DECLARATION OF WANDA FOGLIA

I, Wanda D. Foglia, of Bala Cynwyd, Pennsylvania, do swear and affirm that this Declaration provides an accurate summary of my research, findings and opinions related to the Capital Jury Project and a forecast of the testimony I will provide at a hearing addressing whether the Kansas death penalty statutes and procedures can overcome the challenges of arbitrariness and unreliability evident in jury decision making nationally.

1. I am a Professor of Law and Justice Studies and Coordinator of the Masters in Criminal Justice Program at Rowan University in Glassboro, New Jersey. I am a former prosecutor and police academy instructor, and I currently conduct social science research in the area of criminology and teach students who plan to work in the criminal justice system. I earned a Ph.D. in Criminology from The Wharton School of the University of Pennsylvania, a J.D. from the University of Pennsylvania Law School, and a B.A. in Psychology from Rutgers College. For the past 25 years, I have been involved in the Capital Jury Project (CJP) as an investigator and researcher. My C.V. is attached as Appendix A.

2. The CJP is a continuing program of research on juror decision-making in capital cases. It is a 14-state study consisting of interviews with 1198 jurors who have actually decided death penalty cases. These in-depth interviews took three to four hours and were done using a structured interview instrument that explored the jurors' experiences with the guilt evidence, guilt deliberations, sentencing evidence, and sentencing deliberations, as well as their personal characteristics and attitudes.

3. At an evidentiary hearing in *State of Kansas v. McNeal*, I would explain how the CJP conforms to social science standards and how the results apply to the case before the Court.

The CJP research was funded by the National Science Foundation, an independent federal agency and one of the most prestigious and selective funding sources for basic social science research conducted at America's colleges and universities. Social scientists with expertise in this type of research approved the CJP methodology when the research was initially funded, and then again when additional funds were awarded to expand the project. The CJP uses accepted scientific methods, procedures, and analyses that test legal and behavioral models of decision making to determine the bases upon which capital jurors make their decisions about the imposition of the death penalty, and whether the decision-making process conforms to statutory and constitutionally defined criteria.

4. I will testify that the CJP is organized as a consortium of independent university-based investigators from 14 states: Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. At an evidentiary hearing I would explain how the consistency of the findings in the states studied, regardless of the statutory scheme or geographic location, along with the consistency with results of research done by social scientists not affiliated with the CJP, indicates that the problems revealed are inherent in the capital process and would be present in death penalty cases in any state or federal court. All death penalty systems are similar in the way they utilize separate guilt and punishment phases and require that jurors be death qualified. Thus, the CJP evidence showing that about half the jurors decide the sentence during the guilt phase, and evidence showing that death qualification fails to eliminate automatic death penalty jurors and creates bias, would be relevant in any death penalty case. Most states with the death penalty have statutes modeled on 210.6 of the Model Penal Code and require that jurors weigh aggravating and mitigating factors, as is the case in Kansas. Eight of the CJP states have such statutes

(Alabama, California, Florida, Indiana, Louisiana, North Carolina, Pennsylvania, and Tennessee), and whether the statute is balancing, threshold, or directed does not seem to matter as the same types of misunderstanding of instructions were found under all these sentencing schemes.

5. I will testify that many aspects of the death penalty process are the same in every state and in the federal system because the United States Supreme Court has held that they are constitutionally mandated. For example, it is unconstitutional for any state or federal capital jury to include a juror who would automatically vote for the death penalty and "fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require."[1] In any capital case, jurors must be convinced of the existence of at least one aggravator beyond a reasonable doubt,[2] jurors must be able to consider and give effect to any evidence they consider mitigating,[3] and jurors do not have to be unanimous on findings of mitigation.[4] No statute requires that jurors find mitigation beyond a reasonable doubt. [5] Whether the case is on the state or federal level, the United States Constitution requires that the death penalty can never be mandatory,[6] the jurors always have to realize they are primarily responsible for the sentence,[7] the sentencing process should never be influenced by race,[8] and the jurors should never be forced to make a "false choice" between death and an incorrect assumption that defendants sentenced to life without parole will be paroled.[9]

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[1] Morgan v. Illinois, 504 U.S. 719, 720 (1992).
[2] Ring v. Arizona, 536 U.S. 584 (2002).
[3] Tennard v. Dretke, 542 U.S. 274 (2004).
[4] McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).
[5] Palmer, Jr., Encyclopedia of Capital Punishment in the United States, 77 (2001).
[6] Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).
[7] Caldwell v. Mississippi, 472 U.S. 320 (1985).
[8] Turner v. Murray, 476 U.S. 28 (1986).
[9] Simmons v. South Carolina, 512 U.S. 154 (1994).

6. I will testify that the original CJP research began in November of 1990, and the data collection is now complete and includes interviews with 1198 capital jurors from 353 different trials. he jurors in the original study were chosen using a three-stage sampling design. First, states were chosen to represent the principal variations in capital statutes utilized throughout the United States and to represent different geographic regions. Within each state, a purposive sample of recent capital trials that had proceeded to a penalty phase was obtained so that approximately half the cases resulted in death and the other half resulted in the alternative provided by state law. The purpose of using such a sample was to ensure that there were adequate numbers of death and life cases in each state to allow comparisons between the states and between decision-making in death versus life cases. The third stage involved randomly selecting jurors from each case. Each of the 1198 jurors in our sample were questioned about their attitudes towards the death penalty during the jury selection process, as mandated by U.S. Supreme Court case law, and sat through both a guilt and penalty phase. Nearly every state has approved pattern sentencing instructions that would have been given to the jurors to attempt to ensure that their sentencing decisions complied with state law and constitutional standards. I also will refer to a follow up study involving interviews with capital jurors on cases from 1999 to 2009 in seven states that found similar percentages of jurors making the mistakes found in the original study.

7. I will testify that in each state, 20-30 capital trials providing a rough balance of life and death outcomes were selected. A target sample of four randomly selected jurors from each trial was interviewed. Strict procedures were followed to ensure randomness of juror selection and avoid introducing bias into the sample selection. A coding and storage system preserves confidentiality and accommodates both quantitative and qualitative information. I

would explain more details and answer questions about the methodology at an evidentiary hearing.

8. The juror interview questionnaire contains numerous questions on both legal and social science issues. At an evidentiary hearing in *State of Kansas v. McNeal*, I would highlight the questions and results that relate to the legal issues, and explain how the results demonstrate various indices of validity and generalizability. The questionnaire is the product of six revisions, two pilot tests, and two meetings of participating investigators to ensure the questions are understandable and not leading. The investigators directing the Project in the respective states include psychologists, criminologists, sociologists, and law professors.

9. I will testify that the findings of this research have been presented by numerous different social scientists at annual meetings of the American Society of Criminology, Academy of Criminal Justice Sciences, and the Law and Society Association, and published in peer reviewed and law review journals such as Law and Society Review, Law and Human Behavior, Cornell Law Review, Indiana Law Journal (symposium issue devote to the Capital Jury Project), Texas Law Review, DePaul Law Review, Brooklyn Law Review, University of Pennsylvania Journal of Constitutional Law, Justice Quarterly, Criminal Law Bulletin, and Judicature, among other outlets. Over a dozen different master's theses and doctoral dissertations were based on analyses of CJP data. When CJP research is published or utilized in theses or doctoral dissertations, the methodology is reviewed by experts in the field with no affiliation with the project to ensure that the research meets scientific standards. The findings also have been cited by the U.S. Supreme Court in *Schiro v.Summerlin*, 542 U.S., 348, 356 (2004) and *Simmons v. South Carolina*, 512 U.S. 154, 169-170, n. 9 (1994) on the limited issues being decided in those cases.

10. I will testify that trained interviewers used the carefully designed interview questionnaire to ask people who had served as actual capital jurors about a number of issues related to their punishment decision, their understanding of the instructions, as well as their ability to follow the law in arriving at their punishment decision. Some of the major findings on these issues are presented in *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* which I co-authored with William J. Bowers[10] and which is attached as Exhibit B.[11]

11. I supervised the data collection for the Capital Jury Project in Pennsylvania. In addition, I personally trained interviewers for Pennsylvania, conducted some of the interviews, and have been analyzing the national data and giving presentations, testifying, and publishing articles on the CJP findings since 1996. Since being asked to join the CJP, I have 22 publications relating to death penalty research, including a report detailing CJP results in Pennsylvania that I was asked to write for the Pennsylvania Supreme Court Committee on Gender and Racial Bias. I have been asked to be a Reviewer for the National Institute of Justice on jury research, have been asked to testify before the New Jersey Death Penalty Study Commission, have made 36 presentations at professional meetings, and have been interviewed by PBS News based on my expertise on capital juror decision-making. I have testified as an

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[10] Dr. William J. Bowers earned a Ph.D. in Sociology from Columbia University and is the Principal Investigator who coordinated the 14-state study from his research institute housed at Northeastern University. He subsequently moved to the School of Criminal Justice, University at Albany, before passing away in 2017. Dr. Bowers authored two books and numerous articles on capital punishment, and received the August Vollmer Award in 2000 from the American Society of Criminology for his research on the death penalty.

[11] Bowers and Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* 39 Crim. L. Bull. 51 (2003).

expert witness on capital jury decision-making in 48 cases in 17 states and in the United States District Courts for the Districts of Colorado and Vermont, and have been qualified as an expert in every case in which I have been called to the stand. The states in which I testified include states that were part of the CJP sample [California, Georgia (four times), Indiana (eight times), Louisiana (four times), Missouri (five times), North Carolina (two times), Pennsylvania (four times), South Carolina (two times), Tennessee, Texas, and Virginia], as well as states that were not part of the sample [Colorado (three times), Kansas, New Hampshire, New Mexico (twice), Oregon (seven times), and Washington]. Because the internal and external consistency of the results demonstrates that the constitutional problems are inherent in the capital process rather than the result of any particular state's statute, I have been asked to testify in states that were not part of the sample and in the federal cases in Vermont and Colorado.

12. I will testify that most of the Tables included in this Affidavit are from Bowers and Foglia (2003) and generally show the percentages for 13[12] of the 14 states. The remarkable consistency in the problems found in every state, regardless of geographic location or statutory scheme, makes the results from all fourteen states relevant to state and federal death penalty cases throughout the country. For any given item, statistics are presented for valid responses, meaning all answers except those with missing data.

13. At an evidentiary hearing, I will explain in more detail and answer questions about how the CJP research was subjected to numerous tests to buttress the validity of the results. Social science standards require that research utilize an unbiased sample of at least 30

[12] Louisiana is not listed separately because sampling goals were not met in that state. Only 30 jurors were interviewed and nearly all were from death cases, thus the numbers from Louisiana would not be directly comparable to the numbers from other states that included a more even mix of death and life cases.

subjects in order to be able to generalize to the wider population. The state percentages presented were all based on samples that exceed 30, and the national sample size of 1198 was far above the minimum required. Moreover, care was taken to make sure no bias was introduced into the CJP sample selection. The interview questions met the test of face validity as "on their face" they were straightforward inquiries that did not encourage any particular response. Results demonstrated internal consistency as responses were related in the way one would expect. For example, the jurors who said they knew the sentence should be death by the end of the guilt phase were more likely to believe death was the only acceptable punishment for murder, were more likely to say they discussed the appropriate punishment during guilt deliberations, and were less receptive to mitigation. CJP results meet the test of convergent validity or replication as the results found are very similar to what other researchers found in studies using mock jurors,[13] surveys of the general population,[14] and capital jurors who were not part of the CJP.[15] I am not aware of any published studies that refute the findings of the CJP on the legal issues discussed below.

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[13] Dillehay and Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification* 20 L. and Hum. Behavior 147 (1996); Lynch and Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty* 24 L. and Hum. Behavior 337 (2000); Haney, Hurtado, and Vega, *Modern Death Qualification: New Data on Its Biasing Effects* 18 Law and Hum. Behavior 619 (1994); Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?* 1 Utah L. Rev. 274 (1995); Weiner, Pritchard, and Weston, *Comprehensibility of Approved Jury Instructions in Capital Murder Cases* 80 J. of Applied Psychology 455 (1995).

[14] Gallup Poll, Death Penalty (2021) https://news.gallup.com/poll/1606/death-penalty.aspx; Gross, *Update on American Public Opinion on the Death Penalty – It's Getting Personal* 83 Cornell L. Rev. 1448 (1998).

[15] Costanzo and Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework* 18 Law and Hum. Behavior 151 (1994); Geimer and Amsterdam, *Why Jurors Vote Life or Death: Operative Factors In Ten Florida Death Penalty Cases* 15 Am. J. Crim. L. 1 (1988); Haney, Sontag, and Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* 50 J. of Social Science Issues 149 (1994).

14. At the evidentiary hearing, I will explain in more detail and answer questions about how extensive analyses have been conducted to see whether factors such as the type of case, the demographic characteristics of the jurors, or the final verdict had an impact on the percentages of jurors exhibiting problems. Most of this analysis demonstrated that there were no significant differences based on these factors. (For example, the percentages making the mistakes discussed did not differ significantly for male versus female or young versus older jurors, etc.) Not surprisingly, the percentages making these mistakes was higher in the death cases compared to the life cases, but even if one looks at the life cases exclusively, there were still substantial numbers making these errors. Although this obviously indicates that a life verdict is still possible when jurors make these mistakes, the nature of their misunderstandings and the bias created, makes it more difficult to reach a life verdict than it would be if the process was working according to the constitutional standards the United States Supreme Court has established.

15. I will testify that Bowers and Foglia (2003) identify "seven different problems with the capital jury decision making process."[16] At an evidentiary hearing in *State of Kansas v. McNeal*, I would provide the court with more details and answer questions regarding the following data. I also would address questions as to what the research can tell us regarding the likely success of procedures proposed by the parties or the court to ameliorate the problems identified here.

16. I also will testify that based on the logic of probability sampling, with the CJP sample size of 1198, the 95% confidence interval for the percentage of jurors making each of the errors described below is plus or minus 3 percentage points or less,[17] and the 99.9% confidence

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[16] Bowers and Foglia, *supra* note 9 at 54.

[17] The highest sampling error would be for percentages close to 50% as in the example that follows in the text. The further the percentage gets from 50%, either higher or lower, the lower

interval is plus or minus 4.5 percentage points or less. This means that when we find, for example, 49.2% of the jurors decide the sentence during the guilt phase, there is only a 1 in 20 chance that the percentage would be less than 46.2% or more than 52.2%, and a 1 in 1000 chance that it would be less than 44.7% or more than 53.7%, respectively. I present the percentage of jurors exhibiting these seven different problems below.

1. Premature Decision Making.

17. The United States Supreme Court has approved a bifurcated capital process consisting of separate guilt and sentencing phases. Juries are supposed to determine whether the defendant is guilty of a capital offense during the first phase and then, if so, determine the sentence during the second phase. The CJP results show that many jurors do not follow the constitutionally prescribed process. About half the jurors decide the sentence during the guilt phase, before they have heard the standards that are supposed to guide their sentencing discretion or the sentencing phase evidence they are supposed to consider when deciding the sentence.

18. I will testify that in the CJP interview, all jurors were asked the following question: "After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [defendant's name] should be given a death sentence, a sentence of life without the possibility of parole (or the alternative in that state), [or were you] undecided?" The responses of the jurors are included below in Table 1 from Bowers and Foglia (2003).

Table 1: Percentage of Capital Jurors Taking Each Stand on Punishment Before Sentencing Stage Trial in 13 States

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the sampling error and thus the smaller the confidence interval. Thus the examples in the text involve the maximum confidence intervals and we can be 95% or 99.9% sure that the lower or higher percentages are accurate within a narrower range.

States	Death	Life	Undecided	No. of jurors
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108
Missouri	28.8	16.9	54.2	59
North Carolina	29.2	13.9	56.9	72
Pennsylvania	33.8	18.9	47.3	74
South Carolina	33.3	14.4	52.3	111
Tennessee	34.8	13.0	52.2	46
Texas	37.5	10.8	51.7	120
Virginia	17.8	31.1	51.1	45
All States	30.3%	18.9%	50.8%	1135

19. Nearly half of the jurors nationwide had already decided what the punishment should be at the end of the guilt phase, before the sentencing phase has even begun. Regardless of jurisdiction, at the end of the guilt phase only approximately half of these jurors maintain that they were undecided, as required by law, on what sentence to impose. Nationwide, nearly one-third have decided on death and 18.9% have decided on life prior to hearing evidence and instructions that are supposed to guide their sentencing decision. Most of the jurors who chose death said they were absolutely convinced (70.4%) about the punishment and nearly all the rest said pretty sure (another 27%).

20. We asked our jurors if they thought they knew what the punishment should be at four different points in the process:

1) after the guilt phase but before the sentencing phase (as discussed above)
2) after the sentencing instructions but before deliberations
3) at first vote
4) at final vote

Bowers, Sandys, and Steiner[18] present evidence showing that most of the jurors who had decided that the punishment should be death before the sentencing phase had begun never wavered from this position and maintained that the punishment should be death at all four points about which we inquired. Jurors who prematurely decided the sentence should be death were more likely to say they made their guilt and punishment decisions "together, on the basis of similar considerations." They also were most likely to say they first knew what the punishment should be during the guilt evidence. Those taking a premature death stance were more likely to see death as the only acceptable punishment for more types of murder, expressed stronger support for the death penalty, and were more likely to ultimately find the defendant guilty of capital murder. These jurors reported that during guilt deliberations, they were less likely to discuss issues such as burden of proof and degree of guilt and more likely to report that they discussed the impermissible topic of the appropriate sentence.

21. I will testify that these patterns confirm what social psychology research and common experience tells us: that once people form an opinion, they tend to interpret subsequent information to support their position. This tendency is commonly called confirmation bias. Nearly one out of three jurors are deciding the sentence should be death, before the sentencing phase even begins so the statutes are not guiding their discretion and they cannot be giving meaningful consideration to the mitigating evidence presented during the sentencing phase.

2. Bias in Jury Selection.

22. Capital jurors are generally "death qualified" to ensure they are willing to vote for a sentence of death, but the United States Supreme Court made it clear in *Morgan v. Illinois*

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[18] Bowers, Sandys and Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making* 83 Cornell L. Rev. 1476 (1998).

(1992)[19] that they also must be "life qualified" to ensure that they are open to a sentence less than death. According to Bowers and Foglia (2003), many of the CJP jurors were in fact Automatic Death Penalty (ADP) jurors -- jurors who would vote for a sentence of death in every case in which they found the defendant guilty of a capital offense -- and thus should have been excused for cause.

23. All jurors were asked: "Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes? Murder by someone previously convicted of murder; A planned premeditated murder; Murders in which more than one victim is killed; Killing of a police officer or prison guard; Murder by a drug dealer, and; A killing that occurs during another crime." As can be seen in Table 2 from Bowers and Foglia (2003), nearly three-quarters of the jurors, regardless of jurisdiction, felt that the death penalty is the *only acceptable* punishment for murder by someone previously convicted of murder. Similarly, over half of the jurors felt that death is the *only acceptable* punishment for persons convicted of a planned premeditated murder or a murder with multiple victims. Close to half thought death was the *only acceptable* punishment for killing a police officer or prison guard or a killing by a drug dealer. And nearly one-quarter of these jurors viewed death as the *only acceptable* punishment for a killing that occurs during another crime. The percentage saying death was unacceptable for any of these murders was under 4%, demonstrating that we are much better at death qualifying than life qualifying. Jurors cannot give meaningful consideration to mitigating evidence if they believe death is the only acceptable punishment.

Table 2: Percentages of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State

By defend-.	Planned	Murder	Killing	Murder	Murder

[19] Morgan v. Illinois, *supra* note 1.

States	ant with prior murder conviction	premed-itated murder	with multiple victims	police/ prison guard	by drug dealer	during another crime	N
Alabama	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56
California	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
Florida	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
Georgia	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
Indiana	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
Kentucky	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
Missouri	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
North Carolina	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
Pennsylvania	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
South Carolina	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
Tennessee	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
Texas	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
Virginia	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
All States	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

* The number of jurors answering each question varied slightly, and the number (N) for each state is the lowest number of jurors answering any of the questions.

24. At an evidentiary hearing, I would describe additional results showing that many jurors were deciding the very type of case for which they said death was the only acceptable punishment, and results that demonstrate that these ADP jurors were in fact less receptive to mitigation.

25. I will testify that although the above demonstrates that voir dire is not very effective at disqualifying the ADP jurors, numerous studies show that it is so efficient at eliminating those with reservations about the death penalty that it results in a jury that is more conviction and punishment prone than a representative group of citizens. Prior studies comparing people who would make it through death qualification (includables) with those who would be struck from the jury (excludables) find that includables are significantly more conviction and punishment prone than those who would be excluded.[20] For example, compared to those who

[20] See Haney, Hurtado, and Vega, *"Modern" Death Qualification: New Data On Its Biasing Effects* 18 Law & Human Behavior 619 (1994); Cowan, Thompson, and Ellsworth, *The Effects Of Death Qualification On Jurors' Predisposition To Convict And On The Quality Of Deliberation* 8 Law & Human Behavior 53 (1984); Fitzgerald and Ellsworth, *Due Process vs.*

would be excluded by the death qualification process, jurors who would be death qualified are less likely to believe in criminal justice attitudes supporting due process such as "it is better to risk the guilty going free rather than to convict the innocent," are less likely to find evidence mitigating, and are more likely to find evidence aggravating. The percentages for CJP jurors, who obviously all made it through death qualification, are more similar to those for the includables as opposed to the excludables on the three questions we asked that are analogous to those asked in the earlier study by Haney, Hurtado, and Vega (1994).

26. I will testify that a review conducted by Allen, Mabry, and McKelton (1998) of 14 different studies of how attitudes towards the death penalty relate to favoring conviction found an average correlation of .174 or a 44% increase in the probability of convicting among those who favored the death penalty.[21]

27. In addition, the death qualification process itself, as I will testify, creates a bias against the defendant because all those questions about the death penalty at the outset of the process makes jurors think that the authority figures in the courtroom, the judge, prosecutor and defense attorney, must think the defendant is guilty and deserves death.[22] Haney (1984a) shows that when two groups of people watch the same videotape of a jury selection, except that one group also views a segment on death qualification, the people who viewed the death qualification

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Crime Control: Death Qualification And Jury Attitudes 8 Law & Human Behavior 31 (1984); Sandys and McClelland, *Stacking The Deck For Guilt And Death: The Failure Of Death Qualification To Ensure Impartiality* (Chapter 13 in Acker, et al's America's Experiment With Capital Punishment 2d ed., 2003)); Blume and Johnson, Threlkeld, *Probing Life Qualification Through Expanded Voir Dire* 29 Hofstra L. Rev. 1209 (2001); and articles cited therein.

[21] Allen, Mabry, and McKelton, *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*22 Law & Human Behavior 715 (1998).

[22] Haney, *On the Selection Of Capital Juries: The Biasing Effects Of The Death-Qualification Process*) 8 Law & Human Behavior 121 (1984a); Haney, *Examining Death Qualification: Further Analysis Of The Process Effect* (1984b) 8 Law & Human Behavior 133; and articles cited therein.

are significantly more likely to vote for death. The Allen et al. (1998) review found that the studies that included some form of death qualifying voir dire found larger effects on the propensity to convict than studies that simply surveyed attitudes. The stronger impact observed when voir dire was included is further evidence of the process effect. The CJP interviews confirm results from prior studies that show that all the questions about the death penalty at the beginning of the jurors' experience have a biasing effect. We asked jurors whether these questions made them think the defendant was guilty and should be sentenced to death. In response to both questions, approximately 1 in 10 jurors were conscious of and willing to admit that all those questions about the death penalty had an influence on them. When asked about the impact of these questions, 11.3% of the jurors said the questions made them think the defendant "must be" or "probably was" guilty, and almost as many, 9.2%, said the questions made them think the appropriate sentence "must be" or "probably was" the death penalty.

28. I will testify that the combined influence of each of the above findings creates a profoundly pro-death bias which would permeate the defendant's trial and sentencing.

3. Failure to Understand Instructions.

29. I will testify that one of the major tenets of guided discretion statutes is that instructions would serve to channel discretion so as to remedy arbitrariness in capital sentencing. Results from the Capital Jury Project suggest that many jurors do not understand the sentencing instructions; this is especially true of instructions that are designed to guide jurors in their consideration of mitigating circumstances. The CJP interviews confirm results from prior studies that show that many jurors do not understand the guidance they are supposed to be following.[23]

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[23] Bowers and Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* 39 Crim. Law Bulletin 51 (2003); Garvey and Marcus, *Virginia's Capital Jurors* 44 Wm. and Mary L. Rev. 2063 (2003); Bentele and Bowers, *How Jurors Decide On*

As can be seen from Table 3 from Bowers and Foglia (2003), this is a significant problem in every state, regardless of statutory scheme. The Kansas statutory scheme is sufficiently similar in all significant respects to the eight CJP states with balancing statutes; therefore, the conclusion can be drawn that jurors' comprehension of Kansas court instructions is also deficient. Some of the guidelines will differ under various state statutes, but in every state, jurors have to be able to consider any relevant mitigating evidence because of the United States Supreme Court case law. Nearly half of the CJP jurors nationwide (44.6%) failed to understand this. There also is United State Supreme Court case law that says jurors need not be unanimous on findings of mitigation, but approximately 2 out of 3 jurors nationwide (66.5%) failed to understand they did not need to agree on whether evidence was mitigating. No state requires that mitigation be found beyond a reasonable doubt, but nearly half the jurors nationwide (49.2%) thought they had to apply that standard of proof to mitigating evidence. On the other hand, aggravating evidence does have to

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Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse 66 Brooklyn L. Rev. 1011 (2001); Bowers, Fleury-Steiner, and Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction* (chapter 14 from Acker, Bohm, and Lanier, America's Experiment With Capital Punishment, (2d ed., 2003)); Bowers and Steiner, *Choosing Life Or Death: Sentencing Dynamics In Capital Cases* (chapter 12 from Acker, Bohm, and Lanier, America's Experiment With Capital Punishment, (1st ed., 1998)); Geimer and Amsterdam, *Why Jurors Vote Life Or Death: Operative Factors In Ten Florida Death Penalty Cases* 15 Am. J. Crim. Law 1 (1988); Haney, Sontag, and Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* 50 J. of Social Science Issues 149 (1994); Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of Early Findings* 70 Ind. L. J. 1043 (1995); Haney and Lynch, *Comprehending Life And Death Matters* 18 L. & Human Behavior 411 (1994); Haney and Lynch, *Clarifying Life And Death Matters: An Analysis Of Instructional Comprehension And Penalty Phase Closing Arguments* 21 Law & Human Behavior 575 (1997); Lynch and Haney, *Discrimination And Instructional Comprehension: Guided Discretion, Racial Bias, And The Death Penalty* 24 Law & Human Behavior 337 (2000); Tiersma, *Dictionaries And Death: Do Capital Jurors Understand Mitigation?* 1995 Utah L. Rev. 1 (1995); Eisenberg and Wells, *Deadly Confusion: Juror Instructions in Capital Cases* 79 Cornell L. Rev. 1 (1993); and articles cited therein.

be proven beyond a reasonable doubt, and close to a third (29.9%) of the jurors failed to understand that part of the instructions. The statutes cannot be effectively guiding juror discretion when substantial portions of the jurors do not understand the jury instructions.

Table 3: Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

	JURORS WHO FAILED TO UNDERSTAND THAT THEY...				
States	Could consider any mitigating evidence	Need not be unanimous on mitigating evidence	Need not find mitigation beyond reas. doubt	Must find aggravation beyond reas. doubt	N*
Alabama	54.7%	55.8%	53.8%	40.0%	52
California	24.2%	56.4%	37.6%	41.7%	149
Florida	49.6%	36.8%	48.7%	27.4%	117
Georgia	40.5%	89.0%	62.2%	21.6%	73
Indiana	52.6%	71.4%	58.2%	26.8%	97
Kentucky	45.9%	83.5%	61.8%	15.6%	109
Missouri	36.8%	65.5%	34.5%	48.3%	57
North Carolina	38.7%	51.2%	43.0%	30.0%	79
Pennsylvania	58.7%	68.0%	32.0%	41.9%	74
South Carolina	51.8%	78.9%	48.7%	21.9%	113
Tennessee	41.3%	71.7%	46.7%	20.5%	44
Texas	39.6%	72.9%	66.0%	18.7%	47
Virginia	53.3%	77.3%	51.2%	40.0%	43
All States	44.6%	66.5%	49.2%	29.9%	1185

* The number of jurors answering each question varied slightly, and the number (N) for each state is the lowest number of jurors answering any of the questions.

4. Erroneous Beliefs that Death is Required.

30. Although it is unconstitutional for the death penalty to be mandatory, evidence from the Capital Jury Project reveals that sizeable percentages of jurors erroneously believe that death is required if certain aggravators are proved beyond a reasonable doubt. Nationwide, 43.9% of the jurors falsely believed that the law required them to impose death if the defendant's conduct was "heinous, vile, or depraved." In addition, 36.9% of CJP jurors believed that the law required them to vote for death if the evidence proved that the defendant would be dangerous in the future. As Table 4 from Bowers and Foglia (2003) indicates, these misunderstandings were seen in every state, including states that did not even list these factors as aggravating circumstances.

Table 4: Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was Heinous, Vile or Depraved," or Defendant "Would be Dangerous" in Future by State

	DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED	DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE	N*
Alabama	56.3%	52.1%	48
California	29.5%	20.4%	146
Florida	36.3%	25.2%	111
Georgia	51.4%	30.1%	72
Indiana	34.4%	36.6%	93
Kentucky	42.7%	42.2%	109
Missouri	48.3%	29.3%	58
North Carolina	67.1%	47.4%	76
Pennsylvania	56.9%	37.0%	73
South Carolina	31.8%	28.2%	110
Tennessee	58.3%	39.6%	48
Texas	44.9%	68.4%	117
Virginia	53.5%	40.9%	43
All States	43.9%	36.9%	1136

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

5. Evading Responsibility for the Punishment Decision.

31. I will testify that the jury has primary responsibility for determining the sentence in capital cases. Yet another indication that many jurors did not understand the sentencing process is their failure to understand their responsibility for the defendant's punishment. The United States Supreme Court warned in *Caldwell v. Mississippi* (1985)[24] that jurors would be reluctant to accept responsibility and that the sentence would be unreliable if jurors believed the ultimate responsibility rested with others. The CJP interview instrument asked the jurors to rank the defendant, the law, the juror, the jury and the judge in terms of how responsible they were for the defendant's sentence. Table 5 from Bowers and Foglia (2003) shows the responses to this question.

[24] Caldwell v. Mississippi, *supra* note 6.

Table 5: Percent Ranking Five Sources or Agents of Responsibility for the Defendant's Punishment from Most "1" to Least "5" Responsible

	MOST RESPONSIBLE> 1	2	3	4	LEAST <RESPONSIBLE 5
the defendant because his/her conduct is what actually determined the punishment	49.2	10.7	6.0	7.7	26.3
the law that states what punishment applies	32.8	40.0	8.6	12.5	6.2
the jury that votes for the sentence	8.9	23.6	38.3	25.4	3.8
the individual juror since the jury's decision depends on the vote of each juror	5.6	14.2	27.1	28.4	24.7
the judge who imposes the sentence	3.5	11.3	20.4	25.8	38.9

* Percentages are based on the 1,095 jurors who ranked all five options (i.e., ranks sum to 15).

32. Over 80% of the jurors interviewed said the defendant (49.2%) or the law (32.8%) was primarily responsible for the defendant's punishment. In contrast, only 5.6% said the individual juror and only 8.9% said the jury as a whole were most responsible. Another question in the national sample asked about how responsibility was allocated among the jury, trial judge, and appellate judges and in the 10 states where the jury decision was binding on the judges, only 29.8% believed the jury was strictly responsible.

6. Racial Influence in Juror Decision Making.

33. I will testify that although it is unconstitutional for race to affect who gets the death penalty, evidence from a variety of sources demonstrates that race influences the capital process. The responses of the CJP jurors adds to the existing evidence of how race still influences who gets the death penalty in this country. Studies reveal that a death penalty is more likely when the defendant is black or when the victim is white, and the odds are greatest when

the defendant is black and the victim is white. Regardless of the race of the defendant and victim, the evidence shows that the instructions meant to guide juror discretion have not succeeded in preventing race from affecting the sentencing decision.

34. The most consistent finding in the research on race and the death penalty is what is called the race of victim effect: the evidence showing that defendants are more likely to get the death penalty when the victim is white. The United States General Accounting Office (GAO) review of prior research showed that 82% of the studies indicated that defendants were more likely to get the death penalty if the victim was white.[25] Numerous more recent studies done in jurisdictions as diverse as Connecticut, Colorado, North Carolina, and the Armed Forces also find that the defendant is more likely to get the death penalty when the victim is white.[26]

35. I also will testify about studies that provide evidence that Cornell McNeal is more likely to get the death penalty because he is black, regardless of the race of the victim.[27] These

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[25] U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Patterns of Racial Disparities (1990).

[26] Donohue III, Capital Punishment in Connecticut, 1973-2007: A Comprehensive Evaluation From 4686 Murders to One Execution (2011); Hindson, Potter and Radelet, *Race, Gender, Region and Death Sentencing in Colorado, 1980-1999* 77 U. Colo. L. Rev. 549, 581 (2006); Unah, *Choosing Those Who Will Die: The Effect of Race, Gender, and Law in Prosecutorial Decision to Seek the Death Penalty in Durham County, North Carolina* 15 Mich. J. Race & L. 135, 174 (2009); and Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)*, 101 J. Crim. L. & Criminology 1227 (2012).

[27] See Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings from Philadelphia,* 83 Cornell L. Rev. 1638 (1998); Baldus et al., *Racial Discrimination in the Administration of the Death Penalty: The Experience of the United States Armed Forces (1984-2005)* 101 J. of Crim. L. and Crim 1227 (2012); Beardsley et al., *Disquieting Discretion: Race, Geography & The Colorado Death Penalty In The First Decade Of The Twenty-First Century* 92 Denver U. L. Rev. 431 (2015); Grosso et al., *Race Discrimination and the Death Penalty: An Empirical and Legal Overview* (Chapter 19 Acker, et al.'s America's Experiment with Capital Punishment: Reflection on the Past, Present, and Future of the Ultimate Penal Sanction (3d ed., 2014));

studies find that black defendants are more likely to be sentenced to death even after controlling for factors such as the race of victim and heinousness of the crime.

36. I will discuss two other research findings that will work against Cornell McNeal: (1) evidence that blacks are less likely to support the death penalty is likely to lead them to be underrepresented on capital juries, and (2) evidence that racist attitudes are associated with supporting the death penalty suggests that jurors who make it onto a capital jury are more likely than the general population to have such attitudes. A 2021 poll by Pew Research Center found that 63% of whites supported the death penalty compared to only 49% of blacks,[28] and a review of Gallup Poll results from 1936 to 2006 found that whites were consistently more likely to support the death penalty compared to nonwhites.[29] Because of the death qualification process, lower levels of support for the death penalty among nonwhites will lead to them being underrepresented on a capital jury. In addition, surveys repeatedly reveal that prejudice against blacks is associated with greater support for the death penalty.[30] These results increase the likelihood of getting jurors on a capital jury with racist attitudes that would bias them against Cornell McNeal.

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[28] Pew Research Center, Most Americans Support the Death Penalty Despite Concerns About its Administration (2021) https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/ .

[29] Bohm, Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States (4th ed., 2012).

[30] Bobo and Johnson, *A Taste for Punishment: Black and White Americans' views on the Death Penalty and the War on Drugs* 1 Du Bois R. 151 (2004); Bratina et al., *Racism and White Death Penalty Support: A Test of the Racist Punitive Bias Hypothesis* 18 Internat. J. of Police Sci. and Management 140 (2016); Unnever and Cullen, *White Perceptions of Whether African Americans and Hispanics are Prone to Violence and Support for the Death Penalty* 49 J. of Research in Crime and Delinquency 519 (2012); Young, *Guilty Until Proven Innocent: Conviction Orientation, Racial Attitudes, and Support for Capital Punishment* 25 Deviant Behavior 151 (2004).

37. The underrepresentation of non-white jurors actually makes a death sentence more likely for all defendants. Foglia and Connell's (2019)[31] analysis of CJP jurors found that nonwhite jurors who believed in the death penalty and served as jurors were less likely than white jurors to vote for death, regardless of the race of the defendant and victim, because they had less trust in the capital process and more empathy for defendants. I will testify that non-white CJP jurors were significantly less likely to vote for death than white jurors (38% vs. 58%) and that racial differences in distrust of the capital process and empathy were able to completely explain this difference.

38. Other analyses of the CJP data, as well as research by Baldus, has also found that the racial composition of the jury and the race of individual jurors influence capital sentencing decisions.[32] The CJP research has found that regardless of the race of the defendant and the victim, black jurors are more likely than white jurors to have lingering doubt and to think the defendant was sorry.

39. I will testify that some of the CJP most troubling results were found in cases involving black defendants and white victims. The CJP results revealed that when the defendant was black and the victim was white, the presence of five or more white males dramatically increased and the presence of at least one black male dramatically decreased the chance of a death sentence. Again, in black defendant/white victim cases, black and white jurors sitting on the same cases interpreted the same evidence in very different ways. As shown by comparing the

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[31] Foglia and Connell, *Distrust and Empathy: Explaining the Lack of Support for Capital Punishment Among Minorities* 44 Crim. Just. Rev. 204 (2019).
[32]Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Constit. L. 3, 101, Table 10 (2001); Bowers et al. *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Composition*, 3 U. Pa. J. Constit. L. 171 (2001); Bowers and Foglia, *supra* note 9.

results for white male jurors with black male jurors in Table 6, the black male jurors were seven times more likely to have lingering doubt, six times more likely to think the defendant was not most responsible, five times more likely to think the defendant was sorry, two times as likely to identify with defendant or the defendant's family, half as likely to say "dangerous" described the defendant very well, and one-third as likely to give extremely low estimates of early release.

Table 6: Elements of (a) Lingering Doubts (b) the Defendant's Remorse and Identification, and (c) Dangerousness and Early Release by Jurors' Race and Gender in Black Defendant-White Victim Cases

	JURORS' RACE AND GENDER			
	White Males	White Females	Black Males	Black Females
(A) LINGERING DOUBTS				
1. Importance of lingering doubts about the defendant's guilt for you in deciding on punishment				
VERY	0%	12.5%	26.7%	21.1%
FAIRLY	6.9%	0%	26.7%	15.8%
NOT VERY	6.9%	8.3%	0%	15.8%
NOT AT ALL	86.2%	79.2%	46.7%	7.4%
(No. of jurors)	(29)	(24)	(15)	(19)
2. When considering punishment, did you think the defendant might not be the one most responsible of the killing?				
YES	10.3%	4.0%	60.0%	36.8%
NO	86.2%	96.0%	40.0%	52.6%
NOT SURE	3.4%	0%	0%	10.5%
(No. of jurors)	(29)	(25)	(15)	(19)
(B) REMORSE AND IDENTIFICATION				
1. How well does "Sorry for what s/he did" describe the defendant?				
VERY WELL	7.4%	20.0%	46.7%	31.6%
FAIRLY WELL	7.4%	0%	33.3%	21.1%
NOT SO WELL	33.3%	40.0%	6.7%	15.8%
NOT AT ALL	51.9%	40.0%	13.3%	31.6%
(No. of jurors)	(27)	(25)	(15)	(19)
2. Did you imagine yourself in the defendant's situation?				
YES	26.7%	28.0%	53.3%	31.6%
NO	73.3%	72.0%	46.7%	68.4%
(No. of jurors)	(30)	(25)	(15)	(19)
3. Did you imagine yourself in the defendant's family's situation?				
YES	30.0%	48.0%	80.0%	47.4%
NO	60.0%	48.0%	13.3%	47.4%
NOT SURE	10.0%	4.0%	6.7%	5.3%
(No. of jurors)	(30)	(25)	(15)	(19)
C.DANGEROUSNESS AND EARLY RELEASE				
1. "Dangerous to other people" describes the defendant				
VERY WELL	63.3%	52.0%	26.7%	42.1%
FAIRLY WELL	30.0%	32.0%	53.3%	36.8%
NOT SO WELL	3.3%	8.0%	0%	10.5%
NOT AT ALL	3.3%	8.0%	20.0%	10.5%
(No. of jurors)	(30)	(25)	(15)	(19)
2. How long do you think someone not given the death penalty for a capital murder in this state usually spends in prison?				
0-9 YEARS	30.0%	17.6%	7.7%	7.1%
10-19 YEARS	30.0%	52.9%	30.8%	57.1%
20+ YEARS	40.0%	29.4%	61.5%	35.7%
(No. of jurors)	(20)	(17)	(13)	(14)

7. Underestimating the Death Penalty Alternative.

40. I will testify that when the CJP data was collected, four of the CJP states required that defendants who were found guilty of a capital crime be sentenced to death or life without the possibility of parole (LWOP), just as is required by Kansas law. There is an abundance of research, including CJP data, showing that most capital jurors grossly underestimate how long someone not sentenced to death usually spends in prison, and the lower their wrong estimates, the more likely they are to vote for death.[33]

41. I will testify that Table 7 from Bowers and Foglia (2003), shows that in every state, most of the CJP jurors believed *most* defendants would be released before they were even eligible for parole, even in the states that had Life Without Parole (LWOP) at the time of the interviews. The median estimate for when most defendants get released for the national sample was 15 years. In every state, the median estimate was well below the mandatory minimums all defendants had to serve before even being eligible for parole in each of these states.

Table 7: Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

YEARS IN PRISON IF NOT GIVEN DEATH

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[33] Bowers and Foglia, *supra* note 9; Bowers and Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing* 77 Texas L. Rev. 605 (1999); Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of Early Findings* 70 Ind. L. J. 1043 (1995); Bowers and Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing* 77 Texas L. Rev. 605 (1999); Steiner, Bowers, and Sarat, *Folk Knowledge As Legal Action: Death Penalty Judgments And The Tenet Of Early Release In A Culture Of Mistrust And Punitiveness* 33 Law & Society Rev. 461 (1999); Foglia, *They Know Not What They Do: Unguided And Misguided Discretion In Pennsylvania Capital Cases* 20 Justice Quarterly 187 (2003); Haney, *Violence And The Capital Jury: Mechanisms Of Moral Disengagement And The Impulse To Condemn To Death* 49 Stan. L. Rev. 1447 (1997); Blume, Garvey, and Johnson, *Future Dangerousness in Capital Cases: Always 'At Issue'* 86 Cornell L. Rev. 397 (2001); and Bowers and Steiner, *Choosing Life Or Death: Sentencing Dynamics In Capital Cases* (chapter 12 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (1st ed., 1998))

State	Median estimate*	(N)	Mandatory minimum**
Alabama	15.0	(35)	LWOP
California	17.0	(98)	LWOP
Florida	20.0	(104)	25
Georgia	7.0	(67)	15
Indiana	20.0	(75)	30
Kentucky	10.0	(74)	12, 25***
Missouri	20.0	(47)	LWOP
North Carolina	17.0	(77)	20
Pennsylvania.	15.0	(63)	LWOP
South Carolina	17.0	(99)	30
Tennessee	22.0	(42)	25
Texas	15.0	(106)	20
Virginia	15.0	(36)	21.75
All states	15.0	(943)	-----

*Median estimates exclude "no answers" and unqualified "life" responses but include responses indicating "life without parole" or "rest of life in prison."
**These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.
***Kentucky gives capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives (See Bowers and Steiner 1999, supra at 646 n.198).

42. I will testify that Bowers and Steiner (1999) show that jurors who espouse extremely low estimates are more likely than those giving the more realistic estimate of 20+ years to choose death at all four points about which we inquired. The difference in the percentage choosing death between those with low and high estimates actually gets more pronounced as the trial progresses, which is consistent with jurors' narrative reports that the dangerousness of the defendant if released is a dominant topic in deliberations. Future dangerousness is likely to be an important issue in Cornell McNeal's case as he is relatively young and, if jurors believe he will be released in 15 years or less, they may conclude that he would be dangerous when released. The more jurors underestimate when defendants usually get released, the more likely they are to consistently take a stand for death and ultimately vote for death.

43. Additional evidence of how assuming early release makes someone more likely to support a death sentence can be seen from Gallup Poll results. A review of Gallup Polls done by

Gross (1998)[34] shows that between 1991 and 1998, when support for the death penalty was between 70 and 80%, support dropped 15-20% when LWOP was offered as an alternative. In an "In Depth" summary of trends found in Gallup polling from 1937 to 2021, the results for 2019, the last time Gallup offered the LWOP alternative, showed that this pattern persists. While support for the death penalty was 56% in the 2019 poll, support fell to 36% when LWOP was offered as an option.[35] Like the general public, jurors are less likely to support the death penalty when they think defendants not sentenced to death will spend the rest of their lives in prison. Unfortunately, many jurors unrealistically assume that defendants sentenced to life will be released.

44. At the hearing I will testify that the United States Supreme Court cited some of the earlier CJP research in *Simmons v. South Carolina* where it held that if the alternative to death was LWOP and the prosecution argued the defendant would be dangerous in the future, then the jury must be informed that the defendant could not be paroled. Now nearly all states provide LWOP as an option for at least some capital offenses and require that the jury be told parole is not an option. However, the CJP data show that it is difficult to convince jurors that the defendant really will not be released on parole.

45. I will testify that in interviews with California jurors who were told that a life sentence meant the defendant would not be paroled, some jurors said they simply did not believe what the judge told them. One typical juror in a death case said he believed defendants usually get released in fifteen years even though he observed that officially they say the sentence is:

> Life imprisonment, but even though now it says without possibility of parole, we were still concerned that someday he'd get out on

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[34] Gross, *Update on American Public Opinion on the Death Penalty – It's Getting Personal* 83 Cornell L. Rev. 1448 (1998).
[35] Gallup Poll, Death Penalty (2021) https://news.gallup.com/poll/1606/death-penalty.aspx.

parole. We didn't want him out again at all.

Another juror who ultimately voted for death said:

> I was undecided. I had a personal problem with the life sentence, but then the judge explained to me that if he gets a life sentence there was absolutely no chance that he would get out. I thought he might get out. I still don't trust anybody about it.

In California, 32.9% of the jurors who actually voted for death said they would have preferred life without parole if it had been an alternative, as indeed it was in the cases they decided. Jurors are influenced by memories of media accounts of murderers who have been released from prison, and do not realize that these may have been people sentenced under prior laws or people who had not been convicted of capital murder. It is very difficult to convince jurors that life really means life because of the widespread distrust of the criminal justice system. As Bowers and Foglia note "[b]oth statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death," (2003 at 82).

The Problems Persist.

46. I will testify that a follow up study involving interviews with former capital jurors who sat on trials from 1999 to 2009 shows that the problems persist. This sample consists of 153 interviews with jurors from seven states.[36] Many of the same questions that were asked in the original CJP were asked in these more recent interviews and the percentages of jurors making the same mistakes are remarkably similar.

(i) The percentage of jurors deciding the sentence before the sentencing phase had begun,

[36] The interviews are from jurors in California, Delaware, Indiana, Louisiana, Oklahoma, Pennsylvania, and Texas. Although this is a smaller sample size than the 1198 in the Capital Jury Project, it is far more than the sample size of 30 that is required to do valid statistical analysis.

what we call premature decision-making, was 51%, as opposed to 49% in the original sample. The percentage who had already decided the sentence should be death in the new sample was 35%, compared to 30% in the original sample, and the percentage who had decided the sentence should be life was 16%, compared to 19% in the original sample.

(ii) The percentage of jurors who made it through jury selection even though they thought death was the only acceptable punishment for different types of murder that would encompass nearly all capital cases in the original and new samples were as follows:

Table 8: Percentage of Jurors Considering Death the Only Acceptable Punishment

Type of murder:	Original CJP	New Sample
Def. w/prior murder conviction	72%	72%
Planned, premeditated murder	57%	51%
Murder w/multiple victims	54%	46%
Killing police/prison guard	49%	49%[37]
Murder by a drug dealer	46%	30%
Murder during another crime	24%	18%

(iii) On the four questions about how to handle mitigation and aggravation, the more recent jurors did better on two and worse on two, with 64% failing to understand that they could consider any relevant mitigating evidence (compared to 45%), 63% failing to understand that unanimity is not required for mitigation (compared to 67%), 57% thinking that mitigation has to be proven beyond a reasonable doubt (compared to 49%), and 23% failing to realize that aggravation has to be proven beyond a reasonable doubt (compared to 30%).

(iv) The percentage thinking the law required death if the defendant's conduct was heinous, vile, or depraved was similar in the new and original samples, 42% and 44%, respectively, and the percentage thinking the law required death if defendant would be

[37] In the new sample this question was broken down into two questions and the percentages saying death was the only acceptable punishment was 49.7% for police officers and 49% for prison guards. For ease of comparison, I used the average of the two in this table.

dangerous in the future was actually higher in the new sample at 45%, compared to 37% of the original sample.[38]

(v) The question regarding relative responsibility was changed somewhat to offer three options as opposed to four so the numbers are not directly comparable, but in the new sample 33% said "whether the defendant lived or died... was mostly the responsibility of the judge and the appeals court." In the original sample, 17% said that the sentence was "mostly the responsibility of the judge and the appeals court." The percentage saying the jury or the individual juror were most responsible in the new sample were 5% and 1%, respectively, which is lower than the 9% and 6% found in the original sample.

(vi) There was a substantial increase in the new sample in the median estimate of how long someone not given the death penalty "usually spends in prison," which is understandable now that Life Without Parole has become so much more common. Of those who gave numerical estimates in the new sample, the median was 25 years as opposed to 15 years in the original sample.

47. I also will testify that I do not believe that the problems with the way jurors make their decisions in capital cases can be solved. There are ways of ameliorating these problems to a limited extent, but the evidence suggests that it would be impossible to get 12 jurors who would actually decide the sentence in accordance with the legal standards established by the United States Supreme Court. At an evidentiary hearing, I would be able to explain what the research

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[38] The higher percentage thinking the law required death in the new sample is due to the fact that 30% of the new sample is from Texas which makes future dangerous one of the "special issues," while only 10% of the original sample is from Texas. In the original sample, jurors from Texas (n=117) were most likely (68%) to think the law required death if future dangerousness was established, and 33% of the rest of the sample thought death was required under those circumstances. In the new sample, the percentages thinking death was required were 70% of the 46 jurors from Texas, and, again, 33% of the jurors from other states (n=99).

evidence tells us about the potential for improving the process of remedies suggested by the parties or the court.

48. The failure to follow the law is so widespread that it is my opinion that it is impossible to choose a jury of twelve citizens who will be able to completely avoid the mistakes discussed herein. Focusing on the six areas where jurors are clearly at odds with the law, our interviews demonstrated that nearly half or more are making mistakes in these six areas. More specifically:

- 49.2% are making premature punishment decisions
- 50.2% believe the death penalty is mandatory under commonly found facts
- 58.5% underestimate the death penalty alternative
- 80.8 % express a predisposition for the death penalty
- 82.0% don't feel responsible for the sentence
- 83.1% misunderstood death penalty instructions (not counting Don't Know or no answer)

As the chart published in Bowers, Foglia, Ehrhard-Dietzel & Kelly (2010) and excerpted above and below shows, not one of the 1198 jurors from the original sample answered everything correctly in all of the six areas relating to the legal process that we asked about.

Table 9: Percentage distribution of jurors by the number of areas in which they fail to understand or comport with constitutional requirements

Number of areas with errors	Percentage of jurors making errors in that many areas
0	0%
1	1.9%
2	7.1%
3	20.1%
4	34.4%
5	28.6%
6	7.9%

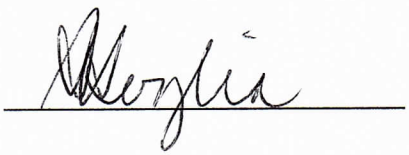
The mean, median and modal number of areas in which jurors made mistakes is four of the six. We could not calculate the probability of getting 12 jurors who do not make mistakes in any of these areas because our results find that the probability of a juror getting everything correct is

zero. Although it would not be constitutionally permissible, in this article we calculate the probability of getting 12 jurors who make mistakes in only one area to demonstrate how impossible it is to get a jury that follows the law. The probability of getting one juror who only makes one mistake is reflected in the 1.9% above. The chance that a defendant would have twelve jurors who only made errors in one area is .019 raised to the 12th power or an infinitesimal 2.213 out of 1,000,000,000,000,000,000,000.[39]

49. I will testify that having been involved in the Capital Jury Project since 1996, having supervised the data collection in Pennsylvania, having co-authored several articles based on the entire data set, having done extensive reviews of research done by others in the preparation of these articles, it is my opinion that the jurors in *State of Kansas v. McNeal* will be similar to capital jurors in the 14 states that comprise the Project: substantial percentages of the jurors are likely to decide the sentence prematurely, to see death as the "only acceptable" punishment, to be biased by the death qualification process, to misunderstand the instructions, to erroneously believe that death is required when certain aggravators exist, to see others as more responsible for the punishment decision than themselves, to be influenced by racial stereotypes, and to underestimate the length of time served for persons not sentenced to death. All of these errors will make jurors more likely to vote for death than they would be if they were following constitutional standards.

I declare under penalty of perjury that the forgoing is true and correct.

February 3, 2022
Bala Cynwyd, Pennsylvania,



[39] Bowers et al., *Jurors' Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence,* 46 Crim. Law Bull. 1147 (2007).

Appendix A

WANDA D. FOGLIA
Professor of Law and Justice Studies
Attorney at Law

Law & Justice Studies
Rowan University
201 Mullica Hill Road
Glassboro, NJ 08028-1701

(856) 256-4399 foglia@rowan.edu

EDUCATION

Ph.D. Criminology, The Wharton School of the University of Pennsylvania, Phila., PA 1996
Dissertation: *Exploring the Interaction of Cognitive and Social Learning Influences to Enhance Understanding of Self-Reported Delinquency Among Inner-City Youth*
Dissertation Advisor: Professor Marvin E. Wolfgang

J.D. University of Pennsylvania Law School, Phila., PA 1982

M.S. Criminology, The Wharton School of the University of Pennsylvania, Phila., PA 1990

B.A. Psychology/Certificate in Criminal Justice, Rutgers College, New Brunswick, NJ 1979
Honors: Graduated with Highest Honors, Henry Rutgers Scholar, Awarded High Distinction in Psychology for Honors Thesis, Member of Psi Chi (Psychology Honor Society), Dean's List Each Semester, Ranked 11th out of 1500

EMPLOYMENT

Professor of Law & Justice Studies, Rowan University
Coordinator for the Master of Arts in Criminal Justice Program
Research Interests: Capital Juror Decision-Making and Cognition and Crime
Former Department Chair and Advisement Coordinator; Member of Advisory Board for Women's Studies; Founding Member of Advisory Board for *Faculty Center for Excellence in Teaching and Learning*, Elected to *Who's Who Among America's Teachers*; and various other department and college committees listed below; Teaching Graduate courses (Contemporary Developments in Theory, Law and Society, Race, Ethnicity, Class and Crime) and Undergraduate courses (Theories of Crime & Criminality, Treatment of the Offender, Corrections, Research Methods, Survey of Criminal Justice and Policing), including writing intensive and Rowan Seminar courses, 1994 to present

Teaching Fellow, Department of Legal Studies, The Wharton School
Taught Criminology, 1988 to 1994; Coordinated filming of instructional videotapes on business ethics, 1993

Research Assistant to Professor Thomas W. Dunfee, The Wharton School
Researched and edited articles and books on social contracts, societal norms, and legal and business ethics, 1991 to 1994

Administered Project to Integrate Ethics into the Undergraduate Curriculum, The Wharton School - Coordinated faculty and teaching materials, and edited and wrote portions of report on project, 1991 to 1993

Instructor, Municipal Police Training Program, Montgomery County Community College Municipal Police Training Program, Blue Bell, PA - Taught Antisocial Behavior and Law courses, 1987 to 1991

Adjunct Faculty
Saint Joseph's University, Philadelphia, PA, 1994
West Chester University, West Chester, PA, 1988
Montgomery County Community College, Blue Bell, PA, 1987
Paralegal Program, Career Institute, Philadelphia, PA, 1987
Taught Criminology, Criminal Justice, Criminal Procedure, Law Enforcement, and Law courses

Assistant District Attorney
Philadelphia District Attorney's Office, Philadelphia, PA
Prepared and tried misdemeanor and felony cases, 1984 to 1986

Associate, Litigation Department
Saul, Ewing, Remick & Saul, Philadelphia, PA
Handled civil and criminal caseload from inception to settlement or adjudication, 1982 to 1984

PUBLICATIONS

Foglia, W. D. (2021). Invited Book Review of *Capital Defense: Inside the Lives of America's Death Penalty Lawyers*, by Jon B. Gould & Maya Pagni Barak, *Criminal Law Bulletin, 57*(1), 1-8.

Foglia, W. D. & Connell, N. (2019). Distrust and empathy: Explaining the lack of support for capital punishment among minorities, *Criminal Justice Review 44* (2), 204-230 https://doi.org/10.1177/0734016818796902).

Foglia, W. D. (2018). Invited Book Review of *Executing Freedom: The Cultural Life of Capital Punishment*, by Daniel LaChance, *Criminal Law and Criminal Justice Books*, http://clcjbooks.rutgers.edu/books/executing-freedom-the-cultural-life-of-capital-punishment-in-the-united-states/.

Foglia, W. D. & Sandys, M. (2018). The capital jury and sentencing: Neither guided nor individualized. In R. M. Bohm & G. M. Lee (Eds.), *Routledge Handbook on Capital Punishment* (pp. 364-384). NY: Taylor & Francis.

Foglia, W.D. & Schenker, N. M. (2017). Capital cases: Arbitrary and capricious after all these years. In Pennsylvania Bar Institute (Eds.), *34th Annual Criminal Law Symposium, Vol. 2* (pp. JJ-5-JJ-9). Mechanicsburg, PA: Pennsylvania Bar Institute (Original work published in 2001).

Foglia, W. D. (2014). Invited Book review of *Capital Punishment's Collateral Damage*, by Robert M. Bohm," *Criminal Law and Criminal Justice Books,* http://clcjbooks.rutgers.edu/books/capital-punishment-collateral-damage.html.

Marceau, J. Kamin, S. & **Foglia, W. D.** (2013). Death eligibility in Colorado: Many are called, few are chosen." *University of Colorado Law Review 84* (4): 1069-1115.

Foglia, W. D. (2013). Invited "Book review of *The Death of the American Death Penalty: States Still Leading the Way*, by Larry W. Koch, Colin Wark, and John G. Galliher," *International Criminal Justice Review 23*(2): 198-200 and *Criminal Justice Review 38* (4): 539-541.

Marceau, J. Kamin, S. & **Foglia, W. D.** (2012). "Final Declaration and Report of Justin Marceau, Sam Kamin, and Wanda Foglia on Colorado Death Eligibility Study." Filed in *State of Colorado v. Edward Montour, Jr.,* Case Number: 02CR782, a death penalty case in Douglas County, CO.

Foglia, W. D. (2012, January 8). The Subjective Face of the Death Penalty." Letter to the Editor in *The New York Times.*

Bower, W. J., **Foglia, W. D.**, Ehrhard-Dietzel, S. & Kelly, C.E. (2010). Jurors' failure to understand or comport with constitutional standards in capital sentencing: Strength of the evidence." *Criminal Law Bulletin 46* (6): 1147-1229.

Foglia, W. D. (2010). Invited Book review of *The Death Penalty: A Worldwide Perspective*, By Roger Hood and Carolyn Hoyle, *International Criminal Justice Review 20* (2): 214-5.

Foglia, W. D. (2010). They know not what they do: Unguided and misguided decision-making in Pennsylvania capital cases," *Justice Quarterly* 20(1):187-211 In Pennsylvania Bar Institute (Eds.), *27th Annual Criminal Law Symposium*. Mechanicsburg, PA: Pennsylvania Bar Institute (Original work published in 2003).

Foglia, W. D. (2008, Winter). Failure to follow the law: Problems with capital juror decision-making, Invited article for *Section Connection: Civil Rights,* Publication of the American Association for Justice, 15 (1): 1-5.

Foglia, W. D. (2008). Invited "Book Review of *Death by Design: Capital Punishment as a Social Psychological System*, by Craig Haney" *The Justice System Journal*, 29(3):443-446.

Bowers, W. J., **Foglia, W. D.**, Giles, J., & Antonio, M.E. (2006). The decision-maker matters: An empirical examination of the way the role of the judge and the jury influence death penalty decision-making," *Washington and Lee Law Review* 63(3):931-1010.

Foglia, W. D. & Bowers, W. J. (2006). Shared sentencing responsibility: How hybrid statutes exacerbate the shortcomings of capital jury decision-making," *Criminal Law Bulletin* 42(6):663-686.

Foglia, W. D. (2005). Constitutional problems with capital jurors' decision-making. *Pennsylvania Bar Institute's 22nd Annual Criminal Law Symposium* 2: DD1-DD13.

Foglia, W. D. (2003). They know not what they do: Unguided and misguided decision-making in Pennsylvania capital cases," *Justice Quarterly* 20(1):187-211.

Bowers, W. J. & **Foglia, W. D.** (2003). Still singularly agonizing: Failure of the law to guide punishment decisions of capital jurors," *Criminal Law Bulletin*, Invited Article for Symposium Issue 39(1):51-86.

Foglia, W. D. (2001). Report on Bias in Capital Juror Decision-Making in Pennsylvania," Submitted in response to request by the *Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System*.

Foglia, W. D. & Schenker, N. M. (2001). Arbitrary and capricious after all these years: Constitutional problems with capital jurors' decision making," *The Champion* Vol. XXV(6):26-31.

Foglia, W. D. (2000). Sigmund Freud: Writings and theories on sexual behavior, in *Encyclopedia of Criminology and Deviant Behavior*, Blacksburg, VA: Taylor & Francis (2000).

Foglia, W. D. (2000). Adding an explicit focus on cognition to criminological theory," in *The Science, Treatment and Prevention of Antisocial Behaviors: Applications to the Criminal Justice System*, Boston, MA: Allyn & Bacon (2000).

Foglia, W. D. (1997). Perceptual deterrence and the mediating effect of internalized norms among inner-city teenagers," *Journal of Research in Crime and Delinquency*, 34(4): 414-42.

Foglia, W. D. (1996). Two-way communication enhances teaching & learning, *The Communique*, Vol. 1(2): 2-3 (1996).

Taka, I. & **Foglia, W. D.** (1994). Ethical aspects of Japanese leadership style, *Journal of Business Ethics*, 13: 135-48.

Foglia, W. D. (1992). *Integrating Ethics into Wharton Undergraduate Curriculum*, Edited Report on Project and wrote Overview, Student Perspectives, Guidelines, and Conclusion sections. Philadelphia, PA: Wharton Reprographics.

Carter, L. H. & **Foglia, W. D.** (1992, June 15). Law Enforcement That Wins Respect for Law," *The Christian Science Monitor*, p. 18.

Foglia, W. D. (1990). Book review of *Four Theories of Rape in American Society: A State-Level Analysis* by Larry Brown & Murray A. Straus," *Qualitative Sociology*, 13-3: 281-4.

Foglia, W. D., Mann, R., & Bottari, J. (1990). *Juvenile Justice in Philadelphia: Court Watch Report 1989-1990*, Published by Philadelphia Citizens for Children and Youth.

WORKS UNDER REVIEW

"Families and Friends of Homicide Victims' Experiences with the Healthcare System: A Trauma-Informed Perspective," with Jeanna Mastrocinque, Jed Metzger, Peter K. Navratil, and Elizabeth A. Cerceo

PRESENTATIONS AND PROFESSIONAL EXPERIENCE

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Jason Brown,* Cause Number: 49G03-1708-MR-028177, a death penalty case in Marion County, IN, 2021.

Expert Witness on Capital Jury Decision-Making in *State of Louisiana v. Matthew Sonnier*, Number 335, 440 Sec. 1 Div. B, a death penalty case in Alexandria, LA, 2020.

"Revealing Evidence of Systemic Racism in the Criminal Justice System through Research," Presentation at DEI Research Mixer 2020 at Rowan University, Glassboro, NJ, 2020.

Expert Witness on Capital Jury Decision-Making in *State of Arizona v. Wayne Prince,* CR 1998-004885 A, a death penalty case in Phoenix, AZ, 2020.

Expert Witness on Capital Jury Decision-Making in *State of North Carolina v. Wisezah Buckman,* File NOs. 17 CRS 972-81, a death penalty case in Pasquotank County, NC, 2020.

Expert Witness on Capital Jury Decision-Making in *State of Georgia v. Dafareya Jamal Hunter,* Indictment Number 19-9-1685, a death penalty case in Marietta, GA, 2020.

Invited Presentation as Critic on Author Meets Critic Panel for *Capital Defense: Inside the Lives of America's Death Penalty Lawyers* at the Annual Meeting of the American Society of Criminology in San Francisco, CA, 2019.

"Understanding the Needs and Experiences of Families and Friends of Homicide Victims," with Jeanna Mastrocinque, Jed Metzger, Peter K. Navratil, and Elizabeth A. Cerceo, Presentation at the Annual Meeting of the American Society of Criminology in San Francisco, CA, 2019.

Chair of External Review Panel for Criminal Justice Administration Department at Delaware Valley University, Doylestown, PA, 2019.

"The Medical System's Response to Families and Friends of Homicide Victims: A Trauma-Informed Perspective," with Jeanna Mastrocinque, Jed Metzger, Peter K. Navratil, and Elizabeth A. Cerceo, Presentation at Rowan University Faculty Research Day in Glassboro, NJ, 2019.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Joseph Albert Oberhansley*, Case No. 10C04-1409-MR-001, a death penalty case in Jeffersonville, IN, 2019.

Expert Witness on Capital Jury Decision-Making in *State of Missouri v. Stephen R. Thompson*, Case No. 15AO-CR00785-01, a death penalty case in Jasper County, MO, 2019.

Expert Witness on Capital Jury Decision-Making in *State Arizona v. Bryan Miller*, CR2015-102066, a death penalty case in Phoenix, AZ, 2019.

Expert Witness on Capital Jury Decision-Making in *State of South Carolina v. Timothy Ray Jones, Jr.* 2105-GS-3200-188 to 192, a death penalty case in Lexington, SC, 2019.

Reviewed Book Proposal for Taylor & Francis for *The Role of the Supreme Court in Mass Incarceration* by William T. Pizzi, 2019.

"Families and Friends of Homicide Victims' Experiences with the Medical System," with Jeanna Mastrocinque, Jed Metzger, Peter K. Navratil, and Elizabeth A. Cerceo, Presentation at Cooper Medical School Research Day, in Camden, NJ, 2018.

"Race and the Death Penalty: Implications of Research on Prejudice, Biased Application and Wrongful Convictions," Presentation at the Annual Meeting of the American Society of Criminology in Atlanta, GA, 2018.

"Exploring the Medical System's Response to Homicide: A Study with Families and Friends of Homicide Victims," with Jeanna Mastrocinque, Jed Metzger, Peter K. Navratil, and Elizabeth A. Cerceo, Presentation at the Annual Meeting of the American Society of Criminology in Atlanta, GA, 2018.

Expert Witness on Capital Jury Decision-Making in *The People of the State of Colorado v. Miguel Contreras-Perez*, Case Number 18CR1538, a death penalty case in Pueblo, CO, 2018.

Invited Lecture: "Insights on Jury Decision-Making from Capital Jurors," for the 19th Annual E. John Wherry, Jr. Distinguished Lecture in Trial Advocacy and Professionalism, Widener University Law School, Wilmington, DE, 2018.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Desi Thomas*, Cause Number 49G05-1407-MR-035471, a death penalty case in Marion County, IN, 2018.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. James Samuel Defrank*, Case No. 11094090C, a death penalty case in Malheur County, OR, 2017.

Expert Witness on Capital Jury Decision-Making in *State of Missouri v. Craig M. Wood*, Cause No. 1431-CR00658-01, a death penalty case in Greene County, MO, 2017.

Expert Witness on Capital Jury Decision-Making in *State of Arizona v. Darnell Jackson*, CR 10-007912, a death penalty case in Maricopa County, AZ, 2017.

"Capital Jury Decision Making," invited Continuing Legal Education course for Pennsylvania Bar Association's 34th Annual Criminal Law Symposium, with Nathan Schenker, Harrisburg, PA, 2017.

"Deciding Who Dies," invited presentation on Death Penalty Panel for Criminal Justice Lecture Series at Rowan University, 2017.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. Jeremy James Bonsignore,* CR1501355, a death penalty case in Clackamas County, OR, 2016.

Invited Presentation on "The Future of Capital Punishment in the United States," Presentation at the Annual Meeting of the American Society of Criminology in New Orleans, LA, 2016.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. Erik John Meiser,* CR1201547, a death penalty case in Clackamas County, OR, 2016.

Expert Witness on Capital Jury Decision-Making in *State of Louisiana v. Thao T. Lam,* No.97-1240, a death penalty case in Parrish of Jefferson, LA, 2016.

Expert Witness on Capital Jury Decision-Making in *United States of America v. Donald Fell, D. Vt.,* 01-12, a federal death penalty case in the U.S. District Court for the District of Vermont, 2016.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Kevin Andrew Schuler,* Cause No. 31 D01-1308-MR-508, a death penalty case in Harrison County, IN, 2016.

Expert Witness on Arbitrariness of the Death Penalty in *State of Arizona v. Jason Noonkester,* CR2011-138281, submitted an affidavit in a death penalty case in Maricopa County, AZ, 2016.

Expert Witness on Capital Jury Decision-Making in *State of Missouri v. Bobby Don Bourne, Jr.,* Case No. 13 BR-CR00140-01, a death penalty case in Henry County, MO, 2016.

"Gender Differences in Support for the Death Penalty Among Capital Jurors," Presentation at the Annual Meeting of the American Society of Criminology in Washington, D.C., 2015.

Expert Witness on Arbitrariness of the Death Penalty in *Commonwealth of Pennsylvania v. Kindler,* a death penalty case in Philadelphia County, Pennsylvania, 2015.

Expert Witness on Capital Jury Decision-Making in *Commonwealth of Virginia v. James Lloyd Terry,* Case Nos. CR12-303-02 to -06 & CR13-31-00 and -01, a death penalty case in Halifax County, VI, 2015.

Invited Presentation on "The Future of Capital Punishment in the United States, Presentation at the Annual Meeting of the American Society of Criminology, San Francisco, CA, 2014.

Invited Presentation on Featured Roundtable: "Perceptions of Crime and Justice: The Future of Capital Punishment in the United States," Presentation at the Annual Meeting of the Academy of Criminal Justice Sciences, Philadelphia, PA, 2014.

Expert Witness on Capital Jury Decision-Making in *State of Louisiana v. Brian Smith,* Docket Number 12-303, a death penalty case in the St. John's Parish, LA, 2014.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. James Samuel Defrank,* Case Number 11094090C, a death penalty case in Malheur County, OR, 2014.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. Dayton Leroy Rogers,* Case Number CR8800355, a death penalty case in Clackamas County, OR, 2014.

Outside Reviewer for Criminal Justice Administration Department at Delaware Valley College, Doylestown, PA, 2013.

Wrote Requested Endorsement for *Hegemonic Individualism and Subversive Stories in Capital Mitigation,* by Ross Kleinstuber (2013).

Invited Presentation on Panel: "The Future of Capital Punishment in the United States," Presentation at the Annual Meeting of the American Society of Criminology, Atlanta, GA 2013.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Richard Carley Hooten, Jr.,* Cause No. 10C04-1303-MR-2, a death penalty case in Clark County, IN, 2013.

Expert Witness on Capital Jury Decision-Making in *State of Missouri v. Mark Anthony Gill,* Cause No. 12BA-CR03801, a death penalty case in Boone County, MO, 2013.

Expert Witness on Capital Jury Decision-Making in *State of South Carolina v. Earnest Stewart Daise,* Indictment No.s: 2009-GS-07-2636, 2637, 2638, & 2639, a death penalty case in Beauford County, SC, 2013.

Expert Witness on Capital Jury Decision-Making in *United States of America v. Gary Douglas Watland,* Criminal Action No. 11-cr-38-JLK-CBS, a death penalty case in the United States District Court for the District of Colorado, 2013.

"Racial Differences Among Capital Jurors: Empathy, Trust in Government, and Retributive Attitudes," Presentation at the Annual Meeting of the American Society of Criminology in Chicago, IL, 2012.

Expert Witness on Capital Jury Decision-Making in *State of Washington v. Christopher Monfort.*, Case Number: 09-1-07187-6 SEA, a death penalty case in King County, WA, 2012.

"How Juries Decide Capital Cases." Invited Presentation at *Capital Defender Training,* Baton Rouge, LA, 2012.

Expert Witness on Capital Jury Decision-Making in *State of Colorado v. Edward Montour, Jr.,* Case Number: 02CR782, a death penalty case in Douglas County, CO, 2012.

Expert Witness on Capital Jury Decision-Making in *State of Louisiana v. Dominic Robinson,* Case Number 27217"B," a death penalty case in Orleans Parish, LA, 2012.

"Explaining Demographic Differences in Jurors' Death Penalty Decision-Making," Presentation at the Annual Meeting of the American Society of Criminology in Washington, DC, 2011.

"What We Need to Know About Jurors." Invited Presentation at *Capital Case Litigation Initiative: Spring Training.* South Carolina commission on Indigent Defense, Litchfield, SC, 2011.

"The Receptivity of Courts to Empirical Evidence of how Jurors Decide Death Penalty Cases: The Capital Jury Project (CJP) as a Case Study." Presentation at *Moving Beyond "Racial Blindsight"? The Influence of Social Science Evidence after the North Carolina Racial Justice Act: A Michigan State Law Review Symposium,* with William J. Bowers, Marla Sandys, Elizabeth Vartkessian, and Christopher E. Kelly. Michigan State University College of Law, East Lansing, MI, 2011.

"What We Need to Know About Jurors." Presentation at *Capital Case Litigation Initiative: Spring Training.* South Carolina Commission on Indigent Defense, Litchfield, SC, 2011.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Ronald Davis,* Case Number 49G 060801 MR018561, a death penalty case in Marion County, IN, 2010.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. Randy Lee Guzek,* Case Number 87CR0373TM, a death penalty case in Deschutes County, OR, 2010.

Expert Witness on Capital Jury Decision-Making in *State of Texas v. John Thuesen,* a death penalty case in Brazos County, TX, 2010.

Training on Problems with Capital Jury Decision-Making for Louisiana Capital Assistance Center, New Orleans, LA, 2010.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. Joshua Abraham Turnidge,* No. 08C51758, a death penalty case in Marion County, OR, 2010.

"Prevalence and Implications of Constitutional Problems with Capital Jury Decision-Making," Presentation at 2009 Annual Meeting of the American Society of Criminology in Philadelphia, PA.

Expert Witness on Capital Jury Decision-Making in *State of Oregon v. Imani Charles Williams*, No. 07-04-31995, death penalty case in Multnomah County, OR, 2009.

Expert Witness on Capital Jury Decision-Making in *State of Georgia v. Joshua Drucker* , Case Number 08-9-2013-40, death penalty case in Cobb County, GA, 2009.

Expert Witness on Capital Jury Decision-Making in *State of Georgia v. Harper*, death penalty case in Floyd County, GA, 2008.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Desmond Turner*, Cause No. 49G02-0606-MR-101336, death penalty case in Marion County, IN, 2008.

Expert Witness on Capital Jury Decision-Making in *State of New Hampshire v. Michael Addison*, Docket No. 07-S-0254, death penalty case in Hillsborough County, NH, 2008.

Expert Witness on Capital Jury Decision-Making in *State of New Mexico v. Michael Paul Astorga*, CR No. CR No. 2006-1670, death penalty case in Albuquerque, NM, 2008.

Expert Witness on Capital Jury Decision-Making in *State of Missouri v. James L. McFarland*, No. 05AR-CR0024, death penalty cases in Kirksville, MO, 2008.

Expert Witness on Capital Jury Decision-Making in *State of Tennessee v. Shawn Anthony Mullins*, Case No. S50,556 death penalty cases in Sullivan County, TN, 2008.

Member of Gloucester County Youth Services Commission (2008).

"Does Hindsight Bias Explain Evidence of Flaws in Capital Jurors' Decision-Making," Presentation at 2007 Annual Meeting of the American Society of Criminology in Atlanta, GA.

Interviewed about New Jersey's Repeal of the Death Penalty on *Delaware Tonight*, WHYY TV Channel 12, December 18, 2007.

Expert Witness on Capital Jury Decision-Making in *State of Colorado v. Robert Ray* and *State of Colorado v. Sir Mario Owens* 06 CR 697 and 705, death penalty cases in Arapahoe County, CO, 2007.

Expert Witness on Capital Jury Decision-Making in *State of California v. Jack Henry Lewis, Jr.* Case No. SCD 193558, a death penalty case in San Diego, CA 2007.

Expert Witness on Capital Jury Decision-Making in *State of Georgia v. Lanny Perry Barnes* CR No. 2006-CR0910-1, a death penalty case in Newton County, GA, 2007.

Expert Witness on Capital Jury Decision-Making in *State of New Mexico v. Daniel Good* CR No. 2004-00522, a death penalty case in Santa Fe, NM, 2007.

Member of Gloucester County Youth Services Commission (2007).

"Effects of Memory on Evidence of Problems with Capital Juror Decision-Making," Presentation at 2006 Annual Meeting of the American Society of Criminology in Los Angeles, CA.

Invited Testimony on Capital Jury Decision-Making before New Jersey Death Penalty Study Commission appointed pursuant to NJ S-709, Trenton, NJ, 2006.

Expert Witness on Capital Jury Decision-Making in *State of North Carolina v. Timothy Lanier Allen* No. 85CRS 5243, a death penalty case in Halifax County, NC, 2006.

Expert Witness on Capital Jury Decision-Making in *Commonwealth of Pennsylvania v. George Bates* No. 4129-04, a death penalty case in Chester County, PA, 2006.

Expert Witness on Capital Jury Decision-Making in *State of Indiana v. Darryl Jeter* No. 45G04-031MR-00010, a death penalty case in Lake County, IN, 2006.

Member of Gloucester County Youth Services Commission (2006).

Monitored Juvenile Justice Programs for Gloucester County Youth Services Commission in Gloucester County, NJ, 2006.

"The Use of Cognitive Interventions in Juvenile Corrections," Presentation at 2005 Annual Meeting of the American Society of Criminology in Toronto, CA.

Served on Allocations Committee for 2006 Services for Gloucester County Youth Services Commission in Sewell, NJ, 2005.

Monitored Juvenile Justice Programs for Gloucester County Youth Services Commission in Gloucester County, NJ, 2005.

Expert Witness on Capital Jury Decision-Making in *State of Louisiana v. Leo Mitchell* No. 002982, a death penalty case in Jefferson, LA, 2004-5.

Expert Witness on Capital Jury Decision-Making in *Commonwealth of Pennsylvania v. John Hofler, Jr.* No. 2306-04, a death penalty case in York, PA, 2004-5.

Presentation on Constitutional Problems with Capital Jurors' Decision-Making for Criminal Law Practice Group of York County Bar Association, York, PA, 2005.

Presentation on Constitutional Problems with Capital Jurors' Decision-Making for Pennsylvania Bar Institute's 22nd Annual Criminal Law Symposium in Harrisburg, PA, 2005.

Presentation on Capital Case Litigation for Pennsylvania Continuing Legal Education Course, 2005, Philadelphia, PA.

"The Role of Race, Gender, and Social Class in Deciding Who Dies," Presentation at 2004 Annual Meeting of the American Society of Criminology in Nashville, TN.

Invited Presentation for Panel on "Criminal Justice System in Black and White" for *Inaugural Human and Civil Rights Conference,* Rutgers Law School, Camden, NJ, 2004.

Invited Facilitation of Workshops on "Exploring the Impact of Crime and Justice Policies on Perceptions of Race" for Fall Conference of New Jersey Project on Inclusive Scholarship, Curriculum, and Teaching in Newark, NJ, 2004.

Interviewed for "Moorestown ministry helps ex-cons adjust" *Courier-Post*, October 16, 2004.

Letter to Congressional Subcommittee on Crime, Terrorism, and Homeland Security on Death Penalty's Lack of Deterrence, which was requested by ACJS Liaison to Congress, made part of the Congressional Record, and reportedly resulted in bill to expand use of death penalty being allowed to die in committee, April 28, 2004.

"Responsibility for Deciding Who Dies," Presentation at 2003 Annual Meeting of the American Society of Criminology in Denver, CO with William J. Bowers.

"Capital Sentencing in Judge-Override States," Presentation at 2003 Annual Meeting of the Academy of Criminal Justice Sciences in Boston, MA with William J. Bowers.

"An Empirical Analysis of Capital Sentencing in Judge-Override States: Denying Responsibility, Rushing to Judgment, and Failing to Understand the Law," Invited Presentation at 2003 Annual Meeting of Eastern Sociological Society in Philadelphia, PA with William J. Bowers.

Expert Witness on Capital Jury Decision-Making in *California v. Scott Thomas Erskine*, No. SCD 161640, San Diego, CA, 2003.

Expert Witness on Capital Jury Decision-Making in *Commonwealth of Pennsylvania v. Mark Macomber*, No. 2414-02, West Chester, PA, 2003.

"Compelled by Law to Choose Death," Invited and funded presentation at a Conference sponsored by the Wayne Morse Center for Law and Politics entitled *The Law and Politics of the Death Penalty: Abolition, Moratorium or Reform* at University of Oregon, Eugene, OR (2002).

"Influence of Race on Capital Juror Decision-Making in Pennsylvania," Presentation at 2002 Annual Meeting of the Academy of Criminal Justice Sciences in Anaheim, CA.

"The Myth of Mitigation: Jurors' Failure to Understand and Apply the Law in Capital Cases," Presentation at 2002 Annual Meeting of the American Society of Criminology in Chicago, IL.

Expert Witness on Capital Jury Decision-Making in *State of Kansas v. Reginald Dexter Carr, Jr.* No.00CR2978, a death penalty case in Sedgwick County, KA, 2002.

Expert Witness on Death Qualified Jurors in *U.S. v. Cacerez*, 98CR000362013, U.S. District Court, Philadelphia, PA, 2002.

Expert Witness on Statistics on Age of Sex Offenders in *Commonwealth of Pennsylvania v. Arthur Hagen*, No. 2010-93, West Chester, PA, 2002.

Consultant for National Institute of Justice asked to peer review final report on NIJ funded research on jury decision-making, 2002.

"Mandatory Language in Pennsylvania Capital Statute Exacerbates Problems with Juror Decision-Making Process," Paper presented at 2001 Annual Meeting of American Society of Criminology in Atlanta, GA.

Invited Presentation at New Lisbon Boot Camp's Career and Transitional Fair, New Lisbon, NJ, 2001.

Invited Presentation at University of Pennsylvania's Faculty Conversation on the Academic Job Search and Academic Life, Philadelphia, PA, 2001.

"Constitutional Problems with Jury Decision-Making in Capital Cases," Paper presented at 2000 Annual Meeting of the Academy of Criminal Justice Sciences in New Orleans, LA and 2000 Rowan University Professional Conference.

Expert Witness on Juror Decision Making in *Commonwealth of Pennsylvania v. Charles Linton*, 1328-99, a death penalty case in West Chester, PA 1999.

Facilitator, Diversity Workshops, for staff of Philadelphia office of federal Department of Health and Human Services, 1999.

Interviewed about challenges facing NJ State Police Superintendent Carson Dunbar, for *Point of View*, cable news broadcast by Tri State Media, New Castle, DE, about, November 1, 1999.

Roundtable: Capital Jury Project Investigator's Review of State Variations in Decision Making, Invited participation in Roundtable at 1999 Annual Meeting of the American Society of Criminology in Toronto, CA.

"Capital Juror's Views on Relevance of Defendant's Background," Paper presented at 1999 Annual Meeting of the Academy of Criminal Justice Sciences in Orlando, FL.

Moderated Panel on Reconciling Rehabilitation and Retribution, Rowan University, Glassboro, NJ 1999.

"Adding an Explicit Focus on Cognition to Criminological Theory," Invited presentation on a Featured Panel at the 1998 Annual Meeting of the Academy of Criminal Justice Sciences in Albuquerque, NM.

"What is Excellence in Teaching?" Invited presentation for New Faculty Orientation sponsored by the Faculty Center for Excellence in Teaching and Learning at Rowan University, 1998.

Interviewed for "Youth Violence," by K. Lombardi, *Worcester News*, Worcester, MA 1998.

"Evaluating and Enhancing Law-Related Education's Impact on Prosocial Cognitions," invited presentation at 1997 Conference of the New Jersey Council for the Social Studies in Flemington, NJ.

The Extent Capital Jurors Consider the "Abuse Excuse," Paper presented at 1997 Annual Meeting of the American Society of Criminology in San Diego, CA.

Evaluation of Law-Related Education in Inner City High Schools Invited presentation at 1997 Annual Meeting of Northeastern Association of Criminal Justice Sciences in Bristol, RI, and presented at 1997 Rowan University Professional Conference.

Participated in Summer Institute, sponsored by the *New Jersey Project on Inclusive Scholarship, Curriculum, and Teaching,* and making presentation at Rowan University on strategies that include diverse student body, 1997.

How to Get Students Actively Engaged Invited presentation on panel on Active Teaching and Learning sponsored by the Faculty Center for Excellence in Teaching and Learning at Rowan College, 1997.

Roundtable: Capital Punishment-The Dynamics of Capital Sentencing Decisions: Influences and Arguments Invited participation in Roundtable at 1996 Annual Meeting of the American Society of Criminology in Chicago, IL.

Roundtable: Capital Punishment-The Dynamics of Capital Sentencing Decisions: Cases in Point Invited participation in Roundtable at 1996 Annual Meeting of the American Society of Criminology in Chicago, IL.

Life at Rowan College Invited presentation on what it is like to teach at a state school on a Panel on Life in Academia at the 1996 Annual Meeting of the American Society of Criminology in Chicago, IL.

Principal Investigator coordinating Pennsylvania portion of Capital Jury Project, funded by the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252.

The Case for Law-Related Education Paper presented at 1996 Annual Meeting of Northeastern Association of Criminal Justice Sciences in Bristol, RI.

Scorekeeping Judge for the Philadelphia Moot Court Competition 1995 and 1996.

"Guest Scholar" on *American Alternatives: The National Conversation* broadcast on 3/22/95 entitled ***Violence: Other Options***, sponsored by the New Jersey Council for the Humanities.

Moderator of Panel on Community Policing and Problem-Solving Strategies at the 1996 Symposium sponsored by the New Jersey Criminal Justice Educators.

The Relation of Perceived Deterrents to Delinquent Behavior Among Inner-City Youth Paper presented at 1996 Annual Meeting of Academy of Criminal Justice Sciences in Las Vegas, NV.

Thinking & Experiencing: Adding Cognition to a Social Learning Model to Enhance Understanding of Self-Reported Delinquency Among Urban Youth, Paper presented at 1995 Annual Meeting of the American Society of Criminology, Boston, MA.

Interviewed about community reaction to violent events on *Good Day New York, ,* April 4, 1995.

Exploring the Role of Internalized Norms in Deterring Crime, Paper presented at 1993 Annual Meeting of The American Society of Criminology, Phoenix, AZ.

Police Workshops on Managing Diversity, Co-facilitated two-day workshops for Lower Merion Police Department with Professor Louis H. Carter , 1993.

Advanced Ethnic Sensitivity Training, Co-facilitated two-day workshop for Philadelphia's Juvenile Probation Officers with Professor Louis H. Carter, 1993.

Relative Importance of Perceived Deterrents Among Incarcerated Juveniles, Paper presented at 1992 Annual Meeting of The American Society of Criminology, New Orleans, LA.

Police Workshops on Managing Diversity, Co-facilitated two-day workshops for University of Pennsylvania Police Department with Professor Louis H. Carter, 1992.

Law Related Education and Delinquency: Going Beyond Moral Reasoning, Paper presented at 1991 Annual Meeting of The American Society of Criminology, San Francisco, CA, with Jane Siegel.

Interviewed for "Unstable backgrounds often lurk behind violent events." By M. Friedman, *Jewish Exponent,* April 25, 1991, p. 8.

UNIVERSITY SERVICE

Member of Law Enforcement & Community Collaborative, 2020 to present
Member of Community Engagement Subcommittee, 2020 to present

College of Humanities and Social Sciences' Representative to Graduate Advisory Committee, 2018 to present
Member of College of Humanities and Social Sciences Graduate Council, 2021 to present
Coordinator, Master of Arts in Criminal Justice Program, 2007 to present
Chair, Masters Program Committee, 1998 to present
Promotion Committee, 1995-6, 2001 to present; **Chair**, 1995-1996
Tenure and Recontracting Committee, 2001 to present
Curriculum Committee, 2004 to present
Strategic Planning Committee, 2009 to present
Member of Advisory Panel for Women's Studies, 1998 to present
Department Textbook Adoption Committee, 2011 to present
College of Humanities and Social Sciences Promotion Committee, 2013
Career Development Committee, 2011
In-Person Registration, Open Houses, and/or Graduate Program Information Sessions, 1994 to present
Coordinator, Economics Department, 2008-2009
College of Liberal Arts and Sciences Representative to Graduate Executive Council, 2007-2008
College of Liberal Arts and Sciences Promotion Committee, 2000, 2004
College of Liberal Arts and Sciences Academic Dismissal Committee, 1998, 1999, 2002
Mentoring Program, 2000-2002, 2011
Imagine, 2002
Assessment Committee, 1998-2002, 2010
Founding Member of Faculty Center for Excellence in Teaching and Learning, 1995-2001
Search Committee for Dean, College of Liberal Arts and Sciences, 1999
Sabbatical Leave Committee, 1999
Graduation Application Task Force, 1998
Participated in NJ Project Summer Institute, 1997
College Recruitment, Admissions, and Retention Committee, 1996-1998
Professional Ethics/Welfare Standing Committee, 1998
Chair, Law and Justice Studies Department, 1998-2001
Advisement Coordinator, Law and Justice Studies Department, 1997-1999
Re-establishing and Advising the Law and Justice Club and Honor Society, 1995-1998
Co-Chair, Search Committee 1997-1999
Senate Representative, 1998
Department Webpage Committee, 1998-2009
Organized Panel on "Reconciling Rehabilitation and Retribution, 1998-1999
Departmental Representative to the College Curriculum Committee, 1996-1997
Chair of Library Committee, 1995-1996
Write to Learn Committee, 1994-1995

PROFESSIONAL AFFILIATIONS, SERVICE AND CERTIFICATIONS

Reviewer for *Deviant Behavior*, 2020
Reviewer for *Criminal Justice Review*, 2013, 2019

Reviewed Book Manuscript: *The Shrinking American Middle Class: The Social and Cultural Implications of Growing Inequality* for Macmillan Publishers, 2012
Reviewer for *Criminology: Theories, Patterns, and Typologies* at request of Thomson/Wadsworth, 2005
Editorial Advisory Board for Journal of Criminal Justice Education Academy of Criminal Justice Sciences 2001-2003.
Member of 2000-2001 Student Affairs Committee for the Academy of Criminal Justice Sciences
Chair for 1999-2000 Publications Committee for the Academy of Criminal Justice Sciences
Section Chair for 1998 Annual Meeting of the American Society of Criminology for section on Capital Punishment.
Deputy Chair for 1998-99 Publications Committee for the Academy of Criminal Justice Sciences
Reviewer for *Criminal Justice Review,* 2010, 2011
Reviewer for *Criminology and Public Policy*, 2002
Reviewer for *Journal of Criminal Justice Education*, 2001, 2002
Reviewer for *Justice Quarterly*, 2002, 2003, 2004, 2005
Reviewer for *Journal of Research in Crime and Delinquency*, 1999, 2002, 2004
Reviewer for *Invitation to Corrections* at request of Allyn and Bacon Publishers 2000
Chair of Committee on Constitution and By-Laws for the Northeastern Association of Criminal Justice Sciences 1996 to 1998.
American Society of Criminology (1988 to present)
Academy of Criminal Justice Sciences (1996 to present)
Northeastern Association of Criminal Justice Sciences (1995 to present)
New Jersey Association of Criminal Justice Educators (1996 to present)
Member of Institutional Review Board for Joseph J. Peters Institute (1994 to present)
Admitted to Pennsylvania and Federal Bars in 1982
Certified by Municipal Police Officers' Education and Training Commission in 1987
Member of Juvenile Justice Committee, Phila. Citizens for Children and Youth (1987 to 1992)
Member of Board of Directors, Philadelphia Citizens for Children and Youth (1989 to 1992)
Chief Associate and Coordinating Editor, Journal of Criminal Law and Criminology (1989 to 1990)
Consulting Editor, Advances in Criminological Theory (1990 to 1994)

Appendix B

Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing

William J. Bowers* and Wanda D. Foglia**

In their classic 1966 study, *The American Jury*,[1] Harry Kalven and Hans Zeisel found substantial evidence of arbitrariness in the sentencing of capital juries. Six years later, in *Furman v. Georgia*,[2] the U.S. Supreme Court ruled that the arbitrariness of capital sentencing rendered all existing capital statutes unconstitutional. States responded with new capital statutes intended to guide juries in the exercise of their sentencing discretion, and in *Gregg v. Georgia* (1976),[3] the Court held that "(o)n their face these procedures seem to satisfy the concerns of Furman."[4] Despite the reforms inspired by Furman and approved in Gregg, research now demonstrates that jurors are not deciding who deserves the death penalty in the way the U. S. Supreme Court has held the constitution requires. These are the findings of the Capital Jury Project (CJP),[5] which has interviewed some 1,201 jurors who actually made the life or death sentencing decision in 354 capital trials in 14 different states.[6]

The American Jury was the first systematic effort to learn about jury decision making, albeit through the eyes of trial judges. The research strategy was to compare jury verdicts in criminal trials with how judges indicated they would have decided the cases. With information from judges on 3,576 criminal trials, Kalven and Zeisel sought to determine how often and why jury decisions departed from the verdicts judges would have rendered. They

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* Principal Research Scientist, College of Criminal Justice, Northeastern University. B.A., Washington & Lee University; Ph.D., Columbia University. Dr. Bowers has authored two books and numerous articles on capital punishment. He is principal investigator of the Capital Jury Project, a national study of capital sentencing underway in fourteen states. He received the August Vollmer Award (2000) from the American Society of Criminology for his research on the death penalty.

** Associate Professor of Law and Justice Studies, Rowan University. B.A., Rutgers College; J.D., Ph.D., University of Pennsylvania. Dr. Foglia's research and publications are in the area of capital juror decision making and cognition and crime, and she has consulted and testified as an expert witness on capital juror decision making.

[1] Harry Kalven, Jr. & Hans Zeisel, The American Jury (1966).

[2] Furman v. Georgia, 408 U.S. 238 (1972).

[3] Gregg v. Georgia, 428 U.S. 153 (1976).

[4] Id. at 198.

[5] The Capital Jury Project started in 1990 with funding from the Law and Social Sciences Program of the National Science Foundation, grant NSF SES-9013252. William J. Bowers initiated the CJP and has served as Principal Investigator.

[6] A list of the publications reporting these findings can be found at http://www.cjp.neu.edu (visited December 9, 2002), which is periodically updated and includes the full text of some articles.

found that the judge and the jury agreed on a guilty verdict in about two-out-of-three cases (64%). In a third as many (22%) the judge and jury disagreed; in most of these instances the jury acquitted while the judge would have convicted (19% vs. 3%).[7] According to the investigators' analyses of judges' accounts,[8] roughly two-out-of-three disagreements were "marked by some jury response to values."[9]

While The American Jury examined jury decisions in a wide variety of criminal cases,[10] one chapter was devoted exclusively to the 111 capital cases in the sample. The findings in that chapter draw a sharp contrast between the determination of guilt in criminal trials and the determination of punishment in capital cases. In the capital cases, judge and jury seldom agreed on the death penalty; in fact, they disagreed more often than they agreed. In only 14 of the 111 capital cases (13%) did both judge and jury believe that the defendant deserved to die. In 21 cases (19%) one party would impose death and the other would not; the judge chose death over prison in 14 cases and the jury opted for death for 7 defendants. In other words, of the 35 cases in which at least one of the decision makers would impose death, the judge and jury were at odds about the defendant's fate half again as often as they were in agreement on the death penalty (21 vs. 14).[11]

This failure of judges and juries to agree on the death penalty was enigmatic because of the difficulty in accounting for the difference. At the heart of the evidence of arbitrariness was the finding that many of the murder cases in which judge and jury disagreed "appear(ed) no less heinous than those in which they agree(d)."[12] Relying on judges' explanations of jury decision making, Kalven and Zeisel found that it was not differences in the character of the crimes but in the value judgments involved in deciding whether a person deserves to die that seemed to account for the lack of agreement about which defendants deserved the death penalty. They surmised from judges' responses that deciding who should get the death penalty, a determination based on the ultimate value judgment, was "singularly agonizing."[13] Kalven and Zeisel end their chapter on the death penalty with

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[7] Kalven & Zeisel, supra note 1, at 58. In the remaining 14% of the cases the judge and jury agreed that the defendant should be acquitted. Id.

[8] In the two different surveys that were used, the judges answered questions probing reasons for why the jurors disagreed with them. Kalven and Zeisel analyzed the judges' responses to these questions, and reported patterns they detected from responses to other questions. Id. at 92. See id. at 527-34, Appendix E, for the Questionnaires.

[9] Id. at 494-95.

[10] Id. at 67, Table 17 (providing a breakdown of the crimes charged in the 3,576 criminal trials included in the sample, ranging from traffic offenses to murder).

[11] Id. at 436.

[12] Id. at 439.

[13] Id. at 448.

the assertion that: "The discretionary use of the death penalty requires a decision which no human should be called upon to make."[14]

Humans are, nonetheless, charged with making that decision in the forty U.S. jurisdictions that currently have the death penalty.[15] Since the Chicago Jury Project, a body of federal and state law has evolved that purports to guide jurors' death sentencing decisions. The CJP is the first national study of jury decision making since the Chicago Jury Project. It deals exclusively with decision making in capital cases, and is designed to assess the efficacy of this new body of law in guiding jurors' exercise of sentencing discretion. Interviews were conducted with capital jurors in fourteen states, chosen for geographical diversity and for coverage of the different types of capital statutes now in effect.[16]

The U. S. Supreme Court has provided a substantial body of law intended to govern the decision of when to take a human life in the name of justice. In *Gregg v. Georgia*,[17] and its companion cases, the Court approved a two-phase capital trial procedure in which the jury first decides guilt and later decides punishment at a second, separate stage of the trial.[18] Subsequent thereto the Court elaborated on aspects of the bifurcated approach. The Court held in *Wainwright v. Witt*[19] and *Morgan v. Illinois*[20] that jurors must be willing to give effect to both aggravating and mitigating evidence. In *Lockett v. Ohio*[21] the Court held that the law cannot limit what mitigating evidence a jury can consider. In *Mills v. Maryland*[22] and *McKoy v. North Carolina*[23] the Court made it clear that a juror can consider evidence he or she finds mitigating without the concurrence of other jurors. The principal that jurors must never impose the death penalty without consideration of mitigation was established in *Roberts v. Louisiana*[24] and *Woodson v. North Carolina*,[25] where the Court rejected mandatory capital statutes. *Caldwell v. Missis-*

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[14] Id. at 449.

[15] Thirty-eight states plus the United States Government and United States Military currently have the death penalty. See Death Penalty Information Center, *State by State Death Penalty Information*, http://www.deathpenaltyinfo.org/firstpage.html (visited August 12, 2002).

[16] The objectives of the research and the sample design are discussed in more detail infra at notes 32 to 34 and accompanying text.

[17] Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

[18] Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976); Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976).

[19] Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

[20] Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992).

[21] Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), reaffirmed in Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) and Penry v. Lynaugh, 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989).

[22] Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

[23] McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990).

[24] Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001, 49 L. Ed. 2d 974 (1976).

sippi[26] stressed the importance of jurors appreciating their responsibility for determining the appropriate punishment. *Turner v. Murray*[27] recognized the need to prevent the influence of conscious and unconscious racism in cases with black defendants and white victims. Finally, in *Simmons v. South Carolina*[28] and *Shafer v. South Carolina*[29] the Court attempted to prevent jurors from voting for death based on false assumptions about available non-death sentencing alternatives, requiring that the jury be told about the lack of parole eligibility under some circumstances. The CJP demonstrates that these rules are not working in practice.

In the following pages, we will briefly introduce the CJP and review seven different problems with the capital jury decision making process. We will describe how the CJP results replicate findings from prior studies and provide additional evidence of: (1) premature decision-making; (2) bias in jury selection; (3) failure to comprehend instructions; (4) erroneous beliefs that death is required; (5) evasion of responsibility for the punishment decision; (6) racial influence in juror decision making; and (7) underestimation of non-death penalty alternatives.[30] The number of problems and the abundance of evidence limit the amount of detail that can be provided in this article, but additional information can be found in the references cited herein and in transcripts of courtroom testimony describing CJP findings and related research.[31]

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[25] Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

[26] Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985).

[27] Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986).

[28] Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).

[29] Shafer v. South Carolina, 532 U.S. 36, 121 S. Ct. 1263, 149 L. Ed. 2d 178 (2001).

[30] This article deals with many of the same issues covered in William J. Bowers, et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction*, in America's Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (James R. Acker et al. eds., 2nd edition (forthcoming)) [hereinafter Bowers et al., *Legal Fiction*]. Here we self consciously present the issues from a legal perspective, in terms intended to communicate more directly to legally trained as compared to lay readers (and the referencing here conforms to conventions familiar to persons trained in law). In particular, the presentation of data here is typically broken down by state to permit comparisons that might reflect differences owing to statute, case law, or legal practice by jurisdiction.

[31] The most exhaustive courtroom presentation of CJP data, as of this writing, can be found in the testimony of Wanda D. Foglia in support of the defense's pretrial challenges to the death penalty in Kansas v. Carr, Case No. CR2978 (2002). Contact Dr. Foglia for a copy of the transcript.

The Capital Jury Project

The CJP has collected a wealth of information about jury decision making from in-depth interviews with jurors who have actually served in capital trials around the nation. States were chosen for the study to represent the principal variations in capital sentencing statutes.[32] Juror interviews were conducted in Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia.

Within each state, researchers selected twenty to thirty capital trials to include both cases resulting in the death penalty and cases resulting in life or whatever alternative term of imprisonment applied under state law. Jurors were chosen randomly from those cases in an attempt to interview four jurors per trial.[33] The questionnaire used for these in-depth interviews required an average of three-and-one-half hours to administer. It probed issues such as what assumptions jurors make when deciding the penalty, how and when they make their decision, what factors they considered, and their understanding of the jury instructions. Interviews were completed with 1,201 jurors from 354 trials in fourteen states.[34]

Constitutional problems with the capital punishment process were found in every state in the study. This consistency indicates that the problems are fundamental, not specific to the laws or procedures of particular states. Additionally, the CJP results are consistent with evidence from previous studies using different methodologies, including surveys and mock juries. The CJP findings, based on interviews with jurors who actually sat through an entire capital case and decided a defendant's sentence, cannot be dismissed with the argument that the context was artificial or the jurors' experience was unrealistic.

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[32] The sample includes states with "threshold," "balancing," and "directed" statutory guidelines for sentencing discretion. It also includes states with "traditional" and "narrowing" definitions of capital murder and states in which the jury decisions are binding and those in which the judge currently can override the jury recommendations. Further details about the sampling procedure can be found in William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 Ind. L. J. 1043, 1077-79 (1995)[hereinafter Bowers, *Preview*].

[33] Difficulties locating jurors or obtaining their consent resulted in fewer than four jurors being interviewed in some cases, and more than four jurors in others in order to obtain sufficient numbers or to get additional information about issues raised in earlier interviews.

[34] Many of the issues discussed here have been addressed in three earlier publications based on the juror interviews available at the time: Bowers, *Preview*, supra note 32; William J. Bowers, et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998) [hereinafter Bowers et al., *Foreclosed Impartiality*];and William J. Bowers, & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Texas L. Rev. 605 (1999) [hereinafter Bowers & Steiner, *Death By Default*]. In this article, findings and statistical tabulations first presented in these earlier publications have been updated utilizing the complete sample.

Premature Punishment Decision Making

Evidence of rampant premature decision making makes it clear that if anything can be done to ameliorate some of the constitutional flaws in the capital punishment process it would have to be done early in the proceedings, before jurors make up their minds about the penalty. In every jurisdiction with the death penalty, the proceeding is bifurcated into two phases so that jurors decide guilt in the first phase and, if the defendant is found guilty of a capital crime, they decide the sentence in the second phase.[35] Requirements such as bifurcating the trial, allowing presentation of mitigation evidence during the sentencing phase, and the use of jury instructions aimed at guiding sentencing discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the end of the guilt phase, before they have heard the penalty phase evidence or received the instructions on how they are supposed to make the punishment decision.

In the CJP interviews, jurors were asked what they thought the punishment should be at four different points in the proceedings: (1) after the guilt phase but before the sentencing phase, (2) after the sentencing instructions but before deliberations, (3) at first vote, and (4) at final vote. The results from 864 interviews in eleven of the CJP states were reported and discussed extensively by Bowers, Sandys, and Steiner in a 1998 article.[36] Those results showed that approximately half the jurors indicated that they decided what the punishment should be before the sentencing phase had even begun.

Table 1 presents updated responses from 13 states[37] to the question: "After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [defendant's name] should be given: a death sentence, a life sentence, [or were you] undecided?" Looking at the average for all thirteen states, the 49.2% of jurors who were premature decision makers consisted of 30.3% who had decided the penalty should be death and 18.9% who had decided the sentence should be life. Premature decision making is present in every state, and the percentage taking an early pro-death stance is

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[35] Ring v. Arizona, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (U.S. 2002) held that statutes in Arizona, Colorado, Idaho, Montana, and Nebraska allowing judges to determine the sentence in capital trials are unconstitutional. In four other states, Florida, Alabama, Indiana, and Delaware, there is a second phase in which the jury decides the sentence, but its decision is only a recommendation and the judge makes the final determination. The rationale of Ring may be used to invalidate these statutory schemes as well, but that issue has yet to be decided by the U. S. Supreme Court.

[36] Bowers, et al., *Foreclosed Impartiality*, supra note 34.

[37] Louisiana is not included in breakdowns by state in any of the tables herein because there are too few interviews with Louisiana jurors (N=29) for reliable percentages. In all other participating states, interviews were completed with a sample of at least forty jurors from a minimum of ten capital trials.

within five points of the average in nine states. Virginia is the only state in which the percentage differs more than 10 points from the average, and its percentages are least reliable because it has the smallest sample size (n=45).

Table 1

Percentage of Capital Jurors Taking Each Stand on Punishment Before Sentencing Stage of the Trial in 13 States

States	Death	Life	Undecided	No. of jurors
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108
Missouri	28.8	16.9	54.2	59
North Carolina	29.2	13.9	56.9	72
Pennsylvania	33.8	18.9	47.3	74
South Carolina	33.3	14.4	52.3	111
Tennessee	34.8	13.0	52.2	46
Texas	37.5	10.8	51.7	120
Virginia	17.8	31.1	51.1	45
All States	30.3%	18.9%	50.8%	1135

Answers to other questions indicate that these premature stances were not tentative conclusions. When jurors were asked how strongly they felt about their decision, 70.4% of those who had taken a premature stance for death indicated that they were "absolutely convinced." When the 27% who said "pretty sure" are included, nearly all (97.4%) indicated that they felt strongly about their early pro-death stance, leaving only 2.6% of those who took a premature stance for death indicating that they were "not too sure."[38]

Most of these early pro-death jurors (59.5%) never wavered from their initial stance for death when questioned at the three subsequent points in the process. Presenting mitigating evidence during the penalty phase cannot be very effective when so many jurors declare that they were already "absolutely convinced" that the defendant deserved death before they heard any mitigation evidence. Given the human proclivity to interpret information in a way that is consistent with what one already believes,[39] it is not surprising that most jurors never waver from their premature stance. Judging from juror comments, most of the 20.1% who changed their position from death

[38] Updating Bowers et al., *Foreclosed Impartiality*, supra note 34, at 1490, Table 2.

[39] Leon Festinger, A Theory of Cognitive Dissonance (1957).

to life at the final vote did so to avoid a hung jury, not because they were persuaded by the mitigating evidence they were supposed to be considering.[40]

Finding that most jurors who prematurely decided the punishment should be death were absolutely convinced and never changed their minds suggests that they were reaching conclusions about what the punishment should be based on the guilt evidence, and that they had already closed their minds to mitigating evidence that would be presented in the sentencing phase. Answers to a question concerning how they made their decision support this suspicion.[41] Jurors who took an early stance for death were over twice as likely as undecided jurors (40.9% vs. 19.1%) to admit they decided guilt and sentence at the same time and on the same grounds.[42]

Additional insight into the tendency to take an early stance for death comes from responses to questions about whether jurors considered death as an acceptable punishment for six different types of murder. As discussed at length later,[43] most of the jurors considered death to be the "only acceptable punishment" for three different types of murder, and nearly half did so for two additional types. The data show that people who almost certainly should have been disqualified as automatic death penalty (ADP) jurors were nevertheless seated on capital juries. These findings are relevant here because jurors who think death is the only acceptable punishment naturally would be inclined to decide the sentence should be death as soon as they heard the facts of the crime during the guilt phase of the trial. As expected, prematurely choosing death and considering death the only acceptable alternative were associated. Among those who believe death is the only acceptable punishment for all of these kinds of killings, early pro-death stances are five times as common (52.2% vs. 10%) as among those who said it was the only acceptable punishment for none of these offenses.[44] In view of the large percentages that thought only death was acceptable for various crimes that would include most types of capital cases, it is not surprising that a substantial percentage decided the penalty should be death after hearing about the crime. These results suggest that many jurors come to the trial

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[40] Updating Bowers et al., *Foreclosed Impartiality*, supra note 34, at 1492, Table 3. For further evidence and discussion of jurors changing vote from death to life to avoid a hung jury, see Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 Ind. L. J. 1183, 1196-97,1207 (1995).

[41] The actual question was: "Some jurors feel that the decisions about guilt and punishment go together once they understand what happened and why; others feel these are separate decisions based on different considerations. Which comes closest to the approach you took?"

[42] Updating Bowers et al., *Foreclosed Impartiality*, supra note 34, at 1493, Table 4.

[43] See infra notes 60 to 67 and accompanying text.

[44] Updating Bowers et al., *Foreclosed Impartiality*, supra note 34, at 1506-07.

predisposed to vote for death,[45] and hence inclined to decide the sentence before they even hear the instructions or evidence of mitigation they are supposed to consider.

These early decisions that the defendant deserves death violate the holdings of *Gregg, Lockett, Eddings, Penry* and *Morgan*. Jurors who decide the sentence should be death before the sentencing phase even begins cannot possibly be heeding the guided discretion mandated by *Gregg*. They also cannot be fully considering the mitigating evidence that will not be presented until the sentencing phase of the trial as *Lockett, Eddings, Penry*, and *Morgan* mandate. Responses of early pro-life jurors were somewhat similar to early pro-death jurors,[46] but they have not been given as much attention because their premature stance does not present the same constitutional problems. *Lockett* and its progeny indicate that any relevant evidence, including what is presented at the guilt phase, can be considered as mitigating against a sentence of death.

Sandys' analysis of CJP interviews from Kentucky and Bentele and Bowers' examination of jurors' narrative responses from death cases in six CJP states provide further evidence of early decisionmaking.[47] Interviews with capital jurors that were not part of the CJP also confirm that prematurely deciding the defendant deserves death is a pervasive problem. According to Costanzo and Costanzo, 26% of Oregon jurors interviewed said that they did not need to hear the evidence at the penalty phase because after hearing about the crime they had already decided the defendant deserved to die.[48] When Geimer and Amsterdam tried to determine the operative factors that actually influenced those who voted for death in their early study of capital jurors in Florida, they found that most jurors relied on factors that made the

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[45] Because jurors were asked their opinions about the appropriate punishment after the trials, it is possible that these views were a result of their experience as capital jurors rather than any predispositions they brought to the trial. In Bowers et al., *Foreclosed Impartiality*, supra note 34, the authors address this possibility in Appendix A where they show that views on death as the only acceptable punishment were more strongly associated with early stands on punishment than with the position jurors took later in the proceedings. If views regarding acceptable punishment were a result of jurors' experience the association should have become stronger rather than weaker as the trial progressed.

[46] Compared to early pro-death jurors, early pro-life jurors were a little less likely to be absolutely convinced of their stance (70.4 vs. 57.7%) and a little less likely to say they made their guilt and punishment decisions on the same bases (40.9 vs. 30.0%). Updating Bowers et al., *Foreclosed Impartiality*, supra note 34, at 1490-93.

[47] Sandys, supra note 40; see also Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 Brooklyn L. Rev. 1011 (2001) [hereinafter Bentele & Bowers, *No Excuse*].

[48] Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 Law & Hum. Behav. 151(1994).

sentencing phase irrelevant.[49] Sixty four percent said that the manner of killing influenced their decision and 54% thought that death was the mandatory or presumed penalty once the defendant was found guilty of first-degree murder.[50]

Craig Haney has identified aspects of the capital trial process he calls "structural aggravation" that make jurors more likely to prematurely decide that the penalty should be death and close their minds to mitigating evidence.[51] He observed that because the often shocking guilt phase evidence comes first it forges a powerful and persistent picture of aggravation that resists alteration. After days, weeks, or even months of hearing the defendant dehumanized and described as deviant, different, and dangerous, "jurors' attitudes and impressions have crystallized and rigidified" before any attempt is made to humanize the defendant in the punishment phase.[52] He also describes how widespread lack of understanding of the social causes of crime and the lives of the typical capital defendant leaves jurors predisposed to punish harshly.[53]

Bias in Jury Selection

Jury selection procedures at the outset of a capital trial yield a jury that is more inclined to impose the death penalty than a representative group of citizens.[54] This pro-death inclination of capital juries can be built into the standards for jury service as it was under *Witherspoon v. Illinois* (1968) or it can be the product of the misapplication of neutral standards as it has been since *Wainwright v. Witt* (1985).[55] The faulty application of jury selection standards yields a disproportionately guilt-prone and death-prone jury in two

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[49] William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factor in Ten Florida Death Penalty Cases*, 15 Am. J. Crim. L. 1 (1988).

[50] Id. at 40, Table 3.

[51] Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 Stan. L. Rev.1447 (1997).

[52] Id. at 1456.

[53] Id. at 1457.

[54] For a recent review of jury selection in capital cases see Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in America's Experiment With Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction (James R. Acker et al. eds., 2nd ed.) (forthcoming).

[55] Witherspoon v. Illinois, 391 U.S. 510 (1968) established a two-prong standard aimed at ensuring that a potential juror's opposition to the death penalty would not interfere with his or her ability to apply the law. Potential jurors could be excluded if they "made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Id. at 509-10 n.21. Because the *Witherspoon* standard only eliminated those at one end of the spectrum of public opinion, it would naturally result in a jury that was more conviction/punishment prone than the general population. Sources cited in

ways: (1) it "over-excludes" by barring jurors who would be able to impose the death penalty under appropriate circumstances despite reservations, and (2) it "under-excludes" by failing to dismiss "automatic death penalty" (ADP) jurors who would not give effect to mitigation in making their sentencing decisions. The consequence is that those on the more prosecution-oriented end of the public opinion spectrum are over-represented on capital juries relative to both the population at large and to correctly selected capital juries.[56]

Evidence of over-exclusion comes from mock jury studies that show some potential jurors would be excluded from capital juries because they initially expressed opposition to the death penalty in the abstract, even though they should not have been excluded because they indicated that they would actually impose death in some cases when subsequently given specific hypothetical crime scenarios.[57] There is a long line of evidence demonstrating that people who would be excluded are less prosecution oriented, less

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note 58 infra discuss research that has demonstrated this biasing effect. The standard subsequently enunciated in Wainwright v. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) was worded neutrally and could thus exclude both those whose extreme opposition or support would prevent them from following the law. Probably in part because of the earlier standard's emphasis on making sure jurors were capable of imposing death, or "death qualified," the Court had to return to this issue in Morgan v. Illinois, 504 U.S. 719, 112 S. Ct. 2222, 119 L. Ed. 2d 492 (1992). In *Morgan*, the Court explained that Witt also required the exclusion of jurors who favored the death penalty so strongly that they would automatically impose it in a capital case without regard to mitigating evidence. Thus jurors have to be "life qualified" as well.

[56] A correct application of jury selection standards would lead to a more death-prone jury than would a random selection of jurors from the population if more life-prone than death-prone jurors were properly excludable. This disproportion would be compounded if death-prone jurors were under-excluded and life-prone jurors were over-excluded owing to the misapplication of the standards for capital jury service.

[57] Robert J. Robinson, *What Does "Unwilling" to Impose the Death Penalty Mean Anyway? Another Look at Excludable Jurors*, 17 Law & Hum. Behav. 471 (1993) and Michele Cox & Sarah Tanford, *An Alternative Method of Capital Jury Selection*, 13 Law & Hum. Behav. 167 (1989) found that 60% and 65%, respectively, of college students surveyed that answered questions that would make them excludable because of their expressed opposition to the death penalty actually would impose the death penalty in response to some of the hypothetical crime scenarios they were subsequently given. The authors argue that saying you are opposed to the death penalty in the abstract is different from being willing to apply it in specific situations, and as long as jurors would vote for death under some circumstances they should not be excluded. Both studies used the standard from *Witherspoon* because it is easier to operationalize, but the problem of over-exclusion is likely to be worse under the current standard established in *Wainwright* because it tends to exclude even more people than the more stringent *Witherspoon* standard.

punitive, and more supportive of due process as opposed to crime control than those who ultimately serve as capital jurors.[58]

Prior research,[59] as well as CJP interviews with former capital jurors, provide evidence of under-exclusion. Jurors' responses to a question[60] on what they thought was the appropriate punishment for six different types of murder reveal that many of the jurors who survived death qualification and decided capital cases probably should have been excluded as ADP jurors. Many of those who become capital jurors said they believe death is "the only acceptable punishment" for the kinds of murder most commonly tried as capital offenses. Over half of the CJP jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim is killed (53.7%). Close to half could accept only death as punishment for the killing of a police officer or prison guard (48.9%), or a murder committed by a drug dealer (46.2%). A quarter of the jurors thought only death was acceptable as punishment for a killing committed during another crime (24.2%), i.e., a felony murder. Nearly three out of ten jurors (29.1%) saw death as the only acceptable punishment for all of these crimes, except felony murder; 17.1% saw death as the only acceptable punishment for all six including felony murder.

In stark contrast, very few of these jurors believed that the death penalty was unacceptable as punishment for these crimes ("unacceptable death penalty" or UDPs). For the first five offenses, between 2.3% and 3.4% said death was unacceptable punishment; for felony murder the percent saying unacceptable rose to 6.9%; doubt about the defendant's intention to kill may have caused a few more jurors to reject the death penalty for felony murder. Quite clearly, the jury selection process eliminated nearly all persons who thought the death penalty was unacceptable as punishment for these crimes

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[58] Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980) discusses much of the social science evidence of conviction/punishment prone capital juries that was subsequently rejected by the Supreme Court in Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). Examples of more recent research that uses the *Witt* standard and addresses some of the issues raised by the court opinions are discussed in Sandys & McClelland, supra note 54.

[59] See, e.g., Ronald C. Dillehay & Marla R. Sandys, *Life Under Wainwright v. Witt: Juror Dispositions and Death Qualification*, 20 Law & Hum. Behav. 147 (1996).

[60] The actual question was: "Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes?" "Murder by someone previously convicted of murder," "A planned, premeditated murder," "Murders in which more than one victim is killed," "Killing of a police officer or prison guard," "Murder by a drug dealer," and "A killing that occurs during another crime."

and failed to remove a great many who believed death was the only acceptable punishment for these offenses.[61]

Table 2

Percentages of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State

States	By defendant with prior murder conviction	Planned premeditated murder	Murder with multiple victims	Killing police/ prison guard	Murder by drug dealer	Murder during another crime	N
Alabama	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56
California	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
Florida	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
Georgia	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
Indiana	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
Kentucky	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
Missouri	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
North Carolina	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
Pennsylvania	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
South Carolina	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
Tennessee	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
Texas	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
Virginia	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
All States	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

Is this failure to detect and remove jurors who see the death penalty as the only acceptable punishment for various kinds of potentially capital murder a failing of some states and not others? Or, like premature punishment decision making, is it a widely pervasive unrelieved failing of the capital punishment system? The data in Table 2 address this question with the

[61] The vast difference between the "unacceptables" (UDPs) and the "only acceptables" (ADPs) among capital jurors may reflect a far greater difficulty of identifying ADPs than UDPs at voir dire. The UDPs' opposition to the death penalty may often be an unconditional matter of moral conscience, one that is self conscious and easy to detect in voir dire questioning. The ADPs' position may more often be a matter of personal conviction grounded in the particulars of the specific kind of crime, and free of any conscientious objection to the alternative, a life sentence. Without having a clear understanding of what constitutes mitigation or even what the term means, and without any prior experience in making such a decision, ADPs may be unlikely to believe or say that they would not be able to follow the judge's instructions, especially given the presumption of many jurors that voir dire is basically a test of whether they can vote for a death sentence. For a further discussion of the difficulties in identifying ADP prospective jurors, see Sandys & McClelland, supra note 54.

breakdown of jurors' "only acceptable" responses for the six potentially capital crimes by state.

Again, as in the case of premature decision making, there is relatively little variation by state. Seven of the thirteen states are within ten points of the sample-wide percentage saying death is the only acceptable punishment on each of the six offenses. Three states, North Carolina, Tennessee, and Texas, depart from the sample-wide figure by as much as ten points on only one type of crime. Alabama is above the sample wide percentage on one crime and below on another by ten points. California and Virginia are the only two states that show consistent departures from the sample-wide figures. Virginia is lower on three of the six crimes; however, as in the case of premature decision-making, the small Virginia sample makes these differences relatively unreliable. California jurors are ten points below the "only acceptable" level for all states on four of the six crimes, suggesting a greater effort to detect and remove ADP jurors, than elsewhere. In fact, judicial decisions in California noted the importance of life qualification before it became effective in other states.[62] Yet the four-to-six-of—ten California jurors who see death as the only acceptable punishment for most of the potentially capital crimes means that despite California's earlier commitment to life qualification, many ADP jurors continue to serve on California juries.

Jurors who believed death is the only acceptable punishment could not have given meaningful consideration to the mitigating evidence, as the law mandates. *Wainwright v. Witt* held that a potential juror must be excluded if his or her strong feelings about the death penalty would "prevent or substantially impair the performance of his (sic) duties as a juror in accordance with his instructions and his oath . . .."[63] This standard was neutrally worded and could be used as a basis for excluding individuals at both ends of the opinion spectrum, both those who would never impose death and those who would always impose death for a given offense. *Morgan v. Illinois* made it unmistakably clear that excluding ADPs was constitutionally required "under the standard enunciated in *Witt*."[64] In *Morgan* the court reiterated this view, which it had announced previously in *Ross v. Oklahoma*.[65] The *Morgan* Court reasoned that people who would automatically vote for death once the defendant was found guilty should be excluded as ADP jurors because they will fail to give the constitutionally required good faith consideration to the aggravating and mitigating circumstances.

> Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth

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[62] See Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980).

[63] Wainwright v. Witt, 469 U.S. 412, 424, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985).

[64] Morgan v. Illinois, 504 U.S. 719, 728 (1992).

[65] Ross v. Oklahoma, 487 U.S. 81, 108 S. Ct. 2273, 101 L. Ed. 2d 80 (1988).

> Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empanelled and the death sentence is imposed, the State is disentitled to execute the sentence.[66]

The CJP data make it clear that many such jurors are surviving jury selection and deciding capital cases, and that their predisposition to see death as the only acceptable punishment makes them more likely to take a premature pro-death stand.[67]

The CJP indicates further that the jury qualification process itself creates a bias toward death. Not only does jury selection over-exclude and under-exclude, thus leaving a jury that is disproportionately pro-conviction and pro-punishment owing to faults in the filtering process, as discussed previously, but there also is evidence that the questioning during voir dire itself prejudices jurors toward finding the defendant guilty and imposing a death sentence.

Among the 1200 jurors from 14 states interviewed by the CJP, approximately 1 in 10 were both conscious of and willing to admit the prejudicial impact on them of the jury selection process. The jurors were asked outright whether the voir dire questions made them think the defendant was guilty and should be sentenced to death. Of these jurors, 11.3% said that the voir dire questions made them think the defendant "must be" or "probably was" guilty. Almost as many, 9.2%, indicated that the voir dire questions made them think that the most appropriate punishment "must be" or "probably was" the death penalty. These pro-conviction and pro-death biases outstrip contrary influences by a 10-1 margin; that is, 0.6% and 0.9%, respectively gave the corresponding "must not be" or "probably was not" responses. Although most jurors claimed not to be prejudiced by the voir dire questioning, many of them may have experienced such an influence but were not conscious of it. In addition, among those who were conscious of such an influence, a good many may have been unwilling to acknowledge it in response to these few quite simple questions.

An experiment comparing mock jurors who had been exposed to death qualifying voir dire with those not so exposed showed that the former were more likely to think the defendant was guilty and to choose a death sentence as opposed to life imprisonment.[68] A meta-analysis of 14 studies on how death penalty attitudes affect the probability of conviction showed greater effects when the subjects were exposed to death qualification, which also sug-

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

[67] For evidence of the link between the predisposition to see death as the only acceptable punishment and the tendency to take a stand on the defendant's punishment at the guilt stage of the trial, see supra note 43 to 45 and accompanying text.

[68] Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process*, 8 Law & Hum. Behav. 121 (1984).

gests that the process itself creates a bias.[69] Haney argues that hearing all those questions about the death penalty, and seeing the dismissal from service of other potential jurors who express grave doubts, seems to send the message that the judge and the lawyers - the authority figures in the courtroom- think this defendant is guilty and deserves death. He emphasizes that this is especially problematic because jury selection occurs at the very beginning of the process and thus creates a powerful first impression.[70]

In *Lockhart v. McCree* the Court was concerned that the subjects in previous research had not had the experience of being jurors in actual capital trials.[71] The CJP addresses this concern, however, by interviewing people who served on actual death penalty cases. The responses of the CJP jurors confirm, as mock jury studies found, that the jury selection process itself tends to convey the impression that the defendant is guilty and that death is the appropriate punishment. What is more, by examining the beliefs of persons who were actually selected and served as capital jurors, it also shows that jury selection fails to exclude persons who see the death penalty as the only acceptable punishment for the kinds of killings likely to be tried capitally, and that this failure contributes to the tendency of jurors to make premature punishment decisions contrary to the constitutional requirement set forth in *Morgan*.

Failure to Understand Instructions

The assumption that newly formulated post-*Furman* capital statutes will guide jurors' exercise of discretion and thus remedy the arbitrariness condemned in *Furman v. Georgia* was the key to the *Gregg v. Georgia* holding that the death penalty could be constitutional. Yet, research shows that many jurors do not understand the jury instructions that are supposed to guide their discretion. Studies using mock juries and survey methods repeatedly show that individuals do not understand death penalty instructions.[72] It may be argued, however, that in a real capital trial the jurors are educated by their lengthy experience in court, and put more effort into understanding sentencing instructions when they are in the position of actually deciding a defendant's fate. The CJP data answer this argument by revealing how jurors in actual capital cases understood their sentencing instructions. They show that a great many people who actually served as capital jurors did not understand the instructions they were supposed to be following.

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[69] Mike Allen et al., *Impact of Juror Attitudes about the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 22 Law & Hum. Behav. 715 (1998).

[70] Haney, supra note 68, at 128-29.

[71] Lockhart v. McCree, 476 U.S. 162, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986).

[72] See Stephen P. Garvey, et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000) and Peter Tiersma, *Jury Questions: An Update on Kalven and Zeisel*,39 Crim. Law Bull.— (2003) for a discussion of research demonstrating the failure of jurors to understand capital instructions.

Jury instructions vary from state to state owing to differences in capital statutes. Most states, including 8 of the 14 CJP states,[73] use ''balancing'' statutes that require jurors to determine that aggravating factors outweigh mitigating factors to return a death verdict. Four of the CJP states represent an alternative approach reflected in what are commonly called ''threshold'' statutes.[74] Under these statutes, jurors must find at least one aggravating factor and must consider mitigating evidence. They are then free to decide whether a death sentence is warranted without further guidance. Two CJP states use ''directed'' statutes that require all jurors to answer specific questions in the affirmative before they can impose the death penalty.[75]

Statutes also differ in what factors may be considered in aggravation, when unanimity is required, and what standards of proof apply. Different treatment for aggravating and mitigating circumstances is required by U.S. Supreme Court caselaw and state statutes.

CJP jurors were asked three questions abut aggravating factors and three about mitigating factors designed to learn whether jurors understood the way, and particularly differences in the way, they were supposed to approach aggravating and mitigating evidence. The questions asked about (1) restrictions on the specific factors jurors could consider, (2) the applicable standard of proof, and (3) whether unanimity was required before a factor could be considered. The wording of the questions was identical except for whether they referred to mitigating or aggravating evidence. The responses to the three questions on mitigation and the one on aggravation where the law requires uniform treatment in every state are summarized in Table 3.

Mitigating Evidence. The U.S. Supreme Court has held capital statutes cannot limit the mitigating factors that jurors may consider[76] and cannot require unanimity for findings of mitigation.[77] The CJP data show, however, that close to half of those who served as capital jurors failed to realize that they were allowed to consider mitigating factors that were not listed in the statute. Overall, 44.6% failed to understand that they were allowed to consider any mitigating evidence. Moreover, this failure is relatively uniform by state. In 11 of the 13 states the percentage of jurors failing to understand that they could consider any relevant evidence that they believed was

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[73] The eight CJP states with balancing statutes are California, Louisiana, North Carolina, Pennsylvania, and Tennessee, where the jury decides the sentence; and Alabama, Florida, and Indiana, where the jury makes a recommendation but the judge decides the sentence. See Bowers, *Preview*, supra note 32, for additional details.

[74] The CJP states with ''threshold'' statutes are Georgia, Kentucky, South Carolina, and Missouri. See id. for additional details.

[75] Texas and Virginia are the two CJP states that require jurors to answer specific questions in the affirmative before imposing the death penalty. The Virginia statute also lists mitigating factors that the jurors are instructed to consider before deciding the penalty. See Bowers, *Preview*, supra note 32, for additional details.

[76] Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[77] McKoy v. North Carolina, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990); Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988).

mitigating is less than 10 percentage points from the figure for all states; in Alabama, it barely exceeds ten points. The two greatest departures from this uniformity are a low of 24.2% in California and a high of 58.7% in Pennsylvania, differences of 20.4 and 14.1 points, respectively, from the overall figure.

Table 3

Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

	JURORS WHO FAILED TO UNDERSTAND THAT THEY. . .				
States	Could consider any mitigating evidence	Need not be unanimous on mitigating evidence	Need not find mitigation beyond reas. doubt	Must find aggravation beyond reas. doubt	N*
Alabama	54.7%	55.8%	53.8%	40.0%	52
California	24.2%	56.4%	37.6%	41.7%	149
Florida	49.6%	36.8%	48.7%	27.4%	117
Georgia	40.5%	89.0%	62.2%	21.6%	73
Indiana	52.6%	71.4%	58.2%	26.8%	97
Kentucky	45.9%	83.5%	61.8%	15.6%	109
Missouri	36.8%	65.5%	34.5%	48.3%	57
North Carolina	38.7%	51.2%	43.0%	30.0%	79
Pennsylvania	58.7%	68.0%	32.0%	41.9%	74
South Carolina	51.8%	78.9%	48.7%	21.9%	113
Tennessee	41.3%	71.7%	46.7%	20.5%	44
Texas	39.6%	72.9%	66.0%	18.7%	47**
Virginia	53.3%	77.3%	51.2%	40.0%	43
All States	44.6%	66.5%	49.2%	29.9%	1185

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

** The number of Texas jurors is reduced in this table because these two questions were replaced with others while the interviewing in Texas was underway.

With regard to unanimity about mitigation, most jurors did not realize that they could consider any factor in mitigation that they personally believed to be proven regardless of whether other jurors agreed. Table 3 shows that two-thirds (66.5%) of the jurors in all 14 states failed to realize that unanimity was not required for findings of mitigation. Again, the misunderstanding was evident in every state, but the variation between and among states was far wider than in the case of what factors could be considered as mitigating. Jurors' responses were within ten points of the overall figure in only five states, more than ten points above in four states and more than ten points

below in four states. They ranged from a low of 36.8% in Florida[78] to a high of 89% in Georgia.

The Supreme Court has not ruled on the burden of persuasion or the standard of proof applicable to mitigating evidence, and most state statutes do not address these issues.[79] While no jurisdiction requires the defendant to prove mitigation beyond a reasonable doubt,[80] the CJP data reveal that almost half of all CJP jurors (49.2%) erroneously assumed that this heightened standard of proof was applicable. This mistaken assumption is more uniform by state than the one that unanimity is required for findings of mitigation but less consistent than the misunderstanding that the scope of mitigation evidence is limited by statute. Jurors in 7 of the 13 states are within 10 points of the figure for all states; only Pennsylvania at 32% and Texas at 66% are more than 15 points from the sample-wide figure.

In two of the CJP states, jury instructions explicitly articulate a standard of proof the defendant must meet to establish the existence of mitigating factors. Pennsylvania[81] and North Carolina[82] require that mitigation be proven by a preponderance of the evidence. The CJP data show that a substantial number of jurors in these two states did not know the standard, even though it is explicitly articulated in the pattern jury instructions of both states. The percentage of jurors mistakenly assuming the beyond a reason-

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[78] The low percentages in Florida, and to a lesser extent in Alabama, are probably attributable to the fact that they are the two CJP states that do not require unanimity for a jury recommendation of death. Jurors in other states are subject to the widely known unanimity requirement for guilt and sentencing decisions, which probably makes them more likely to assume it applies to mitigating evidence as well.

[79] James R. Acker & Charles S. Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes*, 31 Crim. Law Bull. 19-60 (1995).

[80] Louis J. Palmer, Jr., Encyclopedia of Capital Punishment in the United States 77 (2001).

[81] Pennsylvania Death Penalty, Instructions Before Hearing, 15.2502E (Crim), Section (2) ("Aggravating circumstances must be proven by the Commonwealth beyond a reasonable doubt while mitigating circumstances must be proven by the defendant by a preponderance of the evidence, that is, by the greater weight of the evidence."); Death Penalty, Process of Decision and Verdict Slip, 15.2502H (Crim), Section (3)("Remember, the Commonwealth must prove any aggravating circumstance beyond a reasonable doubt while the defendant only has to prove any mitigating circumstance by a preponderance of the evidence.").

[82] North Carolina Pattern Instructions -Crim. Section 150.10, at 27("The existence of any mitigating circumstance must be established by a preponderance of the evidence, that is, the evidence, taken as a whole must satisfy you -not beyond a reasonable, but simply satisfy you -that any mitigating circumstance exists. A juror may find that any mitigating circumstance exist by a preponderance of the evidence whether or not that circumstance was found to exist by al the jurors."). As James Luginbuhl, & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided* ?, 70 Ind. L.J. 1161 (1995) points out, although these instructions appear clear on their face, they occur two-thirds of the way through lengthy instructions in one paragraph, and the difference between how to handle aggravation and mitigation evidence is not emphasized.

able doubt standard, though relatively low compared to the other states, is nearly one third or more: 32% in Pennsylvania and 43% in North Carolina.

Aggravating Evidence. Most states with the death penalty have a statutory list of aggravating factors, and the Supreme Court has ruled that the constitution requires the jury to find at least one of the factors to impose the death penalty.[83] In reaching its punishment decision, the jury is not constitutionally barred from considering other aggravating factors not designated in the state statute.[84] Statutes in effect when the CJP data were collected in Pennsylvania and North Carolina did, however, limit jurors to considering only factors on the statutory list as a basis for the death penalty.[85] Yet, even when the instructions explicitly limit the jurors to aggravating circumstances delineated in the statute, most jurors did not realize that they were only to consider enumerated factors. In Pennsylvania, 63.5% of the jurors failed to realize that they were limited to the statutory list of aggravating circumstances, and in North Carolina the percentage incorrect was 50.6%.

Although the Supreme Court has not ruled on whether unanimity is required for aggravating circumstances, Pennsylvania and North Carolina do have explicit language in their statutes requiring unanimity.[86] Although most of the jurors realized unanimity was required for findings of aggravation in these two states, a substantial minority did not understand the statutory mandates. The percentage failing to understand the unanimity requirement was 17.8% in Pennsylvania and 22.2% in North Carolina.

The capital statutes of most states explicitly require that aggravating circumstances be proven beyond a reasonable doubt, but in five states the statutes list aggravating factors for the jury to consider without specifying the required standard of proof.[87] Florida is the only CJP state in which the statute completely neglects to address the standard of proof for the factors

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[83] Zant v. Stephens, 462 U.S. 862 (1983).

[84] Id. at 878-79.

[85] North Carolina: N.C. Gen. Stat. Section 15A-2000(e) (1994); Pennsylvania: 42 Pa. Cons. Stat. Section 9711 (2001).

[86] Id.

[87] James R. Acker and C.S. Lanier, *Capital Murder From Benefit of Clergy to Bifurcated Trials: Narrowing the Class of Offenses Punishable by Death*, 29 Crim. Law Bull. 291 (1993) reports that five states (Arizona, Connecticut, Florida, Montana, and Nebraska) have statutes that do not specify a burden of proof for aggravating circumstances. However, Acker and Lanier point out that caselaw may interpret the statute to require proof beyond a reasonable doubt, as in State v. Joubert, 224 Neb. 411, 399 N.W.2d 237, 247 (1986). The Supreme Court has not ruled on the issue, but the rationales of In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) and Ring v. Arizona, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (U.S. 2002) could be used as a basis for arguing that proof beyond a reasonable doubt is constitutionally required for aggravating factors. Acker and Lanier explain the argument based on *In re Winship*. Acker & Lanier, supra, at 310 n.78. *Ring* held that aggravating factors were the functional equivalent of an element of a greater offense and thus the Sixth Amendment right to a jury applied. Treating aggravating factors

upon which a death sentence may be based. One CJP state, California, does not distinguish between aggravating and mitigating factors, but merely gives jurors a list of factors to consider. Although caselaw requires a heightened standard of proof when other crimes are used as aggravating factors, there is no standard of proof for establishing other aggravating circumstances in California.[88] In the two CJP states with directed statutes, Texas and Virginia, the specific issues the jurors are directed to address are analogous to aggravating circumstances in that they serve as the basis for a death sentence, and the prosecution must prove them beyond a reasonable doubt.

Table 3 shows that overall 29.9% of the jurors did not think they had to find aggravation beyond a reasonable doubt. Seven of the states were within ten points of this figure and two more barely exceeded a ten point difference. Missouri at 48.3% is the greatest departure from the figure for all states; no other differences are as great as 15 points. The percentage not understanding the standard is substantial whether it is explicitly required by statute, as it is in 12 of the CJP states, or the statute is silent on the issue, as in Florida and California.

The misunderstandings reflected in these incorrect responses on the questions regarding how to handle mitigating and aggravating evidence all make a death sentence more likely. It is more difficult to find mitigating evidence than the law contemplates when jurors think they are limited to enumerated factors, must be unanimous, and need to be satisfied beyond a reasonable doubt. The CJP data show that nearly half (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to consider any mitigating evidence. Two-thirds (66.5%) failed to realize they did not have to be unanimous on findings of mitigation. Nearly half (49.2%) of the jurors incorrectly thought they had to be convinced beyond a reasonable doubt on findings of mitigation. Misunderstandings were not as severe regarding aggravation, but a substantial portion of jurors did not understand the protections for the defendant that state statutes attempt to provide. In states that limited jurors to enumerated aggravating factors and required unanimity for aggravation, most failed to realize they were confined to the list and a substantial minority did not realize unanimity was required. Even when the statutes of most states explicitly required proof beyond a reasonable doubt for findings of aggravation over one quarter (29.9%) of the jurors failed to realize the higher standard of proof applied. The constitutional mandate of *Gregg* and companion cases designed to guide jurors' exercise of sentencing discretion is not being satisfied when jurors do not understand the guidance.

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like elements of an offense suggests that the beyond a reasonable doubt standard should apply.

[88] One author explains that People v. Davenport, 41 Cal. 3d 247, 221 Cal. Rptr. 794, 710 P.2d 861 (1985) establishes the heightened standard of proof for other crimes in California and that 33 of 39, or 84.6%, of the jurisdictions with capital punishment require that aggravating factors be proven beyond a reasonable doubt. Palmer, supra note 80, at 76-7.

Erroneous Beliefs that Death is Required

Beyond the foregoing bases for confusion, there is another way in which jurors fail to understand their responsibility for the punishment decision. A substantial number of jurors wrongly believed that if certain aggravators were proven the law required them to impose the death penalty. The Supreme Court made it clear in *Woodson v. North Carolina* that no state can require the death penalty solely on the grounds that specific aggravating circumstances have been established.[89] It held that the constitution requires that the jurors always be allowed to consider mitigating factors. Yet, half of the jurors believed the death penalty was required if either of two commonly found aggravating circumstances were established.

The CJP jurors were asked whether the evidence in their case established that the defendant's crime was "heinous, vile or depraved" and whether the defendant would be "dangerous in the future." For each of these questions, virtually four-of-five jurors answered "yes" (81.5% and 78.2%, respectively). Jurors were then asked whether, after hearing the judge's sentencing instructions, they thought the law required them to impose death if the defendant's crime was "heinous, vile or depraved" or if the defendant would be "dangerous in the future." The substantial percentage of jurors who wrongly believed the law required the death penalty when either of these circumstances was proven is shown for all jurors, by state, in Table 4.[90]

Table 4

Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was Heinous, Vile or Depraved," or Defendant "Would be Dangerous" in Future by State

	DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED	DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE	N*
Alabama	56.3%	52.1%	48
California	29.5%	20.4%	146
Florida	36.3%	25.2%	111
Georgia	51.4%	30.1%	72
Indiana	34.4%	36.6%	93
Kentucky	42.7%	42.2%	109
Missouri	48.3%	29.3%	58

[89] Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

[90] Updating Bowers, *Preview*, note 32 supra.

	DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED	DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE	N*
North Carolina	67.1%	47.4%	76
Pennsylvania	56.9%	37.0%	73
South Carolina	31.8%	28.2%	110
Tennessee	58.3%	39.6%	48
Texas	44.9%	68.4%	117
Virginia	53.5%	40.9%	43
All States	43.9%	36.9%	1136

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering either of the questions.

For each of these aggravating circumstances, roughly four-of-ten jurors mistakenly believed that the death penalty was mandatory. A few more (43.9%) thought death was required when the defendant's conduct was "heinous, vile or depraved," and a few less (36.9%) thought death was required if they found that the defendant "would be dangerous in the future."[91] Fully half (50.3%) of the jurors thought the death penalty was required by one or the other of these two circumstances.[92]

In no state are jurors free of the misconception that the law requires the death penalty when these circumstances are found. In fact, jurors in seven states are within ten points of the sample-wide figure on each aggravator. Concerning the heinous, vile or depraved aggravator, only one state, North Carolina at 67.1%, departed by as much as 15 points from the sample-wide percent. On the future dangerousness aggravator, three states are at least 15 points from the overall percentage; Alabama at 52.1% is 15.2 points above, California at 20.4% is 16.5 points below, and by far the greatest departure comes with Texas which at 68.4% is 31.5 points above the figure for all

[91] For narrative descriptions of how jurors made their punishment decisions that provide additional evidence of jurors' belief that the law required them to impose the death penalty, see Bentele & Bowers, *No Excuse*, supra note 40, at 1031-53.

[92] Some 45% of the jurors believed the evidence proved a factor they thought required death. As indicated in the text, 81.5% said the evidence proved that the defendant's crime was "heinous, vile, or depraved," and 78.2% said it proved that the defendant would be "dangerous in the future." Some 84.7% believed that the evidence in their case proved at least one of these two aggravating circumstances. When jurors' beliefs about whether the death penalty was required for each circumstance are considered in conjunction with their reports about whether each circumstance was proven by the evidence in their case, 44.6% of the capital jurors embarked upon deliberations with the misimpression that the death penalty was required by law in their case. (This represents the percent of jurors who believed that the death penalty was required for one or the other of these two factors, a factor they also believed was established by the evidence.)

states. The elevated level of misunderstanding in Texas is surely a function of that state's directed statute that makes dangerousness a necessary but not sufficient conditions for the imposition of the death penalty.[93] These erroneous assumptions that death is required again show that a substantial portion of capital jurors are misunderstanding the law that is supposed to be guiding their decisions, and in a way that makes them more likely to impose the death penalty.

Evading Responsibility for Punishment Decision

Another indication that many jurors misunderstand the sentencing process as contemplated by the law can be seen in their failure to appreciate their responsibility for the defendant's punishment. In *Caldwell v. Mississippi*, the Supreme Court reasoned that a sentence is unreliable if it is imposed by a jury that believes "that the responsibility for any ultimate determination of death will rest with others."[94] The preceding discussion of the tendency to mistakenly believe the law requires death provides some indication of how jurors seek to shift the responsibility from their own shoulders. Answers to direct questions about whom or what is responsible provides additional evidence.

CJP jurors were asked to rate the items listed in Table 5 from most to least responsible for the defendant's sentence, using 1 for most responsible and 5 for least responsible.[95] The vast majority of jurors did not see themselves as most responsible for the sentence. Over 80% assigned primary responsibility to the defendant or the law, with 49.3% indicating the defendant and 32.85% indicating the law was most responsible.[96] In contrast, only 5.5% thought the individual juror was most responsible, and only 8.9% believed the jury as a whole was most responsible.

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[93] A 1991 change in the Texas statute made the consideration of mitigating circumstances an explicit component of the decision process. A comparison of cases tried before and after this change gives no indication that the change improved jurors' understanding of the requirement that a finding of dangerousness did not mandate the death penalty; 67.3% of 98 jurors whose cases were tried prior to the change said the law required death if the evidence proved that the defendant would be dangerous in the future compared to 73.7% of the 19 jurors whose cases were tried under the revised statute.

[94] Caldwell v. Mississippi, 472 U.S. 320, 333 (1985).

[95] This table updates Bowers, *Preview*, supra note 32, at 1094, Table 10.

[96] When the choices for first and second most responsible are added together, the law becomes the most important factor. Approximately three of four jurors claim the law is either most or second most responsible.

Table 5

Percent Ranking Five Sources or Agents of Responsibility for the Defendant's Punishment from Most "1" to Least "5" Responsible

	MOST RESPONSIBLE>			LEAST <RESPONSIBLE	
	1	2	3	4	5
the defendant because his/her conduct is what actually determined the punishment	49.2	10.7	6.0	7.7	26.3
the law that states what punishment applies	32.8	40.0	8.6	12.5	6.2
the jury that votes for the sentence	8.9	23.6	38.3	25.4	3.8
the individual juror since the jury's decision depends on the vote of each juror	5.6	14.2	27.1	28.4	24.7
the judge who imposes the sentence	3.5	11.3	20.4	25.8	38.9

* Percentages are based on the 1,095 jurors who ranked all five options (i.e., ranks sum to 15).

In response to another question about how responsibility was allocated among the jury, trial judge, and appellate judges, only 29.8% thought the jury was strictly responsible in the 10 states where the jury decision was binding on the judge. Nearly one in five (17%) thought the responsibility was mostly in the hands of the judges. The research evidence demonstrates that the *Caldwell* Court's fears about how the possibility of appellate review might make it easier for reluctant jurors to vote for death were well founded.

The law is not effectively guiding discretion when jurors fail to understand the instructions, mistakenly think the death penalty is required by law, and do not appreciate their responsibility for the sentence. Finding that the overwhelming majority of jurors claim that the law is primarily responsible for the sentence is particularly ironic considering their lack of understanding of the law.

Influence of Race

Racism has stalked the history of capital punishment in America and racial disparities in capital sentencing have survived the post-*Furman*

reforms.[97] Studies have repeatedly found sentencing disparities by race of victim, race of defendant, and most prominently by race of both defendant and victim, i.e., the death penalty is most likely in inter-racial black defendant/white victim cases.[98] In 1987, the Supreme Court narrowly rejected a constitutional challenge based on defendant/victim racial disparities in capital sentencing in *McCleskey v. Kemp*.[99]

Since then a further dimension of racial bias in capital sentencing has been documented, namely jurors' race. The work of Baldus and his associates have shown the effect of jury racial composition with data from Philadelphia,[100] and the CJP has demonstrated with the data from capital jurors in 14 states that both the racial composition of the jury and the race of individual jurors influence capital sentencing decisions. The Supreme Court acknowledged in *Turner v. Murray* that there is an especially high risk of jurors being influenced by conscious and unconscious racism in black defendant/white victim (hereinafter B/W) cases.[101] The CJP specifically addressed this issue with information on the decision making of black and white jurors in B/W cases.

The large sample of trials from which jurors were interviewed by the CJP made it possible to examine how the racial composition of the jury in conjunction with race of defendant and victim influenced sentencing outcomes, and the target sample of four jurors per case made it possible to compare the perspectives of black and white jurors who served on the same cases. Bowers, Steiner, and Sandys provided a detailed examination of how

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[97] See generally William J. Bowers, Executions In America 56-120 (1974) (documenting the disproportionate executions of blacks over the period 1864-1967 in the U.S.); William J. Bowers, Legal Homicide 67-102 (1984) (examining how offender race and victim race impact capital sentencing after 1972). For a general review of the role of American law in perpetuating the differential treatment of black and white defendants, see Randall Kennedy, Race, Crime, and The Law 76-135 (1997); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 Cornell L. Rev. 1, 13-101 (1990).

[98] David C. Baldus et al, Equal Justice and the Death Penalty: A Legal and Empirical Analysis 407 (1990), is the most rigorous demonstration of the disparate treatment of black defendant/white victim cases. See also Samuel R. Gross & Robert Mauro, Death & Discrimination: Racial Disparities in Capital Sentencing (1989); U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (1990).

[99] McCleskey v. Kemp, 478 U.S. 1019, 106 S. Ct. 3331, 92 L. Ed. 2d 737 (1986).

[100] David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. Pa. J. Constit. L. 3, 101, Table10 (2001).

[101] Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683, 90 L. Ed. 2d 27 (1986).

the racial composition of the jury and the race of individual jurors affected the decision-making process.[102]

The racial composition of the jury had the most dramatic impact on sentencing outcomes in B/W cases, precisely where the Turner court believed the risk was greatest. In these inter-racial homicides there were large differences in the percentage of death sentences depending on the number of white male and black male jurors on the jury.[103] In the 74 B/W cases, the percentage of death sentences was 30% when there were less than five white male jurors, but rose to 70.7% when there were five or more white male jurors on the jury. This ''white male dominance'' effect did not occur in the 165 white defendant/white victim (W/W) or 60 black defendant/black victim (B/B) cases. Having a black male on the jury reduced the probability of a death sentence from 71.9% to 37.5% in the B/W cases, and from 66.7% to 42.9% in the B/B cases. This ''black male presence'' effect was not found in W/W cases.[104]

The punishment stands of black and white jurors in the same B/W cases became more divergent as the trial progressed. As indicated earlier, jurors were asked about their punishment stand at different points in the trial. At the end of the guilt phase, but before the punishment phase had even begun, white jurors were three times more likely than black jurors to take a pro-death stance in B/W cases (42.3% vs. 14.7%). After hearing the sentencing instructions the difference was approximately four-to-one (58.5% vs. 15.2%), and by first vote the difference had reached seven-to-one (67.3% of the white jurors voted for death compared to 9.1% of the black jurors).[105] The positions of black and white jurors thus become more polarized as they listen to the very same evidence.

Jurors' answers to other questions provide insights into how their own race influences their interpretation of the evidence and arguments. The data show that in B/W cases black and white jurors' perspectives diverge dramatically on (a) whether they have lingering doubt about the defendant's guilt, (b) their impressions of the defendant's remorsefulness, and (c) their views regarding the defendant's future dangerousness. Table 6 presents the differences in these three punishment-related considerations by jurors' race and gender in those B/W cases where both white and black jurors were interviewed.[106]

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[102] William J. Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. Pa. J. Constit. L. 171 (2001) [hereinafter Bowers et al., *Black and White*].

[103] Id. at 191-97.

[104] The white male dominance and black male presence effects were highly significant by statistical standards. Using Kendall's taub as the measure of association, the probability of getting such results by chance are .002 and .0055 respectively. Id. at 193 n.103.

[105] Id. at 197-203.

[106] This Table, along with additional details, appears in id. at 203-25, as Table 7.

Table 6

Elements of (a) Lingering Doubts (b) the Defendant's Remorse and Identification, and (c) Dangerousness and Early Release by Jurors' Race And Gender in Black Defendant-White Victim Cases

	JURORS' RACE AND GENDER			
	White Males	White Females	Black Males	Black Females
(A) LINGERING DOUBTS				
1. Importance of lingering doubts about the defendant's guilt for you in deciding on punisment				
VERY	0%	12.5%	26.7%	21.1%
FAIRLY	6.9%	0%	26.7%	15.8%
NOT VERY	6.9%	8.3%	0%	15.8%
NOT AT ALL	86.2%	79.2%	46.7%	47.4%
(No. of jurors)	(29)	(24)	(15)	(19)
2. When considering punishment, di you think the defednant might not be the one most responsible of the killing?				
YES	10.3%	4.0%	60.0%	36.8%
NO	86.2%	96.0%	40.0%	52.6%
NOT SURE	3.4%	0%	0%	10.5%
(No. of jurors)	(29)	(25)	(15)	(19)
(B) REMORSE AND IDENTIFICATION				
1. How well does "Sorry for what s/he did" describe the defendant?				
VERY WELL	7.4%	20.0%	46.7%	31.6%
FAIRLY WELL	7.4%	0%	33.3%	21.1%
NOT SO WELL	33.3%	40.0%	6.7%	15.8%
NOT AT ALL	51.9%	40.0%	13.3%	31.6%
(No. of jurors)	(27)	(25)	(15)	(19)
2. Did you imagine yourself in the defendant's situation?				
YES	26.7%	28.0%	53.3%	31.6%
NO	73.3%	72.0%	46.7%	68.4%
(No. of jurors)	(30)	(25)	(15)	(19)
3. Did you imagine yourself in the defendant's family's situation?				
YES	30.0%	48.0%	80.0%	47.4%
NO	60.0%	48.0%	13.3%	47.4%
NOT SURE	10.0%	4.0%	6.7%	5.3%
(No. of jurors)	(30)	(25)	(15)	(19)
(C) DANGEROUSNESS AND EARLY RELEASE				
1. "Dangerous to other people" describes the defendant				
VERY WELL	63.3%	52.0%	26.7%	42.1%
FAIRLY WELL	30.0%	32.0%	53.3%	36.8%
NOT SO WELL	3.3%	8.0%	0%	10.5%
NOT AT ALL	3.3%	8.0%	20.0%	10.5%
(No. of jurors)	(30)	(25)	(15)	(19)
2. How long do you think someone not given the death penalty for a capital murder in this state usually spends in prison?				
0-9 YEARS	30.0%	17.6%	7.7%	7.1%
10-19 YEARS	30.0%	52.9%	30.8%	57.1%
20+ YEARS	40.0%	29.4%	61.5%	35.7%

	JURORS' RACE AND GENDER			
	White Males	White Females	Black Males	Black Females
(No. of jurors)	(20)	(17)	(13)	(14)

The most striking differences occur between white and black male jurors. Over half the black males said lingering doubts about the defendant's guilt were very or fairly important to them in making their punishment decision (26.7 + 26.7 = 53.4%), whereas only 6.9% of the white males said it was very or fairly important and 86.2% said not at all important. Sixty percent of the black males said they thought the "defendant might not be the one most responsible for the killing" compared to only 10.3% of the white males. Similar differences are seen on the questions about remorse and identification. The vast majority of the black males thought the defendant was remorseful (46.7 + 33.3 = 80%), compared to 14.8% of the white male jurors. The black male jurors were more able than the white male jurors to imagine themselves in the defendant's situation (53.3% vs. 26.7%) and the defendant's family's situation (80% vs. 30%). This greater sense of identification might have made the black male jurors more sensitive to signs of remorse.[107] The black male jurors also were much less likely than white males to say "dangerous to other people" described the defendant very well (26.7% vs. 63.3%). Black male jurors also were more accurate in their estimates of how long someone not given the death penalty spends in prison. Most of the black male jurors gave estimates of 20 years or more (61.5%) as compared to 40.0% for the white male jurors, and only 7.7% of the black male jurors estimated 0-9 years compared to 30% of the white males. The females of both races were less polarized in each of these respects.

State specific analyses of CJP data also demonstrate the affect of race on the capital sentencing process. Eisenberg, Garvey, and Wells report that in South Carolina white jurors were more likely to vote for death than black jurors at first vote, but that race of juror matters less by final vote because of the pressure of the white majority.[108] Another analysis of South Carolina jurors reports that white jurors are more likely to feel anger towards the defendant, less likely to imagine being in the defendant's situation, and less likely to find the defendant likeable as a person.[109] An analysis of Pennsylvania jurors prepared for the Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System found that black defendants were more likely to get the death penalty than white defendants, and many of the race-linked patterns found in B/W cases by Bowers, Steiner, and

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[107] Non-CJP research providing evidence that race affects jurors' ability to empathize can be found in Mona Lynch & Craig Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law & Hum. Behav. 337 (2000); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261 (2000).

[108] Theodore Eisenberg et al., *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. Leg. Stud. 277 (2001).

[109] Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. Rev. 26 (2000).

Sandys were found in both inter-racial and intra-racial cases in Pennsylvania.[110]

The CJP thus adds to the troubling picture of how race influences who gets the death penalty by demonstrating that the racial composition of the jury and the race of the individual juror affect sentencing outcomes. In the B/W cases, where the Supreme Court in *Turner* warned that the risk of prejudice is greatest, the CJP shows that the chances of a death sentence increase when there are five or more white males on the jury; they decrease when there is at least one black male on the jury. Jurors become more polarized as they experience the capital trial, and black and white male jurors have very different perspectives regarding lingering doubt, defendant's remorsefulness, and defendant's future dangerousness. These results provide disturbing evidence of how the capital sentencing process is contaminated by race.

Underestimating the Death Penalty Alternative

Early findings of the CJP indicated that jurors' capital sentencing decisions were influenced by mistaken assumptions about the death penalty alternative. The data revealed that most capital jurors grossly underestimated the amount of time a defendant would serve in prison if not sentenced to death, and that the sooner jurors believed (wrongly) a defendant would return to society if not given the death penalty, the more likely they were to vote for death.[111] Citing early CJP research on jurors' erroneous assumptions of early release,[112] the U.S. Supreme Court in *Simmons v. South Carolina*[113]

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[110] Wanda D. Foglia, *Report on Capital Juror Decision-Making in Pennsylvania*, prepared for the Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System (2001) (on file with author). The smaller number of jurors in Pennsylvania compared to the national sample made it impossible to compare black and white jurors within B/W cases. However, many of the race linked patterns observed by Bowers et al., *Black and White*, supra note 102, in the national sample also were found in the analysis of the 74 Pennsylvania jurors. Juries dominated by white males were more likely to impose death, jurors were more likely to prematurely decide on death when the defendant was black, jurors were more likely to have lingering doubt when the defendant was white, and were more likely to be very concerned about preventing defendant from killing again when the defendant was black. One difference based on race of juror observed was that black jurors were more likely to see the defendant as sorry or remorseful, as in the national data. Over two-thirds of the black defendants in Pennsylvania CJP cases were sentenced to death, compared to half of the non-black defendants. An analysis of the case characteristics failed to reveal differences other than race that would explain this disparity in sentencing outcomes.

[111] Bowers & Steiner, *Death by Default*, supra note 34, at 645-70.

[112] William J. Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 Law & Soc'y Rev.157, 169-70 (1993); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[113] Simmons v. South Carolina, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994).

sought to curb the pernicious effects of jurors misunderstanding the punishment options available to them. The Court reasoned that capital jurors should not be making a ''false choice'': that is, choosing between death and an incorrect or false understanding of the alternative. It held that jurors should be informed about legal restrictions on parole, but it limited this requirement to cases where the sentencing alternative was life without parole (LWOP), and where the prosecution argued the defendant would be dangerous in the future-a limitation that severely circumscribed *Simmons'* repudiation of false choice.

Laws have changed in recent years, and now 35 of the 38 states with the death penalty,[114] as well as the federal and military jurisdictions, offer LWOP as a sentencing alternative for at least some capital offenses.[115] Moreover, the law in every state except Pennsylvania and South Carolina requires that the jury be told there is no possibility of parole when the alternative to death is LWOP.[116] In some states LWOP is the mandated alternative for all capital convictions that do not result in a sentence of death, but in others LWOP only applies to capital offenses committed under specified circumstances.[117] Yet, the work of Bowers and Steiner suggests that convincing jurors that life really means life is a ''formidable'' challenge, and thus that some jurors may still be basing their decisions on erroneous assumptions even when they are told there is no parole.[118]

The extent and pervasiveness of the tendency to underestimate the death penalty alternative is shown state-by-state and for the entire sample in Table 7.[119] For the sample as a whole, ''15 years'' is the median estimate of jurors who were asked, ''How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?''[120] In every state the median estimate of the time usually served was less than the mandatory minimum for parole eligibility in that state.[121] This means that most jurors in each state thought that such defendants would usually be back

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[114] Kansas, New Mexico, and Texas are the three states with the death penalty that do not have LWOP.

[115] Death Penalty Information Center, http://www.deathpenaltyinfo.org/lwop.html (visited October 5, 2002).

[116] Shafer v. South Carolina, 532 U.S. 36, 48 n.4 (2001) (noting same).

[117] Of course, jurors' erroneous assumptions of early release will be unaffected in the three states without LWOP, and in cases where LWOP is not mandated as the alternative to the death penalty. Particularly, in Pennsylvania and South Carolina, jurors will not be told the defendant is ineligible for parole even though the sentence is LWOP, unless the prosecution argues future dangerousness and triggers the *Simmons* requirement.

[118] Bowers & Steiner, *Death By Default*, supra note 34, at 710-16.

[119] Updating id., Table 1.

[120] Id.

[121] Four of the thirteen states had LWOP as the death penalty alternative at the time of the trials from which jurors were interviewed (Alabama, California, Missouri, and Pennsylvania).

on the streets well before they first become eligible for parole, which is of course earlier than they actually are paroled, on average.

Table 7

Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

	YEARS IN PRISON IF NOT GIVEN DEATH		
State	Median estimate*	(N)	Mandatory minimum**
Alabama	15.0	(35)	LWOP
California	17.0	(98)	LWOP
Florida	20.0	(104)	25
Georgia	7.0	(67)	15
Indiana	20.0	(75)	30
Kentucky	10.0	(74)	12, 25***
Missouri	20.0	(47)	LWOP
North Carolina	17.0	(77)	20
Pennsylvania	15.0	(63)	LWOP
South Carolina	17.0	(99)	30
Tennessee	22.0	(42)	25
Texas	15.0	(106)	20
Virginia	15.0	(36)	21.75
All states	15.0	(943)	——

* Median estimates exclude "no answers" and unqualified "life" responses but include responses indicating "life without parole" or "rest of life in prison."
** These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.
*** Kentucky gave capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives (See Bowers and Steiner 1999, supra at 646 n.198).

Both statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death. Jurors who gave low estimates were more likely to take a pro-death stand on the defendant's punishment at each of the four points in the decision process.[122] By the final sentencing vote the difference was 25 percentage points; 71.5% of the jurors who believed release would come in less than 10 years voted for death, compared to 46.4% of those who estimated 20 or more years.[123] The fact that this divergence became most pronounced at the end of the process, together with jurors' ac-

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[122] As indicated earlier, jurors were asked what they thought the punishment should be 1) after the guilt phase but before sentencing had begun, 2) after sentencing instructions but before deliberations, 3) at first vote, and 4) at final vote.

[123] Updating Bowers & Steiner, *Death by Default*, supra note 34, at 654-55, Table 3.

counts of the prominent role of the defendant's future dangerousness and his return to society late in their decision-making, suggests that fear of early release became an especially important issue toward the end of jury punishment deliberations.[124]

Many of the CJP jurors volunteered that they believed they had to vote for death to ensure that the defendant would not get back on the streets. In response to a question about whether they would support the death penalty if they knew the defendant would really serve a life sentence, 42.2% of jurors answered that they would prefer life without parole to the death penalty. A disturbing example is provided by Pennsylvania, where 38.6% of those who actually voted for death said that they would have preferred life without parole if it had been the alternative, as it indeed was in the cases they decided. Jurors are actually voting for death because of their mistaken assumption that it is the only way to keep people they see as dangerous out of society. When the law does not require that jurors be told about parole, as it does not when LWOP is not the alternative, or when there is no state statute and future dangerousness is not argued, jurors are still going to be making "false choices" and voting for death because they underestimate the alternative.

But even more troublesome is the evidence that some jurors do not believe judges when they are told there is no parole from a life sentence. In interviews with California jurors who were told that a life sentence meant there would be no parole, some jurors claimed that they did not believe the judge.[125] In a section entitled "The Challenge is Formidable," Bowers and Steiner previously noted how difficult it is to overcome "culturally embedded perspectives on crime and punishment, selective media coverage and reporting of crime, political posturing on the crime problem, and the sheer inaccessibility of factual information."[126] They provide some suggestions for how to more effectively inform jurors about parole,[127] but are pessimistic about the system's ability to overcome the "hegemonic myth of early release

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[124] The influence of concerns about early release also can be seen by reviewing results from surveys of the general public. Although national polls 1982-1998 showed between 70 and 76% of the public supported the death penalty, surveys consistently showed a 15-20% decline in support for the death penalty when life without parole was the alternative. Samuel R. Gross, *Update: American Public Opinion on the Death Penalty-It's Getting Personal*, 83 Cornell L. Rev. 1448 (1998); see also William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J. Crim. L. 77 (1994).

[125] Bowers & Steiner, *Death by Default*, supra note 34, at 697-700.

[126] Id. at 710.

[127] Bowers and Steiner maintain that getting jurors to understand and believe what they are told about parole, would, at a minimum, require:

> (1) the presentation to the jury of an official state report on the parole of murderers that indicates how long capital murderers not sentenced to death, as compared to first degree, and second (or lesser) degree murderers, usually spend in prison before being paroled; (2) the appearance before the jury of an expert on the parole report who can clearly explain both the substance of the report and the meaning of language or terms used to describe its contents; and (3) the opportunity for jurors to question the expert about parole practices, the meaning of

that infects the capital sentencing decision.''[128] Research revealing widespread distrust of the criminal justice system and how readily subjects dismiss evidence that contradicts their assumptions regarding early release of offenders points to the formidable difficulties of convincing jurors who have misgivings about the criminal justice system that those sentenced to life really will not be paroled.[129]

Summary and Conclusion

The empirical evidence demonstrates that the capital punishment process is riddled with problems. Other sources provide convincing evidence of wrongful capital convictions and death sentences revealed by DNA analysis,[130] and evidence of a ''broken system'' reflected in racial bias, prosecutorial misconduct, and inadequate defense representation from research on the appellate process.[131] The CJP data, as discussed here, reveal that the constitutionally mandated requirements established to guide juror discretion and to eliminate arbitrary sentencing are not working. Despite numerous U.S. Supreme Court decisions and state statutes aimed at channeling juror decision making, evidence of how the process actually works suggests that Kalven and Zeisel were prescient when they said deciding who should die is a ''decision which no human should be called upon to make.''[132] The Supreme Court's working assumption that the law and its interpretation in the courts have cured fundamental flaws in the capital sentencing process is a legal fiction.

The problems begin at the very outset of the capital trial process. Jurors come to the courtroom with predispositions that result in nearly half of them deciding the penalty before they even hear the evidence or legal standards they are supposed to be considering. Most jurors claimed they were absolutely convinced of their premature decisions and maintained their position throughout the proceedings. The death qualifying voir dire fails to eliminate jurors who believe death is the only acceptable punishment and who thus cannot give meaningful consideration to mitigating evidence. This problem is compounded by the tendency of the death qualification process to eliminate jurors who actually could impose death even though they have some reservations about capital punishment, and to leave an especially conviction-prone and punishment-prone group of individuals to decide

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statistics, and the terms used to present the information in order to clarify any misunderstandings and to dispel any remaining misconceptions they may have.

Id. at 713.

[128] Id. at 716.

[129] Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 Law and Soc'y Rev. 461 (1999).

[130] Barry Scheck et al., Actual Innocence (2000).

[131] James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000).

[132] Kalven and Zeisel, supra note 1, at 449.

capital cases. In fact, the death qualifying voir dire leaves one in ten jurors conscious of and willing to admit that the jury selection process made them think the defendant was probably guilty and probably deserved death.

The sentencing instructions jurors receive during the punishment phase of the trial fail to solve the problem. Juror understanding of the instructions on how to handle mitigating evidence is woeful. Most jurors fail to understand the constitutional mandate that they are not limited to consideration of mitigating factors enumerated in the statute or factors they unanimously agreed were mitigating in the case. A substantial minority failed to understand the different standards of proof that applied to aggravating and mitigating evidence. Many jurors failed to understand the guidance on how to handle aggravating evidence even when statutes explicitly provided that jurors should be limited to enumerated aggravating circumstances and that such aggravating evidence must be proven beyond a reasonable doubt. A lack of understanding also is reflected in evidence that over a third of the jurors wrongly believed the death penalty was required when certain common aggravators were established, and that the vast majority denied that the jury itself was primarily responsible for the sentence handed down.

The CJP research on how race affects who gets the death penalty provides especially disturbing evidence of the failure of statutory and case law to take the arbitrariness out of the sentencing process. The impact of race is clearly evident in cases involving black defendants and white victims. The legal guidelines cannot be effectively channeling juror discretion when the presence of five or more white male jurors doubles the chances of a death sentence, and the presence of one or more black male jurors reduces the probability of a sentence of death almost as much. Striking differences between the way white male and black male jurors react to the same evidence in the same cases suggests it is virtually impossible to eliminate arbitrariness, with respect to the impact of race.

Efforts to curb arbitrariness have been aided by CJP evidence. For instance, CJP research was instrumental in the successful challenge of false choice in sentencing by carefully documenting jurors' exaggerated assumptions of early release and systematically demonstrating the role of such assumptions in biasing jurors' choice of punishment toward death. Yet even here the success in curbing arbitrariness is far from complete. Supreme Court caselaw now requires that the jury be told the defendant is ineligible for parole when the sentence is LWOP and the prosecution argues the defendant will be dangerous in the future, but mistaken views about release on parole still will be rampant in other cases where the jury is not given information about parole. And, even when they are told the defendant will not be paroled, research reveals that many jurors do not believe what they are told because of firmly entrenched preconceived notions and mistrust of the criminal justice system.

Like the earlier work of Kalven and Zeisel, the CJP has plumbed the usually hidden process of jury decision making. Unlike Kalven and Zeisel, who used trial judges to learn about jury decision making, the CJP has gone directly to the jurors themselves for evidence of how they make their

decisions. In addition, unlike Kalven and Zeisel, who worked in the pre-*Furman* era when death penalty litigation was largely unregulated by constitutional norms, the CJP has sought to assess how jury behavior and sentiment squares with the constitutional requirements imposed by the Supreme Court.

To carry out its jury-focused work, the CJP has had to penetrate the veil of secrecy that otherwise shrouds the decision making of juries.[133] By interviewing former jurors about their experiences and decision making in particular cases-without directly observing the jury at work in a given case or bringing such information to bear in challenging a particular sentence-the CJP has built upon the groundbreaking empirical inquiry initiated by Kalven and Zeisel. By focusing on capital jurors the CJP has been able to confirm doubts *The American Jury* raised about the feasibility of taking arbitrariness out of deciding who deserves to die. Each one of the problems revealed by the CJP reflects a fundamental flaw in the system; viewed altogether the evidence of system failure is overwhelming.

Recent developments suggest that the courts may be ready to give meaningful consideration to this evidence that the process is failing to meet constitutional standards. Public support for the death penalty has fallen to its lowest level in twenty years, and most people now prefer life without parole rather than the death penalty for convicted first degree murderers.[134] In *Atkins v. Virginia*[135] and *Ring v. Arizona*,[136] decided in 2002, the U.S. Supreme Court released inmates from death row and curbed future use of the death penalty. The Capital Jury Project is continuing to compile a wealth of findings and insights that, in conjunction with prior research, make the evidence of problems with the capital sentencing process compelling. Surely this evidence of how capital jurors actually decide who must die will soon convince our lawmakers that America's post-*Furman* experiment with capital punishment has failed, and that it is futile to keep tinkering with the machinery of death.

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[133] Ironically, the work of Kalven and Zeisel prompted lawmakers to block the direct observation of real juries for research purposes. Following the disclosure in 1955 of the audio taping of jury deliberations in connection with their research, the U.S. Attorney General publicly censured "eavesdropping" on jury deliberations. Congress and more than 30 states responded by enacting statutes prohibiting jury taping. Id. at xv. Such barriers have occasionally been relaxed for media interests (e.g., the airing of video taped deliberations of a Wisconsin criminal jury on the PBS "Frontline" program, April 11, 1986 and of four Arizona juries on a two-hour NBC Special aired on April 16, 1997).

[134] See Death Penalty Information Center, http://www.deathpenaltyinfor.org/Polls.html (visited October 5, 2002).

[135] Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002) (reversing position and holding that execution of the mentally retarded violates the Eighth Amendment).

[136] Ring v. Arizona, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (U.S. 2002) (holding that Sixth Amendment right to jury trial bars judge-made death sentences).