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David H. Yamaseki, Clerk of the Superior Court
County of Santa Clara, California

By: 

Mark McCoy

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 People of the State of California,) Case No.: 213515
13)
14 Plaintiff,)
15)
16 -vs.-) Motion to strike the death
17) penalty as a possible punishment
18 Antolin Garcia-Torres,)
19) Request for evidentiary hearing
20 Defendant.) **Date : 10/3/2016**
21) **Time : 9:02 AM**
22) **Dept : 40**

23 **I. The death penalty constitutes an unconstitutional punishment**

24 Justices Breyer and Ginsburg recently joined several others justices in voicing
25 significant concerns about the constitutionality of the death penalty and called for
reconsideration of the issue. (*Glossip v. Gross* (2015) ___ U.S. ___, 135 S. Ct. 2726.) And
earlier this year, Justice Breyer reiterated his position in his dissent from a denial of certiorari
by saying, “the unfairness inherent in treating this case differently from others which used
similarly unconstitutional procedures only underscores the need to reconsider the validity of
capital punishment under the Eighth Amendment.” (*Brooks v. Alabama* (2016) 136 S.Ct. 708
(Mem.)) In support of their conclusion that “the death penalty, in and of itself, now likely
constitutes a legally prohibited ‘cruel and unusual punishmen[t],” Justice Breyer wrote:

1 In 1976, the Court thought that the constitutional infirmities in the
2 death penalty could be healed; the Court in effect delegated significant
3 responsibility to the States to develop procedures that would protect
4 against those constitutional problems. Almost 40 years of studies,
5 surveys, and experience strongly indicated, however, that this effort has
6 failed. Today's administration of the death penalty involves three
7 fundamental constitutional defects: (1) serious unreliability, (2)
8 arbitrariness in application, and (3) unconscionably long delays that
9 undermine the death penalty's penological purpose. Perhaps as a result,
10 (4) most places in the United States have abandoned its use. I shall
11 describe each of these considerations, emphasizing changes that have
12 occurred during the past four decades. For it is those changes, taken
13 together with my own 20 years of experience on this Court, that lead
14 me to believe that the death penalty, in and of itself, now likely
15 constitutes a legally prohibited "cruel and unusual punishment[t]." U.S.
16 Const., Amdt. 8.

17 *Glossip v. Gross*, *supra*, 135 S.Ct. at pp. 2755-2756.

18 The Connecticut Supreme Court relied on Justice Breyer's analysis not long after
19 *Glossip* was published to hold that "the death penalty . . . is so out of step with our
20 contemporary standard of decency as to violate the state constitutional ban on excessive and
21 disproportionate punishment." (*State v. Santiago* (2015) 122 A.3d 1 (reconsideration den.
22 (2015) 319 Conn. 912.) Although the Connecticut court ultimately relied on state
23 constitutional grounds against cruel and unusual punishment, it explained that it had broadly
24 adopted the federal court's framework for Eighth Amendment challenges. (*Id.*)

25 Of course, both California and federal cases have upheld the death penalty since
1976. However, as Justice Breyer recognized, "the circumstances and the evidence of the
death penalty's application have changed radically . . . given those changes . . . it is now time
to reopen the question. (*Glossip v. Gross*, *supra*, 135 S.Ct. at p. 2755.)

Regardless of how well-settled a given body of law seems to be, there often comes a
time when it changes. This has occurred with regard to the death penalty before. (*See Furman*
v. Georgia (1972) 408 U.S. 238; *Gregg v. Georgia* (1976) 428 U.S. 153.) It has also happened in
regards to sentencing guidelines. For example, 25 years after upholding the federal
sentencing guidelines, the Supreme Court reversed course and found them unconstitutional.

1 (See *Mistretta v. U.S.* (1989) 488 U.S. 361; *Booker v. U.S.* (2005) 543 U.S. 220.)

2 Where the material facts surrounding the relevant legal claims have changed, “an
3 issue is not foreclosed by Supreme Court precedent because the Supreme Court has not
4 decided the matter in dispute.” (*U.S. v. Sampson*, 2015 LW 7962394 at 4 (D. Mass. Oct. 28,
5 2015.) Underpinning the California death penalty scheme is the United States Supreme
6 Court belief that states could construct statutes that would both control discretion and
7 require individualized consideration. Historical practice and scholarly study have shown this
8 belief to be in error. The evidence demonstrates that the statutes do not avoid the arbitrary
9 and capricious application of the death penalty.

10 This Court should consider the arguments raised in this brief and evaluate the current
11 state of the death penalty. Because the death penalty cannot be implemented in a manner
12 that avoids arbitrary results, the California statutes are unconstitutional and the death penalty
13 should be struck as a possible punishment in this case.

14 **A. The California death penalty scheme is unconstitutional because it fails to
15 provide a structure that permits a reasoned choice between a sentenced of
16 life without the possibility of release and execution**

17 When the Supreme Court reinstated the death penalty in 1976, it did so subject to the
18 requirement that “where discretion is afforded a sentencing body on a matter so grave as the
19 determination of whether a human life should be taken or spared, that discretion must be
20 suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious
21 action.” (*Gregg v. Georgia* (1976) 428 U.S. 153, 189.) That requirement followed from *Furman*
22 *v. Georgia*, which had held that “as a result of giving the sentencer unguided discretion to
23 impose or not to impose the death penalty for murder, the penalty was being imposed
24 discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence
25 was cruel and unusual.” (Id. at p. 220-221 (footnote omitted).)

The essential components of the new guided discretion scheme—still in operation
today—are that the pool of death eligible defendants is narrowed in an objective way, and
that every eligible defendant is then entitled to individualized sentencing in which his or her
character and background are put into evidence and the jury given unfettered discretion to

1 exercise mercy. As Justice Breyer's dissent in *Glossip* and the Connecticut Supreme Court's
2 decision in *Santiago* demonstrate, the proper balance between discretion and objective
3 reliability has proved unattainable.

4 Members of the Supreme Court, each with their own opinions regarding the death
5 penalty, have recognized the tension inherent in guiding discretion. Justice Scalia, for
6 example, said that the dictates of *Furman* (not allowing unbridled discretion) and *Lockett*
7 (requiring individualized discretion) could not be reconciled. (*Walton v. Arizona* (1990) 497
8 U.S. 639, 664.) Justice Thomas took a similar position in 1993. (See *Graham v. Collins* (1993)
9 506 U.S. 461, 479.) And Justice O'Connor expressed concerns with the difficulty of
10 achieving consistency while allowing for consideration of individual characteristics. (See
11 *California v. Brown* (1987) 479 U.S. 538.) Perhaps most eloquent in his critique was Justice
12 Blackmun, who said that "discretion could not be eliminated from capital sentencing without
13 threatening the fundamental fairness due a defendant when life is at stake," because
14 "evolving standards of decency required due consideration of the uniqueness of each
15 individual defendant when imposing society's ultimate penalty." (*Callins v. Collins* (1994) 510
16 U.S. 1141, 1147-1149 (Blackmun, J. dissenting from denial of certiorari). Instead,
17 "experience has shown that the consistency and rationality promised in *Furman* are *inversely*
18 *related* to the fairness owed the individual when considering a sentence of death. A step
19 towards consistency is a step away from fairness." (*Ibid.*)

20 Research has demonstrated that it is impossible for jurors to follow these conflicting
21 commands. The most comprehensive study on the actual process of imposing death
22 sentences is by the Capital Jury Project (CJP), a research program funded by a consortium of
23 universities. (For more information on the CJP, go to www.albany.edu/scj/13189.php.) The
24 CJP studied how people who served on actual capital juries made the life and death decisions
25 those cases. Their findings demonstrated the difficulties jurors experience with the guided
discretion scheme, including:

- The jurors had a propensity (over 50% of the time) to decide penalty issues before the penalty phase begins, thereby effectively excluding mitigation from the sentencing calculus;

- The jurors lacked an understanding of what constitutes mitigation and how it related to their sentencing function;
- There was a widespread lack of understanding of the instructions given by the judge

The CJP identified several issues with capital juries that unfairly increased the likelihood of a death sentence, including premature decision-making, death bias, mitigation impairment, a widespread belief that death is mandatory in some cases, an evasion of responsibility for sentencing decisions, the persistence of the use of race as a sentencing factor, and the belief that life sentences will not result in lengthy incarcerations. (See Exhibit A, William J. Bowers, Wanda J. Foglia, *Still Singularly Agonizing*, 39 Crim. Law Bulletin 51 (2003).)

Because death is different than other forms of punishment, courts have long recognized the greater need for reliability in the process by which juries choose life or death. (See *Woodson* 428 U.S. at 303-305 (op. of Steward, Powell & Stevens, JJ.) A death penalty scheme that presents an unreasonable likelihood that the jurors will misunderstand their role and their assignments violates the Eighth Amendment and the Due Process Clause. (See Cf. *Simmons v. South Carolina* (1994) 512 U.S. 154.) Jurors must therefore be provided an environment that permits a reasoned, informed decision about the appropriate sentence. (Cf. *Boyd v. California* (1990) 494 U.S. 370, 380 (reversal required when there is a reasonable likelihood jury misunderstood instruction and thereby improperly limited consideration of mitigating evidence.)

The Capital Jury Project's findings show that the death penalty process is constitutionally inadequate. The results of jurors' grappling with the law—arbitrary, biased, and erroneous death verdicts—are intolerable as a matter of due process and proportional punishment.

B. The California death penalty is unconstitutional because it is arbitrarily inflicted (*Jones* claim)

The California Supreme Court recently addressed one of Justice Breyer's concerns, the arbitrary application of the death penalty and the delays in its imposition, in *People v.*

1 *Seumanu* (2015) 61 Cal.4th 1293. The defendant in that case raised a claim, named by the
2 Court a “*Jones claim*,” that the well-known delay in implementing the death penalty after a
3 jury has returned a death verdict render its implementation arbitrary. (*Id.*) It does so by
4 divorcing the penalty imposed for a crime from the crime itself and makes a person’s
5 selection for execution based on how quickly an inmate’s appeal is processed through the
6 post-conviction review process. (*Ibid.*) Much of that process is outside of the inmate’s ability
7 to control and therefore the delay results in an arbitrary, and thus unconstitutional,
8 application of the death penalty.

9 The Supreme Court ultimately rejected the claim explaining that the defendant had
10 failed to make a sufficient record in the trial court. (*Id.*) It recognized the significant delays
11 between jury verdict and infliction of penalty that exist in California’s system, but said that
12 the delays could simply be the results of differing complexity of various cases and the need
13 to explore every issue that might save someone’s life. The Court explained that “without
14 concrete evidence of the reasons why cases take as long as they do and why some cases take
15 so much longer than others, we cannot conclude that post-conviction delays affecting the
16 imposition of a death sentence are arbitrary, let alone so arbitrary as to violate the Eighth
17 Amendment.” (*Id.*) The Court ultimately denied the claim on direct appeal and suggested it
18 could be renewed with new evidence through a habeas petition, when the defendant could
19 go outside the record. (*Id.*)

20 The defense seeks an evidentiary hearing to establish the things that were missing
21 from the *Seumanu* trial court record. If permitted a hearing, the defense expects to present
22 evidence showing that the delays in the system inject arbitrariness.

23 Conclusion

24 The U.S. Supreme Court believed that a system of guided discretion could remove
25 the problems that caused it to find the death penalty unconstitutional in *Furman*. The
intervening years have shown, as Justices Breyer and Ginsburg have recognized, that the
experiment has failed. Thus, the death penalty is unconstitutional and should be stricken as a
possible punishment in this case.

1 Furthermore, the delays between a jury returning a death verdict and the actual imposition of
2 the penalty make California's death penalty particularly arbitrary. The defense is asking that
3 the Court permit it a hearing on the issue to make a record of its *Jones* claim.

4 Date: September 19, 2016

7 Respectfully submitted,

9 

10 Brian Matthews
11 Deputy Alternate Defender

EXHIBIT A

EXHIBIT A

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

* 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.

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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

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.

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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-*

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).

Mississippi²⁶ 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

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 pre-trial 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.

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 states³⁷ 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

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.

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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."⁸⁸

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,⁸⁹ 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

⁸⁸ Updating Bowers et al., *Foreclosed Impartiality*, supra note 34, at 1490, Table 2.

⁸⁹ 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

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.

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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

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

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

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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

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.

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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 question⁶⁰ 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

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."

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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

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).

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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-

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.

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.

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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 about 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 consider⁷⁶ 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

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).

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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

States	JURORS WHO FAILED TO UNDERSTAND THAT THEY . . .				N*
	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	
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

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below in four states. They ranged from a low of 36.8% in Florida⁷⁸ 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. Pennsylvania⁸¹ and North Carolina⁸² 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-

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 all 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.

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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

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

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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.

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.

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	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.

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.

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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

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, Table 10 (2001).

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

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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

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 tau 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.

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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%	47.4%
(No. of jurors)	(29)	(24)	(15)	(19)
2. When considering punishment, do 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%

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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

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

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).

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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

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).

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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

State	YEARS IN PRISON IF NOT GIVEN DEATH		
	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-

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.

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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

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

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.

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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.

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).

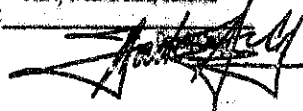
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FILED

2016 SEP 19 P 2:05

David H. Yamasaki, Clerk of the Superior Court
County of Santa Clara, California

By: 

Mark McCoy

10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SANTA CLARA

12 People of the State of California,) Case No.: 213515
13)
14 Plaintiff,)
15)
16 -vs.-) Motion to strike the death
17) penalty as possible punishment
18)
19 Antolin Garcia-Torres,)
20)
21 Defendant.) Proof of Service
22)
23)
24)
25)

26 I am a citizen of the United States and employed in Santa Clara County. I am over
27 the age of eighteen years and not a party to this action. My business address is 701 Miller
28 Street, San Jose, CA 95110.

29 On September 19, 2016 I served a copy of the Motion to strike the death penalty as
30 possible punishment on the plaintiff in this action by leaving a copy for Dep. DA David
31 Boyd in the lobby of his office.

32 I declare under penalty of perjury that the foregoing is true and correct. Executed on
33 this 19th day of September 2016 at San Jose, California.

34 