Misunderstanding of Capital Instructions: Clarification is Possible

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“It was in the outline, you know, if we found the defendant guilty, we had to go by KY state law. If we found him guilty on certain counts, and we found him guilty of capital murder, and we had to weigh some other things too but, you know, we had to give him capital punishment by state law.”

-Former Capital Juror, Capital Jury Project -- Kentucky

The ‘modern era’ of capital punishment often is dated to the decision of Gregg v. Georgia² (1976) and its companion cases. The crux of Gregg, finding the revised capital punishment statutes constitutional, rests on the assumption that jurors could be instructed to apply the law correctly. It is through that correct interpretation and application of the law that the previously found arbitrariness and capriciousness of sentencing decisions in capital cases was to be curtailed. As noted in Gregg:

“While such standards [to guide a capital jury's sentencing deliberations] are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary” (at 193-194). Nearly four decades of research calls the accuracy of that statement into question. This article focuses on how and then what we know about capital jurors’ understanding of instructions, especially Kentucky capital jurors. It then moves to an exploration of why comprehension might be so poor. And finally, the article ends with suggested steps that could be taken to improve juror comprehension of sentencing instructions.

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How and what we Know About Capital Jurors’ Understanding of Instructions

Two broad approaches to research have been used to study understanding of capital sentencing instructions. First are studies conducted with mock jurors, often members of the general public, persons called for jury duty, or college students. These are people who have not necessarily served as capital jurors, but whose qualification to serve as such is usually evaluated. In these studies, research participants are typically randomly assigned to read instructions, either the pattern instructions or a revised set of instructions, after which their comprehension is tested. The hallmark of this approach is its control: The investigator has the ability to isolate changes to the instructions to determine whether comprehension is improved and if so, in response to what and by how much. The second category of research on comprehension of capital sentencing instructions looks to actual capital jurors and asks them what they understood the instructions to mean. The hallmark of this approach is that you have actual jurors who served on actual cases, who were thus qualified to serve as capital jurors and who heard evidence and arguments, who then report what they understood the instructions to mean in the context of the complexity of a case. What is perhaps most informative from this area of research is that the pattern of findings is similar across both research designs. Regardless of whether the researcher is studying college students, lay citizens, or actual capital jurors, regardless of whether the study was conducted in California, Illinois (while it still had the death penalty), Ohio, Tennessee, North Carolina, Kentucky or elsewhere, the general conclusion from the studies is that comprehension of capital sentencing instructions is poor: (Mock) jurors do not understand what they can consider in terms of mitigation and aggravation; they do not know what the terms aggravation and mitigation mean, and; they are especially confused by the burden of proof and the lack of a unanimity requirement for mitigating circumstances. What also is consistent across these studies is that comprehension can be improved.
Mock Jurors

Researchers have tested a variety of aspects to the understanding of capital instructions within the mock jury paradigm. For example, Patry and Penrod\(^3\) (2013) provided participants with the summary of a case and then tested four variations of capital sentencing instructions: 1) no instructions; 2) a modified version of the instructions used in *Buchanan v. Angelone* (1998); 3) an adaptation of the instruction in response to Justice Breyer’s dissent in *Buchanan*, and; 4) a set of instructions revised by the researchers that walked jurors through each decision that they had to make, provided a decision tree to guide the jurors, and discussed different burdens of proof and unanimity requirements for aggravators and mitigators. To test for comprehension of the instructions, the researchers asked four questions about what the appropriate penalty is when the jury either does or does not agree unanimously on aggravators and mitigators. Consistent with the results of other research in this area, overall comprehension was poor. For example, just under half of the mock jurors (44.6% of 224) indicated that a mandatory death sentence was the appropriate penalty if the jury agreed unanimously on the aggravating circumstances. The only condition that resulted in improved comprehension was the instructions revised by the researchers. Moreover, there was no significant difference in the comprehension of mock jurors who read the modified version of *Buchanan* instructions and the no instructions condition. This finding led the authors to conclude that “rewriting and restricting death penalty instructions can increase comprehensibility, but simply adding a key phrase about the definition of mitigating factors and slightly modifying sentence structures – as suggested by Justice Breyer – does not appear to increase the comprehensibility of capital penalty instructions” (at 219).

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Otto, Appelgate and Davis\(^4\) (2007) tested a revised version of Florida’s capital sentencing instructions that pointed to specific areas of likely confusion and explicitly instructed mock jurors on the correct interpretation of that aspect of the instruction. The authors developed five (5) such points of clarification and added them to the pattern instructions. An example of such an added statement, to respond to the tendency of jurors to overestimate the standard of proof for mitigating circumstance, is as follows:

Many jurors mistakenly believe that because other elements of a criminal proceeding must be proven beyond a reasonable doubt that the defense must prove a mitigating factor beyond a reasonable doubt. This is not the case. You need only be reasonably convinced that a mitigating factor exists in order to consider it established (at 508).

This targeted instruction was effective in improving the understanding of the instructions. Comprehension was statistically better (as measured by the number of correct answers to 12 items) for persons in the revised instruction condition than the pattern instruction condition. However, overall comprehension remained poor: Persons in the pattern instruction condition averaged 46.3% correct responses compared to 59.4% for the revised instruction group.

The idea that comprehension can be improved at a statistically significant level and yet be of questionable magnitude was found also in a study by Smith and Haney\(^5\) (2011). In 2005 the California Judicial Council re-wrote and approved “plain language” instructions to be used across the state. Smith and Haney (2011) compared comprehension of the old pattern instructions to the new, plain language instructions, and in their Study 2, a set of instructions that they revised as well. Comprehension was statistically improved with the new plain language instructions. Yet again, however, the absolute level of comprehension remained poor. Persons in the old pattern instruction condition scored, on average,


only 5.56 items correct (on a 16-item index) compared to an average of 7.17 items correct for persons who heard the new, plain language instruction, and an average of 8.33 items correct for the researcher-revised instruction group. Thus, the plain language instructions resulted in under 50% correct and the researcher-revised instruction barely over 50% correct.

The research presented thus far focuses on one way of measuring comprehension – the number of correct responses to multiple-choice questions about the meaning of an instruction. Not surprisingly, however, researchers have looked to other measures of comprehension as well. For instance, Smith and Haney, referenced above, asked participants to answer open-ended questions that required using the terms “aggravation” and “mitigation” in a sentence. The responses were then coded for accuracy, resulting in a scale of -4 (provided completely incorrect, opposite to the legally correct, responses) to +4 (provided completely correct responses). In Study 1, where College students served as the participants, the group presented with the standard pattern instruction did not perform as well (average score of .306) as the group provided with the plain language instruction (average score of 1.80). Thus, in effect, the average participant was either almost correct (legally correct was scored +2; partially correct +1) in their interpretation of aggravation or mitigation, or partially correct in their interpretation of both concepts. Regardless of which way it was, these college students were not able to use both “aggravation” and “mitigation” correctly in a sentence.

Another way in which understanding of instructions has been assessed with mock jurors is through the use of scenarios. Rather than asking respondents to answer multiple-choice questions, they are presented with a description of how a hypothetical juror acted during deliberations. The respondent is then asked whether the hypothetical juror acted in accordance with the instructions. In this way, respondents are asked to apply their understanding of the instructions to the behavior of another
person. This is the approach used by Hans Zeisel\(^6\), then later replicated and expanded on by Diamond and Levi\(^7\) (1996) and others.\(^8\) An example of one of the scenarios is as follows:

A juror decides that Mr. Woods was under the influence of an extreme emotional disturbance at the time he committed the murder. He decides that this fact is not a sufficient mitigating factor to preclude the death penalty and votes for the death penalty. Has that juror followed the judge’s instructions? (yes/no/do not know)

Professor Zeisel’s study was presented to the US District Court, Northern District of Illinois, Eastern Division, in the case of *Free v. Peters*\(^9\) (1992). The finding of the court was relief for Free, noting that “[t]he Zeisel studies establish that neither set of instructions [those heard by the jurors in *Free* or the Illinois Pattern Instructions] is intelligible and definite enough to provide even a majority of jurors hearing them with a clear understanding of how they are to go about deciding whether the defendant lives or dies. We conclude that the Illinois statute, as implemented through these jury instructions, permits the arbitrary and unguided imposition of the death sentence and that Free’s sentence was imposed in violation of the Eight and Fourteenth Amendments” (at 1130). The State appealed. The Seventh Circuit reversed the District Court opinion, partially on the basis of a criticism of Zeisel’s study. The Seventh Circuit raised three general concerns with the study: 1) there was no control group; 2) there was no revised/improved instruction group, and; 3) there was no deliberation component to the study. Those methodological concerns were addressed in a study conducted by Diamond and Levi (1996) who found that revised instructions improved comprehension and that deliberation improved comprehension in only one area—non-unanimity on mitigators – to 88% (at 230).

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\(^6\) Hans Zeisel, Affidavit (21 August), United States District Court, Northern District of Illinois, Eastern Division, Case No. 89C3765 (1990).
Actual Capital Jurors: Kentucky Capital Jurors’ (mis)Understanding of Sentencing Instructions

The presentation thus far has focused on mock jurors. In this section we turn to a discussion of actual capital jurors. In particular, this section focuses on the findings from the Kentucky component of the Capital Jury Project (CJP). Kentucky was one of the original states included in the CJP, a research project, funded by the National Science Foundation, designed to understand the experience of capital jurors. The CJP involves conducting extensive (lasting on average about 3.5 hours) face-to-face interviews with capital jurors, both those who voted for life and those who voted for death. One segment of the interview is devoted to jurors’ understanding of the instructions, especially their understanding of “aggravating” and “mitigating circumstances.”

As might be expected, given the (mock jury) research on this topic, Kentucky capital jurors have a poor understanding of the instructions, especially as they pertain to “mitigating circumstances” as can be seen in Table 1. For instance, a full 45.9% of the Kentucky capital jurors from the CJP failed to understand that they could consider anything in mitigation which is almost identical to the overall finding across all states in the CJP (44.6%). Substantially more Kentucky capital jurors (61.8%), compared to all CJP jurors (49.2%), failed to understand that they need not find mitigation beyond a reasonable doubt. Likewise, a full 83.5% of the Kentucky jurors, in comparison to 66.5% of CJP jurors in total, failed to understand that the jury did not need to be unanimous in its interpretation of mitigating evidence. In addition, while the percentage is substantially lower, 15.6%, a sizeable group of these

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10 For more information about the CJP, including a link to the many publications based on CJP data, see: http://www.albany.edu/scj/13192.php

11 For the purposes of this discussion, the findings from only Kentucky and the overall findings across 13 states are presented; the findings presented in this section come from William J. Bowers & Wanda D. Foglia, Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing, 39 Crim. L. Bull. 51 (2003).

12 The percentages presented in this section are based on 109 interviews of Kentucky capital jurors. The total number of Kentucky capital jurors interviewed was 113; the 109 figures is the lowest number of jurors who answered any single one of the questions.
former capital jurors from Kentucky failed to understand that they must find aggravation beyond a reasonable doubt. This misunderstanding of the standard of proof required for aggravation is basically half that of the entire CJP sample (29.9%).

Table 1

Percent of Jurors who Failed to Understand Instructions Regarding Aggravation and Mitigation

<table>
<thead>
<tr>
<th>Jurors who failed to understand that they ...</th>
<th>Kentucky CJP Jurors (N = 109)</th>
<th>Jurors from All States of the CJP (N=1185)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Could consider any mitigating evidence</td>
<td>45.9%</td>
<td>44.6%</td>
</tr>
<tr>
<td>Need not be unanimous on mitigating evidence</td>
<td>83.5%</td>
<td>66.5%</td>
</tr>
<tr>
<td>Need not find mitigation beyond a reasonable doubt</td>
<td>61.8%</td>
<td>49.2%</td>
</tr>
<tr>
<td>Must find aggravation beyond a reasonable doubt</td>
<td>15.6%</td>
<td>29.9%</td>
</tr>
</tbody>
</table>

Thus, Kentucky capital jurors are similar to the CJP sample as a whole regarding their failure to understand that they could consider anything as mitigation. Substantially higher percentages of Kentucky capital jurors than jurors from all states of the CJP fail to understand that they need not be unanimous on mitigating circumstances, and that they need not find mitigation beyond a reasonable doubt. Kentucky capital jurors are, however, less likely than the CJP jurors as a whole to be mistaken about the burden of proof required for aggravating circumstances. All told, the most likely situation is that a juror serving on a capital case in Kentucky does not understand how to consider and possibly give effect to mitigating evidence, and to a lesser extent, may not require the state to prove aggravating circumstances beyond a reasonable doubt. The obvious follow-up question is why is understanding so poor?
Barriers to Comprehension of Instructions

Lack of Clarity

The standard explanation for the difficulty in understanding instructions is that they are written by lawyers for appellate judges. Stated differently, instructions are written for legal accuracy first, and for (jurors') comprehension second. Given the complexity of the law, let alone capital punishment jurisprudence, it is not surprising that non-lawyers have difficulty understanding the finely nuanced interpretations embedded in instructions. A quick review of a few of Kentucky’s ‘bare bones’\(^{13}\) instructions on aggravation and mitigation suggests points where confusion is likely to occur.

*Instruction on Aggravation*\(^{14}\) (§ 12.06): The first thing to note about the instruction on aggravation is that the term “aggravating circumstance” is never defined. And while it may not be necessary to define the term in the context of this specific instruction, the use of the term “aggravating circumstance” in the instruction regarding authorized sentences (§ 12.07: “… that you find the aggravating circumstance or circumstances to be true beyond a reasonable doubt.”) suggests that it should be defined somewhere.

The actual instruction on aggravation reads, in part, as follows: “In fixing a sentence for the defendant, you shall consider the following aggravating circumstances which you may believe from the evidence beyond a reasonable doubt to be true.” It is unclear in this sentence whether the pronoun “you” is singular – you the juror – or plural – you the jury. Furthermore, why are jurors told that they “shall” consider the aggravators that they “may” believe to be true; does that mean that they do not

\(^{13}\)“Our approach to instructions is that they should provide only the bare bones, which can be fleshed out by counsel in their closing arguments if they so desire” *Cox v. Cooper* 510 S.W. 2d 530, 535 (1974). What this means in practice is that the instructions may differ on a case-by-case basis thereby introducing a lack of consistency to the process. Moreover, it seems likely that jurors would give greater weight to the instructions read by the judge, who commands the most respect in the courtroom, than attempts at clarification by attorneys. This is, of course, an empirical question.

\(^{14}\)All instructions referenced in this section come from Cooper and Cetrulo, *Kentucky Instructions to Juries, Criminal §§ 12.05-12.07, 5th ed.* (Matthew Bender & Co., Inc.: 2013).
have to believe the aggravator to be true? And while the phrasing might be somewhat awkward, it is important to note that the standard of proof – beyond a reasonable doubt – is stated here explicitly.

**Instruction on Mitigation** (§ 12.05): As with the instruction on aggravation, the first thing to note about this instruction is that “mitigation” is never defined, except to refer to “extenuating facts and circumstances.” The lack of a definition of “mitigation” is again problematic because the term is used in a way that assumes understanding. For example, the last mitigating circumstance listed in the instruction is “Any other circumstance or circumstances arising from the evidence which you, the jury, deem to have mitigating value.” If “mitigating” is not defined, it is difficult to know whether it is being interpreted correctly, whether jurors understand that they can consider any circumstance from the evidence that suggests a sentence less than death. The likelihood that jurors understand the term correctly is further brought into question by reading the concluding paragraph of the instruction on mitigation (§ 12.05). In particular, jurors are told to “consider also those aspects of the Defendant’s character, and those facts and circumstances of the particular offense of which you have found him guilty (emphasis added), about which he has offered evidence in mitigation of the penalty to be imposed upon him...” It seems reasonable to suggest that jurors might believe erroneously that “mitigation” must have a nexus to the crime or even that “mitigating circumstances” are “circumstances of the particular offense of which [they] have found him guilty” – that might be seen as reasons in support of a guilty verdict and thus more likely to support a sentence of death.

The last mitigator listed in the instructions, that catchall category noted above, raises an additional question of interpretation. This is the only time in either instruction § 12.05 (mitigation) or § 12.06 (aggravation) that the pronoun you is defined and it is defined as referring to “the jury.” Given that this is the only time that the pronoun is defined, it raises the question of whether jurors would

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assume that every time that the pronoun is used it refers to the jury as a whole or whether because this is the only time that it is defined, all other uses of the pronoun refer to the individual juror. The fact that a full 83.5% of former Kentucky capital jurors interviewed as part of the CJP failed to know that they need not be unanimous in consideration of mitigating circumstances suggests that Kentucky capital jurors are adopting the plural definition of “you” found in this last mitigator to all potential mitigators.

The last point that needs to be made regarding the instruction on mitigation is that nowhere in the instruction is the standard of proof noted. As indicated previously, the standard of proof is made explicit regarding the aggravators. The fact that it is not made explicit regarding the mitigators raises the question of whether jurors use the correct standard of proof to interpret evidence of mitigation. Again, that is an empirical question and findings from the CJP reveal that almost 62% of the former Kentucky capital jurors who were interviewed for that project failed to know that the standard was not beyond a reasonable doubt. In some regards, that is not surprising. Media portrayals of criminal trials focus on the need for proof beyond a reasonable doubt (and that the jury must be unanimous). If jurors are not told otherwise, one might expect them to default to what they know from elsewhere, what they think is the correct course of action.

**Readability**

Another reason why the instructions may be poorly understood has to do with their readability, a measure of how easily a text is read and understood. One form of this analysis comes directly from Microsoft Word. Word is equipped to conduct a check of the spelling and grammar of a document and to provide readability statistics as part of that analysis. The report presents the results of two analyses, the Flesch Reading Ease and the Flesch-Kincaid Grade Level\textsuperscript{16}. According to Word, the analyses are

\textsuperscript{16} Rachel Small, *Assessing Readability of Capital Pattern Jury Instructions*, 1 RWU J. Res. Psych. 33 (2009), conducted the same analyses on the pattern instructions from 35 states. Her findings, for the most part, are presented in the aggregate though she does single out Kentucky, in a positive fashion, for “provid[ing] an example of one of the easiest descriptions of mitigating factors, for example, 'The defendant has no significant history of
based “on the average number of syllables per word and words per sentence.” For general readability, Word suggests that the Flesch Reading Ease score be between 60 and 70 (on a 100-point scale) and that the grade level be between 7.0 and 8.0. The results of the analyses of Kentucky’s sentencing instructions are presented in Table 2.

Table 2

Readability of Kentucky Capital Sentencing Instructions

<table>
<thead>
<tr>
<th></th>
<th>Flesch Reading Ease Score</th>
<th>Flesch-Kincaid Grade Level</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(100 point scale)</td>
<td>(standard school grades)</td>
</tr>
<tr>
<td>Mitigation, § 12.05</td>
<td>42</td>
<td>14.2</td>
</tr>
<tr>
<td>Aggravation, § 12.06</td>
<td>30.8</td>
<td>12.6</td>
</tr>
<tr>
<td>Authorized Sentences, § 12.07</td>
<td>15.7</td>
<td>23.8</td>
</tr>
</tbody>
</table>

It is clear that the instructions fail to meet the general guidelines for readability. None of the instructions meet the target goal of a Reading Ease score between 60-70 or a grade level of 7.0 to 8.0. In fact, the key instruction that is to ‘guide’ the jurors on how they are to arrive at their sentencing decision achieves a Reading Ease score of only 15.7 on a 100-point scale (with higher scores indicating greater ease of understanding). Similarly, that instruction is written for someone who has completed 23.8 years of school. The results regarding the instructions for aggravation and mitigation, while not as extreme as for the instruction on authorized sentences, still fall woefully short of the target for

prior criminal activity.” (at 79). Given her focus on a single statutory mitigator from Kentucky, rather than the overall instruction as was evaluated here, it is difficult to make any further comparisons. Her general findings, however, are in keeping with the results for Kentucky presented in Table 2: overall Reading Ease scores and grade levels of capital sentencing instructions fall below general guidelines.

readability. Given the difficulty of the instructions, the grade level at which they are written, it is no great surprise that jurors fail to understand them. The logical question becomes what should be done about it?

**Suggested Next Steps**

The research is clear: Both mock jurors and actual jurors do not understand capital sentencing instructions all that well, especially when it comes to mitigation. What also is clear, however, is that understanding of those instructions can be improved; every study that tested revised instructions found improved comprehension. The challenge is to come up with an approach that results in meaningful improvement of comprehension.

Given the research presented herein, one might be tempted to think that comprehension cannot exceed approximately 60% correct. English and Sales (1997) disagree, suggesting that there is no ceiling to the improvement that is possible in re-writing instructions. In fact, one of the earliest studies of comprehension of instructions obtained comprehension scores of 80% albeit not based on a capital case. The distinguishing characteristic of that study is that the instructions were re-written twice. The first attempt resulted in improved comprehension scores from a baseline of 51% correct to 66% correct, which is similar to what other researchers have found. Yet, when they re-wrote the instructions again, comprehension improved to 80%. Thus, the lesson learned is not to stop with one re-write; rather, one recommendation is to set a target level of comprehension and continue to revise the

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18 According to recent Census figures, a full 82.4% of Kentucky residents age 25+ have graduated high school or higher; only 21% of Kentucky residents age 25+ have a Bachelor’s degree or higher (see: [http://quickfacts.census.gov/qfd/states/21000.html](http://quickfacts.census.gov/qfd/states/21000.html))


instructions until that goal is reached. Embedded in this recommendation is another one: Revised instructions should be tested as part of the process. Deciding to re-write the instructions is only part of the solution. The decision has to be made to write instructions that jurors can understand and that determination is one that can be done best through testing. It makes no sense to revise instructions only to find out after the fact that they are still incomprehensible to the average juror. Finally, any endeavor to improve instructions should be a joint effort. Obviously, one needs representatives of the legal community to ensure that any revised instructions are in keeping with the letter of the law. Beyond that, however, it would be helpful to invite former capital juror(s) to join the discussion, to present their perspective based on their unique experience. Likewise, enlisting the assistance of a (psycho) linguist, someone trained in how to present information in way that is both accurate and understandable, would be wise. The same is true for a social scientist, someone who is trained to run the studies to determine the level of comprehension as part of the process of revising instructions.

Periodic re-writing of instructions is a routine part of the judicial process. This article suggests a way to increase the effectiveness of that process by being committed, at the outset, to revising and testing instructions until an agreed upon level is achieved, and by engaging in that process as a collaborative effort among persons with varied expertise. The alternative is to continue to assume that jurors understand instructions and that standard re-writing procedures result in improved comprehension when the research tells us those are faulty assumptions.

21 The Center for Jury Studies, a project of the National Center for State Courts, engages in research, education, and public outreach in an effort to help judges and court staff improve jury management. Recognizing the importance of instructions to their mission, the Center convened a national conference on pattern instructions in 2008. In anticipation of that meeting, the Center administered a survey to Pattern Jury Instruction (PJI) Committees across the nation. In that context, the Center notes that “judicial and bar leaders have become increasingly aware of the importance of pattern jury instructions. Of much importance is the credibility of instructions to trial judges, lawyers, and reviewing courts in terms of legal accuracy and clarity to jurors. To meet increased expectations, many PJI committees are considering new internal procedures to address organizational and technical issues such as the optimal committee composition, membership qualifications, and publication and dissemination strategies” (Paula L. Hannaford-Agor & Stephanie N. Lassiter, Contemporary Pattern Jury Instruction Committees: A Snapshot of Current Operations and Possible Future Directions, at 2, see: http://www.ncsc-jurystudies.org/What-We-Do/~media/Microsites/Files/CJS/What%20We%20Do/Contemporary%20Pattern.ashx