Written Testimony of Thomas W. Brewer, Ph.D.
Respectfully Submitted to the
Maryland Commission on Capital Punishment

My name is Tom Brewer and I am an Associate Professor in the Department of Justice Studies at Kent State University in Kent, Ohio. I also hold an appointment as a Research Fellow at Kent State's Institute for the Study and Prevention of Violence. I would like to thank you for considering my testimony in this important matter.

I have been lucky enough in my relatively short career to experience the criminal justice system from a variety of vantage points. As a military police officer in the United States Army I had the distinct privilege of serving in the 101st Airborne Division, I also served as a traffic accident investigator in Germany, and as a desk sergeant in the largest American community outside of our borders. I have also had the opportunity to work in public defense as a research associate at the New York State Defenders Association. Currently I teach and conduct research on the criminal justice system. Since coming to Kent State I have been awarded over $650,000 from the United States Department of Justice and the State of Ohio to study various law enforcement and street gang initiatives. I have also served as the state coordinator for the Capital Jury Project in Ohio and co-investigator for the nationwide research effort. It is this work on capital juries I will discuss today.

The United States Supreme Court, in *Furman v. Georgia*, held that the death penalty was unconstitutional as applied because juries were given little or no guidance on how to make this incredibly important decision. States rushed to draft statutes that attempted to provide some guidance in the exercise of discretion, or eliminated it altogether. Four years later the Court approved the so-called "guided discretion" statutes which sought to channel the jury's decision-making process according to a standardized timetable, a statutorily defined set of factors, specific evidentiary thresholds, and other requirements. The Court then spent the next 30 years trying to further define the concept of guided discretion and reconcile these statutes with the realities of what was happening in the court system. One thing is clear, and the Supreme Court has stated and restated this without equivocation from *Witherspoon and Lockett,* to the recent decision in *Ring v. Arizona*: the constitutionality of the death penalty in the United States is predicated in large part on the ability of jurors to actually apply these guided discretion statutes to their decision-making process.

In 1991, a group of lawyers and social scientists undertook, with funding from the National Science Foundation, a systematic program of study to measure the fidelity between the Supreme Court's mandates and suppositions regarding the behavior of capital jurors and the reality of how they make their decisions. The methodology is described in more detail in the articles submitted, but I will start by briefly explaining what was done. Fourteen states were chosen to include different parts of the country and different types of death penalty statutes. Within each state, between 20 and 30 capital cases were chosen to get approximately half that had resulted in a sentence of death and half in whatever alternative the state provided. Jurors were chosen randomly in an attempt to get four jurors from each case. These people were then questioned by trained interviewers who followed a script of neutrally worded questions laid out in the interview instrument. The final sample is interviews from 1,198 jurors from 353 trials in 14 states.

The study was designed with the understanding that not every jurisdiction with the death penalty could be included and in fact Maryland was not included in the Phase I sample. So, the statistical results I will present today do not include information from jurors in your state. However, the National Science Foundation funded two additional iterations of the Capital Jury Project and Maryland is included in those. We have 12 Maryland interviews from which we can pull some qualitative data. Dr. Charlie Lanier from the University at Albany is a leading expert on analysis of the open-ended data and he has gone through the Maryland interviews with a fine-tooth comb. He found that these interviews suggest Maryland jurors do not perform any better or worse than their colleagues in other states.

In addition to Dr. Lanier's review of the Maryland interviews, I can tell you that in the social sciences, the generalization of data taken from a sample and applied to a population is completely acceptable. What you will see in the supplementary materials I have provided is an amazing consistency among the states represented. The results appear to be independent of region and type of statute.

Over 50 research papers have been published in law reviews and peer reviewed scientific journals which use the Capital Jury Project data. I will talk mostly about the seven different problems with the way juries make their decision which are summarized in the article written by Drs. Bowers and Foglia that I have provided to you with this testimony.

Before I present the results, please allow me to offer one caveat. The testimony I am about to give demonstrates that capital jurors have a very difficult time adhering to the mandates of guided discretion statutes. Most, if not all, jurors undertake this difficult

task with an earnest desire to follow the law and render a just verdict. However, it is a complicated process and an extremely difficult decision and many, sometimes most, did not understand or follow the rules that have been established to make sure the process is not arbitrary or unfair.

Constitutional Problems with Capital Juror Decision-Making

Our interviews with people who actually served on death penalty cases show that there are problems throughout the process, from jury selection through the sentencing phase. Our findings replicate findings from prior research that show:

1) premature decision-making
2) bias in jury selection
3) failure to comprehend instructions
4) erroneous beliefs that death is required
5) evasion of responsibility for the punishment decision
6) the influence of race on the process, and
7) underestimation of the non-death penalty alternative

Premature Decision-Making

As you probably know, capital trials use two phases. The first phase determines guilt or innocence, and assuming the defendant is found guilty, the second phase determines the punishment. It is this second phase where the guided discretion statutes actually provide their constitutionally mandated guidance. 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

Close to half the jurors (49.2%) said they had made up their minds what the punishment should be after the guilt phase but before the sentencing phase had even begun. Thirty percent said they had already decided the punishment should be death. Most of them said they were absolutely convinced (70.4%) about the punishment and nearly all said absolutely convinced or pretty sure (another 27%). 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. 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 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.

My own research confirms this. Using sophisticated multiple regression models, which control for a number of other possible explanations, I found that these pre-death jurors were significantly less likely to consider mitigation evidence during penalty phase deliberations.

Bias in Jury Selection

The second problem, or more accurately set of problems, involves the selection of the jury. Here we are focusing on the beginning of a capital proceeding when jurors are asked a series of questions to make sure they are willing to impose a death penalty. This is commonly called the death qualification process, although legally it also should "life qualify" jurors, or insure that they are willing to consider mitigation as the law requires. There are really three distinct problems with the jury selection process.

First, the death qualification process eliminates potential jurors who do not believe in the death penalty so the resulting jury is composed of people that are more conviction and punishment prone than the general population. This is called a composition effect. There are numerous studies that compare people who would make it through jury selection with those who would be struck from a capital jury. Considering that recent polls show that close to 40% of the public does not believe in the death penalty, a sizable portion of the population would not be allowed to sit on a capital jury. Those who would make it on to a jury are more likely to support punitive attitudes, are more likely to find defendants guilty, are less likely to find certain factors mitigating, and are more likely to vote for death compared to those that would be excluded.

The second problem with the jury selection process is called a process effect because it identifies the biasing effect of going through the death qualification process itself. 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.

Finally, this already flawed process doesn't do a very good job at eliminating jurors who believe so strongly in the death penalty that they are unwilling to consider mitigation as the law requires. Although the process should also "life qualify" jurors or insure that jurors would be willing to consider mitigation, it seems to be more effective at death qualifying. CJP results show that large numbers of our jurors made it on to capital juries even though they say they consider "death the only acceptable punishment" for six different types of murder that would cover nearly all capital cases. They cannot give meaningful consideration to mitigating evidence if they believe death is the only acceptable punishment. More than half the jurors said that death was the only acceptable punishment for planned, premeditated murder, murder by a defendant with a prior murder conviction, or a murder with multiple victims.

Failure to Understand Instructions:

The CJP interviews confirm results from prior studies that show that many jurors do not understand the guidance they are supposed to be following. 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 (44.6%) of the CJP jurors failed to understand this. There is also United State Supreme Court case law that says jurors do not need to be unanimous on findings of mitigation, but over 2 out of 3 jurors (66.2%) 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 (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.

Erroneous Beliefs that Death is Required:

Another indication that jurors are not understanding the guidance they are given is that they erroneously believe death is required once certain facts are proven, although the United States Supreme Court has said that the law can never require death without

consideration of mitigation. Jurors were asked whether, after hearing the sentencing instructions, the law required them to impose death if the defendant's crime was "heinous, vile, or depraved," or if the defendant would be "dangerous in the future." In each case, over 1 out of 3 jurors wrongly believed death was required. For the total sample, 43.9% thought death was required if the defendant's conduct was "heinous, vile, or depraved," and 36.9% thought death was required if the defendant would be "dangerous in the future." This was true even in states where these factors were not even listed as aggravating circumstances. These erroneous beliefs are especially troubling when one considers that in most of the cases the jurors believed that the evidence did prove that the defendant's conduct was "heinous, vile, or depraved" (81.5%) and/or that the defendant would be "dangerous in the future" (78.2%).

In one Maryland case involving the death of a police officer, a juror summarized her perception of one of her colleague's attitudes:

> "I thought there was a kind of a quest for vengeance that disturbed me and kind of my impression was that it effectively closed the persons mind to any mitigating circumstances you kill a police officer you die"

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. Over 80% of the jurors interviewed said the defendant (49.3%) 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 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.

Influence of Race:

Prior research, some of which has been or will be mentioned at these hearings, has found evidence that the defendant is more likely to get the death penalty if the victim is white or if the defendant is African American. 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. When we looked at interviews from such inter-racial crimes we found that the race of the jurors also had an impact.

We looked at inter-racial homicides in cases where we had 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.

When jurors' responses in these inter-racial crimes were broken down by race and gender, we found 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%). A juror in a Maryland case that was interviewed for the second phase of the Capital Jury Project recalled this about the penalty-phase deliberations:

> "There was a lot of screaming and fighting well, that's probably, basically it came down to eleven to one and there was one juror who was holding out because what he said was 'there is no way I'm sending another black man to death row'."

The juror referred to was an African American male.

White male jurors 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%).

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."

Underestimating the Death Penalty Alternative:

Early CJP data showed that the 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. In every state, most of the jurors believed the 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. The United States Supreme Court cited some of this 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, than 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 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."

This sentiment was echoed by a Maryland juror who was worried because she believed there had recently been a wholesale release of "capital prisoners" because of overcrowding in the state's prison system.

In Pennsylvania, which also had LWOP when the CJP interviews were done, 38.6% 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.

<u>Concluding Statement</u>

The findings of the Capital Jury Project point to widespread shortcomings in the ability of guided discretion statutes to properly channel the jury's decision-making process. The findings are not superficial or idiosyncratic, not slight or marginal. In fact, most of the specific mistakes and misunderstandings reviewed above are common to half

or more of the jurors and virtually none of the jurors are free of all such mistakes and misunderstandings.

It is axiomatic in scientific inquiry that research results are an imperfect approximation of the underlying reality. The question is not whether a given percentage, say 51 percent, who reported that they knew what the punishment should be at guilt is exactly the true value for capital jurors, but whether it is a close enough approximation to confirm to a scientific certainty that an unacceptable *proportion* of jurors fail to comport with the constitutional requirement that the punishment decision be made at a separate penalty stage of the trial. Let's assume for the sake of argument that our estimate is 10 points too high. Would the constitution allow 4 in 10 jurors to make up their minds before even hearing the sentencing instructions. Taken to the extreme, let's again assume that our data over represent reality by a factor of 2. Could we honestly say that the constitutional demands of a fair sentencing hearing are being met if 25% of jurors have already reached a decision?

Nor can the presence or magnitude of these departures from constitutional standards be completely attributed to faulty memory on the part of the former jurors. A detailed examination of jurors' responses by how well the jurors say they remembered the trial, by their interviewer's assessment of their recall, and by the elapsed time from the trial to the interview, gives no indication that jurors' responses at odds with the law are owing to faulty memory or hindsight bias. What is more, these misunderstandings and practices contrary to constitutional requirements are common to all states; they are not faults that the statutes or procedures of some states have overcome.

The fact that these flaws in jury decision-making are so common among jurors and pervasive across states suggests that the guidelines they violate may be fundamentally unable to guide the exercise of discretion in a manner that comports with the Supreme's Courts mandates for a constitutionally permissible process.