Jury Instructions Regarding Deadlock in Capital Sentencing

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NOTE

JURY INSTRUCTIONS REGARDING DEADLOCK IN CAPITAL SENTENCING

I. INTRODUCTION

Minutes and hours pass by, and still no verdict, as twelve individuals sit around the dark wood table staring intently at the one man holding out. Why will he not just agree? Everyone is anxious to get home. It has been six long, grueling weeks of listening in silence. Finally, the end is in sight, if only this one man can be convinced to sentence the defendant to death. The judge requested a unanimous decision, but this man will not budge. What will happen if all twelve cannot reach a unanimous decision? The judge has refused to answer this question. In response to the jury’s inquiry, the judge merely stated that the jury should not be concerned with a non-unanimous result. The judge insists that the jury is only responsible for reaching a unanimous decision and, if it cannot accomplish this, the court will be forced to take over.

The juror holding out struggles with the judge’s response:

What does this mean? Will this man go free? I do not want to be the one responsible for his death, but he did rape and murder that poor, helpless woman. What if the court gives him life with the possibility of parole in a few years? Or, what if they let another jury decide and he gets acquitted? He might murder again. I could not live with that on my conscience. I just wish I knew what the outcome would be if we cannot reach a unanimous decision. Well, I guess I will have to agree with the majority and vote for his death. At least this way I know he will not be let out on the streets ever again.

These are common thoughts that pass through the minds of jurors responsible for sentencing capital defendants. Questions regarding the jury’s inability to reach a unanimous decision are often asked of judges and similar uninformative responses are generally given. Is ignoring juror concerns the proper method for handling jury inquiries about the
result of juror non-unanimity in capital sentencing? Or should courts inform capital juries up-front of the consequences of their failure to reach a unanimous verdict?

On June 21, 1999, in *Jones v. United States,* the Supreme Court, in a five-to-four decision, held that the Eighth Amendment of the United States Constitution does not require a jury to be instructed as to the consequences of its failure to reach a unanimous decision in a capital case. This Note explains why such an instruction should be required under the Federal Death Penalty Act of 1994 ("FDPA"), not only to protect the defendant's Eighth Amendment right, but to safeguard the government's interest in maintaining accurate and guided decision-making in capital sentencing procedures. Jury instructions regarding the consequences of deadlock in a capital case are imperative in order to accurately and explicitly direct the jury and to ensure a reliable sentencing decision.

Part II of this Note provides the history and development of both federal and state death penalty legislation, with special attention to the FDPA. This Part sets forth the jury's role in capital sentencing, including jury discretion, and discusses the requirement of juror unanimity in capital sentencing. Part III summarizes the majority's opinion, as well as the dissenting opinion, in the Supreme Court's decision in *Jones.* It analyzes the issue of capital jury instructions in regard to the consequences of deadlock by examining prior Supreme Court precedent in the area of capital punishment. Lastly, Part III compares the issue of capital jury instructions on the consequences of deadlock with the similar issue of jury instructions on the death sentence alternative, as was upheld by the Supreme Court in *Simmons v. South Carolina.* Part IV analyzes the issue of capital jury instructions by implementing studies and statistics from the Capital Jury Project. Part V applies the Supreme Court's rule of accuracy, extracted from its decision

2. See id. at 381.
4. See infra notes 13-98 and accompanying text.
5. See infra notes 99-197 and accompanying text.
7. See infra notes 153-97 and accompanying text.
9. See infra notes 198-210 and accompanying text.
in *California v. Ramos*,\(^\text{10}\) to the *Jones* case.\(^\text{11}\) It demonstrates how the dissent, rather than the majority in *Jones*, favors providing the jury with accurate information. Further, Part V compares the distinct death penalty legislation in New York State with other state and federal death penalty legislation.\(^\text{12}\) Part VI concludes by recommending a jury instruction on the consequences of jury deadlock, prior to deliberations in capital sentencing. This conclusion, based on the *Jones* case, demonstrates how Supreme Court precedent in the area of accuracy and guided discretion in capital sentencing supports the dissent, rather than the majority decision, in *Jones*.

II. HISTORY OF THE DEATH PENALTY

A. Furman's Effect on Death Penalty Legislation

1. *Furman v. Georgia*

   The Eighth Amendment prohibits "cruel and unusual" punishment.\(^\text{13}\) In 1972, the Supreme Court, in the landmark case, *Furman v. Georgia*,\(^\text{14}\) recognized that the penalty of death is different in kind from any other punishment imposed under our criminal justice system.\(^\text{15}\) Because of the unique nature of the death penalty, *Furman* held that capital defendants must be protected from "arbitrary and capricious" sentencing under the Eighth Amendment of the Constitution, thus declaring fully discretionary death penalty statutes unconstitutional.\(^\text{16}\) *Furman* set the standard that a punishment is "cruel and unusual" if it is too severe for the crime, if it is arbitrary, if it offends society's sense of justice, or if it is not more effective than a less severe penalty.\(^\text{17}\)

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11. See infra notes 213-17 and accompanying text.
12. See infra notes 218-36 and accompanying text.
13. The Eighth Amendment of the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. It is applicable to the states through the Fourteenth Amendment. See *Furman v. Georgia*, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).
15. See *Furman*, 408 U.S. at 239-40. There were also five separate concurring opinions.
17. See *Furman*, 408 U.S. at 271, 274, 277, 279 (Brennan, J., concurring).
Prior to Furman, the death penalty was authorized in forty-one states and the District of Columbia, as well as in federal cases. Although there was no national death penalty policy, the Eighth Amendment's protection against "cruel and unusual" punishment extended to the sentencing procedures applied by federal and state laws in capital cases. Federal death penalty legislation, and the legislation of all but two states, had the same open capital sentencing discretion found in the statute at issue in Furman. However, the Supreme Court's decision in Furman effectively voided state and federal death penalty statutes and suspended the implementation of the death penalty.

2. Post-Furman Death Penalty Legislation

Determining whether sentencing procedures are violative of the Eighth Amendment is a recurring issue faced by state and federal courts alike. Since Furman, the Supreme Court has focused on procedural safeguards to avoid arbitrary application of the death penalty and to further guide the jury during sentencing.

In response to Furman, the legislatures of at least thirty-five states enacted new death penalty statutes to remedy the arbitrariness that existed in the pre-Furman capital punishment statutes. States took two different approaches in enacting this new legislation. Twenty-two states imposed mandated death penalty sentencing statutes that eliminated jury sentencing and made death the required punishment for specific forms of murder. The remaining states with death penalty legislation adopted "guided discretion" capital statutes that required a weighing of specific mitigating and aggravating factors in order to control and direct jury sentencing. In both Woodson v. North Carolina and Roberts v. Louisiana, the Supreme Court held that mandatory death penalty statutes are not violative of the Eighth Amendment as long as they make the jury's discretion sufficiently constrained and directed.
sentencing violates the Eighth Amendment. The Woodson court held that mandatory death sentencing does not permit an individualized determination,27 while the Roberts court held that mandatory death sentencing does not provide any standards with which to guide the jury.25 In these post-Furman cases, the Supreme Court essentially held that the death penalty was constitutional if the applicable procedures minimized arbitrariness, and the sentencer made an individualized inquiry.26 Further, in another post-Furman case, Gregg v. Georgia,27 the Supreme Court held: "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Consequently, the guided discretion statutes adopted by a number of states survived an Eighth Amendment analysis.28

Today, thirty-eight states have death penalty statutes, while twelve states, and the District of Columbia, remain without capital punishment.29 Twenty-one of the death penalty states utilize some type of balancing statute that directs jurors to consider aggravating and mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.” Roberts, 428 U.S. at 333-34.

27. Because “death is a punishment different” in kind from lesser punishments, the Eighth Amendment requires “individualiz[ed] sentencing determinations,” and thus prohibits a death sentence fixed by law. Woodson, 428 U.S. at 303-05. “[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” Id. at 304.

28. The sentencer must be given a “meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.” Roberts, 428 U.S. at 333-34.


31. Id. at 189.

32. See id. at 196-207 (upholding a Georgia statute requiring the jury to find at least one statutory aggravating factor before imposing the penalty of death); Jurek, 428 U.S. at 263-76 (upholding a Texas statute requiring that the jury consider five categories of aggravating factors and circumstances, along with mitigating factors); Proffitt, 428 U.S. at 250-60 (upholding as constitutional a statutory requirement of state supreme court review).

mitigating circumstances. A few states, however, have adopted statutes that provide the trial judge, rather than the jury, with capital sentencing authority. The Supreme Court has held that these judge-sentencing statutes are constitutional. Furthermore, the Court has continuously upheld the states’ different capital punishment structures as constitutional, so long as they provide for “guided discretion.”

B. Federal Death Penalty Legislation

Although the United States Constitution does not specifically mention the death penalty, federal death penalty legislation has been enforced since 1790. Congress’ early enactments provided mandatory federal death penalty sentences for a number of specific federal offenses. In 1897, pursuant to Congress’ bill entitled, “An Act To reduce the cases in which the penalty of death may be inflicted,” mandatory federal death penalties were eliminated and became completely discretionary. This statute abolished the death penalty for all but five federal statutory sections, substituting a sentence of life imprisonment at hard labor for many previously capital offenses. Although the United States Code was revised twice, in 1909 and 1948, the discretionary “without capital punishment” option remained intact for murder. Between 1927 and 1963, the United States executed only thirty-four individuals pursuant to federal death penalty legislation. In

34. See Bowers & Steiner, supra note 23, at 618 & n.49.
38. See Act of Apr. 30, 1790, ch. 9, § 33, 1 Stat. 119, 119 (1790) (providing for capital punishment of certain crimes against the United States).
39. See id.
40. See Act of Jan. 15, 1897, ch. 29, § 1, 29 Stat. 487, 487 (1897) (providing for a reduction in the cases in which the death penalty may be inflicted). The Act expressly authorized the jury in any federal murder or rape case that remained death-eligible to qualify its verdict of conviction by adding the words “without capital punishment” in which case a life imprisonment sentence had to be imposed. See id.
41. See id. at § 3.
42. See Little, supra note 37, at 369 & n.108. “[T]he 1909 revision ... subdivided federal murder into first and second-degrees, and limited the death penalty to only first-degree murder convictions.” Id. (discussing Act of Mar. 4, 1909, ch. 321, §§ 273, 275, 35 Stat. 1143 (1909)).
43. See Death Penalty Information Center, Federal Death Penalty, at http://www.deathpenaltyinfo.org/feddp.html (last updated Feb. 7, 2001). State executions were occurring more frequently. Over 3,700 state executions were carried out between 1930 and 1967. See Little, supra note 37, at 370 n.113.
1948, the Supreme Court ruled that the jury's verdict must be unanimous for death to be imposed under the 1897 federal statute and in 1963, the last federal execution occurred.

The absolute and unguided discretion of both federal and state capital juries ended with the Supreme Court's Furman decision in 1972. Following Furman, Congress failed to enact revised procedural, federal death penalty legislation. The older federal statutes suffered from the same infirmities as the state capital sentencing statutes. In addition to the still-existing pre-Furman death penalty provisions, between 1972 and 1988 Congress enacted three new federal death penalty provisions. However, since no federal statutory procedures existed in response to Furman, neither the pre-Furman nor post-Furman death penalty statutes were utilized because of concerns over the constitutionality of the old federal procedures.

Finally, in 1988, in response to the requirements imposed by the Supreme Court, Congress enacted constitutional death penalty procedures for certain violations of the Continuing Criminal Enterprise statute ("CCE"), which provided a model for future death penalty legislation. This federal death penalty legislation for drug-related murders was modeled after the Supreme Court approved post-Gregg statutes drafted by state legislators. The CCE death penalty procedures provide for a bifurcated guilty/penalty proceeding and limit eligibility

44. See Andres v. United States, 333 U.S. 740, 749 (1948).
46. See Little, supra note 37, at 349. "[G]eneral federal death penalty procedure bills were repeatedly introduced, hearings were held, and congressional action was occasionally taken, but no legislation was enacted." Id. at 377.
48. These included death penalty provisions for air piracy, witness killing, and espionage. See Little, supra note 37, at 349 n.5.
49. See id.
50. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 7701, 102 Stat. 4181, 4387-95, (codified at 21 U.S.C. § 848 (e)-(r) (1994 & Supp. IV 1999)). The CCE legislation was limited to a single offense which requires proof of many elements, including a "continuing series of violations" of federal narcotics laws, committed by the defendant "in concert with five or more other persons," with whom the defendant "occupies a position of ... management," and from which the defendant obtains "substantial income or resources." 21 U.S.C. § 848(e) (1994).
51. See Little, supra note 37, at 381. Although this statute is complicated and therefore infrequently used, its procedures "provided a template for future death penalty legislation." Id.
for the death penalty to offenders who "intentionally kill[] or ... cause[] [an] intentional killing."\textsuperscript{54} Additionally, they narrow the class of eligible offenders to those against whom some additional "aggravating" factor is unanimously found,\textsuperscript{55} require the jury to consider "mitigating" factors,\textsuperscript{56} permit non-unanimous consideration of such mitigating factors,\textsuperscript{57} and make it express that "regardless of ... findings with respect to aggravating and mitigating factors," the jury "is never required to impose a death sentence."\textsuperscript{58} Furthermore, they direct that a death sentence "shall not be carried out upon" the mentally retarded, the insane, or persons who were under eighteen when the crime was committed.\textsuperscript{59}

The CCE procedures were first upheld in the 1993 case \textit{United States v. Chandler,}\textsuperscript{60} where the jury unanimously recommended death.\textsuperscript{61} Since 1994, the CCE procedures have continuously survived constitutional challenges,\textsuperscript{62} and have inevitably led to the development of the FDPA.\textsuperscript{63}

\section*{C. The Federal Death Penalty Act of 1994}

Congress first enacted generalized federal death penalty procedures in the FDPA.\textsuperscript{64} These procedures are similar to those enacted in the 1988 CCE, but extend to over forty federal offenses.\textsuperscript{65} The FDPA states that its procedures apply to "any [federal] offense for which a sentence of death is provided."\textsuperscript{66} Congress, however, is not the leader in enacting death penalty legislation. The requirements for guiding jury discretion under the current FDPA follow well-established state law trends.\textsuperscript{67} Similar to many

\begin{flushleft}
\textsuperscript{54.} Id. § 848(e)(1)(A).
\textsuperscript{55.} See id. § 848(k).
\textsuperscript{56.} See id. § 848(m).
\textsuperscript{57.} See id. § 848(k).
\textsuperscript{58.} Id.
\textsuperscript{59.} See id. § 848(l).
\textsuperscript{60.} 996 F.2d 1073 (11th Cir. 1993).
\textsuperscript{61.} See id. at 1079-80.
\textsuperscript{62.} See United States v. Tipton, 90 F.3d 861, 895-901 (4th Cir. 1996); United States v. McCullah, 76 F.3d 1087, 1106-11 (10th Cir. 1996); United States v. Flores, 63 F.3d 1342, 1369-76 (5th Cir. 1995); United States v. Walker, 910 F. Supp. 837, 844-58 (N.D.N.Y. 1995).
\textsuperscript{63.} See Little, \textit{supra} note 37, at 385-88.
\textsuperscript{65.} See Little, \textit{supra} note 37, at 349-50, 392. In 1996, Congress added four more death eligible offenses. \textit{See id.} at 350.
\textsuperscript{66.} 18 U.S.C. § 3591(a)(2).
\textsuperscript{67.} See Little, \textit{supra} note 37, at 495 n.673.
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state capital sentencing statutes, the FDPA requires a separate, “bifurcated” sentencing hearing, after a guilty verdict has been returned on a death-eligible offense.68 The sentencing hearing usually occurs before the same jury, or judge, that determined the guilt of the defendant.69 As in any criminal case, the jury’s sentencing decision must be unanimous; therefore, a single juror can prevent a sentence of death.70 There is no “judge-override” procedure in federal capital sentencing.71 Consequently, if the jury reaches a verdict of death, this decision is binding and the judge must enforce it.72 However, if the jury fails to reach a unanimous decision, the judge is required to impose “any lesser sentence that is authorized by law.”73 For example, “if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.”74

The FDPA provides sentencing guidelines to aid the jury in the deliberation process. Capital sentencing juries have three basic determinations to make: (1) whether the defendant acted with the requisite mens rea, making him death-eligible;75 and, if so, (2) whether other aggravating and mitigating factors are present;76 and, if so, (3) whether a sentence of death is “justified.”77 If one of the requisite mental states is found, the jury must consider evidence of aggravating and mitigating factors.78 Aggravating factors must be proven by the government beyond a reasonable doubt and must be unanimously agreed upon by the jury.79 On the contrary, mitigating factors need to be proven by the defendant only by a preponderance of the evidence, and may be found by any member of the jury individually, “regardless of the number of jurors who concur.”80 Moreover, while “[t]he defendant may present

68. See 18 U.S.C. § 3593(b).
69. See id. § 3593(b)(1).
70. See id. § 3593(a).
71. If the jury properly recommends death, “the court shall sentence the defendant accordingly,” and if the jury does not recommend death, the sentencing judge may not override the verdict. Id. § 3594.
72. See Little, supra note 37, at 399.
73. 18 U.S.C. § 3594.
74. Id.
75. Except for the three non-homicidal provisions (super drug kingpin, espionage, and treason), if one of the requisite homicidal mens rea standards is not found, then the defendant is not eligible for death. See 18 U.S.C. § 3591(a)(2).
76. If no aggravating factor is proven, then “the court shall impose a sentence other than death.” See 18 U.S.C. § 3593(d).
77. Id. § 3591(a)(2).
78. See id.
79. See id. § 3593(c), (d).
80. Id. § 3593(d).
any information relevant to a mitigating factor,” the government, without advance notice, is prohibited from introducing additional evidence regarding aggravating factors. This demonstrates that the federal death penalty procedures are somewhat tilted in the defendant’s favor.

Finally, once the requisite mental state is found and the aggravating and mitigating factors are considered, the jury must weigh all of the information and determine if a death sentence is “justified.” If at least one statutory aggravating factor is proven, the FDPA requires the jury to determine whether all the aggravating factors “sufficiently outweigh” the mitigating factors, “to justify a sentence of death.” This balancing process requires a qualitative, rather than a quantitative, analysis. Even if the jurors find that the aggravating factors “outweigh” any mitigating factors, they can decline to impose death unless they conclude that the greater weight of the aggravators is “sufficient to justify a sentence of death.” Further, the decision to impose death must be unanimous and the court is required to impose this sentence if properly recommended by the jury.

Other than the procedures mentioned above, the FDPA provides no further guidance as to how jury members are to determine whether or not a death sentence is justified. However, federal capital juries are required to complete a special verdict form, rather than merely render a verdict of “death” or “no death.” The FDPA requires the jury to “return special findings identifying any aggravating factor” it unanimously finds to exist in the case. These written jury findings provide clear evidence of the jury’s deliberation.

Through the enactment of the FDPA, Congress attempted to establish a general sentencing policy that provided for consistency in the implementation of the death penalty in all federal cases in the United

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81. Id. § 3593(c).
82. See Little, supra note 37, at 395.
84. 18 U.S.C. § 3593(e). Although non-statutory aggravating factors are considered, a statutory aggravating factor must exist in order to impose a sentence of death. See id.; Little, supra note 37, at 397 n.272.
85. See Little, supra note 37, at 397.
86. 18 U.S.C. § 3593(e).
87. See 18 U.S.C. §§ 3593(e), 3594.
88. See Little, supra note 37, at 397.
89. See 18 U.S.C. § 3593(d).
90. See id.
91. See Little, supra note 37, at 396 & n.270.
States. Congress has set a general federal sentencing policy to attempt to eliminate "unwarranted sentencing disparities" among similarly situated federal defendants. However, because of competing state interests, such national uniformity in the administration of the state death penalty does not exist. The thirty-eight states that authorize capital punishment implement the death penalty through their own state legislative procedures, including the method of execution. In recognizing that a federal death penalty conviction is possible in all fifty states, the federal statute authorizes state courts that do not recognize the death penalty to designate a state that does recognize capital punishment to carry out the federal death sentence.

Currently, there are twenty-four inmates on federal death row: four were sentenced under the 1988 Anti-Drug Abuse Act and twenty were sentenced under the FDPA. The first attempt to interpret the FDPA was in the recent case, Jones v. United States.

III. Jones v. United States

A. Background

1. Majority Opinion

In Jones v. United States, the petitioner was charged with violating 18 U.S.C. § 1201(a)(2) by committing a kidnapping that resulted in the victim's death. Seeking the death penalty option under 18 U.S.C.
§ 3591, the government tried the defendant in the Northern District of Texas, where the jury found him guilty. In a separate sentencing hearing pursuant to 18 U.S.C. § 3593, a unanimous jury returned a verdict of death under the FDPA. The district court imposed this death sentence on the defendant in accordance with the jury’s recommendation pursuant to § 3594.

Under § 3594 of the FDPA, the judge is required to sentence the defendant to life imprisonment without the possibility of parole if the jury is unable to reach a unanimous decision. In Jones, the petitioner’s request for a jury instruction regarding the judge’s role in the event of jury deadlock was denied. On appeal, the petitioner argued that the district court’s failure to instruct the jury as to the consequences of deadlock violated the Eighth Amendment. Petitioner argued that the jury believed that if it could not reach a unanimous decision, petitioner would receive a court-imposed sentence less than life imprisonment.

100. See id.
101. See id. at 376-79.
102. See id. at 379.

Upon a recommendation under section 3593(e) that the defendant should be sentenced to death or life imprisonment without possibility of release, the court shall sentence the defendant accordingly. Otherwise, the court shall impose any lesser sentence that is authorized by law. Notwithstanding any other law, if the maximum term of imprisonment for the offense is life imprisonment, the court may impose a sentence of life imprisonment without possibility of release.

104. See Jones, 527 U.S. at 379-82. The defendant had requested the following instruction: “In the event, after due deliberation and reflection, the jury is unable to agree on a unanimous decision as to the sentence to be imposed, you should so advise me and I will impose a sentence of life imprisonment without possibility of release . . . .

“In the event you are unable to agree on [a sentence of] Life Without Possibility of Release or Death, but you are unanimous that the sentence should not be less than Life Without Possibility of Release, you should report that vote to the Court and the Court will sentence the defendant to Life Without the Possibility of Release.”

105. See id. at 379 (quoting app. 14-15) (alteration in original).
106. See id. at 380.

108. See id. at 384. The instruction given to the jury provided:

“If you recommend the imposition of a death sentence, the court is required to impose that sentence. If you recommend a sentence of life without the possibility of release, the court is required to impose that sentence. If you recommend that some other lesser sentence be imposed, the court is required to impose a sentence that is authorized by the law. In deciding what recommendation to make, you are not to be concerned with the question of what sentence the defendant might receive in the event you determine not to recommend a death sentence or a sentence of life without the possibility of release. That is a matter for the court to decide in the event you conclude that a sentence of death or life without the possibility of release should not be recommended.”

109. See id. at 385 (quoting app. 43-44).
The petitioner's Eighth Amendment claim was based on the contention that the jury is entitled to accurate sentencing information. Therefore, the petitioner claimed that the proposed jury instruction was necessary in order to correct the jury's erroneous belief that the Court may impose a sentence less than life imprisonment in the event of jury deadlock.

Rejecting the petitioner's claim, the United States Court of Appeals for the Fifth Circuit held that the petitioner's requested instruction was substantively incorrect and therefore, affirmed the District Court's death sentence. Since the FDPA had never before been applied, the Fifth Circuit was faced with the initial task of interpreting the federal statute's procedures. Title 18 of the United States Code, which provides that a new jury shall be impaneled for a new sentencing hearing if the jury for the guilt phase is discharged for "good cause," was interpreted by the Fifth Circuit as a requirement that the district court impanel a second jury and hold a second sentencing hearing in the event of jury deadlock. Therefore, the Fifth Circuit held that the district court did not err in refusing the petitioner's requested instruction because it was not substantively correct. Further, the court observed that "[a]lthough the use of instructions to inform the jury of the consequences of a hung jury have been affirmed, federal courts have never been affirmatively required to give such instructions."

In granting certiorari, the Supreme Court first addressed the Fifth Circuit's interpretation of the FDPA. The Supreme Court, in both the majority and the dissenting opinions, recognized that § 3593(b)(2)(c) encompasses events such as juror disqualification, but is not expansive enough to apply to a jury's failure to reach a unanimous decision. Rather, the Court recognized that § 3594 requires the Court to impose the sentence whenever the jury fails to reach a unanimous decision. Nevertheless, the majority agreed with the District Court's decision and

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107. See id. at 384.
108. See id. at 387.
110. See Jones, 527 U.S. at 405, 412 (Ginsburg, J., dissenting).
111. See Jones, 132 F.3d at 243.
112. See id. at 242. Petitioner's proposed instruction stated that the court would impose a sentence of life imprisonment in the event that the jury could not reach a unanimous decision. See id.
113. Id. at 245.
114. See Jones, 527 U.S. at 380.
115. Both the majority and dissent agreed that the petitioner, rather than the Fifth Circuit, had properly interpreted § 3594. See id. at 380-81; id. at 417-18 (Ginsburg, J., dissenting).
116. See id. at 418 (Ginsburg, J., dissenting).
held that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree."  

After reviewing the instructions in the context of the entire charge, the Court held that they were not ambiguous and, therefore, the petitioner's contention that the jury had an erroneous impression failed. Further, the Supreme Court held that the Eighth Amendment's requirement that a sentence of death not be "arbitrarily" imposed does not require a court to instruct a jury as to the consequences of deadlock. Interestingly enough, the Court noted that "failure to instruct the jury as to the consequences of deadlock could give rise to an Eighth Amendment problem of a different sort," and "that a 'jury cannot be affirmatively misled regarding its role in the sentencing process." However, the Court then retreated to its holding and reasoned that the petitioner's proposed instruction had no bearing on the jury's role in the sentencing process.  

Holding that the Eighth Amendment does not require a jury instruction as to the consequences of a breakdown in the deliberative process, the Court provided that "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." Further, the Court "recognized that in a capital sentencing proceeding, the Government has 'a strong interest in having the jury express the conscience of the community on the ultimate question of life or death.'" Therefore, the Jones Court concluded that a charge to the jury on the consequences of deadlock might effectively "undermin[e] this strong governmental interest." The Court also recognized that the appellate courts have uniformly rejected the argument that the Constitution requires an instruction as to the consequences of jury deadlock and further interpreted Congress' silence in this area as a denial that such an instruction be given. In conclusion, the Supreme Court, in a five-to-four decision, "decline[d] to

117. Id. at 381.
118. See id. at 391.
119. See id. at 381.
120. Id.
121. Id. at 381-82 (quoting Romano v. Oklahoma, 512 U.S. 1, 9 (1994)).
122. See id. at 381.
123. Id. at 382 (quoting Allen v. United States, 164 U.S. 492, 501 (1896)).
124. Id. (quoting Lowenfield v. Phelps, 484 U.S. 231, 238 (1988)).
125. Id.
126. See, e.g., Coe v. Bell, 161 F.3d 320, 339-40 (6th Cir. 1998); Green v. French, 143 F.3d 865, 890 (4th Cir. 1998); United States v. Chandler, 996 F.2d 1073, 1089 (11th Cir. 1993); Evans v. Thompson, 881 F.2d 117, 123-24 (4th Cir. 1989).
127. See Jones, 527 U.S. at 383.
exercise [its] supervisory powers to require that [such] an instruction . . . be given in every capital case.”

2. Dissenting Opinion

Writing for the dissent, Justice Ginsburg recognized the confusion caused by the instructions actually given to the jury. These instructions stated that “the jury must be unanimous to ‘bring back a verdict recommending the punishment of death or life without the possibility of release,’” and “that, absent juror unanimity, some ‘lesser sentence’ might be imposed by the court.” The dissenting opinion, in which Justice Ginsburg was joined by Justice Souter, Justice Stevens, and in part by Justice Breyer, agreed with the petitioner’s claim that the proposed instruction would have clarified existing jury confusion. The dissent recognized that there was “a reasonable likelihood that the flawed charge tainted the jury deliberations.” It reasoned that “a jury [might] be swayed toward death if it believes [that] the defendant otherwise may serve less than life in prison.” Further, the dissent recognized that the post-sentencing statements submitted by the jury demonstrate the confusion caused by the jury charge, and although they constitute inadmissible evidence, prove the validity of the petitioner’s claim.

Although the Fifth Circuit argued that such a misunderstanding could have caused the jury to go the other way and impose a life sentence, the dissent demurred, noting that the instructions confused the jury and the outcome in this case resulted in a death sentence. The dissent reasoned that the instructions “introduce[d] a level of uncertainty and unreliability into the fact-finding process that cannot be tolerated in a capital case.” Although the dissent declined to dispute the majority’s opinion that the Eighth Amendment does not require the jury to be instructed as to the consequences of its failure to agree, it did state that the court was obliged to make it clear to the jury that the petitioner’s minimum sentence was life without the possibility of

128. Id.
129. See id. at 417 (Ginsburg, J., dissenting).
130. Id. at 415 (Ginsburg, J., dissenting) (quoting app. at 45).
131. Id. (Ginsburg, J., dissenting).
132. See id. at 415 n.15, 415-16 (Ginsburg, J., dissenting).
133. Id. at 416 (Ginsburg, J., dissenting).
134. Id.
135. See id. at 416 n.19 (Ginsburg, J., dissenting).
136. See id. at 417 (Ginsburg, J., dissenting).
137. Id. (alteration in original) (quoting Beck v. Alabama, 447 U.S. 625, 643 (1980)).
Further, Justice Breyer, among the dissent, proposed that the district court's failure to submit the petitioner's proposed instruction regarding jury deadlock amounted to an "abuse of discretion." Justice Breyer recognized that the "proposed instruction was legally correct . . . and it would have corrected [any] false impression created by the remaining instructions."

B. Analysis of Jones v. United States

1. Gregg's Requirement of Jury "Guidance"

The issue of how jurors should make the life or death choice in sentencing capital defendants is one of great controversy. This two-sided issue deals with the extent to which we can "trust jurors to understand and apply the law correctly" and the extent to which the jurors must "be explicitly directed in their decision-making."

Since the 1976 decision in Gregg v. Georgia, wherein the Supreme Court held that accurate sentencing information is indispensable to jury decision-making, the issue of "guided discretion" has been raised before the Court a number of times. In Gregg, the Court recognized that jury members who "have had little, if any, previous experience in sentencing, . . . are unlikely to be skilled in dealing with the information they are given." The Court advised this problem would be alleviated if the jury were given guidance. "We

138. See id. at 417 n.20 (Ginsburg, J., dissenting).
139. See id. at 415 n.15 (Ginsburg, J., dissenting).
140. Id.
141. Bowers & Steiner, supra note 23, at 608.
143. Justice Stewart reasoned, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189.
144. See California v. Brown, 479 U.S. 538, 541 (1987) ("The Constitution . . . requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (directing that states "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death'").
145. Gregg, 428 U.S. at 192.
146. See id. Justice Stewart recognized that juries are given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. "When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Id. at 193.
think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.\textsuperscript{147}

This "guidance" requirement supports the petitioner's argument in Jones that the jury should be instructed on the consequences of its failure to agree during capital sentencing. In recognizing that juries are instructed on the law and how to apply it before deliberations begin,\textsuperscript{145} it logically follows that such an instruction should include the law, whether it be state or federal, concerning a jury's failure to reach unanimity. Therefore, because the FDPA authorizes the Court to impose a sentence of life imprisonment without the possibility of parole if the jury fails to reach a unanimous decision, the holding in Gregg supports the contention that the jury be instructed accordingly.

\section*{C. Parole—A Major Concern of Capital Juries}

There is national concern regarding the adequacy of jury instructions in capital cases. "The Court has only recently considered how jurors' failure to correctly understand the sentencing options from which they must choose may influence their punishment decisions."\textsuperscript{147} The issue of parole is often a critical concern of the jury in determining whether or not to impose death.\textsuperscript{150} Juries often choose a death sentence over life because they believe that life with the possibility of parole is an inadequate alternative.\textsuperscript{151}

This concern regarding the jury's knowledge of the alternative sentence to death has been addressed a number of times.\textsuperscript{152} However, this issue arises not only in choosing between sentencing alternatives, but also in the assumptions jurors make regarding jury deadlock. In capital punishment cases, most states require judge sentencing once a jury has

\begin{thebibliography}{152}
\bibitem{147} Id. at 204.
\bibitem{148} See id.
\bibitem{149} Bowers & Steiner, supra note 23, at 626.
\bibitem{150} See id. at 611. "[L]ife without parole," is a sentence of life in prison under which the convicted offender is statutorily barred from ever being eligible or considered for parole." Id. at 611 n.17. The issue of parole eligibility concerning the defendant's chances of returning to society in capital jury instructions has been left to state legislation until fairly recently. See id.
\bibitem{152} While some state courts have held that parole eligibility at the sentencing phase of death penalty cases should not be considered, at least thirteen states inform the jury that a capital murder conviction requires that a defendant will be eligible for parole. See Theodore Eisenberg & Martin T. Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 CORNELL L. REV. 1, 1 n.1 (1993).
\end{thebibliography}
deadlocked. In twenty-five of the twenty-nine states in which capital juries have final sentencing authority, . . . the jury’s inability to produce a unanimous penalty-phase verdict results in the [judge sentencing the defendant] to life imprisonment or life imprisonment without parole."

1. Simmons v. South Carolina

Faced with a similar issue in Simmons v. South Carolina, the Supreme Court held that when the defendant’s future dangerousness is at issue, a court’s failure to instruct the jury that life imprisonment excludes the possibility of parole violates the defendant’s right to due process. In Simmons, the Court reasoned that the jury could have reasonably believed that the defendant would have been released on parole if not executed. Therefore, the district court’s refusal to provide the jury with accurate information regarding the defendant’s parole ineligibility caused a misperception that pervaded jury deliberations and effectively caused the jury to make a “false choice” between death and a limited life sentence. As the Court held, “concealing from the sentencing jury the true meaning of its noncapital sentencing alternative” violates due process.

153. See, e.g., CAL. PENAL CODE § 190.4(b) (West 1999 & Supp. 2001). California law provides for a retrial in the event of a hung jury. See id. A few states have adopted capital statutes that give sentencing authority to the trial judge, rather than the jury. See, eg., ARIZ. REV. STAT. ANN. § 13-703(B) (West 1989); IDAHO CODE § 19-2515 (Michie 1997 & Supp. 2000).


156. See id. at 156. In the penalty phase of Simmons’ capital murder trial, the trial judge refused to give the defendant’s proposed instruction which would have informed the jury that under state law, if he were given a sentence of life imprisonment he would be ineligible for parole. See id. at 158, 160. During deliberations, the jury asked the court whether life imprisonment would permit the defendant to be eligible for parole. See id. at 160. In refusing to answer its request, the court instructed the jury not to consider parole in reaching its verdict and that “[t]he terms life imprisonment and death sentence [we]re to be understood in their plain [sic] and ordinary meaning.” Id. (quoting app. at 146).

157. See id. at 161. Justice Blackmun relied upon the findings of a statewide public opinion survey conducted by the Institute for Public Affairs of the University of South Carolina and offered as evidence by Simmons. More than [seventy-five percent] of those surveyed indicated that if they were called upon to make a capital sentencing decision as jurors, the amount of time the convicted murderer actually would have to spend in prison would be an “extremely important” or a “very important” factor in choosing between life and death.

Id. at 159.

158. See id. at 161-62.

159. Id. at 162.
The *Simmons* decision represents a critical recognition among a majority of the Supreme Court Justices: “[C]apital sentencing may be unreliable when jurors are not fully or adequately informed of the sentencing options.”\(^ {160} \) Similarly, by concealing from the sentencing jury the consequences of jury deadlock under the applicable state or federal law, the court diminishes the reliability of the jury’s decision. The Court’s analysis in *Simmons* supports the requirement that all information regarding a defendant’s parole eligibility be disclosed to the jury, including the court’s role in sentencing when jurors fail to reach a unanimous decision.

Further, Justice Souter’s and Justice Stevens’ concurring opinion in *Simmons* applies a less restrictive constitutional interpretation of a capital defendant’s right to have his jurors know what the death penalty alternative is.\(^ {163} \) “The Eighth Amendment entitles a defendant to a jury capable of a reasoned moral judgment about whether death, rather than some lesser sentence, ought to be imposed.”\(^ {162} \) In accordance with Eighth Amendment principles, the jury should be informed of its sentencing alternative, whether it is life without parole or some other sentence, regardless of the defendant’s future dangerousness.\(^ {163} \) “By... withholding from the jury the life-without-parole alternative, the trial court diminished the reliability of the jury’s decision.”\(^ {164} \) In order to avoid an arbitrarily imposed death sentence, Justice Souter reasoned that “whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning.”\(^ {165} \)

2. *Simmons* Applied to *Jones*

Applying *Simmons* to the *Jones* case supports the petitioner’s request for a jury instruction on the consequences of deadlock. The petitioner in *Jones* argued that jurors may vote for death rather than holding out, if they believe that the court, upon jury deadlock, will...

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162. *Id.* (Souter, J., concurring). The Eighth Amendment makes accurate sentencing information “an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die.” *Id.* (Souter, J., concurring) (quoting Gregg v. Georgia, 428 U.S. 153, 191 (1976) (plurality opinion)) “The [Eighth] Amendment imposes a heightened standard ‘for reliability in the determination that death is the appropriate punishment in a specific case.’” *Id.* (Souter, J., concurring) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion)).
163. *See id.* at 172 (Souter, J., concurring).
164. *Id.* at 174 (Souter, J., concurring).
165. *Id.* at 172 (Souter, J., concurring).
impose a sentence less than life imprisonment.\textsuperscript{166} In support of his position, the petitioner in \textit{Jones} relied on \textit{State v. Ramseur},\textsuperscript{167} where the New Jersey Supreme Court exercised its supervisory authority and required that the jury be informed of the sentencing consequences of jury deadlock.\textsuperscript{168} Pursuant to New Jersey's death penalty legislation at the time of \textit{Ramseur}, failure of the jury to reach a unanimous decision resulted in a life sentence of at least thirty years without parole.\textsuperscript{169} The New Jersey Supreme Court held that both the statute and the unique nature of a capital case require that the trial court inform the jury of the consequences of a non-unanimous decision.\textsuperscript{170} Failure to inform a capital sentencing jury about the consequences of non-unanimity in its sentencing recommendation renders a death sentence arbitrary and capricious, in violation of the Eighth Amendment.\textsuperscript{171} State courts have recognized that, where jury non-unanimity results in the imposition of a particular non-death sentence, the jury must be informed of that fact in order to avoid an arbitrary and capricious imposition of the death penalty based on speculation as to what the consequences of deadlock might be.\textsuperscript{172}

Nevertheless, in citing \textit{Justus v. Commonwealth},\textsuperscript{173} the \textit{Jones} Court chose to follow the Supreme Court of Virginia's decision which declined to require an instruction similar to that requested by petitioner Jones.\textsuperscript{174} The \textit{Justus} court reasoned that this was a procedural matter and should not be the subject of an instruction because it would be an open invitation for the jury to disagree and avoid its responsibility.\textsuperscript{175}

However, post verdict interviews conducted with members of the \textit{Jones} sentencing jury affirm the petitioner's contention that non-
unanimity is a factor that jurors consider during deliberations.\(^\text{176}\) According to these jury members, there was considerable pressure to prevent the defendant from receiving a sentence less than life without the possibility of release.\(^\text{177}\) Two jurors conceded that if the jury had been informed that the judge would have imposed a life sentence without the possibility of release, they would not have agreed to vote for a death sentence.\(^\text{178}\) Although the Court would not allow post-sentencing interviews with jury members to undermine the jury’s sentencing recommendation,\(^\text{179}\) these interviews support the position that because it is a subject of deliberations, capital juries should be instructed on the applicable law regarding the consequences of deadlock.

D. States Require Jury Instruction on Non-Unanimity

Similar to Ramseur, several other state courts have held that a trial court must instruct the jury on the consequences of a lack of unanimity during the sentencing phase of a capital case.\(^\text{180}\) The Delaware Supreme Court held that, because Delaware’s capital statute provides that the failure to reach a unanimous decision results in a life sentence, the jury must clearly and explicitly be instructed that it need not be unanimous for a life sentence to be imposed.\(^\text{181}\)

In State v. Williams,\(^\text{182}\) “[t]he trial judge did not inform the jury . . . that its inability unanimously to agree on a recommendation would require the court to impose a sentence of life imprisonment without . . . parole” pursuant to state law.\(^\text{183}\) The Supreme Court of Louisiana reasoned that failure to provide this instruction caused the jury to speculate as to what the outcome would be in the event of non-

\(^{176}\) Post-sentencing, juror Christie Beauregard contacted the defense on her own initiative and stated that “‘[d]uring deliberations, it was her impression that other jurors expressed an opinion that the result of a jury unable to reach a verdict between life without possibility of release and a death sentence would be that the court would impose a lesser sentence.’” Petitioner’s Brief at 12, Jones v. United States, 527 U.S. 373 (1999) (No. 97-9361) (quoting Joint App. at 66).

\(^{177}\) See id. at 12-13.

\(^{178}\) See id. at 13-14. Christie Beauregard and Cassandra Hastings, both jurors at Jones’ trial, believed that a hung jury would result in the eventual release of the defendant on parole. See id.

\(^{179}\) See Jones, 527 U.S. at 394 n.11.

\(^{180}\) See, e.g., Whalen v. State, 492 A.2d 552, 562 (Del. 1985); State v. Williams, 392 So. 2d 619, 633, 633-35 (La. 1980) (on rehearing); State v. Ramseur, 524 A.2d 188, 282-83 (N.J. 1987). However, other courts have held that a capital defendant is not entitled to an instruction informing the jury of the consequences of a lack of unanimity. See, e.g., United States v. Chandler, 996 F.2d 1073, 1089 (11th Cir. 1993); Evans v. Thompson, 881 F.2d 117, 123-24 (4th Cir. 1989).

\(^{181}\) See Whalen, 492 A.2d at 562.

\(^{182}\) 392 So. 2d 619 (La. 1980).

\(^{183}\) Id. at 634.
unanimity. Recognizing that individual jurors could rationally surmise that failure to agree might result in a new hearing or trial before another jury, the court reasoned that such a false impression could have swayed a juror to join the majority, rather than holding to his true belief. Consequently, the court held that "by allowing the jurors to remain ignorant of the true consequence of their failure to decide unanimously upon a recommendation, the trial court failed to suitably direct and limit the jury's discretion so as to minimize the risk of arbitrary and capricious action." Further, the United States Supreme Court has already approved such an instruction to capital juries on the consequences of deadlock. In *Lowenfield v. Phelps*, the Supreme Court upheld a Louisiana trial court's death sentence in which the jury was instructed that if it failed to reach a unanimous decision, the court would be required to sentence the defendant to life imprisonment without the possibility of parole or a suspended sentence. The Supreme Court upheld the charge recognizing that the instruction was not given to avoid the societal costs of retrial, but to correctly state the law and attempt to secure jury unanimity. In light of the state's interest in having capital sentencing juries "express the conscience of the community on the ultimate question of life or death," the Court upheld the instruction under both the Eighth and Fourteenth Amendments because it did not require the jury to reach a decision, but merely stated the appropriate law.

E. Simmons Resurfaces in Brown v. Texas

The Supreme Court was again faced with the *Simmons* issue in *Brown v. Texas*. The Texas death penalty statute at issue in *Brown* prohibits the judge from letting the jury know when the defendant will become eligible for parole if given a sentence of life imprisonment rather than death. Interestingly enough, Texas law requires that such an instruction be given in non-capital cases, thus recognizing the

184. *See id.*
185. *See id.*
186. *Id.* at 634-35.
188. *See id.* at 233-35. This instruction was reiterated to the jury in response to its note to the court indicating its difficulty in reaching a decision. *See id.* at 234-35.
189. *See id.* at 238.
190. *Id.* (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).
192. *See id.* at 942.
importance of jurors understanding their sentencing options. Brown sought to extend the Simmons rule, requiring juries to be informed of the death penalty alternative in all instances, not only when the alternative to death is life without parole. In Brown, the Supreme Court denied certiorari, leaving the issue open for further study by "other tribunals" before the Supreme Court would address it. However, Justice Stevens surmised that the Texas rule in capital cases "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose."

As discussed earlier, there is great similarity between the issue of jury instructions regarding the death sentence alternative, as addressed in Simmons and again in Brown, and the issue of jury instructions regarding the consequences of deadlock. Both issues are concerned with the effect parole eligibility will have on the jury's decision, whether it be between the alternatives of life imprisonment, or the sentence to be imposed by the court in the event of jury deadlock. In line with Justice Stevens' reasoning in Brown, to prohibit the jury from being told that a defendant will not be eligible for parole in the event that the jury cannot reach a unanimous decision tips the scale in favor of the death penalty.

Therefore, in order to maintain a fair and impartial jury, a capital jury must be accurately and fully informed of the consequences of deadlock.

193. See id.

194. See id. at 942. Justice Stevens joined by Justices Breyer, Ginsburg, and Souter, called for further study regarding whether the holding in Simmons should be extended to other types of state sentencing schemes. See id. at 943. Simmons held that capital jurors should be informed of the death penalty alternative, but only when the defendant was alleged to be dangerous and only when the alternative was a sentence of life without the possibility of release. See Simmons v. South Carolina, 512 U.S. 154, 163-64 (1993) (plurality opinion). However, in Brown, the jury found the defendant to be dangerous, but the alternative to the death penalty under Texas law was thirty-five years in prison before parole eligibility, rather than life without the possibility of parole as in Simmons. See Brown, 522 U.S. at 940-41.

195. See Brown, 522 U.S. at 943.

196. Id. at 942. Justice Stevens observed that "[p]oll data from various States supports the conclusion that full information would have an impact on jurors' decisionmaking." Id. at 941 n.2.

197. See People v. Harris, 677 N.Y.S.2d 659, 662 (Sup. Ct. 1998) ("Jurors favoring life without parole may relinquish their conscientiously held views and join the majority in voting to impose the death penalty to avoid the possibility of a potentially lighter sentence if they see as a real prospect defendant's eventual return to society."); cf. Ex parte Giles, 554 So. 2d 1059, 1093 (Ala. 1987) (stating that "the mere fact that the court instructs the jury to deliberate further, after what the jury characterizes as a 'deadlock' has occurred, impermissibly suggests the way the verdict should be returned"); Rush v. State, 491 A.2d 439, 453 (Del. 1985) (stating that "in a ... death penalty hearing, in which lack of unanimity per se results in a sentence of life imprisonment, [instructing a deadlocked jury to deliberate further is] is overly coercive"). But cf. People v. Owens, 727 N.Y.S.2d 275, 277 (Sup. Ct. 2001) (stating that "[i]t is as likely that those jurors who favor life without the possibility of parole will persuade death-prone jurors to change their vote to avoid a non-unanimous verdict").
IV. EMPIRICAL STUDIES

The Capital Jury Project ("CJP") is a multidisciplinary study of how capital jurors make life or death sentencing decisions. According to empirical studies conducted by the CJP, contrary to general assumptions, jurors do not disregard parole eligibility in their decision-making process. CJP studies have repeatedly found that jurors' concern over a defendant’s potential future dangerousness is paramount to their decision. It is how soon jurors erroneously think capital offenders will return to society that influences their sentencing decisions. Jurors who are not fully informed by the trial judge concerning the amount of time capital offenders that are not sentenced to the death penalty will actually spend in prison are usually mistaken about the reality of their state’s death penalty alternative. CJP data supports the contention “that people generally underestimate how long offenders actually spend in prison for their crimes." According to CJP studies, those jurors who are undecided about punishment before jury deliberations are most affected by what they believe the alternative sentence will be. The sooner they think the defendant will get out of prison, the more likely they are to vote for death.

198. See Bowers & Steiner, supra note 23, at 643. “The CJP is organized as a consortium of university-based investigators,” including criminologists, social psychologists, and law faculty members, specializing in the analysis of data collected from jurors who have actually sat in capital cases in their respective states. See id. at 643 n.185. The data is then analyzed to address the following objectives: to examine jurors' exercise of capital sentencing discretion, to identify the sources and assess the extent of arbitrariness in jurors’ exercise of capital discretion, and to assess the effectiveness of different forms of capital statutes in controlling arbitrariness in capital sentencing. See id. For a detailed description of the background, purposes, and methodology of the Capital Jury Project, see William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 IND. L.J. 1043 (1995).

199. See Bowers & Steiner, supra note 23, at 674-80. “Many jurors are confused or uncertain about the death penalty alternative.” Id. at 674. Often jurors ask the judge whether and when the capital defendant will be put on parole. See id. They want to know “whether they can impose a life sentence without parole, and why not.” Id. at 674-75. “The judge’s responses often leave [jury members] confused, frustrated and angry.” Id. at 675.

200. See Eisenberg & Wells, supra note 152, at 4-7.

201. See Bowers & Steiner, supra note 23, at 663-64; see also Eisenberg & Wells, supra note 152, at 15 (finding that South Carolina jurors vote for death “because of false impressions about parole eligibility”).

202. See Bowers & Steiner, supra note 23, at 645.

203. Id. Data reflects that “ambiguity in judges’ instructions about the death penalty alternative encourages . . . manipulation in jurors’ deliberations.” Id. at 694.

204. See id. at 660.

"When capital jurors impose a death sentence because they mistakenly underestimate the death penalty alternative, death is a false choice." Jurors often impose death, not because it is deemed retributively appropriate, but for the incapacitative purpose of keeping the defendant from returning to society. Studies show that jurors would be more likely to impose life imprisonment over the death penalty if they were informed that the defendant would not be eligible for parole. These studies support the contention that prohibiting jury instructions on a capital defendant’s parole eligibility violates the Eighth Amendment. This is because the jury may sentence the defendant to death based on speculation and inaccurate assumptions regarding the defendant’s parole eligibility.

Although the CJP has not specifically studied the consequences of a court’s refusal to instruct capital juries on their failure to reach a unanimous decision, such a situation logically follows the studies conducted regarding juror members being informed of the death sentence alternative. Common sense leads to the conclusion that a juror who would impose death over a life sentence because of his or her fear that a capital offender would be released on parole, would also impose a death sentence if he or she believed that a hung jury would lead to the same result.

V. THE SUPREME COURT SUPPORTS ACCURACY IN JURY INSTRUCTIONS

The Supreme Court has already supported a similar instruction in California v. Ramos. In Ramos, the Supreme Court upheld a California statute requiring trial judges to instruct the jury that the sentence of life imprisonment without the possibility of parole may be commuted by the

206. See Bowers & Steiner, supra note 23, at 611 n.22. Studies show that most jurors voted for death because they wanted to sentence the defendant to life without parole, an unavailable alternative. In these circumstances death is a forced choice. See id. at 701.
207. See id. at 687, 701.
208. See id. at 687.
210. According to statistics from a survey of South Carolina capital jurors by the CJP, twenty-two percent (28 out of 128) of jurors asked the judge for an indication of what would happen if they couldn’t reach a decision during deliberations. Telephone Interview with Professor Stephen Garvey, Capital Jury Project Member, Cornell Law School (Oct. 1999).
governor to a sentence that includes the possibility of parole. This "Briggs Instruction" was held constitutional under both the Eighth and Fourteenth Amendments because it provides the jury with accurate information. "(I)t places before the jury an additional element to be considered, along with many other factors, in determining which sentence is appropriate under the circumstances of the defendant's case." The Supreme Court reasoned "that informing the jury of the Governor's power to commute a sentence of life without [the] possibility of parole was merely an accurate statement of a potential sentencing alternative."

Similarly, providing the jury with information concerning the consequences of jury deadlock is an additional element that should be considered by the jury in its sentencing determination. Such an instruction would provide for further accuracy and aid the jury in making a well informed decision.

A. State Support

If you were a juror on a capital case, would you want to know what sentence the court would impose if the jury could not reach a unanimous decision? Would you want to know that even if you could not reach a decision, the defendant would at least receive life imprisonment without the possibility of release? If you were a juror in a New York capital case, would you want to know that if the jury could not reach a unanimous decision, the defendant would receive a sentence of life imprisonment with the possibility of release in between twenty and twenty-five years?

As discussed above, federal death penalty legislation does not specifically require that an instruction regarding the consequences of deadlock be provided to the jury. Further, the Supreme Court in Jones recently held that such an instruction is not required under the Eighth Amendment of the Constitution. However, some states do require that

212. See id. at 1013. The Respondent argued that the "Briggs Instruction" biased the jury in favor of a death sentence by misleading jurors to believe that only a death sentence would prevent the defendant from returning to society. See id. at 1012.

213. See id. at 1014. The Court held that the "Briggs Instruction" did not violate any of the substantive limitations the Supreme Court has imposed on the capital sentencing process under the Eighth and Fourteenth Amendments. See id. at 1013-14.

214. Id. at 1007.

215. Id. at 1009. "[T]he Constitution does not require the jury to ignore other possible ... factors in the process of selecting ... those defendants who will actually be sentenced to death." Id. at 1008 (quoting Zant v. Stephens, 462 U.S. 862, 878 (1983)).

such an instruction be given pursuant to their state death penalty legislation.\textsuperscript{217}

New York’s death penalty legislation, enacted in 1995,\textsuperscript{218} provides a model for informing capital juries of the consequences of jury deadlock. Section 400.27(10) of the New York Criminal Procedure Law provides:

In its charge, the court must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach [a] unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life.\textsuperscript{219}

Although this section of New York’s death penalty legislation has been challenged as arbitrary,\textsuperscript{220} New York courts have continuously upheld the jury instruction as constitutional.\textsuperscript{221} In \textit{People v. Mateo},\textsuperscript{222} the county court rejected the defendant’s argument that this instruction could “have a coercive effect on the jury and result in a more likely verdict of death.”\textsuperscript{223} Under the Eighth and Fourteenth Amendments, the court upheld the sentencing instruction informing the jury of the consequences of deadlock.\textsuperscript{224}

In support of section 400.27(10), New York state prosecutors contended that this provision does not disadvantage the defendant, but “merely advise[s] the jury of the permissibility and consequences of a

\begin{itemize}
\item \textsuperscript{218} \textit{N.Y. CRIM. PROC. LAW} § 400.27 (McKinney 2000 & Supp. 2001).
\item \textsuperscript{219} \textit{id.} at § 400.27(10).
\item \textsuperscript{220} New York’s sentencing procedures were challenged in \textit{People v. Harris}, 677 N.Y.S.2d 659 (Sup. Ct. 1998), when the judge refused to instruct the capital sentencing jury that if a unanimous decision was not determined, the court would impose a sentence of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. See \textit{id.} at 662. Justice Anne G. Feldman believed that the instruction would lead the jury to impose the death penalty out of fear that the court would parole the defendant. See \textit{id.} Despite the fact that the instruction was not given, the defendant was sentenced to death. See Daniel Wise, \textit{Brooklyn Prosecutor Lends a Hand in First Essex County Capital Case}, N.Y. L.J., Nov. 9, 1998, at 1.
\item \textsuperscript{221} \textit{See People v. McIntosh}, 682 N.Y.S.2d 795, 798 (County Ct. 1998); \textit{People v. Mateo}, 664 N.Y.S.2d 981, 1003 (County Ct. 1997).
\item \textsuperscript{222} 664 N.Y.S.2d 981 (County Ct. 1997).
\item \textsuperscript{223} \textit{id.} at 1003.
\item \textsuperscript{224} \textit{See id.}
\end{itemize}
Further, "jurors who have convicted [the] defendant but who[,] nevertheless[,] will not vote for the death penalty, may [be] assured that [their] vote will not result in [a] mistrial, or [in the] release of [the] defendant." New York's required instruction on non-unanimity merely informs the jury that a non-unanimous verdict is a final verdict, and that a substantial penalty will be imposed by the judge if the jurors cannot agree.

New York is alone among the states requiring the judge to impose a lesser sentence in the event of jury deadlock and requiring that the jury be informed of this lesser sentence. Only three other states, Missouri, New Jersey, and Oregon, authorize the jury to be instructed that the judge will impose a lesser sentence. However, in those states, the sentence is one of the alternatives that the jury considers during deliberations.

As previously discussed, New Jersey's capital sentencing procedures were upheld under both state and federal constitutional challenges by the state supreme court in State v. Ramseur. The instruction clearly provides capital jurors with accurate sentencing information and removes any ambiguity regarding their inability to reach a unanimous decision.

Id.; N.J. STAT. ANN. § 2C:11-3(c)(3)(c) (West 1995 & Supp. 2000) (stating that "[i]f the jury is unable to reach a unanimous verdict, the court shall sentence the defendant pursuant to subsection b," which provides for a variety of lesser sentences depending on the circumstances); OR. REV. STAT. § 163.150(2)(a) (1999 & Supp. 2000). The Oregon statute states:

Upon the conclusion of the presentation of the evidence, the court shall also instruct the jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, [including whether the defendant should receive a death sentence,] the trial court shall sentence the defendant to life imprisonment without the possibility of release or parole.

Id.
prohibited by the Constitution.233 "The entire system of capital punishment depends on the belief that a jury representing the conscience of the community will responsibly exercise its guided discretion in deciding who shall live and who shall die." To hide from the jury the full range of its sentencing options, thus permitting its decision to be based on uninformed and possibly inaccurate speculation, is to mock the goals of rationality and consistency required by modern death penalty jurisprudence.234

Capital defendants in other states have sought such a jury instruction concerning the consequences of jury deadlock, precisely because the absence of such an instruction causes jurors to speculate about the consequences of non-unanimity.235 Capital juries should be instructed on the consequences of deadlock to prevent erroneous speculation. Such an instruction would not only provide the jury with accurate sentencing information, but would maintain the principle of guided discretion that the Supreme Court has continuously required in capital sentencing.

VI. CONCLUSION

Since Furman, the Supreme Court has focused on procedural safeguards to help avoid arbitrary application of the death penalty and to guide capital juries during sentencing.236 As recognized in Gregg, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision."237

The Supreme Court has continuously upheld Eighth Amendment protections in capital cases by ensuring that juries are provided with accurate information and guided discretion in capital sentencing.238 In Simmons, the Court recognized that jurors might impose a death sentence because they underestimate the death penalty alternative, thus imposing a death sentence by "false choice."239 As Justice Souter pointed out, reliability in capital jury decision-making requires clear instructions

233. See id. at 221, 284.
234. Id. at 284.
235. Id.
237. See supra notes 21-37 and accompanying text.
239. See Little, supra note 37, at 385.
regarding sentencing. Further, in Ramos, the Supreme Court upheld a jury instruction on the commutation power of the governor over a sentence of life imprisonment.

Until its recent decision in Jones, the Supreme Court has continued to require guided discretion in capital sentencing schemes. The Court's disagreement with the Fifth Circuit's interpretation of the FDPA supports the implementation of an instruction to capital juries on the consequences of deadlock. Since the Fifth Circuit erroneously held that jury deadlock would result in a new trial, it is very likely that during its deliberations the jury shared this same belief. As the dissent in Jones recognized, if the jury erroneously believed that the defendant might receive a sentence of less than life imprisonment, the jury may have chosen a death sentence solely to prevent the possibility of the defendant being paroled. A charge instructing the jury that a sentence of life without parole would result in the event that the jury is incapable of reaching a unanimous decision would eliminate any juror confusion. Such an instruction would prevent "false" or "forced" choices jurors make based on incorrect assumptions regarding parole eligibility and the effects of jury deadlock.

Refusing to inform capital jurors about the statutorily mandated alternative to the death penalty leads jurors to sentence capital defendants to death when they would not do so if they were fully informed. Similarly, refusing to inform jurors of the consequences of their failure to agree forces many capital jurors to impose a death sentence because of false speculation concerning the outcome of a hung jury. There is no justification for a failure to inform jurors of either of these critical aspects of the law. Capital juries should be fully informed of the law, both substantively and procedurally, before deliberations begin. Failure to fully inform capital juries of their sentencing alternatives, as well as the consequences of jury deadlock, causes arbitrary decision making. Since the Furman decision, the Supreme

241. See id. at 172-73. (Souter, J., concurring).
243. See California v. Brown, 479 U.S. 538, 541 (1987) ("The Constitution ... requires that death penalty statutes be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion."); Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion) (directing that states "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death'").
245. See supra notes 198-210 and accompanying text.
Court has continuously made an effort to curtail this kind of arbitrary decision making.

CJP studies support the contention that current capital sentencing instructions do not provide adequate guidance to the jury. Jurors' false expectations about alternatives to the death sentence influence their sentencing decisions. A jury instruction on the consequences of deadlock clearly upholds the Eighth Amendment, as well as the principles established by the Supreme Court throughout the history of death penalty implementation. The Supreme Court should continue to uphold the principle of informed, guided, and accurate decision making by requiring that capital jurors be provided with information regarding the consequences of jury deadlock. Even if state or federal legislation does not mandate full and clear instructions on the consequences of jury deadlock, trial judges and reviewing courts should provide them in the sound exercise of their discretion.

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