New Hampshire Public Defender

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February 15, 2008

N. William Delker
Jeffrey Strelzin
Office of the Attorney General
33 Capital Street
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RE: Expert Disclosure Pursuant to Sup Ct Rule 35 Relative to April 10, 2008 Evidentiary Hearing

Dear Will and Jeff:

On February 8, 2008, the Court ordered that we provide expert witness disclosure consistent with Superior Court Rule 35 by February 15, 2008. We are providing this document and the attached reports in order to comply with Rule 35. (Please note that due to the short notice of the deadline on this disclosure, these expert reports are not signed as they were sent by e-mail.)

Identity of expert witnesses the defendant expects call as an expert witness at hearing
As you know the Court has approved funds for Wanda Foglia, William Bowers and Mahzarin Banaji. Due to the demands of the El Mexicano trial we have not had an opportunity to thoroughly review your objections on this issue. Additionally, you have not notified us as to the names of your experts, nor provided expert reports. I mention these two things in the event that a more thorough review of your pleadings and/or your experts' reports causes us to seek additional evidence to respond to your arguments. See NH Superior Court Rule 35(f)(1).

Brief summary of the expert's education and experience relevant to his area of expertise
We have provided *curriculum vitae* for all three of these witnesses, which detail their educational background and relative experience. See NH Superior Court Rule 35(f)(2).

Subject matter on which the expert is expected to testify
-Wanda Foglia and William Bowers
William Bowers and Wanda Foglia will testify about research regarding jury decision-making in death penalty cases, including research conducted by the Capital Jury Project. See NH Superior Court Rule 35(f)(3).

-Mahzarin Banaji
Professor Banaji will testify on the subject matter of implicit racial bias and its impact on jury decision-making in death penalty cases. See NH Superior Court Rule 35(f)(3)

Summary of the facts and opinions to which the expert(s) are expected to testify and a summary of the grounds for each opinion

-Wanda Foglia and William Bowers
Although our motions outline in great detail the facts and opinions to which these two experts are expected to testify, I have summarized these opinions as follows:

Motion to Bar Imposition of the Death Penalty #23: Based on Risk of Error In Jury's Determination of Which Defendant's Should be Executed

-There is evidence that many jurors do not understand the instructions they are supposed to follow.
-There is evidence of rampant premature decision-making in death penalty cases.
-A substantial amount of jurors have erroneously believed that if certain aggravators were proved, the law required them to impose the death penalty.
-Jurors believed that the ultimate responsibility for the defendant's punishment rested with someone else.
-Capital jurors grossly underestimated the amount of time a defendant would serve if not sentenced to death.

Motion to Bar the Death Penalty No. 16 : The Death Penalty Statute Violates the New Hampshire Constitution Because it Compels a Trial Before a Jury that is Not As Impartial As The Lot of Humanity Will Admit

-There is empirical evidence indicating that death qualification disproportionately affects the representation of blacks on capital juries since opposition to capital punishment is significantly more prevalent among blacks.
-There is evidence that "death qualification" produces "conviction prone" juries.
-There is evidence that the extensive *voir dire* process required by death qualification increased subject's belief in the guilt of the defendant and their estimate that he would be convicted.
-There is evidence that jury selection fails to remove large numbers of death biased jurors.

Motion to Bar Death Penalty- No. 25: The Unavoidable Impact of Race Makes the Death Penalty Unconstitutional in this Case

-Jury decision-making is influenced by the race of the juror, the race of the defendant and the race of the victim.

-Racial bias, whether conscious or unconscious, has an impact on jury decision-making in death penalty cases as to mitigation evidence.

-Racial bias, whether conscious or unconscious, has an impact on jury decision-making in death penalty cases as to aggravating factors.
-The procedural protections in place to protect against racial bias, whether conscious or unconscious are ineffective.

Much of the grounds for these opinions as based upon the research conducted by the Capital Jury Project. We have also provided you with the address for the website for the Capital Jury Project. This website details the background of the CJP, as well as providing a list of articles and cases which have relied on the research from the CJP. We have provided great detail about this research in defendant's Motion to Bar Death Penalty-No. 25: The Unavoidable Impact of Race Makes the Death Penalty Unconstitutional in this Case, pages 4-7. See NH Superior Court Rule 35(f)(4).

We do anticipate introducing documents from the Capital Jury Project, such as exhibits relating to the interview protocols for interviewing jurors. We do not have those exhibits at this time, but will forward them to your office when we receive it. The CJP website has a list of states where jurors were interviewed as well as the name of the interviewers.

At the hearing last week, you requested that we narrow the list of articles that we will be relying on at the hearing. We cannot do this and this "narrowing" is not required by Rule 35. If we have cited to an article in our motion, we are relying on that article. Obviously, there are some articles which we cite to more frequently than others in our pleadings. See William J. Bowers and Wanda D. Foglia, Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing, 39 Crim. L. Bull. 51 (2003); Craig Haney et. al., "Modern" Death Qualification: New Data on Its Biasing Effects, 18 Law and Hum. Behav. 619, 631 (1994); Bowers, Steiner, Sandys, Death Sentencing In Black And White: An Empirical Analysis Of The Role Of Jurors' Race And Jury Racial Composition, U. Pa. J. Const. L. 171(2001).

--Mahzarin Banaji

Professor Banaji will testify about the growing body of social science research which recognizes the pervasiveness of unconscious racial and ethnic stereotyping and group bias. The results of the testing in this field demonstrates that a given person's "self-report" as to whether they have prejudicial attitudes is not an accurate indicator as to that person's level of racial bias. We have provided great detail about Professor Banaji's proposed testimony in Reply to State Objection to Defendant's Objection to Defendant's Motion for Services Other Than Counsel: Expert on Implicit Racial Bias and Motion for Services Other Than Counsel: Expert on Implicit Racial Bias. See NH Superior Court Rule 35(f)(4).

While our experts have not conducted research on jurors in New Hampshire, they have conducted studies in many other states with a variety of demographics. Except where otherwise noted, their findings are generally consistent through all states examined. Our experts will testify that the potential jurors in NH are sufficiently similar to jurors in other states that the same findings would apply.

We continue to research this issue and prepare for the hearing on these motions. These preparations include meeting with our experts, reviewing their research and reviewing the law and research cited by your office. It is therefore quite possible that we may need to supplement this report between now and April 10, 2008.

Sincerely,

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AFFIDAVIT OF WANDA FOGLIA

1. My name is Wanda Foglia. I am a Professor of Law and Justice Studies and Coordinator of the Masters in Criminal Justice Program at Rowan University, Glassboro, New Jersey. I am a former prosecutor and police academy instructor, and I currently teach students who plan to work in the criminal justice system. I earned a Ph.D. in Criminology from The Wharton School of the University of Pennsylvania, a J.D. from the University of Pennsylvania Law School, and a B.A. in Psychology from Rutgers College.

2. For the past 11 years, I have been involved in the Capital Jury Project as an investigator. The Capital Jury Project, funded by the National Science Foundation, is an ongoing study of how capital jurors make their sentencing decisions. It is designed to test legal and behavioral models of decision-making to determine the bases upon which capital jurors make their decisions about the imposition of the death penalty, and whether the decision-making process conforms to statutory and constitutionally defined criteria.

3. The Capital Jury Project is organized as a consortium of independent university-based investigators from 14 states. States were chosen to include the various statutory schemes utilized in the United States, to include representation of different geographic regions of the country, and to include states where there were a sufficient number of capital cases to meet sampling goals. Research began in November of 1990, and interviews have been conducted with 1198 capital jurors.

4. Typically, 20-30 capital trials providing a balance of life and death outcomes are selected in each state. A target sample of four randomly selected jurors from each trial is interviewed. Strict procedures are followed to ensure randomness of juror selection. A coding

and storage system preserves confidentiality and accommodates both quantitative and qualitative information.

5. The juror interview instrument is the product of six revisions, two pretests and two meetings of participating investigators. The investigators directing the Project in the respective states include psychologists, criminologists, sociologists, and law professors. State specific questions were included in some states to explore nuances relating to some individual states, but the majority of the questions, and all of the results that would be discussed in my testimony, pertain to aspects of the capital process that would be the same in every state because they are dictated by United States Supreme Court case law interpreting the requirements of the United States Constitution.

6. Findings of this research have been presented at annual national meetings of the American Society of Criminology, Academy of Criminal Justice Sciences, and the Law and Society Association, and published in Law and Society Review, Cornell Law Review, Indiana Law Journal (symposium issue devote to the Capital Jury Project), Texas Law Review, DePaul Law Review, Brooklyn Law Review, University of Pennsylvania Journal of Constitutional Law, Justice Quarterly, Criminal Law Bulletin, Judicature, among other outlets. Some of the CJP findings have been cited by the U.S. Supreme Court to decide limited issues in Schiro v. Summerlin, 542 U.S., 348, 356 (2004) and Simmons v. South Carolina, 512 U.S. 154, 169-170, n. 9 (1994).

7. I supervised the data collection for the Capital Jury Project in Pennsylvania. In addition, I personally trained interviewers for Pennsylvania, conducted some of the interviews myself, and have been analyzing the national data and giving presentations, testifying, and publishing articles on the CJP findings since 1996.

8. I have been qualified and testified as an expert in cases in states included in our sample (California, Georgia, Indiana, Missouri, North Carolina, Pennsylvania, and Tennessee) and in states that were not included in our sample (Colorado, Kansas, and New Mexico). Citations are provided in my curriculum vita. Based on CJP results, the judge in New Mexico help aspects of the state death penalty statute unconstitutional and judges in other states have allowed expanded voir dire and expanded jury instructions. I also responded to requests to testify before the New Jersey Death Penalty Study Commission (whose recommendation to repeal the death penalty was recently followed by the New Jersey legislature and governor), and to submit a report to the Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System (who cited my report with approval and recommended a moratorium on the death penalty as well as other reforms). There has never been an expert or research refuting the results of CJP results introduced in any of the forums in which I have testified.

9. As indicated earlier, the United States Supreme Court has relied on CJP results to decide limited issues in previous cases but, to my knowledge, the full testimony that I would present has never been submitted to the United States Supreme Court.

10. Jurors were interviewed about a number of issues related to their punishment decision, their understanding of the instructions, as well as their ability to follow the law in arriving at their punishment decision. Some of the major findings on these issues are presented in *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing* which I co-authored with William J. Bowers.[1]

[1] Bowers and Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, (2003) 39 Criminal Law Bulletin 51.

11. The Tables included in this Affidavit are from Bowers and Foglia (2003) and most of them show the percentages for 13[2] of the 14 states. The remarkable consistency in the problems found in every state, regardless of geographic location or statutory scheme, makes the results from all fourteen states relevant in any jurisdiction governed by the United States Constitution. For any given item, statistics are presented for valid responses, meaning all answers except those with missing data.

12. Bowers and Foglia identify "seven different problems with the capital jury decision making process."[3]

i) Premature Decision-Making: All jurors were asked the following question: "After the jury found [defendant's name] guilty of capital murder but before you heard any evidence or testimony about what the punishment should be, did you then think [defendant's name] should be given a death sentence, a sentence of life without the possibility of parole (or the alternative in that state), [or were you] undecided? The responses of the jurors are included below in Table 1 from Bowers and Foglia (2003).

[2] Louisiana is not listed separately because sampling goals were not met in that state.
[3] Id. at 54.

Table 1: Percentage of Capital Jurors Taking Each Stand on Punishment Before Sentencing Stage Trial in 13 States

States	Death	Life	Undecided	No. of jurors
Alabama	21.2	32.7	46.2	52
California	26.1	16.2	57.7	142
Florida	24.8	23.1	52.1	117
Georgia	31.8	28.8	39.4	66
Indiana	31.3	17.7	51.0	96
Kentucky	34.3	23.1	42.6	108
Missouri	28.8	16.9	54.2	59
North Carolina	29.2	13.9	56.9	72
Pennsylvania	33.8	18.9	47.3	74
South Carolina	33.3	14.4	52.3	111
Tennessee	34.8	13.0	52.2	46
Texas	37.5	10.8	51.7	120
Virginia	17.8	31.1	51.1	45
All States	30.3%	18.9%	50.8%	1135

Regardless of jurisdiction, only approximately half of these jurors maintain that they were undecided on punishment at the end of the guilt phase. Moreover, nearly one-third nationwide stand ready to vote for death prior to hearing evidence and instructions that are supposed to guide their sentencing decision. Most of the jurors who chose death said they were absolutely convinced (70.4%) about the punishment and nearly all the rest said pretty sure (another 27%).

We asked our jurors if they thought they knew what the punishment should be at four different points in the process:

1) after the guilt phase but before the sentencing phase
2) after the sentencing instructions but before deliberations
3) at first vote
4) at final vote

Bowers, Sandys, and Steiner[4] present evidence showing that most of the early pro-death jurors never wavered from this position and maintained that the punishment should be death at all four points about which we inquired. Jurors who prematurely decided the sentence should be death were more likely to say they made their guilt and punishment decisions "together, on the basis of similar considerations." They also were most likely to say they first knew what the punishment should be during the guilt evidence. Those taking a premature death stance were more likely to see death as the only acceptable punishment for more types of murder, expressed stronger support for the death penalty, and were more likely to find the defendant guilty of capital murder. These jurors reported that during guilt deliberations, they were less likely to discuss issues such as burden of proof and degree of guilt and more likely to report that they discussed the impermissible topic of the sentence.

These patterns confirm what social psychology research and common experience tells us: that once people form an opinion they tend to interpret subsequent information to support their position. Nearly half the jurors are deciding the sentence, and nearly one out of three jurors are deciding the sentence should be death, before the sentencing phase even begins so the statutes are not guiding their discretion and they cannot be giving meaningful consideration to the mitigating evidence presented during the sentencing phase.

ii) Bias in Jury Selection: According to Bowers and Foglia, many of the jurors who served on the cases represented by the Capital Jury Project were in fact Automatic Death Penalty jurors -- jurors who would vote for a sentence of death in every case in which they found the defendant guilty of a capital offense -- and thus should have been excused for cause.

All jurors were asked: "Do you feel that the death penalty is the only acceptable punishment, an unacceptable punishment, or sometimes acceptable as punishment for the

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[4] Bowers, Sandys and Steiner, *Foreclosed Impartiality In Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, And Premature Decision Making* (1998) 83 Cornell L. Rev. 1476.

following crimes? Murder by someone previously convicted of murder; A planned premeditated murder; Murders in which more than one victim is killed; Killing of a police officer or prison guard; Murder by a drug dealer, and; A killing that occurs during another crime." As can be seen in Table 2 from Bowers and Foglia (2003), nearly three-quarters of the jurors, regardless of jurisdiction, felt that the death penalty is the *only acceptable* punishment for murder by someone previously convicted of murder. Similarly, over half of the jurors felt that death is the *only acceptable* punishment for persons convicted a planned premeditated murder or a murder with multiple victims. Close to half thought death was the *only acceptable* punishment for killing a police officer or prison guard or a killing by a drug dealer. And nearly one-quarter of these jurors viewed death as the *only acceptable* punishment for a killing that occurs during another crime. Nationwide, the percentage saying death was unacceptable for any of these murders was under 4%. Jurors cannot give meaningful consideration to mitigating evidence if they believe death is the only acceptable punishment.

Table 2: Percentages of Jurors Considering Death the Only Acceptable Punishment for Six Types of Murder by State

States	By defend-. ant with prior murder conviction	Planned premed-itated murder	Murder with multiple victims	Killing police/ prison guard	Murder by drug dealer	Murder during another crime	N
Alabama	66.7%	54.4%	57.9%	37.5%	46.4%	36.8%	56
California	58.6%	41.4%	41.1%	41.4%	33.6%	17.8%	151
Florida	77.6%	64.1%	62.1%	51.3%	52.6%	19.7%	115
Georgia	70.8%	54.8%	46.6%	51.4%	47.2%	23.6%	72
Indiana	74.7%	54.5%	55.6%	44.4%	52.5%	23.2%	99
Kentucky	71.2%	56.7%	50.5%	46.6%	48.5%	18.1%	103
Missouri	75.4%	54.1%	52.5%	45.9%	38.3%	19.7%	61
North Carolina	73.8%	68.8%	55.0%	58.8%	45.0%	21.5%	79
Pennsylvania	71.8%	65.4%	62.8%	55.1%	47.4%	28.2%	78
South Carolina	76.3%	61.4%	54.4%	43.0%	49.1%	26.5%	113
Tennessee	78.3%	67.4%	58.7%	54.3%	43.5%	30.4%	46
Texas	76.9%	57.3%	59.5%	58.6%	48.7%	35.3%	116
Virginia	55.6%	46.7%	40.0%	48.9%	42.2%	15.6%	45
All States	71.6%	57.1%	53.7%	48.9%	46.2%	24.2%	1164

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

Although the above demonstrates that voir dire is not very effective at disqualifying the ADP jurors, numerous studies show that it is so efficient at eliminating those with reservations about the death penalty that it results in a jury that is more conviction and punishment prone than a representative group of citizens. Prior studies comparing people who would make it through death qualification (includables) with those who would be struck from the jury (excludables) find that includables are significantly more conviction and punishment prone than those who would be excluded.[5] For example, compared to those who would be excluded by the death qualification process, jurors who would be death qualified are less likely to believe in criminal justice attitudes supporting due process such as it is better to risk the guilty going free rather than to convict the innocent, are less likely to find evidence mitigating, and are more likely to find evidence aggravating. The percentages for CJP jurors, who obviously all made it through death qualification, are more similar to those for the includables as opposed to the excludables on the three questions we asked that are analogous to those asked in the earlier study by Haney, Hurtado, and Vega (1994). Most of these differences remained significant, even after additional questions were asked to eliminate ADP jurors.

In addition, the death qualification process itself creates a bias against the defendant because all those questions about the death penalty at the outset of the process makes jurors think that the authority figures in the courtroom, the judge, prosecutor and defense attorney, must think the defendant is guilty and deserves death.[6] Haney (1984a) shows that when two

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[5] See: Haney, Hurtado, and Vega, *"Modern" Death Qualification: New Data On Its Biasing Effects* (1994) 18 Law & Human Behavior 619; Cowan, Thompson, and Ellsworth, *The Effects Of Death Qualification On Jurors' Predisposition To Convict And On The Quality Of Deliberation* (1984) 8 Law & Human Behavior 53; Fitzgerald and Ellsworth, *Due Process vs. Crime Control: Death Qualification And Jury Attitudes* (1984) 8 Law & Human Behavior 31; Sandys and McClelland, *"Stacking The Deck For Guilt And Death: The Failure Of Death Qualification To Ensure Impartiality"* (2003) (Chapter 13 in Acker, et al's "America's Experiment With Capital Punishment" 2d ed.); Blume and Johnson, Threlkeld, *"Probing Life Qualification Through Expanded Voir Dire"* (2001) 29 Hofstra L. Rev. 1209; and articles cited therein.

[6] Haney, *On The Selection Of Capital Juries: The Biasing Effects Of The Death-Qualification Process* (1984a) 8 Law & Human Behavior 121; Haney, *Examining Death Qualification: Further Analysis Of The Process Effect* (1984b) 8 Law & Human Behavior 133; and articles cited therein.

groups of people watch the same videotape of a trial, except that one group also views a segment on death qualification, the people who viewed the death qualification are significantly more likely to vote for death. The CJP interviews confirm results from prior studies that show that all the questions about the death penalty at the beginning of the jurors' experience have a biasing effect. We asked jurors whether these questions made them think the defendant was guilty and should be sentenced to death. In response to both questions, approximately 1 in 10 jurors were conscious of and willing to admit that all those questions about the death penalty had an influence on them. When asked about the impact of these questions, 11.3% of the jurors said the questions made them think the defendant "must be" or "probably was" guilty, and almost as many, 9.2%, said the questions made them think the appropriate sentence "must be" or "probably was" the death penalty.

The combined influence of each of the above findings creates a profoundly pro-conviction/pro-death bias which permeates the guilt and penalty phases of a capital defendant's trial.

iii) Failure to Understand Instructions: One of the major tenets of guided discretion statutes is that instructions would serve to channel discretion so as to remedy arbitrariness in capital sentencing. The CJP interviews confirm results from prior studies that show that many jurors do not understand the guidance they are supposed to be following.[7]

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[7] Bowers, Foglia, *Still Singularly Agonizing: Law's Failure To Purge Arbitrariness From Capital Sentencing* (2003) 39 Crim. Law Bulletin 51; Bentele and Bowers, *How Jurors Decide On Death: Guilt Is Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse* (2001) 66 Brooklyn L. Rev. 1011; Bowers, Fleury-Steiner, Antonio, *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, Or Legal Fiction* (chapter 14 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (2d ed., 2003)); Bowers and Steiner, *Choosing Life Or Death: Sentencing Dynamics In Capital Cases* (chapter 12 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (1st ed., 1998)); Geimer, Amsterdam, *Why Jurors Vote Life Or Death: Operative Factors In Ten Florida Death Penalty Cases* (1988) 15 Am. J. Crim. Law 1; Haney, Sontag, Costanzo, *Deciding To Take A Life: Capital Juries, Sentencing Instructions, And The Jurisprudence Of Death* (1994) 50 Journal of Social Science Issues 149; Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of Early Findings* (1995) 70 Ind. L. J. 1043; Haney and Lynch, *Comprehending Life And Death Matters* (1994) 18 Law & Human Behavior 411; Haney and Lynch, *Clarifying Life And Death Matters: An Analysis Of Instructional Comprehension And Penalty Phase Closing Arguments* (1997) 21 Law & Human Behavior 575; Lynch, Haney, *Discrimination And Instructional Comprehension: Guided Discretion, Racial Bias, And The Death Penalty* (2000) 24 Law & Human Behavior 337; Tiersma, *Dictionaries And Death: Do Capital Jurors Understand Mitigation?*

Some of this prior research actually involved linguists who tried to rewrite the instructions to make them easier to understand and gave jurors written copies of the instructions, but they still found many jurors failed to understand the guidance.[8] Results from the Capital Jury Project provide direct evidence that many jurors do not understand the sentencing instructions; this is especially true of instructions that are designed to guide jurors in their consideration of mitigating circumstances.

As can be seen from Table 3 from Bowers and Foglia (2003), this is a significant problem in every state, regardless of statutory scheme. Some of the guidelines will differ under various state statutes, but in every state jurors have to be able to consider any relevant mitigating evidence because of the United States Supreme Court case *Locket v. Ohio*. Nearly half of the CJP jurors nationwide (44.6%) failed to understand this. There also is United State Supreme Court case law that says jurors do not need be unanimous on findings of mitigation, but over 2 out of 3 jurors nationwide (66.5%) failed to understand they did not need to agree on whether evidence was mitigating. No state requires that mitigation be found beyond a reasonable doubt, but nearly half the jurors nationwide (49.2%) thought they had to apply that standard of proof to mitigating evidence. On the other hand, aggravating evidence does have to be proven beyond a reasonable doubt, and close to a third (29.9%) of the jurors failed to understand that part of the instructions. The statutes cannot be effectively guiding juror discretion when substantial portions of the jurors do not understand the jury instructions.

(1995) 1995 Utah L. Rev. 1; Eisenberg and Wells, *Deadly Confusion: Juror Instructions In Capital Cases* (1993) 79 Cornell L. Rev. 1; and articles cited therein.

[8] Diamond and Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions* (1996) 79 (5) Judicature 224; Wiener, Pritchard, and Weston, *Comprehensibility of Approved Jury Instructions in Capital Murder Cases* (1995) 80 Journal of Applied Psychology 455.

Table 3: Percentages of Jurors Failing to Understand Guidelines for Considering Aggravating and Mitigating Evidence

	JURORS WHO FAILED TO UNDERSTAND THAT THEY...				
States	Could consider any mitigating evidence	Need not be unanimous on mitigating evidence	Need not find mitigation beyond reas. doubt	Must find aggravation beyond reas. doubt	N*
Alabama	54.7%	55.8%	53.8%	40.0%	52
California	24.2%	56.4%	37.6%	41.7%	149
Florida	49.6%	36.8%	48.7%	27.4%	117
Georgia	40.5%	89.0%	62.2%	21.6%	73
Indiana	52.6%	71.4%	58.2%	26.8%	97
Kentucky	45.9%	83.5%	61.8%	15.6%	109
Missouri	36.8%	65.5%	34.5%	48.3%	57
North Carolina	38.7%	51.2%	43.0%	30.0%	79
Pennsylvania	58.7%	68.0%	32.0%	41.9%	74
South Carolina	51.8%	78.9%	48.7%	21.9%	113
Tennessee	41.3%	71.7%	46.7%	20.5%	44
Texas	39.6%	72.9%	66.0%	18.7%	47
Virginia	53.3%	77.3%	51.2%	40.0%	43
All States	44.6%	66.5%	49.2%	29.9%	1185

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

iv) Erroneous Beliefs that Death is Required: Beyond the issue of jurors failing to understand instructions, evidence from the Capital Jury Project reveals that sizeable percentages of jurors erroneously believe that death is required if certain aggravators are proved beyond a reasonable doubt. In particular 43.9% of the jurors nationwide falsely believed that the law required them to impose death if the defendant's conduct was "heinous, vile, or depraved." In addition, 36.9% of jurors nationwide believed that the law required them to vote for death if the evidence proved that the defendant would be dangerous in the future. As Table 4 from Bowers and Foglia (2003) indicates, these misunderstandings were seen in every state, including states that did not even list these factors as aggravating circumstances.

Table 4: Percentages of Jurors Thinking Law Required Death if Defendant's Conduct was Heinous, Vile or Depraved," or Defendant "Would be Dangerous" in Future by State

	DEATH REQUIRED IF DEFENDANT'S CONDUCT IS HEINOUS, VILE OR DEPRAVED	DEATH REQUIRED IF DEFENDANT WOULD BE DANGEROUS IN FUTURE	N*
Alabama	56.3%	52.1%	48
California	29.5%	20.4%	146
Florida	36.3%	25.2%	111
Georgia	51.4%	30.1%	72
Indiana	34.4%	36.6%	93
Kentucky	42.7%	42.2%	109
Missouri	48.3%	29.3%	58
North Carolina	67.1%	47.4%	76
Pennsylvania	56.9%	37.0%	73
South Carolina	31.8%	28.2%	110
Tennessee	58.3%	39.6%	48
Texas	44.9%	68.4%	117
Virginia	53.5%	40.9%	43
All States	43.9%	36.9%	1136

* The number of subjects answering each question varied slightly, and the number (N) for each state is the lowest number of subjects answering any of the questions.

v) Evading Responsibility for the Punishment Decision: Yet another indication that many jurors did not understand the sentencing process is their failure to understand their responsibility for the defendant's punishment. The United States Supreme Court warned in *Caldwell v. Mississippi* (1985) that jurors would be reluctant to accept responsibility and that the sentence would be unreliable if jurors believed the ultimate responsibility rested with others. The CJP interview instrument asked the jurors to rank the defendant, the law, the juror, the jury and the judge in terms of how responsible they were for the defendant's sentence. Table 5 from Bowers and Foglia (2003) shows the responses to this question.

TABLE 5: Percent Ranking Five Sources or Agents of Responsibility for the Defendant's Punishment from Most "1" to Least "5" Responsible

	MOST RESPONSIBLE> 1	2	3	4	LEAST <RESPONSIBLE 5
the defendant because his/her conduct is what actually determined the punishment	49.2	10.7	6.0	7.7	26.3
the law that states what punishment applies	32.8	40.0	8.6	12.5	6.2
the jury that votes for the sentence	8.9	23.6	38.3	25.4	3.8
the individual juror since the jury's decision depends on the vote of each juror	5.6	14.2	27.1	28.4	24.7
the judge who imposes the sentence	3.5	11.3	20.4	25.8	38.9

* Percentages are based on the 1,095 jurors who ranked all five options (i.e., ranks sum to 15).

Over 80% of the jurors interviewed said the defendant (49.2%) or the law (32.8%) was primarily responsible for the defendant's punishment. In contrast, only 5.6% said the individual juror and only 8.9% said the jury as a whole were most responsible. Another question in the national sample asked about how responsibility was allocated among the jury, trial judge, and appellate judges and in the 10 states where the jury decision was binding on the judges, only 29.8% believed the jury was strictly responsible.

vi) Racial Influence in Juror Decision Making: Numerous studies using different methodologies show that racial bias still affects the death penalty process. Mock jury studies have found that when the defendant is African American, mitigating evidence is less likely to be accepted as mitigating, and sometimes even used to support a death verdict,[9] and that people with racial bias are more likely to make it through the death qualification process and be

[9] Lynch and Haney, *Discrimination and Instructional Comprehension: Guided Discretion, Racial Bias and the Death Penalty* (2000) 24 Law and Human Behavior 337.

conviction prone.[10] There are now numerous studies showing racial bias in the outcomes of capital cases similar to the earlier work considered by the United States Supreme Court in *McKlesky v. Kemp* (1986). Much of the research on racial bias is discussed in an article by Baldus et al. (1998),[11] including a review of work done throughout the country showing that 90% of the studies showed defendants were more likely to get the death penalty when the victim was white, and evidence from New Jersey and Pennsylvania of bias against African American defendants. The impact of race is especially prominent when both are true, that is, in inter-racial crimes where the defendant is African American and the victim is white. The CJP looked at interviews from such inter-racial crimes we found that the race of the jurors also had an impact.

Bowers and Foglia (2003)[12] present analysis of inter-racial homicides in cases where there were interviews from both African American and white jurors. The racial composition of the jury was strongly related to the outcome of the cases. The chances of a death penalty was 30% when there were less than five white male jurors, but more than doubled (70.7%) when there were five or more white male jurors. The presence of white males did not have this effect in cases where both the defendant and the victim were from the same race. Having an African American male on the jury reduced the chances of a death sentence from 71.9% to 37.5 percent when the defendant was African American and the victim was white, and from 66.7% to 42.9% when both the defendant and victim were African American. The presence of a black male did not have any impact when both defendant and victim were white.

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[10] Young, *Guilty Until Proven Innocent: Conviction Orientation Racial Attitudes, and Support for the Capital Punishment* (2004) 25 Deviant Behavior 151.

[11] Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman era: An Empirical and Legal Overview, with Recent Findings From Philadelphia* (1998) 83 Cornell L. Rev. 1638.

[12] See also Bowers et al., *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composistion*, (2001) 3 U. Pa. J. Constit. L. 171 for additional details.

As can be seen in Table 6, when jurors' responses in these inter-racial crimes were broken down by race and gender, there were striking differences between the way African American men and white men viewed the same cases. African American males were over 7 times more likely to be affected by lingering doubt about guilt when deciding the punishment (53.4% v. 6.9%) and nearly 6 times more likely to think the defendant might not be the one who was most responsible (60.0% v. 10.3%). They were much more likely to think the defendant was sorry (80.0% v. 14.8%), and imagine themselves in the defendant's situation (53.3% v. 26.7%) or in the defendant's family's situation (80.0% v. 30.0%). White males were more than twice as likely to say "dangerous to other people" described the defendant very well (63.3% v. 26.7%) and nearly four times as likely to erroneously believe defendants not given death would be out of prison in less than ten years (30.0% v. 7.7%).

Table 6: Elements of (a) Lingering Doubts (b) the Defendant's Remorse and Identification, and (c) Dangerousness and Early Release by Jurors' Race And Gender in Black Defendant-White Victim Cases

	JURORS' RACE AND GENDER			
	White Males	White Females	Black Males	Black Females
(A) LINGERING DOUBTS				
1. Importance of lingering doubts about the defendant's guilt for you in deciding on punisment				
VERY	0%	12.5%	26.7%	21.1%
FAIRLY	6.9%	0%	26.7%	15.8%
NOT VERY	6.9%	8.3%	0%	15.8%
NOT AT ALL	86.2%	79.2%	46.7%	47.4%
(No. of jurors)	(29)	(24)	(15)	(19)
2. When considering punishment, di you think the defednant might not be the one most responsible of the killing?				
YES	10.3%	4.0%	60.0%	36.8%
NO	86.2%	96.0%	40.0%	52.6%
NOT SURE	3.4%	0%	0%	10.5%
(No. of jurors)	(29)	(25)	(15)	(19)
(B) REMORSE AND IDENTIFICATION				
1. How well does "Sorry for what s/he did" describe the defendant?				
VERY WELL	7.4%	20.0%	46.7%	31.6%
FAIRLY WELL	7.4%	0%	33.3%	21.1%
NOT SO WELL	33.3%	40.0%	6.7%	15.8%
NOT AT ALL	51.9%	40.0%	13.3%	31.6%
(No. of jurors)	(27)	(25)	(15)	(19)
2. Did you imagine yourself in the defendant's situation?				
YES	26.7%	28.0%	53.3%	31.6%
NO	73.3%	72.0%	46.7%	68.4%
(No. of jurors)	(30)	(25)	(15)	(19)
3. Did you imagine yourself in the defendant's family's situation?				
YES	30.0%	48.0%	80.0%	47.4%
NO	60.0%	48.0%	13.3%	47.4%
NOT SURE	10.0%	4.0%	6.7%	5.3%
(No. of jurors)	(30)	(25)	(15)	(19)
C. DANGEROUSNESS AND EARLY RELEASE				
1. "Dangerous to other people" describes the defendant				
VERY WELL	63.3%	52.0%	26.7%	42.1%
FAIRLY WELL	30.0%	32.0%	53.3%	36.8%
NOT SO WELL	3.3%	8.0%	0%	10.5%
NOT AT ALL	3.3%	8.0%	20.0%	10.5%
(No. of jurors)	(30)	(25)	(15)	(19)
2. How long do you think someone not given the death penalty for a capital murder in this state usually spends in prison?				
0-9 YEARS	30.0%	17.6%	7.7%	7.1%
10-19 YEARS	30.0%	52.9%	30.8%	57.1%
20+ YEARS	40.0%	29.4%	61.5%	35.7%
(No. of jurors)	(20)	(17)	(13)	(14)

This difference in perspectives is also reflected in the jurors' narrative accounts of their experience. As a 54 year old black man who actually voted for death said:

> ...there is always racial overtones. Because he's black, it was "automatic," You got six whites, six blacks and you got six whites out there and somebody in authority already told you what the black man has done, so automatically, he's done it. I don't think blacks think that way until they hear. White folks have a tendency, that once the charges are read - "he did it."

In another case where both the defendant and victim were African American, the repeated references to race made by a 58 year old white male juror suggested that he might have been influenced by racial stereotypes. Although he claimed to be objective, he admitted "I have this thing about the black Muslim," and went on to reference innocent people being hurt at some unrelated incident. Although none of the other jurors interviewed from the case mentioned race, he mentioned it repeatedly and referred to the defendant as an animal and a gorilla, and compared him to Rodney King. He went on to say:

> It just illustrates what's going on in this country, right now. I'm not going to be racial about it, but you have to state the facts. The blacks are killing the blacks. And you don't do it gently, it's just brutal.

I was asked to do an analysis of Pennsylvania data for the Supreme Court of Pennsylvania's Committee on Racial and Gender Bias in the Justice System and found similar race linked patterns as those found in the national sample. I analyzed all the cases together because the smaller sample size made it impossible to just look at inter-racial cases. In Pennsylvania I found that juries dominated by white males were more likely to impose death, jurors were more likely to prematurely decide on death when the defendant was African

American, jurors were more likely to have lingering doubt when the defendant was white, and were more likely to be very concerned about the defendant killing again when the defendant was black. As in the national data, black jurors were more likely to see the defendant as remorseful. In Pennsylvania CJP cases, over two-thirds of the black defendants were sentenced to death compared to half of the non-black defendants. An analysis of the case characteristics did not reveal any differences other than race that would explain this contrast in outcomes. The CJP adds direct evidence on the impact of the race of the defendant, the racial composition of the jury and the race of individual jurors to the previous research evidence of how race has a biasing impact in the capital process.

vii) Underestimating the Death Penalty Alternative: There is an abundance of research, including CJP data, showing that most capital jurors grossly underestimated how long someone not sentenced to death would spend in prison, and the lower their wrong estimates, the more likely they were to vote for death.[13] A review of Gallup Polls done by Gross (1998)[14] shows that between 1991 and 1998, when support for the death penalty was between 70 an 80%, support dropped 15-20% when LWOP was offered as an alternative. Polls from 2006 show that this pattern persists. While support for the death penalty is between 65 and 67% in the 2006

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[13] Bowers and Foglia (2003); Bowers and Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing* (1999) 77 Texas L. Rev. 605; Bowers, *The Capital Jury Project: Rationale, Design, And Preview Of Early Findings* (1995) 70 Ind. L. J. 1043; Bowers and Steiner, *Death By Default: An Empirical Demonstration Of False And Forced Choices In Capital Sentencing* (1999) 77 Texas L. Rev. 605; Steiner, Bowers, and Sarat, *Folk Knowledge As Legal Action: Death Penalty Judgments And The Tenet Of Early Release In A Culture Of Mistrust And Punitiveness* (1999) 33 Law & Society Rev. 461; Foglia, *They Know Not What They Do: Unguided And Misguided Discretion In Pennsylvania Capital Cases* (2003) 20 Justice Quarterly 187; Haney, *Violence And The Capital Jury: Mechanisms Of Moral Disengagement And The Impulse To Condemn To Death* (1997) 49 Stan. L. Rev. 1447; Blume, Garvey, and Johnson, *Future Dangerousness In Capital Cases: Always 'At Issue'* (2001) 86 Cornell L. Rev. 397; and Bowers and Steiner, *Choosing Life Or Death: Sentencing Dynamics In Capital Cases* (chapter 12 from Acker, Bohm, Lanier, America's Experiment With Capital Punishment, (1st ed., 1998))

[14] Gross, *Update: American Public Opinion on the Death Penalty-Its Getting Personal.* 83 Cornell Law Review 1448 (1998); see also William J. Bowers, Margaret Vandiver and Patricia H. Dugan, *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators prefer,* 22 American Journal of Criminal law 77 (1994).

polls, when LWOP is offered as an option, support falls to 47%. Like the general public, jurors are more likely to support the death penalty when they think defendants not sentenced to death will be released from prison.

Table 7 from Bowers and Foglia (2003) shows that in every state, most of the CJP jurors believed *most* defendants would be released before they were even eligible for parole, even in the states that had Life Without Parole (LWOP) at the time of the interviews.

TABLE 7: Capital Jurors' Estimates and Mandatory Minimums of Time Served Before Release from Prison by Capital Murderers Not Sentenced to Death by State

	YEARS IN PRISON IF NOT GIVEN DEATH		
State	Median estimate*	(N)	Mandatory minimum**
Alabama	15.0	(35)	LWOP
California	17.0	(98)	LWOP
Florida	20.0	(104)	25
Georgia	7.0	(67)	15
Indiana	20.0	(75)	30
Kentucky	10.0	(74)	12, 25***
Missouri	20.0	(47)	LWOP
North Carolina	17.0	(77)	20
Pennsylvania.	15.0	(63)	LWOP
South Carolina	17.0	(99)	30
Tennessee	22.0	(42)	25
Texas	15.0	(106)	20
Virginia	15.0	(36)	21.75
All states	15.0	(943)	-----

*Median estimates exclude "no answers" and unqualified "life" responses but include responses indicating "life without parole" or "rest of life in prison."
**These are the minimum periods of imprisonment before parole eligibility for capital murderers not given the death penalty at the time of the sampled trials in each state.
***Kentucky gives capital jurors different sentencing options with 12 years and 25 years before parole eligibility as the principal alternatives (See Bowers and Steiner 1999, supra at 646 n.198).

Bowers and Steiner (1999) show that jurors who espouse extremely low estimates are more likely than those giving the more realistic estimate of 20+ years to choose death at all four points about which we inquired. The difference in the percentage choosing death between those with low and high estimates actually gets more pronounced as the trial progresses, which is consistent with jurors narrative reports that the dangerousness of the defendant if released is a

dominant topic in deliberations. The more jurors underestimate when defendants usually get released, the more likely they are to consistently take a stand for death and ultimately vote for death.

The United States Supreme Court cited some of the earlier CJP research in *Simmons v. South Carolina* where it held that if the alternative to death was LWOP and the prosecution argued the defendant would be dangerous in the future, then the jury must be informed that the defendant could not be paroled. Now all but one state provide LWOP for at least some capital offenses, and all but two require that the jury be told parole is not an option. However, the early CJP data show that it is difficult to convince jurors that the defendant really will not be released on parole.

In interviews with California jurors who were told that a life sentence meant the defendant would not be paroled, some jurors said they simply did not believe what the judge told them. One typical juror in a death case said he believed defendants usually get released in fifteen years even though he observed that officially they say the sentence is:

> Life imprisonment, but even though now it says without possibility of parole, we were still concerned that some day he'd get out on parole. We didn't want him out again at all.

Another juror who ultimately voted for death said:

> I was undecided. I had a personal problem with the life sentence, but then the judge explained to me that if he gets a life sentence there was absolutely no chance that he would get out. I thought he might get out. I still don't trust anybody about it.

In California, 32.9% of the jurors who actually voted for death said they would have preferred life without parole if it had been an alternative, as indeed it was in the cases they decided. Jurors are influenced by memories of media accounts of murderers who have been released from prison, and do not realize that these may have been people sentenced under prior laws or people who had not been convicted of capital murder. It is very difficult to convince jurors that life really means life because of the widespread distrust of the criminal justice

system. As Bowers and Foglia note "[b]oth statistical analyses and jurors' narrative accounts of the decision process demonstrate that these unrealistically low estimates made jurors more likely to vote for death," (2003 at 82).

13. In my opinion, having been involved in the Capital Jury Project since 1996, having supervised the data collection in Pennsylvania, having co-authored several articles based on the entire data set, having done extensive reviews of research done by others in the preparation of these articles, New Hampshire capital jurors are similar to capital jurors in the 14 states that comprise the Project: they are just as likely to decide on the punishment decision during the guilt phase, to see death as the "only acceptable" punishment for many of the types of murder most often death-eligible, to misunderstand the instructions, to erroneously believe that death is required when certain aggravators exist, to see others as more responsible for the punishment decision than themselves, to be influenced by racial bias, and to underestimate the length of time served for persons not sentenced to death. None of the statutory approaches used throughout the country have been able to take the arbitrariness out of the system as required by United States Supreme Court case law.

Summary of Testimony of Professor Mahzarin Banaji

A growing body of behavioral science recognizes the pervasiveness of unconscious racial bias, in the form of implicit stereotypes and implicit preferences. The discoveries of this science show that a given person's "self-report" as to whether they have prejudicial attitudes need not be an accurate indicator of the person's level of racial bias. This may be because the person chooses to withhold information but far more likely is the possibility that the reason for the inaccuracy in because we cannot know our minds even when committed to the task of speaking our minds. This outcome is a feature of how the brain and mind work about which we know a great deal more now than we did 25 years ago. The important point here is that even if people are motivated to respond with complete honesty about their inner states, they are compromised because they are not privy to their own implicit thoughts and feelings. The relevance of these discoveries becomes clear when we take into account the fact that not only do implicit thoughts and feelings exist, but that they influence judgment and decision-making.

The concept of implicit bias been extensively tested and demonstrated by psychologists for the past twenty years. This research includes data collected from numerous instruments, a family of which uses speeded responses and error rates to calculate the strength of associations in the mind. One such instrument called the Implicit Association Test (IAT) has received the most attention, producing over 500 reports in scientific journals. Unlike the results of other tests that have been confirmed using small samples of mainly college students, the IAT is unique in having been tested for 10 years at a website at which over 6 million tests have been taken by male and female respondents of various ages, ethic and racial background, social class, geographic region, religion, and personality. From the controlled laboratory tests as well as the more diverse samples obtained via the Internet, the IAT provides robust evidence about implicit or

unconscious bias. Evidence regarding implicit racial bias, has been generally and widely accepted in the relevant scientific community both in the United States and internationally. None of this research was available 21 years ago when McCleskey was decided.

I, Mahzarin R. Banaji, am a Professor of Psychology at Harvard University where I have taught for the past six years. Prior to that I taught at Yale University for 15 years. I am an expert on social cognition, a field of inquiry into the mental models humans have of themselves, other human beings and their social groups. My special expertise is on unconscious mental processes, the way our minds work without awareness and without conscious control. Along with Anthony Greenwald of University of Washington and Brian Nosek of University of Virginia, I am a co-developer of the Implicit Association Test.

I have been supremely mindful of the scope and interpretation of this test and its results. I have taken the conservative position that this test cannot and should not be used to select individuals for particular positions such as a job or in jury selection. This position I take is not necessarily shared by legal scholars who believe that this test can and should be used in selection contexts like juries. As mentioned, mine is the more conservative position, but I do believe that we must distinguish between the test as an instrument to select (which I do not support) and the test as an instrument to discover and understand, but also to educate. As such, my testimony will have no bearing on making the case that jury selection should involve the use of the IAT – in fact, I would be opposed to use usage of the test. It will rely on the strongest scientific evidence as a way to inform and educate the court.

I believe that the concept of implicit bias has garnered substantial evidence in support of the idea that new forms of bias exist that was previously unknown. These discoveries have shaped scientific thinking about the nature of prejudice and it is now widely regarded that the

view of human behavior from which accounts of old-fashioned prejudice were derived in decades past was incorrect. For example, we know that conscious feelings of animus or hatred of a group are not necessary for discriminatory behavior to result. This important result emerges not only from the use of the IAT, but also from the many other significant lines of research generated by many other scholars, notably Russell Fazio of Ohio State University, Patricia Devine of University of Wisconsin, and John Dovidio of Yale University.

The Implicit Association Test, which is the instrument I will rely on most heavily in making my case, has the unique advantage of providing an educational experience. It has allowed individuals to sample in private those aspects of their mind that are not easily visible to them. As such, this test has educational value for all members of society, especially those who face the task of making consequential decisions. It is this educational aspect of the test that perhaps accounts for its wide use as an exercise to raise awareness among all citizens but especially groups of professionals and educators in the worlds of business, law, law enforcement, medicine, and social services. It is the scientific evidence and the unique educational aspect of the IAT that the defense will rely on.

An important question raised by social scientists concerning the IAT is this: Is this test merely tapping a form of bias that passively sits in people's heads and never leaves it, or does it actually influence decision-making and behavior? In other words, does the test meet scientific standards of "predictive validity"? Because of the large number of studies now conducted on this topic, it has been possible to conduct a meta-analysis. This review shows that especially in the domain of discrimination, the IAT predicts behavior better than self-report. (Greenwald, A. G., Poehlman, A., Uhlmann, E. & Banaji, M. R. (in press). Understanding and interpreting the Implicit Association Test III: Meta-analysis of predictive validity. /Journal of Personality and Social Psychology/)

. This research will provide a crucial piece of the evidence to support the defense's claim of the impact of race bias in judgment and decision-making broadly.

The second part of my testimony will concern research on implicit bias that directly implicates the decision-making process in capital cases. The research on implicit racial bias has

been produced from over six million tests and clearly demonstrates its universal presence. "[S]tudies ...have shown, time and again, negative indirect (automatic) evaluations of and behavior toward Black compared with White Americans." (emphasis added), See, Phelps, P.A., O'Conner, K.J., Cunningham, W.A., Funayama, S., Gatenby, J.C., Gore, J.C., Banaji, M.R., Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation, 12.5 Journal of Cognitive Neuroscience, 729- 738, 729 (2000).

I am quite familiar with, and plan to testify about, the specific research of Professor Jennifer Eberhardt, who has used the concept of implicit racial bias to conduct studies of its impact on death penalty decision-making. See, Eberhardt, Jennifer, et al., Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes, Psychological Science, Volume 17, Number 5 (2006); Eberhardt, Jennifer, et al., Not Yet Human: Implicit Knowledge, Historical Dehumanization, and Contemporary Consequences, Journal of Personality and Social Psychology(2008). (This article is due to be published in the next week or so, but counsel has been provided with an advanced copy by Professor Eberhardt). Both the "Not Yet Human" article and the "Looking Deathworthy" article specifically demonstrates how there is a reliable link between the research on implicit racial bias and juror decision-making in actual death penalty cases. Id, at pgs. 12-13. The research conducted by Professor Eberhardt uses much of the same theory and methodology as the research I have conducted. I plan to testify that my research on implicit racial bias, as well as the research of Professor Eberhardt and several others in this field, shows that there is a link between implicit racial bias and the type of judgment and decision-making involved in death penalty cases. I have also served as the advisor of record to Professor Irene Blair of the University of Colorado who has conducted research on the association between race and severity of punishment. See, Pizzi,

W. T., Blair, I. V., & Judd, C. M., Discrimination in Sentencing on the Basis of Afro-centric Features. Chapter to appear in S. Jones, J. Cardi and G. Parks (Eds), Critical Race Realism: Intersections of Psychology, Race, and Law. (in press).

It is my understanding that in a death penalty case the jury is asked to judge the defendant's character, propensity for violence and morality. The research on implicit bias goes to the most fundamental dimension of human character along which a person is judged – their goodness. I will testify about the effects of race on that that basic association as it exists even in the minds of those like myself who genuinely believes herself to have no conscious race bias.

I will argue that such a bias has been reveled in both behavior and in measures of neural activity measured using brain imaging techniques such as functional Magnetic Resonance Imaging. I will also show that the research goes further in demonstrating the infrahumanization of Black Americans, and that automatic associations of "animal" to Black Americans can influence judgments of deathworthiness.

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Mahzarin R. Banaji
February 15, 2008