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INTRODUCTION

When members of a capital jury ask the trial judge to clarify a sentencing instruction, chances are good they didn't understand the instruction. Why else would they have asked the question? Moreover, the trial judge might think it best to clarify matters.

However, the judge presiding over Lonnie Weeks's capital murder trial thought differently. The jurors there asked whether they were *required* to sentence Weeks to death if they believed his crime was heinous, or if they believed Weeks himself constituted a continuing threat to society. The answer, as a matter of law, is no.[1] But rather than answering the question, or otherwise making sure the jurors understood the point, the trial judge simply told them to go back and reread the instruction—the very same instruction that prompted their question in the first place. The jury sentenced Weeks to death.

Weeks appealed. He worked his way through the Virginia courts on direct appeal,[2] and then through the federal courts in habeas

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1 *See* cases cited *infra* note 34.

2 *See* Weeks v. Commonwealth, 450 S.E.2d 379 (Va. 1994), *cert. denied*, 516 U.S. 829 (1995).

corpus proceedings.[3] He lost at every step, including his last one in the U.S. Supreme Court.[4]

How could Weeks have lost? When the members of a capital sentencing jury say that they don't understand a critical instruction, shouldn't the judge be required to answer them with something more than a directive to go back and read the same instruction one more time? The courts have thought not. The Supreme Court, for example, concluded that the jury probably *did* understand the law, despite its question. According to Chief Justice Rehnquist, writing for the five-member majority, Weeks "ha[d] demonstrated only that there exist[ed] a slight possibility that the jury considered itself precluded from considering mitigating evidence."[5]

Here, we put this conclusion to the test. We use the results of a mock jury study to examine how well jurors who are given the sentencing instructions actually used in *Weeks* understand the relevant constitutional principles. We also examine what, if any, difference it would have made if the judge had given a clarifying instruction, instead of simply telling the jurors to go back and re-read the original instruction.[6] Part I describes the facts of *Weeks* in more detail. Part II presents the results of our study. Part III uses these results to explain how trial courts—the Supreme Court's decision in *Weeks* notwithstanding—*should* respond when faced with a capital jury's request for clarification of a critical sentencing instruction.

I
WEEKS V. ANGELONE

A Virginia jury convicted Lonnie Weeks of "capital murder."[7] Weeks had been the passenger in a stolen car when State Trooper Jose Cavazos pulled the car over for speeding. Cavazos ordered Weeks out of the car. As Weeks exited, he shot Cavazos six times, killing him. According to Weeks, the shooting was on impulse. But the jury didn't

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3 *See* Weeks v. Angelone, 4 F. Supp.2d 497 (E.D. Va. 1998), *dismissed*, 176 F.3d 249 (4th Cir. 1999), *aff'd*, 120 S. Ct. 727 (2000).

4 *See* Weeks v. Angelone, 120 S. Ct. 727 (2000).

5 *Id.* at 734 (emphasis omitted).

6 For a discussion of the methodological limitations of such studies, see, for example, Mark Costanzo & Sally Costanzo, *Jury Decision Making in the Capital Penalty Phase: Legal Assumptions, Empirical Findings, and a Research Agenda*, 16 LAW & HUM. BEHAV. 185, 190-92 (1992) (reviewing advantages and disadvantages of simulation studies), and Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y, & L. 589, 591-96 (1997) (discussing methodological limitations of research on jury instruction process).

7 "Capital murder" under Virginia law includes the "willful, deliberate, and premeditated killing of a law-enforcement officer." VA. CODE ANN. § 18.2-31(6) (Michie Supp. 1999).

believe him. The real issue at trial was punishment: Should Weeks be sentenced to life imprisonment or death?

Weeks presented a wide range of evidence in mitigation: Weeks was twenty-years old when he shot Trooper Cavazos. He'd grown up in a poor and violent neighborhood in Fayetteville, North Carolina. His father died when he was ten; his mother, an addict, was unable to care for or discipline him. Weeks nonetheless stayed out of trouble, thanks largely to the support of a strong and loving grandmother, to the time and energy he devoted to high-school basketball, and to his church, which he attended regularly.[8] But when Weeks graduated from high school, his girlfriend told him she was pregnant, and all that changed. As Weeks testified, "I was involved with a young lady . . . and she was pregnant . . . and I didn't want to leave her . . . ."[9] Weeks turned down the college athletic scholarships he had received, moved in with his girlfriend, and stopped going to church. In time, he began selling marijuana with other young men from his neighborhood. He was eventually arrested for selling drugs, pleaded guilty, and received a three-year suspended sentence with five years probation.[10] The events leading to the murder of Trooper Cavazos followed.

When the presentation of evidence at the penalty phase of the trial was over, the judge read the jury four separate instructions.[11] One of these—Instruction No. 2—would later assume center stage in the case. It read in full:

> You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life and a fine of a specific amount, but not more than $100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives:
>
> 1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
>
> 2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

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8 This rendition of the facts is taken from testimony presented at the penalty phase of the trial. *See* Penalty Phase Trial Record at 62-175, Commonwealth v. Weeks, Crim. No. 33170 (Prince William County Cir. Ct. Oct. 21, 1993) [hereinafter Trial Record—Oct. 21] (on file with authors).

9 *Id.* at 67 (testimony of Lonnie Weeks).

10 *See id.* at 72 (testimony of Lonnie Weeks).

11 For the full set of instructions, see *infra* Appendix IV.

> If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [*sic*] and a fine of a specific amount, but not more than $100,000.00.
>
> If the Commonwealth has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for live [*sic*] and a fine of a specific amount, but not more than $100,000.00.[12]

Weeks claimed on appeal that the jury, due to an erroneous understanding of Instruction No. 2, had disregarded the evidence he had presented in mitigation.

Instruction No. 2 is no stranger to the Supreme Court. The instruction is part of the pattern set of instructions given in most, if not all, Virginia death-penalty trials. Indeed, the Supreme Court upheld this very instruction against a facial challenge two years ago. In *Buchanan v. Angelone*,[13] the petitioner argued that Instruction No. 2 was unconstitutional because it contained no language explaining the meaning of mitigation, nor did it explain the circumstances under which a capital jury could determine that death was not warranted. Instruction No. 2, the petitioner in *Buchanan* complained, was thus a poor vehicle for impressing upon the jury the role and meaning of mitigation in the context of a capital-trial penalty phase. The Court disagreed, holding that Instruction No. 2 "did not foreclose the jury's consideration of any mitigating evidence."[14]

But the jury in *Weeks*, unlike the jury in *Buchanan*, expressly asked the judge for clarification, sending the judge the following question during its deliberations:

> If we believe that Lonnie Weeks, Jr., is guilty of at least one of the alternatives, then is it our duty as a jury to *issue* the death penalty? Or, must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty or one of the life sentences? What is the [R]ule? Please clarify.[15]

Instruction No. 2 should already have provided the answer to this question, but apparently it hadn't.

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12 Weeks v. Angelone, 120 S. Ct. 727, 730 n.1 (2000).

13 522 U.S. 269 (1998).

14 *Id.* at 277.

15 Penalty Phase Trial Record at 63-64, Commonwealth v. Weeks, Crim. No. 33170 (Prince William County Cir. Ct. Oct. 22, 1993) [hereinafter Trial Record—Oct. 22] (on file with authors).

Faced with the jury's question, the defense asked the court to "instruct the jury that even if they find one or both of the mitigating factors—I'm sorry, the factors that have been proved beyond a reasonable doubt, that they may still impose a life sentence, or a life sentence plus a fine."[16] The judge rejected the defense request and responded instead with the following notation at the bottom of the jury's inquiry:

> See second paragraph of Instruction #2 (Beginning with "If you find from . . . etc.").[17]

In other words, the judge simply told the jury to go back and read the instruction, which the judge had already read to them once and which the jurors had had in their possession (together with the three other instructions) while they had been deliberating.

A couple of hours later, the jury sentenced Weeks to death, finding that his "conduct in committing the offense [was] outrageously or wantonly vile, horrible or inhuman in that it involved depravity or mind and/or aggravated battery . . . ."[18] The court reporter noted that "a majority of the jury members [were] in tears"[19] as they delivered their verdict.

Weeks claimed on appeal that the jurors who sentenced him to death didn't fully understand that they could and should consider all the mitigating evidence he presented, and that the judge's actual reply to their question did little, if anything, to dispel that confusion. At least some of the jurors, Weeks argued, thought the law *required* them to sentence him to death if they believed his crime was heinous, or if they believed Weeks himself constituted a continuing threat to society, no matter what mitigating evidence he presented. Under these circumstances, he submitted, the trial court was obliged to clarify the instruction.

The Supreme Court disagreed. Relying on its earlier decision in *Buchanan*, the Court assumed that the instructions in *Weeks*, including Instruction No. 2, were constitutionally sufficient.[20] Indeed, the Court emphasized that Weeks was actually better off than Buchanan insofar as the *Weeks* jurors, but not the *Buchanan* jurors, had been

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16 *Id.* at 65.

17 Juror's Second Question to Judge (Oct. 22, 1993) (on file with authors).

18 Trial Record—Oct. 22, *supra* note 15, at 66-67. The full verdict form read:

> [W]e the jury, on the issue joined, having found the defendant Lonnie Weeks, Jr., guilty of capital murder, and having unanimously found that his conduct in committing the offense [was] outrageously or wantonly vile, horrible or inhumane, in that it involved depravity of mind and[/]or aggravated battery, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death . . . .

Id.

19 Trial Record—Oct. 22, *supra* note 15, at 67.

20 Weeks v. Angelone, 120 S. Ct. 727, 732 (2000).

given a separate and specific instruction—Instruction No. 4—on the meaning of mitigation.[21]

Still, as the dissenters in *Weeks* pointed out, a juror certainly *could* have misconstrued Instruction No. 2, even if she had also been given Instruction No. 4.[22] Instruction No. 2 starts out by defining the two possible aggravating factors and explaining the state's burden of proof.[23] It next says that if the jury members unanimously find that the Commonwealth has met its burden, "then you may fix the punishment at death or if you believe from all the evidence that the death penalty is *not justified*, then you shall fix the punishment of the defendant at life imprisonment . . . ."[24] Like the *Weeks* dissenters, we too suspect that this clause contains the confusion that prompted the jury's question.

Under what circumstances should a juror conclude that the death penalty is "not justified"? As the *Weeks* dissenters explained, the answer is unclear because the instruction is ambiguous.[25] According to one interpretation, a juror might think that she is initially supposed to decide if the state has proven the existence of one of the two aggravating circumstances and *only then* decide whether the death penalty is or is not justified based on all the evidence, including the evidence in mitigation. Alternatively, a juror might think she is supposed to consider all the evidence, including the evidence in mitigation, but *only* insofar as it relates to the state's success or failure in proving the existence of one of the aggravating circumstances, with death being required if the state has successfully carried its burden. The first reading is constitutional; the second is not.

In short, a juror certainly *could* have read the instruction in the way Weeks suggested. But that still leaves the real question: Would a *reasonable* juror have misinterpreted the instruction in this way, especially where, as in *Weeks*, the jury asked for clarification and the judge said in reply to go back and reread the original instruction? The

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21 *See id.*

22 *See id.* at 735 (Stevens, J., dissenting).

23 *See infra* Appendix IV.

24 *Id.*

25 *See Weeks*, 120 S. Ct. at 739 (Stevens, J., dissenting). The dissent in *Weeks*, echoing the dissent in *Buchanan*, suggested that lawyers might understand Instruction No. 2 better than nonlawyers. *See id.* at 736 (Stevens, J., dissenting). Our data provide some support for that hypothesis. When we conducted the experiment on second- and third-year Cornell law students enrolled in a course on criminal procedure, students who received the instructions—and nothing more—misunderstood the law almost as much as did the mock jurors who also received nothing more than the instructions. Forty-three percent of the students misunderstood the relevant legal principle, compared to 44% of the mock jurors. However, when the students were told to reread the instruction, their level of misunderstanding dropped dramatically—falling to 23%—whereas the level of misunderstanding among the mock jurors actually increased—climbing to 49%.

Supreme Court thought not. But the evidence, to which we now turn, points to the opposite conclusion.

II
TESTING *WEEKS*

Did the jury in *Weeks* understand the law or not? In order to answer this question, the majority and the dissent in *Weeks* each looked at the totality of the circumstances surrounding the jury's inquiry. But they interpreted these circumstances very differently. The majority concluded that, when all was said and done, only a "slight possibility"[26] existed that the jury's members were confused; the dissent concluded that confusion was a "virtual certainty."[27] Each side looked at the same set of facts, but relying only on common sense and intuition, drew from those facts contradictory conclusions.

We wanted more to go on than common sense and intuition: Hence our experiment. Of course, no experiment can tell us what the actual jurors in *Weeks* did or did not understand, but our results nonetheless provide an empirical basis upon which to assess the particular facts of the case. We find that the *Weeks* dissenters were probably right. The jury that condemned Lonnie Weeks to death probably contained several members who did not understand the law; it would likely have contained fewer confused members if the trial judge had given a simple and direct answer to the jury's question.

A. Designing the Test

We placed an ad in local newspapers in Williamsburg and Newport News, Virginia. Respondents were death-qualified by telephone.[28] A total of 154 members of the two communities eventually participated in mock sessions held on three separate days. Seventy-

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26 *Id.* at 734 (emphasis omitted).

27 *Id.* at 735 (Stevens, J., dissenting).

28 A state may exclude a veniremember from service on a capital case, if he or she would be unable or unwilling to impose a death sentence under any circumstances. *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968) ("[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."). This process is called "death-qualification." If a state chooses to exclude veniremembers on this basis, as Virginia does, then it must likewise exclude jurors who would impose the death penalty in all capital cases. *See* Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding that the Due Process Clause of the Fourteenth Amendment entitles a capital defendant to challenge for cause any prospective juror who "will automatically vote for the death penalty in every case . . . [and who will therefore] fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do"). This process is called "life-qualification." In actual capital trials, death- and life-qualifications are accomplished through voir dire.

five percent of the participants were college students,[29] seventy percent were between eighteen and twenty-one years old, seventy-three percent were female, and seventy-four percent were white.

We designed our experiment to replicate as closely as possible the facts in *Weeks*.[30] All jurors were given a one-page summary of the facts in *Weeks*, which researchers read aloud as the jurors followed along. Researchers told the jurors to assume that Weeks had been convicted of capital murder. The only remaining issue, which each juror was told he or she would individually be asked to decide,[31] was Weeks's sentence: death or life imprisonment. Researchers then read aloud the actual sentencing instructions used at trial, though—consistent with Virginia practice—the jurors were not yet provided with a copy of the instructions.

The jurors were next given a one and a half page statement reflecting a summary of the prosecutor's closing arguments in the penalty phase of the case, as well as a one and a half page summary of defense counsel's closing. Both statements, drawn from the actual trial transcript, were read aloud to the jurors as they followed along. The previously read jury instructions were then handed out, together with the five separate verdict forms used in the case: (1) death based on future dangerousness; (2) death based on heinousness; (3) death based on heinousness and future dangerousness; (4) life imprisonment; and (5) life imprisonment plus a fine to be determined by the jury. Researchers read aloud each of the verdict forms, with the jurors again following along.

The jurors were sorted into three separate groups. One group received the jury instructions, but was not told to assume that anything out of the ordinary had happened during the course of the jury's deliberations (no-question group). A second group received the jury instructions, but was in addition told to assume that the jury asked the judge a question about the instructions. The group's members were then presented with and read the actual question asked in *Weeks*, along with the judge's actual reply (actual-reply group). A third group of jurors received the jury instructions and, like the second group, was told to assume that the jury had asked the judge a question

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29 Most of these participants, if not all, were enrolled in the College of William and Mary or Christopher Newport University.

30 The documents used in connection with the experiment are reproduced *infra* Appendices I-VI.

31 We did not ask the jurors to deliberate. The effect of deliberation on how well jurors understand instructions is less than clear. *Compare* Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, LAW & CONTEMP. PROBS., Autumn 1989, at 205, 218 (suggesting based on intensive case studies of 18 mock juries that the "deliberation process works well in correcting errors of fact but not in correcting errors of law"), *with* Lieberman & Sales, *supra* note 6, at 596 ("[I]n many of the studies where judicial instructions are effective, the mock jurors engaged in group deliberations." (citation omitted)).

about the instructions. Like the second group, the third group was presented with and read the question asked in *Weeks*, only this time the jurors were presented with and read the following reply, which we crafted from the actual defense request (requested-reply group):

> Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.[32]

The jurors were asked to select a verdict, after which the verdict forms and all other materials were collected. The jurors were then asked two sets of questions. The first set collected basic demographic data: sex, race, age, and religious affiliation. The second set asked several questions designed to test how well the jurors understood a few basic and well-established constitutional rules governing their deliberations,[33] including the rule that a capital juror is never *required* to impose a death sentence, no matter what facts she finds in aggravation.

B. Analyzing the Results

Two of our comprehension questions focused directly on the issue troubling the jury in *Weeks*. One question asked: "After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks's conduct was heinous, vile, or depraved?" The second question asked: "After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks would be dangerous in the future?" A juror who answered "yes" to either question would, assuming she was true to her beliefs and followed the law as she understood it, ignore a defendant's mitigating evidence once she concluded that the evidence proved either heinousness or dangerousness.

Table 1 presents the aggregate results. Altogether, fifty-nine percent of the 154 jurors answered the first question "no," which is the correct response. As a matter of law, capital jurors are *never* required to impose a death sentence, no matter how heinous the crime or dangerous the defendant.[34] But forty-one percent gave the wrong answer:

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32 *See infra* Appendix VI.

33 Each of these questions was taken verbatim from questions used in the Capital Jury Project (CJP), thus facilitating comparisons between the results of our mock study and the results already emerging from the nationwide efforts of the CJP. *See infra* note 37 and accompanying text.

34 *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process

TABLE 1
JUROR COMPREHENSION—MANDATORY SENTENCING
(% responding)

	Yes	No	
After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks's conduct was heinous, vile, or depraved?	41	59	100% (n=154)
	Yes	No	
After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks would be dangerous in the future?	38	62	100% (n=154)

"yes." Much the same goes for the second question. Sixty-two percent of the jurors answered "no," which is again the correct response. But that still leaves thirty-eight percent who answered the second question incorrectly. Both results are troubling.

If, as the Court concluded in *Buchanan*, no reasonable juror would have misunderstood Instruction No. 2,[35] then a disturbing number of our jurors failed to act reasonably. Reasonable jurors, according to the *Buchanan* Court, would not have thought Instruction No. 2 required them to impose a death sentence, even if they found that the defendant was death-eligible because the state had proven either heinousness or dangerousness. But that's exactly what thirty-eight to forty-one percent of our mock jurors *did* believe. *Buchanan* would call these jurors unreasonable. The alternative conclusion, of course, is that these jurors were simply confused.

One might argue that mock jurors, not being real jurors, pay comparatively less attention to sentencing instructions. But data from

of inflicting the penalty of death." (citation omitted)); *see also* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (concluding that the state's "unanimity requirement impermissibly limit[ed] jurors' consideration of mitigating evidence and hence is contrary to our decision in *Mills*"); Mills v. Maryland, 486 U.S. 367, 384 (1988) ("Under our cases, the sentencer must be permitted to consider all mitigating evidence."); Hitchcock v. Dugger, 481 U.S. 393, 398-99 (1987) (holding that sentencing judge's refusal "to consider[ ] evidence of nonstatutory mitigating circumstances . . . did not comport with the requirements of *Skipper v. South Carolina*, *Eddings v. Oklahoma*, and *Lockett v. Ohio*" (citations omitted)); Skipper v. South Carolina, 476 U.S. 1, 4 (1986) ("The sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence." (internal quotation marks and citation omitted)); Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence."); Lockett v. Ohio, 438 U.S. 586, 605 (1978) (plurality opinion) ("[A]n individualized decision is essential in capital cases.").

35 *See* Buchanan v. Angelone, 522 U.S. 269, 278-79 (1998).

real capital jurors suggest otherwise.[36] The nationwide Capital Jury Project (CJP) interviewed hundreds of jurors from several different states, asking each juror a wide range of questions about the trial on which they sat, including the same two questions we asked the jurors in our study.[37] The CJP results, based on a sample of some 650 jurors from seven different states, are much the same as ours.[38] Forty-one percent of the CJP jurors erroneously believed that the law required them to impose a death sentence if the evidence proved that the defendant's crime was heinous, vile, or depraved,[39] the same percentage as our mock jurors. Likewise, thirty-two percent of the CJP jurors erroneously believed that the law required them to impose a death sentence if the evidence proved that the defendant would be dangerous in the future,[40] a figure comparable to our thirty-eight percent.[41]

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36 *Cf.* Lieberman & Sales, *supra* note 6, at 592 (citing 1992 study suggesting that the "findings of empirical studies on comprehension are representative of actual juror comprehension").

37 For a description of the Capital Jury Project, see William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995).

Quantitative analyses of CJP data to date can be found in William J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476 (1998) (multistate data); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1998) (multistate data); Theodore Eisenberg et al., *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599 (1998) [hereinafter Eisenberg et al., *But Was He Sorry?*] (South Carolina data); Theodore Eisenberg et al., *Jury Responsibility in Capital Sentencing: An Empirical Study*, 44 BUFF. L. REV. 339 (1996) (South Carolina data); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993) (South Carolina data); Stepben P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) [hereinafter Garvey, *Jurors*] (South Carolina data); Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. (forthcoming Apr. 2000) [hereinafter Garvey, *Emotional Economy*] (South Carolina data); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161 (1995) (North Carolina data); Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183 (1995) (Kentucky data); Benjamin D. Steiner et al., *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 L. & SOC'Y REV. 461 (1999) (multistate data); Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) [hereinafter Sundby, *Absolution*] (California data); and Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997) (California data).

Qualitative analyses of CJP data to date can be found in Joseph L. Hoffmann, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137 (1995) (Indiana data); Austin Sarat, *Violence, Representation, and Responsibility in Capital Trials: The View from the Jury*, 70 IND. L.J. 1103 (1995) (Georgia data).

38 *See* Bowers, *supra* note 37, at 1091 tbl.7.

39 *See id.*

40 *See id.*

41 The following Table compares responses from jurors in the nationwide Capital Jury Project with those from jurors in our mock study:

1. *Does Clarification Improve Comprehension?*

According to the *Weeks* majority, the chance that the jury might have misunderstood Instruction No. 2 was remote. In all likelihood, the Court concluded, the jurors fully understood what they were supposed to do. Consequently, the Court had no occasion to ask what difference, if any, it would have made if the trial judge had simply and directly answered the jury's question. Nonetheless, our results suggest a big difference.

Table 2 shows the responses of our first two groups of jurors: the no-question group, which received the pattern instructions alone and the actual-reply group, which received the pattern instructions, the jury's question, and the judge's response telling them to reread the instruction. If we look at these two groups together—all the jurors whose *only* guidance was the same as that which the actual *Weeks* jurors received—nearly half of them (forty-seven percent) believed that Virginia law required them to impose a death sentence if the evidence proved that Weeks's conduct was heinous, vile, or depraved. Nearly half of the members of these same two groups (forty-six percent) likewise believed that the law required them to impose a death sentence if the evidence proved that Weeks would be dangerous in the future.

Moreover, simply directing the jurors to reread the pattern instruction *did nothing* to improve their comprehension. Jurors who heard the real jury's question and who were directed to look at the original instruction were at least as likely to believe that they were required to impose a death sentence if they found an aggravating factor

Juror Comprehension—Mandatory Sentencing
Capital Jury Project Jurors v. *Weeks* Mock Jurors
(% responding)

After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that [the defendant's] conduct was heinous, vile, or depraved?

	Yes	No	
Capital Jury Project Jurors	41	58	99% (n=655)
Weeks Mock Jurors	41	59	100% (n=154)
Fisher's exact test p=0.928			

After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that [the defendant] would be dangerous in the future?

	Yes	No	
Capital Jury Project Jurors	32	67	98% (n=652)
Weeks Mock Jurors	38	62	100% (n=53)
Fisher's exact test p=0.183			

NOTE: Data for Capital Jury Project jurors were taken from William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1091 tbl. 7 (1995).

TABLE 2
JUROR COMPREHENSION—MANDATORY SENTENCING
NO QUESTION V. ACTUAL REPLY
(% responding)

After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks's conduct was heinous, vile, or depraved?			
	Yes	No	
No question	44	56	100% (n=50)
Actual reply	49	51	100% (n=53)
Fisher's exact test p=0.694			
After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks would be dangerous in the future?			
	Yes	No	
No question	46	54	100% (n=50)
Actual reply	45	55	100% (n=53)
Fisher's exact test p=1.000			

as were jurors who heard the instruction only once. Indeed, simply referring jurors back to the original instruction actually resulted in a five percentage point *increase* in the number of jurors who thought they were required to impose death if the evidence proved Weeks's conduct was heinous, vile, or depraved, which was in fact the aggravating factor the real *Weeks* jury ended up returning.

In contrast, the requested reply to the jury's question in *Weeks* dramatically increases comprehension. As Table 3 shows, among jurors who were made aware of the jury's question and who received a clarifying answer, only twenty-nine percent believed that the law required them to impose death if they found heinousness, compared to forty-nine percent among those who were directed back to the original instruction. The results for future dangerousness are similar. Among jurors who received a clarifying instruction, only twenty-four percent continued to believe that a death sentence was mandatory if they found that the defendant would be dangerous in the future. In other words, a clarifying instruction would have corrected the misunderstanding among forty percent of the otherwise confused jurors. Moreover, these results are statistically significant under traditional measures. Differences this extreme are very unlikely to be the result of chance.

TABLE 3
JUROR COMPREHENSION—MANDATORY SENTENCING
ACTUAL REPLY V. REQUESTED REPLY
(% responding)

After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks's conduct was heinous, vile, or depraved?			
	Yes	No	
Actual reply	49	51	100% (n=53)
Requested reply	29	71	100% (n=51)
Fisher's exact test p=0.047			

After hearing the instructions, did you believe that the law required you to impose a death sentence if the evidence proved that Mr. Weeks would be dangerous in the future?			
	Yes	No	
Actual reply	45	55	100% (n=53)
Requested reply	24	76	100% (n=51)
Fisher's exact test p=0.024			

2. *Does Improved Comprehension Influence Sentencing?*

Does a juror's belief that she must return a death sentence if she finds heinousness have any influence on the sentence she imposes? The answer will undoubtedly depend on the strength of the case at hand. Where the evidence in favor of death is extremely weak or extremely strong, improved comprehension probably wouldn't change the verdict of most jurors. In extremely weak cases, many jurors wouldn't find an aggravating factor in the first place and thus would never even reach the death-selection question; in extremely strong cases, most jurors would probably vote for death whether or not they believed that the law required them to do so.

In closer cases, understanding the instruction might well make all the difference. *Weeks* is such a case. The victim was a state trooper, which conventional wisdom and public opinion polls suggest would

be highly aggravating.[42] But Weeks was young;[43] the killing itself was, according to the defense, done on impulse;[44] and Weeks expressed remorse for his wrongdoing.[45] Indeed, the very fact that the *Weeks* jurors, many of whom wept as they announced their verdict, asked for clarification suggests that some of them were prepared to change their vote one way or the other, all depending on what the judge said in reply. In all likelihood, the outcome for some jurors turned on what they believed the law required of them. The facts alone were indeterminate. Neither life nor death was the obvious choice.

Table 4 examines the relationship, based on the facts in *Weeks*, between a juror's understanding of the relevant legal rule and the sentence he voted to impose.

Jurors who understood the rule were in fact more likely to vote for life compared to jurors who misunderstood the instruction. Although our small sample size failed to yield statistically significant results, improved understanding does nonetheless appear to influ-

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42 *Cf.* Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1466 tbl.4 (1998) (indicating that 75% of public-opinion poll respondents favored the death penalty for the "[m]urder of a police officer"). *But cf.* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 319 tbl.52 (1990) (finding based on multiple regression analysis of capital sentencing in Georgia that the fact that the "[v]ictim was a police or corrections officer on duty" produced a "[d]eath-[o]dds [m]ultiplier" of 1.7 whereas several other aggravating circumstances, at least some of which are intuitively less aggravating, produced even higher death-odds multipliers); Garvey, *Jurors*, *supra* note 37, at 1556 (concluding based on CJP interviews with 153 South Carolina jurors that "[m]urders involving child victims are highly aggravating, but otherwise jurors claim that the victim's status and standing make little difference" as to how they would vote (emphasis omitted)).

43 *See* Trial Record—Oct. 21, *supra* note 8, at 62 (testimony of Lonnie Weeks) (testifying that he was age 21 at the time of trial); *cf.* Garvey, *Jurors*, *supra* note 37, at 1559 tbl.4, 1564 (reporting based on interviews with 153 CJP jurors from South Carolina that 42% believed the fact that the "defendant was under 18 at the time of the crime" would make them less likely to vote for death); *id.* at 1576 tbl.10 (reporting similar results based on interviews with 1017 CJP jurors from 12 different states).

44 *See* Trial Record—Oct. 21, *supra* note 8, at 84-85 (testimony of Lonnie Weeks); *cf.* Garvey, *Jurors*, *supra* note 37, at 1555 tbl.2 (reporting based on interviews with 153 CJP jurors from South Carolina that 55% believed the fact that a "killing was committed under influence of extreme mental or emotional disturbance" would make them less likely to vote for death); *id.* at 1575 tbl.10 (reporting similar results based on interviews with 1017 CJP jurors from 12 different states).

45 *See* Trial Record—Oct. 21, *supra* note 8, at 97-99 (testimony of Lonnie Weeks); *cf.* Eisenberg et al., *But Was He Sorry?*, *supra* note 37, at 1637 (concluding based on CJP study of South Carolina jurors that "remorse makes a difference to the sentence a defendant receives—provided jurors do not think the crime is too vicious"); Garvey, *Jurors*, *supra* note 37, at 1560 (concluding based on CJP interviews with 153 South Carolina jurors that "[l]ack of remorse is highly aggravating" (emphasis omitted)); Sundby, *Absolution*, *supra* note 37, at 1596 (concluding based on CJP study of California jurors that "[t]he more evidence that the jury can find indicating the defendant's acceptance of responsibility for the killing, the more likely the jury will return a life sentence").

TABLE 4
COMPREHENSION—SENTENCING CORRELATIONS
(% responding)

	Life	Death	
Understood death is not required even if heinousness is proven	63	37	100% (n=91)
Believed death is required if heinousness is proven	52	48	100% (n=63)
Fisher's exact test p=0.245			
Understood death is not required even if future dangerousness is proven	62	38	100% (n=95)
Believed death is required if future dangerousness is proven	53	47	100% (n=59)
Fisher's exact test p=0.313			

ence the sentencing verdict.[46] Among jurors who understood that death was *not* required even if heinousness was proven, sixty-three percent voted for a life sentence, whereas the corresponding figure dropped to fifty-two percent among those who believed that death *was* required. The results were similar for future dangerousness. Of the jurors who understood the rule, sixty-two percent voted for life; of the jurors who did not understand the rule, only fifty-three percent voted for life.

III
DECIDING *WEEKS*

The results of our study, read in light of the prevailing doctrine, suggest that *Weeks* should have come out the other way.

A. What Do the Data Mean for *Weeks*?

Some capital sentencing jurors will be confused no matter how they are instructed. Indeed, some of this confusion may not really be confusion at all. It may instead simply reflect a juror's own conviction that any defendant who is "death eligible"—any defendant guilty of

46 For studies finding a correlation between sentencing outcome and improved comprehension based on instructions rewritten in accordance with research in linguistics and jury decision making, see Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 231 (1996) (finding based on study of 170 jury-eligible citizens that jurors who received revised instructions "were less likely to lean toward the death penalty than jurors who received the pattern instructions (51 percent versus 66 percent)"), and Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455, 463 (1995) (concluding based on mock jury study of 173 jury- and death-eligible Missouri residents that "participants who were less confused about the jury instructions (i.e., those who scored higher on the comprehension survey) were least likely to impose the death penalty on the defendant").

aggravated murder—should for that reason alone be sentenced to death.

Not all error, however, is beyond repair. On the contrary, our results suggest that a simple answer to the jury's question in *Weeks* would have eliminated forty percent of the error. Moreover, a forty-percent reduction in the error rate will often tip the balance, from a jury in which the majority of members are confused to a jury in which the majority are not. When the court leaves the question unanswered, as it did in *Weeks*, one would expect on average that half of the jury will wrongly believe that they are required to impose death if they find the crime to be heinous, vile, or depraved. In contrast, when the court gives a clarifying instruction, that number dwindles from around six down to three or four.

Indeed, these *average* figures may well *underestimate* the number of jurors on the actual jury in *Weeks* who misunderstood the law, and thus the number of jurors who could have benefitted from a clarifying instruction. The fact that the *Weeks* jury asked the question at all suggests that many of its members had collapsed the distinction between death-eligibility and death-selection, wrongly thinking the law required that they condemn any death-eligible defendant, only because he is death-eligible. Likewise, the fact that the *Weeks* jurors had raised the question sua sponte—rather than having us raise it for them, as we did for our mock jurors—suggests that the clarification would have had more influence on the real *Weeks* jurors than on our mock jurors. In short, the *Weeks* jury probably had more confused members than the average jury would have had.

No one can say how many of the jurors who actually sat on the *Weeks* jury would have voted differently if the judge had given a clarifying instruction. Our analysis nonetheless suggests that a correct understanding of the law could very well have made the difference between life and death. Again, we would predict an even greater effect where, as in *Weeks*, the jury's deliberations had come to focus on the particular instruction to which the request for clarification was specifically addressed. An instruction is most likely to prompt a request for clarification when the jury's verdict somehow turns upon it. Consequently, if the *Weeks* jurors had understood that the law never requires death, a unanimous verdict in death's favor would, we think, have been unlikely.

B. The Web of Case Law

When a Virginia jury asks what Instruction No. 2 means, the best way to ensure that its members understand the law is to give them a clarifying instruction. According to our data, merely directing jurors back to Instruction No. 2 does nothing to remedy the widespread mis-

understanding that death must follow as a matter of law if the Commonwealth has proven one of the two statutory aggravating circumstances. Thus, the better practice is not to tell the jurors to go back and reread the instructions, but rather to answer the question, unless doing so would introduce prejudice or distraction.

Of course, the Constitution rarely requires the better practice simply because it is better. In this case, however, the jury's misunderstanding went to a basic constitutional rule governing capital sentencing.[47] If Virginia had wanted to enact a rule condemning all death-eligible defendants, it *could not* constitutionally have done so. The Eighth Amendment outlaws mandatory death penalties, because they fail to allow for particularized consideration of the character and record of each convicted defendant.[48] Accordingly, when a jury mistakenly believes that it must in effect follow such a rule, Virginia *should not* be allowed to capitalize on that mistake. Allowing it to do so is little more than a roundabout way for the state to "treat[ ] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."[49]

Virginia could not enact a rule condemning all death-eligible defendants as a matter of law. Nor could it empanel a juror who believed all death-eligible defendants should be condemned and for whom mitigating evidence would therefore be irrelevant. "Any juror to whom mitigating factors are . . . irrelevant," the Court held in *Morgan v. Illinois*,[50] "should be disqualified for cause."[51] It makes no sense to exclude a juror who says during voir dire that his own beliefs require him to condemn every death-eligible defendant, but then to turn a blind eye to a juror who says he believes that the law requires him to do the same thing. Indeed, the juror in *Morgan* came to court already believing that all death-eligible defendants deserve death; the jurors in *Weeks* did not. The Commonwealth's own sloppy instructions *encouraged* that misapprehension, and the Commonwealth, once made

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47 *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

48 *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) ("The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of 'relevant facets of the character and record of the individual.'" (quoting *Woodson*, 428 U.S. at 304 (plurality opinion))).

49 *Woodson*, 428 U.S. at 304 (plurality opinion).

50 504 U.S. 719 (1992).

51 *Id.* at 739. *Morgan* and the *Woodson-Lockett* line of cases point in the same direction, not coincidentally. As the majority opinion in *Morgan* points out, Justice Scalia's dissenting view "may best be explained by his rejection of the line of cases tracing from *Woodson v. North Carolina* and *Lockett v. Ohio*, and developing the nature and role of mitigating evidence in the trial of capital offenses, [as can be seen by examining Justice Scalia's dissenting opinions in favor of] a view long rejected by this Court." *Morgan*, 504 U.S. at 736 (citations omitted).

aware of the effects of its negligence, did nothing to correct the problem. On the contrary, it exploited the jury's mistake. The state's conduct in *Weeks* was therefore *more* culpable, not less, than the state's conduct in *Morgan*.

Moreover, requiring courts to give clarifying instructions in response to requests for such clarification hardly requires the courts to get routinely involved in the business of rewriting capital sentencing instructions. The jurors in *Weeks* were confused about a critical rule governing their deliberations. They asked a question. They hoped the answer would clarify the rule. Their question alerted the trial judge to the fact that they had not understood the instruction and at the same time gave him an opportunity to remedy their confusion. It would have taken the judge no longer to answer their question than it took him to refer them back to the original instruction. Under these limited circumstances, the risk that the jurors' misapprehension of the law "infected [the defendant's] capital sentencing [was] unacceptable in light of the ease with which that risk could have been minimized."[52]

Consider by way of analogy the Supreme Court's plurality opinion in *Simmons v. South Carolina*.[53] Relying on public opinion surveys and CJP data showing that jurors dramatically underestimated the length of time a defendant would serve in prison if sentenced to life imprisonment instead of death,[54] the *Simmons* plurality held that a jury must be instructed on a defendant's statutory ineligibility for parole, *provided future dangerousness was an issue in the case*.[55] The Court reasoned that the state violates due process when it "create[s] a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant never will be released on parole."[56] In *Simmons*, the prosecutor's argument signaled and helped create an unacceptable risk that the jury's decision making would be distorted. In *Weeks*, the jury's question signaled—and the state's confusing instruction helped create—the existence of a similar and similarly unacceptable risk.

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52 Turner v. Murray, 476 U.S. 28, 36 (1986) (plurality opinion) (footnote omitted); *accord Morgan*, 504 U.S. at 736.

53 512 U.S. 154 (1994) (plurality opinion).

54 *See id.* at 170 & n.9 (collecting public opinion and juror surveys).

55 *See id.* at 156 (holding "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible").

56 *Id.* at 171.

Of course, some jurors will consider future dangerousness even if the prosecutor doesn't argue it.[57] Likewise, many jurors believe that they are required to impose a death sentence even when they ask no question.[58] Nonetheless, when a specific and readily identifiable reason exists to believe that a capital sentencing jury may have been misled—whether, as in *Simmons*, by a prosecutor's argument that promotes a false impression of the facts or, as in *Weeks*, by a question from the jury which shows that its members have misinterpreted and misunderstood the law—due process requires the state to fix the misimpression it has created, rather than exploit it.

Indeed, in at least one respect, the case for a narrowly tailored rule in *Weeks* is even stronger than the case for such a rule in *Simmons*. In *Simmons*, one must infer from the prosecutor's argument a likelihood that the jury will focus on future dangerousness and that a mistaken belief about parole may influence the jury's decision; in *Weeks*, no such inference is necessary, because the jury's question itself directly signals both the existence of a misunderstanding and the importance of the subject of that misunderstanding to its decision.

CONCLUSION

The jurors who sentenced Lonnie Weeks to death did not understand the law. They asked the trial judge for help. Based on our mock study, the answer he gave probably did precious little good. Consequently, when the jurors voted to condemn Weeks, some of them probably still didn't understand the law and continued to think that they *had* to vote for death. Yet no capital juror is ever required to vote for death. The Supreme Court upheld Weeks's death sentence nonetheless. But the Court's judgment is ultimately based on nothing more than instinct and conjecture. Sadly, the evidence presented here leads to one conclusion: The Court got this one wrong, both on the facts and on the law.

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57 *See* Bowers & Steiner, *supra* note 37, at 671 (reporting that the data "show[ ] that the greater tendency of jurors who underestimate the alternative to vote for death is not restricted to cases in which the defendant is alleged to be dangerous, nor indeed to defendants they thought were proved to be dangerous or whose possible return to society greatly concerned them").

58 *Cf.* Bowers, *supra* note 37, at 1091 tbl.7 (indicating that 41% of 655 jurors from seven different death-penalty states responded "yes" when asked: "After hearing the judge's instructions, did you believe that the law required you to impose a death sentence if the evidence proved that the [d]efendant's [c]onduct [w]as [h]einous, [v]ile, or [d]epraved" (emphasis omitted)).

APPENDIX I

STATEMENT OF FACTS

The defendant, Lonnie Weeks, is 20 years old. Along with others, Weeks burglarized a home in North Carolina while the owners were not present. He found keys to a car, which he stole. Weeks then bought a gun, which had been used in another murder that Weeks had no involvement in. There was testimony that Weeks bought the gun because he planned to kill a man with whom he had quarreled about selling drugs, but Weeks himself said that he had not been involved in selling drugs, and only bought the gun to defend himself. About two weeks later, Weeks drove the car from the place where the burglary had been committed to Washington D.C. There was testimony from one of his friends that Weeks planned to sell or trade the car for drugs, but Weeks said that he went to visit family members. No drugs or large amounts of money were ever found in his possession.

On the way back from Washington, Weeks was a passenger in the stolen car, which Weeks's uncle was driving. A Virginia state trooper, Jose Cavazos, was parked in a marked police car, monitoring traffic by radar, when he determined that the car Weeks was riding in was speeding. The officer activated his emergency lights and chased the vehicle, bringing it to a stop after a brief distance.

As Trooper Cavazos approached the car on the left side, he asked the driver, Weeks's uncle, to step out of the car. After the driver got out, Cavazos asked Weeks to step out of the car. As Weeks got out of the car, he was carrying a gun, which he fired five or six times. Two of the bullets hit Trooper Cavazos, who died within minutes.

Weeks and his uncle drove away from the scene and parked at a nearby service station. They realized that the uncle's driver's license was still at the scene of the crime, and Weeks returned on foot to retrieve it. He ran part of the way, then walked down the ramp where another state trooper was already investigating what had happened. After pretending to help, Weeks got the driver's license and rejoined his uncle.

The police found Weeks and his uncle in the parking lot of a motel, and after a preliminary investigation of the scene, questioned them both. Four hours later, the uncle told the police that Lonnie Weeks had shot the Trooper. The police then arrested Weeks, who later that day confessed that he had shot the Trooper. Weeks also wrote a letter to a jail officer admitting the shooting and expressing remorse over it.

APPENDIX II

PROSECUTOR'S REASONS FOR IMPOSING A SENTENCE OF DEATH

I don't ask for a death sentence lightly, but there are so many victims in this case: Trooper Cavazos himself, his two children, all of the police officers from whom you've heard who grieve him, as well as the kids to whom Lonnie Weeks was selling drugs. Lonnie Weeks's grandmother, who raised him in the church and raised him to do right, is also a victim. Lonnie may have grown up poor, but he had the guidance of his grandmother and a coach. He had talent as an athlete too, but that's not what he chose. And he did have a choice—his sister, who grew up in the same household, is not a criminal. He was on probation, and the judicial system had given him a chance, but that is not what he chose. He has always chosen to do what is good for himself—and he doesn't care about anybody else.

They showed you pictures of Lonnie Weeks's children, but he is not a family man. He fathered two children by two different women, and abandoned them both, and he has provided almost no support for his children. His character witnesses talked about what a good person Mr. Weeks was, that he was not violent, but they were talking about the person he used to be. In the year and a half since he graduated from high school, he has done just about every kind of crime you can think of except rape. He has been a burglar and a drug dealer, and he bought a gun from a murderer, planning to kill someone in a drug turf war, somebody who had hit him in the head with a gun. And now, instead of killing another drug dealer, he has murdered a State Trooper.

He could have thrown the gun out the window, but instead, he shot Jose Cavazos, an older "Pop"-type Trooper, when all Trooper Cavazos did was to politely ask him to get out of the car. He shot him six times. One shot would have killed him. But six times—that was not just fear; he was determined to kill him. And that was aggravated battery. But if that were all he had done, I probably would not be asking you to sentence him to death. But that isn't all. Then Lonnie Weeks got up on the stand and lied about what happened. He is a liar, and he is dangerous.

He lied about what he bought the gun for—you heard testimony from his friend, his "business" associate, that Lonnie Weeks was going to kill a man over a drug dispute. But Lonnie Weeks claims he wasn't selling drugs and claims he was going to wait for the man he argued with to shoot at him first. He claims he panicked, but he went back to get the license, went back in cold blood. He wasn't so upset that he ran all the way; no, he slowed down before the people at the scene

could see him in order to not look suspicious—and then he lied about having heard some shots. That was vile, horrible, and inhumane. No doubt about it—everybody else is trying to save the Trooper, and he is calculating how to sneak off with the evidence.

He lied when he was questioned, and he lied on the stand. He said an evil spirit made him do it! But if there is an evil spirit, it is Lonnie Weeks himself. He lies and he is selfish. He says he is sorry. Yes, but when he told you that he would die himself if it would bring Trooper Cavazos back to life he put a condition on it—he would die *if he knew he would go to heaven!* That was selfish too; that's not real remorse.

Mr. Weeks burglarized a house, stole a car, was dealing drugs, bought a gun that killed a man in order to kill another man, killed a State Trooper who meant him no harm—and now he lies about it all. He is a selfish, dangerous liar, and I am asking you to impose the most serious penalty possible. He should be sentenced to death.

Don't let Trooper Cavazos' death be in vain. He died working for you. Show all the other troopers that you stand behind them, and let some good come from this needless death. We ask you to impose the most serious penalty that the law allows for this most serious of crimes.

APPENDIX III

DEFENDANT'S LAWYER'S REASONS FOR IMPOSING A SENTENCE OF IMPRISONMENT FOR LIFE

I'm asking you to give my client a sentence less than death. Lonnie Weeks has admitted that he did a terrible thing. The victims of this crime have suffered, and there has been a lot of anger. I would never say there hasn't been a lot of hurt and anger, and I would never say that being poor justifies something like this. He has admitted doing wrong, burglarizing a house and stealing a car and worst of all, shooting this Trooper. He isn't lying; he is telling you the truth. And he is not lying about dealing in crack cocaine; the only evidence that he did is that of a jailbird who was willing to testify in order to make it easier on himself. There is no physical evidence of drugs, and drugs are not the reason Lonnie Weeks took the car—he took it to visit his family, because he had missed the family reunion in Washington D.C. That was a stupid reason, but it isn't the reason the state is trying to make you believe.

And it is not true that he repeatedly and deliberately shot at Trooper Cavazos. He told you what happened—Lonnie Weeks doesn't even know how many rounds he fired. And they were fired so fast that an eyewitness said he only heard two or three shots. And he didn't hit the Trooper in the center. These facts all add up to a man who panicked, not to an expert shot. And there is no evidence that he shot Trooper Cavazos when he was on the ground, and no evidence that the defendant bought the deadly bullets that were in the gun; they came with the gun.

And the defendant didn't lie about going back to help the Trooper—he said he did it for his uncle. He could just have said "tough luck uncle, there isn't any evidence there against me." But he knew he had gotten his uncle involved in something he wasn't responsible for, so he went back.

He did lie when first arrested; and even when he confessed, he lied about where he had gotten the gun. But that was because he didn't want to get others in trouble for what he'd done. And he tried to be truthful with you on the stand. He admitted killing Trooper Cavazos; admitted breaking into the house; admitted stealing the car; admitted his one prior criminal conviction for selling marijuana.

Mr. Weeks is not a very eloquent person. He doesn't speak very well, and he can't explain why he did this. I knew the state would bring up "The devil made me do it," but those were not Mr. Weeks's words, those were the state attorney's words, which Mr. Weeks then agreed to. It was the only way he could understand why he did this: He got out of touch with God, and then he did these evil acts. You

know he was a very religious person—his Sunday school teacher told you how he would sometimes cry in church, he was so moved by Scripture. He went to church, but he grew up in a very bad area, with drugs and shootings. And for eighteen years, he went to church, he was a star athlete, a man with real basketball talent, and he had no trouble with the law. He was an exception to the rule. And you heard all of those witnesses testify that they never knew Lonnie to do a violent act, not even to get in a fight, and they were shocked by what has happened.

But then he went away from church, away from school, and he started hanging around with the wrong people. And he had been abandoned by his mother, who is a drug addict. She doesn't even care enough about him to see him now, knowing her son is on trial for his life. And that had an impact on him too. And when he got out of touch with the Lord, all of this happened.

There is no excuse for what Lonnie Weeks did. He is repentant, and he admits that he has sinned, grievously sinned. He told you that if he could die and bring Trooper Cavazos back again, he would do it. He did put in a provision—that he would do it if he could go to heaven. Now maybe it would have sounded better if he said "I would die to bring him back even if I would go to hell," but he told you the truth as he saw it. He is trying to find God again, and that is terribly hard under the circumstances. I pray ladies and gentlemen of the jury, that you will return a sentence of life.

APPENDIX IV

JURY INSTRUCTIONS

Instruction 1

You are the judge of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

Instruction 2

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than $100,000.00. Before the penalty can be fixed at death, the State must prove beyond a reasonable doubt at least one of the following alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society; or
2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the State has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

If the State has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

Instruction 3

"Aggravated battery" means a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.

Instruction 4

Mitigation evidence is not evidence offered as an excuse for the crime of which you have found the defendant guilty. Rather, it is any evidence which in fairness may serve as a basis for a sentence less than death. The law requires your consideration of more than the bare facts of the crime.

Mitigating circumstances may include, but not be limited to, any facts relating to the defendant's age, character, education, environment, life and background, or any aspect of the crime itself which might be considered extenuating or tend to reduce his moral culpability or make him less deserving of the extreme punishment of death.

You must consider a mitigating circumstance if you find there is evidence to support it. The weight which you accord a particular mitigating circumstance is a matter of your judgment.

APPENDIX V

Verdict Forms

Verdict Form #1

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background, that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Verdict Form #2

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Verdict Form #3

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society, and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind and/or aggravated battery and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Verdict Form #4

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Verdict Form #5

We, the jury, on the issue joined, having found the defendant, LONNIE WEEKS, JR., GUILTY of CAPITAL MURDER and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life and a fine of $ _____.

APPENDIX VI

WEEKS JURY QUESTION & COURT REPLIES

WEEKS *Jury Question*

If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to *issue* the death penalty? or must we *decide* (even though he is guilty of one (1) of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the [R]ule? Please clarify.

Actual Reply

See second paragraph of Instruction #2 (Beginning with "If you find from . . . etc.).

Requested Reply

Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.