LIFE OR DEATH DECISIONS: MEASURING JURY INSTRUCTION IMPACT ON IMPOSITION OF THE DEATH PENALTY

by

JOHN ROBERT BARNER

(Under the Direction of Larry Nackerud)

ABSTRACT

The context in which instructions are given to juries, including their clarity and comprehension, the weight given to legal precedent, findings of fact, and explication of aggravating and mitigating circumstances are crucial to determining the real impact of those instructions in the sentencing phase of a capital trial. The purpose of this study is to investigate the content of jury instructions and the impact they have on the process of jury decision-making. This study provides empirical evidence to enable jurisdictions and reviewing courts to better ascertain the comprehensibility of jury instruction content and explore key areas that require consideration with regard to how fluctuations and/or arbitrariness in clarity and comprehensibility alter the final verdict in a capital trial. This study investigates the possible reciprocal relationship between differing conceptions of justice inherent in jury instruction content and predispositions toward imposition of the death penalty. Concerns are derived from the dissenting opinions found in *Gregg v. Georgia* (1976) as to whether increased attention to a strict "rule of law" in jury instructions fosters increased jury imposition of the death penalty. Empirical information is gathered from jurors as to whether procedural efforts to avoid arbitrariness in jury instruction may potentially bias juries away from consideration of aggravating or mitigating circumstances in capital trials and

obscure key decision-influencing variables. The relationship between capital jury instructions and imposition of the death penalty is analyzed through a mixed methodology utilizing data collected as part of the archives of the national Capital Jury Project (CJP) at the School of Criminal Justice at the State University of New York at Albany (*N*=1198) and survey research conducted in Georgia to identify instructional factors that are consistent with imposition of the death penalty or lesser sentence recommendations. Results contributed to the development and validation of an empirical instrument, the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) measuring the content in the jury instructions.

INDEX WORDS: Law, Jury instructions, Death penalty, Capital punishment, Arbitrariness, Theories of justice, Decision-making

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DEDICATION

This dissertation is dedicated to Theodore Edward Barner, *amicus curiæ.*

Wer mit Ungeheuern kämpft, mag zusehn, dass er nicht dabei zum Ungeheuer wird. Und wenn du lange in einen Abgrund blickst, blickt der Abgrund auch in dich hinein.

—NIETZSCHE

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CHAPTER 1

Introduction

Today, the United States remains the only Western nation that maintains a federally-sanctioned death penalty, and one of five nations (including China, Iran, Pakistan, and Saudi Arabia) that carry out 88% of all known executions worldwide. In contrast, the rest of the world continues to move toward abolition, with more than three countries a year abolishing the death penalty for all crimes during the past three decades (Jasper, 1998). Out of 195 nations, 139 have abolished the death penalty in law or practice (Amnesty International, 2011), yet it remains the legal standard in 34 of the 50 American states. America's relationship to the death penalty, from the colonial era to the present day, has been fraught with controversy as to its potential cruelty, disproportionate or capricious legal application, and efficacy as a deterrent to crime. Despite passionate views held by advocates for its retention or abolition, a full examination of this controversy remains, as McGowen (2011) noted, conspicuously absent from public discourse despite capital punishment being continually upheld in the American judicial process.

As a form of punishment, lethal execution of criminals has existed since the earliest forms of civilization, and debates over its imposition and application are recurrent in the development of religious, philosophical, and political thought dating back over two millennia. The passage of time has done little to quell debates over capital punishment in America and other countries where it is legally sanctioned, which exist in much the same form today as they have throughout history (Ehrlich, 1975; Sellin, 1959; Vila & Morris, 1997). These debates form the backbone in the development of juridical and punitive systems from antiquity to the present and

are still considered, given the finitude of the punishment, to be the highest echelon of civil governance within a modern society (Banner, 2002; Steiker & Steiker, 2006).

Contemplation over the legal contexts, punitive efficacy, and moral and ethical grounding of the execution of criminals has factored heavily in the development of ecumenical thinking in both the East and West regarding the relationship between religious and secular judicial bodies, the development of the sovereign nation-state in the transition from monarchical rule to parliamentary democracy, and the continued political and social development of human society (Bedau, 1992; Benn, 2002; Coggins, 1990; Ewin, 1972; Megivern, 1997). However, as Baumgartner, De Doef, and Boydstun (2008) noted, "whereas capital punishment for serious crimes was once common across the bulk of Western countries, since 1945 it has been increasingly rare in democratic nations and more geographically concentrated within the United States" (p. 6). This dissertation traces this centrality to the development of the modern jury system and two features which are unique to American jurisprudence: 1.) The structure of capital sentencing from a uniform model handed down by a singular legal or governmental authority (i.e., a head of state or duly appointed judge) to the current bifurcated model of guilt and penalty phases; and, 2.) The subsequent ability of an impaneled jury to render a complete and final sentence deciding the enforceable punishment.

This study explores the controversy over the administration of the death penalty in the United States by addressing how the current procedural structure impacts, through mandated instructions, the jury as the final arbiter of sentence. Writing a concurring opinion in the case of *Ring v. Arizona* (2002), Justice Stephen Breyer noted that the Constitution of the United States, particularly its Eighth Amendment, supported the view of the jury as the "conscience of the community" (p. 616; see also Bowers, Foglia, Giles, & Antonio, 2006, p. 946) and thus more

equipped to render a just sentence than an appointed or elected state official. The evocation of the communitarian responsibility of deciding punishment in the modern procedural reforms of capital punishment in America contextualizes the death penalty as a *social* issue. The social function of capital adjudication not only directly (by force of law) places responsibility ultimately in the hands of a jury comprised of the larger citizenry but is also a byproduct of a steady evolution of historical and social developments within the United States that have culminated in the current procedures. By exploring the latter by way of historical overview, this study sets the stage for an empirical examination of the procedures themselves.

The Death Penalty in America: An Overview

Capital punishment in the United States evolved from the traditions of English Common Law and Puritan religious tenets of early colonial settlers. As Vila and Morris (1997) noted, in early settlements such as the Massachusetts Bay Colony, founded in 1641, the types of crime designated as meriting a capital sentence and the mechanisms by which the sentence was carried out drew directly from the European tradition and relied upon Biblical references as a moral support for the appropriateness of the sentence. Though types of offenses varied from one colony to another, as did the frequency of enforcement over time, a sentence of death was considered binding and mandatory until the mid-1700s (Bedau, 1997). As Vile (2006) noted, the founding of the United States foments a particular allegiance to the "rule of law;" that is to say, that the sovereignty of the nation is found through its codified documents, and not, as centuries of monarchical rule had previously held, any one particular individual or office.

With the birth of the new nation coming at a time of tremendous philosophical, political, and social change throughout the world, the debate over the death penalty as it would be applied was central in forming the new United States. As early as 1779, founding father Thomas

Jefferson would advocate for legal reform that greatly diminished the role of capital punishment from its previous ubiquity in the former colonies. Inspired in part by the Enlightenment philosopher Cesare Beccaria (who is discussed in greater detail in Chapter 2), Jefferson (1950) submitted a bill to the Virginia legislature which stated that "cruel and sanguinary laws defeat their own purpose by engaging the benevolence of mankind to withhold prosecution, to smother testimony, or to listen to it with bias" (p. 495). While the Virginia bill was not initially adopted, the spirit in which it was written, along with the legal reforms of William Blackstone in England, would later become codified as major tenets of the Eighth Amendment of the United States Constitution, barring "cruel and unusual punishment," ratified in 1791 as part of the federal Bill of Rights (Nakell & Hardy, 1987; Vila & Morris, 1997), thus inaugurating a legal and philosophical debate over capital punishment that continues to the present day.

Between late 1700s until the end of the Civil War, the movement to abolish the death penalty in the United States built considerable momentum and saw considerable legal and penological reforms throughout many states. In 1786, Pennsylvania passed an act greatly delimiting the crimes which could be punished by execution, while throughout the early- and mid-1800s, several states, including Louisiana (1825), Maine (1836), Massachusetts (1836), New Jersey (1841), and New York (1843) publicly debated the merits of having capital punishment (Vila & Morris, 1997). As Bedau (1997) noted, several major judicial developments occurred on the federal level during the same time period, with trial juries being granted the right to sentencing discretion, public executions being prohibited and the number of capital crimes being dramatically reduced. These developments led Michigan (1847), Maine (1876), Rhode Island (1852), and Wisconsin (1853) to either partially or completely abolish the death penalty,

and the issue of capital punishment quickly became a matter for United States Supreme Court, beginning with *Wilkerson v. Utah* in 1878.

Foley (2003) noted that "from 1878 to 1972, the Supreme Court deferred consistently and willingly to states' rights concerning both criminal justice and the death penalty" (p. 2). Moreover, early efforts at universal judicial and penal reform regarding the death penalty suffered severe setbacks during the aftermath of the Civil War and the First and Second World Wars. Of the 16 states and jurisdictions that outlawed capital punishment after 1845, only seven (Michigan, Rhode Island, Wisconsin, Maine, Minnesota, North Dakota, and Puerto Rico) had maintained their abolition to the death penalty statute by the beginning of the 1950s. The majority of judicial and constitutional challenges to the death penalty that occurred between 1878 and 1972 were met with a strong interpretation of the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution that supported the legality of capital punishment (Zimring, 2003). Often, in these legal challenges, there was "little opposition to the death penalty and, at times, no opposition at all among the justices" (Foley, 2003, p. 2). By the early 1960s, how the death penalty was applied in America varied greatly from state to state in terms of crimes meriting a capital sentence, means of execution, and trial procedures. This variance, combined with a large number of federal challenges and precipitous decline in executions, brought the issue of the death penalty to the attention of the high court.

Steiker and Steiker (1998) noted:

> The first suggestion that the Court might regulate state death penalty practices appeared not in a Court decision, but in a 1963 Court order announcing the denial of two petitions for *certiorari*…Justice Goldberg, writing for himself and two

> other Justices, maintained that the questions raised by the petitions were worthy of the Court's attention (p. 92).

The intervention of the Supreme Court in the latter 1960s would lead to both a resurgence of abolition movements throughout the United States and the first salient expressions of public opinion since before the Civil War. Moreover, the constitutional challenges which arose during the *de facto* moratorium on executions brought on by the Court would bring to light the central themes and issues that are still debated among lawyers, advocates, and scholars today.

Simply put, over its long history, the legal and practical issue of the death penalty in America became, and remains, a complex one, particularly regarding its imposition and application. Paradoxically, the death penalty is both a highly contested yet deeply ambivalent aspect of the American legal corpus (Baumgartner, et al., 2008). This seemingly ineradicable aporia at the heart of the death penalty debate can be most clearly evinced in the recent constitutional challenges heard by the United States Supreme Court from the early 1970s until the present.

The United States Supreme Court heard the case of *Furman v. Georgia* in 1972 and, in a 5 to 4 decision, issued a *per curiam* opinion that the death penalty as administered in the United States was in direct violation of the Eighth and Fourteenth Amendments to the Constitution (Arkin, 1980; Banner, 2002; Bedau, 1992; Costanzo & White, 1994; Ehrlich, 1975; Jasper, 1998; Oshinsky, 2010; Zimring & Hawkins, 1985). As Vidmar and Ellsworth (1974) noted, the majority opinion specified that, with regard to the Eighth Amendment ban on "cruel and unusual punishment" and the Due Process clause of the Fourteenth Amendment, the death penalty was unconstitutional primarily because it "was applied in a sporadic, capricious, arbitrary, or unfairly discriminatory way" (p. 1245). The opinion suggested that, through judicial review throughout

the 32 states with sanctioned death penalties, the nationwide moratorium enacted by *Furman* could eventually be overturned if significant changes were made to the judicial processes by which a sentence of death was levied. Under the guidelines of the decision, states seeking to lift the moratorium and once more legalize the use of capital punishment would have to apply strict prosecutorial and sentencing standards specifying the conditions under which the death penalty could or could not be imposed.

Within four years of the *Furman* case, the Supreme Court convened to again hear oral arguments involving the procedural standards in a death penalty case. The overarching thrust of the majority decision (by a vote of 7 to 2) in *Gregg v. Georgia* (1976) was that revised capital sentencing procedures, which included a bifurcated proceeding where the determination of guilt or innocence and sentencing are conducted separately, specific jury findings as to the severity of the crime and the disposition of the defendant, and "guided discretion," i.e., a comparison of each capital sentences' circumstances with judicial precedent, were sufficient to prevent capricious imposition of death (Zimring & Hawkins, 1985). Although this would seem a surprising reversal given the short amount of time that had passed since *Furman* was handed down, the decision in *Gregg* effectively reaffirmed the constitutionality of the death penalty without explicitly contradicting the *Furman* findings, thus demarcating the difference between procedure (the constitutionality of which was upheld in *Gregg*) and practice (at issue in *Furman*) with regard to the death penalty in the United States. In other words:

> Ordinarily, a judicial decision about whether a decision-making process is arbitrary is based on a determination of whether the system lacks necessary procedures. Therefore, the standard constitutional remedy for arbitrariness is simply the erection of procedural safeguards. Confidence in the efficacy of

> procedure as the instrument for the protection of liberty is a hallmark of…due process jurisprudence. Once the procedures are in place, the Court customarily assumes they will work and does not generally inspect their performance (Nakell & Hardy, 1987, p. 38).

The *Furman* and *Gregg* decisions were notably different in that, combined, they set the precedent that the death penalty had the potential for arbitrary imposition and instituted a set of procedures explicitly designed to prevent that arbitrariness that needed to be inspected in order to adhere to the standard upheld by the Court (Bedau, 1997; Garland, 1990; Greenberg, 1982). Without any mechanism outside the existing appellate process to inspect such procedures, the issue of the potential arbitrariness of the death penalty inaugurated a contentious debate in American jurisprudence that has continued since its resumption in 36 states following the *Gregg* decision. While this debate has continued, from 1976 until 2009 there have been 1,188 executions in the United States (Cothron, 2009).

Currently, capital offenses under state law are especially heinous crimes involving the intentional death of another human being, or, in the case of Federal trials, treason or acts of terrorism. Capital offenses are automatically accorded a jury trial (upheld most recently as per *Summerlin v. Stewart*, 2003), chosen through an elaborate selection process (*voir dire*), rendering the jury "death qualified" or "death ready" (Dillehay & Sandys, 1996). Following the *Gregg* decision, capital trials are conducted in two phases: the guilt phase which determines the conviction; and the penalty phase, which determines the sentence. In most cases, the same jury decides the guilt phase and the penalty phase. Each phase carries with it a set of orally-delivered or written instructions, depending on state statute. Moreover, states may determine whether the jury is allowed to ask additional questions (Armstrong & Mills, 2003; Banner, 2002).

For thirty-five years since *Gregg*, death penalty scholars have argued that potential arbitrariness in these instructions undermines the legal and political structure of capital punishment as practiced in the United States so as to far outweigh its punitive efficacy and its ability to function as a deterrent to crime. This argument is supported by the death sentence moratorium in Illinois issued in the year 2000 and exonerations of over 100 condemned individuals nationwide since 1976, either as part of the appeal process or due to post-conviction judicial review (Armstrong & Mills, 2003; Leo, 2005). Moreover, a statistical study of 4,578 capital cases between 1976 and 1995 found the overall rate of prejudicial error in capital cases was 68%. In other words, courts found serious, reversible error in seven out of every ten capital sentences (Gross, 1996; Liebman, Fagan & West, 2000; Leo, 2005). As Bowers (1995) noted, an emerging "zig-zag pattern of renouncing, requiring and then relaxing statutory guidance for capital sentencing discretion" (p. 1044) may, regardless of the facts of the case or any individual juror's predispositions toward the legal and moral justification for the death penalty, be unable to provide that juror with the appropriate tools to render a legally sound and constitutionally just decision.

Statement of the Problem

The problem that this dissertation aims to address is whether instructions to jurors in capital cases are appropriately effective, given their legal, historical, and empirical context. *Black's Law Dictionary* defines jury instruction as "direction or guideline[s] that a judge gives a jury concerning the law of the case" (Garner, 1999, p. 861). Jury instructions represent a significant portion of statutory guidance jurors receive when deciding on capital sentencing, as per the decision handed down in *Gregg v. Georgia* (1976). Given the special circumstances of capital trials, instructions are considered wholly separate from the *charge* of the jury found at the

conclusion of closing arguments and immediately prior to the jury deliberations resulting in the rendering of a verdict of guilt or innocence, although both are comprised of applicable legal guidelines, descriptive materials, and procedural mandates regarding weighing evidence and testimony (see Figure 1). Capital instructions are generally given immediately following the reading of the guilt phase verdict, and inaugurate the penalty phase of the capital trial. As the arbiter of fact when they serve in a capital trial, jurors are reliant upon court instructions to provide a clear, demonstrable legal rubric to aid the decision making process and provide a summative assessment of legal precedents. Jury instructions lead jurors through the statutory code to the sentencing verdict that should be delivered based on what the jury determines to be true in the penalty phase of a capital trial.

In the penalty phase of the trial, jurors have special responsibilities that fall outside typical review of evidence, findings of fact, and testimony, including finding for potential aggravating and mitigating factors in relationship to the crime which the defendant has been convicted (Barron, 2002; Bentele & Bowers, 2001; Crump & Jacobs, 2000). In the current capital sentencing process, the jury is obliged to find an aggravating circumstance (e.g., an attendant or concomitant crime in addition to the capital charge or the extent of injury to the victim) to merit a death penalty verdict and weigh any mitigating evidence (e.g., lack of violent convictions, age, mental capacity, extreme duress, or provocation). If aggravating circumstances are not found or mitigating factors are weighed more heavily by the jury in favor of a lesser sentence (e.g., life imprisonment), then the lesser sentence is often imposed by, or recommended by, the court (Baldus, Pulaski, Woodworth, & Kyle, 1980; Bedau & Radelet, 1987; Cantero & Kline, 2009; Garvey, 1998; Haney & Lynch, 1994; Schroeder, Guin, Pogue & Bordelon, 2006). This process of introduction of opposing evidence and argument is parallel to that found in

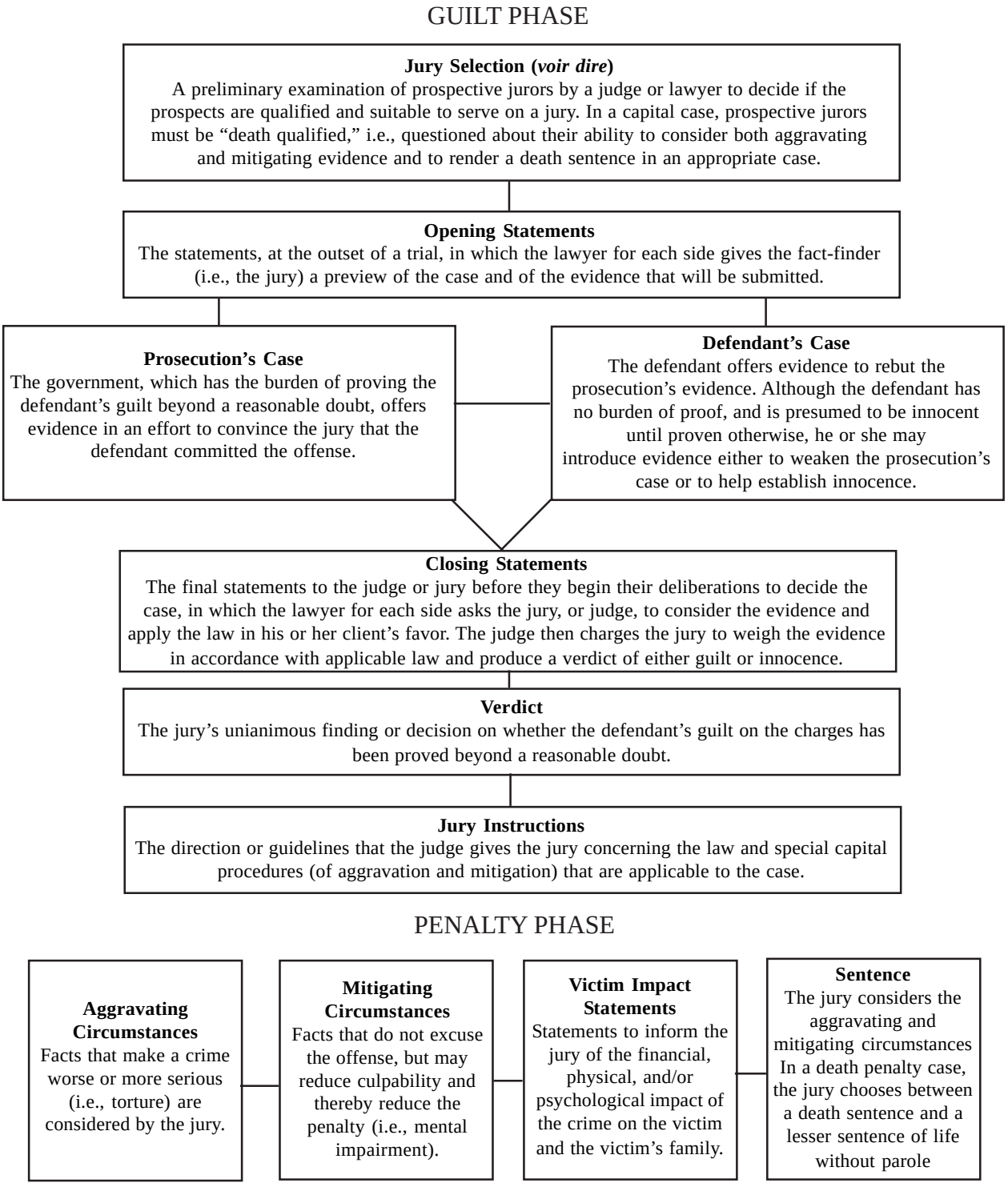

Figure 1: Bifurcated capital trial procedure.

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Text adapted from http://deathpenaltycurriculum.org/node/3

prosecution and defense arguments found in the guilt phase of the trial itself (see Figure 1). However, as Bowers, et al. (2006) noted, sentencing in capital trials differs from the rendering of a verdict in the guilt phase, as two death penalty states (Alabama and Florida) continue to litigate the constitutionality of whether a judge may instruct jurors that the court may ignore or override the sentence found by the jury (Richardson, 2004). This is compounded with the fact that, throughout the states that actively impose the death penalty, the criteria that constitute what aggravating and mitigating circumstances are specifically outlined in the jury instructions are often challenged as to their relevance to the individual cases, or the constitutionality of whether providing any specificity at all promotes jury bias (Sondheimer, 1990).

As a result of these disputes, there are no uniform standards governing the application of jury instructions currently in the United States. A growing body of literature has pointed to the strong need for empirical assessment of the role that jury instructions have in influencing jury decision-making, particularly in the areas of instruction clarity and comprehension (Cho, 1994; Diamond & Levi, 1996; Dumas, 2002; Eisenberg & Wells, 1992; Hall & Brace, 1994; Haney, Sontag, & Costanzo, 1994; Otto, Applegate, & Davis, 2007). While some jurisdictions have made efforts at jury instruction reform, further research is needed to articulate the extent and scope of influence (or, conversely, the arbitrariness) of jury instructions and areas in need of legal scrutiny and reform.

Purpose of the Study

The purpose of this study is to explore the content of jury instructions and the impact these instructions have on the process of jury decision-making in capital trials. The context in which instructions are given to juries, including the clarity and comprehension of the instructions, the weight given to legal precedent, findings of fact, and explication of the weight

given to aggravating and mitigating circumstances are crucial to determining the real impact of the instructions chosen by the court. As there are, at present, no clear judicial or constitutional mandates for jury instruction content, this study provides empirical evidence to enable jurisdictions and reviewing courts to better ascertain the impact of jury instruction content and explore key areas that require consideration when developing future instructions or implementing jury reform efforts.

This dissertation study is focused on three interrelated research areas. The first explores how fluctuations and/or arbitrariness in clarity and comprehensibility of jury instructions alter the final verdict in a capital trial. The second area concerns the possible reciprocal relationship between differing conceptions of justice inherent in jury instruction content and predispositions toward imposition of the death penalty, in an effort to answer the question: does increased attention to a strict "rule of law" in jury instructions foster increased jury imposition of the death penalty? The theoretical underpinnings of this question generate a third area centered on the lack of uniformity in the instructions and disputatious nature of their application: namely, the proposition that procedural efforts to avoid arbitrariness in jury instruction may potentially bias juries away from consideration of aggravating or mitigating circumstances in capital trials and obscure key variables that play a significant role in jury sentencing decisions. This study expands on procedural analyses of jury instruction clarity and comprehension (e.g., Blankenship, Luginbuhl, Cullen & Redick, 1997; Haney & Lynch, 1997; Weiner, Prichard & Weston, 1995) and is an extension and outgrowth of pioneering work of social workers and attorneys who have explored how important underestimated variables overlooked in jury instructions have cast a "long shadow of death" (Beck, Britto & Andrews, 2007, p. 8) on families, communities and society-at-large (Beck, Blackwell, Leonard & Mears, 2003; Bowers, 2003).

The theoretical framework utilized for this study is derived from critical legal studies and the literature on theories of justice. Critical legal theory, as defined by Kelman (1987) is the systematic study of the "structure and meaning of standard legal discourse" (p. 2), its practical application and its political and social implications. Critical legal theory views textual materials (including court instructions, statutes, precedents, and case law) as having only a partial effect on the outcome of legal disputes, and differing impacts based on the social and political context of the case. Legal texts impose significant constraints on the adjudicators in the form of substantive rules, but in a critical legal analysis, this may often not be enough to bind jurors to come to a particular decision. In this dissertation, critical legal theory frames the hypothesis at the center of the debate over jury instruction arbitrariness: that the content of jury instructions potentially has no influence on decision making in capital trials.

Consideration of the theoretical grounding of jury instructions also necessitates investigation into the role of possible intervening variables, such as gender, race, religion, the media, and the impact on families of the victim and accused. Relevant legal and social work literature on the death penalty, jury behavior and decision making, due process, jury nullification, and possible mitigating variables to jury decision-making are incorporated into the discussion section (Chapter 5) of this dissertation. Moreover, the debate over jury instructions is cast in light of the theoretical differences in the conception of justice in "rule of law" and interpretavist legal perspectives. These perspectives are, in turn, compared with social justice as it is viewed in the profession of social work.

Relevance to Social Work Practice

The National Association of Social Workers (2009) has recently taken a strong stand supporting efforts at capital sentence reform, taking as a policy platform that:

> The death penalty has always been and continues to be differentially applied to people who are poor, disadvantaged, of limited mental or intellectual capacity, or from ethnic or racial minority groups, execution goes against the social worker's *Code of Ethics*, which holds them responsible for preventing discrimination and eliminating exploitation of any group or class of people. For the individual, infliction of the death penalty permanently forecloses their capacity for reform that is possible even when serving a life sentence (p. 38).

Social workers are a growing professional presence in the criminal justice system providing a myriad of services for incarcerated clients and families of victims and defendants. Moreover, social workers have been instrumental in developing a platform of advocacy for persons on death row, including leading the call for better legal defense and equal trial rights for ethnic and cultural minorities. Legal and forensic social workers play an active role in consulting with client's legal representation, advocating for strengthening of support services for families of victims and the accused, and supporting the development of public policy that bolster reforms of due process and equal protection under the law (Beck, et al., 2007; Betancourt, Dolmage, Johnson, Leach, Menchaca, Montero & Wood, 2006; Lane, 1993). In the area of capital adjudication, social workers serve as members of mitigation teams, consulting with counsel and providing expert testimony and evidence to assist with juror decision-making regarding mitigation (Guin, Noble, & Merrill, 2003; Schroeder, Guin, Pogue & Bordelon, 2006; Swenson, 1997; Weisberg, 2005). This dissertation study is designed to contribute to a social work perspective on issues surrounding capital sentencing and provides needed conceptual frameworks and evidence-based research to assist in reforms and policy change.

Conclusion

This chapter has shown that the imposition of the death penalty has been a controversial element throughout history, with significant ties to political and social development. Moreover, in considering the death penalty debate in the context of the United States, it is extremely difficult to view the legal and practical reality of capital punishment as it is imposed in America apart from its philosophical and historical contexts. Two contemporary Supreme Court case decisions were highlighted as relevant to the current course of capital punishment in America and also provided the framework for the issues of guided discretion and arbitrariness in capital juries. The variables of instruction clarity and comprehensibility, and the procedural apparatuses in place to aid capital jurors with their decision making were introduced as possible predictors of sentencing. The chapter also begins to build a case, using a critical legal framework, for the relevance of this study by drawing from recent criminal justice and social work literature to show how a social work perspective can inform the civic exercise of jury instruction.

The following chapter presents a review of the literature to expand upon the points introduced in this chapter concerning the philosophical and legal concepts that underpin jury instructions and detail the concept of arbitrariness. In particular, Chapter 2 expands upon the historical and philosophical antecedents of the death penalty in the United States and contrast the notion of "rule of law" with both classical and contemporary philosophical views of justice. Four theories of justice are examined with regard to their influence on case law and current procedures used by courts to ascertain and control for arbitrariness in death penalty trials.

CHAPTER 2

Jury Instructions and Imposition of the Death Penalty: A Review of the Literature

As outlined in Chapter 1, the study of the procedural role of jury instructions necessitates an examination of the relationship between the definition of capital punishment as a practice along with the historical, social, and legal context that frames the judicial procedure of sentencing and imposition of the death penalty. The distinction between practice and procedure is carefully nuanced in the legal domain as well as the philosophical literature on jurisprudence. Moreover, the relevant findings in both the *Furman* and *Gregg* decisions bring the distinction between practice and procedure to the forefront of the debate over the death penalty in America. In order to carefully explore this distinction, the following review examines relevant case law, articles from the full range of peer-reviewed publications in law and the social sciences, theoretical works of legal interpretation, and philosophical definitions of justice, with direct quotation of primary sources and supplementary material, so as to present as complete a contextual picture of the debate over judicial arbitrariness as possible.

Theoretical Considerations

In this dissertation, critical legal studies (CLS) frames the research hypothesis at the center of the debate over jury instruction arbitrariness: that the content of jury instructions, due to shortfalls in clarity and procedural integrity, potentially has no influence on decision making in capital trials, thus failing to meet the procedural standard called for in *Gregg v. Georgia* (1976). As attorney Peter Goodrich (1987) noted, the law is "assumed to be a coherent system of meaning and texts, a coded unity accessible to legal experts, though to no-one else" (p. 55). As

such, a critical legal analysis of capital jury instructions exposes a key point of practical contradiction. Namely, that instructions and sentencing guidelines are beholden to the "rule of law" embodied in *Furman v. Georgia* (1972) while also adapting to a continually changing regime of procedural requirements supplemental to the *Gregg* decision as formal judicial "standards." Furthermore, these standards are imposed directly on the citizenry, as opposed to "experts" who are assumed to have assimilated the complex codes. As Kelman (1987) noted:

> Likewise, it is hard to look at the Supreme Court's attempts…to elucidate the occasions when the death penalty may be applied constitutionally as anything more than a particularly dramatic lesson in the instability of both the rule and the standard form, with each pole rapidly and completely undercutting the other. The Court eliminates a death penalty grounded in unguided jury discretion [i.e., *Furman*], forcing the legislatures to write statutes establishing ostensibly rulelike [instructions]…as long as they are not applied in a rigid, rulelike, mandatory, nondiscretionary fashion [i.e., *Gregg*]…Rules will surely be imprecise, for it is obviously impossible to capture categorically all meaningful distinctions…[and] standards will be enforced in an arbitrary way (pp. 27-28).

Moreover, as Sondheimer (1990) noted, this contradiction between rule and standard extends to the handling of concepts within sentencing statutes that are unique to the adjudication of capital trials, such as aggravation and mitigation:

> Implicit in these statutes is the assumption that aggravating and mitigating circumstances are readily distinguishable and amenable to categorization. As perceptive commentators and judges have recognized, however, jurors may view certain mitigating factors as factors aggravating the gravity of a capital crime.

> Consequently, jurors may, and sometimes do, improperly weigh mitigating factors on the side of aggravation, altering the proper balance between aggravating and mitigating factors in a particular case and depriving defendants of what the United States Supreme Court has declared to be their constitutional right to have each mitigating factor considered 'as a mitigating factor'. (p. 410).

A CLS-based perspective views the potential compromising of textual elements of the statute as not only grounds for investigation in a strictly legal or constitutional sense, but also as potentially undermining to the verisimilitude of the judicial procedure itself (Kelman, 1987; Russell, 1994).

Similarly, Holterman (2002) recognized the similarity between the debates over arbitrariness in legal discourse, the stated theoretical disposition of CLS and the tenets of social science research, attending specifically to the need for "internal consistency" in the application of procedures and the definitional equivalence (i.e., comprehensible, agreed-upon definitions) of the terms of argumentation. This last point can be evinced in recent case law regarding the clarity of definitions of aggravating and mitigating circumstances (Bowers, Sandys & Steiner, 1998; Costanzo & Costanzo, 1992; Frank & Applegate, 1998; Garvey, 1998; Sarat, 1995; Taylor-Thompson, 2000). As Russell (1994) noted, the specific application of a CLS-based analysis to a capital case (e.g., *McClesky v. Kemp*, 1987) addresses this "indeterminacy and anti-formalism…which allows for a demystification of the law and legal reasoning" (p. 240) through a thorough examination of textual and procedural elements.

The debate over jury instructions necessitates an exploration, in the current chapter, of the philosophical and theoretical differences in the conception of justice from a CLS-based legal standpoint compared with social justice as it is viewed in the profession of social work. Consideration of these elements of jury instructions also necessitates investigation into the role

of possible intervening variables, such as gender, race, religion, the media, and the impact on families of the victim and accused. In order to provide such consideration, relevant legal and social work literature on the death penalty, jury behavior and decision making, due process, jury nullification, and possible intervening variables to jury decision-making is discussed at length in Chapter 5.

Philosophical Antecedents

The strictly philosophical debate over the justification of a sovereign state to punish through death is one of the oldest elements of codified law, systematized governance, and social organization (Sellin, 1980). Some of the earliest known prescriptive death penalties are to be found in the Babylonian Code of Hammurabi, circa 1790 BCE, the laws of Moses, circa 1312 BCE, and the laws of Draco enacted in Greece during the archonship of Aristaechmus, circa 620 BCE (Aristotle, *The Athenian Constitution*, trans. 1920; Blecker, 2006; Coggins, 1990; Driver & Miles, 2007). From these earliest known sources, two diverging methods of inquiry regarding the death penalty begin to emerge historically in philosophical discourse: an ethical and epistemological argument.

While evolving independently of each other, these arguments are often considered together when philosophers discuss capital punishment. The ethical argument considers whether the killing of an individual guilty of a crime represents, in itself, a moral act, i.e., an act that is either good-in-itself; determined, through some ethical calculus, to be the right course of action or response, or ordained as such by a deity or deities (Jacquette, 2009; Wilkinson & Douglas, 2008). The second follows the epistemological argument, which asks whether a moral justification for the death penalty is adequate, given its assumption of absolute certainty regarding the facts, the determination of guilt, and characterological judgments on the accused

(Culbert, 2008; Philipsborn, 2004) and whether such absolute certainty is obtainable in the field of human knowledge. Moreover, the epistemological argument contends that, following the ethical argument to the letter, that, if a mistake is made and an innocent person is killed, then the authority under which the killing is conducted is, as such, guilty of murder (Ewin, 1972). Throughout history, both arguments have retained their essential locus despite growing rhetorical complexity as philosophy has progressed from its classical era to modern times.

Emerging from the moral codes of early civilization, the ethical argument in favor of the death penalty emerged as a central component of moral reasoning in the ancient world. The degree to which discussions of state- or socially-sanctioned killing were a part of philosophical discourse was largely due to its relative ubiquity as a form of punishment. In early Greek, Roman, and Chinese cultures, wars and radical shifts in sovereignty resulted in a general acceptance of the death penalty as a sanctioned punishment (Benn, 2002; Sellin, 1980), although, as Schabas (2002) noted, laws demanding a sentence of death were not without critique, particularly for the brutality of execution.

The ethical argument: Greek precedents. As Sellin (1980) noted, the evolution of the ethical argument for the death penalty can be viewed most distinctly in the works of Plato. It is within Plato's corpus, from his supposed earliest dialogues (*Apology*), middle period (*Gorgias* and *Protagoras*) to his later work (*The Laws*), that the argument splits into its two most notable guises: as a retributive argument and as a consequentialist argument. The retributive side of the ethical argument views the capital crime as a crime against the whole citizenry and open defiance of the rule of law, and acts as an actual incitement to the state to stop the violence or criminality lest it lead to further negative action. The consequentialist side of the argument is described by ethicists as drawing on the "beneficial effects of capital punishment, normally

focusing on deterrence" (Wilkinson & Douglas, 2008, p. 56). It is notable that one of Plato's earliest works, the *Apology,* would deal directly with the ramifications of an imposed death sentence—the accused being Socrates, Plato's mentor and the oft-proclaimed "wisest man in Athens" (*Apology*, trans. 2007, 21a). Detailing the trial proceedings and Socrates' own words of defense, Plato deftly articulates the problematic elements of reconciling the retributive and consequentialist sides of the ethical argument for the death penalty, casting light on the moral certitude necessary for administration of capital punishment, and foreshadowing the epistemological argument that marked the modern era of jurisprudence:

> I declare that retribution will come to you swiftly after my death, you men who have killed me, more troublesome, by Zeus, than the retribution you took when you put me to death. You have done this just now trying to avoid giving an account of your life, but I think the complete reverse will occur […] If you think that killing people will prevent anyone from rebuking you for not living properly, you are not thinking straight, since this escape is scarcely possible (*Apology*, trans. 2007, 39c-d).

If the death penalty was not administered soundly (i.e., morally, correctly, and pleasing to the gods, in the Greek idiom), Plato offers the view that the judges who condemned Socrates would themselves be guilty of murder, although none would be personally responsible for his death, as Socrates was forced, per Athenian law, to commit suicide by drinking poison, as told in Plato's *Phaedo*. A direct connection can be viewed here from the Greek ideals of Socrates, who proclaims to the jury that they must judge him not according to the oratorical skills on display in the court, but by the truth (*Apology*, trans. 2007, 18a) and the aforementioned legal reforms

proffered by Thomas Jefferson, namely, that the sentence must fall to a jury of the people to decide, free from coercion or bias.

Whereas the *Apology* explored the retributive argument, *Protagoras* presents a philosophical excursus on the viability of the consequentialist argument that would go on to inspire several aspects of modern criminal law. Sellin (1980) quotes from the titular character in saying that "he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he had regard to the future…and…punishes for the sake of prevention" (*Protagoras*, 324b-c, quoted in Sellin, 1980, p. 4). However, Socrates questions Protagoras on a number of points, namely whether or not a wrongdoing can be said to be "sensible" and demonstrate the use of "good judgment," (*Protagoras,* trans., 1992, 333d) despite the unjustness of the action itself. Thus, in the response of Protagoras, we are presented a conflicted notion, namely, that a person who is doing an unlawful act must be doing so sensibly (i.e., knowing what they are doing is unjust) while also seeking to afford themselves a betterment through commission of the unlawful act, thus, proving it to be "good" while at the same time unlawful.

This complicated double-gesture in Socrates' questioning provides the foundation for two common elements of judgment in criminal law, *mens rea*, or "guilty mind" (sometimes referred to as "malice aforethought") which accompanies the *actus reus,* i.e., the "guilty act" or the crime (Bedau, 1997; Martin, 2003). In common law, up to the present day, both must be proven to legal standard before a sentence of death is imposed (Bodenheimer, 1974). However, by Protagoras' stated standard, it would be difficult to prove unequivocally that an individual knew the wrongness of a crime, and yet simultaneously was able to rationally determine the individual benefit commensurate with its commission. The dialogue concludes with the philosopher never fully articulating an answer to Socrates' inquiry.

The Laws, dated by historians to near the end of Plato's life, contains Plato's clearest statement regarding the death penalty (Schabas, 2002; Sellin, 1980). Having weighed the retributive and consequenialist aspects of the morality of capital punishment in the earlier works mentioned above, Plato formulates in the dialogue that:

> Whenever any man commits any unjust act, great or small, the law shall instruct him and absolutely compel him for the future either never willingly to dare to do such a deed, or else to do it ever so much less often, in addition to paying for the injury […] But for all those whom he perceives to be incurable in respect of these matters, what penalty shall the lawgiver enact, and what law? The lawgiver will realize that in all such cases not only is it better for the sinners themselves to live no longer, but also that they will prove of a double benefit to others by quitting life—since they will both serve as a warning to the rest not to act unjustly, and also rid the State of wicked men—and thus he will of necessity inflict death as the chastisement for their sins, in cases of this kind, and of this kind only (*The Laws*, trans. 1926, 862d-863b).

The conflation of the retributive and consequentialist elements of the ethical justification for the death penalty here takes another turn, which relates directly on the ability of punishments to rehabilitate criminals. The death penalty here is seen not as simply a judicial tool among many, but rather an avenue of last resort and, as some scholars would have it, mercy (Nakell & Hardy, 1987; Sellin, 1980). The universal application of the death penalty, apropos to its historical usage in Hammurabi and Draco, is maintained, but only after every exhaustible avenue of punishment and rehabilitation has been tried, and considering the *mens rea*, the criminal is of sound mind, yet unrepentant.

The Platonic argument on the moral justification of the death penalty held sway for much of the Greco-Roman philosophical discourse. Although murder and other crimes and punishments are mentioned, Aristotle does not mention the death penalty in either the *Eudemian Ethics* or *Nicomachean Ethics* (Pakaluk, 2005). Conversely, Plato's reasoning is echoed in similar or contemporaneous works, including those of Demosthenes, Xenophon, and Thucydides, with the latter including a debate on the death penalty as a deterrent during wartime in the *History of the Peloponnesian War* (Blecker, 2006; Schabas, 2002; Williams, 1998). While classical Greek scholarship was instrumental in the development of Roman, and eventually all of Western jurisprudence, the influence of religion also greatly impacted the growth of the ethical argument for the death penalty into law (Stein, 1999).

The ethical argument: Religious traditions. Within the moral teachings of the Abrahamic faiths, which directly evolve from or have vestigial ties to the codes of both Moses and Hammurabi, the death penalty was allowed for various crimes, including murder, rape, and kidnapping, but also for idol worship, practicing magic or witchcraft, and failure to observe holy days (Megivern, 1997). As religious historians have suggested, the relationship between these religious prohibitions of crimes and allowance of the death penalty on moral grounds are themselves complicated (Jacobs, 1995). The obvious first point of reference is within the Decalogue, which carries with it a prohibition against murder accepted by Judaism, Christianity, and Islam (Exodus 20:13; Qur'an 5:32) but does not make a claim as to punishment. In each of the traditions, an appeal is made to what would become an important early judicial concept that still permeates debates over capital punishment today: *lex talionis*, or "an eye for an eye" (Beck, Britto, & Andrews, 2007; Pojman & Reiman; 1998).

The principles of *lex talionis* can be found in several places in Old Testament, always carrying the variant of reciprocal, or mirrored, punishment (Leviticus 24:19–21, Exodus 21:22–25, and Deuteronomy 19:21). But, as Sellin (1980) noted, the addition of reciprocal capital punishment to the admonitions of Moses did not provide much instruction in the ways of its practical application, causing a similar dilemma to the one Plato recalls in his *Apology*. A significant difference was that the laws themselves could not change, as they were divinely wrought. The ethical dilemma persisted over centuries, resulting in the Jewish lawgivers' movement away from practical application of capital punishment. As Jacobs (1997) explained:

> According to the Mishnah (Sanhedrin 1:4) the death penalty could only be inflicted, after trial, by a Sanhedrin composed of twenty-three judges and there were four types of death penalty (Sanhedrin 7:1): stoning, burning, slaying (by the sword), and strangling. A bare reading of these and the other accounts in the tractate would seem to suggest a vast proliferation of the death penalty. Yet, throughout the Talmudic literature, this whole subject is viewed with unease, so much so that according to the rules stated in that literature the death penalty could hardly ever have been imposed. For instance, it is ruled that two witnesses are required to testify not only that they witnessed the act for which the criminal has been charged but that they had warned him beforehand that if he carried out the act he would be executed, and he had to accept the warning, stating his willingness to commit the act despite his awareness of its consequences. The criminal's own confession is not accepted as evidence. Moreover, circumstantial evidence is not admitted (p. 67).

For Christians, the issue of *lex talionis* is made more problematic in the New Testament. Jesus of Nazereth, in the Sermon on the Mount, issues a direct renunciation of the practice of reciprocal punishment when charging his disciplines: "Ye have heard it hath been said, an eye for an eye, and a tooth for a tooth: But I say unto you, That ye resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also" (Matthew 5:38-39). This statement would reverberate into the debate over whether or not nascent Christians would continue to accept the *lex talionis* after Jesus' teaching and subsequent execution by the Roman state.

Within Christianity, the debate over capital punishment continues today in much the same form that it had in the days of early Christianity (Megivern, 1997). Disciples of Jesus, like Paul, offered up a moral teaching that allowed, much like Aristotle's, differing interpretations without explicit reference to support or refutation of capital punishment (cf. Romans, 13:1-6). The debate would continue, shaping a large segment of Christian moral philosophy, with notable fathers of the early church either vocally supporting (in the case of Augustine and Thomas Aquinas) or calling for the abolition (Origen, Tertullian, and Duns Scotus) of the death penalty (Sellin, 1980). The fractious nature of the debate did much to fuel the rift during the Protestant Reformation, with Martin Luther and John Calvin taking pro-capital punishment stances. As Sellin (1980) noted, this "lead to a great expansion of the role of capital punishment, as states began to transform some offenses previously under the jurisdiction of ecclesiastical courts into felonies punishable by the state" (p. 22).

Within Islam, the juridical element of *lex talionis* evolved in another direction entirely from Judaism and Christianity. For one, much of the adjudication for murder as a capital crime remains under the aegis of religious teaching rather than secular authority (i.e., the state). Secondly, explicit forms and delimitation of punishment is contained within the Qur'an, e.g. "if

anyone is slain wrongfully, we have given his heir authority (to demand qisas [the death penalty] or to forgive): but let him not exceed bounds in the matter of taking life; for he is helped (by the Law)" (Qur'an: 17:33) and "If one is pardoned by the victim's kin, an appreciative response is in order, and an equitable compensation shall be paid. This is an alleviation from your Lord and mercy. Anyone who transgresses beyond this incurs a painful retribution (Qur'an: 2:178). Traditional Islamic jurisprudence retains elements of both retributive and consequentialist ethical viewpoints and bears marked resemblance to the Judaic tradition outlined in the Mishnah (Jacobs, 1997), with universal application of sentence, high evidentiary standards, mandatory conviction by religious court, and low tolerance for acts of vigilantism (Schabas, 2000). It is the stringent connection to religious doctrine that makes argument for abolition of the death penalty in Islamic states a difficult one, but both popular and legal opinion on the death penalty appears to be evolving (Harris, 2002).

In contrast to the ethical argument, the epistemological argument regarding the death penalty says that while it is one thing to *believe* the death penalty is right or wrong, it is quite another to *know* it, that is to say, to know how to actualize that moral belief correctly in every circumstance, to "get it right every time" (Bedau, 1997; Bright, 2008; Dow, 2005). As history progressed, philosophical discourse on the death penalty began to change, looking beyond the idea of an instilled moral or ethical reasoning to more socially defined areas of knowledge, including political sovereignty, individual rights and recognitions, and codified systems of law. To address all aspects of philosophy as it related to capital punishment from the Classical period and the religious scholarship of the Middle Ages to modern times is not possible within the confines of this dissertation. In order to pay specific attention to problems of the death penalty and understand the epistemological argument, this dissertation uses two particular schools of

philosophy that emerged from secular reasoning as opposed to the early Greek and religious traditions that framed the ethical argument. Both utilitarianism and German idealism concerned themselves specifically with the epistemological argument regarding the death penalty and its social, political, and legal implications.

The epistemological argument of Utilitarianism: Beccaria. Cesare Bonesana, the Marquis de Baccaria, held economics as a vocation, but quickly discerned the need for application of certain principles of knowledge and reason to all aspects of human life. In so doing, Beccaria believed that overall happiness would increase for the majority of people. Furthermore, institutions such as the state, business, and education should conform to the principles of such *utility*, inspiring English philosopher Jeremy Bentham's cultivation of the philosophy of utilitarianism and inaugurating the movement to adhere to these principles, or, if institutions were already existing, leading the effort to reform them (Bedau, 1983). Drawing from figures of the French Enlightenment, such as Voltaire and Diderot, Beccaria turned to the prison system as it operated in his home city of Milan as a potential philosophical model (cf. Sellin, 1980, pp. 140-141). After studying all aspects of the criminal justice system in Milan at the time, Beccaria produced the treatise *On Crimes and Punishment* in 1764 (Beccaria, 1995/1764). The result was one of the first condemnations of the death penalty to emerge from empirical study (Sellin, 1980).

Simply stated, Beccaria's critique of the death penalty addresses the epistemological independence of the individual through a contractarian argument. That is to say, Beccaria questions the right of the state to decide to take the life of a sovereign individual who has not entered into any social contract in which the prescribed punishment for crimes against that state is death. Thus, even an individual knowing the guilt of their own actions or purpose does not, in

effect, know they will be caught, know they will be tried, or know what their sentence will be in common juridical practice. To do so would be to return to the universal application of the Draco Code. Secondly, Beccaria overtly questions capital punishment as a useful and necessary form of punishment by addressing the retributive and consequentialist (i.e., deterrence) functions. As Beccaria (1995/1764) stated:

> Our sensibility is more easily and more powerfully affected by weak but repeated impressions, than by a violent but momentary impulse. The power of habit is universal over every sensible being. As it is by that we learn to speak, to walk, and to satisfy our necessities, so the ideas of morality are stamped on our minds by repeated impression. The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others than the continued example of a man deprived of his liberty…*If I commit such a crime*, says the spectator to himself, *I shall be reduced to that miserable condition for the rest of my life.* A much more powerful preventive than the fear of death which men always behold in distant obscurity (p. 67, emphasis in original).

Beccaria, and later Bentham, would claim that it was the guarantee of punishment, not the severity of the sentence, which would achieve the preventative effect, along with swift judicial action and transparency (i.e., making public) of all legal, judicial, and legislative business.

The epistemological argument of Idealism: Kant. German philosopher Immanuel Kant engaged with Beccaria's critique, taking the opposite view. In a work entitled *Die Metaphysik der Sitten*, published in 1797, Kant not only offers a strong support for capital punishment, but also addresses the criticisms inherent in the epistemological argument, by reconciling it with the retributive elements of the ethical argument. This is done through a formalist critique of the

deterrence argument, which claims, as Beck, Britto & Andrews (2007) noted, that "the rationale behind the death penalty is not revenge but moral duty" (p. 15) and by placing the primacy of thinking above the empirical world (i.e., idealism). This kind of idealism, when considering the sovereignty of statehood, or the rule of law, ushers in a concept known in many death penalty arguments as the theory of rational choice (Bodenheimer, 1974; Beschle, 1997). Simply put, the individual is aware of what they are doing, at all times. Thus, when a capital crime is committed, the individual committing that crime is essentially choosing to end their own life, and it is simply the contractual duty of the state (or the rule of law) to assist the criminal in engaging in this process (Wright, 2000).

Kant addresses the second point of Beccaria's argument, concerning the appropriateness of the death penalty as a deterrent, by simply dismissing it. For Kant, the only indicator of justice is a principle of equality, the actual measure of whether the punishment, in this case death, fits the crime (Foley, 2003). This formulation ostensibly has as its ethical equivalent the notion of *lex talionis,* and Kant, in his *Die Metaphysik der Sitten* of 1797, with only two exceptions (maternal infanticide when the child is born out-of-wedlock without viable means of support and the survivor of a duel), strongly supported the death penalty for all murderers (Beck, Britto & Andrews, 2007; Potter, 2002). Kant's retributive argument is notable for its reactionary tone, reaching back to the Draconian (i.e., early Greek) ideal critiqued in Plato's *Protagoras.* As Wright (2000) contended, the central aim of Kant's idealist argument is that the gulf between life and death is such that no other punishment could achieve the same ideal (i.e., a universal equivalence). Conversely, as Potter (2002) noted, Kant was writing at a time when the death penalty was imposed for a number of crimes, so, although Kant's support is in keeping with the retributive aspects of *lex talionis,* it actually represents an argument in favor of limiting the

overall use of capital punishment while not abolishing it completely. Under the stringent rules of the idealism as espoused by Kant, until a degree of epistemological equivalence is founded, the practical implications of the death penalty and the debate over its application may be considered intractable.

Theories of Justice

In the revised edition of his classic 1940 treatise on jurisprudence, Edgar Bodenheimer (1974) noted that the death penalty is an example of a judicial controversy that depends as much on its ethical and philosophical grounding as it does "the ascertainment of relevant factual data" (p. 205). The theoretical study of the law has expanded greatly upon the ethical and epistemological arguments of Greek and Roman antiquity and the retributive and consequentialist arguments of the Enlightenment. In order to understand the varying juridical interpretations of the debate over the death penalty and arbitrariness, this study examines four contemporary theoretical conceptions of justice that impact the current procedural administration of the death penalty in the United States: the positivist conception, evinced in the legal philosophy of Joseph Raz and H.L.A. Hart; the constructivist conception, drawn from John Rawls, the interpretivist perspective of Ronald Dworkin, and an egalitarian philosophy explored by G.A. Cohen. Although these theoretical perspectives are often strongly opposed, they all offer particular insights into the issue of arbitrariness and its social, political, and legal consequences.

Justice in the positivist tradition: Hart and Raz. The concept of "rule of law" is significant in capital adjudication, not only in the Constitutional interpretations handed down in *Furman* and *Gregg*, but also in the charter maintained by procedural rules and standards, which are created in furtherance and support of the sovereignty of the judicial body, political system, and, ultimately, the will of the people (Austin, 1954; Douzinas & Gearey, 2005; Culbert, 2007).

Legal positivism represents a move away from the classical conceptions of jurisprudence found, and argued, by Enlightenment thinkers like Kant, Bentham, and Beccaria, in favor of what H.L.A. Hart (1958) describes as a separation from the previously described philosophical and religious moral grounding of law, into that of deliberative judgments and commonly-held codified standards.

Legal positivism as espoused by Hart and Joseph Raz, offered a singular version of the rule of law, adopted from Austin's (1954) theory of "law as command." Rules, in the positivist conception, are factually based, accepted by the majority, and "strong pressures for their observance are exerted by the majority upon noncooperative members of the society" by its enforcers—courts and judges (Bodenheimer, 1971, p. 105; cf. Hart, 1961; Murphy, 2008). Procedural rules are considered "secondary" and provide a formal structure for consideration and modification, if necessary, of primary rules (i.e., legislation).

With regard to the function of punishment, Raz (2009) noted:

> By prohibiting undesirable behavior the law directs human activities in ways it finds appropriate. The law itself decides on ends which are desirable or undesirable and it limits individual choice to guarantee the achievement of the proper ends […] It does not impose its will on individuals but serves them in realizing their own will. The individual's freedom of choice is restricted only in consequence of…previous free decisions and actions (p. 170).

For legal positivism, law must remain singular and univocal and justice is equated directly with fidelity to the letter of the law. Such a perspective leaves no room for procedural arbitrariness. As Hart (1958) noted, "to use in the…interpretation of laws the suggested terminology of a fusion or inability to separate what is law and ought to be [law] will serve…only to conceal the

facts" (p. 629). As such, in the positivist perspective, juries, in order to fulfill their role as "finder of fact" in a capital trial, must therefore be given a delimited (by law *as written*) set of choices (e.g., for sentencing, deciding punishment, or evidentiary consideration) *in order to* render a just decision. When considering the death penalty in light of these statements, one can see the influence of legal positivism in promoting the *Gregg* decision as a structural "fix" to judicial procedure, rather than overturning extant law or acknowledging any deficiency in the law itself.

Historically, legal positivism has been a decisive force behind the death penalty debate in America and has generally accepted the deterrence argument in support of capital sentencing. As articulated by the positivist van den Haag (1986), the deterrence argument states that:

> We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and deterrence is a sufficient practical justification for them. Retribution is an independent moral justification. Although penalties can be unwise, repulsive, or inappropriate, and those punished can be pitiable, in a sense the infliction of legal punishment on a guilty person cannot be unjust. By committing the crime, the criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk. Thus, the death penalty cannot be unjust to the guilty criminal (pp. 1667-1668).

From the positivist perspective (and following from the earlier conceptions of Kant), the noumenal aspects of the law establishing capital punishment as practice as it is articulated in the

deterrence argument and as a procedure (i.e., as a punishment or sentence) are not to be treated as separate and distinct, but rather interlocking parts of a whole. That is to say, following the Hart's (1961) distinction between primary (i.e., law, as it is written and enforced) and secondary (i.e., procedural rules and norms) aspects of law, the means by which law evolves follow closely to three procedural rules: recognition, adjudication, and change. Laws must be recognized by society and its social, political, and legal representatives in order to be considered *in force*, and, thus, enforceable. Once the law has been duly recognized, parameters must be established to determine when it has been broken, and its corresponding penalties or punishments, thus setting the means by which the law may be adjudicated. Finally, the rule of change, according to Hart (1961), empowers the social, political, and legal authority to erect procedures to directly address existing primary rules so that laws might be created, altered or deleted as proven necessary in due course of adjudication. Thus, if we apply these by the positivist rationale encapsulated in these three central rules to the procedural discourse around the application and adjudication of the death penalty set forth by van den Haag, if innocents are being wrongly executed because they were wrongly convicted, and guilt was wrongly assumed, the system is, *mutatis mutandis*, not a just system (cf. Blume & Eisenberg, 1999; Fagan & West, 2009).

The contradictory elements inherent within the procedural controversy around capital punishment do not stop at merely the determination of whether the penalty is, in itself, a just one, or if the rules governing its recognition and adjudication are in need of changing. As viewed through the lens of legal positivism, which seeks to contract the conception of law from the larger political, economic, and social dimension, the question rests solely on the Kantian conception of fitness of the punishment to the crime. In defending the death penalty, van den Haag (1986) noted:

> Punishments are imposed on persons, not on racial or economic groups. Guilt is personal. The only relevant question is: does the person to be executed deserve the punishment? Whether or not others who deserved the same punishment, whatever their economic or racial group, have avoided execution is irrelevant. If they have, the guilt of the executed convicts would not be diminished, nor would their punishment be less deserved. To put the issue starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others (p. 1663).

As such, the deterrence argument (proffered by van den Haag) provides a monolithic theoretical support for both moral and legal precedence for application of the death penalty. However, strict adherence to the tenets of legal positivism, as evinced by Hart and Raz, strictly delimit the degree to which a law may be maintained when its primary and secondary rule-governing functions are undermined, or, as some critics of capital punishment would advance, undermine one another (White, 1991). Thus, in consideration of the quandary of capital punishment, the preferred juridical "wholeness" characterized by a legal positivist conception of the rule of law is disrupted.

Justice in the constructivist tradition: Rawls. In contrast, when thinking of punishment, Rawls (1955) offers up a bifurcated concept of rule of law, noting that punishment, while appearing to be singular, is actually governed by two conceptions of rules, one which governs the procedure by which one can be punished, and the other the action meriting punishment itself. Rawls' (1955) early essay "Two Concepts of Rules" is significant in

articulating both the parameters of the debate and the role that arbitrariness plays in complicating an already divisive circumstance. In Rawls' conception, the "rule of law" in this case is beholden not only to the retributive act of enforcing punishment, but also the utilitarian ends of societal benefit. Rawls (1955) explores retributive and utilitarian views of justice, noting that, often, these views fail to consider two differing conceptions of rules, namely, the rules that govern a practice, and the ruling actions that define said practice. This allows for consideration for a particular act to be judged relevant to its own utilitarian merits, without discounting the utilitarian value of the practice itself. In considering the debate over the death penalty, capital jurors are impaneled to decide the latter through strict adherence to the former. As Rawls would later stress, the degree to which those former, definitional rules, are defined (i.e., free from arbitrary interpretation), determines the justness of the latter action.

Rawls (1999) went on to dedicate a section of *A Theory of Justice*, published in 1971, to attempt to specify governing concepts of the rule of law, and its implications on modern judicial practice. For Rawls (1999), there were a number of precepts that "guarantee…the impartial and regular administration of rules" (p. 208) and establish and bound (i.e., construct) an overall system of legislated governance. The first precept acknowledges that rules must be made with the reasonable expectation that they can be carried out. The second precept mandates that similar cases be treated similarly. The third precept "demands that laws be known and expressly promulgated" (Rawls, 1999, p. 209). The final precept adheres to the conception of Rawls' (1999) own Difference Principle, which provides for equality among persons with any inequities only benefitting the least well off and that rule-based legal trappings (e.g., judges, lawyers, trials, and juries) adhere to this principle and appeal to the "natural" state of justice, which Rawls (1999) equates with fairness (cf. pp. 65-66; pp. 209-210).

From Rawls' constructivist perspective, the capital juror is placed in a unique position of being *both* an instrument of adjudicative procedure and deciding, ultimately, on which punitive practice will be initiated by the court. This bifurcated judicial role has been upheld through recent precedent, not only in the *Ring v. Arizona* (2002) decision holding that the Sixth Amendment requires a jury to find the aggravating factors necessary for imposing the death penalty, but also *Caldwell v. Mississippi* (1985), which stated that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere" (pp. 328–29). Thus, statements by the judge or prosecutors in a case must emphasize and uphold the jury's decision as complete and final. Statements to the contrary are considered unconstitutional (violating the Eighth Amendment and the special circumstances of capital trials set forth by *Gregg*) and dangerous in the potential that the jury may potentially minimize the importance of its role or be disempowered in their decisive action.

These precedents and the current role of the capital juror resonate with Rawls' precepts, specifically the second precept, advocating similar treatment of similar cases and the third precept, which demands that any procedural instrument (i.e., the jury) be constructed with full and transparent knowledge of the applicable laws and rules necessary to produce a suitably just decision. From the constructivist perspective, aligning Rawls with the Kantian idealist tradition, the current administration of the death penalty in the United States violates the second precept simply by virtue of its relative statistical rarity. The Bureau of Justice Statistics reports that, following the resumption of the death penalty after the *Gregg* decision, until 2008, there were 625,777 murders with an average of 20,859 per year. Only 7, 713 of these were sentenced to death, approximately 257 per year. 1,136 people were actually executed during this time with an

average of 38 people per year. Only 1.2% of murders within this time period led to a death sentence and only 0.18% led to an execution (Snell, 2009). If similar cases of capital murder are adjudicated differently (i.e. a sentence of death in one and a sentence of life imprisonment in another, cf. *Pulley v. Harris*, 1984), such an inconsistency would, by Rawls' account, render one of those decisions unjust.

With regard to the third precept, given that there are no universal standards governing instructions to juries, and no universal guidelines or constitutional requirements placed upon juries with regard to weighing aggravating and mitigating evidence (see *Franklin v. Lynaugh*, 1988), it is difficult to know with any certainly whether legal knowledge is adequately promulgated among impaneled capital jurors in accordance with Rawls' third precept. Chapters 3 and 4 of this dissertation represent both a review and analysis of current studies and outline a current empirical effort to discern the degree of legal and procedural knowledge of both formerly and potentially impaneled jurors.

Justice in the interpretavist tradition: Dworkin. While Dworkin (1996) agrees, for the most part, with Rawls and argues against what he perceives as rigidity inherent in the positivist reading of the law, the interpretavist perspective he espouses can be compared and contrasted with both positivism and constructivism on three salient points. The first is on the issue of discretion, in which Dworkin (1996) appears to agree with the positivist view that the rule of law should be strictly enforced by the mechanisms and actors within the legal system, including lawyers, judges, and legislators. However, this power should not extend to the interpretation of the law itself. In Dworkin's (1996) terms, the legal system cannot decide *tout court* what a law means, as such, but must offer an interpretation based on the moral traditions upon which the legal system was founded. In this case, a moral reading of law constitutes an interpretation based

on an inclusive social understanding of—and respect for the dignity of—the populace under the law, taking into account political, psychological, and individual factors into account in order "to arrive at beliefs on these matters through their own reflective and finally individual conviction" (p. 26).

The second point would also appear to be a point of agreement with the positivist view, that there are "concrete" and "background" concepts that make up the body of law (Donnelly, 1978, p. 1115). However, upon closer inspection, this view is more comparable to Rawls' perspective, as these rules or concepts are subordinated to liberty, or attendant "rights" (e.g., there may be a rule on how to adjudicate libel, but this rule is subordinate to the right to free speech as a function of individual liberty). Finally, there is a third salient point of departure from Dworkin and Rawls on the issue of what constitutes "background" or "concrete" rights, and where to locate an origin for said rights. The constructivist perspective of Rawls (1999) locates its origins in the social contract (i.e., the Constitution). Dworkin shows no such documentary locus of understanding, instead drawing on the individual's (and, by extension, the majority's) sense of moral tradition.

As Donnelly (1978) points out, contention between all three of these points of departure have resonance for the *Gregg* decision regarding capital punishment, namely:

> John Rawls's theory of justice…[and] Dworkin's method, served as the foundation…for a theory of criminal punishment related to an understanding of human dignity. Under this theory of criminal responsibility, punishment is for the sake of liberty. If it will not promote liberty, that is, deter interference with liberty by private violence, then it is simply inappropriate…The death penalty, which itself is peculiarly destructive, would not be permitted unless there were clearly

> convincing evidence of deterrent effect, supported by rigorous empirical studies (pp. 1171-1172).

This need for empirical basis compounded with the moral reading espoused by Dworkin is manifest in creating a conception of justice (through law) as "integrity" (Dworkin, 1996, p. 11; Murphy, 1999). In the interpretavist perspective, a strict reading of the rule of law (i.e. a reliance on legal precedent and generally accepted interpretation of the Constitution) alone does not provide adequate support for legal integrity. For example, the Fifth Amendment seems to suggest that the right to life, liberty, and property cannot be infringed *without* the due process of law, which may be interpreted as inaugurating the possibility of the death penalty. But, in *Gregg* and elsewhere, the challenge was explicitly to the "cruel and unusual punishment" clause of the Eighth Amendment, ratified when capital punishment was relatively ubiquitous throughout the world. As Dworkin (1996) noted:

> The Eighth Amendment enacts the following premise: punishments inherently cruel and unusual in the practices of civilized nations must not be inflicted. The framers did not think the death penalty failed those two tests; in fact, it plainly did not fail the second when the amendment was adopted, though it probably does now. Whether it also fails the first test now becomes a matter of minor premise that [Supreme Court] judges applying the clause must inescapably decide for themselves. On that interpretation, the Fifth Amendment language, which merely confirms what the framers themselves thought, cannot assist judges any more than the fact that the framers of the Fourteenth Amendment accepted segregated schools assists in understanding the equal protection clause (p. 301).

Thus, in the case of capital juries in the aftermath of *Gregg*, the right to consider the sentence of death is duly empowered by the highest authority of the Supreme Court and is generally supported by legal precedent. This does not, however, leave the matter at solely the jury's determination of sentence as a fairly arrived just punishment in Dworkin's interpretavist assessment. The deliberative act of the capital juror must meet the constitutional requirements as a procedural extension of the judicial system (i.e., be commensurate with the due process of law) while also adhering to the mandate that it is not arbitrarily applied, per *Furman* and the Eighth Amendment prohibition. Dworkin's critique is two-fold in that the allowance of a duly just process in one amendment does not automatically guarantee its ability to meet the criteria of another. Jurors must therefore be instructed to consider independently of one another both the rightness of the punishment and the rightness of the procedure by which the punishment is reached. This hearkens back to both the Jeffersonian conception of the juror as both finder of fact for the case at hand, but also as arbiter for the rightness of the action as a matter of law, as well as Rawls' rule-based conception, constituting an internal check on whether or not capital defendants are afforded appropriate due process (Freedman, 2003).

Egalitarian justice: Cohen. G.A. Cohen's view accounts for an additional conception of justice, rooted not in fidelity to "law" as in the positivist position, or "fairness" in the constructivist perspective, or integrity in the interpretive view, but equality. Cohen noted a discrepancy inherent in the work of Rawls and Dworkin centered mainly on the practicalities of Rawls' final precept, the Difference Principle and Dworkin's account of the "integrity" of legally-sanctioned processes. The egalitarian view argues that the Difference Principle, by allowing for inequities to exist only in such as it benefits the least well off in a society, is actually a barrier to the promotion of justice. For example, if a law is found to disproportionately and

adversely impact a less well off segment of society, then it would, per Rawls, need to be struck down. If that same law is similarly believed to be integral to societal functioning or judicial practice, as Dworkin would contend, society would, by moral and legal right, support its retention. Following either course of action has the potential for an unjust decision or result. Cohen (2008) defines this quandary as "moral arbitrariness," a position which, "permits increases in inequality that do not benefit the worst off…and which…gives no weight to equality at all" (p. 160).

Cohen's egalitarian perspective moves beyond the retributive conception of justice common to the study of criminal law and primarily focused on punishment, to the *distributive* conception focused on allocation of advantages (e.g., rights or resources). The retributive argument for or against the death penalty is well known and common to consideration in criminal justice, but the distributive role of rights (e.g., to a jury trial, to due process, to consideration of relevant evidence prior to sentence) is as integral to the just and fair application of capital sentencing as the relative legal or moral correctness of the punishment handed down (Spader, 1988). Cohen argues for a monistic view of justice that equates the distributions of rights, resources, and privileges within systems that must also prohibit, restrict, or punish for the sake of society. In Cohen's (1997) conception, "principles of distributive justice…apply to the choices that people make within the legally coercive structures to which, so everyone would agree, principles of justice (also) apply" (p. 3).

Ideally, Cohen postulates, such a system would produce justice as a byproduct of equal distributions of rights and resources, rather than taking on inequalities as in Rawls' Difference Principle. As seen with Dworkin's view, constitutional issues regarding capital sentencing rest not only with the ethical prohibitions contained within the Eighth Amendment and its various

legal challenges, but also with the procedural elements inherent in the Fifth and Fourteenth Amendments and the judicial scaffolding needed to render a just sentence. As Murphy (1999) recounted, Cohen's view of the ways in which Rawls and others have characterized such an ideal system is one in which persons need not pursue justice in their daily lives, something required by the current judicial system through the civic duty of jury service. This participatory element of criminal law, Cohen (1997) suggests, produces two "truths:"

> First, although the legally coercive structure of society is indeed discernible in the ordinances of its constitution and law, those ordinances count as delineating it only on condition that they enjoy a broad measure of compliance. And, second, legally coercive structure achieves its intended social effect only in and through the actions which constitute compliance with its rules (p. 29).

Thus, in the first instance, if capital sentencing is applied infrequently and in different measures from state to state, or region to region, the standard for equality is not met, rendering the likelihood for injustice high. Moreover, even if some efforts are made for allowances for least well-off members facing capital sentencing (e.g., assigned free legal counsel), the initial inequality would necessarily create situations in which the positive elements are differentially or disproportionally applied. As attorney Stephen Bright (1994) noted:

> Arbitrary results, which are all too common in death penalty cases, frequently stem from inadequacy of counsel. The process of sorting out who is most deserving of society's ultimate punishment does not work when the most fundamental component of the adversary system, competent representation by counsel, is missing. Essential guarantees of the Bill of Rights may be disregarded because counsel failed to assert them, and juries may be deprived of critical facts

> needed to make reliable determinations of guilt or punishment. The result is process that lacks fairness and integrity.

The second instance that Cohen noted can be evinced in the context of capital sentencing by the Baldus study. Controlling for 39 nonracial variables, Baldus, Pulaski & Woodworth (1990) found that the odds of being executed were 4.3 times greater for defendants who killed whites than for defendants who killed blacks. Again, controlling for nonracial variables, the study also found that, all other things being equal, black defendants are 1.1 times more likely to receive a sentence of death as whites.

The Baldus study was cited in the U.S. Supreme Court case *McClesky v. Kemp* (1986), in which a black defendant was sentenced to death for killing a white police officer in Georgia. The defense argued the sentence violated the Equal Protection clause of the Fourteenth Amendment, since the Baldus study had shown some statistical support that the defendant stood a greater chance of getting the death penalty on account of the victim being white. The Court rejected the defense argument in *McClesky* on the grounds that general trends did not prove the existence of discrimination among the jury who decided the case. Using Cohen's rationale, the disparities that Baldus, et al. (1990) show allow that the potential for unjust decisions exists in the application of the death penalty, insofar as general trends *do* evince societal inequality, despite the lack of evidence of explicit discriminatory action, in exercise of the general rule, i.e., the sentence imposed by the jury.

Social work, social justice, and the law. It would seem, in reviewing the philosophical and historical precedents for the ethical and epistemological arguments for and against the death penalty, that the conception of justice espoused by many social workers is congruent with a reformist epistemological view, such as Beccaria's. Although philosophy provides a depth of

argumentation for the moral or theoretical implications of the death penalty, there are a number of practical concerns that social workers face in the field of criminal justice, the legal arena, and the area of capital case law. The literature on social work has continually set forth that, whatever one's personal beliefs or views on the efficacy of the death penalty, the need to pay close attention to its application and use within the United States is in keeping with social work's professional values and well suited to the cause of social justice as evinced in the discipline (Devine, 1922; Maschi & Killian, 2009; National Association of Social Workers, 2009).

As Albert (2000) noted, the law is but one aspect of an often shifting social environment in which the social worker must practice. Commensurate with the views held by philosophers of justice like Rawls and Dworkin, the need for empirical research and social science-based practice strengthens both the integrity of judicial actions and the role of the social work profession can play within the judicial system, while also promoting the goals and values inherent in both disciplines. Using social science methods, knowing and communicating changes in precedent, judicial decisions, appellate proceedings, and current Supreme Court arguments enable the social worker to transfer this knowledge to stakeholders, and help to develop a clear understanding of current client status to assist in planning for further actions. Capital punishment research in the United States involves a hybrid of micro and macro level skills as well as a panoply of forensic and policy knowledge (Coggins & Fresquez, 2007).

Social workers are a growing professional presence in the criminal justice system providing a myriad of services including provision of pre-trial social services, and counseling for incarcerated clients and families of victims and defendants. As Siegel (2008) noted, the social work role in presenting legally admissible expert testimony is a growing category of practice, with social workers potentially contributing to over 50,000 criminal cases in 46 states. Moreover,

social workers have been instrumental in developing a platform of advocacy for persons on death row that resonates with many of conceptions of justice described above, including leading the call for better legal defense and equal trial rights for ethnic and cultural minorities (Barker & Branson, 2003; Finn & Jacobson, 2003; Maschi & Killian, 2009).

Research by practicing social workers has reflected the growth of legal and forensic social work, emphasizing the active role of social workers in consulting with client's legal representation, advocating for strengthening of support services for families of victims and the accused, and supporting the development of public policy that bolster reforms of due process and equal protection under the law (Beck, Britto & Andrews, 2007; Betancourt, Dolmage, Johnson, Leach, Menchaca, Montero & Wood, 2006; Lane, 1993). In the area of capital adjudication, social workers have served as members of mitigation teams, consulting with counsel and providing expert testimony and evidence to assist with juror decision-making regarding mitigation (Andrews, 1991; Guin, Noble, & Merrill, 2003; Schroeder, et al., 2006; Swenson, 1997; Weisberg, 2005).

It is incumbent on social workers working on a death penalty case to understand that, although they are working in a practice area that is often polarizing and fraught with high levels of emotion and passionate convictions, the work that they do contributes greatly to a more just and equitable society (Guin, Noble, & Merrill, 2003; Reed & Rohrer, 2000). Preparing a social history, actively consulting with attorneys, providing expert testimony to a jury, and meeting with clients are significant in that they are shaped by the unique perspective on human behavior, commitment to professional ethics, and skills specific to the profession of social work. Recognizing the importance of this professional role is integral to the continued growth of social work in the area of capital punishment and the possibility of justice. This dissertation study is

designed to contribute to a bourgeoning social work perspective (i.e., a practice-focused, evidenced-based conception of social justice) on juror responsibility in capital sentencing and provides needed conceptual frameworks and evidence-based research to assist in reforms and policy change.

Procedural Context of Jury Instructions

The context in which instructions are given to juries, including the clarity and comprehension of the instructions, the weight given to legal precedent, findings of fact, and explication of the weight given to aggravating and mitigating circumstances are crucial to determining the real impact of the instructions chosen by the court. As there are, at present, no clear judicial or constitutional mandates for jury instruction content, development of an empirical measure of potential juror's perception as to clarity of jury instructions will provide evidence to enable jurisdictions and reviewing courts to better ascertain the impact of jury instruction content and explore key areas that require consideration when developing future instructions or implementing jury reform efforts (Cunningham, Sorensen, & Reidy, 2009; Dumas, 2002; Eisenberg, Garvey, & Wells, 2001b, Geimer & Amsterdam, 1987-1988; Haney & Logan, 1994; Weiner, Hurt, Thomas, Sadler, Bauer, & Sargent, 1998). Comprehensibility in jury instructions, as explored in a meta-analytic review by Sweeney & Haney (1992), may be best defined by focus on two interrelated domains: what this study calls "clarity" and the way in which the unique circumstances of the crime under adjudication, what this study refers to as "procedural integrity".

This distinction resonates throughout the history of the death penalty in America, emerging, as detailed in Chapter 1, with Thomas Jefferson's efforts at legal reform in the first years of nationhood. Writing in 1782, Jefferson (1982) noted that juries in the American system

must not only have the facts presented to them in full clarity (as they are charged with, in legal terms, "trying the facts" of the case before them), but also with a set of legal procedures that are appropriate to both the letter of the law and the circumstances of the case:

> If the question before them be a question of law only, they decide on it themselves: but if it be of fact, or of fact and law combined, it must be referred to a jury. In the latter case, of a combination of law and fact, it is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relates to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact (p. 130).

In the recent era of the death penalty debate, Jefferson's distinction between "law" (i.e., legal procedures) and "fact" has grown much more complex, increasing the necessity for the jury to receive clear instructions on both the facts of the case and the legal procedures commensurate with a capital trial. This can be most clearly seen in Justice Ginsberg's majority opinion in *Ring v. Arizona* (2002), which stipulates that "capital defendants… are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment" (p. 2). Cho (1994) has defined procedurally sound jury instructions as utilizing several key characteristics. These include specificity to the case, clear descriptions of jury roles and responsibilities, a clear description of juror unanimity or agreement, and a clear relationship to appropriate case law and precedent (Hoffman, 1995). Instructions with high procedural integrity are generally considered commensurate with the "guided discretion" approach to jury instructions outlined in *Gregg*, clearly mapping out the role and responsibilities of the jury, outlining what must be considered, establishing individual culpability of the defendant, and

determining the appropriateness of the sentence. This dissertation represents an effort to extend and empirically support the relationship between instructions and jury decision-making as it has emerged in legal precedent and scholarly literature on the death penalty in the United States.

Jury Instructions and the Arbitrariness Debate

When applied to the application of the death penalty in the United States, each of the discussed theories of justice focus on one or more particular aspects of the capital process as being vaguely defined or arbitrary. For positivists like Hart, the lack of codified law inaugurates the potential for variant or arbitrary rulings by the jury. For constructivists like Rawls, the law itself may carry a firm, codified precedent, but the rules governing its procedure may require greater specificity to engender just decision-making. Dworkin, in the interpretavist perspective, mandates that procedural rules must accommodate both a primary interpretation as well as attendant interpretations as to their relative legality in order to be just. Finally, in Cohen's egalitarian perspective, a law cannot be just when it is not uniformly applied. Each of these perspectives hinges on a legal determination of equality free from discriminatory application or arbitrariness.

Nakell and Hardy (1987) define arbitrariness specific to the legal rules governing capital sentencing. In capital cases, arbitrariness "may…be demonstrated by evidence that the decisions [made by the jury] are not explained by legal standards" (p. 16). Additional reasoning or extralegal factors are not necessary to determine arbitrariness in a capital case, and the determination is not dependent upon whether the sentence is thought, upon review, to be either unduly harsh or lenient. The debate over the death penalty, in the aftermath of *Gregg v. Georgia* (1976) has incorporated, over the years, several arguments concerning the role of race and class in capital punishment.

The principal argument of the literature hinges directly on the need for research into the legal recognition of procedural arbitrariness, with the overall moral arbitrariness of potential racial and class-based discrimination (Bowers, 2003; Bright, 1994; Butler, 1995; Eisenberg, Garvey, & Wells, 2001a, Haney, 1997; Lynch & Haney, 2000). As Murphy (2008) noted:

> The concept of law is indeterminate, or partially ambiguous. We cannot live with the ambiguity, since we need to be able to make statements about the content of the law in force. So it appears that we need to disambiguate. But there are political stakes associated with each possible disambiguation, so we cannot just pick one at random. It matters to people which disambiguation we use. This explains the appeal of the instrumental argument as well as the persistence of the quixotic search for the correct ambiguity-free account of our concept of law (p. 1104).

With the previously discussed justice theorists, both Dworkin (1996) and Cohen (2008) explicitly noted the need for empirical clarification. The current study is designed with this need in mind, utilizing elements from these four divergent theories of justice to articulate the role that arbitrariness plays in capital juror decision-making.

In order to meet the requirements enumerated by jurists and theorists of justice, examination of capital sentencing procedure must move beyond case law and legal precedent. As there exists (in *Gregg*) a mandate for "guided discretion," but no uniform requirements for jury instructions, any empirical effort must begin to determine what procedural efforts are held in common in capital adjudication (Cho, 1994; Diamond, 1993). Furthermore, attention must be paid to the role of the jury as finder of fact *and* procedural instrument (cf. Eisenberg, Garvey, & Wells, 1996). Finally, as Baldus, Woodworth and Weiner (2009) noted, there is "a need for

research to identify the mechanisms that produce the patterns of arbitrariness and discrimination that are not explained by legally relevant factors" (p. 147). Chapter 3 of this study explores the methods by which information drawn from current jurors can qualify the dimensions of the current arbitrariness debate.

Conclusion

This chapter outlined current procedural context of capital punishment as it is applied in the United States. The chapter, utilizing a Critical Legal Studies-based approach, also explained the historical, legal, and philosophical bases for the death penalty from both retributive and distributive theories of justice, and the rationale for utilizing them in this study. Justice theory provided the framework to explain capital punishment and identify the assumptions for the current use of guided discretion for capital juries. Constitutional challenges to the use of the death penalty and state- and federal-level responses along with several judicial disparities in sentencing were analyzed. This chapter also established the rationale for investigation of several relevant variables for the current research project. Existing case law and legal theories were utilized to identify relevant criteria for the empirically-based study of capital jury decision-making. The literature reviewed in this chapter has demonstrated support that this material, when analyzed with the fundamental tenets of justice theories, provides a sufficient exposition of the concept of capital jury arbitrariness.

The following chapter expands on the need, as noted in the literature on capital punishment, for research methodologies that address the concept of arbitrariness as defined in the current chapter, as well as the need for more rigorous research methods on jury decision making. The next chapter establishes relevant research questions and hypotheses along with providing the information on the sample and the methodology used in this study. The theoretical and

operational definitions of key research concepts are presented. The next chapter also identifies and explains the design rationale and procedures crucial for the study.

CHAPTER 3

Methodology

This dissertation study examines the relationship between the content of jury instructions and the impact these instructions have on the process of jury decision-making in capital trials. As stated in the introduction, the practice of jury instruction clarity and comprehensibility continues to be disputed in death penalty cases, and information is needed to explore the degree to which instructions influence imposition of sentence and ascertain the potential for arbitrariness in judicial instruction. A review of the theoretical literature on theories of justice in Chapter 2 revealed that strict adherence to "rule of law" exposes a contradiction between these current, non-uniform instructional practices of death penalty states and the concomitant constitutional mandates issued by the Supreme Court for procedures of "guided discretion" as outlined in the ruling in *Gregg v. Georgia* (1976).

In order to explore this disputed area, a mixed-methodological design was used to gauge potential juror response to instructions in order to determine the ways in which instructions contribute to decision making. A nationwide survey of capital jurors, encompassing both self-report data on instruction clarity and comprehension and juror opinion on the relevance of the instructions to their decisions, was used. As Bowers (1995) noted, early research into this area revealed:

> [Jury instructions] are consistent with an other-directed, outcome-driven decision process in which, for many jurors, the critical choice of punishment appears to be formed, and even finalized, relatively early in the process-well before the

> presumed guidance of sentencing evidence, arguments, and instructions. Accordingly, most jurors see sentencing instructions more as a framework for a decision already made than as guidance for a decision yet to be made. They transfer responsibility for the punishment decision to the law or even to the defendant, presumably because of their own personal uneasiness about taking responsibility for whether someone lives or dies (p. 1101).

As such, the legal ramifications of such findings bolster the original prohibition of an arbitrary and capricious capital sentencing standard found in *Furman v. Georgia* (1972). Two salient research questions have been conceived in the hope that empirically-derived research will greatly improve the current process of guided discretion as mandated by law, and will provide a locus for the development of practical jury instruction and/or policy reform.

Research Questions and Hypotheses

This dissertation study aims to answer two questions that relate directly to the research area described above. The primary research question is: Do jury instructions predict jury imposition of the death penalty? This question directly addresses the need for empirical study into the role of guided discretion in capital cases. This study tests the null hypothesis that jury decision making will not vary according to the instructions that the jurors receive and does so by statistical comparison of juror and potential juror self-report on discrete constructs related to the makeup of instructions and comparing them to jurors' final decisions in capital cases. The second research question addresses the role of instructions in determining the standard for arbitrariness, and asks: Does lack of clarity and integrity in jury instructions contribute to juror decision-making in capital sentencing? It is predicted that there is a negative correlation between juror understanding and death penalty sentencing. Unclear instructions or lack of definitional

material may inhibit the jury from seeking alternative punishments or increase the influence of factors other than the gravity of the crime (i.e., aggravation) or the culpability of the offender (i.e., mitigation), affecting the frequency of death sentences handed down (Bowers & Foglia, 2003). These research questions and hypotheses are consonant with a recent trend in the literature on the death penalty and scholarly study into the legal and procedural ramifications of the arbitrariness debate (Blankenship, et al., 1997; Eisenberg, Garvey & Wells, 1996; Haney & Lynch, 1997; Sandys, 1995; Weiner, et al., 1995; Weiner, Prichard, & Weston, 1995).

Measurement Constructs and Variable Definitions

The decision handed down in *Gregg v. Georgia* (1976), which effectively reinstated the death penalty in the United States, hinged the constitutionality of capital punishment on the use of "guided discretion" to assuage the *Furman* debate over arbitrary and capricious sentencing. Each phase in a post-*Gregg* capital trial carries with it a set of orally-delivered or written instructions, depending on state statute. Moreover, states may determine whether the jury is allowed to ask additional questions (Banner, 2002). Following the literature on the death penalty in America, this study is focused on the area of jury instruction comprehensibility as the procedural effort most likely to evince variance in juror understanding of these efforts at guided discretion (Bowers, Sandys & Steiner, 1998; Costanzo & Costanzo, 1992; Frank & Applegate, 1998; Garvey, 1998; Sarat, 1995; Taylor-Thompson, 2000). From the literature on guided discretion and review of the material, five relevant constructs related to the procedure of guided discretion have been identified.

Clarity. Clarity is defined in this study as the conciseness of the instructions and general ease of understanding for the juror, as well as absence, as Blankenship and colleagues (1997) noted, of "poorly worded or vague and ambiguous" instructions which may "invite precisely the

arbitrary and capricious application of the death penalty that the U.S. Supreme Court sought to avoid in *Furman*" (p. 327). Clear, concise instructions must be free from bias and specifically outline the methods by which jurors, if allowed by statute, are able to seek legal advice, or ask clarifying questions. In most death penalty states, statutes specify that the instructions be presented (i.e., either orally communicated or written) as completely as possible so as to minimize instances of further instruction (e.g., answering questions, providing legal citation, or defining terms) to the jury. Clarity can also be linked with the special responsibilities for finding for aggravation and mitigation, and are mandated to provide clear, concise, and complete definitions for each of these concepts (Bentele & Bowers, 2001; Garvey, 1998).

The legal mandate for instruction clarity is not only held up by the *Gregg* decision, but also subsequent cases, including *Boyde v. California* (1990). *Boyde* argued that jurors in California who were instructed that they "shall impose" (p. 374) a penalty of either death or life without parole was unclear as to whether or not certain evidence could be considered by the jury. As such, a clear mandate by the court could potentially bias a jury away from the full comportment of their duties, thus creating a breach of the court's perceived impartiality and render the court instructions, per *Gregg*, unconstitutionally ambiguous and prejudicial. The Supreme Court rejected the claims of *Boyde*, and determined that jury instructions fail to meet the standard of clarity when they are "ambiguous, and therefore subject to erroneous interpretation…[and] there is a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence" (p. 371). As with many of the challenges to *Gregg*, the ruling of the Supreme Court upholds the standard of guided discretion without a full examination into the potential causes for legal challenge, thus rendering clarity of judicial instructions in capital trials still subject to debate.

Procedural integrity. In addition to being clear, jury instructions must relate directly to the role of the jury as arbiter of fact and be consonant with the judicial structure of the court. This concept is often termed procedural integrity or a lack of arbitrariness (Bowers, 2003). This study defines instructions with high procedural integrity as legally sound, free from bias or presumed prejudice, and clearly and consistently demarcating of the roles and responsibilities of the jurors. In this definition, a legally sound procedure is noted as being representative of constitutional and Sixth, Eighth and Fourteenth Amendment requirements and protections (e.g., due process, right to effective counsel) as upheld by legal precedent. In protecting against bias or prejudice, post-*Gregg* capital proceedings must also relate penalty phase considerations (i.e., aggravating and mitigating circumstances) to the specific evidence and facts of the crime as presented in the prosecution and defense cases in the guilt phase and relevant social, legal, medical, psychological, or characterological aspects of the defendant (Benson-Amram, 2003; Carter, 1987; Chemerinsky, 2006). Demarcation of roles and responsibilities of the jurors is specified as being clear to the juror that they are making the final decision in the case (or, as with the exception of Alabama and Florida, describing that a judge may override a jury ruling in certain cases), defining when and how voting takes place and whether it is required to be unanimous, simple majority, or individual, and setting the parameters of their punishment recommendation (e.g., between death or life without the possibility of parole).

As Sondheimer (1990) noted, the constitutionality of various sentencing schemes have, for several states, been constantly challenged since the *Gregg* decision in 1976. Moreover, making instructions relatable to the case under consideration has been difficult for many states to put into practice while still promoting clarity (Horowitz, 1988). This has led to a debate over whether uniform application of instructions to improve clarity is problematic to their

applicability to the unique facts of different cases. If instructions are insufficiently applicable to the case, they can be said to suffer from arbitrariness, and run the risk of causing confusion or being ignored by deliberating jurors, thereby violating the *Furman* precedent. Several judicial decisions following *Gregg* supported the development of procedurally sound instructions, particularly *Lockett v. Ohio* (1978) which called for sentencing schemes that afford the accused a "degree of respect due the uniqueness of the individual" (p. 608). *Eddings v. Oklahoma* (1982) was even more adamant in its demand for procedural integrity in sentencing, stating that capital sentencing must be applied "fairly, and with reasonable consistency, or not at all" (p. 112).

Aggravation. The *Gregg* decision enumerated elements of crimes for which the death penalty could be considered. These offenses must meet certain statutory circumstances, known as aggravators. *Black's Law Dictionary* defines aggravation, in the legal sense, as "a fact or situation that increases the degree of…culpability for a…criminal act (Garner, 1999, p. 236). As Baldus, et al. (1990) noted, "most state laws now identify six to twelve aggravating circumstances, at least one of which must be present before a convicted murderer is eligible for a death sentence" (p. 22). Circumstances that are considered aggravating vary by state, with the most common being: 1.) A felony committed while incarcerated, 2.) Previous convictions for violent felonies, 3.) Knowingly creating fatal risk for many persons, 4.) Murder committed in the commission of another felony (i.e., robbery, rape, burglary, or kidnapping), 5.) Murder committed to avoid or prevent lawful arrest (e.g., murder of a police officer); 6.) Murder committed for pecuniary gain (Bedau, 1997; Jasper, 1998). Knowledge and understanding of the aggravating factors is a key feature of sentencing for the capital juror.

Mitigation. Commensurate with the consideration of at least one aggravating factor in deciding on a capital sentence is the weighing of mitigating factors. A mitigating factor is

defined as one which "does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce…the punishment (in a criminal case)" (Garner, 1999, p. 236). In keeping with the *Gregg* decision, the Supreme Court has attempted to make the sentence of death in the United States less arbitrary by emphasizing that jurors must be allowed to consider all mitigating evidence prior to sentence (Vila & Morris, 1997; Zimring, 2003).

Following *Lockett v. Ohio* (1978), the Supreme Court's rulings have broadened the definition of mitigating evidence in the United States and the procedural barriers to jury consideration and weight of that evidence. *Lockett* is particularly impactful as a precedent, as the Supreme Court held that the arbiter of fact (i.e., the jury) must be able to consider, without court limitation, potential mitigation the defendant's character, previous criminal record, and circumstances of the offense, which was not done in *Lockett*, as the judge disregarded a psychiatric report supporting the defense. The Court has further upheld precedents which articulate the legal requirement of the fundamental respect for human dignity set out by the Eighth Amendment, positing that jurors must be provided with requisite information on the characterological, psychological, medical, and legal history of the defendant, as well as a full description and background of the offense (see *Penry v. Lynaugh*, 1989; *Bigby v. Dretke*, 2005).

Mitigating circumstances common in the adjudication of capital crimes are: 1.) The defendant having no significant criminal background or history, 2.) The crime was committed during extreme mental or emotional disturbance, 3.) The victim was a willing participant or initiated the act, 4.) The defendant was an accomplice in a capital felony committed by another person and the defendant's participation was minor, 5.) The act was committed under extreme duress, 6.) Diminished capacity of the defendant; and 7.) The defendant was a minor at the time of the commission of the felony (Jasper, 1996). Although the courts have attempted to raise

awareness of mitigating circumstances and their important role in capital decision-making, Bowers, Brewer, and Lanier (2009) noted that "many presumptively mitigating considerations are not strongly or consistently viewed as mitigation by jurors […] In many cases jurors' responses indicate uncertainty or ambiguity [regarding mitigation] (p. 207). Moreover, the procedural standards applied to mitigation are often conflated with those of guilt, with one study finding that 45% of jurors failed to understand that they were allowed to consider any mitigating evidence during the sentencing phase of the trial. In addition, two-thirds of jurors failed to realize that unanimity was not required for findings of mitigation (Bowers & Foglia, 2003).

Preparedness. Emerging from both a theoretical and legal examination of the previous constructs and their relationship to determining the presence or absence of judicial arbitrariness in capital sentencing is the notion of the juror, themselves, feeling adequately prepared to make the decision regarding sentence. As Whitman (1999) stated:

> Death penalty jurors must be told in "strong, unequivocal language" that their role is both a difficult one and one which they cannot in truth pass off onto the "shoulders" of the judge, the defendant, or an abstract concept of "the law." This message should be communicated at as many points during the sentencing phase as possible. It should be mentioned in the opening statement, in the closing argument, and in proposed sentencing instructions (p. 284).

As in previous studies related to jury decision making (see Frank & Applegate, 1998; Geimer & Amsterdam, 1987; Weiner, et al., 1995, 1998), this study operationalizes decision-making preparedness based on juror self report after review of instructions, as well as objective "knowledge-based" assessment of important concepts, such as aggravation and mitigation (Haney, et al., 1994).

Research Design

This study uses a "mixed-methods" design (Teddlie & Tashakkori, 2009), which utilizes procedures for collecting, analyzing and "mixing" both quantitative and qualitative data during the research process in order to better understand a research problem (Creswell, 2007). As Greene (2007) noted, the use of mixed-methods brings together disparate methodological stances, sets of criterion, and modes of inquiry (p. 170). However, this mixed design does not assume that these criteria and stances are necessarily opposed. In testing hypotheses related to juror decision making in capital cases throughout the nation, it is necessary to draw from both traditions to provide evidence, reinforce inferences made on the strength of that evidence, and provide description and explanation of particular phenomena. For the purposes of this study, both quantitative and qualitative methods are expected to provide data, warranted inferences, description, and explanation consonant with the criteria and values inherent within each tradition. The mixed-methods design, therefore, represents the effort to maximize these expected outcomes.

The rationale for mixing these methodological approaches in this study is twofold. First, in the area of legal research, rooted in the areas of rhetoric, argument, and subjective interpretation, neither quantitative nor qualitative methods are sufficient by themselves to capture juror's interpretations of documentation, evidence and testimony and concomitant meanings and independent judgments (Fielding, 2010; McCrudden, 2006). However, when used in combination, quantitative and qualitative methods complement each other and allow for a more complete analysis (Greene & Caracelli, 1997; Teddlie & Tashakkori, 2009).

Quantitative measures in the current study are geared specifically to the areas of defining frequency and magnitude of jury instruction impacts on capital decision-making as well as

empirically testing the prediction power of those impacts on imposition of a capital sentence. As Baldus, et al. (1980) reported, quantitative measures and means of assessment, such as multiple regression analysis, can be effective in determining the predictive power of determinant variables related to imposition of the death penalty. This research carries this aspect from specific variables related to the capital case itself, such as the race of the defendant or number of victims (Baldus, et al. 1980, p. 37), to variables related to the judicial procedures in adjudicating the case (Blankenship, et al., 1997; Bowers, 1995). Demographic data, including potentially intervening variables, is discussed at length in Chapter 4 of this study.

In contrast, the qualitative research processes in this study are focused on the subjective meanings and impressions of former capital jurors with regard to the content of the actual jury instruction. Following from other mixed-methodologists in the field of empirical legal studies, such as Neilsen (2010), qualitative elements of a mixed design process are often theory- or hypothesis- generating, while quantitative research elements continually test and refine those theories and hypotheses. Moreover, many of the research questions asked about law and larger societal influence "can only be answered in the first instance using qualitative methods" (Neilsen, 2006, para. 1). As Greene (2007) and others have noted, rich description and detailed textual elements are often only able to be collected and explored using qualitative methods (e.g., coding of interview transcripts), thus providing significant context and depth to the study (Creswell, 2007; Padgett, 1998).

A mixed-methods design, constructed to maximize the benefits inherent within each methodological tradition, presents significant strengths and weaknesses to any research endeavor (Greene, Caracelli, & Graham, 1989). The method also has strengths and weaknesses unique to its combination of traditions, often reflected in the dichotomous relationship between the

traditions. For example, strengths of the mixed design method include the use of qualitative data to add meaning and detail to quantitative data, while quantitative data adds specificity and precision to qualitative narratives or document texts. Qualitative means can be used to gather and formulate opinions, questions, or theories, while quantitative methods can be used to test and falsify this information. Utilizing these dichotomies "can provide stronger evidence for a conclusion through convergence and corroboration of findings […] can add insights and understanding that might be missed…[and] can be used to increase the generalizability of the results" (Johnson & Onwuegbuzie, 2004, p. 21). As such, the mixed design produces, at once, a more complete and more detailed picture of a phenomenon and its effects.

Weaknesses of the approach are also evident in the dichotomous relationship, particularly in the belief that, when methods are combined, resources spent on the research must be split between two different methodologies with separate means of data collection and analysis. The result is often that research is more time consuming, more expensive, and laborious than singular-approach studies (Johnson & Onwuegbuzie, 2004). Moreover, as Greene (2007) noted, mixed methods are often very complex in their construction and implementation, and, as a result, have the potential to slow or stall analysis of data. Specific to the area of empirical legal studies, as Neilsen (2006) contended, efforts at mixed methods must contend with differences in sampling, collection, and analysis inherent within each respective tradition, and close scrutiny must be paid to these differences when combining the methods into a research plan. For example, in the current study, quantitative data analysis is conducted on larger samples of a single group (i.e., former capital jurors) than qualitative data analysis, which analyzes a smaller subset of interview data. While this subset is non-representative, it was randomly drawn and "embedded within" the larger sample (Neilsen, 2006, para. 8).

Potential vs. past capital jurors. As previously mentioned, this research study faces a significant limitation, in that the data to be obtained uses a single group, namely former capital jurors. The experience of serving on a capital trial and delivering a sentence has the potential to change individual perceptions on the law, government, the criminal justice system, and the death penalty. Moreover, analysis of data from only past capital jurors would be expected to demonstrate a cohort effect, in which similar responses are to be expected (Haney, 1997). The principal motivation for adding a sample of potential jurors is to gauge whether issues of instruction comprehensibility exist for the general public (i.e., the potential pool of capital jurors), persist throughout the trial (i.e., selection and qualification, guilt/innocence phase, sentencing phase) and impact imposition of sentence.

Comparison of these groups may allow a more accurate discernment of where jury instructions and attendant judicial procedure succeed or fail to meet comprehensibility standards as set forth in the *Gregg* decision. This is in keeping with the development of this research project as both descriptive, in terms of understanding what role jury instructions play in the decision-making process, and evaluative, in determining whether or not the current procedures meet or fail to meet the standard of the law. As judicial service is an obligation for citizens of the United States, and the potential for capital sentencing exists in 34 states, the possibility of capital jury service exists for a majority of Americans. This research study is committed to contributing to the public discussion on the ramifications of the death penalty and upholding the standards of empirically-based criteria and sound interpretation of the law.

Research Procedure

There were three stages in the research procedure. The first and second stages utilize quantitative and qualitative data from a nationwide survey of former capital jurors. The third

stage included a quantitative survey instrument that was especially developed and designed to collect and analyze similar self-report information obtained from potential capital jurors in the state of Georgia. Approval from the Human Subjects Office of the University of Georgia's Institutional Review Board (IRB) was obtained for all stages of the research process.

The Capital Jury Project. This study analyzes qualitative and quantitative data collected as part of the archives of the national Capital Jury Project at the School of Criminal Justice at the State University of New York at Albany. The Capital Jury Project (CJP) is a program of research on how jurors in capital cases make life or death sentencing decisions. It has sought to determine whether jurors' exercise of sentencing discretion under modern capital statutes conforms to constitutional standards and whether these statutes have remedied the arbitrariness ruled unconstitutional by the *Furman* decision. The project was initiated in 1991 by a consortium of university-based researchers with support from the National Science Foundation (NSF) and was designed to: 1.) systematically describe jurors' exercise of capital sentencing discretion; 2.) assess the extent of arbitrariness in jurors' exercise of such discretion; and 3.) evaluate the efficacy of capital statutes in controlling such arbitrariness (Bowers, 1995; Blume, Eisenberg & Garvey, 2003). As of this writing, the CJP has produced over 50 peer-reviewed and law review publications, and its findings have been admitted into deliberations in several Supreme Court cases (e.g., *State of Tennessee v. Dellinger*, 2002; *Simmons v. South Carolina*, 1994; *Strickler v. Greene*, 1999; *Summerlin v. Stewart*, 2003).

Stage 1: Quantitative data. The need for integration of quantitative empirical data within criminal justice has been widely expressed in legal, criminological, sociological, and psychological literatures (Baldus, et al., 1980; Costanzo & Costanzo, 1992; Diamond & Levi, 1996; Eisenberg, Garvey & Wells, 1996; Frank & Applegate, 1998; Haney & Lynch, 1997;

Neuman & Wiegand, 1999; Weiner, et al., 1998). As Bowers (1995) noted, the CJP has principally focused on gathering and analyzing juror self-report quantitative data related to death penalty deliberations primarily as an indicator of frequency and distribution from state to state. This research study utilized the Capital Jury Project (CJP) sample to provide a more inclusive level of statistical analysis consistent with the needs expressed by the literature (Lanier, 2009). By viewing issues of juror decision making across several states, substantial commonalities and divergences in the instructions can be noted. One aim of the quantitative analyses offered in this study is to describe and explore what, if any, jury instruction procedures are held in common, as well as their differences in order to determine whether these factors correspond with, or contribute to, patterns in jury decision making.

Sample. The Capital Jury Project (CJP) has profiled 1198 jurors from 353 capital trials in 14 states. The states in the study (Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia) represent the principal variations in capital sentencing statutes. Within each state, a sample of twenty to thirty capital trials was drawn to represent both life and death sentencing outcomes. For the purposes of this study, the full CJP database of 1198 participants as coded into the Statistical Program for the Social Sciences, 16.0 (SPSS) was utilized, but 293 cases were eliminated from the study due to missing or incorrectly coded data. This study utilizes a sample (N=905) of complete responses to the CJP quantitative instrument, with all of the participating states represented.

Instrument. The full CJP questionnaire (see Appendix A) runs to over 50 pages, containing 226 discrete questions ranging from demographics on the juror, the defendant, and the victim in a capital trial and information on the legal proceedings; to participant self report on

prosecutors, defense attorneys, judges, and jury instructions. Type of questions include dichotomous items (yes/no; more/less), ordinal measures ranking juror response to evidence, testimony and judicial instruction, and Likert-type scale questions. The instrument also contains several prompts and open-ended questions, which are described in Stage 2 below. Given the breadth and depth of the instrument, numerous studies as to its reliability have been conducted in determining juror opinion in various stages of capital trials (Blume, et al., 2003; Bowers, 1995; Bowers, Brewer & Lanier, 2009; Bowers & Foglia, 2003; Bowers, et al., 2006; Bowers, Sandys & Steiner, 1998; Eisenberg, Garvey & Wells, 1996; Foglia, 2003; Garvey, 1998). In adapting the CJP instrument to this study, a preliminary test of reliability was conducted by this author on 72 scalar items addressing sentencing and the penalty phase of capital trials. The result, using Cronbach's alpha as a measurement of internal consistency was $\alpha = .852$, considered to be in the acceptable range as a measurement of scale reliability. With regard to validity, Bowers, Foglia, Ehrhard-Dietzel & Kelly (2010) noted that the Capital Jury Project instrument has shown strong face and construct validity and continues to be refined and reviewed by experts in the fields of law and social sciences.

Procedure. For the purposes of this study, 10 items from the CJP instrument were selected for analysis, along with the final disposition of sentence (i.e., death/life) as endorsed by the participating former juror. First, items were selected that were relevant to one or both of the research questions stated above. Next, items were grouped by their relevance to the five identified constructs of clarity, procedural integrity; aggravation, mitigation, and decision-making preparedness (see Table 1). Three items addressed the clarity of the jury instructions that respondents received from the court. Two items addressed the procedural integrity of the instructions and the jurors' perception of their role and responsibility as arbiter of fact and

determiner of sentence in the penalty phase. Two items dealt with how aggravation was defined to the juror and how weighing of factors affected their final decision. Similarly, two items address mitigating factors, assessing their definition and relative weight given in determining sentence. One item addressed the degree to which the juror felt prepared to render the final sentencing decision, and whether the juror considered the sentence rendered by the jury to be correct.

Analysis of the CJP data directly addresses the need for advanced statistical analysis of the five most commonly disputed factors in capital sentencing, namely, the clarity and comprehensiveness of instructions given by the court, the legally adequate weighing of aggravating and mitigating circumstances, and impaneling of jurors who are confident that they have been properly educated and instructed to render a legally sound decision. Analysis of this data was conducted to demonstrate what factors have the greatest predictive influence on the final sentencing decision.

Stage 2: Qualitative data. Data being analyzed and coded for this dissertation study was collected by the Capital Jury Project, utilizing three-to-four hour audio recorded interviews with 80 to 120 capital jurors in each of the participating states, using a semi-structured method to gather juror insights as to the extent to which jurors' exercise of capital sentencing discretion is informed by jury instructions, what methods are used to curb potential arbitrariness, bias, and discrimination, and jurors' impressions of the capital sentencing rules and procedures (Bowers, 1995). The research is conducted by a consortium of university-based investigators including attorneys, criminologists, social psychologists, and forensic social workers utilizing a common set of open-ended questions and response prompts contained within the main CJP instrument described above. Interviews were conducted and data collected and transcribed in accordance

Table 1

Operational Definitions of Variables from Capital Jury Project

Research Question Addressed	Target Construct and Definition	Original CJP Item Number and Survey Question	Type	Coding
Two	**Clarity**, defined as the conciseness of the instructions and general ease of understanding for the juror, as well as absence, as Blankenship, Luginbuhl, Cullen, & Redick (1997) noted, of "poorly worded or vague and ambiguous" instructions.	5.1. As you understood the judge's instructions for deciding punishment, could the jury consider… 5.2. Among factors in favor of a death sentence, could the jury consider… 5.6. Among factors in favor of a life or lesser sentence, could the jury consider…	Ordinal	Any/all evidence from trial (=2); Some/selected evidence or factors (=1); Respondent indicated they did not know/were not instructed (=0)
One	**Procedural integrity** is defined in this study as the degree jury instructions relate directly to the role of the jury as arbiter of fact and the structural procedures of the court	3c17a. After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence showed that the defendant's conduct was heinous, vile, or depraved? 3c17b. After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence showed that the defendant would be dangerous in the future?	Nominal	Yes (=1) or No (=0)
Both One and Two	**Aggravation** is "a fact …that increases the degree of…culpability for a…criminal act (Garner, 1999, p. 236). Baldus, et al. (1990) noted, "state laws…identify six to twelve [aggravators]; at least one must be present…for a death sentence" (p. 22). A unanimous finding of aggravation is required (Cantero & Kline, 2009).	5.3. For a factor in favor of a death sentence to be considered, did it have to be…	Nominal	Beyond a reasonable doubt (=1), or either by a preponderance of evidence, to the juror's own satisfaction or the respondent did not know (=0)

Table 1 continued

Operational Definitions of Variables from Capital Jury Project

Research Question Addressed	Target Construct and Definition	Original CJP Item Number and Survey Question	Type	Coding
Both One and Two	**Aggravation** is defined, in the legal sense, as "a fact or situation that increases the degree of…culpability for a…criminal act (Garner, 1999, p. 236). Baldus, et al. (1990) noted, "state laws now identify six to twelve [aggravators], at least one of which must be present before a convicted murderer is eligible for a death sentence" (p. 22). In most states, a unanimous finding of aggravation is required (Cantero & Kline, 2009). At the very least, a simple majority vote is required for finding of aggravation.	5.4. For a factor in favor of a death sentence to be considered did…	Nominal	All jurors have to agree on the factor (=1), or respondent indicated that jurors do not have to agree unanimously or did not know what was required (=0)
Both One and Two	**Mitigation** is defined as one which "does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce…the punishment (in a criminal case)" (Garner, 1999, p. 236). The Supreme Court has upheld the Eighth Amendment, positing that jurors must be provided with all requisite information on the history of the defendant, as well as a full description and background of the offense (see *Penry v. Lynaugh*, 1989; *Bigby v. Dretke*, 2005) and that any mitigating factor may be considered, from any aspect of the trial, without the requirement of unanimity or majority.	5.7. For a factor in favor of life or a lesser sentence to be considered, did it have to be…	Nominal	to the juror's own satisfaction (=1) or either beyond a reasonable doubt, by a preponderance of evidence, or the respondent did not know (=0)

Table 1 continued

Operational Definitions of Variables from Capital Jury Project

Research Question Addressed	Target Construct and Definition	Original CJP Item Number and Survey Question	Type	Coding
Both One and Two	**Mitigation** is defined as one which "does not justify or excuse a wrongful act or offense but that reduces the degree of culpability and thus may reduce…the punishment (in a criminal case)" (Garner, 1999, p. 236). Following constitutional requirements, any mitigating factor may be considered, from any aspect of the trial, without the requirement of unanimity or majority.	5.8. For a factor in favor of life or a lesser sentence to be considered did…	Nominal	Jurors do not have to agree unanimously (=1) or the respondent indicated that all jurors have to agree on the factor or that they did not know (=0)
One	Decision-making **preparedness** based on juror self report as well as objective "knowledge-based" assessment of important legal and procedural concepts, as arbiter of fact and recognized legal authority.	5.10. Do you believe that these guidelines or instructions led to the right or to the wrong punishment for the defendant?	Ratio	Led to no particular punishment (=0); Led to wrong punishment (=1), the wrong punishment, but jurors followed own consciences and decided on the right punishment (=2), Led to the right punishment (=3)

with the guidelines regarding human subjects mandated by the Institutional Review Board of the State University of New York in Albany.

Sample. The Capital Jury Project, as part of its overall sampling plan, randomly selects a minimum of at least four jurors from each case used as part of the overall trial sample (Bowers, 1995). From the pool of interviewed jurors, a purposive sample (N=36) was systematically selected for participation in this study. These cases represent those contained in the overall CJP sample where jury instructions for the trials in which respondents participated were part of the materials collected by the CJP. Transcripts of both the juror interviews and the jury instructions for the trials were obtained from the CJP. The purpose of obtaining such a sample was to: 1.) obtain narrative information on the five constructs of jury instruction clarity, procedural integrity, aggravation, mitigation, and decision-making preparedness *in the jurors' own words*; and 2.) be able to compare jurors' subjective experience as relayed in the interviews to the instructions as they were presented at the trial. The sample used for this study contains both oral instructions read into the record of the trial by a court reporter and written instructions presented to individual jurors.

Procedure. Commensurate with participation in the CJP, jurors were asked open-ended questions that invited extended narrative responses in the form of 3-4 hour interview. The interviews trace the juror's trial experience with questions on jury selection, the guilt trial, jury deliberations on guilt, the penalty trial, and jury deliberations leading to the final life or death decision (Bowers, et al., 2010). After selection of the initial sample as described above, transcripts from the cases were digitally scanned and transferred from the CJP in Albany, New York, to this author through the U.S. Postal Service on a series of compact discs. Transcripts

were then printed and sorted according to representative state to begin the coding process. Method of coding and qualitative analysis is described in Chapter 4 below.

Potential jurors in Georgia. In addition to the data collected and analyzed from the pool of former jurors in the Capital Jury Project, this study sought to address the issues of jury instruction comprehensibility with potential jurors in order to determine whether the legal and procedural debates around instruction comprehensibility exist for the general public and whether instructions alone (i.e., without potentially coercive elements in *voir dire*, evidence and argument in the guilt phase, jury deliberation or victim statements) impact imposition of sentence. Including a sample of potential jurors also addresses the potential for a cohort effect as described above. Such sampling provides a more accurate view of instructions as a social or civic function within larger juridical and governmental systems of death penalty states, as well as their legal valence as set forth in the *Gregg* decision.

Stage 3: Quantitative data. A brief survey instrument has been created and used for data collection with a sample pool of potential jurors in three counties in Georgia. Study participants were randomly assigned to review case material and prepared jury instructions from an adjudicated capital trial, i.e., *Butler v. State of Missouri* (1990), *Longworth v. State of South Carolina* (1991), or *Randolph v. State of Florida* (1990). After the participants reviewed the material, they were asked to answer questions on issues of clarity, procedural integrity, aggravation, mitigation, and decision-making preparedness. Survey data: 1.) tested whether the content in the jury instructions is consistent with juror decisions found in the Capital Jury Project (CJP) qualitative and quantitative data; and 2.) identified and described barriers faced by potential jurors. These survey questions were also analyzed to determine the presence and influence of possible intervening variables outside of jury instruction content. Statistical

measures suitable to the study design were conducted to determine the strength of the relationship between jury instructions and juror decision. Analysis and comparison with CJP data is presented in Chapter 4 of this dissertation.

Sample. This study surveyed potential jurors (*N*=182*)* within the state of Georgia. Inclusion criteria for obtaining the sample were that: 1.) participants were U.S. citizens and Georgia residents age 18 or older who possessed sufficient knowledge of the English language, and 2.) had not been convicted of a felony or had been convicted of a felony and their civil rights restored. Exclusion criteria include: 1.) participants had previously served on a capital jury; 2.) individuals were eligible for jury duty but lived outside the specified geographic area and 3.) individuals who did not meet the juror eligibility requirements as set forth in the Georgia State Constitution and U.S. Constitution.

Recruitment occurred in three counties which served as data collection points for the study: Athens-Clarke County Georgia, Fulton County, Georgia, and Cobb County, Georgia. Fulton and Cobb counties were chosen as they, according to the latest report from the Georgia Department of Corrections (2010), have high incidence of capital convictions and death penalty sentencing. Clarke County, by comparison, has a low incidence of adjudicated capital trials. Moreover, each county contained a college or university with a high undergraduate population to serve as sampling pools. Use of university students in behavioral research has shown to be both an efficient and effective means of obtaining a larger and demographically diverse sample size (Hultsch, MacDonald, Hunter, Maitland & Dixon, 2002). Moreover, in the area of legal studies on the death penalty and issues of comprehensibility, student samples have proven to be beneficial. As Haney & Lynch (1994) report:

> The most important way in which…[a student] sample likely differs from that larger population (namely, in terms of educational background) would tend to favor their increased sophistication with and comprehension of these instructions. That is, because our subjects were likely far more literate and conversant with the general terminology employed in judicial instructions and more recently experienced at interpreting complicated verbal formulations than the average capital juror, all other things being equal, we would expect them to score better on tasks that require term definition and general comprehension of complex instructions (p. 418).

Given the size of the sample and homogeneity in terms of education, generalisability of the findings to either the state or national population was not assumed. However, it is noted that the use of the student sample did allow for a sampling frame comprised of both high and low incidence of capital adjudication and a demographically diverse sample in county of origin, race, and age. These demographics are provided for comparison with the national sample from the Capital Jury Project in Chapter 4.

Instrument. The Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) has been created for the purposes of this dissertation study (Barner, 2009). The instrument is structured as a 13 question, four-item forced choice Likert-type scale, measuring the opinions of potential "death ready" jurors (see Appendix B). For the purposes of measurement, a random assignment of one of three case summaries and their jury instructions from the sample collected from the Capital Jury Project was provided to respondents. Respondents are asked to read an overview of the guilt phase of a capital case and the jury instructions provided for the penalty phase. A similar model of measurement has been previously utilized in a study conducted by

Weiner, et al. (1995) as effectively measuring the construct of jury instruction comprehensibility, including clarity and procedural integrity. After review of the existing literature on jury instruction comprehensibility and legal procedures governing capital trials, 13 questions were bundled in order to best address the research questions of the study, and then to accurately measure the five constructs of clarity, procedural integrity, aggravation, mitigation, and decision-making preparedness (see Table 2).

Within the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ), five questions address the clarity of jury instructions. Five additional questions address procedural integrity of the jury instructions. It is noted that in the previous instruments constructed to test jury instruction comprehension (e.g., Weiner, et al., 1995; Frank & Applegate, 1998), potential jurors were "tested" on specific elements of jury instruction content, while the current instrument addresses potential juror perceptions when considering a given set of jury instructions. Based on this, three additional questions were asked to address an overall sense of decision-making preparedness, including understanding definitions and weight of aggravating and mitigating circumstances, and the potential juror's estimation of adequate education and instruction to offer a valid sentence in a death penalty case. The questions, randomly selected case summary and jury instructions, were provided to respondents in a paper-and-pencil survey format.

A pilot test of the instrument was conducted with 60 university students, comprised of 37 undergraduate students and 23 graduate students. Implied consent was gathered from each of the students to participate in the pilot study in accordance with the University of Georgia Institutional Review Board guidelines and professional ethics. Based on this initial pilot testing, reliability for the BJICQ was derived using Cronbach's alpha coefficient for the total scale. Cronbach's alpha of .70 or above is considered good internal consistency for a newly developed

Table 2

Operational Definitions of BJICQ Items

Research Question Addressed	Target Construct and Definition	Item Number and Survey Question	Type	Coding
Two	**Clarity**, defined as the conciseness of the instructions and general ease of understanding for the juror, as well as absence, as Blankenship, Luginbuhl, Cullen, & Redick (1997) noted, of "poorly worded or vague and ambiguous" instructions.	1. The jury instructions were clear and easily understood. 5. The definition of "aggravating circumstances" was clear in the instructions as given. 6. The instructions required several readings in order to fully understand them. 7. The definition of "mitigating circumstances" was clearly defined in the jury instructions. 9. The jury instructions were clear on the issue of jury agreement and disagreement.	Interval	4-point Likert scale from 1 (Strongly Disagree) to 4 (Strongly Agree)
Two	**Procedural integrity** is defined in this study as the degree jury instructions relate directly to the role of the jury as arbiter of fact and the structural procedures of the court	2. The jury instructions were specific to the case under consideration. 3. I was able to understand my responsibilities as a juror from the instructions given. 4. I disagree with some of the jury instructions given. 8. The jury instructions provided the jury with a clear understanding of the laws governing capital murder cases. 10. I would need to ask additional questions after reading the jury instructions for this case.	Interval	4-point Likert scale from 1 (Strongly Disagree) to 4 (Strongly Agree)

Table 2 continued

Operational Definitions of BJICQ Items

Research Question Addressed	Target Construct and Definition	Item Number and Survey Question	Type	Coding
Both One and Two	Decision-making **preparedness** based on juror self report after review of instructions (Question 13), as well as objective "knowledge-based" assessment of important concepts, such as aggravation and mitigation (Questions 11 and 12, see Haney, et al., 1994). Definitions of aggravating and mitigating circumstances are drawn directly from *Black's Law Dictionary, 7th edition* (Garvey, 1999).	11. According to the instructions, the definition of "aggravating circumstances" refers to: 1 – circumstances that provide the jury evidence of the heinousness of the crime. 2 – circumstances related to the reason(s) the juror believes the crime was committed. 3 – circumstances of the crime that increase the guilt of the defendant and injury to the victim. 4 – circumstances that increase the likelihood that the defendant would commit another crime. 12. According to the instructions, the definition of "mitigating circumstances" refers to: 1 – a fact or circumstance in the life of the defendant that led to the commission of the crime. 2 – a fact or circumstance that does not excuse the crime but that reduces culpability for the crime. 3 – a fact or circumstance that the jury unanimously decides reduces the guilt of the defendant. 4 – a fact or circumstance that excuses the commission of the crime.	Nominal	4-point multiple choice selection.
One		13. Based on the summary evidence and instructions provided, state your opinion on how well prepared a juror would be to render a sentence. 1 – there is sufficient evidence and instruction to render a sentence of death in this case. 2 – there is sufficient evidence and instruction to render a sentence of life imprisonment. 3 – there is sufficient evidence and instruction, but either sentence cannot be recommended 4 – there is insufficient evidence and instruction to render a sentence in this case.	Interval	4-point scale from 1 (Insufficient instruction) to 4 (Sufficient instruction for sentence of death)

scale (Nunnally, 1978). The pilot testing of the BJICQ achieved a Cronbach's alpha of $\alpha = .840$ with a reported scale mean of 26.68 and standard deviation of 4.354 (Barner, 2009). Questions involving respondents needing to read the instructions several times for clarification (alpha if deleted = .892) and needing to ask the court or judge additional questions (alpha if deleted = .893) were seen as negatively correlated to the other items, but were consistent with the overall difficulty of the sample instructions and deletion alpha was not considered significant to merit additional analysis with item deletion.

During the construction and piloting testing of the instrument, efforts were made to establish overall content, or "face" validity of the instrument (Rubin & Babbie, 2008). A panel of legal experts was consulted as to the question content and applicability of the instrument protocol to studies of capital adjudication and jury deliberations. Preliminary criterion validity comparisons with extant scales were conducted and compared with existing legal statues and precedent in Georgia and surrounding death penalty states. Information on validity and comparison efforts are described in greater detail in the section below.

Procedure. For primary survey data collection, letters to potential participants or key informants (e.g., faculty members, student organizations, and electronic listservs and discussion boards) were created (see Appendix C) and used at each of the three data collection points in Clarke, Cobb and Fulton counties. A randomized selection of information packets containing one of three case summaries, jury instructions, demographic face sheets, and Brief Jury Instruction Comprehensibility Questionnaires (BIJCQ) were created and distributed to participants in either classroom settings or at individually arranged meeting times.

All recruitment materials were approved by the University of Georgia Institutional Review Board (IRB) and provide prospective participants with contact information for further

questions or concerns. In order to protect the participant privacy, a cell phone used only by this author was the primary contact number for the research study. There was also the option of contacting the author via e-mail which was also private and confidential. All identifying information (e.g., participant names or phone numbers) of participants was kept only as long as it is needed to schedule, conduct, and complete the survey and then deleted and replaced with an individualized participant number. Completed questionnaires were kept separate from the face sheets containing demographic information and de-identified using the assigned participant number to connect BIJCQ responses to the corresponding demographic data. All collected data was then collated and entered into the Statistical Program for the Social Sciences, 16.0 (SPSS) for analysis.

Data Analysis Plan

Capital Jury Project quantitative data. Analysis of Capital Jury Project (CJP) quantitative survey data utilized statistical software (i.e., SPSS) and primarily focus on identified construct variables of clarity, procedural integrity, aggravation, mitigation, and decision-making preparedness. Frequency and descriptive statistics for the demographic data were analyzed. These included frequency counts and percentage values for each demographic category. Measures of central tendency were obtained and included category means. In order to examine the initial distribution of the data, the level of skew and kurtosis were computed. Cross-tabulations and appropriate parametric and nonparametric statistical tests were utilized, including Chi-Squared Tests of Independence, a Mantel-Haenszel test, binary logistic regression and examination of the odds ratio involved in predicting jury decisions were employed. A complete summary of all data analysis techniques, procedures and results is contained in Chapter 4 of this dissertation.

Capital Jury Project qualitative data. For the purposes of this study, a method of "open coding" was used to review each of the transcriptions (Padgett, 1998). Open coding is utilized to isolate instances of textual support for the five identified constructs (clarity, procedural integrity, aggravation, mitigation, and decision-making preparedness) and possible intervening variables (discussed in Chapter 4), as well as additional responses lending thematic support or exposition to the capital juror experience. Once the qualitative themes were determined by review of each transcription and coded responses emblematic of the five thematic constructs, they were subject to comparison with both the quantitative instruments and the case summary and jury instructions from the capital trial, so as to triangulate the informational sources that emerge regarding each construct (Baldus, et al., 1990). Chapter 4 of this dissertation reproduces textual excerpts from the transcripts to illustrate common results found in the coding representative of the identified measurement constructs.

Potential jurors in Georgia: Quantitative Data. The internal consistency of the Brief Jury Instruction Comprehensibility Questionnaire (BIJCQ) was computed and assessed using Cronbach's coefficient alpha (α) as computed by the Statistical Program for the Social Sciences, 16.0 (SPSS). The correlation matrix was analyzed using exploratory factor analysis (EFA) techniques. It was determined that the given sample size from potential jurors in Georgia was appropriate to apply factor analysis to the BIJCQ instrument (Osborne & Costello, 2004; Gorsuch, 1983). Factor loadings were computed and revealed the extent to which specific items group together to form factors. Principal components analysis (PCA) was used to simplify the factor structure of the BIJCQ so as to permit more detailed analysis of the data and explore the possibility that the constructs being evaluated could be undifferentiated (i.e., instruction clarity and procedural integrity) and overlap existed between certain items (i.e., those examining

aggravation and mitigation). The correlation matrix and factor analysis for the BIJCQ are provided in Chapter 4 of this dissertation.

Conclusion

This chapter provided an overview of the design of the research study along with a detailed explanation of the variables utilized in the study. The chapter also outlined the procedures used to analyze the data set, provided an explanation of the sampling procedures used, gave the rationale for the construction of the research questions, and reviewed the data collection procedures used in this study. The next chapter presents the analytic techniques used in this study and provides an in-depth analysis of the research questions and the findings.

CHAPTER 4

Analysis

This dissertation study closely examined the literature on capital punishment in the United States and derived five instructional factors which contribute to capital decision-making: instruction clarity, procedural integrity, aggravating circumstances, mitigating circumstances, and juror's sense of preparedness. Moreover, several key demographic variables were identified as potentially contributing to the overall jury decision, including race, ethnicity, gender, and level of education. These variables and their relevance to the current study were also identified and supported by current literature. This chapter provides evidence via statistical and qualitative analyses to refute or support the research questions and hypotheses previously presented in Chapter 3.

This chapter is presented in three sections. In the first section, descriptive statistics and analysis of quantitative data from the 14-state Capital Jury Project (CJP) are presented. Then, results for each research question and hypothesis are addressed using tabular renderings and explanatory text of statistical analyses, procedures, and findings. The second section provides contextual data from CJP qualitative interviews with capital jurors to provide description and provide contextual data regarding each of the instructional variables. The third and final section presents analysis of the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) conducted with a sample of potential jurors from the state of Georgia. This section has two distinct parts: a review of construction and initial testing of the instrument and an exploratory factor analysis of the BJICQ. Information on sampling, descriptive statistics, and relevant

analyses of the instrument are presented along with an explanation of sampling procedures and analysis methods used in the study.

Section One: Capital Jury Project Quantitative Data

The Capital Jury Project (CJP) has profiled 1198 jurors from 353 capital trials in 14 states. The states in the study (Alabama, California, Florida, Georgia, Indiana, Kentucky, Louisiana, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia) represent the principal variations in capital sentencing statutes. Table 3 displays the geographic distribution of jurors that comprise the sample. Within each state, a sample of twenty to thirty capital trials was drawn to represent both life and death sentencing outcomes. At the time of this writing, the full CJP database totaled 1198 participants, but 293 cases were eliminated from this study due to missing or incorrectly coded data. This study utilized a sample (N=905) of complete responses to the CJP quantitative instrument, with all 14 of the participating states represented.

Descriptive statistics. With regard to race, there were 806 white jurors (89.1%), 82 black jurors (9.1%), 9 Hispanic/Latino jurors (1.0%), 2 Asian jurors (0.2%), and 6 jurors who were classified or self-identified as "other" (0.7%, see Table 4). It should be noted that this "other" category includes Native American, Pacific Islander, and Middle Eastern jurors. These numbers illustrate a significant difference between the racial and ethnic makeup of jurors as compared to capital defendants adjudicated in the cases reviewed as part of the CJP research project. Previous research emerging from the Capital Jury Project with regard to this issue has concluded that "[racial] contrasts between contrasts between jurors…differ greatly in their numbers or representation on the jury and quite possibly in their prominence or influence in jury decision making" (Bowers, Sandys, & Steiner, 2001, p. 236).

Table 3

Capital Jury Project Sample Geographic Distribution of Juror Participants

	Frequency (*N*)	**Percent (%)**
State		
Alabama	34	3.8
California	132	14.6
Florida	97	10.7
Georgia	61	6.7
Indiana	75	8.3
Kentucky	90	9.9
Louisiana	20	2.2
Missouri	53	5.9
North Carolina	65	7.2
Pennsylvania	62	6.9
South Carolina	99	10.9
Tennessee	40	4.4
Texas	42	4.6
Virginia	35	3.9
Total	**905**	**100.0**

However, such significance must take into account a constellation of racial differences in addition to the racial or ethnic makeup of the jury sampled by the CJP, including the presence or absence of multiple defendants, the race of the defendant(s), and the race of the victim. As such, an in-depth empirical analysis of race as a direct impact on decision-making in capital trials is

beyond the purview of this dissertation study with the noted exception that among the 89.1 percent of white jurors surveyed by the CJP, more than half of these jurors would be adjudicating cases in which the defendant was of a different race than the juror (Blume, Johnson, & Sundby, 2008; Bowers, et al., 2001).

There were a total of 437 male and 468 female jurors in this data set for a total of 905 jurors with a relatively even gender distribution within the CJP sample. The demography of the CJP sample is consistent with the recent, post-*Gregg* era of capital juries, as it was not until 1975, in *Taylor v. Louisiana*, that the U.S. Supreme Court clearly held against the systematic exclusion of women from jury service. As Connell (2009) noted, the language of the statute is unambiguous in its mandating of a "fair, cross-section" of the jurisdictional venue (i.e., the community in which the crime occurred) to be represented by the jury.

With respect to highest level of education completed, 247 jurors had finished high school, 76 had some technical school education, 237 had completed some college, 189 were college graduates, and 155 had completed some graduate or professional schooling. In the *Handbook of Jury Research*, produced by the American Law Institute-American Bar Association Committee on Continuing Professional Education, Lieberman and Sales (1999) noted that level of education in death penalty trials, on average, is consistent with meeting the minimum standard required by state law (i.e., completion of a high school diploma) or partial completion of undergraduate level coursework (i.e., "some technical school" or "some college") as endorsed by 561 jurors, or 62% of the CJP sample used in this study. Studies within the literature on jury instruction comprehension are supportive of the finding that juror comprehension is consistent with the level of education found in the CJP sample (Diamond & Levi, 1996; Weiner, et al., 1995).

Table 4

Capital Jury Project Demographics

	Frequency (*N*)	Percent (%)
Race/Ethnicity		
White	806	89.1
Black	82	9.1
Hispanic	9	1.0
Asian	2	0.2
Other	6	0.7
Gender		
Male	437	48.3
Female	468	51.7
Level of Education		
High School	248	27.4
Some Technical School	76	8.4
Some College	237	26.2
College Graduate	189	20.9
Graduate or Professional School	155	17.1

Table 4 graphically displays the demographics of the CJP sample utilized for this study in each of the aforementioned categories.

Variables and coding. As outlined in Table 1 of Chapter 3, ten questions culled from the Capital Jury Project (CJP) questionnaires (see Appendix A) were bundled according to five variables: clarity, procedural integrity, aggravating circumstances, mitigating circumstances, and

juror's sense of decision-making preparedness. Clarity was measured using three rank-ordered responses gauging juror's understanding about what information could be considered during deliberations. Procedural integrity was measured by two questions related to juror's specific attitudes toward specific evidence and facts of the crime as presented in the prosecution and defense cases in the guilt phase and relevant social, legal, medical, psychological, or characterological aspects of the defendant, namely whether the instructions were written so as to require a sentence of death upon particularly vile, heinous, or depraved acts, or if the defendant showed an inclination toward "future dangerousness" either to themselves or others (Sorenson, 2009). Regarding aggravating and mitigating circumstances, jurors were asked two parallel questions to determine whether aggravating or mitigating circumstances were delimited at all by the jury instructions as to what could be considered (i.e., a standard of proof) and if jury unanimity was required to consider an aggravating or mitigating circumstance in imposing sentence. Juror sense of preparedness was measured using a single scalar question asking jurors' own impressions as to whether the instructions led to the correct decision and punishment.

Question 1. The first research question examined whether instruction content (i.e., procedural guidelines, definitions of aggravation, mitigation, and means of preparing jurors for rendering sentence) were significant in determining the sentence rendered by the jury. To determine the predictive ability of these independent variables, a binary logistic regression was conducted. Capital Jury Project (CJP) data was screened and no outliers were found in the CJP sample. Logistic regression was conducted controlling for all variables, including demographic variables of race, gender, and level of education.

Appreciating the determination of sentence by a capital jury can potentially be understood by exploring the influence of a number of variables pertaining to instruction content,

including their descriptive influence in describing the circumstances of the crime (i.e., heinousness) and the characterization of the accused (i.e., future dangerousness), the weight given to special circumstances of aggravation and mitigation, and the relative requirement of unanimity and the standard of proof required by the court. The model of logistic regression examined these variables, as well as the race, gender, and level of education of the CJP sample jurors to determine the predictive accuracy of jurors deciding for the death penalty over a lesser sentence. In this study the decision is dichotomized between the death sentence and a life or lesser sentence. Predictive accuracy is determined by approximate expected and observed values (Harrell, 2010; Walker & Maddan, 2009).

The predicted instances of a death sentence being administered in CJP jurors (N = 905, 100% of sample) was 85.9% (N = 446) as compared to the observed number of death sentences (N = 519). The model was less successful at predicting when jurors would administer a sentence of life imprisonment or lesser (N =100 or 25.9%) when compared to observed sentences (N = 386). The percentage of correctly predicted jurors resulted in the correct classification of 60.3% of the sample. The model incorrectly classified sentencing in 39.7% of the sample, with 14.1% of the cases in which a death sentence was administered incorrectly attributed to life and 74.9% of the cases in which a sentence of life or lesser was administered incorrectly attributed to a death sentence.

Results of the logistic regression indicated that the overall model of procedural integrity was only reliable in distinguishing between jurors who imposed a sentence of death and those who imposed a lesser recommended sentence when consideration was made of the "future dangerousness" of the defendant (-2 Log Likelihood = 1220.027; χ^2 (2) = 14.953; p = .001). The model correctly classified 57.3% of cases within the sample based on endorsement of this

variable as a meaningful component of jury instruction. Additionally, results of the logistic regression showed that the model of juror preparedness (i.e., the self-reported assessment of the juror as to whether the instructions led to the appropriate punishment for the defendant) was statistically significant in predicting the sentence returned by the jurors in the CJP sample (-2 Log Likelihood = 1230.162; χ^2 (1) = 4.818; $p < .05$). The model correctly classified 56.7% of cases within the sample based on juror perception of preparedness based upon court instruction.

Wald statistics for both future dangerousness of the defendant and juror sense of preparedness indicated that the variables significantly predicted sentencing outcomes for individual jurors. However, analysis of the odds ratio for these variables indicates significant changes in sentencing outcomes, resulting in a decrease of the odds of imposition of a life sentence, as a result of the independent variables. The odds ratio for future dangerousness of the defendant was $e^2 = .618$. The odds ratio for decision-making preparedness was $e^2 = .856$. Thus, examination of the regression model for the variable of procedural integrity of the jury instructions in effectively determining the potential future dangerousness of the defendant yielded an odds increase by a factor of 3.92 when all other independent variables are held constant. Similarly, the odds for administration of a death sentence were 1.44 times more likely when jurors felt the instruction content prepared them adequately to render sentence.

Hypothesis 1. This study tests the null hypothesis that jury decision making will not vary according to the instructions that the jurors receive. The current study examines whether sentencing outcomes vary according to procedural integrity (through heinousness of the crime and future dangerousness of the defendant), aggravation, and mitigation. Cross-tabulations were conducted using juror responses on key variables and the final sentencing outcome (death/life or lesser sentence) in the sample collected from the Capital Jury Project (CJP). As a measure of

Table 5

Regression Coefficients

Variable	***B***	***Wald***	***df***	***p***	***Exp. (B)***
Procedural Integrity					
Heinousness	-.115	.432	1	.511	.892
Future Dangerousness	-.551	8.706	1	.003	.576
Aggravation					
Standard of Proof	-.091	.279	1	.598	.913
Unanimity	.045	.063	1	.802	1.046
Mitigation					
Standard of Proof	.045	.085	1	.770	1.046
Unanimity	.101	.350	1	.534	1.106
Sense of Preparedness	-.160	4.547	1	.033	.852
Demographic Variables					
Juror's Race	.220	2.486	1	.115	1.246
Juror's Gender	-.094	.457	1	.499	.911
Level of Education	-.088	3.283	1	.070	.916
Constant	-.296	19.404	1	.000	.744

Nagelkerke $R^2 = .042$

association between the independent variables and sentencing outcome, Chi-square tests were utilized. Statistically significant results were calculated and obtained for the two CJP measures of procedural integrity, Chi-square test for heinousness had a value of χ^2 (1, n = 905) = 7.820 (p = .005) which suggests rejection of the null hypothesis in favor of CJP juror decision-making being

influenced by instruction content related to the description of the crime (i.e., its depiction as heinous, violent, and/or depraved). The Chi-square value for future dangerousness was χ^2 (1, n = 905) = 14.424 ($p < .001$), which suggests that jurors were also motivated by instruction content related to the defendant's character. Analysis of cross-tabulations indicate that, across all jurors within the CJP sample, 43.4% indicated that, according to their perception of the instructions given, a sentence of death was required by law if the crime was deemed to be heinous, vile, or depraved. Similarly, 34.1% of all jurors sampled indicated that the instructions mandated a death sentence if the defendant was deemed to be dangerous in the future (see Table 6).

The Mantel-Haenszel chi-square statistic tests the alternative hypothesis that a linear association exists between two variables in a two-by-two tabular distribution with one degree of freedom (Kuritz, Landis, & Koch, 1988). Mantel-Haenszel chi-square analyses were run on all CJP measures of procedural integrity and final sentencing verdict to derive a common odds ratio estimate. For heinousness, the Mantel-Haenszel χ^2 (1, n = 905) = 9.453 ($p = .002$) for a common odds ratio estimate of 1.562. The Mantel-Haenszel values for future dangerousness were χ^2 (1, n = 905) = 14.396 ($p = .000$) for a common odds ratio estimate of 1.782. No additional variables were found to be significant.

While issues of aggravation and mitigation were not found to be statistically significant, cross-tabulations did show marked trends in juror perceptions. Cross-tabulations indicated that 28.7% of jurors professed that unanimity was not required (see Table 6). With only one exception, all of the states in the CJP sample require a unanimous finding for aggravation. As Cantero and Kline (2009) noted, Florida maintains that aggravating circumstances may be found by a simple majority of the jury. As Florida only accounts for 10.7% of the sample, the remaining 18% discrepancy in responses indicates that many jurors are either not instructed on

the need for unanimity or that the instructions given are unclear as to voting procedures. Comparatively, for consideration of mitigating circumstances, the law is clear in mandating that unanimity is not required and the U.S. Supreme Court has upheld this standard, set in *Lockett v. Ohio* (1978), as precedent for all death penalty states, as in *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494, U.S. 433 (1990). Analysis of cross-tabulations for mitigation found that 65% of CJP jurors indicated that believed they were instructed that all jurors must agree on a mitigating circumstance, contradicting existing case law.

Cross-tabulations of aggravation and mitigation also indicated some disparities regarding what CJP jurors considered to be the standard of proof for mitigating circumstances. As Palmer (1998) noted, at present there is "no capital punishment jurisdiction [that requires defendants to] prove the existence of mitigating circumstances beyond a reasonable doubt" (p. 129). However, cross-tabulations of CJP jurors asked specifically about whether factors that would mitigate the crime or favor a lesser sentence indicate that 50.7% of all CJP jurors within the sample stated that mitigating circumstances or circumstances supporting a lesser sentence had to be proven beyond a reasonable doubt. Within this percentage, more than half of jurors (28.8% of the total CJP sample) who endorsed a reasonable doubt standard of proof also returned a death penalty sentence.

In summary, the data shown in Table 6 would suggest that instructional description of the crime and the character of the defendant have a mild influence on the decision-making of CJP jurors, and seem to favor administration of a death sentence over that of life or a lesser sentence recommendation. Moreover, the cross-tabulations suggest that jurors express a greater familiarity with statutory guidelines regarding aggravating circumstances over those of mitigating circumstances. The findings are supported by the fact that, while states differ on the statutory

Table 6

Cross-Tabulations of Capital Jury Project Data

	Sentencing Outcome		
	Life (%)	Death (%)	Total (%)
Procedural Integrity			
Death required for Heinousness			
Yes	147 (16.2%)	246 (27.2%)	393 (43.4%)
No	239 (26.4%)	273 (30.2%)	512 (56.6%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)
Death required for Future Dangerousness			
Yes	105 (11.6%)	204 (22.5%)	309 (34.1%)
No	281 (31.0%)	315 (34.9%)	596 (65.9%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)
Aggravation			
Standard of Proof			
Reasonable Doubt	279 (30.8%)	370 (40.9%)	649 (71.7%)
Other Standard or Did Not Know	107 (11.8%)	149 (16.5%)	256 (28.3%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)
Unanimity			
Required	275 (30.4%)	370 (40.9%)	645 (71.3%)
Not Required	111 (12.2%)	149 (16.5%)	260 (28.7%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)

Table 6 continued

Cross-Tabulations of Capital Jury Project Data

	Sentencing Outcome		
	Life (%)	Death (%)	Total (%)
Mitigation			
Standard of Proof			
Reasonable Doubt	198 (21.9%)	260 (28.8%)	458 (50.7%)
Juror's Satisfaction	188 (20.7%)	259 (28.6%)	447 (49.3%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)
Unanimity			
Required	254 (28.1%)	334 (36.9%)	588 (65.0%)
Not Required	132 (14.5%)	185 (20.5%)	317 (35.0%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)

model of discretion (as discussed later in this chapter and presented in Table 8 below), the application of aggravators is considerably more standardized than mitigating factors and constitutional challenges are more likely to involve a question of whether jurors fully considered mitigating evidence to outweigh the aggravating circumstances, as articulated Justice Scalia's dissenting opinion in *Morgan v. Illinois* (1992). Foley (2003) paraphrases this quandary as emblematic of "the essential difference between the two cases, then, is that the consequences of the lone death penalty opponent are far greater than the consequences of the lone death penalty proponent" (p. 163). Examination of the CJP sample demonstrated that, despite more familiarity

with the standards of aggravation, CJP jurors still endorsed incorrect statutory guidelines regarding unanimity and the standard of proof in over 28% of the cases. Regarding mitigation, incorrect endorsement—amounting to serious reversible error—occurred in over half of the cases sampled, with 50.6% of respondents misapplying the standard of proof, and 65% of respondents unclear on the requirements of unanimity.

Question 2. The second research question addresses the role of instructions in determining what Bowers and Pierce (1980) referred to as the standard for arbitrariness (i.e., procedural actions by the court that seek to delimit "prevailing extralegal influences which compromise and displace the legally prescribed functions of such punishment," p. 563). The common procedural standard for arbitrariness since the *Furman* decision has been the "guided discretion" model of jury instruction, which emphasizes clarity (Bentele & Bowers, 2001; Frank & Applegate, 1998; Weiner, 1998). This study asked whether increase or decrease in perceived clarity of jury instructions contribute to juror decision-making in capital sentencing. Three questions were collated from the Capital Jury Project (CJP) sample to measure the level of clarity in the instructions. CJP jurors responded as to how they were instructed with regard to the evidence presented in the case, potential aggravating circumstances, and potential mitigating circumstances.

To determine if a relationship existed between the independent variables and sentencing outcome, Chi-square tests were utilized. No statistically significant relationships between independent variables related to instruction clarity and sentencing outcome were found. However, cross-tabulations of the questions in Table 7 regarding clarity indicated that 69.8% of CJP jurors indicated that all trial evidence (including evidence and testimony from the guilt-innocence phase of the trial) was to be considered in sentencing deliberations. 48.6% of the CJP

jurors responded that any potential aggravating circumstance could be considered, rather than any set or delimited list of aggravators provided by the court. Similarly, Table 7 shows that 58.0% of CJP jurors indicated that any mitigating factor could be considered in determining sentence.

Examination of data suggests that there is considerable variability among CJP jurors as to what they were to consider in deliberating and rendering the punishment decision. As Table 7 indicates, given the weight of the decision, the number of jurors (15-26%) indicating that they did not know or were not instructed regarding certain statutory considerations is a sizable aberration. Moreover, instruction content in these areas relates specifically to mandates to the penalty phase emerging from the *Gregg* decision and subsequent Supreme Court mandates upholding that precedent.

According to *Gregg*, jurors are duly empowered to consider and weigh all evidence in reaching the sentencing decision and must be instructed as such. Most states, including those in the CJP sample, limit and define aggravating circumstances via statute. As Doyle (2007) noted, "a set of aggravating factors, especially when confined to those statutorily identified, would…capture only those things rationally related to a defendant's culpability" (p. 276). Conversely, the Supreme Court has offered a wide latitude in terms of statutorily-defined mitigation, stressing that jurors should be allowed to consider any potential mitigation, without exclusivity (see *Blystone v. Pennsylvania*, 494 U.S. 299, 1990). As the cross-tabulations conducted in this study indicate, although there were no statistically significant relationships found between clarity and the sentencing decision, there was questionable levels of non-response and marked numbers of responses that did not support the statutory mandates of *Gregg* and later cases, calling for clear delineation of special circumstances and juror purview.

Table 7

Cross-Tabulations of Capital Jury Project Instructional Clarity Data

	Sentencing Outcome		
	Life (%)	Death (%)	Total (%)
Evidence Presented			
Considerations deciding punishment			
All evidence presented	275 (30.4%)	357 (39.4%)	632 (69.8%)
Only penalty phase evidence	59 (6.5%)	72 (8.0%)	131 (14.5%)
Don't Know	52 (5.7%)	90 (10.0%)	142 (15.7%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)
Aggravation			
Considerations deciding punishment			
Any aggravating factor	192 (21.2%)	248 (27.4%)	440 (48.6%)
Specific list of aggravators	87 (9.6%)	141 (15.6%)	228 (25.2%)
Don't Know	107 (11.8%)	130 (14.4%)	237 (26.2%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)
Mitigation			
Considerations deciding punishment			
Any mitigating factor	225 (24.8%)	300 (33.2%)	525 (58.0%)
Specific list of mitigations	73 (8.1%)	101 (11.1%)	174 (19.2%)
Don't Know	88 (9.7%)	118 (13.1%)	206 (22.8%)
Total	386 (42.6%)	519 (57.4%)	905 (100.0%)

Hypothesis 2. This study's second hypothesis postulated that there is a negative correlation between juror understanding and death penalty sentencing. Juror understanding was operationalized through CJP juror responses as to whether instructions led to an appropriate sentencing outcome. Juror responses were coded as interval-level responses to whether instructions led to no particular punishment (=0); led to the wrong punishment (=1), led to the wrong punishment, but jurors followed their own consciences and decided on the right punishment (=2), or that the instructions led to the jurors' deciding the right punishment (=3). Correlation between jurors' responses and the final sentencing outcome (coded as either a death (=1) or non-death (=0) sentencing outcome) was derived by using a point biserial correlation. In the relationship between the independent variable and the sentencing outcome, r_{pb}= -.073, p = .027, two tailed. The point biserial correlation coefficient demonstrates a moderately inverse relationship between juror sense of instruction understanding and final sentencing outcomes. The initial directional hypothesis was supported, as jurors were statistically more likely to render sentence in favor of the death penalty despite some reform, summarized by capital punishment scholar Craig Haney as a situation in which "death becomes the default outcome when jurors don't understand the instructions they're given" (McNulty, 2005, p. 1).

Summary of significant findings. The statistical analyses of the data from the sample provided partial support for both research questions. However, the statistical relationships among the variables were shown to be moderate at best using a binary logistical regression model. The overall logistic regression analysis for question one indicated that issues of procedural integrity and juror sense of preparedness were the strongest predictors of sentencing outcome in capital cases. The null hypothesis of question 1, stating that sentencing outcomes would not vary according to the instructions received by jurors, was rejected. Information as to the heinousness

of the crime and the perceived future dangerousness of the defendant were shown to be influential predictors in capital juror decision-making. With regard to research question two, there was no statistical evidence to support that overall perception of clarity of the instructions was instrumental in the juror's decision-making. Analysis of cross-tabular data from CJP sample jurors suggested that, while jurors endorsed higher levels of understanding of statutory instructions regarding aggravation, one-quarter of the CJP sample indicated an incorrect statutory response. Moreover, over one-half of the CJP sample indicated an incorrect perception of the statutory guidelines around mitigation. These reports would indicate, under current precedent, serious error in administration of sentence. Further examinations of the cross-tabular data also evince a large number of sampled respondents, comprising 15-26% of the overall sample, stated that they did not know or were not instructed as to the full comportment of evidentiary considerations of special circumstances. The corresponding hypothesis that juror's own sense of preparedness via the judicial instructions received was shown, via point biserial correlation to be moderately related to the sentencing outcome.

Section Two: Capital Jury Project Qualitative Data

Samples of juror interview transcripts were systematically selected from the Capital Jury Project (CJP) sample for use in this study. These cases represent expanded responses to the CJP questionnaire and additional open-ended questions and prompts comprising a three-to-four hour semi-structured interview audio recorded and transcribed by CJP interviewers. Initially, a sample was drawn, for the purposes of this study, from those cases in which the CJP materials included a copy (either as written documents, or court reporter's transcripts of trial proceedings) of the jury instructions. Jury instructions were required given that procedural standards are not the same in

every participating CJP state. Thus, the following analyses take these differences into account and reflect a comparison of juror self-report to the procedural standards of the adjudicating state.

From this initial pool of juror interviews, a further random sample (*N*=36) was drawn from a cross-section of the CJP participating states, including California, Florida, Missouri, South Carolina, and Texas. Transcripts that were randomly selected included 30 jurors who handed down a sentence of death and six (6) jurors who administered a lesser sentence (e.g., life in prison without the possibility of parole). From the sample drawn, 17 of the respondents were male, and 19 were female, with an age range of 23-61. Approximately 90% of the sample (31 respondents) was Caucasian, with 4 African American respondents and 1 Hispanic/Latino respondent.

Coding of interview data. In order to prepare the transcripts for "open coding," the transcripts were de-identified from any identifying information (including the demographics of age, race, and gender as reported above). Moreover, the final sentencing decision of the jury was also redacted from transcripts undergoing analysis, so as to avoid bias or premature judgments of patterns in juror decision-making. Following methodologically from Corbin and Strauss (2008), the transcripts were compiled and read "considering all possible meanings and examining the context carefully" (p. 160). After subsequent readings, elements of each juror narrative were labeled according to the broad concepts associated with penalty phase judicial process. These labels corresponded to the five constructs of jury instruction clarity, procedural integrity, aggravation, mitigation, and decision-making preparedness in the jurors' own words. Once juror responses were categorized, the narrative responses were used to compare jurors' subjective experience as relayed in the interviews to the instructions as they were presented to the jurors at the trial. The following sections reproduce excerpts from the juror transcripts to illustrate

common responses in each of the thematic categories. Additionally, summaries of comparative findings between juror's perceptions and the research questions (along with attendant hypotheses) of the current study are also reported.

Instruction clarity. Among the transcripts coded as part of the current study, 28 respondents (approximately 80% of the sample) indicated that clarity of the court instructions during the penalty phase was a major point of contention for the jury in their respective cases. From the subjective experience of the jurors within the sample, the issue of clarity involved both the textual level of understanding of terminology and the jurors' understanding of trial proceedings and their role in the deliberative process. On the issue of textual clarity, one Missouri juror noted:

> We were ticked off as we are not attorneys…I don't think [an attorney] even knows what the heck this stuff is…and it wasn't explained to us and this was the most important thing […] The way this stuff is worded…is because that's how the [law] books told them they have to word it. But that wasn't told to us…and we're sitting here thinking that they [the court] tried to trick us.

Another Missouri juror noted:

> The worst thing was that we weren't clear on those instruction[s]…we had to decide from them…pick them apart to understand what they meant, they weren't clear […] and we were all very tired and…stressed out.

With regard to lack of clarity and its impact on the deliberative process, several jurors spoke about the lack of clarity in the instructions that related directly to the process of jury deliberation and weighing of evidence, with a Missouri juror citing the instructions' lack of clarity as a motivating factor in the sentencing decision:

> When we were reading the instructions…in order to consider the death penalty—that influenced my decision because if one or more of those things that were present—we had to find more things that were present and…I wanted to make sure that everything was there…[because] a lot of us had questions about that. I don't know how it could've been made more clear—there's gotta be a way to make it more clear to people who aren't familiar with the way things are—explain, you know, the terminology. [It's] hard to understand!

A Florida juror indicated that court instructions were even lacking in a adequate description of the bifurcated process:

> I thought we were finished with the trial! All of a sudden the judge called us back and said that we had to come the…next week for sentencing […] By that time I was so upset, I didn't want to go through that.

The sense of confusion as to how to go about the sentencing was evident in over half of the respondents used in this sample (19 transcripts in total) with regard to voting procedures, unanimity, and definitional elements of the crimes, including explication of malice aforethought, lying-in-wait, and degrees of severity for murder. As one South Carolina juror mentioned:

> I think we needed to know more, we needed to be instructed on what was considered…all the different things, like what was [meant by] "manslaughter" or "first degree" and what that would mean in terms of the punishment. [The jury] first had to decide [what these terms meant]…before you could decide on what the punishment was going to be.

As a Texas juror responded, the lack of understanding of terminology made certain members of the jury reliant on other jurors for information, under the assumption that the information

gleaned from these jurors was correct. Otherwise, juror report indicated that jurors were often in a position to appeal to the court for further explanation:

> Our foreman and a couple of the others had previous understanding on legal terminology…But someone like me had no idea…what legal terms and all that meant. We had a group of people who could explain it. Otherwise, we would have had to send a lot of questions to the judge.

This type of response reinforces Connell's (2009) contention that the jury is "a group phenomenon instead of a sum of individuals" (p. 185) and that sentencing outcomes can, at least partially, be attributed to the impact of group process on decision-making. As described in the section on intervening variables below, a common thread among juror responses links the idea of instruction clarity or a general lack of instruction to greater reliance on the group to "make sense" of legal terms, or to clarify roles and responsibilities from within the jury as opposed to instruction by the court (Connell, 2009; Palmer, 1998).

Procedural integrity. In contrast to the clarity of the instructions given, a majority of the respondents included in the sample (23 jurors, or 76% of the sample) noted that the instructions were considered by the jurors as procedurally sound in that they related directly to crime being adjudicated, the defendant's state of mind and motivations, and the circumstances of the guilt phase of the trial (Benson-Amram, 2003; Chemerinksky, 2006). The largest discrepancy, evinced in approximately 20% of the sample (i.e., eight respondents), was the issue of the jury requiring further instruction, or asking clarifying questions of the court. As Chilton and Henley (1996) noted:

> In most states and in federal court, however, trial court judges can let jurors ask questions if the judge feels it is appropriate. The practice, however, has generally

> been discouraged. Some courts have discouraged juror questioning because it may be prejudicial...or interfere with the integrity of the trial process (p. 3).

CJP sample respondents questioned the procedural integrity of this process. Procedural integrity is brought under scrutiny by addressing non-response from the court (as a procedural safeguard) in a request for further clarification. A juror from Florida noted:

> [There] was a technical question of some sort that we needed some clarification on—I don't remember what it was, [but] I don't think the judge really answered the question—it was that we had to make the decision ourselves. The jury then thought "what do we do now?"

Moreover, a juror from Texas noted:

> I know during the trial we asked the judge's clarification of a couple of things but I don't think it was [given]…It seemed like everybody was trying to follow the directions exactly so kind of once we decided…we tried to just stop talking about [the decision].

As seen in these two examples from the interview transcripts, it is difficult to ascertain the substantive nature of a juror query after it has been offered up to the court and no response is given. Jurors in the midst of deliberations are likely to take a non-response as dismissive and move on to another topic, or an indication that the nature of the query is not germane to the deliberation process and, in the words of the Texas juror, it is best to "just stop talking about" it. As a Missouri juror stated:

> We wanted to get one of the doctor's reports and they said no and I think we wanted clarification or something else and I think the judge wrote back [and said] "read it [the instructions] and figure it out yourself" because he couldn't really

> [answer]…I think it was the reasoning behind it [that]…he could have biased the way we did something [so we asked] can we break for the evening…the judge was like "sure"

Given that issues of court non-response to queries were evident in over one quarter of the responses, there is a high likelihood that procedural issues within the jury that may impact decision-making are obscured by the procedural mechanisms and safeguards themselves. This is particularly evident when procedural queries are compared to substantive requests, such as to review witness testimony, see forensic or crime scene photographs, or examine physical evidence. No indication is given in the sampled transcripts that these requests were ever denied, even well into the penalty phase, although they may be considered to be equally prejudicial to a sentencing jury (Chilton & Henley, 1996; Platania & Small, 2010).

Aggravating circumstances. Aggravating circumstances were mentioned in an overwhelming majority of the sample (approximately 90% or 32 respondents). Respondents reported that the language of the court, including instruction and closing arguments made explicit mention of aggravating circumstances during the guilt and penalty phases of the trial. A juror from South Carolina noted:

> [It] was pretty much clear, at the guilt phase, if we found the aggravating circumstance, we could go to the death penalty phase of the trial. Once…we found [the defendant] guilty, it was up to us…it wasn't 'beyond a reasonable doubt' anymore.

This juror statement is common among the interview statements made in the transcripts from all of the sampled states. While it does endorse the explicit procedural rule (called a "threshold statute") that an aggravating circumstance must be found by the jury to consider death as a sound

Table 8

Statutory Models of Guided Discretion in CJP Participating States

	Forms of Guided Discretion			
Definiton of Capital Homicide	**Threshold**	**Balancing with Sentencing**		**Directed**
		Advisory	Binding	
Narrow	VA	AL	CA, LA	TX
Traditional	GA, KY, SC, MO	FL	NC, IN, PA,TN	

Note: This table © 2011 John R. Barner, adapted from Bowers (1995).

punishment and legally appropriate remedy, the juror's understanding of the regarding aggravating being not "beyond a reasonable doubt" any longer once guilt has been determined is a procedural misunderstanding. Table 8 displays the specific statutory models held by each of the participating states in the Capital Jury Project (CJP) sample. As Diamond (1993) noted:

> States…differ in the basic structure they use to guide juror discretion […] A "threshold" statute [as in South Carolina and Missouri]…list[s] specific aggravating circumstances and tell[s] the jury that any one of them is sufficient for a death sentence; the jury has complete discretion to impose the death penalty once it finds a single aggravating circumstance. States, such as Florida…uses a "balancing" statute, direct[ing] jurors to weigh aggravating and mitigating circumstances against one another. The jury's decision on life or death under Texas's "directed" statute is strictly determined by its answer to three questions on

> intent, absence of provocation, and likely future dangerousness of the defendant (p. 427, see also Bowers & Vandiver, 1991).

The threshold statute specifically indicates that aggravation must be found beyond a reasonable doubt and, in the case of South Carolina, that this circumstance also be held unanimously by the jury, supporting previous findings of juror misunderstanding found by the Capital Jury Project (Bowers & Foglia, 2003; Sundby, 2010).

In addition to juror misunderstanding, the jurors included in this sample indicated that instruction on how aggravating circumstances should be weighted, in light of guilt phase evidence, and against possible mitigating circumstances to determine a sentence was often "vague" and "frustrating." A Missouri juror stated that, in reading the instructions:

> We had to review the aggravating circumstances and if we felt there was reason for the death penalty there, we didn't have to go any further. If we didn't have enough proof [to justify the death penalty]…we were gonna then use the mitigating circumstances […] See, we didn't have to go to the mitigating circumstances unless the aggravating [circumstances] worked. That's basically my understanding. It's just confusing [because with] aggravating, you're supposed to decide for or against the death penalty. The mitigating [circumstances]…you're supposed to decide for or against life imprisonment. And it's like, you know, it's just—by changing what you're supposed to be deciding…screws everything up.

Juror responses like this one are similar to the South Carolina juror quoted above in the level of juror procedural misunderstanding (or procedural miscommunication). However, as the quoted response indicates, the possible consequences, deliberative and adjudicative, are far

greater, and have what a Texas juror noted as a "negative" impact on jury proceedings and clear determination of sentence, with individual jurors deriving contradictory meanings to the same instruction. Jurors are often thrown into conflict when one juror insists that, due to either a guilty verdict or the presence of aggravators, they do not need to "go any further" in discussing or deliberating possible mitigation or considering alternative sentencing, with those who insist on these being afforded an equal portion of jury deliberations. This calls into question a issue clearly demarcated by the U.S. Supreme Court, namely that:

> The finding of a statutory aggravating circumstance serves a limited purpose—it identifies those members of the class of persons convicted of murder who are eligible for the death penalty, without furnishing any further guidance to the jury in the exercise of its discretion in determining whether the death penalty should be imposed (*Zant v. Stephens*, 462 U.S. 862, 1983).

Even with first-person accounts of jury deliberations, it is difficult to isolate precisely what instructive elements may lead to such misunderstandings, but research into the influence of special circumstances on the guided discretion process seems to point to a lack of universality in the weighing process, albeit with similar procedural expectations from the differing statutory processes from state to state. Although these discretionary statutes differ in what they explicitly ask of the jury, none contradict the implicit procedural changes instituted in the *Furman* and *Gregg* decisions, namely that consideration of special circumstances must equally consider both aggravators and mitigation as independent arbiters of fact—neither circumstance "automatically" imposes a sentence. Even in threshold statute states, while the threshold for imposition of the death penalty is met with one aggravator, it must be unanimously held as such by the jury. Conversely, mitigating circumstances must meet the same threshold (i.e., one from a court-

supplied list of possible considerations), the burden of unanimity is not enforced (Bowers & Foglia, 2003; Sandys & Trahan 2008). The Capital Jury Project data—and the subjective experiences of the sampled jurors—do not seem to be consonant with this aspect of guided discretion.

Mitigating circumstances. In the sample, mitigating circumstances were only mentioned as relevant influences on juror decision making in eight of the analyzed transcripts (22% of the sample). In addition to the Missouri excerpt cited above, sampled jurors also noted that aggravating and mitigating circumstances were often conflated in the instructions and parsing both the explicit statutory rule (e.g., threshold or balancing) and the implicit criteria for deliberation (i.e., if and when unanimity is required, what standard of proof is defined, and what factors can be considered) was, in a California juror's words, a "dragged out," or arduous process "that confused me [with] all that aggravating and mitigating stuff."

As a Missouri juror explained:

> You had three aggravating circumstances—all you had to do is get twelve people to decide one of the three [and it] would open the door for the death penalty. And this is not to say that the death penalty was automatic but this would open the door for the death penalty. You had three mitigating circumstances. If you could find one of the mitigating circumstances it would close the door to the death penalty…Twelve had to agree on at least one aggravating…you had to agree on at least one mitigating […] We went over the aggravating circumstances [with other jurors]…[a juror] had it in her head that if we agreed that there was…aggravating circumstances—then that automatically said that that was the death penalty. No! That's not what I said! She [the juror] wanted the judge to say so. [There was a]

> question, now let's send it to the judge. She wrote the question out, gave it to the bailiff, he took it to the judge […] Fifteen minutes later, the bailiff came back and said the judge can't answer your question. We knew he's not gonna answer it! I mean it's…it's there in the instruction, the instructions are fairly plain (sighed)…people agreed on the aggravating circumstances, [but not] the mitigating circumstances…[so] the foreman said "alright, we're going to…vote on the death penalty"

This particular illustration underscores a potential for arbitrariness described by several studies assessing the receptivity to mitigation by capital jurors (Bowers, et al., 2009; Brewer, 2005; Eisenberg, Garvey & Wells, 1998; Lanier, 2004). If the instruction process fails to specifically differentiate between both types of special circumstances, aggravating and mitigating, and between different statutory processes (i.e., threshold, balancing, or directed), it would be difficult for a jury to both intuit an appropriate plan of discussion, deliberation, and voting to render an informed decision and whether such action was allowable under the current state law and legal guidelines. These findings are consonant with the literature cited above, in that CJP jurors indicate that they are under-informed as to the exact parameters of their role, and the legal force of their agency.

There were also issues brought up by the responding jurors of the context in which their responsibilities are explained to them in the instructions. For example, a South Carolina juror noted:

> [The instructions]…sounded like they were giving off a prepared text, these are the things they have to tell you, so you sort of listen with an "okay, okay" attitude…I don't know that [it] was discussed…so much.

A Texas juror stated:

> Until we went out and heard what the judge said about sentencing during the punishment phase, we didn't know how that [finding for special circumstances] was going to be done. We didn't know…what the sentencing parameters were.

Based solely on the responses regarding mitigation in the sample transcripts, it is difficult to ascertain the level of juror understanding; however, the low response rate regarding mitigation may explain a contextual effect of jury instructions that may impact the deliberation process. If the descriptions of special circumstances were not singled out to the jury as unique aspects to the procedure, a greater possibility exists for juror misunderstanding of the procedure, or altogether failing to consider special circumstances in the jury's deliberations.

Juror's sense of preparedness. Two-thirds of the response sample (approximately 27 respondents) indicated that they did not feel adequately prepared to render a sentence based on the instructions they received and gave several reasons for feeling unprepared. Analysis of the transcript data seemed to show that states with directed statutes (in which jurors must simply answer two out of three questions in the affirmative to support a sentence of death) had a higher level of juror confusion with regard to procedural preparedness. A Texas juror responded:

> This is where things were kind of…strange. You had three…questions that you could answer yes or no to. And if you answered yes to two out of the three that meant capital punishment otherwise it was life. But you didn't go in there…[and] say "capital punishment" or "life" so it's an extreme mind game. With Texas law, they tell you "Here's three questions…is [the defendant] going to be a continuing menace to society, did [the defendant] do [the crime] premeditated, did he know what he was doing, and I can't remember what the other one was, to tell you the

> truth. But we weren't going in there to talk about whether or not he should get the death penalty. It's a very strange process and I think, if they are going to have something as severe as capital punishment, I think it would be better if they decide to go there and decide whether or not [a defendant] gets capital punishment: "Here's why you should do it, [now] you know what the criteria are."

A California juror noted that, during the penalty phase, the role of the jury was not evident to the individual jurors, feeling as if the responsibility was being deferred to them, but without adequate explanation.

> We were not allowed to leave the room for lunch and stuff […] We would be…in deliberations and they said we couldn't go to the bathroom or anything […] They kept us in that room. And they wanted us to hurry up, because I think it was [around] Christmas, it was "Come on, let's go!" and we had [evidence and photographic material related to the crime]…here sitting [in] this room [and you're] trying to eat your lunch and to look at this crap and it was tough for everybody to get together and say "death," you know, because I said "Goddamn it, what does that judge do? What do they pay him for?" and to me he was nothing more than…I'm not sure what he is, or why they pay him! He was leaving this guy's life or death [up to us]. And I didn't think it was fair! I thought "He makes big money let him decide if this guy lives or dies" and that's what we were…in there being God, and we didn't like it.

Other jurors, particularly those in threshold or balancing states, felt unprepared to deal with the emotionally charged deliberations A Florida juror noted, the deliberations were "very

upsetting. I felt a life depended on our decision. I'm not one to take life but to [try to] preserve life. I felt very mixed up to do this." Another Florida juror noted that jurors often combated the high emotions by distracting themselves away from case:

> I was sort of upset with the people on the jury—I just thought some were more concerned with going to lunch…I know I would never do it again. The jury [experience]…was terrible.

A Missouri juror noted that:

> We were discussing [aggravating factors] and I'm sitting across the table from [another juror] and he's standing up, leaning over the table, screaming at me […] Everybody else was just sitting there watching as this man was just screaming at me […] Later on, we heard from the bailiff that they had heard it. They could actually…hear the screaming from outside…We put in two hours [in deliberations] and [other jurors] were like "fine, let's go home" and that upset me because I really thought [the victim in the case] deserved more.

Thus, sense of preparedness cannot be said, from analysis of the qualitative data, to be a singular, univocal factor in decision-making, but rather multi-faceted and highly correlated to subjective experiences of the jury as a group and reactions to the procedural structures inherent in the trial proceedings (Connell, 2009; Sorenson, 2009).

Overall, analysis of qualitative CJP responses supported many of the quantitative findings reported in section 1. One marked divergence was the reporting of over 80% of the interview respondents that instruction clarity was a significant barrier to decision-making. This finding would suggest that data regarding instruction clarity is not being captured by the questions utilized from the current CJP instrument. Procedural integrity, particularly areas of heinousness

and future dangerousness was supported by interview data. Moreover, CJP respondents articulated incidents in which the procedural safeguards in place may have inadvertently led to instruction bias or arbitrariness (i.e. non-response intended to eliminate perception of bias disallowed requests for further clarification well within legal parameters). Interview responses also supported quantitative measures of aggravation, indicating both elevated levels of endorsement (in approximately 90% of the sample) when compared to mitigating circumstances and procedural misunderstandings related to both aggravation and mitigation. Qualitative analysis also indicated that, in two-thirds of the respondents, jurors felt unprepared to make the sentencing decision.

Comparison with research hypotheses. The qualitative interview data obtained through the Capital Jury Project (CJP) was found to correlate highly with the respective quantitative findings shown above. Moreover, the transcripts provide a number of rich, descriptive examples that support the conclusions formed by testing both of the hypotheses of this study. Select examples, along with a brief discussion of the findings in light of the hypotheses, are provided below.

Question and Hypothesis 1. The first research question in this study examines whether instruction content were significant in determining the sentence rendered by the jury. The attendant hypothesis was that sentencing outcomes vary according to the level of procedural integrity (through heinousness of the crime and future dangerousness of the defendant), or special circumstances. Analysis of the CJP qualitative data shows substantial support to the directional hypothesis. As one Florida juror indicated, however, jurors are still susceptible to issues of instruction clarity during the sentencing deliberations, when they are often without recourse to further instruction:

> I don't really know what 'vile' means. I was to consider it a heinous crime… [it was] just very very bad. [But] I don't know if that means 'vile.' I think it was heightened by [the defendant being on] drugs, and [the defendant] did something horrible…[but] I feel he could be straightened out.

This illustration points to the inherent difficulty in the threshold and balancing procedures, given that aggravating circumstances may lack clarity and mitigating circumstances [such as drug intoxication] may be insufficiently explained to the jury. While the heinousness of the crime is, according to the CJP data, a singularly compelling factor to the average juror, more in-depth analysis is needed to extend its impact beyond simple provocation and heightened emotional reaction, into consideration of its legal and procedural status.

In considering the research question, the juror self-report deviates slightly from the quantitative analyses, with jurors endorsing aggravation as having a more substantial impact on decision making. As with the results of the quantitative analysis of the CJP data presented above, the most commonly endorsed aspect of procedural integrity was juror receptivity to the aggravating factor of the crime being "vile, heinous, or depraved" (Garvey, 2003, see also *Walton v. Arizona*, 497 U.S. 639, 1990). The conditions of the crime are key components of consideration across all statutory processes, e.g., forming one of the "thresholds," one aspect to be "balanced," and one of the directed questions asked of the jury, along with jury impressions on intent and future dangerousness of the defendant. The heinousness of the crime is considered an aggravating circumstance in all 14 of the participating CJP states and in most capital jurisdictions (Death Penalty Information Center, 2010).

Question and Hypothesis 2. This research question asked whether increase or decrease in perceived clarity of jury instructions contribute to juror decision-making in capital sentencing as

its second research question. This aspect of clarity impact seems to be supported by juror self-report across all five domains. Moreover, as the citations above have demonstrated, clarity of instruction content and the relative ability for jurors to seek clarification from the court (as per the method of guided discretion supported by the *Gregg* decision) seems to be an obstacle to decision-making in all of the sampled states. The hypothesis ventured in this study was that, as a result of these obstacles within the guided discretion method, a greater number of jurors would opt for a more severe sentence.

After conclusion of the coding and analysis detailed in the above sections, this hypothesis was tested by retrieving sentencing information previously unknown for the small sample of qualitative transcripts (N=36). Of the sample utilized for this analysis, juror self-report on issues of clarity or lack of understanding of the judicial instructions was found in both cases where the sampled jurors returned sentences of death or a lesser sentence. While a more intensive study of the full-sample CJP qualitative data was not possible in this study, it is likely that future qualitative analyses would support the findings of the quantitative findings, showing a slight increase in likelihood of a death sentence in jurors who also endorse deficits in instruction understanding.

Possible intervening variables. Based on review of the CJP qualitative data, there were two possibilities identified for intervening variables influencing instruction impact on juror decision-making. The following sections provide some textual support for two variables that could potentially intervene with juror decision-making, or confound deliberations, consideration of evidence, or special circumstances. The first variable is the juror's own sense of responsibility to their juridical duty and the emotional and cognitive impact of that sense of responsibility. The second variable is juror disagreement with or willful disobedience of court instructions. Each

section contains illustrations from the Capital Jury Project (CJP) interviews and discussion of how these variables may confound juror decision-making.

Juror sense of responsibility. Foremost in the current sample was juror's sense of responsibility following *voir dire*. Given that sentencing differs from adjudication of guilt in that jurors need not be unanimous and are empowered to assert their own independent judgment, sense of responsibility and unwillingness to form an opinion contrary to the majority for fear of reprisal or upsetting the process is a significant factor that, on the basis of juror statements found within the sample, will require further study. For example, a juror from South Carolina noted:

> The judge repeated [in the instructions] what he had said earlier about the laws in the state of South Carolina on capital punishment. We understood if the jury couldn't reach a decision that a new jury would have to be picked and they would have to start all over again and we felt that we were responsible.

Feelings of responsibility to comply with instructions or fears that the trial would be jeopardized resulting in an acquittal demonstrate potentials for arbitrariness as it pertains to both instruction clarity and procedural integrity (i.e., jurors report not being able to discern between stages of trial, or specific roles and responsibilities unique to sentencing). For some, disagreement among the jurors with regard to sentencing increased the emotional nature of the deliberations and prolonged the proceedings. One Missouri juror responded:

> I think most of us [were in favor of the death penalty]. We had a couple that were just wimps and should not have even been there—they just couldn't make a decision. It was really awful, they cried and everything.

Similarly, a California juror noted that, in instances where emotions were heightened and jurors were either confused by instructions or unable to receive clarification by the court, a sense of

responsibility became a prime motivator to render sentence, even when jurors were unsure of what decision to make:

> We were assuming it would just be a hung jury. We thought "What will happen, will he be tried all over again? Will he be set free?" […] We weren't sure…if he would be tried all over for both [guilt and penalty phases] or it would just be the second part…there was not a dry eye in the jury room.

More information would be needed to probe further into the nature of juror sense of responsibility and how this connects with aspects of unanimity, group dynamics in the shift from guilt phase to sentencing, and receptivity to mitigating circumstances (Bowers, et al., 2009; Eisenberg, Garvey & Wells, 1998). Moreover, as explained in Chapter 5 below, an avenue of further research would be to examine if sense of responsibility in jurors is correlated with the severity of sentence handed down.

Juror disagreement with or disobeying instructions. In less than 5% of the sampled transcripts, there were indications of jurors' deliberately disobeying, expressing disagreement with, or ignoring the court instructions outright. While rare, this potential intervening variable into juror decision making presents the largest potential for arbitrariness in sentencing, given individual juror bias and persuasion from within the group. Instances of juror disobedience of instructions recorded in the Capital Jury Project (CJP) sample related to two main areas: juror discussion of the case prior to deliberations or sequestering, and understanding of the parole system and belief in alternative sentencing (i.e., that a life sentence was for the natural life of the defendant). For example, a Missouri juror described the former by noting:

> The one thing I can fault our jury for is that they didn't follow the judge's instructions about refraining from discussing the case prior—there was

> discussion, I'd say, as the trial went on. It became more and more complex…a lot of discussion…it was kind of [a] small, little clique-type group—it wasn't like we all sat down together.

The judicial instruction to not discuss the case prior to the deliberation period serves many procedural functions: to maintain the jury's full, undivided attention on evidence and testimony, to prevent bias and to retain the sanctity, and, in the case of sequestered juries, the relative privacy, of the proceedings. Disobeying the instruction from within the jury has a two-fold impact, first dividing the jury into those who have prematurely formulated, shared, or influenced one another's opinions on the case, and creates a opportunity for those within the "little clique-like group" to formulate what Laura Uderkuffler (1999) described as "conscientic" decisions, or when "the legal decision maker determines not what the law (as societally established) is but rather what the law (as a matter of personal belief or "conscience") should be" (p. 1714) exterior to the jury as arbiter of fact.

This phenomenon is further evinced by those jurors who reported disobeying jury instructions that asked that jurors not consider parole as a factor in determining sentence. As a California juror explained, the majority of instructions, regardless of their statutory construction, contain a caveat regarding consideration of parole:

> Whatever we had decided, like if we had decided it should be life without possibility of parole we were not to worry that he would ever get out. Whatever we decided, we were supposed to decide whole-heartedly that was what exactly would be carried out. So in other words if he got life with no parole then he served life with no parole, no ifs, ands, or buts. And… if we voted for death that

> he would be executed…We were not to speculate. It was to be one or the other and believe that, that was what was going to happen.

Despite the seeming lack of obscurity to this instruction, a common response among jurors who endorsed some disobedience or disagreement with the instructions indicated a similar sentiment to a Missouri juror, who stated "My problem was [with sentencing the defendant to] prison for life without parole. Even though they told me no parole, I had my doubts... he'll do something to get out." As a Texas juror noted:

> We were not allowed to talk parole and [another juror] didn't understand that life in the United States…didn't mean you never get out of prison. So his thought was, if we give him life, he'll be in prison, therefore he cannot be a menace to society anymore. So we had to convince him…that life in the United States did not mean you stayed there forever and ever and ever.

The juror or jurors, through either disagreement with the judicial system, the parole system, or the jury system, and a higher adherence to a extralegal conscientic decision model, abdicates the juror's role and responsibility (in both the Jeffersonian and Dworkinian conception) as arbiter of fact.

Summary of significant findings. Analyses were conducted of the qualitative data from a sub-sample of the Capital Jury Project (CJP) sample. Juror self-report information was gathered following the methods of open coding supported by mixed-methodological and empirical legal research (Greene, 2007; Neilsen, 2006) and provided support for all five jury instruction variables impacting juror decision making. The initial research questions and hypotheses of the study were supported and transcripts were excerpted to provide thematic examples. Deviating from the quantitative analysis, CJP jurors endorsed moderate to high

degrees of confusion regarding the instructions and procedural guidelines. With regard to procedural integrity, jurors endorsed that the statutory model of sentencing did influence their decision-making and that aggravating circumstances played a role in determining the appropriate sentence. Juror responses suggest that a potential for instruction arbitrariness or, in some cases, inadvertent bias, exists when courts are non-responsive to claims for procedural clarification. Based on juror self-report, a discrepancy was also noted between prevalence of explanatory and definitional language in aggravating as opposed to mitigating circumstances. The qualitative data supported the study's hypothesis that juror's own sense of preparedness via the judicial instructions received was related to the sentencing outcome. Moreover, careful analysis of the Capital Jury Project (CJP) data exposed two possible intervening variables that were not explored in the initial research, including juror sense of responsibility and juror disagreement or disobedience of jury instructions.

Section Three: Potential Jurors in Georgia

Analysis of the CJP data showed the existence of a number of variables related to juror decision making in capital trials. A wide variety of different decision making typologies are employed in the study of judicial proceedings, and legal scholars and social psychologists have theorized several different ways of categorizing the specific processes of deliberating jurors. In 50 years of empirical studies, there has been no clear consensus on the underlying factor structure of decision making responses (Devine, Clayton, Dunford, Seying, & Pryce, 2000; Winter & Greene, 2007). Proposed factor structures have ranged from a three factor structure with key elements of reasonable doubt, confidence, and cynicism (Myers & Lecci, 1998) to a 14 factor model containing sense of moral disengagement, recipient characteristics, juror agency, trial outcome, culpability of the defendant, race, gender, religious affiliation, jury racial

composition, juror behavior, sentencing model, statutory differences, and instruction comprehension (Flores, 2010).

Comprehensibility of judicial instructions is of particular interest, because, following the *Furman* and *Gregg* decisions, it has been seen as crucial in maintaining not only the constitutionality of the death penalty in the United States but also the current adjudicative process in criminal law. As such, several studies have interviewed jurors, tested instruction comprehensibility, and produced empirically-based instruments such as the Juror Bias Scale (Kassin & Wrightsman, 1983) to measure the decision making processes at work in jury deliberations (Blankenship, et al., 1997; Bowers & Foglia, 2003; Eisenberg & Wells, 1992; Foglia, 2003; Frank & Applegate, 1998; Haney, Sontag, & Costanzo, 1994, Luginbuhl, 1992; Luginbuhl & Howe, 1995; Lynch & Haney, 2000; Weiner, et al., 1995). As Flores (2010) noted, many of these studies and ongoing work by the Capital Jury Project (CJP) corroborated one another:

> In particular they examined jurors' understanding of the central concepts related to aggravation and mitigation and their role in the sentencing determination. These concepts included the domain from which aggravating and mitigating factors may be selected, as well as the burden of proof and unanimity requirements for establishing the existence of these factors. Their analyses revealed a tendency for jurors to expand the range of aggravating factors considered during sentencing beyond the legally-defined domain. In contrast, there was also evidence that the scope of mitigating evidence considered was unnecessarily and unconstitutionally constricted. There was also indication that jurors struggled to comprehend the

> standards of proof for the respective types of evidence, with jurors demonstrating greater difficulty grasping the standard for mitigating circumstances (p. 37).

Emerging from the history of pre-trial investigations of juror decision-making, the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) was specifically developed for assessing instruction comprehensibility prior to trial, particularly given the need for procedural integrity, variations from state to state, and differing statutory models (Barner, 2009; see Appendix B). The BJICQ was created for use with potential jurors utilizing all three of the operative statutory models (threshold, balancing, and directed) in order to codify common deliberative actions. In development and testing of the BJICQ, the five factors supported by the literature on instruction comprehensibility and analysis of the CJP data were hypothesized as the existing factor structure for juror comprehensibility. The BJCIQ was created to be administered during *voir dire*, or the jury selection process, and consists of ten scalar items from the five initial factors and three comprehension assessment items from the three factors of Understanding of Aggravating Circumstances, Understanding Mitigating Circumstances, and Sense of Decision-Making Preparedness. Though some early reliability and validity tests of the instrument were conducted, the current study represents the first testing of the theoretical factor structure of the BJICQ.

Descriptive Statistics. The BJICQ was administered to prospective jurors in three counties within Georgia. As outlined in the preceding chapter, the sample (N=182) was drawn from three counties chosen based on the prevalence of capital trials, as maintained by the records of the Georgia Department of Corrections (2010). Jurors in Cobb (42 respondents or 23.1% of the sample) and Fulton (55 or 30.2%) counties are perceived as having a high likelihood of capital jury service and death penalty sentencing. Clarke County (85 or 46.7% of the sample), by

Table 9

Demographics of Potential Georgia Jurors

	Frequency (*N*)	Percent (%)
Age		
25 or under	74	40.7
26-40	83	45.6
41-55	21	11.5
56 or above	4	2.2
Race/Ethnicity		
African/African-American	38	20.9
Arabic	1	0.5
Asian/Pacific Islander	7	3.8
Caucasian	130	71.4
Hispanic/Latino	6	3.3
Gender		
Male	69	37.9
Female	113	62.1

Table 9, continued

Demographics of Potential Georgia Jurors

	Frequency (*N*)	Percent (%)
Level of Education		
High School Diploma or Equivalent	5	2.7
Some College	34	18.7
Bachelor's Degree	121	61.5
Master's Degree	13	7.1
Doctoral Degree	2	1.1
Professional Degree	7	3.8

comparison, would have potential jurors with a low likelihood of capital jury service and sentencing.

Particpants. Table 9 above displays the demographics of the potential juror sample utilized for this study in each of the aforementioned categories. The sample contained 69 males (37.9%) and 113 females (62.1%). Participants ranged in age from 25 years of age or under to 56 and above. With regard to race and/or ethnicity of the sample, there were 130 Caucasian jurors (71.4%), 38 (20.9%) Africa-American jurors, seven (3.8%) Asian or Pacific Islander jurors; six Hispanic/Latino jurors (3.3%) and one Arabic juror (0.5%). Participants were given the option of "would rather not say" with regard to disclosing their racial or ethnic identity, but this option was not used by any of the above sample. Although a category was provided, no participants

classified or self-identified as "other" than the above categories provided. As outlined in Chapter 3, participants were sampled from colleges and universities within the target counties. The majority of participants (66.5% or 121 individuals) had completed, at minimum, a Bachelor's degree.

Scale Analysis. The psychometric properties of the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) are presented below. These data specifically address the reliability and validity of the instrument, as well as the efficacy of its proposed five factor structure. The information obtained through the following analyses will assist and guide the further refinement of scale items and the overall structure of the instrument as well as providing empirical support of issues pertaining to capital jury decision-making.

The BJICQ is a 13-item questionnaire which used a 4-point "forced choice" Likert scale response format (see Appendix B). The response format is: 1 = Strongly Disagree, 2 = Disagree, 3 = Agree and 4 = Strongly Agree. Higher scores on items 1, 2, 3, 5, 7, 8, & 9 on the BJICQ are theorized to predict higher levels of comprehensibility among survey respondents. Items 4, 6, and 10 address the role of the juror as arbiter of fact in a capital trial and relate specifically to the juror's agreement with the instructions (item 4), need for multiple re-readings of written instructions (item 6), and the need to ask clarifying questions (item 10). As such, these items were reverse scored to register higher levels of comprehensibility among respondents.

The final three items constitute an abbreviated comprehension inventory, drawing upon previous efforts at assessing juror comprehensibility (Frank & Applegate, 1998; Weiner, et al., 1995). Items 11 and 12 ask the potential juror to give the definition of aggravating and mitigating circumstances according to the model instructions they have been given. Item 13 solicits potential juror perspective of whether or not the instructions as given are sufficient for them to

render a verdict of death, life imprisonment, another unspecified sentence, or that instruction was insufficient. Descriptive statistical analysis and discussion of these items are included in a section below. Thus, based upon the 10 scalar items, the maximum score attainable on the BJICQ for an individual item is 4 and 40 for the entire measure. The overall scores of the survey respondents on the BJICQ were evaluated and scores ranged from 10 to 37. (M= 22.02, SD= 4.696).

Reliability. The reliability or internal consistency of the BJICQ was evaluated to assess the homogeneity of scale items. As Streiner (2003) noted, the evaluation of a scale's internal consistency is an indicator of how well the scale items reflect a common underlying construct (e.g., instruction comprehensibility). The examination of the BJICQ to determine its reliability was conducted in three ways. First, the Cronbach's coefficient alpha for the BJICQ was found to be $\alpha = .741$. Kline (2010) reported that a coefficient alpha statistic of .70 is adequate for reliability evaluation. Second, split-half procedures were utilized, dividing questions into groups of items 1 through 5, and 6 through 10. Reliability measures primarily utilize Pearson product-moment correlation coefficients (*r*) as tests of the linearity, direction and significance of the relationship between two variables as well as effect size (Green & Salkind, 2008; Nunnally, 1978). The Guttman split-half coefficient for this first procedure was $r = .845$. Similarly, a Spearman-Brown coefficient was found to be $r = .846$. These findings provide solid support of the internal consistency of the BJICQ. Finally, an inter-item correlation matrix was computed and the relationships tested for statistical significance.

Table 10 below displays the inter-correlations for the scalar items on the BJICQ. Five items showed consistently the highest (i.e., significant at the 0.01 level, 2-tailed) correlations. They were item 1, "the jury instructions were clear and easily understood;" item 5, "the

Table 10

Inter-Item Correlations of the BJICQ

	Clarity of Instructions	Specific to Case	Understand Responsibilities	Disagreement with Instructions	Definition of Aggravating Circumstances Clear	Instructions Required Several Readings	Definition of Mitigating Circumstances Clear	Relationship to Capital Case Law	Clear on Verdict	Need for Additional Questions or Clarification	Definition of Aggravating	Definition of Mitigating	Juror Sense of Preparedness for Specific Sentencing Outcome
Clarity of Instructions	1.000	.583**	.687**	.037	.645**	.059	.677**	.562**	.617**	-.334**	.297**	.241**	-.144
Specific to Case	.583**	1.000	.460**	-.094	.373**	.096	.380**	.434**	.405**	-.267**	.172**	.236**	-.119
Understand Responsibilities	.687**	.460**	1.000	.092	.526**	-.103	.536**	.395**	.565**	-.293**	.081	.113	-.002
Disagreement with Instructions	.037	-.094	.092	1.000	.009	-.134	.014	-.109	-.034	-.002	-.119	-.011	.140
Definition of Aggravating Circumstance Clear	.645**	.373**	.526**	.009	1.000	.099	.772**	.534**	.590**	-.403**	.271**	.238**	-.177*
Instructions Required Several Readings	.059	.096	-.103	-.134	.099	1.000	.105	.143	.255**	.124	.256**	.356**	-.032
Definition of Mitigating Circumstances Clear	.677**	.380**	.536**	.014	.772**	.105	1.000	.532**	.581**	-.397**	.294**	.285**	-.117
Relationship to Capital Case Law	.562**	.434**	.395**	-.109	.534**	.143	.532**	1.000	.523**	-.246**	.206**	.335**	-.096
Clear on Verdict	.617**	.405**	.565**	-.034	.590**	.255**	.581**	.523**	1.000	-.325**	.317**	.244**	.038
Need for Additional Questions/Clarification	-.334**	-.267**	-.293**	-.002	-.403**	.124	-.397**	-.246**	-.325**	1.000	-.140	-.095	.128
Definition of Aggravating	.297**	.172**	.081	-.119	.271**	.256**	.294**	.206**	.317**	-.140	1.000	.337**	-.141
Definition of Mitigating	.241**	.236**	.113	-.011	.238**	.356**	.285**	.335**	.244**	-.095	.337**	1.000	.056
Juror Sense of Preparedness for Specific Sentencing Outcome	-.144	-.119	-.002	.140	-.177*	-.032	-.117	-.096	.038	.128	-.141	.056	1.000

Note. **Correlation is significant at the 0.01 level (2-tailed).
*Correlation is significant at the 0.05 level (2-tailed).

definition of ‘aggravating circumstances’ was clear in the instructions as given;” item 7, “the definition of ‘mitigating circumstances’ was clearly defined in the jury instructions;” item 8, “the jury instructions provided the jury with a clear understanding of the laws governing capital murder cases;” and item 9, “the jury instructions were clear on the issue of jury agreement and disagreement.” As hypothesized in the previous chapter, the items clustered within the issue of instruction clarity were thought to impact decision-making in a positive direction and to a statistically significant degree. Testing of items measuring instruction clarity having significant inter-correlations provided evidence that the BJICQ was measuring a construct defined theoretically as comprehensibility and its closely related constructs of clarity and procedural integrity.

Validity. To establish content validity, the scale was reviewed by panel including an Appeals Court-level judge, three attorneys with experience in capital trial procedure, and one law student specializing in capital sentencing. All panelists agreed that the scale adequately addressed issues of clarity and procedural integrity. Preliminary criterion validity comparisons with jury clarity and arbitrariness scales (Frank & Applegate, 1998; Weiner, et al., 1995) were conducted and satisfactory comparisons were made between the measures with regard to clarity and sentencing procedure. Weiner and colleagues (1995) reported an internal consistency score (Kuder-Richardson 20 for dichotomous data) of .71 commensurate with the Cronbach’s alpha reported for the BJICQ (α =.741). Similarly, the Jury Bias Scale as designed by Kassin and Wrightsman (1983) reported a Guttman split-half coefficient of .81, commensurate with the BJICQ Guttman coefficient of r = .845 (see Myers & Lecci, 1998). These statistical similarities provide evidence of good internal consistency and criterion validity for the BJICQ. It is noted, however, in previous instruments potential jurors were “tested” on specific elements of jury

instruction content, while the BJICQ addresses potential juror perceptions when considering a given set of jury instructions. Thus, more direct statistical measurement and comparison of similar instruments for the same sample was not possible in the current study. Chapter 5 below posits potential alternatives for validity testing of the instrument as avenues for further research.

Tests of initial constructs. Derived, in part, from the review of the Capital Jury Project (CJP) data, it is hypothesized that the concept of comprehensibility in capital jury instructions can be explored by five constructs; clarity, procedural integrity, understanding of aggravators (AGG), understanding of mitigation (MIT), and sense of preparedness to render a just decision (SOP). Internal consistency tests were conducted on the five constructs as measured by the BJICQ. These tests revealed $\alpha = .691$ for clarity, $\alpha = .595$ for procedural integrity, $\alpha = .424$ for AGG, $\alpha = .429$ for MIT, and $\alpha = .636$ for SOP.

Inter-item correlations were computed to test the significance of the relationships among all five of the hypothesized constructs. It was hypothesized that all constructs would correlate with one another, positively and to a statistically significant level. They were compared and the results of these analyses are presented in Table 11 below. In this analysis, some statistical significance was found in all of the relationships between comprehensibility constructs. The relationships ranged between $r = .713$ and $r = .022$. The highest correlations were found between clarity and procedural integrity ($r = .713$) and the relationship between AGG and MIT was $r = .332$. Notably, juror sense of preparedness was not significantly correlated with understanding of mitigation. These findings provide support for some of the expected relationships between constructs, but a lack of uniform correlation within the hypothesized five-factor model raises questions about proposed constructs and their significance in accurately measuring instruction comprehensibility.

Table 11

Comprehensibility Construct Correlations (N=182)

	Clarity	Procedural Integrity	AGG	MIT	SOP
Clarity	1.00	.713**	.260**	.177*	.151*
Procedural Integrity	.713**	1.00	.234**	.263**	.202**
AGG	.260**	.234**	1.00	.337**	.232**
MIT	.177*	.263**	.337**	1.00	.022
SOP	.151*	.202**	.232**	.022	1.00

Note ** Correlation is significant at the 0.01 level (2-tailed)
* Correlation is significant at the 0.05 level (2-tailed)

Item analysis. An item analysis was conducted to evaluate the individual scale items on the BJICQ. Item frequency and distribution values as well as measures of skewness and kurtosis were computed and evaluated. As Corder & Foreman (2009) noted, skewness and kurtosis values outside of the 2.0 to -2.0 range are generally considered problematic and suggest a closer examination of an item for non-normal distributive characteristics or other evidence of its appropriateness for retention in the instrument. No items were found outside of the suggested parameters. Analysis of the BJICQ items found a skewness range of -.260 (item 10) to 1.014 (item 6). Kurtosis ranged from -1.224 (item 13) to .628 (item 12).

Descriptive analysis of comprehension items. Items 11 through 13 of the BJICQ constitute an abbreviated comprehension inventory on both definitional items (specifically, the definitions of aggravation and mitigation presented in the jury instructions) and potential juror self-report (item 13) on the overall impact of the instructions on the decision-making process.

Table 12

Frequency Data for Comprehension Items of BJICQ (N=182)

	Frequency (*N*)	**Percent (%)**
Item 11. Correct definition of "aggravating circumstances"	85	46.7
Item 12. Correct definition of "mitigating circumstances"	123	67.6
Item 13. Juror sense of preparedness for specific sentencing outcome:		
Sufficient for death sentence	19	10.4
Sufficient for life sentence	59	32.4
Neither sentence appropriate	42	23.1
Insufficient instruction to render sentence	62	34.1

Frequency data was compiled for each of the definitional items and compared to the accepted definitions of the terms in the seventh edition of *Black's Law Dictionary* (Garner, 1999). Table 12 lists the item and the number and percentage of correct answers for definitional items. Also given are numbers and percentages of respondent self-report concerning their estimation of decision-making preparedness based on the instructions given.

Based on the frequency data presented in Table 12, when asked to report the definition of aggravating circumstances as reported in the instructions 53.3% (or 97 respondents) were incorrect. The largest number of respondents (44 or 24.2%) commonly took aggravation to be a measure of the heinousness of the crime, a commonality shared with the Capital Jury Project

(CJP) self reports excerpted above. When asked to report the definition of mitigation based on the instructions, 59 respondents (or 32.3%) were incorrect. The largest subset of incorrect responses (N = 35, 19.2%) defined mitigation as "a fact or circumstance in the life of the defendant that led to the commission of the crime."

False associations of this sort, evinced in the CJP data, are emblematic of what Bowers, et al. (2009) term as juror "ambiguity about the mitigating role" (p. 207). Consideration of a fact that led to the commission of the crime could potentially hold either aggravating or mitigating power, and an inability to differentiate could lessen the weight of mitigating evidence in jury deliberations, as mitigating factors are often more subtle than aggravators (i.e., drug dependence as opposed to a previous history of violence), or have a less direct connection to the crime (i.e., an history of childhood physical or sexual abuse). Far more individuals in the Georgia sample were able to identify mitigation by definition, a noticeable difference from the CJP sample, where aggravation was defined in more detail and with greater frequency throughout the trial proceedings.

In answering item 13 of the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ), only 19 respondents (10.4%) endorsed that there was enough instruction for the individual juror to feel comfortable sentencing the defendant to death. An additional 59 respondents (32.4%) felt that the instructions enabled a lesser sentence (i.e., life without parole). 104 respondents (57.2%) endorsed, that, based strictly on the circumstances of the cases and the judicial instructions, neither sentence felt appropriate or, as over one third of the full sample (N = 62, 34.1%) noted, that the instructions were insufficient to render a sentence. These latter two responses were incorporated into the BJICQ to gauge a sample of potential jurors for the possibility of jury nullification, which is discussed at length in Chapter 5. When compared with

CJP findings above, this data demonstrates that jury instructions alone do not control for significant levels of arbitrariness and causes of juror confusion, misunderstanding, and wrongful instruction.

Summary of significant findings. Analysis of the BJICQ and the Capital Jury Project (CJP) evinced several notable similarities. Procedural integrity, as seen through descriptions within the sampled instructions of both the heinousness of the crime and the future dangerousness of the defendant were found to be significant indicators, and the construct as a whole was highly correlated to juror decision-making. Aggravating circumstances were similarly found to be highly correlated, with mitigation less correlated to juror decision. As seen in the CJP sample, significant error was reported with regard to the definitional content of the jury instructions, with over half of the Georgia sample (53.3%) incorrectly endorsing the statutory definition of aggravation. Testing of the BJICQ differs from the CJP sample in assessing the definitional content of mitigation, with a higher number of correct answers to item 12. However, incorrect definitions of mitigation were endorsed by 19.2% of Georgia respondents, a much lower number than the CJP, by comparison, but still indicative of a high level of probable reversible error. Another notable difference between the CJP data and preliminary analysis of the BJICQ was the high correlation of instruction clarity to other variables. This finding suggests that the BJICQ measurement of clarity was not, as measured by the CJP instrument, a measure of juror consideration, but rather of the instruction content itself and is consonant with CJP juror interview responses.

The BJICQ: An Exploratory Factor Analysis

Given that significant results were found in each of the theorized five factors or categories and that notable comparisons and differences were found between CJP and BJICQ

data, the BJICQ was subjected to an exploratory factor analysis utilizing the Georgia sample. (N = 182). Although there is some disagreement as to what constitutes an adequate sample size for a factor analysis, the current sample satisfied the two most common recommendations for determining sample size. First, the total N of the study was found to be in the moderate range (N = 100-200, per Kline, 2010). Second, the current sample size befits the recommended subject to variable ratio (SVR) of 10:1 for an adequate sample size (Nunnally, 1978; Osborne & Costello, 2004).

Principal components analysis. As Shlens (2009) noted, principal components analysis "provides a roadmap for how to reduce a complex data set to a lower dimension to reveal the sometimes hidden, simplified structure that often underlies it" (p. 1). Principle components analysis was used because: 1.) the primary purpose was to explore simplification of the hypothesized five-factor model of comprehensibility for the factors underlying the BJICQ, and, 2.) to test the magnitude of intercorrelation of BJICQ items to ensure that juror comprehensibility is effectively being measured by the instrument. As Chapter 5 details, possible future research efforts would require further statistical analysis of the BJICQ with capital jurors and a larger, more heterogeneous sample.

The factorability of the 10 scalar BJICQ items were examined utilizing Kline's (2010) criteria for the factorability of a correlation. Firstly, nine of the ten scalar items correlated at least .3 with at least one other item, suggesting reasonable factorability. Secondly, the Kaiser-Meyer-Olkin measure of sampling adequacy was .861, significantly above the recommended value of .6, and Bartlett's test of sphericity was shown to be significant (χ^2 (45) = 775.036, $p <$ .01). The diagonals of the anti-image correlation matrix were analyzed as measures of sampling adequacy, and found to be over .5, supporting the inclusion of each item in the factor analysis for

Table 13

Factor loadings and communalities for 8 items of the BJICQ (N = 182)

	Instruction Comprehensibility	Communality
The jury instructions were clear and easily understood.	.871	.758
The jury instructions were specific to the case under consideration.	.642	.412
I was able to understand my responsibilities as a juror from the instructions given.	.757	.573
The definition of "aggravating circumstances" was clear in the instructions as given.	.826	.683
The definition of "mitigating circumstances" was clearly defined in the jury instructions.	.833	.694
The jury instructions provided the jury with a clear understanding of the laws governing capital murder cases.	.711	.506
The jury instructions were clear on the issue of jury agreement and disagreement.	.782	.612
I would need to ask additional questions after reading the jury instructions for this case.	-.508	.259

Note. Factor loadings < .2 are suppressed

all items except item 6, (.391) and item 4 (.499). Due to the analysis of measure of sampling adequacy items 4 and 6 were removed from the analysis. Finally, the communalities of the remaining eight items were all above .3 (see Table 13) further confirming that items shared some common variance. Given these overall indicators, factor analysis was conducted with the eight remaining BJICQ items.

Factor analysis of the eight-item BJICQ extracted a single factor. Initial eigenvalues showed that this first factor (eigenvalue = 4.496) explained 56.2% of the variance. Two additional factors were not extracted (i.e., did not have eigenvalues greater than 1), but the second factor (eigenvalue = .840) explained an additional 10.5% of the variance, and a third

Table 14

New descriptive statistics for single-factor BJICQ (N = 182)

	No. of items	*M* (*SD*)	Skewness	Kurtosis	Alpha
Comprehensibility	8	19.5(4.08)	.40	-.102	.892

factor (eigenvalue = .727) an additional 9% of the variance. Wood, Tataryn, and Gorsuch (1996) have presented the danger in overextraction of factors, and the solution is supported by scrutiny of the scree plot for the 8-item BJICQ (see Figure 2 below), the single factor model was retained for the scale as a unidimensional measure of jury instruction comprehensibility.

As a single factor was extracted, varimax (i.e. orthogonal) or oblimin (i.e., oblique) rotations were not possible for the single-factor solution. Factor loadings for all eight BJICQ items were all fair (> .45) to excellent (> .70) as determined by Comrey and Lee (1992). Moreover, communalities were in the moderate to high range for seven of the eight factors. New item and scale scores were created for the eight-item single factor solution, based on the mean of the item which had loaded on the single factor. Descriptive statistics for the refined scale are presented in Table 14. The skewness and kurtosis were well within a tolerable range for assuming a normal distribution. Higher scores (item = 4, scale total = 32 with item 10 as a reversed coded item) indicated greater instruction comprehensibility. Also, comprehensibility was seen to involve general clarity of the instructions and definitional terms and specificity of juror roles and responsibilities.

Summary of significant findings. Drawing from the literature on jury decision-making and an analysis of the Capital Jury Project (CJP), an objective measure of jury instruction comprehensibility was constructed. Inclusion of an abbreviated comprehension inventory was

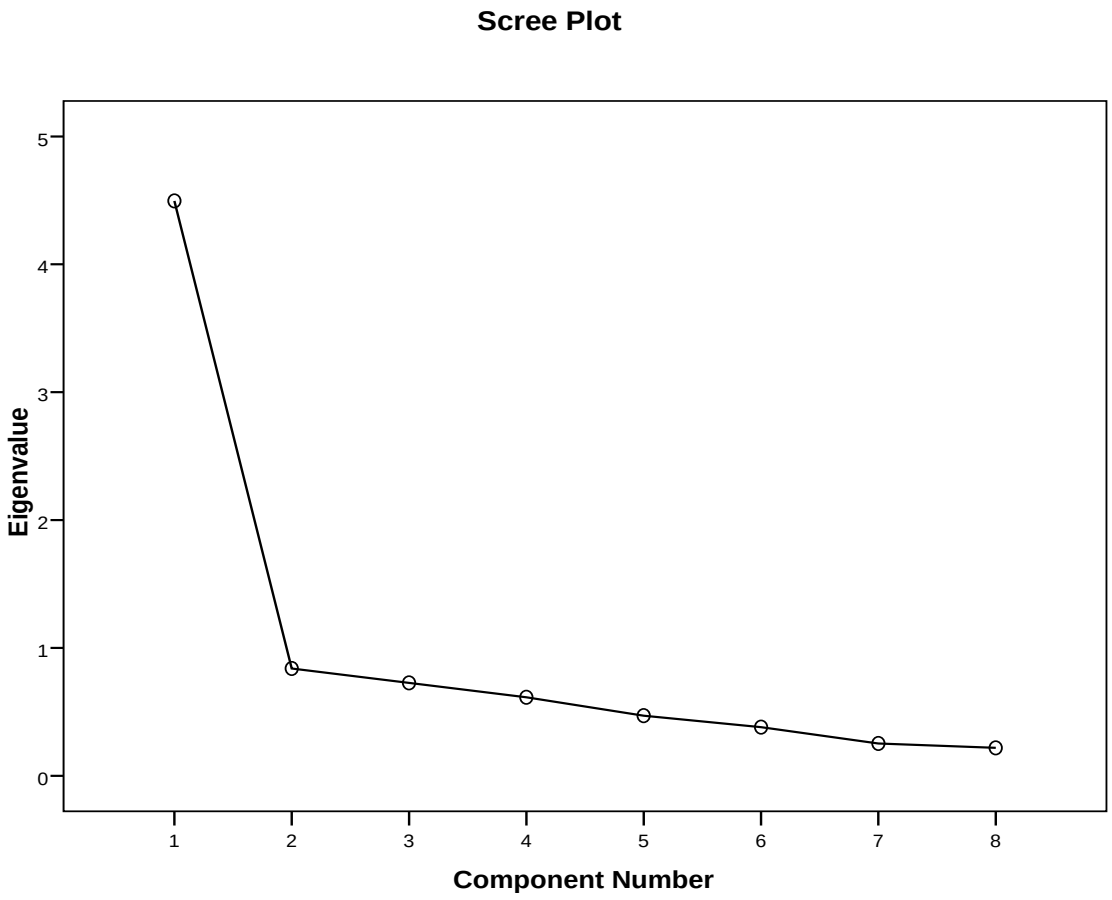

Figure 2: Single-factor scree plot of the BJICQ

crucial in determining potential instructional deficits within existing judicial schemes. The BJICQ showed moderate to good reliability and criterion validity and an exploratory factor analysis was employed to address the degree to which the instrument measured theorized constructs related to instruction comprehensibility. Statistical analysis resulted in a scale revision which greatly enhanced the internal consistency and efficacy of the BJICQ as a uniform measure of jury instruction comprehension. A single-factor solution was achieved through use of principal components analysis, and contributed to greater construct validity for the BJICQ.

In analyzing a sample of potential jurors in Georgia, drawn from two counties in which capital adjudication is among the highest, and one county in which it is lowest, BJICQ data shows moderate support for both study research questions. Bolstering the findings from the data collected by the CJP, it can be inferred from the Georgia BJICQ data that the study's primary question as to whether instruction content impacts decision-making was supported. The study's null hypothesis, that decision-making does not vary according to the instructions received was tested by random assignment of differing instructions, and was rejected. The second research question, which asked if perceived clarity displays an impact on decision-making was highly endorsed by potential Georgia jurors, and compared favorably to CJP qualitative self-reports from actual capital jurors. Finally, the second hypothesis, positing that efforts to improve clarity and procedural integrity through guided discretion measures results in more severe sentencing was rejected in the Georgia sample. However, the Georgia sample strongly endorsed that, based on instruction content alone, jurors would either wish to consider a sentence other than death or life without parole in order to exercise their judicial duties, or that, given the instructions, any capital sentencing was deemed inappropriate. The disparity between the hypothesized condition and the Georgia response is discussed further in Chapter 5.

Conclusion

Data was analyzed and results were reported in this chapter for each of the three parts of the current study. The statistical analyses of the data from the CJP sample and potential jurors in Georgia provided partial and moderate support for the study research questions. Two hypotheses were put forth by this study and found partial, if marginal, support from within the CJP sample and the sample of potential jurors in Georgia.

Qualitative data from the CJP was used as the theoretical grounding for the development of an empirically-based measurement of jury instruction comprehensibility. Preliminary development and validation was conducted through the use of exploratory factor analysis (EFA) and principal components analysis (PCA). From five relevant constructs to jury decision-making used in the CJP sample, a single-factor solution was evolved in the measurement of potential jurors in Georgia, resulting in a robust unidimensional scale of instruction comprehensibility.

The null hypothesis, that instruction content would not be predictive in terms of sentence, was rejected. Findings suggested that issues of procedural integrity that linked instruction content to the guilt-phase of the trial (heinousness of the crime and future dangerousness of the defendant) were found to be correlated with the decision of the jurors in both CJP and Georgia samples. The second hypothesis posited that juror misunderstanding would lead to more severe sentencing. CJP data suggested that a moderate directional relationship existed between juror confusion of statutory remedies and more severe sentencing.

Two significant differences emerged from comparison of BJICQ data and CJP data. The first difference was that a more content-based measure of instruction clarity was significantly correlated with juror decision. Second, jurors in Georgia that completed the BJICQ were given the option to indicate that instruction content was insufficient to render adequate sentencing. As

such, there was a significant drop in severe sentencing. BJICQ findings were consonant with qualitative interview data from the CJP sample and, overall, issues of reversible error regarding weight and definitional content of special circumstances (aggravation and mitigation) were found in both CJP and Georgia samples and were commensurate throughout this study. These findings suggest that issues thought to be contained by the legal remedies mandated by the *Gregg* decision are incomplete in their elimination of instruction arbitrariness. Further theoretical consequences of these findings are discussed in greater detail in the following chapter.

Chapter 5 begins with a comprehensive summary of significant findings of the study. The chapter forges a link between theories of justice and the results of the study and addresses potential implications for social work practice, policy, and legal research. Methodological and study-specific limitations and possible future research possibilities are discussed as a means of advancing and refining the research agenda initiated by this study. Chapter 5 concludes by exploring capital punishment as a social phenomenon and the legal, technical and procedural aspects of capital sentencing as it is practiced in the United States.

CHAPTER 5

Discussion

This dissertation study closely examined the literature on capital punishment in the United States and four comparative theoretical frameworks of justice. By utilizing the nationwide research conducted by the Capital Jury Project (CJP), five instructional variables were isolated as contributing to capital decision-making: instruction clarity, procedural integrity, aggravating circumstances, mitigating circumstances, and juror's sense of preparedness. Utilizing a mixed-methodological design, each variable was analyzed as to its respective contribution to two related research questions: do jury instructions predict jury imposition of the death penalty? And, does lack of perceived clarity or procedural integrity of jury instructions contribute to juror decision-making in capital sentencing? This study tested the null hypothesis that jury decision making will not vary according to the instructions that the jurors receive. It successfully predicted that a negative correlation exists between juror understanding and death penalty sentencing in capital cases.

As presented in the previous chapter, the mixed-methodological design allowed a wide variety of quantitative statistical methods and qualitative analyses to be applied to a sample of capital jurors from the 14-state Capital Jury Project (CJP). Then, the same variables were utilized and tested via principal components analysis (PCA) and exploratory factor analytic techniques in the construction and testing of the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ), conducted with a sample of potential jurors from the state of Georgia. This chapter briefly summarizes significant results found in the study, provides further explanation of these

results and show how they either support or refute the fundamental tenets of the positivist, constructivist, interpretavist, and egalitarian theories of justice. This chapter also describes the various limitations of this research and the implications for both social work practice and policy.

Summary of Significant Results

The Capital Jury Project: Quantitative findings. With regard to the first study research question, juror sense of future dangerousness of the defendant and juror sense of preparedness, based on the jury instructions, were found to be statistically significant predictors of sentencing decisions. Analysis of Wald statistics and odds ratios showed that Capital Jury Project (CJP) jurors who thought the defendant may be likely to be dangerous in the future were 39.2% more likely to impose the death penalty. A striking finding was that jurors who felt that the content of the instructions led to the appropriate sentence were 14.4% more likely to render a sentence of death in the cases sampled by the CJP.

While both findings are moderate in their predictive ability, they do point to instruction content as being a supportive factor in jury decision-making, effectively rejecting the null hypothesis of this study that sentencing decisions would not vary based on instruction content. The juxtaposition of these moderate predictors are supported in the literature on capital jury decision-making, and the controversy surrounding guided discretion and statutory direction, including CJP findings from Bowers, et al. (2010) and as argued in the cases that were heard contemporaneous with the *Gregg* decision, including *Proffitt v. Florida* (1976), *Roberts v. Louisiana* (1976), *Woodson v. North Carolina* (1976) and *Jurek v. Texas* (1976). That these cases stipulated similar procedural issues did not necessarily indicate, despite the Court's concurrent rulings, that they were the same with regard to the issue of statutory direction (Latzer, 1998). Regnier (2004) noted that if the Supreme Court:

> Eliminated future dangerousness prediction in death sentencing, it might have to get rid of it in other areas of the law. Again, no attempt was made to distinguish between capital sentencing and other kinds of legal judgment. The Court cites a statement…that "there may be circumstances in which prediction is both empirically possible and ethically appropriate," without catching on to the very narrow and tentative nature of the statement. Yes, there may be some situations in which prediction is ethical and appropriate, but that does not mean it is therefore ethical and appropriate in all situations (p. 485).

Put simply, analysis of the data would seem to indicate that jurors are more compelled by the descriptions of the crime (i.e., its heinousness) and the potential that exists for future dangerousness of the defendant than any legal or conceptual instruction in determining sentence. This would seem to be the case despite confusion about instruction content, given that the language of the "directed" statute utilizes the same content as that which would be used, in the guilt phase, to describe the crime, or, in fact, any act of extreme violence. Even in the face of an incomplete understanding of instruction content, such syntactic similarities afford a degree of comfort, in a moderate and significant percentage of jurors, that a death sentence is justified, although the data also begs Regnier's (2004) question "how can there be 'due process' when the outcome depends strictly on someone's surmises about the future, not on provable incidents from the past" (p. 478)?

A point biserial correlation coefficient tested the second research question, and moderately supported an inverse relationship between juror sense of preparedness and final sentencing outcome. This finding supported the directional hypothesis of the second question, namely that unprepared jurors generally defaulted to supporting a vote for application of the

death penalty. This finding was bolstered by cross-tabulations which showed a moderate degree of juror misunderstanding regarding jury unanimity and the standard of proof required of special (i.e., aggravating and mitigating) circumstances supporting a sentence of death.

The Capital Jury Project: Qualitative findings. Quantitative findings were further supported by qualitative analysis, in which former capital jurors expressed confusion, frustration, or ambivalence in areas of instruction clarity and procedural integrity. Specifically, jurors reported significant degrees of confusion as to the clarity of the instructions and the verbiage used to define their role and the exact parameters guiding both their sentencing decision and findings of fact. Both hypotheses put forward in this study, that jury instruction content does influence decision making, and that jurors are more likely to return death sentences as a result of incomplete or misunderstood instruction content were supported. Moreover, a discrepancy was found in the degree to which statutory aggravators influenced decision-making as opposed to mitigating testimony, calling into question both its compliance with that of the *Gregg* decision and subsequent legal precedent, i.e., *Godfrey v. Georgia* (1980). Juror self-report from within the Capital Jury Project (CJP) sample seems to indicate that jurors, by the time of sentencing deliberations, either thought they could not access mitigating evidence, or were barred in their efforts for procedural clarification.

Potential jurors in Georgia. In an effort to capture the effects of jury instruction content when isolated from the larger evidentiary comportment of a capital trial (e.g., testimony, physical evidence, and oral argument), and to contribute to the empirical assessment of instruction content, the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) was composed. Drawing from the five conceptual variables derived from the Capital Jury Project (CJP), the instrument was constructed to test the correlation of each of these variables in turn with a pool of

potential Georgia jurors. Marked similarities were noted between potential Georgia jurors and the larger sample of former jurors sampled by the CJP.

For example, in the comprehension inventory section of the BJICQ, nearly half of the respondents were incorrect in their assessment of the standard of proof for aggravating circumstances, based on perusal of court instructions. Similarly, nearly one-third of the Georgia sample were incorrect in assessing the standard for mitigation, numbers which correspond to both the CJP literature and independent assessments, such as those conducted by the Georgia chapter of the American Bar Association (2006), described in further detail below. Deviating from the CJP literature, was the fact that, when given a choice to renege on issuing sentence based on inadequate information in the instructions, only ten percent of the potential Georgia sample went forward with endorsing a sentence of death, far lower than the CJP or state average. These findings open up the real possibility for wholesale rejection of the procedural standard of punishment based on capital juries being unable to issue sentence, based on the indeterminate nature of procedural guidance offered by the court. This phenomenon, known as jury nullification, is discussed below.

The psychometric properties of the BJICQ were derived through exploratory factor analysis of the principal components of the instrument. This testing lent empirical support to this study's theoretical claim that jury instruction comprehensibility consists of discreet, but overlapping characteristics commensurate with a uniform construct of juror decision-making. The internal consistency of the instrument was high; indicating the measure indeed explicates a commonly understood concept by study participants endorsed in this study as instruction comprehensibility. This means that jurors felt they needed to be instructed in order to render a correct and legally sound decision, and that the instruction they receive must be clearly

delineated. The underlying dimensions of this overarching construct were well correlated indicating the detection of a single-factor latent construct of instruction comprehensibility. The single-factor analyses of the BJICQ study data reinforced the internal consistency and construct validity of instruction comprehension as a uniform object of empirical scrutiny in legal research.

Theoretical links. Examination of jury instructions, both empirical and from the Critical Legal Studies (CLS) framework deployed in this dissertation, draws upon a number of divergent threads of theoretical and conceptual debate around the imposition of capital punishment in the United States. By revisiting the theoretical frameworks around justice, the following sections aim to make clear two salient directions that the debate over capital punishment is likely to take in the future. By doing so, this dissertation attempts to underscore the significant and palpable frustration felt in Justice Blackmun's dissenting opinion in *Callin v. Collins* (1994):

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?--cannot be answered in the affirmative (p. 1145).

It is imperative to note, by way of discussing how these threads might be brought together, that any study of legal phenomena obfuscates as much as it elucidates, given the highly subjective nature of jury deliberation and decision-making. In so doing, the theories of justice discussed in Chapter 2 come into more direct opposition, showing that, as Garvey (2000) noted, "before we change a regulatory framework we ought to know as much as we can about the economy it regulates" (p. 27). The following sections instantiate that need, and, through use of the theoretical concepts of Rawls and Dworkin, clearly demarcate two distinct facets of legal study subordinate to the contentious debate over the death penalty in the United States: that of the responsibility to educate jurors *prior* to instruction, and the phenomenon of instruction indeterminacy and the possibly for the death penalty, as it is currently employed, to be "nullified," or rendered legally moot, by jurors' inability to decide.

Jury instruction and jury education: Two concepts of rules. The issue, emergent in both Capital Jury Project (CJP) jurors and potential jurors in Georgia, of whether jurors adequately understand instruction content is reminiscent of Rawls' conception of two divergent concepts of rules. As put forth in the essay by Rawls (1955), a crucial distinction between the legal rules justifying a practice or institution and those procedural rules justifying particular actions that fall under it, must operate in tandem to justify punishment. Thus, it is not simply a matter of a juror knowing that they are arbiter of fact (following *Ring*) in determining sentence, but also of knowing the full legal comportment commensurate with that role. Thus, for the jurors who are instructed, but remain uninformed or only partially cognizant of the full scope of educative knowledge involved in capital adjudication, and as evinced in both the CJP and Georgia sample, Rawls (1955) concludes that "once one realizes that one is involved in setting up an *institution*, one sees that the hazards are very great" (pp. 11-12, emphasis in the original). Indeed, this

moment ushers in a variety of questions for Rawls, not dissimilar from those contained within the CJP qualitative interviews:

> For example, what check is there on the officials? How is one to tell whether or not their actions are authorized? How is one to limit the risks involved in allowing such systematic deception? How is one to avoid giving anything short of complete discretion to the authorities to [level sentence upon] anyone they like? In addition to these considerations, it is obvious that people will come to have a very different attitude towards their penal system […] They will be uncertain as to [severity of punishment]...They will wonder whether or not they should feel sorry for him. They will wonder whether the same fate won't at any time fall on them. If one pictures how such an institution would actually work, and the enormous risks involved in it, it seems clear that it would serve no useful purpose. A utilitarian justification for this institution is most unlikely (Rawls, 1955, p. 12).

One such unifying purpose of both the aims of the CJP and the development of the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) is to bring to the fore the question of juror education and to generate a means by which to empirically test that education, so as to avoid the semblance of procedural misdirection or miscommunication on the part of the juror. It is therefore not, as legal positivists would contend, the law itself that must be amended or, as Blackmun in *Callin* (1994) would have it, 'tinkered with,' but rather that a closer scrutiny be paid to the institutional frameworks by which jurors are empanelled and empowered (Mulvaney, 2007; cf. van den Haag, 1985). If Rawls' (1955) conception is followed to its conclusions, it may be seen to share considerable affinity with opposition to the death penalty, if only in that the just practice put forth in a strictly legalistic conception of capital punishment elides a significant

potential for a breakdown in the institutional structure which allows for misapplication of the attendant practice (Sellin, 1961; Steiker, 2009; Zimring & Hawkins, 1986). Put simply, capital sentencing does not function correctly because the procedural apparatus (i.e., its instructional component) breaks down, or rather; it lacks the procedural machinery necessary for it to work in the first place.

There are, as examination of the CJP juror interviews have shown, innumerable barriers to separating juror education from the instruction process as it current is applied. As CJP jurors have indicated, the period of instruction comes at the end of the guilt phase of the trial, and judges, fearing that further instruction or clarification efforts would bias or conflict with jury deliberations, often refuse clarification or stay mute. This fact, coupled with the lack of uniform standards on statutory direction and special circumstances, make it increasingly difficult to apply any uniform effort at reform. This is further complicated by the fact that efforts at education applied during *voir dire* could possibly undercut both the strategic aims of the prosecution and defense representatives and erode the presumptions of impartiality held by the court prior to trial or during the death qualification process. While it is legally and logistically possible to include an instrument such as the BJICQ during the charge of the jury, its merits are constrained to an instructional reform, ensuring that instructions are comprehensible to the jury prior to deliberations and prior to severance of recourse to further clarification, but not as a tool of juror selection.

Jury nullification and the indeterminacy debate. Consideration of the Rawlsian conception of procedural rules underlines another central tenet of the recent debate around the efficacy of the death penalty in American jurisprudence. Jury nullification is, as Scheflin & Van Dyke (1980) noted, when "jurors…have the power to refuse to apply a law (or 'nullify' its

effect) in situations when the strict application of the law would lead to an unjust or inequitable result" (p. 53) as arbiter of fact. Several scholars, including Butler (1994) and Schopp (1996), have put forth that aspects of the debate over capital punishment, including its unsteady legal and moral grounding, its racial disproportions, and its procedural complexity are leading to an inevitable conclusion: jurors will eventually simply disregard the legal application of the death penalty as an acceptable practice rather than (and contrary to) the rule of law, ruling it, per the Jeffersonian conception of jury empowerment (and Cohen's egalitarian perspective) mentioned in previous chapters, as illegal by default.

What may seem to be a radical and unlikely stance is in fact a generally accepted and constitutionally protected point of American law. The right to nullify after instruction is supported by both the Fifth and Sixth Amendments, upholding the concepts of both jeopardy and due process, respectively. Nullification in the United States has its own rich and detailed history, resultant in its unique status as being upheld by one of the earliest legal precedents in American jurisprudence in *Georgia v. Brailsford* (1794) and garnering support by both Thomas Jefferson and Justice John Jay. Its relative rarity and unknown status in modern jurisprudence comes per the 1895 decision in *Sparf v. United States*, a 5-4 decision which held that a trial judge has no responsibility to inform the jury of the right to nullify laws, and a subsequent battle to reaffirm its status in jurisprudence that continues into the present day.

Germane to the issue of capital punishment, jury nullification emerges as a byproduct of exploration into its tangled procedural history and brings forward a conception of legal indeterminacy framed by Ronald Dworkin and the interpretavist theory of justice. The debate over indeterminacy is, simply put, asking the question whether or not a legal rule is robust enough to hold up in every situation in which it is utilized, or as Dworkin (1978) contended,

whether such a rule constitutes a "right answer" to a question of law (p. 1). Dworkin's commitment to the interpretative integrity of legal rules and procedures is, as evinced in Chapter 2 of this dissertation, connected with the concept of reliability over time and repeated application of the rule as proof of its ability to affirmatively answer the question of whether a prescribed legal remedy (such as the death penalty) is appropriate.

As Dworkin (1978) noted, "if there is a conceptual, and not simply a contingent, connection between dispositive concepts [i.e., the accepted "rule of law"] and legal rights and duties, there is also a conceptual, and not merely a contingent, connection between such concepts and the types of events they report" (p. 8). When applied to the death penalty, the disposition of the jury as arbiter of fact choosing to enact the penalty of death on a defendant by virtue of the accepted law of the United States and the procedural instructions jurors receive seems to slip the bounds of Dworkin's relatively strict conceptual basis. Dworkin's (1978) argument emerges from both the relatively unstable legal grounds for the death penalty following *Gregg*, but also in the social contract between the court and the impaneled jury.

As examination of the Georgia data in this study has shown, 57% of potential jurors would fall under the category supporting a nullification of the existing statutory mandate to find for either capital punishment or a lesser sentence of life without the possibility of parole. This was compounded with evidence of Capital Jury Project respondents that a prime motivating factor in their decision-making was that jurors felt sufficient pressure to make a decision, but were unsure as to the parameters they could use to make such a decision. While a legal positivist rendering of the indeterminacy question and the lack of a "right answer" in Dworkin's view may be explained by simply stating that a mistake exists in the law and must, as with *Gregg*, simply be corrected, the end result is ultimately the same, as the application of the punishment cannot

stand as either indeterminate or a legal error in need of correction. Adding to this the continuing legal battles over jury override discussed in Chapter 1, and the precarious legality of informing jurors about a null response, the debate over legal indeterminacy as endorsed by both Dworkin and critical legal scholars like Kelman (1987) seems primed to become supplementary to any reform effort or abolitionist movement around the death penalty in the United States.

Limitations

In addition to the countervailing theoretical concerns of this study, there were practical limitations that influence the receptivity of this dissertation. In the following sections, attempts are made to underscore limitations in method, instrumentation, and sampling. Moreover, suggestions are provided for further study, including expansion of the sampling frame, sample heterogeneity, and further testing of study instruments.

Methodological limitations. While having significant advantages in this study, there are methodological limitations to a concurrent mixed model design. To address these, in considering a mixed-methodological approach, a principle of weighing costs and benefits is considered prior to collecting data or moving forward with a research plan. Johnson and Turner (2003) define this principle as follows:

> Methods should be mixed in a way that has complementary strengths and non-overlapping weaknesses. … It involves the recognition that all methods have their limitations as well as their strengths. The fundamental principle is followed for at least three reasons: (a) to obtain convergence or corroboration of findings, (b) to eliminate or minimize key plausible alternative explanations for conclusions drawn from the research data, and (c) to elucidate the divergent aspects of a

> phenomenon. The fundamental principle can be applied to all stages or components of the research process (p. 299).

After such an analysis, this study faced three significant methodological limitations. The first limitation concerns the secondary data collected from the Capital Jury Project (CJP). The data consists of self-report surveys and intensive interview material collected from former capital jurors. This constitutes reliance on self-report of jurors and may present issues related to the overall reliability and validity (Teddlie & Tashakkori, 2009). A second, related issue is the reliance on retrospective data, particularly with regard to the self report and qualitative interview data. These materials are based in large part in what jurors remember of their deliberations, and may have been collected several years from the trial. A third limitation is the lack of control or comparison groups, which this study attempted to ameliorate through surveying of a comparison group of potential jurors, as detailed in the concluding section of Chapter 4.

Instrumental and sampling limitations. The current study faced several limitations that were due, in whole or in part, to the use of the CJP instrument and the sampling used for both the CJP and the sample of potential jurors in Georgia. First, it was outside of the scope of this study to use the complete set of variables measured by the CJP instrument and those which pertained most directly to jury instructions were constrained mainly to variables which required nominal or ordinal levels of measurement. Moreover, due to missing data, the entirety of the sample could not be used. As the Capital Jury Project is an ongoing study, further research may endeavor to supplement missing data and broaden the scope of questions pertaining to include more questions on jury instructions. Furthermore, jury instruction questions must be applicable to measurement on an interval or ratio scale, opening up the possibility for more statistically rigorous measurements, including linear regression and analysis of variance. Second, while the

current pool of CJP respondents presents an equal number from both genders, and a wide variance of level of education, the racial makeup of the sample is disproportionate with regard to race. As race is a potentially integral variable in the discussion of capital punishment and jury demography, future research in the area of capital jury decision-making must contain with it an effort to more fully analyze race as a potentially important confounding or intervening variable to instruction content.

While the study of potential jurors in Georgia did contain a high degree of applicability to statistical rigor, it faced significant limitations due to its sampling frame, sample size, and relative homogeneity. As the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) was only utilized with potential capital jurors, its use in the current study was limited to only a comparison group. Moreover, as with the CJP sample, the sample of potential jurors in Georgia suffered from relative homogeneity with regard to race, age, and level of education. As stated in Chapter 4, the BJICQ endeavored to sample those who would be above the average level of education of a capital juror, in order to better test instruction comprehensibility. Further research studies utilizing the BJICQ would benefit greatly from a larger and more heterogeneous sample of capital jurors.

Further testing of the BJICQ. Preliminary testing of the BJICQ completed as part of the current study resulted in the development of a robust unidimensional scale of instruction comprehensibility. However, as testing was conducted with a relatively small, homogenous sample, further application of the scale is necessary to further study the construct of instruction comprehensibility. Further testing must account for the three identified limitations stated above, in terms of sample frame, evincing the need for application of the BJICQ with current or former jurors, sample size, addressing the need for large samples to supply an adequate subject-to-

variable ratio (SVR), as recommended by Kline (2010), and the need for a more heterogeneous sample.

In addition to these limitations, the BJICQ, as a unidimensional measure, must be coupled with other instruments, such as the Jury Bias Scale (Kassin & Wrightsman, 1983) or additional comprehension instruments (e.g., Frank & Applegate, 1998; Weiner, et al., 1995) to shed more empirical light on additional factors contributing to jury instruction comprehension. Future studies may wish to reframe the questions exempted from the principal components analysis (PCA) of the BJICQ, including items addressing juror disagreement (item 4) and the need for multiple readings of written instructions (item 6). These items, while lacking sampling adequacy with the current sample, may be considered for future revisions of the BJICQ or further testing with a larger sample, as these factors may be indicative of an additional factor model. Moreover, any future tests of BJICQ efficacy would benefit greatly from confirmatory factor analysis (CFA) to support its theoretical undercurrent and provide additional support for its factor structure and validity.

Avenues for Further Research

Taking its analysis and findings from both a national and local sample, the current study presents a number of possible implications for legal policy and practice regarding the death penalty debate, as well as locating itself within a bourgeoning field of social work that concerns itself with issues related to the law and its impacts on individuals, families, and the community. The following sections delineate several suggestions to practitioners, policy makers and researchers on how to utilize the results from this study to improve their application, interpretation and analysis of jury education and instruction, and the ongoing debate over capital punishment.

Legal policy and practice. This study provides significant weight to the argument that juridical instruction is, at best, problematic in imposition of the death penalty in the United States and warrants further study. Since 2006, several death penalty states, including North Carolina, New York, and Florida have issued partial or complete moratoria. Moreover, the American Bar Association (2010) has inaugurated a Death Penalty Moratorium Implementation Project, noting specifically that:

> Our system cannot protect the innocent unless the criminal justice system administers capital punishment in a fair and nondiscriminatory manner, protecting everyone within the system. Our system cannot protect the innocent unless the criminal justice system administers capital punishment in a fair and nondiscriminatory manner, protecting everyone within the system (p. 1).

Consequently, state-level branches of the American Bar Association (ABA) have issued calls for moratoria in several states, including Alabama, Arizona, Florida, Georgia, Tennessee, and Texas and have begun assessment proceedings and investigations specifically into the role of patterned or guided jury instructions, noting in an Executive Summary that:

> Jurors in capital cases have the awesome responsibility of deciding whether another person will live or die. Unfortunately, Georgia capital jurors are confused not only about the scope of mitigation evidence that they may consider, but also about the applicable burden of proof. Approximately 41% of interviewed Georgia capital jurors did not understand that they could consider any evidence in mitigation and 62.2% believed that the defense had to prove mitigating factors beyond a reasonable doubt (American Bar Association, 2006, pp. iii-iv)

These findings are markedly similar to national figures found as part of the Capital Jury Project (CJP) and results of both the national CJP sampling and state-level testing and validation of the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) conducted with potential Georgia jurors. Further research and testing of an instrument such as the BJICQ would contribute greatly to further research in jury instruction reform, and, should a state choose to utilize an instrument or take heed of comparative findings, evidence supports that it would greatly enhance reform efforts.

Study findings and implications for Furman *and* Gregg**.** As outlined in Chapter 1, *Furman v. Georgia* (1972) outlawed sentencing schemes that supported an arbitrary or capricious leveling of the death penalty, as clear violations of due process and, if disproportionately applied, the Constitutional prohibition of "cruel and unusual" punishment. Following the decision in *Gregg v. Georgia* (1976), sentencing schemes that allowed for a bifurcated trial procedure, finding of special circumstances, and the erecting of procedural safeguards that protected the discretionary power of the arbiter of fact, which, after *Ring v. Arizona* (2002), is considered the jury (though this is still disputed, as seen in jurisdictional battles in Florida and Alabama). Virtually all of the Supreme Court challenges heard since *Gregg* have been attempts to cement the position that procedural instructions are a sufficient legal remedy to the problems for capital sentencing delineated in the *Furman* opinion. They are, as it were, meant as a procedural "fix" to the problem of arbitrariness (Earl, 2005).

The results of this study suggest that, despite the voluminous amounts of argument and legal precedent, juror confusion exists in much the same way today as it did when *Furman* was first heard by the high court. As Hoffmann (2000) noted:

> The most direct judicial action a federal judge can take to block an unjust execution would be to rule that the death penalty is unconstitutional as applied to the individual defendant. Yet, with only a few rare exceptions, the Court has consistently declined to define the appropriate role of the federal courts in this way. Instead, as most lawyers are wont to do, the Court has tended to seek procedural solutions for substantive problems…This tendency dates all the way back to the start of the modern era of American death penalty law in the early 1970's, when the Court decided…*Furman v. Georgia*, and *Gregg v. Georgia*. [The] cases involved systemic challenges to the manner by which the death penalty was then being administered in the states. And the end result of the[se] cases was to change substantially that manner of administration (p. 1777-1778).

As viewed in Chapter 4, analysis of the Capital Jury Project (CJP) data suggests that jurors do not understand the substance of instructions given to them by the court, often despite understanding the process, as such. Moreover, efforts at obtaining clarification are often procedurally subverted. Analysis of both CJP and BJICQ findings suggest that definitional misunderstanding and statutory understanding of special circumstances of aggravation and mitigation are subject to large percentages of error and jurors are often lacking in a sense of preparedness to render sentence but are without recourse, statutorily, to do otherwise. Thus, in light of these findings, it is incumbent upon researchers to promote the study of existing law and policy and promote a structure that reviews, rather than attempts to revise, the existing scheme for capital punishment.

Social work policy and practice. It would seem, in reviewing the historical precedents for the ethical and epistemological arguments for and against the death penalty, that the policy

position of the National Association of Social Workers (NASW), as addressed in Chapter 1, is congruent with both the professional endorsement of social justice as both an central organizing principal and ethical mandate, not unlike a reformist, epistemological view, such as Beccaria's. However, it is important to note that NASW is functioning as an organization with a wide, diverse membership, and thus, functions much like a court in maintaining an appearance of impartiality, and allowing the organization's members the freedom to form individual opinions that exist outside of any organizational dictates that would appear to be incongruent with generally held ethical values (Steiker, 2005).

Just as there are prison guards today on America's death row who do not believe in the efficacy of the death penalty, there are surely social workers who believe it is an appropriate punishment and useful deterrent. That is not an issue explored in this dissertation. However, the policy position of NASW does point to an important philosophical consideration: that taking a stand against procedural wrongs in the application of the death penalty allows social workers, regardless of their own personal views, to better serve their clients, whether they are defendants, their families, victim's families, prosecutors, defense attorneys, or jurors. As attorney David Dow (2005) noted:

> People have opinions about the 'big' issue: whether capital punishment is moral or immoral, whether the state should or should not be in the business of executing its citizens. But that big issue is not really relevant, because the death penalty that people debate is not the death penalty we have (p. x).

Too often, saying an organization is "for" something is equated with saying that something is "right." Thus, when an organization like NASW (or the Catholic Church, or the American Bar Association) that formerly supported the death penalty recognizes the need for procedural

reforms, it no longer seems tenable to maintain support. That is not an attack on individual morals of its membership, but rather a shoring up of organizational ethics, setting guidelines for professional behavior that demand accountability and elicit responsibility in kind.

Social work practice, social justice, and emergent legal applications. Where the debate over capital punishment is founded mainly upon institutional grounds within social work policy, the potential practice implications found in this study are, by contrast, large and wide-ranging in scope (Beck & Jones, 2007-2008). This is, in part, because placing the debate around capital punishment into a firmly legalistic and procedural framework divorces it from its broader social implications. Whereas this study has presented several suggestions of how it is incumbent upon legal professionals to educate and properly instruct the people who make up juries, as discussed in Chapter 1, much of what social workers who work with victims, offenders, their families and communities, and those who have been wrongfully accused, sentenced, or imprisoned, are already doing contributes greatly to judicial reform (King, 2005; Sharp, 2005; Sinclair & Sinclair, 2009; Smykla, 1987; Vandiver, 1998). As Beck, et al. (2007) noted, the claim to social justice made by social workers and advocates:

> May help all those harmed by violent crimes…[when] experience has shown us that the criminal justice system does not do this on its own and that simply matching harm with a punishment may provide a superficial sense of justice, while the obligations created by the crime still go largely unmet. (p. 235).

In fact, the core values inherent within the theoretical conceptions of justice discussed in this study (legality, fairness, integrity, and equity) comport well with the conception of social justice espoused by social workers. As discussed in Chapter 1, this study shows how much of the practice devoted to the social fabric that surrounds the death penalty as it is administered in the

United States constitutes what Radelet (2001) termed "sociologically informed activism" (p. 83) and brings into sharp focus what, in King's (2005) words, "society not only overlooks…[but] we disregard" (p. 7).

As Nathanson has argued, the death penalty in America:

> Perpetuates and exacerbates the liabilities and disadvantages which unjustly befall many of our fellow citizens. These are genuine and serious problems, and those who have raised them in the context of the capital punishment debate have both exposed troubling facts about the actual workings of the criminal law and illuminated the difficulties of acting justly. Most importantly, they have produced a powerful argument against authorizing the state to use death as a punishment for crime (pp. 163-164).

This study hopes to contribute to the work of attorneys, social workers, mitigation specialists, sociologists, social psychologists, investigators, and jurors from all walks of life to address what can be seen as serious procedural flaws in jury instruction. Moreover, the current study seeks to connect its aims and direct its findings toward the growing area of research and practice in which much fruitful work has already been done, and promising opportunities lie ahead. The diverse fields that contribute are united in a single goal: to assist one another and the general public in developing the judicial system we all deserve.

Conclusion

This research study explored the impact of jury instructions on capital sentencing. In addition, it assessed the historical, philosophical, theoretical and conceptual frameworks that shape debate over the efficacy of capital punishment in America. The author suggested that, despite controversy, several commonalities exist among justice theories that are important to the

profession of social work and efforts at legal and procedural reform, as well as marked frequency among oppressed groups with which social work has traditionally identified. A review of the literature suggested that empirical study of jury instruction impact is necessary to assist in educating jurors and the public at large and, as such, support judicial review and legal and procedural reform.

In this study, a mixed-methodological design was used to compare the attitudes and experiences of former and potential capital jurors. In addition to review and analysis of a nationwide sample from the Capital Jury Project (CJP), a survey instrument, the Brief Jury Instruction Comprehensibility Questionnaire (BJICQ) was used to assess attitudes and comprehension of jury instructions. Chi-square and regression analyses were used to compare CJP respondents self-reports of jury instruction clarity, integrity, and sense of preparedness. Grounded theory allowed for the coding and analysis of CJP qualitative interview data. Finally, through the use of exploratory factor analysis (EFA) of the principal components, the reliability and validity of the BJICQ was tested and a robust single-factor construct of instruction comprehensibility was developed.

These results suggested that instruction content continues to have a significant impact on the decision-making of capital jurors. In general, capital jurors appear to have a disputatious relationship with court instructions, displaying high levels of misunderstanding and confusion. Therefore, by increasing the focus on jury instruction content and the ability of jurors to understand their roles and responsibilities, the courts of respective death penalty jurisdictions may influence the number death sentences handed down and increase the level of juror involvement and legally sound jury decision-making. However, issues of jury misunderstanding and erroneous instruction cast considerable doubt as to the institutional and procedural efficacy

of capital punishment as a legal remedy. Further studies must not only be aware of how the death penalty is currently applied, but also new unfolding developments that may dramatically change the judicial framework of capital punishment tomorrow.

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APPENDICES

APPENDIX A

CAPITAL JURY PROJECT JUROR INTERVIEW INSTRUMENT

JUROR INTERVIEW INSTRUMENT

National Study of Juror Decision Making in Capital Cases

Central Office: Justice Research Center
College of Criminal Justice
Northeastern University
Boston, Massachusetts
02115

CONTENTS

I. FACE SHEET

1.Defendant's name: _____/_____
(last) (first)

2.Trial dates: ___/___/____ (jury selection began)

___/___/____ (jury's sentencing verdict)
(mo)(dy)(yr)

location: _____/_____/_____
(town/city) (county) (state)

sentence: ___ death sentence
___ prison term of _____

3.Juror's name: _____/_____
(last) (first)

address: _____

_____/_____/_____
(city/town) (state) (zip)

phone: _____/_____/_____
(home) (work) (other)

4.Interview date: _____/_____/_____
(month) (day) (year)

place: _____

_____

5.Interviewer's name: _____/_____
(last) (first)

INTERVIEW STARTING TIME: _____:_____/_____
(hr) (min) (am/pm)

II. THE CASE

THE GROUND RULES ARE THAT YOU SHOULD INTERRUPT AS WE GO ALONG TO MAKE THINGS CLEAR AND TO TELL ME WHAT YOU THINK IS IMPORTANT. WE ARE HERE TO LEARN FROM YOUR EXPERIENCE, SO DO NOT HESITATE TO BRING UP ANYTHING YOU THINK WILL HELP US UNDERSTAND WHAT IT WAS LIKE FOR YOU AS A JUROR ON THIS CASE.

I'D LIKE TO BEGIN WITH SOME VERY GENERAL QUESTIONS ABOUT THE (THE DEFENDANT'S) _____'S CASE.

1.Did this case attract much attention in your community?

___ a great deal
___ a fair amount
___ not very much
___ none at all

2.Did any of your friends or neighbors come to the trial?

___ many did
___ some did
___ a few did
___ none did

II.A THE CRIME

1. Now, I'd like you to tell me about the crime. In your own words, give me the details I need to understand what happened and why.

(RECORD THE ELEMENTS OF THE RESPONDENT'S NARRATIVE IN SEQUENCE AS S/HE RELATES THEM. THE ELEMENTS COULD INCLUDE FACTS OR CIRCUMSTANCES OF THE CRIME, REASONS WHY THINGS HAPPENED, CHARACTER OR MOTIVES OF THE DEFENDANT AND/OR VICTIM(S), ETC.)

Element #1

_____
_____
_____
_____

Element #2

_____
_____

Element #3

Element #4

Element #5

Element #6

Element #7

Element #8

Element #9

Element #10

2.In your mind, how well do the following words describe the killing?

1 very well **2** fairly well **3** not so well **4** not at all

___ bloody
___ gory
___ vicious
___ depraved
___ calculated
___ cold blooded
___ senseless
___ repulsive
___ the work of a "mad man"
___ it made you feel sick to think about it
___ the victim(s) was/were made to suffer before death
___ the body(ies) was/were maimed or mangled after death
___ other, specify _____
_____
_____

3.Is there anything about this case that sticks in your mind, or that you keep thinking about?

4.Now let me make sure I have some basic facts straight.

a. As I understand it, there was/were . . .

#_____ person(s) killed
#_____ person(s) injured
#_____ person(s) responsible for the killing

b. Do you remember the victim's(s') name(s)?

V1 _____
V2 _____
V3 _____

(IF MORE THAN ONE,) which one did you find most memorable or think most about?

(INDICATE BY CIRCLING V1, V2, OR V3 ABOVE)

c. I'd like some facts about the defendant(s) and victim(s). When you're not sure, just give me your best guess. I'll note that you're not sure.

(USE "_" LETTERS TO INDICATE RESPONSES; ADD "?" MARK TO INDICATE "NOT SURE"; MAKE ADDITIONAL COLUMNS FOR MORE THAN THREE DEFENDANTS OR VICTIMS)

	Defendant(s)			Victim(s)		
	D1	D2	D3	V1	V2	V3
MALE/FEMALE	_____	___	___	___	___	___
WHITE/BLACK/ HISPANIC/OTHER	_____	___	___	___	___	___
Age (# YRS)	_____	___	___	___	___	___
Education (# YRS)	_____	___	___	___	___	___
MARRIED/SINGLE	___	___	___	___	___	___
Children (#)	_____	___	___	___	___	___

Occupation (WHEN LAST EMPLOYED)

D1 _____ V1 _____

D2 _____ V2 _____

D3 _____ V3 _____

5. Were the defendant(s) and victim(s) related in any of the following ways?

(IF MORE THAN ONE DEFENDANT OR VICTIM, INDICATE PAIR SPECIFIC RELATIONSHIPS, E.G. D1-V3 SPOUSE)

1 yes **2** no **3** not sure (FOR D1-V1)

___ spouse, ex-spouse
___ family relations
___ neighbors
___ friends
___ acquaintances
___ strangers
___ lovers
___ co-workers
___ employer/employee
___ tenant/landlord
___ other relationship, specify_____

6.How Often did the defense and prosecuting attonreys most often refer to the defendant in court?

Defense attorney(s) most often used ...

Prosecuting attorney(s) most often used ...

___	___	last name preceded by Mr./Mrs./Ms.
___	___	last name only (no formal address)
___	___	first name
___	___	first and last name
___	___	nickname, (IF SO, SPECIFY) _____
___	___	the impersonal phrase "the defendant"

7.Which of these names for the defendant should I use in the following questions I have about him/her?

_____

II.B THE DEFENDANT(S)

NOW, I'D LIKE TO GET YOUR PERSONAL IMPRESSIONS OF (THE DEFENDANT) _____ . (THE ONE NAMED ON THE FACE SHEET IN Q.#I.1, IF MORE THAN ONE)

1. In your mind, how well do the following words describe (DEF) _____

1 very well **2** fairly well **3** not well **4** not at all

___	from a poor or deprived background
___	a "loner" without many friends
___	doesn't know his/her place in society
___	doesn't know right from wrong
___	has gotten a raw deal in life
___	vicious like a mad animal
___	mentally defective or retarded
___	emotionally unstable or disturbed
___	dangerous to other people
___	went crazy when s/he committed the crime
___	sorry for what s/he did
___	severely abused as a child
___	raised in a warm loving home
___	someone who loved his/her family
___	lacks basic human instincts
___	drug addict
___	occasional drug abuser

___ alcoholic
___ occasional alcohol abuser
___ had a history of violence and crime
___ a good person who got off on the wrong foot
___ other, specify _____
_____

2. Did (DEF) _____ remind you of someone or make you think about anyone?

___ no
___ yes; (IF SO,) who? Describe the person(s).

3. What did (DEF) _____ usually wear in court?

___ a business suit, coat and tie
___ casual civilian clothes
___ prison clothing or a uniform
___ can't remember

4. How did (DEF) _____ appear to you during the trial?

___

1 yes **2** no

___ uncomfortable or ill at ease
___ bored (i.e., indifferent, remote)
___ spruced up to make a good appearance
___ frightening (i.e., threatening, defiant)
___ sorry for what s/he had done
___ sincere, (i.e., honest)
___ self confident
___ bitter (i.e., resentful)
___ other, specify _____
_____

5. How did the defense attorney(s) treat (DEF) _____ ?

___ acted like (DEF) _____ wasn't even there
___ occasionally spoke to (DEF) _____, but mostly ignored him or her
___ frequently talked to (DEF) _____, but didn't seem to involve him or her in their decisions
___ seemed to have a close working relationship with (DEF) _____ as part of the defense team

6. Did (DEF) _____'s mood or attitude change after the guilty verdict was handed down and the focus of the trial shifted to what the punishment should be?

___ no
___ yes; (IF SO,) how?

7. Did you have any of the following thoughts or feelings about (DEF) _____?

1 yes **2** no

___ found (DEF) _____ frightening to be near
___ felt anger or rage toward (DEF) _____
___ felt pity or sympathy for (DEF) _____
___ found (DEF) _____ likable as a person
___ was disgusted or repulsed by (DEF) _____
___ couldn't stand to look at (DEF) _____
___ imagined being like (DEF) _____
___ imagined yourself in (DEF) _____'s situation
___ other reactions, specify _____
_____

8. Did any of (DEF) _____'s family members come to the trial?

___ no, I am sure they did not
___ no, I don't think so
___ yes, I think so
___ yes, I am sure they did

(IF YES,) indicate which family member(s) you think/are sure were at the trial:

(IF YES,) did any member of (DEF) _____'s family remind you of someone or make you think about anyone?

___ no
___ yes; (IF SO,) who? Describe the person(s).

9. Whether or not they came to the trial, did you have any of the following thoughts or feelings about (DEF) _____'s family?

1 yes **2** no **3** (NOT SURE, NO ANSWER)

___ imagined yourself in their situation
___ felt anger or rage toward (DEF) _____'s family
___ felt contempt or hatred for (DEF) _____'s family

___ felt sympathy or pity for (DEF) _____'s family
___ they seemed very different from your own family
___ wished you knew (DEF) _____'s family personally
___ imagined yourself as a member of (DEF) _____'s family
___ other reactions, specify _____
_____

II.C THE VICTIM(S)

NEXT, I'D LIKE TO GET YOUR PERSONAL IMPRESSIONS OF (THE VICTIM) _____. (IF MORE THAN ONE, THE VICTIM "YOU THOUGHT MOST ABOUT" OR FOUND MOST "MEMORABLE" FROM Q.#II.A.4.)

1.In your mind, how well do the following words describe (THE VICTIM) _____?

1 very well **2** fairly well **3** not well **4** not at all

___ admired or respected in the community
___ from a poor or deprived background
___ raised in a warm loving home
___ someone who loved his/her own family
___ a "loner" without many friends
___ had a wonderful future ahead
___ was an innocent or helpless victim
___ had an unstable or disturbed personality
___ had a problem with drug or alcohol
___ was too careless or reckless
___ other, specify _____
_____

2. Did (VIC) _____ remind you of someone or make you think about anyone?

___ no
___ yes; (IF SO,) who? Describe the person(s).

3. Did you have any of the following thoughts or feelings about (VIC) _____?

1 yes **2** no

___ admired or respected (VIC) _____
___ imagined yourself in (VIC) _____'s situation
___ imagined yourself as a friend of (VIC) _____
___ imagined (VIC) _____ as a member of your own family

___ felt grief or pity for (VIC) _____
___ were disgusted or repulsed by (VIC) _____
___ wished (VIC) _____ had been more careful
___ other reactions, specify _____
_____

4. Did any of (VIC) _____'s family members come to the trial?

___ no, I am sure they did not
___ no, I don't think so
___ yes, I think so
___ yes, I am sure

(IF YES,)indicate which family member(s) you think/are sure were at the trial:

IF YES,)did any member of (VIC) _____'s family remind you of someone or make you think about anyone?

___ no
___ yes; (IF SO,) who? Describe the person(s).

5.Whether or not they came to the trial, did you have any of the following thoughts or feelings about (VIC) _____'s family?

1 yes **2** no **3** (NOT SURE, NO ANSWER)

___ imagined yourself in their situation
___ felt their grief and sense of loss
___ felt distant or remote from them
___ felt they were partly to blame for what happened
___ they seemed very different from your own family
___ wished you knew (VIC) _____'s family personally
___ imagined yourself as a member of (VIC) _____'s family
___ other reactions, specify _____
_____

III. THE TRIAL

LET'S TURN NOW TO THE TRIAL, AND TALK ABOUT YOUR EXPERIENCE AND IMPRESSIONS AS A JUROR. RECALL THAT YOU FIRST HEARD EVIDENCE ABOUT (DEF) _____'S GUILT AND DECIDED WHETHER S/HE WAS GUILTY OR NOT GUILTY; YOU THEN HEARD EVIDENCE ABOUT WHAT THE PUNISHMENT SHOULD BE AND DECIDED WHETHER OR NOT TO GIVE (DEF) _____ THE DEATH PENALTY.

1.How well do you remember each of the following stages of the trial?

1 very well **2** fairly well **3** not well **4** not at all

___ the selection of the jury
___ hearing evidence about (DEF) _____'s guilt
___ jury deliberations about (DEF) _____'s guilt
___ hearing evidence about (DEF) _____'s punishment
___ jury deliberations about (DEF) _____'s punishment

2. Did any part of the trial seem too long to you or make you impatient?

1 yes **2** no

___ the selection of the jury
___ hearing evidence about (DEF) _____'s guilt
___ jury deliberations about (DEF) _____'s guilt
___ hearing evidence about (DEF) _____'s punishment
___ jury deliberations about (DEF) _____'s punishment

3.When the trial bega, did you know that the jury would decide what the punishment should be, if it found the defendant guilty of capital murder, that is murder for which the death penalty could be imposed?

___ no
___ yes
___ not sure

III.A GUILT TRIAL

LET'S NOW TURN TO THE FIRST PART OF THE TRIAL, WHERE YOU HEARD EVIDENCE ABOUT WHETHER OR NOT (DEF) _____ WAS GUILTY.

1.How many days in court did it take to hear all the evidence about whether or not (DEF) _____ was guilty?

____# of (FULL AND PARTIAL) days in court

2. To the best of your memory, roughly how many people testified or presented evidence about whether (DEF) _____ was guilty or not guilty? About how many . . .

_____# testified for the prosecution

_____# testified for the defense

3.What kinds of evidence did the prosecutor use to link (DEF) _____ to the crime?

1 yes **2** no **3** not sure

___ formal confession to authorities by (DEF) _____
___ testimony of an accomplice or co-defendant
___ fingerprint identification
___ other scientific evidence, such as blood or hair analysis, ballistics tests etc.
___ testimony of a medical or forensic expert
___ photographs of the crime scene
___ photographs of the victim's body showing the manner of the killing
___ DNA typing

4. Did any witness other than the police or an accomplice testify that he or she . . .

1 yes **2** no **3** not sure

___ actually saw (DEF) _____ commit the crime
___ heard (DEF) _____ admit the crime
___ could place (DEF) _____ at the time and location of the crime
___ knew of a motive (DEF) _____ had for the crime

5.What was (DEF) _____'s main motive for the murder, according to the prosecutor?

6.What were the main reasons why (DEF) _____ should be found not guilty, according to the defense?

1 yes **2** no **3** (NOT SURE, NO ANSWER)

___ (DEF) _____ had no role whatsoever in the killing
___ (DEF) _____ had only a minor role in the killing
___ (DEF) _____ killed in self defense
___ (DEF) _____ killed in defense of others
___ (DEF) _____ was provoked by the victim or others

___ it was an unintentional or impulsive act
___ it was an accident or mistake
___ (DEF) _____ was mentally ill and could not fully appreciate the wrongfulness of his/her actions
___ (DEF) _____ was insane
___ (DEF) _____ simply was not proved guilty beyond a reasonable doubt
___ other, specify _____
_____

7.Did you find the testimony of any of the witnesses for the prosecution or the defense hard to believe?

___ no
___ yes; (IF SO,) which witnesses, what testimony, and why?

8.Did (DEF) ____ testify at the guilt stage of the trial?

___ no; (IF NO,) what impression did this make on you?
___ yes; (IF SO,) what impression did s/he make on you?

9.What do you think was the strongest evidence of (DEF) _____'s guilt?

10.After you heard the judge's instructions to the jury for deciding about (DEF) _____'s guilt, but before you began deliberating with the other jurors, did you then think (DEF) _____ was . . .

___ guilty of capital murder; that is, murder for which the death penalty could be imposed
___ guilty, but not of capital murder
___ not guilty
___ undecided

(IF GUILTY OF CAPITAL OR NONCAPITAL MURDER,)

a. How strongly did you think so?

___ absolutely convinced
___ pretty sure
___ not too sure

b. When did you first think so?

(PROBE FOR TIMING: PRETRIAL; JURY SELECTION; EVIDENCE, ARGUMENTS, OR INSTRUCTIONS ON GUILT)

III.B GUILT DELIBERATIONS

LET'S NOW TALK ABOUT HOW THE JURY DECIDED WHETHER (DEF) _____ WAS GUILTY OR NOT GUILTY.

1. About how long did it take the jury to reach its verdict about (DEF) _____'s guilt?

____# of days; ____# of hours; ____# of minutes

2.How much did the discussion among the jurors focus on the following topics?

1 great deal **2** fair amount **3** not much **4** not at all

___ (DEF) _____'s background or upbringing
___ (DEF) _____'s history of crime and violence
___ (DEF) _____'s motives or reasons for the crime
___ (DEF) _____'s role or responsibility in the crime
___ (DEF) _____'s mental condition or sanity
___ alcohol as a factor in the crime
___ drugs as a factor in the crime
___ (DEF) _____'s dangerousness if ever back in society
___ (DEF) _____'s dangerousness to others in prison
___ pain and suffering of the victim
___ loss and grief of the victim's family
___ brutal or vile manner of the killing
___ strengths or weaknesses of the evidence of guilt
___ believability of certain witnesses
___ (DEF) _____'s appearance or manner in court
___ the ways the attorneys presented their cases
___ jurors' feelings for the family of the victim
___ jurors' feelings toward (DEF) _____
___ jurors' feelings about the right punishment
___ the judge's instructions to the jury
___ the meaning of "proof beyond a reasonable doubt"
___ other topics, specify _____
_____

3. Among the topics you did discuss, what were the main areas or points on which jurors disagreed?

4. Among the topics you did discuss, what was the single most important factor in the jury's decision about (DEF) _____'s guilt?

5.Was there any discussion of whether (DEF) _____ was guilty of murder, but not of capital murder?

___ no
___ yes; (IF SO,) what were the main points?

6. In deciding guilt, did jurors talk about whether or not (DEF) _____ would, or should, get the death penalty?

___ no
___ yes; (IF SO,) what did they say?

61.In deciding guilt, was there any discussion of what the punishment might be if the defendant was found guilty of less than capital murder

___ no
___yes (if so,) what did most jurors think the punishment would be?

62. what did you think the defendant's punishment would be if s/he was found guilty of less than capital murder?

63.Was there any discussion among the jurors about the meaning of "proof beyond a reasonable doubt?"

___ no
___ Yes (if so,) what did the jurors think it meant?

64.During your guilt deliberations, did the jury stop to ask the judge any questions?

___ no
___yes (if so,) what was/were the question(s), what was the judge's response, and what was the jury's reaction?

7. Were any jurors reluctant to go along with the majority on (DEF) _____'s guilt?

___ no
___ yes; (IF SO,) were you at all reluctant? ___ yes
___ no

8. About how much time passed before the first jury vote was taken on whether (DEF) _____ was guilty of murder?

___ less than 10 minutes
___ 10 to 20 minutes
___ 20 to 40 minutes
___ 40 to 60 minutes
___ 1 to 2 hours
___ more than 2 hours

9. When the first jury vote on the murder charge was taken, roughly how many jurors . . .

_____# voted guilty of capital murder
_____# voted guilty of a lesser crime
_____# voted not guilty
_____# were undecided
(= 12)

10. When the first jury vote was taken, how did you vote?

___ guilty of capital murder
___ guilty of a lesser crime
___ not guilty
___ undecided

(IF NOT GUILTY OF CAPITAL MURDER,) what caused you to change your vote to guilty by the final ballot?

11.Can you think of anything more we haven't talked about yet that was important in understanding the jury's guilt decision?

12. After the jury found (DEF) _____ guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think (DEF) _____ should be given . . .

___ a death sentence
___ a life (OR THE ALTERNATIVE) sentence
___ undecided

(IF A DEATH OR A LIFE SENTENCE,)

a. How strongly did you think so?

___ absolutely convinced
___ pretty sure
___ not too sure

b. When did you first think so?

(PROBE FOR TIMING: PRETRIAL; JURY SELECTION; GUILT EVIDENCE, ARGUMENTS, INSTRUCTIONS,OR DELIBERATIONS)

13. Did you believe that once you had convicted (DEF) _____ of this particular kind of murder, the law of this state made the death penalty . . .

___ the only acceptable punishment
___ the most appropriate punishment
___ just one available punishment

III.C SENTENCING TRIAL

LET'S TURN NOW TO THE SECOND PART OF THE TRIAL, WHERE YOU HAD TO DECIDE WHAT THE PUNISHMENT SHOULD BE.

1.How many days in court did it take to hear all the evidence about what (DEF) _____'s punishment should be?

____# of (FULL AND PARTIAL) days in court

2.To the best of your memory, about how many people testified or presented evidence about what (DEF) _____'s punishment should be? Roughly how many. . .

_____# testified for the prosecution

_____# testified for the defendant

3. Did the prosecution witnesses at the punishment stage of the trial include . . .

1 yes **2** no **3** not sure

___ the arresting or investigating police officers
___ any other law enforcement or corrections personnel
___ a medical or forensic expert
___ a psychologist or psychiatrist
___ an expert on the death penalty
___ any others involved in the crime
___ an employer, co-worker or business acquaintance of the victim(s)
___ a friend or neighbor of the victim(s)
___ a family or ex-family member of the victim(s)
(IF SO,) specify relation _____
_____
___ others not listed; specify _____
_____
_____

4.What prosecution evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

5.Did any of the testimony by prosecution witnesses at the punishment stage of the trial "backfire," or actually hurt their case?

___ no
___ yes; (IF SO,) explain

6.Did the defense witnesses at the punishment stage of the trial include . . .

1 yes **2** no **3** not sure

___ a clergyman who knows (DEF) _____
___ a school teacher of (DEF) _____
___ a social worker or investigator familiar with (DEF) _____'s background and upbringing
___ a medical or forensic expert
___ a psychological or psychiatric expert
___ an expert on the death penalty
___ any others involved in the crime
___ an employer, co-worker or business acquaintance of (DEF) _____
___ a friend or neighbor of (DEF) _____
___ a family or ex-family member of (DEF) _____
(IF SO,) specify relation _____
_____
___ others not listed; (IF SO,) please specify _____
_____

7.What defense evidence or witness at the punishment stage of the trial was most important or influential, in your mind, and why?

8.Did any of the testimony by defense witnesses at the punishment stage of the trial "backfire," or actually hurt their case?

___ no
___ yes; (IF SO,) explain

9. How much did the prosecutor's evidence and arguments at the punishment stage of the trial emphasize . . .

1 great deal **2** fair amount **3** not much **4** not at all

___ the death penalty is what (DEF) _____ deserved
___ the death penalty will deter others from killing
___ the death penalty will keep (DEF) _____ from killing again
___ the character and motives of (DEF) _____
___ past crime or violence of (DEF) _____

___ drugs as a factor in this crime
___ the brutal or savage character of this crime
___ the reputation and character of the victim(s)
___ the pain and suffering of the victim(s)
___ the loss and grief of victim's(s') family(ies)
___ the punishment wanted by victim's(s') family(ies)
___ (DEF) _____'s dangerousness to others in prison
___ danger to the public if (DEF) _____ ever escaped or was released from prison
___ how (DEF) _____ or this crime compare to other criminals or crimes
___ other topics, specify_____
_____
_____

10.How much did the defense evidence and arguments at the punishment stage of the trial emphasize . . .

1 great deal **2** fair amount **3** not much **4** not at all

___ the death penalty is not humane
___ the death penalty is not a superior deterrent
___ (DEF) _____'s abuse or mistreatment as a child
___ the influence of mental illness on (DEF) _____
___ the influence of alcohol on (DEF) _____
___ the influence of drugs on (DEF) _____
___ how factors (DEF) _____ could not control led to the crime
___ the recklessness or provocation of the victim(s)
___ the major responsibility of others for the crime
___ the risk of mistakenly executing the wrong person
___ basic human qualities and potential of (DEF) _____
___ that (DEF) _____ was sorry or asked for mercy
___ how (DEF) _____ had changed since this crime
___ that (DEF) _____ had become a model prisoner
___ that (DEF) _____ had found religion
___ how (DEF) _____ or this crime compared to other criminals or crimes
___ other topics, specify _____
_____
_____

11.Did (DEF) _____ testify or make a closing statement at the punishment stage of the trial?

___ no
___ yes, as a sworn witness who could be examined and cross examined by the attorneys
___ yes, though not as a sworn witness, but only to make a closing statement to the jury

(IF NO,) what kind of impression did this make on you?
(IF YES,) what kind of impression did s/he make on you?

12. What did the prosecutor stress most as the reason why (DEF) _____ should get the death penalty?

13. What did the defense attorney stress most as the reason why (DEF) _____ should not get the death penalty?

14. What do you remember about the judge's instructions to the jury for deciding what the punishment should be?

(NOTE IF RESPONDENT USES THE TERMS "AGGRAVATING" AND/OR "MITIGATING")

15. After hearing all the evidence and the judge's instructions to the jury for deciding on the punishment, but before you began deliberating with the other jurors, did you then think (DEF) _____ should be given . . .

___ a death sentence
___ a life (OR THE ALTERNATIVE) sentence
___ undecided

(IF A DEATH OR A LIFE SENTENCE,)

a. How strongly did you think so?

___ absolutely convinced
___ pretty sure
___ not too sure

b. When did you first think so?

(PROBE FOR TIMING: PRETRIAL; JURY SELECTION; GUILT EVIDENCE, ARGUMENTS, INSTRUCTIONS, OR DELIBERATIONS; PUNISHMENT EVIDENCE)

16. After hearing all of the evidence, did you believe it proved that . . .

1 yes **2** no **3** undecided

___ (DEF) _____'s conduct was heinous, vile or depraved
___ (DEF) _____ would be dangerous in the future

17. After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that . . .

1 yes **2** no

___ (DEF) _____'s conduct was heinous, vile or depraved
___ (DEF) _____ would be dangerous in the future

18. From what you could tell, did you think the judge believed (DEF) _____ should be sentenced to death?

___ pretty sure the judge favored a death sentence
___ pretty sure the judge opposed a death sentence
___ think the judge favored a death sentence
___ think the judge opposed a death sentence
___ had no idea what the judge favored or opposed

III.D SENTENCING DELIBERATIONS

NOW WE'RE READY TO TALK ABOUT HOW THE JURY DECIDED WHAT THE DEFENDANT'S PUNISHMENT SHOULD BE.

1. In your own words, can you tell me what the jury did to reach its decision about (DEF) _____'s punishment? How did the jury get started; what topics did it discuss, in what order; what were the major disagreements and how were they resolved?

(RECORD THE ELEMENTS OF THE RESPONDENT'S NARRATIVE IN SEQUENCE AS S/HE RELATES THEM.)

Element #1

_____
_____
_____
_____

Element #2

_____
_____
_____
_____

Element #3

_____
_____
_____

Element #4

_____
_____
_____

Element #5

_____
_____
_____
_____

Element #6

_____
_____
_____
_____

2. How much did the discussion among the jurors focus on the following topics?

1 great deal **2** fair amount **3** not much **4** not at all

___ (DEF) _____'s background or upbringing
___ (DEF) _____'s history of crime or violence
___ (DEF) _____'s role or responsibility in the crime
___ (DEF) _____'s motive for the crime
___ (DEF) _____'s planning or premeditation
___ (DEF) _____'s IQ or intelligence
___ (DEF) _____'s sorrow, remorse, or lack of it
___ (DEF) _____'s appearance or manner in court
___ alcohol as a factor in the crime

___ drugs as a factor in the crime
___ mental illness as a factor in the crime
___ insanity as a factor in the crime
___ (DEF) _____'s dangerousness to others in prison
___ (DEF) _____'s dangerousness if ever back in society
___ how likely s/he would be to get a parole or pardon
___ how long before s/he would get a parole or pardon
___ need to prevent him/her from ever killing again
___ death penalty as a deterrent to killings by others
___ death penalty as what (DEF) _____ deserved
___ reputation or character of the victim(s)
___ the victim(s)' role or responsibility in the crime
___ innocence or helplessness of the victim(s)
___ pain or suffering of the victim(s) before death
___ loss or grief of victim's(s') family(ies)
___ punishment wanted by victim's(s') family(ies)
___ the way in which the victim(s) was/were killed
___ how weak or strong the evidence of guilt was
___ how well the attorneys presented their cases
___ jurors' own attitudes about capital punishment
___ jurors' feelings for the family of the victim
___ jurors' feelings toward (DEF) _____
___ jurors' feelings toward (DEF) _____'s family
___ what religious beliefs require
___ what moral values require
___ what community feelings require
___ what the law requires
___ similarity to other crimes and other murderers
___ other, specify _____
_____
_____

3. Among the topics you did discuss, what was the single most important factor in the jury's decision about what (DEF) _____'s punishment should be?

4. Among the topics you did discuss, what were the main areas or points on which jurors disagreed?

5. Did you have any difficulty understanding or following the judge's sentencing instructions to the jury?

___ no
___ yes; (IF SO,) explain

6.During your sentencing deliberations, did the jury stop to ask the judge . . .

1 yes **2** no

___ for further explanation of the law or clarification of the instructions to the jury
___ for an indication of what would happen if the jury could not reach a decision
___ for a review or transcript of certain testimony
___ for information on how long before (DEF) _____ could be released if not given a death sentence
___ for other information or instructions, specify ____
_____
_____

(IF SO,)what was the judge's response and what was the jury's reaction?

7.Would you say the judge's sentencing instructions to the jury . . .

1 yes **2** no

___ simplified the decision making process
___ confused the decision making process
___ helped jurors reach agreement
___ actually led to disagreement
___ simply provided a framework for the decision most jurors had already made
___ had little or no influence on the jury's decision

8.Were any jurors especially reluctant to go along with the majority on (DEF) _____'s punishment.

___ no
___ yes; (IF SO,) were you at all reluctant?

___ no
___ yes (IF SO,) what were your reasons?

9.About how much time passed before the first jury vote was taken on what sentence to impose?

___ less than 10 minutes
___ 10 to 20 minutes

___ 20 to 40 minutes
___ 40 to 60 minutes
___ 1 to 2 hours
___ more than 2 hours

10. When the first jury vote was taken, roughly how many of the jurors . . .

_____# voted for a death sentence
_____# voted for a life (OR ALTERNATIVE) sentence
_____# were undecided
(= 12)

11. As best you can remember, how many votes did the jury take on what sentence to impose?

_____# of votes

12. About how long, overall, did the jury deliberate on (DEF) _____'s punishment in order to reach its final decision?

____# of days; ____# of hours; ____# of minutes

13.Can you think of anything more we haven't talked about yet that was important in understanding the jury's punishment decision?

IV. THE RESPONDENT'S SENTENCING DECISION

NOW I WANT TO ASK HOW YOU REACHED YOUR OWN DECISION ABOUT WHAT THE PUNISHMENT SHOULD BE.

1.How important were the following considerations for you in deciding on what (DEF) _____'s punishment should be?

1 very **2** fairly **3** not very **4** not at all

___ sentences imposed for similar crimes
___ sentences imposed on similar defendants
___ the pain and suffering of the victim(s)
___ the loss and grief of the victim(s) family(ies)
___ the punishment wanted by the victim(s) family(ies)
___ your feelings about what such crimes deserve
___ the principle of an eye for an eye
___ the goal of rehabilitation
___ keeping (DEF) _____ from ever killing again
___ keeping other people from killing
___ lingering doubts about (DEF) _____'s guilt

___ the vicious or brutal manner of the killing
___ feelings of vengeance or revenge
___ desire to avoid a horrible mistake
___ desire to avoid deliberately killing someone
___ weight of aggravating and mitigating factors
___ desire to see justice done
___ desire to apply the law correctly
___ desire to see the law enforced
___ community outrage over this crime
___ punishment wanted by most members of the community
___ feelings of compassion or mercy for (DEF) _____
___ the belief that (DEF) _____ should have a chance to pay for the crime and become a law abiding citizen
___ other, specify _____
_____
_____

2.When you were considering the punishment, did you have any of the following thoughts about (DEF) _____'s guilt; for instance, that s/he . . .

1 yes **2** no **3** not sure

___ might be altogether innocent, a case of mistaken identity
___ definitely had planned or intended to kill the victim, but might not be the one who did so
___ definitely killed the victim, but might not have planned, intended, or wanted to do so
___ might not be one most responsible for the killing

3.When you were considering the punishment, did you believe that (DEF) _____ was truly sorry for the crime?

___ yes, sure (DEF) _____ was sorry
___ yes, think (DEF) _____ was sorry
___ not sure, (DEF) _____ acted sorry but it might have been just a show
___ no, (DEF) _____ acted sorry but it was a show
___ no, (DEF) _____ didn't even pretend to be sorry

4.How true are the following statements about the role of mercy in your decision about (DEF) _____'s punishment?

1 very true **2** fairly true **3** not very true **4** not true

___ the idea of mercy never occurred to you
___ the law required the jurors to decide about punishment without thinking about mercy

___ (DEF) _____ didn't deserve mercy because s/he didn't show any toward the victim(s)
___ If (DEF) _____ wanted mercy, s/he should have admitted his/her guilt from the very beginning
___ (DEF) _____ deserved mercy because s/he was sorry
___ (DEF) _____ deserved mercy due to mental problems
___ (DEF) _____ deserved mercy because other people wanted to see him/her have another chance
___ (DEF) _____ deserved mercy because you felt s/he would try to make up for what s/he did

5.How well do these statements reflect the thoughts or feelings you had as you considered the punishment?

1 very well **2** fairly well **3** not so well **4** not at all

___ anyone who commits such a crime must be crazy; you have to be out of your mind to do such a thing
___ saying (DEF) _____ was sorry isn't worth much after saying s/he wasn't guilty
___ drugs and alcohol aren't excuses; they make the crime worse, so the punishment should be worse
___ saying (DEF) _____ was mentally ill is just trying to play on our emotions

6. When you were considering the punishment, were you concerned that (DEF) _____ might get back into society someday, if not given the death penalty?

___ yes, greatly concerned
___ yes, somewhat concerned
___ yes, but only slightly concerned
___ no, not at all concerned

7.How long did you think someone not given the death penalty for a capital murder in this state usually spends in prison?

_____ # of years

8.How likely did you think it was that murderers sentenced to death in this state will be executed?

___ nearly all will eventually be executed
___ most will be executed
___ about half will be executed
___ less than half will be executed
___ very few will ever be executed

9.How likely did you think it was that a jury decision for the death penalty would be accepted or rejected by the trial judge?

___ the judge must accept the jury's decision; it's final
___ the judge would probably accept the jury's decision
___ the judge would probably reject the jury's decision
___ had no idea what the judge would do

10. How likely did you think it was that a death sentence in this case would be accepted or rejected by the appeals courts?

___ appeals courts accept nearly all death sentences
___ appeals courts accept most death sentences
___ appeals courts reject as many as they accept
___ appeals courts reject most death sentences
___ appeals court reject nearly all death sentences
___ had no idea what the appeals courts would do

11.Did the chances that your punishment decision might by overruled or changed make you feel . . .

1 yes **2** no **3** not sure

___ good, because you would not have the death of another human being on your conscience
___ good, because it meant that any mistakes we might have made could be corrected
___ bad, because it makes our sentencing decision less important
___ bad, because it means that (DEF) _____ might not get what s/he deserves

12.When you were considering the punishment, did you think that whether (DEF) _____ lived or died was. . .

___ strictly the jury's responsibility and no one else's
___ mostly the jury's responsibility, but the judge or appeals courts take over responsibility whenever they overrule or change the jury's decision
___ partly the jury's responsibility and partly the responsibility of the judge and appeals courts who review the jury's sentence in all cases
___ mostly the responsibility of the judge and appeals courts; we make the first decision but they make the final decision

13. Rank the following from "most" through "least" responsible for (DEF) _____'s punishment.

Give **1** for most through **5** for least responsible

___ the law that states what punishment applies
___ the judge who imposes the sentence
___ the jury that votes for the sentence
___ the individual juror since the jury's decision depends on the vote of each juror
___ (DEF) _____ because his/her conduct is what actually determined the punishment

14.When the first jury vote was taken on the punishment to be imposed, did you vote for a . . .

____ death sentence
____ life (or alternative) sentence
___ undecided

15. Was your final vote the same as your first vote?

___ yes
___ no; (IF NO,) what caused you to change your mind?

16.Was there any information you did not have about (DEF) _____ or his/her crime that you feel would have helped in making your decision about punishment?

____ no
____ yes; (IF SO,) what information?

17.What information about (DEF) _____ or the crime could have made you change your mind about what the punishment should be?

IV.A DECISION MODELS

JURORS HAVE DIFFERENT WAYS OF MAKING HARD DECISIONS ABOUT PUNISHMENT. I'M GOING TO DESCRIBE SOME OF THE WAYS JURORS GO ABOUT IT, AND ASK IF YOU USED ANY OF THESE APPROACHES.

1.Some jurors feel that the decisions about guilt and punishment go together once they understand what happened and why; other jurors feel these are separate decisions based on different considerations. Which comes closest to the approach you took?

___ made your guilt and punishment decisions together on the basis of similar considerations
___made your guilt and punishment decisions separately on the basis of different considerations
___ (CAN'T CHOOSE OR SAY THEY DID BOTH)

2. In making your punishment decision, did you compare (DEF) _____ or his/her crime to any other murderers or murder cases you knew about?

___ no, not at all
___ yes, to a minor extent; (IF SO,) . . .
___ yes, to a major extent; (IF SO,) . . .

a. What other case(s) or murderer(s) did you use as comparison(s)? _____
_____

b. How did you know or learn about the other case(s) or murderer(s)?

(PROBE SOURCES: E. G., BOOKS, TV, NEWSPAPERS, OTHER JURORS, PROSECUTION, DEFENSE ETC.)

(PROBE TIMING: E. G., JURY SELECTION, OPENING STATEMENTS, ETC.)

c. What were the similarities or differences that helped you decide on the punishment?

3.In making your punishment decision, did you use the evidence to develop your own "story" about what happened, and why, that made you feel you knew what the punishment should be?

___ no, not at all
___ yes, to a minor extent; (IF SO,) . . .
___ yes, to a major extent; (IF SO,) . . .

a. How did you develop your own story of what happened and why?

(PROBE SOURCES E. G., BOOKS, TV, NEWSPAPERS, OTHER JURORS, PROSECUTION, DEFENSE ETC.)

(PROBE TIMING: E. G., JURY SELECTION, OPENING STATEMENTS, ETC.)

b. Were there any problems of missing evidence or evidence that didn't seem to fit into your story?

___ no
___ yes; (IF SO,) what was this evidence and how did you deal with it?

4. In making your punishment decision, did you find a specific feature or aspect of the case that made you feel you knew whether life or death should be the punishment?

___ no, not at all
___ yes, to a minor extent; (IF SO,) . . .
___ yes, to a major extent; (IF SO,) . . .

a. What factor or aspect of the case made you feel that way?

b. Why did it make you feel that way?

5. In making your punishment decision, did you "add up" the factors in favor of a death sentence and "add up" the factors against a death sentence, and then "weigh" one side against the other side?

___ no, not at all
___ yes, to a minor extent; (IF SO,) . . .
___ yes, to a major extent; (IF SO,) . . .

a. By how much did the factors on one side "outweigh" the factors on the other side?

___ greatly
___ moderately
___ slightly
___ about even

b. What were the strongest factors for and against the death penalty?

c.What were the strongest factors for and against a life (OR THE ALTERNATIVE) sentence?

6.Of the following ways jurors make such hard decisions, rank them in order of importance for your punishment decision.

Rank from **1** for most through **4** for least important

___ comparing or contrasting with other cases or murderers you knew about
___ putting together your own story of what happened and why in this case
___ adding up the factors for and against a death sentence and weighing one side against the other
___ finding one specific factor or aspect of the case that makes it clear what the punishment should be

IV.B AGGRAVATING AND MITIGATING FACTORS

SOME FACTORS ABOUT A MURDER, THE VICTIM, OR THE DEFENDANT MAKE PEOPLE FEEL A DEATH SENTENCE IS MORE OR LESS APPROPRIATE. I WANT TO ASK YOU ABOUT FACTORS THAT MIGHT HAVE INFLUENCED YOUR DECISION IN THE _____ CASE.

1. I am going to read you a list of factors that might be true or present in a murder case. For each factor on the list, I want you to tell me:

a. Was this a factor in the _____ case?

1. yes
2. no
3. not sure

b. (IF YES,) how important was this factor in your punishment decision?

1. very important in your sentencing decision
2. fairly important in your sentencing decision
3. not important in your sentencing decision

c. Did /(IF NO) Would/ this factor make you . . .
(ASK IN ALL SITUATIONS)
1. much more likely to vote for death
2. slightly more likely to vote for death
3. slightly less likely to vote for death
4. much less likely to vote for death

5. just as likely to vote for death

FIRST ARE FACTORS ABOUT THE KILLING:

__ __ __ the killing was not premeditated but was committed during another crime, such as a robbery, when the victim tried to resist
__ __ __ the killing was especially bloody or gory
__ __ __ the killing was brutal, involving torture or physical abuse
__ __ __ the killing was committed while (DEF) _____ was under the influence of alcohol
__ __ __ the killing was committed while (DEF) _____ was under the influence of drugs
__ __ __ the killing was committed while (DEF) _____ was under the influence of an extreme mental or emotional disturbance
__ __ __ (DEF) _____ made the victim suffer before death
__ __ __ (DEF) _____ maimed or mutilated the victim's body after death

a. Was this a factor in the _____ case?

1. yes, it was a factor in this case
2. no, it was not a factor in this case
3. not sure whether it was a factor in this case

b. (IF YES,) how important was this factor in your punishment decision?

1. very important in your sentencing decision
2. fairly important in your sentencing decision
3. not important in your sentencing decision

c. Did /(IF NO) Would/ this factor make you . . .

1. much more likely to vote for death
2. slightly more likely to vote for death
3. slightly less likely to vote for death
4. much less likely to vote for death
5. just as likely to vote for death

NEXT ARE FACTORS ABOUT THE VICTIM:

__ __ __ the victim was a female
__ __ __ the victim was a child
__ __ __ the victim was a respected person in the community
__ __ __ the victim was a stranger in the community
__ __ __ the victim was a known troublemaker
__ __ __ the victim had a criminal record
__ __ __ the victim was an alcoholic

__ __ __ the victim was a drug addict
__ __ __ the victim had a loving family

NEXT ARE FACTORS ABOUT THE DEFENDANT:

__ __ __ (DEF) _____ had no previous criminal record
__ __ __ (DEF) _____ had a history of violent crime
__ __ __ (DEF) _____ was mentally retarded
__ __ __ (DEF) _____ had a loving family
__ __ __ (DEF) _____ was under 18 when the crime occurred
__ __ __ (DEF) _____ was an alcoholic
__ __ __ (DEF) _____ was a drug addict
__ __ __ (DEF) _____ had a history of mental illness
__ __ __ (DEF) _____ had a background of extreme poverty
__ __ __ (DEF) _____ was a stranger in the community
__ __ __ (DEF) _____ had been seriously abused as a child
__ __ __ (DEF) _____ had been placed in institutions in the past but never given any real help or treatment for his problems
__ __ __ (DEF) _____ did not express any remorse, regret or sorrow for the crime

a. Was this a factor in the _____ case?

1. yes, it was a factor in this case
2. no, it was not a factor in this case
3. not sure whether it was a factor in this case

b. (IF YES,) how important was this factor in your punishment decision?

1. very important in your sentencing decision
2. fairly important in your sentencing decision
3. not important in your sentencing decision

c. Did /(IF NO) Would/ this factor make you . . .

1. much more likely to vote for death
2. slightly more likely to vote for death
3. slightly less likely to vote for death
4. much less likely to vote for death
5. just as likely to vote for death

FINALLY, THERE ARE ADDITIONAL FACTORS THAT MIGHT HAVE AFFECTED YOUR SENTENCING DECISION:

__ __ __ (DEF) _____ was convicted with evidence from an accomplice who testified against (DEF) _____ in return for a reduced charge or sentence

__ __ __ (DEF) _____ would be a hardworking well behaved inmate, and would make positive contributions in prison
__ __ __ there is a possibility that (DEF) _____ would be a danger to society in the future
__ __ __ the victim's family suffered severe loss or grief
__ __ __ the vicim's family asked for the death penalty
__ __ __ the community was outraged over the crime
__ __ __ most community members wanted the death penalty
__ __ __ although the evidence was sufficient for a capital murder conviction, you had some lingering doubt that (DEF) _____ was the actual killer
__ __ __ (DEF) _____ did not testify on his own behalf

IF THERE ARE FACTORS NOT ON THIS LIST THAT AFFECTED YOUR SENTENCING DECISION, PLEASE INDICATE WHAT THEY ARE, HOW IMPORTANT THEY WERE, AND WHETHER THEY MADE A DEATH SENTENCE MORE OR LESS LIKELY:

__ __ __ other factors _____
__ __ __ other factors _____
__ __ __ other factors _____
__ __ __ other factors _____

V. SENTENCING GUIDELINES

LET'S TAKE A MINUTE OR TWO TO TALK ABOUT THE JUDGE'S INSTRUCTIONS FOR DECIDING WHAT THE PUNISHMENT SHOULD BE.

1.As you understood the judge's instructions for deciding punishment, could the jury consider . . .

___ all the evidence presented at the entire trial
___ only the evidence presented at the second stage of the trial after (DEF) _____ was convicted
___ (DON'T KNOW)

2.Among factors in favor of a death sentence, could the jury consider . . .

___ any aggravating factor that made the crime worse
___ only a specific list of aggravating factors mentioned by the judge
___ (DON'T KNOW)

3.For a factor in favor of a death sentence to be considered, did it have to be . . .

___ proved beyond a reasonable doubt
___ proved by a preponderance of the evidence

___ proved only to a juror's personal satisfaction
___ (DON'T KNOW)

4.For a factor in favor of a death sentence to be considered, did . . .

___ all jurors have to agree on that factor
___ jurors not have to agree unanimously on that factor
___ (DON'T KNOW)

5.To the best of your memory, was the jury required to impose a death sentence, or free to choose between death and a lesser sentence, if it found . . .

1 death required **2** free to choose **3** (DON'T KNOW)

___ one or more factors favoring a death sentence
___ one or more factors favoring a death sentence and none opposing it
___ more factors favoring than opposing a death sentence
___ stronger factors favoring than opposing a death sentence
___ an equal balance between factors favoring and opposing a death sentence

6.Among factors in favor of a life or lesser sentence, could the jury consider . . .

___ any mitigating factor that made the crime not as bad
___ only a specific list of mitigating factors mentioned by the judge
___ (DON'T KNOW)

7.For a factor in favor of a life or lesser sentence to be considered, did it have to be . . .

___ proved beyond a reasonable doubt
___ proved by a preponderance of the evidence
___ proved only to a juror's personal satisfaction
___ (DON'T KNOW)

8.For a factor in favor of a life or lesser sentence to be considered, did . . .

___ all jurors have to agree on that factor
___ jurors did not have to agree unanimously on that factor
___ (DON'T KNOW)

9.To the best of your memory, was the jury required to impose a sentence of life or less or free to choose between death and a lesser sentence, if it found . . .

1 life or less required **2** free to choose **3** (DON'T KNOW)

___ one or more factors opposing a death sentence
___ one or more factors opposing a death sentence and none favoring it
___ more factors opposing than favoring a death sentence
___ stronger factors opposing than favoring a death sentence
___ an equal balance between factors opposing and favoring a death sentence

10.Do you believe that these guidelines or instructions led to the right or to the wrong punishment for (DEF) _____?

___ led to the wrong punishment, but jurors followed their own consciences and decided on the right punishment
___ led to the wrong punishment, and jurors accepted it
___ led to the right punishment
___ led to no particular punishment

VI. THE JUDGE, PROSECUTOR(S), AND DEFENSE ATTORNEY(S)

LET'S TALK NEXT ABOUT THE JUDGE AND THE OPPOSING ATTORNEYS.

1. In your mind, how well do the following words describe the judge?

1 very well **2** fairly well **3** not so well **4** not at all

___ stern (i.e., often grim faced)
___ good humored (i.e., often smiling)
___ self-confident
___ easy going (i.e., relaxed)
___ a warm outgoing person
___ a forceful, take-charge person
___ strict about rules and procedures
___ sometimes looked bored
___ sometimes looked annoyed
___ acted friendly toward jurors
___ acted friendly toward (DEF) _____
___ acted friendly toward the prosecuting attorney(s)
___ acted friendly toward the defense attorney(s)

___ sometimes difficult for you to understand
___ someone you came to admire
___ someone you did not like personally
___ other, specify_____
_____

2. Toward which side--the defense or the prosecution--did it seem to you that the judge's attitude was more . . .

1 defense **2** prosecution **3** (NEITHER, NO DIFF.)

___ sympathetic
___ accepting of requests or objections
___ impatient
___ careful about what s/he said or did
___ favorably inclined

3. For the prosecution, how many attorneys were involved?

_____ # of prosecuting attorneys

(IF MORE THAN ONE,) how did they allocate the work?

___ one took primary responsibility throughout the trial
___ they divided responsibility; one handled the guilt portion of the trial; another handled the punishment portion of the trial.
___ they shared responsibility for presenting evidence throughout the trial

(ASK ABOUT THE "SENTENCING STAGE" ATTORNEY IF RESPONSIBILITY WAS DIVIDED; ABOUT THE "MOST MEMORABLE" ONE IF IT WAS SHARED; OTHERWISE ABOUT THE "PRIMARY" OR "ONLY" PROSECUTING ATTORNEY.)

4.Please indicate how well you think the following words describe the (DESIGNATED) prosecutor.

1 very well **2** fairly well **3** not so well **4** not at all

___ a forceful, take-charge person
___ competent and professional
___ did an outstanding job of presenting his/her case
___ didn't seem to have his/her heart in the case
___ was polite and respectful toward the judge
___ was hostile toward (DEF) _____
___ was hostile toward the defense attorney(s)
___ was hostile toward defense witnesses
___ cared more about winning than seeing justice done

___ someone you came to admire (respect)
___ someone you did not like personally
___ other, specify_____
_____

5. Did the prosecutor's decision to ask for the death penalty in this case make you think that . . .

1 yes **2** no **3** not sure

___ the case against (DEF) _____ must be strong
___ (DEF) _____ must deserve the death penalty

6. For the defense, how many attorneys were involved?

_____ # of defense attorneys

(IF MORE THAN ONE,) how did they allocate the work?)
___ one took primary responsibility throughout the trial
___ they divided responsibility; one handled the guilt portion of the trial; another handled the punishment portion of the trial
___ they shared responsibility for presenting evidence throughout the trial

(ASK ABOUT THE "SENTENCING STAGE" ATTORNEY IF RESPONSIBILITY WAS DIVIDED; ABOUT THE "MOST MEMORABLE" ONE IF IT WAS SHARED; OTHERWISE ABOUT THE "PRIMARY" OR "ONLY" DEFENSE ATTORNEY.)

7.How well do you think the following words describe the (DESIGNATED) defense attorney?

1 very well **2** fairly well **3** not so well **4** not at all

___ a forceful, take-charge person
___ competent and professional
___ did an outstanding job of presenting his/her case
___ didn't seem to have his/her heart in the case
___ was warm and friendly toward (DEF) _____
___ was friendly toward the judge
___ was hostile toward the prosecuting attorney(s)
___ was hostile toward prosecution witnesses
___ cared more about winning than seeing justice done
___ someone you came to respect (admire)
___ someone you did not like personally
___ other, specify_____
_____

8.In your judgement, by how much did the prosecution or the defense have the advantage in these respects,

Prosecution Advantage: **1** great **2** moderate **3** slight
Defense Advantage: **4** great **5** moderate **6** slight
No Advantage: **7** (NEITHER HAD THE ADVANTAGE)

___ did better communicating with the jury
___ prepared their case better for trial
___ had more money and resources to work with
___ had a stronger commitment to winning the case
___ fought harder at the guilt stage of the trial
___ fought harder at the punishment stage of the trial

9.Finally, I would like you to rate the prosecution and the defense on a scale from **1** to **10**, with **10** being "the hardest possible" and **1** being "not hard at all."

a.How hard did the prosecuting attorney(s) work to convince you that (DEF) _____ . . .

Scale of **1** to **10**

___ was guilty of capital murder
___ deserved a penalty of death

b.How hard did the defense attorney(s) work to convince you that (DEF) _____ . . .

Scale of **1** to **10**

___ was not guilty of capital murder
___ deserved a penalty other than death

VII. JURY SELECTION AND COMPOSITION

NOW, I'D LIKE TO ASK YOU ABOUT SELECTION OF THE JURY.

1. During jury selection, were you questioned alone or in a group with others?

___ alone
___ in a group; (IF SO,) with how many # ____ ?
___ both in a group and alone (IF SO,) with how many #_

2.During jury selection, who asked you the most difficult questions?

___ the judge
___ the prosecutor(s)
___ the defense attorney(s)

3. During jury selection were you asked what you had heard or knew about the _____ case?

___ no
___ yes

4. Had you heard about the _____ case before the trial?

___ no, nothing at all
___ yes, but very little
___ yes, knew some details

5. During jury selection were you surprised at the number of questions you were asked about your attitude toward the death penalty, when (DEF) _____ had not yet been convicted of murder?

___ no
___ yes, somewhat surprised
___ yes, very surprised

6.Did these questions make you think (DEF) _____ . . .

___ must be guilty
___ probably was guilty
___ probably was not guilty
___ must be not guilty
___ no effect one way or the other

7.Did the questions make you think the appropriate punishment for (DEF) _____ . . .

___ must be the death penalty
___ probably was the death penalty
___ probably was not the death penalty
___ must not be the death penalty
___ no effect one way or the other

8. Were any of the question you were asked during jury selection especially hard for you to answer?

___ no
___ yes; (IF SO,) which question(s); why were they hard; who asked them?

9. During jury selection, who made the most favorable and who made the least favorable impression on you?

1 most favorable **2** least favorable **3** Neither most or least favorable

___ the judge
___ the prosecutor(s)
___ the defense attorney(s)

NOW I WANT TO FIND OUT WHO GOT CHOSEN FOR THE JURY; IF YOU'RE NOT SURE OF AN ANSWER, JUST GIVE ME YOUR BEST GUESS. I'LL MAKE A NOTE THAT YOU'RE NOT SURE.

10. To the best of your memory, how many of the 12 jurors

were:	and how many of the men and women were:		
	WHITE	BLACK	HISPANIC
#___ men	#___ men	#___ men	#___ men
#___ women	#___ women	#___ women	#___ women
(=12)			

11.Was the jury foreperson . . .

___ you, yourself
___ male/white
___ male/minority (SPECIFY _____)
___ female/white
___ female/minority (SPECIFY _____)

12. During the jury deliberations:

a. How many of the jurors would you say . . .

#___ talked a lot
#___ almost never talked
#___ were between these extremes
(=12)

b. Were you among . . .

___ the most talkative
___ the least talkative
___ in between

13. Did you know any of the other jurors before the trial?

___ no

___ yes, (IF SO,)
#___ by sight though not personally
#___ as personal acquaintances
#___ as jurors you had served with previously

14. Have you stayed in touch with any of the jurors since the trial?

___ no
___ yes; (IF SO,) #_____ you knew before the trial
#_____ you met during the trial

15. In your mind, how well do the following words describe the jury?

1 very well **2** fairly well **3** not so well **4** not at all

___ likeminded, saw things the same way
___ closedminded, intolerant of disagreement
___ too quick to make a decision, in a hurry
___ friendly and respectful to one another
___ decided on guilt and punishment at the same time
___ dominated by a few strong personalities
___ got too emotionally involved in the case
___ was confused by the judge's instructions
___ did not follow the judge's instructions
___ kept making mistakes
___ you felt like an outsider

16. Can you think of anything more about the jury that helps to explain how or why it reached its decisions?

VIII. CRIME AND PUNISHMENT ATTITUDES

I NOW HAVE JUST A FEW QUESTIONS ABOUT YOUR FEELINGS TOWARD PUNISHMENT FOR CONVICTED MURDERERS.

0. Do you agree or disagree with the following statements about crime and the criminal justice system?

Agree: 1 strongly 2 moderately 3 slightly
Disagree: 4 strongly 2 moderately 6 slightly
7 (NOT SURE; CAN'T SAY; UNDECIDED)

___ it is better for society to let some guilty people go free than to risk convicting an innocent person
___ even the worst criminals should be considered for mercy
___ if the police obtain evidence illegally, it should

not be permitted in court, even if it would help convict a guilty person
___ the insanity plea is a loophole that allows too many guilty people to go free
___ a person on trial who doesn't take the witness stand and deny the crime is probably guilty
___ prosecutors have to be watched carefully, since they will use any means they can to get convictions
___ defense attorneys have to be watched carefully, since they will use any means to get their clients off
___ if we really cared about crime victims, we would make sure that criminals were given harsh punishments
___ if we really cared about crime victims, we would make offenders work to pay for the injuries and losses their victims have suffered.

1.Do you agree or disagree with the following statements about punishment for convicted murderers?

Agree: **1** strongly **2** moderately **3** slightly
Disagree: **4** strongly **5** moderately **6** slightly
7 (NOT SURE; CAN'T SAY; UNDECIDED)

___ you wish we had a better way than the death penalty of stopping murderers
___ the death penalty is too arbitrary because some people are executed while others serve prison terms for the same crimes
___ if the death penalty were enforced more often there would be fewer murders in this country
___ even convicted murderers should not be denied hope of parole some day, if they make a real effort to pay for their crimes
___ murderers owe something more than life in prison to society and especially to their victims' families
___ defendants who can afford good lawyers almost never get a death sentence
___ the death penalty should be required when someone is convicted of a serious intentional murder
___ you have moral doubts about death as punishment
___ persons sentenced to prison for murder in this state are back on the streets far too soon

2.Would you prefer the following alternatives:

1 yes **2** no **3** not sure

___ If murderers in this state could be sentenced to life in prison without the possibility of ever being released on parole, would you prefer this as an alternative to the death penalty?

___ What if murderers in this state could be sentenced to life with absolutely no chance of parole and also required to work in prison for money that would go to the victims' families; would you prefer this as an alternative to the death penalty?

___ What if murderers in this state could be sentenced to life in prison with no chance of parole for 25 years and even then be eligible for parole only if they earned and paid a required amount of money to the families of their victims; would you prefer this as an alternative to the death penalty?

3. For convicted murderers, do you now feel that the death penalty is . . .

___ the only acceptable punishment
___ the most appropriate of several punishments
___ just one of several appropriate punishments
___ the least appropriate of several punishment
___ an unacceptable punishment

4.Do you feel that the death penalty is the only accept-able punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following specific kinds of murder and other crimes?

1 only acceptable **2** unacceptable **3** sometimes acceptable

___ a planned, premeditated murder
___ a planned murder, when the victim survives
___ a killing that occurs during another crime
___ murders in which more than one victim is killed
___ murder by someone previously convicted of murder
___ murder by a drug dealer
___ killing of a police officer or prison guard
___ when an outsider to the community kills an admired and respected member of the community
___ a rape with permanent injury to the victim

5.Have your personal feelings about the death penalty changed as a result of serving on the _____ case?

___ yes, more opposed than I was before

___ yes, more in favor than I was before
___ no, feelings have not changed

6.Do you now generally favor or oppose the death penalty for convicted murderers?

____ strongly favor
____ somewhat favor
____ somewhat oppose
____ strongly oppose
___ (NOT SURE; DON'T KNOW)

7.Do you now think that your personal feelings about the death penalty at the time of the _____ trial affected your guilt or punishment decisions in any way?

1 yes **2** no **3** not sure

___ guilt decision; (IF SO,) in what way . . .
___ punishment decision; (IF SO,) in what way . . .

IX. PERSONAL BACKGROUND

FINALLY, I NEED TO ASK YOU A FEW QUESTIONS ABOUT YOURSELF.

1. Check respondent's (ASK ONLY IF NOT SURE)

a. sex:

____ male
____ female

b. race/ethnicity:

____ white
____ black
____ hispanic
____ asian
____ other

2. What was your age at your last birthday?

_____# years old

3. Have you ever been married?

___ no, never been married
___ yes, been married once
___ yes, been married more than once

4. Are you now married?

____ married and living with your spouse
____ married but separated
____ divorced
____ widowed

5.Do you have any children, step children or foster children; (IF SO,) what is the age and sex of each?

(RECORD AGE [# YRS] AND SEX [M OR F] OF EACH)

___ no children						
___ yes, your own	____	____	____	____	____	____
___ yes, step	____	____	____	____	____	____
___ yes, foster	____	____	____	____	____	____

(IF YES,) which, if any, are now living with you?

(CIRCLE AGE/SEX OF CHILDREN LIVING WITH YOU)

6. What was the last grade of school you completed?

_____# grade completed (IF LESS THAN 12TH GRADE)

____ finished high school (OR 12TH GRADE)
____ some technical school beyond high school
____ some college but did not graduate
____ graduated from college
____ attended graduate or professional school

7. Are you currently employed outside of the home?

___ yes, full-time
___ yes, part-time
___ no, housewife, homemaker, child rearing
___ no, injury, disability
___ no, layoff, strike
___ no, student
___ no, retired
___ no, without explanation

(IF NO,) have you been employed

___ within the past 5 years?
___ more than 5 years ago?
___ never been employed

(IF EVER EMPLOYED,)

a. What kind of work do (OR DID) you do?

b. What job or position do (OR DID) you have?

8. Roughly speaking, in which of the following categories does your current family income fall?

___ less than $10,000 a year
___ $10,000-$20,000 a year
___ $20,000-$30,000 a year
___ $30,000-$50,000 a year
___ $50,000-$75,000 a year
___ more than $75,000 a year
___ (NO ANSWER; REFUSAL)

9. Are you involved in any local groups or organizations?

1 yes **2** no

___ school or parent/teacher association
___ youth activities, e.g., Little League, Boy Scouts
___ political parties, candidates or campaigns
___ church or religious groups
___ special interest groups, e.g., Sierra Club, NRA
___ others, specify _____
_____

(IF ANY SUCH INVOLVEMENTS,) have you held office or taken a leadership role? Explain.

10. Over the past week, on how many days did you . . .

a. read a newspaper? . . . . . _____# of days

b. listen to the news on TV or radio? _____# of days

11.What do you like most to do for recreation?

12. What is your religious preference?

(PROBE FOR SPECIFIC RELIGION OR DENOMINATION)

___ Baptist
___ Southern Baptist
___ Lutheran
___ Methodist
___ Presbyterian
___ other Protestant, specify _____
___ Roman Catholic
___ Jewish
___ Other religion, specify _____
___ No religious preference

13. How often do you attend religious services?

___ more than once a week
___ once a week
___ several times a month
___ once a month
___ several times a year
___ once a year
___ never

14. Did your religious beliefs have any impact on your decision in the _____ case?

___ no
___ yes; (IF SO,) what impact did they have?

15. Have you served in the military?

___ no
___ yes; (IF SO,) what branch and what was the nature of your service?

16.How long have you lived at your current address?

_____ # of years; _____ # of months

17.Do you rent or own your own home?

___ renter
___ home owner

AND LASTLY, I HAVE A FEW QUESTIONS ABOUT YOUR PREVIOUS EXPERIENCE WITH THE CRIMINAL JUSTICE SYSTEM.

18. Did you ever serve on a trial jury before this case?

___ no
___ yes, (IF SO,) ___ on a criminal case
___ on a civil case

19. Did you ever attend a criminal trial in some other capacity before this case?

___ no
___ yes, (IF SO,) ___ as a spectator
___ as a witness
___ as a defendant

20. Have you or other members of your household been the victim of a serious crime in the past five years?

___ no
___ yes, (IF SO,) ___ you yourself
___ other members of your household

(IF YES,) how often in the past five years? ____times
(IF YES,) how often since (DEF) ____'s case? ____times

21. Do you know people who work in the law enforcement or criminal justice fields?

1 yes **2** no

___ in the police, including private security
___ in the courts, including judges, prosecutors, defense attorneys, clerks or other staff
___ in corrections, including jails, prisons or other corrections facilities

22. When you think back about serving as a juror on the _____ case, is there anything you wish you had said or done differently?

___ no
___ yes; (IF SO,) what was it?

23.Did you find the experience emotionally upsetting?

___ no
___ yes; (IF SO,) in what ways?

24.During the trial or right after it, did you have any trouble sleeping, any bad dreams or nightmares, or lose your appetite?

___ no
___ yes; (IF SO,) explain or elaborate.

25.How would you feel if you were asked to serve on another death penalty case? Would you . . .

___ welcome the opportunity
___ do so reluctantly
___ try to get out of it
___ refuse to do so

26.Have you been interviewed by anyone else, attorneys, investigators, media etc. about your experience as a juror on this case?

___ yes
___ no

How much have you talked to others about this experience?

THANK YOU VERY MUCH FOR YOUR COOPERATION.

INTERVIEW ENDING TIME: _____:_____/_____
(hr) (min) (am/pm)

X. INTERVIEWER'S DEBRIEFING SHEET

1.Interview condition:

a. interruptions (e.g., phone call(s), visitor(s))
If so, at what points (Q#s) and for how long (minutes at each Q#) _____
b. others present (e.g., spouse, offspring)

If so, who and for how long (from Q# to Q# for each instance) _____

c. unfinished but completed later by phone
d. never completed
e. completed without incident

2. Were any questions or topics awkward for the respondent to answer or talk about? If so, which ones?

3. Did the respondent appear to have trouble remembering events or circumstances of the crime or the trial? If so, which events of circumstances?

4. In your opinion, was the respondent less than candid or truthful about some issues? If so, about which issues?

5. Did you tape record the interview entirely or in part? Did this create any problems? Explain.

6. What were the main problems with this interview? What about . . .

interruptions
distractions
lack of rapport
weak or faulty recall
doubts about confidentiality
defensiveness or insecurity

Elaborate on these or any other problems.

APPENDIX B

BRIEF JURY INSTRUCTION COMPREHENSIBILITY QUESTIONAIRE

Instructions:

You are being asked to assume the role of a jury member on a capital murder case. Please read the case summary and the jury instructions on the following pages. On the last page of this packet, you will be asked to evaluate the jury instructions for the penalty phase of a capital murder trial. Answer the questions about your impressions of the jury instructions from your point of view as a jury member. Please circle your responses. The reading and questionnaire takes approximately ten to fifteen minutes to complete.

Demographic Information:

What is your age? 25 or under 26-40 41-55 56 or older

What is your gender? Female Male

What is your county of residence? _____

What is your primary language? English Spanish Other _____

What is the highest level of education you have completed?

Grammar school High school or equivalent Vocational/technical school (2 year)

Some college Bachelor's degree Master's degree

Doctoral degree Professional degree (MD, JD, etc.) Other_____

How would you classify yourself?

Arabic Asian/Pacific Islander Black Caucasian/White

Hispanic Indigenous or Aboriginal Latino Multiracial

Would rather not say

Other: _____

Have you served on a jury before? Yes No

CASE SUMMARY
Butler v. State of Missouri (1990)

Guilt Phase

At 5:10 p.m. in the afternoon Steve Olin discovered Mrs. Betty Butler's body on a graveled road in North Kansas City. Mrs. Butler had been shot in the head twice with a .22 caliber gun. Although the first shot killed her, a second contact shot was fired into Mrs. Butler's temple. Missing was Mrs. Butler's $7,000 diamond ring. Fingerprints of Mrs. Butler and her husband Dennis Butler were found inside and outside the automobile. Also found on the trunk of the car were three unidentified fingerprints. Mr. Butler explained to the police that on the day of the death he had driven down the graveled road after completing some errands. Mr. Butler stated that he wound up at First City Bank at 3:57 p.m. and returned down the graveled road at about 5:00 p.m. The medical examiner told the defense investigator Mrs. Butler died between 3:40 and 4:20 p.m., but later testified that the time of death was 5:00 p.m. Mr. Butler also explained to the police that he owned several guns that were stolen from his home in Shreveport, Louisiana. In his insurance claim, Mr. Butler stated that except for a Ruger .22 automatic six shot, all the weapons had been recovered. However, Frank Arnold, a former boyfriend of Mrs. Butler's daughter testified when he had helped the Butlers move he had seen a Ruger .22 caliber weapon. Mr. Butler consented to a police search of his home which turned up six guns and some .22 caliber shells, but no .22 caliber weapon. At the time of her death, Mrs. Butler had insurance policies with proceeds totaling $191,000 and a 401K plan valued at $177,000. Dennis Butler was the beneficiary named on the plans. Challenging Mr. Butler's financial motive was testimony of state witnesses who stated that some of the insurance policies were provided by Wilcox Electric Company, where both the Butlers worked. Mrs. Butler had increased the coverage on the policies only four months prior to her death. Based on the foregoing evidence the jury unanimously found Mr. Butler guilty of first degree murder.

Penalty Phase

The state had presented evidence of several aggravating factors that warranted the death penalty. The state claimed that the murder was committed for pecuniary (financial) gain and it had shown "depravity of mind" because excessive physical force was used (i.e., two shots were fired, the second at point blank range). Members of the defendant's family testified to several mitigating circumstances including that Dennis is a polite man who, as a youngster, attended Catholic schools and participated in intramural sporting activities. After graduating, Dennis worked as a fireman and then in the oil business. When the oil business took a downfall he went back to college and obtained his Bachelor of Science in computer programming. Mr. Butler had no prior convictions.

JURY INSTRUCTION (STATE OF MISSOURI)
Butler v. State of Missouri (1990)

If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Betty Butler.

You may also consider: 1. whether the murder of Betty Butler was committed while the defendant was under the influence of extreme mental or emotional disturbance, and 2. whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

You may also consider any circumstance which you find from evidence in mitigation of punishment. It is not necessary that all jurors agree on the existence of the same mitigating circumstance. If each juror finds one or more mitigating circumstance sufficient to outweigh the aggravating circumstances found to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

If all the jurors agree that at least one of the aggravating circumstances listed in exists beyond a reasonable doubt and that the aggravating circumstance or circumstances found to exist are sufficient to justify the death penalty, and then you must decide if mitigating circumstances are present. Mitigating circumstances make Mr. Butler less deserving of the death penalty. For example, one is if Mr. Butler murdered Betty Butler while he was mentally or emotionally disturbed, and another is if Mr. Butler was unable to fully appreciate that his actions were unlawful and he was unable to act within the requirements of the law. If any juror finds one or both of these circumstances, he or she may consider it or them when weighing the mitigating circumstances against the aggravating circumstances. There may be other mitigating circumstances that you find in the case. You may consider any circumstance that you consider to be mitigating. It need not be named in this instruction. In deciding if a mitigating circumstance or circumstances exist, you may consider all of the evidence presented during both the guilt and penalty parts of the trial. It is not necessary for all jurors to agree that a particular mitigating circumstance exists and it is not necessary for the defense to show that it exists beyond a reasonable doubt. For a mitigating circumstance to exist it is sufficient for one juror to find a circumstance that makes Mr. Butler less deserving of the death penalty. Although all jurors must agree beyond a reasonable doubt when determining aggravating circumstances, they do not need to do so when determining mitigating circumstances. If each juror finds that a mitigating circumstance or circumstances exist that is more important than the aggravating circumstance or circumstances in this case, then you must sentence Mr. Butler to life imprisonment without eligibility of probation or parole. The mitigating circumstance or circumstances found by one juror need not be the same as those found by other jurors.

CASE SUMMARY
Longworth v. State of South Carolina (1991)

Guilt Phase

In the evening of January 7, 1991, Longworth and his friend David Rocheville decided, while driving around in their minivan, to rob a cinema in Spartanburg. After entering the theater, Longworth took his handgun from his shoulder holster and gave it to Rocheville, and the two viewed a movie for a short time. The two then proceeded into the lobby to implement their plan to rob the theater of money located in the ticket booth. When they encountered an usher, Alexander George Hopps, 19, walking down the hallway, Longworth knocked Hopps down, jumped on him, held his hand over Hopps' mouth, and dragged him outside of the theater through the side exit. As Longworth pinned Hopps against a waist-high bar that protected the air conditioning unit, Rocheville shot Hopps in the left side of the head. Rocheville then returned the gun to Longworth, who placed it back in his shoulder holster. To re-enter the theater, Longworth and Rocheville walked around to the front of the cinema and found the front doors locked. They motioned to James Todd Greene, 24, a cinema employee to whom they had waved when they initially entered the theater, and Greene opened the door. At that point, Longworth drew his gun and demanded that Greene open the safe in the ticket booth. Longworth took several money bags from the safe and ascertained from Greene that there were more bags in Greene's automobile, ready for deposit. After retrieving those bags, Longworth and Rocheville forced Greene into their minivan, which Longworth drove. Longworth again handed his gun to Rocheville and instructed him to shoot Greene if he moved. After driving away from the theater, Longworth stopped the vehicle and instructed Greene to get out, walk five paces, get on his knees, and stare straight ahead. At that point, Rocheville shot Greene in the back of the head. Longworth and Rocheville were arrested the next day, after Rocheville had led law enforcement officers to Greene's body. After Longworth was arrested, he provided officers with a detailed statement of the crimes that he and Rocheville had committed. Each was indicted on two counts of murder, one count of kidnapping, and one count of armed robbery.

Penalty Phase

The aggravating circumstances presented to the jury are the commission of the attendant crimes of kidnapping and robbery and that Longworth had provided a full confession. Mitigating evidence presented during the trial included the fact that the defendant did not actually pull the trigger resulting in the murders for which he was being prosecuted. No further mitigating circumstances were presented by client's counsel.

JURY INSTRUCTION (STATE OF SOUTH CAROLINA)
Longworth v. State of South Carolina (1991)

As you are aware, the defendant, Mr. Longworth, has been found guilty of the crimes of armed robbery, and kidnapping, and two separate charges of murder. I will impose sentence on the charges and the finding by you of kidnapping and armed robbery. Your assistance is required as to the two counts of murder. It is your duty now to determine which sentence you will recommend that I impose upon the defendant for having been convicted of the offense of murder. You must determine whether I sentence the defendant to life imprisonment or sentence him to death, which in South Carolina is by electrocution. Whatever sentence you recommend will be the sentence that I will give to this defendant.

In, in arriving at your recommendation, you may consider any extenuating or mitigating circumstances which are supported by the evidence, and you may consider certain so called statutory aggravating and statutory mitigating circumstances which I will submit to you. In arriving at your decision, you must first determine from the evidence which was offered at trial, and, of course, during this sentencing proceeding, whether the alleged statutory aggravating circumstances existed beyond any reasonable doubt at the time the victims in this case were murdered. Reasonable doubt does not mean any sort of doubt. Because you and I know from every day experience that one can have any sort of doubt about every matter that arises regardless of how serious or how trivial that matter might be. A reasonable doubt is a doubt for which you could give a reason. It is a doubt for which a person honestly seeking to find the truth can give a reason. Any reasonable doubt, as I have earlier instructed you, must be resolved in favor of the defendant and in favor of life.

Now, ladies and gentlemen, a statutory aggravating circumstance is a fact, an incident, a detail, or an occurrence which the Legislature of our state has declared by statute would make worse, that is would aggravate, the offense of murder when that fact or incident or detail or occurrence accompanies an act of murder. **A** statutory aggravating circumstance is a circumstance which increases the enormity of the offense or a circumstance which adds to the injurious consequences of the offense. Before you can recommend the imposition of the death sentence upon this defendant, all twelve of you primary jurors must agree that the evidence in this case discloses beyond any reasonable doubt the existence of at least one of the alleged statutory aggravating circumstances. Unless all
twelve of you unanimously find beyond any reasonable doubt that the evidence does disclose the existence of at least one of the alleged statutory aggravating circumstances, you can not recommend that the defendant be sentenced to death.

The statutory aggravating circumstances, circumstances alleged by the State in the murder of Alex Hopps are these. The murder was committed while in the commission of robbery while armed with a deadly weapon. That is armed robbery as I have previously instructed you. And two, that two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct. The statutory aggravating circumstances alleged by the State in the indictment for the murder of James Greene are that the murder was committed while in commission of robbery while armed with a deadly weapon, kidnapping, both of which I have, of

course, defined to you fully. And three, two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

If you unanimously agree that the evidence in the case discloses at least one of these alleged statutory aggravating circumstances, then you must consider such circumstance in arriving upon your recommendation of sentence. The fact that you have found the defendant guilty of murder is not in itself an aggravating circumstance. The statutory aggravating circumstances which you are authorized to consider in this case, as I say I have typed them for you, and I will submit them to you to consider during the course of your deliberations. Now, ladies and gentlemen, the Constitution of our country and our state forbids the imposition of the death penalty upon one who did not personally take life or attempt to take life or intend that life be taken. Therefore, I will tell you that the death penalty cannot be imposed on one who aids and abets in a crime in the course of which a murder is committed by another. But who did not himself kill, attempt to kill, or intend that a killing take place, or that lethal force, force be used by another. Stated differently, before you can recommend this defendant be sentenced to death, you must first find beyond any reasonable doubt at least one of the statutory aggravating circumstances I have read to you, and at least one of these three criteria. That this defendant did kill a victim or that if this defendant did not kill a victim, then he intended that the victim be killed by another or that if he did not kill a victim, that he intended that lethal force be used by another.

Major participation by a defendant in the commission of a felony, combined with reckless indifference to human life, may be considered by you as you determine the defendant's intent in this case. If you find beyond any reasonable doubt that at least one of the alleged statutory aggravating circumstances existed at the time a victim in this case was murdered, and the existence of one of these three criteria I have read to you, then you would be authorized to recommend that the death sentence be imposed upon this defendant. Should you determine that at least one of the alleged statutory aggravating circumstances existed at the time the murder was committed and that at least one of these three criteria existed and should unanimously recommend that a sentence of death be imposed upon the defendant, then you would, of course, be required to specify in writing your recommendation, the statutory aggravating circumstance or circumstances that you found to exist beyond any reasonable doubt.

If you do not find that the evidence discloses at least one of the statutory aggravating circumstances existed at the time of a murder in this case or the absence of these, one of these three criteria or the presence of one of these three criteria, then you would not be authorized to recommend the sentence of death, and your recommendation must be a sentence of life imprisonment. Even if you unanimously find beyond any reasonable doubt that at least one of these alleged statutory aggravating circumstances existed at the time of a murder in this case, and the presence of one of these three factors I have read to you, you may in any event recommend that the defendant be sentenced to life in prison.
In addition, in addition to considering the alleged statutory aggravating circumstance, you must also consider each alleged statutory mitigating circumstance supported by the evidence in the case, along with any other mitigating circumstances you find supported by the evidence in this case. **A** statutory mitigating circumstance is a circumstance which the Legislature has recognized by statute as a I circumstance which in fairness and mercy may be considered I as extenuating or as reducing the degree of moral guilt for

the commission of the act of murder. **A** mitigating circumstance would not constitute either justification or an excuse of the offense. But would lessen ones' guilt and, make him less blameworthy. It is not necessary that you find beyond a reasonable doubt the existence of an alleged statutory or non-statutory mitigating circumstance. You may recommend a sentence of life imprisonment for any reason or for no reason whatsoever. There is, of course, no burden upon the defendant to prove mitigating circumstances. But rather the burden is upon the State to prove aggravating circumstances beyond any reasonable doubt.

While it is necessary for you to find beyond a reasonable doubt the existence of at least one of the alleged statutory aggravating circumstances and the presence of at least one of the factors I read to you before you can recommend that the defendant be sentenced to death, it is not required that you find beyond a reasonable doubt the existence of at least one of the alleged mitigating circumstances in order to recommend that the defendant be given life imprisonment. You may recommend that the defendant receive a sentence of life whether or not you find the existence in the evidence of statutory mitigating circumstances or any other mitigating circumstance. If you find beyond a reasonable doubt that at least one of the statutory aggravating circumstances existed at the time of a murder in this case, and the presence of at least one of those three factors I read to you, you may recommend that the defendant be sentenced to death even if you also find that a statutory or other mitigating circumstance existed at the time a victim was killed. As I have told you, you may recommend a sentence of life even if you find beyond a reasonable doubt the existence of an alleged statutory aggravating circumstance. You may recommend a sentence of life for any reason or for no reason whatsoever. You may recommend a sentence of life imprisonment even if there is no evidence in this case of any mitigating circumstance. A recommendation of life imprisonment must be unanimously agreed by all twelve of you just as a recommendation of the sentence of death must be unanimously agreed by all twelve of you.

Statutory aggravating circumstances I will submit to you for your consideration are listed also on the statutory instructions you will have and they are the following. The defendant has no significant history of prior criminal conviction involving the use of violence against another person. The murder was committed while the defendant was under the influence of a mental or emotional disturbance. The defendant was an accomplice in the murder committed by another person, and his participation was relatively minor. The defendant acted under duress or under the domination of another person. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The age or mentality of the defendant at the time of the crime.

Those are only statutory instructions I will submit to you, and you must consider them during the course of your deliberation. You may also, of course, consider any other mitigating circumstance or circumstances which you may find from the evidence in the case. And I will submit to you a listing of non-statutory mitigating circumstance, which you may consider, which you must consider as you determine the sentence that you will return to me in this case. I remind you that your recommendation of sentence, whether that of life or death, must be unanimous. As jurors, you must decide the issues involved in this proceeding without bias, without prejudice to any party. Both the State and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case, and that you will follow the law as I'm now giving it to you in arriving at your recommendation.

In addition, ladies and gentlemen, I want to read to you a portion of, portion of our law that you may consider also. A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life. When the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt, and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years. When a statutory aggravating circumstance is not found beyond a reasonable doubt, the defendant shall be sentenced to life imprisonment and he shall not be eligible for parole until the service of twenty years. No person sentenced under either of the sentencing schemes just explained may receive any work release credits, good time credits, or any other credit that would reduce the mandatory imprisonment.

CASE SUMMARY
Randolph v. State of Florida (1990)

Guilt Phase

Police found Minnie Ruth McCollum at the Handy-Way store she managed in Palatka, Florida. She was alive but had been beaten and stabbed. Randolph was arrested Aug. 15 on charges of armed robbery and auto theft. McCollum then died at Shands Hospital in Gainesville. On Aug. 22 Randolph was arrested for first-degree murder. The Court appointed the Putnam County Public Defender and the Asst. Public Defender was assigned to represent Randolph. On Sept. 1, the grand jury indicted Randolph on first-degree murder, armed robbery, sexual battery and grand theft charges. The jury convicted Randolph of first degree murder, armed robbery, sexual battery, and grand theft.

Penalty Phase

Aggravating circumstances were brought forth in that the crime of murder was committed in furtherance of a sexually-based offense, as well as in the commission of a robbery and auto theft. Photographs were shown to the jury and a medical examiner provided testimony as to the extent of the injuries inflicted. For mitigating circumstances, the Court appointed a confidential defense expert to access competency, sanity, and statutory and non-statutory mitigation. A psychological evaluation of Randolph was conducted at the Putnam County Jail. The report stated that Randolph, who was adopted when he was five months old, had problems getting along with people in school, and his behavior problems caused him to be referred to psychotherapy for a year in the third grade. His mother was emotionally unstable and was hospitalized for psychiatric reasons on a number of occasions, and his father was physically abusive, and administered discipline by tying him and beating him with his hands, a broomstick, and a belt. Despite his emotional deficiencies, Randolph graduated from high school. He received an honorable discharge from the Army; however, he started using drugs during his service, including marijuana and cocaine. In 1984 he began using highly-addictive crack cocaine. The expert testified that, unlike alcohol intoxication, crack cocaine's effects are not readily apparent from merely looking at a person. When someone regularly uses crack cocaine, the effects of the drug stay in the blood; one's personality and behavior are affected, not necessarily by an immediate ingestion of the drug, but rather by its use over time. He believed that Randolph's abnormal personality was greatly influenced by his drug addiction at the time of the offense.

JURY INSTRUCTION (STATE OF FLORIDA)
Randolph v. State of Florida (1990)

Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder. As you've been told the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law that will now be given you by the Court and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

Your recommendation is important and will be given great weight in imposing sentence. Your advisory sentence should be based upon the evidence that you've heard while trying the guilt or innocence of the Defendant and the evidence that has been presented to you in these proceedings. The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: First, the crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of the crime of sexual battery; second, the crime for which the Defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest; third, the crime for which the Defendant is to be sentenced was committed for financial gain; and, fourth, the crime for which the Defendant is to be sentenced was he especially heinous, atrocious, or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. And cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. A conscienceless or pitiless crime which is unnecessarily tortuous to the victim. If you find-the aggravating circumstances do not justify the death penalty your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years. Should you find sufficient aggravating circumstances do exist, it will then be your duties to determine whether mitigating circumstances exist that outweigh the aggravating circumstance. Among the mitigating circumstances you may consider if established by the evidence are that Richard Barry Randolph has no significant history of prior criminal activity; the crime for which the Defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; the age of the Defendant at the time of the crime; and any other aspect of the Defendant's character or record, and any other circumstances of the offense.

Each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. A mitigating circumstance need not be proved beyond a reasonable doubt by the Defendant. If you are reasonably convinced that a mitigating circumstance exists you may consider it as established.

The sentence that you recommend to the Court must be based upon the facts as you find them from the evidence, and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury. The fact that the determination of whether a majority of you recommend a death sentence, or sentence of life imprisonment in this case can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake. And bring to bear your best judgment in reaching your advisory sentence.

BRIEF JURY INSTRUCTION COMPREHENSIBILITY QUESTIONAIRE

Section One

Directions: *You are being asked to evaluate a set of jury instructions for the penalty phase of a capital murder trial. Please read through the case summary and jury instructions on the next page. Answer the following questions about your impression of the jury instructions. Please circle the appropriate response. This questionnaire takes approximately five to seven minutes to complete.*

Scale 1-4: (1) Strongly Disagree – (2) Disagree – (3) Agree – (4) Strongly Agree

1. The jury instructions were clear and easily understood.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

2. The jury instructions were specific to the case under consideration.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

3. I was able to understand my responsibilities as a juror from the instructions given.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

4. I disagree with some of the jury instructions given.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

5. The definition of "aggravating circumstances" was clear in the instructions as given.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

6. The instructions required several readings in order to fully understand them.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

7. The definition of "mitigating circumstances" was clearly defined in the jury instructions.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

8. The jury instructions provided the jury with a clear understanding of the laws governing capital murder cases.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

9. The jury instructions were clear on the issue of jury agreement and disagreement.

   1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

10. I would need to ask additional questions after reading the jury instructions for this case.

1 Strongly Disagree — 2 Disagree — 3 Agree — 4 Strongly Agree

Section Two

Directions: *You are being asked to evaluate a set of jury instructions for the penalty phase of a capital murder trial. Please read through the case summary and jury instructions on the next page. Answer the following questions about you're the content of the jury instructions you read. Please circle the appropriate response.*

11. According to the instructions, the definition of "aggravating circumstances" refers to:

1 – circumstances that provide the jury evidence of the heinousness of the crime.
2 – circumstances related to the reason(s) the juror believes the crime was committed.
3 – circumstances of the crime that increase the guilt of the defendant and injury to the victim.
4 – circumstances that increase the likelihood that the defendant would commit another crime.

12. According to the instructions, the definition of "mitigating circumstances" refers to:

1 – a fact or circumstance in the life of the defendant that led to the commission of the crime.
2 – a fact or circumstance that does not excuse the crime but that reduces culpability for the crime.
3 – a fact or circumstance that the jury unanimously decides reduces the guilt of the defendant.
4 – a fact or circumstance that excuses the commission of the crime.

13. Based on the summary evidence and instructions provided, state your opinion on how well prepared a juror would be to render a sentence.

1 – there is sufficient evidence and instruction to render a sentence of death in this case.
2 – there is sufficient evidence and instruction to render a sentence of life imprisonment.
3 – there is sufficient evidence and instruction, but either sentence cannot be recommended
4 – there is insufficient evidence and instruction to render a sentence in this case.

APPENDIX C

RECRUITMENT MATERIALS (LETTER, LISTSERV POST, CONSENT FORM)

1. LETTER

Dear [Potential Participant]

I am writing to let you know that a research study is being planned that may be of interest to you. It is possible that you may be eligible to participate in this study. If you are 18 years of age and citizen of Georgia and the United States and you have not been convicted of a felony or had your rights reinstated, you are eligible to participate.

Please be aware that, even if you are eligible, your participation in this or any research study is completely voluntary. There will be no consequences to you whatever if you choose not to participate. If you do choose to participate, the study will involve reading the jury instructions for a criminal court case and answering a brief, 10-question survey about what you have read.

If you are interested in participating, or would like some help determining your eligibility, please contact John R. Barner at the University of Georgia, School of Social Work at the contact information below. Any questions you have about the study will be answered.

Thank you for your interest,

John R. Barner, MSW
School of Social Work
University of Georgia
Tucker Hall
310 East Campus Road
Athens, GA 30602-7016
706-542-6153
jrbarner@uga.edu

2. LISTSERV ANNOUNCEMENT

Dear Participant,

John R. Barner at the University of Georgia School of Social Work is conducting a survey on "Measuring Jury Instruction Impact on Imposition of the Death Penalty". You are being invited to participate in this survey by providing a return address by mail or email to John Barner (see address below).

Please note that a consent form and cover sheet with instructions are included in the survey to explain the purpose and procedures of this study. Your participation and/or assistance would be greatly appreciated.

Thanks in advance for your participation!

John R. Barner, MSW
School of Social Work
University of Georgia
Tucker Hall
310 East Campus Road
Athens, GA 30602-7016
706-542-6153
jrbarner@uga.edu

3. INFORMED CONSENT STATEMENT

I, _____, agree to participate in a research study titled "MEASURING JURY INSTRUCTION IMPACT ON IMPOSITION OF THE DEATH PENALTY" conducted by John R. Barner, at the School of Social Work, University of Georgia, 410 Tucker Hall, 310 East Campus Road, Athens, GA 30602-7016, by phone at 706-542-6153, or by e-mail at jrbarner@uga.edu under the direction of Dr. Larry Nackerud, 301 Tucker Hall, available by phone at 706-542-5470, or email at nackerud@uga.edu. I understand that my participation is voluntary. I can refuse to participate or stop taking part at anytime without giving any reason, and without penalty or loss of benefits to which I am otherwise entitled. I can ask to have all of the information THAT can be identified as mine returned to me, removed from the research records, or destroyed.

Judges, attorneys and social scientists agree that we need a better understanding of the challenges and difficulties experienced by persons who serve as jurors on capital murder trials. Currently in the State of Georgia, a person who is over 18 years of age, a citizen of both Georgia and the United States, and either has not been convicted of a felony or has had their rights reinstated can serve on a capital jury. This research study is designed to study the opinions of potential jurors with regard to the clarity of the instructions they receive regarding their responsibilities as jurors. This research is produced by John R. Barner, a doctoral student at the School of Social Work at the University of Georgia, in collaboration with the Capital Jury Project, a National Science Foundation-funded nationwide project based at the School of Criminal Justice at the State University of New York at Albany. If I volunteer to take part in this study, I will be asked to do the following things:

1) Read a case summary and jury instructions from a capital murder case
2) Answer a brief, 10-question survey on what I have read.

Reading of the prepared materials and completion of the survey are not expected to take more than ten to fifteen minutes.

The benefits for me are learning more about the civic duty of serving as a juror and the legal responsibilities involved in that duty. The researcher also hopes to learn more about the effectiveness of jury instructions and the effect they may have on decision-making in capital trials.

No risk is expected but I may experience some discomfort or stress when reading detailed information about murder or other criminal acts. My participation in this study is strictly voluntary and I am free to discontinue my participation in this study at any time if any materials are disturbing to me or for any reason and skip any question that is uncomfortable to me or for any reason.

No individually-identifiable information about me, or provided by me during the research, will be shared with others without my written permission unless required by law. I will be assigned an identifying number and this number will be used on all of the questionnaires I fill out. Face

sheets containing my demographic information will accompany my questionnaire but will be kept separate so as not to identify me. A master list containing my identifying number will be destroyed once recruitment for this study is completed.

The investigator will answer any further questions about the research, now or during the course of the project. I understand that I am agreeing by my signature on this form to take part in this research project and understand that I will receive a signed copy of this consent form for my records.

_____
Name of Researcher

_____
Signature

_____
Date

Telephone: _____

Email: _____

_____
Name of Participant

_____
Signature

_____
Date

Please sign both copies, keep one and return one to the researcher.

Additional questions or problems regarding your rights as a research participant should be addressed to The Chairperson, Institutional Review Board, University of Georgia, 612 Boyd Graduate Studies Research Center, Athens, Georgia 30602-7411; Telephone (706) 542-3199; E-Mail Address IRB@uga.edu