

Public Law Research Institute Report:

Ambiguities in the Penalty Phase of Capital Proceedings: Statutory Patterns and Suggestions for California

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SUMMARY

Sentencing a defendant to death for a capital crime is perhaps the most significant decision a juror can make. States where jurors may impose the death penalty have constructed guidelines to assist the jury in the decision-making process. These guidelines, however, are often insufficient and even confusing. From the manner in which guidelines are presented to the jury to the wording of the instructions themselves, ambiguities in state capital statutes and jury instructions pervade the sentencing phase of a capital trial.

Although state legislatures do not intend that jurors have complete discretion in the sentencing phase of a capital trial, states' failures to adequately guide juries in this profound decision effectively force jurors to divine legislative intent from the jury instructions. This ambiguity contributes to random imposition of death sentences.

The ambiguities in the California death penalty instructions are similar to those in other states' instructions. Most death penalty states use similar instructions and, consequently, ambiguities in instructions are often consistent from state to state. This paper examines other states' statutes and instructions and compares them to the California framework. This comparison highlights areas of particular ambiguity and identifies alternatives to improve the California statute and instructions.

Areas of particular ambiguity include linguistic ambiguities, where the language itself can be misconstrued by jurors, and structural ambiguities, where the process itself may cloud jurors' ability to make clear sentencing decisions. Suggestions that address linguistic ambiguities include changing the wording of some of the mitigating and aggravating sentencing factors upon which jurors are to base their sentencing decision, and adding definitional information to the instructions. Structural ambiguity suggestions derived from analyzing the process in other states include clearly identifying which factors may be used as aggravating and mitigating, providing jurors with information about the purpose of the death penalty, and making jurors feel more responsible for their decision by requiring individual jurors to fill out form verdicts.

I. INTRODUCTION AND HISTORICAL CONTEXT

Overview

Thirty-eight states [No. 1] now impose the death penalty for capital crimes. These states provide varying degrees of direction to the sentencing authority [No. 2] in their statutes and jury instructions. This paper addresses ambiguities the sentencing authority faces in

the penalty phase of a capital proceeding.

*Many different variables affect the outcome of a death penalty proceeding, including: (1) the language and structure of the statute; (2) the discretion of the prosecutor to bring a death penalty case; (3) a jury's particular composition and predilections [No. 3]; (4) the structure of the guilt phase of the proceeding; (5) the instructions provided to the jury; and (6) whether the same jurors hear the evidence in the guilt and penalty phases of the proceeding. The more time the authors spent researching this subject, the clearer it became that to treat only one or two of these variables in isolation would illuminate only a part of the death penalty process. Time and resource constraints, however, limited the analysis to the **statutory framework and jury instructions in the penalty phase of the proceeding**. Significant further research would be necessary to evaluate the impact of the other variables on the process. [No. 4]*

We had hoped to include in this analysis a statistical examination of how often juries return a death penalty sentence when one is requested by a prosecutor and correlate that information with variations in the statutes and instructions. Straight imposition rates mask this figure since they reflect results of stays, appeals and substantial time lags. In fact, there are no statistics that compare the number of cases in which the death penalty is sought to those where it is imposed. Furthermore, without (or even with) a change in a statute, it is difficult to track the effect of a law and or jury instructions on outcomes. While we were able to obtain general imposition rate data for the death penalty states (see Appendix D), we were not able to find data linking national capital jury outcomes to variations in the law [No. 5].

The paper contains four sections. Section I provides a historical context for the analysis. Section II summarizes the current California statutory death penalty provisions and jury instructions. Section III identifies patterns in death penalty statutes, highlights the statutes that vary most significantly from the Model Penal Code (MPC) guided discretion format, and compares jury instructions from three sample states to those states' statutory provisions. Section III also compares California's provisions to the different state practices. Finally, Section IV suggests modifications to both the California statute and jury instructions to clarify existing ambiguities.

Structure

Capital offense trials consist of two stages: an eligibility phase and a penalty phase. In the eligibility phase, the jury determines whether the defendant is guilty of a capital crime. In the penalty phase, the jury or judge determines whether the particular defendant should receive the death penalty. In this stage, the sentencer determines whether aggravating and/or mitigating factors exist and whether those factors substantially weigh in favor of or against imposition of the death penalty.

The two phase process can be confusing because most jurisdictions define the "capital crime" eligible for the death penalty through the use of special or aggravating circumstances in the guilt phase and the penalty phase. Aggravating circumstances used in the guilt phase may also be used in the penalty phase in combination with other "special circumstances" to determine whether the death penalty should be imposed. California, for example, uses 20 special circumstances to elevate first degree murder to capital murder in the guilt phase. In the penalty phase, California uses ten factors, which overlap with some of the guilt phase factors, from which a jury can determine whether to impose a death sentence on the defendant.

For purposes of the penalty phase, "aggravating factors," or "aggravating circumstances" are defined as facts about the defendant's record or the offense itself that weigh in favor of imposing a death sentence. [No. 6] "'Mitigating factors,' or 'mitigating circumstances,' are any aspects of a defendant's character, background, record, offense, or any other circumstances proffered by the defendant that, although not constituting excuse or justification for the crime, might serve as a basis for a sentence less than death." [No. 7] For example, in the MPC guided discretion format [No. 8], youth, extreme mental illness, and lack of prior criminal activity are included as mitigating factors.

The United States Supreme Court has held that the Eighth Amendment prohibition against cruel and unusual punishment requires the individualized consideration of mitigating circumstances in death penalty jury deliberations. As a result of the following decisions, mitigating evidence not enumerated in a statute is still available for the jury's consideration. In Lockett v. Ohio, [No. 9] and later in Eddings v. Oklahoma, [No. 10] the Court ruled that all relevant mitigating evidence presented must be admitted and considered by the sentencer in a capital case, even if the mitigating factor is not specifically enumerated in a statute. In Skipper v. South Carolina, [No. 11] the Court stated that the sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [No. 12]

In Penry v. Lynaugh, [No. 13] the Court held that the trial judge must instruct the jury that it may consider evidence of non-statutory mitigating factors presented by the defendant. Recently, in Delo v. Lashley, [No. 14] the Court clarified its position on the presentation of mitigating factor jury instructions, holding that such instructions are constitutionally required only when evidence supporting them is proffered. [No. 15]

Since any relevant mitigating factors must be considered by the capital sentencer, no exclusive list of mitigating factors can be compiled in a statute. There are, however, several common categories of mitigating circumstances addressed by the Supreme Court and the Circuit Courts: minimal participation in the crime, youth, family history, good prison behavior, potential for rehabilitation, mental retardation, lack of significant prior criminal activity, good character, and "any relevant factors." [No. 16]

Historical Background

From its inception, the death penalty has been an evolving issue in America. As of 1965, most of the death penalty states were in the South. The top ten executing states, however, were not in the south: California and New York topped the list. [No. 17] By 1967, death penalty imposition in the United States had been declining for several years. [No. 18]

A central issue in the modern death penalty debate is the amount of guidance provided to juries by death penalty statutes and jury instructions. Prior to 1972, most states' capital statutes left broad discretion to juries. Upon a jury verdict of guilty, for example, many statutes gave the jury absolute discretion to impose a death or prison sentence, without guiding principles or required findings of fact ("total discretion" statutes). It was believed by many that this broad discretion resulted in inconsistent patterns of death sentence imposition. [No. 19]

In 1972, the United States Supreme Court examined a "total discretion" death penalty

statute in Furman v. Georgia. [No. 20] The Court found that the lack of narrowing guidelines in capital statutes produced a random and irrational process which violated the Eighth and Fourteenth Amendments of the United States Constitution. [No. 21] Furman rendered most state death penalty statutes unconstitutional and commuted hundreds of prior death sentences to terms of life imprisonment.

Public opinion did not coalesce with the Supreme Court's findings, and the Furman decision triggered a "legislative backlash" to re-impose state death penalty provisions. [No. 22] Eighteen states responded with mandatory death statutes, which eliminated any discretionary element. This non-discretionary capital statute, with its roots in the English Common law, provided for a mandatory death sentence upon a jury verdict of guilty for specified crimes. Such statutes were declared unconstitutional in Gregg v. Georgia. [No. 23]

Gradually, most states moved toward the Model Penal Code (MPC) "guided discretion" format. [No. 24] The guided discretion format was approved by the Supreme court in Profitt v. Florida, Jurek v. Texas, and Gregg v. Georgia. [No. 25] Now the predominant form for death penalty statutes, the MPC format is followed by California and most other states.

Model Penal Code Format

Of the 37 death penalty states (38 with the recent addition of New York), all but Georgia, Texas and Oregon follow a format similar to the one outlined in the MPC. An overview of the philosophical basis of the MPC provisions follows so that the reader may consider and evaluate variations from the model adopted by different states.

Ironically, the committee members who drafted the Model Penal Code almost unanimously opposed the death penalty. [No. 26] Despite this opposition, the MPC format for the death penalty has influenced existing legislation more dramatically than any other Model Penal Code provision. [No. 27]

The MPC divides murder into several categories. This division limits death penalty eligibility to those crimes classified as first degree murder. Under the MPC definition, first degree murder includes premeditated killing and felony murder. [No. 28]

The MPC death penalty provisions are enumerated in section 210.6. [No. 29] Section 210.6 lists eight aggravating and eight mitigating factors for consideration by a jury. [No. 30] The jury must find at least one listed aggravating factor exists that is "not ... substantially offset" by the presence of mitigating factors. Specific instructions regarding the weight to be accorded individual factors are not provided. The latest MPC commentary states that, "the [United States Supreme] Court has left the Model Code provision as the constitutional model for capital sentencing statutes." [No. 31]

The aggravating and mitigating factors method provides standards absent in the completely discretionary statutes. The MPC commentary states:

As of 1959, none of the statutes authorizing sentence of death for murder provided standards to guide the determination whether to impose that penalty. Discretion always includes the possibility of abuse, and discretion that is neither disciplined nor informed by intelligible standards is all the more likely to be exercised on unacceptable bases. . . . Section 210.6 attempts a more informative delineation of the instances of murder to

which the death penalty should be confined, if its use in any circumstances is admitted. [No. 32]

Many commentators, however, note inherent problems with the MPC guided discretion format. For example, to consider the aggravating factor of "especially heinous," the jury must first define this term. Particular jury panels may define the term differently in a penalty hearing for similar crimes. Another ambiguity problem identified in the MPC format relates to the identification of mitigating circumstances. The MPC format includes the absence of "significant prior criminal activity" as a mitigating circumstance for a jury to consider. It is unclear, however, whether "significant" refers to multiple prior crimes or whether it can include a single prior murder. Also, the code directs the jurors to weigh the lack of prior activity against the circumstances of the current crime. It is unclear how a jury should assign weight to this fact when the charged crime is especially gruesome. [No. 33]

Current Ambiguity Issues

In 1994, the United States Supreme Court re-examined ambiguities in the death penalty sentencing process. In Tuilaepa v. California, two capital defendants challenged the California death penalty statute, claiming that several of the special circumstances considered in death penalty proceedings were unconstitutionally vague. [No. 34] The California Supreme Court, which agreed with the defendants, was reversed by the United States Supreme Court. The Supreme Court held: (1) the California death penalty instruction requiring the jury to consider the "circumstances of the crime" was not unconstitutionally vague; (2) the instruction requiring the jury to consider the defendant's prior criminal activity was not unconstitutionally vague; and (3) the instruction requiring the jury to consider the defendant's age at time of crime was not unconstitutionally vague.

The Court based its analysis on cases decided concurrently with Gregg v. Georgia [No. 35]. In Jurek v. Texas, [No. 36] the Court held that a "factor is not unconstitutional if it has some common sense core of meaning . . . that criminal juries should be capable of understanding." [No. 37] In a companion case, Woodson v. North Carolina, [No. 38] the court found that an aggravating or mitigating factor must only be explained to a jury in an instruction in "understandable terms." [No. 39] Neither of these guidelines clearly delineates the constitutionally required level of specificity.

Although the United States Supreme Court in Tuilaepa found the California statute to be constitutionally permissible, the California Supreme Court's finding of vagueness in the law is significant. At the very least, it indicates there is room to improve the California death penalty sentencing process.

II. CURRENT CALIFORNIA DEATH PENALTY PROVISIONS

Statutory Framework

The California death penalty statute resembles the one originally outlined in the Model Penal Code. A defendant must first be charged with first degree murder with an allegation of at least one special circumstance. A jury must then find the defendant guilty beyond any reasonable doubt, and that at least one special circumstance exist. California lists 20 special circumstances in Penal Code section 190.2. [No. 40] This list of special circumstances in the guilt phase is larger than that of most other death penalty states,

creating a potentially larger "death pool" than in other jurisdictions. [No. 41]

At the conclusion of the guilt phase, the case proceeds to the penalty phase. California provides the jury with 10 factors to consider in determining whether to impose a death sentence in the penalty phase. The jury (either the jury who deliberated during the guilt phase or a separate, penalty-phase jury) considers evidence on the ten factors and any other mitigating factors offered by the defense. [No. 42] Aggravating and mitigating factors are not separately identified. [No. 43]

Jury Instructions

The California death penalty jury instructions mirror the statute. The ten factors the jury evaluates to determine whether the death sentence should be imposed are nearly identical to those outlined in the statute. [No. 44] Mitigating and aggravating factors are not separately identified and the jury is not instructed on how to weigh the factors, other than "you are free to assign whatever moral or sympathetic value you deem appropriate" to the different factors. [No. 45] The final factor instructs the jury that it may consider "any other circumstance which extenuates the gravity of the crime." [No. 46] The instruction further provides that the jury may consider any special circumstance found to be true in the guilt phase. The jury is not instructed on a burden of proof for determining the existence of any factor.

III. PATTERNS AND AMBIGUITIES IN DEATH PENALTY STATUTES

Methodology

This Section analyzes two areas of potential ambiguity in the different state death penalty statutes: **Linguistic** and **Procedural**.

Linguistic ambiguities relate to the wording of each state's death penalty statute. Linguistic ambiguities arise where the language of jury instructions or the statute is subject to multiple interpretations.

Procedural ambiguities relate to the process by which the sentencer decides whether or not to impose the death penalty. For example, a procedural ambiguity exists when the trial court provides little guidance to the jury in how to weigh the mitigating and aggravating factors. Another procedural ambiguity is the failure to categorize factors as either aggravating or mitigating.

Patterns of Ambiguity in Death Penalty Statutes

A. Linguistic Ambiguities

Most death penalty statutes list aggravating and mitigating factors for the sentencing jury to consider in determining whether to impose a death sentence. These factors, however, are often linguistically vague: too much depends upon the sentencer's ability to decipher and interpret the language of the factor. For instance, requiring a jury to evaluate whether the murder was "especially heinous, cruel or depraved," an aggravating circumstance, could apply to a wide variety of circumstances and might apply to any murder in the minds of jurors deliberating on their first death case. [No. 47]

Another example of ambiguous language in death penalty statutes is the aggravating factor of murder done for "pecuniary gain." Most guided discretion statutes include this as

an aggravating factor, yet no statute specifies the amount of money that must be involved for the offense to qualify as one committed for pecuniary gain. Juries are not instructed as to whether the pecuniary gain must be "great" (e.g. \$1,000,000), or insignificant (e.g. \$1). If this factor is not clearly identified as an aggravating factor, a juror could find that an especially large sum actually made the defendant's act of murder more understandable, or at least makes the defendant less deserving of a death sentence.

The term "murder of a 'severely handicapped person,'" an aggravating factor in some jurisdictions, may also create confusion. It is unclear who qualifies as "severely handicapped." Does the term include individuals that are blind or deaf, or those who have AIDS, diabetes or cancer? Is the class of individuals limited to mentally or physically disabled people?

Some states also direct the jury to consider the "emotional state of the defendant" as a mitigating factor, with no further definition or direction. Different juries may have different interpretations of what emotional state is an appropriate mitigating circumstance.

In California, the special factors the capital jury must consider in the penalty phase include "the circumstances of the crime." This term is subject to wide interpretation:

Prosecutors have argued, and juries are free to find, that circumstances of the crime constitute an aggravating factor because the defendant killed the victim for some purportedly aggravating motive, such as money or because the defendant killed the victim for no motive at all; because the defendant killed in cold blood, or in hot blood; because the defendant made the victim endure the terror of anticipating a violent death, or because the defendant killed without any warning. [No. 48]

Neither the California legislature nor the California courts has articulated a limiting construction for "circumstances of the crime." [No. 49]

Other terms in the California statute and jury instruction that are potentially ambiguous include the instruction that the jury consider the "age" of the defendant; and whether the defendant had a "moral justification" for the crime. [No. 50] Like the "circumstances of the crime," these terms are subject to wide interpretation.

B. Structural/Procedural Ambiguities

1. Classification of Aggravating and Mitigating Factors

Thirty-three of the thirty-seven death penalty statutes distinguish aggravating and mitigating circumstances, either by listing them in separate statutes or by placing them within different subsections of the same statute. California, Texas, Georgia and Oregon do not follow this format.

Although the factors are generally separately identified, there is a risk that juries will interpret the absence of a mitigating factor as an aggravating factor. For example, where a defendant's youth or state of intoxication at the time the crime is a listed mitigating factor, a juror may construe a defendant's adult age or sober state as aggravating. [No. 51] Most states do not specify that factors identified as mitigating must not be construed as aggravating.

Nearly all death penalty states require the sentencer to find at least one aggravating factor in order to impose a death sentence. If, however, the jury finds that no aggravating

or mitigating factors exist, it may still impose a prison sentence in most states.

California's statute closely follows the MPC guided discretion format; however, the statute does not label the enumerated circumstances as either "aggravating" or "mitigating." Implicit in California's statute is the assumption that aggravating and mitigating factors are readily distinguishable and amenable to categorization. Yet jurors may view certain mitigating factors as aggravating since the two are not clearly distinguished in the California death penalty jury instructions. [No. 52]

Examples of this lack of categorization exist in the California statute and jury instructions. Factors considered by California death penalty juries include:

- 1) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence;
- 2) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation of his conduct;
- 3) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the effects of intoxication; and
- 4) The age of the defendant at the time of the crime.

Each of these factors is potentially confusing to jurors. For example, the defendant's prior violent criminal activity is probably intended to be an aggravating factor. The phrase "presence or absence," however, does not indicate whether the **absence** of such activity is a mitigating or neutral factor.

A "moral justification for the capital offense" is also likely intended to be a mitigating factor. Since, however, "most murder cases present the absence of the mitigating circumstance of moral justification and victim participation," the jury may construe the absence of moral justification and victim participation as an aggravating circumstance. [No. 53]

When interpreting the "age" factor, some jurors may view youth as a mitigating factor, while others may view advanced age as a mitigating factor. "In practice, prosecutors and trial judges have applied this factor to defendants of virtually every age: in their teens, twenties, thirties, forties, and fifties at the time of the crime." [No. 54]

Another factor subject to dual interpretation is the defendant's mental state. The American penal system has historically accorded special consideration and leniency to criminals suffering from mental abnormalities. "A large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of mental illness, uncontrolled emotional state of mind, or drug abuse." [No. 55] Sentencing authorities, however, often interpret mental illness as an aggravating factor because of the belief that the defendant's disorder presents a continuing danger to society. [No. 56]

In California, the defendant's mental illness may weigh on the aggravating side of the

sentencing scale, because prosecutors may suggest it represents a threat of future danger. [No. 57] In People v. Kaurish, [No. 58] the trial judge mistakenly concluded that the defendant's lack of mental impairment constituted an aggravating factor. The appellate court held the mistake harmless error, and affirmed the trial court's judgment, because two other substantial aggravating factors existed and little was presented in mitigation. The fact that the appellate court scrutinized the trial judge's ruling, however, indicates that a trial ruling based on misinterpretation of a factor would constitute reversible error. In other words, a trial court's mistaken analysis could cause the imposition of a death sentence to be reversed.

2. Standard of Proof for Existence of Aggravating and Mitigating Factors

States vary as to the standard of proof required to establish the existence of aggravating or mitigating factors. In most states, the jury must find beyond a reasonable doubt that an aggravating factor exists and by a preponderance of the evidence that a mitigating factor exists, in determining the defendant's sentence. Other states, including California and Colorado, do not articulate a standard for determining the existence of aggravating or mitigating factors.

The California statute instructs:

The trier of fact [the jury] shall consider, take into account and be guided by the aggravating and mitigating circumstances. . . and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole. [No. 59]

The statute thus provides no burden of proof requirement, and the jury instructions do not resolve this ambiguity.

3. How to Weigh Factors

In Zant v. Stephens, [No. 60] the Supreme Court held that a statute identifying aggravating circumstances need not provide standards to govern the jury in weighing the significance of those circumstances. In lieu of such standards, however, the Court stated a statute must provide for appellate review of "the death sentence to determine whether it was arbitrary, excessive, or disproportionate."

There is thus no federal constitutional requirement that a capital sentencing authority attach any particular weight to individual factors in the sentencing decision. [No. 61] Generally, statutes instruct juries to weigh mitigating factors against at least one aggravating factor. Many states require that the jury find the aggravating factors outweigh the mitigating factors by a preponderance of the evidence in order to impose capital punishment. Other states require that aggravating factors outweigh mitigating factors beyond a reasonable doubt for imposition of a death sentence.

In Connecticut, a jury must impose a sentence of life imprisonment without the possibility of parole if it finds even one mitigating factor exists, despite the existence of any aggravating factors. In Connecticut, therefore, assigning weight to any particular aggravating or mitigating circumstance would be irrelevant to the final result.

In California, Alabama, Colorado, Florida and Idaho, the absence of aggravating factors means that the capital defendant will be sentenced to life imprisonment without the possibility of parole. If the jury finds that one or more aggravating factors exists, but that mitigating factors outweigh the aggravating factors, the defendant will also receive life imprisonment without the possibility of parole. If, however, the jury finds that one or more aggravating factors exists and that those aggravating factors outweigh any applicable mitigating factors, the defendant will receive a death sentence. [No. 62]

Utah does not have any officially adopted model criminal forms, but the Utah Supreme Court recently ruled the following instruction acceptable in State v. Young. [No. 63] The instruction provides an example of how many states direct juries to evaluate and weigh the aggravating and mitigating factors:

It is your duty to weigh aggravating factors proven by the State beyond a reasonable doubt against mitigating factors. Your 'weighing' of these factors should not consist merely of adding up the numbers of aggravating and mitigating circumstances, or otherwise applying a mechanical rule to their value. Rather, each juror is free to assign whatever weight he or she deems appropriate to each factor that you believe the evidence shows in accordance with the burdens of proof that the Court has heretofore explained to you. [No. 64]

Utah, like most other states, gives jurors wide discretion in the weighing process. Note that there is no articulated burden of proof for establishing mitigating factors.

The California system also effectively requires the jury to assign weights to individual factors. But California jurors have the added challenge of identifying the different factors, something the California statute does not do.

Other Observations

In examining the statutory provisions in different death penalty states, some features unrelated to ambiguity issues became apparent. They are included here as supplemental background information.

A. Unanimity Requirements

Most states require that the jury unanimously decide that the defendant should receive the death penalty. However, states such as Alabama require that only ten of twelve jurors vote to impose the death penalty.

Some states require that jurors unanimously agree that an aggravating or mitigating factor exists. North Carolina, and other states, require a unanimous finding of aggravating, but not mitigating, factors. [No. 65]

B. Numbers of Aggravating and Mitigating Factors

The number of statutory aggravating and mitigating factors evaluated in the penalty phase varies from state to state. The number of statutory factors listed in the penalty phase appears to be at least partially related to the factors, if any, listed for consideration in the guilt phase [No. 66]. The average number of penalty phase aggravating factors is around 10, peaking at 20 in Delaware. The existence of statutory mitigating factors ranges from 0 in Georgia and Idaho to 12 in Colorado. Some jurisdictions refer to factors used in the guilt phase in the penalty phase, while others do not.

C. Power of Trial Judge

The power of the trial judge also varies from state to state. In Arizona, Idaho and Montana, the trial judge, after considering aggravating and mitigating factors, determines whether the defendant will receive the death penalty. [No. 67] Trial judges in other states may overrule the jury's decision to impose death. In other states, the trial judge determines whether the defendant will receive the death penalty only when the defendant pleads guilty.

States That Vary From the MPC Format

The three states that vary most significantly from the guided discretion Model Penal Code format are Texas, Georgia and Oregon.

A. Texas

The Texas death penalty statute represents a significant departure from the MPC format. Instead of listing aggravating and mitigating factors, it specifically defines capital murder as first degree murder in one of five different circumstances. [No. 68] Once a defendant has been convicted of capital murder, the jury considers two questions before imposing a death sentence. A third question is considered if raised by the evidence. In order to impose death, each juror must respond affirmatively to each relevant question: [No. 69]

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) Whether there is a probability that the defendant would commit future criminal acts of violence that would constitute a continuing threat to society; and

* (3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. [No. 70]

Thus, in sharp contrast to the guided discretion format of the Model Penal Code, the Texas format uses three direct questions that limit the scope of the jury's duties to answering each question. The Texas capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death. While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose. [No. 71]

The constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors. [No. 72] In Jurek v. Texas, [No. 73] the Texas Court of Criminal Appeals held, and the Supreme Court affirmed, that it would interpret the "continuing threat to society" question to mean that the jury could consider various mitigating factors:

In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could

consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. [No. 74]

By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function and, thereby, comply with the Eighth and Fourteenth Amendment requirements.

B. Georgia

The Georgia statute lists ten aggravating factors (two more than the MPC but about average among death penalty states following the MPC format), but no mitigating factors. The jury has the opportunity to consider all of the defendant's individual circumstances, but the statute provides no examples or sample mitigating factors for the jury to consider.

Most MPC states include as a final mitigating consideration "anything else a jury may find relevant to consider," since limiting the mitigating factors a jury may consider has been held unconstitutional. [No. 75] Georgia's failure to enunciate any mitigating factors, however, may make the jury's weighing role more difficult. Logically, providing examples through a list of mitigating circumstances would seem to stimulate the evaluation process.

C. Oregon

Oregon re-instituted the death penalty after the Furman decision. Once an Oregon jury finds the defendant guilty of capital murder, the jury is presented with four questions to determine whether a death sentence should be imposed. To impose the death penalty, the jury must find the answer to the following four questions is "yes" beyond a reasonable doubt: 1) whether the murder was committed deliberately, 2) whether a probability of recidivism exists in the defendant, 3) whether the conduct of the defendant was unreasonable in light of any provocation by the victim and, 4) whether the conduct of the defendant warrants a death sentence. [No. 76] The jury is instructed (see below, under Jury Instructions) that it may consider any mitigating factors in determining the answers to the four questions, and provides a few examples.

Another distinctive aspect of the Oregon statute is the emphasis placed on juror participation. The jurors must make separate findings on each factor. "If the jury returns an affirmative finding on each issue considered under paragraph (b) of this subsection, the trial judge shall sentence the defendant to death." [No. 77]

Jury Instructions

The constitutional standard for ambiguity allowed in jury sentencing instructions is a lenient one. A jury instruction is not unconstitutionally ambiguous unless there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." [No. 78] This standard was rendered even less exacting in Tuilaepa v. California. [No. 79] In Tuilaepa, the Court

held that a capital sentencing factor in a jury instruction will not be ruled unconstitutional for vagueness as long as it has some "commonsense core of meaning. . . that criminal juries should be capable of understanding." [No. 80]

Not all death penalty jurisdictions require a jury to deliberate in the penalty phase, [No. 81] and the jury instructions for the states that do use a jury were not readily available. Where possible, we compared jury instructions with that state's death penalty statute. Just as the statutes varied in specificity and approach, the states provided different levels of guidance in sentencing instructions. In general, however, the instructions mirrored the statutes. The following are outlines of three states' instructions compared to those states' statutory provisions.

A. Oregon

Oregon's instructions closely resemble its statutory capital provisions. The instructions present the jury with five questions. (See Oregon's penalty phase determinants, above.) The Oregon instructions define terms within the five questions. For example, following the question that asks whether the murder was deliberate, the jurors are instructed on how to define a deliberate criminal act. The terms "mitigating factors" and "beyond a reasonable doubt" are also specifically defined in the instructions. [No. 82]

The instruction further provides that a death sentence may be imposed only where the jury answers yes to questions one through four unanimously and beyond a reasonable doubt. It also indicates that the defendant need not prove mitigating factors beyond a reasonable doubt to establish their existence.

Another important feature of the Oregon instruction is the special verdict form. The form communicates the different sentencing alternatives available, such as what will happen to the defendant in case jurors do not impose a death sentence, and requires each juror to answer each question individually. The sentencing alternatives -- life imprisonment without possibility of parole, life imprisonment with parole eligibility after 30 years, etc. -- are carefully defined.

B. Texas

The Texas death penalty jury instructions also closely resemble the statute. Both the instructions and the statute charge the jury to answer two or three questions (depending on whether the third question is relevant to the defendant's case). In order to answer a question affirmatively, in favor of death, the jury must agree unanimously. In order to answer a question negatively, in favor of life imprisonment, 10 out of 12 jurors must agree. The statute is unclear about the result if fewer than 10 jurors answer negatively.

The only difference between the instructions and the statute is that the instructions define the standard of proof for determining whether mitigating circumstances exist. The instructions asks whether the jurors find, "or have a reasonable doubt thereof, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" [No. 83] This seemingly minor addition to the jury instructions clarifies the standard juries need to use when determining the existence of mitigating circumstances. The jury is better able to recognize that it must find that no mitigating circumstances exist beyond a reasonable doubt in order to answer "no" to this question.

The Texas penalty phase verdict form, like the Oregon verdict form, clearly instructs the jury on the burden of proof in answering each of the two (or three) questions.

C. North Carolina

The North Carolina death penalty jury instruction is lengthy and detailed. It instructs the jury to consider 11 aggravating circumstances and 10 mitigating circumstances in determining whether a death sentence should be imposed. [No. 84] The jury is instructed it must find the presence of each aggravating factor unanimously and beyond a reasonable doubt. The terms within the factors are defined (e.g., "felony involving the use or threat of violence," "lawful arrest," "substantial criminal activity," and "especially heinous, atrocious or cruel.") and the instruction provides examples to give the juror's guidance in evaluating certain factors (for example, the mitigating circumstance of the defendant's emotional state indicates the court should describe the source of disturbance, e.g., "schizophrenia"). It directs the jury to consider the enumerated and any other mitigating circumstance, and that the defendant has the burden of persuading the jurors of the existence of a mitigating circumstance by a preponderance of the evidence. The burdens of proof the jury is to use are carefully defined. [No. 85]

Form verdicts are not provided to individual jurors. Instead, the jurors' collective findings on each factor are recorded by the foreperson in a form.

The concluding instruction asks the jury to consider the totality of the aggravating and mitigating circumstances. To impose a death sentence, the jury must unanimously find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. [No. 86]

IV. CONCLUSION: SUGGESTIONS FOR ADDRESSING AMBIGUITIES IN CALIFORNIA DEATH PENALTY LEGISLATION

The capital sentencing process is a complex and important one. An efficient, fair sentencing process is one that clearly conveys the legislature's intent to the sentencing authority so that it may act in an informed and fair manner. This legislative intent should be understood and executed at all phases of the process.

While constitutionally permissible, the current California provisions provide broad discretion, and little direction, to juries in the sentencing of capital defendants. Linguistic and structural ambiguities in the California death penalty statute and jury instructions obscure the legislative intent behind many of the issues the capital jury must consider.

The recommended changes in this section apply only to the penalty phase of the proceeding, and focus on the statute and applicable jury instruction. They are based on other states' practices. A broader analysis would also include the many influences in the guilt phase, including prosecutorial discretion and juror predispositions; and the interaction between the guilt phase and penalty phase.

We have divided the suggestions into the same categories we used to identify patterns in statutes: linguistic ambiguities and procedural ambiguities.

Linguistic Ambiguities: Making the Language Clearer

A. Age

One area of linguistic ambiguity in the California statute is the consideration of the "age" of the defendant. An alternative to this term might be to have the jury consider whether the defendant is "of a very young age or very advanced age." The problem with a definitive age cut-off would be that it could operate arbitrarily for those near cut-off ages. Although other penalties are often structured with a set age cut-off, the finality of the death penalty suggests a more flexible standard may be appropriate.

B. Circumstances of the Crime

The legislature has directed that penalty phase juries consider the "circumstances of the crime" for which the defendant was convicted. The term "circumstances of the crime" is, however, subject to wide interpretation. Other states have avoided this ambiguity by offering specific circumstances for the penalty jury to consider. Some examples might include: whether the crime involved torture or multiple victims; whether the murder involved lying in wait; etc. The legislature should provide more direction to juries by defining this term, or at least providing examples as is done in the Oregon jury instructions for some of those states aggravating and mitigating death penalty factors.

C. Moral Justification

"Moral justification" as a mitigating factor is another confusing term. One alternative to the mere inclusion of the term in the statute would be to offer examples of what might constitute a moral justification for a murder, at least in the mind of an assailant. A jury instruction defining moral justification might read: "moral justification includes, but is not limited to, euthanasia, religious motivation, and others." The legislature should carefully identify what it means by this term as a mitigating factor and communicate that intent to jurors either in statute or the jury instruction.

Procedural Ambiguities

A. Categorization of Mitigating and Aggravating Factors

The modification that would likely have the greatest impact on current ambiguities in the California statute is the categorization of factors as either mitigating or aggravating. The current California framework of combining mitigating and aggravating into single, undifferentiated list seems unfair to the defendant and renders the juror's job unnecessarily challenging.

Classifying aggravating and mitigating factors separately would render the California death penalty statute more like the MPC format and most other guided discretion statutes. It might also enable the jury to better understand its duties in the penalty deliberation process.

B. Instruction on Absence of Mitigating Factors

Another way to make the sentencer's role clearer would be to instruct the jury that the absence of a mitigating factor may not be considered an aggravating circumstance weighing in favor of the death penalty. Such a clear instruction may help to prevent juror's from considering evidence in a manner not intended by the legislature.

C. Assign Standard To Determine Existence of Factors

Another way to more sharply define and limit the jury's responsibility in a capital case is to

assign a standard (preponderance of the evidence, clear and convincing evidence or beyond a reasonable doubt) for determining whether a particular aggravating or mitigating factor exists.

California requires only that the jury find the aggravating or mitigating factors are "true." Where the same jury deliberates during both the guilt and penalty phases, such an instruction could place sentencing responsibility in a legal context. Ideally, the California instructions would define what constitutes reasonable doubt and preponderance of the evidence, if applicable, like the Oregon and North Carolina instructions. [No. 87]

This is especially important in light of a recent study suggesting jurors misunderstanding of burdens of proof in capital cases. South Carolina capital jurors were instructed on the requirement of beyond a reasonable doubt for a finding of an aggravating factor, but were not instructed on the difference between that burden and the "preponderance of the evidence" standard for mitigating factors. Many reportedly mistakenly believed the beyond a reasonable doubt standard was required for aggravating and mitigating factors. [No. 88]

D. Assign Standard For Weighing Factors

Another potential way to render the process less ambiguous would be to assign a standard for determining whether the aggravating factors outweigh the mitigating factors. In most death penalty jurisdictions, the standard is "beyond a reasonable doubt."

E. Assign Weight To Factors.

None of the death penalty jurisdictions assigns weight to individual factors. Assigning strict weights could impair the jury's role to evaluate individual circumstances. One way to address the total absence of weighing, however, might be to classify aggravating and mitigating factors: for example, a murder involving more than 2 victims or involving torture might be in the "first tier" of aggravating circumstances.

The problem with this approach is that it still might fail to consider all the different defendant situations, and invade the province of the jury to decide the importance of particular factors.

Other Ways to Improve the Process

A. Form Verdicts

One way to ensure juries carefully consider the impact of their decision to impose death is to use form verdicts. These forms ask jurors individual questions that lead up to the verdict, and may provide a logic check on an emotionally-loaded decision-making process.

A form verdict, such as those used in North Carolina and Oregon that require each juror to deliberate on each factor, would seem to help juror's understand the individual impact of their decisions.

B. Instruction on the Purpose of the Death Penalty

One way to help ensure juries contemplating imposition of the death penalty to recognize the gravity of their role might be a special jury instruction that explains to them why they

are considering the death sentence. Just as in the tort context, juries are instructed on the purpose of punitive damage awards, an instruction about the nature and purpose of the death penalty would seem helpful to such a critical decision. [No. 89]

C. Provide Information to Jurors on Sentencing Alternatives

A recent study on jury reactions in capital cases suggests that jurors' "false expectations about alternatives to the death sentence probably influence their sentencing decisions." [No. 90] h CALJIC 8.88 directs jurors that they have a choice between sentencing a defendant to death or to life in prison without parole, more information would seem helpful for jurors making such a decision. For example, the jurors could be instructed that the prison term would be in a maximum security institution, that the defendant could expect to share a cell, what the conditions would be, etc. The jurors could further be instructed as to the way the death penalty would be administered (i.e., lethal injection). It seems appropriate that those deciding these sentences should understand how they will be carried out.

Conclusion

Reforming California's death penalty process may not completely eliminate the uncertainty jurors face during the sentencing phase of a capital trial. Reform may reduce the confusion inherent in the process, however, and thereby reduce the randomness with which the State of California sentences people to death.

NOTES

[No. 1] Although there are now 38 death penalty states with the recent addition of New York, New York's new death penalty statute, passed in April, 1995, was not included in this analysis. The New York statute follows the Model Penal Code guided discretion format, discussed *infra* at pp10-11.

[No. 2] Throughout this paper, the term "sentencing authority" or "sentencer" refers to either the jury or judge. Some jurisdictions vary regarding who imposes a death sentence.

[No. 3] See Theodore Eisenberg and Martin T. Wells, *Deadly Confusion: Juror Instructions In Capital Cases*, 79 Cornell L. Rev. 1 (which chronicles a federally funded project that examined juror reactions and predispositions in capital cases).

[No. 4] There is a significant literature, for example, documenting the psychological reactions of capital jurors. A recent social science project suggests that capital jurors have a marked bias toward imposing the death penalty before hearing any sentencing evidence. See Eisenberg and Wells, *supra* note 3, and Scott Burgins, *Jurors Ignore, Misunderstand Instructions*, 30 ABA Journal, May 1995 at 31.

[No. 5] But, see *Id.* for statistical information on jury reactions in South Carolina cases.

[No. 6] Joshua N. Sondheimer, *A Continuing Source of Aggravation: The Improper Consideration of Factors in Death Penalty Sentencing*, 41 Hastings L.J. 409, 446 n. 3 (1990).

[No. 7] *Id.* at 446, n. 2.

[No. 8] *See* Model Penal Code section, *infra* at pp7-9.

[No. 9] 438 U.S. 586, 98 S. Ct. 2954 (1978) (holding capital sentencing procedure, to be constitutional, must permit consideration, as a mitigating circumstance, of "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

[No. 10] 455 U.S. 104, 102 S. Ct. 896 (1982) (holding sentencing court's refusal to consider defendant's difficult family history as a mitigating factor violates Lockett).

[No. 11] 476 U.S. 1 (1986).

[No. 12] Quoting from 1994 Ninth Circuit Capital Punishment Handbook, Ninth Circuit Judicial Council, September 1994, at 168.

[No. 13] 492 U.S. 302, 109 S. Ct. 2934 (1989) (holding Texas death penalty statute improperly restricted the jury's consideration of Penry's mental retardation as mitigating evidence; therefore, trial court should have instructed jury that it could give effect to such mitigating evidence).

[No. 14] 113 S. Ct. 1222 (1993) (upholding trial court's refusal to give instruction in sentencing phase that jury could consider petitioner's lack of significant prior criminal activity because no evidence regarding defendant's prior criminal history presented; Constitution does not obligate court to give mitigating circumstance instruction when no evidence offered to support it).

[No. 15] 1994 Ninth Circuit Capital Punishment Handbook, *supra* note 12, at 168.

[No. 16] *Id.* at 174.

[No. 17] Franklin Zimring and Gordon Hawkins, Capital Punishment and the American Agenda, 31-32.

[No. 18] *Id.*

[No. 19] Raymond Paternoster, Capital Punishment in America, 17 (1991).

[No. 20] 408 U.S. 238 (1972).

[No. 21] *Id.* The Eighth Amendment of the United States Constitution protects against cruel and unusual punishment. The Fourteenth Amendment guarantees due process of law.

[No. 22] Zimring and Hawkins, *supra* note 17, at 41.

[No. 23] 428 U.S. 153 (1976) (upholding Georgia statute requiring sentencing judge or jury, in bifurcated trial, to find at least one of ten statutory aggravating circumstances beyond a reasonable doubt when sentencing death, to consider any additional mitigating or aggravating evidence, and to specify aggravating circumstance(s) found, and also providing for direct review by state supreme court of appropriateness of death sentences).

[No. 24] *Zimring and Hawkins, supra note 17, at 77; American Law Institute, Model Penal Code and Commentaries Pt. II, sec. 210.6.*

[No. 25] *428 U.S. 242 (1976); 428 U.S. 262 (1976); 428 U.S. 153 (1976). See Zimring and Hawkins, supra note 17, at 84-87.*

[No. 26] *American Law Institute, Model Penal Code and Commentaries Pt. II, sec. 210.6, at 111.*

[No. 27] *Zimring and Hawkins, supra note 17, at 77.*

[No. 28] *American Law Institute, Model Penal Code and Commentaries Pt. II, sec. 210.5. "Felon Murder" is a killing committed in furtherance of a dangerous felony, whether or not the murder itself was intended.*

[No. 29] *Id. at 107.*

[No. 30] *The MPC aggravating factors are: (a) The murder was committed by a convict under sentence of imprisonment, (b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person, (c) At the time the murder was committed, the defendant also committed another murder, (d) The defendant knowingly created a risk of death to many persons, (e) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping, (f) The murder was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from lawful custody, (g) The murder was committed for pecuniary gain, (h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.*

The MPC mitigating factors are: (a) The defendant has no significant history of prior criminal activity, (b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, (c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal conduct, (d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct, (e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor, (f) The defendant acted under duress or under the domination of another person, (g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication, (h) The youth of the defendant at the time of the crime.

[No. 31] *Zimring and Hawkins, supra note 17, at 80; American Law Institute, Model Penal Code and Commentaries Pt. II, sec. 210.6, at 171.*

[No. 32] *American Law Institute, Model Penal Code and Commentaries (1980), at 132.*

[No. 33] *See, Zimring and Hawkins, supra note 17, at 81.*

[No. 34] *114 S. Ct. 2630 (1994).*

[No. 35] *428 U.S. 153 (1976).*

[No. 36] 428 U.S. 262 (1976).

[No. 37] *Id.* at 279.

[No. 38] 428 U.S. 280 (1976).

[No. 39] 428 U.S. 280 (1976); *see Tuilaepa v. California*, *supra* at note 34.

[No. 40] 20 factors in Penal Code section 190.2 are listed in Appendix B.

[No. 41] *See Tuilaepa*, *supra*, at 2646.

[No. 42] Cal. Pen. Code sec. 190.3 (West 1995). *See* Appendix A.

[No. 43] *See* Section III of this paper.

[No. 44] CALJIC 8.85.

[No. 45] CALJIC 8.88.

[No. 46] *Id.*

[No. 47] The term "especially heinous" is akin to "most unique" in its lack of specific meaning.

[No. 48] *Tuilaepa*, 114 S. Ct. at 2642-42 (Blackmun, J., dissenting).

[No. 49] *Id.* at 2643.

[No. 50] What possible moral justification could there be for committing first degree murder? Should a jury feel more or less outrage that a capital murder was perpetrated by a very young person?

[No. 51] *Id.*

[No. 52] *Sondheimer*, *supra* note 6, at 409; CALJIC 8.85.

[No. 53] *People v. Davenport*, 41 Cal. 3d 247, 289, 221 Cal. Rptr. 794, 821 (1985).

[No. 54] *Tuilaepa*, 114 S. Ct. at 2643.

[No. 55] *Sondheimer*, *supra* note 6, at 418.

[No. 56] *Id.* at 420.

[No. 57] *Id.*

[No. 58] 52 Cal. 3d 648, 717, 276 Cal. Rptr. 788, 826 (1990).

[No. 59] Cal. Pen. Code sec. 190.3(k) (1994).

[No. 60] 462 U.S. 862, 103 S. Ct. 2733 (1983) (holding, based on *Jurek v. Texas*, that standards for balancing aggravating against mitigating circumstances not required, but appellate review needed in the alternative).

[No. 61] *See, California v. Ramos*, 463 U.S. 992, 1008-09.

[No. 62] For example, a jury must decide whether the defendant's lack of significant prior criminal history and lack of capacity to appreciate the criminality of his conduct (mitigating factors) are outweighed by the fact that the defendant committed the capital offense for pecuniary gain (aggravating factor). If the judge were to instruct the jury that each factor carries equal weight, then mitigating factors would objectively outweigh the aggravating factors and life imprisonment would be imposed.

In another situation, the jury may decide that the defendant's youth (mitigating factor) may not itself outweigh the fact that the defendant tortured the victim (aggravating factor) during the capital offense. However, the combination of youth, lack of significant prior criminal history and mental illness (mitigating factors) may outweigh the one aggravating factor.

[No. 63] 853 P. 2d 327 (1993).

[No. 64] Utah Death Penalty Instruction.

[No. 65] North Carolina Pattern Jury Instructions for Capital Cases, Sec. 150.10, 1979.

[No. 66] In other words, where there are numerous factors in the guilt phase there are often fewer factors listed in the penalty statute and jury instructions. Often, however, the guilt phase factors are incorporated by reference.

[No. 67] *Walton v. Arizona*, 497 U.S. 639 (1990) (holding Sixth Amendment not violated by sentencing scheme in which judge alone determines aggravating and mitigating circumstances and imposes sentence).

[No. 68] *Zimring and Hawkins*, *supra* note 17, at 84-85.

[No. 69] *Jurek v. Texas*, 428 U.S. 262 (1976).

[No. 70] Tex. Crim. Proc. Code Ann. sec. 37.071 (Vernon 1979).

[No. 71] *Jurek v. Texas*, 428 U.S. 262, 270 (1976).

[No. 72] *Id.* at 272.

[No. 73] *Id.*

[No. 74] *Id.*

[No. 75] *Lockett v. Ohio*, 438 U.S. 587 (1978).

[No. 76] Oregon Revised Statutes Sec. 163.150(1)(B) (1994).

[No. 77] Oregon Revised Statutes Sec. 163.150(1)(D)(f) (1994).

[No. 78] *Boyde v. California*, 494 U.S. 370 (1990).

[No. 79] 114 S. Ct. 2630 (1994).

[No. 80] *Id.*

[No. 81] *In Arizona, for example, a judge weighs the mitigating and aggravating factors to determine the defendant's punishment in the penalty phase. AZ ST sec. 13-703.*

[No. 82] *In some jurisdictions, definitional instructions supplement the death penalty instruction. The provision of definitions and examples within the death penalty instruction itself seems to allow for greater consistency between proceedings, however, since using other instructions may require specific requests from defense attorneys or prosecutors.*

[No. 83] *Jury Charges for Texas Criminal Practice, McClung Law Books, Inc. (1995), art. 37.071.*

[No. 84] *North Carolina Death Penalty Instruction to Jury at Separate Sentencing Proceeding, G.S. 15A-2000.*

[No. 85] *Id.*

[No. 86] *Id.*

[No. 87] *Utah's reasonable doubt instruction offers another example of a model California could follow:*

"Proof beyond a reasonable doubt does not require proof to an absolute certainty. By reasonable doubt is meant a doubt that is based upon reason, and one which is reasonable in view of all of the evidence. A reasonable doubt is a doubt which reasonable men and women would entertain, and it must arise from the evidence or the lack of evidence in this case. A reasonable doubt cannot be a doubt that is merely fanciful or imaginary, or based upon a wholly speculative possibility.

"Proof beyond a reasonable doubt is that degree of proof which satisfies the mind, convinces the understanding of those who are bound to act conscientiously upon it, and obviates all reasonable doubt. A determination that the verdict imposing the death penalty is appropriate by a standard of proof of beyond a reasonable doubt demands the application of reason, impartiality and common sense. You must have greater assurance of the correctness of such a decision than you would normally have in reaching the weighty decisions affecting your own life.

Utah Death Penalty Instruction.

[No. 88] *Eisenberg and Martin T. Wells, supra note 3, at 9.*

[No. 89] *In Pacific Mutual v. Haslip, 499 U.S. 1 (1991), the Supreme Court held that a punitive damages award by a jury did not violate the Due Process Clause of the Fourteenth Amendment where reasonable constraints were exercised on the jury's discretion. Such constraints included description of the nature and purpose of punitive damages awards, identification of the damages as punishment for civil wrongdoing of the kind involved, and explanation that the imposition of punitive damages was not compulsory.*

[No. 90] *Theodore Eisenberg and Martin T. Wells, Deadly Confusion: Juror Instructions In Capital Cases, supra note 3.*