Holding the Line: Identifying and Confronting Barriers to Effective Capital Voir Dire in Texas

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Given the central role of the jury in capital sentencing, voir dire in capital cases must elicit and explore potential jurors' true beliefs and feelings about the death penalty. Far too often, however, Texas capital voir dire falls short of sufficiently identifying those potential jurors who are unqualified to serve because of their pro-death views. The Colorado Method, or the Morgan Method, of jury selection provides a structured approach to death penalty voir dire, grounded in constitutional caselaw and informed by practice-tested knowledge about juror decision-making. Yet, Texas courts often foreclose essential elements of the Method, for reasons that are often based in misunderstandings of the Method itself or the prevailing constitutional principles on which it relies.

This Article demonstrates that well-prepared defense teams should be able to employ this structured approach to enforce constitutional qualification standards in capital voir dire. While certain aspects of Texas law are often interpreted to shortchange effective capital voir dire, this Article shows that the legal landscape, while complicated, is not as bleak as it may appear. After examining oft-cited Texas caselaw and dispelling common misconceptions about the Method's approach and foundational principles, this Article offers practical guidance for capital defense teams to hold the constitutional line and select a jury that is truly qualified to sit in a case where the State seeks the penalty of death.

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INTRODUCTION

A central principle of the modern death penalty is the Eighth Amendment prohibition against mandatory death sentences[1]—in fact, "an individualized decision is essential in capital cases."[2] Though statutory structures vary across death-sentencing jurisdictions, all states that allow for capital punishment require jury participation in the sentencing decision.[3] Therefore, jury selection in capital cases is of vital importance, and like any other aspect of capital representation, requires specific competencies above and beyond general criminal defense.[4]

The "gold standard" of capital jury selection is sometimes referred to as the Colorado Method,[5] or the Morgan Method[6] (the Method), which provides capital defense counsel with a structured approach to death penalty voir dire. Given the central role of the jury in capital sentencing, this method of jury selection has been credited as "the saving grace" of "countless" defendants facing the death penalty,[7] yet it is rarely employed in Texas capital trials. As this Article demonstrates, however, the struggles with implementing the Method in Texas are not insurmountable. Well-prepared defense teams should be able to utilize, and adapt, the Method's approach to enforce constitutional qualification standards in voir dire and more effectively identify and strike jurors who are in fact disqualified from service in capital cases due to their views on capital punishment.

The purpose of this article is *not* to substitute for or argue against training in the Colorado Method for capital defense teams. Instead, by

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[1] Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (finding that North Carolina's statute requiring the death penalty for persons convicted of first-degree murder violated the Eighth Amendment); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (finding that Louisiana's mandatory death penalty statute violated the Eighth Amendment).

[2] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

[3] *See* Richa Bijlani, Note, *More Than Just a Factfinder: The Right to Unanimous Jury Sentencing in Capital Cases*, 120 MICH. L. REV. 1499, 1510–19 (2022) (surveying death penalty states' approaches to jury sentencing in capital cases).

[4] *See* Am. Bar Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1049 (2003).

[5] Sophie E. Honeyman, *Escaping Death: The Colorado Method of Capital Jury Selection*, 54 UIC J. MARSHALL L. REV. 247, 274 (2021).

[6] This term is drawn from the Supreme Court case, *Morgan v. Illinois*, 504 U.S. 719, 729 (1992), which held that jurors who would always vote for the death penalty are challengeable for cause by a capital defendant and established a right to questioning sufficient to identify such jurors. More on *Morgan* below.

[7] Honeyman, *supra* note 5, at 250.

elaborating upon the Method's tenets and what is known about capital jury decision-making, this Article endeavors to (1) identify areas of state law that are wrongly decided under prevailing federal constitutional principles and elucidate how they mutually reinforce each other to unconstitutionally impair capital jury selection in Texas; (2) correct misconceptions and misrepresentations of the Method often cited by prosecutors in efforts to foreclose constitutionally-adequate voir dire[8]; (3) recognize existing Texas cases that support the ability of defense teams to utilize key aspects of the Method during jury selection; and (4) provide tools, examples, and guidance for defense teams to supplement the Colorado Method and maximize the opportunity to obtain life verdicts in the Lone Star State.

I. JURY SELECTION: CAPITAL-SPECIFIC PRINCIPLES

In every criminal case, potential jurors may be eliminated in one of two ways: (1) upon a judicial finding that they are legally disqualified, or "for cause"[9]; or (2) by peremptory challenge, "without assigning any reasons therefore."[10] Challenges for cause are unlimited, based on the rationale that such a juror is legally "incapable or unfit to serve on the jury,"[11] but the number of peremptory challenges is often dictated by statute.[12] "[V]oir dire is an integral part of defense counsel's role in providing adequate legal assistance because it allows counsel to intelligently exercise peremptory challenges and challenges for cause during the jury selection process."[13]

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[8] *Morgan*, 504 U.S. at 729 ("[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.").

[9] TEX. CODE CRIM. PROC. art. 35.16 (2005) ("Reasons for Challenge for Cause").

[10] TEX. CODE CRIM. PROC. art. 35.14 (1966) ("A Peremptory Challenge"). Such challenges are subject only to the constitutional limitations on striking jurors on the basis of race, *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), or sex, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994). In 2022, Arizona became the first state to eliminate peremptory challenges entirely. Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 2, 7–8 (2024).

[11] CRIM. PROC. art. 35.16(a).

[12] *See, e.g.*, TEX. CODE CRIM. PROC. art. 35.15 (1991) (designating number of peremptory challenges by gravity of charge; for example, fifteen peremptory challenges are allowed "[i]n capital cases in which the State seeks the death penalty").

[13] Dinkins v. State, 894 S.W.2d 330, 344 (Tex. Crim. App. 1995); *see also* Sanchez v. State, 165 S.W.3d 707, 710–11 (Tex. Crim. App. 2005) ("The first purpose [of voir dire] is to elicit information which would establish a basis for a challenge for cause because the venireman is legally disqualified from serving or is biased or prejudiced for or against one of the parties or some aspect of the relevant law.").

A. Death Qualification and the Reciprocal Rule of Life Qualification

Capital jury selection is subject to particularized requirements. These requirements stem from the bifurcated nature of capital trials and the concomitant need to empanel a singular jury that will determine both whether the State has proven a defendant guilty of a death-eligible crime and, if so, the proper penalty.[14] Because a single jury is selected to decide both the merits of the charge and, if necessary, the appropriate sentence, a juror's ability to consider both potential punishments upon conviction in a case in which the State is seeking death is not only proper but a vital area of inquiry.[15]

The process of ensuring potential jurors' willingness to impose the death penalty is often referred to as "death qualification," which accounts for a substantial portion of capital voir dire.[16] Over the course of several decades, the Supreme Court has issued three major decisions that, taken together, govern death qualification of capital juries. The Court first imposed a limitation on the State's ability to exclude jurors who were even hesitant about the death penalty. In *Witherspoon v. Illinois*,[17] the Supreme Court held that the government violates a capital defendant's right under the Sixth and Fourteenth Amendments to trial by an impartial jury when it excuses for cause all members of the venire who express conscientious scruples against capital punishment.[18] As the *Witherspoon* Court observed, a jury from which all such members are excluded would not be the

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[14] *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) (observing that "a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information" sufficiently addresses the concerns identified in *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding the death penalty unconstitutional in three cases)); *see also* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 794–98 (2006) (arguing for "true bifurcation," i.e., separate juries for the determination of guilt and penalty in a capital case).

[15] Wainwright v. Witt, 469 U.S. 412, 416 (1985) (noting that the State possesses a "legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate administration of a State's death penalty scheme"); Lockhart v. McCree, 476 U.S. 162, 165, 180 (1986) (rejecting a constitutional challenge to death qualification of jurors prior to the guilt phase of a bifurcated capital trial, noting the "State's entirely proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case"); *Dinkins*, 894 S.W.2d at 344 ("[A] defendant is generally entitled to voir dire prospective jurors on any matter which will be an issue at trial."); TEX. PENAL CODE § 12.31(a) ("An individual adjudged guilty of a capital felony in a case in which the state seeks the death penalty shall be punished by imprisonment in the Texas Department of Criminal Justice for life without parole or by death.").

[16] *See* Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 L. & HUM. BEHAV. 121, 122 (1984).

[17] Witherspoon v. Illinois, 391 U.S. 510 (1968).

[18] *Id.* at 518, 522.

impartial tribunal required by the Sixth Amendment, but rather a jury "uncommonly willing to condemn a man to die."[19]

In the years that followed, confusion amongst lower courts concerning the general application of *Witherspoon*'s rule led the Court to clarify the proper standard of exclusion due to jurors' views about the death penalty. In *Wainwright v. Witt*,[20] the Supreme Court explicitly adopted its language from a Texas case as "preferable for determining juror exclusion."[21] Where death is a possible penalty, prospective jurors may be excused for cause if their views on capital punishment would "prevent or substantially impair the performance of [their] duties as . . . juror[s] in accordance with [the] instructions and [their] oath."[22]

Subsequently, the Court made clear that the *Witt* rule is reciprocal. In *Morgan v. Illinois*,[23] the Court held that "based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment," a juror who would automatically vote for the death penalty—and thus would "fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do"—is challengeable for cause by a capital defendant.[24] If "even one such juror" is empaneled, the State may not enforce a resulting death sentence.[25]

Morgan also guarantees the right of a defendant to "*adequate* voir dire to identify [such] unqualified jurors"[26] and "exercise intelligently his complementary challenge for cause."[27] This means that "general fairness

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[19] *Id.* at 521.

[20] 469 U.S. 412 (1985).

[21] *Witt*, 469 U.S. at 421, 424.

[22] *Id.* at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). Potential jurors whose opposition to the death penalty excludes them from service in capital cases are often known as *Witt*-excludable (WE) jurors. *See, e.g.*, Ramos v. State, 934 S.W.2d 358, 368 (Tex. Crim. App. 1996).

[23] 504 U.S. 719 (1992).

[24] *Id.* at 729. Such jurors are known in capital voir dire parlance as "always death penalty (ADP)" jurors. John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing "Life-Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1211 n. 5 (2001) (describing the term and noting that early use of the term "ADP" is found in cases including *Grigsby v. Mabry*, 569 F. Supp. 1273, 1287, 1305–06, 1318 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (1985), *rev'd sub nom.*, Lockhart v. McCree, 476 U.S. 162 (1986), and *Hovey v. Superior Court*, 616 P.2d 1301, 1310–11 nn.48–49, 1319–20 nn.70–71, 1343–44 nn.110–12, 1346 n.115, 1353 n.133 (Cal. 1980), *superseded by statute*, CAL. CIV. PROC. CODE § 223 (West 2025)).

[25] *Morgan*, 504 U.S. at 729.

[26] *Id.*

[27] *Id.* at 733–34. The Court explained:

and 'follow the law' questions" as to a capital juror's ability to be fair are insufficient to ensure a constitutionally impartial jury, even if the juror responds in the affirmative.[28] As the *Morgan* Court noted, persons whose death penalty support would in fact prevent or substantially impair their performance as a capital juror "could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed."[29]

B. Eighth Amendment Principles and Life Qualification

While the *Witherspoon/Witt* rule is rooted in the Sixth Amendment right to an impartial jury, the Eighth Amendment also requires that a capital juror be able to consider and give effect to a defendant's mitigating evidence in making an individualized determination regarding penalty.[30] "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence."[31] While jurors "may determine the weight to be given relevant mitigating evidence[,] . . . . they *may not give it no weight* by excluding such evidence from their consideration."[32]

As the *Morgan* Court noted, failure to enforce a complementary "life-qualification" standard would therefore also run afoul of the Eighth

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> Were *voir dire* not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so.

Id.

[28] *Id.* at 734–35 ("*Witherspoon* and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect" jurors unqualified by virtue of their beliefs for *or against* the death penalty, "their protestations to the contrary notwithstanding.").

[29] *Id.* at 735.

[30] *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (holding that mandatory death penalty statutes violate the Eighth Amendment because "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.").

[31] Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

[32] Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (emphasis added); *accord* Heiselbetz v. State, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995) ("Each juror must be able to consider mitigating evidence, but the weight that each juror gives to particular 'mitigating' evidence is left to the individual's discretion.").

Amendment requirement of individualized sentencing.[33] Jurors who would always sentence a capital defendant to death upon conviction "obviously deem mitigating evidence to be irrelevant to their decision to impose the death penalty: They not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it."[34] In other words, a prospective juror who is unable or unwilling to consider evidence offered in mitigation is subject to a challenge for cause because they cannot follow the law.[35]

Finally, the Court has also demanded that the sentence returned by a capital jury must reflect "a reasoned *moral* response to the defendant's background, character, and crime."[36] Thus, in addition to the constitutional requirement that jurors in capital cases be able and willing to consider a wide range of mitigating evidence in determining the appropriate sentence, each individual juror must determine for themselves the existence of mitigating factors and the weight accorded to them.[37]

Taken together, these decisions require that a qualified capital juror must be willing and able to: (1) require the State to prove all of the elements of a capital crime and the requisite aggravating facts beyond a reasonable doubt; (2) give meaningful consideration to a wide range of mitigating factors; (3) make an individualized decision in cases where the State has proven capital eligibility beyond a reasonable doubt as to whether death is the right punishment in *that* case; and (4) listen to and consider the thoughts of fellow jurors during deliberation but also hold

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[33] *See Morgan*, 504 U.S. at 728–29; *accord* Lockett v. Ohio, 438 U.S. 586, 604 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."); *Eddings*, 455 U.S. at 113–14 (holding that states "may not by statute preclude the sentencer from considering any mitigating factor," nor may "the sentencer refuse to consider . . . any relevant mitigating evidence"); Penry v. Johnson, 532 U.S. 782, 797 (2001) (reiterating that "the key" to *Penry v. Lynaugh* was "that the jury be able to 'consider and give effect to [a defendant's mitigating] evidence in imposing sentence'" (quoting Penry v. Lynaugh, 492 U.S. at 319)).

[34] *Morgan*, 504 U.S. at 736 (framing Justice Scalia's "jaundiced" view expressed in dissent as stemming from his personal rejection of the Eighth Amendment's individualization requirement stemming from *Woodson*, 428 U.S. 280, and *Lockett*, 438 U.S. 586).

[35] *See id.* at 729; *see also Eddings*, 455 U.S. at 113–14 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider . . . any relevant mitigating evidence*." (emphasis added)).

[36] *Penry v. Lynaugh*, 492 U.S. at 319 (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

[37] *See* Mills v. Maryland, 486 U.S. 367, 384 (1988) (holding that states may not require juror unanimity to find existence of mitigating circumstances).

firm to their own reasoned moral response to the evidence if convinced of a conclusion contrary to that of other jurors.[38]

C. Who Ends Up Serving?

The concern expressed by the Court in *Morgan*—that unqualified jurors may elude detection and ultimately sit on death penalty juries without adequate questioning to reveal their disqualifying views—is borne out by the results of social science studies and interviews with capital jurors. Research affirms that many jurors who should be disqualified because they would always vote for death upon conviction for capital murder are nonetheless qualified in practice.[39]

Beginning in 1990, a group of university-based researchers, supported by the National Science Foundation, undertook an expansive project to gain insight into the experience and decision-making of capital juries through lengthy, in-person interviews with jurors.[40] The Capital Jury Project (CJP) data provided valuable information about the dynamics of capital jury deliberations and how jurors process the evidence presented by both the prosecution and the defense at a capital trial.[41]

The CJP data illuminates the need for competent and probing voir dire and demonstrates the prevalence of service by jurors who should be disqualified for their pro-death predispositions.[42] Interviews with those

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[38] Blume et al., *supra* note 24, at 1219 (summarizing the requisite qualifications of jurors drawn from the Supreme Court's various cases on the issue).

[39] *See, e.g.*, Ronald C. Dillehay & Marla R. Sandys, *Life Under* Wainwright v. Witt*: Juror Dispositions and Death Qualification*, 20 L. & HUM. BEHAV. 147, 159 (1996) (estimating that as many as 28.2% of capital jurors may not be qualified to serve because they would always vote for death upon conviction for capital murder but would nonetheless be qualified under *Witt*).

[40] William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043, 1077 (1995).

[41] *See, e.g.*, William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORN. L. REV. 1476, 1477 (1998) (noting that interviews with capital jurors reveal that "many jurors reached a personal decision concerning punishment before the sentencing stage of the trial, before hearing the evidence or arguments concerning the appropriate punishment, and before the judge's instructions for making the sentencing decision"); Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1571 tbl. 8 (1998) (finding mental illness, mental impairment, and history of child abuse to be highly mitigating); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORN. L. REV. 1557, 1574–75, 1590–91 (1998) (finding a denial defense more likely to result in a death sentence and emphasizing the important of acceptance of responsibility in jurors' receptivity to mitigation generally).

[42] *See* Blume et al., *supra* note 24, at 1223–24 (summarizing CJP data demonstrating that significant numbers of jurors who served in capital cases were in fact ADP when considering

who served reveal that many jurors, despite their assurances during voir dire, decide that death is the appropriate punishment for the defendant during the presentation of the *merits*-phase evidence and "adhere to feelings and to beliefs that directly contradict the legal requirements for capital jury service."[43]

Furthermore, CJP interviews have confirmed that many capital jurors are, in fact, "mitigation impaired—unable or unwilling to consider particular mitigating factors—and thus constitutionally unqualified."[44] Many jurors who ultimately serve on capital juries are also confused about the utility of mitigating evidence and tend to erroneously believe that the defense has the burden of proving mitigating circumstances or that unanimity is required to give mitigating effect to such evidence.[45]

D. Priming Effects of the Qualification Process

Confirming the concerns expressed by the *Witherspoon* Court over fifty years ago, studies demonstrate that the death qualification process "still seats juries uncommonly willing to find guilt, and uncommonly willing to mete out death."[46] The data from the CJP shows that the process more effectively winnows out those with hesitations about the death penalty, while leaving firm supporters in the jury pool despite serious questions about their ability to be unbiased.[47] And the structure and

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either the definition of capital murder or the aggravating circumstances that actually make a defendant eligible for the death penalty).

[43] Bowers et al., *supra* note 41, at 1531–33.

[44] Blume et al., *supra* note 24, at 1228–29; *see also Morgan*, 504 U.S. at 749 (Scalia, J., dissenting) (noting that under *Morgan*, "a State is constitutionally *compelled* to exclude jurors who would, on the facts establishing the particular aggravated murder, invariably impose death").

[45] Rozelle, *supra* note 14, at 791 (citing William J. Bowers, Benjamin D. Fleury-Steiner & Michael E. Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction, in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT, AND FUTURE OF THE ULTIMATE PENAL SANCTION 413, 438 (James R. Acker, Robert M. Bohm & Charles S. Lanier eds., 2d ed. 2003)) ("[A]pproximately half of the CJP jurors wrongly believed that mitigators had to be proven beyond a reasonable doubt and that no mitigator could affect the punishment decision unless jurors agreed on it unanimously.").

In Texas, jurors are specifically instructed that no burden of proof is assigned to mitigating evidence. However, the general confusion regarding the degree of consensus required to find mitigation is exacerbated by a controversial aspect of the Texas statute discussed below: jurors are also told that the agreement of ten jurors is required to return a verdict that sufficient mitigation exists to warrant a sentence of life without parole rather than death. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(f)(2).

[46] Rozelle, *supra* note 14, at 784–85.

[47] *See* Andrea D. Lyon, *The Negative Effects of Capital Jury Selection*, 80 IND. L.J. 52, 53 (2005). Lyon explains:

questioning of the death-qualification process itself biases jurors in favor of guilt, desensitizes them to the imposition of the death penalty, and suggests that the courtroom actors believe that the death penalty is a likely, and appropriate, result.[48]

Incidentally, qualifying jurors in capital cases based on their willingness to impose the death penalty also eliminates disproportionate numbers of women, Black community members, other minoritized groups, and adherents of certain religions.[49] Researchers have also noted the risk of death qualification's "supposedly race-neutral line of questioning act[ing] as an indirect prime that triggers stereotypes of African Americans, including criminality, dangerousness, and guilt."[50] Particularly in cases involving interracial dynamics, such biases can amplify the effects of an already-skewed panel and further stack the deck against a capital defendant.[51]

The biasing effects of the death-qualification process are compounded by the complexities of capital sentencing proceedings and jury instructions. "[U]nless prospective jurors are provided enough information to understand the essentials of the proceedings and their own role, a reasonably valid prediction of their own behavior is not possible,

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> What happens is you have a jury from which everyone who opposes the death penalty is excused for cause, from which everyone who waivers on it (if it was Bin Laden, I could do it, but it would have to be that bad) gets excused peremptorily by the prosecution. It's been my experience that people who oppose the death penalty tend to be pretty honest about it, but people who support it tend to lie and will say upon rehabilitation, "oh, sure, I'll consider mitigation if the judge tells me to."

Id.

[48] Haney, *supra* note 16, at 128–30; John Paul Stevens, Associate Justice, Supreme Court of the U.S., Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html [https://perma.cc/8V3R-HE6Y].

[49] *See* Craig Haney, Eileen L. Zurbriggen & Joanna M. Weill, *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, 28 PSYCH., PUB. POL., & L. 1, 2–3 (2022) (describing and citing various studies establishing the "demographic dilemma in death qualification" (quoting J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107 (2014))); Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148, 167 (2018). *See generally* Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide"*, 45 L. & SOC'Y REV. 69 (2011).

[50] Justin D. Levinson, *Race, Death, and the Complicitous Mind*, 58 DEPAUL L. REV. 599, 619 (2009).

[51] *See* William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 192–93 (2001) (describing a "white male dominance" effect in capital sentencing for cases involving a Black defendant and white victim, where "the presence of five or more white males on the jury dramatically increased the likelihood of a death sentence").

and that task loses much of its meaning."[52] And because the Supreme Court has explicitly rejected constitutional challenges to the requirement of death qualification itself,[53] it falls to capital defenders to not only provide jurors with enough information to understand the essentials of the proceedings and their own role, but also to develop and deploy voir dire questioning adequate to sufficiently identify jurors with pro-death penalty bias and remove them for cause *and* to ensure jurors open to considering a life penalty understand the law and are not improperly removed.[54] These urgent tasks can only be accomplished with advanced preparation, strategy, and precision—attorneys must utilize a methodical and scientific approach to capital voir dire.

E. Colorado Method—Death Penalty Voir Dire That Works

It is widely accepted that cases are often won (or lost) in jury selection.[55] Nowhere is this truer than in a capital case. Recognizing the need for an expansive and death-penalty-specific technique that accounted for and addressed many of the realities described above, renowned capital

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[52] Dillehay & Sandys, *supra* note 39, at 149; *see also* Morgan v. Illinois, 504 U.S. 719, 734–35 (1992).

[53] Lockhart v. McCree, 476 U.S. 162, 173 (1986) (assuming, *arguendo*, "that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," but holding, "nonetheless, that the Constitution does not prohibit the States from 'death qualifying' juries in capital case").

[54] *See* Blume et al., *supra* note 24, at 1243–44. Voir dire is a "crucial aspect" of capital defense comprised of numerous "urgent tasks," including "establish[ing] a common language" to discuss complicated and foreign legal concepts,

> identify[ing] jurors that [defense counsel] can effectively challenge for cause, employ[ing] questioning techniques that will enable her to challenge ADP jurors for cause, identify[ing] jurors who are appropriate targets for peremptory strikes, us[ing] effective methods to 'rehabilitate' and 'save' from state challenges-for-cause those jurors who have reservations about the death penalty, and 'educat[ing] jurors as to their rights to be free from harassment and disrespect so that they can exercise their individual judgment, regardless of the group dynamics.

Id. (emphasis removed) (quoting Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, CHAMPION, Jan.–Feb. 2001, at 35, 42).

[55] *See, e.g.*, Herald Price Fahringer, *Mirror, Mirror on the Wall . . .": Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197, 197 (1993) (noting that, according to experts, eighty-five percent of cases "are won or lost when the jury is selected," requiring counsel to approach voir dire with care); Jeffery R. Boyll, *Psychological, Cognitive, Personality and Interpersonal Factors in Jury Verdicts*, 15 L. & PSYCH. REV. 163, 176 (1991) ("[J]ury selection is one of the most vital components of the trial proceedings. The case may be [won] or lost at voir dire."); Margaret Covington, *Jury Selection: Innovative Approaches to Both Civil and Criminal Litigation*, 16 ST. MARY'S L.J. 575, 575–76 (1984) ("Experienced trial lawyers agree that the jury selection process is the single most important aspect of the trial proceedings. In fact, once the last person on the jury is seated, the trial is essentially won or lost." (footnote omitted)).

defense attorney David Wymore developed what is generally referred to as "the Colorado Method," or Morgan Method,[56] of capital voir dire; it is implemented by practitioners across jurisdictions, adapting its central tenets to differentiations in state law.[57] This methodical approach offers a structured and highly effective method of jury selection.[58]

Designed to educate jurors about the realities of death penalty procedures and select jurors based on their true beliefs regarding capital punishment, the Method "maximizes the opportunity to obtain life verdicts."[59] This article does not attempt to explain the mechanics of this method in detail, but a brief explanation of its origins and central tenets is necessary to the discussion and propositions to follow.

It is important to note that the Method does not attempt to seat jurors who are excludable under *Witt* on the basis of their opposition to the death penalty.[60] But practitioners *do* seek to identify venirepersons who might "potential[ly]" vote for a life sentence, who both "realize[] the seriousness of being asked to sit on the capital jury and take[] seriously the value of human life" *and* can still "give meaningful consideration to the death penalty"[61]; such persons should not be struck for cause because they are sufficiently "death-qualified" under the constitutional standard.[62] And jurors who would disregard mitigating evidence or fail to meaningfully consider a sentence of life without parole are not.[63]

Grounded in the constitutional rule that a death sentence is never mandatory,[64] the Colorado Method involves a multi-pronged approach to balancing the scales of death qualification:

1. Foster a non-judgmental environment during voir dire where potential jurors are invited to share their feelings and views about the death penalty and life imprisonment by stripping away any extraneous culpability defenses, issues, and circumstances

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[56] The broader "Morgan Method" shorthand references the Supreme Court case, described supra, that establishes the defense right to question and challenge jurors who are biased in favor of the death penalty. *Morgan*, 504 U.S. at 733–34.

[57] *See* Honeyman, *supra* note 5, at 272, 274.

[58] *See id.* at 250.

[59] Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, CHAMPION, Nov. 2010, at 18, 18.

[60] *See id.* at 19 (acknowledging that such "[a] person . . . is a conscientious objector and is impaired because she will never give meaningful consideration to a death sentence" (emphasis added)).

[61] *See id.* at 18–19.

[62] *See* Witherspoon v. Illinois, 391 U.S. 510, 517, 519–21 (1968).

[63] *See* Morgan v. Illinois, 504 U.S. 719, 729 (1992).

[64] *See* Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

through voir dire questioning about the jurors' views about capital punishment;
2. Excuse jurors (with cause challenges and peremptory challenges) based on punishment views only;
3. Identify and rate strong pro-death and potential life-voting jurors;
4. Build and make challenges for cause against pro-death-penalty biased jurors based on the strength of their views about the death penalty;
5. Protect other jurors from cause challenges;
6. Ensure potential life-voting jurors are not bullied, harassed, threatened, or misled into surrendering their individual moral judgment for life; and
7. Confirm that strong pro-death jurors understand all jurors must be treated with respect and dignity (including life-giving jurors).[65]

While this method is rightly credited with saving the lives of numerous capital defendants,[66] it is not fully publicly available. Annual trainings are conducted in Boulder, Colorado, by experienced litigators and trainers.[67] As a consequence of the adversarial nature of criminal proceedings and the numerous structural advantages to the State baked into capital proceedings specifically, the training itself is not public, and materials are generally available only to those who have attended the trainings.[68]

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[65] *See* Rubenstein, *supra* note 59, at 18–19.

[66] Honeyman, *supra* note 5, at 250 (describing the Colorado method as the "saving grace" for "countless . . . defendants facing the death penalty," including federal defendant Brendt Christensen and Aurora theater shooter James Holmes); *see also* Corinna Barrett Lain & Douglas A. Ramseur, Essay, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. RICH L. REV. 183, 274–79 (2021) (describing the Colorado Method as "the gold standard" of capital voir dire and discussing its role in Virginia's final death penalty trial before legislative abolition).

[67] *Annual Theory & Intense Practice Capital Voir Dire Training Boulder, Colorado*, NAT'L COLL. OF CAP. VOIR DIRE, https://www.nccvd.org/ [https://perma.cc/Q9VN-XLKH].

[68] *See* Honeyman, *supra* note 5, at 251–52. However,

> the National College of Capital Voir Dire regularly . . . provides scholarships to capital defense counsel unable to pay the registration fee. No attorney is turned away from the college because of a lack of funds. Regional programs are also available and many attorneys skilled in Colorado Method voir dire volunteer to work with defense counsel in jurisdictions across the United States to help them learn the method and prepare for voir dire.

Antonio X. Milton, *Response to Newton's Article, Getting to Know You: An Expanded Approach to Capital Jury Selection*, NAT'L COLL. OF CAP. VOIR DIRE (Jan. 30, 2022), https://www.nccvd.org/response-newton-article [https://perma.cc/VQ2B-QT2A].

But, as seen below, even the sparsely available literature and materials have led to precisely the consequences its architects feared—Texas prosecutors, likely frustrated by the success of the Method, have begun to request that courts prohibit or strictly regulate its use in capital trials across Texas.[69] However, such requests are not unique to Texas, and skilled attorneys can overcome prosecution efforts to foreclose effective voir dire.

In response to prosecution efforts to restrict use of the Colorado Method, Texas capital defense lawyers should not revise the Method or adopt alternative approaches to voir dire questioning. To be clear, *every* defense team preparing to try a capital case should avail themselves of the Boulder training and develop proficiency in this crucible-tested tool. But it is true that some Texas courts are restricting the use of the Method, notwithstanding its consistency with Supreme Court precedent. Capital defense attorneys in Texas must not abandon the lessons of the Method but instead must become the experts in the courtroom on the foundational principles of constitutional voir dire, and must be prepared to advocate for constitutionally adequate voir dire in capital trials *and*, if necessary, adapt their practice to fulfill this mandate even in the face of adversarial rulings in an individual case. Thus, this Article attempts to provide resources and guidance for defense teams to supplement the Method and maximize the opportunity to obtain life verdicts in the Lone Star State.

II. THE REPUBLIC OF TEXAS: PROBLEMATIC STATE LAW AND STRICTURES ON CONSTITUTIONALLY ADEQUATE VOIR DIRE IN CAPITAL CASES

"Texas is widely regarded as the [epi]center of the modern American death penalty."[70] Many scholars and advocates have speculated that the structure of Texas's capital sentencing statute contributes to its outsized role in death sentencing and execution in the United States.[71] While this is almost certainly the case, the role of Texas's unique

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[69] Pretrial motions with identical arguments seeking to bar the use of the Colorado Method have been filed in multiple recent capital cases across Texas. Copies of several of these motions, riddled with inaccuracies and misrepresentations, are on file with the author and are discussed in detail in Part III.

[70] Carol S. Steiker and Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEXAS L. REV. 1869, 1875 (2006).

[71] *See, e.g.*, Elizabeth S. Vartkessian, *Dangerously Biased: How the Texas Capital Sentencing Statute Encourages Jurors to Be Unreceptive to Mitigation Evidence*, 29 QUINNIPIAC L. REV. 237, 239–40 (2011); Janet Morrow & Robert Morrow, *In a Narrow Grave: Texas Punishment Law in Capital Murder Cases*, 43 S. TEXAS L. REV. 979, 983–86 (2002).

sentencing statute and related jury instructions is magnified by the interplay between several specific state law doctrines.

The structure of the Texas special issues, including the "10–12 rule" that governs the degree of consensus required to answer the special verdict forms, the overbroad interpretation of commitment questions under state law, and a series of cases conflating the constitutionally required ability to "consider" mitigating circumstances with each individual juror's decision to give mitigating circumstances weight in the sentencing decision all interact in ways that complicate the defense of capital cases in Texas, particularly during voir dire.

However, when some of these widely accepted doctrines are examined, it is apparent they rest on shaky, if not untenable, ground. Thus, a brief discussion of these principles, their relationship to each other, and the lack of fit between state law and constitutional mandates is necessary to understand and confront state-specific obstacles and restrictions on capital voir dire in Texas.

A. Texas's "Special Issues"

States that provide for capital punishment must ensure that their statutory schemes perform two independent constitutional functions—guided discretion, by "establish[ing] a threshold below which the penalty cannot be imposed" and "rational criteria that narrow the decisionmaker's judgment" to ensure that threshold is met, and individualization of the sentencing determination upon conviction for a capital crime.[72] The Eighth Amendment requires that a state capital sentencing scheme "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."[73] The Supreme Court has referred to factual determinations that perform this requisite narrowing function as "eligibility" factors, while the ultimate discretionary decision of whether a particular defendant is sentenced to death is the "selection" decision.[74]

In contrast to the sentencing schemes of other death penalty jurisdictions,[75] the Texas Legislature has defined a specific crime of

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[72] *See* Romano v. Oklahoma, 512 U.S. 1, 6–7 (1994) (quoting Lowenfield v. Phelps, 484 U.S. 231, 244 (1988)) (describing the "two somewhat contradictory" constitutional requirements of guided discretion and individualized sentencing).

[73] Zant v. Stephens, 462 U.S. 862, 877 (1983); *see also* Gregg v. Georgia, 428 U.S. 153, 177 (1976).

[74] *See* Tuilaepa v. California, 512 U.S. 967, 971 (1994).

[75] Of the twenty-seven other states that allow for capital punishment, only Oregon has a similar statutory structure. *See* OR. REV. STAT. § 163.095 (2019) (defining "aggravated

capital murder[76] and asks capital jurors to answer special verdict forms upon conviction of capital murder in a case where the State is seeking the death penalty.[77] In other words, Texas provides a two-step process for determining a defendant's eligibility for a sentence of death.[78] Death eligibility is not established by conviction of capital murder alone.

If a Texas defendant is convicted of the offense of capital murder in a case where the State seeks the death penalty, the jury is then asked to determine, unanimously and beyond a reasonable doubt, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[79] This first special issue is often colloquially referred to as the "future dangerousness" issue.[80] A capital defendant is not eligible for a death sentence unless the jury also returns a unanimous affirmative finding on the future dangerousness issue at the penalty phase.[81] If *that* affirmative finding is made, the jury then

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murder"); OR. REV. STAT. § 163.150 (2019) (outlining sentencing options for aggravated murder). While Kansas also defines "capital murder" as a statutory crime, *see* KAN. STAT. ANN. § 21-5401 (2017), the sentencing proceeding asks jurors to weigh aggravating and mitigating circumstances to determine whether death or life without parole should be imposed, KAN. STAT. ANN. § 21-6617 (2014).

Oregon has had a gubernatorial moratorium on the death penalty since 2011; in 2019, the legislature revised Oregon's capital statute to narrow the definition of aggravated murder and remove the special issue question of future dangerousness from the jury's determination. Dirk VanderHart, *Gov. Kate Brown Signs Bill Narrowing Oregon Death Penalty*, OR. PUB. BROAD. (Aug. 1, 2019), https://www.opb.org/news/article/death-penalty-oregon-bill-signed-kate-brown/ [https://perma.cc/9MEU-9ZCR].

Following these revisions, Texas's structure stands truly alone among death penalty jurisdictions.

[76] TEX. PENAL CODE § 19.03.

[77] *See* TEX. CRIM. PROC. CODE art. 37.071, § 2(b).

[78] See supra note 74 and accompanying text.

[79] CRIM. PROC. art. 37.071, § 2(b)(1), (c) (imposing burden on State to prove first special issue beyond a reasonable doubt); id. § 2(d)(2) (requiring unanimity for an affirmative finding).

[80] *E.g.*, Smith v. State, 779 S.W.2d 417, 420 (Tex. Crim. App. 1989).

[81] *See supra* note 79 and accompanying text; *see also* CRIM. PROC. art. 37.071, § 2(g) (mandating that if the jury "returns a negative finding on . . . or is unable to answer" the future dangerousness issue "the court shall sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole").

As a federal constitutional matter, the future dangerousness special issue question functions as an aggravating circumstance establishing a capital defendant's "eligibility" to be sentenced to death in Texas. *Tuilaepa*, 512 U.S. at 972 (explaining that an eligibility aggravating factor "may be contained in the definition of the crime or in a separate sentencing factor (or in both)" (emphasis added)); Satterwhite v. Texas, 486 U.S. 249, 250 (1988) (noting that the State "can sentence a defendant to death only if the prosecution convinces the jury, beyond a reasonable doubt," of the future dangerousness issue); *Smith*, 779 S.W.2d at 419–20 (the future dangerousness special issue is designed "to further narrow the class of death-eligible offenders to less than all those who have been found guilty of [capital murder]" by restricting the class to only those who also pose a "continuing threat to society").

proceeds to the selection decision, in which they are asked whether there may yet be a sufficient mitigating circumstance or circumstances to warrant a sentence of life without parole.[82] This second special issue is known as the "mitigation" special issue.[83]

While the future dangerousness issue has been the subject of much litigation and scholarship, the second special issue—the mitigation issue—is more pertinent to this article's discussion, because determining a potential juror's ability and willingness to consider mitigating evidence upon conviction of capital murder and following an affirmative answer to the "future danger" special issue is precisely the "life qualification" that the Constitution requires.

Scholars and advocates have long observed that "the current capital sentencing statute in Texas encourages the dismissal of mitigation evidence as being irrelevant to jurors' sentencing decision,"[84] by design and by the sequence and language of the special verdicts themselves. And these structural factors are compounded by both practical realities and particular lines of Texas decisional law.

For one, "[r]esearch has shown that the key terms used in capital statutes are often poorly defined and poorly understood by jurors,"[85] despite the discussions in voir dire of these key terms. And the structure of voir dire allows first judges and then prosecutors to orient jurors to these previously-foreign concepts, thus influencing capital jurors' understandings of central principles like the proper scope of mitigating evidence.[86] Typically, judges will first explain "the principles, as

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By comparison, the second special issue question—whether "there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment [rather than death] be imposed," CRIM. PROC. art. 37.071, § 2(e)(1)—functions as the "selection decision" in the Texas capital sentencing process, *Tuilaepa*, 512 U.S. at 972 (defining the "selection decision" as "where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence").

[82] CRIM. PROC. art. 37.071, § 2(e)(1).

[83] The Texas capital sentencing statute was revised in 1991 to include the mitigation issue and restructure the special issues in this manner, Act of May 17, 1991, 72d Leg., R.S., ch. 838, § 1, art. 37.071, 1991 Tex. Gen. Laws 2898, 2898, after the Supreme Court ruled that the prior scheme was unconstitutional because it failed to provide jurors with an appropriate vehicle to express a reasoned moral response to a defendant's mitigating evidence, *see* Penry v. Lynaugh, 492 U.S. 302, 319 (1989).

[84] Vartkessian, *supra* note 71, at 240.

[85] *Id.* at 250 (citing, inter alia, CRAIG HANEY, DEATH BY DESIGN: CAPITAL PUNISHMENT AS A SOCIAL PSYCHOLOGICAL SYSTEM 143 (Ronald Roesch ed., 2005)); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1181 (1995).

[86] *See* Robert Angelo Creo, *Making Decisions: Primacy, Halo and Anchoring Cognitive Biases*, PA. LAW., May–June 2022, at 50, 50–51.

applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion."[87] And while state law does not proscribe the sequence of individualized questioning in capital cases, almost all trial courts proceed by allowing the prosecution to question each juror first; this enables the State to qualify jurors with lines of questioning that frame important concepts and allow unqualified jurors "to express how they can recognize that evidence could be taken into account as mitigation while privately holding the belief that they would never actually consider it as mitigating."[88]

CJP interviews from Texas cases reinforce the confusion and misunderstanding that often grips capital jurors during deliberations and offer insight into how those difficulties are resolved. A staggering number of Texas jurors—in one study, 70%—believed that a death sentence was *required* if the defendant was found to be a future danger.[89] But a juror who believes this to be true is not qualified to serve—and without meaningful consideration given to a defendant's mitigating evidence through the mitigation special issue, an automatic death sentence following the eligibility decision violates the Constitutional requirement of individualized sentencing.[90]

Jurors also often mistakenly believe that they must be unanimous about mitigating evidence, and may erroneously assign a burden of proof regarding mitigation to the defense.[91] And experience has shown that, rather than answering the special issues individually and conceptually, the "typical Texas juror" will often decide "whether the defendant deserves to die for what he did and then answer[] the questions to achieve that result."[92] Confusion over key terms of the special issues, including the proper scope of mitigating evidence to be considered, means that the special issue questions "both facilitate death sentences by making them, for all practical purposes, automatic, while at the same time increasing the

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[87] TEX. CRIM. PROC. CODE art. 35.17(2).

[88] Vartkessian, *supra* note 71, at 266 (emphasis omitted).

[89] *Id.* at 281.

[90] Woodson v. North Carolina, 428 U.S. 280, 304–05 (1976).

[91] Blume et al., *supra* note 24, at 1230 (observing that Capital Jury Project data demonstrates that jurors "frequently believe that . . . mitigation must be proved beyond a reasonable doubt, and that findings concerning mitigation (like those concerning aggravation) must be unanimous"). *See generally* Prystash v. State, 3 S.W.3d 522, 535 (Tex. Crim. App. 1999) ("[B]ecause there are no constitutional limits on the jury's discretion to consider mitigating evidence, the [C]onstitution does not require a burden of proof.").

[92] Morrow & Morrow, *supra* note 71, at 986–87; *see also, e.g.*, William J. Bowers et al., *supra* note 41, at 1486–89 (noting that Capital Jury Project interviews demonstrate that many jurors are firmly convinced of their decision about punishment, particularly that the sentence should be death, before the penalty phase of the trial has even begun).

chances of arbitrary sentencing due to the lack of guidance provided for the mitigation issue."[93]

Therefore, to adequately prepare capital jurors for their task and to increase the likelihood of a life sentence, defense counsel must utilize the voir dire process to provide jurors with substantial education and guidance to help jurors understand "*how* to give effect to the mitigation evidence that will be presented."[94]

B. The 10–12 Rule

With regards to each special issue form in any given case,[95] Texas jurors are specifically instructed that to return a verdict in favor of the State on any special issue, the jury must be unanimous.[96] To return a verdict in favor of the defendant, i.e., that there is *not* a reasonable probability that the defendant will pose a future danger to society, or that sufficient mitigating circumstances exist to warrant a sentence of life without parole, jurors are instructed that ten or more jurors must agree.[97]

This instruction, often known as the "10–12 rule," has been the subject of much litigation by the defense bar, and draws considerable attack in both scholarship and practice. While it is undeniable that the practical and psychological effect of such an instruction further tips the deliberative scales towards death, conceals the actual result of just one juror deciding and remaining firm in their conviction that sufficient mitigating circumstances exist to warrant a sentence of life without parole,[98] and arms death-leaning jurors with an additional weapon with

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[93] Vartkessian, *supra* note 71 at 283.

[94] *See* Vartkessian, *supra* note 71, at 287–88.

[95] While every capital sentencing proceeding in Texas includes at least the "future danger" issue codified in TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1) and the mitigation issue in section 2(e)(1), "in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party," the jury must also determine "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." *Id.* § 2(b)(2). And where the issue of intellectual disability is raised, current Texas law asks the jury to determine by special punishment verdict whether the defendant is intellectually disabled and therefore exempt from a death sentence. *See* Petetan v. State, 622 S.W.3d 321, 333–37 (Tex. Crim. App. 2021).

Therefore, every capital sentencing proceeding requires the jury to answer at least two, and as many as four, special verdict questions, depending on the evidence presented at trial.

[96] CRIM. PROC. art. 37.071, § 2(d)(2), (f)(2).

[97] *Id.* (providing that jurors may not answer the special verdict form in favor of the defendant "unless 10 or more jurors agree").

[98] CRIM. PROC. art. 37.071, § 2(g) ("If the jury returns a negative finding on any issue submitted under Subsection (b) or an affirmative finding on an issue submitted under Subsection (e)(1) *or is unable to answer any issue submitted under Subsection (b) or (e), the court shall*

which to bludgeon life-leaning jurors into submission in the jury room,[99] myriad constitutional challenges to the instruction in both theory and application have failed.[100]

An important aspect of the Colorado Method's education function—confirming each juror's individual responsibility and concomitant right to determine the existence and weight of mitigating circumstances and, ultimately, the appropriate penalty—is therefore complicated by Texas's explicit (and arguably misleading) instruction that the agreement of ten jurors is *required* to answer a special issue in such a way that a sentence of life without parole rather than death will result.[101]

Further obscuring the individual power of each capital juror is the state law prohibition against informing prospective jurors of the consequences of their inability to arrive at a consensus of either ten or twelve votes.[102] While the statute requires ten votes for a special verdict answer that results in a life sentence, a non-unanimous jury decision at any point during the penalty phase results in a sentence of life without parole.[103] Although numerous federal district courts have affirmatively instructed juries that a non-unanimous jury at penalty results in a sentence of life without parole, such an instruction is expressly forbidden by Texas law.[104]

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sentence the defendant to confinement in the Texas Department of Criminal Justice for life imprisonment without parole." (emphasis added)).

[99] *See* Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 119–36 (2010) (providing numerous examples of potential life-giving jurors being pressured by a death majority).

[100] *E.g.*, Draughon v. State, 831 S.W.2d 331, 338 (Tex. Crim. App. 1992) (holding that the "10–12" instructions on answering the special issues do not mislead the jury); Prystash v. State, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999) (rejecting constitutional challenge and noting that the Texas Court of Criminal Appeals (TCCA) has "consistently upheld as constitutional the instructions . . . known as the '10–12' rule"); Leza v. State, 351 S.W.3d 344, 361–62 (Tex. Crim. App. 2011).

[101] *But see Prystash*, 3 S.W.3d at 536 (contending that "[a]ny juror who wishes to vote life contrary to the votes of the majority is 'given an avenue to accommodate the complained-of potential disagreements,' for 'every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues.'" (citations omitted)).

[102] CRIM. PROC. art. 37.071, § 2(a)(1) ("The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree . . . .").

[103] *Id.* § 2(g) (providing that the result of inability to reach a verdict on any special issue is a sentence of life without parole).

[104] *See, e.g.*, United States v. Sampson, 335 F. Supp. 2d 166, 240 (D. Mass. 2004) (stating that the court informed the jury of consequences of non-unanimity because this emphasized individual responsibility of each juror and ensured that each was fully informed of consequences of his or her actions); *cf.* Cantu v. State, 939 S.W.2d 627, 644 (Tex. Crim. App. 1997) (rejecting constitutional challenge to rule from CRIM. PROC. art. 37.071, § 2(a)(1)).

While constitutional challenges to the "10–12 rule" may be dead in the water (or at least on ice), this does not mean that counsel must accept the practical consequences that flow from the confluence of the statutory requirements of ten votes for a life-preserving verdict and the prohibition against informing jurors of the consequences of their inability to reach a consensus of ten or twelve on any special issue.

While additional strategies for effective voir dire are set out in Part IV, below, addressing the 10–12 rule in jury selection is of utmost importance. Using the prosecutors' own materials, defense counsel can and should emphasize three facts: (1) the *only possible* punishments for a conviction of capital murder under state law are life without the possibility of parole or death;[105] (2) if the venireperson is selected for service and they along with eleven other jurors convict the defendant, the *only* question to be decided after conviction is whether the person will die a natural death in the Texas Department of Criminal Justice or whether they will be intentionally killed by the State; and (3) "as the government just told you," unanimity is required to convict, to answer the first special issue in the affirmative, and to answer the mitigation issue negatively.[106]

Because the law is clear, counsel should be permitted to inform the jury that the *only* way a defendant may be sentenced to death in Texas is with *twelve votes* to convict, *twelve affirmative votes* on the first special issue, and *twelve negative votes* on the mitigation issue.[107] Such an argument does not run afoul of the prohibition against informing jurors of the consequences of a hung jury, but emphasizes that if a defendant is convicted—i.e., if the jury is considering punishment at all—there are only two possible penalties, and the only way to achieve one of the two is by consecutive unanimous votes. Defense counsel may also carefully inform jurors that while "we can't tell you what will happen if you cannot reach ten or twelve votes," there will be no mistrial and the resources and time spent will not be wasted.

C. Commitment Questions Generally

As a general rule, Texas law forbids attorneys from seeking to "pre-commit" jurors to a certain verdict or evaluation of evidence in a case

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[105] *See* CRIM. PROC. art. 37.071, § 2(g).

[106] *See* CRIM. PROC. art. 37.071, § 2(d)(2), (f)(2).

[107] *See* Prystash v. State, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999) (contending that "[a]ny juror who wishes to vote life contrary to the votes of the majority is 'given an avenue to accommodate the complained-of potential disagreements,' for 'every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues'" (citations omitted)).

through voir dire questioning.[108] Such "stake-out" or "commitment" questions are improper when they ask jurors to promise to base their verdict or course of action on a specific fact or circumstance before they hear any actual evidence. For example, in a prosecution for drug possession, it is improper for prosecutors to ask potential jurors "[i]f the evidence, in a hypothetical case, showed that a person was arrested and they had a crack pipe in their pocket, and they had a residue amount in it, and it could be measured, and it could be seen, is there anyone who could not convict" based upon that evidence.[109]

The prohibition on eliciting precommitments is rooted in the defendant's right to an impartial jury; the goal is "to ensure that the jury will listen to the evidence [presented] with an open mind—a mind that is impartial and without bias or prejudice—and render a verdict based upon that evidence."[110]

Like most other jurisdictions, Texas law defines commitment questions as those in which "one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question."[111] However, the law is equally clear that "[n]ot all commitment questions are improper."[112]

Indeed, a commitment question is permissible when one or more of the answers might lead to a valid challenge for cause, i.e., *where the law requires a commitment*.[113] Given the constitutional requirement that capital jurors must "commit" to giving meaningful consideration to a defendant's mitigating evidence before determining the appropriate penalty,[114] it would seem that confirming a potential juror's ability to do so would be a proper commitment question.

But there exists a split of authority amongst both state and federal courts as to what degree of specificity is appropriate, and what facts may be included, in *Morgan*-type life-qualification questioning. In *United States v. Johnson*,[115] the Chief Judge of the Northern District of Iowa

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[108] Sanchez v. State, 165 S.W.3d 707, 712 (Tex. Crim. App. 2005).

[109] Atkins v. State, 951 S.W.2d 787, 789 (Tex. Crim. App. 1997) (emphasis omitted).

[110] *Sanchez*, 165 S.W.3d at 712.

[111] Standefer v. State, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001).

[112] *Id.* at 181.

[113] *Id.* ("The distinguishing factor [between proper and improper commitment questions] is that the law requires jurors to make certain types of commitments. When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard.").

[114] *See supra* note 35 and accompanying text.

[115] 366 F. Supp. 2d 822 (N.D. Iowa 2005).

surveyed numerous judicial decisions and explored in great detail the various types of questioning that courts have considered, and attorneys have posited, regarding prospective jurors' ability to consider both mitigating evidence and a life sentence in capital cases.[116] All capital defense teams preparing to select a jury where the State is seeking the death penalty should read this thoroughly detailed opinion, which provides well-reasoned guidance for crafting permissible questions that more effectively determine whether a juror is in fact life-qualified in a given case.[117]

A question about whether a juror *could*—not would—find that certain facts *per se* establish a legal precondition for imposition of the death penalty, such as an affirmative finding on the first special issue, or whether a prospective juror could fairly consider either a death or life sentence notwithstanding proof of certain facts, should be permissible because it "commits a juror to no other position than fair consideration of the appropriate penalty in light of all of the facts and the court's instructions."[118] Determining whether a juror could give meaningful consideration to mitigating evidence, as the law requires, should be permissible for the same reason—if a juror is unable to do so, they are subject to a challenge for cause under *Eddings* and *Morgan*. But due in part to a general misconception of what a stake-out question actually is and does, Texas courts often prevent defense counsel from meaningful inquiry into jurors' views in this area, frustrating the development of cause challenges and impairing counsel's ability to intelligently exercise their peremptory challenges.

D. Tracing the Doctrinal Roots of Restricting Questioning that Seeks to Ascertain Potential Bias (Mitigation Impairment)

Questioning prospective jurors concerning their ability to *consider* certain types of mitigating evidence—or any mitigating evidence at all—in the event of conviction is "necessary . . . to determine the ability of jurors to be fair and impartial in the case actually before them, not merely in some 'abstract' death penalty case."[119]

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[116] *Id.*

[117] Given the procedural differences in voir dire in federal prosecutions as opposed to state courts, where attorneys conduct the majority or all of individual voir dire questioning, pretrial rulings on the propriety of specific questions in capital cases are found almost exclusively in federal courts. However, the federal constitutional guarantees that provide support for sufficient life qualification apply with equal force in state courts.

[118] *Johnson*, 366 F. Supp. 2d at 845.

[119] *Id.* at 850 (emphasis omitted).

But in Texas, a particular line of decisional law also provides an oft-misapplied overlay that operates to further frustrate constitutionally adequate voir dire in capital cases, exacerbated by *Standefer*'s explicit (and erroneous) incorporation of capital voir dire as an example when defining the state rule against commitment questions.[120] To fully unravel the origins of this overbroad restriction and its roots, a closer look into several cases is required.

1. *Raby v. State*

Raby v. State[121] is often cited for the proposition that in capital cases,

> the law does not require a juror to consider any particular piece of evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating.[122]

In *Raby*, the defendant filed a motion seeking to voir dire prospective jurors on "whether . . . they could consider or would be willing to consider, at least in some cases, the following types of evidence in mitigation of punishment" and listing, *inter alia*, youth, mental illness, intoxication, and history of childhood abuse as possible mitigating evidence.[123]

As Raby correctly argued, "such questions would not require a prospective capital juror to 'commit' to returning a life sentence if any or all of the foregoing types of mitigating evidence were in fact introduced at trial."[124] Nor do the proposed questions require prospective jurors to "commit" that they *would* assign any particular mitigating weight to such evidence if it were introduced at trial. Instead, the proposed questions merely sought to inquire into "whether prospective jurors could 'consider' such evidence, at least in some cases."[125] To the extent that the Texas Court

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[120] *See* Standefer v. State, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001) ("[A] prospective juror is not challengeable for cause simply because he does not consider a particular type of evidence to be mitigating. And whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry." (footnote omitted) (citing Raby v. State, 970 S.W.2d 1, 3 (Tex. Crim. App. 1998))).

[121] 970 S.W.2d 1 (Tex. Crim. App. 1998).

[122] *Id.* at 3 (citing Green v. State, 912 S.W.2d 189, 195 (Tex. Crim. App. 1995)).

[123] *Id.* (alteration in original).

[124] *Id.*

[125] *Id.*

of Criminal Appeals (TCCA) rejected these arguments, *Raby* was wrongly decided.[126]

2. *Coleman v. State*

In reaching the result in *Raby*, the TCCA explicitly relied on a 1995 case, *Coleman v. State*.[127] But this foundation is flawed in two major respects. First, the attorney in *Coleman* failed to properly craft a permissible question, asking a prospective juror if she "*would* consider" specific evidence "*as* a mitigating circumstance[] that would call for a less severe penalty."[128] Instead of inquiring into the juror's ability or willingness to consider the evidence at all—i.e., "would you consider [specific evidence] in determining whether a sufficient mitigating circumstance exists"—defense counsel in *Coleman* attempted to ask the prospective juror whether she would give particular evidence mitigating *weight*, thus exceeding the permissible limits of commitment.[129]

In contrast, the questions proposed in *Raby* would not have elicited an improper commitment but instead sought to determine a juror's ability to consider the evidence at all, as they are required to do by law. Thus, under a proper application of permissible commitment questions, *Coleman* should not control, nor does it dictate the result of *Raby*. But by eliding the crucial difference between "could" and "would,"[130] the TCCA effectively

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[126] The Eighth Amendment also requires jurors in a capital case to be able to consider and give meaningful effect to evidence in mitigation. "Once this low threshold for relevance [of mitigating evidence] is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." Tennard v. Dretke, 542 U.S. 274, 285 (2004) (quoting Boyde v. California, 494 U.S. 370, 377–78 (1990)); *see also* Payne v. Tennessee, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances . . . ." (alterations in original) (quoting Eddings v. Oklahoma, 455 U.S. 104, 114 (1982))).

[127] *Raby*, 970 S.W.2d at 3 (citing Coleman v. State, 881 S.W.2d 344 (Tex. Crim. App. 1994)).

[128] *Coleman*, 881 S.W.2d at 350.

[129] *Id.*

[130] The TCCA has, in a subsequent case, described its holding in *Raby* as a rejection of a "[defendant]'s claim that he is entitled to ask potential jurors in a death penalty case about what specific evidence that juror *could or would* consider as mitigating." Coble v. State, 330 S.W.3d 253, 295 (Tex. Crim. App. 2010) (emphasis added). But this post hoc expansion of *Raby*'s holding is unsupported by authority.

While the contention that a defendant is not entitled to ask a juror to commit to considering a particular type or evidence *as* mitigating is defensible under the general rule against commitment questions, to extend the prohibition to forbid questioning about whether a juror *could* consider mitigating evidence exceeds the rationale behind the general rule and impairs constitutionally-adequate voir dire under these circumstances.

laid the groundwork for prosecutors and trial courts to foreclose proper inquiry into a juror's ability to consider certain categories of mitigating evidence before determining whether such evidence *would* carry mitigating weight.

3. Intervening Statutory and Constitutional Law

The second problematic aspect of the Texas courts' singular reliance on *Raby* concerns the outmoded caselaw upon which *Coleman* itself relied. To support the holding that "[t]he trial court did not abuse its discretion in refusing to allow appellant to ask questions based on facts peculiar to the case on trial,"[131] the TCCA in *Coleman* cited two Texas cases—*Allridge v. State*[132] and *White v. State*.[133] But both *Allridge* and *White* were decided prior to 1991, under the former capital sentencing statute that *did not include the mitigation special issue at all*.[134] Under current law, jurors who will not consider mitigating evidence are unwilling or unable to perform their duties under Article 37.071(e)(1) and should be subject to a challenge for cause.[135]

Further, *White* and *Allridge* were both decided prior to the Supreme Court's holding in *Morgan*, which made explicitly clear the requirement

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[131] *Coleman*, 881 S.W.2d at 351.

[132] 762 S.W.2d 146 (Tex. Crim. App. 1988).

[133] 629 S.W.2d 701 (Tex. Crim. App. 1981).

[134] Act of Apr. 16, 1985, 69th Leg., R.S., ch. 44, § 2, art. 37.071, 1985 Tex. Gen. Laws 434, 434 (amended 1991) (current version at TEX. CODE CRIM. PROC. art. 37.071).

[135] TEX. CODE CRIM. PROC. art. 35.16(c)(2); *see* Heiselbetz v. State, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995) ("Each juror must be able to consider mitigating evidence, but the weight that each juror gives to particular 'mitigating' evidence is left to the individual's discretion.").

It is worth noting that prosecutors often cite *Barajas v. State*, 93 S.W.3d 36 (Tex. Crim. App. 2002) for the proposition that even *vaguely worded* questions that seek to determine jurors' abilities to be fair and impartial based on facts of the case are improper. In *Barajas*, defense counsel attempted to ask veniremembers if they could be fair and impartial in an indecency case involving a child of a particular age. *Id.* at 37. Citing the non-capital sentencing statute, the TCCA held that such a question was improper because "[t]he jury need *not decide or refrain from assessing the appellant's punishment on the basis of the age of the victim*. . . . [A defendant] may not seek to commit venire members to assess or refrain from assessing punishment on this basis." *Id.* at 40 (citing TEX. CODE CRIM. PROC. art. 37.07, § 3(a)(1); Standefer v. State, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001) (emphasis added)).

The rule of *Barajas* cannot constitutionally be imported into capital voir dire. There is no automatic death penalty in the United States, and jurors must therefore *refrain from assessing* the death penalty on the basis of the age of the victim alone; instead, they must answer both special issue questions according to the evidence at trial in order to provide the individualized sentencing determination required by *Woodson*, *Lockett*, *Eddings*, and the other Eighth Amendment cases in this area. Thus, *Barajas* is distinguishable in constitutionally meaningful ways, and counsel should be prepared to explain and argue this point when delineating proper voir dire questions.

of life qualification and sufficient questioning to identify jurors who are in fact not life-qualified. After *Morgan*, capital defendants have a clear constitutional right to determine whether jurors would consider a life sentence upon conviction for capital murder. And other courts have recognized that satisfaction of *Morgan*'s guarantee may indeed require case-specific inquiries.[136]

For example, noting the "detailed taxonomy of voir dire questions that inquire as to prospective jurors' ability to consider aggravating and mitigating factors" set forth in *Johnson*, the District Court of Vermont correctly observed that there is "a crucial difference between questions that seek to discover how a juror might vote and those that ask whether a juror will be able to fairly consider potential aggravating and mitigating evidence."[137] Under *Morgan*, "a juror may be asked whether he or she could *fairly consider* evidence relating to the defendant's upbringing or potential for rehabilitation."[138] This is precisely the type of case-specific yet permissible inquiry proposed in, and potentially foreclosed by, *Raby*.

By failing to acknowledge or engage with the intervening rule of *Morgan*, let alone consider its application to the statutory special issues jurors are actually called to answer, the Texas courts have imparted an outdated and unconstitutionally restrictive gloss to contemporary capital voir dire.

E. *Raby*'s Legacy

Relying on *Raby*, the Texas courts have conjured and enforced a rule based on linguistic sleight of hand and outdated precedent, resulting in an overbroad prohibition that permeates capital voir dire in this state—that because "a prospective juror is not challengeable for cause simply because he does not consider a particular type of evidence to be mitigating[,] . . . . whether a juror considers a particular type of evidence to be mitigating is not a proper area of inquiry."[139]

Thus, trial courts often foreclose inquiry into a juror's ability to even *consider* any specific category of evidence in determining the proper sentence or answering the mitigation special issue, and rely on *Raby* and its progeny to deny challenges for cause to jurors who have explicitly stated they would not consider a specific category of evidence.

This mistaken application is both premised on and reinforces the courts' apparent conflation of the significant difference between

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[136] *See, e.g.*, United States v. Johnson, 366 F. Supp. 2d 822, 850 (N.D. Iowa 2005).

[137] United States v. Fell, 372 F. Supp. 2d 766, 770–71 (D. Vt. 2005).

[138] *Id.* at 771 (emphasis added).

[139] *Standefer*, 59 S.W.3d at 181.

consideration of a defendant's mitigating evidence—which is constitutionally required—and the separate, individual determination of how much, if any, *weight* to accord such evidence.[140] While jurors "may determine *the weight* to be given relevant mitigating evidence[,] . . . . they *may not give it no weight* by excluding such evidence from their consideration."[141] Therefore, inquiry into a juror's ability or willingness to do so should be permitted, and the prevailing prohibition on such lines of questioning stymies the meaningful life-qualification determination that *Morgan* requires.[142]

Defense attorneys should familiarize themselves with the cases frequently relied upon by prosecutors and the courts to impair constitutionally adequate life qualification and be prepared to explain and argue why such questioning should not be foreclosed by existing state precedents.

III. Common Arguments Against Effective Voir Dire

While resistance to the utilization of the Colorado Method is nothing new, prosecutors across the state of Texas have begun to file pretrial motions seeking to prevent defense teams from "mention[ing], allud[ing] to, or question[ing] the venire" about specific aspects of the law and jurors' rights and responsibilities.[143] These motions in limine seek to require defense counsel to approach the bench to obtain a ruling before discussing or questioning jurors about a list of topics, addressed below, and argue that

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[140] Similar analytical flaws are apparent in the TCCA's reliance on cases like *Morrow v. State*, 910 S.W.2d 471 (Tex. Crim. App. 1995), but in *Morrow*, the defendant argued that "that certain evidence is mitigating as a matter of law," *id.* at 473. The TCCA's adverse holding in *Morrow*—which was cited in *Raby*—was specifically premised on the fact that the law does not require a judge "to inform jurors or potential jurors that certain evidence is mitigating as a matter of law . . . [and, t]herefore, the trial judge did not err in overruling appellant's challenges for cause because the venire members did not believe certain evidence was mitigating." *Id.*

[141] Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982) (emphasis added); *accord* Heiselbetz v. State, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995) ("Each juror must be able to consider mitigating evidence, but the weight that each juror gives to particular 'mitigating' evidence is left to the individual's discretion.").

[142] But under *Morgan*, "a State is constitutionally *compelled* to exclude jurors who would, on the facts establishing the particular aggravated murder, invariably impose death." Morgan v. Illinois, 504 U.S. 719, 749 (1992) (Scalia, J., dissenting).

However, counsel should be aware that numerous state courts have adopted, or at least failed to interrogate, the linguistic sleight of hand wrought by *Raby* and cases that rely upon it. To combat this overreliance, each case cited by or relied upon by prosecutors and the trial court should be carefully read for analytical errors or distinguishing aspects and these distinctions thoroughly briefed and argued prior to the commencement of capital voir dire.

[143] *E.g.*, State's Second Motion in Limine at 1, State v. Newson, No. 55033-B (124th Dist. Ct., Gregg Cnty., Tex. Aug. 30, 2024).

the "matters are not proper" areas of inquiry or discussion.[144] In practice, such arguments are often advanced by prosecutors during the jury selection process. But as explained below, common State arguments put forth on these points rely on wrongly decided law,[145] misrepresent certain aspects of the Method and its goals, and mischaracterize the state of the law as it currently exists.

Defense counsel faced with such a motion should respond in writing, and request oral argument, to clarify and correct the prosecution's specific arguments and take all measures necessary to defend their client's right to constitutionally adequate voir dire.[146] Because these motions appear to advance similar, if not identical, arguments, several are addressed below, with examples of appropriate voir dire strategies to combat these arguments.

A. Jurors Should ("Not") Answer the Special Issues Individually

Prosecutors in Texas have contended that "the basic purpose of the Colorado Method [is] to persuade veniremen to ignore their statutory duty to deliberate with the other jurors."[147] Because Texas law is to the contrary, the State avers, use of the Method should be prohibited.[148]

Arguing that the Colorado Method "draws its support from a cherry-picked quote" from a Colorado case,[149] the State's motion contends that even if Colorado law allowed[150] "a juror to decide punishment without deliberating with and consideration of the views of the other jurors, [such an approach] is contrary to both Texas and U.S. Supreme Court jurisprudence."[151] However, the arguments advanced in support of this contention not only mischaracterize the Colorado Method's "basic

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[144] *E.g.*, *id.*

[145] *See supra* subpart II(D).

[146] *See* Am. Bar Ass'n, *supra* note 4, at 1028–32, 1049–51 (providing that "counsel should be sure to litigate all of the possible legal and factual bases for the request" and "object to anything that appears unfair or unjust even if it involves challenging well-accepted practices").

[147] State's Second Motion in Limine, *supra* note 143, at 1–2.

[148] *Id.*

[149] *Id.* ("Each of you must make your own individual assessment of whether Mr. Tenneson shall be sentenced to death or to life in prison." (quoting People v. Tenneson, 788 P.2d 786, 802 (Colo. Sup. Ct. 1990))).

[150] Colorado abolished the death penalty in 2020. *See Colorado Abolishes the Death Penalty, Governor Commutes Sentences of Death Row Prisoners*, AM. BAR ASS'N (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/colorado-abolishes-death-penalty/ [https://perma.cc/DP7H-R56X].

[151] State's Second Motion in Limine, *supra* note 143, at 2.

purpose,"[152] but also omit important aspects of cited caselaw and ignore the important distinction between the jury's task in determining whether the State has met its burden of proof beyond a reasonable doubt—as required for both a conviction and an affirmative answer on the first special issue—and answering the second special issue question found in Article 37.071(e)(1).

B. Against Individual Moral Judgment and Conscience

The State often argues that the constitutional mandate that jurors must answer the second special issue according to their individual moral judgment is "contradict[ed]" by state law, characterizing the Colorado Method as attempting to "persuade veniremen to ignore their statutory duty to deliberate with the other jurors."[153] To advance this argument, prosecutors frequently cite *Howard v. State*,[154] in which the TCCA approved a supplemental jury instruction which read:

> Each of you must decide the case for yourself but *only after discussion and impartial consideration of the evidence with your fellow jurors*. Do not hesitate to re-examine your own views and to change your opinion if you are wrong, but do not surrender your honest belief as to the weight and effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.[155]

But to excerpt *Howard* in such a way to prohibit emphasis on the individual moral judgment and conscience of the jurors is both inaccurate and misleading. The full instruction approved in *Howard* continues with explicit deference *to* the juror's individual conscience: "With these additional instructions you are requested to deliberate in an effort to arrive at a verdict that is acceptable to all members of the *jury if you can do so without doing violence to your conscience. Do not violate your conscience* but continue to deliberate."[156] Importantly, the TCCA's approval of the instruction at issue was explicitly influenced by the observation that "the

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[152] *Id.* at 1–2; *cf.* Rubenstein, *supra* note 59, at 18 (noting that the Colorado Method provides attorneys "the skills and techniques . . . to conduct capital voir dire in a manner that maximizes the opportunity to obtain life verdicts" and "works to create a nonjudgmental respectful atmosphere during jury selection that facilitates juror candor").

[153] State's Second Motion in Limine, *supra* note 143, at 1–2.

[154] 941 S.W.2d 102 (Tex. Crim. App. 1996).

[155] State's Second Motion in Limine, *supra* note 143, at 1–2 (quoting *Howard*, 941 S.W.2d at 123).

[156] *Howard*, 941 S.W.2d at 123–24 (emphasis added).

trial court simply directed the jurors to debate the issue in good faith, to reconsider their own views and to *change such views only if this could be done without violence to the juror's individual conscience*."[157]

Further, Texas law recognizes that "the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror."[158] Therefore, counsel should understand and be prepared to draw this distinction for trial courts—in contrast to the unanimity required to convict or to answer the first special issue in the affirmative beyond a reasonable doubt, each juror's answer to the mitigation special issue *is* "a subjective determination undertaken by each individual juror."[159]

Yet, despite the clear constitutional requirements that capital jurors individually determine the existence and weight of mitigating evidence,[160] which have been established and refined in the latter half of the twentieth century, the State claims that the Supreme Court "disavowed" these principles over 125 years ago in *Allen v. United States*[161] when it observed that "[t]he very object of the jury system is to secure unanimity by a comparison of views."[162] The State alleges that "[t]he Colorado Method teaches to the contrary" by "claim[ing] that a juror is free to make the punishment decision without a comparison of views and that jurors should not listen with deference to competing arguments."[163]

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[157] *Id.* at 124 (emphasis added).

[158] Colella v. State, 915 S.W.2d 834, 845 (Tex. Crim. App. 1995) (holding that appellate courts will not review the sufficiency of mitigating evidence on appeal "[b]ecause the weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror"); *accord* Prystash v. State, 3 S.W.3d 522, 536 (Tex. Crim. App. 1999) (reiterating that the jury's "normative decision" on the mitigation special issue is not subject to appellate review).

[159] *Colella*, 915 S.W.2d at 845; *accord* Heiselbetz v. State, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995) ("Each juror must be able to consider mitigating evidence, but the weight that each juror gives to particular 'mitigating' evidence is left to the individual's discretion.").

[160] *See* Mills v. Maryland, 486 U.S. 367, 384 (1988); *see also* TEX. CODE CRIM. PROC. art. 37.071, § 2(d)(3), (f)(3) (providing that members of the jury "need not agree on what particular evidence supports" an answer in favor of life without parole on either special issue).

[161] 164 U.S. 492 (1896).

[162] The full quote included in these motions is:

> The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or that he should close his ears to the arguments of men who are equally honest and intelligent as himself.

Id. at 501–02.

[163] State's Second Motion in Limine, *supra* note 143, at 2. Importantly, the Colorado Method does no such thing. Instead, practitioners and trainers who employ the Method

Our system does indeed require unanimity to *convict*; setting aside the fact that *Allen* itself predates the entirety of the Supreme Court's modern death penalty jurisprudence, that case concerned the propriety of an instruction to a jury deliberating guilt, where unanimous agreement that the State proved each element of the crime beyond a reasonable doubt *was* required.[164] The dicta from this opinion—decided seventy years before the Supreme Court even began to regulate the modern death penalty in this country—should thus be read in context.

To be clear, the unanimity requirement is rational and reasonable in most areas of legal decision-making. In almost every other context, decisionmakers are charged with applying the social contracts of existing legal regulations to factual disputes, and our system assumes "they will not, on the basis of 'conscience' or some similar notion, decide—of their own accord—what the law should be."[165] In this context, for decisionmakers to "engage in 'conscientic' decision-making—for them to decide what, *from their own points of view*, the law should be—is entirely contrary to the rule of law."[166]

In the capital sentencing context, however, the rule of law requires something else entirely—a "subjective," "moral," "conscientic" decision by each individual juror.[167] As the late Supreme Court Justice Antonin Scalia—who himself disclaimed the *Woodson/Lockett* doctrine[168]—has observed, "Whether mitigation exists, however, is largely a judgment call (*or perhaps a value call*); what one juror might consider mitigating another might not."[169]

Capital jurors must be personally aware of "the gravity of their choice[s] and . . . the *moral* responsibility reposed in them as

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specifically discuss with jurors their obligation to listen to all the evidence *and discuss* with their fellow jurors. However, the Method does emphasize that "[e]ach juror assigns the weight and significance he or she believes is appropriate to the . . . mitigation." Rubenstein, *supra* note 59, at 23. This principle is grounded in federal constitutional law and acknowledged by the Texas courts. *See Mills*, 486 U.S. at 384; *Heiselbetz*, 906 S.W.2d at 509 ("[T]he weight that each juror gives to particular 'mitigating' evidence is left to the individual's discretion.").

[164] *Allen*, 164 U.S. at 500.

[165] Laura S. Underkuffler, *Agentic and Conscientic Decisions in Law: Death and Other Cases*, 74 NOTRE DAME L. REV. 1713, 1720 (1999) (footnote omitted) (referring to this as the "agentic" model of decision-making, which explicitly contrasts to "conscientic" decision-making in the capital sentencing context).

[166] *Id.*

[167] *Id.* at 1725 ("The moral judgment that the sentencer must make is . . . a profoundly personal one.").

[168] *See* Walton v. Arizona, 497 U.S. 639, 671–73 (1990) (Scalia, J., concurring in part and concurring in the judgment).

[169] Kansas v. Carr, 577 U.S. 108, 119 (2016) (emphasis added).

sentencers,"[170] and must answer the special issue questions in a way that "reflect[s] a 'reasoned moral response' to [a defendant's] mitigating evidence."[171] Moreover, the Supreme Court has repeatedly and explicitly incorporated this moral responsibility in various strands of death penalty jurisprudence:

> Selection of individuals for death involves not "individualized inquiry" but "individualized *moral* inquiry;" the decision involves not "individualized judgment" but "individualized moral judgment;" the facts considered by the sentencer must have not "direct relevance" but "direct *moral* relevance"; the sentencer must determine not that the defendant is "deserving"' of death but that he is *"morally* deserving" of death.[172]

The Method, and effective capital voir dire in general, incorporates proper education of jurors[173] on the reality of capital decision-making and the substantive difference between the agentic application of law to facts required at the merits phase (and in answering the first special issue) and their individual, moral, *subjective* determination as to the weighing of mitigating evidence. For example:

> DEFENSE COUNSEL: [O]ne thing I want to make sure that you know, right, is on the second special issue, if you are chosen for this jury and you convict the defendant of the crime, and you're convinced that he's going to be a danger in the future, there's still this mitigation question. Right? And on that question, it's a little bit different. So it's not the kind of question where you look at the law, and you look at the facts, and you ask if the State has proven this to you. Right?
>
> On the Special Issue Question No. 2, which asks about mitigating circumstances, nobody has the burden. Okay? So no one's going to convince you either way. That is kind of your individual moral judgment. And each juror makes their own moral judgment. So it's different from any other

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[170] California v. Ramos, 463 U.S. 992, 1011 (1983) (emphasis added).

[171] Penry v. Lynaugh, 492 U.S. 302, 323 (1989) (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

[172] Underkuffler, *supra* note 165, at 1725 (quoting McCleskey v. Kemp, 481 U.S. 279, 336–37 (1987) (Brennan, J., dissenting); Payne v. Tennessee, 501 U.S. 808, 838 (1991) (Souter, J., concurring)) (citing Saffle v. Parks, 494 U.S. 484, 492–93 (1990) (appropriateness of the death penalty is "a moral inquiry into the culpability of the defendant" (quoting *Brown*, 479 U.S. at 545 (O'Connor, J., concurring)))).

[173] *See* Rubenstein, *supra* note 59, at 24–26.

> thing that you're going to be asked to do in this trial. Do you understand that?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: And we don't have that burden, either. So we never have to bring certain things to you. You get to determine for yourself whether there's a sufficient mitigating circumstance or circumstances such that a life without parole sentence should be imposed instead. Do you get that?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: Okay. And I think you were shown the text of that specific question, the mitigation question, and it said, you know, considering all the circumstances, including the circumstance of the offense, the background of the offender. But your consideration at that point is not limited to those things. Okay? Mitigating evidence is determined by you individually, right, and by each other juror individually. So you don't even have to agree on what evidence is mitigating. Do you understand that?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: And you can make that determination, and no one else can change your mind about that. Just like you can't really change anyone else's mind about that, right?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: And mitigating evidence can be anything to you that would warrant a sentence less than death. It doesn't even have to be related to personal culpability for the crime itself. Does that make sense?
>
> VENIREPERSON: Yes.[174]

Rather than encouraging jurors "not to deliberate," as the State's motion contends, effective voir dire informs jurors of their own individual and unique role in determining and weighing mitigating circumstances—recognized by both Texas and federal law.

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[174] W231 Transcript of Voir Dire at 150–51 (case citation omitted for confidentiality) (on file with author).

In another example, a Texas defense attorney orients a venireperson to the individual moral decision required to consider and evaluate mitigating evidence:

> DEFENSE COUNSEL: What I want to point out to you is that mitigation can be anything that's supported by the evidence that you personally feel supports a sentence for life.
>
> . . . .
>
> DEFENSE COUNSEL: I want to talk a little bit about how the . . . punishment phase is different from the decision at the guilt phase. So at the guilt phase you're looking at facts, right?
>
> . . . .
>
> DEFENSE COUNSEL: The punishment phase is different. And it's the only area in the law that has a different calculation. Punishment phase in a death penalty case is about your personal moral judgment.
>
> . . . .
>
> DEFENSE COUNSEL: In other words, you don't have to find the same thing that any of your other jurors find. You get to search your heart and your soul and decide that for yourself.
>
> . . . .
>
> DEFENSE COUNSEL: But at the end of the day, again, because this question about mitigation is so wide and clear that you could find this thing mitigating, another juror could find a different thing mitigating.
>
> . . . .
>
> DEFENSE COUNSEL: A third juror might find nothing mitigating. You get to maintain your opinion about that.[175]

Where (1) the law explicitly imposes a duty on individual jurors to make an *individual* moral determination,[176] (2) the unanimity requirement does not and cannot apply to the determination of the existence or weight

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[175] B154 Transcript of Voir Dire at 105, 108–10 (case citation omitted for confidentiality) (on file with author).

[176] *See e.g.*, Colella v. State, 915 S.W.2d 834, 845 (Tex. Crim. App. 1995) ("[T]he weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror.").

of mitigating evidence,[177] and (3) what constitutes "'mitigating evidence' is not specifically defined" but "[i]nstead . . . is left to *each individual juror*'s own determination,"[178] the State's cited passages hardly "contradict" juror education regarding these principles.[179]

In fact, the adversarial nature of our criminal legal system incentivizes ignorance of the moral conflict and immense trauma that capital trials inflict on jurors. While prosecutors and defense counsel are focused on selecting jurors receptive to their cases, the impact of the process on capital jurors and the lifelong burden of their ultimate decision is often sidelined or disregarded entirely. Numerous scholars—and jurors themselves—have documented the painful aftermath of participation in the process often experienced by jurors who have voted for death.[180] Many of these jurors were morally conflicted and changed their vote under duress,[181] a mistaken understanding of their own role and duties as a juror,[182] or both. Jurors who ultimately vote for life are similarly affected

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[177] Mills v. Maryland, 486 U.S. 367, 380–81 (1988).

[178] McFarland v. State, 928 S.W.2d 482, 498 (Tex. Crim. App. 1996) (emphasis added) ("In fact, Article 37.071 § 2(f)(4) defines 'mitigating evidence' to be 'evidence that *a juror might regard* as reducing the defendant's moral blameworthiness.'").

[179] Education on these points is an essential component of effective voir dire. Capital Jury Project data reflects that capital jurors often mistakenly believe unanimity is in fact required when determining the existence and weight of mitigating factors. Blume et al., *supra* note 24, at 1230.

[180] *See, e.g.*, Saby Ghoshray, *Capital Jury Decision Making: Looking Through the Prism of Social Conformity and Seduction to Symmetry*, 67 U. MIA. L. REV. 477, 507 (citing studies that show "[a]n increasingly significant numbers of jurors [who] have exhibited post-sentencing remorse and have lamented upon imposition of the death penalty at various times[;] . . . . jurors post-sentencing have routinely gone through discontent or sadness in their ability to stay the course of their personal views"); SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 54 (2005); Sven Berger, *My Regrets as a Juror Who Sent a Man to Death Row*, THE MARSHALL PROJECT (Mar. 10, 2016), https://www.themarshallproject.org/2016/03/10/my-regrets-as-a-juror-who-sent-a-man-to-death-row [https://perma.cc/ZM8N-2K8S]; POV: *Lindy Lou, Juror Number 2* (PBS television broadcast, aired July 16, 2018) (documenting the story of a capital juror who, "[f]or 20 years[,] . . . lived with an unbearable feeling of guilt" after sitting on a Mississippi jury that handed down the death penalty, before "an overwhelming feeling of regret compel[led her] to track down her fellow jurors").

[181] *See* Sundby, *supra* note 99, at 133–34 (describing "juries where a holdout persisted in holding out for life for a substantial period of time, the majority's feelings of frustration would spike, and the holdout's sense of isolation would intensify; voices were raised, tables were pounded, and tears were shed," including a juror recalling how the majority yelled and screamed at a juror who felt life was the appropriate punishment).

[182] *See* Vartkessian, *supra* note 71, at 281 (noting that 70% of participating jurors in the sample of Texas jurors believed a death sentence to be required if the defendant was found to be a future danger); Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse*, 66 BROOK. L. REV. 1011, 1039–41 (2001) (describing pro-death jurors' mistaken belief that death was required and their strategies to convince jurors inclined to vote for life to abandon their convictions).

by the content and process of a death penalty trial,[183] but do not have to live with the weight—and potential regret—of the death decision in the same way.

By providing capital jurors with *true* and complete information about the process—and their rights and responsibilities throughout it—voir dire that adheres to constitutional demands not only enhances the reliability of capital trials but ensures that jurors will ultimately vote according to their *own* conscience, and respect the moral judgment of others, as they are obligated to do.

C. The "Impropriety" of Asking Jurors to Respect Each Other's Views

The importance of one aspect of the Colorado Method—linguistic precision and consistency—is highlighted by the State's complaint that "[v]eniremen are asked to acknowledge that each juror has the right to make their own moral judgment about the death penalty, and their fellow jurors are required to respect that decision and promise not to criticize that decision or pressure the juror to change his or her mind."[184] This approach, prosecutors have contended, "violate[s] the law requiring a jury's duty to deliberate [and] constitutes an improper commitment question."[185]

In the law, to "deliberate" means "to weigh and analyze all the evidence after closing arguments."[186] To ask jurors to respect each other and their views *as they weigh and analyze* the evidence does not violate the law—indeed, the Colorado Method teaches jurors to listen to the views of other jurors *as* they deliberate:

> DEFENSE COUNSEL: [Y]ou, as a juror, should be free from coercion in the performance of your official duty. Nor should you be influenced to violate your duties under the law. Right. So again, this means that you, as a juror, should not be subjected to any bullying, any force to try and make you change your mind, that your obligation is to listen or to share your views, but you don't have any obligation to reach consensus with the other people in jury room.

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[183] *See* Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG. (Jul. 6, 2003), https://www.nytimes.com/2003/07/06/magazine/in-the-face-of-death.html [https://perma.cc/WC2Y-UB7N] (describing nightmares and emotional agony experienced throughout the trial process by jurors who unanimously sentenced defendant to life).

[184] State's Motion in Limine—Colorado Method at 3, State v. Davis, No. 114-0696-21 (114th Dist. Ct., Smith Cnty., Tex. May 24, 2021).

[185] *Id.*

[186] *Deliberate*, BLACK'S LAW DICTIONARY (12th ed. 2024).

. . . .

> DEFENSE COUNSEL: How do you feel about whether you'd be the kind of person that would stand up and say, look, I just disagree with the rest of you?
>
> VENIREPERSON: . . . [P]retty frequently in my job that, of course, it's on a less serious matter, but once I've reached a conclusion—well, I can't say once I reach a conclusion I'm not going to change my mind because I can be persuaded to change my mind but not on a whim or on a—you know, a personal idea. I would need to be given reasons to change my mind.
>
> DEFENSE COUNSEL: Sure.
>
> And so if you're kind of the person who can already do that on something with a little thing, I think you'd certainly be able to do that on something you have a strong moral conviction about?
>
> VENIREPERSON: Yes.[187]

The ultimate weight accorded to mitigating circumstances in any given case remains a deeply personal and *individual* decision.[188]

"From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect."[189] For the reasons explained above, fulfilling the constitutional requirement of a subjective and individual decision by each individual juror concerning the existence of and weight accorded to mitigating circumstances and ensuring jurors treat each other with respect during deliberations simply does not "violate the law requiring a jury's duty to deliberate."[190]

The contention that such a dialogue constitutes an "improper commitment" is disposed with just as easily. The TCCA has defined a commitment question as a question where "one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained

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[187] B154 Transcript of Voir Dire, *supra* note 175, at 110–12.

[188] *E.g.*, Heiselbetz v. State, 906 S.W.2d 500, 509 (Tex. Crim. App. 1995) ("[T]he weight that each juror gives to particular 'mitigating' evidence is left to the individual's discretion."); Colella v. State, 915 S.W.2d 834, 845 (Tex. Crim. App. 1995) ("[T]he weighing of 'mitigating evidence' is a subjective determination undertaken by each individual juror.").

[189] Wellons v. Hall, 558 U.S. 220, 220 (2010) (per curiam).

[190] State's Motion in Limine—Colorado Method, *supra* note 184, at 3.

in the question."[191] But this question contains no facts and concerns the process by which the issues in the case will be resolved. Under this definition, the questions ensuring that jurors will respect each other's views *during deliberation* hardly qualify.

By introducing the discussion on individual decision-making and respect *in the context of deliberation*, defense counsel can make clear that the thrust of the questioning is not to encourage jurors to refuse to do so, as this example demonstrates:

> DEFENSE COUNSEL: [Y]ou will have an obligation to talk to other jurors, right?
>
> VENIREPERSON: Right.
>
> DEFENSE COUNSEL: You'll have an obligation either to listen to someone or to speak up yourself. But at the end of the day, it becomes your individual personal vote.
>
> . . . .
>
> DEFENSE COUNSEL: Seem fair?
>
> VENIREPERSON: Yes, ma'am.
>
> . . . .
>
> DEFENSE COUNSEL: And you wouldn't feel on a jury that anyone was above you in terms of the equality of your opinion?
>
> VENIREPERSON: No, ma'am.
>
> DEFENSE COUNSEL: And you would be able to voice your opinion?
>
> VENIREPERSON: Yes, ma'am.
>
> DEFENSE COUNSEL: All right, so the law never requires you to surrender your conscience. Okay, and, again, coming down to these decisions that are going to be made in your heart, right?
>
> So, again, the law is not going to give you the answers to these questions. Either choice is based on the law and the evidence. Either way follows the law. Does that make sense to you.
>
> VENIREPERSON: Yes, ma'am.

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[191] Standefer v. State, 59 S.W.3d 177, 180 (Tex. Crim. App. 2001).

> DEFENSE COUNSEL: This isn't a group decision. On the question of mitigation, this is an individual decision. Can be based on any one or a number of mitigating circumstances that you think personally are sufficient to warrant a life sentence. Agreed?
>
> VENIREPERSON: Yes, ma'am.
>
> . . . .
>
> DEFENSE COUNSEL: Again, the law will be satisfied with either life without parole or the death penalty as long as what you are doing is supported in the evidence. Never are you required to vote for death. Only required to answer those two questions knowing which direction your votes will lead.[192]

D. Mitigating Evidence—Consideration vs. Weight

As discussed in Part II, *supra*, Texas decisional law often conflates the constitutionally significant distinction between jurors' ability and willingness to *consider* evidence offered in mitigation and the decision to accord that evidence mitigating *weight*. To the extent that prosecutors argue for restrictions on defense counsel's ability to probe a prospective juror's willingness to consider mitigating evidence based on these state law decisions, defense counsel must be able to articulate why such cases do not trump the constitutional guarantee of adequate voir dire to protect a defendant's right to trial by an impartial jury.[193]

When the distinction between consideration and weight is scrupulously observed, such questions should be—and are—allowed. For example, in one Texas case, where the questionnaire provided jurors an opportunity to reflect on potentially mitigating circumstances, defense counsel oriented the prospective juror to their responses on that question and explained that "it deals with the idea of mitigation, which goes back to [special issue] 2, whether taking into consideration all the evidence, the person's background, character, and characteristics, what you should think."[194]

Defense counsel then walked the juror through their responses on each listed factor, asking questions like:

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[192] B151 Transcript of Voir Dire at 80–83 (case citation omitted for confidentiality) (on file with author).

[193] *See* Morgan v. Illinois, 504 U.S. 719, 738–39 (1992).

[194] E231 Transcript of Voir Dire at 67–68 (case citation omitted for confidentiality) (on file with author).

DEFENSE COUNSEL: [A] person's . . . emotional development does that affect—is that something that a person or a jury should take into consideration when reviewing facts as related to [special issue] 2; mitigation, person's character and background. Does that kind of—

JUROR: Yes.

. . . .

DEFENSE COUNSEL: . . . [S]hould you look at the abuse, lack of abuse, or any abuse of a child to decide whether or not that's something that should be taken into consideration?

PROSECUTOR: Your Honor, I'm going to object under what we've been talking about before. That that's an improper community [sic] question with the case I've provided to you.

. . . .

PROSECUTOR: That a potential juror doesn't have to consider anything. And I believe we represent, in case law yesterday, with regard to *Standefer* and *Raby* case that I presented to the Court. That a potential—or *a juror does not have to consider any piece of mitigating evidence*.

. . . .

PROSECUTOR: . . . [The] objection with regard to the form of the question *being committed saying could they consider a specific thing* and category that are within the Question 39.

Because as a juror, they don't have to consider everything, any mitigating circumstances. They have to come up with a sufficiently mitigating—and if—let me back up. A juror has to decide for themselves if something is sufficiently mitigating.

The case law is clear with regard to the fact that they don't have to consider anything. So I believe . . . [the] objection to the form of the question with regard to it being commitment saying, "Will you consider these things."

. . . .

> DEFENSE COUNSEL: So, Your Honor, if we say, "Can you consider," that's different than, "Will you consider." Just so we're clear.[195]

E. "Stripping" Questions

Another component of the Method commonly challenged by prosecutors is the "strip question," which the State describes as "questions that are designed to strip away all potential defenses and then ask the venire if they could still consider mitigation or a life sentence."[196] Prosecutors often contend that "[s]uch questions are improper commitment questions and, depending on the specifics, irrelevant."[197]

This argument is flawed in two respects. First, the commitment, if any, asked of the venirepersons is a *proper* one;[198] the law requires that jurors in capital cases be able and willing to give meaningful consideration to mitigating evidence upon conviction for a capital crime *and* requires that capital jurors be able and willing to return a life sentence even if they convict a defendant of a death-eligible crime. Thus, if a juror answers in the negative to a "strip" question, i.e., if the juror indicates that the death penalty is the only appropriate punishment for a defendant convicted of capital murder, they are subject to a valid challenge for cause.[199]

Common prosecutorial motions include an example like the following:

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[195] *Id.* at 69–72 (emphasis added). In this example, the State attempted to rely on *Standefer* and *Raby* for the flatly unconstitutional assertion that "a juror does not have to consider anything" or "any piece of mitigating evidence." In fact, jurors must consider *all* mitigating evidence, before determining what weight to assign such evidence. Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, *neither may the sentencer refuse to consider [it].*"); *Morgan*, 504 U.S. at 736 (holding that jurors who would always impose the death penalty upon conviction for capital murder are challengeable for cause *because* such jurors "not only refuse to give such evidence any weight but are also plainly saying that mitigating evidence is not worth their consideration and that they will not consider it").

Here, the trial court overruled the prosecutor's objection, requiring only that defense counsel "preface [the question] with saying, 'There's no complete list.' It can be anything that a juror would think would be mitigating, and then you can go into the, 'Can you consider.'" E231 Transcript of Voir Dire at 74.

[196] State's Motion in Limine—Colorado Method, *supra* note 186, at 5.

[197] *Id.*

[198] *See* Standefer v. State, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001) (holding that commitment questions are proper if one of the answers lead to a challenge for cause because "the law requires jurors to make certain types of commitments. When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard").

[199] *Morgan*, 504 U.S. at 729.

> "In this hypothetical case, you were convinced the defendant was guilty of premeditated, intentional murder. It wasn't an accident or mistake, self-defense, defense of another, heat of passion, or insanity. The defendant premeditated the murder and then committed the murder without excuse or justification. For that defendant, do you believe that the death penalty is the only appropriate penalty?" Because this stripping question asks the juror if they would resolve the issue of the death penalty based on facts of the case, it is an improper commitment question.[200]

But this argument is erroneously overbroad. While the State tends to cite *Standefer* for the proposition that such a question is "an *improper* commitment question," the *Standefer* opinion first *defines* commitment questions[201] and then explains that some commitment questions may in fact be proper if the answer leads to a valid challenge for cause.[202] Again, a juror who would only consider a life sentence or consider mitigating evidence in a case where they found the presence of an affirmative defense listed above—a juror who would answer in the affirmative to the example question—is *not* life-qualified, because their ability to consider a life sentence or mitigating evidence is conditioned on a finding that would require a conviction for a lesser-included, non-capital offense.[203] Therefore, to inquire into a juror's ability to consider mitigating evidence or a life sentence *upon conviction for capital murder* is a proper question under *Morgan*; an answer that indicates the juror would consider the death penalty the only appropriate punishment upon conviction for capital murder should lead to a challenge for cause, and therefore the commitment is not an improper one.

Prosecutors also often argue that the question is improper under *Gardner v. State*, which requires the law to be explained to a juror before

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[200] State's Motion in Limine—Colorado Method, *supra* note 186, at 5–6 (citing *Standefer*, 59 S.W.3d at 180 ("[A] question is a commitment question if one or more of the possible answers is that the prospective juror would resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question.")).

[201] *Standefer*, 59 S.W.3d at 179–83 (answering first, "What is a commitment question?" before answering, "When are commitment questions improper?" to define the two-step "inquiry for improper commitment questions").

[202] *See id.* at 181 ("Not all commitment questions are improper. . . . [T]he law requires jurors to make certain types of commitments. When the law requires a certain type of commitment from jurors, the attorneys may ask the prospective jurors whether they can follow the law in that regard.").

[203] *See* Natman Schaye, *Capital Jury Selection: The Minimum Standards for Counsel*, CHAMPION, Jan.–Feb. 2017, at 20, 24 (noting that a juror who expresses an ability to consider a life sentence "may be imagining a case in which the defendant killed someone accidentally or committed a crime other than homicide").

a challenge for cause may be established.[204] According to the State, "[b]y failing to first explain the law regarding the [various] defenses, the question fails to establish the basis for a challenge for cause; therefore it is an improper commitment question."[205] But this argument misapprehends both the import of the question and the basis for a challenge for cause that may result from the venireperson's answer. Rather than attempting to determine a potential juror's ability to follow the law of self-defense, insanity, defense of another, etc., the question seeks to establish whether prospective jurors will always return a verdict of death or refuse to consider mitigating evidence upon conviction of capital murder, which necessarily includes rejection of any affirmative defenses—in the context of a bifurcated trial with a singular jury, there "can be no legitimate objection to eliciting a juror's thoughts about the death penalty if the client is convicted as charged."[206]

Second, prosecutors commonly argue that such questions are "irrelevant," often asking the trial court to require defense counsel to "demonstrate to the court that such defenses are in fact an issue in the case" and to forbid the defense from asking a strip question in the absence of such a showing.[207] But again, the goal of such a question is not to gauge a prospective juror's ability to follow the law applicable to a given affirmative defense, but rather to determine whether the juror would be life-qualified *under the law that applies to the case*—in other words, whether the juror could consider both possible penalties upon conviction of capital murder where, necessarily, no affirmative defenses were found to exist.[208] Whether a juror is life-qualified is unquestionably relevant to the issues at trial where the State is seeking the death penalty.[209]

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[204] Gardner v. State, 306 S.W.3d 274, 295 (Tex. Crim. App. 2009) (holding that the proponent of a challenge for cause has the burden to demonstrate that the challenge is proper and he "does not meet this burden until he has shown that the veniremember understood the requirements of the law and could not overcome his prejudice well enough to follow the law").

[205] State's Second Motion in Limine, *supra* note 145, at 6.

[206] Schaye, *supra* note 205, at 24.

[207] State's Motion in Limine—Colorado Method, *supra* note 186, at 6. Were any of the statutory defenses actually at issue in a given case, specifically inquiring of jurors about an issue of disputed fact risks veering closer to an improper commitment question than the general hypothetical strip question proposed here.

[208] *See* Blume et al., *supra* note 25, at 1223–24 (summarizing CJP data demonstrating that significant numbers of jurors who served in capital cases were in fact ADP when considering either the definition of capital murder or the aggravating circumstances that actually make a defendant eligible for the death penalty).

[209] Common State arguments along these lines include, for example:

> Such a question is also irrelevant if it asks the venire's views on defenses that are not at issue at trial. A proper question seeks to discover a venire's views on an issue *applicable to the case*. The trial court is authorized to restrict voir dire to the legal

Defense counsel must therefore be prepared to articulate the utility behind the strip question, why it should be permitted,[210] and the reasons why such theoretical defenses must be "stripped" away from the juror's self-evaluation. As *Morgan* recognizes, "general fairness and 'follow the law' questions" are insufficient to lay bare prospective jurors' biases in favor of the death penalty.[211] This is so because many jurors may believe that they could consider mitigating circumstances but are envisioning circumstances that would constitute a defense to the charge itself: reduced culpability, provocation, and other such circumstances that, if proven, would result in a conviction for a lesser included offense or an acquittal.[212] Such jurors "could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent [them] from doing so."[213]

When defense teams have sufficiently articulated and defended this right, Texas courts *have* allowed effective strip questions in capital trials. For example:

> DEFENSE COUNSEL: Let me ask you a question in a hypothetical way.

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issues in the case at hand. Absent a showing that self defense, insanity, mistake, or voluntary manslaughter is an issue in this case, the question should not be allowed.

State's Motion in Limine—Colorado Method, *supra* note 186, at 6 (citations omitted). *But see* Standefer v. State, 59 S.W.3d 177, 181 (Tex. Crim. App. 2001) (noting that "a prospective juror must be able to consider the full range of punishment provided for an offense or be challengeable for cause" and, therefore, questions that go to a juror's ability to consider the full range of punishment are proper).

[210] Prosecutorial motions to prohibit the use of the Colorado Method often cite to one of the most detailed publicly available discussions of the Method: Matthew Rubenstein's *Overview of the Colorado Method of Capital Voir Dire*, published in the National Association of Criminal Defense Lawyer's *The Champion* in November 2010. Some motions even attach a copy of Rubenstein's article as "Exhibit A." *See, e.g.*, State's Motion in Limine—Colorado Method, *supra* note 186, at 1 n.1.

But these motions fail to acknowledge the explicit caution in Rubenstein's article to "avoid[] 'staking-out' or 'precommitting' a juror" and suggestion to "[r]eview the Iowa case *United States v. Johnson* for a useful discussion distinguishing appropriate case-specific and case-category questioning from inappropriate 'stake-out' or 'pre-commitment' questions." Rubenstein, *supra* note 60, at 22.

[211] Morgan v. Illinois, 504 U.S. 719, 734–35 (1992).

[212] *See* Schaye, *supra* note 205, at 24 ("If the defense attorney simply asks a juror, 'How do you feel about the death penalty?' she may say she does not favor it. But she may be imagining a case in which the defendant killed someone accidentally or committed a crime other than homicide."); Eric Carpenter, *Hidden Killers and Imagined Saints: Why Courts Fail to Identify Unconstitutional Jurors in Death Penalty Cases*, 2022 MICH. STATE L. REV. 449, 485 (2022) (discussing the importance of defining capital murder during the voir dire process because "[w]ithout a thorough definition of what the crime is and is not, we do not know if the questions accurately measure the venireperson's true qualification status").

[213] *Morgan*, 504 U.S. at 735.

> VENIREPERSON: Okay.
>
> DEFENSE COUNSEL: If you have an individual who has been—you've been a juror with 11 other people, and you have found that hypothetical defendant guilty of intentional murder; in other words, you have found that that person meant to do it, wanted to do it, planned to do it and did it, correct? Are you with me so far?
>
> VENIREPERSON: Yes, ma'am.
>
> DEFENSE COUNSEL: And in that example, let's also assume that he wasn't forced to do it, no one threatened him to make him do it, and that he was not acting in self-defense. That that person was not acting in defense of somebody else. That that person did not have insanity; in order [sic] words, he knew what was right and what was wrong, and he chose to do the wrong thing anyway. And that it wasn't an accident, and it wasn't a mistake. You with me still on all these facts we're assuming?
>
> VENIREPERSON: Yes, ma'am.
>
> DEFENSE COUNSEL: Then I want you to go on and consider that in your view and in the view of the 11 other jurors, you have found this person to be a continuing threat to society. In other words, you think this person is going to be dangerous in the future, right? They would continue to engage in criminal acts of violence in the future.
>
> VENIREPERSON: Yes, ma'am.
>
> DEFENSE COUNSEL: It's your view, is it not, that that is a case that the death penalty is the only proper punishment?[214]

A defense attorney might alternatively first ask a prospective juror a strip question that situates them at the point of conviction for capital murder, and then follow up with the juror to determine whether they can remain open to a life sentence following a unanimous affirmative finding on the first special issue:

> DEFENSE COUNSEL: Well, for purposes of hypothetical now, I want you to presume after you found this person guilty of capital murder, you have heard the evidence that was presented. And you and the 11 other jurors all agreed

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[214] B152 Transcript of Voir Dire at 197–98 (case citation omitted for confidentiality) (on file with author).

> beyond a reasonable doubt that this person is going to continue to commit criminal acts of violence that constitute a continuing threat to society.
>
> VENIREPERSON: Okay.
>
> DEFENSE COUNSEL: What are your feelings now about the death penalty being the only appropriate punishment for that guilty capital murderer?
>
> VENIREPERSON: I think that if we have gone through all the steps properly and that is the choice—that is not just my choice but the choice of the other 11 people in the room—that would be the appropriate—the appropriate choice.
>
> DEFENSE COUNSEL: Okay. So for you if this person is guilty of capital murder and you're convinced beyond a reasonable doubt that they are going to be a continuing threat to society, that for you, the death penalty is really the only appropriate choice for punishment?
>
> VENIREPERSON: Yes, I do.[215]

A juror who would only consider mitigation, or a life sentence, if they believed the defendant was insane or acted in self-defense, under duress, or in defense of another, is not "life-qualified," regardless of whether they believe themselves to be.[216] Defense counsel must be able to probe whether a juror believes that death should be imposed "upon conviction of a capital offense" because such an individual is unable to follow the law.[217] And in Texas, a juror must still be able to consider mitigation and a life sentence even after a unanimous affirmative finding on the first special issue.

Counsel must sufficiently emphasize the constitutional entitlement to voir dire to "lay bare the foundation" for a challenge for cause against jurors who are unable or unwilling to meaningfully consider mitigation and/or a life without parole sentence; without this ability, as the Court recognized, the right not to be tried by such jurors would be rendered meaningless.[218]

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[215] B153 Transcript of Voir Dire at 161–62 (case citation omitted for confidentiality) (on file with author).

[216] *Morgan*, 504 U.S. at 735.

[217] *Id.*

[218] *Id.* at 733–34.

F. The (Im)Propriety of "Mercy"

Finally, prosecutors often contend that it is improper for defense counsel to inquire "as to whether they believe mercy plays a role in deciding punishment or if they could consider mercy in a case in which the defendant murdered without justification."[219] While it is true that "[s]entencers do not have discretion to extend *mere* mercy or sympathy"[220] untethered to evidence presented to them, the argument that mercy plays *no* role in the capital sentencing decision is simply wrong.

While Texas does not require jurors to weigh aggravating and mitigating factors against each other, the second special issue asks specifically whether there exists a sufficient mitigating circumstance to warrant a sentence of life without parole rather than death. To give mitigating weight to evidence is in and of itself an extension of mercy.

As the late Justice Antonin Scalia observed in *Kansas v. Carr*,

> of course[,] the ultimate question [under the Kansas statute] whether mitigating circumstances outweigh aggravating circumstances is *mostly a question of mercy*—the quality of which, as we know, is not strained. . . . [J]urors will accord mercy if they deem it appropriate, and withhold mercy if they do not, *which is what our case law is designed to achieve.*[221]

Numerous cases of the Texas high court refer to the Texas sentencing structure as one that "allow[s] a jury to recommend mercy based on mitigating evidence."[222] Upon conviction for a capital crime, and

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[219] *E.g.*, State's Motion in Limine—Colorado Method, *supra* note 186, at 7; State's Second Motion In Limine, *supra* note 145, at 7.

[220] Richardson v. State, 879 S.W.2d 874, 883 (Tex. Crim. App. 1993) ("Sentencers do not have the discretion to extend mere mercy or sympathy . . . because such discretion would inevitably result in the inequitable, arbitrary imposition of the death penalty . . . .") (emphasis added).

[221] Kansas v. Carr, 577 U.S. 108, 119 (2016) (emphasis added).

[222] *See, e.g.*, McFarland v. State, 928 S.W.2d 482, 520 (Tex. Crim. App. 1996) ("[A]s long as the class of murderers subject to capital punishment is narrowed, a procedure *allowing a jury to recommend mercy based on mitigating evidence* introduced by a defendant raises no constitutional infirmity." (emphasis added) (citing Penry v. Lynaugh, 492 U.S. 302, 327 (1989)); *accord* Goss v. State, 826 S.W.2d 162, 165 (Tex. Crim. App. 1992) (noting that the TCCA "look[s] at whether the defendant is less deathworthy, i.e., entitled to *the consideration of the jury of the extension of mercy, in the form of a sentence of life imprisonment*" (emphasis added)); Morris v. State, 940 S.W.2d 610, 614 (Tex. Crim. App. 1996) ("[T]he United States Supreme Court has held that allowing a jury *the discretion to recommend mercy after considering mitigating evidence* is not unconstitutional." (emphasis added) (citing Penry v. Lynaugh, 492 U.S. at 319)); Mosley v. State, 983 S.W.2d 249, 264 (Tex. Crim. App. 1998) ("[T]he mitigation issue carries no burden of proof that must be carried by the State before a death sentence can be

a unanimous affirmative answer on the first special issue posed, Texas law presumes death is the appropriate punishment[223]—and yet the second special issue, as the Constitution requires, provides an opportunity for the jury to extend "mercy, in the form of a sentence of life imprisonment."[224]

Discussion that appropriately frames the utility of mercy under the law (as a response to mitigating evidence) *is* permissible. For example:

> DEFENSE COUNSEL: You have the discretion to dispense mercy in this case. Talk a little bit about that. What does mercy mean to you?
>
> VENIREPERSON: Kind of forgiveness.
>
> DEFENSE COUNSEL: Do you find yourself to be a merciful person?
>
> VENIREPERSON: I would think so.
>
> DEFENSE COUNSEL: And you know in this kind of case, you can have an individual decision. You could decide all by yourself that you want to dispense mercy in this case. And that you can hold on to that vote as your own individual choice.
>
> PROSECUTOR: Judge, I'm going to object. As long as it's based on the evidence.
>
> DEFENSE COUNSEL: As long as it's based on the mitigating circumstances that you found in the evidence, fair enough?
>
> VENIREPERSON: Yes, ma'am.
>
> . . . .
>
> DEFENSE COUNSEL: And, again, granting mercy is not breaking the law. It's respecting the law. As long as it's

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imposed. The issue, instead, *confers upon the jury the ability to dispense mercy, even after it has found a defendant eligible for the death penalty.*" (emphasis added) (citation omitted)).

[223] *See* TEX. CODE CRIM. PROC. art. 37.071(e)(1) (asking jurors to determine "[w]hether . . . 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").

[224] *Goss*, 826 S.W.2d at 165; *see also* Sandoval v. State, 665 S.W.3d 496, 545 (Tex. Crim. App. 2022) (explaining that counsel's sentencing argument strategy was reasonable where he "might have thought that [it] was a good springboard for a Biblical plea for mercy"); Caldwell v. Mississippi, 472 U.S. 320, 331 (1985) (discussing, in the context of capital sentencing deliberations, "the thought processes required to find that an accused *should be denied mercy and sentenced to die*." (emphasis added) (quoting Caldwell v. State, 443 So. 2d 806, 817 (Miss. 1983) (Lee, J., dissenting), *rev'd in part sub nom.*, Caldwell v. Mississippi, 472 U.S. 320 (1985))).

> supported by the evidence you have, your sole decision can be that you want to dispense mercy in this case.
>
> VENIREPERSON: Yes, ma'am.
>
> DEFENSE COUNSEL: You agree that's how it should be?
>
> VENIREPERSON: I think so.[225]

IV. COMPETENT VOIR DIRE THROUGH THE LOOKING GLASS

Given the complications of the Texas statutory scheme and the practical implications of state law described above, creative strategies are necessary to fulfill the constitutional mandate of adequate voir dire in Texas capital cases. Again, this Article does not suggest that advocates abandon the Colorado Method or its principles, or preemptively concede that the Method is impermissible under Texas law. Instead, an expanded approach to life qualification and jury education is necessary given the realities of Texas law and practice.

As an initial matter, defense teams must develop a system of data collection, review, and categorization prior to *and during* voir dire.[226] The Colorado Method incorporates individualized ratings for each prospective juror based on their death penalty views;[227] each member of the team should be involved in the rating and evaluation process to increase the likelihood of accuracy in rating with the goal of attaining interrater reliability.

However, while each juror's views regarding the death penalty are of central importance, additional information can be gathered throughout the voir dire process that can be extremely helpful to inform selection and strike strategy, particularly in jurisdictions like Texas where implementation of the Colorado Method may be thwarted in whole or in part by objection and judicial ruling. Advanced preparation and centralization of juror materials and information is the foundation of any minimally competent jury selection strategy. Specific areas of voir dire and related motions practice that should be adapted to the realities of litigation in Texas state courts are discussed below.

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[225] B151 Transcript of Voir Dire, *supra* note 194, at 80, 83.

[226] *See* Rubenstein, *supra* note 60, at 18–19 (describing the juror rating system).

[227] *Id.*

A. Questionnaires

Even before the voir dire process has formally begun, defense practitioners have an opportunity to lay the groundwork for more effective voir dire by proposing and litigating the contents of the questionnaire that is distributed to the panel of prospective jurors. This opportunity is a crucial one, and advocates should seize the opportunity to glean as much information as possible from prospective jurors before voir dire begins. Questionnaires provide useful blueprints that teams may use to structure effective and efficient voir dire, and illuminate the values and decision-making proclivities of prospective jurors. While many courts will suggest a "standard" capital questionnaire, counsel should not accept these boilerplate questions but instead propose their own case-specific and thoughtfully crafted questions.[228] It is also useful to compile as many questionnaires as possible from other cases to demonstrate that non-standard, case-specific questionnaires are not only permissible but also preferable.

While drafting proposed questions, advocates should craft as many open-ended questions as possible.[229] Eliciting from jurors their thoughts about the death penalty and related issues in their own words is crucial to make the most of individualized voir dire questioning. This is true for several reasons. Choosing a multiple-choice option or circling a proposed statement enhances the likelihood that prospective jurors will select a response that does not reflect their true beliefs; even if veniremembers engage with the substance of each question, selecting the most fitting statement obscures the nuances of human decision-making and anchors jurors to the framing of the question, rather than determining how jurors themselves think about and approach a given issue. Prospective jurors may select an answer that they believe is "correct" or reflects how they would prefer to be perceived rather than how they truly feel and think.[230] More importantly, inviting jurors to examine and articulate their own perspectives, in their own words, not only encourages them to confront the issues to be discussed in voir dire but provides an opportunity to explore the jurors' views in their own words during the voir dire discussion.

Questionnaires are useful as a threshold metric, and can often enable the parties to agree to excuse clearly pro-death-biased and *Witt*-excludable jurors without individualized questioning. In every case, the

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[228] Blume et al., *supra* note 25 at 1255 ("Experienced capital defenders do not use standard-form questionnaires; each capital defendant, each capital case and each local jury pool are so distinct that they require highly individualized surveys.").

[229] United States v. Fell, 372 F. Supp. 2d 766, 772 (D. Vt. 2005) ("Clearly, answers to open-ended questions are more likely to reveal a juror's true feelings.").

[230] *See* Schaye, *supra* note 205, at 21.

questionnaires should be used to develop a profile of each potential juror and should inform the individualized voir dire strategy for each potential juror called for questioning.

It is imperative that counsel highlight and confirm the potential juror's relevant responses on the record during questioning if they could potentially support a challenge for cause.[231] For example:

> DEFENSE COUNSEL: What I want to get to with you right now is how you feel about something. And this question—remember, we talked earlier, you said nothing in this question would be changed in your view, right? I couldn't change your mind about it?
>
> VENIREPERSON: Right.
>
> DEFENSE COUNSEL: And [prosecutors] couldn't change your mind about it, right?
>
> VENIREPERSON: Right.
>
> DEFENSE COUNSEL: So you indicated that if it is a true capital murder that [the death penalty] should be assessed in every case where the person has been convicted of capital murder?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: And you circled a ten?
>
> VENIREPERSON: Uh-huh.
>
> DEFENSE COUNSEL: So—and the question was whether you thought it should never be assessed or it should always be assessed, and you put yourself at the ten—
>
> VENIREPERSON: Yes.
>
> . . . .
>
> DEFENSE COUNSEL: And you are not going to automatically turn into a different person when you step into a jury box, are you?
>
> VENIREPERSON: No.
>
> . . . .

[231] Under Texas law, the questionnaires themselves are not a part of the formal voir dire process. Spielbauer v. State, 622 S.W.3d 314, 321 (Tex. Crim. App. 2021) ("Questionnaires answered outside of voir dire are not a part of formal voir dire.").

> DEFENSE COUNSEL: And your personal moral convictions have not changed on this question?
>
> VENIREPERSON: No.[232]

In another example, after prosecutors elicited a general commitment to follow the law from a strong pro-death juror, defense counsel returned to the questionnaire answers to build a record of the venireperson's true beliefs:

> DEFENSE COUNSEL: When you were asked to describe in detail your values and beliefs about the death penalty as a punishment for a person convicted of capital murder, you said there is no need to keep a murderer alive. Do you still feel that way?
>
> VENIREPERSON: [Yes].
>
> . . . .
>
> DEFENSE COUNSEL: And when you checked that you generally favor the death penalty, but you would base the decision to impose it on the facts—
>
> . . . .
>
> DEFENSE COUNSEL: —you wrote, "Concrete evidence must be provided before taking a life away".
>
> VENIREPERSON: That's right.
>
> DEFENSE COUNSEL: So, if you were convinced that someone was guilty of capital murder, you would vote for the death penalty?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: In every case?
>
> VENIREPERSON: [Yes].
>
> . . . .
>
> DEFENSE COUNSEL: Okay. And when you said you were opposed to life without the possibility of parole as the proper punishment in a capital murder case, you said you were opposed in every possible case because, you wrote, "a life for a life".
>
> VENIREPERSON: That's right. Yes.

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[232] B153 Transcript of Voir Dire, *supra* note 217, at 60–62.

> DEFENSE COUNSEL: And you feel that way still?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: Okay. On Question No. 53, . . . "What is the best argument against the death penalty, in your opinion?"
>
> . . . .
>
> DEFENSE COUNSEL: And I think the District Attorney asked you about this question too. And you said that you were concerned about a wrongful accusation.
>
> VENIREPERSON: That's right.
>
> DEFENSE COUNSEL: So you wouldn't want an innocent person to be put to death?
>
> VENIREPSON: That's—that's correct.
>
> DEFENSE COUNSEL: . . . I think that's fair.
>
> . . . .
>
> DEFENSE COUNSEL: But a guilty person, if they commit a capital murder, and you're convinced, you would always vote for the death penalty?
>
> VENIREPERSON: Yes.
>
> DEFENSE COUNSEL: And you're opposed to life without parole as the penalty for that person?
>
> VENIREPERSON: Yes.[233]

While views on capital punishment are central to both the Colorado Method and effective questionnaire drafting, advocates should also explore other aspects of a juror's personality and belief system that are likely to influence their decision-making and approach to deliberation. Exploring whether jurors—and those who know them—consider themselves a leader or a follower, for example, can help predict dynamics during deliberation and is often relevant to the intelligent exercise of peremptory challenges. Similarly, providing opportunities for jurors to reflect on and explore their own values and views on human behavior—including the concept of free will and the influence of circumstances on life trajectories—is crucial to understanding more about prospective jurors and gauging their potential receptivity to aggravating and mitigating

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[233] W232 Transcript of Voir Dire at 138–40 (case citation omitted for confidentiality) (on file with author).

evidence; understanding the relevance of these trait-based areas of questioning and arguing for their inclusion in capital questionnaires can empower defense counsel to take a more expansive and accurate approach to the individual voir dire process.

Finally, defense teams must provide jurors with the opportunity to articulate their best arguments in favor of and against the imposition of both the death penalty and life without parole. Such queries provide invaluable information into the prospective juror's views on the two possible punishments upon conviction for capital murder and provide crucial insight into the juror's ability and willingness to consider the potential defenses and anticipated penalty-phase evidence in the case at bar.

B. Motions

Given the heightened constitutional requirements that apply to death penalty cases in general, and capital voir dire specifically, judges should be very careful to ensure adequate voir dire and a robust jury selection process. But the realities of an elected judiciary, judges who may never have tried or heard a capital case, and the particularities of Texas law described above often result in truncated and/or constitutionally inadequate voir dire in Texas capital cases. In addition to developing skills and creative approaches to voir dire questioning, capital defense attorneys must litigate and educate the courts through motions practice and argument on the mandate of life qualification, the proper scope of capital voir dire, and the actual implications (and limitations) of Texas state law commonly cited by prosecutors to restrict the scope of defense voir dire.

The ABA Guidelines specifically mandate certain competencies and impose specific duties on capital teams approaching jury selection.[234] These include determining "whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge" and pursuing such challenges.[235]

Particularly in light of the emerging trend, described above, of prosecutorial motions preemptively seeking to frame and prohibit necessary and proper voir dire questioning on behalf of defense counsel, teams should be prepared to brief and litigate their client's rights to adequate voir dire through citations to proper authority and distinguish irrelevant or misleading caselaw as appropriate. Teams should be thoughtful and intentional about incorporating their integrated case theory into voir dire and exploring concepts with jurors relevant to every crucial

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[234] Am. Bar Ass'n, *supra* note 4, at 1049.

[235] *Id.* at 1028–29, 1049.

aspect of the case.[236] It is often useful to include sentencing data, findings from the Capital Jury Project, and other factual assertions; these motions should be supported by expert affidavit and testimony.[237]

In addition to educating courts—correcting misconceptions about what is improper and clarifying what is required to ensure a defendant's rights are protected during voir dire—teams should utilize motion practice as a vehicle by which to secure sufficient time to explore juror's views in individual voir dire,[238] request that prosecution and defense alternate individual voir dire to mitigate anchoring and framing effects in the explanation and discussion of relevant law and juror responsibilities,[239] prohibit judicial rehabilitation once a venireperson's disqualifying views have been established, and set out procedures to insure the intelligent exercise of peremptory challenges by qualifying a sufficient panel from which the petit jury will be selected (as opposed to the "strike-as-you-go" approach sometimes employed by trial judges, in which parties exercise peremptory strikes after the questioning of each prospective juror).

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[236] Blume et al., *supra* note 25, at 1263 (competent voir dire "communicat[es] the defense's theme of the case"); *see also* JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION: GAINING AN EDGE IN QUESTIONING AND SELECTING A JURY 50 (1995) ("Crucial for success at trial is identifying a persuasive theme of the case. . . . Developing questions that reveal the potential jurors' receptivity to the party's theme is important."); Stephen B. Bright, *Developing Themes in Closing Argument and Elsewhere: Lessons from Capital Cases*, LITIGATION, Fall 2000, at 40, 41 ("Voir dire provides . . . an important opportunity to identify biases that may interfere with a juror's ability to consider counsel's theory of the case . . . .").

[237] Schaye, *supra* note 205, at 23.

[238] However, as experienced trial teams are aware, judicial economy and the pressures of a trial docket are often top of mind for judges. Therefore, defense teams should strike a balance between ensuring their ability to sufficiently discuss pertinent beliefs with each potential juror while also assuring the trial court that these methods will not result in endless voir dire. *See id.*

[239] While trial courts often automatically grant the prosecution the right to examine each venireperson before passing the prospective juror to the defense, Texas law does not require that the prosecution conduct individual voir dire questioning before the defense. *See* TEX. CODE CRIM. PROC. art. 35.17(2) (providing that "on demand of the State or defendant, *either is entitled to examine each juror on voir dire individually* and apart from the entire panel, and may further question the juror on the principles propounded by the court" (emphasis added)); *cf.* TEX. CODE CRIM. PROC. art. 35.13 ("A juror in a capital case in which the state has made it known it will seek the death penalty, held to be qualified, *shall be passed* for acceptance or challenge *first to the state* and then to the defendant." (emphasis added)).

In *Ladd v. State*, 3 S.W.3d 547 (Tex. Crim. App. 1999), the TCCA rejected a capital defendant's claims that the trial court violated his Sixth Amendment right to an impartial jury and his Fourteenth Amendment right to due process of law "when it refused to alternate, as between the State and the Defense, the opportunity to initiate the questioning of each venireman." *Id.* at 561–62. But *Ladd* does not foreclose this option, and trial courts have broad discretion over the management of voir dire proceedings. Barajas v. State, 93 S.W.3d 36, 38 (Tex. Crim. App. 2002) ("The trial court has broad discretion over the process of selecting a jury.").

Finally, teams should collect and carefully examine transcripts of voir dire conducted in other capital cases tried by their prosecutors and presided over by their trial judge. Additional "player-specific" motions prohibiting specific improper behavior known to be employed by state actors should be developed and filed where appropriate.[240]

C. Visiting with Jurors About Their Views

As most successful trial lawyers know, adopting a genuine and authentic style in the courtroom is essential to establishing a relationship of trust with potential jurors. Just as each individual juror brings their own values, beliefs, experiences, and morals to the decision-making process, so too should trial lawyers bring their genuine selves to the courtroom while zealously enforcing constitutional guarantees on behalf of their client.

While the Colorado Method teaches that jurors must be educated about their responsibility to treat each other with curiosity and respect, so too must the examining lawyer respect each prospective juror, regardless of their views, and create a non-judgmental space in which the prospective jurors' views on punishment, desert, and other crucial topics may be explored with candor.[241]

However, in capital cases in particular, attorneys must adopt a somewhat-counter-intuitive approach to voir dire. While many veniremembers may express views—perhaps unexamined and often deeply held—antithetical to the basic human dignity and constitutional rights of capital clients, it is essential for attorneys conducting capital voir dire to abandon their role as advocate during the voir dire conversation. Here lies the counter-intuitive demand—if a juror expresses, in the questionnaire and/or during individual questioning, a proclivity or predisposition that will prevent or substantially impair the performance of their duties as a juror in accordance with their oath, capital defense counsel must be able to nonjudgmentally explore these stated positions, probe and affirm their centrality to the prospective juror's thought process and decision-making, and abandon all impulses to advocate for their client during individual voir dire.[242] Faced with a juror who expresses the view that they cannot think of a case in which mitigating evidence would persuade them that life without parole would be appropriate upon

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[240] Schaye, *supra* note 205, at 23.

[241] Rubenstein, *supra* note 60, at 18 (noting that the Method "works to create a nonjudgmental respectful atmosphere during jury selection that facilitates juror candor").

[242] *See* Schaye, *supra* note 205 at 30 (stating that counsel must "[e]licit— . . . not attempt to change—each juror's death penalty views through open-ended questioning and active listening").

conviction of capital murder, an effective advocate must abstain from suggesting that the juror should wait to hear all the evidence, attempting to extract promises to be fair or follow the judge's instructions, or any other tactic that is likely to elicit responses that may be used to rehabilitate the juror.

Instead, defense counsel must tap into genuine curiosity and become acquainted with the person before them—why does the prospective juror feel this way? Have they interrogated and established their own beliefs, or have they adopted the position of their family of origin/dominant culture/religion? What other related beliefs does the juror hold that could be pertinent to the evaluation of punishment phase evidence? Is the juror easily persuaded by the views of others, or do they carefully come to their own conclusions (and stick to them)? For example, one juror expressed strongly-held pro-death bias in their questionnaire, but promised the prosecutor to "wait to hear all the evidence" before deciding whether the death penalty was appropriate:

> DEFENSE COUNSEL: And are you someone who kind of makes a snap decision, or do you like to come to your own opinion after judgment and reasoning?
>
> VENIREPERSON: I like to come with my own opinion after judgment and reasoning.
>
> DEFENSE COUNSEL: And it sounds like a lot of your opinions are pretty strongly held?
>
> VENIREPERSON: M'hum.
>
> DEFENSE COUNSEL: Are you a person who changes your mind easily?
>
> VENIREPERSON: Not very easily. I guess, like, it takes like a really good amount of convincing.
>
> DEFENSE COUNSEL: That's fair. So you have some strong opinions.
>
> VENIREPERSON: Yeah.
>
> DEFENSE COUNSEL: And is your opinion on the death penalty one of those opinions?
>
> VENIREPERSON: That's a hard one.
>
> DEFENSE COUNSEL: Yeah. That's totally fine. There's no right answers.
>
> VENIREPERSON: . . . I guess, like if you show—if—if you were to give me like pros and cons list of like life

> without parole, I could—I could change my mind about it.[243]

Affirming the strength of the juror's views on the death penalty or the insufficiency of life without parole as a punishment for capital murder without judgment requires skill and introspection on behalf of defense counsel. Failure to adopt this non-judgmental and humanist approach will result in misguided attempts to advocate for one's client at the wrong stage of trial, ultimately talking killer jurors onto death penalty juries by throwing them a lifeline of rehabilitation.

After determining the initial profile of each veniremember, counsel should approach individual voir dire questioning with a goal (or goals) in mind, as the Colorado Method instructs.[244] Again, this Article does not advocate for the abandonment of the Method in Texas, but in anticipation of unfavorable judicial rulings, suggests that counsel explore and develop additional relevant views to buttress challenges for cause if the Method's blueprint is stymied by State objection.

Defense counsel should also carefully workshop questions that appropriately reach any case-specific issues, biases, and viewpoints. In addition to litigating the proper bounds of voir dire in an individual case through motions practice and, if necessary, responsive argument, counsel should devote time and resources to crafting questions that are permissible under the prevailing constitutional framework.

Questions that explore a prospective juror's ability to fairly consider a life sentence, or affirmative answer to special issue two, given a general case-specific fact,[245] while avoiding language that appears aimed to extract an improper promise, commitment, or statement of intent to assign mitigating weight to a specific category of evidence, are permitted and should be employed:

> DEFENSE COUNSEL: [I]f you were convinced that someone committed capital murder, which in this case is the intentional or knowing murder of a child under ten.
>
> . . . .

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[243] W232 Transcript of Voir Dire, *supra* note 235, at 121–22.

[244] *See* Rubenstein, *supra* note 60, at 22.

[245] *See* United States v. Johnson, 366 F. Supp. 2d 822, 849 (N.D. Iowa 2005) (finding that "it would be permissible for defense counsel to frame a 'case-specific' question as a 'life-qualifying' question (for example, either, 'Could you fairly consider a life sentence if the evidence showed *x*?' or 'Would you automatically reject a life sentence if the evidence showed *x*?)").

> DEFENSE COUNSEL: And of the mother of the child as well
>
> . . . .
>
> DEFENSE COUNSEL: So if the State proved to you beyond a reasonable doubt that somebody committed that crime, would you ever be able to consider life without parole as a proper penalty for them?
>
> VENIREPERSON: I don't think so.[246]

Finally, it should be obvious that the role of race cannot be ignored in any criminal prosecution, least of all a capital case.[247] Competent counsel simply cannot ignore interracial dynamics between their client, the victim, and the community—including prospective jurors. In cases involving an interracial crime, the defense has the constitutional right to inquire as to prospective jurors' racial biases and how they might impact decision-making.[248] But a heavy-handed approach to discussing race is not only ineffective; it can be affirmatively harmful.[249] And indeed, while the race of an individual juror cannot be a proxy for their own views, values, and experiences, exploring the impact of race on an individual juror's life can illuminate their approach to individual responsibility, willingness to accept specific evidence or client's life experience, and understanding of power and authority—all centrally important to ranking and selecting jurors in capital cases.

D. Making Lemonade Out of Lemons

The statutory special issue framework should also be used to guide the development of life-qualifying questioning. While a juror who will affirm that they would always, or "automatically," sentence a defendant to death upon conviction of capital murder is unquestionably challengeable for cause, a juror who would not consider mitigation or a life sentence after

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[246] W232 Transcript of Voir Dire, *supra* note 235, at 120–21.

[247] A substantial body of scholarship exists on the historical underpinnings and racialized application of the death penalty in the United States. *See, e.g.*, Levinson, *supra* note 51; McCleskey v. Kemp, 481 U.S. 279 (1987); Carol S. Steiker & Jordan M. Steiker, *The American Death Penalty and the (In)Visibility of Race*, 82 U. CHI. L. REV. 243 (2015); Matthew A. Gasperetti, *Crime and Punishment: An Empirical Study of the Effects of Racial Bias on Capital Sentencing Decisions*, 76 U. MIA. L. REV. 525 (2022); *see also supra* notes 50–51 and accompanying text.

[248] Turner v. Murray, 476 U.S. 28, 36–37 (1986) (holding that a "capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias").

[249] *See* Levinson, *supra* note 51, at 602–03.

affirmatively answering special issue one is equally unqualified under Texas law.[250]

Relatedly, when raising and articulating challenges for cause, defense counsel must be conscientious about using the proper language of *Witt*'s exclusionary rule, and emphasizing for the court that jurors are disqualified from service if their views on the death penalty are so strong that they would "prevent or substantially impair" their service as a juror.[251] While this standard includes that smaller category of jurors who would not only automatically sentence a defendant to death but who are also comfortable endorsing such a view during voir dire, it also encompasses jurors who might be able to affirm for the prosecution that they could "wait to hear all the evidence" and "follow the law" but whose answers on the questionnaire and in response to voir dire questioning call such assurances into doubt.

Consider this example, arguing a challenge for cause against an ADP juror:

> DEFENSE COUNSEL: [The venireperson] marked on his questionnaire that he was always in favor of the death penalty. He would vote to impose it in every case. Life without parole would never be a sufficient punishment for him upon conviction of capital murder. And those are the answers that he ratified to me today.
>
> Respectfully, . . . the District Attorney was asking him if he would automatically vote for death. And he said he would not. But that's not the standard for qualification. . . . [T]he standard is whether his views on the death penalty are so strong that they would prevent or substantially impair his duties as a juror. And he over and over again said that upon conviction for capital murder, if he was convinced that a person was guilty he would always vote for the death penalty, and that life without parole would not be a sufficient punishment to him. He could never impose that.[252]

Thus, counsel should include questioning to support an argument that the juror is substantially impaired even if the prosecution is able to

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[250] *See* Riley v. State, 889 S.W.2d 290, 300–01 (Tex. Crim. App. 1993).

[251] Wainwright v. Witt, 469 U.S. 412, 424 (1985).

[252] W232 Transcript of Voir Dire, *supra* note 235, at 145–46.

extract such a promise—after all, *Morgan* itself is clear that general "follow the law" questions are inadequate to reveal pro-death biases.[253]

E. Tackling Complicated Concepts Through the Language of the Statute

An important aspect of the Colorado Method is jury education. While strict adherence to the scripts of the Method may be blocked by objection and ruling—however erroneous such rulings might be under federal constitutional principles—capital defense counsel in Texas must heed and adapt this educational function to the realities and structure of the capital sentencing statute in Texas. Flexibility in this realm requires both an understanding of the Method's goals and approach and expert familiarity with the statutory scheme in Texas in order to frame the Texas juror's rights and responsibilities in a permissible and accurate fashion.

Capital defense counsel must specifically stress and ensure the juror's understanding of the difference between deliberation, as required by law, and the concomitant requirement that jurors must center their own conscience while assessing and answering the special issue. For example:

> DEFENSE COUNSEL: Again, it is not a group decision. You decide mitigation individually, any one thing that you might find sufficient to support a vote for a sentence less than death, to support a life sentence. You can decide to dispense mercy.
>
> . . .
>
> DEFENSE COUNSEL: In other words, you can look at all the evidence presented—again, rooted in the evidence,

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[253] Morgan v. Illinois, 504 U.S. 719, 749 (1992) ("[S]uch jurors could in all truth and candor respond affirmatively, personally confident that such dogmatic views are fair and impartial, while leaving the specific concern unprobed."). Furthermore, as scholars and advocates have noted, "social desirability bias," a psychological phenomenon that refers to the tendency of individuals to give responses congruent with what they think the questioner—or the larger audience—approves of and wants to hear, often creeps into the voir dire process. *See* Kelson Bohnet, *Stop Spinning and Start Striking: Psychology, Evidence-Based Best Practice, and the Case for Cause-Based Jury Selection*, KAN. BAR J., Mar.–Apr. 2025, at 26, 29–30 ("Not only do jurors face external pressure to give 'fair' and 'correct' responses, but they also may sincerely believe that they can act in an unbiased way despite their extraneous knowledge or deeply held beliefs."). Factors found in research settings to exacerbate the effects of social desirability bias are present during voir dire in a courtroom in a capital case, where the venireperson is face-to-face with the examiners, discussing a very charged issue (the death penalty), and where they may be rejected by people of high social standing and escorted out of the courtroom if they do not answer 'correctly.' Carpenter, *supra* note 214 at 473.

> right?—and you can make a decision that you want to dispense mercy in this case.[254]

Developing and refining analogies to tease out and emphasize the difference between envisioning a case where a person is killed—in which the death penalty might not be appropriate—and the ability to give meaningful consideration to mitigating evidence in the event of a conviction for capital murder is essential, both as a psychological reality and to combat the mischaracterization advanced by prosecutors that the Colorado Method encourages jurors "not to deliberate."[255]

For example, to emphasize the juror's responsibility to consider *all* the evidence in answering the second special issue, defense counsel might offer the following:

> DEFENSE COUNSEL: [W]ould you consider it all, his family background, for example?
>
> VENIREPERSON: I would consider anything that was provided to me.
>
> . . . .
>
> DEFENSE COUNSEL: When you use the word "consider" I could say, ma'am I want you to consider lighting the podium on fire and turning circles three times.
>
> VENIREPERSON: I would consider that and I would say, no that's against the law and I would get in a lot of trouble and I won't do it.
>
> DEFENSE COUNSEL: Precisely. That's precisely the point. So when you say you can consider, you can consider almost anything. But the law requires more than just having things flow in one ear and out the other, you have to give meaningful consideration of it, and it has to be able to move you.[256]

Furthermore, numerous elements of competent jury selection that are *not* commitment questions must be adapted and employed during voir dire, such as teaching jurors to respect each other's views during the deliberation process.

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[254] B154 Transcript of Voir Dire, *supra* note 177, at 113. By explicitly acknowledging and incorporating the language of the law—that mercy may be extended *based on the evidence*, *see supra* note 224 (citing example cases), this line of discussion withstood prosecutorial objection.

[255] *See* State's Second Motion in Limine, *supra* note 145, at 2.

[256] Vartkessian, *supra* note 72, at 277.

Because Texas asks jurors to answer special issue questions rather than weigh mitigating and aggravating circumstances against each other, defense counsel must align their linguistic approach with the language of the special issues themselves. Given the lessons from the Capital Jury Project, counsel must teach jurors how to interpret and answer the special issue questions according to their individual moral response, and must provide analytical frameworks by which jurors may understand and give effect to their own individual moral judgment within the special issues framework.[257] For example:

> Not everything is in the statute. The law will not tell you how to make these decisions. The law doesn't tell you what a sufficient mitigating circumstance is either. There is nothing in here that says: sufficient mitigating circumstances are the following 25 things. I'm trying to give you the framework for how you decide what a sufficient mitigating circumstance is or is not because the law doesn't give you any guides. The law does not say: "if you find one of the following ten things, that is, under the law, a sufficient mitigating circumstance and a life sentence must be imposed.". . . It might be helpful to give you more guidance as a juror, but what happens here is that the law turns you loose . . . .[258]

This endeavor requires engagement with the specific language of the special issues and verdict forms; counsel can often make use of prosecutors' visual aids (such as slides with text of special issue questions or capital sentencing processes) to clarify and expand the jury's understanding of their role and ability beyond the blinkered approach advanced by the prosecutors during the initial voir dire process.

One of the most perennially frustrating aspects of Texas sentencing law, the "10–12 rule," must be addressed as early as possible when discussing the sentencing statute with individual veniremembers. Defense teams should brainstorm frameworks that can be used during jury selection and reemphasized during closing argument, reminding jurors of their duties and abilities as they answer the special issue forms.[259] And while

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[257] *See id.* at 278.

[258] *Id.* at 273 (alteration in original).

[259] Defense counsel should also consider making use of TCCA statements that affirm the reality of capital sentencing. *See, e.g.*, Lawton v. State, 913 S.W.2d 542, 559 (Tex. Crim. App. 1995) ("[E]very juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues. The jury is not informed of the consequences of a hung jury, but *each juror will know that without his or her vote the death sentence cannot*

the traditional Colorado Method frame—that "even one juror" can insist upon a life sentence—will almost certainly be disallowed under current state law, prosecutors will often have discussed the special verdict forms with prospective jurors before defense counsel begins their individual discussion; this can be used to the benefit of the defense.

As described in Part II, *supra*, defense counsel should explicitly emphasize that the *only* question to be decided after conviction is whether the person will die a natural death in the Texas Department of Criminal Justice or whether they will be intentionally killed by the State, and the *only* way a defendant may be sentenced to death in Texas is with *twelve votes* to convict—*twelve affirmative votes* on the first special issue, and *twelve negative votes* on the mitigation issue.[260]

For example:

> DEFENSE COUNSEL: [W]hat is happening is the State is seeking three unanimous 12-to-0 verdicts. Okay. The first one will come at that guilt/innocence stage. The next would be on the question of continuing threat to society. And then the third would be that there's no sufficient mitigating circumstance. Okay. Those would have to be 12-to-nothing decisions in order for the death penalty to be imposed.[261]

CONCLUSION

There is no legitimate purpose for exclusion for cause of qualified jurors from capital trials,[262] nor is there a defensible legal basis for intentionally seating unqualified jurors who should be excluded for their pro-death biases and resulting inability to follow the law. "Under the banner of a strong commitment to justice, *all principal actors in the courtroom have an investment in eliminating ADP jurors*, but in the

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be imposed." (emphasis added)), *abrogated on other grounds by*, Mosley v. State, 983 S.W.2d 249 (Tex. Crim. App. 1998).

[260] *See* Prystash v. State, 3 S.W.3d 522, 536 (Crim. App. Tex. 1999) (contending that "[a]ny juror who wishes to vote life contrary to the votes of the majority is 'given an avenue to accommodate the complained-of potential disagreements,' for 'every juror knows that capital punishment cannot be imposed without the unanimous agreement of the jury on all three special issues'" (citations omitted) (quoting McFarland, 928 S.W.2d 482, 519 (Tex. Crim. App. 1996); *Lawton*, 913 S.W.2d at 559)).

[261] B154 Transcript of Voir Dire, *supra* note 177, at 104–05.

[262] *See* Wainwright v. Witt, 469 U.S. 412, 420 (1985) (noting that the State's "legitimate interest [is] in obtaining jurors who could follow their instructions and obey their oaths" (quoting Adams v. Texas, 448 U.S. 38, 44 (1980))); *see also* Gray v. Mississippi, 481 U.S. 648, 666–68 (1987) (rejecting an erroneous exclusion for cause of a venireperson whose scruples about the death penalty did not justify *Witt* exclusion as harmful *per se*).

adversary system the burden falls on the defense."[263] Defense counsel must therefore zealously advocate for the constitutional rights of capital clients, and judges must enforce those rights. By cultivating a deep knowledge of the controlling caselaw—both the constitutional principles and potential state law roadblocks—capital defense teams can maximize the efficacy of voir dire and respond to common objections from prosecutors.

A multi-faceted approach that is grounded in the principles of the Colorado Method and confronts the realities of Texas law head-on will enable defense counsel to prepare for and conduct capital voir dire in accordance with constitutional demands. Education and precision in every aspect of voir dire is essential. By availing themselves of training in the Method, aggressively litigating the content and structure of the voir dire process, and carefully crafting and deploying a structured approach aimed at deselecting jurors based on their pro-death views, capital defense teams in Texas can push back against unconstitutional restrictions on voir dire questioning. And to fulfill their ethical obligations to their clients, they must.[264]

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[263] Dillehay & Sandys, *supra* note 40, at 162 (emphasis added).

[264] *See* Tex. Disciplinary Rules Prof'l Conduct R 1.01, cmt. 6 ("[A] lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf."); Am. Bar Ass'n, *supra* note 4, at 1049. ABA Guideline 10.10.2, entitled *Voir Dire and Jury Selection*, provides as follows:

> Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

Am. Bar Ass'n, *supra* note 4, at 1049.