

Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines

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INTRODUCTION

There is perhaps no task more daunting for members of our society than to decide whether a person deserves to live or die. This is exactly the decision that courts in most states ask of jurors who serve on capital cases. The experience of being a capital juror is emotionally upsetting.¹ This fact suggests that capital jurors take their task very seriously, a suggestion that is supported by interviews with them.² There is a distinction, however, between taking a task seriously and following the law.

Although death penalty laws differ somewhat by state, all such laws fall under the general rubric of "guided discretion statutes." This Article focuses on capital jurors' personal accounts of how they reached their sentencing decisions, and whether these accounts are consistent with the requirements of guided discretion statutes. Part I explains the provisions of guided discretion statutes. The Kentucky component of the Capital Jury Project ("CJP"), which is the basis of the information presented in this Article, is discussed in Part II. Specifically, Part II presents a general description of the methodology of the Kentucky component—how cases and jurors were selected for inclusion in the study—as well as the results of the study. Part II also discusses the sentencing decisions of juries which included at least one "cross-over juror"—a juror whose penalty preference crossed over from death to life, or vice versa, during the time between the end of the guilt phase of the trial and the end of the penalty phase of the trial.³ This Article concludes with a

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1. See Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L.J. 1333, 1338 (1993); Marla Sandys, *The Life or Death Decisions of Capital Jurors: Preliminary Findings from Kentucky 4* (paper presented at the annual meeting of the American Society of Criminology in San Francisco, California) (November 22, 1991) (copy on file with the *Indiana Law Journal*).

2. Sandys, *supra* note 1, at 4.

3. In contrast to a cross-over juror, a "constant juror" maintains his or her penalty preference throughout the trial. In this Article, penalty-preference change is evaluated by comparing a juror's reported penalty preference at the end of the guilt phase of the trial with the jury's final sentencing decision. The terms "cross-over" and "constant" are borrowed from Lorelei Sontag, *Deciding Death: A Legal and Empirical Analysis of Penalty Phase Jury Instructions and Capital Decision-Making 147-48* (1990) (unpublished Ph.D. dissertation, University of California (Santa Cruz), reprinted by UMI Dissertation Services).

discussion of the consistency between the requirements of guided discretion statutes and the jurors' accounts of how they actually made their sentencing decisions.

I. THE PROVISIONS OF GUIDED DISCRETION STATUTES

Until relatively recently, there were no laws to guide jurors in making their sentencing decisions. This unbridled discretion led to the "arbitrary and capricious" imposition of death sentences and the historic United States Supreme Court decision in *Furman v. Georgia*⁴ that capital punishment, as then applied, was unconstitutional. The necessary implication of the *Furman* opinion was that capital statutes which curbed the arbitrary application of capital sentencing would be found constitutional.⁵ The states responded accordingly. Within some eighteen months after *Furman*, thirty states had reinstated capital punishment.⁶

These new death penalty laws followed one of two forms. Some states proposed mandatory sentencing schemes under which all persons convicted of certain capital offenses would automatically receive a death sentence.⁷ Other states enacted guided discretion statutes whereby the sentencer (jury or judge) is provided with a list of aggravating and mitigating circumstances that are intended to guide the sentencing decision. The Supreme Court addressed the constitutionality of these two new forms of death penalty laws in *Gregg v. Georgia*⁸ and its companion cases⁹—only the guided discretion statutes passed constitutional muster.¹⁰ The Court's reason for denouncing the mandatory capital sentencing schemes is revealing:

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a

4. 408 U.S. 238 (1972) (per curiam).

5. See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

6. WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, at 174 (1984).

7. For example, Indiana's mandatory statute, which included nine capital offenses, provided that "[w]hoever perpetrates any of the following acts is guilty of murder in the first degree and, on conviction, shall be put to death." IND. CODE § 35-13-4-1 (1973) (repealed 1977). Examples of the capital offenses included: the murder of a police officer, corrections employee, or a fireman acting in the line of duty; murder in the course of a kidnapping or attempted kidnapping; a killing by a person for hire, by a person lying in wait, by a person who with a prior murder conviction, or by a person serving a life sentence. *Id.*

8. 428 U.S. 153 (1976).

9. *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

10. The Florida and Texas statutes were upheld. See *Jurek*, 428 U.S. 262; *Proffitt*, 428 U.S. 242. Death sentences under Louisiana's and North Carolina's mandatory statutes were reversed. See *Roberts*, 428 U.S. 325; *Woodson*, 428 U.S. 280.

designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.¹¹

Thus, in rejecting mandatory sentencing schemes, the Court placed a premium on individualized sentencing, which was *thought* to be achieved by guided discretion statutes.¹²

Guided, individualized sentencing was deemed constitutional by the Court based on the belief that such sentencing would respect the uniqueness of each defendant while simultaneously reducing the arbitrariness of capital sentencing which the Court found to exist under the statutes invalidated in *Furman*.¹³ The guided discretion statutes, although varying slightly from state to state,¹⁴ included three basic provisions, each noted and discussed by the Court in *Gregg*. First, capital trials must be conducted as bifurcated proceedings. As in all criminal cases, a jury in a capital case must first decide whether the accused is guilty. If the jury finds the accused guilty of a capital crime, the same jury then hears evidence of aggravating and mitigating circumstances to determine the appropriate sentence. According to the majority opinion in *Gregg*,

When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.¹⁵

Another provision of the guided discretion statutes that purportedly reduces the arbitrariness of capital sentencing is the specification of aggravating and mitigating factors to guide the jury's sentencing decision.¹⁶ The *Gregg* Court

11. *Woodson*, 428 U.S. at 304 (joint opinion of Stewart, Powell, and Stevens, JJ.).

12. The constitutionality of guided discretion statutes was not based on an evaluation of the actual sentencing schemes then in effect. Instead, in an opinion announcing the judgment of the Court in *Gregg*, Justice Stewart stated, "On their *face* these procedures *seem* to satisfy the concerns of *Furman*." *Gregg*, 428 U.S. at 198 (joint opinion of Stewart, Powell, and Stevens, JJ.) (emphasis added). Subsequent research has not supported the Court's conjecture, as several post-*Furman* studies have documented racial disparities in capital sentencing. See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* 150-51, 179 (1990); SAMUEL R. GROSS & ROBERT MAURO, *DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING* (1989); BARRY NAKELL & KENNETH A. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 82-92 (1987); William J. Bowers & Gleun L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 *CRIME & DELINQ.* 563, 593-601 (1980); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: The Case of Victim-Based Racial Discrimination*, 18 *LAW & SOC'Y REV.* 437, 450-55 (1984).

13. These fundamentally conflicting goals—consistency in capital sentencing versus individualized sentencing—ultimately led former Justice Harry Blackmun to declare that "the death penalty experiment has failed." *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (mem.) (Blackmun, J., dissenting), *denying cert.* to 998 F.2d 269 (5th Cir. 1993).

14. For a discussion of the various types of guided discretion statutes, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 *IND. L.J.* 1043, 1045-50 (1995).

15. *Gregg*, 428 U.S. at 191-92.

16. Most state statutes list various aggravating and mitigating circumstances. For instance, having a prior conviction for a capital offense or a history of assaultive criminal convictions, committing the murder while engaged in the commission of other listed crimes, committing the murder for money or anything of value, or murdering a prison employee while in prison constitute some of the aggravating

noted that “[w]hile such standards are by necessity *somewhat general*, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.”¹⁷ In a somewhat contradictory statement, the Court also noted that “while some jury discretion still exists, ‘the discretion to be exercised is controlled by *clear and objective standards* so as to produce non-discriminatory application.”¹⁸ Thus, even while reinstating capital punishment, the *Gregg* Court appeared to be somewhat ambivalent about the ability of guided discretion statutes to eliminate arbitrariness and discrimination in capital sentencing. On the one hand, providing jurors with aggravating and mitigating circumstances to consider when making their sentencing determination was viewed as “general guidance.” On the other hand, the aggravating and mitigating circumstances were also interpreted as “clear and objective standards,” implying that they will provide jurors with definite, concrete direction in reaching their sentencing decisions.

The final provision of guided discretion statutes is an automatic appeal of all death sentences to the state’s supreme court. The purpose of this appeal is not merely to determine whether the sentence was lawfully imposed, but rather to “determine whether [the death sentence] was imposed under the influence of passion or prejudice, whether the evidence supports the jury’s finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.”¹⁹

The combination of these three provisions in guided discretion statutes was thought to be sufficient to remedy the problems with capital sentencing noted by the Court in *Furman*: “No longer should there be ‘no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.’”²⁰ The remainder of this Article assesses how two of these three provisions of guided discretion statutes—bifurcated proceedings, and aggravating and mitigating circumstances—actually operate in practice.

There can be no doubt that capital trials are *conducted* in two distinct phases, consistent with the requirement of bifurcated proceedings. It also can

circumstances in Kentucky. KY. REV. STAT. ANN. § 532.025(2)(a)(1), (2), (4), (5) (Michie 1990). Under Indiana’s statute, aggravating factors include: committing the murder in the course of committing any of ten other enumerated crimes, committing the murder by use of an unlawful explosive, hiring or being hired by another to commit the murder, having a prior murder conviction, dismembering the victim, or murdering a person less than 12 years of age. IND. CODE § 35-50-2-9(b)(1), (2), (4), (5), (7), (10), (11) (Supp. 1994). Mitigating factors in Kentucky include having no significant criminal history, being under the influence of extreme mental disturbance, believing that the killing was morally justified, committing the act under duress or the domination of another, or committing the act while still a youth. KY. REV. STAT. ANN. § 532.025(2)(b)(1), (2), (4), (6), (8) (Michie 1990). Indiana’s statute lists as possible mitigating factors: having no prior criminal history, being under the influence of an emotional or mental disturbance at the time of the murder, acting as an accomplice with relatively minor participation, lacking capacity to appreciate the criminality of the conduct, and being under 18 years of age at the time of the murder. IND. CODE § 35-50-2-9(c)(1), (2), (4), (6), (7) (Supp. 1994).

17. *Gregg*, 428 U.S. at 193-95 (emphasis added).

18. *Id.* at 197-98 (emphasis added) (quoting *Coley v. State*, 204 S.E.2d 612, 615 (Ga. 1974)).

19. *Id.* at 198.

20. *Id.* at 198 (quoting *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring)).

be assumed, for purposes of this analysis, that courts abide by the appropriate evidentiary rules in the majority of cases so that "information prejudicial to the question of guilt but relevant to the question of penalty"²¹ is not presented at the guilt phase of the trial. Neither of these practices, however, can ensure that jurors, either individually or collectively, necessarily wait until the end of the sentencing phase to reach their decisions as to the appropriate sentence. It may be the case that, in the minds of capital jurors, guilt and sentencing decisions go hand-in-hand. If this hypothesis is true, then bifurcated proceedings fail to eliminate the problem of unitary trial systems—the lack of an individualized, particularized sentencing decision in capital cases—which was a primary concern of the *Gregg* Court.²²

The role aggravating and mitigating factors play in a juror's sentencing decision also remains unclear. In affirming Georgia's guided discretion statute, the *Gregg* Court contended that a jury's consideration of aggravating and mitigating factors would successfully remedy the arbitrary capital sentencing which existed under pre-*Furman* statutes:

The new Georgia sentencing procedures . . . focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines.²³

The question remains, of course, whether the sentencing decisions of capital jurors are in fact guided by a careful consideration of the aggravating and mitigating circumstances set forth in guided discretion statutes. One strategic way to address this question is to study capital jurors who change their penalty preference over the course of the trial. Stated differently, are statutory aggravating and mitigating circumstances the reason that jurors change their minds about the appropriate sentence?

According to the doctrine advanced in *Gregg*, aggravating and mitigating circumstances should be the reason for capital jurors' sentencing decisions. Therefore, jurors who cross over from supporting a death sentence to voting for a life sentence should do so because of the mitigating circumstances presented during the penalty phase of the trial. Similarly, the persuasiveness of the aggravating circumstances argued during the penalty phase should be the reason jurors who initially endorse a life sentence cross over and vote to impose a death sentence.

21. *Id.* at 191.

22. *Id.* at 196-98.

23. *Id.* at 206-07.

II. THE KENTUCKY COMPONENT OF THE CAPITAL JURY PROJECT

Interviews conducted with jurors as part of the CJP provide useful information related to two of the three provisions of guided discretion statutes. First, the interviews contained a series of questions designed to assess whether bifurcated proceedings are effective in separating capital jurors' guilt and penalty decisions. Then, based on responses to these questions, a sub-sample of jurors—those whose penalty preferences changed (*i.e.*, cross-overs)—were subject to further analysis. The remainder of this Article explores the sentencing decisions of juries on which at least one cross-over juror served, using the jurors' own words to describe how they reached their decisions.

Information from all jurors interviewed in these cases is presented to evaluate whether aggravating and mitigating circumstances do in fact guide capital jurors' sentencing decisions in the manner intended by the *Gregg* Court. Interviews with constant jurors are included, not only because they contribute to our understanding of the importance of aggravating and mitigating circumstances in capital jurors' sentencing decisions, but also because they provide a unique perspective on how other members of the jury perceive cross-overs. Moreover, interviews with both cross-overs and constant jurors from the same jury provide a glimpse of the sociometric processes that steer a jury to unanimity.

A. Methodology

The CJP is a consortium of university faculty members, representing a variety of disciplines and geographic regions of this country, who use the same core instrument when interviewing jurors who served on capital cases.²⁴ One of the goals of the CJP is to have the decision-makers—the jurors themselves—describe their experiences. The CJP devotes particular attention to the sentencing decisions of the jurors: Do capital jurors arrive at their sentencing decisions in the manner envisioned by guided discretion statutes?

Kentucky was one of the original eight states included in the CJP because it provided an example of a threshold statute that employs a traditional definition of capital murder,²⁵ and because of its geographic location.²⁶ This Part describes the method by which the cases and jurors in Kentucky were selected for this study. This Part also presents the results pertaining to bifurcated proceedings and the stories of the juries on which cross-overs served. Finally, this Part presents some tentative conclusions that can be drawn from this data.

24. For an in-depth description of the CJP, its goals, and its general methodology, see Bowers, *supra* note 14.

25. "Threshold" guided discretion statutes and the "traditional definition of capital murder" are concepts described more fully in *id.* at 1046-50.

26. See *id.* at 1077-79.

1. Case Selection

The complete record of capital cases in Kentucky reveals that relatively few death sentences have been imposed since the new death penalty laws were enacted; from 1978 through 1991, only fifty-one death sentences were imposed. For this reason, no sampling procedure was employed in Kentucky to select the death cases for inclusion in this study. Rather, all death cases since 1985 were included in order to reach the goal of having fifteen death cases in the sample.²⁷ Specifically, the sample included five death cases from 1991, three from 1989, two from 1987, four from 1986, and one from 1985.

There have been substantially more life cases than death cases in Kentucky during the period of study. Therefore, a sampling procedure was needed to determine which life cases to study. The selection of life cases was not random; instead, a premium was placed on the recency of the trial. Therefore, all cases from 1989 through 1991 (a total of ten cases) were initially targeted for inclusion in the sample. Because there were fourteen life cases in 1988, the decision of which cases to include in the sample was based on the geographic region of the state in which the case was tried.²⁸ A comparison of the death cases and the ten life cases since 1989 revealed that life cases from the eastern region of Kentucky were underrepresented. Unfortunately, however, there was only one life case in 1988 in the eastern region of the state to add to the sample. Therefore, three additional life cases from the central region and two from the western region were added to the sample. The sample, therefore, consisted of sixteen life cases.

As the task of locating jurors began, it became evident that the records from three of the life cases in the sample could not be located.²⁹ Consequently, additional life cases are currently in the process of being selected for inclusion in the study. Given the disproportionate number of life cases held in Kentucky, one would think that this would be a relatively easy task; however, it is not. Many of the life cases resulted in plea agreements or joined trials, neither of which are appropriate for this study. Hence, because of the difficulties encountered in case selection, juror interviews are ongoing in Kentucky.

27. This goal of studying 15 death cases and 15 life cases was formulated by the CJP. *Id.* at 1079-80.

28. Life cases were selected based on the geographic region of the state in order to accurately reflect the cultural diversity of the State of Kentucky. Louisville, for example, is a large city, whereas the eastern region of the state is part of Appalachia and is thus distinctively rural. Therefore, the state was divided into regions based on cultural differences, and life cases that were tried in the same region as were death cases were included in the study.

29. In addition, all jurors from one of the life cases refused to be interviewed.

2. Selection of Jurors

The twelve jurors who served on each case in the sample were divided into three panels of four jurors each, denoted as panels A, B, and C.³⁰ The assignment of jurors to panels rotated with each case to ensure that the order in which jurors were contacted for inclusion in this study was random. The goal was to interview all four jurors from panel A and to use jurors from panels B and C as replacements if necessary. Of the death jurors in this sample, 35% are panel A jurors, 35% are panel B jurors, and the remaining 30% are panel C jurors. The corresponding figures based on the jurors who served on life cases are 39%, 43%, and 18%.

As of January, 1995, a total of ninety-seven interviews had been conducted in Kentucky. Fifty-two of these were with jurors who had served on death cases. Not all ninety-seven interviews are ready for analysis, however, because not all of the interviews have been transcribed. Given the importance of the jurors' personal accounts of the reasons for the change in their penalty preferences, only interviews that have been transcribed are included in this analysis. Thus, the sample for purposes of this analysis consisted of sixty-eight juror interviews, forty of which were interviews with jurors who had served on death cases. The difference in the number of interviews by sentence (death versus life) is not likely associated with the willingness of jurors to be interviewed; instead, this disparity is likely attributable to the number of each type of case included in the sample (ten life cases as opposed to twelve death cases).

3. The Interviews

The interview instrument used in the study was a comprehensive, fifty-one page document designed to capture the totality of the experiences of being a juror on a capital case. Hence, jurors were asked not only about the sentencing component of the trial, but also about jury selection, the guilt phase of the trial, their perceptions of the judge and attorneys, as well as general crime-related questions. The interviews in Kentucky typically have occurred in the juror's home and have each taken approximately three and one-half hours to complete. A majority of the jurors agreed to have their interviews tape recorded.

Most of the information presented in this Article comes from the sections of the interview instrument devoted to jurors' sentencing decisions. In particular, one section of the interview enumerated forty possible circumstances, both aggravating and mitigating, that could have been present in the

30. The method used for selecting jurors for the study is also discussed in Bowers, *supra* note 14, at 1081.

juror's case.³¹ Jurors were asked to indicate whether the circumstances were present in their respective cases and, if so, to indicate the importance and impact of the circumstance on their sentencing decisions. In other words, jurors were asked whether the circumstance made them more likely (aggravating) or less likely (mitigating) to vote for death. However, the jurors often mentioned issues relevant to their sentencing decisions in response to items included in other sections of the interview. These responses are also included in this Article.

B. Results

This Section contains three parts: first, data pertaining to bifurcated proceedings are presented; second, an exploration is made into the sentencing decisions of death-to-life cross-overs; and finally, life-to-death cross-over jurors are discussed.

1. Bifurcated Proceedings in Practice

Jurors interviewed as part of the CJP are asked: (1) whether there was any discussion of the death penalty during the guilt deliberations; (2) what punishment they thought the defendant deserved after the guilt phase, but before any evidence was presented in the penalty phase; and (3) how certain they were about the appropriate punishment at that point in the trial. These three items attempt to assess whether bifurcated proceedings actually serve to separate the guilt and penalty decisions of capital jurors. The jurors' responses to these three questions and a discussion of those responses are presented below.

As can be seen in Table 1, approximately one-half of the jurors (33 of 68), regardless of the final sentence imposed, acknowledged that some discussion of the death penalty took place during the jury's guilt deliberations. Theoretically, at this juncture in the case, capital jurors are to decide only whether or not the defendant is guilty. One could argue that jurors who discuss the death penalty during guilt deliberations are not actually deciding on the sentence at that time, but are only discussing possible penalties. However, the purpose of bifurcated proceedings is to separate the guilt and sentencing decisions. Any discussion of the appropriate sentence during the guilt deliberations is (theoretically) irrelevant and inappropriate.

31. Generally, the circumstances explored during the interviews included the killing, the victim, the defendant, and additional circumstances that may have influenced the jurors' sentencing decisions. Examples of specific circumstances include: the killing was not premeditated but was committed during another crime, such as a robbery; the victim tried to resist; the victim was a child; the victim had a loving family; the victim had a criminal record; the defendant was an alcoholic; the defendant was a drug addict; the defendant was mentally retarded; and the defendant was convicted with evidence from an accomplice who testified against him in return for a reduced charge or sentence.

TABLE 1
 FREQUENCY OF DISCUSSION ABOUT DEATH DURING GUILT PHASE

Interview Question: *In deciding guilt, did jurors talk about whether or not [the defendant] would, or should, get the death penalty?*

	Sentence Outcome			
	Life	Death	Total	
			N	%
Yes	13	20	33	48.5%
No	15	20	35	51.5%
Total	28	40	68	100%

Most jurors, as evidenced by Table 2, were also willing to express their penalty preference before the sentencing phase of the trial. In fact, only 34%, or 23 of the jurors interviewed, claimed that they were undecided before the sentencing phase as to the sentence they would impose. When broken down by outcome of trial, there was not much difference in terms of the percentage of jurors who were undecided as to the sentence they would impose; 32% (9 of 28) of jurors on life cases were undecided, compared to 36% (14 of 39) of jurors on death cases. However, of the jurors who were willing to express a penalty preference before the sentencing phase of the trial, substantially more were inclined to believe that death, rather than life, was the appropriate penalty. Forty-three percent (29 of 67) of the jurors who were willing to express a penalty preference before the sentencing phase thought that the defendant should receive a sentence of death, while only 22% (15 of 67) thought the defendant should receive a lesser sentence.³²

32. The sentencing options in Kentucky are death, life, life without the possibility of parole for twenty-five years, or a term of years. KY. REV. STAT. ANN. § 532.030 (Michie 1990). Thus, a "lesser sentence" refers to any sentence other than death. This term is used interchangeably with "life sentence" in this Article.

TABLE 2
THOUGHTS REGARDING APPROPRIATE SENTENCE
BEFORE PENALTY PHASE

Interview Question: *After the jury found [the defendant] guilty of capital murder, but before you heard any evidence or testimony about what the punishment should be, did you then think [the defendant] should be given _____?*

	Sentence Outcome			
	Life	Death	Total	
			N	%
Death Sentence	9	20	29	43%
Life Sentence	10	5	15	22%
Undecided	9	14	23	34%
Total	28	39 ^a	67	99% ^b

^a One juror stated that she did not realize that the jury would have to decide the sentence. Therefore, she did not think about the penalty at that time.

^b The total percentage does not equal 100% due to rounding.

The strong support for a death sentence at this stage of the trial suggests that a substantial proportion of the jurors stood ready to make a commitment to vote for death, even before hearing evidence regarding aggravating or mitigating factors. If this is true, then the guilt phase of the trial tilts jurors' penalty preferences toward death, and perhaps thereby creates a frame through which jurors will view the evidence presented at the penalty phase of the trial.³³

Table 3 reports the degree of certainty associated with the jurors' penalty preferences before the sentencing phase of the trial. In particular, jurors who indicated a sentencing preference prior to the penalty phase of the trial were asked how certain they were about that penalty preference at that point in the

33. Another possible explanation is that the jury selection process itself, not the guilt phase, tilts jurors' penalty preferences toward death:

Death qualifying *voir dire* does more than provide cues and implicit suggestions to veniremen about the nature of the case that will follow. It requires each qualified juror to publicly affirm their willingness to take the most extreme legal action ever available to a juror. The act of publicly proclaiming one's willingness to impose the death penalty is likely to intensify commitment to that course of action.

Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 L. & HUM. BEHAV. 133, 143 (1984) (italics in original).

proceeding. The possible response alternatives were "convinced," "pretty sure," or "not too sure." The most striking finding is that 70%, or 30 of the 43 jurors who were interviewed, were "absolutely convinced" of their penalty preference before they heard any evidence as to the appropriate sentence. An additional 25%, or 11 of the jurors who were interviewed, were "pretty sure" of the appropriate penalty, and only 5%, or 2 of the jurors interviewed, were "not too sure."

TABLE 3

DEGREE OF CERTAINTY REGARDING PENALTY BEFORE SENTENCING PHASE

Interview Question: *How strongly did you think so?*³⁴

Trial Outcome						
	Life		Death		Total	
	Initial Preference		Initial Preference			
Degree of Certainty	Life	Death	Life	Death	N	%
Absolutely Convinced	8	7	0	15	30	70%
Pretty Sure	2	2	2	5	11	25%
Not Too Sure	0	0	2	0	2	5%
Total	10	9	4	20	43	100%

The findings presented thus far demonstrate quite clearly that at least one component of guided discretion statutes does not function in the manner predicted by the *Gregg* Court: bifurcated proceedings do little to separate the guilt and penalty decisions in the minds of capital jurors. Moreover, the findings suggest that the use of aggravating and mitigating circumstances—another provision sanctioned in *Gregg* to curtail arbitrariness in capital sentencing—is ineffective. If capital jurors are making their guilt and sentencing decisions concurrently, how can they also evaluate the aggravating and mitigating factors presented during the penalty phase, factors which are intended to guide their sentencing decisions?

34. This question followed the question associated with Table 2. The 23 jurors who claimed that they were undecided as to the sentence before the penalty phase began were not asked this question. In addition, 2 jurors did not answer this question.

In this regard, two cells in Table 3 stand out. First, there were 7 jurors who were "absolutely convinced" the defendant should receive a sentence of death before the penalty phase, although the defendant actually received a life sentence. Three of these 7 death-to-life cross-overs served on the same jury; the remaining 4 each served on different juries. The sentencing decisions of the jurors interviewed from these 5 cases are presented in Part II.B.2.

There were also 2 jurors in Table 3 who were "pretty sure" the defendant should receive a life sentence before the penalty phase, yet these 2 jurors ultimately voted for a sentence of death. These 2 life-to-death cross-overs served on different juries, and the stories of their juries' sentencing decisions are presented in Part II.B.3.

2. Death-to-Life Cross-Overs

The following discussion presents the stories of the sentencing decisions of the juries associated with the seven death-to-life cross-overs and offers some tentative conclusions about the implications of these findings for guided discretion statutes. To reiterate, death-to-life cross-overs are jurors who were convinced that the defendant deserved a sentence of death prior to the penalty phase, yet ultimately voted for life. According to the model embraced in *Gregg*, the change in these jurors' sentencing preferences should be due to the mitigating circumstances presented in the penalty phase of the trial. As will become evident, that was rarely the case.

a. Case A

The defendant in this case was convicted of burglarizing a convenience store, kidnapping the clerk, and raping and sodomizing her before killing her. This was the defendant's second trial; the first trial resulted in a hung jury at the guilt phase. Most of the jurors who were interviewed merely mentioned that they served on the jury in the defendant's second trial when asked to recount the general facts of the case. For example, in response to the first question of the interview, which asked about the extent of attention devoted to the trial in the community, Juror A-2³⁵ said, "It was his second trial. It was a hung jury at first." Juror A-2 also noted, however, that the jury never asked the judge for an indication of what would happen if the jury could not reach a sentencing decision because that "had already happened with the previous jury." Juror A-4 believed that the fact that it was the defendant's second trial did influence the jury's decision-making: "The previous trial had been well-publicized and these people were pretty familiar with it already. I would be strongly suspect that they were familiar with the evidence and had

35. In an effort to keep track of the jurors who were interviewed while preserving confidentiality, the following notation system has been adopted for use throughout the remainder of this Article. The cases cited in this study are designated by letters. Each juror from each case was assigned a number. Thus, Juror A-2 is juror number 2 from the first case.

preconceived notions.” Thus, some jurors who serve on retrials appear to do so with some knowledge of the outcome of the defendant’s previous trial, which could conceivably influence the jurors’ decisions; it is plausible to assume that such jurors may be reluctant to second-guess another capital jury’s decision.

The only death-to-life cross-over juror who served on this case, Juror A-1, also appears to have been influenced by the fact that it was the defendant’s second trial: “[The] only reason I didn’t stick with [the death penalty], didn’t want a hung jury ‘cause he might get off on a technicality. I think he’s guilty and deserves [the] death penalty.” Thus, Juror A-1 apparently changed her sentencing preference from death to life because she did not want the case to result in *another* hung jury. Juror A-1 did not mention any mitigating factors in support of her new penalty preference. In fact, when asked about forty possible circumstances in the case, both aggravating and mitigating, the juror said that *none* of them influenced her penalty preference. Juror A-1 based her sentencing decision predominantly on a specific feature or aspect of the case that made her feel that she knew what the appropriate punishment should be. When asked what that feature was, Juror A-1 responded: “[T]he type of crime it was, rape and murder.” When asked why she felt that way, Juror A-1 said, “[I]t’s a capital crime.” Hence, Juror A-1 acknowledged that it was the crime itself—not the evidence presented during the sentencing phase of the trial—that convinced her of the appropriate sentence.

An interesting aspect of Juror A-1’s interview is the fact that she still does not agree with the jury’s ultimate decision: “[I] still believe he deserved [the] death penalty.” Juror A-1 further acknowledged that her views did not prevail because of the jury: “[I] wanted death but didn’t get what I wanted because of the jury.” According to Juror A-1, the jury was dominated by a few strong personalities who “wanted without a *shadow*³⁶ of a doubt and not a reasonable doubt.” Juror A-1 indicated that the jury ultimately voted for a life sentence because “we never resolved [the appropriate standard of] *doubt*, nobody wanted him out.”

The four remaining jurors interviewed from Case A indicated that they favored a life sentence after the guilt phase of the trial. In addition, these jurors noted that, once the sentencing deliberations began, it was approximately one to two hours before the jury had its first vote on the sentence. It is interesting to note, however, that the cross-over (Juror A-1) claimed that the first vote occurred within forty to sixty minutes. The cross-over and the four other jurors also had conflicting accounts of the outcome of the first vote. While the cross-over juror believed the first vote was not unanimous, the

36. Here and throughout the remainder of this Article, the emphasis which jurors placed on specific words or phrases during the interviews is indicated by italics. In other words, the emphasis is the juror’s own, as indicated by his or her pitch, tone, or volume. Emphasis which has been added by this Author is noted accordingly.

In addition, the use of the masculine or feminine pronoun when referring to a particular juror is only to render this Article more readable and to help protect confidentiality. The specific uses were chosen at random and in no way reflect the actual gender of the juror participating in the interview.

four other jurors who were interviewed disagreed. As Juror A-4 noted, “[W]e had agreed by [the] time [of the first vote].” This apparent discrepancy could be explained by varying definitions of what constitutes a vote.³⁷ All of the jurors who were interviewed acknowledged that the jury spent considerable time discussing the case before taking the first vote. Juror A-4 noted that “it’s nice to have everybody have their say. You don’t want to have anybody feel left out.” Thus, it is reasonable to expect that some jurors consider the pre-vote discussions of the appropriate sentence as indicative of their fellow jurors’ penalty preferences, and thus a vote.

None of the jurors interviewed from Case A indicated that the sentencing deliberations were exceptionally heated. Juror A-4, perhaps one of the “strong personalities who dominated the sentencing deliberation” as identified by the cross-over (Juror A-1), agreed with the cross-over that the issue of “doubt” was at the heart of the jury’s sentencing deliberations. Specifically, Juror A-4 said that the “circumstantiality of the evidence” was the single most important factor in the jury’s sentencing decision. Juror A-4 recalled: “Those concerned with circumstantiability of the evidence said *no* to the death penalty. Several of us did. And if we’re going to do anything, we may as well wrap it up.”

Juror A-4’s account of the jury’s road to consensus is also quite revealing:

I think that this was the deal we worked out. Yeah, we felt he was guilty. Those of us who had more doubts, it was kinda a *brokered agreement* (emphasis added). We didn’t feel so strongly that we’d hang the jury, but yet we weren’t going to vote for [the] death penalty.

Juror A-4’s comments tend to show that the sentencing decision was based on evidence presented during the guilt phase of the trial. In addition, none of the jurors interviewed from Case A indicated that any of the mitigating factors about which they were questioned were influential in their sentencing decision. Juror A-4’s responses indicate that the ultimate sentencing decision was a compromise—an agreement reached to avoid a retrial. Juror A-4 “thought [the defendant] was guilty, but thought that [it] wasn’t right to go with death due to strength of evidence, *circumstantial* (emphasis added) evidence.”

In conclusion, the jurors’ responses indicate that their sentencing decision was based primarily on the desire to avoid a retrial. None of the jurors who were interviewed seemed to have been guided by the presentation of aggravating and mitigating circumstances during the sentencing phase. Instead, the sentencing decision was based on evidence presented during the guilt phase of the trial and, in particular, on the fact that the case was based on circumstantial evidence. Thus, the jury appeared to agree that the defendant was guilty of the crimes, but the evidence was not strong enough to warrant

37. According to Reid Hastie, Steven D. Penrod, and Nancy Pennington, there are four possible polling procedures: the secret ballot, the public show of hands, the verbal go-around, and the verbal expression of dissent only. REID HASTIE ET AL., *INSIDE THE JURY* 28 (1983); see also Marla Sandys & Ronald C. Dillehay, *First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials*, 19 LAW & HUM. BEHAV. 175 (1995) (discussing the difficulties associated with defining a first-ballot vote).

a sentence of death. Hence, this jury's sentencing decision was reached without any of the jurors mentioning that they were persuaded by a single mitigating circumstance.

b. Case B

The second case examined involved several accomplices who allegedly conspired to murder a man at the request of his ex-wife, who hoped to collect the proceeds of the victim's life insurance. While none of the accomplices were joined at trial, the fact that there were several accomplices seemed to weigh heavily in the jurors' sentencing decisions, though not always in the same direction. Juror B-1 explicitly noted that he voted for life because there were so many accomplices. He stated, "If he had done it all by himself I would have given him death, but since there was more than him and he was hired to do what he'd done He was one of four [killers]." The importance to Juror B-1 that there were several accomplices was corroborated by his response to a question asking what effect, if any, the fact that the defendant was convicted with evidence from an accomplice who testified against the defendant had on his sentencing decision. Juror B-1's response indicated that this factor made him "much less likely to vote for death." In fact, this was the only circumstance interpreted as mitigating by any of the three jurors interviewed from Case B. For Juror B-1, the defendant's participation in the crime did not warrant a death sentence because Juror B-1 viewed the responsibility for the crime as diffused among the accomplices. In contrast, Juror B-3 acknowledged that there were several persons responsible for the crime, but indicated that this fact had "no effect" on his sentencing decision.

The cross-over juror, Juror B-2, appeared to base his decision on factors other than the defendant's responsibility and the existence of accomplices. When asked whether he thought the defendant might not be the one most responsible for the killing, Juror B-2 responded: "He was responsible. Well, of course I think [others involved in the crime, mentioned by name] were responsible. [The defendant] might not be the one most responsible. The direct action, yes he did, I mean, but someone else was responsible for [the defendant] being there and carrying it out." Although Juror B-2 acknowledged that the defendant might not have been the one most responsible for the crime, he still supported a sentence of death. Furthermore, when asked whether the fact that the defendant was convicted with evidence from an accomplice made him more or less likely to vote for death, Juror B-2 responded that it made him "slightly more likely to vote for death." Clearly, the fact that there were several accomplices involved cannot explain why this juror's penalty preference changed from death to life. In fact, when asked directly why he changed his penalty preference, the cross-over responded quite succinctly: "Get a unanimous verdict. It had to be unanimous." Juror B-2 did not appear to be overly concerned whether his position regarding the appropriate sentence would prevail. He admitted that some jurors were

especially reluctant to go along with the majority on the defendant's punishment but claimed that he was not one of them. Juror B-2 said, "I had no problem [with the majority view]; I just didn't want to have a hung jury."

According to the cross-over juror, the jury's sentencing decision was a "compromise." His account of the jury's sentencing deliberation was as follows:

We took a vote right when we got in the room, after reading the instructions, to see what we could agree on. Found that we couldn't agree on the death penalty because some people wouldn't vote for it. You would be surprised how many people would've gone either way. We could not have a 12-0 vote so we went over the instructions to see the most severe penalty we could give short of the death penalty and found that if he were given life for both murder (and the aggravating factors), and that the terms were to run consecutive, meaning one after the other, that he would not be eligible for parole for over twenty years, over one-third of his life.

Thus, the requirement of unanimity appears to have been the primary reason why this juror crossed over from death to life. To avoid the possibility of a hung jury, Juror B-2 changed his penalty preference and agreed to impose a sentence of life imprisonment. Unlike the cross-over juror in Case A, however, Juror B-2 seems comfortable with his decision. At no point during the interview did Juror B-2 adamantly maintain his preference for a sentence of death. In fact, Juror B-2's interview responses indicate that a misunderstanding of the law may have led him to believe that death was the appropriate sentence. For example, Juror B-2 stated that "after the guilty verdict" he was "absolutely convinced" that the defendant deserved a sentence of death. Furthermore, Juror B-2 incorrectly believed that the law *required* jurors to impose a death sentence if the evidence proved that the defendant's conduct was either "heinous, vile, or depraved," or that "the defendant would be dangerous in the future."³⁸

The cross-over's account of the jury's sentencing deliberations is corroborated by responses from the other two jurors interviewed in this case. After Juror B-1 explained that the jury was not initially unanimous in its sentencing preference, the interviewer asked him how those jurors who favored a death sentence became convinced to vote for life. Juror B-1 responded, "Well, they decided we better all vote the same way . . . they thought we might as well just do it and get it over with, and that's just about the words they used, 'just do it and get it over with.'" Juror B-1 then added that the amount of time the defendant would serve before becoming eligible for parole was pivotal in changing the penalty preference of the jurors who initially advocated the death sentence. Juror B-1 recounted the dilemma as follows:

38. Juror B-2's beliefs demonstrate a misunderstanding of Kentucky law regarding the death penalty in two respects. First, Kentucky jurors are not *required* to impose the death penalty; they are merely authorized to *recommend* a sentence of death. See KY. REV. STAT. ANN. § 532.030(4) (Michie 1990). Furthermore, neither the fact that the crime was "heinous, vile, or depraved" nor the defendant's potential future dangerousness is an aggravating factor under Kentucky's statutory scheme. See *id.* § 532.025(2)(a).

If we give him enough time so that he wouldn't get back out on the street [those who preferred a death sentence] would go along with it, but they wanted enough time that he would not live to get back out on the street, and I don't think he has, I don't think he had enough time to get back out. I don't think he will have. He'd live to be pretty old if he does. I think the best I calculate he'd be right at eighty years old or close to it.

The other juror interviewed regarding this case, Juror B-3, stated that two jurors initially favored a death sentence. When asked why these jurors changed their penalty preferences, Juror B-3 responded, "Well, I don't know really for sure of the one, [but] the other one felt he would be out-voted." Juror B-3's response again demonstrates the great desire among the jurors for unanimity. This desire might explain why the jurors in this case changed their penalty preferences from death to life.

Juror B-2, like the cross-over juror in Case A, appears to have changed his penalty preference for reasons other than evidence of mitigating circumstances presented during the penalty phase of the trial. In addition, the cross-over jurors in Case A and Case B also offered the same reason for switching their penalty preferences—the desire to avoid a hung jury.

As an aside, it is interesting to note that the defendant in Case B actually was the triggerman. Moreover, the defendant, because of his principle role in the murder, had retained experienced capital litigators. His accomplice's attorney, in contrast, was court-appointed. The accomplice received a death sentence.³⁹

39. Four members of the accomplice's jury were interviewed. After the guilt phase, two of these jurors believed that the defendant should receive a death sentence, one was undecided, and the other thought that a sentence of less than death was appropriate. Data from this case are not included in the section devoted to life-to-death cross-overs because the one cross-over in this case indicated that he was "not too sure" about the sentence at that point in the trial. The jury's deliberation was fascinating, however, and a brief description of its key points is warranted to provide a basis for comparison to the data gathered from Case B.

Most of the jurors interviewed in Case B discussed the fact that there were several accomplices to this crime. All four jurors in the accomplice's trial, by contrast, noted that there were several accomplices, but did not elaborate on the issue—it seemed irrelevant to their sentencing decisions. These four jurors claimed that they never thought the defendant "might not be the one most responsible for the killing." As one juror noted, "He was the only one with the qualifications to do it." Another juror stated, "He was the mastermind. He got the whole thing together."

Evidently, at least two of the jurors who served on the accomplice's jury were initially inclined to vote for life. Again, none of the jurors on this case acknowledged the existence of any mitigating circumstances. Rather, the jurors' reluctance to vote for death was based on religious convictions. As one juror mentioned, "The best I remember, we had two [jurors] that didn't agree [with a death sentence]. They were religious and they thought this man could get forgiven for his crime." Another juror's account of how he came to terms with voting for a death sentence substantiates the importance of religion to the reluctant jurors' sentencing decisions: "I asked the chairman, the foreman, what I want to know, will [the defendant] have time to get right with the Lord, and he said, 'Oh, yes.' That helped me." This same juror also mentioned that the deliberations were very emotional: "They were crying. It was sad in there because that is, that is some decision. I had to pray a lot about it. . . . After I prayed about it, it was easy then to make [the decision to vote for death]."

One juror who served in the accomplice's case mentioned additional factors that he thought helped sway the reluctant jurors:

I think [the reluctant jurors] decided that [the defendant] would kill again and [the death sentence] would probably be the best thing. Knowing this, and I think this is the main factor, knowing that death sentence prisoners, capital murder prisoners hardly ever die. In other words,

c. Case C

One of the five remaining death-to-life cross-overs, Juror C-1, was the only juror from Case C who agreed to be interviewed. It is possible that the other jurors' reluctance to be interviewed was related to the fact that they served during the defendant's second trial. The defendant had been sentenced to death six years earlier. The state supreme court granted the defendant a new trial, however, finding that the defendant and his accomplice should have been tried separately.⁴⁰ The accomplices were subsequently found guilty of robbing their place of employment and kidnapping, and then murdering, a supervisor.

Juror C-1 noted that it was the defendant's second trial, but this seemed less important to her than the fact that the defendant had an accomplice. The most important factor in the jury's sentencing decision, according to Juror C-1, was "how much [the defendant] willingly participated in the crime, how strong the coercion was [from the other accomplice], and could he prevent it."

By the time Juror C-1 entered the room to begin the sentencing deliberations, her inclination to vote for death had already wavered. She indicated that, at this point, she was in favor of a sentence of less than death. In light of other juror interviews that have been conducted in Kentucky as part of the CJP, it is surprising that Juror C-1 did not view *any* of the prosecution's evidence presented at the punishment phase of the trial as important or influential in making her sentencing decision. Instead, this juror was apparently influenced by the testimony of a "clergyman [who] convinced [the defendant] to turn himself in. . . . [That was] mitigating." Juror C-1 denied that her religious beliefs had any bearing on her penalty decision; however, the interviewer noted that the juror's home was filled with religious paraphernalia.

According to Juror C-1, the jury in Case C deliberated for a full two hours before taking its first vote. At that time, all but two of the jurors were in favor of a life sentence. While there is no way of knowing for certain why the two jurors who initially voted for a death sentence changed their preferences and voted for life, Juror C-1 indicated that there was a sense of resignation within the jury. That is, the jurors "[f]inally concluded to give him life and let the parole system deal with him."

The issue of parole was also important in the jury's sentencing decision at both trials. In the first trial, however, the issue of parole had the opposite impact on the jury. For example, one juror interviewed from the initial trial

if we give [the defendant] life, which means what, five years, and if we give him the death sentence that means he *will* be spending the rest of his life in prison.

The juror said that her question to the foreman, about the defendant "getting right with the Lord," was the single most important factor that caused her to change her penalty preference. This juror did note, however, that "[i]t was mentioned if he got out he would probably do it again." It seems, therefore, that the reluctant juror changed her mind due to a belief that the defendant would have time to "get right with the Lord" before being executed rather than a fear that the defendant would probably kill again if he was ever released.

40. The co-defendant pled guilty and was sentenced to life in prison.

acknowledged that she was reluctant to vote for a death sentence but changed her mind due to the "fact that [the defendant] would be paroled." From this juror's perspective, then, a death sentence was the only effective means to ensure that the defendant would not be released on parole.

Because only one juror was interviewed, it is difficult to draw any concrete conclusions about what influenced the sentencing decision of the jury in Case C. Juror C-1 (the cross-over) did claim, however, to have been influenced by one mitigating factor: the clergyman who convinced the defendant to turn himself in.⁴¹ According to this juror, though, other jurors initially favoring a sentence of death were not persuaded in the same fashion. Instead, Juror C-1 suggests that those jurors decided to relinquish responsibility for the sentencing decision to the parole system.⁴²

d. Case D

Case D⁴³ involved a youthful offender who, along with his brother, robbed a grocery store. According to newspaper accounts of the crime, their motive was to steal money for drugs.⁴⁴ The defendant's brother pled guilty and received a sentence of forty years. The defendant, who was allegedly the triggerman, received a sentence of life without the possibility of parole for twenty-five years; a concurrent sentence of ten years was added for the robbery charge.

Interview responses suggest that the defendant's youth was apparently the determining factor in the jury's sentencing decision. As Juror D-2 noted, "[E]veryone agreed [the defendant] didn't deserve [the] death penalty because of age." Juror D-2 also added that the jury in Case D "wanted to keep [the defendant] there for a long time" and that the "death penalty would just get appealed."

Another juror who was interviewed, Juror D-1, mentioned that the defendant's young age made her slightly less likely to vote for death. Juror D-1 claimed that the reason the jury voted for life was because "if anyone had a reasonable doubt, that automatically ruled out death. Six jurors had a

41. It was not entirely clear from Juror C-1's responses whether she was influenced by the fact that the defendant turned to a clergyman or the fact that the defendant turned himself in. While these issues (like many others) are not among the mitigating factors specifically listed in the statute, jurors are allowed to consider them in making their penalty decision. See *Lockett v. Ohio*, 438 U.S. 586, 604 ("[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record . . .") (emphasis in original) (footnote omitted).

42. The jury ultimately fixed the sentence at life plus 15 years.

43. Three jurors from Case D were interviewed, although none agreed to have their interviews tape recorded. All interviewers were instructed to record jurors' responses verbatim during the course of the interviews. The quotations and other data presented in reference to Case D, therefore, are taken from the interviewers' notes.

44. One project derived from the CJP research done in Kentucky is an assessment of the effect of pretrial publicity on capital cases. Copies of newspaper articles discussing capital cases were collected, and on occasion referred to for information regarding the cases included in this study. The preliminary results of this project have been compiled in Marla Sandys & Steve Chermak, *A Journey into the Unknown: The Effect of Pretrial Publicity on Capital Cases* (1995) (unpublished manuscript, on file with author).

reasonable doubt; death was ruled out. Four [jurors] wanted death, two would have gone any way.”

The cross-over in Case D, Juror D-3, also responded that the defendant's youth made her “slightly less likely to vote for death.” In addition, Juror D-3 mentioned that the defendant's clean criminal record was another factor which persuaded her that the defendant should receive a sentence of less than death. When asked explicitly why her sentencing preference changed, however, the cross-over responded very succinctly: “a compromise.”

Like the cross-over in Case B, Juror D-3 did not convey to the interviewer that she harbored a feeling that an injustice was done in this case. She described her fellow jurors in favorable terms (*e.g.*, like-minded, respectful of one another) and indicated that she would “welcome the opportunity” to serve on another capital case. Like Juror B-2, Juror D-3 may have interpreted the judge's instructions in such a way as to believe that death was the required sentence. Juror D-3 believed that Kentucky law required jurors to impose a sentence of death if the defendant's conduct was heinous, vile, or depraved, or if the evidence proved that the defendant would be dangerous in the future.⁴⁵ Furthermore, when asked to rank who was most responsible for the defendant's punishment, Juror D-3 ranked the defendant first, followed by the law, the jury, and then herself. Thus, Juror D-3 recognized the existence of mitigating circumstances, but these mitigating circumstances were less important to this juror's ultimate vote than her perceived need to compromise in order to avoid a hung jury.

e. Case E

As mentioned previously, the three remaining death-to-life cross-overs served on the same case, Case E. Another juror from this trial, Juror E-1, was also interviewed; he was undecided about the penalty at the end of the guilt phase of the trial. According to the other jurors interviewed, Juror E-1 was the only life hold-out on the jury. The crime in Case E involved a brutal rape and murder; the victim and the defendant were strangers.

Although the focus thus far has been on how jurors reach a consensus in their sentencing decisions, the guilt deliberations of the jury in Case E included an unusual twist which warrants mentioning. Two of the three death-to-life cross-overs claimed that there were no disagreements regarding the defendant's guilt. Both jurors agreed that all twelve of the jurors indicated that the defendant was guilty of capital murder in the first vote during the guilt deliberations. However, the third death-to-life cross-over, Juror E-4, mentioned that there was one dissent. According to the hold-out juror (Juror E-1), who acknowledged that he was undecided, “the question was what would the punishment be, life or execution. That was the question. And you voted yes [guilty of capital murder] if you wanted to kill him and no if you didn't.”

45. See *supra* note 38 and accompanying text.

At first reading, this quote may sound as though the juror was confusing the guilt and penalty deliberations. However, when asked if the question Juror E-1 was answering was the issue at the guilt stage, the juror said "yes." Interestingly, Juror E-1 claimed "I didn't change my vote, didn't have to agree on guilt. The only thing you had to agree on was the punishment. That was the whole thing." Had Juror E-1 been aware that unanimity on guilt is required, he probably would have been the prime example of a "guilt nullifier." This was the great concern of the Supreme Court in *Witherspoon v. Illinois*.⁴⁶ This juror's lack of such knowledge, however, simply made him the prime example of a juror who failed to understand the judge's instructions. Had Juror E-1 understood the judge's instructions, Case E may never have reached the sentencing phase of the trial because Juror E-1, realizing that a sentence of death would then be possible, may have refused to vote for guilt.

As might be expected, this jury's sentencing deliberations were much more eventful than the deliberation on the issue of guilt. All four jurors interviewed agreed on this point. The three death-to-life cross-overs' accounts of the sentencing deliberations, not surprisingly, focused on the hold-out juror (Juror E-1). In fact, the cross-overs' descriptions of Juror E-1 were quite hostile. For example, Juror E-4 stated:

We all pretty much agreed *except that one person* (emphasis added). [He] held out on guilt because [he] didn't want to see [the defendant] executed. That's why we were in there so long. We didn't know how [he] got on there. *We figured they just put [him] in there to have an argument with us.* He believed [the defendant] was guilty really, but didn't believe in execution. Everybody agreed on life sentence once we agreed on guilt.

It is important to note how Juror E-4's description of the hold-out juror corroborates the hold-out's own claim that he never changed his vote on guilt. Moreover, Juror E-4 questioned how the hold-out juror ever ended up on the jury, apparently alluding to the questions which had been asked of prospective jurors in Case E as part of the jury selection process. Juror E-3, another death-to-life cross-over, provided a more succinct description of the sentencing deliberations that reiterated this same theme, but his description is even more to the point:

One juror admitted that under no circumstance, none whatsoever, could he impose the death penalty. I had a real problem with that because in the jury selection I specifically remember the judge ask the question: You realize

46. 391 U.S. 510 (1968). *Witherspoon* served to limit the criteria by which prospective capital jurors could be excluded for cause. Prior to *Witherspoon*, prospective capital jurors were ineligible to serve if they expressed any conscientious or religious scruples against the death penalty. The *Witherspoon* Court held that such juries, which excluded all opponents of capital punishment, were biased against the defendant in the penalty phase of the trial. Consequently, the Court decided that only those jurors who make it "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*" should be precluded from serving in a capital case. *Id.* at 522 n.21 (emphasis in original). The second part of this standard implies that the Justices were concerned that ardent opponents of capital punishment would vote "not guilty" during the guilt phase in order to insure that the death penalty would not be imposed.

this is a capital offense and [the] death penalty is an option and should you deem it warranted, would you have any problem voting for the death penalty? Jurors were polled individually on this, so I'm not sure how [the hold-out] answered for sure. Maybe [he] said no and it was misunderstood that no, [he] wouldn't have a problem with it—I don't know. [He] admitted to us as a jury that we could sit here until whenever—he did *not* believe in the death penalty. I don't have a problem with that, but that being the case, I don't think [he] should have served. I'm convinced that's the only reason that the death penalty was not imposed.

The hold-out juror realized that his opposition to the death penalty was the focal point of the sentencing deliberations. He recalled that

[the] main question was what the punishment should be. All wanted death but me. The others didn't change their minds, they just saw I wasn't going to change mine. When they found I wasn't going to change, they changed to life without parole. . . . To me, if you kill him then you're an accessory to murder. I've got a conscience. My conscience is clear. I've said what I felt about it and I can go home and take a bath and go to bed and go on to sleep.

The hold-out juror acknowledged that he was probably resented by the other jurors, but this realization did not seem to bother him: "I'm sure they were upset with me but it didn't make any difference. I told them everybody's entitled to their opinion. So, I'm a big [boy] and I can take care of myself. I said, 'Your opinion is yours and mine is mine and that's that.'" Evidently, the hostility expressed by the other jurors was not conveyed to the hold-out juror, who expressed that "everybody [on the jury] was very nice."

One question, of course, is how the jury in Case E ever reached consensus on the sentence. The jurors who were interviewed admitted that they asked the judge what would happen if they could not agree on the sentence. After learning that, in the event of a hung jury, the case would be retried, the jury became more determined to find common ground. As Juror E-2 said, "[The] next jury wouldn't get evidence presented as we heard it and they probably wouldn't feel as strong as we did."

As noted previously, the death-to-life cross-overs in Case E realized that the hold-out juror was not going to change his position. That knowledge, combined with a desire to avoid a retrial, appears to have been the impetus for the sentence negotiation. The focus of the deliberations shifted from concerns about what would happen if a consensus was not reached to concerns about parole eligibility. Again, the jurors went to the judge, but this time they asked for information about when the defendant would be released if given a term of years. The judge, however, did not provide this information. Juror E-3 summarized the jury's road to consensus as follows:

When it became obvious we weren't going to change this [hold-out juror], we discussed the options. I believe we even asked the judge what would happen if we couldn't reach a verdict, agree. I believe they said they could declare a hung jury and the whole thing thrown out, a new trial. We determined that it would be better for us to agree on some type of lesser punishment than let that happen. Personally, I didn't feel that way because my conviction was that he deserved the death penalty. I [wound] up going along with them. We gave him some ridiculous sentence, life with 100 or

life with 200 years, more to make a statement of how adamantly we felt about it and be sure that [the defendant] would not be eligible for parole, even though we didn't know that or couldn't really ensure it.

The hold-out's perception of the road to agreement was slightly different. According to Juror E-1, "[The other jurors] thought I wasn't going to change my mind, so let's get out of here."

In sum, it appears the death-to-life cross-overs in Case E changed their votes because of the lone hold-out and their desire to avoid a retrial. Their primary concerns, then, were that the defendant receive a harsh sentence and that the jury do its best to send that message to the parole board. According to Juror E-2:

After we voted for life, they told us parole was in seven and a half years. [The] prosecutor said give him a couple of hundred years and it'll give a message to the parole board that you don't want to see him out no more. When they see a sentence like that it lets them know you're very disturbed about what had happened. So we gave him a little extra. We gave him [life plus] three hundred years which is another seven and a half years, but they are to run consecutively to bring it almost to fifteen years before he can get out.

Hence, the jurors reached a consensus without the hold-out having to compromise his individual views. However, the jurors who originally supported a death sentence also triumphed in that, given the prosecutor's remarks, the defendant "figuratively" received a death sentence.

Thus, the reason why the three cross-over jurors in Case E changed their votes on the penalty is clear: the hold-out juror made it unmistakably clear that he would not vote for death. The hold-out did not convince the other jurors that life was the appropriate sentence. In fact, he did not even indicate that the crime involved any mitigating circumstances. Instead, his position was that "no factor *at all* would make me vote for [the] death penalty." Only one of the cross-overs, Juror E-4, acknowledged the existence of a mitigating circumstance—that the defendant had a loving family. However, Juror E-4 also claimed that this factor had no effect on his willingness to vote for death. Thus, the sentencing deliberations in Case E focused on the hold-out's unwillingness to vote for death, rather than on an evaluation of aggravating and mitigating circumstances which guided discretion statutes presume to be effective. The result in Case E was a compromise, fueled by the jury's desire to avoid a hung jury.⁴⁷

47. One intriguing question still remains about the jury in Case E: Exactly how *did* the hold-out juror become death qualified and thus eligible to serve on the jury? There are few clues in the juror's interview. The transcript of the voir dire revealed that the general death qualification was conducted by the judge, who asked a *Witt*-type question. See *infra* note 57 and accompanying text. For the most part, the judge asked the same question of all prospective jurors. For example, the trial transcript reveals that the judge asked Juror E-2 the following question:

And then Count Three, which is the intentional murder count, upon conviction carries permissible punishments of death, life imprisonment or confinement for a term of not less than 20 years. Now if you were selected for the jury and if you and the other members of the jury determined, under the instructions of the Court, beyond a reasonable doubt that the defendant is guilty of intentional murder, could you consider the entire range of penalties provided by the law of this state as I have just outlined them to you?

f. Conclusions Regarding Death-to-Life Cross-Overs

Overall, two consistent themes have emerged from these interviews. First, the primary reason that cross-overs changed their penalty preferences was the desire to avoid a retrial. Consequently, mitigating circumstances were not usually the focus of these juries' sentencing deliberations. Rather, many of the jurors discussed in this Part serve as examples of how personal predilections permeate capital jurors' sentencing decisions.

Another theme of these interviews was that the existence of at least one strong personality who maintains an opposing viewpoint leads to dissension in the jury. The prime example of this situation was in Case E, where a single hold-out for life succeeded in changing the other jurors' sentencing vote. The cross-overs in Case E never themselves believed that life was the appropriate sentence. Instead, they personally maintained their preference for a death sentence while publicly complying with the hold-out to avoid a hung jury. Moreover, this "forced" compromise led to resentment toward the hold-out. The same can be said of the cross-over in Case A. Juror A-1 insisted on his continued support for a death sentence while also expressing resentment toward the strong personalities on the jury whose penalty preference ultimately prevailed. No such strong personalities appear to have been present on the other juries with death-to-life cross-overs and, consequently, these juries are not marred by resentment.

Finally, it must be noted that certain mitigating circumstances were expressed by the jurors. For example, jurors in Case D were affected by the defendant's youthfulness, and in Case C, one juror mentioned explicitly that the testimony of a clergyman had a mitigating effect on her penalty preference. The cross-overs in Cases C and D, however, seemed less than adamant about their new-found penalty preferences. For instance, the cross-over juror in Case C claimed that the jury decided to vote for life and let the parole system deal with the defendant, whereas the cross-over in Case D viewed the sentencing decision as a compromise. Hence, while these jurors acknowledged the existence of mitigating circumstances, their penalty preferences seemed to reflect a sense of resignation more than a true endorsement of life as the appropriate sentence.

The judge's phrasing of the question to the hold-out, however, was slightly different:

I want to advise you that under Kentucky law in this case the capital offense of intentional murder carries with it possible penalties *upon conviction of the death penalty*, life imprisonment or confinement for not less than 20 years. Now if you're seated as a juror in this case and along with your fellow jurors, after hearing the evidence and the instructions of the Court, determined that the defendant is guilty of intentional murder, could you consider the entire range of permissible punishments provided by the law in Kentucky that I have just outlined to you? (emphasis added).

Thus, the hold-out was told, in effect, that if the defendant was convicted of the death penalty, the sentence could be life imprisonment or a minimum of 20 years in prison. Given the phrasing of the question the hold-out was asked, it is not surprising that he thought the defendant would receive a sentence of death if the jury convicted him of capital murder.

3. Life-to-Death Cross-Overs

This subsection is devoted to the stories of the two life-to-death cross-overs. These jurors were inclined to vote for life at the end of the guilt phase, yet ultimately voted to impose the death penalty. According to the theory behind guided discretion statutes, the change in these jurors' sentencing preferences should be attributable to the existence of aggravating factors.

As was revealed in Table 3, no life-to-death cross-overs were "absolutely convinced" that life was the appropriate sentence prior to the penalty phase of the trial. But two jurors who were "pretty sure" that life was the appropriate sentence at the end of the guilt phase ultimately voted for death. Thus, the standard of certainty is different for the two categories of cross-overs. The death-to-life cross-overs were all convinced that death was the appropriate sentence at the end of the guilt phase of the trial, while the life-to-death cross-overs were never absolutely convinced that life was the appropriate sentence. The life-to-death cross-overs, however, still struggled in reaching their decision to vote for a death sentence.

a. Case F

Case F involved, in addition to the murder, the kidnapping and sexual assault of the victim. According to the jurors interviewed in this case, the victim was the defendant's former employer and had refused to give the defendant money.

The first life-to-death cross-over, Juror F-1, never sincerely felt that a sentence of less than death was appropriate. She *wanted* to give a sentence of less than death but did not think the facts warranted such a decision. When asked what punishment she thought the defendant deserved after the guilt phase of the trial, Juror F-1 responded:

I didn't want to give him the death sentence, and I wasn't undecided. It's something you don't get people—I mean the average person is not used to that, and, the average person has a fight within themselves to find out what their views are. I was always raised against the death penalty, so it was a rough decision and no, I didn't want to, I was always looking for a way out not to.

Just before the sentencing deliberations began, however, Juror F-1 became increasingly aware of the possibility of sentencing the defendant to death: "There was a little voice inside of me that said, 'Yes, he should [receive a sentence of death],' but I didn't bring it out and didn't say it until—I wanted to wait until I heard other people's views about it before I said my opinion." By the time of the first vote on the sentence, which, according to Juror F-1, occurred "probably within twenty minutes, [or] within half an hour," Juror F-1 cast her vote for death.

The question, of course, is how a self-proclaimed lifelong opponent of capital punishment comes to vote for the death penalty. Juror F-1's own words provide the best response to this question. When asked for the strongest factors which made her oppose a death sentence, Juror F-1 responded:

Me personally? Born against the death penalty. Is it possible to be against the death penalty and still enforce it? It's about responsibility, and okay, in my view you have to carry life with parole the way the law is written, regardless of my own personal feelings, so *I kept my personal feelings out of it*, that's part of the responsibility (emphasis added).

This theme of responsibility echoed Juror F-1's remarks earlier in the interview regarding her experiences during the jury selection process:

You weren't *ready* for it, and I seriously questioned myself, could I do that? And, I knew what the judge was going to ask me. As a matter of fact I had to do a little soul-searching before I accepted. And the reason I accepted was I think it's a *matter of responsibility* (emphasis added), as a matter of learning. It wasn't an easy thing to do. I *wouldn't* volunteer to do it again. . . . I really don't think anybody really looks for something like that. I mean, it was exciting the first moment I got in and then the realism hit me about it, and then of course you don't get any choices about changing your mind. It's a responsibility and you just do it; it's something that you have to do.⁴⁸

One might expect that Juror F-1 experienced a tremendous amount of conflict between her personal convictions and sense of responsibility in arriving at her decision in favor of death. Juror F-1's comments indicate, however, that this was not the case. Rather, it seems that Juror F-1 fully adopted the role of a juror and, as she said, "kept [her] personal feelings out of it." The sense of responsibility Juror F-1 talks about, therefore, is not of the personal nature, but as a member of society. Juror F-1 adheres to the belief that individuals must relinquish certain individual freedoms for the betterment of society. In so doing, Juror F-1 appears to have found a viable way of divorcing her personal opinions from the task at hand and placing the responsibility for deciding the appropriate sentence on the law. In fact, when asked to rank the degree of responsibility for the defendant's punishment, Juror F-1 claimed that the law was most responsible, followed by the defendant, the jury, the judge, and then finally herself.

The extent to which Juror F-1 attributed responsibility to the law for the sentence imposed is somewhat surprising given the reality of the law in Kentucky. First, Kentucky is not a judge-override state.⁴⁹ In addition, case

48. Juror F-1's explanation of accepting the responsibility to serve as a juror is interesting; it implies that she felt the decision to serve as a juror was personal. In fact, this may be exactly how Juror F-1 viewed the selection process. Later in the interview, when asked if there was anything she would have done differently, Juror F-1 replied,

Well, they give you an option and a lot of potential jurors said they couldn't do that because of their routines or work, they couldn't take off. Sometimes I sort of second guess myself and wished I had said, "No, I can't do that [serve as a juror] because I have to be at work."

49. A "judge-override" state is one in which the judge has the ultimate authority to determine the defendant's sentence; in other words, the judge has a "veto power" over the jury's sentencing recommendation, which is merely advisory in nature. Indiana is a judge-override state. *See* IND. CODE § 35-38-1-17(a)(3) (1993) (stating that within 365 days after the defendant begins serving his sentence "the court may reduce or suspend the sentence"); *see also* Roark v. State, 644 N.E.2d 565 (Ind. 1994) (modifying Indiana's override provision to require that any Indiana trial judge who overrides a jury's recommendation for a life sentence must issue a brief written opinion recognizing the jury's recommendation and indicating why he overrode it); Joseph L. Hoffmann, *Where's the Buck?—Juror*

law prohibits the use of the term "recommend" when addressing jurors about their role in the sentencing decision.⁵⁰ Despite the restrictions of Kentucky statutory and case law, Juror F-1 still believed that the law was most responsible for the defendant's punishment.

One obvious question is why Juror F-1 came to think of the law as responsible for deciding the sentence. The answer appears to be Juror F-1's failure to understand the judge's instructions. After disagreeing with the interview item that "the judge's sentencing instructions to the jury had little or no influence on the jury's decision," Juror F-1 elaborated:

Let me re-phrase that. It was in the outline, you know, if we found [the defendant] guilty, we had to go by Kentucky state law. *If we found him guilty on certain counts*, and we found him guilty of capital murder, or a capital crime, and we had to weigh some other things too but, you know, *we had to give him capital punishment, by state law* (emphasis added). . . .

....
Ours was not a decision. Well it is a decision. In fact we were just following the law. In Kentucky, you know, capital punishment is legal, so we were going by the law and then [the judge] had to make the final decision.

Thus, according to Juror F-1, there was not much of a decision to make, aside from a determination of guilt. Rather, Juror F-1's interpretation of the judge's sentencing instructions led her to believe that all she had to do was select the sentence associated with the degree of guilt. But, even at that, she seemed to believe that the jury merely made a recommendation to the judge.

The fact remains that Juror F-1, an opponent of capital punishment, voted for a death sentence. Juror F-1 stated that she based her decision primarily on the jury's determination of guilt. In fact, when asked how important the "pain and suffering of the victim" was to the jury's sentencing decision, Juror F-1 said: "That's very important, but *the most important thing I think was the fact that he was proven guilty*" (emphasis added).

Since *Witherspoon v. Illinois*,⁵¹ the Supreme Court has resisted including opponents of capital punishment on capital juries for fear that such opponents would nullify a guilty verdict to avoid a death sentence. Obviously, that fear is unsupported by Juror F-1's responses. In fact, Juror F-1 described the jury's guilt deliberations as less than controversial:

You know, [we] just brought up, let's give [the defendant] the benefit of the doubt that it's *possible* that he could be not guilty. Is there anything in the evidence, does anyone know of anything in the evidence that would be

Misperception of Sentencing Responsibility in Death Penalty Cases, 70 IND. L.J. 1137, 1146 (1995) (discussing Indiana's statutory scheme). *But see* KY. REV. STAT. ANN. § 532.055 (Michie 1990) (allowing the court to "modify," (i.e., reduce) but not override (i.e., increase) a felony sentence).

50. *Tamm v. Commonwealth*, 759 S.W.2d 51, 53 (Ky. 1988) (holding that "in capital cases in which trial commences after the effective date of the finality of this opinion, the word 'recommend' may not be used with reference to a jury's sentencing responsibilities in voir dire, instructions or closing argument"). Case F was tried several years after the *Tamm* decision.

51. 391 U.S. 510 (1968). For a general discussion of *Witherspoon*, see *supra* note 46 and accompanying text.

beneficial to him? And, there [were] very few things brought up. So, it really wasn't a *hard* decision to make.

Hence, Juror F-1 never seemed to consider the possibility of nullifying the guilty verdict.⁵²

The discussion of Case F thus far has focused on Juror F-1's attribution of responsibility for the sentencing decision. As such, it appears that Juror F-1 absolved herself of personal responsibility and thus resolved any cognitive dissonance she may have experienced between her personal convictions and actually having voted for death. Although Juror F-1 did not assume personal responsibility for the sentencing decision, she nonetheless voted for death. What convinced Juror F-1 that death was appropriate, even if only as a recommendation to the judge? The brutality of the crime was obviously the key factor. When asked how she would describe the killing, Juror F-1 responded graphically: "Sadistic, sick. I don't know. It was just terrible, animalistic." In fact, Juror F-1 claimed that she continued to think about the actual manner of the killing.

One could argue that this case involved no mitigating circumstances and, therefore, Juror F-1 had no basis for arguing against a death sentence. Yet, Juror F-1 noted that the defendant was an alcoholic who had been drinking on the night of the crime and that "he was a very neglected child, and he just didn't have the opportunities growing up. He was neglected. He was more or less left on his own." Nonetheless, Juror F-1 claimed that none of these mitigating circumstances affected her sentencing decision.

As previously noted, Juror F-1 believed that a guilty verdict necessarily implied a death sentence. Furthermore, Juror F-1 believed that the brutality of the crime warranted a death sentence. Kentucky law requires jurors to determine whether any aggravating and mitigating circumstances exist when making their decision, but it makes no mention of brutality as an aggravating circumstance.⁵³ Juror F-1 acknowledged the existence of mitigating circumstances but never evaluated them when deciding on the sentence. Hence, though Juror F-1 stated, "I didn't *want* to give him the death sentence," she never felt that the manner of the killing warranted anything but a death sentence. It is as though Juror F-1's decision to vote for death was made when she misinterpreted the judge's instructions. As such, it is not surprising that this jury's sentencing deliberations were relatively uneventful. In fact, according to newspaper accounts of the trial, the jury deliberated for less than one hour on the sentence. Another juror interviewed as part of the CJP indicated that the jury deliberated for only "fifty-eight minutes" on the sentence.

Given that the length of the sentencing deliberations was quite short, and that Juror F-1 voted for death on the first ballot, it is not surprising that she

52. As an aside, it is interesting to note that throughout the interview, Juror F-1 still professed to be an opponent of capital punishment. She did acknowledge, however, that she must be somewhat in favor of the penalty if she voted for death. Juror F-1 said, "I contradict myself, don't I?"

53. KY. REV. STAT. ANN. § 532.025(1)(b) (Michie 1990).

was not discussed in the other jurors' interviews. According to the other jurors, however, there were some jurors who were initially reluctant to go along with the majority. These descriptions, however, corroborate that Juror F-1 was not one of the reluctant jurors to whom these other jurors referred.⁵⁴

Due to the brevity of the sentencing deliberations, any reluctance expressed by jurors to vote for death was short-lived. In fact, Juror F-3's description reveals that the sentencing deliberations were quite bland:

They just discussed the testimony that was given. Really, there wasn't a whole lot of discussion because everybody pretty much had their mind made up when we went back to deliberate. We had to take a second vote. There was a couple of them [who] weren't real sure that [imposing the death penalty] was the way they wanted to go. But after they discussed the testimony, then they agreed.

Juror F-5 claimed that discussing pictures of the victim's body swayed the reluctant jurors to vote for death: "[Then] they were more sure they wanted the death penalty."

The issue of parole eligibility also appears to have been important to the jury's sentencing decision. According to Juror F-3:

The main reason we didn't go for a life sentence was that we felt if he got a life sentence he would get paroled. The jury, as a whole, did not ever want him back on the street. He got 185 years plus death. We gave him three ninety-five year sentences. What we did—we gave him ninety-five years on each one instead of a life sentence on account of the parole possibility. The way the laws are written, I believe you gotta serve at least half. So, we knew if we gave him that, then he would never get out anyway. And the judge gave him exactly the way we brought it out, too.

None of the jurors interviewed from Case F thought that the defendant would serve more than ten years if he received a life sentence.

Jurors F-5 and F-3 cited the brutality of the crime as the primary reason that they voted for death. Juror F-4 said that she made her guilt and punishment decisions together, on the basis of similar considerations. Thus, the cross-over juror's reasoning for switching to a death sentence was corroborated by other jurors. The cross-over juror, however, was the only one who believed that a guilty verdict (on the capital crime) automatically led to a death sentence.⁵⁵

54. Juror F-4 mentioned that some of the jurors were afraid of the defendant. It is intriguing that Juror F-4's description of the jurors she believed were afraid of the defendant comports well with her description of the jurors who were reluctant to vote for death. In describing why some jurors were afraid of the defendant, Juror F-4 said:

Well, [the defendant] would look over at us sometimes and everything and then when we would go back, when, every time we'd get breaks or anything and [the jurors] would be talking, "Did you see, he looked at us." Oh . . . I thought, well just look back at him. I don't know why they were scared of him in general. Because of what we had seen in court I guess. If such a reported fear actually existed, it seems plausible that it was easier for the majority to persuade the reluctant jurors to vote for death.

55. This is not to say that the other jurors understood the judge's instructions correctly. For example, Jurors F-4 and F-5 erroneously believed that all jurors had to agree on a mitigating circumstance in order for it to be considered by the jury in its sentencing decision. See *Mills v. Maryland*, 486 U.S. 367 (1988) (holding unconstitutional Maryland's requirement that determinations

Although the jurors' accounts of the sentencing deliberation are not riddled with conflict, one juror's comment suggests that the reluctant jurors may have been pressured to change their votes. When asked about the jurors who were reluctant to vote for death, Juror F-3 explained: "One or two kind of balked a little bit but when we explained the testimony they went right along. *We had to clarify and put it into words they could understand* (emphasis added)." Regrettably, there is no explanation of how this was accomplished.

Juror F-1, the cross-over, focused substantially more on the issue of responsibility than did any of the other jurors who were interviewed. Jurors F-3 and F-4, however, ranked the law as most responsible for the defendant's punishment. Juror F-5 viewed the jury as most responsible for the defendant's sentence, but ranked the judge as more responsible than the individual juror. The jurors on this case evidently believed that they were not personally responsible for the sentence. In fact, Juror F-3 agreed with the cross-over's declaration that the jury's sentencing decision was merely a recommendation. As Juror F-3 said: "The judge explained to us that as a jury all we did was recommend. He was the one that would make the final decision."⁵⁶

of mitigating and aggravating circumstances be unanimous); *see also* McKoy v. North Carolina, 494 U.S. 433 (1990) (holding North Carolina's mandatory requirement unconstitutional under the *Mills* standard); James Luginbuhl, *Comprehension of Judge's Instructions in the Penalty Phase of a Capital Trial: Focus on Mitigating Circumstances*, 16 LAW & HUM. BEHAVIOR 203, 215-17 (1992); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995).

56. Juror F-2's interview responses are not discussed in the text due to a fascinating discovery: Juror F-2 claimed that the jury voted for life. This is the second juror I have discovered who served on a death penalty case and incorrectly believed that the jury voted for life. Subsequent analysis will focus on these jurors. Interestingly, the remainder of the interviews with these jurors are not noticeably less reliable than those of the other jurors interviewed about their respective cases.

Juror F-2's explanation of the jury's sentencing decision warrants mention. As will become evident, Juror F-2 recounted the exact number of years the jury set for the non-capital crimes committed by the defendant:

We went around the room. And, each person said what they wanted to impose upon him. And there were probably eight out of the twelve that wanted the death penalty. Okay. Three of us would have probably went along with the death penalty, me and two others. But there was one young lady, there was one lady there that was, no, she didn't want to give him the death penalty. So, what we did was we all talked about the evidence and things some more. And then we went around the room again. By that time we was probably two of the twelve that didn't want to give him the death penalty. And I was one of those two. [The lady referred to above] was the other. So, we talked about it some more. It was getting pretty late, really. Then they decided to come down to where we were. [Because] we talked about that since [the defendant] was 50, 52 years old, that if we impose 95 years on him, he could not, he'd have to serve 45 years even before he could get out the door, *even before* he'd come up for parole, he'd have to serve 45 years. And, at that rate, he'd be 97 years old, or thereabouts. At 97 years old he's not going to hurt a flea. So, we took another look at what we could impose because that one line had, had ah, life. But, if you gave a person life, they didn't have life without parole, it just had life. If you gave a person life, then in eight years the person could apply for parole. So, we didn't do it like that. We decided that ah, the third time around everybody decided not to give him the death penalty . . . So, he's going to spend the rest of his life in jail anyway. If he escapes, somebody's gonna kill him. So what the heck.

Thus, Juror F-2 is convinced that she, along with another juror, was successful in holding out for life.

Another factor that comes across in Juror F-2's description of the jury's sentencing decision is that her preference for a life sentence was due to personal reasons and not any mitigating circumstance or support for the defendant. When asked for the strongest factors opposing a death sentence, Juror F-2 explained:

b. Case G

The facts of Case G are similar to those of Case F. The defendant worked for the victim, whom he killed when the victim refused to give him additional money. The crime was a death-eligible offense because the defendant robbed the victim's home.

The second life-to-death cross-over (Juror G-1) shared some of the same sentiments as the life-to-death cross-over in Case F. In particular, Juror G-1 also expressed what could be considered sympathy for the defendant. In fact, when asked if he found the defendant "likable as a person," Juror G-1 said, "He had good appearance, in a way, yes, strangely enough." Juror G-1 also expressed sympathy for the defendant's family and even acknowledged that he had placed himself in the shoes of the defendant's family members: "Perhaps I imagined what it would be like to be in a family with someone who was accused of a capital crime. How would you react if your son was accused of a capital crime?"

The life-to-death cross-overs in Case F and Case G were also similar with respect to their perceptions that the law requires jurors to decide on the sentence without regard to their personal views. As Juror G-1 noted when asked to recall the judge's sentencing instructions:

[The judge told us] that we were to make our decision on the basis of his instructions and the law, not what we felt, not what we thought ought to be, but what we were constrained to do by the instructions he gave us, which he told us was the law of this state. That we had these specific options, and once the verdict was in, that a verdict of guilty for that type of crime had these specific options, and that we had to go with those guidelines and that our personal opinions of the law were not to come into play. If we thought it was a just law, or an unjust law, that was not to matter, or our emotions didn't matter. We were to make the decision according to his instructions, as to what the law said.

Hence, both life-to-death cross-overs agreed that their task was to determine the sentence irrespective of their personal opinions.

However, Juror G-1 appears to have had substantially more trouble distinguishing between his personal views and his perceptions of what the law requires than did the life-to-death cross-over in Case F. At the end of a series of questions asking the juror how important each of the considerations was to his personal sentencing decision, the interviewer said, "On the question 'desire to apply the law correctly,' you said 'fairly important,' but you sort of grimaced when you said it." Juror G-1 then responded:

I didn't see any real need to take the man's life, you know. One person was dead. Why should I? A life is not mine to give, and it's not mine to take. I mean, if I can give you some blood to save your life, I'll give you some blood. But I don't think a life is mine to take; I think that's strictly to the good Lord and let it go at that.

Hence, religion again emerged as an important factor in a juror's sentencing decision. Ironically, Juror F-2 claims that one of the jurors in Case F was a preacher who was in favor of a death sentence: "There's one thing ironic in there is that we had a preacher in there with us, and he was willing to impose the death penalty on the guy."

Well again, I guess what is legal is not always ethical and moral. It should be, and I think it usually is, but it is *not* always (emphasis added). Again, we're dealing with a play of personal convictions, and emotions, and all that. Yes, you want to see the law obeyed, ah, but you're not trying to be vengeful for instance. And if you feel the law is not correct, of course, there's just an interplay of feelings, and emotions, and instructions that come into play in this. Maybe not with every juror, but there was with me. And, I understood that we were to follow the law and not judge whether we felt the law was correct or not. But, yet, at the same time, perhaps you can't always do that. I don't know.

One major distinction between the life-to-death cross-overs in Case F and Case G is that Juror G-1 acknowledged that the jury was faced with sentencing options; he did not believe that a determination of guilt in a capital case necessarily meant that the defendant would be sentenced to death. In fact, when asked whether the jury talked during guilt deliberations about whether the defendant would, or should, get the death penalty, Juror G-1 responded: "Perhaps some, but that was pretty much separate when we decided the penalty phase. So, really, we stuck pretty much to the guilt, guilty and not guilty aspect of it. Pretty objective on that."

Another issue on which the two life-to-death cross-overs differ is that Juror G-1 never explicitly described himself as an opponent of capital punishment. Rather, he said, "I guess I am reluctantly in favor of the death penalty, enough to have gone ahead and voted in favor of it in this case. Had I not been, I don't believe I ever would have been on the jury in the first place."

Juror G-1 also gave serious thought to the manner in which he was selected to serve as a juror. He was very precise in his recollection of the determining question that rendered him a qualified juror: "That was a struggle also. The judge's question in chambers during jury selection was 'Could you *consider* capital punishment?' If he had said, 'Would you *vote* for capital punishment?' I would have probably disqualified myself at that point, but I could consider it."

Although Juror G-1 agreed to consider capital punishment, he still expressed tremendous conflict in reaching his decision to sentence the defendant to death. Juror G-1 manifested this conflict by drawing a distinction between his personal impressions of the defendant and those he garnered through the evidence. Juror G-1 verbalized this distinction eloquently when asked how well he thought the phrase "dangerous to other people" described the defendant:

My impressions of him, just observing, I would say not well. But, of course, the facts, speaking from intellectual observation as opposed to emotional observation [pause] I hate to back up, are we speaking, there's a dichotomy of feeling here. Are we speaking as a result of the trial, of the evidence that I heard and had to decide upon, or just my general impressions of him, seeing him, running into him in the corridor, and all those, and that sort of thing?

The interviewer responded, "It would be more like if you were to talk to somebody about the case, how would you describe him?" Juror G-1 continued:

Okay, [dangerous to others describes the defendant] very well, based on testimony. It's just strange. You'd have a break and he'd use the same restroom as you would and he'd speak. Of course, he may have been trying to sway a juror, I don't know. After the trial I ran into people who went to high school with the fella. They said, "You know, he seemed to be a good guy in high school. I'd have never thought he'd of done that." Also, after the trial you learn that he had been suspected in another murder case before the policemen were able to get enough evidence on him. So, my impressions of him, just emotional, as a person to run into him and to hear people who knew him as buddies in school, is that he was not a dangerous person. But obviously he is a dangerous person. I know I'm probably not helping your cause, but I have this dichotomy of thought here. Of course, I'm sure no defendant is going to try and appear dangerous in a courtroom.

Juror G-1, like the life-to-death cross-over in Case F, also stressed the issue of responsibility in deciding whether to vote for death. However, the two jurors' interpretations of responsibility could not be more divergent. Juror G-1 first brought up the issue of responsibility when he was asked to explain why he was initially reluctant to go along with the majority on the defendant's punishment. He stated: "Circumstantial evidence, and then ethical, personal, religious considerations. You know, I just, sentencing a man to death is an overwhelming responsibility, and uh, I had to view it in a moral and personal framework, and a spiritual and religious one." The interviewer then asked the juror to elaborate on the religious considerations he had mentioned:

Well, I guess it's just, is it right to take another person's life? Um, one man on the jury said, "Well, I couldn't pull the switch." Well, of course, if we sentence him to death, we're as responsible as the person who *does* pull the switch. Ah, so you have to really grapple with that and really grasp with that. Ah, um, in a very strict, objective perspective, I feel that scripture does not, that it does endorse capital punishment. But, emotionally, I still have trouble dealing with it. *I guess I just take the responsibility very seriously* (emphasis added).

Juror G-1 was also much more definite than the life-to-death cross-over in Case F in expressing his inclination that the defendant should be given a sentence of less than death. Juror G-1 acknowledged that he continued to believe that the defendant should receive a sentence of less than death well into the sentencing deliberations. In fact, Juror G-1 was, in effect, the last holdout for a sentence other than death. One must wonder what transpired during the jury's sentencing deliberations to convince this juror to vote for a sentence of death. Again, Juror G-1's own words best convey the answer.

Juror G-1 began recounting the sentencing deliberations by explaining a critical point of agreement among the jurors:

I think the overriding emotion or feeling among the jury was that he should not ever be out where he could harm other, cause harm to society again. In fact, we had to, according to the judge's instructions, give capital punishment and I think the next level of punishment was thirty years with, life with no parole for thirty years, which would have put him out on the streets, he was thirty-one, at the age of sixty-one. There were some of us who were willing to do that, only a couple of us, but the majority were not. So, we went back in to the judge and asked him, "Is there no other level

of punishment that could be imposed, specifically life with no chance of parole?" He simply said, "I've given you the only instructions I can give you by law." We had to go back in and make our decision. So, I think that was the overriding factor that we pretty much agreed that he shouldn't be allowed to be out where he could harm someone again.

Juror G-1 then elaborated on why some of the other jurors were uncertain about parole after thirty years:

The main thing would be whether the possibility of parole after thirty years was, well, from some people's point of view, a *severe* enough punishment, or whether it would assure society that they were safe from the man. A lot of people felt that at sixty, sixty-one, he might get out of prison even more hardened than when he went in; he would still be dangerous when he came out, and there would be a very *real* possibility of him getting paroled.

The interviewer then asked Juror G-1: "In the process of getting to unanimity, what sorts of things seemed to shift the dissenters over to capital punishment?" Juror G-1 responded:

I would think the convincing of some of the jurors that yes, this man would still be dangerous if he gets out of prison at age sixty-one. I think that without a doubt, if the jury could've been assured that he would be given life without any possibility of parole, the jury would've voted to do that. But, that seemed not to be an option. So, it seemed that one by one the jurors, the four of us, were convinced that capital punishment was the only alternative. Such things were mentioned as, "well, the law requires an appeal." You could fall back on that I suppose. It finally got down to another [juror] and myself holding out for the life with no parole for thirty years. I gradually came to see that, I don't mean this to be vain at all, I knew that if I changed my mind, [she] would change [hers]. I didn't want to influence [her] one way or the other. At the same time, I felt the jury had deliberated honestly, and I did not want it to be a, I didn't know whether it could become a hung jury on the penalty phase of the trial or not. So, it kind of gradually came down to that. And, finally, I guess I collapsed on that, and when I did, [she] did also. So, we reach a unanimous verdict. It may have been a contest of wills, I don't know.

Later in the interview, when asked why he changed his vote, Juror G-1 highlighted the same themes:

I guess the fact that I did not want him to create harm in society again, and also, I felt the jury had done as good a job as any jury probably would. I didn't know whether it could go back to a retrial or not. Again, it was a combination of things. It was an awareness that it would be, it was an awareness that it would be appealed, appeals mandated by law. If it had not been appealed, if I had not been aware that there would be a necessary appeal, I might *not* have changed my mind.

This comment again demonstrates that Juror G-1 came to terms with his decision by falling back on the law.

Three other jurors who served in Case G were also interviewed, one of whom (Juror G-4) was undecided about the appropriate sentence. Juror G-4 had no difficulty acknowledging the existence of aggravating factors, but she never mentioned them in relation to why she ultimately voted for death. Instead, Juror G-4's reluctance to impose the death penalty was demonstrated

by her personal discomfort about being asked to decide whether a person deserves to die: "Very traumatic. Who am I to sentence to death?" Juror G-4 did not appear to suddenly realize that death was the appropriate sentence, but instead changed her penalty preference as a result of concerns over parole eligibility and her belief that the defendant would never actually be executed: "Other jurors told [me] that [the execution] probably wouldn't be carried out in [my] lifetime anyway, and probably won't." Moreover, Juror G-4 appears to have accepted the legitimacy of her role in deciding for death by looking to the other jurors: "If eleven others agree, I can too."

Juror G-1's recognition of the importance of parole eligibility to the jury's sentencing decision was echoed by the other jurors from Case G. As Juror G-3 mentioned, "No one wanted to be responsible for imposing [the] death penalty, but in the end, [we] didn't want him on the street and [the death penalty] was [the] *only* choice that guaranteed that." In fact, Juror G-3 claims to have favored a death sentence just prior to the penalty deliberations, yet his first vote was for life. Juror G-3 was reluctant to vote for death because, in his words, "[I] just had a hard time making the decision whether somebody was going to live or die." When asked what caused him to change his vote for death, Juror G-3 succinctly responded: "The fact that he could be paroled in [a] relatively short time." When asked how much time he thought the defendant would serve in prison if given a life sentence, Juror G-3 said "two to three years," and "probably not more than ten" years if he received a sentence of life without the possibility of parole for twenty-five years.

The responses of Juror G-2, who consistently supported a death sentence, also focused on the importance of parole eligibility to his sentencing decision. When asked about his penalty preference before the start of the sentencing deliberations, Juror G-2 responded: "I had only two in my mind. It would either be the death sentence or, if we couldn't come to that, then life without parole, which there is no such thing in the state of Kentucky." Juror G-2 further explained his dissatisfaction with that fact when asked about the judge's instructions. Specifically, when asked if he had any difficulty understanding or following the judge's sentencing instructions, Juror G-2 said: "No, I only wish that Kentucky did have a life without chance of parole option, which it does not have."

Juror G-2, like the cross-over (Juror G-1), seemed to find comfort in the fact that their jury's decision to impose the death penalty would be appealed: "The judge did tell us that there is an automatic appeal attached to any death sentence. I don't know where, but someone else would be taking a look at this." In fact, Juror G-4 was the only juror interviewed in Case G who ranked the jury as more responsible for the defendant's punishment than the law. Interestingly, however, Juror G-4 ranked the law as more responsible than the individual juror.

There is little doubt that the jury in Case G was far from unanimous when it began its sentencing deliberations. Like those juries previously discussed, the jury's discussion focused on personal beliefs—not an examination of aggravating and mitigating circumstances. Unlike some of the other juries,

however, the sentencing deliberations in Case G do not appear to have been marked by any hostility. One possible reason for this is that there were several jurors who initially favored a death sentence and several other jurors who initially favored a sentence other than death. Moreover, three of the four jurors who were interviewed acknowledged a reluctance to vote for death. All of the jurors interviewed in Case G agreed that the jurors were "friendly and respectful to one another." In fact, a consistent theme throughout all the interviews in this case was admiration for the jury. For instance, Juror G-2, who consistently favored a death sentence, described the jury as follows:

The jury was very, very considerate of each other. Very concise. Did not get frustrated or emotional or anything else over somebody holding out. There was no calling of names. Never having served on a jury before, all I know is what you see on TV where they might get furious. Maybe they never do, but I can imagine sometimes they would. This was a very calm and collected and considerate group of people.

Only Juror G-4 expressed concern about how the other jurors viewed her because of her reluctance to vote for death: "During some part [of the sentencing deliberations] the other jurors probably felt I was a horse's ass, but I just went with my conscience." None of the other jurors corroborated her sentiment.

Regardless of their generally positive view of the jury, none of the jurors who were interviewed claimed that they would welcome the opportunity to serve on another death penalty case. Jurors G-2 and G-3 said they would "do so reluctantly," whereas Jurors G-1 and G-4 said they would "try to get out of it."

Religion is the final aspect which appears to have been important to the sentencing deliberations in Case G. Three of the four jurors interviewed in Case G indicated that they attend religious services more than once a week. All four jurors acknowledged that their religious beliefs had an impact on their decisions. As Juror G-2 said, "As a part of me, they had to play a part." Beyond having a personal impact, religion seems to have been an overt component of the jury's sentencing deliberations. For instance, Juror G-2 described the jury's road to unanimity as follows:

There were about four in the beginning who were not sure. Not that they were against [the death penalty], but they were not sure. Then as we talked on and went over it one by one, they all came around but two. Everybody was very kind and very considerate. I admire that jury very much. You're getting tired and so forth, but nobody pressured anyone. Nobody swayed to the lesser; people were going toward the more severe punishment. We gradually got down to [Juror G-1], and [he] asked for some time and we all *prayed together* that whatever would be would be the right, you know, [punishment] (emphasis added). It took a long time while we went back over and reviewed everything to make sure. We all respected each other and their opinion.

Thus, prayer was a comfort to the jurors in reaching their decision to sentence the defendant to death. This gives new meaning to the term "guided discretion."

c. Conclusions Regarding Life-to-Death Cross-Overs

In sum, what do these interview responses reveal about these life-to-death cross-overs? The most obvious indication is that their reluctance to vote for a sentence of death was based on personal beliefs, not mitigating factors. If this finding is true for other jurors who express a reluctance to vote for death, then the underlying premise of the Supreme Court's endorsement of guided discretion statutes as the means to curtail the arbitrariness in capital sentencing is not supported.

Another tentative conclusion that can be drawn from the jurors' responses presented in this section is that the Court's concern over guilt nullifiers is unwarranted. Neither of the two life-to-death cross-overs who were interviewed expressed any reluctance to vote for guilt, although they initially favored a life sentence. Juror F-1 claimed that the first vote on guilt, after substantial discussion, was unanimous.

One positive conclusion that can be drawn from the jurors' responses is that the ideas advanced by the Supreme Court in *Wainwright v. Witt*⁵⁷ appear to be operating in the manner that the Court intended. Both of the life-to-death cross-overs expressed reluctance to vote for death. Yet, at the same time, they were able to overcome their personal opposition and follow the law. The fact remains, however, that their interpretation of the judges' sentencing instructions appears to have been faulty. In particular, at no time during the interviews of the two life-to-death cross-overs did they allude to anything resembling the *Lockett* Court's broad interpretation of the mitigating circumstances to be considered by capital jurors.⁵⁸ Thus, it seems as though the life-to-death cross-over jurors thought that the law precluded them from evaluating the very mitigating factors that should have been guiding their sentencing decisions, as determined by the Court in *Gregg*.

CONCLUSION

The evidence presented in this Article supports the conclusion that guided discretion statutes do not operate in the manner predicted by the Supreme Court in *Gregg*. The data reveal quite dramatically that although capital cases may be conducted as bifurcated proceedings, the majority of jurors reach their decisions about guilt and punishment at the same time—prior to the penalty phase of the trial. Of course, this finding runs counter to the *Gregg* Court's

57. 469 U.S. 412 (1985). The juror-eligibility standard established in *Witt* mandates that prospective jurors whose views would "prevent or substantially impair the performance of [their duties] as a juror in accordance with [their] instructions and [their] Oath" may be excluded for cause. *Id.* at 850.

58. The *Lockett* Court held:

We are now faced with those questions and we conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Lockett v. Ohio, 438 U.S. 586, 604 (1977) (emphasis in original) (footnotes omitted).

requirement that guilt and punishment decisions of capital jurors be decided separately.

The finding that guilt and penalty decisions tend to be made concurrently—prior to the penalty phase of the trial—also precludes capital jurors from basing their sentencing decisions on an evaluation of aggravating and mitigating circumstances. Rather, when consensus is lacking at the outset of the sentencing deliberations, jurors attempt to negotiate a sentence that is amenable to all. The primary concerns, as expressed by the juror interviews discussed in this Article, are the desire to avoid a hung jury and the fear of the defendant's early release from prison, neither of which are incorporated in the statutory provisions that theoretically should guide capital jurors in their sentencing decisions. Thus, a second provision of guided discretion statutes appears not to be functioning in actual capital cases.

The Court in *Gregg* endorsed guided discretion statutes as the means to curtail the arbitrariness of capital sentencing. The results presented in this Article support the conclusion that two of the three provisions of guided discretion statutes are not operating in the manner anticipated by the *Gregg* Court. Hence, it is doubtful that guided discretion statutes have done much to eliminate the arbitrariness of capital sentencing, especially if the findings of this study hold true for capital jurors in other states.