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ESCAPING DEATH: THE COLORADO METHOD OF CAPITAL JURY SELECTION

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I. INTRODUCTION

In 2015, three years after massacring twelve innocent people and injuring seventy more in a Colorado movie theater, James Holmes was on trial for his life.[1] Close to 3,000 pieces of evidence and more than 300 witnesses convinced prosecuting District Attorney George H. Brauchler that Holmes' case, which took three months to try, "cried out for the death penalty."[2] Yet, after a mere seven hours of deliberation, Holmes received the default sentence of life imprisonment without the possibility of parole when jurors were unable to reach a unanimous verdict.[3] Nine jurors voted in favor of the death sentence; two jurors remained uncertain; and one juror explicitly refused to cast a vote for death.[4] Holmes' narrow escape from the "ultimate punishment" was not the product of good luck, however.[5] Rather, his life sentence was the calculated result of an intricate capital defense strategy colloquially known as the

1. Elisha Fieldstadt & Jacob Rascon, *Aurora Movie Theater Shooter James Holmes to Be Sentenced to Life in Prison*, NBC NEWS (Aug. 7, 2015), nbcnews.com/news/us-news/aurora-movie-theater-shooter-james-holmes-be-sentenced-life-prison-n406276 [perma.cc/VK9G-4JT7]. On July 20, 2012, just "minutes into a special midnight screening of 'The Dark Knight Rises,'" twenty-four-year-old James Holmes, "encased in armor, his hair tinted orange, a gas mask obscuring his face, stepped through the emergency exit of a sold-out movie theater . . . and opened fire." Erica Goode et al., *Before Gunfire, Hints of 'Bad News'*, N.Y. TIMES (Aug. 26, 2012), nytimes.com/2012/08/27/us/before-gunfire-in-colorado-theater-hints-of-bad-news-about-james-holmes.html [perma.cc/LM6C-8T5V]. "By the time it was over, there were 12 dead and 58 wounded." *Id.*

2. Maria L. La Ganga, *James Holmes prosecutor talks about the one holdout juror who spared the killer's life*, L.A. TIMES (Aug. 24, 2015), www.latimes.com/nation/la-na-holmes-da-qa-20150824-story.html [perma.cc/6BCA-TYHC].

3. Ken Broda-Bahm, *Build Resistant Jurors: Lessons from the Aurora Theater Trial*, PERSUASIVE LITIGATOR (Aug. 13, 2015), persuasivelitigator.com/2015/08/build_resistant_jurors.html [perma.cc/86LN-R7ES] [hereinafter Broda-Bahm I].

4. *Id.*

5. Ephrat Livni, *The Pittsburgh shooter may become the second American to face death for a federal hate crime*, QUARTZ (Oct. 29, 2018), qz.com/1441826/pittsburgh-shooter-may-face-the-death-penalty-for-a-federal-hate-crime/ [perma.cc/HU2N-VEH6].

Colorado Method.[6]

Four years later, the Colorado Method worked its magic again in the trial of Brendt Christensen.[7] In October 2017, after a federal grand jury indicted Christensen with one count of kidnapping resulting in death and two counts of making false statements to the FBI,[8] Christensen was on trial for his life[9] in Peoria, Illinois.[10] Matthew Rubenstein, director of the Capital

6. Jack Healy, *Aurora Gunman's Mental State Poses Test for Jury Weighing Death Penalty*, N.Y. TIMES (July 22, 2015), nytimes.com/2015/07/23/us/aurora-gunmans-mental-state-poses-test-for-jury-weighing-death-penalty.html [perma.cc/HX77-46WU]. At its core, the Colorado Method is simply a jury selection strategy "devised to prevent death sentences." Susan Greene, *Inside the small legal community defending Colorado death penalty clients, a wary hope for repeal*, COLO. INDEP. (Feb. 21, 2020), coloradoindependent.com/2020/02/21/death-penalty-abolition-capital-defenses/ [perma.cc/582R-45W3].

7. The author was a second-year law student and judicial intern for the Hon. James E. Shadid during the capital trial of Brendt Christensen in 2019. As a result, the author was privy to the juror selection process and witnessed the Colorado Method at work. She therefore formulates a lot of the opinions herein from that first-hand experience.

8. In July of 2017, Brendt Christensen was initially indicted with one count of kidnapping, which alleged that he "willfully and unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, and carried away [Yingying Zhang], and otherwise held her for his own benefit and purpose" in violation of 18 U.S.C. § 1201(a)(1) (2021). Indictment at 1, United States v. Christensen, No. 17-20037 (C.D. Ill. July 12, 2017). The indictment also charged that Christensen "used and caused to be used a means, facility, and instrumentality of interstate commerce, namely, a Motorola cellular telephone and a Saturn Astra motor vehicle, in committing and in furtherance of the commission of the offense." *Id.* Later, in October 2017, a superseding indictment added two counts of making false statements to FBI Special Agents Anthony Manganaro, Joel Smith, and Michael Carter, and modified the kidnapping charge to "Kidnapping Resulting in Death." Superseding Indictment at 1–3, United States v. Christensen, No. 17-20037 (C.D. Ill. Oct. 3, 2017). The superseding indictment also included notice of eight special findings, including that Christensen "[i]ntentionally killed" Zhang "in an especially heinous, cruel, or depraved manner, in that it involved torture or serious physical abuse," and that the killing was done "after substantial planning and premeditation[.]" *Id.* at 3–4.

9. The Government issued a Notice of Intent to Seek a Sentence of Death on January 19, 2018, citing statutory aggravating factors of death during commission of another crime, heinous, cruel, or depraved manner of committing the offense, and substantial planning and premeditation. Notice of Intent to Seek a Sentence of Death at 2–3, United States v. Christensen, No. 17-20037 (C.D. Ill. Jan. 19, 2018). The Notice also listed six non-statutory aggravating factors: victim impact evidence, future danger of the defendant, lack of remorse, other serious acts of violence, vulnerability of victim, and obstruction. *Id.* at 3–4.

10. U.S. ATT'Y OFF. CENT. DIST. ILL., *Grand Jury Returns Superseding Indictment that Charges Champaign Man with Kidnapping Resulting in Death*, U.S. DEP'T OF JUST. (Oct. 3, 2017), justice.gov/usao-cdil/pr/grand-jury-returns-superseding-indictment-charges-champaign-man-kidnapping-resulting. Although Christensen was indicted in the Urbana Division of the Central District of Illinois, his request to transfer the venue to the Peoria Division of

Resource Counsel Project, joined Christensen's defense team as a jury consultant on January 18, 2019.[11] Rubenstein brought with him the Colorado Method, a "highly sophisticated" and "particularly effective" instrument of jury selection.[12]

Rubenstein and the Colorado Method would soon become Brendt Christensen's saving grace, just as it was for James Holmes and countless more defendants facing the death penalty.[13] Christensen was ultimately found guilty of kidnapping, sexually assaulting, and torturing twenty-six-year-old Yingying Zhang, a Chinese visiting scholar at the University of Illinois at Urbana-Champaign.[14] A wire-recorded confession from Christensen revealed that, after choking and raping her, he murdered Zhang by beating her with a baseball bat, stabbing her, and eventually decapitating her.[15] Zhang's remains have yet to, and likely never

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the Central District of Illinois was granted on December 6, 2018, due to pretrial publicity, docket management, courthouse space, and promptness concerns. Order and Opinion at 4, United States v. Christensen, No. 17-20037 (C.D. Ill. Dec. 6, 2018).

11. Entry of Appearance for Defendant at 1, United States v. Christensen, No. 17-20037 (C.D. Ill. Jan. 18, 2019). Although not mandated, the use of jury consultants in capital cases has increased over the years. Ben Zigterman, *Christensen trial |Both sides utilizing consultants to try to stack jury*, NEWS-GAZETTE (June 9, 2019), news-gazette.com/news/christensen-trial-both-sides-utilizing-consultants-to-try-to-stack/article_0c11ec35-0c3f-5fa8-8c5c-211ac8c46544.html [perma.cc/8VGD-9YQG]. James Acker, a professor at the University at Albany's School of Criminal Justice, noted that it would be strange nowadays if a jury consultant was not involved for a death-eligible case. *Id.* (statement of James Acker). Jury consultants have been found to be immensely beneficial to any trial attorney, specifically because their expertise in social science, psychology, and statistics allows them to strategize a tailored approach to whatever trial they face. *Selecting a jury can be complicated during divisive political times*, AM. BAR ASSOC. (June 2018), americanbar.org/news/abanews/publications/youraba/2018/june-2018/selecting-a-jury-can-be-complicated-during-divisive-political-ti/ [perma.cc/W26C-S9W4]. For more information on Matthew Rubenstein, the jury consultant for Brendt Christensen, see *Matthew Rubenstein*, FED. DEATH PENALTY RES. COUNS., fdprc.capdefnet.org/project-staff/matthew-rubenstein [perma.cc/DPW8-5CKM] (last visited Feb. 17, 2021).

12. Brandon Garrett, Daniel Krauss, & Nicholas Scurich, *Capital Jurors in an Era of Death Penalty Decline*, 126 YALE L.J. F. 417, 428 (Mar. 6, 2017).

13. David Wymore currently holds the Colorado Method in propriety and, as such, specific information about the method is limited. Janae M. Lepir, *Hypothetically Speaking: The Constitutional Parameters of Capital Voir Dire in the Military after Morgan v. Illinois*, 225 MIL. L. REV. 375, 397 (2017). Accordingly, it is difficult to estimate how many capital defendants have received life sentences because of it.

14. Jamie Munks, *Judge sentences U. of I. killer Brendt Christensen to life in prison after jury unable to decide on death sentence*, CHI. TRIB. (July 18, 2019), chicagotribune.com/news/criminal-justice/ct-brendt-christensen-yingying-zhang-death-penalty-20190718-hkypbggymfexdef2eqgmxpa3se-story.html [perma.cc/44FY-NYAB]; Judgment in a Criminal Case at 1, United States v. Christensen, No. 17-20037 (C.D. Ill. July 19, 2019).

15. Andrea Reiher, *Man's Girlfriend Wore an FBI Wire to Get His Rape &*

will, be found.[16] Despite the uncontested heinousness of these crimes, Christensen was spared the death penalty and sentenced to life imprisonment without the possibility of parole after two of the twelve jurors were unable to render a unanimous decision regarding a potential death sentence.[17] Shockingly, Christensen's defense team even admitted his guilt in their opening statements,[18] further underscoring the Colorado Method's effectiveness; even when the abhorrent facts are undisputed — worse, highlighted — the Colorado Method provides an escape from death.

Currently, the only way to effectively learn the Colorado Method is by attending a "Colorado Method voir dire seminar."[19]

Murder Confession, HEAVY (June 12, 2020), heavy.com/entertainment/2020/06/brendt-christensen-yingying-zhang-murder-fbi-wire/ [perma.cc/8XZA-66ZQ].

16. Matt Masterson, *Finding Yingying Zhang's Remains 'May Be Impossible' Family Says After New Details Surface*, WTTW NEWS (Aug. 7, 2019), news.wttw.com/2019/08/07/brendt-christensen-offers-information-yingying-zhang-remains [perma.cc/49NS-Q3BJ]. In November 2018, under an immunity agreement, Christensen revealed to prosecutors that, after killing her, he placed Zhang's "butchered body in three separate garbage bags, which he tossed in a dumpster outside his Champaign apartment before disposing of her personal items among trash receptacles around the Champaign-Urbana area." *Id.* This means that recovering Zhang's remains "may be impossible as investigators believe the size of Zhang's remains by now could be 'smaller than a cellphone.'" *Id.*

17. *High-Profile Federal Death-Penalty Trial of Brendt Christensen Ends in Life Sentence*, DEATH PENALTY INFO. CTR. (July 22, 2019), deathpenaltyinfo.org/news/high-profile-federal-death-penalty-trial-of-brendt-christensen-ends-in-life-sentence [perma.cc/4SWU-5HD8]. Judge Shadid's remarks as he sentenced Christensen remain profound:

> As for the defendant, the jury has been unable to reach a unanimous decision. In deliberating some jurors thought death was appropriate and at least one thought it wasn't. That means by law I must impose on you a sentence of life without release in the Bureau of Prisons. There should be no second guessing the decision of a jury. It is a cornerstone of our system. The mercy extended to you by the jury is a testament to their humanity and not your character.

James E. Shadid, Closing Remarks at *Christensen* Sentencing (July 18, 2019) (transcript on file with author).

18. Jamie Munks, *In opening statement, attorney admits Brendt Christensen abducted, killed Chinese scholar at University of Illinois*, CHI. TRIB. (June 12, 2019), chicagotribune.com/news/breaking/ct-met-u-of-i-chinese-student-kidnapping-openings-20190611-story.html [web.archive.org/web/20210116071021/https://www.chicagotribune.com/news/breaking/ct-met-u-of-i-chinese-student-kidnapping-openings-20190611-story.html]. The defense team admitting Christensen's guilt was certainly a surprise for everyone in the courtroom, although it later made perfect sense considering the Colorado Method's prioritization of mitigating evidence.

19. Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, 34 CHAMPION 18, 27 (2010). Because Wymore has expertly managed to keep his teachings of the Colorado Method private, Lepir, *supra* note 13, Rubenstein's article remains the most comprehensive source regarding the

However, these seminars cost hundreds of dollars to attend and only occur once or twice a year, making accessible literature on the technique scarce.[20] Accordingly, the need to publicize this successful strategy is more than warranted. In undertaking an examination of the Colorado Method's effectiveness, this Comment proceeds in three main parts: Part II breaks down the relevant history of the American death penalty and its procedures before introducing the Colorado Method; Part III explores the well-documented controversy surrounding capital jury selection before assessing the advantages and disadvantages of utilizing the Colorado Method; finally, Part IV advocates for achievable modifications to the Colorado Method. Considering that Colorado's "public defender system is one of the strongest in the nation," its namesake method surely deserves national attention.[21]

II. BACKGROUND

To say that death penalty jurisprudence is complicated would be a massive understatement, but a certain understanding of its parameters is required before moving forward. The Background of this Comment aims to offer that understanding by exploring, first, the history and procedures of the federal death penalty, second, the structure of capital jury selection, and third, the five stages of the Colorado Method of capital jury selection.

A. The Death Penalty

The ins and outs of capital punishment are difficult to grasp for a number of reasons, particularly because the "United States is not one single place when it comes to the death penalty."[22] For example, during open-court voir dire for the Christensen jury in June 2019, one potential juror questioned "how a conviction could carry the death penalty in Illinois when the state struck capital punishment from its statutes years ago."[23] Judge James E. Shadid of the Central District of Illinois explained how Christensen's case

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Method and thus is frequently cited herein.

20. Kathryn J. Stimson et al., *Six of the Greatest: Outstanding Lawyers in Colorado History*, 44 COLO. LAW. 34, 36 (July 2015) (stating "lawyers travel annually to Boulder to attend the National College of Capital Voir Dire to learn and practice the Colorado Method.").

21. Greene, *supra* note 6.

22. DAVID GARLAND, EMBASSY OF U.S. OF AM., WHY DOES THE U.S. HAVE CAPITAL PUNISHMENT? 1 (May 2012) (*available at* photos.state.gov/libraries/amgov/133183/english/P_You_Asked_WhyCapitalPunishment_English.pdf).

23. Michael Tarm, *Death-penalty trial panned in state that ended punishment*, AP NEWS (June 10, 2019), apnews.com/d95a57e3616c4d8f8a46811f3c1b02de [perma.cc/TVD5-62MA].

was a "rare instance of the U.S. Department of Justice seeking the death penalty in one of the more than 20 states" that abolished capital punishment.[24] As Justice Stewart elucidated in 1972, this is not the only unique aspect of America's capital punishment scheme:

> The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its complete irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.[25]

Further, the history of capital punishment in the United States is convoluted and disappointingly "intertwined with slavery, segregation, and social reform movements."[26] It is no surprise that "the discretionary use of the death penalty" in America has been recognized as "a decision which no human should be called upon to make."[27] Even the Supreme Court has yet to master America's capital punishment scheme, resulting in a "zig-zag pattern of renouncing, requiring, and then relaxing statutory guidance" with regard to death penalty jurisprudence.[28] Thus, comprehending the controversiality of the death penalty's history and current procedures is necessary to grasp why improving the system is so critical.[29]

Initially, the first-known death penalty laws were codified in 1700s B.C. in the Code of King Hammurabi of Babylon, which enumerated twenty-five crimes punishable by death.[30] Then, in the

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24. *Id.* The *Christensen* case is a clear illustration of how a state's abolition of capital punishment "does not impede the federal government from applying the death penalty to a prisoner from that state." Kelley Czajka, *How Does the Federal Death Penalty Work?*, PAC. STANDARD (July 25, 2019), psmag.com/news/how-does-the-federal-death-penalty-work [perma.cc/N8EG-KNPM].

25. Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

26. *History of the Death Penalty*, DEATH PENALTY INFO. CTR., (Nov. 29, 2017), deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty [perma.cc/SV73-HNU5]. Undoubtedly, the road to modern-day death penalty jurisprudence is as long as it is brutal. *Death Penalty Issues*, CAL. INNOCENCE PROJECT, californiainnocenceproject.org/issues-we-face/death-penalty/ [perma.cc/874W-D7X5] (last visited Feb. 18, 2021).

27. William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 53 (2003).

28. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1044–45 (1995).

29. It must be noted that, with regard to the death penalty, this comment "paints with a broad brush, and as a result, many important issues have not received the attention they deserve." MICHELLE ALEXANDER, THE NEW JIM CROW 15 (2012). Accordingly, many important facets of death penalty jurisprudence are not discussed herein.

30. *Early Death Penalty Laws*, DEATH PENALTY INFO. CTR. (Apr. 5, 2019),

1600s, British colonizers brought the practice of capital punishment with them to America.[31] The first documented American execution took place in Virginia in 1608,[32] and by the onset of the American Revolution in 1775, all thirteen colonies utilized their own statutory death penalties.[33]

The federal death penalty, however, was not established until the Punishment of Crimes Act ("Crimes Act") was enacted by the First U.S. Congress in 1790.[34] The Crimes Act became the first comprehensive list of federal offenses, listing twenty-three federal crimes, seven of which were punishable by death.[35] Its passage not only signaled the beginning of a dually-operating set of capital punishment laws, but also represented a much-needed shift away from the "colonial-era tendency to make the death penalty mandatory for all serious crimes."[36]

In 1968, the United States Supreme Court began tackling some of the legal parameters of who could "take a human life in the name of justice" and when they could do so.[37] In *Witherspoon v. Illinois*, the Court limited death penalty jurisprudence by holding unconstitutional the dismissal of veniremen based solely on their opposition to capital punishment.[38] This created "a broad standard

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deathpenaltyinfo.org/facts-and-research/history-of-the-death-penalty/early-history-of-the-death-penalty [perma.cc/6ZPS-2P29].

31. *Id.*

32. ROBERT M. BOHM, DEATHQUEST: AN INTRODUCTION TO THE THEORY AND PRACTICE OF CAPITAL PUNISHMENT IN THE UNITED STATES 1 (5TH ED. 2017).

33. *A look at the history of capital punishment in the United States,* VICT. ADVOC. (Feb. 25, 2016), victoriaadvocate.com/counties/dewitt/history-of-capital-punishment-in-the-united-states/article_02131991-103a-55ec-830b-e76ddd41aa5a.html.

34. *Crimes Act*, FED. JUD. CTR., fjc.gov/history/timeline/crimes-act-0 [perma.cc/8FX6-32Z3] (last visited Jan. 1, 2021).

35. *Id.* The seven death-eligible offenses were "treason, willful murder, aiding in the escape of a death row felon, counterfeiting, piracy, and murder or robbery on the high seas." Adam Levinson, *Crimes Act of 1790 (1st Federal criminal law)*, STATUTES & STORIES (Feb. 9, 2018), statutesandstories.com/blog_html/crimes-act-of-1790-1st-federal-criminal-law/ [perma.cc/3BGJ-2YBG]. Hanging was specified as the sole method of execution for these crimes. *Id.*

36. Crimes Act, supra note 34.

37. Bowers & Foglia, *supra* note 27. For a thorough summary of the constitutional law governing death qualification of the capital jury, see Sam Kamin & Jeffrey J. Pokorak, *Death Qualification and True Bifurcation: Building on the Massachusetts Governor's Council's Work*, 80 IND. L.J. 131 (2005).

38 Witherspoon v. Illinois, 391 U.S. 510 (1968). The Court explained that, "a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522. It was thus only appropriate to exclude for cause jurors who "would *automatically* vote against

applicable to the qualification of jurors in all death penalty states: all that could constitutionally be required of jurors was a willingness 'to consider all the penalties provided by state law.'"[39] Then, in 1972, *Furman v. Georgia* placed the initial ban on both federal and state death penalty laws.[40] In invalidating the death penalty as it existed at both levels, the Court reasoned that such regulations "resulted in a disproportionate application of the death penalty, specifically discriminating against the poor and minorities," which ultimately violated the Eighth Amendment's protection against cruel and unusual punishment.[41]

Four years later, in *Gregg v. Georgia*, the Supreme Court clarified that capital punishment was not per se invalid as it reinstated the death penalty at the state level.[42] The Court reasoned that criminal sanctions "must accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'"[43] Therefore, states could still constitutionally impose the death penalty where it did "not involve the unnecessary and wanton infliction of pain,"[44] and was not "grossly out of proportion to the severity of the crime."[45] In response to Furman, rather than abolishing their unconstitutional death penalty laws, however, thirty-five state legislatures developed new, constitutionally

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the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." *Id.* at 522 n.21 (emphasis in original).

39. Kamin & Pokorak, *supra* note 37, at 134 (citing *Witherspoon*, 391 U.S. 510 (emphasis in original)).

40. CORNELL L. SCH., *Death Penalty*, LEGAL INFO. INST., law.cornell.edu/wex/death_penalty [perma.cc/7QXZ-X2YJ] (last visited Jan. 25, 2021). *Furman* involved three Black prisoner-petitioners, all of whom has been convicted in state court and sentenced to death by a jury under applicable state statutes. *Furman v. Georgia*, 408 U.S. 238 (1972). The Court held that the racially discriminatory imposition of the death penalty "constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239–40.

41. CORNELL L. SCH., *supra* note 40 (citing *Furman*, 408 U.S. 238).

42. Gregg v. Georgia, 428 U.S. 153, 169 (1976) ("We now hold that the punishment of death does not invariably violate the Constitution."). The Court underscored that the Eighth Amendment's prohibition of cruel and unusual punishment is not "a static concept." *Id.* at 172–73. Rather, the Eighth Amendment's meaning must be drawn "from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958)). Consequently, the *Furman* holding is better categorized as a *suspension* of capital punishment, rather than its abolition.

43. *Gregg*, 428 U.S. at 173 (citing *Trop*, 356 U.S. at 100).

44. *Id.* (citing *Furman*, 408 U.S. at 392–93).

45. *Id.* (citing *Trop*, 356 U.S. at 100). Georgia revised its death penalty procedures that were struck down by *Furman* and the *Gregg* Court approved the modifications, "reasoning that the Georgia rules reduced the problem of arbitrary application as seen in earlier statutes." CORNELL L. SCH., *supra* note 40 (summarizing Gregg v. Georgia, 428 U.S. 153 (1976)).

permissible statutes that provided capital punishment "for at least some crimes that result[ed] in the death of another person."[46]

The United States did not reinstate the federal death penalty until 1988, however, with the passage of the Anti-Drug Abuse Act.[47] Even still, it only applied to "a very narrow class of offenses."[48] By the mid-1990s, the Crime Act of 1994 and the Antiterrorism and Effective Death Penalty Act of 1996 expanded the availability of the federal death penalty to more than sixty substantive crimes.[49] Today, federal law divides death-eligible crimes into three categories: homicide offenses, espionage and treason, and "drug offenses that do not involve a killing."[50] These categories now specify approximately forty-two federal offenses that are eligible for the death penalty,[51] including genocide,[52] murder for hire,[53] and

46. *Gregg*, 428 U.S. at 179–80. Post-*Gregg*, the Supreme Court took up many death penalty-related issues, and will undoubtedly do so again. *See* CORNELL L. SCH., *supra* note 40 (providing a detailed timeline of death penalty jurisprudence).

47. Catherine Kim, *The Trump administration is bringing back federal executions*, VOX (July 25, 2019), vox.com/2019/7/25/8930191/federal-execution-death-penalty-bill-barr-trump-administration [perma.cc/BV5B-WCKF]. *See Expansion of the Federal Death Penalty*, CAP. PUNISHMENT IN CONTEXT, capitalpunishmentincontext.org/issues/expansion [perma.cc/ULM4-AN2X] (last visited Jan. 27, 2021) (explaining that, post-*Furman*, "whether there should be a federal death penalty remained a controversial issue, and Congress did not pass a capital punishment statute until 1988." (referencing Furman v. Georgia, 408 U.S. 238 (1972)).

48. *Federal Death Penalty*, DEATH PENALTY INFO. CTR. (Oct. 12, 2017), deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty [perma.cc/269K-UFST]. Most notably, the Anti-Drug Abuse Act of 1988, colloquially known as the "Drug King Pin" statute, "authorize[d] the death penalty for a defendant convicted in federal court of a murder committed while engaging in a continuing criminal enterprise." *Expansion of the Federal Death Penalty*, *supra* note 47.

49. Eileen M. Connor, The Undermining Influence of the Federal Death Penalty on Capital Policymaking and Criminal Justice Administration in the States, J. 100 CRIM. L. & CRIMINOLOGY 149, 155–56 (2010) (citing U.S. DEP'T OF JUST., THE FEDERAL DEATH PENALTY SYSTEM: A STATISTICAL SURVEY 1988-2000 at 1 (2000) (available at usdoj.gov/dag/pubdoc/dpsurvey.html) [perma.cc/2YFJ-VAJL]). The Federal Death Penalty Act was part of the Crime Act of 1994, which authorized the death penalty for crimes including "murder of designated government officials, kidnapping resulting in death, murder for hire, fatal drive-by shootings, sexual abuse crimes resulting in death, car-jacking resulting in death," as well as "certain crimes not resulting in death." Expansion of the Federal Death Penalty, supra note 47.

50. Charles Doyle, Cong. Res. Serv., Federal Capital Offenses: An Overview of Substantive and Procedural Law, Cong. Res. Serv. Rep. No. R42095, at 13 (2016); 18 U.S.C. § 3591 (2021).

51. *Federal Laws Providing for the Death Penalty*, DEATH PENALTY INFO. CTR. (Jan. 1, 2019), deathpenaltyinfo.org/stories/federal-laws-providing-death-penalty [perma.cc/R3NX-3WHB].

52. 18 U.S.C. § 1091 (2021).

53. 18 U.S.C. § 1958 (2021).

Brendt Christensen's crime of murder during a kidnapping.[54]

As of February 2021, capital punishment is authorized by the federal government, twenty-seven states, and the U.S. military.[55] Naturally, this means that twenty-two states and the District of Columbia have abolished the death penalty, some of which simply never attempted to pass revised legislation after Gregg.[56] General public support of capital punishment has remained steady over the past few years, but "new death sentences and executions remain at near historic lows."[57] From 2010 to 2015, just sixteen counties across America sentenced "more than one person to death" on average each year;[58] these shifts are largely attributable to concerns about the

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54. 18 U.S.C. § 1201 (2021).

55. *States and Capital Punishment*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 24, 2020), ncsl.org/research/civil-and-criminal-justice/death-penalty [perma.cc/3TYS-44XR]. Currently, the following states permit capital punishment: Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming. *Id.* Of those states, however, California, Oregon, and Pennsylvania each have a gubernatorial moratorium on the death penalty, meaning that their governors' offices have chosen to suspend the punishment. *States Without the Death Penalty*, DEATH PENALTY INFO. CTR. (updated March 2020), deathpenaltyinfo.org/state-and-federal-info/state-by-state [perma.cc/6EKV-6GN9]. In March 2021, Virginia became the first Southern state to abolish the death penalty. Madeleine Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME (Mar. 24, 2021), time.com/5937804/virginia-death-penalty-abolished/ [perma.cc/E5ZB-JCKB].

56. *States Without the Death Penalty*, *supra* note 55. The following twenty-two states and the District of Columbia have abolished the death penalty: Alaska (1957), Colorado (2020), Connecticut (2012), Delaware (2016), District of Columbia (1981), Hawaii (1957), Illinois (2011), Iowa (1965), Maine (1887), Maryland (2013), Massachusetts (1984), Michigan (1847), Minnesota (1911), New Hampshire (2019), New Jersey (2007), New Mexico (2009), New York (2007), North Dakota (1973), Rhode Island (1984), Vermont (1972), Washington (2018), West Virginia (1965), and Wisconsin (1853). *Id.* California, Oregon, and Pennsylvania each imposed a gubernatorial moratorium on the death penalty in 2019, 2011, and 2015, respectively. *Id.*; Hadar Aviram, *Death Penalty Moratorium in California—What it Means for the State and for the Nation*, CONVERSATION (Mar. 20, 2019), theconversation.com/death-penalty-moratorium-in-california-what-it-means-for-the-state-and-for-the-nation-113634 [perma.cc/M5NB-D2BR]. *See New York*, DEATH PENALTY INFO. CTR., deathpenaltyinfo.org/state-and-federal-info/state-by-state/new-york [perma.cc/Z9GD-W2EU] (last visited Feb. 17, 2021) (providing explanation regarding New York's 1984 "effective[]" abolition and its 2007 final abolition).

57. Amber Widgery, *Death Penalty on Trial*, NAT'L CONF. ST. LEGISLATURES (June 7, 2019), www.ncsl.org/research/civil-and-criminal-justice/death-penalty-on-trial.aspx [perma.cc/8H8X-H63M].

58. BRANDON L. GARRETT, END OF ITS ROPE: HOW KILLING THE DEATH PENALTY CAN REVIVE CRIMINAL JUSTICE 12 (2017). The sixteen counties included "Los Angeles County, California, which leads the country in death sentences," and "Caddo Parish, in northwest Louisiana, where the prosecutor emphatically says they should 'kill more people.'" *Id.* Garrett poses a

morality, efficiency, cost, and fairness "of this final form of punishment."[59]

The Colorado Method may have played a role in the decline of capital punishment as well, with Colorado sentencing only two people to death in the past decade.[60] But after a seventeen-year hiatus, the Trump administration resumed federal executions in 2020,[61] and, for the first time in U.S. history, the federal government subsequently "executed more American civilians than all the states combined."[62] Despite this, sixty percent of Americans believe that life imprisonment without the possibility of parole is a "better punishment for murder" than the death penalty.[63] As of

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spectacular question: "Should a handful of counties keep an entire state's execution machinery going?" *Id.*

59. Widgery, *supra* note 57.

60. Jeffrey Toobin, *The Mitigator*, NEW YORKER (May 9, 2011), newyorker.com/magazine/2011/05/09/the-mitigator [perma.cc/LTC5-GT9G]. *See* GARRETT, *supra* note 58, at 59 (noting that "[t]he Colorado Method may be part of the reason why" "there have been only two death sentences in Colorado in the past decade."). The Method "works because it conveys why each juror must be capable of making an individual moral decision." *Id.*

61. Madeleine Carlisle, *In a Year Marked by Death, the Trump Administration Cements a Legacy of Unprecedented Executions*, TIME (Dec. 30, 2020), time.com/5923973/trump-executions-death-penalty-covid-19/ [perma.cc/MKL2-TEHZ]. Daniel Lee was the first person executed by the federal government "in more than 17 years." Josh Gerstein, *Trump administration carries out first federal execution in 17 years*, POLITICO (July 14, 2020), politico.com/news/2020/07/14/supreme-court-federal-execution-injunction-360490 [perma.cc/XJ3C-U7KY]. When "asked if he wished to offer any final words, he proclaimed his innocence." *Id.*

62. Ed Pilkington, *Trump administration has executed more Americans than all states combined, report finds*, GUARDIAN (Dec. 16, 2020), theguardian.com/us-news/2020/dec/15/trump-administration-us-death-penalty-executions [perma.cc/E63T-DMJV]. In 2020, the collective states executed seven people; the Trump administration executed ten. *Id.* Daniel Lewis Lee was executed on July 14, 2020; Wesley Ira Purkey was executed on July 16, 2020; Dustin Lee Honken was executed on July 17, 2020; Lezmond Charles Mitchell was executed on August 26, 2020; Keith Dwayne Nelson was executed on August 28, 2020; William Emmett Lecroy, Jr. was executed on September 22, 2020; Christopher Andre Vialva was executed on September 24, 2020; Orlando Cordia Hall was executed on November 19, 2020; Brandon Bernard was executed on December 10, 2020; and Alfred Bourgeois was executed on December 11, 2020. *Capital Punishment*, FED. BUREAU OF PRISONS, www.bop.gov/about/history/federal_executions.jsp [perma.cc/39RC-W6M8] (last visited Dec. 31, 2020). Three additional executions were quickly scheduled before President Biden's inauguration in January 2021, which were carried out on January 13 (Lisa M. Montgomery), 14 (Cory Johnson), and 16 (Dustin John Higgs). *Id.*

63. Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, GALLUP (Nov. 19, 2020), news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx [perma.cc/J59L-SE8M]. Accordingly, the federal government's decision to resume executions is "out of step with a years-long decline in use of capital punishment at the state level, the suspension of state executions this summer due to COVID-19 and rising opposition to the

November 25, 2020, federal death row was home to fifty-four individuals.[64] At the state level, more than 2,500 inmates await the same fate.[65]

1. Federal Death Penalty Procedures[66]

Capital punishment "cannot be sought without the prior written authorization of the Attorney General."[67] The procedures for gaining such authorization are set out in the United States Attorneys' Manual.[68] Initially, U.S. Attorneys must submit an authorization request for a case involving a death-eligible crime, "regardless of whether or not the U.S. Attorney recommends seeking the death penalty."[69] These submissions are sent to the Department of Justice ("DOJ") Criminal Division before being passed on to a Capital Review Committee responsible for reviewing all federal death-eligible cases.[70] The Committee then has the discretion to consider any reasons not to seek death that are raised by the defense attorneys before making recommendations to the Attorney General regarding whether seeking capital punishment would be appropriate in that situation.[71] Ultimately, the decision to seek the death penalty in any particular case rests solely with the U.S. Attorney General.[72] The subsequent decision-making process remains entirely confidential, but the local U.S. Attorneys must wait for authorization before announcing their intent to seek the

death penalty among the American public." Carlisle, *supra* note 61.

64. Christina Carrega*, DOJ set to execute 5 federal prisoners before Inauguration Day*, CNN (Nov. 25, 2020), cnn.com/2020/11/25/politics/barr-trump-federal-executions/index.html [perma.cc/N5D4-53DJ]. Of the fifty-four people on federal death row, twenty-four were Black men, twenty-one were white men, seven were Latinos, one was an Asian woman, and one was a white woman. *Id. See List of Federal Death-Row Prisoners*, DEATH PENALTY INFO. CTR., deathpenaltyinfo.org/state-and-federal-info/federal-death-penalty/list-of-federal-death-row-prisoners [perma.cc/KTN4-DYDM] (last visited Dec. 31, 2020) (providing list of federal death row prisoners).

65. *Death Row Prisoners by State*, DEATH PENALTY INFO. CTR. (Oct. 1, 2020), deathpenaltyinfo.org/death-row/overview [perma.cc/3GFL-K43N].

66. Because each state's death penalty is determined by its legislation, this Comment focuses mainly on the federal death penalty for brevity's sake.

67. U.S. DEP'T OF JUST., The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review, CAP. CASE REV. PROCEDURE (June 6, 2001), justice.gov/archive/dag/pubdoc/deathpenaltystudy.htm#capitalcasereviewprocedure [perma.cc/Q3LW-M2PV].

68. *Id.*

69. *Id.*

70. *Id.*

71. Czajka, *supra* note 24.

72. U.S. DEP'T OF JUST., *9-10.000 – Capital Crimes*, JUST. MANUAL (April 2014) (*available at* justice.gov/jm/jm-9-10000-capital-crimes#9-10.010 [perma.cc/LK5K-H4E2]).

death penalty.[73] With support from Yingying Zhang's family,[74] prosecutors in Brendt Christensen's case first announced their intent to seek the death penalty on January 19, 2018.[75]

When the time comes to try a capital case, federal law requires a bifurcated (two-part) trial comprised of a guilt phase and a penalty phase.[76] The bifurcation requirement initially serves as a procedural safeguard to "counteract arbitrariness."[77] Moreover, bifurcation was designed to shield the jury's determination of a capital defendant's guilt from "the infiltration of potentially prejudicial information, such as bad-character evidence and prior convictions, that is admissible only during the second phase of sentencing."[78] Importantly, though the severed phases of a capital trial are "separate universes, governed by very different rules,"[79] they are married by the requirement of a unitary jury.[80]

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73. Indictment at 1, United States v. Christensen, No. 17-20037 (C.D. Ill. July 12, 2017); *Overview of the Capital Trial Process*, CAP. PUNISHMENT IN CONTEXT, capitalpunishmentincontext.org/resources/trialprocess [perma.cc/XG3Z-WHW9] (last visited Jan. 14, 2021).

74. Lily Kuo, *Yingying Zhang Murder: anger in China as US killer of scholar spared death penalty*, GUARDIAN (July 18, 2019), theguardian.com/us-news/2019/jul/19/yingying-zhang-killing-us-man-jailed-for-life-for-and-of-chinese-scholar [perma.cc/3LQX-PA36].

75. U.S. ATT'Y OFF. OF THE CENT. DIST. ILL., *Government Files Intent to Seek Death Penalty Against Champaign Man Charged with Kidnapping, Death of Chinese Scholar*, DEP'T OF JUST. (Jan. 19, 2018), justice.gov/usao-cdil/pr/government-files-intent-seek-death-penalty-against-champaign-man-charged-kidnapping [perma.cc/HSN7-MY42].

76. James R. Spencer, Robin J. Cauthron, & Nancy G. Edmunds, Subcomm. on Fed. Death Penalty Cases, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (May 1998) (*available at* uscourts.gov/sites/default/files/original_spencer_report.pdf [perma.cc/UAC4-TJ6F]). *See* Gregg v. Georiga, 428 U.S. 153, 195 (1976) (positing that "the concerns expressed in *Furman* … are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information").

77. Jessie Cheng, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Defense*, 35 L. & SOC. INQUIRY 39, 43 (2010). In 1972, the Supreme Court had determined that "capital jurors, under the statutory schemes that then existed, enjoyed an impermissible level of discretion in administering death sentences," thus resulting in unfettered arbitrariness. *Id.* at 42 (citing Furman v. Georgia, 408 U.S. 238 (1972)). To combat this arbitrariness, bifurcation "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Wood v. North Carolina, 428 U.S. 280, 304 (1976).

78. Talia Fisher, *Constitutionalism and the Criminal Law: Rethinking Criminal Trial Bifurcation*, 61 U. TORONTO L.J. 811, 813 (2011).

79. John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1968 (Nov. 2005).

80. Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 793 (2006) [hereinafter Rozelle I] (citing Federal Death Penalty Act, 18 U.S.C. § 3593(b)(1) (2000)

The guilt phase requires the jury to determine "whether the prosecution has proven, beyond a reasonable doubt, that the defendant has committed a crime punishable by death."[81] If, and only if, a conviction is returned on the capital count, the trial then moves on to the penalty phase, where the same jury decides whether the defendant will be put to death.[82] In the penalty phase, the jury is presented with new evidence of aggravating and mitigating factors.[83] A convicted capital defendant may only receive a death sentence if the jury concludes that (1) at least one of the sixteen statutory aggravating circumstances listed in 18 U.S.C. § 3592(c) exists, and (2) the defendant either:

> (A) killed the victim intentionally; (B) intentionally inflicted serious injuries that resulted in the victim's death; (C) intentionally participated in an act, aware that it would expose a victim to life-threatening force, and the victim died as a consequence; or (D) intentionally engaged in an act of violence with reckless disregard of its life-threatening nature and the victim died as a consequence.[84]

Aggravating factors are those threshold and additional circumstances which make the defendant especially deserving of death.[85] Conversely, 18 U.S.C. § 3592(b) prescribes seven mitigating factors—those solely additional considerations which make a life sentence more appropriate for that particular defendant.[86] To render a verdict of death, the jury must unanimously agree that any aggravating factor(s) sufficiently outweigh(s) any mitigating factor(s).[87] This overwhelming duty of deciding whether a stranger lives or dies is further complicated by the unrealistic expectation that jurors think like legal experts in a field most likely foreign to them.[88]

(providing that sentencing "shall be conducted . . . before the jury that determined the defendant's guilt")).

81. SPENCER, CAUTHRON, & EDMUNDS, *supra* note 76; *see also* Ring v. Arizona, 536 U.S. 584 (2002) (holding that juries, not judges, are responsible for making the factual decisions as to whether a convicted murderer should receive the death penalty).

82. Douglass, *supra* note 79, at 1969.

83. *See* Zant v. Stephens, 462 U.S. 862, 879 n.25 (1983) (affirming that the death penalty may not be imposed unless "at least one . . . statutory aggravating circumstances exist").

84. DOYLE, *supra* note 50, at 13–14 (citing 18 U.S.C. § 3591(a)).

85. *See* Lockett v. Ohio, 438 U.S. 586, 604 (1978) (explaining that sentencing authorities must be able to consider every possible mitigating factor, and should not be limited to a specific list); Douglass, *supra* note 79, at 1994. For a list of aggravating factors for homicide, *see* 18 U.S.C. § 3592(c) (2021).

86. SPENCER, CAUTHRON, & EDMUNDS, *supra* note 76. For a list of mitigating factors, *see* 18 U.S.C. § 3592(a) (2021).

87. U.S. Dep't of Just., *supra* note 67.

88. J. Amy Dillard, *And Death Shall Have No Dominion: How to Achieve the Categorical Exemption of Mentally Retarded Defendants from Execution*, 45 U. RICH. L. REV. 961, 1001 (Mar. 2011).

B. Capital Jury Selection

News of Brendt Christensen's verdict understandably prompted widespread anger across Yingying Zhang's home country of China.[89] Zhang's partner, Hou Xiaolin, was among the masses who found the jury's decision incomprehensible.[90] Among other commentary, a common theme emerged from the backlash that the verdict was "proof the American justice system is not fair."[91] However, this result may be better categorized as proof that capital jury selection is truly the gateway to success.[92] Because a defendant's fate is so often "fixed after jury selection," it is unsurprising that jury selection is recognized as "the most important part of any criminal trial."[93] The jury is heralded as "the zenith of American jurisprudence: the marquee of justice designed to protect the innocent and lay blame to the guilty."[94] Consequently, the ability of a defense attorney to comprise a jury most favorable to a capital defendant "is of paramount importance."[95]

The severity of a capital trial inevitably transforms an otherwise ordinary case into a complex and emotional event, fraught with intense social pressure and anxiety.[96] One of the strengths of the American justice system[97] "is the gravity with which jurors view their charge to reach a decision based on the information presented; however, this is also one of the most difficult parts of being a juror."[98] Capital jurors "are only human," yet they are asked to participate in "an arduous, harrowing, life-changing process."[99] Often, the theater that is a capital trial "leave[s] jurors

89. Kuo*, supra* note 74.

90. *Id.*

91. *Id.*

92. JAMES A. DAVIS, MODIFIED WYMORE FOR NON-CAPITAL CASES, 1 (2017) (*available at* davislawfirmnc.com/wp-content/uploads/sites/231/2017/01/NEW-PAPER.pdf [perma.cc/M36F-C25V]).

93. Herald P. Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 LAW & CONTEMP. PROBS. 116, 116 (Autumn 1980).

94. Margaret Bull Kovera, Jason J. Dickinson, & Brian L. Cutler, *Voir Dire and Jury Selection*, 2 HANDBOOK PSYCHOL. 161, 161 (2012).

95. Fahringer, *supra* note 93.

96. Courtney Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 LAW & CONTEMP. PROBS. 137, 140 (Autumn 1980).

97. In America, the justice system and the legal system are not the same beast. Lynne Butler, *Legal System vs. Justice System*, MENSA CAN. (Apr. 24, 2019), mensacanada.org/blog/2019/04/24/legal-system-vs-justice-system/ [perma.cc/AER9-23QP].

98. Janvier Slick, *The weight of 'playing God': In capital punishment cases, jurors are punished*, OR. LIVE (Jan. 10, 2019), oregonlive.com/opinion/2011/10/the_weight_of_playing_god_in_c.html [perma.cc/SV6G-JVF4].

99. ROBIN E. WOSJE, WILLIAM J. BRUNSON, & DAPHNE A. BURNS, PRESIDING

with emotional scars and resentment."[100] In fact, the heightened stress and anxiety of serving on a capital jury may lead to "extreme emotional setbacks" and "a variety of health problems" for jurors, including insomnia, nightmares, "stomach pains, nervousness, tension, shaking, headaches, heart palpitations, sexual inhibitions, depression, anorexia, faintness, numbness, chest pain, and hives."[101] Accordingly, as columnist Janvier Slick argues, the "unrecognized victims of the death penalty" are those jurors who are forced to play God.[102]

Unlike any other kind of trial, death-eligible cases are controlled by prejudice and emotionality,[103] and any prejudices or biases held by a juror have the potential to adversely "influence final jury verdicts."[104] Accordingly, "death penalty voir dire is the only time jurors' sentiments about punishment play a central role in determining their competence" to serve.[105] In 1985, the Supreme Court provided three acceptable inquiries concerning a potential juror's death penalty views, known as the Witt Questions: whether the juror is so against the death penalty that they would automatically vote for a life sentence; whether the juror is so in favor of the death penalty that they would automatically vote for a death sentence; and whether the juror is open to considering both available sentences of the death penalty and life imprisonment

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OVER A CAPITAL CASE: A BENCHBOOK FOR JUDGES 120–21 (2010); George Allen Moore, *The Righteous Cause of Justice and the American Trial Lawyer*, ALA. JUST. CTR., www.alabamajusticecenter.com/articles-legal-resources/righteous-cause-justice-american-trial-lawyer/ [perma.cc/XY42-UJSK] (last visited Jan. 3, 2021) (stating that jurors are "empowered to make bi[n]ding decisions that affect the lives and fortunes of their fellow citizens."). *See* Slick, *supra* note 98 ("Jurors recognize that their verdict and sentencing decision affects not only the defendant, but also the victim and his or her family members.").

100. RICHARD C. DIETER, DEATH PENALTY INFO. CTR., BLIND JUSTICE: JURIES DECIDING LIFE AND DEATH WITH ONLY HALF THE TRUTH, at 24 (Oct. 2005) (*available at* prisonpolicy.org/scans/deathpenaltyinfo/blindjustice report.pdf [perma.cc/D7YT-HRP9]).

101. Michael E. Antonio, *Jurors' Emotional Reactions to Serving on a Capital Trial*, 89 JUDICATURE 282, 283 (2006) (citing S.M. Kaplan & C. Winget, *The Occupational Hazards of Jury Duty*, 20 BULL. AM. ACAD. PSYCHIATRY & L. 325, 327 (1992)).

102. Slick, *supra* note 98. Since 1999, Janvier Slick has debriefed jurors after traumatic trials, including cases in which the death penalty was sought. *Id.* He explains that jurors "are unconsidered casualties in death penalty cases," and recalls one remarkable juror who claimed, "that while she was convinced of the defendant's guilt, she was haunted by thoughts of the defendant's execution." *Id.*

103. Mullin, *supra* note 96.

104. Ronald J. Matlon, *Strategies for More Effective Voir Dire*, THE JURY EXPERT (Aug. 1, 2013), thejuryexpert.com/2013/08/strategies-for-more-effective-voir-dire/ [perma.cc/869X-987B].

105. Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 32 (June 1984).

without parole.[106] Seven years later, in *Morgan v. Illinois*, the Court clarified that: (1) a jury undertaking a capital sentencing must, for due process purposes, be indifferent and impartial; (2) a potential juror who would automatically vote to impose a death sentence may be challenged for cause; (3) as part of the defendant's right to an impartial jury, the court must, at the defendant's request, inquire during voir dire into potential jurors' beliefs regarding the death penalty; (4) general questions as to whether the potential juror could follow the law failed to adequately detect automatic-death jurors; and (5) jurors who would automatically vote to impose or automatically vote against the death penalty require disqualification for their inability to follow the law.[107]

Research has shown that an individual's attitude regarding the death penalty is influenced by almost every part of their worldview: socioeconomic status, age, geographical location, race, gender, and religion[108] - even personality traits, such as extroversion or agreeableness, play a role.[109] Thus, capital jury selection must be careful, strategic, and thorough.[110] As former Colorado Public Defender Doug Wilson explains, "I've never had a capital client who wasn't severely damaged in some way," and it is his responsibility, not to justify their actions, but to "explain how they got there."[111] Capital jury selection involves two steps: general voir dire questioning and death qualification.[112]

1. General Voir Dire

The Supreme Court has long held that a defendant must be afforded the opportunity to, in the presence of the court, examine and inspect each potential juror face to face.[113] This preliminary

106. Wainwright v. Witt, 469 U.S. 412 (1985).

107. Morgan v. Illinois, 504 U.S. 719 (1992); *see* Reid v. State, 588 S.W.3d 725, 735 (Ark. 2019) (Linker Hart, J., dissenting) (summarizing *Morgan*'s five-point holding).

108. Theodore Eisenberg, Stephen P. Garvey, & Martin T. Wells, *The Deadly Paradox of Capital Jurors*, 74 S. CAL. L. REV. 371, 387 (2001).

109. John H. Blume, *An Overview of Significant Findings From the Capital Jury Project & Other Empirical Studies of the Death Penalty Relevant to Jury Selection*, Presentation of Evidence & Jury Instructions in Capital Cases 14–15 (2008), www.swlaw.edu/sites/default/files/2021-02/Williams%2C%20Kenneth%20-%20Empirical%20Studies%20Summaries.pdf [perma.cc/2XJR-5C9C] (citing Monica Robbers, *Tough-Mindedness and Fair Play: Personality Traits as Predictors of Attitudes Toward the Death Penalty – an Exploratory Gendered Study*, 8 Punishment & Soc. 203 (2006)).

110. Jesse Nason, *Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification*, 10 ROGER WILLIAMS U. L. REV. 211, 211 (2004).

111. Greene, *supra* note 6.

112. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 87.

113. Pointer v. United States, 151 U.S. 396, 408–09 (1894) (asserting that a

examination is the voir dire: "the questioning of prospective jurors in relation to their ability to decide a particular case."[114] Whereas jury selection generally refers to "a pretrial legal proceeding," voir dire specifically refers to "the execution of that procedure."[115] Voir dire functions "as a tool for counsel and the court to carefully and skillfully determine, by inquiry, whether biases or prejudices, latent as well as acknowledged, will interfere with a fair trial if a particular juror serves on it."[116]

One consequence of the bifurcation of capital trials is that the voir dire questioning must necessarily be altered from that of other criminal cases.[117] Voir dire in capital cases should thereby thoroughly probe the prospective jurors' sincerely-held beliefs "to ascertain whether they hold biases" which would prevent them from impartially and fairly deciding the case at hand.[118] In most cases, this is "is a stark little exercise consuming minutes rather than hours."[119] A "quick and cursory" voir dire not only respects the potential jurors' time, but preserves the court's resources.[120] In capital cases, however, the process—rightfully—warrants "a time-consuming" undertaking.[121]

The presiding judge typically conducts general voir dire by asking prospective jurors questions "designed to elicit basic demographic information, knowledge about the case, and perhaps case-specific attitudes."[122] The most important function of this process is to "eliminate extremes of partiality and assure . . . that

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defendant "cannot be compelled to make a peremptory challenge until he has been brought face to face, in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice").

114. Barbara Allen Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 545 (1974).

115. Kovera, Dickson, & Cutler, *supra* note 94, at 165.

116. Ann M. Roan, *Reclaiming Voir Dire*, CHAMPION (July 2013), www.nhd.uscourts.gov/pdf/FPI/Reclaiming%20Voir%20Dire.pdf [perma.cc/NWP8-HJU4].

117. Fitzgerald & Ellsworth, *supra* note 105.

118. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 94 (citing Smith v. State, 513 S.W.2d 823, 826 (Tex. Crim. App. 1974)). "Asking about bias against parts of the range of punishment is certainly permissible," especially because "bias against any of the law upon which the defendant is to rely is ground for a challenge for cause and a proper matter for query." *Smith*, 513 S.W.2d at 826.

119. Babcock, *supra* note 114, at 549.

120. Nancy S. Marder, *Juror Bias, Voir Dire, and the Judge-Jury Relationship*, 90 CHI.-KENT L. REV. 927, 931 (June 23, 2015).

121. Paula Mitchell, *Are Trial Courts Even-Handed in Excusing Jurors Based on their Views on the Death Penalty?*, VERDICT (Oct. 9, 2013), verdict.justia.com/2013/10/09/trial-courts-even-handed-excusing-jurors-based-views-death-penalty [perma.cc/8QB7-S98C]. The process of confirming that potential jurors "will be able to set aside any personal convictions and follow the law in the case before them" can consume several days to several weeks. *Id.*

122. Kovera, Dickson, & Cutler, *supra* note 94, at 162.

the persons chosen to decide the guilt or innocence of the accused will reach that decision solely upon the evidence produced at trial."[123] Voir dire must also ask about pre-trial publicity and racial attitudes.[124] Frequently, capital voir dire "is conducted with the entire group in the courtroom responding to questions by raising their hands," although sequestered and individual voir dire "provides the best forum for determining people's deeply-held attitudes."[125] If the specific line of questioning warrants a sensitive and private discussion, the judge may choose to inquire further in chambers.[126]

2. Death Qualification

Specific to death penalty trials, each potential juror must be "death qualified."[127] Death qualification is a unique type of voir dire questioning that aims to determine an individual's "fitness for jury service" based on their attitudes specifically regarding capital punishment.[128] This process includes confirming whether, if seated, the potential juror "will be able to follow the law in deciding what sentence to impose."[129]

Some courts conduct death qualification "in a totally individual session with one juror appearing in the courtroom at a time; others

123. State v. Honeycutt, 285 N.C. 174, 179 (N.C. 1974), *death sentence vacated*, 428 U.S. 903 (1976) (citing Swain v. Alabama, 380 U.S. 202, 219 (1965), *rehearing denied*, 381 U.S. 921 (1965)).

124. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 115–16 (citing Mu'Min v. Virginia, 500 U.S. 415 (1991) (pretrial publicity); Turner v. Murray, 476 U.S. 28 (1986) (racial bias)). The Supreme Court has "acknowledged that 'adverse pretrial publicity can create such a presumption of prejudice in a community that jurors' claims that they can be impartial should not be believed.'" *Mu'Min*, 500 U.S. at 429 (citing Patton v. Yount, 467 U.S. 1025, 1031 (1984)). Additionally, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner*, 476 U.S. at 36–37. Both issues of pretrial publicity and racial bias were inquired into during the *Christensen voir dire* since the case had already received international attention and because Zhang was a Chinese non-citizen. S.E. Honeyman, *Christensen Trial Notebook* 3 (June 2019) (on file with author).

125. Mullin, *supra* note 96, at 146.

126. Marder, *supra* note 120, at 932.

127. Mark Costanzo & Lawrence T. White, *An Overview of the Death Penalty and Capital Trials: History, Current Status, Legal Procedures, and Cost*, 50 J. SOC. ISSUES 1, 7 (July 1994). *See* Glossip v. Gross, 576 U.S. 863, 913 (2015) (explaining death qualification by stating, "no one can serve on a capital jury who is not willing to impose the death penalty.") (citing Rozelle I, *supra* note 80, at 772–93, 807).

128. Craig Haney, Aida Hurtado, & Luis Vega, *"Modern" Death Qualification*, 18 LAW & HUM. BEHAV. 619, 619 (1994).

129. *Death Qualification*, CAP. PUNISHMENT IN CONTEXT, capitalpunishmentincontext.org/resources/deathqualification [perma.cc/L2QK-KSQU] (last visited Jan. 24, 2021).

administer it in small groups of five to eight jurors."[130] Regardless, being death qualified means that each juror must be willing to give meaningful consideration to both a death sentence and a sentence of life imprisonment without parole.[131] Any veniremen possessing "disqualifying" attitudes are excused from service,[132] and the end result is, theoretically, "a jury pronounced fit to decide a capital case."[133] Ideally, that fitness is based on individuals who "are not strictly opposed to capital punishment but who also do not believe that the death penalty should be imposed in all cases of capital murder."[134]

Considering how "jurors' prior experiences and attitudes are more likely to influence their verdict than the arguments presented to them at trial," successful death qualification is critically important to any capital defendant.[135] Without sufficient information about the prospective jurors' innate beliefs and biases, a capital defendant "cannot realize his right to 'select' the jury"[136] in his best interest.[137] Consequently, the process relies heavily on potential jurors being "honest and forthcoming in revealing some of their most personally held attitudes, beliefs, and biases."[138]

These jury selection processes continue until the death-qualified potential jury pool reaches its desired total, which is typically set by the judge. For Brendt Christensen, that meant seventy death-qualified veniremen.[139] The judge and the attorneys then select each citizen who will make up the jury, as well as any

130. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 87. For *Christensen*, the preliminary questioning took place in open court via panel voir dire, but each potential juror was additionally questioned alone in chambers with respect to death qualification.

131. *Death Qualification*, supra note 129.

132. Haney, Hurtado, & Vega, *supra* note 128.

133. Alice Chao et al., *Death-Qualified Juries and the Flowers Trials*, CORNELL U. L. SCH. SOC. SCI. & L., courses2.cit.cornell.edu/sociallaw/FlowersCase/deathqualifiedjuries.html [perma.cc/Z6FN-2YBY] (last visited Feb. 17, 2021).

134. *Id.*

135. Matlon, *supra* note 104 (citing RANDALL A. BONO, A FORMER JUDGE'S PERSPECTIVE ON VOIR DIRE (2000)).

136. Babcock, *supra* note 114, at 549.

137. Absolute impartiality "is impossible for any juror," and the "reasons a jury may impose a death sentence are about as predictable as being 'struck by lightning.'" Dillard, *supra* note 88 (citing Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring)).

138. Kovera, Dickson, & Cutler, *supra* note 94, at 163.

139. Ben Zigterman, *175 potential jurors for Christensen trial eliminated; pool now at 476*, NEWS-GAZETTE (May 14, 2019), news-gazette.com/news/potential-jurors-for-christensen-trial-eliminated-pool-now-at/article_002c2ec3-6513-5d0e-b841-cd1f431217cf.html [perma.cc/3UPC-AXJ5]. It took seven days to select the seventy death-qualified veniremen in *Christensen*. Honeyman, *supra* note 124, at 13.

alternate jurors, together.[140] Undoubtedly, the success of seating a favorable jury is inextricably intertwined with the effectiveness of the death qualification.[141]

Frustratingly, few protections for a capital defendant are meant to "expedite criminal proceedings, and the voir dire necessary to safeguard a capital defendant's right to a fair trial is no exception."[142] Judges are consistently pressured to "curtail those protections and thereby save the extra time they require."[143] Thus, voir dire in federal courts often limits the attorneys' abilities to fully probe and uncover potential biases.[144] An in-depth, probing voir dire is clearly necessary in capital cases, but courts still "exert a tremendous amount of pressure on attorneys to move their cases along."[145] Nonetheless, "[g]iven the important, delicate, and complex nature of the death qualification process, there can be no substitute for thorough and searching inquiry."[146]

3. Excluding Disqualified Jurors

There are two kinds of excusable jurors: nullifiers and excludables.[147] Nullifiers are those individuals who would simply "refuse to convict of a death-eligible crime despite evidence" of the defendant's guilt.[148] Nullification has been around "since trial by jury was first established in thirteenth century England and still exists today."[149] Alternatively, those jurors who are classified as excludables would vote to convict a guilty capital defendant, but would not consider voting for the death penalty as punishment.[150] Seating either nullifiers or excludables on a capital jury "subverts the system" and is precisely what the death qualification process was created to avoid.[151] If a juror is unfit to serve on a capital case, they must be excused, though "the legal category of exclusion is not

140. *How Courts Work*, AM. BAR ASSOC. (Sept. 9, 2019), americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/juryselect/ [perma.cc/C8JZ-MP38]. In *Christensen*, twelve jurors and six alternates were ultimately selected. Honeyman, *supra* note 124, at 13.

141. Kovera, Dickson, & Cutler, *supra* note 94, at 163.

142. John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1239 (2001).

143. *Id.*

144. Matlon, *supra* note 104, at 1–2.

145. Mullin, *supra* note 96, at 151.

146. State v. Williams, 550 A.2d 1172, 1182 (N.J. 1988).

147. Rozelle I, *supra* note 80, at 775–77.

148. *Id.* at 776.

149. BOHM, *supra* note 32, at 2.

150. Rozelle I, *supra* note 80, at 776.

151. *Id.* at 776–77.

bounded by bright and unyielding lines."[152]

"[J]ury selection, in a real sense, is an opportunity for counsel to see if there is anything in a juror's yesterday or today that would make it difficult for that juror to view the facts, not in an abstract sense, but in a particular case, dispassionately."[153] Subsequently, both automatic life and automatic death jurors must be excluded.[154] After each potential juror's interviews, the attorneys and judge privately scrutinize the responses received and attempt to determine whether the individual should be excused or seated.[155]

In *Witherspoon v. Illinois*, the 1968 Supreme Court held that prospective jurors could not be disqualified from jury service simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against it.[156] Twenty-four years later, in *Morgan v. Illinois*, the Court ruled that automatic death penalty jurors must be excused "because their presence on the jury would violate 'the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment.'"[157] Conversely, "not all who oppose the death penalty are subject to removal for cause in capital cases."[158] Rather, "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."[159]

There are two ways to remove an individual from the jury pool: they may be excused "for cause" or excused by a peremptory strike.[160] Initially, some jurors may be excused for cause if they possess "work hardships, childcare problems, and other physical health issues."[161] These excusals can easily be conducted in open court before any discussion of the case commences, like in Christensen.[162] Then, if any remaining juror's "feelings about the

152. Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133, 135 (1984) [hereinafter Haney I].

153. State v. Hedgepath, 66 N.C. App. 390, 398 (N.C. Ct. App. 1984)).

154. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 116.

155. Kovera, Dickson, & Cutler, *supra* note 94, at 162.

156. *Witherspoon*, 391 U.S. at 519–20 (holding that the dismissal of potential jurors based on their personal opposition to the death penalty was unconstitutional because, "in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community").

157. Blume, Johnson, & Threlkeld, *supra* note 142, at 1217 (citing Morgan v. Illinois, 504 U.S. 719, 729 (1992)).

158. Lockhart v. McCree, 476 U.S. 162, 176 (1986).

159. *Id.*

160. *How Courts Work*, *supra* note 140.

161. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 91.

162. Ben Zigterman, *Court casting wide net for jury in Christensen trial*, NEWS-GAZETTE (Mar. 15, 2019), news-gazette.com/news/court-casting-wide-net-for-jury-in-christensen-trial/article_28623a3b-46ca-50c1-95cb-

death penalty [in either direction] would impair his or her ability to judge the case and choose the punishment fairly," they must also be excused for cause.[163] Ultimately, the judge has the final say in which veniremen are dismissed,[164] though most states allow both parties to ask follow-up questions before that final call.[165] The prosecution and defense are both granted an unlimited number of times to request a juror be excused "for cause."[166] For prosecutors, the idea here is to strike jurors "who have doubts about the death penalty," whereas defense attorneys will aim to strike jurors "who are so pro-death penalty that they could not judge guilt fairly in a capital case."[167]

Any jurors who survive these initial challenges may still be eliminated through peremptory challenges.[168] Peremptory challenges are used to dismiss jurors without having to state a reason, although peremptory challenges based on a juror's race, gender, or religion are strictly prohibited.[169] These excusals are limited in number by jurisdiction and are not subject to the court's discretion.[170] Thus, if either party perceives any prospective juror to be biased, "that party may argue to the court that the person should be struck for cause and, failing that, may strike him peremptorily."[171] Ideally, at the end of this process, which can take up to weeks at a time, the stage will be set for the capital trial to begin.[172] In the end, a capital jury should consist of "jurors who can follow the law and consider the death penalty and any life options .

0cf16566ce1b.html [perma.cc/F446-FFGX?type=image] (reporting that as much of the jury selection process would be done in open court as possible).

163. *Death Qualification*, *supra* note 129.

164. Wainwright v. Witt, 469 U.S. 412, 428 (1985). The Court affirmed "that the question whether a venireman is biased has traditionally been determined through *voir dire* culminating in a finding by the trial judge concerning the venireman's state of mind," especially since "such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.*

165. Haney I, *supra* note 152, at 134.

166. Babcock, *supra* note 114, at 550.

167. *Death Qualification*, *supra* note 129.

168. *Id.*

169. Batson v. Kentucky, 476 U.S. 79, (1986) (holding that the Fourteenth Amendment's Equal Protection Clause forbids prosecutors from using peremptory challenges to excuse potential jurors based on their race).

170 *Death Qualification*, *supra* note 129; Swain v. Alabama, 380 U.S. 202, 220 (1965).

171. Babcock, *supra* note 114, at 551.

172. Richard Kopf, *How long should it take to pick a jury in a murder case?*, HERCULES & UMPIRE (June 23, 2013), herculesandtheumpire.com/2013/06/23/how-long-should-it-take-to-pick-a-jury-in-a-murder-case/ [perma.cc/HP9U-36U8]. For Brendt Christensen, he met face-to-face with more than 100 potential jurors and, after about one week, faced a jury of twelve of his peers with six alternates at the ready. Honeyman, *supra* note 124, at 13.

even though they may be personally in favor or against the death penalty."[173]

As the sparing of Christensen's life suggested to many that "the American justice system is not fair,"[174] the result may be better categorized as proof that capital jury selection is truly the lynchpin to success—for both the prosecution and defense.[175]

C. The Colorado Method

Beginning in 1990, researchers from eight different states teamed up with the National Science Foundation to create the Capital Jury Project ("CJP").[176] A multidisciplinary research effort, the CJP set out "to generate 'a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions.'"[177] Its findings, however, were generally disheartening: among other flaws, the CJP uncovered evidence of "premature decision-making," "bias in jury selection," "failure to comprehend instructions," "erroneous beliefs that death is required," "evasion of responsibility for the punishment decision," "racial influence in juror decision making," and "underestimation of non-death penalty alternatives."[178] Further, the CJP found that "capital jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution."[179] In spite of these concerning revelations, the CJP also revealed that "most juries start deliberations with at least some jurors who support a life sentence."[180] Former Chief Deputy

173. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 116.

174. *Id.*; Kuo, *supra* note 74.

175. DAVIS, *supra* note 92.

176. Bowers, *supra* note 28, at 1043. The CJP conducted "three-to-four hour interviews with 80 to 120 capital jurors in each of the participating states," in order to study "the extent to which jurors' exercise of capital sentencing discretion is still infected with, or now cured of, the arbitrariness which the United States Supreme Court condemned in *Furman v. Georgia*." *Id.*

177. Rozelle I, *supra* note 80, at 784 (citing Bowers, *supra* note 28).

178. Bowers & Foglia, *supra* note 27, at 54. The disheartening nature of death penalty jurisprudence runs deep—an understanding among defense lawyers everywhere. *See* Greene, *supra* note 6 (detailing the story of Mary Claire Mulligan, a death penalty defense lawyer from Boulder County, Colorado, and quoting her as saying that she had lost "any belief that the system was fair, or just, or would ultimately work.").

179. Rozelle I, *supra* note 80, at 785 (citing BENJAMIN FLEURY-STEINER, JUROR'S STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 24–25 (2004)).

180. Eric R. Carpenter, *An Overview of the Capital Jury Project for Military Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, Army Law. 6, 22 (2011) (citing Marla Sandys, *Cross-Overs – Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1196–220 (1995)).

for the Colorado Public Defender System, David Wymore, understood this finding for what it really meant: defense counsel must figure out a way to "preserve those potential votes."[181]

In response to the CJP's research, Wymore published an article outlining a new litigation technique he called "the Colorado Method of capital jury selection" in 1995.[182] Centered around the unique dynamics of each potential juror, Wymore's technique provides defense teams with a structured approach to capital voir dire "that maximizes the opportunity to obtain life verdicts."[183] Broadly speaking, the Colorado Method creates "a nonjudgmental respectful atmosphere during jury selection that facilitates juror candor" with the intent of uncovering potential jurors' attitude toward the death penalty and its imposition.[184] Its premise is simple: every juror must decide individually "whether to impose the death penalty or exercise mercy."[185] This requires defense attorneys to "secure a jury favorably disposed to the consideration of mitigating evidence."[186] The Colorado Method's framing of a capital juror's duty as a "deeply personal judgment," rather than a unanimous factual

181. *Id.* (citing Videotape: Selecting a Colorado Jury—One Vote for Life (Wild Berry Productions 2004), available at thelifepenalty.com/). Interestingly, Wymore was called to his specialty after watching the 1958 film noir "I Want to Live!" Greene, *supra* note 6. Wymore was "crushed" when Susan Haywood's character, a prostitute wrongly convicted of murder, was given the death penalty. *Id.* Wymore worked on approximately eighty death penalty cases during his tenure; "None of Wymore's clients ever was executed." Christine Reid, *Masters' attorney a master public defender*, DAILY CAMERA (Aug. 16, 2009), www.dailycamera.com/2009/08/16/masters-attorney-a-master-public-defender/ [perma.cc/GKW2-426R]. Noting that Wymore "passed on his 'dogged determination' to a 'generation of public defenders,'" his colleagues have affectionately dubbed him "the 'epitome of no stone unturned.'" Garrett, *supra* note 58, at 54 (citing Jessica Fender, *Tenacity Led to His Toughest Win Ever*, DENVER POST (Jan. 21, 2008), www.denverpost.com/2008/01/20/tenacity-led-to-his-toughest-win-ever/).

182. John Ingold, *Timeline: The death penalty in Colorado*, COLO. SUN (Mar. 4, 2019), coloradosun.com/2019/03/04/timeline-the-death-penalty-in-colorado/ [perma.cc/SH6A-84WV]. This technique is also sometimes referred to as the Morgan Method or the Wymore Method. *See Webinar: Introduction to the Methods and Techniques of the Colorado Method*, NAT'L ASSOC. FOR PUB. DEF. (Dec. 30, 1899), publicdefenders.us/ev_calendar_day.asp?eventid=71 [perma.cc/P325-QYZ5] (referring to the technique as the Colorado Method and Morgan Method interchangeably); *see also Choosing Jurors Who Will Choose Life: Capital Case Jury Selection*, CTR. FOR DEATH PENALTY LITIG. (2016), cdpl.org/wp-content/uploads/2016/09/October-24-26-2016-Wymore-Training.pdf [perma.cc/4S6J-643D] (referring to the Wymore Method).

183. Rubenstein, *supra* note 19, at 18.

184. *Id.*

185. GARRETT, supra note 58, at 54. *See* Toobin, *supra* note 60 (explaining that the Colorado Method "empower[s] the jurors to know their right to show mercy." (statement of David Lane, Colorado Method proponent)).

186. Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 1 UNIV. CHI. LEGAL F. 117, 141 (2010).

determination, helps the defense prepare the jurors who remain "for the possibility of a life verdict."[187]

Wymore, who, admittedly, has "never been big" on "the whole reaping lethal vengeance on the citizenry thing,"[188] believed that jury selection, especially for a capital trial, could only be improved by attacking its flaws with science.[189] Interestingly, that science stems from a series of U.S. Navy-sponsored experiments.[190] In the 1950s, social psychologist Solomon Asch uncovered "the dynamic of social conformity, which is essentially the fear of disagreeing with the majority in a public setting."[191] Asch discovered that, in group settings, many individuals succumb to pressure to "go along with the group" and modify their behavior accordingly.[192] Individuals then become "captive to this social conformity," and have difficulty cultivating their own ideas.[193] Similar to the situation many capital jurors face in the deliberation room, Asch explained the circumstances of this social conformity:

> The subject knows (1) that the issue is one of fact; (2) that a correct result is possible; (3) that only one result is correct; (4) that the others and he are oriented to and reporting about the same objectively given relations; (5) that the group is in unanimous opposition at certain points with him.[194]

However, this social conformity effect can be significantly reduced when an individual believes "that his decision is a moral, not necessarily factual" choice, and understands that being in opposition to the majority is perfectly acceptable because more than one resolution exists.[195] This development was key to the

187. Broda-Bahm I, *supra* note 3.

188. Greene, *supra* note 6.

189. GARRETT, *supra* note 58, at 54 ("Wymore believed that there should be more of a science to jury selection in death penalty cases.").

190. Carpenter, *supra* note 180, at 7.

191. *Id.* (citing S.E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Harold Guetzkow ed. 1951); SOLOMON E. ASCH, SOCIAL PSYCHOLOGY (1952); Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS: GEN & APPLIED 1 (1956)). Asch himself described his investigations as being "concerned with the conditions of independence and lack of independence in the face of group pressure." *Id.*

192. *Id.* at 8 (citing S.E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP, AND MEN: RESEARCH IN HUMAN RELATIONS 181 (Harold Guetzkow ed. 1951)).

193. Saby Ghoshray, *Capital Jury Decision Making: Looking Through the Prism of Social Conformity and Seduction to Symmetry*, 67 U. MIAMI L. REV. 477, 485 (2013).

194. Carpenter, *supra* note 180, at 22 (citing SOLOMON E. ASCH, SOCIAL PSYCHOLOGY 461 (1952)).

195. *Id.* Interestingly, Asch's conclusion may have unintentionally paved the way for partisan distrust of science and evidence in favor of opinion and feelings

establishment of the Colorado Method.[196]

The brass tacks explanation of the Colorado Method's structure provides two goals: (1) getting jurors to reveal their thoughts regarding the death penalty and mitigation, so that the defense team may "rationally exercise their peremptory challenges and [] build grounds for challenges for cause;" and (2) minimizing or, preferably, eliminating the social conformity Asch identified.[197] Today, even though jury selection has consistently been a "daunting task" for capital defense lawyers,[198] David Wymore and his colleagues have been "credited with largely slowing down death penalty sentencing in Colorado."[199] The more times prosecutors sought the death penalty against Wymore's defendants and lost, the less Colorado prosecutors bothered to seek it.[200] In fact, before Colorado abolished the death penalty in March 2020, use of the Colorado Method had "nearly emptied Colorado's death row."[201] As Wymore's creation continues to gain notoriety across the country's state and federal jurisdictions,[202] it has evolved into "the gold standard in death penalty defense."[203] Better yet, "the Colorado Method of jury selection has been proven to work."[204] Increasing success in state and federal courts nationwide[205] begs the question: how'd Wymore do it?

To overcome a death sentence, the Colorado Method "seeks to reduce the force of social conformity and get the life votes out of the deliberation room."[206] Whereas other approaches to capital voir dire

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seen throughout the 2020 political uprising and January 6, 2021 insurrection—although such a discussion is well outside the scope of this Comment.

196. *Id.*

197. *Id.* (explaining "[t]his is a very simplified description of the method").

198. Thomas J. Hurney, Jr. & Randal H. Sellers, *Picking Juries: Questionnaires and Beyond*, 75 DEF. COUNS. J. 370, 370 (Jan. 2008).

199. Stimson et al., *supra* note 20.

200. *Id.*

201. *National Capital Voir Dire Training Program*, NAT'L COLL. OF CAP. VOIR DIRE, nccvd.org (last visited Jan. 5, 2020). Since reinstating the death penalty in the 1970s, Colorado has only executed one person. Neil Vigdor, *Colorado Abolishes Death Penalty and Commutes Sentences of Death Row Inmates*, N.Y. TIMES (Mar. 23, 2020), www.nytimes.com/2020/03/23/us/colorado-death-penalty-repeal.html [perma.cc/3WDT-E38E].

202. Broda-Bahm I, *supra* note 3.

203. Ingold, *supra* note 182 (citing *Capital Training*, OFF. COLO. ST. PUB. DEF., coloradodefenders.us/training/capital-training/ (last visited Jan. 1, 2021)).

204. Robert Costello, *Three Important Books Worthy of Your Time*, 32 Crim. Just. 52, (2018) (quoting EDWARD C. MONAHAN & JAMES J. CLARK, TELL THE CLIENT'S STORY: MITIGATION IN CRIMINAL AND DEATH PENALTY CASES 416 (2017)).

205. *Id.* (explaining "[f]or the past few decades, death penalty defense lawyers have been successfully using the Colorado Method in state and federal courts across the country.").

206. Carpenter, *supra* note 180.

have focused specifically on forming a "tribe" with jurors to do so, the Colorado Method specifically "aims to uncover inner biases."[207] The technique does so by emphasizing how each member of a jury must respect one another's beliefs and, ultimately, their vote for life or death.[208] In a very real sense, however, the Colorado Method is all about disqualification.[209] Its structure can be broken down into five stages:[210] (1) the Preliminary Ranking stage; (2) the Information-Gathering stage; (3) the Record-Building stage; (4) the Trial Overview stage; and (5) the Principle Confirmation Stage.

1. The Preliminary Ranking Stage

Before voir dire begins at the district courthouse, the Colorado Method encourages defense counsel to request a juror questionnaire.[211] If granted, the court summons local eligible citizens to complete the questionnaire of questions agreed upon by both parties.[212] The responses are usually the attorneys' primary information about the jury pool,[213] providing a brief insight into each potential juror's demographics, characteristics, and feelings toward the death penalty.[214] Strategic questionnaires will be written in a way that elicit "more than a yes or no answer" in order to "learn more about how potential jurors think, not just what they think."[215] After receiving these responses, but before beginning the voir dire process, the defense team ranks each respondent based on the Colorado Method's seven-point scale.[216]

A juror ranked as a "1" is a person who will never vote for the death penalty; the Colorado Method dubs this person a "Witt Excludable" juror.[217] The person is "vocal, adamant, and articulate

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207. Lepir, *supra* note 13, at 400.

208. *Id.* at 396–97.

209. Honeyman, *supra* note 124, at 14.

210. These stages are summarized based on the information provided in Rubenstein, *supra* note 19, at 18–27.

211. Rubenstein, *supra* note 19, at 21.

212. *Jury Service*, U.S. CTS., www.uscourts.gov/services-forms/jury-service [perma.cc/H2ML-TXJF] (last visited Nov. 14, 2019).

213. *Selecting a jury can be complicated during divisive political times*, *supra* note 11.

214. GORDON BERMANT, FED. JUD. CTR., JURY SELECTION PROCEDURES IN UNITED STATES DISTRICT COURTS 7–8 (June 1982) (*available at* www.fjc.gov/sites/default/files/2012/JurSelPro.pdf [perma.cc/6H4N-S8EC]).

215. *Selecting a jury can be complicated during divisive political times*, *supra* note 11 (emphasis added).

216. These categories are summarized from the information provided in Rubenstein, *supra* note 19, at 21.

217. GARRETT, *supra* note 58, at 54; Rubenstein, *supra* note 19, at 18 (referencing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)). The *Witt* standard "for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in

about" their disdain for capital punishment.[218] A "1" juror "is impaired because [he or] she will never give meaningful consideration to a death sentence."[219]

A juror ranked as a "2" is a person "who is hesitant to say that he [or she] believes in the death penalty."[220] This person clearly recognizes "the seriousness of being asked to sit on the capital jury and takes seriously the value of human life."[221] Nonetheless, this individual asserts that he or she "can give meaningful consideration to the death penalty."[222] Category 2 jurors "can be intelligent abstract thinkers or less intelligent, but compassionate, people."[223]

Noted as "[b]asically pro-death penalty," a juror ranked as a "3" is a person who, while able to quickly assert they have favored the death penalty for a long time, is "unable to express why."[224] Known as a "kill problem," this person is seemingly pro-death penalty "as long as someone else is responsible for imposing the sentence."[225] Category 3 jurors are "sensitive to mitigation" and, if asked to do so, could "make an argument against the death penalty."[226] These jurors are also "readily willing to respect the views and individual assessments of those who are more hesitant about the death penalty."[227]

A juror ranked as a "4" is a person who is comfortable and secure in the utilization of capital punishment.[228] Referred to as "[p]ro-death," this individual is able to explain why they are for the death penalty, although they will readily listen to mitigating factors; they want to hear "both sides."[229] Category 4 jurors "readily argue that there could be mitigation that calls for life even after conviction of first-degree, cold-blooded, after-deliberation murder."[230] These veniremen differ from category 3 jurors "in their initial response of having a comfort level with the death penalty."[231]

A juror ranked as a "5" is also pro-death but goes further in

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accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424.

218. Rubenstein, *supra* note 19, at 18.

219. *Id.* at 19. A juror ranked as a "1" "will be excluded for cause by the judge." GARRETT, *supra* note 58, at 54.

220. *Id.* at 18.

221. *Id.*

222. *Id.* Essentially, whether the potential venireperson can give "meaningful consideration" is the lynchpin of the Colorado Method.

223. *Id.* at 18–19.

224. *Id.* at 19.

225. *Id.*

226. *Id.*

227. *Id.* A juror ranked as a "2" or "3" "believes in the death penalty but does not have strong reasons to be for it, and, depending on the person, can feel compassion for a criminal." GARRETT, *supra* note 58, at 54.

228. Rubenstein, *supra* note 19, at 19.

229. *Id.*

230. *Id.*

231. *Id.*

that they are vocal and "articulate in their support for the death penalty."[232] This person is a "sure vote for death" but might also be sensitive to perhaps two or three mitigating factors.[233] Category 5 jurors typically react positively to the prosecutors, but they would be less prone to bullying other jurors than a category 6 or 7 juror.[234]

A juror ranked as a "6" is "a strong pro-death juror."[235] This is someone who, while a "[c]oncrete backer of the death penalty," escapes the automatic death penalty ranking because he or she can perhaps listen to mitigating factors.[236] A category 6 juror's sole "argument against the death penalty is that it is not used enough."[237] These jurors usually nod their heads along with the prosecutors and believe that "the economic burden of a life sentence for defendant and others will personally affect [him or] her."[238] When faced with a 6 or 7 juror, defense counsel should begin to prepare a cause challenge.[239]

Finally, a juror ranked as a "7" is a person who will absolutely impose a death sentence for a defendant convicted of capital murder.[240] Referred to as an "ADP" (automatic death penalty), this individual believes in "an eye for an eye," and feels that life imprisonment is not an adequate alternate sentence.[241] Category 7 jurors are "[h]ateful and proud of it," and believe the only mitigating circumstances would entail self-defense or manslaughter.[242] A "7" juror "is impaired because [he or] she will not give meaningful consideration to life imprisonment without release."[243] This person resembles an automatic vote for death.[244]

To be sure, this aforementioned scale is confusing.[245] Essentially, a ranking of "1" would convey "Gandhi," and a ranking of 7 "would be Hitler," with rankings 2 through 6 marking all points in between.[246] The ranking assigned to each potential juror denotes

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232. *Id.* A juror ranked as a "4" or "5" "comfortably support[s] the death penalty" but is "open to hearing arguments that a particular murderer might not deserve the ultimate punishment." GARRETT, *supra* note 58, at 54.

233. Rubenstein, *supra* note 19, at 19.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 21.

240. *Id.* at 19

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* A juror ranked as a "7" "will be excluded by the judge just like a" juror ranked as a "1." GARRETT, *supra* note 58, at 54.

245. *See infra* Part III(C)(1) (dissecting the problematic overlap between the preliminary ranking stages).

246. Macradee Aegerter, *Defense attorneys use 'Colorado method' to save theater shooter from death penalty*, FOX 31 DENVER (Aug. 10, 2015), kdvr.com/news/defense-attorneys-use-colorado-method-to-save-theater-

the ultimate goal of voir dire: "removal or retention" of each juror."[247] The defense team will then use these rankings to set out their game plan for the in-person voir dire with respect to each individual.[248] If the juror is ranked 4 to 7, defense counsel will prepare a cause challenge; if the juror is ranked 1 to 4, defense counsel will develop a defense against government cause challenges.[249] Now recognized as "the leading defense approach" to voir dire, the Colorado Method utilizes this ranking to "secure a jury favorably disposed to the consideration of mitigating evidence."[250]

2. The Information-Gathering Stage

During the Information-Gathering Stage, defense attorneys are primarily concerned with discerning each potential juror's ability to serve on a case that will, evidently, be gruesome and violent in nature.[251] Here, the Colorado Method encourages attorneys to utilize a poster to summarize the charges in the indictment, because presenting this information first may allow a "small but not insignificant number of prospective jurors" to request a hardship excusal.[252] The Colorado Method asserts that, by discussing "the violent nature of the charges" before asking about capital punishment, defense attorneys are "more likely to get emotionally honest" feedback, as well as "a more realistic assessment of the jurors' ability to give meaningful consideration to all sentencing options."[253]

The Information-Gathering stage directs defense counsel to use a "conversational and nonjudgmental tone" when asking open-ended questions that will elicit the juror's views about the death penalty.[254] The specific views defense counsel should attempt to uncover include situations perceived to be deserving of the death penalty, any "arguments or policy reasons the juror finds compelling for or against capital punishment, the length of time the juror has held these views, and the basis for these views."[255] This involves exploring the individual's "upbringing, religious conviction, personal moral code, concerns about appropriate use of government resources," and more.[256] In this stage, the Colorado

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shooter-from-death-penalty/amp/ [perma.cc/X8M6-4C87] (statement of David Lane, death penalty criminal defense attorney and Colorado Method lecturer).

247. Rubenstein, *supra* note 19, at 22.
248. *Id.* at 21–22.
249. *Id.*
250. Steiker & Steiker, *supra* note 186.
251. Rubenstein, *supra* note 19, at 20.
252. *Id.*
253. *Id.*
254. *Id.* at 21.
255. *Id.*
256. *Id.*

Method seeks to prevent "shallow and meaningless, socially acceptable responses" that are too frequently the result of typical voir dire.[257] As the Supreme Court has noted, "[w]ithout an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled."[258]

Finally, the Colorado Method encourages the defense team to collectively modify their rating from the Preliminary Ranking stage "based upon the juror's response to the court, government, and defense questioning."[259] In reviewing how a juror's ranking may have changed, the defense team thus reassesses its voir dire plan for that juror, and adjusts their next steps accordingly.[260] This construct has been well-received by the defense community: "[i]n selecting a jury, the most effective strategy may be to consider each prospective juror's 'Wymore ranking' with little or no attention to other possible predictors of his or her decision."[261]

3. The Record-Building Stage

While the Information-Gathering stage utilizes open-ended questions to get a sense of the potential juror as a person, the Record-Building stage uses leading questions to forge a path to impairment or protection.[262] During this part of capital voir dire, the defense attorneys compile a comprehensive record of all of the juror's responses thus far in order to "support a 'cause' challenge against pro-death jurors and to defend against a government 'cause' challenge against potential life-givers."[263] To strike a pro-death juror, the defense will have to convince the judge that the individual is incapable of considering mitigation.[264] Alternatively, if the defense believes the prosecution will try to strike a pro-life juror, defense counsel will have to convince the judge of why that juror is protected. Either way, the argument made to the court will be "based on the prospective jurors' views on punishment," as elicited

257. Mullin, *supra* note 96, at 151.

258. Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981) (plurality opinion).

259. Rubenstein, *supra* note 19, at 21.

260. *Id.* at 22.

261. Albert W. Alschuler, *Celebrating Great Lawyering*, 4 OHIO J. CRIM. L. 223, 230 (2006).

262. Rubenstein, *supra* note 19, at 22.

263. *Id.* at 19.

264. *See* United States v. Fell, 372 F. Supp. 2d 766, 771 (D. Vt. 2005) (stating that the sentencer may not refuse to consider evidence relating to the defendant's background or upbringing, and such jurors must be excused for cause).

through voir dire.[265] For the Colorado Method, "attitude toward the death penalty trumps every other factor usually associated with jury selection," such as "race, ethnicity, occupation, [and] education."[266]

Record-Building is most effective when defense attorneys strip away irrelevant facts and extraneous defenses that are revealed to influence the juror's views on capital punishment.[267] The Colorado Method incorporates these so-called "strip questions" into relevant and case-specific hypotheticals that can break down "typical juror 'hiding places' like self-defense, accident, [and] mistaken ID."[268] The Colorado Method cautions against talking too specifically about the defendant's case, however; "doing so conditions the juror to vote for death in the client's case."[269] Instead, the Method suggests the defense attorney "should continue to indicate that she is talking about a hypothetical case (albeit similar to the client's case)."[270]

4. The Trial Overview Stage

When the record can sufficiently shield potential pro-life jurors from government challenges and/or defeat the government's defenses of pro-death jurors, the Colorado Method moves into a discussion of the structure of a capital trial.[271]

Initially, the defense confirms that the potential juror is able to decide whether the prosecution met their burden of proving the defendant's guilt based on only the evidence presented at trial.[272] Then, the defense makes clear that if the defendant is found guilty, the trial will progress into the sentencing phase, and the jury's role will change.[273] The Colorado Method seeks to affirm with each juror that if—and only if—the penalty phase occurs, each juror will be called upon to make a unique, individual, and moral judgment about the sentence the defendant should receive.[274] Additional clarifications may be provided here, such as, "a juror is never required to impose a death sentence," or "the only parties in the courtroom seeking the death penalty are the prosecutors."[275]

During the Trial Overview stage, counsel differentiates between the distinct phases of a capital trial in order to prevent

265. Rubenstein, *supra* note 19, at 18.
266. Toobin, *supra* note 60.
267. Rubenstein, *supra* note 19, at 20.
268. Paula Sites, *Defending a Capital Case*, IND. PUB. DEF. COUNCIL 1, 66 (Mar. 2013).
269. Rubenstein, *supra* note 19, at 22.
270. *Id.*
271. *Id.* at 23.
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 23, 26.

jurors from incorrectly believing that they are not ultimately responsible "for determining the sentence in a capital case."[276] First, the defense underscores that the guilt phase requires jurors to make a unanimous, factual decision; the sentencing phase asks each individual juror to arrive at an "intensely personal" decision based on their own "unique life experience[s], personal philosophy, and walk in life."[277]

Next, the attorney solidifies this notion by emphasizing that capital jurors are expected to arrive at different results.[278] For example, in the guilt phase, if the jury cannot unanimously decide, then a "hung jury" exists and a mistrial occurs.[279] However, there is no such thing as a "hung jury" in the sentencing half of a capital trial; "if any one juror chooses life, based on that juror's personal moral judgment, then the defendant will be sentenced to life imprisonment without release."[280] Through this clarification process, the Colorado Method corrects the frequent misconception that the life-or-death responsibility is shared with trial judges and appellate courts.[281]

5. The Principle Confirmation Stage

Finally, the Principle Confirmation stage works to ensure any votes for life will be respected inside the jury room so that those votes can survive outside of the jury room.[282] Considering that "[m]ost capital juries are destined to undergo a process of persuading one or more jurors to change their votes to reach unanimity," the importance of this process cannot be overstated. [283] Here, counsel asks leading questions "to confirm that the jurors understand and are willing to make their sentencing trial decisions in a constitutionally appropriate and lawful manner."[284] The Principle Confirmation stage requires three kinds of confirmation: Isolation, Insulation, and Respect.[285]

During the isolation phase, the defense confirms that the life

276. *Id.* at 24.
277. *Id.* at 25.
278. *Id.*
279. *Id.*
280. *Id.*
281. Stephen P. Garvey, *The Emotional Economy of Capital Sentencing*, 75 N.Y.U. L. REV. 26, 38 (2000).
282. Rubenstein, *supra* note 19, at 24. The Colorado Method underscores "that every juror has a vote and must think for herself about whether to impose the death penalty or exercise mercy." GARRETT, *supra* note 58, at 54. Moreover, "[t]hey must respect each other's votes and cannot force others to vote for death." *Id.* at 54–55.
283. Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103, 107 (May 11, 2010).
284. Rubenstein, *supra* note 19, at 24.
285. *Id.*

or death decision "each juror makes in a capital case is an individual, personal moral judgment," based upon "each juror's personal philosophy, walk in life, and common sense."[286] Next, the insulation phase requires the defense to ensure that each juror understands that "she makes her decision with the knowledge and comfort that it will be respected, she will not be bullied or intimidated by other jurors during her decision-making process, and the court and parties will respect her decision."[287] Lastly, the defense extracts "a commitment from every juror that she will respect the personal moral judgment made by every other juror on the ultimate life or death decision–whether she personally agrees with the other juror's decision or not."[288] This does not mean that jurors may avoid deliberation.[289] On the contrary, it means that "a juror is never required to explain, justify, or put into words a vote for life or a vote for death."[290]

With an understanding of David Wymore's methodology, it is easy to see why the Colorado Method has been successful at sparing the lives of capital defendants. With few other comprehensive techniques for successfully seating a life-leaning jury, however, the Colorado Method must be scrutinized and, if possible, continually improved.

III. ANALYSIS

As if the importance of effective voir dire was not made clear enough, many trial attorneys recognize that "almost every case has been won or lost by the time the jury is sworn."[291] Current jury selection practices, however, are simply ineffective at "measuring death penalty attitudes," meaning that defense attorneys cannot adequately contemplate the likelihood that a particular juror would favor sparing the defendant's life.[292] Supreme Court Justice John Paul Stevens underscored this notion in 2005:

> In case after case many days are spent conducting voir dire examinations in which prosecutors engage in prolonged questioning to determine whether the venire person has moral or religious scruples that would impair her ability to impose the death penalty. Preoccupation with that issue creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant. More

286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.* at 25.
290. *Id.*
291. *Selecting a jury can be complicated during divisive political times*, *supra* note 11 (quoting defense attorney Clarence Darrow).
292. Michele Cox & Sarah Tanford, *An Alternative Method of Capital Jury Selection*, 13 LAW & HUM. BEHAV. 167, 171 (1989).

> significantly, because the prosecutor can challenge jurors with qualms about the death penalty, the process creates a risk that a fair cross-section of the community will not be represented on the jury.[293]

Though Justice Stevens scratches the surface with regard to the flawed nature of America's capital punishment system, the total pervasiveness of capital jury selection is grim. Fortunately, the Colorado Method may be the best way to overcome the detriments caused by the death qualification process. In light of the Method's recent success in sparing convicted murderer Brendt Christensen in 2019, an assessment of its effectiveness is warranted. The following analysis proceeds in three parts: first, this Comment presents the well-documented detriments of the death qualification process; second, this Comment explores the how the Colorado Method confronts and minimizes those detriments; and third, this Comment highlights potential issues within the Colorado Method that frustrate its underlying goal of protecting a capital defendant's constitutionally guaranteed rights.

A. Problems with Capital Jury Selection

Death qualification "is the worst part of a broken system."[294] At its best, the process is "woefully ineffective at the most elementary task – weeding out unqualified jurors."[295] In two prominent 1984 studies, social psychologist and pioneer death qualification researcher, Dr. Craig Haney, documented some of the earliest findings regarding the requirement that capital jurors be death-qualified.[296] Haney found that the death qualification process significantly and impermissibly alters a capital juror's state of mind.[297] In turn, a capital defendant's rights and interests are severely prejudiced.[298] Yet, almost fifty years after the Furman Court held that juries were imposing the death penalty in an arbitrary and capricious manner, extensive problems with juries

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293. Rozelle I, *supra* note 80, at 785 (citing Justice John Paul Stevens, Remarks at the Thurgood Marshall Awards Dinner (Aug. 6, 2005), www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html [perma.cc/UN3V-2ZD3]).

294. Kamin & Pokorak, *supra* note 37, at 131 (citing Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 82 (1980)).

295. Blume, Johnson, & Threlkeld, *supra* note 142, at 1211.

296. Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 121 (June 1984) [hereinafter Haney II]; Haney I, *supra* note 152, at 145.

297. *Id.* at 131 (stating "[t]he results of this study suggest that jurors may be strongly influenced by the process of death qualification and approach the evidentiary stage of a criminal trial in a frame of mind that differs significantly from that of jurors who have not been exposed to the process.").

298. *Id.* at 128–29.

and their selection still exist.[299] Primarily, exposing jurors to the "unusual and suggestive legal process"[300] of death qualification has the ability to "seriously compromise the fairness and impartiality of capital juries."[301]

Death qualification has been criticized for as long as it has been implemented,[302] yet the "elephant in the room" cannot be overstated: "death qualification helps the prosecution win the case."[303] First, death qualification results in a jury primed to convict a capital defendant. Second, that jury is then more likely to sentence a capital defendant to death. Third, death qualification produces an unrepresentative cross-section of the community. Fourth, death qualification causes potential jurors to modify their conduct.

1. Death Qualification Produces a Jury Primed to Convict

First, exposure to the death qualification process primes jurors to believe the defendant is guilty before the trial even begins.[304] Numerous courts now acknowledge how "the mere mention" of punishment before trial can "seriously distort [the jury's] decision-making process, influence a juror's role as fact finder, and constitute reversible error."[305] In fact, one tenth of death-qualified jurors are "conscious of and willing to admit that the jury selection process made them think the defendant was probably guilty" before the trial ever began.[306] While jurors certainly expect some likelihood that the defendant may be guilty (otherwise there would be no reason for a jury trial in the first place), completing the death qualification process increases jurors' estimation of conviction.[307] Further, when compared to "excludable jurors, death-qualified jurors have attitudes that predispose them toward the prosecution[']s point of view and toward conviction."[308] This also means that death-qualified jurors are less trusting of defense attorneys,[309] thereby establishing a juror pool that is distinctly "pro-prosecution" from the very beginning.[310]

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299. Bowers, *supra* note 28, at 1053 (referencing *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972)).

300. Haney II, *supra* note 296, at 121.

301. Haney I, *supra* note 152, at 145.

302. Kamin & Pokorak, *supra* note 37, at 148.

303. Rozelle I, *supra* note 80, at 777 (citing Andrea D. Lyon, *The Capital Jury, Open Discussion*, 80 IND. L.J. 60, 64 (2005)).

304. Cox & Tanford, *supra* note 292, at 169.

305. Haney I, *supra* note 152, at 146.

306. Bowers & Foglia, *supra* note 27, at 85.

307. Haney II, *supra* note 296, at 128.

308. Fitzgerald & Ellsworth, *supra* note 105, at 39.

309. *Id.* at 44.

310. Rozelle I, *supra* note 80, at 785 (citing FLEURY-STEINER, *supra* note

This premature determination of guilt is largely the result of the penalty phase being discussed "long before penalty is relevant."[311] Social psychological research "suggests that thinking about or imagining an event increases our subjective estimate that it will occur."[312] Frustratingly, this means that "the more the court dwells on the penalty-phase procedures, [even] in a valiant effort to be completely clear, the clearer becomes the implication that the penalty phase is likely to occur."[313] Evidently, jurors quickly forget about the presumption of innocence as they are thrust into deliberating postconviction events.[314]

In 1968, the *Witherspoon* Court, "acknowledged that defendants should not be subjected to the judgment of a 'tribunal organized to convict.'"[315] Yet, the mere fact "that death-qualified jurors are more likely to vote for conviction represents an obvious threat to the fairness of the tribunal, and is especially serious since it is an imbalance to the detriment of the defense."[316]

2. Death Qualification Results in a Jury Likely to Sentence a Capital Defendant to Death

In addition to making jurors more likely to convict a capital defendant in the guilt phase, death qualification also results in those jurors being primed to vote for a death sentence in the penalty phase.[317] Again, this prejudicial bias toward death is a product of repeated exposure to discussing penalty before the trial begins.[318]

The death qualification process and the kind of questioning it necessitates communicates to veniremen that the penalty phase is inevitable in the forthcoming trial.[319] However, when guilt seems more likely, capital jurors begin to believe that a sentence of death is more appropriate.[320] Forcing potential jurors to "come to terms"

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179).

311. Haney I, *supra* note 152, at 133.

312. Haney II, *supra* note 296, at 129.

313. Haney I, *supra* note 152, at 138.

314. *Id.* at 133.

315. Haney II, *supra* note 296, at 131 (citing *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

316. Claudia L. Cowan, William C. Thompson, & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53, 59–60 (1984) (citing Ballew v. Georgia, 435 U.S. 223, 236 (1978)).

317. *See* Haney I, *supra* note 152, at 139 (lamenting that, in an attempt to "ensure that veniremen will keep an 'open mind' in the penalty phase," the use of death qualification may instead "help to close their minds at the guilt phase").

318. Bowers & Foglia, *supra* note 27, at 65.

319. Haney I, *supra* note 152, at 136.

320. Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 52 BAYLOR L. REV. 677, 693–94 (2002) [hereinafter Rozelle II].

with the death penalty "far earlier than they must actually decide upon it" may impair the juror with respect to both the "ultimate issue" as well as "the series of prior decisions it subsumes."[321] Thus, many jurors "have been led toward guilt and death by the voir dire questioning without realizing it," or, worse, "may have realized it but been unwilling to admit as much."[322]

When jurors become biased to vote for death, the end result is desensitization.[323] Repeated discussion of the penalty phase "exposes prospective jurors to the most emotional and profound issue that can be confronted in human experience – life and death."[324] This constant re-imagining of an event "makes its cognitive category, as well as the necessary sequence of events that precede it, more available and easier to mentally access."[325] Subsequently, death qualified jurors become subconsciously "less frightened and intimidated" by the possibility of imposing the death sentence.[326] The California Supreme Court eloquently underscored this argument in *Hovey v. Superior Court of Alameda County*:

> For many people, even those who are in favor of the death penalty, the prospect of having to make a personal decision about whether another human is to live or die poses an understandably intimidating duty . . . When people are continually exposed to a stimulus which is intimidating or frightening to them, they become desensitized to what they earlier found to be threatening. In a capital voir dire, prospective jurors are repeatedly prompted to think about the penalty decision they may later be called upon to make. What was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life.[327]

As a result, death qualification causes jurors to engage in premature decision-making when it comes to the defendant's guilt and appropriate sentence. Death-qualified jurors enter the courtroom with "predispositions that result in nearly half of them deciding the penalty before they even hear the evidence or legal

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321. Haney I, *supra* note 152, at 141.

322. Rozelle I, *supra* note 80, at 793 (citing Bowers & Foglia, *supra* note 27, at 65).

323. Robert M. Berry, *Remedies to the Dilemma of Death-Qualified Juries*, 8 U. ARK. LITTLE ROCK L. REV. 479, 494 (1986) (explaining that "[e]xtended discussions of penalty may imply that the defendant is guilty, and witnessing such debate may desensitize the observing juror to the death penalty."); *see also* Haney II, *supra* note 296, at 130 (revealing "[d]eath qualification may also desensitize jurors to conviction in a capital case and to the imposition of the death penalty.").

324. Haney I, *supra* note 152, at 140.

325. *Id.* at 139.

326. Haney II, *supra* note 296, at 130.

327. Hovey v. Super. Ct. of Alameda Cty., 616 P.2d 1301, 1350 (Cal. 1980).

standards they are supposed to be considering."[328] Thus, it is unsurprising that jurors often decide – and decide strongly[329] – what they believe the penalty should be before the conclusion of the guilt phase.[330] "After days, weeks, or even months of hearing the defendant dehumanized and described as deviant, different, and dangerous, 'jurors' attitudes and impressions have crystallized and rigidified' before any attempt is made to humanize the defendant in the punishment phase."[331]

Even when conducted on an "individual, sequestered basis," death qualification still demands that each juror traverse this emotional hurdle "before he or she can be accepted."[332] Jurors thus come to understand "that, in someone's opinion, at least, the case they are about to hear is worth of the most horrible and extreme punishment the law permits."[333] The bottom line is grave: becoming desensitized to the emotional nature of the death penalty inquiry causes jurors to act "as though the issue was more or less routine."[334] In sum, death qualification "primes [jurors] to hand down the harshest available sentence."[335] Consequently, procedural safeguards "such as bifurcating the trial, allowing presentation of mitigation evidence during the sentencing phase, and the use of jury instructions aimed at guiding sentencing discretion are of little use if jurors have already decided what the penalty should be."[336] Thus, "[i]n its quest for a jury capable of imposing the death penalty, the State produce[s] a jury uncommonly willing to condemn a man to die."[337]

3. Death Qualification Produces an Unrepresentative Cross-Section of the Community

A jury pool "must represent a cross section of the community," meaning that a proportionate representation of age, sex, and minority characteristics should be present.[338] However, capital

328. Bowers & Foglia, *supra* note 27, at 84.
329. *Id.* at 57.
330. *Id.* at 56.
331. *Id.* at 60.
332. Haney I, *supra* note 152, at 140.
333. *Id.* at 142.
334. *Id.* at 141.
335. Bidish J. Sarma, *Challenges and Opportunities in Bringing the Lessons of Cultural Competence to Bear on Capital Jury Selection*, 24 U. MEM. L. REV. 907, 914 (2012).
336. Bowers & Foglia, *supra* note 27, at 56.
337. Rozelle I, *supra* note 80, at 772 (citing Witherspoon v. Illinois, 391 U.S. 510, 520–21 (1968)).
338. Mullin, *supra* note 96, at 144. *See* Taylor v. Louisiana, 419 U.S. 522, 538 (1975) ("the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.").

juries fall short of this legal standard as they do not "reflect the scope of the public's attitude toward death as a sanction, and thereby may . . . deprive[] the defendant of his 6th amendment right to an impartial jury."[339] As evidenced, jurors who complete the death qualification process differ from non-death-qualified jurors "in ways that were consistently prejudicial to the interests and rights of defendants."[340]

The cause of this deprivation is death qualification's failure to exclude "jurors who believe death is the only acceptable punishment," while simultaneously eliminating anyone "who actually could impose death" despite some reservations.[341] Two to eight individuals seated on a twelve-person jury "are likely to be automatic death penalty jurors, while less that one will be an automatic life penalty juror."[342] Further, death qualification eliminates seventy percent of potential jurors because of their strong opposition to capital punishment, thereby removing some of the strongest advocates of mercy, due process, and the defendant's point of view.[343] Moreover, by excluding "a much higher percentage of anti-death penalty jurors," the prosecution may actually "have enough peremptory strikes available to prevent any individual with even minor qualms about the death penalty from making it on to the jury."[344] Consequentially, the number of "prosecution-oriented" individuals who survive death qualification is over-representative of the population.[345]

Intended to compose an impartial jury, this "culling of potential jurors based on their moral views" produces a jury that both looks and thinks quite differently from the community it supposedly represents.[346] Unsurprisingly, death qualification also discriminates against minorities, particularly African Americans and women.[347] In fact, once "the prosecution preemptively strikes any potential juror who forecloses the possibility of a death

339. Faye Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumption in the Law*, 5 HARV. L. REV. 53, 53 (1970).

340. Haney II, *supra* note 296, at 129.

341. Bowers & Foglia, *supra* note 27, at 84.

342. Rozelle I, *supra* note 80, at 789.

343. Fitzgerald & Ellsworth, *supra* note 105, at 42, 44.

344. Sarma, *supra* note 335, at 919. Conversely, the defense "may struggle to eliminate all of the folks near the 'automatic-death' end of the spectrum." *Id.*

345. Bowers & Foglia, *supra* note 27, at 61.

346. Babcock, *supra* note 114, at 550.

347. Fitzgerald & Ellsworth, *supra* note 105, at 46. *See* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 103–04 (2009) (explaining that "[p]ersons who oppose the death penalty are not evenly distributed throughout the population," which results in Black individuals being "more likely to be disqualified from service based on attitudes toward the death penalty.").

sentence, the remaining potential jurors are often white, male, protestant, and less educated than the overall jury pool which included those who would not impose a death sentence."[348]

Additionally, "death qualification's homogenization of the jury decreases accuracy in fact-finding"[349] because individuals "understand our perceptions as congruent with the framework already entrenched in our own minds."[350] After the death qualification process inadvertently creates "certain expectations and preconceptions in the minds of the jurors about the legal case that is to follow," capital jurors begin to "receive and interpret evidence" in a manner consistent with those preconceptions.[351] This results in "reduce[d] diversity of ideas and perceptions causing juror deliberation to suffer."[352]

By presenting "the often shocking guilt phase evidence" first, "a powerful and persistent picture of aggravation" is formed in the minds of jurors.[353] The conviction-prone and death-prone perspectives of death qualified juries "often persist in the face of powerful contradictory evidence."[354] Not only do death-qualified jurors "start out less favorable to the defense attorney," they are also substantially less willing to contemplate issues raised by the defense.[355] This pitfall "forces a defendant whose life is at stake to assume a special handicap in his contest with the state."[356] Accordingly, death qualified jurors "might literally see a different case," one "that conforms to their expectation of guilt and one that is far more unfavorable to the defendant."[357] Ultimately, "capital

348. Dillard, *supra* note 88, at 1001–02 (citing Brooke Butler & Adina W. Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense*, 36 J. APPLIED SOC. PSYCHOL. 1744, 1745–46 (2006)). *See* Sarma, *supra* note 335, at 917 (asserting that, although "jurors may differ from defendants on a range of cultural indices, put simply, 'compared to juries seated in nondeath cases, [capital jurors] are disproportionately white, male, older, and more religiously and politically conservative.'" (citing Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide"*, 45 LAW & SOC'Y REV. 69, 73 (2011))).

349. Rozelle I, *supra* note 80, at 780 (citing *Hovey v. Super. Ct. of Alameda Cty.*, 616 P.2d 1301, 1312–13 (Cal. 1980)).

350. *Id.* (citing Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110, 1119 (2006) (explaining that "[t]he general phenomenon—normative bias—is well supported by evidence of confirmation bias, by which people tend to seek out, and to believe, evidence that supports their own antecedent views.")).

351. Haney II, *supra* note 296, at 130.

352. Nason, *supra* note 110, at 222 (citing Cowan, Thompson, & Ellsworth, *supra* note 316, at 75–76).

353. Bowers & Foglia, *supra* note 27, at 60.

354. Haney II, *supra* note 296, at 131.

355. Fitzgerald & Ellsworth, *supra* note 105, at 44.

356. *Id.* at 46.

357. Haney II, *supra* note 296, at 131 (emphasis in original).

juries represent what is, virtually by definition, an unrepresentative group on death penalty issues."[358]

4. Death Qualification Causes Jurors to Modify Their Responses

"Identifying jurors who are subject to challenges for cause is an indispensable component of due process."[359] This effort is frustrated, however, when jurors modify their responses during voir dire.[360] There are two main factors that cause jurors to modify "their behavior [and] their statements" in response to death qualification questioning: the required public affirmation and the desire to please authority figures.[361]

First, death qualification inherently "requires each qualified juror to publicly affirm their willingness to take the most extreme legal action ever available to a juror."[362] However, social psychologists assert that this kind of "active, public advocacy of a position intensifies one's belief in it."[363] Especially when conducted in open court, this has the potential to create "a climate of death-penalty support" as veniremen watch their peers repeatedly "express a willingness to impose the penalty"[364] in order to dodge disqualification. Worse, this compelled proclamation conveys "that the judge and both attorneys – including defense counsel – all believe that the defendant is guilty, and that the only important task remaining is to find enough jurors who can do what is necessary."[365] Jurors then view their responsibility solely as ensuring a death sentence is rendered because, from their perspective, that is what the court wants.[366] The intensity of this

358. Haney, Hurtado, & Vega, *supra* note 128, at 631.

359. Roan, *supra* note 116 (citing U.S. Const. amends. VI, XIV).

360. Haney II, *supra* note 296, at 122.

361. Catherine M. Grosso & Barbara O'Brien, *Lawyers and Jurors: Interrogating Voir Dire Strategies by Analyzing Conversations*, 16 J. EMPIRICAL LEGAL STUD. 515, 519 (Sept. 2019).

362. Haney I, *supra* note 152, at 143.

363. Haney II, *supra* note 296, at 130. *See* Haney I, *supra* note 152, at 143 (highlighting that "[t]he act of publicly proclaiming one's willingness to impose the death penalty is likely to intensify commitment to that course of action").

364. Haney I, *supra* note 152, at 140.

365. Rozelle I, *supra* note 80, at 792 (citing Hovey v. Super. Ct. of Alameda Cty., 616 P.2d 1301, 1351 (Cal. 1980); CRAIG HANEY, THE BIASING EFFECTS OF THE DEATH QUALIFICATION PROCESS (pre-published draft) (1979)).

366. As public defender Ira Mickenberg explains, "[w]hen asked questions about the criminal justice system, prospective jurors know what the 'right' or expected answer is." IRA MICKENBERG, N.C. DEF. TRIAL SCH., VOIR DIRE & JURY SELECTION, at 2–3 (2011) (*available at* ncids.org/defender%20training/2011defendertrialschool/voirdire.pdf [perma.cc/FV9V-K6A6]). "Jurors will almost always give the 'right' answer to avoid getting in trouble with the court, to avoid seeming to be a troublemaker, and to avoid looking stupid in front of their peers." *Id.* at 3. In this way, death qualification is very much akin to a test

notion continues to increase when, as commonly happens, "people who almost certainly should have been disqualified as automatic death penalty (ADP) jurors were nevertheless seated on capital juries."[367]

Second, potential jurors invariably try to please the court and, in doing so, "will actually alter their expressed attitudes when questioned by" or in the presence of a judge.[368] When placed in "novel or unfamiliar situations," individuals are "especially sensitive to cues from authority figures and apparently knowledgeable others."[369] Moreover, when a potential juror "says one thing but actually means another[,] . . . [f]or the sake of judicial economy and expediency, judges will quickly accept the juror's words at face value."[370] In a question-and-answer situation, "two processes are at work: information is being exchanged and a social relationship is being created, maintained or, in some cases, weakened."[371] As such, it is understood that "the people who answer the questions usually try to please the questioner."[372]

Jury selection is already an intimidating "process of elimination" that is executed under oath, inside a courthouse, in front of a judge, several attorneys, and an armed bailiff.[373] Essentially, "[i]t's set up to scare you to death."[374] Realizing "that the judge and attorneys possess the power to determine if they are fit to serve on the jury," jurors tend to respond in "less truthful but socially desirable ways to garner a favorable evaluation from the judge" or attorneys.[375] Consequently, jurors put forth what they think is the "correct answer to the question."[376] In fact, some commentators have cited the Milgram experiment[377] when discussing death qualification, pointing out that, "if volunteers are willing to follow the rather ambivalent orders of doctors in an experiment, those who are told by a judge that the rule of law

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that potential jurors desperately want to pass.

367. Bowers & Foglia, *supra* note 27, at 58.

368. Matlon, *supra* note 104, at 2–3.

369. Haney II, *supra* note 296, at 129.

370. Richard S. Jaffe et al., *Capital Cases: Ten Principles for Individualized Voir Dire on the Death Penalty*, JAFFE, HANLE, WHISONANT & KNIGHT (June 6, 2016), rjaffelaw.com/articles/2016/june/ten-principles-for-individualized-voir-dire-on-t/ [perma.cc/FQ73-YNKM].

371. Roger W. Shuy, *How a Judge's Voir Dire Can Teach a Jury What to Say*, 6 DISCOURSE & SOC'Y 207, 208 (1995).

372. *Id.*

373. Andrea D. Lyon, *The Negative Effects of Capital Jury Selection*, 80 IND. L.J. 52, 53 (2005).

374. *Id.*

375. Kovera, Dickson, & Cutler, *supra* note 94, at 164.

376. Lyon, *supra* note 373 (internal punctuation omitted).

377. *See generally* STANLEY MILGRAM, OBEDIENCE TO AUTHORITY 113–22 (1974) (concluding that test subjects will obey the directives of authority figures, even when directed to perform acts that conflict with their conscience).

requires them to consider the death penalty are likely to be affected in some way."[378]

Witnessing other disqualifications additionally convinces jurors that the judge and the prosecution "personally favor the death penalty."[379] This may then cause these jurors to advocate more aggressively for the death penalty in deliberations.[380] The exclusions witnessed by surviving veniremen are then perceived as "official and personal."[381] When jurors feel as though they must answer with the "right" or "good" answer, dubbed the "social desirability bias," they fall prey to the "many trappings of official power and formality" within the courtroom setting, and ultimately offer answers intended to "satisfy the judge and the attorneys" rather than answers that honestly convey any biases.[382]

By and large, capital jurors harbor "disproportionately punitive orientations toward crime and criminal justice."[383] The death qualification process causes potential jurors to want to provide the court with the "correct" answer, which results in a desensitized and unrepresentative jury that is distrustful of the defense, is more likely to find a capital defendant guilty, is more likely to sentence a convicted defendant to death, and is primed to interpret evidence differently.[384] The death qualification process "systematically distorts the attitudes of the jury in a direction that discriminates against the defendant and undermines the protections of due process."[385] Accordingly, the practice of death qualification presses "a thumb on the prosecutor's side of the scale."[386] To produce truthful, insightful, and relevant discussion, then, defense attorneys must recognize how exceedingly crucial their interaction with each potential juror is.[387]

B. Advantages of Using the Colorado Method

Capital defense lawyers have traditionally "done a remarkably poor job in voir dire and jury selection."[388] The cards have been

378. Adam M. Clark, *An Investigation of Death Qualification as a Violation of the Rights of Jurors*, 24 BUFF. PUB. INT. L.J. 1, 11 (2006).

379. Haney II, *supra* note 296, at 130.

380. *Id*.

381. Haney I, *supra* note 152, at 144.

382. Ken Broda-Bahm, *Getting Beyond "Can You Be Fair?" Framing Your Cause Questions*, JURY EXPERT, at 1, 2 (Aug. 2013) [hereinafter Broda-Bahm II].

383. Rozelle I, *supra* note 80, at 785 (citing FLEURY-STEINER, *supra* note 180).

384. Haney II, *supra* note 296.

385. Fitzgerald & Ellsworth, *supra* note 105, at 48.

386. Rozelle I, *supra* note 80, at 771.

387. Shuy, *supra* note 371.

388. Rubenstein, *supra* note 19, at 18.

stacked against them, though; with regard to capital jury selection, the aforementioned processing effects are latent but lethal "currents of prejudice."[389] Nonetheless, the practice of death qualification remains judicially approved.[390] As such, capital defendants have no say in whether death qualification will occur, and "are left only with difficult tactical decisions" about how to best avoid exacerbating the processing effects inherently produced by a death penalty trial.[391]

"Scholars have long argued that the biases of the death-qualified jury violate due process," especially since such "jurors will reject credible evidence of affirmative defenses."[392] In 1980, Haney's analysis regarding the processing effects of death qualification left "most observers generally pessimistic that the effects [could] be neutralized as long as '[l]egally mandated procedures compel attorneys . . . to engage in lengthy discussions about death penalty attitudes with prospective jurors . . . .'"[393] Of course, fifteen years later, the Colorado Method emerged.[394]

By framing the penalty phase as a "deeply personal choice," rather than the product of group collaboration, the Colorado Method presents reaching a verdict as an "individual moral judgment" rather than a group decision.[395] These subtle communicative distinctions have a massive impact: as District Attorney George H. Brauchler underscores, "[w]hen the judge says it's a profoundly reasoned moral judgment and says it 10 times, you always know that any death penalty case could" result in a life sentence—even for the most vile of defendants.[396] Accordingly, it is imperative to recognize how exceedingly hard the Colorado Method works to improve and equalize the capital jury selection process.

The benefits of utilizing the Colorado Method are far-reaching: First, the preliminary rating helps streamline jury selection; Second, the Information-Gathering stage effectively uncovers underlying biases; Third, the Trial Overview stage substantially minimizes processing effects; Fourth, the Principle Confirmation stage protects votes for life; and Fifth, the Colorado Method advantageously includes the court in its process.

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389. Initial Brief of Appellant at 22, Durousseau v. Florida, No. SC 15–1276 (Fla. Dec. 3, 2015).

390. Haney I, *supra* note 152, at 145.

391. *Id.*

392. Dillard, *supra* note 88, at 1003.

393. Berry, *supra* note 323 (citing Craig Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME & DELINQ. 512, 521 (1980)).

394. David Wymore first introduced the Colorado Method in 1995. Ingold, *supra* note 182.

395. Broda-Bahm I, *supra* note 3.

396. La Ganga, *supra* note 2.

1. The Preliminary Ranking Streamlines the Initial Jury Selection Processes

The Colorado Method begins by rating jurors from one to seven in accordance with their views on the death penalty and their ability (or refusal) to consider mitigating evidence at trial.[397] The main benefit of this approach is that it serves to shape the defense team's goals with regard to each potential juror, thereby facilitating "clear team communication and collaboration."[398] When the defense works as a unitary front, the defendant's interests are best effectuated.

Before this ranking even occurs, however, the Colorado Method encourages defense counsel to request a jury questionnaire.[399] By doing so, the Colorado Method "increases the likelihood the parties can agree on the excusal of 'extreme' jurors who are impaired . . . and gives the parties time to prepare tailored and targeted questioning of the jurors."[400] In fact, utilizing juror questionnaires allows potential jurors to write out their responses in their own words and in the privacy of their own home, thus offering more candid responses which better identify bias.[401] Accordingly, both parties "can quickly pinpoint . . . specific areas that require individual follow-up questioning."[402] This crucial preliminary stage forges a path to truly understanding what makes each juror tick.

2. The Information-Gathering Stage Attempts to Best Understand Each Juror's Psyche

Closed and "affectively flat" questions are most frequently used during general voir dire.[403] Yet, the Information-Gathering stage instead employs open-ended questions to dig deep into a juror's psyche to uncover any latent prejudices.[404] This line of questioning essentially explores how the individual arrived at their own moral code and the ways in which it manifests in their everyday experiences.[405] "Prospective jurors have a host of attitudes, relevant experiences, and potential biases," each representing a complex background that can materially impact that persons' decision making.[406] Through the Information-Gathering stage, the Colorado

397. *See supra* Part II(C)(1) (detailing the preliminary ranking stage).
398. Rubenstein, *supra* note 19, at 19.
399. *Id.* at 21
400. *Id.*
401. Matlon, *supra* note 104, at 5–6.
402. *Id.* at 6.
403. Grosso & O'Brien, *supra* note 361, at 540.
404. Rubenstein, *supra* note 19, at 21.
405. *Id.*
406. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179, 1179 (2003).

Method best equips defense attorneys to prevent or substantially reduce processing effects by recognizing and counteracting the intricacies of the human psyche. [407]

Utilizing open-ended questions gives the respondent "permission" to reveal his or her sincerely-held beliefs, and thus allows attorneys to quickly and more candidly pinpoint potential prejudices.[408] Honest answers to these inquiries allow the defense to relay that "[m]any people have personal, moral, or philosophical opposition to the death penalty yet serve on a capital jury," thus reducing any confusion or apprehension regarding the legal process to come.[409] In this way, the Colorado Method counteracts the desensitization of the death qualification process by placing the "enormity and gravity of the criminal conduct alleged in the case front and center."[410] The sooner potential jurors recognize their individual responsibility in the sentencing phase, the more impenetrable they become to the pervasive influence of a pro-death juror.

3. The Trial Overview Stage Minimizes Processing Effects

The Trial Overview stage is perhaps the most important part of the Colorado Method because it assists defense counsel in negating some of the processing effects stemming from repeated exposure to the discussion of penalty. A "large portion" of capital jurors have historically misunderstood and misapplied "the constitutional principles that govern" a death-eligible case.[411] For example, nearly one third of death-qualified jurors believe that "a defendant who fails to testify is probably guilty."[412] Knowing that death-qualified jurors are "less likely to consider mercy, more likely to favor harsh punishment as a means of reducing crime, and more likely to believe in the strict enforcement of all laws, no matter what the consequences,"[413] it is unequivocally important for the defense team to correct any legal misunderstandings during this stage in order to prevent any perpetuation of processing effects. This stage requires defense counsel to assert that, "if the result is 'not guilty,' the case is over" and the juror will not have to consider the death penalty at all.[414] In turn, this confirmation has the potential to avoid the adverse health effects capital jurors may suffer by eliminating the anxiety surrounding death qualification.

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407. Rubenstein, *supra* note 19, at 20.
408. Grosso & O'Brien, *supra* note 361, at 523.
409. Rubenstein, *supra* note 19, at 23.
410. *Id.* at 20.
411. *Id.* at 18.
412. Fitzgerald & Ellsworth, *supra* note 105, at 43.
413. *Id.* at 43–44.
414. Rubenstein, *supra* note 19, at 23.

Here, the attorneys break down what the bifurcation and unitary jury requirements really mean: a juror's duty is marginally different in the separate phases of a capital trial.[415] Further, by underscoring that the sentencing verdict is not required to be unanimous, the Colorado Method empowers and prepares jurors to make a "lawful, legitimate, and appropriate," though perhaps non-unanimous, decision.[416] When the jurors understand that sparing the defendant from the death penalty is as straightforward as one juror voting for life, the issues regarding capital jurors' premature decision-making may be considerably curtailed. In this instance, the selected jurors will begin to interpret the evidence presented in a way that is constantly evaluating whether the defendant deserves to die because of it, rather than searching for ways the evidence can align with their belief in the defendant's guilt.

The Trial Overview stage is designed to inform jurors that the legal system expects capital jurors to "arrive at different results" because it is the responsibility of each juror, individually, to give their own consideration to mitigation.[417] Though the death penalty "is supposed to be reserved for only the worst of the worst crimes,"[418] subjecting jurors to death qualification results in the poisonous inference that "the matter is far less consequential than they would otherwise have thought."[419] By thoroughly engaging in the Trial Overview stage, however, defense attorneys legitimize the jury's authority to impose a life sentence and, ultimately, can re-sensitize the jury to the gravity of a death sentence thereby making it exceedingly difficult to impose.

4. The Principle Confirmation Stage Empowers Pro-Life Jurors to Stand Their Ground

The goal of the Principle Confirmation stage is to teach pro-death jurors how to respect pro-life jurors, while simultaneously creating safeguards for those pro-life jurors to resist succumbing to the pressure of the deliberation room.[420] During sentencing deliberations, many "pro-death jurors employ coercive tactics and bullying against jurors favoring life."[421] Thus, the Colorado Method excels by placing a great weight on informing potential jurors "that they have the right to be treated with respect and dignity throughout the voir dire and trial process" in order to help them

415. *Id.*
416. *Id.*
417. *Id.* at 25.
418. *Arbitrariness*, DEATH PENALTY INFO. CTR. (Oct. 12, 2017), deathpenaltyinfo.org/policy-issues/arbitrariness [perma.cc/V998-VD3Z].
419. Haney I, *supra* note 152, at 141.
420. Rubenstein, *supra* note 19, at 23.
421. *Id.* at 19.

"understand and exercise the tremendous individual, personal [and] moral responsibility they will be given," namely, the decision of whether "another human being . . . lives or dies."[422] This emphasis on respect highlights the defense lawyer's most fundamental task: "provid[ing] possible life holdouts the tools in advance to resist the pressures of the majority once they retire to the jury room."[423]

5. The Colorado Method Advantageously Utilizes the Power of the Court

Finally, the Colorado Method reduces the inevitability that jurors may modify their responses to please the judge by fully including the judge in its methodology. "In a capital case, the judge cannot simply set the stage and let the lawyers conduct the jury seating"[424] – there is too much on the line. Instead, the judge "must actively manage and control" the jury selection process.[425] Of course, the interference of the judge can substantially impair the strategy of either party's voir dire, so the Colorado Method set out to change that.

Initially, defense attorneys are encouraged to discuss with the court the language to be used during voir dire before the voir dire actually begins. By refraining from suggesting the jurors need to be "fair" or "appropriate" for the case, the judge has the ability to negate the feeling that the jurors are being evaluated or interviewed.[426] Rather, the Colorado Method urges judges to issue an instruction:

> Before we begin, I would like to explain that there are no 'right' or 'wrong' answers to any of the questions that will be posed to you today. Citizens in our community have and are entitled to hold different views and perspectives on many topics, and the same holds true for jurors. You will all be treated with dignity and respect, and I simply ask you to provide honest and complete answers.[427]

This kind of preemptive communication (between defense counsel and judge as well as between judge and potential juror) is greatly beneficial to the Colorado Method's cause. Immediately, the judge is on the same page as the defense team and the atmosphere parallels what the Colorado Method teaches. Death qualification renders jurors "especially receptive to arguments that they must follow the implicit 'promise' made to the court."[428] Thus, when it

422. *Id.* at 20.
423. Sundby, *supra* note 283, at 148–49.
424. WOSJE, BRUNSON, & BURNS, *supra* note 99, at 87.
425. *Id.*
426. Rubenstein, *supra* note 19, at 20.
427. *Id.*
428. Initial Brief of Appellant, *supra* note 389, at 20.

comes time for the defense to conduct voir dire, the juror will be comfortable hearing these kinds of phrases after hearing them directly from the supreme authority in the room. The Method suggests several other kinds of proposed jury instructions that defense teams should use, including instructions specifically addressing the processing effects produced by pre-trial penalty questioning.[429] Ultimately, by confronting death qualification's processing effects head-on, the Colorado Method is actively working toward eliminating them altogether.

The Colorado Method was established to help boost the number of life-leaning jurors seated to decide the fate of capital defendants.[430] After examining the gains that are possible through using the Colorado Method, its prominence becomes clear. First, the preliminary rating helps streamline jury selection; Second, the Information-Gathering stage effectively uncovers underlying biases; Third, the Trial Overview stage substantially minimizes processing effects; Fourth, the Principle Confirmation stage protects votes for life; and Fifth, the Colorado Method utilizes the power of the court to its advantage.

C. Potential Issues With The Colorado Method

While its nationwide recognition is still growing, the enigmatic Colorado Method has already been successful at selecting a capital jury designed to render a life sentence in the face of evil—just ask James Holmes or Brendt Christensen.[431] However, the technique is not infallible. After murdering three and injuring more than 250 others in the 2013 Boston Marathon bombing, Dzhokhar Tsarnaev was sentenced to death on May 15, 2015,[432] despite his attorneys following the Colorado Method.[433]

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429. Rubenstein, *supra* note 19, at 20 (stating that "[r]esearch shows that jurors who are questioned about their punishment views before a trial even begins are more likely to convict the defendant and to sentence the defendant to death.").

430. As Rubenstein explains, the Colorado Method "provides defense counsel with the skills and techniques . . . to conduct capital voir dire in a manner that maximizes the opportunity to obtain life verdicts." *Id.* at 18.

431. James Holmes' attorney, Tamara Brady, "didn't plan to defend death penalty cases." Greene, *supra* note 6. Rather, she admits that, as a young public defender, she "naively assumed that Wymore and the people of his generation would be there to handle those cases." *Id.* Brady "retired from capital defense shortly after persuading Holmes' jury in 2015 to spare him from death." *Id.*

432. Andy Thibault, Tom Winter, & Jon Schuppe, *Tsarnaev Sentenced to Death in Boston Bombing Trial*, NBC NEWS (May 15, 2015), www.nbcnews.com/storyline/boston-bombing-trial/boston-bombing-trial-jury-reaches-verdict-penalty-phase-n359731 [perma.cc/Q29W-A595].

433. Frederick Leatherman, *Using the Colorado Method of Jury Selection in Tsarnaev Death Penalty Trial*, SHADOW PROOF (Jan. 2, 2015), shadowproof.com/2015/01/02/using-the-colorado-method-of-jury-selection-in-tsarnaev-death-

Due to the complex nature of any capital punishment trial, the methods used to protect a defendant with his life on the line should constantly be re-evaluated and, if possible, improved. With regard to the Colorado Method, three potential issues arise: (1) the seven-point scale has too much overlap; (2) the Colorado Method uses faulty questioning techniques; and (3) the Colorado Method relies too heavily on rehabilitation. There is no doubt that "extracting reliable information regarding venire members' views on the death penalty is a delicate operation," and the same can be said for the methodology used to do so.[434]

1. The Preliminary Ranking's Seven-Point Scale Has Too Much Overlap

While the Colorado Method's Preliminary Ranking is beneficial for streamlining voir dire preparation, its seven-point scale does not sufficiently delineate the categories of jurors it attempts to create. Instead of seven clearly different types of jurors, the scale creates two obvious categories (categories one and seven), while categories two through six become indistinguishable. As author Brandon Garrett illustrates:

> A "one" will never vote for the death penalty and is vocally opposed to it . . . . A two or a three believes in the death penalty but does not have strong reasons to be for it, and, depending on the person, can feel compassion for a criminal. If you are a four or five, you comfortably support the death penalty and think it is a "good thing" to have . . . . If you are a six, you are a natural "head nodder" whenever the prosecution talks . . . . If you are a seven, you will automatically sentence any convicted murderer to death, no matter

penalty-trial/ [perma.cc/BW7A-FL5V]. On July 31, 2020, the First Circuit Court of Appeals overturned Dzhokhar Tsarnaev's death sentence, reasoning that "the judge who oversaw the case did not adequately screen jurors for potential biases." Alanna Durkin Richer, *Court overturns Boston Marathon bomber's death sentence*, AP NEWS (July 31, 2020), apnews.com/article/dzhokhar-tsarnaev-trials-boston-marathon-bombing-ap-top-news-bombings-af38a703ab88fe922629dcc254cb41df [perma.cc/S3VH-B6VM]. The court "ordered a new penalty-phase trial on whether the 27-year-old Tsarnaev should be executed for the attack that killed three people and wounded more than 260 others." *Id.* The Justice Department is expected to ask the Supreme Court to reinstate Tsarnaev's death sentence and thus avoid a penalty phase re-trial. Deborah Becker, *What To Expect As Debate About Tsarnaev's Death Sentence Resurfaces*, WBUR NEWS (Aug. 21, 2020), www.wbur.org/news/2020/08/21/tsarnaev-death-sentence-retrial [perma.cc/6CCC-52VX]. If Tsarnaev is granted a retrial, the author suspects his defense counsel will utilize the Colorado Method, but it remains to be seen whether it will work. *Id.*

434. Motion to Establish Jury Selection Procedures at 34, United States v. Christensen, No. 17-20037 (C.D. Ill. Feb. 9, 2019).

what.[435]

With no clear boundaries, the united front the Method intends to facilitate is seriously diminished. For defense attorneys, understanding and applying the Preliminary Ranking may become an unwelcome rigidity to their already overwhelming duty. At best, the seven-point scale seems frivolous, at worst, a waste of the defense's time.

2. The Colorado Method Uses Faulty Questioning Techniques

The Colorado Method excels by initially understanding that the success of every communication "depends not only on what people say but also on their approach to the interaction."[436] Importantly, the "form, tone, and implication" of questions asked during death qualification can impair interactions with jurors and "worsen the basic defects that are built directly into the process itself."[437] During the Information-Gathering stage, the Colorado Method instructs defense attorneys to pose hypothetical and leading questions to determine a potential juror's fitness to serve on a capital jury.[438] However, both of these questioning formats have been largely criticized, further exacerbating the disservices done by death qualification.[439]

First, the Colorado Method encourages defense attorneys to posit hypothetical situations to potential jurors, containing similar fact patterns and circumstances to the case at issue.[440] The Colorado Method asserts that having jurors "predict their own behavior" in a hypothetical situation assists attorneys in assessing "their ability to impose the death penalty," as well as the likelihood they will follow through.[441] While using hypotheticals makes sense to uncover a juror's inclination to vote for life or death, frustratingly, the act of posing a hypothetical problem can "itself change the beliefs" of the juror."[442] Accordingly, the Colorado Method's use of hypothetical

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435. GARRETT, *supra* note 58, at 54.

436. Shuy, *supra* note 371.

437. Haney I, *supra* note 152, at 134.

438. Rubenstein, *supra* note 19, at 20–21.

439. *See* MICKENBERG, *supra* note 366 (providing a detailed report of the pitfalls of jury selection). By asking leading and hypothetical questions, defense attorneys often receive "aspirational answers," meaning that "the juror is just giving us what she knows we want to hear, and we don't know anything about her." *Id.* at 1, 3. Even the Supreme Court has recognized that "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Wainwright*, 469 U.S. at 424.

440. Rubenstein, *supra* note 19, at 20–21.

441. Haney II, *supra* note 296, at 129.

442. John S. Carroll, *The Effect of Imagining an Event on Expectations of the Event: An Interpretation in Terms of the Availability Heuristic*, 14 J.

questions may actually result in jurors that are "significantly more likely" to believe that the death penalty would be an appropriate penalty than those jurors who were not privy to the death qualification process.[443] This places the attorneys back at square one: confronting a conviction-prone, death-prone jury.

Second, "[d]etermining the proper questions to ask jurors in order to uncover bias remains difficult."[444] Plus, the semi-impromptu[445] nature of death qualification means that defense attorneys often overlook the questions they should be asking, even with the structure the Colorado Method provides. As a result, attorneys often find themselves "asking truly biased juror questions that lead [the juror] away from an admission of bias and not toward one."[446] The demeaning tone often elicited from leading questions "telegraph[s] to the juror that the answers she has given to counsel are the 'wrong' answers,"[447] causing the individual to "conform to the underlying presupposition of the question" or push back against any perceived aggression from the defense attorney.[448] Simply put, "[l]eading questions are of minimal value in weeding out jury bias and, by their nature, elicit only the prospective jurors' own perceptions of their biases which are generally not accurate information."[449]

3. The Colorado Method Relies Too Heavily on Rehabilitation

Frankly, during death qualification, "neither litigant is trying to choose 'impartial' jurors," but rather, each side is focused on strategically eliminating anyone could be "sympathetic to the other

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EXPERIMENTAL SOC. PSYCOL. 88, 95 (Jan. 1978).

443. Haney II, *supra* note 296, at 128 (stating that jurors who were exposed to "a set of facts in [a] hypothetical penalty phase" during the death qualification process were "significantly more likely" to believe that the death penalty would be an appropriate penalty than those jurors who were not privy to the death qualification process).

444. Christopher A. Cosper, *Rehabilitation of the Juror Rehabilitation Doctrine*, 37 GA. L. REV. 1471, 1485 (2003).

445. *See* Brett Godfrey, *Advanced Voir Dire and Jury Selection (Part 1)*, GODFREY JOHNSON, gojolaw.com/advanced-voir-dire-jury-selection/ [perma.cc/JKZ6-MRQB] (last visited Nov. 14, 2019) (stating that "[m]any advanced practitioners consider *voir dire* to be more of a magical art than a formulated technique").

446. Broda-Bahm II, *supra* note 382.

447. Roan, *supra* note 116.

448. Shuy, *supra* note 371, at 207–08.

449. Matlon, *supra* note 104, at 4. *See* MICKENBERG, *supra* note 366, at 6 (stating that "[l]eading questions will get the juror to verbally agree with you but won't let you learn anything about the juror") "Voir dire is not cross-examination." *Id.*

side, hopefully leaving only those biased for him."[450] As such, capital voir dire can quickly devolve "into a game of cat and mouse . . . with the members of the venire caught in the middle."[451] Rehabilitative questioning not only ensures this devolution, but potentially violates "the constitutional right to an impartial jury."[452]

"When a juror is challenged based on actual bias, opposing counsel is traditionally afforded the opportunity to re-question the juror."[453] These "post-challenge inquiries are colloquially known as 'rehabilitation' of the juror."[454] "Rehabilitation" is a misnomer, though; the goal should not be to change a juror's biased perspective, but rather, should be "for the purpose of clarification or elaboration."[455] Unfortunately, the tool has devolved into "getting a juror to change a biased attitude."[456]

Proponents of rehabilitative questioning view the process as "peeling away the skin of an onion and getting to the raw truth,"[457] and, of course, some level of rehabilitation is necessary for a competent voir dire strategy.[458] In fact, when used appropriately, rehabilitation may help reduce the premature perception of a defendant's guilt.[459] However, an "aggressive and intimidating approach to rehabilitation is fatal to seating a fair and impartial jury," and otherwise inconsistent with the Colorado Method's initiative.[460] As public defender Ira Mickenberg observed, "[i]f a juror gives a 'bad' answer we rush to correct or rehabilitate him to make sure the rest of the panel is not infected by the bias."[461] When used excessively, rehabilitation essentially walks back jurors from the edge of elimination.[462] Proper rehabilitative questions should be "purely investigative in nature," but in practice, rehabilitation often results in jurors "renounce[ing] their beliefs."'[463] Jurors' "deeply held personal views on capital punishment are picked apart and

450. Babcock, *supra* note 114, at 551 (emphasis in original).

451. Roan, *supra* note 116.

452. Cosper, *supra* note 444, at 1497.

453. Roan, *supra* note 116.

454. *Id.*

455. *Id.*

456. *Id.* (citing O'Dell v. Miller, 565 S.E.2d 407, 412 (W. Va. 2002); Daniel J. Sheehan, Jr. & Jill C. Adler, *Voir Dire: Knowledge is Power*, 61 TEX. B.J. 630, 633 (1998)).

457. Godfrey, *supra* note 445.

458. Blume, Johnson, & Threlkeld, *supra* note 142, at 1263 (citing Jaffe, *supra* note 370, at 42).

459. Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 LAW & HUM. BEHAV. 212, 220 (July 31, 2009).

460. Roan, *supra* note 116.

461. MICKENBERG, *supra* note 366, at 4.

462. Cosper, *supra* note 444, at 1488 (stating that "rehabilitative questioning seeks to 'persuade' the juror that he could go against his previously disclosed bias.").

463. Roan, *supra* note 116.

used as a litmus test of their ability to serve as a member of the jury."[464] Often, rehabilitation is "nothing more" than either counsel or the court "trying to talk a juror out of the position that has been established by counsel's questions and exploiting the juror's fear and respect for the judiciary to do so."[465]

The Colorado Method seeks to minimize the elimination of veniremen whose death-penalty opposition appears unequivocal by relying heavily on rehabilitation.[466] Ultimately, this results in the manipulation of jurors' beliefs in order to fit the needs of counsel. Thus, vulnerable jurors find themselves feeling judged, causing them to modify their answers which, in turn, leads to unpredictable verdicts and a huge waste of resources. The fact of the matter is this: clarification does not equate to rehabilitation, and a rehabilitated juror should be excused regardless how much of an asset he would be to the defense.[467] Instead, by relying on rehabilitation, the Colorado Method frustrates voir dire and eliminates "the opportunity to use the cause challenge for its true and intended purpose: to remove a juror who cannot reliably be fair in evaluating the facts of the case."[468] As it stands, the Colorado Method's reliance on rehabilitation perpetuates the qualification and eventual seating of biased jurors.[469] To again invoke the wise words of public defender Ira Mickenberg, "[w]hen a juror tells us something bad, there are only two things we should do: Believe them [or] [g]et rid of them."[470]

In sum, the Colorado Method has proved its ability to provide a workable map for defense attorneys to best navigate the daunting process of capital voir dire. When taking a closer look, it appears that the Method has room for improvement with regard to three areas: First, the seven-point scale has too much overlap; Second, the Colorado Method uses faulty questioning techniques; Third, the Colorado Method relies too heavily on rehabilitation.

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464. DIETER, *supra* note 100.

465. Roan, *supra* note 116.

466. Haney I, *supra* note 152, at 136.

467. *See* Cosper, *supra* note 444, at 1471 (providing an example of a potential juror who "should [have been] removed from the pool of potential jurors because she ha[d] demonstrated a bias in favor of one of the parties," but was not removed because of "one simple reason: juror rehabilitation."). As the author witnessed during the *Christensen voir dire*, rehabilitation can transform a seemingly unqualified venireperson into a qualified juror.

468. Broda-Bahm II, *supra* note 382, at 1.

469. Cosper, *supra* note 444, at 1476–77.

470. MICKENBERG, *supra* note 366, at 5. In the words of Maya Angelou, "[w]hen someone shows you who they are, believe them the first time." Maya Angelou (@DrMayaAngelou), TWITTER (June 12, 2015, 11:01AM), twitter.com/drmayaangelou/status/609390085604311040?lang=en.

IV. PROPOSAL

To be truly successful, voir dire "must elicit truthful and thoughtful answers" so that the court and attorneys can best determine the juror's "ability to consider the evidence fairly and impartially."[471] Even at its best, though, death qualification is detrimentally inadequate at its main task of "weeding out unqualified jurors."[472] To no fault of the Colorado Method, as long as the death qualification process is implemented, its processing effects will skew the fitness of a capital jury. The solution is as simple as it is impractical: the death qualification process should be eliminated. Despite the procedure not being federally mandated, this is unlikely to happen.[473] Still, "there is room within the system for modification."[474]

Undoubtedly, "[m]ore must be done to address death qualification's profound failure to provide capital defendants with any semblance of an impartial jury, or we must recognize the futility of the attempt and dismantle the machinery of death for good."[475] Until such change is possible, however, the Colorado Method is in the best position to seek attainable improvements to the jury selection process. As such, the Colorado Method should consider: (A) simplifying its preliminary ranking scale, (B) supporting true bifurcation, (C) prioritizing jurors' cultural identities, and (D) making the Colorado Method more accessible to the public.

A. The Preliminary Ranking Scale Should Be Simplified

First and foremost, the Colorado Method's seven-point preliminary ranking scale should be simplified to a five-point scale. Not only will this further increase efficiency when preparing for voir dire, but this will also afford defense lawyers extra time to focus on other aspects of jury selection. By signaling when rehabilitation is acceptable, the five-point scale also reduces its aggressive use. The scale should be re-written as follows:[476]

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471. Grosso & O'Brien, *supra* note 361, at 516.

472. Blume, Johnson, & Threlkeld, *supra* note 142, at 1211.

473. Motion to Establish Jury Selection Procedures for Defendant, *supra* note 434, at 5.

474. Cox & Tanford, *supra* note 292.

475. Rozelle I, *supra* note 80, at 806. To be sure, abolishing the death penalty altogether would solve each aforementioned problem in a heartbeat. Moreover, the death penalty *should* be abolished. *See* GARRETT, *supra* note 58, at 1 (arguing that "[w]e can abolish [the death penalty] not in a matter of generations, but in a matter of years. And it is imperative that we do so, for its abolition will be a catalyst for reforming our criminal justice system.").

476. The rewriting of these categories is based upon the knowledge the author gained as a judicial extern during the *Christensen* case and the seven

1. Automatic Life: a juror ranked as a "1" would automatically vote for a life sentence (whether under the facts of the specific case at hand or any other case) because there is no way their conscience would allow them to cast a vote for putting someone to death. This person is vocal and adamant about their disdain for capital punishment and likely offers some kind of justification against the death penalty without being substantially prompted by counsel. A juror in this category may have had personal experiences with the justice system or the death penalty in a way that makes them completely unwilling to consider it as a sentencing option. Mitigating and aggravating circumstances are irrelevant to this juror; they firmly believe that people should not have a role in taking the life of another. A juror who is so against the death penalty is impaired, and thus any veniremen categorized as a "1" should be excused without attempting rehabilitation.

2. Life-Leaning: a juror ranked as a "2" would be more inclined to vote for life than for death, though they are not as steadfast in those beliefs as a juror ranked as a "1." This "life-leaning" juror may be hesitant or unsure of their beliefs, but is considerate of the solemnity necessary to deliberate a death penalty case. Any hesitation here is negated by the person's willingness to consider both aggravating and mitigating evidence. When a potential juror is not so against the death penalty that they become impaired, but would prefer a life sentence over a death sentence, that juror should be categorized as a "2" and the defense team should prepare a defense to a potential challenge from the prosecution. Rehabilitation should only be attempted if the prosecution engages in rehabilitative questioning first.

3. Wildcard: a juror ranked as a "3" is a person who does not hold a firm belief one way or another; they may be somewhat frustrating in their inability to commit to a position. Rather than aggressively rehabilitating this person into a category favoring life or death, these jurors should be ranked as ambiguous. This identifier suggests that counsel should not assume they can predict the juror's actions; in a sense, they are the wildcard. However, it is also clear that this person is not impaired. Light rehabilitation may be appropriate for a Wildcard juror in the sense that they do not hold a firm belief to be impermissibly walked back from. If rehabilitation is unsuccessful, cultural questioning becomes necessary to coax important attitudes from this juror.[477] Inevitably, the prosecution may also prioritize this juror, so defense counsel

categories of the Colorado Method as provided by Rubenstein, *supra* note 19.

477. *See infra* Part IV(C) (urging the increase of cultural questioning and recognition).

should prepare accordingly.

> *4. Death-Leaning:* a juror ranked as a "4" is more inclined to vote for death than for life, though they are not an automatic vote for death. They are generally comfortable with the imposition of capital punishment in society, and respect the death penalty as a sometimes warranted tool of justice. This person may have had a personal experience relevant to the case at hand, and they place a strong sense of goodwill in governmental authority. Death-leaning jurors may speak of "an eye for an eye," but they do not necessarily view capital punishment as appropriate in every situation; they are open to considering both aggravating and mitigating evidence. While preparing a cause challenge against this juror, cultural questioning is still important in case this juror is seated on the final jury.
>
> *5. Automatic Death:* a juror ranked as a "5" will automatically impose a death sentence for a defendant convicted of capital murder. They see criminality in black and white terms and believe that capital punishment is a useful and necessary tool to better society. Automatic death jurors think highly of the government and are unwilling to listen to any mitigation. Because of this, jurors categorized as a "5" are impaired and must be excused. The defense team should not spend too much time on these jurors once they provide a clear reason to warrant disqualification, and should move directly to challenge.

Additionally, defense counsel should note whenever a potential juror has been rehabilitated in any way and how such rehabilitation happened. This is critical to understanding how strong the person's beliefs were, how impressionable they are to differing viewpoints, and what kind of reasoning they are most susceptible to. Ultimately, downsizing to a straightforward five-point scale will decrease any time spent mulling over ambiguities, and the more time defense teams have to "explore a juror's attitudes," the higher their chances of selecting the most beneficial jurors.[478]

B. The Colorado Method Should Push for True Bifurcation

Bifurcation, literally defined as "[t]o separate into two parts, esp. for convenience,"[479] is the requirement that capital trials be divided into separate guilt and penalty phases.[480] This "procedural

478. Mullin, *supra* note 96, at 146.
479. *Bifurcate*, BLACK'S LAW DICTIONARY (5th ed. 2016).
480. Cheng, *supra* note 77, at 40.

bifurcation" necessarily results in "two distinct, and in many ways contradictory, domains of knowledge," with law "on one side of the bifurcated divide" and morality on the other.[481] However, the "reliance by the Supreme Court on bifurcation as a restraint on arbitrariness has largely been misplaced"[482] since any benefits of bifurcation are illusory when a single jury is required to evaluate both the defense strategy and penalty arguments.[483]

Bifurcation "has been criticized for decades."[484] When the same jury determines both guilt and penalty, "the situation is not different from a unitary trial," and the intended procedural safeguard is rendered useless.[485] Specifically, "having just heard the grisly details of this defendant's death-eligible crime and having just found this defendant guilty, it would be asking far too much to imagine that these jurors can divorce themselves from their context" and decide the appropriate sentence fairly.[486] Unfortunately, the unitary jury of a bifurcated trial "maximizes the skewing effects of death qualification, ensuring that the scales of justice tilt in favor of the prosecution."[487]

The logical solution, then, is separate juries. Known as "true bifurcation," this procedure composes a different set of jurors to independently decide the guilt and penalty hearings.[488] Because the downfalls of a unitary jury "combine[] with death qualification to tilt the scales even more firmly toward guilt and death than death qualification alone," true bifurcation is a necessary and welcome change.[489] Despite neither the federal nor any state's "capital statutory scheme contemplate[ing] the impaneling of separate juries,"[490] attention to the intersection of death qualification and the unitary jury is increasing nationwide.[491] Actually, true bifurcation is already accepted when multiple criminal defendants are tried together.[492]

In the capital context, when Senator Mitt Romney was Governor of Massachusetts, his Council on Capital Punishment recommended that a capital defendant should have the right "to request the selection of a new jury for the sentencing stage."[493]

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481. *Id*.

482. Kamin & Pokorak, *supra* note 37 at 146–47.

483. *Id.* at 147.

484. Rozelle I, *supra* note 80, at 794 (citing HANS ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARDS CAPITAL PUNISHMENT 51 (1968)).

485. *Id.*

486. *Id*. at 807.

487. *Id*. at 793–94.

488. Cheng, *supra* note 77, at 48.

489. Rozelle I, *supra* note 80, at 794.

490. Kamin & Pokorak, *supra* note 37, at 146.

491. Rozelle I, *supra* note 80, at 772.

492. Kamin & Pokorak, *supra* note 37 at 149.

493. Joseph L. Hoffman, et al, Report of the Governor's Council on Capital Punishment, 80 IND. L.J. 1, 16, (2005).

Despite the Massachusetts House rejecting the bill, in 2005, the First, Fifth, and Sixth Circuits "ruled on their respective trial judges' bifurcation of capital juries into (1) non-death-qualified, guilt-phase juries and (2) death-qualified sentencing-phase juries."[494] Additionally, despite Indiana's death penalty statute requiring that the same jury hear both phases, the Indiana Supreme Court "does not interpret that provision to apply where it is impracticable."[495] Recent developments like these suggest that "the courts may be ready to give meaningful consideration" to truly bifurcating a capital trial.[496] This could mean a huge step toward a truly fair trial for capital defendants.

In a very real sense, impaneling two juries would allow a capital defendant to "truly determine where his case is strongest and to make that case to the jury in a way that best puts the prosecution to its proof."[497] The benefits of true bifurcation are abundant:

> First, seating an entirely separate sentencing jury obviates the need to perform a full, comprehensive death qualification of the liability-phase jury. Instead, the liability-phase jury could be asked a single, neutrally-phrased question intended to suss out tendencies toward nullification.[498] The operative issue is "whether their feelings about the death penalty would prevent them from considering all of the evidence presented for and against the defendant throughout the trial."[499] Thus, potential jurors whose feelings would prevent them from finding impartially on guilt may be detected, while avoiding talk of punishment and its attendant presumption of guilt.
>
> Second, waiting to death-qualify a separate sentencing jury means the liability jury is not death-qualified. This change would remove the taint of prosecution-proneness injected into the proceedings by death qualification's over-exclusion, not only be demographic group, but also by ideology . . . . In addition, this approach would eliminate the taint of inculcating jurors pretrial with the idea that this

494. Rozelle I, *supra* note 80, at 774. *See* United States v. Williams, 400 F.3d 277, 282 (5th Cir. 2005) (holding that a defendant has no "no right . . . to choose a unitary or bifurcated jury"); *see also* United States v. Green, 407 F.3d 434. 441–42 (1st Cir. 2005) (holding that "a single, properly constituted jury will hear both phases of a federal capital trial unless circumstances definitively rule out that option."); *see also* United States v. Young, 424 F.3d 499, 506–07 (6th Cir. 2005) (holding that a defendant is not permitted "to adopt a dual-jury procedure in federal capital cases.").

495. Sites, *supra* note 268, at 42 (citing Burris v. State, 642 N.E.2d 961 (Ind. 1994)).

496. Bowers & Foglia, *supra* note 27, at 86.

497. Kamin & Pokorak, *supra* note 37, at 151.

498. Rozelle II, *supra* note 320, at 682–90 (asserting that systemic sweeping over excludes and removes many more persons as death penalty opponents than the law permits).

499. *Id.*

> defendant is guilty and that the only real question before them is whether they have the mettle to sentence him to death.[500]

"[A]ll principled executioners" have the duty to "insist on reform," and, currently, the Colorado Method may be the most principled strategy for capital jury selection.[501] Thus, the Colorado Method should include a provision encouraging defense counsel to file a "motion to sever the guilt-innocence and penalty phases and use a jury which has not been death-qualified for the guilt-innocence phase."[502] In expanding upon the Massachusetts Council's work, University of Denver Assistant Professor Sam Kamin and Suffolk University Law School Associate Professor Jeffrey J. Pokorak propose the following approach:

> A capital defendant should be given the option of electing to have a separate jury impaneled for the sentencing phase of the trial, in the event that the guilt-phase jury convicts him of capital murder. The defendant should be allowed to exercise this option either prior to the guilt phase of the trial or after conviction of capital murder. If the defendant makes a pretrial election to have a separate jury impaneled for sentencing, then the guilt-phase jury will not be death-qualified. If the defendant decides to defer the election until after conviction of capital murder, then the guilt-phase jury will be death-qualified.[503]

When "the only barrier standing in the way of increasing fairness in our capital punishment system is statutory," change becomes not only agreeable, but necessary.[504] Until these motions pick up speed, proponents of the Colorado Method must push for statutory change with regard to capital bifurcation.[505]

True bifurcation may unfortunately mean increased time and effort at the capital defense attorney's expense, but above all else, it "offers capital defendants, if not a fair trial, then at least a trial that is more fair."[506] Further, any additional costs related to true bifurcation would be "relatively modest," considering that true bifurcation "saves the cost of death-qualifying all liability juries, and incurs the additional costs of a second jury only in those cases where the defendant is convicted."[507] And although "separate juries may necessitate presenting certain evidence twice (as when evidence presented to the liability jury is also relevant to

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500. Rozelle I, *supra* note 80, at 796.

501. *Id.* at 771.

502. Sites, *supra* note 268, at 42.

503. Kamin & Pokorak, *supra* note 37, at 132.

504. Rozelle I, *supra* note 80, at 801.

505. *Id.* at 798 (stating that the Federal Death Penalty Act will typically prohibit true bifurcation under presently existing statutory schemes).

506. *Id.* at 793.

507. *Id.* at 802.

sentencing), this is already a common phenomenon."[508] As Justice Marshall pointed out in *Lockhart v. McCree*, "it cannot fairly be said that the costs of accommodating a defendant's constitutional rights under these circumstances are prohibitive, or even significant."[509] So, while true bifurcation cannot negate the full detriments of the death qualification process, the undeniable "need to bridge the rupture of bifurcation therefore must become a conscious aspect of the overall defense strategy."[510]

Abolishing the death penalty, or even its death qualification procedure, "may be out of reach in the current political climate."[511] But, by advocating for true bifurcation, the Colorado Method has the ability to "lighten the thumb that the unitary, death-qualified jury lays on Lady Justice's scales."[512] "[T]rue bifurcation is a commonsense, achievable improvement in our capital punishment system's fairness,"[513] and the Colorado Method should make waves to ensure such an improvement happens.

C. The Colorado Method Should Increase Cultural Recognition

An attorney's strategy for each potential juror "depends on the quality of the information" they elicit from each individual.[514] The "on-the-ground reality" of death qualification, however, is that "many capital defense teams fail to investigate the cultural factors that have shaped a client's life, and do not convey those factors effectively to jurors."[515] In order to relate the defendant's story in a way the jury can undeniably connect to, defense attorneys must be culturally competent in both the defendant and the individual jurors' lives.[516]

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508. *Id.*

509. *Id.* at 803 (citing *Lockhart v. McCree*, 476 U.S. 162, 205 (1986) (Marshall, J., dissenting)). Justice Marshall continued, "[a]ny suggestion that capital defendants will benefit from a single jury thus is more than disingenuous. It is cruel." *Lockhart*, 476 U.S. at 206 (Marshall, J., dissenting).

510. Cheng, *supra* note 77, at 55.

511. Rozelle I, *supra* note 80, at 775. Then again, death penalty abolition may not be such a pipe dream after all, as Brandon Garrett notes that "[t]he death penalty in the United States is at the end of its rope." GARRETT, *supra* note 58, at 1.

512. Rozelle I, *supra* note 80, at 775.

513. *Id.* at 806.

514. Grosso & O'Brien, *supra* note 361, at 516.

515. Sarma, *supra* note 335, at 913. Of course, culture is "notoriously difficult to define," as it "is a complex and nuanced convergence of … innumerable characteristics." *Id.* at 910.

516. *Id.* at 912. "[W]inning over capital jurors" is nonetheless a daunting task "because defense counsel must confront the cultural chasm that separates nearly all capital jurors from the death penalty defendants they must judge." *Id.* at 914.

A jury's "genuine understanding of a capital defendant's background and social history and their willingness to grasp that evidence's mitigating significance is what determines whether they will choose life over death."[517] This genuine understanding cannot be realized through hypothetical or open-ended questions, but through cultural recognition. Cultural differences can severely impact "lawyers' and clients' capacities to understand one another's goals, behaviors and communications," leading to jurors attributing "different meanings to the same set of facts."[518] Therefore, incorporating a cultural focus into capital voir dire is important for two reasons: "(1) a well-communicated cultural understanding of the client can help jurors understand him; and (2) the defense team's understanding of prospective jurors' cultural underpinnings will enable them to select the most favorable jurors and present evidence more effectively."[519]

Jurors "who can culturally relate to the client in a meaningful way are far more likely to receive the mitigation narrative with an open mind."[520] For this reason, cultural questioning goes beyond determining whether jurors can meaningfully consider mitigation, and seeks to reveal if and how prospective jurors can directly relate to a particular set of facts or circumstances.[521] Significantly, if a juror feels they have "come to know, and to a certain extent, understand" the defendant, he then becomes "complicated, real, and human," making it increasingly difficult for that juror to "cast aside" his life.[522] In past studies, "[t]he more a juror reported having felt sympathy or pity for the defendant, having found the defendant likeable as a person, or having imagined being in the defendant's situation, the more likely she was to cast her first vote for a sentence of life imprisonment."[523]

For the Colorado Method, "[c]ulture need not be a separate or altogether new consideration; instead, it is a concept that can be subsumed within the broader strategy" that the Method provides.[524] Counsel should avoid posing "prescriptive or even judgmental" questions but should instead attempt to connect the source of any bias to the cultural foundation it stems from. Bidish J. Sarma,

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517. Lynch & Haney, *supra* note 348, at 93.

518. Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL C. REV. 33, 42 (2001).

519. Sarma, *supra* note 335, at 909. Properly incorporating culture into the jury selection process "can be a matter of life and death in capital cases because it has the potential to influence the jury's ultimate determination." *Id.*

520. *Id.* at 934.

521. *Id.* at 927–28. Non-culturally diverse juries "deliberate less critically and the jurors are more likely to share the same view of the evidence." *Id.* at 911.

522. *Id.* at 913.

523. Garvey, *supra* note 281, at 62.

524. Sarma, *supra* note 335, at 925.

former Deputy Director of the Capital Appeals Project in New Orleans,[525] elucidates how the Colorado Method can best incorporate cultural voir dire:

> For example, if the client was taken away from his parents at a young age, counsel may want to ask whether jurors know individuals who have grown up under similar circumstances or have done so themselves. Or, if the client witnessed the violent death of a loved one, counsel may want to find out if prospective jurors have had a similar experience. Not every question needs to be related to mitigation; the defense lawyer could simple ask "get-to-know-you" questions early in voir dire. For example, she may ask if any jurors are the oldest sibling in the immediate family, or if they ever worked in the same job as the client.[526]

In this way, cultural questioning may also increase minority representation in death qualified juries. A juror's cultural identity heavily influences their perceptions of guilt or innocence, and thus, the presence of minority jurors on juries can aide the defense by translating the "cultural meaning[] of acts and words" in a way most favorable to the defendant.[527] Moreover, preserving juror diversity "is of central importance both to the defendant, who is entitled to the collective judgment of the community, and to the community itself, whose members are entitled to an equal say on matters so fundamental as criminal justice."[528] Defense attorneys should therefore utilize "a method of selection that increases the demographic and attitudinal representativeness of the capital jury sample."[529] Cultural questioning can do just that.

D. The Colorado Method Should be More Publicly Available

The Colorado Method provides an invaluable cheat sheet to mastering "one of the most difficult yet crucial skills for capital defense lawyers."[530] However, the only way to immerse oneself in its methodology is to attend an annual $500 seminar in Colorado.[531] Information on the method is otherwise shielded from the public.[532]

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525. *Bidish Sarma*, HUFFPOST (Feb. 20, 2019), huffpost.com/author/bidish-sarma [perma.cc/4F4R-UENR].

526. Sarma, *supra* note 335, at 928.

527. Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285 (2000).

528. Cowan, Thompson, & Ellsworth, *supra* note 316, at 54.

529. Cox & Tanford, *supra* note 292.

530. *National Capital Voir Dire Training Program*, *supra* note 201.

531. *Id.* As an aside, the impact and forced remoteness of COVID-19 has undoubtedly made access to the Colorado Method even more elusive.

532. Lepir, *supra* note 13, at 397 (stating "the Colorado Method is both proprietary and an important part of trial strategy for capital defense counsel").

Not only did this make researching and writing this Comment frustratingly difficult, but this fact presents a larger implication regarding the capitalization of tools intended to further the public good.

Capitalization and collection of profits should not—and cannot—take precedent over the dissemination of information, especially when such information has the potential to save lives. Because of this, the Colorado Method should be made available to the public, defense attorneys, and law students alike. To withhold this tool of justice is to perpetuate the systemic issues with capital jury selection and conceal, arguably, the best legal advocacy available to criminal defendants. Moreover, death penalty cases are unfathomably taxing on the attorneys who try them; David Wymore himself admits, "[i]t's a horrible business . . . Never should have gotten involved in it."[533] But access to the Colorado Method could significantly lighten that load, if only by providing a navigational tool or a sense of structure.

Without a doubt, David Wymore has changed the game with regard to capital jury selection procedures, and he deserves the utmost credit. Nonetheless, he may stand to recall the wise words of Justice Hugo L. Black so long ago: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[534] There too can be no equal justice where the kind of trial a defendant receives depends on the amount of money their lawyer has.

V. CONCLUSION

Since Colonial times, the United States has allowed for certain crimes to be punishable by death, but the rules that govern the parameters of death-eligible crimes have given the criminal justice system severe whiplash for just as long.[535] The most detrimental part of the capital punishment scheme, death qualification, directly changes the composition of a capital jury in shocking ways. Among other pitfalls, a death qualified jury is conviction-prone, death-prone, unrepresentative, biased, and impartial—everything a jury should not be.[536] Faced with these detriments of the current capital jury selection procedures, Colorado public defender David Wymore created a blueprint of how to maximize life verdicts through

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Interestingly enough, Wymore himself has noted that "the ugliest part of the death penalty [is] the part that's not talked about." Greene, *supra* note 6. Because the methodology is kept under wraps, a huge debt of gratitude is owed to Matthew Rubenstein and his publication.

533. Greene, *supra* note 6 (statement of David Wymore).

534. Griffin v. Illinois, 351 U.S. 12, 19 (1956).

535. Costanzo & White, *supra* note 127, at 2–3 (explaining that "[p]rogress of the movement to abolish the death penalty has been slow and erratic").

536. Haney II, *supra* note 296.

structured voir dire.

Wymore's Colorado Method has successfully spared some of the most infamous capital defendants from death since 1995, including James Holmes and Brendt Christensen. To protect the interests of countless more capital defendants, the Colorado Method should consider simplifying its preliminary ranking scale, supporting true bifurcation, prioritizing uncovering jurors' cultural identities, and making the Colorado Method more accessible to the public. In doing so, the Colorado Method has the potential to solidify its name as the threshold way to conduct capital jury selection nationwide. Crucially, the more attorneys able to master the technique, the more death-eligible defendants may be saved.

Today, public support for capital punishment has fallen to its lowest level in forty-five years, and most people now prefer life without parole rather than the death penalty for convicted murderers.[537] While a sure step in the right direction, the fact that "state-sanctioned murder"[538] is still an available sentencing option means that America's punishment schemes still have a long way to go. However, considering that lasting opposition to imposing the death penalty comes "less from giving people more information about the death penalty and more from giving them–and convincing them that they truly have available–a meaningful alternative to death that both punishes the defendant and keeps him or her off the streets for good,"[539] it is clear why Wymore's Method "is now a key element in death penalty training across the country."[540]

Moving forward, research on the effects of the capital jury selection process must continue with full force but, more importantly, defense attorneys must proactively push for legislative change. So long as death remains "a permissible punishment,"[541] it is on those fighting its permissibility to ensure capital defendants are afforded the fairest possible trial.[542] In the meantime, the Colorado Method simply furthers this mission.

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537. Jones, *supra* note 63. *See* GARRETT, *supra* note 58, at 1 (recognizing that "[t]he decline and fall of the death penalty will save lives, but more important it provides an opportunity to revive the broken American justice system.").

538. Michael Coard, *Death penalty: State-sanctioned murder*, PHILA. TRIB. (Feb. 27, 2016), phillytrib.com/commentary/death-penalty-state-sanctioned-murder/article_9ae8ab3b-1c63-50c3-b03f-9286130b630c.html [perma.cc/CJ8T-XC3K].

539. Eisenberg, Garvey, & Wells, *supra* note 108, at 379.

540. GARRETT, *supra* note 58, at 54.

541. Rozelle I, *supra* note 80, at 807.

542. Just as "[t]he criminal justice system doesn't give up its prey very easily," neither should death penalty abolitionists. Reid, *supra* note 181 (statement of David Wymore).