

MOCK JURORS' COMPREHENSION OF AGGRAVATING AND MITIGATING FACTORS: THE IMPACT OF TIMING AND TYPE OF SENTENCING PHASE INSTRUCTIONS

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Research concludes that after receiving sentencing phase instructions in capital cases, mock jurors do not understand aggravating and mitigating factors, and the behaviors or circumstances that contribute to each (e.g., Smith & Haney, 2011). Through utilization of a real murder trial transcript, the present study examines the effects of the simplicity (standard or simplified) and timing of the sentencing phase instructions (before or after sentencing phase testimony) on mock jurors' understanding of such factors. Thematic analysis of open-ended responses to survey questions also explores the nature of mock jurors' (mis)understanding. Results indicate that there is a relationship between type of instructions given and participants' understanding of both aggravating and mitigating factors. Simplified instructions resulted in better, but still poor, understanding. However, no statistically significant relationships are found between instruction timing and participants' understanding of aggravating or mitigating factors. Open-ended responses reveal ways in which participants erroneously define aggravating and mitigating factors, which could aid policy makers in the rewriting of sentencing phase instructions.

Keywords: aggravating factors, mitigating factors, jury instructions, capital cases

The United States remains the only Western democracy that allows for the death penalty, with 29 states still permitting the death penalty in 2019 (Death Penalty Information Center, 2019a). Various criticisms of the death penalty exist, and are beyond the scope of this paper, however two ways the death penalty has been scrutinized is for its racial bias and question of whether capital jurors understand sentencing instructions. African Americans make up approximately 13% of the U.S. population (U.S. Census Bureau, 2018), but are disproportionately represented on death row and among those executed. Thirty-two percent of the 22 men executed in the United States in 2019 were African American (Death Penalty Information Center, 2019b), and since 1976, 34% of those executed were African American (Death Penalty Information Center, 2019c). Furthermore, 42% of those on death row are African American (NAACP Legal Defense Fund, 2018). Research finds that jurors hold racial biases (Cohn, Bucolo, Pride, & Sommers, 2009; Mitchell, Haw, Pfeifer,

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& Meissner, 2005), and African American defendants are more likely to receive the death penalty than Caucasian defendants for the same crime (Baldus, Woodworth, Zuckerman, & Weiner, 1998). In laboratory research including mock jurors, African American defendants are significantly more likely than Caucasian defendants to receive a death sentence (Applegate, Wright, Dunaway, & Wooldredge, 1993).

As a result of *Gregg v. Georgia* (1976), capital cases must have bifurcated trials. If the defendant is found guilty of a capital offense, the sentencing phase of the trial begins. During this phase, jurors rely on the instructions provided to them by judges to assist in their decision-making (Barner, 2014; Costanzo & Costanzo, 1992). However, research has concluded that jurors do not understand jury instructions provided to them at the sentencing phase of capital trials (Barner, 2014; Frank & Applegate, 1998; Haney, 1995; Haney & Lynch, 1997; Otto, Applegate, & Davis, 2007; Wiener, Pritchard, & Weston, 1995), and lack of understanding results in discriminatory death sentences (Lynch & Haney, 2000, 2009). A major problem for jurors interpreting instructions during the sentencing phase of a capital trial is understanding the difference between aggravating and mitigating factors and the behaviors or circumstances that contribute to each (Frank & Applegate, 1998; Otto, et al., 2007; Sandys, 2014; Smith & Haney, 2011).

The purpose of this current research is three-fold. First, using a real murder trial transcript, we investigate the effects of sentencing phase instructions (standard or simplified), and timing of the instructions (before or after sentencing phase testimony) on mock jurors' overall understanding of aggravating and mitigating factors. Second, through analysis of open-ended responses to survey questions, the researchers provide examples of definitions of aggravating and mitigating factors provided by participants, which show participants' (mis)understanding of aggravating and mitigating factors. Understanding common misconceptions about what constitute aggravating and mitigating factors could assist policymakers in developing clearer jury instructions. Third, regardless of whether participants understand aggravating or mitigating factors, analysis of open-ended responses to survey questions explores specific factors that participants rendered important as they determined the appropriate sentence for the defendant. This knowledge could be particularly useful for prosecutors as they seek the death penalty for the defendant, or for defense attorneys with the goal of preventing their client from receiving a death sentence.

LITERATURE REVIEW

In capital trials, the decision process is bifurcated. After determining guilt, the sentencing phase begins if the defendant has been found guilty. During the sentencing phase the jury relies on instructions from the judge and sentencing phase testimony to determine if the appropriate sentence is death or life without the option of parole. The intent of these instructions is to provide jurors with an understanding of mitigating and aggravating factors, which determine the sentencing outcome. Mitigating factors are those factors regarding the crime or the defendant that should lead jurors to recommend life without option of parole (LWOP), whereas aggravating factors should lead jurors to recommend death. While

what is considered aggravating and mitigating factors may vary by state, common aggravating factors include: murder committed for financial gain, prior conviction for a violent felony, murder committed during the commission of another felony, or murder committed to avoid arrest (Bedau, 1997; Jasper, 1998). Common mitigating factors include: no significant criminal history for defendant, act occurring under duress, or the defendant having a diminished mental capacity or committing the act while mentally disturbed (Bedau, 1997; Jasper, 1998). In addition, aggravating factors must be statutorily defined while mitigating factors have room for jurors to include any factors they may find relevant.

Researchers demonstrate that juror understanding of capital sentencing instructions is very limited (Blankenship, Luginbuhl, Cullen, & Redick, 1997; Diamond & Levi, 1996; Frank & Applegate, 1998; Haney, 1995; Haney & Lynch, 1994, 1997; Haney, Sontag, & Costanzo, 1994; Lieberman, 2009; Luginbuhl, 1992; Reifman, Gusick, & Ellsworth, 1992). Some jurors misunderstand what constitutes aggravating and mitigating factors as well as how these factors should be considered or weighed (Barner, 2014; Bentele & Bowers, 2002; Haney & Lynch, 1997; Sandys, 2014; Wiener, et al., 1998). Haney and Lynch (1994) asked mock jurors (college students) to define aggravating and mitigating factors after reviewing California's sentencing phase instructions (which did not contain an explicit definition of either aggravation or mitigation). They found that only 64% were even partly correct in their definitions. Perhaps more important, fewer (only 47%) could provide a partial definition of mitigating factors (Haney & Lynch, 1994).

Research participants also confuse aggravating factors with mitigating factors; factors are incorrectly interpreted as aggravating when intended to be the opposite (Haney & Lynch, 1994, 1997; Lynch & Haney, 2000, 2009). Haney, Sontag, and Costanzo (1994) interviewed former death penalty jurors in California and found that jurors confuse mitigating factors as aggravating ones. Data from the Kentucky Capital Jury Project also show that jurors do not understand what qualifies as a mitigating factor (Sandys, 2014).

Through interviews with 36 former capital jurors, Barner (2014) finds that jurors were confused and frustrated by the instructions provided to them, particularly on how to weigh and consider aggravating and mitigating factors. Bowers, Brewer, and Lanier (2009) also find juror confusion over mitigating factors. When considering jurors' understanding of aggravating and mitigating factors, they are more likely to understand aggravating factors compared to mitigating factors (Frank & Applegate, 1998; Luginbuhl, 1992; Luginbuhl & Howe, 1995; Otto, et al., 2007).

The tendency to mistake mitigating factors as aggravating and focus more on the "negative" of a defendant increases the possibility that lack of understanding of aggravating and mitigating factors may result in a death sentence (Wiener, et al., 2004), or may favor the prosecution (Frank & Applegate, 1998). For example, in a sample of undergraduate mock jurors, 45% erroneously believed that if a jury unanimously identifies aggravating factors, then a death sentence is mandatory (Patry & Penrod, 2013). Other research finds that lack of understanding of capital sentencing instructions results in a preference for a death sentence (Bowers, 1995; Patry & Penrod, 2013; Wiener, et al., 1998), but mock ju-

rors who receive simplified capital sentencing instructions are less likely to favor a death sentence (Diamond & Levi, 1996; Wiener, et al., 2004).

Research supports that jurors exhibit more racial biases when they do not understand sentencing phase jury instructions (Haney & Lynch, 1994, 1997; Lynch & Haney, 2000). Data from the Kentucky Capital Jury Project show that jurors have misconceptions about what qualifies as a mitigating factor, and this low level of comprehension encourages resorting to racial stereotypes. For example, when research participants watched a videotape of a mock robbery and murder trial and the defendant and victim's race were manipulated, "jurors" who showed poor comprehension of the sentencing instructions were much more likely to sentence an African American defendant to the death penalty than a Caucasian defendant (Lynch & Haney, 2000). Follow-up research conducted by Lynch and Haney (2009) also found a significant relationship between racial bias against African American defendants and poor comprehension of sentencing instructions. In efforts to make instructions easier to comprehend, one approach has been to simplify them, for example, by removing double-negatives and making the discourse shorter (Charrow & Charrow, 1979). Shaked-Schroer, Costanzo, and Marcus-Newhall (2008) tested the difference in sentences between jurors who receive standard versus simplified instructions and find that when the instructions are easier to understand, the bias against African American defendants is reduced.

Research has also examined the effect of the type of instructions given and the benefit of re-writing instructions (see Cho, 1994). Smith and Haney (2011) found that providing simplified instructions improves comprehension of the death penalty phase instructions over standard instructions, although comprehension remains low. Otto, Applegate and Davis (2007) re-wrote Florida's pattern instructions by adding five statements intended to clarify misunderstanding about application or weighing of aggravating and mitigating factors. By using a sample of mock jurors, they conclude that those who receive the revised sentencing instructions have better comprehension. Frank and Applegate (1998) provided a sample of death qualified jurors with standard capital sentencing instructions (Ohio) and re-written instructions. They conclude that those who receive the revised instructions exhibit a significantly better understanding of the instructions. Other research finds that while revising capital sentencing instructions improves understanding of sentencing phase instructions, the improvement is small, and comprehension remains limited (Diamond & Levi, 1996; Smith & Haney, 2011; Wiener, et al., 1995).

Patry and Penrod (2013) investigated the effect of sentencing phase instruction on comprehension using the case of *Buchanan v. Angelone* (1998). In that case, Buchanan was found guilty of the murder of his father, stepmother, and his two brothers. Mitigating evidence was presented regarding his difficult childhood and emotional instability. Despite this evidence, the jury returned a sentence of death. Patry and Penrod (2013) used three variations of aggravating and mitigating instruction. One was patterned after the actual instructions given to jurors in *Buchanan v. Angelone* (1998). A second version was based on the recommendation of dissenting Chief Justice Breyer when the case was considered by the Supreme Court, and the third was based on the intuition of the researchers. Although

instruction version is only one of the independent variables manipulated, they found a significant difference in participants' understanding of the relationship between aggravating and mitigating factors as well as their sentencing decision. The instructions revised by the researchers resulted in a significantly better understanding than the other two versions, and participants who received the other two versions scored no better than participants who received no instructions at all.

When instructions are revised there is a greater improvement of understanding of aggravating factors than mitigating factors. With revised instructions, mock jurors' understanding of aggravating factors improves (71% able to provide partially correct explanation). However, only 52% of the sample provides a partially correct explanation of mitigating factors (Haney & Lynch, 1997).

There is a long history in cognitive psychology regarding the role of schemas in comprehension. Schemas provide a structure or scaffold for new information that might otherwise seem unrelated. Bartlett (1932) utilized the notion of a schema to explain how we interpret and remember information that is familiar or unfamiliar to us. Schemas can be described as pre-existing packets of knowledge, and generally refer to what we know about typical things and about how events usually unfold. These pre-packaged collections of knowledge and expectations help us to anticipate what is to come and also help us to fill in information that may be missing. Therefore, providing jury instructions before testimony is presented might afford jurors the ability to draw relations between pieces of testimony and assist them to organize new material presented, directing their attention to evidence that is particularly important.

Other research highlights differences in trial outcomes when instructions are provided prior to the trial. Smith (1991) found that when the presumption of innocence is defined prior to a trial, conviction rates are significantly lower and jurors are better able to integrate the trial facts with the relevant law compared to when the definition is given after the trial evidence is presented. In a civil trial, recall of important trial information is improved by giving jurors instructions prior to their hearing the evidence (Forsterlee & Horowitz, 1997). Heuer and Penrod (1989) found that when judges provide jurors instructions (e.g., as to standards and burden of proof, the presumption of innocence, the evaluation of testimony) prior to the presentation of evidence, they have better recall of the instructions. On the contrary, Cruse and Browne (1986) found that the timing of instructions was not significantly related to mock jurors' verdicts. While racial biases in sentencing is not the focus of this current research, prior research concludes that racial bias can be reduced by the timing of jury instructions (Ingriselli, 2015; Mitchell, et al., 2005).

In the present study, we manipulated both the type (standard or simplified) and timing of the sentencing phase instructions (before or after sentencing phase testimony). We hypothesize that like prior researchers, we would find poor comprehension of both aggravating and mitigating factors. However, it was believed that providing the simplified instructions would improve comprehension and, based on schema theory, this would be especially true in the "before testimony" conditions. In addition, by examining participants'

responses to open-ended questions about aggravating and mitigating factors we sought to identify the nature of their misunderstandings. Finally, analysis of open-ended responses sought to reveal factors that participants rendered important as they determined the appropriate sentence for the defendant.

METHODS

Participants

One hundred and twenty-one students from a private, East coast metropolitan university were included in this study. Participants were between the ages of 18 and 22 years old ($M = 18.53$, $SD = .81$). Most participants (86%) were freshmen, and female (63%). Most (73%) were Caucasian, 19% were African American, 4% were Asian, and 8% were another race. Most (93%) indicated their ethnicity was non-Hispanic.

The survey asked participants to indicate if they *could* impose a death sentence if a defendant was found guilty of a capital offense (such as murder). Twelve percent (12%) of the sample responded that they could not impose a sentence of death. Chi-square analyses showed that there was no relationship between a participant indicating that he/she could vote for the death penalty if a person was convicted of a capital offense and finding the defendant guilty of either of the crimes of which he was accused, nor deciding that the defendant in this case should receive the death penalty. As a result, these 14 participants were ultimately included in the final analyses even though jurors would need to be death qualified to serve on a capital jury.

Materials

All participants signed an Institutional Review Board approved consent form prior to beginning the experiment. The informational materials for this study consisted of: pre-trial instructions from a judge, pictures of the “defendant”, a “cast of characters,” a bifurcated trial transcript, guilt phase instructions, two sets of sentencing phase jury instructions (standard and simplified), and sentencing phase testimony containing both aggravating and mitigating factors. Research participants also were asked to complete two “factual” quizzes (one for the guilt phase, one for the sentencing phase) to ensure they were paying attention, two reaction surveys (one for guilt phase, one for sentencing phase), and a questionnaire asking their demographics.

The pre-trial instructions from the judge were based on the proposed Mississippi plain language model jury instructions-criminal (courts.ms.gov, 2012), since the transcript that the researchers used was from a trial that took place in Mississippi. These were general instructions informing participants about how a trial proceeds, and instructions to pay close attention to the witness’ testimony, instructions to not form an opinion before all of the evidence has been presented, explanation of what constitutes evidence, and explanation of how the judge rules on motions. Participants were told to base their decisions only on the evidence presented at trial and to not use any extra materials or devices (e.g., cell phones) to learn anything about the case. All participants were provided with the same pre-trial jury instructions. The “cast of characters” paper was a list and description of the key players

involved in the trial including the defendant, defendant's lawyer, prosecutor, the witnesses (e.g., law enforcement, medical personnel, and childcare employees), and family members of both the defendant and the victim.

The trial transcript was taken from an actual trial transcript of Jeffrey Keith Havard (*Havard v. Mississippi*, 2003-DP-00457-SCT) posted on Freejeffreyhavard.org. He was accused (and ultimately convicted) of the 2002 sexual battery and murder of his girlfriend's 6-month-old daughter, a crime for which he was on death row until 2018 [1]. The accusations focused on circumstantial evidence and physical injuries the baby suffered that were consistent with Shaken Baby Syndrome and rape. However, Mr. Havard claimed he dropped the baby, no DNA testing was conducted, and no instrument of trauma was ever found. After a pilot study including 21 participants determined that the transcript was much too long (14, 253 words) for students to read in the hour allotted for the study (taking a mean of 74.05 minutes, $SD = 13.06$), a modified transcript was created. Redundant testimony from multiple medical personnel and childcare personnel was condensed. After modifications, the transcript was cut to 22 pages in length (approximately 8,000 words) and had a Flesch-Kincaid readability statistic of 4.9.

Guilt Phase

While the focus of this article is on the effects of timing of the instructions (before or after sentencing phase testimony) and type of instructions (standard or simplified), on mock jurors' overall understanding of aggravating and mitigating factors, as well as participants' understanding, or lack thereof, of aggravating and mitigating factors shown through analysis of open-ended responses to survey questions, it should be noted that participants read the guilt phase testimony and were asked if the defendant should be found guilty or not guilty for murder and sexual battery. Participants were asked questions on both categorical (guilty or not guilty) and continuous scales (on a 1 to 7-point scale, with 1 being "very unsure" of guilt or innocence and 7 being "very sure"). Open-ended questions asked participants why they found the defendant guilty/not guilty of murder and sexual battery.

Sentencing Phase

At this time during the study, all participants were told that the defendant had been found guilty and that they were now entering the sentencing phase of the trial. The transcripts from the sentencing phase of the trial included testimony from the deceased baby's grandmother and the defendant's mother. The grandmother spoke about how close she and the baby were and how her other granddaughter would now be denied the opportunity to grow up with her cousin. These factors were viewed as aggravating. The defendant's mother spoke about Havard's love for children and his somewhat difficult childhood. These factors were viewed as mitigating. The sentencing phase instructions from the judge were received by participants either before or after the sentencing phase testimony depending on the condition to which they had been assigned. The instructions for the sentencing phase were taken from the trial transcript and another, simplified, version based on California's simplified instructions was also created for this study (CALCRIM, 2005). The primary purpose of these instructions was to **define aggravating and mitigating factors** and explain how they should be considered/weighed in the determination of a sentence. For example,

the standard instructions define an aggravating factor as “any fact, condition or event attending to the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.” In the simplified version, this was rewritten as “any fact, condition or event that increases the seriousness of the crime, giving reasons to impose the death penalty.” The standard instructions define a mitigating factor as “any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.” In the simplified version, this was rewritten as “any fact, condition or event, which is not an excuse for the crime, but may decrease the severity of the crime, giving reasons to impose a sentence of life in prison without the possibility of parole.”

In the sentencing phase instructions, participants were told that the defendant had been found guilty of murder and sexual battery. Participants were asked to choose a sentence of life in prison without parole or the death penalty, and to rate their confidence in their decision. Open-ended questions asked participants to define aggravating and mitigating factors, and also explain why they think the defendant should receive life in prison without the option of parole or the death penalty.

Quizzes

Participants were quizzed about the guilt and sentencing phase testimonies after having read them to make sure they read and understood the testimony. Each participant was awarded a total quiz score based on the number of quiz items (out of 10) that had been answered correctly. All participants scored at least 70% with 86% of participants scoring 80% or higher on quiz questions indicating that they were paying close attention to the details of the trial transcripts. Hence, they were all included in the analyses.

Procedure and Design

Participants were recruited from introductory psychology courses at the university. As a requirement of the course, students must either write a paper or participate in any Psychology experiment administered by Psychology faculty or students. Once participants signed up for the study in the undergraduate psychology department, they were instructed to report to a classroom on campus at a designated time, where a research assistant met them. Between two and ten participants participated in the research at a time. The research assistant physically spaced out each participant so that no participants were sitting directly next to one another.

Participants read introductory instructions telling them what they would do while participating in the research (a repetition of the general information on the IRB approved consent form) and the research assistant read the participants the instructions for the study also. Folders for each of the participants had been prepared prior to the initiation of the study and the research assistant used these folders to keep track of the participants' materials. The assistant subsequently provided every participant with each piece of material from their folder separately. As soon as a participant finished with one material, it was removed

and placed in their folder prior to their receiving the next piece of material from the folder. As previously stated, the exception to this was the “cast of characters” sheet, which remained available to them throughout the experiment. Participants took a mean of 69.45 minutes ($SD = 15.98$) to read the transcript and complete the accompanying measures.

The quantitative data were entered into IBM SPSS® by a student research assistant. The design was a 2 (**type** of instruction – standard or simplified) x 2 (**timing** of instruction – before or after sentencing testimony was given) between-participants factorial design. (Some of the results regarding the quantitative data on guilt and sentencing are reported in a prior publication (Mannes, Foster, & Maier, 2018)). Here we focus on participants’ ability to define aggravating and mitigating factors and how this relates to their decisions. We explore the definitions that participants provided for aggravating and mitigating factors, as well as reasons why they believed the defendant should receive LWOP or a death sentence.

The three researchers independently scored whether the participants’ definitions of aggravating and mitigating factors were correct. The researchers then met three times (approximately an hour each time) to come to an agreement on whether the participants’ definitions of aggravating and mitigating factors were correct. After much discussion, it was decided that we would determine if the definition provided was correct in the narrowest sense (that which had been provided in the instructions) and also determine if we thought that, while the response was not exact, the participant exhibited an understanding of aggravating or mitigating factors by providing examples. We refer to these two levels of understanding as narrow and expanded.

One of the researchers typed all hand-written responses to the open-ended questions asking participants to define aggravating and mitigating factors. The analysis involved identifying core themes that emerged from multiple reads of the responses (Rubin & Rubin, 1995). The more frequently the same concept occurs, the more likely it is a theme (Ryan & Bernard, 2003). The researchers used open coding, so no pre-determined codes were identified prior to analysis (Bernard, Wutich, & Ryan, 2017). Given the brevity of open-ended responses, the researchers did not consider using qualitative data analytic software but rather color-coded responses with common themes. While inter-rater reliability was not formally examined, the researchers separately analyzed the responses to the open-ended questions. One of the researchers then reviewed the codes created by other researchers; there was little to no discrepancy in identified themes.

A series of Chi-square analyses was conducted to examine relationships between the correctness of the narrow definition and expanded definition of aggravating and mitigating factors, with type of instructions (simplified or standard) and timing of instructions (before or after sentencing phase testimony). A logistic regression model was then used with three predictor variables (type of instructions, timing of instructions, and interactions between type and timing of instructions). This model was used to predict four dependent variables (whether or not the participants’ narrow and expanded definitions of aggravating and mitigating factors were correct), one at a time.

RESULTS

After reading the trial transcripts, participants were asked to evaluate Havard's guilt. Most (77%) participants found the defendant guilty of sexual battery, and most (71%) participants found the defendant guilty of murder. Then during the sentencing phase participants were told that the defendant had been found guilty of murder and sexual battery. After receiving the sentencing phase instructions and testimony, participants were then asked to impose a sentence and the vast majority (80%) of participants gave life without parole as the appropriate sentence.

Most participants did not provide the correct definition of aggravating or mitigating factors (narrow), or failed to exhibit a general understanding of such factors by providing examples (expanded). Table 1 shows the percent of participants who were correct in their definitions of aggravating and mitigating factors when the narrow and expanded definitions were used. Participants were slightly more likely to correctly define aggravating than mitigating factors, although these differences were not statistically significant for either the narrow ($z = .85$) or expanded definitions ($z = 1.14$).

Table 1. *Percent correct as a function of the type of factor and definition used*

Factor	Aggravating	Mitigating
Definition		
Narrow	19.0	14.9
Expanded	33.1	26.4

Type and timing of instructions

When the researchers agreed that the participants' **narrow** definition of **aggravating** factors was correct, most of those participants (78%) had been given simplified instructions. The relationship between instruction type and correctness is statistically significant, $\chi^2(1, N = 121) = 8.81, p = .003$. When the researchers agreed that the **expanded** definition of **aggravating** factors was correct, most of those participants (62.5%) had been given simplified instructions. The relationship is trending towards statistical significance, $\chi^2(1, N = 121) = 3.49, p = .062$.

When the researchers agreed that the **narrow** definition of **mitigating** factors was correct, most of those participants (77.8%) had been given simplified instructions. The relationship is statistically significant, $\chi^2(1, N = 121) = 6.33, p = .012$. When the researchers agreed that the **expanded** definition of **mitigating** factors was correct, most of those participants (68.8%) had been given simplified instructions. The relationship is statistically significant, $\chi^2(1, N = 121) = 5.85, p = .016$. Clearly there is a relationship between type of instructions given and participants' understanding of both aggravating and mitigating factors, with better but still poor understanding for participants in the simplified instructions condition. There were no statistically significant relationships between instruction timing

and participants' understanding of aggravating or mitigating factors when either the narrow or expanded definitions were considered (all $p > .22$) [2]

As previously stated, four logistic regressions were performed with the three predictor variables, once for each of the four dependent measures (yes or no, was the definition correct). Type of instruction (simplified versus standard) was a significant predictor of participant comprehension using the narrow aggravated definition (Wald = 8.341, $p = .004$), the narrow mitigating definition (Wald = 5.755, $p = .016$), the expanded aggravated definition (Wald = 4.094, $p = .043$), and the expanded mitigating definition (Wald = 6.379, $p = .012$). For all four measures, those given **simplified** instructions were more likely to exhibit comprehension. Neither the main effect of instruction timing nor its interaction with instruction type reached statistical significance, all $p > .179$. A series of Chi-square analyses failed to find any evidence of a relationship between participants' sentence (death or LWOP) and their ability to define aggravating and mitigating factors for either the narrow or expanded definitions, all $p > .35$.

Nature of misconceptions of aggravating and mitigating factors

As previously stated, the majority of participants provided neither the correct definition of aggravating or mitigating factors, nor exhibited a general understanding of such factors by providing examples. The following section shows the lack of understanding by most participants, despite the fact that aggravating and mitigating factors were defined for them in writing. When analyzing open-ended responses to survey questions on the definition of "aggravating factors" three common themes emerged that all three researchers agreed were incorrect. First, participants indicated that aggravating factors were simply facts or evidence (indicated by 24 participants). Some examples of responses include: "hard evidence and facts about trial," "things seen as evidence," "facts of what happened," "physical evidence," "factors pointing towards prosecutor's allegations," "pieces of evidence that support a claim," and "evidence against defendant." A second theme that emerged on incorrect definitions of aggravating factors is that they were not simply evidence, but important, significant or useful evidence (indicated by 18 participants). Some responses were: "things very important to case," "factors that are huge," "major factors," "factors that stand out among others," and "evidence important to the case." A third theme that emerged on incorrect definitions of aggravating factors is that they were facts that show emotion, anger, cause or intent (indicated by 15 participants). Some responses include: "a factor that causes a crime," "hurting someone because you are angry," "factors that would lead to anger," "factors that he [the defendant] knew what he was doing," and "doing something with reason (on purpose)."

When analyzing the open-ended responses to survey questions on the definition of "mitigating factors" it was more challenging to identify themes because of participants' varied (and incorrect) responses, showing their lack of understanding of "mitigating factors." However, two common themes emerged on definitions of mitigating factors that all three researchers agreed were incorrect. First, participants indicated that mitigating factors were small, unimportant, or irrelevant factors (indicated by 25 participants). Some exam-

ples of responses include: “factors that are small,” “minor elements about [defendant],” “minor or less important factors,” “more of secondhand factors that are not as important,” and “factors that really don’t mean much or assist much on the situation.” Second, participants indicated that mitigating factors were simply facts about the defendant, facts about the case, or evidence (indicated by 14 participants). Some examples of responses include: “facts about a person, not physical but emotional,” “things that come up when investigating,” “factors that could show evidence,” “pieces of information or detail that are stable, solid,” and “hard evidence that is indisputable.”

Participants’ reasons for selecting LWOP or death

Regardless of whether participants understand aggravating and mitigating factors, it is important to understand *why* participants indicated that the defendant should receive life in prison without the option of parole (LWOP), or the death penalty. The majority (80%) of the participants gave life without the option of parole as the appropriate sentence. A total of 95 participants answered why the defendant should receive LWOP. However, 36 participants provided responses that were coded in multiple categories: thirty-one participants gave two different reasons why the defendant deserved LWOP, three participants gave three reasons, and two participants gave four reasons.

Reasons why the defendant deserved LWOP rather than the death penalty focused on the defendant, the case, or perceptions of the death penalty. Through thematic analysis of open-ended responses to survey questions, five themes emerged regarding an appropriate sentence for the defendant. The first theme on why the defendant deserved LWOP rather than the death penalty reflected on his earlier life, lack of prior record, character witness testimony, and relationship with his family (discussed in 29 responses). This shows that some participants are aware of factors that are mitigating despite inability to define or even describe mitigating factors when directly asked. One research participant states: “Reading about his previous life I could not justify giving him the death penalty.” Reflecting on the fact that the defendant was born to a young mother and spent most of his early life living with his grandparents. Another participant stated, “I believe that the fact that Jeffrey has a bright past and no other dark spots he shouldn’t be given the death penalty.” A participant agrees, “He has no other form of record before this incident.” One participant states, “The prosecution did not reference any prior crimes committed by the defendant and the defense demonstrated that he does care for children and this is the only incident of him ever being accused of this type of behavior.”

The second theme that emerged as to why the defendant deserved LWOP rather than the death penalty reflected on his cooperative and apologetic attitude after the incident (discussed in 11 responses). One participant states, “From testimony he seems very apologetic.” Another participant states, “Jeffrey decided to cooperate with authorities proved that he wasn’t deserving of death.” A participant agrees, “He came forward to police and cooperated.”

A third theme pointed to perceptions that the death of the baby was accidental or not premeditated (discussed in 24 responses). One participant commented, “The testimony

for it to have been an accident was very reliable.” Another participant agreed, “I think that he truly did panic and did not mean to kill the baby. Even though what he did was horrible, I don’t think the death penalty is the correct sentence for this case.” A participant stated, “This really could have been an accident and he shouldn’t die.” Another participant agrees, “The fact that he killed [the baby] by accident does not allow for the death sentence. He was not sure what to do and he did not murder [the baby] out of hate or anger.”

A fourth theme pointed to the lack of evidence for the sexual battery charge and lack of other solid evidence (discussed in 21 responses). Regarding the sexual battery charge, participants reflected on the lack of an object at the scene that could have been used to penetrate the victim’s anus. When reflecting on general evidence, one participant stated, “There was no exact evidence proving [the defendant] killed that baby. They have theory but no solid proof.” Another participant agrees, “They never really found full evidence that he killed the baby. So now he’d be killed for possibly something he didn’t do.”

Lastly, participants who indicated that the defendant deserved LWOP rather than the death penalty focused on their general attitudes about the death penalty and LWOP. Some participants expressed the reasons they would be against the death penalty for this case (discussed in nine responses). One participant stated, “I believe he should receive life in prison because we shouldn’t take another life because of a death he caused.” Another participant states, “Jail is not going to pay for [the baby’s] death but like the [defendant’s] grandmother said, it is not our place to kill him. He will get what he deserves.” Focusing on rehabilitation, one participant states, “I believe that [the defendant] deserves life in prison because his crime is so unfathomable that he needs to receive help.” Another participant agrees, “I feel that he doesn’t deserve death, but a chance to change. Whether he leaves prison or not, he should be able to change himself and improve.”

On the other hand, some participants selected LWOP rather than death for the defendant because of the perception that a sentence of LWOP is actually a greater punishment than death and that the defendant should suffer in prison and live with the guilt of what he did (discussed in 14 responses). One participant called death “the easy way out.” Another participant agrees, “Sentencing death on someone for death of another is much easier than living your life in prison acknowledging what you did was wrong and being reminded every day.” One participant commented, “He needs to think about what he did for the rest of his life. Death is the easy way out.” Another participant agrees, “Sometimes I feel living the rest of your life in prison with all the guilt is more punishment than escaping it by death. He deserves to suffer in prison.” Another participant reflected, “If you give him the death penalty then he cannot live with guilt that he killed an innocent baby.” Six other participants stated that the defendant deserves “to suffer.”

Twenty-one participants provided a reason why the defendant deserved the death penalty rather than LWOP. Five participants provided responses that were coded in multiple categories: four participants gave two different reasons why the defendant deserved the death penalty and one participant gave three reasons. The first theme that emerged as reasons why the defendant deserved the death penalty rather than LWOP focused on the

fact that the victim was an infant (discussed in 12 responses). One participant states, "If you take the life of an innocent baby, you deserve to die, having already lived." The second theme that emerged as reasons why the defendant deserved the death penalty rather than LWOP focused on the seriousness of the charges (discussed in 13 responses). One participant explains, "I believe that if you take away someone's life justice would be death penalty." Another participant agrees, "I decided he was guilty and should face death because he took a life willing and not accidentally."

Analysis of open-ended responses reveal participants' confusion regarding aggravating and mitigating factors. Many assume that they are simply "facts" or "evidence" but do not understand the difference between the two. Reasons why participants believed the defendant deserved LWOP rather than death varied widely, focusing on the defendant's character and cooperativeness with police, possibility that the incident was accidental, lack of evidence for the sexual battery charge, and general feelings against the death penalty. Some participants also selected LWOP as the appropriate sentence because they viewed it to be a greater punishment than death since the defendant has time to "suffer" in prison. Participants who thought the defendant deserved death focused on the seriousness of the offense and the age of the victim.

DISCUSSION

Like prior research, this research supports that mock jurors do not understand aggravating and mitigating factors (Barner, 2014; Bentele & Bowers, 2002; Haney & Lynch, 1994, 1997; Sandys, 2014; Wiener, et al., 1995, 1998). In fact, even when the three researchers agreed to accept a definition of mitigating factors if examples were provided (expanded definition), most participants (74%) did not exhibit comprehension of mitigating factors, 67% did not exhibit comprehension of aggravating factors. This can be compared to research by Haney and Lynch (1994) who also used a sample of college students as mock jurors. The find that only 64% were even partly correct in their definitions of aggravating and mitigating factors, and less than half (47%) could provide a partial definition of mitigating factors. Although the differences were not statistically significant for either the narrow or expanded definitions of aggravating or mitigating factors, participants were slightly more likely to correctly define aggravating than mitigating factors, which supports prior research that also concluded that jurors are more likely to understand aggravating factors compared to mitigating factors (Frank & Applegate, 1998; Luginbuhl, 1992; Luginbuhl & Howe, 1995; Otto, et al., 2007). Unlike prior research that concluded that lack of understanding of sentencing phase instructions results in a preference for a death sentence (Bowers, 1995; Patry & Penrod, 2013; Wiener, et al., 1995), this research failed to find any evidence of a relationship between participants' sentence (death or LWOP) and their ability to define aggravating and mitigating factors for either the narrow or expanded definitions.

This current research supports prior research that concludes the simplified or revising sentencing phase instructions improve comprehension (Frank & Applegate, 1998; Otto, et al., 2007; Patry & Penrod, 2013; Smith & Haney, 2011). However, like prior research, this research also concludes that although revising capital sentencing instructions

improves understanding, comprehension remains limited (Diamond & Levi, 1996; Smith & Haney, 2011; Wiener, et al., 1995).

Despite the contribution to the literature on comprehension of jury instructions, this research is not without limitations. Although a strength of this research is the use of a real trial transcript (*Havard v. Mississippi*), and the use of instructions based on existing instructions, only one trial transcript was used. In addition, all of the participants were students at the same metropolitan university. As a result, our ability to generalize our results to other trials, crimes, and populations is somewhat compromised.

Also, sentencing testimony was not excessive in this case. There was one witness each for the defense and prosecution: both from relatives of the parties involved and both primarily emotional in nature. If there had been more testimony, it may have had a more significant impact on participants' responses. However, we intended to keep our materials as close as possible to the original trial content.

Despite these limitations, this research contributes to existing literature on jurors' understanding of sentencing phase instructions, and policy suggestions can be offered. While literature explores the influence of the timing of instructions on jury recall of evidence (Heuer & Penrod, 1989), this research specifically focuses on the possible relationship between instruction timing and participants' understanding of aggravating and mitigating factors. Given that the research does not find statistically significant relationships between instruction timing and participants' understanding of aggravating and mitigating factors, judges may not want to focus on the timing of instructions as a way to improve understanding of aggravating and mitigating factors in capital cases. However, given that simplified instructions predict understanding of aggravating and mitigating factors, consideration should be given to revising instructions to improve comprehension. Prior research concludes that when instructions include statements that could dispel commonly held misconceptions about the *application* of aggravating and mitigating factors their comprehension improves (Otto, et al., 2007). Hence, policymakers should consider revising instructions based on misconceptions about the *meaning* of or definition of aggravating and mitigating factors.

While other research examines juror understanding of sentencing phase instructions through multiple-choice questions and close-ended evaluation questions (Blankenship, et al., 1997; Frank & Applegate, 1998; Otto, et al., 2007; Patry & Penrod, 2013), this research offers a better understanding of *how* jurors may misunderstand aggravating and mitigating factors. As stated by Patry and Penrod (2013), "[I]t is critical that future research identify the specific qualities of instructions that lead to increased comprehensibility" (p. 240). This current research attempts to unravel the nature of jurors' misunderstanding of sentencing phase instructions through an analysis of open-ended responses that provides knowledge of *how* they are incorrectly defining aggravating and mitigating factors. This information could assist policymakers as they revise sentencing phase instructions.

Lastly, this research contributes to the literature by exploring *why* participants indicated that the defendant should receive LWOP or the death penalty, regardless of whether

they exhibited an understanding of aggravating and mitigating factors. Research exploring case factors that predict a death sentence is limited (Patry & Penrod, 2013). Patry and Penrod (2013) recommend that future research should explore what mediating factors influence death penalty decisions (p. 241). Research has identified factors that predict a death sentence include heinousness of the crime and perceived dangerousness of the defendant (Patry & Penrod, 2013). On the contrary, jurors who sympathize with the defendant are more likely to vote for a life sentence rather than a death sentence compared to jurors who do not sympathize with the defendant (Garvey, 2000). Results from this research support that a LWOP sentence could be influenced by perceptions of the defendant as having a “bright past” and no prior record. In addition, past research finds that jurors who perceive the defendant as showing no remorse for the crime are more likely to vote for a death sentence (Eisenberg, Garvey, & Wells, 1998; Garvey, 1998). Results from this research also finds that a LWOP sentence could be influenced by recognition of the defendant’s apologetic attitude. If these are factors in cases, defense attorneys trying to avoid a death sentence for their client should stress absence of a prior record and apologetic attitude. However, it must be noted that, as our participant responses indicated, the opinion of the death penalty as being the more punitive sentence is not uniform, and attorneys on both sides should be mindful of this.

In conclusion, prior research indicates that jurors do not understand sentencing phase instructions in capital cases. The fact that this research supports that jurors do not understand aggravating and mitigating factors should be a cause for concern that death sentences are not being given fairly. Furthermore, while racial bias in sentencing that may result from lack of understanding of sentencing phase instructions is beyond the scope of this paper, prior research concludes that jurors exhibit more racial discrimination when they do not understand sentencing phase jury instructions (Haney & Lynch, 1994, 1997; Lynch & Haney, 2000, 2009). This research suggests not only that providing simplified instructions may improve comprehension of aggravating and mitigating factors, but also our identification of ways in which participants erroneously define aggravating and mitigating factors could assist policy makers in the rewriting instructions in a way that clearly explains what aggravating and mitigating factors are not.

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Date Received: 02/2020

Date Accepted: 11/2020

Suggested citation: Maier, S. L., Mannes S., & Foster E. E., (2021). Mock Jurors' Comprehension of Aggravating and Mitigating Factors: The Impact of Timing and Type of Sentencing Phase Instructions. [Electronic Version]. *Applied Psychology in Criminal Justice*, 16(1), 65-83.

ENDNOTES

[1] After being on death row for 16 years, in September 2018 Havard was taken off death row because questions arose regarding medical testimony about how the baby had died and if her death could have resulted from Shaken Baby Syndrome.

[2] Results available upon request