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## Instructions on Death: Guiding the Jury's Sentencing Discretion in Capital Cases

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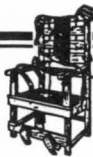
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# CAPITAL CASES



## Instructions on Death: Guiding the Jury's Sentencing Discretion in Capital Cases

by Stephen Ellmann

### Introduction

The men and women who sit on capital juries rarely take their duties lightly. Defense counsel tell them—and probably they agree—that the decision to take a defendant's life is awesome and difficult. Unfamiliar with the law, no doubt inexperienced in sentencing, the jurors face a confusing and painful task.

For this task jurors naturally seek, and the law provides, some guidance. This guidance, of course, is delivered by the judge in instructions to the jury; these instructions have at least three functions, each of which may be critically important for defense counsel.

First, instructions may explicate crucial legal issues (such as the nature of aggravating and mitigating circumstances, the burdens of proof shouldered by prosecution and defense, the process of weighing the various circumstances pointing for and against death), and a host of other specific points bearing on the jury's decision. These points *matter*. Carefully prepared instructions can illuminate the jurors' duties in ways that heighten their awareness of their responsibility to avoid an improper sentence of death; ill-prepared instructions may encourage the jury to

view its task as a mechanical one, in which the state's accumulation of aggravating circumstances automatically leads to a death sentence.

Second, even if—as seems likely—many of the instructions given by judges are too technical, or confusing, or extended for jurors to recall their details accurately, the instructions given by the court help set the mood for the jurors' deliberations. Instructions that highlight aggravating circumstances and give only passing reference to mitigating circumstances may lead jurors to give more weight to the state's reasons for death than they otherwise would; conversely, instructions that set out in detail the factors or evidence in mitigation may encourage jurors to accept those factors as significant. Moreover, in closing argument counsel can rely on favorable instructions and underscore them for the jury while also buttressing the closing argument itself.

Third, the instructions given (and those requested but refused) become the basis for appeal. *If* timely requests for instructions are made, and *if* timely objections are made to instructions that jeopardize the defendant's rights, then the client may, literally, live to fight another day.

It goes without saying that instructions are vitally important at both guilt and penalty phases. This article will focus only on the penalty phase, however, and even within this field it will not be exhaustive, for the range of instructions that defendants may need at penalty trials is as broad as the range of issues and evidence at those trials. In the pages to come I will try only to highlight some of the central issues on which instructions can be helpful, and the sorts of instructions that counsel may want to offer on them. The rest, as always, is

up to the attorneys in each individual case.<sup>1</sup>

### Preparation and Presentation of Instructions

Precisely because every case will call for slightly different instructions, it is essential for counsel to plan and prepare the instructions before trial. Just as a capital attorney must devise a theory of the case that will sustain the defense through both guilt and sentencing, so he or she must devise instructions that buttress the defense theory in every way possible.

The first step, then, is a careful assessment of the strengths and weaknesses of the defense case. If, for example, the defendant's hopes for a life term depend on nonstatutory mitigating circumstances, counsel should prepare instructions that highlight the presence of the nonstatutory circumstances and emphasize the jury's power (or even duty) to consider them. Otherwise, the mere fact that they are not specified by the state statute may militate against the jury's considering them.

In light of this assessment, counsel can formulate the instructions that would be most helpful to the case. Some states or courts may have form instructions, and these should certainly be consulted—although the purpose may be more to identify instructions which must be objected to than to find models whose use should be

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1. I am grateful to James Liebman, Anthony Amsterdam, Timothy K. Ford and Dennis Baldwin for numerous suggestions which I have incorporated into this article, generally without specific attribution.

sought. Fortunately, model instructions—likely to be helpful starting points in almost any case—are available from a number of sources, including the California State Public Defender's *California Death Penalty Manual*, the Kentucky Public Advocate's *Death Penalty Manual*, the Indiana Public Defender Counsel's *Death Penalty Defense*, the Ohio Death Penalty Task Force and Criminal Defense Lawyers Association's *Ohio Death Penalty Manual*, the Southern Poverty Law Center's *Motions for Capital Cases*, and probably others. I've drawn extensively on some of these sources in the discussion that follows.

Just as important as the drafting of the instructions is the decision on strategy for seeking their acceptance by the court. A crucial element in this decision, in turn, is thorough research of the relevant law. Obviously, it is ideal if the instructions the case calls for are supported by relevant precedent. This precedent may rest on the federal constitution, state constitution, or state statutes, rules or decisions; all should be consulted.

Even if an instruction is not currently required by law, it may well make sense to request that it be given. The court may, after all, have ample discretion to give the instruction if it chooses. Moreover, even an instruction that is currently rejected by governing law may also be well worth requesting, if only to secure the issue for appeal. On the other hand, if a case looks winnable at trial, it could conceivably be best not to raise weak legal claims for improved instructions—if the result may be to trigger the prosecution's interest in obtaining obstructions that are even worse than those otherwise likely to be given.

Assuming that it makes strategic sense to ask for a given instruction, counsel of course must decide how vigorously to press for its acceptance. But whether a particular instruction is urgently needed at trial, or instead is expected to serve primarily as the basis for argument on appeal, counsel should assert all possible legal grounds for its appropriateness. One straightforward way of ensuring that important legal rights are not waived by omission is to preface the entire set of proposed instructions with a written motion urging that they be given, in light of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and ap-

propriate parts of the state's constitution and laws.

Where an instruction is crucially needed, of course, counsel should be prepared to press for it. Important Supreme Court decisions offer both logic and language that can be brought to bear in this effort. "[C]areful instructions on the law and how to apply it" were endorsed in *Gregg v. Georgia*, 428 U.S. 153, 193 (1976) (plurality opinion). Indeed, it is difficult to understand how, without clear instructions, sentencing juries can arrive at decisions that provide a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not," *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

The absence of such instructions in fact contributed to the Supreme Court's overturning of the death sentence in *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980) (plurality opinion). Similarly, in *Caldwell v. Mississippi*, 86 L.Ed.2d 231, 246 (1985), the Supreme Court struck down a death sentence, in part because the trial court, rather than giving "a strong curative instruction," had expressed agreement with comments by the prosecutor that risked undermining the jury's sense of responsibility in death sentencing. Moreover, even under state statutes that deliberately leave some aspects of the sentencing decision to the jury's discretion—as we now know that Georgia does, see *Zant v. Stephens*, 462 U.S. 862, 890 (1983)—*Gregg's* principles continue to support pressing for careful instructions concerning those aspects of the decision which the system (purportedly) guides more precisely.

When an instruction is important, moreover, one version of it may not be enough. The best possible instructions are likely to be the most open to objection from the prosecution, and if counsel has no fallback instructions prepared, wholly unobjectionable aspects of the defense instructions may be lost in the shuffle. It is also possible that pressing for the best possible instructions will help persuade the court to grant at least the second-best—though pressing for too many ideal and unwinnable instructions may jeopardize counsel's credibility.

While the decisions about whether and

how vigorously to press for particular instructions are delicate ones, sad experience suggests that counsel should at least think very carefully before *not* raising any available legal claim. Death penalty trials can end in death sentences, and the fate of the defendant after that judgment is likely to depend in large measure on whether his trial attorneys have preserved the grounds for appeal. That may later save him. For the same reason, it is *essential* that all proceedings concerning instructions (and objections to them) be on the record.

With these thoughts in mind, let us consider more specifically what sentencing phase instructions should cover and how they can do so best. But first, these caveats: Many, probably most, of the instructions given as examples in the following pages embody strongly pro-defense interpretations of the law; if these examples are offered in actual trials, counsel should be ready to respond with alternative formulations in case the court rejects the instructions suggested here. Similarly, the citations given in this article are generally meant to provide a starting point in seeking positive authority; counsel should be aware that there are many adverse decisions on these issues as well. Finally, the instructions suggested here are *suggestions*—in every case, counsel must decide which instructions will best serve the needs of the client, in light of the client's chances at trial and on appeal.

### Issues to Be Covered

The issues that sentencing instructions need to address are as broad and complex as the issues of the capital sentencing decision itself. Space does not permit a discussion in detail of the kinds of language defense counsel may need to seek on all of these issues. But it is possible to outline the topics that comprehensive capital instructions should cover and to address more thoroughly certain important themes in the instructions that defense counsel should proffer.

#### *The Life-or-Death Nature of the Sentencing Decision*

The very first instruction<sup>2</sup> should immediately remind the jurors that "their

task...[is] the serious one of determining whether a specific human being should die at the hands of the State." *Caldwell v. Mississippi, supra*, 86 L.Ed.2d at 240. They should be encouraged, in this instruction and throughout, to think of the defendant as a person with a name, rather than "the defendant," and so he should always be referred to by his name (and perhaps as "Mr."). They should also be made aware of the nature of their choice, and so, if possible, the opening instruction should identify the method of death (rather than leaving execution as an abstraction). It should also identify the alternative to death, in as firm language as the state's law will support; for example, the alternative may be described as "life imprisonment," with further explanations, if any, of the availability of parole postponed until later. Thus an opening instruction might read:

Ladies and gentlemen of the jury, it is now your duty to determine what punishment must be imposed upon (*name of defendant*). You must determine which of the following punishments is appropriate to impose on (*name of defendant*):

- 1) Life imprisonment without the possibility of parole;
- or
- 2) Death by electrocution.<sup>3</sup>

**The Basic Steps in the Sentencing Decision**

Before the jurors can understand the nature of aggravating or mitigating circumstances, or the burdens of proof applying to them, or a variety of other matters, they need a basic framework. Suppose we have a death penalty statute that requires proof beyond a reasonable doubt of one statutory aggravating circumstance as a predicate for death-eligibility, and then

2. This discussion focuses on the instructions to be given after the evidence at the penalty phase has been presented. It may also be very helpful to have initial instructions to the jury before the sentencing hearing gets under way. Defense counsel should seek to insure that such initial instructions share the emphasis of the post-hearing instructions, as discussed throughout this article, on reinforcing the jury's caution about imposing death.
3. Southern Poverty Law Center, *Motions for Capital Cases* 203 (1981).

provides for a weighing of aggravating and mitigating circumstances to arrive at a final decision. It is important for the jury to know, first, that death is out of the question unless a statutory aggravating circumstance is proven, and, second, that even if such a circumstance is shown, the question of sentence is still far from decided. These points might be made this way:

In deciding whether to sentence (*name of defendant*) to life imprisonment without parole or death by electrocution, you will first have to determine whether the state has proven beyond a reasonable doubt that a statutory aggravating circumstance exists in this case. (*Name of defendant*) cannot be sentenced to death by electrocution unless each juror finds beyond a reasonable doubt the existence of one statutory aggravating circumstance. I will explain what a statutory aggravating circumstance is shortly, but you should understand that the fact that you have found (*name of defendant*) guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself a statutory aggravating circumstance.

Therefore, unless you unanimously find beyond a reasonable doubt at least one statutory aggravating circumstance, you cannot even consider sentencing (*name of defendant*) to death.

Even if you unanimously find the existence of one statutory aggravating circumstance beyond a reasonable doubt, you are not then authorized to impose the death penalty on (*name of defendant*). This finding merely authorizes you to consider imposing the death sentence. In deciding then whether to sentence (*name of defendant*) to death by electrocution, you are bound by law and by your oath as jurors to consider those mitigating circumstances which I will list for you later, and any other mitigating evidence which you find in the case, before imposing a sentence.

It will then be your duty, in accordance with the instruction I am about to give you, to make a moral assessment of the circumstances of the case

as they reflect on the ultimate question of life or death: whether (*name of defendant*) should be sentenced to life imprisonment without parole or to death by electrocution.<sup>4</sup>

This instruction by no means completely describes the weighing process that the jury will carry out and on which instructions are certainly needed. It may well be valuable also to describe that weighing process briefly here, if it is one that carefully protects defendants. If not, the instruction given above offers a general guideline, is meant to convey an overall sense of the necessity of caution and care in the sentencing process, and is compatible with a variety of more specific instructions later concerning the details of the weighing process.

**Definition and Proof of Aggravating Circumstances**

Juries often find aggravating circumstances in capital cases. It is essential, however, that jurors not be permitted to rely on circumstances that are not present or have not been adequately proven. Jury instructions can help insure against these risks, although counsel should bear in mind that unduly elaborate instructions concerning aggravation themselves carry the risk of unintentionally focusing the jury's thoughts on the aggravating circumstances in the case. Ideally, instructions to the jury on aggravating circumstances should:

- 1) narrowly and precisely define each aggravating circumstance;
- 2) limit the aggravating circumstances that the jury will be allowed to consider;
- 3) specify the burden of proof that must be met by the State;
- 4) explain the presumption of innocence; and
- 5) limit the evidence the jury may consider.

4. This instruction is drawn largely from the Kentucky Public Advocate's *Death Penalty Manual* 159 (1979) (hereinafter cited as *Kentucky Manual*); Southern Prisoners' Defense Committee et al., Supplemental Materials, Seminar on Improving Special Criminal Defense Skills (Nashville, TN, October 24, 1981), Part IV.E., at 8 [hereinafter cited as *Seminar Materials*]; *People v. Albert Brown*, 40 Cal.3d 512, 220 Cal. Rptr. 637, 709 P.2d 440 (1985).

Narrow and Precise Definition

Many of the aggravating circumstances specified in modern death penalty laws are vague, some of them exceptionally so. Others may be clear enough to lawyers, but not at all self-explanatory for lay jurors. None of these ambiguities should be permitted if they expand the grounds on which jurors might imagine they can find an aggravating circumstance proven.

For example, counsel should press for a narrowing definition of the "heinous, atrocious or cruel" circumstance—specifying, perhaps, that such an offense must involve "torture, that is, serious and deliberate physical abuse of the victim before death, or the pitiless infliction of unnecessary pain on the victim."<sup>5</sup> Similarly, if the instructions defining homicide at the guilt phase and those defining aggravating circumstances at sentencing appear to permit a death sentence against a person who neither took life, attempted to take life, nor intended to take life or that lethal force be employed, in violation of *Enmund v. Florida*, 458 U.S. 782 (1982), then this serious error should be challenged, both by a motion to bar or dismiss the death penalty from the case and, if that fails, with corrective instructions.<sup>6</sup>

Sometimes the issues needing clarification will be more intricate. If, for example, it is an aggravating circumstance that a murder was committed in the commission of robbery, it may be very important

—depending on the facts and evidence—to:

1) instruct the jury on the elements of robbery, and direct them that they cannot find this aggravating circumstances unless they find that each of the elements of robbery has been proven beyond a reasonable doubt;

2) instruct the jury (if this is not a question of law for the court) that the homicide must be an integral part of the commission of robbery, rather than, for example, merely close in time to the robbery, see generally, *People v. Green*, 27 Cal. 3d 1, 164 Cal. Rptr. 1, 609 P.2d 468, 504-06 (1980); or

3) instruct the jury that they must find that the homicide was committed with the intent to aid the commission of the robbery.

Undoubtedly there will be many other such issues revealed by a close reading of applicable statute and case law. It is important *not* to assume that state law will be unfavorable, for courts in such states as Florida, Illinois, Louisiana, and Tennessee have in fact sought to articulate careful definitions of aggravating factors. Even when state law is not helpful, federal constitutional law may call for narrowing constructions. See, e.g., *Godfrey v. Georgia*, 446 U.S. 420 (1980).<sup>7</sup> Where the facts raise these issues, they should not be overlooked.

Limitation of Aggravating Circumstances

In particular, counsel should seek to bar the jury from considering nonstatutory aggravating circumstances (especially if state

law supports this limitation). Even if state law permits consideration of nonstatutory aggravation, it may still be possible to narrow the range of nonstatutory circumstances that the jury will consider.

Whatever the applicable rule on nonstatutory aggravating circumstances, counsel should not overlook other possible limits on the circumstances that the jury can be instructed to consider. Moreover, "[w]here it is doubtful whether a particular aggravating circumstance should be submitted," counsel should maintain, with the North Carolina Supreme Court, that "the doubt should be resolved in favor of defendant." *State v. Oliver*, 274 S.E.2d 183, 204 (N.Ca. 1981). There are a number of possible sources for such limits on aggravating circumstances.

First, in cases where a defendant has already gone through one or more penalty trials, any aggravating circumstance which was not found against him in the prior trial(s)—whether or not it was submitted to the prior sentencing judges or juries—and any aggravating circumstance for which the evidence was ultimately held constitutionally insufficient (either in state or federal court) should be objected to on double jeopardy and heightened reliability grounds, see *Young v. Georgia*, 79 L.Ed.2d 198 (1984) (Marshall, J., dissenting from denial of certiorari); cf. *Jones v. Florida*, 459 U.S. 891 (1982) (Marshall, J., dissenting from denial of certiorari); *State v. Silhan*, 275 S.E.2d 450, 480-83 (N.Ca. 1981).

Second, double jeopardy, heightened reliability and due process, and equal protection concerns also can be invoked to support objections to aggravating circumstances that constitute elements of the offense of which the defendant has been convicted (such as an "in the commission of a felony" circumstance where the defini-

5. Cf. *State v. Sonnier*, 402 So.2d 650, 659 (La. 1981), cert. denied, 463 U.S. 1229 (1983); see also *Mills v. State*, 476 So.2d 172, 178-79 (Fla. 1985) (per curiam) (opinion for Justices Ehrlich, Shaw, and perhaps Alderman).

6. After this article was in draft, the Supreme Court decided *Cabana v. Bullock*, 54 U.S.L.W. 4105 (U.S. Jan. 21, 1986). The trial jury in *Bullock's* case had returned a death sentence on the basis of instructions that did not require it to find the level of culpability mandated by *Enmund*, but the Court held that this death sentence could still stand "provided only that the requisite findings are made in an adequate proceeding before some appropriate tribunal—be it an appellate court, a trial judge, or a jury." *Id.* at 4109. Probably most, if not all, states will nonetheless continue to entrust this decision in the first instance to the trial sentencer. As a result, *Bullock* makes it all the more important that a sentencing jury be correctly instructed—since a failure to give correct instructions may now be held to call only for appellate factfinding rather than for a new sentencing hearing before a correctly instructed jury.

7. I am grateful to James Liebman for identifying these sources of potentially useful case law.

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tion of capital homicide is "killing in the course of specified felonies"), see *Collins v. Lockhart*, 754 F.2d 258, 261-65 (8th Cir. 1985), cert. denied, 54 U.S.L.W. 3375 (U.S. Dec. 3, 1985); *State v. Cherry*, 257 S.E.2d 551, 567-68 (N.Ca. 1979), cert. denied, 446 U.S. 941 (1980).

Third, overlapping or duplicative aggravating circumstances (e.g., that the murder was committed during a robbery and that it was committed for pecuniary gain, or that each of two concurrent murders is a "multiple murder" aggravating circumstance to the other) should also be resisted on similar grounds, see *People v. Harris*, 36 Cal.3d 36, 60-67, 201 Cal. Rptr. 782, 679 P.2d 433, 447-52 (1984) (plurality opinion), cert. denied, 105 S.Ct. 365 (1984); *State v. Goodman*, 257 S.E.2d 569, 586-88 (N.Ca. 1979); *Cook v. State*, 369 So.2d 1251, 1256, 1258 (Ala. 1978); *Provence v. State*, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977).<sup>8</sup>

Fourth, aggravating circumstances that on their face or as applied require a jury that has just convicted the defendant of a murder to decide whether he committed another unrelated crime, for which he has not already been found guilty, should be resisted as risking prejudiced and unreliable decisionmaking, see *State v. McCormick*, 397 N.E.2d 276 (Ind. 1979). At the least, counsel should press for a requirement that any such other crimes be proven beyond a reasonable doubt. Cf. *People v. Robertson*, 33 Cal.3d 21, 188 Cal. Rptr. 77, 655 P.2d 279, 297-99, 303-04 (1982) (plurality and concurring opinions).

Finally, state or federal law may of course provide still other grounds for resisting the state's use of aggravating circumstances. Counsel should creatively explore, in particular, the possibility of formulating, and seeking instructions on, defenses to aggravating circumstances (requiring, for example, that the defendant have been aware of his victim's status as a peace officer; or providing that facts showing duress, even though not sufficient to make out a guilt phase defense, suffice to negate an aggravated circumstance of

killing during an escape<sup>9</sup>).

#### Specify Burden of Proof

Typical statutes require that the jury unanimously find at least one statutory aggravating circumstance beyond a reasonable doubt, and this limit should of course be repeated. It should also be made explicit that the jury cannot find additional aggravating circumstances unless this same burden of proof is satisfied for each one. If possible, each juror should also be required not to take into account any other aggravating circumstances unless these, too, are found by the entire jury beyond a reasonable doubt.

In jurisdictions that permit nonstatutory aggravating circumstances to be considered, counsel may want to seek instructions imposing the same limits on the jurors' consideration of these nonstatutory circumstances. Any such instructions, however, should be phrased carefully so as not to inadvertently encourage the jury to consider nonstatutory aggravating circumstances that it might otherwise have ignored. One formulation that has been suggested would tell the jurors that these limits must be satisfied "before you consider any fact as an aggravating circumstance."

The instructions should also explain the meaning of the "beyond a reasonable doubt" standard, and should do so in terms that reinforce the jurors' sense of the gravity of their responsibility. For example:

In order to find that an aggravating circumstance has been proven to exist you must be convinced of its existence beyond a reasonable doubt and to a moral certitude. Proof of an aggravating circumstance beyond a reasonable doubt is evidence by which the understanding, judgment and reason of the jury are well satisfied and convinced to the extent of having a full, firm and abiding conviction that the circumstance has been proven to the exclusion of and beyond a reasonable doubt.

A reasonable doubt as to the existence of an aggravating circumstance may arise from the

evidence presented or from the lack, want or insufficiency of the prosecution's evidence.

A reasonable doubt does not mean that you have to give yourself a specific reason for the doubt; it is sufficient that you are not convinced to an abiding certainty.

If you have a reasonable doubt as to whether an aggravating circumstance is present, it is your duty to find that it is not present.<sup>10</sup>

#### Explain the Presumption of Innocence

The presumption of innocence should be applied to each of the aggravating circumstances considered by the jury, and, needless to say, should be phrased as firmly as possible.

#### Limit the Evidence

For example, instructions might fruitfully state that the fact that an aggravating circumstance has been alleged against the defendant is not evidence of its existence, and should not be considered by the jury,<sup>11</sup> that the jury may not consider any evidence that is not relevant to one of the aggravating circumstances being submitted to it, or that circumstantial evidence alone is not sufficient to prove the existence of an aggravating circumstance beyond a reasonable doubt.

In addition, counsel may restate or supplement their opposition to the use of overlapping aggravating circumstances<sup>12</sup> with an instruction, as has been suggested, on these lines: "A fact which you consider as the basis for finding one aggravating circumstance may not also be considered by you as the basis for finding another aggravating circumstance; you may consider the same fact in aggravation only once, not more than once, even though it may come within the definition of more than a single aggravating circumstance which I have read to you."

8. Similarly, an instruction may be sought to prevent the overlapping use of aggravating evidence. See text accompanying note 12 *infra*.

9. The latter was suggested by James Liebman.

10. See *Kentucky Manual*, *supra* note 4, at 160-61. For the last sentence, see New Mexico Uniform Jury Instructions for death penalty cases, No. 39.22 (1980 version).

11. This instruction was suggested by Timothy K. Ford.

12. See text accompanying note 8 *supra*.

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**Definition and Proof of Mitigating Circumstances**

Instructions on mitigating circumstances can help a defendant; they can also hurt. It is essential that these instructions highlight the defense case and its significance for the jury's deliberations—and it is likely that standard instructions will fail to do this as well as they should. Instructions in connection with mitigating circumstances should:

- 1) clarify the significance of mitigating circumstances in the jury's decision;
- 2) identify and, if appropriate, explain both the statutory and non-statutory mitigating circumstances which the jury may consider; and
- 3) explain the burden of proof on mitigating circumstances.

**Clarify the Significance of Mitigating Circumstances**

In an important series of cases, the Eleventh Circuit (formerly the "Fifth Circuit Unit B") has decided that the constitution generally requires instructions which explain to a jury "why the law allows...a consideration [of mitigating circumstances] and what effect a finding of mitigating circumstances has on the ultimate recommendation of sentence." *Dix v. Kemp*, 763 F.2d 1207, 1209 (11th Cir. 1985). Significantly, *Dix* adhered to this line of decisions despite the Supreme Court's determination in *Zant v. Stephens*, *supra*, 462 U.S. at 890, that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." See *Dix*, 763 F.2d at 1209 n.3.

A typical formulation of these points would be the following:

I charge you that mitigating circumstances are those which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame, and which, therefore, call for the imposition of a punishment less than the ultimate punishment.<sup>13</sup>

Counsel may want to tender even more

elaborate instructions, which explain, for example, that mitigating circumstances are those that tend to indicate that the deterrent or retributive functions of punishment would not be served in this case. See Liebman & Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 818-21 (1978) (hereafter cited as "Liebman & Shepard").

**Explain Statutory and Nonstatutory Mitigating Circumstances**

Implicit in this guideline are seven important considerations.

*First*, mitigating circumstances may be ambiguous. Even a seemingly clear factor such as "age" may well need explanation to highlight the range of ages that would count as mitigating or to highlight non-chronological factors such as mental age that might bring a defendant within the circumstance. An explanation of the reasons that age counts as a mitigating factor—the immaturity of a defendant tends to reduce his culpability and so to reduce the appropriateness of the ultimate penalty—may also be useful. (Counsel should, however, be careful to frame these explanations so as not to narrow inadvertently the range of mitigating material that the jurors understand they may consider and rely on as reasons for giving a life sentence.)

*Second*, it is essential that mitigating circumstances that are *not* present in the case not be presented to the jury. Typical mitigation instructions may list, and submit, every mitigating circumstance, whether it is present or not; the effect may be to emphasize for the jurors the number of mitigating circumstances that are missing from the case before them. Moreover, statutory mitigating circumstances may be defined very stringently—for instance, to require "extreme emotional disturbance" to show mitigation. If counsel believe that the evidence does not meet the definitions of related mitigating circumstances specified in the statute, but that this evidence is nonetheless mitigating, then they may well want to prevent the statutory circumstances in question from being submitted to the jury, or at least to seek modifications in the statutory language that would normally be used in the instructions.<sup>14</sup>

*Third*, if the defense case rests in whole or in part on nonstatutory mitigating cir-

cumstances, it is extremely important that these be presented to the jury with the same emphasis as statutory circumstances. Otherwise the jurors may infer that, compared to the statutory circumstances, the nonstatutory circumstances are less important, or the jury is under less of an obligation to consider them. An instruction directly telling the jurors to weigh and consider both sets of circumstances equally may be helpful. See generally *People v. Lucky*, \_\_\_ Cal.3d \_\_\_ (Dec. 31, 1985). In *State v. Johnson*, 257 S.E.2d 597, 614-17 (N.Ca. 1979), the North Carolina Supreme Court recognized that an instruction "put[ting] some mitigating circumstances in writing and leav[ing] others to the jury's recollection," *id.* at 616-17, might violate *Lockett v. Ohio*, 438 U.S. 586 (1978), by effectively discouraging the jury from considering relevant mitigating circumstances.

*Fourth*, it is a reality of capital trials that often the prosecution will be able to prove the existence of multiple aggravating factors. While instructions can then be sought that minimize the significance of merely counting the number of factors, it behooves defendants to seek to offer multiple mitigating factors as well. Often, this effort will require the presentation of nonstatutory mitigating factors, and will also call for the careful identification of the separate factors shown by the evidence.

*Fifth*, counsel should always explore carefully the range of possible mitigating circumstances, especially nonstatutory mitigating circumstances, in the case, and seek instructions on those that seem promising. These can include, but are by no means limited to, an almost infinite range of facts about the offender himself and the circumstances of the crime. Another mitigating circumstance could be the presence of any remaining doubt about the defendant's guilt, for such doubt, even if less than a reasonable doubt, might still weigh against death. Cf. *Smith v. Balkcom*, 660 F.2d 573, 579-82 (5th Cir. Unit B 1981), *modified on other grounds*, 671 F.2d 858.

14. Even if counsel believe that their evidence may satisfy the statutory standards, they may wish to challenge such stringently defined mitigating circumstances as unduly limiting the jury's consideration of mitigating evidence, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978).

13. See *Seminar Materials*, *supra* note 4, Part IV.E., at 3.

(5th Cir. Unit B), *cert. denied*, 459 U.S. 882 (1982). A lighter sentence to a co-defendant might also be viewed by a jury as mitigating. So might the *absence* of an *aggravating* circumstance (for instance, that the defendant did not act for pecuniary gain). And the defendant's behavior in prison since his arrest—which for a defendant on retrial, may have been years ago—may show evidence of rehabilitation or nondangerousness, for instance, that will be of mitigating value. The Supreme Court is now considering the admissibility of evidence of past and likely future good conduct of a defendant in prison in *Skipper v. North Carolina*, No. 84-6859, *cert. granted*, 54 U.S.L.W. 3252 (U.S. Oct. 15, 1985).

*Sixth*, the instructions should direct the jury to give consideration to those mitigating circumstances that it finds in the case. *Eddings v. Oklahoma*, 455 U.S. 104, 114-15 (1982), declares that the sentencer "may determine the weight to be given relevant mitigating evidence. But [the sentencer] may not give it no weight by excluding such evidence from [its] consideration"; this instruction implements this view. For similar reasons, counsel should seek instructions requiring the jury to find the existence of those circumstances sufficiently demonstrated by the evidence (under the applicable burden of proof). *Cf. State v. Johnson*, 257 S.E.2d 597, 617-19 (N.Ca. 1979). (Instructions that direct the jury's attention to mitigating evidence, if permitted, may serve this same purpose to some extent.) If appropriate—for example, in a case in which the defendant is suffering from a mental illness which contributed to his offense—counsel should also seek instructions directing the sentencing jury to treat particular circumstances or evidence as mitigating rather than as aggravating. *Cf. Zant v. Stephens*, *supra*, 462 U.S. at 885.

*Seventh*, the instructions should present the mitigating circumstances at issue in the case "in the most favorable light for the defendant."<sup>15</sup> Definitions of mitigating circumstances, explanations of their meaning in the jury's deliberations, and, if permissible, references to the relevant evidence should all be drafted in light of

the actual strengths and weaknesses of the case. Instructions such as these are likely to be especially important when the mitigating evidence is liable to be misunderstood or disregarded—as may be the case, for example, with evidence of mental illness, which jurors may be reluctant to credit or to view as mitigating. Support for such instructions may be found, in such cases, not only in death penalty jurisprudence but in general principles concerning "prophylactic instructions on...confusing or prejudicial evidence." Liebman & Shepard, *supra*, at 819-20 n.275.

An instruction briefly accomplishing several of these objectives might read as follows:

The Court instructs the jury that in deciding whether to sentence (*name of defendant*) to life imprisonment without parole or to death by electrocution, you are bound by law to consider all of the mitigating circumstances presented by the defense, and any other mitigating circumstances that you find in the case. That is, you should focus your attention on those aspects of the case, and in particular those characteristics of the defendant, which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame, and which, therefore, call for the imposition of a punishment less than the ultimate punishment. Thus, you must consider the following factors as evidence of mitigation if you believe from the evidence that they are present:

1. (*Name of defendant*) acted under extreme duress or under the substantial domination of another person, \_\_\_\_\_.
2. (*Name of defendant*) did not strike the fatal blow which caused the death of the victim.
3. The age of (*name of defendant*), 20, at the time of the crime, and the resultant immaturity that would reasonably be expected to contribute to his criminal conduct.
4. (*Name of defendant*)'s cooperation with the police.
5. (*Name of defendant*)'s prior family history, including his having been abused physically and emotionally as a child, that would

reasonably be expected to contribute to his criminal conduct.

6. (*Name of defendant*)'s low intelligence and his suffering from chronic depression that would reasonably be expected to contribute to his criminal conduct.

7. Any other circumstance which you consider mitigating even if I have not mentioned it.

It may well be helpful to elaborate on the last item on the list ("any other circumstance"), particularly if the court refuses to identify nonstatutory mitigating circumstances in its charge to the jury. Such an elaboration might declare:

The mitigating circumstances which I have read for your consideration are factors that you may take into account as reasons for deciding to impose a sentence of life imprisonment. You should pay careful attention to each of those factors. Any one of them, standing alone, may be sufficient to support a decision that life imprisonment is the appropriate punishment for (*name of defendant*). However, you should not limit your consideration of mitigating circumstances to the specific mitigating circumstances mentioned. You may also consider any other circumstance relating to the case or to (*name of defendant*) as reasons for imposing a sentence of life imprisonment.<sup>16</sup>

#### Explain Burden of Proof on Mitigating Circumstances

The instructions to present on the burden of proof depend, of course, on what this burden of proof is, and what party bears it. Ideally, the answer might be that the state must disprove beyond a reasonable doubt any mitigating circumstance on which the defense proffers evidence. This rule would implement the requirement of heightened reliability in death penalty cases, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), by borrowing the standard developed to insure reliability in determining "the degree of criminal

16. *Seminar Materials*, *supra* note 4, Part IV.E., at 6.

15. *Seminar Materials*, *supra* note 4, Part IV.E. at 4.



culpability" at the guilt stage of even the most mundane capital cases, *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).

Unfortunately, arguments for this standard have not fared very well in the courts; as a practical matter, it will be essential to offer alternative instructions embodying less favorable burdens of proof. These instructions should also explain the meaning of the various formulas used, if such explanations will be helpful to the defense.

For example, counsel might offer the following instructions (beginning with the first or second and presenting the later ones, in order, if the court rejects those already presented):<sup>17</sup>

If you have a doubt about the existence of a mitigating circumstance then you shall find that that mitigating circumstance exists.

The prosecution must prove beyond a reasonable doubt the nonexistence of each of the mitigating circumstances which I have listed for you before you can find that such circumstance does not exist. [Here include a strong definition of reasonable doubt.] If you have a reasonable doubt as to whether a mitigating circumstance has been proven not to exist, it is your duty to find that it is present.

In order for you to find the existence of a mitigating circumstance it does not have to be proven beyond a reasonable doubt to exist. You must find the existence of a mitigating circumstance if there is any evidence introduced to support it. [Counsel may wish to vary this instruction or prepare a fall-back version, by adding a clause such as "unless you are firmly convinced from all of the evidence in the case that this circumstance does not exist."]

In order for you to find the existence of a mitigating circumstance it does not have to be proven beyond a reasonable doubt to exist. You must find the existence of a mitigating factor if the existence of that factor is in any degree more likely than not. [Here it may be helpful to

formulate further instructions emphasizing how modest this burden of proof is, or the jurors' duty to adhere to it.]

In addition, these instructions should seek to ensure that each juror is free to consider as mitigating any factor that he or she views as such, even if other jurors do not agree that the factor is present or do not view it as mitigating. If individual jurors are denied this freedom, counsel should seek at least to ensure that a mitigating circumstance is deemed to be present (and so must be considered by the entire jury in its weighing decision, or at least *may* be considered by any juror) so long as a mere majority (rather than the entire jury) find it to be present. Finally, such instructions should seek to insure that jurors are free to consider mitigating *evidence*, even if they do not find on the basis of that evidence that a mitigating factor has been *proven* to the requisite level of proof. See *Stebbing v. Maryland*, 83 L.Ed. 2d 212, 214-15 (1984) (Marshall, J., dissenting from denial of certiorari).

**Clarify the Nature of the Weighing Process**

Modern death penalty statutes must direct the jury's attention to the consideration of both aggravating and mitigating factors present in the case. Unfortunately, current doctrine does *not* consider it essential for this purpose that "specific standards for balancing aggravating against mitigating circumstances" be fashioned, nor, apparently, that these factors be "explicitly balanced against each other." See *Zant v. Stephens*, *supra*, 462 U.S. at 875 & n.13 (discussing the Georgia and Texas death penalty statutes).

Nonetheless, many, if not most, state statutes do explicitly provide for some form of balancing process. Even in those states that do not, defense counsel may be able to win instructions that offer considerable clarification of the role and significance of mitigating circumstances, or of other aspects of the sentencing decision, and proffering such instructions is likely to be useful strategy.

In the discussion that follows, however, I will assume that the applicable law does expressly provide for a weighing of aggravating and mitigating circumstances. The establishment of a weighing process

may be helpful for defendants, but it hardly guarantees an adequate consideration of the circumstances that should argue against death. As a result, instructions should seek to ensure that the weighing process is not tilted towards execution. For this purpose, instructions on the following points are likely to be helpful.

**The Decision Before the Jury Is Not a Mechanical One**

A number of state laws provide that after the jury has found a statutory aggravating circumstance beyond a reasonable doubt, it "shall" sentence the defendant to death unless the mitigating circumstances outweigh the aggravating circumstances. Such "presumptions of death" should be attacked as violations of the teaching of *Woodson v. North Carolina*, 428 U.S. 280 (1976), which prohibited mandatory death penalty statutes, and of *Lockett v. Ohio*, 438 U.S. 586 (1978), which required that sentencers not be precluded from considering any appropriate circumstances offered in mitigation. Justice Marshall has also pointed out, see *Maxwell v. Pennsylvania*, 83 L.Ed. 2d 306, 308-09 (1984) (Marshall, J., dissenting from denial of certiorari), that such statutes can undermine the jurors' full recognition of the oral responsibility they bear in death sentencing, by focusing them on relatively mechanical issues peripheral to the true question of life or death—a potential violation of the teaching of *Caldwell v. Mississippi*, *supra*, which insists on the importance of the jurors' fully recognizing this responsibility. One response to these problems is to seek instructions which shift the weighing formula, for example to require that aggravating circumstances be shown to outweigh mitigating circumstances, and I will set out such instructions in the next subsection.

Another response, however, is to make clear to the jury that it is *never* under a duty to impose death unless it concludes as a matter of its own independent moral judgment that death is the appropriate penalty. Instructions such as these are likely to be useful whatever the weighing formula is—at least unless the defense is confident that a more formulaic application of the weighing standard will result in a sentence less than death. This response is strongly supported by the California Supreme Court's

17. See *Kentucky Manual*, *supra* note 4, at 162-63.

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recent decision in *People v. Albert Brown*, *supra* note 4, 40 Cal.3d 512 (1985); *cf. State v. McDougall*, 301 S.E.2d 308, 325-26 (N.Ca.), *cert. denied*, 464 U.S. 865 (1983). Instructions on this point might say, for example:

As I have already explained to you, if you find that the state has proved beyond a reasonable doubt the existence of one or more aggravating circumstances, it will then be your duty to weigh any aggravating circumstance or circumstances that you find against any mitigating circumstances that you find in the case. I charge you that your weighing of these circumstances should not consist of merely adding up the number of aggravating circumstances and mitigating circumstances. Rather, each juror is free to assign whatever moral or sympathetic value he or she deems appropriate to each and all of the various factors you are permitted to consider.

[By directing that the jury "shall" impose the death penalty if it finds that aggravating factors "outweigh" mitigating] (use the bracketed words only if necessary), the law should not be understood to require or even to permit any juror to vote for the death penalty for (*name of defendant*) unless, upon completion of the weighing process, he or she decides that death is the appropriate penalty under all the circumstances.

Moreover, the law does not intend that (*name of defendant*) be sentenced to death if the jury merely finds more bad than good about him or to permit life imprisonment without parole only if it finds more good than bad. The weighing of aggravating and mitigating circumstances must occur within the context of these two punishments—life imprisonment without parole, or death by electrocution—and the balance is not between good and bad but between life and death. Therefore, to return a death judgment, each juror must be persuaded that the "bad" evidence is so substantial in comparison with the "good" that it requires death instead of life without parole. Instructions should also make plain that

multiple aggravating circumstances do not necessarily call for the death penalty, and that a single mitigating circumstance may call for a lesser penalty.

#### The Issues and the Burdens

Earlier sections of this article have already discussed desirable instructions on two burdens of proof issues: the burdens of proof of the existence of aggravating and mitigating circumstances. It is possible to identify three distinct issues that may remain for the jury's consideration at the "weighing" stage, and on at least two<sup>18</sup> of these, instructions on the burden of proof may be helpful.

#### *The relative weights of the aggravating and mitigating circumstances.*

Counsel should press for instructions that preclude death unless the jury finds that the aggravating circumstances clearly outweigh the mitigating circumstances. Another formulation, of similar import, would direct the jury that "[i]f the weight of the mitigating circumstances approaches or exceeds the weight of the aggravating circumstances then you cannot sentence (*name of defendant*) to death by electrocution."<sup>19</sup> Without such provisions as these, juries are free to impose death even when the relevant circumstances are actually or nearly in equipoise.

Whatever the "weighing" formula, counsel should also press for a "beyond a reasonable doubt" standard. This standard can be justified even if the courts decide that "weighing" is not "fact-finding," for the effect of the "beyond a reasonable doubt" standard should be to insure that the jurors, as they should, treat the weighing decision with just as much seriousness as they would the factfinding in a regular case. Accordingly, jurors could be charged, for example, that "unless you find that the state has shown beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors in this case, you cannot sentence (*name of defendant*) to death by

electrocution." See *State v. Wood*, 648 P.2d 71, 83-85 (Utah), *cert. denied*, 459 U.S. 988 (1982). As in every burden of proof context, counsel should be ready with fall-back instructions if the most favorable language is rejected.

#### *The question of whether to grant mercy.*

Death penalty systems may explicitly authorize capital juries to grant mercy. Even under statutes that do not, however, defendants can argue for a right to jury consideration of mercy on the grounds that without such a right jurors may be precluded from giving mitigating circumstances the weight they otherwise would, in violation of the teaching of *Lockett v. Ohio*, *supra*. See, e.g., *Maxwell v. Pennsylvania*, 83 L.Ed. 2d 306, 308 (1984) (Marshall, J., dissenting from denial of certiorari); *cf. Drake v. Kemp*, 762 F.2d 1449, 1460-61 (11th Cir. 1985) (en banc) (U.S. Appeal or petition for certiorari pending). If it is possible to establish that the jury is authorized to grant mercy, then it may well be important to make sure that the jury is aware of this power. An instruction on mercy might read:

I charge you that if you see fit, and regardless of your findings on the other issues I have set out for you, you are always free to afford [there

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18. The only possible exception would be the issue of mercy, to which a "burden of proof" instruction may not readily apply.

19. See *Kentucky Manual* at 163.

is nothing that prevents you from affording] (*name of defendant*) mercy in these proceedings and sentencing him to life imprisonment without parole.

You may grant mercy to (*name of defendant*) regardless of the evidence presented to you and even if you have not found the existence of any mitigating circumstances.

This decision is solely in your discretion and not controlled by any rule of law. Each juror may decide to grant mercy to (*name of defendant*), with or without a reason.

You may in particular decide to grant mercy to the defendant because of [here describe the mitigating circumstances as proffered in the case].<sup>20</sup>

Just as it is important to inform the jurors of their power to grant mercy, it is important to resist instructions that might obscure this power or otherwise interfere with the jury's full consideration of mitigating circumstances. Traditional instructions to render a verdict without consideration of sympathy, or without regard to the consequences, should therefore be resisted—a position endorsed by the California Supreme Court. See, e.g., *People v. Albert Brown*, *supra* note 4.

*The overall appropriateness of a death sentence.*

The corollary of the effort to resist a mechanical weighing process is the view that the jury should not be able to return a death verdict based on a mere weighing of aggravating and mitigating circumstances but instead should be required to address directly the question of the appropriateness of life or death for the defendant.<sup>21</sup> If the jury is responsible for

sentencing, a failure to put this ultimate issue squarely before them may be said to undermine their sense of responsibility for the decision as well as their attention to the significance of mitigating factors or grounds for mercy.

Justice Stevens expressed his concern that the issues put to the jury not distort their decisionmaking in *Smith v. North Carolina*, 459 U.S. 1056 (1982) (Stevens, J., opinion respecting the denial of petition for certiorari). Stevens' opinion quotes from *State v. Wood*, *supra*, 648 P.2d at 83. In light of *Wood*, and of *State v. McDougall*, *supra*, 301 S.E.2d at 327-28 (*McDougall* is North Carolina's response to Stevens' opinion in *Smith*), counsel might seek the following instruction, perhaps buttressed with further instructions reminding the jury of the non-mathematical nature of their decision:

In order to impose a death sentence, you must be convinced beyond a reasonable doubt that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances. If you are not convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you must return a verdict of life imprisonment.

In order to impose a death sentence, you must further be convinced beyond a reasonable doubt that the imposition of the death penalty is the only justified and appropriate sentence in the circumstances. If you are not convinced beyond a reasonable doubt that the imposition of the death penalty is the only justified and appropriate sentence in the circumstances, again you must return a verdict of life imprisonment.

The jury's understanding of the care with which it should approach a possible sentence of death can be further reinforced with instructions on the presumption of innocence, or on what could be called the death sentencing corollary of the presumption of innocence—the presumption of imprisonment. An instruction on this issue might read:

The law presumes (*name of defendant*) innocent of the aggravating circumstances alleged against him, and the law, consequently, presumes that the appropriate sentence for the of-

fense of which (*name of defendant*) has been convicted is life imprisonment without parole.

You are further instructed that this presumption alone is sufficient to require you to sentence (*name of defendant*) to life imprisonment without parole unless you conclude, beyond a reasonable doubt, that only the sentence of death is appropriate for (*name of defendant*).

The Consequences of Nonunanimity

Under many statutes, the death sentence can only be imposed if the jury unanimously agrees to it; if the jury is split, the result is not a new trial but a sentence of imprisonment. Given the inevitable pressures for agreement inside the jury room, it is important for jurors sympathetic to the defendant to understand the consequences of their decisions. Otherwise, arbitrary pressure for unanimity may result in a death verdict in a case in which community sentiment, as reflected in the jury, would not call for execution. Even if state law prohibits instructions on this issue, counsel generally should seek them in order to preserve this issue for appeal.

A strong statement of this point would be:

In order to return a sentence of death, it is absolutely necessary that all twelve (12) jurors agree on that sentence.

If any juror does not believe the sentence of death is warranted under these instructions, then a sentence of life imprisonment without parole will be imposed.

For the same reason, defense counsel should contend that the jury's failure to agree after a reasonable time requires a sentence of life imprisonment (even if state law does not so provide). And for exactly the same reasons, counsel normally should vigorously resist any "Allen" or "shotgun" charge designed to press the jury toward unanimity.

The Meaning of the Possible Sentences

There are two critical concerns here. First, it is important that the jury understand that a death verdict means the defendant's death—rather than being merely some form of symbolic gesture. It may be

20. See Southern Poverty Law Center, *Motions for Capital Cases* 208 (1981); *Seminar Materials*, Part IV.E. at 9.

21. If the weighing process has already ruled out the death penalty, of course, there would be no reason, and possibly no statutory authorization, for the jury to reach this final question. Counsel should seek instructions which make clear to the jurors that decisions at various early or intermediate steps of the decisionmaking process will resolve the case by precluding the possibility of a death sentence.

wise, therefore, to have the jury instructed that "in your deliberations on the question of punishment, you are to presume that if you sentence (*name of defendant*) to death, he will be executed by electrocution."

Second, it is essential that the jury not imagine that the alternative to death is a punishment of no more than a few years' imprisonment. There are three possible ways of insuring against such misunderstanding:

a) If the alternative punishment is fixed by state law at "life imprisonment without parole," it may be best to leave this language precisely as it is, on the theory that it is already as clear as it can be.

b) If the penalty is only "straight life," counsel may ask for an instruction telling the jury "to presume that if you sentence (*name of defendant*) to life imprisonment, he will spend the rest of his life in prison. You are to make no other presumptions." This method assumes that the jurors will be willing, after hearing this instruction, to put aside their suspicions about parole or commutation.

c) If the issue of parole cannot be so easily dispelled, it may be best to meet it head-on. To do so, one commentator has suggested, counsel in such situations should seek instructions telling the jury not only that it should presume that life imprisonment indeed is imprisonment for life, but also that in considering this sentence the jurors should not assume that the defendant will ever be paroled from it; that the question of parole is committed to a responsible official agency with a duty to protect the public; and that the jury should not imagine that such an official agency will fail to do its duty to refuse parole in any case in which the public safety would not be fully protected if parole were granted.

**Reinforce the Jury's Sense of Responsibility**

The Supreme Court in *Caldwell v. Mississippi*, *supra*, 86 L.Ed. 2d at 239-40, emphatically confirmed the constitutional importance of the jurors' sense of moral responsibility. This sense of responsibility is easily diluted; indeed, many jurors will arrive with it diluted in advance, by their vague, and perhaps inaccurate, impressions of the likelihood of review by the trial judge or by courts on appeal. It may

well be helpful, therefore, to seek an instruction on these lines:<sup>22</sup>

You are instructed that this court has no option in the present case to impose any sentence other than the sentence recommended by you, the jurors.<sup>23</sup>

This instruction should be sought even in states where the jury's recommendation is in fact subject to review by the trial judge, on the ground that informing the jury of the prospect of this review will make their contribution to the sentencing process less reliable and responsible. Even in states which explicitly inform the jurors that their decision is only a recommendation, it may well be helpful to seek instructions which emphasize the gravity of making such a recommendation, and the limited circumstances (if they are limited) under which the jury's recommendation will be overturned.

Counsel should be careful, however, not to leave the jurors with the impression that a death verdict will receive further review, while a verdict of life will be final—for that perspective would tempt jurors to render purely symbolic verdicts of death.

**The Verdict Form Should Reinforce the Instructions**

Particularly if the instructions are not provided to the jurors in writing, the only written reflection of the court's instructions that the jurors will have with them during deliberations will be the verdict form. Needless to say, it is essential that the implicit or explicit messages of the verdict form reinforce the scrupulous caution about imposing death towards which all of the defense instructions will have aimed.

The precise contents of the verdict form may well need to vary, depending on the facts of the case and the likely concerns of the jurors (as well as on the requirements of state law). Whenever (and in whatever respects) counsel believe that the jury's performance will be enhanced by a clearer understanding of the steps they are to undertake in reaching a verdict,

however, it is likely to be helpful and arguably constitutionally necessary for the verdict form itself to remind the jurors of the information counsel wish them to remember.

The jurors may be required, for example, to determine the existence of aggravating circumstances; determine the existence of mitigating circumstances; weigh them together; determine whether to grant mercy; and determine, ultimately, whether life or death is the appropriate sentence. If so, then the verdict form might well require the jury to state its decision on each of these issues, and might also—if this information would be helpful—remind them of the burden of proof that must be met as to each one.

For similar reasons, it may be appropriate to require the jury to state explicitly in the verdict form, for each aggravating circumstance, whether it found that circumstance present or absent. This requirement of explicitness may be useful in clarifying the record for appeal, and it may also force the jurors to focus more thoroughly on each of the circumstances in question. It is less clear, however, that a similar requirement as to mitigating circumstances would be advisable, since the more rigidly the jurors' decision on mitigation is structured the less free jurors may feel to give appropriate weight to nonstatutory, even inarticulate, factors calling for life.

Again for similar reasons, it may be useful to require each juror to sign a verdict of death. The same requirement could also be imposed on intermediate decisions (such as the presence of aggravating circumstances) that contribute to the ultimate verdict on death.

The following verdict form embodies rather stringent guidance on the various steps in the sentencing decision.<sup>24</sup>

**SAMPLE VERDICT FORM**

Circle the appropriate alternative in each question that you answer. Begin with the first question; do not go on to subsequent questions if you

22. This instruction is taken from *Seminar Materials*, Part IV.E., at 11.  
23. This instruction would probably need to be harmonized with an instruction on nonunanimity, if the latter were given as well.

24. I am grateful to James Liebman for many suggestions which I have incorporated in drafting this form, and for his pointing out the critical importance of the verdict form itself.

are instructed not to do so based on your answers to earlier questions.

1. (We unanimously find) (We do not unanimously find) beyond a reasonable doubt the aggravating circumstance of \_\_\_\_\_ as alleged.<sup>25</sup>

\_\_\_\_\_  
Foreman

UNLESS YOU FIND THE EXISTENCE OF AT LEAST ONE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT, (NAME OF DEFENDANT) WILL BE SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE. IN THAT CASE, DO NOT ANSWER ANY FURTHER QUESTIONS.

\*\*\*

2. (We unanimously find) (We do not unanimously find) by a preponderance of the evidence that the mitigating circumstance of \_\_\_\_\_ does exist.<sup>26</sup>

\_\_\_\_\_  
Foreman

\*\*\*

3. (We unanimously find) (We do not unanimously find) beyond a reasonable doubt that the aggravating circumstance(s) we have found outweigh the mitigating circumstance(s) we have found.

\_\_\_\_\_  
Foreman

UNLESS YOU UNANIMOUSLY FIND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCE(S) WHICH YOU HAVE FOUND OUTWEIGH THE MITIGATING

CIRCUMSTANCE(S) WHICH YOU HAVE FOUND, (NAME OF DEFENDANT) WILL BE SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE. IN THAT CASE, DO NOT ANSWER ANY FURTHER QUESTIONS.

\*\*\*

4. (We unanimously agree) (We do not unanimously agree) that mercy should not be granted to (name of defendant).

\_\_\_\_\_  
Foreman

UNLESS YOU UNANIMOUSLY AGREE THAT MERCY SHOULD NOT BE GRANTED TO (NAME OF DEFENDANT), (NAME OF DEFENDANT) WILL BE SENTENCED TO LIFE IMPRISONMENT WITHOUT PAROLE. IN THAT CASE, DO NOT ANSWER ANY FURTHER QUESTIONS.

\*\*\*

5. (We unanimously agree) (We do not unanimously agree) beyond a reasonable doubt that the imposition of death in the manner provided by law on (name of defendant) is justified and appropriate in the circumstances of this case.

\_\_\_\_\_  
Foreman

IF YOU DO NOT UNANIMOUSLY AGREE THAT THE IMPOSITION OF DEATH IN THE MANNER PROVIDED BY LAW ON (NAME OF DEFENDANT) IS JUSTIFIED AND APPROPRIATE IN THE CIRCUMSTANCES OF THIS CASE, (NAME OF DEFENDANT) WILL BE SENTENCED TO LIFE IMPRISONMENT

WITHOUT PAROLE. IN THAT CASE, YOU ARE NOT TO ANSWER ANY FURTHER QUESTIONS.

\*\*\*

6. (We unanimously agree) (We do not unanimously agree) that (name of defendant) should be sentenced to death in the manner provided by law.

\_\_\_\_\_  
Foreman

\_\_\_\_\_  
Juror<sup>27</sup>

DO NOT ANSWER QUESTION 6 UNLESS THE JURY HAS (1) FOUND AT LEAST ONE AGGRAVATING CIRCUMSTANCE BEYOND A REASONABLE DOUBT; (2) FOUND BEYOND A REASONABLE DOUBT THAT THE AGGRAVATING CIRCUMSTANCE(S) YOU HAVE FOUND OUTWEIGH THE MITIGATING CIRCUMSTANCE(S) YOU HAVE FOUND; (3) FOUND UNANIMOUSLY THAT MERCY SHOULD NOT BE GRANTED TO (NAME OF DEFENDANT); AND (4) FOUND THAT THE IMPOSITION OF THE DEATH PENALTY ON (NAME OF DEFENDANT) IS JUSTIFIED AND APPROPRIATE IN THE CIRCUMSTANCES OF THIS CASE, BEYOND A REASONABLE DOUBT, AND THE FOREMAN HAS SO INDICATED BY COMPLETING THE QUESTIONS ABOVE AND SIGNING HIS OR HER NAME UNDER EACH QUESTION.

**Conclusion**

This article does not by any means cover all of the instructions that may prove helpful in a capital case. That task is one that only the lawyers in each case can accomplish—and that they must accomplish in order to safeguard the rights and the life, of their client.

25. Provide a separate question for each aggravating circumstance.  
26. Provide a separate question for each statutory and nonstatutory mitigating circumstance proffered by the defendant.

27. Provide a separate line for the signature of each juror.

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