

An Overview of the Capital Jury Project for Military Justice Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility

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Introduction

What exactly happens in the deliberation room of a capital trial? What are the jurors thinking and how are they acting as they make their decisions? Do they act rationally and bravely like the holdout juror played by Henry Fonda in *12 Angry Men*,¹ or do they succumb to group pressure and change their votes without actually changing their minds? Do they understand and follow the military judge's directions or are they confused about the fundamental rules that govern capital cases? Do they accept responsibility for their votes or shift responsibility to the other actors in the system? In a capital system that requires a unanimous vote at several stages²—and where a holdout juror can stop the death penalty process—it is critically important for capital attorneys to know the answers to these questions.

Because juror deliberations are closed and secret, however, trial advocates have not had much insight into juror dynamics.³ Fortunately, the Capital Jury Project (CJP), a major research effort, has come up with some answers to those questions, and many of these answers are startling. Civilian capital defense counsel have recognized the value of the CJP findings by adopting new strategies based on those findings, particularly in theme development and *voir dire*. Unfortunately, most military counsel are not familiar with the CJP's findings or these new strategies and we, as a community, risk falling well below the standard of practice currently found in state and federal death penalty cases.

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¹ 12 ANGRY MEN (Orion-Nova Productions 1957). The movie was based on the teleplay and play by Reginald Rose, and was remade as a television show in 1997.

² MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1004 (2008) [hereinafter MCM].

³ At least two projects have filmed actual jury deliberations. *Frontline* filmed a jury as it deliberated a case involving jury nullification, *Frontline: Inside the Jury Room* (PBS television broadcast Apr. 8, 1986) [hereinafter *Frontline* project], and *ABC News* filmed five juries as they deliberated five separate cases, including one capital case, *In the Jury Room* (ABC television broadcast Aug. 10, 2004). The deliberations captured in these videos reflect many of the Capital Jury Project findings. See also HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* (1966) (the first in-depth study of juror dynamics).

Military capital attorneys are drawn from a pool of general criminal trial advocates. Most in this pool have no experience in capital litigation⁴ because very few courts-martial are referred with a capital instruction and military attorneys frequently rotate through both locations and legal disciplines.⁵ While serving as general criminal litigators, these counsel have no pressing need to keep up with this capital litigation developments. Therefore, military counsel who find themselves detailed to a capital case will likely be operating in the world of the Unknown Unknowns, as Donald Rumsfeld would say. Review his famous quote, cleverly adapted by Hart Seely (without changing the order of any words) to a poem titled *Unknown*:

As we know,
There are known knowns.
There are things we know we know.
We also know
There are known unknowns.
That is to say
We know there are some things
We do not know.
But there are also unknown unknowns,
The ones we don't know
We don't know.⁶

When an attorney can spot the issue and know the answer right away, she is operating in the world of the Known Knowns. When she can spot the issue but still needs to look up the answer, she is operating in the world of Known Unknowns. When she has no idea what the issues are, she is in the world of Unknown Unknowns: she does not even know that she should be looking something up.⁷ With no previous exposure to capital litigation—and not having peers or supervisors with that experience—a military defense counsel assigned to a capital case may not know that she does not know about admission defenses, the Colorado method of *voir dire*, or the Federal Death Penalty Resource Counsel.

⁴ The Court of Appeals for the Armed Forces (CAAF) has noted that “there is no professional death penalty bar in the military services.” *United States v. Kreutzer*, 61 M.J. 293, 299 n.7 (C.A.A.F. 2006).

⁵ See REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 10–11 (2001), available at http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1.

⁶ Hart Seely, *The Poetry of D.H. Rumsfeld: Recent Works of the Secretary of Defense*, SLATE (Apr. 2, 2003), <http://www.slate.com/id/2081042/>.

⁷ Recognizing that a defendant or accused, or an attorney, or a panel member or juror are represented by both sexes in capital cases, throughout this article, I will use “he” as the pronoun for the defendant or accused; “she” as the pronoun for the attorney; and “he” as the pronoun for a juror or panel member.

The main purpose of this article is to shrink somewhat, for the prospective military capital attorney, the world of the capital Unknown Unknowns by providing an overview of certain areas covered by the CJP—capital jury dynamics, juror confusion, and juror responsibility—and by providing an overview of a major litigation technique that has been developed based on those CJP findings, the Colorado method of *voir dire*. Having moved these topics to the category of Known Unknowns, prospective military capital attorneys can then work to learn these topics.

Yet military attorneys may not find value in the CJP findings if they think that these findings are unique to civilian jurors and would not shed light on how court-martial panel members think and act. That leads to the other purpose of this article: to show that some evidence exists that capital court-martial panels behave consistently with the CJP findings. Military panel members are human beings and have shown that they follow the same patterns of reasoning and behavior that civilian jurors follow. Not all jurors or panel members will follow all of the patterns revealed by the CJP, but many will think and act in ways described by the CJP findings and some will cast votes based on those thoughts—and in a system where a single vote can decide life or death, those votes are critical.

This article will first cover the CJP findings on jury dynamics; will look at how the military's rules that govern capital cases could impact panel dynamics; and will demonstrate that military panels in three capital courts-martial have behaved consistently with the CJP findings. This article will next cover the CJP findings related to juror confusion and will demonstrate that military panels or military judges in three capital courts-martial have behaved consistently with those findings. Next, this article will discuss the concept of juror responsibility and how this concept may apply in a military context. Finally, this article will discuss a method of *voir dire* that defense counsel can use in capital cases to address the issues raised by the CJP.

What is the Capital Jury Project?

Started in 1991, the CJP is a research project supported by the National Science Foundation and headquartered at the University of Albany's School of Criminal Justice.⁸ The people doing the work are “a consortium of university-based investigators—chiefly criminologists, social psychologists, and law faculty members—utilizing common data-gathering instruments and procedures.”⁹

⁸ *What is the Capital Jury Project?*, STATE UNIV. OF NEW YORK AT ALBANY SCH. OF CRIMINAL JUSTICE, <http://www.albany.edu/scj/CJPwhat.htm> (last visited June 7, 2011) [hereinafter *What is the CJP?*].

⁹ William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1068 (1995).

The CJP investigators conducted in-depth interviews with people who have served on juries in capital cases, “randomly selected from a random sample of cases, half of which resulted in a final verdict of death, and half of which resulted in a final verdict of life imprisonment.”¹⁰ Trained interviewers administered a fifty-one page survey and then conducted a three to four hour interview.¹¹ The interviews “chronicle the jurors' experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.”¹² When coming to their findings, the researchers draw upon the statistical data created by the surveys and interviews as well as the narrative accounts given by the jurors.¹³ To date, the CJP has conducted interviews with 1198 jurors from 353 capital trials in 14 states.¹⁴ Academics have published the results of these interviews in many journals and books.¹⁵

Findings on Juror Dynamics

In the 1950s, Solomon Asch ran a series of experiments sponsored by the U.S. Navy that revealed the dynamic of social conformity, which is essentially the fear of disagreeing with the majority in a public setting.¹⁶ The examiner would bring a subject into a classroom along with seven to nine other people, all of whom were in on the experiment (only the subject was not).¹⁷ As an example, the examiner would give a card to the subject with a line on it,

¹⁰ John H. Blume et al., *Lessons from the Capital Jury Project*, in BEYOND REPAIR? AMERICA'S DEATH PENALTY 144, 173 (Stephen P. Garvey ed. 2003).

¹¹ *Id.*

¹² *What is the CJP?*, *supra* note 8.

¹³ *Id.* See also Bowers, *supra* note 9, at 1077–84 (in-depth discussion of the sample design and data collection methods); Blume et al., *supra* note 10, at 145–48.

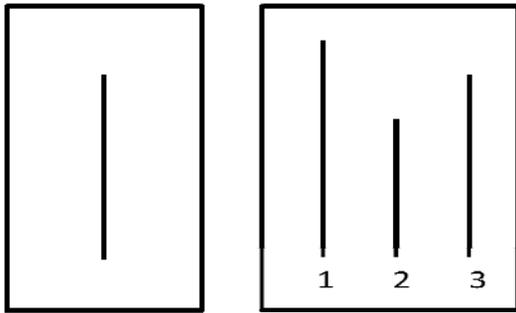
¹⁴ *What is the CJP?*, *supra* note 8.

¹⁵ SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY (2005) (providing an excellent introduction to and survey of the CJP findings). Sundby introduces the broad themes of the CJP within the study of a single jury. For lists of publications related to the CJP, see *Publications*, STATE UNIV. OF N.Y. AT ALBANY SCH. OF CRIM. JUST., <http://www.albany.edu/scj/CJPpubs.htm> (last visited June 7, 2011); *Articles*, CORNELL UNIV. L. SCH., <http://www.lawschool.cornell.edu/research/death-penalty-project/Articles.cfm> (last visited June 7, 2011); SUNDBY, *supra*, app., at 213–15.

¹⁶ S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Harold Guetzkow ed. 1951) [hereinafter Asch, *Effects of Group Pressure*]; SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952) [hereinafter ASCH]; Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN. & APPLIED 1 (1956) [hereinafter Asch, *A Minority of One*]. See also GREGORY BURNS, ICONOCLAST: A NEUROSCIENTIST REVEALS HOW TO THINK DIFFERENTLY 88–92 (2008) (providing simple explanations of these experiments); SUNDBY, *supra* note 15, at 81–84.

¹⁷ Asch, *Effects of Group Pressure*, *supra* note 16, at 178.

along with another card that had three lines on it, as shown below:¹⁸



The subject's task was to match the line on the left to either line 1, 2, or 3 on the right. The examiner would then ask one of the other people who was helping with the experiment for the answer and the person would deliberately give an *incorrect* answer, say, 1. The examiner would ask another person and that person would also give that same incorrect answer, and on down the line until the examiner reached the subject. The examiner would then ask the subject for the answer, which the subject would have to state in front of everyone else.¹⁹

The results of the experiment are startling: for each individual question, the subjects would go along with the group and give the wrong answer to this simple question *nearly one-third of the time*. During the series of multiple questions, *one-fourth* of the subjects would miss at least one question.²⁰ Compare that to when the subjects were alone when they did the task: the subjects would get the right answer on all of the questions 95% of the time.²¹

The experiments revealed that this force of social conformity primarily arose when three or more people gave the wrong answer first; had some influence when two people gave the wrong answer first; and had little influence when only one gave the wrong answer first.²² Further, if just one other person went against the majority, the power of the group pressure was greatly reduced. If that "partner" later changed his answer to the incorrect answer, the power of social conformity returned with full force.²³ When the subjects did not have to announce their findings in public, the majority effect diminished markedly.²⁴

But can one look to Asch's research to draw conclusions about how jurors and panel members act? The situations are quite different. First, other than public embarrassment, not much was on the line during the Asch experiments. Much more is at stake in a capital trial—someone's life. Next, in Asch's experiments, the subjects were dealing with facts (the length of lines). Capital jurors deal with facts but they also deal with norms and values such as whether someone should live or die. Finally, in the Asch experiments, no requirement existed for the group to return a unanimous group answer—the experiment dealt with a series of individual answers. Capital juries must return a unanimous verdict.

The CJP research shows that the answer to this question is, "Yes." Capital jurors, dealing in norms or values, faced with the requirement to produce a unanimous answer, are affected by group pressure—even when someone's life is on the line. But unlike the Asch findings, adding one partner (having a minority of two) is not enough to overcome that pressure. The minority needs to be at least 25% and probably as high as 33% in order for those jurors to preserve in their votes. For example, during the first vote on sentence, if 25% or fewer of the jurors vote for life, those jurors will *almost always* change their votes and the verdict will be death. If 33% or more vote for life, those jurors will *almost always* maintain their vote and the verdict will be life. If the vote falls between 25% and 33%, the verdict can go either way.²⁵

Importantly, the research indicates that the minority voters do not actually change their *beliefs* about whether the defendant should live or die: they just change their *votes*.²⁶ Asch stated that, "A theory of social influences must take into account the pressures upon persons to act contrary to their beliefs and values."²⁷ What social pressures and dynamics occur in a deliberation room that can cause someone to vote against his belief when so much is at stake?

One of the first interesting findings is that jurors do not remain open-minded for very long. Even if jurors were not that committed to their position before they cast their first vote, they quickly harden them: "Psychologists have discovered that when groups deliberate and an initial disagreement exists, group members tend *not* to move toward a 'middle' position, but actually become even more

¹⁸ ASCH, *supra* note 16, at 452.

¹⁹ ASCH, *Effects of Group Pressure*, *supra* note 16, at 178–79.

²⁰ *Id.* at 181–82; ASCH, *A Minority of One*, *supra* note 16, at 9.

²¹ ASCH, *Effects of Group Pressure*, *supra* note 16, at 181; ASCH, *supra* note 16, at 457; ASCH, *A Minority of One*, *supra* note 16, at 9–10.

²² ASCH, *Effects of Group Pressure*, *supra* note 16, at 188.

²³ *Id.* at 186.

²⁴ ASCH, *A Minority of One*, *supra* note 16, at 65.

²⁵ Blume et al., *supra* note 10, at 173. See also Scott Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 110 (2010). Sundby notes that there is a first vote threshold that forecasts the result of the trial in eighty-nine percent of the studies he sampled. With a jury of twelve members, if the first vote has five or more votes for life, the sentence will almost always be life. If the first vote on sentence has nine or more votes for death, the sentence will almost always be death.

²⁶ SUNDBY, *supra* note 15, at 96–97; Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1195–220 (1995).

²⁷ ASCH, *supra* note 16, at 450–51.

extreme or polarized in the direction of their original leanings.”²⁸ As members of the majority argue their points to the minority, the members of the majority become cemented in their attitudes²⁹ and approach the minority as teachers “trying to lead students to the right answer.”³⁰ The middle ground quickly disappears. Scott Sundby also notes that some juries learned from the guilt-phase voting that once people make a public announcement of their position, it is difficult to move them off that position.³¹ Based on those guilt-phase experiences, some juries decided to avoid that problem by not taking an initial vote during the penalty phase, thereby trying to preserve some middle ground.³²

With jurors now polarized, the majority begins to work on the minority by applying social pressure. Sundby notes that in many of the juries studied, some jurors adopted recurring roles. One of these roles is the victim’s advocate. The victim’s advocate believes that “it is up to them personally to act as the victim’s voice in the jury room”³³ and “that ‘they didn’t want to run into the victim’s parents and feel like they didn’t do the right thing by the victim and parents.’”³⁴ Another of these roles is the bully. The bully may resort to sarcasm, belligerence, name calling, and demeaning comments.³⁵ The bully may believe that his role is to serve as the “bad cop”: “He sensed that the others expected him to be brusque, to raise the arguments that they were too polite to make or were not worldly enough to fully comprehend.”³⁶ Sometimes these roles are played by the same juror. Often, in civilian trials, the deliberations will become contentious, loud, and angry,³⁷ and jurors are often reduced to tears.³⁸

As the minority is whittled down to a single holdout,³⁹ the pressure increases. Frustration and anger arise because the majority feels that the holdout can essentially hold the entire group’s decision hostage to his views.⁴⁰ Members of the majority will challenge the holdout with whether he had been honest in *voir dire* when asked if he could vote for death (or life, if holding out the other way).⁴¹ Jurors will use subtle pressure to get the holdout to change his position like cutting off his questions, talking to him in a patronizing tone, or sighing.⁴² According to Asch, this withdrawal of social support is a powerful component of group pressure.⁴³

Further, the holdout is under constant pressure from all angles and cannot take any mental breaks:

The worst part was that [the holdout] could not easily opt out of the active deliberations as some other jurors had done. [The holdout] had become the focus of the deliberations, and in some sense every question and every comment was directed at her, asking her to justify how she could still be voting life now that eleven were for the death penalty.⁴⁴

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

Eventually the holdout changes his vote, not because he now believes in the rightness of the other side’s position or is persuaded by the aggravating evidence, but because he has reached emotional exhaustion and simply acquiesces. Sundby remarks,

[T]he powerful pull of conformity can be observed readily, whether on the playground or in the workplace. And, of course, such pressures come into play in the jury room. For those of us who have whispered to ourselves that we would play Henry Fonda’s role in the jury room, the sobering reality is that many of us would not live up to our hopes and expectations.⁴⁵

²⁸ SUNDBY, *supra* note 15, at 51. Asch describes something similar, where the subject adopts the majority position and the act of adopting the majority position “increases the person’s confidence in his response.” Asch, *Effects of Group Pressure*, *supra* note 16, at 182. Further, “[G]roup decisions are generally more extreme than are individual decisions.” Steven J. Sherman, *The Capital Jury Project: The Role of Responsibility and How Psychology Can Inform the Law*, 70 IND. L.J. 1241, 1246 (1995). Sherman continues, “[D]ifferent individuals may have different reasons for their individual decision. When each person is then exposed to other supporting arguments by the other group members who share their decision outcome, they become even more polarized. Research clearly demonstrates that jury deliberations produce this polarization effect.” *Id.*

²⁹ SUNDBY, *supra* note 15, at 51–52.

³⁰ *Id.* at 21.

³¹ Sundby, *supra* note 25, at 112.

³² *Id.*

³³ SUNDBY, *supra* note 15, at 128.

³⁴ *Id.* at 129.

³⁵ *Id.* at 122.

³⁶ *Id.*

³⁷ *Id.* at 123.

³⁸ *Id.* at 56.

³⁹ See also *id.* at 81–84 (including an interesting discussion of Asch’s experiments related to this process).

⁴⁰ *Id.* at 55.

⁴¹ *Id.* at 23.

⁴² *Id.* at 66–68.

⁴³ Asch, *Effects of Group Pressure*, *supra* note 16, at 188.

⁴⁴ SUNDBY, *supra* note 15, at 85.

⁴⁵ *Id.* at 84.

Likewise, the jurors who cross-over from a death vote to a life vote often do so to avoid becoming a hung jury and not because they were influenced by mitigating factors.⁴⁶ As Asch would predict, the *social* factors in the courtroom—and not the aggravating or mitigating circumstances—drive the juror to change his vote.⁴⁷

Jury Dynamics and the Military Justice System—in Theory

This section will discuss in theory how panel member dynamics in a capital case might be affected by the force of social conformity. The next section will discuss whether there is any evidence that the dynamics discovered by the CJP actually exist in capital courts-martial. Looking first at voting procedures, like civilian capital trials, capital courts-martial require unanimous votes: before a death sentence may be imposed, a panel must have a unanimous finding of guilt on a capital offense,⁴⁸ a unanimous vote on the existence of an aggravating factor,⁴⁹ a unanimous vote that extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances,⁵⁰ and a unanimous vote that death is the appropriate sentence.⁵¹ The basic framework is the same as that found in civilian systems, so maybe members faced with resolving the difficult issue placed before them will follow the same patterns as civilian jurors.

However, the Rules for Courts-Martial (RCM) include provisions not found in civilian systems that should prevent the force of social conformity from coming into play at three of the four voting junctures – all but the final vote on life or death. One of most important of these rules deals with how

the panel votes and re-votes on the question of guilt as to the capital offense. For death to be an available punishment in the presentencing proceeding, a panel of at least twelve members must vote unanimously that the accused is guilty of the capital offense.⁵² After the members deliberate on the capital offense, the members vote by secret written ballot.⁵³ The junior member collects and counts the ballots, the president announces the result, and that result is the finding.⁵⁴

If the vote on the capital offense is two-thirds or greater for guilt,⁵⁵ the finding on that offense is guilty; however, if the vote on the capital offense is not unanimous, then the accused cannot face the death penalty. He is still guilty of the offense, he is just not eligible for the death penalty. Importantly, *the rules prohibit the panel from re-voting on that finding of guilt* for the purpose of increasing the votes to a unanimous vote, thereby making the accused death-eligible. The finding can only be reconsidered under the procedure outlined in Article 52 of the Uniform Code of Military Justice (UCMJ) and RCM 924,⁵⁶ and those rules do not allow for a non-unanimous vote for guilt to be reconsidered.⁵⁷

This means an 11-1 vote for guilt is a finding and cannot be revisited in an effort to get a unanimous vote on a capital offense. The rules themselves preserve the minority: the majority *never gets a chance* to apply pressure on the minority members to change their votes to guilty. A single panel member can anonymously remove the death penalty as an available sentence by voting for a lesser-included offense of the capital offense without subsequently having to explain himself to the group.

Turning to the capital presentencing proceeding, some of the rules also protect the minority. There are three potential votes in the capital sentencing deliberations: a vote on whether an aggravating factor exists,⁵⁸ if all panel members agree that at least one does, then a vote on whether the extenuating and mitigating factors are substantially outweighed by the aggravating circumstances (the balancing test),⁵⁹ if all panel members vote yes, then they vote on the ultimate sentence, which could include death.⁶⁰ As with the

⁴⁶ Sandys, *supra* note 26, at 1207. Sundby describes how the process of converting death votes to life votes is very similar. Sundby, *supra* note 25, at 140–44. The jury filmed for the project displays many of these dynamics. *Frontline* project, *supra* note 3. Interestingly, the holdout is arguing for a conviction where the law clearly requires a conviction (the case is about jury nullification). The force of social conformity works against him and he eventually joins the vote for acquittal – not because he believed the defendant was not guilty, but because he did not want to prevent the others from reaching *their* decision.

⁴⁷ After reviewing CJP data, Sundby concluded that capital juries followed remarkably similar patterns as they reached a decision on the sentence. Sundby, *supra* note 25, at 105–06. Juries would follow a five-step process: first, the majority would unite with a strong viewpoint; second, the majority would isolate and focus on the holdouts to get them to change their votes; third, the majority would convert the holdouts to the majority position; fourth, the majority would reconcile with and support the former holdouts until the verdict was announced; and fifth, the jurors would wait in suspense as the jurors were individually polled during the announcement of the sentence, wondering if a holdout would change positions at the last minute. *Id.* at 105–06, 146–48.

⁴⁸ MCM, *supra* note 2, R.C.M. 1004(a)(2).

⁴⁹ *Id.* R.C.M. 1004(b)(4)(B).

⁵⁰ *Id.* R.C.M. 1004(b)(4)(C).

⁵¹ *Id.* R.C.M. 1006(d)(4)(A).

⁵² *Id.* R.C.M. 1004(a)(2).

⁵³ *Id.* R.C.M. 921(c)(1).

⁵⁴ *Id.* R.C.M. 921(c)(6).

⁵⁵ UCMJ art. 52(a)(2) (2008).

⁵⁶ MCM, *supra* note 2, R.C.M. 924(b) & discussion.

⁵⁷ UCMJ art. 52(c); MCM, *supra* note 2, R.C.M. 924(b); R.C.M. 922(b)(2); R.C.M. 922 analysis, at A21-70.

⁵⁸ MCM, *supra* note 2, R.C.M. 1004(b)(7).

⁵⁹ *Id.* R.C.M. 1004(b)(4)(C).

⁶⁰ *Id.* R.C.M. 1004(b)(7).

merits voting, the votes are also by secret, written ballot,⁶¹ and the junior member collects and counts the ballots while the president announces the result.⁶²

For the first two votes (the vote on the aggravating factor and the vote on the balancing test) the first vote is the *finding*,⁶³ just like the vote on guilt after the merits deliberations is a *finding*. The votes on these first two gates may not be reconsidered *because there are no reconsideration procedures for these votes*.⁶⁴ Like the vote on guilt for the capital offense, if a single member anonymously votes that no aggravating factor exists or that the extenuating and mitigating factors are not substantially outweighed by the aggravating circumstances, then the deliberations on those gates are over and those votes cannot be revisited.

For these three findings votes (the guilt finding on the capital offense, the aggravating factors finding, and the balancing test finding), defense counsel should be wary of “straw votes.” Straw votes are informal votes taken by members to see where they stand on the issues. They are not authorized by the RCMs or the UCMJ but are not specifically prohibited by these sources.⁶⁵ However, the Court of Military Review has said that “we do not believe that this practice merits encouragement,”⁶⁶ primarily because straw polls circumvent the voting reconsideration rules, remove anonymity, and allow superiority of rank considerations to enter the deliberation room.⁶⁷ Having seen that the established voting rules prevent the force of social conformity from affecting these first three findings votes, defense counsel should recognize the danger posed by straw votes, should object to any request that straw votes be allowed, should ask the military judge to instruct that no straw votes may be taken, and should educate panel members during *voir dire* to prevent straw votes.

Turning to the final vote on the sentence, the rules no longer protect the minority to the same degree. Members propose sentences in writing and submit them to the junior member who in turn provides them to the president who announces them in the deliberation room.⁶⁸ The members then vote and revote on the sentences, starting with the least severe sentence, and continuing with the next least severe until enough votes exist for a sentence.⁶⁹ The vote requirements are a three-fourths majority for life⁷⁰ (which is the mandatory minimum for premeditated murder and felony murder),⁷¹ three-fourths for life without parole (LWOP),⁷² and unanimous for death.⁷³

The panel continues to vote and revote until one of two things happens. If enough panel members have voted for a particular sentence, then the sentence has been *adopted*.⁷⁴ (Unlike the merits vote and the first two votes during the sentencing deliberations, this decision is not a “finding.”) Or, the panel can hang. In the court-martial system, panels cannot hang on the merits—if there are not enough votes for a guilty finding when the ballot count is announced, then the accused is acquitted. However, panels can hang on the sentencing decision.⁷⁵ If the panel cannot agree on a sentence, the military judge will declare a mistrial on the sentence only (the merits findings still stand), and the case is returned to the convening authority to either order a rehearing on the sentence only or order that no punishment be imposed.⁷⁶

Unlike the first three votes, where the rules prohibit re-voting and so shield against the force of social conformity, here the rules allow that force to enter the deliberation room because re-voting is explicitly allowed. One should expect the force of social conformity to play a major role in deliberations—the majority will get the chance to work on the minority as the panel struggles to reach either a three-fourths vote for life or LWOP, or a unanimous vote for death. Even though the votes are still by secret, written ballot,⁷⁷ everyone will be able to recognize who the holdout

⁶¹ *Id.* R.C.M. 1004(b)(7), 1006(d)(2). The rules expressly call for a secret, written vote on the aggravating factors gate but do not expressly call for a secret, written vote on the balancing gate. However, the CAAF advises military judges to require that this vote be reduced to writing. *United States v. Curtis*, 44 M.J. 106, 159 (C.A.A.F. 1996). Complying with that advisory, Army judges provide an instruction that calls for a secret, written vote on the balancing decision. U.S. DEP’T OF ARMY, PAM. 27-9, MILITARY JUDGES’ BENCHBOOK para. 8-3-40 (1 Jan. 2010) [hereinafter MILITARY JUDGES’ BENCHBOOK].

⁶² MCM, *supra* note 2, R.C.M. 1006(d)(3).

⁶³ *Id.* R.C.M. 1004(b)(4).

⁶⁴ *Id.* R.C.M. 1004(b)(4)(C) & (b)(7); R.C.M. 1006.

⁶⁵ *United States v. Lawson*, 16 M.J. 38, 41 (C.M.A. 1983).

⁶⁶ *Id.*

⁶⁷ *Id.* In *Lawson*, the panel asked the military judge whether they could conduct straw votes on the findings (not on the sentence, where the rules allow for revoting without using reconsideration rules), and the military judge said they could. *Id.* at 40. Importantly, the defense counsel did not object. *Id.* The Court of Military Review indicated that this procedure would not be allowed over defense objection. *Id.* at 41.

⁶⁸ MCM, *supra* note 2, R.C.M. 1006(c).

⁶⁹ *Id.*, R.C.M. 1006(d)(3)(A). In a note to the hung jury instruction, the Military Judges’ Benchbook states that, “In capital cases, only one vote on the death penalty may be taken.” MILITARY JUDGES’ BENCHBOOK, *supra* note 61, para. 2-7-18. However, that note is not supported by the rules or case law.

⁷⁰ UCMJ art. 52(b)(2) (2008).

⁷¹ *Id.* art. 118(4).

⁷² *Id.* art. 52(b)(2).

⁷³ *Id.* art. 52(b)(1).

⁷⁴ MCM, *supra* note 2, R.C.M. 1006(d)(6).

⁷⁵ *Id.* R.C.M. 1006(e); MILITARY JUDGES’ BENCHBOOK, *supra* note 61, para. 2-7-18.

⁷⁶ MCM, *supra* note 2, R.C.M. 1006(e).

⁷⁷ *Id.* R.C.M. 1006(d)(2).

is because he is the one making the arguments for life.⁷⁸ Further, the president of the panel can keep the deliberations open until he or she feels that the debate is done,⁷⁹ which could mean keeping the deliberations open until the holdout comes around.

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

[Y]ou each have the right to conscientiously disagree. It is not mandatory that the required fraction of members agree on a sentence and therefore you must not sacrifice conscientious opinions for the sake of agreeing upon a sentence. Accordingly, opinions may properly be changed by full and free discussion during your deliberations. You should pay proper respect to each other's opinions, and with an open mind you should conscientiously compare your views with the views of others.

[Y]ou are not to yield your judgment simply because you may be outnumbered or outweighed.

If, after comparing views and repeated voting for a reasonable period in accordance with these instructions, your differences are found to be irreconcilable, you should open the court and the president may then announce, in lieu of a formal sentence, that the required fraction of members are unable to agree upon a sentence.⁸⁰

This language explains to the holdout in a public setting that he does not have to move from a conscientious decision (that is, a moral decision based on an inner sense of right and wrong) simply because he is outnumbered. His only obligation is to deliberate for a reasonable period of time.

The problem for the defense counsel is getting the military judge to read this instruction to the panel. The

⁷⁸ In *Lawson*, the court recognized that, "Typically there will be some discussion among court members as to the facts of a case, and it is hard to imagine how, in speaking about the facts, a member could completely conceal his views." *United States v. Lawson*, 16 M.J. 38, 40 (C.M.A. 1983).

⁷⁹ MCM, *supra* note 2, R.C.M. 502(b)(1), 1006; *United States v. Accordino*, 20 M.J. 102, 105 (C.M.A. 1985).

⁸⁰ MILITARY JUDGES' BENCHBOOK, *supra* note 61, para. 2-7-18.

directions in the instruction state that it should be read "[w]henver any question arises concerning whether the required concurrence of members on a sentence or other matter relating to sentence is mandatory"⁸¹ or if the panel "has been deliberating for an inordinate length of time."⁸² If, after deliberating, the panel asks the military judge a question about the effect of a non-unanimous vote on the death penalty, or if the panel has been deliberating for a long time, the defense counsel should ask the military judge to read this instruction. And, the defense counsel should work this instruction into her *voir dire* of the panel.

If the panel adopts a sentence, another rule exists which could work to counter the force of social conformity—the reconsideration provisions for adopted sentences outlined in RCM 1009.⁸³ To reconsider an adopted sentence of death with an eye toward lowering the sentence to life, only one member needs to vote to reconsider.⁸⁴ While this procedure only applies to sentences that have been adopted (which means that the holdout member has already given up, at least temporarily) and not to the votes taken as the panel tries to reach an adopted sentence, it does serve as a final opportunity for a holdout member to return to his original vote. The rules require that the panel go to the judge for additional instructions before they can reconsider the sentence.⁸⁵ This provides the opportunity for the military judge to read the hung jury instruction, which then might work against the force of social conformity and enable the holdout member to preserve his vote. After asking for reconsideration, the panel member would be instructed that the law does not expect him to change a firmly held moral belief—he only needs to negotiate with an open mind for a reasonable amount of time.

This discussion of the voting rules suggests that defense counsel should focus on those decision points that have rules that protect against the force of social conformity. Defense counsel should refine their merits arguments to focus the panel on lesser-included offenses. Defense counsel can use "admission defenses"⁸⁶ to present a credible argument that

⁸¹ *Id.*

⁸² *Id.*

⁸³ MCM, *supra* note 2, R.C.M. 1009.

⁸⁴ *Id.* R.C.M. 1009(e)(3)(B). To reconsider the sentence with a view toward increasing the sentence from life to death requires a majority vote. *Id.* R.C.M. 1009(e)(3)(A). That would require a significant number of life voters to change to death voters and is unlikely to happen. See Sundby, *supra* note 25, at 108–09.

⁸⁵ MCM, *supra* note 2, R.C.M. 1009(e)(1).

⁸⁶ Scott E. Sundby, *The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 88 CORNELL L. REV. 1557, 1568–69, 1584 (1998). Admission defenses "admit that the defendant committed the acts charged, but also assert that she lacked the requisite intent to be held criminally liable for the offense charged. Provocation, self-defense, insanity, diminished capacity, and lack of specific intent are all examples of admission defenses." Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299 (1983). See also Carpenter, *An Overview of the Capital Jury Project for Military Justice*

the accused is not guilty of the greater capital offense. In their sentencing arguments, defense counsel should specifically address the aggravating factors and the balancing test. Defense counsel will often have to find novel approaches to the aggravating factors since the aggravating factors are often not in controversy, especially when there are two or more murder victims.⁸⁷ However, the balancing test vote (that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances)⁸⁸ is always in controversy. If the defense counsel properly educates the members in *voir dire* and the military judge clearly instructs the members on the voting rules for the balancing test vote, a potential holdout juror will recognize that he can anonymously end the debate on life versus death by voting against death at the balancing test vote.

Turning now to bullies in the deliberation room, we should not expect to find overt bullies in a court-martial deliberation room, but a dynamic that resembles that pressure exists: the dynamic of rank in the deliberation room. Overt use of rank within the deliberation room is a form of unlawful command influence and is impermissible.⁸⁹ Panel members understand that. Senior-ranking members do not look at the junior-ranking members and tell them, “You will vote this way.” The real problem is subtle or even unintended influence. During deliberations, members will learn where other members stand on the issues; therefore, even though the voting is secret, the junior member will generally know where the senior member stands and vice versa. The Court of Military Review said as much in *United States v. Lawson*.⁹⁰

[W]e cannot deny that considerations of rank may have, at least, an unconscious effect upon the deliberations of a court-martial. Typically there will be some discussion among court members as to the facts of the case, and it is hard to imagine how, in speaking about the facts, a member could completely conceal his views.

....

Obviously, if [verbal “straw polls” were taken], the danger would be enhanced, because each member’s position—albeit, a tentative position—is clearly revealed to

the others; and junior members might be influenced to conform to the expressed positions of their seniors.⁹¹

If the panel follows the correct voting procedures and does not cast any straw votes, this dynamic should not be much of an issue during the first three votes. The junior member can anonymously cast a vote and end the discussion.

However, this dynamic may play a significant role in the final vote for life or death. While one should not expect that anyone on a panel will resort to name-calling or other bully tactics, the respect given to rank might achieve the same result. A junior panel member who is holding out for life may change his vote when eleven other senior members in the military, including a president who is most likely a colonel, are telling him, albeit politely or through stares, that a life vote is inappropriate. And, the president of the panel can exercise his discretion to keep the deliberations open until he feels that the debate is done,⁹² which a president could do until he feels that the holdout vote has come around.

A look at the RCMs, then, shows that the potential for the force of social conformity exists in a military panel’s deliberation room. On the final vote for life or death, the panel must continue to re-vote until they reach a sentence or hang. One of the dynamics that causes a minority voter to change his vote in a civilian jury—a bully in the deliberation room—probably does not exist in that form in a military panel room but may have a close counterpart: the influence of rank in the deliberation room. The next step is to see if any evidence exists that these dynamics have surfaced in a capital court-martial.

Evidence of These Dynamics in Capital Courts-Martial

At least three capital courts-martial appear to reflect some of the CJP findings. A review of the appellate opinions of the modern capital courts-martial that have resulted in approved death sentences⁹³ reveals two cases in which, at some point in deliberations, at least one panel member voted for life. In addition, news reports of a recent capital court-martial indicate that at least one panel member voted for life before changing his or her vote to death. Two of these cases may have also been impacted by the influence of rank in the deliberation room.

One of the important CJP findings is that most juries start deliberations with at least some jurors who support a

Practitioners: Aggravation, Mitigation, and Admission Defenses, ARMY LAW. (forthcoming July 2011).

⁸⁷ MCM, *supra* note 2, R.C.M. 1004(c)(7)(J).

⁸⁸ *Id.* R.C.M. 1004(b)(4)(C).

⁸⁹ *United States v. Accordino*, 20 M.J. 102, 104 (C.M.A. 1985).

⁹⁰ 16 M.J. 38 (C.M.A. 1983).

⁹¹ *Id.* at 40–41.

⁹² MCM, *supra* note 2, R.C.M. 502(b)(1); R.C.M. 1006; *Accordino*, 20 M.J. at 105.

⁹³ See Colonel Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 17–19 (2006).

life sentence.⁹⁴ As discussed earlier, though, if the minority vote is 25% or fewer, those jurors will almost always change their minds.⁹⁵ In *United States v. Loving*,⁹⁶ possibly the most recognized capital case in the military, the initial vote on a proposed sentence was seven votes for death and one for life.⁹⁷ The panel re-voted the sentence after further deliberations and, as the CJP findings would predict, that one voter (12%) changed his vote to death.

The influence of rank in the panel room may have also played a role in *Loving*. The *Loving* opinion contains three affidavits from panel members,⁹⁸ allowing a rare (though short) glimpse into the deliberation room of a capital court-martial. Again, the initial vote on the sentence in *Loving* was seven votes for death and one for life.⁹⁹ In this case, under the president's guidance, the panel did not vote on aggravating factors,¹⁰⁰ did not vote on the balancing gate,¹⁰¹ did not nominate sentences (the president, a colonel, told them that they needed to vote between two options, life and death),¹⁰² the junior member did not count the votes, but passed them to the president to count instead;¹⁰³ and the panel did not vote on the lightest sentence first.¹⁰⁴

After discussing that these rules exist to prevent rank from entering the deliberation room, in the dissenting opinion, Judge Wiss stated:

Regrettably, the specter [of unlawful command influence] has been raised that this carefully designed structure of procedures broke down in this case—and critically, that it did so entirely because the superior-ranking member of the court unilaterally imposed his own short-cut

toward a sentence rather than follow the clear path carefully mapped out [by the rules].¹⁰⁵

Judge Wiss concluded:

It is not within [the president's] authority or discretion . . . to divine his own personally preferred procedural path toward a death sentence, . . .

Unlawful command influence? I think so. . . . [These affidavits] portray a scenario in which the senior-ranking member, solely by the virtue of his rank, successfully imposed a procedure that was unlawful.¹⁰⁶

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

The judge had explained before we adjourned that the death penalty required a unanimous vote. . . . After another 1 1/2 hours of review, I asked if everyone was prepared to vote again. They said they were. . . . The second vote resulted in the following: 8 votes [for death].¹⁰⁷

The language the president used is important, particularly when viewed from the perspective of whoever was Panel Member #8 in this case. Panel Member #8 knows that he voted for life and is the only life vote, so the president of the panel—the colonel who just made that statement—necessarily voted for death. The colonel has just said that in order to impose the death penalty, everybody needs to vote for death. He did not say, “Or three-fourths of us can vote for life, or we can be a hung jury, all three of which are acceptable options.” The implied message to the holdout is,

⁹⁴ William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Juror's Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1491–96 (1998); Sandys, *supra* note 26.

⁹⁵ Blume et al., *supra* note 10, at 173.

⁹⁶ 41 M.J. 213 (C.A.A.F. 1994).

⁹⁷ *Id.* at 234–35. Prior to the passage of Article 52a, UCMJ, in 2001, which requires twelve members in a capital court martial, capital courts-martial only require the same number of panel members that are required in any general court-martial—five. UCMJ arts. 16(a)(A), 52a (2008).

⁹⁸ The dissenting opinion in *Loving* contains all three affidavits in their entirety. *Loving*, 41 M.J. at 331–33 (Wiss, J., dissenting).

⁹⁹ *Id.* at 234–35.

¹⁰⁰ *Id.* at 313 (Wiss, J., dissenting).

¹⁰¹ *Id.* at 233–35.

¹⁰² *Id.* at 313 (Wiss, J., dissenting). In theory, a case could be capital-eligible going into the sentencing deliberations but then no panel member would nominate death as a sentence. All of the panel members might nominate life or life without parole (LWOP). In that case, the panel would not be able to deliberate on death.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 313–14 (Wiss, J., dissenting).

¹⁰⁵ *Id.* at 313 (Wiss, J., dissenting).

¹⁰⁶ *Id.* at 314 (Wiss, J., dissenting). Judge Wiss contrasts the president's ability and power to modify the procedures with the inability of a second lieutenant on a panel to do the same thing. *Id.* at 314–15 n.1 (Wiss, J., dissenting):

Can it be more than rhetorical to ask whether anyone except the most senior ranking person on the court could have unilaterally imposed on all of the other, presumably intelligent, officer members a procedure of his own handiwork that was in marked deviation from that which clearly and in detail was prescribed by the military judge? I am not so naïve as to believe that a second lieutenant . . . could have been so possessed of nature leadership that he so effectively could have led astray a whole panel of his colleagues.

¹⁰⁷ *Id.* at 331–33 (Wiss, J., dissenting). His account was confirmed by two junior members on the panel who also provided affidavits. *Id.* Sundby documents very similar language which was used against a holdout. SUNDBY, *supra* note 15, at 90.

“You need to change your vote.” Panel Member #8 is the one during deliberations who mentioned that life might be appropriate, so everyone on that panel, including Panel Member #8, must have know, that the colonel was speaking to Panel Member #8.

In *Loving*, Panel Member #8 changed his vote—possibly because of the social conformity dynamic and because of the subtle pressure of rank in the deliberation room.¹⁰⁸ Even if the panel member genuinely changed his mind (and not just his vote) based on the deliberations, the key is to recognize that there is real potential for these dynamics to exist.

The capital case of *United States v. Thomas (Thomas J)*¹⁰⁹ also contains portions of post-trial depositions given by panel members. These depositions indicate that multiple votes were taken on the finding of guilt with at least some votes for acquittal on the capital offense.¹¹⁰ This was contrary to the RCMs, which, as discussed above, do not allow for re-voting on the findings for the purpose of seeking a unanimous vote on the capital offense. After receiving instructions on the findings from the military judge, the panel president asked how many times the panel could vote on the verdict before they announced their finding.¹¹¹ The military judge essentially told him that if that issue came up, to come back to the military judge.¹¹² Based on that question, the defense counsel asked the military judge to ask the panel how many times they voted on the finding but the military judge denied that request.¹¹³

After the trial, the appellate defense counsel called the junior member of the panel who told him (and another appellate defense counsel) that the panel voted multiple times on the finding of guilt.¹¹⁴ The appellate defense counsel provided affidavits to the Navy-Marine Court of Military Review, which then ordered depositions of the panel members.¹¹⁵ Of these nine panel members, three said that the initial vote on guilt included votes for not guilty with probably two panel members voting for not guilty. Five said

that only one vote was taken on the guilty finding (including the president, and, interestingly, the junior panel member that the appellate defense counsel had interviewed earlier). One had retired and refused to answer questions.¹¹⁶

The difference in the way the panel members remember the voting process is interesting. Very likely, the two panel members who voted not guilty are among the three that remember the multiple votes. They would have been the ones that the group dynamics worked against and would have felt a high degree of stress, resulting in a memorable event. By this reasoning, the president of the panel was very likely in the majority block that was voting for guilt. He remembered only one vote.¹¹⁷ This president, like the president in *Loving*, did not follow the rules and may have unintentionally invited the subtle pressure of rank into the deliberation room. Had the president followed the rules, no further deliberations would have been allowed on the merits. The accused would not have received a death sentence. Instead, the minority voters changed their positions (at only 22%, this result conforms to the CJP findings), possibly because of the force of social conformity and the subtle pressure of rank in the deliberation room.

Last, in the recent capital court-martial of Master Sergeant Timothy Hennis, the panel asked a question that indicated that at least one panel member voted for life during the sentencing deliberations.¹¹⁸ After more than seven hours of debate, the fourteen-member panel asked the military judge, “If one person votes against imposing a death sentence, are subsequent ballots automatically for a life sentence?”¹¹⁹ The reasonable inference from this is that at least one person in the panel room voted for life, and to his credit, the president of the panel returned to the judge for guidance. The military judge told the panel to follow the rules for voting on a sentence: to keep deliberating and voting until the panel reached sufficient votes to adopt a sentence (three-fourths for life or unanimous for death).¹²⁰ The military judge did not, however, read them the hung jury instruction.¹²¹ After another six hours of deliberation, consistent with the CJP findings (the minority was 7%), that voter changed his vote and the panel adopted a sentence of death.¹²² Had the military judge read the hung jury instruction, the minority voter may have found assurances in the language and hung on to his vote.

¹⁰⁸ The court in *Loving* resolved the unlawful command influence issue by ruling that the affidavits provided by the panel members were not admissible under the 1984 *Manual for Courts-Martial (MCM)*. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (1984) [hereinafter 1984 MCM]. *Loving*, 41 M.J. at 239. The majority declined to hold that the information included in the affidavits rose to the level of unlawful command influence necessary to satisfy one of the exceptions in Military Rule of Evidence (MRE) 606(b). 1984 MCM, *supra*, MIL R. EVID. 606(b); *Loving*, 41 M.J. at 237–38.

¹⁰⁹ 39 M.J. 626 (N.M.C.M.R. 1993).

¹¹⁰ *Id.* at 637.

¹¹¹ *Id.* at 628.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 629.

¹¹⁶ *Id.* at 628, 637.

¹¹⁷ *Id.* at 637.

¹¹⁸ Paul Woolverton, *Hennis Jurors Extend Debate*, FAYETTEVILLE OBSERVER, Apr. 15, 2010, <http://www.fayobserver.com/Articles/2010/04/14991074>.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Paul Woolverton, *Hennis Sentenced to Death for 1985 Eastburn Murders*, FAYETTEVILLE OBSERVER, Apr. 16, 2010, <http://www.fayobserver.com/Articles/2010/04/15/991361>.

These three cases indicate that panel members in capital cases face similar dynamics when deliberating cases that civilian jurors face. In each of these cases, at least one panel member changed a vote that could have prevented the imposition of the death penalty but changed that vote, consistent with the research on jury dynamics. And in two of these cases, the subtle influence of rank in the deliberation room may have substituted for the bullying behavior that is sometimes found in civilian juries.

Juror Confusion

Another of the major findings of the CJP is the striking degree to which jurors do not understand the law because the instructions were incomplete, poorly drafted, or otherwise confusing. For example, even after hearing the instructions and sitting through a capital trial, 63% of jurors in one study thought that the law *required* them to impose the death sentence if they found that the crime was heinous, atrocious, or cruel;¹²³ 43% thought the same if they found the defendant would pose a future danger;¹²⁴ 41% thought the standard of proof on mitigating factors was beyond a reasonable doubt;¹²⁵ 42% thought unanimity was required on mitigating factors;¹²⁶ only one-third understood that life was the required sentence if the mitigating factors outweighed the aggravating factors;¹²⁷ and when given six basic questions about the process to answer, fewer than 50% were able to answer more than half of the questions correctly.¹²⁸

One of the main reasons for this is that instructions are written by trial lawyers for appellate lawyers and not for jurors. Even when provided with the written instructions, jurors find them long, boring, and confusing, “like the undecipherable user’s manual that comes with a new computer, written by one technician for another.”¹²⁹ The instructions may have gaps or confusing portions and the process for seeking clarification from the judge is overwhelming, intimidating, and time consuming. If a juror has a question, the court has to get the lawyers, get the defendant from a holding cell, and formally march everyone into the courtroom.¹³⁰ The response from the judge is often

to simply re-read the same instruction that the jurors found was confusing.¹³¹ After doing that once, jurors figure out that the process is not worth it and try to solve the problems on their own—often incorrectly.¹³²

For those who think that a military panel filled with college-educated professionals will have no problem following the instructions or the law, or that military judges will provide complete, accurate instructions, a review of three military capital cases may challenge that assumption. Look again at *Loving*.¹³³ The panel failed to follow many of the military judge’s instructions. According to affidavits provided by three panel members, including the president (a colonel), the panel did not vote on the aggravating factors,¹³⁴ violating RCM 1004(b)(7).¹³⁵ The panel did not vote on whether the aggravating factors substantially outweighed the extenuating and mitigating factors,¹³⁶ violating RCM 1004(b)(4)(B).¹³⁷ The panel did not vote in order of least severe sentence to most severe sentence,¹³⁸ violating RCM 1006(d)(3)(A).¹³⁹ The junior member did not count the votes (the president did),¹⁴⁰ violating RCM 1006(d)(3)(B).¹⁴¹ While this could be the result of the president deliberately ignoring the rules, the panel may have just been confused.

The military judge also gave incomplete instructions. He did not instruct that only one vote could be taken on say again which gates and that those votes could not be revisited.¹⁴² While at least one of the aggravating factors (multiple murders)¹⁴³ was not an issue, the holdout panel member might have voted against the balancing gate had a vote actually been taken specifically on that gate. If the panel had been thoroughly instructed on the rules, and if the panel had followed those rules, the minority voter may well have voted against death at the balancing gate.

Similarly, in *United States v. Thomas (Thomas I)*,¹⁴⁴ both the panel members and the military judge appeared confused about the rules. After the military judge read the instructions at the conclusion of the merits, the president of

¹²³ James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1174 (1995). See also Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); Stephen P. Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000).

¹²⁴ Luginbuhl & Howe, *supra* note 123, at 1174.

¹²⁵ *Id.* at 1167.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1173.

¹²⁸ *Id.* at 1168.

¹²⁹ SUNDBY, *supra* note 15, at 49. See also Luginbuhl & Howe, *supra* note 123, at 1169.

¹³⁰ SUNDBY, *supra* note 15, at 49–50.

¹³¹ Garvey et al., *supra* note 123.

¹³² SUNDBY, *supra* note 15, at 50.

¹³³ 41 M.J. 213 (C.A.A.F. 1994).

¹³⁴ *Id.* at 234.

¹³⁵ 1984 MCM, *supra* note 108, R.C.M. 1004(b)(7).

¹³⁶ *Loving*, 41 M.J. at 313 (Wiss, J., dissenting).

¹³⁷ 1984 MCM, *supra* note 108, R.C.M. 1004(b)(4)(B).

¹³⁸ *Loving*, 41 M.J. at 234–35.

¹³⁹ 1984 MCM, *supra* note 108, R.C.M. 1006(d)(3)(A).

¹⁴⁰ *Loving*, 41 M.J. at 313 (Wiss, J., dissenting).

¹⁴¹ 1984 MCM, *supra* note 108, R.C.M. 1006(d)(3)(B).

¹⁴² *Loving*, 41 M.J. at 233.

¹⁴³ *Id.* at 267.

¹⁴⁴ 39 M.J. 626, 628 (N.M.C.M.R. 1993).

the panel asked: “I want to say, your instructions on reconsideration, if I understood correctly, we can have several ballots on the issue? We can reconsider at anytime up until the findings has been announced; and then, additionally, before the sentence has been announced?”¹⁴⁵ The correct response from the military judge should have been:

Do not worry about sentencing right now.

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

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

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

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

Compare that to the military judge’s actual response: “If it comes up—if anybody wants to raise the issue that, ‘Hey, I want to talk about this, reconsider it,’ let me know and I’ll give you the instructions on it.”¹⁴⁶ Provided with this incomplete response, the panel then re-voted the finding of guilt on the capital offense in order to raise a seven-two vote to a unanimous vote, which ultimately led to an adopted sentence of death.

In both *Loving* and *Thomas I*, the military judges provided incomplete but not incorrect instructions on the specified issues. In *United States v. Simoy*,¹⁴⁷ the military judge issued a patently incorrect instruction: he told the

panel to vote on death before voting on life.¹⁴⁸ The Court of Appeals for the Armed Forces (CAAF) reversed, stating:

The instructions to the members should make [clear that] . . . they may not vote on the death penalty first if there is a proposal by any member for a lesser punishment, *i.e.*, life in prison. Some of those members who voted for the death penalty in this case might have agreed with life in prison. Thus, unless they held out on their vote for the lesser punishment of life, three-fourths might very well have agreed on life in prison rather than death. Thus, it was important for the members to understand that, because of requirements for unanimous votes, any one member at any stage of the proceeding could have prevented the death penalty from being imposed.¹⁴⁹

The court’s reasoning is in concert with the CJP’s findings: a properly educated and instructed panel member might decide to hold on to his or her vote for life.¹⁵⁰ In *United States v. Thomas (Thomas II)*,¹⁵¹ the CAAF dealt with an error in the military judge’s instructions that had not been raised in *Thomas I* and found that the military judge’s instructions that the panel should vote on death first was reversible error.¹⁵² One should not be surprised that panel members are confused by the rules when these rules confuse military judges, too.

Juror confusion also has the effect of causing a hung jury. One of the primary concerns of jurors is to avoid

¹⁴⁸ *Id.* at 613–14.

¹⁴⁹ *United States v. Simoy*, 50 M.J. 1, 2–3 (C.A.A.F. 1998). The statement, “any one member at any stage of the proceeding could have prevented the death penalty from being imposed” should be read to mean that at the first three gates, one vote can prevent death from being considered as a sentence, and on the sentencing vote, one vote can prevent death from ultimately being imposed by hanging the jury.

¹⁵⁰ Note this interesting contrast between *Loving* and *Thomas*. If the panel members vote improperly (they vote out of order or do not vote on certain gates at all) because they are either confused or purposefully choose not to follow the rules, but they do so after having been properly instructed by the military judge, then the appellate courts will not intervene. The appellate courts will let those known, faulty votes stand by finding that the evidence of that improper voting does not satisfy MRE 606b. MCM, *supra* note 2, MIL. R. EVID. 606(b). The courts will not consider the evidence, or essentially, “hear no evil, see no evil.” See *United States v. Loving*, 41 M.J. 213, 237–38 (C.A.A.F. 1994); *Thomas*, 39 M.J. at 636. If, however, the military judge issues an incorrect instruction, and even without evidence that the panel did in fact vote improperly, the courts will find those verdicts untrustworthy. *Simoy*, 50 M.J. at 2–3; *United States v. Thomas (Thomas II)*, 46 M.J. 311, 312 (C.A.A.F. 1997). That seems to be a paradox within due process but one sanctioned by the Supreme Court. See *Tanner v. United States*, 483 U.S. 107 (1987).

¹⁵¹ 46 M.J. 311.

¹⁵² *Id.* at 315–16.

¹⁴⁵ *Id.* at 628.

¹⁴⁶ *Id.*

¹⁴⁷ 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

becoming a hung jury.¹⁵³ In his case study, Sundby describes what happened when the holdout juror suggested that the jury deadlock on the sentencing decision.¹⁵⁴ One of the jurors read the instructions and thought that if the jurors deadlocked, then the defendant would automatically get LWOP.¹⁵⁵ The instruction actually said that all that would happen is that a new jury would reconsider the sentence. After incorrectly decoding the instructions, the rest of the jurors became increasingly upset with the idea that this one juror “would now dictate the result.”¹⁵⁶ This holdout juror eventually changed his vote.

Something similar happened in *Thomas I*. Asked why the panel took multiple votes during the guilt deliberations, a panel member “said that they voted more than once to avoid being a ‘hung jury.’ He had understood that a hung jury was ‘a jury that has not reached a unanimous conclusion.’”¹⁵⁷ The military judge did not instruct the members that they were not required to come to a unanimous conclusion and that they could not reconsider a non-unanimous finding of guilt.¹⁵⁸ Had the panel members returned to the instructions to find the answer, they would not have found it. Instead, they would have found that standard instructions are themselves confusing enough that sometimes military judges cannot get them right.¹⁵⁹ The panel continued to deliberate and re-vote, eventually convicting the accused of a capital offense by a unanimous vote.

In addition to confusion about the rules themselves, another area of significant confusion is the meaning of a life sentence and the meaning of a death sentence. Jurors generally do not believe that a life sentence, either with or without parole, means that the defendant will actually spend his life in prison.¹⁶⁰ Rather, jurors tend to believe that if the defendant does not get the death penalty, he will be back on the street in fifteen years—even in jurisdictions that have LWOP.¹⁶¹

¹⁵³ Sundby, *supra* note 25, at 117-19. See generally Sandys, *supra* note 26, at 1195-96, 1199, 1203, 1205-08.

¹⁵⁴ SUNDBY, *supra* note 15, at 90.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 91.

¹⁵⁷ *Thomas I*, 39 M.J. 626, 638 (N.M.C.M.R. 1993).

¹⁵⁸ *Id.* at 646 (Jones, S.J., dissenting).

¹⁵⁹ See *United States v. Simoy*, 50 M.J. 1 (C.A.A.F. 1998); *Thomas II*, 46 M.J. 311 (C.A.A.F. 1997).

¹⁶⁰ William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); Benjamin D. Steiner, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 LAW & SOC'Y REV. 461 (1999); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339, 340 (1996) [hereinafter, Eisenberg et al. *Jury Responsibility*]; Theodore Eisenberg et al., *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 373 (2001) [hereinafter, Eisenberg et al., *The Deadly Paradox*].

¹⁶¹ Bowers & Steiner, *supra* note 159, 645-48.

Considering that future dangerousness is one of the determining factors in a juror's decision to vote for death,¹⁶² this issue is no small matter. Jurors are more likely to vote for death when they believe that the alternative to death will result in the defendant's release from prison.¹⁶³ Those who underestimate the parole date are more likely to vote for death, more so as the trial progresses.¹⁶⁴

[J]urors who underestimate the alternative are more likely to vote for death, whether the alternative does or does not permit parole. In fact, it is when jurors think the defendant will return to society in less than twenty years, regardless of how much longer he will actually serve, that they are substantially more likely to vote for death.¹⁶⁵

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

Understandably, this is a critical issue to jurors. Sundby notes that this is often the area when the jury deadlocks:

[J]urors favoring life would have acknowledged that they would of course vote for death if they thought the defendant would ever get out of jail, and the jurors favoring death would have agreed that arguments existed for a life sentence but maintained that a life sentence could not guarantee the defendant would not be back on the streets.¹⁶⁶

Jurors often ask the trial judge, “If we sentence the defendant to life, will he ever be paroled?” The trial judge usually says that “life means life” or simply rereads the instructions.

This is the rule in the military. In *United States v. Simoy*,¹⁶⁷ the only options for the panel were life with parole and death.¹⁶⁸ As Sundby would predict, the panel asked the military judge whether the accused could be paroled if sentenced to life and the judge gave the “life means life”

¹⁶² Blume et al., *supra* note 10, at 165-67.

¹⁶³ Bowers & Steiner, *supra* note 159, at 655.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 671. See also Eisenberg & Wells, *supra* note 123.

¹⁶⁶ Sundby, *supra* note 25, at 117.

¹⁶⁷ 46 M.J. 592 (A.F. Ct. Crim. App. 1996).

¹⁶⁸ *Id.* at 614. The offense occurred before 1997, which was the year that Congress authorized life without parole as a punishment for premeditated murder. UCMJ art. 56a(a) (2008).

response, telling them that whether or not the accused could be paroled was collateral to the sentencing decision and not something that they should consider.¹⁶⁹ In the recent capital court-martial of Master Sergeant Timothy Hennis, the panel was faced with the same issue.¹⁷⁰ The panel asked the military judge if the accused could be paroled if given a life sentence and the military judge replied with the “life means life” instruction.¹⁷¹

However, jurors would likely take that response to mean the judge is hiding the fact that the defendant *can* be paroled.¹⁷² And when jurors remain confused about the meaning of life, they revert to using their folk knowledge about when murderers are released from prison.¹⁷³ The result of this confusion is that jurors or panel members may choose death not because it is the *appropriate* punishment but because it is the *least inappropriate* of the alternatives that they believe exist—particularly when LWOP is not an option. Commentators call this a “forced choice.”¹⁷⁴

Some jurors who voted for death say that the defendant did not deserve to die, but deserved a true life sentence. They say that they did not believe death was the appropriate punishment, that they wanted LWOP, but that death was their only option in view of what they knew about parole. They say the defendant deserved life; the jury wanted life; but that was not an option.¹⁷⁵

They may even solve the problem by deciding that, because of endless appeals and the rarity of executions, “death” does not mean “death” – it means life spent on death row until the defendant dies of a heart attack.¹⁷⁶ If the jurors believe that the defendant might one day be paroled if given a life or LWOP sentence,¹⁷⁷ but will not be paroled if given a death sentence and will not actually be executed, then jurors may vote for death to punish the defendant with a form of super-LWOP.¹⁷⁸

Some jurors who voted for death did so in the belief that this was the way to come closest to an LWOP sentence, that it was the only way to keep the defendant in prison for the rest of his life. They became convinced that sentencing the defendant to death would not really mean his execution, but would ensure that he stays in prison for life.¹⁷⁹

The military has a long appellate process and a high rate of overturning death sentences, and has not executed anyone since 1961.¹⁸⁰ One can reasonably believe that some military panel members believe death does not equal death and so will follow this reasoning.¹⁸¹

How a military counsel deals with this question will depend on whether LWOP is available in that particular case. Military defense counsel defending capital cases in which LWOP is not an option should seek to fully inform the panel about the parole process because the rules make it very unlikely that this type of offender will ever be paroled. For example, under Army regulations, an Army service member convicted of murder can only be paroled if the Secretary of the Army or his designee approves the parole board’s recommendation.¹⁸² Panel members who are considering voting for life can be reasonably confident that no Secretary of the Army is going to take the political risk of signing the parole paperwork for someone who has committed the kind of a crime that many people feel warrants a death sentence.

For cases without LWOP as an option, fully informing the panel should lead to more reliable sentences—the panel members will only choose death if death is the appropriate

¹⁶⁹ *Id.* 46.

¹⁷⁰ The offense occurred before 1997. Woolverton, *supra* note 118.

¹⁷¹ *Id.*

¹⁷² Bowers & Steiner, *supra* note 159, at 673–77.

¹⁷³ *Id.*

¹⁷⁴ *Id.* Bowers and Steiner argue that this “forced choice” may be unconstitutional.

¹⁷⁵ *Id.* at 677.

¹⁷⁶ SUNDBY, *supra* note 15, at 38–39.

¹⁷⁷ Jurors remain skeptical that life without parole actually means that the defendant will never be paroled. Sundby, *supra* note 25, at 117.

¹⁷⁸ *Id.* at 39.

¹⁷⁹ Bowers & Steiner, *supra* note 159, at 678.

¹⁸⁰ Sullivan, *supra* note 93.

¹⁸¹ In the recent capital court-martial of Master Sergeant Timothy Hennis, the husband and father of the three murder victims expressed that reasoning: the death penalty will “keep him there until that sentenced is carried out or until he dies a natural death, which I think is a just punishment.” [the widower] said, and it doesn’t matter to him whether Hennis is executed.” Woolverton, *supra* note 122.

¹⁸² U.S. DEP’T OF ARMY, REG. 15-130, ARMY CLEMENCY AND PAROLE BOARD para. 4-2b (23 Nov. 1998). While an Army service member sentenced to life with parole cannot be paroled from a military prison without approval of the Secretary of the Army or his designee, the service member could be transferred to a federal prison where he would fall under federal parole regulations rather than Army parole regulations. *Id.* para. 3-1e(9). If that happened, the Secretary of the Army would lose his veto authority over any subsequent parole recommendation. However, the decision to transfer an Army prisoner to a federal prison is wholly the Army’s to make. U.S. DEP’T OF ARMY, REG. 190-47, THE ARMY CORRECTIONS SYSTEM para. 3-3 (15 June 2006). If the Secretary of the Army wants to prevent someone who has committed a heinous crime but who has been sentenced to life in prison with parole from ever leaving prison, the Secretary of the Army can do that by preventing the service member from being transferred to a federal prison and then vetoing any recommendation for parole that comes before him.

punishment, not the least inappropriate of the sentencing alternatives. If defense counsel simply seek the “life means life” instruction, the CJP findings suggests that the panel will assume that the judge is hiding the fact that the accused can be paroled and will then follow the reasoning outlined above—that he will be paroled, and the best way to prevent his parole is to put him on death row.

In the military, the degree of this “forced choice” problem should be reduced for those cases with offenses committed after the 1997 change to Article 50(a) that authorized LWOP. The CJP findings indicate that many jurors find LWOP to be an appropriate alternative to the death penalty.¹⁸³ However, the problem still exists, even in LWOP cases:

[E]ven when the law does in fact provide for LWOP or LWOP+, jurors and members of the general public are unaware of it, or, if they are aware of it, they do not believe it. Instead, they wrongly think the alternative to death is some term of imprisonment short of LWOP. Reality is one thing; perception is another.¹⁸⁴

To complicate this problem, in the military, LWOP does not mean LWOP. The convening authority can reduce the sentence at action,¹⁸⁵ the President can pardon the accused,¹⁸⁶ or after the accused serves 20 years in prison, the Service Secretary can remit the sentence to life with parole.¹⁸⁷ If the panel asks the military judge whether an accused can ever get out of confinement if given LWOP, what should the military judge say? Here, fully informing the panel might lead to an unreliable sentence: the panel members might choose death not because it is the appropriate sentence but because they believe it is less inappropriate than an LWOP sentence where the accused can technically be paroled.¹⁸⁸

All military attorneys in the court room—trial counsel, defense counsel, and the military judge—should be committed to ensuring that the panel understands the law and the rules of the deliberative process. All should be committed to reducing panel member confusion. The laws and rules are designed to ensure a reliable sentence, the very lynchpin of death penalty jurisprudence.¹⁸⁹ So far, in at least

three of the fourteen modern military capital convictions, panels have not followed the rules or the military judge has issued improper deliberation instructions. This problem can be solved by drafting clear instructions and providing helpful responses to panel member questions. The tougher problem is whether to inform panel members when that information might actually lead to an unreliable sentence, such as when the panel asks about the meaning of LWOP.

Juror Responsibility

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

[T]he decisions of people who feel personally responsible for an outcome differ from the decisions where the individual assumes no such responsibility . . . particularly when the decision involves consequences to the welfare of another person . . . Given that a life or death decision during the sentencing phase of a capital trial is as important a consequence to another person as there can be, it follows that the degree of responsibility experienced by a jury would impact on capital decisions.¹⁹⁰

Theodore Eisenberg and colleagues further refine juror responsibility into role responsibility and causal responsibility.¹⁹¹ Role responsibility is “the obligations one has flowing from a role one has assumed . . . [I]n the capital sentencing context, role responsibility focuses on whether jurors understand and accept the primary responsibility they have for the defendant’s sentence in the role they have assumed as sentencer.”¹⁹² A juror might believe that someone other than himself has the primary role in making the sentencing decision, or that he is carrying out the decision on behalf of someone else. Jurors might shift responsibility for their decision to any number of places, to include the law, if, as discussed earlier, the jurors incorrectly believe that the law requires a death sentence,¹⁹³ to the judge,¹⁹⁴ to the community,¹⁹⁵ or to the other jurors, through

¹⁸³ Eisenberg et al., *The Deadly Paradox*, *supra* note 159, at 391.

¹⁸⁴ *Id.* at 395–96.

¹⁸⁵ UCMJ art. 56a(b)(1)(A) (2008).

¹⁸⁶ *Id.* art. 56a(b)(3).

¹⁸⁷ MCM, *supra* note 2, R.C.M. 1108(b).

¹⁸⁸ In the *Military Judges’ Benchbook*, the only guidance is for the military judge to say that LWOP means “confinement for life without eligibility for parole.” MILITARY JUDGES’ BENCHBOOK, *supra* note 61, para. 8-3-40.

¹⁸⁹ *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

¹⁹⁰ Sherman, *supra* note 28, at 1242.

¹⁹¹ Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 340.

¹⁹² *Id.*

¹⁹³ Sherman, *supra* note 28, at 1244.

¹⁹⁴ *Id.*

de-individualization and group dynamics, as discussed earlier.¹⁹⁶ The CJP provides evidence that some jurors do shift role responsibility.¹⁹⁷ “Most jurors accept role responsibility though a disquietingly large minority do not.”¹⁹⁸ And the degree to which jurors feel responsible for the sentencing decision appears to be modestly correlated to the final vote: “[W]e find limited evidence that jurors who impose life sentences accept more responsibility than do jurors who impose death sentences.”¹⁹⁹

The other type of juror responsibility is causal responsibility. Causal responsibility is “whether or not, and how strongly, someone or something figures in the causal chain leading to some outcome . . . [including] all of the factors that might be responsible for the defendant’s sentence, including, most importantly, the conduct of the defendant himself.”²⁰⁰ If a juror (understandably) believes that the defendant is primarily responsible for his own sentence, that lessens the juror’s feeling of personal responsibility for the sentence—and the CJP findings indicate that jurors do shift causal responsibility to the defendant.²⁰¹ Another significant factor in causal responsibility is the belief held by some jurors that the defendant will never be executed—the “death does not mean death” belief.²⁰² “A clear majority say that ‘very few’ death-sentenced defendants will ever be executed, and about 70 percent of jurors believe that ‘less than half’ or ‘very few’ will be executed.”²⁰³

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

One type of role responsibility may have special significance in the military: the shift of responsibility to the community. Steven Sherman describes the shift to the community in the civilian context as follows:

Jurors are informed that they have been chosen as representatives of the community, and that they must represent the moral values of that community. In a capital case, there is often outrage and anger in the community-at-large about the murder. Cries for retribution and a death sentence are common. Believing that they are simply conduits for the expression of community values can greatly diminish the jurors’ personal sense of responsibility.²⁰⁴

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

Capital cases are unique in that these are the only courts-martial in which the convening authority, by the very act of referral, has communicated to the panel what he thinks is the appropriate sentence in that case. The panel members can reasonably assume that the convening authority believes that death is the appropriate sentence; otherwise, the convening authority would not have referred the case with a capital instruction. Military attorneys tend to analyze problems like this using the framework for unlawful command influence²⁰⁵ (and maybe this is a form of unintended but *per se* unlawful command influence), but for a capital defense counsel, this referral process presents additional problems. If the panel member believes, or even just thinks, that he is simply a conduit for the expression of the convening authority’s values, then he may shift role responsibility for his decision to the convening authority. Another problem exists: the panel members may shift role responsibility to the convening authority in the way that civilian jurors might shift responsibility to the judiciary. Panel members who are aware that a convening authority can reduce a sentence (and one should assume that panel members know this) may opt for a higher sentence believing that if they miss the convening authority’s target, the convening authority will reduce the sentence later.

This is not a fanciful problem. In *United States v. Dugan*,²⁰⁶ the convening authority had held meetings where he discussed military justice issues in an inappropriate way, essentially saying that there was no room in the military for

¹⁹⁵ *Id.* at 1245.

¹⁹⁶ *Id.* at 1246.

¹⁹⁷ Joseph L. Hoffman, *Where’s the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 *IND. L.J.* 1137, 1138 (1995).

¹⁹⁸ Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 349.

¹⁹⁹ *Id.* at 341, 376–77.

²⁰⁰ *Id.* at 340–41. *See also* Sherman, *supra* note 28, at 1244.

²⁰¹ Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 341.

²⁰² *Id.* at 340. *See also* Sherman, *supra* note 28, at 1245.

²⁰³ Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 363.

²⁰⁴ Sherman, *supra* note 28, at 1245.

²⁰⁵ Convening authorities cannot tell panel members what the appropriate punishment is for an accused. *United States v. Baldwin*, 54 M.J. 308, 310 (C.A.A.F. 2001).

²⁰⁶ 58 M.J. 253 (C.A.A.F. 2003).

drug users.²⁰⁷ The military judge allowed *voir dire* on this issue but that remedy was not good enough—apparently, the remaining panel members were still concerned about what the convening authority would think of their sentence because they talked about that in the deliberation room. According to a letter filed by the junior member of the panel, “a couple of the panel members expressed the notion that a Bad Conduct Discharge was a ‘given’ for a person with these charges”²⁰⁸ and “a panel member reminded us that our sentence would be reviewed by the convening authority and we needed to make sure our sentence was sending a consistent message.”²⁰⁹ This was a not a capital case but still shows that panel members think—and even talk—about how the convening authority will think about their sentence. This process shifts role responsibility away from the panel member and onto the convening authority.

To ensure panel members retain responsibility for their decisions, in capital cases the defense counsel should ask the judge to “instruct jurors that the decision they are about to make is, despite its legal trappings, a moral one and that, in the absence of legal error, their judgment will be final.”²¹⁰ Counsel should explore in *voir dire* what the panel members think about the fact that the convening authority referred the case with a capital instruction. And counsel should explore with the panel members in *voir dire* whether they would shift role responsibility for their individual decisions onto the panel as a whole—as in, whether they would concede their personal, conscientious decision to the majority because of group pressure.

Colorado Voir Dire

The CJP has influenced one of the major revolutions in capital trial work—the development of the Colorado *voir dire* method. One of the CJP findings is that most juries start deliberations with at least some jurors who support a life sentence.²¹¹ David Wymore recognized that the key for defense counsel is to find a way to preserve those potential votes.²¹² Essentially, he set out to find a way around the force of social conformity that Asch documented.

²⁰⁷ *Id.* at 254.

²⁰⁸ *Id.* at 255.

²⁰⁹ *Id.* The court took the unintended unlawful command influence issue seriously and returned the case for a fact finding hearing: “It is exactly this type of command presence in the deliberation room—whether intended by the command or not—that chills the members’ independent judgment and deprives an accused of his or her constitutional right to a fair and impartial trial.” *Id.* at 259.

²¹⁰ Eisenberg et al., *Jury Responsibility*, *supra* note 159, at 379.

²¹¹ Bowers et al., at 1491–96; Sandys, *supra* note 26.

²¹² Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Productions 2004), available at <http://www.thelifepenalty.com/>.

Asch described the subject’s quandary in his experiment as this, which, as it turns out, is much the same as the quandary that many capital jurors believe they are in:

The subject knows (1) that the issue is one of fact; (2) that a correct result is possible; (3) that only one result is correct; (4) that the others and he are oriented to and reporting about the same objectively given relations; (5) that the group is in unanimous opposition at certain points with him.²¹³

However, if the juror knows that his decision is a moral,²¹⁴ not necessarily factual, decision; that more than one resolution of this complex problem is possible; that he must decide for himself what the resolution should be,²¹⁵ and that it is acceptable to be in opposition to the majority, then the force of social conformity might be significantly defused. If Asch had told his subjects that more than one result was possible and that the majority might have it wrong, the results of his experiment would likely have been much different.

David Wymore pioneered a new method of *voir dire* for use in capital cases that, among other things, seeks to reduce the force of social conformity and get the life votes out of the deliberation room. Called the Colorado *voir dire* method (Wymore was practicing in Colorado when he developed this method), the method has two basic parts.²¹⁶ The first part is designed to get jurors to accurately express their views on capital punishment and mitigation in order for the defense to rationally exercise their peremptory challenges and to build grounds for challenges for cause.²¹⁷ The second part is designed to address the Asch findings on group dynamics. This part focuses on teaching the juror the rules

²¹³ ASCH, *supra* note 16, at 461.

²¹⁴ *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

²¹⁵ *Allen v. United States*, 164 U.S. 492 (1896).

²¹⁶ This is a very simplified description of the method. The method is generally taught over a three or four day hands-on seminar. The National Association of Criminal Defense Lawyers generally offers one training seminar on the Colorado method every year. See *CLE & Events*, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, <http://www.nacdl.org/meetings> (last visited Oct. 7, 2010). One of these seminars has been captured on video and is available for training. Videotape: Selecting a Colorado Jury—One Vote for Life, *supra* note 211. See generally Richard S. Jaffe, *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, CHAMPION, Jan. 2001, at 35.

²¹⁷ Under the Colorado method, defense counsel exercise their peremptory challenges based only on the juror’s death views. The method uses a ranking system based on juror responses. This portion of the method (the wise use of the peremptory challenge) plays a small role when Colorado *voir dire* is used in a court-martial. In the federal system, the defense gets twenty peremptory challenges in a capital case. FED. R. CRIM. P. 24(b). However, in the military, the accused in a capital case only gets one. MCM, *supra* note 2, R.C.M. 912(f)(4). In the military, defense counsel should focus on building grounds for challenge for cause.

for deliberation; that he is making an individual moral decision;²¹⁸ that he needs to respect the decisions of others; and that he is entitled to have his individual decision respected by the group. The goal is not to teach the juror to change everyone else's mind—the goal is to teach the juror how not to fold and to teach the other jurors to respect everyone else's opinions.

The method is grounded in constitutional law²¹⁹ and fits within the framework of the military's liberal grant mandate. The liberal grant mandate is a response to the unique nature of the military justice system, "because in courts-martial peremptory challenges are much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere."²²⁰ The reasoning is that since the convening authority can hand-pick the panel members, in fairness, the defense counsel should be able to conduct *voir dire* of the panel members and then the military judge should give the Defense the benefit of the doubt on challenges when an issue arises.

Defense counsel should anticipate possible objections to the use of this method of *voir dire* and litigate any issues that might implicate panel dynamics, panel confusion, and panel member responsibility to establish a foundation for using the method. The defense counsel will probably not receive the direct remedy requested in the motion but likely will receive a different, valuable remedy: the ability to *voir dire* the panel members on that issue. For example, the defense counsel should file motions to have the junior member appointed as the president; require random panel member selection; find *per se* unlawful command influence in the referral process; change the place of trial based on pretrial publicity; trifurcate the trial into a merits, aggravating factor, and sentencing phase to reduce panel member confusion;²²¹ allow an opening statement in the presenting proceeding because of potential panel member confusion; request certain instructions; request additional peremptory challenges and limit government peremptory challenges and challenges for cause; allow parole rules and statistics as mitigation; etc.

For the military defense counsel who is detailed to a capital case, training in the Colorado method is the most important capital-specific training to receive.²²² If the

²¹⁸ See generally *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985).

²¹⁹ See John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1229 (2001).

²²⁰ *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005). See also *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987).

²²¹ Donald M. Houser, Note, *Reconciling Ring v. Arizona with the Current Structure of the Federal Capital Murder Trial: The Case for Trifurcation*, 64 WASH & LEE L. REV. 349 (2007).

²²² Prior to the passage of Article 52a in 2001, which requires twelve members in a capital court martial, capital courts-martial only required the

counsel in *Thomas I* had known of and used the Colorado method, the outcome at trial may well have been different. Had the panel members been educated on the rules and then followed them, they very likely would not have re-voted the initial guilt finding and the case would not have reached the presentencing proceeding with death as an authorized punishment.²²³ Similarly, in *Loving*, the outcome at trial may have been different had the holdout panel member been educated on the rules. He may have voted against death at the balancing gate.²²⁴

In these two cases, teaching the members techniques to withstand group pressure may have helped to preserve the holdout votes: in both cases, the minority voters fell in the range where the minority block will fold (in *Loving*, one of eight voters, or 12%; in *Thomas I*, two of nine voters, or 22%). Getting the president of the panel to commit to following the rules may have helped to preserve the votes. This would have prevented the possibility of the subtle influence of rank in the panel room, as might have occurred in *Loving* and *Thomas I*.

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

Conclusion

Hopefully, this overview of the CJP has reduced the space occupied by the capital Unknown Unknowns. In your capital case, you should realize that your panel members will behave in ways consistent with the CJP findings on juror dynamics. You should realize that your panel members might be confused about the law and the rules. You should

same number of panel members that are required in any general court-martial—five. UCMJ arts. 16(a)(A), 52a (2008). Some cases that originated before this change suggested to defense counsel that they should not strike members from panels in order to raise the total number of panel members from five to something much larger, which would therefore increase the odds that one panel member might be seated who would eventually vote for life. See *United States v. Simoy*, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring). Now that the minimum number of panel members is twelve, that advice is inapplicable and should not be followed. We also now know from the CJP findings that that advice may have been to no avail anyway: even if the panel grew to a size where one potential life vote were seated, if he were the only life vote, he would change his vote anyway.

²²³ *Thomas*' death sentence was set aside. *United States v. Thomas*, 46 M.J. 311 (C.A.A.F. 1997).

²²⁴ *Loving* still faces the death penalty. *United States v. Loving*, 68 M.J. 1 (C.A.A.F. 2009).

realize that your panel members might shift responsibility to other actors in the case. And you should realize that you must learn the Colorado method of *voir dire* so that you can address all of those dynamics.

Still, the CJP covers much more than jury dynamics, juror confusion, and juror responsibility. Depending on your case, it may offer additional insight into areas like race, religion, the effect of the accused not testifying, jurors' views on experts,²²⁵ victim impact testimony, and more. But the CJP is not everything. The void of Unknown Unknowns is great. Should defense counsel approach the victims and survivors?²²⁶ How do you present or rebut the case for future dangerousness? What is impaired executive functioning? I am sure that there are many more – I just do not know what they are. They are, after all, Unknown Unknowns.

Although this article has examined three capital courts-martial in which the panels appeared to act and think consistently with the CJP findings and three capital courts-martial in which panel members and judges appeared confused, some may still question whether the CJP findings can apply to court-martial practice. The only way to truly resolve that question is to conduct research on military panels, capital and non-capital. One might quickly respond that the rules do not allow anyone to talk to panel members, thereby preventing research. But do the rules say that? Almost all of the rules that one can point to deal with whether *evidence* of what happened in the deliberation room can be admitted *in court*.²²⁷ Those rules do not prohibit a panel member from talking to a researcher. The apparent prohibition comes from an unlikely source—the oath given to panel members. The text of the oath is not mandated by

the Uniform Code of Military Justice; rather, Article 42(a) simply states that the service secretaries shall prescribe the form of oaths.²²⁸ The Secretary of the Army did so in Army Regulation 27-10, directing that this oath be used: “[T]hat you will not disclose or discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law.”²²⁹ The primary purpose behind the rules, and presumably, this oath, is to protect freedom of deliberation, protect the stability and finality of verdicts, protect panel members from harassment and embarrassment, and prevent unlawful command influence.²³⁰

Researchers could ask questions that prevent a panel member from violating this oath (say, by not identifying any particular member's vote or opinion) while still respecting the values underlying the MREs and RCMs—and these rules would then govern any statements made by a panel member to a researcher if someone wanted to introduce them in the particular court-martial of which one of these panel members was a member. A well-crafted, properly-conducted sociological research project could call into question many of our assumptions about whether rank plays a role in the deliberation room or whether panel members follow instructions. Research could cause us to reexamine the legal fictions that are found throughout the common law. Research could shed light on how our panels approach sexual assault cases. And, most importantly, properly conducted research can help military attorneys fully understand their audience so that they can present cases to them in ways that will allow them to solve the difficult problems they are given. Military justice can certainly benefit from that.

²²⁵ See Scott E. Sundby, *The Jury As Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (providing an interesting article on how to effectively use expert witnesses, in capital cases or otherwise).

²²⁶ Richard Burr, *Expanding the Horizons of Capital Defense: Why Defense Teams Should be Concerned About Victims and Survivors*, CHAMPION, Dec. 2006, at 12; Russell Stetler, *Capital Cases: Working with the Victim's Survivors in Death Penalty Cases*, CHAMPION, June 1999, at 42.

²²⁷ See MCM, *supra* note 2, MIL. R. EVID. 509 & 606; R.C.M. 923 discussion; R.C.M. 1007(c).

²²⁸ UCMJ art. 42(a) (2008).

²²⁹ U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 11-8c (16 Nov. 2005) [hereinafter AR 27-10]. This is the same as the suggested oath found in MCM, *supra* note 2, R.C.M. 807(b)(2) discussion. As a practical matter, the oath given in all Army courts-martial is that found in the MILITARY JUDGES' BENCHBOOK, *supra* note 612, para. 2-5, which is the same as that in AR 27-10 and the RCM 807(b)(2) discussion except that the parentheses were dropped. However, at the end of the members' service, the trial judge is supposed to give this instruction: “If you are asked about your service on this court-martial, I remind you of the oath you took. Essentially, the oath prevents you from *discussing your deliberations with anyone*, to include stating any member's opinion or vote, unless ordered to do so by a court.” *Id.* para. 2-5-25 (emphasis added). That is an incorrect statement—the oath required by the MCM and Army regulations is much narrower.

²³⁰ See *United States v. Loving*, 41 M.J. 213, 235–37 (C.A.A.F. 1994).