FD” finding). To date, there has been no research examining how these cases are different from cases where the jury found the defendant a future danger (i.e., an “FD” finding). This research examines the differences between the nine No FD cases that resulted in LWOP to nine FD matched cases that resulted in a death sentence. The primary research question guiding this research is: **What salient factors, if any, are associated with negative and positive findings of future dangerousness in death penalty cases in Texas from 2005 to 2015?**

To answer the primary research question, heinousness of the instant offense, the terminology of the special issue question, guidance provided to the jurors, expert testimony on future dangerousness, mitigating evidence, and aggravating evidence not related to the instant offense are examined. This is accomplished by analyzing the sentencing transcripts from the 18 death penalty cases.

A review of case law related to the death penalty is presented to establish the legal factors examined in this study. The review of case law is not exhaustive; however, it illustrates a clear picture of the death penalty in the U.S. and highlights the components relevant to the current study. These cases and subsequent cases set the context for this research. To adhere to *Furman* (1972), the scheme must narrow the death eligible crimes, must provide guided juror discretion, must allow mitigating evidence, and must allow for individual sentencing. These cases are still relied upon to test whether the death penalty is cruel and unusual and set the parameters for the current study. Each foundational case

and subsequent case adds a different dimension to measure cruel and unusual punishment. The necessity for heightened reliability in death cases by narrowing death-eligible crimes, providing guided juror discretion, and individualized sentencing is acknowledged in *Gregg* and companion cases. To ensure that only the worst of the worst offenders receive a death sentence, Texas statute requires that first, future dangerousness is determined prior to the final sentencing decision (illustrated in Figure 3). The illustration depicts the solution to *Furman* (1972), isolating the worst of the worst offenders for the penalty of death. First-degree murder is the foundation of the pyramid, murder including a codified aggravator limits the eligible for the death. Mitigation individualizes sentences. Texas adds the special issue of future dangerousness before mitigation. The heinousness of the offense is assessed because jurors hear all of the details of the crime prior to the punishment phase and it may impact the decision regarding future dangerousness.

Researchers from the relevant scholarly literature posits that jurors are confused by the term *a probability* as it is relied upon in the statute; a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (Citron, 2006; Otero, 2014; Shapiro, 2008; Sites, 2007; Witsil, 2014). Because the statute does not explain *a probability*, it is the responsibility of the court to articulate the meaning. Furthermore, the literature suggests that jurors do not understand that a defendant who receives a LWOP sentence will spend the remainder of their natural life in an institution; prison, therefore, becomes their *society* (Shapiro, 2008; Witsil, 2014). Additionally, the literature suggests that jurors do not understand that inmates, particularly those serving life sentences, do better in an institution than in the free world

(Merillat, 2006). The current study examines to what extent the terminology from special issue 1 is similar/dissimilar between the groups of cases.

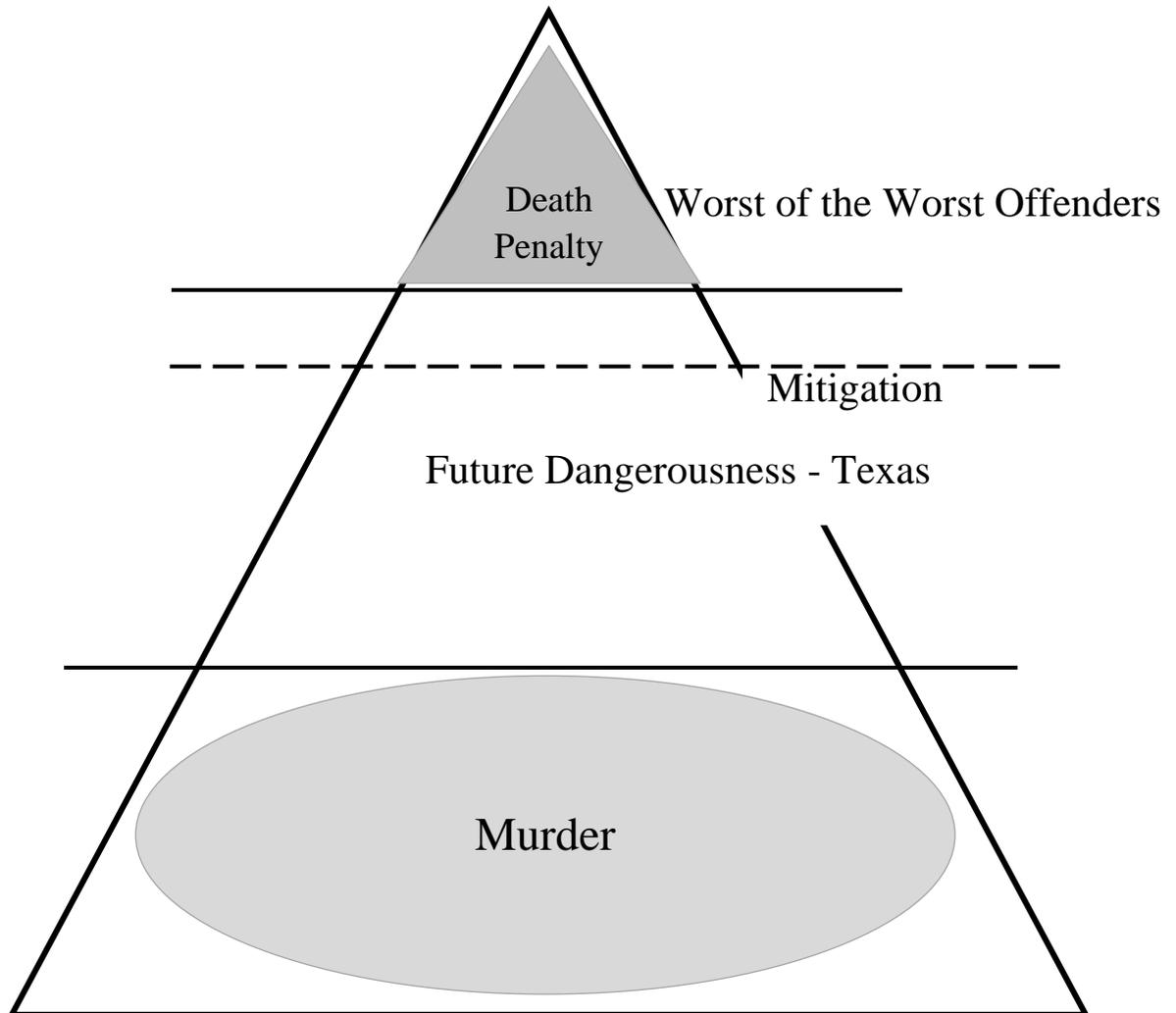


Figure 2. Death Penalty Solution to Arbitrariness. This illustration depicts the solution to Furman (1972), to isolate the worst of the worst offenders for the penalty of death. First degree murder is the foundation of the pyramid, murder including a codified aggravator limits eligible for the death penalty. Mitigation individualizes sentences. Texas adds the special issue of future dangerousness before mitigation (revised from Rivkind & Shatz, 2009).

Researchers also suggests that expert testimony regarding future dangerousness of a defendant presented by the State using a psychiatrist or psychologist resulted in a death sentence (Krauss, McCabe, & Lieberman, 2012; La Fontaine, 2002). The current study examines the differences, if any, in how expert testimony is relied upon between the groups of cases.

The guidance provided to the jurors throughout the punishment phase of the trial is analyzed. Who provides the guidance—judge, prosecution, and/or defense—and the context of the guidance. The judge’s sentencing instructions to the jury are not included in this assessment. This study examines patterns, if any, and compares the differences between the two groups of cases?

Finally, the extent of mitigating and aggravating evidence presented, the types of mitigating evidence, and the response from the prosecutor is examined. The existing scholarly literature on mitigating factors presented mixed findings on remorse, mental illness, history of alcohol abuse, and history of child abuse. Each of these mitigating factors are assessed in the current research, as well as any emerging patterns within mitigating evidence. The current study assesses patterns pertaining to mitigating and aggravating evidence, if any, between the groups of cases. Figure 4 illustrates the differences between the groups of cases as found in the extant literature. This illustration explains which factors are found in cases resulting in LWOP and which factors are found in cases resulting in a death sentence. In the middle is an intentional overlap of the two groups, implying there may be some factors found in both groups of cases.

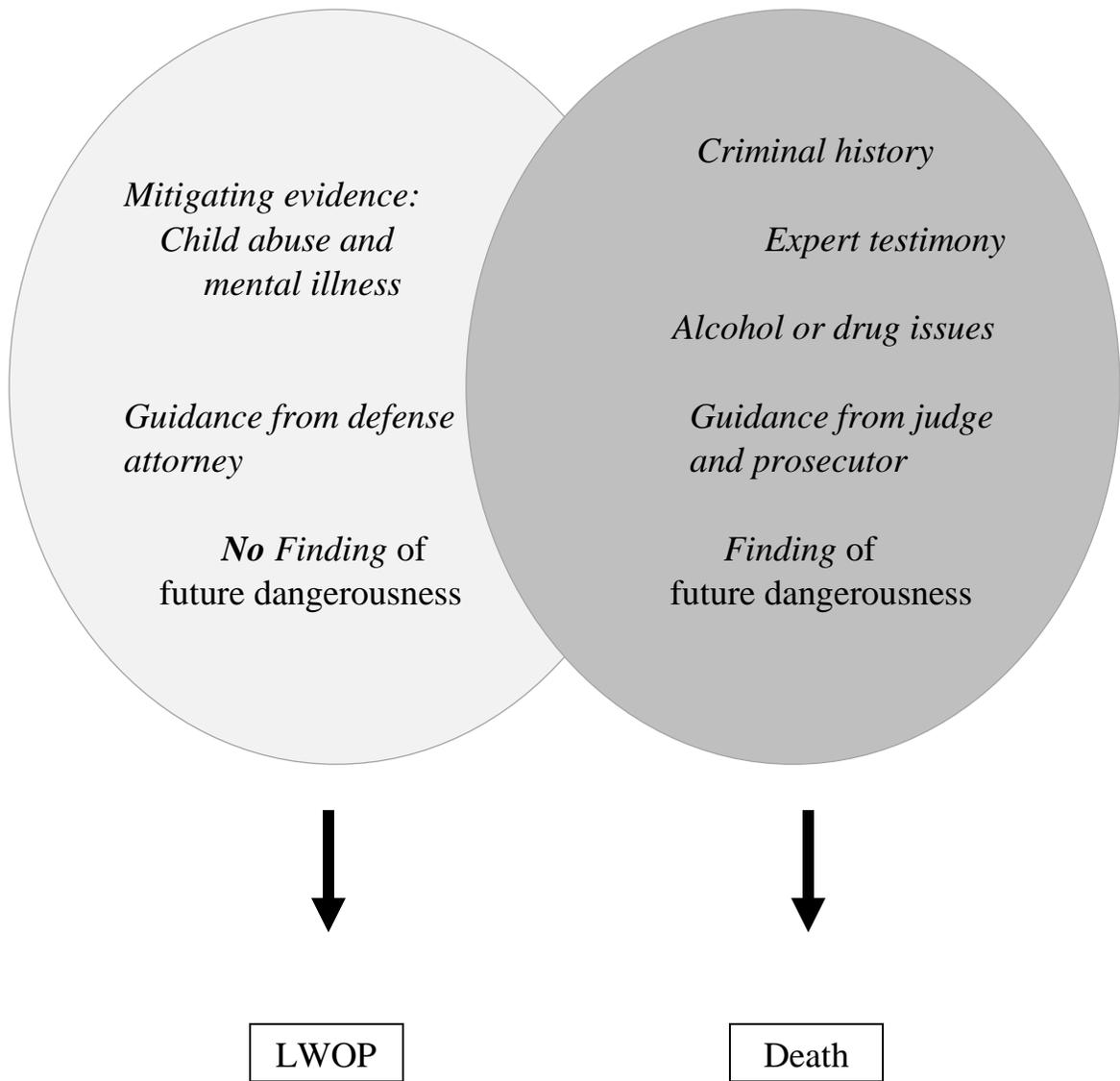


Figure 3. Factors Posited from Literature in LWOP v. Death. This figure illustrates how factors may be found in no finding of future dangerousness cases compared to cases with a finding of future danger. According to the literature, the factors are placed in the appropriate oval, with an unknown area of overlap.

Relevant Case Law

As noted in Chapter 1, the key concepts embedded in the research questions include the terminology from special issue 1, guidance to jurors, expert testimony related to future dangerousness, and mitigating and aggravating evidence. This section on case law is not exhaustive, but offers a foundation of cases relevant to these key concepts focused upon in this study. In particular, these key concepts address guided juror discretion and individuality, both mandated by the U.S. Supreme Court in *Furman* (1972).

Cruel and Unusual Application of the Death Penalty

In 1972, the U.S. Supreme Court decided *Furman v. Georgia*; this landmark case changed the death penalty in the U.S. The Justices did not rule that the death penalty was unconstitutional, but rather the application was arbitrary and capricious. This case is relevant to the research questions posed here, as the case introduced the discussion that would ensue for subsequent decades regarding the fairness of the court processes associated with sentencing one to the death penalty. It was stated that because the jurors had no guidance, the application of the death penalty was discriminatory. The U.S. Supreme Court specifically ruled that the procedures courts rely on must be fair, but left the specific procedures to the states. Additionally, the circumstances of each defendant should be heard so that the sentence would fit that individual. If the process is fair, it is assumed that jurors will be guided and details about the defendants' lives would be considered.

The Court held that the punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances, as long as it was judiciously employed.

The Court also confirmed that the death penalty served the purpose of retribution and deterrence, and was not disproportionate to specific crimes (*Furman v. Georgia*, 1972). This decision led to a de facto moratorium of the death penalty, voiding 40 state statutes and commuting 629 death sentences in the U.S. (Michigan State University Communication Technology Lab and Death Penalty Information Center, 2004).

Though the death penalty has been part of the U.S. justice system throughout its history, the Eighth Amendment to the U.S. Constitution, which barred cruel and unusual punishment, was ratified December 15, 1791 (U.S. Constitution online, 2016). When the Amendment was passed, there were differing perspectives of the purpose of the clause *cruel and unusual punishment*, but none included the use of the death penalty. The purposes were to hold the government to the principle of proportionality—not allow punishment unauthorized by law—and avoid methods of punishment that were painful or oppressive (Banner, 2002).

Several cases set the foundation for the ruling of *Furman* in 1972 (see *Weems v. U.S.*, 1910, *Williams v. New York*, 1949, *Trop v. Dulles*, 1958, *U.S. v. Jackson*, 1968, *Witherspoon v. Illinois*, 1968, and *Maxwell v. Bishop*, 1970). The two cases heard by the U.S. Supreme Court the year before *Furman* (1972) were *McGautha v. California* and *Crampton v. Ohio* (1971). The arguments in these cases were that the death penalty was unconstitutional because it violated due process because of its unitary structure, and that there were no standards to guide the jury. The Court was less receptive to these arguments and held in a 6-3 decision to affirm that the unitary structure and unguided

juror discretion¹ was not a violation of due process (*McGautha v. California*, 1971). The U.S. Supreme Court agreed to hear another set of death penalty cases shortly after *McGautha* (1971), focusing not on procedural issues and due process, but rather on the Eighth Amendment argument that the death penalty was a cruel and unusual punishment (Banner, 2002).

The challenges leading to *Furman* (1972) included race discrimination, death qualification of jurors, unitary procedures, evolving standards of decency, offenses other than murder, and standardless sentencing discretion—all of which are discussed in the opinions of the Justices, and all of which are relevant still today in cases heard by the U.S. Supreme Court. *Furman v. Georgia* (1972) included three companion cases: *Jackson v. Georgia* and *Branch v. Texas*, both of which were rape cases, and *Aikens v. California*, a murder case like *Furman*. The California Supreme Court ruled the death penalty unconstitutional before arguments were heard, eliminating *Aikens* from *Furman*, *Jackson*, and *Branch*.

The attorneys argued that evolving standards of decency rendered the death penalty cruel and unusual and racial disparity contributed to unusual punishment. The U.S. Supreme Court held in a 5-4 decision on June of 1972, the application of the death penalty violated the Eighth Amendment of the Constitution. This case was unique because the Justices did not agree on the reason for the decision; the reasons included two votes due to evolving standards of decency, two votes due to arbitrary and capricious application of the death penalty, and one vote for discrimination in the application of the death penalty (Banner, 2002). Unusually, all nine Justices wrote separate opinions.

¹ One of the reasons given in *Furman v. Georgia* (1972) that the death penalty was cruel and unusual was that jurors had no standards or procedures to make decisions (unguided discretion); therefore resulting in an arbitrary and capricious application of the death penalty.

Issues from the Justices included: lack of standards to guide the jury led to discriminatory decisions; the randomness of when the death penalty was imposed; the arbitrariness of jury decisions; the infrequency of executions; and that capital punishment served no legitimate purpose (*Furman v. Georgia*, 1972). The dissenting Justices pointed out that only two of the majority actually declared the death penalty to be unconstitutional, the other three Justices discussed problems with the administration of the death penalty—this left the door open for the states to fix their statutes. After *Furman*, 35 states and the federal government passed legislation in an attempt to satisfy the Court; the new laws focused on mandatory sentencing, quasi-mandatory sentencing, and guided discretion (Vollum, del Carmen, Frantzen, San Miguel, & Cheeseman, 2015).

State Solutions to Cruel and Unusual Application of the Death Penalty

Four years later, states had passed legislation believed to satisfy the *Furman* (1972) requirements, and more than 75 cases had been appealed and were awaiting a decision by the U.S. Supreme Court (Banner, 2002). The Court chose five cases, collectively referred to most often as the *Gregg* case, selected to cover the different types of legislation passed by the states to fix the issues raised in *Furman*: *Gregg v. Georgia*, *Proffitt v. Florida*, *Jurek v. Texas*, *Woodson v. North Carolina*, and *Roberts v. Louisiana*, (1976). The U.S. Supreme Court ruled what procedures could be relied upon to provide juror guidance and to consider each defendant individually in the *Gregg* cases.

Understanding the rulings on these cases provides a foundation for examining the research questions two through five in the current study, which assesses terminology related to special issue 1, guidance provided to jurors, expert testimony regarding future

dangerousness, and aggravating and mitigating evidence between the two groups of cases.

In *Gregg v. Georgia* (1976), several important guidelines to the *Furman* were clarified. The *Gregg* case led the U.S. to the current bifurcated proceedings where guilt/innocence and penalty phases are conducted separately. The Court set out two broad points: (1) mitigating factors were to be heard before sentencing and (2) an appellate judicial review must be in place. Another important component in this case was that the Georgia legislature in its determination that capital punishment had a general deterrent effect was not supported (*Gregg v. Georgia*, 1976).

It was determined in *Proffitt* (1976) that the new capital punishment scheme in Florida met the demands of *Furman* and was deemed constitutional. The new Florida statute listed eight aggravators and seven mitigators that were to be considered to ensure individuality. Additionally, the sentencing judge was to write up an explanation for each death sentence for the Florida Supreme Court to review. These protections were put in place to safeguard the death penalty in Florida from being arbitrary and capricious (*Proffitt v. Florida*, 1976).

In *Jurek* (1976), the defendant argued that the death penalty was unconstitutional because it would always be applied arbitrarily, specifically in Texas, because it was not possible to predict future dangerousness. When Texas legislators rewrote the death penalty statute to conform to *Furman* (1972), it included three questions that the jury must answer unanimously and affirmatively before it could sentence a defendant to death. One of the questions was whether there was a probability the defendant would be a future threat to society, also known as future danger. The Court upheld the Texas statute and

found that it did provide guided discretion and it would not result in an arbitrary and freakish imposition of the death penalty (*Jurek v. Texas*, 1976). The Court specifically concentrated on the future dangerousness issue and stated that the jury could answer the question by focusing on: substantial criminal history, severity of prior violence, age of the defendant, whether the defendant was under duress, and extreme mental or emotional stress (*Jurek v. Texas*, 1976). It was stated that if a jury considered these factors, they could have reasonable and controlled discretion (*Jurek v. Texas*, 1976).

In *Woodson* (1976), the U.S. Supreme Court found the North Carolina legislation unconstitutional because the statute made the death penalty mandatory for all defendants convicted of first degree murder. The Justices provided three reasons for their decision: (1) the public rejected mandatory death sentences; (2) a mandatory sentence took away the discretion of the jury; and (3) the law did not allow juries to consider the character and history of each defendant (*Woodson v. North Carolina*, 1976). Emphasis was placed on the importance that the jury consider each offender individually, by hearing all evidence presented regarding the defendant, regardless of the relationship of the evidence to the current case (*Woodson v. North Carolina*, 1976).

In *Roberts v. Louisiana* (1976), the Court held the new Louisiana statute unconstitutional because it mandated the death penalty for certain crimes; it did not allow juries to consider mitigating evidence, and it did not allow the offenders to be individualized, per *Furman* (1972). Additionally, the Court did not approve of the requirement to instruct juries of lesser charges, per defendant, because they felt it might encourage the jury in a particular direction (*Roberts v. Louisiana*, 1976).

The U.S. Supreme Court addressed several issues in *Gregg* and its companion cases: death-eligible crimes needed to be narrowed, mandatory sentences eliminated jurors' guided discretion, a bifurcated system was preferred, individualized sentencing was important because death was different, and death cases needed to have heightened reliability because death was irreversible (*Gregg v. Georgia*, 1976). Over the next 40 years, the U.S. Supreme Court would hear more than 50 cases in an effort to clarify this decision (Death Penalty Information Center, 2016). Research questions one (heinousness), four (expert witness on future danger), and five (mitigating and aggravating evidence) are concerned with individualized sentencing, while research questions two (terminology of special issue 1) and three (guidance to jurors) are focused on guided juror discretion—all issues addressed in *Gregg*. Individualized sentencing can manifest itself through the heinousness of the instant offense, the expert witness testimony regarding a defendant's future dangerousness, and the mitigating and aggravating evidence provided. Guided discretion can be evident through the words of the judge, prosecution, or defense and the special issue questions in the Texas statute when the terminology is explained.

Mitigating Evidence

Mitigating evidence addresses individual sentencing, mandated by the U.S. Supreme Court, and is relevant to research question five (To what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?). In 1978, the U.S. Supreme Court heard *Lockett v. Ohio*, in which Sandra Lockett had driven a getaway car in a robbery that resulted in a murder. The Ohio statute required the death penalty for those convicted of aggravated

murder, limiting mitigating evidence to whether the victim facilitated the offense, whether the offense had been committed under duress or coercion, or whether the offense had been committed due to psychosis or mental deficiency of the defendant. If none of these mitigating factors were found to be true, the death penalty was obligatory (*Lockett v. Ohio*, 1978). The Court held that the Ohio statute was too strict and that it did not allow for *any* aspect of the defendant's character or background, which would prevent individualized sentencing as required by the constitution (*Lockett v. Ohio*, 1978). After the *Lockett* case, every jurisdiction but Texas added to its death penalty statute some type of "catch all" mitigating evidence section.

In 1982, the U.S. Supreme Court held that the sentencer must be open to hearing mitigating evidence and may not refuse to consider any mitigating factor (*Eddings v. Oklahoma*). In this case, a 16-year-old youth shot a police officer, and the defense tried to present evidence that the youth had a troubled childhood and an abusive alcoholic parent. The judge stated on record that he was not allowed to consider the facts of the defendant's violent background (*Eddings v. Oklahoma*, 1982). The Court reversed the death sentence and clarified one more time that all evidence related to the defendant's background, character, or circumstances of the offense must be heard and considered in deciding whether the defendant deserves a sentence less than death (*Eddings v. Oklahoma*, 1982). This ruling substantiated the emphasis of individualized sentencing determined in *Furman* (1972).

Skipper v. South Carolina was decided by the U.S. Supreme Court in 1986; this case involved a rape and a murder in which Ronald Skipper had been tried and convicted. At the sentencing phase of his trial, the defense attempted to present mitigating evidence

of how well Skipper had adjusted to incarceration, including testimony by two jailors regarding his good behavior (*Skipper v. South Carolina*, 1986). This evidence was presented to show his good character warranted a sentence less than death. The trial court excluded the evidence stating it was irrelevant because it was unrelated to the defendant's culpability for the instant offense. The Court overturned the verdict stating that mitigating evidence is not limited to culpability related evidence and that this evidence might be considered as a basis for a sentence other than death (*Skipper v. South Carolina*, 1986).

In *Mills v. Maryland* (1988), Ralph Mills was an inmate in Maryland who was convicted of killing his cellmate. Mills argued that he presented mitigating evidence, but because it required unanimity of the jurors, it was unconstitutional. The U.S. Supreme Court held that the statute was confusing, and the case was remanded for resentencing. The Court clarified that statutes can have aggravators that require unanimous agreement from the jury, but cannot have mitigating factors that require unanimous agreement from the jurors (*Mills v. Maryland*, 1988). Though this is not an exhaustive summary of cases related to mitigating evidence, those specifically related to Texas are discussed in a subsequent section.

In a decade, the U.S. Supreme Court clarified individualized sentencing by way of mitigating evidence in these four cases. The Court explained mitigating evidence to include any aspect of a defendant's character or background, required that the sentencing body must consider the mitigating evidence, clarified the evidence was not limited to culpability-related evidence, and affirmed that statutes could not require a jury to have an unanimous finding to mitigate a death sentence. Mitigating evidence is the way the Court has identified that a capital defendant will receive individual sentencing; therefore,

resulting in a fair application of the death penalty. Mitigating evidence is the key to answer research question five (To what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?).

Texas Death Penalty

Because the current research focuses on Texas death penalty cases and because Texas death penalty scheme has generated its own body of law, this section details the cases relevant to this study. This is not a comprehensive list of Texas death penalty cases heard by the U.S. Supreme Court, but rather an overview of factors directly pertaining to the current research.

After *Furman* (1972), the death penalty structure in Texas was quickly modified to accommodate the new requirements. It was less than four years later that the U.S. Supreme Court heard its first challenge to Texas' new scheme in *Jurek v. Texas* (1976). This court case is the foundation of the current research and the elements addressed in the research questions to determine fair application of the Texas death penalty scheme (i.e. guided juror discretion addressed in research questions two and three; and individuality addressed in research questions one, four, and five).

Future Dangerousness

An understanding of future dangerousness is pertinent to the entirety of this research. The Texas statute has been revised several times since 1976, but the one element that has remained consistent over the past 40 years is that the jury must unanimously vote "yes" that there is a probability the defendant will commit criminal

acts of violence that would constitute a continuing threat to society for a death sentence to occur (Texas Code Criminal Procedure, 2015, Article 37.071).

The U.S. Supreme Court heard its first case related to future dangerousness in 1983, *Barefoot v. Estelle*. This case is particularly important to research question four (To what extent is expert testimony on future dangerousness associated with negative and positive findings of future dangerousness?), because the Court held expert testimony on future dangerousness was constitutional. Thomas Barefoot was charged and convicted of capital murder; during his sentencing, the prosecution called two psychiatrists to testify to Barefoot's future dangerousness. Neither psychiatrist met with Barefoot. Instead, they made their diagnosis from hypothetical questions asked by the prosecution. One of the doctors, James Grigson, was the psychiatrist dubbed "Dr. Death" because he had testified for the prosecution in more than 150 death penalty cases in Texas. The American Psychiatric Association (APA, 1983) filed an Amicus Brief in this case, stating that only one out of three predictions of future dangerousness is accurate and that it is unethical to give a prognosis without an exam. The Court held that expert testimony could be heard and that the adversarial process of our system would discover the true facts (*Barefoot v. Estelle*, 1983). Ruling differently on this case would have been contrary to the *Jurek* decision and would have called into question other issues, such as the rules of evidence. Expert testimony is commonly admitted in response to hypothetical questions. Justice Blackmun's dissent was contemptuous:

The Court holds that psychiatric testimony about a defendant's future dangerousness is admissible, despite the fact that such testimony is wrong two times out of three. The Court reaches this result -- even in a capital case -- because, it is said, the testimony is subject to cross-examination and impeachment. In the present state of psychiatric knowledge, this is too much for me. One may accept this in a routine lawsuit for money damages, but when a

person's life is at stake -- no matter how heinous his offense -- a requirement of greater reliability should prevail. In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself. (*Barefoot v. Estelle*, 1983, Blackmun's dissent)

In 1993, The U.S. Supreme Court heard a civil case, *Daubert v. Merrell Dow Pharmaceuticals*, and held that the Federal Rules of Evidence, not the *Frye* test that was relied upon in *Barefoot*, was the standard for expert scientific testimony in a trial. It became the trial judge's responsibility to act as a "gatekeeper" to determine whether the witness qualified as an expert. With this new standard, the expert status was weighted on more than just credentials, as in *Frye* (1923), but proven and accepted knowledge (*Daubert v. Merrell Dow Pharmaceuticals*, 1993). This case was important to testimony about future dangerousness (research question four) because there was a contradiction in the State's expert testimony predicting future danger and the accepted knowledge that future behavior could not be predicted. It would now be up to the judge to allow or disallow such testimony.

There has been little empirical research on future dangerousness testimony in a capital trial, so it is unclear whether the new standard actually impacted future dangerousness in Texas. A study completed using Arkansas capital trials found that more stringent testimony using actuarial instruments was relied upon post-*Daubert*. Future dangerousness, however, is not a requirement in Arkansas, and the researcher suggested completing a similar study in Texas (Beecher-Monas, 2007).

The next significant case regarding future dangerousness, relevant to research question four (expert testimony on future danger), was heard by the Texas Court of Criminal Appeals in 2002, *Saldano v. State*, after it was remanded by the U.S. Supreme

Court. The case was unusual because the Texas Attorney General filed a petition to the U.S. Supreme Court admitting the State mistakenly allowed expert testimony on race and ethnicity to prove future dangerousness. Therefore, the U.S. Supreme Court never heard the case, but rather remanded it. The Texas Court of Criminal Appeals reviewed the facts of the case and overturned it. Victor Hugo Saldano was tried and convicted for capital murder. The prosecution called an expert witness that testified to Saldano's future dangerousness due to his ethnicity. Race/ethnicity is an extra-legal factor that cannot be relied upon to determine future dangerousness. The case was returned to the trial court and set for resentencing; Saldano received the death penalty a second time.

Another Texas case heard by the U.S. Supreme Court, *Smith v. Texas* (2004), did not specifically focus on future dangerousness, but rather on the entire Texas death penalty scheme. When this case was originally tried in 1991, Texas had only two special issue questions: (1) did the defendant act deliberately and (2) did the defendant pose a future danger. In the jury instructions, the judge told the jurors that if they believed there was mitigating evidence to warrant a sentence other than death to go ahead and answer "no" to one of the special issue questions (*Smith v. Texas*, 2004). The judge presented a way for the jurors to nullify their verdict because the Texas sentencing scheme did not allow evidence to mitigate a death sentence unless it was relevant to future dangerousness. In this case, Smith had committed a particularly violent murder. Also, he was low functioning and he had a history of violence. The jury answered "yes," they thought he was a future danger; and "yes," they believed he killed his co-worker deliberately. According to the current death penalty structure, these answers would mandate a death sentence. The U.S. Supreme Court held the current structure violated the

U.S. Constitution and that informing a jury to return a false answer was not a sufficient way to handle mitigating evidence (*Smith v. Texas*, 2004).

In summation, these cases are relevant to the current research because they focused on what factors distinguished cases with a negative finding of future dangerousness from cases with a positive finding of future dangerousness. These cases explain that the Texas statute addressing future dangerousness has changed several times over the past four decades. First, the Court addressed that laypeople could determine future dangerousness and expert witnesses could testify to a defendant's future dangerousness. The Court explained that due to our adversarial system, both sides had the opportunity to provide evidence and the judge could determine who qualified as an expert.

Mitigating Evidence

Mitigating factors are not codified in the Texas death penalty statute. In fact, it was not until after *Penry II* that instruction regarding mitigating evidence was given to juries in Texas after answering the three special issues:

If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues. (*Penry v. Johnson*, 2001, p. 783)

And it was not until 2005 that Texas changed the special issue questions again and added the question:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.
(Texas Code Criminal Procedure § 37.071)

This was the first time mitigating evidence was mentioned in Texas law, which occurred 29 years after *Gregg* and its companion cases and subsequent cases regarding mitigation. As a summary of the mitigation cases discussed earlier, in 1978, *Lockett v. Ohio* held that Ohio's three codified mitigating factors were too strict and did not allow for any aspect of the defendant's character or background. This was the point in which all states except Texas added vague language to ensure all mitigating evidence could be allowed.

Next, it was held in *Eddings v. Oklahoma* (1982) that sentencers may not refuse to consider mitigating factors. Four years later in 1986, *Skipper v. South Carolina* reemphasized that mitigating evidence was not limited to culpability-related evidence and that mitigating evidence can be the basis for a sentence less than death. Finally, in *Mills v. Maryland* (1988), the Justices from the U.S. Supreme Court reminded the states that statutes can be unanimous for aggravators, but not mitigators. From this point, this section examines the case law specifically related to Texas mitigating evidence and its statute beginning in 1988 until 2007. This section of case law is specifically a foundation for research question five (To what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?).

Texas law regarding mitigating factors. In 1988, for the first time since *Jurek*, a few Justices on the U.S. Supreme Court expressed concern that the Texas death penalty

scheme did not permit juries to consider evidence that fell outside the scope of future dangerousness (*Franklin v. Lynaugh*, 1988). The majority concluded, however, that in Franklin's case, what evidence he presented in mitigation could be taken into account by the jury under its instructions. At this time, there was nothing in the Texas statute that mentioned mitigating evidence, which is why the defendant requested the judge give special instruction to the jurors.

One year later, on the heels of *Franklin*, the U.S. Supreme Court heard *Penry v. Lynaugh* (1989), another Texas case. Penry was mentally disabled and suffered a history of severe child abuse and presented this mitigating evidence to explain his diminished moral culpability. The jury sentenced him to death. On appeal, Penry claimed that the jury could not take his mental disability and history of child abuse into account in sentencing him. The Court held that the Texas statute did not allow the jury the latitude to consider the fullness of the mitigating evidence, which did not allow for individualization in determining whether to impose the death penalty. Specifically, the Court held that the capital scheme must provide a meaningful vehicle for jurors' consideration of relevant mitigating evidence (*Penry v. Lynaugh*, 1989).

Yet, four years later the U.S. Supreme Court heard *Johnson v. Texas* (1993) where the defendant appealed his death sentence claiming a violation to his Eighth Amendment right because the Texas statute did not "provide a vehicle" for the jury to give effect to his youthfulness, the Court upheld the lower court's decision stating the Texas scheme as applied in this case allowed for mitigating evidence. The Court explained the difference between this case and *Penry* (1989), "that there is ample room in the future dangerousness assessment for a juror to take account of youth as a mitigating

factor is what distinguishes this case from *Penry*” (*Johnson v. Texas*, 1993, p. 323).

Johnson was 19 when he committed first degree murder. This defendant’s issue was his moral culpability due to his youthfulness; and while future dangerousness pertains to incapacitation (not moral culpability), the Court insisted the Texas statute was constitutional in this case.

The U.S. Supreme Court heard *Penry*’s case a second time in 2001. *Penry* was retried in 1990 and sentenced to death a second time. The second time he was tried, the jurors were given a special instruction to nullify one of the special issues if they believed the defendant deserved a punishment less than death. The Court held that the jury instructions in *Penry II* did not comply with the Court’s mandate in *Penry I*. A nullification instruction cannot be given—jurors who have been sworn into duty cannot be told to be untruthful if they want to give a sentence less than death (*Penry v. Johnson*, 2001).

In 2004, the U.S. Supreme Court heard *Tennard v. Dretke*. During the punishment phase, *Tennard* presented his low IQ of 67. When the judge gave instruction, he told the jurors to determine whether the crime was deliberate and whether *Tennard* posed a future danger. Per *Penry*, the judge’s instructions were not enough to allow the jurors to consider his low IQ as evidence that could mitigate a death sentence.

The most recent case heard by the U.S. Supreme Court regarding the Texas scheme and mitigating evidence is *Abdul-Kabir v. Quarterman* and *Brewer v. Quarterman*, two cases heard together in 2007. The Court granted *Penry* relief to two defendants who presented evidence of possible neurological damage from a history of child abuse (*Abdul-Kabir*) and mental illness (*Brewer*). The pendulum once again swung

back, and the U.S. Supreme Court reaffirmed the original broad holding of *Penry I*. The Court held that the Texas death penalty scheme did not give jurors the opportunity "to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty" (*Abdul-Kabir v. Quarterman*, 2007, p. 2). A timeline of the cases relevant to the current study is presented in Figure 2. This Figure illustrates the expanse of time and the changes in death penalty changes related to factors in the current study.

In summation, the U.S. Supreme Court ruled the death penalty cruel and unusual because it was arbitrarily and discriminatorily applied, leaving room for the states to respond with legislation that would narrow the death eligible crimes, guide jurors' discretion, and allow for individualized sentencing. Over the years, the Justices have attempted to uphold the U.S. Constitution, while allowing autonomy in the states. In regard to the current study, Texas has narrowed the death eligible crime to capital murder, which is a murder committed intentionally and knowingly, along with one of nine aggravators (Texas Penal Code, Sec. 19.03). Texas has two special issue questions, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken" (Code of Criminal Procedure, Art. 37.071(b)). If both of these questions are answered yes unanimously, the defendant can be sentenced to death. The court instructs the jury that it "shall" consider all evidence that may mitigate a sentence of death. The U.S. Supreme

Court has ruled that the two special issue questions guide the jury, and the instruction regarding mitigating evidence allows for individualized sentencing.

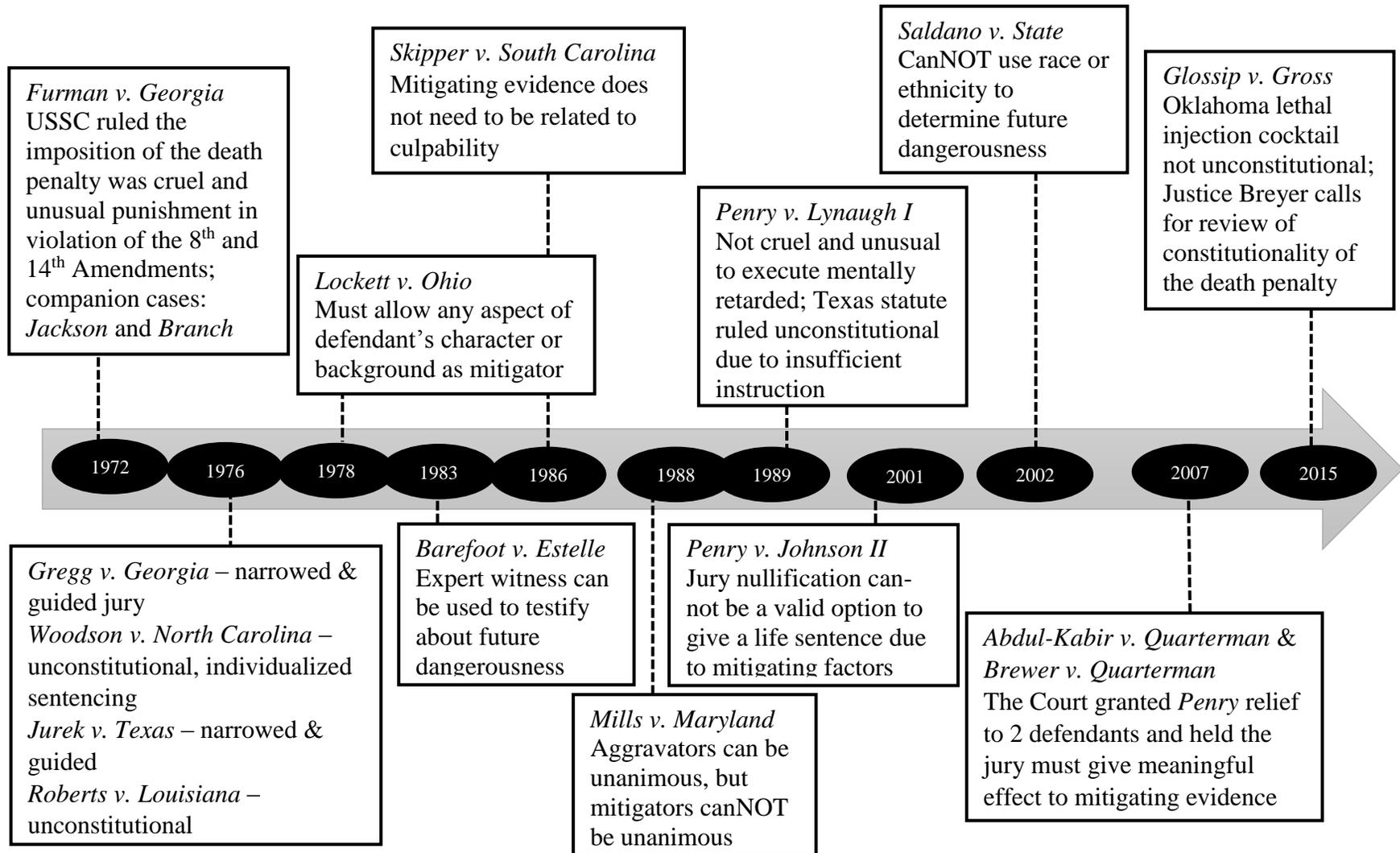


Figure 4. Timeline of Court Cases Relevant to the Death Penalty and the Current Study.

Literature Review

While the U.S. Supreme Court has established the death penalty as an appropriate punishment for only the “worst of the worst,” many have questioned whether this goal is met in practice. Since 1976 in Texas, approximately 800 defendants have been deemed a future danger and sentenced to death, while very few have been found to not be a future danger and received LWOP (*Furman v. Georgia*, 1972; Death Penalty Information Center, 2015; Texas Defender Services, 2015, Texas Judicial Branch, 2015). The future dangerousness finding has been repeatedly criticized on the grounds there is nothing more arbitrary and capricious than predicting a person’s future behavior (Citron, 2006; Marquart, Ekland-Olson, & Sorensen, 1989; Merillat, 2006; Otero & Gass, 2013; Texas Defender Service, 2004). A counterargument can be made that predictions of future behavior are made every day in the criminal justice system, during bail hearings, in probation/parole conditions and revocation hearings, and even when an inmate is incarcerated and sent to isolation (Roberts, 2005). Nevertheless, none of these situations involve death, a sentence that cannot be reversed if the prediction is wrong.

The research on future dangerousness focuses on three areas of the Texas future danger special issue, namely: (1) probability, (2) prediction of future danger, and (3) society. Based on the statutory language that sentences a defendant to death, the jurors must answer “yes” unanimously to the following question: “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society” (Texas Code Criminal Procedure § 37.071).

Mitigating evidence, juror guidance, and the influence of non-legal factors have been examined in the prior literature. This literature is relevant to the current study, as all

of the research questions pertain to these issues: probability, future dangerousness, society, juror guidance, mitigating evidence, and aggravating evidence. These are the factors assessed to answer research questions two (terminology of special issue 1), three (juror guidance), four (expert testimony on future danger), and five (mitigating and aggravating evidence).

A Probability

Judges W. A. Odom and T. E. Roberts of the Texas Court of Criminal Appeals concurred in part with the plurality in *Jurek v. Texas* (1976) that the death penalty was not unconstitutional, but dissented strongly with the remainder of the decision (Texas Court of Criminal Appeals, 1975). The judges specifically addressed that the special issue dealing with future dangerousness was too vague to meet the requirements put forth in *Furman v. Georgia* (1972) to guarantee the death penalty was not applied arbitrarily and capriciously.

What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a "probability" that he will perform certain acts in the future? Did it mean, as the words read, is there *a* probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, *a* probability, and no one would say it is no probability or not a probability. It has been written: "It is probable that many things will happen contrary to probability," and "A thousand probabilities do not make one fact." The statute does not require a particular degree of probability but only directs that *some* probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster. (Judge Odom dissent in *Jurek v. State*, 1975)

How does a jury define "probability" when answering the future dangerousness question? What is the level of proof required by a jury to be certain of future danger?

Technically, when a capital trial reaches the penalty phase, the jurors should begin with the idea that the defendant will receive life in prison without parole and that the burden of proof is on the prosecution—it is not the reverse, that the defense must prove the defendant is worthy of a life sentence (Regnier, 2004). During the first phase of a capital trial, the State must prove beyond a reasonable doubt that the defendant is guilty. It would be expected in the penalty phase the State would prove beyond a reasonable doubt that there is a probability the defendant will commit future acts of violence that constitute a threat to society. However, the authors of the law did not provide an explanation (Citron, 2006). Black’s Law Dictionary (1910, online) defines beyond a reasonable doubt as “after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.” Simply stated, the prosecution must present evidence so strong that there is no other logical option other than execution. Article 37.071 (2)(b) should not be confused to mean that there is a probability that the defendant will commit future violent acts, but rather it should be proven by the state that there is no other possible logical explanation than it is probable the defendant will commit future acts of violence that constitute a threat to society. However, the language of Article 37.071 essentially allows subjective interpretation from each juror; “a probability” is so ambiguous that any level of certainty could prevail (Witsil, 2014).

Society

The word “society” is another unclear term in Article 37.071 that specifically is asked about in the future danger special issue (“whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing

threat to society” (Texas Code Criminal Procedure § 37.071)). When a defendant is convicted of capital murder and the jurors must decide if there is a probability of future violent behavior that will cause a continued threat to society—what does “society” refer to? It is important for the defense counsel to explain to jurors understand that “society” does not mean their community—that LWOP means incarcerated until the end of the defendant’s natural life. Additionally, it is important for the defense to enlighten the jurors about the concept of an “institutional man”—the notion that some individuals function better incarcerated than living free in society (Merillat, 2006). To make this point, it would be relevant for the jurors to hear testimony on a defendant’s conduct during a previous incarceration or in county jail awaiting trial.

One area of testimony relied upon by both defense and prosecution is about the living conditions in Texas Department of Criminal Justice (TDCJ); specifically, what is it like for capital murderers who receive a sentence of LWOP. Often times the defense solicits testimony from retired TDCJ employees to explain a new stricter classification system since the infamous Texas 7² escape from the maximum security Connally Unit and the prosecution presents testimony to show that capital murderers still have contact with other inmates (Merillat, 2006). Each defendant sentenced to TDCJ goes through an elaborate classification process and is placed in a unit on a custody level according to many factors, including current offense. Those receiving a sentence of 50 years or more, including LWOPs, are classified as G(3), which is the mid-level classification at TDCJ. Inmates in this classification are restricted to specific living arrangements, but can earn work privileges; capital murderers receiving LWOP cannot ever decrease from this level

²Seven inmates escaped from the Connally Unit near Kenedy, Texas, on December 13, 2000. The inmates eluded police for over a month, resulting in the death of one police officer. One escapee was incarcerated for capital murder.

of supervision (TDCJ, Connections, 2006). Higher supervision is more restrictive with less privileges and lower supervision is less restrictive with more privileges. The prosecution challenges the defense to make the point through this testimony that the defendant can still inflict violence on other inmates and guards, if prison is his “society” and that it is possible for an inmate to escape, threatening the jurors’ “society.”

Though “society” is discussed less in the literature, it is an important concept to understand as a juror in a capital trial. It is relevant in the current study, as one would expect the term to be explained more by defense testimony in the cases that resulted in no finding of future dangerousness. It would be expected that the jurors understood that some individuals fair better in an institution where choices are minimal, rules are clear, and violations are strictly enforced.

Juror Guidance

When the U.S. Supreme Court affirmed *Gregg, Proffitt, and Jurek* (1976), part of each state’s capital punishment scheme provided guided discretion to the jurors, to eliminate arbitrary and capricious death sentencing. The other two cases, *Woodson* and *Roberts*, were found unconstitutional because they both required mandatory death sentences, not allowing for individualized sentencing by jurors. The Court wanted to alleviate random application of the death penalty, but at the same time allow for mercy, so that the death penalty would only be given in the worst of the worst offenders (Vollum et al., 2015). The death penalty is different in that the jurors not only decide guilt or innocence, but they decide the sentence, life or death. In all but six states, Texas being one of the six, jurors do not decide sentences in any other criminal trial—only guilt or innocence.

Researchers have revealed that many jurors do not understand the process of a capital trial and better juror guidance is needed to complete their responsibilities (Barner, 2014; Costanzo & Costanzo, 1994; Smith & Haney, 2011; Vartkessian, 2011; Vartkessian, 2012). Additionally, 12 jurors who do not know one another, do not know the defendant or victim, do not know the attorneys or judge, and do not understand the law, are deciding whether a person lives or dies. Juror guidance is examined in the current study to answer research question three (To what extent is guidance given to jurors associated with negative and positive findings of future dangerousness?).

The extant literature related to juror guidance focuses mostly on the comprehension of instructions by jurors, which will not be analyzed in the current research, but explains different ways the prosecution and defense guide the jurors, which is assessed in the current research. Second, the literature on juror guidance related to the current study is minimal—who is giving the guidance, how much is given, and what is the context of guidance.

In one extensive qualitative study from eight capital trials in Texas using trial transcripts and interviews of jurors, the researcher posited that the Texas capital sentencing statute biased jurors to not consider all the mitigating evidence (Vartkessian, 2011). The term mitigation is not relevant in everyday language, so expecting jurors to understand what and how evidence could mitigate a death sentence is precarious. The researcher speculated that the prosecution uses four methods to encourage jurors to disregard mitigating evidence: (1) flipping mitigating evidence into aggravating evidence, (2) arguing that mitigating evidence is not relevant to sentencing, (3) stating that mitigating evidence must be related to the crime, and (4) enumerating mitigating

evidence not related to the particular case (Vartkessian, 2011). The prosecution may define mitigating evidence using examples they know have nothing to do with the current defendant, leading the jurors to believe that is the only type of mitigating evidence. Often the jurors perceived the prosecutor was on the same side as the judge and, therefore, the jurors tended to believe the prosecutor more than the defense attorney (Vartkessian, 2011).

In Texas, potential jurors are informed about the special issue questions before the trial begins. Judges and attorneys explain the capital trial process to the potential jurors during *voir dire*. Some findings from the analysis included: that jurors saw the judge's comments as fact because the judge was the leader in the courtroom; in cases that resulted in a death sentence, the judges gave broad interpretations to terms relevant to future dangerousness; yet, when the judge gave limited examples of mitigation, the jurors believed that was all they could consider and in cases that resulted in LWOP, judges did not discuss the special issue questions during *voir dire* (Vartkessian, 2011).

In another qualitative study analyzing 36 interviews of capital jurors, Barner (2014) examined clarity and procedural integrity. They found there was a sense of confusion from more than half of the jurors regarding voting, unanimity, and definitions. Regarding clarity, interviewees expressed they were not attorneys, so the wording was difficult to understand, the instructions were not clear, and the terminology was confusing (Barner, 2014). The researcher reported that generally, the jurors agreed that the procedures related to the current offense and the guilt and innocence phase were good; however, in sentencing a consistent pattern from the interviewees was the inability to get clarification from the judge (Barner, 2014). One juror reported that these types of

decisions should not be left to jurors—the judge makes the big money and, therefore, should make the decision (Barner, 2014). Overall, the jurors were unprepared for the emotional toll that the trial and sentencing would have on them.

Two empirical studies that relied upon a sample of undergraduate college students assessed juror instructions from California and Virginia for comprehension. The first study included a sample of 211 and relied upon California’s revised “plain language” instructions developed by the legislature in 2005 (Smith & Haney, 2011). The researchers found that the comprehension was greater than when previous instructions relied upon; however, the participants still only scored slightly more than half of the possible comprehension points (Smith & Haney, 2011). Additionally, the participants scored very low when applying mitigating and aggravating weighing to capital scenarios.

The second study included a sample of 245 participants and relied upon a factorial design and path analysis to examine Virginia’s jury instructions. Jurors most often made pro-prosecution errors (Patry & Penrod, 2013). More specifically, nearly half of the respondents believed that when aggravating factors were found, the death sentence was mandatory. Of course this is incorrect because a mandatory death sentence is a violation of the Eighth and Fourteenth Amendments. Additionally, one-third of the sample believed that the death penalty was still an option even when they found mitigating evidence that warranted a life sentence (Patry & Penrod, 2013).

In summation, jurors in capital trials often believed the judge knew all and the prosecutor was on the same side as the judge, which led to more decisions of death. Second, jurors were confused by the instructions; they were frustrated by their inability to clarification, and that the experience was highly emotional for jurors, leading to mistakes

or just giving into the majority. Finally, Devine (2012) found that capital jury instruction comprehension was lower than other types of trials.

The current study examines the amount and context of guidance given by the judge, prosecution, and defense to the jurors, which is assessed in research question three (To what extent is guidance given to jurors associated with negative and positive findings of future dangerousness?). It would be expected that more guidance to jurors from the defense would be found in cases with a finding of no future danger, while more guidance to jurors from the prosecution and judge would be found in cases with a finding of future danger.

Expert Testimony Regarding Future Violence

Whether a defendant will commit violence in the future is difficult, if not impossible, to predict by expert witnesses. This is especially true for death row inmates because they are placed on death row and have limited contact with others, substantially reducing their ability to commit violent acts towards others. After a 1998 death row escape in Texas, death row was moved from the Ellis Unit to the Livingston Unit, further limiting death row inmates' ability to commit violent acts. The death row inmates remained in their cells 23 hours each day, with an hour of isolated exercise. With these changes to death row and given that the average death row inmate serves 7.92 years prior to execution, it is difficult to assess the accuracy of predicted violence (Witsil, 2014).

The U.S. Supreme Court decided in *Jurek* (1976) that *all relevant* information about the defendant should be heard. It was not articulated what would account for relevant information in deciding future danger and particularly, whether expert testimony would be seen as relevant information (Regnier, 2004). It was articulated, however, that

jurors could determine future dangerousness by examining whether the defendant had a substantial criminal history, severity of prior violence, age of defendant, and whether the defendant was under duress or extreme mental or emotional stress (*Jurek v. Texas*, 1976). The use of expert testimony to predict future danger in capital cases has been a controversial issue.

In Texas, the prosecution's expert witnesses have often testified about a defendant's probability of future danger through a series of hypothetical questions offered by the prosecutor during testimony, having never met with the defendant (Texas Defender Service, 2004). To specifically measure the accuracy of expert prediction on future dangerousness, researchers from Texas Defender Service³ (TDS) conducted a study that evaluated the behavior of 155 Texas death row inmates who had been identified as cases in which a prosecution expert predicted future violence. Of the 155 inmates, 67 had been executed, 40 resided on death row at the time of the study, and 48 had their death sentence commuted to life for various reasons (Texas Defender Service, 2004). The researchers reviewed Texas Department of Criminal Justice (TDCJ) disciplinary records of each inmate. Classification of offenses included major or minor infractions. Specifically, the research identified "serious assaultive behavior" as violence worthy of the classification of future dangerousness. Of the 155 inmates, 5% engaged in serious assaultive behavior, 20% had no disciplinary violations, and 75% had minor offenses. None of the inmates in this study had committed another homicide (Texas

³ Texas Defender Service (TDS) is a non-profit organization established in 1995 by experienced Texas death penalty attorneys. Their mission is to establish a fair and just criminal justice system in Texas. TDS aims to improve the quality of representation afforded to those facing a death sentence and to expose and eradicate the systemic flaws plaguing the Texas death penalty.

Defender Service, 2004). Thus, 95% of the predictions made by experts that the defendant would commit future violence were incorrect.

In summation, prediction of future behavior is uncertain. If the jury examines only past behaviors to predict the future, a defendant is being punished for a crime he did not commit. If the jury bases predictions on behaviors of similar persons, researchers found that capital offenders do not commit homicide in the future 99% of the time (Marquart & Sorensen, 1988). Finally, if a jury relies on expert testimony to predict future dangerousness, the APA released a statement that said psychiatrists are wrong two out of three times (American Psychiatric Association, 1982).

Researchers examined the accuracy of dangerousness predictions of capital offenders in Texas by studying the behavior of pre-*Furman* inmates with death sentences that were commuted to life over a 14-year period (Marquart, Ekland-Olson, & Sorensen, 1989). Before *Furman*, there was not a requirement for the jury to find a probability of future danger, but it was assumed that the worst of the worst offenders received the death penalty and that the jurors believed them to be too dangerous to live in society or in prison.

Marquart et al. (1989) compared two groups of inmates: one group (death inmates) consisted of 92 inmates convicted of capital murder, sentenced to death by a jury, and commuted to life after the *Furman* ruling and the second group (life inmates) consisted of 107 inmates who were convicted of capital murder, but sentenced to life. Data were collected from Texas Department of Criminal Justice records, Texas Board of Pardons and Parole, and trial transcripts from the Texas Court of Criminal Appeals. Variables compared between the two groups included criminal history, prior violence,

conviction of prior violent crimes, convictions of prior property crimes, and prior adult incarceration; all of these areas were examined by juries to assist in determining future dangerousness (Marquart et al., 1989).

Overall, a higher percent of life inmates as compared to the death inmates fell into the categories expected to be the most dangerous (Marquart et al., 1989). More specifically, 41% of life inmates compared to 35% of death inmates had five or more prior incidents with police, whereas 11% of death inmates compared to 9% of life inmates had no prior incidents with police (Marquart et al., 1989). The death inmates did have slightly higher convictions for violent crimes in the three or more categories (3%, 1%) and twice the convictions for property crimes in the three or more categories (25%, 12%). In almost all of the categories, however, the percentages were almost identical (Marquart et al., 1989). The two groups were followed for 14 years and 90% of the inmates in both groups obtained trustee status. Two-thirds of both groups were never sent to solitary confinement and nearly a quarter of each group never had any sort of disciplinary record (Marquart et al., 1989). In general, the results were nearly identical and most of the inmates served their time without major incident. Eight percent of the death inmates and six percent of the life inmates, however, were identified as prison gang members and placed in administrative segregation (Marquart et al., 1989). The results from the study provided evidence that those sentenced to death were no more dangerous than those sentenced to life and perhaps a jury really cannot predict who will commit future violent acts.

These two studies are important to the current study because they are the only two studies completed on Texas death row inmates that examined the prediction of future

dangerousness. It was found in these two studies that neither “experts” nor lay jurors can predict future dangerousness in most cases. If future dangerousness cannot be predicted, one may assume there will not be consistent patterns in regard to determining future dangerousness between the two groups of cases examined in the current study.

Mitigating Evidence

Mitigating evidence is examined to address research question five (To what extent are patterns of mitigating and aggravating evidence associated with negative and positive findings of future dangerousness?). The factors identified in this section, remorse, mental illness, history of alcohol abuse, and history of child abuse, are essential to research question five. Unlike aggravating factors, mitigating factors are not codified in Texas. Mitigating factors are those factors in an individual case, background, or character presented to the court about the defendant or circumstances of the crime that may lessen the sentence, for capital cases in particular, from death to life. The federal statute addresses what factors at a minimum shall be considered in mitigating circumstances. Many states have followed these guidelines. The factors include: impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, emotional or mental disturbance, victim’s consent, or other factors in the defendant’s background (18 U.S. Code § 3592). The Texas Code of Criminal Procedure, Section 37.071, Section 2(a)(1) states the following about mitigating factors:

If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant’s counsel as to any matter that the court deems relevant to sentence,

including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty.

In 1989, the U.S. Supreme Court ruled that the Texas death penalty statute did not allow for jurors to give adequate consideration of mental disability as a mitigating factors in a capital case (*Penry v. Lynaugh*, 1989). One of the issues with this case was whether mitigating factors were presented and if so, were they presented as mitigators or aggravators. The Texas Legislature revised the statute in 1991 so if the two special issue questions: (1) whether the defendant was likely to be a future danger to society; and (2) did the defendant intend to kill the victim. If these were answered affirmatively, the court asked if all mitigating evidence had been considered for a sentence less than life (Brock, Sorensen, & Marquart, 2000). The purpose of mitigating evidence heard by the jurors should not be to excuse an offender's behavior, but to explain why an offender may be less culpable (Barnett, Brodsky, & Davis, 2004).

Since these changes in the law, several researchers have examined what mitigating factors jurors considered in a capital case, how jurors interpreted offender histories, and what mitigating factors were viewed as aggravating factors. Previous studies have primarily relied on college-student samples, while few have relied upon summonsed jury panels. Psychological, psychosocial, and biopsychosocial factors, including mental illness, intellectual disability, alcohol and drug abuse, remorse, psychotic traits, and histories of abuse have been examined. A summary of types of mitigating evidence that has been examined in capital trials is included.

Remorse. Remorse is defined as a feeling of distress for past behaviors; psychopaths are believed not capable of feeling remorse. Researchers have explored

whether remorsefulness of an offender presented as a mitigating factor in a capital sentence hearing influences the jurors toward a LWOP sentence and findings consistently show that remorselessness of an offender equate more often to a death sentence (Corwin, Cramer, Griffin, & Brodsky, 2012; Cox, Clark, Edens, Smith, & Magyar, 2013).

Corwin et al., (2012) surveyed 206 psychology students using a 2x2 factorial design⁴ scrutinizing whether a defendant was sentenced to death or LWOP if he showed remorse or no remorse. The researchers distinguished two types of remorse: verbal and nonverbal. Remorse is viewed as a mitigator because it can be a sign that the offender sees his wrongdoing and feels some pain for his behavior; this is often associated with rehabilitation of an offender. The mock jury viewed a video simulation that displayed nonverbal remorse, such as crying, not making eye contact, slumped shoulders, and a hanging head. Verbal remorse was exemplified by apologizing for the crime and the pain suffered. Remorselessness was shown by making eye contact, scanning the courtroom, expressing a carefree attitude by smiling and talking with counsel (Corwin et al., 2012).

In summation, the researchers found that a defendant displaying nonverbal remorse was perceived to be more remorseful than those displaying verbal remorse only. When a defendant displayed both nonverbal and verbal remorse, however, the defendant was not viewed as more remorseful. The researchers surmised that the display of nonverbal and verbal remorse possibly led the mock jurors to believe the remorse was not genuine (Corwin et al., 2012).

In another study that examined psychopathy of capital murder offenders, in particular remorsefulness, the findings were consistent with previous research that found

⁴ This study examined whether the defendant showed remorse (yes/no) and whether they defendant received LWOP or a death sentence.

an offender's remorselessness equated to a death sentence (Cox et al., 2013).

Psychopathy traits are inherently socially objectionable; Cox et al. (2013) suggested that lay people (i.e., jurors) would notice these undesirable traits in an offender and it would influence the juror in deciding death over LWOP.

In addition to remorselessness, shallow emotions, irresponsibility, fearlessness, social dominance, intelligence, lack of anxiety, hostility, and failure to learn from mistakes were studied (Cox et al., 2013). Community members were relied upon as mock jurors as opposed to college students who were typically relied upon in previous literature. Overall, similar results were found; however, none of the results were as strong (Cox et al., 2013). In conclusion, remorse has primarily been found in previous studies to be a mitigating factor. It is expected that in the current study testimony related to remorse would more often be found in cases of no future danger, rather than future danger cases.

Mental illness. There is little empirical research involving psychological or psychosocial evidence in death penalty sentencing procedures. Barnett et al. (2011) focused on the need for an organized scheme for evaluation by mental health workers in an effort that attorneys present a clearer picture of a defendant's life during the sentencing phase of a capital murder.

Barnett, Brodsky, and Price (2007) conducted research on the impact of sentencing related to a variety of biopsychosocial mitigating factors, including mental illness. A survey of 121 Texas college students and 478 random community residents in Alabama were examined. No significant differences were found between the compared groups. A vignette was presented, the participants sentenced the offender, and then a mitigator was presented; the results showed that 41% found mental illness as a reason for

a lesser sentence. Additionally, the researchers asked whether the defendant's sentence should increase, decrease, or stay the same. Thirty-seven percent found no reason to change the sentence, in spite of the presence of a mental illness (Barnett et al., 2007). More participants perceived mental illness as a mitigator than thought the sentence should be decreased due to mental illness. More participants perceived mental illness as a mitigating factor, but less thought the defendant deserved a different sentence.

Researchers evaluated mitigating factors in capital murder and found that mental illness was one of five mitigating factors that resulted in a less severe sentence (Barnett, Brodsky, & Davis, 2004). This research administered 10 vignettes to 260 students at the University of Alabama. Overall, the study found that the mock jurors were more likely to give a life sentence when mitigators were present (52%) and participants ranked the following mitigating factors as those receiving the lowest sentence severity: defendant beaten badly by his parents as a child, a defendant who had been in a psychiatric hospital, a defendant with no prior criminal record, and a defendant who was mentally ill (Barnett et al., 2004).

Overall, mental health presented as a mitigating factor to a death sentence was found to be inconclusive. Testimony regarding mental health of the defendant is assessed in the current research. There is no clear expectation as to whether mental illness will be relied upon more often in cases of no finding of future danger or future danger, as it may be perceived as an aggravator in some cases and as a mitigator in others, depending on the context of the testimony.

History of alcohol abuse. Researchers confirms that a history of alcohol abuse in an offender's life, when relied upon as a mitigating factor in a capital murder case, was

perceived by jurors more as an aggravator than a mitigator (Barnett, Brodsky, & Price, 2007; Stevenson, Bottoms, & Diamond, 2010). Research conducted to identify whether jurors were more inclined to give a life sentence when a mitigating factor of alcohol abuse was presented found that jurors were more apt to pay attention to testimony that concerned the defendant's use of alcohol in the current crime as opposed to history of alcohol abuse (Stevenson et al., 2010). This juror perception research relied upon 402 jury-eligible citizens in two counties using mock trials, including videos of opening and closing attorney arguments and expert witness testimony on aggravating and mitigating factors. This research was consistent with previous research in that jurors typically perceive alcohol abuse as a choice that leads to a more retributive sentence (Marlow, Lambert, & Thompson, 1999; Stevenson et al., 2010; Wall & Schuller, 2000).

Additional research supporting the conclusion that alcohol use presented as a mitigating factor was perceived by jurors as an aggravator, revealed that defendants who were intoxicated at the time of the crime received a harsher sentence by more than 50% of the mock jurors. Also, when presented with a history of alcohol or drug abuse, more than one-third of the mock jurors viewed this as an aggravator (Barnett et al., 2004). The conclusion drawn from the literature is that alcohol or drug use presented as a mitigating factor to mock jurors is indeed most often seen as an aggravating factor. It is possible that the perception is one of irresponsibility, a choice made by the offender, and/or that the defendant is less rehabilitative because of the substance abuse.

A history of alcohol and/or drug abuse is assessed in the current research to address five (to what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?). Guided by

previous research findings, the expectation is that testimony regarding a history of alcohol or drug abuse is more prevalent among future danger cases due to the aggravating effect perceived from a history of alcohol and/or drug abuse.

History of child abuse. The existing literature regarding perceptions of jurors on the history of child abuse when presented as a mitigating factor in a death penalty trial is limited. Existing research has primarily relied upon college students to collect data regarding juror perceptions and all of the literature focuses on multiple aggravating factors, not exclusively child abuse (Ball, 2005; Barnett et al., 2007; Najdowski, Bottoms, & Vargas, 2009; Platania & Kostantopoulou, 2014; Stevenson, Bottoms, & Diamond, 2010).

Conclusions from extant research include a variety of findings with different methods of measurement, making it difficult to identify generalizable findings. These findings include mock jurors more likely (55%) to give a life sentence to an offender whose mitigating factor included a history of verbal and physical abuse by parents (Barnett et al., 2004); while in a similar study, slightly more than one-third (37%) of the mock jurors found child abuse to be a mitigator, resulting in a more lenient sentence (Barnett et al., 2007). Najdowski et al. (2009) found juveniles who were abused by their parents were less responsible for murder than non-abused juveniles. It was also reported that abused juveniles were perceived as less responsive to rehabilitation than non-abused juveniles—therefore, child abuse was perceived as an aggravator. Another inconclusive study conducted by Platania and Kostantopoulou (2014) assessed the presentation of a history of child abuse as a mitigating factor to mock jurors in the sentencing phase of a capital trial. Slightly more than half (53%) perceived this factor as important to

sentencing and slightly less than half (45%) perceived this factor as unimportant to sentencing. Yet in another study, jurors were more concerned with how abuse affected the current crime than why the offender was abused as a child. Jurors did not excuse the crime due to child abuse and did not make the offender less responsible; in fact, the jurors relied upon the child abuse to rationalize permanent damage, ultimately seeing it as an aggravator (Stevenson et al., 2010).

In a recent study, researchers relied upon both a sample of college students and a summonsed juror sample upon being excused from further jury duty to assess any possible differences between a history of neglect, physical abuse, or sexual abuse in mitigating a death sentence (Holleran, Vaughan, & Vandiver, IP). The researchers found similar results in death-qualified students and jurors who favored the death penalty; the most mitigating type of history of abuse was sexual. Moderate mitigation was found for physical abuse, and minimal mitigation was found for neglect (Holleran et al., IP). Holleran et al. (IP), however, found different results between the groups when focused on those death qualified, but opposed the death penalty. The results from the student sample indicated the strongest mitigator was physical abuse and the weakest mitigator was neglect, and sexual abuse was an aggravator. The juror sample revealed the strongest mitigator was neglect, followed by sexual abuse (moderate effect) and physical abuse (weak effect). The differences between the groups may be due to heterogeneity of students and jurors who oppose the death penalty.

Overall, a defendant's history of child abuse has been found as both a mitigator and an aggravator. History of child abuse is examined in the current research as a

mitigating factor. The expectation is that more history of child abuse will be found in cases of no finding of future danger.

In summation, the extant literature on mitigating factors was inconsistent; some researchers have found certain factors were important, while others have found the opposite. Researchers have found that jurors' perceptions of background and character factors were viewed as mitigating evidence, aggravating evidence, or irrelevant. The limitations of studies using mock jurors was that the respondent was not an actual capital juror, not hearing the horrors of a real case, not sitting in a trial for weeks, not subjected to the duty of deciding life or death of a person, and not emotionally drained from the entire experience. It is difficult to generalize the findings to actual cases. The current research examines mitigating evidence presented in cases with no finding of future dangerousness and cases with a finding of future dangerousness to determine any similarities and differences of mitigating evidence presented in the punishment phase of a capital trial.

Extraneous Factors Related to the Death Penalty

Extraneous factors include any extralegal factors, such as the defendant's race and any other factors that jurors base their decision on that are beyond the legal scope of the trial. This could include the demeanor or physical appearance of the defendant, the likability of the attorney, the location of the offense, etc. The extant literature regarding extraneous factors in death penalty cases has focused primarily on discrimination and discretion. The Justices' primary concerns in *Furman* (1972) included discrimination, particularly related to race, and discretion of jurors—both contributing to the arbitrary and capricious imposition of the death penalty. The current research does not examine the

extraneous factors in regards to future dangerousness; however, the current study minimizes their effects by matching the cases between the two groups on potential extraneous factors.

The relevant scholarly literature on extraneous factors has focused on the race of the defendant and victim, gender of the defendant and victim, geographic location of the offense, physical appearance of actors in the court room, the demeanor of defendant and defense counsel, and offender/victim relationship (Antonio, 2006; Foley, 1987; Gillespie, Loughran, Smith, Fogel, & Bjerregaard, 2013; Richards, Jennings, Smith, Sellers, Fogel, & Bjerregaard, 2014; Robinson, Jackowitz, & Bartels, 2012; Smith, 2012; Songer & Unah, 2006; Vito & Keil, 1988). The similarities and differences regarding these factors between the two groups of cases are presented in Chapter 4.

Conclusion

The primary research question (What salient factors, if any, are associated with negative and positive findings of future dangerousness in death penalty cases in Texas from 2005 to 2015?) and subsequent research questions are formed from the case law and existing literature. The case law provided the foundation for this research, starting with *Furman* (1972), which ended arbitrary and capricious death sentences. *Gregg* (1976) and succeeding cases set the guidelines for the Texas death penalty scheme and the relevant literature reveals what patterns to examine. The current research asserts a counterfactual relationship—these defendants are probably going to cause future violence so they are sentenced to death and the counterfactual is these defendants are probably *not* going to cause future violence so they receive a LWOP sentence.

III. METHODS

The current research compares and contrasts variables and themes between the following two sets of Texas death penalty cases that were tried between 2005 and 2015: (1) all cases ($n = 9$) in which a defendant was found not to be a future danger and subsequently, resulting in a LWOP sentence and (2) a sample of nine matched cases in which the defendant was found to be a future danger, resulting in a death sentence. Given that the two sets of cases resulted in different outcomes (i.e., LWOP and death), it may be assumed substantive factors (other than those used in the matching) differentiated the two sets of cases. This study assesses this assumption.

The case variables that are critical to matching the cases include: race/ethnicity of defendant, age of defendant at the commission of the crime, sex of defendant, the aggravator making the crime eligible to be tried as a capital case, and the county of prosecution. Although the cases are not matched on victim characteristics, a description is provided that includes race of victim, age of victim, sex of victim, and the defendant/victim relationship. The substantive factors to be examined include: explanation of terminology, guidance to jurors, expert testimony on future dangerousness, mitigating evidence, and aggravating evidence. The categorization matrix (see Figure 5) illustrates how the factors identified from case law and relevant scholarly literature were linked to each research question.

The data, sample, research questions, and analytical strategies are described in this chapter. Furthermore, the different analytical techniques to be employed in the current research, including a survey, content analysis, cluster analysis, and mind mapping are explained in this chapter. The research design is explained through the qualitative

paradigm, the cogent argument for addressing each of the research questions, and the chronological steps to be utilized in this research to ensure replicability. This chapter concludes with ethical considerations.

Data

In content analysis, three types of units are discussed: sampling units, coding units, and context units (Krippendorff, 2004). The sampling units for the current study are the nine cases that resulted in a no finding of special issue 1 and nine matched cases (discussed more thoroughly in the Sample section below). Sampling units are relied upon to set parameters to what is included in the analysis and what is excluded (Krippendorff, 2004). Coding units are limited to parts of the sampling unit that are categorized (Krippendorff, 2004). The coding unit for the current study is the transcript from the punishment phase of each case in the sampling unit. And finally, the context unit is how the meaning of the text in the coding unit is categorized for the analysis (Krippendorff, 2004). The context units for the current study are the categories defined in the codebook (see Appendix A). The categories originate from case law and relevant scholarly literature. Additional categories are developed as they emerge during the coding process.

Copies of the transcripts are obtained from the trial attorneys, Court Clerks, and court reporters. Transcripts are obtained electronically when possible and will be scanned into electronic files when only a paper copy is obtained. Transcripts are given to the researcher free of charge in most cases, but the researcher purchases some of the transcripts. Obtaining the transcripts is a time-consuming process. An email is sent to the appellate attorney explaining the purpose of the research along with the request for the transcripts. Some attorneys respond quickly and are eager to assist, while others do not

respond to the first email. Subsequently, a second email is sent and then a telephone call is made when necessary. When the appellate attorney cannot be reached, a call is made to the county clerk to ask for assistance. These are the transcripts that need to be paid for, varying in cost. If transcripts cannot be obtained from the appellate attorney or court clerk, the court reporter is contacted. The Court of Criminal Appeals Clerk of Court provides transcripts for all nine cases resulting in a death sentence. Transcripts are divided into volumes by the court reporter; only the volumes containing the punishment phase are uploaded to NVivo, a qualitative data analysis software.

Sample. A matched sample is developed in the current study for the purpose of identifying two sets of death penalty cases that are most similar in case characteristics, yet result in different outcomes. The first group of cases is those with a finding of no future danger (No FD) in Texas from 2005 - 2015. All of the cases in which a jury finds no probability of a threat of continued violence to society automatically receive a LWOP. The staff at TDS and Office of Court Administration (OCA)⁵ help identify these cases. The characteristics of the cases and dates are compiled from trial transcripts, Texas Department of Criminal Justice inmate public database, and news media. Verification of the cases with a negative finding of special issue 1 is challenging. Prior to 2007, there is no central registry of Texas death penalty cases. In 2007, the 80th Texas Legislature added Section 72.087(c) of the Texas Government Code, which required a the sentencing charge to juries in all Texas capital cases be sent to the Office of Court Administration within 30 days of finality of the case (Texas Judicial Branch, 2015). TDS staff is

⁵ The Office of Court Administration (OCA) is a unique state agency in the Judicial Branch that operates under the direction and supervision of the Supreme Court of Texas and the Chief Justice. Their mission is to provide resources and information for the efficient administration of the Judicial Branch of Texas.

confident in the data for the past decade; thus, the current research focuses on the only nine cases with a finding of no future dangerousness in Texas from 2005 to 2015.

The second group of cases, those with a finding of future danger (FD), is matched to the case characteristics of the first group as near as possible with the priorities in descending order: aggravator, county of prosecution, race/ethnicity of defendant, sex of defendant, age of defendant, and date of sentence. The aggravator is the offense that made the murder a capital offense; it is decided to match this element first so the cases would be similar (i.e., matching a burglary/homicide to a multiple murder could introduce more dissimilarities). The second priority is the county of prosecution; it was found in existing research that the location of prosecution matters when trying a capital case (Foley, 1987; Songer & Unah, 2006). The third priority is the race/ethnicity of the offender. The race/ethnicity of the offender has been found by previous researchers to be a critical factor in previous research (Baldus, Pulaski, and Woodworth, 1983; *McCleskey v. Kemp*, 1987; Richards, Jennings, Smith, Sellers, Fogel, & Bjerregaard, 2014; Songer & Unah, 2006; Vito & Keil, 1988; Vollum, del Carmen, Frantzen, San Miguel, & Cheeseman, 2015). Additionally, these priorities are vetted and agreed upon by the dissertation committee. The case characteristics of the two groups are displayed in Table 1.

In Texas, it is possible for a defendant to receive a LWOP sentence even with a finding of future dangerousness; however, the current study only matches cases with a finding of future dangerousness that results in a sentence of death. TDS maintains a database of all death penalty cases in Texas since 2005, and provided a list of 264 cases that match the nine no finding cases by a minimum of one characteristic (i.e., aggravator,

county prosecuted, age of defendant, race/ethnicity, or year of prosecution). From this list, each no finding of future danger case is matched to one case with a finding of future danger with as many characteristics as possible. The two groups of cases are listed in Table 1, which illustrates how many characteristics are matched identically and which characteristics vary. For example, if a case with No FD occurs in Dallas County, the aggravator is multiple deaths, the defendant was White, male, and 23 when the offense occurs, the 264 cases are ordered to identify all the cases in Dallas County, and then identifies a case with an aggravator of multiple deaths.

If both characteristics are found and there is more than one case, the next characteristic is searched for—race, and the process continues. For example, in a review of Table 1: 1 No FD and 1 FD are matched exactly on aggravator, race/ethnicity, sex, date of offense, date of sentence, and co-defendant. They vary on county of prosecution. The age of the offender at the time of the offense varies by two years.

A random sample is not relied upon because the sample is so small and the goal is to compare two groups that are as similar as possible on a variety of variables (see Seawright & Gerring, 2008 for further discussion). Random samples are often utilized with large samples; when one randomly samples a population with only a few cases, the sample is often unrepresentative (Seawright & Gerring, 2008). One could argue that because the examination is focused on defining terminology of the special issue, guidance to the jurors, expert testimony of future dangerousness, and mitigating and aggravating evidence not related to the instant offense, the case characteristics will not matter, only the finding to the special issue question. To eliminate as many extraneous

differences as possible between the groups, the case characteristics of the two groups are matched as closely as possible.

Table 1

Offender Characteristics of Cases

D	County	Aggravator	Race/ Ethnicity	Sex	Age	Date of Sentence	Date of Offense	Co-D
1 no FD	Williamson	Robbery	Black	M	32	2/14/2012	4/18/2010	Yes
1 FD	Tarrant	Robbery	Black	M	34	1/27/2012	3/23/2010	Yes
2 no FD	Bexar	Robbery	Black	M	23	8/24/2012	4/12/2010	No
2 FD	Bexar	Robbery	Black	M	21	2/7/2006	11/21/2004	No
3 no FD	Bexar	Multiple	Black	M	31	10/22/2012	4/18/2009	No
3 FD	Bexar	Multiple	Hispanic	M	22	3/8/2007	6/24/2005	Yes
4 no FD	Angelina	Multiple	White	F	34	4/2/2012	4/28/2008	No
4 FD	Cameron	Child	Hispanic	F	38	7/11/2008	2/17/2007	No
5 no FD	Bexar	Burglary	Hispanic	M	18	3/3/2010	4/24/2008	No
5 FD	Bexar	Burglary	Hispanic	M	20	8/17/2005	3/18/2004	No
6 no FD	Travis	Robbery	Hispanic	M	25	9/5/2008	12/17/1990	No
6 FD	Harris	Robbery	Hispanic	M	19	3/14/2014	12/6/2005	No
7 No FD	Tarrant	Multiple	White	M	19	3/5/2006	12/11/2003	Yes
7 FD	Tarrant	Multiple	Black	M	21	2/27/2009	4/8/2008	No
8 no FD	Nueces	Multiple	Hispanic	M	27	2/26/2015	2/16/2014	Yes
8 FD	Nueces	Police	Hispanic	M	21	3/5/2010	3/11/2009	No
9 no FD	Travis	Multiple	Hispanic	M	33	10/1/2009	11/18//2007	Yes
9 FD	Travis	Multiple	White	M	43	10/8/2009	8/24/2007	No

Note: D = defendant; No FD = no future danger; FD = future danger; Co-D = co-defendant

In addition to the defendant characteristics, each case contained at least one victim. The guilt/innocence phase of the trial is not assessed in the current study, and

no details about the current offense that are discussed in the punishment phase of the trial are coded for analysis. However, it is important to compare the characteristics of the victims to identify any similarities or differences. The majority of the details about the victims are obtained from the trial transcripts, yet some details are obtained from various

Table 2

Victim Characteristics of Cases

D	No Vic	Sex	Age	Race/ Ethnicity	Offender/ Victim Relationship	Details of Murder
1 no FD	1	M	19	Hispanic	Stranger	Shot by gun
1 FD	2	M	20, 70	Hispanic, White	Acquaintances	Shot by gun
2 no FD	1	F	25	Hispanic	Stranger	Hit by vehicle
2 FD	1	M	55	Asian	Stranger	Shot by gun
3 no FD	2	F	23, 46	Black	Acquaintances	Shot by gun
3 FD	3	M (2), F	72, 54, 43	Hispanic, White (2)	Strangers	Shot by gun
4 no FD	5	F (4), M	68, 78, 86, 91, 65	White	Acquaintances	Injected with bleach
4 FD	1	F	2	Hispanic	Family	Blunt force trauma to head
5 no FD	1	F	76	Hispanic	Acquaintance	Shot by arrow
5 FD	1	M	32	White	Acquaintance	Shot by gun
6 no FD	2	M	41, 57	White, Hispanic	Strangers	Shot by gun
6 FD	1	M	16	Hispanic	Acquaintance	Shot by gun
7 no FD	2	F, M	46 (2)	White	Family	Shot by gun
7 FD	2	F	48, 5	Black	Strangers	Shot by gun
8 no FD	2	F	2, 6	Hispanic	Strangers	Shot by gun
8 FD	1	M	47	White	Stranger	Ran over by car
9 no FD	2	M, F	28, 51	White	Acquaintances	Shot by gun
9 FD	2	F	15, 17	White	Acquaintances	Shot by gun

Note: D = defendant; XX = unknown; No FD = no future danger; FD = future danger; No Vic = number of victims

news media sources. The victim characteristics from the cases of no finding of future danger are presented in Table 2, labeled NO FD. The victim characteristics from the cases that the jury found a probability of future violence causing a threat to society are labeled FD (i.e., future danger). Additionally, Chapter 4 consists of a summary of each case and compares and further contrasts the characteristics in Table 1 and 2.

Overall, the cases in the No FD group and the cases in the FD group are matched identically or very similarly. The county, aggravator, race/ethnicity, gender, and age of the offender, therefore, should not impact the outcome of the analysis. Additionally, the No FD and FD cases are similarly matched on victim characteristics; other minor differences between cases should not influence the outcome.

Research Questions

The research questions are developed on several substantive factors that are identified in case law and prior literature as important, which include: heinousness of the offense, explanation of terminology, guidance to jurors, expert testimony on future dangerousness, mitigating evidence, and aggravating evidence. The categorization matrix (see Figure 5) illustrates how the factors identified from case law and existing scholarly literature are linked to each research question. The primary theme is at the top and the secondary themes are listed under each primary theme.

The primary research question for the current study is: **What salient factors, if any, are associated with negative and positive findings of future dangerousness in death penalty cases in Texas from 2005 to 2015?** To answer the primary research question, the heinousness of the instant offense is assessed, the terminology of the special issue question, guidance provided to the jury, expert testimony on future



Figure 5. Categorization Matrix. This matrix was adapted from Elo & Kyngas (2008) with current study categories and subcategories established from case law and relevant scholarly literature. This figure also identifies what factors are examined to address each research question.

dangerousness, mitigating evidence, and aggravating evidence not related to the instant offense is examined.

Research Questions 1 – 5, collectively, inform the primary research question (any salient factors); Research Question 1 assesses how the details of the instant offense influence future danger, Research Questions 2 and 3 pertain to guided juror discretion as instructed by *Furman* and Research Questions 4 and 5 relate to individualized sentencing, per *Furman* (1972).

Research Question 1: **To what extent is the heinousness of the instant offense associated with negative and positive findings of future dangerousness?** Prior literature indicated that heinousness affected conviction rate and sentencing outcome (Bright & Goodman-Delahunty, 2006; Myers, Roop, Kalnen, & Kehn, 2013), and the U.S. Supreme Court has specified that the death penalty is for the worst of the worst offenders (*Furman*, 1972); therefore, it is important in the current research to determine whether the heinousness of the 18 cases impact the finding of future dangerousness.

Research Question 2: **To what extent is the terminology from special issue 1 associated with negative and positive findings of future dangerousness?** Researchers have stated that the terminology in special issue I question was confusing to jurors and was not explained by the statute (Citron, 2006; Sites, 2007). Researchers suggested in prior literature that when the judge and the prosecutor explained the terminology, they were seen as a team and the sentence results in death (Geimer, 1990; Vartkessian, 2011). When the defense attorney explained the terminology, researchers posited that the jurors regarded the information as untrustworthy because the attorney was associated with the defendant (Vartkessian, 2011).

Research Question 3: **To what extent is guidance given to jurors associated with negative and positive findings of future dangerousness?** The U.S. Supreme Court ruled that jurors must have guided discretion to ensure the death penalty was reserved for the worst of the worst offenders and not applied arbitrarily (*Furman v. Georgia*, 1972).

Research Question 4: **To what extent is expert testimony on future dangerousness associated with negative and positive findings of future dangerousness?** This information is evaluated to discover patterns, if any, related to expert witness testimony regarding future dangerousness.

Research Question 5: **To what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?** Mitigating evidence is presented by the defense to show the defendant is not a future danger and that he deserves LWOP, rather than death. The prosecution presents aggravating evidence to illustrate the defendant's dangerousness and to show he is not worthy of any sentence other than death.

In Texas, the jurors must answer two questions when sentencing a capital defendant. The first question: is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society (is the defendant a future danger?). If the jurors answers both affirmatively and unanimously, the second question is asked: taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, is there a sufficient circumstance to warrant a sentence of life imprisonment without parole rather than a death sentence. If the answer is "no," the defendant will receive the death penalty and if the answer is "yes," the defendant will

receive LWOP. If the jurors answers “no” to the first question regarding future danger, the defendant must receive a sentence of LWOP. This research assesses whether there is a pattern of salient factors between the two groups of cases, No FD and FD, to determine if Texas capital scheme fulfills the requirements of *Furman*.

Analytical Strategy

Several analytical techniques are employed to address the research questions. Research Question 1 (heinousness) is address by creating a survey in which participants read a short vignette and estimate the heinousness of each instant offense. A composite score is created for each vignette to evaluate which cases are perceived to be the most heinous and the least heinous. Content analysis is applied to address Research Questions 2 – 5, which assesses terminology related to special issue 1, guidance provided to jurors, expert testimony regarding future dangerousness, and aggravating/mitigating evidence between the two groups of cases. The existing themes are established from case law and relevant scholarly literature (see Figure 5), including five primary themes and 22 secondary themes. Also to address Research Question 5 (aggravating/mitigating evidence), a cluster analysis is relied upon to determine correlations between secondary themes in mitigating evidence and aggravating evidence and then compares the two groups of cases. Finally, to address the Primary Research Question (any salient factors), all of these techniques mentioned are relied upon and mind mapping is employed. A mind map is relied upon to present the story of the research by illustrating the relationships between the two groups of cases. The mind maps are relied upon in the presentation of the results of the primary research question. Each of these analytical strategies is discussed more in-depth in this section.

Heinousness survey. Heinousness has been found to affect conviction rate and sentencing outcomes in civil and criminal cases (Bright & Goodman-Delahunty, 2006; Myers et al., 2013). Heinousness is assessed for each of the 18 cases examined in the current study, for the purpose of gauging whether defendants view some cases as “worse” than others (refer back to Figure 3; Rivkind & Shatz, 2009). A summary of each case (100 words or less) is compiled and a scale is created for participants to rank each vignette from one (not very heinous) to seven (extremely heinous) (see Appendix A). An additional case is created to purposely be the “least heinous” as a reference for the survey participants. The participants complete a survey on heinousness through MTurk⁶.

The survey is created on SurveyMonkey⁷ and a link to the survey is developed on the researcher’s MTurk account created specifically for the current research. The selection parameters set for the participants are: age 18 or older, not a convicted felon, and held U.S. citizenship. These are the requirements for jury duty. The rationale for setting these parameters is that the overarching study is related to testimony heard by juries in death penalty cases; therefore, it makes sense that those ranking the heinousness of the crimes should be jury eligible.

The link for the survey will go live and 100 surveys will be completed. Each participant will be paid \$.25 through Amazon Mechanical Turk once the “work” is approved by the researcher. Each participant is required to read a consent form and select “I understand what I have read and want to participate in this study” to proceed to the survey questions. Each vignette has Likert- type scale that ranges from 1 (not very

⁶ Amazon Mechanical Turk is an online market for human intelligence. Mechanical Turk allows businesses and researchers a diverse environment to recruit participants. The businesses and researchers provide a nominal fee for tasks to be completed at a “workers” convenience.

⁷ SurveyMonkey is an online survey development cloud-based software.

heinous) to 7 (extremely heinous) on an individual page; however, an answer is not required to proceed to the next vignette. One hundred participants will complete the survey. At the end of the survey, the participant receive a code to copy and paste into MTurk before they can claim their “work” is completed and receive payment. No demographics or identifiers are collected from the participants to ensure anonymity.

An assumption regarding the heinousness scale is that the cases resulting in a finding of No FD will have a lower score than the cases resulting in a finding of FD. Furthermore, assuming a fair process exists, the defendants with a lower score should not be perceived as a future danger, and the defendants with a higher score should be perceived as a future danger.

Content analysis. Content analysis is “a research technique for making replicable and valid inferences from text to the contexts of their use” (Krippendorff, 2004, p. 18). Content analysis is relied upon to understand how human reality is established through interactions and language. In the current study, content analysis is relied upon to assess how future dangerousness was established in death penalty cases by analyzing language from trial transcripts.

The framework for the current study is visually depicted in Figure 6, where the phenomenon of interest was future dangerousness. In Texas, future dangerousness is determined through evidence presented by the prosecution and the defense in the punishment phase of a capital trial. The jurors listen to the evidence and determine whether there is a probability the defendant will commit acts of violence that constitute a continued threat to society. The research questions are addressed through an analysis of a sample of trial transcripts, and an understanding of the phenomenon is framed. Content

analysis is relied upon to assess the language used in the trials of the groups of cases and to identify similarities and differences. Content analysis is relied upon to analyze research questions 2 – 5, which assesses terminology related to special issue 1, guidance provided to jurors, expert testimony regarding future dangerousness, and mitigating and aggravating evidence between the two groups of cases). To ensure interrater reliability, a sample of the transcripts is assessed for consistency in coding.

The rationale for using content analysis to examine trial transcripts as a method to understand future dangerousness is that it is an objective system to analyze data. The data are the words; the trial transcripts are legal documents of the recorded language used during the trials. It is the only method to study the language for evaluating the phenomenon. Content analysis is both objective and systematic, and allows the researcher to draw inferences (Krippendorff, 2004). By using the coded text to answer the research questions, the researcher can assess the phenomenon and draw inferences (Krippendorff, 1989). Content analysis can quantify the level of specific language or words or interpret the language in a larger context. For this study, the context of the text is interpreted via the coding process and examines the quantity of specific patterns identified in the literature to answer the research questions. For example, this includes examining the number, the context, and pattern of references made to *society* in No FD and FD cases.

Directed content analysis is relied upon in this study. In conventional content analysis, the researcher begins coding and categories emerge from the data. In directed content analysis, the researcher codes to categories established from the conceptual framework (Humble, 2009). Directed content analysis is more deductive than inductive and uses a more structured procedure. Directed content analysis can be relied upon to

gain a better understanding of a phenomenon (Hsieh & Shannon, 2005). The current study seeks to assess future dangerousness findings by assessing heinousness of the instant offense, using categories from the case law (narrowing, guided discretion, and individualized sentencing), and existing literature regarding future dangerousness (terminology of the statute, guidance of jurors, expert witness testimony, and mitigating and aggravating evidence).

The coding scheme for the current study is presented in Table 3, which provides examples of the type of testimony or the context of testimony that comprise each category for the current directed content analysis. For example, what should be noted is that for each primary theme (i.e., terminology associated with special issue 1, attorney guidance, expert witness testifying to future danger, mitigating testimony, and aggravating testimony), several secondary themes are included. For each of those secondary themes, the coded text can include a broad range of examples that vary from case to case. Overall, Table 3 illustrates the level of organization involved in coding each sentence in the transcripts.

A strength of directed content analysis is that it can provide support for an existing framework (Hsieh & Shannon, 2005), which means in the current research, the patterns should be clearly distinct in the two groups of cases to reveal any differences between cases where the jury finds No FD versus where the jury finds FD. The procedure for direct content analysis relied upon in the current study involved the following steps: (1) identify preliminary research questions; (2) read relevant literature; (3) revise research questions if necessary to support or contradict conceptual framework; (4) develop

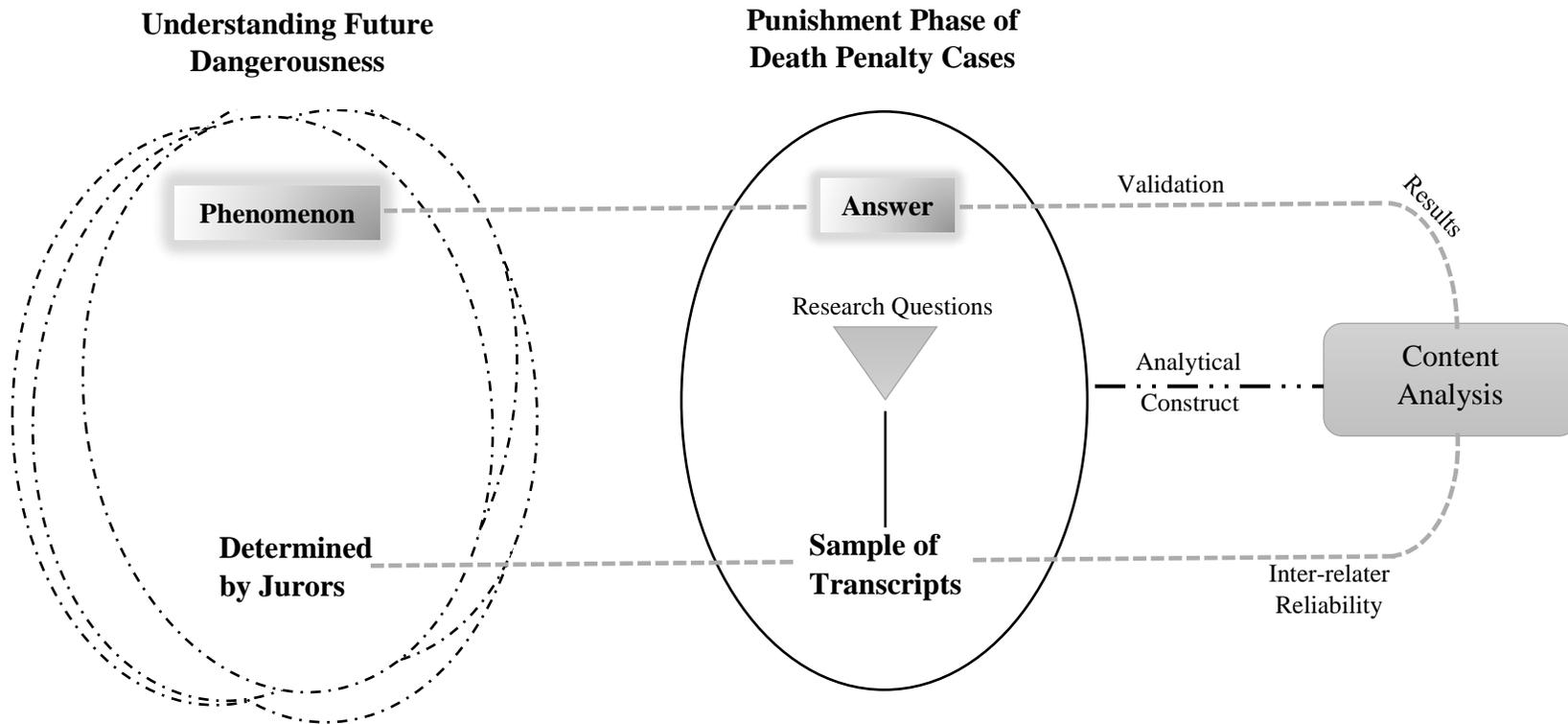


Figure 6. Content Analysis Framework. The framework for the current study was based on a model developed by Krippendorff (1989, 2004). The research questions search for similarities/dissimilarities in the cases, using an analytical construct or model developed from case law, literature, and coding to make inferences related to the phenomenon.

categories to answer research questions; (5) choose an appropriate sample; (6) begin coding to established categories and note text that is not coded; (7) after coding the entire sample, review notes to determine if additional categories need to be created; (8) analyze data; and (9) write up the results (Hsieh & Shannon, 2005).

NVivo 10 is utilized for the content analysis of the transcripts. NVivo is a software produced by QSR International and relied upon for qualitative analysis. NVivo allows a researcher to import the sources, explore the data, code the data, run queries to analyze the data, create models, and illustrate the results (NVivo, 2014). The procedures for the current analysis started with obtaining the transcripts and uploading the volumes containing the punishment phase of each case. Next, the categories (themes) were created from the conceptual framework that guided the research; these themes were vetted with the dissertation committee. Each of the transcripts was read, coding the themes according to the codebook, creating memos when something was identified that did not fit into an existing theme. Transcripts from *voir dire* and the guilt/innocent phase of the trial were not read in an effort to maintain unbiased coding.

Subsequently, a second coder coded a sample of the transcripts, and interrater reliability was assessed. After coding was complete and interrater reliability was at an acceptable level, the analysis began. The similarities and differences between each group were identified. The results were summarized, and a discussion regarding the results, limitations, and future research conclude the dissertation.

Table 3

Coding Examples

Category (Primary Theme)	Subcategory (Secondary Theme)	Example of coded text
Expert – Future Danger	Prosecution	D has been diagnosed with mental illness and lacks impulse control.
	Prosecution	D has a history of violence in school, public, and prison.
	Defense	D does not have a recent history of violence.
	Defense	D started a behavior modification program a year ago.
	Defense	Reports from recent incarceration show change in D's behavior.
Mitigating	Family dysfunction	D was raised by his grandparents because his mother was a drug addict.
	Family dysfunction	D did not know his father; grandfather was physically abusive to him and his grandmother.
	Family dysfunction	D's uncle lived in home on and off and was an alcoholic/drug addict; got D involved in drugs and petty crime.
	Remorseful	D has written two letters to the judge expressing his remorsefulness and asking to meet with victim's family.
	Remorseful	D has talked to therapist about how bad he feels for the murder he committed and has asked for help to do the right thing now.
Aggravating	Criminal history	D has two previous arrests for assault, one aggravated.
	Criminal history	D has 4 disciplinary write ups for fighting (3 with inmates, 1 with staff) during two previous incarcerations.
	Weapon	D has two previous arrests that include weapon charges.
	Weapon	D was expelled from a high school when he was 15 for bringing a gun to school.
Terminology – special issue 1	Defense – society	If you give the D life without parole, he will never be eligible for parole; he will be in prison until he dies.

Note: D = defendant

Strengths and weaknesses of content analysis. There are several strengths and weaknesses of content analysis that must be addressed in the current study. The strengths identified by Weber (1990) include: (1) a direct method relied upon to analyze human interaction; (2) uses both qualitative and quantitative procedures; (3) documents are a reliable sources of data; (4) communication is relevant to culture and has a relationship to economy, social elements, political environment, and cultural change; and (4) typically uses unobtrusive measures. The current study analyzes human interaction by assessing trial transcripts, uses both qualitative and quantitative elements to discuss the results, makes inferences about the culture of the death penalty that can be related to economy, politics, and evolving standards, and with a closer focus on the interactions between the court personnel, witnesses, and jurors, it could be helpful to change the current culture.

A primary issue of concern with content analysis is that the researcher condenses a large amount of text into a limited number of categories to develop themes, with other text assumed to have the same meaning. Depending on the purpose of the research, there is the potential for biased results—is the researcher coding the text to slant the outcome? To make valid inferences about the data from using content analysis, there must be a reliable procedure established to categorize the data.

Reliability. To ensure reliability in content analysis, the researcher is to have clear coding rules, well-defined categories, and multiple coders to safeguard accurate coding. For the current study, the codes are defined in Appendix A. Second, the transcripts are coded by the primary researcher, and a second researcher, the interrater reliability coder, code a sample of the data. In NVivo, a query for the two coders is created and a report produced a percentage agreement and a Kappa coefficient. The Kappa coefficient is a

statistical measure that takes into account the amount of agreement that could be expected to occur through chance. Both the percentage agreement and the Kappa statistic are reported in the results section. The percentage agreement is the number of units of agreement divided by the total units of measure within the data item, displayed as a percentage. The statistic ranges from 0 to 1, with 0 indicating no agreement between the raters and 1 indicating complete agreement between the raters. Table 4 explains how to interpret the Kappa statistic (NVivo Help, 2014). There is not a specific agreement percentage established in the existing literature, yet the purpose is that running the query allows the researcher to drill down to the exact text where differences in the coding occur. If inconsistencies occur or additional coding rules need to be established, this can occur. A goal of .75 or better was established for this study.

Table 4

Interpretation of Kappa Values

Kappa value	Interpretation
Below 0.40	Poor agreement
0.40 – 0.75	Fair to good agreement
Over 0.75	Strong agreement

Validity. In content analysis, validity refers to two issues that the researcher must be concerned, validity of the construct scheme and generalizability. Face validity is often the weakest form of validity, yet it is the most relied upon in content analysis. Face validity is typically assessed by the researcher asking others in the field if the definitions of the categories measure the concepts (Weber, 1990). For the current research, the researcher reviews the coding categories and the definitions with the members of the dissertation committee. In regard to generalizability, it is always the goal to generalize the results to the data. Krippendorff (2004) highlights six types of inferences: (1)

extrapolations, (2) standards, (3) indices and symptoms, (4) linguistic representations, (5) conversations, and (6) institutional processes. The current study focused on institutional processes—the use of content analysis to understand institutional phenomenon, such as the death penalty, in one of our oldest U.S. institutions, the criminal justice system. Only legal factors and the communication between the key actors in the trial are examined in this study, as opposed to the extraneous factors, According to Krippendorff (2004), studying the communications of an institution is one of the best ways to understand its culture.

Cluster analysis and mind map. A cluster analysis is a technique available in NVivo 10 to identify patterns in the data by grouping themes that were coded similarly. Cluster analysis diagrams are a graphical representation of the themes that are coded in groups; in the current research included the use of a horizontal dendrogram. The dendrogram is a branching diagram that depicts similar items closer together and different items further apart (NVivo 10 Help, 2014). The cluster analysis utilized in the current study is based on code similarity. The farthest neighbor hierarchical clustering algorithm is relied upon to group coded references into clusters (NVivo 10 Help, 2014). Farthest neighbor clustering is also known as complete linkage clustering (Everitt, Landau, & Leese, 2001). Farthest neighbor clustering has an advantage over closest neighbor clustering, due to the chaining phenomenon; which can allow elements to be clustered because of closeness (Everitt et al., 2001). First, a table is built in NVivo in which the rows are the nodes (mitigating and aggravating in the current study) and the columns are the sources (the cases), with a “1” indicating the presence of the mitigator or aggravator being coded and “0” indicating an absence (Hora, 2014; NVivo 10 Help,

2014). The first step is to treat each group as a separate cluster and then use a stepwise process to combine the most similar groups based on the two most furthest points in different clusters (Schmidt & Martyshenko, 2015; Tan, Steinbach, & Kumar, 2006). In the current research, cluster analysis is relied upon to examine mitigating and aggravating factors more completely.

Mind maps are applied throughout the qualitative research process, to sort concepts and build themes, to develop new themes and reveal gaps, and present results (NVivo 10 Help, 2014). A mind map consists of a central idea with branches depicting relationships. Mind mapping is relied upon to illustrate associative links (Brightman, 2003). A mind map can be relied upon to represent connections in a hierarchical perspective (Eppler, 2006). Images, shapes, colors, fonts, and variation in line thickness are relied upon in creating mind maps. Mind maps help the researcher demonstrate the importance between themes and the central focus (Wheeldon & Faubert, 2009). In the current study, mind maps are relied upon to illustrate the relationships of patterns between the two groups of cases in the presentation of the results of the primary research question.

Ethical Considerations

An application to the Institutional Review Board (IRB) is submitted to conduct this research upon approval from the dissertation committee. There are two separate applications submitted for this research. First, it is noted that the transcripts are public information and the human subjects involved in the trials are not contacted directly; therefore, informed consent is not necessary for this part of the research project. The names of the defendants are not identified out of concern for harm to victim's family and

offender's family; each offender is identified with a number. The data are stored on a password-protected secure server at Texas State University. The benefit of this research is that it has the potential to (1) identify factors that lead to jury conclusions that the defendant is not a future danger or is a future danger, and this information, in turn, (2) provides attorneys and prosecutors in death penalty trials with factors that affect the jury's decision.

The second IRB application involves the survey on heinousness, which is lengthier because human subjects are involved. The survey is administered through MTurk, a crowdsourcing website ran through Amazon Services. There is minimal risk to the subjects, while the benefits to society are great. The risks are minimized through ensuring anonymity—not collecting any identifying information from the survey participants. This research has the potential to identify salient factors that affect jurors deciding whether a defendant is a future danger or not.

IV. NARRATIVES AND COMPARISONS OF CASES

The current study analyzed the punishment phase of 18 capital trial cases in Texas from 2005 to 2015. Of the 18 cases, nine had a finding of no future dangerousness—these were the only nine no future dangerous cases in Texas in the decade examined. The nine matched cases that resulted in a finding of future dangerousness and resulted in a sentence of death were matched to the nine no finding cases by case characteristics. Each case is described in this chapter by discussing the characteristics of the case and the aggravating and mitigating evidence presented by the prosecution and the defense. A summary of each case is provided that includes the instant offense and the aggravating and mitigating evidence presented to address future dangerousness. The number of each case No FD case was matched to the correlating FD case (e.g. 1 No FD is matched to 1 FD).

No Future Danger Cases

1 No FD. The defendant was convicted of capital murder and two counts of aggravated robbery and sentenced to LWOP in Williamson County, Texas in 2012. The defendant was a Black male, age 32 in 2010 when the crime occurred. The defendant waited along a dark country road for his two female co-defendants to arrive with two strangers they had picked up at an Austin nightclub. Under the guise of one of the women getting sick, the two male victims pulled the car to the side of the road. The defendant ambushed the two victims, taking their money and shooting at them as he fled the scene. A bullet hit one victim; the uninjured victim drove to the hospital where his friend was pronounced dead. The deceased victim was a 19-year-old Hispanic male.

The punishment phase lasted three and one-half days. The prosecution filled days one and two with a total of 18 witnesses, while the defense argued their case on day three with six witnesses. The fourth day involved closing arguments and the reading of the charge. The prosecution focused on the defendant's extensive criminal history, which began when he was a juvenile. The defendant's criminal history included convictions for criminal trespass, three felony possessions of controlled substance, possession of marijuana, two misdemeanor family violence assaults, one felony family violence assault, and driving while license suspended. The defendant was incarcerated in TDCJ Institutional Division (state prison) on two occasions, one five-year sentence and one four-year sentence, and in county jail for a year-long sentence, plus several nights in county jail. The defendant had been on probation, as a juvenile and an adult, and on parole. The prosecution also had testimony regarding the drug usage of the defendant and weapon possession.

The defense strategy consisted of an expert witness who testified to what a prison *society* involved (i.e., classification, physical facilities, and privileges) and future dangerousness. The expert testified to the idea that prior institutional history was the best predictor of how an inmate would behave in the future, if incarcerated. The additional defense witnesses testified to the defendant's good history while incarcerated, both in prison and jail, while on probation and parole, and when in the custody of police. The defense also had testimony about the defendant as a generally good person and that he was very loving, compassionate, and caring towards his three children. Finally, the defense had testimony from the defendant's mother about her history of being married to

abusive men while her son was young. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

2 No FD. The defendant was convicted of capital murder and robbery and was sentenced to LWOP in Bexar County, Texas in 2012. The defendant was a Black male, age 23 in 2010 when the crime occurred. The defendant pulled into a gas station in a stolen SUV where he stole the victim's purse out of her car as she was pumping gas. The victim was a Hispanic, 25-year-old female recent basic training graduate of the U.S. Air Force. As the defendant fled the scene, the victim jumped on the running boards of the SUV, banging on the window, trying to get her purse back. The defendant raced out of the gas station onto the access road reaching speeds of 50 mph, swerving in and out of traffic as the defendant clung to the SUV. Witnesses testified that the defendant deliberately sideswiped another vehicle to get the victim off his vehicle. The victim was thrown several feet into the air and hit the access road, dying shortly after.

The punishment phase lasted one and a half days. The prosecution presented their case the first half of the day with eight witnesses, and the defense presented their case in the afternoon with two witnesses. The second day involved closing arguments and the reading of the charge. The prosecution presented the defendant's criminal history, which included juvenile offenses, such as including escape from a juvenile facility and theft by check. Additionally, the prosecution presented evidence of a negative history of incarceration while the defendant was in county jail awaiting trial for the instant offense. The defendant had altercations with two different inmates and refused to be a cellmate with anyone.

The defense focused on the defendant's childhood, which was filled with abuse and poverty. The defendant did not know his biological father, but had two different stepfathers during his childhood. The first stepfather was abusive to the defendant, his younger brother, and his mother. The defendant's mother was not capable financially or mentally to care for her two children, which she said contributed to her bad choices in relationships. The second stepfather was a violent drug addict; there were several violent incidents that occurred in the defendant's home when this man was present. The defendant's mother testified about these relationships. Additionally, the defendant grew up in extreme poverty. The defendant's mother was not capable of working and relied upon subsidized housing that she characterized as crime-ridden. The defendant's brother testified to months of not having electricity or water. The defendant and his brother would have to carry jugs to the neighbor's house a mile away to get water. Also there were many times when the boys only got one meal a day because they had no food. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

3 No FD. The defendant was convicted of capital murder for multiple deaths (2) and was sentenced to LWOP in Bexar County, Texas in 2012. The defendant was a Black male, age 31 in 2009 when the crime occurred. The defendant shot his girlfriend age 28, who survived, the girlfriend's mother, age 46, and the girlfriend's sister, age 23. Both the mother and sister died in the parking lot of the apartment complex where they lived. The defendant was charged with a second capital murder after his girlfriend miscarried their baby, but the trial has never occurred. The defendant shot his pregnant girlfriend in the stomach three times. Although no bullets hit the fetus, the trauma led to a miscarriage.

The police said the three women were shot a total of 21 times. The defendant claimed self-defense, stating the girlfriend's sister came at him with a knife.

The punishment phase lasted six days. The prosecution presented their case the first three and a half days with 29 witnesses, and the defense presented their case in a day and a half with nine witnesses. The final day consisted of the prosecution calling a rebuttal witness and the defense reopening to call a final witness, for a total of 30 and 10 witnesses. The prosecution opened their case by recalling police and crime-scene investigators from the instant offense to review the violence that occurred in that event. Additionally, the surviving victim, the defendant's girlfriend, testified about the instant offense, miscarrying a baby, losing her mother and sister, and the tumultuous relationship she had for several years with the defendant. Their relationship was violent and on-again-off-again. The witness also testified that the defendant almost always carried a gun. The prosecution had several witnesses who testified to disciplinary infractions by the defendant in the 30 months he was in county jail waiting for the current trial. The defendant was caught with contraband on multiple occasions, did not follow basic rules, and behaved aggressively towards others.

The defense team started the mitigation portion of the trial with the defendant going on record to tell the judge that he did not want his defense team to put on any mitigating evidence. The defense attorneys argued that the U.S. Supreme Court mandated defense teams to identify and present mitigation in a capital trial. The judge allowed them to present their mitigating evidence, which was quite extensive. At six months of age, the defendant was abandoned in a trash dumpster at a gas station by his biological parents. He was adopted by an elderly couple, who had two adult daughters with children of their

own. The adoptive parents loved him, but were unable to meet all of the psychological and behavioral issues the defendant faced as an adolescent and teen. The defendant was not able to handle his own basic needs and counted on others around him to provide for him. The defendant never got the therapy he needed to deal with his abandonment issues. Officials from the school district testified to how the system failed the defendant by never meeting his educational needs; he was tested and plans were created, but never followed through. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

4 No FD. The defendant was convicted of capital murder for multiple deaths (5) and was sentenced to LWOP in Angelina County, Texas in 2012. The defendant was a White female, age 34 in 2008 when the crime occurred. The defendant was a licensed practical nurse (LPN) working at a dialysis center where she injected bleach into the dialysis tubes of 10 patients—five died, and five others survived. The victims were all patients, ages 65 to 91, and were Black and White. The crimes were discovered after a senior emergency medical services (EMS) official requested the State Health Department to do an inquiry because EMS had transported 16 patients from the dialysis center to the hospital in two weeks, and at that time four of those patients had died.

The punishment phase lasted one day. The prosecution presented their case with three witnesses, and the defense presented nine witnesses. The prosecution presented a criminal history of family violence, one arrest of the defendant, and one protective order violation by the defendant. Additionally, the prosecution presented evidence regarding a previous nursing-board violation against the defendant regarding improper drug use. The defense's case contained testimony about the defendant's stable employment history and

prosocial behaviors in the community, and her loving, compassionate, and caring behaviors displayed by her involvement in her daughter's extracurricular activities. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

5 No FD. The defendant was convicted of capital murder and burglary and was sentenced to LWOP in Bexar County, Texas in 2010. The defendant was a Hispanic male, age 18 in 2008 when the crime occurred. The defendant and the Hispanic, 76-year-old female victim were next-door neighbors. The defendant snuck into the victim's home in the middle of the night to steal money or items he could sell. The victim woke up and the defendant shot her in the head using a bow and arrow. The defendant stole cash, credit cards, and her car. The defendant returned the following morning and started a fire in the victim's bedroom.

The punishment phase lasted nine days, two of which were half-days. The prosecution presented their case the first four and a half days with 24 witnesses. The defense presented their case the following two and a half days with eight witnesses. The prosecution then presented two rebuttal witnesses on the eighth day, and both sides gave closing arguments on the ninth day. The prosecution started their case with victim-impact testimony from the victim's adult daughter. She primarily testified to her mother's values, specifically her great quality of forgiveness. The prosecution then proceeded with extensive testimony regarding the defendant's criminal history, including theft from co-workers, two auto thefts, credit card fraud, and two burglaries of a habitat. The prosecution also presented testimony concerning aggressive behavior from the defendant on social media toward his cousin and relied upon an expert witness to testify to the

society of a capital murderer, testifying to the amount of violence and drugs within Texas prisons.

The defense focused their testimony on the defendant's low IQ and low functioning. The defense had multiple witnesses from several schools testify to the defendant's low functioning at school. The defense then relied upon expert witnesses to testify to a diagnosis of fetal alcohol syndrome, and its causes and effects. Additionally, the defense had the defendant's parents and family members testify to the mother's alcohol consumption while pregnant with the defendant. Moreover, there was testimony from the parents, family, and school officials regarding the defendant's parent's non-follow through of the recommendations from the school to treat the defendant's behavior; instead they moved him to a new school. This happened on four different occasions. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

6 No FD. The defendant was convicted of capital murder and robbery and was sentenced to LWOP in Travis County, Texas in 2008. The defendant was a Hispanic male, age 25 in 1990 when the crime occurred. The defendant killed two cab drivers after robbing them, on two different occasions within a couple days. The victims were both male, one White and one Hispanic, ages 41 and 57. The defendant shot a sawed-off shotgun through the back of the cab drivers' seats. Originally, another man was arrested for these two murders, but was found not guilty by a jury. The defendant was identified 17 years after the murders when his finger prints from a federal prison matched an unsolved capital murder in Austin. The defendant was serving 26 years in a federal prison for bank robbery and weapons charges.

The punishment phase lasted two half days and two full days. The prosecution presented their case in a day and a half with 17 witnesses, and the defense presented their case in a day with six witnesses, concluding with a rebuttal witness by the prosecution and closing arguments on the final half day. The prosecution presented evidence of the defendant's extensive criminal history and weapons use. The defendant's criminal history included burglary of a home, burglary of a business, three aggravated robberies of banks, and two aggravated robberies of businesses. The prosecution presented witnesses who testified to the use of guns during the crimes committed by the defendant. Additionally, the prosecution presented testimony of a school official regarding the defendant bringing a gun to school when he was a teenager.

The defense presented testimony primarily on the defendant's good behavior during his past incarcerations, and his then current incarceration in federal prison. Additionally, the defense relied on an expert witness to talk about the structured living and security within the prison system in Texas. The witness also described the living arrangements of an inmate serving LWOP. The defense also called the defendant's wife and two stepchildren to testify to all of the programs the defendant had participated in over the years while incarcerated to improve himself and how loving, caring, and compassionate he was. The two murders that the defendant was being charged with occurred before the defendant was married to the current wife. The defense also presented testimony about the defendant's dysfunctional childhood; he was raised by his grandparents because his parents were not capable of caring for him due to mental health and substance abuse issues. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Federal prison.

7 No FD. The defendant was convicted of capital murder for multiple (2) homicides and was sentenced to LWOP in Tarrant County, Texas in 2006. The defendant was a White male, age 19 in 2003 when the crime occurred. The victims were the defendant's parents, both White and both age 46. The defendant, his girlfriend, and another female friend entered the residence in the middle of the night to kill the defendant's parents so he would inherit their million dollar life insurance policy. The defendant's mother was shot in the head and stabbed 18 times. The defendant's father was shot in the face and the back and stabbed more than 21 times. The three had attempted to kill the defendant's parents the previous month by shooting at their vehicle gas tank to cause an explosion.

The punishment phase lasted two and a half days. The prosecution presented their case the first half day with 3 witnesses, and the defense presented their case the remainder of the first day and the second day with 13 witnesses. The prosecution called two rebuttal witnesses on the third day, and then both sides presented closing arguments. The defendant had no criminal history. The prosecution's case for future dangerousness was that the defendant had sold marijuana, although he was not a drug user. The prosecution also brought witnesses forward who stated the defendant talked about killing his parents and sister.

The defense had several witnesses who testified about the defendant's previous employment history through high school and his prosocial behaviors in the community. The defense also relied on an expert witness to talk about prison as the *society* where the defendant would live out his life; they explained the physical facilities, the classification system, and the structure of day-to-day living in a Texas prison. The defense also had two

expert witnesses that discussed the defendant's mental health issues and future dangerousness. The first expert testified that the defendant grew up in a home with a mother who could not bond to her children due to her own mental illness and a father who was always working and unavailable emotionally, and the second expert witness testified that the issues the defendant had would not cause him to be a future danger. The prosecution ended the testimony with a rebuttal expert witness that reviewed the defendant's records and testified that the defendant had a personality disorder and not an attachment disorder, as diagnosed by the defense expert. Furthermore, he testified that the defendant's personality disorder could not be modified with medication and would continue to be a problem. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

8 No FD. The defendant was convicted of capital murder for multiple homicides and was sentenced to LWOP in Nueces County, Texas in 2015. The defendant was a Hispanic male, age 27 in 2014 when the crime occurred. The victims were two Hispanic girls, ages two and six, who were at a birthday party in a home. The defendant and a co-defendant drove by and shot into the home in retaliation. The intended victim had stepped out of the house into the backyard to take a phone call five minutes before the shooting. One victim was shot in the head, and the other victim was shot in the chest. The defendant was the half-brother of the intended victim, a dad of one of the child victims.

The punishment phase lasted one day. The prosecution presented their case with three witnesses, and the defense presented their case with nine witnesses. The one-day punishment phase ended with closing arguments. The prosecution's case focused on the defendant's criminal history. The defendant began to get in trouble at age 12, when he

got into a fight with another boy his age. As an adult, he had three felony convictions of possession of cocaine and one felony conviction for evading arrest. The defendant spent two years in a state jail facility for one incident, 18 months in a state jail for another incident, and five years on probation for the third incident. The evading arrest charge was combined in the two-year sentence.

The defense case included mostly family members who testified about how loving, caring, and compassionate the defendant was. Additionally, the defense presented witnesses who testified about the defendant's history of employment. The defendant's divorced parents also testified; the defendant came from a poor family whose parents had grade school educations. His father was an alcoholic who had a sporadic work history, while his mother worked hard for very menial pay to try to care for her two sons. The boys were exposed to some dysfunction, an alcoholic parent, marital problems due to the alcohol, and the lack of parental supervision. An expert witness testified that the defendant was not a future danger. He did have a drug problem, but he was not aggressive. His history of incarceration included no disciplinary actions. The expert concluded that the defendant could live in prison the rest of his life without any threat of future aggression. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

9 No FD. The defendant was convicted of capital murder for multiple (2) homicides and was sentenced to LWOP in Travis County, Texas in 2009. The defendant was a Hispanic male, age 33 in 2007 when the crime occurred. The defendant and a co-defendant went to a home late at night to retaliate against a snitch; the defendant entered the house and shot two males in their late twenties multiple times. One died and one

survived. The mother of the victim who survived came out of a back bedroom, and the defendant grabbed her and kidnapped her. The co-defendant was waiting in the car and later testified that he had no idea that the defendant was going to shoot anyone. Less than 10 miles south on the interstate, the defendant told the driver to pull to the side of the road. The defendant walked the female victim a mile into a field, made her get on her knees facing away from the defendant, and he shot her in the back of the neck. The victim died and was not found for several days.

The punishment phase lasted four days. The prosecution presented their case the first two days with 18 witnesses, and the defense presented their case the third day with eight witnesses. On the final day, both sides presented closing arguments. This case was different than all the other cases in that the defendant refused to come to court three of the four days. He attended the first day, but when the bailiff went to get him on the other three days, he told the bailiff he did not want to go to court. The judge and the attorneys discussed this situation outside the presence of the jurors; the judge left the decision to the defense attorney. His options were to have the defendant handcuffed and drug in by the deputies, or the defendant could be left in his cell. The defense attorneys decided that they would rather explain the defendant's absence than have him drug into the courtroom in handcuffs in front of the jury.

The prosecution began their case with the defendant's extensive criminal history, which included convictions for three burglaries of a habitation, two cocaine possessions, one possession of cocaine with intent to deliver, one driving while license suspended, two family violence assaults, one DWI, one unlawful possession of a weapon, one failure to identify, one evading police, and one possession of marijuana. The defendant had been

incarcerated several times for many years. The focus of the prosecution's case was that the defendant was a known member of a violent prison gang and that he had been identified inside and outside of prison as part of this gang. Finally, the prosecution presented testimony regarding the defendant's negative history while incarcerated.

The defense's case focused on the defendant's family dysfunction and good history while incarcerated. The defendant was raised by an alcoholic, drug-addicted, disabled, violent father and a mother who was trying to survive the abuse from the father. There were three children, two boys and a girl. The defendant was 12 when his parents divorced; and the defendant and his brother moved with their dad, and the sister stayed with their mom. The defendant rarely saw his mother after the divorce. The defendant had no rules with his father, dropped out of school in the ninth grade, and used drugs at home with his father. The defendant began selling drugs and burglarizing homes and buildings to pay rent and support his drug habit. Additionally, the defense presented evidence of good behavior while incarcerated; showing that the defendant did well in prison. The jury did not find the defendant a future danger. The defendant was sentenced to LWOP and currently resides in a Texas prison.

Future Danger Cases

1 FD. The defendant was convicted of capital murder for multiple homicides and robbery; he was sentenced to death in Tarrant County, Texas in 2012. The defendant was a Black male, age 34 in 2010 when the crime occurred. The victims were a 20-year-old Hispanic male store clerk and a 70-year-old White delivery man. The defendant and three co-defendants entered a convenience store, which also cashed checks, as it opened to rob the store; when the clerk discovered he knew one of the co-defendants, the defendant shot

him. As the co-defendants were leaving the store, a delivery man entered the store, and the defendant shot him. The co-defendants attempted to light the store on fire, but were unsuccessful.

The punishment phase lasted six days. The prosecution presented their case the first day and a half with 10 witnesses, and the defense presented their case the remainder of the second day, all of the fourth day, and half of the fifth day with 53 witnesses. Also on the fifth day, the prosecution presented three rebuttal witnesses. On the third day of the punishment phase, the defendant's psychologist requested a competency hearing, which the judge granted and dismissed the jury for the day. The records for that hearing were sealed and not part of the transcript; however, the defendant was back in court on the fourth day. On the sixth day, both sides presented closing arguments. The prosecution's first witness was one of the co-defendants from the instant offense; he testified to aggressive, criminal behavior of the defendant for which he was not arrested. The only prior offense was a misdemeanor assault family violence that occurred at an elementary school where he was trying to pick up his daughter and he assaulted his ex-wife. Finally, the prosecution had a few witnesses from the county jail, where the defendant had been the past two years, who testified to negative behavior while incarcerated (i.e., malingering, not following rules, escape plans).

The defense had an extensive case focused on family, school, employment, and having been a member of the community—all of the defendant's prosocial activities. The defendant had a prosocial, well-respected family, a college education, a professional job, and no history of violence, none of the characteristics one would associate with murder. The defense had many witnesses testify to those elements of the defendant's life. Another

focus of the defense was on the defendant's time while he was incarcerated. The defendant was depressed, on medication, lost 80 pounds, and slept most of the day and night. The defendant spent over a year in the hospital section of the county jail. The defense called the county jail doctors and psychologist who cared for him to testify to his depression. The prosecution ended the punishment phase by calling three rebuttal witnesses who testified to the defendant malingering. The defendant was found a future danger and received the death penalty. The defendant currently resides in a mental health unit of TDCJ, and an execution date has not been set.

2 FD. The defendant was convicted of capital murder, robbery, and sexual assault; he was sentenced to death in Bexar County, Texas in 2006. The defendant was a Black male, age 21 in 2004 when the crime occurred. The sexual assault victim was a single mother of three young children; the defendant gained entrance into her apartment and demanded her money at gun point. She had \$28; the defendant said that was not enough so he sexually assaulted her in front of her children. After the assault, the defendant forced the victim by gun point to her car and made her drive. After a short time, he wanted to drive, and as they were switching positions in the car, the victim was able to escape. The defendant then stole the car and drove to a local convenience store where he robbed the owner and shot him. The store owner was a 55-year-old Asian male.

The punishment phase lasted four days. The prosecution presented their case the first three days with 20 witnesses, and the defense presented their case the last day with 7 witnesses. The prosecution started by calling the murder victim's son as victim-impact testimony. The prosecution then transitioned into the defendant's criminal history consisting of one felony vehicle theft, one misdemeanor possession of marijuana, one

misdemeanor family violence assault, one felony possession of a firearm, and one felony discharge of a firearm. The prosecution had several law enforcement officers and crime scene investigators testify, as well as the victims from his criminal history.

The defense focused their testimony on the defendant's family and childhood. The defendant's grandparents both testified to what a loving, caring young man he was; the defendant lived with his grandparents part of his life. The defendant's father was murdered when the defendant was eight years old. The defendant's mother remarried a few years later, and the defendant began to accept and trust this new male role model. Three years later, the defendant's sister became impregnated by their stepfather. The defense had a forensic psychologist testify to how the defendant responded to his childhood trauma, including self-medicating with alcohol and drugs. The defendant was found to be a future danger and sentenced to death. The defendant currently resides on death row, and an execution date has not been set.

3 FD. The defendant was convicted of capital murder for multiple homicides and robbery; he was sentenced to death in Bexar County, Texas in 2007. The defendant was a Hispanic male, age 22 in 2005 when the crime occurred. The defendant and co-defendant went into a bar and played a game of pool before the defendant shot and killed the bar owner, a Hispanic, 70-year-old male, and a bar employee, a White, 53-year-old male. The defendant also shot another bar employee, a White, 41-year-old female; however, she survived her wounds. The defendant shot the owner and male employee multiple times; the male employee died three weeks after the incident due to complications from his injuries. The female employee was shot in the back and pushed to the floor where the defendant kicked her repeatedly.

The punishment phase lasted three days. The prosecution presented their case the first two and half days with 31 witnesses, and the defense presented their case the remainder of the third day with seven witnesses. The prosecution began their case with the defendant's criminal history including two aggravated burglaries, both including a gun and both including the defendant discharging the weapon and shooting someone in one crime. Additionally, the defendant had an aggravated assault with a deadly weapon that included holding a gun to a woman's head and shooting at a car driving away. The prosecution concluded with disciplinary incidents while the defendant was in jail awaiting trial.

The defense presented teachers, school officials, siblings, and an expert witness who completed an assessment of the defendant. The defendant was one of 12 children who was raised by his oldest brother and sister. The defendant's parents were at the bar every night until 2:00 a.m. – 3:00 a.m., would sleep until noon the next day and then go to the bar again. The family constantly moved because they were repeatedly evicted for non-payment of rent. The oldest two siblings testified about how they were raised; one sibling was shot and killed while he was stealing a car at age 16. Another sibling died at age 11 months when she rolled over into a plastic trash bag and suffocated. All the kids were sleeping in the one bedroom of their apartment on the floor with their trash bags of possessions. The kids told their parents when they arrived home from the bar, but the parents did not call authorities until mid-morning the next day. The defendant also had a low IQ and cognitive disabilities, which made it difficult for him in school and to function in day-to-day life. The defendant was found to be a future danger to society and

sentenced to death. The defendant currently resides on death row. An execution date has not been scheduled.

4 FD. The defendant was convicted of capital murder for the murder of a child under the age of six and was sentenced to death in Cameron County, Texas in 2008. The defendant was a Hispanic female, age 38 in 2007 when the crime occurred. The victim was the defendant's two-year-old daughter. The victim died from blunt force trauma to the head. The victim also had cocaine in her system, and her body was covered with old and new bruises, contusions, and bite marks. Additionally, the victim had a spiral fracture on one arm that had healed on its own. The defendant had 14 children. Child Protective Services had removed the children from 2004 to 2006.

The punishment phase lasted two days. The prosecution presented their case the first day with eight witnesses, and the defense presented their case the second day with two witnesses. The prosecution called an expert witness to explain to the jury what the defendant's *society* would be if she was incarcerated for life. The expert focused on the level of violence and drugs in the Texas prison system. The prosecution also called employees of the state child welfare system to testify about the defendant's abuse and neglect of her 14 children. The child welfare agency had more than 20 referrals over a 15-year period. One child was born with cocaine in her system. Several of the children were physically abused, and all were neglected due to their parents' cocaine abuse. The children were removed and returned to their parents several times. The prosecution ended their case with the negative behavior (i.e., not following the rules) of the defendant since she had been in jail awaiting trial. The defendant did not have a prior criminal history.

The defense began their case by asking for a directive from the judge because the prosecution did not prove the defendant would be a future danger. The judge denied the request. The defense continued with two expert witnesses, one testified on mental health issues, and one testified on future dangerousness. The first witness testified to the defendant's own history of physical and sexual abuse as a child and low cognitive ability. Additionally, this expert testified that the defendant used cocaine to self-medicate and cope with her own abuse issues. The second witness testified that the defendant would not be a future danger because she had only ever been physically abusive to children and she would not have that opportunity in prison. The jury found the defendant to be a future danger and sentenced her to death. The defendant currently resides on death row. An execution date has not been set.

5 FD. The defendant was convicted of capital murder for multiple (2) homicides and burglaries and was sentenced to death in Bexar County, Texas in 2005. The defendant was a Hispanic male, age 20 in 2004 when the crime occurred. The defendant confessed to killing the two victims on two separate days. The defendant planned a revenge killing of his former boss due to being fired two weeks prior to the homicides. The first murder, of a 29-year-old Hispanic female, was not part of the defendant's plan; however, when he broke into the wrong apartment and discovered the victim, the defendant realized his mistake and suffocated her to death to cover his intentions. The defendant stole possessions from the apartment and the victim's car, which he drove for two days. Two days after the first murder, the defendant broke into his former boss's apartment and waited for him to come home. He shot him multiple times; the second

victim was a 32-year-old White male. The defendant, again, stole possessions from the apartment, including his car, which he drove until he was arrested.

The punishment phase lasted five days. The prosecution presented their case the first two and a half days with 17 witnesses, and the defense presented their case the remaining two and a half days with 20 witnesses. The prosecution began their case with disciplinary reports regarding the defendant's behavior during his incarceration awaiting the trial for the instant offense. There were six disciplinary reports made against the defendant in the 18 months he was in county jail; these reports consisted of an assault on another inmate, an assault on a corrections officer, contraband consisting of one Xanax pill, jamming a plastic spoon in his tray slot, and contraband of a weapon (rolled up newspaper). The defendant had no criminal history that resulted in an arrest; however, the weapon that the defendant used in the capital murder was connected to an unsolved burglary. The prosecution's next witness was a psychologist who testified as an expert witness about future dangerousness of the defendant. The testimony was centered on the details of the instant offense and the defendant's behavior while incarcerated in the prior 18 months awaiting trial. The prosecution presented their story with the facts and then called multiple witnesses to give the details of the disciplinary reports and the burglary. The prosecution also presented an expert who testified on the *society* of prison, including the classification system and who the defendant could have as cellmates, with the opportunity to commit violence, and scenarios of inmates who have been very violent while incarcerated in TDCJ. The prosecution concluded their case with victim impact testimony.

The defense strategy was focused on who the defendant was prior to the instant offense by calling multiple witnesses who knew him to share stories of the defendant's loving, caring, and compassionate demeanor. The defendant grew up as a missionary in a missionary family. Since he was a little boy, his parents and siblings had traveled to Mexico and South America to serve as missionaries. The defendant only returned to San Antonio to attend college. His younger sister returned one year later to live with the defendant and also attend college in the U.S.; she noticed a change in the defendant. The defendant had started working at a bar and had a girlfriend who used drugs. Several people testified to that behavior as being out of character for the defendant. The defense testimony also included multiple witnesses asking for mercy and telling the jury how the defendant could spread the message of God while serving the remainder of his life in prison. The defense concluded their testimony with an expert from TDCJ who contradicted the prosecution's testimony regarding *society*. The defendant was found to be a future danger and was sentenced to death. The defendant currently resides on death row. No execution date has been set.

6 FD. The defendant was convicted of capital murder and burglary and was sentenced to death in Harris County, Texas in 2014. The defendant was a Hispanic male, age 19 in 2005 when the crime occurred. The defendant was involved in a gang and was a suspect along with six others in a year-long crime spree involving 10 murders. The victim was a 16-year-old Hispanic male; the defendant entered the apartment where the juvenile was and shot him multiple times. The defendant was also charged in a homicide of a 31-year-old Hispanic man who was gunned down in the middle of an intersection nine days later.

The punishment phase lasted 11 days, the lengthiest punishment phase of the 18 cases examined. The prosecution presented their case the first five days with 32 witnesses, and the defense presented their case the next four days with 21 witnesses. The prosecution subsequently called 11 rebuttal witnesses, and both sides gave closing arguments on the eleventh day. The prosecution called a total of 43 witnesses, the majority of them law enforcement officers, detectives, crime-scene investigators, and victims. The prosecution's strategy was to paint a very vivid picture of all the violence committed by the defendant. The defendant had an extensive criminal history, although he was not arrested or convicted for much of it because law enforcement put all the pieces together after the defendant was charged with the current capital murder. However, the prosecution provided extensive testimony relating to all the crime. The defendant was a member of a gang; the prosecution provided testimony to corroborate that, including juvenile probation officers and staff from juvenile gang programs. Much of the defendant's criminal activity occurred when he was a juvenile, as he was 19 years old when he was arrested for capital murder. The prosecution also provided testimony from a fellow gang member who testified as part of a plea bargain, and several people who were periphery associates who provided details regarding the sex, violence, and drugs use by the defendant.

The defense did not argue the defendant's behavior, but instead provided witnesses who testified to what life experiences lead the defendant to the behavior. The defendant's mother and father testified. His mother testified that she was not available to the defendant when he was little; she did not want to have children and her husband insisted. She had two children. The defendant is 18 months older than his brother. The

mother worked during the day and went to bars at night, leaving the boys alone or with a neighbor. The father eventually left the family when the defendant was three or four years old. There was violence between the parents, and the mother testified that she remembered the defendant hiding in the closet during those incidents. By the age of five, the defendant had a new stepfather, who was extremely physically abusive to both of the boys. The younger sibling testified that the defendant tried to protect him and tried to avoid the stepfather. The stepfather also sexually abused the defendant. The defendant's mother had two more sons by the stepfather, and when the defendant was 10 and his brother was 8, the mother took the boys to Mexico and abandoned them with their aunt. The boys were devastated at first, but quickly adapted to the new safe life and thrived with the aunt and her family. Two years later, the defendant's mother and stepfather returned to Mexico to retrieve the boys; neither wanted to return to the U.S. with them. The defendant returned to Houston, and his life spiraled downward; he got involved with a gang, began drinking and using drugs, skipped school, and began a life of crime.

The defense provided expert witnesses who conducted several assessments and interviews with the defendant and concluded that he was not a future danger because he was low on an aggressiveness scale. The defendant had an average IQ, but had some mental health issues due to the abuse by the stepfather and mother. The defense also provided testimony to show the extent of the abuse and how it manifested in this family; the youngest son of the stepfather killed himself the previous year, and the oldest son of the stepfather was confined in a mental facility. The defendant was found to be a future danger and sentenced to death. The defendant currently resides on death row. An execution date has not been set.

7 FD. The defendant was convicted of capital murder for multiple homicides and was sentenced to death in Tarrant County, Texas in 2009. The defendant was a Black male, age 21 in 2008 when the crime occurred. The defendant and co-defendant drove by a house looking for the intended victim. The get-away driver dropped off the defendant a block away, and he walked back to the house where he opened fire on a birthday party that was happening in the front yard. The intended victim was at the party but was not injured. However, his five-year-old daughter and 48 year-old mother were shot and killed. Additionally, four other people were shot and injured. The defendant fled in a car, but was apprehended by police after the driver crashed the car.

The punishment phase lasted six days. The prosecution presented their case the first three days with 27 witnesses, and the defense presented their case the last two days with eight witnesses. The prosecution began by calling two witnesses who testified to an armed robbery committed by the defendant and two co-defendants. The defendant had a gun and held one of the victims on the ground with a gun at his head during the robbery. The prosecution also had a police statement that the defendant gave regarding another homicide he committed; he shot a drug dealer six times at a convenience store to retaliate from an altercation that occurred previously. Earlier that day, the dealer threatened the defendant by putting a gun to his head. The defendant had been incarcerated for the robbery, the first two witnesses testified, and again for possession of a firearm and marijuana. The prosecution also presented extensive evidence related to the defendant's problematic behavior while incarcerated. The defendant had multiple disciplinary reports, including fighting, contraband, assault of a correctional officer, and attempted escape—all while awaiting the capital trial.

The defense strategy was to explain the defendant's behavior by sharing his life history. He was born to a 14-year-old mother who was given to a 26-year-old man by her father. The defendant's father testified that he had not seen the defendant in 17 years. The defendant's father was in TDCJ custody and had been since the defendant was two-years-old. The defendant's young mother and her sister raised the defendant. His mother worked at a fast food restaurant to purchase diapers for the defendant. The defendant's father was an alcoholic and abusive. The defendant's mother did not complete grade school. The defendant's mother remarried and had more children. She was not emotionally available to any of the children—three of the five children are incarcerated. The defendant was physically abused, emotionally and physically neglected, did not complete high school, and had incapable role models. The defendant was diagnosed with attention-deficit/hyperactivity disorder (ADHD) when he was in grade school; however, due to his mother's low functioning, the defendant never got the help he needed that was recommended by the school. Additionally, the defendant was tested for multiple disabilities when he was young, including glasses—he never got glasses or at least he never wore glasses in school. As an adult, the defendant was retested, and his IQ was below normal. The defendant was found to be a future danger and was sentenced to death. The defendant currently resides on death row. No execution date has been set at this time.

8 FD. The defendant was convicted of capital murder for killing a police officer and was sentenced to death in Nueces County, Texas in 2010. The defendant was a Hispanic male, age 21 in 2009 when the crime occurred. The defendant was pulled over by the police for a routine traffic stop; the defendant got out of his car and physically

assaulted the police officer and then got back in his SUV and fled. The traffic stop turned into a high-speed chase involving several officers. The officer who was killed had placed a spike strip and then stepped back into the grassy median. When the defendant saw the spike strip, he swerved to miss it and ran over the police officer, killing him. The defendant was apprehended a couple miles from the scene. The victim was a 47-year-old White male, who was a 20-year veteran of the police force.

The punishment phase lasted four days. The prosecution presented their case the first three days with 15 witnesses, and the defense presented their case the last day with five witnesses. The prosecution began their case with witnesses who testified to the defendant's negative behavior while in custody while awaiting trial. The defendant had been incarcerated for more than a year and had multiple violations, including possession of a weapon, possession of a handcuff key, assault, and multiple contraband items. The defendant had spent the previous six months in maximum security—in segregation. The prosecution also presented witnesses who testified to the defendant's multiple children (five in total) by four different women, most were young teenagers when they were impregnated by the defendant. The defendant was arrested for having sex with two girls under the age of 15 and was a registered sex offender. The prosecution's witnesses also testified that the defendant did not take care of his children.

The defense presented four witnesses, a teacher, the defendant's mother and brother, and the mother of one of defendant's children. The teacher testified to the defendant's good qualities and difficulty he had in school. The defendant did not graduate from high school and spent most of his time in an alternative school for bad behavior. The teacher testified that the defendant was in need of attention and guidance, none of

which he received at home. The defendant's mother testified to the dysfunctional marriage to her boys' father. He was an alcoholic and abusive; both parents were uneducated and laborers. After their divorce, his mother worked two jobs to pay rent. She could not provide much, and she did not provide much guidance to her boys. The boys went to live with their father for a short time. During that time, he physically abused them and locked them in a closet. The defendant's brother testified to the abuse they suffered. The defendant reunited with one of the women that he had a child with, while he was in jail, and she testified to him being loving, compassionate, and caring. The defendant used cocaine and sold drugs. The defendant was found to be a future danger and was sentenced to death. The defendant waived his appeals and wrote multiple letters to judges asking to be executed. His attorney fought the execution, citing the defendant's pleas to die as a sign of mental illness. The defendant was executed August 12, 2015.

9 FD. The defendant was convicted of capital murder for multiple (2) homicides and was sentenced to death in Travis County, Texas in 2009. The defendant was a White male, age 43 in 2007 when the crime occurred. The defendant was convicted of shooting the 15-year-old, White daughter of an ex-girlfriend and her 17-year-old White female friend during a killing spree. The defendant started the spree at his then current girlfriend's house. She kicked him out for stealing from her, and he became angry. He fired his gun several times at the couch and the wall, but not at her. He then fled to a local bar where he put a gun to the head of the bartender, a former girlfriend, and pulled the trigger. The gun jammed, and the victim fled. The defendant then went to the back of the bar and fatally shot the bar owner. The defendant fled to another ex-girlfriend's house with the intentions of stealing her car. When the defendant arrived at her home, the

current boyfriend answered the door, and the defendant shot and killed him. He proceeded into the house and killed the ex-girlfriend, her daughter, and the daughter's friend. He fatally shot all of them. He then stole the car and fled the state. Two days later, four states away from the murders in Texas, the stolen car became inoperable. The defendant found an elderly woman sitting on the porch of her country home; he shot her and stole her car. The defendant was apprehended the next day in New York.

The punishment phase lasted four days. The prosecution presented their case the first two days with 13 witnesses, and the defense presented their case the third day with 10 witnesses. The final day consisted of closing arguments. The defendant was charged with two of the six murders he committed over several days; therefore, the prosecution began their case with the details of the other four homicides and the aggravate assaults that ensued over those few days. Additionally, the prosecution had an expert witness testify to the *society* of Texas prisons, explaining to the jurors who the defendant would come into contact with and how he could continue to be manipulative and be violent. The prosecution also had a psychologist expert witness who reviewed the defense's expert witness report on the defendant's mental health. The prosecution witness testified to the defendant's future dangerousness and antisocial personality.

The defense presented a case primarily focusing on the defendant's poor mental health and good behavior while incarcerated. The defendant had been incarcerated for two years awaiting trial and had earned trustee status at the county jail, which meant he was given more privileges and was trusted by the staff to manage additional responsibilities in jail. Several jail personnel testified to his good behavior while in jail. The defense also had family members testify to his dysfunctional family upbringing.

Both of his parents drank excessively and were physically abusive to one another. The defendant was low functioning and dropped out of high school. He began using alcohol and drugs at a very young age and never learned to take care of himself very well. The defense presented testimony from a family member who stated the defendant always lived with a family member or a girlfriend because he was not capable of taking care of his day-to-day business. The defendant had worked menial jobs on and off, and was a good worker as long as he was told exactly what to do. The defendant had been in a psychiatric hospital for a few short stays in another state for depression and delusions. The defense counsel hired a psychologist to conduct a series of assessments on the defendant and to review records from the defendant's life—school, police, hospitals, doctors, etc. The psychologist concluded that the defendant had a substance abuse problem, clinical depression, and a personality disorder. The defendant had been prescribed medications over the years, but he was not capable of staying on his medication, so he would use alcohol and drugs to self-medicate. Since the defendant had been in jail (two years) and his medication was regulated, the defendant was stable and functional. The defense strategy was to show that the defendant did well in a structured environment. The defendant was found to be a future danger and sentenced to death. The defendant currently resides on death row. An execution date has not been set.

Conclusion. The narratives of the 18 cases examined in the current research give a context from which the themes of the analysis were drawn. The purpose of these narratives was to provide a foundational story for the themes from the transcripts. The details of each of the cases were very different, and the goal of the narratives was to show the similarities and differences between cases by focusing on the instant offense, the

mitigating evidence, and the aggravating evidence, all of which the jury relied on to reach their decisions regarding future dangerousness.

Description of the Cases

Given that the cases from the two groups (i.e., negative and positive findings of future dangerousness) were matched on several offender and case characteristics, the offender characteristics were similar (i.e., sex, race/ethnicity, and age), as were the aggravators that led to the death penalty charge and the counties in which the cases were tried. The counties of prosecution included: Angelina (1), Bexar (6), Cameron (1), Harris (1), Nueces (2), Tarrant (3), Travis (3), and Williamson (1). Generally, the county of prosecution was matched. When that was not possible a similar county (i.e., rural, urban, etc.) was chosen. The aggravator that made the homicide a capital murder included: multiple deaths (8), robbery (6), burglary (2), victim under the age of six (1), and victim was a police officer (1). In the 18 cases, six of the defendants were Black, nine were Hispanic, and three were White. The age range of the defendants was 18 – 43, including three in their teens, eight in their twenties, six in their thirties, and one in his forties. The defendant was a male in 16 of the cases and a female in two of the cases. Of the 18 cases, 12 of the defendants committed the crime alone, while six committed the crime with a co-defendant. Between the two sets of cases, the majority (five) were also matched by whether the defendant acted alone or with a co-offender. The purpose of matching was to compare cases as similar as possible between the groups to eliminate extraneous biases (see Table 1 to review details).

The victim characteristics differed from case to case (see Table 2); however, there was no identifiable difference between the two groups of cases. The number of victims

per case ranged from one to five, with seven cases having one victim, eight cases having two victims, two cases have three victims, and one case having five victims. Again, this characteristic was generally matched between cases.

The race/ethnicity of the victim(s) varied from case to case including White, Black, Hispanic, and Asian victims. The relationship between the offender and the victim was either stranger (n = 11), acquaintance (n = 15), or family (n = 3), for a total of 29 victims in the 18 cases. The ages of the victims ranged from 2 – 91. The method of the murder varied. Most (13 of the 18) involved a firearm, while one involved a bow and arrow, two were struck by a vehicle, one used a blunt object, and one injected others with bleach. Additionally, whether the defendant had a co-defendant was assessed. Twelve cases involved a defendant who committed their crime alone, while six had a co-defendant.

Compare and Contrast Extraneous Factors

The Justices in the *Furman* Court were primarily concerned with discrimination and discretion resulting in arbitrary and capricious use of the death penalty. As discussed in Chapter 2, extraneous factors were the issues about which the U.S. Supreme Court was concerned. There are many extraneous factors in every court case, yet, they seem more important in death penalty cases because the punishment is not reversible. The only way to exclude extraneous factors is to have mandatory sentencing requirements; however, the Court stated that individualized sentencing was important. Though the focus of the current study was not on extraneous factors, the following section provides an overview of the case characteristics, including race, age, sex of offender and victim, number of victims, method of murder, and whether the offender acted alone, which all could be

considered extraneous factors that the jurors may have relied upon in their determination of future dangerousness. Moreover, it was not possible to know if jurors considered extraneous factors in deciding future dangerousness, which was why the current research attempted to eliminate as many of these factors as possible through matching the two groups.

In regard to the county of prosecution, both the No FD group and the FD group had three cases from Bexar County and one case from Nueces County. The No FD group had one case from Tarrant County and two cases from Travis County, while the FD group had two cases from Tarrant County and one case from Travis County. The primary difference between the groups in relationship to the county of prosecution was that the No FD group had one case in Williamson County and one case in Angelina County, and the FD group had one case in Harris County and one case in Cameron County. These four counties are different (i.e. Williamson is suburban, Angelina is in East Texas, Harris is large urban, and Cameron is on the Texas/Mexico border). Overall, the county of prosecution was one of the primary factors for matching the cases. No conclusions can be drawn regarding future dangerousness from the differences in the four counties (see Table 5).

The aggravating factor that made each case a capital murder offense (i.e., murder committed during the commission of another felony, murder of a law enforcement officer, murder of a child under the age of six, etc.) may have contributed to the jurors' decision on future danger; however, there was no way to know. The aggravating factor was not considered when examining future dangerousness in the current study. The aggravator, along with the county of prosecution, was the primary matching factor in the

two groups. In both the No FD group and the FD group, three cases included robbery (the felony that occurred in addition to the murder), and one case included a burglary. In the No FD group, five cases included the death of multiple victims, while in the FD group three cases included the death of multiple victims. Additionally, in the FD group, in one case the victim was a law enforcement officer, and in another case the victim was under the age of six, both factors making the homicide a capital murder. The FD case with the murdered law enforcement officer was the only case with this type of victim in both groups.

Although conclusions cannot be drawn about a defendant's future dangerousness when the victim was a police officer, it is possible that this extraneous factor was considered by the jurors. Moreover, the FD case with a 2-year-old victim was the only case in both groups that used the aggravator of under the age of six to charge the defendant with a capital murder. There was one case in the No FD group that had two child victims, ages two and six, but the aggravator was multiple victims. No conclusion could be made about a child victim influencing the jurors' decision of future danger, because there was one case in each group (see Table 5).

Race of the offender was an extraneous factor and one the U.S. Supreme Court stated was one of the primary causes of discrimination in death penalty cases in *Furman* (1972). In both the No FD and the FD groups, three offenders were Black. In the No FD group, two offenders were White and four were Hispanic, and in the FD group one offender was White and five were Hispanic (see Table 5). No conclusion can be drawn about the race of the offender and future dangerousness. Race of the offender was relied upon to match the cases, which resulted in very little variation between the groups.

In both the No FD and the FD cases, there were eight male offenders and one female offender (see Table 5). The ages of the offenders in the No FD group ranged from 18 to 34, while the offenders in the FD group ranged from 19 to 43 (see Table 5). The average age of the offender in the No FD group was 26.9, and the average age of the offender in the FD group was 26.6. The factors of sex and age were relied upon to match the cases, and there was very little variation between the groups.

The final factor related to the offender was whether the capital murder was committed alone or with a co-defendant. This factor was not relied upon to match the cases in each group primarily because there were not enough cases to match on this factor. In the No FD group, five offenders committed the capital murder alone, four offenders committed the capital murder with at least one co-defendant. In the FD group, seven offenders committed the capital murder alone, while four offenders committed the capital murder with at least one co-defendant (see Table 5). The current study did not investigate what charges were brought against the co-defendants or what roles they played. The relevance of the co-defendant could have been raised in the guilt/innocence phase of the trial; however, the current study only examined the punishment phase. In conclusion, it was possible that a jury could consider an offender who committed a capital murder alone to be more dangerous than one who committed a capital murder with a co-defendant; but this would be considered an extraneous factor and was not examined in the current research.

Table 5

Case Characteristics of No Future Danger and Future Danger

	No Future Danger (9)	Future Danger (9)
County	Williamson (1)	Harris (1)
	Bexar (3)	Bexar (3)
	Angelina (1)	Cameron (1)
	Travis (2)	Travis (1)
	Tarrant (1)	Tarrant (2)
	Nueces (1)	Nueces (1)
Aggravator	Robbery (3)	Robbery (3)
	Multiple victims (5)	Multiple victims (3)
	Burglary (1)	Burglary (1)
		Police victim (1)
		Child victim (1)
Race of Offender	Black (3)	Black (3)
	White (2)	White (1)
	Hispanic (4)	Hispanic (5)
Sex of Offender	Male (8)	Male (8)
	Female (1)	Female (1)
Age of Offender	18, 19, 23, 25, 27 31, 32, 33, 34,	19, 20,21, 21, 21, 22, 34, 38, 43
Co/Solo Defendant	Co-defendant (4)	Co-defendant (2)
	Solo (5)	Solo (7)

The characteristics of the murder victims in each case were not considered while matching the two groups of cases, as it was not feasible. However, the victim characteristics were similar in both groups. In general, the instant offense was not discussed in detail in the punishment phase, which led to further research to determine the characteristics of the victims. The punishment phase did allow for victim impact testimony; however, this information involved how the loss of the victim impacted the

family and details about the victim's good qualities. Victim impact testimony was heard in only one case—resulting in no future danger.

There were 18 murder victims from the nine No FD group and 14 murder victims from the FD group. There may have been additional victims in the cases, but the only victims accounted for in this summary were the murder victims in the capital case examined (i.e., in one FD case, the defendant killed six people, but he was only charged with two murders; in a No FD case, a defendant murdered two, severely assaulted one, and kidnapped one, but the defendant was charged with two murders). In the No FD group, there were three cases with one victim, and in the FD group there were five cases with one victim. The No FD group had five cases with two victims, while the FD group had three cases with two victims. The No FD group had one case with five victims, and the FD group had one case with three victims. Overall, the number of victims was comparable in the two groups. The case with the most victims was a No FD case.

The sex of the victims varied slightly in the two groups of cases. The No FD group had six male victims and 12 female victims, while the FD group had eight male victims and six female victims (see Table 6). Overall, the No FD group had twice as many female victims as male victims. No conclusions can be drawn in regard to whether the victim's sex affected the likelihood of the defendant's a future danger, as the variation was minimal and the number of cases compared is too small for a defensible conclusion. The age of the victims in the No FD group ranged from two to 91 and in the FD group ranged from two to 72 (see Table 6). In both groups, there were two victims under the age of 10 (No FD = two and six, FD = two and five). The No FD group had six victims

age of 65 or older, while the FD group had two. Thus, conclusions about the age of the victim could not be drawn from these data.

The results from extant literature revealed that differences between the offender's and the victim's race were important extraneous factors in death penalty cases (see Chapter 2 for more information). The general conclusion was that Black offenders who kill White victims received a sentence of death disproportionately to any other racial combination of offender and victim (Foley, 1987; Richards et al., 2014; Songer & Unah, 2006; Vito & Keil, 1988). The race of the offender was matched in the current study to control for this extraneous factor. Though the race of the victim was not examined for matching purposes, the race of the victims in these two groups were very similar. In both the No FD and the FD groups, there were two Black victims. In the No FD group, there were 10 White victims, and in the FD group there were seven White victims. There were six Hispanic victims in the No FD group and four Hispanic victims and one Asian victim in the FD group (see Table 6). In the three No FD cases where the defendant was Black, two of the cases had one Hispanic victim and one case had two Black victims. In the three FD cases where the offender was Black, there was one victim who was either Hispanic, Asian, or Black. There were no Black on White homicides in either group of cases. Though there was a slight difference in the race of victims between the groups, definitive conclusions could not be drawn from these data.

The offender/victim relationship was also a factor that was noted in each of the 18 cases. The victims were categorized as stranger, acquaintance, or family member. In the No FD group, six victims were strangers, 10 victims were acquaintances, and two victims were family. The two family members were the offender's parents. In the FD group,

seven victims were strangers, six victims were acquaintances, and one victim was family. The one family victim in the FD group was the offender's daughter. The relationship between the offender and the victim was an extraneous factor not assessed in the current research. The FD case that involved an offender killing her daughter may be viewed as more heinous; nevertheless, it was unclear whether that was related to future dangerousness. In general, the relationship of the offender and victim was similar in the two groups, and no defensible conclusion could be drawn about whether race influenced the juries' decisions about future dangerousness.

The final case characteristic involves the method of murder. In the No FD group, 11 victims were shot by a gun; whereas, in the FD group, 12 victims were shot by a gun. The contexts of the homicides were all different, as noted in the case summaries. The cases included a drive-by shooting and an execution-style shooting in the back of the neck in the No FD group, and a walk-by shooting into a group on a lawn and a face-to-face shooting during a robbery in the FD group. Additionally, both the No FD group and the FD group included one homicide by vehicle. The context of the vehicle homicides were very different; the No FD offender was trying to shake the victim off the side of his vehicle, and the FD offender swerved to miss a spike strip and hit a law enforcement officer standing on the side of the road. The remaining two cases in the No FD group consisted of one victim being shot in the head by an arrow and five victims being injected with bleach by their nurse. The remaining FD case involved a victim being murdered from blunt force to the head (see Table 6). In conclusion, there were some differences in the context of the homicides committed between the two groups; but the majority of the victims were killed by a gunshot. No distinguishable differences could be established

between the two sets of cases based on these data. Additionally, the method of murder may have been more related to the level of heinousness as opposed to whether an offender was a future danger.

Table 6

Victim Case Characteristics of No Future Danger and Future Danger

	No Future Danger (18)	Future Danger (14)
Number of Victims	1 victim (3)	1 victim (5)
	2 victims (5)	2 victims (3)
	5 victims (1)	3 victims (1)
Sex of Victims	Male (6)	Male (8)
	Female (12)	Female (6)
Age of Victims	2, 6, 19, 23, 25, 28, 41, 46, 46, 46, 51, 57, 65, 68, 76, 78, 86, 91	2, 5, 15, 16, 17, 20, 32, 43, 47, 48, 54, 55, 70, 72
Race of Victims	Black (2)	Black (2)
	White (10)	White (7)
	Hispanic (6)	Hispanic (4)
		Asian (1)
Offender/Victim Relationship	Strangers (6)	Strangers (7)
	Acquaintances (10)	Acquaintances (6)
	Family (2)	Family (1)
Method of Murder	Shot by gun (11)	Shot by gun (12)
	Vehicle (1)	Vehicle (1)
	Arrow (1)	Blunt force trauma (1)
	Bleach (5)	

In summary, the offender characteristics in the No FD and FD groups were similar (i.e., sex, race/ethnicity, and age), as well as, the aggravator that led to the death penalty charge and the county in which the case was tried. These characteristics were

generally similar because the factors were relied upon for matching, so the analysis was based on as similar of cases as possible between the groups to eliminate extraneous biases (see Table 5 to review details). The victim characteristics differed from case to case (see Table 6; however, there was no identifiable pattern of the victims between the groups of cases. The race/ethnicity of the victim(s) varied from case to case. The relationship between the offender and the victim was a stranger (n = 13), acquaintance (n = 16), or related (n = 3), for a total of 32 victims in the 18 cases. The ages of the victims ranged from 2 – 91. The method of the murder varied. There was not any identifiable pattern of variation between the two groups. The goal of case matching was to eliminate as much bias due to extraneous factors as possible.

V. RESULTS OF ANALYSIS

Overview of Content Analysis

The data for the current research came from the punishment phase of 18 death penalty cases tried in Texas between 2005 and 2015. Once the cases were selected, the transcripts of the punishment phase of the 18 cases were collected and imported into NVivo 10, where the transcripts were coded and the content analyzed. The dataset included 13,570 pages of transcript or 3,026,102 words. The cases ranged from 145 – 2,423 pages; the shortest was a No FD case and the longest was a FD case. The No FD cases consisted of a total of 5,389 pages, while the FD cases totaled 8,181 pages (66% of the total pages read and coded). The range of pages in the No FD cases was 145 – 1,647 with an average of 599 pages; whereas, the range of pages in the FD cases was 420 – 2,423 with an average of 909 pages. Thus, the FD cases were, on average, longer than the No FD cases.

Directed content analysis was relied upon to analyze the primary nodes⁸ (themes) established from the case law and literature: *terminology from special issue 1, guidance provided to jurors, expert testimony on future dangerousness, mitigating evidence, and aggravating evidence* (not related to instant offense). Additionally, there were multiple secondary themes under each primary theme that were established from the literature, and several emerging secondary themes developed from the data in both the *mitigating* and *aggravating* primary themes (see Table 7). For example, researchers from the extant literature reported a history of alcohol and/or drug abuse was presented as mitigating evidence, but perceived most often as aggravating evidence. A history of alcohol and/or

⁸Node is a technical term used in NVivo. A node is defined as a collection of references about a specific theme, place, person or other area of interest. From this point forward, the word “theme” will be used.

drug abuse was an existing factor examined in the current research. Additionally, good history of incarceration was presented as mitigating evidence in many cases in the current research; therefore, it became an emerging theme (see Table 7 for a complete list of existing and emerging factors).

Table 7

Existing and Emerging Secondary Themes for Mitigating and Aggravating

Primary Theme	Existing	Emerging
Mitigating Evidence	Remorse about crime	Therapy, counseling, programs
	Mental health issues	Loving, compassionate, caring
	Child abuse or neglect	History of family dysfunction
	Alcohol and/or drug addiction	Good history while incarcerated, parole, probation, or in custody
		General good person
		Employment history
		Mercy
Aggravating Evidence	Weapon	Youthfulness
	Mental health issues	History of family dysfunction
	Criminal history	Aggressive behavior
	Alcohol and/or drug use	Gang membership
		Negative history while incarcerated, on parole/probation, or in custody

The unit of analysis for the current study was at the sentence level. Questions by the attorneys or judge and answers given by the witnesses were coded. Only the sections of the transcripts in which the jury was present were assessed, as the goal of the research was to examine the content of information presented to the jury from which the jurors decided whether a defendant was a future danger or not. Additionally, only the data pertaining to the defendant was coded (e.g., credentials of a witness was not coded;

commentary by the attorneys at opening or closing was not coded, except for guidance, and entering evidence was not coded because it was repetitive to the testimony). All of the coding guidelines were documented in the Code Book for the interrater coder or future replication.

Interrater Reliability

A colleague coded a sample of sections from the transcripts, using the Code Book (Appendix A) for guidance, to ensure reliability. The sample was attained through a multistage cluster sampling method. This sampling technique was relied upon because of the vastness of the transcripts coded by the primary researcher and the need to select sections of transcripts with the highest coding density for the interrater reliability coding. The sample was selected from sections of transcripts with the highest concentration of coding and measured by relying on NVivo's coding density diagnostics, which assesses density based on all the themes relied upon to code the content, not only the themes relied upon in that particular section (NVivo Help, 2014).

The first level of multistage cluster sampling took into consideration the number of references coded in each primary theme. A theme is a virtual container connected to a subject, defined by the researcher, to hold the references that were coded (NVivo 10 Reference Guide, 2012). The researcher defined five primary themes predetermined from the literature; these themes were: *terminology from special issue one, guidance/instruction from prosecutor, defense, or judge, expert testimony on future dangerousness, mitigating evidence, and aggravating evidence* not related to instant offense. A reference is an occurrence of coding (NVivo Help, 2014). Sentences were coded from the transcripts when the context of a sentence related to one of the themes as

described in the Code Book (see Appendix A); this is also known as a coding reference. A count of the references in each theme is stored and provided in NVivo. The two themes with the largest number of references were *aggravating evidence* and *mitigating evidence*; therefore, these two themes were selected from the first stage of multistage cluster sampling. Each of these two themes had more than four times the number of references as the third highest theme.

Within each primary theme, there were multiple secondary themes; for *mitigating evidence* there were 12 secondary themes and for *aggravating evidence* there were eight secondary themes. The second stage of the cluster sampling identified the sources, which in the current study were the 18 cases divided into volumes by the Court Reporters for each day of testimony, with the most *mitigating* and *aggravating evidence* references. There were 62 sources with *mitigating evidence* references and 68 sources with *aggravating evidence* references. The sources in each of these primary themes, *mitigating evidence* and *aggravating evidence*, were sorted in descending order according to the number of references coded in these themes. The number of references in the *mitigating evidence* theme ranged from 1 – 573, while the number of references in the *aggravating evidence* theme ranged from 2 – 538.

The final stage of the multistage cluster sampling involved relying on the sources with the highest number of references in the testimony and then selecting the sections of those sources, transcript volumes, with the highest density of coding from both the *mitigating evidence* and *aggravating evidence* themes. The coding density is displayed in NVivo by a stripe varying from white to gray to black, with black indicating the most density. Multiple sections from the sources with the most coding created the interrater

reliability sample. It was important to rely on the sections of sources with the broadest range of variation in the coded themes to ensure that the established definitions established are replicable.

The results of the interrater reliability. After the interrater reliability coder completed coding the sample, a coding comparison query was built in NVivo to compare the two coders' degree of agreement. Both the percentage agreement and Kappa coefficient were examined; the percentage agreement is the number of units in which the coders agreed upon divided by the total measurable units and the Kappa coefficient is a statistical measure that considers the amount of agreement that could occur by chance according to the amount of data coded (NVivo Help, 2014).

As illustrated in Table 4, all but three of the Kappa values were greater than .75, indicating strong agreement between coders. The three secondary themes that did not reach the highest goal, all fell within the fair to good agreement (.40 - .75). To address those values, the primary researcher examined the discrepancy and determined the errors were with the interrater reliability coder, not the primary researcher or Code Book; thus, no recoding was done. The interrater reliability coder did not adhere to the definition of one category, established in the Code Book.

The first Kappa value below the strong level was the secondary theme *weapon* in Case 4. Upon further examination, the primary researcher found that the interrater reliability coder had coded the testimony of a police officer and the prosecution entering photos, casings, and a weapon into evidence. This testimony was lengthy and was repeated once the evidence was entered. The Code Book (see Appendix A) states: "ONLY code testimony related to evidence after it is admitted." This was a coding

mistake made by the interrater reliability coder not following the guidelines. The total percent agreement and overall Kappa value for Case 4 (totals are not reported for each case on Table 8) was 93.73% and 0.8752; which is strong, even with coding mistake by the interrater reliability coder.

Table 8

Interrater Reliability

	Primary Theme	Secondary Theme	% Agreement	Kappa
Case 1	Mitigating Evidence	Child Abuse and Neglect	98.78	0.8081
		History of Family Dysfunction	97.52	0.9201
		Mental Health Issue	96.80	0.9357
Case 2	Mitigating Evidence	Good History while Incarcerated	84.65	0.8819
Case 3	Mitigating Evidence	Mental Health Issue	97.06	0.8352
Case 4	Aggravating	Alcohol and Drug Use	99.16	0.9027
		Criminal History	88.90	0.7509
		Weapon	92.12	0.6848
Case 5	Aggravating	Criminal History	91.31	0.8051
		Weapon	92.79	0.8440
Case 6	Aggravating	Criminal History	62.71	0.5000
		Aggressive Behavior	60.19	0.5000

The other two Kappa values below the strong level were in Case 6; the Kappa values of the two secondary themes were both 0.5000, fair to good agreement. Upon further examination, the primary researcher coded a section of testimony as *criminal history* and the interrater reliability coder coded the same testimony as *aggressive behavior*, which was why both values were at 0.5000. Nearly identical testimony was coded, simply to different themes. The Code Book rules explained *criminal history* as: information presented about the defendant’s criminal history (i.e., arrests, convictions, details of investigation or crime, etc.); and *aggressive behavior* as: “not resulting in a criminal violation; threatening, intimidating, by words or actions. Can also include risky behavior. Bad behavior in school or work. Plan of criminal activity or criminal activity that

did not result in arrest.” The testimony in question was a police officer testifying to his interrogation of the defendant and the reading of the defendant’s confession of a sexual assault. The interrater reliability coder should have coded this testimony as *criminal history*. The total percent agreement and overall Kappa value for Case 6 (totals are not reported for each case on Table 8) was 94.94% and 0.8572, still in the strong category even with the coding mistake.

In conclusion, there was no reason to believe there was any discrepancy in the overall coding. The coding was not altered. The interrater reliability goal of strong agreement for this study was accomplished.

Assessment of Primary Themes

NVivo captures the coded data⁹ and stores them in units called references, within each theme. Therefore, when coding to a theme by the context of the sentence, NVivo is able to calculate a frequency count to assist the researcher identify which themes occurred more often versus least often. Moreover, comparisons of the correlation between two themes were assessed in NVivo to assist the researcher identify patterns among themes. The findings of each primary theme by the number of references coded to each theme, the level of coding per theme was presented along with an example of testimony to provide context. Additionally, this section assessed the difference between primary themes between No FD and FD cases.

In total, 19,025 references were coded from the transcripts. Overall, the number of references from the transcripts of the 18 cases revealed 47% of the testimony was related to *aggravating evidence* (8,816 total references), 36% *mitigating evidence* (6,784 total references), 8% *terminology of special issue 1* (1,595 total references), 6% *guidance from*

⁹ Coded data are the sentences in the testimony that represent the context of a theme.

attorneys (1,212 total references), and 3% *expert testimony concerning future dangerousness* (618 total references). These findings showed that the majority of the punishment phase was the prosecution presenting aggravating testimony to demonstrate future dangerousness and the defense presenting mitigating testimony to show the defendant was not a future danger. *Aggravating evidence* was gathered through eight secondary themes (*criminal history, negative history while incarcerated, weapon, mental health issue, aggressive behavior, history of family dysfunction, gang membership, and alcohol and/or drug use*). The following testimony was a victim explaining to the jury the details of a home burglary committed by the defendant, which was coded as *criminal history*:

Q. And do you know what types of items were taken from your home at that time?

A. Mostly jewelry.

Q. Okay.

A. Three or four of my father's handguns and just some personal things.

Q. Good jewelry?

A. Yes. (6 No FD)

The prosecution relied upon various witnesses to explain to the jury the extent of the defendant's criminal history (i.e., police, victims, family, witnesses, and probation or parole officers). In the example above, the victim was able to share how the defendant impacted her life personally; whereas, police typically only had the facts from their police report. This type of witness could evoke more emotion in the jury than a police officer, which was relied upon by the prosecution to impact the decision on future dangerousness.

Another type of aggravating evidence was a defendant's *gang membership*. If the defendant was a gang member, the prosecution called a witness who could testify to that. The prosecution presented this type of evidence as aggravating because of the bond

documented between gang members and the prison violence associated with gangs; both could show future dangerousness. The following was testimony from a former probation officer of the defendant continuing his gang involvement even though he was in a gang tattoo removal program:

Q. And did you ever learn what tattoo it was that he had gotten while participating in the D-Tag Program (gang tattoo removal program)?

A. Yes, I did –

Q. What type --

A. Initially I thought it was just his name. His mother had said it was his name. Initially that's what I thought. Then I asked him to see it at some point in time and it revealed to be a three point crown and "La 9 Tercera" on his stomach. (6 FD)

The negative behavior (i.e., misbehavior, including violent behavior, not completing a program, etc.) of the defendant while incarcerated, in prison or jail, on parole or probation, or in police custody was also testimony the prosecution relied upon to prove the defendant was a future danger. The prosecution relied upon jailers, police, and probation or parole officers to explain to the jury that even when the defendant was in custody, his/her behavior was violent. The following was testimony of an interaction between the prosecution and a defense witness; the prosecution was discrediting what the witness had just testified by explaining to the jury that the defendant was now in maximum security because he could not follow the rules in jail even while awaiting his capital murder trial:

Q. Were you aware he's in 23-hour lockdown?

A. I'm not sure what 23-hour lockdown means.

Q. Well, he's in super max at the Harris County jail. Were you aware of that?

A. I believe so.

Q. And you were aware then, having reviewed the records that he was sent there because he was unable to behave in general population? (6 FD)

In conclusion, these examples of testimony explain the context of *criminal history*, *gang*

membership, and negative history of incarceration; three of the secondary themes of the primary theme *aggravating evidence*.

Mitigating evidence, on the other hand, was presented by the defense in an effort to explain the defendant's behavior and mitigate a death sentence. There were 12 secondary themes of *mitigating evidence* (*mental health issue, history of family dysfunction, good history while incarcerated, loving and compassionate, child abuse or neglect, general good person, employment history, alcohol and/or drug abuse, mercy, remorse, therapy, and youthfulness*). One type of *mitigating evidence* was *mental health issues*, both psychological and cognitive. The following examples were testimony, first, of a psychological *mental health issue* and, second, a cognitive *mental health issue*:

Q. The environment he lived in, the criminal environment in his neighborhood, the lack of concern by his mother -- I mean, doc, all of those things related to those major choices in his life and explain, not excuse, but explain much of his decisions and behavior. And that's the only point that I'm trying to make in this testimony. One final question before I pass you. You spoke earlier this morning about Juan's (defendant) half-brothers.

A. Yes.

Q. And the history of mental illness that runs through the family.

A. Ivan and Alejandro, yes.

Q. The record reflects that Ivan has been diagnosed with what?

A. Ivan has been diagnosed with major depressive disorder with psychotic features. (6 FD)

A. He does meet one of the criteria for mental retardation?

Q. The adaptive function and deficits are consistent with mental retardation. But he does not meet the I.Q. requirement. There are three requirements for mental retardation: I.Q. of 70 or under, or 75 with a standard measurement. Adaptive function deficits in multiple categories. And the onset has to be before age 18. So he actually meets two of the three. He's got the adaptive function deficits and the onset well before age 18, but he doesn't meet the I.Q. requirement. (5 No FD)

Another form of mitigating evidence the defense relied upon for the purpose of diminishing the defendant's punishment was a *history of family dysfunction* (i.e., divorced parents, parental alcohol/drug use, lack of supervision, family violence between parents,

living with grandparents, extreme poverty). The following example is testimony regarding *history of family dysfunction*:

Q. What did you think about Eleazar?

A. He caused me a lot of fear.

Q. Why is that?

A. When he arrived, a lot of strange things started happening at my house.

Q. Like what?

A. Like one time I remember that we were at the house, and there was no one at home, my grandparents had gone out selling, and I stayed there as the oldest with my little brothers and sisters. And Juan (defendant) and Jesus were there and he (Eleazar) said, y'all come on, I'm going to put a movie in for you. And so, we all sat down to watch the movie. And when he turned on the TV, he had put on an adult movie and so, I told him, I said, how are my brothers going to be watching that? So then I took them or I grabbed them and I took them to my aunt's house. (6 FD)

In conclusion, these examples of testimony explain the context of two secondary themes, *mental health issue*, and *history of family dysfunction*, of the primary theme *mitigating evidence*.

Additionally, researchers in existing death penalty literature discussed the confusion jurors encountered with the *terminology of special issue 1*, specifically *a probability, future violent acts*, and *society*, the secondary themes. Less than 10% of the testimony involved an explanation of this terminology. Witnesses for both the prosecution and the defense testified to the explanation of *society*. Examples of this are provided in the following excerpts:

Q. (by Prosecution) So you would agree then, Mr. AuBuchon -- I think -- that a capital lifer could bunk up with someone who's been convicted of D.W.I., theoretically, correct?

A. Theoretically, yes.

Q. Person who's been convicted of burglary of a habitation, theoretically?

A. Yes. (6 FD)

Q. (by Defense) How is -- how does TDCJ handle telephone calls on a G3 level?

A. Once again, they have to -- the offender has to have someone on the outside put money into an account for them to buy minutes. It's a prepaid minute plan is

what they're using.

Q. But they don't have a telephone in their cell?

A. No, sir. There's some number of phones per cell block depending on the size of the cell block and the number of offenders. And they can use it based upon their custody and their time earning status and their behavior. (6 FD)

The testimony regarding the *terminology of special issue 1* was expressed in very different contexts from both sides; the prosecution explained *society* in a manner that led jurors to believe that a capital murderer could be cellmates with an offender who was convicted of a DWI, which could be very dangerous for the DWI offender. Alternatively, the defense focused on how regulated the behavior was in a prison, including phone calls and all privileges. The defense objective was to persuade the jurors that the defendant could live in prison and would not commit future violence due to the high level of supervision that exists in a prison.

Guidance to jurors was another primary theme assessed in the current research. The secondary themes were *guidance by judge*, *by prosecution*, and *by defense*. A judge provided guidance at any time during a trial. The prosecution and defense primarily provided guidance during opening and closing arguments. The *guidance to jurors* was coded when the attorneys explained the law or the duty of a juror. There was very little instruction from the judge to the jury; the few times guidance was provided involved the judge instructing the jurors to disregard a statement or question by the attorney or the witness. The following are examples of attorney *guidance to jurors*:

Prosecution: And remember, unlike the first special issue, there is no burden of proof on the mitigation question. It's for you to decide. But what it's not -- And we talked about this when you came in individually -- it's not guilt; it's not sympathy; it's not emotion. It's what are the facts; what evidence was produced. And is it sufficient. So look back, again, the circumstances of the offense. It tells you to do that. And we went over that. Look at his own personal moral culpability in this crime. You heard it from his mother. He's a leader. He was the ringleader of this

crime. He was the one that orchestrated it and organized it and carried it out. So were there any sufficient mitigating circumstances that you heard about? No. (1 No FD)

Defense: Capital cases are unique. Each set of facts are unique to each one. Both on the guilt and innocence and the actual crimes themselves, and whatever punishment evidence you may hear. That's what you have to decide today. And that's why I said I hope you're not rushing to go home. Because this is going to be a difficult decision, I hope. I hope this isn't something that you told us after you convicted somebody of capital murder you would listen to all the evidence go back, hash it out with the other jurors, and then make your decision. Please. Whatever your decision is, take some time to think about it. Please. Please. Take your time and look at all the evidence. (5FD)

In summation, these examples of testimony from the prosecution and defense provide context for two secondary themes, *guidance from prosecution*, and *guidance from defense*, of the primary theme *guidance to jurors*. The first example was the prosecution guiding the jurors to pay attention to the facts, not the emotion or mitigation. The second example was the defense guiding the jurors to take their time and review the facts, and he reminded the jurors that they all agreed to listen to the evidence.

Another primary theme assessed was *expert testimony of future dangerousness*. Expert witness testimony regarding future dangerousness has historically been a psychologist/psychiatrist testifying to the defendant's future danger; there were several doctors who testified for the prosecution in the 1980s and 1990s in Texas. In recent years higher courts have overturned death sentences due to unreliable experts. This has decreased this type of testimony today—the findings from the current research revealed this diminishing trend of experts predicting future dangerousness (TDS, 2004). The following are examples of *expert testimony regarding future dangerousness* by witnesses for the prosecution and defense, respectively:

Q. (by the Prosecution) But based upon what you know of Paul, if he has access to large amounts of alcohol and drugs and if he has the opportunity to harm

someone weaker than him and if he is in an environment where there is a lack of structure, you do believe that he would be a future danger, correct?

A. I think if those three things - pardon - if those things were present, that he would be a future danger, yes, sir. (9 FD)

Q. (by the Defense) Did reviewing those records assist you in making a determination for this jury as to whether he would be a future danger while incarcerated?

A. I didn't see that he would be a danger to others, I saw that he would be a danger to himself, just because I thought his depression would intensify, and he might try to harm himself. (3 No FD)

These examples of *expert testimony related to future dangerousness* presented by the prosecution and defense provide context for two secondary themes, *expert - aggravating*, and *expert - mitigating*. The first example from a prosecution expert witness states the defendant would be a future danger. The second example from a defense expert witness explained that the defendant would not be a future danger.

In conclusion, the length of the punishment phases of the 18 capital trials varied from a one-half of a day to 11 days of testimony, but there was no consistent pattern of length between the No FD and FD cases. Overall, the majority of the punishment phase was the prosecution focusing on evidence regarding the defendant's future dangerousness and the defense putting on mitigating evidence, not expert testimony regarding future dangerousness, testimony on terminology, nor guidance by the attorneys. The strategies were vast, though without pattern, some attorneys waived opening arguments, some attorneys relied upon every correctional officer who had contact with defendant on the stand to testify to negative or positive behavior, whereas other attorneys had one key officer summarize the history of incarceration. Some attorneys called every police officer and every crime scene investigator who worked a case to testify; whereas, other attorneys would call every family member to testify, even when they had not seen the defendant in

over a decade. The strategies were enormously different.

Primary Theme Similarities and Differences between No FD and FD

A broad view of how the primary themes were distributed between the No FD and FD cases gives a foundation for the secondary themes. The nine No FD cases had slightly more *aggravating evidence* than *mitigating evidence* (3,051 and 2,724 references).

Without knowing the context of the testimony and assuming more was better, it would be expected that more *mitigating evidence* would have been presented than *aggravating evidence* in No FD cases. *Terminology of special issue 1* and *guidance to jurors* were had nearly the same number of references (765 and 685, respectively), while *expert testimony on future dangerousness* was the least occurring theme examined with 386 references (see Figure 7). Figure 7 illustrates the disbursement of coded references in No FD cases: 40% of the coded references was *aggravating evidence*, 36% of the coded references were related to *mitigating evidence*; 10% of the coded references were related to *terminology of special issue 1*; 9% related to *guidance of jurors*; and 5% was *expert witness testimony of future danger*.

The nine FD cases had half of the total references coded to *aggravating evidence* (5,765) and slightly more than one-third of the total references coded to *mitigating evidence*. In following a “more-is-better” philosophy, it was logical that half of the testimony was focused on evidence to illustrate future dangerousness to jurors in the FD cases. The other three primary themes, *terminology of special issues 1*, *guidance*, and *expert witness on future dangerousness*, were considerably less with 830, 527, and 232 references, respectively (see Figure 8).

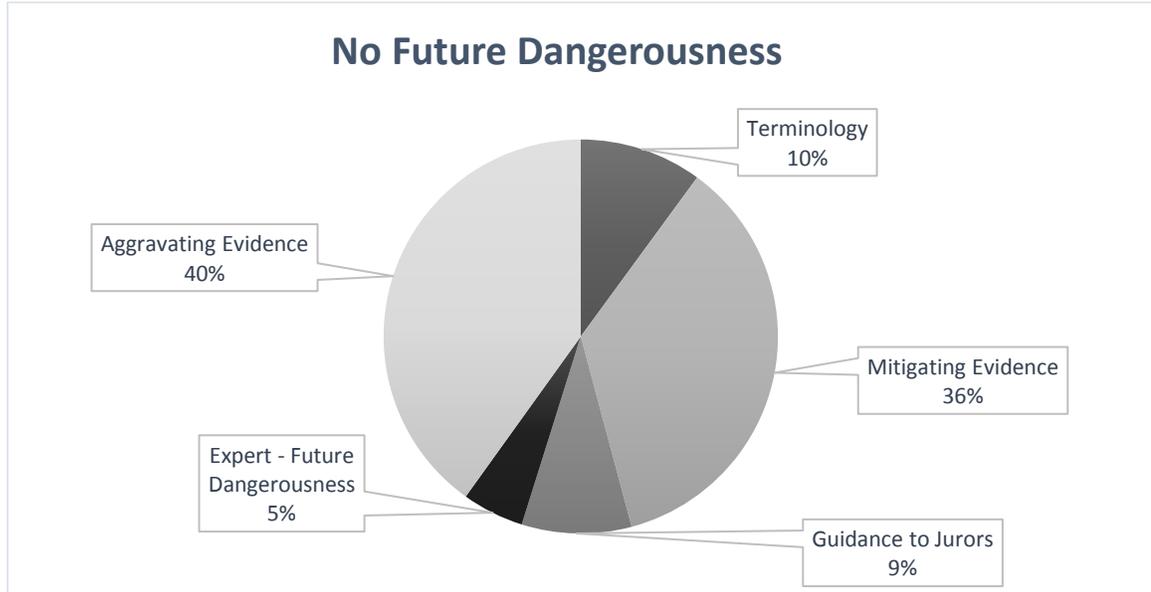


Figure 7. Total References Coded for No FD Cases. This figure illustrates the disbursement of references coded to the primary themes for cases of no finding of future dangerousness.

In comparing the primary themes between No FD and FD cases, 50% of the coded references in FD cases and 40% in No FD referred to *aggravating evidence*. Assuming a fair process exists, it would be expected that more of the punishment phase was attributed to *aggravating evidence* in FD cases than No FD cases, because the prosecution focused on *aggravating evidence* to support the claim that the defendant was a future danger. The opposite, however, was not true—there was not more *mitigating evidence* than *aggravating evidence* in the No FD cases, nor was there more *mitigating evidence* in the No FD cases than the FD cases. In fact, both groups of cases had 36% of their total coded references directed to *mitigating evidence*. The defense spent more time on explaining the *terminology*, *guiding the jurors*, and presenting *expert witnesses* than the prosecution; approximately three percent more in each category. From a broad

perspective, there were a several noticeable differences, but examining the secondary themes revealed even more of the story.

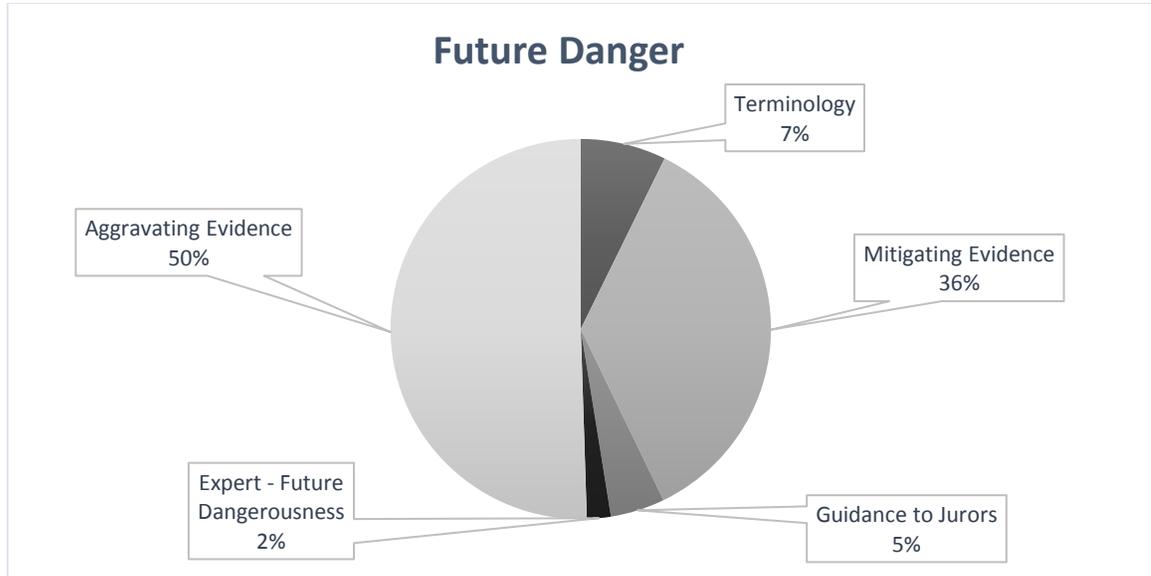


Figure 8. Total References Coded for FD Cases. This figure illustrates the disbursement of references coded to the primary themes for cases with a finding of future dangerousness.

The only similarity between the two groups of cases was the distribution of the testimony. In both groups, the most references in the testimony presented was related to *aggravating evidence*, then *mitigating evidence*, and followed by *terminology related to special issue 1*, *guidance provided to jurors*, and lastly *expert testimony on future dangerousness*.

Assessment of Research Questions

The purpose of this study was to assess similarities/differences between capital cases in which jury determined the defendant was not a future danger compared to those defendants the jury determined were a future danger. In this study, it was asserted that dissimilar patterns of testimony would be found between No FD and FD cases. Assuming a fair process exists, if these results held true, one could posit that future dangerousness

was applied distinctly using legal factors in Texas; therefore, the death penalty was applied justly. If the results did not show distinct patterns between the groups of cases, an explanation may be that future dangerousness was not determined solely by legal factors. Therefore, the death penalty was applied arbitrarily in Texas. Finally, if the results did not show any distinguishable patterns between the groups examining legal factors, one may posit extraneous factors contributed to the arbitrary application of future dangerousness, which resulted in an arbitrary application of the death penalty.

The secondary themes reveal a more detailed story about future dangerousness in Texas. As previously mentioned, there were multiple secondary themes within each primary theme that were established from the literature; this section, first, reviews the secondary themes under *terminology from special issue 1, guidance provided to jurors, and expert testimony on future dangerousness* and how the findings addressed Research Questions 2 – 4. Second, this section includes a review of the secondary themes under *mitigating evidence*, both existing and emerging themes. Third, this section examines the secondary themes under *aggravating evidence*, again both existing and emerging. The assessment of *mitigating evidence* and *aggravating evidence* will address Research Question 5. Finally, this section begins with the synthesis of results from the survey on heinousness (Research Question 1) and second, the results from the content analysis relied upon to assess Research Questions 2 – 5. All of these results were relied upon to address the primary research question.

Research question 1: Heinousness. Heinousness of the instant offense was assessed to address research question 1: **To what extent is the heinousness of the**

instant offense associated with negative and positive findings of future dangerousness?

An average was calculated from the results of each vignette to allow for one composite score. The results from the 101 completed surveys regarding heinousness revealed the control vignette did have the lowest heinous score of 4.51 on a scale of 1 – 7; however, this score was more than midway on the scale and was expected to be lower. The range of heinous scores for No FD cases was 5.64 – 6.49 and the No FD average was 6.30. The range of heinousness scores for FD cases was 5.61 – 6.60 and the FD average was 6.23.

The results from the actual case vignettes ranged 5.61 – 6.60 on a scale of 1 – 7. The vignette with the lowest score, 5.61, was a FD case. The vignette with the highest score, 6.60, was also a FD case (see Table 9). The vignette with the lowest heinousness score was:

The offender (age 21) led police on a high-speed chase that resulted in running over and killing a police officer, age 47, who stood in a median. The victim was a husband and father. The offender was also charged with trying to run over 5 other police officers, an aggravated assault on a public servant, and possession of a controlled substance.

When this item was examined individually, of the 101 participants 29% selected 7 (extremely heinous), 28% selected 6, 26% selected 5, 14% selected 4 (midway between not very and extremely heinous), 2% selected 3, and 2% selected 2. None of the participants selected 1 (not very heinous). Whereas the vignette with the highest heinousness score was:

The offender (age 38) was arrested for killing her two-year-old daughter. The victim died of blunt force trauma to her head. Additionally her neck and torso were covered with green and purple bruises. The autopsy revealed bite marks, old fractures on both arms, and damage to her liver and kidneys.

Table 9

Heinousness Scores

Defendant	Average Heinousness Rating	Rank
1 no FD	6.20	
1 FD	6.13	
2 no FD	5.64	
2 FD	6.48	
3 no FD	6.48	
3 FD	6.17	
4 no FD	6.35	
4 FD	6.60	High
5 no FD	6.43	
5 FD	6.26	
6 no FD	6.30	
6 FD	6.05	
7 No FD	6.49	
7 FD	6.41	
8 no FD	6.38	
8 FD	5.61	Low
9 no FD	6.47	
9 FD	6.35	
Control Case	4.51	

When this item was examined individually, of the 101 participants 77% selected 7 (extremely heinous), 12% selected 6, 6% selected 5, 4% selected 4 (midway between not very and extremely heinous), and 1% selected 3. None of the participants selected 2 or 1 (not very heinous).

Though the difference between the lowest and the highest composite score were not great, when examining the individual scores it was clear that killing a two-year-old who had obviously suffered extensive abuse was seen by participants more heinous than killing a police officer by running him over to avoid spike strips. Both of these cases,

however, resulted in a finding of future dangerousness and both defendants received a death sentence. The results from the survey on heinousness indicated that the heinousness of the instant offense did not differ between No FD and FD cases. Indicating that heinousness of the instant offense was not a factor in future dangerousness in the current study.

According to the composite score of each vignette, the highest eight scores were associated to three FD cases and five No FD cases—the opposite was expected. Moreover, there was very little variance in the scores, and there was no clear indication of which cases were the most heinous and the least heinous.

In conclusion, the level of heinousness in the 18 cases examined in the current research had little to no variance and did not offer any distinction of heinousness between No FD cases and FD cases. This is important to the current research, given that jurors hearing all of the testimony regarding the instant offense and all perceive its level of heinousness. It was expected that the worst of the worst offenders would commit the most heinous murders. Furthermore, the higher scores would correlate to the FD cases and result in a sentence of death and the lower scores would correlate to the No FD cases and result in a LWOP sentence. The findings did not support this expectation.

Research question 2: Terminology from special issue 1. The *terminology from special issue 1* was assessed to address research question: 2. **To what extent is the terminology from special issue 1 associated with negative and positive findings of future dangerousness?** The terminology in the statute, *a probability, future violent acts,* and *society*, are not defined in case law. These terms, therefore, are subject to interpretation and assessing how they are interpreted and by whom can provide additional

insight into future dangerousness. This primary theme was examined to evaluate whether terminology explained by testimony from the prosecution, defense, or judge revealed a pattern in No FD or FD cases.

The expected outcome of the primary theme, *terminology from special issue 1*, was that more defense testimony of all three secondary themes, *a probability*, *future violent acts*, and *society* would occur in No FD cases. Moreover, more prosecution and judge references of all three secondary themes, *a probability*, *future violent acts*, and *society* were expected. Specifically, the expectation was that more references related to *society* in No FD cases, and more references regarding *a probability* and *future violent acts* in FD cases.

The secondary themes of *terminology from special issue 1* included *a probability*, *future violent acts*, and *society*, in addition to the source of the testimony (i.e., the prosecutor, defense attorney, witness, or the judge). First, the secondary themes *judge – a probability*, *judge – future violent acts*, and *judge – society* were non-existent; in other words, in these 18 cases the judge did not address these three terms at all in the presence of the jury during the punishment phase. The transcripts suggested that more time was allotted to the statute and the definition of this terminology during *voir dire*. Furthermore, several attorneys referred to the judge's explanation of the statute during *voir dire*.

The term *society* was testified to most often in both groups of cases, those with a finding of no future danger (No FD) and those with a finding of future danger (FD). In both groups, the prosecution had slightly more coded references than the defense, but not enough to suggest a substantial difference. The second most testified to term, again in both No FD and FD cases, was *future violent acts*; however, almost double the number of

references of testimony were offered by the defense in No FD cases and slightly more by the defense in the FD cases.

A probability. The secondary theme *a probability* had minimal testimony regardless of who presented, defense or prosecution, or which group of cases, No FD or FD. When the defense presented *a probability*, the No FD cases had three cases with zero references while the FD group had six cases with zero references. The remaining cases in both groups ranged from one to nine coded references, which was far fewer compared to *future violent acts* and *society*. When the prosecution presented *a probability*, twelve cases had zero references, six No FD and six FD. The remaining six cases had even less testimony regarding *a probability*. There was no qualitative difference between No FD and FD cases. Testimony regarding the terminology *a probability* from *special issue 1* had no discernable pattern between the 18 capital cases examined in the current study.

Future violent acts. The secondary theme, *future violent acts*, was assessed in the 9 No FD and 9 FD cases. A comparable number of references to *future violent acts* were made in both groups (No FD = 128 references; FD = 118 references). Testimony related to *future violent acts* by the defense was evenly distributed between the No FD and FD cases. Only one case (No FD) had zero references. Sixteen cases had a range from 1 – 18 references. A FD case had the most references of *future violent acts* by the defense at 29. in a FD case. The testimony regarding *future violent acts* by the prosecution was relatively evenly distributed. The range of references was zero (two No FD cases) to 16.

The defense presented more evidence than the prosecution in both groups of cases (145 *defense* and 101 *prosecution*). The defense, however, presented almost twice as much compared to the prosecution in the No FD cases. The message from the defense did

not have a main focus in either group of cases; rather, the testimony varied greatly as compared to the testimony from the prosecution. The message from the defense included the following: impossibility of predicting one's future; the current offense was the only crime the defendant ever committed—so let his past predict the future; as long as the defendant was on medication, he behaved appropriately and he was given his medication every day in prison; my client can function very well in a structured environment; no evidence of future danger; and the defendant has been a model inmate for the past two years in county jail awaiting trial.

In both No FD and FD cases, the focus of the testimony related to *future violent acts* presented by the prosecution was that a defendant's past behavior explained his future behavior, see the following examples:

Prosecutor: So let's look back at everything that he's done in his life that has brought us to this day, to this point, because we always say what's the best predictor of future behavior? Let's look at his past, sort of his resume of his criminal life. (1 No FD)

Q. Doctor, is it true that the best single predictor of future behavior is past behavior?

A. Yes. (7 FD)

In conclusion, eight of the nine No FD and all nine FD cases had some testimony regarding *future violent acts*. Overall, the defense presented more testimony than the prosecution regarding *future violent acts*, regardless of the finding in the case. Moreover, the defense presented more references in No FD cases than in FD cases. The primary difference, however, was not between the No FD and FD cases, but rather the different messages from the prosecution and the defense. The prosecution presented evidence in both No FD and FD cases regarding how the defendant's past should be used to predict his/her future whereas, the defense did not present any consistent theme, regardless of

whether in a No FD or FD case. There was a notable quantitative difference, in number and content, with regard to references made about a *future violent acts*.

Society. Regarding the terminology from *special issue 1*, *society* had the most references of testimony by both the prosecution and the defense (673 and 635), and in both the No FD and FD cases (619 and 689). Although FD cases had more testimony related to *society*, the prosecution and defense had the same number of references (345 and 344), whereas the prosecution had more references than the defense (328 and 291) in the No FD cases.

The message was entirely different between the groups of cases. In most of the cases (7 No FD cases and 6 of the FD cases), the prosecution presented evidence focused on *society*. The three main messages from the prosecution regarding *society*, which were seen in both groups of cases, were escape, violence, and drugs. The following are examples of that testimony:

Escape:

Q. Okay. Now, the Texas seven, the inmates that escaped?

A. Uh-huh.

Q. It was from the Connally Unit, right?

A. Yes. (6 No FD)

Q. Are you familiar with a case in -- of any cases where inmates have been bench warranted to county jails, they are serving prison sentences in TDC, been bench warranted to county jails and they have escaped from county jails?

A. Yes, ma'am. When a person reaches the prison system, there is no control over who or where he can be bench warranted to. In other words, prison says no, we can't let you go to the county jail because you are too dangerous. If a judge orders him to be brought to a county jail to answer charges or whatever, he is going to go. That happened with Charles Thompson, condemned capital murderer waiting to be executed. He got bench warranted to Harris County jail and escaped. (6 No FD)

Q. Of those three that escaped in 2011, were they found and recovered?

A. To my knowledge, yes.

Q. Have you ever known in the last ten years of an inmate having left the facility,

not having been brought back?

A. I know of two actually.

Q. Okay. What happened? (6 FD)

Violence:

Q. Do you have experiences in dealing with the investigation of criminal acts committed in prison society, knowledge that a jury of twelve ordinary people who don't have experience with the prison system might not have?

A. Yes, sir, I have very detailed knowledge of what happens inside the penitentiary, the day-to-day lives of inmates, the levels of violence, what happens inside a penitentiary that most of the general public does not have any idea about. (9 FD)

Q. Are you aware of June 25th of 2008 at Gib Lewis high security unit that an inmate killed his cellmate?

A. No.

Q. Were you aware that on August 18th of 2008, on the Estelle high security unit that an inmate killed his cellmate?

A. No, ma'am. (6 No FD)

Q. Tell the jury what Juan Soria did while he was on death row?

A. He convinced a volunteer chaplain, not a prison chaplain, a fellow that does a volunteer ministry, 70-something years old, he was on death row. And Soria convinced the chaplain to put his arm through the gap -- the doors have a natural gap in them. He told Chaplain Westbrook, he said, I made you a bracelet; would you put your arm through here and let me see if it fits your wrist. And the chaplain did. And he put his arm through the gap in the door and Soria took his bed sheet, which was already tied by one end to his toilet in his cell, he looped the sheet around the chaplain's wrist and tied it off so now he can't get his hand back through the cell door. And then he took a razor blade that the end was melted into a toothbrush, and sawed his arm with it all the way through the bone. (5 FD)

Drugs:

Q. In the Texas prison, do drugs get in there and get to inmates?

A. Drugs in the penitentiary are prime. Drugs are a crime that is being committed in the prison. We prosecute hundreds of drug cases, everything from marijuana to methamphetamine to heroin, you name it. (6 No FD)

Q. You mentioned other types of contraband, drugs. Drugs are a big problem in T.D.C.?

A. Yes, ma'am.

Q. Marijuana gets smuggled in?

A. Yes, ma'am. (6 FD)

Q. Would someone in the general population in a Texas prison have access to things such as drugs and alcohol?

A. Yes, sir.

Q. How could that happen?

A. Well, we work cases where inmates -- sometimes they make it themselves, but a lot of times, unfortunately, guards will smuggle in alcohol. And there's been a recent killing involving an inmate who got drunk and beat his cellmate to death. But they're -- drugs are the most prevalent illegal substance in the prison, but there is also alcohol.

Q. When you say prevalent, how much drugs can there be in prison?

A. Well, I don't have a number, but I know we stay very busy. Hundreds and hundreds of cases of drugs being brought in and found on inmates or being abused by inmates, everything from methamphetamine to marijuana, crack cocaine, everything. Anything you can get on the streets of Austin, you can get inside the penitentiary. (9 FD)

In summation, when the prosecutor presented evidence regarding the term *society*, the focus was on escaping, violence, and drugs. This was true in both No FD and FD cases. The testimony heard by the jury was that prison was not as controlled as society imagined and that the defendant could continue his/her same behavior in prison.

Contrary, the defense presented evidence focused on *society* in all nine No FD cases and in eight of the nine FD cases. The focus of defense testimony regarding *society*, was on classification, physical facilities, and privileges. Again, this type of testimony from the defense was found in both No FD and FD cases; the following testimony exemplifies this:

Classification:

Q. Okay. And what would an intake procedure be like for Albert (defendant) in a maximum security facility?

A. Intake is the same for every individual. We have several Intake facilities around the state. Either—I can describe at Huntsville -- you would go through the diagnostic unit through classification and sociology, be scrutinized, get your history taken down, have your medical exam, psychological exams, gather all the information concerning your past criminal behavior, any institutional behavior, basically collecting all of the records that would define this particular person, then he would be assigned to a facility based on the – (6 No FD)

Q. While you were there, were you familiar with how the classification was handled for somebody that was convicted of capital murder but given a life sentence?

A. Yes, sir.

Q. Can you explain a little bit in terms of where they're housed and the type of facility they go to? Do you know that information for the jury in terms of where they would be?

A. It would be -- the best that could happen to the offender coming under capital life would be a G3 classification. They could at that point be housed in a dormitory situation. That is the best situation they can hope for coming in as a G3 classification. They would be in that position for ten years before they're reevaluated. Now, they can move up out of a G3 classification to 4, 5 which is close custody, and then you get into the ad seg situation, administrative segregation 1, 2 and 3. (7 No FD)

Physical Facilities:

Q. All right. And what -- tell me about this Level 5. What makes it a maximum security facility? Just -- just summarize it.

A. Okay. The housing is primarily cell block, one-person, two-person cells. The building is constructed of concrete and steel. There are two perimeter fences, two fences all the way around the facility with a large space in between called no man's land. There are armed guard towers around this fence. There's a road that goes around the facility, and there's an officer -- an armed officer in a vehicle 24-seven patrolling that. There are motion sensors on the fences. And now in many of the facilities, they're installing video security also. (1 No FD)

Q. So where does an LWOP live?

A. They live in cell blocks with another person. It's a two-person cell. (4 No FD)

Q. Now, if they are housed in a dormitory, how many people could be in a dormitory?

A. Any number of people. 50.

Q. And do they each have their own cubicle, or?

A. They have a little cubicle and they keep their personal belongings in the cubicle. And the walls of the cubicle are low enough that a correctional officer walking through can easily see into the cubicle and observe the offender. (9 FD)

Privileges:

Q. Let's talk about privileges.

A. Privileges would be the main -- G4 and 5 are disciplinary type status. So the worse he behaves, the less privileges. Just like what we do with our kids. If our kids want to be able to watch TV or go outside and play and have snacks and treats, they -- we hope that they behave. We want our kids to earn privileges. The penitentiary works exactly the same way. So as you start misbehaving, we're

going to say, you can't go outside and play for the next 2 days. You're on cell restriction. You can't go to the day room, you can't go to the rec room, and you can't go out and play. You can't have as many snacks and treats because we're going to restrict your commissary if you're not behaving. And commissary is incredibly important to an inmate because the State provides you just enough to live when it comes to food. As far as hygiene products, you'll get a bar of soap. Okay? No deodorant, no lotions. You'll get a little bitty stubby toothbrush but probably nothing to put on it, unless you can go to the commissary and buy these types of items, plus snacks or cold drinks or things of that nature. So that's a very important privilege that can be taken away if they don't behave. Visitation is a huge privilege. (6 FD)

Q. You mentioned the word "privileges" a moment ago. What's a "privilege" that can be lost?

A. The ability to leave the cell, to go watch television, play dominoes, go to the rec yard can be lost. The privilege of being able to have a fan or a radio in your cell.

Q. And would it be a fair statement or accurate statement that things that we take for granted, the smallest of things that are considered privileges in the penitentiary, they become even more important to the inmate?

A. Absolutely. (2 No FD)

Thus, when the defense presented testimony regarding the term *society*, the main focus was on classification of the offender, the physical facilities, and privileges in both No FD and FD cases. The primary message was an explanation to the jury about what life in prison was like, because most of the general population does not know. By explaining how the defendant would be classified in relationship to security risk, how different prison facilities kept the public secure, and how inmates received and lost privileges. The defense's goal was to show the safety and the structure of the environment—where the defendant would do well.

When comparing the two sets of cases in regards to *society*, the No FD cases had more testimony by the defense, as expected. Overall, there was more prosecution testimony related to *society*, than defense testimony. Finally, the message was different between the prosecution and the defense, but the same in both groups of cases.

In conclusion, research question 2 assessed whether there was a pattern of testimony regarding terminology from special issue 1 from the prosecution or defense between the No FD and FD cases. There was a substantial difference, in number and content, with regard to references made about the terminology from special issue 1, specifically regarding *society*. There were some differences found between No FD and FD cases regarding *a probability*. Overall, the defense presented more evidence than the prosecution regarding *future violent acts* in both No FD and FD cases. Furthermore, the difference was notably more in No FD cases. The most important distinction drawn was that No FD cases had a greater pattern of evidence presented by the defense regarding *society*. However, there was also a pattern of *society* presented by the prosecution for FD cases, but to a lesser extent.

Furthermore, the primary difference was the context of the testimony regarding the term *society* between the prosecution and defense, regardless of whether it was No FD or FD case. After examining these 18 cases, it was clear why researchers in extant literature found that jurors were confused by the *terminology of special issue 1* (Citron, 2006; Otero, 2014; Shapiro, 2008; Sites, 2007; Witsil, 2014).

Research question 3: Guidance to jurors. *Guidance to jurors* was the primary theme examined with three secondary themes, *prosecution*, *defense*, and *judge*, which addressed research question 3: **To what extent is guidance given to jurors associated with negative and positive findings of future dangerousness?** The context of the theme was formed to determine whether any patterns of guidance from a particular court actor existed between the No FD and FD cases. Assuming a fair process exists, the expectation would be, for example, if a pattern of defense guidance to jurors was seen in No FD

cases, that pattern, defense guidance to jurors, would not be seen in the FD cases. The guidance to the jurors from the prosecutor and defense was coded in the opening and closing statements in the punishment phase. This guidance came in the form of explanation of the law or juror responsibility. Opening and closing statements were a choice and were often waived by one side or the other.

The expected outcome for the secondary themes of *guidance to jurors*, was more references presented by the *defense* in No FD cases and more references presented by the *prosecution* and *judge* in FD cases. Overall, the number of coded references for the secondary themes, *prosecution*, *defense*, and *judge*, are illustrated in Table 10. This Table reveals *prosecution* provided slightly more references in No FD compared to FD cases; *defense* provided nearly twice as much guidance in No FD cases compared to FD cases; *judges* made the least references to guidance, though more in FD cases. Each of these findings are discussed in more detail below, with consideration given to the qualitative themes in which they occurred.

Judge. In general, the judge provided little guidance during the punishment phase of the 18 cases examined. The judge, however, did provide more than three times as much guidance in FD cases as compared to No FD cases. The majority of those coded references came from one case in which the judge repeatedly told the jury to disregard a statement made by the prosecution. There were too few references ($n = 28$) to conclude any distinct pattern and most of the references occurred in a single case.

Table 10

Guidance to Juror Coded References

Guidance	No Future Danger	Future Danger
Prosecution	242	229
Defense	437	276
Judge	6	22

Prosecution and defense. In both groups of cases, No FD and FD, the defense provided more guidance to the jurors than the prosecution, and the message was similar in both groups of cases. The following excerpts from the transcripts are examples of the *prosecution* and the *defense* presenting *guidance to the jurors* in No FD and FD cases:

(Prosecution) And it's not going to matter where he is. It's not going to matter if he's in prison or where he is, he's going to do what he wants to do. The answer to that Special Issue is "yes." (2 FD)

(Prosecution) The only thing that we have ever asked of all of y'all since the first day we started talking to you is could you keep an open mind and listen to the evidence and look at the law and look at the evidence and let the law and the evidence guide you to the true and correct verdict. And that's all we're going to continue to ask you to do is look at the law and the evidence and let that guide you to the proper verdict. (3 No FD)

(Defense) If you look at the evidence that you've been presented in regard to her future dangerousness mitigating factors, there's no question that beyond a reasonable doubt that the State has not met that burden. (4 FD)

(Defense) And we expect and we're holding you to the promise that you will give us a true verdict according to how each of you feel and what you saw in this case. And I do intend as we go through this to talk to you about mercy, about justice. (7 No FD)

These examples show both the *prosecution* and the *defense*, between the two groups (No FD and FD), presented *guidance to the jurors* in regard to the law and the jurors' responsibility. Both the *prosecution* and the *defense* presented similar information—the *defense* simply presented more testimony.

When examining the *guidance to jurors* between No FD and FD cases, considerably more *guidance to jurors* was given in No FD cases (685 and 527). The number of coded references by the *defense* in FD cases and *prosecution* in both No FD and FD cases was relatively the same (276, 242, and 229) (see Table 10). The number of coded references that was notably more by the *defense* in No FD cases (437). Seven of the nine No FD cases had a range of 43 – 72 references to *guidance to juror*, while the highest two FD cases had 48 and 50 references.

In the No FD cases, the *prosecutor* gave an opening statement in four out of nine cases and the *defense* in six out of nine. Whereas, in the FD cases, the *prosecutor* gave an opening statement in four out of nine and the *defense* in two out of nine. Both sides did choose to give closing arguments in all 18 cases. The *defense* articulated to the jury that the death penalty should be reserved for the worst of the worst in seven out of nine No FD cases and one out of nine FD cases.

Another qualitatively notable difference between No FD and FD cases was the reference to God was often relied upon by the *defense*. In the references of *guidance to jurors* by the *defense*, there were four references to God in No FD cases and 14 references to God in FD cases. The prosecution made references to God considerably less, with one reference in one No FD case and two references in one FD case.

In conclusion, research question 3 assessed whether there was a pattern of *guidance to jurors* from the *prosecution*, *defense*, or *judge* between the No FD and FD cases. The context of the message between and from both the prosecution and defense was similar: listen to all the evidence, do your duty, be strong, take your time, and this is how you should answer the special issue questions. There was more *guidance to the*

jurors from the *judge* in the FD cases than the No FD cases; however, there was not a discernable pattern because the majority of the references came from one case. Also, there was no discernable pattern of guidance from the *prosecution* between the No FD or FD cases. However, the *guidance to the jurors* from the *defense* did reveal a pattern: the *defense* gave considerable more *guidance to jurors* in the No FD cases compared to the FD cases. The defense explained to the jurors that the death penalty was for the worst of the worst offenders in the No FD cases. The defense used God in their guidance to jurors more often in FD cases than No FD cases. In summary, the primary distinct pattern with regard to *guidance to juror* from the *prosecution, defense, and judge*, was that the *defense* provided substantially more *guidance to jurors* in No FD cases than the FD cases.

Research question 4: Expert testimony on future dangerousness. *Expert testimony on future dangerousness* was examined by assessing the amount and context of the mitigating or aggravating evidence presented. These secondary themes, *mitigating* and *aggravating*, addressed research question 4: **To what extent is expert testimony on future dangerousness associated with negative and positive findings of future dangerousness?** *Expert testimony of future dangerousness* was presented by a professional that was qualified as an expert, in a separate hearing outside the presence of the jury. The standards for a witness to be qualified as an expert were established in *Daubert v. Merrell Dow Pharmaceuticals* (1993). Expert testimony on future dangerousness has declined since Dr. Death's testimony in the 1990s. The expected outcome of *expert testimony on future dangerous* was that more *mitigating testimony* would be presented in No FD cases and more *aggravating testimony* would be presented in FD cases.

Mitigating. First, this evaluation examined expert testimony on future dangerousness as mitigating evidence. More than half of the 18 cases, five No FD and 5 FD, had no *mitigating* evidence related to *future dangerousness presented by an expert witness*. There was more than five times as much mitigating evidence than aggravating evidence in regard to future dangerousness presented by expert witnesses in No FD cases and nearly double in FD cases.

Expert witness testimony on future dangerousness as a mitigating factor and an aggravating factor was presented in essentially the same number of cases; however, the range of *mitigating* expert testimony in the cases was more varied than the *aggravating* expert testimony. The No FD case with the most testimony (201 coded references) had more than three times the amount of testimony than the most testimony in a FD (63 coded references). There was more *mitigating* testimony in No FD than FD. However, the most relevant pattern was the 10 cases with no *mitigating testimony on future dangerousness by an expert witness*. The data supported the existing literature that suggested that the defense attorneys do not open the door to future dangerousness as often as in the 1990s (TDS, 2004; Maringer, 1993).

It was expected that *expert testimony related to future dangerousness* presented as *mitigating testimony* would be found in more No FD cases than FD cases, which the data supported. However, there was a notable number of coded references of *mitigating testimony* by an expert on future dangerousness in FD cases. *Expert testimony on future dangerousness as mitigating evidence* was presented in the same number of No FD and FD cases. Just examining the numbers suggested that hiring an expert to testify on future dangerousness as mitigating evidence was irrelevant. However, closer examination of the

context of the testimony revealed differences between No FD and FD cases. The No FD cases involved *expert testimony on future dangerousness* related to mental health issues, such as family dysfunction, fetal alcohol syndrome, detachment disorder, and personality disorder. Whereas, the FD cases had *expert testimony regarding future dangerousness* primarily focused on the defendant's behavior while incarcerated. The following are examples of *mitigating expert testimony on future dangerousness* in No FD cases:

Q. Let's get into the nexus as you call it. Is that what you call it in your assessment?

A. The nexus. Drawing the link. The connection. How the [Fetal Alcohol Syndrome Disorder] FASD affected his behavior in the offense. You would expect or I would expect, with my expertise in FASD, that individuals with FASDs who commit crimes, those crimes will be -- will involve or include illogical behavior, impulsive behavior, behaviors that don't seem to make sense that people with average normal intelligence and functioning probably wouldn't do. (5 No FD)

Q. All right. And also in your studies, we have heard from [the defendant's] parents, but would you agree that his upbringing was dysfunctional as far as his parenting?

A. Based on information that I had available for my examination, I would say it was quite dysfunctional, from a mental health standpoint. When people are struggling with some of their own problems, sometimes the fallout, collateral damage is the children. [The defendant] was effected by that. (8 No FD)

Aggravating. Second, *expert testimony on future dangerousness as aggravating evidence* was assessed between No FD and FD cases. More than half of the cases, five No FD and six FD, had no *aggravating testimony from an expert witness regarding future dangerousness*. The cases that did have *aggravating evidence* presented by an *expert witness regarding future dangerousness* had some similarities and differences between No FD and FD cases. One strategy relied upon by the prosecution was to present *aggravating testimony* which included discussing the mitigating expert's testimony in a way that suggested it was actually aggravating. This strategy was relied upon in both No

FD and FD cases. *Expert testimony regarding future dangerousness* presented as *aggravating evidence* included history of violence, hypothetical evaluation, security threat due to gang involvement, and anti-social personality disorder. The following excerpts are examples of those types of *aggravating expert testimony associated with future dangerousness*:

Q. And how do you go about doing that, Doctor?

A. Here we are. I look at several things. One is what is the person's -- if the issue is future dangerousness, what is this person's history of violence. Well, in this situation, we have a long history of violence and even a diagnosis of intermittent explosive disorder, essentially hurting, assaulting, et cetera, weaker people. What is the person's attitude about violence? Is that okay with them or is it something that makes them feel bad or prevents them in doing it? No. In this situation, you know, as far as we could tell from his record, violence is fine with him. He's utilized it a number of times to get his way. (9FD)

Q. Now Doctor, taking into account everything that you reviewed, everything that was sent to you by the District Attorney's Office, all your knowledge of this case, okay? Taking that into consideration, and then I would like to pose a hypothetical to you, and then I want to see if you can express to the jury whether or not you have an opinion about somebody's future dangerousness. Okay?

A. Okay. (5 FD)

Q. Is there also a process for defining whether or not an individual is a member of a security threat group?

A. Yes. Basically we have investigators that work on mail, doing interviews, looking at incidents that might be gang-related. They also search for tattoos, paraphernalia in an offender's cell. (9 No FD)

Q. And can you tell the jury, what is anti-social personality disorder?

A. Well, anti-social personality disorder is generally a long-standing pattern of malice, you know, bad behaviors, maladjusted behaviors, that usually begin in childhood and involve actions that might include repeated grounds for arrests, violation of rights of others, increased irritability, argumentative, fighting, things of that nature. (3 No FD)

In conclusion, research question 4 assessed whether there was a pattern regarding *expert testimony of future dangerousness* between No FD cases and FD cases.

Specifically, the evaluation examined *mitigating evidence* and *aggravating evidence*

related to future dangerousness offered by an expert witness. There was a notable difference, both quantitatively and qualitatively, in *mitigating evidence* regarding *future dangerousness presented by an expert witness* between No FD and FD cases. There was no clear distinction between No FD and FD cases when *aggravating evidence* was given by an *expert witness regarding future dangerousness*. More than half of the cases had no *aggravating evidence* by an *expert witness on future dangerousness*. However, when *expert testimony on future dangerousness* was offered as *mitigating evidence* there was a difference between No FD cases and FD cases. There was more *mitigating evidence* by an *expert witness on future dangerousness* in No FD cases. Also, the cases with a finding of No FD all had face-to-face evaluations completed by doctors; whereas, two FD cases had face-to-face evaluations.

Additionally, the testimony was qualitatively different. All of the No FD cases had *mitigating expert testimony on future dangerousness* related to mental health issues. The FD cases had *mitigating expert witness testimony on future dangerousness* focused on the defendant being less aggressive, having a good history of incarceration, and consistency in taking medications. The FD cases that involved a separate evaluation (as opposed to the prosecution expert reviewing the defense evaluation) had testimony on more than one of these factors. In one FD case, the expert presented his own research on incarcerated offenders in Texas and their level of dangerousness. The expert compared characteristics (e.g., age, number of offenses, type of crimes, etc.) of the defendant to the research and predicted his future dangerousness.

Thus, the primary difference observed in the *expert witness testimony on future dangerousness* in No FD and FD cases was that none of the FD cases had testimony

about mental health issues that were not the “fault” of the defendant. Whereas the No FD cases had *expert testimony on future dangerousness* related to mental health issues due to family or environment that the defendant was exposed to as a child.

Research question 5: Mitigating and aggravating evidence. *Mitigating and aggravating evidence* were the contrasting primary themes assessed to address research question 5: **To what extent are patterns of mitigating evidence and aggravating evidence associated with negative and positive findings of future dangerousness?**

Before the results of each secondary theme of mitigating and aggravating evidence are presented, it is essential to understand the role of mitigating and aggravating evidence in relation to future dangerousness. The presentation of mitigating evidence in the punishment phase of a capital trial is the primary opportunity the defense has to talk about the background and character of the defendant. In some trials, mitigating evidence is presented by the defense attorney throughout the case, which is known as frontloading (Cheng, 2010). Mitigating evidence attempts to humanize the defendant, show another side of his/her life, and explain to the jury how the defendant got to the point of capital murder. Mitigating is not an excuse for the crime, but rather an explanation and an opportunity for the defendant to present a case for a sentence of LWOP. In Texas, a jury must find a defendant to be a future danger before a death sentence can be issued; however, even if the defendant is found a future danger the jury can still sentence the defendant to LWOP. Nine of the 18 cases reviewed in this research were the *only* nine cases in Texas in the last decade in which the jury found the defendant was not a future danger versus over 100 in the same time period in which a finding of future danger was found. The goal of this research was to determine any similarities or differences between

the nine No FD cases and nine matched FD cases. The mitigating evidence revealed some notable findings between No FD and FD cases.

Additionally, during the punishment phase, the prosecutor presents aggravating evidence to show the life pattern of the defendant as a way to prove future dangerousness. During the punishment phase, the prosecution can reiterate the factors from the instant offense that may lead a jury to conclude future danger; however, it is the only time the prosecution can bring in testimony regarding the defendant's criminal history. Moreover, this is the time the prosecution can provide testimony on negative aspects of a defendant's life that may persuade a jury to answer special issue 1: yes, it is probable that the defendant will commit future violent acts that constitute a threat to society.

This section first discusses the results of secondary themes of mitigating factors between No FD and FD cases. Second, the results of secondary themes of aggravating factors between No FD and FD cases are presented. And third, the results from secondary themes that were presented as both mitigating and aggravating are presented.

Mitigating evidence. *Mitigating evidence* consisted of more than one-third of the total testimony in the 18 cases examined for the current study. There were notably more mitigating references of testimony presented in the FD cases compared to the No FD cases (4,060 and 2,724, respectively). This alone did not reveal much when considering the context, in both groups of cases, the *mitigating evidence* was 36% of the total evidence presented (see Figures 11 and 12). It was expected that *mitigating evidence* should be an important component of the punishment phase in a capital trial because it is the only opportunity for the defense team to present evidence that could explain the defendant's character and background. It was expected that more *mitigating evidence*

would be presented in No FD cases.

A closer examination of the secondary themes was necessary to reveal patterns between the No FD and FD cases. The secondary themes coded as *mitigating evidence* were: *alcohol/drug abuse, child abuse and neglect, employment history, general good person, good history of incarceration/parole/custody, loving, compassionate, and caring, mercy, remorse, therapy, counseling, and programs, and youthfulness.*

Remorse, therapy, counseling, and programs, and youthfulness had very little testimony and are excluded from further analysis (see Figure 9). *Remorse* had a total of 40 coded references, *therapy, counseling, and programs* had 28, and *youthfulness* had 9. Two of these were emergent themes that in the end did not need to be coded. *Remorse* about crimes was defined as testimony regarding regret or guilty feeling by the defendant toward the current crime, crimes committed in the past, victims or victims' family members, or defendant's family members. *Therapy, counseling, and programs* was coded when the defendant was involved in or had been involved in therapy, counseling, or a program to better himself, either while incarcerated or on his own. And *youthfulness* was coded when there was testimony related to the idea that the brain does not fully develop until a person is in their mid-twenties and just because a defendant was adult age, did not mean he had a mature brain.

Mercy. As one would expect, more testimony regarding *mercy* was presented in No FD cases as compared to FD cases (see Figure 9); however, *Mercy* testimony was found in five No FD cases and six FD cases. *Mercy* was identified when the witness asked the jury for mercy or asked the jury to give the defendant a sentence of LWOP. There were four No FD cases and three FD cases that had no testimony related to *mercy*. The

message was consistent in both groups of cases. These messages consisted of pleas for LWOP, love of defendant, or the good the defendant could accomplish in prison. The word “mercy” was used five times in the No FD cases and one time in the FD cases. It could be assumed that asking the jury for “mercy” had little to no impact in the 18 cases analyzed for the current research. *Mercy* was only coded 92 times total in both groups of cases. The following excerpts are examples of *mercy*:

Q. Are you asking this jury to spare his life?

A. Yes.

Q. Mr. Atchley, are you asking this jury to spare him, spare his life?

A. Yes, I am, most definitely, as heartfelt as I can. (7 No FD)

Q. And is there anything you would like to say to them to help them know something about him?

A. Well, I love Kwame. I feel in my heart, I know he will deposit to somebody in the prison system. And I'm sorry about what took place to the people, innocent people, but I do love Kwame and I hope you spare his life. (1 FD)

Q. You know the jury's gonna have to make a -- a big decision in your brother's life, don't you?

A. Yes.

Q. You understand that?

A. Yes, ma'am.

Q. Would you -- well, I know what you want, right?

A. Yes.

Q. You want to go see him in prison, don't you, alive?

A. Yes. (7 FD)

In conclusion, both family members and close friends testified asking the jury for *mercy*. It was always communicated as a plea, which may have made an impact on some jurors. The similarity between the groups was the message, though more witnesses explicitly asked for “mercy” in the No FD cases. Pleas for mercy occurred in the same context between No FD and FD cases. Mercy would not be considered a mitigating factor in the current study. While there was slightly more testimony regarding *mercy* in No FD

cases than FD cases, more FD cases included testimony seeking *mercy*. The conclusion would be that *mercy* did not support a salient factor in either No FD or FD cases.

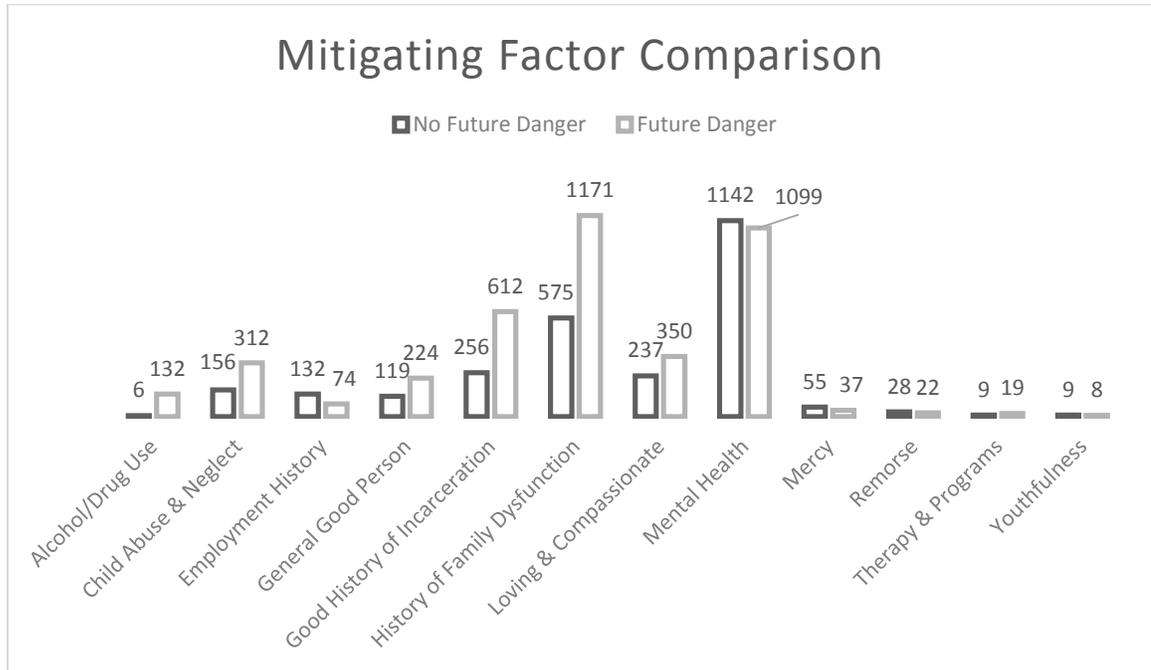


Figure 9. Mitigating Factor Comparison for all 18 Cases. This figure illustrates all the references coded to the secondary themes for all the cases.

Employment history. *Employment history* was defined as testimony about the defendant’s employment history (e.g., was employed, was a good employee, etc.).

Employment history was identified as a mitigating factor because it showed a defendant’s stability. The expected outcome for *employment history* was more references of testimony in No FD cases than FD cases.

More than twice as many references to *employment history* were found in No FD cases compared to FD cases. *Employment history* was testified to in six of nine No FD cases and four of nine FD cases. Due to the low number of references, *employment history* would seem marginally relevant in the current study. Of the nine No FD cases, three had no testimony and the remaining six ranged from 2 – 80 references. Whereas,

five FD cases had no testimony and the remaining four cases ranged from 7 – 37 references. *Employment history* was similar in context between No FD and FD cases (e.g. good employee, worked hard, length of employment). The following are examples of testimony *regarding employment history*:

Q. Was there a time after he came out of prison that he worked at your restaurants?

A. Yes, sir.

Q. Restaurants?

A. He worked for us for •• typically it would be several months. He was a very good employee. (9 No FD)

Q. And Kwame (defendant) was not working sales at that time? He was actually working in the finance department?

A. Yes. He was in charge of the finance department, yes. (1 FD)

Q. And how long did he work there before he was arrested for this offense, would you say

A. Almost about a year.

Q. About a year?

A. Yeah.

Q. And was he a regular employee?

A. Yes.

Q. That is, did he come every day?

A. Yes, he did.

Q. How many days a week did you all work?

A. Six days a week (1 No FD)

Overall, few references were coded regarding *employment history*, because most of the defendants did not have employment histories. The results showed more *employment history* in No FD cases, which supports the idea that someone who has shown stability in their life should not be considered the worst of the worst. The goal with presenting an *employment history* was for the defense to show that the defendant could be stable and adhere to conventional norms. It made sense that jurors might have seen these defendants as more stable than those without an *employment history*. As this

testimony showed, the defense does not try to hide past criminal history. The purpose was to present a picture that showed the defendant was human and had a work history. The conclusion is that *employment history* was a mitigating factor, seen more prevalent in No FD cases than FD cases; however, it was not one of the mitigating factors with a great amount of testimony.

Alcohol/drug abuse. Alcohol/drug abuse was defined as testimony regarding a defendant's history of alcohol and/or drug addiction. *Alcohol/drug abuse* context was different than the aggravator *alcohol/drug use*. The context of the mitigator was assessing diagnosed addiction or abuse and extensive history related to emotional or mental trauma. There was no expected outcome of the assessment. Past research showed alcohol/drug abuse resulted was more often viewed by jurors as aggravating (Barnett, Brodsky, & Price, 2007; Marlow, Lambert, & Thompson, 1999; Stevenson, Bottoms, & Diamond, 2010; Wall & Schuller, 2000).

Overall, *alcohol/drug abuse* was not a mitigating factor for No FD cases; six of the nine cases had zero references, two cases had one reference, and one case had four references. There was very little mitigating testimony regarding alcohol and/or drug abuse in No FD cases. The FD cases revealed a different story of alcohol and drug abuse. Even though three FD cases had zero references and one case had only one reference, the remaining five cases had references that ranged from 7 – 47. The FD cases had notably more mitigating testimony regarding alcohol and/or drug abuse.

In summary, when alcohol and drug abuse was presented as a mitigating factor, the jury may have considered it an aggravating factor. Examples of alcohol and/or drug abuse testimony presented as mitigating evidence in FD cases are as follows:

Q. Could I get you to look two lines up from that line in your report?

A. Okay. Oh, he stated -- I'm sorry, he stated he started using alcohol and a number of drugs in his adolescence and that he used many substances daily when he had the money to obtain them. (9 FD)

Q. How was that significant, Doctor?

A. It's significant because of the reasons that he turned actually to each of the drugs that he used. He said that he turned to alcohol and marijuana. Marijuana in particular, he said, I was smoking marijuana to numb my mind to stop me from thinking about all the bad stuff that had happened to me and especially to stop me from thinking about the sexual abuse. (6 FD)

In both of these examples the defendant had been using drugs since adolescence; both to forget and numb the pain of past experiences. It cannot be presumed that the evidence regarding *alcohol/drug abuse* was the sole reason the jury determined the defendant was a future danger; however, it should be noted that *alcohol/drug abuse* as mitigating evidence did not help a defendant who was seeking a sentence of LWOP in the current study. *Alcohol/drug abuse* was more aggravating than mitigating.

Child abuse and neglect. *Child abuse and neglect* was defined as testimony regarding abuse or neglect that the defendant suffered as a child. The expected outcome was that a history of child abuse and neglect would be considered mitigating and would help explain a defendant's behavior. *Child abuse and neglect* was not a mitigating factor for the No FD cases; six of the nine cases had no testimony. Of the FD cases, only two had no testimony and the remaining seven cases had references that ranged from 2 – 192. The highest number of references in the FD cases was more than double the highest number of reference of the No FD at 81. The following are excerpts of testimony related to a history of child abuse or neglect presented as mitigating evidence in FD cases:

Q. At one point in time are you aware of Christopher (defendant) being beaten by his stepfather?

A. Yeah, his mom told us when she came back, because she also was assaulted by him. She even had to—her whole face was messed up when they first came back down here. (2 FD)

Q. Okay. Can you describe for this jury then, you know, what parental skills your mother and father exhibited towards you?

A. None at all.

Q. Who was responsible-- can you tell the jury who was responsible for maintaining this household?

A. Me and my oldest brother were.

Q. And where were you parents at the time?

A. In the bar. (3 FD)

These two examples range from sexual abuse to neglect of supervision; one was testimony from a doctor while the other was testimony of a sibling. In both of these cases the defendant was found to be a future danger. The current research, as well as some extant literature on child abuse and neglect as a mitigating factor, was either not mitigating, not important, or aggravating (Ball, 2005; Barnett et al., 2007; Najdowski, Bottoms, & Vargas, 2009; Platania & Kostantopoulou, 2014; Stevenson, Bottoms, & Diamond, 2010).

General good person. *General good person* was defined as testimony regarding the defendant's behavior that indicated he was generally good— as a parent, as an employee, as a community member (e.g., respectful, prosocial, attended church; did well in school, etc.). This testimony was generally from friends or family of the defendant with an occasional pastor or teacher. One would expect more testimony regarding the defendant as a *general good person* to be found in No FD cases.

The results revealed an interesting pattern with two No FD and three FD cases having no testimony regarding the defendant being a good person; slightly more than two-thirds of the all 18 cases had testimony about the defendant being good person.

Additionally, the case with the most references (141) was a FD case, while the highest No FD case had 35 references. The rest of the cases had evenly distributed number of references (range: 1 – 34). There were nearly twice as many coded references for FD cases compared to No FD cases.

The following examples of testimony regarding general good person are from two cases, one No FD and one FD:

Q. And very polite?

A. Yes, sir. He (defendant) was -- he -- very polite to my wife. I brought some of my family members. Because I was so proud that they went as missionaries. But he was very polite to me and my wife. Very kind. Sweet kid. If I had a son, I would want Noah (defendant) to be my kid. (5 FD)

Q. You say you've known him nearly all your life?

A. Yeah.

Q. Do you think there's good things in Andrew (defendant)?

A. Yes.

Q. What do you think those are?

A. He's a strong-willed person that can really get things done and has so much potential and can be a very, very loving person. (7 No FD)

In conclusion, testimony regarding the defendant being a respectful, prosocial, church attending, or a good student did not seem to sway the jurors one way or another, if anything, this testimony leaned more towards a non-mitigating or non-relevant factor.

Good history while incarcerated. Good history while incarcerated, on parole/probation, or in custody was coded when the defendant's behavior was good when in custody of the criminal justice system (e.g., no violence, followed rules, trusted by staff, completed programs, etc.). This evidence may have been from a previous prison incarceration, waiting for trial in county jail, on parole/probation, or while being arrested by police. *Good history while incarcerated, on parole or probation, or in custody* presented as a mitigating factor was not a strong mitigating factor. It was expected that if

the defendant had success during previous incarcerations or on probation, it was more likely he/she could live out life incarcerated.

There were more references of *good history while incarcerated* in FD cases than No FD cases. Two No FD cases had zero references to *good history while incarcerated*, while all the FD cases had some references (4 – 391) to *good history while incarcerated*. The highest No FD case had 73 coded references. The context of the testimony was the same in No FD and FD cases. Examples of these references included good behavior while in prison or jail, completion of parole or probation, or respectful to law enforcement while in custody:

Q. Were you surprised to learn that he had been charged and convicted of capital murder?

A. Yes, I was.

Q. Why is that?

A. Well, because like I said, he never gave me any problems when he was in placement. (6 FD)

Q. You stopped him, got him out of his car. During that stop and detention of Mr. Segura (defendant), he did not resist you in any fashion?

A. No, sir.

Q. He didn't call you any names?

A. No, sir.

Q. Didn't make any threats toward you?

A. No, sir.

Q. Didn't offer or indicate he might have stopped you in any way?

A. No, sir.

Q. And to the extent that anybody arrested for a criminal offense cooperates, he cooperated with you after you got him out of the car?

A. That's correct. (9 No FD)

In conclusion, there was notably more testimony regarding *good history of incarceration, on parole or probation, or in law enforcement custody* in FD cases compared to No FD cases. The context between the groups of cases was the same. To have a good history, there must be prior criminal justice intervention and the jurors may

have interpreted this history as negative regardless of whether the defendant had good behavior. The defense presented this type of evidence to show that the defendant could live in a structured environment.

Loving, compassionate, and caring. Loving, compassionate, and caring was coded when the testimony described how the defendant exhibited behavior that showed *love, compassion, or caring* (i.e., to children, spouse, family, or others). More effort by the defense to present a picture that the defendant *was loving, caring, and compassionate* was evident in three FD cases; moreover, there was no effort by the defense to present a picture of a *loving, caring, or compassionate* in three No FD cases. There were mixed findings. This was the type of evidence that the defense relied upon to help make the defendant seem human, as opposed to a monster. It was not a decisive mitigating factor and it seemed that when too much testimony was given it may have been interpreted as an effort by the defense to make the defendant look like someone he was not.

FD cases had the highest three and the lowest three references of *loving, caring, and compassionate*. Both No FD and FD cases each had two cases with no testimony. The No FD cases had the majority of the midrange number of references. The message relayed was similar in both No FD and FD cases, and family and friends were most often the witnesses:

Q. Would he come by your house and play with you guys?

A. Yes.

Q. A bunch?

A. Yes, ma'am.

Q. What would y'all play?

A. We played a lot. We'd see him, and we'd just run up to him, just start hugging and playing.

Q. So all the girls get excited when the big brother shows up?

A. Yes. (7 FD)

Q. Was he ever a problem around the house?

A. No.

Q. Did he - what would he do to help y'all around the house?

A. He would help take care of my kids while I went to work. He would keep the house clean, wash clothes, took care of my car, yard work. Basically did everything that a father or the male of the house would do. (9 No FD)

In summary, *loving, compassionate, and caring* did not show a distinct pattern between No FD and FD cases. There was more testimony regarding *loving, compassionate, and caring* behavior in FD cases, but not noteworthy. The similarity between No FD and FD cases was the message (e.g., playing with siblings, taking care of household chores, watching children, etc.).

In conclusion, there were only one mitigating factor that revealed a prominent pattern: *employment history*. This mitigating factor was seen in No FD cases and absent in FD cases. The message was similar between both groups. *Employment history* did not have a large amount of testimony.

Researchers in prior literature discussed that *alcohol and drug abuse* and *child abuse* had been viewed by jurors as both mitigating and aggravating. Though there was not a great deal of testimony related to these two themes, the data revealed that jurors found both themes were aggravating—there was more testimony regarding *alcohol and/or drug abuse* and *child abuse* in FD cases. The themes of *general good person, good history of incarceration*, and *loving, compassionate, and caring* would be mitigating evidence relied upon to show the good qualities in the defendant. Again, the findings revealed that more mitigating evidence in these three areas were presented in FD cases (see Figure 9). Thus, these findings revealed that not all mitigating evidence was viewed by the jurors in the

manner the defense team had planned. In fact, the only mitigating factor that had a positive association with a finding of No FD was *employment history*.

In sum, all the mitigating factors were counter to the expected outcome, except *mercy, remorse, and employment history*. However, *mercy* and *remorse* were not strong enough to justify a pattern. This information could suggest that much of the mitigating evidence presented was not as important as the defense projected. Finally, the remaining three mitigating factors, *remorse, therapy, counseling, and programs, and youthfulness*, were not noteworthy in the current study.

Aggravating evidence. Aggravating factors were defined as evidence that was presented to intensify a defendant's future dangerousness. This evidence was presented by the prosecution and included *criminal history, weapon use, gang membership, negative history of incarceration, parole or probation, or in police custody, and aggressive behavior*. Aggravating evidence could include details about the instant offense, but in this study, these details were not coded.

In No FD cases, 40% of the coded testimony was aggravating; while in FD cases, 50% of the coded testimony was aggravating. It was expected that more aggravating evidence would be presented in cases where the defendant was found to be a future danger. Aggravating evidence was presented by the prosecutor to show future dangerousness. There were eight secondary nodes under aggravating evidence; six of the eight secondary nodes went in the direction expected; more aggravating evidence in FD cases than No FD cases. However, *history of family dysfunction* and *mental health issues* were in the opposite direction than expected; these two factors are discussed in the last section (see Figure 10).

Furthermore, there were not any dissimilar messages related to aggravating evidence between No FD and FD cases.

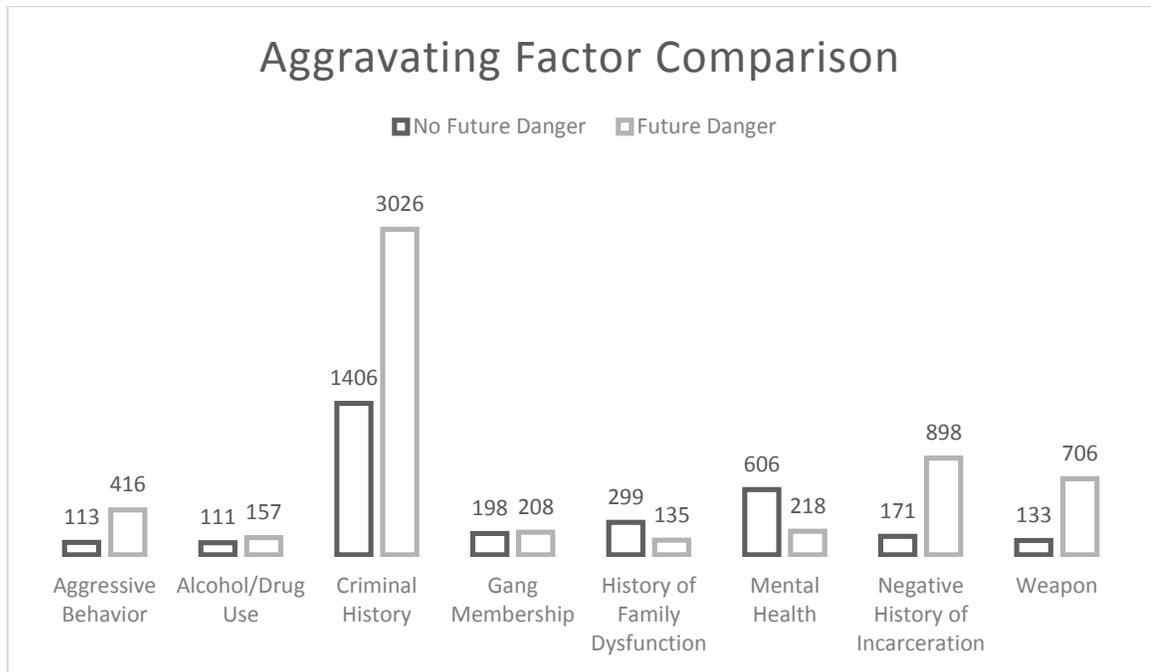


Figure 10. Aggravating Factor Comparison for all 18 Cases. This figure illustrates all the references coded to the secondary themes for all the cases.

Criminal history. Criminal history was defined as information presented as the defendant’s criminal history, not related to instant offense, and included only formal adjudications. Evidence of the defendant’s criminal history accounted for more than half of all the aggravating evidence presented. Criminal history had 4,432 references. As one may expect, criminal history was presented more than twice as much in FD cases compared to No FD cases, 3,026 and 1,406 respectively (see Figure 10). Criminal history was testified to in 17 of the 18 cases. References included testimony from police, jailers, victims, and co-defendants. There was no prevalent difference in the message between No FD and FD cases. The following are examples of testimony on criminal history:

Q. And when was it that that offense took place?

A. That offense took place on April the 4th, 2008.

Q. When you received the case file or the report from Officer Gilbert on April 5th of 2008, did you have any leads or any information to begin your investigation?

A. Not at that time I did not.

Q. Did you have the name of the victims in that case?

A. Yes, the victims were listed in the report (7 FD)

Q. And, Deputy, beginning with cause 92-1644 within that document, for what offense is that a conviction?

A. Burglary of a habitation.

Q. Does it indicate what offense date that was committed?

A. Offense date was July 24, 1991.

Q. And the date the sentence was imposed? A. Date sentence imposed, August 5, 1992. (9 No FD)

A. Yes. When I got off of work around 8:00 o'clock when we were closing, I went to the back where the lockers are where most everybody puts their belongings. And my keys were in there and they were gone.

Q. So let's focus on December 27th now. You go, your keys are missing. What did you think?

A. First I thought maybe I misplaced them. So I went to the parking lot and I checked to see if my car was there, and it wasn't. And I was like, well, maybe -- maybe I can't remember. So I looked through the whole parking lot, because I always parked in the same lot, and it wasn't there. (5 No FD)

Criminal history testimony included a lot of detail; in several cases the prosecution incorporated testimony from several witnesses regarding one offense (e.g., first officer on scene, detective, victim, and witness would all testify about the same offense). The details of the defendant's *criminal history* gave the jurors a broad view of the impact of crime. The *criminal history* often was the longest part of the punishment phase of the trial, which may have made an impact on the jury. In conclusion, extensive testimony regarding a defendant's *criminal history* was a predominant pattern in FD cases. The message was similar between cases.

Negative history while incarcerated. Testimony regarding a defendant's *negative history while incarcerated, on parole/probation, or in the custody of the police* was an

aggravating factor relied upon by the prosecution to show the defendant could not successfully live out a LWOP sentence. *Negative history while incarcerated* was another secondary aggravating theme that was notable in FD cases. FD cases had more than six times as much negative history while incarcerated testimony compared to No FD cases (see Figure 10). It was conceivable that jurors would view defendants who had more negative experiences of incarceration as those who were more dangerous, or less salvageable. Therefore, deserving of the death penalty. The context of the testimony was consistent between the No FD and the FD cases and included disciplinary actions from previous incarcerations, non-completion of programs, and violations of probation or parole; examples of testimony are in the respective order:

Letter from defendant read in open court: I've been getting in a lot of trouble here. First, I beat up a jailer in here but they clicked me at the end. So I got another assault on a public servant and resisting arrest. Second, they found a cuff key on me so they charged me of manufacturing an escape tool. Third, they found a gang writing on my walls and shoes so gang unit took more pictures of my walls and tattoos. Finally, fourth, they found needles and razors in my cell so they wrote me up for contraband and classified me as dangerous and high-risk prisoner. (8 FD)

Q. And did he ever successfully finish Casa Phoenix Program?

A. No, he did not. He was discharged a second time on November 29th of 2013 and, basically, he was discharged for continued behavioral issues. (6 FD)

Q. What was his condition when he came in for his meeting?

A. He was just released from jail. They had had a parole hearing on him in which they did not find, and so they had released him back into supervision.

Q. And how long after that did you meet with him?

A. I did a home visit on him that month, and then I had instructed him to show up in February. I believe it was February 7, 2002. And he did not show up to the office for his office visit. (9 No FD)

Negative history of incarceration, parole/probation, or in custody was testified to by jailers, parole and probation officers, police, or by other offenders. This *negative history of incarceration* explained to the jury that the defendant could not behave appropriately

even when in custody of the criminal justice system. The context of the message was the same between groups of cases. There was a prevalent pattern of testimony of *negative history of incarceration, on parole/probation, or in custody of law enforcement* in FD cases, but not in No FD cases.

Weapon and aggressive behavior. *Weapon* and *aggressive behavior* were two additional secondary themes that were notable in future danger cases. It would be expected that testimony regarding both of these factors would more often be found in FD cases. *Weapon* was defined as testimony about the defendant's possession of any type of weapon. *Weapon* had more than five times as much testimony in FD cases compared to No FD cases (see Figure 10).

Aggressive behavior had more than three times as much testimony in FD cases compared to No FD cases (see Figure 10). *Aggressive behavior* was defined as behavior not resulting in a criminal violation; that was threatening or intimidating, by words or actions, and included risky behavior (e.g., bad behavior in school or work or planning of a criminal activity, etc.). *Aggressive behavior* was an emerging theme that was added to capture behavior that jurors heard testimony regarding, but was not coded elsewhere. The researcher thought this behavior might influence a juror and it needed to be captured.

Both *weapon* and *aggressive behavior* fit rational reasoning, that defendants with the most references regarding *weapons* and *aggressive behavior* were the worst of the worst offenders—a future danger. The context of the testimony was similar between FD and No FD cases. The following examples are testimony related to weapons and aggressive behavior:

Weapon:

Q. You stated that the three with guns had the guns to your head?

A. Yes.

Q. What happened then?

A. The one that had the shotgun tells one of them to watch Daniel and that if he moved, to kill him. (6 FD)

Q. So, he's already been arrested for possession of a handgun?

A. Yes.

Q. So what happened when you are searching him?

A. In the process of searching him, then, that's when I felt an object, a hard object in his coat pocket and I looked in and found that there was another pistol.

Q. All right. So, did you ultimately take him in for one pistol or two?

A. No, I took him in then for two. (3 No FD)

Aggressive behavior:

Q. Okay. And describe for jury what happened during that [job interview].

A. Well, it was never completed because Paul (defendant) came in and interrupted. He was afraid that I was having an affair with this doctor.

Q. When you say he came in and interrupted, how did that happen?

A. He just barged his way in.

Q. And what did he do once he came -- once he was in the room?

A. He said this interview is over, you're coming with me.

Q. And did you leave with him?

A. Yes, I did. (9 FD)

Q. And did he tell you why he wanted to have his sister killed?

A. Something about the contesting of the will, something, if one of them fought over the will and not to get it or something like that, she was -- I don't know, she was already contesting it or something like that.

Q. Did he discuss with you what you could get in return for helping him out?

A. Yeah. I was told I was going to get \$250,000 once everything was taken care of. (7 No FD)

In conclusion, both *weapon* and *aggressive behavior* had a similar and dissimilar pattern in No FD and FD cases. The similarity, for both themes, was that the context of the testimony was the same in both No FD and FD cases. The difference was that both themes were predominant in FD cases and virtually nonexistent in No FD cases. Of the two themes, *weapon* and *aggressive behavior*, *weapon* had a stronger impact on FD cases.

Alcohol/drug use and gang membership. The findings regarding the last two aggravating factors examined, *alcohol/drug use* and *gang membership*, revealed that FD

cases were more likely than No FD cases to involve testimony that focused on *alcohol/drug use* and *gang membership*. However, the difference in the amount of testimony was not great (157 FD to 114 No FD in *alcohol/drug use* and 208 FD to 196 No FD for *gang membership*; see Figure 10). The notable finding was *alcohol/drug abuse/use*; both mitigating and aggravating evidence was found more often in FD cases compared to No FD cases. This may be interpreted that *alcohol and/or drug abuse/use* was viewed by the jurors as aggravating; perhaps because it was seen as a choice.

The context of the message was the same in both No FD and FD for both *alcohol and/or drug use* and *gang membership*. The following are excerpts from both of these aggravating factors:

Alcohol/drug use:

Q. Okay. UA is a urinalysis?

A. Urinalysis, yes, ma'am.

Q. And he came up positive several times?

A. Yes. He would always be apologizing to me for -- telling me, you know, he's sorry. (1 No FD)

Q. Okay. Do you recall how many times she had been tested by 2001?

A. I see one test.

Q. And what were the results of the test?

A. Positive for cocaine.

Q. Had any of the children that she had up to that point, been tested?

A. One. (4 FD)

Gang membership:

Q. In this case, confirm him, [defendant's name], as a member of the Texas Syndicate?

A. Yes, sir.

Q. And before designating somebody, before saying "This inmate is a member of Texas Syndicate," is there a review process?

A. Yes, sir. (9 No FD)

Q. He was LTC member?

A. Right. Alief.

Q. Now, when a person is cliqued in, as you described it they've gotten beat up, what happens in LTC? They get beat up, but what else happens?

- A. They get a marking.
Q. Marking, what kind of marking?
A. A number 3?
Q. What does the 3 present?
A. Barrio Tres. (6 FD)

In summary, both *alcohol/drug use* and *gang membership* were aggravating factors more often found in FD cases than No FD cases. However, these two aggravating factors showed a less prevalent than other aggravating factors, primarily due to the number of references of in the testimony. The message of the testimony in both factors, was similar between cases.

In conclusion, the aggravating factor with the most discernable pattern between No FD and FD cases was *negative history of incarceration, on parole/probation, or in custody of law*. This secondary theme had the second highest number of aggravating factor references, but proportionately, it occurred six times more often in FD cases compared to No FD cases. *Criminal history* was the second most prominent factor. *Criminal history* was presented as an aggravating factor in all but one of the 18 cases and it had notably more references than any other secondary theme.

All of these aggravating factors were more prominent in FD cases than No FD cases; *weapon* and *aggressive behavior* to a lesser extent, and *alcohol/drug use* and *gang membership* even lesser. The context of the message was the same for each secondary theme between No FD and FD cases.

Mitigating and aggravating. *Mental health issues* and *history of family dysfunction* were both presented as mitigating and aggravating evidence. This is sometimes referred to as the “double edged sword,” as it cuts both ways (Bowers &

Foglia, 2003). There is a clearer understanding of these two secondary themes when the mitigating and aggravating results are presented together.

Mental health issues. *Mental health issues* were coded as both a mitigating factor and an aggravating factor. *Mental health issues* as mitigating evidence, psychological or cognitive, was defined as something that a defendant could not control; therefore, making him less culpable. However, *mental health issues* were defined as aggravating evidence because the defendant did not have control over the *mental health issue*, which made it uncontrollable; therefore, it made him more dangerous. There was not a clear expectation of direction for *mental health issues*.

Mental health issues were presented as mitigating evidence more than three times as much as *mental health issues* were presented as aggravating evidence. Both mitigating and aggravating testimony on *mental health issues* was found in No FD cases (see Figure 9 and Figure 10). This was not anticipated—it would be expected that more mental health mitigating evidence would be presented in No FD cases, and not more mental health aggravating evidence.

Mitigating evidence. The number of mitigating mental health references was similar between No FD (1,142) and FD (1,099) cases. Of the No FD cases, only three of nine cases had mental health mitigating evidence, while eight of nine future danger cases had mental health mitigating evidence. The three No FD cases that had testimony related to *mental health issues*, were a result of the neglectful parenting: one defendant was put in a garbage dumpster at age three months by his mother, one defendant had parents who did not emotionally bond to the defendant due to their own mental health issues, and one was born with fetal alcohol syndrome. Examples of the parental induced *mental health*

issue are discussed in the following excerpts:

A. You have a child that can't process. He's scared of everybody. He believes everybody is against him. They know the history that he had a reactive attachment disorder predicated upon probably some bad things that happened with being rejected and abandoned. (3 No FD)

A. Well, I determined that he had what we refer to as an impaired attachment. The environment that was presented to him as a child, as an infant, and then ongoing had not been enough to meet his needs to become emotionally attached in a healthy way. (7 No FD)

A. And there are the primary deficits. That's the -- usually related to the direct effect of the alcohol on your brain kind of as you come into the world. And so you've got difficulties with learning disorders, you've got difficulties with impulsivity. And you might be short or slight. You may have trouble in terms of sucking or feeding and things of that nature. You may have difficulties with your memory. And those are the -- kind of the hard-wired difficulties. (5 No FD)

Whereas, when *mental health* evidence was provided in FD cases as mitigating evidence, the mental health issues included neurological development, low IQ, psychotic diagnosis, and behavioral problems at school:

Q. So, again, what were the conclusions that you reached?

A. First of all, my conclusion is that Juan (defendant) suffered a great deal of trauma in his childhood years. It was repetitive and pervasive and that the level of his trauma could be defined as extreme to a level that we looked at in the scientific literature about the impact of such trauma on the development of children/adolescents; both their neurological development, their behavioral development, as well as their psychological and mental health problems. (6 FD)

Q. Could you explain to the jury what you found?

A. Specifically with the IQ, her overall IQ is 82. That's a low average. Her performance IQ falls in the average range and verbal IQ in the low average range. Another score that's derived from that is called the verbal comprehensive score. And that score fell in the border line range, which means that it's close to the mentally retarded range. (4 FD)

Q. All right. Tell the jury what does Haldol, what does that address?

A. Haldol is an antipsychotic medication. (9 FD)

A. Apparently it was bad enough that the school threatened to expel him from first grade.

Q. And -- and that's pretty bad to get threatened to be expelled from first grade?

A. I think that's pretty unusual. (7 FD)

These were the main themes of mental health mitigating evidence in the FD cases; some cases included testimony on more than one of these issues. These FD case issues were different than the issues in the No FD cases; the issues in the FD cases could not be changed (IQ and psychotic disorder) or the defendant chose not to change his behavior—making the defendant more dangerous.

Aggravating evidence. There was more aggravating mental health testimony in the No FD cases (606) than the FD cases (218). The expectation was counter to the actual results. One would expect more aggravating evidence mental health evidence would be presented in FD cases. An examination of the aggravating mental health testimony showed that three of nine No FD cases had references, while eight of nine FD cases had references. However, the No FD cases had almost three times as much testimony.

The aggravating mental health evidence was always a counter argument to the defense testimony related to mitigating mental health issues. Typically, it included an evaluation by a doctor hired by the prosecution—most often an evaluation of records or of the defense's evaluation. Moreover, in FD cases, the prosecution witness often indicated the possibility of an antisocial personality disorder, which was identified as a disorder that could not be modified with medication and was very dangerous. The following were examples of aggravating mental health testimony:

Q. Now, you also stated that you had diagnosed him with conduct disorder, adolescent onset type. Would you explain what that means?

A. Conduct disorder is from the adolescent disorders. It is, basically, a disorder, a behavioral disorder and it's, as far as the behavioral disorders or kind of order, it's probably the most -- or it is the most severe of the adolescent behavior

disorders. If a kid is coming in that had something recent happen to them and their behavior was kind of a result to a death in the family or something that had happened recently, it would be an adjustment disorder. If it became a little bit more long-term, it would be a disruptive behavior disorder. If it was really focused at authority figures, it would be an oppositional defiant disorder. And as those behaviors get increasingly severe, they would become a conduct disorder. (6 FD)

Q. His Axis II diagnosis is a personality disorder not otherwise specified, antisocial avoidant and passive aggressive traits. Does that sound like a diagnosis?

A. Yes, it is.

Q. -- that you reviewed and, in fact, included in your report?

A. Yes.

Q. And antisocial, that would be like an antisocial personality disorder?

A. Yes, ma'am.

Q. Is that correct?

A. Yes.

Q. And passive aggressive traits, again, would be a personality disorder?

A. Yes.

Q. But traditionally the viewpoint has been that an Axis II diagnosis is a diagnosis of who the person is and typically is not changed?

A. Yes and is not stable. (9 FD)

The aggravating testimony related to mental health issues was primarily a response from the prosecution, which would explain why there was more aggravating testimony in No FD cases. The difference in the aggravating mental health testimony between the No FD and the FD cases was that FD cases had more testimony related to unchangeable personality disorders.

In conclusion, *mental health issue* was not a mitigating factor in the current research. The context of the testimony was similar in each group of cases. Even though there was slightly more mitigating references to *mental health issues* in No FD, an outlier skewed the results. There were FD cases with *mental health* aggravating testimony, but notably more aggravating testimony in No FD cases. It is possible that more aggravating evidence was presented in the No FD cases to ensure a strong argument to the mitigating *mental health* evidence. *Mental health issues*, both mitigating and aggravating, did not

substantiate a discernable pattern between No FD and FD cases.

History of family dysfunction. *History of family dysfunction* was defined as information pertaining to the defendant's family dysfunction as a child or adult; when the defendant was a child it included divorced parents, parental alcohol/drug use, lack of supervision, family violence between parents, living with grandparents, or extreme poverty. If it related to the defendant as an adult it included marital problems, spousal addiction issues, divorce, family violence, extreme poverty, or low education level. *History of family dysfunction* was presented as mitigating evidence by the defense to help the jury understand the defendant's childhood and/or current familial culture. Whereas, *history of family dysfunction* was presented as aggravating evidence by the prosecution to explain to the jury that this was the only way of life the defendant knew and it would not change.

It was expected that more mitigating *history of family dysfunction* evidence would be presented in No FD cases and more aggravating *history of family dysfunction* evidence would be presented in FD cases—the opposite was found in the data. Both mitigating and aggravating are presented together in this section due to the inconsistent results and the relationship of the evidence (see Figure 9 and Figure 10). *History of family dysfunction* as a mitigator was found in eight of nine No FD cases and eight of nine FD cases. *History of family dysfunction* as an aggravator was found in five of nine No FD and seven of nine FD cases.

In the FD cases, *history of family dysfunction* was the most coded mitigating reference (1,171). FD cases had the highest two number of references at 271 and 519, while the range of the references in the No FD cases ranged from 0 – 266. There was

nearly twice as much testimony to *history of family dysfunction* as *mitigating* evidence in FD cases compared to No FD cases.

There was no consistent pattern regarding types of family dysfunction between the groups of cases, No FD or FD, as mitigating or aggravating. The cases most often had two or three types of dysfunctions presented, including testimony on poverty, education level within the defendant's family, parental marriage issues, parental mental health issues, and parental alcohol or drug use, as depicted in the following excerpts:

Q. Were you all without utilities at times?

A. Yes, sir. For months at a time we were out until -- the lights and water, and stuff like that. And we were -- we had to go and get water from the neighbors to bathe, and stuff like that. And flashlights, candles. That's all that we had. (2 No FD)

Q. Neither AJ (defendant) nor his younger brother Andrew graduated from high school, right?

A. No, sir, they didn't.

Q. They quit going to school?

A. Yes, sir.

Q. Do you remember what grade AJ was in when he quit going to school?

A. I believe the 9th grade. (9 No FD)

Q. What were you-all always fighting about?

A. Well, we're talking about whenever I got out.

Q. When you did that, who was taking care of Juan (defendant)?

A. He was frustrated because he did not want to be responsible for them, and I did not want to be responsible for them either. I mean, and we will fight and I will see that Juan Manuel, who was already 3 years old, he will hide. He will leave and hide underneath the bed or he will also hide in the closet or at the corners. (6 FD)

Q. You saw them drunk in your home?

A. Yeah.

Q. Your mother, Frances, used and abused alcohol?

A. Yes, sir.

Q. You saw her drunk in your home?

A. All the time. There wasn't one day she wasn't drunk. (3 FD)

Thus, the context of the testimony on *history of family dysfunction* was the same regardless of whether the testimony was mitigating or aggravating or in a No FD or FD

case. The notable result was that the number of references was opposite of the researcher's expectation—more than double mitigating evidence in FD cases and more than double aggravating evidence in No FD cases.

In conclusion, *history of family dysfunction* did not mitigate for a sentence less than death. A conclusion could be that when jurors heard about a defendant's familial chaos, it is possible they assumed that the defendant would not have the support needed to live out a life of incarceration or that the chaotic lifestyle was all that the defendant knew and would not be able to make any substantial life-changes.

Additionally, more *aggravating history of family dysfunction* and *aggravating mental health issues* were found in No FD cases. With regard to *mental health issues*, the results could be explained as mental health issues dismiss culpability because the defendant was not in control. The *history of family dysfunction* was not as easily explained, other than a typical capital defendant would most likely come from a family with pervasive dysfunction.

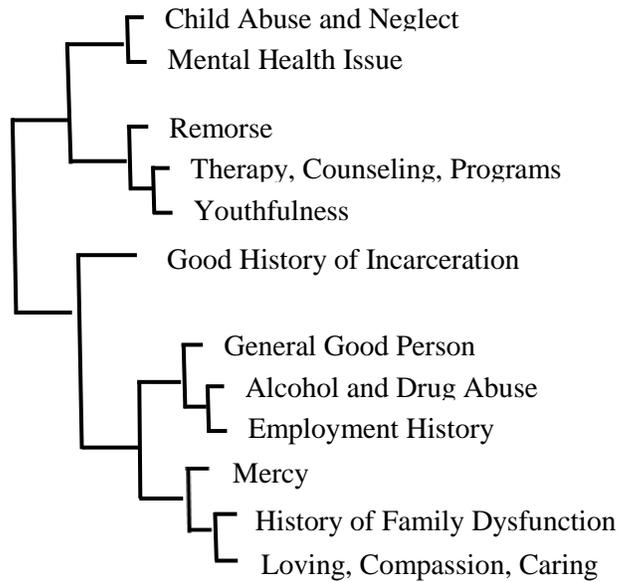
In summation, research question 5 assessed whether there was a pattern regarding *mitigating* and *aggravating evidence* between No FD and FD cases. In that regard, the only mitigating factor with a substantial pattern was seen in No FD cases and absent in FD cases was *employment history*. The context was similar between both groups. All the aggravating factors went in the direction as expected, except *mental health issues* and *history of family dysfunction*. This information could suggest that *mental health* testimony was always seen as mitigating evidence, even if the prosecutor was presenting it as aggravating evidence. However, *history of family dysfunction* was not clear at all; the opposite direction was found in aggravating factors and mitigating factors—when

presented as a mitigator it was found more often in FD cases and when presented as an aggravator it was found more often in No FD cases. The most notable aggravating factors were *criminal history, negative history of incarceration, weapon, and aggressive behavior*.

Cluster analysis of mitigating and aggravating factors. A cluster analysis was completed on both mitigating and aggravating factors in each group of cases (No FD and FD) to assess whether any factors were correlated. The results were then compare between No FD and FD cases. A cluster analysis generates a diagram of the themes, in this case all mitigating secondary themes (Figure 11) and separately all aggravating secondary themes (Figure 12), to determine any correlation. The cluster analysis was completed on coding similarity, which clustered themes that were coded within several sources—the more coding across more sources resulted in a stronger correlation.

The cluster analysis of mitigating factors in No FD and FD cases (see Figure 11) shows *child abuse or neglect* was most correlated to *mental health issues* in No FD cases. While, *child abuse or neglect* was most correlated to *history of family dysfunction* in FD cases. A further distinction between No FD and FD cases, was the correlation to *history of family dysfunction*; in No FD cases the relationship was to *loving, compassion, caring* and in FD cases the relationship was to *child abuse or neglect*. Additionally, *mental health issue* was correlated to *good history while incarcerated* in FD cases and in No FD cases *good history while incarcerated* was not associated directly with any other mitigating factor. There were no mitigating factor correlation similarities between No FD and FD cases also (see Figure 11).

Cluster Analysis of Mitigating Factors for No Future Danger Cases



Cluster Analysis of Mitigating Factors for Future Danger Cases

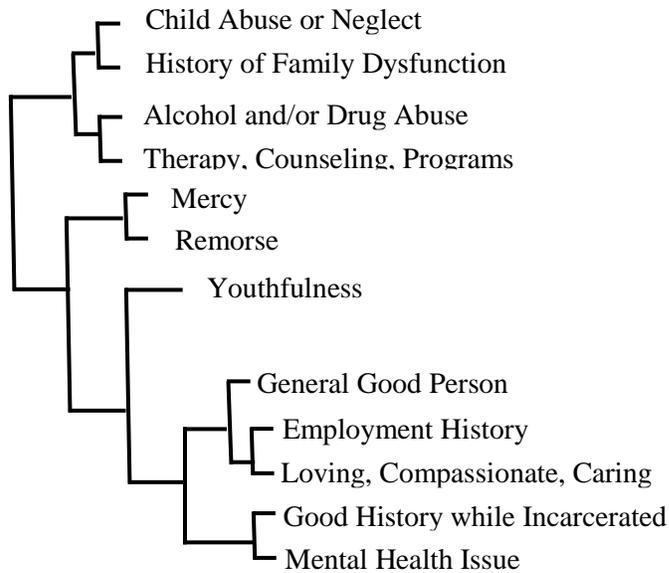


Figure 11. Cluster Analysis of Mitigating Factors. The illustration depicts correlation between secondary mitigating themes in cases resulting in no future danger and future danger.

Cluster Analysis of Aggravating Factors for No Future Danger Cases



Cluster Analysis of Aggravating Factors for Future Danger Case

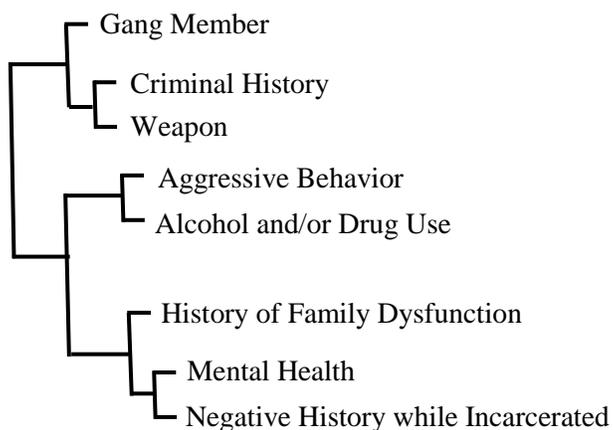


Figure 12. Cluster Analysis of Aggravating Factors. The illustration depicts correlation between secondary aggravating themes in cases resulting in no future danger and future danger.

The cluster analysis of aggravating factors revealed more patterns differences between No FD and FD cases. For No FD cases, the cluster analysis showed two close correlations: *criminal history* to *gang membership* and *history of family dysfunction* to *weapon*. None of these correlations were found in FD cases. These correlations indicate

which aggravating factors presented in multiple cases were found in No FD cases. However these correlations were all had weak correlations (see Table 11). Hinkle, Wiersma, and Jurs (1979) established the following correlation guidelines on strength of relationship used in Tables 11, 12, and 13: .90 to 1.00 an almost perfect correlation, .70 to .90 a very large, very high, huge correlation, .50 to .70 a large, high, or major correlation, .30 to .50 a moderate or medium correlation, and .00 to .30 little if any correlation.

Furthermore, an examination of the cluster analysis of aggravating factors for FD cases showed that *criminal history* and *weapon* had a relationship to *gang membership*. It revealed that when a jury viewed a defendant with a *criminal history* involving *weapons* and *gang membership*, the defendant was viewed as a future danger. Additionally, when *aggressive behavior* and *alcohol and/or drug use* was correlated, this testimony resulted in a finding of future danger. Finally, for cases with a correlation between *mental health issue* and *negative history of incarceration*, and had a *history of family dysfunction*, the defendant was seen as a future danger. A juror may have viewed this person as hopeless—no family support, could not follow rules even with the structure of corrections, and had a mental health issue. In sum, these distinct patterns between groups could assist the prosecution in their strategy of presentation of aggravating evidence in future capital trials (i.e. if the defendant has a negative history of incarceration, a history of family dysfunction, and mental health issues, it would be important to have a witness connect those three factors to dangerousness; see Figure 12).

Table 11

Mitigating Factor Correlations in No Future Danger Cases

Mitigating Factor	Correlation	Strength	Outcome of Case
Mental Health to Child Abuse	.70	Very Strong	No FD
Loving, Compassionate, Caring to History of Family Dysfunction	.65	Strong	No FD
Employment History to Alcohol and Drug Abuse	.51	Moderately Strong	No FD
Loving, Compassionate, Caring to Alcohol and Drug Abuse	.51	Moderately Strong	No FD
General Good Person to Employment History	.50	Moderate	No FD
Youthfulness to Therapy, Counseling, and Programs	.47	Moderate	No FD
Mercy to Child Abuse and Neglect	.45	Moderate	No FD

In regard to research question 5, the extent of patterns of mitigating evidence and aggravating evidence between the No FD cases and FD cases, the mitigating factors were presented by the defense to diminish the chance of a death sentence. In sum, the only mitigating factor in the current research that showed a greater amount of testimony between groups was *employment history*. However, upon closer examination, this mitigating factor was not substantial enough to stand alone as a salient mitigating factor to influence a finding of no future danger. There was substantially more references in No FD than FD, but in totality, there was not a substantial amount of testimony.

The only very strong correlation between mitigating factors in No FD cases was *mental health issue* and *child abuse*; however, there were several moderate correlations (see Table 11). Moreover, none of these factors stood alone as prevalent mitigating factors in No FD cases. An examination of Pearson correlation of mitigating factors in FD cases revealed two moderately strong correlations and two moderate correlations (see

Table 12).

Table 12

Mitigating Factor Correlations in Future Danger Cases

Mitigating Factor	Correlation	Strength	Outcome of Case
Loving, Compassionate, Caring to Employment History	.58	Moderately Strong	FD
Loving, Compassionate, Caring to General Good Person	.56	Moderately Strong	FD
General Good Person to Employment History	.48	Moderate	FD
Good History while Incarcerated to General Good Person	.48	Moderate	FD

From the defense perspective, these combinations of mitigating factors that showed moderate correlation in FD cases may need to be avoided or expanded upon to better connect the factors for the jurors. In conclusion, mitigating factors did not play a notable role in No FD cases in the current research. *Employment history* was the only mitigating factor in No FD cases that individually was dissimilar to FD cases.

Additionally, there were four mitigating factors that appeared to be more aggravating—or at least were more notable in FD cases: *history of family dysfunction*, *good history of incarceration*, *child abuse and neglect*, and *alcohol and drug abuse*.

Criminal history was testified to the most in the current study. There was only one case that had no testimony regarding criminal history, and it was a No FD case. It can be assumed that if there was not a history of criminal behavior, than the defendant was not a future danger. Criminal history was an important factor in determining future dangerousness.

Testimony regarding *weapon use or possession* was also more prevalent among FD cases than No FD cases. More than half No FD cases had no testimony related to

weapon use or possession, while only one FD case had no testimony. In conclusion, *weapon use or possession* seemed to influence jurors when deciding future dangerousness.

Testimony regarding *gang membership* was not an important aggravating factor in future dangerousness. More than half of No FD cases and two-thirds FD cases had no testimony regarding gang activity. It is difficult to conclude a meaning from this finding because it could have been that the defendants in the current study were not the norm or that they were the norm and gang membership is not prevalent in capital cases.

Testimony regarding *negative history of incarceration, parole or probation, or law enforcement custody* was an aggravating factor in determining future dangerousness in the current study. More than half of the No FD cases had no testimony related to *negative history of incarceration*. The FD cases had notably more testimony regarding *negative history of incarceration* than the No FD cases.

Aggressive behavior testimony was more prevalent in FD cases than No FD cases and would be considered a salient factor in FD cases, though not as strong as *negative history of incarceration, criminal history, or weapon possession*. Testimony regarding *alcohol and drug use*, was similar in No FD and FD cases. *Alcohol and/or drug use* would not be considered prevalent aggravating factors in No FD or FD cases.

Finally, *history of family dysfunction* and *mental health issues* were coded as aggravating factors, as well as a mitigating factor. *History of family dysfunction* had more cases with no testimony in No FD cases than FD cases; however, the remaining No FD cases had more testimony of *history of family dysfunction* than FD cases. *Mental health issues* revealed more than half No FD had no testimony and only one FD case had

no testimony. These two aggravating factors were not as clearly aggravating as the others. In conclusion, as a prosecution, the three aggravating factors that seemed non-important in the current study were *aggressive behavior*, *alcohol and drug use*, and *gang membership*.

A Pearson correlation was ran to determine if any of the coded aggravating factors had a relationship that could assist the prosecution in securing a future danger finding from the jury. The results did not reveal any strong relationships in either group of cases, but did reveal two moderately strong relationships (see Table 13). The moderately strong correlations between *weapon* and *criminal history* were consistent with two factors that were most often testified to in FD cases. However, the same was not true for the second correlation *aggressive behavior* and *alcohol/drug use*; *alcohol/drug use* was not a notable factor in FD cases.

Table 13

Aggravating Factor Correlations to Future Danger Cases

Aggravating Factor	Correlation	Strength	Outcome of Case
Weapon to Criminal History	.57	Moderately Strong	FD
Alcohol or Drug Use to Aggressive Behavior	.56	Moderately Strong	FD

Primary Research Question

The Primary Research Question guiding this research was: **What salient factors, if any, are associated with negative and positive findings of future dangerousness in death penalty cases in Texas from 2005 to 2015?** This primary research question was addressed by the cumulative findings of the secondary research questions (see Appendix C). The primary research question can best be responded to through the illustration of

two mind maps (see Figures 17 and 18). For No FD cases, the most discernable pattern of relevant testimony was the *guidance to jurors by the defense attorney*, while the most important mitigating factor was *employment history*. The most salient aggravating factors were *mental health issues* and *history of family dysfunction*; which means these two aggravating factors were the ones most often testified to in No FD cases. Finally, *expert testimony regarding future dangerousness* was minimal, but played an important role in the No FD cases. In the end, none of these factors were consistent enough or powerful enough to suggest any salient patterns in the No FD cases (see Figure 13).

For the FD cases, the most important aggravating factors were *negative history of incarceration*, followed by *criminal history* and *weapon*. All of these aggravators were consistent enough and powerful enough to be considered salient factors in the FD cases. The most consistent pattern of relevant mitigating evidence testimony was *history of family dysfunction*. Additional mitigating evidence that was relatively consistent in FD cases were a *good history of incarceration* and, to a lesser extent, *alcohol and drug abuse* and *child abuse and neglect*. The prosecution has no control over mitigating evidence, so this information was not as useful in FD cases. Finally, the terminology on *society*, with the message of escape, violence, and drugs, was consistent in FD cases and noteworthy (see Figure 14).

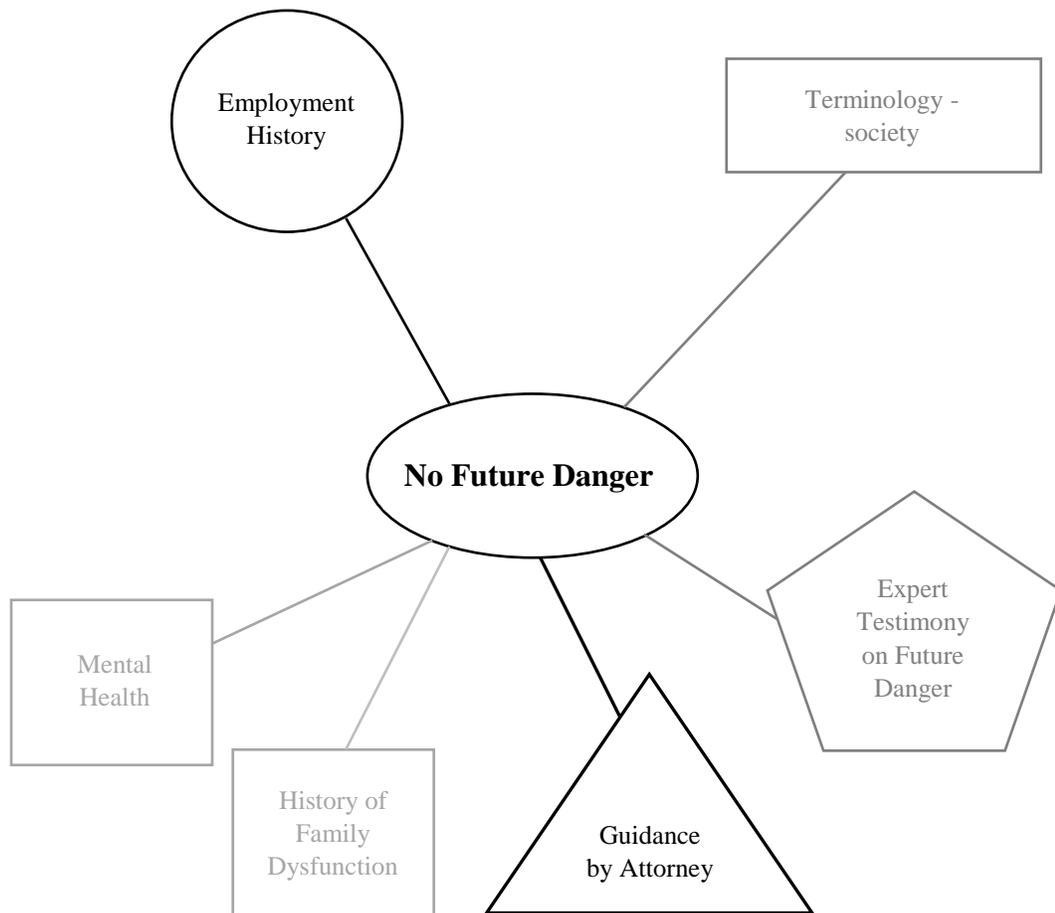


Figure 13. No Future Danger Mind Map. The following illustration depicts the response to the primary research question: What salient factors, if any, distinguish the death penalty cases in Texas from 2005 to 2015 that resulted in a negative finding of future dangerousness from the cases with a positive finding of future dangerousness? The stronger relationships are indicated by the thickness and darkness of the line.

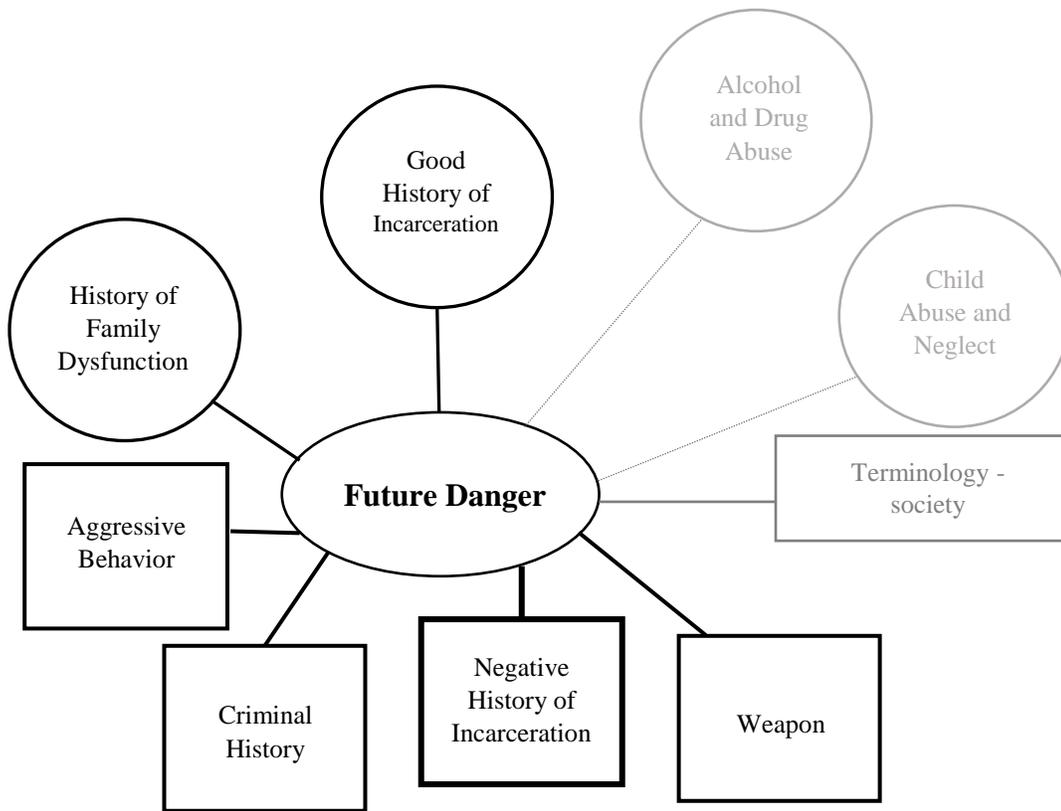


Figure 14. Future Danger Mind Map. The following illustration depicts the response to the primary research question: What salient factors, if any, distinguish the death penalty cases in Texas from 2005 to 2015 that resulted in a negative finding of future dangerousness from the cases with a positive finding of future dangerousness? The stronger relationships are indicated by the thickness and darkness of the line.

VI. DISCUSSION AND CONCLUSION

This research explored several potential factors affecting the jurors' decision regarding the defendant's future dangerousness by examining the official capital murder punishment transcripts in 18 cases from 2005 to 2015 in Texas. The purpose was to determine whether there were any salient factors that distinguished death penalty cases that resulted in a finding of no future danger from those with a finding of future danger. Although this study examined the role of legal factors that led to a defendant's sentence, it was recognized additional factors could have affected the outcome; measures were taken to decrease this through matching the cases on several factors identified as relevant in the existing literature. The Texas death penalty scheme requires a determination of future danger by the jury, as the method to comply with *Furman* (1972). The research questions were designed to assess whether the Texas death penalty scheme allowed for guided juror discretion and individual sentencing as mandated by *Furman* (1972).

Guided juror discretion was assessed by examining whether there were differences between the two sets of cases (i.e., those cases that resulted in a finding of no future danger and those resulting in a finding of future danger) with regard to the explanation of key terminology (i.e., *a probability, future violent act, and society*) associated with special issue 1 (research question 2) and patterns of guidance from attorneys and judge (research question 3). Second, the individual sentencing was assessed by examining differences between the two sets of cases with regard to heinousness of instant offense (research question 1), expert testimony on future dangerousness (research question 4), and patterns of mitigating and aggravating evidence (research question 5). Overall, the results revealed some degree of support for both; guided juror discretion and

individual sentencing were attained for some of the factors examined, but not for other factors in these cases.

Guided Juror Discretion

In *Furman* (1972), it was stated that unfettered juror discretion and mandatory sentencing were unconstitutional and mandated that death penalty schemes must provide guidance to jurors when applying the death penalty. A fair judicial process would likely result in a disparate number of references related to key terminology associated with special issue 1 and guidance provided by the prosecution and defense to the jurors in both sets of cases. For example, it may be expected that in cases where the defendant was not found to be a future danger that (1) the defense provided more explanation, (2) the terminology was presented in a different context, and (3) the provided more guidance. Also, it may be expected that the prosecution and judge provided more explanation of terminology and provided more guidance in cases where the defendant was found to be a future danger.

Special issue 1. Special issue 1 terminology included *a probability*, *future violent acts*, and *society*. *A probability* was examined because the statute does not define *a probability*, and the judge does not define its meaning for the jurors. There was no discernable qualitative or quantitative difference between the two sets of cases with regard to the term *a probability*. With regard to *future violent acts*, the defense presented more evidence than the prosecution in both sets of cases, yet the defense was much more likely to present such evidence than the prosecution in cases where the defendant was not found to be a future danger.

Society is a term in the statute that was presented differently in no future danger cases and future danger cases. The most noteworthy pattern was that the set of cases where the defendant was not found to be a future danger involved more evidence on *society*, presented by the defense. In cases where the defendant was not found to be a future danger, the testimony was focused on classification, the physical facility, and privileges, whereas in future danger cases the testimony focused on escape, violence, and drugs.

Thus, the results for guided juror discretion were weak with regard to the key terminology associated with special issue 1. Although a discernable pattern between the two sets of cases was identified with regard to the use of the term *society*—suggesting guided juror discretion existed, it was not found with the terms *a probability* or *future violent acts*.

Guidance to jurors from attorneys and judge. The results concerning guidance to jurors from the attorneys (prosecution and defense) and judge given to jurors (research question 3) showed mixed results. The judge provided very little guidance in both set of cases. There was no distinct difference between the two sets of cases regarding juror guidance from the judge.

There was no distinct pattern of guidance from the *prosecution* to the jurors between the two sets of cases. The message between the two groups of cases and from both the prosecution and defense was similar: due your duty, consider only the evidence, do not be swayed by others, take your time, etc.

The guidance provided by the defense to the jurors, however, did reveal a discernable pattern: the *defense* gave considerable more *guidance to jurors* in the cases

that resulted in a finding of no future danger compared to those with a finding of future danger. The primary distinct pattern with regard to *guidance to juror* from the *prosecution, defense, and judge*, was that the *defense* provided substantially more *guidance to jurors* in no future danger cases compared to future danger cases.

Individualized Sentencing

Individualized sentencing was mandated in the U.S. Supreme Court's *Furman* (1972) decision to ensure that only the worst of the worst received the death penalty. The Court stated that any evidence that mitigated the sentence of death should be heard, including any part of a defendant's background or character. Individualized sentencing was assessed by examining heinousness of the instant offense (research question 1), expert witness testimony regarding future dangerousness (research question 4), and mitigating and aggravating evidence (research question 5). Overall, the results revealed little support for individualized sentencing, and the findings related to several factors were contrary to expectations, if one assumed a fair process exists.

Heinousness. The results of the survey that assessed heinousness revealed no distinction of heinousness between the sets of cases (research question 1). It was expected that the worst of the worst offenders would commit murders that were perceived as the most heinous, and subsequently result in a finding of future danger. Overall, there was virtually no variation between the levels of heinousness between the sets of cases. Furthermore, the cases with the highest and lowest heinousness score, were both future danger cases. This finding points to a conclusion that some factor, other than the level of heinousness, determined the sentencing outcomes.

Expert testimony on future dangerousness. The findings regarding *expert testimony on future danger* showed some support for individualized sentencing (research question 4). There was a pattern of mitigating *expert testimony on future dangerousness* in no future danger cases. However, there was no pattern of aggravating *expert testimony on future danger* in cases resulting in future danger. With regard to the cases where the defendant was found to be future danger, six of nine cases had no aggravating evidence presented by an *expert witness on future dangerousness*.

Additionally, the testimony was qualitatively different. The no future danger cases had mitigating *expert testimony on future dangerousness* related to psychological mental health issues. The future danger cases had mitigating *expert testimony on future dangerousness* connected to behavioral issues. Partial support for individualized sentencing was found in results from *expert testimony on future dangerousness*. To assume fairness, there would have been salient patterns of expert testimony from both the prosecution (aggravating) and the defense (mitigating).

Mitigating and aggravating evidence. Although the majority of the mitigating and aggravating factors examined revealed no differences between the two sets of cases, a small number of the mitigating (2 of 12) and aggravating (3 of 8) factors examined were different between the two sets of cases. This provides some support for individualized sentences. The *mitigating* factor that occurred in the no future danger cases was *employment history*. Thus, in the cases where the defendant was not found to be a future danger, it was emphasized that the defendant's positive employment history showed stability. Furthermore, the *aggravating* factors, *negative history of incarceration*, *criminal history*, and *weapon use/possession*, were salient in future danger cases. Also,

these factors were absent in no future danger cases. Assuming a fair process, *mitigating* factors would be more salient in no future danger cases and *aggravating* factors would be more salient in future danger cases.

Not all of the findings related to *mitigating and aggravating* factors, however, provided supporting evidence for individualized sentencing. For example, when *mental health issues* and *history of family dysfunction* were presented in the context of *aggravating* factors, it occurred more often in cases where the defendant was not found to be a future danger. Moreover, in cases where the defendant was found to be a future danger, several mitigating factors (*history of family dysfunction, good history of incarceration, alcohol and drug abuse, and child abuse and/or neglect*) were prominent. One may expect such mitigating effects to be associated with cases that resulted in a defendant who was not a future danger.

Although similar amounts, as well as content, of mitigating evidence was presented in both sets of cases, more aggravating evidence was presented in cases that resulted in a defendant who was found to be a future danger. This suggests for death penalty cases in Texas, when more aggravating evidence was presented and the focus was on specific aggravators (*negative history of incarceration, criminal history, and weapon use/possession*) the result was that the defendant was deemed a future danger.

Linkage of Mitigating and Aggravating Factors

Although analysis of individual factors gives some insight to future dangerousness in the Texas death penalty scheme, additional insight was revealed by examining how these individual factors correlated with one another. Thus, it may not be that child abuse in of itself distinguished future danger cases from no future danger, but

rather a distinction could be made when child abuse (or any other factor) was presented in combination with some other factor (alcohol and/or drug abuse) that distinguished the two sets of cases.

Several distinct clusters of testimony were identified in cases that resulted in a finding of no future danger from those with a finding of future danger that may have influenced a juror as to whether a defendant had a probability of committing future acts of violence in society. A cluster analysis was generated within all primary themes; however, only *mitigating* and *aggravating* evidence had moderate or strong relationships, which warrants additional discussion.

Mitigating. It is not possible to know what specific evidence presented influenced a juror, or whether it was a combination of evidence. In cases where the defendant was found to be no future danger, *child abuse and neglect* and *mental health issues* were often presented together. Whereas, in cases where the defendant was found to be a future danger, *child abuse and neglect* and *alcohol and drug abuse* were often presented together (see Table 14). An explanation could be that the jurors believed defendants who suffered a *mental health issue* due to *child abuse or neglect* were less culpable. While, those defendants who suffered *child abuse or neglect* and chose to *abuse alcohol or drugs* were viewed as more culpable.

Additionally, *mercy* was connected when *alcohol and drug abuse* and *child abuse and neglect* were presented together in future danger cases. In the future danger cases, *mercy* may have sounded superficial to the jurors because the defendant chose to self-medicate to deal with trauma suffered as a child.

In cases that resulted in no future danger finding, *history of family dysfunction* and *good history of incarceration* were presented together. However, in cases that resulted in future danger finding, testimony regarding *history of family dysfunction* and *mental health issues* were often presented together (see Table 14). It is plausible that jurors' viewed defendants who had a *history of family dysfunction* and *good history of incarceration* as defendants who needed the guidance and structure of the criminal justice system, and would not commit violence in the future. Moreover, defendants who were exposed to a *history of family dysfunction* and had *mental health issues* (see Table 14) were viewed as a future danger because the guidance and structure of the criminal justice system would not be enough to deter future violence.

Aggravating. There were three sets of correlated aggravating factors that distinguished the two sets of cases. In cases resulting in no future danger, *history of family dysfunction* was more often correlated with *weapon use or possession*. Furthermore, in cases resulting in future danger, testimony regarding a *history of family dysfunction* and *negative history of incarceration* was more often correlated (see Table 14).

A possible interpretation may be that jurors understood *weapon use or possession* with a defendant who was raised with a *history of family dysfunction* because the defendant did not have the guidance needed to understand the dangerousness of weapons. Additionally, a defendant would have structure and no access to weapons in prison. However, jurors may have interpreted a defendant with a *history of family dysfunction* and a *negative history of incarceration* as a person who was hopeless, with no family support, and could not follow rules even with the structure of the criminal justice system.

Cases that resulted in no future danger finding had two additional factor correlations that were not found in future danger cases, and vice versa. In cases resulting in no future danger, *mental health issues* and *negative history of incarceration* were often presented together, as well as, *alcohol and/or drug use* and *criminal history* (see Table 14). Possible explanations of why jurors did not find these two relationships to be associated with a future danger could be that if the defendant had a mental health issue, a negative history of incarceration could be expected and alcohol and/or drug use was a cause of a criminal history. Both of these issues would be resolved while the defendant was incarcerated; such as, the defendant could receive medication to stabilize the mental health issue and other specialized services would be provided to assist with mental health issues; therefore, decreasing the negative behavior while incarcerated. Thus, no future violence would be committed, as the defendant would no longer have access to alcohol and drugs.

Cases that resulted in a future danger finding also had two additional relationships between factors that may have influenced future dangerousness decisions. *Criminal history* and *weapon use or possession* were presented together, as well as, *aggressive behavior* and *alcohol and/or drug use* (see Table 14). Jurors may have seen these combinations as more dangerous—making them less salvageable.

Table 14 shows the pairs of factors for no future danger cases and future danger cases, as previously described. Additionally, Table 14 is divided between mitigating factors and aggravating factors for each set of cases. The final element of the table is the circled factors; these circled factors illustrate the noteworthy themes that were also individually identified as prevalent in cases resulting in no future danger and future

danger. It should be recognized that six of 10 factors in the future danger cases were notable individually; whereas only two of 10 factors in no future danger cases were notable individually. Moreover, Table 14 illustrates, only two factors, both aggravating, are individually important in cases resulting in no future danger: *mental health issues* and *history of family dysfunction*. Whereas, in cases resulting in future danger, three mitigating and three aggravating factors illustrated in Table 14 are also notable individually: *mitigating—child abuse and neglect, history of family dysfunction, and mental health issues* and *aggravating—criminal history, weapons use or possession, and negative history of incarceration*. A conclusion may be that cases resulting in future danger have more salient factors than cases resulting in no future danger.

Summary of Guided Juror Discretion and Individual Sentencing

A few differences were found between cases that resulted in no future danger and cases that resulted in future danger in the current study. If a fair process is assumed, one would expect that future dangerousness was determined by reliance upon legal factors in Texas. Alternatively, if no distinctions were found between the two sets of cases, an explanation could be that future dangerousness was not applied using legal factors; therefore, the death penalty was applied arbitrarily in Texas. The results of the current study revealed that with regard to several key themes (i.e., guidance by defense attorney, terminology of society, negative history of incarceration, criminal history, and weapons use), the outcome of the research suggested juror discretion and individualized sentencing occurred in some cases, to some extent.

Table 14

Factors of No Future Danger and Future Danger Cases

	No Future Danger	Future Danger
Mitigating	Child abuse or neglect with a mental health issue	Child abuse or neglect with alcohol and/or drug abuse
	History of family dysfunction with good history of incarceration	History of family dysfunction with mental health issue
Aggravating	History of family dysfunction with weapon use or possession	History of family dysfunction with negative history of incarceration
	Mental health issue with negative history of incarceration	Criminal history with weapon use or possession
	Alcohol and/or drug use with criminal history	Aggressive behavior with alcohol and/or drug use

The factors examined between the two sets of cases to assess the presence of guided juror discretion included: testimony regarding special issue 1, which includes the following terminology: (1) a probability, (2) future violent act, (3) society. Also, guidance from court officials was assessed by examining information presented by (4) the prosecution, (5) the defense, and (6) the judge. Two of these six areas revealed a distinctive pattern between the two sets of cases. First, with regard to terminology associated with society, the context of the testimony in no future danger cases was the classification of inmates, the physical facilities of prisons, and how privileges are restricted/must be earned. Cases that resulted in a defendant who was found to be a future danger was more likely to have testimony related to society in regard to prison escapes, violent behavior in prison, and drug availability. Second, with regard to guidance provided by defense, more guidance was provided by the defense in cases that resulted in

a finding of no future danger compared to cases that resulted in a finding of future danger.

The factors examined between the two sets of cases to assess the presence of individual sentencing include (1) the heinousness of the instant offense, (2) expert testimony regarding future dangerousness, and (3) mitigating/aggravating evidence. Although no differences were found with regard to heinousness and only a slight difference with regard to expert testimony regarding future dangerousness, differences in mitigating and aggravating evidence were found between the two sets of cases. Individually, the distinct differences of patterns of mitigating evidence between the sets of cases included employment history prevalent in cases resulting in no future danger and absent in future danger cases. With regard to individual aggravating differences, the following factors were more likely to occur among cases where the defendant was found to be a future danger: negative history (i.e., bad behavior) while incarcerated, a lengthy criminal history, and possession or use of a weapon.

With regard to co-occurrences of factors, several combinations of mitigating and aggravating evidence were found. For mitigating factors, child abuse and neglect occurred in both sets of cases, yet the theme was presented alongside the defendant's mental health issues in no future danger cases and alcohol and drug abuse in future danger cases. Cases resulting in a future danger finding were more likely to have information regarding mercy presented when child abuse and neglect and alcohol and drug abuse were presented together. Cases resulting in a no future danger finding were also distinguished from future danger cases in that no future danger cases typically presented a history of family dysfunction with a good history of incarceration (i.e., never

received a discipline report, completed programs, etc.), while cases with a finding of future danger presented the same history of family dysfunction with mental health issues.

With regard to co-occurrences of aggravating factors, there were three strongly correlated combinations in each set of cases that distinguished the two sets of cases. For the cases resulting in no future danger, the co-occurrences included: history of family dysfunction with weapon use or possess, mental health with negative history of incarceration, and alcohol and/or drug use with criminal history. The cases resulting in a finding of future danger had three different co-occurrences: history of family dysfunction alongside negative history of incarceration, criminal history alongside weapon use or possession, and aggressive behavior and alcohol and/or drug use.

In conclusion, there was some support for guided juror discretion and individual sentencing in the current study. However, there were many additional factors examined that did not support guided juror discretion or individualized sentencing because the patterns were nonexistent in both groups. An argument could be made that the death penalty scheme in Texas was arbitrarily applied because there were no distinct patterns in the no future danger cases. However, this would be a stretch because there were salient patterns in future danger cases. Another argument could be that there were additional factors not examined that would show a distinct pattern of factors; and further research needs to be done. Moreover, extralegal and extraneous factors were controlled for; however, this does not address all possible extralegal factors. In general, this study is a good foundation to build upon when examining the Texas capital punishment scheme, but alone this study cannot imply fairness or arbitrariness.

Limitations

These results must be considered in light of several inherent limitations. The scope of the study only assessed what occurs in Texas, and therefore, should not be generalizable beyond Texas. Limiting the scope of the study was necessary, given that the Texas death penalty scheme is unique. In Texas, the jury must decide after hearing all the evidence in the punishment phase whether it is probable that the defendant will commit future acts of violence that would constitute a continuing threat to society, known as future danger. Defendants are sentenced to a life in prison without the possibility of parole if the jury decides the defendant is not a future danger. A death sentence is imposed only when (1) the jury decides that the defendant is a future and (2) subsequently considers whether the mitigating evidence does not warrant sparing the defendant's life.

Furthermore, the study was limited by a small sample size. There were only nine cases in which juries found the defendant not to be a future danger from 2005 to 2015; and 2005 was when Texas changed the law to allow life without parole. Therefore, using all of these cases was the best possible outcome. The two sets of cases were matched by county, aggravator, race, and age. This decision was made to eliminate other types of biases.

The analysis of these cases was also limited to the punishment phase of these 18 capital trials. The punishment phase is the shortest part of a capital trial and the cases analyzed ranged from 2 days to 11 days. *Voir dire* is the longest part of a capital trial and typically takes a month to choose the jury. Though *voir dire* does not technically involve the instant offense or the defendant's character and background, it is the time in which

the attorneys get to know jurors, which may help in strategy development. Additionally, it is during *voir dire* that the statute is discussed the most and potentially has a substantial impact on the jurors. Additional analyses, while possible, were beyond the scope of this study given limited resources.

Finally, another limitation may be that NVivo only uses one clustering method, and selects 10 clusters by default. To remedy, data could be exported and analyzed using a different statistical package.

Future Research

While this research has taken a step toward assessing the social construct of future dangerousness in Texas capital trials from 2005 to 2015, it has also provided a foundation for future research. Moreover, to really assess future dangerousness decisions and not only how the message is delivered, but how the message is received, interviews with jurors would be important. The Capital Jury Project¹⁰ has interviewed many jurors, but not any from the 18 cases relied upon in the current study. It would be a great extension of the current research to interview the jurors of these 18 cases to gain more insight regarding the message they heard from the testimony and attorneys.

Perhaps it would be more effective to interview the defense attorneys and the prosecutors from these 18 trials, as locating and interviewing 216 jurors from the past decade would generate new issues. Often, attorneys do exit interviews with the jurors; gathering their feedback while it is fresh in their memory. Insight into the strategies the attorneys relied upon and the data from the individual cases might provide additional insight into the issues. Additionally, identifying what evidence the prosecution and

¹⁰ The CJP is a program of research on how persons who serve as jurors on capital cases make the life or death sentencing decision. School of Criminal Justice University at Albany State University of NY.

defense chose not to present may be revealing.

Overall, this research yielded substantive findings regarding the fairness of the death penalty scheme in Texas between 2005 and 2015. It was found that guidance by the defense was the most salient factor in no future cases, while negative history of incarceration, criminal history, and weapon use were the most salient in future danger cases. Furthermore, several correlated factors were present in both no future danger cases and future danger cases. Though the results of the current study indicated some level of guided juror discretion and individuality as mandated in *Furman* (1972), in Texas, overall continued research should be conducted on this topic, as new death penalty cases are inevitable at the current time in Texas.

APPENDIX SECTION

APPENDIX A Code Book.

General coding rules: Coding includes the questions/statements from the judge/attorney and the response from the individual giving testimony. Questions or testimony regarding the current offense is NOT coded. ONLY testimony when the jury is present is coded. ONLY testimony related to defendant is coded (e.g. not credentials of witness). Code both the question and the answer. Code commentary by judge, prosecutor, and defense counsel (when jury is present), if it is giving the jurors some guidance or instruction. ONLY code testimony related to evidence after it is admitted. Do NOT code witnesses taken on *voir dire*.

Codes and Descriptions:

Terminology from special issue 1: transcript is coded for *a probability, future violence acts, or society*; three terms that do not have codified definitions. Each term is coded by reference to who addresses it: judge, prosecution, or defense, or if witness is testifying—who is questioning the witness.

Terminology from special issue 1: **Prosecution – probability:** prosecutor or state witness, answering prosecutor questions, addressing the terminology from the statute regarding *a probability*.

Category	Subcategory	Examples
Terminology from special issue 1	Prosecution - probability	Talked about probably meaning more likely than not.
		We talked about probability, more likely than not, more than a mere chance but less than a certainty. Remember that? Every one of you heard it probably multiple, multiple times.
		What is a probability? More likely than not; it's not a certainty, but it is more

Category	Subcategory	Examples
		than a mere possibility.

Terminology from special issue 1: **Prosecution – future violence:** prosecutor or state witness, answering prosecutor questions, addressing the terminology from the statute regarding *will commit violent acts in the future* – both violent acts and future.

Category	Subcategory	Examples
Terminology from special issue 1	Prosecution – future violence	Does he still have the desire to solve his problems at gunpoint? Yes, he does. Three to the back of the head. Problem solved. Violence is still the man's method of choice. No prison, no period of incarceration has ever changed that most basic character
		He wants the power of making people do his bidding by force and by violence, and he enjoys the rush of it and he enjoys the rush of getting away with it.
		So the question here today is as he sits here right before you is the defendant dangerous? That is the question. Not will he be dangerous in prison, but looking at him, is he a dangerous man?

Terminology from special issue 1: **Prosecution – society:** prosecutor or state witness, answering prosecutor questions, addressing the terminology regarding *society*.

Category	Subcategory	Examples
Terminology from special issue 1	Prosecution - society	Q. Were you aware that on August 18 th of 2008, on the Estelle high security unit that an inmate killed his cellmate? A. No, ma'am
		Q. On death row he grabbed the chaplain's arm, secured the arm so it remained inside the cell? A. Yes, while the chaplain was on the outside of the cell. Q. Uh-huh. And then he started carving up the chaplain's arm? A. Correct

		Q. So drugs are smuggled into our Texas prisons? A. They have been, yes.
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Terminology from special issue 1: **Judge – probability:** judge addressing the terminology from the statute regarding a probability; **Judge – future violence:** judge addressing the terminology from the statute regarding *will commit violent acts in the future* – both violent acts and future; **Judge – society:** judge addressing the terminology from the statute regarding *society*.

NOTE: The **judge** did not address *a probability, future violent acts, or society* during the punishment phase of the cases examined.

Terminology from special issue 1: **Defense – probability:** defense or defense witness, answering questions, addressing the terminology from the statute regarding *a probability*.

Category	Subcategory	Examples
Terminology from special issue 1	Defense - probability	To find that Andrew is a future danger, you can't have a doubt that that probability exists. Because that's their burden.
		"Probability" means more likely to occur. Not a possibility to occur, not the opportunity to occur, not the chance that it can occur, but the probability that it could occur.
		And so what this is asking, if you break it down, we're asking you to find a probability. And that's not a mere possibility we've told you and explained to you. That means something more likely than not.

Terminology from special issue 1: **Defense – future violence:** defense or defense witness, answering questions, addressing the terminology from the statute regarding *will commit violent acts in the future* – both violent acts and future.

Category	Subcategory	Examples
Terminology from	Defense – future	He is not going to be a danger in that

Category	Subcategory	Examples
special issue 1	violence	society. Your answer to that should be no.
		A. Well, one of the things I look at is in any kind of opinions I draw, is that the past behavior, past institutional behavior is a pretty good indicator of future behavior. I look at that. If they've been in prison before. Some haven't been in prison. I try to explain to them what to expect and how they should behave, what's expected of them.
		Q. What is in your opinion in terms of this work that you've done and the decisions that you've made, what is the best predictor of future behavior? A. Historically one of the strongest indicators of how a person is going to act while they're incarcerated is their prior institutional history.

Terminology from special issue 1: **Defense – society**: defense or defense witness, answering questions, addressing the terminology from the statute regarding *society*.

Category	Subcategory	Examples
Terminology from special issue 1	Defense - society	That is the society he is going to live in. In the year 2025, he will be a 60 year old man.
		Q. Okay. And tell me, what does maximum security mean in the prison system? A. In the prison system, maximum security basically means that there are two fences around the facility instead of one.
		They do get a three inch thick cotton mattress. That is their desk, toilet and sink combination. That is what it would look like if you were sitting in a cell.

Guidance/Instruction to Jurors: instruction from judge, prosecutor, or defense attorney that guides the juror in their responsibilities and duties as a juror.

Guidance to Jurors: **from Prosecution:** guidance from prosecutor regarding jurors' responsibilities and duties.

Category	Subcategory	Examples
Guidance to Jurors	from Prosecution	Unanimous. All 12 people have to vote yes. Or ten people can vote no. Realistically there's overwhelming evidence of this Defendant's violence.
		We hope that you will agree with us that this is no ordinary case and it goes beyond the death of this simple two year old it rises to the level were the ultimate sanction should be death.
		Because you know what the answer to those questions are going to mean. You know what the result is going to be. And so, now you have to take a look at all the evidence that you heard in the case and decide the answers to those special issues.

Guidance to Jurors: **from Defense Attorney:** guidance from defense attorney regarding jurors' responsibilities and duties.

Category	Subcategory	Examples
Guidance to Jurors	from Defense Attorney	Because as jurors, you took oaths, each and every one of you, to abide by and to listen to the evidence at this phase of the trial that deals with mitigating evidence, mitigation.
		I submit to you that this is one of the most important decisions you will ever make in your life, and it will stick with you forever, the decision that you make here today.
		From the testimony that we heard, ladies and gentlemen, we're asking for mercy from this Court. That's all we can do.

Instruction to Jurors: **from Judge:** instructions from Judge regarding jurors' responsibilities and duties, does not include charge at the end of punishment.

Category	Subcategory	Examples
Instruction to Jurors	from Judge	I want to correct, for the record, and also to you that Daniel Lopez did not have a juvenile conviction for possession of marijuana and he did not -- he has never been convicted of indecency with a child, all right?
		Ladies and gentlemen of the jury, you're instructed that if there is any evidence before you regarding the Defendant's having committed offenses, wrongs or acts other than the offense for which he has been convicted in this case.
		All of the evidence that has been previously submitted will be available for your 3 inspection if you require it.

Expert Testimony – Future Dangerousness: Expert testimony regarding the defendant's future dangerousness; both aggravating and mitigating

Expert Testimony – Future Dangerousness: **Expert – Mitigating:** Expert testimony regarding future dangerousness relied upon to mitigate defendant's likelihood of future dangerousness.

Expert Testimony – Future Dangerousness	Expert - Mitigating	Q. Can you provide a little bit more information about what 4 the P.A.I. is? A. So this is a full personality battery so it gives me an idea of how this person ticks and really gives me a road map of predicting how this person might behave in the future under certain situations.
		Q. Can you tell us what your conclusions were? A. What it shows specifically for Juan is that Juan, compared to other inmates, is less aggressive. He is more -- he is more submissive and less dominant. So

		in an inmate population, he would not be the predator.
		A. The risk assessment was based on what's called the Violence Risk Appraisal Guide, and it's an actuarial assessment that looks at what statistically goes into predicting whether somebody will engage in future acts of violence as opposed to relying on a gut response or not using any statistically derived measures.

Expert Testimony – Future Dangerousness: **Expert – Aggravating:** Expert testimony regarding future dangerousness relied upon to aggravate defendant’s likelihood of future dangerousness.

Expert Testimony – Future Dangerousness	Expert - Aggravating	Q. And I just want to clarify that regarding this particular defendant that gunned down three women, left a woman dying in a car at the scene of a major collision, pulled a gun on a security guard at school, beat and raped a girlfriend, defied jail guards, threatened to assault any new cellmate that comes in, possesses weapons such as razor blades in the jail, you do not think he's a future danger? A. I said he would be a future danger to himself.
		Q. Excuse me, Doctor. I'll withdraw the last question. The question I want to ask you, given the hypothetical that I just explained to you, take all those facts as fact, the things that I just described to you. Do you have an opinion in my hypothetical about whether that hypothetical person would be a future danger? A. Yes, I do.
		Q. I believe you testified that you were evaluating him to determine the potential for future dangerousness; is that correct? A. Yes.

Mitigating Evidence: information presented by the defense team to mitigate a sentence of death. Only questions asked by attorney and testimony given by witnesses are coded; not commentary by attorney at opening or closing.

Mitigating Evidence: **Therapy, counseling, programs:** defendant is involved or has been involved in therapy, counseling, or a program to better himself.

Category	Subcategory	Examples
Mitigating Evidence	Therapy, counseling, programs	Q. Now, since the defendant was in Three Rivers, he underwent a lot of counseling programs and so forth to try and make himself a better person? A. Yes, he has taken advantage of every course. He has taken air condition course, barber course, counseling courses, family counseling because of the kids so he would be a good role model. I have dozens of certificates for him at home.
		Q. What programs was he required to attend by the Court? A. By the Court, Drug Free Youth, which was drug counseling.
		Q. Did he get his GED? Do you recall A. It is my understanding that he completed his GED on his most recent incarceration in 2009, I believe.

Mitigating Evidence: **Remorse about crimes:** testimony regarding regret or guilty feeling of defendant toward current crime, crimes committed in the past, victims or victims' family members, or defendant's family members.

Category	Subcategory	Examples
Mitigating Evidence	Remorse about crimes	Q. Officer, did you ever have any conversations with the defendant while he was---incarcerated? A. Yes. Q. Okay. Did he ever express remorse to you for the crimes he committed? A. Often.

		<p>Q. Did he ever express remorse for killing those two men?</p> <p>A. Remorse about the crime, yeah. We don't go into details with them about it.</p> <p>Q. But he definitely expressed remorse?</p> <p>A. Yes.</p> <p>Q. About kill the two men?</p> <p>A. Yes, he did.</p>
		<p>Q. Okay. So when he expressed remorse, what are you – what kind of things would he say?</p> <p>A. Just remorse about how he screwed up in his life and mistakes he had made.</p>

Mitigating Evidence: **Loving, compassionate, caring:** defendant has exhibited behavior that has shown love, compassion, or caring in the past, i.e. to children, spouse, family, others, etc.

Category	Subcategory	Examples
Mitigating Evidence	Loving, compassionate, caring	<p>Q. How do you and the defendant get along, sir?</p> <p>A. We get along great.</p> <p>Q. Do you visit him?</p> <p>A. I do.</p> <p>Q. And you talk on the phone?</p> <p>A. We do.</p>
		<p>Q. Tell me the kind of role that the defendant plays in your life?</p> <p>A. He plays as a leader in my life, to be honest.</p> <p>Q. How so?</p> <p>A. How? He—any time I talk to him on the phone, he is always encouraging me, do the right thing in life.</p>
		<p>Q. Okay. Tell me, how did he treat your mother?</p> <p>A. He treated her great.</p> <p>Q. Tell me how that is?</p> <p>A. He was always there supporting her, helping her around the house.</p>

Mitigating Evidence: **History of family dysfunction:** information pertaining to the defendant's family dysfunction as a child or adult; could include: divorced parents, parental alcohol/drug use, lack of supervision, family violence between parents, living with grandparents, extreme poverty, etc. As an adult it could include marital problems, spousal addiction issues, divorce, family violence, extreme poverty, low education level, etc.

Category	Subcategory	Examples
Mitigating Evidence	History of family dysfunction	Q. Tell me, in about 1979, you and your first wife split up, you divorced, did you not? A. No, we lived for a few years, and then we split, yeah.
		Q. Your in-laws helped raise the defendant; is that right? A. Yea, he grew up with them. Q. That was until he was a very young man, about 10 years of age or so; is that correct? A. Exactly.
		Q. Did Christopher ever mention to you anything about his father being murdered? A. Yeah. It just didn't settle right with him.

Mitigating Evidence: **Good history while incarcerated, on parole/probation, or in custody:** Previous incarceration, etc. testimony in which the defendant's behavior was good, no violence, trusted by staff, etc.; this evidence may be previous prison incarceration, county jail, on parole/probation, or while being arrested by police.

Category	Subcategory	Examples
Mitigating Evidence	Good history	You are going to hear that the defendant is what some people call an institutional man. He does not have any violent history whatsoever inside of any prison facility he has ever been in. In fact, he has an almost spotless record inside the prison walls.
		Q. Was the defendant what you might

		call a troublesome inmate, or was he a good inmate or fair to middling, how would you describe him? A. Good inmate.
		Q. But did you ever feel him to be a threat to yourself or any of the other inmates? A. Not at all.

Mitigating Evidence: **General good person:** testimony regarding defendant's behavior that indicates he is general good; as a parent, as an employee, as a community person, i.e. respectful, prosocial, attends church; did well in school, etc.

Category	Subcategory	Examples
Mitigating Evidence	General good person	Q. You said the defendant immediately complied with your orders? A. Yes, sir. Q. And continued to comply with the orders of all the officers out there that day? A. He was cooperative, yes, sir.
		Q. You never had any concerns about the defendant? A. No. Q. So you would see the defendant and have contact with him daily for approximately a three and a half year period? A. Correct.
		Q. Tell the jury about the Kwame you knew, what kind of person was he? A. The Kwame that I -- the Kwame that I knew was a kind, gentle little boy that took out so much time with my child that -- that really showed me that this is someone that I would consider my son. Kwame was always happy. He always showed me respect. I never had any problems with Kwame.

Mitigating Evidence: **Employment history:** Testimony regarding defendant's employment history, i.e. was employed, was a good employee, etc. Showed defendant's stability.

Category	Subcategory	Examples
Mitigating Evidence	Employment history	Q. Do you recall where he was working during that time that he was taking your class? A. Yes. The last job was Putt-Putt Golf and Games on Cooper.
		Q. Was there anything that he did while he lived at your home? For example, did he work somewhere? A. He used to work at a fruit stand in Bishop.
		Q. And Kwame was not working sales at that time? He was actually working in the finance department? A. Yes. He was in charge of the finance department, yes.

Mitigating Evidence: **Child Abuse or Neglect:** testimony regarding abuse or neglect that defendant suffered as a child.

Category	Subcategory	Examples
Mitigating Evidence	Child abuse or neglect	Q. How many different schools do you remember that he attended during that time? A. At least five.
		Q. Can you tell me, Ms. Reyes, if you didn't want to get pregnant and you didn't feel that you were ready to get pregnant, how did you feel about Juan? Did you feel like you loved him like you should have? A No, because I -- I felt that at that point, that it was a nuisance because I was young.
		Q. Was she is there any indication that she was ever abused as a young child? A. Yes, she was. She was sexually abused by one of her mother's lovers, a live-in lover, and it lasted for

		approximately two years, the duration that he was in the home.
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Mitigating Evidence: **Alcohol and/or drug Addiction:** testimony regarding defendant’s history of alcohol and/or drug addiction.

Category	Subcategory	Examples
Mitigating Evidence	Alcohol/drug addiction	Q. Did he talk to you anything about using drugs or alcohol? A. A little bit. Mostly this was from some reports from North Texas State Hospital and from, I believe, some arrests. He did report that he had used marijuana, cocaine, crack, special K, PCP, crystal methamphetamine, and nicotine.
		Q. Ms. Edwards, is it possible that during the time that the defendant was in your presence that he was under the influence of any controlled substances or narcotics? A. I wouldn’t know.
		Q. And in fact, I think you testified that he was so drunk that – A. He threw up. Q. He threw up. Is that right? A. Yes.

Mitigating Evidence: **Mental Health:** defendant was identified as being depressed, suicidal, or having a mental illness. Identification came from family, social worker, or dr. To include emotional, mental illness, learning disabilities, or variations of mental disability. How mental and emotional effected behavioral.

Mitigating Evidence	Mental health	Q. Why don't we punish a kid that can't read? A. It's not fair. It's not equitable. He 6 doesn't have social responsibility or understanding. 7 The same reason you don't punish somebody that is insane 8 at the time of the alleged offense.
		Q. As a result of the assessment that

		<p>you did of Andrew based on your review of all the records and your personal evaluations of him, did you come to some opinions regarding his mental status and condition?</p> <p>A. Yes, I did.</p>
		<p>Q. And you said that you do a clinical interview. I assume that you actually met with Juan?</p> <p>A. I did.</p> <p>Q And what type of observations did you make about his behavior during the course of the interview?</p> <p>A. He was cooperative.</p>

Mitigating Evidence: **Mercy:** The witness is asking the jury to give the defendant mercy by giving a sentence of LWOP.

Mitigating Evidence	Mercy	<p>Q. And is there anything you would like to say to them to help them know something about him?</p> <p>A. Well, I love Kwame. I feel in my heart, I know he will deposit to somebody in the prison system. And I'm sorry about what took place to the people, innocent people, but I do love Kwame and I hope you spare his life.</p>
		<p>Q. You understand that the jury has found him guilty and they're making decisions about him. Are you asking the jury to spare his life?</p> <p>A. Yep.</p>
		<p>Are you asking this jury for mercy for James?</p> <p>A. Yes, I am.</p>

Aggravating Evidence NOT Related to Instant Offense: evidence presented by the prosecution that is not related to the instant offense and is not expert witness testimony on future dangerousness. Only questions asked by attorney and testimony given by witnesses are coded; not commentary by attorney at opening or closing.

Aggravating Evidence NOT Related to Instant Offense: **Weapon:** information about defendant's possession of weapons of any kind.

Aggravating Evidence NOT Related to Instant	Weapon	<p>Q. Do you think it would help you to take a look at the police report where it documents the guns that were stolen to help refresh your memory in answering these questions right now?</p> <p>A. No, I think I pretty much remember. One was a .22, one was a handgun, one was a .25 caliber handgun.</p>
		<p>Q. What type of gun was it you found?</p> <p>A. It was a revolver.</p>
		<p>Q. Did he give you information about finding a handgun in a student's locker?</p> <p>A. Yes.</p>

Aggravating Evidence NOT Related to Instant Offense: **History of Family Dysfunction:** history of family dysfunction when defendant was a child or an adult that is presented as negative evidence by prosecution; i.e. divorce, family criminals, troubled children, family violence, poverty, low education, etc.

Aggravating Evidence NOT Related to Instant	History of family dysfunction	<p>Q. You were in a halfway house and the defendant was in the halfway house; that is how you met?</p> <p>A. Yes.</p>
		<p>Q. -- it was just too much for them?</p> <p>A. He thought the baby was better off where he could get better discipline and emotional and psychological help.</p> <p>Q. Okay.</p> <p>A. And that's what he needed.</p>
		<p>Q. Ms. Jackson, what precipitated the incident that happened back in September of 2004?</p> <p>A. I moved out and he wasn't able to get in contact with me, and so he met me at the school because he knew I had to take her to school.</p>

Aggravating Evidence NOT Related to Instant Offense: **Criminal History:** information presented about the defendant's criminal history (i.e., arrests, convictions, details of investigation or crime, etc.).

Aggravating Evidence NOT Related to Instant	Criminal history	He committed that new offense on April 3 rd of 1984. He came to court and was given a second chance on probation.
		He went to prison for those four for what amounted to a 10-year sentence, but we know he did not serve the entire 10 years because on September 17 th of 1990 he went into Big State Pawn Shop.
		He was released from federal prison sometime in 1999, and on April 26 th of 2000 he committed – he commits a bank robbery.

Aggravating Evidence NOT Related to Instant Offense: **Alcohol and/or Drug use:** defendant's use of alcohol or drugs related in a negative manner.

Aggravating Evidence NOT Related to Instant	Alcohol and/or drug use	Q. I think there was one positive drug test back in 1996 for methamphetamine? A. There is, yes.
		Q. And a positive drug test for methamphetamine, would you call that a minor glitch? A. He did get a major disciplinary for it, but is still a minor glitch.
		Q. The first line there reveals -- and there is a word that starts with a "B," how do you pronounce that? A. Benzoyl-ecgonine. Q. What is that? A. It's a metabolite to cocaine.

Aggravating Evidence NOT Related to Instant Offense: **Mental Health:** when a defendant's mental health issue is used against him/her or when the prosecutor compares

the defendant's mental health issue to "everyone else," such as: not everyone who has an emotional problem would commit murder. To include emotional, mental illness, learning disabilities.

Aggravating Evidence NOT Related to Instant	Mental illness	Q. So you agree -- you'll agree with me, though, that not every single person who would be in the exactly same circumstance of the defendant is going to eventually commit murder? A. No, I would agree with you.
		Q. And so, again, on the other murders that this jury has heard evidence about, he did or did not have a choice as to his involvement in those cases? A I think that he had choices in a sense that he was not so mentally ill that he could not have walked away from the situation, if you look at it very simplistically.
		Q. So he had anger management problems going all the way back to school, is that a fair statement, according to the information that you obtained from these records? A. Yes.

Aggravating Evidence NOT Related to Instant Offense: **Negative History while incarcerated, on parole/probation, or in police custody:** Previous incarceration, etc. testimony in which the defendant's behavior was bad, violence, deviance, write-ups, discipline actions, etc.; this evidence may be previous prison incarceration, waiting for trial in county jail, on parole/probation, or while being arrested by police.

Aggravating Evidence NOT Related to Instant	Negative history while incarcerated, etc.	Q. Okay. When you asked the defendant to get off of the telephone so that you could continue with the feeding, what was his response? A. No, I'm not getting off the phone. I'm talking -- I'm talking to someone.
		Q. Okay. She fails to complete those drug services. You already

		testified to that, correct? A. Yes.
		Letter: Finally, they found needles and razors in my cell so they wrote me up for contraband and classified me as dangerous and high-risk prisoner. Now I get strip searched and cell searched about every day. All this happened in a month and a half so I can't get visitation, commissary and phone calls till February.

Aggravating Evidence NOT Related to Instant Offense: **Gang Membership:** testimony related to defendants involvement with gangs, either as a member or had a relationship to the gang.

Aggravating Evidence NOT Related to Instant	Gang membership	Q When you met him, how was he introduced to you? I mean, what did you -- what was told to you about him? Was he in LTC, not in LTC? A. He was LTC member.
		Q. Can you explain to the jury what the Texas Syndicate is? A. The Texas Syndicate is probably one of the oldest prison gangs recognized within the Department of Corrections.
		Q. Also as part of that summary, there's something called institutional adjustment, and you noted that he's a confirmed Blood gang member. Is that correct? A. That is correct.

Aggravating Evidence NOT Related to Instant Offense: **Aggressive Behavior:** not resulting in a criminal violation; threatening, intimidating, by words or actions. Can also include risky behavior. Bad behavior in school or work. Plan of criminal activity or criminal activity that did not result in arrest.

<p>Aggravating Evidence NOT Related to Instant</p>	<p>Aggressive behavior</p>	<p>Q. Okay. And describe for jury what happened during that meeting. A. Well, it was never completed because Paul came in and interrupted. He was afraid that I was having an affair with this doctor. Q. When you say he came in and interrupted, how did that happen? A. He just barged his way in.</p>
		<p>Q. He had taken all the phones in the house? A. He had taken all the phones away. Q. Okay. A. I had changed into a pair of shorts and a T-shirt, and he literally cut them off of me.</p>
		<p>Q. And are you aware of a situation where the Defendant broke a glass table? A. Yes. Q. Are you aware of a situation where the Defendant threw a video at his father and hit him in the head? A. Yes.</p>

APPENDIX C Similarities and Differences in Primary and Secondary Themes.

	Theme	No FD	FD	Message
Similarities	heinousness	Did not affect dangerousness	Did not affect dangerousness	
	a probability	Did not affect dangerousness	Did not affect dangerousness	
	mental health as a mitigator	same amount of references in both No FD and FD	same amount of references in both No FD and FD	Different message between No FD and FD
Differences	future violent acts			Different message between prosecution and defense but not between No FD and FD
	future violent acts			Defense presented more evidence than prosecution regardless of No FD or FD
	Society	Defense presented a substantial amount of evidence in No FD cases	Prosecution presented enough evidence in FD cases to show a pattern	Different message between prosecution and defense but not between No FD and FD
	guidance to jurors	Defense presented more evidence in No FD		Similar message between the prosecution and the defense and between No FD and FD

	Theme	No FD	FD	Message
Differences	guidance to jurors	Defense gave opening arguments more often	Prosecution gave opening arguments more often	
	guidance to jurors		Defense made a reference to God more often	
	Expert testimony of future danger	Defense presented more evidence in No FD		
	Expert testimony of future danger	Different message than FD	Different message than No FD	
	mercy	Slightly more mitigating evidence in No FD		Similar message between No FD and FD
	employment history	More mitigating evidence in No FD		Similar message between No FD and FD
	alcohol/drug abuse		More mitigating evidence in FD	
	child abuse/neglect		More mitigating evidence in FD	
	general good person		More mitigating evidence in FD	
	good history of incarceration		More mitigating evidence in FD	Similar message between No FD and FD
	loving, compassionate, & caring		More mitigating evidence in FD	Similar message between No FD and FD
	criminal history		More aggravating evidence in FD	Similar message between No FD and FD

	Theme	No FD	FD	Message
Differences	negative history of incarceration		More aggravating evidence in FD	Similar message between No FD and FD
	weapon use		More aggravating evidence in FD	Similar message between No FD and FD
	alcohol/drug use		More aggravating evidence in FD	
	gang membership		More aggravating evidence in FD	
	mental health - aggravator	More aggravating evidence in No FD		Different messages between No FD and FD
	history of family dysfunction - mitigator		More mitigating evidence in FD	Similar message between No FD and FD
	history of family dysfunction - aggravator	More aggravating evidence in No FD		Similar message between No FD and FD
Cluster Analysis	mitigating	Child abuse/neglect & mental health issues	Child abuse/neglect & alcohol/drug abuse	
	mitigating	History of family dysfunction & good history of incarceration	History of family dysfunction & mental health issues	
	mitigating	General good person & loving, compassionate, & caring	General good person & loving, compassionate, & caring	

Cluster Analysis	aggravating	Mental health issues & negative history of incarceration	Criminal history & weapons use & gang membership
	aggravating	Alcohol/drug use & criminal history	Aggressive behavior & alcohol/drug use
	aggravating	History of family dysfunction & weapon use	History of family dysfunction & mental health issues

Bolded themes indicate the substantial differences between No FD and FD cases.

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