



Summer 2008

State v. Fry: Reconsidering Death-Qualification in New Mexico Capital Trials

Kyle Wackenheim

Recommended Citation

Kyle Wackenheim, *State v. Fry: Reconsidering Death-Qualification in New Mexico Capital Trials*, 38 N.M. L. Rev. 627 (2008).

Available at: <https://digitalrepository.unm.edu/nmlr/vol38/iss3/7>

STATE V. FRY: RECONSIDERING DEATH-QUALIFICATION IN NEW MEXICO CAPITAL TRIALS

KYLE WACKENHEIM*

*“Preoccupation with [death qualification] creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant.”*¹

INTRODUCTION

Death-qualification, the process by which potential jurors are impaneled in a capital trial, deprives the defendant of a fair and impartial trial. Sociological evidence indicates that death qualifying a jury results in a prosecution friendly, conviction-prone jury. Potential jurors who oppose the death penalty are excluded, while their prosecution friendly peers remain. Jurors are asked if they are able to sentence the defendant to death even before opening statements; even as the defendant sits as an innocent party.

The New Mexico Supreme Court, in *State v. Fry*,² had the opportunity to revisit death-qualification but rejected the defendant’s argument that the exclusion of certain prospective jurors violated his constitutional right to an impartial jury.³

This case note encourages the New Mexico Supreme Court to reexamine the state’s death-qualification process for juries in capital cases. In light of recent studies by the Capital Jury Project that demonstrate the failures of death-qualified capital juries, a reconsideration of the existing unitary jury system in New Mexico capital cases is necessary. Without a change, accused defendants who are presumed innocent will continue to be deprived of their constitutional right to a fair and impartial jury.

To begin, this note will briefly discuss *Furman v. Georgia*⁴ and the United States Supreme Court’s concerns about the arbitrary implementation of the death penalty. Next, it will survey the Supreme Court cases that addressed concerns about the death-qualification of juries, including the then-existing sociological studies that were before the Court. The note will then trace New Mexico jurisprudence on death qualification of capital juries, followed by an examination of the New Mexico Supreme Court’s decision in *Fry*. Then, it will describe the work and findings of the Capital Jury Project. Finally, this note proposes a tangible and workable solution to this serious deficiency in New Mexico’s capital jury selection procedure. The purpose of this article is not to advocate for the abolition of the death penalty,⁵ but rather to reexamine a practice that, by its nature, may deprive an accused’s fundamental right to a fair jury in the most perilous of cases.

* J.D. Candidate, 2009. I would like to thank Professor Barbara Bergman for her guidance and wisdom. I am also indebted to Jeff Buckels, Jared De Jong, Nat Chakeres, and Juan Marquez. Finally, I would like to thank Paula for her support and patience throughout this process.

1. Justice John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner, Hyatt Regency Hotel, Chicago, Illinois (Aug. 6, 2005) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html).

2. 2006-NMSC-001, 126 P.3d 516.

3. *Id.* ¶ 15, 126 P.3d at 524.

4. 408 U.S. 238 (1972). See Part I *infra*.

5. For a balanced discussion on both sides of the capital punishment debate, see DEBATING THE DEATH PENALTY: SHOULD AMERICA HAVE CAPITAL PUNISHMENT? (Hugo Bedau & Paul Cassell eds., 2004).

I. OVERVIEW OF DEATH-QUALIFICATION

Modern Supreme Court death penalty jurisprudence derives from *Furman v. Georgia*.⁶ In that case, the Supreme Court, in a plurality opinion, declared the death penalty as applied in Georgia and Texas unconstitutional. An understanding of the holding in *Furman* and the subsequent re-establishment of the death penalty is important in understanding present day American death penalty jurisprudence.

Furman consolidated the cases of three defendants who had been sentenced to death.⁷ One defendant was found guilty of murder while the two other defendants were convicted of rape.⁸ Without a majority opinion, five members of the court held the Georgia and Texas statutes unconstitutional under the Eighth Amendment.⁹ The court issued a per curiam opinion that stated, "the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹⁰

At the heart of the Court's decision in *Furman* was a concern over the arbitrary implementation of capital punishment. Justice Douglas identified the problem: "[N]o standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."¹¹ The Georgia statute failed to provide the judge or jury with standards to guide discretion in deciding whether or not to impose the death penalty.¹² Indeed, for Justice Stewart, the death sentences at issue were "cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹³ While Justices Marshall and Brennan held the death penalty unconstitutional under the Eighth Amendment,¹⁴ the plurality opinion did not declare capital punishment *per se* unconstitutional.¹⁵ This opening allowed states to redraft their statutes to confront the Court's concerns with the arbitrary nature of capital punishment.

And, indeed, thirty-five states passed amended capital punishment statutes in response to *Furman*.¹⁶ The Supreme Court then ruled on the constitutionality of the modified statutes in a series of three cases: *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas*.¹⁷ Georgia's amended statute, which provided six categories of crime

6. 408 U.S. 238 (1972).

7. *Id.* at 239.

8. *Id.*

9. See generally *id.* (Justices Douglas, Brennan, Stewart, White, and Marshall comprised the majority).

10. 408 U.S. at 239. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

11. 408 U.S. at 253 (Douglas, J., concurring).

12. See 408 U.S. at 308-309 n.8 (Stewart, J., concurring) (noting that the Georgia statute gave juries the choice of at least one year imprisonment, life imprisonment, or death).

13. 408 U.S. at 309 (Stewart, J., concurring). Justice White also noted, "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring).

14. *Id.* at 305 (Brennan, J., concurring) ("The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it...."); *id.* at 370 (Marshall, J., concurring) ("[T]he death penalty violates the Eighth Amendment.").

15. *Id.* at 239-40 (per curiam).

16. For a complete list, see *Gregg v. Georgia*, 428 U.S. 153, 179 n.23 (1976).

17. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

for death,¹⁸ was at issue in the first of the three.¹⁹ In a bifurcated proceeding, the trial judge or jury first determined the defendant's guilt or innocence.²⁰ If a finding of guilt was returned, the trier of fact then heard "additional evidence in the extenuation, mitigation, and aggravation of punishment" to determine the defendant's sentence.²¹ Further, the trier of fact could only sentence the defendant to death if one of the ten (10) enumerated aggravating factors were found beyond a reasonable doubt.²² The trial judge was also required to complete a six-and-one-half page questionnaire designed to determine any arbitrariness and disproportionality of the sentence.²³ Additionally, the statute provided the defendant with an expedited mandatory appeal to the state high court to determine, among other things, "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or [any other] arbitrary factor."²⁴

The Supreme Court found that the Georgia statute satisfied the Court's concern over arbitrary implementation of capital punishment.²⁵ The Court noted that a bifurcated capital trial in which a guilt/innocence determination is separate and distinct from a sentencing decision "is more likely to ensure elimination of [*Furman's*] constitutional deficiencies."²⁶ The Court further noted that jurors needed guidance regarding the sentencing decision as they are "unlikely to be skilled" in considering the information presented during the punishment phase.²⁷ Thus, the Court endorsed the Georgia capital punishment scheme while not mandating that states follow Georgia's exact procedure.²⁸

The Court also declared that both the Florida²⁹ and Texas³⁰ statutes were constitutional. In contrast to Georgia, Florida's statute rendered the jury's verdict as advisory only and the trial judge determined the final sentence after weighing the statutory aggravating factors and mitigating circumstances.³¹ The Court did not find this difference substantial enough to invalidate the statute.³² Indeed, the court noted that the Florida system "serves to assure that sentences of death will not be

18. GA. CODE ANN. §§ 26-1101 (1972), 26-1311 (1972), 26-1902 (1972), 26-2001 (1972), 26-2201 (1972), 26-3301 (1972). The only notable difference for the court was the removal of a possible death sentence for the crime of capital perjury. *Gregg*, 428 U.S. at 163 n.6.

19. *Gregg*, 428 U.S. 153.

20. *Id.* at 163.

21. *Id.* (citing GA. CODE ANN. § 27-2503 (1975)).

22. *Id.* at 164-65; see also GA. CODE ANN. § 27-2534.1 (1975) (list of all ten aggravating factors).

23. *Id.* at 167 (citing GA. CODE ANN. § 27-2537(a) (1975)).

24. *Id.* at 166-67 (citing GA. CODE ANN. § 27-2537 (1975)).

25. *Id.* at 187 ("We hold that the death penalty is not a form of punishment that may never be imposed....").

26. *Id.* at 191-92.

27. *Id.* at 192.

28. For the majority, Georgia's statute was sufficient:

We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting *Furman's* constitutional concerns.

Id. at 195.

29. See *Proffitt v. Florida*, 428 U.S. 242 (1976).

30. See *Jurek v. Texas*, 428 U.S. 262 (1976).

31. *Proffitt*, 428 U.S. at 252.

32. *Id.* at 252 ("[I]t has never been suggested that jury sentencing is constitutionally required.").

'wantonly' or 'freakishly' imposed."³³ Thus, Florida's approach to capital punishment was sufficient to overcome *Furman*.

The Court also ruled the Texas Capital Punishment statute as constitutional in *Jurek*.³⁴ In addition to limiting death-eligible crimes, the Texas statute guided the jury's discretion in the sentencing phase by asking three questions which focused on the accused's state of mind, his threat to society, and the reasonableness of his actions.³⁵ If the jury found the answer to each question in the affirmative beyond a reasonable doubt, a sentence of death was imposed, otherwise the defendant was sentenced to life imprisonment.³⁶ The Court concluded that the Texas statute also met the concerns in *Furman* by limiting and guiding discretion in the penalty phase of a capital trial.³⁷

Thus, the Court endorsed capital punishment schemes in as much as they confronted its concern in *Furman* about arbitrary and standardless impositions of the death penalty. The Court was satisfied that, with a bifurcated proceeding in which the jury considers aggravating factors and mitigating circumstances, the death penalty would be reserved for the most deserving of crimes.

II. SUPREME COURT JURISPRUDENCE ON DEATH-QUALIFICATION

In a capital trial, the jury is charged with the most serious of tasks—possibly deciding on the life or death of a defendant. Because of the seriousness of the jurors' role, challenges on behalf of capital defendants have centered, in part, on the role of the capital jury. Through a series of cases decided by the United States Supreme Court, unitary juries that decide both phases of a capital trial must go through a specialized voir dire to ensure they are "death-qualified" and able to decide on both phases of the capital trial. This section explores the requirements as set forth by the high court in death-qualifying a jury and traces the challenges to this procedure.

A. *Witherspoon v. Illinois* and the *Witherspoon-excludables*

In *Witherspoon v. Illinois*,³⁸ the Court invalidated a statute that allowed the state to challenge for cause any juror who had "conscientious scruples" against the death penalty.³⁹ The petitioner appealed the jury's guilty verdict and sentence of death,

33. *Id.* at 260 (internal citations omitted).

34. 428 U.S. 262.

35. The three questions were:

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. art. 37.071(b) (Vernon 1976), *quoted in Jurek*, 428 U.S. at 269.

36. *Id.* Texas also provided for an expedited appeal to the Texas Court of Criminal Appeals. TEX. CODE CRIM. PROC. art. 37.071(f) (Vernon 1976), *cited in Jurek*, 428 U.S. at 269.

37. *Jurek*, 428 U.S. at 276.

38. 391 U.S. 510 (1968). While *Witherspoon* was decided before *Furman* and its progeny, the holding in *Witherspoon* was unaffected by those cases.

39. *Witherspoon*, 391 U.S. at 512. The statute at issue read: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital

claiming that the prosecution's successful challenges for cause to nearly half of prospective jurors resulted in an unfair trial.⁴⁰

Witherspoon argued, among other things, that the Illinois process for jury selection resulted in a jury that was conviction prone.⁴¹ He offered, as means of introduction to the issue, a law review article that discussed the effect of death-qualification on the jury's evaluation of guilt.⁴² In that article, Professor Oberer made the proposition that "a jury qualified on the death penalty is one more apt to convict..."⁴³ As support for his theory, he suggested that

The consequence [of death-qualification] is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members.... Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach.⁴⁴

In support of this theory, Witherspoon offered a number of unpublished sociological studies.⁴⁵ In W. Cody Wilson's 1964 study, for example, 187 college students were given a written survey that sought to test the validity of Professor Oberer's proposition.⁴⁶ The students were given a series of simulated capital trials in which they were to reach a verdict on the fictitious defendant's guilt.⁴⁷ The students' responses to the simulated trials provided a baseline for the individual's tendency towards guilt.⁴⁸ In addition, the students were asked for their general attitudes with respect to capital punishment.⁴⁹ The students were also asked whether they agreed or disagreed with a series of statements that would indicate the individual's tendency for a positive or negative prosecution bias.⁵⁰

punishment, or that he is opposed to the same." *Id.* (citing ILL. COMP. STAT., c.38, § 743 (1959)). While both the defendant and state had a prescribed number of peremptory challenges that did not require an articulated reason for dismissal, challenges for cause were unlimited under the statute. *Id.*

40. *Witherspoon*, 391 U.S. at 512. A total of forty-seven potential members of the jury were excluded for cause. Of those forty-seven, five stated they were unable to impose the death penalty in any circumstance. *Id.* at 514.

41. Brief of Petitioner at 11, *Witherspoon v. Illinois*, 391 U.S. 510 (1968) ("[A] jury composed of persons who have no scruples against capital punishment is partial to the prosecution on the issue of innocence or guilt, and is therefore more likely to find the defendant guilty than a jury from which scrupled jurors are not excluded.").

42. *Id.* at 30 (citing Walter E. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545 (1961)).

43. Oberer, *supra* note 42, at 545 (emphasis in original).

44. *Id.* at 549.

45. Brief of Petitioner app. 4, *supra* note 41.

46. *Id.* (citing W. Cody Wilson, *Belief in Capital Punishment and Jury Performance* (unpublished manuscript, Univ. of Texas)).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* The statements were:

- a) The district attorney's interpretation of the facts in a criminal case [is] usually more reliable than the defense lawyer's.
- b) If two witnesses gave conflicting testimony in a criminal case, I would probably believe the witness for the prosecution rather than the witness for the defense.
- c) If I were a member of a jury, I could never vote 'not guilty' for a man whose defense was insanity.
- d) The plea of 'not guilty by reason of insanity' is a loophole that allows many criminals to escape punishment.

Id.

Wilson found, based on an analysis of the students' written responses, that death-qualification resulted in the denial of a fair trial.⁵¹ Specifically, exclusion of jurors with conscious scruples against capital punishment resulted in a jury pool more biased in the favor of guilt, more confident in its decision, more biased in favor of the prosecution, prejudiced against a defense of insanity, and more likely to impose a more severe punishment.⁵² Wilson concluded, "If the existence of such systematic biases in juries as a result of the selection process constitutes denial of fair trial, then disqualification of jurors for scruples against capital punishment does constitute denial of fair trial."⁵³

As further support for death-qualification's effect on the guilt/innocence phase of a trial, Witherspoon offered a study conducted by Faye Goldberg in which two-hundred students answered a questionnaire that included sixteen simulated capital trials.⁵⁴ The students imposed a verdict and sentence and disclosed whether they had conscientious scruples against the death penalty.⁵⁵ The results of the study indicated that those who had no scruples against the death penalty convicted in 75 percent of the simulated cases, while those who had scruples convicted in 69 percent of the cases.⁵⁶ In sum, those subjects who did not have scruples against capital punishment were more likely to convict, more likely to convict for a harsher crime, more likely to impose harsher sentences, and less likely to acquit by reason of insanity.⁵⁷

Unfortunately for Witherspoon, the Court considered the proffered studies as "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in determination of guilt."⁵⁸ The Court declined to rule that death-qualification resulted in an unrepresentative jury on guilt, or that it substantially increases the risk of conviction.⁵⁹ The majority agreed with an amicus brief that noted the *Witherspoon* record did not provide the necessary factual context to make such a determination.⁶⁰

However, the Court did not leave *Witherspoon* without relief. Instead, it held that the Illinois statute produced a death-qualification scheme that violated the Sixth and

51. *Id.*

52. *Id.*

53. *Id.*

54. Brief of Petitioner app. 4, *supra* note 41 (citing Faye J. Goldberg, *Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Jury Cases* (unpublished manuscript, Morehouse College)).

55. *Id.*

56. *Id.* The study also included a glimpse into the racial divide over the death penalty. Seventy-six percent (76%) of African-American subjects indicated they had scruples against capital punishment as compared to 47 percent (47%) of White subjects. *Id.* Notably, 42 percent (42%) of those who indicated they had scruples against capital punishment voted to impose death in at least one of the simulated cases. Goldberg considered this discrepancy as a contradiction on the part of the subjects. *Id.* However, there may be another interpretation of this "inconsistency." That a significant portion of jurors with scruples against the death penalty voted to impose death may speak to those jurors' ability to follow the law over their internal disposition.

57. *Id.*

58. *Witherspoon v. Illinois*, 391 U.S. 510, 517 (1968).

59. *Id.* at 517-18.

60. See Motion for Leave to File Brief Amici Curiae and Brief for NAACP Legal Defense and Educational Fund, Inc. as Amici Curiae Supporting Petitioner at 15, *Witherspoon v. Illinois*, 391 U.S. 510 (1968) ("[W]e contend that decision of the scrupled-juror issue had best be deferred for decision on fuller records than are now before the Court....").

Fourteenth Amendments.⁶¹ These constitutional violations stemmed from the fact that the state excluded potential jurors that had *any* opposition to the death penalty without determining if that opposition would interfere with returning a verdict of death.⁶² Thus, Witherspoon was subjected to a system that “produced a jury uncommonly willing to condemn a man to die.”⁶³

The *Witherspoon* decision prohibited states from excluding potential jurors who exhibited “general objections to the death penalty or expressed conscientious or religious scruples against its infliction.”⁶⁴ However, the decision also ensured that states could exclude jurors who made “unmistakably clear” that they would vote against a sentence of death without consideration of the evidence or “that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s *guilt*.”⁶⁵ These jurors, who can be excluded for cause under the holding in *Witherspoon*, are called “*Witherspoon-excludables*.”⁶⁶

B. *Wainwright v. Witt and the Modification of Witherspoon*

The Court further clarified the *Witherspoon*⁶⁷ standard in *Wainwright v. Witt*.⁶⁸ Witt was convicted and sentenced to death under Florida law.⁶⁹ On appeal from the Middle District of Florida’s denial of habeas corpus, the Eleventh Circuit found that the excusal of one of the jurors for cause violated the *Witherspoon* standard.⁷⁰ During voir dire, veniremember Colby’s responses were unclear as to whether she would automatically fail to follow the jury instructions based on her general scruples against capital punishment.⁷¹ The Eleventh Circuit drew on footnote

61. *Witherspoon*, 391 U.S. at 518. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI. The Fourteenth Amendment provides in relevant part: “nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

62. *Witherspoon*, 391 U.S. at 520.

63. *Id.* at 521.

64. *Id.* at 522.

65. *Id.* at 522 n.21.

66. The precise definition of a properly excluded *Witherspoon-excludable* has changed over time. See Part II.C.2 *infra*.

67. In 1980, the Court recast the standard for *Witherspoon-excludables* in *Adams v. Texas*, 448 U.S. 38 (1980): “[A] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Id.* at 45. Seemingly, this was a conflict with *Witherspoon*’s standard which required an absolute opposition to capital punishment for exclusion.

68. 469 U.S. 412 (1985).

69. *Id.* at 414.

70. *Id.* at 415 (citing *Witt v. Wainwright*, 714 F.2d 1069 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984)).

71. In relevant part, the exchange during voir dire occurred as follows:

Prosecutor (P): Do you have any religious beliefs or personal beliefs against the death penalty?

Colby (C): I am afraid of being a little personal, but definitely not religious.

P: Now, would that interfere with your sitting as a juror in this case?

C: I am afraid it would.

twenty-one of the *Witherspoon* opinion and determined that "Colby's limited expressions of feelings and thoughts failed to unequivocally state that she would automatically be unable to apply the death penalty."⁷²

In the majority opinion, Justice Rehnquist began by limiting the scope of *Witherspoon*'s holding. *Witherspoon* was decided before *Furman* and dealt with a jury that had unlimited discretion over the defendant's sentence.⁷³ Since *Furman* and its progeny, the majority noted, a capital jury no longer had unfettered discretion in sentencing decisions.⁷⁴ Therefore, the issue became whether the juror could truthfully answer the questions provided for in the statutory scheme. Otherwise, a state might force "a venireman to sit despite the fact that he will be unable to view the case impartially."⁷⁵

The Court's new standard for removing a venireman for cause in a capital trial became, "whether the juror's views would *prevent* or *substantially impair* the performance of his duties as a juror in accordance with his instructions and oath."⁷⁶ The bias did not need to be demonstrated with "unmistakable clarity" and, in making this determination, the trial judge was given deference.⁷⁷ Under this clarified standard, juror Colby was justly excused for cause, and the Court reversed the Eleventh Circuit's decision.⁷⁸

C. Lockhart v. McCree—Federal Treatment of Death-Qualification and Jury Proneness for Guilt

In 1986, the Supreme Court decided *Lockhart v. McCree*,⁷⁹ a case in which the issue of death-qualification's effect on guilt-prone juries was directly before the Court.⁸⁰ McCree had been found guilty of capital felony murder under Arkansas law, but was sentenced to life imprisonment without parole.⁸¹ During voir dire, eight prospective jurors were excused for cause because they stated an inability to, under any circumstances, impose the death penalty.⁸² McCree challenged the removal of the "*Witherspoon*-excludables" under his Sixth and Fourteenth Amendment right

P: Would it interfere with judging the guilt or innocence of the Defendant in this case?

C: I think so.

Id. at 415–16 (citing *Witt*, 714 F.2d 1069).

72. *Id.* at 417 (internal quotations omitted).

73. *Id.* at 421.

74. See Part I *supra*.

75. *Witt*, 469 U.S. at 422. The majority also cast footnote twenty-one of *Witherspoon* as dicta. The *Witherspoon* holding related to the circumstances under which a state *could not* exclude a potential juror, not necessarily when the State *could* exclude a potential juror. *Id.*

76. *Id.* at 424 (internal quotations omitted) (emphasis added).

77. *Id.* at 425–26.

78. *Id.* at 430, 435. Justice Brennan's dissent criticized the court for departing from its view that "risks to a defendant's Sixth Amendment rights from a jury from which those who oppose capital punishment have been excluded as far more serious than the risk to the State from inclusion of particular jurors whose views about the death penalty might turn out to predispose them toward the defendant." *Id.* at 445 (Brennan, J., dissenting).

79. 476 U.S. 162 (1986).

80. Seemingly, the Court would revisit the invitation left open in *Witherspoon*. See *supra* note 59 and accompanying text.

81. *McCree*, 476 U.S. at 166.

82. *Id.*

to have guilt determined by an impartial jury.⁸³ In federal district court, McCree presented multiple social science studies on the relationship between death-qualification and its effect on the guilt phase in a bifurcated trial.⁸⁴

1. Studies

The district court opinion presented McCree's studies at length and concluded that death-qualified juries were more prone to convict than non-death-qualified juries.⁸⁵ The court discussed the three studies from *Witherspoon*⁸⁶ that had been completed and published in the interim.⁸⁷ In addition, McCree submitted additional studies from Zeisel,⁸⁸ Jurow,⁸⁹ Harris,⁹⁰ Ellsworth,⁹¹ Haney,⁹² and Cowan.⁹³

In Zeisel's study, jurors who had participated in actual felony trials were surveyed following their jury duty.⁹⁴ Participants were asked their views on capital punishment and their voting patterns in the actual felony cases on which they served.⁹⁵ They were asked how they voted on their first ballot, and what the full jury's first vote was. Zeisel determined the relative strength of the cases,⁹⁶ and found that there was a correlation between non-scrupled jurors and a tendency to vote in favor of the defendant in close cases.⁹⁷

In Jurow's 1971 study, 211 employees at a company plant participated after work hours.⁹⁸ The participants rated their views on the death penalty in one of five categories, with the higher category indicating stronger support of the death penalty.⁹⁹ The participants then listened to audio-recorded simulated cases and

83. *Id.* at 167. McCree also challenged the conviction based on the claim that his jury was not selected from a representative cross section of the community because of the exclusion of *Witherspoon*-excludables. *Id.*

84. *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983), *overruled by* *Lockhart v. McCree*, 476 U.S. 162 (1986).

85. *Grigsby*, 569 F. Supp. at 1323. Many of the studies were also discussed and given approval in *Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C. 1984), *rev'd*, 742 F.2d 129 (4th Cir. 1984).

86. Wilson, *supra* note 46; Goldberg, *supra* note 54; H. Zeisel, *Some Insights into the Operation of Criminal Juries* (Nov. 1957) (confidential first draft, Univ. of Chicago).

87. *Grigsby*, 569 F. Supp. at 1290.

88. Zeisel, *supra* note 86.

89. George L. Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971).

90. Welsh White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973).

91. Ellsworth et al., *Juror Attitudes and Conviction Proneness: The Relationship between Attitudes towards the Death Penalty and Predisposition to Convict* (1979) (prepub. draft). Ellsworth's collection of five studies is discussed at length in *Hovey v. Superior Court*, 616 P.2d 1301, 1323 (1980).

92. Lois Harris & Associates, Inc., Study No. 2016 (1971).

93. Cowan et. al, *The Effects of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984).

94. *Grigsby v. Mabry*, 569 F. Supp. 1276, 1295 (E.D. Ark. 1983).

95. *Id.*

96. *Id.* at 1295-96 (To determine the strength of the evidence in an actual trial, Zeisel looked at split votes from the juries. For example, if eleven jurors voted to convict, and a single juror voted to acquit, then Zeisel considered the evidence for conviction strong. This base line approach to the strength of the case was approved by the district court.).

97. *Id.* at 1296.

98. Jurow, *supra* note 89 (cited in *Grigsby*, 569 F. Supp. at 1296).

99. *Grigsby*, 569 F. Supp. at 1297 (citing Jurow, *supra* note 89). The categories were as follows:

1. I could not vote for the death penalty regardless of the facts and circumstances of the case.
2. There are some kinds of cases in which I know I could not vote for the death penalty even

indicated if they would vote to acquit or convict.¹⁰⁰ The data demonstrated a correlation between participants who more strongly favored the death penalty and those who voted to convict.¹⁰¹

In a survey conducted by Louis Harris and Associates and published in the Cornell Law Review, a national sample of 2,068 adults were administered a survey in person.¹⁰² The poll identified which jurors would be classified as *Witherspoon*-excludables for unwillingness to vote for the death penalty.¹⁰³ After receiving criminal case descriptions and uniform jury instructions, the subjects were asked to vote to acquit or convict.¹⁰⁴ The study found that people who favor the death penalty are more likely to convict than those who could never vote for the death penalty.¹⁰⁵

While describing the findings of the studies, the district court noted that they had not taken into account "nullifiers."¹⁰⁶ These are jurors whose opposition to the death penalty is so fervent that they will fail to find guilt in any capital case for fear of a possible sentence of death.¹⁰⁷ If subjects who will vote to acquit in any case were unaccounted for, they would distort actual rates of death-qualification's effect on proneness to convict.

Ellsworth's studies, also submitted to the district court, took "nullifiers" into account. Subjects in these studies were taken from actual jury rolls in California.¹⁰⁸ After a screening question identified "nullifiers,"¹⁰⁹ the remaining participants were subdivided into two groups resulting in 258 death-qualified subjects and thirty *Witherspoon*-excludables.¹¹⁰ Juries were composed of both categories of subjects with any particular jury containing no more than four *Witherspoon*-excludables.¹¹¹ The juries watched a two-hour reenactment of an actual Massachusetts trial which included opening/closing statements, direct/cross examinations, and jury instructions.¹¹² The jurors then voted for first-degree murder, second-degree murder, manslaughter, and acquittal.

if the law allowed me to, but others in which I would be willing to consider it.

3. I would consider all of the penalties provided by the law and the facts and circumstances of the particular case.

4. I would usually vote for the death penalty in a case where the law allows me to.

5. I would always vote for the death penalty in a case where the law allows me to.

100. *Id.*

101. *Id.*

102. White, *supra* note 92, at 1178, 1185 (cited in *Grigsby*, 569 F. Supp. at 1297).

103. *Grigsby*, 569 F. Supp. at 1298 (The question asked was, "[whether in a murder trial] there would be any situation in which you might vote for the death penalty, or do you think you could never vote for the death penalty, regardless of the circumstances?").

104. White, *supra* note 90, at 1186.

105. *Id.* Note that those who are unable to vote for the death penalty are excludable under the *Witherspoon* standard. The study also described those with "relatively low scruples against the death penalty [as] disproportionately authoritarian, conservative, and punitive." *Id.*

106. *Grigsby*, 569 F. Supp. at 1298.

107. *See id.* at 1290-91.

108. Ellsworth *supra* note 91 (cited in *Grigsby*, 569 F. Supp. at 1299).

109. *Id.* Subjects who agreed with the following statement were eliminated from the experiment: "I would not be fair and impartial in deciding the question of guilt or innocence, knowing that if the person was convicted he or she might get the death penalty." *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1299-1300 (The district court described the videotaped trial to be a "high quality and realistic stimulus.").

The results of Ellsworth's study demonstrated that death-qualified subjects were 25 percent more likely to vote for guilt than their *Witherspoon*-excludable counterparts.¹¹³ For the district court, the study marked "the culmination of some fifteen years of research demonstrating the divergent juror voting propensities of death-qualified versus excludable jurors."¹¹⁴ Thus, the district court concluded that the exclusion of jurors through the death-qualification process results in a "substantially lessen[ed] likelihood" of acquittal or guilt of a lesser offense.¹¹⁵

The Haney study also demonstrated the adverse effect death-qualification has on otherwise qualified jurors. After eliminating non-eligible jurors, including "nullifiers" and *Witherspoon*-excludables, the remaining subjects were divided into two groups.¹¹⁶ Both groups watched videotaped simulated trials with only one difference between the tapes:¹¹⁷ one tape included the voir dire associated with death-qualification, while the other did not.¹¹⁸ The results of the study showed that the subjects exposed to death-qualification were more likely to convict the defendant, assume the defendant was guilty before the trial began, assume the law disapproves of people who oppose the death penalty, more likely to assume all parties involved (including the judge, prosecutor, and defense attorney) believe the defendant is guilty, and are more likely to believe the defendant deserves the death penalty.¹¹⁹ According to the results of the study, death-qualification results in jurors believing the only real issue is whether or not to impose death; not necessarily the determination of guilt or innocence.¹²⁰

In one of the most far-reaching studies that questioned whether death-qualified juries were more likely to convict, Cowan reached a demonstrative connection between death-qualification and guilt-prone juries.¹²¹ Cowan's study involved over 288 subjects who watched an in-depth videotaped simulated trial of a homicide in which the evidence reasonably supported a verdict of either guilt and innocence.¹²² The subjects were placed into twelve-member juries that either included only jurors who would vote to impose the death penalty, or included two to four jurors who would be excluded, in an actual trial, for their unwillingness to impose the death penalty.¹²³ Subjects indicated how they would vote on a verdict both immediately after the video and after deliberating with their assigned jury.¹²⁴

113. *Id.* at 1300 (The statistical differences between death-qualified jurors and *Witherspoon*-excludables with respect to first or second degree murder were insignificant. However, when the results are categorized between guilty (first/second degree murder and manslaughter) and acquittal, 77.9 percent of death-qualified jurors voted to convict compared to 53.3 percent of *Witherspoon*-excludables. In addition, 46.7 percent of *Witherspoon*-excludables voted to acquit as compared to 22.1 percent of death-qualified jurors.).

114. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1301 (E.D. Ark. 1983), *overruled by* *Lockhart v. McCree*, 476 U.S. 162 (1986).

115. *Id.*

116. Craig Haney, Aida Hurtado, and Luis Vega, "Modern" Death Qualification: New Data on Its Biasing Effects, 18 LAW & HUM. BEHAV. 619 (1994) (cited in *Grigsby*, 569 F. Supp. at 1302-1303).

117. *Id.* at 1303.

118. *Id.*

119. *Id.*

120. *Id.*

121. Cowan, *supra* note 93.

122. *Id.* at 61-66.

123. *Id.* at 61.

124. *Id.* at 65-66.

The study found strong support for the hypothesis that death-qualified jurors convict at a higher rate.¹²⁵ Thirteen point seven percent of death-qualified jurors voted not guilty after deliberation, while 34.5 percent of the excludables voted not guilty after deliberation. Indeed, the study indicated that more death-qualified jurors than excludables found prosecution witnesses credible.¹²⁶

Based upon the data from the studies as well as "reason and common sense," the district court concluded that death-qualified jurors are substantially more prone to convict than non-death-qualified jurors.¹²⁷ McCree had succeeded in persuading the district court that death-qualification resulted in a jury more likely to convict and his conviction was overturned.¹²⁸ The Eighth Circuit affirmed the district court's holding.¹²⁹ The Supreme Court then granted certiorari.¹³⁰

2. Rejection of Studies

Unfortunately for McCree, the Supreme Court found "serious flaws" in the evidence presented in the form of the studies.¹³¹ Of the fifteen studies presented,¹³² the Court found that only six dealt with the effect of removal of *Witherspoon*-excludables on the guilt/innocence phase.¹³³ Three of those studies were also before the Court in *Witherspoon* and were summarily rejected, despite the fact that the studies had been completed following the 1968 decision.¹³⁴ The remaining three studies were deficient in as much as they did not concern "actual" and "sworn" jurors applying law to the facts of an "actual case involving the fate of an actual defendant."¹³⁵ Further, only one of the remaining studies attempted simulated death-qualification and none attempted to predict to what extent *Witherspoon*-excludables would have an impact on the guilt determination outcome of a full jury.¹³⁶ Finally, only one study properly excluded "nullifiers."¹³⁷ Thus, the Court was unwilling to impose a far reaching *per se* constitutional rule based upon the evidence offered.¹³⁸

125. *Id.* at 68 (Death-qualified jurors voted for guilt at a rate of 77.9 percent, while *Witherspoon*-excludables voted at a rate of 53.3 percent.).

126. *Id.* at 69-70.

127. *Grigsby v. Mabry*, 569 F. Supp. 1273, 1294 (E.D. Ark. 1983), *overruled by* *Lockhart v. McCree*, 476 U.S. 162 (1986).

128. *Id.* at 1324.

129. *Grigsby v. Mabry*, 758 F.2d 226 (8th Cir. 1985), *rev'd* *Lockhart v. McCree*, 474 U.S. 816 (1985).

130. *Lockhart v. McCree*, 474 U.S. 816 (1985).

131. *Id.* at 168.

132. This discussion addressed only five studies because they bore directly on the issue of death qualification and its effect on guilt proneness. It omitted studies that supported McCree's argument that death qualification resulted in a jury unrepresentative of a fair cross section of the community. For a full discussion of the remaining studies, see *Hovey v. Superior Court of Alameda County*, 616 P.2d 1301 (1980), *superseded by statute*, CAL. CIV. PROC. CODE § 223 (West 1990), *as recognized in*, *Covarrubias v. Superior Court*, 60 Cal. App. 4th 1168 (Ct. App. 1998).

133. *McCree*, 476 U.S. at 169 n.4.

134. The Wilson, Goldberg, and Zeisel studies were before the Court in *Witherspoon*. To the *McCree* Court, "if these studies were too 'tentative and fragmentary'...in 1968, the same [unchanged] studies...are still insufficient." *Id.* at 171. However, the studies were not "unchanged" and the district court noted that the Zeisel and Goldberg studies are now "thorough and complete." *Grigsby*, 569 F. Supp. at 1290.

135. *McCree*, 476 U.S. at 171 (emphasis added).

136. *Id.* at 171-72.

137. *Id.* at 172.

138. *Id.* at 172-73. In contrast, Justice Marshall found sufficient evidence that death qualification "predisposes the jurors that survive it to believe that the defendant is guilty." *Id.* at 188 (Marshall, J., dissenting).

Despite the rejection of McCree's studies, the Court assumed for purposes of the opinion that the studies indicated that death-qualification "produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries."¹³⁹ Even with this assumption, the Court held that death-qualification was constitutional and rejected McCree's arguments.¹⁴⁰

McCree argued that he did not have an impartial jury because exclusion of *Witherspoon*-excludables "slanted" the resulting jury in favor of guilt.¹⁴¹ To McCree, an impartial jury is one in which less conviction-prone jurors are not excluded while their prosecution-biased peers remain.¹⁴² However, the Court did not adopt McCree's definition of an impartial jury, stating that, "an impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts."¹⁴³ Holding otherwise, the Court noted, would result in a complicated "balancing" of jurors to ensure that an equal number of opposite members for a particular issue or viewpoint were represented.¹⁴⁴

In addition, the Court characterized McCree's reliance on *Witherspoon* as misplaced. In *Witherspoon*, the State of Illinois was found to have no legitimate interest in its broad rule of exclusion of jurors with scruples against the death penalty without evidence that such scruples would interfere with the juror's oath.¹⁴⁵ In McCree's case, in contrast, the Arkansas legislature provided for a single jury to decide all of the issues in the defendant's case.¹⁴⁶ The two questions of guilt and sentence "are necessarily interwoven" and the same jury must shoulder the burden of both.¹⁴⁷ Two juries would require two presentations of evidence which, adopting the reasoning of the Arkansas Supreme Court, "could not be consistently fair to the State and perhaps not even to the accused."¹⁴⁸ Neither the Arkansas court nor the United States Supreme Court elaborated on how two trials would result in unfairness to the state or defendant.¹⁴⁹ In sum, the Court found a sufficient interest for the state in its preference for a unitary jury in a bifurcated capital trial¹⁵⁰ and rejected defining jury impartiality in terms of a balance of individual juror

Instead of "haphazard jabs" at the individual methodologies and results of the studies, the body of evidence resulted in unanimity. *Id.* at 189. For a further discussion of the studies presented in *McCree*, see Rogers Elliot, *Social Science Data and the APA: The Lockhart Brief as a Case in Point*, 15 LAW & HUM. BEHAV. 59 (1991) and Phoebe C. Ellsworth, *To Tell What We Know or Wait for Godot?*, 15 LAW & HUM. BEHAV. 77 (1991).

139. *McCree*, 476 U.S. at 173.

140. *Id.*

141. *Id.* at 177.

142. *Id.*

143. *Id.* at 178 (emphasis omitted) (internal citation omitted).

144. *Id.* For example, a court might have to balance the number of Republicans with the number of Democrats on the jury. *Id.*

145. *Id.* at 180 (citing *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)).

146. ARK. CODE ANN. § 41-1301(3) (1977) (cited in *McCree*, 476 U.S. at 180).

147. *McCree*, 476 U.S. at 181 (citing *Rector v. Arkansas*, 659 S.W.2d 168, 173 (Ark. 1983)). The high court in Arkansas, in an argument against two consecutive trials in a capital case, wrote: "[A] second trial would be comparable to having the actors in a play, after the audience has left the theater, repeat their lines in a second performance for a few spectators in a nearly empty house." *Rector*, 659 S.W.2d at 173.

148. *McCree*, 476 U.S. at 181 (citing *Rector*, 659 S.W.2d at 173).

149. Inferentially, two trials may be "unfair" to the State in as much as the State would have to expend additional resources. As for unfairness to a defendant, the court briefly discusses the doctrine of "residual doubt." See *infra* note 205 and accompanying text.

150. *McCree*, 476 U.S. at 182.

viewpoints.¹⁵¹ Thus, the Court concluded that death-qualification of jurors in a capital trial did not violate the federal constitution.¹⁵²

This series of Supreme Court cases, beginning with *Witherspoon*, provide the framework for the current death-qualification of juries in capital cases. In a later case that expanded the Court's death-qualification jurisprudence, *Morgan v. Illinois*,¹⁵³ a defendant was given the ability to challenge "reverse *Witherspoon*-excludables."¹⁵⁴ Under *Morgan*, a defendant is constitutionally entitled to remove a juror for cause if that juror "will automatically vote for the death penalty irrespective of the facts [or the] law."¹⁵⁵ The state is allowed to challenge veniremen for cause if a particular person's opposition to the death penalty would substantially interfere with that juror's compliance with his or her oath.

III. NEW MEXICO'S ADOPTION OF THE FEDERAL DEATH-QUALIFICATION STANDARD

New Mexico courts have adopted the United State Supreme Court's approach to death-qualification of capital juries. However, a review of New Mexico jurisprudence on challenges to capital juries does not reveal an in-depth review of death-qualification and its relationship to guilt-prone juries. Indeed, New Mexico case law on the topic is little more than a verbatim adoption of federal jurisprudence. Thus, a full analysis of evidence of conviction-prone juries and the death-qualification process has yet to be conducted in a New Mexico appellate court.

In *State v. Trujillo*,¹⁵⁶ the New Mexico Supreme Court's first foray into modern death-qualification,¹⁵⁷ the defendant argued that the process of death-qualification violated his Sixth and Fourteenth Amendment rights to a representative and fair jury.¹⁵⁸ The trial court examined the studies discussed in *Hovey v. Superior Court of Alameda County*,¹⁵⁹ which Trujillo submitted. However, the court did not discuss nor review the studies because it thought it "unnecessary to reconsider [a] doctrine so clearly expressed by the United States Supreme Court."¹⁶⁰

151. *Id.* at 183.

152. *Id.* at 183-84. McCree also argued that exclusion of jurors who opposed the death penalty violated his right to a jury represented by a fair-cross-section of the community. *See id.* at 173-77. However, the Court rejected this argument because, in part, jurors opposed to the death penalty did not qualify as a "distinct" group for purposes of the cross-section requirement. *Id.*

153. 504 U.S. 719 (1992).

154. *Id.* at 729.

155. *Id.*

156. 99 N.M. 251, 657 P.2d 107 (1983).

157. All subsequent New Mexico cases that discuss the issue of death qualification rely upon *Trujillo*. No other case is cited in later opinions on the issue. In *State v. Trivitt*, 89 N.M. 162, 548 P.2d 442 (1976), the New Mexico Supreme Court adopted the *Witherspoon* standard for capital jurors: "nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against 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 165 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968)). The court overturned Trivitt's sentence on other grounds. *Id.* at 169.

158. *Trujillo*, 99 N.M. at 252, 657 P.2d at 108.

159. 616 P.2d 1301 (Cal. 1980).

160. *Trujillo*, 99 N.M. at 252, 657 P.2d at 108.

The following year, in *State v. Hutchinson*,¹⁶¹ the defendant appealed the trial court's death-qualification of potential jurors before the sentencing phase, rather than waiting until a determination of guilt.¹⁶² After dismissing the defendant's argument by referring to *Trujillo*'s recent holding, the New Mexico Supreme Court stated that the established system of capital voir dire was "the only reasonable manner...in which [it] can be conducted."¹⁶³ The court also ruled against a similar argument in *State v. Simonson*,¹⁶⁴ referring to *Hutchinson*'s holding.¹⁶⁵ There were practical reasons for refusing to implement new capital jury procedures. For example, the Uniform Jury Instructions would have to be modified to ask jurors if they could find a defendant guilty knowing that a different person could impose death based on that verdict.¹⁶⁶ In addition, the selection criteria for jurors would have to reflect this difference.¹⁶⁷ Thus, the defendant's argument was "emphatically and unequivocally" rejected.¹⁶⁸

Justice Stowers in *State v. Gilbert*¹⁶⁹ also declined to discuss studies that highlighted death-qualification and its relationship to conviction-prone juries.¹⁷⁰ Gilbert challenged his conviction and sentence of death, in part, because the death-qualification process results in a conviction-prone jury.¹⁷¹ However, a simple string-cite to both *Trujillo* and *Hutchinson* was enough for the court in dismissing the argument.¹⁷²

The later case of *State v. Sutphin*¹⁷³ marked New Mexico's adoption of *Witt*. In *Sutphin*, the New Mexico Supreme Court denied the defendant's challenge of the removal for cause of two jurors who first indicated that the death penalty would affect their decisions, and later indicated that the death penalty would not affect their decision.¹⁷⁴ The court found that the potential jurors were properly excused for cause under the *Witt* standard.¹⁷⁵ The case also recognized the state's strong interest in death-qualification.¹⁷⁶ *State v. Allen*¹⁷⁷ provided this pithy statement of reasoning: "For purposes of disqualifying an individual from serving on a jury in a death penalty case, it is the fact that the individual's vote will be automatic, rather than the particular reasons he or she gives for casting such an automatic vote."¹⁷⁸

161. 99 N.M. 616, 661 P.2d 1315 (1983).

162. *Id.* at 619, 661 P.2d at 1318.

163. *Id.* at 620, 661 P.2d at 1319.

164. 100 N.M. 297, 669 P.2d 1092 (1983).

165. *Id.* at 299-300, 669 P.2d at 1094-95.

166. *Id.* at 300, 669 P.2d at 1095.

167. *Id.*

168. *Id.*

169. 100 N.M. 392, 671 P.2d 640 (1983).

170. *Id.* at 396, 671 P.2d at 644.

171. *Id.*

172. *Id.*

173. 107 N.M. 126, 753 P.2d 1314 (1988).

174. *Id.* at 128-29, 753 P.2d at 1316-17.

175. *Id.*

176. *Id.* ("The [United States Supreme] Court also...recognized the state's legitimate interest in excluding those jurors whose opposition to capital punishment would not allow them to view the proceedings impartially, and who therefore might frustrate the administration of a state's death penalty scheme.") (citing *Wainwright v. Witt*, 469 U.S. 412, 416 (1989)).

177. 2000-NMSC-002, 994 P.2d 728.

178. *Id.* ¶ 86, 994 P.2d at 758.

In sum, from *Trujillo* to *Allen*, the New Mexico Supreme Court failed to fully analyze a constitutional challenge to the death-qualification process with respect to its effects on the impartiality of a jury and, without much analysis, the New Mexico courts adopted federal jury death-qualification reasoning and holdings. Seven years after the *Allen* decision was handed down, the court, in *State v. Fry*,¹⁷⁹ had another opportunity to reexamine death-qualification and its effect on the capital jury.

IV. *STATE V. FRY*

A. Introduction

The case of *State v. Fry* presented the Supreme Court of New Mexico with a challenge to the practice of death qualification. Fry's conviction and subsequent appeal to the court produced an opinion that reaffirmed the State's practice of empanelling a death-qualified jury.

B. Overview

Robert Fry was convicted of first-degree murder, kidnapping, attempted criminal sexual penetration, and tampering with evidence in connection with the murder of a Farmington woman.¹⁸⁰ After the jury specified a sentence of death, the trial court affirmed the sentence.¹⁸¹ Fry appealed his conviction and sentence,¹⁸² asserting, *inter alia*,¹⁸³ the exclusion of prospective jury members who opposed the death penalty for religious reasons violated his constitutional right to an impartial jury under the Sixth and Fourteenth Amendments to the Federal Constitution, and Article II, Section Fourteen¹⁸⁴ of the New Mexico Constitution.¹⁸⁵ He argued that the exclusion of jurors who opposed the death penalty on religious grounds during

179. 2006-NMSC-001, 126 P.3d 516.

180. *Id.* ¶ 1, 126 P.3d at 519.

181. *Id.*; see also NMSA 1978, § 31-18-14(A) (1993).

182. *Fry*, 2006-NMSC-001, ¶ 1, 126 P.3d at 519.

183. Fry also argued that the underlying felony of kidnapping could not be used as aggravating factor since the jury did not specify if it arrived at first degree murder through felony murder. NMSA 1978, § 31-20A-5 (1981). Justice Bosson criticized the majority for failing to correct this:

If the State used the same kidnapping, both to define first-degree felony murder and then to aggravate that same conviction to make it death eligible, how then has the State truly narrowed the death penalty to only those most heinous offenses? If the jury was not asked to find something significantly more about Defendant than what it had already found in convicting him, then we have a constitutional dilemma on our hands.

Fry, 2006-NMSC-001, ¶ 72, 126 P.3d at 544 (Bosson, J., dissenting in part).

184. Article II, Section Fourteen, of the New Mexico Constitution provides in relevant part:

In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.

N.M. CONST. art. II, § 14.

185. Fry also cited to the Treaty of Guadalupe Hidalgo to support his argument that civil rights should not be denied on account of religious beliefs. Brief of Appellant at 17, *State v. Fry*, 2006-NMSC-001, 126 P.3d 516 (citing Treaty of Peace, Friendship, Limits and Settlement, art. IX, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922, 930). The court quickly dismissed this argument as the treaty does not contain any protections of religion independent of the federal and state constitutions. *Fry*, 2006-NMSC-001, ¶ 7 n.2, 126 P.3d at 521 n.2.

the guilt/innocence phase of the trial results in a biased jury in favor of the prosecution that is more likely to convict.¹⁸⁶ Fry's brief referenced the effect death-qualification has on the guilt/innocence phase of a capital trial: "[T]he use of a 'death-qualified' venire results in a jury that is biased in favor of the prosecution, is more likely to convict and to give greater sentences."¹⁸⁷ For support, Fry briefly mentioned two sociological studies.¹⁸⁸

To accommodate the state's interest in a death-qualified jury for the penalty phase of a bifurcated trial, Fry suggested impaneling the jurors who would otherwise be excluded under *Witherspoon* during the guilt/innocence phase, and replacing those jurors with alternates if necessary for the subsequent guilt phase.¹⁸⁹ This procedure, Fry argued, is authorized under existing court rules on alternate jurors.¹⁹⁰ Thus, the court would impanel additional death-qualified jurors to account for the possible exclusion of non-qualified jurors during the penalty phase.¹⁹¹ The court, in a unanimous opinion,¹⁹² ultimately rejected Fry's arguments.¹⁹³

C. Court's Reasoning

The court began by citing *Wainwright v. Witt*¹⁹⁴ noting that a prospective juror is excluded if "the juror's views would *prevent* or *substantially* impair the performance of his duties as a juror in accordance with his instructions and his oath."¹⁹⁵ The court then acknowledged that this standard also applied to New Mexico capital jurors¹⁹⁶ and explained that a trial court's discretion in excluding a juror will not be disturbed "absent a clear abuse of discretion or a manifest error."¹⁹⁷

Having set out the legal standards surrounding death-qualification in New Mexico, the court then dismissed Fry's proposed solution under Rule 5-704(A) NMRA.¹⁹⁸ In so doing, the court determined that the rule was meant to effectuate

186. Brief of Appellant at 8–9, *State v. Fry*, 2006-NMSC-001, 126 P.3d 516. Fry also argued that the exclusion of individual jurors for cause because of religious opposition to the death penalty violated Article VII, Section Three of the New Mexico Constitution, "The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion..." N.M. CONST. art. VII, § 3.

187. Brief of Appellant at 9, *State v. Fry*, 2006-NMSC-001, 126 P.3d 516.

188. Cowan, *supra* note 93; William C. Thompson et al., *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 LAW & HUM. BEHAV. 95 (1984). Thompson's findings were part of the Ellsworth studies discussed in *McCree*. See *supra* notes 79, 91.

189. *Fry*, 2006-NMSC-001, ¶ 11, 126 P.3d at 522.

190. See Rule 5-704(A) NMRA (prior to Apr. 19, 2004 amendment).

191. *Fry*, 2006-NMSC-001, ¶ 11, 126 P.3d at 523.

192. Justice Bosson's concurrence related to the underlying felony and aggravating circumstances. See *supra* note 183.

193. *Fry*, 2006-NMSC-001, ¶ 11, 126 P.3d at 522.

194. 469 U.S. 412 (1985).

195. *Fry*, 2006-NMSC-001, ¶ 8, 126 P.3d at 521 (citing *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (internal quotations omitted) (emphasis added)).

196. *Fry*, 2006-NMSC-001, ¶ 9, 126 P.3d at 522 ("The trial court may properly exclude a juror for cause if the juror's views would substantially impair the performance of the juror's duties in accordance with the instructions and oath.") (citing *State v. Clark*, 1999-NMSC-035, ¶ 10, 990 P.2d 793, 801).

197. *Fry*, 2006-NMSC-001, ¶ 10, 126 P.3d at 522 (citing *State v. Supphin*, 107 N.M. 126, 130, 753 P.2d 1314, 1318 (1988)).

198. *Id.* ¶ 12, 126 P.3d at 523. The court also described how there would be no meaningful distinction between prospective jurors who would automatically vote against a death sentence and those who would automatically vote for a death sentence. *Id.* ¶ 15 n.3, 126 P.3d at 524 n.3.

the Capital Felony Sentencing Act¹⁹⁹ that requires “the sentencing proceeding [to be] conducted...before the original jury.”²⁰⁰ Thus, the court reasoned, the legislature intended for capital sentencing to involve the original jury, not the alternate jury Fry had suggested.²⁰¹ Any modifications to the single jury-system would “frustrate” the Legislature’s intent.²⁰² Additionally, reading Rule 5-704(A) NMRA requires consideration of Rule 5-605(B) NMRA 2005 which limits the number of alternate jurors available to a district judge to six.²⁰³ The court also looked to Rule 5-606(C) NMRA 2005 and determined that it does not allow for excusal of jurors for one part of a trial because of their inability to follow their oath.²⁰⁴

Interestingly, the court looked to *Rector v. State*²⁰⁵ in support of the underlying legislative purpose in a single jury system for capital trials.²⁰⁶ The court supplied three reasons in support of the policy of having a single jury in a capital trial. First, in what appears to be a conservation of judicial resources argument, both phases of the trial are “interwoven” and demand “consideration of similar evidence.”²⁰⁷ Secondly, the doctrine of residual doubt suggests that a single jury can benefit to a defendant of having a single jury.²⁰⁸ Finally, and echoing *McCree*, repetitive trials for two juries would not likely be fair to either party.²⁰⁹ This, of course, was not at issue in Fry’s case considering his proposed solution for additional alternate jurors to replace *Witherspoon*-excludables in the event of a sentencing phase.²¹⁰ Still, the court cited to the dissent in *Grigsby v. Mabry*,²¹¹ “jurors...cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty.”²¹²

The court shifted its analysis to Fry’s claim that a death-qualified jury is more prone to convict.²¹³ First, the court considered it significant that in addition to the seven excused veniremembers at issue, the trial court excused at least nineteen prospective jurors because they stated they would automatically impose a death sentence upon a first-degree murder conviction and one aggravating circumstance.²¹⁴ Thus, any disadvantage to Fry was “offset” by excluding automatic votes in favor of the death penalty.²¹⁵

199. NMSA 1978, § 31-20A-1(B) (1979).

200. *Id.*

201. Given the text of NMSA 1978, § 31-20A-1(B) (1979), a change to the unitary jury system currently in place may require legislative action. *See* discussion *infra*.

202. *Fry*, 2006-NMSC-1, ¶ 12, 126 P.3d at 523.

203. Rule 5-605(B) NMRA 2005 (“In a criminal case, the district court may direct that not more than six jurors, in addition to the regular jury, be called and impaneled to sit as alternate jurors.”).

204. *Fry*, 2006-NMSC-1, ¶ 14, 126 P.3d at 524.

205. 659 S.W.2d 168 (Ark. 1983).

206. *Fry*, 2006-NMSC-1, ¶ 13, 126 P.3d at 523. *Rector* relied upon the *McCree* opinion. *See* Part II.C *supra*.

207. *Fry*, 2006-NMSC-1, ¶ 13, 126 P.3d at 523 (citing *Rector v. State*, 659 S.W.2d 168, 173 (Ark. 1983)).

208. *See infra* note 269.

209. *Fry*, 2006-NMSC-1, ¶ 13, 126 P.3d at 523.

210. Fry proposed impaneling extra jurors during the guilt/innocence phase that would be used for purposes of death qualification if necessary. *See supra* notes 189–91 and accompanying text.

211. 758 F.2d 226, 243 (8th Cir. 1985), *rev’d sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986).

212. *Fry*, 2006-NMSC-1, ¶ 13, 126 P.3d at 524 (citing *Grigsby v. Mabry*, 758 F.2d 226, 247 (8th Cir. 1985)(Gibson, J. dissenting) *rev’d sub nom.* *Lockhart v. McCree*, 476 U.S. 162 (1986)).

213. *Fry*, 2006-NMSC-1, ¶¶ 15–16, 126 P.3d at 524–26.

214. *Id.* ¶ 15, 126 P.3d at 524.

215. *Id.* ¶ 15, 126 P.3d at 525.

According to the court, there is a very real concern about prospective jurors who, in their opposition to the death penalty, admitted an effect on "their ability to be fair in the determination of guilt or innocence."²¹⁶ In an act of speculation, the court reasoned, "our Legislature...might have concluded that such prospective jurors could not reasonably be expected to set aside their beliefs about the death penalty...knowing that the sentence they vehemently oppose could, based on their vote, be considered by other jurors."²¹⁷ Further, the parties did not fully explore this concern in the voir dire.²¹⁸ Indeed, in reiterating the court's reasoning in *State v. Simonson*,²¹⁹ the Uniform Jury Instructions would have to be changed to question jurors present only for the guilt/innocence phase whether they could follow their duty knowing that they would not play a role in the final determination of the sentence.²²⁰ Thus, the New Mexico Supreme Court rejected Fry's solution to the guilt tilting effect of jury death-qualification through additional alternate jurors. In sum, according to *Fry*, the trial court was within its discretion to excuse jurors for both phases of Fry's trial who indicate that their opposition to the death penalty would prohibit imposition of the death penalty in any circumstance.²²¹

The court in *Fry* did not focus upon the underlying argument that a death-qualified jury results in a jury that is more conviction prone. Instead, the New Mexico Supreme Court continued to follow federal death-qualification jurisprudence without a full consideration of the sociological data on the effect death-qualification has on the guilt/innocence phase of a capital trial.

V. CAPITAL JURY PROJECT

A. Introduction

Following the United States Supreme Court's decision in *McCree*,²²² the future of using sociological studies to support constitutional challenges to the death penalty was unclear. The *McCree* Court summarily dismissed a wide array of studies that supported a finding of basic violations of the Sixth and Fourteenth Amendments.²²³ If future studies were to have any weight with the Court, they would need to concern "actual jurors" in "actual trials" concerning "actual defendants."²²⁴ The Capital Jury Project, discussed *infra*, may be just the type of study the Court contemplated.

The Capital Jury Project (CJP) was an extensive research and data collection effort that sought to demonstrate the continued systemic problems inherent in the administration of the death penalty in the United States.²²⁵ Funded in part by the

216. *Id.* ¶ 16, 126 P.3d at 525.

217. *Id.*

218. *Id.*

219. See *supra* note 164 and accompanying text.

220. *Fry*, 2006-NMSC-1, ¶ 16, 126 P.3d at 526.

221. *Id.* ¶ 17, 126 P.3d at 526.

222. See Part II.C *supra*.

223. See *supra* notes 135–38 and accompanying text.

224. See *supra* note 135 and accompanying text.

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

National Science Foundation and beginning in 1990,²²⁶ the CJP has interviewed 1,201 jurors in 354 capital trials in fourteen states.²²⁷ Interviews were conducted with at least four randomly selected jurors from actual capital trials that resulted in either a death sentence or the state's alternative sentence.²²⁸ Interviews adhered to a protocol and took an average of 3.5 hours to complete.²²⁹ The interview asked a wide variety of questions that sought to chronicle the individual jurors' thoughts and decision-making process throughout the trial.²³⁰ Interviews were then transcribed and analyzed by graduate students and sociologists. Results from the project have yielded in-depth insight into the functioning of capital juries.²³¹ With data from *actual* jurors in *actual* trials concerning *actual* defendants, the CJP results are extremely probative and persuasive.

B. Findings

In a 1998 article, CJP researchers discussed the very real problem of premature jury sentencing decisions. Almost half of the jurors interviewed admitted reaching a decision on the defendant's sentence during the guilt/innocence phase of the trial.²³² On average, 49.2 percent of jurors prematurely decided on the defendant's sentence prior to the sentencing stage. Of jurors who decided upon a sentence prematurely, 30.3 percent chose death and 18.9 percent chose a life sentence.²³³ Only 2.6 percent of early death supporters felt "not too sure" thought about changing their minds, while over 70 percent were "absolutely convinced" of their decision.²³⁴

226. *Id.* at 1043 n.1.

227. William J. Bowers and Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003). Jurors from the following states were included: Alabama, California, Florida, Georgia, Indiana, Louisiana, Kentucky, Missouri, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, and Virginia. The diversity of jurisdictions involved in the study result in a collection of data that "can be reasonably applied in New Mexico...as the findings of the CJP are applicable nationally to a reasonable scientific certainty." Defendant Good's Proposed Findings of Fact and Conclusions of Law at 6, *State v. Good*, No. CR 2004-00522 (on file with the author). See Part VI *infra*.

228. Bowers, *supra* note 227, at 55.

229. *Id.*

230. Bowers, *supra* note 225, at 1082.

The interview instrument is a mixture of both structured questions with designated response options and open-ended questions that occasionally invite lengthy narrative descriptions of issues such as the crime and the jury's sentencing deliberations. It contains many explicit interviewing instructions. All questions and response options were read verbatim by the interviewer, and open-ended questions were typically accompanied by instructions about areas or issues to be probed. To convey both the general orientation of these interviews and to identify the types of problems and difficulties that some interviewers have experienced, a 15-page Interviewers' Guide was prepared that emphasizes the importance of encouraging respondents to take as much time as they need to relate everything they regard as relevant.

Id. at 1082 n.206.

231. For a survey of academic literature based on the CJP data, see <http://www.albany.edu/scj/CJPPubs.htm> (last visited Sept. 21, 2008) (list of publications based upon CJP data).

232. William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1488 (1998).

233. Bowers, *supra* note 227, at 56.

234. *Id.* at 57.

The majority of death supporters did not waiver from their premature decision throughout the remainder of the trial.²³⁵

This particular data demonstrates a clear failure of the bifurcated capital trial system. Jurors are explicitly instructed not to consider sentencing until after the guilt/innocence phase.²³⁶ Jurors must wait for the presentation of aggravating factors and mitigating circumstances in the sentencing stage before making up their minds.²³⁷ Indeed, deciding upon a sentence without proper administration of constitutionally-protected procedures is no better than the "arbitrary" decisions of life or death declared unconstitutional in *Furman*.²³⁸ The limitations on jury discretion in *Gregg* and its progeny that satisfied the concerns in *Furman* are ineffective with actual jurors as demonstrated by this finding of the CJP.

Another troubling finding of the CJP is the inclusion of jurors that, according to *McCree*, are prohibited from sitting on a capital jury. Namely, jurors who believe the death penalty is the only appropriate sentence for certain types of murder, by definition, fail to consider aggravating factors and mitigating circumstances as constitutionally required.²³⁹ These automatic death penalty (ADP) jurors present the opposite of *Witherspoon*-excludables.²⁴⁰ In one survey, 26 percent of jurors, based on the heinous nature of the crime, prematurely determined the defendant should die.²⁴¹ Indeed, ADP jurors vastly outnumber *Witherspoon*-excludables.²⁴²

The result is a system of capital juries that over-excludes *Witherspoon*-excludable jurors and under-excludes ADP jurors.²⁴³ The findings of the CJP support the conclusions of the sociological studies presented in *McCree*. Capital juries, because of the death-qualification process, are more prone to convict a defendant. It is this failure of the system to provide the defendant with a fair and impartial jury under federal and state constitutions that requires repair.²⁴⁴

235. *Id.* (stating that 59.5 percent of early death penalty supports "never wavered from their initial [decision]").

236. For example, New Mexico Criminal Uniform Jury Instructions describe the process as follows: "In [the innocence/guilt] phase the jury decides whether the state has proven the defendant guilty beyond a reasonable doubt. In making this decision the jury cannot consider the consequences of its verdict or any possible sentence." UJI 14-121 NMRA.

237. "[During sentencing] the jury may hear more evidence and will hear legal instructions and arguments of counsel. The jury *then* decides the penalty of life in prison or death." UJI 14-121 NMRA (emphasis added).

238. *Furman v. Georgia*, 408 U.S. 238 (1972).

239. See Part I *supra*.

240. Bowers, *supra* note 227, at 59.

241. See Sally Contanzo & Mark Costanzo, *Life or Death Decision: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151, 158 (1994). Specifically, seven jurors believed that all useful information had been gathered and that the sentencing phase was "unnecessary." *Id.*

242. Bowers, *supra* note 227, at 63 (Seventy-one point six percent of jurors believed death to be the only appropriate punishment for a defendant with a prior murder conviction, 57.1 percent for planned premeditated murder, 53.7 percent for murder with multiple victims, 48.9 percent for killing police/prison guard, 46.2 percent for murder by drug dealer, 24.2 percent for murder during another crime).

243. *Id.* at 65.

244. The CJP has made other well-founded and supported conclusions regarding the problems associated with death penalty juries. They include "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." *Id.* at 54. These failures are significant and constitute unconstitutional practices and might well require abolition of the death penalty as a permissible sentence. That, however, is beyond the scope of this discussion. Problems in the administration of the death penalty warrant serious

VI. STATE V. GOOD AND A SUCCESSFUL CHALLENGE TO NEW MEXICO CAPITAL PUNISHMENT

The findings of the Capital Jury Project have succeeded in persuading at least one New Mexico district court judge that the current capital punishment scheme is unconstitutional under both the United States and New Mexico Constitutions.²⁴⁵ In *State v. Good*, Daniel Good was charged with first-degree murder in connection with the death of an inmate at the Santa Fe County Jail.²⁴⁶ After the prosecution indicated that it would seek death, Good filed a "Motion to Dismiss the Death Penalty on the Ground that the Death Penalty Statute Is Unconstitutional Due to the Failure to Meet Minimum Constitutional Requirements Set Forth in *Furman v. Georgia* and its Progeny."²⁴⁷ The district court in Santa Fe held a hearing on the motion in March of 2007, during which Dr. William J. Bowers and Dr. Wanda D. Foglia²⁴⁸ testified.²⁴⁹ Judge Timothy Garcia found that the "premature determination of the death penalty during the evidentiary (guilt) phase of trial is...an arbitrary and capricious violation of the United States and New Mexico Constitution."²⁵⁰ Thus, Good's motion was granted in part to require a second jury to be empanelled during the sentencing phase of the trial, if necessary.²⁵¹ The prosecution subsequently withdrew the death penalty.²⁵²

Following the *Good* decision, the findings of the CJP are beginning to percolate through the New Mexico district courts. Recently, a Second Judicial District Court judge denied a related motion to dismiss the death penalty based upon the CJP findings, including the testimony of Drs. Bowers and Foglia.²⁵³ Now, with a direct

reconsideration of the practice, even without discussion of the underlying moral implications of state executions. *Id.* This article advocates for a tangible and workable solution to the fundamental flaw of guilt proneness of capital juries.

245. See Order Partially Granting and Partially Denying Motion to Dismiss, *State v. Good*, No. D-0101-CR-200400522 (on file with the author).

246. *Id.*

247. See Defendant Good's Proposed Findings of Fact and Conclusions of Law, *State v. Good*, No. CR 2004-00522 (on file with the author).

248. Both Drs. Bowers and Foglia have published findings based upon CJP data. See, e.g., William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931 (2006); William J. Bowers et al., *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing when the Defendant is Black and the Victim is White*, 53 DEPAUL L. REV. 1497 (2004); William J. Bowers & Benjamin D. Steiner, *Death by Default: An Empirical Demonstration of False and Forced Choices in Capital Sentencing*, 77 TEX. L. REV. 605 (1999); Wanda D. Foglia & William J. Bowers, *Shared Sentencing Responsibility: How Hybrid Statutes Exacerbate the Shortcomings of Capital Jury Decision-Making*, 42 CRIM. L. BULL. 663-686 (2006); Wanda D. Foglia, *They Know Not What They Do: Unguided and Misguided Decision-Making in Pennsylvania Capital Cases*, Justice Quarterly, vol. 20, no. 1 (2003).

249. See Order Partially Granting and Partially Denying Motion to Dismiss, *State v. Good*, No. D-0101-CR-200400522 (on file with the author).

250. *Id.*

251. *Id.* Defendant Good's motion was heard before the Honorable Judge Timothy Garcia. Judge Garcia was recently appointed to the New Mexico Court of Appeals. State Bar of the State of New Mexico, *N.M. Court of Appeals Judicial Appointment*, BAR BULLETIN, Nov. 17, 2008, at 4.

252. Joline Gutierrez Krueger, *New Mexico Courts Taking Death Penalty Into Their Own Hands*, ALBUQUERQUE TRIBUNE, Jan. 8, 2008, available at <http://www.abqtrib.com/news/2008/jan/08/new-mexico-courts-taking-death-penalty-their-own-h/>.

253. See Joline Gutierrez Krueger, *Death Penalty on Table; Astorga Attorneys Will Appeal Ruling*, ALBUQUERQUE J., Mar. 15, 2008, at A1.

appeal pending, the New Mexico Supreme Court will have the opportunity to directly address and analyze the constitutionality of the death penalty.²⁵⁴ If given its proper weight and consideration, the findings of the CJP support a finding that the death penalty in its current form in New Mexico is unconstitutional.

VII. POSSIBLE SOLUTION: SIMULTANEOUS CAPITAL JURIES.

A. *Introduction and Proposal*

The discussion *supra* demonstrates the failure of a bifurcated capital trial with a single jury in assuring the defendant a fair, impartial jury during the guilt/innocence phase. There is a workable solution that will remedy this deficiency: the impaneling of two juries during the guilt/innocence phase.

Logistically, the court would empanel the first jury (Verdict Jury) through typical voir dire. The Verdict Jury would be responsible for the guilt/innocence phase of the trial. The second jury (Sentencing Jury) would go through the death-qualification impaneling process as set forth in the New Mexico Uniform Jury Instructions.²⁵⁵ If the Verdict Jury returns a verdict of not guilty, then the Sentencing Jury would be dismissed as no longer necessary. If the Verdict Jury returns a guilty verdict, the death-qualified Sentencing Jury would decide the sentence.

The use of two simultaneous juries would remedy some of the problems associated with a single death-qualified jury in capital trials. Those jurors who may oppose the death penalty, known as *Witherspoon*-excludables, will remain to decide upon the defendant's guilt or innocence. The jury will not suffer from the constitutional deficiencies as demonstrated by the sociological studies.²⁵⁶ This way, a capital defendant is assured the same constitutional protections a non-capital defendant is afforded.²⁵⁷

The state's interest in having a death-qualified jury decide upon the sentence is preserved under the proposed solution. The Sentencing Jury, having been death-qualified, will decide upon the sentence of a convicted defendant. Additionally, the Sentencing Jury will have heard evidence during the guilt/innocence phase relevant to the sentencing decision. There will be no need to present the guilt/innocence phase evidence twice. And indeed, the court may exclude the Sentencing Jury at any point during the initial phase if evidence irrelevant to the sentencing determination is presented.

The practice of selecting simultaneous juries is best known in the context of issues involving co-defendants when certain evidence is admissible against only one or some of the defendants and not against others, known as a *Bruton* problem.²⁵⁸ In

254. See *Astorga v. New Mexico* (S. Ct. No. 31,046). On interlocutory appeal from the district court, *Astorga* argues, *inter alia*, "The Capital Jury Project and other independent studies demonstrate that capital juries are biased and predisposed against the defendant, which deprives the defendant of a fair trial, fair sentencing, and due process of law." Appellant's Brief in Chief, *Astorga v. New Mexico* (S. Ct. No. 31,046) at i.

255. See *UJI 14-121 NMRA*. Note that the language would have to be changed to reflect the two jury system.

256. See *Part II.C.1 supra*; see also *Part V supra*.

257. A non-capital defendant is not burdened with a death-qualified juror and is therefore afforded a jury that has not been tilted towards guilt.

258. See, e.g., *Bruton v. U.S.*, 391 U.S. 123 (1968). A *Bruton* dilemma arises when co-defendants are tried jointly, an inculcating statement is given by one defendant about both defendants prior to trial, and the statement is inadmissible as to the non-declarant defendant. *Id.*

such circumstances, the trial courts usually grant motions to sever the trials, but an alternative practice is to select dual juries.²⁵⁹ In general, each panel in a dual-jury trial is present only for evidence relevant and admissible to that jury's eventual decision. When the bulk of evidence presented in a trial is relevant for two juries making two separate determinations, it becomes more efficient to have a dual-jury procedure.

The New Mexico Court of Appeals reviewed such a process in *State v. Padilla*.²⁶⁰ *Padilla* presented the district court with a *Bruton* problem.²⁶¹ Given the district court's discretion under Rule 5-203(C) NMRA²⁶² and *Padilla*'s request to sever the proceedings, the district court ordered the selection of dual juries.²⁶³ While *Padilla* did not concern death-qualification, the court discussed the implementation of a two-jury trial. For example, there was "no confusion or impropriety" with dual juries.²⁶⁴ The jury was instructed on the procedure and was told not to speculate as to why there were two juries.²⁶⁵ Thus, a dual-jury procedure, admittedly for a different purpose, has been approved for use in the New Mexico district courts. In *Padilla*, of course, there were no questions of legislative intent or constraining rules of criminal procedure with which the court had to grapple.

B. Considerations

The most apparent complication with the use of a dual jury system for a single capital case involves the extra resources necessary for its implementation.²⁶⁶ First, the voir dire process would require an additional number of potential jurors. In addition to the number of jurors necessary for a death-qualified jury (Sentencing Jury), the court would need additional jurors for the Verdict Jury. However, it does not appear that the solution would require twice as many potential jurors as under existing capital trials. Rather, the Verdict Jury does not need to go through the demanding process of death-qualification, which dismisses more jurors due to the constitutional requirements discussed above. There would not be a need for two

259. Two juries were used in the infamous trial of Lyle and Erik Menendez precisely because of a *Bruton* problem. Alan Abrahamson, *Menendez Brothers' Murder Trial Opens*, LOS ANGELES TIMES, June 15, 1993, at B3; see also, *Hedlund v. Sheldon*, 840 P.2d 1008 (Ariz. 1992) (approving use of two juries); *State v. Beam*, 710 P.2d 526 (Idaho 1985) (same); *People v. Patterson*, 610 N.E.2d 16 (Ill. 1992) (same); *Scarborough v. State*, 437 A.2d 672 (Md. Ct. Spec. App. 1981) (same); *People v. Hana*, 524 N.W.2d 682, (Mich. 1994) (same); *Ewish v. State*, 871 P.2d 306 (Nev. 1994) (same).

260. 1998-NMCA-088, 964 P.2d 829.

261. *Id.* ¶¶ 7–10, 964 P.2d at 831–32 (*Padilla*'s co-defendant made statements inculcating to both himself and *Padilla*. After the co-defendant asserted a Fifth Amendment privilege against self-incrimination, the statements became admissible only against the co-defendant and not *Padilla*.)

262. Rule 5-203(C) NMRA provides the district court with instructions on joining or severing criminal cases.

263. *Padilla*, 1998-NMCA-088, ¶ 16, 964 P.2d at 833.

264. *Id.*

265. *Id.* (jurors explicitly told not to discuss the trial with members from the other jury).

266. New Mexico opponents to capital punishment cite to the enormous costs associated with implementation of the penalty. New Mexico spends approximately four million dollars on the death penalty each year and currently has two inmates on death row. See Joline Gutierrez Krueger, *New Mexico Courts Taking Death Penalty into Their Own Hands*, ALBUQUERQUE TRIBUNE, Jan. 8, 2008, available at <http://www.abqtrib.com/news/2008/jan/08/new-mexico-courts-taking-death-penalty-their-own-h/>. While there are additional costs associated with impaneling a second jury, they likely pale in comparison to the total amount spent during a capital trial. And indeed, before the state executes a defendant, spending additional resources to ensure a fair trial will increase the legitimacy of the system.

deliberation rooms, as both juries would never deliberate simultaneously.²⁶⁷ Of course, there would need to be two different rooms for the juries to go during break and recess periods.

Still, there are other considerations. Namely, the additional jury would require another seating arrangement. Indeed, the two juries would require separation and strict supervision. This is not beyond the ability of courts, however. The court can allot space in the galley for the second jury or provide temporary seating elsewhere. The practical considerations of managing two juries in a single trial are possible, if carefully controlled and planned.²⁶⁸

However, the policy of having the original jury that determines guilt or innocence also determine the sentence is persuasive. It is a practice that is engrained in the American capital punishment system of law. In addition, a dual-jury system could cripple the basic tactic of residual doubt used in capital defense.²⁶⁹ However, using the same jury for both phases in a bifurcated capital trial requires that the jury decides on the sentence only after consideration of aggravating factors and mitigating circumstances. But, as discussed above, substantial evidence exists that juries decide punishment prematurely and without such careful consideration.²⁷⁰ So, to the extent that the proposed Sentencing Jury prematurely decides on punishment, it does not affect the improvement in the guilt/innocence phase. As for the noble idea that, "jurors...cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty,"²⁷¹ the CJP suggests that jurors fail to accept responsibility for deciding upon the sentence anyway.²⁷² So, if the original jurors decide prematurely and do not ultimately take responsibility for their decision, they are not fulfilling their prescribed role.

There is little reason to maintain a dysfunctional system of single-jury bifurcated capital trials.

C. Implementation

The Court in *Fry* rejected a similar proposal, in part, because of the idea that a jury that decides guilt/innocence, should also decide upon the punishment. Indeed, *Fry*'s reasoning includes discussion on the intent of the legislature to have the original jury decide sentencing. Thus, legislative action would probably be

267. During the guilt/innocence phase, only the Verdict Jury needs to deliberate.

268. *State v. Lambright*, 673 P.2d 1 (Ariz. 1983), *rev'd*, *Lambright v. Stewart*, 220 F.3d 1022 (9th Cir. 2000). In discussing the logistical accomplishments of a dual jury trial, "[t]he two juries were kept physically separated, and were carefully instructed not to speak with persons on the other jury....[When both] juries were present, one sat in the jury box and the other sat in designated rows of chairs on the other side of the courtroom." *Id.*

269. Residual doubt may exist in a jury that nevertheless voted to convict, but may be hesitant to sentence the defendant to death. Thus, a unitary capital jury may decide upon a guilty verdict, but fail to impose death during the sentencing phase. Of course, under the proposed solution, a defendant would be unable to have residual doubt within the Verdict Jury, which does not decide upon sentence. If the defendant's strategy relies upon residual doubt, he could waive the dual-jury system and request a single jury.

270. See Part II.C.1 *supra*; see also Part V *supra*.

271. *State v. Fry*, 2006-NMSC-001, ¶ 13, 126 P.3d 516, 524 (citing *Grigsby v. Mabry*, 758 F.2d 226, 247 (8th Cir. 1985) (Gibson, J., dissenting)).

272. *Bowers*, *supra* note 227, at 74–75 (49.2 percent of jurors in the CJP considered the defendant as the party responsible for the sentence, while only 5.6 percent of the jurors identified themselves as the most responsible party for the ultimate sentencing decision.).

necessary before this recommended change can be adopted as part of New Mexico's capital jury selection process.²⁷³ Amended Uniform Jury Instructions would then follow.²⁷⁴ Of course, the New Mexico Supreme Court could reconsider²⁷⁵ death-qualification in light of the CJP, and determine the process unconstitutional.²⁷⁶

VIII. CONCLUSION

There are serious systemic flaws in the implementation of capital punishment. This note has discussed the prejudicial effect of death-qualification. Without a change, accused defendants will continue to be subjected to partial and unfair juries. By impaneling two separate juries, New Mexico can begin to address some of the inherent defects in capital punishment. New Mexico need not strictly adhere to federal court precedent on the issue. Indeed, New Mexico should take the lead and ensure fair and impartial capital trials. Implementing true bifurcation is but one small step towards that goal.

273. See Appendix. The Capital Felony Sentencing Statute would require amendments. Some amendments would include the insertion of a new section.

274. Modified Uniform Jury Instructions include instructions to both the verdict and sentencing juries. The Verdict Jury would be instructed to decide upon the question of guilt/innocence without consideration of a possible sentence. The Verdict Jury should be told the purpose of the Sentencing Jury. Voir dire for these jurors should be limited to identifying and excluding "nullifiers" (those jurors whose opposition to the death penalty would affect their guilt/innocence determination). See *supra* notes 106-107 and accompanying text. The Sentencing Jury should be impaneled prior to the verdict phase. These jurors should be told their role in the process and not to consider punishment until the Verdict Jury returns a guilty verdict.

275. Or, the New Mexico Supreme Court could fully consider the *McCree* studies that have not undergone examination. See *supra* notes 85-170 and accompanying text.

276. It is well within the ability of the New Mexico Supreme Court to declare the Capital Felony Sentencing Act unconstitutional as the court is free to provide more protection to defendants under the State constitution than the United States Supreme Court has provided under the federal constitution. See, e.g., *State v. Gutierrez*, 116 N.M. 431, 863 P.2d 1052 (1993).

APPENDIX

The following section would need insertion:

§ 31-20A-1A. Capital felony trials; procedure for verdict and sentencing juries:

A. The court shall impanel two separate juries for capital felony trials, except as provided under § 31-20A-1A(D). Both the verdict and sentencing juries shall be present during the verdict phase of the bifurcated capital felony trial. If there are proceedings during the verdict phase that do not bear upon the sentencing decision of the sentencing jury, or if there is good cause to exclude the sentencing jury during the verdict phase, the sentencing jury shall be excused.

B. The verdict jury shall decide upon the verdict of the defendant without consideration of the punishment.

C. If the verdict jury returns a verdict that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the sentencing jury shall decide upon the proper sentence in accordance with § 31-20A-1.

D. A defendant charged with a capital felony may waive his right to a two jury capital trial.

In addition, the following sections would require amendments:

§ 31-20A-1. Capital felony; sentencing procedure: A. At the conclusion of all capital felony cases heard by the **verdict jury, and after proper charge from the court and argument of counsel, the **verdict** jury shall retire to consider a verdict of guilty or not guilty without any consideration of punishment...**

B. Upon a verdict by the **verdict jury or judge that the defendant is guilty of a capital felony, or upon a plea of guilty to a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized herein. In a jury trial, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge before the **sentencing** jury. In a nonjury trial the sentencing proceeding shall be conducted as soon as practicable by the original trial judge. In the case of a plea of guilty to a capital felony, the sentencing proceeding shall be conducted as soon as practicable by the original trial judge or by a **sentencing** jury upon demand of a party.**

§ 31-20A-2. Determination of sentence:

B. After weighing the aggravating circumstances and the mitigating circumstances, weighing them against each other, and considering both the defendant and the crime, the **sentencing jury or judge shall determine whether the defendant should be sentenced to death or life imprisonment.**

§ 31-20A-2.1. Prohibition against capital punishment of mentally retarded persons; presentencing hearing:

C. Upon motion of the defense requesting a ruling that the penalty of death be precluded under this section, the court shall hold a hearing, prior to conducting the sentencing proceeding under Section 31-20A-3 NMSA 1978. If the court finds, by a preponderance of the evidence, that the defendant is mentally retarded, it shall sentence the defendant to life imprisonment. A ruling by the

court that evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing proceeding or to argue that that evidence should be given mitigating significance. If the sentencing proceeding is conducted before ~~a~~ **the sentencing jury**, the **sentencing jury** shall not be informed of any ruling denying a defendant's motion under this section.

§ 31-20A-3. Court sentencing:

In a jury sentencing proceeding in which the **sentencing jury** unanimously finds beyond a reasonable doubt and specifies at least one of the aggravating circumstances enumerated in Section 6 of this act, and unanimously specifies the sentence of death pursuant to Section 3 of this act, the court shall sentence the defendant to death. Where a sentence of death is not unanimously specified, or the **sentencing jury** does not make the required finding, or the **sentencing jury** is unable to reach a unanimous verdict, the court shall sentence the defendant to life imprisonment. In a nonjury sentencing proceeding and in cases involving a plea of guilty, where no **sentencing jury** has been demanded, the judge shall determine and impose the sentence, but he shall not impose the sentence of death except upon a finding beyond a reasonable doubt and specification of at least one of the aggravating circumstances enumerated in Section 6 of this act.

§ 31-20A-4. Review of judgment and sentence:

E. In cases of remand for a new sentencing proceeding, all exhibits and a transcript of all testimony and other evidence admitted in the prior trial and sentencing proceeding shall be admissible in the new sentencing proceeding, and:

(1) if the sentencing proceeding was before a **sentencing jury**, a new **sentencing jury** shall be impaneled for the new sentencing proceeding;

§ 31-20A-5. Aggravating circumstances:

The aggravating circumstances to be considered by the sentencing court or **sentencing jury** pursuant to the provisions of Section 31-20A-2 NMSA 1978 are limited to the following...

§ 31-20A-6. Mitigating circumstances:

The mitigating circumstances to be considered by the sentencing court or the **sentencing jury** pursuant to the provisions of Section 3 of this act shall include but not be limited to the following...

§ 31-18-14.1. Capital felony case heard by ~~a jury~~ **two juries**; sentencing hearing; explanation by court to the ~~jury~~ **juries**:

At the beginning of a sentencing hearing for a capital felony case, subsequent to a verdict by the **verdict jury** that the defendant is guilty of a capital felony, the court shall explain to the **sentencing jury** that a sentence of life imprisonment means that the defendant shall serve thirty years of his sentence before he becomes eligible for a parole hearing, as provided in Section 31-21-10 NMSA 1978.