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# EVALUATING EVIDENCE OF CHILDHOOD ABUSE AS A FUNCTION OF EXPERT TESTIMONY, JUDGE'S INSTRUCTIONS AND SENTENCE RECOMMENDATION

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In the current study we examined how jurors utilize evidence of childhood abuse as a function of expert testimony and sentence recommendation. We also varied the specificity of instructional language in the context of mitigating circumstances. We predicted jurors who impose a life sentence would rate evidence of childhood abuse as significantly more important in determining sentence compared to jurors who impose the death penalty. Furthermore, we expected this effect to be moderated by expert testimony. Testimony of childhood abuse increased importance ratings of non-statutory mitigating circumstances. This effect was more evident for jurors who imposed a life sentence compared to those who imposed the death penalty. In addition, specific instructional language influenced how jurors considered circumstances related to the defendant's life.

*Keywords:* mitigating circumstances, childhood abuse, expert testimony

## *Aggravating and Mitigating Circumstances*

In 1972 the U.S. Supreme Court acknowledged the arbitrary manner in which the death penalty was imposed, thus violating the Eight Amendment prohibition against cruel and unusual punishment (*Furman v. Georgia*, 1972). As a result, death penalty statutes were revised in order to ensure guided discretion during the sentencing phase of capital trials (*Gregg v. Georgia*, 1976). Guided discretion was delineated as the presentation of specific aggravating and mitigating circumstances surrounding the capital offense (Haney, 2005; Kelly, 1992). Aggravating circumstances are typically presented by the prosecution and render the death sentence as an appropriate punishment for the defendant. Alternatively, mitigating circumstances are presented by the defense and render a life sentence as appropriate (Sandys, Pruss, & Walsh, 2009).

In an effort to secure the constitutionality of the capital trial procedure, the death penalty is considered an appropriate punishment when the jury unanimously decides that the state has proven at least one aggravating circumstance beyond a reasonable doubt (*Brown v. Sanders*, 2006; *Zant v. Stephens*, 1983). Unlike aggravating circumstances, the majority of capital punishment jurisdictions require that mitigating circumstances need only be

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proven to the individual juror's satisfaction. Mitigating circumstances are separated into those that relate to the crime (statutory) and those that relate to the defendant's background, character, or experiences (non-statutory). Examples of statutory mitigating circumstances include: the circumstances of the crime, the absence of a significant criminal history, and the age of the defendant at the time of offense (Acker & Lanier, 1994). Examples of non-statutory mitigating circumstances include evidence of childhood abuse (*Penry v. Lynaugh*, 1989), difficult family history, and emotional disturbance (*Eddings v. Oklahoma*, 1982). As stated by Haney (1995), mitigating evidence is "not intended to excuse, justify, or diminish the importance of what the defendants have done, but to help explain it in a manner that provides guidance and relevance to capital jurors' decision-making" (p. 560).

### ***Expert Testimony, Childhood Abuse and the Capital Defendant***

The movement towards individualizing the sentencing process has necessitated the need to re-examine how mitigating evidence is utilized in the sentencing phase. Although the law does not require a direct connection be formed between mitigating evidence and the capital offense (*Tennard v. Dratke*, 2004), testimony of mitigating circumstances is important to jurors since it provides a context for understanding the criminal act (Sundby, 1997). For example, research has found that presenting evidence of the defendant's troubled life is not enough to invoke juror empathy. This is primarily due to jurors' inability to relate to specific aspects of a capital defendant's life such as violence, abuse, drugs, access to weapons, and victimization (Fabian, 2009, 2003). The role of expert testimony, therefore, is to provide the jury with a framework for understanding the relation between the defendant's criminality and his/her mental, social, and emotional issues. That being said, in the context of a capital trial, experts will often offer testimony to the long-term consequences of childhood trauma and/or abuse. Interestingly, research finds that a great majority of defendants facing a capital offense share a common pattern of childhood trauma and maltreatment (Sarat, 1993). The psychological, physiological and developmental long-term impairments caused by childhood abuse have been identified as impaired impulse control, poor social skills, self-injurious and suicidal behaviors, and poor emotional and behavioral regulation (Malinosky-Rummell & Hansen, 1993). It would appear then that for a capital defendant, presenting the long-term consequences of childhood abuse would empower its mitigating quality when considering sentence. However, research finds that this is not always the case, as certain mitigating circumstances possess stronger mitigating power compared to others. For example, data obtained from the Capital Juror Project (South Carolina) revealed that the most powerful mitigating circumstances identified by jurors were those related to the defendant's involvement in the crime, followed by reduced culpability factors such as mental retardation and age (Garvey, 1998). As part of the same study, the least powerful circumstances were those that fell in the cluster of non-statutory mitigating circumstances, such as the defendant's experiences with childhood abuse, poverty, and never receiving treatment for his problems. In an empirical test of this finding, Barnett, Brodsky and Davis (2004) found that mental retardation and major mental illness (schizophrenia) rendered more life sentences compared to evidence of the defendant's childhood abuse and substance abuse. This evidence also yielded significantly higher portions of life sentences compared to the condition in which evidence was not presented. Barnett, Brodsky and Price (2007) found

that jurors considered mental retardation as the most mitigating circumstance. In decreasing order they considered mental illness (hospitalization), no prior criminal record, major head injury, schizophrenia, and lastly, evidence of childhood physical and sexual abuse.

The inability of testimony of abuse to possess any mitigating power is important when viewed through the lens of death-qualified jurors. In fact, research finds that compared to excludable jurors, death-qualified jurors are not only less receptive to mitigating evidence they are more receptive to aggravating circumstances. In addition, they are significantly more likely to either dismiss evidence of childhood abuse or attribute a weak mitigating effect to this type of evidence (see Butler & Moran, 2007, 2002; Luginbuhl & Middendorf, 1988). Luginbuhl and Middendorf found that as support for the death penalty increased endorsement of mitigating circumstances decreased. Butler and Moran (2002) found that greater consideration of aggravating circumstances was associated with jurors who imposed the death penalty. Conversely, greater consideration of non-statutory mitigating circumstances was associated with jurors who sentenced the defendant to life in prison. Stevenson, Bottoms, and Diamond (2010) found that in the context of a child abuse history, jurors made more controllable attributions for the defendant -- suggesting that the defendant had the ability to control the negative consequences of his abuse. With the research findings in mind, in the current study we examine expert testimony of childhood abuse among death-qualified jurors. We are specifically interested in not only how jurors think about testimony of childhood abuse, but also how this evidence is conceptualized in the context of sentence recommendation. Based on research, expert testimony should provide a foundation for understanding the non-statutory mitigating circumstances related to evidence and effects of childhood abuse.

### ***Instructional Language***

In the current study we also vary mitigating instruction language in order to examine whether and to what extent instructional language affects how jurors consider mitigating circumstances. There is a considerable body of research demonstrating deficiencies in the language of capital sentencing instructions (see Blackenship, Luginbuhl, Cullen, & Reddick, 1997; Bowers, 1995; Diamond & Levi, 1996; Luginbuhl, 1992; Ritter, 2004). The majority of this research has identified two particularly problematic areas: poor comprehension of instructions intended to guide jurors in the legal threshold of mitigation and aggravation, and poor understanding and evaluation of the concepts of mitigation and aggravation (Konstantopoulou, 2013). For example, Diamond and Levi (1996) found significant improvements in juror comprehension of pattern instructions when mitigating factors were identified separately. The researchers concluded that as juror comprehension of mitigating factors increased they were less likely to favor a death penalty. However, Luginbuhl (1992) found that when mock jurors struggled with concepts of mitigation, their comprehension significantly decreased. Interestingly, when comparing two sets of instructions (old and new), Luginbuhl found no differences in jurors' understanding of how to apply the law when determining the existence of aggravating circumstances. This was not the case when examining how jurors considered mitigating circumstances. Jurors exposed to an older version of instructions had a great deal of difficulty in interpreting and applying

the decision criteria for mitigating circumstances. Specifically, almost half of the sample incorrectly believed that mitigating evidence should be proven beyond a reasonable doubt, and that they should be decided unanimously. One explanation offered for this finding was the extent to which this (incorrect) information was consistent with jurors' schemas. Jurors exposed to the old instructions expected that mitigating circumstances needed to be found unanimously. Regardless, Luginbuhl quite cogently stated that, "the finding of no differences between the groups regarding their understanding of the decision rules to be applied to aggravating circumstances is a strong indication that the large effects with regard to mitigating circumstances cannot be accounted for by some procedural difference that artifactually depressed the understanding of the subjects exposed to the old instructions" (p. 215). Although this study took place over two decades ago, the implications remain the same -- misunderstanding the decision rules associated with deciding the existence of mitigating circumstances can lead to a breach of due process for the capital defendant.

Researchers suggest, however, that even by improving the comprehensibility of instructions, the level of understanding of mitigation still remains under question. Specifically, Otto, Applegate and Davis (2007) found that although correct identification of non-statutory factors increased with the addition of a clarification to the pattern instructions, the level of comprehension remained low (58.8% v. 38.1% with pattern instructions only). Addressing the confusion surrounding the terms of mitigation and aggravation, Haney and Lynch (1994) found that only 8% of college students provided completely correct definitions for aggravation and mitigation, while 64% provided a partially correct definition for aggravation and only 47% for mitigation. In the same study when asked to categorize a variety of factors as either mitigating or aggravating, 36% listed the instruction that stated "any other circumstances appropriate for consideration" (*Indiana Code*, 2010) as aggravating evidence. This instruction is considered a *catch-all* instruction and varies according to state statute.

### **The *Catch-all* Instruction**

In accordance with the 1978 Supreme Court decision of *Lockett v. Ohio*, most jurisdictions include an additional instruction that allows the sentencing jury to take into account non-statutory mitigating circumstances. This instruction is referred to as the *catch-all* instruction and has been challenged for its lack of clarity. Specifically, in *Boyde v. California* (1990), the defendant argued that California's *catch-all* mitigation instruction, which reads: "Any other circumstance, which extenuates the gravity of the crime even though it is not a legal excuse for the crime" (California Penal Code), precluded jurors from considering evidence of his background and character, giving rise only to crime-related evidence. The judge in *Boyde* ruled that there was no reasonable likelihood that the *catch-all* instruction precluded jurors from considering mitigating evidence related to the defendant's background and character. The higher Court ruled that the sentencing court did not constitutionally err by instructing jurors to reach a verdict by considering all the evidence without providing any further instruction on mitigation. Sixteen years later in *Ayers v. Belmontes* (2006), the Court once again upheld the constitutionality of the *catch-all* instruction when the trial judge refused to specifically state the non-statutory mitigating

evidence consisting of the defendant's ability to be a productive individual and survive in a structured setting while incarcerated (Williams, 2006).

Legal scholars have criticized the *catch-all* instruction for its lack of explicitness (Turlington, 2008). Specifically, the instruction fails to provide the same type of guidance offered in the instructional language used to present statutory aggravating and mitigating circumstances. Research has found that jurors exhibit significant difficulty understanding the term "extenuates" – with 36% of the study's participants incorrectly understanding this term to be associated with aggravation rather than mitigation (Haney & Lynch, 1994). Of concern to the researchers was the percentage of participants (53%) that restricted their definition of mitigating circumstances to those related to the crime. In a follow-up study, Haney and Lynch (1997) found individuals provided definitions that were the opposite of the terms aggravating, mitigating, and extenuating. Most relevant to the current study, participants defined extenuating as "factors accentuating or multiplying guilt or extremity of the crime" (p. 578). As a result of the research findings in this area, in the current study we examine whether and to what extent instructional language affects how jurors consider mitigating circumstances. To date there are no studies examining the relative efficacy of the *catch-all* instruction compared to a specific instruction, which proposes to instruct the jury to consider each of the non-statutory circumstances offered in mitigation. Therefore, in the current study we examine the role of instructional language in evaluating both non-statutory (evidence of childhood abuse) and statutory (crime-related) mitigating circumstances. As a test of the Courts' decisions in *Boyde* and *Ayers* we will vary the specificity of mitigating instructional language and observe differences (if any exist) in how jurors consider statutory and non-statutory mitigating circumstances. We are specifically interested in whether jurors will delineate between mitigating circumstances related to the crime and mitigating circumstances related the defendant's life (childhood abuse) in terms of their relative importance when determining sentence. We are also interested in whether jurors will differ in their delineations as a function of sentence recommendation.

### ***The Current Study***

The limited mitigating ability of evidence of abuse, as well as the perceived challenge facing jurors in the *catch-all* instruction, form important research questions. Accordingly, based on research findings in the current study we predict the following:

Hypothesis One: We predict a main effect of sentence recommendation. Namely, jurors who impose a life sentence will award greater importance to mitigating circumstances related to the defendant's life (childhood abuse) compared to jurors who impose the death penalty. Furthermore, we expect this effect to be moderated by expert testimony. We base this prediction on the expectation that an expert will provide jurors with a framework for understanding the relation between the defendant's criminality and his/her mental, social, and emotional issues. In light of the research findings (see Butler & Moran, 2002), we should observe differences in how jurors perceive mitigating circumstances as a function of sentence recommendation.

Hypothesis Two: We expect instructional language to influence how jurors consider mitigating circumstances. Considering the relatively few empirical studies investigating perceptions of mitigating circumstances as a function of instructional language, we favored an exploratory hypothesis over a directional hypothesis when examining this effect.

## METHOD

### *Participants*

One hundred and eighty-five jury-eligible community members participated in our online study through *SurveyMonkey*.<sup>1</sup> StudyResponse Project, hosted by the School of Information Studies at Syracuse University, recruited all participants. StudyResponse exists as a resource for student and faculty researchers in the social sciences (<http://www.studyresponse.net/>). Participants were pre-screened for basic jury eligibility. In addition, they were death-qualified according to the *Wainwright v. Witt* (1985) criterion which excludes jurors based on whether their attitudes towards the death penalty “prevents or significantly impairs” their ability to follow the law. After screening, the sample consisted of 170 death qualified participant-jurors (90% of sample) and 15 non-death qualified participant-jurors. The non-death qualified individuals did not continue with the study. Demographics revealed 51% of the sample as male, 49% female ( $n = 87$  v.  $83$ ). Forty-five percent were between the ages of 34 and 44, 88% Caucasian, 34% Catholic, 58% married, 34% considered themselves slightly conservative, 51% served on a jury, 70% were employed full time, and 61% held a bachelor’s degree. Upon completion of the study participants were awarded a \$10 gift card to Amazon through StudyResponse.

### *Materials*

#### *Pre-Trial Materials*

Prior to reading trial materials, participant-jurors read the following one paragraph summary of the case facts. The case is based on an actual case (*State v. Humphries*, 1996). We modified the mitigating circumstances to fit our research questions.

*The defendant in this case, John Andrews is being charged with attempted armed robbery, possession of a firearm during the commission of a crime and the first-degree murder of Tom Allen. The evidence established that Andrews entered the grocery store on a Saturday night and tied up the victim, Tom Allen, at gunpoint. While the defendant was emptying the store shelves, the victim freed himself and began running toward the door. The defendant Andrews yelled for him to stop and when he didn't, he shot and killed him. The events of the crime were captured by the store's surveillance camera.*

After reading the summary all participants rendered a verdict. Participants who found the defendant not guilty did not continue with the study. Extensive pilot study indi-

1 We conducted an *a priori* power analysis utilizing G\*Power 3.1 (Faul, Erdfelder, Lang, & Buchner, 2007) to calculate a sufficient sample size for the current study. Input parameters included:  $\alpha = .05$ ,  $1 - \beta = .80$ , effect size  $f = .25$ , numerator  $df = 3$ , number of groups = 12. Analysis revealed  $N = 168$  as sufficient sample. Additional output parameters included actual power = .80 and critical  $F = 2.65$ .

cated a 96-99% guilty verdict after reading the summary. In the current study, 97% of our sample found the defendant guilty. Participants then read a death-qualification instruction that provided the legal definition of murder and explained the separate sentencing proceeding including the role of the prosecutor and the defense attorney. After reading the instruction they responded to the following item assessing their views on the death penalty: *Do you feel that your views on the death penalty, either in favor or opposed, would prevent or substantially impair you from considering both penalties in this case? (Life in prison vs. death penalty)*. As previously stated, 15 participants did not meet the standard for death-qualification and therefore did not continue with the study. The remaining 170 participant-jurors then completed 12 items assessing basic demographic information. After completing these items, they proceeded to the experimental phase of our study.

#### *Penalty Phase Trial Materials*

Penalty phase trial materials consisted of the following: a pre-trial jury instruction, opening statements from both defense and prosecution (150 words), expert testimony and cross examination of the expert testimony, closing arguments and judge's instructions. Testimony and instructions were varied depending on experimental condition. In order to preserve the integrity of our expert testimony manipulation, no mention of evidence of abuse was made in either attorney's opening statement or closing argument.

The pre-trial instruction consisted of a description of the sentencing phase and the appropriate penalty choices (life in prison v. death penalty). Participants exposed to the expert testimony condition read a 1,500 word transcript offered by a clinical psychologist explaining the long-term effects of childhood physical abuse in adulthood and its consequences. In the current study we limited our examination of non-statutory mitigating circumstances to only those related specifically to childhood abuse. However, in order to maintain ecological validity and to provide a context for jurors, the expert also expressed his awareness of other factors relevant to mitigation such as defendant remorse and good behavior. Jurors were subsequently instructed on all non-statutory mitigating circumstances.

An excerpt of the testimony follows:

*D: Dr. Taylor, what can you tell us about Mr. Andrews?*

*E: John Andrews was subject to persistent and brutal abuse throughout his childhood. He grew up in the absence of a nurturing environment, around explosive tempers. These individuals then became a model for him for future behaviors.*

*D: As a professional what are the long-term effects of childhood physical abuse?*

*E: Literature suggests that among the damaging results of childhood physical abuse is a chronic inability to regulate emotions, behaviors and impulses, aggression against one's self or others. The ability to understand one's own behavior and to understand how inappropriate their responses are to this behavior is quite limited.*



*D: Dr. Taylor, in your professional opinion is there a direct causal connection between child abuse and aggressive behaviors?*

*E: Yes I think that is well established. The experience of being abused produces fear, anxiety and anger. It produces difficulty in relating to others. It isolates the person from his peers and from other adults, and those kinds of feelings and social skills tend to lead a child into an escalating pattern of delinquent behavior.*

*D: What can you tell us about how the experience of childhood abuse has affected the defendant?*

*E: I believe that the experience of physical abuse has psychologically damaged Mr. Andrews, who does not possess the normal capacity to make accurate judgments, control his behavior or understand the consequences of his actions. The fact that these impairments may become more pronounced or debilitating in stressful situations could certainly play a role in circumstances that ended in murder.*

*An excerpt of the cross-examination testimony:*

*P: Dr. Is it true that most of the literature which examines the long term effects of childhood abuse throughout adulthood suffers from a variety of methodological problems, such as lack of appropriate comparison groups and reliance on correlational studies?*

*E: Yes that has been addressed. There are many intervening factors between the event of childhood abuse and the present day that it makes it challenging to isolate only the factors related to the abuse.*

*P: Do you believe that we have the capacity to choose right from wrong?*

*E: Yes that can happen if one has a nurturing environment that would support that capacity and allowed it to be used.*

*P: How do you explain why some people who come from bad homes do well in life?*

*E: We all have different innate endowments as well as the ability to tolerate frustration. One cannot simply look at people and know who will turn out good and who will turn out bad. Along the same lines we have seen individuals who have been brought up in good families but have turned out making bad choices with their lives. You have to look carefully at the environment and especially the family dynamics.*

*P: Was the defendant's childhood abuse the cornerstone of Chronic Anger Syndrome? Was violence inevitable?*

*E: He had no way of expressing what was happening to him. His feelings were just festering inside him. He could have learned to channel those feelings and the violence if he had received professional help. Events in his childhood caused problems that he needed professional help that he never received.*

*P: Whose fault is it that Andrews committed the robbery?*

*E: He would have to take responsibility for that.*

*P: And for all his other voluntary acts?*

*E: He would be responsible.*

*P: No further questions.<sup>2</sup>*

Participants then read closing arguments and judge's instructions that were varied according to experimental condition. All jurors read the following instruction<sup>3</sup>:

*You must decide whether the defendant will be sentenced to death or life in prison without the possibility of parole. In reaching your decision, consider all of the evidence. Do not allow bias, prejudice, or public opinion to influence your opinion in any way. In reaching your decision, you must consider and weigh the aggravating and mitigating circumstances or factors shown by the evidence. An aggravating circumstance is any fact, condition, or event relating to the commission of a crime, above and beyond the elements of the crime itself that increases the wrongfulness of the defendant's conduct, the enormity of the offense, or the harmful impact of the crime. An aggravating circumstance may support a decision to impose the death penalty. A mitigating circumstance is any fact, condition, or event that makes the death penalty less appropriate as a punishment, even though it does not legally justify or excuse the crime.*

*A mitigating circumstance is something that reduces the defendant's blameworthiness or otherwise supports a less severe punishment. A mitigating circumstance may support a decision not to impose the death penalty. Aggravating factors include: (a) The murder was especially heinous, atrocious, or cruel, (b) The capital offense was committed during the commission of a specific felony (robbery). Among the mitigating circumstances you are allowed to consider include: (a) The defendant's age at the time of the crime[s] of which he was convicted in this case, (b) The defendant did not have a significant prior history of other criminal activity.*

*You must decide whether aggravating or mitigating factors exist. Each aggravating circumstance must be established beyond a reasonable doubt. If you are reasonably convinced that mitigating circumstances exist you may consider it as established. Determine which penalty is appropriate and justified by con-*

<sup>2</sup> Complete transcript of testimony can be obtained by contacting Dr. Judith Platania, [jplatania@rwu.edu](mailto:jplatania@rwu.edu).

<sup>3</sup> Instructions adopted from California's pattern jury instructions for death penalty.

*sidering all the evidence and the totality of any aggravating and mitigating circumstances. Even without mitigating circumstances, you may decide that the aggravating circumstances are not substantial enough to warrant death. To return a judgment of death, you must be persuaded that the aggravating circumstances both outweigh the mitigating circumstances and are also so substantial in comparison to the mitigating circumstances that a sentence of death is appropriate and justified.*

In the *catch-all* instruction condition, the non-statutory mitigating circumstance language included the following: *Any other circumstance, which extenuates the gravity of the crime though it is not a legal excuse for the crime.* In the specific instruction condition, the non-statutory mitigating circumstance language consisted of the following: *Any aspect of the defendant's character or record or background, any other circumstances of the offense offered by the defense as a basis for a sentence less than death including but not limited to: (a) testimony that Andrews was severely physically abused by his father during childhood and (b) that his current psychological disturbances are related to the abuse he experienced as a child. You are also allowed to consider that the defendant has never received any treatment of his problems, that he has displayed remorse for the distress caused, he has not been a discipline problem during incarceration, he hasn't lured anyone else in his family into trouble with the law, and that he has encouraged his cousins to do well.*

Based on research that points to difficulty in defining the term “extenuates” in the context of instructional language, we included a revised instruction to determine if differences would be observed in language used in the *catch-all* instruction compared to this revised instruction. This instruction has been offered as a suggested revision to California's limited *catch-all* instruction (see Deveney 2009): *Any other circumstances, other than the ones I have already read to you, that make the crime seem less serious, even though the circumstances are not a legal excuse. In this case do not limit yourself to considering just the crime itself, but any circumstances of the defendant's life.*

#### *Post-Trial Measures*

After the completion of the trial stage, participant-jurors completed post-trial measures consisting of sentence determination (life in prison v. death penalty) and assessments of the mitigating factors presented during the trial. Assessments of the importance of the mitigating circumstances were formed on an 11-point scale of 0% to 100%. We also measured understanding of the burden of proof instruction for aggravating and mitigating circumstances.

#### ***Design and Procedure***

We utilized a 2 – Expert Testimony of Childhood Physical Abuse (Present v. Absent) x 3 – Instructions (Catchall v. Revised v. Specific) x 2 – Sentence Recommendation (Life in Prison v. Death Penalty) between-subjects factorial design. After participant-jurors electronically signed the informed consent, they proceeded to the study where they read the

case summary and the death qualification instruction. The respondents who indicated that the defendant was not guilty and/or that their views on the death penalty (either in favor or opposed) would prevent or substantially impair them from considering the both penalties in this case, were thanked for their participation and did not continue to the next phase of the study. Respondents who indicated otherwise proceeded with the study and were randomly assigned to 1 of the 12 experimental conditions. They then completed the pre-trial instruments, read the trial materials and completed all the dependent measures. Upon completion of the study, participant-jurors were thanked, debriefed and awarded the \$10 research incentive. Participation required approximately 30 to 40 minutes.

## RESULTS

Table 1 displays the overall mean percentage of importance awarded each mitigating circumstance by jurors. Cross-tabulation analysis indicated no significant differences in the proportion of individuals who imposed life v. death sentences in terms of exposure to our experimental manipulations:  $p = .298$  (two-sided).

Table 1.

Overall Mean Importance Awarded Each Mitigating Circumstance ( $N = 164$ ).

| <u>Circumstance</u>  | <u>M</u> |
|--|----------|
| <u>Non-Statutory Mitigating</u>                                    |          |
| The defendant suffered severe physical abuse during his childhood. | 49%      |
| The defendant's psychological disturbances are related to abuse.   | 52%      |
| <u>Statutory Mitigating</u>  |          |
| The defendant's age at the time of the offense.                    | 63%      |
| The defendant had no significant prior criminal history.           | 62%      |

*Note:* On a scale of 0 – 100% jurors rated the how important each circumstance was to their sentencing decision. Jurors were informed that their totals did not need to equal 100%.

### ***Hypothesis Tests – Mitigating Circumstances***

In order to test the relative importance of mitigating circumstances as a function of our independent variables, a MANOVA was conducted. A MANOVA was determined the most appropriate choice after considering increased likelihood of inflating Type I error given the number of dependent measures (4) examined. The dependent measures included ratings of importance of each non-statutory and statutory mitigating circumstance on a scale of 0 = 0% to 11 = 100%. Inter-item correlations among our four mitigating circumstances ranged from .33 to .74,  $p < .01$  (one-tailed)<sup>4</sup>. The two non-statutory mitigating cir-

4 MANOVA is most effective when dependent variables are not highly correlated. Tabachnik and Fidell (2007) recommend .40 to .74. The consequence of multicollinearity is the assumption that the dependent variables are measuring the same variable.

cumstances included: *The defendant suffered severe physical abuse during his childhood*; and *The defendant's psychological disturbances are related to abuse*. The two statutory mitigating circumstances included: *The defendant's age at the time of the offense*, and *The defendant had no significant prior criminal history*.

We found support for Hypothesis One: Jurors differed in the importance they placed on mitigating circumstances as a function of sentence recommendation: Wilks' Lambda = .75;  $F(4, 147) = 12.49, p < .001; \eta^2 = .25$ . A test of between-subjects effects found this main effect of sentence recommendation significant on three of four mitigating circumstances,  $p$  values ranged from  $< .001$  to  $.005$ . See Table 2 for display of findings for differences in importance placed on mitigating circumstances as a function of sentence recommendation.

Table 2.

Mean Differences in Importance Ratings for Mitigating Circumstances as a Function of Sentence Recommendation

| <u>Circumstance</u>  | <u>Life in Prison</u> | <u>Death Penalty</u> |
|--|-----------------------|----------------------|
| <u>Non-Statutory Mitigating</u>                                    |                       |                      |
| The defendant suffered severe physical abuse during his childhood. | 52%                   | 38%*                 |
| The defendant's psychological disturbances are related to abuse.   | 52%                   | 46% $\varphi$        |
| <u>Statutory Mitigating</u>  |                       |                      |
| The defendant's age at the time of the offense.                    | 71%                   | 40%**                |
| The defendant had no significant prior criminal history.           | 70%                   | 39%**                |

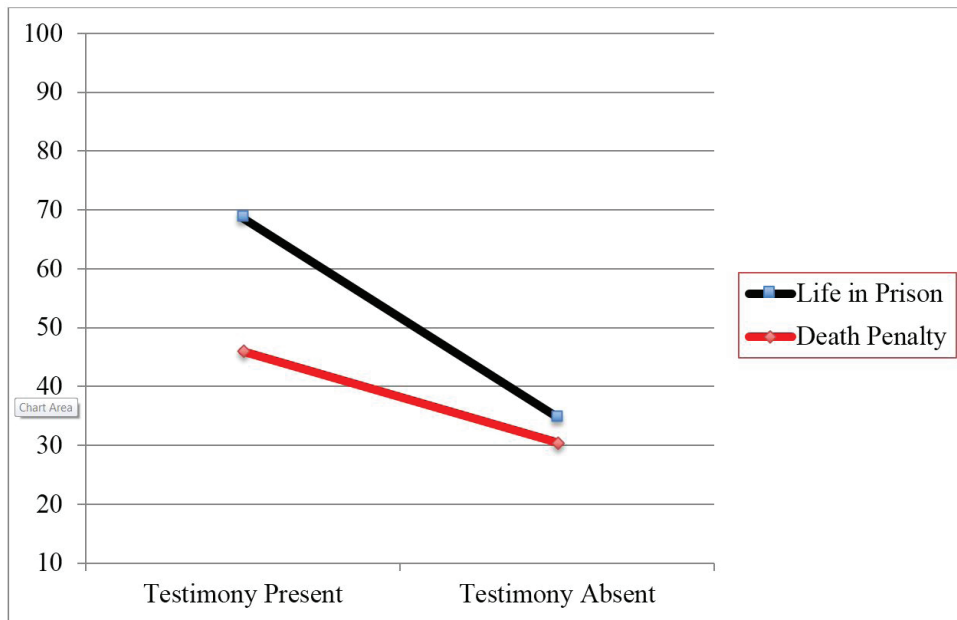
Note:  $n = 107$  - Life in Prison,  $n = 57$  - Death Penalty. \* $p < .01$ ; \*\* $p < .001$ ;  $\varphi p > .05$ .

Our results also revealed a (marginally) significant expert testimony x sentence recommendation interaction on ratings of importance of mitigating circumstances: Wilks' Lambda = .94;  $F(4, 147) = 2.34, p = .058; \eta^2 = .06$ . A test of between-subjects effects found this interaction significant for all 4 mitigating circumstances,  $p$  values ranged from  $.007$  to  $.057$ . As predicted, expert testimony moderated the relation between sentence recommendation and importance ratings. The presence of an expert led to increased ratings of importance of non-statutory mitigating circumstances for jurors recommending both life and death compared to no expert testimony. Figures 1 and 2 provide graphic depictions of this interaction for each non-statutory mitigating circumstance. As can be seen from the graphs, even in the absence of expert testimony, jurors who imposed a life sentence rated the non-statutory mitigating circumstances of childhood abuse as more important to their sentencing decision compared to jurors who imposed the death penalty. Figures 3 and 4 depict this interaction with respect to statutory mitigating circumstances. Again, jurors who imposed a life sentence rated mitigating circumstances related to the crime as more important to their decision compared to jurors who imposed the death

penalty. For jurors who imposed death, exposure to expert testimony led to decreased importance ratings of circumstances related to the crime and increased ratings of importance when not exposed to an expert. The opposite effect was observed for jurors who imposed a life sentence. Overall, the highest ratings of importance were observed for jurors who imposed a life sentence.

Figure 1.

Testimony x Sentence Recommendation Interaction on *Defendant suffered severe physical abuse during his childhood.*



Note: Dependent Variable: Percentage of importance on sentencing decision (0-100%).

Figure 2.

Testimony x Sentence Recommendation Interaction on *Defendant's psychological disturbances is related to abuse.*

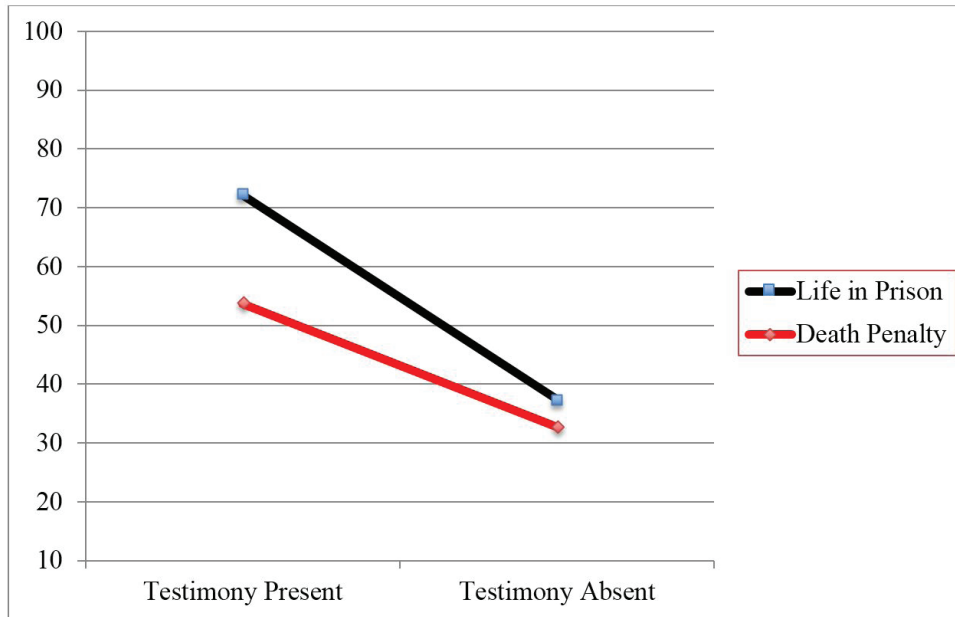


Figure 3.

Testimony x Sentence Recommendation Interaction on *Defendant's age at the time of the offense.*

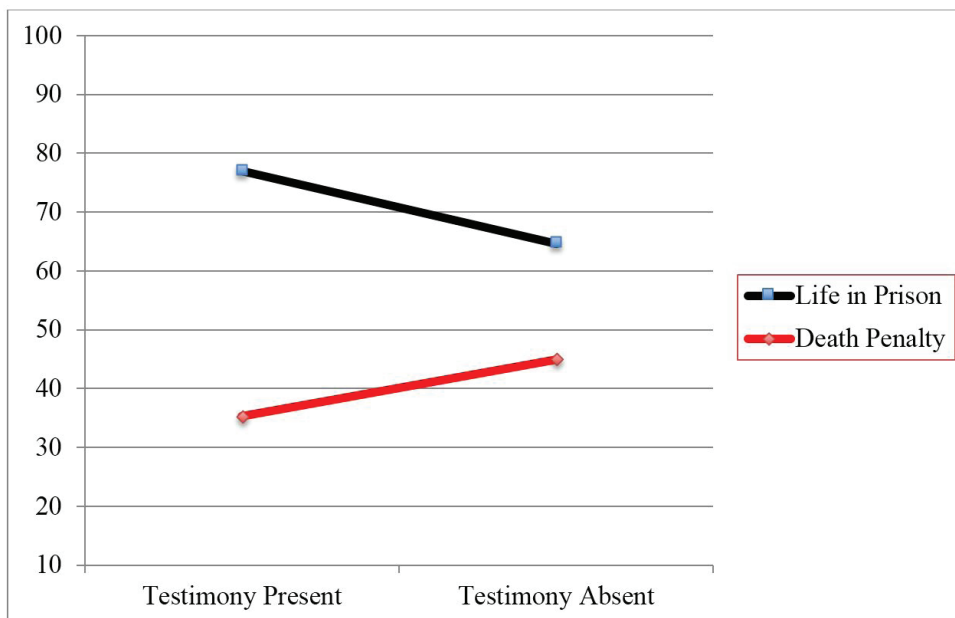
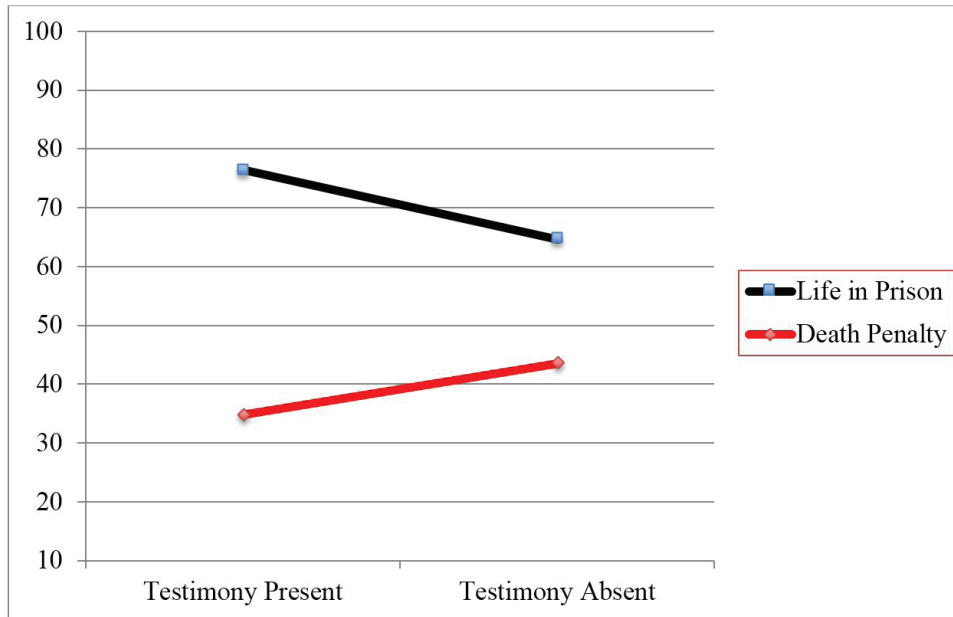


Figure 4.

Testimony x Sentence Recommendation Interaction on *Defendant had no significant prior criminal history*.



We found support for Hypothesis Two: Mitigation instructional language influenced jurors' importance ratings but only for non-statutory mitigating circumstances: Wilks' Lambda = .89;  $F(8, 296) = 2.04, p = .041; \eta p^2 = .052$ . Post hoc analysis using Scheffé's test revealed jurors exposed to the least specific mitigating instructional language (*catch-all*) reported rating the non-statutory mitigating circumstance: *The defendant suffered severe physical abuse during his childhood* on sentencing decision as least important to sentencing decision compared to the more specific instructional language ( $M_{catch-all} = 36\%$  v.  $M_{revised} = 47\%$  and  $M_{specific} = 51\%$ ). The same pattern emerged for: *The defendant's psychological disturbances are related to the abuse he experienced as a child*: ( $M_{catch-all} = 38\%$  v.  $M_{revised} = 53\%$  and  $M_{specific} = 55\%$ ). Again, no difference emerged in importance ratings as a function of instructional language for statutory mitigating circumstances.

Finally, 64% of our sample of death-qualified jurors reported that in order to consider a factor in favor of the death sentence it must be proven beyond a reasonable doubt, compared to 26% who reported by a preponderance of the evidence, and 10% who stated that it needed to be proven only to a juror's satisfaction. Conversely, 43% of our sample of death-qualified jurors reported that in order to consider a factor in favor of life in prison it must be proven beyond a reasonable doubt, compared to 44% who reported by a preponderance of the evidence, and 13% who stated that it needed to be proven only to a juror's satisfaction.



## DISCUSSION

In the current study we examined how jurors utilize evidence of childhood abuse as a function of expert testimony and sentence recommendation. We also varied the specificity of instructional language in the context of mitigating circumstances. We predicted jurors who imposed a life sentence would rate evidence of childhood abuse as significantly more important in determining sentence compared to jurors who impose the death penalty. In addition, we expected this effect to be moderated by expert testimony. Our results revealed support for our predictions. To start, jurors' perceptions of the importance of mitigating circumstances differed as a function of sentence determination. This finding provides support for Butler and Moran (2002) who observed greater consideration of non-statutory mitigating circumstances associated with jurors who impose life in prison compared to those who imposed the death penalty. Interestingly, in the current study our sample also differed in ratings of importance of statutory mitigating circumstances as a function of sentence determination. Jurors who imposed a life sentence rated the statutory mitigating circumstances as significantly more important in their sentencing decision compared to jurors who imposed death. This result supports the findings of the Capital Juror Project that revealed that the most powerful mitigating circumstances were those related to the defendant's involvement in the crime (Garvey, 1998). One key difference between our findings and Garvey was the value attached to each statutory mitigating circumstance. In the current study, all but 11% of our sample placed some importance on the absence of any previous criminal history. In the Garvey study, less than 25% of jurors thought that the absence of a prior criminal history was mitigating. However, the defendant's age was perceived as mitigating in both the current study as well as Garvey (1998). Specifically, 41.5% of jurors in Garvey felt the defendant's age was mitigating; in our study 85% of our sample assigned some importance (value greater than 0%) to this factor. In the current study, the only mitigating circumstance in which jurors did not differ with respect to sentence recommendation was the item stating that the defendant's psychological disturbances were related to his abuse. Jurors who imposed life rated this circumstance slightly more than 50% (52%) important in their sentence, while jurors who imposed the death penalty rated this circumstance as slightly less than 50% (45%) in their sentence determination. Regardless, jurors who imposed life in prison rated all mitigating circumstances as significantly more important to their sentencing decision compared to jurors who imposed the death penalty.

As predicted, we also observed a moderating effect of expert testimony in the relation between sentence recommendation and perceptions of the importance of mitigating circumstances. Testimony of childhood abuse enhanced importance ratings of non-statutory mitigating circumstances. This finding was more evident for jurors who imposed a life sentence compared to those who imposed the death penalty. A different interpretation emerged, however, when examining statutory mitigating circumstances. Interestingly, the expert did not testify to circumstances related to the crime, yet for jurors who imposed a life sentence the defendant's age at the time of the offense and the fact that he had no significant prior criminal history was rated as more important in their decision when exposed to expert testimony compared to those jurors not exposed to the expert. The opposite

was found for jurors who imposed the death penalty. Mitigating circumstances related to the crime were rated as more important when not exposed to an expert compared to when exposed to testimony of childhood abuse. This finding also supports researchers who have found that individuals who favor the death penalty think differently about mitigating circumstances compared to those who favor a life sentence (Butler & Moran, 2007; Luginbuhl & Middendorf, 1988). As a result it appears our findings provide support for the assumption that testimony of mitigating circumstances is important to jurors as it provides a context for understanding the criminal act (Sundby, 1997).

In the current study we also examined the role of a specific instruction designed to guide jurors on how to apply evidence of mitigating circumstances when determining sentence recommendation. Our interest was to observe whether and to what extent variations in instructional language influence how jurors consider mitigating circumstances. As stated earlier, we favored an exploratory hypothesis over a directional hypothesis when examining this effect considering the relatively few empirical studies investigating perceptions of mitigating circumstances as a function of instructional language. Our results indicated that mitigation instructional language influenced jurors' importance ratings but only for non-statutory mitigating circumstances. Jurors exposed to the least specific mitigating instructional language (*catch-all*) rated the non-statutory mitigating circumstances as least important to sentencing decision compared to the more specific instructional language. This finding is consistent with other researchers who found significant improvements in juror comprehension of pattern instructions when mitigating factors were identified separately (see Diamond and Levi, 1996).

Our findings also provide empirical support for those who have found fault with the *catch-all* instruction due to its lack of explicitness (see Turlington, 2008). Specifically, the instruction fails to provide the same type of guidance offered in the instructional language used to present statutory aggravating and mitigating circumstances. This result is encouraging when compared to other studies that find that the least powerful circumstances are those are categorized as non-statutory mitigating circumstances, such as the defendant's experiences with childhood abuse, poverty, and never receiving treatment for his problems (Barnett, Brodsky & Davis, 2004; Barnett, Brodsky & Price, 2007). It is important to note, however, that no differences emerged in importance ratings as a function of instructional language for statutory mitigating circumstances. Jurors appear to be using more specific instructional language when rating the importance of factors related to the defendant's life, but not when rating mitigating factors related to the crime (defendant age and prior criminal activity). In order to provide an explanation for this finding, future research should focus on differences in how jurors process information related to non-statutory and statutory mitigating circumstances in the context of a capital trial.

### ***Limitations***

It's important to point out that we are cognizant of the concerns raised with respect to studies examining juror decision-making. To start, although research reports very little difference in the type of medium chosen for stimulus materials (see Bornstein, 1999), in the current study testimony was conveyed through a written transcript rather than a videotape,

which is less representative of actual jury trial. In addition, although all attempts were made to familiarize our sample with complete case facts, the absence of the guilt phase limits the scope of our study. The nature of the experimental design required a brief version of the sentencing hearing itself, which did not include victim impact testimony, or testimony from members of the defendant's family. The lack of a deliberation component also restricts the extent to which we can generalize our findings to that of a jury. That being said, extensive pilot study of our stimulus materials and a representative sample of individuals assisted in ensuring control of our manipulated factors and confidence in our findings.

### ***Future Directions and Conclusions***

After considering the study's limitations, our findings point to the need for further empirical tests of non-statutory as well as statutory mitigating circumstances. We see a number of potential research possibilities stemming from our results. To start, future researchers should examine the efficacy of specific instructional language in different capital trial paradigms. Perhaps perceptions of mitigating circumstances would change as a function of type of felony associated with the capital murder charge (e.g., physical v. sexual assault). That being said, expert testimony of other types of non-statutory mitigating circumstances may yield differences in perceptions of mitigating circumstances. For example, juxtaposing physical abuse with sexual abuse might provide additional insight into the value of mitigation testimony and the efficacy of specific instructional language. Also, although in the current study we observed differences in importance ratings of mitigating circumstances between the *catch-all* instruction and the revised instruction, we did not observe any differences between the revised instructional language and listing each mitigating circumstance separately on importance ratings. Future research should investigate the conditions under which jurors prefer revised instructional language v. specific instructional language. We also limited the number of mitigating circumstances to two in each category. In trial, capital defendants will typically proffer more than the number used in the current study. Perhaps when examined in a group, differences will emerge in how jurors choose instructional language when determining the importance of mitigating circumstances. In addition, in light of difficulty in understanding the term "mitigation" (Luginbuhl & Middendorf, 1988), future researchers should also investigate the relation between comprehension of mitigation instructional language and importance of mitigating circumstances.

With this in mind, the current study confirms that juries need additional guidance with respect to how to apply the law when considering statutory and non-statutory mitigating evidence during the sentencing phase of a capital trial. Our results would suggest specific instructional language assists jurors in understanding the law. Since mitigation is designed to safeguard the defendant from a sentence of death, it is critical for capital jurors to understand concepts of mitigation in order for the defendant to have a fair, impartial, and constitutionally appropriate trial.

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