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DEADLY CONFUSION: JUROR INSTRUCTIONS IN CAPITAL CASES

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SUMMARY:
... Yet our interviews with jurors who served in South Carolina capital cases indicate that this nightmare is a reality. ... The fifty-page interview instrument, designed and tested by the Capital Jury Project, covered all phases of the guilt and sentencing trials. ... Table 2 presents juror responses to three principal interview questions about their impressions of the role of dangerousness and the time defendants might serve if a death sentence were not imposed. ... If an aggravating circumstance is found by the jury, but no death sentence is imposed, the minimum period of incarceration before parole is thirty years. ... Second, what we know about juror behavior contemporaneous with the capital sentencing decision suggests that expected time in jail influences jurors in the direction we observe. ... Juror confusion, particularly about the mitigating circumstance burden of proof, cannot simply be attributed to inability to grasp legal terminology and concepts. ... The data suggest that the sentencing phase of a capital trial commences with a substantial bias in favor of death. ... The empirical data remove any support for the view that, on balance, keeping juries ignorant about parole protects defendants in capital cases. ... Since the 1976 capital punishment cases, state statutes requiring guided discretion in sentencing have dominated death penalty adjudication. ...

TEXT:
[*1]

A fatal mistake. A defendant is sentenced to die because the jury was misinformed about the law. The justice system should be designed to prevent such a tragic error. Yet our interviews with jurors who served in South Carolina capital cases indicate that this nightmare is a reality.

Although our data are limited to South Carolina, the question whether jurors are adequately

instructed in capital cases is of national concern. For example, the issue whether jurors should be more fully informed about the alternative to a death sentence has arisen in other states. [1] And the question whether jurors understand the burdens of proof in capital cases can arise in any death penalty state. [2]

As with many death penalty issues, it is tempting to view the question of juror instructions solely as a question for resolution by the Supreme Court as a matter of federal constitutional law. [3] This narrow **[*2]** perspective may be reinforced by the Supreme Court's grant of certiorari in State v. Simmons [4] to decide whether a jury should be informed when a life sentence means life without the possibility of parole. However important Supreme Court death penalty decisions are, the initial responsibility for instructing jurors rests with trial judges. Our data and analysis should inform trial judges about the real impact of the instructions they choose to give and not to give. Even if the Constitution does not mandate full and clear instructions, trial judges and reviewing courts should provide them in the sound exercise of their discretion.

After describing the data and the law in Part I, Part II shows that jurors' false expectations about alternatives to the death sentence probably influence their sentencing decisions. Part III establishes that jurors do not understand the burdens of proof governing the sentencing phase of murder trials. Part IV shows that confusion works against the defendant because the jurors' strong initial inclination is to sentence to death. I. The Data and Applicable Law

A. The Data

The data analyzed here were gathered as part of the Capital Jury Project, a National Science Foundation-funded multistate research effort. The Project is intended to fill a major gap in our knowledge of death penalty decisionmaking. Researchers trying to draw inferences about how jurors determine capital case sentences tend to rely on surveys of the general population, [5] on anecdotal data from individual cases, [6] and on material in the written record, [7] but not on data systematically gathered from jurors who sat in capital cases. Such systematic data is scarce. The data gathered by the Capital Jury Project should **[*3]** begin to inform policymakers and courts about how actual jurors decide between life and death.

The results reported here are from the Capital Jury Project's efforts in South Carolina. Jurors who sat in thirty-one South Carolina murder cases were randomly sampled, with a goal of four juror interviews per case. Nineteen cases resulting in death sentences and twelve cases resulting in life sentences are in the sample. The cases in the study are all South Carolina capital cases (other than resentencings) brought since enactment of the South Carolina Omnibus Criminal Justice Improvements Act of 1986. [8] That law worked fundamental changes in the standards of parole in capital cases and provided a logical stopping point. A total of 114 live interviews were completed by interviewers trained to work with the interview instrument. [9]

The fifty-page interview instrument, designed and tested by the Capital Jury Project, covered all phases of the guilt and sentencing trials. [10] The data include facts about the crime; the racial, economic and other characteristics of the defendant, the victim and their families; the process of juror deliberation; and the conduct of the case by defense counsel, the prosecutor, and the judge. The interviews also included questions about jurors' background characteristics and their views on the death penalty.

B. South Carolina's Death Penalty Statute

If a prosecutor has given notice that the state seeks the death penalty, [11] a sentencing trial follows the defendant's conviction for murder. [12] After hearing evidence at the sentencing phase, the jury must determine whether at least one statutory aggravating circumstance is present. If an

aggravating circumstance is present a jury may sentence the defendant to death but is not required to do so. Murder under aggravating circumstances includes murder committed during the commission of certain serious crimes such as kidnapping and rape, murder of a police officer, and murder by a defendant previously convicted of murder. [13] The jury may also consider statutory mitigating circumstances. These include lack of prior convictions for violent crime, the age or mental capacity of the defendant, duress, **[*4]** and provocation. [14] If the jury does not unanimously find the presence of an aggravating circumstance, the sentence is automatically life imprisonment. [15] II. Expectations About Nondeath Sentences

A defendant's future dangerousness to society is an appropriate factor in death sentence decisions. Although South Carolina statutes do not mandate considering dangerousness as an aggravating factor in sentencing, [16] the state's evidence in aggravation is not limited to statutory aggravating circumstances. [17] South Carolina prosecutors frequently emphasize a defendant's dangerousness. In their evidence and argument at the punishment stage, they often note that the death penalty will keep the defendant from killing again and cite the danger to the public if the defendant were ever to escape or to be released from prison. [18] The frequency with which dangerousness is argued to the jury estops the state from claiming that dangerousness is not at issue in sentencing.

In assessing dangerousness, the probable actual duration of the defendant's prison sentence is an important consideration. [19] Holding other factors constant, a defendant likely to be released after a shorter time could be viewed as more dangerous than the same defendant expected to serve a longer sentence. Several commentators claim that juries sometimes return death verdicts out of fear that the defendant will be eligible for parole after relatively few years in jail. [20] Our data confirm that jurors' deliberations emphasize dangerousness and that misguided fears of early release generate death sentences.

Expectations about future dangerousness play a substantial role in juror deliberations. Table 1 shows, on a 1-4 scale, the extent to which juror discussions focused on several topics relevant to the sentencing decision. The first numerical column shows the mean response in cases where the defendant was sentenced to life imprisonment. The second numerical column shows the mean re **[*5]** sponse in cases where the death penalty was imposed. In calculating the means, an average score for each case is calculated using the interviews in that case. These average scores for each case are then averaged across all cases. Unless otherwise indicated, the number of respondents to the questions in Table 1 and to the questions reported in all subsequent tables ranges from 104 to 114.

[SEE TABLE IN ORIGINAL]
[*6]

Other than facts about the crime, questions related to the defendant's dangerousness if ever back in society are the issues jurors discuss most. Discussion of dangerousness exceeds discussion of the defendant's criminal past, the defendant's background or upbringing, the defendant's IQ or intelligence, and the defendant's remorse or lack of it.

Jurors usually conclude that the defendant will be dangerous. Table 2 presents juror responses to three principal interview questions about their impressions of the role of dangerousness and the time defendants might serve if a death sentence were not imposed.

[SEE TABLE IN ORIGINAL] **[*7]**

Table 2 shows that, on average, over three-quarters of the jurors believe that the evidence in their case established that the defendant would be dangerous in the future. And the more the jurors agree on this fact, the more likely they are to impose a death sentence. An average of ninety-five percent of the jurors in death sentence cases believe the evidence established future

dangerousness compared with an average of seventy-four percent of jurors in life sentence cases. This difference is significant at the .006 level. [21] Responses to question III.C.17 show that about thirty percent of jurors in both life and death cases believe, incorrectly, that the law requires them to impose a death sentence if the evidence proves that the defendant will be dangerous in the future.

Not surprisingly, jurors assessing dangerousness attach great weight to the defendant's expected sentence if a death sentence is not imposed. Most importantly, jurors who believe the alternative to death is a relatively short time in prison tend to sentence to death. Jurors who believe the alternative treatment is longer tend to sentence to life. Table 2, Question IV.7, shows that, for the twelve life cases, the mean time the jurors expected the defendant to serve in prison was 23.8 years. For the nineteen death cases, the mean time was 16.8 years. This difference is significant at the .001 level. The sharp difference between the expected sentences in life and death cases is consis **[*8]** tent with other studies of jurors in capital cases [22] and with surveys of the population at large. [23]

Since expected nondeath sentences play a major role in sentencing deliberations, jurors should be accurately informed about the nondeath alternative. Under South Carolina law, a person who is convicted of (or pleads guilty to) murder but is not sentenced to death is automatically sentenced to life without any possibility of parole for twenty years. [24] If an aggravating circumstance is found by the jury, but no death sentence is imposed, the minimum period of incarceration before parole is thirty years. [25] Eligibility for parole does not mandate parole, so the murderer may well serve in excess of the twenty or thirty year minimum before release. Moreover, if the defendant has a prior violent felony conviction, there is no possibility of parole. [26] Gubernatorial commutation of a death sentence does not render the defendant eligible for parole. [27] And no person who pleads guilty to or is convicted of murder is eligible for work-release credits, good-time credits, or any other credit that would reduce the mandatory term of imprisonment. [28]

Yet jurors in capital cases cannot be told of the mandated nondeath sentences. In State v. Torrence, [29] the South Carolina Supreme Court prohibited the trial judge from instructing jurors about the alternative to a death sentence. In particular, judges may not inform jurors about the minimum term that must be served before a defendant is eligible for parole. Judges may only instruct that the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning. [30]

Refusing to inform jurors about the statutorily mandated length of nondeath sentences appears to lead jurors to sentence to death when they would not do so if they were more fully informed of the law. There is no justification for executing people because the state **[*9]** has prevented jurors from learning the law governing a critical aspect of the case.

One caveat is in order. As in many empirical studies of legal phenomena, one must be concerned about questions of cause and effect for the observed results. [31] For example, death case jurors may, after the fact, report shorter expected sentences because they know their jury imposed the death sentence. Since their jury imposed the death sentence, their ex post reasoning may go, they must have thought the defendant would have a relatively short sentence if not executed.

Two factors mitigate this concern. First is a countervailing bias not reflected in our data. If jurors' expectations about sentences were, at the time of deliberation, influenced by the relative heinousness of the crime, the expected sentence means should show a relationship opposite to that observed. That is, if death sentences are imposed for the worst crimes, then those jurors who sentence to death should report longer expected sentences, not shorter ones, than jurors who do not sentence to death.

Second, what we know about juror behavior contemporaneous with the capital sentencing

decision suggests that expected time in jail influences jurors in the direction we observe. When deliberating jurors ask the trial judge questions about parole, they tend to be looking for support for not imposing death. [32]

On balance, the simplest explanation of our sentencing data is the most plausible. Jurors who sentence to death believe the alternative actual time in jail will be shorter than jurors who sentence to life. III. Confusion About Burdens of Proof

In addition to jurors' imposed ignorance of the sentencing alternative, their lack of understanding of the standards of proof applicable to mitigating circumstances and the required level of interjuror agreement also hamper the decisionmaking process.

A. Applicable Law and Practice

South Carolina law requires that aggravating circumstances be proved beyond a reasonable doubt and that a death recommendation be unanimous. [33] There is no requirement that the defendant demonstrate the existence of a mitigating circumstance beyond a reasonable **[*10]** doubt. [34] And the Supreme Court has held that agreement on mitigating circumstances need not be unanimous. [35]

South Carolina trial judges, of course, instruct jurors that the prosecution must prove its guilt case beyond a reasonable doubt. Judges also inform juries of the beyond-a-reasonable-doubt requirement for finding aggravating circumstances at the penalty phase. [36] But the statute does not require judges to instruct juries that mitigating factors need be neither proved beyond a reasonable doubt nor unanimously accepted. And the South Carolina Supreme Court has rejected an attack on instructions that do not expressly distinguish between the differing burdens of proof applicable to aggravating and mitigating circumstances. [37]

This silence with respect to the burden of proving a mitigating factor does not occur in a vacuum. The beyond-a-reasonable-doubt standard is deeply ingrained in our criminal law. It is constitutionally required [38] and likely to be the default standard applied even in the absence of instruction. Given the express beyond-a-reasonable-doubt instruction with respect to guilt and aggravating circumstances, and the general prominence of the reasonable doubt standard, it may be asking too much of jurors to expect them to infer some other standard for mitigating factors.

B. Juror Beliefs About Applicable Law

Our data suggest that jurors do not infer the correct legal standard. Neither the aggravating nor mitigating standards of proof are well understood. Table 3 shows that jurors who believe, incorrectly, that aggravating factors need not be proved beyond a reasonable doubt are more likely to sentence to death than jurors who do not. No jurors on life juries believe that an aggravating factor may be established by either a preponderance of the evidence or only to a juror's personal satisfaction. In contrast, about twenty percent of the jurors on death juries believe that an aggravating factor can be established by preponderance of the evidence or only to a juror's personal satisfaction. [39] **[*11]**

[SEE TABLE IN ORIGINAL]

With respect to mitigating circumstances, Table 4 shows more widespread confusion about the proper proof standard. About half the jurors incorrectly believe that a mitigating factor must be proven beyond a reasonable doubt. Less than a third of jurors understand that mitigating factors need only be proved to the juror's personal satisfaction. The great majority of jurors - in excess

of sixty percent in both life and death cases - erroneously believe that jurors must agree unanimously for a mitigating circumstance to support a vote against death.

[SEE TABLE IN ORIGINAL]

The data also show that jurors are not hopelessly confused about all burdens of proof. Table 3 shows that the great majority of jurors understand that proof beyond a reasonable doubt is required to establish an aggravating circumstance. It is this solid grasp of the traditional criminal law standard of proof that may limit their mastery of the different standard governing mitigating circumstances. Juror confusion, particularly about the mitigating circumstance burden of **[*12]** proof, cannot simply be attributed to inability to grasp legal terminology and concepts. IV. The Tendency to Sentence to Death

The mitigating circumstance data in Table 4 do not directly suggest that confusion about standards of proof generates death sentences, but only that such confusion frequently exists. Indeed, we do not report life case means and death case means separately in Table 4 because they do not differ significantly. Fully assessing the impact of juror confusion on sentencing requires exploring another topic - the default sentence. The default sentence in a capital case is death.

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

Nor is it surprising that the sentencing phase begins with a bias towards death. The prosecutor presumably has screened out cases in which death would be a wholly inappropriate sentence. The sentencing phase jurors have just found the defendant guilty of capital murder. [40] Jurors indicate, in both life and death sentence cases, that the killing was vicious, cold blooded, senseless, and repulsive. [41] They believe that the defendant's conduct was heinous and expect that the defendant will be dangerous in the future. [42] They have already disbelieved any defense the defendant offered on the merits.

These factors support our conclusion that indecision tends to be resolved in favor of death. When jurors report predeliberation indecision about either guilt or sentence, the undecided jurors tend to vote for death. [43] Juror holdouts tend to be those favoring death in life **[*13]** cases. An average of ninety-one percent of the life case jurors report that some jurors were especially reluctant to go along with the majority, while only an average of sixty-seven percent of the death case jurors report such reluctance. [44] Thus, there is less holdout activity by those favoring life in death cases. These findings confirm that, in capital sentencing deliberations, death is the norm.

Juror voting patterns and reactions to their deliberations also confirm this analysis. Table 5 presents several measures of juror voting patterns and reactions.

[SEE TABLE IN ORIGINAL] **[*14]**

Table 5, Question III.D.10, shows that when the first jury vote is taken in life cases, the average initial vote is reported as seven to five in favor of life. In death cases, the average initial vote is reported as ten to three in favor of death. [45] Those who receive life sentences have an initial bare majority. Those who receive death sentences have an initial substantial majority. Question III.D.11 shows that it takes more ballots for a jury to reach a life sentence than it takes to reach a death sentence verdict. [46] Question III.2 shows that life case juries, more than death case juries, complain that punishment deliberations made them impatient. [47]

Jurors express more dissatisfaction with the process in life cases than in death cases. Question VII.15 shows that jurors in life cases more often indicate that their juries were dominated by a few strong personalities than do jurors in death cases. [48] Jurors in life cases tend to believe, more than jurors in death cases, that the jury did not follow the judge's instructions. [49]

These results suggest that a defendant on trial for his life at the punishment stage has one foot in the grave. The defendant needs affirmative action by jurors to pluck him from the crypt, action that is likely to annoy other jurors, at least initially. The juror favoring life faces a struggle against initial opposition that will last throughout the deliberations and continue to annoy fellow jurors in post-trial interviews. Depriving jurors of full knowledge of life-favoring legal standards may not directly cause them to vote for death, but confusion about such standards mutes the impact of burdens of proof designed to favor life. **[*15]** Conclusion

One unaccustomed to the world of legal doctrine may wonder why the issue we address can even be seriously debated. How can a state ask jurors to determine life or death in part on the basis of dangerousness, but intentionally deprive jurors of what they view as the most important datum influencing that determination? Traditionally, jurors were not told of parole possibilities in order to protect defendants from jurors' inflating sentences to yield net sentences satisfactory to the jurors, [50] and to avoid intruding on executive branch prerogatives with respect to administration of sentences. [51]

The empirical data remove any support for the view that, on balance, keeping juries ignorant about parole protects defendants in capital cases. Juries that might otherwise sentence to life do not do so because of false impressions about parole eligibility. The separation of powers argument is also questionable. Informing juries about mandatory parole limitations does not interfere with executive discretion in the administration of sentences. The executive branch retains full power to grant or deny parole. Informing juries merely assures that the decisionmaker primarily responsible for the life-or-death determination decides on the basis of reliable information about the law and not on the basis of avoidable and inaccurate speculation.

Since the 1976 capital punishment cases, [52] state statutes requiring guided discretion in sentencing have dominated death penalty adjudication. Given the presence of discretion, punishment determinations cannot be expected to be perfect or perfectly consistent. Perhaps all one can ask is that states make their best effort to guide the exercise of discretion. [53] At a minimum, the process of guiding juror discretion ought to be logical. It is virtually certain that South Carolina's system currently misleads jurors about fundamental aspects of the punishment decision. It is likely that juror misimpressions about dangerousness and standards of proof could be corrected or reduced. Failure to rectify these problems raises the spectre of arbitrariness in sentencing that two decades of Supreme Court jurisprudence have sought to curtail. **[*16]**

[SEE APPENDIX IN ORIGINAL] **[*17]**

[APPENDIX CONTINUED]

FOOTNOTES:

n1. Quick v. State, 353 S.E.2d 497, 503 (Ga. 1987) (parole eligibility should not be considered at sentencing phase of death penalty case); Commonwealth v. Henry, 569 A.2d 929, 941 (Pa. 1990) (same), cert. denied, 499 U.S. 931 (1991); Jenkins v. Commonwealth, 423 S.E.2d 360, 369-70 (Va. 1992) (same), cert. denied, 113 S. Ct. 1862 (1993). At least thirteen states inform the jury that a capital murder conviction carries with it a defendant's ineligibility for parole. James M. Hughes, Note, Informing South Carolina Capital Juries About Parole, 44 S.C. L. Rev. 383, 405-06 n.153 (1993). Three other states require a capital case jury to be informed that the

defendant will be ineligible for parole, either in all cases or when the defendant's prior criminal record precludes parole. Id. at 406. See also Willam W. Hood, III, Note, The Meaning of Life for Virginia Jurors and Its Effect on Reliability in Capital Sentencing, 75 Va. L. Rev. 1605 (1989) (recommending that instructions about parole be given in Virginia cases).

n2. See James Luginbuhl, Discretion in Capital Sentencing: Guided or Misguided (paper presented at the meeting of the Law and Society Association, Chicago, May 30, 1993) (North Carolina data) (on file with authors).

n3. Franklin E. Zimring, On the Liberating Virtues of Irrelevance, 27 Law & Soc'y Rev. 9 (1993).

n4. 427 S.E.2d 175 (S.C.), cert. granted, 114 S. Ct. 57 (1993).

n5. James A. Fox et al., Death Penalty Opinion in the Post-Furman Years, 18 N.Y.U. Rev. L. & Soc. Change 499 (1991); Hood, supra note 1; Anthony Paduano & Clive A. Stafford Smith, Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty, 18 Colum. Hum. Rts. L. Rev. 211 (1987). See J. Mark Lane, Is There Life Without Parole?: A Capital Defendant's Right to a Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327, 334 (1993) (collecting studies).

n6. Lane, supra note 5, at 334-44 (reporting juror interviews in three cases and in studies encompassing as many as six cases).

n7. Id. at 335-38 (reviewing Georgia capital cases in which deliberating jurors asked the trial judge questions about parole). One juror interview study covered 10 Florida capital cases and 54 jurors. See William S. Geimer & Jonathan Amsterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases, 15 Am. J. Crim. L. 1, 8-9 (1988). An Oregon study covered nine Oregon capital cases and 27 jurors. See Sally Costanzo & Mark Costanzo, Life or Death Decisions: An Analysis of Capital Jury Decision-Making Under the Special Issues Sentencing Framework, 18 Law & Hum. Behav. (forthcoming). See also Mark Costanzo & Sally Costanzo, Jury Decision Making in the Capital Penalty Phase, 16 Law & Hum. Behav. 185, 189 (1992) (noting that few studies involve interviews with capital case jurors).

n8. 1986 S.C. Acts 2983.

n9. The interview process is continuing and cases will be added to the sample as the interviews are completed and the data coded. The data analyzed here reflect all interviews completed through the summer of 1992.

n10. Justice Research Center, Northeastern University, Juror Interview Instrument, National Study of Juror Decision Making in Capital Cases (on file with authors).

n11. S.C. Code Ann. 16-3-26(A) (Law. Co-op Supp. 1992).

n12. S.C. Code Ann. 16-3-20(B) (Law. Co-op Supp. 1992).

n13. S.C. Code Ann. 16-3-20(C)(a) (Law. Co-op Supp. 1992).

n14. S.C. Code Ann. 16-3-20(C)(b) (Law. Co-op Supp. 1992).

n15. S.C. Code Ann. 16-3-20(C) (Law. Co-op Supp. 1992).

n16. S.C. Code Ann. 16-3-20(C)(a) (Law. Co-op Supp. 1992).

n17. The Supreme Court held in Barclay v. Florida, 463 U.S. 939 (1983), that the consideration

of non-statutory aggravating factors did not violate the U.S. Constitution, provided that the state establishes at least one statutory aggravating factor.

n18. Question III.C.9. References to Questions throughout this article refer to the Juror Interview Instrument, supra note 10. Referenced questions not reproduced in tables in the text are included in the Appendix.

n19. Cf. California v. Ramos, 463 U.S. 992, 1003 (1983) (approving a jury instruction that the Court characterized as inviting the jury to assess whether the defendant was someone whose probable future behavior would make it undesirable that he be permitted to return to society).

n20. E.g., Lane, supra note 5, at 334.

n21. The p-values (sometimes called significance levels) reported in our text and footnotes represent the likelihood of observing by chance a difference between the life juries and the death juries as large as the observed difference. The reported p-values were computed using a t-test for continuous variables and a two-sample binomial test for dichotomous variables. See Steven F. Arnold, Mathematical Statistics 366-78 (t-test), 385-89 (two-sample binomial) (1990). For ordinal data, p-values were computed using the Mann-Whitney two-sample statistic. See H. B. Mann & D. R. Whitney, On A Test of Whether One of Two Random Variables is Stochastically Larger than the Other, 18 Annals of Mathematical Stat. 50 (1947). For categorical questions with mutually exclusive responses (Questions III.A.10(a), III.B.12, and V.3), p-values were computed using logistic regression coefficients and standard errors. The regressions run used life or death as the dependent variable and dummy variables for categorical responses as the independent variables. P-values for the logistic regression results are reported using Huber standard errors. See Peter J. Huber, The Behavior of Maximum Likelihood Estimates Under Non-Standard Conditions, 1 Proceedings of the Fifth Berkeley Symposium on Mathematical Statistics and Probability 221 (1967). Except for the p-values computed using the Mann-Whitney test and logistic regression, the data were weighted to reflect the fact that different numbers of jurors were interviewed for different cases. Weighting does not materially affect the results.

n22. William Bowers, Research Note: Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions, 27 Law & Soc'y Rev. 157, 170 (1993) (reporting Capital Jury Project results for two other states as well as South Carolina).

n23. E.g., Hughes, supra note 1, at 408-09.

n24. S.C. Code Ann. 16-3-20(A) (Law. Co-op Supp. 1992).

n25. Id.

n26. S.C. Code Ann. 24-21-640 (Law. Co-op Supp. 1992).

n27. S.C. Code Ann. 16-3-20 (Law. Co-op Supp. 1992).

n28. Id.

n29. 406 S.E.2d 315, 321 (S.C. 1991) (Chandler, J., concurring in which a majority joins) (overruling State v. Atkins, 360 S.E.2d 302 (S.C. 1987)).

n30. State v. Simmons, 427 S.E.2d 175 (S.C.), cert. granted, 114 S. Ct. 57 (1993). Some of the cases in our sample were decided when State v. Atkins, supra note 29, allowed jurors to be told of the alternative to a death sentence. This may help explain the difference in expected sentence between life case and death case jurors. Regardless of the source of jurors' expectations about sentence length, the fact remains that those jurors who expected longer sentences tended to vote for life.

n31. See Karl Monsma & Richard Lempert, The Value of Counsel: 20 Years of Representation Before A Public Housing Eviction Board, 26 Law & Soc'y Rev. 627, 629-31 (1992).

n32. Lane, supra note 5, at 335-41.

n33. S.C. Code Ann. 16-3-20(C) (Law. Co-op Supp. 1992).

n34. State v. Patrick, 345 S.E.2d 481 (S.C. 1986).

n35. McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

n36. State v. Green, 392 S.E.2d 157, 163 (S.C.), cert. denied, 498 U.S. 881 (1990).

n37. Id.

n38. Jackson v. Virginia, 443 U.S. 307 (1979); In re Winship, 397 U.S. 358 (1970).

n39. Compared to the three other possible responses to Question V.3, the response Proved beyond a reasonable doubt points towards a life sentence (p=.208). Our findings about juror confusion are consistent with those reported by the Capital Jury Project's principal researcher for North Carolina. See Luginbuhl, supra note 2.

n40. If a defendant is found guilty of murder, the sentencing phase of the trial follows. South Carolina law requires that the sentencing proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. S.C. Code Ann. 16-3-20(B) (Law. Co-op Supp. 1992).

n41. Question II.A.2.

n42. Question III.C.16. For additional evidence that death can be the default sentence, see Geimer & Amsterdam, supra note 7, at 41-47 (finding that a significant number of jurors in death penalty cases believed the death penalty was mandatory or presumed for first degree murder).

n43. Compared to the other three possible responses to Question III.A.10(a) (asking about jurors' initial feelings about guilt), the response Undecided points towards a death sentence (p=.024). Compared to the responses A death sentence and A life (OR THE ALTERNATIVE) sentence to Question III.B.12 (asking about jurors' initial feelings about punishment), the response Undecided points towards a death sentence (p=.362, p=.031, respectively).

n44. Question III.D.8 (p=.01).

n45. Question III.D.10 (p=.000).

n46. Question III.D.11 (p=.07).

n47. Question III.2 (p=.027).

n48. Question VII.15 (p=.057).

n49. Question VII.15 (p=.065).

n50. Hood, supra note 1, at 1617-18 & nn. 71-72.

n51. Id. at 1618 n.77.

n52. Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976); Green v. Oklahoma, 428 U.S. 907 (1976).

n53. See Robert Weisberg, Capital Punishment, in 1 Encyclopedia of the American Constitution 201, 206 (Leonard W. Levy et al. eds., 1986).