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Examining Comparative Value Arguments, Capital
Sentencing Evidence, and Legal Safeguards

Rachel Small

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Abstract

Comparative value arguments (CVA) suggest to jurors that a death sentence is appropriate because the victim's value surpasses the defendant's value. Jurors exposed to CVA are likely to misuse mitigation and victim impact evidence. The present study has a sample of 140 university students. A $2 \times 4 + 1$ between-groups factorial design was utilized to examine effects of mitigation and victim impact evidence in the context of CVA (held constant); and to test legal safeguard efficacy. A main effect was found of legal safeguards on jurors' perceptions of prosecutorial misconduct, and a significant association was found between legal safeguards and sentence recommendation. Attitudes toward the death penalty mediated the predictive relationship between affective and cognitive factors and sentence recommendation.

Examining Comparative Value Arguments, Capital Sentencing Evidence, and Legal Safeguards

Comparative value arguments have emerged as a result of the broad admissibility standard for victim impact evidence established by the Supreme Court's decision in *Payne v. Tennessee* (1991). Beginning in the 1960's, the victims' rights movement gained momentum, leading to an expansion of the victim's role in the criminal trial process. Although the Supreme Court previously found admission of victim impact evidence during capital sentencing unconstitutionally prejudicial in *Booth v. Maryland* (1987); in *Payne*, the court held the Eighth Amendment does not proscribe use of victim impact evidence during capital sentencing. The *Payne* court found evidence of the victim's uniqueness permissible during sentencing, as long as the prejudiciality of the evidence does not render the trial fundamentally unfair (Gross, 2007). This vague criteria for determining constitutionality of victim impact evidence opened a flood gate for the persuasion of capital jurors using highly emotional testimony and inflammatory prosecutor argument (Logan, 1999; McCampbell, 2006; Myers & Greene, 2004; Smith, 2008).

Comparative value arguments are a new and potent form of closing argument, and suggest to jurors that a death sentence is appropriate because the victim's value surpasses the defendant's value. Although the Supreme Court has not specifically ruled on the permissibility of this form of prosecutor argument, it can easily violate the standard of permissibility established by *Payne*, because jurors who engage in this comparison are likely to use victim impact evidence to evaluate the worth of the victim, rather than to consider the victim's uniqueness (McCampbell, 2006). Similar to victim impact statements, comparative value arguments pose a significant risk of shifting the focus of capital sentencing proceedings away from the blameworthiness of the defendant, and toward the victim (Gross, 2007).

Although comparative value arguments are a relatively new trial phenomenon,

prosecutorial misconduct is not a new problem in capital sentencing. The harm caused by prosecutorial misconduct is magnified when prosecutors intentionally abuse power for the selfish purpose of increasing their conviction rates. Prosecutors have received a remarkable amount of leeway in their closing arguments and trial behavior. Legal scholars have suggested the breadth of their freedom stems from the infrequent reprimand offered by trial judges and higher courts. When defendants appeal based upon prosecutorial misconduct, appellate courts may find certain behaviors improper, but nevertheless uphold convictions in these cases (Gaines, 2007). Over time, this has allowed prosecutors to emphasize moral rather than evidential reasons for recommending the death penalty in capital cases, leading to unconstitutional enforcement of capital punishment (Platania, 1995).

Prosecutors serve a dual role in capital trials: to aggressively seek justice, and to ensure the fair prosecution of criminals in accordance to constitutional principles. In this vein, the Eighth Amendment prohibits prosecutors from misleading jurors regarding their role in capital trials, and the evidence they are to deliberate on *Caldwell v. Mississippi* (1985). The Due Process Clause of the Fourteenth Amendment protects capital defendants from improper prosecutor comments which render the trial fundamentally unfair; including statements which misinform the jury about the correct application of law, or encourage jurors to recommend a death sentence based upon irrelevant extralegal factors. Established trial rules are intended to protect jurors from exposure to irrelevant or unreliable evidence (Bilaisis, 1983). Research demonstrating the differential influence of extralegal and inadmissible information on juror verdict (Broeder, 1959; Carretta & Moreland, 1983; Kassin & Sommers, 1997; Kassin & Sukel, 1997; Pickel, 1995; Rind, Jaeger, Strohmets, 1995; Steblay, Hosch, Culhane, & McWethy, 2006; Sue, Smith & Caldwell, 1973; Wolf & Montgomery, 1977;) and sentence recommendation (Platania, 1995;

Platania, Moran, 1999; Platania & Small, in press) indicates a strong need for regulatory rules of prosecutor behavior.

Mitigation evidence also plays an important role in capital sentencing, by providing the jury with evidence of the defendant's good character, or any other factor which might persuade the jury to recommend a sentence of life in prison without parole (McCampbell, 2006; Turlington, 2008). The Eighth and Fourteenth Amendments require capital jurors to consider any relevant mitigating evidence which might connote leniency *Lockett v. Ohio* (1978). *Lockett* expanded the class of mitigating factors from a relatively contained list of statutorily defined mitigators (varying by state) to any and all mitigating factors which could influence the jury to recommend a life sentence (Doyle, 1987). While jurors have the freedom to determine the weight they will give to any mitigating evidence, they are not allowed to decide to exclude it entirely from their consideration (Barnett, Brodsky, & Price, 2007; *Eddings v. Oklahoma*, 1982).

This new class of non-statutory mitigation was intended to enhance defendants' due process rights. However, in the context of comparative value arguments and victim impact evidence, mitigation evidence portraying the defendant's troubled life or difficult upbringing may be improperly used to contrast the lowly and incorrigible defendant against the esteemed victim, whose life the defendant took (McCampbell, 2006). Several psychological theories suggest, and numerous empirical works demonstrate legal safeguards designed to uphold due process are unable to neutralize the damaging effects of inadmissible information (Wilson, 2004). Without adequate legal safeguards in place, inflammatory prosecutor arguments dismantle capital defendants' due process and other constitutional guarantees.

Comparative Value Arguments

Considering the potential distortion of sentencing evidence created by comparative value

argumentation, it is necessary to further examine the ramifications of persuading jurors with this type of argument. Two forms of comparative value arguments have been documented in legal scholarship (McC Campbell, 2006). *Comparative Life Arguments* persuade jurors to impose the death penalty because the victim lived a better life than the defendant. This type of argument often manifests as a timeline of the defendant's and victim's respective life events. Inevitably, a timeline of this sort reveals the victim's successes or accomplishments, and the defendant's struggles or pitfalls. This strategy communicates to the jury that at any given point in time, the victim was thriving, while the defendant was sinking into criminality. One salient example of comparative life argumentation originates from *Humphries v. Ozmint* (2005):

In 1984 the victim met Pat, and they fell in love, and they got married. That's the same year Shawn Paul Humphries committed two house break-ins at age 13...Then in 1988, July the 4th, Mendal "Dickie Smith" and his wife have a little baby girl...That's the same year Shawn Paul Humphries went to jail for two years.

In contrast, *Comparative Worth Arguments* compare the character of the victim and the defendant, and ask jurors to identify the value associated with each party's life. Prosecutors use comparative worth arguments to suggest to jurors that by deciding the victim's life had a higher value than the defendant's life, they should likewise decide the defendant deserves to die. According to the court's opinion in *Humphries v. Ozmint* (2005), comparative worth arguments appear more effective in obtaining death sentences, and therefore pose a greater risk to due process, by explicitly urging jurors to compare human worth, rather than the cumulative quality of various life events. In *Hall v. Catoe* (2004), the prosecutor argued:

If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than the victim's. I urge you to assign the defendant his value on

the basis that he committed an aggravated murder. He should be found less valuable because he is a convicted killer.

Although this type of argument is yet to be empirically tested in the field of jury simulation research, legal commentators have identified constitutional threats posed by comparative value arguments. The Eighth Amendment prohibits arbitrary enforcement of capital punishment. In capital trials, prosecutors have a heightened duty to refrain from inducing the jury's passions or prejudices (McCampbell, 2006). Capital sentencing decisions carry burdensome consequences which amplify judicial interests in ensuring these decisions are made carefully; and are based on reason rather than emotion (*Gardner v. Florida*, 1977). As specified in *Caldwell*, the Constitution prohibits prosecutors from making unduly inflammatory comments, or comments which mischaracterize the jury's role. By engaging in improper trial conduct, such as appealing to jurors' emotions, prosecutors unfairly tip the scales against the defendant. Emotionally driven prosecutor argument places an unconstitutional burden on the defendant, who must counteract damaging information, and attempt to restore the jury from negative inferences drawn from the improper evidence (Bilaisis, 1983).

Comparative life statements argued in *Humphries* were the basis of the defendant's appeal to the Fourth Circuit Federal Court. The Fourth Circuit court found arguments comparing the defendant to the victim were unconstitutional offerings of victim impact evidence, and violated the *Payne* standard. The *Humphries* court recognized the prosecutor's repeated contrast of the victim's vitality with the defendant's demise encouraged the jury to impose a death sentence based upon a brief comparison of human worth; rather than a careful weighing of aggravating and mitigating factors. Although the court vacated *Humphries*' death sentence on the basis of a *Payne* violation, the *Payne* decision makes no specific assertion regarding the

admissibility of defendant-to-victim comparisons. The *Humphries* court found imposition of a death sentence based upon “explicit and pointed comparative worth argument” to be fundamentally at odds with the prescribed use of victim impact evidence; to inform jurors about specific harm caused by the defendant’s crime (Kuhn, 2006).

However, one judge’s partial dissent of the *Humphries* opinion illuminates the alarming likelihood that this type of argument will remain a problematic feature of capital sentencing. Judge Hamilton maintained the *Humphries* majority erred in finding comparative prosecutor arguments in violation of the *Payne* standard. Hamilton reasoned, information about the defendant and the victim referred to in the prosecutor’s closing argument had been already been presented by witnesses and was therefore in the record – differences between the defendant the victim were apparent before the prosecutor’s closing argument. He argued *Humphries* had the opportunity to demonstrate his uniqueness, by calling 13 witnesses to offer mitigating evidence at sentencing; the state mutually maintains the right to demonstrate the victim’s uniqueness by offering victim impact evidence describing the victim’s successes.

Hamilton’s dissent argued *Payne* had not established parameters to identify what form of victim impact evidence might violate the fundamental fairness standard. The state has a “legitimate interest” in demonstrating the victim’s personal characteristics and evidence of the harm caused by the crime. Furthermore, Hamilton emphasized that victim impact evidence was intended, under *Payne*, to counteract mitigating evidence. He urged victim-to-defendant comparisons are inescapable under *Payne*, and inevitable in capital sentencing, where the jury is asked to determine the weight of non-statutory mitigation and victim impact evidence.

Numerous judicial districts and State Supreme Courts have converged with the *Humphries* majority regarding the prejudicial and inflammatory nature of statements comparing

the defendant and the victim. In *State v. Muhammad* (1996), the New Jersey Supreme Court ruled sentencing authorities could not consider crimes committed against virtuous people to be more heinous than crimes committed against socially undesirable victims. In *State v. Koskovich* (2001), the New Jersey Supreme Court deemphasized the distinction between comparative life and comparative worth arguments; reasoning that a comparison of the lives of the defendant and the victim is effectually identical to a comparison of their respective worths. The New Jersey Supreme Court stated any comparison between victim and defendant will always prejudice the jury, because defendants will persistently be seen as more delinquent, and of lower value.

In *State v. Story* (1995), the Missouri Supreme Court ruled against prosecutor statements blatantly characterizing the defendant's life as less valuable than the victim's life. The *Storey* court declared this manifestation of victim impact evidence to be a gross misinterpretation of law; one which could lead the jury to arbitrarily or capriciously impose the death penalty. The court argued by using the defendant's act of murder to distinguish him from the victim, comparative value arguments create a new aggravating factor which applies to all murderers. While this sentiment conveys the court's awareness of the capability of comparative value arguments to eviscerate constitutionally guaranteed due process rights, not all courts have recognized comparative value arguments as a breach of the permissibility standard established by *Payne*.

In *State v. Haseldon* (2003), and *Jackson v. State* (2000), The Texas Supreme Court found value-of-life comparisons between the victim and the defendant had been appropriately admitted. The *Haseldon* court held the prosecutor's argument properly reminded the jury of the victim's unique life, and was relevant in determining the defendant's culpability. The court asserted "prosecutors have a duty to advocate zealously that the facts in evidence warrant

imposition of the death penalty, and they are permitted wide latitude in their arguments.” This wide latitude cannot be denied. While many courts have ruled against the use of comparative value arguments in capital sentencing, there is an evident lack of consensus on this matter. Until the Supreme Court decides against this distorted application of victim impact evidence, comparative value arguments are likely to pervade capital sentencing proceedings (Smith, 2008).

The Supreme Court denied certiorari to *Humphries*, and has likewise rejected opportunities to revisit previous rulings on victim impact evidence, indicating the persuasion of capital jurors with damaging comparative arguments will continue (Kuhn, 2006; Smith, 2008). Members of the legal community warn against the allowance of comparative value arguments due to moral and ethical implications. Specifically, the failure of *Payne* to prohibit comparative value arguments enables the capital punishment of defendants based upon their societal status. Arguments which compare the societal value of the defendant and the victim are counterintuitive to models of legal equality. Hypothetically, if comparative value arguments were presented in all trials, wealthy individuals with high social standing are likely to disproportionately benefit over defendants with less desirable positions in society (Smith, 2008). This presents a startling but clear violation of the constitutional right to a fair trial.

The line between evidence of a victim’s uniqueness and evidence of societal value is difficult to distinguish (Smith, 2008). Opponents of victim impact evidence argue that presentation of victim impact evidence inherently suggests some lives are more valuable than others. If the legal system is truly based on equality, all human lives lost should represent commensurate losses to society; the personal characteristics of the victim should not influence jurors’ perceptions of defendant culpability, or capital sentencing decisions. If juries are using a comparative value analysis to form capital sentencing decisions, cases where a valuable victim

was allegedly killed by a worthless defendant would be easiest to argue. This value ratio could lead prosecutors to seek the death penalty more frequently when the defendant meets this description, further violating the defendant's right to fair trial (Kuhn, 2006). In light of these constitutional threats, it is necessary to assess how evidence presented at capital sentencing influences sentence recommendations, and whether current legal safeguards are adequately protecting the trial process against pervasive inflammatory prosecutor argument.

Mitigation Evidence

In the penalty phase of capital trials, jurors are instructed by the court on what evidence is permissible for their consideration, and how they are to weigh evidence to determine the appropriate sentence. Jurors are presented evidence of aggravating circumstances, which magnify the wrongfulness of the crime (i.e. killing a law enforcement officer, killing for hire, committing a murder in the course of a felony) and evidence of mitigating circumstances, which reduce the defendant's culpability (i.e. severe emotional distress, age, no record of prior criminal activity). Capital juries can also consider any aspect of the defendant or the crime which has mitigating value (*Lockett v. Ohio*, 1978; Luginbuhl & Middendorf, 1988; Turlington, 2006).

While deliberating, jurors are faced with answering several questions: Has an aggravating circumstance been proven beyond a reasonable doubt? Do the aggravating circumstances warrant the death penalty? Do any mitigating factors exist? Do the mitigating circumstances diminish the appropriateness of the death penalty? These questions represent the substantive workload of capital sentencing juries. Research suggests death qualified jurors are conviction prone in determining guilt, and death qualified jurors have demonstrated less acceptance of mitigating circumstances than those who strongly oppose the death penalty (Luginbuhl, 1992). Furthermore, individuals who strongly oppose the death penalty considered mitigating circumstances

significantly more than their death qualified counterparts. The differential consideration of aggravating and mitigating circumstances by death qualified and excludable jurors results in capital juries biased toward a penalty of death (Luginbuhl, & Middendorf, 1988).

Due to jurors' limitless consideration of mitigating circumstances established by *Lockett* (1978), defendants present a wide range of highly variable mitigating evidence. While some defense teams are able to show the defendant's good character and deeds, many defendants ask for mercy on the basis of mental deficiency, lack of education, poor physical health, history of substance abuse, or a troubled upbringing. Mitigating evidence which negatively characterizes the defendant may explain factors which contributed to the defendant's commission of the crime, and cause jurors to vote for leniency. However, in the context of comparative value arguments, mitigation can lower the defendant's value in the eyes of the jury. Stevenson, Bottoms, & Diamond (2010) describe research on juror's perceptions of this type of mitigation as inconclusive. Research indicates jurors demonstrate less punitiveness in sentencing a defendant who presented evidence of child abuse, compared to no history of child abuse (Barnett, Brodsky, & Davis, 2004; Stalans & Henry, 2009). Stevenson, et al. (2010) tested a history of child abuse, among other potentially biasing mitigating factors, and found that in simulated juror deliberations, jurors discussed this factor as an aggravator significantly more than as a mitigator. However, other findings suggest mitigating circumstances such as a history of child abuse, alcohol, or drug abuse can lead to greater punitiveness among jurors (Garvey, 1998; Gordon & Brodsky, 2007; Lynch & Haney, 2000; Salerno & Bottoms, 2009; Stevenson et al., 2008).

Consequently, mitigation evidence presented to communicate the defendant's *troubled life* is likely to have harmful ironic effects, or a backfire effect (Barnett, et al., 2007; Stevenson, et al., 2010) on sentencing when jurors are exposed to comparative value arguments. Inversely,

mitigation evidence which conveys the defendant's *social value* or positive contributions to the community may raise the defendant's value. When jurors are asked to reach a sentencing decision by comparing the values of the defendant and the victim, the more value jurors assign to the defendant, the less likely they are to recommend death. (McCampbell, 2006).

Victim Impact Evidence

Comparative value arguments ask jurors to weigh the defendant's value against the victim's value. While mitigation evidence provides insight into the life of the defendant, the prosecution uses victim impact evidence to portray the victim's life. When the victim is not available to testify, as in capital trials, family members or other close acquaintances of the victim provide a depiction of the life lead by the victim, and the impact of the loss on survivors (Gordon, & Brodsky, 2007). These witnessess provide the jury with positive details about the victim's personal characteristics which are likely to boost the victim's value in the context of a comparative value argument. Jurors may even raise the victim's value because the victim did not murder the defendant, and therefore represents a more valuable member of society. Although the *Payne* court intended this type of evidence to provide a "quick glimpse" into the life of the victim, victim impact evidence has spiraled beyond the scope of this goal, and is often the centerpeice of capital sentencing trials (Logan, 1999; McCampbell, 2006; Myers & Greene, 2004; Turlington, 2008). Introduction of this type of evidence can cause the focus sentencing proceedings to stray away from reason and the defendant's culpability, and toward the emotionality and the victim's suffering (Gross, 2007).

Trial judges have broad discretion in admitting victim impact evidence, and there are no existing instructional provisions to inform jurors on how to consider victim impact evidence, or what burden of proof to apply (Logan, 1999; Turlington, 2008). Research suggests this type of

evidence has a prejudicial effect on capital jurors. Across several studies, participants exposed to victim impact evidence were significantly more punitive (Erez & Tontadonato, 1990; Tsoudis, & Smith-Lovin, 1998) and more likely to vote for the death penalty than individuals who had not heard victim impact evidence (Luginbuhl & Burkhead, 1995; Myers & Arbuthnot, 1999; Salerno & Bottoms, 2009).

In one study, researchers varied the presentation of the victim to be either high-respectability or low-respectability and found participants gave more consideration to mitigating factors when presented impact evidence of the low-respectability victim (Greene, Koehring, & Quiat, 1998). Participants also perceived survivors' suffering as greater when presented the loss of a high-respectability victim, compared to a low-respectability victim. Additionally, jurors rated the social standing of high and low respectability victims, and greater social standing was positively associated with the degree of harm caused by the crime (Greene, 1999). These findings indicate defendants may receive differential treatment in capital sentencing depending on the social desirability of the victim (Myers, Weidemann, & Pearce, 2006).

In an attempt to answer some of the due process questions associated with the *Payne* decision, researchers have tested the degree to which victim impact evidence negatively characterizing the defendant influences capital sentencing decisions. Death qualified community members were more likely to sentence the defendant to death when presented victim impact evidence containing dehumanizing language, and when victim impact evidence was delivered in a highly emotional presentation (Myers, Godwin, Latter, & Winstanley, 2004; Tsoudis & Smith-Lovin, 1998).

Research also suggests capital jurors are influenced by who presents victim impact evidence. Green-McGowan and Myers (2004) found perceptions of survivor suffering were

greatest when victim impact evidence was presented by a family member, compared to a coworker or rescue-first responder. Participant-jurors have also been found to sentence defendants with greater punitiveness when exposed to testimony regarding a victim with a high level of suffering, compared to a victim with a low level of suffering (Kerr, & Kurtz, 1977). In another study, participants were exposed to one of four levels of harm expressed through victim impact evidence. Jurors' ratings of negative emotionality were positively associated with the degree of harm; however ratings of negative emotion did not significantly affect sentencing decisions (Myers, Lynn, & Arbuthnot, 2002).

Legal Safeguards

Given the emotional nature of capital sentencing evidence, and the potential for jurors to improperly weigh aggravating and mitigating circumstances in capital sentencing, a clearly problematic relationship is likely to exist when capital jurors are exposed to improper prosecutor arguments. In addition to the distorting effect of comparative value arguments on non-statutory aggravating and mitigating evidence, this type of argument has a volatile potential to influence capital sentencing decisions due to the inadequacy of current legal safeguards against prosecutorial misconduct. Numerous studies lend substantial empirical support to the resilience of various forms of inadmissible evidence in the presence of legal safeguards (Broeder, 1959; Carretta & Moreland, 1983; Kassin & Sommers, 1997; Kassin & Sukel, 1997; Pickel, 1995; Platania & Moran, 1999; Platania & Small, in press; Rind, et al., 1995; Steblay, et al., 2006; Sue, et al., 1973; Wolf & Montgomery, 1977). However, of these studies, only two examine the utility of legal safeguards to inhibit jurors' consideration of improper prosecutor argument in particular (Platania & Moran, 1999; Platania & Small, in press).

The courts operate under the assumption that adequate legal safeguards against

prosecutorial misconduct are in place, but researchers and legal scholars suggest prosecutorial misconduct is a frequently occurring problem lacking desperately needed mechanisms of regulation (Bilaisis, 1983; Gaines, 2007; Platania & Moran, 1999; Platania & Small, in press; Schoenfeld, 2005). By consistently applying harmless error doctrine to appeals based upon claims of prosecutorial misconduct, courts tend to affirm convictions even in cases where prosecutorial misconduct appears egregious. The harmless error standard allows appellate courts to concentrate on the weight of the case evidence, rather than on prosecutors' motives or behavior. In these cases, the courts believe the same verdict or decision would have been reached in the absence of the misconduct. Resulting decisions and written opinions do not sufficiently discourage prosecutors from behaving improperly, since the prosecutor's misconduct is rarely a cited reason for reversal. The legal community has some awareness of the threats to fairness and impartiality caused by improper prosecutor argument, evidenced by the United States Attorneys' Manual; but a dangerous disparity exists between the awareness of the legal community and the courts' decisions, which threatens the integrity of the entire legal system (Bilaisis, 1983).

Since appellate courts are not likely to reverse convictions on the grounds of prosecutorial misconduct, prosecutors must act with heightened caution in capital trials. If improper or inadmissible information is entered into the sentencing phase of a capital trial, opposing counsel must object, and a judicial instruction may or may not be delivered. Whether an instruction is offered or not, Attorney Objection → Curative Instruction remains the only possible route to correcting the information error. However, psychological theory and empirical findings provide burdensome reasons to be skeptical of the likelihood this process will produce the desired correction in information processing – disregarding improper information.

Attorney objection.

Few experimental studies have directly tested the cognitive and social psychological effects of attorney objection; but several theories can be used to explain this attentional phenomenon, which are empirically supported. Essentially, an attorney objection is an interruption of trial proceedings. When viewed as a cognitive event, an interruption has been theorized to produce changes in attention. Researchers suggest interruptions can increase attentional demands (Eccleston, & Crombez, 1999; Geiger & Reeves, 1993; Krugman, 1983). Interrupting an individual while performing a task may increase memory for the task, known as the Zeigarnik Effect (Zeigarnik, 1927). The attention-allocation theory proposes task-relevant interruptions enhance task-attention (Maentylae & Sgaramella, 1997). When this theory is applied to the capital juror, the defense attorney's objection to an improper prosecutor argument is an interruption of the juror's task, and is related to the juror's task. Consequently, the juror's attention to the proceedings at the time of the interruption would be increased; ultimately resulting in increased attention to inadmissible information.

The relationships among attention, memory, and interruptions have been studied in a wide range of contexts. Molly Juliann Walker Wilson (2004) is among the first researchers to manipulate attorney objection during criminal trial, and to empirically separate objection from instruction. Wilson (2004) articulates the need for research which manipulates legal safeguards in a way that allows experimentors to compare objection-present versus objection-absent conditions, and objection-overruled versus objection-sustained conditions. In this way, researchers can identify the effect of an objection, and examine whether jurors treat objected-to evidence differently depending on the judge's admissibility ruling. Wilson (2004) found mock jurors who heard objected-to testimony returned more guilty verdicts than mock jurors who

heard the same testimony with no objection; indicating the objection increased juror attention to the evidence. Wilson (2004) argues objections are problematic even when the objected-to evidence is ruled admissible. Even if the objected-to evidence is proper for the jury's consideration, an attorney objection may draw undue attention to the evidence, and the judge's affirmative ruling on the evidence may lead the jury to believe the evidence bears particular significance.

Judicial instruction.

In the case of judicial instructions to disregard inadmissible or improper information, empirical studies and theories are both available to support and explain the failure of these instructions to cause the desired information processing outcome. Wilson (2004) posed a concern that attention drawn to inadmissible information by attorney objection may overpower the instruction to disregard the evidence. Psychologists have studied directed forgetting; a construct which parallels the court's request of jurors to disregard inadmissible evidence, or to act as though the evidence had not been introduced. Findings consistently suggest individuals are more successful in forgetting meaningless information, such as a three letter trigram, than meaningful or task-relevant information (Fischhoff, 1975, 1977; Geiselman, 1974; Golding, Fowler, Long, & Latta, 1990; Golding & Keenan, 1985; Weiner, 1966; Wyer & Budesheim, 1987).

Wegner's (1994) theory of Ironic Processes of Mental Control details the mechanisms of suppressing a thought; one must engage in continual mental self-monitoring to ensure the prohibited thought has not intruded. In doing so, individuals inevitably attend to this forbidden stimuli, and experience the thought intrusion they are attempting to avoid. Brehm's (1966) reactance theory describes the tendency for an individual's desire to perform a specific action to increase when freedom to perform the action is threatened. According to reactance theory, as the

perceived threat to freedom intensifies, the desire to perform the forbidden action likewise intensifies. Both theories indicate a possible backfire effect of judicial instructions to disregard inadmissible evidence, resulting in greater consideration of inadmissible evidence (Wilson, 2004).

Research has illustrated the dubious efficacy of this type of instruction to shield jurors from inadmissible evidence when determining verdict (Broeder, 1959; Carretta & Moreland, 1983; Kassin & Sommers, 1997; Kassin & Sukel, 1997; Pickel, 1995; Rind, et al., 1995; Steblay, et al., 2006; Sue, et al., 1973; Wolf & Montgomery, 1977). However, far fewer studies have been done on the effectiveness of instructions to disregard inadmissible capital sentencing evidence (Platania & Moran, 1999; Platania & Small, in press). Capital sentencing presents unique circumstances under which jurors must weigh aggravating and mitigating evidence, and hear highly prejudicial victim impact statements. Capital jurors are undeniably faced with an emotionally and cognitively demanding set of responsibilities. The impact of both attorney objection and judicial instruction must be empirically evaluated in the context of capital sentencing, because these remain the primary safeguards available to defendants during capital sentencing trials.

Affect & Cognition

One primary concern regarding the introduction of sentencing evidence is the likelihood that emotional evidence will inflame the jury (Myers, et al., 2006). In addition to emotionally driven victim impact and mitigation evidence, prosecutors may tap juror emotionality by attempting to elicit negative emotions about the defendant, such as anger and disgust (Salerno & Bottoms, 2010). Based on previous rulings, the courts seem to be aware of the problems associated with sentencing defendants out of emotion, passion, or prejudice (*Eddings v.*

Oklahoma, 1982; *Gardner v. Florida*, 1977). However, research has broadly demonstrated the influential role of emotion in decision making processes.

Individuals have a tendency to make judgments consistent with their mood, known as the mood-congruency effect. Mood can also affect decision making indirectly, by altering information processing strategies. Happiness has been associated with less effortful information processing, compared to sadness. In contrast, anger tends to produce less detailed information processing, and more heuristic processing (Myers, et al., 2006). One possible explanation for this pattern is individuals' motivation to maintain a positive state such as happiness; and therefore engage in less effortful searching for information which could cause a mood shift. Alternatively, some theorists propose an attributional paradigm, whereby firm emotions such as happiness and anger lead to certainty, and nebulous emotions such as sadness cause uncertainty; the less certain an individual is, the more extensively he or she will process information (Myers, et al., 2006).

According to the Affect Infusion Model (AIM), judgments we make on a daily basis are not purely rational cognitions, but are influenced by affective state (Forgas, 1995). Forgas (1995) described four distinct cognitive processes: direct access, motivated, heuristic, and substantive processing strategies. Direct and motivated processing strategies involve retrieval of previously formed judgments, either directly, or according to goal-oriented search patterns. In the absence of a prior judgment or a motivational goal, an individual is likely to use heuristic or substantive processing; whereby a new judgment is created based upon simplified (heuristic) or extensive (substantive) constructive processing. These second two strategies are more susceptible to the infusion of affectively loaded information, because they require more open-ended searching than direct access and motivated processing strategies, and employ a broader search scope.

Several variables, including personality traits, motivational goals, cognitive capacity, familiarity with the target, and judgment complexity determine which processing strategy is employed (Forgas, 1995). Jurors in capital trials are required to construct judgments and evaluations of new and complex information. In court, jurors must absorb a large load of cognitively demanding information, and must weigh aggravating and mitigating circumstances, determine the credibility of witness testimony, and render a verdict or sentence recommendation. These demanding juror tasks necessitate constructive processing such as heuristic and substantive strategies; supporting the use of the AIM in jury simulation research.

The *Need for Cognition* (NFC) has been connected to methods of information processing (Cacioppo & Petty, 1982; Cacioppo, Petty, & Kao, 1984), such as the evaluation of testimony heard in court (Butler, & Moran, 2007). NFC is defined as “the tendency to engage in and enjoy effortful cognitive activity” (Cacioppo, et al., 1984). Individuals with a high need for cognition have a tendency to process information intensively. In contrast, lower NFC individuals tend to process less intensively, use less case specific information, and utilize more peripheral cues. Researchers have found death qualified jurors to exhibit a significantly lower NFC than those jurors excluded by the *Witt* standard (Butler, & Moran; *Wainwright v. Witt*, 1985).

Recently, researchers have suggested individuals’ susceptibility to emotional information is strongly related to need for cognition (Haddock, Maio, Arnold, & Huskinson, 2008; Maio & Esses, 2001). Identified as *need for affect*, this construct has been studied as an individual difference factor in studies addressing level of receptiveness to cognitively and affectively persuasive messages. Results indicate both need for affect and need for cognition reliably predict susceptibility to affective or cognitive messages (Haddock et al., p. 777). Specifically,

individuals high in need for affect and low in need for cognition were more persuaded by affective messages compared to those high in need for cognition.

Need for affect may play an important role in explaining the persuasive effect of comparative value arguments, mitigation and victim impact evidence, especially in relation to need for cognition (Salerno & Bottoms, 2009). Individuals high in need for affect and low in need for cognition may be more likely to find comparative value arguments persuasive compared to those high in need for cognition and low in need for affect. Research in this area will provide important information in understanding the affective and cognitive processes associated with jurors' sentencing decisions.

In contrast to many robust findings demonstrating the prejudicial influence of victim impact evidence, an insufficient amount of empirical work examines the ways in which jurors consider other types of capital sentence evidence, such as mitigation evidence (Salerno & Bottoms, 2009). Uproar in the legal community regarding the improper use of comparative value arguments, and its detrimental effect on defendants' due process rights (Kuhn, 2006; McCampbell, 2006; Smith, 2008) operates as a signal to the field of psychology that current legal assumptions about capital decision making do not accurately reflect the tendencies of jurors. Therefore, patterns of emotion and judgment related to capital sentencing require additional empirical testing. Considering the dearth of empirical research on comparative value arguments, and their potential to misguide the jury's consideration of mitigation and victim impact evidence, the proposed research intends to examine the differential influence of these variables, and the impact of attorney objection and curative instruction on capital sentencing decisions.

Proposed Hypotheses

- H*₁: Attorney objection will increase juror attention to objected-to information (CVA in closing argument), leading to an increase in death penalty recommendations in both conditions where attorney objection is present, compared to conditions where attorney objection is absent.
- H*₂: Judicial instructions to disregard improper prosecutor statements will be tested to determine whether and to what extent curative instruction influences jurors' sentencing decisions, and their consideration of comparative value arguments.
- H*₃: A main effect of troubled life mitigation is predicted, and is expected to lower jurors' perceptions of the defendant's value, ultimately leading to more death penalty recommendations than in the control condition, where troubled life mitigation is not presented.
- H*₄: A main effect of Victim Impact Evidence on perceptions of comparative worth statements is predicted. In the context of comparative value arguments, victim impact evidence should result in the more death penalty recommendations and decreased perceptions of the defendant's value.
- H*₅: In light of the characteristic differences past research has shown between general and death qualified samples, participants' scores on the Attitudes toward the Death Penalty scale is predicted to mediate the relationship between mood, affect and cognition on sentencing decisions.

Method

Participants

Participants were pre-screened for jury eligibility to serve on a capital trial, using the *Witt*

standard (Wainwright v. Witt, 1985), as well as the criteria of having a valid driver's license. The sample consisted of 140 undergraduate students, recruited from two universities in New England. Participants were randomly assigned to one of nine experimental conditions. Participation required approximately one hour. Informed consent (see Appendix A) was obtained prior to participation, and participation was followed by debriefing (see Appendix E).

Materials

Participants completed a pre-trial survey instrument (see Appendix B) consisting of demographic items, the Positive Affect Negative Affect Scale – Short Form (PANAS-SF; Thompson, 2007) to measure affective state, Attitudes Toward the Death Penalty (ATDP; O'neil, Patry, & Penrod, 2004), Need for Affect (NFA; Maio & Esses, 2001) and Need for Cognition (NFC; Caccioppo, et al., 1984) scales.

Trial simulation materials (see Appendix C) were based on the case information from *Humphries v. Ozmint* (2005) and *Hall v. Catoe* (2004). The case facts came directly from *Humphries*, and comparative worth arguments came directly from *Hall*. Trial materials included a summary of the guilt phase with information regarding the events leading up to the murder: The night before the killing the defendant and a friend were drinking, stole a gun, and decided to rob a store clerk. In the course of the robbery, the clerk reached under the counter for a gun; the defendant then fired a shot which struck the victim in the head. This was followed by the judge's pre-sentencing instructions, attorney opening statements, witness presentation of victim impact and mitigation evidence, and attorney closing arguments.

Post-trial dependent measures (see Appendix D) included sentence recommendation, manipulation checks, and Likert ratings of confidence in sentence, witness credibility, and consideration of sentencing evidence. Participants completed a post-trial PANAS-SF, and Victim

Concern Scale (VCS; Clements, Brannen, Kirkley, Gordon, & Church, 2006) Factor 2 to assess attitudes toward victims of violent crime at the time of determining sentence.

Design & Procedure

The proposed study utilizes a 2 (Victim Impact Evidence: Present v. Absent) x 4 (Legal Safeguards: Objection-Overruled v. Objection-Sustained v. Objection-Sustained with curative instruction v. None) + 1 (Control: No Mitigation, No Victim Impact Evidence, No Legal Safeguard) between-groups factorial design. Death qualified, jury-eligible participants completed the pre-trial survey instrument to identify individual difference factors related to the evaluation of capital sentencing evidence.

Participants were randomly assigned to one of 9 conditions (8 experimental conditions, and one control condition). Participants read the trial simulation materials describing the case of *Humphries v. Ozmint*, (2005), and rendered a verdict (guilty/not guilty). Pre-sentencing judicial instructions were constant across all conditions. Prosecutor opening statements introduced the witnesses in victim impact present conditions, and only discuss statutory aggravating factors in victim impact absent conditions. The defense attorney opening statement is constant across all conditions. When present, permissible victim impact evidence was offered by one family member and one community member. The defendant also called one family member and one community member to testify to the defendant's troubled life (dysfunctional home and difficulty in school). In the control condition, non-statutory mitigation was not presented.

The defense attorney's closing argument remained constant across all conditions. The prosecutor's closing argument contained three comparative worth statements, drawn from *Hall v. Catoe* (2004), in which the prosecutor explicitly requests jurors assign a value to the life of the victim and the defendant. Comparative worth is not a manipulated variable, and is constant

across all conditions. The present study did not test the differential influence of comparative worth arguments, because preliminary findings have identified main effects for both comparative worth and comparative life statements on sentence recommendation, in the direction of harsher sentences. Additionally, preliminary findings suggest the prejudicial influence of comparative worth statements is stronger than that of comparative life statements (Serpa, Small, & Platania, 2010).

The legal safeguard manipulation occurred half-way through the prosecutor's closing argument, to ensure the objection was timely when present; and to maintain ecological validity. All elements of the trial were held constant except for the manipulations listed. Following is a brief description of each legal safeguard condition:

Objection-overruled condition.

The defense attorney objected to the prosecutor's line of argument half-way through the closing argument, and the judge responded, "the objection is overruled. Counselor, you may continue".

Objection-sustained condition.

The defense attorney objected to the prosecutor's line of argument half-way through the closing argument, and the judge responded, "the objection is sustained."

Objection-sustained with curative instruction.

The defense attorney objected to the prosecutor's line of argument half-way through the closing argument, and the judge responded, "Ladies and gentlemen of the jury, there was an objection by the Defense to the Prosecutor's line of argument, which was sustained. Closing arguments are not evidence for your consideration. In his closing argument, the prosecutor made several statements comparing the worth of a defendant's life with that of his victim or comparing

the way in which the defendant and the victim lived their lives. This line of argument is inflammatory. Consider the case as though this line of argument was not expressed.” (*Donnelly v. DeChristoforo*, 1974).

No legal safeguard condition.

The defense attorney did not object throughout the prosecutor’s closing argument, and no comment or instruction was given by the judge.

Following the trial simulation, jurors provided individual sentence recommendations (life in prison without parole v. death). Jurors completed all post-trial measures, including manipulation checks, items measuring perceived importance of due process rules and disregarding inadmissible evidence, VCS items, and post-trial PANAS-SF to assess mood effects associated with exposure to sentencing evidence. Primary dependent measures included ratings of the degree to which prosecutor and witness statements influenced sentencing recommendations.

Results

Sample Demographics

Of the sample of 140 participants, 43.6% were male, and 56.4% were female. All participants fell between the age range of 18 to 34, with the vast majority (98.6%) being between 18 and 24 years of age, and only two participants (1.4%) being between 25-34 years of age. When asked about racial background, 90% of the sample identified themselves as Caucasian, 4.3% identified themselves as Hispanic, and 5% described themselves as “Other”. Considering data was collected in undergraduate courses, it is not surprising that 81.4% described their employment status as student, with only 2.9% and 10.7% reporting full-time and part-time employment, respectively. All but one member of the sample described their marital status as

Single (99.3%).

Regarding religious affiliation, 52.9% of the sample reported a Catholic affiliation, 17.1% reported a Protestant affiliation, 2.1% reported a Jewish affiliation, and 27.9% selected “Other”. When asked about their political views, 31.4% of the population identified themselves as liberal 27.9% identified themselves as slightly liberal, 22.1% as slightly conservative, and 16.4% as conservative. 70% of the sample reported being registered voters. Only three participant (2.1%) had served on a civil jury, and four participants (2.9%) had served on a criminal jury. Just under half of the sample (47.1%) reported having a close friend or relative in the justice system.

Death Qualification

Our sample was death qualified based on participants’ responses to three qualifying items. Participants were excluded from further analyses if they did not have a valid driver’s license (4.3%), if they reported having any views on the death penalty that would prevent or substantially impair their consideration of both penalties, in violation of the *Witt* standard (16.4%), and if they felt the death penalty was either appropriate (8.6%) or inappropriate (5.7%) in all capital cases. These exclusion criteria produced a death-qualified sample of 100 participants.

Scale Reliabilities

In order to assess the scale reliabilities of our dependent measures, a series of reliability analyses were conducted. The pre-trial PANAS items measuring positive affect demonstrated a Cronbach’s alpha = .87, $n = 10$. The range of responses measured by this scale was 13 to 45, with higher scale scores indicating higher reporting of positive affect. The pre-trial PANAS items measuring negative affect had a Cronbach’s alpha = .78, $n = 10$; responses ranged from 10-

31 with higher scale scores indicating higher ratings of negative affect. Attitudes Toward the Death Penalty (ATDP) items were highly reliable as a scale, Cronbach's alpha = .84, $n = 15$. Responses to this scale ranged from 28 – 118, with higher scores indicating greater endorsement of the death penalty.

Need for Affect and Need for Cognition were also analyzed for scale reliability, and both demonstrated strong reliability. For Need for Affect, Cronbach's alpha = .86, $n = 25$, and responses ranged from 37 to 118, with higher scores reflecting a higher need for affect. The Need for Cognition scale had a Cronbach's alpha = .82, $n = 19$, and responses ranged from 27 to 86, with higher scores reflecting a higher need for cognition.

Post-trial PANAS items measuring positive affect had a Cronbach's alpha = .89, $n = 10$. Responses to this scale ranged from 10-47, with higher scores reflecting higher ratings of positive affect. Post-trial PANAS items measuring negative also demonstrated suitability to use as a scale, with Cronbach's alpha = .84, $n = 19$; and responses ranging from 27 – 86, with higher scores demonstrating greater self-reported negative affect. The ten Victim Concern Scale items assessing attitudes toward victims of violent crimes were reliable as a scale, with Cronbach's alpha = .84, $n = 10$. Responses to this scale ranged from 35 – 50, with higher scores reflecting greater concern for victims.

Hypothesis Tests

Among our primary dependent measures were three items assessing jurors' consideration of comparative worth statements in determining sentence. All three comparative worth items were significantly intercorrelated, at $p < .001$ (See Table 1 for inter-item correlations). This provided support to create a scale of the three items, which had an acceptable Cronbach's alpha = .77, $n = 3$.

To test the effects of our manipulated trial factors on responses to the Comparative Worth Scale (CWS) a two-way ANOVA was conducted, but no significant interactions or effects were found. The absence of significant differences between the legal safeguard conditions does not lend to support to Hypotheses 1 or 2. No significant differences were found between conditions where the defense attorney objected or did not object to the comparative worth statements. Therefore directional inferences about the impact of attorney objection cannot be made, and Hypothesis 1 cannot be supported. Similarly, the lack of significant differences between the Objection Sustained and Objection Sustained with Instruction conditions prevents us from answering Hypothesis 2.

To further examine the impact of the legal safeguard manipulation on jurors' perceptions of the comparative worth statements, three one-way ANOVA's were conducted to provide an item-by-item analysis. Legal safeguards only had a significant effect on responses to the first comparative worth statement, "I am talking about values... What is the life of this victim worth?", $F(3, 99) = 2.91, p = .039$, partial eta squared = .08. Unfortunately, this analysis also failed to produce any significant differences between the legal safeguard conditions (No Objection, $M = 4.94$; Objection Overruled, $M = 4.54$; Objection Sustained, $M = 4.08$; Objection Sustained with Instruction, $M = 4.13$).

To test associations among categorical variables, hierarchical loglinear analysis was conducted using backward elimination. A significant IV/DV association was found between legal safeguard and sentence, $\chi^2(3, n = 100) = 8.13, p = .043$. Please see Table 2 for post-hoc crosstabulations of legal safeguard by sentence.

The process of death-qualifying our sample resulted in an abnormal distribution among the troubled life mitigation present and absent conditions. Given the already small sample size,

there was not sufficient power to analyze between-groups differences resulting from the troubled life manipulation. Therefore, Hypothesis 3 was omitted from testing, and the design was modified to a 4 (Legal Safeguard) X 2 (Victim Impact Evidence) between-subjects factorial design.

Two independent samples t-tests were conducted to examine if participants' sentence recommendations (measured linearly as -1 = Life in prison, +1 = Death penalty) and CWS scores differed as a function of exposure to victim impact evidence. No significant differences were found, indicating that the presence of victim impact evidence did not significantly influence jurors' consideration of comparative worth statements, nor did it affect their sentencing decisions. Therefore, no support was found for Hypothesis 4.

A theoretically relevant path model was conducted using multiple regression analysis, to test for the mediating effects of attitudes toward the death penalty on the relationship between affective and cognitive processes and sentencing decisions (See Appendix A). To examine sentencing recommendation as a linear variable, sentencing decisions were recoded (from 1 = Life in prison, 2 = Death penalty, to -1 = Life in prison, +1 = Death penalty). This has previously been done in studies examining culpability (Bornstein & Muller, 2001), and the influence of inadmissible testimony on verdict (Kassin, & Sukel, 1997); to our knowledge this is the first use of this measurement of sentence. Need for affect (NFA), need for cognition (NFC), pre-trial positive affect, and pre-trial negative affect (PANAS) were used as predictor variables of sentence, with attitudes toward the death penalty (ATDP) as a mediator.

Independent of the other variables, ATDP significantly predicted sentence, $\beta = .372$, $r^2 = .14$, $p < .001$. When NFA and ATDP were placed in a model together, the model was significant at $p = .001$; indicating that ATDP significantly mediated the relationship between NFA, $\beta = .061$,

$r^2 = .00$, $p < .523$, and sentence, $\beta = .372$, $r^2 = .14$, $p < .001$. A significant path ($p = .001$) was also found from NFC, through ATDP, to sentence; suggesting ATDP mediated the relationship between NFC, $\beta = -.031$, $r^2 = .00$, $p = .744$, and sentence, $\beta = .372$, $r^2 = .14$, $p < .001$. Another significant path ($p = .001$) demonstrated the mediating effect of ATDP on the relationship between pre-trial positive affect, $\beta = .07$, $r^2 = .01$, $p = .462$, and sentence, $\beta = .362$, $r^2 = .13$, $p < .001$. The model containing pre-trial negative affect and ATDP was also significant at $p = .001$, indicating a mediating effect of ATDP on pre-trial negative affect, $\beta = -.069$, $r^2 = .01$, $p = .468$, and sentence, $\beta = .018$, $r^2 = .14$, $p < .001$. This series of significant paths confirms the mediating effect of attitudes toward the death penalty predicted in Hypothesis 5.

Discussion

Our findings failed to identify differential effects of our manipulated trial factors. The first two hypotheses tested both pertained to the anticipated influence of attorney objection and curative instruction on participants' consideration of comparative worth statements in the prosecutor's closing argument. Although preliminary data analysis has shown this type of prosecutorial misconduct does bias capital jurors, and can persuade them to recommend the death penalty more often than jurors not exposed to this type of misconduct (Serpa, et al., 2010); in the present study we were testing the legal safeguard, rather than the misconduct. In doing so, we have focused analysis on a manipulation of legal safeguards that has never been done before. This manipulation came directly from Wilson's (2004) suggestion to compare objection-present versus objection-absent conditions, as well as objection overruled versus objection sustained conditions.

While Wilson's dissertation research found significant attentional shifts in mock-jurors exposed to attorney objection using a similar manipulation, we were unable to locate significant

differences between the legal safeguard conditions. In light of the abundant cognitive literature which suggests task interruption is likely to increase task attention, and Wilson's findings which converge with this body of literature, it would be irresponsible to assume the absence of differences between the legal safeguards conditions reflects a true absence of these effects in real-world trial settings. Given the main effect of legal safeguards on jurors' perceptions of one of the comparative worth statements, the failure of between-groups differences to emerge in our analysis can be more reasonably attributed to potential weakness of our manipulation, or to inadequate power in the legal safeguard conditions.

The hierarchical loglinear analysis conducted to examine our categorical variables identified a significant association between legal safeguard and sentence. The post-hoc crosstabulation depicted in Table 2 shows the frequency of life imprisonment and death penalty recommendations in each of the four legal safeguard conditions. In each legal safeguard condition, the number of life imprisonment recommendations more than doubled the number of death penalty recommendations. This may be in part due to the fact that data was collected in a state which does not impose the death penalty. However, when the sample was death qualified, more participants were omitted for feeling the death penalty was always appropriate in capital trials ($n = 12$), than those removed for feeling the death penalty was never appropriate ($n = 8$). Therefore, death qualification may have actually skewed the sample in favor of life in this case. This finding, abnormal for a death qualified sample, in addition to the possible hesitance experienced by residents of a non-death penalty state, may have created or influenced the disproportionate prevalence of life imprisonment recommendations in the present study.

The distribution of sentence recommendations must be considered with these sample characteristics in mind. One interesting finding is that the objection-overruled condition

produced more death penalty recommendations than the no objection condition. This does suggest that the presence of the objection, although overruled, increased attention to the prosecutorial misconduct. Hypothetically, since the statement was ruled admissible, there is no problem with the juror's heightened attention to it. However, from a broader perspective, we must recognize that just because a trial judge rules prosecutorial misconduct admissible, it does not mean the misconduct statements will not bias the jury. In the present study, the presence of an overruled objection did increase attention to the misconduct statements, resulting in a greater number of death penalty recommendations.

Although the number of death penalty recommendations in the objection sustained ($n = 1$) and objection sustained with instruction ($n = 2$) conditions are both small, it is interesting to note that there were more death penalty recommendations when the judge included a curative instruction. This indicates that it may be the instruction, rather than the objection, which is responsible for any observed backfire effects in juror's consideration of improper evidence. It is necessary to collect additional data to increase the cell size of each condition, to determine if this pattern has tenacity.

Our sample was definitely a hindrance to our analysis of this data. While we initially planned the sample to consist of 100 undergraduate students and 100 community members, there was an evident lack of interest demonstrated by community members who agreed to participate but did not show up to participation sessions. The difficulty we experienced in collecting data among community members was exacerbated by time restrictions and other pragmatic limitations. As a result, our sample was substantially smaller and more homogenous than expected. The narrow range of age and racial background of the sample reflects the mostly-white college community where data was collected.

The present findings do not provide clear empirical support for Hypothesis 1 or 2. However, given the main effect of legal safeguards on perceptions of the first comparative worth statement, and the significant association between legal safeguard and sentence, we are optimistic that if additional data were collected, increasing statistical power, expected differences between the legal safeguard conditions would appear. The process of death qualifying the sample of juror-participants further reduced our sample size, and this reduction must be taken into account when planning future research on capital decision-making.

Our manipulation of victim impact evidence (present versus absent) likewise failed to demonstrate a significant effect on consideration of comparative worth statements, and to influence sentence. In addition to the concerns about statistical power in the sample, there is a concern about the strength of the victim impact evidence presented. In our attempt to avoid a confound, our victim impact evidence lacked explicit emotionality. Additionally, our study was pencil and paper, which prevents jurors' exposure to physical, social, and emotional cues that might be present in an audio or video presentation of victim impact evidence. It is likely that in future study of the relationship between victim impact evidence and prosecutorial misconduct, a more vivid presentation of victim impact evidence would elicit stronger responses, potentially resulting in a significant effect of the evidence. Unlike attorney objection, there is no shortage of research findings on victim impact evidence which broadly demonstrates its prejudicial influence on capital jurors. Therefore, it is more probable that the absence of a significant effect in our study is due to our small sample size, and the lack of emotionality in our presentation of victim impact evidence.

Support was found for our last hypothesis, predicting the moderating effect of attitudes toward the death penalty (ATDP) on the relationship between affective and cognitive factors and

sentencing decision. The path model illustrated in Figure 1 identifies four predictive models (significant at $p = .001$) in which ATDP significantly moderated the relationship between participants' scores on the Need for Affect, Need for Cognition, and PANAS scales, and sentence recommendation. When the direct relationship between these scale scores and ATDP was tested, no paths were significant. This indicates that ATDP scores are primarily driving the significance in the predictive model overall. Considering the highly significant paths achieved when NFA, NFC, and PANAS went through ATDP, to sentence, it is clear that ATDP had a strong moderating effect on these variables in predicting sentence.

Future Research

This is the second study in a brand new line of research investigating juror's treatment of various sources of sentencing evidence in the context of comparative value argumentation. The next step in this line of research is to collect additional data using the current materials in order to increase the chances of locating meaningful differences between the four legal safeguard conditions. If the attentional phenomenon described in cognitive literature still fails to appear in a larger sample, attorney objection must be a unique form of task interruption, impervious to attentional shifts. Although this outcome is not likely, it must be empirically ruled out by further data collection.

Aside from the underwhelming results obtained in this study, which may or may not be largely attributed to sample size and power, this study offers a novel contribution to the field by examining attorney objection as a legal safeguard. Due to the extremely limited literature on attorney objection, further research examining the timing of objections, the frequency of objections, perceptual differences in objections made by the prosecutor versus the defense attorney is necessary.

In contrast, there is a large body of research on the influence of mitigation and victim impact evidence on capital sentencing. However, research in this area has not sufficiently explored the compounded effects of these prejudicial forms of evidence in the context of prosecutorial misconduct and comparative value arguments. In this study, the statutory mitigators presented were age, and lack of criminal record, and the non-statutory mitigation focused on the defendant's troubled upbringing. Future studies should test the influence of other statutory and non-statutory mitigating factors. Especially considering the mixed findings regarding juror's treatment of mitigating evidence of a history of child abuse (Barnett, et al., 2007), more research must be conducted to examine the potential for this evidence to bias jurors exposed to prosecutorial misconduct in the form of comparative value arguments.

Another facet of research that is missing in this area is the differences between individual and group information processing of sentencing evidence and prosecutorial misconduct. Future studies should compare individual and group decision-making when jurors are exposed to comparative value arguments, and non-statutory sentencing evidence. Conducting mock-jury deliberations requires substantial time and man power, but would provide unparalleled insights into the deliberation process, and would bring us closer to an ecologically valid representation of capital sentencing procedures.

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Intercorrelations Among Comparative Worth Statements

Statement	“Whose life has more value? The defendant’s or the victim’s?” (CW2)	“If you let this murderer walk... you are saying his life is worth more than the victim’s” (CW3)
“I am talking about values...What is the life of this victim worth” (CW1)	$r = .532^*$	$r = .551^*$
“Whose life has more value? The defendant’s or the victim’s?” (CW2)		$r = .499^*$

* $p < .001$

Table 2

Crosstabulation of Legal Safeguard Condition by Sentence Recommendation

	No Objection	Objection Overruled	Objection Sustained	Objection Sustained with Instruction
Life in Prison without Parole	n = 27	n = 19	n = 24	n = 13
Death by Lethal Injection	n = 5	n = 9	n = 1	n = 2

Figure 1. Path Model Diagram

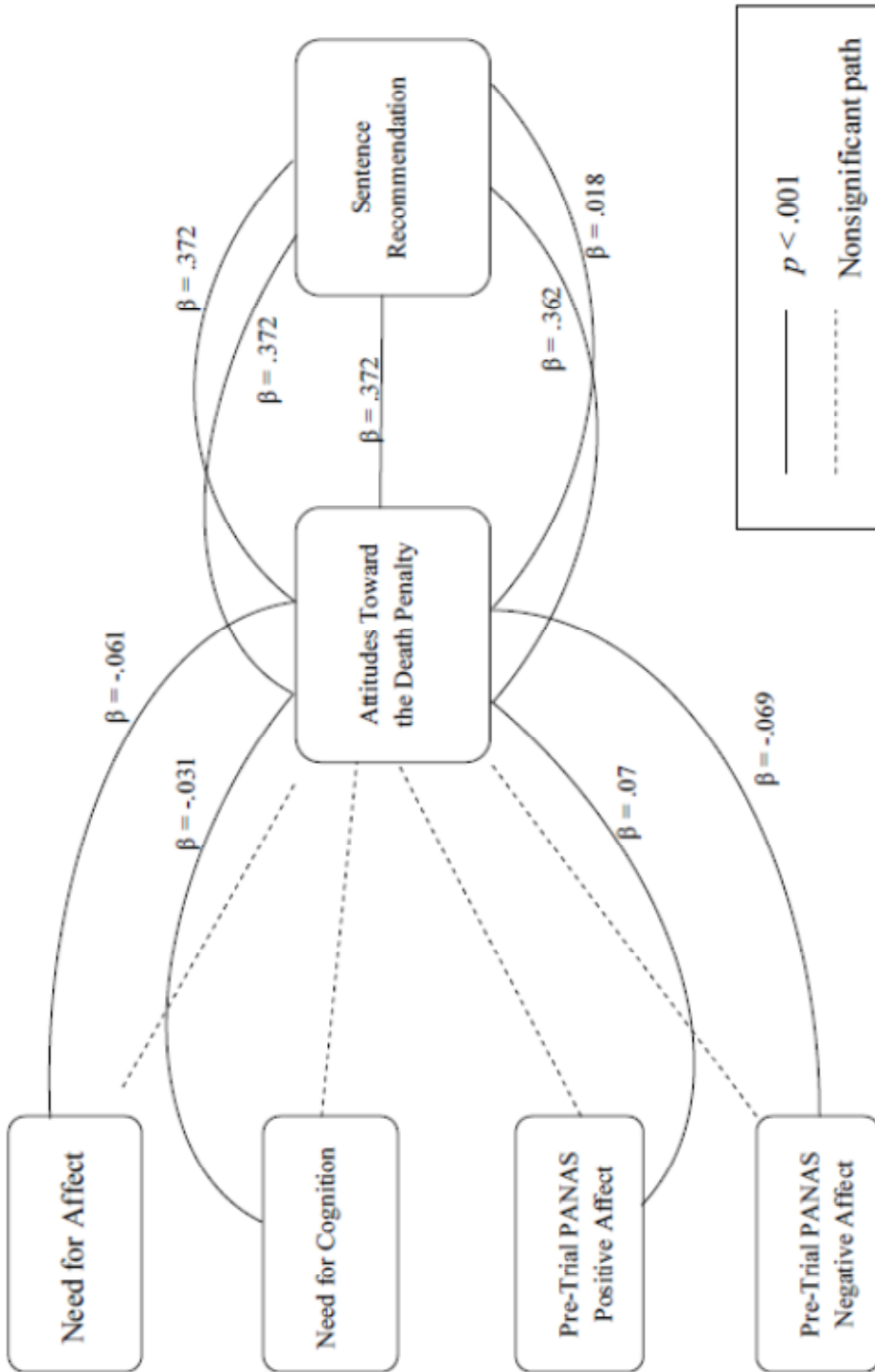


Figure 1. Path model illustrating the moderating effects of Attitudes Toward the Death Penalty (ATDP) on the relationship between affective and cognitive factors and sentence recommendation.

Informed Consent Form

Principal Investigators: Alicia Serpa, B.A., Rachel Small, B.A., and Judith Platania, Ph.D.

1. Purpose of the Study: This study will examine jury decision making during a capital trial. A minimum of 260 participants will be included in this study.

2. Procedures Experienced by Participants: By participating in this study, you will be asked to read a segment of testimony in a death penalty case. You will then fill out a questionnaire regarding your attitudes toward the testimony you viewed. Participation should take approximately one hour, and the questionnaires will be completed in the given time today.

3. Confidentiality and Anonymity: Only the investigators listed above will have access to your responses, which will ensure your confidentiality. Additionally, your name will only be written on your consent form, which will be collected and maintained separately from your questionnaire. Thus, your responses will remain anonymous.

4. Your Rights: You have the right to decline participation without any penalties or prejudice because participation is strictly voluntary. Additionally, at any point in the study if you do not feel comfortable or no longer want to participate, you have the right to withdraw from the study without prejudice or penalty. You may also ask questions at any time during the course of the study and you may contact the primary investigator (whose name, email address and telephone number appear at the bottom of this form) at any time after you have participated in the study.

5. Risks and Benefits of being a Participant: No physical, psychological, or emotional risks are associated with this study. At any time during your participation, you are allowed to withdraw from this study without facing any penalties. A potential benefit is an increased understanding of how psychological research is conducted.

More Information: After participation, please feel free to contact Dr. Judith Platania in FCAS 104, by email at jplatania@rwu.edu, or telephone 254-5738 should you have any additional questions.

This certifies that I _____ have given my full consent to participate
 Print your name

in this study. I am at least 18 years of age or older. I have read this form and fully understand the content.

 Participant's Signature

 Date

This certifies that I have defined and informed the participant named above of all elements pertaining to this research study.

 Principal Investigator

 Date

PRE-TRIAL JUROR QUESTIONNAIRE

Thank you for agreeing to participate in our study. Your responses are important to our research. Please answer every question on this form by placing a check in the box that corresponds to the appropriate response.

Your gender:

- Male [1]
 Female [2]

Into which of the following age categories do you fall:

- 18-24 [1]
 25-34 [2]
 35-44 [3]
 45-54 [4]
 55 or older [5]

Which of the following characterizes your background?

- Caucasian [1]
 Hispanic [2]
 African-American [3]
 Other [4]

What is your religious affiliation?

- Catholic [1]
 Protestant [2]
 Jewish [3]
 Other [4]

Your marital status:

- Single [1]
 Married [2]
 Divorced [3]
 Other [4]

How would you evaluate your political views?

- Liberal [1]
 Slightly Liberal [2]
 Slightly Conservative [3]
 Conservative [4]

Do you have a valid driver's license?

- No [1]
 Yes [2]

Are you a registered voter?

- No [1]

Yes [2]

Have you ever served on a jury in a civil case?

No [1]

Yes [2]

Have you ever served on a jury in a criminal case?

No [1]

Yes [2]

What is your employment status? (Only check one)

Not working now/unemployed [1]

Retired [2]

Student [3]

Homemaker [4]

Employed full-time [5]

Employed part-time [6]

Are you, a close friend of, or related to, anyone employed in the justice system? (police officer, judge, attorney, etc.)

No [1]

Yes [2]

What is the highest year of education you have attained?

Less than high school [1]

Attended some high school [2]

High school diploma [3]

Partial college or junior college [4]

College degree [5]

Post-graduate college degree [6]

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)

No [1]

Yes [2]

Which of the following best describes your view regarding the death penalty:

Appropriate in all cases where someone has been murdered. [1]

Generally appropriate with very few exceptions. [2]

Generally opposed with very few exceptions. [3]

Opposed in every possible case where someone has been murdered. [4]

This scale consists of a number of words and phrases that describe different feelings and emotions. Read each item and mark the appropriate answer in the space next to that word. Indicate to what extent you feel this way

right now. Use the following scale to record your answers:

1 <i>very slightly or not at all</i>	2 <i>a little</i>	3 <i>moderately</i>	4 <i>quite a bit</i>	5 <i>extremely</i>
--	-----------------------------	-------------------------------	--------------------------------	------------------------------

- | | |
|--------------------|------------------|
| _____ attentive | _____ strong |
| _____ irritable | _____ inspired |
| _____ afraid | _____ alert |
| _____ upset | _____ active |
| _____ guilty | _____ nervous |
| _____ excited | _____ hostile |
| _____ proud | _____ jittery |
| _____ ashamed | _____ scared |
| _____ enthusiastic | _____ distressed |
| _____ determined | _____ interested |

Please circle the number that corresponds most closely to how you feel.

It is immoral for society to take a life regardless of the crime the individual has committed.

- 1 2 3 4 5 6 7 8 9
- Strongly disagree Strongly agree

Executing a person for premeditated murder discourages others from committing that crime in the future.

- 1 2 3 4 5 6 7 8 9
- Strongly disagree Strongly agree

The death penalty is the just way to compensate the victim’s family for some murders.

- 1 2 3 4 5 6 7 8 9
- Strongly disagree Strongly agree

It is more cost efficient to sentence a murderer to death rather than to life imprisonment.

- 1 2 3 4 5 6 7 8 9
- Strongly disagree Strongly agree

The death penalty should be used more often than it is.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

There are some murderers whose death would give me a sense of personal satisfaction.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

There is no such thing as a sentence that truly means "life without parole."

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

The desire for revenge is a legitimate reason for favoring the death penalty.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

Executing a murderer is less expensive than keeping him in jail for the rest of his life.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

The death penalty does not deter other murderers.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

No matter what crime a person has committed executing them is a cruel punishment.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

Even when a murderer gets a sentence of life without parole, he usually gets out on parole.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

I think the death penalty is necessary.

1 2 3 4 5 6 7 8 9
 Strongly disagree Strongly agree

The death penalty makes criminals think twice before committing murder.

1 2 3 4 5 6 7 8 9

Strongly disagree Strongly agree

Society has a right to get revenge when murder has been committed.

1 2 3 4 5 6 7 8 9

Strongly disagree Strongly agree

For each of the statements below, please indicate whether or not the statement is characteristic of you or of what you believe. For example, if the statement is extremely uncharacteristic of you or of what you believe about yourself (not at all like you) please place a "1" on the line to the left of the statement. If the statement is extremely characteristic of you or of what you believe about yourself (very much like you) please place a "5" on the line to the left of the statement. You should use the following scale as you rate each of the statements below.

1	2	3	4	5
extremely uncharacteristic of me	somewhat uncharacteristic of me	uncertain	somewhat characteristic of me	extremely characteristic of me

- _____ If I reflect on my past, I see that I tend to be afraid of feeling emotions.
- _____ I prefer complex to simple problems.
- _____ I like to dwell on my emotions.
- _____ I have trouble telling the people close to me that I love them.
- _____ I like to have the responsibility of handling a situation that requires a lot of thinking.
- _____ I wish I could feel less emotion.
- _____ I feel that I need to experience strong emotions regularly.
- _____ Thinking is not my idea of fun.
- _____ Avoiding emotional events helps me sleep better at night.
- _____ Emotions help people get along in life.
- _____ I would rather do something that requires little thought than something that is sure to challenge my thinking abilities.
- _____ I am sometimes afraid of how I might act if I become too emotional.
- _____ I am a very emotional person.
- _____ I try to anticipate and avoid situations where there is a likely chance I will have to think in depth about something.
- _____ I feel like I need a good cry every now and then.
- _____ I think that it is important to explore my feelings.
- _____ I find satisfaction in deliberating hard and for long hours.

- _____ I would love to be like “Mr. Spock,” who is totally logical and experiences little emotion.
- _____ I approach situations in which I expect to experience strong emotions.
- _____ I only think as hard as I have to.
- _____ I like decorating my bedroom with a lot of pictures and posters of things emotionally significant to me.
- _____ I find strong emotions overwhelming and therefore try to avoid them.
- _____ I prefer to think about small daily projects to long term ones.
- _____ I would prefer not to experience either the lows or highs of emotion.
- _____ I like tasks that require little thought once I’ve learned them.
- _____ I do not know how to handle my emotions, so I avoid them.
- _____ The idea of relying on thought to make my way to the top appeals to me.
- _____ Emotions are dangerous—they tend to get me into situations that I would rather avoid.
- _____ I really enjoy a task that involves coming up with new solutions to problems.
- _____ Acting on one’s emotions is always a mistake.
- _____ Learning new ways to think doesn’t excite me very much.
- _____ We should indulge our emotions.
- _____ I prefer my life to be filled with puzzles I must solve.
- _____ Displays of emotion are embarrassing.
- _____ The notion of thinking abstractly is appealing to me.
- _____ Strong emotions are generally beneficial.
- _____ I would prefer a task that is intellectual, difficult, and important to one that is somewhat important but does not require much thought.
- _____ People can function most effectively when they are not experiencing strong emotions.
- _____ I feel relief rather than satisfaction after completing a task that requires a lot of mental effort.
- _____ The experience of emotions promotes human survival.
- _____ It’s enough for me that something gets the job done; I don’t care how or why it works.
- _____ It is important for me to be in touch with my feelings.
- _____ I usually end up deliberating about issues even when they do not affect me personally.
- _____ It is important for me to know how others are feeling.

APPENDIX C

TRIAL SIMULATION MATERIALS

SUMMARY OF GUILT PHASE IN THE CASE OF:

State v. Humphries, 325 S.C. 28, 479 S.E.2d 52, 53 (1996)

On the morning of January 1st, 1994 Shawn Paul Humphries, then age 22, and Eddie Blackwell, then age 19, had been drinking beer when they decided to rob a convenience store, owned and operated by Mendal “Dickie” Smith. Upon entering Smith’s store, Humphries revealed a stolen gun, and demanded Smith’s money. Smith reached under the counter, appearing to grab a stored gun; Humphries responded by firing one fatal shot at Smith. On August 5th, 1994, Humphries was charged with attempted armed robbery, possession of a firearm during the commission of a violent crime, criminal conspiracy, and the murder of “Dickie” Smith. The events of the crime were captured by the store’s surveillance camera.

As a result of reading the facts of the case, do you find Shawn Paul Humphries guilty or not guilty of the murder of “Dickie” Smith?

Not Guilty [1]

Guilty [2]

PRE-SENTENCING PHASE JUDGE'S INSTRUCTION

Ladies and Gentlemen/Members of the Jury: As a juror in the sentencing phase of the capital trial of Shawn Paul Humphries, you will hear evidence from both the Prosecution and the Defense. After you have heard evidence from each side, you will be asked to recommend a sentence of either life in prison without parole, or death by lethal injection. "Murder" is the killing of any person with malice aforethought, either express or implied. When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. A separate sentencing proceeding is conducted to determine whether sentence should be death or life imprisonment. In this proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. In this sentencing proceeding, you will hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial has been deemed admissible. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed. At the close of this proceeding, I will instruct you on the law in this case and the application of aggravating and mitigating circumstances to your recommendation of a sentence of either life in prison without parole, or death by lethal injection.

OPENING STATEMENT: PROSECUTION

Ladies and Gentlemen of the jury, it is your duty today to decide upon the appropriate sentence for the defendant, Shawn Paul Humphries. The sentencing decision before you is certainly a difficult one; you must determine which penalty is the appropriate sentence for this crime: life imprisonment without parole, or the death penalty by lethal injection. This decision must be based upon the careful consideration of aggravating and mitigating circumstances. The jury has already found the defendant guilty of first-degree murder of the victim in the course of a robbery with a deadly weapon. The prosecution will present evidence that the murder of the victim was premeditated. I trust that after hearing the evidence presented today, you will arrive at the only appropriate sentence for this defendant – death by lethal injection. Thank you.

OPENING STATEMENT: DEFENSE

Members of the jury, today you will hear testimony from two witnesses who spent considerable time with the defendant, Shawn Paul Humphries. These two witnesses are here today to speak on behalf of the defendant, and to

inform the jury of grounds for you to spare his life. In determining which penalty is appropriate for Shawn Paul Humphries, you are permitted to identify any aspect of the defendant, or his background, which may lead you to recommend a sentence of life imprisonment. You may hear evidence from the witnesses regarding the defendant's troubled life or social value. This is considered appropriate evidence for you to consider in favor of a life sentence. I am confident that the testimony presented today will lead you to recommend the appropriate sentence – life imprisonment without parole. Thank you.

PROSECUTION WITNESS ONE: DENNIS CONWAY

Prosecutor: I call my first witness to the stand, the arresting officer. Please state your full name for the court.

Witness: My name is Officer Dennis Conway and I have been with the city police force for almost ten years.

Prosecutor: How are you involved in the case at hand?

Witness: I was the first to respond on the morning of January 1st, 1994 when I received the call that there was robbery in progress at Dickie Smith's convenience store. Dickie Smith had been shot in the course of the robbery.

Prosecutor: Can you describe for the court the circumstances surrounding the crime?

Witness: After I had arrested Shawn Paul Humphries, and read him his rights, he said, "Someone's gonna get it tonight." There was quite a bit of noise and I wasn't sure I heard him correctly, so I asked him to repeat what he just said.

Prosecutor: And he repeated himself.

Witness: Correct.

Prosecutor: What did he say again?

Witness: He said, "Someone's gonna get it tonight."

Prosecutor: Thank you for your testimony.

VICTIM IMPACT WITNESS ONE: LARRY MARTINS

Judge: The court calls Larry Martins to the stand; you may now read your written statement.

Witness: My name is Larry Martins, I am the victim's cousin. The defendant murdered my cousin while he was working at the convenience store he owned. My cousin Dickie and I were very close; we were like brothers. We did everything together. Dickie was a real athlete when he was younger. I have so many fond memories of us playing sports together. He used to beat me at every sport growing up. As adults we still had fun challenging each other to a basketball game or some street hockey on the weekend. Even though Dickie always won, he always showed humility and was never a bragger. Since I have been married and started raising a family, Dickie has always been welcome at my home. I would frequently invite Dickie over to barbeque at my house. Dickie was famous for his barbeque recipe. Many things Dickie and I did together will never be the same now that he is gone. It will be too painful to go back on the basketball court without my cousin. Dickie was always there for me. I just don't think I could enjoy our old interests alone. And the family barbeques will definitely not be the same; his presence will be greatly missed.

Judge: Thank you for your testimony today.

VICTIM IMPACT WITNESS TWO: SUSAN FELDMAN

Judge: The court calls Susan Feldman to the stand; you may now read your written statement.

Witness: My name is Susan Feldman. I lived next door to the victim, Dickie Smith, prior to this unfortunate event. After the incident a police officer came to my house and notified me that Dickie had been murdered while working. Dickie was a very friendly and generous neighbor. We came to know each other quite well; we lived next door to one another for over ten years. We were both avid gardeners; we would often share gardening tips and exchange vegetables, or other things we had grown in our gardens. He would always invite me over to his cousin's family barbecues. Since I live alone, I always appreciated having such a cordial neighbor. I will definitely miss his company. Gardening will always remind me of warm memories of Dickie, but it will also bring me some sadness.

Judge: Thank you for your testimony today.

DEFENSE WITNESS ONE: ANGELA CRAWFORD (Statutory Mitigator – age)

Defense Attorney: I call my first witness to the stand. Please state your full name for the court.

Witness: My name is Angela Crawford.

Defense Attorney: How do you know the defendant?

Witness: I have been a community based youth counselor for the last fifteen years. Shawn Paul Humphries was one of my clients for several years.

Defense Attorney: Can you describe what type of community member he is?

Witness: Shawn was a reserved young man. In our meetings he was always polite, although he sometimes seemed a little uncomfortable when I ask him to discuss personal problems.

Defense Attorney: Can you describe for the Court the circumstances surrounding the crime?

Witness: At the time Shawn committed the crime he was an inexperienced young man and was somewhat immature. Additionally, Shawn had no significant history of violent crime prior to this crime.

Defense Attorney: How is it that you would have knowledge of this information?

Witness: Due to the nature of our work at the Center, it is mandatory that I look into this before meeting with my clients.

Defense Attorney: How do you specifically look into this?

Witness: I check with the local probation office. They do not release any specific information. I simply asked if there were any record of any significant history of violent crime for Shawn. I was told there was not.

Defense Attorney: Thank you for your testimony.

DEFENSE WITNESS TWO: JOSEPH GLENN
(TROUBLED LIFE MITIGATION)

Defense Attorney: I call my first witness to the stand, the cousin of the defendant. Please state your full name for the court.

Witness: My name is Joseph Glenn.

Defense Attorney: How are you acquainted with the defendant?

Witness: I am the defendant's cousin.

Defense Attorney: Are you aware of the crime your cousin has been convicted of?

Witness: Yes, my cousin was convicted of the murder of the convenience store owner, Mr. Smith.

Defense Attorney: Were you and your cousin close?

Witness: Yes, we were very close. We were raised as if we were siblings and spent most of our childhood together. We remained close into adulthood. Shawn came from a very troubled home-life, and he spent a lot of time at my house.

Defense Attorney: Can you explain what you mean by troubled home-life?

Witness: Well, my aunt and uncle had a lot of problems with their marriage, stemming from my uncle's alcohol abuse. Unfortunately he didn't give a lot of attention to give Shawn, unless it was to scream at him or hit him. My uncle always drank after work, and he had no control of his temper. When he was drunk he was verbally and physically abusive toward my aunt, and toward Shawn if he tried to stop the fight or intervene. Because his parents fought so much, Shawn and I spent a lot of time together after school.

Defense Attorney: Can you describe to the court some of the activities you and your cousin recently enjoyed?

Witness: Shawn and I go camping most weekends, especially when the weather is nice. During the day we fish out on the lake. At night we build a fire, and invite a few old friends over. Shawn and I also share a passion for cars. We would often fix up older cars and go to auto shows when they came to town.

Defense Attorney: Will you still enjoy these activities without your cousin?

Witness: No, I would not be able to go camping or work on cars without him. It would be very painful for me to do the things we loved doing together without him there. He is like an older brother to me; I will miss him very much if he is not around.

Defense Attorney: Thank you for testifying on your cousin's behalf.

DEFENSE WITNESS THREE: PATRICIA WILLIAMS
(TROUBLED LIFE MITIGATION)

Defense Attorney: I call my second witness to the stand, the guidance counselor of the defendant. Please state your full name for the court.

Witness: My name is Patricia Williams.

Defense Attorney: How are you acquainted with the defendant?

Witness: For the last fifteen years I have been employed as a guidance counselor at the local high school; Shawn was one of my students.

Defense Attorney: Are you aware of the crime your prior student was convicted of?

Witness: Yes, I read in the newspaper that Shawn was convicted of the murder of Mr. Smith.

Defense Attorney: How well do you know the defendant?

Witness: Shawn and I spoke frequently. The school requires every student to meet their guidance counselor twice a year, but Shawn would usually come to my office once or twice a week.

Defense Attorney: Can you describe to the jury what typically takes place during your meetings with Shawn?

Witness: Well, Shawn usually talked to me about disciplinary problems he experienced at school. He had a lot of anger toward the school administration because the principle reprimanded him so often. It seemed that Shawn could barely get through a school day without somehow getting the principle's attention. The principle never seemed to notice Shawn's efforts to comply with school rules, but disciplined him for every mistake.

Defense Attorney: Can you describe an instance when Shawn was disciplined by the principle?

Witness: Shawn received detention afterschool so often, it didn't seem to bother him by his second year. However, when the principle suspended Shawn during his third year, for a fight Shawn insisted was not his fault, Shawn became furious with the school administration. I explained the school's zero-tolerance violence policy – both students involved are suspended regardless of who claims to be responsible. After that incident, Shawn's attitude toward school took a downward spiral.

Defense Attorney: Thank you for your testimony today.

DEFENSE ATTORNEY CLOSING ARGUMENT

Good afternoon ladies and gentlemen of the jury. Today you have a difficult task before you – you must recommend a sentence for the defendant, Shawn Paul Humphries. Shawn Paul Humphries has been convicted of the murder of Mendal "Dickie" Smith, and it is your job to decide whether life imprisonment or death by lethal injection is the most appropriate punishment. You have read testimony from individuals who are close to the defendant. His cousin Joseph Glenn, and his guidance counselor Patricia Williams each offered testimony regarding aspects of the defendant's life. Their testimony describes the defendant as having been affected by circumstances in life as well as having an impact on the lives of the people he knew. Shawn Paul Humphries is a productive member of the community who reaches out and is quick to help others. However, as a result of his actions, this defendant has hurt himself as well as many others around him. This is not about whether the defendant will be excused. There is no excuse for what Shawn Humphries did. Nothing excuses or justifies his crime. When you consider mitigating evidence it isn't to excuse or justify. He is responsible for what he did. That's why we are here, at the point of sentencing. Mitigating evidence is offered to help you understand what he did, not to excuse or justify it. We learn about the place of mercy and compassion. Here the law makes room for mercy and compassion. We are proud of our law because it allows us to show mercy. There are two mitigating circumstances to this crime you are allowed to consider: The defendant has no significant history of prior criminal conviction involving the use of violence against another person; and the age or mentality of the defendant at the time of the crime. In addition, if you find anything about Shawn Humphries' life and background that makes him worthy of not being killed – If anything merits mercy whether you've heard it or not, you can vote for life in prison rather than death. So ladies and gentlemen, now that you are familiar with my points on this position, I ask, on behalf of the defense, that you put Shawn in prison for the rest of his natural life. Truly, that is not a pleasant thing either. However, it is the only choice that we believe is appropriate in this case. Thank you.

PROSECUTOR CLOSING ARGUMENT (NO OBJECTION)

Shawn Paul Humphries comes into this courtroom asking you for mercy. I ask you what mercy did he give the victim - None. Shawn Paul Humphries comes in here and asks you for life, and he gave death. Is that fair? Is that justice? You have the right to look at the uniqueness of the individual when deciding this case and I would submit to you that Dickie Smith, by everybody's description to you was a unique individual. In 1984 Dickie Smith met his wife, and they fell in love, and they got married. In 1986, Dickie Smith starts building homes in the community he had grown up in. Then in 1988, the victim and his wife have a little baby girl. And in the spring of 1992, DickieSmith, opens the doors to his new company, building a business – helping to sustain a community. Dickie Smith had values; x everyone in the community felt his values. *I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the life of Dickie Smith is worth, but nevertheless it is a question of values. What is the life of this victim worth? (CW1) Is it worth the life of this man, this killer? When you look at a case like this, when you look at the aggravation, when you look at the total lack of mitigation, I would submit, when you look at the character of this Defendant, and when you look at Dickie Smith, you will realize that the reason we have the death penalty is because the right of the innocent people to live outweighs the right of the guilty not to die. Whose life is more important to you? Whose life has more value – the defendant's or the victim's? (CW1) When you decide this case you look a number of things: You look at the*

aggravating circumstances in the case – murder with robbery and premeditation. We have established that. You look at any mitigating factors the defense has presented to you. And the last thing you look at is the victim, his uniqueness and the suffering to the victim’s family that this defendant caused? Those are the four things you look at. What punishment do you recommend when a man is defending his store, he’s defending what he has built? What punishment do you recommend when someone like Dickie Smith is taken from us. Justice – that’s what you are here for. It’s up to you. *If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than the victim's. I urge you to assign the defendant his value on the basis that he committed an aggravated murder. He should be found less valuable because he is a convicted killer (CW1)*

PROSECUTOR CLOSING ARGUMENT
(OBJECTION OVERRULED)

Shawn Paul Humphries comes into this courtroom asking you for mercy. I ask you what mercy did he give the victim - None. Shawn Paul Humphries comes in here and asks you for life, and he gave death. Is that fair? Is that justice? You have the right to look at the uniqueness of the individual when deciding this case and I would submit to you that Dickie Smith, by everybody's description to you was a unique individual. In 1984 Dickie Smith met his wife, and they fell in love, and they got married. In 1986, Dickie Smith starts building homes in the community he had grown up in. Then in 1988, the victim and his wife have a little baby girl. And in the spring of 1992, Dickie Smith, opens the doors to his new company, building a business – helping to sustain a community. Dickie Smith had values; x everyone in the community felt his values. I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the life of Dickie Smith is worth, but nevertheless it is a question of values. What is the life of this victim worth? Is it worth the life of this man, this killer?

Defense Attorney: Your Honor, I object to the Prosecutor’s line of argument on the grounds that it is an improper extension of *Payne v. Tennessee*.

Judge: The objection is overruled. Counselor, you may continue.

When you look at a case like this, when you look at the aggravation, when you look at the total lack of mitigation, I would submit, when you look at the character of this Defendant, and when you look at Dickie Smith, you will realize that the reason we have the death penalty is because the right of the innocent people to live outweighs the right of the guilty not to die. Whose life is more important to you? Whose life has more value – the defendant's or the victim's? When you decide this case you look a number of things: You look at the aggravating circumstances in the case – murder with robbery and premeditation. We have established that. You look at any mitigating factors the defense has presented to you. And the last thing you look at is the victim, his uniqueness and the suffering to the victim’s family that this defendant caused? Those are the four things you look at. What punishment do you recommend when a man is defending his store, he’s defending what he has built? What punishment do you recommend when someone like Dickie Smith is taken from us. Justice – that’s what you are here for. It’s up to you. If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than the victim's. I urge you to assign the defendant his value on the basis that he committed an aggravated murder. He should be found less valuable because he is a convicted killer.

PROSECUTOR CLOSING ARGUMENT
(OBJECTION SUSTAINED)

Shawn Paul Humphries comes into this courtroom asking you for mercy. I ask you what mercy did he give the victim - None. Shawn Paul Humphries comes in here and asks you for life, and he gave death. Is that fair? Is that justice? You have the right to look at the uniqueness of the individual when deciding this case and I would submit to you that Dickie Smith, by everybody's description to you was a unique individual. In 1984 Dickie Smith met his wife, and they fell in love, and they got married. In 1986, Dickie Smith starts building homes in the community he had grown up in. Then in 1988, the victim and his wife have a little baby girl. And in the spring of 1992, Dickie Smith, opens the doors to his new company, building a business – helping to sustain a community. Dickie Smith had values; x everyone in the community felt his values. I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the life of Dickie Smith is worth, but nevertheless it is a question of values. What is the life of this victim worth? Is it worth the life of this man, this

killer?

Defense Attorney: Your Honor, I object to the Prosecutor's line of argument on the grounds that it is an improper extension of *Payne v. Tennessee*.

Judge: The objection is sustained.

When you look at a case like this, when you look at the aggravation, when you look at the total lack of mitigation, I would submit, when you look at the character of this Defendant, and when you look at Dickie Smith, you will realize that the reason we have the death penalty is because the right of the innocent people to live outweighs the right of the guilty not to die. Whose life is more important to you? Whose life has more value – the defendant's or the victim's? When you decide this case you look a number of things: You look at the aggravating circumstances in the case – murder with robbery and premeditation. We have established that. You look at any mitigating factors the defense has presented to you. And the last thing you look at is the victim, his uniqueness and the suffering to the victim's family that this defendant caused? Those are the four things you look at. What punishment do you recommend when a man is defending his store, he's defending what he has built? What punishment do you recommend when someone like Dickie Smith is taken from us. Justice – that's what you are here for. It's up to you. If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than the victim's. I urge you to assign the defendant his value on the basis that he committed an aggravated murder. He should be found less valuable because he is a convicted killer.

PROSECUTOR CLOSING ARGUMENT
(OBJECTION SUSTAINED WITH INSTRUCTION)

Shawn Paul Humphries comes into this courtroom asking you for mercy. I ask you what mercy did he give the victim - None. Shawn Paul Humphries comes in here and asks you for life, and he gave death. Is that fair? Is that justice? You have the right to look at the uniqueness of the individual when deciding this case and I would submit to you that Dickie Smith, by everybody's description to you was a unique individual. In 1984 Dickie Smith met his wife, and they fell in love, and they got married. In 1986, Dickie Smith starts building homes in the community he had grown up in. Then in 1988, the victim and his wife have a little baby girl. And in the spring of 1992, Dickie Smith, opens the doors to his new company, building a business – helping to sustain a community. Dickie Smith had values; x everyone in the community felt his values. I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the life of Dickie Smith is worth, but nevertheless it is a question of values. What is the life of this victim worth? Is it worth the life of this man, this killer?

Defense Attorney: Your Honor, I object to the Prosecutor's line of argument on the grounds that it is an improper extension of *Payne v. Tennessee*.

Judge: The objection is sustained. Ladies and gentlemen of the jury, there was an objection by the Defense to the Prosecutor's line of argument, which was sustained. Closing arguments are not evidence for your consideration. In his closing argument, the prosecutor has made several statements comparing the worth of the defendant's life with that of his victim or comparing the way in which the defendant and the victim lived their lives. This line of argument is inflammatory. Consider the case as though this line of argument was not expressed.

When you look at a case like this, when you look at the aggravation, when you look at the total lack of mitigation, I would submit, when you look at the character of this Defendant, and when you look at Dickie Smith, you will realize that the reason we have the death penalty is because the right of the innocent people to live outweighs the right of the guilty not to die. Whose life is more important to you? Whose life has more value – the defendant's or the victim's? When you decide this case you look a number of things: You look at the aggravating circumstances in the case – murder with robbery and premeditation. We have established that. You look at any mitigating factors the defense has presented to you. And the last thing you look at is the victim, his uniqueness and the suffering to the victim's family that this defendant caused? Those are the four things you look at. What punishment do you recommend when a man is defending his store, he's defending what he has built? What punishment do you recommend when someone like Dickie Smith is taken from us. Justice – that's what you are here for. It's up to you. If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than

the victim's. I urge you to assign the defendant his value on the basis that he committed an aggravated murder. He should be found less valuable because he is a convicted killer.

PRE-DELIBERATION JUDGE'S INSTRUCTION

Ladies and Gentlemen/Members of the jury: Now that you have heard the testimony and the arguments of the lawyers, it is my duty to instruct you on the law that applies to this case. It is your duty to accept the rules of law as I give them to you whether you agree with them or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathies in forming your decision. In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. And you must not read into these instructions or into anything I may have said or done any suggestion as to what verdict you should return - that is a matter entirely for you to decide. The evidence from which you are to decide what the facts are consists of: (1) the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witnesses; (2) the existence of aggravating and mitigating circumstances in the case. In reaching your verdict, you may consider only the testimony received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list these things for you: arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their opening statements and closing arguments is intended to help you interpret the evidence, but it is not evidence. You must also decide the credibility of witnesses and which testimony you will believe. You are the sole judges of the credibility, or believability, of each witness. You may believe all or any part or nothing of what a witness said while on the stand. In determining whether to believe any witness, you should apply the same tests of truthfulness that you apply in your own everyday affairs. All of these are matters for you to consider in finding the facts.

“Murder” is the killing of any person with malice aforethought, either express or implied. When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. A separate sentencing proceeding is conducted to determine whether sentence should be death or life imprisonment. You have just heard the prosecution and defense

opening statements, testimony from their witnesses, and each of their closing arguments in this case. If you have found, during this proceeding, the existence of a statutory aggravating circumstance the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.

The jury shall consider mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances, which may be supported by the evidence:

Statutory aggravating circumstances:

- (1) The murder was committed while in the commission of a robbery while armed with a deadly weapon.
- (2) The defendant committed the murder after substantial planning and premeditation.

Mitigating circumstances:

- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
- (2) The age or mentality of the defendant at the time of the crime.
- (3) Any other mitigating matter concerning the background, character, or record of the defendant or the circumstances of his offense including evidence of a troubled life and evidence of the value of his life.

The statutory aggravating circumstance or circumstances, must be found beyond a reasonable doubt.

Unless at least one statutory aggravating circumstance is found, the death penalty must not be imposed.

The prosecution has introduced what is known as victim impact evidence. Victim impact evidence is not the same as evidence of a statutory aggravating circumstance. Introduction of victim impact evidence does not relieve the state of its burden to prove beyond a reasonable doubt the existence of a statutory aggravating circumstance. This evidence is simply another method of informing you about the harm caused by the crime in question. To the extent that you find that this evidence reflects on the defendant's culpability, you may consider it, but you may not use it as a substitute for proof beyond a reasonable doubt of the existence of a statutory aggravating circumstance and limit the scope of the evidence presented.

APPENDIX D

POST-TRIAL JUROR QUESTIONNAIRE

Please place a check in the box that corresponds with your response.

Please recommend a sentence for the defendant in this case.

- Life in prison [1]
- Death by lethal injection [2]

Please circle the number that corresponds most closely to how you feel.

How confident are you of your sentencing recommendation?

1 2 3 4 5 6 7 8

Not at all confident Completely confident

Using the following scale, please record the number that reflects your credibility rating of each person listed.

1 2 3 4 5 6 7 8

Not at all credible Completely credible

- Prosecutor’s first witness, Dennis Conway _____
- Prosecutor’s second witness, Larry Martins _____
- Prosecutor’s third witness, Susan Feldman _____
- Defense’s first witness, Angela Crawford _____
- Defense’s second witness, Joseph Glenn _____
- Defense’s third witness, Patricia Williams _____
- The Prosecutor _____
- The Defense Attorney _____

Please circle the number that corresponds most closely to how you feel.

Based on the testimony, how troubled was the defendant’s life?

1 2 3 4 5 6 7 8

Not at all troubled Completely troubled

Based on the testimony, how valuable was the defendant to society?

1 2 3 4 5 6 7 8

Not at all valuable Completely valuable

Based on the testimony, to what extent do you believe the victim’s death was a unique loss to his family?

1	2	3	4	5	6	7	8
Not at all a unique loss				An extremely unique loss			

How seriously did you take your role as a juror in this case?

1	2	3	4	5	6	7	8
Not at all serious				Completely serious			

Circle the number that most closely matches how much you weighed each statement in reaching your sentencing decision.

“Shawn Paul Humphries is a productive member of the community who reaches out and is quick to help others.”

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

“If you find anything about Shawn Humphries’ life and background that makes him worthy of not being killed – If anything merits mercy whether you’ve heard it or not, you can vote for life in prison rather than death.”

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

“I am talking about values, because a jury verdict is a statement of values. And I am not talking about dollars and cents as far as what the life of Dickie Smith is worth, but nevertheless it is a question of values. What is the life of this victim worth? Is it worth the life of this man, this killer?”

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

“The reason we have the death penalty is because the right of the innocent people to live outweighs the right of the guilty not to die. Whose life is more important to you? Whose life has more value? The defendant's or the victim's?”

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

“If you let this murderer walk out of this courtroom with his life then you are saying that his life is worth more than the victim's. I urge you to assign the defendant his value on the basis that he committed an aggravated murder. He should be found less valuable because he is a convicted killer.”

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

“And the last thing you look at is the suffering to the victim’s family that this defendant caused.”

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

The murder was committed while in the commission of a robbery while armed with a deadly weapon.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

The defendant committed the murder after substantial planning and premeditation.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

The harm caused by the crime in question.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

The age or mentality of the defendant at the time of crime.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

Testimony that described the defendant as having a troubled life.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

Testimony that described the defendant has having a valued life.

1	2	3	4	5	6	7
Weighed in favor of life			Did not weigh in decision		Weighed in favor of death	

Please circle the number that corresponds most closely to how you feel.

How important is it for jurors to disregard inadmissible evidence in reaching sentence?

1	2	3	4	5	6	7
Unimportant					Important	

How important is it to make an accurate sentencing decision, regardless of court rules or technicalities?

1	2	3	4	5	6	7
Unimportant					Important	

How important is it to see that due process (i.e. following rules and procedures) was carried out in determining sentence?

1	2	3	4	5	6	7
Unimportant						Important

Please place a check in the box that corresponds to the appropriate response.

When a judge overrules an attorney’s objection to evidence, which of the following is correct?

- The evidence is proper for the jury to consider [1]
- The evidence is improper for the jury to consider [2]

When a judge sustains an attorney’s objection to evidence, which of the following is correct?

- The evidence is proper for the jury to consider [1]
- The evidence is improper for the jury to consider [2]

If the defense attorney objected, how did the judge respond?

- The judge overruled the defense attorney’s objection [1]
- The judge sustained the defense attorney’s objection [2]
- The judge sustained the defense attorney’s objection and instructed the jury [3]
- The defense attorney did not object [4]

Please indicate whether or not the judge made the following statements in his instructions to the jury:

If you have found, during this proceeding, the existence of a statutory aggravating circumstance the defendant must be sentenced to death.

- The judge made this statement in his instructions to the jury [1]
- The judge did not make this statement in his instructions to the jury [2]

If you have found, during this proceeding, the existence of a statutory aggravating circumstance the defendant must be sentenced to either life imprisonment or death.

- The judge made this statement in his instructions to the jury [1]
- The judge did not make this statement in his instructions to the jury [2]

If you have found, during this proceeding, the existence of a statutory aggravating circumstance the defendant must be sentenced to life imprisonment.

- The judge made this statement in his instructions to the jury [1]
- The judge did not make this statement in his instructions to the jury [2]

If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.

- The judge made this statement in his instructions to the jury [1]
- The judge did not make this statement in his instructions to the jury [2]

Victim impact evidence may be substituted for the existence of an aggravating circumstance in the case.

- The judge made this statement in his instructions to the jury [1]
- The judge did not make this statement in his instructions to the jury [2]

This scale consists of a number of words and phrases that describe different feelings and emotions. Read each item and mark the appropriate answer in the space next to that word. Indicate to what extent you feel this way right now. Use the following scale to record your answers:

1	2	3	4	5
<i>very slightly or not at all</i>	<i>a little</i>	<i>moderately</i>	<i>quite a bit</i>	<i>extremely</i>

- | | |
|---|---|
| <p>_____ attentive</p> <p>_____ irritable</p> <p>_____ afraid</p> <p>_____ upset</p> <p>_____ guilty</p> <p>_____ excited</p> <p>_____ proud</p> <p>_____ ashamed</p> <p>_____ enthusiastic</p> <p>_____ determined</p> | <p>_____ strong</p> <p>_____ inspired</p> <p>_____ alert</p> <p>_____ active</p> <p>_____ nervous</p> <p>_____ hostile</p> <p>_____ jittery</p> <p>_____ scared</p> <p>_____ distressed</p> <p>_____ interested</p> |
|---|---|

Using the following scale, please indicate to what extent you think people should be concerned about the following victims.

	1	2	3	4	5	
	Not at all concerned			Extremely concerned		
Victims of kidnapping	_____					Murder Victims _____
Sexual Assault victims	_____					Female victims _____
Victims of violent assault	_____					Victims of child molestation _____
Child Victims	_____					Rape Victims _____
Victims of domestic assault	_____					Victims of hate crimes _____

Appendix E
Debriefing Sheet

We appreciate your participation in our study on juror perceptions. The responses you provided will be used to examine effects of the prosecutor's statements on sentencing decisions in capital cases. For additional information about confession evidence, the following is an excellent resource:

Platania, J., & Moran, G. (1999). Due process and the death penalty: The role of prosecutorial misconduct in closing argument in capital trials. *Law and Human Behavior, 23*, 471-486.

If you have any concerns regarding this study, please feel free to contact Dr. Judith Platania in the Feinstein College of Arts and Sciences Building Office 104, via e-mail at jplatania@rwu.edu or at 401-254-5738. Thank you for your participation. *If you are experiencing stress and need assistance, please contact the Roger Williams University Counseling Center at (401) 254-3124.