THE PROPOSED CAPITAL PENALTY PHASE RULES OF EVIDENCE

David McCord & Hon. Mark W. Bennett†

No person or organization has ever proposed model rules of evidence for the unique penalty phase of a death penalty trial. Now a law professor skilled in the scholarship of both death penalty jurisprudence and evidence, and a federal judge with extensive federal death penalty experience, do just that. This work transcends the hodge-podge of evidentiary approaches taken by the various state jurisdictions and federal law. The result is the Proposed CAPITAL PENALTY PHASE RULES OF EVIDENCE—clear and uniform rules to govern the wide-ranging evidentiary issues that arise in the penalty phase of capital trials. Death penalty trials, long criticized for the arbitrariness of their results, will greatly benefit from these Rules.

TABLE OF CONTENTS

† David McCord is a Professor of Law at Drake University Law School. The Honorable Mark W. Bennett is a U.S. District Court Judge for the Northern District of Iowa.

INTRODUCTION

The penalty phase of a capital case is both ordinary and unique. It is ordinary because just as in all criminal trials the prosecution and defense may offer evidence and make objections and a trial judge rules on admissibility; it is unique in the life-or-death decision presented to the jury.[1] With life in the balance, one might expect death penalty jurisdictions to have well-developed and coherent evidentiary rules for the admissibility of evidence. But an examination of capital penalty phase evidentiary practices reveals instead a bewildering variety of approaches about which rules of evidence, if any, apply.[2] Some

1 Unless waived by a defendant, a jury is involved in all death-sentencing trials. *See* U.S. CONST. amend. VI; Ring v. Arizona, 536 U.S. 584, 609 (2002); Duncan v. Louisiana, 391 U.S. 145 (1968). First, a defendant has a Sixth Amendment right to a jury determination as to whether the defendant meets a statutory criterion—typically an "aggravating circumstance"—for death eligibility. *See* U.S. CONST. amend. VI; *Ring*, 536 U.S. at 609 (so holding). Second, in most jurisdictions a jury decides whether a death-eligible defendant should receive a death sentence. In only five jurisdictions does a judge decide whether a defendant should receive a death sentence; in three of those—Alabama, Delaware, and Florida—the judge decides after receiving an advisory verdict from the jury. *See* ALA. CODE §§ 13A-5-46(d)–(e), 13A-5-47(a) (2006); DEL. CODE ANN. tit. 11, § 4209(c)–(d) (2013); FLA. STAT. § 921.141(1)–(2) (2013). Only in Montana and Nebraska does a judge make the decision without a jury recommendation. *See* MONT. CODE ANN. § 46-18-305 (2013); NEB. REV. STAT. § 29-2521(1)(a) (2014) (three-judge panel).

It is the involvement of jurors, who are non-legally-trained decision makers, that primarily compels the need for evidence rules. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.1 (5th ed. 2012) ("The first [reason for evidence law] is mistrust of juries (a point that seems strange in a country that puts such faith in the jury system), and this point goes far to prove that faith in juries is limited.").

2 *See* Sharon Turlington, *Completely Unguided Discretion: Admitting Non-Statutory Aggravating and Non-Statutory Mitigating Evidence in Capital Sentencing Trials*, 6 PIERCE L. REV. 469, 469 (2008) (characterizing penalty phase, from the perspective of a practicing death penalty defense lawyer, as "an evidentiary free-for-all"). Additionally, Turlington notes, "[t]he courts and

jurisdictions hold that the same evidence rules applicable to all cases—"the normal rules"—govern,[3] but this only goes a moderate distance in answering admissibility questions because many evidentiary issues are unique to the capital penalty phase.[4] A few jurisdictions function under statutes that ostensibly impose only two rules—evidence must be relevant and the defendant must be given a fair opportunity to rebut hearsay[5]—but courts of those jurisdictions have found it necessary to supplement these with the proposition that the normal rules still act as a sort of non-binding guide,[6] even though they are to be "relaxed"[7] and

legislatures are failing to recognize that the bulk of evidence in capital sentencing trials is admitted without rules of evidence. This is appalling." *Id.* at 483. The only comprehensive canvass of the law of admissibility at the penalty phase was conducted more than two decades ago. *See* Robert Alan Kelly, *Applicability of the Rules of Evidence to the Capital Sentencing Proceeding: Theoretical & Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411 (1992). Kelly provided a breakdown of the muddled state of the law as of 1992, attempting to discern which jurisdictions applied most of the rules of evidence, which applied only some, and which purported to apply none. *See id.* at 435–41.

3 *See* CAL. EVID. CODE § 300 (West 2011) (providing that the Evidence Code "applies in every action before the . . . superior court"). California has consistently held the Code applicable to capital sentencing proceedings. *See, e.g.*, People v. Kraft, 5 P.3d 68, 102 (Cal. 2000) ("Application of the ordinary rules of evidence generally does not impermissibly infringe on a capital defendant's constitutional rights."); *see also* LA. CODE CRIM. PROC. ANN. art. 905.2(A) (2008) ("The hearing shall be conducted according to the rules of evidence."); VA. CODE. ANN. § 19.2-264.4(B) (West 2007) ("[E]vidence may be presented as to any matter which the court deems relevant to sentence . . . . [but] subject to the rules of evidence governing admissibility . . . ."); State v. Sheppard, 703 N.E.2d 286, 293 (Ohio 1998) (holding rules of evidence apply at penalty phase); Turrentine v. State, 965 P.2d 955, 977 (Okla. Crim. App. 1998) (holding that in proving an aggravating circumstance, the prosecution must do so "in conformance with the rules of evidence"); Beltran v. State, 728 S.W.2d 382, 387 (Tex. Crim. App. 1987) (en banc) (holding that the wide discretion given to trial court as to relevance "does not alter the rules of evidence insofar as the manner of proof is concerned").

4 One of the primary ways in which the normal rules are stretched in attempting to apply them at the penalty phase is that character evidence regarding the defendant is admissible, which is not true at the guilt/innocence phase. *See* FED. R. EVID. 404(a)(1) ("*Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). So, for example, Louisiana has attempted to codify this difference in article 905.2 of the Louisiana Criminal Procedure Code, while still asserting that the normal rules apply; however, the statute largely acknowledges that the normal rules of evidence have to be vastly supplemented for the penalty phase: "The [penalty phase] hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue." LA. CODE CRIM. PROC. ANN. art. 905.2(A).

5 *See* ALA. CODE § 13A-5-45 (2006) ("Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements."); FLA. STAT. ANN. § 921.141(1) (West 2006) (virtually verbatim language as Alabama statute, *supra*); TENN. CODE ANN. § 39-13-204(c) (2014) (virtually verbatim language as Alabama statute, *supra*).

6 *See* State v. Odom, 336 S.W.3d 541, 564–65 (Tenn. 2011) (holding a trial court may use the rules of evidence as guidance even while not using them to exclude otherwise reliable evidence).

7 *See* Johnson v. State, 660 So. 2d 637, 645 (Fla. 1995) (holding that even though rules of evidence are relaxed, they are "emphatically not to be completely ignored").

not applied "strictly."[8] Some jurisdictions purport to operate with only one rule: evidence may be excluded if its probative value is outweighed by countervailing considerations.[9] For example, in cases under the Federal Death Penalty Act of 1994,[10] "[i]nformation is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury."[11] But here, too, courts have supplemented with the proviso that the normal rules nonetheless provide a sort of guide.[12] Still, other jurisdictions say the normal rules *do not* apply and all admissibility decisions are within the judge's discretion.[13] And some jurisdictions make no general statements about which rules apply and simply address each evidentiary issue as it arises.[14] Also, a small but growing number of death penalty cases are "trifurcated"; that is, the penalty phase, already bifurcated from the guilt/innocence phase, is itself bifurcated into an "eligibility" phase and a "selection" phase, which presents further evidentiary issues.[15]

This profusion of approaches is not optimal. Prosecutors, defense counsel, and trial judges need more concrete guidance as to the admissibility of penalty phase evidence. Part of the problem is that no law-improvement organization,[16] advisory committee, or scholar has

---

8 *See* Billups v. State, 72 So. 3d 122, 132 (Ala. Crim. App. 2010) (holding strict rules of evidence not applicable).

9 *See* 18 U.S.C. § 3593(c) (2012); Prieto v. Commonwealth, 721 S.E.2d 484, 496 (Va. 2012) (holding scope of testimony at penalty phase is wide and standard for exclusion "is whether the prejudicial effect substantially outweighs its probative value").

10 18 U.S.C. §§ 3591–3598.

11 *Id.* § 3593(c). Note, there is no requirement that the probative value must be "substantially" outweighed to exclude evidence as there is under Federal Rule of Evidence 403. *See id.*; FED R. EVID. 403.

12 *See* United States v. Purkey, 428 F.3d 738, 759–60 (8th Cir. 2005) (en banc) (holding broad admissibility does not "divest[] the trial judge of his or her traditional authority to control the mode and order of the interrogation of witnesses and the presentation of evidence").

13 *See* Storey v. State, 175 S.W.3d 116, 133–34 (Mo. 2005) (quoting State v. Storey, 40 S.W.3d 898, 908 (Mo. 2001) (en banc)) (holding trial court has discretion to admit whatever evidence it deems helpful to the jury); State v. Carroll, 573 S.E.2d 899, 913 (N.C. 2002) (citing State v. Thomas, 514 S.E.2d 486, 513 (N.C. 1999)) (holding trial court has discretion to admit any relevant evidence); Commonwealth v. Mitchell, 902 A.2d 430, 459 (Pa. 2006) (citing Commonwealth v. May, 887 A.2d 750, 761 (Pa. 2005)) (holding admissibility is in the discretion of trial court).

14 *See* Kelly, *supra* note 2, at 439 (characterizing these states' law as "ambiguous" regarding the applicability of the rules of evidence to the penalty phase). South Carolina and Oklahoma fall into this category. *Id.*

15 For more on trifurcation, see *infra* notes 64–66 and accompanying text.

16 Certainly the American Law Institute is not going to do so, having disavowed its original Model Penal Code death penalty provisions as unworkable in 2009. *See* Robyn Blumner, *Fatal Wounds for the Death Penalty*, ST. PETERSBURG TIMES, Jan. 10, 2010, at 5P, *available at* 2010 WLNR 1585572.

ever put forth a proposal about what the capital penalty phase rules of evidence should look like. This is surely because almost all legal scholars are opponents of the death penalty, and thus are averse to proposing anything that might make it "better." One of the authors of this Article, Professor McCord, is an opponent of the death penalty as well, but believes that as long as it is still with us, the normal scholarly impulse to improve the law is legitimate. The other author, Federal District Judge Bennett, takes no position regarding the desirability of the death penalty, but rather endeavors to uphold his constitutional oath to correctly enforce federal law, which includes capital punishment. Having this weighty responsibility, which he has had to discharge in two cases, Judge Bennett likewise believes that greater rationality and consistency in the law relating to the admissibility of evidence at the penalty phase is a critically important goal.

Professor McCord, who has written extensively about both death penalty[17] and evidence[18] topics, initiated this project by leaping into the

---

> The very group that laid out the modern framework for the implementation of capital punishment has now declared that the system is wholly unworkable and broken. In October [2009] the American Law Institute voted to repudiate the legal structure it had created in 1962 for death penalty cases as part of a Model Penal Code. According to the group, decades of experience tells us that there is no way to ensure "a minimally adequate system for administering capital punishment."

Id.

17 *See, e.g.*, BARRY LATZER & DAVID MCCORD, DEATH PENALTY CASES (3d ed. 2011); David McCord, *A Year in the Life of Death: Murders and Capital Sentences in South Carolina, 1998*, 53 S.C. L. REV. 249 (2002); David McCord, *An Open Letter to Governor George Ryan Concerning How to Fix the Death Penalty System*, 32 LOY. U. CHI. L.J. 451 (2001); David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1 (1998); David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Analysis of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105 (1999); David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 FLA. ST. U. L. REV. 545 (1997); David McCord, *Lethal Connection: The "War on Drugs" and Death Sentencing*, 15 J. GENDER, RACE & JUST. 1 (2012) [hereinafter *Lethal Connection*]; David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to Be Unconstitutionally Arbitrary More than Three Decades after* Furman, 71 BROOK. L. REV. 797 (2005); David McCord, *Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?—An Empirical and Normative Analysis*, 49 SANTA CLARA L. REV. 1 (2009) [hereinafter *Should Commission?*]; David McCord, *State Death Sentencing for Felony Murder Accomplices Under the* Enmund *and* Tison *Standards*, 32 ARIZ. ST. L.J. 843 (2000); David McCord, *Switching Juries in Mid-Stream: The Perplexities of Penalty-Phase-Only Retrials*, 2 OHIO ST. J. CRIM. L. 215 (2004) [hereinafter *Switching Juries*]; David McCord, *What's Messing with Texas Death Sentences?*, 43 TEX. TECH L. REV. 601 (2011).

18 *See, e.g.*, David McCord, *A Primer for the Non-Mathematically Inclined on Probabilistic Evidence in Criminal Cases:* People v. Collins *and Beyond*, 47 WASH. & LEE L. REV. 741 (1990); David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered by a Criminal Defendant to Suggest that Someone Else is Guilty*, 63 TENN. L. REV. 917 (1996); David McCord, *Expert Psychological Testimony About Child Complainants in Sexual Abuse Prosecutions: A Foray into the Admissibility of Novel Psychological Evidence*, 77 J. CRIM. L. &

breach to research and draft a set of model rules governing the admissibility of evidence at the capital penalty phase.[19] Upon completion of the initial draft, he submitted the proposed Rules to Judge Bennett, one of only a handful of federal judges to try two complex and lengthy federal death penalty cases to verdict—both of which resulted in the imposition of the death penalty. In one of those cases, following a nineteen-day trial in the 28 U.S.C. § 2255 proceeding, Judge Bennett granted a new penalty phase trial based on trial counsels' ineffective assistance of counsel.[20] Judge Bennett suggested changes to many of the Rules. The authors then embarked upon an intensive back-and-forth discussion in which each changed his mind on various issues. In the end, the authors reached common ground as to most of the Rules. As to the few on which they were unable to reach a consensus, a dissent is included (typically not specifying which author is in dissent). The result of this painstaking process is this Article.

The starting point was U.S. Supreme Court case law relating to admissibility of evidence at the penalty phase, which is surprisingly sparse given the enormous attention the Court has paid to the death penalty since 1972[21]—just five cases sum up the foundational principles regarding admissibility. First, in *Gregg v. Georgia*,[22] the Court

---

CRIMINOLOGY 1 (1986); David McCord, *Syndromes, Profiles, and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19 (1987); David McCord, *The Admissibility of Expert Testimony Regarding Rape Trauma Syndrome in Rape Prosecutions*, 26 B.C. L. REV. 1143 (1985).

19 Professor McCord and Judge Bennett, members of the American Law Institute (ALI), modeled their roles as the equivalent of Co-Reporters for a project undertaken by that organization, while recognizing that the ALI has not selected either this project or these Co-Reporters.

20 In the course of these two death penalty cases and the 28 U.S.C. § 2255 proceeding, Judge Bennett published thirty-four death penalty opinions, ten in *United States v. Honken*, 381 F. Supp. 2d 936 (N.D. Iowa 2005) and twenty-four in *United States v. Johnson*, 403 F. Supp. 2d 721 (N.D. Iowa 2005). These decisions totaled 1333 pages—often on multiple and cutting-edge federal death penalty issues. Both Honken and Johnson received the death penalty from separate juries in separate trials. He affirmed both convictions in lengthy post-trial rulings—albeit Johnson's with great reluctance. *Honken*, 381 F. Supp. 2d 936; *Johnson*, 403 F. Supp. 2d 721. In a 276-page opinion, Judge Bennett granted Angela Johnson a new penalty phase re-trial finding massive ineffective assistance of counsel. Johnson v. United States, 860 F. Supp. 2d 663 (N.D. Iowa 2012). For a complete list of citations to the thirty-four published opinions, see Mark W. Bennett, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 HOFSTRA L. REV. 391 (2013).

21 *See* Furman v. Georgia, 408 U.S. 238 (1972) (the Court effectively struck down all then-existing death penalty sentencing schemes, holding that they violated the Eighth Amendment prohibition against cruel and unusual punishment). Jurisdictions reenacted death penalty statutes, thus ushering in the "post-*Furman* era" wherein the Court has since been creating its death penalty jurisprudence. For a fairly recent summary of the Court's massive death penalty jurisprudence, see James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1 (2007).

22 428 U.S. 153 (1976).

approved—and thus virtually assured—the now-familiar bifurcated trial with the "guilt/innocence" or "merits" phase, and if guilt is found, the "penalty phase," where the sentence is determined.[23] While *Gregg* did not establish any evidentiary principles, it did create the framework within which evidentiary issues arise. Second, *Woodson v. North Carolina*[24] specified three bases of relevance at the penalty phase: the defendant's character, record, and circumstances of the offense.[25] Third, *Green v. Georgia*[26] held that an evidence rule must occasionally give way to the defendant's due process right to present probative and reliable evidence: "the hearsay rule [and, by implication, any other rule] may not be applied mechanistically to defeat the ends of justice."[27] Fourth, *Crane v. Kentucky*[28] opined that evidence rules may nonetheless *usually* be applied at the penalty phase without constitutional error: "we have never questioned the power of the States to exclude evidence through application of evidentiary rules that themselves serve the interests of fairness and reliability . . . ."[29] And fifth, *Payne v. Tennessee*[30] added another basis of relevance: victim impact.[31]

These foundational principles do not reveal much about how penalty phase admissibility issues have played out across the country over the last four decades. So we researched the law of the sixteen most prominent death penalty jurisdictions—fifteen states and the federal government.[32] These jurisdictions consisted of the twelve states that top

---

23 *Id.* at 190–92.

24 428 U.S. 280 (1976).

25 *Id.* at 304. Woodson's reference to "record" includes the earlier reference to the much broader "past life and habits" of the accused. *Id.* at 296–97; *see also* Sumner v. Shuman, 483 U.S. 66, 77–78 (1987) (holding unconstitutional a statute imposing mandatory death sentence on prisoner who committed murder while under a sentence of life without parole because even such a murderer has a constitutional right to present mitigating evidence); Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) ("[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."). And thus the jury could not be limited to consideration of a limited list of mitigating circumstances in the statute. *Id.*

26 442 U.S. 95 (1979) (citation omitted).

27 *Id.* at 97.

28 476 U.S. 683 (1986).

29 *Id.* at 690; *see also* People v. McCurdy, 331 P.3d 265 (Cal. 2014) ("The federal Constitution . . . does not generally create a code of evidence that supersedes a state's evidentiary rules in capital sentencing proceedings.").

30 501 U.S. 808 (1991).

31 *Id.* at 822–23. While the list of foundational cases is small, there are a handful of additional U.S. Supreme Court precedents that elaborate on particular aspects of admissibility at the penalty phase that we will cite throughout the Article as appropriate.

32 Judge Bennett notes that this selection may skew this Article because of the possibilities that these fifteen states may have evidentiary rules that favor the state and that may be a factor in why these states top the list of executions.

the list of executions in the post-*Furman* era (as of the end of 2012)[33]—Texas (492), Virginia (109), Oklahoma (102), Florida (74), Missouri (68), Alabama (55), Georgia (52), Ohio (49), North Carolina (43), South Carolina (43), Arizona (34), and Louisiana (28)—plus three states that are in the top twelve for number of persons currently under death sentences: California (727), Pennsylvania (202), and Tennessee (87), because even though those states rarely succeed in converting death sentences into executions, they still produce a significant amount of case law on penalty phase admissibility issues.[34] Lastly, we included federal law because federal judges write extensive and illuminating opinions even though the federal government has executed only three prisoners in the post-*Furman* era,[35] and the federal death row population (61) is not among the top twelve.[36] Together, these sixteen jurisdictions account for eighty-nine percent of the executions in the post-*Furman* era and for eighty-nine percent of the inmates currently on death row.[37]

Finally, we used the research from U.S. Supreme Court case law and the sixteen jurisdictions, plus our best judgment, to draft the proposed Rules. The Rules follow the template of the Federal Rules of Evidence, with seven Articles numbered with Roman numerals, and the Rules within each Article numbered with three-digit Arabic numbers corresponding to the Article number. Each Rule's number is preceded by a "P" for "penalty phase" to allow them to be easily distinguished from other rules. The Rules are not intended to expound novel positions, but rather to function like a restatement by imposing a comprehensive order onto the topic, stating clear rules for each sub-topic, and, when necessary, recommending policy choices among competing alternatives. Typically the Rules opt for the majority rule, but

---

33 DEBORAH FINS, NAACP LEGAL DEF. & EDUC. FUND, INC., DEATH ROW U.S.A. 5–6, 33–34 (2013) [hereinafter DEATH ROW USA], *available at* http://www.naacpldf.org/files/publications/DRUSA_Winter_2013.pdf. All figures are taken from *Death Row U.S.A.*, at 5–6, as to number of executions by jurisdiction, and at 33–34 as to number of prisoners currently under death sentences by jurisdiction. *Id.* Eight of the top twelve states as to executions are also in the top twelve for inmates currently under death sentences: Texas (300), Florida (413), Alabama (198), Georgia (97), Ohio (147), North Carolina (161), Arizona (127), and Louisiana (88), but four of them are not—Missouri (48), Oklahoma (60), South Carolina (53), and Virginia (11). *Id.* at 33–34. Virginia is a particularly "deadly" jurisdiction—it is second in executions with 109 but has only eleven inmates currently under death sentences. *Id.* at 6, 34. Virginia has been singularly effective at converting death sentences into executions. *See id.*

34 *See id.* at 5–6, 33–34. In the post-*Furman* era, California has executed only thirteen, Pennsylvania only three, and Tennessee only six. *Id.* at 6–7. Yet California is far-and-away the leading generator of penalty phase admissibility case law of any death penalty jurisdiction.

35 Bureau of Prisons, U.S. Dep't of Justice, *Capital Punishment*, BUREAU OF PRISONS, http://www.bop.gov/about/history/federal_executions.jsp (last visited Oct. 18, 2014). And none since 2003. *Id.*

36 *See* DEATH ROW USA, *supra* note 33, at 34.

37 *See id.* at 5–6, 33–34 (1174 of 1320 executions and 2780 of 3131 current death sentences).

do not uncritically accept such positions and sometimes recommend a minority rule. Thus, an interested jurisdiction will find the Rules useful at least as a structuring mechanism even if the jurisdiction adopts some specific positions contrary to the ones embraced by the Rules.

The Rules are dominated by issues of relevance and its countervailing considerations, many of which are peculiar to the capital penalty phase. Indeed, four of the seven Articles (II, III, IV, and V) pertain to relevance and countervailing considerations, and twenty-seven Rules are contained within those Articles compared with only seven Rules in Articles I, VI, and VII.

So, without further ado, allow us to present—complete with Comments and supporting citations—the . . .

I. CAPITAL PENALTY PHASE RULES OF EVIDENCE[38]

A. *Article I: General Provisions*

1. Rule P101: Purpose and Construction[39]

1) The purpose of these Rules is to govern the admissibility of evidence at the penalty phase of a capital trial so as to administer it fairly and in compliance with the Constitution of the United States with a view toward providing the sentencer with as complete information as possible for making the sentencing decision while avoiding unfair prejudice to the extent possible. These Rules shall be construed so as to fulfill this purpose.
2) A more specific Rule shall be construed to govern over a more general Rule.

Comment: Subpart (1) states the obvious principle that the admission of penalty phase evidence must comply with governing constitutional law on the topic, which almost entirely consists of the case law of the United States Supreme Court.[40] Subpart (1) also sets forth the delicate balance to which the Rules aspire of providing the sentencer with the most

38 Suggested Bluebook abbreviation: CAP. PEN. PH. R. EVID.

39 CAP. PEN. PH. R. EVID. P101.

40 *See supra* notes 21–31.

information possible while avoiding the ever-present specter of unfair prejudice.[41]

Subpart (2) merely reiterates a common principle of statutory construction that the specific governs over the general, which applies equally to rules as well as statutes.[42] There are instances in the Rules in which this principle must be applied, such as where the general rule regarding balancing of probative value and countervailing considerations in Rule P205 is abrogated by a more specific Rule that a certain kind of evidence is admissible without regard for any such balancing.[43]

2. Rule P102: Applicability of the Rules of Evidence[44]

1) The Rules of Evidence of this jurisdiction apply except to the extent they are supplanted by these Rules.
2) If the trial judge trifurcates the case by dividing the penalty phase into an "eligibility" phase and a "selection" phase,

---

41 Gregg v. Georgia, 428 U.S. 153, 204 (1976) ("We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."); *see* Moore v. Johnson, 225 F.3d 495, 506 (5th Cir. 2000) ("[Once a] defendant falls within the legislatively defined category of persons eligible for the death penalty, the jury is then free to consider a myriad of factors to determine whether death is the appropriate punishment." (quoting Tuilaepa v. California, 512 U.S. 967, 979–80 (1994)); State v. Debler, 856 S.W.2d 641, 656 (Mo. 1993) ("The decision to impose the death penalty, whether by a jury or a judge, is the most serious decision society makes about an individual, and the decision-maker is entitled to any evidence that assists in that determination." (citations omitted)); Commonwealth v. Baumhammers, 960 A.2d 59, 93 (Pa. 2008) (citing Commonwealth v. Eichinger, 915 A.2d 112, 1139 (Pa. 2007)) (noting state's jurisprudence favors introduction of all relevant evidence during capital sentencing); Commonwealth v. Trivigno, 750 A.2d 243, 254 (Pa. 2000) (using "myriad of factors" language); State v. Hughes, 521 S.E.2d 500, 504 (S.C. 1999) ("The sentencing jury is charged with considering all possible relevant information about the individual defendant whose fate it must determine." (citations omitted)); Terry v. State, 46 S.W.3d 147, 156 (Tenn. 2001) (using "myriad of factors" language). *But see* Turlington, *supra* note 2, at 483 ("The reasoning that more evidence results in more reliability in [capital] sentencing is simply not true. Juries need to be given more guidance on how to use non-statutory aggravating and non-statutory mitigating evidence in the sentencing process.").

42 *See* LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 175 (Carolina Academic Press 2d ed. 2013) ("The first canon seems simple: a specific statute governs a general statute. . . . '[T]he presumption is that the legislature intended the specific provision to be an exception to the general [provision].'" (quoting RONALD BENTON BROWN & SHARON JACOBS BROWN, STATUTORY INTERPRETATION: THE SEARCH FOR LEGISLATIVE INTENT 90–91 (2002))).

43 *See, e.g.*, CAP. PEN. PH. R. EVID. P409(1) ("All convictions of the defendant, both felony and misdemeanor, rendered prior to the beginning of the penalty phase shall be admitted upon request of either party."); CAP. PEN. PH. R. EVID. P412(3) (providing that the court "shall have no discretion under Rule P205, however, to exclude relevant specific instances of defendant's conduct while in custody").

44 CAP. PEN. PH. R. EVID. P102.

> then the normal rules of evidence apply to the eligibility phase, and these Rules apply to the selection phase.

Comment: A jurisdiction's rules of evidence have become *The Rules* for good reason—they represent the state of the art, often developed over the centuries, for the admission and exclusion of evidence. Also, trial judges and lawyers are familiar with using those rules. Thus, Subpart (1) states the general principle that those rules should govern in penalty phase proceedings except to the extent that the more particular Rules set forth herein are designed to deal with specific evidentiary issues that arise in a capital penalty phase.

Despite statements in some jurisdictions that the normal rules of evidence do not apply or do not strictly apply at a capital penalty phase, an examination of the case law shows that most courts *do* apply most of the rules most of the time. Courts are induced to make statements about the rules not applying by virtue of the numerous ways in which the capital penalty phase presents unique evidentiary issues. But these unique issues should not obscure the fact that many of the evidentiary issues arising at a penalty phase are ordinary and appropriately dealt with by the normal rules of evidence. Indeed, hardly any of the normal rules of evidence are completely abrogated by our proposed Rules. Rather, the primary contribution of our Rules—by reference to the Federal Rules of Evidence Article IV's terminology—is to supplement "Relevance and Its Limits" to deal with the issues peculiar to the capital penalty phase. Thus, the normal rules apply unchanged to all the other *substantive* topics, including judicial notice,[45] privileges,[46] most rules as to witnesses,[47] personal knowledge requirement for lay witnesses,[48]

---

45 *See* FED. R. EVID. 201.

46 *See* FED. R. EVID. 501.

47 *See* FED. R. EVID. 601 (Competency to Testify in General); FED. R. EVID. 603 (Oath or Affirmation to Testify Truthfully); FED. R. EVID. 604 (Interpreter); FED. R. EVID. 605 (Judge's Competency as a Witness); FED. R. EVID. 606 (Juror's Competency as a Witness); FED. R. EVID. 607 (Who May Impeach a Witness); FED. R. EVID. 608 (A Witness's Character for Truthfulness or Untruthfulness); FED. R. EVID. 609 (Impeachment by Evidence of a Criminal Conviction) (as to witnesses other than the defendant, but as to impeachment by prior conviction of a testifying defendant). Additionally, see Rule P409(7), which does away with all limits on such impeachment. *See* CAP. PEN. PH. R. EVID. P409(7); *see also* FED. R. EVID. 610 (Religious Beliefs or Opinions); FED. R. EVID. 612 (Writing Used to Refresh a Witness's Memory); FED. R. EVID. 613 (Witness's Prior Statement); FED. R. EVID. 614 (Court's Calling or Examining a Witness); FED. R. EVID. 615 (Excluding Witnesses). As to Federal Rule of Evidence 602 (Need for Personal Knowledge), see *infra* note 48, and for Federal Rule of Evidence 611, see *infra* notes 54–55.

48 *See* FED. R. EVID. 602; *see also* United States v. Lighty, 616 F.3d 321, 363–64 (4th Cir. 2010) (holding that defendant's uncle, who spent most of his adult life in prison, was properly precluded from opining that defendant would be a positive influence in prison; such testimony would be rank speculation); People v. Blacksher, 259 P.3d 370, 427 (Cal. 2011) (finding it proper to preclude defendant's sister from opining as to why her older siblings did not understand

expert opinion,[49] hearsay (with two modifications—see Rule P601), authentication and identification,[50] and the "best evidence" rule.[51]

---

defendant or hated him, as calling for speculation); Hudson v. State, 992 So. 2d 96, 114 (Fla. 2008) (holding improper to permit eyewitness to testify victim knew he was going to die, as improperly speculative); State v. Waring, 701 S.E.2d 615, 656 (N.C. 2010) (holding testimony of special education teacher who was not proffered as an expert concerning defendant's I.Q. inadmissible as a mere guess); Davis v. State, 313 S.W.3d 317, 349 (Tex. Crim. App. 2010) (holding admissible lay opinion from police officer who had seen injuries to victim's cat because observations did not require expertise and officer was in a superior vantage point to the juror's regarding the injuries); Davis v. State, No. AP–74393, 2007 WL 1704071, at *9 (Tex. Crim. App. June 13, 2007) (holding error to exclude defense lay witness opinion that defendant would not be a future threat to society).

49 There is voluminous case law on the admissibility of expert testimony at the penalty phase, but for nearly all of it courts apply the six familiar principles embodied in FED. R. EVID. 702–704:

First, the expert must be qualified. FED. R. EVID. 702; *see* People v. Castaneda, 254 P.3d 249, 284 (Cal. 2011) (finding it proper to exclude proposed defense expert who would have testified about genetic basis for defendant's drug and alcohol problems where the expert was not an expert in genetics); People v. Watson, 182 P.3d 543, 571 (Cal. 2008) (excluding criminologist's testimony because that witness merely collected and synthesized information about defendant's background and had no expertise to opine as to the effect of defendant's childhood on his current behavior or his adaptability to life in prison); Butts v. State, 546 S.E.2d 472, 483 (Ga. 2001) (holding prosecution's gang expert properly qualified); Garza v. State, No. AP-75477, 2008 WL 5049910, at *9 (Tex. Crim. App. Nov. 26, 2008) (holding expert properly qualified to testify to defendant's gang membership as it related to future dangerousness).

Second, the testimony must be helpful to the trier of fact. FED. R. EVID. 702(a); *see* United States v. Montgomery, 635 F.3d 1074, 1093 (8th Cir. 2011) (upholding exclusion of defendant's expert witness's testimony about defendant's structural brain abnormalities when those results were irrelevant to insanity defense and mitigating factors defendant pleaded); United States v. Purkey, 428 F.3d 738, 757–58 (8th Cir. 2005) (holding it improper to exclude defendant's expert's testimony that defendant suffered from fetal alcohol syndrome when it was supported by facts); People v. Smith, 107 P.3d 229, 245–46 (Cal. 2005) (holding prosecution's expert's testimony about what the child victim felt was sufficiently beyond common experience to be admissible); Rojem v. State, 207 P.3d 385, 389–91 (Okla. Crim. App. 2009) (holding improper to refuse to allow defendant's expert to use a computerized slide-slow demonstrative aid); Lott v. State, 98 P.3d 318, 344 (Okla. Crim. App. 2004) (holding expert opinion of sex crimes investigator that defendant murdered some of his rape victims to avoid arrest or prosecution could have been helpful to the jury in determining the aggravating circumstance of murder to avoid arrest or prosecution); Commonwealth v. Brown, 987 A.2d 699, 711 (Pa. 2009) (holding ballistic expert's testimony did more than reaffirm the obvious facts that bullets go fast and can ricochet, and was admissible); State v. Mercer, 672 S.E.2d 556, 562 (S.C. 2009) (finding probative value of defense expert's testimony about "questionable abnormality" on defendant's brain scan not substantially outweighed by danger of unfair prejudice to the state).

Third, the testimony must be based on sufficient data. FED. R. EVID. 702(b); *see* Jenkins v. State, 972 So. 2d 111, 152 (Ala. Crim. App. 2004) (upholding exclusion of defendant's psychologist's testimony where that expert never interviewed defendant or conducted any psychological tests on him); Hooker v. State, 887 P.2d 1351, 1367 (Okla. Crim. App. 1994) (holding proper to preclude defense expert psychiatrist from testifying that children of defendant and victim would suffer more if defendant were sentenced to death than if defendant were sentenced to prison when expert had never interviewed the children).

Fourth, the expert must have reliably applied principles and methods to the facts. FED. R. EVID. 702(c); *see* People v. Castaneda, 254 P.3d 249, 287 (Cal. 2011) (holding it proper to exclude defense expert's proposed testimony about depression among criminal gang members when such expert's depression criteria did not match established diagnostic criteria); People v. Thornton, 161 P.3d 3, 44 (Cal. 2007) (holding pediatrician's opinion properly excluded when questions did not

Similarly, as to *procedural* topics, the normal rules apply equally to matters such as rulings on evidence,[52] preliminary questions,[53] the scope

call for opinion but for "impressions"); Mendoza v. State, No. AP-75213, 2008 WL 4803471, at *20–22 (Tex. Crim. App. Nov. 5, 2008) (holding it proper to preclude defense expert's opinion of statistical likelihood of defendant committing a serious violent act in prison where based on incomplete data set, ignored defendant's assaultive actions in prison, and method had not been critically evaluated in any published material); Roberts v. State, 220 S.W.3d 521, 527–31 (Tex. Crim. App. 2007) (holding proper to exclude defense expert from opining about link between defendant's alcohol and cocaine dependence and his violent behavior when pharmacological studies provided insufficient basis for concluding how any particular individual would behave). *But see* United States v. Fields, 483 F.3d 313, 342 (5th Cir. 2007) (*Daubert* reliability factors inapplicable to penalty phase (citing Daubert v. Merrell Dow Pharm., 509 U.S. 579 (1993))).

Fifth, the data upon which the expert relied in forming the opinion must be of the kind that experts in the field reasonably rely upon. FED. R. EVID. 703; *see* State v. Tucker, 160 P.3d 177, 194 (Ariz. 2007) (finding it proper for testifying expert to rely, in part, on non-testifying expert's opinion); Kearse v. State, 969 So. 2d 976, 984 (Fla. 2007) (finding defense expert neuropharmacologist properly relied upon consultations with other experts in forming opinions).

Finally, expert opinion on the ultimate issue is not objectionable just because it embraces an ultimate issue. FED. R. EVID. 704; *see* Barber v. State, 952 So. 2d 393, 454–55 (Ala. Crim. App. 2005) (holding proper for police officer to testify that victim's murder was especially heinous, atrocious, or cruel compared with other murders in officer's experience); State v. Villalobos, 235 P.3d 227, 234 (Ariz. 2010) (holding medical expert properly permitted to offer opinion that victim's pain was especially cruel); People v. Lindberg, 190 P.3d 664, 700 (Cal. 2008) (holding expert could opine that defendant was a white supremacist even if such opinion embraced an ultimate issue as to the special circumstance); Davis v. State, 313 S.W.3d 317 (Tex. Crim. App. 2010) (holding that it is proper to admit State's psychiatrist and psychologist to express opinion that defendant would be a continuing threat to society). *But see* Garcia v. State, No. 71417, 2003 WL 22669744, at *4 (Tex. Crim. App. Nov. 12, 2003) (holding expert's opinion that sufficient mitigating circumstances existed to warrant a non-death sentence would not have assisted the jury).

Also, the defendant must "play fair" in generating expert testimony. *See* Fitzgerald v. State, 61 P.3d 901, 904–05 (Okla. Crim. App. 2002) (holding that it is proper to exclude testimony of defense expert on violent risk assessment where defendant did not properly disclose information about the expert); Ward v. State, No. AP-74695, 2007 WL 1492080, at *7 (Tex. Crim. App. May 23, 2007) (holding proper to preclude defendant's mental health expert when defendant had refused to submit to a psychiatric examination by a prosecution expert); Muhammad v. Commonwealth, 619 S.E.2d 16, 46–47 (Va. 2005) (holding proper to preclude testimony by defense mental health expert where defendant had refused to be interviewed by prosecution mental health expert and in giving the prosecution notice of it).

50 *See* FED. R. EVID. 901 (Authenticating or Identifying Evidence); FED. R. EVID. 902 (Evidence That Is Self-Authenticating); FED. R. EVID. 903 (Subscribing Witness's Testimony); *see also* State v. Canez, 42 P.3d 564, 589 (Ariz. 2002) (en banc) (holding Department of Corrections record showing defendant's past convictions self-authenticating); State v. Carroll, 573 S.E.2d 899, 912–13 (N.C. 2002) (holding out-of-state fingerprint card upon which prosecution expert relied on was properly authenticated); Grant v. State, 205 P.3d 1, 19–20 (Okla. Crim. App. 2009) (holding expert reports were properly excluded because not properly authenticated); Quintanilla v. State, No. AP-75061, 2007 WL 1839805, at *5–6 (Tex. Crim. App. June 27, 2007) (holding affidavit of records custodian at Department of Corrections sufficiently authenticated defendant's penitentiary packet).

51 *See* FED. R. EVID. 1001–1008. We could not find any reported cases addressing the applicability of the "best evidence rule" to the penalty phase.

52 *See* FED. R. EVID. 103.

53 *See* FED. R. EVID. 104.

of direct rule,[54] form of questions,[55] "the rule of completeness,"[56] limits of cross-examination of both lay[57] and expert witnesses,[58] the

54 *See* FED. R. EVID. 611(b); *see also* People v. Tate, 234 P.3d 428, 482 (Cal. 2010) (applying scope of direct rule). Equally, the "wide-open cross" rule could likewise be applied at the penalty phase.

55 *See* FED. R. EVID. 611(c); *see also* Prieto v. Commonwealth, 721 S.E.2d 484, 499 (Va. 2012) (holding that it is proper for the court to sustain objections to defense counsel's leading or vague questions).

56 *See* FED. R. EVID. 106; *see also* United States v. Mills, 446 F. Supp. 2d 1115, 1139 (C.D. Cal. 2006) (holding rule of completeness applies to allow prosecution to present evidence in response to mitigation); People v. Williams, 148 P.3d 47, 69–70 (Cal. 2006) (holding that is was proper not to admit defendant's exculpatory statement under rule of completeness when inculpatory statements that were admitted were from a different interview); Commonwealth v. Baumhammers, 960 A.2d 59, 89 (Pa. 2008) (holding rule of completeness is applicable, but only to other writings or statements at the same time as the admitted writing or statement).

57 *See* State v. Davis, 880 N.E.2d 31, 76–77 (Ohio 2008) (finding it proper to cross-examine mitigation witness who was a friend of defendant's family about how defendant's sister had managed to overcome her father's abuse, in order to reduce the power of defendant's family-related mitigation); State v. Miller, 771 S.W.2d 401, 404 (Tenn. 1989) (allowing cross-examination of defense witness who testified to defendant's religious conversion, regarding the fact that said conversion occurred after defendant had received an earlier death sentence).

58 There are hardly any reported appellate cases in which the defendant is claiming improper restriction of defense counsel's cross-examination of a prosecution expert, indicating that trial judges give defense counsel broad-ranging cross-examination rights as to prosecution experts. The only case found where the appellate court determined that defense counsel had been improperly restricted in cross-examining a prosecution expert is *United States v. Purkey*, 428 F.3d 738, 758–59 (8th Cir. 2005), where the court found that it was improper to preclude defense questioning of prosecution expert regarding expert's error made when testifying in another death penalty case.

There are many reported cases in which defendants contend that the prosecution was permitted too much leeway in cross-examining a defense expert, but appellate courts almost always find the cross-examination to have been proper. *See* United States v. Lee, 274 F.3d 485, 495 (8th Cir. 2001) (holding proper to allow cross-examination of defense psychological expert on the issue of psychopathy even though witness had not testified on direct about that topic); Albarran v. State, 96 So. 3d 131, 173 (Ala. Crim. App. 2011) (holding proper cross-examination of defense expert for bias); People v. Castaneda, 254 P.3d 249, 283 (Cal. 2011) (holding cross-examination regarding defendant's nonviolent escapes proper to rebut good character); Coday v. State, 946 So. 2d 988, 1006–07 (Fla. 2007) (holding that prosecution is authorized to cross-examine defense experts on any information that formed the basis of their opinions); Lucas v. State, 555 S.E.2d 440, 448–49 (Ga. 2001) (holding cross-examination of defense expert on corrections proper because witness raised issue of prison security); Middleton v. State, 103 S.W.3d 726, 741 (Mo. 2003) (en banc) (holding it proper for cross-examination of defense expert that said expert believed defendant had lied to him); State v. Waring, 701 S.E.2d 615, 655 (N.C. 2010) (holding cross-examination proper about defense doctor that other experts might disagree with his opinion); State v. Hale, 892 N.E.2d 864, 902 (Ohio 2008) (holding it proper to allow cross-examination of defense psychologist about some individuals in the same family not becoming criminals as a way of highlighting that a bad upbringing does not necessarily lead to criminality); Mendoza v. State, No. AP-75213, 2008 WL 4803471, at *26 (Tex. Crim. App. Nov. 5, 2008) (finding it proper to allow cross-examination of defense mitigation expert that said witness had testified in numerous capital cases for the defense). But occasionally an appellate court will find error because the prosecutor did not have a good faith basis for the question. *See* People v. Boyette, 58 P.3d 391, 436 (Cal. 2002) (holding prosecutor did not establish good faith basis for asking defense expert a hypothetical question embodying two alleged assaults by defendant in jail where defendant denied the incidents and no other firsthand evidence supported the occurrence of the assaults).

accomplice corroboration requirement, if a jurisdiction has one,[59] the corpus delicti rule,[60] and limits on rebuttal.[61]

Subpart (2) of the Rule applies to the atypical scenario where the case is "trifurcated"—sometimes because that is the jurisdiction's rule[62] and sometimes because an individual trial judge decides to do so.[63]

---

59 *See* People v. Carrington, 211 P.3d 617, 654 (Cal. 2009) (holding that requirement of corroboration of accomplice testimony applies at penalty phase); Littlejohn v. State, 989 P.2d 901, 911 (Okla. Crim. App. 1998) (holding accomplice corroboration requirement not satisfied by newspaper article). *But see* State v. Bane, 57 S.W.3d 411, 419 (Tenn. 2001) (holding accomplice corroboration requirement does not apply at penalty phase).

60 *See* State v. Hobley, 752 So. 2d 771, 780 (La. 1999) (finding defendant's confession to unrelated, unadjudicated murder not sufficiently trustworthy to be admitted because no evidence other than the confession showed that the murder even occurred). *But see* Bible v. State, 162 S.W.3d 234, 247 (Tex. Crim. App. 2005) (holding corpus delicti rule does not apply to extraneous offenses at penalty phase).

61 Evidence offered in rebuttal is governed by the same rules as all other evidence. A much-litigated issue is whether the proffered evidence is really within the scope of rebuttal, that is, does it rebut evidence offered by the opposing party (permissible) or is it rather an attempt to inject new evidence on a point not raised by the opposing party's evidence (impermissible). While this issue generates a great deal of case law, we will not include citations here because this is not strictly speaking an evidence issue. For the general rule, see Michael H. Graham, *Error on Appeal: Waiver of Right, Invited Error, Rebuttal, and "Door Opening,"* 41 CRIM. L. BULL., no. 1, 2005, at 5–6 (Univ. of Miami, School of Law) ("In the court's discretion, evidence tending to refute is admissible in rebuttal . . . ."); *see also* Kormondy v. State, 845 So. 2d 41, 51–52 (Fla. 2003) (noting that state generally allowed to rebut mitigation evidence and defense to rebut aggravation).

62 Arizona is the only state jurisdiction that has a trifurcated trial process. Arizona applies the normal rules to the first two phases but embraces wide admissibility at the third phase. *See* ARIZ. REV. STAT. ANN. § 13-703 (2001); State v. Pandeli, 26 P.3d 1136, 1145 (Ariz. 2001) (holding evidence submitted to support an aggravating circumstance must comply with the rules of evidence, but evidence offered by either party as to mitigation need not comply with those rules).

63 *See, e.g.*, United States v. Hager, 721 F.3d 167, 175 (4th Cir. 2013) ("The trial consisted of three parts: (1) the guilt-innocence phase, (2) the death penalty eligibility phase, and (3) the sentencing selection phase."); United States v. Rodriguez, 581 F.3d. 775, 784 (8th Cir. 2009) (simply noting that "[t]he district court bifurcated penalty proceedings into an eligibility phase and a selection phase" (footnote omitted)); United States v. Bolden, 545 F.3d 609, 618–19 (8th Cir. 2008) ("[U]nder the [Federal Death Penalty Act of 1994 (FDPA)] the statute contemplates but does not require a single penalty proceeding."); *id.* (noting that while bifurcation of the penalty phase is not required the granting or denial of it in the district court is reviewed for "abuse of discretion"); United States v. Basciano, 763 F. Supp. 2d 303, 340–41 (E.D.N.Y. 2011) (granting defense request for trifurcation, even though the defendant "argue[d] that bifurcation [of the penalty phase] will prevent any prejudice to the eligibility determination that might result from including information relating to, for example, Non-Statutory Aggravating Factors when making the eligibility determination" (citation omitted)); Mitchell v. United States 2010, No. CR–01–1062–PCT–MHM, 2010 WL 3895691, at *18–19 (D. Ariz. Sept. 30, 2010) (concluding no ineffective assistance of counsel in 28 U.S.C. § 2255 proceeding for failure of defense trial counsel to request trifurcation); Jackson v. United States, 638 F. Supp. 2d 514, 611–13 (W.D. N.C. 2009) (concluding no ineffective assistance of counsel in 28 U.S.C. § 2255 proceeding for trial counsel not to ask for trifurcation); United States v. Taylor, 635 F. Supp. 2d 1236, 1238–41, 1243 (D.N.M. 2009) (rejecting Due Process argument that the trial be divided into four phases: a "merits" phase and a "trifurcated" penalty phase including "eligibility," a third phase to determine "'nonstatutory aggravating' evidence that involved unajudicated criminal activity," and a fourth phase to decide punishment); United States v. Taveras, No. 04-Cr-156 JBW, 2006 WL 473773, at *12–13 (E.D.N.Y. Feb. 28, 2006) (tentatively declining to follow United States v. Davis, 912 F. Supp. 938,

When a case is trifurcated, the first phase—the guilt/innocence phase—is the same as in a bifurcated trial. Then, if the defendant is found guilty, the penalty phase itself is bifurcated into an "eligibility" phase (the second phase); and if death-eligibility is found, then the trial proceeds to determination of sentence—the "selection" phase (the third phase). Trifurcation reflects the notion that several of the broad penalty phase principles—particularly those admitting character evidence and victim impact evidence—would be too unfairly prejudicial to the defendant for a jury to hear until after the jury has deemed the defendant eligible for the death penalty. Judge Bennett wrote extensively about the advantages of trifurcation and its effect on the admissibility of evidence.[64] Subsequently, the Second Circuit cited Bennett's position with approval,[65] noting that

> [a]lthough we would not go so far as to require trifurcation, we encourage district courts ruling on motions to trifurcate to consider carefully the ramifications of presenting victim impact evidence, or any evidence that would otherwise be inadmissible in the guilt phase of a criminal trial, to a jury that has not yet made findings concerning death eligibility.[66]

949 (E.D. La. 1996)); *Davis*, 912. F. Supp. at 949 (suggesting that the penalty phase may be bifurcated into eligibility and selection of penalty phases so the jury would not hear evidence about unrelated nonstatutory aggravating factors before deciding eligibility). *But see* Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 AKRON L. REV. 1, 40–48 (2010) (arguing, we find extremely unpersuasively, that judicial trifurcation, attempting to fix the potential Sixth Amendment Confrontation Clause problem of relaxed evidence in the "eligibility" phase by trifurcating, is itself unconstitutional).

64 *See* United States v. Johnson, 362 F. Supp. 2d 1043, 1099–111 (N.D. Iowa 2005).

65 United States v. Fell, 531 F.3d 197, 239–40 (2d Cir. 2008) ("A trifurcated proceeding allows a district court not only to avoid the admission of prejudicial evidence before the eligibility decision, *see Johnson*, 362 F. Supp. 2d at 1110 (describing trifurcation as a 'cure' for 'potential unfair prejudice, confusion, and misdirection'), but also to delineate clearly between the applications of the Confrontation Clause in the eligibility and selection phases. Another response has been to preclude proof of non-statutory aggravating factors (i.e., evidence relevant only to "death selection") during the eligibility phase when that evidence threatened to undermine the presumption of innocence. *See, e.g.*, United States v. Gonzalez, No. 3:02CR7(JBA), 2004 WL 1920492, at *7, 2004 U.S. Dist. LEXIS 16907, at *5–9 (D. Conn. Aug. 17, 2004). The availability of such solutions under the FDPA allows district courts to avoid unfair prejudice potentially resulting from the consideration of 'death-selection' evidence before 'death eligibility' has been determined." (footnote omitted)).

66 *Fell*, 531 F.3d at 240, n.28.

3. Rule P103: Guilt-Innocence Phase Evidence Admissible[67]

1) At a trial where the penalty phase is tried to the same jury that rendered the guilty verdict (or if the judge is the sentencer, the same judge who presided over the guilt/innocence trial) evidence admitted during the guilt/innocence phase shall be deemed automatically admitted into evidence at the penalty phase.
2) At a penalty phase-only retrial where the penalty phase is tried to a different trier-of-fact than rendered the guilty verdict:
    a) Real evidence admitted during the earlier guilt/innocence phase and penalty phase shall be admitted at the request of either party.
    b) The parties may call witnesses to present evidence from the earlier trial, or may present evidence through the transcripts of testimony from the earlier trial in compliance with the hearsay rule. If a party presents evidence through the transcript from the earlier trial, the trial judge shall allow the party to present the evidence in a manner so as to give the new trier-of-fact a full understanding of that evidence.
    c) Notwithstanding Subparts (a) and (b) of this Rule, evidence from the earlier trial shall not be admitted in the new penalty phase if:
        i. A reviewing court has determined that the evidence was improperly admitted at the earlier trial;
        ii. A reviewing court has determined that that specific aspect of the earlier trial reflected ineffective assistance of defense counsel;
        iii. Except in compliance with Rule P208(e), it constitutes evidence by which the defendant at an earlier trial sought solely to contest guilt; however, defense evidence offered to contest the existence of an aggravating circumstance is not inadmissible simply because it may also have a tendency to contest guilt.
    d) The parties are not limited to evidence that was presented at the earlier trial.

---

67 CAP. PEN. PH. R. EVID. P103.

Comment: Subpart (1) states the common-sense principle that where the sentencer has already been presented with the evidence at the guilt-innocence phase, that evidence should be automatically deemed admitted as to the penalty phase.[68]

Subpart (2) deals with resentencing when an appellate court has affirmed a conviction but overturned a death sentence, and the prosecution chooses to pursue a new death sentence through a penalty phase-only retrial[69]—a scenario that occurs with regularity.[70] The problematic situation presented is that, by then, the case is years down the road from the original sentencing and the former jury cannot be reconstituted. Accordingly, a new jury is required. This new jury will be instructed to accept the guilty verdict. Yet the new jury must still be put in a position to understand the evidence supporting the guilty verdict in order to be in a position to consider the proper sentence. Subpart (2)(a) allows the parties to present all real evidence from the earlier trial without additional foundation—the foundation laid at the earlier trial suffices. Subpart (2)(b) allows the parties to present witnesses from the earlier trial. This subpart also allows the parties to use transcripts of testimony from the earlier trial, but only in compliance with the hearsay rule, which as a practical matter will usually mean the party must show

---

68 *See* State v. Boggs, 185 P.3d 111, 125 (Ariz. 2008) (en banc) (at sentencing stage, error to exclude facts established at the guilt phase); People v. Ramirez, 139 P.3d 64, 115–16 (Cal. 2006) (stating that jury could consider evidence from entire trial including guilt phase); O'Kelley v. State, 670 S.E.2d 388, 397 (Ga. 2008) (noting jury may consider evidence from guilt/innocence phase); State v. Davis, 506 S.E.2d 455, 481–82 (N.C. 1998) (state statutes contemplate sentencing determination based on evidence presented at both guilt and sentencing phases); Commonwealth v. Wholaver, 989 A.2d 883, 907 (Pa. 2010) ("[I]ncorporation of guilt phase evidence into the penalty phase was 'purely a procedural matter . . . .'" (quoting Commonwealth v. Williams, 896 A.2d 523, 545 (Pa. 2006))); State v. Tucker, 462 S.E.2d 263, 265 (S.C. 1995) (since evidence was admissible at guilt phase, jury could consider it at penalty phase); Young v. State, 283 S.W.3d 854, 863–64 (Tex. Crim. App. 2009) ("[T]he jury is entitled to consider all the evidence at the guilt phase in addition to . . . [all] the evidence from [penalty] phase."). *But see* State v. Hancock, 840 N.E.2d 1032, 1055 (Ohio 2006) (stating that it is within trial judge's discretion—although not endorsed by the appellate court—to disallow introduction of guilt phase photos of strangulation in penalty phase on the basis that the photos could have distracted jury from focusing on aggravating and mitigating factors).

69 *See generally Switching Juries*, *supra* at note 17.

70 *See* DEATH SENTENCES TODAY, http://deathsentencestoday.wix.com/davidmccord# (last visited Oct. 18, 2014) (a website where I have posted summaries of every death penalty handed down from 2004–2012, and have noted which were re-sentences). Since 2004, when I began tracking death sentences in the United States, from 2004 through 2009 an average of seventeen death sentences per year were re-imposed by a new sentencer after an earlier penalty phase was found by an appellate court to be infected by reversible error; from 2010 to 2013, that average dropped to eight per year. *Id.* Beyond those death sentences, there are surely many other re-sentence trials where the sentencers did *not* return death sentences—these cases are not included on my website.

that the witness is currently unavailable so that the transcript falls into the exception for former testimony.[71]

This subpart (b) allows the parties to present the testimony of an unavailable witness in such a way as to give the jury a full understanding of that evidence, which would typically mean the use of a "reader witness."[72]

Subpart (c)(i) states a law-of-the-case principle that evidence found by a reviewing court to have been improperly admitted at the earlier trial cannot be admitted at the retrial. Subpart (c)(ii) states an equally obvious principle that portions of the earlier transcript found by a reviewing court to reflect ineffective assistance by defense counsel cannot be admitted at the retrial.

Subpart (d) recognizes that in most cases one or both of the parties will desire to present evidence that was unavailable at the earlier trial—at a minimum, the behavior of the defendant while in custody during the intervening years. The admissibility of such evidence is governed by the rest of these Rules.

4. Rule P104: Admissible for One Purpose Is Admissible for All Purposes[73]

> Evidence admissible under this Rule for one purpose shall be admissible for all purposes, and no limiting jury instruction shall be given, except in extraordinary circumstances.

Comment: This is the only proposed Rule that flatly contradicts the normal rule of evidence. The normal rule provides for admitting evidence of limited admissibility with a limiting instruction.[74] But Rule

---

71 Even though the earlier testimony was given under oath and subject to cross-examination at an earlier proceeding in the same case, it is still hearsay and for admission requires compliance with Federal Rule of Evidence 804. *See* FED. R. EVID. 804(b)(1) ("Testimony that was given as a witness at a trial, hearing, or lawful deposition, whether given during *the current proceeding* or a different one . . . ." (emphasis added)). According to the Advisory Committee Notes, "opportunity to observe demeanor is what in large measure confers depth and meaning upon oath and cross-examination . . . . In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available." FED. R. EVID. 804(b)(1) advisory committee notes, 1972 Proposed Rules.

72 *See* Muehleman v. State, 3 So. 3d 1149, 1162 (Fla. 2009) (holding it proper for transcript of absent witness's testimony to be read by members of the prosecutor's staff); Littlejohn v. State, 85 P.3d 287, 297 (Okla. Crim. App. 2004) (prior testimony admissible in oral form only when the written transcript is not admissible).

73 CAP. PEN. PH. R. EVID. P104.

74 *See* FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."). Despite this

P104 takes the opposite tack based on the premise that the jury should usually be permitted to focus as clearly as possible on the life/death decision, that is the point of the penalty phase. The jury should not ordinarily be distracted by limiting instructions asking it to perform mental gymnastics about using evidence for one purpose but not for another, as by having to consider evidence to be hearsay for one purpose but not for another. The Rule does, however, provide an exception "in extraordinary circumstances" to prevent evidence from being used for the *wrong* purpose, for example, if evidence of the defendant's mental impairment were to be used as an aggravating factor rather than a mitigating factor.

5. Rule P105: Evidence Suppressed at the Guilt-Innocence Phase[75]

1) Subject to Subpart (3), evidence that was suppressed at the guilt-innocence phase due to a constitutional violation that occurred prior to filing of the formal charge is not for that reason inadmissible at the penalty phase.
2) Evidence that was suppressed at the guilt-innocence phase due to a constitutional violation that occurred after the filing of the formal charge is inadmissible at the penalty phase.
3) A confession that was suppressed at the guilt-innocence phase as involuntary is inadmissible.

Comment: Courts have split as to the admissibility at sentencing of evidence obtained via a constitutional violation.[76] Subparts (1) and (2) adopt different answers based on the time when the constitutional violation occurred, which as a practical matter implicates different kinds of constitutional violations. As to violations that occurred before the filing of the formal charge, which typically will be Fourth Amendment search-and-seizure violations or Fifth Amendment *Miranda* violations by the police, Subpart (1) recognizes that evidence obtained by such

Rule's belief in the jurors' ability to comprehend a limiting instruction and their willingness to adhere to it, there is grave doubt that jurors can comply with limiting instructions even if they endeavor to do so. *See* Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. LITIG. 117, 122 (2013) ("There are three major theories focused on why jurors fail to ignore inadmissible information, which will be discussed in turn: motivation-based theory, ironic mental processes, and mental contamination.").

75 CAP. PEN. PH. R. EVID. P105.

76 *See* ARTHUR W. CAMPBELL, LAW OF SENTENCING § 9.9, at 381 (3d ed. 2004) ("Does the exclusionary rule, developed to protect critical constitutional rights, apply to sentencing information? There appears to be little harmony among the cases."). The majority rule, though, is that the exclusionary rule does not apply to sentencing. *See infra* note 78.

violations is typically *reliable* evidence that is suppressed only because of the higher value of deterring constitutional violations by the authorities.[77] Thus, the key balancing test is whether there is sufficient deterrent value in exclusion to outweigh the loss of reliable evidence. The Rule's choice to admit reflects Rule P101's weighty emphasis on providing the sentencer with "as complete information as possible," while the weight on the suppression side of the scale is small—there would be scant *additional* deterrent value in excluding such evidence at the penalty phase beyond what already exists in suppressing it at the guilt-innocence phase.[78] Note, though, that the Rule states that the evidence is "not for that reason inadmissible," which is not the same as saying that it is necessarily admissible—like other evidence, it has to comply with the admissibility standards set forth in the remainder of these Rules.

On the other hand, after the formal charge has been filed, Subpart (2) makes the choice for exclusion. Such violations will typically be of the Sixth Amendment right to counsel—often via unreliable jailhouse snitches—or Fifth Amendment violations by a government mental health professional, such as in *Estelle v. Smith*.[79] Such violations are more calculated than those made by the police in the heat of an investigation—and may well involve a prosecutor in addition to the police. They are thus are more deterrable, and should be excluded from the penalty phase as well.

---

77 In *Davis v. United States*, the court stated:

> Real deterrent value is a 'necessary condition for exclusion,' but it is not 'a sufficient' one. The analysis must also account for the 'substantial social costs' generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a 'last resort.' For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy cost.

131 S. Ct. 2419, 2427 (2011) (citations omitted).

78 Courts usually do not apply the exclusionary rule at sentencing. *See* Orin Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1102–03 (2011) ("Although the Supreme Court has never addressed the issue, the federal circuit courts also have uniformly held that the exclusionary rule generally does not apply at sentencing: that is, the fruits of unlawful searches and seizures that were suppressed at trial can nonetheless generally be used and considered during posttrial sentencing proceeding."). *But see, e.g.*, FLA. STAT. ANN. § 921.141(1) (West 2012) ("[T]his subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States . . . ."); TENN. CODE ANN. § 39-13-204(c) (West 2014) (identical language); TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(a) (identical language); *see also* Kordenbrock v. Scroggy, 919 F.2d 1091, 1096–97 (6th Cir. 1990) (holding admission of *Miranda*-defective confession reversible error).

79 451 U.S. 454, 473 (1981) (holding prosecution's mental health expert's examination of defendant without advising defendant of privilege against self-incrimination violated the Fifth and Sixth Amendments).

As to involuntary confessions, there is no room for debate about what rule is required. Subpart (3) carries out the holding of *Mincey v. Arizona*,[80] that an involuntary confession is inadmissible for any purpose.[81] The same rule would result from a balancing of probative value versus countervailing considerations: the probative value of an involuntary confession is low because of the substantial probability of unreliability, and the corresponding chance of misleading the jury is unacceptably high.[82]

B. *Article II: Relevancy and Its Limits—In General*

1. Rule P201: General Test for Relevant Evidence

Evidence is relevant if:
1) it has any tendency to make a fact more or less probable than it would be without the evidence; and
2) it may reasonably be of consequence to the determination of the sentence.

Comment: One can hardly improve upon the widely-accepted definition of "relevant evidence" from the Federal Rules of Evidence,[83] with the substitution of "sentence" for "action" in Subpart (2).

2. Rule P202: Facts of Consequence to the Determination of the Sentence[84]

The facts of consequence to the determination of the sentence are:
1) The circumstances of the offense;
2) The defendant's character, including the defendant's record;
3) The impact of the defendant's offense(s); and

---

80 437 U.S. 385, 398 (1978).

81 *Id.* ("*[A]ny* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law . . . .").

82 The U.S. Supreme Court has long recognized that involuntary confessions are excluded in part because of their unreliability. *See, e.g.*, Jackson v. Denno, 378 U.S. 368, 385–86 (1964) (holding that one of the reasons for excluding involuntary confessions is their unreliability; other reasons are that important human values are sacrificed by wringing confessions out of suspects, and the feeling that the government's agents must obey the law even while enforcing it).

83 *See* FED. R. EVID. 401.

84 CAP. PEN. PH. R. EVID. P202.

4) The impact of defendant's execution on the defendant's relatives and friends.

Comment: While the Federal Rules of Evidence cover an open-ended set of legal "actions,"[85] and thus cannot specify the "facts of consequence to the determination" as to any of them, it is possible and useful to specify the facts that are of consequence to the determination of sentence in the penalty phase because Supreme Court case law largely establishes the parameters of materiality.

Subparts (1) and (2) cover the traditional case law triumvirate of character, record, and circumstances of the offense.[86] Further elaborations upon this triumvirate comprise Articles III and IV. Subpart (3) recognizes that the Supreme Court has held the admission of "victim impact" evidence by the prosecution is constitutional.[87] Of course, a jurisdiction is not required to admit such evidence, and a few have chosen not to do so.[88] But none of the sixteen jurisdictions whose law was reviewed for purposes of formulating these Rules is among the few that prohibit such evidence. Thus, it is necessary to propound evidentiary rules for jurisdictions that wish to permit victim impact evidence, which are found in Article V hereof.

Subpart (4) covers evidence that has not achieved constitutional status via Supreme Court case law, to wit, evidence related to the likely impact the defendant's execution would have on the defendant's relatives and friends. But such evidence is permitted in some jurisdictions,[89] and, as will be explained with respect to Rule P504, the argument for permitting it is stronger than the argument for excluding it.[90] Thus this Rule recognizes it as a fact of consequence.

Note that the ultimate determination whether the defendant should receive a death sentence is *not* defined as a fact of consequence to the determination of the sentence. The ultimate determination of

---

85 *Id.*

86 *See supra* notes 24–25 and accompanying text.

87 *See supra* notes 30–31 and accompanying text.

88 *See* Joe Frankel, Comment, *Payne, Victim Impact Statements, and Nearly Two Decades of Devolving Standards of Decency*, 12 N.Y. CITY L. REV. 87, 112–13 & n.170 (2008) (listing jurisdictions that prohibit victim impact evidence (Wyoming) or severely limit it (Indiana—only if relevant to an aggravating or mitigating circumstance), and Mississippi (only to establish an aggravating circumstance); and jurisdictions that permit it (including all sixteen whose law was reviewed for purposes of this Article)). Frankel's Comment updated the foundational survey article on the topic of victim impact evidence. *See* John H. Blume, *Ten Years of* Payne*: Victim Impact Evidence in Capital Cases*, 88 CORNELL L. REV. 257, 267–77 (2003).

89 *See infra* note 228 and accompanying text.

90 *See infra* notes 259–61 and accompanying text.

sentence is not a "fact," but rather a value judgment based on the facts of the case as filtered through the moral intuitions of the sentencer.[91]

3. Rule P203: General Admissibility of Relevant Evidence[92]

> Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution [or the constitution of this State], a federal [or state] statute, or these rules. Irrelevant evidence is not admissible.

Comment: Again, this comes directly from the Federal Rules of Evidence, with suggested modifications in brackets for use by states.[93]

4. Rule P204: No Requirement of Relation to Statutory Aggravating or Mitigating Circumstance[94]

> Evidence shall not be excluded merely because it does not directly relate to a statutory aggravating or mitigating circumstance. However, evidence of non-statutory aggravating factors is only admissible if the government has given written notice to the defense within 60 days of the defendant being formally charged, of the non-statutory aggravating factors the government alleges are present in the case.

Comment: Aggravating evidence that does not directly tend to prove a statutory aggravating circumstance—known as "non-statutory aggravation"—can often be quite probative for the prosecution. In keeping with the Rules' emphasis that more evidence for the sentencer is better than less, this Rule adopts a position that non-statutory aggravation should be permitted. Jurisdictions are split on this issue. Some favor the position espoused by this Rule,[95] others bar such

---

91 *See* Malone v. State, 293 P.3d 198, 220 (Okla. Crim. App. 2013) (holding that death sentence decision is a highly subjective and largely moral judgment that can only be reviewed to determine if a rational trier of fact could have balanced the aggravators and mitigators to have arrived at a death sentence).

92 CAP. PEN. PH. R. EVID. P203.

93 *See* FED. R. EVID. 402.

94 CAP. PEN. PH. R. EVID. P204.

95 *See* State v. Hampton, 140 P.3d 950, 962 (Ariz. 2006) (en banc) (holding jury may consider aggravating factors other than those in the statute); Hightower v. State, 386 S.E.2d 509, 512 (Ga. 1989) (holding prosecution not limited to presenting evidence of statutory aggravators); State v. Brown, 902 S.W.2d 278, 293 (Mo. 1995) (holding that after sentencer finds a statutory aggravator it may then consider non-statutory aggravators); State v. Ketterer, 855 N.E.2d 48, 71 (Ohio 2006)

evidence,[96] and federal law requires notice to the defense of the prosecution's intention to offer non-statutory aggravation, and then gives the trial judge discretion whether to permit it.[97]

As to evidence offered by the defense in mitigation, broad admissibility is, of course, constitutionally required.[98]

5. Rule P205: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons[99]

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

(holding prosecution not limited to evidence pertaining only to statutory aggravators); Commonwealth v. Spotz, 18 A.3d 244, 304–05 (Pa. 2011) (holding evidence may be presented as to any relevant matter even though the sentencer must weigh only statutory aggravators in reaching decision); *Ex parte* Jennings, No. AP-75806, 2008 WL 5049911, at *7 (Tex. Crim. App. Nov. 26, 2008) (holding defendant's mitigation did not come close to outweighing the non-statutory aggravation).

96 *See Ex parte* Stephens, 982 So. 2d 1148, 1153 (Ala. 2006) (sentencer may consider only statutory aggravators); People v. Hawthorne, 205 P.3d 245, 263 (Cal. 2009) (holding prosecution may only present evidence relating to the statutory aggravating circumstances); Eaglin v. State, 19 So. 3d 935, 946–47 (Fla. 2009) (holding lack of remorse inadmissible in prosecution's case-in-chief because not a statutory aggravator—although admissible in rebuttal if defendant presents evidence of remorse or other mitigating factors such as rehabilitation); Zack v. State, 911 So. 2d 1190, 1208–09 (Fla. 2005) (holding that the only matters that may be considered in aggravation are those set out in the statute); State v. Silhan, 275 S.E.2d 450, 484 (N.C. 1981) (holding that in its case-in-chief prosecution may prove only statutory aggravators); State v. Odom, 336 S.W.3d 541, 559–60 (Tenn. 2011) (holding state may not rely upon non-statutory aggravators). This doctrine occasionally leads to results that seem wrong. For example, in *Kormondy v. State*, 703 So. 2d 454, 463 (Fla. 1997), the court held it reversible error to admit testimony that defendant had threatened to kill two prosecution witnesses if released, on basis that the evidence went to an impermissible non-statutory aggravating circumstance. It is hard to conceive of evidence that is more probative of future dangerousness than this.

97 *See* 18 U.S.C. § 3592(c) (2012) (government must give notice); *id.* § 3593(d) (stating that the jury must return special finding as to each aggravating circumstance, including those not listed in the statute). The trial court may exercise its sound discretion to preclude the government from presenting evidence as to a non-statutory aggravator. *See* United States v. Frank, 8 F. Supp. 2d 253, 265 (S.D.N.Y. 1998).

98 *See* Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (holding unconstitutional a statute that limited mitigating evidence to a prescribed list).

99 CAP. PEN. PH. R. EVID. P205.

Comment: Yet again, the Federal Rules of Evidence correctly supply this basic, all-purpose Rule.[100] This Rule applies to all issues except in the two instances when a more specific Rule abrogates it: Rule P409(1) (all convictions admissible) and Rule P412(3) (all instances of defendant's relevant behavior while in custody admissible). Also, in various other Rules, this Rule is explicitly referenced when it seems helpful to do so.[101] But the fact that Rule P205 is referenced explicitly in some other Rules does not mean that it is inapplicable when it is not specifically referenced in other Rules.

Rule P205 applies equally to prosecution and defense evidence. Since the Rule is tilted in favor of admissibility in that the countervailing considerations must *substantially outweigh*[102] probative value for exclusion to be warranted, prosecution evidence is typically not excluded by it,[103] although occasionally it is.[104] As to defense evidence,

---

100 *See* FED. R. EVID. 403; *see also* Prieto v. Commonwealth, 721 S.E.2d 484, 496 (Va. 2012) ("[T]he standard for exclusion of relevant evidence is whether prejudicial effect substantially outweighs probative value.").

101 *See* CAP. PEN. PH. R. EVID. P409(2), P410(1), P411(4).

102 Thus, the standard in the Federal Death Penalty Act, 18 U.S.C. § 3593(c), that "information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury," seems to conduce toward easier exclusion of evidence because it does not require that the countervailing considerations must *substantially* outweigh probative value for the evidence to be excluded. *See* 18 U.S.C. § 3593(c). Judge Bennett noted this distinction between the FDPA and the Anti-Drug Abuse Act (ADAA), 21 U.S.C. § 848(l) (2012). *See* United States v. Johnson, 915 F. Supp. 2d 958, 1010 (N.D. Iowa 2013). There is some case law on the exclusion standard under § 3593(c), but it is hard to tell whether federal judges have interpreted the rule any differently than the normal rule embodied in Federal Rule of Evidence 403, which is also adopted in this Rule P205. *See supra* note 100.

The standard for exclusion of evidence during the sentencing phase under the ADAA was first passed in 1988. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4390 (codified at 21 U.S.C. § 848). The easier standard for exclusion of evidence was passed in 1994, when Congress passed the FDPA, Pub. L. No. 103-322, 108 Stat. 1959, codified at 18 U.S.C. § 3591–3599, as part of the Violent Crime Control and Law Enforcement Act of 1994. Congress's subsequent repeal of the death penalty procedural provisions of the ADAA in 2006, and replacement of those procedures with those in the FDPA, 18 U.S.C. § 3591(b), as part of the USA Patriot Improvement and Reauthorization Act, Pub. L. No. 109-177, 120 Stat. 231, suggest that Congress intended that the FDPA's easier standard for exclusion of evidence in the sentencing phase of a capital case should apply generally in federal death penalty cases.

Other jurisdictions use other formulas regarding probative value and countervailing consideration. *See, e.g.*, State v. Golphin, 533 S.E.2d 168, 233 (N.C. 2000) (holding no requirement to perform balancing test as to any relevant evidence prosecution offers that is relevant to aggravating circumstances); Commonwealth v. Eichinger, 915 A.2d 1122, 1142 (Pa. 2007) (holding probative value of prosecution's evidence must "clearly outweigh[] the likelihood of inflaming the minds and passions of the jury").

103 *See* United States v. Lujan, 603 F.3d 850, 854–905 (10th Cir. 2010) (holding gruesome evidence of prior double homicide allegedly committed by defendant proper because evidence did not pose such a risk of unfair prejudice as to outweigh its high probative value); United States v. Bolden, 545 F.3d 609, 628 (8th Cir. 2008) (holding probative value of use of Styrofoam skull to illustrate paths of bullets was not outweighed by danger of unfair prejudice); United States v. Corley, 519 F.3d 716, 726–27 (7th Cir. 2008) (holding two photos of charred body of victim of

while courts are understandably leery of infringing on a defendant's constitutional right to present evidence,[105] courts do regularly and appropriately exclude otherwise admissible defense evidence, perhaps

prior unadjudicated murder allegedly committed by defendant was not more prejudicial than probative); United States v. Sampson, 486 F.3d 13, 43 (1st Cir. 2007) (holding probative value of crime scene, autopsy, and physical evidence outweighed potential for unfair prejudice); Luong v. State, No. CR-08-1219, 2014 WL 983288, at *19 (Ala. Mar. 14, 2014) (holding that where child victims were murdered by being thrown off a bridge, admission of videotape showing a police officer tossing sandbags of the approximate weight of each of murdered children off a bridge, and off same bridge, and his testimony about the rate of speed at which the children fell was properly admitted as illustrative of the circumstances of the offenses); Hutcherson v. State, 727 So. 2d 846, 860 (Ala. Crim. App. 1997) (holding photo of elderly victim's body probative enough for admission despite possible tendency to inflame minds of jurors); State v. Lynch, 234 P.3d 595, 606 (Ariz. 2010) (holding trial court did not abuse its discretion in admitting autopsy photos); State v. Dann, 207 P.3d 604, 615 (Ariz. 2009) (same); People v. Hajek, 324 P.3d 88, 150 (Cal. 2014) (finding autopsy photographs' probative value outweighed their unfair prejudice as to contested torture-murder special circumstance); People v. Hawthorne, 205 P.3d 245, 270 (Cal. 2009) (holding audiotape of 911 call by victim's daughter not cumulative); People v. Loker, 188 P.3d 580, 594 (Cal. 2008) (holding autopsy photos admissible); Poole v. State, No. SC11-1846, 2014 WL 2882864, at *10 (Fla. June 26, 2014) (holding probative value of preserved fingertip of victim who survived defendant's attack was not outweighed by danger of unfair prejudice); Armstrong v. State, 73 So. 3d 155, 170 (Fla. 2011) (holding vial of blood from victim and three photos of victim's body not impermissibly cumulative); Presnell v. State, 551 S.E.2d 723, 732 (Ga. 2001) (holding crime scene and pre-autopsy photos properly admitted); State v. Robertson, 712 So. 2d 8, 29–30 (La. 1998) (same); State v. Dorsey, 318 S.W.2d 648, 657–58 (Mo. 2010) (holding crime scene photos properly admitted); State v. King, 546 S.E.2d 575, 599 (N.C. 2001) (holding crime scene photos of body admissible even if gory or gruesome); State v. Craig, 853 N.E.2d 621, 640 (Ohio 2006) (holding trial court did not abuse discretion in admitting autopsy photos); Harmon v. State, 248 P.3d 918, 937 (Okla. Crim. App. 2011) (holding probative value of 911 audiotape substantially outweighed danger of unfair prejudice); Commonwealth v. Brown, 786 A.2d 961, 969–70 (Pa. 2001) (holding life-sized photos of child victim admissible as highly probative when court gave cautionary instruction to avert unfair prejudice); State v. Torres, 703 S.E.2d 226, 228–29 (S.C. 2010) (holding autopsy photos properly admitted); State v. Jordan, 325 S.W.3d 1, 83 (Tenn. 2010) (holding photos of crime scene, including victim's bodies and assault victim's injuries properly admitted); Saldano v. State, 232 S.W.3d 77, 101 (Tex. Crim. App. 2007) (holding autopsy photos properly admitted); Payne v. Commonwealth, 509 S.E.2d 293, 297 (Va. 1999) (holding crime scene and autopsy photos and videos, while shocking and gruesome, were nonetheless admissible as probative of aggravating circumstances).

104 *See* United States v. Tavares, 584 F. Supp. 2d 535, 539 (E.D.N.Y. 2008) (holding danger of unfair prejudice from evidence defendant dismembered victims' bodies outweighed probative value); George v. State, 717 So. 2d 827, 841–43 (Ala. Crim. App. 1996) (holding evidence of defendant's deplorable living conditions should not have been admitted when its sole purpose appeared to be to inflame minds of jurors and dehumanize defendant); Mitchell v. State, 136 P.3d 671, 695–96 (Okla. Crim. App. 2006) (holding trial court abused its discretion in failing to properly constrain prosecution's presentation of graphic photos of victim's body at scene and from autopsy).

105 *See, e.g.*, State v. LaCaze, 824 So. 2d 1063, 1083 (La. 2002) ("[D]efendant may introduce virtually any evidence in mitigation . . . ."); State v. Mercer, 672 S.E.2d 556, 562 (S.C. 2009) (stating rule allowing exclusion of relevant evidence offered by capital defendant should be cautiously invoked in light of due process implications of right to present mitigation).

most frequently on the basis of "needlessly presenting cumulative evidence."[106]

This Rule implicitly rejects the doctrine in some jurisdictions that the prosecution should be permitted greater leeway in presenting gruesome evidence at the penalty phase than at the guilt/innocence phase.[107] Under Rule P205, such evidence is subject to the same balancing test during either phase of the trial.

6. Rule P206: Particular Types of Irrelevant Evidence—Public Policy-Related[108]

Evidence on the following topics is irrelevant:
1) The moral desirability or undesirability of the death penalty.
2) The general deterrent effect, or lack thereof, of the death penalty.

---

106 *See* Matthews v. Parker, 651 F.3d 489, 520–21 (6th Cir. 2011) (opining that states have authority to set reasonable limits on the evidence a defendant presents in mitigation and to control the manner in which it is submitted); United States v. Lighty, 616 F.3d 321, 363 (4th Cir. 2010) (opining that even though defense has wide berth to present mitigating evidence, that does not mean "defense has carte blanche to introduce any and all evidence it wishes" (quoting United States v. Purkey, 428 F.3d 738, 756 (8th Cir. 2005))); Johnson v. State, No. CR-99-1349, 2009 WL 3171220, at *8 (Ala. Crim. App. Oct. 2, 2009) ("'Although a defendant's right to present mitigating evidence is quite broad, evidence that is irrelevant to the defendant's character or record or the circumstances of the crime is properly excluded." (quoting Woods v. State, 13 So. 3d 1, 33 (Ala. Crim. App. 2007))); People v. Virgil, 253 P.3d 553, 602 (Cal. 2011) (holding permissible for trial judge to admit only five of nine photos defendant offered of his child); People v. Thornton, 161 P.3d 3, 45 (Cal. 2007) (holding reasonable for trial court to exclude letters written by defendant's former girlfriend expressing affection as cumulative); People v. Coffman, 96 P.3d 30, 117 (Cal. 2004) (holding probative value of additional details of defendant's battered woman's syndrome evidence properly excluded); Postelle v. State, 267 P.3d 114, 141 (Okla. Crim. App. 2011) (holding trial judge did not abuse discretion in excluding three video clips as cumulative when substance of evidence was presented through testimony of defendant's family members); Andrews v. Commonwealth, 699 S.E.2d 237, 273 (Va. 2010) (holding trial court properly excluded box containing cremains of defendant's father that defendant had carried around in his backpack when younger, given that defendant's mother testified about defendant's habit of carrying the cremains).

107 *See* People v. Booker, 245 P.3d 366, 403 (Cal. 2011) (stating trial court's discretion more limited to exclude prosecution's photos at penalty phase because "sentencer is *expected* to subjectively weight the evidence, and the prosecution is entitled to place the capital offense and offender in morally bad light" (citations omitted)); People v. Mills, 226 P.3d 276, 315 (Cal. 2010) (holding trial court has broader discretion to admit photos at penalty phase compared with guilt phase); People v. Moon, 117 P.3d 591, 613 (Cal. 2005) (holding photos of victims admissible at penalty phase even though excluded at guilt phase as more prejudicial than probative); *Torres*, 703 S.E.2d at 229 (opining that at penalty phase scope of probative value of photos is much broader than at guilt/innocence phase); State v. Odom, 336 S.W.3d 541, 565–66 (Tenn. 2011) (same).

108 CAP. PEN. PH. R. EVID. P206.

3) The desirability or undesirability of the death penalty as a matter of public policy compared with other possible punishments.
4) Geographical disparities in death sentencing.
5) Racial, gender, or other disparities in death sentencing based on personal characteristics of defendants or victims.
6) Method of execution.
7) Evidence of the defendant's life in prison if offered by the government to show how comfortable the defendant's life will be with a life sentence.
8) Any other similar public policy-related evidence.

Comment: Whether a jurisdiction should have the death penalty, and how executions should be carried out, are matters of public policy for the legislature, not for any particular jury. Thus, evidence regarding matters of public policy must be excluded.[109] Indeed, courts in almost every jurisdiction consistently exclude evidence regarding the moral desirability or undesirability of the death penalty;[110] its general deterrent effect or lack thereof;[111] comparative desirability of alternative

109 *See* Brannan v. State, 561 S.E.2d 414, 421 (Ga. 2002) (finding evidence about death penalty in general, including international treaties, abolition in other countries, religious teachings, and method of execution irrelevant).

110 Such evidence almost always consists of critical views of the death penalty offered by the defense. *See* State v. Brogdon, 457 So. 2d 616, 622 (La. 1984) (holding testimony by Catholic priest and Jewish rabbi that capital punishment conflicted with religious or moral principles irrelevant); State v. Braxton, 531 S.E.2d 428, 464 (N.C. 2000) (holding proper to prevent defense from quoting a public figure's views on the death penalty); State v. Taylor, 283 S.E.2d 761, 783 (N.C. 1981) (holding trial court correctly precluded defense witnesses' proposed testimony regarding religious, ethical, legal, and public policy perspectives on the death penalty); State v. Glenn, 504 N.E.2d 701, 708 (Ohio 1986) (holding newspaper articles debating philosophical basis for death penalty not proper mitigation); Commonwealth v. Lesko, 719 A.2d 217, 223 (Pa. 1998) (holding chaplain's personal opinions, and traditions of Islamic culture, irrelevant to mitigating circumstances); State v. Wise, 596 S.E.2d 475, 481 (S.C. 2004) (holding defense may not present witnesses merely to testify to their religious or philosophical attitudes toward death penalty); State v. Thompson, 768 S.W.2d 239, 249 (Tenn. 1989) (holding positions of various religious denominations on death penalty irrelevant); Canales v. State, 98 S.W.3d 690, 699 (Tex. Crim. App. 2003) (holding proper to exclude bar journal article critical of death penalty).

111 *See* United States v. Johnson, 354 F. Supp. 2d 939, 973–74 (N.D. Iowa 2005) (holding evidence of deterrent effect or lack thereof irrelevant); People v. Thompson, 753 P.2d 37, 71 (Cal. 1988) (holding that the defendant is not entitled to present evidence of lack of deterrent effect); Rivera v. State, 647 S.E.2d 70, 79 (Ga. 2007) (holding evidence regarding deterrent effect by either party prohibited); Fleming v. State, 458 S.E.2d 638, 640 (Ga. 1995) (holding prosecutor could argue deterrent effect but defendant could not attempt to rebut with expert evidence of lack of deterrent effect); State v. Ali, 407 S.E.2d 183, 191 (N.C. 1991) ("[W]hether capital punishment has a deterrent effect is not a proper line of inquiry . . . ."); State v. Jenkins, 473 N.E.2d 264, 289 (Ohio 1984) (holding testimony of social scientist regarding lack of deterrent effect of capital punishment irrelevant); Warner v. State, 144 P.3d 838, 886 (Okla. Crim. App. 2006) (holding evidence of lack of deterrent effect inadmissible); State v. Allen, 687 S.E.2d 21, 24 (S.C 2009) (holding that while argument concerning deterrent effect or lack thereof permitted, evidence

punishments;[112] alleged geographical disparities;[113] alleged racial, gender, or other disparities in death sentencing based on personal characteristics of defendants or victims,[114] and details of the method of execution.[115] As to Subpart (7) precluding the prosecution from presenting evidence regarding a defendant's likely "life of ease" in prison, we know of no appellate cases on this issue, but we can imagine the prosecution attempting this tactic—thus, a Rule precluding it. Prison conditions may, however, be relevant to future dangerousness under Rule P412.

---

thereof is irrelevant); *Thompson*, 768 S.W.2d at 249 (holding opinion of criminologist about deterrent effect of death penalty irrelevant). *But see*, State v. Amrine, 741 S.W.2d 665, 669 (Mo. 1987) (holding prosecution's evidence regarding deterrent effect in the unique setting of a correctional institution where aggravating circumstance of murder committed in a correctional institution is submitted to jury).

112 One line of such argument that courts consistently exclude consists of defense evidence that the death penalty is not cost-effective. *See* People v. Elliott, 269 P.3d 494, 590 (Cal. 2012) (holding jury may not consider relative costs of life in prison versus death penalty); State v. Clark, 851 So. 2d 1055, 1083 (La. 2003) (holding testimony concerning relative costs of incarceration versus death penalty irrelevant); State v. Ferguson, 20 S.W.3d 485, 506 (Mo. 2000) (same); *Warner*, 144 P.3d at 886 (same).

Another line of such argument that courts consistently exclude consists of defense evidence about how punitive prison is to support the argument that imprisonment is a sufficiently horrible punishment to suffice. *See* People v. Eubanks, 266 P.3d 301, 332 (Cal. 2011) (holding defense's evidence of conditions of confinement for life term without parole not permitted); People v. Ervine, 220 P.3d 820, 859–60 (Cal. 2009) (same); People v. Brown, 73 P.3d 1137, 1180 (Cal. 2003) (same); State v. Bryant, 642 S.E.2d 582, 589 (S.C 2007) (finding defense expert's testimony that death penalty more merciful than life without parole inadmissible); Teleguz v. Warden, 688 S.E.2d 865, 879 (Va. 2010) (holding what an inmate may expect in "penal system is not relevant mitigation"). Occasionally the prosecution will attempt to prove prison conditions to show defendant's lot would be too cushy if imprisoned; this is also held inadmissible. *See* State v. Smith, 554 So. 2d 676, 684–85 (La. 1989) (holding prosecutor improperly argued how relatively good defendant would have it in prison, and evidence of actual prison conditions would have been inadmissible if offered).

113 *See* United States v. Gabrion, 719 F.3d 511, 520–22 (6th Cir. 2013) (holding that fact that defendant was only within federal jurisdiction and thus subject to the death penalty because he killed the victim in a national forest in a state that otherwise could not have imposed a death sentence (Michigan) was not mitigating evidence); United States v. Higgs, 353 F.3d 281, 308 (4th Cir. 2003) (same); Bell v. State, 938 S.W.2d 35, 55 (Tex. Crim. App. 1996) (holding inadmissible that counties with large tax bases able to seek death penalty more frequently).

114 A defendant can attempt to prove such a claim via a pretrial motion to the court, but such a claim is virtually impossible to substantiate. *See* McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (rejecting statistical evidence of discrimination and requiring proof of actual discriminatory intent). We could not find any reported appellate opinions where a defendant raised a claim that his evidence of discrimination had been improperly excluded from the jury's consideration, which probably indicates that defendants do not even try to present such evidence to juries.

115 *See* McGahee v. State, 632 So. 2d 976, 978 (Ala. Crim. App. 1993) (holding inadmissible evidence about method of execution); People v. Collins, 232 P.3d 32, 78 (Cal. 2010) (same); Pace v. State, 524 S.E.2d 490, 507 (Ga. 1999) (same); State v. Langley, 711 So. 2d 651, 663 (La. 1998) (same); State v. Smith, 532 S.E.2d 773, 783 (N.C. 2000) (same); Fuller v. State, No. AP-73106, 2000 WL 35432767, at *5 (Tex. Crim. App. Dec. 20, 2000) (same).

7. Rule P207: Particular Types of Evidence—Sentence Comparisons[116]

1) When the sentencer is a jury:
    a) Evidence that compares the relative seriousness of the defendant's case with the cases of unrelated defendants is irrelevant; provided, however, if a representative of the prosecutor's office, other than in the context of plea bargaining, has stated that the case is unworthy of a death sentence, evidence of such statement is relevant, and qualifies as an admission of a party opponent for purposes of the hearsay rule.
    b) Evidence of the sentence of a defendant's co-perpetrator is irrelevant; however, if the co-perpetrator testifies, examination concerning the co-perpetrator's sentence shall be permitted as is pertinent to the witness's credibility.
2) When the sentencer is a judge or panel of judges, judicial notice may be taken of sentences in other cases.

Comment: This Rule makes a distinction between sentence comparison evidence depending on whether the sentencer is a jury or a judge. For the jury's purposes, each capital defendant is unique, and the jury is called upon to render a sentencing decision unique to that defendant. Accordingly, evidence about sentences in other capital cases would merely serve to distract the jury from its proper function to determine which sentence *this* defendant should receive.[117] While it might be possible to usefully present jurors with the outcomes of some comparable cases, no procedure has ever been devised for doing so. The Rule does, however, provide an exception in the rare case where a representative of the prosecutor's office—other than in the context of

116 CAP. PEN. PH. R. EVID. P207.

117 *See* United States v. Sampson, 486 F.3d 13, 45 (1st Cir. 2007) (upholding exclusion of evidence that numerous other federal defendants convicted of multiple murders had not been sentenced to death); Johnson v. State, 519 S.E.2d 221, 227 (Ga. 1999) (holding defendant properly precluded from questioning district attorney and former district attorney regarding allegedly more heinous cases in which death penalty was not sought); State v. Braxton, 531 S.E.2d 428, 464 (N.C. 2000) (holding proper for trial court to exclude defense from arguing facts of newsworthy cases); State v. Ketterer, 855 N.E.2d 70, 75 (Ohio 2006) (upholding exclusion of evidence that only nine percent of capital indictments resulted in death sentences); State v. Dixon, 805 N.E.2d 1042, 1057 (Ohio 2004) (holding proper to exclude defense evidence seeking to compare defendant's crime with crimes of others); State v. DePew, 528 N.E.2d 542, 552 (Ohio 1988) (upholding as irrelevant preclusion of evidence of number of multiple-murder defendants who were charged with death-eligible murder and number of such defendants who were sentenced to death); Walker v. Commonwealth, 486 S.E.2d 126, 134 (Va. 1997) (holding sentence comparison of similar capital cases irrelevant).

plea bargaining—has made a statement indicating that the prosecutor him/herself believes a death sentence to be excessive for the case.[118] Fairness compels that the jury be apprised of the fact that the prosecutor's office may be pressing for a death sentence while at the same time believing it to be inappropriate.

Even the sentence of a co-perpetrator in the same case is subject to so many vagaries and variables that revelation of it to the jury would be more confusing than helpful.[119] One of the authors dissents and believes that proportionality among co-defendants is highly relevant.[120] Of course, if the co-perpetrator testifies, and his sentence has a bearing on his credibility—most commonly that he bartered his testimony for a non-death sentence—then cross-examination concerning the sentence must be permitted as a normal matter of impeachment for bias and interest.[121]

As to judge sentencing, the Rule recognizes that, unlike juries, judges are usually aware of the outcomes of other capital cases—and can

---

118 *See* State v. White, 982 P.2d. 819, 825 (Ariz. 1999) (holding belief of prosecutors that the case was a run-of-the-mill murder for which death penalty would be appropriately admissible as non-statutory mitigating circumstance).

119 *See* State v. Ellison, 140 P.3d 899, 923 (Ariz. 2006) (en banc) (stating that it is proper for court to preclude jury from hearing that co-perpetrator received a life sentence); People v. Moore, 253 P.3d 1153, 1181–82 (Cal. 2011) (holding defendant is not entitled to introduce evidence that co-perpetrator received life-without-parole sentence); People v. Howard, 243 P.3d 972, 990–91 (Cal. 2010) (stating that the disposition of co-perpetrators' cases irrelevant); Crowder v. State, 491 S.E.2d 323, 325 (Ga. 1997) (same); State v. Brogden, 457 So. 2d 616, 626 (La. 1984) (same); Edwards v. State, 200 S.W.3d 500, 509–11 (Mo. 2006) (same); State v. Jackson, 751 N.E.2d 946, 962–63 (Ohio 2001) (holding co-perpetrator's plea agreements inadmissible); Postelle v. State, 267 P.3d 114, 141 (Okla. Crim. App. 2011) (holding sentence received by co-perpetrator irrelevant); Commonwealth v. Lesko, 15 A.3d 345, 399 (Pa. 2011) (holding that given the individualized nature of capital sentencing, the sentence of a co-perpetrator is irrelevant to defendant's culpabililty); State v. Hughes, 521 S.E.2d 500, 505 (S.C. 1999) (same); Joubert v. State, 235 S.W.3d 729, 734 (Tex. Crim. App. 2007); Walker v. Commonwealth, 486 S.E.2d 126, 134 (Va. 1997) (same). *But see* United States v. Bin Laden, 156 F. Supp. 2d 359, 369–70 (S.D.N.Y. 2001) (holding proportionality among sentence treatment of co-perpetrators appropriate for jurors to consider); State v. Roseboro, 528 S.E.2d 1, 8 (N.C. 2000) (holding jury may consider co-perpetrator's sentence as a mitigating circumstance under the "catchall" instruction).

120 In this lone instance, we will identify Judge Bennett as the dissenter inasmuch as he permitted such evidence in *United States v. Johnson*, 403 F. Supp. 2d 721 (N.D. Iowa 2005). *See* Final "Penalty Phase" Instructions, Instruction No 3—Step Two: "Mitigating" Factors, *Johnson*, 403 F. Supp. 2d 721 (N.D. Iowa June 20, 2005) (No. 01-cr-03046-MWB), ECF No. 589 ("(4) Another person, Dustin Honken, who is equally or more culpable in the murders of Greg Nicholson, Lori Duncan, and Terry DeGeus, will not be punishable by death for those murders."); Preliminary "Penalty Phase" Instructions, Instruction No. 2—Nature of Proceedings, Step Two: "Mitigating Factors," *Johnson*, 403 F. Supp. 2d 721 (N.D. Iowa May 31, 2005) (No. 01-cr-03046-MWB), ECF No. 544 (same).

121 *See* Colin Miller, *Deal or No Deal: Why Courts Should Allow Defendants to Present Evidence That They Rejected Favorable Plea Bargains*, 59 U. KAN. L. REV. 407, 455 (2011) ("[I]t is well established that defendants can impeach witnesses for the prosecution through evidence that those witnesses were offered plea bargains in exchange for their testimony.").

become more thoroughly aware through research. It would be futile to attempt to require judges to ignore such outcomes; indeed, doing so would undermine one of the main perceived benefits of judge sentencing—more uniformity across cases exactly because judges can compare outcomes. Beyond that, if the jurisdiction employs appellate proportionality review, it is incumbent upon the trial judge to search out comparable cases in order to attempt to assure that a death sentence in the given case will be deemed proportional on appeal.[122]

8. Rule P208: Particular Types of Irrelevant Evidence—Residual Doubt[123]

> Evidence that there may be residual doubt as to the defendant's guilt is inadmissible; however, defense evidence offered to contest the existence of an aggravating circumstance, or establish a mitigating circumstance, is not rendered inadmissible merely because it may also have a tendency to raise residual doubt as to the defendant's guilt.

---

122 In explaining proportionality review, one scholar as noted:

> Comparative proportionality review is the process in which a state court compares the facts and circumstances of a death sentence case with other death eligible-cases that result in either death or lesser sentence Under one method of review, known as the frequency approach, the court first evaluates the frequency with which death sentences are imposed among cases in the jurisdiction that are comparable to the review case. The court then determines whether the death sentencing frequency among the similar cases is sufficiently high to justify the death sentence before the court. The "precedent seeking" or "comparative culpability" approach is the more commonly used method of review. Under this method, the court, on the basis of the facts and criminal culpability of the death cases before it, determines whether the review case is more comparable to past cases where life sentences were imposed or to those where death was imposed. When the review case appears more comparable to life sentence cases, it is found to be comparatively excessive and the sentence is reduced to life imprisonment. When, however, the review case appears more comparable to prior death sentence cases, the death sentence is affirmed as not excessive.

David Baldus, *When Symbols Clash, Reflections on the Future of Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1586 (1996) (footnotes omitted). Most of the sixteen jurisdictions reviewed for this Article conduct proportionality review. In most of these jurisdictions it is required by statute. *See, e.g.*, ALA. CODE § 13A-5-53(b) (2006); GA. CODE ANN. § 17-10-35(c) (2014); LA. CODE CRIM. PRO. ANN. art. 905.9 (2008); MO. REV. STAT. § 565.035 (2013); N.C. GEN. STAT. § 15A-2000(D)(2) (2013); OHIO REV. CODE ANN. § 2929.05(A) (West 2006); TENN. CODE ANN. § 39-13-206(c)(1)(D) (2014); VA. CODE ANN. § 17.1-313(E) (2013); S.C. CODE ANN. REGS. § 16-3-25 (2013). By contrast, Florida conducts proportionality review by case law precedent. *See* State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973) (concluding proportionality review required by Florida Constitution).

123 CAP. PEN. PH. R. EVID. P208.

Comment: Subpart (1) of this Rule states the general rule that "residual," a.k.a "lingering," doubt evidence is inadmissible at the penalty phase. Most jurisdictions support this position,[124] although a couple permit such evidence.[125] The better position is that once guilt has been determined, further evidence attempting to cast doubt on guilt is simply confusing. These Rules take no position whether "residual or lingering doubt" is a mitigating factor that the trial judge may instruct on and allow the defense to argue.[126] This Rule simply mandates that such an argument be based on the evidence at the guilt-innocence phase, not on new evidence of innocence from the penalty phase.

---

124 *See* Oregon v. Guzek, 546 U.S. 517, 523 (2006) (holding neither Eighth nor Fourteenth Amendment accorded defendant the right to present additional alibi evidence at penalty phase); McMillan v. State, 139 So. 3d 184, 244–45 (Ala. Crim. App. 2010) (stating that residual doubt not a mitigating circumstance); State v. Dann, 207 P.3d 604, 619 (Ariz. 2009) (holding that fingerprints at murder scene did not match defendant's irrelevant as attempting to cast doubt upon guilt); Lebron v. State, 894 So. 2d 849, 855 (Fla. 2005) (holding evidence that merely seeks to relitigate guilt inadmissible at resentencing); State v. Fletcher, 555 S.E.2d 534, 545 (N.C. 2001) (holding residual doubt evidence improper); Rojem v. State, 130 P.3d 287, 299 (Okla. Crim. App. 2006) (holding evidence relating to residual doubt irrelevant); Commonwealth v. Paddy, 15 A.3d 431, 463–64 (Pa. 2011) (holding trial court did not err in prohibiting defendant's protestations of innocence during penalty phase); Williams v. State, 273 S.W.3d 200, 231–32 (Tex. Crim. App. 2008) (holding inadmissible evidence seeking to relitigate guilt); Atkins v. Commonwealth, 534 S.E.2d 312, 316 (Va. 2000) (holding defense evidence properly excluded as attempt to interject residual doubt), *rev'd on other grounds*, 536 U.S. 304 (2002).

125 *See* People v. Chism, 324 P.3d. 183, 225 (Cal. 2014) (holding that lingering doubt evidence is admissible as part of the circumstances of the offense); State v. Austin, 87 S.W.3d 447, 461–63 (Tenn. 2002) (holding evidence supporting non-guilt admissible as relating to non-statutory mitigating circumstance of residual doubt).

126 Margery Malkin Koosed, *Averting Mistaken Executions by Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt*, 21 N. ILL. U. L. REV. 41 (2001). Judge Bennett did instruct on residual doubt in both *Honken* and *Johnson*. Final "Penalty Phase" Instructions, Instruction No 3—Step Two: "Mitigating" Factors, United Sates v. Johnson, 403 F. Supp. 2d 721 (N.D. Iowa June 20, 2005) (No. 01-cr-03046-MWB), ECF No. 589 ("In addition to these 'Mitigating Factors,' you may also consider, as an additional 'Mitigating Factor,' any residual or lingering doubts that any of you have as to Angela Johnson's guilt or innocence or her role in the offenses in determining whether or not to impose a sentence of death, even though those doubts did not rise to the level of 'reasonable doubts' under the instructions given to you during the 'merits phase' of the trial."); Preliminary "Penalty Phase" Instructions, Instruction No. 2—Nature of Proceedings, Step Two: "Mitigating Factors," *Johnson*, 403 F. Supp. 2d 721 (N.D. Iowa May 31, 2005) (No. 01-cr-03046-MWB), ECF No. 544 (same); Final "Penalty Phase" Instructions to the Jury, Instruction No. 5—Step Four: "Mitigating" Factors, United States v. Honken, 381 F. Supp. 2d 936 (N.D. Iowa Oct. 21, 2004) (No. 01-cr-03047-MWB), ECF No. 524 ("In addition to these 'mitigating factors,' you may also consider, as an additional 'mitigating factor,' any residual or lingering doubts that any of you have as to Dustin Honken's guilt or innocence or his role in the offenses in determining whether to impose a sentence of life imprisonment without release or a sentence of death, even though those doubts did not rise to the level of 'reasonable doubts' under the instructions given to you during the 'merits phase' of the trial."); Preliminary "Penalty Phase" Instructions to the Jury, Instruction No. 2—Nature Of Proceedings, Step Four: "Mitigating" Factors, *Honken*, 381 F. Supp. 2d 936 (N.D. Iowa Oct. 18, 2004) (No. 01-cr-03047-MWB), ECF No. 519 (same).

The jury in most jurisdictions *does*,[127] however, have to determine whether an aggravating circumstance exists that makes the defendant death-eligible. Thus, the defendant must be allowed to present evidence to negate an aggravating circumstance, or establish a mitigating circumstance, even if that evidence might also have a tendency to contest guilt. For example, suppose defendant's evidence at the guilt/innocence phase was that he was standing lookout at the mouth of an alley while he believed his friends were merely going to demand repayment of a debt from the victim, and defendant was stunned to learn that his friends had instead robbed and murdered the victim. Suppose in the interval between the guilt/innocence phase and the penalty phase the defendant finds an additional witness to testify that the defendant merely acted as a lookout. Such evidence may suggest innocence of either variety of death-eligible murder—first-degree premeditated murder or first-degree felony murder, but the defendant should not be permitted to admit that evidence at the penalty phase to argue innocence. However, the evidence also could negate the existence of the during-the-course-of-a-robbery aggravating circumstance inasmuch as it tends to prove that the defendant did not have the necessary culpable mental state for robbery, or support a mitigating factor of relatively minor participation—and for these tendencies the defense must be allowed to present the evidence in the penalty phase.

9. Rule P209: Particular Types of Irrelevant Evidence—Opinion as to Sentence[128]

> Opinion evidence as to the proper sentence, and pleas for mercy except by the defendant, are inadmissible.

---

127 In a few jurisdictions the new sentencer will *not* be called upon to determine whether the murder is death-eligible. The codes of Texas and Virginia define the crime of "Capital Murder," which effectively makes the aggravating circumstance(s) part-and-parcel of a guilty verdict of the offense and therefore binding on the new sentencer. *See* TEX. PENAL CODE ANN. § 19.03 (West 2012) (defining nine types of capital murder); VA. CODE. ANN. § 18.2-31 (2012) (defining fifteen types of capital murder). And in Arizona, the only jurisdiction with trifurcation, the aggravating circumstance(s) found at that separate phase will be binding on the new sentencer (assuming there was no reversible error at the aggravation phase). *See* ARIZ. REV. STAT. ANN. § 13-752(K) (2012) ("At the penalty phase, if the trier of fact is a jury and the jury is unable to reach a verdict, the court shall dismiss the jury and shall impanel a new jury. The new jury shall not retry the issue of the defendant's guilt or the issue regarding any of the aggravating circumstances that the first jury found by unanimous verdict to be proved or not proved. If the new jury is unable to reach a unanimous verdict, the court shall impose a sentence of life or natural life on the defendant.").

128 CAP. PEN. PH. R. EVID. P209.

Comment: It is the province of the jury to reach its own opinion about the proper sentence. As to an opinion from a prosecution witness that the defendant should receive a death sentence, such an opinion is unconstitutional[129]—despite the fact that Oklahoma has a statute[130] and case law[131] that purport to allow it. Likewise, an opinion that the defendant should be sentenced "severely" (or some similar adverb) is inadmissible since it so clearly implies the opinion that death—the most severe sentence—is the appropriate one.

The defense will often wish to offer the opinion of the defendant's family members or friends that the defendant should not receive a death sentence. Some jurisdictions prohibit such testimony,[132] and some permit it.[133] This Rule opts to exclude such testimony as invading the province of the jury. Also, occasionally the defense will discover that a *victim's* family member is opposed to the death penalty, and will seek to have that person so testify. Such testimony is barred by all courts[134] and by this Rule.

---

129 *See* Payne v. Tennessee, 501 U.S. 808, 830 n.2 (1991) ("[T]he admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment."); United States v. Whitten, 610 F.3d 168, 192 (2d Cir. 2010) (holding admission of victim's family members' opinion about appropriate sentence violates Eighth Amendment).

130 *See* OKLA. STAT. ANN. tit. 21, § 142A-8 (West 2013) (including a "victim's opinion of a recommended sentence" as part of admissible "victim impact statement").

131 *See* Jones v. State, 201 P.3d 869, 890 (Okla. Crim. App. 2009) (holding opinion of victim impact witness's opinion that death is appropriate sentence admissible as long as it is a simple statement without amplification). On habeas review, the Tenth Circuit has repeatedly recognized that this doctrine of Oklahoma law is unconstitutional, but has just as consistently found that the admission of such opinions was not reversible error, thus allowing Oklahoma to perpetrate the same constitutional error time after time with impunity. *See* Lockett v. Trammel, 711 F.3d 1218, 1238–39 (10th Cir. 2013) (holding victim impact witness's testimony about sentence improperly admitted but not sufficiently harmful to be reversible under relaxed habeas standard of review); Lott v. Trammel, 705 F.3d 1167, 1219 (10th Cir. 2013) (same); DeRosa v. Workman, 679 F.3d 1196, 1240 (10th Cir. 2012) (same); Selsor v. Workman, 644 F.3d 984, 1025 (10th Cir. 2011) (same); Welch v. Workman, 639 F.3d 980, 1003–04 (10th Cir. 2011) (same); Welch v. Sirmons, 451 F.3d 675, 704 (10th Cir. 2006).

132 *See* Dotch v. State, 67 So. 3d 936, 996–98 (Ala. Crim. App. 2010) (holding opinions of defendant's family recommending sentence inadmissible); State v. Collings, No. SC 92720, 2014 WL 4086313, at *21 (Mo. Aug. 19, 2014) (holding that neither prosecution nor defense witnesses may give opinions about the appropriate sentence); State v. Smith, 607 S.E.2d 607, 619–20 (N.C. 2005) (holding defendant's mother's testimony was tantamount to an irrelevant statement of her feelings concerning punishment); State v. Dickerson, 716 S.E.2d 895, 906 (S.C. 2011) (stating defendant prohibited from directly eliciting family members' opinions regarding appropriate penalty).

133 *See* People v. Blacksher, 259 P.3d 370, 428 (Cal. 2011) (holding defense may elicit opinions regarding sentence from defendant's family members); State v. Manning, 885 So. 2d 1044, 1098–99 (La. 2004) (holding defendant's relatives permitted to testify whether they wanted defendant's life to be spared).

134 *See* State v. Trostle, 951 P.2d 869, 887 (Ariz. 1997) (holding requests from victim's family that defendant be spared death sentence inadmissible); People v. Sattiewhite, 328 P.3d 1, 38–39 (Cal. 2014) (holding opinions of victim's relatives opposition to death penalty inadmissible

A plea for mercy, usually proffered by a close family member of the defendant, is closely akin to an opinion that death is not the appropriate sentence, and is likewise barred. The only real difference is that a plea for mercy does not take the last step of explicitly asserting the witness's opinion that the sentence should be other than death—but the implication of the plea "I'm begging you to show mercy" is quite clearly the equivalent of an explicit opinion that the sentence should not be death. A couple of jurisdictions permit such a plea,[135] but most jurisdictions prohibit it,[136] as does this Rule.

It should be noted, however, that much of the sting of prohibiting mitigation witnesses from offering opinions about the appropriate sentence and making pleas for mercy is salved by two facts. First, as a practical matter, the very appearance of the defendant's relative or friend on the witness stand unambiguously conveys that witness's wish that the defendant not be executed. Second, Rule P504 allows mitigation witnesses to testify to the effects the defendant's execution would have on them. It is but a baby step for the jury to infer that such witnesses' opinions are that the defendant should not be sentenced to death, and are in effect pleas for mercy. One could thus argue that the prohibition of explicit opinion testimony and pleas for mercy in Rule P209 is largely

---

regarding proper punishment); State v. Bowman, 509 S.E.2d 428, 440 (N.C. 1998) (holding not mitigating evidence that murder victim's mother had an opinion that defendant should not be sentenced to death); State v. McKnight, 837 N.E.2d 315, 353 (Ohio 2005) (holding irrelevant testimony from victim's family members that defendant should receive a life sentence); Commonwealth v. Bomar, 826 A.2d 831, 851–52 (Pa. 2003) (holding testimony that victim's mother opposed death penalty inadmissible); State v. Hester, 324 S.W.3d 1, 59–60 (Tenn. 2010) (holding testimony of surviving victim of fire that she opposed death penalty inadmissible). *But see* Young v. State, 12 P.3d 20, 43 (Okla. Crim. App. 2000) (holding victim impact witness's opinion that defendant should not get death sentence admissible); Juniper v. Commonwealth, 626 S.E.2d 383, 420 (Va. 2006) (holding testimony of victim's father regarding opposition to defendant's being sentenced to death inadmissible).

135 *See* Childs v. State, 357 S.E.2d 48, 60 (Ga. 1987) (holding defendant permitted to elicit plea for mercy from mitigation witness); *Dickerson*, 716 S.E.2d at 907 (holding that plea for mercy is admissible while opinion regarding appropriate penalty is not).

136 *See Dotch*, 67 So. 3d at 996–98 (holding defendant's family's pleas for mercy inadmissible). Whatever the black-letter law regarding mitigation witnesses' sentencing opinions and pleas for mercy, from reading thousands of news articles on death penalty cases Professor McCord can report that it is very common for trial judges to permit defense mitigation witnesses to express an opinion that the defendant should not be sentenced to death, or to plead for mercy on the defendant's behalf. Appeals in such cases will never reveal that such opinions and pleas were offered because, first, the defendant had to be sentenced to death in spite of such opinions in order to need to appeal; and second, the prosecution has no need and no right on defendant's appeal to complain about the admission of such opinions and pleas. *See also* Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 518 (2000) ("[T]he prohibition [on witnesses offering sentence recommendations] is frequently being honored in the breach, with courts across the land now either expressing uncertainty over the continued existence of the prohibition or upholding admission of sentence opinion testimony on a variety of rationales.").

formalistic. But this Rule's view is that the formality that no witness should be permitted to explicitly recommend a sentence, or plead for severity or mercy, is a formality worth upholding.[137] Nothing in this Rule precludes family members or other witnesses from testifying to the relationship they hope to have with the defendant and the activities they would engage in with the defendant, for example, a child seeking parental guidance in prison, should the death penalty not be imposed.

If the defendant testifies in the penalty phase the defendant is allowed to plead for mercy, but may be cross-examined on this testimony. The Rule carves out this exception because of the "death is different" jurisprudence of the Supreme Court.[138] Because the death penalty is both "irrevocable" and the "ultimate" punishment, fundamental fairness supports this exception. "To err may be human, but death-is-different jurisprudence asks for added procedural safeguards when humans play at God" by making the ultimate moral judgment.[139] Rule P701 also permits a defendant to make a plea for mercy during allocution without being subject to cross-examination. It is a strategic decision for the defense whether the defendant should avail himself of neither of these opportunities, both, or one but not the other.

10. Rule P210: Particular Types of Irrelevant Evidence—Polygraph-Related[140]

> Polygraph-related evidence, including an offer to take an examination, a refusal to take an examination, and results of an examination, is inadmissible.

Comment: Polygraph evidence is not admissible at the guilt/innocence phase in virtually any jurisdiction because it is not sufficiently reliable and because it may overawe the jury.[141] These same reasons support its

---

137 *See* United States v. Mitchell, 502 F.3d 931, 991 (9th Cir. 2007) (holding it proper to permit witnesses to testify regarding their affection for defendant and wish for his life to be spared, but prohibiting from offering opinion on what sentence should be).

138 *See* Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM L. 37, 47 n.1 (2013) (collecting quotes for "death-is-different" from Supreme Court opinions).

139 Jeffery Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117–18 (2004).

140 CAP. PEN. PH. R. EVID. P210.

141 *See* Adam B. Schniderman, Comment, *You Can't Handle the Truth: Lies, Damned Lies, and the Exclusion of Polygraph Evidence*, 22 ALB. L.J. SCI. & TECH. 433, 433–34 (2012) ("Over the course of the past ninety years, lie detection has been routinely excluded from American courtrooms in all of its technological forms. A variety of explanations have been offered to justify this exclusion, ranging from a lack of adequate scientific underpinnings, to an inconsistency in

exclusion at the penalty phase.[142] The dissenting view is that the results of polygraph examinations, but not the offer or refusal to take a polygraph examination should be admissible in the penalty phase. This is consistent with the expansive view of admitting evidence in the penalty phase and also supported by two federal circuit opinions.[143] Admissibility of offers and refusals would generate a lot of collateral evidence in violation of Rule P205.

C. *Article III: Relevancy and Its Limits—Circumstances of the Offense*

1. Rule P301: Circumstances of the Offense Generally[144]

> All aspects of the circumstances of the offense, including the mental processes of the defendant in connection therewith, are relevant.

Comment: The Supreme Court has deemed "circumstances of the offense" one of the constitutionally mandated bases of relevance for the penalty phase, along with character and record.[145] Numerous circumstances may either aggravate[146] or mitigate[147] an offense, and this

---

published error rates, to the notion that lie detection would usurp the function of the jury as the ultimate fact finder and arbiter of credibility.").

142 *See* United States v. Fulks, 454 F.3d 410, 434–45 (4th Cir. 2006) (holding defendant had no constitutional right to present polygraph evidence); Minor v. State, 780 So. 2d 707, 785 (Ala. Crim. App. 1999) (upholding exclusion of defense-offered polygraph evidence), *rev'd on other grounds*, 780 So. 2d 796 (Ala. 2006); People v. Burgener, 62 P.3d 1, 30 (Cal. 2003) (same); State v. Robertson, 712 So. 2d 8, 35 (La. 1998) (holding polygraph evidence inadmissible); Paxton v. State, 867 P.2d 1309, 1323 (Okla. Crim. App. 1993) (holding results of polygraph testing per se inadmissible). *But see* Height v. State, 604 S.E.2d 796, 798 (Ga. 2004) (stating polygraph may be admissible in trial court's discretion if sufficiently reliable, and that defendant entitled to present such evidence in this case because sufficiently reliable).

143 *See* Paxton v. Ward, 199 F.3d 1197, 1214–16 (10th Cir. 1999) (observing that the U.S. Supreme Court decision in *United States v. Scheffer*, 523 U.S. 303 (1998), holding that a per se rule against admissibility of polygraph evidence in court martial proceedings was not unconstitutional, did not overrule the Ninth Circuit's ruling in *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996)); *Rupe*, 93 F.3d 1434 (holding polygraph evidence admissible in penalty phase of death penalty trial); *see also* Christopher Domin, Comment, *Mitigating Evidence? The Admissibility of Polygraph Results in the Penalty Phase of a Capital Trial*, 43 U.C. DAVIS L. REV. 1461 (2010).

144 CAP. PEN. PH. R. EVID. P301.

145 *See supra* notes 24–25 and accompanying text.

146 *See Should Commission?*, *supra* note 17, at 11–13 (compiling an exhaustive list of aggravating facts); *see also* Revis v. State, 101 So. 3d 247, 299 (Ala. Crim. App. 2011) (holding unsavory details of defendant's conduct during and immediately after murder admissible as part of res gestae of offense); State v. Armstrong, 189 P.3d 378, 386 (Ariz. 2008) (en banc) (holding guilt-phase testimony of cohort about planning and execution of murders admissible); People v. Eubanks, 266 P.3d 301, 330 (Cal. 2011) (finding trial court's discretion more circumscribed at penalty phase than at guilt/innocence phase in excluding evidence of circumstances of offense,

Comment will not examine them in detail—the point of this Rule is that all such evidence is relevant. The Rule emphasizes that the defendant's mental processes in connection with the crime are part-and-parcel of the relevant circumstances.[148]

While this Rule is fundamental, it seems unlikely that either party will need to resort to it often. Typically, the prosecution does not need to present evidence of the circumstances of the offense in the penalty phase, having just presented them in the guilt-innocence phase. Likewise, if the defense presented evidence at the guilt-innocence phase of the case, it will not need to re-present those facts at the penalty phase. If either party attempts to belabor facts that were proven at the guilt-innocence phase, the court can certainly curtail this effort under Rule P205 as a waste of time.

2. Rule P302: Role of a Co-Perpetrator[149]

1) If a co-perpetrator was involved in the offense, all aspects of the co-perpetrator's involvement, including the mental

---

and thus admitting crime scene reconstruction expert's testimony about the proximity of the victims not an abuse of discretion even if the evidence was arguably of marginal value); People v. D'Arcy, 226 P.3d 949, 977–78 (Cal. 2010) (holding photos of victim's charred corpse as demonstrating circumstances of offense); People v. Loker, 188 P.3d 580, 595 (Cal. 2008) (stating that evidence illustrating the precise nature of crime admissible); People v. Smith, 68 P.3d 302, 332 (Cal. 2003) (holding racial epithets during violence was properly admitted to show facts surrounding defendant's crimes); People v. Lucero, 3 P.3d 248, 265–66 (Cal. 2000) (holding method of disposing of bodies properly admitted as circumstances of offense); State v. Gross, 776 N.E.2d 1061, 1087 (Ohio 2002) (finding it proper to admit autopsy photos, eyewitness testimony about last moments of victim's life, and victim's clothing and personal belongings as relevant to circumstances of offense); Commonwealth v. Montalvo, 986 A.2d 84, 98 (Pa. 2009) (holding condition of victim's body at crime scene probative of circumstances of offense).

147 *See* Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigation Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 657–88 (2004) (for an extensive list of mitigating circumstances related to the circumstances of the offense); *see also* Rodgers v. State, 934 So. 2d 1207, 1219–20 (Fla. 2006) (holding that defendant is entitled to introduce evidence found at co-perpetrator's residence that supported defendant's theory that he was under domination of co-perpetrator).

148 *See* People v. Cornwell, 117 P.3d 622, 653–54 (Cal. 2005) (holding proper to admit evidence of defendant's strained financial circumstances as motive for robbery that resulted in murder), *cert. denied*, 546 U.S. 1216 (2006); People v. Smith, 107 P.3d 229, 239 (Cal. 2005) (holding testimony of clinical psychologist regarding motivations of sexual sadists admissible as relating to circumstances of offense, that is, the perpetrator's motive), *cert. denied*, 546 U.S. 980 (2005); State v. Tisius, 92 S.W.3d 751, 759–60 (Mo. 2002) (en banc) (holding evidence of defendant's repeated listening to violent rap song shortly before murders admissible to show defendant was psyching himself up for the murders); State v. Golphin, 533 S.E.2d 168, 233 (N.C. 2000) (upholding admission of evidence that murder was racially motivated); Fratta v. State, No. AP–76188, 2011 WL 4582498, at *22 (Tex. Crim. App. Oct. 5, 2011) (holding defendant's strange sexual preferences relevant to his state of mind).

149 CAP. PEN. PH. R. EVID. P302.

processes of the co-perpetrator in connection therewith, are relevant.

2) The court has discretion to admit evidence of a co-perpetrator's bad conduct extraneous to the offense for which the penalty phase is being held if that evidence is substantially probative regarding the respective roles of the perpetrators as to the offense for which the penalty phase is being held.

Comment: Subpart (1) is technically superfluous inasmuch as a co-perpetrator's role is covered by the general circumstances of the offense principle in Rule P301. It cannot hurt to separately emphasize, however, the importance of the role of a co-perpetrator because the respective actions of each co-perpetrator can often spell the difference between a life or death sentence.

Subpart (2) recognizes that while a co-perpetrator's bad conduct extraneous to the offense for which the penalty phase is being held is not routinely relevant, there are circumstances in which it can be probative of the respective roles of the perpetrators. Such conduct can include, but is not limited to, incidents for which the co-perpetrator was convicted. Imagine, for example, that Perpetrator A is a thirty-five-year-old with a long record of serious felonies, while Perpetrator B is a nineteen-year-old with no criminal record. The record of Perpetrator B should be admissible by prosecution in seeking a death sentence against Perpetrator A to support the inference Perpetrator A was the worse participant in the crime. Conversely, the defense for the Perpetrator B should be permitted to introduce the record of Perpetrator A to support the same inference in trying to defeat a death sentence for Perpetrator B. What little case law exists on this point is contrary to this Rule,[150] but the Rule rejects that case law.

150 *See* Jones v. State, 539 S.E.2d 154, 161 (Ga. 2000) (holding defendant not entitled to introduce co-perpetrator's murder and armed robbery convictions); State v. Roache, 595 S.E.2d 381, 428 (N.C. 2004) (holding defendant's expert's observations about co-perpetrator's behaviors ten years earlier irrelevant); *Montalvo*, 986 A.2d at 97 (holding co-perpetrator's criminal record inadmissible); State v. Huggins, 519 S.E.2d 574, 576–77 (S.C. 1999) (holding testimony that co-perpetrator had shot a person three or four years earlier over a trivial incident irrelevant).

D. *Article IV: Relevancy and Its Limits—Defendant's Character*

1. Rule P401: Definition of "Character"[151]

> "Character" means every fact that has a bearing on determination of the defendant's sentence, except the circumstances of the offense, the impact of the defendant's offense(s), and the impact of the defendant's execution on the defendant's relatives and family. Character encompasses, but is not limited to, the defendant's record of past behavior, current character, and the possibilities regarding the defendant's future behavior, as well as the influences that shaped the defendant's character.

Comment: While the Supreme Court has never comprehensively defined "character" and "record" in the context of the penalty phase, experience shows that "character" (which logically encompasses "record") is an expansive concept that includes every fact that has a bearing on the determination of the defendant's sentence, except for the "circumstances of the offense" (covered by Article III), the impact of the defendant's offense(s), and the impact of the defendant's execution on the defendant's relatives and family (covered by Article V). Character evidence encompasses the defendant's past behavior, including but not limited to criminal record or lack thereof; the defendant's character traits; and possibilities regarding defendant's future behavior—including predictions concerning whether the defendant would be dangerous in the future. But "character" also extends to the background and influences that *shaped* the defendant's character—and, indeed, some of the most powerful mitigating evidence is of this type. Thus, however unsatisfying it may be to define the key concept of "character" by stating what it is *not*, that is the only way to describe this expansive concept. All of these concepts will be fleshed out in the remaining Rules and Comments in Article IV.

2. Rule P402: Modes of Proof of Character: Reputation, Opinion, and Specific Instances of Conduct[152]

> Character may be proven by any one or more of the following modes: reputation, opinion, and specific instances of conduct.

---

151 CAP. PEN. PH. R. EVID. P401.

152 CAP. PEN. PH. R. EVID. P402.

Comment: This is merely a condensed version of Federal Rule of Evidence 405, which allows all three modes of proof when character is "an essential element of a charge, claim, or defense."[153] As a matter of constitutional law, the defendant's character is an essential element of the death sentencing decision[154]—thus, the Rule allows all three modes of proof.

3. Rule P403: Defendant's Character Automatically in Issue; Evidence Relating Thereto Relevant; All Traits Relevant[155]

> Defendant's character is automatically in issue, and all aspects of a defendant's character, both good and bad are in issue.

Comment: This Rule states in evidentiary terms the import of the Supreme Court's doctrine that the defendant's character is constitutionally relevant.[156] Supreme Court doctrine does not suggest any limitation on the relevant traits of a defendant's character to the death sentencing decision,[157] and accordingly, neither does this Rule. Nor does Supreme Court doctrine suggest that the defense needs to "open the door" on character before the prosecution can present character evidence. Thus, the Rule provides that the defendant's character is automatically in issue. The Rule thus rejects the practice in some jurisdictions that the prosecution can only respond with character evidence if the defense "opens the door."[158]

---

153 Federal Rule of Evidence 405(a) allows reputation or opinion evidence when a person's character or character trait is admissible; Federal Rule of Evidence 405(b) permits specific instances of conduct when character or a character trait is an essential element of a charge, claim, or defense. *See* FED. R. EVID. 405.

154 *See supra* notes 24–25 and accompanying text.

155 CAP. PEN. PH. R. EVID. P403.

156 *See supra* notes 24–25 and accompanying text.

157 *See* State v. Howard, 751 So. 2d 783, 814 (La. 1999) (holding defendant's character automatically in issue); State v. Tisius, 362 S.W.3d 398, 406 (Mo. 2012) (en banc) (holding defendant's character is a central issue of the penalty phase and both prosecution and defense may introduce any evidence relating to defendant's character, including details of prior convictions and conduct subsequent to crime being adjudicated); Harmon v. State, 248 P.3d 918, 940 (Okla. Crim. App. 2011) (noting penalty phase designed to provide sentencer with as much evidence as possible about defendant's character and record); State v. Owens, 552 S.E.2d 745, 760 (S.C. 2001), *overruled on other grounds by* State v. Gentry, 610 S.E.2d 494 (S.C. 2005) (holding defendant's character is automatically in issue).

158 *See* People v. Loker, 188 P.3d 580, 597 (Cal. 2008) (holding that when defendant places character in issue, prosecution may rebut with character evidence); People v. Kipp, 33 P.3d 450, 474 (Cal. 2001) (stating that character evidence under California law can only be mitigating, so prosecution cannot introduce character evidence in its case-in-chief); State v. Jalowiec, 744 N.E.2d

While no aspects of defendant's character are categorically off-limits to the prosecution under this Rule, as a practical matter, the bad aspects of character about which the prosecution commonly offers evidence are relatively limited in number, and Rules P407–P412 deal with them. There is still a role for the basic rules of probative value (P201) and countervailing considerations (P205) if the prosecution inappropriately strays into debatable character traits. For example, suppose the prosecution sought to prove the defendant's character trait of being an *inept* artist. This evidence should be excluded as either irrelevant, or as having very slight probative value that is substantially outweighed by confusion of the issues and waste of time.

By contrast, the range of character traits the defense may offer is more open-ended, encompassing anything that might persuade a jury to view the defendant more favorably. So, the defense may seek to prove the defendant's trait of being a *skilled* artist[159] because that might have a tendency to convince a juror to spare the defendant's life.

4. Rule P404: Character as Related to Defendant's Physical and Mental Conditions[160]

> Defendant's physical and mental conditions before, during, and after the crime for which the penalty phase is being held are relevant.

Comment: While it is difficult in normal parlance to consider physical and mental conditions as an aspect of "character," they are certainly an aspect of character for purposes of capital sentencing. Claims for leniency based on *physical* condition are less common, but include advanced age[161] and serious health conditions.[162] Ameliorative claims

---

163, 176–77 (Ohio 2001) (holding defendant's presentation of positive character evidence opened door to prosecution rebuttal).

159 *See* Kirchmeier, *supra* note 147, at 660 (listing "Creative (art/poetry)" as recognized mitigating evidence).

160 CAP. PEN. PH. R. EVID. P404.

161 Some statutes explicitly recognize age as potentially mitigating. *See* Kirchmeier, *supra* note 147, at 673 n.226 (quoting statutory language in many jurisdictions and noting that "statutory mitigating factors sometimes focus on 'youth' as mitigating, while others focus on the 'age' of the defendant, leaving open the possibility that old age might be mitigating," and quoting, in particular, TENN. CODE ANN. § 39-13-204(j)(7) (2014) ("[t]he youth or advanced age of the defendant at the time of the crime")). Of course, a defendant who commits murder prior to his eighteenth birthday is ineligible for a death sentence. *See* Roper v. Simmons, 543 U.S. 551, 574 (2005) (so holding).

162 *See* State v. Banks, 271 S.W.3d 90, 162 (Tenn. 2008) (noting defendant's HIV positive status as mitigating.) *But see* State v. Kayer, 984 P.2d 31, 48 (Ariz. 1999) (en banc) (holding defendant's post-murder poor physical condition not mitigating). The issue of defendant's declining physical

relating to *mental* conditions are very common, and include intellectual disability (formerly known as "mental retardation"),[163] mental illness,[164] traumatic brain injury,[165] and having been intoxicated[166] (this Rule covers intoxication *at the time of the crime*, while Rule P406 covers defendant's *history* of alcohol and/or drug abuse). Note that the defendant's physical and mental conditions are relevant whether they existed before, during, or after the capital crime—all the way up through sentencing.

5. Rule P405: Character as Reflected by Defendant's Relationships[167]

> Testimony by a witness who has personal knowledge arising from involvement with a defendant is relevant to prove:
> 1) A witness' positive feelings toward a defendant.
> 2) A defendant's positive feelings toward another person.
> 3) A witness's factual testimony about fear of a defendant.

Comment: This Rule allows testimony about some feelings of a witness, as long as the feelings have a foundation in personal knowledge from

---

health is particularly likely to be presented if the penalty phase is conducted years after the crime, either because the defendant was only belatedly identified, or because the original sentence was reversed and a new penalty phase trial is then held—the defendant's physical condition may be much deteriorated compared with the time of the crime.

163 Such evidence is so obviously admissible—and therefore presumably so commonly admitted—that there is very little appellate case law reaffirming its admissibility. *See* Commonwealth v. Sanchez, 36 A.3d 24, 64 (Pa. 2011) (holding evidence of low mental functioning is relevant mitigation even if it falls short of establishing mental retardation, which would make defendant ineligible for a death sentence).

164 Similarly, such evidence is obviously admissible and generates little appellate case law regarding its admissibility. *See* State v. Prince, 250 P.3d 1145, 1171 (Ariz. 2011) (en banc) (noting that poor mental health that does not rise to the level of statutory mitigation may nonetheless constitute non-statutory mitigation).

165 In Johnson v. United States, 860 F. Supp. 2d 663, 881–91 (N.D. Iowa 2012), Judge Bennett found ineffective assistance of counsel in a 18 U.S.C. § 2255 habeas proceeding and granted a new penalty phase trial due to ineffective assistance of counsel in determining and presenting evidence of substantial traumatic brain injury and dysfunction. *See* Laura Snodgrass & Brad Justice, *"Death is Different": Limits on the Imposition of the Death Penalty to Traumatic Brain Injuries*, 26 DEV. MENTAL HEALTH L. 81, 97 (2007) (recognizing not only that traumatic brain injury can be mitigating, but arguing that like juvenile status and "mental retardation," it should render a defendant suffering its effects ineligible to receive a death sentence).

166 *See* Phillips v. State, 65 So. 3d 971, 1041 (Ala. Crim. App. 2010) (noting trial judge had found non-statutory mitigator of intoxication); Commonwealth v. Spotz, 47 A.3d 63, 116–17 (Pa. 2012) (noting evidence of voluntary intoxication falls under the "catchall" mitigator); *see also* Kirchmeier, *supra* note 147, at 679 n.237 (noting intoxication as a possible mitigating factor, and citing statutes so recognizing). Intoxication is a frequent companion to capital murder. *See Lethal Connection*, *supra* note 17, at 6–7 (exploring empirically some of the extent of prevalence of intoxicated capital offenders).

167 CAP. PEN. PH. R. EVID. P405.

involvement with a defendant.[168] Subpart (1) recognizes that defense evidence of a witness' positive feelings toward a defendant can support an inference that the defendant has positive character traits that inspire those feelings, which could cause a juror to lean toward sparing the defendant.[169] Correlatively, Subpart (2) recognizes that a defendant's positive feelings toward another person can support an inference that the defendant possesses normal warm human emotions that may make the defendant worth sparing.[170] Note that a defendant could be a witness to offer testimony under Subpart (2), e.g., "I love my mother/wife/children etc." and a defendant certainly has "involvement" with himself to provide a foundation to do so.

Subpart (3) recognizes that almost all feelings a prosecution witness might have toward a defendant—such as hatred, disgust, "he's a monster," etc.—are irrelevant. There is, though, one fact related to a feeling that the prosecution should be allowed to prove—factual testimony that supports the inference that the witness has reason to fear the defendant, since this is relevant to possible future dangerousness.[171] This must, of course, be based on the witness's involvement with the defendant, not on the actions of the defendant the witness has merely learned about.

---

168 *See* People v. Smith, 107 P.3d 229, 248–49 (Cal. 2005) (holding error to exclude defendant's former tutor's wish that defendant not be executed, but noting that, "[a]dmissibility of course requires that the witness have a significant relationship with the defendant. Here, Janice Foster's three-year tutorial relationship with defendant qualifies").

169 *See* State v. Cañez, 42 P.3d 564, 595 (Ariz. 2002) (en banc) (holding loving family relationships are mitigating); People v. Virgil, 253 P.3d 553, 602 (Cal. 2011) (holding evidence defendant is loved by family or others admissible to show good character); Parker v. State, 643 So. 2d 1032, 1035 (Fla. 1994) (holding defendant's capacity to form loving relationships is admissible); State v. Perez, 920 N.E.2d 104, 141 (Ohio 2009) (holding defendant's loving relationship with close family member may be mitigating); State v. Cauthern, 967 S.W.2d 726, 738 (Tenn. 1998) (holding letter to defendant from his young son expressing love admissible as mitigating). However, evidence merely that defendant's family would continue to support defendant if defendant were sentenced to prison is inadmissible. *See* State v. Nicklasson, 967 S.W.2d 596, 619 (Mo. 1998) (en banc) (holding fact that defendant's relatives would visit him in prison irrelevant); State v. Smith, 607 S.E.2d 607, 620 (N.C. 2005) (holding evidence that defendant's family would support him in prison irrelevant since not probative of defendant's character).

170 *See* State v. Spears, 908 P.2d 1062, 1079 (Ariz. 2011) (holding defendant's love for and of family permissible mitigation); People v. Bennett, 199 P.3d 535, 554–55 (Cal. 2009) (holding evidence that defendant was concerned about how his family was coping with his capital murder charges admissible as indirectly evidencing his character); Barnes v. State, 496 S.E.2d 674, 687–89 (Ga. 1998) (holding error to exclude love poem defendant wrote for his wife).

171 *See* Ellington v. State, 735 S.E.2d 736, 765 (Ga. 2012) (holding prosecutor's summation characterizing defendant as someone "everyone fears" proper because future danger is a relevant penalty phase issue); Phillips v. State, 989 P.2d 1017, 1040 (Okla. Crim. App. 1999) (noting defendant's family members' testimony that they were afraid of him helped establish future dangerousness aggravator).

6. Rule P406: Character and Defendant's Background[172]

> Evidence about the defendant's background is relevant, including, but not limited to: that relating to defendant's family, medical, educational, military service, correctional, and alcohol and drug usage histories.

Comment: The Supreme Court has made it clear that the defendant's "character" encompasses influences that shaped character.[173] The Court has further made clear that admission of such evidence cannot be limited by requiring a "nexus" between such evidence and the defendant's crime.[174] The Rule lists six of the typical influences, but these are not exclusive. Modern mitigation investigations will typically generate many factors bearing upon a defendant that had a tendency to shape the defendant's character.[175] Because factors that shaped the defendant's life are the meat-and-potatoes of many mitigation presentations, the court should curtail such evidence only after serious consideration due to fairness and reversibility concerns. The court does, nonetheless, have the discretion to limit such mitigation. Two situations most often illustrate a court's permissibly exercising its discretion to curtail defense mitigation. First, the court may curtail such evidence

---

172 CAP. PEN. PH. R. EVID. P406.

173 *See* Wiggins v. Smith, 539 U.S. 510, 516–19, 526 (2003) (holding ineffective assistance of counsel for defense lawyer to cease investigating defendant's extreme childhood abuse); Williams v. Taylor, 529 U.S. 362, 398–99 (2000) (holding ineffective assistance for defense lawyer to fail to investigate records that would have detailed defendant's horrible upbringing).

174 *See* Smith v. Texas, 543 U.S. 37, 45 (2004) (holding that requiring defendant to prove such a nexus is "a test we never countenanced and now have unequivocally rejected"); Tennard v. Dretke, 542 U.S. 274, 283–87 (2004) (same).

175 For an excellent compendium of the types of mitigation that good mitigation lawyering can unearth, see Kirchmeier, *supra* note 147, at 658–79. *See* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV 1035, 1036 (2008) (explaining how defense counsel can most effectively use mitigating evidence); *see also Ex parte* Hodges, 856 So. 2d 936, 947 (Ala. 2003) (holding evidence of frequent childhood moves of defendant's family relevant); State v. Prince, 250 P.3d 1145, 1170 (Ariz. 2011) (en banc) (stating difficult or traumatic childhood mitigating); Douglas v. State, 878 So. 2d 1246, 1260 (Fla. 2004) (same); State v. Frank, 957 So. 2d 724, 737 (La. 2007) (same); State v. Perez, 920 N.E.2d 104, 141 (Ohio 2009) (same); Commonwealth v. May, 898 A.2d 559, 573–75 (Pa. 2006) (same); Goad v. State, 938 S.W.2d 363, 369–70 (Tenn. 1996) (same); *Ex parte* Jones, No. AP-75896, 2009 WL 1636511, at *3–4 (Tex. Crim. App. June 10, 2009) (holding jury must be provided with opportunity to consider defendant's evidence that he was influenced by strong external negative forces, including abandonment by his father, as well as positive evidence of defendant's intelligence, work ethic, reliability, and trustworthiness); Andrews v. Commonwealth, 699 S.E.2d 237, 276–77 (Va. 2010) (holding admissible testimony from social work professor regarding factors predicting future violence to show defendant was a product of forces beyond his control).

under Rule P205 if it is cumulative.[176] Second, the court may exclude evidence that focuses on defendant's family members if there is little or no direct connection of that evidence to the defendant.[177]

While this Rule will predominantly apply to defense mitigation showing how bad influences in the defendant's background for which the defendant was not responsible may have later contributed to the defendant's homicidal conduct, the Rule also applies to defense evidence of good influences in the defendant's past that could bode well for the defendant's future useful life in prison. Further, the Rule applies to the occasional case where the prosecution seeks to turn the tables to contend that the defendant benefited from positive influences that

176 *See* State v. Glass, 136 S.W.3d 496, 519 (Mo. 2004) (en banc) (upholding exclusion of poem written by defendant and family tree composed by defendant because cumulative of other mitigating evidence); Postelle v. State, 267 P.3d 114, 141–42 (Okla. Crim. App. 2011) (upholding exclusion of childhood videos of defendant as cumulative when same information was presented through testimony of defendant's family members); Lawlor v. Commonwealth, 738 S.E.2d 847, 883–85 (Va. 2013) (upholding exclusion of evidence of defendant's non-violent behavior in prison as cumulative because jury already was presented with that evidence through other witnesses).

177 *See* Beckworth v. State, 946 So. 2d 490, 507 (Ala. Crim. App. 2005) (holding evidence that defendant's father had sexually abused defendant's daughter irrelevant to murder of defendant's victim); Smith v. State, No. CR–97–1258, 2000 WL 1868419, at *22 (Ala. Crim. App. Dec. 22, 2000) (upholding exclusion of evidence that two of defendant's siblings attempted suicide); *In re* Champion, 322 P.3d 50, 69–70 (Cal. 2014) (holding evidence of capital defendant's half-brother's childhood life history admissible as it reflected on defendant's own contemporaneous developmental history in same family; however, evidence of defendant's mother's and uncle's life histories was irrelevant because it could only evoke sympathy for defendant's mother, not defendant); People v. McDowell, 279 P.3d 547, 578 (Cal. 2012) (noting that background of defendant's family is irrelevant unless it is connected to its effects on defendant, and thus proper to exclude evidence that defendant's grandfather beat defendant's father when no evidence offered as to how the abuse of his father affected defendant); People v. Davis, 208 P.3d 78, 139 (Cal. 2009) (upholding exclusion of evidence about two of defendant's older half-siblings who had been given up for adoption where no indication defendant had ever been aware of those half-siblings); People v. Loker, 188 P.3d 580, 610 (Cal. 2008) (upholding exclusion of defendant's half-brother's testimony regarding events that happened before defendant's birth and involving persons other than defendant's mother); People v. Holloway, 91 P.3d 164, 199 (Cal. 2004) (upholding exclusion of marginally relevant evidence concerning character of defendant's father due to potential for prejudice and distraction); State v. Nicklasson, 967 S.W.2d 596, 619 (Mo. 1998) (en banc) (holding evidence of defendant's mother's sterilization and mental instability irrelevant); Shuffield v. State, 189 S.W.3d 782, 793 (Tex. Crim. App. 2006) (holding evidence that others in defendant's family had been sexually abused irrelevant); Reynoso v. State, No. AP-74952, 2005 WL 3418293, at *1–2 (Tex. Crim. App. Dec. 14, 2005) (upholding exclusion of records of defendant's brother from a children's center where the brother had been because of problems at home). *But see Ex parte* Smith, No. 1010267, 2003 WL 1145475, at *4–5 (Ala. Crim. App. Mar. 14, 2003) (holding error to rule that defendant could not present evidence about anything that happened to anyone other than him because such ruling improperly prevented defendant from showing how his dysfunctional family may have affected his development); Williams v. State, 22 P.3d 702, 727 (Okla. Crim. App. 2001) (holding defendant's brother's prior conviction relevant in demonstrating possible family history of mental problems).

should have shaped his character in ways such that he would not have committed murder.[178]

7. Rule P407: Character as Reflected by Defendant's Remorse or Lack Thereof[179]

1) The defendant's remorse for an offense is relevant.
2) The defendant's lack of remorse for an offense is relevant, but proof thereof must not unconstitutionally impinge upon the defendant's Fifth Amendment right to remain silent.

Comment: Subpart (1) recognizes that the defendant's remorse is relevant, and, indeed, very important to the jury.[180] An out-of-court statement of remorse must comply with the hearsay rule, which means that some such statements will be barred,[181] while others will be admissible if within an exception.[182]

Subpart (2) recognizes the counterpart principle that the defendant's lack of remorse is likewise relevant.[183] Often, such lack of

178 *See* Abdool v. State, 53 So. 3d 208, 220–21 (Fla. 2010) (holding prosecution evidence, which that showed that defendant was raised in a loving, faith-based home relevant to the aggravating and mitigating circumstances).

179 CAP. PEN. PH. R. EVID. P407.

180 *See* Blume, *supra* note 175, at 1036–37 (based on twenty-five years of research about juries' death penalty decision making, three considerations are primary: perceptions of how "bad" the crime was, jurors' belief about how dangerous the defendant is, and whether the defendant showed remorse); *see also* People v. Tully, 282 P.3d 173, 264 (Cal. 2012) (stating presence of remorse is mitigating); *Prince*, 250 P.3d at 1172 (stating expression of remorse is non-statutory mitigator); Ault v. State, 53 So. 3d 175, 192–93 (Fla. 2010) (stating presence of remorse is mitigating); State v. Duke, 623 S.E.2d 11, 22 (N.C. 2005) (same); State v. Kirkland, No. 2010–0854, 2014 WL 1924813, at *21 (Ohio May 13, 2014) (holding defendant's apologies and expressions of remorse admissible mitigation); State v. Barton, 844 N.E.2d 307, 320 (Ohio 2006) (same); Commonwealth v. Fletcher, 861 A.2d 898, 917–18 (Pa. 2004) (same).

181 *See* People v. Williams, 148 P.3d 47, 70 (Cal. 2006) (holding defendant's post-arrest statement of remorse to reporter not sufficiently reliable to be admitted); Commonwealth v. May, 887 A.2d 750, 765–66 (Pa. 2005) (holding testimony about defendant's out-of-court apology to victim's daughter properly excluded as hearsay).

182 *See* State v. Northcutt, 641 S.E.2d 873, 880 (S.C. 2007) (holding letter defendant wrote to wife expressing remorse for death of infant victim admissible in rebuttal where prosecution presented evidence defendant never showed remorse); State v. Carter, 114 S.W.3d 895, 904–05 (Tenn. 2003) (holding correspondence from death row by defendant to minister relevant to show remorse); Renteria v. State, 206 S.W.3d 689, 697–98 (Tex. Crim. App. 2006) (finding error in excluding defendant's in-custody expression of remorse when offered in rebuttal of prosecution's expert's testimony that defendant would be a continuing threat based in part on lack of remorse).

183 *See* Sears v. State, 426 S.E.2d 553, 557 (Ga. 1993) (holding lack of remorse relevant to sentence); State v. Juniors, 915 So. 2d 291, 336 (La. 2005) (holding lack of remorse relevant to defendant's character); State v. Taylor, 669 S.E.2d 239, 271 (N.C. 2008) (holding although lack of remorse may not be submitted as an aggravating circumstance, prosecution may draw attention to defendant's failure to express remorse throughout capital proceeding); State v. Braxton, 531

remorse can be proven by the defendant's statements after the murder.[184] But the last phrase of the Subpart points out that once the Fifth Amendment right to remain silent has become applicable—typically after the defendant is in custody and being interrogated and thus entitled to *Miranda* warnings[185]—evidence relating to the defendant's failure to express remorse should be prohibited.[186]

8. Rule P408: Character as Reflected by Defendant's Cooperation with the Authorities or Lack Thereof[187]

1) The defendant's cooperation with the authorities in investigating or prosecuting the offense is relevant. However, defendant's offer to plead guilty is inadmissible.

S.E.2d 428, 444–45 (N.C. 2000) (holding proper for investigating officer who had observed defendant in the hours of investigation following murder to testify defendant showed no remorse); Warner v. State, 144 P.3d 838, 891 (Okla. Crim. App. 2006) (stating lack of remorse appropriate for jury consideration). *But see* Eaglin v. State, 19 So. 3d 935, 946–47 (Fla. 2009) (based on Florida's rule that prosecution may only prove statutory aggravating circumstances in its case-in-chief, lack of remorse is inadmissible because not an aggravating circumstance, but may be proven to rebut defendant's evidence of remorse or rehabilitation).

184 *See* United States v. Rivera, 405 F. Supp. 2d 662, 673 (E.D. Va. 2005) (holding admissible defendant's statements expressing delight in death of victim); People v. Enraca, 269 P.3d 543, 565 (Cal. 2012) (stating conduct or statements demonstrating lack of remorse at crime scene or while fleeing admissible). *But see* People v. Rodriguez, 319 P.3d 151, 200 (Cal. 2014) (holding evidence of lack of remorse significantly after the crime inadmissible in aggravation).

185 *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966) (holding defendant entitled to famous warnings if defendant is both in custody and being interrogated).

186 *See* United States v. Caro, 597 F.3d 608, 629–30 (4th Cir. 2010) (noting that federal courts are divided over whether using silence as evidence of lack of remorse violates the Fifth Amendment, and inclining to follow those holding it to be violative); United States v. Umana, 707 F. Supp. 2d 621, 636 (W.D.N.C. 2010) (holding Fifth Amendment limits proof of lack of remorse to affirmative words of conduct of defendant, not defendant's silence); United States v. Roman, 371 F. Supp. 2d 36, 50 (D.P.R. 2005) (holding prosecution may not urge lack of remorse as aggravator when doing so would have a substantial possibility of encroaching on defendant's right to remain silent); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 65 (2011) ("Most states provide for increased sentences for those defendants who fail to express remorse for their crimes. Federal courts likewise have routinely imposed longer sentences on those who do not express remorse." (footnotes omitted)); *id.* at 64 (These authors are not necessarily in agreement with this position, though: "Courts arguably fail to enforce the Fifth Amendment's privilege against self-incrimination at sentencing by enhancing the sentences of defendants who fail to express . . . remorse." (footnote omitted)); *see also* United States v. Montgomery, No. 2:11–cr–20044–JPM–1, 2014 WL 1347156, at *40 (W.D. Tenn. Mar. 19, 2014) (holding that defendant's mere silence cannot be probative of lack of remorse); People v. Tully, 282 P.3d 173, 265 (Cal. 2012) (holding defendant's failure to show remorse at crime scene admissible); People v. Bonilla, 160 P.3d 84, 243–44 (Cal. 2007) (stating prosecution allowed to focus on lack of remorse as a circumstance of the offense by conduct or statements at the crime scene indicating lack of remorse, and by rebutting mitigating circumstance of remorse, but may not otherwise suggest lack of remorse as an aggravating factor).

187 CAP. PEN. PH. R. EVID. P408.

2) The defendant's efforts to interfere with the authorities in investigating or prosecuting the offense are relevant, but proof thereof must not unconstitutionally impinge upon the defendant's Fifth Amendment right to remain silent.

Comment: Subpart (1) acknowledges that defendant's cooperation with the authorities constitutes relevant mitigating evidence,[188] but that evidence of defendant's offer to plead guilty is inadmissible in accordance with the normal rule of evidence.[189]

Subpart (2) recognizes the counterpart principle that the defendant's efforts to hinder the authorities in investigating or prosecuting the offense constitutes relevant aggravating evidence. As to efforts to hinder investigation that occur relatively contemporaneously with the murder, such as dumping the body, eliminating or intimidating witnesses in conjunction with the murder, making statements to the police in the immediate aftermath of the murder to attempt to send the investigation away from the defendant, this Rule will be duplicative of Rule P301 because the defendant's efforts constitute "circumstances of the offense." After the defendant is in custody for the murder, this Rule will be duplicative of Rule P412 as to the efforts of the defendant while incarcerated to influence the case, such as by attempting to make arrangements to have witnesses killed or intimidated. Thus, this Rule covers the unusual case where a defendant has made efforts to hinder the investigation significantly after the murder, but before the defendant's being taken into custody for it.

The last phrase of Subpart (2) points out that the defendant's simply remaining silent cannot be used to prove hindrance in light of the Fifth Amendment privilege against self-incrimination.[190]

---

188 *See* State v. Kirkland, No. 2010–0854, 2014 WL 1924813, at *21 (Ohio May 13, 2014) (holding defendant's confession and cooperation with law enforcement are admissible mitigation); State v. Hutton, 797 N.E.2d 948, 962–63 (Ohio 2003) (holding defendant's voluntary return from out of state and voluntary surrender are mitigating).

189 *See* FED. R. EVID. 410(a); *see also* United States v. Fell, 531 F.3d 197, 217 (2d Cir. 2008) (holding proper to exclude opinions of prosecutor set forth in draft plea agreement); People v. Cook, 157 P.3d 950, 969 (Cal. 2007) (holding prosecution plea offer of life without parole properly excluded); Bryant v. State, 708 S.E.2d 362, 384 (Ga. 2011) (holding that defendant was never offered a plea bargain to a life sentence inadmissible); State v. Langley, 711 So. 2d 651, 658–59 (La. 1998) (holding proper to prohibit defendant from proving willingness to plead guilty); State v. Nicklasson, 967 S.W.2d 596, 621 (Mo. 1998) (en banc) (same); State v. Bethel, 854 N.E.2d 150, 185 (Ohio 2006) (holding prosecution's offer of plea bargain not mitigating); State v. Dixon, 805 N.E.2d 1042, 1057 (Ohio 2004) (holding defendant's plea offer irrelevant); Prystash v. State, 3 S.W.3d 522, 527–28 (Tex. Crim. App. 1999) (en banc) (holding prosecutor's plea offer properly excluded).

190 This is identical to the rationale for excluding evidence of defendant's silence after receiving warnings under Rule P407(2). *See supra* notes 185–86 and accompanying text.

9. Rule P409: Character as Reflected by Defendant's Convictions and Juvenile Adjudications or Lack Thereof[191]

1) All convictions of the defendant, both felony and misdemeanor, rendered prior to the beginning of the penalty phase shall be admitted upon request of either party. So long as a guilty verdict has been rendered by a trier-of-fact, none of the following shall affect the conviction's admissibility: that the verdict has yet to be formally entered due to post-trial litigation; that the verdict is on appeal; that the defendant was a juvenile if the conviction was in adult court; or that the conviction was effected by executive action such as an expungement.
2) An adjudication against the defendant in a juvenile proceeding is relevant, but the court has discretion to exclude it under Rule P205.
3) A defendant who testifies may be cross-examined about any conviction, and any juvenile adjudication that is admissible under Subpart (2) hereof.
4) A conviction or juvenile adjudication may be proven by public record, or by other evidence, or both.
5) The facts underlying a conviction or juvenile adjudication may be proven by either party only to the extent necessary to allow the trier-of-fact to understand the import of the conviction for purposes of the penalty phase.
6) If the prosecution is not aware of any convictions and/or any juvenile adjudications of the defendant, other than those in the case for which the penalty phase is being held, the prosecution must so stipulate.
7) Within 180 days before the beginning of the penalty phase, the prosecution shall notify the court and the defense of the criminal convictions and juvenile adjudications it will offer.

Comment: In accordance with a majority of jurisdictions, Subpart (1) of the Rule sets forth the broadest possible rule for the admission of prior convictions, providing that they are all admissible, and that the court has no discretion to exclude them.[192] Broad admission is necessary to ensure a full exploration of the defendant's character. Note that while typically it will be the prosecution that wants to admit a prior

191 CAP. PEN. PH. R. EVID. P409.

192 *But see* People v. Streeter, 278 P.3d 754, 802 (Cal. 2012) (holding misdemeanor convictions inadmissible).

conviction, the Rule provides for equal admissibility when offered by the defense since if a conviction is isolated and minor, it can support the claim of a mitigating circumstance of lack of a significant criminal history.

Subpart (1) lists several things that do not affect the admissibility of a conviction: that the verdict has yet to be formally entered due to post-trial litigation;[193] that the verdict is on appeal;[194] that the defendant was a juvenile if the conviction was in adult court;[195] or that the conviction was effected by executive action such as expungement.[196] It should be noted, however, that the prosecution runs a risk by admitting a conviction that is still the subject of litigation—if that conviction is reversed after a death sentence has been imposed in partial reliance on it, the death sentence will likely have to be reversed as well.[197]

Subpart (2) states the majority rule that adjudications in juvenile proceedings are admissible.[198] It distinguishes their treatment from

---

193 *E.g.*, United States v. Basciano, 763 F. Supp. 2d 303, 350 (E.D.N.Y. 2011) (noting that a conviction need not be final in order to be considered as a prior conviction for purposes of the penalty phase).

194 *E.g.*, Commonwealth v. Paddy, 15 A.3d 431, 457 (Pa. 2011) (holding that a conviction is still useable at the penalty phase even if it is still being challenged at the post-verdict or appellate stage).

195 *See* Woodward v. State, 123 So. 3d 989, 1048 (Ala. Crim. App. 2011) (holding conviction relevant when juvenile convicted as an adult); People v. Williams, 233 P.3d 1000, 1042–43 (Cal. 2010) (same); State v. Evans, 586 N.E.2d 1042, 1053 (Ohio 1992) (same).

196 *See* People v. Pride, 833 P.2d 643, 680 (Cal. 1992) (en banc) (holding expunged juvenile adjudication nonetheless admissible in aggravation).

197 *See* Johnson v. Mississippi, 486 U.S. 578, 586 (1988) (holding that reliance by a capital jury on a conviction later reversed requires a new penalty phase); *see also* United States v. Rodriguez, 389 F. Supp. 2d 1135, 1140 (D.N.D. 2005) (holding a prior overturned conviction cannot be used as an aggravating circumstance); State v. Bowman, 337 S.W.3d 679, 691–92 (Mo. 2011) (en banc) (holding that jury's consideration of two prior murder convictions that were reversed prior to trial warranted reversal for a new penalty hearing, although the underlying conduct without apprising the jury of the additional fact of conviction might well have been admissible as prior unadjudicated conduct).

198 United States v. Stitt, 760 F. Supp. 2d 570, 585–86 (E.D. Va. 2010) (holding juvenile adjudications are not automatically excluded as non-statutory aggravators); Knight v. State, 907 So. 2d 470, 486–87 (Ala. Crim. App. 2004) (holding juvenile record admissible to diminish weight to be accorded to alleged mitigator of lack of history of prior significant criminal activity); State v. Leeper, 565 S.E.2d 1, 5 (N.C. 2002) (holding prior juvenile adjudication for armed robbery admissible); Coddington v. State, 254 P.3d 684, 707 (Okla. Crim. App. 2011) (holding juvenile offenses can support continuing threat aggravator); Commonwealth v. Miller, 746 A.2d 592, 604 (Pa. 2000) (holding juvenile adjudication can support aggravator of significant history of felony convictions); State v. Nesbit, 978 S.W.2d 872, 895 (Tenn. 1998) (holding that defendant had a juvenile record was relevant); Peterson v. Commonwealth, 302 S.E.2d 520, 528 (Va. 1983) (holding juvenile history relevant). *But see* Henyard v. State, 689 So. 2d 239, 251–52 (Fla. 1996) (holding juvenile adjudication is not a "conviction" and cannot be admitted as such—and not admissible otherwise because Florida does not permit evidence of non-statutory aggravators); State v. Howard, 751 So. 2d 783, 807 (La. 1999) (holding reliance on juvenile adjudication erroneous). *See generally* Joseph B. Sanborn Jr., *Striking out on the First Pitch in Criminal Court*, 1 BARRY L. REV. 7, 31–34 (2000) (performing a survey of the treatment of admissibility of juvenile

convictions in Subpart (1), however: convictions are automatically admissible, but a juvenile adjudication may be excluded if its probative value is substantially outweighed by countervailing considerations under Rule P205.[199] There are plausible arguments for entirely excluding juvenile adjudications,[200] but such adjudications do have probative value, and the discretion of the court to exclude under Rule P205 is sufficient to prevent unfair prejudice.

Federal Rule of Evidence 609 places some limits on cross-examination of a testifying defendant regarding prior convictions and juvenile adjudications. However, Subpart (3) of Rule P409 abolishes all such limits and automatically allows cross-examination of a testifying defendant about any conviction, and any juvenile adjudication that is admissible. Given that these convictions and juvenile adjudications will be admitted in the prosecution's case-in-chief in aggravation under Subparts (1) and (2) of Rule P409, it would make no sense to constrain cross-examination about them if the defendant chooses to testify.

Subpart (4) provides for the typical form of proof of a conviction or juvenile adjudication by public record. It also provides the option of proof by other evidence, which typically would come from witnesses to the prior crime. This option is necessary to accommodate Subpart (5) of the Rule.

Subpart (5) recognizes that sometimes the simple paper record of conviction will be insufficient to provide as much probative value concerning the conviction as a party is entitled to. For the prosecution the underlying facts may be probative of the severity of the crime in a way that the paper record cannot reflect.[201] Conversely for the defense,

---

adjudications at the penalty phase as of 2000, and finding that in the sixteen jurisdictions studied for purposes of this Article, only in Florida are such adjudications inadmissible, although in a few jurisdictions they may not be admissible in the prosecution's case-in-chief, but only in rebuttal to defense's asserted lack of prior significant criminal history).

199 *See Stitt*, 760 F. Supp. 2d at 586 (holding some of juvenile records inadmissible as unfairly prejudicial due to remoteness in time and lack of use of violence); United States v. Brown, No. 3:06-cr-14-01-RLY/WGH, 2008 WL 4965152, at *6 (S.D. Ind. Nov. 18, 2008) (holding conviction for criminal recklessness inadmissible due to remoteness in time).

200 *See* Sanborn Jr., *supra* note 198 (surveying jurisdictions on admissibility of juvenile adjudications in capital penalty phase and arguing against juvenile adjudications automatically being admissible to enhance later adult sentence); Andrew Sokol, Comments, *Juvenile Adjudications as Elevating Factors in Subsequent Adult Sentencing and the Structural Role of the Jury*, 13 U. PA. J. CONST. L. 791, 814 (2011) (urging that a rule be propounded that juvenile adjudications cannot be permitted to enhance adult sentences).

201 *See* Banks v. State, 46 So. 3d 989, 998 (Fla. 2010) (holding video of defendant committing robbery that resulted in prior conviction admissible); Franklin v. State, 965 So. 2d 79, 95–96 (Fla. 2007) (holding state permitted to refuse defendant's offer to stipulate to aggravating factor of prior violent felony convictions and present details of prior crimes); State v. McFadden, 369 S.W.3d 727, 745 (Mo. 2012) (en banc) (noting that not just existence of prior convictions, but also the facts and circumstances surrounding them, are admissible); Sanchez v. State, 223 P.3d 980, 1003 (Okla. Crim. App. 2009) (stating prosecution may prove continuing threat aggravator by

the underlying facts may be probative that the crime was not as bad as the paper record might indicate. The parties must be given leeway to prove the facts necessary to allow the trier-of-fact to understand the import of the conviction or juvenile adjudication for the purposes of the penalty phase decision. But the court must allow only the minimum amount of evidence necessary to make the point lest the penalty phase be sidetracked into re-litigation of the facts of the prior crime.[202] No more specific rule can be devised—the wise exercise of the court's discretion is the only way to keep the penalty phase from devolving into an inappropriate focus on collateral matters.

Subpart (6) recognizes that the prosecution has, by far, the better access to the defendant's criminal history so that if the prosecution cannot find that the defendant has any criminal history, it should be required to save the court and the defense time and effort by stipulating to that fact.

Subpart (7) requires the prosecution to give significant advance notice of the convictions and juvenile adjudications that it intends to present in order to give the defense sufficient time to prepare to meet them.

10. Rule P410: Character as Reflected by Defendant's Prior Conduct of a Criminal Nature for Which Defendant Has Not Been Convicted[203]

> 1) Defendant's prior conduct of a criminal nature that constituted an offense, but for which no conviction was rendered, is relevant unless the defendant was acquitted of the offense. The remoteness in time of such conduct, including expiration of the statute of limitations, shall not disqualify it from admissibility, although remoteness is a

paper records of prior convictions, or by evidence showing details thereof, or both); Commonwealth v. Flor, 998 A.2d 606, 623 (Pa. 2010) (holding specific and descriptive evidence of facts underlying prior convictions admissible, and trial court not required to limit evidence to sterile paper record); State v. Bennett, 632 S.E.2d 281, 286–87 (S.C. 2006) (holding hospital photos of victim of defendant's prior conviction admissible); Winston v. Commonwealth, 604 S.E.2d 21, 51–52 (Va. 2004) (holding proper to admit evidence of circumstances of prior offense in addition to paper record of conviction because jury may obtain inaccurate or incomplete impression of defendant's temperament and disposition from mere record). *But see* Black v. State, 21 P.3d 1047, 1076 (Okla. Crim. App. 2001) (holding defendant may stipulate that prior conviction involved threat and violence and prevent prosecution from presenting details of offense).

202 *See* United States v. Basciano, 763 F. Supp. 2d 303, 346 (E.D.N.Y. 2011) (holding full re-litigation of prior convictions not appropriate); *Banks*, 46 So. 3d at 998 (noting that details of prior conviction should not be emphasized such that that offense becomes a feature of the penalty phase).

203 CAP. PEN. PH. R. EVID. P410.

factor the court may consider under Rule P205. Also, under Rule P205 the court may consider the fact that the defendant was a juvenile at the time of the conduct.

2) Before such conduct may be presented to the jury, the court must be satisfied via an offer of proof that the prosecution will be able to present evidence that would justify a reasonable juror in finding by a preponderance of the evidence that the defendant committed such conduct.

Comment: Most jurisdictions permit evidence of the defendant's prior conduct of a criminal nature for which no conviction was rendered, often referred to as "unadjudicated crimes."[204] Since the penalty phase should allow all aspects of the defendant's character to be considered, the defendant's bad acts are relevant whether or not they resulted in convictions. Some commentators have advocated that proof of unadjudicated crimes should not be permitted,[205] but this position should not prevail in light of the importance of wide-open consideration of the defendant's character. However, since such evidence will often be weighty, and has the potential to cause a mistrial if the prosecution does not present sufficient proof of such conduct to justify its submission to the jury, Subpart (2) requires a prosecutorial offer of proof. The preponderance standard is appropriate because it is the traditional burden as to preliminary questions of fact.[206]

The Rule precludes evidence of an alleged crime that was adjudicated in the defendant's favor via an acquittal in a prior proceeding. If the jurisdiction requires the penalty phase jury to find the unadjudicated crime beyond a reasonable doubt[207]—an issue that is beyond the scope of these Rules since it does not involve admissibility—then logically a prior acquittal should have preclusive effect. If the

---

204 *See* People v. Avila, 327 P.3d 821, 839 (Cal. 2014) (holding that prior unadjudicated criminal conduct is proper aggravation); People v. Nelson, 246 P.3d 301, 318 (Cal. 2011) (holding circumstances of uncharged violent criminal conduct admissible); People v. Collins, 232 P.3d 32, 69 (Cal. 2010) (holding proper focus regarding prior violent crimes is on facts, not on labels assigned to them).

205 *See* Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1251 (1993) (arguing admission of unadjudicated crimes violated the Eighth Amendment); Anne-Marie von Aschwege, Comment, *In the Prosecutor We Trust? A Case Against Permitting Evidence of Unadjudicated Criminal Conduct into the Sentencing Phase of Capital Trials*, 26 ST. LOUIS U. PUB. L. REV. 157, 159 (2007) (stating five reasons such evidence should not be admitted).

206 *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 592 n.10 (1993) (noting that the preponderance standard applies to whether evidence is admissible under FED. R. EVID. 104(a)).

207 *See* People v. Benavides, 105 P.3d 1099, 1127 (Cal. 2005) (holding jury must be instructed that it may consider the unadjudicated crime as aggravation only if it finds defendant's commission of crime proven beyond a reasonable doubt).

jurisdiction does not require the penalty phase trier-of-fact to find the unadjudicated crime beyond a reasonable doubt, there is a cogent argument in favor of permitting such evidence because the jury could believe the defendant committed the conduct by a preponderance of the evidence despite the fact that a prior factfinder did not find proof beyond a reasonable doubt.[208] While it has been suggested that double jeopardy principles preclude the use of prior acquitted conduct, this seems doubtful.[209] Still, this Rule opts for not permitting the use of prior acquitted conduct to keep things simple for the jury. If the prosecution were permitted to use such evidence, then the defense would have a right to prove that the defendant was acquitted of the conduct, which would then require the court to issue a dense technical explanation about different standards of proof. It is better for the jury to focus as clearly as possible on the life/death decision rather than on such intricacies.

The Rule further states the common sense principle that the remoteness in time of unadjudicated crimes does not disqualify them from admission, but is a factor for probative value versus unfair prejudice analysis under Rule P205. The Rule further continues the treatment of juvenile conduct as relevant, but subject to exclusion if its probative value is substantially outweighed by countervailing considerations.[210]

---

208 *See* United States v. Watt, 519 U.S. 148, 149 (1997) (holding in a non-capital case that prior acquitted conduct could be considered by the sentencing judge as long as it was established by a preponderance of the evidence). There is no compelling reason to believe the Court would hold differently as to capital sentencing. *But see* Bullington v. Missouri, 451 U.S. 430, 445–46 (1981) (holding that a jury decision against imposing a death sentence in an earlier penalty phase constituted an "acquittal" of the death sentence and barred a new penalty phase under the Double Jeopardy clause). But an acquittal of a separate offense would not seem to implicate the Double Jeopardy protection provided by *Bullington*.

209 *See* United States v. Stitt, 760 F. Supp. 2d 570, 584 (E.D. Va. 2010) (holding that prior acquitted conduct cannot be used by the prosecution at the penalty phase to establish an aggravating circumstance because of Double Jeopardy principles (citing Delap v. Dugger, 890 F.2d 285, 317 (11th Cir. 1989))). *But see, e.g.*, State v. Williams, 686 S.E.2d 493, 507–08 (N.C. 2009) (holding even though the defendant had been acquitted of a robbery, the underlying facts could still be proven to show that he possessed the fruits thereof that linked him to both the robbery victim and the murder victim).

210 California disallows admission of the fact of the juvenile adjudication on the reasoning that a juvenile adjudication is not a "conviction," but permits the underlying conduct to be admitted as an unadjudicated bad act. *E.g.*, People v. Roldan, 110 P.3d 289, 350 (2005) (noting that although the fact of a juvenile adjudication cannot be used as a prior conviction, evidence of the underlying violent criminal act may be admitted as an unadjudicated bad act); *see also* People v. McKinnon, 259 P.3d 1186, 1253 (Cal. 2011) (holding jury may consider violent misconduct as a juvenile); People v. Lee, 248 P.3d 651, 675 (Cal. 2011) (holding admission of juvenile bad acts did not violate Eighth Amendment); *cf.* Commonwealth v. Moore, 937 A.2d 1062, 1068 (Pa. 2007) (holding juvenile adjudication can support aggravator of significant history of felony convictions).

For an example of when a juvenile adjudication was held to be unfairly prejudicial, see United States v. Brown, No. 3:06-cr-14-01-RLY/WGH, 2008 WL 4965152, at *6 (S.D. Ind. Nov.

11. Rule P411: Character as Reflected by Defendant's Non-Criminal Bad Conduct, Thoughts, and Associations[211]

1) A defendant's bad conduct that could not have constituted a crime is relevant.
2) A defendant's expressed bad thoughts that could not have constituted a crime are relevant.
3) A defendant's association with a blameworthy group that could not have constituted a crime may be relevant; however, proof thereof must not unconstitutionally infringe upon defendant's First Amendment freedoms. In particular as to evidence of membership in a criminal gang, to be admissible it must be probative of some relevant fact beyond simply that the defendant was a member.
4) Under Rule P205 the court may consider the fact that the defendant was a juvenile at the time of the conduct, thoughts, or associations.

Comment: Subparts (1) and (2) continue the Rules' preference for wide-ranging exploration of the defendant's character. Non-offense conduct and expressed bad thoughts can be probative of a defendant's bad character—after all, the criminal law merely sets a floor on conduct, and many non-criminal behaviors are nonetheless indicative of bad character.[212] Of course, the defense is permitted to offer evidence of the

18, 2008) (holding juvenile adjudication for criminal recklessness over ten years old would be excluded as unfairly prejudicial).

211 CAP. PEN. PH. R. EVID. P411.

212 *See* United States v. LeCroy, 441 F.3d 914, 930 (11th Cir. 2006) (upholding admission of defendant's "hit list" of persons he wanted to kill, including mother of statutory rape victim and law enforcement personnel); People v. Kipp, 33 P.3d 450, 474 (Cal. 2001) (holding that defendant's value system with a favorable view of Satan was relevant to claimed feelings of remorse); Bryant v. State, 708 S.E.2d 362, 385 (Ga. 2011) (holding defendant's tattoos that were defiant of correctional officers were admissible); Riley v. State, 604 S.E.2d 488, 499 (Ga. 2004) (holding that defendant's letter to his wife demanding that she engage in three-way sex with him and another woman was admissible); McPherson v. State, 553 S.E.2d 569, 577 (Ga. 2001) (holding that defendant's repeated refusals to complete drug addiction treatment was admissible); State v. Holmes, 5 So. 3d 42, 92 (La. 2008) (finding relevant that defendant subjected her nine-year-old nephew to the horrors at the crime scene); State v. Bourque, 699 So. 2d 1, 10–11 (La. 1997) (holding defendant's derogatory language toward the victim and her mother admissible); State v. Six, 805 S.W.2d 159, 166 (Mo. 1991) (en banc) (upholding admission of evidence of defendant's bumper sticker that read, "I'm the person your mother warned you about"); State v. Davis, 539 S.E.2d 243, 256 (N.C. 2000) (holding admissible that defendant fought with his girlfriend at work, and submitted high school homework assignments that showed knowledge of drugs); Welch v. State, 968 P.2d 1231, 1250 (Okla. Crim. App. 1998) (holding admissible testimony by a jailer that defendant enjoyed watching violent movies in jail and was excited by them); Commonwealth v. Bond, 985 A.2d 810, 828–29 (Pa. 2009) (holding admissible defendant's spiteful statement at the end of the guilt phase to one of the victim's family members); Davis v. State, 329 S.W.3d 798, 820–

defendant's good conduct and expressed good thoughts under other Rules.[213]

Subpart (3) recognizes that the defendant's association with a blameworthy group—most commonly a criminal gang—can likewise be probative of bad character.[214] The last two sentences of the Subpart accommodate the principle of *Dawson v. Delaware*[215] that mere proof of the defendant's membership in a gang, without additional proof regarding the characteristics of the gang and the roles of members, violates a defendant's First Amendment freedom of association.[216] The prosecution will often be able to comply with *Dawson* by introducing evidence that the gang engages in violent crime, and that members typically participate in its commission.[217] This evidence may also be relevant to the defendant's future dangerousness.[218]

Subpart (4) continues the Rules' philosophy that juvenile conduct is relevant, but may be excluded if its probative value is substantially outweighed by countervailing considerations.

---

21 (Tex. Crim. App. 2010) (holding defendant's jokes told to his brother during a recorded call while incarcerated probative of future dangerousness); Conner v. State, 67 S.W.3d 192, 201 (Tex. Crim. App. 2001) (noting that defendant's tattoos, like defendant's drawings, can reflect character); Corwin v. State, 870 S.W.2d 23, 35 (Tex. Crim. App. 1993) (en banc) (holding admissible defendant's drawing of monster holding a bloody axe and woman's scalp). *But see* United States v. Grande, 353 F. Supp. 2d 623, 635 (E.D. Va. 2005) (holding it irrelevant that in high school defendant was suspended and expelled); People v. Lancaster, 158 P.3d 157, 188 (Cal. 2007) (holding that possession of a handcuff key in jail was not admissible); State v. Robinson, 743 So. 2d 194, 194 (La. 1999) (holding the evidence of defendant's sociopathic homicidal fantasies were irrelevant because not concerned with the charged crime).

213 *See infra* CAP. PEN. PH. R. EVID. P403–P409.

214 *See* United States v. Wilson, 493 F. Supp. 2d 491, 501–02 (E.D.N.Y. 2007) (holding evidence of defendant's conduct as a gang member admissible); Wilson v. State, 525 S.E.2d 339, 344 (Ga. 1999) (holding evidence of defendant's involvement with a gang as the chief enforcer and of the duty of members to commit violent acts was probative of defendant's continuing threat to society, and did not violate his First Amendment rights); State v. Cooks, 720 So. 2d 637, 649–51 (La. 1998) (holding that defendant's gang affiliation was relevant to future dangerousness); Moreno v. State, 1 S.W.3d 846, 861 (Tex. Ct. App. 1999) (holding defendant's gang membership is relevant character evidence). *But see Grande*, 353 F. Supp. 2d at 640 (holding that non-statutory aggravator of defendant's membership in a criminal street gang would not assist the jury).

215 503 U.S. 159 (1992).

216 *Id.* at 165–67.

217 People v. Monterroso, 101 P.3d 956, 978 (Cal. 2004) (holding that gang expert's testimony about defendant's "almost racist" tattoos was admissible to show motive); Harris v. State, No. AP–76810, 2014 WL 2155395, at *15–16 (Tex. Crim. App. May 21, 2014) (holding proper to admit testimony of police gang expert that defendant's tattoos were gang-affiliated, and the tattoos' meanings); Broadnax v. State, No. AP–76207, 2011 WL 6225399, at *15 (Tex. Crim. App. Dec. 14, 2011) (holding gang unit detective's testimony about the gang's general activities and the character and reputation of the gang was relevant to defendant's character); Conner v. State, 67 S.W.3d 192, 201 (Tex. Crim. App. 2001) (holding that gang expert could testify to the significance of defendant's gang-related tattoos).

218 *Dawson*, 503 U.S. at 166.

12. Rule P412: Character as It Relates to Defendant's Possible Future Dangerousness or Lack Thereof[219]

1) Argument about the degree of defendant's possible future dangerousness admitted pursuant to subparts (2)–(4) of this Rule is limited to the context of the jurisdiction's most secure prison or prisons.
2) Evidence of specific conditions under which the defendant would be confined within the jurisdiction's most secure prison or prisons, and evidence of the likelihood of defendant's violent behavior under these conditions, is relevant.
3) Specific instances of defendant's conduct while in custody that are relevant to the degree of defendant's possible future dangerousness are admissible in accordance with other Rules in Part IV hereof. The court shall have no discretion under Rule P205, however, to exclude relevant specific instances of defendant's conduct while in custody.
4) Lay and expert opinion about the degree of the defendant's possible future dangerousness is relevant.

Comment: This Rule proceeds from the empirically proven premise that the trier of fact is concerned about the defendant's future dangerousness in every case, whether or not the jurisdiction's law makes specific provision for consideration of that issue.[220] Thus, the Rule rejects the idea that future dangerousness is relevant only if one of the parties "opens the door" on the issue.

Subpart (1) departs from the Rules' focus on admissibility to propound a crucial rule of argument that frames the context for the admission of evidence of future dangerousness. The Rule adopts the minority position that the only realistic context in which the jury should be allowed to assess the possibility of the defendant's future dangerousness is prison.[221] It is logically insupportable to allow, as some

---

219 CAP. PEN. PH. R. EVID. P412.

220 *See* Blume, *supra* note 175, at 1037 (based on twenty-five years of research about juries' death penalty decision making, three considerations are primary: perceptions of how "bad" the crime was, jurors' belief about how dangerous the defendant is, and whether the defendant showed remorse). Oregon, Texas, and Virginia require the jury to make a finding of future dangerousness/continuing threat in order to render a death verdict; Oklahoma has continuing threat among its list of aggravating circumstance. In other jurisdictions future dangerousness is more generally relevant to the jury's life/death decision. *See supra* note 180.

221 *See* United States v. Montgomery, No. 2:11–cr–20044–JPM–1, 2014 WL 1347156, at *33–34 (W.D. Tenn. Mar. 19 2014) (implying that admissible evidence of defendant's conduct in non-prison setting to establish future dangerousness in prison setting—and only in the prison setting);

jurisdictions do, a jury thought-experiment about whether the defendant would be dangerous in society at large.[222] In every jurisdiction life-without-parole is an option[223] so that the jury can assure that such a defendant will never again live in society at large unless the defendant escapes, or his sentence is commuted, both of which possibilities are so vanishingly small as to warrant ignoring them.[224] Further, the Rule limits the context not just to prison, but to the jurisdiction's most secure prison or prisons on the almost certainly true assumption that a capital murderer will spend the rest of his life in such a prison.[225]

Subpart (2) permits specific evidence concerning the security conditions the defendant will experience. The prosecution may wish to offer such evidence to show that the defendant could commit violent acts despite tight security, while the defendant may wish to offer such evidence to show that the security is so tight that opportunities for violence are minimal.[226] In permitting such evidence, this Subpart adopts the minority rule—most jurisdictions do not permit testimony

---

United States v. Basciano, 763 F. Supp. 2d 303, 352 (E.D.N.Y. 2011) (holding non-statutory aggravator of future dangerousness would be considered in the context of life in a maximum security prison).

222 *See* Coble v. State, 330 S.W.3d 253, 268–69 (Tex. Crim. App. 2010) (holding focus of continuing threat inquiry is on defendant's character for violence, not merely the kind of institutional restraints under which defendant would operate in prison, and thus the issue is whether in or out of prison defendant could be violent without regard to how long defendant might serve in prison); Prieto v. Commonwealth, 721 S.E.2d 484, 502 (Va. 2012) (holding continuing threat refers not to the prison population but to society as a whole).

223 The last jurisdiction to enact life without parole as an alternative to the death penalty was Texas in 2005. From 1993 until the change, Texas had the so-called "hard 40" alternative sentence; that is, life with possibility of parole in forty years. *See* TEX. PENAL CODE ANN. § 12.31(a) (West 2003 & Supp. 2010); *see, e.g.*, *As of Today, It's the* Law, DALLAS MORNING NEWS, Sept. 1, 2005, at 6A ("Laws taking effect today: Life without parole—Jurors can now choose between the death penalty and life without parole in sentencing capital murderers. Life with the possibility of parole is no longer an option."); Kelley Shannon, *Life Without Parole Among New Laws Taking Effect Sept. 1*, ASSOCIATED PRESS, Aug. 27, 2005, http://www.mrt.com/import/article_591f6561-266e-56fb-8efd-e2f89098b276.html?TNNoMobile ("Until now, jurors in Texas capital murder cases had two sentencing options: execution by lethal injection or life in prison with the possibility of parole after 40 years. The new law takes away any chance of parole."); *see also* Scott Phillips, *Legal Disparities in the Capital of Capital Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 717, 732 n.55 (2009) (noting that before 1993 the rule was "hard 35").

224 Prison security has reached the point that escape of any inmate from a maximum-security institution is rare. As to commutation, governors do occasionally exercise executive clemency as to death-sentenced inmates, but only when the inmate has been proven actually innocent.

225 It is true that prison authorities could classify a murderer as low-risk enough to be placed in a lower-security facility, but the chances of this happening with an aggravated murderer seem vanishingly small. *But see* State v. Storey, 40 S.W.3d 898, 910 (Mo. 2001) (en banc) (holding testimony by defense expert that classification of "maximum security inmate" would remain with defendant for the rest of his life properly excluded as speculative).

226 *See* Canales v. State, 98 S.W.3d 690, 699 (Tex. Crim. App. 2003) (noting defendant presented evidence of lack of danger of inmates in administrative segregation, which then allowed prosecution to cross-examine regarding instances where inmates in segregation had defeated door locking mechanisms).

about the details of prison security,[227] although a few permit it if the evidence specifically connects the security measures to the particular defendant.[228] Without the details of prison security in that most secure facility, it is difficult for a factfinder to assess the defendant's possible future dangerousness.

Subpart (3) recognizes that specific instances of good and bad conduct admitted under many of the other Rules in Part IV can be extrapolated through argument to the defendant's possible future dangerousness in prison. Many of those kinds of evidence are within the court's discretion to exclude if their probative value is substantially outweighed by countervailing considerations under Rule P205, but the second sentence of Subpart (2) withdraws this discretion as to the defendant's conduct while in custody. Such conduct is extremely probative of the defendant's possible future dangerousness in the relevant context. Thus, defendant's misbehavior in custody, such as threatening or assaulting others,[229] defying correctional officers,[230]

---

227 *See* United States v. Taylor, 583 F. Supp. 2d 923, 936–40 (E.D. Tenn. 2008) (holding general testimony about prison security not relevant mitigation); People v. Martinez, 224 P.3d 877, 914 (Cal. 2010) (holding exclusion of details of prison system permissible); People v. Ervine, 220 P.3d 820, 859–60 (Cal. 2009) (holding confinement in secure setting does not show that an individual defendant would be unlikely to engage in violence, so it is irrelevant); Troy v. State, 948 So. 2d 635, 650–51 (Fla. 2006) (holding not an abuse of discretion to exclude evidence of "close custody" conditions under which defendant might be held); State v. Bryant, 642 S.E.2d 582, 589 (S.C. 2007) (holding generally issues of prison conditions and escape possibilities irrelevant); Andrews v. Commonwealth, 699 S.E.2d 237, 275 (Va. 2010) (holding evidence of general prison conditions not relevant to future dangerousness); *see also* State v. Roseboro, 528 S.E.2d 1, 11 (N.C. 2000) (holding defendant not entitled to offer evidence regarding the levels of security at the prison, although defendant could offer evidence of good behavior, good adjustment, and freedom of movement); Sells v. State, 121 S.W.3d 748, 765 (Tex. Crim. App. 2003) (en banc) (holding evidence about administrative segregation irrelevant).

228 *See, e.g.*, State v. Burkhart, 640 S.E.2d 450, 453 (S.C. 2007) (noting evidence of prison conditions may be admitted if narrowly tailored to demonstrate defendant's behavior in those conditions); Morva v. Commonwealth, 683 S.E.2d 553, 565 (Va. 2009) (holding evidence of prison environment admissible only if it connects to the specific character of the particular defendant's future adaptability; evidence that merely reduces the likelihood of future danger of all inmates is irrelevant). *But see* United States v. Wilson, 493 F. Supp. 2d 491, 509 (E.D.N.Y. 2007) (holding defense expert's testimony that prison authorities capable of safely managing inmates convicted of violent offenses admissible even though testimony not tailored to defendant individually).

229 *See* Whatley v. State, No. CR–08–0696, 2010 WL 3834256, at *40–41 (Ala. Crim. App. Oct. 1, 2010) (holding defendant's misconduct in jail and threats toward other inmates admissible).

230 *See* United States v. Basham, 561 F.3d 302, 332 (4th Cir. 2009) (holding not abuse of discretion to admit evidence of defendant's sexually aggressive behavior toward female prison employees); United States v. Concepcion-Sablan, 555 F. Supp. 2d 1205, 1235–36 (D. Colo. 2007) (holding specific instances of violence toward correctional officers admissible); State v. Torres, 703 S.E.2d 226, 230 (S.C. 2010) (holding video of defendant's refusal to submit to a routine pat-down while incarcerated was admissible).

possessing weapons,[231] plotting or attempting escape,[232] and seeking to continue criminal activity in society at large through agents[233]—is admissible. Conversely, the defendant's good behavior while in custody is admissible.[234]

Subpart (4) accepts the majority view that permits the parties to offer opinion or reputation evidence from either lay[235] or expert[236] witnesses about the defendant's future dangerousness. While there is significant scholarly opinion that such expert opinion is unreliable,[237] a

---

231 *See* People v. Gonzales, 256 P.3d 543, 596 (Cal. 2011) (holding evidence of razors found in defendant's cell admissible); People v. Mills, 226 P.3d 276, 317 (Cal. 2010) (holding defendant's possession of two sharpened toothbrushes admissible).

232 *See* Beatty v. State, No. AP–75010, 2009 WL 619191, at *13 (Tex. Crim. App. Mar. 11, 2009) (holding handcuff key taken from defendant at booking relevant).

233 *See* State v. Odenbaugh, 82 So. 3d 215, 253–54 (La. 2011) (holding defendant's letter from jail suggesting recipient hire a hit man to kill surviving victim admissible).

234 *See* Skipper v. South Carolina, 476 U.S. 1, 4–8 (1986) (holding error to exclude evidence of defendant's good behavior in jail); State v. Kiles, 213 P.3d 174, 190 (Ariz. 2009) (en banc) (holding good behavior in custody non-statutory mitigation); People v. Salcido, 186 P.3d 437, 489 (Cal. 2008) (holding defendant may offer evidence that he would adapt well to prison life); State v. Smith, 607 S.E.2d 607, 620 (N.C. 2005) (holding defendant entitled to offer evidence of good adaptation to confinement); State v. Neyland, 12 N.E.3d 1112, 1164 (Ohio 2014) (holding good behavior while incarcerated is relevant to lack of future dangerousness); Hanson v. State, 72 P.3d. 40, 52–53 (Okla. Crim. App. 2003) (holding evidence of good behavior in prison relevant to continuing threat aggravator).

235 Bell v. State, 938 S.W.2d 35, 49 (Tex. Crim. App. 1996) (en banc) (holding correctional officer's testimony that he had seen other death row inmates suddenly snap and commit violent acts after long periods of good behavior was marginally relevant).

236 *See* United States v. Fields, 483 F.3d 313, 345 (5th Cir. 2007) (upholding admission of forensic psychiatrist's opinion concerning future dangerousness); United States v. Umana, 707 F. Supp. 2d 621, 634 (W.D.N.C. 2010) (holding doubts about the accuracy of predictions of future dangerousness did not render the testimony sufficiently unreliable for exclusion; prosecution may offer both lay and expert opinion); United States v. Rodriguez, 389 F. Supp. 2d 1135, 1144 (D.N.D. 2005) (holding government may offer psychiatric testimony of future dangerousness); Whatley v. State, No. CR–08–0696, 2010 WL 3834256, at *45–46 (Ala. Crim. App. Oct. 1, 2010) (holding licensed clinical social worker prediction of future dangerousness admissible); Malone v. State, 168 P.3d 185, 216–17 (Okla. Crim. App. 2007) (upholding admission of opinion of law enforcement officers qualified by training and experience that defendant was a high or very high security risk); Hanson v. State, 72 P.3d 40, 51–52 (Okla. Crim. App. 2003) (holding prosecution's psychiatric evidence of defendant's future dangerousness, both in and out of prison, admissible); Devoe v. State, 354 S.W.3d 457, 461–62 (Tex. Crim. App. 2011) (holding psychological evidence is relevant to continuing threat); Ward v. State, No. AP-74695, 2007 WL 1492080, at *8 (Tex. Crim. App. May 23, 2007) (holding admission of expert prediction of continuing threat not an abuse of discretion).

237 *See* Erica Beecher-Monas & Edgar Garcia-Rill, *Danger at the Edge of Chaos: Predicting Violent Behavior in a Post*-Daubert *World*, 24 CARDOZO L. REV. 1845, 1847 (2003) ("[T]he testimony of clinicians about future dangerousness offers little more than that of an astrologer . . . ."); Adam Lamparello, *Using Cognitive Neuroscience to Predict Future Danger*, 42 COLUM. HUM. RTS. L. REV. 481, 490–91 (2011) ("In fact, a recent study analyzing predictions of future dangerousness found that expert witnesses' predictions are inaccurate in an overwhelming majority of cases." (footnote omitted)); Elizabeth S. Vartkessian, *What One Hand Giveth, the Other Taketh Away: How Future Dangerousness Corrupts Guilt Verdicts and Produces Premature Punishment Decisions in Capital Cases*, 32 PACE L. REV. 447, 451 (2012) ("Research indicates that

defendant almost certainly has a constitutional right to present it.[238] Such testimony usually asserts that the defendant "would do well in a structured environment," or "would adapt well to the prison setting."[239] In light of the fact that such evidence is permissible for the defense, most jurisdictions permit the prosecution to present expert evidence in its penalty phase case-in-chief that the defendant presents a future danger. One of the authors, however, dissents and would adhere to an alternative approach used primarily in California that prohibits such expert testimony in the prosecution's case-in-chief, and gives the defense the choice whether to open the door to prosecution expert rebuttal by presenting a defense expert.[240]

E. *Article V: Relevancy and Its Limits—Impact Evidence*

1. Rule P501: Evidence Regarding Characteristics of Murder Victim[241]

1) Testimony for the prosecution that offers a brief glimpse into the life of a murder victim whose death was a part of the course of criminal conduct for which the penalty phase is held, is relevant.

---

projections of a defendant's dangerousness are poor predictions of whether or not a defendant will actually commit future acts of violence. Research also indicates that mental health professionals who hold themselves out as future dangerousness 'experts' are often inaccurate in their assessments." (footnotes omitted)).

238 *See* United States v. Sampson, 335 F. Supp. 2d 166, 228 (D. Mass. 2004) (holding admissible testimony of forensic psychologist that propensity toward violence outside prison often does not correlate to propensity to violence in prison); State v. Twyford, 763 N.E.2d 122, 138 (Ohio 2002) (holding error to exclude testimony of defense psychologist regarding whether defendant would be threat to another inmate if returned to prison).

239 *See Skipper*, 476 U.S. at 3–4 (holding defendant has right to present evidence of likely good adjustment to prison); *see also Kiles*, 213 P.3d at 190 (holding defendant's good behavior in custody constitutes mitigation); State v. McGill, 140 P.3d 930, 945 (Ariz. 2006) (en banc) (holding evidence that defendant would be a "model prisoner" is relevant mitigation); *Salcido*, 186 P.3d at 489 (holding defendant may offer evidence that he would behave well in prison or adapt well to prison life); State v. Duke, 623 S.E.2d 11, 22 (N.C. 2005) (holding evidence whether defendant would adjust well to prison relevant); Johnson v. State, 95 P.3d 1099, 1103–04 (Okla. Crim. App. 2004) (holding defendant entitled to offer expert testimony regarding processes of institutionalization and "aging out" to rebut continuing threat aggravator).

240 *See* People v. Banks, 311 P.3d 1206, 1258–59 (Cal. 2014) (holding prosecution prohibited from offering expert testimony predicting future dangerousness in its penalty phase case-in-chief, but if defendant offers expert testimony prognosticating non-violence in prison, prosecution may cross-examine and present contrary evidence in rebuttal); People v. Tully, 282 P.3d 173, 261 (Cal. 2012) (holding prosecution may not present expert evidence of future dangerousness, but may argue such from the defendant's record); People v. Stanley, 140 P.3d 736, 768–69 (Cal. 2006) (holding the probative value of expert predictions of future dangerousness outweighed by potential for unfair prejudice).

241 CAP. PEN. PH. R. EVID. P501.

2) The court has discretion to admit a very limited amount of demonstrative evidence in connection with the testimony allowed in Subpart (1).
3) Evidence offered by the defendant about the murder victim only to impugn the victim's character is irrelevant, but evidence relevant to the circumstances of the offense that may reflect badly on the victim is not barred by this Rule.

Comment: Subpart (1) addresses one aspect of the doctrine of *Payne v. Tennessee*[242] through which the Supreme Court granted its imprimatur to so-called "victim impact evidence" in the penalty phase. Experience shows that such evidence is really of three varieties—related to the murder victim himself (addressed by this Rule), related to the impact of the murder victim's death on his relatives and friends (addressed by Rule P502),[243] and related to an assault victim who survived defendant's attack (addressed by Rule P503).

As to evidence regarding the murder victim, while it is unclear whether the Court intended the phrase in *Payne*, "brief glimpse," to be part of the holding or merely dictum, this Rule adopts that limitation as appropriate. This "brief glimpse" typically encompasses the victim's character traits, accomplishments, and aspirations.[244] Some courts are careful to only permit "brief glimpses" of the victim,[245] which is in

242 Payne v. Tennessee, 501 U.S. 808, 838–39 (1991).

243 *See* Ladd v. State, 3 S.W.3d 547, 571 (Tex. Crim. App. 1999) (holding evidence of both the victim's character impact and victim's death on others admissible). Note that in Texas the defendant may deprive the prosecution of the right to present victim impact evidence by waiving presentation of defense evidence as to the mitigation future dangerousness special issue. *See* Williams v. State, 273 S.W.3d 200, 224 (Tex. Crim. App. 2008) (so holding). However, this would probably infrequently be a good strategic trade-off.

244 *See* Jerome Deise & Raymond Paternoster, *More Than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 HASTINGS CONST. L.Q. 611, 611 (2013).

> The testimony, usually provided by live in-court testimony, consists of information about how valuable the victim's life was, what the victim contributed to their community and family, how much they are loved and will be missed by family members, how difficult life has been in the absence of the victim . . . .

Id.; *see also* Commonwealth v. Flor, 998 A.2d 606, 635–36 (Pa. 2010) (approving admission of fellow police officer's brief references to good qualities of murdered officer).

245 *See* Frankel, *supra* note 88, at 114–15.

accordance with this Rule; other courts construe "brief" quite expansively,[246] which would not accord with this Rule.

Another limitation in the Rule is that the victim impact evidence must relate to a victim whose death was a part of the course of criminal conduct for which the current penalty phase is being held (which, of course, can include more than one victim). That is, the Rule does not permit victim impact evidence as to a person defendant killed or injured in an incident that was completely separate from any murder or murders arising from the present case.[247]

Subpart (2) recognizes that usually the prosecution should be permitted to present a very limited amount of demonstrative evidence, such as a few photographs of the victim.[248] But the Rule precludes copious and emotionally-laden demonstrative evidence, such as a video montage with background music.[249] The trial court must exercise sound discretion to limit emotionally-charged victim impact evidence.

> There are common themes on how states reign [sic] in the scope of victim impact evidence. For example, some states limit who may testify. Other states have reversed sentences when the scope of victim impact statements went too far. "Too long and too emotional" seems to be a guiding principle for when victim impact evidence can be precluded where it would be otherwise permissible. Courts and legislatures have imposed similar limitations on victim impact video footage. The unifying theme in these limitations is that the intention of *Payne* was to provide a "quick glimpse" into the life of the victim. Courts have held that this "quick glimpse" should indeed be quick.

Id. (footnotes omitted).

246 *See* State v. Worthington, 8 S.W.3d 83, 90 (Mo. 1999) (holding no error in admitting victim impact testimony from thirteen witnesses along with photos of victim and her family).

247 *See* Prieto v. Commonwealth, 721 S.E.2d 484, 496 (Va. 2012) (holding inadmissible victim impact evidence from unadjudicated crimes); Frankel, *supra* note 88, at 114 (noting "victim impact statements from victims of a defendant's previous crimes are typically inadmissible because they are irrelevant to the case for which the defendant is standing trial").

248 *See* United States v. Barnette, 390 F.3d 775, 799–800 (4th Cir. 2004) (upholding admission of noninflammatory and otherwise non-prejudicial photos of victim to accompany family members' victim impact testimony); State v. Garza, 163 P.3d 1006, 1019 (Ariz. 2007) (holding proper for victims' mothers to display photos of victims during mothers' testimony); Malone v. State, 168 P.3d 185, 219 (Okla. Crim. App. 2007) (stating appropriate to admit a photo of the victim while victim was alive).

249 Thus, the Rule disapproves of, for example, two well-known instances in which the California Supreme Court was quite expansive in its approval of the admission lengthy and emotional victim impact demonstrative evidence, and the U.S. Supreme Court declined to grant certiorari. *See* People v. Zamudio, 181 P.3d 105, 134–37 (Cal. 2008), *cert. denied sub nom.* Kelly v. California, 555 U.S. 1020 (2008) (upholding admission of video with more than one hundred photographs of victims); People v. Kelly, 171 P.3d 548, 569–71 (Cal. 2007), *cert. denied sub nom. Kelly*, 555 U.S. 1020 (upholding admission of twenty-minute video depicting victim from infancy until shortly before death). California continues to permit substantial demonstrative evidence as part of victim impact presentation. *See* People v. Booker, 245 P.3d 366, 406 (Cal. 2011) (upholding admission of videotapes of three murder victims); People v. Brady, 236 P.3d 312, 337–38 (Cal. 2010) (upholding admission of four-minute edited video of victim at family Christmas celebration two days before murder and six-minute edited video of victim's memorial and funeral services);

Subpart (3) recognizes that victim impact evidence as to the victim's character is not reciprocal: the prosecution can offer positive qualities, but the defense should not be permitted to offer negative qualities merely to impugn the victim.[250] This is because the only inference from negative character traits of the victim offered by the defense is that the victim was less deserving of life than a higher-character victim—an illegitimate inference since all victims are equally entitled under the law not to be murdered. But the last phrase of Subpart (3) recognizes that sometimes there are circumstances of the offense—often a drug deal gone bad—that do not reflect well on the victim, but that are nonetheless relevant and are not barred by this Subpart because they are *not* offered *only* to impugn the victim.[251]

2. Rule P502: Impact of Victim's Murder on Victim's Relatives and Friends[252]

> 1) As to a murder victim whose death was a part of the course of criminal conduct for which the penalty phase is held, testimony for the prosecution that offers a brief glimpse of the impact of the victim's death on the victim's family and friends is relevant. The court shall not, however, permit a lay witness to opine as to speculative physical health effects of the murder victim's death on that witness or any other person.

People v. Dykes, 209 P.3d 1, 47–48 (Cal. 2009) (upholding admission of eight-minute video of nine-year-old murder victim and family members); *see also* Bryant v. State, 708 S.E.2d 362, 383 (Ga. 2011) (upholding admission of slide show of photos of victim at various stages of life); State v. Strong, 142 S.W.3d 702, 721 (Mo. 2004) (same).

250 *See* United States v. Beckford, 962 F. Supp. 804, 822 (E.D. Va. 1997) (holding impermissible defense effort to use victim impact statement to support argument defendant was undeserving of death simply because victim was drug dealer); People v. Harris, 118 P.3d 545, 575 (Cal. 2005) (holding proper to exclude evidence victim had a false driver's license and may have known she was living with a person who was involved in drug dealing); Stinski v. State, 691 S.E.2d 854, 871 (Ga. 2010) (upholding exclusion of evidence that victim had killed her husband during domestic abuse incident); State v. Zink, 181 S.W.3d 66, 71, 73 (Mo. 2005) (upholding exclusion of evidence that victim habitually violated her curfew); State v. Green, 609 N.E.2d 1253, 1263 (Ohio 1993) (holding fact that victim had illegally bought and sold food stamps not mitigating); State v. Southerland, 447 S.E.3d 862, 866 (S.C. 1994) (upholding exclusion of evidence that victim involved in smuggling drugs into prison); State v. Powers, 101 S.W.3d 383, 401–02 (Tenn. 2003) (holding evidence of victim's extramarital relationships and marriage difficulties irrelevant); Lenz v. Commonwealth, 544 S.E.2d 299, 307 (Va. 2001) (holding proper to preclude defendant from admitting evidence of victim's criminal record); Remington v. Commonwealth, 551 S.E.2d 620, 635 (Va. 2001) (same).

251 *See Lethal Connection*, *supra* note 17, at 6–7 (detailing prevalence of lethal drug deals in capital murders).

252 CAP. PEN. PH. R. EVID. P502.

2) The court has discretion to admit a very limited amount of demonstrative evidence in connection with the testimony allowed in Subpart (1).

Comment: This Rule addresses the second aspect of "victim impact evidence"—the impact of the victim's death on the victim's family and friends—and parallels the preceding Rule in all important aspects: it adapts the "brief glimpse" language from *Payne* as a limiting principle on this type of evidence; incorporates the limitation that the victim must be one whose death was a part of the course of criminal conduct for which the penalty phase is held; and allows a very limited amount of demonstrative evidence.[253] For example, the victim's wife could be permitted to present a recent anniversary card from her husband, but not thirty such cards, and certainly not videos from their thirtieth anniversary party. Again, the trial judge must exercise careful discretion to limit such emotionally-laden evidence.

---

253 *See* People v. Montes, 320 P.3d 729, 784 (Cal. 2014) (holding victim impact evidence not limited to effects known or reasonably apparent to capital murder defendant at the time he committed the crime; also holding testimony by murder victim's mother regarding vandalism of his grave admissible victim to illustrate her suffering even though defendant had nothing to do with the vandalism); People v. Davis, 208 P.3d 78, 139 (Cal. 2009) (upholding admission of photo of victim's mother and six-year old daughter taken shortly after victim's kidnapping); People v. Hamilton, 200 P.3d 898, 951 (Cal. 2009) (upholding admission of photo of victim's husband and sons after murders to show husband had tried to provide happy home for sons after victim's murder); Commonwealth v. Hairston, 84 A.3d 657, 673–74 (Pa. 2014) (holding victim impact witnesses not limited to family, so proper for long-time family friend to testify); Thuesen v. State, No. AP–76375, 2014 WL 792038, at *43–44 (Tex. Crim. App. Feb. 26, 2014) (holding victim impact evidence highly probative of future dangerousness where defendant was aware of victims' characters and the relationships that they had with others who testified). Judge Bennett allowed the following poem to be read in the penalty phase by a childhood friend of a six-year-old murder victim:

> She was only six when she left on a picnic, then the theft.
> She never would be able to get to the age of seven,
> For she was shot and sent to heaven.
> I never got to say good-bye.
> The nights I was scared, those nights I'd cry,
> Wishing to see her face again,
> Wishing that it'd never been.
> For my dear friend, I loved her so.
> I never wanted her to go.
> Only five and not aware,
> Of what would be ahead. Oh, what a scare.
> Amber isn't just a color. She was my friend.
> Forever together until the very end.

See United States v. Johnson, 403 F. Supp. 2d 721, 855–57 (N.D. Iowa 2005), *aff'd and remanded*, 495 F.3d 951 (8th Cir. 2007), for an extended discussion of its admissibility under Payne v. Tennessee, 501 U.S. 808 (1991).

The last sentence of Subpart (1) requires the trial judge to exclude opinion testimony of a lay witness as to speculative cause-and-effect of the murder on the witness's (or any other person's) physical health. Some health effects, such as a victim's relative suffering a heart attack immediately upon being informed of the murder or not being able to sleep are not speculative. Other alleged effects clearly are speculative, such as attributing a miscarriage to the murder or attributing the early death of someone to it (e.g., "I'm sure the victim's murder caused mom to die early.").[254]

3. Rule P503: Impact of Assault on a Surviving Victim[255]

> Brief impact testimony from a surviving victim of a physical assault that was a part of the course of criminal conduct for which the penalty phase is held is relevant.

Comment: Sometimes during the course of criminal conduct that results in the capital murder, a defendant injures other victims who survive. Logically, victim impact testimony from such injured persons must be admissible—if impact testimony would have been admissible if the person had died, then that person should be able to testify to the impact upon him or her having survived the injuries. Note, however, that by limiting such victims to those whose assaults were part of the course of criminal conduct for which the penalty phase is held, the Rule implicitly excludes impact testimony from victims of unconnected assaults, as admitting such evidence would take the penalty phase too far afield to justify its admission.[256] The Rule does not, however, preclude victims of unconnected crimes from offering evidence about the *facts of the assault itself* if those are admissible under other Rules. For example, a defendant's ex-wife could testify that the defendant physically abused her—such evidence would be relevant to the defendant's character for violence; but she would be prohibited from testifying about the impact of that abuse on her psychologically, on her attitudes, on her life prospects, etc. Note also that, unlike the two preceding Rules, this Rule does not provide for the admission of even a very limited amount of demonstrative evidence.

---

254 *See* Frankel, *supra* note 88, at 110–11 (noting "[m]urder victims' family members have been allowed to testify about a wide range of effects including miscarriages, heart attacks, and other illnesses and negative effects that they attribute to the loss" (footnote omitted)).

255 CAP. PEN. PH. R. EVID. P503.

256 In effect, this adopts the position that a balancing test of probative value versus prejudicial effect under Rule P205 would always come out with the prejudicial effect substantially outweighing the probative value.

4. Rule P504: Impact of Defendant's Execution

1) Defense testimony that offers a brief glimpse of the expected impact the defendant's execution would have on defendant's family and friends is relevant.
2) Prosecution testimony of the expected impact of defendant's execution on the murder victim's family and friends is irrelevant.

Comment: Subpart (1) permits a "brief glimpse" from the defendant's family and friends about the impact the defendant's execution would have on them. While the Supreme Court has never decided that the Constitution requires the admission of such testimony,[257] and the majority view is that execution impact evidence is inadmissible,[258] this Rule sides with the minority of courts that permit it.[259] There are two reasons the position in favor of admission is better. First, testimony about the impact of the defendant's absence due to execution relates inferentially to the defendant's character in the same way as evidence permitted under Rule P405—that there must be good aspects of defendant's character if someone would miss him if he were executed.[260] Second, fairness and reciprocity argue in favor of permitting it—since

257 *See* Catherine Bendor, *Defendants' Wrongs and Victims' Rights:* Payne v. Tennessee, 27 HARV. C.R.-C.L. L. REV. 219, 241 (1992) (noting that the Court would "most likely deem [execution impact evidence] completely irrelevant").

258 *See* Albarran v. State, 96 So. 3d 131, 204–05 (Ala. Crim. App. 2011) (holding execution impact testimony irrelevant); People v. Fuiava, 269 P.3d 568, 645–46 (Cal. 2012) (permitting testimony from defendant's family members that they want defendant to live, but prohibiting testimony regarding the effect defendant's execution would have on the family); State v. Anderson, 996 So. 2d 973, 1014 (La. 2008) (holding no right of defense to elicit execution impact testimony); State v. Nicholson, 558 S.E.2d 109, 136 (N.C. 2002) (same); Commonwealth v. Harris, 817 A.2d 1033, 1054 (Pa. 2002) (same); State v. Dickerson, 716 S.E.2d 895, 906–07 (S.C. 2011) (holding defendant's cousin's testimony about effect defendant's execution would have on family properly excluded as bordering on opinion as to proper sentence); Jackson v. State, 33 S.W.3d 828, 834 (Tex. Crim. App. 2000) (upholding exclusion of execution impact testimony); *see also* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 32–33 (2000) (noting that admission of such evidence a minority position).

259 *See* United States v. Wilson, 493 F. Supp. 2d 491, 506–07 (E.D.N.Y. 2007) (holding evidence regarding how defendant's family would feel if he were executed admissible); State v. Gallardo, 242 P.3d 159, 169 (Ariz. 2010) (noting without comment that defendant's mitigation, which included testimony about impact defendant's execution would have on his family members, could reasonably have been found insufficient to call for leniency).

260 *See* People v. Vieira, 106 P.3d 990, 1009 (Cal. 2005) (holding defendant may offer testimony that defendant is loved by family members or others and they want to see defendant live because such evidence indirectly relates to defendant's character). *But see* People v. Smith, 107 P.3d 229, 248 (Cal. 2005) (holding evidence that mitigation witness wants defendant to live admissible to extent it relates to defendant's character, but not if it relates merely to impact of defendant's execution on witness).

the victim's survivors are permitted to testify to the impact the victim's death had on them, it seems fair to permit the defendant' intimates to testify to the effect they believe the defendant's death would have on them.[261] Admittedly, such testimony *implicitly* expresses an opinion that the sentence should be other than death, and is thus in tension with Rule P209's prohibition of *explicit* opinion about the proper sentence, but this is a tension the law must live with.

Subpart (2) shows that the admissibility of such testimony is not reciprocal for the prosecution if it is offered by the victim's relatives and friends—such testimony would be in the nature of, "it would relieve my mind and give me closure if I knew the defendant had been executed." There is no inference that can be derived from such testimony as to the defendant's character. Rather, the only inference is that the victim's relative or friend has an opinion that it would be better if the defendant were executed—an opinion that is prohibited by Rule P209.

F. *Article VI: Hearsay*

1. Rule P601: Hearsay[262]

1) Except as modified by Subpart (2) hereof, the hearsay rules of this jurisdiction apply; that is, evidence that is not hearsay or that is within a hearsay exception is admissible, and evidence that is hearsay and not within a hearsay exception is inadmissible.
2) Evidence offered by the defendant that is otherwise inadmissible under the hearsay rules shall nonetheless not be barred by those rules if the evidence has substantial probative value and substantial reasons exist for believing it to be reliable.
3) The Confrontation Clause is inapplicable to the penalty phase of a bifurcated trial. If the penalty phase is trifurcated, the Confrontation Clause applies to the eligibility phase, but not to the selection phase.

Comment: Subpart (1) adopts the position that—except as modified by Subpart (2)—the hearsay rules apply at the penalty phase just as at trial.

---

261 *See* Bendor, *supra* note 257 ("[I]f the true aim is to achieve a balance, allowing evidence of the impact of the victim's death on his or her family would mandate that the defendant's family be allowed to testify as to the impact the execution of the defendant would have on them . . . .").

262 CAP. PEN. PH. R. EVID. P601.

This is the majority rule.[263] While the hearsay rules occasionally draw criticism for their complex nature,[264] like other venerable rules of evidence, they have the practical wisdom of generations behind them, and courts and counsel are experienced in using them. There is voluminous case law on hearsay issues in the capital penalty phase, but almost all of it involves mundane applications of the hearsay rule: evidence is admissible if it is not hearsay[265] or if it is within an exception;[266] it is inadmissible if it is hearsay and not within an exception.[267]

---

263 *See infra* notes 265–67 for citations from many jurisdictions that apply the hearsay rules at the penalty phase. *But see supra* note 5 for the Alabama, Florida, and Tennessee statutes that permit hearsay as long as the opposing party has a fair opportunity to rebut it. As to cases in these jurisdictions, see, e.g., Johnson v. State, 120 So. 3d 1130, 1193–94 (Ala. Crim. App. 2009) (holding presentence investigation report admissible even though hearsay); Seibert v. State, 64 So. 3d 67, 79 (Fla. 2010) (holding hearsay testimony regarding defendant's prior violent felony admissible provided defendant has a fair opportunity to rebut it); State v. Rimmer, 250 S.W.3d 12, 23 (Tenn. 2008) (stating plain language of statute prohibits exclusion of mitigating evidence merely because it is hearsay). See also Arizona law, which has long distinguished between hearsay offered to prove an aggravating circumstance, to which the hearsay rules applies, and hearsay offered to rebut defendant's mitigation, to which the hearsay rule does not apply, although the defendant must be given sufficient notice of the prosecution's intention to use the hearsay to prepare to meet it. *See* State v. Greenway, 823 P.2d 22, 28 n.1 (Ariz. 1991) (so holding); *see also* State v. Chappell, 236 P.3d 1176, 1186 (Ariz. 2010) (reaffirming the *Greenway* rule).

264 *See, e.g.*, Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last*, 26 ME. BAR J. 126 (2011) (Part 1 of 2) [hereinafter *Abolish Hearsay Rule Part 1*]; Matthew Caton, *Abolish the Hearsay Rule: The Truth of the Matter Asserted at Last*, 26 ME. BAR J. 207 (2011) (Part 2 of 2) [hereinafter *Abolish Hearsay Rule Part 2*]. In arguing for the rule's abolition at least in civil cases, the author asserts

> The common law rule of hearsay is a technical and arcane rule of evidence established at the end of the 17th century and barnacled with exceptions over time. Generations of law students and practitioners neither understand fully nor question the hearsay rule; they just learn it . . . . [T]he impossible task of simplifying a hearsay rule that has ambled along for centuries solely by the force of tradition calls for its abolition.

Abolish Hearsay Rule Part 1, *supra*, at 126 (footnotes omitted).

265 *See, e.g.*, State v. Smith, 159 P.3d 531, 538 (Ariz. 2007) (holding medical examiner's discussion of prior examiner's data and opinions not hearsay because not offered for the truth of the matter asserted but as a nonhearsay basis for expert opinion); People v. Letner, 235 P.3d 62, 137 (Cal. 2010) (holding letter from another inmate to defendant not hearsay where offered for nonhearsay purpose of showing what defendant did in response); State v. Johnson, 284 S.W.3d 561, 584 (Mo. 2009) (en banc) (holding impact statement of murder victim's son not hearsay because offered for nonhearsay purpose of showing the effect of the crime on son); State v. Barden, 572 S.E.2d 108, 137–38 (N.C. 2002) (holding testimony of prior rape victim of defendant that defendant's friends advised her "to do what [defendant] says because he's crazy" not hearsay because offered to show the effect of the words on the victim); Andrews v. Commonwealth, 699 S.E.2d 237, 274 (Va. 2010) (holding poem written by defendant offered as non-hearsay evidence of character and not for truth of contents of poem).

266 *See, e.g.*, United States v. Robinson, 367 F.3d 278, 291 (5th Cir. 2004) (finding prosecution hearsay admissible under the co-conspirator exception); *Smith*, 159 P.3d at 539 (holding detective's reference to a police report he had signed admissible under recorded recollection exception); State v. Ball, 824 So. 2d 1089, 1111 (La. 2002) (holding testimony from prior trial admissible under prior recorded testimony exception); State v. Hand, 840 N.E.2d 151, 171 (Ohio

Subpart (2) accommodates the holding of *Green v. Georgia*[268] that the hearsay rule cannot be applied so as to exclude probative and reliable defense hearsay.[269] *Green* held that exclusion was improper if the evidence had two characteristics. First, the evidence would need to be "highly relevant" to a penalty phase issue.[270] This Rule opts for the slightly different language that the evidence has "substantial probative value," a better formulation because relevance is *not* a matter of *degree*—evidence is either relevant or it is not.[271] There are, however, degrees of *probative value*, which must have been what the Court was getting at in *Green*. The second *Green* requirement is that the defense evidence would need to be such that "substantial reasons existed to assume its reliability."[272] This Rule adopts the "substantial reasons" language, but

2006) (holding statements by one murder victim regarding defendant's involvement in two uncharged murders admissible under wrongdoing of a party exception); State v. Owens, 664 S.E.2d 80, 81 (S.C. 2008) (holding list of defendant's disciplinary infractions in custody admissible under business records exception); Coble v. State, 330 S.W.3d 253, 293–94 (Tex. Crim. App. 2010) (holding angry statement by defendant's sister's niece that defendant had been looking into the niece's window while she was dressing admissible under excited utterance exception).

267 *See, e.g.*, People v. Eubanks, 266 P.3d 301, 332 (Cal. 2011) (holding hearsay rule properly excluded evidence defendant had been sexually molested and had helped a fellow inmate at the jail infirmary received medical attention); Gulley v. State, 519 S.E.2d 655, 663–64 (Ga. 1999) (holding hearsay rule properly excluded witness from testifying that defendant had told the witness that the defendant was the person named in a newspaper article concerning a person with defendant's name who had saved the lives of two people); State v. Allen, 913 So. 2d 788, 804–08 (La. 2005) (holding hearsay rule properly precluded detective from testifying about what a co-perpetrator had told the detective about the defendant's involvement in a prior armed robbery); State v. Casey, 775 So. 2d 1022, 1039 (La. 2000) (holding expert's mere retelling of facts gleaned from defendant's family members about family history properly excluded by hearsay rule); McLaughlin v. State, 378 S.W.3d 328, 347 (Mo. 2012) (holding hearsay rule properly precluded statements capital murder defendant's brother made to witnesses that he had raped the victim on the night of the murder); Commonwealth v. Baumhammers, 960 A.2d 59, 89 (Pa. 2008) (holding statements by defendant's parents to him that they believed he had acted under the influence of mental illness properly excluded as hearsay); Smith v. State, No. AP–75793, 2010 WL 3787576, *21–22 (Tex. Crim. App. Sept. 29, 2010) (holding videotape of defendant's mother explaining aspects of his childhood properly excluded as hearsay); Halprin v. State, 170 S.W.3d 111, 116 (Tex. Crim. App. 2005) (holding hearsay evidence in the form of record of Texas Department of Criminal Justice properly excluded because defendant did not lay proper foundation for business records exception); Lovitt v. Warden, 585 S.E.2d 801, 826–27 (Va. 2003) (holding affidavits of several of defendant's family members properly excluded as hearsay).

268 Green v. Georgia, 442 U.S. 95, 95 (1979).

269 *Id.* at 96–97 (holding a violation of due process to exclude as inadmissible under the state hearsay rule a statement of a co-perpetrator that he had killed the victim after sending defendant to run an errand, particularly where the state had introduced and relied on that statement at the separate trial of the declarant's trial to gain a conviction and death sentence against him); *see also* Sears v. Upton, 130 S. Ct. 3259, 3263 n.6 (2010) (reaffirming the vitality of *Green*).

270 *Green*, 442 U.S. at 97.

271 In the language of Federal Rule of Evidence 401, evidence is relevant if it has "any tendency" to be probative of a fact of consequence. Whether evidence has any such tendency is a yes/no inquiry—if the answer is "yes," the evidence is relevant; if the answer is "no" it is irrelevant. Thus evidence cannot be "highly" relevant—or any other degree of relevance.

272 *Green*, 442 U.S. at 97.

substitutes "for believing it to be reliable" instead of "assum[ing] its reliability"—generally courts do not "assume" evidence to be reliable, but determine whether there are reasons "for believing" it to be reliable. Courts presented with *Green*-based arguments usually find that the defense evidence fails to meet both criteria,[273] especially if they are the defendant's own self-serving statements,[274] but occasionally a defendant prevails.[275] Note also that subpart (2) merely states that defense evidence meeting the two criteria is "not barred by the hearsay rule," not that the evidence is necessarily admissible. As with other evidence, it has to comply with the remainder of the Rules to be admissible.[276]

Subpart (3) addresses an issue that arises from the Supreme Court's reinvigoration of the Confrontation Clause over the past decade.[277] Prior to that time, under *Ohio v. Roberts*,[278] at the guilt/innocence phase if a

---

273 *See, e.g.*, Reynolds v. State, 114 So. 3d 61, 102–03 (Ala. Crim. App. 2010) (holding confession of third party embodied in police report did not have sufficient indicia of reliability to overcome the prohibition against the use of hearsay); People v. McCurdy, 331 P.3d 265, 301 (Cal. 2014) (holding defense-proffered hearsay properly excluded because insufficient indicia of reliability); People v. Gonzales, 281 P.3d 834, 879 (Cal. 2012) (holding statements of third party that may have deflected guilt from defendant were properly excluded under the hearsay rule because the statements "were neither particularly reliable nor highly relevant"); People v. McDowell, 279 P.3d 547, 577 (Cal. 2012) (holding trial court did not abuse its discretion in excluding under the hearsay rule written statements by defendant's deceased family members concerning defendant's terrible childhood).

274 *See, e.g.*, People v. Russell, 242 P.3d 68, 91 (Cal. 2010) (holding defendant's hearsay statements to police in videotape lacked indicia of reliability and due process did not require their admission as mitigation); People v. Williams, 148 P.3d 47, 70 (Cal. 2006) (holding defendant's post-arrest statement of remorse to reporter not sufficiently reliable to be admitted); People v. Jurado, 131 P.3d 400, 439 (Cal. 2006) (holding capital defendant has no right to admit his own self-serving statements without subjecting himself to cross-examination); State v. Davis, 539 S.E.2d 243, 260–61 (N.C. 2000) (holding letters written by defendant to mother from prison were properly excluded as unreliable); Commonwealth v. May, 887 A.2d 750, 764–66 (Pa. 2005) (holding testimony about defendant's out-of-court apology to victim's daughter properly excluded as hearsay); Estrada v. State, 313 S.W.3d 274, 313 (Tex. Crim. App. 2010) (holding defendant's out-of-court statements about his aspirations were properly excluded as hearsay).

275 *See, e.g.*, Mitchell v. State, 136 P.3d 671, 697–98 (Okla. Crim. App. 2006) (finding error in exclusion under a "mechanistic[]" application of the hearsay rule as to two letters, a poem, and a birthday card defendant had sent to his brother that served to humanize the defendant).

276 *See* Carter v. Chappell, No. 06CV1343 BEN (KSC), 2013 WL 1120657, at *84 (S.D. Cal. Mar. 18, 2013) (holding defense's proffered testimony about actions of the defendant as a child to avoid a terrible home life inadmissible because witness did not have personal knowledge of defendant's actions); State v. Davis, 290 P.3d 43, 57–58 (Wash. 2012) (en banc) (holding that trial court was within its discretion to exclude for lack of personal knowledge the testimony of mitigation witnesses who "had little to no contact with [defendant] during his childhood. Consequently their opinions that [defendant] had a bad mother and childhood could have been based on family gossip, what they heard from the mitigation specialist in preparation for the interview, or even what they read in the newspaper about [defendant's] previous trials").

277 For a recent exhaustive analysis of the Court's last decade of Confrontation Clause jurisprudence, see Michael A. Sabino & Anthony Michael Sabino, *Confronting the "Crucible of Cross-Examination": Reconciling the Supreme Court's Recent Edicts on the Sixth Amendment's Confrontation Clause*, 65 BAYLOR L. REV. 255 (2013).

278 448 U.S. 56 (1980).

piece of prosecution evidence satisfied the hearsay rule, it almost always satisfied the Confrontation Clause,[279] and under *Williams v. New York*[280] as to sentencing proceedings, the Clause was deemed inapplicable.[281] Since *Crawford v. Washington*,[282] separate hearsay and Confrontation Clause analyses are required at the guilt/innocence phase,[283] and the Supreme Court has not yet addressed whether the Clause applies to the sentencing proceedings. Most lower federal courts and state courts, however, have held that the Confrontation Clause continues to be inapplicable to sentencing,[284] although some commentators have argued to the contrary.[285] This Rule adopts the position that the Clause is inapplicable to the sentencing phase of a traditionally bifurcated trial because of the thrust of the Rules toward broad admissibility. In essence, this Rule adopts the theory of *Ohio v. Roberts* as to the penalty phase.

---

279 *Id.* at 66 (holding that the primary purpose of the Confrontation Clause is to assure the out-of-court statement's reliability, and thus if the statement can be shown to be reliable, confrontation is not constitutionally necessary; such reliability is established "where the evidence falls within a firmly rooted hearsay exception.").

280 337 U.S. 241 (1949).

281 *Id.* at 250 (rejecting hearsay and Confrontation Clause objections to a trial judge's receiving a probation report at sentencing, stating "[w]e must recognize that most of the information now relied upon by judges to guide them in the intelligent imposition of sentences would be unavailable if the information were restricted to that given in open court by witnesses subject to cross-examination.").

282 541 U.S. 36 (2004).

283 *Id.* at 59 (holding that "[t]estimonial statements" of out-of-court declarants are admissible "only where the declarant is unavailable and only where the defendant has had a prior opportunity to cross-examine," even if the statement is within a hearsay exception).

284 For a good collection of the holdings of both lower federal and state courts on this issue see State v. Martinez, 303 P.3d 627, 631–32 (Idaho Ct. App. 2013) ("Most state courts that have addressed the issue have followed suit [with the lower federal courts in holding that the Confrontation Clause does not apply at sentencing]." (citations omitted)); *see also* United States v. Umana, 750 F.3d 320, 348 (4th Cir. 2014) (holding that the Confrontation Clause does not apply during at least the selection phase of capital sentencing, and that hearsay statements offered to prove defendant was the shooter in two prior murders had sufficient indicia of reliability as to be properly admitted); Amanda Harris, Note, *Surpassing Sentencing: The Controversial Next Step in Confrontation Clause Jurisprudence*, 64 FLA. L. REV. 1447, 1468–76 (2012) (agreeing that almost all lower federal courts have rejected the argument that the Confrontation Clause should apply in the capital penalty phase).

285 *See* John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1975 (2005) ("[T]he Sixth Amendment rights of notice, counsel, confrontation, compulsory process, and the right to a jury do not conflict with Eighth Amendment concerns about consistency, proportionality, and the sentencer's need for broad access to information. Instead, Sixth Amendment rights will complement Eighth Amendment values and make modern capital sentencing fairer."); Penny J. White, *"He Said," "She Said," and Issues of Life and Death: The Right to Confrontation at Capital Sentencing Proceedings*, 19 REGENT U. L. REV. 387, 428 (2006–07) (contending that "[n]either the Constitution's text, its history, nor interpretative precedent provide a reasoned basis for denying a person facing death the right to confront the witnesses at a capital sentencing proceeding"); Harris, *supra* note 284, at 1482 (asserting "[t]hus, a logical extension of both defendant protection and history may very well be that the Confrontation Clause must apply during at least capital sentencing, if not parts of noncapital sentencing more generally").

Thus, taking a typical Confrontation Clause issue of a crime lab report as an example, while the Clause might require the opportunity for cross-examination of the preparer of the report at the guilt-innocence phase,[286] this Rule does not require such an opportunity at the penalty phase. Of course, if the defense can show a substantial reason not to trust the report, it may nonetheless be excludible under Rule P205 as causing confusion of the issues. This Subpart goes on to provide, however, that if the trial is trifurcated, the Confrontation Clause applies to the eligibility phase, but not to the selection phase.[287] This is because the eligibility phase presents a traditional legal issue of proof of an aggravating circumstance which is quite amenable to requiring compliance with the Confrontation Clause, while the selection phase ultimately presents a moral issue of what sentence the defendant deserves.

G. *Article VII: Allocution*

1. Rule P701: Defendant's Right of Allocution[288]

> Before closing arguments, the defendant shall be permitted to address the sentencer without being put under oath and without being subject to cross-examination. The defendant's right of allocution is limited to the following topics:
> 1) The presence or absence of remorse;
> 2) Representations about his/her likely future good or bad behavior;
> 3) Pleading for mercy or requesting a death sentence.

---

286 *See* Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011) (holding as to a blood alcohol lab report the defendant had a right to cross-examine the analyst who had performed the test, and that the Confrontation Clause was not satisfied by the testimony of another analyst who testified as to the results of the test); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 305 (2011) (holding as to cocaine analysis lab reports, an affidavit as to the results did not satisfy the Confrontation Clause because there was no witness for the defendant to cross-examine). *But see* Williams v. Illinois, 132 S. Ct. 2221, 2228 (2012) (plurality opinion) (holding that an expert who did not perform the DNA profile could nonetheless refer to the results of the test as a basis for expert opinion inasmuch as an expert's using such data as a basis for an opinion does not constitute hearsay because not offered for the truth of the matter asserted, and thus the defendant had no Confrontation Clause right to cross-examine the analyst who had performed the test).

287 Judge Bennett has held that the Confrontation Clause applies to the "eligibility" phase of capital cases but that "trifurcation" cures the Confrontation Clause problems. United States v. Johnson, 378 F. Supp. 2d 1051, 1059–62 (N.D. Iowa 2005).

288 CAP. PEN. PH. R. EVID. P701.

Comment: Jurisdictions have taken various positions regarding whether the defendant should be accorded an opportunity to address the sentencer without being under oath and subject to cross-examination.[289] This Rule permits the defendant a *limited* right to do so on three sentence-related topics—remorse, future behavior, and request for a certain sentence.[290] The Rule believes that many defendants who choose

---

289 *See, e.g.*, CAMPBELL, *supra* note 76, § 9:18, at 405–06 ("Jurisdictions split variously concerning the source of a right to allocute. A few tribunals elevate it to the level of a constitutional right, although most do not. A number of states recognize allocution as part of their common law. Many now provide for it by statute; others, including the federal system, afford it by court rule." (footnotes omitted)); *see also* Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2651–52 (2007) ("However, the extent of allocution protection for capital defendants varies from jurisdiction to jurisdiction, despite the origins of the practice in capital cases . . . ."). Under federal law, Federal Rule of Criminal Procedure 32(i)(4)(a)(ii) permits allocution to the judge in a normal case where the judge imposes sentence; a federal court *may* have discretion to permit allocution to the jury in a capital case. *See* United States v. Wilson, 493 F. Supp. 2d 509, 510–11 (E.D.N.Y. 2007):

> It is not clear whether a capital defendant has a constitutional right to allocute to his remorse, and several federal courts have held that he does not. *See* United States v. Purkey, 428 F.3d 738, 760–61 (8th Cir. 2005); United States v. Barnette, 211 F.3d 803, 820 (4th Cir. 2000); United States v. Hall, 152 F.3d 381, 391–98 (5th Cir.1998), abrogated on other grounds by United States v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774, 145 L. Ed. 2d 792 (2000). In addition, the Second Circuit has held in a non-capital case that "a defendant's right to a sentencing allocution is a matter of criminal procedure and not a constitutional right." United States v. Li, 115 F.3d 125, 132–33 (2d Cir. 1997).
>
> What is clear, however, is that this court has the discretion to permit Wilson to allocute. The Federal Rules of Criminal Procedure provide that, in both capital and non-capital cases, "[b]efore imposing sentence, the court must address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence[.]" FED. R. CRIM. P. 32(i)(4)(A)(ii). In a capital case, in which a defendant's fate is determined by a jury, permitting a defendant to speak to the court before the court imposes his sentence, but not to the jury before it determines that sentence, would afford capital defendants an "empty formality" rather than the substantive right afforded non-capital defendants. United States v. Chong, 104 F. Supp. 2d 1232, 1234 (D. Haw. 1999). Such a disparity would be unjust.

Id. Judge Bennett, relying on established Eight Circuit precedent, held that a defendant does not have the right to allocate before the jury in the penalty phase. United States v. Johnson, 403 F. Supp. 2d 721, 871 (N.D. Iowa 2005), *aff'd and remanded*, 495 F.3d 951 (8th Cir. 2007). Judge Bennett allowed the allocution before he mandatorily imposed the death sentence selected by the jury. The Third Circuit recently ruled in a non-capital case that the federal trial judges have discretion to require a defendant to allocate under oath. United States v. Ward, 732 F.3d 175, 184 (3d Cir. 2013). Several states that are active in imposing death sentences reject the right of a capital defendant to allocute inasmuch as the defendant has a right to testify at the penalty phase—albeit subject to cross-examination—to present his view to the jury. *See, e.g.*, People v. Tully, 282 P.2d 173, 263 (Cal. 2012) (so holding); Troy v. State, 948 So. 2d 635, 649 (Fla. 2006) (same); Garza v. State, No. AP–75477, 2008 WL 5049910, at *12 (Tex. Crim. App. Nov. 26, 2008) (same).

290 This right of allocution is modeled on one crafted by the New Jersey Supreme Court, when that state still had the death penalty, in State v. Zola, 548 A.2d 1022 (N.J. 1988).

to exercise their Fifth Amendment right not to testify will nonetheless have things they wish to say—and that the jury will wish to hear[291]—about the sentencing decision.

Note that the Rule does *not* permit the defendant to allocute as to the facts of the crime—a matter about which the prosecutor should certainly have a right to cross-examine.[292] The trial judge must enforce this Rule by sustaining a prosecutorial objection if the defendant attempts to allocute about the facts of the case. Perhaps the most likely way for the defendant to stray into testifying about prohibited facts would be to make an assertion about culpable mental state, e.g., "I never intended for anyone to get hurt." Such statements would be beyond the

---

> [The defendant] seeks no more than the right to stand before the jury and ask in his own voice that he be spared. He would not be permitted to rebut any facts in evidence, to deny his guilt, or indeed, to voice an expression of remorse that contradicts evidentiary fact . . . .
>
> The procedure we contemplate would allow the jury to hear from the defendant's voice that he is, "an individual capable of feeling and expressing remorse and of demonstrating some measure of hope for the future . . . ."

Zola, 548 A.2d at 1045–46 (quoting J. Thomas Sullivan, *The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation*, 15 N.M. L. REV. 41, 41 (1985)). Further,

> [I]t would be superfluous and unfair to subject testimony to cross-examination when the defendant merely allocutes as to mercy, remorse, or an interest in remaining alive. Indeed, in capital sentencing, where oaths and cross-examination are usually required, courts dispense with these procedures when a defendant asserts no concrete facts. In these cases, cross-examination would not reveal factual inconsistencies that shed light on credibility. Moreover, it would be unfair for a defendant to have to concretely prove remorse, or her interest in remaining alive. Thus, the costs spent on cross-examination, and the unfairness of placing a defendant in the impossible position of trying to prove such intangible assertions would not exceed the intended benefits of the safeguard.

Celine Chan, Note, *A Defendant's Word on Faith or Under Oath?*, 75 BROOK. L. REV. 579, 623 (2009) (footnotes omitted).

291 *See* John H. Blume, Sheri Lynn Johnson & Scott E. Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 HOFSTRA L. REV. 1035, 1037 (2008) (finding "the empirical studies reveal that three primary considerations drive juror decision-making at the penalty phase of a capital trial:" how "bad" the crime was, how dangerous they think the defendant is, and whether the defendant is remorseful). These authors also cast doubt, though, on how effective a defendant's expression of remorse during the penalty phase is likely to be: if the defendant takes the stand to express remorse, "jurors are generally doubtful of the sincerity of the defendant who takes the stand to declare for the first time how sorry he is: 'Yes, he's sorry now,' they think. 'Sorry he got caught, and sorry he is going to fry.'" *Id.* at 1049. Rather, the authors hope the defense can uncover and present evidence of remorse earlier in the trial. *Id.* Rule P407 hereof recognizes the admissibility of such evidence, but also notes that the hearsay rule may be an insurmountable barrier to out-of-court statements of remorse.

292 *See Zola*, 548 A.2d at 1046 ("The Maryland procedure would permit more than we contemplate in that it seemingly would allow a defendant to deny the killing. That would be more than a plea for mercy and should expose the defendant to impeachment." (citation omitted)).

scope of allocution, and the prosecutor and trial judge must stand on guard to prohibit them.

Most defendants want to *avoid* a death sentence and will wish to express their remorse for the crime, represent that they would behave well during future incarceration, and/or plead for mercy. On the other hand, a small number of defendants *desire* a death sentence and will wish to express lack of remorse for the crime, represent that they will continue to constitute a threat while incarcerated, and/or request a death sentence.[293] Either way, the jury may well find the defendant's statements probative on the issue of sentence.

Also, beyond the *content* of the defendant's allocution, the *process* itself is important—this may well be the only time the jurors get to hear the defendant speak in the courtroom, and will certainly be the only time the defendant gets to relate directly to the jurors (except for the rare pro se defendant). It is appropriate to provide for this interaction given the momentous human decision the jurors are being called on to make.[294]

CONCLUSION

So, the Rules come full circle from Rule P101, which declares the purpose of "providing the sentencer with as complete information as possible for making the sentencing decision, while avoiding unfair prejudice to the extent possible," to Rule P701, which implements that precept by allowing the defendant to personally allocute before the jury about the sentence. The Capital Penalty Phase Rules of Evidence facilitate the goal of a well-regulated penalty phase by proposing uniform and clear rules of admissibility for use across all death penalty jurisdictions. Enabling the sentencer to hear all properly admissible evidence in making the momentous decision of life or death is critical, yet in most jurisdictions the evidentiary rules governing the admissibility of such evidence are hard to discern, non-comprehensive, variable, and sometimes even nonexistent. The death penalty has a long

---

293 This Rule is arguably unnecessary as to a defendant who wishes to be sentenced to death, because presumably such a defendant will have no objection to testifying to that desire subject to cross-examination. But allowing allocution in these circumstances would at least show consideration for the feelings of the long-suffering capital defense attorney, who may be squeamish about having to put the defendant on the stand and ask questions that counsel knows will result in the client requesting death.

294 *See, e.g.*, *Zola*, 548 A.2d at 1045 (quoting McGautha v. California, 402 U.S. 183, 220 (1971)) ("Each capital jury expresses the collective voice of society in making the individualized determination that a defendant shall live or die. Whatever the Constitution permits, it bespeaks our common humanity that a defendant not be sentenced to death by a jury 'which never heard the sound of his voice.'").

and tortured history of criticism for its arbitrary imposition. Nothing can be more arbitrary in the penalty phase than admitting or excluding evidence based on imprecise rules that fluctuate from case to case and from jurisdiction to jurisdiction. Martin Luther King, Jr., often preached that "the arc of the moral universe is long but bends towards justice."[295] We know from history it does not bend on its own. The authors trust these Rules will help bend penalty phase trials towards greater justice.

295 *See* TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS, 1954–63, at 197 (1988) ("[O]ne of King's favorite lines, from the abolitionist preacher Theodore Parker [was]: 'The arc of the moral universe is long, but it bends toward justice.'").