UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)

CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA, PLAINTIFF,

vs.

STEVEN DALE GREEN, DEFENDANT.

MOTION TO DECLARE THE FEDERAL DEATH PENALTY ACT UNCONSTITUTIONAL DUE TO IMPROPER SENTENCING PROCEDURES

Comes the defendant, Steven Dale Green, by counsel, and moves the Court pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States to declare the Federal Death Penalty Act (FDPA) unconstitutional because the findings of the Capital Jury Project (CJP) are irreconcilable with death penalty jurisprudence since the decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

Statement of the Case

The defendant, Steven Dale Green, was a Private First Class (PFC) in the United States Army stationed in Iraq on March 12, 2006, when he is alleged to have committed the crimes charged in the indictment herein. (R. 36 Indictment). The indictment reflects that Green is subject to the death penalty for the crimes alleged in Counts 3-10 and Counts 13-16. The indictment charges as follows:

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629 Fourth Avenue
Louisville, KY 40202

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Count 1 charges Green with conspiring to murder Abeer Kassem Hamza Al-Janabi, Hadeel Kassem Hamza Al-Janabi, Kassem Hamza Rachid Al-Janabi, and Fakhriya Taha Mohsine. 18 U.S.C. §1111 and 18 U.S.C. §1117, and 18 U.S.C. §3261(a)(2).

Count 2 charges him with conspiring to commit aggravated sexual abuse against Abeer Kassem Hamza Al-Janabi.18 U.S.C. §371, 18 U.S.C. §2241(a), and 18 U.S.C. §3261(a)(2).

Counts 3-6 charge Green with the premeditated murders of the four aforementioned persons. 18 U.S.C. §1111, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §(2).

Counts 7-10 charge Green with felony murder in connection with the deaths of the four aforementioned persons. 18 U.S.C. §1111, 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Count 11 charges Green with aggravated sexual abuse against Abeer Kassem Hamza Al-Janabi.18 U.S.C. §2241(a), 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Count 12 charges Green with aggravated sexual abuse of a child (Abeer Kassem Hamza Al-Janabi) who was between the ages of 12 and 16. 18 U.S.C. §2241(c), 18 U.S.C. §3261(a)(2), and 18 U.S.C. §2.

Counts 13-16 charge Green with using a firearm during a crime of violence against the four aforementioned persons. 18 U.S.C. §§924(c)(1)(A) and 924(j)(1), 18 U.S.C. §3261(a)(2) and 18 U.S.C. §2.

Count 17 charges Green with obstruction of justice. 18 U.S.C. §1512(c)(1).

The indictment also sets forth the following special findings as to Counts, 3 -10, and 13-16:

Paragraph 42(a) alleges that Green was over the age of 18 at the time of the offenses. 18 U.S.C. §3591(a).

Paragraphs 42(b-e) set forth various mental states ("Gateway Factors") underlying the perpetration of the alleged crimes. 18 U.S.C. §3591(a)(2)(A)-(D).

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Fax (502) 584-2808

Paragraphs 42(f)-(I) set forth the following statutory aggravating circumstances with respect to Counts 3-10:

> The offenses were committed in a heinous, cruel, and depraved manner in that they involved torture and serious physical abuse, 18 U.S.C. §3592(c)(6);
>
> The offenses were committed after substantial planning and premeditation to cause death, 18 U.S.C. §3592(c)(9);
>
> The victims described in Counts 3, 4, 7, and 8 were particularly vulnerable due to youth, 18 U.S.C. §3592(c)(11); and
>
> The defendant intentionally killed or attempted to kill more than one person in a single criminal episode, 18 U.S.C. §3592(c)(16).

On July 3, 2007, the prosecution filed notice of intent to seek the death penalty as to Counts 3-10 and 13-16. (R. 70 Notice of Intent to Seek Death Penalty) and cited the following statutory and non-statutory aggravators:

> Counts 3, 7, and 13 were committed in a heinous, cruel, and depraved manner in that they involved serious physical abuse to Abeer Kassem Hamza Al-Janabi, 18 U.S.C. §3592(c)(6);
>
> Counts 3-10 and 13-16 were committed after substantial planning and premeditation to cause death, 18 U.S.C. §3592(c)(9);
>
> Abeer Kassem Hamza Al-Janabi (Counts 3, 7, and 13) and Hadeel Kassem Hamza Al-Janabi were particularly vulnerable due to youth, 18 U.S.C. §3592(c)(11); and
>
> The defendant intentionally killed more than one person in a single criminal episode, 18 U.S.C. §3592(c)(16).

The death penalty notice also listed the following non-statutory aggravators:

> Witness Elimination - The defendant killed the victim and witnesses of the alleged rape “to eliminate” them as possible witnesses;

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629 Fourth Avenue
Louisville, KY 40202

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Fax (502) 584-2808

> Victim Impact Evidence - The defendant caused injury, harm and loss to the family of each victim as evidenced by his or her "personal characteristics as a human being and the impact of [his or her] death on [his or her] family;" In addition, the injuries caused by the defendant extend to "the two minor children orphaned as a result of their parents' death and to those presently caring for the children."

The government also gave notice that in support of imposing the death penalty it intended to rely on all evidence admitted during the guilt phase of the trial. (R. 70 Notice of Intent to Seek Death Penalty).

Because the death penalty continues to be imposed in an arbitrary, capricious and random manner it can no longer be constitutionally acceptable. The imposition of the death penalty, as detailed below, violates the Eighth Amendment as set out in *Furman v. Georgia*, 408 U.S. 238 (1972), continued evolving standards of decency, and principles of fundamental fairness; consequently, the death notice must be stricken.

Argument

A. The Findings of the Capital Jury Project (CJP) Are Irreconcilable with the Death Penalty Jurisprudence since the Decision of the Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972).

In *Furman*, the Court struck down capital sentencing as it had been historically applied by the states throughout the country as so freakishly wanton, so arbitrary and capricious, and so unreviewable on appeal, that it violated the Cruel and Unusual Punishment Clause of the Eighth Amendment. In the three decades since *Furman* the Court has repeatedly reiterated that "vesting of standardless sentencing power in the jury violates the Eighth and Fourteenth Amendments." *Woodson v. North Carolina* 428 U.S. 280, 302 (1976). To be constitutional, a capital jury's sentencing discretion must be channeled by clear and objective standards

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200 Theatre Building
629 Fourth Avenue
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Fax (502) 584-2808

which provide specific and detailed guidance for the jury and render the capital sentencing process one that can be rationally reviewed. *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Maynard v. Cartwright*, 486 U.S. 356 (1988).

The requirement of clear and objective standards to guide capital jurors has led the Court to strike down vague statutory criteria which cannot be reviewed objectively on appeal. In *Godfrey v. Georgia*, 446 U.S. 420 (1980), Georgia's "outrageously or wantonly vile, horrible, and inhuman" aggravator was invalidated. The Court concluded it was so vague that it failed to provide any meaningful guidance to the jury. A capital jury making a sentencing decision on such a factor was as unconstrained in its sentencing choice as juries were under the schemes invalidated by *Furman*. Oklahoma's "especially heinous," atrocious, or cruel standard was struck down on this same basis in *Maynard v. Cartwright*, 486 U.S. 356 (1988). The *Maynard* Court reaffirmed that its Eighth Amendment jurisprudence since *Furman* had "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." *Id.* at 362.

In *Stringer v. Black*, 503 U.S. 222 (1992) the Court concluded that the presence of a vague aggravator in the weighing process created a greater risk of arbitrariness:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance ... [T]he use of a vague aggravating factor in the weighing process creates

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200 Theatre Building
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Fax (502) 584-2808

> the possibility not only of randomness but also of bias in favor of the death penalty.

Id. at 235-36.

Thus, the Court's jurisprudence has made it clear that capital sentencing decisions must be made according to criteria that are sufficiently clear to permit ordinary citizens to understand and apply them and that the jury's discretion must not be arbitrary.

As set out below, the research of the CJP demonstrates conclusively that capital juries, as currently selected and instructed, violate the Eighth Amendment in spite of efforts to provide those standards and instructions in at least seven distinct ways.

1. The Capital Jury Projects Proof that Capital Sentencing is Unconstitutional

The Law and Social Sciences Program of the National Science Foundation (grant NSF SES-9013252) first funded the Capital Jury Project ("CJP") in 1990. For the more than fifteen years since its creation in 1990, the CJP has systematically researched the decision-making of actual capital jurors. See William J. Bowers, *The Capital Jury Project: Rationale, Design, and a Preview of Early Findings*, 70 Ind. L. J. 1043 (1995).

Within each state chosen for its research study, the CJP picked 20 to 30 capital trials to represent both life and death sentencing decisions. From each trial, four jurors were selected for in-depth three-to-four-hour personal interviews. Interviewing began in the summer of 1991. The current CJP working sample includes 1,201 jurors from 354 capital trials in 14 states. Bowers and Foglia, *Still Singularly Agonizing: Laws Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law. Bull. 51, 51 (1993) [hereinafter,

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629 Fourth Avenue
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Fax (502) 584-2808

Bowers and Foglia].

Data collected and analyzed by CJP researchers, has been cited by the United States Supreme Court and other state and federal courts in capital cases. See e.g., *Schriro v. Summerlin*, 542 U.S. 348, 356 (2004); *Simmons v. South Carolina*, 512 U.S. 154, 170 (1994); *United States v. Young*, 376 F. Supp.2d 787, 797 (M.D. Tenn. 2005) vacated on other grounds 424 F.3d 499 (6th Cir. 2005); *People v. LaValle*, , 3 N.Y.S.3d 88, 117, 2 N.Y.S.3d 14, 79-82, 817 N.E.2d 341, 357 (N.Y. 2004); *People v. Cahill*, 809 N.E.2d 561, 600-602 (N.Y. 2003). Further, since 1993, some 30 articles presenting and discussing the findings of the CJP have been published in scholarly journals. See, e.g., Eisenberg, Garvey & Wells, *The Deadly Paradox of Capital Jurors*, 74 S. Cal. L. Rev. 371 (2001); Garvey, Johnson & Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 Cornell L. Rev. 627 (2000); Bowers & Steiner, *Death by Default*: *An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); Garvey, *Aggravation and Mitigation in Capital Cases: What do Jurors Think*?, 98 Colum. L. Rev. 1538 (1998); Hoffman, *Where's the Buck - Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137 (1995).

According to Bowers and Foglia (and other articles on the same subject) the CJP data reveal profound discrepancies between what the federal and state constitutions require and how actual capital jurors make their decisions. These data reveal the following unconstitutional characteristics of capital juries:

1) premature decision-making which renders the penalty phase meaningless;

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2) the failure of jury selection to remove large numbers of death-biased jurors, and the overall biasing effect of the selection process itself;

3) the pervasive failure of death qualified jurors in actual cases to comprehend and/or follow penalty instructions;

4) the wide-spread belief among jurors who sat on capital trials that death is required;

5) the wholesale evasion of responsibility for the punishment decision;

6) the continuing influence of race discrimination on juror decision-making; and

7) the significant underestimation of the alternative to death.

These "seven deadly sins of capital sentencing" are discussed in turn below with reference to the article by Bowers and Foglia and other articles publishing the results of the CJP research and with reference to relevant authority.

(a) Premature Decision-Making

Nearly half (49.2%) of all capital jurors make their sentencing decision before the penalty phase begins. These jurors feel strongly about their decision, and they do not waver from it over the course of the trial. Bowers and Foglia, *supra*, 39 Crim. Law Bulletin at 56. Premature decision making occurs in every state studied by the CJP Thus, bifurcation and instructions, the mechanisms relied on by the Courts to insure fairness in capital sentencing, have little effect in guiding capital jurors on their sentencing decision:

> Requirements such as bifurcating the trial, allowing presentation of mitigation evidence during the sentencing phase, and the use of jury instructions aimed at guiding sentencing discretion are of little use if jurors have already decided what the penalty should be. Interviews with capital jurors throughout the country show that jurors have often decided what the penalty should be by the

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> end of the guilt phase, before they have heard the penalty phase evidence or received the instructions on how they are supposed to make the punishment decision.

Bowers & Foglia, *supra*, 39 Crim. Law Bulletin at 56.

Approximately 30% of all capital jurors, nationwide, made the decision that the defendant should receive the death penalty at the end of the guilt phase. Of these jurors making early decisions to impose the death penalty, 54.6% indicated that they thought they knew what the punishment should be during the presentation of guilt evidence.[1]

These jurors reach their decision long before they have even had the opportunity to discuss it with any of their fellow jurors or heard any of the capital defendants mitigating evidence.[2] Many of these early pro-death jurors cite convincing proof of guilt of the underlying crime as the reason for their early pro-death stands.

For some jurors, it was the nature of the crime itself that convinced them that death should be the punishment.[3] Many jurors stressed the role of physical evidence, especially photographs or video tapes, as critical in their punishment decisions.[4] In addition to the nature of the crime and the evidence of guilt, some early pro-death jurors focused on the defendant

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[1] Bowers, Sandys & Steiner, *Foreclosed Impariality in Capital Sentencing: Juror's Predispositions, Guilt-Trial Experience, and Premature Decision Making,* 83 Cornell L. Rev. 1476, 1495 (1998).

[2] Bowers, Fleury-Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment or Legal Fiction,* inAcker, Bohm & Lanier, *America's Experiment with Capital Punishment,* Chapter 14 and 17 (Carolina Academic Press, 2d ed., 2003) [hereinafter, *The Capital Sentencing Decision*].

[3] *Id* at 17-18.

[4] *Id* at 18

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629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

to explain what caused them to take a stand for death during the guilt stage of the trial. These accounts typically concerned the demeanor of the defendant during trial and the juror's early perception of his future dangerousness.[5]

In terms of how strongly early pro-death jurors felt about the decision they made to impose the death penalty, and in terms of how consistently they stuck to their early decision, the CJP data establishes that 97.4% of all early pro-death jurors felt strongly about their early pro-death stance, with 70.4% indicting they were absolutely convinced and 27% indicating they were pretty sure about their decision. Bowers & Foglia, supra, 39 Crim. Law Bulletin at 57.

> Presenting mitigating evidence during the penalty phase cannot be very effective when so many jurors declare that they were already "absolutely convinced" that the defendant deserved death before they heard any mitigation evidence. Given the human proclivity to interpret information in a way that is consistent with what one already believes,[6] it is not surprising that most jurors never waver from their premature stance.

Bowers & Foglia, 39 Crim. Law Bulletin at 57.

This premature decision undercuts efforts to insure fair and constitutional capital sentencing and precludes consideration of mitigation. Thus, decisions granting the defendant the right to present mitigation and to have instructions requiring jurors to consider it cannot protect the defendants from jurors who have decided the penalty before hearing any mitigation at all.

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[5] *Id* at 18.

[6] Leon Festinger, *A Theory of Cognitive Dissonance* (1957)

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Beginning with *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court has repeatedly made it clear that capital jurors must be permitted to consider a wide range of mitigating circumstances in deciding whether death is the appropriate sentence. This principle flowed from earlier holdings rejecting capital sentencing schemes that made death mandatory for certain murders. The Eighth Amendment dictates individualized determination of the appropriate sentence. *Lockett, supra*. Just as the statutory scheme cannot preclude consideration of mitigating evidence, so too "the sentencer [may not] refuse to consider, as a matter of law, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). Simply allowing the mitigating evidence to be admitted is not enough. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); see also, *Skipper v. South Carolina*, 476 U.S. 1 (1986) (Evidentiary ruling excluding relevant mitigating evidence of defendants adjustment to prison setting violates *Eddings*); *Mills v. Maryland*, 486 U.S. 367 (1988) (Requirement of unanimous jury finding on mitigating factors created unconstitutional barrier to consideration of relevant mitigating evidence). Only when the capital juror is free to consider and give effect to all mitigating evidence is there an assurance that there has been an individualized sentencing determination. *Lockett, supra*.

Where the jurors have already made up their minds before hearing any of the mitigation evidence at the sentencing phase of the trial, the Eighth Amendments requirement of consideration of mitigation is violated.

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(b) The Failure of Jury Selection to Remove Large Numbers of Death-biased Jurors and the Overall Biasing Effect of the Selection Process

Potential jurors who have reservations about the death penalty are not automatically disqualified from serving on a capital jury. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). A sentence of death returned by a jury biased toward death violates the Constitution:

> A State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected ... Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution.

Id. at 522, 523. Only potential jurors whose reservations about the death penalty would "prevent or substantially impair the performance of [their] duties as a juror in accordance with [their] instructions and [their] oath" can be disqualified under federal law. *Wainwright v. Witt*, 469 U.S. 412, 424 (1985).

Witherspoon's prohibition against a capital jury biased toward death was extended in *Morgan v. Illinois*, 504 U.S. 719 (1992), to require the disqualification of death-biased jurors. The *Morgan* Court held that potential jurors who would automatically impose a sentence of death without regard to mitigating circumstances are disqualified from serving as capital jurors. Leaving such jurors on a capital jury violates the capital defendants constitutional right to an impartial jury.

> A juror who will automatically vote for the death penalty in

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> every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any **2230 prospective juror who maintains such views. *If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.*

Morgan v. Illinois, 504 U.S. at 729 (emphasis added). For this reason, attorneys must not be precluded from examining potential jurors about their ability to consider the mitigating evidence likely to be presented. Adequate voir dire on these subjects plays a critical function of insuring that the jury is not skewed toward a verdict of death. *Id*. at 730.

In addition, the *Morgan* Court defined what the term "impartial" means in a capital case:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136 (1955). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burrs Trial 416 (1807). 'The theory of the law is that a juror who has formed an opinion cannot be impartial.' *Reynolds v. United States*, 98 U.S. 145, 155 (1879)."
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> * * * *
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> Thus it is that our decisions dealing with capital sentencing juries

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> and presenting issues most analogous to that which we decide here today, [citations omitted], have relied on the strictures dictated by the Sixth and Fourteenth Amendments to ensure the impartiality of any jury that will undertake capital sentencing.

Id. at 727-28, (emphasis added).

The holdings in *Witt* and *Morgan* teach that potential capital jurors must be indifferent on the question of the appropriate penalty in the case at issue. The real question for potential jurors regarding their views about capital punishment is whether those views would prevent or impair the juror's ability to return a verdict of life without parole without benefit or death in the case before the juror.

To understand why so many jurors prematurely decide to impose death the CJP researchers investigated the possibility that jury selection procedures, despite being conducted pursuant to the *Witt* or *Morgan* standards, fail to identify jurors for whom death is the only appropriate penalty for the cases on which they served. The jurors were presented with the following question/matrix:

> Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the following crimes? Murder by someone previously convicted of murder; A planned, premeditated murder; Murders in which more than one victim is killed; Killing of a police officer or prison guard; Murder by a drug dealer; and, a killing that occurs during another crime.[7]

The CJP survey results documented profound deviations between what capital jurisprudence requires and what actual capital jurors believe. Many jurors who had been

[7] Bowers & Foglia, 39 Crim. Law Bulletin at 62, fn. 60.

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screened as capital jurors under *Morgan* standards, and who decided an actual capital case, approached this task believing the death penalty was the only appropriate penalty for many of the kinds of murder. In effect, mandatory death penalty laws, while banned by the Supreme Court under *Woodson*, are applied by jurors despite the procedural safeguards of *Morgan* and discretionary statutory schemes on which jurors were instructed.

> Over half of the CJP jurors indicated that death was the only punishment they considered acceptable for murder committed by someone previously convicted of murder (71.6%); a planned or premeditated murder (57.1%); or a murder in which more than one victim was killed (53.7%). Close to half could accept only death as punishment for the killing of a police officer or prison guard (48.9%), or a murder committed by a drug dealer (46.2%). A quarter of the jurors thought only death was acceptable as punishment for a killing during another crime (24.2%), i.e., a "felony murder." Nearly three out of ten jurors (29.1%) saw death as the only acceptable punishment for all of these crimes.

Bowers & Foglia, 39 Crim. Law Bulletin at 62; *accord* Bowers, Fleury-Steiner & Antonio (Carolina Academic Press, 2003); Bentele & Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation in no Excuse*, 66 Brooklyn L. Rev. 1011 (2001); Bowers, Sandys & Steiner, *Foreclosed Impartiality in Criminal Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (1998); Bowers & Steiner, *Choosing Life or Death: Sentencing Dynamics in Capital Cases*, in Acker, Bohm & Lanier, Americas Experiment with Capital Punishment, Chapter 12 (1st ed., 1998).

In addition to identifying large numbers of jurors who enter the jury box with their own personal mandatory death penalty opinions to guide them, as opposed to the court's

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Fax (502) 584-2808

instructions, researchers identified to a statistical certainty that there was a direct relationship between taking a strong premature stance for death and being identified as a "death is the only appropriate sentence" juror. "Because a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror." *Morgan* at 729. It is for that reason that the *Morgan* Court went on to say that "[i]f even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence." *Id.*

Further, the process of capital jury selection itself produces the worst possible group of jurors precisely when a criminal defendant should have a right to the most qualified jurors. The studies demonstrate that the process negatively impacts the guilt/innocence phase of the capital trial in several ways. First, by questioning potential jurors extensively about their attitudes towards the death penalty, substantial numbers of jurors believe both that the defendant must be guilty, and that apparently they are going to be asked to sentence him to death. After all, if the judge and the lawyers were not operating on the assumption he was guilty and that death was the likely sentence, then why are they spending so much time talking about what his punishment should be? Moreover, many jurors, after seeing which jurors stay and which leave, believe that if selected, it is understood that they will find the defendant guilty, and that they will sentence him to death.[8]

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[8] *See e.g.*, Haney, Hurtado & Vega, *"Modern" Death Qualification: New Data on its Biasing Effects,* 18 Law & Human Behavior 619 (1994); Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process Effect,* 8 Law & Human Behavior 121 (1984); Haney, *Examining Death Qualification: Further Analysis of the Process Effect,* 8 Law & Human Behavior 133 (1984).

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200 Theatre Building
629 Fourth Avenue
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Tel (502) 584-0525
Fax (502) 584-2808

Early studies showing that death-qualifying voir dire results in the least representative juries, which have been validated by the CJP, established rather obvious phenomena. Attitudes towards capital punishment do not exist in a vacuum. One's attitude about this very controversial topic, over which Americans have very divergent views, are strongly associated with a whole constellation of attitudes about the criminal justice system. These studies established, for instance, that people who support the death penalty-- and who not only support it, but are able to tell the lawyers and the judge in the courtroom that they would be able to impose it-- hold a number of other views about the criminal justice system that work strongly against the capital defendant.

The data demonstrates that these jurors, much more strongly than non-death-qualified jurors, believe that if a defendant does not testify in his or her own defense, that the failure to do so is affirmative proof of guilt. Death-qualified jurors do not believe in the presumption of innocence. They believe much more strongly that "where there is smoke, there is fire." They are extremely distrustful of defense lawyers and view everything they have to say with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and its witnesses -- especially police officers -- and believe them.

They do not believe in Due Process guarantees like requiring the prosecution to bear the burden of proof beyond a reasonable doubt. They are highly suspicious of experts called by the defense. In short, death qualified jurors are the jurors least representative of the community as a whole and are the jurors least likely to give a criminal defendant the benefit

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of the doubt.[9] With such jurors, the defendant not only is denied a fair determination of the appropriate sentence, he is denied a fair determination of guilt or innocence of the underlying crime.

(c) Capital Jurors Fail to Comprehend And/or Follow Penalty Instructions

The CJP research demonstrates that capital jurors fail to understand and/or follow the instructions given in capital trials. This is consistent with pre-CJP and non-CJP data and conclusions that significant numbers of capital jurors fail to understand the concept and role of mitigation in capital cases.[10] Capital jurors fail to understand that they are not only allowed to consider mitigation, but they are required to do so even if it does not excuse or lessen the capital defendants culpability for the murder. Thus, the commands of *Lockett* are being ignored.

Over half of the capital jurors (56.4%) studied in California failed to understand that the jury did not have to be unanimous about individual mitigating factors before they were allowed to consider them. Moreover, a third (37.6%) believed mitigating factors had to have

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[9] Cowan, Thompson & Ellsworth, *The Effects of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation*, 8 Law & Human Behavior 53 91984); Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 Law & Human Behavior 31 (1984).

[10] See e.g., Sandys & McClelland, *Stacking the Deck for Guilty and Death: The Failure of Death Qualification to Ensure Impartiality*, in Acker, et al, America's Experiment with Capital Punishment (2d ed., 2003); Lynch & Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias, and the Death Penalty*, 24 Law & Human Behavior 337 (2000); Haney & Lynch, *Clarifying Life and Death Matters: An Analysis of Instructional Comprehension and Penalty Phase Closing Arguments*, 21 Law & Human Behavior 575 (1997); Tiersma, Dictionaries and Death: Do Capital Jurors Understand Mitigation?, 1995 Utah L. Rev. 1 (1995); Haney & Lynch, Comprehending Life and Death Matters, 18 Law & Human Behavior 411 (1994); Eisenberg & Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

been proven to them beyond a reasonable doubt before they could be considered.[11]

The reasons for this massive misunderstanding of the rules which are supposed to guide and channel capital jury decision-making is the lack of familiarity with the capital sentencing process -- i.e., the total absence of any culturally normative experience with the unique kind of decision capital jurors are called upon to make.

Americans are very familiar with a jury's role as fact-finder. This role is a longstanding part of our culture. On the other hand, Americans are not familiar with the role a capital jury has in making the decision as to whether the capitally accused should live or die.[12]

American jurors are accustomed to finding facts such as whether a weapon was used, whether a taking of property was a theft, or whether a driver was legally intoxicated. They are unaccustomed to deciding what weight to give a capital defendant's dysfunctional childhood, serious psychiatric disorder, or brain damage in a capital sentencing. Capital jurors have to resort to their own rules because terms like mitigation and aggravation have no meaning to them:

> [CA juror:] The first thing we asked for after the instruction was, could the judge define mitigating and aggravating circumstances. Because the different verdicts that we could come up with depended on if mitigating outweighed aggravator if aggravating outweighed mitigating, or all of that. So we wanted to make sure. I said: "I don't know that I exactly understand what it means." And then everybody else said, "No, neither do I", or "I

[11] Bowers & Foglia, 39 Crim. Law Bulletin at 66-71.

[12] *See* Lynch & Haney, 24 Law & Human Behavior 337; Haney & Lynch, 21 Law & Human Behavior 575; Haney & Lynch, 18 Law and Human Behavior 411.

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Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

> can't give you a definition." So we decided we should ask the judge. Well, the judge wrote back and said, "You have to glean it from the instructions."
>
> [CA juror:] I don't think anybody liked using those terms because when we did use them, we got confused . . . They were just confusing and I had never really used them before in anything. So, yeah, they sit there and throw these stupid words at you and I'm like, "Well, what do they mean?" I'd get so confused "cause they sound the same." I'm thinking, "Now which one was that again?" you know. And it totally confused me.

Haney, Sontag & Costanzo, 50 Journal of Social Science Issues at 168-169.

The net effect of these misunderstandings is that capital jurors are skewed toward a sentence of death.

> The misunderstandings reflected in these incorrect responses on the questions regarding how to handle mitigating and aggravating evidence all make a death sentence more likely. It is more difficult to find mitigating evidence than the law contemplates when jurors think they are limited to enumerated factors, must be unanimous, and need to be satisfied beyond a reasonable doubt. The CJP data show that nearly half (44.6%) of the jurors failed to understand the constitutional mandate that they be allowed to consider any mitigating evidence. Two-thirds (66.5%) failed to realize they did not have to be unanimous on findings of mitigation. Nearly half (49.2%) of the jurors incorrectly thought they had to be convinced beyond a reasonable doubt on findings of mitigation . . . The constitutional mandate of Gregg and companion cases to guide jurors' exercise of sentencing discretion is not being satisfied when jurors do not understand the guidance.

Bowers & Foglia, 39 Crim. Law Bulletin at 71.

(d) Jurors Believe They Are Required to Return a Verdict of Death

Given the findings reported about premature decision making and the failure of voir

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

dire to remove pro-death penalty jurors, it should come as no surprise that many jurors believe death to be required if certain aggravating factors are proven beyond a reasonable doubt.

In no state are jurors free of the misconception that the law requires the death penalty if the evidence establishes that the murder was "heinous, vile or depraved" or the defendant would be "dangerous in the future." CJP data shows that substantial percentages of jurors "erroneously believe that death is required if certain aggravators are proved beyond a reasonable doubt."

These mistaken beliefs result in a jury which is much more likely to return a verdict of death.

(e) Evasion of Responsibility for the Punishment Decision

Capital jurors must not be misled so as to diminish their sense of responsibility for any death sentence imposed. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). Each juror must understand that he or she, alone, is responsible for his or her sentencing decision. Uncorrected beliefs that "responsibility for any ultimate determination of death will rest with others" create a possible bias toward a death sentence. *Id.* at 333.

A jury unconvinced that death is the appropriate punishment, "might nevertheless wish to 'send a message' of extreme disapproval for the defendants acts" and vote for death on the assumption that the ultimate sentencer will correct any error. *Id*. at 332. A jury led to believe a life sentence cannot be increased to death may vote death because it understands any decision to "delegate responsibility" for a sentence of death "can only be effectuated by returning" a death sentence. *Id.*

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200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

As the Court explained in *Caldwell*, "[b]elief in the truth of the assumption that sentencers treat their power to determine the appropriateness of death as an 'awesome responsibility' has allowed this Court to view sentencer discretion as consistent with -- and indeed as indispensable to -- the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Id*. 472 U.S. at 330. CJP data demonstrates that this assumption is false.

Almost no capital jurors, however, view themselves as most responsible for the decision they make. They place primary responsibility elsewhere:

> The vast majority of jurors did not see themselves as most responsible for the sentence. Over 80% assigned primary responsibility to the defendant or the law, with 49.3% indicating the defendant and 32.85% indicating the law was most responsible. In contrast, only 5.5% thought the individual juror was most responsible, and only 8.9% believed the jury as a whole was most responsible ...

Bowers & Foglia, 39 Crim. Law Bulletin at 74-75.

Death penalty statutes are not effectively guiding discretion when jurors misunderstand the instructions, mistakenly believe death is required by law, and do not appreciate their responsibility for the sentence imposed. The CJP finding that a large majority of jurors believe the law is "primarily responsible for the sentence is particularly ironic considering their lack of understanding of the law." *Id*. at 75.

(f) The Continuing Influence of Race on Juror Decision-making

CJP data demonstrates that in all 14 states, the process of capital jury decision-making

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

is influenced, not only by the race of the defendant and the race of the victim, but by both the racial composition of the jury and the race of the individual jurors. CJP data demonstrate that along gender lines, the outcome of a capital jury's verdict is greatly dependent on how many white males make it on to the jury, and whether any African American males serve as jurors.

The data demonstrates, for instance, that white male capital jurors (generally speaking) do not experience lingering doubt about the defendant's guilt. They see the defendant as remorseless and are unable to put themselves in either the defendant's shoes or his family's shoes. They believe that the defendant will be dangerous in the future unless executed.

On the other hand, African American male capital jurors (generally speaking) frequently have at least some doubts about the evidence of guilt. They are able to see the defendant as someone who is sorry for what he has done. They are able to put themselves in the defendant's situation and understand what it must be like for the defendant's family. And, they do not see the defendant as someone who will hurt other people in the future.

It would be difficult to imagine a more arbitrary circumstance than having to depend on the racial composition of the jury for a life sentence. Nevertheless, the data demonstrate that the outcome of a capital case is greatly dependent on the race of the individual jurors and on the overall racial composition of the jury as a whole.[13]

(g) Underestimation of the Alternative to a Death Sentence

In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the Court held that because the

[13] Bowers, Steiner & Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition,* 3 U. Pa. J. Const. L. 171 (2001).

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200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

jury that sentenced Simmons to death reasonably may have believed he could be released on parole if he were not sentenced to death, this misunderstanding "had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration." *Id*. at 162. In *Shafer v. South Carolina,* 532 U.S. 36 (2001), the Court reaffirmed the principles established in *Simmons*. A capital jury's choice to sentence someone to death should never be premised upon false, misleading, or inaccurate beliefs about parole eligibility or early release.

As *Simmons* and *Shafer* hold, a death sentence returned by a jury that was "forced" to impose a death sentence because of its false belief that a life sentenced defendant would be eligible for release on parole is unconstitutional.

> The data revealed that most capital jurors grossly underestimated the amount of time a defendant would serve in prison if not sentenced to death, and that the sooner jurors believed (wrongly) a defendant would return to society if not given the death penalty, the more likely they were to vote for death ...
>
> Both statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death. Jurors who gave low estimates were more likely to take a pro-death stand on the defendant's punishment at each of the four points in the decision process.

Shafer 532 U.S. at 80, 82.

The CJP research has confirmed that jurors do not understand that a vote for life is a vote for life without parole.

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200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

Capital Jurors Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

State	Median Estimate	Number of Jurors	Mandatory Minium*
Alabama	15.0	35	LWOP
California	17.0	98	LWOP
Florida	20.0	104	25
Georgia	7.0	67	15
Indiana	20.0	75	30
Kentucky	10.0	74	12,25*
Louisiana	15.0	23	LWOP
Missouri	20.0	47	LWOP
North Carolina	17.0	77	20
Pennsylvania	15.0	63	LWOP
South Carolina	17.0	99	30
Tennessee	22.0	42	25
Texas	15.0	106	20
Virginia	15.0	36	21.75

* These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.
** Kentucky gave capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives.

Thus, jurors are confused about the impact of their decisions in ways which increase the likelihood that death will be imposed.

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2. The Capital Jury Projects Findings Are Consistent with Other Research

The findings of the CJP are consistent with other studies based on in-depth interviews of actual capital jurors were conducted in Florida, California and Oregon. These studies showed that capital jurors were not following the constitutional guidelines established by the Supreme Courts post-*Furman* jurisprudence:

> Shortly after the *McCleskey* decision, researchers undertook studies based on in-depth interviews with persons who had served on capital juries in Florida, California, and Oregon. These interviews focused on how jurors actually made their decisions and whether, or to what extent they were guided by the capital statutes in their respective states. The questioning was largely an open ended inquiry into what factors influenced the sentencing decision, and whether jurors' decision making was being guided by statutory provisions and the Court's conception of the sentencing decision as a reasoned moral choice.
>
> In Florida, Geimer and Amsterdam (1987-88) interviewed some 54 jurors from 10 trials, five in which the jurors voted for death, and five in which they voted for life. They asked jurors to explain the reasons for their life or death sentencing decisions and to evaluate the role or influence of Florida's statutory aggravating and mitigating considerations on their decisions. Two out of three jurors (65%) indicated that Florida's statutory aggravating and mitigating guidelines had "little or no influence" on their sentencing decisions.
>
> From jurors' explanations of how they did make their decisions, Geimer and Amsterdam identified what they called the "operative factors" that actually shaped jurors' sentencing decisions. While most of the jurors who voted for death (64%) cited the "manner of the killing" as an operative factor, more than half (54%) gave the impermissible "presumption of death" as a factor, the constitutionally forbidden belief that the death penalty was the correct or appropriate punishment, unless they could be persuaded otherwise (at 41). As one juror bluntly put it, "[o]f course he got death. That's what we were there for" (at 45-46). Next in line as influential operative factors in the death decision

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Fax (502) 584-2808

were "defendant's demeanor" and "defense attorney performance" (32% and 21% of the jurors in death cases, respectively). The former was illustrated by a juror's comment that the "[defendant] seemed callous, indifferent. Nobody saw a heartbeat of regret. He didn't move a muscle except for crossing his legs. By the time of the penalty phase, the jury was not inclined to feel sorry for him. Minds were already colored" (at 52).

Likewise, Geimer and Amsterdam identified operative factors among the jurors who voted for life. Most common (65%) was "lingering doubt" about the capital murder verdict. An example of this explanation was "we found him guilty, there wasn't anybody else to put it on . . . . But we didn't want to execute him because some evidence might come out in the future about the other guy (at 29). Concerning the defense attorney's performance, a juror said, "I shouldn't say it, but I feel it in my heart and always have, his lawyer left a lot to be desired. I realize he was hired by the state to do a job and probably not paid much . . . . I didn't mention it at the jury room but I think he was not determined enough. He didn't try enough and that affected the jury" (at 53).

In California, Sontag (1990) interviewed 30 jurors drawn from one death and one life case in each of five counties throughout the state. In Oregon, Costanzo (1990) interviewed 27 jurors from five death and four life cases from a single urban county responsible for the majority of Oregon's capital trials. The findings of these two studies are reviewed and contrasted in Haney, Sontag, and Costanzo (1994).

Under California's statute, which lists "factors in aggravation and factors in mitigation" without specifying whether those factors are to be considered as aggravating or mitigating, and without indicating how the factors are to be weighed in deciding on the defendant's punishment, juries seemed quite confused about how to make the sentencing decision. Sontag found that California juries deliberated with much broader and less coherent agendas, and took approximately three times longer to reach a sentencing verdict than did the Oregon juries studied by Costanzo. Many California jurors tended to search for a key factor that would make the decision

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Tel (502) 584-0525
Fax (502) 584-2808

clear-cut. They typically narrowed the decision by focusing almost exclusively on the crime and on issues which had already come up in the guilt phase of the trial. Haney et al.(1994) reported that "fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a presumption in favor of death" (at 162) -- quite comparable to what Geimer and Amsterdam identified as the most common operative factor among Florida jurors who voted for death.

This tendency to reduce the complex question of life or death to one decisive point among California jurors is illustrated in the comments of a few jurors. For example, one death-jury member recalled the nature of the penalty decision as a matter of determining premeditation: "[A]ccording to the instructions, the main thing was, was it premeditated? Did he deliberately, did he intend to kill these people? If so, then we should give him the death penalty. If not, then we should give life without the possibility of parole" (at 162). Another juror confused the penalty decision with the legal standard of insanity: "I think the bottom line was, at the time he was committing [the crimes], did he know what he was doing? Did he know right from wrong? That's the whole thing" (at 162).

Oregon's directed statute, modeled on that of Texas, made the life or death sentence rest heavily upon jurors' answers to a single question: "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Oregon juries, compared to those in California, appeared more coherent in their decision-making but were much more constricted in the range of information they considered. The directed statutes used in Oregon and Texas have been challenged for discouraging the consideration of mitigating evidence. In this connection, Costanzo reported that many of the jurors' comments underscored the narrowing effect of the directed statute on the range of issues they considered: "We just had to stick to those four [sic] basic criteria. We couldn't deviate with this mitigating circumstance, or testimony of people that had spoken on his behalf or against him. We just had to go by those guidelines that they give you when you make that decision" (at 165-166).

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Tel (502) 584-0525
Fax (502) 584-2808

> Oregon jurors relied upon the sentencing instructions not only to narrow the scope of the evidence they considered but also to minimize their responsibility for the outcome of their deliberations: "We are not sentencing him to death--we are just answering these questions. We talked about it. We are just answering these questions--to get a clear mind so as not to feel guilty that I sentenced him to die. That's how the law has it--just answer these questions" (at 161-167). Oregon jurors also generally underestimated how long convicted defendants who were not given the death penalty would spend in prison before returning to society, and fully one-half of the Oregon jurors did not believe that the death penalty would actually be carried out.
>
> Concerning both the California and Oregon studies, the investigators observed that "there was a tendency among jurors from both samples to shift or abdicate responsibility for the ultimate decision--to the law, to the judge, or to the legal instructions--rather than to grapple personally with the life and death consequences of the verdicts they were called upon to render" (Haney et al. 1994:160). In addition, the researchers concluded: "Capital penalty instructions fail to acknowledge (let alone clearly frame or carefully guide) the inherently moral nature of the task that they direct jurors to undertake. They seem to imply that death sentencing involves nothing more than simple accounting, an adding up of the pluses and minuses on the balance sheet of someone's life (at 172)."
>
> These studies raised serious questions about the operation of post-Furman capital statutes. Jurors appear to understand sentencing instructions poorly, especially their obligation to give effect to mitigation. Many appear to presume that death is the appropriate punishment for capital offenses without regard for mitigation. They seem to focus narrowly on a single issue to simplify decision making and to reach consensus on punishment. In explaining the decision to impose the death penalty, they invoke guilt related considerations as if the sentencing process was merely a replay of the guilt decision. These soundings were sufficiently ominous to justify a more extensive investigation of the capital sentencing process, one that would take a more systematic look into the black box of jury decision making.

Bowers, Fleury-Steiner & Antonio, *The Capital Sentencing Decision: Guided Discretion,*

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

Reasoned Moral Judgment, Or Legal Fiction, (chapter 14 in Acker, Bohm, Lanier, America's Experiment With Capital Punishment, Carolina Academic Press, 2d ed., 2003) at 8-11 (emphasis added.).

Conclusion

Because the traditional means of guiding the discretion of jurors in capital cases have been shown by the research of the Capital Jury Project to be constitutionally inadequate and because there are no other means available identified as protecting the defendants rights, the death notice should be dismissed.

/s/ Scott T. Wendelsdorf
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

/s/ Patrick J. Bouldin
Assistant Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

/s/ Darren Wolff
Attorney at Law
2615 Taylorsville Road
Louisville, KY 40205
(502) 584-0525

Counsel for Defendant.

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

CERTIFICATE

I hereby certify that on February 15, 2008, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808