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EXAMINING JURORS' DISCURSIVE EXCHANGES RELATED TO MITIGATING FACTORS DURING CAPITAL JURY DELIBERATIONS

by

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A dissertation submitted to the Graduate Faculty in Psychology
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Abstract

EXAMINING JURORS' DISCURSIVE EXCHANGES RELATED TO MITIGATING FACTORS DURING CAPITAL JURY DELIBERATIONS

By

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Adviser: Professor Michelle Fine

This dissertation investigates the extent to which capital juries consider mitigating factors during their sentencing deliberations, and the extent to which capital jurors assist each other with the sentencing task. This research is a secondary analysis of data collected by Patry (2001), a fully-crossed 2x2x2x2x2 experiment investigating the effects of sentencing instructions on capital jury decision making. The case stimulus was based on Buchanan v. Angelone (1998). Trial manipulations included the presence or absence of a history of emotional abuse, heinousness of the crime, prior criminal record, pattern or revised Virginia sentencing instructions, which included or not, a list of case specific mitigators. In the present research, the videotaped deliberations of 108 mock juries (623 mock jurors) from Patry (2001) were transcribed. Juror statements were coded according to a coding scheme designed to capture the extent to which jurors discussed mitigators, converted mitigators into aggravators and assisted fellow jurors in the sentencing task. History of emotional abuse and the list of case specific mitigators did not increase the frequency with which juries discussed mitigators. Dispositional mitigators were discussed more frequently in a manner disfavoring the defendant. Aggravators were discussed with the same frequency when heinousness and prior criminal record were present and absent. Conversion of mitigators into aggravators accounted for less than 1%

of all statements. Discussion of inconsistency of mitigators was significantly correlated with the discussion of disfavoring dispositional mitigators. Juror assistance accounted for less than 1% of all coded statements. Juror understanding of instructions and mitigation was coded significantly more often in the revised instruction condition than in the pattern instruction condition. Heinousness of the crime was a reliable predictor of jury sentences. The implications are significant for capital jury decision making and for the legal system in its pursuit of constitutional death penalty statutes.

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Chapter 1

Introduction

In typical criminal trials, juries are asked to make decisions pertaining to the guilt of the defendant. In capital trials, juries are asked to determine guilt and in some states, juries are also asked to determine the sentence of the defendant in a separate sentencing phase of the trial. In this separate phase, it is common for the prosecution to present to the jury aggravating factors such as the heinousness of the crime, in support of a death sentence. It is also common for the defense to present mitigating factors, such as childhood abuse suffered by the defendant, arguing that a death sentence is not the appropriate punishment for this defendant. Scholars have argued that the consideration of mitigating factors is a challenge to juries in dealing with this aspect of capital sentencing (Bowers, 1995; Haney, 1995; Sontag, 1990).

The present study focused specifically on how juries reach their sentencing decisions by analyzing mock jury sentencing deliberations. The study is a secondary analysis based on data gathered for a separate project focusing on the effects of legal sentencing instructions given to jurors (Patry, 2001). The ways in which juries treat mitigating factors, how they discuss them during their deliberations and whether the discussion of mitigating factors may be related to jury life or death sentences was explored. The study also explored whether fellow jurors assist each other when misunderstanding about the legal instructions and the concept of mitigation arise during the deliberations. To contextualize the current research questions, the structure of today's capital punishment system is first examined.

The structure of the American contemporary capital jury system

Capital juries exercised complete discretion in their sentencing decisions prior to the U. S. Supreme Court decision in Furman v. Georgia (1972). In Furman, the Court held that "juries were imposing the death penalty in an arbitrary and capricious manner in violation of the Eighth Amendment's prohibition against 'cruel and unusual punishment'" (pp. 309-310). That is, the Court found capital juries were reaching sentencing decisions unconstitutionally, resulting in the abolition of the death penalty for a short period. In response to Furman, various states developed new statutes intended to resolve the issues of arbitrariness and capriciousness, leading the U. S. Supreme Court to deliver five death penalty decisions and to set the stage for the contemporary system of capital punishment.[1]

The U. S. Supreme Court was presented with different capital statutes, each aimed at addressing the issues raised in Furman v. Georgia (1972). North Carolina proposed, for example, to mandate capital punishment for those convicted of capital crimes as a way to eliminate jury discretion. The U. S. Supreme Court held this practice to be unconstitutional, and ruled that because "death is different" from other punishments, the Eighth Amendment requires "individualized treatment" in capital sentencing and proscribes death sentences predetermined by law (Woodson v. North Carolina, pp. 303-04). Other states sought to limit the sentencer's discretion by providing sentencing guidelines. In Gregg v. Georgia (1976), Jurek v. Texas (1976) and Proffitt v. Florida (1976), consolidated in Gregg, the U. S. Supreme Court sanctioned such guidelines by endorsing "guided discretion" statutes.

The basic structure of today's discretionary statutes emerged through legal trial and error, and consists of four key reforms: 1) a statutory classification of death-eligible murders, 2) the bifurcation of capital trials into guilt and penalty phases, 3) separate

[1] Gregg v. Georgia, 428 U. S. 153 (1976), Proffitt v. Florida, 428 U. S. 242 (1976), Jurek v. Texas, 428 U. S. 262 (1976), Woodson v. North Carolina, 428 U. S. 280 (1976), Roberts v. Louisiana, 428 U. S. 325 (1976).

sentencing instructions, and 4) automatic or expedited review of the trial by state supreme courts. The first reform was developed to allow for the classification of some first degree murders in a separate category, punishable by death. The second reform was the bifurcation of capital trials, in which there are separate guilt and penalty phases, each with separate deliberations but typically with the same jury.[2] As part of the decision making process, two tasks are required of the sentencer in capital cases; a factfinding task, which constitutes the determination of guilt, and a sentencing task, which constitutes the determination of punishment based on aggravators and mitigators. The sentencing phase of a capital trial was instated to broaden the focus of the sentencing phase beyond the issues presented in the guilt phase (Haney, 1995). Given the bifurcation of capital trials, separate sentencing instructions were also introduced as a reform. These separate instructions are intended to guide the jury's discretion in sentencing capital defendants.

The fourth reform guarantees capital defendants automatic appellate review of convictions and sentence. The reform also includes the issue of proportionality review, a practice that helps the state to identify and reduce sentencing disparities. Proportionality reviews allow the state appellate court to compare the sentence in the case under review with similar cases within the state, to determine if it is disproportionate.[3]

In addition to the reforms, capital jurors in post-Furman trials are presented typically with aggravating and mitigating factors during the penalty phase. Aggravating circumstances, such as the heinousness of a crime, are factors that support the execution of a

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[2] Some states commit juries to determine guilt and punishment, other states commit a judge/jury combination to determine the outcomes of each phase, but this may change given the recent U. S. Supreme Court decision in Ring v. Arizona (2002), in which the Court held that juries must undertake the task of factfinding in capital cases, not judges. This case is further discussed below.

[3] For a discussion of inherent, comparative and specific proportionality reviews of sentences, see Mandery (2002).

defendant. Mitigating circumstances, such as mental illness or child abuse, are factors that argue against a penalty of death, subject to interpretation by each state. The statutes must allow for the consideration of mitigating factors as part of an individualized treatment of capital defendants. Extending the notion of individualized treatment and because "death is different," the U. S. Supreme Court ruled that jurors could consider any mitigating factor, not just statutory mitigators (Lockett v. Ohio, 1978, pp. 604-605). Depending on the type of discretionary statute, jurors are instructed to consider, weigh, determine or answer specific questions related to the aggravators and mitigators presented in the penalty phase.

Three types of discretionary statutes exist in contemporary capital sentencing. Georgia, for example, has a "threshold" discretionary statute, requiring jurors to find at least one aggravating factor beyond a reasonable doubt from its specified list of aggravators in order to set the punishment at death. Florida has a "balancing" discretionary statute, asking jurors to weigh aggravating and mitigating circumstances. Texas has a "directed" statute, asking juries to respond to specific questions before rendering the sentencing decision.[4] Regardless of the type of statute, capital juries are required to find at least one aggravating circumstance if the death penalty is to be imposed by the state. In most states, jurors are required to weigh aggravating and mitigating circumstances (Bowers, 1995).

Factors undermining the safeguards against arbitrary decisions

The various statutes are intended to shape the sentencing decision making process, but certain factors undermine their effectiveness in doing so (Bowers, 1995; Geimer, 1990; Haney, Patry, 2001; Sontag & Costanzo, 1994; Wiener, Pritchard & Weston, 1995). For

[4] In Texas and states that have adopted similar discretionary statutes, the imposition of a life or death sentence depends on three schemes: the future dangerousness of the defendant, the defendant's intent to kill or the defendant's level of responsibility of the victim's death, and the existence of mitigating factors, which would warrant a life sentence (as cited in Bowers, 1995).

example, jury sentencing instructions may weaken the statutes' safeguarding value against arbitrary lethality (Patry, 2001; Wiener, Pritchard & Weston, 1995; Wiener et al., 2004). Another feature of capital statutes that may undermine their effectiveness in guiding capital juries' discretion is the absence of instructions related to the task of weighing aggravating and mitigating factors. Thus, even if the goal of discretionary statutes is to prevent arbitrary death penalties, in practice, particular features of the statutes, or lack thereof, may indeed obstruct juries from accomplishing their task.

One element that may also obstruct the goal of discretionary statutes is the absence of a definition of mitigation or special mitigation instructions. This issue was raised in Buchanan v. Angelone (1998), a case in which the defendant killed his father, his step-mother and two step-brothers, and was convicted of these capital crimes. Buchanan's defense presented the following case related mitigating factors at the sentencing phase: 1) his mother's early death from breast cancer, 2) his father's remarriage to his mother's cousin, 3) his father's and step-mother's attempts to prevent Buchanan from visiting his maternal relatives, 4) a psychiatrist's testimony that Buchanan was under extreme emotional duress at the time of the murders, and 5) Buchanan had no prior felony convictions.

The trial judge charged the jury with Virginia's pattern capital instructions, which stated among other things, that: "1) before the death penalty could be fixed, the prosecution had to prove beyond a reasonable doubt that the conduct was vile; 2) if the jury found that this condition was met, then the jury could fix the punishment at death, or if the jury believed from all the evidence that the death penalty was not justified, life imprisonment; 3) if the jury did not find the condition met, then the jury had to impose a life sentence" (Buchanan, p. 269). The judge refused, however, to add the defense's particular instructions

regarding mitigating factors; an instruction that would have defined and explained the concept of mitigation to the jury. The jury returned a death sentence. When the case reached the U. S. Supreme Court, the Court was faced with the task of deciding whether the Eighth Amendment requires that a capital jury be instructed on the concept of mitigation generally, or on specific mitigators.

To decide this issue, the U. S. Supreme Court used the standard of "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" (Boyde v. California, 1990). The Court held that the Buchanan jury "did not violate these constitutional requirements" (Buchanan v. Angelone, 1998, p. 276). The Court argued that "the instruction did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on 'all the evidence', the instruction afforded jurors an opportunity to consider mitigating evidence" (Buchanan, p. 277). In other words, the Court found no requirement for a definition of mitigation, and decided that fuller, clearer explanations about mitigation would not assist the jury in its pursuit of justice. This opinion, however, is in opposition to case law requiring juries to hear all relevant mitigating factors, and to consider each mitigator during the sentencing deliberation. Jurors' ability to consider and weigh mitigators is undermined if they do not know what mitigators are and how they should be applied in sentencing. It is as if jurors are asked to follow instructions on how to reach a decision, but they are given the instructions in another language.[5] Thus, for capital juries to accomplish their sentencing task, including considering and weighing mitigators, one noted death penalty scholar (Haney, 1995) argued that juries ought to be given

[5] See Justice Breyer's dissenting opinion in Buchanan v. Angelone (1998).

explanations to these concepts, particularly since jurors do not often experience such concepts in mundane activities.

While there are numerous variations among discretionary statutes and procedural reforms, most statutes require the determination of three issues related to factfinding and sentencing: 1) the existence of at least one aggravating factor, 2) the existence of mitigating factors of the defendant's character, record or offense, and 3) whether the aggravating factors outweigh the mitigating aspects of the case (Stevenson, 2003). Given some of the factors that undermine the effectiveness of statutes in guiding juries' discretion, however, can jurors navigate through legal intricacies associated with the capital sentencing task?

When juries decide the ultimate punishment

Of the 36 states with the death penalty since the reinstatement of the death penalty, 29 states committed juries to perform the most challenging civic task of sentencing someone to death.[6] The remaining nine states with capital punishment deferred the decision-making to a judge only or a hybrid sentencing scheme of judge and jury.[7] This led capital defendants to challenge certain provisions in various statutes related to the right to a jury as sentencing authority in a series of cases over the last 25 years.

Starting with Proffitt v. Florida (1976), and rationalizing similarly in Spaziano v. Florida (1984) and Walton v. Arizona (1990), the U. S. Supreme Court upheld the decision to limit the jury's role in sentencing the defendant to that of a recommendation, with a judge rendering the ultimate sentence decision. The Court declared that it "has never suggested

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[6] The federal government and the military also have death penalty statutes. New York and Kansas death penalty statutes have been deemed unconstitutional in 2004.

[7] Until Ring v. Arizona (2002), five states committed the tasks of factfinding and sentencing to a judge only. In four other states, the jury held an advisory role in sentencing and the judge made the ultimate sentence decision. This meant that judges could override jury sentence recommendations, even life recommendations. It is still not clear how the judges only and judge-jury statutes will hold against Ring in the future. See Ring v. Arizona (2002, pp. 2442-2443).

that jury sentencing is constitutionally required" (Proffitt, p. 252). Further, the Court declared that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases" (Proffitt, p. 252). Although the legal challenges to jury determination of sentence were distinct in each case, the U. S. Supreme Court stayed firm throughout the multiple decisions, upholding the statutory provisions limiting the role of the jury to a recommendation in capital sentencing until Ring v. Arizona (2002).

Arizona is one of the five states that commit factfinding and sentencing to a judge only. In Ring v. Arizona (2002), the U. S. Supreme Court overruled Walton v. Arizona (1990), which upheld that a jury was not a constitutional requirement for factfinding in a capital case.[8] The Court overruled Walton in Ring because it supposed Walton could not endure given the more recent non-capital decision in Apprendi v. New Jersey (2000). In Apprendi, the U. S. Supreme Court held that any evidence (beyond the defendant's potential for recidivism) serving as the basis for the imposition of a sentence harsher than the statutory maximum, must be decided by a jury upon proof beyond a reasonable doubt. Some states with judge only or hybrid judge/jury sentencing schemes such as Florida, however, argued that because death is the maximum penalty in a capital case, Apprendi does not apply to capital cases (Cochran, 2004). The Ring Court resolved the issue by remaining consistent with Apprendi and considered the constitutional requirement to commit a jury to the task of factfinding in a capital case. Therefore, the issue in Ring was whether the Sixth Amendment creates a right to a jury determination of aggravating

[8] See Harris v. Alabama, 513 U. S. 504 (1995), for statistics showing that a judge is more likely to give a death sentence than a jury, or is more likely to override juries' life sentences than death sentences.

factors that are "necessary for the imposition of a death penalty" and that "operate as 'the fundamental equivalent of an element of a greater offense'" (Apprendi, p. 494). The Ring ruling now guarantees a capital defendant the right to a jury determination of aggravation, contradicting death penalty schemes with judge only or judge/jury determination of aggravation.

In its ruling, the Court focused on the issue of whether the determination of aggravating factors should be conferred to a jury; it did not address whether a jury is a constitutional requirement for the two other determinative tasks of establishing the existence of mitigating factors and weighing the aggravating and mitigating aspects of the case. Although the Court did not address the latter two issues, it did exhibit a shift in its analysis of the role of the jury in sentencing determination since Walton v. Arizona (1990). Moreover, Justice Stevens who previously favored limiting the role of the jury in capital cases (Harris v. Alabama, 1995, dissenting opinion) shifted to the belief that juries more accurately reflect communal conscience than a judge when determining guilt and sentence. Legal scholars have stipulated that the Ring decision may open the door to greater consideration of the role of the jury in capital sentencing (Stevenson, 2003), leading one to wonder whether the process of death qualification will be more problematic than it already is for the legal system (i.e., temporal or economic costs of death-qualification, potential bias resulting from death-qualified jurors.)

Death-qualification

In capital cases, jurors must be death-qualified, a process permitting removal or exclusion for cause of jurors whose attitudes toward the death penalty would preclude them from considering all sentencing options appropriately, including the death sentence

(Witherspoon v. Illinois, 1968).[9] Today, the law requires potential capital jurors to be death qualified under Wainright v. Witt (1985). In sum, a prospective capital juror can be removed for cause if his attitudes toward the death penalty "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (Wainright, p. 424).[10] One relevant question here is whether the death-qualification process itself tends to bias jurors by rendering jurors more conviction-prone.

In Lockhart v. McCree (1986), evidence demonstrating a biasing effect of death-qualification on jurors' decisions was presented to the U. S. Supreme Court.[11] The Court rejected the evidence for a number of reasons including the studies framing the evidence of bias involved mock juries rather than real juries (Baldus, 1995). The Court ruled that bias within the process of death-qualification is without proof in real capital cases, reaffirming its previous decision in Wainright v. Witt, 1985.[12] Scholars have argued repeatedly however, the Wainright doctrine is unsuccessful in removing conviction-prone bias induced by the process of death-qualification (e.g., Haney, 1984; Haney, 1995; Neises & Dillehay, 1987).

If the trend in legal analysis continues to favor juries over judges in capital cases, there may be more demand on citizens to perform a task of challenging magnitude and

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[9] There are two ways jurors can be excluded from performing jury duty in civil and criminal cases. During the jury selection process, each party is permitted a specific number of peremptory challenges. These refer to the right of a party to challenge a juror without giving a reason for the challenge; see Batson v. Kentucky, 106 S. Ct. 1712 (1986). After exhausting all peremptory challenges, one is required to furnish a reason or cause affecting and concerning the ability of the juror to perform jury duty. For cause challenges are not limited like the peremptory challenges, and must be based on law and public policy, such as a juror's demonstrable biased or racist attitudes. In capital cases, potential jurors' attitudes regarding the death penalty are challenged during voir dire.

[10] Death qualification has been identified in psycho-legal research as a process tending to bias juries toward death sentences (e.g., Bowers, 1995; Ellsworth, 1988; Haney, 1984; Haney, 1995).

[11] The Lockhart v. McCree (1986) decision was much more complex than what is presented here; for the purpose of this dissertation, only the relevant issue was extracted from the decision. For a more detailed analysis of this opinion, see Haney (1995).

[12] It should be noted the Court held that even if the evidence about death-qualification bias was true, the decision would still disfavor Lockhart, see Lockhart v. McCree (1986).

more pressure on the legal system to address problematic issues related to death-qualification; a circumstance which calls for a look at the assumptions embedded in the capital jury system.

Legal assumptions regarding capital juries

Legal opinions often expose various assumptions made by the legal system concerning jury behavior and sentencing decisions. The assumptions discussed and challenged below are extracted from relevant U. S. Supreme Court holdings. For example, the Gregg (1976) plurality held that a jury must be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision" (Gregg, p. 192). This decision and subsequent others resulted in an approach to the death penalty involving the concept of guided discretion by means of aggravating and mitigating factors. Thus, one assumption associated with Gregg is that jurors can distinguish and categorize aggravating and mitigating factors.

In Lockett v. Ohio (1978), the court held that a jury can only consider statutory aggravators and is prohibited from considering any other evidence in aggravation, whereas individual jurors are not limited to statutory mitigators and can consider all evidence presented at trial in mitigation. The assumption, which derives from the Court's decision, is that jurors can distinguish the different domains from which aggravators and mitigators may be selected. Moreover, the Buchanan v. Angelone (1998) holding was that jurors do not require specific instructions regarding the concept of mitigation; the assumption being that they understand the concept of mitigation, and share the same definition of mitigation held

by the Court. Another assumption embedded in post-Furman statutes is that jurors can distinguish the different standards of proof required for aggravators and mitigators.[13]

The assumptions above carry with them a number of concerns associated with jury capital sentencing. One major concern is whether the assumptions, if wrong, lead to violations of a capital defendant's due process. Due process in criminal proceedings is deemed violated when procedural or substantive constitutional rights in legal processes work unfairly against the defendant. Even if the Eighth Amendment does not require perfect jury comprehension of legal instructions, guided discretion in post-Furman cases require, at the very least, that courts convey effectively to jurors how to proceed in capital sentencing. Three categories of assumptions and related concerns will be addressed and challenged with legal theory and research literature in the following sections, beginning with the all encompassing assumption - capital jurors understand the legal instructions given to them by the judge.

Assumptions related to capital jury comprehension of instructions

Researchers and legal theorists have argued that jurors are typically confused by the trial court's instructions about how to weigh aggravating factors against mitigating factors (Bowers, 1995; Geimer & Amsterdam, 1988; Haney, 1995; Luginbuhl & Howe, 1995). Some scholars have also argued that the prosecution's argument for death conveys to jurors that the formula for weighing the factors is nothing more than the subtraction of mitigators from aggravators (Bowers, 1995). In North Carolina, for example, jurors are instructed to "decide from all the evidence what value to give to each circumstance, and then weigh the aggravating circumstances, so valued, against the mitigating circumstances, so valued, and

[13] Aggravating factors must be determined beyond a reasonable doubt, whereas mitigating factors must be determined by a preponderance of the evidence.

finally determine whether the mitigating circumstances are insufficient to outweigh the aggravating circumstances" (as cited in Luginbuhl & Howe, 1995, p. 1174-75). If applied carefully, these instructions could well serve the jury in its decision making process. Such convoluted instructions however, undermine the fundamental role of moral judgment in the evaluation of mitigating factors (Luginbuhl and Howe, 1995). In addition, applying everyday decision making processes to decide a capital case further complicates the issue of weighing factors. Although various courts instruct jurors to weigh the related factors in the case and not to simply add up the number of aggravating and mitigating factors, a frequent everyday strategy in decision making is to evaluate the pros and cons of a matter and to side with the greater evidence (Tiersma, 1995). As a result, due process can be violated in capital sentencing decisions because of the parenthetical perplexity of judicial sentencing instructions (Haney, 1997; Stevenson, 2003; Tiersma, 1995).

Assumptions related to the terms aggravation and mitigation

To apply judicial sentencing instructions, jurors must understand the vocabulary used in the instructions. Bowers (1995), Tiersma (1995) and others have argued the legal terms "aggravation" and "mitigation" are unfamiliar and confusing to many jurors (Berkman, 1989; Geimer & Amsterdam, 1988; Haney, 1995; Sondheimer, 1990). In addition, "mitigation" is an uncommon term, used infrequently in spoken language, and "aggravation" has a different meaning in a forensic context than in everyday discourse (Tiersma, 1995). Lakoff (1986) explained that the term "aggravate" means to "annoy" or "irritate" in everyday discourse, whereas "aggravate" refers to something about the crime or the defendant that justifies sentencing the defendant to death. The legal system endorses the view, however, that the "aggravating or mitigating nature of any of the factors should be

self-evident to any reasonable person within the context of a particular case" (People v. Jackson, 1980, p. 264). Although some judges and attorneys have expressed that jurors must be provided with standards, descriptions or definitions if they are to determine which factors aggravate and which mitigate a capital crime (Sondheimer, 1990), the view from the legal standpoint suggests that jurors need not be provided with explicit instructions regarding the nature of aggravating and mitigating factors (Buchanan v. Angelone, 1998).

During typical sentencing phases, prosecutors present jurors with aggravating factors and associated provisional standards (i.e., unanimity requirement for finding an aggravator.) Defense attorneys then present jurors with mitigating factors and associated provisional standards (i.e., unanimity is not required to find a mitigator), at which point character witnesses and experts, such as mental health professionals, testify on behalf of the defendant. Some judges and attorneys believe the provision of standards related to mitigators should be supplied by the court, rather than defense attorneys, because defense attorneys have a hard time impressing on jurors the relevance and importance of mitigating factors in an evocative manner (Haney, 1995). If jurors do not comprehend the concept of mitigation and its function in sentencing decisions, it is likely that jurors will focus on issues presented during the guilt phase while deliberating the sentence (Haney, 1995; Sontag, 1990). In addition, because aggravating factors are characterized by more dramatic and concrete evidence, such as the heinousness of a crime, jurors are likely to focus on those factors rather than on mitigating factors (Geimer & Amsterdam, 1988; Haney, 1995). If so, due process may again be violated as death becomes the sentence of choice.

The legal assumption related to jurors' understanding of aggravating and mitigating factors goes beyond the mere understanding of vocabulary. The law also assumes that jurors

can distinguish between mitigators and aggravators. After interviewing numerous capital jurors for the Capital Jury Project (CJP), some researchers indicated that certain jurors reported having considered and weighed mitigating factors appropriately in their decision making process (Bentele & Bowers, 2001; Bowers, 1995; Luginbuhl & Howe, 1995).[14] Those same data, however, revealed that some jurors were mistakenly considering mitigating circumstances as aggravators (Berkman, 1989; Bowers, 1995; Haney, 1995; Sondheimer, 1990; Wiener, 2002). For instance, jurors can interpret a defendant' s mental illness, introduced as a mitigator by the defense to show reduced culpability, as making the defendant more likely to be dangerous in the future (i.e., an aggravator). As a result, jurors can erroneously weigh such a circumstance as an aggravator and vote for a death sentence.

In Zant v. Stephens (1983), the U. S. Supreme Court recognized the ambiguity related to some aggravators and mitigators when it held that mental illness could not be considered an aggravator because it would violate due process. In Penry v. Lynaugh (1989), the Court further recognized that certain mitigators, such as mental retardation, can lead to confusion with respect to the categorization of factors. Yet the Court did not prohibit the execution of mentally retarded individuals until recently, in Atkins v. Virginia (2002).[15] Despite the Atkins opinion, jurors may still erroneously weigh mitigators as aggravators, such as when jurors consider drug abuse to be aggravating because they perceive drug abuse as contributing to the defendant's future dangerousness. This perception of a mitigator can therefore result in a death sentence when life imprisonment might be the legitimate outcome. Perhaps the courts do not worry whether individual jurors may confuse or erroneously weigh

[14] For a complete review of the published work of the Capital Jury Project, see the consortium of articles in the 1995 Indiana Law Journal, 70, 1033-1270.

[15] This recent decision may have widespread implications for a number of statutory death sentencing schemes (see van Dulmen-Krantz, 2002).

mitigators and aggravators because the law relies generally on the notion that groups outperform individuals in the decision making process.

Assumptions associated with group behavior

The assumption that a group will outperform an individual is exposed in a number of legal decisions regarding the issue of jury size (e.g., Duncan v. Louisiana, 1968; People v. District, 1981; Williams v. Florida, 1970). The Sixth Amendment guarantees the right to a trial by an impartial jury to prevent governmental oppression and to guarantee fair and impartial determination of factual issues; the question is whether this constitutional right requires a specific number of jurors. Beginning with its decision in Duncan, in which the U.S. Supreme Court had the opportunity to consider the history of a 12-member jury and question the constitutionality requirement for a 12-member jury, the Court has rendered various decisions on the issue of jury size. Borrowing the words from Duncan, the Williams Court stated that although the size of the jury appears to have been "fixed generally at 12 [sometime in the 1300's], that particular feature of the jury system appears to have been a historical accident, [and is] unrelated to the great purpose which gave rise to the jury in the first place" (p. 89). Based on this constitutional analysis, the Williams Court deemed a 6-man jury constitutional; however the Court drew the line at six jurors in Colgrove v. Battin (1973) and in Ballew v. Georgia (1978) while "readily [admitting] that the Court [does not] discern a clear line between six members and five" (Ballew, p. 239).

Although there is no constitutional requirement for a 12-person panel in jury trials, including capital cases, the legal system still requires that a group of laypersons make the decision of guilt or sentencing (in states that require jury sentencing).[16] In People v. District

[16] In Colorado, a six-member jury can be impaneled for a felony case, but a 12-member jury is required in capital cases. This is not a constitutional requirement in all capital statutes.

(1981) for example, the Colorado Supreme Court considered the issue of jury size and determined that although the U. S. Supreme Court could not "discern a clear line between six and five members," the Colorado court could discern that "a jury of one as requested and ordered in this case is no jury at all" (p. 47).[17] The legal assumption here is that a group of jurors will be more effective than an individual juror; even if groups may suffer disadvantages such as group polarization and groupthink.[18]

The rationale for this notion is that individual biases are counterbalanced rendering the group more objective (Monahan & Walker, 1998). Additionally, recall of facts may be more accurate in group deliberations than by individuals. Thus a fundamental assumption underlying the jury system is the belief that the deliberation process may be more effective in the application of the law. This notion further implies that jurors assist each other when confusion or misapplication of the law to the case arises during the deliberation process. A comparison of group and individual decision making is not the goal here. Rather, evidence of juror assistance during the deliberation was recorded in the present analysis to test the assumption that jurors assist each other to achieve a better understanding or application of the law.

Jury determination of capital sentences is the sentencing scheme of choice in 75% of states with capital punishment. Additionally, Ring v. Arizona (2002) is a strong indication that the U. S. Supreme Court is considering placing an even greater responsibility on capital juries in determining sentences. Therefore it is imperative to

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[17] The issue of jury size has prompted much empirical research to study the effects of number of jury members on decision making. For a discussion related to research on jury size, see Saks (1977).
[18] Much social science research on group decision making has been gathered and various theories have been advanced in psychology to explain group behavior. See Monahan & Walker (1998) for a discussion of group behavior and how it relates to juries.

understand how juries make sentencing decisions, and to determine whether the legal assumptions embedded in contemporary capital punishment statutes are merely conjecture.

Background literature on jury decision making

Research on juror or jury decision making involves examining variables that might explain how individuals or groups reach verdicts. Studies have included procedural characteristics, such as jury size and jury instructions, to investigate potential effects of institutional parameters on juror decision making (e.g., Diamond & Levi, 1996; Eisenberg & Wells, 1993; Lieberman & Arndt, 2000; Luginbuhl & Howe, 1995; Patry, 2001; Saxton, 1998; Wiener, Pritchard & Weston, 1995; Wiener et al, 2004). Other studies have included participant characteristics such as juror demographics to see whether participant characteristics have any effect on verdicts and sentences. Moreover, defendant characteristics, such as defendant courtroom behavior, have been studied to elucidate verdict preferences (e.g., Cowan et al., 1984; Fisher, 1997; Hastie, Penrod & Pennington, 1983; Saks, 1997). Case characteristics, such as strength of the evidence or type of crime, have also been investigated as predictor variables for juror or jury decision making (e.g., Greene, 1988; Hans, 1998; Leippe, 1985). Deliberation characteristics, such as polling mechanisms or interpersonal influence, are also become part of the panoply of variables used to uncover how jurors and juries make decisions in criminal trials (e.g., Sandys & Dillehay, 1995; Tanford & Penrod, 1986). Because of the nature of the research questions addressed here, the most relevant literature to the present dissertation is based on procedural and participant characteristics.

Procedural characteristics: are jurors willing and able to follow the law?

To extend the earlier discussion on jury instructions and the legal assumptions associated with legal instructions, the following section presents empirical research on the topic of jury/juror comprehension of instructions conducted during the last four decades.

Research on jury instruction comprehension has included instructions about eyewitness testimony, reasonable doubt, and capital sentencing among others (e.g., Borgida & Park, 1988; Ellsworth & Reifman, 2000; Greene, 1988; Lieberman & Arndt, 2000; Lieberman & Sales, 1997). In their comprehensive review of jury decision making research spanning the last 45 years, Devine et al. (2001) revealed that "jurors have difficulty wading through the technical jargon, convoluted logic, and stilted structure that characterizes many pattern instructions" (p. 667). Pattern instructions are instructions adopted by state and federal courts that are required to be used in respective cases. Limiting instructions restrict what juries can and cannot do, such as the instruction to disregard a witness's statement. Researchers investigating limiting instructions demonstrated that these instructions are ineffective and may even increase the proscribed behavior (i.e., disregarding the witness's statement) (Devine et al., 2001).

In an attempt to remedy jurors' lack of instruction comprehension, researchers have tested the effects of revised instructions (e.g., Diamond & Levi, 1996; Greene, 1988; Hastie, Schkade & Payne, 1998; Patry, 2001; Saxton, 1998; Smith, 1990; 1991a; 1991b; 1993; Wiener, Pritchard & Weston, 1995). The results of such studies have indicated that juror comprehension increased modestly or not at all, whereas recall of revised instructions increased significantly. These findings suggest that recall of revised instructions may not aid in improving juror comprehension of such instructions. What

these findings fail to reveal is whether revised instructions facilitate the deliberative process, enough to promote an increase in efficient application of the law.

In addition to presenting jurors with revised instructions, investigators have tested the effects of linguistic principles consistent with lay persons' discourse compared to linguistic principles typically found in legal discourse (Diamond & Levi, 1996; Greene, 1988; Hastie et al., 1998; Saxton, 1998; Smith, 1990; 1991a; 1991b; 1993; Wiener et al., 1995). These studies revealed a beneficial effect on juror comprehension when affirmatives rather than double negatives were used in sets of revised instructions. Studies on jury instructions indicate a need for uncomplicated instructions with straightforward linguistic principles in order for jurors to better understand and recall their instructions (Devine et al.; Tiersma, 1995). In their critique of the Smith (1990; 1991a; 1991b; 1993) and Wiener et al. studies, however, English and Sales (1997) indicated that there is also a "critical need to determine if instructions have been rewritten effectively" (p. 400).[19]

A small body of empirical research has provided data related to how real capital jurors make sentencing decisions, and whether legal instructions adequately and sufficiently guide jurors in their discretion (Bowers, 1995; Bowers, Sandys & Steiner, 1998; Eisenberg & Wells, 1993; Luginbuhl & Howe, 1995; Sontag, 1990). In these studies, researchers interviewed real capital jurors to evaluate the process of sentencing decisions; they found that capital jury instructions are also problematic. For example, Sontag (1990) interviewed 30 California capital jurors and found that approximately 33% of those jurors focused their penalty phase deliberations on the crime itself in a way that

[19] Based on their results, Smith (1990; 1991a; 1991b; 1993) and Wiener et al. (1995) proposed a ceiling effect on juror comprehension of legal instructions, for which English and Sales (1997) blamed methodological flaws.

favored a death sentence. As was mentioned earlier, the penalty phase of a capital trial is to broaden the focus of the penalty phase beyond the issues presented in the guilt phase. Because California statutory guidelines do not indicate to jurors how to weigh the aggravating and mitigating factors, jurors in the Sontag (1990) study reported being confused about how to determine their sentencing choice. Content analyses of the interview transcripts revealed that the jurors resorted to discussing the crime itself as a way to determine the punishment. Moreover, jurors who opted for a death sentence reported discussing the mitigators as much as the jurors who opted for a life sentence in the same sample. However, analyses of the interview transcripts also revealed that death jurors converted or transformed the mitigators into aggravators (i.e., mental illness or drug abuse presented as mitigating factors are used as arguments for future dangerousness, an aggravating factor.) Based on these results, Haney (1995) appropriately argued that the legal concept of mitigation remains "a hopelessly abstract concept" for capital jurors (p. 1229).

Focusing on other aspects of judicial instructions, such as standard of proof, Luginbuhl and Howe (1995) conducted interviews with North Carolina capital jurors as part of the CJP. Based on their interviews, the researchers determined that less than 50% of the jurors in their study correctly understood that the standard of proof required for mitigating circumstances was a preponderance of evidence. Those jurors also poorly understood that unanimity was not required for such circumstances. In contrast, the jurors were most accurate with respect to questions regarding the standard of proof (i.e., reasonable doubt) and the requirement of unanimity associated with aggravating factors. Moreover, Luginbuhl and Howe (1995) determined that jurors poorly understood the

concepts of aggravation and mitigation and how to consider these concepts. Their study revealed that only 60% of the jurors in the sample considered all the appropriate mitigating factors. Luginbuhl and Howe (1995) concluded from their results that "capital sentencing instructions, which should provide an accurate and detailed road map to the jury's final destination, appear instead to provide many detours and roadblocks" (p.1180).

For their study, Eisenberg and Wells (1993) interviewed South Carolina capital jurors as part of the CJP. The researchers found that about 30% of jurors in cases resulting in life and death sentences incorrectly understood that the instructions required them to render a death sentence if there was evidence that the defendant would be dangerous in the future. Eisenberg and Wells (1993) argued that the instructions misled jurors about the basic features of the sentencing decision. The researchers further noted that failure to remedy jurors' misunderstanding of the law is in opposition to Furman v. Georgia (1972) and Gregg v. Georgia (1976), because misunderstanding the law can lead to imposing a sentence of death arbitrarily and capriciously.

Another CJP study revealed that jurors make premature decisions concerning the sentence (Bowers, Sandys & Steiner, 1998). Jurors are instructed to decide the matter of guilt following the guilt phase of the trial; but they are not to consider the punishment until the deliberation of the sentencing phase. Bowers et al. (1998), however, found that jurors do decide the punishment - or at least discuss the punishment - during the guilt phase, although technically such discussion is improper. From the studies relating to instruction comprehension discussed thus far, we can ascertain that jurors do not generally comprehend judicial instructions, but that even when they do understand them, they do not necessarily follow them (Hans, 1988).

Participant characteristics: Attitudes and attributions

One reason that jurors may not follow judicial instructions may be that they hold various beliefs and attitudes about the criminal justice system and the death penalty, and they apply these beliefs and attitudes in their decision making despite judicial instructions. Although the courts often assume that jurors are essentially tabula rasa because of procedures and safeguards embedded in the law (e.g., the safeguard against media influence on jurors), jurors enter the courtroom with their own beliefs and attitudes about myriad factors. The literature on attitudes and jury decision making reveals 30 years of research on the relationship between attitudes and verdict predilection (Devine et al., 2001; Goodman-Delahunty, Greene & Hsiao, 1998). One example of this type of research examines the relationship between attitudes on the death penalty and verdicts and sentences in capital cases.

Researchers in the field of capital jury decision making argue that juror attitudes about the death penalty are embedded in a constellation of other beliefs about the criminal justice system, such as attitudes about prosecutors, defense attorneys and witness credibility (Ellsworth, 1993). It is the constellation of attitudes that serves to predict verdicts and sentences rather than the attitude about the death penalty itself. For example, Goodman-Delahunty et al. (1998) found that jurors who held a pro-death penalty attitude inferred criminal intent from the defendant's actions when shown a videotaped murder of a store clerk, compared to jurors who opposed the death penalty. According to these researchers, the cluster of attitudes about the death penalty structures the inferences drawn by jurors when evaluating evidence. The relationship between attitude, verdict and sentence is not a direct relationship; jurors' attitudes are a kind of

cognitive steering apparatus on which they rely to evaluate evidence, perceive key players in the trial, deliberate with other jurors, and finally, render a decision. Moreover, these data provide additional explanation for the relationship between death-qualification and the tendency to convict and sentence to death.

Researchers investigating the role of attitudes about the death penalty have addressed the impact of the process of death qualification on verdict outcomes (e.g., Bernard & Dwyer, 1984; Cowan et al., 1984; Horowitz & Seguin, 1986).[20] One study, for example, revealed that death-qualified jurors were more likely to render a guilty verdict prior to and after deliberating, compared to excludable jurors (Cowan et al.) Moreover, the process of death qualification affects more than verdicts; it affects how jurors will recall evidence. In the Cowan et al. study, juries composed of death-qualified and excludable jurors better recalled the evidence of the case than juries composed solely of death-qualified jurors. Thus, attitudes about the death penalty reflected in the process of death-qualification affect various levels of jury decision making, including how jurors make attributions about a defendant's criminal actions.

Understanding how individuals characterize the causes of others' behaviors has been explained by the theory of attribution (Jones & Harris, 1967; Jones & Nisbett, 1972; Kelley, 1967). Social psychologists have researched causal attribution for over 50 years and have developed an extensive array of variables associated with making attributions (Jones & Harris, 1967; Jones & Nisbett, 1972; Kelley, 1972). We make judgments about other people's behaviors daily, and we often make these judgments relatively swiftly. In contrast, attempting to understand why others kill and attribute causes for such a behavior requires in depth information processing. Moreover, research on jurors' attitudes about

[20] Death qualification is discussed in the present thesis (p. 9).

the death penalty as a function of their viewpoints on punishment, such as retribution, deterrence and rehabilitation, fails to explain how jurors' attitudes originate. Hence, attribution theory is well suited for research on how capital jurors make sentencing decisions, and on whether capital jurors consider mitigating factors.

When capital jurors are asked to consider mitigating factors, they must be able and willing to consider dispositional and situational factors (Reid, 1999). Situational factors are external factors, whereas dispositional factors are internal to the individual whose behavior is being judged or determined. Mitigators can be represented as situational factors when they help the defense argue that the defendant is not inherently evil. Mitigators are used in such a context to argue that the defendant's social environment, perhaps characterized by poverty, abuse and neglect, fueled the defendant's criminal actions. Mitigators can also be represented by dispositional factors related to the defendant's character. For example, defendants who hold faithful or religious beliefs are presented as inherently good despite their crimes, arguing for the jury to show mercy on the individual by rendering a life sentence. The question is whether juries do consider situational and dispositional characteristics of the defendant and apply them in their evaluation of the defendant's criminal actions.

Social psychologists have demonstrated that individuals tend to attribute dispositional factors to explain others' negative behaviors, whereas individuals attribute situational factors when explaining their own negative behaviors. This cognitive process has been termed the fundamental attribution error, and has been investigated in various types of causal attribution studies (e.g., Gilbert & Malone, 1995; Jones & Harris, 1967; Jones & Nisbett, 1972; Leyens, Yzerbyt & Corneille, 1996; Ross, 1977). This line of

research has revealed that individuals tend to apply cognitive biases when attributing dispositional or situational causes for others' negative behaviors. Also, different attributional styles may impact the extent to which individuals will apply cognitive biases in their decision making processes (Lee & Seligman, 1997).

In relation to juror decision making, previous studies have shown that people who hold dispositional attributional styles believe that offenders are more culpable and deserving of punishments than do people who hold situational attributional styles (Carroll, 1978; Carroll, Perkowitz, Lurigio & Weaver, 1987; Grasmick & McGill, 1995; Young, 1991). Limited work has also been conducted on understanding attribution theory and attitudes toward the death penalty and punishment preferences (Cochran, Boots & Heide, 2003; Cullen, Clark, Cullen & Mathers, 1985; Ellsworth & Gross, 1994). In an attempt to expand the research on attitudes on the death penalty and attribution theory, Cochran et al. used attribution theory to explain jurors' degree of support for the death penalty for juveniles, the mentally ill, and the mentally retarded. After exposing their participants to different vignettes describing crime scenarios, participants were asked to make sentencing recommendations for the different types of offenders (i.e., juveniles, mentally ill, mentally retarded) and crimes (i.e., felony robbery/murder – death eligible, drug-related murder – not death eligible).

Cochran et al. (2003) found that the participants' attributional styles had a direct impact on attitudes toward the death penalty. That is, participants with a dispositional attributional style were more punitive and held greater support for the death penalty than participants with situational attributional styles. The latter were less punitive and demonstrated less support for the death penalty. One explanation for the different

attributional styles may be that the less punitive participants processed the information about the defendant and the crime at a deeper level.

Building on the theory of attribution styles, Fletcher (1986) designed a scale to measure individual attributional complexity. According to Fletcher (1986), attributionally complex individuals demonstrate a cognitive ability for deeper information processing and a high need for cognition, and exhibit less biased attitudes in their judgments about others compared to attributionally simple individuals. Attributionally complex individuals produce more causes for personality dispositions and choose more complex causal attributions for simple behaviors (Fletcher, 1986; Fletcher, Reeder & Bull, 1990). Attributional complexity is a variable seldom studied in relation to jury decision making; however, it is a useful tool in determining whether jurors who are attributionally complex are better equipped cognitively to understand judicial instructions and consider mitigators.

Pope and Meyer (1999) used Fletcher's (1986) attributional complexity scale to determine if juror decision making is influenced by attributional complexity levels. Pope and Meyer (1999) exposed mock jurors to a videotaped simulation of an armed robbery, presented them with evidence, and asked them to make individual judgments about the case. Mock jurors' judgments were recorded before and after the evidence was presented to them. The results of the study indicated that although attributionally complex jurors considered dispositional factors, they were more likely to take into account external or situational factors as possible influences on the defendant's actions. Attributionally simple jurors, on the other hand, attributed more dispositional attributes to the defendant's actions, were more likely to find the defendant guilty before and after

evidence presentation, and reported higher levels of confidence in their judgments. Pope and Meyer (1990) concluded that these findings indicate individual differences in jurors' attributional styles; an important factor in jury selection, especially if jurors will be asked to take into account mitigators.

Another important factor with respect to mitigation is the persuasive element of professional experts. In a theoretical paper, Whitman (1999) reported studies involving the persuasive effects of professional experts on real capital jurors. Her article revealed various biases jurors have toward psychiatric or psychological experts in death penalty trials, such as the "hired gun effect" and the notion that experts are often cloistered in their "ivory towers." The author further claimed that defense experts were perceived most negatively and remembered more often by jurors than prosecution experts. An interesting finding was that jurors compared their own life experiences and human behavior theories to what the expert had proffered as testimony. Whitman (1999) argued the defense expert's testimony, which was presented as a way to explain the defendant's abnormal behavior, was discounted by jurors "as flying in the face of their concept of personal responsibility" (p. 278).

In her article, Whitman (1999) also reported that a significant number of jurors stated that they had shared similar life experiences with the defendant, such as an impoverished childhood, alcoholism, or drug addiction. Interestingly, jurors did not consider the defendant's hardships as mitigation for a life sentence. Instead, jurors noted that unlike the defendant, they endured the hardships without committing murder. Whitman (1999) concluded that mitigation runs in direct opposition to jurors' concepts of personal responsibility, rendering jurors skeptical of the mitigation testimony. The

findings here extend the notion that jurors often focus on the dispositional characteristics of the defendant to explain his criminal actions, and dismiss or neglect to consider situational factors.

The juror as focus of inquiry

The empirical studies presented above reveal important information about jury behavior; however, past research has consistently focused on individual jurors' comprehension of judicial instructions, on how individual jurors' attitudes affect their verdicts, and on juror attributional styles to the exclusion of jury level data. In addition, although some of the CJP interview questions offer a glimpse into the deliberation process by asking jurors about the issues discussed during the deliberation, the interview responses were based on individual jurors' recollections of their deliberation. Such studies allow for a better understanding of how jurors make decisions in criminal cases, but they fail to provide information about how a jury, as a group, discusses evidence and issues presented at trial.

In the present dissertation, the concern is whether juries discuss mitigators, and whether jurors convert mitigators into aggravators. Until now, the few studies that have investigated jurors' understanding of aggravating and mitigating factors have not included jury deliberations (Bentele & Bowers, 2001; Bowers et al., 1998; Luginbuhl & Howe, 1995; Sontag, 1990). The data collected for the CJP, in which jurors were asked about aggravators and mitigators, required jurors to recall how they thought about evidence (i.e., aggravating and mitigating factors) many years after the trial. While important, it is likely that jurors may not remember, accurately recall, or even be aware that they have considered mitigators and transformed them into aggravators; what will be

contrived here as the conversion of mitigators into aggravators (Bentele & Bowers, 2001; Bowers, 1995; Haney, 1995; Luginbuhl & Howe, 1995). Hence, the primary focus of the present work was to capture jurors' discursive exchanges related to mitigating factors during the deliberation process, challenging the assumption that jurors understand the concept of mitigation. The secondary focus of the study was to uncover whether fellow jurors assist those who misapply or misunderstand legal instructions and the concept of mitigation during deliberation, challenging the assumption that jurors understand capital sentencing instructions.

The present study

Recalling the judge's instructions in a Missouri death penalty case, one capital juror stated "that you could have a mitigating circumstance that outweighed aggravating circumstances in which case [the] death penalty would be advised. If there was no mitigating [circumstance] then there was no death penalty" (Bentele & Bowers, 2001, p. 1045). Recalling the function of mitigating factors in sentencing decisions, one California capital juror stated that "[the jury] had no instructions or didn't ask as to what role [the defendant's] childhood should play. [We] didn't know if the defendant's childhood was a valid reason... to deny death" (Bentele & Bowers, 2001, p. 1045). Recalling the meaning of mitigating factors in another case, a juror stated "the mitigating [circumstance] is against him, right? This is where I'm confused" (Tiersma, 1995, p. 19). Uttered by real capital jurors to CJP investigators, these replies indicate the level of confusion some jurors exhibit over the definition and function of mitigation. Therefore, the current study builds on past research by CJP researchers and others to further our

understanding of juror confusion over the concept of mitigation and conversion of mitigators into statutory aggravators.

The current study investigates mock juries' consideration of mitigating factors during sentencing deliberations. It also investigates whether fellow mock jurors assist each other when misunderstanding or confusion about the instructions and mitigation arises during deliberations. It is a secondary analysis of data previously collected for a separate study described below, exploring capital juries' discursive exchanges about various issues related to juries' sentencing decisions.

The present inquiry is responsive to the legal assumptions concerning capital jury decision making embedded in death penalty statutes. The following legal assumptions guided the present research: jurors understand the definition and the function of mitigators; jurors can categorize and distinguish mitigators from aggravators; jurors understand the different domains from which aggravators and mitigators come from; jurors understand judicial instructions; fellow jurors assist those who misunderstand or misapply the concept of mitigation, based on the assumption that the group outperforms the individual.

This research is also responsive to positivistic oriented investigation which has neglected to include the voices of jurors in naturally occurring contexts (i.e., deliberations) as a way to understand how jurors proceed in their sentencing task. Moreover, the lack of theory governing the study of jurors' consideration of mitigating factors is a motivation guiding this research. Although the theory of attribution was not directly tested here, the fundamental attribution error had a theoretical utility. It served a

theoretical function in developing the coding scheme for the content analysis of the sentencing deliberations, and in conceptualizing the research questions.

Beginning with Furman v. Georgia (1972), the law has reshaped how death penalty cases are tried in state courts across the U. S. Today, the law requires potential capital jurors to be death-qualified under Wainright v. Witt (1985), it requires the bifurcation of the trial. The law requires that jurors consider only statutory aggravating factors, but that they consider any mitigating factors they deem pertinent to their sentencing decisions. It further requires jurors to weigh the aggravating factors against the mitigating factors to reach a sentencing verdict. Even states that do not require the balancing of aggravators and mitigators, such as Virginia, necessitate the consideration of factors that support a penalty of death or the lesser punishment of life imprisonment (Lane, 1999). At the very least, the reshaping of death penalty laws has rendered the task of capital juries ever more complex and taxing on juries. It is timely, therefore, to investigate the following four research questions.

To what extent do capital juries discuss mitigating factors during their deliberation? To what extent do juries convert mitigating factors into aggravating factors? Is there a relationship between conversion of mitigators and jury sentence? To what extent do fellow jurors assist those who misunderstand or misapply the law during the deliberation? A content analysis of deliberations will help answer these four questions by revealing the language used by the participants under study; it will allow for the discovery of discursive themes, competing discourses favoring life and death sentences, and how these themes contribute to the sentencing decision.

Chapter Two

Methodology

Participants

The participants in the present secondary analysis served as mock jurors in the original study which focused on individual mock jurors' comprehension of legal instructions in a capital case (Patry, 2001). Patry (2001) recruited his participants from university psychology classes and through flyers and newspaper ads in Lincoln, Nebraska. Participants were scheduled for the study by contacting the researcher by telephone or email. At the time of scheduling, participants were death qualified for the purposes of the original study by responding to the question: "Is your attitude toward the death penalty so strong that it would seriously affect you as a juror and interfere with your ability to perform your duties?" An affirmative response (n = 49) resulted in non-participation. Patry (2001) based his death qualification process on the standard in Wainright v. Witt (1985) and on research conducted by Dillehay and Sandys (1996). Although this process is not representative of actual voir dire in capital cases, it served to disqualify some individuals from participation who may be considered excludable in real capital cases.

The original study included 735 predominantly non-student, jury eligible participants; jury eligible student participants made up 18% (n = 130) of the sample. Of the 730 participants who reported their gender, 53.9 % (n = 396) were female and 45.4% (n = 334) were male. Of the 731 participants who reported their ethnic backgrounds, 88.2% (n = 648) were Caucasian, 3.1 % (n = 23) were African-American, 1.1% (n = 8) were Asian-American, 2.3% (n = 17) were Latin American, and 4.8% (n = 35) reported their ethnic backgrounds as "other," which included Native Americans. Of the 734 participants who

reported their age, 7.6% (n = 56) were under age 20, 41.9 % (n = 308) were between the ages of 20 and 39, 36.9% (n = 267) were between the ages of 40 and 59, and 14% (n = 103) were between the ages of 60 to over 70.

Materials and procedures: Patry (2001)

A videotaped replication of the sentencing phase of Buchanan v. Angelone (1998) was used as trial stimuli in the original study. Recall that in 1987, Douglas Buchanan, Jr. was convicted of killing his father, his step-mother and two step-brothers after he argued with his father over his natural mother's death, and was sentenced to death. At the sentencing phase, Buchanan's defense attorney presented the following specific case related mitigating factors: 1) his mother's early death from breast cancer; 2) his father's remarriage to his mother's cousin soon after his mother's death; 3) his father's and step-mother's attempts to prevent Buchanan from visiting his maternal relatives; 4) a defense psychiatrist's testimony that Buchanan was under extreme emotional duress at the time of the murders; and 5) no prior felony convictions. The judge charged the jury with Virginia's pattern capital sentencing instructions, but refused to add Buchanan's case specific mitigating factors to the instructions. When the case reached the U. S. Supreme Court, the Court held that under the Eighth Amendment there is no requirement for fuller, clearer explanations about mitigation, and that such explanations would not assist the jury in its pursuit of justice.

To test whether revised instructions could improve juror comprehension of sentencing instructions, Patry (2001) tested a 2 x 2 x 2 x 2 x 2 experimental design and created 32 videotaped versions of the Buchanan v. Angelone (1998) sentencing phase replication. Patry (2001) varied the defendant's emotionally abusive history (present or absent in the sentencing phase video), the defendant's bad prior record (present or absent in

the sentencing phase video), the heinousness of the crime (high or low in the sentencing phase video), the sentencing phase instructions (pattern or revised), and a list of case-relevant mitigators included or not with the instructions: emotional immaturity (i.e., that of a ten year old), emotional duress at the time of the crime, the death of his mother at an early age, isolation from his maternal relatives, his military background, and his involvement with the church (see Appendices A & B for sentencing instructions.)

The sentencing phase video began with opening statements by the prosecution and defense attorneys. Each attorney then presented evidence on the "appropriate" sentence for the defendant (Patry, 2001, p. 131.) The prosecution included four witnesses: an expert psychologist who testified generally about the defendant's mental stability, a law enforcement forensic analyst who testified to the details of the crime, a friend of the defendant who testified to the defendant's family life, and the defendant's aunt who testified to the defendant's family life and childhood. The defense included three witnesses: an expert psychologist who testified to the defendant's mental status at the time of the crime; a pastor and a military supervisor both of whom served as character witnesses. The sentencing phase video ended with the judge's verbal sentencing instructions, which were also given in writing to the jurors prior to deliberation.

Participants arrived at the designated research facility and were grouped into randomly assigned mock jury conditions; each group was composed of three to seven mock jurors. Once grouped, participants received information related to the study and to their role as jurors in the case before them from the researcher. After completing an informed consent, the participants were told to assume they had convicted the defendant of first degree murder. Participants then viewed one of the 32 sentencing phase video conditions,

representing the sentencing phase of the case. Each experimental condition was tested four times, generating 127 mock juries.[21]

After watching their respective sentencing phase video, mock juries were asked to deliberate the sentence until they reached a unanimous sentence or until 40 minutes had elapsed (i.e., the maximum time participants were allowed to deliberate in the study.) In the informed consent, participants were made aware that their deliberations would be filmed. A camera was set up in the deliberation room and was turned on prior to the start of deliberation. Subsequent to their deliberations, the camera was turned off and mock jurors responded to dependent measures intended for the original study. Non-student participants were compensated $35 for their participation in the study, and student participants were compensated $20 or received extra academic credit, or both. The videotaped sentencing deliberations were not included in the Patry (2001) analysis; they were used as data for a content analysis conducted in the present dissertation.

Materials and Procedures: The present study

One hundred and twenty seven videotaped capital mock jury deliberations were gathered from the Patry (2001) study. The deliberation videotapes ranged from a few minutes to 40 minutes (M = 26.8, SD = 11.3). These videotapes depict groups ranging from three to seven mock jurors sitting in a room around a table, deliberating the sentence of the defendant. Written transcripts were prepared from these videotaped deliberations. There were 623 mock jurors in total in the 108 deliberations used in the present analyses, including 378 female and 275 male mock jurors.

Because different deliberations were filmed in different rooms of the research facility, visual and audio quality of the videotaped deliberations varied from excellent to

[21] One condition was only tested three times.

poor. Poor audio quality such as muffled sound due to filming conditions or to mock jurors interrupting each other or speaking all at once prevented written transcription of portions of the deliberations. Estimating the portion of mock jury deliberations that could not be transcribed is unfeasible. To do so would require many hours of work just to capture what viewers cannot hear. Moreover, estimating the inaudible portions of mock jury deliberations (i.e., "INA") would not render an accurate account of inaudible portions of deliberations. Every deliberation contained some inaudible verbiage; therefore, none of the transcriptions represent a complete mock jury deliberation.

Transcriptions

To assess the best possible coding method for the analysis, the researcher initially watched the videotapes while timing the deliberations and noting gender composition of jury, general topics of discussion and audio quality of deliberations. Based on the research questions, the theoretical framework and the initial viewing of the deliberations, a preliminary coding scheme was generated to categorize mock jurors' statements directly from the videotapes into specific codes. It became clear from initial attempts to code mock jurors' statements directly from the videotapes, however, that written transcriptions of the deliberations would better capture statements uttered by mock jurors, and facilitate the coding process.

The deliberations were transcribed word for word when mock jurors' statements were related to the research questions of the present study and when they were audible. Statements were defined as any verbal communication related to the case spoken by a mock juror. Statements were not identified by the juror who said them; in this research, statements were considered as made by the jury. Occasionally, single words such as "yes" were uttered

and transcribed but not coded. Verbiage or statements unrelated to the case, such as statements about other crimes, were not transcribed, unless they revealed information related to the research questions. Therefore, the total number of statements transcribed does not represent all statements spoken by jurors during the entire deliberation, nor can the total number of mock juror statements be calculated from these data. However, based on numerous viewings of the deliberation videotapes by the investigator and a research assistant and on discussions between the two about the issue of proportions of transcribed statements, a guesstimate of 65% of the total (i.e., transcribed, inaudible and unrelated statements) number of statements during the deliberations were transcribed for the present analysis. The guesstimate of 65% represents 100% of audible research relevant statements.

The transcription process used here served as a method of data reduction to facilitate coding and analysis of the deliberations (see Appendix C for an example of the hand written transcriptions.) The researcher was blind to the original study conditions during the transcribing process. Transcriptions were hand written on sheets divided into 20 blocks, each block representing approximately 1 minute and 10 seconds of deliberation time. This transcription method allows one to review the videotape and easily find a specific statement on the videotape, if need be. A short line (-) was drawn before each statement or group of statements by the same mock juror, demarcating each time a different mock juror spoke. When some or all jurors spoke at the same time, the exchange was transcribed as "all talking" but actual statements were not transcribed as part of the conversation. A number of abbreviations were used to expedite transcription of the deliberations. For example, the abbreviation "INA" was used to represent inaudible statements. Other abbreviations were used to refer to words used frequently during the deliberations, such as "SM" for

stepmother, "SB" for stepbrothers and "PR" for premeditation. Statements referring to the crime at hand were only transcribed word for word if they were pertinent to jurors' consideration of mitigation, otherwise they were transcribed using the abbreviation "CRIMES". All abbreviations were used consistently throughout the transcribing process. After all the deliberations were transcribed, statements were coded using the coding scheme described below.

Coding Scheme

Developing the coding scheme was ongoing throughout the planning phase of the study, the transcription process and while coders were familiarizing themselves with the coding process. In the planning stages of the study, thematic categories were developed to best represent the theoretical framework (i.e., attribution theory) and the four research questions: 1) To what extent do capital jurors discuss mitigating factors during their deliberation? 2) To what extent do jurors convert mitigating factors into aggravating factors? 3) Is there a relationship between conversion of mitigators and sentence? 4) To what extent do fellow jurors assist those who misunderstand or misapply the law during the deliberation?

Multiple versions of the coding scheme emerged and codes initially construed as pertinent to the coding scheme were deleted or adjusted, depending on whether they could reveal issues related to the present research. In addition, codes representing extra-legal themes indirectly related to the research questions were added to gain more insight into issues considered important to jurors. The final version of the coding scheme served to code the hand written transcriptions and is illustrated in Table 1 (See Appendix D for the full version of the final coding scheme.)

Table 1

Categories, categorical codes and exemplars of statements

Category	# of codes per category	Exemplars of categorical codes	Exemplars of statements falling within a category
Structural	5	Gender composition	
Thesis	38	Defendant's military background	"Let's consider the mitigators."
Attribution	4	Dispositional factors disfavoring defendant	"This guy is evil, he's just a bad person."
Juror assistance	2	Assistance in understanding the instructions	"We can consider emotional abuse as a mitigating factor."
Instruction	4	References to instructions	Anytime jurors read/referred to instructions
Sentence	16	Life sentence based on mitigators	"I vote for life because of how he was treated by his parents."
Extra-legal issues	9	Assumption of life without parole	"I don't think he'll ever get out."

The structural category represented variables related to the structure of the jury, such as number of jurors and the gender composition of the jury. In categories two through seven, some codes were framed as statements containing issues relevant to the research questions or the theoretical framework, such as "statements containing juror expression or discussion of inconsistencies in the mitigators (ex: he was in the military, so how could he be emotionally immature and have leadership qualities.)" Other codes in categories two through seven were framed as interpretations of mock jurors' statements related to their individual sentences, their assumptions of the legal system and

other legal issues, with the aim of producing frequency counts of such statements for the analysis.

The thesis category included codes related to the research questions regarding mitigation and aggravation. These codes identified statements about mitigating factors, conversion and rejection of mitigators. In the current study, conversion is defined as the transformation of a mitigator, such as extreme emotional duress at the time of the crime, into a statutory aggravator, such as the defendant's potential for future dangerousness. When applicable, some statements related to mitigators were coded as favoring or disfavoring the defendant. For example, if a statement revealed the consideration of the defendant's age as a mitigator (e.g., "he is only 22 years old; that's too young to be put to death",) it was further coded as favoring the defendant. In contrast, a statement indicating that age worked against the defendant because he was old enough to know right from wrong was coded as disfavoring the defendant. Codes in this category also identified statements concerning aggravating factors (e.g., the defendant's bad prior record).

The attribution category was created to capture statements mock jurors made about situational and dispositional characteristics of the defendant, and whether such statements favored or disfavored the defendant. For example, if a statement referred to the absence of emotional support or counseling for the defendant in response to the emotional abuse he suffered in his childhood, it was coded as a situational factor favoring the defendant. If a statement referred to the defendant's age at the time of the crime (i.e., 19) as old enough to know right from wrong, it was coded as a dispositional factor disfavoring the defendant.

Dispositional and situational factors disfavoring the defendant should not be confused with conversion of mitigators into aggravators. Conversion refers to the

transformation of a mitigator into an aggravator such as when a juror states that because the defendant is emotionally immature (i.e., the emotional maturity of a 10 year old), he will be more likely to be dangerous in the future. Thus, for conversion to have occurred in the present study, an aggravator such as future dangerousness must follow the consideration of a mitigator.

The juror assistance category included two codes representing jurors' explanations to fellow jurors about the sentencing instructions or the concept of mitigation when fellow jurors exhibited confusion or misunderstanding of such topics. Assistance with sentencing and assistance with mitigation were coded separately as a way to determine juror understanding of sentencing instructions. For example, when a juror explained or defined aggravated battery to a fellow juror, such a statement was coded as juror assistance related to instructions. Explanations could reflect instructions used in the study or legally correct personal notions of law brought into the deliberation by venire persons. For example, the notion that the alternate punishment to death is a life sentence without the possibility of parole.

The fifth category included codes related to the sentencing instructions given to mock jurors by the judge during the sentencing phase video, and in writing prior to deliberation. One code determined whether juries began their deliberations by reading the instructions. Two instruction codes represented statements exhibiting juror understanding or lack of understanding of the sentencing instructions. A code was designated for the number of times jurors referred back to the written instructions during deliberation.

The sentence category included a code designated to identify statements referring to jurors' sentences, such as the defendant should get the death penalty. Other codes in the sentence category identified statements indicating the attitude that death is a lesser punishment than life. In this category, the final jury sentence was coded as unanimous or as a majority decision; the direction of the sentence was also coded. Other codes in this category identified statements revealing reasons for juror sentence. For example, if a juror stated that the defendant should get the death penalty because death should be warranted in all murder cases, the statement was coded differently than if the reason for death was based on the defendant's crime. Moreover, some mock jurors expressed difficulty in rendering a death sentence based on what they thought to be extremely limited case information. To tease apart statements reflecting a life sentence based on mitigators and a life sentence based on insufficient case information, a code was created to identify each type of statement.

Category seven included codes indirectly related to the research questions and the theoretical framework. The codes identified jurors' consideration of various extralegal issues, such as premeditation, remorse, and the crime. Codes in this category also identified jurors' assumptions related to future case and sentence appeals. A code was also created to identify whether jurors assumed a life sentence was without parole (as it should be assumed.)

Coding procedure

Prior to coding the transcriptions, two independent trained coders, blind to the original study conditions, coded ten deliberations across conditions to assess concordance agreement rate. The concordance agreement formula was $C = 2(C_{1,2})/(C_1 + C_2)$. C is the concordance agreement rate for statements, $C_{1,2}$ is the number of matching codes given by

both coders, and C_1 and C_2 is the total number of codes given by the first and second coders, respectively (Kovera, 2002.) Concordance agreement rate for mock juror statements ranged between .56 and .94, with a mean of .75 across the ten deliberations.

Once concordance agreement rate was determined, each statement was coded if it matched one of the codes in the coding scheme. Statements including more than one thought or idea were coded more than once when fitting. For example, if a juror stated the following: "The defendant is a bad person, he deserves to die, I really don't think he was abused", such a statement would have been coded with three different codes because there are three separate thoughts or ideas embedded in that one statement. If a statement did not fall into one of the seven categories, it was considered non applicable and was excluded from analysis. The statements were coded from the written transcriptions onto sheets divided into 20 blocks, like those used for transcription (see Appendix E.) For example, if a statement was written at the bottom of the first block, the matching code for that statement was typed or written in the same space on the coding sheet. This method of coding facilitated finding a written statement when checking and rechecking the coding process. The coding was conducted by the researcher who was blind to the original study conditions, and was verified carefully before entering the codes in the data matrix for analysis. To avoid multiple coding of statements, each statement was coded only once with its most fitting code.

In the interest of data reduction, a clustered coding scheme was developed after the coding of data was completed. A number of codes from the final coding scheme were clustered with similar codes within the same category, if applicable (i.e., some codes were not clustered). The clustered coding scheme yielded 10 codes from four of the

seven categories the final coding scheme. The10 codes were relevant to the current study and were used in the analyses below. Four of the 10 codes used here were related to mitigation (mitigators), one to conversion of mitigator into aggravator (conversion), one to inconsistency or rejection of mitigators (inconsistency), one to aggravation (aggravator), one to fellow juror assistance (assistance), one to understanding of instructions and mitigation (understanding), and one to misunderstanding of instructions and mitigation (misunderstanding) (see Appendix F for a list of the codes in the clustered coding scheme). The frequency of codes was the unit of analysis; that is, the frequency of codes represents the number of times a statement was coded, the frequency does not represent the amount of time jurors spent discussing an issue.

Chapter 3

Results

To control for varying deliberation lengths, statement codes are reported as a percentage of all coded statements. The total with which the percentages were calculated was equal to the sum of all coded statements for all mock juries. All descriptive results and statistical analyses were based on group level data (i.e., mock juries, N = 108). Because we were interested in juries that reached a sentencing decision, juries that did not reach a decision within the maximum deliberation time were excluded from the analyses.[22] The independent variables used in the statistical analyses were the manipulated variables used in the Patry (2001) study: heinousness of the crime (present vs. absent), emotional abuse suffered by the defendant (present vs. absent), prior criminal record of the defendant (present vs. absent), legal instructions (pattern vs. revised), and list of mitigators (present vs. absent; e.g., the defendant's mother's premature death).

The sum of all coded statements was 8545. Of the total coded statements, 27% were statements related to mitigators. An example of a statement related to mitigators was, "He was emotionally abused, and his mother died when he was only ten years old." The breakdown for the other coding categories was: less than one percent for explicit conversion of a mitigator into a statutory aggravator (e.g., he was emotionally immature so he's more likely to be dangerous in the future), 7.79% for inconsistency (e.g., "He was a leader in the military, but they said he had the emotional maturity of a ten year old."), 15.33% for aggravators (e.g., "I think what he did was vile and horrible."), less than one percent for assistance (e.g., "Wantonly vile means that it was a merciless type of

[22] Data from 19 juries were excluded from analyses; 18 undecided juries, and one jury for which the independent variables could not be identified.

killing."), 3.13% for understanding (e.g., "The judge told us that we could consider any circumstances for mitigation."), and less than one percent for misunderstanding (e.g., "Abuse and alcoholic parents are not excuses for killing people.") These percentages reflect the number of times a statement related to a particular issue was coded; they do not reveal the amount of time jurors spent discussing an issue.

To what extent do juries consider mitigators?

Two of the five independent variables were expected to increase the discussion of mitigation: emotional abuse and the list of mitigators (i.e., emotional immaturity, emotional duress at the time of the crime, the death of his mother at an early age, and isolation from his maternal relatives.)

No significant main effects were found for either emotional abuse, $F(1,107) = .09$, $p = ns$, or list of mitigators, $F(1, 107) = .75$, $p = ns$. Furthermore, there was no interaction between emotional abuse and list of mitigators, $F(1.107) = .00$, $p = ns$. Discussion of mitigators occurred with approximately the same frequency when emotional abuse and the list of mitigators were present ($M = 16.64$, $SD = 8.41$, $M = 17.61$, $SD = 8.11$, respectively) than when these variables were absent ($M = 17.10$, $SD = 8.44$, $M = 16.20$, $SD = 6.66$, respectively).

To gain perspective on mock juries' consideration of mitigators, it was also important to evaluate mock juries' consideration of aggravators. In the present study, independent variables related to issues of aggravation were the heinousness of the crime (e.g., explicit information about the killings embedded in the trial stimulus), and prior criminal record (e.g., explicit information regarding previous aggravated battery charges for beating someone with a baseball bat embedded in the trial stimulus), when present.

The category of aggravation in the clustered coding scheme included statements about the heinousness of the crime, how vile the crime was, the defendant's prior criminal record, and the defendant's potential for future dangerousness. Moreover, statements referring to the instructions concerning the heinousness of the crime were coded in the aggravation category.

No significant main effects were found for heinousness, $F(1, 107) = 1.61$, $p = ns$, and prior criminal record, $F(1, 107) = 2.51$, $p = ns$, on aggravators. The interaction among the independent variables was not significant, $F(1, 107) = .31$, $p = ns$. Discussion of aggravators occurred with approximately the same frequency when prior criminal record was present ($M = 15.87$, $SD = 7.95$) than when this variable was absent ($M = 13.54$, $SD = 7.51$). The same pattern of results was found when heinousness was present ($M = 13.72$, $SD = 7.04$) than when this variable was absent ($M = 15.62$, $SD = 8.38$).

Dispositional and situational mitigators

Attribution theory served a theoretical function in the development of the coding scheme. Thus to capture how mock juries deliberate mitigators, mitigators were further coded as dispositional and situational mitigators. The five following mitigators were coded as dispositional: age, emotional immaturity, military background, church involvement, and absence of prior criminal record. Situational mitigators were the following four: history of emotional abuse, emotional duress at the time (caused by the emotional abuse over time), death of the defendant's mother at an early age, and isolation from his maternal relatives.

Dispositional and situational mitigators were further coded as favoring or disfavoring the defendant. All statements were coded only once; therefore, a statement

representing a dispositional mitigator that could not be identified as favoring or disfavoring the defendant was coded only as a dispositional mitigator. Only when statements could be identified as favoring or disfavoring were they coded as a favoring dispositional or situational mitigator, disfavoring dispositional or situational mitigator. Of all the coded mitigators (i.e., any statement related to a mitigator), 10% were coded as disfavoring dispositional mitigators, the most coded of the four types of mitigators. Both favoring dispositional and situational mitigators fared the same; each reflected 3% of the statements. Disfavoring situational mitigators accounted for less than one percent of the data (i.e., disfavoring situational mitigators occurred 87 times.) No further analyses were conducted on the latter category.

When comparing favoring and disfavoring dispositional mitigators, a significantly higher percentage was found for disfavoring mitigators ($M = 8.67$, $SD = 5.77$) than for favoring mitigators ($M = 3.83$, $SD = 4.67$), $t(107) = -6.35$, $p = .001$, $r^2 = .41$, across conditions. No differences were found among favoring dispositional and situational mitigators, ($M = 3.86$, $SD = 4.70$, $M = 3.51$, $SD = 4.19$, respectively), $t(107) = .62$, $p =$ ns.

Heinousness, a factor argued by some to bias jurors toward a death sentence, produced a significantly higher percentage of disfavoring dispositional mitigators for juries exposed to heinousness ($M = 10.48$, $SD = 6.04$) compared to juries not exposed to such a variable ($M = 6.99$, $SD = 5$), $t(106) = -3.27$, $p = .001$ (two-tailed), $r^2 = .3$

To what extent do mock juries convert mitigators into aggravators?

Based on the premise that jurors have difficulty understanding and applying the concept of mitigation, some degree of conversion of mitigators into aggravators was

expected in the present study. One code was used to code statements of conversion that made explicit the conversion of mitigators into aggravators. The data however, reveal less than one percent of the coded statements represents explicit conversion (i.e., conversion occurred 13 times across conditions.) No further analyses were conducted on the category of conversion.

To further explore how mock juries deliberate mitigators, a percentage of inconsistency of mitigators (e.g., "The defendant was in the military but he had the emotional maturity of a ten year old; that just does not make sense") and rejection of mitigators (e.g., "A lot of people are abused and they don't go around killing people; it doesn't make a difference if he was abused") was calculated. Inconsistency was coded using one code in the clustered coding scheme. The data indicate 6.6% of the total codes were statements of inconsistency. A simple correlation yielded a significant positive relationship between disfavoring dispositional mitigators and inconsistency ($r = .41$, $p < .01$). The discussion of disfavoring dispositional mitigators was related to a higher percentage of inconsistency. All other types of mitigators (e.g., situational favoring) were not significantly related to inconsistency. Table 2 presents the simple correlations between inconsistency and type of mitigator.

Table 2

Simple correlations between mean percentages for inconsistency and rejection of mitigators and type of mitigator

Dispositional Disfavoring	.41	($p < .001$)
Dispositional Favoring	-.17	($p = .077$)
Situational Disfavoring	-.09	($p = .307$)
Situational Favoring	-.13	($p = .175$)

To what extent do fellow jurors assist others in understanding instructions or the concept of mitigation?

Although a prediction was not made with respect to the extent to which fellow jurors would assist other jurors if the latter exhibited a lack of instruction comprehension or of mitigation, a low percentage of assistance was expected based on the premise that jurors have difficulty with legal instructions and mitigation. Less than one percent of the data was coded as assistance (i.e., assistance occurred 22 times across conditions); no further analyses were conducted on this category.

To gain further insight into juries' understanding of legal instructions and mitigation, percentages of understanding and lack of understanding of instructions and mitigation were analyzed. A significantly higher percentage of understanding of instructions and mitigation was obtained for mock juries in the revised instructions condition ($M = 1.46$, $SD = 1.66$) compared to mock juries in the pattern instructions condition ($M = .79$, $SD = 1.29$), $t(107) = -2.35$, $p = .021$ (two-tailed), $r^2 = .2$.

Interestingly, although understanding was coded significantly more often in the revised condition, lack of understanding was not significantly less coded in the revised condition. Lack of understanding was approximately equal for the pattern and revised conditions (M = 1.8, SD = 2.29, M = 1.9, SD = 2.32, respectively), t(106) = -.23, p = ns, (two-tailed).

Mock jury sentences: How are they related to mock jury discussions and trial conditions?

Based on the results above, it was appropriate to test the relationship between heinousness, instructions, disfavoring dispositional mitigators, inconsistency and mock jury sentences. Heinousness (i.e., independent variable in Patry, 2001), instructions (i.e., independent variable in Patry, 2001), inconsistency and disfavoring dispositional mitigators, served as predictors and mock jury sentence served as outcome variable in a logistic regression. Data from 108 mock juries were available for analysis: 56 mock jury life sentences and 52 mock jury death sentences.

A test of the full model with the four predictors against a constant-only model was statistically reliable, X^2 (4, N = 108) = 26.16, p < .001, indicating that the set of predictors reliably distinguished between life and death sentences. The strength of association for the model was R^2 = .28. Prediction success was notable, with 80.4% of life sentences and 69.2% of death sentences correctly predicted, for an overall success rate of 75%.

Table 3 presents regression coefficients, Wald statistics, odds ratios and 95% confidence intervals for odds ratios for each of the predictors.

Table 3

Logistic Regression Analysis of Mock Jury Death Sentences as a Function of Heinousness, Instructions and Mean Percentages of Dispositional Disfavoring Mitigators

				95% Confidence Interval for Odds Ratios	
Variable	B	Wald Test	Odds Ratio	Upper	Lower
Heinousness	-1.25	7.76	.28	.68	.11
Instructions	.59	1.80	1.81	4.32	.76
Inconsistency	.05	1.33	1.05	1.16	.96
Dispositional Disfavoring	.09	4.50	1.09	1.19	1.00
Constant	-.95	2.46			

The Wald criterion indicated that heinousness and the percentage of statements of dispositional disfavoring mitigators reliably predicted mock jury death sentences z = 7.76, $p < .005$ and $z = 4.5$, $p < .03$, respectively. The odds ratio of .28 indicates that heinousness is the most influential predictor of death sentences. The odds ratio of 1.09 indicates little change in the likelihood of voting for death on the basis of a one unit change in percentage of statements of dispositional disfavoring mitigators.

Chapter 4

Discussion

The aim of the present study was to uncover the extent to which mock juries consider and convert mitigating factors, challenging the legal assumptions that juries understand the concept of mitigation and how to apply it in their decision making. Of the total number of statements made by mock jurors in this study, slightly more than 25% were in some way related to mitigators; however, mock juries converted mitigators into aggravators explicitly with much less frequency than was expected. When mock juries did consider mitigators, they were more likely to focus on dispositional mitigators in ways that disfavored the defendant, but without converting the mitigator into an aggravator. Disfavoring dispositional mitigators were positively related to inconsistency and rejection of mitigators (e.g., "If he was in the military, how could he mentally be 10 years of age.") Although a weak predictor of a death sentence, dialogue related to disfavoring dispositional mitigators was positively associated with deadly outcomes. The findings here support arguments and results put forth by scholars of the Capital Jury Project (CJP) and others regarding limited or lack of capital juries' appropriate consideration of mitigation (Bowers, 1995; Haney, 1995; Linginbuhl, 1995; Sundby, 1997 Whitman, 1999; Wiener et al, 2004.)

Another aim of the present study was to determine whether jurors assist each other with the sentencing task. As expected, assistance was very low (i.e., less than one percent of the total number of statements.) Moreover, understanding of instructions was greater in the revised instruction condition than in the pattern instruction condition; a concurrent finding with Patry (2001). A decrease in misunderstanding however, was not

found in the revised instruction condition, misunderstanding was coded as often in both conditions. Finally, similar to Patry (2001), heinousness was the most influential predictor of jury sentence in the present research.

This research uncovered various themes deliberated by juries during deliberations; a source of information pertinent to understanding how juries make sentencing decisions. Throughout the following discussion, two examples of mock jury transcriptions will be used to illustrate how the findings in the current research unfold in actual mock jury deliberations, and to amplify the points that derive from the analyses. One transcript consists of a life sentencing mock jury (i.e., life jury) and the other consists of a death sentencing jury (i.e., death jury) (See Appendices G and H for full transcripts.) The life jury was exposed to emotional abuse and the list of mitigators, whereas the death jury was presented with the list of mitigators but not emotional abuse. Both juries were instructed to consider age and the absence of a bad prior criminal record as mitigators. The life jury was presented with low heinousness and received pattern instructions, whereas the death jury was presented with high heinousness and revised instructions.

Mitigation

The extent to which mock juries consider mitigators

The mitigators in the study were emotional abuse, the absence of a prior criminal record and a list of mitigators presented as a set of factors: emotional immaturity (i.e., that of a ten year old), emotional duress at the time of the crime, the death of the defendant's mother at an early age, and isolation from his maternal relatives. Also included as mitigating factors in the sentencing trial were his military background, his

involvement with the church, his age (i.e., 19 at the time of the crime, and 22 at the time of the trial.)

A significant main effect for the independent variable emotional abuse was not found here; however, when presented to juries, emotional abuse was the most discussed mitigator. One explanation for this finding may be that emotional abuse was discussed as a mitigator but also as a way to understand the defendant's motivation for the crimes against his family, who was said to have caused the emotional abuse (i.e., his father and his step mother). An example of this in the life jury was: "I thought he was abused and that made a big difference in, I think if he was not treated the way he was treated he wouldn't have killed the step parents, I don't really understand why he killed the step brothers, maybe he didn't want to get caught, that's why he killed the step brothers, he wanted to get rid of the aggressors in his life." The death jury was not presented with emotional abuse as a mitigator, but some jurors did raise, but quickly rejected, the possibility of abuse: "It didn't sound like they were abusive to him."

Aggravating aggravators

Capital juries are often asked to weigh or consider mitigators and aggravators in their sentencing decisions. To get a fuller sense of how juries consider such factors, it was relevant to analyze mock juries' consideration of aggravation. The aggravators in this study were heinousness of the crime (e.g., number of victims, age of victims, manner in which victims were killed), prior criminal record, and future dangerousness. This category was a combination of the discussion of the concepts related to aggravation, the discussion of the vocabulary related to aggravation instructions, and the discussion of the defendant's prior criminal record and his potential for future dangerousness.

Although significant main effects of the independent variables heinousness and prior criminal record on aggravators were not found in the present study, when teased apart, juries discussed the heinousness of the crime with greater frequency compared to bad prior record and future dangerousness. For example, in the life and death juries used as illustrations here, 19 statements were made about heinousness in the life jury and seven were made in the death jury compared to two statements about future dangerousness in the life jury and 1 in the death jury. Prior criminal record was not presented to either of these juries and no statements were made about this issue in either jury. This pattern was similar across all juries suggesting that juries focus on the heinousness of the crime with greater frequency than other statutory aggravators such as prior criminal record or future dangerousness. Haney (1995) argued that heinousness is a concrete factor compared to the concept of mitigation, which he termed as "hopelessly abstract". It may be that heinousness is discussed with greater frequency than other aggravators in the current study because heinousness may be more concrete as a decisive factor compared to prior criminal record and future dangerousness.

In addition, pattern and revised instructions may play a role in the frequency of statements about heinousness. In the life jury, who received pattern instructions, 19 statements were made regarding heinousness whereas seven statements were made in the death jury, who received revised instructions. An example of a statement about the heinousness of the crime in the life jury was: "Obviously it was outrageous, wantonly vile and involved torture, CRIME, it involved depravity of mind and battery and the judge is telling me I have to sentence him to death if these things were proved beyond a reasonable doubt by the state whether I am for or against the death penalty, I would have

to think that I could get in trouble if I don't sentence him to death." In the death jury, a statement reflecting the heinousness of the crime was: "That's cold-blooded murder, killing your old man like that." Until further studies investigate how capital juries discuss aggravators during deliberations with greater depth, caution must be applied to the interpretations regarding the discussion of heinousness and other aggravators presented here.

Dispositional and Situational Mitigators: The theory of attribution

The theory of attribution guided the development of the coding scheme. According to the theory, people have a tendency to attribute personal characteristics to others as a way to explain others' behavior. The theory also suggests that it is difficult to attribute situational characteristics to others when judging others' behavior (Jones and Nisbett, 1972; Ross, 1977). The sentencing phase of a capital trial is in essence a context in which jurors must attribute responsibility in weighing mitigators and aggravators, ultimately to decide the punishment. Dispositional mitigators in the present research were: age, emotional immaturity, military background, church involvement, and absence of prior criminal record. Situational mitigators were: emotional abuse, emotional duress at the time of the crime, death of mother at early age, and isolation from maternal relatives.

Of interest is the finding that of the total number of statements across conditions, dispositional mitigators yielded the highest frequency of occurrence compared to situational mitigators. These findings support the notion that people tend to attribute dispositional factors when judging others' behavior. One example of dispositional mitigators in the death jury was: "I understand they said he was dependent on people and

was easily influenced, but." Another example from the life jury was: "Those are more what they call mitigating circumstances that determine if you give life or death, one of them was if he had a bad prior record, he had not, then his age, I guess as far as the low age is concerned your age can be a mitigating circumstance which means if you're 75 years old and you kill someone, you're more likely to get death because at 22, you have a chance to be a decent person in jail."

Situational factors occurred much less frequently than dispositional factors. This may be indicative of the difficulty involved with the consideration of such factors according to the attribution theory. In the life jury, a situational factor was considered in the following manner: "Why would the kid [the defendant] not be allowed to see his maternal relatives next door to his father's house?" In the death jury, an example of a situational factor was: "He didn't have anybody at home but he had people at church, and people in his parish probably did try to help, he had friends." Perhaps the difficulty of considering situational factors lies in jurors' capability to consider factors that serve to diminish a defendant's responsibility when he has already been found guilty of heinous crimes.

Can mitigators spare a defendant's life?

Over a third of all statements related to mitigators were coded as disfavoring dispositional mitigators. This suggests that juries considered the mitigators in question, but their consideration of the dispositional mitigators tended to work against the defendant. The following are two examples of a mitigator used to disfavor the defendant. "And if he liked working around kids a lot and then he goes and kills his step brothers, no way, what kind of animal does that?" "He went to church so he knew the Ten

Commandments; he knew thou shall not kill." In this last example, the defendant's involvement in church was intended to work favorably for him, in an attempt to spare his life by demonstrating good character dispositions. Instead, the mitigator was used to argue that the defendant's responsibility for the crime was even greater; in some cases inevitably more punishable.[23]

Compared to the disfavoring dispositional mitigators, juries made very few dispositional statements favoring the defendant. One example of a favoring mitigator in the life jury was, "22 [the defendant's age], I have to say life." There were three coded statements of favoring dispositional factors, compared to 49 disfavoring dispositional factors in the two selected juries presented here; a difference that cannot go unnoticed. Thus, mock juries did discuss favoring dispositional mitigators, but did so much less frequently compared to disfavoring mitigators.

Whitman (1999) indicated that jurors who shared similar negative life experiences with the defendant argued that unlike the defendant, they had endured the hardships without committing murder. In the death jury one example of this was "Some people are beaten and they grow up just fine." As Whitman (1999) concluded, mitigators seem to run in direct opposition to jurors' concepts of personal responsibility, rendering jurors skeptical of mitigation testimony. The notion that jurors often focus on dispositional characteristics of the defendant was extended here by showing that jurors not only focus on dispositional attributes, but also use them in ways that disfavor the defendant. In

[23] Although a mitigator used as an argument to increase the defendant's responsibility for the crimes he committed can be considered as conversion, it was not coded as such here because the definition of conversion proposed here required a mitigator be transformed explicitly into a statutory aggravator such as future dangerousness.

addition, jurors are more likely to dismiss or neglect to consider situational factors, but when they do, they seem to think of them as favoring the defendant.

In contrast to dispositional mitigators, situational mitigators favoring the defendant were more frequently discussed than situational mitigators disfavoring the defendant. Considering the emotional abuse mitigator produced the greatest frequency of all mitigators, it is likely that mock juries considered emotional abuse as a situational factor that did in fact mitigate the crime, but not enough to outweigh disfavoring dispositional mitigators or aggravators. An example of a favoring situational mitigator from the life jury was, "He wasn't even allowed to go to the grandfather's funeral." Another more substantial example from the same jury was, "I feel sorry for the way he grew up, the life he had." These examples illustrate how mock juries considered emotional abuse. When one reads through the transcript, however, one can see the consideration of these favorable mitigators do little to actually favor the defendant because mock juries are more likely to discuss disfavoring attributes, offsetting any benefit from favoring ones.

Another factor that may offset mock juries' consideration of favoring mitigators is the heinousness of the crime. Heinousness is believed to bias capital juries toward death sentences (Bowers, 1995; Haney, 1995; Patry, 2001). In the current study, the presence of heinousness was found to increase the frequency of disfavoring dispositional mitigators. An example of this in the death jury was, "I agree. That's why I say death [because he killed four people], even if he had a mental illness, what are his chances of having a better life?" A sequence of statements in the death jury also shows how jurors consider heinousness and disfavoring dispositional mitigators: "I'm not saying that's

okay, most people who kill have some anger problem or they can't control themselves." "Even temporary." "It doesn't necessarily mean that's okay because he might have had emotional problems, everyone has emotional problems." "Okay, yeah." "Yeah." "We don't go to that extreme." "Yeah." "Where we tell people we're going to kill you, you can always walk away and he had a chance to get out of there and leave." "He could have stopped at any moment." "That 13-year old boy [step brother], they talked about torture being one of the things for the death penalty and aggravated battery, well he had to bring him back in and stab him and shoot him again, so I can say that was aggravated." Similar discussions are found throughout other deliberations in the current work, suggesting the effect of heinousness may have increased the defendant's level of responsibility, leading to a greater likelihood of death.

The extent to which mock juries convert mitigators

The underlying question in the current study is how mock juries consider mitigators in their sentencing decision. Based on interviews with California capital jurors, Haney (1995) argued that at times, these jurors converted mitigators into aggravators. In the current investigation, conversion was defined as a mitigator that has been explicitly transformed into a statutory aggravator, such as future dangerousness. For example, "He has a history of mental problems, so he is likely to kill someone in prison." Conversion was expected to occur with greater frequency than what was found in the deliberations (i.e., less than one percent of the total codes.) One explanation for such low frequency of conversion may be that too few mitigators in the stimulus trial lent themselves to conversion.

The definition of conversion used in the present work was a narrow one because it was designed to capture the legally relevant conversion of a mitigator to an actual, cognizable aggravator. This approach, however, may have excluded substantive transformation of mitigators into factors that work against the defendant but not into statutory aggravators necessarily. Because disfavoring dispositional or disfavoring situational factors work against the defendant, the consideration of such factors could be considered conversion but to a lesser degree than conversion as defined in the present study. Therefore, the consideration of a mitigator that disfavors the defendant is worth additional attention as a potentially explanatory factor in jury decisions.

Another explanation for the low frequency of conversion may be that mock juries were rejecting the mitigators because they found them to be inconsistent with each other or with the crime. As Sundby (1997) reported, "testimony about the defendant's behavior often creates perceived holes in the mitigation story and jurors, shocked by the brutality of the crime, often will be waiting to spot inconsistencies as evidence that the defense is trying to fool them" (p. 1169).

The discussion of inconsistency and rejection of mitigators

In the development of the coding scheme, it became evident that mock juries were not converting the mitigators into aggravators. Rather, they were discussing how some mitigators were inconsistent with other mitigators, or inconsistent with the crime. An example of inconsistency between mitigators from the death jury was "How could he be such a zombie [emotionally distraught] and be in the military and do all that?" This was followed by "and be emotionally stunted, some psychological test would have shown that." An example of inconsistency between a mitigator and the crime was "How could a

guy with the emotional maturity of a ten year old premeditate all these murders?" It also became evident the discussion of inconsistency of mitigators sometimes led to the rejection of mitigators. For example, "How could a guy with the emotional maturity of a ten year old premeditate all these murders, he just can't be mentally ten years old."

In some cases, rejection of mitigators occurred without discussion of inconsistency; the mitigator was either not believed at all, or was considered then rejected. An example of rejection of mitigators from the death jury was, "It didn't sound like they were abusive to him." Another example from the death jury illustrates rejection of all mitigators, "I don't think there were any mitigating circumstances."

Although low frequency (i.e., 6.6% of all codes) of inconsistency and rejection of mitigators occurred relative to other categories, a positive relationship was uncovered between disfavoring dispositional mitigators and inconsistency and rejection of mitigators. A parsimonious explanation for this relationship is that because disfavoring dispositional mitigators were more frequent than other mitigators, disfavoring dispositional mitigators were more likely to be found inconsistent and were more likely to be rejected by mock juries.

Do jurors assist fellow jurors?

Past research reveals low levels of juror comprehension of legal instructions (Devine et al, 2001). Based on such findings, we expected that jurors would not assist fellow jurors when the latter expressed confusion or misapplication of the law during deliberation. Although there were some instances of assistance, the more common response to a confused juror was "I don't know what that means either" or "I was wondering about that too." The legal assumption that groups outperform individuals in a

decision task may still hold, but not when the group as a whole exhibits a lack of comprehension. The finding of interest here was the observed increase in understanding of instructions and mitigation for mock juries in the revised instructions condition.

Patry (2001) observed an increase in post deliberation individual juror comprehension scores as a result of revised instructions. Even though the present study was not designed to measure juror comprehension of instructions, the data confirm the Patry (2001) findings by demonstrating an increase in the frequency of understanding instructions in the revised instruction condition.

Curiously, misunderstanding of instructions did not decrease as a function of revised instructions. One explanation may be that comprehension of instructions and mitigation increased for only certain aspects of the law, but remained unaffected for others. For example, one death juror stated "What do they mean by depravity of mind, he obviously had to be depraved, is that a circumstance that calls for the death penalty? I'd have to say yes." This statement indicates the juror does not understand the term "depravity of mind" or its function. According to instructions, this term is used to decide whether the crime involved depravity of mind to the victims, a factor introduced as an aggravator. In the example above, however, the juror associates depravity of mind with the defendant's mental condition (i.e., a mitigator). By stating that the defendant was "obviously depraved," the juror reversed the function of depravity of mind to the victims (i.e., its function as an aggravator) and interpreted depravity of mind as a mitigator (i.e., the defendant suffered a mental disturbance).

At this point in time, it is difficult to say exactly which aspects of the instructions were better understood because the study did not focus on mock jury comprehension of

instructions, nor was the coding scheme sufficiently elaborate to capture this query. There was, however, some indication that aggravation, as well as mitigation, was poorly understood. One definition of aggravation provided by a juror was "I think there was aggravation because his parents aggravated him, he's obviously very aggravated." Here, the use of aggravation can almost be seen as a conversion of aggravation to mitigation. These and other examples of misunderstanding reveal to some degree, the level of misunderstanding related to legal concepts in sentencing phases, an issue the legal system cannot overlook.

Limitations of the present study and future endeavors

A limitation of the current study was the poor quality of the deliberation videotapes. Two sound engineers were consulted to discuss improving the sound quality of the deliberations. Both experts argued that technology does not permit improvement of material that has already been filmed, and any attempt to isolate individual juror statements would be extremely costly. Poor sound quality impacted the transcription process, which in turn affected the amount of data generated from the deliberations. Although a rich source of data was generated, a better sound quality would have permitted more accurate analyses of the deliberations and offered a better perspective of how mock juries consider such issues as mitigation. It should be noted however, better sound quality would not overcome the difficulty in understanding jurors when they speak over each other, an obstacle related to content analysis of any group discussion.

Another limitation was a common criticism directed toward research involving mock juries. For obvious reasons, research with real juries is very difficult to undertake and the analyses of real capital jury deliberations while they are occurring is impossible

given our laws today.[24] In addition, research with real capital jurors has its own flaws. For example, the CJP offers post deliberation responses to fixed and open interview questions, but the time between the trial and the interview is often years after the trial. The type of data in the current study overcame these obstacles by capturing the process of deliberation while it occurred, allowing for a direct representation of what juries discuss and how they discuss it. On this basis, it is reasonable to believe that mock juries fairly represented real jury behaviors.

A criticism often associated with mock jury studies is the use of student participants as mock jurors. Patry (2001) found no differences between his non student and student samples, and differences were not observed on the videotapes between these groups. Moreover, based on their demeanor and their discussions, all individuals seen on the videotapes gave the impression that they were approaching the sentencing task in a serious and applied manner. There is no reason therefore, to conclude that the student and non student samples behaved differently in this study.

Conclusions

Vidmar and Schuller (1992) argued that "most empirical researchers have only made inferences about the deliberations from the variables manipulated in the experiments and from the resulting verdicts" (pp. 175-176). In the current project, we were able to extrapolate how juries considered mitigators, and draw inferences directly from the deliberations themselves. In future endeavors, researchers must recognize the richness with which these data can extend empirical knowledge collected from other sources, and be willing to open Pandora's Box.

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[24] Current research is being conducted in Arizona on real civil juries to uncover what they discuss during deliberations. See Diamond, Vidmar, Rose, Ellis & Murphy, (2003).

The research above, along with research produced by the CJP and others, raises concerns about whether the sentencing task can be accomplished in a satisfactory manner given the instructions and legal boundaries with which jurors are expected to operate (Patry, 2001; Sundby, 1997; Wiener et al, 2004). As Wiener et al (2004) suggested, "Although the task [of weighing aggravators and mitigators] is conceptually simple, it proves to be much more difficult in practice because of the richness of the evidence and the influence of deliberations in jury trials" (p.521). Can a reasonable person, with little knowledge of the law, be expected to partake in the most difficult civic responsibility with sparing information to guide the decision making process, and make a fair life or death decision? The research here and elsewhere suggests that such an expectation should not be anticipated under the current legal framework (Bowers, 1995; Haney, 1995; Luginbuhl & Howe, 1995).

In Ring v. Arizona (2002), the Court called for greater participation from the jury in the determination of aggravation. Moreover, a number of courts have revisited their capital statutes recently, and emerging opinions reflect a critical approach to undertaking death sentence appeals. For example, Kansas law states that if capital jurors find aggravators and mitigators to be equal, they should favor a death sentence. The Kansas Supreme Court however has recently opined in a 4-3 majority decision, that capital juries are guided by laws violating the Eighth and Fourteenth Amendments and the capital statute operating in Kansas at present is deemed unconstitutional.[25] In Texas, the Supreme Court overturned the death sentence of a convicted murderer because the jury failed to consider his learning disability and other evidence in his case (Smith v. Texas,

[25] The Eighth Amendment addresses "cruel and unusual punishment" and the Fourteenth Amendment addresses guaranteed rights, due process and equal protection for U.S. citizens.

2004). In its decision, the Court wrote "there is no question that a jury might well have considered Smith's IQ scores and history of participation in special education classes as a reason to impose a sentence more lenient than death." Such a consideration might only occur if the jury is properly instructed.

The implications of the current project are significant for capital jury decision making. The implications are also important to the legal system in its pursuit of constitutional statutes, particularly when a life is at stake. Whether or not juries are imposing death sentences arbitrarily and capriciously is a difficult question to tackle. Even if juries consider mitigators in ways that disfavor the defendant, it does not necessarily mean they are imposing capital punishment arbitrarily. It is however, an indication that juries sometimes consider mitigators in ways that can lead to a greater likelihood of a death sentence, an outcome the U. S. Supreme Court could well deem unconstitutional. In most states with death penalty statutes, capital juries are asked to weigh aggravators and mitigators; if juries consider mitigators as disfavoring the defendant, aggravators will inevitably outweigh mitigators.

Appendix A

Sentencing instructions

Pattern Virginia Instructions

You have convicted the Defendant of an offense which may be punishable by death. You must decide whether the defendant should be sentenced to death or to life imprisonment.

Before the penalty can be fixed at death, the state must prove beyond a reasonable doubt that his conduct in committing murders of [his family] was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the above four victims, or to any one of them.

If you find from the evidence that the state has proved beyond a reasonable doubt that the requirements of the preceding paragraph in this instruction, then you shall fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment.

If the State has failed to prove beyond a reasonable doubt the requirements of the second paragraph in this instruction, then you shall fix the punishment of the Defendant at life imprisonment.

Appendix B

Sentencing instructions

Revised Instructions

The jury has convicted the Defendant of an offense which may be punishable by death. The jury must decide whether the defendant should be sentenced to death or to life imprisonment. In reaching the penalty decision, follow these instructions carefully.

First, the jury must consider whether the prosecution has proved beyond a reasonable doubt that the defendant's conduct in committing the murders of [his family] was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the above four victims, or to any one of them. If the jury finds that the prosecution has proven the aggravated nature of the crime beyond a reasonable doubt, then you should proceed to the next step.

If the jury unanimously finds that the aggravated nature of the crime has been proven beyond a reasonable doubt, it must then take into consideration the mitigating evidence presented by the defense. This may include evidence presented of circumstances which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment. There are no limitations to what you may consider as a factor that reduces the defendant's culpability, nor must the jury unanimously agree that these factors exist. If, after weighing all of these mitigating factors that favor leniency for the defendant, one or more jurors believe that the defendant does not deserve the death penalty, the jury must sentence the defendant to life in prison. Only if both of these two conditions are true: 1) that the jury unanimously agrees that the aggravating nature of the crime has been

proven beyond a reasonable doubt and 2) that no jurors feel that the defendant deserves a life sentence, may you sentence the defendant to death.

(Mark the circles that match your answers)

1) Are you sure as a member of the sentencing jury, convinced beyond a reasonable doubt that the defendant committed an aggravated crime?

O Yes: continue to next question O No: life sentence- STOP HERE

2) Do you believe the mitigating evidence, any evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment, merits life over death?

O Yes: life sentence- STOP HERE O No: continue to next question

3) Do you vote for death of life imprisonment?

O Death sentence O Life imprisonment

Appendix C

Example of deliberation transcription

- what do you think? - it wasn't clear to me what the order of the killing was - INA - father, SB, SM - he didn't intend to kill SB right? - right - INA, CRIME - based on the testimony, I don't see any F on H other than he slit	her throat - CRIME - CRIME - CRIME - CRIME - the agg. part is he could have stopped when he shot SB - I don't see whether the way he was treated was completely wrong, influenced what he did, there was a	lingering hatred for his dad & SM - right, & dad knew Jerry wanted a car & instead of helping him, he buys SB a car & he's too young to drive - INA - all talking - every person is different, some react to stress more than others - & it was PR	- yeah - all talking - he went there to kill someone - his wife, he talked it over with wife | - one thing they didn't say is if he's going for LWOP - yeah - yeah - yeah - yeah	- read INST, the state has to PBRD, 2nd par. & it meets all this, regardless of his background, if he met all this, we'd have to sentence him to D - all talking - INA - DR. B was defense witness said he was emo - stunted but it wasn't enough for insanity plea
- DR. B also stated he had no emo - when he confessed killing to her, if he was really repenting, there'd be some emo - all talking - he didn't show R - but he did show R to some people, the minister said he did	- but when you're fighting Lord, you're gonna show R, you can get religious in a hurry - yeah, but there's no doubt there was abuse, no one's questioning that - all talking - that's no excuse - all talking	- but he had emo of a 10 - a 10 cannot handle M service - yeah - back to INST & each one of these & prosecution proved these - it was agg bath for one SB - yeah - all talking |	- like D said, he could've stopped anytime - he ate & drank - all talking - if his motives were to kill SM - let's go to DR. T's statements, PR b/c he hid bodies & used gloves - yeah, used gloves - that's PR	- go back to INST the state must PBRD that conduct was O/W/V | - to SB, that's agg bath - CRIME | - INA - CRIME
- he didn't go there with idea of killing SB, they just come home - read INST - he could've stopped - that's it, are we U on D? - U on agg - CRIME |	| - he didn't have to slit her throat - CRIME | - if he was emo, he would just stop - CRIME - read INST	| - state PBRD - guilty - yeah - his R & all that - all talking - if you just go in there & you're upset, that's something	- all talking - the only thing in his favor was that he has no BPR, but he wasn't under EED - what does age have to do with it - no BPR, no one has a record until the 1st time - 1st they said he had no record,	then they said he had no sig. record - was it drugs in HS? - all talking - INA - you can argue he had a tough life but if you look at judge's INST - yeah
- he wasn't even living in the house, he was married & living away, he had to go over there, he planned it - yeah - right - gloves, gun - married - he had no emo problem in M,	& he was married - & he worked - he worked & went to church - they didn't say he was fired alot from jobs - he didn't have emo - problem - INA - he knew what he was doing,	CRIME, to me that's agg - yeah, me too - SO - INA - they threw all that emo thing in - he had time to get help - if LWOP, I'd gone that way	UD	

Appendix D

Coding Scheme

1) Structural category

Codes

1A) Tape

1B) Jury

1C) # of jurors

1D) Gender composition

1E) Total deliberation time

2) Thesis category

Codes related to mitigating factors

2A) code statements containing the words mitigation, mitigators or mitigating factors (*This code was not used)

2B) code statements containing a conversion of a mitigator into an aggravator (ex: he is emotionally immature so he is more likely to be dangerous in the future)

Do the following mitigators favor or disfavor the defendant?

Case Mitigators: Identify each mitigators when considered by jurors

2C) - age f/d

2D) - emotional immaturity f/d

2E) - hx of emotional abuse f/d

2F) - extreme emotional duress (at time of crime) f/d

2G) - death of mother at an early age f/d

2H) - prevented from having a relationship with maternal relatives f/d

Character Mitigators: Identify each mitigators when considered by jurors

2I) - military background f/d

2J) - church going f/d

2K) - no BPR f/d

2L) statements containing juror confusion related to the concept of mitigation

2M) statements containing juror expression or discussion of inconsistencies in the mitigators (ex: he was in the military, so how could he be emotionally immature and have leadership qualities?)

2N) statements containing juror rejection or insufficiency of mitigators

2O) statements containing consideration (approving or critical) of any mitigator

Codes related to aggravating factors

2P) statements containing the words heinous or heinousness in reference to the crimes

2Q) statements containing discussion of the murder of the SB as an argument for DP

2R) statements containing a definition or an opinion of the terms outrageously and wantonly vile, horrible or inhuman, torture, depravity of mind and aggravated battery

2S) bad prior record as an aggravator

2T) statements containing a reference to future dangerousness

2U) statements containing the word "excuses" or justification for the crime (ex: the mitigators are just excuses for the crime)

3) Attribution category

Codes

3A) statements containing dispositional factors disfavoring the defendant (ex: the defendant is basically a bad person; he doesn't learn from punishment; we all have problems but we don't kill; he is easily influenced)

3B) statements containing situational factors that disfavor the defendant (ex: the defendant should have done something to help himself like go live with his grandparents; he should have sought help at the church or through the minister; the defendant should have stayed away from his family)

3C) statements containing dispositional factors that favor the defendant (ex: the defendant's good qualities that argue for a L sentence; he could help someone in prison because he is a good person at the core)

3D) statements containing situational factors that favor the defendant (ex: any mitigator used by a juror to argue for a L sentence, such as emotional abuse, his mother's death; the defendant didn't get any help from his family or his community)

4) Juror assistance category

Codes

4A) statements containing juror or jury assistance toward another juror in understanding the instructions or the law

4B) statements containing juror or jury assistance toward another juror in understanding the concept of mitigation

5) Instructions category

Codes

5A) do jurors begin their deliberations by reading the instructions?

5B) statements containing references to instructions during the deliberations

5C) statements containing a lack of understanding the instructions

5D) statements containing understanding of the instructions

6) Sentence category

Codes

6A) individual juror death sentence

6B) individual juror life sentence

6C) individual juror death sentence as mercy or as a lesser punishment than life sentence

6D) individual juror life sentence as worse punishment than death sentence

6E) individual juror death sentence because of the instructions/law

6F) individual juror death sentence because of the defendant (in other words, it's the defendant's fault he's getting death)

6G) individual juror life sentence based on mitigators

6H) individual juror life sentence because God is responsible for defendant's death

6I) individual juror life sentence because there is not enough information about the case or about the defendant's life to give a death sentence

6J) individual juror death sentence because the juror believes there is a possibility of parole if a life sentence is given to the defendant

6K) unanimous jury death sentence

6L) unanimous jury life sentence

6M) majority vote jury sentence (indicate how many L, how many DP)

6N) statements containing juror belief that a life sentence is 20, 25 yrs

6O) statements containing complete opposition to the death penalty

6P) statements containing the belief that the death penalty should be imposed in all murder cases?

7) Extra-legal issues category

Codes

7A) statements containing issues of intent or premeditation

7B) statements containing the assumption of case appeal

7C) statements containing the assumption of sentence appeal

7D) statements containing remorse

7E) remorse favors the defendant

7F) remorse disfavors the defendant

7G) statements containing the assumption of life without parole

7H) statements containing the lack of information in the case

7I) statements containing the discussion of the crime

Appendix E

Example of coded transcription (T1J4 1/1)

-7I -7I -7I -7I	-2R -7I -7I -7I -7I -2R,5C -2N	-2E -7A	-7A -7A -5C	-2R,5C -2E
-7F -7D	-7F -2E/f -2U	-2D/f -2M -2R -2R	-3A -7I -7I -7A -7A -7A	-2R -2R -7I -7I
-7I -2R -3A -2R -7I	-3A -7I -3A -7I	-5B -2R -7D	-2K/f,2N -2L -2K -2K	-2K -2E,5B
-3B,7A -7A -2M,2N	-2I -2N -7A,2R	-3A -6J **-6K**		

Appendix F

Clustered Coding Scheme

Structural Codes (see coding scheme)

Thesis codes (includes thesis codes and attribution codes)

- 2a/f) Dispositional mitigators favoring defendant

2C/f) - age

2D/f) - emotional immaturity

2I/f) - military background

2J/f) - church going

2K/f) - no Bad Prior Record (BPR)

3C) statements containing dispositional factors that favor the defendant (ex: the defendant's good qualities that argue for a L sentence; he could help someone in prison because he is a good person at the core)

- 2a/d) Dispositional mitigators disfavoring defendant

2C/d) - age

2D/d) - emotional immaturity

2I/d) - military background

2J/d) - church going

2K/d) - BPR as an aggravator

3A) statements containing dispositional factors disfavoring the defendant (ex: the defendant is basically a bad person; he doesn't learn from punishment; we all have problems but we don't kill; he is easily influenced)

- 2b/f) Situational mitigators favoring defendant

2E/f) - hx of emotional abuse

2F/f) - extreme emotional duress (at time of crime)

2G/f) - death of mother at an early age

2H/f) - prevented from having a relationship with maternal relatives

3D) statements containing situational factors that favor the defendant (ex: any mitigator used by a juror to argue for a L sentence, such as emotional abuse, his mother's death; the defendant didn't get any help from his family or his community)

- 2b/d) Situational mitigators disfavoring defendant

2E/d) - hx of emotional abuse

2F/d) - extreme emotional duress (at time of crime)

2G/d) - death of mother at an early age

2H/d) - prevented from having a relationship with maternal relatives

3B) statements containing situational factors that disfavor the defendant (ex: the defendant should have done something to help himself like go live with his grandparents; he should have sought help at the church or through the minister; the defendant should have stayed away from his family)

- 2B) statements containing a conversion of a mitigator into an aggravator (ex: he is emotionally immature so he is more likely to be dangerous in the future)

- 2mn) Codes representing inconsistency and rejection of mitigators

2M) statements containing juror expression or discussion of inconsistencies in the mitigators (ex: he was in the military, so how could he be emotionally immature and have leadership qualities?)

2N) statements containing juror rejection or insufficiency of mitigators

- 2pr) Codes representing the aggravated nature of the crime

2P) statements containing the words heinous or heinousness in reference to the crimes

2Q) statements containing discussion of the murder of the SB's as an argument for DP

2R) statements containing a definition or an opinion of the terms outrageously and wantonly vile, horrible or inhuman, torture, depravity of mind and aggravated battery

2S) prior criminal as aggravator

2T) statements containing a reference to future dangerousness

Juror Assistance Codes

- 4ab) Codes representing fellow juror assistance related to instructions and mitigation

4A) statements containing juror or jury assistance toward another juror in understanding the instructions or the law

4B) statements containing juror or jury assistance toward another juror in understanding the concept of mitigation

Understanding/Misunderstanding

- 5C) statements containing a lack of understanding the instructions

- 5D) statements containing understanding of the instructions

Appendix G

Life Jury

Tape 1 Jury 2

Condition: Heinousness (absent); Emotional abuse (present); Prior criminal record (absent); Instructions (pattern); List (present)

-should we do it like a real jury and vote first and see if we go with that or if it is unanimous or do we discuss

-(inaudible)

-(inaudible)

-I guess we'd only deliberate if we all don't agree initially, if we all think he deserves death penalty now, we don't need to deliberate or if one person doesn't, then we have to discuss it so we can just vote on a piece of paper or a hand count

-(inaudible)

-who thinks the proper penalty is death in this case?

-three for death penalty, as far as the other three are concerned, there isn't enough evidence or they don't feel death penalty is appropriate right now so we do have something to discuss

-(inaudible)

-(inaudible), abused

-I thought he was abused and that made a big difference in, I think if he was not treated the way he was treated he wouldn't have killed the stepparents, I don't really understand why he killed the step brothers, maybe he didn't want to get caught, that's why he killed the step brothers, to get rid of the aggressors in his life

-but for step brothers it was outrageously, wantonly vile, thirteen years old

-he just killed everyone in the room, (inaudible)

-and it was aggravated battery in this case, he had an argument with his wife about doing it and he said he didn't want to do it and he is probably very ambivalent about it knowing his background

-(inaudible)

-he was married

-(all talking)

-it's funny how they only gave us some of the facts

-(all talking)

-minor statement that had a huge impact

-another jury convicted him, we would have had more info about the murders

-(all talking)

-he brought a gun to the house, and he never cries

-and to me that shows intent

-(inaudible)

-maybe he was taught not to cry because of they way the step parents treated him

-he told his father he was hunting

-(inaudible)

-yeah

-according to the judge and the second paragraph of those instructions, if state proved beyond a reasonable doubt that his conduct was outrageously, wantonly vile... and maybe it did not involve torture, but you can say that slitting a throat is, and certainly it

contained depravity of mind and aggravated battery to these victims, according to the judge's instructions, if we agree that one of these things is happening, there's a lot of "ors" in these instructions, outrageously or wantonly or aggravated battery

-to any or one of them

-(inaudible)

-even if it was just to his step mom, aggravated battery, it does not have to be to all four and I think it was outrageously, wantonly vile to kill the younger one, and he was an expert marksman, and so he has been taught how to shoot, he had training in the military

-(inaudible)

-(inaudible)

-(inaudible), he included everyone

-his best friend, the one he did drugs with, there must have been a special bond between them and through high school and he said he never saw any abuse, maybe it was hidden but he said he was at the house many times and he did not see anything

-(inaudible)

-mental abuse can be very subtle, I can understand that but

-he brought gloves to the house, (inaudible)

-his defense attorney brought up that he had leadership qualities in military, in church, but at the same time, they're trying to say he's stunted like a ten or eleven year old kid

-yeah

-his own defense attorney in his closing argument, the most important part that he can say to get you to spare so he can live in jail for the rest of his life, he's bringing up all these

qualities in military and church, doesn't sound like he was stunted like a ten or eleven year old

-and he stepped forward when others needed help

-even if you don't believe in the death penalty, before we were chosen, they quizzed us and if anyone was too "gunho" about the death penalty, they would not be on this jury, just like anyone who is against the death penalty, so we can deliberate without radical opinions

-(inaudible), Doctor said

-(all talking)

-he didn't want to kill the step brothers, they were just there

-they were there

-he was afraid to get caught

-that's an afterthought

-it shows premeditation, it shows he is in control of his senses, he is saying "I don't want to get caught so I have to kill them"

-and he hid the bodies

-(all talking)

-the last Doctor's credentials were way over the top

-she must have no social life

-(all talking)

-if he is such a zombie how could he get into military and do all that

-and be emotionally stunted, some psychological test would have shown that

-yeah, it would have kept him out of the military

-and a commander is an important rank

-he was a commander?

-yes he was

-(inaudible)

-Jerry was a commander?

-oh, no, he was a seaman, the witness was a commander, he gave evidence that he had normal behavior

-but he said he did not really know him

-that's right, he just knew of his observable behavior as a seaman, but he said nothing negative about him

-(inaudible)

-(inaudible)

-(inaudible)

-(inaudible)

-(inaudible)

-(inaudible)

-(all talking)

-if he was picked up for something as a juvenile there would be no record of that, he is 22, everything is kind of borderline in this case

-yeah

-those are more what they call mitigating circumstances that determine if you give a life or a death sentence, one of them was if he had a bad prior record, he had not, then his age, I guess as far as the law is concerned, your age can be a mitigating circumstance

which means if you're 75 and you kill someone, you're more likely to get the death penalty because at 22 you have a chance to be a decent person in jail

-(inaudible)

-how can they have such indecisiveness about it, they say he is under extreme emotional duress

-yeah, both experts said something different, one said he was stunted, the other said he was ok

-they put him on the fence so we would have to gauge

-one Doctor said there was no age attached to emotional levels, and I don't know what that MMPI is, it's 600 questions, it's huge

-it's the same questions over and over

-yeah

-one Doctor said that he didn't act under extreme emotional duress, he was methodical and organized when he committed the crime, he had discussed it, he wore gloves, hid the bodies, the other Doctor comes in and says he didn't plan it, he was under extreme emotional duress, so it was like you said, they pay the experts to say these things and make us think about it

-what about the aunt

-she thinks about Jerry as that eight or nine year old when his mom was killed and she's holding onto that child because his mom had breast cancer and she's holding onto to that memory

-they said she didn't know him afterward

-later on

-why would the kid not be allowed to see his relatives that live right next door by his father

-his grandparents

-they were calling his mom a whore, (inaudible)

-I agree that's possible but

-yeah, burning all her clothes

-(all talking)

-that destroyed him

-he was a wretched person for doing that to Jerry

-he wasn't even allowed to go to his grandmother's funeral

-that's wretched too

-(all talking)

-now, see if he wanted to go after his dad

-yeah

-I could see that, (inaudible), he seemed to get along better with his step mom than the father

-yeah

-and he cuts her throat

-yeah

-chopped her up

-(all talking)

-it's wretched circumstances for a child, wretched but he had an opportunity to be away from that

-(inaudible), in military

-church

-around people that loved him

-then he came back and father was showing him the car

-yeah

-then all that clicked back in his head

-but at that point he was in the house with his dad and step brothers, and he and his wife had discussed it

-I'd like to know more about that

-yeah, I see two defendants in this trial, don't you? I know they were all actors but

-wife...

-she planted the seed

-there's missing information, I don't know, that's why they want to see, in my opinion, I don't like death but I think the reason why I don't like the death penalty is because they sit on death row for so many years like 15 or 18 years, so if they're gonna do it, they should do it right away

-(all talking)

-the taxpayers pay for it

-(all talking)

-they have a right to, so many appeals

-(all talking)

-it's suppose to be a swift and merciful execution, that's in the law, that's what turns me off so much about the death penalty

-rifle or handgun?

-we would have more detail of the crime if we saw the first trial

-(all talking)

-I was surprised that he slit step mom's throat, (inaudible)

-that's aggravated, that's factual

-CRIME, torture

-and step brothers were 12 and 13

-(inaudible), he was thinking about when he was younger

-he stayed with grandparents a little bit

-they said something about Crossroads

-yeah

-yeah

-(all talking)

-that's for only 30 or 60 days

-then he ran away

-(inaudible)

-(inaudible)

-I would have liked to hear the whole thing

-(inaudible)

-(inaudible)

-(inaudible)

-when you go in with the gun and you hide the bodies

-CRIME

-that implies criminal intent, premeditated, he understood the criminality of his actions

-he knew he'd go to jail or get killed if they found him, for killing two kids

-Doctor Brown (inaudible)

-(all talking)

-you see it on TV, they buy witnesses that can bend their words and bend the studies, two psychologists, one said he was ok and the other said he wasn't, they are just paid witnesses, I go back to second paragraph and we have to listen to the judge, my question is, do all these have to have been committed?

-some of them

-obviously it was outrageously, wantonly vile and involved torture, CRIME, it involved depravity of mind and battery, and the judge is telling me I have to sentence him to death if these things were proved beyond a reasonable doubt by the state whether I am for or against the death penalty, I would have to think that I could get in trouble if I don't sentence him to death

-(inaudible), is there some time he could get out

-yeah, we don't know that, did he get convicted of four separate counts of murder so he has no chance to get out

-(inaudible)

-(inaudible)

-first degree murder of four persons

-so as taxpayers, do we want to take care of him for the rest of his life

-he might come up on parole

-yeah, he might get parole after 20 years

-(all talking)

-he might be looking at four life sentences

-(inaudible), reading instructions, wantonly vile, horrible or inhumane, in that it involved torture

-and if shooting were not enough for aggravated, slitting her throat would qualify him for that violation

-yeah

-(all talking)

-(inaudible)

-they were all wretched people except the two kids

-(all talking)

-he had to be jealous of those two step brothers because they got everything they wanted

-yeah, the car they could go anywhere

-think of your own life, I'm the oldest and my parents were on me about everything

-(inaudible)

-(inaudible)

-I always thought my siblings got their own way and I was the one who was put upon, and I didn't see anything in the evidence that was outrageously abusive, beyond the burning of mom's clothes and no pictures

-he didn't go to grandmother's funeral

-we don't know that relationship

-yeah

-what did his best friend say about this?

-(inaudible)

-your parents aren't going to treat you equally but that's no excuse for murder

-I have three boys

-I have two

-I think we've got aggravated battery, that's been established

-the only thing we don't know is the depravity of mind, if someone's going to kill someone, they have to have a depraved mind, everything else in those instructions

-they said he took acid when he was younger

-they never tried to use that as a reason why he did the crimes, he had been in the military and in church, I did a lot of acid when I was a kid and I haven't killed anybody, and I've been in a lot of tough situations, I'm an ex-cop, I've been in fights just because I took acid, doesn't mean I'm killing people

-(inaudible)

-(inaudible)

-sounds like wife was encouraging him to do it

-yeah, and Doctor said he didn't seem to remember the things he did at the end with the step brothers

-he didn't remember shooting them actually

-(inaudible)

-CRIME

-Dr. Brown said he was compliant with her, willing to be guided by her, which shows me that he's just kind of going along with her

-yeah but she said he was under stress but not enough for insanity

-but she also said that he didn't plan the crime and he does not communicate well with adults

-but we don't know about her

-the first doctor said he was not under stress, he was methodical and organized, he discussed it, he hid the bodies, had gloves

-and he understood the criminality of his actions

-(inaudible)

-(inaudible)

-(all talking)

-(inaudible)

-I'm surprised he didn't do more to the father

-(inaudible)

-I'm concerned if he's up for one charge of murder or if he can get out on parole, 40 years when he is sixty two, I certainly don't want this person back in society if he's murdered four people

-(inaudible)

-we don't know if it's four counts or a life sentence and he would never get out, maybe we don't have to kill him if he goes to prison for life, it won't cost anymore to house him for 60 years than it will with all the appeals and trials to execute him, it's not like its gonna drain our taxpayers to keep him in there, as long as I knew that he's in there for life without parole.

-don't you think he will get life since he killed four people

-I guess we would know if he was convicted of four counts but they did not tell us that and we need to know four counts or one would be eligible for parole in zero, 20, 30 years

-(inaudible)

-I need to know before I can determine life or death

-we do know that he got first degree of four people and it was aggravated battery to four or any one of them, he understood the criminality or he wouldn't have hid the bodies and he wasn't so disturbed that he couldn't hide the bodies

-as far as the judge's instructions, he's guilty of all these things

-(inaudible), he was guilty

-and not knowing if he can get out, then I have to vote for death, I don't really have a stance on the death penalty, no religious problems with it or mental problems with it, I think it has to be decided case by case, there are some that need to be killed so that they can not escape, we can't even have confidence that murderers are gonna be in jail for life because they escape

-or they get out on work release programs or treatment

-they can con the doctors in thinking that they are well again, four murders, you'd think the guy would be in jail for life

-(all talking)

-killing four, so couldn't you kill while you're in jail, someone who wants to take you in the shower

-is first degree murder the worst you can do?

-(all talking)

-so we know it's four counts of first degree murder

-so you would assume that he'd never get out on parole

-wife

-wife, insurance

-they said he and his wife argued before the murders

-they said she encouraged him

-yeah and he kept denying, no

-(inaudible)

-(all talking)

-(all talking)

-there might be a conspiracy factor

-Jerry discussed murders with his wife and brought gloves, and that shows me that his mental capacity was not disturbed

-(inaudible)

-and the gun

-he did not want to kill the kids

-(all talking)

-(inaudible)

-wife

-wife

-(inaudible)

-he was easily guided, (inaudible)

-I feel sorry for the way he grew up, the life he had

-it sounded bad

-(inaudible)

-that is not a justification for four murders

-well it didn't help

-it was all "mumbo jumbo" that he was stunted like 10 or 11 because of all the people who said how great he was a leader, a marksman, all the things he did well so if he was like a 10 or 11 year old child, he carried out four murders, how could someone with the mentality of a 10 or 11 year old child can pull that off?

-you'd think the 13 year old could have manipulated him if he was 10 or 11

-yeah, not physically but intellectually, he was in the military so he wasn't retarded or stunted, you're not in the military if your 10 or 11

-(inaudible)

-basic training

-we don't know if he did a few years in the navy and then joined the reserves

-he's 22, he couldn't have done a whole lot

-yeah

-but they would have checked him out of there, I was in the National Guard and they would have booted you out

-the biggest thing for me is if it's for life, he might get out, then I lean towards death

-(inaudible)

-it's confusing to me because judge tells you about the mitigating circumstances which means that they have an effect on how to decide and his age, he was only 22 and he had no bad prior record, those are two things in his favor, there were four things

-extreme emotional duress

-and that hasn't been proved

-no because two experts disagreed

-so that's a wash

-and he understood the criminality of his actions and that I can't defy at all because he had gloves, he hid bodies

-well which is more punishment, life or death?

-22, I have to say life

-yeah, life would be more punishable

-he can go back to school, he can do different things

-yeah he can do all kinds of things in there

-he'll get workout time, TV

-he's gonna go to a state facility

-other case

-(all talking)

-I'm not "gunho" about the death penalty, but since I don't know if it's for life, then I say death

-do you think they want us to assume some things

-it's a two hour study

-talking to experimenter about life without parole

-two people stepped out

-all aggravated battery

Appendix H

Death Jury

Tape 1 Jury 7

Condition: Heinousness (present); Emotional abuse (absent); Prior criminal record (absent); Instructions (revised); List (present)

-(inaudible)

-(inaudible)

-mental abuse

-well his mom died when he was 10

-yeah

-the mother died

-yeah

-the mother died too?

-the mom died

-they harp on that a great amount, that makes you think that he was totally abused through out the years

-no and alcohol didn't seem to be a factor, it's not like they were falling down drunks and living in a bad house, the only one who came home drunk was the last one

-she was legally able to drive

-(inaudible)

-it's not like she was driving around like a drunk

-yeah

-the only one with alcohol was last one killed, if it had been the first, I could see that being a factor

-you're talking about like a 12 and 13 year olds

-CRIME, shot them in the head

-CRIME

-they said the step brothers stumbled onto it, they weren't supposed to stumble onto it

-yeah

-the way they made it sound

-yeah

-step brothers were not supposed to have any part in that

-(all talking)

-(inaudible), CRIME

-(all talking)

-CRIME

-CRIME

-(all talking)

-what do they mean by depravity of mind, he obviously had to be depraved, is that a circumstance that calls for death penalty, I'd have to say yes

-(all talking)

-that's cold blooded murder, killing your old man like that

-cold blooded murder

-yeah

-cold blooded

-he shot four people in his family

-cold blooded

-(all talking)

-CRIME

-something must have made him do that

-the second Doctor, everything she said

-(all talking)

-I didn't believe the other doctor either

-I didn't believe the second doctor either, (inaudible)

-(all talking)

-CRIME

-(all talking)

-you're not that old are you? would you want to spend life in prison? you know he is gonna do life or be dead, what would you rather do, spend life in prison or be dead?

-well of course you would, nobody wants to put their life to an end

-(all talking)

-anything you do, don't you say "something serious is going to affect you for the rest of your life"

-he wasn't thinking about his life, being so young and all, but he also didn't think about the younger kids

-that's right

-(all talking)

-CRIME

-(all talking)

-(reading instructions) do we believe it was an aggravated crime?

-yes

-yes

-(reading instructions) second question

-(inaudible)

-(all talking)

-he was a member of the church and the fact that he never had a bad prior record, it indicates to me

-you usually don't have a bad prior record before you are 20 anyway

-no, no

-(all talking)

-most people get to be 21 and not have a bad prior record

-(all talking)

-a normal average family, usually they don't

-(all talking)

-(inaudible), there's a lot of people who kill and go to church and he had a lot of support from pastor

-(all talking)

-he didn't have anybody at home but he had people at church, and people in his parish probably did try to help, he had friends

-it didn't sound like they were abusive to them

-no

-no

-(all talking)

(inaudible)

-(all talking)

-I don't think there are any mitigating circumstances

-even his best friend said there was not anything

-yeah

-yeah

-(all talking)

-(all talking)

-mitigating circumstances

-(all talking)

-(inaudible)

-(inaudible)

-the lethal part

-(inaudible)

-(all talking)

-he was in the navy, he knew he should not go out and kill

-(all talking)

-you're talking about someone's state of mind, (inaudible), you decide to kill four people, should you die also or should you spend your life in prison?

-(all talking)

-an eye for an eye and a tooth for a tooth, who's to say he won't snap again?

-yeah

-yeah

-his best friend and commanding officer

-I don't think his best friend was his best friend, to be honest

-well, yeah

-they didn't say anything about him having any mental problems, and defense would have tried

-yeah

-(all talking)

-anyone that kills someone, he snaps, something makes him flip out

-(inaudible)

-temporary insanity

-(inaudible), did his step mom do something to him because he sat there and waited for her to get back to kill her, he wanted her more than anybody

-I'm not saying that's ok, most people who kill have some anger problems or they can't control themselves

-even temporarily

-it doesn't necessarily mean that's ok because he had some emotional problems, everyone has emotional problems

-oh yeah

-yeah

-we don't go to that extreme

-yeah, where we tell people we're gonna kill you, you can always walk away, he had a chance to get out of there and leave

-(all talking)

-he could have stopped at any time

-yeah

-we're all supposed to consider these things like that high rank in army and these good things about him in church

-actually, if step mom was first to die, I could lean toward life

-yeah

-but then to kill dad and step brothers, because you see how that could set off a situation, and step mom is not blood relative

-that was still his family, she tried her best to raise him

-(inaudible)

-(inaudible)

-I don't know what she did to set him off

-his best friend said they got along real well

-he said she was fond of him

-(all talking)

-I could still see death to someone who is not a relative but a blood relative, there's a big difference here

-it's still killing, but I see what you're saying

-yeah

-(all talking)

-(inaudible)

-not your step brother

-yeah

-(inaudible)

-(all talking)

-he's 22, he mad a mistake

-that's a pretty big mistake

-it doesn't even sound like he regrets what he did

-drunk driving is a mistake, or if he would have stopped at any time

-what time of day was it?

-I don't know

-(all talking)

-probably in the afternoon

-(all talking)

-took a little time

-(all talking)

-so it had to be five or six

-(all talking)

-he gave dad a hug so he was not going for his dad

-that wasn't his target

-but that could be a hug goodbye

-yeah

-you never know if somebody thinks like that

-maybe something was said in their conversation, (inaudible), he was nervous when he went in the first time

-then that was premeditated

-oh yeah, it was planned, he went with a gun

-(inaudible), CRIME, it was brutal

-and the young kids too

-we all agree

-(inaudible)

-he supposedly went to church every weekend with step brothers, (inaudible), he already believed in that and how is his life going to improve anyway?

-we all agree it was an aggravated crime right?

-yeah

-and we all agree that the mitigating evidence is not effective

-yeah

-(all talking)

-(inaudible)

-I feel sorry sending someone so young to die but

-he killed 12 and 13 year olds, CRIME

-CRIME, what's he got to live for?

-(all talking)

-if he gets life, what is he gets out on good behavior?

-(all talking)

-not for four deaths though

-people in prison will not let him live

-yeah they will

-but what kind of life though

-they want to rape people in jail

-rapists

-(inaudible)

-I'm torn on that too

-(all talking)

-I wish we heard a closing statement from him, the thing he has to say

-(inaudible)

-(inaudible)

-there's gonna be appeals

-he's gonna think about what he did

-(all talking)

-(all talking)

-do you know how long it takes them to be executed?

-years

-(all talking)

-that's a bunch of appeals

-let's say he killed step mom, she came home first and he didn't kill the step brothers or the dad, would he deserve the death penalty?

-I'd say there were mitigating circumstances there

-I'd say more life

-me too, life sentence but not all four, I'm sorry

-he could have done her outside the house

-she was killed pretty quickly

-(all talking)

-CRIME

-(all talking)

-but if he just killed her, would he deserve to die?

-I'd say life

-me too, but because four and step brothers

-the other thing is if she deserved to die?

-(all talking)

-(inaudible), abuse

-she drank a lot

-that's not an excuse

-(all talking)

-so what

-(all talking)

-(all talking)

-(all talking)

-he was an adult, he wasn't dependant on living in that household or anything

-(all talking)

-and married

-I can't really say anyone deserves to die but she didn't do anything that would

-they didn't say

-yeah, they did not prove it

-there had to be a reason why he snapped

-I don't think he snapped

-(inaudible)

-it's not a pattern of behavior, it's very extreme from his usual behavior

-yeah

-somebody snaps, they get a butcher knife but when you go off on somebody, but when you get a gun and you get in your car and you're there and you wait for them one by one and you bring them back into the house, no, no that's not snapping, snapping to me is something else, you ever been around someone who just looses it? that burst into a fit of rage

-yeah

-well that's snapping, usually they come back out of it, but that's snapping to me

-(inaudible)

-to me that's snapping

-he did do that

-so as a jury do we vote silently or (inaudible)

-we can go around the table

-so we're pretty much down to life or death, that's what we're down to

-(all talking)

-(inaudible)

-(all talking)

-I understand they said he was dependant on people, and he was easily influenced but

-but four or five years he was out

-he had his church

-he was in the military

-(all talking)

-he could've gone back to military

-yeah

-or devote himself to the church, he had a wife and they could have moved away from there

-well he had four years on his own

-and being in the military he could have

-(inaudible)

-(inaudible)

-(all talking)

-he was partying with his buddy

-(inaudible)

-(inaudible)

-(inaudible)

-I still don't think the drugs had anything to do with it

-yeah

-yeah

-not those drugs

-no

-experimental drugs

-(all talking)

-smoking a joint

-drugs

-he was not on drugs at the time anyway

-they would have mentioned it

-that would have been a mitigating circumstance

-yeah

-so are we all in agreement? I believe we are to answer the last question

-I don't know

-I'm debating it still

-I've been debating, I was going for life and the more we talked the more appropriate

-(all talking)

-(inaudible)

-(all talking)

-I'm saying death

-I mean it is a tough decision

-(all talking)

-oh yes

-this guy is 22 and he's just starting in his life

-(all talking)

-he's a young adult

-(all talking)

-we're not here to decide that

-so if you're 50

-(all talking)

-the age has nothing to do with it, but it does

-it does

-(all talking)

-a 50 year old, you can say death penalty

-yeah

-22 year old kid you say "oh no, he's just a kid, let him live", that should not be an excuse

-(all talking)

-(all talking)

-that's why I am saying one person, he made a mistake, but four, and the step brothers

-(all talking)

-he went to church and he knew the Ten Commandments, he knew thou shall not kill

-I believe he was mentally ill, but it was not enough

-what makes you say he was mentally ill

-because all of the things they talked about are symptoms of mental illness that strike someone at that age

-(all talking)

-and if he liked working around kids a lot and then he goes and kills step brothers, no way, what kind of animal is that?

-(inaudible)

-(inaudible)

-(inaudible)

-I voted for death

-I think I say death whether he's 20, 50 or 80

-it's a hard decision, I mean 22 years old, I remember when I was 22

-he killed his brothers

-yeah

-(all talking)

-that's what I'm saying, he killed that much, he deserves to die

-yeah

-killing a 12 or 13 year old kid, they did not even begin life yet, they have not gotten to where you are

-he probably can remember when they came home from the hospital, when they were this big, changing diapers, come on now

-I can understand if he was 16 which is when your brain isn't fully developed but he's 22

-the decision making

-yeah

-(all talking)

-(inaudible)

-they didn't talk about any incident that happened just prior to this

-(inaudible)

-(all talking)

-his mom died

-(all talking)

-my mom died and my dad died, that's something you live through

-(all talking)

-I'm sure he has had a lot of counseling about that too

-yeah

-to get him over that

-usually you will see a destructive teenager distraught

-but I mean just prior to, just prior to

-(inaudible)

-when he was 10

-no, just prior to, his mom died 12 years ago

-it's not clear

-what happened just prior to, they didn't talk about it at all

-no they didn't

-so they must not have been

-there has to have been a reason why he did what he did

-like did his step mom threaten him out of the will

-(all talking)

-why was his wife trying to talk him into killing them

-(all talking)

-they just said him and his wife had an argument

-all of this does not make it come together, his wife telling him to kill them is from out there, left field

-yeah

-it doesn't have to do with anything

-got mad at somebody

-they just threw it in there to make it seem like something

-if she had something to do with it, they would have mentioned it

-wife

-(inaudible)

-(inaudible)

-all talking

-the first Doctor said he didn't cry and he didn't show that much emotion about it all

-all actors

-all phony

-it's an experiment

-phony

-long hair actor

-actor he looked like

-would they kill someone who isn't guilty? And, oops, sorry if there isn't any clause

-but he already admitted that he did it

-he killed four people

-that's my whole thing

-some innocent get executed

-other case death penalty

-DNA evidence

-he said he did not intend to kill, but he was carrying a gun and he told that Doctor he was going to kill them

-yeah

-he took that gun with that thought

-it was all premeditated

-all premeditated

-all premeditated

-he had it all planned even before he went over there

-that's why he is convicted of first degree murder

-yeah

-because it was premeditated

-(inaudible)

-he had nothing to loose, why lie about it?

-if you asked me a question after I just killed four people "Do you feel sorry about..." "umm, yeah, I feel sorry", no you don't, if he felt sorry after the first one, he would have stopped, but he killed four

-if he was going to stop, you would think that he would have stopped when the step brothers came in

-yeah

-unless he planned to kill them

-he could have stopped after the one got away

-but, no, he didn't, said ok "I got to finish this"

-he could have gotten that kid help

-he could have stopped after the dad

-yeah

-(inaudible)

-father was giving him face and he shot him

-(all talking)

-CRIME

-CRIME

-CRIME

-(inaudible)

-I think he deserves the death penalty and I didn't think I could say that

-if there was any doubt that he didn't do this, then ok, but

-no doubt

-it was brutal

-I just don't understand the motivation though

-yeah, why did he do it?

-yeah

-(all talking)

-seems like there should have been a reason to kill your whole family

-bad job

-all the questions

-defense attorney should have told us what happened just prior

-why

-I don't think there is always a reason why

-there's always a reason why

-(all talking)

-(inaudible)

-some people are beaten and they grow up just fine

-yeah

-everybody handles life situations differently

-there was beating there, maybe verbal abuse

-does not seem like there was even that

-cold blooded murder

-cold blooded

-he could have stopped, and I don't care why or what his excuse was, if he snapped or if he didn't, and I don't think he snapped

-(all talking)

-other crime

-but you are talking about killing four people

-and I agree, that's why I say the death penalty, even if he had a mental illness, what's his chances of having a better life

-there is no better life to have and he deserves to die

-he will for another decade

-well we all came to a conclusion

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