CHAPTER 8
Duty of Judge and Jury

"What could explain Alabama judges' distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures."

Justice Sonia Sotomayor, dissenting opinion in *Woodward v. Alabama*

Recommendation 26. Capital punishment should not be imposed in the absence of a unanimous verdict both as to the death penalty sentence or advisory sentence and as to each aggravating circumstance used to support that sentence.

In some states, while a unanimous jury must find the defendant guilty of the death eligible crime, the jury's decision need not be unanimous at the sentencing phase of trial. The Committee opposes this practice. A requirement that juries render unanimous decisions at all phases of a death penalty trial for imposition of a death sentence will improve accuracy and support the credibility of the process used to impose capital punishment.

Twenty-two of the thirty-two states that currently impose the death penalty require that the jury unanimously find the aggravators that make the defendant death eligible and require that the jury unanimously sentence or make a unanimous recommendation of death.[1] The federal death penalty statute also requires a jury to find aggravators unanimously and make a unanimous recommendation of death.[2] Nine of the other ten states require unanimity as to one of these decisions. In these nine states, either the jury must make a unanimous finding as to the aggravators that make the defendant death eligible or the ultimate sentencing recommendation, but not both.[3] In the most egregious departure from unanimous decision-

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[1] Arizona (Ariz. Rev. Stat. Ann. § 13-752(E), (H) (2013)); Arkansas (Ark. Code Ann. § 5-4-603(a) (2012)); California (Cal. Penal Code § 190.4(a)-(b) (West 2013)); Colorado (Colo. Rev. Stat. §18-1.3-1201(2)(b) (2012)); Georgia (Ga. Code. Ann. § 17-10-31(c) (2012)); Idaho (Idaho Code Ann. § 19-2515(3)(b) (2012)); Kansas (Kan. Stat. Ann. § 21-6617(e) (West 2012)); Louisiana (La. Code Crim. Proc. Ann. art. 905.7 (2013)); Mississippi (Miss. Code Ann. § 99-19-103 (2013)); New Hampshire (N.H. Rev. Stat. Ann. § 630:5(IV) (2013)); Ohio (Ohio Rev. Code Ann. § 2929.03(B), (D) (West 2013)); Oklahoma (Okla. Stat. Ann. tit. 21, § 701.11 (West 2013)); Oregon (Or. Rev. Stat. Ann § 163.150(1)(b)-(e) (West 2013)); Pennsylvania (42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (West 2013)); South Carolina (S.C. Code Ann. § 16-3-20(C) (2012)); South Dakota (S.D. Codified Laws §§ 23A-26-1, 23A-27A-4 (2013)); Tennessee (Tenn. Code Ann. § 39-13-204(g) (2013)); Texas (Tex. Code Crim. Proc. Ann. art. 37.071(2) (West 2013)); Washington (Wash. Rev. Code Ann. §§ 10.95.060, 10.95.080 (West 2013)); and Wyoming (Wyo. Stat. Ann. § 6-2-102(d)(ii) (2012)). North Carolina requires a unanimous jury recommendation to impose the death penalty. N.C. Gen. Stat. Ann. § 15A-2000 (2013). *See also Geary v. State*, 952 P.2d 431, 433 (Nev. 1998) (holding aggravators must be unanimously determined and a jury must unanimously recommend death); *State v. McKoy*, 394 S.E.2d 426, 428 (N.C. 1990) (requiring jury to determinate aggravators unanimously).

[2] 18 U.S.C. § 3593(c)–(d) (2006).

[3] Utah and Virginia require a unanimous recommendation for the death penalty but do not require a unanimous decision as to aggravating factors. Utah Code Ann. § 76-3-207(5) (West 2013); Va. Code Ann. § 19.2-264.4 (2013); *see also State v. Carter*, 888 P.2d 629, 655 (Utah 1995) (concluding that there is no requirement that the jury find separately and unanimously each aggravator relied on in imposing the death penalty); *Clark v. Commonwealth*, 257 S.E.2d 784, 791-792 (Va. 1979) (holding it is not necessary for jurors to find aggravators unanimously). Delaware, Montana, Nebraska, Alabama, Indiana, Kentucky and Missouri require only that the jury reach a unanimous decision as to aggravators. Del. Code Ann. tit. 11, § 4209(d)(1) (2013) (requiring a unanimous jury decision for aggravating factors); Mont. Code Ann. § 46-1-401(1)(b), (3) (West 2013); Neb. Rev. Stat. Ann. § 29-2520(4)(f) (West 2012); *Ex parte McNabb*, 887 So.2d 998, 1005-06

making, Florida requires only that a simple majority of jurors find an aggravating factor for the death penalty to be imposed. Florida jurors do not even have to agree on which aggravating factor exists. The death penalty may be imposed in Florida if seven of twelve jurors – just over 50 percent – each find a different aggravating factor and recommend a sentence of death.[4]

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Lack of jury unanimity for death undermines the credibility of death penalty verdicts. Courts have characterized the unanimous jury decision as "the inescapable element of due process that has come down to us from earliest time,"[5] and an "indestructible principle of our criminal law [that] the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement."[6] Jury research shows that unanimous jury decisions for death produce more accurate outcomes by forcing jurors to engage with the evidence:

> Majority-verdict deliberations tend to be more verdict-driven, meaning that the jurors are more likely to take the first ballot during the first ten minutes of deliberation and vote until they reach a verdict. Unanimous-verdict juries, on the other hand, tend to be more evidence-driven, generally delaying their first votes until the evidence has been discussed.[7]

In contrast to unanimous juries, "non-unanimous juries express less confidence in the justness of their decisions."[8]

Unanimous jury decisions for imposition of a death sentence promote accuracy and legitimacy by ensuring that all viewpoints are heard. As Justice Brennan noted, "[w]hen less

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(Ala. 2004); *State v. Barker*, 809 N.E.2d 312, 316 (Ind. 2004); *Soto v. Commonwealth*, 139 S.W.3d 827, 871 (Ky. 2004); Mo. R. Crim. P. 29; *State v. Thompson*, 134 S.W.3d 32, 33 (Mo. 2004).

4 Raul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 St. Thomas L. Rev. 4, 9 (2009).

5 *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953).

6 *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

7 Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After McDonald*, 101 J. Crim. L. & Criminology 1403, 1429 (2012).

8 Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1272 (2000).

than unanimity is sufficient, consideration of minority views becomes nothing more than a matter of majority grace."[9] Racial minorities often form the numerical minority on the jury. To the extent that their view of the case diverges from the majority, a lack of unanimous jury requirement allows their viewpoint to be ignored because they may simply be outvoted.[10]

In 2005, the Supreme Court of Florida joined other courts that have noted the problems with a lack of unanimity in jury death penalty sentencing and appealed to the Florida legislature to fix the problem:

> We perceive a special need for jury unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The 'heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate'; *Sumer v. Shuman*, 483 U.S. 66, 107 S. Ct. 2716, 2720, 97 L.Ed.2d 56 (1987); convinces us that jury unanimity is an especially important safeguard at a capital sentence hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.[11]

To ensure accurate, reasoned and inclusive decisions, legislatures should require death penalty juries to render a unanimous verdict both to impose the death sentence or advisory sentence and as to each aggravating circumstance used to support that sentence.[12] Alternatively, if a sentencing decision is not unanimous, then the sentence imposed should be the alternative sentence available in capital cases in the jurisdiction. In the event of a lack of unanimity, there should not be a mistrial and then the possibility of a new sentencing trial, as is employed in the federal system and some state systems. A single vote against the death penalty should result in imposition of an alternative sentence, as is true in most states. However, defendants should also be permitted to make an informed waiver of jury sentencing.

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9 *Johnson v. Louisiana*, 406 U.S. 356, 396 (1972) (Brennan J. dissenting).

10 Taylor-Thompson, *supra* note 8, at 1264.

11 *State v. Steele*, 921 So.2d 538, 549 (Fla. 2005) (quoting *State v. Daniels*, 542 A.2d 306, 315 (Conn. 1988)).

12 A bill with these requirements is under consideration by the Florida Legislature as of the time of publication of this report. *See* S.B. 334, H.B. 467, 2014 Leg., Reg. Sess. (Fla. 2014).

Recommendation 27. Judges should be prohibited from overriding a jury's recommendation of a sentence less than death.

Although the U.S. Supreme Court has ruled that judicial override of a jury's recommendation of a sentence less than death is constitutional,[13] the Court also has recognized the constitutional importance of the jury's role in death penalty determinations. In *Ring v. Arizona*,[14] the Court held that allowing the judge to determine aggravators violated the Sixth Amendment. In her dissent in *Ring*, Justice O'Connor recognized that the case's rationale eroded the legal justification for hybrid sentencing regimes.[15] Perhaps more to the point is Justice Breyer's concurrence, where he noted the "comparative advantage" jurors possess over judges with respect to deciding retribution because they "reflect more accurately the composition and experiences of the community as a whole."[16] It is this comparative advantage that makes the jury uniquely equipped to make the community's moral judgment at the heart of the imposition of the death sentence. The jury, which is comprised of community members and represents that community, is best positioned to "express the conscience of the community on the ultimate question of life or death."[17] As opposed to a single government official, the jury may be most likely to avoid the danger of an excessive response to the always horrible act of intentional homicide. Indeed, in states such as Alabama, where judges are elected and subjected to tough-on-crime politics that typically equate electoral success with unwavering support for the death penalty, juries may be the voice of reasoned moderation.[18]

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Judicial override not only lowers the quality of sentencing decisions, but it also negatively affects the quality of the jury's decision-making regarding the defendant's guilt or innocence of the underlying crime. Studies have revealed that jurors in hybrid sentencing regimes are

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13 *See, e.g.*, *Johnson*, 402 U.S. 356; *Harris v. Alabama*, 513 U.S. 504 (1995).

14 536 U.S. 584 (2002).

15 *Id.* at 621(O'Connor, J. dissenting).

16 *Id.* at 615 (Breyer, J. concurring).

17 *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968).

18 *See infra* note 26 and accompanying text.

"especially likely to make their decisions [as to guilt or innocence] quickly, to invest less effort in understanding the sentencing instructions, and to deny responsibility for the defendant's punishment."[19] Jurors in judicial override states realize that their recommendation for death or life is simply that – a recommendation. As a result, jurors in hybrid states are less likely to see themselves as responsible for the defendant's punishment.[20] Juries in states with judicial override thus tend to abdicate their role as the community's moral voice and pass the buck to the judge. The U.S. Supreme Court has acknowledged that it is problematic "to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."[21]

Fortunately, judicial override of jury life sentencing decisions has become increasingly rare. Of the thirty-two states that have the death penalty, only three – Alabama, Delaware and Florida – continue to permit judicial override of jury recommendations.[22] In 2002, the same year as *Ring*, Indiana abolished judicial override.[23] In Delaware, judicial override has been used sparingly and generally has been used to reduce death sentences to life sentences. From 1991 to 2011, Delaware judges have overridden life sentences only twice, and the Delaware Supreme Court overturned both of those decisions on appeal. However, trial judges in Delaware overrode seventeen jury death sentences to life.[24] While judicial override from life to death was commonplace in Florida, a defendant has not been sentenced to death in Florida after a jury recommendation for life in thirteen years, due to the change in the appellate review standard for override decisions by the Florida Supreme Court.[25]

Alabama now stands alone as the only state where judicial override is actively exercised to impose a death sentence. From 1981 to 2011, ninety-three defendants in Alabama have been sentenced to death as a result of judicial override. While the reasons that Alabama judges have overridden life sentences to impose death cannot be conclusively established, one major cause is clear – political survival. In Alabama, "trial judges are often selected in

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[19] Wanda D. Foglia & William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 Crim L. Bull. 663 (2006).

[20] *Id.*

[21] *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

[22] Although the general trend is towards unanimity in death penalty sentencing, legislative initiatives have been introduced to amend state laws currently requiring unanimity. For example, a high profile death penalty trial in Georgia resulting in a life sentence recently led to one such push to undo unanimous jury sentencing. *See* Robbie Brown, *In Georgia A Push to End Unanimity for Execution*, N.Y. Times, Dec. 17, 2008, at A18.

[23] Ind. Code Ann. § 35-50-2-9(e) (West 2013).

[24] Michael A. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 Mich. St. L. Rev. 793, 798-99 (2011).

[25] *Id.* at 809.

hotly contested partisan elections in which judges campaign on their records of imposing death," including running campaign ads boasting that the judge had "looked into the eyes of murderers and sentenced them to death."[26] As Justice Stevens noted, elected trial judges may be "too responsive to a political climate in which judges who covet higher office – or merely wish to remain judges – constantly profess their fealty to the death penalty."[27] In the 2013 dissent from the denial of certiorari in *Woodward v. Alabama*, Justice Sotomayor cited a number of studies demonstrating the proportional increase in death sentences imposed in Alabama by judicial override during election year, and stated that the empirical evidence "casts a cloud of illegitimacy over the criminal justice system."[28]

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In American death penalty jurisprudence, no rule of law requires the imposition of the death penalty on any set of facts. Thus, a determination by the jury to impose death will often be appropriate under the facts but will never be required as a matter of law. On the other hand, the imposition of death, in some instances, may not only be inappropriate but also be legally or morally improper. In some cases, it may be disproportionate or excessive or may simply be contrary to the weight of the evidence. Thus, states may appropriately authorize their trial courts to correct juries' sentencing recommendations of death when the court judges such a sentence to be excessive, while at the same time prohibiting those same trial courts from overriding a jury recommendation of a sentence less than death.

This recommendation does not speak to states that entrust death penalty sentencing to judges in the first place. For reasons discussed above, the wisdom of having such a structure may be questioned, given the reality of judicial electoral politics. However, a death sentence that results from a judge overriding a jury determination that the accused should live is far more difficult to justify. At least a minority of U.S. Supreme Court justices have expressed concern about the constitutionality of judicial override statutes in general and Alabama's statute in particular. In *Woodward*, Justice Sotomayor and Justice Breyer noted that Alabama "has been the only State in which judges have imposed the death penalty in the face of contrary

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[26] Equal Justice Initiative, The Death Penalty in Alabama: Judge Override (2011), at http://eji.org/eji/files/Override_Report.pdf.

[27] *Harris*, 513 U.S. at 519 (Stevens, J. dissenting).

[28] *Woodward v. Alabama*, No. 13-5380, ___ U.S. ___, 134 S. Ct. 405 (Nov. 18, 2013) (J. Sotomayor, dissenting) (citations omitted).

jury verdicts" and they voiced "deep concerns" about whether the practice violates the Sixth and Eighth Amendments of the U.S. Constitution.[29] Justice Sotomayor stated that, following the jury's determination that the convicted defendant should be sentenced to life imprisonment without parole, the trial judge "conducted his own sentencing proceeding" at which the State presented additional evidence concerning the mitigating circumstances presented to the jury and on the basis of the new evidence, the judge rejected the jury's finding, made his own determination that the aggravating circumstances outweighed the mitigating circumstances and imposed a sentence of death.[30] Justice Sotomayor also noted that "[t]he very principles that animated [the Court's] decisions in *Apprendi v. New Jersey* and *Ring v. Arizona*" that aggravating factors required for imposition of an increased sentence must be specifically found by a jury "call into doubt the validity of Alabama's capital sentencing scheme."[31]

Recommendation 28. Jurors should be instructed that residual doubt may be considered as a mitigating circumstance in sentencing.

In *Lockhart v. McCree*, the U.S. Supreme Court recognized that jurors who vote to convict may nevertheless entertain "residual doubts" about the defendant's guilt that would "bend them to decide against the death penalty."[32] Residual doubt is defined as any remaining or lingering doubt a jury has concerning the defendant's guilt, despite having been satisfied beyond a reasonable doubt. Jurors who are confident enough of the defendant's guilt to convict may still conclude that their level of confidence falls short of the complete moral certainty needed to take a person's life. The reasonable doubt standard permits a conviction despite the presence of genuine doubts, or the absence of absolute certainty, about the defendant's guilt of the crime. Given the irrevocable nature of capital punishment, a decision to impose the penalty requires a greater degree of reliability than is required for imposition of other penalties. Jurors should be instructed that they should not vote for the death penalty if they entertain doubts as to the defendant's factual guilt.

In *Franklin v. Lynaugh*,[33] a plurality of the Supreme Court ruled that the Eighth Amendment does not mandate the giving of a residual doubt instruction. In *Oregon v. Guzek*,[34] the Court went further to find that the defendant had no constitutional right to present residual doubt evidence to a capital sentencing jury as mitigating evidence. Notwithstanding legal precedent on the right of a defendant to present such evidence, juries do consider residual doubt as a

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[29] *Woodward*, 134 S. Ct. at 405 (Breyer, J. and Sotomayor, J., dissenting).

[30] *Id*. at 406.

[31] *Id*. at 410 (Sotomayor, J., dissenting).

[32] *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (citations omitted).

[33] 487 U.S. 164 (1988).

[34] 546 U.S. 517 (2006).

mitigating factor. "In a comprehensive study that examined 600 homicide cases in Georgia on a variety of parameters, it was found that residual doubt about guilt effectively influenced the severity of the penalty imposed and led to commuting of death sentences to life."[35]

Among jurors interviewed who had actually served on capital cases, "[r]esidual doubt' over the defendant's guilt [wa]s the most powerful 'mitigating' fact."

Among jurors interviewed who had actually served on capital cases, "[r]esidual doubt' over the defendant's guilt [wa]s the most powerful 'mitigating' fact."[36] Yet many jurors may be unaware of the continuing relevance of their doubts of guilt, in the absence of a jury instruction informing them.

Several states have barred, through judicial decision, the giving of a residual doubt instruction. In other states, the issue is dealt with inconsistently.[37] This recommendation addresses the issue left open by the Supreme Court by making it clear that states should not bar the giving of residual doubt instructions. It also goes further and, as a matter of common sense and fundamental fairness, encourages states to adopt rules mandating the giving of such instructions. The Committee recommends that trial judges instruct juries that lingering or residual doubt may be considered as a mitigating circumstance in sentencing.

Recommendation 29. Judges should ensure that they have adequately discharged their duty to guide jurors properly in the applicable law.

Empirical evidence shows that capital sentencing juries often labor under significant misapprehensions about the nature and scope of their obligation at the penalty phase. From the outset, jurors may be predisposed to vote for the imposition of a death sentence. The very process of death qualification of jurors, where even the defense lawyer attempts to get prospective jurors to agree that they could hypothetically vote for death, results in juries that are biased in favor of the death penalty. Studies by the Capital Jury Project show that many jurors have already decided on a death sentence before the end of the guilt phase, or before the start of the penalty phase. These same studies have shown that many juries do not understand the "beyond a reasonable doubt" standard or the meaning of "mitigation" (and

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35 Talia Fisher, *Conviction Without Conviction*, 96 Minn. L. Rev. 833, 842 (2012).

36 Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1563 (1998).

37 *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1097 n.190-94 (1995); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J 1161, 1164-67 (1995); Jordan M. Steiker, *The Limits of Legal Language: Decision-Making in Capital Cases*, 94 Mich. L. Rev. 2590, 2596-99 (1966).

may believe it means aggravation). In addition, jurors also appear to misunderstand other jury instructions relevant to capital sentencing.

Research indicates that many jurors approach the sentencing decision in the same manner as they do the guilt decision, that is, without fully understanding that (a) mitigating factors do not need to be found by all members of the jury in order to be considered in an individual juror's sentencing decision, and (b) mitigating circumstances need to be proved only to the satisfaction of the individual juror, and not beyond a reasonable doubt, to be considered in the juror's sentencing decision.[38] This confusion can make it more likely that juries will sentence a defendant to death than if they understood their obligations more clearly.

Studies by the Capital Jury Project show that many jurors have already decided on a death sentence before the end of the guilt phase, or before the start of the penalty phase.

Standard pattern jury instructions that give jurors complex criteria, including lists of aggravating and mitigating factors, often leave jurors with the erroneous impression that their moral duty will be discharged if they simply tally up the number of aggravating and mitigating factors and weigh them against each other.[39] Juries often do not understand that they are not confined to considering enumerated mitigating factors, but may also consider non-enumerated and non-statutory mitigating factors. Indeed, juries are often seriously confused about what mitigation is and how it must be proved.[40] Moreover, they often believe that the factors can be weighted or tallied according to a pre-existing formula,[41] whereas in fact they must be considered in light of each juror's ultimate duty to decide whether the particular defendant, in light of all the circumstances before the jury, deserves to receive the death penalty.[42] These erroneous beliefs tend to tilt juries toward a death sentence for a variety of reasons. First, enumerated aggravating factors tend to outnumber enumerated mitigating factors. Second, any attempt to weigh these factors is difficult and misguided because the factors are not comparable, and because such an attempt obscures the true issue: whether the jurors conclude in light of all the evidence that the defendant deserves to die.[43]

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38 *See infra* note 50 and accompanying text.

39 *See generally* Steiker, *supra* note 37; *see also* Craig Haney, *Taking Capital Juries Seriously*, 70 Ind. L. J. 1223 (1995).

40 *See generally* Bowers, *supra* note 37.

41 *Woodson v. North Carolina*, 428 U.S. 280 (1976).

42 *See* Steiker, *supra* note 37.

43 *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225 (2000) (upholding an instruction that arguably left the jury with

The U.S. Supreme Court has upheld jury instructions which empirical evidence demonstrates are apt to give jurors incorrect impressions about their duties.[44] Those Court decisions should not relieve capital sentencing judges of the duty to ensure that the instructions given in their courts are as clear and accurate as possible. For example, Professor Jordan Steiker suggests the following instruction:

> The death penalty, as opposed to other serious punishments such as life imprisonment, is reserved only for those defendants who deserve the penalty, and the moral judgment of whether death is deserved remains entirely with you. The determination whether death is deserved involves consideration of any factors that suggest whether the defendant is or is not among the small group of "worst" offenders; and in deciding whether the defendant deserves the death penalty, you are required to consider not only the circumstances surrounding the crime, but also aspects of the defendant's character, background, and capabilities that bear on his culpability for the crime.[45]

Capital defendants must be permitted to counteract misconceptions that further exacerbate the tilt toward imposing death. In *Eddings v. Oklahoma*, the Supreme Court noted that the Eighth Amendment gives more latitude to the capital defendant than to the government, in that it permits the defendant to introduce unlimited mitigation evidence so that a jury can choose to be merciful for any reason or no reason at all.[46] In furtherance of *Eddings*, juries should be instructed that even if they find the aggravating circumstances outweigh the mitigating circumstances, they are never required to return a death sentence.[47]

Furthermore, judges often respond to jury requests for clarification of their obligations simply by referring the jurors back to reread the instructions. This practice, not surprisingly, is ineffective at clearing up juror confusion. Indeed, one study concluded that this practice increased the likelihood that jurors would sentence the defendant to death based on misapprehension about their duties.[48] A judge confronted with juror confusion should take affirmative steps to dispel that confusion. Simple answers to jury questions, in plain English, can significantly improve the odds that jurors will decide on a sentence based on an accurate

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the impression that it was required to sentence the defendant to death if it found the requisite aggravating factors existed); *see also id*. at 237-39 (Stevens, J, dissenting); Stephen Garvey et al., *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627 (2000); *see generally* Bowers, *supra* note 37.

[44] Garvey et al., *supra* note 43, at 627-633.

[45] *See* Steiker, *supra* note 37, at 2622 n.134.

[46] *Eddings v. Oklahoma*, 455 U.S. 104 (1982).

[47] *See* FLORIDA SUPREME COURT, FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, at http://www.floridasupremecourt.org/jury_instructions/instructions.shtml.

[48] *See generally* Garvey et al., *supra* note 43.

understanding of the law. For example, Professors Steven Garvey, Sheri Lynn Johnson and Paul Marcus found the following simple clarification to significantly improve juror comprehension:

> Even if you find that the state has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.[49]

Judges also can alleviate the problem of juror confusion by allowing a copy of the jury instructions in the jury room for jurors to reference (as long as the jury instructions are accurate and clear). As to both the original instructions and the means of clarifying juror confusion, no one formula can ensure that juries understand their duties. The important point is that the judge should not assume, particularly in light of all the evidence to the contrary, that reliance on pattern jury instructions and refusal to clarify will be sufficient. Judges must remain vigilant to ensure that they have adequately discharged their duty to guide jurors in the applicable law.

Recommendation 30. The trial court should instruct the jury about all available sentencing options and inform the jury as to the meaning of those sentences, including a life sentence without parole.

By far one of the most powerful influences on a capital sentencing jury's decision about whether the defendant should be sentenced to death or imprisonment is its perception of whether, if imprisonment is chosen, the defendant will be released from prison, and if so, how soon. Empirical data demonstrate that, in the absence of information on this issue, juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released.[50] In light of this confusion, juries may err on the side of the harshest punishment. In both "life without parole" situations and all other sentencing situations, jurors significantly underestimate the amount of time defendants will remain in prison.[51] Their mistaken belief in this regard leads them to impose

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[49] *Id.* at 654.

[50] William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law Bull. 51, 80-84 (2003); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 Tex. L. Rev. 605 (1999); Peter Finn, *Given Choice, Va. Juries Vote for Life; Death Sentences Fall Sharply When Parole Is Not an Option*, Wash. Post, Feb. 3, 1997, at A1; *see also* Frank Green, *Va. Goes 20 Months Without a Death Verdict from a Jury*, Richmond-Times Dispatch, Nov. 14, 2009; Andrew Welsh-Huggins, *Ohio Prosecutors Using New Life Without Parole Option*, Associated Press, Jun. 23, 2008 (finding that indictments in capital cases have drastically reduced in Ohio and other states since life without the possibility of parole became a sentencing option).

[51] In all states that have capital punishment and in federal government cases, life without parole is now an alternative to the death penalty. However, the Supreme Court has ruled that it is unconstitutional for states to mandate life without parole for juveniles convicted of murder. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

death sentences in many cases in which they would opt for life sentences if they were better informed.[52]

Not only does confusion about sentencing options tend to increase the number of death sentences, it also exacerbates an already existing tilt toward imposition of death. Empirical evidence documents that jurors at the beginning of the penalty phase, and before hearing any penalty phase evidence at all, show a significant imbalance in favor of imposing a death sentence and may have even made a sentencing decision by that point.[53]

...juries exhibit significant confusion about whether a sentence of life imprisonment without parole really means that the defendant will never be released.

All jurisdictions that impose capital punishment now have "life without parole" as an alternative. Many jurisdictions also have "life" sentences as a sentencing option in homicide cases. However, without meaningful explanation of the true length of these sentencing options, including the minimum length of time those convicted of murder must serve before being eligible for parole under a life sentence, jurors may find themselves making a false and forced choice of imposing a death sentence on a defendant because of incorrect assumptions about the amount of time that the defendant will spend in jail under each of these sentences.

Whether juries are involved in sentencing in capital cases varies by state.[54] However, in some jurisdictions where the jury is involved in sentencing, the jury is not required to be told of the life without parole option.[55] In Texas and Utah, judges are mandated by statute to explain the availability of life without parole.[56] Other states have adopted model jury instructions giving

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[52] Bowers & Steiner, *supra* note 50, at 605; Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1 (1993).

[53] *See* Bowers, *supra* note 37, at 1100-01; *see also* William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 Cornell L. Rev. 1476 (Sept. 1998); William J. Bowers, *The Capital Jury: Is It Tilted Toward Death?*, 79 Judicature 200 (March-April 1996).

[54] The judge sentences defendants in capital cases in Montana and Nebraska. Mont. Code Ann. § 46-18-301 *et seq.;* Neb. Rev. Stat. § 29-2522. In some states, such as Alabama, Delaware and Florida, the jury gives a recommendation to the judge on the defendant's sentence and the judge issues the final sentence. In other states, the jury may determine the defendant's sentence.

[55] *See* Emma Reynolds, Phila. Fed. Defender, Survey of Life Without Parole Instructions in Death Penalty States (July 2009), at http://www.deathpenaltyinfo.org/documents/LWOPSurvey.pdf.

[56] The Texas Code of Criminal Procedure, however, bars all parties from "inform[ing] a juror or a prospective juror of the effect of a failure of [the] jury to agree" on aggravation (or the "special issues"

an explanation of life without parole and its availability. Tennessee's model instruction is a laudable example of one that explains life without parole and life sentences.[57] In other states, a defendant may request the life without parole instruction in a capital case.[58] Still others, like Kansas and Pennsylvania, have statutes that make life without parole available, but there is no requirement that the judge instruct the jury accordingly.

In *Simmons v. South Carolina*,[59] the U.S. Supreme Court held that the Due Process clause required the jury to be informed of the defendant's ineligibility for parole where the prosecutor argued for a death sentence based on future dangerousness.[60] Conversely, in cases where the defendant's future dangerousness was not an issue before the jury, there may be no due process violation resulting from a court's refusal to instruct the jury that the defendant would be ineligible for parole if he or she were sentenced to life. Although the limits of the Court's ruling have not been tested, in *State v. Sutherland*, the South Carolina appellate court held that the defendant's due process right was not violated by the trial court's refusal to instruct the jury on the meaning of life imprisonment where defense counsel had informed the jury throughout closing argument that life imprisonment for the defendant meant that he would never be released from prison.[61]

...some states continue to bar jury instructions regarding parole eligibility in capital cases.

In circumstances not covered by *Simmons* (where the prosecutor does not explicitly rest an argument on the defendant's future dangerousness), some states continue to bar jury instructions regarding parole eligibility in capital cases. Even those that permit such instructions do not mandate them, and generally do not ensure that juries are provided with full and understandable information. Yet jurors are greatly concerned about and influenced by parole issues even in cases in which the prosecutor does not explicitly argue the defendant's future dangerousness. Without accurate information on the issue, jurors may

presented in the Texas death penalty sentencing scheme). Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(a) (2013). This provision conceals from jurors their individual capacity to impose a sentence less than death.

57 Tenn. Code Ann. § 39-13-204(e)(2)(B) (West 2014) ("The jury shall also be instructed that a defendant who receives a sentence of imprisonment for life without possibility of parole shall never be eligible for release on parole.").

58 *See Yarborough v. Commonwealth*, 519 S.E.2d 602 (Va. 1999) (holding that defendant may request the life without parole instruction in a capital case); see also *Bruce v. State*, 569 A.2d 1254 (Md. 1990) (holding that when requested to do so, the court should give a life without parole instruction).

59 512 U.S. 154 (1994).

60 *See Shafer v. South Carolina*, 532 U.S. 36 (2001) (reaffirming *Simmons*).

61 *State v. Southerland*, 447 S.E.2d 862 (S.C. 1994).

make unsupported and inaccurate assumptions, often based on misleading media portrayals or other unreliable sources regarding the possible release of a prisoner under a life sentence, even a prisoner under a sentence of life without the possibility of parole.

In the past, refusals to tell juries about parole eligibility have often been justified as a way of protecting defendants (on the assumption that juries may give greater sentences if they know about the possibility of parole). In the capital context, however, the jury's ignorance of parole eligibility can increase the risk of a defendant receiving a death sentence based on a false choice. Capital juries have a constitutional duty to make a reasoned, moral decision on whether a death sentence is appropriate; this decision must be unencumbered by ignorance and supported by information sufficient and relevant for reliable and rational decision-making.[62] Full disclosure on the available parole options will help them discharge this duty.

Judges should instruct juries regarding available sentencing alternatives, and their true meaning. Where there is not already a requirement for judicial instruction in this regard, one should be instituted. In some jurisdictions, courts have ruled that it was sufficient for the jury to have heard of the alternatives from defense counsel or the prosecutor.[63] However, juries are more likely to give credence to the word of the court, rather than arguments presented by attorneys in the case. In fact, jurors are instructed to follow the law as explained by the judge, not the lawyers. Accordingly, juries should be instructed by the court regarding the available alternatives even if the attorneys argue the alternatives before the jury.

Courts should make no statements or instructions to the juries that would ten to relieve jurors of their sent of responsibility for their verdict.[64] Thus, it goes hand in hand with the principle that the court should instruct the jury on all available sentences in capital cases, and the true meaning of those sentences, that the judge and the attorneys in the case should not inform or otherwise indicate to the jury that the defendant's sentence can later be appealed or commuted or is not otherwise final.

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[62] *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989).

[63] *See, e.g.*, *Southerland*, 447 S.E.2d 862.

[64] *See* James S. Liebman, *The Overproduction of Death*, 100 Colum. L. Rev. 2030 (2000); *see, e.g.*, *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (finding a violation of the Eighth Amendment and vacating a death sentence that was imposed as a result of a sentencing hearing in which the prosecutor argued to jury that it should not view itself as the final arbiter of the petitioner's death sentence because the sentence would be reviewed by the Mississippi Supreme Court).