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An Empirical Analysis of the Role of Mitigation in Capital Sentencing in North Carolina Before and After *McKoy v. North Carolina* (1990)

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An Empirical Analysis of the Role of Mitigation in Capital Sentencing in North Carolina
Before and After *McKoy v. North Carolina* (1990)

by

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A thesis submitted in partial fulfillment
of the requirements for the degree of
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ABSTRACT

This study focuses on the influence of mitigating circumstances on the sentencing outcome before and after the *McKoy* (1990) decision. In *McKoy* (1990) the Supreme Court decided that the jurors did not have to find mitigating circumstances unanimously. Results are reported based on a sample of North Carolina first-degree murder cases where the state sought the death penalty. Logistic regression is used to determine the importance of mitigating circumstances as predictors of jury decision-making in North Carolina, controlling for the variety of other factors that influence that decision.

The descriptive statistics show that the average number of mitigating circumstances submitted and accepted had doubled in the post-*McKoy* cases. At the same time, the number of aggravating circumstances presented and submitted stayed about the same. The analysis then moved to the consideration of the impact of mitigating circumstances, and whether there had been a change between the two eras. Separate logistic regression analysis revealed that there had indeed been a shift in the effects of aggravation and mitigation, but not in the manner that might have been anticipated. Specifically, in the post-*McKoy* era, mitigating circumstances had a diminished impact on the probability of a death sentence while, conversely, aggravating circumstances carried an increased impact.

Chapter One

Introduction and Statement of the Research Issue

Introduction

In 1972, the United States Supreme Court (hereafter referred to as the “Court”) decided in the historical *Furman v. Georgia* (1972) case that capital punishment statutes allowing unguided discretion were unconstitutional because they produced arbitrary and capricious sentencing outcomes. Four years later, the Court ruled that mandatory death penalty statutes were also unconstitutional because they did not allow for individualized sentencing (*Woodson v. North Carolina*, 1976). Since then, 36 states have incorporated systems of capital punishment that employ different versions of a guided discretion model that was approved in *Gregg v. Georgia* (1976) and, in somewhat different form, in *Proffitt v. Florida* (1976). Texas and Oregon utilize yet another guided discretion model approved in *Jurek v. Texas* (1976).

From 1976 until today, the Court has focused on two principles regarding capital punishment that are part of the Eighth Amendment prohibition against cruel and unusual punishment. First, discretion must be guided so that the group of death-eligible persons is narrowed. Second, the sentencer must consider all mitigating evidence and allow for individualized sentencing that hypothetically takes into account the full context in which the crime occurred (Kirchmeier, 1998, p. 3). The general trend of Court decisions has been to systematically increase the discretion of jurors regarding mitigating and aggravating circumstances, both of which are key elements in the guided discretion models employed in capital murder cases (i.e., those eligible for the death penalty) during the penalty phase of the trial. Briefly, aggravating circumstances are situations established through state legislation by which a murder becomes eligible for the death penalty, and states vary considerably in the number and types of situations that are statutorily defined (Coyne and Entzeroth, 2001, p. 329). In contrast, mitigating factors are circumstances presented by defendants, the purpose of which is to argue that they should

be spared the death penalty. In most states, if one or more statutory aggravators are found to exist, they must be “weighed” against mitigating circumstances. However, the Court has not specified any rules on how to weigh aggravating against mitigating factors, so jurors (or, in some states, judges) are left with rather broad discretion in their decision to give the defendant a life or death sentence.

One of these Court decisions was *McKoy v. North Carolina* (1990) whereby the Court ruled that jurors do not have to be unanimous in deciding whether any specific mitigating factor should be taken in account during punishment deliberations. This ruling was particularly important to the North Carolina system of capital punishment because juries have the final sentencing authority. The result of *McKoy* was to overturn a number of death sentences in North Carolina and, of longer-term consequence, to mandate a new procedure in which jurors respond to mitigating factors presented by the defense. The essence of this change was that jurors no longer had to agree unanimously that a specific mitigating factor existed in responding “yes” on an “Issues and Recommendation” form that juries are required to complete as a record of their deliberations regarding sentencing. The revised procedure that remains in use today simply requires that one or more jurors believes that a mitigating factor exists for the jury to answer “yes” on the form. In effect, the meaning of a “yes” response has changed; in its extreme ramification, a lone juror rejecting a mitigator prior to *McKoy* would have resulted in a “no” being recorded, while after *McKoy*, a lone juror accepting a mitigator would mandate a “yes” being recorded.

Background to the McKoy Case

A bit of background on the *McKoy* case may be helpful in understanding how the case unfolded. Dock McKoy, Jr. (also known by several aliases), age 65, was a resident living outside of Wadesboro in Anson County, North Carolina. On the afternoon of December 22, 1984, the Anson County Sheriff’s office received reports that McKoy was discharging a firearm outside his house in an area that was dangerously close to other residents. Two deputies responded, conferred with the person calling in the complaint, and then talked with McKoy. Noting that he was highly intoxicated, they asked him to stop the shooting. A short time later, two other deputies were sent back to McKoy’s house because of complaints that the shooting had resumed. When the officers arrived, McKoy retreated inside his house, rejected their requests that he come outside, and

threatened to kill them if they did not leave. Other officers began to arrive, and one deputy walked to the back of McKoy's house to see if entry could be gained.

Unexpectedly, McKoy pushed open his screen door and fired a shot at Deputy Kress Horne, who was braced against a patrol car. The shot hit Deputy Horne in the face, a wound from which he died later that evening. A brief gun battle broke out between McKoy and the officers on site, finally ending when a wounded McKoy surrendered.

Because of intense publicity in the relatively small county, McKoy's trial was moved to neighboring Stanly County. The state announced that it would seek the death penalty, and following McKoy's conviction for first degree murder, presented two aggravating circumstances, both of which the jury accepted: (1) that McKoy had been previously convicted of a felony involving violence to the person (he had been convicted of two counts of assault with a deadly weapon in 1977, crimes for which he served five years in prison), and (2) that the murder was against a law enforcement officer performing his professional duties. The defense presented seven mitigators, including a "catch-all" factor that allowed the jury to consider any other mitigating factor it believed warranted consideration (as mandated in *Locket v. Ohio* [1978]). A unanimous vote was required to indicate acceptance of each mitigator, resulting in the jury indicating "yes" to two mitigators, "no" to four others presented by the defense, and indicating in response to the "catch-all" that they had no other mitigators they wished to consider. On August 8, 1985, the jury returned a sentence of death.

In their appeal to the North Carolina Supreme Court, McKoy's attorneys raised a number of issues, many of which centered on his intoxicated state at the time of the offense. One appeal, however, questioned whether requiring unanimity from juries in accepting mitigating factors led to jurors believing that they could not consider that factor when they made their individual decisions regarding the sentence. In other words, the question raised was whether the unanimity requirement could lead to a single dissenting juror neutralizing a strong feeling among others that a specific mitigator (especially McKoy's intoxication) should be taken into account. The charge was that jurors might interpret this guideline to mean that they could not take this factor into account when making their individual decision for a life or death sentence. The North Carolina justices were not persuaded by this, or any of the other arguments presented on appeal, and thus

upheld McKoy's conviction and death sentence (*State of North Carolina v. Dock McKoy, Jr.*, 1988).

McKoy's attorneys continued to press his appeals, and eventually got a hearing before the U.S. Supreme Court. There, basing their argument on the recent Court decision in *Mills v. Maryland* (1988), they pressed the argument that their client might have received a death sentence because some jurors believed that they could not consider issues presented in the four mitigators that were not unanimously found by the jury. The state's attorneys argued that North Carolina juries were not compelled to assess a death sentence even in the absence of finding any mitigators, and unlike the Maryland procedures struck down in *Mills*, the jury instructions made this clear. Ultimately, by a 6-3 vote, the Court's majority justices were persuaded by the arguments on behalf of McKoy. Although the Court upheld his conviction, it vacated McKoy's death sentence and ordered a new sentencing phase trial (*McKoy v. North Carolina*, 1990).

As an ironic ending to the case, Dock McKoy was declared incompetent to be retried because of his deteriorated mental condition following long-term alcohol abuse. Now 84 years old, he remains incarcerated as of this writing. The North Carolina Department of Correction website indicates that his current status is no longer a matter of public record, suggesting that he is confined to the mentally disabled ward of the state's main prison in Raleigh, North Carolina.

Statement of the Research Issue

As will be discussed in the next chapter, a variety of Court decisions have demanded a somewhat standardized procedure of capital punishment that nevertheless allows for individualized sentencing decisions. That is, while seeking to eliminate arbitrariness (meant as the absence of legally relevant factors as predictors of death sentences), the Court recognizes that seemingly similar cases may have characteristics that will cause jurors (and, in some states, judges) to vary in the sentences they assign. This thesis addresses the question of whether the *McKoy* (1990) decision has influenced the way in which mitigating factors are considered by North Carolina capital juries. Specifically, a large sample of capital cases in North Carolina will be analyzed to determine whether there is a difference before and after the *McKoy* decision in the role of

mitigating factors in predicting juries' sentencing recommendations. Three possibilities exist:

- (1) There will be no difference in the two periods;
- (2) Because unanimity was required pre-*McKoy*, mitigating factors will have a stronger influence; or
- (3) If jurors were indeed dissuaded from considering mitigating factors unless there was juror unanimity, freeing them from this constraint might result in mitigating factors very significantly related to sentencing recommendations.

Organization of the Study

To explore the issue of whether the *McKoy* decision affected the role of mitigation in North Carolina capital sentencing patterns, this study is organized in the following manner. Chapter 2 provides an evaluation of the decisions of the Court regarding its jurisprudence on how aggravating and mitigating circumstances are to be taken into consideration by the sentencer in order to avoid arbitrary death sentences. Included in this discussion are changes in case law that have influenced North Carolina's death penalty system towards increased juror discretion. Against this background, I consider the extent to which the Court's post-*Furman* jurisprudence may be inconsistent with its decision in *Furman* and *Gregg* that capital sentencing should be standardized to avoid arbitrary and capricious sentencing outcomes.

In Chapter 3, a review of the empirical literature is presented regarding issues of arbitrariness in capital punishment decision making after *Furman* (1972). During the past 30 years, researchers have conducted extensive research that addresses whether continued arbitrariness in the administration of the death penalty exists. The general findings from this literature are discussed, with a special focus on the roles of aggravating and mitigating circumstances as statistical predictors of sentencing outcomes.

Chapter 4 explains the methodology and statistical analysis of the current study, while the results of the study's analyses are presented in Chapter 5. Chapter 6 contains a discussion of the findings and their implications, and concludes the thesis with suggestions for further research in this area.

Chapter Two

Legal History of Capital Punishment from *Furman* (1972) to *McKoy* (1990)

In *McGautha v. California* (1971), the Court considered for the first time the constitutionality of unguided discretion in capital sentencing. In a 6-3 vote, the justices ruled that unguided discretion models do not violate the Fourteenth Amendment due process clause. However, only a year later, the Court appeared to reverse itself in the case of *Furman v. Georgia* (1972) when a deeply divided court ruled 5-4 that the then-current practice of capital punishment was unconstitutional. Even though the five majority justices issued separate opinions, a common thread across their discussions was that the death penalty was administered in an arbitrary and capricious manner due to the unfettered discretion granted to capital juries. They emphasized an underlying premise that “death [sentencing] is different.” They believed that the arbitrariness and capriciousness that seemed to characterize Georgia’s death sentencing was unacceptable. Consequently, the prevailing opinion was that the decisions of the sentencer must be guided by clear rules so as to create a standardized sentencing model. The primary requirements for those states wishing to resume capital punishment were to “channel the sentencer’s discretion by clear and objective standards that provide specific and detailed guidance and that make rationally reviewable the process for imposing a sentence of death“ (*Furman v. Georgia*, p. 428) and to narrow the class of offenders that are death eligible. In regards to narrowing the group of offenders eligible for death sentencing, the justices wanted to overcome the problem of “overinclusion,” meaning the failure to differentiate those whose crimes most merited the death penalty from those whose crimes were of a less egregious nature (Striker and Steiker, 2003).

Following the *Furman* (1972) decision, most state legislatures rewrote their capital punishment procedures. In 1976, several different approaches came before the Supreme Court. In *Gregg v. Georgia* (1976), *Jurek v. Texas* (1976), and *Proffitt v.*

Florida (1976) the Court approved, by 7-2 votes, three separate guided discretion models. All three employed a bifurcated trial procedure whereby separate guilt and sentencing phases of the trial were conducted. In the penalty phase, aggravating and mitigating circumstances were to be considered in order to guide the sentencer's discretion and thereby eliminate arbitrary and capricious sentencing decisions.¹ These models also provided guidance in narrowing the class of death-eligible offenses by limiting death eligibility to first-degree murders with at least one aggravating circumstance, and required a proportionality review to discern whether a given death sentence was proportionate compared to other similar cases. In approving these models, the majority justices were optimistic that the concern for fairness expressed in *Furman* (1972) four years earlier would be adequately addressed.

While the guided discretion models were declared constitutional, mandatory death penalty models introduced by *Woodson v. North Carolina* (1976) and *Roberts v. Louisiana* (1976) were rejected and said to violate the Eighth Amendment. The reasoning of the Court was that mandatory schemes provided no guidance to the sentencer, did not address the problem of overinclusion, and did not allow for the consideration of the character of the crime and the defendant. The Court was also concerned with jury nullification, which refers to the reluctance of juries to convict defendants whom they believe to be guilty, but not deserving of death (Coyne and Entzeroth, 2001).

Interestingly, the decisions of the Court in *Gregg*, *Proffitt*, and *Jurek*, and those in *Woodson* and *Roberts*, are somewhat contradictory. On the one hand, the Court required standardized sentencing in *Gregg*, *Proffitt*, and *Jurek* to address the concerns raised in *Furman*; on the other hand, the Court rejected *Woodson* and *Roberts* because the statutes did not allow for more individualized sentencing. Critics have said that a precedent was set in favor of individualized sentencing, and the Court's focus shifted from guided discretion to simply narrowing the class of death-eligible defendants (Kirchmeier, 1998). In most states, including North Carolina, as long as jurors find at least one statutory aggravating factor to exist, they have broad discretion to return either a life or a death sentence.

Subsequent decisions of the Court make this contradiction more evident. Two years after *Gregg* and *Woodson*, *Lockett v. Ohio* (1978) increased the discretion of the

sentencer when the Court ruled that *any* mitigating circumstance supported by the evidence can be submitted by the defense, not just those specified in the state's capital punishment statutes. This decision was confirmed and expanded in *Eddings v. Oklahoma* (1982) when the Court held that the sentencer cannot refuse to take into account any mitigating factor supported by the evidence. The rulings in *Lockett* and *Eddings* drew on *Woodson* and *Roberts* in specifying that sentencing must be individualized and related to the culpability of the offender, but appeared contrary to the *Furman* and *Gregg* decisions that standardized discretion models must channel discretion. Sundby (1991) argues that the ultimate impact of the *Lockett* decision, however unintended, was to provide capital juries with an increased opportunity to make the kinds of arbitrary and capricious sentencing decisions that were objected to in *Furman*.

In three decisions in 1983, the Court further expanded the discretion of capital juries regarding their consideration of aggravating circumstances. The decisions in *Stephens v. Zant* (1983), *Barclay v. Florida* (1983), and *California v. Ramos* (1983), provided juries with more flexibility to return a death sentence by expanding the scope of aggravating factors that could be considered. In *Zant*, the Court decided that a death sentence is constitutional even if one of the several aggravating circumstances found by the jury is later held to be invalid (but, at least one must be valid). The Court also allowed the consideration of non-statutory aggravating circumstances if the jury unanimously found at least one statutory aggravating factor to exist. However, the decision's impact was limited to states where the jury did not have to "weigh" aggravating against mitigating factors. In *Barclay*, the Court closed the hole that it had left open in *Zant* when it stated that if there are other valid aggravating factors, one invalid aggravating circumstance does not support the claim of a new sentencing hearing even when the jury or judge is supposed to weigh the aggravating circumstances against the mitigating circumstances. Further expanding discretion, the Court ruled in *Ramos* that jurors are allowed to consider unrelated aggravating factors, such as a possibility of a commutation from a life sentence without the possibility of parole to a life sentence with the possibility of parole, in their final sentencing decisions.

Critics such as Justice Thurgood Marshall have said that the decisions in *Lockett/Eddings* and *Zant/Barclay/Ramos* served to undermine a fair and consistent sentencing

procedure and violated the *Furman* requirement of guided discretion. Justice Marshall expressed this concern in his dissent from the *Zant* decision by saying that "[o]nce [the threshold] finding [of one statutory aggravating circumstance] is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices" (*Zant v. Stephens*, 1983, p. 2760).

The growing discretion that alarmed Justice Marshall was widened even further in *Mills v. Maryland* (1988) when the Court removed the barrier of jury unanimity in considering mitigating circumstances. *Mills* reaffirmed and expanded *Lockett* by ruling that the vote of a single juror is sufficient to find the existence of a mitigating factor. More precisely, that juror cannot be prevented from taking that mitigator into account when making the sentencing decision, even if others on the jury elect not to do so.

Importantly for the present research, the *Mills* (1988) decision was the basis for a change in North Carolina's death penalty statute. Two years later, the appeal of Dock McKoy was ruled on. A key element of the appeal had been to use *Mills* to challenge North Carolina's requirement that each mitigating factor being considered by the jury must be approved unanimously. Attorneys for the state argued that what distinguished North Carolina from Maryland was that the North Carolina statute clearly stated that the jury was not required to impose a death sentence when no mitigating evidence was found to exist. Contrary to North Carolina, the sentencing instructions in Maryland were so ambiguous that they may have misled the jury to believe that finding no mitigators mandated a death sentence.

In a 6-3 decision, the justices rejected the state's argument in *McKoy v. North Carolina* (1990) and ruled that "North Carolina's unanimity requirement impermissibly limits jurors' consideration of mitigating evidence and hence is contrary to this Court's decision in *Mills*" (*McKoy v. North Carolina*, 1990, p. 2). The majority of justices argued that it was unconstitutional for one holdout juror to prevent the other jurors from considering mitigating evidence, especially since this may inadvertently slant the subsequent decision toward a death.

Justice Antoine Scalia delivered the dissenting opinion of the court, one which Chief Justice William Rehnquist and Justice Sandra O'Connor joined. These justices agreed that the State must guide the sentencers' discretion and provide the opportunity to

rationally assess their decision in order to return a death or a life sentence. However, they believed that “there is little guidance in a system that requires each individual juror to bring to the ultimate decision his own idiosyncratic notion of what facts are mitigating, untempered by the discipline of group deliberation and agreement” (*McKoy v. North Carolina*, 1990, p. 21). They believed that a capital jury is supposed to return a final sentence as a “body” that deliberates and decides together the appropriate sentence. Their dissent expressed concern that *McKoy* will separate the jurors and force them to reach an isolated decision, an outcome not supported by *Lockett* (1978), *Eddings* (1982), or *Mills* (1988). In sum, the *McKoy* decision, according to the dissenting justices, violated the rules of guided discretion, thereby undermining “sound jury deliberations” (*McKoy v. North Carolina*, 1990, p. 23).

The pragmatic effect for North Carolina was to immediately alter the wording of Issue Two in the Issues and Recommendation Sheet that juries must complete as a record of their deliberations. The wording was changed to (and remains) the following instruction: “Do you find from the evidence the existence of one or more of the following mitigating circumstances?” followed by “Before you answer Issue Two, consider each of the following mitigating circumstances. In the space after each mitigating circumstance, write ‘yes,’ if *one or more of you* [my emphasis] finds that circumstance by a preponderance of the evidence. Write ‘no’ if none of you find that mitigating circumstance.” This replaced the wording that was in effect: “Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?” followed by “Before you answer Issue Two, consider each of the following mitigating circumstances. In the space after each mitigating circumstance, write ‘yes,’ if you unanimously find that mitigating circumstances by the preponderance of the evidence. Write ‘no,’ if you do not unanimously find that mitigating circumstance by a preponderance of the evidence.”²

As a result of the *McKoy* ruling, all individuals who received a death sentence under the unanimity requirement had their death sentences remanded. However, those cases where the jury unanimously accepted all submitted mitigators were not considered to have the basis for an appeal. A review of death sentences prior to *McKoy* revealed that 41 individuals whose cases were originally upheld by the North Carolina Supreme Court

had their sentences remanded for retrial (Rhee, 1993). Of these, my analysis shows that 24 received death sentences in subsequent re-trials of the sentencing phase using the new guidelines.

As discussed at the beginning of this chapter, the Court's concern in *Furman* was that the death penalty was imposed in an arbitrary and capricious manner. With its decisions following *Gregg* (1976), the Court may have opened the doors once again for unfettered discretion and invited exactly the arbitrary decision making that was the focal concern of *Furman*. In reality, subsequent rulings have created a situation where there is not much guidance left for jurors, because they can consider anything in mitigation and anything in aggravation, as long as one statutory aggravating factor is found exist.

What has emerged in practice from this situation? A large body of empirical literature has been devoted to patterns of capital sentencing following the resumption of executions in 1977. The next chapter reviews this literature to determine whether arbitrariness and capriciousness remain as part of the contemporary character of death sentencing in the United States.

Endnotes

¹The differences in the models are as follows:

(*Gregg v. Georgia*, 428 U.S. 153, p. 1) - The new Georgia "statutory provisions with regard to imposition of the death penalty for the crime of murder and other offenses, (1) guilt or innocence is determined, either by a jury or the trial judge, in the first stage of a bifurcated trial, with the judge being required to charge the jury as to any lesser included offenses when supported by the evidence, (2) after a verdict, finding, or plea of guilty, a presentence hearing is conducted, where the jury (or judge in a case tried without a jury) hears argument and additional evidence in mitigation or aggravation of punishment, (3) at least one of ten aggravating circumstances specified in the statutes must be found to exist beyond a reasonable doubt, and must be designated in writing, before the jury (or judge) may impose the death sentence on a defendant convicted of murder, the trial judge in jury cases being bound by the jury's recommended sentence, (4) on automatic appeal of a death sentence, the Supreme Court of Georgia must determine whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supported the finding of a statutory aggravating circumstance, and whether

the death sentence was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, and (5) if a death sentence is affirmed, the decision of the Georgia Supreme Court must include reference to similar cases that the court considered“.

(Jurek v. Texas, 428 U.S. 262, p. 1) - Under the new Texas statutes, (1) capital homicides are limited to intentional and knowing murders committed in the five specified situations of murder of a peace officer or fireman, murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson, murder committed while escaping or attempting to escape from a penal institution, murder committed for remuneration, and murder committed by a prison inmate when the victim is a prison employee; (2) if a defendant is convicted of a capital offense, a separate presentence hearing must be held before the jury, where any relevant evidence may be introduced and arguments may be presented for or against the death sentence; (3) the jury must answer the questions (a) whether the defendant's conduct that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, (b) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and (c) if raised by the evidence, whether the defendant's conduct in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; (4) if the jury finds that the state has proved beyond a reasonable doubt that the answer to each of the pertinent questions is yes, then the death sentence is imposed, but if the jury finds that the answer to any question is no, then a sentence of life imprisonment results; and (5) death sentences are given expedited review on appeal”.

(Proffitt v. Florida, 428 U.S. 242, p. 1) - “Under the new Florida statutes, (1) if a defendant is found guilty of first-degree murder, a separate presentence hearing is held before the jury, where arguments may be presented and where any evidence deemed relevant to sentencing may be admitted and must include matters relating to eight aggravating and seven mitigating circumstances specified in the statutes, (2) the jury is directed to weigh such circumstances and return an advisory verdict as to the sentence, to be determined by a majority vote, (3) the actual sentence is determined by the trial judge, who is also directed to weigh the statutory aggravating and mitigating circumstances, (4)

if a death sentence is imposed, the trial court must set forth in writing its fact findings that sufficient statutory aggravating circumstances exist and are not outweighed by statutory mitigating circumstances, and (5) a death sentence is automatically reviewed by the Supreme Court of Florida, which considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case.”

As a note, the capital punishment statutes ultimately adopted by the North Carolina legislature seems to be consistent with the Florida statute developed in *Profitt*. However, one major exception exists in that that the judge has no authority to overturn a jury decision in North Carolina; in essence, the jury is the sentencer in North Carolina while final authority rests with the trial judge in Florida.

²The form in place at the time came about through a North Carolina Supreme Court decision, *State of North Carolina v. Clinton Rondale Kirkley* (1983), in which a revision of the original post-*Gregg* Issues and Recommendation form was ordered. The essence of the revision was that the state, in Issue Two, had been submitting mitigating factors as a group. The jury had to indicate whether or not it unanimously found one or more of them to exist, but did not require the jury to indicate which mitigators it did, or did not, approve. The *Kirkley* decision led to a revised form that required unanimous approval for each separate mitigator. This revised form was the object of appeal in the *McKoy* decision.

Chapter Three

Research on the Administration of the Death Penalty in the United States in the Post-*Gregg* Era

Researchers have conducted many studies since the re-instatement of capital punishment in *Gregg v. Georgia* (1976). The major part of research has focused on whether the issues raised in *Furman v. Georgia* (1972) have been addressed, namely the presence of arbitrariness (the absence of legal factors as predictors of death sentencing) and discrimination (whether non-legal factors are found as predictors). The United States General Accounting Office (GAO) analyzed 28 studies that had been conducted in the first decade post-*Gregg*, and attempted to summarize the findings emanating from this body of research. The ensuing report (GAO, 1990) concluded that even though the studies varied in their method and overall quality, a consistent finding was that factors related to aggravation were significant predictors of death sentences, although their relative weights varied considerably among the states that were sources of the data. Interestingly, the report was not as explicit in its assessment of mitigation in predicting death sentencing. What may have contributed to this absence is that a number of the studies reviewed in the GAO report did not include some aspect of mitigation as part of the analysis.¹

The following sections concentrate on subsequent literature not covered in the GAO (1990) report because of the issue of arbitrariness, specifically how a change in North Carolina juries' consideration of mitigation may have changed its role in predicting death sentences. The discussion is divided into two sections, one concentrating on research that included mitigating factors in the analysis and the other on those studies which considered both aggravating and mitigating factors as legal factors in predicting death sentences.

Research on the Issue of Arbitrariness: Aggravating Factors

Almost all death penalty studies since the GAO (1990) report have examined the impact of aggravating circumstances on sentencing outcomes, treating them as legally relevant variables that should be expected to influence those decisions. Some researchers have included separate aggravators accepted by juries as dummy variables while others have employed aggravating factors as a summed variable (the number of aggravating circumstances found by the jury). Also, a few researchers have created a so-called culpability index as a method for grouping cases on a seriousness scale. The researchers then compared the sentencing outcomes of “similar” cases (proportionality review). The vast majority of recent studies including aggravating factors as dummy variables find that certain single aggravating circumstances can significantly influence the outcome of capital trials. Klein and Rolph’s (1991) study in California showed that murders involving the victim being subjected to sodomy led to a death sentence in 92% of the cases and murders that included torture led to a death sentence in 100% of the cases. Other aggravating circumstances that significantly increased the probability of a death sentence were murder to avoid arrest, murder for pecuniary gain, and prior prison record.

Keil and Vito (1995), analyzing death sentencing in Kentucky, included four legally relevant variables (felony circumstances, multiple victims, silenced victim [murder to avoid prosecution]) in their analysis. They also included a variable for “case seriousness” that indicated whether more than one aggravating circumstance existed. The results indicated that multiple victims, silenced victim, and case seriousness all significantly influenced penalty trial outcomes towards a death sentence. However, the authors found evidence that juries treated aggravating circumstances differently depending on the race of the defendant and the race of the victim, namely that black defendants who killed a white victim were more likely to receive a death sentence.

Brock, Cohen, and Sorensen (2000) found in Texas that felony circumstances (the murder was committed in the course of another crime) were the best predictor of a death sentence. Among the felony circumstances, sexual assault was overrepresented among death sentences. The probability of a death sentence was also higher for multiple offenders, multiple victims, murders by strangers, and murders by men. Additionally, physical weakness of a victim (females, children, elderly) also increased the probability

of a death sentence. Further, Brock et al. created a scale of case seriousness that included felonies by strangers, death by weapons other than guns, multiple victims, and helplessness of the victim when murdered. The scale was created by assigning scores based on the existence or absence on these four factors. The authors were able to show that with an increasing level of case seriousness the probability of a death sentence also increased. In other work, a study by Holcomb and Williams (2001) in Ohio found that felony circumstances (the murder committed in the course of another crime) were the best predictor of a death sentence, along with multiple victims being murdered. Similarly, Pierce and Radelet's (2002) study of Illinois showed that prior murder record, felony circumstances, and multiple victims were significantly related to a death sentence.

Even though the studies discussed here employed very different methodologies and were based on research in different states, a general finding to emerge is that felony circumstances, prior violent record, and multiple victims were consistently and significantly related to death sentencing. However, based on the model to emerge from the *Gregg* decision and subsequent U.S. Supreme Court rulings, mitigating circumstances must also be considered as legal factors that can legitimately influence sentencing decisions. Therefore, the next section will review studies that have assessed the influence of both mitigating as well as aggravating circumstances in determining predictors of death sentencing.

Research on the Issue of Arbitrariness: Both Aggravating and Mitigating Factors

In 1990, Baldus, Woodworth, and Pulaski published a now-famous study about the administration of the death penalty in Georgia.² In their Procedural Reform Study (PRS), Baldus and his colleagues compared the administration of the death penalty in Georgia before and after Furman. They found that the probability of a death sentence increased with an increasing number of accepted aggravating circumstances. However, the death sentencing rate for the most aggravated cases was only .63. The authors concluded that "the statutorily designated aggravating circumstances in Georgia's post-*Furman* law do not serve in practice to distinguish murder cases in which death sentences are routinely imposed from those that normally result in a life sentence" (Baldus et al., 1990, p. 97).

Additionally, Baldus et al. (1990) discovered that single statutory and non-statutory aggravating and mitigating circumstances had a significant influence on the sentencing outcome.⁴ An important component of their analyses of whether Georgia's death penalty operates arbitrarily was the construction of a "culpability scale" that included seventeen legitimate factors (aggravating and mitigating circumstances). The culpability index consisted of five levels: 1) "very mitigated," 2) "some mitigation," 3) "neither aggravated nor mitigated," 4) "some aggravation," and 5) "very aggravated." The hypothesis was that "in a random or highly capricious death-sentencing system, there would be little or no relationship between the perceived culpability of those sentenced and the sentences they received" (p. 59). The results suggested that the level of culpability was related to the sentencing outcome, namely the higher the level of culpability, the greater the probability of a death sentence. However, in the midrange of aggravation, the death sentencing rate varied between .08 and .80. This finding indicated to the authors that the death penalty in Georgia in the post-*Furman* era was not reserved for the most aggravated cases and that the death penalty was not being applied consistently.

Baldus et al.'s (1990) analysis shows that even though the administration of the death penalty may be less arbitrary and more evenhandedly applied in the post-*Furman* era than in the pre-*Furman* era, legitimate case characteristics do not fully explain the sentencing outcome and death sentences are only applied evenhandedly in 50 to 60 percent of all cases.⁴ In sum, the results imply that the Georgia death penalty system still operates in a somewhat arbitrary and excessive manner.

In 1998, Baldus, Woodworth, Zuckerman, Weiner, and Broffitt published the results of another study, this one from the city of Philadelphia. The researchers used different methodologies to measure defendant culpability and their results suggested that aggravating factors significantly influenced juries' decisions. In contrast, mitigating factors appeared to have little influence. In further work, a study of Nebraska capital sentencing by Baldus, Woodworth, Grosso, and Christ (2002) found support for their Philadelphia findings. Whereas six of the statutory aggravating circumstances were significantly related to sentencing outcomes, none of the statutory mitigating factors was significant.³ When the jury found one aggravating circumstance to exist, mitigation had a

slight effect. When the jury found two aggravating factors, the probability of a death sentence decreased when the number of mitigating factors increased. When a jury found three or more aggravating factors, mitigating factors did not matter. In sum, the influence of the number of mitigating factors on the sentencing outcome varied depending on the number of aggravating factors. Overall, aggravating factors had a much stronger influence on the sentencing outcome than mitigating circumstances.

Unah and Boger (2001) conducted a later study in North Carolina that began with all murders in North Carolina during 1993 – 1997,⁵ analyzing the likelihood of a case receiving a death sentence at several levels of the criminal justice process (e.g., decision to charge first degree murder, decision to seek the death penalty, etc.). For those cases that were tried capitally, the aggravating circumstances of prior violent felony, felony circumstances, killing of a law enforcement officer, an especially heinous killing, the murder posing a great risk to other persons, and violence against another victim were all found to be significantly related to a death sentence. Conversely, acceptance of two statutory mitigating factors, “capacity to appreciate criminality impaired” and “defendant’s age,” were significantly related to the defendant receiving a life sentence. The authors also created a variable “nonstatutory mitigating factors” and a variable “nonstatutory aggravating circumstance of victim”. Both variables were significantly related to the sentencing outcome. However, the authors provided no information as to which factors were counted as non-statutory aggravating and mitigating circumstances.

More recently, Lenza, Keys, and Guess (2003) analyzed data from Missouri and found that prior convictions, an aggravating factor, had a significant effect on defendants receiving a death sentence. Age of the defendant (younger than 21), a mitigating factor, did not significantly decrease the probability of receiving a death sentence. Conversely, defendants younger than 30 years were more likely to be sentenced to death. The authors speculated that jurors saw young people as having less social value and therefore being more “executable” than older offenders.

Paternoster (2003) concentrated mainly on the influence of geography and race of victim, as well as race of defendant, when he examined the application of the death penalty in Maryland. Paternoster used aggravating and mitigating circumstances as control variables to determine whether the capital punishment system of Maryland shows

discriminatory patterns. Numerous aggravating and mitigating circumstances had a significant influence on the sentencing outcome when estimating the effects of geography (counties). The influential statutory and non-statutory aggravating factors are “multiple victims,” “victim sexually abused,” “victim killed execution style,” and “prior felony conviction.” The influential statutory and nonstatutory mitigating circumstances were “defendant physically abused as a child” and “defendant made full confession to aggravating factors.” These aggravating and mitigating circumstances were also significantly related to the sentencing outcome when the effects of the defendant’s race were assessed. Additionally, the statutory and nonstatutory aggravating factors of “defendant implicated in other killings,” “defendant forced his way into the place of the victim,” “victim suffered multiple traumas,” “victim killed execution style.” and “defendant tried to hide or dispose body” and the statutory and nonstatutory mitigating circumstances “defendant had history of drug abuse,” “defendant sexually abused as a child” and “defendant confessed to aggravating circumstances” were significantly related to the sentencing outcome when effects of victim race were evaluated (Paternoster, 2003).

The Purpose of the Study Reiterated

Although stated in Chapter 1, the foregoing discussion may have clarified the intended objectives of the present study. To reiterate, the purpose is to explore whether the Court’s *McKoy v. North Carolina* (1990) decision affected the role of mitigation in capital sentencing in North Carolina. A large set of capital cases in North Carolina will be analyzed to determine whether there is a difference before and after the *McKoy* decision in the role of mitigating factors in predicting juries’ sentencing recommendations. A secondary consideration is whether the predictive models of death sentencing show less or more arbitrariness between the two periods. Three possibilities exist:

- (1) There will be no difference in the two periods, with predictors of death sentencing being essentially the same during both time periods;
- (2) Because unanimity was required pre-*McKoy*, mitigating factors will have a stronger influence; or

(3) If jurors were indeed dissuaded from considering mitigating factors unless there was juror unanimity, freeing them from this constraint could enhance the relationships of mitigating factors with sentencing recommendations.

Endnotes

¹Another finding of the GAO report, one that received greater attention than the evidence concerning arbitrariness, was the consistent result that white victim cases were significantly more likely to receive a death sentence than those involving the murders of non-white victims. While the presence of non-legal factors is not a focus of the present research, variables are included as controls in the analysis that will allow for an assessment of their roles as predictors.

²This work was the centerpiece of the defense's claim of systemic discrimination in the U.S. Supreme Court ruling *McCleskey v. Kemp* (1987). The findings showed that the murder victim being white was a statistically significant predictor of death sentencing in Georgia. While the legacy of this work is the finding concerning discrimination, the results contain valuable information about aggravation and mitigation.

³The six aggravating circumstances found to have a significant effect were "record of murder, terror, or serious assault," "contract murder," "murder was heinous, atrocious, or cruel," "multiple victims," "great risk of death to others," and "murder as committed in an effort to conceal the commission of another crime."

⁴The aggravating circumstances "murder committed during the course of another felony," "previous convicted of violent crime," "defendant created great risk of death to others," "murder for money," "murder for hire," "murder wanton or vile" and "defendant was prisoner or escapee" (Baldus et al., 1990, p. 657). A number of mitigating circumstances was also significantly related to the sentencing outcome, namely "defendant 16 or younger," "no conviction for a previous violent felony," "defendant was underling in murder" and "defendant was provoked" (Baldus et al., 1990, pp. 656-657).

⁵Undoubtedly, the authors were cognizant of the fact that juries' responses to mitigation had different meanings in years before the *McKoy* decision, so they elected to focus on cases during a relatively limited time span in the post-*McKoy* era. This study is available on-line as a report from the agency that sponsored the research, but, surprisingly, does not appear to have been published in a scholarly journal.

Chapter Four

Method and Analytical Procedures

Data

Description of the sample and case materials. The analysis is based on information from reviews of capital murder trials in North Carolina. These cases were located through *LexisNexis* searches of North Carolina Supreme Court and Court of Appeals cases. In these trials, the defendants were convicted of, or pled guilty to, first degree murder, the state sought the death penalty, the trial progressed to a sentencing phase whereby the jury heard evidence concerning aggravating and mitigating factors, and the jury issued a binding recommendation for a sentence. In making a sentencing recommendation, North Carolina capital juries have only two options, a death sentence or a sentence of life in prison, currently one without the possibility of parole except by the governor's clemency. Included in the analyses are cases where the sentencing phase was conducted, but the jury declared that they could not reach the required unanimous decision regarding a sentence (in essence, a "deadlocked jury"), resulting in the default sentence of life in prison.

Reviews of capital trials were derived from public records materials that accompany decisions regarding appeals of capital murder convictions rendered by the North Carolina Supreme Court and the North Carolina Court of Appeals. These materials include defendant and state briefs, as well as a form completed by the jury that records its responses to aggravating and mitigating factors, and concludes with the jury's sentencing recommendation. Historically, these materials have been published in hard-copy form and placed in two university law libraries in North Carolina (the University of North Carolina – Chapel Hill and Wake Forest University), while other locations have microfilm copies. Beginning with decisions returned from cases tried in 1999, hard copies have not been made available, but materials are accessible via an electronic data file (<http://www.ncappellatecourts.org>).

There are 818 cases in the dataset from trials held during the period 1979-2000. The initial year of 1979 represents the first year following the *Gregg v. Georgia* (1976) decision that death sentences were likely to be sustained upon appeal to the North Carolina Supreme Court. The year 2000 represents the latest year for which Supreme or Appeals Court decisions have been issued for the substantial majority of appeals filed. Of these, 741 cases are original trials while 86 are retrials following a vacating of either the defendant's conviction and/or death sentence.

Because there is no centralized source of information regarding capital murder trials in North Carolina, it is impossible to determine the precise number of all capital murder trials conducted during the period under investigation. However, appeals of death sentences are automatically referred to the state Supreme Court. Also, a large proportion of defendants receiving a life sentence appeal their first degree murder convictions to the state Court of Appeals. If the Court of Appeals decision is not in their favor, defendants may appeal to the state Supreme Court, but that court has the option of declining to hear the case. Given that the substantial majority of capital cases are appealed to at least one of these courts, we estimate that the available data contain reviews of 80-90% of all sentencing recommendations made by juries during this period.

There are two instances where defendants are unlikely to appeal, and therefore not be included in the dataset. First, if they pled guilty and received a life sentence, there is little basis for appeal. Second, some defendants' convictions are upheld, but their death sentences vacated. If, upon retrial of the penalty phase, they receive a life sentence, there is no basis for appeal. Both of these situations result in cases that are difficult to discover, especially if the trials were held in smaller rural counties without a major news outlet. A much smaller basis for some trials not included in the dataset involved those that were actually identified, but their case materials were not available because hard copies were missing from both libraries or not yet posted in electronic form (n = 12 cases).

Of the 818 cases reviewed, 598 had complete information necessary for the analyses. The pre-*McKoy* dataset consists of 210 cases and the post-*McKoy* dataset consists of 388 cases.

Several sources of missing data have been determined that resulted in cases being excluded from the working dataset. These sources include:

- Cases that did not have a full set of materials necessary for review. Specifically, a number of appeals in cases where the individual received a life sentence did not include the jury recommendation form (termed “Issues and Recommendation”) among the case materials. Therefore, it was impossible to determine the specific aggravating circumstances and mitigating factors submitted for jury consideration.
- Also excluded from the analysis are trials that involved two types of situations emerging from the jury deliberations. First, the jury did not find an aggravating factor. Second, the jury found an aggravating circumstance to exist, but judged that it did not merit the death penalty. In either case, the sentencing decision defaults to life, and the deliberations conclude prior to considering mitigating evidence.
- In the early post-*Gregg* years of capital trials in North Carolina, the juries of some counties were submitted a set of mitigators and were asked if they accepted any of those listed. Thus, the acceptance or rejection of individual mitigators was not required, rendering these cases invalid for this analysis
- Finally, some appeals were prepared in a manner that did not allow for coding of all variables used in the analysis. That is, descriptions of the crime were lacking in detail, or materials were excluded that were necessary to complete some codings.

Defendant information. Defendants’ age, race, and sex were available from the North Carolina Department of Corrections website, <http://www.doc.state.nc.us/offenders>.

Victim information. Through 1996, victims’ age, race, and sex were taken from a commercially available CD-ROM, *North Carolina Vita Records: Deaths 1968-1996*. For 1997-2000, victims’ demographic information was determined from some combination of court material (such as reference to the victim in the state’s or defendant’s appeals briefs), newspaper accounts, or obituaries obtained through World Wide Web search engines. Cases for which this information could not be obtained are not included in the dataset.

Description of Variables Used in the Analysis

Dependent variable. The dependent variable for the analysis is whether or not the jury assessed the defendant a sentence of death. For all cases, life sentences are coded as “0” while death sentences are coded as “1.”

Focus variables: Aggravating and Mitigating Circumstances. The main focus of this study is on the effect of the *McKoy v. North Carolina* decision (1990), which changed the unanimity requirement for mitigating circumstances, and how it affected the sentencing outcomes in capital murder trial. North Carolina is a “weighing” state in which the jury must weigh aggravating circumstances against mitigating circumstances in making a sentencing decision. Mitigating circumstances are defined as: “a fact or group of facts which do not constitute any justification or excuse for killing or reduce it to a lesser degree of the crime of first-degree murder, but which may be considered as extenuating, or reducing the moral culpability of the killing, or making it less deserving of the extreme punishment than are other first degree murders” (North Carolina Capital Punishment Statutes, p. 148).

The North Carolina Capital Punishment Statutes identify 11 statutory aggravating circumstances in the order as they appear in the statutes. These are:

1. The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
2. The capital felony was committed for pecuniary gain.
3. The capital felony was especially heinous, atrocious, or cruel.
4. The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.
5. The defendant knowingly created a great risk of death to more than one person by means of a weapon or device, which would normally be hazardous to the lives of more than one person.
6. The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A,

B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

7. The capital felony was committed by a person lawfully incarcerated.
8. The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.
9. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.
10. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.
11. The capital felony was committed against a law-enforcement officer, employee of the Department of Corrections, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty” (North Carolina Capital Punishment Statutes).

North Carolina also provides a list with nine statutory mitigating circumstances, which are the following:

1. The defendant has no significant history of prior criminal activity.
2. The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.
3. The age of the defendant at the time of the crime.
4. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.
5. The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.
6. The defendant acted under the duress or under the domination of another person.
7. The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

8. The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act
9. Any other circumstance arising from the evidence which the jury deems to have mitigating value (known as the "catchall" factor).

The prosecution must prove the existence of the aggravating circumstance or circumstances beyond reasonable doubt and the aggravating circumstances must be found unanimously by the jury. In contrast to the aggravating circumstances, mitigating circumstances must only be proven to the satisfaction of an individual juror. Pre-*McCoy*, the mitigating circumstances had to be found unanimously by the jury.

For the analysis, aggravation was measured as a summed variable consisting of the numbers of aggravators accepted by the jury. Mitigation was measured as the sum of the eight statutory variables (described above) accepted by the jury and the sum of all non-statutory mitigators accepted by the jury; the latter count included any "yes" responses to the catchall question.¹ The range of aggravators accepted was 1 – 9. The range of mitigators accepted was 1 – 44.

Control Variables. To determine whether any results would hold when taking into account the effects of other variables shown by past research to predict death sentencing, a set of control variables employed a number of control variables based on previous research were included. Some of these were additional variables could be interpreted as additional legal factors that could legitimately influence jury decisions, either by further aggravating or mitigating the case. These variables were:

- multiple victims (coded 1 if the case had multiple murder victims)
- urban or rural county in which the trial was held (coded 1 if an urban county)
- whether the defendant confessed (coded 1 if the defendant confessed).

Another set of variables were included to capture the possible effect of non-legal factors influencing sentencing outcomes. Those included are, by far, the most prominent non-legal variables studied in the post-*Gregg* literature, and have been found in a majority (but not all) studies to emerge as predictors of death sentencing. Comprised of demographic characteristics of defendants and victims, these variables are:

- race of the defendant (coded 1 for white defendants, 0 for black and other defendants)

- age of the defendant (interval variable ranging from 15-77)²
- race of the victim (coded 1 for white victims, 0 for black and other victims)
- sex of the victim (coded 1 for male victims, 0 for female victims)
- age of the victim (interval variable ranging from 0 to 100)

Statistical Analysis

The analysis consists of two parts, development of descriptive statistics and a multivariate analysis. The descriptive statistics give an overview about the number of aggravating and mitigating circumstances presented to and accepted by capital juries and where they have changed, if at all, as result of the *McKoy* decision. A logistic regression analysis examines the extent to which these changes, if any, have influenced capital sentencing outcomes. The logistic regression analysis consists of three models: (1) a model for the total dataset including 598 cases with a variable in the model indicating whether a case was pre- or post-*McKoy*; (2) a model for the pre-*McKoy* dataset including 210 cases; and (3) a model for the post-*McKoy* dataset including 388 cases. The logistic regression analysis allows for a comparison of the change in the impact of mitigating circumstances post-*McKoy*. A comparison of the models also allows for assessing the impact of the legally relevant variables of aggravation and mitigation, while controlling for nine other variables on the sentencing outcome pre- and post-*McKoy*.

Logistic regression can be used when the dependent variable (life or death sentence) is a binary variable. Logistic regression estimates the impact of the independent variables on the odds that a defendant would receive a sentence of death. The odds ratio measures the strength and direction of the independent variables on the probability of a death sentence. The odds refer to the probability of an event occurring (death sentence) divided by the probability of an event not occurring (no death sentence). The odds can take values between 0 and ∞ . The odds ratio determines whether the probability of a certain event (ex. death sentence) is the same for 2 groups (e.g. white and black defendants). The odds ratio is the ratio of the odds of an event occurring for one group (e.g. the odds of a death sentence occurring for white defendants) divided by the odds of an event occurring for another group (e.g. the odds of a death sentence occurring for black defendants). An odds ratio of a 1 indicates that an event is equally likely in both groups. When an odds ratio is greater than 1 it indicates that the odds of getting a 1 on the

dependent variable increases when the independent variable increases. When an odds ratio is between 0 and 1 it indicates that the odds of getting a 1 on the dependent variable decreases when the independent variable increases (Menard, 1995).

The size of the effects of the independent variables on the probability of a death sentence is reported through the coefficients (b) of the independent variables. For instance, if the coefficient (b) for the number of aggravating circumstances accepted is .857 and the odds ratio is 2.356, this means that every additional aggravating circumstance accepted *increases* the probability of a death sentence by 240 percent (2.356 rounded). If the coefficient has a negative value, the odds ratio would mean that with every additional circumstance accepted the probability of a death sentence *decreases* by 240 percent. An independent variable is said to have a statistically significant effect if that variable contributes to the prediction of the probability of a death sentence beyond a contribution that might be due to chance. A probability of .05, or 1 in 20, is low enough to be thought of as statistically significant. The interpretation of the results will be based on whether the legally relevant variables are shown to be statistically significant and, based on their relative probabilities, whether they are more or less important as predictors of death sentencing during the periods before and after the *McKoy* decision.

Endnotes

¹The influence of the single aggravating and mitigating factors was tested, but due to the small number of submitted and accepted single aggravating and mitigating factors we created a summed variable (number of aggravating circumstances).

²Arguably, this variable could also serve as a mitigator because juries may decide that the youth (or even older ages) of the defendant serves to lessen culpability. However, all other things being equal, as they are in treated in the statistical analysis to follow, it could also be argued that age, like race and/or sex, is an ascribed status that should not be a determinant of sentencing decisions.

Chapter Five

Results

The first aspect of the periods before and after the *McKoy v. North Carolina* (1990) decision is whether there has been an apparent shift in the total number of mitigating circumstances both presented by the defense and accepted by the jury. An assumption would be that eliminating the unanimity requirement would present the defense with greater latitude in presenting mitigators, knowing that they only have to convince one juror of that factor's relevance to the case. This assumption is supported by the results shown in Table 1 where the average number of aggravating and mitigating circumstances presented to and accepted by the jury for 210 pre-*McKoy* cases and 388 post-*McKoy* cases is presented. While the aggravating circumstances presented and accepted have increased only slightly in the post-*McKoy* era, the number of mitigating circumstances presented has more than doubled post-*McKoy*, increasing from 9.12 to 20.6, and likewise, the average number accepted increased from 4.31 to 10.46.

Table 1

Average Number of Aggravating and Mitigating Circumstances Presented and Accepted Pre- and Post-McKoy

	Presented		Accepted	
	Pre-McKoy	Post McKoy	Pre-McKoy	Post McKoy
Total Number of Aggravating Circumstances	2.04	2.45	1.81	2.25
Total Number of Mitigating Circumstances	9.12	20.61	4.31	10.46
a) Statutory Mitigating Circumstances	2.3	2.86	0.97	1.4
b) Non-Statutory Mitigating Circumstances	6.82	17.75	3.34	9.06

Table 1 also presents the average number of statutory versus non-statutory mitigating circumstances presented and accepted. Pre-*McKoy* defense counsel presented on average 2.3 statutory mitigating circumstances and the jury, under the pre-*McKoy* unanimity requirement, accepted .97. Furthermore, post-*McKoy* 2.86 statutory mitigating circumstances were presented and 1.4 were accepted. This finding demonstrates a slight increase in the number of statutory mitigating circumstances both presented and accepted post-*McKoy*.

Regarding non-statutory mitigating circumstances, pre-*McKoy* defense counsel presented on average 6.82 and the jury accepted 3.34 of them. In contrast, post-*McKoy* defense counsel introduced on average 17.75 non-statutory mitigating circumstances and the jurors accepted 9.06 of them. These results show clear increases in the number of non-statutory mitigating circumstances presented and accepted post-*McKoy*.

Interestingly, Table 1 also demonstrates an increase in the average number of aggravating circumstances both introduced and accepted post-*McKoy* despite the fact that the Court's decision did not change the interpretation of how aggravating circumstances should be considered by the jury. One possible explanation for this jump in the average number of aggravating circumstances presented post-*McKoy* by prosecutor's may be a strategic attempt to combat the larger number of mitigating circumstances being presented by defense counsels.

Because the number of both statutory and non-statutory mitigating circumstances presented and accepted has more than doubled post-*McKoy*, it is possible that mitigating circumstances might have a greater influence on capital sentencing outcomes by decreasing the probability of a death sentence. Logistic regression was used to model the determinants of capital sentencing, and, in turn, test this hypothesis.

The results of these logistic regression analyses are presented in Table 2. Three models are presented; one is for the total sample of capital cases and one each for cases sentenced both pre-*McKoy* and post-*McKoy*. The logistic regression model for the total sample includes a dichotomous variable to distinguish between pre-*McKoy* and post-*McKoy* cases (post-*McKoy* = 1). Surveying the results, this model indicates that the *McKoy* decision had an impact on capital sentencing outcomes because of the effect of

this dichotomous, pre- vs. post-*McKoy* variable attains statistical significance ($b = .871$, $p < .001$). However, the effect of this variable is positive and indicates that the odds of receiving a death sentence were 2.4 times higher in the post-*McKoy* era. While the *McKoy* decision theoretically presented defendants with a greater opportunity to sway jurors through mitigation, the results indicate that, all other things being equal, post-*McKoy* defendants were actually at greater risk of receiving a death penalty.

Table 2
Logistic Regression Model

Variable	Total			Pre-McKoy			Post-McKoy			Differences in Effects	
	b	se(b)	Odds Ratio	b	se(b)	Odds Ratio	b	se(b)	Odds Ratio	Z	p
Post-McKoy cases	.871**	.227	2.389	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.	N.A.
Aggravators Accepted	.857**	.119	2.356	.475*	.194	1.608	1.059**	.164	2.885	2.30*	.022
Mitigators Accepted	-.098**	.014	.906	-.181**	.044	.835	-.098**	.016	.907	1.77	.076
Multiple Victims	.034	.226	1.034	.103	.372	1.108	-.069	.308	.993	-.356	.718
Confession	.079	.051	1.083	.416*	.152	1.515	-.011	.061	.989	-2.61*	.008
Defendant Age	.028*	.011	1.028	-.005	.018	.995	.055**	.017	1.057	2.42*	.016
Defendant Race (Non-White)	-.153	.232	.858	-.152	.381	.859	-.127	.311	.881	.051	.960
Victim Age	-.016*	.005	.985	-.015	.008	.985	-.017*	.007	.983	-.188	.850
Victim Sex	.405*	.202	1.500	-.009	.329	.991	.678*	.269	1.971	1.62	.106
Victim Race (White)	.331	.247	1.392	.258	.415	1.294	.369	.320	1.447	.212	.842
County	-.425*	.205	.653	-.309	.335	.734	-.526	.280	.591	-.497	.624
Intercept	-1.220	.558	.295	.623	.909	1.864	-1.389	.737	.059		
-2 Log Likelihood intercept model			783.446			286.227			492.066		
			622.597			235.378			359.634		
Model X ²			160.849			50.849			132.432		
Corrected R ²			.323			.289			.402		
N			598			210			388		

*p < .05; **p < .001

The logistic regression model for the total data set also shows that the number of aggravating and mitigating circumstances accepted by the jury are related to capital sentencing outcomes in a manner consistent with their legal function. That is, the greater the number of aggravating circumstances accepted by the jury, the greater the likelihood of a death sentence ($b = .857, p < .001$). Conversely, the greater the number of mitigating circumstances accepted by the jury, the lower the likelihood of a death sentence ($b = -.098, p < .001$). In fact, each additional aggravating circumstance accepted by the jury increases the odds of a death sentence by a multiple of 2.36, while each additional mitigating circumstance accepted by the jury reduces the odds of a death sentence by approximately 9%.

The results from this first model presented in Table 2 suggest that several extra-legal variables also significantly influence sentencing outcomes. First, defendants in urban counties are 34.7% less likely to receive a death sentence than defendants in rural counties. Second, murderers of female victims were 1.5 times more likely to receive a death sentence than murderers of male victims. Third, killers of younger victims have a higher probability of receiving a death sentence ($b = -.016, p < .05$). The age of the defendant also significantly influences sentencing outcomes -- the younger the defendant, the less likely the probability of a death sentence ($b = .028, p < .05$). The effects of multiple victims, defendant race, victim race, and confession failed to attain statistical significance.

While these data do not measure the weights given to the various aggravating and mitigating circumstances accepted by capital juries in North Carolina, they do show that numerous mitigating circumstances may be required to overcome even a small number of aggravating circumstances. Because the *McKoy* decision reduced the burden to the defense at penalty phase for jurors accepting mitigating circumstances, it is possible that the influence of aggravating and/or mitigating circumstance on capital case sentencing outcomes in North Carolina varies across these two capital sentencing eras. To address this possibility, two additional logistic regression models are presented in Table 2. To reiterate, the pre-*McKoy* model is based on 210 capital cases sentenced while the post-*McKoy* model is based on 388 capital cases sentenced.

The pre- and post-*McKoy* models presented in Table 2 both show that increases in the number of mitigating factors accepted by capital jurors decrease the probability of a death

sentence. However, contrary to what might be expected, mitigating circumstances have *less* impact on sentencing outcomes post-*McKoy*. In the pre-*McKoy* era, each additional mitigating circumstance accepted by the jury decreased the probability of a death sentence by 16.5%. In the post-*McKoy* era, each additional mitigating circumstance accepted decreased the probability of a death sentence by only 9.3%. Table 2 also reports the results of a test for the equality of pre- and post-*McKoy* model coefficients (Brame, Paternoster, Mazerolle, and Piquero, 1998). The differences in the effects of the impact of number of mitigating circumstances accepted pre- and post-*McKoy* are statistically significant (difference = 1.77), reinforcing the finding that mitigating factors appear to have less of an effect in the post-*McKoy* era.

Conversely, the impact of the number of aggravating circumstances accepted on sentencing outcomes was much stronger post-*McKoy* than pre-*McKoy*. For both the pre- and post-*McKoy* model, as expected, an increasing number of aggravating circumstances accepted were significantly associated with a greater probability of a death sentence. In the pre-*McKoy* model, each additional aggravating circumstance accepted increased the odds of a death sentence by a multiple of 1.6. In the post-*McKoy* model each additional aggravating circumstance accepted increased the odds of a death sentence by a multiple of 2.89. The difference in these effects (difference = 2.30) was statistically significant.

Even though the number of mitigating circumstances doubled post-*McKoy*, the impact of mitigating circumstances on sentencing outcomes decreased; moreover, the influence of aggravating factors and the probability of a death sentence both increased during the post-*McKoy* period. These findings are contrary to any expectation that the increased latitude in having mitigators accepted may have resulted in decreased death sentencing. In practical terms, the *McKoy* decision may have inspired defense counsel to submit more mitigating factors at penalty phase, and it made jury acceptance of these mitigators more likely by eliminating the unanimity requirement, but the weight or influence of these additional mitigators appears to have been very slight. Moreover, their presence may have diluted or diminished the influence of other more salient mitigators. In turn, the influence of aggravating circumstances may have increased and the odds of a death sentence became more likely as a consequence.

These pre- and post-*McKoy* models presented in Table 2 also provide additional evidence of the extent to which the death penalty may have been applied arbitrarily and/or capriciously in North Carolina. In the pre-*McKoy* model, only the effects of three legally relevant variables attained statistical significance: number of aggravating circumstances accepted, number of mitigating circumstances accepted, and confession. None of effects of the extra-legal variables attained statistical significance. Conversely, in the post-*McKoy* model, five variables attain significance. Three of these variables are legally relevant to the sentencing decision, the number of both aggravating and mitigating circumstances accepted, and defendant age. The other two variables that attained significance were quasi-legal variables. First, as victim's age increased, the odds of a death sentence decreased. Second, murderers of female victims were twice as likely to receive a death sentence as murderers of male victims.

These findings suggest that the death penalty in North Carolina shows no clear and convincing evidence of arbitrariness nor capriciousness during either the pre-*McKoy* or the post-*McKoy* eras. The results shown in Table 2 reveal that legal factors are the primary predictors of death sentencing. Although the results make clear that aggravating circumstances are much stronger predictors of a death sentence compared to mitigating. While both defendant and victim age are included among the statistically significant variables these can be argued as being relevant to the sentencing decision and cannot be necessarily be construed as evidence of caprice relevant to the sentencing decision and could not be construed as evidence of caprice. However, the significant effect of victim's sex during the post-*McKoy* era suggests that some level of gender-based bias may be present. Although beyond the scope of the present study, this effect might be attributed to female-victim murders in which rape was involved, a single aggravator that may carry special weight in tilting the jury's decision toward a death sentence.

Chapter Six

Discussion and Recommendations for Future Research

Summarizing the Results

In *McKoy v. North Carolina* (1990), the Court increased jurors' discretion in capital sentencing by holding that jurors do not have to find mitigating circumstances unanimously, but that each juror can find the mitigating circumstances he/she believes to be present. This decision provided the basis for our primary research question, which was whether the *McKoy* (1990) decision influenced the way in which aggravating and mitigating circumstances are processed in North Carolina. The focus of the Court on individualized sentencing also represents the basis for a related question as to whether or not the death penalty system in North Carolina operates arbitrarily, meaning the legally relevant variables of aggravation and mitigation fail to determine the probability of a death sentence.

Since each juror can now find mitigating circumstances independent of the other jurors in the post-*McKoy* era, it was expected that the number of mitigating circumstances presented and accepted would increase. This expectation is supported by the descriptive statistics, which showed that the average number of mitigating circumstances presented and accepted doubled in the post-*McKoy* cases. At the same time, the number of aggravating circumstances presented and submitted stayed about the same. The analysis then moved to a consideration of the impact of mitigating circumstances, and whether there had been a change between the two eras. Separate logistic regression analyses revealed that there had indeed been a shift in the effects of aggravation and mitigation, but not the manner that some might have anticipated. Specifically, in the post-*McKoy* era, mitigating circumstances were found to have a diminished impact on the probability of a death sentence while, conversely, aggravating circumstances carried an increased impact.

Discussion of the Results

The findings of this study suggest that even though the number of mitigating circumstances accepted has doubled post-*McKoy*, they have less influence on the probability of a death sentence. One possible explanation could be a diffusion effect. In essence, even though jurors accept twice as many mitigating circumstances post-*McKoy*, the accepted mitigating circumstances seem to carry less weight. Jurors are presented with on average 20 mitigating circumstances by the defense counsel in the post-*McKoy* era. The jurors might have the impression that defense attorneys present anything they possibly can because there is not a specific reason why the defendant does not deserve to die. As an extension of this thinking, jurors might believe that if the defendant has a good reason why he should not die, he would not need to submit so many mitigating circumstances.

Ironically, the decreased relevance of mitigating circumstances post-*McKoy* could also be caused by the abandonment of the unanimity requirement for mitigating circumstances that was dictated in *McKoy v. North Carolina*. In the pre-*McKoy* era, jurors had to find mitigating circumstances unanimously and when they did, these circumstances were probably very salient and carried significant weight. In the post-*McKoy* era, jurors do not have to agree on the same circumstance and therefore it may be that the “accepted mitigating circumstances” are not given the same weight. Jurors may engage in fewer discussions about whether or not to accept a certain mitigating circumstance; therefore, each juror is left to decide for her/himself whether to accept the mitigator, and the approval of the other jurors is not necessary. If the jurors do not discuss the importance of a mitigating factor together, those who do not initially agree with it are unlikely to consider it when it comes time to vote for the sentence.

A second research question referred to the issue of arbitrariness and whether legally relevant variables determine the sentencing outcome. The logistic regression analysis indicates that North Carolina sentencing outcomes appear to have been significantly influenced by the legally relevant variables of aggravation and mitigation. The analysis, however, also suggests that even though the number of mitigating circumstances accepted significantly decreases the probability of a death sentence, the impact of mitigating circumstances is only marginal when compared to the impact of aggravating circumstances, especially post-*McKoy*. In the absence of guidance for jurors on how to weigh the

aggravating against the mitigating circumstances, and when everything counts in aggravation and mitigation, subjectivity appears to influence sentencing outcomes and invites arbitrary decision-making (Steiker and Steiker, 1995).

In both time periods, jurors were given the opportunity for arbitrary decision-making by the state being allowed to submit vague statutory aggravating circumstances. Some of the statutory aggravating circumstances are so broad that they could be submitted in any first-degree murder case. North Carolina employs the aggravating circumstance “murder was heinous and/or cruel,” which means that in some way the murder was worse than another and the defendant therefore deserves the death penalty. The terms “heinous and cruel” are very subjective and very open to interpretation. A similar broad statutory aggravating circumstance is “murder for pecuniary gain,” which can include anything from a robbery to a murder for hire, so has great latitude in its meaning. The statutory aggravating circumstance “capital felony was committed while the defendant was engaged in another felony” can also be applied to many other non-capital first degree murders. These examples show that there is a broad prosecutorial discretion to seek the death penalty among theoretically death-eligible cases and, when sought, if the jury accepts one or more aggravating circumstances, they have virtually unbridled discretion to impose a life or death sentence. Justice Potter Stewart wrote in *Gregg v. Georgia* (1976, p. 46) that “a system could have standards so vague that they would fall adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.” The goal of narrowing the class of death eligible defendants and provide a consistent application of the death penalty is hard to achieve when almost any first-degree murder can be death-eligible by employing vague aggravating circumstances that make a defendant death-eligible.

The current death penalty system may be deceptive because it creates the impression (some would say “illusion”) that the death penalty is administered fairly and non-arbitrarily. The Court has, over the past three decades, created a death penalty system that is highly discretionary, but generates the impression of a greatly regulated, supervised system. Steiker and Steiker (1995, p. 3) propose that the death penalty today “... is, perversely, both over- and under-regulated. The body of doctrine produced by the Court is enormously complex and its applicability to specific cases difficult to discern; yet, it remains unresponsive to the

central animating concerns that inspired the Court to embark on its regulatory regime in the first place. Indeed, most surprisingly, the overall effect of twenty-odd years of doctrinal head-banging has been to substantially reproduce the pre-*Furman* world of capital sentencing.”

That said, one particular finding merits discussion because of the absence of an effect. As discussed in Chapter 3, one of the most consistent findings in the post-*Gregg* death penalty literature concerning discrimination is a persistent race-of-victim effect found across a variety of studies. The impact of this much-reported effect is to increase significantly (although the magnitude varies from state to state) the likelihood of defendants receiving a death sentence when the victim is white. In contrast to this rather voluminous literature, none of the three models presented in Table 2 demonstrate this effect. It is noteworthy that the only other systematic analysis of North Carolina death sentencing in recent years is the research of Unah and Boger (2001) (see Chapter 3, especially Endnote 5). Their work attracted considerable attention upon its release because it purported to show a pronounced race-of-victim effect in North Carolina death sentencing practices whereby murderers of whites were more likely to receive a death sentence, even when controlling for legal factors of the cases. Careful scrutiny of their results reveals that this effect is found at the decision-making levels of deciding to pursue a first degree murder charge and to seek the death penalty. However, in a little discussed portion of their report, the race-of-victim effect disappears at the trial level. To re-emphasize Chapter 3, Endnote 5, the years of Unah and Boger’s analysis were somewhat limited (1995-1999) and were all post-*McKoy*. It is of considerable interest that the similar findings discussed in this thesis are from much larger set of capital trials across a much broader span of years. This effect is more remarkable in the light of the fact that, if Unah and Boger’s findings are generalizable to the larger set of capital trials discussed here, juries have been, in effect, handed a set of cases in which a race-of-victim effect is already embedded. Explanations why this effect disappears at the trial level – arguably the stage of the criminal justice process most subject to arbitrariness and capriciousness – are quite elusive, and will pose a considerable challenge for future researchers.

Finally, one possibility exists that is difficult to ascertain, but the influence of which cannot be ruled out. Faced with the challenge of seeking the death penalty for defendants

who are entitled to more latitude in having the potentially mitigating aspects of their crimes considered, state prosecutors may have become more selective in their cases in the post-*McKoy* era. That is, they are less likely to go forward with single-aggravator cases, and to pay more attention to what mitigation the defendant might present so that it can be more aggressively countered in the sentencing phase of the trial. In addition, prosecutors may have gone to greater lengths to present strong cases to the jury so that the aggravators they present will carry more weight. In essence, the *McKoy* decision may have resulted in a conscious change in prosecutors' presentation of aggravation, leading to an enhanced effect of these legal aspects of the cases.

Suggestions for Future Research

An acknowledged weakness of empirical death penalty studies using secondary analysis is that there are undoubtedly subtle variables that may influence decisions for which no controls are feasible. These include, but are not limited to, the demeanor of the defendant during the trial, the sheer quality of the prosecution and defense presentations, and the socio-political environment surrounding the trial (e.g., the O. J. Simpson trial). However, there are some other avenues for future suggested by this research that could be pursued, some of which are discussed in the paragraphs that follow.

The decision-making of jurors has been assessed by the Capital Jury Project ("CJP"; see Bowers, 1995), a consortium consisting of criminologists, law faculty, and social psychologists. As part of the CJP, researchers interviewed between 80 and 120 former capital jurors from each of 14 states, including North Carolina (Luginbuhl and Howe, 1995). The interviews are open-ended about the "jurors experiences and decision-making over the course of the trial, identify points at which various influences come into play, and reveal the ways in which jurors reach their final sentencing decision" (Bowers, Fleury-Steiner, and Antonio, 2003, p. 423). A major finding of the CJP is that jurors often do not correctly understand the sentencing instructions provided to them by the court, especially how the rules for considering mitigating circumstances are different from the rules for considering aggravating circumstances. Because the study is spread over a number of states, the numbers of *cases* studied in each state is relatively limited. A possibly useful avenue of exploration is to determine how widespread the misunderstandings of jurors were across a broad range of capital cases in North Carolina, and how this may have impacted their considerations of

aggravating and mitigating circumstances. The study could replicate some of the CJP methodology, but be tailored more specifically to the possible confusion generated by the seemingly obtuse wording that characterizes North Carolina's "Issues and Recommendation" form.¹ If such misunderstandings are indeed widespread, arbitrariness could enter in by virtue of the jurors erroneously believing that their options for voting life or death were limited, thus undermining the impact of the legal factors of the case. Further, more extensive, research is needed to thoroughly explore this possibility.

As a policy recommendation that would open up numerous opportunities for research, states could clarify the required weighing process by quantifying the weights given to single aggravating and mitigating circumstances. Although resolving the details would present a formidable challenge that is well beyond the scope of this thesis, a systematic quantification of the weighing process would give capital jurors considerably more guidance in their sentencing decision, thereby further reducing the unfettered discretion that was condemned in *Furman v. Georgia* (1972). Conceptually, the jurors would compare their scores assigned to aggravating to those assigned to mitigation and sentence accordingly. By quantifying the weighing process, the state could record not only which aggravating and mitigating factors were accepted, but also how much weight the jurors gave to each factor. That information would be useful for several reasons. First, the information about how jurors weighed the single aggravating and mitigating circumstances could be used by the state Supreme Court during the automatic appeal and proportionality review to ensure that the death penalty was not imposed arbitrarily. Second, in states where the judge has the right to override the sentencing recommendation of the jury (not the case in North Carolina), judges would be able to review how much weight was given to the single aggravating and mitigating factors, thus better informing their decisions to affirm or override the jury's decision.

Finally, researchers could also use the information gathered from quantitatively-oriented jury studies of this nature to gain a better understanding of the decision-making process of the jurors. That information would also promote our understanding whether jurors react negatively to a high number of mitigating circumstances presented by defense counsel. Jurors may have the feeling that defense counsel admits anything in mitigation they can think of. Consequently, jurors may have the impression that the mitigating circumstances

submitted are meaningless and that the defense thinks that quantity is more important than quality.

The suggested analysis would also promote our understanding whether jurors react negatively to a high number of mitigating circumstances presented by defense counsel. Jurors may have the feeling that defense counsel admits anything in mitigation they can think of. Consequently jurors may have the impression that the mitigating circumstances submitted are meaningless and that the defense thinks that quantity is more important than quality.

Another avenue to explore is whether it is more effective for the defense counsel to concentrate on a few important mitigating factors that most of the jurors could agree upon, thereby maximizing their effect. Research of this nature could focus on whether the number of mitigators *rejected* serves as a predictor of death sentencing, or alternatively, whether the using ratio of submitted to accepted mitigators yields meaningful results.

Concluding Thought

As these suggestions indicate, there is still much work to be done in better determining capital punishment sentencing practices and in developing rational explanations for their existence. What cannot be resolved through empirical work alone is whether the system can ever be made just and fair enough, despite numerous efforts by state and federal courts, to continue a practice that has been abandoned by most of the industrial world.

Endnote

¹Issue Three of the form asks “Do you unanimously find beyond a reasonable doubt that the mitigating circumstances or circumstance found by you is or are insufficient to outweigh the aggravating circumstance found by you?” while Issue Four poses the question “Do you unanimously find beyond a reasonable doubt that the aggravating circumstance you found is sufficiently substantial to call for imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?”. As a point of clarification, answering “yes” to Issue IV *does not* require the jury to impose a death sentence. But, answering “no” to either III or IV defaults to a life sentence.

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