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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

People of the State of California,	) Case No.: 213515
Plaintiff,	) Motion for fair jury selection
-vs.-	) procedures
Antolin Garcia-Torres,	) Date: October 3, 2016
	) Time: 9:00 am
Defendant.	) Dept.: 40

I. This Court should not call jurors from south county

The Court is well-aware of the extensive publicity this case has received since Ms. LaMar was reported missing. The defense ask the Court to consider the evidence presented during the hearing on its Motion to Change Venue when it evaluates this motion. At that hearing, the defense presented over 100 newspaper articles from the San Jose Mercury News and over 20 from the San Francisco Chronicle. The articles reported on the case and included information regarding the many searches that were conducted to find Ms. LaMar and the fact that many searchers wore shirts emblazoned with the phrase "everyone's daughter."

The defense also presented the results of a survey commission by Professor Edward Bronson that showed an 83% recognition rate and a 53% prejudgment rate. The survey

demonstrated that the case has become deeply embedded in the community and that many potential jurors will respond to their summons with preconceived notions about the case, Mr. Garcia-Torres' guilt or innocence, and the appropriate penalty. Cross-tabs from the survey showed that respondents from the southern part of Santa Clara County, the area where Ms. LaMar lived, were more likely to recognize and prejudge the case. Indeed, the recognition rate for that part of the County was 100%. The survey assessed the views of 300 people and 22 of them were from the southern part of the county. It is a small number of people, but the finding should not be surprising. The overwhelming coverage this case has received, the degree of identification with Ms. LaMar and her family, and the small community in this rural part of the county, make the findings predictable.

The Sixth Amendment secures to criminal defendants the right to an impartial jury. (*Skilling v. U.S.* (2010) 561 U.S. 358, 377.) The Eighth Amendment guarantees a reliable and fair sentencing proceeding. (*Woodson v. North Carolina* (1976) 428 U.S. 280.) And the due process clauses of the 5th and 14th Amendments guarantee a fair proceeding, including a jury that decides the case solely upon the evidence before it and not on information it receives from outside the courtroom. (*In re Carpenter* (1995) 9 Cal.4th 634, 647.) All these constitutional rights may be imperiled by pretrial publicity.

This Court has already denied the defense Motion for a Change of Venue. Determining the venue issue does not, however, mean the Court's work in preserving a fair trial is over. As the Supreme Court has said, "we have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." (*Estes v. State of Tex.* (1965) 381 U.S. 532, 540.)

Professor Bronson identified several things the Court could do to reduce the prejudice he had identified. He thought none of them would be sufficient, but identified them nonetheless. One of the protective measures he suggested was that the Court work with the Jury Commissioner to avoid sending a summons to potential jurors living in the zip codes associated with the southern part of the County. This would serve to avoid calling potential jurors from the area most impacted by the case and the subsequent publicity. There

are no cases that would forbid this action and, given the court's wide discretion to control the conduct of jury selection in the interest of obtaining a fair and impartial jury, the defense requests it.

II. The defense requests that the Court not engage in the "death qualification" process or that it impanel two juries, one for guilt and one for penalty

A significant issue to determine before jury selection is whether the Court will engage in the process of death-qualification, the means by which conscientious objectors to the death penalty are systematically excluded prior to the selection of the petit jury that will actually hear the case. The defense objects to the death-qualification process as a violation of the right to due process under the 5th Amendment, the right to a fair trial before an impartial jury under the 5th and 6th Amendments, and the right to be free from cruel and unusual punishment under the 8th Amendment. Finally, the death qualification process likely violates the excluded jurors' 1st Amendment rights of free exercise of religion and the separation of church and state, and the 5th Amendment right to due process.[1]

While *Uttecht v. Brown* (2007) 551 U.S. 1, *Lockhart v. McCree* (1986) 476 U.S. 162, and *Wainwright v. Witt* (1985) 469 U.S. 412, 424 upheld state court decision removing jurors based on their opposition to the death penalty, none of them requires the removal of such jurors. And the California Supreme Court has held that there is no constitutional prohibition to death qualifying a jury such that death penalty opponents are excluded from service. (*People v. Mills* (2010) 48 Cal.4th 158, 172.) Thus, while it may be constitutionally permissible to death qualify a jury, it is not mandated. This Court may, therefore, decide not to question jurors regarding their opinions on the death penalty.

The removal of jurors based on their opposition to the death penalty results in a jury that is not drawn from a fair cross-section of the community. The biasing effect of death

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[1] The defendant has standing to assert the 1st and 5th Amendment rights of the excluded jurors. (*See Powers v. Ohio* (1991) 499 U.S. 400, 413-416 (criminal defendant has standing to challenge systemic exclusion of third-party group in jury selection process.)

qualification is well understood and has been recognized in judicial opinions. In his concurring opinion in *Baze v. Rees* (2008) 553 U.S. 35, Justice Stevens explained that the conviction and punishment biases of capital juries call death penalty verdicts into question:

> Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and preemptory challenges has persuaded me that that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive.

Baze v. Rees, supra, 553 U.S. at p. 84 (Stevens, J., concurring.)

However, the Supreme Court has concluded that the death-qualification process did not violate the fair cross-section requirement because it did not involve the systematic exclusion of a distinctive group in the community. (*Lockhart v. McCree* (1986) 476 U.S. 162, 165.) Thirty years later, empirical evidence unavailable at the time of *Lockhart v. McCree* demonstrates that excluding people who oppose the death penalty means that members of protected classes—women and minorities—are excluded. (See Exhibit A, Haney, et al., "Modern Death Qualification: New Data on Its Biasing Effects" (1994))

Jurors who refuse to consider mitigation or who would always vote to impose the death penalty frustrate a defendant's right to an impartial jury. (*See Morgan v. Illinois* (1992) 504 U.S. 719, 727.) But since the government enjoys no 6th Amendment right, jurors who oppose the death penalty are simply expressing the conscience of the community. And the California death penalty scheme permits jurors to consider any mitigation in determining the appropriate penalty. (Pen. Code § 190.3, subd. (k).) Thus that a potential juror views human life as sacred and is thus inclined to believe that a defendant's existence as a human being is a decisive mitigating factor cannot be considered a basis for disqualification. On the contrary, such a juror would merely be following the law.

Because the practice of death qualifying a jury has no constitutional or statutory underpinnings, distorts the jury function, introduces arbitrariness into capital sentencing, and

increases the influence of racism and sexism on the death determination, there is no justification for maintaining it. The defense asks this Court not to death-qualify the jury by identifying and excluding those who do not believe in the death penalty.

Even if the Court were to decide to death-qualify the jury over the defense objection, there remains one category of opinions that cannot constitutionally form the basis for exclusion. A juror's views of the death penalty often reflects their religious convictions—whether they favor the government ("eye for an eye") or the defendant (religious beliefs that do not permit a juror to vote for execution). Excluding those jurors on the basis of their religious beliefs violates the 1st Amendment's Free Exercise and Establishment clauses, as well as Art. IV, cl.3 ("no religious test shall ever be required as a Qualification to any Office or public Trust under the United States.")

For example, if a potential juror is Catholic, Quaker, or any sect of any other religion and, based on their religious beliefs, does not believe in the death penalty, excluding them because of their beliefs discriminates against them because of their religion. No rule, such as excluding members of religious groups because of their death penalty views, should operate to sanction religious discrimination. (*See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520.) The defense therefore requests that the Court issue an order precluding the government from removing jurors based upon their views on the death penalty. Alternatively, the defense asks the Court to require the Government to demonstrate a compelling purpose justifying the removal of jurors based on their religious or moral views. (*Cf. Wisconsin v. Yoder* (1972) 406 U.S. 205, 215 (*only those interests of the highest order can overbalance legitimate claims to free exercise of religion.*)

If the Court decides to death qualify the jury, the defense asks that it impanel two juries. The first jury would determine guilt/innocence and would not have to be death qualified. The second jury would determine penalty and would be death qualified. Because there is a clear biasing effect to the death qualification process and because such a process is unnecessary when selecting a guilt phase jury, the Court should use two juries to ensure Mr. Garcia-Torres received a fair trial. Failing to use two juries would violated his rights under

the 5th, 6th, 8th, and 14th Amendments as well as their California corollaries.

The defense recognizes that this argument has been rejected by the California Supreme Court in *People v. Mills, supra,* 48 Cal.4th 158, 172 and that this Court is bound to follow the precedent of the California Supreme Court. The defense argues, however, that the death qualification process has been found to introduce unfairness into the proceedings and that the courts should not accept recognized unfairness in a capital prosecution.

III. The defense requests individualized sequestered voir dire

A criminal defendant has the right under both the federal and state constitutions to due process and an impartial jury. (U.S. Const., 5th, 6th, and 14th amends.; Cal. Const., art. I, §§ 7, 15, and 16.) He also is entitled to a reliable penalty determination under the 8th Amendment. The defense requests individualized sequestered voir dire to help preserve these rights.

This Court has the discretion to conduct individual sequestered voir dire. (*People v. Tafoya* (2007) 42 Cal.4th 147, 168.) The Code of Civil Procedure holds that questioning of jurors should be performed in the presence of other jurors where it is practicable to do so. (Code Civ. Pro. § 223.) But the questioning and the process used must be reasonably sufficient to test prospective jurors for bias or partiality. (*People v. Box* (2000) 23 Cal.4th 1153, 1179 (*disapproved on other grounds*).

Collective voir dire is impracticable in this case and will make it less likely the eventual jury will be fair and impartial. This case has received a great deal of attention from the media and, as the evidence presented during the hearing on the Motion to Change Venue showed, many potential jurors are likely to have formed opinions based on the coverage. Some of those opinions may be based on inaccurate beliefs about the facts and may be clouded by conversations potential jurors have had with family, neighbors, and friends. Conducting group voir dire will further exacerbate the problem by informing potential jurors of the media coverage seen by their cohort and exposing them to opinions about it. Group voir dire would therefore make it substantially more difficult to obtain a jury that is fair and impartial and one that would help guarantee due process. (*See Patterson v. State of Col. Ex Rel.*

Attorney General (1907) 205 U.S. 454, 462 (*theory of system is that conclusions be reached only by evidence and argument in open court.*) Indeed, the Rules of Court recognize that sequestered voir dire may be necessary in high profile cases. (Cal. Rules of Court, rule 4.201 Advisory Committee comment (*judge may conduct sequestered voir dire on questions concerning media reports of the case.*)

In addition, collective voir dire raises concerns about the impact on potential jurors of being exposed to repeated questioning of their cohort regarding the death penalty. (*See Hovey v. Superior Court* (1980) 28 Cal.3d 1.) Questioning jurors together about penalty before guilt has been determined conditions them to believe the trial participants believe the defendant is guilty and that a death sentence may be appropriate. (*Id.*) It also leads to what has been called 'group think,' whereby jurors learn what is socially acceptable and what might serve to either keep them on the jury or get them excused from service. Either way, the parties don't get the opinions of the individual; rather, we get their opinions after they have been impacted by the process, the questions asked their colleagues, and the answers they hear.

The California Supreme Court has held that Proposition 115 eliminated the requirement that trial courts conduct individualized sequestered voir dire. (*Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1182.) The decision is left to the trial court's discretion. There are specific reasons related to this case, not the least of which being the impact of the pretrial publicity, for this Court to conduct individualized sequestered voir dire in addition to using a questionnaire.

IV. The defense requests extensive attorney directed voir dire

According to Rule 4.201 of the California Rules of Court, counsel must be permitted to conduct supplemental questioning of potential jurors. (Cal. Rules of Court, rule 4.201.) The questioning should be conducted in aid of the exercise of challenges for cause. (Code Civ. Pro. § 223.) The Court may impose reasonable time limits on the attorneys. (People v. Carter (2005) 36 Cal.4th 1215, 1249-1252.)

One of the alternatives to changing venue, according to Professor Bronson's

testimony, is to permit the attorneys an extensive opportunity to question prospective jurors. Given the nature of the case and the need to ascertain whether potential jurors have developed biases that must be identified and assessed, the defense asks the Court to permit the attorneys wide latitude in the questioning of prospective jurors.

V. The defense requests the Court order that jurors be paid at least minimum wage for their service as jurors

This case is estimated to take many months to complete. It is anticipated that many potential jurors will seek to be excused from service because of the financial hardship they will experience if they are selected. Paying them the usual amount for their service will exclude many potential jurors leaving government employees (whose employer typically pays while the employee serves) and retired persons as the only people who can reasonably be expected to serve. Artificially constricting the jury pool in this manner results in a skewed jury in violation of Mr. Garcia-Torres's rights to a fair trial and due process. (See U.S. Const. 5th, 6th, 14th amends.)

Date: September 19, 2016

Respectfully submitted,

Brian Matthews
Deputy Alternate Defender

EXHIBIT A

EXHIBIT A

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"Modern" Death Qualification

New Data on Its Biasing Effects*

Craig Haney,† Aida Hurtado,† and Luis Vega‡

We report on the results of a comprehensive statewide survey of death penalty attitudes in which respondents were categorized in terms of their death-qualified or excludable status under several different Supreme Court doctrines governing the death-qualification process. We found that although changes in public opinion with respect to the death penalty in general have altered the relative sizes of the death-qualified and excludable groups, significant differences remain between them on a number of attitudinal dimensions, no matter which doctrines are employed to define these groups. We discuss the implications of these recent data, especially with respect to the Supreme Court's continued reference to the death-qualified jury as an index of community standards with respect to the death penalty itself.

Death qualification is the process by which potential capital jurors are screened for their fitness for jury service on the basis of their death-penalty attitudes. Persons holding "disqualifying" attitudes are dismissed from participation. In *Witherspoon v. Illinois* (1968), the Supreme Court established the standard by which prospective jurors could be constitutionally excluded from service on capital juries as one of "unequivocal opposition" (i.e., that a prospective juror could never impose the death penalty, no matter what the facts or circumstances of the case). Since then the process of death qualification has been the subject of extensive legal commentary (e.g., Gross, 1984; Schnapper, 1984; White, 1973) and social science research (e.g., Bronson, 1970; Ellsworth, 1991; Haney, 1984), as well as constitutional challenges based on the contention that it produced unrep-

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resentative and conviction-prone juries (e.g., Bersoff, 1987; *Hovey v. Superior Court,* 1980; *Grigsby v. Mabry,* 1985). In *Lockhart v. McCree* (1986), the United States Supreme Court rejected such challenges by questioning the validity of the relevant social science research and concluding among other things that, even if valid, the research itself was not dispositive because juries biased in the ways that death-qualified juries appeared to be could have arisen by chance. Specifically, Justice Rehnquist wrote for the majority that "it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a State-ordained process, yet impartial when exactly the same jury results from mere chance" (p. 178).

Because it now appears to be a permanent feature of modern death penalty trials, death qualification continues to have legal and social scientific significance (e.g., Cox & Tanford, 1989; Seltzer, Lopes, Dayan, & Canan, 1986; Thompson, 1989). The process of excluding potential jurors from participation in capital trials solely on the basis of their feelings about the death penalty gives practical, legal importance to the psychological measurement of death penalty attitudes, whether or not the Supreme Court grants it constitutional status. Moreover, as Justice Stevens and others have acknowledged, one of the key "societal factors" the Court has continued to look to "in determining the acceptability of capital punishment to the American sensibility is the behavior of juries" (*Thompson v. Oklahoma,* 1988, p. 831). Thus, the behavior of capital juries, each one of which has been created through a process that includes death qualification, continues to serve as a measure of the "national consensus" on the death penalty and an important index of the extent to which such certain death penalty laws offend evolving standards of decency, the hallmark of an Eighth Amendment analysis.

However, the core research on death qualification—the research that first documented its biasing effects and was used in the litigation challenging its constitutionality—was conducted more than a decade ago. Since that time, at least three important changes have occurred that may have altered the relationship of death qualification to capital juror bias, mooting the concerns of the critics of the process or otherwise vindicating the Supreme Court's judgment that death qualification does not represent a threat to capital jury impartiality. In addition, to the extent to which these changes have altered the composition of capital juries, such juries may have become more—or less—representative of the larger community, thus reflecting on the propriety of the Court's continued reliance on capital jury behavior as evidence of a national consensus on death penalty issues.

The first such change concerns the amount of abstract support for the death penalty that now exists among members of the general public. By virtually all accounts, that support has reached unprecedented high levels over the last decade. Thus, Gallup (1985) reported in the mid-1980s that abstract support for the death penalty reached the highest levels ever recorded in the 49 years of scientific polling. Others reached similar conclusions (e.g., Bohm, 1987; Fox, Radelet, & Bonsteel, 1990–91; Harris, 1986; Zeisel & Gallup, 1989). Of course, changes in the public's abstract attitudes about capital punishment are legally relevant to

estimates of the effects of death qualification because potential capital jurors typically are screened in precisely this way (that is, on the basis of their abstract attitudes toward the death penalty). Thus, it is reasonable to assume that changes in public opinion will produce changes in the size of the group excluded under death qualification, as well as changes in the effects of their exclusion on the pool of jurors who remain to serve on capital juries.

In addition, two important changes occurred during the last decade in the legal standards by which death qualification is conducted that may have affected the biasing effects of this process. Seventeen years after *Witherspoon,* the Supreme Court in *Wainwright v. Witt* (1985) significantly revised the operative standard by which persons were excluded from capital jury service from one of unequivocal opposition to merely holding death penalty attitudes that would "prevent or substantially impair the performance of his [or her] duties as a juror in accordance with his [or her] instructions and oath" (p. 852). The significance of the *Witt* opinion was acknowledged by legal practitioners and scholars alike, who speculated that the less precise language and seemingly broader scope of the *Witt* formulation would result in a substantial increase in the size of the excludable group as well as complicating the precise application of the legal standard of exclusion. For example, one death penalty litigator observed that "the Court not only abandoned the *Witherspoon* test for a much less stringent standard, but also invested trial courts with unbridled discretion in the application of the new standard" (Balske, 1985, p. 22). Similarly, a social science expert on death qualification concluded that "[t]he *Witt* opinion abrogates the *Witherspoon* standard and expands the class of individuals who may be excluded from capital juries because of their feelings about the death penalty" (Thompson, 1989, p. 186). Yet, few studies have directly addressed this important topic.

Finally, the size of the group of potential jurors excluded from capital trials may have been significantly affected by an additional doctrinal change affecting the law of death qualification: judicial recognition that a category of persons exist whose *support* of the death penalty is so strong that it is legally disqualifying (sometimes called *automatic death penalty* or *ADP* jurors). In practical terms, the origins of this legal category lay in *Hovey v. Superior Court* (1980), where California Supreme Court Chief Justice Rose Bird distinguished a "*Witherspoon*-qualified" jury from what she termed a "California-qualified" jury along precisely this dimension. She noted that although *Witherspoon* had not directly addressed the issue of whether the Constitution required exclusion of jurors who would automatically vote to impose the death penalty, a broad reading of the relevant California statute providing for the challenge of potential jurors on the basis of "actual bias" did require such exclusion. Until *Hovey,* however, this practice—of excluding jurors at the outermost points of *both* ends of the death-penalty attitude spectrum—was rarely done, even in California. Since *Hovey,* trial and appellate courts have been increasingly sensitive to the issue of *Witherspoon*'s one-sidedness (i.e., the manifest unfairness of the practice by which extreme death penalty opponents were excluded from jury service but extreme

death-penalty proponents were rarely questioned further about their death-penalty attitudes and almost never excluded from service, no matter how extreme their views).[1]

At the federal level, *Witherspoon* (1968) had touched only briefly on this issue in a footnote (pp. 521–522, n. 20), citing a Fourth Circuit case that invalidated a murder conviction by a jury that included a juror who felt it was his "duty" to sentence every convicted murderer to death (*Crawford v. Bounds,* 1971). In *Ross v. Oklahoma* (1988), the Supreme Court noted in dictum that a capital defendant should have the right to remove for cause prospective jurors who stated in voir dire that they would always vote to impose the death penalty (but, because the juror in question had been removed via a peremptory challenge, a reversal was not required). In *Morgan v. Illinois* (1992), the Court finally decided the issue of whether the exclusion of automatic death penalty jurors was constitutionally mandated. Justice White, writing for the majority, held that the impartiality requirement embodied in the due process clause of the Fourteenth Amendment required the exclusion of potential capital jurors who would vote to impose the death penalty in every case. The states of Illinois, Delaware, Missouri, and South Carolina, at least, had apparently refrained from excluding ADP jurors even at the time of *Morgan* (p. 2227, n. 4, and cases cited therein).

Thus, "modern" death qualification now takes place in the context of record-high abstract support for the death penalty, it operates to exclude persons whose death penalty attitudes would merely "impair" them in performing their functions in a capital trial, and it eliminates persons on the basis of extreme death penalty support as well as opposition. Yet, many of the surveys of death penalty attitudes conducted in the United States are now more than a decade old; they cannot speak to any of the effects that the changes in public opinion that occurred during the 1980s might have had on the process of death qualification. In addition, studies of death qualification done before the *Witt* and *Hovey/Morgan* doctrines were established could not have assessed the impact of these more recent legal practices.[2] The present study adds to the contemporary data base on death qualification by addressing some of the effects of the current form of this legally mandated process.

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[1] In *People v. Turner* (1984), Chief Justice Bird noted that death-qualifying voir dire was still less likely to surface extreme death penalty supporters as opposed to death penalty opponents: "[A] far greater percentage of death penalty skeptics identify themselves at voir dire than do death penalty supporters. Review of the voir dire transcripts of automatic appeals decided by this court confirms the existence of the problem. Although death penalty supporters vastly outnumber opponents, it is a rare voir dire transcript where more venirepersons acknowledge support for capital punishment than opposition" (p. 348).

[2] For example, Fitzgerald and Ellsworth's (1984) sophisticated telephone survey with random sample of 811 Alameda County jury eligible respondents was administered in 1979. Harris's (1986) telephone interview study of 1,476 adults from nationwide representative sample was administered more recently (November, 1984), but predated the *Witt* and *Hovey/Morgan* doctrinal changes. Similarly, although one of Luginbuhl and Middendorf's (1988) studies included consideration of ADPs, as required by *Hovey/Morgan,* both predated *Witt.*

METHOD

Telephone interviews were conducted with a sample of adult California residents.[3] Modern sampling techniques (random digit dialing, or RDD) were employed to maximize the representativeness of the sample of respondents.[4] Our survey included some 40 death-penalty-related items in what was likely the most detailed statewide survey on Californians' death penalty attitudes ever done.[5] The survey also differed from at least some others in the degree to which we attempted to employ legally correct formulations of the related death-qualification questions, as well as to explain to respondents the overall legal procedures by which capital cases were conducted. Thus, within the limitations imposed by survey research methodology, we sought to have our respondents answer many of the death-penalty-related questions in the general legal context that they might be posed in court. For example, we explained that capital cases typically proceeded in a two-stage process and that in California (similar to most states) a defendant was eligible to receive the death penalty only if he or she had been convicted of first-degree murder and at least one "special circumstance" had been found to be true. Following an initial series of items that posed the relevant death-qualifying questions, subsequent items addressed the respondents' general attitudes about the criminal justice system and their beliefs and knowledge about the overall operation of the death penalty in the United States. Respondents were then informed that jurors in an actual capital case would be instructed in the second stage of the trial—the penalty phase—to be guided by the presence or absence of "aggravating" and "mitigating" circumstances in making their decision between the death penalty and life in prison without possibility of parole. They were then asked to indicate whether each specific factor read to them from a list of factors sometimes present in death penalty cases would lead them to favor a life or death verdict.

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[3] Since the 1970s, when the percentage of U.S. households with telephones exceeded 90%, interviews by telephone became "the most popular form of data gathering in survey research" (Frey, 1989, p. 23). See, also, Lavrakas (1987): "By far the most important advantage of telephone surveying is the opportunity it provides for quality control over the entire data collection process. This includes sampling, respondent selection, and the asking of questionnaire items. It is this advantage that almost always recommends the telephone as the preferred approach to surveying" (p. 12).

[4] RDD is a telephone survey technique in which computer-generated digits are assigned to existing telephone prefixes within the target sample area. The advantage of this technique is that it "theoretically provide[s] an equal probability of reaching a household with a telephone access line (i.e., a unique telephone number that rings in that household only) regardless of whether its telephone number is published or listed" (Lavrakas, 1986, p. 33). RDD is generally regarded by survey researchers as superior to any other method of obtaining a representative sample of telephone numbers, and telephone surveys that employ it are generally regarded as superior to mail or face-to-face surveys for obtaining a representative sample of respondents.

[5] It was implemented for us by the Field Research Corporation in December, 1989, with a completion rate of 72%. We are grateful to Amnesty International, the American Civil Liberties Unions of Northern and Southern California, Death Penalty Focus, and the Friends' Committee on Legislation for providing the funds with which to conduct this survey. The authors retained complete autonomy over the design and implementation of the survey and the interpretation of its results.

Table 1. Sizes of Excludable Groups as Function of Applicable Legal Doctrine

Oppose		Favor	
Impaired at guilt due to strong opposition	4.4%	Impaired at guilt due to strong support	6.2%
Could never impose in any case (*Witherspoon* doctrine)	5.8%	Would always impose in every case (*Witherspoon & Morgan* doctrines)	2.6%
Impaired at penalty due to strong opposition (*Witt* doctrine)	8.4%	Impaired at penalty due to strong support (*Witt & Morgan* doctrines)	8.6%

RESULTS

A total of 498 persons were interviewed, yielding a final sample that was composed of 52% men, 19% minority (including Hispanic, African American, and Asian), and averaged 41 years of age. Several things were notable about the results of our death-qualifying questions. The first was that, as perhaps would be expected from changes in public opinion about capital punishment generally over the last decade, the size of the group of persons whose death penalty opposition would disqualify them from jury service in a capital case had diminished since previous empirical studies of this issue. For example, earlier surveys had indicated that approximately 8% to 12% of eligible jurors were *guilt-phase nullifiers*—persons whose death penalty opposition would affect their ability to convict someone in a case where the death penalty was a possibility (e.g., Fitzgerald & Ellsworth, 1984). Only 4.4% of our sample responded in this way. In addition, previous California surveys had identified 11% to 17% of eligible jurors who were *penalty-phase nullifiers* or what have been called *Witherspoon*-excludables (persons who would never vote to impose the death penalty). (See Thompson, 1989, p. 209, and references cited at n. 127.) In our survey, however, 5.8% of the respondents answered in this way. See Table 1.

As expected, application of the *Witt* standard did increase the size of the group of persons who were excludable on the basis of their death penalty opposition: 8.4% of our sample indicated that their opposition to the death penalty would influence or substantially impair their penalty-phase decision making. Thus, although it seems clear that the *Witt* standard results in an increase in the size of the excludable group beyond that created by *Witherspoon,* corresponding changes in the distribution of death penalty attitudes over the last decade have meant, at least for our California sample, that there has been no *net* increase in the size of the group excluded because of death penalty opposition.[6]

[6] A caveat should be made at this point concerning the inherent imprecision in the legal standard of exclusion under *Witt*. Unlike the *Witherspoon* standard, which was categorical (i.e., jurors had to indicate that they would *never* vote to impose the death penalty no matter the facts and circumstances) and required jurors to make it "unmistakably clear" that this was the case before they could be properly excluded, *Witt* is both substantively more ambiguous (i.e., what, exactly, does "prevent or substantially impair" mean?) and allows the trial judge much latitude in deciding whether or not this

We also focused on the other end of the death penalty attitude spectrum—the automatic death penalty respondents—as required by the *Hovey/Morgan* doctrine. Similar effects were found both for the changing distribution of death penalty attitudes over the last decade and for the introduction of a broader *Witt*-inspired ADP standard. Thus, a total of 6.2% of our respondents answered in a way that might qualify them as "guilt-phase excludables" on the basis of their extreme pro-death-penalty beliefs. Under the traditional "reverse-*Witherspoon*" definition of automatic death penalty respondents, our data indicated that there was a slight increase in the number of persons statewide to 2.6% of our sample—up from the generally accepted number of 1% from surveys conducted 10 or more years ago—who were willing to say that they would *always* vote to impose the death penalty irrespective of the facts and circumstances of the case (e.g., Luginbuhl & Middendorf, 1988; Thompson, 1989). We also recognized that *Hovey/Morgan* could be interpreted in such a way that it reflected *Witt*'s broader standard of exclusion, which would very likely expand the category of ADPs. Rather than speculate on the effects of such an interpretation, we agreed with Thompson (1989) that the issue "certainly warrants empirical verification" (p. 210). In fact, when we classified persons on the basis of a broadest possible construction of *Hovey/Morgan*—in essence, a "reverse-*Witt*" ADP standard that included all persons who said their support for the death penalty was so strong that it would prevent or substantially impair their ability to act as jurors in the penalty phase of a capital trial—the size of this group increased to 8.6% of our sample. Thus, although there were still more than twice as many *Witherspoon*-excludables as *Witherspoon*-ADPs in our California sample (5.4% vs. 2.6%), the application of a broader *Witt* standard of exclusion to both ends of the death penalty attitude spectrum produced almost identical numbers of persons who would be disqualified for extreme death penalty support as for opposition (8.6% vs. 8.4%).

In addition to changes in absolute numbers of death penalty opponents and supporters over the last decade, we examined whether the interrelationships between death penalty attitudes and other important criminal justice attitudes and beliefs had been altered during this period. We found that *Witherspoon*-excludable respondents still were significantly different from the remainder of our sample in numerous ways that were consistent with previous research (e.g., Bronson, 1970; Fitzgerald & Ellsworth, 1984). Moreover, when *Witt* rather than *Witherspoon* was used as the criterion for excluding death penalty opponents, the overall pattern of interrelationships was not significantly altered. That is, although *Witt* resulted in a somewhat larger group of death penalty opponents being excluded (an increase from 5.8% to 8.4% of our sample), differences between those persons excused for death penalty opposition and the remainder of the sample were only slightly attenuated. Thus, *Witt*-exclusions still resulted an attitudinally distinct group of potential jurors being denied participation in capital jury service.

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demonstration has in fact been made. On the face of it, then, the *Witt* standard is more difficult to operationalize in a standardized survey in a way that clearly replicates its courtroom application. Studies of death qualification under *Witt* that utilize transcripts of actual voir dire would be especially useful to augment the data and issues we present here.

For example, as Table 2 illustrates, both *Witherspoon*- and *Witt*-excludable subjects were significantly more likely to agree with one of the "due process" attitude statements (concern over the risk of convicting the innocent), and were significantly less punitive on virtually every one of the attitude statements dealing with general orientation toward punishment in the criminal justice system (i.e., they were significantly *more* likely to believe that even the worst criminal should be considered for mercy and that harsher treatment of criminals is not the solution to the crime problem, and significantly *less* likely to believe that criminals should be punished harshly to demonstrate that society cares about crime victims and that it is more important for prisons to punish than to rehabilitate). In addition,

Table 2. Effects of Exclusions for Death Penalty Opposition Under *Witherspoon* and *Witt* Standards

	Witherspoon excludable (n = 29)	*Witherspoon* includable (n = 469)	*Witt* excludable (n = 39)	*Witt* includable (n = 459)
[*Criminal justice attitudes*]				
Risk guilty going free to protect innocent	65.5%	38.8%*	64.1%	38.3%*
Even worst criminal deserves mercy	62.1%	30.6%***	53.8%	30.5%**
Harsher punishment *not* a solution to crime	75.8%	41.8%***	69.2%	41.6%**
Punish criminals harshly for victims	58.6%	84.5%***	64.1%	84.5%**
Prisons should punish more than rehabilitate	6.8%	37.1%***	13.2%	37.2%**
[*Conceptions about deatlh penalty*]				
Death penalty more expensive	44.8%	24.5%*	41%	24.4%*
Innocent too often executed	62.1%	19.6%***	59%	19%***
Death penalty unfair to minorities	72.4%	39%**	74.4%	38.1%***
LWOP means LWOP	58.6%	24.1%***	61.5%	23.1%***
Death penalty deters murder	6.9%	76.5%***	20.5%	76.9%***
Religious opinion supports death penalty	3.4%	41.2%**	12.8%	41.2%**
Focus only on crime, ignore background	10.3%	54.2%***	12.8%	54.9%***
Retribution alone justifies death penalty	0%	38.6%***	7.7%	38.8%***
[*Finds mitigating*]				
Felony murder not premeditated	72.4%	38.8%***	76.9%	37.7%***
Under influence of drugs or alcohol	62.1%	33.5%***	53.8%	33.6%**
No prior felonies	69%	45.6%**	74.4%	44.7%**
Convicted person over age 30	58.6%	15.6%***	56.4%	14.8%***
Convicted person from background of poverty	58.6%	18.1%***	53.8%	17.6%***
Convicted person abused as a child	48.3%	36.5%*	53.8%	35.7%*
Would adjust well and contribute in prison	65.6%	37.1%**	61.5%	36.8%**
Never received treatment	58.6%	38.8%*	66.7%	37.7%**
[*Finds aggravating*]				
Especially brutal murder	13.8%	89.3%***	33.3%	89.3%***
More than one murder victim	3.4%	73.6%***	20.5%	73.6%***
Murder during sexual assault	3.4%	69.3%***	15.4%	69.7%***
Prior violent felony	0%	36%***	7.7%	36.2%***
Defendant expressed no remorse	10.3%	72.5%***	20.5%	73%***

* $p < .05$. ** $p < .01$. *** $p < .001$.

there were dramatic differences between both *Witherspoon*- and *Witt*-excludable respondents and the rest of our sample on every question we posed concerning beliefs about the general nature and effect of the death penalty (e.g., they were significantly more likely to believe that the death penalty was more expensive than life imprisonment and that a sentence of life without parole means that the person never be released from prison, and significantly less likely to believe that the death penalty deters murders, that only the nature of the crime should be considered in deciding whether the death penalty is appropriate, and that retribution alone is a sufficient societal justification for the death penalty). Not surprisingly, both *Witherspoon*- and *Witt*-excludable respondents were differentially receptive to virtually every potentially mitigating and aggravating feature of a capital case that we posed (i.e., they were significantly *more* receptive to numerous potential mitigating factors and *less* receptive to aggravating ones).

Finally, we used our death-qualifying screening questions to estimate the attitudinal and demographic effects of modern death qualification by identifying the group of respondents in our sample who would likely be death qualified under all current legal doctrines and comparing them along a number of relevant dimensions to those who would be excluded. In order to identify the respondents most likely to survive modern capital voir dire, we used a relatively stringent definition: Only those respondents who met *both* the *Witherspoon* and *Witt* standards of death qualification were included as *Death-qualified* and all others were labeled *Excludable* on the basis of either extreme death penalty opposition or support.[7] Of course, the strongest death penalty proponents also had to be included in this calculation, as they have been with increasing regularity since *Hovey* and as is now required by *Morgan*. By using *both* ends of the *Witherspoon* and *Witt* formulations, 403 of our respondents were categorized as Death-qualified out of our total sample of 498. The 95 Excluded respondents represented 19.1% of our sample.[8]

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[7] We reasoned that persons close to the excludable margins at each end of the death penalty attitude spectrum likely would be challenged for cause under one or another of the disqualifying standards, or peremptorily excused by one or the other side. Several studies have suggested that peremptory challenges are used to eliminate those persons who are close to the margins of the exclusion standard but who have not been successfully excluded through cause challenges. See Winick (1982). See, also, *People v. Ashmus* (1991) (prosecutor's use of peremptory challenges to excuse prospective jurors who expressed reservations about capital punishment did not violate capital defendant's federal or state constitutional rights to an impartial jury drawn from a fair cross-section of the community). Cf., also, *Gray v. Mississippi* (1987) and *Ross v. Oklahoma* (1988). In addition, we have reported the results only from the analysis in which the more inclusive category of "reverse-*Witt*" jurors were incorporated into the excludable group. Analyses of differences between death-qualified and excludables in which only "reverse-*Witherspoon*" jurors were incorporated into the excludable group were conducted and yielded somewhat larger differences, and significant differences on some additional dimensions, as would be expected. However, we chose not to report these comparisions because conversations with attorneys conducting death penalty trials, at least in California, have convinced us that most trial courts are now using the broader reverse-*Witt* categorization to identify ADPs, the standard reflected in Table 3.

[8] We have capitalized the terms *Death-qualified* and *Excludable* to refer to the overall categorization of respondents who would most likely remain as death-qualified after the combined excludable categories had been removed from the venire panel. We will employ this notation in the remainder of the discussion.

When those persons whom we classified as overall Excludable subjects (all those persons who were guilt- or penalty-phase nullifiers on the basis of either strong death penalty opposition or support under either *Witherspoon* or *Witt*) were compared to the remaining group—our overall Death-qualified sample—there were a number of statistically significant differences between them. As perhaps would be expected, there were fewer such differences as a result of eliminating potential jurors from both ends of the attitude spectrum. Indeed, the means for the overall Excludable group represented the averaging of a bimodal distribution of responses—opinions on virtually every question in which roughly half of the group (extreme death penalty supporters or opponents) was at one end of the spectrum or the other. Although each member of the combined Excludable group likely differed significantly from the mean of the overall Death-qualified sample, the average of this group on some questions was very similar to that of the Death-qualifieds, particularly on the general criminal justice attitude questions. Thus, the only two general criminal justice attitudinal issues on which the overall groups differed significantly were the questions concerning the necessity of punishing criminals harshly to demonstrate care for crime victims (64.2% of Excludables agreed strongly with this statement as opposed to 58.3% of Death-qualified, $p = .054$) and whether harsher punishment is the solution to the crime problem (31.6% of the Excludables strongly agreed that it was not as compared to 21.6% of the Death-qualified respondents, $p = .038$). Similarly, although as a group the Excludable respondents were significantly less likely than Death-qualifieds to endorse the use of the death penalty with juveniles (41.1% vs. 54.6%, $p = .006$), there was no statistically significant difference with respect to mentally retarded defendants.

However, as Table 3 illustrates, despite the fact that the Excludable group was composed of persons from both ends of the spectrum of death penalty attitudes, the remaining Death-qualified group was still a significantly different—and significantly more punitive—group than it would have been if the Excludables had not been removed. Thus, there were significant differences between these groups in terms of their general beliefs and knowledge about the death penalty. That is, the Death-qualified group was significantly *more* likely to believe that the death penalty deterred murder and that penalty-phase decision making should focus only on the nature of the crime and significantly *less* likely to believe that innocent people are too often convicted of capital crimes, that the death penalty is unfair to minorities, and that life without parole really means that a prisoner will not be released from prison. In addition, as compared to Excludables, our Death-qualified respondents were significantly *less* responsive to several important and potentially mitigating factors (that the murder was not premeditated, the convicted person was over the age of 30, came from a background of extreme poverty, never received treatment for his problems, and had a loving family and friends who wanted him to live). On the other hand, they were significantly *more* responsive than Excludables to most of the potentially aggravating factors (brutal murder, more than one victim, murder in the course of a sexual assault, convicted person had committed at least one prior felony, and expressed no remorse for the present crime).

Table 3. Effects of Modern Death Qualifications (Incorporating *Witt* and *Hovey/Morgan* Standards)

	Excludables (n = 95)	Death-qualifieds (n = 403)
[*Beliefs about death penalty*]		
Death penalty deters murder	56.8%	76.2%****
Focus only on crime, ignore background	45.3%	53.1%***
Too many innocent executed	35.8%	18.9%***
Death penalty unfair to minorities	53.7%	38%**
LWOP means LWOP	41.1%	22.6%***
[*Finds mitigating*]		
Felony murder not premediated	54.7%	37.5%**
Convicted person over age 30	33.7%	14.4%****
Convicted person from background of poverty	32.6%	17.6%***
Loving family and friends supportive	35.8%	15.6%****
Never received treatment	48.4%	38%*
[*Finds aggravating*]		
Especially brutal murder	67.4%	89.1%****
More than one murder victim	58.9%	72%****
Murder during sexual assault	49.5%	69.2%****
Prior violent felony	27.4%	35.5%***
Expressed no remorse	53.7%	72.5%****

*$p < .1$. ** $p < .05$. *** $p < .01$. **** $p < .001$.

Modern death qualification also resulted in a skewing of the demographic composition of the sample, even when the extreme death penalty proponents were taken into account. The effect on gender was slight: Women accounted for 58.6% of our *Witherspoon*-excludable group and 64.1% of *Witt*-excludables, and 54.7% of those persons in the combined Excludable group (which included the strong death penalty proponents) were women. This compared to 48.4% of our entire sample who were women. In addition, a number of studies have documented the consistently lower levels of death penalty support among racial minorities, particularly African Americans (e.g., Combs & Comer, 1982; Smith, 1975; Zeisel & Gallup, 1989) and the corresponding effects of death qualification on minority group representation on capital juries (e.g., Fitzgerald & Ellsworth, 1984). However, we were hampered in our attempt to study systematic differences in death penalty support among different racial groups by the fact that our sample only included 56 Hispanic, 26 Black, and 10 Asian respondents. Such underrepresentation of minorities is problematic in telephone surveys generally (e.g., Adams-Esquivel & Lang, 1987; Aday, Chiu, & Anderson, 1980). In fact, however, this kind of underrepresentation is similar to the underrepresentation that plagues political participation (voting), the composition of jury pools, and, especially in capital cases, the racial make-up of the actual jury (e.g., Fukurai, Butler, & Krooth, 1991). Thus, although our sample failed to adequately represent minorities in terms of their numbers in the overall state population, we somewhat better approximated the racial make-up of the voting public, jury pools, and capital juries in California. With these limitations in mind, the effect of modern death qualifi-

cation on race was similar to gender: Racial minorities accounted for a total of 31% of our *Witherspoon*-excludable group, 30.7% of our *Witt*-excludable group, and 26.3% our combined Excludables. Put somewhat differently, racial minorities comprised 18.5% of our overall sample, but 26.3% of our Excludable group, so that death qualification (even when it included strong death penalty proponents) resulted in the loss of 27.1% of our minority respondents.[9]

DISCUSSION AND CONCLUSIONS

We draw four overall conclusions from consideration of these data with respect to the death qualification process. The first is that the changes in the distribution of death penalty attitudes that have occurred over the last decade have affected the relative size of the groups of persons excluded through death qualification. Our estimate of the size of the overall Excludable group—19.1%—is somewhat less than those obtained in some earlier studies (e.g., Fitzgerald & Ellsworth, 1984), and substantially less than those obtained in one other (Neises & Dillehay, 1987).[10] These differences are likely the result of shifts in abstract support for the death penalty that have taken place over the last decade, at least in California, and they underscore the degree to which death qualification yokes the composition of capital juries—and perhaps the quality of justice they render—to variable trends in public opinion. Second, our survey indicated that the effect of *Witt*'s revision in the law of death qualification was to expand the category of persons found excludable because of their death penalty attitudes, but it did not increase the size of this category by the amount or in the manner that we

[9] This figure is also somewhat attenuated from the figures that other studies have obtained. A North Carolina study, for example, found that fully 55.2% of Black respondents were excluded by death qualification, as opposed to 20.7% of Whites (Jacoby & Paternoster, 1982). Although this attenuation, like the previous ones we have mentioned, likely is due to both the changes in public opinion that have occurred over the last decade as well as the effects of the different standard of exclusion that is now in operation in these cases, another possibility must be considered with respect to race. It may be that states in which minorities, particularly African Americans, have experienced the greatest discrimination are ones in which death qualification will produce the largest racially disproportionate effects (because the legacy of racial discrimination in these states will lead minorities to oppose the death penalty in greater numbers.) Although this may account for the comparatively lower rate of racial exclusions under death qualification in California, it raises disturbing questions about the operation of the process elsewhere. Death qualification may exclude the greatest number of minorities in precisely those places where their participation is most needed.

[10] Indeed, to date the only published empirical data on many of the questions addressed in our study were collected by Neises and Dillehay (1987) with a smaller, more localized sample some 4 years before ours (a telephone survey of 135 registered voters in 1985 in Fayette County, Kentucky). Although they reported patterns similar to those found in our study (e.g., that use of the *Witt* standard resulted in significantly more exclusions of potential jurors than did *Witherspoon*), they also reported much larger categories of exclusions than those reported here (e.g., over 40% of their sample was excludable under a combined *Witt*/ADP combination).

and others expected. For example, Thompson (1989) predicted that "it is likely that the percentage of eligible jurors excludable under *Witt* will be larger than the 21%–29% excludable under *Witherspoon*" (p. 209). Although theoretically astute (exclusions under *Witt* exceed those under *Witherspoon*), the prediction about the absolute size of the excludable group necessarily failed to take into account changes in the overall distribution of death penalty attitudes. Third, despite several modifications in the legal standard applied to exclude potential jurors on the basis of their death penalty attitudes (use of the *Witt* standard and *Hovey/Morgan* ADP exclusions), this process continues to produce a group of eligible jurors in capital cases—under whatever standard they are defined—that appear to be significantly different on a number of important dimensions from jurors eligible to sit in any other kind of criminal case (e.g., Gross, 1984). Even when the Excludable group includes extreme pro-death-penalty jurors—in a modification of the process that might otherwise be though to "balance" the effects of death qualification—Death-qualified juries remain significantly different from those that sit in any other kind of criminal case. Although somewhat attenuated from the results of previous studies, our data confirm that at least some of the problems hinted at in *Witherspoon,* documented in *Hovey,* and dismissed in *McCree,* persist.

Finally, we believe these data underscore the inappropriateness of drawing conclusions about societal condemnation of the death penalty in various contexts and for specific kinds of cases based on verdicts rendered by capital juries. In a number of opinions on the constitutionality of specific death penalty laws—including capital punishment for the crime of rape (*Coker v. Georgia,* 1977), for juvenile offenders (*Stanford v. Kentucky,* 1989; *Thompson v. Oklahoma,* 1988), the mentally retarded (*Penry v. Lynaugh,* 1989), and accomplices to capital murder (*Enmund v. Florida,* 1986; *Tison v. Arizona,* 1987)—the United States Supreme Court has pointed repeatedly to the behavior of capital juries as indicative of a "national consensus" on these issues. In its search for "objective evidence of how our society views a particular punishment today," the Court regularly has "looked to data concerning the actions of sentencing juries" (*Penry v. Lynaugh,* 1989, p. 331). Yet, capital juries represent what is, virtually by definition, an unrepresentative group on death penalty issues. Thus, not only is at least one fifth of the public automatically excluded from having their views registered by the Court as part of a national consensus on any of these issues, our research suggests that the group from which capital juries are drawn remains unrepresentatively punitive with respect to their death penalty and related attitudes, including topics as central to the administration of the death penalty as their conceptions of aggravation and mitigation and their basic understanding of the way in which the system of capital punishment operates in the United States. When the results of research on the confusion that surrounds the penalty instructions by which capital juries are supposedly guided (e.g., Haney & Lynch, 1994) and the misconceptions that plague at least some death penalty deliberations (Haney, Sontag, & Costanzo, 1994) are considered as well, the sentencing behavior of capital juries seems an odd place indeed to look for a national consensus on evolving standards of decency with respect to capital punishment.

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

People of the State of California, Plaintiff, -vs.- Antolin Garcia-Torres, Defendant.	Case No.: 213515 Motion for fair jury selection procedures Proof of Service

I am a citizen of the United States and employed in Santa Clara County. I am over the age of eighteen years and not a party to this action. My business address is 701 Miller Street, San Jose, CA 95110.

On September 19, 2016 I served the Motion for fair jury selection procedures on the plaintiff in this action by leaving a copy for Dep. DA David Boyd in the lobby of his office.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of September 2016 at San Jose, California.