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**Inducing Empathy in Jurors in a Capital Penalty Phase Trial: An Examination of how to
Reduce Jurors' Death Sentence Decisions**

A Thesis Presented in Partial Fulfillment of the Requirements for the Degree of
Master of Arts in Forensic Psychology
John Jay College of Criminal Justice
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Inducing Empathy in Jurors in a Capital Penalty Phase Trial: An Examination of how to Reduce
Jurors' Death Sentence Decisions

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This Thesis has been presented to and accepted by the Office of Graduate Studies, John Jay College of Criminal Justice in Partial Fulfillment of the Requirements for the Degree of Master of Arts in Forensic Psychology.

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Abstract

The present research explores whether inducing empathy in death-qualified mock jurors leads to fewer death sentences in a penalty phase trial. Previous research has shown that inducing empathy in jurors leads to lesser sentences and perceived responsibility of the perpetrator for the crime. However, none of this research has examined death penalty cases, and most have focused on instances where the victim was also the perpetrator of a separate crime against the defendant (e.g., abuse). Extending this line of research, the present study examines whether these results extend to instances where the perpetrator and victim are strangers. Additionally, considering the influence certain impairments may have on the perpetrator's competence, the study also explores instances where the perpetrator exhibits evidence of mental illness, brain damage, or experience of sexual abuse. To examine this, participants were presented with a trial transcript and half of these participants were shown an empathy-inducing prompt. After providing a sentence of life in prison without parole (LWOP) or death, mock jurors' level of empathy and the responsibility they placed on the defendant for the crime were measured. Results indicated that empathy induction did not influence empathy level nor verdict. However, predictors of verdict included confidence of the mock juror as well as the total responsibility they placed on the defendant.

Keywords: empathy, jury decision making, death penalty, penalty phase

Inducing Empathy in Jurors in a Capital Penalty Phase Trial

The Sixth Amendment of the United States Constitution grants an accused individual the right to be judged by an impartial jury (*U.S. Const. amend. VI*); however, current research on capital jury decision-making shows that this is often not the case. Jurors in death penalty cases are faced with the difficult decision on the life or death of another human being. A large body of research on capital punishment have explored the many factors that may influence jurors' decisions (e.g., their attitudes in reference to the death penalty, and the biases they bring into the courtroom, see Lynch & Haney, 2011; Thompson et al., 1984; White, 1987; *Witherspoon v. Illinois*, 1968). Despite the Court's attempts at ensuring unbiased juries, research indicates that jurors often hand down biased decisions based on, for example, race (Lynch & Haney, 2011) and gender (Plumm & Terrance, 2009). Additionally, exposure to the death qualification process in capital cases has been shown to influence jurors' decisions, in that they are more likely to sentence the defendant to death (Haney, 1984). Many of the factors that influence jurors' decisions may also be attributed to their lack of understanding the process, certain laws, and the meaning of certain evidence (Bowers, 1995; Devine & Kelly, 2015; Haney, 1984). As such, jurors have been found entering the courtroom with a death presumption (Luginbuhl & Burkhead, 1994), with beliefs that opposing the death penalty is disapproved of by the law (Haney, 1984), and with confusion regarding the meaning of mitigating and aggravating evidence (Bowers, 1995).

Considering the numerous factors that may influence the final decision of jurors, it is difficult to pinpoint the exact solution to the biases that influence jurors' decisions when it comes to the aforementioned research. However, researchers have explored various tactics that could be

used in the courtroom to increase the likelihood of defense success, such as inducing empathy (Balske, 1980). Studies in which researchers induced empathy in mock jurors focused on cases in which the victim is also the perpetrator of another crime against the defendant, hence, the crime was an act of retaliation or self-defense (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). No research has yet explored how jurors may be influenced using empathy-inducing methods in death penalty cases nor in instances when there's no relationship between the defendant and victim. Additionally, although some research has considered underlying impairments that defendants on death row often have, none have examined the three most prevalent impairments: mental illness, brain damage, and past experience of sexual abuse, as indicated in Death Penalty Information Center (DPIC) Year-End reports (DPIC, 2020).

Thus, the goal of the present study is to fill this gap in the literature by examining whether the effect that empathy-inducing has been shown to have on jurors' verdicts extends to death penalty cases, specifically, when there is no prior relationship between the defendant and the victim. Additionally, a significantly high numbers of individuals on death row and those who have already been executed exhibit evidence of mental illness, brain damage, and/or have experienced past abuse. Thus, this study will examine how empathy induction might differ across these individual differences. In the following sections, I will discuss the prior literature on capital jury decision making, jury characteristics that may mitigate the sentence, and the research on empathy in the criminal justice setting. Last, I will introduce the present study.

Capital Jury Decision Making

Prior to participating in a capital trial, jurors must be deemed to be fair and impartial--those who do so are considered death-qualified (*Witherspoon v. Illinois*, 1968). Capital jurors

have been found to differ from other jurors on several characteristics. For example, when it comes to studies specifically exploring the jurors selected in the process of *voir dire*, results demonstrated different attitudes, beliefs, and presumptions in comparison to those jurors who are not deemed death-qualified (Haney, 1984). More specifically, death-qualified jurors have been found to be more conviction prone, more likely to employ a presumption of death (Luginbuhl & Burkhead, 1994), and, naturally, more likely to provide a death sentence in comparison to other jurors (Allen et al., 1998; Haney, 1984). While the results of Bindler and Hjalmarsson's (2018) study have contradicted these findings by demonstrating that, overall, jurors tend to avoid death sentences, this finding was in reference to instances where jurors have an option of either participating in a capital trial or not. Most research suggests that death-qualified jurors are more likely to sentence a defendant to death (see Allen et al., 1998; Costanzo & Costanzo, 1992; Haney, 1984; Thompson et al., 1984).

Bowers (1995) argued that the inclination to provide a verdict of death is due to the death-qualified jurors' tendency to make a personal decision prior to the death-qualification process and the trial itself. Supporting this statement, a study interviewing 916 capital jurors found that jurors reach a personal decision prior to the sentencing, trial arguments and evidence, and the instructions from the judge (Bowers et al., 1998).

Alternatively, Haney (1984) argued that the "death proneness" on the part of death-qualified jurors may be attributed to the biasing effect elicited by the death-qualification process. To test this possibility, Haney (1984) provided subjects with two different forms of a simulated *voir dire*, of which one included death qualification and the other did not. After watching the two-hour videotape assigned to their condition, participants' attitudes were measured using a

questionnaire and they were asked to provide a sentence. Results of this study indicated several attitudes of capital jurors: those exposed to the death qualification process were more likely to convict, to sentence to death, to believe that other jurors see the defendant as guilty, and to believe that death penalty opposition is disapproved by the law.

Regardless of which part of the process predominantly sways the opinions of jurors, Haney (1984) explained that jurors often enter the courtroom with uncertainty regarding the mannerism of trials, the process, and the guilt of the defendant. Additionally, Bowers (1995) found that capital jurors find legal terms such as “aggravating” and “mitigating” confusing which, therefore, impair their ability to properly weigh these factors prior to deciding on the sentence. Aggravating factors are details of a case that increase the culpability of the perpetrator, such as a high likelihood that the defendant will reoffend in the future (Bowers, 1995). Alternatively, mitigating factors are those that decrease culpability, such as a defendant showing evidence of mental or emotional disturbance (Bowers 1995). Understanding the meaning of these terms are a crucial part of the jurors’ duty when weighing the facts of the case and deciding on a verdict.

Jurors who tend to misunderstand the information presented to them and/or underestimate the importance of certain evidence may lead to unjust verdicts (Bowers, 1995). For example, jurors often consider mental illness (specifically, organic mental disorder such as intellectual disabilities or psychomotor epilepsy) a non-contributing factor towards the defendant’s criminal responsibility despite the drastic ways in which it may influence an individual and their actions (Poulson et al., 1997). For example, an individual’s mental illness may result in violent impulses

(DPIC, 2015), hence, their condition should be viewed as a contributing factor towards their responsibility for the crime.

All in all, capital jurors tend to avoid the death sentence as showcased by their preference of not wanting to participate in capital trials altogether (Bindler & Hjalmarsson, 2018); however, when they are exposed to the death qualification process, their attitudes may become more punitive (Haney, 1984). In addition to the biases that they encounter during *voir dire*, jurors also come into the courtroom with their own biases and predispositions which can range from racial bias to the beliefs they may have regarding the impact mental illness has on an individual. These biases and predispositions also play a role in jurors' decision-making process (Bowers et al., 1998; Luginbuhl & Burkhead, 1994). Hence, jurors may come to a decision before being presented with crucial evidence and considering the mitigating and aggravating circumstances which can naturally lead to more innocent individuals being sentenced to death. Despite the inconsistency in certain results, research on capital jury decision making shows that capital jurors are often not impartial and unbiased, and tend to misattribute factors, such as a defendant's mental impairment, which may result in biased decisions and, in turn, a greater number of death sentences. Regardless, it is the defense's obligation to bring to light any mitigating evidence that may be crucial to jurors' final verdicts, such as a defendant's impairments or history that may have had influence on the defendant's actions.

Mitigating Evidence: Mental Illness, Brain Damage, and Sexual Abuse

In *Atkins v. Virginia* (2003), the Supreme Court ruled that the execution of mentally ill offenders is prohibited by the Eight Amendment of the Constitution as it is deemed a cruel and unusual punishment. Yet, a total of seventeen executions were conducted in 2020, of which all

prisoners showcased evidence of, or a combination of, significant impairments including severe mental illness; brain injury, developmental brain damage, or IQ in the intellectually disabled range; and/or chronic serious childhood trauma, neglect, and/or abuse as reported in the 2020 Year-End Report of the Death Penalty Information Center (DPIC, 2020). The Year-End Reports of DPIC depict a continuous pattern throughout the years, exhibiting that each year the penalty is implemented on those who are mentally ill, emotionally disabled, and those who demonstrate evidence of not being fit for execution (DPIC, 2020). Thus, while research has shown that, as the severity of the penalty in a case increases, jurors' need for more proof of guilt increases as well (Kerr, 1987), jurors still sentence individuals, who clearly raise the question of competence, to death (DPIC, 2020). This may be attributed to several reasons outside of the attitudes of jurors. For example, as reported by DPIC (2020), some prisoners on death row are granted the ability to go *pro se* or to represent themselves during the trial. Many of the same offenders do not acknowledge the fact that they are mentally ill, have brain damage, or that they have experienced past sexual abuse - all factors which could influence jurors' their decision-making ability (DPIC, 2020). Hence, the jury is not provided with crucial information that may prove pertinent when making their decision. However, even if jurors are presented with this information, it is not clear that jurors would understand how such impairments may influence the defendant's actions (Poulson et al., 1997). The following sections will discuss the three most prevalent impairments (i.e., mental illness, brain damage, and past experience of sexual abuse) and their impact in the courtroom (DPIC, 2020).

Mental Illness

Mental illness can greatly influence an individual's behavior and their thought processes (DPIC, 2015). For example, in the case of schizophrenia, an individual may have violent impulses and paranoia which can naturally be associated with criminal behavior (DPIC, 2015). Research shows, however, that jurors do not tend to consider the effects of mental illness (e.g., schizophrenia) as a mitigating factor (Poulson et al., 1997; White, 1987). In a study conducted by White (1987), jurors were exposed to one of four defense strategies: an anti-capital punishment defense; a social history defense such as experience of abuse, maltreatment, and/or neglect; a mental illness defense, or no defense. Additionally, mock capital jurors viewed one of the three crimes: robbery-murder with accidental violence, robbery-murder with wanton violence, and multiple murders. Participants in the mental illness defense condition were presented with the testimony of a clinical psychologist who said that the criminal behavior of the defendant may be attributed to the conditions in which the defendant grew up (White, 1987). Ultimately, White (1987) found that jurors were most punitive in the mental illness defense where the crime was multiple murder and least punitive when exposed to the anti-capital punishment defense where the crime was robbery-murder.

Consistent with White's (1987) findings, Poulson et al. (1997) found that death-qualified jurors hold beliefs that an individual with a mental illness is just as blameworthy as an individual without a mental illness. Moreover, the jurors were also found to be significantly less willing to deem a defendant Not Guilty by Reason of Insanity, less likely to believe in the efficacy of the insanity defense, and more likely to accept the prosecution's expert testimony (Poulson et al., 1997).

Brain Damage

Overall, impairments such as brain damage can negatively influence an individual's impulse control, problem solving abilities, and social behavior (DPIC, 2015). While there is a dearth of research examining the impact a defendant with brain damage may have on juror decision-making, the existing research suggests that it acts as mitigating evidence, especially when paired with high dangerousness of the defendant (Greene & Cahill, 2012). These findings appear contradictory to the results of Devine and Kelly (2015) who found that defendants who are deemed as dangerous are more likely to receive the death penalty. However, the difference in results may be due to a difference in the presentation of evidence and the way in which jurors receive it (Bell Holleran et al., 2016). As explained by Bell Holleran et al. (2016), with the absence of instruction, jurors may consider some evidence irrelevant or perceive it as aggravating, therefore much depends on the way such evidence is presented to them. Therefore, if evidence of brain damage is presented the "right way," jurors may be more likely to perceive it as mitigating (Bell Horan et al., 2016).

Sexual Abuse

Like individuals with brain damage, a person who has experienced sexual abuse in the past can similarly be subjected to several effects such as the hindering of the development of the brain and developmental deficits in moral competence (DPIC, 2016; Walker et al., 2018). White (1987) found that when rating the similarity between the defendant and jurors, jurors felt most similarly to the defendant in the social history (i.e., childhood sexual abuse) condition (vs., e.g., mental illness). Other research examining the effect that social history has on verdicts reveals that jurors are likely to rely on theories or general societal beliefs when being presented with a defendant who has previously been abused (Costanzo & Costanzo, 1992). That is, for example,

since it is generally believed that there is a connection between childhood abuse and later violent behaviors, jurors likely view such defendants as less responsible for their crime (Costanzo & Costanzo, 1992).

Bell Holleran and colleagues (2016), similarly, examined the difference in how capital jurors perceive defendants with childhood abuse or neglect and defendants with no such history. Ultimately, they found that a history of abuse, especially sexual abuse, acts as a mitigating factor and leads jurors to provide fewer death sentences. While there have been some mixed findings regarding this topic, most of the differences can be attributed to how the information is presented to the jurors. If presented in a way that dismisses the importance of this evidence such as by not building an argument on it but merely mentioning it, jurors may not appraise the defendant's past as relevant or may see it as an aggravating factor in that the defendant is damaged and therefore, dangerous (Bell Holleran et al., 2016). As such, defendants who are perceived as dangerous are at a higher risk of receiving the death penalty (Devine & Kelly, 2015).

Summary

All in all, current research on the aforementioned impairments indicates that jurors may view their effects as mitigating factors under certain circumstances (see, e.g., White, 1987). However, there are also instances where jurors tend to ignore, on various levels, the evidence of mental illness, brain damage, and/or experience of sexual abuse, or not appraise them as mitigating. This is critically important, especially considering how many innocent individuals are sentenced to death each year. For example, there have been a total of 37 exonerations from death row between 2010 and the beginning of 2021 (DPIC). As such, it is important to ensure that fewer innocent individuals are sentenced to death. One possible way to do so would be to

increase the extent to which jurors empathize with the defendant. To this end, defense lawyers may utilize empathy-inducing tactics that instruct jurors to place themselves into the shoes of the defendant to stimulate a deeper understanding of the defendant's perspective, especially when they have the aforementioned "impairments."

Empathy

Generally, there are two types of empathy: trait empathy and state empathy (Haegerich & Bottoms, 2000). Trait empathy refers to the general ability to understand and share the feelings of another individual (Haegerich & Bottoms, 2000). Alternatively, state empathy refers to empathy that has been induced or prompted by a stimulus (Haegerich & Bottoms, 2000). Therefore, when utilizing an empathy-inducing method, the stimulus (such as a prompt) is triggering state empathy in the receiver. The most frequently used method of inducing empathy is perspective-taking, first introduced by Stotland (1969). In short, the perspective-taking approach focuses on instructing individuals to place themselves into the shoes of another and form an understanding of their behavior (Stotland, 1969).

Empathy in the Criminal Justice System

Despite the limited amount of research examining the efficacy of empathy-inducing in the courtroom, the existing research suggests that the perspective-taking empathy-inducing method can be effective in influencing the jurors' empathy levels and, in turn, leading jurors to hand down lesser sentences (Archer et al., 1979; Batson et al., 1995; Haegerich & Bottoms, 2000; Plumm & Terrance, 2009).

In a study conducted by Haegerich and Bottoms (2000), mock jurors participated in a patricide case where the defendant claimed that the crime was committed in self-defense and

accused the victim of a separate crime, that is, sexual assault. Participants either received the empathy-inducing (perspective-taking) prompt or not (Haegerich & Bottoms, 2000). The results suggested that participants in the empathy-inducing condition were found to have more empathy for the defendant, were more likely to see the abuse as a mitigating factor and found the defendant less guilty and less responsible for the crime (Haegerich & Bottoms, 2000). Additionally, they found that women, in comparison to men, were more likely to find the defendant's abuse allegations more credible and more likely to find the defendant less guilty and less responsible for the crime (Haegerich & Bottoms, 2000).

Plumm and Terrance (2009) extended this line of research by examining induced empathy in a case where a battered woman was charged with murdering her abusive husband. Findings were consistent with those of Haegerich and Bottoms (2000), indicating that mock jurors in the empathy-inducing condition were more likely to empathize with the defendant leading them to choose a lesser sentence (Plumm & Terrance, 2009). Additionally, women were more likely than men to consider the defendant's actions as justified, more mentally stable, reasonable, and credible (Plumm & Terrance, 2009).

Plumm and Terrance (2009) indicated that the effectiveness of empathy induction in cases where the perpetrator is less likely to be viewed sympathetically by the jury has yet to be examined. A perpetrator may be viewed less sympathetically in cases where the crime is especially gruesome or where the perpetrator is an adult in comparison to a child (Plumm & Terrance, 2009). In both aforementioned studies (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009), a relationship between the perpetrator and the victim existed prior to the crime, in the context of abuse. Archer et al. (1979) took a slightly different approach and had the crime

still involving self-defense but where there was a question of whether unnecessarily excessive force was utilized. Consistent with the findings of Haegerich and Bottoms (2000) and Plumm and Terrance (2009), Archer et al. (1979) found in Experiment 1 that mock jurors in the empathy-inducing condition viewed the actions of the defendant as more lawful. Additionally, male participants were found to empathize more with the male defendant (Archer et al., 1979).

Issues with Inducing Empathy

Although guiding jurors to place themselves in the shoes of the defendant may effectively induce empathy, factors such as the empathic divide may decrease the effectiveness of the process or even halt it all together (Aucoin & Kreitzberg, 2018; Ghostray, 2013). The empathic divide refers to a psychological barrier between the defendant and the jury (Aucoin & Kreitzberg, 2018). The purpose of this barrier is to help jurors rationalize their decisions on the life or death of the defendant (Aucoin & Kreitzberg, 2018). Using empathy, the attorneys' goal should be to overcome the empathic divide and to humanize the defendant to the jury (Ghostray, 2013).

Overall, attorneys are not completely oblivious to the effect that empathy has in the courtroom. Despite this, they do not appear to utilize any specific technique to induce it (Balske, 1980). Rather, some attorneys aim to select highly empathic jurors during the *voir dire* process which they select based on questions such as, "who has recently donated blood?" (Aucoin & Kreitzberg, 2018). This approach, however, may have an adverse effect on the fate of the defendant especially in cases whereby the prosecutor introduces victim impact evidence (Myers & Arbuthnot, 1999). Victim impact evidence refers to instances where the jury is presented with statements or testimony of witnesses regarding the impact of the crime on the victim and the

victim's family (Aucoin & Kreitzberg, 2018; Myers & Arbuthnot, 1999). In these situations, it is possible that highly empathic jurors will still empathize with the defendant. However, empathetic jurors may be equally and/or more likely to empathize with the victim as a result of the victim impact statement (Aucoin & Kreitzberg, 2018). The tactics that defense attorneys currently use involving empathy may not necessarily be as effective and/or be beneficial for the defendant. Through the utilization of the proposed empathy-inducing method in the current study, jurors might realize the impact of mental illness, brain damage, and sexual abuse, on the defendant and their actions and make a more lenient decision on the life or death of a defendant.

Present Study

Empathy-inducing may be one solution toward reducing the sentencing of innocent individuals to death. Previous research has examined the effects of empathy-inducing methods with defendants who were victims of crimes committed by the person they then targeted; hence, the crimes include potential arguments of self-defense (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). These studies have found that inducing empathy in jurors results in lesser sentences, less responsibility being placed on the defendant for the crime, and jurors being more likely to recognize abuse as a mitigating factor (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). However, it remains unclear whether inducing empathy similarly leads to lesser sentences when the defendant and victim are strangers. Furthermore, considering the significant numbers of individuals on death row as well as those who have already been executed exhibiting one or more seemingly, mitigating conditions (mental illness, brain damage, and/or experience of sexual abuse), it is crucial to examine whether empathy-inducing may lead jurors to provide lesser sentences when considering a capital case.

Although crimes in which the offender and victim are strangers receive the most severe sentences (Dawson, 2004), I hypothesize that the empathy-inducing method will prompt jurors to empathize with the defendant and, in turn, lead to less death sentences. Since jurors find the experience of sexual abuse a highly mitigating factor (Bell Holleran et al., 2016), I hypothesize that overall, jurors in the past sexual abuse condition will provide the least death sentences and view the defendant as least responsible for the crime. Considering the small amount of research on brain damage the condition will be exploratory. I hypothesize the jurors in the condition will provide more death verdicts than in the sexual abuse condition but less than in the mental illness condition. In view of jurors' tendency to view defendants with mental illness just as responsible as those without (Poulson et al., 1997), I also hypothesize that jurors in the mental illness condition who receive no empathy-inducing prompt will provide the most death verdicts and attribute the most responsibility to the defendant for the crime.

Method

Design

The present study will consist of a 2 (empathy-inducing, no empathy-inducing) x 4 (mental illness, brain damage, past sexual abuse, none) between-subjects design. The participants were randomly assigned to one of the eight conditions. The dependent variables consisted of verdict outcomes of death or LWOP, confidence ratings, empathy scores, and responsibility scores.

Participants

Participants were 67 John Jay College of Criminal Justice students who are jury-eligible and death qualified, as determined by measures detailed below. Originally, data was collected

from 345 participants, however, of those who passed an attention check and completed the survey in 30 minutes or more, only 67 qualified. All participants received credit for their participation and were randomly assigned to the conditions. The mean age of the participants was 19.48 ($SD=2.69$) with a range of 17-37. The majority of the participants were female (77.6%) with 3.0% identifying as "other". Participants were mostly Caucasian (37.3%), Hispanic/Latinx (22.4%), "other" (11.9%), Black or African American (10.4%), Asian (14.9%), American Indian or Alaska Native (1.5%), and Native Hawaiian or Pacific Islander (1.5%). Participants were mostly Atheist (29.9%) or Christian (28.4%). Additionally, the majority of the participants were freshmen (50.7%).

Procedure and Materials

The study was distributed through the college's online platform, SONA. Once signed up for the study, participants gained access to the study questionnaire via Qualtrics. Upon receiving the link to the study on Qualtrics, participants were also automatically assigned an identification number utilized to provide credit after completion. Participants were asked to complete the study independently, in a quiet room without distractions, and to employ the same degree of seriousness as they would if they were a juror in a real trial. Once the participants commenced the study, they completed the following tasks in the order provided.

Juror Eligibility & Death Qualification

After clicking on the link, participants were presented with a screening consent form. Once participants agreed to participate, they were asked a series of questions determining whether they are jury eligible and death qualified. Questions regarding jury eligibility included age (18 or older), citizenship (US), proficiency in English, mental/physical conditions that may

influence one's ability to serve on a jury (e.g., intellectual disability), being subject to felony charges, and having prior convictions.

The death qualification questions asked participants whether they could be fair and impartial if they would be selected to be a juror in a death penalty case and would have to determine whether they sentence the defendant to life without parole or to death (see Haney, 1984, for full text). Adjustments, such as changing reference of a guilt phase trial to a penalty phase, were made to the text to better serve the current study (see Appendix A).

Subjects who were not jury eligible or deemed that they could not be fair and impartial and could not impose the death penalty in any case were excused and thanked for their time (*Witherspoon v. Illinois*, 1968). The remaining participants (those jury eligible and death-qualified) were then randomly allocated to one of the eight conditions. They were then provided with a consent form to which, after reading, they had a choice to either agree to participate or not.

Penalty Phase Trial Transcript & Empathy Induction

Next, qualified and consenting participants were provided with a link to a Google PowerPoint presentation with a voice-over of a penalty phase trial transcript (see Appendix E). The transcript was derived from Casper and Diamond (1991) and was altered based on the conditions for the present study (e.g., the condition of the defendant). In all conditions, the crime depicted was a robbery-murder. The changes made to the trial transcript included the defense lawyer saying the empathy-inducing phrase in the appropriate condition as well as adding the evidence of mental illness, brain damage, or experience of past sexual abuse depending on the condition. All other aspects of the transcripts were identical across conditions. The empathy-

induction phrase was found towards the end of the transcript when the defense was making their final statements:

"Imagine what it would be like if you were John Henry. Put yourself in his shoes. Try hard to put yourself in his place and really think about how you would be feeling in his situation. Try to reflect upon the way you would feel in these circumstances. In your mind's eye, perhaps you can visualize how it would feel for you to be John Henry in this situation. How would you feel? What would you be thinking? How are you thinking and feeling right now, as John Henry." (Haegerich & Bottoms, 2000, page 427).

When coming to the end of the transcript, participants were prompted to return to the Qualtrics questionnaire and to close the PowerPoint presentation. Following that, the mock jurors were asked to, "Please take a 3-minute recess and think about the verdict you will provide in the State v. John Henry Smith case. You will have the option of sentencing John Henry Smith to life without the possibility of parole or to death." A timer directly under was displayed counting down from three minutes.

Verdict

After the three minutes, jurors were asked to provide their verdict (see Appendix B) of death or life without the possibility of parole as well as a reason for the sentence¹. Subsequently, jurors were asked to complete a confidence rating of their verdict. The question posed asked the participant how confident they are with the verdict they provided, to which they had the option of choosing 1 (*not confident*) through 6 (*very confident*).

¹ The reason for the sentence was not pertinent to the present research question, therefore, it was not included in the analyses.

Manipulation Check

Participants were asked “what condition/experience did the defendant show evidence of?” With the multiple-choice option of choosing mental illness, brain damage, sexual abuse, or none.

Empathy and Responsibility

Next, to measure the empathy and the responsibility mock jurors placed on the defendant for the crime was measured using the Defendant Empathy Scale (Appendix C) and Killing Responsibility Scale (Appendix D), respectively (Haegerich & Bottom, 2000). The scores for each item in the scale were aggregated for one score in both, the Empathy and the Responsibility Scales. In the Defendant Empathy Scale, participants rated, on a 6-point scale ranging from 1 (*not at all*) to 6 (*completely*), the degree to which they “can imagine themselves in the shoes of the defendant”, “can imagine the thoughts running through the defendant’s head”, “can feel what the defendant must have been feeling at the time of the crime”, “can experience the same feelings the defendant experiences”, “can take the perspective of the defendant and understand why the crime occurred”, and “know what it would be like to be the defendant.” There were eight items in total constituting empathy level, the scale had a high level of internal consistency, as determined by a Cronbach’s alpha of 0.878.

In the Killing Responsibility Scale, participants rated, on a 6-point scale ranging from 1 (*not at all*) to 6 (*completely*), the degree to which they “blame the defendant for the crime”, “felt the crime was the defendant’s fault”, and “believe that the defendant was responsible for the crime”. The Haegerich and Bottoms study involved a shooting, therefore, in the scale, the word

“shooting” was replaced with the word “crime.” The three items constituted responsibility level and had a high level of internal consistency as determined by a Cronbach’s alpha of 0.927.

Demographic Questionnaire

Participants were then asked to complete a demographics questionnaire (Appendix F) including their age, gender, religion, ethnicity, education, whether they have been previously convicted of any crime, whether they have been exposed to or have personally experienced mental illness, brain damage, and/or sexual abuse. After completion, participants were provided with a debriefing form which they had the option of downloading to their device, they were compensated with course credits, and thanked for their time.

Results

In what follows, first, preliminary analyses were conducted to examine the effectiveness of the empathy prime to induce empathy in the participants. Second, the verdict provided by mock jurors was explored in relation to condition of the defendant, empathy induction, confidence, total empathy, and total responsibility to determine whether any of these factors may have influenced the verdict given. Third, the results examining whether condition, gender, and empathy induction influence overall empathy and, last, a similar analysis was conducted examining any changes in responsibility. The analyses will include gender as a predictor due to previous research (e.g. Archer et al., 1979) highlighting its importance on the effect it may have on empathy, responsibility, and the verdict provided. The analyses are based on data that was split based on the duration it took for participants to complete the survey as well as whether they responded successfully to the attention check ($N=67$).

Preliminary Results

Upon conducting a one-way ANOVA, empathy induction ($M=15.89$, $SD=6.72$) compared to no empathy induction ($M=15.44$, $SD=7.49$) revealed no significant difference on empathy total, $F(1,65)=.067$, $p=.797$.

Verdict

Across all conditions, 70.1% ($N=47$) of participants provided a verdict of life without the possibility of parole (LWOP) and 29.2% ($N=20$) provided a verdict of death. The most LWOP verdicts were given to the defendant with brain damage (42.6%) followed by mental illness (23.4%), sexual abuse (21.3%), and the control condition (12.8%). The most death verdicts to the defendant with mental illness (30.0%) followed by sexual abuse (25.0%), control (25.0%), and brain damage (20.0%).

A factorial regression analysis was performed to determine the effects of the condition of the defendant (mental illness, brain damage, sexual abuse, none), empathy induction, confidence, total empathy, total responsibility, and gender as predictors of the verdict provided (See Figure 1). The condition of the defendant did not indicate to be a significant predictor, ($p=.928$, 95% CI [-1.89, 2.07]). Similarly, empathy induction revealed not to be a significant predictor ($p=.121$, 95% CI [-2.32, .280]). Confidence was a statistically significant predictor of verdict ($p=.017$, 95% CI [-.287, -.030]), as was total responsibility ($p=.004$, 95% CI [.021, .103]). Total empathy ($p=.704$, 95% CI [-.24, .016]) and gender ($p=.901$, 95% CI [-1.63, 1.43]) showed no significance.

Figure 1

	<i>B</i>	<i>p</i>	95% CI	Partial Eta Squared
Condition	.089	.928	[-1.89, 2.07]	.000
Empathy Induction	-1.02	.121	[-2.32, .280]	.051
Confidence	-.158	.017*	[-.287, -.030]	.118
Empathy Total	-.004	.704	[-.024, .016]	.003
Responsibility Total	.062	.004*	[.021, .103]	.169
Gender	-.095	.901	[-1.63, 1.43]	.000

Figure 1: Factorial regression of condition, empathy induction, confidence, empathy total, responsibility total, and gender on verdict

To examine the direction in which confidence and responsibility was skewing based on the verdict, a series of post hoc t-tests were conducted. The analyses revealed that greater responsibility was placed on the defendant by individuals who provided the death verdict ($N=20$, $M=16.25$, $SD=3.4$) in comparison to those who provided the LWOP verdict ($N=47$, $M=14.3$, $SD=3.28$) ($t(65)=-2.20$, Cohen's $d=-.588$, $p=.196$). Furthermore, confidence was higher for individuals providing an LWOP verdict ($M=4.79$, $SD=.88$) in comparison to those providing a verdict of death ($M=4.25$, $SD=1.25$) ($t(65)=2.0$, Cohen's $d=.535$, $p=.115$).

Empathy

A three-way ANOVA was conducted with condition (mental illness, brain damage, sexual abuse, none), gender (female, male, other), and empathy presence (yes, no) as the independent variables and total empathy as a dependent variable to examine any main or interaction effects. Results indicated that there was no main effect for condition of the defendant, $F(3,49)=.698$, $p=.558$. However, there was a main effect for gender, $F(2,49)=6.698$, $\eta^2=.215$, $p=.003$, whereas

none for empathy induction, $F(1,49)=2.148, p=.149$. The two-way interactions revealed no significance: condition*gender ($F(3,49)=2.060, p=.118$), gender*empathy presence ($F(1,49)=1.806, p=.185$). However, the interaction of condition and empathy presence approached statistical significance: $F(3,49)=2.693, p=.056$. Finally, the interaction of condition of the defendant, gender, and empathy presence did not significantly impact total empathy, $F(3,49)=.687, p=.564$.

In order to examine the main effect for gender (female (N=52), male (N=13), other(N=2)) a one-way ANOVA was conducted revealing that empathy total increased from the “female” group ($M=14.6, SD=5.8$), to the “male” group ($M=17.6, SD=8.8$), to the “other” group ($M=31.5, SD=.71$), in that order. Tukey post hoc analysis revealed that the mean increase in empathy total from “female” to “other” (16.92, 95% CI [5.77, 28.08]) was statistically significant ($p=.002$), as was the increase from “male” to “other” (13.88, 95% CI [2.13, 25.64], $p=.017$). While the increase in empathy total from “female” to “male” (3.04, 95% CI [-1.76, 7.84]) was not statistically significant ($p=.289$).

The interaction of condition and empathy presence revealed to be approaching significance, therefore further analyses were performed. The results indicated that empathy total was higher when empathy was induced ($N=35, M=15.89, SD=6.72$) in comparison to instances where empathy was not induced ($N=32, M=15.44, SD=7.49$) ($t(65)=.258$, Cohen’s $d=.063, p=.650$). A one-way ANOVA revealed that empathy total was lowest for the control group ($M=14.27, SD=7.2$), increasing for “mental illness” ($M=15.11, SD=6.47$), followed by “sexual abuse” ($M=16.2, SD=6.36$), with the highest empathy total being for “brain damage” ($M=16.38, SD=8.02$) ($F(3,63)=.278, p=.841$).

Responsibility

In order to examine whether the independent variables influenced perceptions of responsibility, a three-way ANOVA was conducted with condition, gender, and empathy presence as the independent variables and total responsibility as a dependent variable to examine whether any main or interaction effects are present. Results indicated that condition of the defendant did not influence total responsibility, $F(3,49)=1.512, p=.223$. Additionally, there was no main effect for gender or empathy, $F(2,49)=.980, p=.383$ and $F(1,49)=.250, p=.619$, respectively. The two-way interactions revealed no significance: condition*gender ($F(3,49)=1.629, p=.195$), condition*empathy presence ($F(1,49)=1.262, p=.298$) except for the interaction of gender and empathy presence result indicating statistical significance: $F(3,49)=4.403, \eta^2=.082, p=.041$. Finally, the interaction of condition of the defendant, gender, and empathy presence did not significantly impact total responsibility, $F(3,49)=1.99, p=.127$.

A series of post-hoc tests were conducted to examine the interaction between gender and empathy presence on responsibility total. The results revealed that individuals in the condition where empathy was induced placed more responsibility on the defendant for the crime ($N=35, M=15.4, SD=3.15$) in comparison to those in the no empathy induction condition ($N=32, M=14.31, SD=3.64$) ($t(65)=1.31, \text{Cohen's } d=-.320, p=.469$). Individuals in the male group provided the highest responsibility total ($N=13, M=15.62, SD=3.23$), followed by the female group ($N=52, M=14.75, SD=3.41$), and by the other group ($N=2, M=13.5, SD=6.36$) ($F(2,64)=.495, p=.612$).

Although the differences in the condition of the defendant were not significant based on responsibility total, further analysis were conducted to determine if there are any trends between

the conditions. A one-way ANOVA determined that responsibility total was lowest for the “brain damage” group ($M=14.33$, $SD=3.29$), increasing for “mental illness” ($M=14.53$, $SD=4.37$), followed by “sexual abuse” ($M=15.33$, $SD=3.04$), with the highest responsibility total being for “control” ($M=16.00$, $SD=2.41$). However, the differences between the groups were not significant, $F(3,63)=.739$, $p=.533$, therefore, no definitive claims can be made.

Discussion

The present study examined whether inducing empathy influenced the sentence given in a capital penalty phase trial and whether a defendant’s condition or experience influenced the decision of verdict. Overall, the present results found that empathy induction and condition of the defendant did not influence the verdict provided. However, the interaction of confidence and total responsibility reported had an impact on the verdict. The condition of the defendant did not impact the total empathy nor total responsibility but the interaction of condition with empathy presence showcased approaching significance. Gender revealed to affect empathy total while the interaction of gender and empathy induction affected responsibility total. I will discuss each of these in turn.

Verdict

Generally, our results do not replicate the findings of previous studies which indicated the efficacy of empathy induction on the empathy that jurors felt towards the defendant resulting in lesser sentencing (Archer et al., 1979; Batson et al., 1995; Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). This may have been due to the lack of relationship between the defendant and victim as warned by Dawson (2004). Previous research in which empathy induction successfully resulted in a lesser verdict considered crimes of retaliation or self-defense in which there was a

clear relationship between the defendant and victim and more room to empathize with what the now defendant previously went through due to the now victim (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). Another possible reason for the lack of influence of the empathy induction on the total empathy includes the empathic divide which has been shown to decrease or halt the effect of the empathy induction due to a psychological barrier between the defendant and jury (Aucoin & Kreitzberg, 2018; Ghostray, 2013). Additionally, research has indicated that the effectiveness of empathy induction may lessen due the perpetrator being viewed less empathically due to the crime they committed or their inherent characteristics (e.g., age), however, research has not established the specific circumstances. (Plumm & Terrance, 2009).

Factors that revealed to influence the verdict provided included the interaction of confidence of the mock jurors with the responsibility they placed on the defendant. Mock jurors who provided verdicts of LWOP reported more confidence. This may relate to previous research indicating that jurors attitudes tend to be influenced by the death qualification process, however, generally, they tend to avoid providing the death sentence as indicated by their preference of aversion of capital trials (Bindler & Hjamlarsson, 2018). By providing the verdict of LWOP rather than death, jurors may have felt more confident due to their personal success in avoiding the death penalty. Furthermore, mock jurors who provided a verdict of death reported placing more responsibility on the defendant for the crime which is in tune with the harsher sentence.

Although the condition of the defendant had no significant impact on the verdict that participants provided, the non-significant differences correspond to previous research stating that jurors are most punitive with defendants whose defense is their mental illness (White, 1987) and that brain damage tends to act as mitigating evidence (Greene & Cahill, 2012). Verdicts provided

for the sexual abuse condition did not deviate far from those given to the mental illness condition which deviates from research indicating past sexual abuse as a mitigating factor (Bell Holleran et al., 2016; Poulson et al., 1997; White, 1987). The lack of significant effect of the condition on the verdict may also be attributed to the fact that the impact such impairments may have on the defendant's actions may be underestimated (Bowers, 1995) or simply not be understood by jurors (Poulson et al., 1997). The transcript utilized in the current study did not involve a testimony from a professional who described the possible influence that the condition of the defendant may have on his actions. Therefore, it is possible that the lack of this information from a credible source may have affected the juror's ability to understand the importance of said condition. Alternatively, the testimony of an employer and relative was included. Their testimonies included the ways in which the defendant was affected by his condition from their point of view. Therefore, credibility may have played a part in the mock juror's understanding and consideration of the evidence involving the defendant's condition.

Empathy and Responsibility

Empathy and responsibility revealed to not be significantly different based on the condition/experience of the defendant, however, the differences that were seen adhered, to some extent, to findings of previous research. The defendant which was indicated to not have any impairment received the lowest empathy total and highest responsibility total. The lowest empathy total was followed by the mental illness condition while responsibility total for the mental illness condition fell between the sexual abuse and brain damage conditions which may dispute with research indicating that mental illness is an, overall, non-contributing factor and that an individual with a mental illness is just as blameworthy as one without (Poulson et al., 1977).

Total empathy for sexual abuse fell in between the mental illness and brain damage conditions while total responsibility for sexual abuse fell between the mental illness and no impairment (control) condition. Inconsistent with these results, previous research has associated sexual abuse with lesser responsibility for the crime (Constanzo & Constanzo, 1992) and higher empathy (Haegerich & Bottoms, 2000). Highest total empathy and lowest total responsibility was attributed to the brain damage condition which has not been excessively examined in the courtroom based on empathy or responsibility, however, the existing research classified brain damage as a generally mitigating factor (Greene & Cahill, 2012). Although the results were non-significant, the impairments indicated a trend. Notably, the interaction of condition and empathy presence appeared to approach significance on the empathy total. However, since no definitive claims can be made, it is possible that jurors underestimated the importance of this evidence (Bowers, 1995).

In terms of total empathy, a significant effect was seen in gender. Individuals who identified as “other” revealed the highest total empathy, followed by the “male” group, with the “female” group reporting the least empathy. These findings generally differ from research indicating that female jurors tend to find the defendant as less guilty and less responsible (Haegerich & Bottoms, 2000). However, considering that male individuals empathized with the defendant more than did female participants may be attributed to the fact that male jurors tend to empathize more with male defendants (Archer et al., 1979). In terms of total responsibility, a significant effect was seen in the interaction of gender and empathy induction in that individuals identifying as male provided the highest responsibility total and more responsibility was placed on the defendant when empathy was induced. These results are consistent with research

indicating that female jurors gravitate towards finding the defendant less responsible (Haegerich & Bottoms, 2000). However, they are inconsistent with research suggesting that empathy induction lessens the responsibility jurors place on the defendant (Haegerich & Bottoms, 2000).

Limitations and Future Directions

Previous studies have focused on crimes where there was a previous altercation between the victim and defendant, therefore, the crime was a form of retaliation or self-defense (Haegerich & Bottoms, 2000; Plumm & Terrance, 2009). The crime demonstrated in the current study was a robbery-murder. Future research should examine the effectiveness of empathy inducing in different types of murder with and without a previous relationship between the defendant and victim.

This study also examined the possible influence that the defendant's condition may have on the verdict provided. However, the trial transcript only included testimony from an employer and family member about the impact that that condition had on the defendant. Previous research has explored, to an extent, the effect some impairments may have on verdict, empathy, and responsibility (Bell Holleran et al., 2016; Constanzo & Constanzo, 1992; Haegerich & Bottoms, 2000; Poulson et al., 1997); however, it is unclear whether the available research has included expert testimony explaining the effects of the condition on the defendant's actions. Future research should examine the impact that the inclusion of expert testimony may have on the effectiveness of empathy induction.

Finally, due to the study being online, a small sample was utilized after splitting the data based on the amount of time it took the participants to complete the study and whether they successfully responded to the attention check. This also resulted in unequal cell sizes which may

have influenced the analyses. Due to the splitting, there were only two participants who identified as “other” when asked for their gender which may have influenced the analyses involving gender as a predictor. To address these concerns, data collection is ongoing in order to recruit a larger sample size and ensure proper statistical power.

Conclusion

The current study examined empathy induction in a capital penalty phase trial and the possible influence of different conditions the defendant possessed. The results did not replicate those of previous studies showcasing that empathy inductions resulted in higher empathy and lesser verdicts given to the defendant. However, aspects of the case varied from those of previous research such as the case being a capital trial and the defendant not having a previous relationship with the victim. Although empathy induction did not influence the verdict, the confidence mock jurors had with their verdict and the responsibility they placed on the defendant for the crime was significantly related to the verdict they provided. One identified predictor of the amount of empathy a mock juror reported for the defendant was gender and the interaction of gender and empathy induction revealed to influence the total responsibility placed on the defendant. Overall, the present study examined the influence of empathy in a novel trial scenario and with some of the most vulnerable populations as an independent factor. The present results provide fodder for future research to further explore the impact empathy may have in jury decision-making.

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Appendix A

Assume that you have been called as a possible juror in a murder trial. The prosecutor is asking for the death sentence. Since this is a case where the death penalty may be imposed, the judge will ask you certain questions about your attitudes toward the death penalty before deciding whether you would be chosen to serve on the jury.

There may be two parts to any trial where the death penalty may be imposed. In the first part, the jury decides whether the person on trial is guilty or not guilty. If the person is found guilty, there is a second part--a separate trial--in which the jury decides whether he or she should get the death penalty or life in prison.

The judge will ask you this question:

Is your attitude toward the death penalty such that, as a juror you would never be willing to impose it in any case, no matter what the evidence was, or would you consider voting to impose it in at least some cases. Which of the following best expresses your attitude?

- a. I would be unwilling to vote to impose it in any case.
- b. I would consider voting to impose it in some cases.

Suppose that you were a juror in the *second* part of the trial, just to decide whether the accused person will be sentenced to death or life in prison. The judge instructs you that in reaching your decision you are only allowed to consider the evidence presented in court, and must follow the law as he will state it to you.

Which of the following expresses what you would do if you were a juror for the second part of the trial?

a. I would follow the judge's instructions and decide the question of life or death in a fair and impartial manner based on the evidence and the law.

b. I would not be fair and impartial in deciding the question of life or death.

Appendix B

Please provide your verdict:

- 1) Life without the possibility of parole
- 2) Death penalty

How confident are you with the verdict you have provided? (1=not confident, 6=very confident)

1 2 3 4 5 6

Appendix C

To what extent to you agree with the following? (1=Strongly Disagree, 6=Strongly Agree)

I have empathy for the defendant.

1 2 3 4 5 6

I can really imagine the thoughts running through the defendant's head.

1 2 3 4 5 6

I can really feel what the defendant must have been feeling the night of the shooting.

1 2 3 4 5 6

I can experience the same feelings that the defendant experienced.

1 2 3 4 5 6

I can take the perspective of the defendant and understand why the crime occurred.

1 2 3 4 5 6

I can really see myself in the defendant's shoes

1 2 3 4 5 6

I feel like I can easily take the perspective of the defendant.

1 2 3 4 5 6

I know what it would be like to be the defendant.

1 2 3 4 5 6

Appendix D

Please rate the following on a scale of 1 through 6 where 1=no: not at all and 6=yes: completely.

To what degree do you blame the defendant for the crime?

1 2 3 4 5 6

To what degree do you feel the crime was the defendant's fault?

1 2 3 4 5 6

To what degree do you believe the defendant is responsible for the crime?

1 2 3 4 5 6

Appendix E

State vs. John Henry Smith (Condition: Mental Illness & Empathy Induced)

1991 Jonathan D. Casper and Shari Seidman Diamond

Judge: Ladies and gentlemen of the jury, we now come to the penalty phase of the criminal trial involving the State versus John Henry Smith. Mr. Smith has been convicted by a plea of guilty, to one account of murder and one account of armed robbery. The prosecution has asked that a jury be in panel to consider whether Mr. Smith should receive the death penalty for his conviction of murder. The law requires the jurors in proceedings like these consider the nature of the crimes committed by the defendant, as well as a set of aggravating and mitigating factors in deciding whether the defendant shall receive a sentence of death. First, let me introduce the defendant to you. The defendant in this case is Mr. John Henry Smith. Mr. Smith, would you please stand? The penalty hearing will begin with an opening statement by the prosecuting attorney, Mr. Fred Williams, followed by the opening statement of the defense attorney, Mr. Charles Davis. Mr. Williams will then call witnesses for the prosecution and after completion of the prosecution testimony, Mr. Davis will present witnesses for the defense. At the close of the hearing, each side will present a closing argument. I will then instruct you further about the legal rules you are to apply in making your decision. Mr. Williams, you may proceed.

Prosecutor (Fred Williams): Thank you, your honor. Ladies and gentlemen of the jury, you've been called upon to perform a difficult and unpleasant task, but one that is absolutely crucial if we are to maintain a decent, safe, and law abiding community. The defendant in this case has

been convicted of crimes whose brutality is shocking to decent citizens like yourself, and simply hard to comprehend. The details are unpleasant to hear and to ponder, but they must be discussed in order to convey the magnitude of what John Henry Smith did. For it is careful consideration of exactly what the defendant did to his victim, Albert Havens, that will lead you to the conclusion that your only appropriate decision is that he must suffer the ultimate punishment of being put to death for his crime. You will hear from one witness from this hearing. The witness will tell you exactly what John Henry Smith did to Albert Havens on the evening of August 23, 1988. The Bible tells us that we should punish those who break our laws in the same measure as their own acts. An eye for an eye and a tooth for a tooth. There are many reasons why this philosophy was enshrined in our most holy book, and why it endures to this very day. First, it's a matter of simple justice. Albert Havens was simply sitting by a lake trying to catch fish, when John Henry Smith tied him up and shot him. This act has put himself in a position where he deserved death. Respect for the victim demands it. The community demands it. Any reasonable notion of what is fair and just demands that his punishment fit his crime. His crime was murder, and his punishment should be death. But there's more involved here than simply what John Henry Smith deserves for his terrible crime. There are also important concerns for protecting society from him, and from others who might behave as he did. There is only one way to be sure that this killer will not kill again, and that is to take away his ability to do so. The only sure way to do this is to impose the ultimate penalty. And as you will hear, this was not an impulsive act by John Henry Smith. He killed Albert Havens because John Henry Smith realized that Havens had recognized him. He tied him to a tree, put a gun to his head, and blew his brains out, just to make sure that John Henry Smith would not be caught and prosecuted for robbery. If we punish such behavior with

anything less than the death penalty, we'll be saying to potential killers that life simply doesn't count for all that much in our society. When they're faced with similar circumstances, will they hesitate and turn away from killing because they know that they're going to put their own lives in danger? No. They'll be reinforced in their belief that even the taking of another human's life can be atoned for a term in prison. The death penalty must be imposed here as simple justice demands it, protection of the rest of us from John Henry Smith demands it, and the need to deter this kind of heinous conduct demands it. When you've heard what happened here, I am confident that your own sense of what is right and necessary will demand it as well.

Judge: Thank you, Mr. Williams. Mr. Davis, you may proceed.

Defense Attorney (Charles Davis): Thank you, your honor. Ladies and gentlemen of the jury, this is indeed a very difficult matter that you have before you. My client, John Henry Smith, has been convicted of the crimes of murder and armed robbery. And his fate has been placed in your hands. Now you must choose whether this man is to live or whether he is to die. Obviously I'm not going to stand before you and argue that my client is an admirable citizen, he is not. He's been convicted of killing another person in the course of robbing him. So, I would look foolish if I tried to spend time talking about his virtues. But he is a human being. And as you will hear, one who has mental illness. I hope to show you that executing John Henry Smith would simply compound the terrible tragedy of the murder he committed. The deliberate, sober taking of his life is irrevocable. You just can't take it back. So if my client is put to death, all possibility of his reform is removed. I know you'll think very hard about your choices here and I hope that the

finality of one choice and the fact that it does not allow for any possibility of reform will weigh heavily in your decision. What do we know about John Henry Smith? His life clearly took its toll on John Henry. He started showing symptoms of mental illness, which became a serious problem for him and much of what's happened to him since has been associated with his mental illness. Needless to say, it's not a life that he's proud of. It's a sad life, one of few opportunities and little support. The witness you'll hear from today is John Henry Smith's sister, Alice. She'll tell you how important John Henry has been to her, how he grew up with her and protected her, and stayed in close touch throughout all the years. I hope to persuade you not that John Henry Smith is a fine human being, but rather that he's an unfortunate sinner like many of us. Worse than most, but still, a human being that makes mistakes, but who can still change. The testimony you will hear will emphasize that one of the real problems in his life has been mental illness. This fact doesn't excuse the things that he's done, but it may help us understand him better. Throwing his life away and saying that there's simply no possibility of change would be a tragic mistake. I hope that when you analyze all the evidence and think hard about this case, you'll come to the same conclusion. Thank you.

Judge: Thank you, Mr. Davis. Proceed, Mr. Williams. You may call the first witness for the prosecution.

Prosecutor: Please call Frank Thomas.

Judge: Please raise your right hand. Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

Frank Thomas: I do.

Prosecutor: Mr. Thomas, could you please tell us what you were doing on the evening of August 23rd, 1988?

Frank Thomas: Well, John Henry and I was out by blue lake, doing a little fishing starting about five in the afternoon. We was mostly just sitting around, and maybe doing more fishing I guess you could say.

Prosecutor: What happened then?

Frank Thomas: Well, we was just sitting around talking. And John Henry said something about a guy he saw across the lake. Said he looked like he might have some money.

Prosecutor: Was he talking about going over and asking the man for a loan?

Frank Thomas: No, he was talking about taking his money away from him.

Prosecutor: What happened then?

Frank Thomas: Well, we kind of moseyed over toward him to see what was going on. He was fishing. John Henry asked if he had any money, and well, the guy was a little lippy, I guess. He asked why John Henry wanted to know or something like that. John Henry got a little hot then and told him he better give us whatever he had or else there'd be trouble. And the guy told him to get lost, and stood up.

Prosecutor: What happened then?

Frank Thomas: Well, then John Henry went into his pocket and pulled up his revolver, and told the guy to give us everything he had. The guy looked real scared then. And took out his wallet and gave it to John Henry. He took the money out and threw the wallet in the lake. Then he told the guy to go over next to a tree and he tied him up with some rope that was laying there.

Prosecutor: And then what happened?

Frank Thomas: Well, at this point I figured John Henry and I was going to get the hell out of there as quick as possible. But it didn't quite work out that way.

Prosecutor: What happened?

Frank Thomas: Well, we was fixing to leave when the guy said, hey don't I know you from someplace? Isn't your name Jack Smith? Well, that put a whole different light on things as far as John Henry was concerned. Cause now he knew he'd get identified to the police.

Prosecutor: What happened next?

Frank Thomas: John Henry walked over to the guy and said something like, buddy this is not your lucky day. Then he put the gun up against the back of his head and shot him. Then we sure did get out of there as quick as we could.

Prosecutor: The man who was tied up, Albert Havens. Did he threaten John Henry Smith in any way?

Frank Thomas: No, not so as I recall. He just made him mad at first, then he remembered his name.

Prosecutor: And Havens was tied to the tree when he was shot?

Frank Thomas: Yep.

Prosecutor: No further questions for this witness your honor.

Judge: Any questions for the defense, Mr. Davis?

Defense Attorney: Yes, your honor. Now Mr. Thomas, you took part in this robbery and killing, didn't you?

Frank Thomas: No sir, I didn't. I was just kind of there with John Henry, but I didn't do anything.

Defense Attorney: Well isn't it true that you were originally charged with armed robbery and murder in this case just as Mr. Smith was?

Frank Thomas: Well that's true but the charges was all dropped.

Defense Attorney: Were they dropped in return for your agreement to testify against Mr. Smith?

Frank Thomas: Well I did say I would tell what happened.

Defense Attorney: Mr. Thomas, do you have any prior criminal record?

Frank Thomas: Yeah, I've had some troubles before.

Defense Attorney: Now is it correct that your criminal record goes back nearly fifteen years?

That you've been convicted seven times? And that you've served two terms in jail and one term in prison for armed robbery?

Frank Thomas: Yeah that's about right.

Defense Attorney: Well, does a past history like that suggest that you're an upstanding citizen who's likely to tell the truth under rope? The type of person that the jury ought to believe?

Frank Thomas: I can't say what they might think. All I can do is tell what happened when I get asked. Everything else is up to them.

Defense Attorney: I have no further questions for this witness your honor.

Judge: Very well. Mr. Williams. Ladies and gentlemen of the jury, the defense will now present its witness. Mr. Davis, you may proceed.

Defense Attorney: Please call Alice Spencer.

Judge: Please raise your right hand. Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

Alice Spencer: I do.

Defense Attorney: Mrs. Spencer, could you describe to the jury your relationship to the defendant?

Alice Spencer: He is my brother. We grew up together in the same house and we've always been close. He comes to visit me and my kids pretty regularly, so I see him a lot.

Defense Attorney: Could you tell the jury something about your childhood and John Henry's?

Alice Spencer: Well, we didn't have an easy time when we were growing up. Most of the time John Henry is a gentle man, who loves kids. He's always coming over to my place and bringing them gifts and playing with them. He has a mental illness and nine times out of ten it doesn't have any real effect on him, but every once in a while something changes and he gets mean.

Defense Attorney: So, except for these few episodes, he's never had any trouble with violence so far as you know?

Alice Spencer: That's right.

Defense Attorney: And most of the time, he seems to be a decent and caring person who's interested in others and their welfare?

Alice Spencer: For sure.

Defense Attorney: Well finally, Mrs. Spencer, do you have an opinion about how your brother, John Henry Smith, might respond to the various forms of treatment he might receive if he's sentenced to prison?

Alice Spencer: Well, course no one can ever really know about the future, but I really think he's finally ready to try to do something about his mental illness, and the things that sometimes go with it. He feels really terrible about what he did, and ever since it happened, all he can talk about is how he wishes to God that he had never done what he did. And then he knows he's got to do something to make up for the terrible thing he did. He knows he deserves to be punished real hard, for what he did. And this is probably the last chance he'll ever get to change his ways. He also knows he owes a real debt to the man and to society too.

Defense Attorney: I have no further questions for this witness, your honor.

Judge: Thank you, Mr. Davis. Any questions, Mr. Williams?

Prosecutor: Just a couple your honor. Now Mrs. Spencer, you've testified that in your mind, your brother's conduct is related to his mental illness. Have you ever known him to participate in treatment programs for this problem that you believe that he has?

Alice Spencer: Yeah, he's tried a couple of times. But he still has symptoms pretty regular. But most of the time there's no problem.

Prosecutor: Now, Mrs. Spencer, assuming that mental illness is related to his violence, is there any reason to believe that this pattern of behavior is likely to change?

Alice Spencer: Well, as I said before, no one can be sure of the future, but I think that what's happened here has really got his attention. And made him focus on the problem so based on knowing him and talking to him , I just believe that he's ready to do something about his problems.

Prosecutor: Thank you, Mrs. Spencer. Your honor, I have no further questions for this witness.

Defense Attorney: The defense would like to call the defendant, John Henry Smith.

Judge: Please raise your right hand. Do you solemnly swear that the testimony you're about to give will be the truth, the whole truth and nothing but the truth?

John Henry Smith: Yes, I do.

Defense Attorney: Now Mr. Smith, you are the defendant in this case, is this correct?

John Henry Smith: Yes sir, that's correct.

Defense Attorney: Now Mr. Smith, could you describe to us your version of what happened on the date this crime occurred?

John Henry Smith: Well, I sure wish I could do that. Cause if I could, then I image this whole thing never would've happened. But all I really remember is sitting around with Frank Thomas and fishing that afternoon. And then running into this guy. I remember talking to him a little and then getting real mad, but after that I can't really remember what I did or why.

Defense Attorney: So, you do remember talking to Albert Havens?

John Henry Smith: Yes sir, I do recall that. I think we asked him if he could give us some money. And I also remember that when he turned us down, we took it from him and he said something that I didn't like.

Defense Attorney: Do you remember harming Mr. Albert Havens?

John Henry Smith: No sir, I don't. Though I know now that I did kill the man and I wish to God that I hadn't.

Defense Attorney: Why do you think that you killed him?

John Henry Smith: Well I just can't really say. I do know that I've got a problem with my mental illness, and I have got to do something about it. I don't really know exactly what cause it, but I do know that I've got to do something about it.

Defense Attorney: Do you think you deserve to die for what you did?

John Henry Smith: Well, that's a pretty hard one to answer. The choice isn't really up to me. I know that I did a terrible thing here and that I deserve to be punished very hard for what I did. I suppose that no one really wants to die, so of course I'd say that I don't want to be put to death. I can understand why people want to do that to me, but I hope they don't.

Defense Attorney: Well why shouldn't you be executed?

John Henry Smith: It's true for sure that my life isn't what you call a model for others. I do have mental illness, but there's truly no excuse for most of what I've done. But I think I've also tried hard to do some good for people as well. And even if I have to spend the rest of my life in prison, I might still do some more good. I think I'm ready to do something about my mental illness and about the kind of life I've lived. I hope I might do something for other younger guys, telling them about what can happen if you don't try to take care of your problems as early as you can. So I guess I think that if I stay in prison for a very long time or maybe never even get out, I

might still turn my life into something more worthwhile than it's been so far. I'd sure like to have the opportunity to try and I know I can never bring Mr. Havens back, but maybe I could do something to make up for what I did.

Defense Attorney: Thank you, Mr. Smith. I have no further questions, your honor.

Judge: Thank you, counsel. Any questions, Mr. Williams?

Prosecutor: Yes your honor, I do have a few. Would it be fair to say, Mr. Smith, that you've had lots of chances in the past to change your ways?

John Henry Smith: I guess you could say that, yes sir.

Prosecutor: Also, would it be fair to say that you've had numerous chances to take advantage of the rehabilitative programs?

John Henry Smith: Well, it's true that I've had some chances, but I don't think I was really ready to take advantage of them.

Prosecutor: Evidently, Mr. Smith, evidently. Indeed, wouldn't it be fair to say that after having all of these chances to learn your lessons, you now have gone on to commit the worst crime possible?

John Henry Smith: Yes sir, that's true.

Prosecutor: Did you not hold a gun to Albert Havens' head and shoot him through the brain in cold blood just to make sure he couldn't identify you?

John Henry Smith: Like I said before, I really don't remember what I did or why I did it. But I'm not trying to get around the fact that I did kill a man. Yes sir, I did do that. And it's something I'll always be sorry about.

Prosecutor: I only wish your sorrow could bring him back. Now Mr. Smith, you sit up there today, you tell us that all of a sudden, you're ready to change. Just at the time when you're facing the ultimate penalty. Would it be unfair of me to wonder that this is just a little too convenient? Like the sinner who repents on his deathbed, hoping to put aside a life of misdeeds and get into Heaven all the same?

John Henry Smith: Well sir, like I said before, I can't take back what I did. No matter how much I wish I could. Maybe it does sound like a convenient time to say I'm ready to change, but all I could do is to say that it's true. I've messed up a lot of things in my life and I've got no excuses. But if it's in the jury's heart to give me the chance, I want to try to make some kind of amends for what I've done. I can't ever make up for my crime, but I can maybe do some good for myself and for others that'll balance the slat a little. That's what I'm hoping for.

Prosecutor: I have no further questions for this witness, your honor.

Judge: Thank you, Mr. Williams. Do you have any further witnesses, Mr. Davis?

Defense Attorney: No your honor, I do not.

Judge: Ladies and gentlemen of the jury, the defense has rested its case. And we have now concluded the presentation of evidence in the penalty phase of the trial. We will now hear closing arguments by the prosecutor and the defense attorney. After which, I will instruct you on the legal principles you are to use in deciding upon a sentence for the defendant. Mr. Williams, you may proceed.

Prosecutor: Ladies and gentlemen of the jury, you're getting close to the most difficult part of your role in this trial. The decision about what penalty is to be imposed on the defendant in this case, John Henry Smith. My job at this stage is not as hard as yours, but it's not easy either. Standing before you and requesting that a man be put to death is not an easy job, but it's even harder to decide to do it. Yet this is what I am asking you to do. For this is what the law and justice required. Justice is due for an innocent victim who was executed by the defendant in this case. Justice is also due to society. We've got to send a message to others that this kind of conduct is completely unacceptable. As a community, we've not only got to reaffirm that taking human lives is amoral and will not be tolerated, we've also got to continue to send a message to

killers like John Henry Smith that if they take a life in this kind of brutal fashion, their own lives will be forfeited. We owe it to all the innocent people in our society to do everything humanly possible to protect them from killers like John Henry Smith. Now let's be clear about what John Henry Smith did in this case. He robbed an innocent man at gunpoint, he tied Albert Havens to a tree, he then realized that the man knew his name, he calmly and coolly went to Albert Havens and put a gun to his head, and shot him dead. When you consider an appropriate sentence in this case, I urge you to keep clearly in mind exactly what the defendant did to an innocent man. That man could have been you or your husband, wife, or even your child. So, I come before you to ask that you impose the ultimate penalty upon John Henry Smith. I do so both in sorrow and in anger. The sorrow comes from having to come to the conclusion that a person has done so much harm, and is so dangerous, that nothing short of the death penalty will do justice and protect the rest of us. The anger is on behalf of his victim, an innocent man who was peacefully fishing before John Henry Smith came along, robbed him, and executed him in cold blood.

What is there to say about John Henry Smith? Here we have a man who has killed another. If he is not executed, what will happen next? Do any of you really doubt that he is a dangerous person? To me, this is the real key to the case. Can we as a society take the risk of letting a man like John Henry continue on with this life and ways? I just don't think we can. When you put together the considerations of what ought to matter in this case, what does John Henry Smith deserve as punishment for what he has done and what will best serve to protect us from him and others like him, I think there's only one penalty that fits the crime here. And that's a sentence of death. As I say, I don't recommend this with any gladness in my heart. My job is to represent the

interest of law-abiding citizens and my duty is clear. I believe that your duty is just as clear. I urge that you impose the penalty of death upon the defendant in this case. Thank you.

Judge: Mr. Davis, you may make your closing statement.

Defense Attorney: Thank you, your honor. Ladies and gentlemen, you do have a difficult and important job before you. Our system asks you to decide whether another person should live or die. In other words, to play God. Now this is an incredible responsibility, because once the death penalty is delivered, there is never an opportunity to take it back. My client did a terrible thing, and it is a thing that deserves to be punished with great harshness. But the question for you is whether that punishment should be death? Does it help him, or you, or anyone else in this society to take away John Henry Smith's life? My own answer is no. And I hope I can persuade you that it is the right one. For me though, it's a scary situation because so much depends on what I say to you right now. The prosecutor in his very eloquent way, he tells you that there are two crucial reasons why the defendant ought to be put to death. One, he deserves death for what he did. The other goes to the question of how dangerous the defendant might be in the future. And one of the best ways to deal with the level of danger he might present. Now let me talk about each of them separately. First, what does John Henry Smith deserve for killing Albert Havens? As I started out by saying, no one can defend what he did. Killing another human being is a terrible act that deserves severe punishment. But is taking John Henry Smith's life an act of justice? Does it bring the victim back? Well, clearly it does not. Does it do anything to help the family and friends of the victim? Again, I would submit that it does nothing more than satisfy their desire for

revenge. Now this is a natural instinct that they may feel, one that any of us might experience, but is satisfying this desire for revenge enough to justify taking the defendant's life? If we do that, we forsake all possibility of change and reform. Now granted, rehabilitation is difficult. But do we want to give up all possibility of it taking place? There's a finality to the death penalty that no other penalty involves. It is this finality that makes the penalty unjustified in a case like this one. What about the argument that we often take the defendant's life in order to protect us against his future behavior? Now what seems to be credible in thinking about this question in the same idea that I just talked about, finality. If John Henry Smith is put to death, well there's no question that we'll never have to worry about him hurting anyone again. But we will purchase this assurance at a very high price. The price of taking the life of this young man, albeit an imperfect, is taking a life nonetheless. We will forsake any chance that he might change and become a decent and productive citizen. How can we say with real confidence about what John Henry Smith will be like in the future? More importantly, think about it in terms of your own common sense and experience. If you based a judgment on a paper record, mind you never even talked to the person, do you think that it's possible, plausible, to make a confident prediction of what that person will do over the next forty years? Oh sure, you might have some hunches or some strong ideas, but do you think that you could say that you could be certain? I'll bring it even closer to home. Think about your own kids. You probably know them better than anyone else in the whole world. But could you even say about them that you're certain about what they will do for the rest of their lives? I'll bet you wouldn't be that confident. Life is a complex entity that cannot always ensure certainty. On the issue of what the future will bring, I think we've just got to be a little careful. No one can promise what it will bring, but best evidence suggests that John Henry Smith

is not likely to have one of these episodes again. Now remember, if you don't recommend the death penalty, he's going to be locked up for a long time. And during this time, he's going to be getting treatment for his mental illness and whatever other problems he's got. So when you think about what punishment is appropriate in terms of protecting society from the defendant, I think that you'll find that the death penalty is not required in this case. Well, I've taken enough of your time. I see that you've followed all the evidence carefully and paid close attention to all our arguments. The decision is in your hands, and I only hope that you'll think about what is appropriate and necessary in this case, and what is reasonable and, and merciful. Imagine what it would be like if you were John Henry. Put yourself in his shoes. Try hard to put yourself in his place and really think hard about how you would be feeling in his situation. Try to reflect upon the way you would feel in these circumstances. In your mind's eye, perhaps you can visualize how it would feel for you to be John Henry in this situation. How would you feel? What would you be thinking? How are you thinking and feeling right now, as John Henry? That being said, I urge you not to impose the death penalty on John Henry Smith. Thank you.

Judge: Members of the jury, the evidence and arguments in this case have been completed. I will now instruct you as to the law. Number one, the law that applies to the case is stated in these instructions and it is your duty to follow all of them. You must now single out certain instructions and disregard others. Neither sympathy nor prejudice should influence you. The evidence which you should consider consists only of the testimony of the witnesses which the court has received. You should consider all the evidence in the light of your own observations and experience in life. Neither by these instructions nor by ruling or remark which I have made, so I mean to indicate

any opinion as to the facts or as to what your verdict should be. Faithful performance by you of your duties as jurors is vital to the administration of justice. The defendant in this case has been found guilty of the offense of murder. Now according to the law of the state, the defendant in this case will be put to death or in prison. Only you can determine that the death penalty shall be imposed by this court. If you do not do so, the court will sentence the defendant to a term of imprisonment. The defendant will be sentenced to death if you find beyond a reasonable doubt that one or more statutory aggravating factors exist, and that no mitigating factor or factors exist sufficient to preclude the death penalty. Number two, first let me describe the statutory aggravating factors. Before the defendant can be sentenced to death, you must find the reasonable doubt that the murdered individual was killed in the course of another felony, and A) the murdered individual was actually killed by the defendant and not by another party to the crime, or simply as a consequence to the crime. And B) the defendant killed the murdered individual intentionally or with the knowledge that the acts which cause the death created a strong probability of death or great bodily harm to the murdered individual. And C) the other felony was one of the following: armed robbery or robbery. Aggravating factors are those facts or circumstances which provide reasons for imposing the death penalty. Aggravating factors include, but need not be limited to, the required statutory aggravating factors regarding which you're instructed in instruction number two. Mitigating factors are any facts or circumstances that provide reasons for imposing a sentence less than the death penalty. Mitigating factors may include that 1) the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance, although not such as to constitute a defense to prosecution, or 2) the murdered individual was a participant in the defendant's homicidal conduct

or consented to the homicidal act, or 3) the defendant may be rehabilitated or restored to useful citizenship, or 4) any other facts or circumstances that provide reasons for imposing less than the death penalty. If you determine that there is no mitigating factor or factors sufficient to keep the death sentence from being imposed, check that box on the verdict form which states that there is no mitigating factor or factors sufficient to conclude the imposition of the death sentence on the defendant. If you check this box, the court must sentence the defendant to death. If you determine that there is a mitigating factor or factors sufficient to conclude the imposition of the death sentence, check that box on the verdict form indicating this decision. If you check this box, the court must sentence the defendant to imprisonment. Ladies and gentlemen, I now ask you to retire and consider all of the evidence and the instructions which I have read for you, which govern the law, and please come to a verdict. Thank you.

Appendix F

Demographics Questionnaire

Age: _____

Gender: _____

Religion:

- 1) Christian
- 2) Jewish
- 3) Muslim
- 4) Hindu
- 5) Buddhist
- 6) Atheist
- 7) Other: _____
- 8) Prefer not to answer

Race/Ethnicity:

- 1) White
- 2) Black
- 3) Hispanic/Latinx
- 4) Asian
- 4) East Indian
- 5) Arabic
- 6) Other: _____
- 7) Prefer not to answer

Education:

- 1) Freshman
- 2) Sophomore
- 3) Junior
- 4) Senior
- 5) Prefer not to answer

Have you been previously convicted of any crime?

- 1) Yes
- 2) No
- 3) Prefer not to answer

Have you been exposed to or have personally experienced mental illness, brain damage, and/or sexual abuse?

- 1) Yes
- 2) No
- 3) Prefer not to answer

What do you think was the race/ethnicity of the defendant?

- 1) White
- 2) Black
- 3) Hispanic/Latinx
- 4) Asian
- 4) East Indian
- 5) Arabic

6) Other: _____