

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
 v.) Crim. No. 13-10200-GAO
)
 DZHOKHAR TSARNAEV)

**DEFENDANT’S MEMORANDUM OF LAW
RESPECTING VOIR DIRE EXAMINATION
OF PROSPECTIVE JURORS ON DEATH-PENALTY VIEWS**

Defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully files this Memorandum of Law regarding legal issues that are likely to arise as prospective jurors are questioned regarding the death penalty in this case, and to provide the legal authority that governs their resolution. These issues are:

1. The legal standards that *limit* the power to exclude jurors for cause because of *opposition* to the death penalty, *Wainwright v. Witt* (1985), *Uttecht v. Brown*, 551 U.S. 1 (2007).
2. The legal standards that *require* exclusion of all jurors whose *support* for the death penalty in some or all cases is so categorical as to impair their ability to fairly consider mitigating factors or vote for a sentence of less than death in the case to be tried. *Ross v. Oklahoma*, 487 U.S. 81 (1988); *Morgan v. Illinois*, 504 U.S. 719 (1993).
3. Why the complexities of juror death- and life-qualification justify (a) special instructions to acquaint jurors with the capital sentencing process, and (b) a reasonable opportunity for attorney-conducted voir dire questioning.

1. The legal standards that restrict disqualification of jurors based on death penalty views: *Witherspoon* and *Witt*.

Jury selection in capital cases has long been distinguished by this peculiar feature: each potential juror’s eligibility to serve in such cases is conditioned on his or her ability to participate in the morally and religiously controversial practice of capital pun-

ishment. As Americans' opposition to the death penalty grew in the decades following World War II,¹ the once-common practice of excluding all jurors who entertained doubts about capital punishment collided with the constitutional requirement of a representative jury. The Supreme Court first grappled with this problem in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), a case decided just as opposition to the death penalty appeared to have gained plurality support in the United States. *Id.* at 520, n. 16. In *Witherspoon*, the Court squarely addressed the implications of diminishing public support for capital punishment:

A jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment —of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.

391 U.S. at 519-520 (footnotes omitted).

Witherspoon resolved this conundrum by holding that the exclusion of prospective jurors from service solely because they held reservations or scruples regarding capital punishment violated capital defendants' due process right not to be placed on trial before a "tribunal organized to return a verdict of death." *Id.*, 391 U.S. at 521.

Although *Wainwright v. Witt*, 469 U.S. 412 (1985), would later modify *Witherspoon's*

¹ See, e.g., Gallup, "Americans' Support for Death Penalty Stable," (Oct. 23, 2014) <http://www.gallup.com/poll/178790/americans-support-death-penalty-stable.aspx?years.aspx>

subsidiary holding that cause challenges could be granted only where jurors made it “unmistakably clear” 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,” *Id.* at 523 n.21 (emphasis added), *Witherspoon*’s basic principle remains good law today:

A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

391 U.S. at 522. And the Supreme Court has repeatedly held that when even a single juror has been excluded in violation of this rule, harmless error review is inapplicable, and the death penalty must be vacated. *Davis v. Georgia*, 429 U. S. 122 (1976) (per curiam), *Gray v. Mississippi*, 481 US 648 (1987).

In *Wainwright v. Witt*, the Court reformulated *Witherspoon*’s constitutional rule to forbid courts from disqualifying any juror on the basis of opposition to the death penalty unless that opposition was so categorical that it “would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *Id.* at 421; *see also United States v. Chanthadara*, 230 F.3d 1237, 1268-1272 (10th Cir. 2000) (reversing, on *Witherspoon* grounds, a sentence of death imposed pursuant to the Federal Death Penalty Act). And since *Witt*, the Court has consistently held that even strong opposition to capital punishment does not necessarily disqualify a prospective juror from serving on a capital case.

It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

Lockhart v. McCree, 476 U.S. 162, 176 (1986). Reaffirming this principle in *Uttecht v. Brown*, 551 U.S. 1 (2007), the Court summarized its 40 years of precedents as establishing “at least four principles of relevance here.”

First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U.S., at 521. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U.S. at 416. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.

Id., at 424-434. And restating the 38-year-old *Witherspoon* rule, the Court concluded, “Capital defendants have the right to be sentenced by an impartial jury. The State may not infringe this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties.” *Id.*, at 22.

Jury selection in this case will present the *Witherspoon* problem in an especially stark form. It will be tried in a jurisdiction that has long rejected the death penalty as a matter of state law, and where a very large segment of the population opposes it—whether on grounds of morality, religious faith, public policy, or some combination. The

more the jury pool is culled of jurors who oppose the death penalty, the risk increases that those who remain will be unable to express “the conscience of the community on the ultimate question of life or death.” *Witherspoon*, 391 U.S. at 519. It is thus especially important to ensure that the Court excludes only those jurors whose opposition to the death penalty is so categorical as to prevent or substantially impair their ability to apply the highly discretionary sentencing scheme created by the Federal Death Penalty Act.

This has practical implications for the conduct of voir dire examination. First, jurors who oppose the death penalty must be clearly informed—and must actually understand—that serving on a capital case never requires any juror to *impose* the death penalty, but only to fairly consider it. Such jurors must also understand that the law entrusts all decisions regarding mitigating factors and whether to impose the death penalty to the unfettered discretion of each individual juror.² In other words,

²With respect to the power of a single juror to find and give effect to mitigating factors, the Federal Death Penalty Act codifies the Eighth Amendment holding of *Mills v. Maryland*, 486 U.S. 367 (1988) as follows:

A finding with respect to a mitigating factor may be made by 1 or more members of the jury, and any member of the jury who finds the existence of a mitigating factor may consider such factor established for purposes of this section regardless of the number of jurors who concur that the factor has been established.

18 U.S.C. § 3593(d). Each juror’s virtually unlimited discretion to reject the death penalty is embodied in the Federal Death Penalty Act’s requirement that death not be imposed unless the entire jury unanimously agrees that “the aggravating factor or factors found to exist *sufficiently* outweigh all the mitigating factor or factors found to exist to justify a

each juror the question, “Could you ever vote for the death penalty?” assumes a situation in which that individual juror has first found the death penalty to be the appropriate sentence; no juror is ever required or expected to impose a death sentence with which he or she does not personally agree.

All of this is counter-intuitive. Many members of the jury venire will arrive at court assuming that the law prescribes a particular punishment for each crime, and thus that to be able to apply the death penalty sentencing scheme, jurors must be prepared to impose a death sentence even if they personally believe it to be unwarranted. In short, jurors are unlikely to appreciate the highly discretionary sentencing scheme created by the Federal Death Penalty Act unless it is carefully explained in understandable terms that non-lawyers can grasp and apply. And unless jurors have such an appreciation, no reliable determination can ever be made that any given juror’s opposition to the death penalty rises to the level of a substantial impairment sufficient to justify a challenge for cause.

Moreover, after being questioned about whether they can impartially decide the defendant’s guilt or innocence, jurors must be made aware that “impartiality” regarding the death penalty accommodates a much wider range of attitudes than is true with respect to guilt or innocence. After all, as the Supreme has recognized, “it is entirely possible [that] even a juror who believes that capital punishment should never

sentence of death” 18 U.S.C. § 3593(e) (emphasis added). The statute nowhere defines “sufficiently,” and so entrusts each juror’s ultimate sentencing decision to the exercise of his or her own factual and moral judgment.

be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.” *Witherspoon*, 391 U.S. at 514 n. 7. Thus the fact that a juror may feel strongly inclined against imposing the death penalty does not justify a finding that he or she is “substantially impaired” within the meaning of *Witt*, and disqualifying even one such juror for cause on that basis would be reversible error.

As noted above, the challenge here similar to the one that the Supreme Court confronted nearly five decades ago in *Witherspoon*. Given that death penalty may once again enjoy the support of only a “dwindling minority” of the population from which the Court must draw a jury in this case, great care will have to be taken to avoid disqualifying broad swathes of the population of eastern Massachusetts simply on the basis of general opposition to capital punishment. Unless this is done, the Court runs the risk of empanelling a jury that cannot speak for the people of this district on the question of life or death, and of violating the defendant’s due process right not to be condemned by “a tribunal organized to return a verdict of death.” *Witherspoon*, at 521.

2. The legal standards that *require* disqualification of jurors whose ability to consider mitigation or vote against the death penalty is substantially impaired: *Morgan v. Illinois*.

At the other end of the attitudinal spectrum, the difficulty of reliably identifying “substantial impairments” in prospective jurors’ ability to vote for a *life* sentence,

Morgan v. Illinois, 504 U.S. 719 (1993), is even more daunting. In *Morgan*, the Supreme Court held that any juror who would automatically impose the death penalty upon conviction of the capital offense charged must be disqualified for cause, and that capital defendants are constitutionally entitled to examine prospective jurors on voir dire with enough specificity to identify and challenge any juror holding such views. To be sure, there will be occasional easy cases: “eye-for-an-eye” jurors who simply declare that they would automatically impose the death penalty in every murder case, without regard to any mitigating evidence that might be adduced. But such jurors are but a small subset of the much larger group whose attitudes in favor of capital punishment would “substantially impair the performance of [their] duties as . . . juror[s] in accordance with [their] instructions and [their] oath.” *Uttecht v. Brown*, 551 at 7 (quoting Witt, 469 U.S., at 424 (internal quotation marks omitted)). This is so because “life-qualification” under *Morgan* requires that each juror have the capacity to weigh mitigating factors and to consider a sentence other than death *in the case to be tried*. And that’s where much potential for confusion lies.

The Supreme Court has long held that a mandatory death penalty scheme—one mandating a death sentence without allowing for consideration of any reasons why death should not be imposed—violates the Eighth Amendment no matter how egregious or narrowly-defined the capital crime. *Sumner v. Shuman*, 483 U.S. 66 (1987) (invalidating mandatory death-sentencing statute applicable only to prison inmates who commit murder while serving life sentences). Even in the most highly aggra-

vated murder cases, then, every constitutional death-sentencing scheme—including the Federal Death Penalty Act—requires each juror to weigh all relevant mitigating factors, and to fairly consider imposition of a sentence less than death.

In this case, the defendant is charged with multiple counts of use of a weapon of mass destruction resulting in death, 18 U.S.C. § 2332a(a)(2), bombing of a place of public use resulting in death (18 U.S.C. § 2332f(a)(1) & (c), malicious destruction of property resulting in personal injury and death (18 U.S.C. § 844(i), and firearms violations resulting in death. 18 U.S.C. §924(j). It is these offenses, not simply “murder,” that the government has elected to charge. Upon conviction for these crimes, therefore, he is entitled not only to twelve jurors who could consider imposing life imprisonment rather than the death penalty for *some* kinds of murder, but for *these* kinds. And that is the relevant question that *Morgan v. Illinois* entitles him to put to each prospective juror.

Nor is that all. For the statutory offenses alleged in the indictment are not, standing alone, capital crimes. Rather, those statutory crimes do not become death-eligible unless and until the jury finds both intentionality and at least one statutory aggravating factor. For this reason, the mental state gateway factors and statutory aggravating factors set forth in 18 U.S.C. §§ 3591(a)(2) and 3592(b)—factors that the government has charged here both by way of special findings in the indictment, DE 58, ¶¶ 155-156, and in the Notice of Intent to Seek the Death Penalty, DE 167, pp. 2-5,—are the “functional equivalent” of elements of a greater offense than “‘murder’ *simpliciter*.”

Sattazahn v. Pennsylvania, 537 U.S. 101, 112 (2003) (plurality opinion); see also *Ring v. Arizona*, 536 U.S. 584, 592-93 (2002) (holding that “[b]ecause Arizona’s enumerated aggravating factors operate as “the functional equivalent of an element of a greater offense, [*Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (2000)], the Sixth Amendment requires that they be found by a jury.”).

This means that the capital crimes charged in this case include, for example, that the defendant

1. used a weapon of mass destruction that resulting in death, 18 U.S.C. § 2332a(a)(2)
2. that in doing so he intentionally killed the victim(s), 18 U.S.C. §§ 3591(a)(2)(A),
3. and that
 - a. The defendant committed the offense in an especially heinous, cruel, or depraved manner, 18 U.S.C. § 3592(c)(6), or
 - b. the killings were committed after substantial planning and premeditation to cause the death of a person or commit an act of terrorism, 18 U.S.C. § 3592(c)(9), or
 - c. the defendant intentionally killed or attempted to kill more than one person in a single criminal episode, 18 U.S.C. § 3592(c)(16), or
 - d. one of the victims was particularly vulnerable due to youth. 18 U.S.C. § 3592(c)(11).

Both the Federal Death Penalty Act and the jurors’ oaths will require them to consider mitigating factors, and to fairly weigh *both* possible punishments of death and life imprisonment, only after they have found these offenses and statutory intent and aggravat-

ing factors to have been proven beyond a reasonable doubt. It will therefore be essential to frame “life-qualifying” questions to each prospective juror in terms of the capital crimes alleged by the government in this case. Failing to do so risks qualifying jurors whose ability to consider a life sentence in the case before them will be substantially impaired by their belief that the death penalty should be imposed in every case—without regard to mitigating factors— involving terrorist offenses, or intentional killings, or premeditated killings, or killings of children, or other specific types of statutorily death-eligible murders.

Abstract or general questions risk eliciting answers that obscure disqualifying bias rather than expose it. For example, an affirmative answer to the question, “Could you weigh all of the aggravating and mitigating evidence and return either a death sentence or a sentence of life imprisonment, depending on the evidence presented?” could mean easily that the juror could vote against the death penalty so long as:

1. the evidence did not conclusively establish guilt;
2. the killing was accidental or committed in sudden heat and passion;
3. the killing was not intentional;
4. the defendant was insane;
5. the defendant acted in self-defense or was otherwise provoked;
6. the victim was engaged in criminal conduct at the time of his or her death;
7. only a single victim was killed;
8. the victim was not a child; or

9. the crime did not involve terrorism.

This list could be extended indefinitely. The point is simply that a “yes” response to such a question is virtually meaningless unless the juror first understands that the question presupposes the defendant’s guilt of both the charged offenses and the statutory aggravating factors *that the government has actually alleged in the case to be tried*. Otherwise a seemingly qualifying response is likely to mean only that the juror might not favor the death penalty in cases where it is legally unavailable in any event, or in categories of cases far removed from the one about to be tried.

Such juror confusion is a common and recurring problem. In a thorough discussion of the propriety of “case-specific” voir dire questions as part of the death- and life-qualification process in capital cases, *United States v. Johnson*, 366 F.Supp.2d 822 (N.D. Iowa 2005), Judge Mark Bennett wrote:

[T]his court’s own experience with jury selection in the . . . federal death-penalty case against Dustin Honken, *United States v. Honken*, No. CR 01–3047–MWB (N.D. Iowa) . . . suggests the insufficiency of purely “abstract” questions to determine the ability of jurors to perform their duties. In *Honken*, there were numerous examples of the phenomenon of jurors who agreed that they could “fairly consider” both life and death sentences in the abstract, but quickly acknowledged that they could only consider one penalty in a case involving certain facts. For example, in *Honken*, several potential jurors readily agreed that they could “fairly consider” both life and death sentences in the case if they found the defendant guilty. However, several of those same potential jurors stated that they were either doubtful that they could consider, or stated expressly that they could not consider, a life sentence if they found the defendant guilty of the murder of children. These responses highlight the ineffectiveness of purely “abstract” questions to probe, in these cases, whether or not a juror would be able to fulfill his or her duty to give fair consideration to both life and death sentences no matter what the facts are. See *Morgan*, 504 U.S. at 728.

Id. at 847-48. *See also, United States v. Fell*, 372 F.Supp.2d 766 (D. Vt. 2005) (explaining why *Morgan* requires questioning concerning jurors' ability to consider both life and death as possible punishments in the context of the actual case before them).

Attached as Exhibit A to this memorandum is a brief excerpt from the transcript of jury selection in a Virginia federal capital case, *United States v. Beckford et al.*, No. 3:96 CR 66 (E.D.Va. 1997), that exemplifies the problem that Judge Bennett described in *Johnson*, and shows just one of the many ways that a juror's death penalty views can "prevent or substantially impair" her ability to serve, and yet pass undetected. In this example, the juror responded affirmatively to both the trial judge's and prosecutor's questions about to her ability and willingness to consider aggravating and mitigating factors and her ability to follow the court's instructions, stating, "I think I would have to consider them, yes." She further stated that she would not impose death automatically, but "would consider both options, both sides," and could be "a fair and impartial juror." *Beckford*, Tr. 1273-1276. But she responded very differently when defense counsel listed for her the elements of the specific capital crime charged in the indictment:

BY [Defense Counsel]: If the jury found one of the defendants, one or more of them, guilty of the following crime: A knowing, intentional, and unlawful murder in furtherance of a conspiracy to distribute crack cocaine . . . would you then, regardless of the aggravating or mitigating circumstances, believe that the death penalty was the only appropriate punishment for that crime?

VENIREMAN: I think I would have to vote for the death penalty if it was a knowing crime, based on my religious beliefs, yes."

Q. Okay. That is based on religious beliefs?

VENIREMAN: Right.

Q. So that the crime that is at issue here you would believe that that would be the only appropriate punishment, am I correct?

VENIREMAN: Right.

* * *

BY [counsel for the government]: Ma'am, I think - - I want to understand, because I think your answer to my question and answer - -

VENIREMAN: He explained it to me I think a little better. He read the whole thing there, and I understood more about what the question was when he read it. I am having a little problem with aggravating and mitigating here, so I what he said, the whole crime, I can answer my question from that,

Q. That is fine

At this juncture, the prosecutor described aggravating and mitigating factors, and told the juror that he had earlier described the crime to her as defense counsel had, “that is, of an intentional, knowingly, unlawfully killing someone in furtherance of a drug punishment (sic). . . . Tr. 1279. But the transcript actually shows that he had done no such thing. Rather, he had simply described the crime as “murder in furtherance of the drug trafficking offense.” Tr. 1276. The prosecutor presumably knew the mental elements implied by his use of “murder,” but it was clearly a mistake to assume this juror did, or that any other juror would. And once this juror was clearly informed that she was being asked about the appropriate range of punishment *for intentional murder*, she restated her views in terms that persuaded even government counsel of her inability to serve:

VENIREMAN: Based on my religious beliefs, if it was a knowing crime, committed by someone who knew what they were doing, I would vote for the death penalty.

* * *

BY [counsel for the government]: Move to strike. Tr. 1277-1279.

The findings of the Capital Jury Project (CJP) show that the type of juror misunderstanding that surfaced in *Johnson* and *Beckford* is not rare but pervasive, and that it often goes undetected. The CJP is a federally-funded research project involving in-depth interviews with hundreds of jurors who actually served on capital juries. *See generally*, Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L. J. 1233 (1995). CJP interviews with capital-case jurors in 11 states revealed that very large numbers of such jurors had been found qualified to serve—and actually rendered life-or-death decisions—despite views which should have caused their disqualification under *Morgan*. William J. Bowers, Marla Sandys & Benjamin Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Attitudes and Premature Decision-Making*, 83 CORNELL L. REV. 1476, 1504 (1998). For example, 912 former capital trial jurors were asked whether the death penalty was “the only acceptable punishment” for seven types of murder, as well as two other serious violent crimes.

Astonishingly, more than half of the jurors said that they believed that death was the only acceptable punishment for three of the seven kinds of murder: repeat murder, premeditated murder, and multiple murder. Nearly half of the jurors identified death as the only acceptable punishment for the killing of either a police officer or prison guard or for a murder by a drug dealer. Almost a quarter of the jurors said that death was the only acceptable punishment for three of the remaining four crimes-- including rape without murder, for which the imposition of the death penalty would be unconstitutional. Only for a planned murder in which the victim survives did

decidedly fewer than one in four jurors (15.7%) say that death was the only acceptable punishment.

Id., at 504-505 (footnotes omitted).

It is also worth noting that these large cohorts of jurors who believed only death to be an acceptable punishment were not “balanced out” by jurors at the other end of the spectrum—that is, by jurors who were allowed to serve despite believing that *life imprisonment* was the only acceptable punishment. Rather, the CJP researchers found that number of jurors who held such hard-and-fast pro-life views was vanishingly small—between 2.2% and 7.6% for each of the seven categories of murders. *Id.*, at 1505. This indicates that the capital jury selection process has been much more effective at identifying and removing jurors who are biased in favor of life than at identifying jurors with disqualifying pro-death biases under *Morgan*.

It is sobering, to say the least, that so many capital trial jurors entertained disqualifying beliefs in favor of the death penalty despite having undergone voir dire examination, and having sat through trial, jury instructions, and sentencing deliberations. Even more disturbing is that these undetected biases have been shown to line up with the actual sentencing rationales offered by many jurors. In a follow-up analysis of interviews with 240 jurors in six states who had actually imposed death sentences, more than 40 percent told CJP researchers that they regarded the death penalty in the cases on which they served to be *required by law* once the prosecution had proved one or another aggravating factor. Ursula Bentele & William J. Bowers, *How Jurors Decide On Death: Guilt Is*

Overwhelming; Aggravation Requires Death; And Mitigation Is No Excuse, 66 BROOK. L. REV. 1011, 1071-1073 (2001). Such evidence—and the CJP findings have been replicated in state after state—underscores the necessity for probing voir dire examination to ensure that no juror is seated despite a categorical belief that only one of the two statutorily-authorized punishments is ever acceptable for the crimes charged in this case.

3. The unique features of juror death-qualification and life-qualification justify (a) special instructions to orient prospective jurors to the capital sentencing process, and (b) a reasonable opportunity for attorney-conducted voir dire questioning.

(a) Preliminary instructions. The foregoing discussion of the complexities of jury selection in a capital case shows why jurors must be fully oriented to the capital legal process *before* they are questioned about their ability to carry out their responsibilities in that process. To that end, defense counsel has reached agreement with the government concerning a set of proposed pre-voir dire instructions that the parties are jointly submitting.

(b) Attorney participation in voir dire questioning. Although attorney participation in voir dire questioning is rare in federal courts throughout the nation, the practice is commonplace in federal *capital* cases. In fact, federal judges have permitted attorney-conducted questioning of prospective jurors in the large majority—over 80 percent—of death penalty cases to have been tried in the post-*Gregg* era. Exhibit B, Declaration of Kevin McNally Regarding Jury Selection Practices at 5 (Aug. 14, 2014) (stating that federal courts permitted attorneys to question jurors in 186 of 227 capital trials to date). The

authors of the Federal Judicial Center's *Resource Guide for Managing Capital Cases* (rev. 2004) likewise report:

Judges in death-penalty cases have taken a number of approaches with respect to allowing attorney participation in the voir dire process. Most have allowed attorney participation in some form, even if this is not their standard procedure in criminal cases. Most frequently, judges allow attorneys to question the jurors directly, often placing a time limit on the questioning of each juror.

Resource Guide at 35 (http://www.fjc.gov/library/fjc_catalog.nsf).

This near-complete reversal of the federal courts' usual approach to attorney-conducted voir dire likely reflects that the usual objections to such questioning—that lawyers waste time and try to “indoctrinate” jurors with their view of the case—have much less force in capital cases. Simply put, there is no time to waste, and the parties' need to probe and test jurors' actual beliefs and views concerning capital punishment is too pressing for counsel to get off-track. As the *Beckford* transcript excerpt illustrates, biases concerning capital punishment can be difficult to bring to the surface. Jurors often struggle to identify and articulate what their true feelings are, and disqualifying attitudes can be hidden by common misunderstandings of the sentencing process. A very high-profile case such as this one, moreover, presents additional challenges, including the risk that some prospective jurors will be motivated by self-interest or a desire to see a particular verdict or sentence. While no system for screening jurors will ever be foolproof, *see United States v. Sampson*, 820 F.Supp.2d 151 (D. Mass. 2011) (juror's dishonest responses on voir dire required court to order new capital sentencing trial), allowing coun-

sel for the parties a brief opportunity to probe jurors' views directly enhances the likelihood that any disqualifying biases will be detected in time.

The ability to question jurors directly also enhances the usefulness of peremptory challenges. The very large number of additional challenges allotted in capital cases by Rule 24(b) (40 in all, rather than the 16 allowed in non-capital felony cases) would have much less utility if the parties were unable to probe the views of prospective jurors in some efficient but direct manner. It is interesting to note in this connection that when Congress disapproved a 1977 Supreme Court proposal to amend Rule 24(b) to equalize the number of challenges in felony cases, its expressed rationale rested in large part on the general unavailability of attorney-conducted voir dire in the federal courts:

The Committee has concluded that changes to Rule 24 should be studied further by the Judicial Conference. The basic problem seems to be in the voir dire procedures. The testimony before the House Subcommittee on Criminal Justice indicates that in most Federal courts the judge conducts voir dire. Only rarely are counsel permitted to question prospective jurors directly. Witnesses indicated that this makes it difficult for counsel to identify biased jurors and develop grounds to challenge for cause. The committee believes the Judicial Conference should have the benefit of the comments that have been made on this rule since it was submitted to Congress in deciding whether to make such a change in the future.

Senate Report No. 95-354, 95th Cong., 1st Sess., 1977 WL 16013, at 16-17 (July 20, 1977); accord, *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) ("Peremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes."). The issue has not been revisited since. Although Congress apparently viewed the lack of attorney questioning of jurors as

a sufficient reason to retain the 10-6 defense advantage in peremptory challenges, no such advantage exists when the government seeks the death penalty. *See* DE ____, *Defendant's Motion for Extra Peremptory Challenges* (filed Dec. 1, 2014). Thus in capital cases, the need for counsel to intelligently exercise peremptory challenges further weighs in favor of permitting attorney participation in voir dire.

Finally, the Supreme Court has cited the ability of defense counsel to participate in voir dire questioning as evidence of the fairness of the process, and of the reliability of the trial judge's eventual rulings on cause and venue challenges. *E.g., Wainwright v. Witt*, 469 U.S. at 434-435 (defense counsel's decision not to question anti-death penalty juror supports inference that she was properly excused); *Skilling v. United States*, 561 U.S. at 372, 374, 388 n. 22, 389 (noting, as evidence of the adequacy of the voir dire examination, that trial court allowed counsel to pose follow-up questions to prospective jurors). Allowing brief attorney-conducted questioning reduces post-trial speculation about what additional probing might have revealed about possible juror bias, and creates a more reliable record for appellate review. For all these reasons, attorney-conducted voir questioning in very highly-publicized capital cases ultimately makes the jury selection process more rather than less efficient, and should be allowed in this case.

Dated: December 1, 2014

Respectfully Submitted,

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/s/ David I. Bruck

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

3:96CR66

DEAN ANTHONY BECKFORD,
CLAUDE GERALD DENNIS,
LEONEL ROMEO CAZACO,
RICHARD ANTHONY THOMAS,
LEWELLEN FERNANDO SMITH,

Defendants.

Before: HONORABLE ROBERT E. PAYNE,
United States District Judge

Jury Selection

June 10, 1997
Richmond, Virginia

GILBERT FRANK HALASZ, RMR
Official Court Reporter
U. S. Courthouse
Richmond, VA 23219
(804) 730-9626

1 so far.

2 All right.

3 (Venireman withdrew)

4 (Venireman entered courtroom)

5 Come in. Have a seat.

6 Thanks again for your patience and service here
7 today.

8 You heard me explain twice now what the basic
9 procedures are because this involves, this case involves the
10 possibilities of a death penalty. Do you feel as if you
11 understand it, or would you like additional explanation?

12 VENIREMAN: I am sorry?

13 THE COURT: Do you feel like you understand the
14 procedures --

15 VENIREMAN: Yes.

16 THE COURT: -- that I explained, or would you like
17 additional explanation?

18 VENIREMAN: No. I understand.

19 THE COURT: All right.

20 If you are selected to serve as a juror in the case
21 would you issue your verdict in the case based solely on the
22 evidence and on the law that is given to you by The Court in
23 both the first stage and the second stage, if there is one?

24 VENIREMAN: I would do my very best, yes.

25 THE COURT: Do you think you could do that?

1 VENIREMAN: I think so.

2 THE COURT: All right.

3 Now, let's talk about now the feelings that you have,
4 if you have any, about the death penalty, either for or
5 against death. Do you have any feelings, either moral or
6 personal or religious or other side in favor of the death
7 penalty?

8 VENIREMAN: Yes, I do.

9 THE COURT: All right.

10 Are your feelings about the death penalty such,
11 whatever they may be, that you would always vote to impose
12 the death penalty on a defendant in a case in which the
13 defendant is convicted of a crime for which the death is a
14 possible penalty?

15 VENIREMAN: Sorry. Repeat it again.

16 THE COURT: All right.

17 Are your feelings about the death penalty of such a
18 nature that you would always vote to impose the death
19 penalty on the defendant if he were convicted of a crime for
20 which the death penalty was a possible punishment?

21 VENIREMAN: I support the death penalty. Okay.

22 THE COURT: Right.

23 VENIREMAN: I am not sure if I would impose it every
24 time, but I do support the death penalty.

25 THE COURT: All right.

1 In that regard, would you be willing to consider in
2 deciding whether to impose the death penalty the nature of
3 the crime and aggravating factors and mitigating factors as
4 I explained them to you?

5 VENIREMAN: I think I would have to consider them,
6 yes.

7 THE COURT: All right.

8 Well, under the law you would be told that you have
9 to consider the aggravating factors as well as any
10 mitigating factors; do you understand that?

11 VENIREMAN: Right. Right.

12 THE COURT: Could you follow that instruction?

13 VENIREMAN: Yes.

14 THE COURT: All right.

15 Are your feelings about the death penalty of such a
16 nature that they would either prevent or impair you in some
17 way from serving as a fair and impartial juror in the first
18 stage, that is, where the guilt or innocence is determined?

19 VENIREMAN: I don't think so. That is a really good
20 question, but I don't think it would impair me.

21 THE COURT: All right.

22 Would you be able to make the decision? Because you
23 will be told that you can not consider punishment in any way
24 in deciding on whether somebody is guilty or innocent. You
25 will be told that that is the law. Could you follow that

1 instruction?

2 VENIREMAN: I can follow instructions, yes.

3 THE COURT: All right. Can you follow that one?

4 VENIREMAN: Yes.

5 THE COURT: All right.

6 Would your feelings about the death penalty in any
7 way prevent you or substantially impair you from performing
8 your duties as a juror under your oath and under my
9 instructions in either phase of the case?

10 VENIREMAN: No.

11 THE COURT: Would your feelings, just so -- I want to
12 make sure, would your feelings about the death penalty
13 either prevent or make it very hard for you to consider all
14 mitigating evidence and all the aggravating evidence before
15 deciding whether to impose the death penalty?

16 VENIREMAN: Sorry. You lost me there.

17 Repeat again.

18 THE COURT: Would you consider all of the mitigating
19 evidence and all of the aggravating evidence before you
20 decided to impose the death penalty or not?

21 VENIREMAN: Certainly.

22 THE COURT: All right.

23 BY MR. NOVAK:

24 Q. Good evening. If I could ask you.

25 If we were in a situation where the guilt phase is

1 concluded and one or more of the defendants have been found
2 guilty of murder in furtherance of the drug trafficking
3 offense, and therefore that necessitated the second phase,
4 penalty phase, where, as the Judge told you, the government
5 would have an opportunity to present to you evidence as
6 aggravating factors, basically why it is the government
7 believes the defendant should receive the death penalty, of
8 course then the defendants, they have the opportunity, if
9 they chose to do so, to introduce their own evidence in
10 mitigation, reasons why they believe the death penalty
11 should not be imposed. Would you consider the testimony
12 introduced by the government and the defense prior to
13 deciding whether the death penalty is appropriate in that
14 case, or would you automatically find in favor of the death
15 penalty without regard to the aggravating mitigating
16 evidence?

17 VENIREMAN: I would consider both options, both
18 sides.

19 Q. Before you made final decision?

20 VENIREMAN: Before final decision was made.

21 Q. Thank you.

22 THE COURT: Any questions?

23 BY MR. MILLER:

24 MR. ZERKIN:

25 Q. Yes, Your Honor.

1 Good afternoon, ma'am.

2 I notice on the questionnaire you were born in Clay
3 County, Mississippi. Is that where you were raised?

4 VENIREMAN: Raised in Monroe, the next county over,
5 right.

6 Q. The specific crime capital crime that four of the
7 defendants are charged with is a knowing, intentional,
8 unlawful murder in furtherance of a conspiracy to distribute
9 crack cocaine. If you found one or more of the defendants
10 guilty of that specific charge, do you believe that
11 regardless of the aggravating or mitigating circumstances
12 that for that crime the only appropriate punishment would be
13 death?

14 VENIREMAN: Read the crime.

15 Q. The crime?

16 VENIREMAN: The charge.

17 THE COURT: Read the whole question again.

18 Q. I will do that.

19 If the jury found one of the defendants, one or more
20 of them, guilty of the following crime: A knowing,
21 intentional, and unlawful murder in furtherance of a
22 conspiracy to distribute crack cocaine -- that is the
23 crime -- would you then, regardless of the aggravating or
24 mitigating circumstances, believe that the death penalty was
25 the only appropriate punishment for that crime?

1 VENIREMAN: I think I would have to vote for the
2 death penalty if it was a knowing crime, based on my
3 religious beliefs, yes.

4 Q. Okay. That is based on religious beliefs?

5 VENIREMAN: Right.

6 Q. So that the crime that is at issue here you would
7 believe that that would be the only appropriate punishment,
8 am I correct?

9 VENIREMAN: Right.

10 Q. Thank you.

11 THE COURT: Any questions?

12 MR. NOVAK: Could I ask another?

13 BY MR. NOVAK:

14 Q. Ma'am, I think -- I want to understand, because I
15 think your answer to my question and answer --

16 VENIREMAN: He explained it to me I think a little
17 better. He read the whole thing there, and I understood
18 more about what the question was when he read it. I am
19 having a little problem with aggravating and mitigating
20 here, so I what he said, the whole crime, I can answer my
21 question from that,

22 Q. That is fine. Let me ask you one question.

23 Again, aggravating factors are the evidence that the
24 government would put forward as to why the government
25 believes that death is the appropriate sentence for the

1 defendant. Mitigating is evidence that the defendants may
2 elect if they want to introduce as to why they say it is not
3 appropriate, the death penalty. My question to you
4 originally was this: If the defendant is convicted of the
5 crime that Mr. Zerkin just described, that is, of an
6 intentional, knowingly, unlawfully killing someone in
7 furtherance of a drug punishment, they are convicted of that
8 then we get to the second phase where there is this issue
9 about the government putting on aggravating factors, and
10 defense, if they want to, can put on mitigating evidence.
11 My question to you is: Would you consider the aggravating
12 and mitigating factors before making your decision, or as I
13 understand what you said to Mr. Zerkin was, that you would
14 automatically sentence them to death without any regard to
15 the aggravating or mitigating evidence.

16 MR. BAUGH: Excuse me, Your Honor.

17 THE COURT: Yes, sir.

18 VENIREMAN: Based on my religious beliefs, if it was
19 a knowing crime, committed by someone who knew what they
20 were doing, I would vote for the death penalty.

21 MR. NOVAK: Thank you.

22 THE COURT: You may step outside for just a moment.

23 (Venireman withdrew)

24 MR. NOVAK: Move to strike.

25 THE COURT: You agree she should be?

1 MR. ZERKIN: Yes.

2 THE COURT: Ask her to come. Back, please.

3 (Venireman entered courtroom)

4 I want to thank you for the time and service that you
5 have given today in the administration of justice in the
6 Eastern District of Virginia. You may be called for service
7 further on a jury during the rest of your term, which I
8 think expires at the end of the month. But it won't be
9 necessary for you to serve on this jury. Nonetheless, even
10 though you won't serve, I want you to know that we
11 appreciate the time and commitment that you have given
12 today, because we can't do this job without you and people
13 like you.

14 You are excused to go about your business, and you
15 need not come back Friday.

16 Thank you so much. Fine.

17 (Venireman withdrew)

18 (Venireman entered courtroom)

19 THE COURT: All right.

20 Thank you very much again for your patience. I have
21 a couple of things I want to ask you.

22 I believe that either Mr. Wagner or you or somebody
23 said that you might have had lunch, or might have met Mr.
24 Wagner and forget about it, earlier in the introduction. Do
25 you remember either having lunch with Mr. Wagner or meeting

DECLARATION REGARDING JURY SELECTION PRACTICES

1. I currently serve as the Director of the Federal Death Penalty Resource Counsel Project, assisting court-appointed and defender attorneys charged with the defense of capital cases in the federal courts. I have served as Resource Counsel since the inception of the Resource Counsel Project in January, 1992. The Project is funded and administered under the Criminal Justice Act by the Office of Defender Services of the Administrative Office of the United States Courts.

2. My responsibilities as federal resource counsel include the monitoring of all federal capital prosecutions throughout the United States in order to assist in the delivery of adequate defense services to indigent capital defendants in such cases. This effort includes the collection of data on the initiation and prosecution of federal capital cases.¹

¹The work of the Federal Death Penalty Resource Counsel Project is described in a report prepared by the Subcommittee on Federal Death Penalty Cases, Committee on Defender Services, Judicial Conference of the United States, FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION (May, 1998), at 28-30. www.uscourts.gov/dpenalty/1COVER.htm. The Subcommittee report “urges the judiciary and counsel to maximize the benefits of the Federal Death Penalty Resource Counsel Project ..., which has become essential to the delivery of high quality, cost-effective representation in death penalty cases ...” *Id.* at 50. A recent update to the Report stated: “Many judges and defense counsel spoke with appreciation and admiration about the work of Resource Counsel. Judges emphasized their assistance in recruiting and recommending counsel for appointments and their availability to consult on matters relating to the defense, including case budgeting. Defense counsel found their knowledge, national perspective, and case-specific assistance

3. In order to carry out the duties entrusted to me, I maintain a comprehensive list of federal death penalty prosecutions and information about these cases. I accomplish this by internet news searches, by reviewing dockets and by downloading and obtaining indictments, pleadings of substance, notices of intent to seek or not seek the death penalty, and by telephonic or in-person interviews with defense counsel or consultation with chambers. This information is regularly updated and is checked for accuracy by consulting with defense counsel. The Project's information regarding federal capital prosecutions has been relied upon by the Administrative Office of the United States Courts, by the Federal Judicial Center and by various federal district courts.

4. I have personally assisted appointed counsel in voir dire in the following federal capital trials: *United States v Richard Tipton, et al.*, (E.D. Va. No. 3-92-CR-68); *United States v. John Javilo McCullah* (E.D. OK. CR-92-032-S); *United States v. Michael Murray* (M.D. Penn. No. 1:CR-92-200); *United States v. Jean Claude Oscar, et al.* (E.D. Va. 93-CR-131-Morgan); *United States v. Stacey Culbert* (E.D. Mich. No. CR-92-81127); *United States v. Louis Jones* (N.D. Texas No. 6-95 CR 0015-C); *United States v. Orlando*

invaluable.”

<http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/Publications/UpdateFederalDeathPenaltyCases.aspx>

Hall (N.D. Tex. No. 4:94-CR-121-Y); *United States v. Bruce Webster* (N.D. Tex. No. 4:94-CR-121-Y) and *United States v. Len Davis* (E.D. La. No. 94-381). I have observed portions of the jury selections in other cases: *United States v. Thomas Pitera* (E.D. N.Y. No. CR 90-0424 (RR)) and *United States v. Dennis B. Moore* (W.D. Mo. No. CR 94-00194-01-12-CR-W-9). I have selected federal capital trial juries as counsel of record. *United States v. Quinones and Rodriguez* (S.D. NY CR No. 00 CR 0761 (JSR)) and *United States v. Valerie Friend* (S.D. WV CR No. 2:05-00107). I have assisted in preparing defense counsel for jury selection in other cases: *United States v. Jason De la Torre* (D.N.M. No. CR 95-538-MV); *United States v. Timothy McVeigh* (W.D. OK CR No. M-95-98-H) (Alley) on change of venue to (D. CO CR No. 96-CR-68-M) (Matsch); *United States v. Theodore Kaczynski* (E.D. CA. No. CR-S-96-259) and *United States v. Angela Johnson* (N.D. IA CR No. 00 CR 3034-MWB).

A. Attorney Questioning

5. In the vast majority of federal capital trials, attorneys are permitted to ask the jury questions. As of August 11, 2014, jury selection has begun 227 times in a federal capital case. Attorney questioning of potential jurors was allowed in 186 (or 82%) of these trials (186/227).²

²In one trial, attorney questioning was permitted for a defendant for almost half of the jury panel, then was stopped (*Battle*). In another, attorney questioning was

B. Jury Questionnaires

6. In the vast majority of cases, jury questionnaires containing additional questions beyond those found in standard questionnaires have been used in order to reduce the amount of in-court time necessary to select a jury.

7. In all but 11 of these trials, the district court ordered or approved a juror questionnaire which asked questions in addition to the standard questions. In a few of these 227 trials, there was no request for use of an extensive questionnaire. In a majority of the 216 trials where a questionnaire was used (95%, 216 of 227), the questionnaire was extensive.³

8. The reason that so many district judges approve the use of prospective juror questionnaires, including extensive questionnaires, is that it conserves precious judicial resources by eliminating the need for time-consuming in-person questioning on a variety of topics.⁴ Rather, district court judges have chosen to use an expanded

not allowed initially, but then was allowed (*Bobbitt/Jones*).

³Five of the “expanded” questionnaires were very brief.

⁴*The Benchbook for United States District Court Judges*, §3.01 “Death Penalty Procedures,” Pretrial ¶(A)(5), p. 117 (March 2000 rev), suggests consideration of “having veniremembers complete a jury questionnaire” prior to a federal capital trial and providing the same to counsel. This is the reason the *Resource Guide for Managing Capital Cases*, Chapter III A1, p. 33 (Federal Judicial Center, 2002) states: “All the judges we interviewed used questionnaires.” The Guide also states: “Nearly all federal judges who have had a death penalty trial to date have used a written jury

questionnaire as a tool to identify specific areas that may require testimony by potential jurors.

9. Appellate courts have rejected claims in federal capital cases that voir dire was inadequate, in part relying upon the district court's use of in-depth questionnaires. *See, e.g., United States v. McVeigh*, 153 F.3d 1166, 1208 (10th Cir. 1998) (“an extensive questionnaire”); *United States v. Ortiz*, 315 F.3d 873, 888 (8th Cir. 2002) (“a questionnaire of 103 questions”).

C. Individual and Sequestered Voir Dire

10. Similarly, relatively few judges have declined to conduct individual, sequestered (away from other potential jurors) voir dire, *at least on the issue of punishment views* in federal death penalty cases.⁵ To our knowledge, judges refused individual, sequestered (private - apart from other jurors) voir dire on the issue of the

questionnaire.” *Id.*, Chapter III A2, p. 34. “Most questionnaires have been in the range of ten to fifteen pages.” *Id.*

⁵The *Benchbook for United States District Court Judges*, §3.01, ¶(A)(7), p. 119, recommends that punishment questions be posed individually “at sidebar ...” *See also Chambers to Chambers*, Vol. 10, No. 1, pp. 3-7 (Federal Judicial Center 1995). The *Resource Guide for Managing Capital Cases*, Chapter III A3a, p. 36, states that all the district judges interviewed used a combination of group (for general issues) and individual (for death penalty issues) voir dire. Of course, group voir dire is well suited and time efficient for non-sensitive topics – although some judges have conducted all questioning in private and individually.

death penalty 31 times.⁶ So, 86% of federal judges conduct “private” individual questioning of potential jurors *at least on the issue of capital punishment views* (196 of 227).

11. Punishment questioning in a group setting carries with it 1) a danger that other jurors, who listen to the answers of fellow potential jurors, may be contaminated or improperly influenced by those responses and thus 2) may shade their answers based on what they hear and 3) is demonstrably inferior in identifying biased jurors and 4) requires repeated exposure to questions about the death penalty which presume guilt and creates a less than neutral jury.

12. In those federal cases where the district court required small group questioning, sensitive issues (the death penalty, exposure to pretrial publicity or racial or ethnic attitudes) often end up requiring some questioning out of the hearing of other jurors, usually at the bench. In the end, the process is not time efficient, particularly if there is no questionnaire allowing counsel and the court to focus on troublesome topics. Rather than bring individual jurors in on a scheduled basis for questioning, the group approach often requires a large panel of jurors to sit idly (whether they can hear the answers of other jurors or not). This unnecessarily wastes the time of many citizens,

⁶Five judges permitted individual questions in private “as necessary.”

as opposed to setting up an individual interview schedule, which creates the least imposition on each citizen.

I declare under the penalty of perjury under the laws of the United States of American, 28 U.S.C. §1746, that the foregoing is true and correct.

Executed this 11th day of August, 2014.

/s/ Kevin McNally

Dated: Frankfort, Kentucky
August 11, 2014