

INSTRUCTIONS AS A SAFEGUARD AGAINST PROSECUTORIAL MISCONDUCT IN CAPITAL SENTENCING

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Prosecutorial misconduct in the form of improper closing argument has been identified as a leading cause of unfairness in capital trials. The U.S. Supreme Court has indicated that arguments with the potential to unduly influence the jury should be clarified by a specific judicial instruction. The present study investigated the effectiveness of varying instructions on sentence recommendations and perceptions of improper prosecutor argument. Results indicated that the inclusion of a specific, cautionary instruction led to significantly less death penalty recommendations compared to a brief, general instruction. In addition, instructions minimized the importance of the misconduct statements on participants' sentence recommendations. Findings provide support for the validity of judicial instructions as a legal safeguard against prosecutorial misconduct in capital sentencing.

Improper Prosecutor Argument

Prosecutorial misconduct has been identified as a contributing factor in the wrongful conviction of innocent people (Schoenfield, 2005). According to statistics published by The Center for Public Integrity, in the last three decades, prosecutorial misconduct has been cited as a factor “when dismissing charges, reversing convictions or reducing sentences in over 2,000 cases” (<http://projects.publicintegrity.org/pm/>). Misconduct is defined as any intentional use of illegal or improper methods to convict a defendant in a criminal trial and can occur in numerous forms. Some examples include suppressing evidence, using false or perjured evidence, improperly questioning witnesses and referencing the defendant's failure to testify on his own behalf (Lucas, Graif, & Lovaglia, 2006). The implications for prosecutorial misconduct can be severe, particularly in capital cases, due to the critical importance of both the outcome of the sentencing proceeding as well as the prosecutor's role in determining the outcome (Kirchmeier, Greenwald, Reynolds, & Sussman, 2009). The pressure to engage in misconduct in order to secure a conviction and subsequent death sentence is often related to the likelihood that misconduct will occur. For some, the pressure is viewed as an intentional misuse of prosecutorial discretion (Minsker, 2009); others frame it as a heuristic – an automatic and unintentional consequence of the cognitively demanding tasks involved (Burke, 2007). Legal discussion of these concerns consist of a critical analysis of current remedies as well as suggested remedies for in-trial misconduct, and educating prosecutors on the role of cognitive bias in the sentencing process (Brewer, 2000; Burke, 2007; Minsker, 2009).

Regardless of intent, misconduct in the form of improper prosecutor argument is likely to mislead the jury not only about its role but also about the possible consequences of its choices. Empirical evidence has found that individuals exposed to improper statements made by the prosecutor in closing argument recommended the death penalty significantly more often than those not exposed to the statements (Platania & Moran, 1999). The impact of such misconduct diverts jurors' attention from the legally relevant facts and compromises a defendant's right to a fair trial. Thus, it is extremely important for courts to distinguish prosecutorial misconduct from permissible arguments (Minsker, 2009).

Although the U.S. Supreme Court has yet to establish specific guidelines determining the parameters of permissible prosecutorial argument, lower courts have provided general principles for defining improper penalty phase arguments. In reviewing cases involving claims of prosecutorial misconduct, the following themes presented in argument were ruled as improper: discussing cost (*Gregg v. Georgia*, 1976), mischaracterizing the jury's role (*Caldwell v. Mississippi*, 1985), emphasizing personal beliefs in the death penalty (*Brooks v. Kemp*, 1985), and using improper grounds to impose the death penalty, e.g., quoting the bible (*Romine v. Head*, 2001). In *Chapman v. California* (1967), the Supreme Court ruled that the prosecutor's tactic of repeatedly referencing the defendant's failure to testify inferred his guilt and substantially influenced the jury to convict. In addition, prosecutors often argue that mitigating circumstances are exaggerated and irrelevant to sentence determination (*State v. Stojetz*, 1999). Finally, prosecutors often explain the crime in vivid detail and focus on the suffering of the victims and their families (*Brooks v. Kemp*, 1985). Each has been viewed as an attempt to improperly justify imposing the death penalty. In their attempts to persuade the jury to vote for death, prosecutors' arguments combine a number of persuasive tactics, often with little relevance to the law's requirements of proving the existence of aggravating circumstances (Costanzo & Costanzo 1994; Costanzo & Smith, 1994)

It is not uncommon for higher courts to rule that prosecutorial misconduct is "harmless error"; i.e., error ruled as having no bearing on the outcome of the trial (Fisher, 1988). In *Brooks v. Kemp* (1985) for example, the prosecutor made 12 specific statements that the defendant believed were improper and in violation of his constitutional rights. Specifically, Brooks claimed that arguments of deterrence, prosecutorial discretion, victim characteristics, and trivializing the task of the sentencing jury were outside the scope of relevant sentencing guidelines. The U.S. Court of Appeals for the Eleventh Circuit refused to overturn Brooks' death sentence despite the existence of prosecutorial misconduct. The court ruled the prosecutor's improper statements as harmless error: i.e., in the absence of the statements, the defendant still would have received the death penalty. Considering that exposure to prosecutorial misconduct during closing argument has been found to increase the likelihood of imposing the death penalty, the harmless error rule is particularly problematic (Gaskill, 1991).

Instructions as a Safeguard

In addition to raising constitutional challenges to improper prosecutor argument, defendants can exercise their right to object and, in the wake of such argument, request a curative instruction. The Supreme Court has indicated that arguments violating the parameters of permissible argument should be objected to and clarified by specific judicial instruction (*Donnelly v. DeChristoforo*, 1974). The ability to neutralize the effects of prosecutorial misconduct often is based on the efficacy of a jury instruction or the opportunity for defense counsel to object. An effective curative instruction should follow an objection, indicate the impropriety of the remark, and instruct the jury that the remark should be disregarded. Similarly, an effective jury instruction should indicate not only that closing arguments are not evidence for consideration, but also instruct jurors to “consider the case as if no such statement was made” (*Donnelly v. DeChristoforo*, 1974, p. 641).

The effectiveness of jury instructions as a legal safeguard however, appears to depend on the circumstances of the case. In *United States v. Solivan* (1991), the U.S. Court of Appeals for the Sixth Circuit ruled curative instructions were insufficient and too late to negate the highly prejudicial impact of the prosecutor’s remarks on the jury. In *Blake v. State* (2005), the defendant asserted the prosecutor improperly commented on his propensity to commit future crimes. The defendant did not object at trial, and counsel raised the issue of misconduct on appeal. The Court found that absent objection, the comments were proper and did not influence the jury’s sentencing decision. In *United States v. Bess* (1979), the Sixth Circuit stressed the importance of giving an immediate curative instruction to curtail any prejudicial effects of misconduct. In *Weaver v. Bowersox* (2006), the only instruction bearing on the prosecutor’s argument “was a general, unelaborated admonition that the arguments of counsel are not evidence” (p. 312). In *Brooks v. State* (1977), no misconduct instruction was given. Hence, there appears to be no structure to the type of safeguard employed as well as its subsequent ruling.

Very little research has investigated how individuals respond to specific curative instructions in the context of misconduct. This is striking, considering the emphasis appellate courts place on the use of instructions to counter the potentially harmful effects of improper argument. However, empirical evidence exists addressing the efficacy of jury instructions in other legal contexts, which is useful in conceptualizing the present study. For example, in a study investigating the role of instructions on perceptions of victim impact testimony (Platania & Berman, 2006), the researchers found that a specific, limiting instruction on the use of victim impact evidence decreased the importance placed on this type of testimony when considering sentence. This finding differed significantly from considering victim impact evidence in the absence of any specific instruction. The researchers also found that specific instructions led to significantly less death penalty recommendations compared to a general instruction. Research also has pointed to moderator variables when examining the efficacy of curative instructions. For example, individuals’ willingness to engage in thought (Cacioppo & Petty, 1982) was found to be associated with increased understanding of instructions. Specifically, Alison and Brimacombe (2010) found individuals high in need for cognition were significantly more likely to comprehend judge’s instructions

regarding prior convictions compared to individuals low in need for cognition. One study in particular however, revealed interesting and relevant findings to the present study. A meta-analysis of 49 studies examining inadmissible evidence, found that judicial admonition did not completely cure the impression made by this type of evidence (Stebly, et al., 2006). However, improvements in effects were observed when instructions included a justification for inadmissibility, namely when the judge explained the unreliability associated with the evidence, that it was considered hearsay evidence, or that it was immaterial to the case. When a specific instruction to disregard inadmissible evidence was administered in conjunction with the general jury charge, jurors returned fewer convictions compared to those who were exposed to inadmissible evidence without instructions. According to the authors, this finding demonstrates jurors' ability to "respond to specific information they can understand and appreciate" (p. 486). One explanation for the inability of judicial admonition to increase comprehensibility is the likelihood that jurors' awareness to the issue in question is actually increased rather than decreased, thus leading to a "backfire effect" (Cox & Tanford, 1989; Lieberman, Arndt, & Vess, 2009). This finding has been explained best in terms of psychological reactance theory (Brehm & Brehm, 1981). According to Lieberman and Arndt (2000), "jurors are motivated to maintain their freedom, and thus the ineffectiveness of limiting instructions can be explained by the provocation of reactance" (p. 703). As a result, an effective curative instruction should provide specific information in a manner that can be understood and appreciated. If these factors are considered, a properly administered instruction should minimize any weight given to improper argument when determining sentence.

The Current Study

In the present study, we investigated the effects of varying instructions on sentence recommendation in the presence of prosecutorial misconduct. In addition, we were interested in perceptions of the importance of improper prosecutor argument on sentence recommendation. Earlier research (Platania & Moran, 1999) found that individuals exposed to improper closing argument rated the prosecutor's statements more favorably compared to individuals not exposed to such improper statements. The present study expanded this work by varying the type of instruction given after hearing sentencing phase closing arguments. Improper statements made by the prosecutor used in our study were adopted from the actual trial of William Anthony Brooks in Georgia during the mid-1970s (*Brooks v. State*, 1977). Given the potential emotional impact of misconduct, we expected that a specific, thorough instruction, similar to *Donnelly v. DeChristoforo* (1974), would be necessary to decrease the number of death penalty recommendations and to minimize the perceived importance of improper closing argument.

METHOD

Participants

A total of 150 jury-eligible individuals participated in our study (75 undergraduate students and 75 community members). Participants who responded affirmatively to the following items were considered jury-eligible: registered voter, U.S. citizen, at least 18

years old, possessed a valid driver's license, and no felony convictions. Undergraduates participated as part of a research requirement; community members were paid \$20 for their participation. Participants ranged in age from 18-54. Sixty-five percent of our combined sample indicated conservative political views; 48% reported having a relative employed in law enforcement. Of our sample of community members, 83% were married and employed full-time. Twenty-two percent (16 students and 17 community members) indicated their inability to follow the judge's instructions in the case as defined by the standard set forth by the U.S. Supreme Court in *Wainwright v. Witt* (1985). This percentage is comparable to *Witt*-excludable participants identified in numerous studies focusing on the relation between death-qualified jurors and various trial-specific and individual difference factors (see Butler, 2009; Butler & Moran, 2007). Further analysis found this sub-sample to be significantly more likely to recommend life in prison compared to the remaining sample. As a result, their responses were not included in our results.

Materials

Videotaped Penalty Phase. Participants viewed a videotape based on the penalty phase of the trial of William Anthony Brooks (*Brooks v. State*, 1977). This case was selected because of access to complete transcripts of closing arguments and the judge's instructions. The videotape consisted of a summary of the details of the first phase of the trial, penalty phase closing arguments of the prosecutor and defense attorney, and the judge's instructions. In the summary of the first phase, participants were told that the defendant was found guilty of kidnapping and first-degree murder of the victim, Carol Jeanine Galloway. To minimize the likelihood of encountering any ceiling effects, we removed the charges of rape and robbery from our depiction of the case. Participants were randomly assigned to one of three experimental conditions ranging in length from approximately 45 minutes (*No Misconduct Instructions* and *General Instructions*) to 50 minutes (*Specific Instructions*). The videotape was filmed from a juror's perspective in a moot courtroom at a local law school. Male actors portrayed the judge and both attorneys.

The videotape began with a brief narrated account by the judge of the evidence presented during the first phase of the trial. At the end of the summary, the judge informed the participants that the jury had found the defendant guilty of all the charges. He closed with the following:

The question to you, as jurors in this case, is which penalty is appropriate for this crime. You will now hear the defense attorney and prosecutor present closing arguments in this case. The prosecutor will argue that you should vote for the death penalty. You will then hear the defense attorney's argument for mercy, asking that you spare the defendant's life. Finally, I will be providing you with sentencing instructions.

The prosecutor and defense attorney arguments were taken directly from the transcript of the penalty phase of the *Brooks* trial. The prosecutor's argument was approximately 20 minutes in length and contained 12 statements that "interjected irrelevant considerations into the fact-finding process" (*Brooks v. Kemp*, 1985, p. 1408). In order to preserve ecological validity and to maintain the integrity of the research, the researchers included the pattern of objections and subsequent rulings depicted in the *Brooks* trial. The defense

attorney's argument was also approximately 20 minutes long and followed the prosecutor in his argument, adhering to the order of presentation of arguments in *Brooks*. There were no objections present in the defense attorney argument. See Table 1 for the complete list of 12 statements taken from *Brooks*.

Table 1
Improper Prosecutor Statements

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1. "He was just walking along with a pistol in his pocket and decided: 'Well I'll just make a hustle,' to use their language, his language."
 2. The prosecutor's statement of his personal belief in the death penalty: "If you have to take sides, I take the side of capital punishment. I believe in the death penalty, I think it's necessary."
 3. Comparing Brooks to a "cancer on the body of society."
 4. Discussing the broad criminal element, then seeking death for Brooks by stating, "He's a member of the criminal element."
 5. Reference to discretion in seeking the death penalty: "In the seven and a half years I've been District Attorney, I believe we've only asked for the death penalty less than a dozen times."
 6. Referring to victims of child abuse: "They don't turn to a life of crime after abuse."
 7. "What kind of person was Carol Jeanine Galloway?" Discussion of the victim by emphasizing her youth, attractiveness, and kind disposition.
 8. Diluting the jury's sense of responsibility by arguing that it would not be responsible for Brooks' death: "Brooks himself pulled the switch on the day he murdered the victim."
 9. Reminding the jury of the tragedy to the victim's family: "Next week when it's Thanksgiving and they are sitting around the table, Carol Jeannine won't be there and never will be there again."
 10. Reference to the futility of thought regarding Brooks' rehabilitation: "There is no chance this defendant can be rehabilitated."
 11. Focusing on the future dangerousness of the defendant by asking, "Whose daughter will it be next time?"
 12. Arguing that the defendant himself believed in the death penalty: "He executed her a whole lot more horrible than the electric chair."
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Note: For complete statements see opinion in *Brooks v. Kemp* (1985) <http://openjurist.org/762/f2d/1383>

Instruction Conditions. In the final segment of the videotape, the judge instructed the participants with an abbreviated version of the actual instructions used in the sentencing phase of the *Brooks* trial. Although abbreviated, the instructions contained the relevant aggravating, mitigating, and weighing language present in the *Brooks* instructions. See Table 2 for the instructions. This set of instructions was administered to each of the three experimental conditions. In the *No Misconduct Instruction* condition it was the only instruction administered there were no additional instructions regarding attorney arguments. In the *General Instruction* condition of the study, the judge added the following statement: "You should not use sympathy, passion, or prejudice when arriving at a decision. Please bring to bear your best judgment in reaching your sentence, realizing that a human life is at stake." In the *Specific Misconduct Instruction* condition the judge added the statement: "In his closing argument, the prosecutor made statements relating to the following: his personal discretion in seeking the death penalty; mischaracterizations of your role as ju-

Table 2.
Judge's Instructions Administered in all Experimental Conditions

Ladies and Gentlemen, it is now your duty to determine what punishment will be imposed upon the defendant for his crime of first-degree murder. Sentence is determined exclusively by the existence of aggravating and mitigating circumstances. If you recommend the death penalty, then the court is required by law to sentence the defendant to death. On the other hand, if you can see fit to recommend mercy for the defendant, then the court is required by law to sentence the defendant to life imprisonment.

Your first responsibility as a juror is to determine whether any mitigating or aggravating circumstances existed at the time the murder was committed. You are authorized to recommend the death penalty only if you find, beyond a reasonable doubt, the existence of one or more of three statutory aggravating circumstances. A defendant who at the time of the crime has attained the age of 18 or more and who has been found guilty of first degree murder may be sentenced to death if: (a) The murdered individual was killed in the course of another felony [kidnapping], and (b) The defendant acted with the intent to kill the murdered individual. If you recommend a life sentence then the court is required by law to sentence the defendant to life imprisonment.

Among the mitigating circumstances you may consider: (a) The defendant has no significant history of prior criminal activity, (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (c) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired, (d) The age of the defendant at the time of the crime, (e) Any other aspect of the defendant's character or record or any other circumstances of the offense. Each aggravating circumstance must be established beyond a reasonable doubt. If you are reasonably convinced that mitigating circumstances exist you may consider it as established.

Your sentence must be based on these considerations, carefully considering all of the evidence realizing that a human life is at stake and bring to bear your best judgment in reaching your sentence.

Note: Participants in the *No Misconduct Instruction* condition received *only* this instruction. Instructions taken from *Brooks v. Kemp* (1985).

rors; improper justification for seeking the death penalty; and his personal opinion of and belief in the death penalty. You should not consider these statements in terms of sympathy, passion, or prejudice. Please bring to bear your best judgment in reaching your sentence, realizing that a human life is at stake.”

Questionnaire. Participants completed a 15-item questionnaire prior to viewing the videotape. The items assessed various demographics and included one item measuring participant's views on the death penalty. The question asked whether individual's attitude toward the death penalty, either in favor or opposed, would “prevent or substantially impair” the participant-juror's ability to consider both penalties in this case (*Wainwright v. Witt*, 1985). This question is designed to capture death penalty attitudes, which would disqualify their responses to our dependent measures. After viewing the videotape, participants completed an additional 20 items assessing: sentence recommendation including life in prison or death by lethal injection; items assessing an understanding of aggravating and mitigating circumstances; verdict confidence; and perceptions of the importance of each of the improper statements on their sentencing recommendation.

RESULTS

Sentence Recommendation

Participants who heard the specific misconduct instructions were significantly more likely to recommend life in prison compared to participants in the remaining two instruction conditions: $\chi^2(2, N = 117) = 11.81, p = .003$. In addition, 64% of participants in the *No Misconduct* condition recommended the death penalty compared to 36% who recommended life in prison. Table 3 displays the distribution of sentence recommendations among the three instruction conditions.

Table 3.
Sentence Recommendation by Type of Instruction (N = 117)

<u>Sentence Recommendation</u>	<u>Misconduct Instructions</u>		
	None	General	Specific
Life in Prison	14	15	34
Death by Lethal Injection	24	17	13

Note: Sentence recommendation measured dichotomously: 1 = *life in prison* 2 = *death by lethal injection*. Prior to death-qualification, each Instruction condition contained 50 participants.

Effectiveness of Instructions

A one-way Analysis of Variance (ANOVA) was conducted to determine the role of instructions on the importance of the improper statements on sentence recommendation. The dependent variable was rated on a scale of 1 = *Not at all important in reaching my decision* to 7 = *Extremely important*. A significant effect of the instructions was found on six of the 12 statements. See Table 4 for the specific statements and the range of responses on perceived importance of each of the six statements on sentence recommendation. As Table 4 indicates, instructions played a significant role in the importance of the improper statements on sentence recommendation.

Specifically, improper statements were perceived as most important when considering sentence for participants who did not hear any misconduct instructions. For some statements, there were no significant differences in importance ratings between the general and specific instructions. However, for all statements, *some* type of instruction appeared to be better than none at all in minimizing the importance of the misconduct statements on sentence recommendation. Additionally, a separate one-way ANOVA found significantly more consideration of sympathy for the defendant for participants in the General Misconduct Instruction condition compared to the *No Misconduct Instruction* condition: $F(2, 114) = 3.99, p = .021$: ($M_{\text{General}} = 3.84$ v. $M_{\text{No}} = 2.78$). Responses were scaled from 1 = *Not at all considered in reaching my decision* to 7 = *Completely considered*.

Table 4.
Mean Importance Ratings of Improper Statements as a Function of Instruction (N = 116)

<u>Improper Statements</u>	None	<u>Misconduct Instructions</u>	
		General	Specific
“I believe in the death penalty.”	4.65 _a	3.09 _b	2.95 _b
“He's a member of the criminal element.”	5.55 _a	4.00 _b	3.87 _b
“I've asked for it less than a dozen times.”	4.89 _a	3.90 _{ab}	3.10 _b
“They don't turn to a life of crime after abuse.”	5.97 _a	4.65 _b	4.31 _b
“Brooks himself pulled the switch.”	6.05 _a	5.29 _{ab}	4.78 _b
“No chance for [defendant] rehabilitation.”	5.31 _a	3.93 _b	3.80 _b

Note: Ratings were made on a 7-point scale from 1 = *Not at all important* to 7 = *Extremely important*. Row means with different subscripts are significantly different from one another.

All mean differences significant at $p < .01$. F values ranged from 4.26 – 7.87, $df = (2, 114)$ for each significant effect. Refer to Table 1 for complete statement.

Life v. Death Differences

An independent-samples t-test was conducted to examine whether and to what extent differences existed in perceived importance of the 12 statements between participants who recommended life in prison compared to those who recommended the death penalty. Results indicated differences for six of the 12 statements. In all cases, participants recommending death rated the statements as significantly more important in their sentence recommendation compared to those who recommended life. Table 5 displays the six statements as well as the mean importance ratings categorized by sentence recommendation.

Table 5
Mean Importance Ratings of Improper Statements Between Life and Death Verdicts

<u>Improper Statement</u>	Life	Death
“What kind of person was Carol Jeanine Galloway?”	3.11	4.00*
“No chance for [defendant] rehabilitation.”	3.85	4.88**
“I believe in the death penalty, I think it's necessary.”	3.17	3.98*
“He's a cancer on the body of society.”	4.15	4.93*
“Whose daughter will it be next time?”	4.31	5.87**
“He's a member of the criminal element.”	4.36	5.59**

Note: * $p < .05$; ** $p < .01$. Ratings were made on a 7-point scale (1 = *Not at all important* to 7 = *Extremely important*): t values ranged from -1.98 to -2.69, $df = (115)$ for each significant effect.

Participants also differed as a function of sentence recommendation with respect to individual consideration of aggravating circumstances. Results of an independent samples *t*-test revealed those recommending the death penalty were significantly more likely to consider aggravating circumstances compared to those recommending life in prison: $t(115) = -2.28, p = .028$: ($M_{\text{Death}} = 5.70$ v. $M_{\text{Life}} = 5.09$.) Responses scaled from 1 = *Not at all considered* to 7 = *Completely considered*. Participants did not differ in sentence recommendation in consideration of mitigating circumstances and sympathy for both the victim and the defendant.

A series of multiple regressions were conducted to determine the predictive utility of a number of factors on overall perceived importance of the 12 improper statements; confidence in sentence recommendation; and sympathy for the victim. The best predictors of confidence in sentence recommendations were consideration of aggravating circumstances and relation to law enforcement: $F(5, 110) = 3.32, p = .008; R^2 = .14$. Specifically, individuals related to someone in law enforcement reported more confidence in their sentence recommendation compared to those not related to law enforcement ($\beta = .185$). Similarly, greater consideration of aggravating circumstances was associated with greater confidence in sentence recommendation ($\beta = .302$). Individual characteristics, however, did not reliably predict importance ratings of the misconduct statements. In other words, participants' perceptions of the 12 improper statements were better explained in the context of the sentencing phase as opposed to predisposed attitudes or beliefs.

Finally, independent-samples *t*-tests were conducted to determine if students and community members differed in responses to our dependent measures. Results indicated no significant differences were found between undergraduate students and members of the community in sentence recommendation. In addition, no differences were found in responses to items assessing the following: importance of statements to sentence recommendation, consideration of aggravating and mitigating circumstances, and sympathy for victim and defendant: *p* values ranged from .48 to .98. Our sample reported taking their role as 'jurors' in his case seriously: ($M_{\text{Students}} = 5.34$ v. $M_{\text{CM}} = 5.43$) (responses scaled from 1 = *Not at all seriously* to 6 = *Very seriously*).

DISCUSSION

In the present study, the empirical question was a test of the ability of judicial instructions to safeguard against prosecutorial misconduct. Results indicate that the inclusion of a specific, cautionary instruction led to significantly fewer death penalty recommendations compared to a brief, general instruction. In addition, instructions minimized the importance of the misconduct statements on participants' sentence recommendation. Namely, participants exposed to a specific instruction produced the most life sentence recommendations and the fewest death penalty recommendations. These findings underscore the importance of the addition of a specific instruction as a remedy to the probable influence of improper argument on sentence recommendation (*Donnelly v. DeChristoforo*, 1974).

In the present study, participants did not discriminate with respect to the type of improper statement when evaluating each statement's relative importance on sentence recommendation. Specifically, improper statements of the prosecutor's personal belief in the death penalty were rated as important as statements regarding future dangerousness when recommending sentence. In addition, for all statements *some* type of instruction appeared to be better than none at all in minimizing the importance of the misconduct statements on participants' sentence recommendation. These findings emphasize the need to prohibit the use of improper statements regardless of the type to ensure a fair and just trial.

Limitations

It is important to point out that the magnitude of participants' responses to various trial-related issues in this type of research study can be exaggerated due to the limited amount of trial information made available to them. This type of problem is not atypical in laboratory research simulating complex trial procedures. Other issues with simulated trial research have included the less-than-realistic nature of the task; level of seriousness in participation; and the choice of undergraduate students as research sample. Although each of these concerns is legitimate, research finds simulated trial studies with undergraduate students acting as jurors to be fairly representative of the behavior of actual jurors in actual cases (Bornstein, 1999). In addition, multiple studies examining differences in verdict as a function of sample type found no significant differences between student and non-student participants in verdict preference in hypothetical trials (Finkel & Handel, 1989; Fulero & Finkel, 1991). In addition, minimal effects have been observed for type of medium used in mock jury research (Bornstein, 1999). Nonetheless, care should be taken when generalizing results from simulated trial studies to the 'real world'.

In our study, we attempted to minimize these problems by using a number of ecologically valid materials including closing arguments and judge's instructions taken from actual cases. In addition, we utilized videotaped stimuli, which are accepted as the standard for realistic trial simulations compared to written transcripts and audio presentation. In addition, we used both a student and non-student sample and found no significant differences in their responses to trial stimuli. Although we are confident that our approach to examining this topic drew on the strengths of both internal and external validity, we echo other researchers' concerns regarding generalizing results involving life and death decisions (Myers & Greene, 2004).

CONCLUSION

The frequency with which prosecutorial misconduct claims appear on appeal identifies this topic as crucial for due process (*Garcia v. State*, 1993). Furthermore, our results demonstrate the impact of prosecutors' remarks on death penalty recommendations is apparently magnified by a clear lack of *misconduct* instruction. Although appellate courts rule that improper statements made by prosecutors do not render sentencing proceedings unfair, some judges express concern that the error may not be harmless (Edwards, 1995). Specifically, the Court in *Brooks* noted that prosecutors may not state personal beliefs to the jury, diminish the jury's sense of responsibility for sentence, and suggest the jury con-

sider prosecutorial discretion when deciding the death penalty. The present study found a significant increase in death penalty recommendations when prosecutors argue facts not in evidence. This finding must be considered when determining fairness.

An empirical examination of improper prosecutor argument, such as this one, allows us to explore and evaluate the efficacy of the safeguards against prosecutorial misconduct. Experimental data assists in clarifying the steps necessary to minimize the likelihood that a trial will be rendered fundamentally unfair. We are confident that our research paradigm provided a valid examination of this influence in the context of improper argument. As a first attempt in addressing the importance of the role of legal safeguards, our study isolated closing argument and examined the specific effects of instructions, offering a first look at how individuals are using instructions in the domain of misconduct. These results expand upon Platania and Moran (1999), who demonstrated the harmful effects of prosecutorial misconduct on sentence recommendation. Future research should examine the interplay between evidence and argument in order to evaluate the role, if any, of the moderating effects of evidence on capital sentencing decisions. In addition, an interesting and worthwhile empirical question is the efficacy of defense objection to improper statements on both sentence recommendations and perceptions of improper statements.

The results of the present study provides empirical data to augment the scope of permissible prosecutorial comments in closing arguments and address the imbalance of due process with the allowance of improper prosecutor argument. Most importantly, the value of this study is the insight offered into the use of instructions as a legal safeguard against prosecutorial misconduct in capital sentencing. Results support the need to improve prosecutorial accountability for misconduct and other issues contributing to wrongful convictions.

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