

EXHIBIT C



Scott Sundby

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1. I have been asked to testify regarding my research and work with the Capital Jury Project and its data collection and the literature that is based upon that research and data in order to address the issues of unreliability, arbitrariness, and jury decision making that are raised by Kansas's capital punishment statutes and procedures used.

Expert Qualifications

2. I am a Professor of Law and Dean's Distinguished Scholar at the University of Miami School of Law in Miami, Florida.

3. I have studied capital punishment law for thirty-seven years as part of my scholarship and teaching responsibilities. These responsibilities include extensive involvement in judicial education on the death penalty. I have been a faculty member of the National Judicial College (NJC) "Handling Capital Cases" course since 1987 and have also annually taught the death penalty law course to trial and appellate judges for both the Florida Advanced Judicial Studies program and the Virginia Judicial Education program; these programs are prerequisites in those states for a judge to preside over a capital case. The Virginia course ended in 2021 when the State abolished the death penalty (I will continue to teach other courses for their Judicial Education program in other areas of criminal law and procedure).

4. I have been involved as a primary investigator with the Capital Jury Project (CJP) since its inception in 1992. The CJP is an ongoing study originally funded by the National Science Foundation to determine how jurors in capital cases decide between life and death sentences. The

CJP has conducted in-depth standardized interviews (lasting on average three to four hours) with approximately 1200 jurors from 353 capital cases from 14 different states, of which roughly half served on juries that returned a life sentence and half served on juries that returned a sentence of death. I also was a principal investigator for a National Science Foundation funded project, Judging Capital Murder Cases. This project interviewed judges who were the sole decision maker for deciding whether to impose a death sentence under their state statutes; the study utilized the same methodology used for interviewing jurors. The project terminated with the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

5. Since its inception, CJP researchers have published over fifty articles and two books based on the data. I am familiar with all of the published literature relating to the CJP data. I have written one book (*A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (Palgrave Macmillan/St. Martin's Press 2005)), eight articles, and two book chapters using CJP data. To date, my work on the death penalty has been cited over fifty times by over thirty different courts, including twice in United States Supreme Court opinions. A Westlaw search will also show that my publications have been utilized in a number of briefs and motions by both the prosecution and the defense.

6. My writings have examined a variety of aspects of the death penalty decision, including jurors' use of mental health evidence, the role of the defendant's remorse in affecting the jury's decision, the impact of expert witnesses, the importance of how jurors perceive the victim, the process of jury deliberations, and how different trial strategies influence the jury's choice between a life and death sentence. These (and other CJP) studies have been cited in a number of judicial opinions; the findings on how trial strategy affects a juror's death penalty decision was relied upon by the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175,

192 (2004). Although the CJP research is based on interviews with jurors outside of Kansas, the aspects of death penalty decision making I have written about apply to jurors in Kansas cases as well: it is the nature of a capital case that makes the capital punishment decision inescapably unreliable, arbitrary, and inconsistent, not any one statute or scheme.

Overview of Sources and Opinions

7. If called in the pretrial hearing in *State v. McNeal*, I would provide the Court with expert testimony as outlined below. This testimony is based upon the CJP findings regarding juror decision making and the resultant unreliability of the process. My particular research draws upon both the CJP's quantitative findings and the qualitative data that I have gathered from interviewing capital jurors over the past thirty years. The testimony I outline below draws upon the full panoply of CJP sources, however, my own studies are primarily addressed in: *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty's Unraveling*, 23 William and Mary Bill of Rights Journal 487 (2014); *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 Hastings Law Journal 103 (2010); *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra Law Review 1035 (2008) (with John Blume and Sheri Lynn Johnson); *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (Palgrave Macmillan/St. Martin's Press 2005); *The Jury and Absolution: The Intersection of Trial Strategy, Remorse and the Death Penalty*, 83 Cornell Law Review 1557 (1998); *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert Testimony*, Virginia Law Review 1109 (1997).

Expert Opinions

8. Based on these studies, I will testify that the CJP interviews have raised concerns in a number of areas as to the operation of the capital punishment system, particularly as to the

unreliability and arbitrariness of jury verdicts. As the Supreme Court has ruled, consistency and reliability are the constitutional underpinnings of a post-*Furman* capital punishment system. I will testify that while we must be concerned with the factual accuracy of the guilt verdict in death penalty cases, another accuracy question unique to capital proceedings must also be confronted. This is the “moral accuracy question.” It recognizes, as has the Supreme Court, that the death penalty decision is inescapably a moral judgment by the jurors and asks whether the jury's decision that a particular defendant deserves to live or die is accurate. The fundamental question becomes: Can we be confident that a properly impaneled jury will always return a death sentence in certain types of cases and a life sentence in other types of cases? Because there are no scientific means to measure moral judgment, reliability must be measured by looking at the likelihood that juries across a range of cases are returning life and death sentences in a consistent and non-arbitrary manner.

9. I will testify that capital litigation inevitably involves wild-card factors affecting how the case is presented and how the jury decides the case that cannot be fully accounted for by rules and procedures. Consequently, no matter how carefully crafted and meticulously applied, capital punishment proceedings can never guarantee that a particular defendant deserves to die. I will testify that there are particular aspects of a capital sentencing that create this unreliability. Some of these are the quality of defense counsel, the personal characteristics of jurors, the race and gender of jurors, the jurors’ perception of remorse, the quality of the presentation of the case for life, the emotional impact of the aggravating evidence, and the jurors’ ability to comprehend and relate to the mitigation case.

10. I will testify that a primary area of concern based upon the literature and my interviews is how jurors process mitigating evidence. Mitigation related to a defendant’s mental

illness in particular poses special risks to juror decision making as jurors tend to use mental illness as a ‘double-edged sword.’ While jurors generally understand the highly mitigating nature of serious mental illness, they often are unable to give full consideration to the mitigation because they also view the mental illness as showing that the defendant is dangerous.¹ I will testify, moreover, that a further concern is raised because defense testimony about mental illness is largely presented through expert witnesses. As the Supreme Court has recognized, expert testimony about mental illness is often complex and contradictory, and the CJP data² indicates that this makes it especially difficult for jurors to fully consider mental illness as mitigation. Professional expert witnesses were viewed negatively in a significant portion of the cases and the skepticism about clinical testimony had the greatest negative impact on the defense experts when it came to the ‘battle of the experts,’ because they were the ones generally espousing theories in conflict with the jurors' preconceived notions of human behavior and responsibility.

11. I also will testify, based upon my review of CJP data and juror interviews, about two additional reasons that a special risk of unreliability is created where mental illness mitigation is at issue. First, mentally ill defendants often commit their crimes in a manner that jurors find “bizarre” or gruesome, frequently causing jurors difficulty in focusing on mental illness as mitigation because it is overwhelmed by the brutality of the crime. Second, I will also testify that jurors report that mentally ill defendants are often viewed as remorseless either because of a perceived lack of emotion (sometimes due to medication) or because of outbursts related to their illness. CJP’s findings thus suggest that the types of considerations that played an important role

¹ See e.g., *The True Legacy of Atkins and Roper: The Unreliability Principle, Mentally Ill Defendants, and the Death Penalty’s Unraveling*, 23 William and Mary Bill of Rights Journal 487, 518-20 (2014).

² *Id.* at 520-22.

in the Supreme Court placing intellectually disabled defendants (*Atkins v. Virginia*) and juvenile defendants (*Roper v. Simmons*) outside the constitutional reach of the death penalty also apply to mentally ill defendants.

12. I will testify that the CJP data and my interviews with jurors also reveal an unacceptable likelihood that jurors cannot give reliable consideration to other types of constitutionally protected mitigation. The brutality or coldblooded nature of any particular crime, for example, can overpower mitigating arguments based on relative youth, even where the offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's relative youth may even be counted against him, creating the "double-edged sword" problem. In addition, the CJP data reveal that many jurors had doubts whether factors that are constitutionally recognized as mitigating really do act as mitigation. This was true whether the factor was drug abuse, intoxication, a bad childhood, or even severe mental illness.³

13. I also will testify that the CJP data raises concerns over how capital jurors use future dangerousness as a sentencing consideration. Despite the use of life without parole as the standard alternative to a death sentence, many jurors continue to believe that a defendant who receives a life without parole sentence will be released at some point. This misapprehension is often based on news reports and 'folklore' surrounding the parole hearings of infamous defendants like Sirhan Sirhan. This concern over release can lead the death penalty to be imposed based upon erroneous assumptions. This factor is particularly crucial because capital jurors understandably view their foremost duty as one of never letting a defendant who has been convicted of capital murder kill

³ Scott E. Sundby, *The Jury As Critic: An Empirical Look At How Capital Juries Perceive Expert And Lay Testimony*, 83 Virginia Law Review 1109, 1135-36 (1997).

again. In carrying out that pledge, however, the CJP has found a significant risk that a juror's decision will be based on a disbelief that 'life means life.'⁴

14. I will also testify about the importance of the interaction of the guilt/innocence and penalty phases in influencing the jurors' deliberations. This is reflected in part by how some jurors will reach their decision for death prematurely before even hearing the penalty phase evidence, something which is constitutionally impermissible.⁵

15. I will also testify that CJP interviews have highlighted the critical importance that each juror's personal views and attitudes has on the jury's decision as a group. CJP findings indicate that the only means to adequately ascertain individual juror's views is through extensive voir dire by the parties. Part of the difficulty is that jurors may sincerely say that they would not automatically impose the death penalty for an intentional killing, but they are thinking of a scenario like a defendant who kills in self-defense and would not be guilty of murder at all. Likewise, jurors may state that they would be open to a life sentence but the only type of evidence that would sway them that way—such as the defendant killing while suffering from acute Alzheimer's—would never result in a capital murder charge in the first place. In fact, both of these are actual juror statements from CJP interviews. Consequently, without extensive voir dire, a serious risk arises that jurors who could not constitutionally serve on a jury will be seated even though they could not give fair consideration to the defendant's mitigation and would not be open to a life sentence if they understood what actually constituted capital murder.

⁴ William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing*, 39 Criminal Law Bulletin 51 (2003); William J. Bowers and Benjamin D. Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing*, 77 Texas Law Review 605 (1999).

⁵ See William J. Bowers, Marla Sandys, and Benjamin D. Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making*, 83 Cornell Law Review 1476 (1998).

16. I also will testify that in cases involving an African-American defendant accused of killing a white victim, the seating of a single African-American male dramatically reduced the likelihood that the jury would return a death sentence. Juries with one African American male juror returned death sentences in 42.9% of such cases—a far lower rate than the 71.9% of the cases where no African American males were on the jury.⁶ The Bowers study found that the difference in the death sentence rate reflects the fact that male African-American jurors (and to a lesser extent female African-American jurors) were more likely than whites to perceive the evidence in a manner supportive of those factors that lead jurors to vote for life sentences: they were more likely to see the defendant as remorseful, to believe that the defendant's background had adversely influenced his life, to have lingering doubts about the defendant's role in the crime, and to believe that the defendant did not pose a future danger if given a life sentence.⁷ These differences in perception existed in all cases, but were particularly noticeable when an African-American defendant was accused of killing a white victim,⁸ the category of cases that research has consistently identified as raising the gravest concerns about racial discrimination in the death penalty.⁹

17. I additionally will testify that the CJP data reveals through its study of jury dynamics that in a significant number of cases the final outcome of a life or death sentence would

⁶ William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 *University of Pennsylvania Journal of Constitutional Law* 171, 193-94 (2001). Also important was the independent effect of the number of white males on the jury. Cases involving a black-on-white killing that had four or fewer white males on the jury returned a death sentence in 30% of the cases, but if the jury included five or more white males the chances of a death sentence increased “dramatically,” with 70.7% of such cases resulting in death sentences. *Id.* at 193.

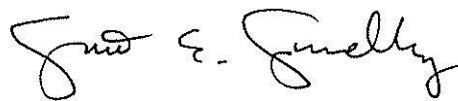
⁷ *Id.* at 215-26.

⁸ *Id.* at 241-44.

⁹ *Id.* at 259-66.

likely have been different if only one or two jurors had been seated with different moral- and world-views.¹⁰ This is because CJP’s findings show that once deliberations begin, a jury’s verdict almost always follows a ‘critical mass’ based on the jury’s first vote.¹¹ If the defense is able to secure five votes for “life” or “undecided” on the first ballot, the result is almost invariably a life sentence.¹² Indeed, in some instances, as few as four votes for “life” or “undecided” can still result in a life sentence.¹³ By contrast, unless at least eight jurors vote for “death” on the first ballot, there is hardly any possibility that the jury will return a death sentence,¹⁴ and a death sentence is almost always the result if at least nine jurors vote for “death” on the first ballot.¹⁵ Consequently, and especially on juries that had three or four votes for life (and thus eight or nine votes for death) on the first ballot, the substitution of a single “life” or “undecided” juror for a juror voting “death” would have likely led to a life rather than death sentence. These findings raise significant and alarming questions about the reliability and consistency of capital punishment, where the substitution of a single juror would have changed a sentence from death to life.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Scott E. Sundby". The signature is written in a cursive, flowing style.

Scott E. Sundby

¹⁰ Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 *Hastings Law Journal* 103, 107-11 (2010).

¹¹ *Id.* at 107-11; Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 *Journal of Legal Studies* 277, 304 (2001).

¹² Eisenberg, *supra* note 11 at 304 (“Death verdicts are therefore relatively more difficult to orchestrate [than life verdicts].”). *See also id.* at 303 tbl.7 (reporting that in the twenty-one South Carolina cases in which fewer than two-thirds of jurors voted for death on the first ballot, none resulted in a death sentence); Sundby, *supra* note 10 at 107-11 (finding similar results in California cases).

¹³ Eisenberg, *supra* note 11 at 303 tbl.7; Sundby, *supra* note 10 at 107-11.

¹⁴ *Id.*

¹⁵ *Id.*

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