

Discretion in Capital Sentencing Instructions: Guided or Misguided?

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INTRODUCTION

The role of the jury in a criminal trial is to determine the facts from the evidence and then to apply the law to those facts. The applicable law is given to the jurors through instructions from the judge prior to the jury's deliberations. Judicial instructions, therefore, play a crucial role in the outcome of a trial. Nowhere is this role more important than in the sentencing phase of a capital trial, the point at which the jury has in its hands the ultimate moral decision: whether a defendant will live or die. Capital sentencing instructions also play a critical role in mitigating the unbridled juror discretion in capital sentencing that was at issue in *Furman v. Georgia*.¹ In *Furman*, the United States Supreme Court declared the death penalty unconstitutional because of its potentially capricious application.²

The decision whether or not to take a life is intensely difficult for a jury, and capital sentencing instructions presumably should aid the jury by providing guidance:

[C]apital jurors are much more at the mercy of their instructions than jurors in other kinds of cases. They depend upon these instructions to tell them how to comprehend the decision before them, to focus them collectively on what is important, guide them as a group about which theories to use, which factors to take into account, and how to reach a consensus about this uniquely personal and deeply moral decision.³

Given the potentially dire consequences if capital sentencing instructions are misunderstood by jurors, one would assume that considerable attention has been devoted to framing these instructions in a way that jurors can understand. Furthermore, one would assume that attempts have been made by the legal system to determine whether jurors, in fact, do understand the capital sentencing instructions to which they are exposed. The data to be reported here, however, suggest that this is not the case.

Our data are derived from intensive interviews with eighty-three jurors who served in capital trials in North Carolina between 1990 and 1994. The fifty-two females and thirty-one males served in a total of twenty-six capital murder trials. Seventy-nine of the eighty-three jurors served in eleven matched

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1. 408 U.S. 238 (1972) (per curiam).

2. See *id.* at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.")

3. Craig Haney et al., *Deciding to Take a Life: Capital Juries, Sentencing Instructions, and the Jurisprudence of Death*, J. SOC. ISSUES, Summer 1994, at 149, 155.

pairs of capital trials in the same or adjoining counties, with one trial ending in a life sentence verdict and the other in a death penalty verdict. Both males and females were divided almost evenly between life and death cases: fifteen males served on life juries and sixteen on death juries, while twenty-seven females served on life juries and twenty-two on death juries.⁴ We interviewed three jurors from nine of the trials and four jurors from the other thirteen trials.

The interviews were conducted under the auspices of the Capital Jury Project, a multi-state project funded by the National Science Foundation which was aimed at gaining a greater understanding of the capital jury experience.⁵ The interviewers used a standard interview form of approximately fifty pages, and, on average, the interview lasted more than three and one-half hours. The interviews delved into all facets of the juror's experience in his or her capital trial.

I. CAPITAL SENTENCING CONCEPTS

Death penalty states employ a bifurcated trial which splits the trial process into two distinct phases. Jurors first hear evidence regarding guilt or innocence and render a verdict. If the defendant is found guilty of capital murder, the trial moves to the second stage in which the jurors hear evidence regarding aggravating and mitigating factors and then decide on the penalty.⁶ The Capital Jury Project interviews explored the jurors' experiences during both stages of the trial. This Article, however, focuses only on the jurors' comprehension of the judicial instructions given to them in the second (or penalty) stage—the stage at which the jurors decide on life or death for the defendant. In North Carolina, the jury's decision at stage two of the trial is binding on the judge,⁷ another factor which adds to the importance of jurors understanding the law (as conveyed by the instructions) governing their life or death decision.

During the penalty phase of a capital trial, North Carolina juries must make a series of decisions before arriving at the final verdict of life or death. These decisions include (a) whether aggravating factors (facts about the crime or the defendant that argue for death) exist; (b) whether mitigating factors (facts about the crime or the defendant that argue for life) exist; (c) whether the mitigating factors are insufficient to outweigh the aggravating factors; and (d) whether the aggravating factors, taking into account any mitigating factors,

4. The four remaining jurors served in four different trials. The interview process for these four trials was initiated but was discontinued for various reasons. Coincidentally, all four of the trials ended with a death penalty verdict, and all four jurors were women.

5. The overall project is under the direction of William Bowers of Northeastern University.

6. The United States Supreme Court established the bifurcated trial process in *Gregg v. Georgia*, 428 U.S. 153 (1976).

7. See N.C. GEN. STAT. § 15A-2000(b) (1994). While the jury's verdict is labeled in the statute as merely a "sentence recommendation," the North Carolina Supreme Court has held that a trial court does not have the power to overturn a death sentence recommended by a unanimous jury. *Smith v. State*, 292 S.E.2d 264 (N.C. 1982).

are sufficiently substantial to call for the death penalty.⁸ The instructions regarding these decisions are read by the judge from the pattern instructions at the conclusion of the penalty phase evidence.⁹ Although jurors may have been exposed to some aspects of the sentencing instructions during voir dire, the conclusion of the penalty phase is the only time at which jurors will hear the instructions in their entirety.

The capital sentencing instructions define various terms and describe concepts and procedures that the jurors are expected to employ in their deliberations. There are three particularly crucial concepts related to aggravating and mitigating factors: (a) the domain from which aggravating and mitigating factors may be selected; (b) the burden of proof required to prove the existence of aggravating and mitigating factors; and (c) whether or not unanimity is required to establish the existence of aggravating and mitigating factors. It is imperative that jurors understand these concepts if they are to render a legally correct decision as to life or death.

A. The Domain from Which Aggravating and Mitigating Factors May Be Selected

The North Carolina General Assembly has established (as have most legislatures in states with the death penalty)¹⁰ a list of statutory aggravating factors.¹¹ The prosecution can only present evidence of these statutory aggravating factors, and the jury can consider only those factors (if presented by the prosecution) as potential aggravators.¹² The jury is prohibited from considering other facts or evidence in aggravation.

By virtue of the Federal Constitution, however, the defense is not limited in what it can present in mitigation, nor are the jurors limited as to what they may consider in mitigation.¹³ All evidence introduced at trial can be considered in mitigation if a juror so chooses, provided the trial judge determines that the evidence is relevant, and therefore admissible.

The consequences of jurors failing to understand these distinctions are grave. For example, the failure of the jurors to understand that they may consider any factors they desire in mitigation, not just those specifically enumerated by the judge, could limit the weight given to mitigating evidence. Conversely, if a significant number of jurors believe that they are allowed to

8. See N.C. GEN. STAT. § 15A-2000(b)-(c).

9. These instructions are located at N.C.P.I.—CRIM. § 150.10 (1993).

10. *E.g.*, ALA. CODE § 13A-5-49 (1994); ARIZ. REV. STAT. ANN. § 13-703 (1994); ARK. CODE ANN. § 5-4-604 (Michie 1993); COLO. REV. STAT. ANN. § 16-11-103 (West 1994); FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1995); GA. CODE ANN. § 17-10-30 (1990); MISS. CODE ANN. § 99-19-101 (1994); N.J. STAT. ANN. § 2C:11-3 (West 1994); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (1994); UTAH CODE ANN. § 76-5-202 (1994).

11. See N.C. GEN. STAT. § 15A-2000(e).

12. *Id.*

13. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding that “the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death”) (emphasis in original) (footnote omitted).

consider *any* evidence of aggravation introduced at trial, the range of factors they may use to justify a death sentence would be broadened. Expanding the range of acceptable aggravating factors, while simultaneously narrowing the range of acceptable mitigating factors, would appear to increase the odds of the jury imposing the death penalty rather than a life sentence.

B. Burden of Proof for Aggravating and Mitigating Factors

The prosecution must prove aggravating factors beyond a reasonable doubt.¹⁴ The defense, however, must prove mitigating factors only to the juror's satisfaction.¹⁵ The defense is thus held to a less stringent standard of proof for establishing the existence of mitigating factors than is the prosecution for establishing the existence of aggravating factors. In other words, the law makes it *easier* to prove mitigation than to prove aggravation.

This is an extremely important point which the judicial instructions must make clear to the jurors. The jurors must understand that the defense, in asking for mercy, is not required to prove as much as the prosecution, which is seeking death. As discussed in Part I.C below, the fact that the prosecution and the defense bear different burdens of proof is not a concept with which jurors are familiar. If the instructions do not emphasize this difference, many jurors are unlikely to recognize it.

Do jurors understand this distinction? Do they comprehend that the *definition of proof* for mitigating factors is different than it is for aggravating factors? If they do not—particularly if jurors are prone to believe that mitigating factors, like aggravating factors, must be proven beyond a reasonable doubt—then the defense will be held to an unconstitutionally high standard of proof, making it less likely that jurors will find the existence of at least some mitigating factors. If this sort of misunderstanding were to occur, the jurors might unconstitutionally sentence the defendant to death.

C. Unanimity Requirements for Aggravating and Mitigating Factors

Jurors must be unanimous in their finding of any aggravating factor.¹⁶ The unanimity requirement does not apply to mitigating factors, however. In *McKoy v. North Carolina*,¹⁷ and *Mills v. Maryland*,¹⁸ the Supreme Court held that mitigating factors do not require unanimity—any juror who believes that a mitigating factor exists may consider that factor in his or her final decision on life or death. This is another way in which the law makes it easier

14. See *id.* at 604 n.12 ("Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.")

15. N.C.P.I.—CRIM. § 150.10, at 27; see *infra* text accompanying note 22.

16. See N.C. GEN. STAT. § 15A-2000; *State v. Kirkley*, 302 S.E.2d 144, 157 (1983) (holding that the "jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation").

17. 494 U.S. 433 (1990).

18. 486 U.S. 367 (1988).

for the defense to prove mitigation than it does for the state to prove aggravation.

As with the issues discussed previously, it is necessary to determine whether or not the instructions convey this crucial difference in the unanimity requirements, and what consequences might follow if they do not. If, for example, jurors believe that they must be unanimous in the decision about any specific mitigating factor, individual jurors may very well fail to consider mitigating factors that they would have considered had they been aware that unanimity was not required. Such a misunderstanding would be in direct violation of *Mills* and *McKoy* and, again, would seem to increase the likelihood of a death sentence.

II. FINDINGS

The issues raised above were explored during interviews in which the former capital jurors were asked a total of six questions. Three of the questions related to aggravating factors and three related to mitigating factors. The questions, along with the percentage and number of jurors giving each response, are presented in Table 1.

TABLE 1
JUROR RESPONSES TO QUESTIONS ON AGGRAVATING
AND MITIGATING FACTORS

<i>Aggravating Factors</i>	<i>Percent</i>	<i>Number</i>
1. Among factors in favor of a death sentence, could the jury consider:		
a. any aggravating factor that made the crime worse	48%	40
b. only a specific list of aggravating factors mentioned by the judge	36%**	30
c. don't know/no answer	16%	13
2. For a factor in favor of a death sentence to be considered, did it have to be:		
a. proved beyond a reasonable doubt	68%**	56
b. proved by a preponderance of the evidence	14%	12
c. proved only to a juror's personal satisfaction	12%	10

<i>(Table 1, continued)</i>		
d. don't know/no answer	6%	5
3. For a factor in favor of a death sentence to be considered, did:		
a. all jurors have to agree on that factor	76%**	63
b. jurors not have to agree unanimously on that factor	22%	18
c. don't know/no answer	2%	2
<i>Mitigating Factors</i>	<i>Percent</i>	<i>Number</i>
4. Among factors in favor of a life sentence, could the jury consider:		
a. any mitigating factor that made the crime not as bad	59%**	49
b. only a specific list of mitigating factors mentioned by the judge	24%	20
c. don't know/no answer	17%	14
5. For a factor in favor of a life sentence to be considered, did it have to be:		
a. proved beyond a reasonable doubt	41%	34
b. proved by a preponderance of the evidence	23%**	19
c. proved only to a juror's personal satisfaction	24%**	20
d. don't know/no answer	12%	10
6. For a factor in favor of a life sentence to be considered, did:		
a. all jurors have to agree on that factor	42%	35
b. jurors not have to agree unanimously on that factor	47%**	39
c. don't know/no answer	11%	9

Note: Starred (**) responses are legally correct.

Responses to the first three questions showed a considerable lack of comprehension regarding the standards relating to aggravating factors.

Roughly one-half (48%) of the jurors incorrectly believed that they could consider as an aggravating factor *any* factor that made the crime worse. Only about one-third (36%) of the jurors correctly understood that they were restricted to the specific list of aggravating factors mentioned by the judge. Jurors showed higher levels of comprehension on Question 2 (burden of proof) and Question 3 (unanimity), with two-thirds (68%) correctly being aware that an aggravating factor had to be proven beyond a reasonable doubt and three-fourths (76%) of the jurors understanding that unanimity was required to find the existence of an aggravating factor. Nevertheless, one-half (48%) of the jurors incorrectly believed that they could have considered non-enumerated aggravating circumstances, one-fourth (26%) incorrectly believed that aggravating factors needed only to be proven by a preponderance of the evidence or to the satisfaction of the juror, while only a comparatively small percentage (22%) incorrectly believed that unanimity was not required.

Overall, juror comprehension appears to be worse when mitigating factors are considered. Well over one-half (59%) of the jurors were aware that they could consider any evidence they desired as a mitigating factor. However, jurors' understanding with regard to the issues of burden of proof and unanimity was poor. Slightly under one-half (47%) of the jurors correctly understood that mitigating factors did not require proof beyond a reasonable doubt, while almost as many (41%) incorrectly thought that the standard of proof for mitigating factors was proof beyond a reasonable doubt. Similarly, less than one-half (47%) of the jurors were aware that unanimity was not required to find the existence of mitigating factors, while a similar percentage (42%) incorrectly believed that unanimity was required.

If jurors are to correctly apply the law, an appreciation of the different requirements regarding burden of proof and unanimity is crucial. Yet these percentages demonstrate that very similar proportions of jurors gave correct and incorrect responses to the questions regarding those two issues. It is unknown how many jurors were simply guessing at the correct response.

These data reveal that jurors inadequately comprehend the domain from which aggravating and mitigating factors could be considered, as well as both the required burden of proof and the requirement (or lack thereof) of unanimity. While jurors' understanding of the requirements regarding burden of proof and unanimity for aggravating factors was fairly high, one-half believed that they could apply these criteria to any aggravating factor that they desired. Conversely, although slightly more than one-half of the jurors correctly understood that they could consider anything in mitigation, fewer than one-half correctly understood that the burden of proof was less than a reasonable doubt or that unanimity was not required. This suggests that even if a juror correctly believed that he or she could consider a particular factor in mitigation, it is likely that the juror would fail to find the existence of that mitigating factor due to a lack of understanding of the burden of proof.

In order to understand jurors' comprehension (or lack thereof), we recoded the responses to the already-described six questions. A score of "1" represents a correct answer and a score of "0" represents an incorrect answer, a "don't

know," or a failure to respond. These new scores are summed over the six questions to yield a total score, which can range from zero (the juror failed to answer a single question correctly) to six (the juror answered all six questions correctly). These results are presented in the top portion of Table 2.

TABLE 2
SUMMED ACCURACY SCORES

<i>Aggravating and Mitigating Factors Combined</i>		
Score	Frequency	Percent
0	2	2%
1	4	5%
2	10	12%
3	31	37%
4	24	29%
5	9	11%
6	3	4%
<i>Aggravating Factors Alone</i>		
Score	Frequency	Percent
0	8	10%
1	20	24%
2	36	43%
3	19	23%
<i>Mitigating Factors Alone</i>		
Score	Frequency	Percent
0	16	19%
1	24	29%
2	26	31%
3	17	21%

Table 2 further illustrates that comprehension of these three vital principles was poor. Only three jurors (4%) answered all six questions correctly, nine jurors (11%) answered five questions correctly, and twenty-four jurors (29%) answered four questions correctly. Thus, less than fifty percent of the jurors could answer more than one-half of the questions correctly. These results suggest that the lack of comprehension was not limited to a small subset of jurors; confusion and misunderstanding was the rule rather than the exception. Such results suggest that there is a reasonable likelihood that jurors misunderstood, or simply failed to understand, the instructions.¹⁹

19. Where the claim is that an instruction is ambiguous and therefore subject to an erroneous interpretation, the Supreme Court has stated that the proper inquiry is whether there is a reasonable

Our research also calculated the degree of comprehension separately for the three questions directed at aggravating factors and the three questions directed at mitigating factors. These results are displayed in the bottom portion of Table 2 and provide additional evidence that juror comprehension of all three principles was poor. For example, thirty-four percent of the jurors correctly answered none or only one of the questions concerning aggravation; this figure increases to forty-eight percent when the questions concern mitigation. Instructions must be considered inadequate when such a substantial percentage of jurors fail to understand the law supposedly conveyed by the instructions.

Why is juror comprehension so poor? One reason may simply be the length and generally boring nature of the instructions. In an experimental study conducted in the early 1990's, jury-eligible citizens were exposed to a videotaped reading of the North Carolina capital sentencing instructions (with minor portions omitted).²⁰ The tape lasted approximately twenty-five minutes, and many subjects commented afterward that, due to the length and complexity of the instructions, they found it difficult to follow them. Thus, jurors may very well have difficulty remembering the instructions simply because they are long and boring.

Capital instructions also typically use complex language, unfamiliar words, one-sentence definitions of terms, and many sentences with multiple negatives. Linguistic analyses of the Illinois capital sentencing instructions uncovered serious problems regarding syntax, semantics, general organization, and a lack of information necessary to arrive at a decision.²¹ Indeed, many of our jurors noted that the instructions were difficult to understand and that jurors frequently desired clarification. When asked, "What do you remember most about the judge's instructions?", several jurors noted that they were lengthy and hard to remember. Jurors noted that when they asked for clarification, the judge "simply reread the instructions," and one exasperated juror reported that the judge "reread the entire instructions, not just what we wanted to know." Other comments on the instructions included: "[T]hey are full of legal talk," and "[they are] very long and complicated, hard to retain and interpret as fast as he was reading it." Thus, objective assessments reveal that instructions are complex and full of unusual terminology, and the subjective experience of the jurors serves as confirmation.

A second potential reason for poor comprehension is that the instructions do not alert jurors to concepts that are novel or unfamiliar. Therefore, jurors tend to fall back on their own prior knowledge. In the interview questions, jurors were most accurate on the questions regarding the burden of proof and the requirement of unanimity for proving aggravating factors. This is not surprising, since proof beyond a reasonable doubt and jury unanimity are familiar concepts to most jurors. Jurors fared the worst, however, in applying

likelihood that the jury has misapplied the challenged instruction, thereby resulting in prejudice to the defendant. See *Boyde v. California*, 494 U.S. 370, 380-81 & n.4 (1990).

20. James Luginbuhl, *Comprehension of Judges' Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAV. 203 (1992).

21. Judith N. Levi, *Evaluating Jury Comprehension of Illinois Capital-Sentencing Instructions*, AM. SPEECH, Spring 1993, at 20.

these same concepts to mitigating factors, tending to believe that mitigating factors were subject to the same criteria of proof as aggravating factors.

The rules for burden of proof and juror unanimity as they apply to mitigation are not consistent with jurors' expectations, and the instructions in no way alert the jurors that these rules are in any way special or something of which they should take note. The instructions read:

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 doubt, but simply satisfy you—that any mitigating circumstance exists. If the evidence satisfies any of you that a mitigating circumstance exists, you would indicate that finding on the "Issues and Recommendation" form. A juror may find that any mitigating circumstance exists by a preponderance of the evidence whether or not that circumstance was found to exist by all the jurors.²²

While this provisions does state the law in a way that most jurors probably would understand, it occurs in a single paragraph, two-thirds of the way through the instructions. The difference in burden of proof and unanimity for mitigating factors is not emphasized. The instructions fail to point out to jurors that the criteria for mitigating factors differs from those for aggravating factors. It is not pointed out to jurors that mitigation *does not* have to be proven beyond a reasonable doubt. It is not emphasized that unanimity is *not* required to find the existence of mitigation. It is *not made clear* that a single juror can find that a mitigator exists and can consider that factor in his or her final decision. There is, thus, no hint that the concepts and rules described in this paragraph of the instructions are any more important than those described elsewhere. Yet these concepts are, in fact, crucial for the jurors to understand if they are to correctly apply the law.²³

In addition, the manner in which aggravating and mitigating factors are handled on the "Issues and Recommendation" form—which the jurors have in front of them while they deliberate—virtually ensures that the different standards of proof will not be recognized by the jurors. Jurors first must answer Issue One, which reads: "Do you unanimously find from the evidence beyond a reasonable doubt the existence of one or more of the following aggravating circumstances?"²⁴ Next, the jurors answer Issue Two, which reads: "Do you find from the evidence the existence of one or more of the following mitigating circumstances?"²⁵

Note that the words "beyond a reasonable doubt" and "unanimously" are simply *omitted* for mitigating factors. No attempt is made to alert jurors that the criteria for mitigating factors differ from those for aggravating factors. Is it any wonder that jurors have a poor grasp of the differences in the standards used to determine the existence of aggravating and mitigating factors?

22. N.C.P.I.—CRIM. § 150.10, at 27.

23. The North Carolina pattern instructions, including the "Issues and Recommendation" form, were revised in 1993, and the revision helps reduce this deficiency. *See id.* § 150.10.

24. *Id.* § 150.10 app.

25. *Id.*

Jurors come to the courtroom with certain expectations, or schemata, about what their role will be.²⁶ If they in fact will be required to act in ways that do not conform to their expectations, this should be emphasized in the instructions. Abundant research in the domain of social psychology attests to the power of expectations.²⁷ In addition, recent research indicates that individuals possess naïve representations (schemata) of crimes that frequently are not in accordance with the legal definition of that crime, and which are not counteracted by ordinary jury instructions.²⁸ Such schemata are counteracted only by directly attacking specific inaccurate features of these schemata with the correct legal information²⁹—something that capital sentencing instructions routinely fail to do.³⁰

Note also that not only are the standards for proving mitigating factors different from those used for proving aggravating factors, but they also differ from the standards used during the guilt/innocence phase of the trial. That is, the jury has arrived at the penalty phase precisely because they have employed the criteria of reasonable doubt and unanimity in finding the defendant guilty of capital murder. Thus, these concepts are firmly embedded in the jurors' minds, and are not easily dislodged.

Jurors responded to another pair of questions designed to evaluate their comprehension of the sentencing instructions. One question asked whether certain sets of circumstances would require a sentence of death, while the other question asked whether certain sets of circumstances would require a sentence of life imprisonment. When the issue concerned death, jurors were given five different sets of circumstances (*e.g.*, "one or more factors favoring a death sentence," or "stronger factors favoring than opposing a death sentence"). After each set of circumstances was posed, jurors were asked whether the jury was required to impose a death sentence, or whether it was free to choose between death and life imprisonment. When the issue concerned life, jurors were asked whether the jury was required to impose a life sentence or free to choose between death and life, under five different sets of circumstances (*e.g.*, "one or more factors opposing a death sentence," or "stronger factors opposing than favoring a death sentence"). These questions, along with jurors' responses, are presented in Table 3.

26. See generally Luginbuhl, *supra* note 20; Vicki L. Smith, *When Prior Knowledge and Law Collide: Helping Jurors Use the Law*, 17 LAW AND HUM. BEHAV. 507 (1992).

27. See, *e.g.*, SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1991).

28. See, *e.g.*, Smith, *supra* note 26.

29. Smith, *supra* note 26, at 533.

30. It is reasonable to ask whether jurors' comprehension was related to their educational level. Jurors were asked the extent of their education in the interview, and their responses were coded into one of six categories: (1) did not finish high school; (2) finished high school; (3) some technical training beyond high school; (4) some college but did not graduate; (5) graduated from college; and (6) attended graduate or professional school. Analyses revealed no statistically significant relationship between a juror's level of education and any of the indices of comprehension.

TABLE 3
UNDERSTANDING OF MANDATORY DEATH AND LIFE SENTENCES

<i>Question</i>			
1. To the best of your memory, was the jury required to impose a death sentence, or free to choose between death and life, if it found:	<i>Death Required</i>	<i>Choose</i>	<i>DN/NA</i>
a. one or more factors favoring a death sentence	11%	80%	10%
b. one or more factors favoring a death sentence and none opposing it	25%	59%	16%
c. more factors favoring than opposing a death sentence	23%	69%	8%
d. stronger factors favoring than opposing a death sentence	27%	60%	13%
e. an equal balance between factors favoring and opposing a death sentence	2%	83%	14%
2. To the best of your memory, was the jury required to impose a sentence of life imprisonment, or free to choose between death and life, if it found:	<i>Life Required</i>	<i>Choose</i>	<i>DN/NA</i>
a. one or more factors opposing a death sentence	11%	72%	17%
b. one or more factors opposing a death sentence and none favoring it	36%	48%	16%
c. more factors opposing than favoring a death sentence	30%	54%	16%
d. stronger factors opposing than favoring a death sentence	34%	48%	18%
e. an equal balance between factors favoring and opposing a death sentence	17%	66%	17%

In North Carolina, the final penalty issue the jurors must decide (assuming that they have found the existence of one or more aggravating factors which are not outweighed by the mitigating factors), is whether the aggravating factors are strong enough, when considered together with any mitigating factors, to call for the death penalty.³¹ As can be seen in Table 3, none of the five options for the first question embodied that concept; instead the questions focus on the number or strength of factors for or against the death penalty. Thus, in none of the five examples would the jury be *required* to impose a death sentence. It is always within the jury's power to decide whether life or death is the appropriate sentence.³² Under three of the five scenarios presented, however, approximately one-fourth of the jurors believed that the death penalty was required.

Jurors appear to be influenced by whether the aggravating factors are stronger or more numerous than the mitigating factors. When aggravators and mitigators are equally balanced (Option e), almost none of the jurors believed that death was required. When mitigators are not mentioned (Option a), there is still a relatively low error rate. But when mitigators are specifically mentioned and are described as somehow weaker than aggravators (Options b, c, and d), a substantial minority of the jurors believed that the jury was required to impose death.

The comparable question and responses regarding a mandatory sentence of life are displayed in the bottom half of Table 3. There are certain conditions where a North Carolina jury would be required to impose a sentence of life. If there are no factors favoring death, that is, the jury has not found the existence of any aggravating factors (Option b), the jury is bound by law to impose a sentence of life imprisonment.³³ In addition, if the mitigating factors outweigh the aggravating factors (Option d), the jury would also be required to impose a life sentence.³⁴ Yet only one-third of the jurors understood that life was mandatory under each of those conditions.

In sum, it is disturbing that roughly one-fourth of the jurors felt that death was mandatory when it was not and approximately one-half of the jurors failed to appreciate those situations which mandated life. An incorrect response rate of one-fourth may not seem disproportionate, but that translates into three out of the twelve jurors who feel that death is mandated.

These hypothetical situations might have led to some confusion. However, at an earlier point in the interview, some very straight-forward questions were asked which further reveal jurors' poor understanding of the law. In questioning jurors about the penalty phase, they were asked whether, after hearing all the evidence at the penalty phase, they believed it proved that (a) the defendant's conduct was "heinous, atrocious, or cruel"; and (b) the defendant would be "dangerous in the future." A high percentage responded

31. N.C. GEN. STAT. § 15A-2000(b), (c).

32. This varies by state. In Tennessee, for example, the death penalty is mandated if the aggravating factors outweigh the mitigating factors. T.P.I.—CRIM. § 7.04, at 69 (1992).

33. N.C. GEN. STAT. § 15A-2000(b), (c).

34. *Id.*

positively to both questions: eighty-nine percent believed that evidence proved that the defendant's conduct was heinous, atrocious, or cruel, while seventy percent believed the evidence proved that the defendant would be dangerous in the future.

Jurors were next asked whether, after hearing the judge's sentencing instructions, they believed that the law required them to impose a death sentence if (a) the defendant's conduct was heinous, atrocious, or cruel; or (b) the defendant would be dangerous in the future. Here is where poor understanding of the law is evident. Sixty-three percent of the jurors incorrectly believed that the law required them to impose a death sentence if the evidence proved that the defendant's conduct was heinous, atrocious, or cruel. If one considers only those jurors who actually believed that the defendant's conduct was heinous, atrocious, or cruel, this figure increases to sixty-eight percent. A smaller percentage, forty-three percent, incorrectly believed that the law required them to impose a death sentence if the evidence proved that the defendant would be dangerous in the future. This percentage increases to fifty-three percent when one considers only those jurors who actually thought that the defendant would be dangerous in the future.

Note that these questions—whether the crime was heinous, atrocious, or cruel, and whether the defendant would be dangerous in the future—had emotional content that related directly to the evidence recently heard by the jurors. When jurors were thinking graphically about their own trial, a large number of them thought that death was mandatory. This is potent evidence that our North Carolina jurors did not understand the law.

If the law, when properly understood, specifies certain conditions under which either death or life is the appropriate punishment, then the instructions should convey that law to the jurors in a way that they can readily comprehend. For example, consider the issue of whether certain conditions mandate a sentence of death. Perhaps it is difficult for jurors to distinguish between the concepts of death being required if aggravating factors are stronger than mitigating factors, versus death being required only if aggravating factors, considered along with mitigating factors, are sufficient to call for death.

In everyday life, a common decision strategy is to weigh the pros and cons on a particular issue and then to go with the greater weight of the evidence. It would therefore be understandable if a jury returned a verdict of death when it determined that the aggravating factors outweighed the mitigating factors. This is not, however, the criterion in North Carolina. If jurors find the existence of aggravating and mitigating factors, their next task is to decide whether the mitigating factors are insufficient to outweigh the aggravating factors.³⁵ The instructions on this point read as follows:

You should not merely add up the number of aggravating circumstances and mitigating circumstances. Rather, you must decide from all the evidence what value to give to each circumstance, and then weigh the

35. N.C.P.I.—CRIM. § 150.10, at 42, app. (1993).

aggravating circumstances, so valued, against the mitigating circumstances, so valued, and finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances.³⁶

Parenthetically, note the awkwardness of what the jurors are instructed to do. Jurors are asked to determine if the mitigating factors are *insufficient* to outweigh the aggravating factors. If the answer is "No," then the defendant is sentenced to life. Thus, in order to sentence a defendant to life, the jury must answer a negative question with a negative answer. The jury must *not* find that the mitigating factors are *insufficient* to outweigh the aggravating factors, which in plain English translates into "mitigating factors outweigh aggravating factors." The instructions would be clearer if the words "are insufficient to" were simply omitted from the final sentence in the preceding paragraph, which would then conclude with, "finally determine whether the mitigating circumstances outweigh the aggravating circumstances."

If jurors decide that the mitigating factors do not outweigh the aggravating factors, they must then decide whether the defendant deserves the death penalty. Issue Four of the "Issues and Recommendation" form, which the judge gives to the jury to fill out, asks:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?³⁷

If these instructions are carefully attended to and understood, the law is clear. Jurors must decide whether mitigation outweighs aggravation. If mitigation does not outweigh aggravation, they *still* must determine whether the aggravation, taken together with the mitigation, is severe enough to warrant the death penalty.

Thus, even if the total aggravation is stronger than the total mitigation (irrespective of the number of aggravating and mitigating factors found), jurors must still decide whether the totality of factors merits the death penalty. In theory these are stringent criteria and, if followed scrupulously, would restrict the use of the death penalty to only those most aggravated cases of first-degree murder. In practice, however, roughly one-fourth of the jurors fail to understand the law as conveyed by the instructions.

36. *Id.* § 150.10, at 42-43.

37. *Id.* § 150.10 app.

TABLE 4
CONSEQUENCES OF FAILURE TO UNDERSTAND CAPITAL
SENTENCING INSTRUCTIONS

<i>Principle</i>	<i>Interpretation of Misunderstanding</i>	<i>Consequences</i>
Non-enumerated Factors	• Will consider inappropriate <i>aggravators</i> , thereby broadening range of <i>aggravators</i> .	Death more likely
	• Will not consider appropriate <i>mitigators</i> , thereby narrowing range of <i>mitigators</i> .	Death more likely
Burden of Proof	• Will not require proof beyond a reasonable doubt for <i>aggravators</i> , thereby making it easier to prove <i>aggravation</i> .	Death more likely
	• Will require proof beyond a reasonable doubt for <i>mitigators</i> , thereby making it harder to prove <i>mitigation</i> .	Death more likely
Unanimity	• Will not require unanimity for <i>aggravators</i> , thereby making it easier to prove <i>aggravation</i> .	Death more likely
	• Will require unanimity for <i>mitigators</i> , thereby making it harder to prove <i>mitigation</i> .	Death more likely

We believe the instructional ambiguity we have documented increases the likelihood of the jury returning a verdict of death. Table 4 presents a summary of the consequences if jurors misunderstand the instructions. It appears that in all cases, an incorrect interpretation of the instructions tilts the jurors toward a verdict of death. For example, if jurors believe that factors other than those listed by the judge can be considered in aggravation, the list of

potential aggravating factors is expanded, thereby increasing the likelihood of a death verdict. In a complementary fashion, if the jury believes that only those factors listed by the judge can be considered in mitigation, the list of potential mitigators is limited, again increasing the likelihood of a death verdict.

Continuing down the table, by believing that aggravating factors do not have to be proven beyond a reasonable doubt, the jurors increase the likelihood of some aggravating factors being found, and thus make a verdict of death more likely. Conversely, if the jurors believe that mitigating factors *do* have to be proven beyond a reasonable doubt, they decrease the likelihood of some mitigators being found and make a verdict of death more likely. Finally, a belief that aggravating factors do not have to be found unanimously will increase the likelihood of some aggravators being found, thereby again moving the jury toward a verdict of death. Similarly, if jurors believe that mitigating factors must be found unanimously, the jury is likely to find fewer mitigators, again increasing the likelihood of a death verdict.

The consequences of instructional misunderstanding are particularly significant because it is apparent that even before hearing the instructions, the jury is predisposed toward a verdict of death. There are many reasons for this predisposition. For example, evidence collected by other researchers shows that death is likely to be seen as the appropriate punishment by jurors in capital cases—a phenomenon which has sometimes been called a “presumption of death.”³⁸ One of the factors contributing to this presumption is the belief by a majority of jurors that not only will the defendant be dangerous in the future, but that he is also likely to be paroled after only a few years.³⁹

Our data also suggest that jurors view death as a more likely punishment than life. For example, as indicated earlier, large numbers of jurors thought that death was mandatory if the evidence proved that the murder was heinous, atrocious, or cruel, and nine out of ten jurors thought that this was exactly what had to be proven by the evidence. Most of the jurors have thus concluded that an aggravating circumstance exists, even before deliberations have begun.

It is also true that the death-qualification process of selecting capital juries (that is, asking jurors whether they would be willing to vote for the death penalty, and rejecting those who indicate they would not) results in a jury consisting of death penalty supporters. Those who could never vote for death are excluded from serving,⁴⁰ as are those who indicate that their ability to follow the law would be impaired by their opposition to the death penalty.⁴¹ A number of studies have strongly suggested that the resulting jury tends to

38. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 12 (1993); William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 41-46 (1988).

39. Eisenberg & Wells, *supra* note 38, at 7-8.

40. See *Witherspoon v. Illinois*, 391 U.S. 510, 516-18 (1968).

41. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

be more conviction-prone than a non-death-qualified jury.⁴² Furthermore, it has been shown that the process of death-qualification itself increases the likelihood, in the jurors' view, that the defendant will receive the death penalty.⁴³ Additional data suggest that jurors who support the death penalty are more receptive to aggravating factors and less receptive to mitigating factors than are jurors who oppose the death penalty.⁴⁴

The jurors we interviewed who had sentenced a defendant to death had a strong belief that defendants who have murdered and are not sentenced to death spend a relatively short time in prison. Jurors were asked: "How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?" We divided the jurors into those who indicated less than twenty years, those who indicated between twenty and thirty years, and those who indicated more than thirty years. The results can be seen in Table 5.

TABLE 5
ESTIMATE OF YEARS SERVED IN PRISON

<i>Sentence</i>	<i>Less than 20</i>	<i>20-30</i>	<i>More than 30</i>
Death	74% (N = 32)	12% (N = 5)	14% (N = 6)
Life	28% (N = 11)	67% (N = 27)	5% (N = 2)

Note: The percentages refer to the percent for that row, not for the entire group.

Of those jurors who sentenced a defendant to death, three-fourths believed that a convicted murderer who was not sentenced to death would spend less than twenty years in prison, while only one-fourth of the jurors who had imposed a life sentence held similar beliefs. Instead, two-thirds of the jurors who sentenced a defendant to life believed that defendants who committed murder and who were not sentenced to death would spend from twenty to thirty years in prison, while only a small percentage (12%) of those on the death juries believed a defendant would serve that long. These huge differences reflect real concerns of jurors who sentence defendants to death.

Jurors were also asked: "When you were considering the punishment, were you concerned that [the defendant] might get back into society someday, if

42. See Claudia L. Cowan et al., *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 73-74 (1984).

43. See Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 128-29 (1984).

44. See James Luginbuhl & Kathi Middendorf, *Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials*, 12 LAW & HUM. BEHAV. 263, 275-76 (1988); see also Craig Haney et al., "Modern" Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUM. BEHAV. 619, 630-31 (1994).

not given the death penalty?" Their response options were, "yes, greatly concerned," "yes, somewhat concerned," "yes, but only slightly concerned," and "no, not at all concerned." We collapsed the four response categories into two, which we labeled "Concerned" and "Not Concerned," and evaluated how concerned those who had sentenced to life and those who had sentenced to death were about the possibility that the defendant might return to society. The results are shown in Table 6.

TABLE 6
CONCERN WITH DEFENDANT RETURNING TO SOCIETY

<i>Sentence</i>	<i>Concerned</i>	<i>Not Concerned</i>
Death	76% (N = 37)	24% (N = 12)
Life	41% (N = 7)	59% (N = 10)

Note: The percentages refer to the percent for that row, not for the entire group.

Three-fourths of the jurors who sentenced to death were concerned that the defendant might return to society if not given a death sentence, while well under one-half (41%) of the jurors who sentenced to life had similar concerns. Thus, the belief that a defendant who was not sentenced to death would spend relatively little time in prison and then be released back into society appears to be a strong motivation for a juror's vote for death.

Another factor which would seem to tilt a capital jury toward death is the difference in the content and nature between aggravating and mitigating factors. Aggravating factors tend to be objective and factual. Typical aggravating factors include (a) the defendant's prior conviction for a violent crime; (b) the actions of the defendant which pose a threat to many people; (c) the fact that the victim was a police officer, state patrol officer, official of the court, etc.; (d) the murder being committed to avoid capture; and (e) the murder being committed for pecuniary gain.⁴⁵ If the prosecution presents evidence on any of the aggravating factors, it is almost a foregone conclusion that the jury will find them to exist.

Mitigating factors, on the other hand, are much more subjective; they are judgment calls. Is the age of the defendant a mitigating factor or not? Was the defendant's state of mind such that he could not conform his behavior to the law? How minor was the defendant's role in the murder? What role, if any, should a history of child abuse and neglect play?⁴⁶

45. See N.C. GEN. STAT. § 15A-2000(e).

46. One of the more subjective factors that is common to many states' statutes is whether the murder was especially "heinous," "atrocious," or "cruel." See, e.g., *id.* § 15A-2000(e)(9). While this is more subjective than most other aggravating factors, jurors view all murders as atrocious and, after hearing testimony and frequently viewing disturbing pictures, are likely to see the murder about which

This analysis of the difference between aggravating and mitigating factors suggests that even though the burden of proof for aggravating factors is more rigorous than it is for mitigating factors, aggravating factors may in fact be easier to prove than mitigating factors. If aggravating factors are either true or false on their face, then proving to the jury, beyond a reasonable doubt, the existence of an aggravating factor (such as the defendant's having been previously arrested for a violent crime) imposes no particular burden on the prosecution. However, just "satisfying" jurors that a particular quality of the crime or the defendant has mitigating value may be quite difficult for the defense.

Many factors, therefore, point capital jurors in the direction of death. Confusion about the law they are to apply in deciding between life or death would appear to further bias the jury against the defendant. As Eisenberg and Wells state:

[Our] data suggest that the sentencing phase of a capital trial commences with a substantial bias in favor of death. This is not itself an indictment of the death trial phase. But the tilt towards death suggests that a defendant with a confused jury may receive a death sentence by default, without having a chance to benefit from legal standards designed to give him a chance for life.⁴⁷

Thus, the capital sentencing instructions, which should provide an accurate and detailed road map to the jury's final destination, appear instead to provide many detours and roadblocks. With regard to mitigation, for example, jurors must make a number of important decisions. They must decide what can be considered in mitigation, what is the appropriate burden of proof, whether they must agree unanimously, and in the end, whether the totality of the evidence still merits the death penalty.

The data in Tables 1 and 3 show that (a) only three-fifths of the jurors are likely to consider all the appropriate mitigating factors; (b) less than one-half will require the appropriate burden of proof for mitigating factors; (c) less than one-half will understand that unanimity is not required to find a mitigating factor; and (d) only one-third will understand that a sentence of life is required if the mitigating factors outweigh the aggravating factors. Even if many jurors are predisposed to a verdict of life in a particular case, given the extent of their misunderstanding of the law, and the ample opportunity they have to apply this misunderstanding at the various decision points, the probability is high that the law will be misapplied at some point during this decision process. Put another way, if the final penalty decision is death, there is a high probability that this final penalty verdict is partially a product of the faulty interpretation of the law.

For example, the jury may fail to consider a mitigating factor because it was not one of those specifically enumerated by the judge. Or, if the jury does consider that factor, the jurors may decide that it does not exist because it has

they are deliberating as being particularly so.

47. Eisenberg & Wells, *supra* note 38, at 12.

not been proven beyond a reasonable doubt. Or, some jurors may find that the mitigating factor exists while others do not, and the jurors therefore do not further consider the factor because they cannot all agree that it exists.

An obvious implication of the data from our juror interviews is that revising and improving the instructions should lead to increased comprehension of the law by the jurors. This in turn should result in juror capital sentencing decisions being influenced relatively more by the law and less by jurors' often erroneous perception of the law. While we believe this to be the case, only a portion of the arbitrariness that accompanies the decision on life or death would be reduced by instructional improvement. William Bowers, for example, reports that significant numbers of jurors have made up their minds as to the penalty before the penalty phase of the trial has even begun.⁴⁸ It is also likely that an even higher number of jurors have made up their minds after hearing the evidence in the penalty phase, but before beginning deliberations. Thus, as long as we retain the death penalty, there are many issues to address in the attempt to reduce the arbitrariness of its application.

CONCLUSION

The North Carolina capital sentencing instructions, on their face, appear to set rather stringent criteria for the sentencing jury to apply before they may impose the death penalty. Juror comprehension of the law as it is conveyed by these instructions, however, is mediocre. The effect of the jurors' poor understanding of the law is to reduce the likelihood that capital defendants will benefit from the safeguards against arbitrariness built into the North Carolina law.

Jurors have always had, and will continue to have, discretion in their capital sentencing decision. At issue is the extent to which their discretion is guided or misguided.

48. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1093 tbl. 9 (1995).