

Mental Health: An Arbitrary Mitigator and Aggravator


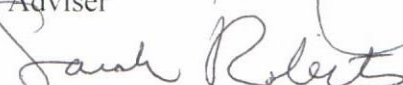
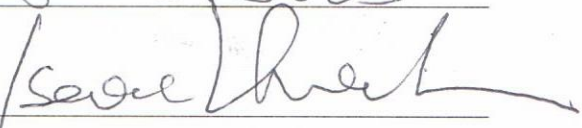
By Betsy Neill

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Approved by

Adviser

Introduction

In the United States, there is an overwhelming amount of mental illness in the prison system as well as an unmet increasing demand for psychiatric services outside of the prison system. Researchers are beginning to realize that mental health patients are treated in the prison system more so than in psychiatric hospitals and other therapeutic programs (Torrey 1995; Johnson 2015; Rubinow 2014). This phenomenon occurs with death row prisoners as well, but at even higher rates (Cunningham and Vigen 2002). Issues pertaining to mental health are supposed to be a mitigating factor during trial, so it seems counterintuitive that so many mentally ill inmates have been executed. This high prevalence of mental illness on death row is concerning because instead of receiving treatment, these inmates are executed, or engaging in state-assisted suicide by volunteering to be executed by waiving their appeals.

John M. Fabian, an expert witness, talks about this phenomenon as he explains the many different roles a forensic psychologist has in a capital trial. He has both his J.D. and his Psy.D. and has conducted interviews and done expert testimonies for both juvenile and adult criminal trials. He wrote an article explaining the role of a psychological expert at trial and, towards the end, he brings up an extremely difficult problem with testimonies. Fabian claims:

Certain mitigating factors and circumstances may be viewed by judges and jurors as aggravating and thus have the opposite result, ultimately to the detriment of the defendant's future and hope for a favorable outcome. Specifically, mental illness, substance abuse, and having a deprived and abusive childhood, factors that would appear to be mitigating and arising sympathy, may be viewed as aggravating and suggestive of future dangerousness (Fabian 2003).

Fabian explains perfectly the potentially detrimental effects of mental health testimony. In a capital murder trial, a history of mental health concerns may lose its element of sympathy

because it contributes to the jury's perceptions of danger and recidivism. He explains the paradox the jury faces:

One can suffer from a mental illness such as Bipolar Disorder, a mood disorder caused by a biochemical imbalance in the brain, marked by intense cycles of depression and mania, which may ultimately become psychotic and aggressive. The psychotic mania may have in part led to the homicide. The judge and/or jury may understand the link and consider it as mitigation, but may at the same time fear the defendant's propensity for future violence resulting from this disorder. The expert must attempt to negate this fear by suggesting the disorder can be medicated and treated, and cite that the violence was caused by an illness that responds to medication rather than a questionably untreatable criminal personality (Fabian 2003).

Even if a jury understands the mitigating power of a mental illness, it can be hard for them to separate the potentially aggravating aspects of the mental illness when they make their decision.

In my thesis, I look at the impact that a jury's opinion of a defendant's mental health has on the outcome of the trial. It seems as though the sentence that the defendant receives is indeed swayed by whether or not a jury finds the mental illness to be mitigating or not. This means that two different juries can view the same mental illness as mitigating or not mitigating, and the defendant receives a different sentence because of this. The arbitrariness of the jury's opinion is concerning because it points out that the capriciousness is unconstitutional because it violates the 14th Amendment. The 14th Amendment claims that the State cannot deny any person of life "without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws". If mental health is viewed arbitrarily, one person with a mental illness will be tried differently than another, and therefore that person is deprived of their life without equal protection.

Preliminary Study on Mental Illness Prevalence

To test the prevalence of mental illness on death row, I, with the help of my professor, Dr. Frank Baumgartner and three other students, did a preliminary research project where we calculated statistics on each of the 824 death row inmates executed between the years 2000 and 2015. To collect this data we used the Clark County Prosecutor website¹ and the legal website Justia.com. The Clark County Prosecutor database has information from 2000 to 2014 with the exception of two inmates from 2014 and is a compilation of many news articles and law sources pertaining to the case. Justia is an online database with different court records and write-ups of cases. For 2015 and these two excluded inmates, I did a Google search and selected the top five mainstream sources as well as Justia. I repeated this process for each inmate executed from 2000 through 2015. Earlier cases were excluded mostly because less data was available online for each inmate, making any interpretations less reliable. Our analysis of 824 inmates is complete for all those executed since 2000; these inmates represent 58 percent of the 1,422 executed in the modern period.

On these sources, separately for each inmate, I searched for the following phrases: “psych”, “mental”, “suic”, “diagnos”, “hospital”, “abus”, “child”, “neglect”, “abandon”, “retard”, “alcohol”, “drug”, “depend”, “addict”, and “disorder”. These helped me find information on the psychological testimonies and mitigating circumstances related to mental health including: substance abuse, mental illness, intellectual disabilities, suicidal tendencies, hospitalizations, and trauma. For each inmate executed, I recorded whether or not and to what degree they had each of these specific mental health problems. In compiling our data, I simply coded a “1” when there was a judicial finding or other significant evidence that the inmate had

¹ <http://www.clarkprosecutor.org/html/death/usexecute.htm>.

² <http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.PDF>.

been professionally diagnosed with the given ailment, which are detailed in the results section below.

Our estimates of mental illness are conservative in two ways. First, I used very strict criteria to ensure that I did not overestimate the numbers; I listed an inmate as having an illness only if I found credible source material that they had been diagnosed with it, such as in evidence or testimony presented at trial, or repeated in the media. Second, the numbers likely underestimated because much psychological evidence may not have been addressed in court, or formally assessed by a professional. Since I rely on these publicly available sources, any inmate's illness that was not addressed in court or in news coverage about their case would likely escape our study, leading to an under-estimate of the prevalence of mental illness.

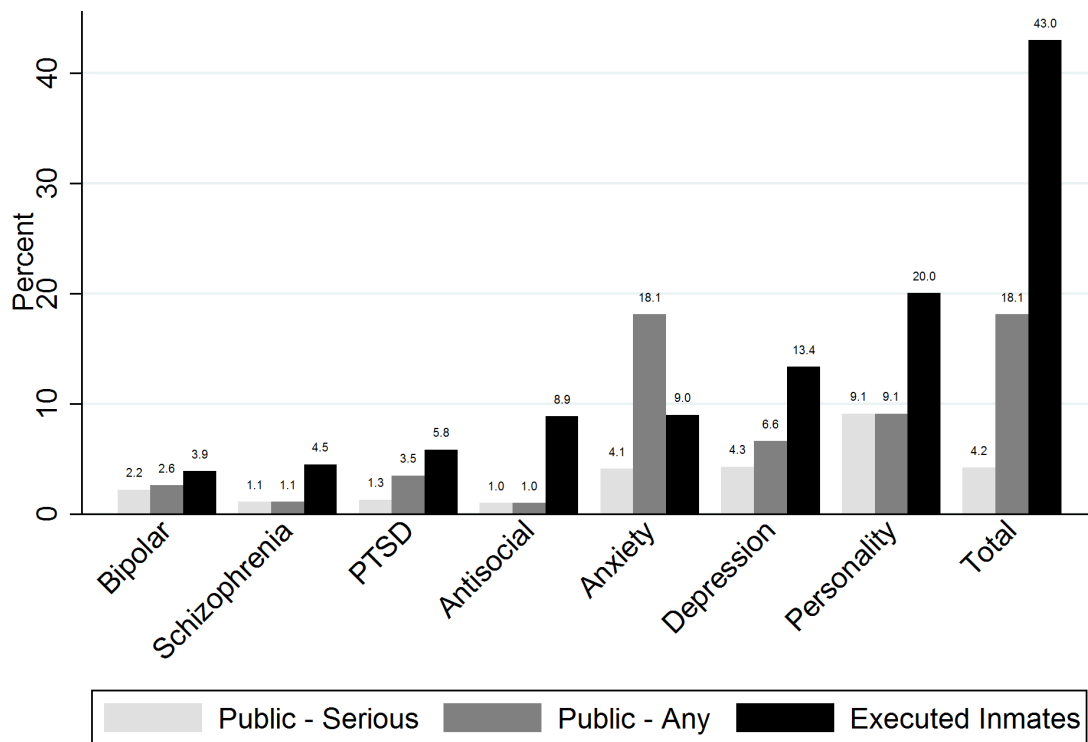
Mental Illness Findings

According to the National Institute of Mental Health (NIMH), about 18.1 percent of the U.S population, almost one person in five, suffer from a mental illness. The NIMH compiled the data from a number of sources, but typically involve individual self-reports about whether or not they suffered from a mental illness “within the past year”. NIMH distinguishes between “any mental illness” (AMI) and “serious mental illness” (SMI). Both AMI and SMI do not include substance abuse disorders, and SMI is limited to those ailments that result in functional impairment that interferes with at least one major life activity. Because all of these inmates have been found guilty of first degree murder, it is probable that their mental illness resulted in the functional impairment of at least one major life activity and are therefore more accurately compared to the SMI categories.

The most common form of mental illness in the general public is anxiety disorders; these include generalized anxiety disorder, social anxiety disorder, phobias, obsessive-compulsive

disorder, trauma related disorders, and a few others. Many anxiety disorders can be extremely debilitating, but most are not considered SMI. In the United States, 18.1 percent have an anxiety disorder, and only 4.1 percent are considered “serious”. There are of course many other forms of mental illness. Figure 1 compares the prevalence of various forms of mental illness in the U.S. population with those inmates executed from 2000 through 2015. In each case, we present the general public numbers for “any” and for “serious” forms of the disease compared with the mental illness prevalence numbers of the executed inmates, excluding all substance use disorders. Some of these are the same for example schizophrenia is always considered a serious illness.

Figure 1. The Prevalence of Mental Illness.



Source for general public: National Institute of Mental Health.

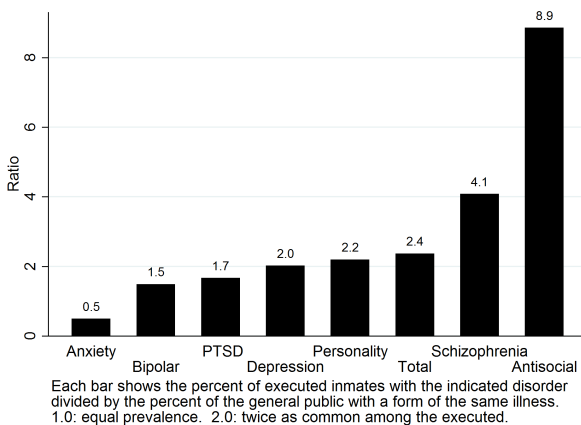
Figure 1 makes clear that executed inmates have much higher rates of every type of mental illness, often by very large margins. For each of the other types of mental illness, as well as for overall frequency of affliction, the inmates are typically much more likely to exhibit

symptoms. Every category of serious mental illness is significantly lower for the general population than amongst the executed inmates. Over 40 percent of the inmates suffered at some point in their lives from a serious mental illness, according to our review of court records and news accounts, which of course is most likely an understatement. The prevalence of mild anxiety is more common in the general public than among executed inmates. However, serious anxiety, interfering with a major life activity, is more than twice as common among the inmates than in the general population. Another important thing to note is that PTSD, a trauma-related anxiety disorder is more common amongst the executed inmates in both the any and serious categories. In every other case but this one, the executed inmates show much higher rates than the general population, whether we look at mild or serious forms of each illness.

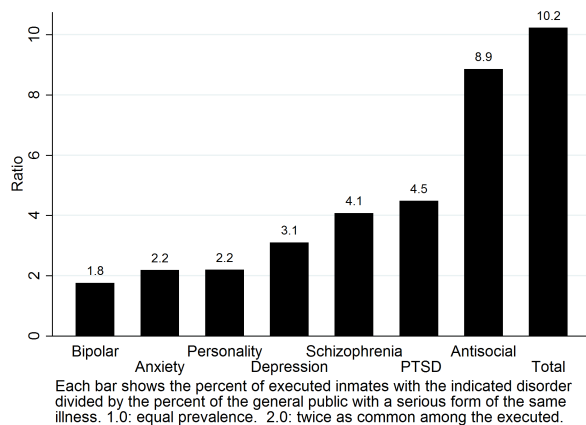
Figure 2 shows the ratio between the rates of the same types of mental illness for the two groups. So for example, 18.1 percent of the general public has “any mental illness” whereas 43.0 percent of the inmates do; this ratio is therefore 2.4. The graph puts the illness in order of the ratio, making it clear which illnesses are proportionately more common among the inmates. In the left side of the figure we compare the inmates to the prevalence of “any mental illness” in the general public, and on the right side, we use “serious mental illness.”

Figure 2. Ratios of Affliction.

A. Any Mental Illness



B. Serious Mental Illness



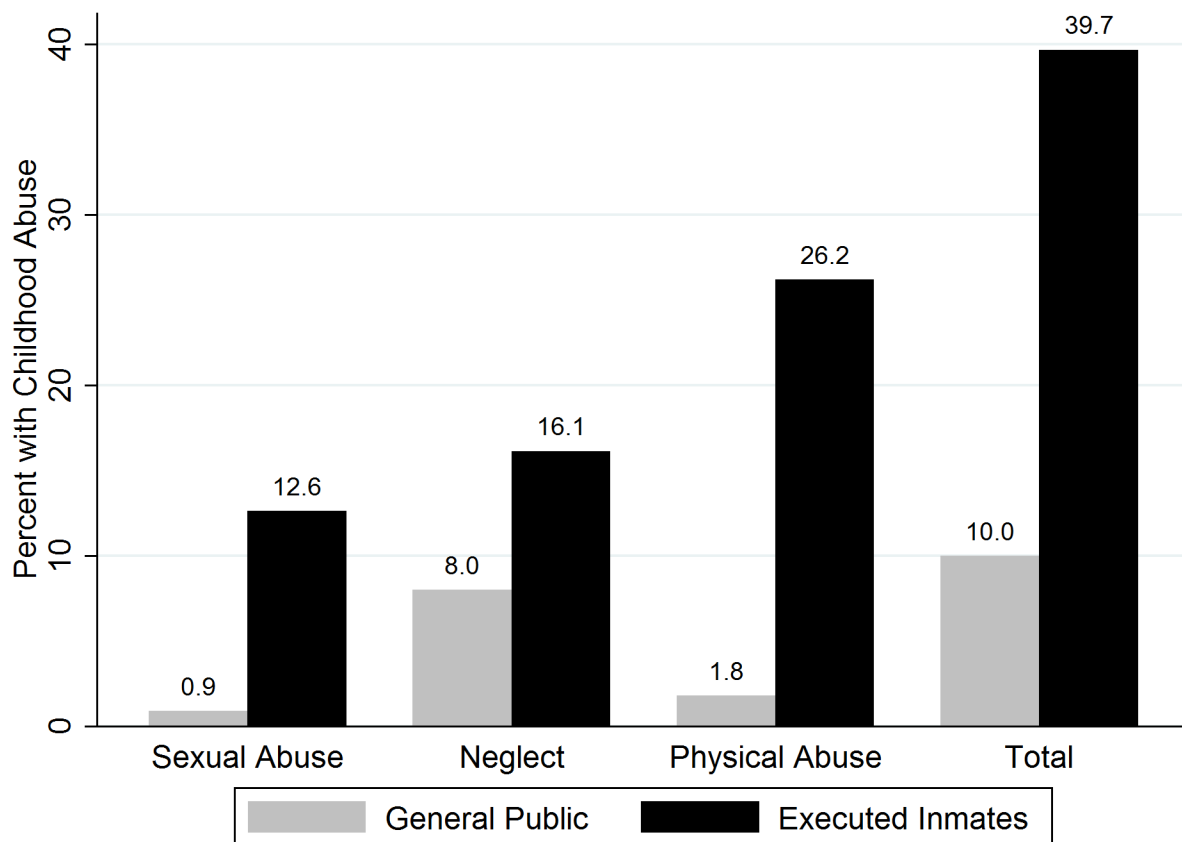
These two graphs demonstrate the strikingly high ratios of mental illness amongst the executed inmates. The most notable is antisocial personality disorder as it is 8.9 times more common amongst the executed inmates than amongst the public. This disorder can easily be skewed by the prosecution and therefore used as an aggravating factor because it is the technical name for the terms “sociopath” and “psychopath” that are often used in media. Similarly, schizophrenia occurs in only about 1.1 percent of the general population, but in over four percent of the inmate group. The prosecution can also skew this disorder because a diagnosis of schizophrenia is accompanied by hallucinations, delusions, disorganized speech patterns, and catatonic affect. These symptoms can make a defendant seem more dangerous and unpredictable as well as less than human.

Childhood Trauma Findings

According to the U.S. Department of Health and Human Services, in the United States, one in ten children are abused. Of those abused, about 80 percent suffer from childhood neglect or abandonment (8 percent of the U.S. population) making this the most common type of abuse. The next most common is physical abuse. Of those abused, 18 percent suffer from physical abuse (1.8 percent of U.S. population), and lastly, 9 percent suffer from sexual abuse (0.9 percent

of the U.S. population). Because the national statistics do not report emotional or verbal abuse, we too excluded it from our data. Of the executed inmates from 2000 to 2015, these numbers go up significantly: 38.47 percent experience some type of abuse, 12.50 percent of them were sexually abused, 26.09 percent were physically abused, 11.77 percent were neglected, and 7.65 percent provided evidence of abuse but did not specify which type of abuse. It is important to note that physical abuse is the most common form of abuse among those executed between 2000 and 2015. This suggests that from an early age, more than a quarter of these individuals were taught that punishment was enforced with physical force and violence. Those that were sexually abused during their childhood were introduced to sex in a very unhealthy way, contributing to a confused understanding of relationships later on in life. Figure 3 summarizes these stark differences.

Figure 3. Childhood Abuse.



The numbers in Figure 3 show startling differences in the rates at which executed inmates were abused as children, compared to the general public (and, of course, these may be an understatement of the scope of the difference). The increased rates at which they experience abuse ranges from about twice as likely for neglect (16.1 percent compared to 8.0 percent) to more than ten times as likely. Childhood sexual abuse occurs in less than one percent of the general public, according to official statistics, but in more than 12 percent of inmates executed. More than one-quarter of the executed inmates suffered childhood physical abuse, compared to fewer than two percent of the general public, and almost 40 percent experienced some form of childhood abuse, compared to 10 percent among the general public.

Our statistics include abuse that is reported as mitigating circumstances at trial and some news articles included on the website. Many cases of abuse are not reported. There were also

many mentions of statements such as a traumatic childhood, poverty, or cases where the inmate claimed they were molested or beaten, but there was no way of proving these events happened because no one could testify as a witness. Therefore, the numbers about abuse should be viewed as the bare minimum of abuse cases with consideration of the cases that went unreported or unsupported with evidence. National statistics on child abuse are vastly underreported as well as not every child's abuse is brought to the attention of the authorities. That being said, both statistics are most likely underreported, but that does not change the overwhelming prevalence of childhood abuse amongst the executed inmates. Overall, executed inmates grew up in abusive households much more often than the general population of the United States.

Suicide Findings

Trauma does not always stem from the world outside of prison. Death row specifically can be a very demeaning and melancholy environment because every inmate faces the constant looming of the harsh inevitability that they could be executed at any moment. This is often referred to as "Death Row Syndrome" (Smith 2007). An inmate may enter death row already suffering from depression, or they could develop it as a side effect of their experiences on death row. Suicide is not uncommon, and depression is quite common.

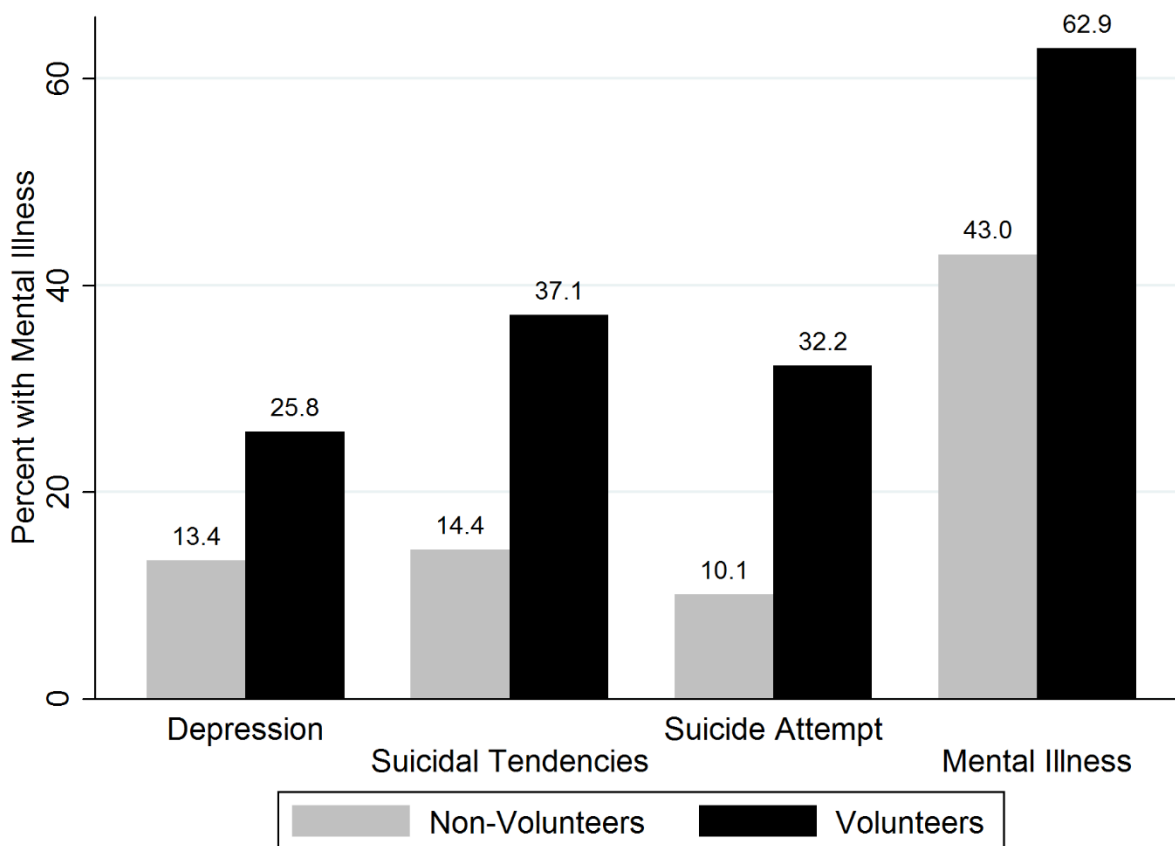
We used the same methodology described above to assess previous suicide attempts, suicidal ideation, and depression. This analysis shows that of the inmates executed from 2000 to 2015, 10.07 percent had previously attempted suicide in their lifetime, and 14.42 percent had previously exhibited suicidal thoughts or tendencies. In the U.S. general population, the Centers for Disease Control² report that in 2013, among adults, 3.9 percent had suicidal thoughts or tendencies; 1.1 percent made an actual plan, and 0.6 percent acted on that plan and made a

² <http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.PDF>.

suicide attempt. So the executed individuals again have much higher rates of suicidal thoughts and attempts than the general population.

John H. Blume conducted a study of death row volunteers from 1976 through 2003, finding that 88 percent had a mental illness or substance abuse disorder (Blume 2005). We have also done this with our own data. Our numbers are lower, but still result in similar findings—mental illness, suicidal behavior, suicide attempts, and depression are much higher among those that volunteer to skip the appeal process and die than others on death row. Figure 4 shows these comparisons.

Figure 4. Mental Illness among Execution Volunteers.



As I have shown, mental illness is very prevalent on death row. However, it runs even higher among that subset of executed inmates who have volunteered to cease their legal appeals. Often after periods of depression, previous suicidal thoughts, or previous failed suicide attempts,

they can indeed find a way. Execution of condemned inmates who drop their appeals is a form of “suicide by state”. About ten percent of US executions, 137 individuals, have succeeded in doing so.

Literature Review

Previous research tends to agree with my preliminary study. According to a meta-analysis, mental illness, childhood trauma, suicidal tendencies, and substance abuse are more prevalent on death row than in the general public (Cunningham and Vigen 2002). Mental illness can be present before entering death row, or it can develop as a side-effect to the constant worrying that the next day could be your last, as I mentioned in the previous section (Smith 2007). Both of these phenomena are even more prevalent amongst volunteers, death row inmates that waive their appeals process and are executed right away (Blume 2005).

Efforts have been made to create exemptions from the death penalty to mentally ill offenders. However, it has proven to be an extremely difficult task because a mental health testimony can be extremely subjective and arbitrary. Firstly, not every psychologist agrees with every single previous diagnosis. The Diagnostic Statistical Manual (DSM) is constantly being updated and even if we have the most updated version, there are so many different mental illnesses and each disorder has a varying degree of debilitation. Another problem with the testimony is that the mental health expert must decide whether the disorder affected the individual at the time of the murder. They also need to decide whether the symptoms they experience are due to a substance or not. Because trials are lengthy, both of these factors are often decided months, even years after the murders take place. The key point to take from this is that there is no clear-cut line to draw between a mentally competent versus a non-competent individual (Bonnie 2004; Jubilut 2007; Ryan and Berson 2006). It is also concerning that a jury

that has no mental health training is the group of people that ultimately makes that call regardless of what is said in a mental health testimony.

Because no one has been able to find a solution to the arbitrariness of mental health testimonies, it is important to look at the situation from the perspective of this group that makes the final call about mental health—the judge and the jury. The high prevalence of mental health issues on death row seems counterintuitive considering that mental health factors are considered mitigating factors in a capital trial. Existent literature suggests that mental health may serve as an informal aggravating factor for juries in sentencing.

Some psychologists have tried to explain this association between mental health factors and increased future dangerousness assessments made by juries and judges. Edens et al. (2005) conducted a study where they asked 203 participants to read a description of an actual capital trial and rate whether or not they would give him the death penalty. Using random assignment, they manipulated whether or not the inmate was psychotic (suffers from delusions, hallucinations, or another form of psychosis), a psychopath (suffers from a disorder associated with impulsive behavior and a lack of empathy), or had no mental illness. In the ANOVA, the means of danger perception for psychosis and psychopath were significantly higher than when there was no disorder. They also conducted a logistic regression to test the effect of these two disorders and found that being a psychopath increases the chance of a death sentence by 77%, but psychosis, while it made the defendant appear more dangerous, did not significantly affect the sentence outcome (Edens et al. 2005). Overall, they found that in all of the cases that the inmate suffered from psychosis or psychopathy, the person perceived them to be more dangerous than when they did not have either of these mental illnesses, but only being a psychopath actually changed the sentence outcome (Edens et al. 2005). Edens et al. finds this concerning

because they claim most of the existing research suggests that there is not an actual association between mental illness and future dangerousness (Edens et al. 2005).

Another concern is the validity of the risk assessments because it does not matter if future violence is correlated with mental illness if the future risk of violence is not accurately calculated. Some research suggests that future dangerousness assessments are valid based on the finding that inmates on death row commit more violent infractions than non-death row inmates (DeLisi and Munoz 2003). Other research suggests the opposite. Cunningham and Sorenson (2010) conducted a study that looked at the 4.4 years after a capital trial. They found that the number and extremity of violent infractions did not differ between death row and non-death row inmates and were much lower than the future dangerousness assessments predicted (Cunningham and Sorensen 2010). It is unclear whether or not future violence and dangerousness can be predicted accurately. However, it is clear that juries believe these assessments as well as make the assumption that mental illness is associated with a likelihood of future dangerousness (Edens et al. 2005).

One study examined whether or not a mental disorder played a significant role at the sentencing phase of a capital trial. They looked at over 600 cases and found that having a mental illness was not an effective mitigating circumstance. In fact, there was almost no difference in whether someone received a death sentence if they had a mental illness versus if they did not (Stites and Dahlsgaard 2015). Stites and Dahlsgaard (2015) recommend future researchers look at the mitigating effects of specific mental illnesses instead of mental illness as a whole. They also mention that risk assessments can have a large influence on a case in their background section, but do not include this in their current study (Stites and Dahlsgaard 2015).

Unah (2011) wrote a paper analyzing the role of race during trial and found similar results as Stites and Dahlsgaard (2015). He was able to draw conclusions on some of the legal and procedural limitations of capital trials, both surrounding race, as well as other elements in trial. When looking at the effects of statutory mitigating and aggravating circumstances during the penalty phase of trial, Unah (2011) found that increasing the number of aggravating circumstances during trial significantly increases the likelihood of a death sentence, while increasing the number of mitigating circumstances only decreases the likelihood of a death sentence by a very small amount. This finding suggests that mitigating factors have comparatively little to no effect on the outcome of a capital trial. This could help to explain why Stite and Dahlsgaard (2015) found that having a mental illness does not decrease your likelihood of getting a death sentence. One limitation of Unah (2011)'s study, however, is that he only analyzed the effect of statutory factors. Non-statutory factors include many of the mental health factors that are case-specific such as a mental illness diagnosis or a traumatic childhood experience. That being said, the finding that mitigating circumstances play less of a role at trial than aggravating circumstances is extremely important for understanding the way the jury thinks. It seems as though if the crime is extremely heinous, it does not really matter what the defense presents as mitigators.

Edens et al. (2005) showed that individuals associate psychosis and psychopathy with dangerousness, but did not show that this affects the jury's decision during the sentencing phase in actual capital trials. Stites and Dahlgaard (2015) successfully showed that mental disorders do not play a mitigating role at the sentencing phase of the trial, but failed to look at the effects of specific mental illnesses. I plan to fill these two holes in the research as well as expand on Unah (2011)'s finding by testing the effects of non-statutory mitigating circumstances. I plan to

conduct a similar experiment as Stites and Dahlgaard where I analyze real cases, but I will distinguish between different mental illnesses and look specifically at the jury's decision to consider a mitigating factor. Ultimately, I want to see if the jury actually considers certain mental illness as mitigating when they decide to sentence someone to death.

Theory

As mentioned with depressive and suicidal symptoms, many of these inmates develop their mental illness as a side effect to the conditions of death row. However, that does not account for the extremely high rates of personality disorders, psychotic disorders, and other mental illnesses. It is possible that the jury does not see these factors as mitigating. For my thesis, I will explore this theory. The phenomenon of such a high prevalence of mental illness on death row has not been studied extensively; however, those that have studied it look to the jury because they are the ones that make a decision about a life or death sentence. To understand the perspective of the jury, we must first understand the different types of psychological testimonies the jury hears. In a capital trial, psychological experts testify about a number of mitigating factors such as a defendant's past or current diagnoses, any sort of abuse he or she has suffered from, any suicidal tendencies, any signs of remorse, and any previous hospitalizations. Just as with mental illness, death row inmates have a higher prevalence in each of these categories than in the general public. Psychological experts can also testify about future dangerousness. This can be a mitigating or aggravating factor depending on the testimony. If a psychologist performs a risk assessment and concludes that an inmate is a future danger to society, this acts as aggravating and the jury can take it into account in their decision.

Having a mental illness most likely plays an unintentional aggravating role in the eyes of the jury because mental illness is flooded with negative stigmas and the prosecutor often takes

advantage of this by reminding the jury of the negative effects of mental illness (Lee et al. 2013). These stigmas could stem from the stigmas in television, movies, news coverage of crimes cases, and other forms of social media (Friedman, Forcen, and Shand 2014; Wahl 1997). In crime shows and horror movies, the antagonist or murderers are often portrayed as merciless, unempathetic, and crazy. For this hypothesis to work, the assumption must be made that the jury has been exposed to the negative stigmas surrounding mental illness. They do not necessarily have to believe them, but they have to have seen or heard these stigmas at one point in their life. It is important to remember that every individual that is up for a death sentence has committed capital murder. The jury is not making a decision about an individual with a mental illness, they are making a decision about an individual with a mental illness that has been found guilty of capital murder and is already seen as dangerous. The mental illness most likely adds to this perception of dangerousness.

Overall, I theorize that the reason mental illness is so prevalent on death row is that mental illness, child abuse, and other mental health factors do not play a mitigating role at trial as they are supposed to.

Methods

To test this theory, I analyzed all defendants whose cases were filed between the years 1999 and 2009. I chose this date range based on the availability of documents, as the University of North Carolina-Chapel Hill Law library is still in the process of filing the documents outside of this date range. Each of these defendants was tried capitally and either received a life or a death sentence. After omitting all cases where the necessary completed documents were unavailable (n=16), I had 70 cases where the defendant was sentenced to death, and 75 cases where the defendant was sentenced to life without possibility of parole (total n=145). Once I was

able to locate the documents for the cases, I collected the Issues of Recommendation form for each inmate. This is a form that the jury fills out after listening to the penalty phase of the capital trial. It is a completed list of the aggravating and mitigating circumstances presented by the defense and prosecution at trial. The jury writes “yes” or “no” for each circumstance to indicate whether or not the jury found the factor to exist and have either mitigating or aggravating power in their decision about the sentence. This form is especially important to test my hypothesis because it allows me to look not only at mental illness in general, but more specifically the jury’s perception of mental illness. By looking at which factors juries believed had mitigating power, we can understand the way the jury views mental illness in the context of a capital trial.

I created a spreadsheet with each defendant and created the categories: mental illness, intellectual disability, substance abuse, childhood, and caretaker. I then listed all eight statutory mitigating circumstances and all eleven statutory aggravating circumstances. For each defendant, I added a row on the spreadsheet for all non-statutory mitigating circumstances into the section that they best fit. I coded each factor as 0 if the factor was not presented at trial. I coded the factor as 1 if it was presented, but the jury found it to have no mitigating or aggravating power. I coded it as 2 if the jury found the factor to have either mitigating or aggravating power. Here is a table with three examples of mitigating circumstances that would get placed into the mental illness category on my raw data spreadsheet:

Table 1. Raw Data Spread Sheet Example

Name	Abner Nicholson
ID Number	2
Life=1/Death=0	0
Mental Illness:	Generalized Anxiety Disorder, Narcissistic Personality Disorder with Schizoid and Antisocial traits

Consider whether the defendant has been diagnosed as having a narcissistic personality disorder.	2
Consider whether the defendant has been diagnosed as having schizoid and antisocial traits.	2
Consider whether the defendant has been diagnosed as having a generalized anxiety disorder with alcohol and marijuana dependence.	2

From there, I created a second spread sheet with a list of variables including all mental illness diagnoses, a list of childhood traumas, substances abused, and all other relevant mental health factors. This list was created after I coded 10 defendants that received life, and 10 that received death and made a list of the mental health variables from these cases. From then on, if I found more mental health factors presented, I would add them to the list. I separated the variables into columns of mitigating and non-mitigating variables as well so that in these variables I was able to code everything as either a 1 or a 0. The final list of my variables used in my models can be found in the appendix. I put each mental health non-statutory mitigating circumstance into the most appropriate category and coded it with either a 0, 1, or 2 for the raw variables and a 1 or 0 for the variables that specified between mitigating and non-mitigating. I also had a variable that was a total and did not distinguish between mitigating and non-mitigating.

As an example, of each of these variables, I will again mention the coding process for Abner Nicholson. The variables GAD, personality disorder, and addict, would all be coded as 2 for the raw category, indicating that the jury found each of these mental health factors to play a mitigating role in Abner Nicholson's death sentence. For the mitigating category, all would be coded as 1, and for the non-mitigating category, they would all be coded as 0. For the total

category, all would be coded as 1. The final variables that I calculated were the total number of mental health mitigators, non-mental health mitigators, total number of mitigators, and total number of aggravators. I also converted these to ratios as well. From here, I ran a logistic regression for these mental health variables, and tested the effect that each factor has on a defendant's penalty outcome.

I coded the aggravators, including statutory aggravator 9, the heinousness of crime, as well as all others. There was not a category that listed torturous elements or to what degree of heinousness the murder was. Because heinousness of crime could be a confounding variable with mental illness, I included all of the aggravating variables in my regression models to make sure I controlled for the aggravators.

Because of the alarmingly high rates of antisocial personality disorder, other personality disorders, and psychotic disorders, and the association with violence that previous research has identified (Edens et al. 2005), I hypothesize that these diagnoses will increase the likelihood of a death sentence. I also hypothesize that these diagnoses will be less likely to have mitigating value in the eyes of the jury. Because of the common phenomenon of Death Row Syndrome, it is possible that these depressive symptoms develop in prison and therefore I hypothesize that depression and suicidal tendencies are more likely to result in a life sentence, and are more likely to be seen to have mitigating value in the eyes of the jury.

As for substance addiction and childhood trauma, I hypothesize that these will also be less likely to be seen as mitigating in the eyes of the jury because of the conclusions made by Fabian (2003) and will therefore increase the likelihood of getting a death sentence. Finally, because of the decision in *Atkins v. VA* (2002) that it is cruel and unusual punishment and therefore unconstitutional to execute someone with an IQ in the borderline mentally retarded

range, I hypothesize that all deficits reported in intellectual functioning will be viewed as mitigating and therefore decrease the likelihood of a death sentence.

Results

In this experiment, I conducted five logistic regressions. Below is a frequency table of the variables used in these analyses. The variables are separated by those sentenced to life and those sentenced to death as well as by what percent of the characteristic was found mitigating by the jury and what percent was not found mitigating by the jury. They are separated like this to demonstrate the stark differences between the high percent of mitigating variables amongst life sentences and the low percent of mitigating variables amongst the death sentences. In other words, the percent of non-mitigating variables is much higher amongst the death sentences than the life sentences. With the exception of borderline mental retardation, and other variables pertaining to intellectual functioning, at least about 40% of mental health factors are found mitigating and the defendant got life. In the cases where the defendant got death, this percent decreases and the percent found non-mitigating rises. This being said, there are still cases where mental health factors are found not mitigating and the defendant gets life, as well as factors where the characteristic is found mitigating and the defendant gets death. These are the cases that go against the intended function of mitigating factors.

Table 2: Frequencies of Mental Health Characteristics

Characteristic	Mitigating		Not Mitigating		Total	
	Life	Death	Life	Death	N	Percent
Statutory M2: emotional disturbance*	59.6%	32.1%	0.091%	7.3%	109	100%
Statutory M6: capacity to appreciate*	44.4%	15.7%	14.8%	25%	108	100%
Mental Illness**	44.1%	22.1%	9.1%	24.7%	77	100%
Depression	50%	20%	13.3%	16.7%	30	100%
Suicidal Tendencies	47.3%	15.8%	10.5%	26.3%	19	100%
Personality Disorders	38.8%	22.2%	5.6%	33.3%	18	100%
Psychotic Disorders	40%	10%	10%	40%	10	100%
ADHD	75%	25%	0%	0%	8	100%
Learning Disabilities	40%	20%	6.7%	33.3%	15	100%
Borderline Mental Retardation	21.1%	52.6%	10.5%	15.8%	19	100%
Low IQ	37%	22.2%	25.9%	14.8%	27	100%
Limited Cognitive Ability	26.7%	26.7%	20%	26.7%	30	100%
Drug/Alcohol Addict	47.2%	28.3%	7.5%	17%	53	100%
Childhood trauma of any kind***	43.6%	41.9%	6%	8.5%	117	100%
Physical Abuse	45.9%	43.2%	2.7%	8.1%	37	100%
Sexual Abuse	61.5%	15.4%	15.4%	7.7%	13	100%
Neglect or Abandonment	43.6%	32.7%	9.1%	14.5%	55	100%
Emotional or Psychological abuse	53.6%	42.9%	0%	3.6%	28	100%
Grew up in poverty	42.4%	24.2%	15.2%	18.18%	33	100%
Witnessed domestic violence as a child	53.3%	43.3%	0%	3.3%	30	100%
Death of loved one as a child	37.5%	28.1%	18.8%	15.6%	32	100%

*See the appendix for full explanations of all statutory mitigating and aggravating circumstances mentioned in all tables throughout the paper.

**Mental Illness variable is a combination of all mental illness variables.

***Childhood trauma includes all abuse variables, poverty, witnessing domestic violence, death of a loved one as a child, as well as any other childhood trauma, maltreatment, or disturbance. See appendix for elaboration on this variable.

Table 3 shows the effect of variables that the jury found to have mitigating power. When a defendant is borderline mentally retarded, or suffers from borderline intellectual functioning as it has newly been named, and the jury finds this circumstance to be mitigating, the defendant's likelihood of a death sentence increases by 13.52 times or 1252% (odds ratio 13.52, $p=.028$). Both M2 and M6 significantly decrease the likelihood of a death sentence. Statutory mitigating circumstance 2 is "The homicide was committed while the defendant was under the influence of

mental or emotional disturbance” and when the jury finds this to be mitigating, the chance of a death sentence decreases by 25% (odds ratio 0.85, $p=.001$). Statutory mitigating circumstance 6 is “the defendant's capacity to appreciate that his conduct was criminal, or to conform his conduct to the law, was impaired” and when the jury finds this to exist, the chance of a death sentence decreases by 89% (odds ratio 0.11, $p=.003$). Statutory aggravating circumstances A5 robbery with a firearm, A6, A9, and A11 all increase the likelihood of death. When the jury finds statutory aggravating circumstance 5 robbery with a firearm to exist, the chance of death increases by 10.66 times or 966% (odds ratio 10.66, $p=.006$). Statutory aggravating circumstance 6 is “The homicide was committed for pecuniary gain” and when the jury finds this to exist, the chance of death increases by 5.44 times or 444% (odds ratio 5.44, $p=.047$). Statutory aggravator 9 is “The homicide was especially heinous, atrocious, or cruel” and when the jury finds this to exist, this increases your chance of death by 5.31 times or 431% (odds ratio 5.31, $p=.013$). And finally, statutory aggravator 11 is “The homicide was part of a course of conduct involving a crime of violence against another person” and when the jury finds this to exist, the chance of getting a death sentence increases by 5.14 times or 414% (odds ratio 5.14, $p=0.018$).

Table 3: Logistic Regression Model of All Mitigating Factors Found by the Jury to be Mitigating

	Odds Ratio	<i>p</i>
Statutory M2	0.85	.001*
Statutory M6	0.11	.003*
Depression	0.79	.794
Suicidal Tendencies	1.71	.625
Personality Disorder	1.69	.628
Psychotic Disorder	0.17	.254
ADHD	0.10	.086
Learning Disability	0.42	.438
Drug/Alcohol Addict	0.80	.763
Borderline Mental Retardation	13.52	.028*
Low IQ	0.72	.717
Limited Cognitive Ability	0.80	.810
Physical Abuse	2.21	.383
Sexual Abuse	0.21	.250
Neglect or Abandonment	1.90	.426
Emotional or Psychological abuse	0.79	.789
Grew up in poverty	0.50	.386
Witnessed domestic violence as a child	1.20	.823
Death of loved one as a child	0.23	.122
Statutory A3	3.28	.067
Statutory A4	7.39	.083
Statutory A5 Rape	16.21	.063
Statutory A5 Robbery with Firearm	10.66	.006*
Statutory A5 Robbery	1.74	.629
Statutory A5 Burglary	0.14	.080
Statutory A5 Arson	1.43	.813
Statutory A5 Kidnapping	0.22	.170
Statutory A6	5.44	.047*
Statutory A8	2.08	.646
Statutory A9	5.31	.013*
Statutory A10	31.46	.086
Statutory A11	5.14	.018*

*indicates significance at the .05 interval

Table 4 shows all mitigating variables that the jury found to be not mitigating. None of the mitigators are significant in this model. Statutory aggravator 9 still significantly increases the chance of a death sentence by 3.84 times or 284% when it is found by the jury to exist (odds ratio 3.84, $p=0.010$).

Table 4: Logistic Regression Model of All Mitigating Factors Found by the Jury to be Not Mitigating

	Odds Ratio	<i>p</i>
Statutory M2	6.52	.215
Statutory M6	2.15	.156
Depression	0.59	.660
Suicidal Tendencies	1.16	.933
Personality Disorder	3.50	.383
Psychotic Disorder	4.53	.309
Learning Disability	4.96	.251
Drug/Alcohol Addict	2.18	.364
Borderline Mental Retardation	1.30	.850
Low IQ	0.37	.344
Limited Cognitive Ability	0.88	.887
Physical Abuse	3.47	.538
Sexual Abuse	0.43	.602
Neglect or Abandonment	1.04	.967
Grew up in poverty	1.12	.903
Death of loved one as a child	1.00	.998
Statutory A3	2.25	.096
Statutory A4	4.48	.059
Statutory A5 Rape	3.91	.190
Statutory A5 Robbery with Firearm	1.35	.659
Statutory A5 Robbery	0.87	.897
Statutory A5 Burglary	0.77	.744
Statutory A5 Arson	0.67	.738
Statutory A5 Kidnapping	1.07	.927
Statutory A6	1.76	.281
Statutory A8	5.82	.212
Statutory A9	3.84	.010*
Statutory A10	5.47	.251
Statutory A11	2.17	.112

*indicates significance at the .05 interval

Table 5 shows the effect of the total number of mental health mitigators found to be mitigating and non-mental health mitigators found to be mitigating. For every mental health mitigator found, the likelihood of death decreases by 8% (odds ratio 0.92, $p=.003$). The likelihood of death is not significantly effected by non-mental health mitigators (odds ratio 0.97, $p=.266$). The range of mental health mitigators found is 0 to 44 and the mean is 8.48. The range of non-mental health mitigators found is 0 to 93 with a mean of 6.23.

Table 5: Logistic Regression Model For the Mitigating Circumstances Found Distinguishing Between Mental Health and Non-Mental Health Factors

	Odds Ratio	<i>p</i>
Number of Mental Health Found	0.92	.003*
Number of Non-Mental Health Found	0.97	.266
Total Aggravators Found	2.35	.000*

*indicates significance at the .05 interval

Figure 5 is a chart that shows the results from Table 5. The maximum number of mental health mitigators found was 44. This means that if you have 44 mental health factors found mitigating, the chance of a death sentence decreases by 352%.

Figure 5: The Percent Decrease in the Likelihood of a Death Sentence for Every Mental Health Factor Found Mitigating

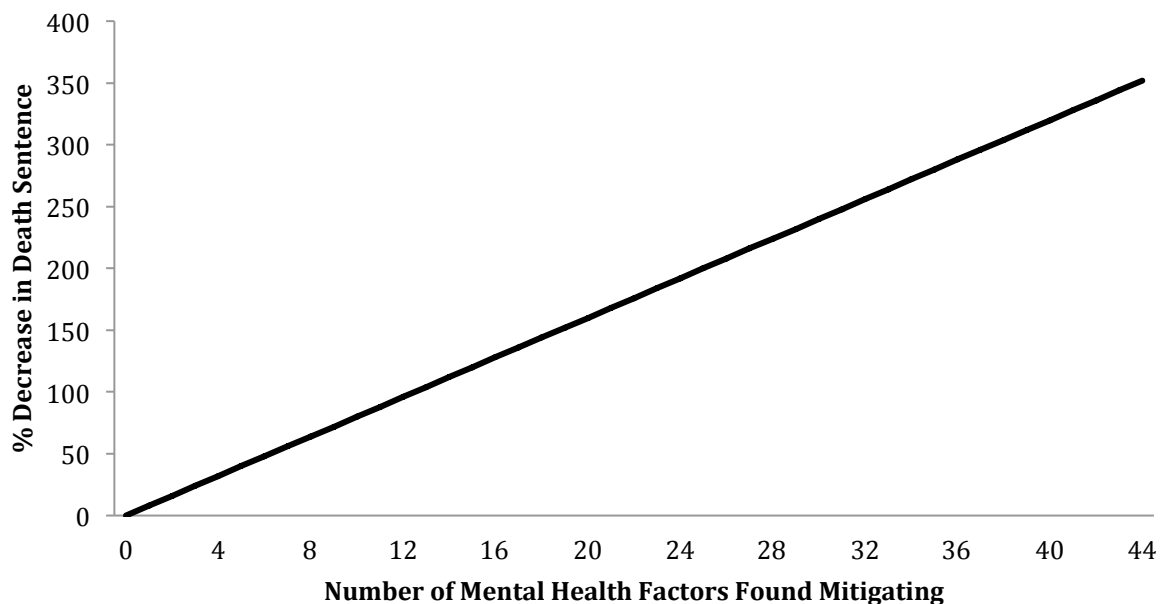


Table 6 shows the effect of the total percent of mitigators found out of how many were presented. For every one percent increase, the likelihood of a death sentence decreases by 90.4% (odds ratio 0.096, $p < .001$). The percent of mitigators found mitigating ranges from 0 to 100 and the average is 62.89%.

Table 6: Logistic Regression Model For the Percent of All Mitigating Circumstances Found

	Odds Ratio	<i>p</i>
Percent Found Mitigating	0.096	.000*
Total Aggravators Found	2.12	.000*

*indicates significance at the .05 interval

Table 7 shows the effect of the total percent of mental health mitigators found out of how many were presented. For every one percent increase, the likelihood of death decreases by 92% (odds ratio 0.08, $p < .001$). The percent of mental health mitigators found mitigating ranges from 0 to 100 percent and the mean is 66%.

Table 7: Logistic Regression Model For the Percent of All Mental Health Mitigating Circumstances Found and Percent of All Non-Mental Health Circumstances Found

	Odds Ratio	<i>p</i>
Percent Mental Health Found Mitigating	0.08	.000*
Total Aggravators Found	2.07	.000*

*indicates significance at the .05 interval

Discussion

Hypotheses

While only one of the non-statutory mitigators, borderline mental retardation, proved to be significant in the models, the non-significant results are still very important. The non-significant results confirms Unah (2011)'s finding that aggravators have more weight than mitigators and also expands on his finding and shows that this is true regardless of whether or not they are statutory. It is likely that these mitigating variables are not significant because we are controlling for the extremely large effect of the aggravators. Another limitation that could have resulted in

lesser significance is the sample sizes. I will talk more about this as I go through each of my hypotheses.

I hypothesized that when the jury did not find a personality disorder to be mitigating, the chance of a death sentence would increase. There were only 18 cases of personality disorders. This is a small sample size, but of those 18, 10 were death cases and 8 were life. However, of those that got death, 60% of the time the jury did not find the personality disorder to have any mitigating power. With life, only 12.5% of the time the jury did not find the personality disorder to be mitigating (87.5% of the cases of personality disorders that resulted in life were deemed to have mitigating power). If the sample size was bigger, it is probable that this would be significant and therefore support my hypothesis. This would mean that when a jury allows stigma to cloud their judgment about a personality disorder, the chance of a death sentence would increase. However, we cannot definitively say that these conclusions will hold up if the sample sizes are not larger, only that the numbers are leaning in that direction. It is also possible, as I mentioned before, that personality disorders are strongly correlated with aggravators and therefore the effect is reduced in the models because we are controlling for the large effect of the aggravators.

As with personality disorders, it seems as though when the jury does not find a psychotic disorder to be mitigating, the chance of death is higher. This, again, is not supported in the logistic regression. This most likely is also due to the small sample size of psychotic disorders (n=10) or controlling for the strong effects of the aggravators in the models. Edens et al. (2005) found that both antisocial personality disorder (psychopath) and psychosis are both associated with a perception of an increased probability of future danger. This could help to explain some of the overlap in the cases of psychosis and personality disorders and the aggravators. That being

said, a closer look at the frequencies suggests that if the trends remain, a larger sample size could produce results that support my hypothesis. Of the 5 cases of psychotic disorders amongst those that got death, 4 of the disorders were not found mitigating by the juries (80%). Of the 5 cases where the defendant had a psychotic disorder and got life, only one case was found to not be mitigating (20%). Just as with personality disorders, it seems as though when you have a psychotic disorder, but the jury does not find it mitigating, your chance of a death sentence increases.

I can draw a similar conclusion with the cases of depression and suicidal tendencies. Neither was significant in the logistic regression models, but the frequencies approach the direction that I hypothesized and could possibly be significant with larger sample sizes. I hypothesized that depression and suicidal tendencies would decrease the likelihood of a death sentence when the jury found them to be mitigating. There were 30 cases of depression out of the 145 defendants. Nineteen of these cases resulted in life sentences with 78.9% of them found to have mitigating power. Only 11 of the cases resulted in death, and of those 11, only 6 (54.5%) were found to be mitigating. These frequencies also support my hypothesis because those that had depression that the jury thought was mitigating, usually got life. There were only 6 cases (20% of the total) where the jury found a defendant's depression to be mitigating and still gave them a death sentence. Suicidal tendencies were not significant in either model. There were 19 cases of suicidal tendencies, 8 that received death, and 11 that received life. Of those that got death, only 37.5% of the cases were found to be mitigating. Of those that got life, 81.8% of the suicidal tendencies were found to be mitigating. As I hypothesized, the frequencies of a diagnosis of depression or suicidal tendencies suggest that when the jury finds these mitigating,

the likelihood of life does increase. However, as I mentioned, the sample sizes are very small so the effect is not significant in the logistic regression models.

The childhood trauma variables do not appear to affect the sentence outcome in the regression models either. The combined variable of childhood trauma had a sample size much larger (n=113). This means that 77.9% of the defendants presented some sort of traumatic event in their life before the age of 18. This is an extremely high percentage. For these variables, there is little difference between life and death because most often the trauma was found to be mitigating no matter the sentence. This does not support my hypothesis, but is nonetheless telling of the jury's mindset and suggests that defense attorneys should continue to present evidence of childhood abuse, loss of loved ones, bad caretakers, and other childhood trauma.

Borderline mental retardation (BMR) was the one variable that was significant. However, it was significant in that when found mitigating, significantly increases the chance of death, not life. This is concerning because in *Atkins v. VA* (2002), the ruling stood that it was cruel and unusual punishment to execute someone with an IQ in the borderline mentally retarded range. It is possible that this particular mental health factor is not strongly correlated with any of the aggravators and that is why it is significant and the others are not because the sample size is 18, comparable to the other sample sizes. Of those 18, 52.6% had mitigating BMR and received a death sentence. These numbers are not as high with the low IQ and limited cognitive ability variables, however, they do all stray from the general trends of the other mental health variables in that there is not a much higher rate of the mitigating variable amongst the life cases.

Finally, addiction was not significant in the regression model. Again, this is most likely due to the strong effects of the aggravating variables. The sample size for this variable was larger than some of the other categories (n=53). Of those that had an addiction, 47.2% of them were

found mitigating and got life. Seventeen percent of the time the addiction was found not mitigating and the defendant got death. This goes against my hypothesis, as I predicted that addiction would increase the chance of death when not found mitigating. While 17% is larger than the 7.5% that got life and had a non-mitigating addiction, almost all cases (71%) were found mitigating by the jury. Similarly to childhood trauma, defense attorneys should mention if their defendant has a drug or alcohol addiction as it is almost always seen as a mitigator.

The overall conclusion that we can make from these frequencies is that when the jury finds a mental illness to be mitigating, the defendant almost always gets life and the mental illness plays its intended mitigating role. However, when the jury does not think that a mental illness plays a mitigating role, the defendant usually gets a death sentence. The jury's understanding and opinion of mental illness can be very subjective to the jury members' experiences with mental illness.

Arbitrariness of Jury's Opinions

Another conclusion that I found in the regression models is that the ratio of mitigators found versus presented is a heavy indicator of sentence. If you have a low percent of mental health mitigators found, you are more likely to get a death sentence and vice versa. In many cases the exact same mental health factor is viewed as mitigating or not depending on the jury. This is important because for every mental health mitigator found, your chance of death decreases by 8% so each mental health mitigator is important. This is concerning when one jury finds a mental illness mitigating, but another finds the same exact mental illness not-mitigating because it creates an arbitrary process.

One possibility for this is that instead of weighing all the mitigating against the aggravating, it is possible that the jury makes a decision of life or death before seeing all of the

circumstances based on how heinous the murder is. As we saw in my regression models and Unah (2011)'s results, aggravating circumstances, especially A9 ("The homicide was especially heinous, atrocious, or cruel"), affect the sentencing outcome much stronger than mitigating circumstances do. The number of the mental health factors found still does decrease the likelihood, but the jury could make the decision about these mental health factors after they have already decided to give the defendant a life sentence. In theory, the jury should fill out the Issues of Recommendation form and at the end are asked if the mitigating outweigh the aggravating or vice versa once they have considered all factors. If the jury has a predetermined sentence in mind, it may sway the way they look at the mitigating factors presented on the form and therefore make them more likely to put a "yes" if they plan to give the defendant life, or a "no" if they plan to give the defendant death.

Another possibility is that mental illness is talked about very differently in each case. It is possible that the jury hears a skewed version of a mental illness and other mental health factors. In the transcript for Jim Haselden's case, the prosecutor said the following words in his closing argument:

Sort of interesting, in the Good Book here it was the first offense known to mankind, wasn't it? What did they say? Oh, but the serpent beguiled me, tricked me. It was the very first offense. And they're still doing it. They're doing it now. Called Issues and Recommendations and mitigating factors. Oh, let's blame it on something else. Have you ever heard your parents say, oh, I guess the devil made you do that? Have you heard somebody say, well, the devil made me do that? That's a shorthand version of I did it and I did it wrong. You know, it's interesting. They diagnosed Mr. Haselden as a substance abuse, ADHD disorder, low IQ, bad relationship. They left one out. Killer. Murderer. That's one of the diagnoses of this man. And you have found it beyond a reasonable doubt. What about that diagnosis? What about when Mr. Watson asked him, said, "Doctor, don't you believe that past behavior predicts future behavior?" This arbitrariness manifests itself in almost all of the mental health mitigators. He said, "Yes. Yes, I do."...[he goes on to talk in depth about the torturous elements of the crime]... I think I stopped here at number 9. The defendant is a product of deprived social environment and his early life was fairly chaotic. 10, the defendant's insight,

judgment and behavior control are all poor at times. Find it. Defendant's borderline retardation impairs his judgment. Nothing wrong with this man's judgment. There's nothing wrong with his insight. He just wants to do this. And he'll keep on wanting to do this and he'll keep on doing it as long as he's got a chance. As a child the defendant was sweet, loving and obedient. Find it. The defendant had little or no relationship with his natural father. You see what I mean? They tote this doctor in here and get him up on the stand to list -- go through them so we can put them down here on the paper. Well, I found that he was this, and I found that he didn't have a good relationship with his father, and I found that he was this, and I found he was of a low IQ. And then they want you to take that and weigh it against this? Defendant's emotional age is much less than his chronological age. Find it. Defendant was diagnosed as bipolar and was treated for such with prescribed medications. I think that's the only one that didn't come from the doctor. I think that came from his aunt. She opined at some time in the past he was bipolar. I don't know if that's true or not, but that's what she said. 16, after the defendant's hospitalization at Charter Hospital in Greensboro and in John Umstead Hospital in Butner there was little or no follow-up or after care provided to the defendant. He went to jail. He was put on probation. He couldn't even stay on probation without killing somebody, or committing a crime of violence. Find them all. The defendant as a teenager hung around with the wrong crowd which resulted in substance abuse and behavior change. Defendant stipulated and conceded that he was the individual who inflicted the wounds upon the decedent to cause the death. You know what they talking about? They're talking about this thing right here, State's Exhibit No. 13. He wanted you to get in this car once before and ride with him, wanted you to find him guilty of second degree murder. Well, now, since you didn't buy that second degree murder argument how about get in the car with me this time. Since I admitted it, that it was at my hands, how about, how about now giving me -- give me a life sentence, give me a break somewhere here. Can't you find a break for me? Why didn't he give her a break? Why didn't he do it for her?

This prosecutor presents Haselden's mental illness and all mitigating factors to the jury as excuses, simply something to blame the bad behavior on. He undermines his diagnoses and actually spins them off to appear to be aggravators by referring to the doctor's statements about future dangerousness. In this case, he even refers to mental health as arbitrary, but in a much different way than I am. He claims all mental health factors are arbitrary in the way that they manifest themselves in the future because they imply unpredictability. It seemed counterintuitive that borderline mental retardation increases the chance of a death sentence, but if the jury is told that it is an excuse and instead talked about as this prosecutor does: "Nothing wrong with this

man's judgment. There's nothing wrong with his insight. He just wants to do this. And he'll keep on wanting to do this and he'll keep on doing it as long as he's got a chance” this result seems more feasible. He also discredits the sources and refers to his Aunt’s testimony by saying “I don't know if that's true or not, but that's what she said” even though he was taking prescription medications for his Bipolar Disorder that were prescribed by a doctor and was admitted to a psychiatric hospital for the disorder. This closing argument is a prime example of what Fabian (2003) was referring to in his article. Mental illness can be undermined and skewed very easily to appear to be an aggravator.

Haselden had 18 mitigating circumstances presented. Of those, 13 were mental health mitigators and only 38.5% were found to be mitigating. According to my results, if all 13 were found to be mitigating, his chance of a life sentence would have increased by 64%. My study did not include a screening of the entire transcripts of cases so I cannot analyze the way mental illness is talked about by the prosecution in all cases. However, it is possible that the prosecutor’s words and witnesses called can skew mental health and make it appear aggravating to the jury. This, again, is arbitrary because one jury may be exposed to the same mental illness, but depending on the prosecution, that same mental illness could be presented in very different ways regardless of the fact that they are the same diagnosis. As we see with my regression and with the case of Haselden, having less mental health factors found could significantly decrease the chance of a life sentence.

Finally, one other reason that could contribute to the jury’s arbitrariness of determining if a mental health factor is mitigating, is the jury’s understanding of mental health. If a jury member grew up with a sibling or parent that overcame depression, they might be more likely to find that a defendant’s depression is mitigating because they understand the toll that depression

takes on a person's life. However, if a jury member's only exposure to mental illness is the media, they may have a very different outlook on the reality of mental illness. The jury's background with mental health is also arbitrary. One defendant may get lucky and end up with a jury that knows a lot about the developmental brain defects of trauma for example, whereas the others may know nothing about that and assume that the trauma made them a more violent individual. The background of the juries is arbitrary and could contribute positively or negatively to a defendant's sentence.

Keeping these three possibilities in mind, it is important to look at some specific examples of these arbitrary decisions. Even with the statutory mitigating circumstances, there is room for the jury to draw different conclusions about the same condition. For example, statutory mitigating circumstance 2, "whether the felony was committed while the defendant was under the influence of mental or emotional disturbance" can occur differently per case. For the case of Jeffrey Neal Duke, the jury was instructed:

You will find this mitigating circumstance if you find that the defendant suffered from bipolar disorder, poly-substance abuse, borderline personality disorder with antisocial features, and depression, and that as a result the defendant was under the influence of mental or emotional disturbances when he killed the victim.

The jury did not find that he was under the influence of a mental or emotional disturbance, most likely because the threshold for this circumstance to exist was so high. In contrast, a different jury did find James King under the influence of a mental or emotional disturbance when the criteria was much less strict:

You would find this mitigating circumstance if you find the defendant was rejected by his wife in an attempt to get back together and that this enraged James King and that as a result the defendant was under the influence of emotional disturbance when he killed the victim

Being enraged by your wife is an easier threshold to meet than finding that a defendant suffers from four different mental illnesses. This is important because this mitigating circumstance weighs heavily on whether or not someone gets a life sentence, as it was a significant predictor in the first logistic regression model. If someone is under the influence, they are much more likely to get a life sentence than a death sentence.

Mitigating borderline mental retardation unexpectedly increased the chance of a death sentence. Brandon Jones had a non-statutory mitigating circumstance, “consider whether the defendant has an IQ of 79 placing him in the borderline range of adult intelligence.” The jury said that this did not have any mitigating power. Another defendant, Charles Dickerson, had an almost identical mitigating circumstance presented, “Consider whether the defendant had I.Q. scores of 78 and 79, and whether you deem this to have mitigating value.” The jury said that this did have mitigating power. When borderline mental retardation is a significant predictor when found mitigating, it seems concerning that the jury is allowed to make a judgment call on IQ levels that are the same score.

This phenomenon is repeated over and over in almost every variable. The jury in Larry Bowman’s case found that this was not mitigating, “In 1984, Dr. All found that Larry, then almost 4, and his brother Dwight, then 2, had been sexually abused by Jacob” when almost every other case of childhood sexual abuse or assault was considered mitigating (76.9%). It seems concerning that a jury can rule that the defendant getting sexually abused at age 4 is not mitigating in one case, when a different jury rules that a defendant getting sexually abused in lesser circumstances is mitigating.

Francisco Tirado was sentenced to death despite many mitigating circumstances about his psychotic disorder:

1. Defendant's mental disease or disorders have necessitated the use of anti-psychotic medications to include Thorazine and Risperdol and other psychiatric medications to include Depakote and Prozac.
2. Defendant has been hospitalized at Dorothea Dix State Hospital and received psychiatric treatment at the Dobbs Training School where he was found to have command hallucinations or auditory hallucinations, i.e., voices commanding him to carry out aggressive acts.
3. Defendant has bizarre and paranoid thinking which causes him to feel persecuted and alienated.
4. Defendant has a tendency to think in a psychotic manner as his stress level increases.

The jury concluded that all four circumstances had no mitigating value, whereas Keith Hall had a very similar list of mitigators, all of which were found mitigating and he was sentenced to life.

1. Keith Hall has a long and documented history of a serious mental illness, schizophrenia, which has been diagnosed and treated by doctors at the state hospitals at Dorothea Dix and Broughton, among other facilities.
2. At the time of the crime, Keith Hall's mental illness was not being effectively treated.
3. Keith Hall has been diagnosed with a cognitive disorder.

I could give examples for almost all variables, but overall, it is clear that trauma, intellectual functioning, mental illness, and mental competency are all subjective variables. The jury can interpret them and choose to view the same variables as mitigating or not. And again, there is a significant result where the percent of mental health variables found and the number of mental health variables found both increase the likelihood of getting a life sentence. For this reason, the number of mental health mitigators found is important for determining a defendant's sentence. Because the ratio of these factors does affect the outcome and each individual factor does not significantly predict the likelihood of either sentence, this study shows and supports that the current system that the jury uses is arbitrary, and therefore unconstitutional.

Conclusion

Mental illness, as I mentioned in my introduction, is vastly over-represented on death row. The results of this paper shed light on one potential reason for this. Mental health variables are very subjective and arbitrary mitigators, and when the defendant gets death, the mental illness is usually found not mitigating. These factors may not be enough to outweigh the aggravators. The jury may have made a decision about the sentence before they even consider these variables. The prosecution may skew the perception of the factors. The jury may have varying background in their knowledge of mental health. Whatever the reason for the arbitrariness, it is very clear that the exact same mental health factor is not always found to be mitigating or not mitigating by different juries. The frequencies in my results show that, in the cases that got death, most often the jury did not see the mental health factors as mitigating and vice versa.

Future research should continue to explore the capriciousness of mental health and the role that this plays in capital trial. It could be beneficial to increase the sample sizes by expanding the date ranges once the documents are available or by expanding this study to other states. It would also be beneficial to expand the study outside of the Issues of Recommendation forms to include the jury instructions, which often include additional mental illness diagnoses, as well as explore the narratives told about the mental illnesses within the transcripts of the trial. The findings of this study suggest that the way that mental health functions in the current system is arbitrary and unconstitutional. I believe that expanding my research will confirm this finding. Finally, and most importantly, my research suggests that the reason that there are so many mentally ill inmates executed between 2000-2015 is that the juries in those cases arbitrarily decided that their mental illnesses were not mitigating and therefore could not outweigh the aggravators.

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Appendix

List of variables used in models:

1. Statutory mitigating circumstance 2: This murder was committed while the defendant was under the influence of mental or emotional disturbance.
2. Statutory mitigating circumstance 6: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.
3. Mental illness: Any mental illness, 2 if any is 2, 1 if all are 1, 0 if no mental illness mentioned
4. Depression: Any depression: Major depressive disorder, chronic depression, dysthymia, or simply depression
5. Suicidal: Suicidal tendencies such as a suicide attempt or self-injurious behavior
6. Personality Disorder: Personality disorder of any kind
7. Psychotic Disorder: Psychotic disorder of any kind including schizophrenia
8. ADHD: Attention deficit hyperactivity disorder
9. Learning Disorder: Learning disorders including, but not limited to dyslexia
10. Borderline Mental Retardation: Borderline mentally retarded or borderline intellectual functioning
11. Low IQ: The defendant has a low IQ
12. Limited Cognitive Ability: Decreased cognitive ability in some way such as scoring low on a reading exam or functioning at a lower grade level than they should be
13. Addict: Substance abuse disorder, addiction, dependency, or problem
14. Childhood Trauma: Any childhood trauma or adversity including abuse of any kind, poverty, death of loved one, bullying, moving houses and school a lot, homelessness, surviving a near death experience, head injury, divorce or separation of parents, born into a single-parent household etc. all under the age of 18
15. Physical Abuse: Physical abuse before the age of 18
16. Sexual Abuse: Sexual abuse before the age of 18, including sexual assault, rape, and molesting
17. Neglect: Neglect (medical, physical, or emotional) or abandonment before the age of 18
18. Emotional Abuse: Emotional or psychological abuse before the age of 18
19. Witnessed Domestic Violence: Lived in a house with domestic violence amongst the caretakers before the age of 18
20. Death of a Loved One: Close friend or relative dies before the age of 18
21. Statutory Aggravator 1: The defendant was lawfully incarcerated when the homicide occurred
22. Statutory Aggravator 2: The defendant had previously been convicted of another capital felony
23. Statutory Aggravator 3: The defendant had previously been convicted of a violent felony;
24. Statutory Aggravator 4: The homicide was committed to avoid or prevent an arrest, or to escape from custody

25. Statutory Aggravator 5 Rape: The homicide was committed during rape
26. Statutory Aggravator 5 Firearm: The homicide was committed during robbery with a firearm
27. Statutory Aggravator 5 Robbery: The homicide was committed during robbery
28. Statutory Aggravator 5 Burglary: The Homicide was committed during burglary
29. Statutory Aggravator 5 Arson: The homicide was committed during arson
30. Statutory Aggravator 5 Kidnapping: The homicide was committed during kidnapping
31. Statutory Aggravator 5 Homicide: The homicide was committed during another homicide
32. Statutory Aggravator 6: The homicide was committed for pecuniary gain
33. Statutory Aggravator 7: The homicide was committed to disrupt or hinder government or law enforcement
34. Statutory Aggravator 8: The homicide victim was a law enforcement officer, judge, prosecutor, etc.
35. Statutory Aggravator 9: The homicide was especially heinous, atrocious, or cruel
36. Statutory Aggravator 10: The defendant knowingly created a great risk of death to more than one person by use of a hazardous weapon or devise
37. Statutory Aggravator 11: The homicide was part of a course of conduct involving a crime of violence against another person.
38. Mental Health Presented: Total number of mental health mitigating circumstances presented
39. Mental Health Found: Total number of mental health mitigating circumstances found to be mitigating
40. Mental Health Percent: The total mental health found divided by the total presented
41. Non-Mental Health Presented: Total number of non-mental health mitigating circumstances presented
42. Non-Mental Health Found- Total number of non-mental health mitigating circumstances found to have mitigating power
43. Non-Mental Health Percent: The total number of non-mental health found divided by the total presented
44. Total Mitigators Presented: Total number of mitigating circumstances presented (statutory and non-statutory combined)
45. Total Mitigators Found: Total number of mitigating circumstances found to have mitigating power (statutory and non-statutory combined)
46. Total Mitigators Percent: The total mitigators found divided by the total presented
47. Total Aggravators Presented: Total number of aggravating circumstances presented
48. Total Aggravators found- Total number of aggravating circumstances found to have aggravating power (only statutory because there are not non-statutory aggravating circumstances)

*Variables 1 through 37 all have 4 variations of the same variable.

- a) Raw variation: coded a 0=not presented, 1=presented, but not found, 2=found
- b) Total variation: coded as 0=not presented, 1=presented as mitigating or found
- c) Mitigating variation: coded as 0=not presented or not found, 1=found
- d) Non-mitigating variation: coded as 0=not presented or found, 1=presented

Criteria for Being Considered a Mental Health Mitigating Factor:

- Anything about mental illness or mental illness symptoms
- Anything about a family member with mental illness or family history of mental illness
- Anything about the capacity to understand
- Anything about I.Q. or intelligence tests
- Anything about dropping out of school or failing a grade
- Anything about treatment-addiction, special education, or psychiatric
- Anything about psychological development
- Anything about developmental delays-e.g. premature birth
- Anything about the mental state or that affects it-e.g. fatigue or stress
- Anything about the childhood environment (good or bad)
- Anything about the parental guidance e.g. inconsistency, emotionally distant, criminal involvement, or drug usage
- Anything about negative or violent influences at a young age
- Anything pertaining to substance abuse or use around them or by them
- Anything trauma related that would meet childhood trauma criteria in childhood or adulthood (e.g. assault, death of loved one, abuse, living in poverty etc.)
- Any injury to the brain
- Spent part of formative years in confinement

*All other mitigators that do not fit any of the criteria are considered non-mental health factors.

One copy of an Issues of Recommendation Form is attached as an example.

STATE OF NORTH CAROLINA
MONTGOMERY COUNTY

**IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
99 CRS 3818**

STATE OF NORTH CAROLINA,

v.

SCOTT DAVID ALLEN,

Defendant.

ISSUES AND RECOMMENDATION AS TO PUNISHMENT

ISSUE ONE:

Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?

ANSWER yes.

BEFORE YOU ANSWER ISSUE ONE, CONSIDER EACH OF THE FOLLOWING AGGRAVATING CIRCUMSTANCES. IN THE SPACE AFTER EACH AGGRAVATING CIRCUMSTANCE, WRITE "YES," IF YOU UNANIMOUSLY FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT. WRITE, "NO," IF YOU DO NOT FIND THAT AGGRAVATING CIRCUMSTANCE FROM THE EVIDENCE BEYOND A REASONABLE DOUBT.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "YES," IN THE SPACE AFTER ISSUE ONE AS WELL. IF YOU WRITE, "NO," IN ALL OF THE SPACES AFTER THE FOLLOWING AGGRAVATING CIRCUMSTANCES, WRITE, "NO," IN THE SPACE AFTER ISSUE ONE.

(1) Was this murder committed for the purpose of avoiding or preventing a lawful arrest?

ANSWER yes

(2) Was this murder committed for pecuniary gain?

ANSWER yes

(3) Was this murder especially heinous, atrocious or cruel?

ANSWER yes

IF YOU ANSWERED ISSUE ONE "NO," SKIP ISSUES TWO, THREE, AND FOUR, AND INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT", ON THE LAST PAGE OF THIS FORM. IF YOU ANSWERED ISSUE ONE "YES," PROCEED TO ISSUE TWO.

ISSUE TWO:

Do you find from the evidence the existence of one or more of the following mitigating circumstances?

ANSWER yes

BEFORE YOU ANSWER ISSUE TWO, CONSIDER EACH OF THE FOLLOWING MITIGATING CIRCUMSTANCES. IN THE SPACE AFTER EACH MITIGATING CIRCUMSTANCE, WRITE "YES," IF ONE OR MORE OF YOU FINDS THAT CIRCUMSTANCE BY A PREPONDERANCE OF THE EVIDENCE. WRITE, "NO," IF NONE OF YOU FINDS THAT MITIGATING CIRCUMSTANCE.

IF YOU WRITE, "YES," IN ONE OR MORE OF THE FOLLOWING SPACES, WRITE, "YES," IN THE SPACE AFTER ISSUE TWO AS WELL. IF YOU WRITE, "NO," IN ALL OF THE FOLLOWING SPACES, WRITE, "NO," IN THE SPACE AFTER ISSUE TWO.

(1) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

ANSWER NO One or more of us finds this mitigating circumstance to exist.

(2) Scott Allen has a support system in the community.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (3) Scott Allen is a loving son.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (4) Scott Allen has the love of his immediate family and extended family.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (5) Scott Allen has a very close and loving relationship with his daughter.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (6) Scott Allen was affected by the numerous separations of his parents.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (7) Scott Allen dropped out of school in the tenth grade.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (8) Scott Allen has been helpful to Gina Coble and Jordan Allen.

ANSWER NO One or more of us finds this mitigating circumstance to exist.

- (9) As a child, Scott Allen did not think his father loved him as much as he did his brother.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

- (10) Scott Allen was deeply affected by the death of his grandfather.

ANSWER YES One or more of us finds this circumstance to exist and deem it to have mitigating value.

(11) Scott Allen's death would have a detrimental impact on his mother, father, daughter and other family members.

ANSWER YES One or more of us finds this circumstance to exist and deem it to have mitigating value.

(12) After Scott Allen's arrest for this offense, he has exhibited positive behavior while in jail and prison.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

(13) Scott Allen is unlikely to cause problems in prison.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

(14) Scott Allen would adjust well to prison life.

ANSWER NO One or more of us finds this circumstance to exist and deem it to have mitigating value.

(15) Any other circumstance or circumstances arising from the evidence which one or more of you deems to have mitigating value.

ANSWER NO One or more of us finds the mitigating circumstance to exist.

ANSWER ISSUE THREE IF YOU ANSWERED ISSUE TWO, "YES." IF YOU ANSWERED ISSUE TWO, "NO," SKIP ISSUE THREE AND ANSWER ISSUE FOUR.

ISSUE THREE:

Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?

ANSWER YES

IF YOU ANSWER ISSUE THREE, "YES," PROCEED TO ISSUE FOUR. IF YOU ANSWER ISSUE THREE, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT."

ISSUE FOUR:

Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances you found is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

ANSWER YES

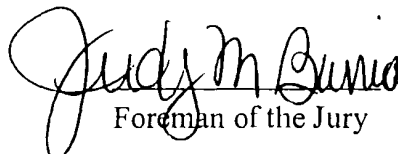
IF YOU ANSWER ISSUE FOUR "YES," INDICATE DEATH UNDER "RECOMMENDATION AS TO PUNISHMENT." IF YOU ANSWER ISSUE FOUR, "NO," INDICATE LIFE IMPRISONMENT UNDER "RECOMMENDATION AS TO PUNISHMENT."

RECOMMENDATION AS TO PUNISHMENT

INDICATE YOUR RECOMMENDATION AS TO PUNISHMENT BY WRITING "DEATH," OR "LIFE IMPRISONMENT," IN THE BLANK IN THE FOLLOWING SENTENCE:

We, the jury, unanimously recommend that the defendant, Scott David Allen, be sentenced to Death.

Date: This 18 day of November, 2003.

 (Signature)
Foreman of the Jury
Judy M. Burris (Printed)