ORIGINAL

GERAGOS & GERAGOS
A PROFESSIONAL CORPORATION
LAWYERS
39TH FLOOR
350 S. GRAND AVENUE
LOS ANGELES, CALIFORNIA 90071-3480
TELEPHONE (213) 625-3900
FACSIMILE (213) 625-1600

MARK J. GERAGOS SBN 108325
GREGORY R. ELLIS SBN 121705
Attorney for Defendant SCOTT LEE PETERSON

FILED
SAN MATEO COUNTY
FEB - 9 2004
Clerk of the Superior Court
By [signature] DEPUTY CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN MATEO

55500-A

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. SCOTT LEE PETERSON, Defendant.	Case No. STANCO 1056770 MOTION FOR SEPARATE GUILT AND PENALTY PHASE JURIES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF TRIAL DATE: February 9, 2004 TIME: 9:00 a.m. PLACE: Dept. 2M

Scott Lee Peterson, by and through counsel, moves for separate guilt and penalty phase juries.

Dated: February 6, 2004

Respectfully submitted,

GERAGOS & GERAGOS
Mark J. Geragos
Gregory R. Ellis

By: [signature]
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Although the guilt and penalty proceedings in a capital case are bifurcated, a single jury usually hears both. The voir dire of a capital jury will therefore cover issues pertaining not only to the determination of guilt or innocence, but also to the ability of jurors to impose death as a punishment. This process of questioning on the death penalty is termed "death-qualifying" the jury, and enables the prosecution to excuse for cause any juror who states that he or she cannot impose the death penalty under any circumstances. This discharge is allowed even if the juror is otherwise qualified to decide the defendant's guilt or innocence.

Penal Code section 190.4, subdivision (c), however, gives the Court discretion to empanel separate juries for the guilt and penalty phases for good cause. Abundant good cause exists in this case. Specifically, it results from a combination of factors unique to this case: the enormous amount of pretrial publicity adverse to Mr. Peterson combined with the unusually high number of people who have prejudged him guilty combined with the fact that, as discussed below, the process of death qualification creates a jury that leans in favor of the prosecution and conviction. In essence, this aggregate of all three factors makes it extremely unlikely that Mr. Peterson will be able to obtain a guilt phase jury which is not conviction-prone.

Conversely, however, the simple protective measure of empanelling two juries – or, alternatively, selecting sufficient death-qualified alternate jurors to replace non-death-qualified jurors if it becomes necessary to move on to the penalty phase – would greatly help to reduce the likelihood of a conviction-prone jury. Given that the inconvenience to the State would be minimal, and given the important interest at stake, the granting of this request would certainly be a reasonable exercise of the Court's discretion.

By way of this motion, Mr. Peterson also makes a constitutional challenge to the death qualification process, separate from but related to his section 190.4, subdivision (c) request.

As alluded to above, numerous studies over the past 20 years have established that death qualification unfairly skews the jury's fact-finding function, posing "a substantial threat to the ability of a capital defendant to receive a fair trial on the issue of his guilt or innocence." (*Lockhart v. McCree* (1986) 476 U.S. 162, 185 ("*Lockhart*") (dis.opn. Marshall, J.) These studies support the common sense recognition that the built-in consequence of eliminating jurors unwaveringly opposed to the death penalty is a guilt phase jury which tilts in the direction of the prosecution. This result is constitutionally impermissible, and fundamentally unfair.

Both the United States and California Supreme Courts, however, have found death qualification of the guilt phase jury not unconstitutional. (See, e.g., *Lockhart v. McCree*, *supra*, 476 U.S. 162; *People v. Steele* (2002) 27 Cal.4th 1230,1243; see also *Hovey v. Superior Court* (1980) 28 Cal.3d 1.) *Lockhart*, though, was decided 18 years ago. During the past decade, our society has become painfully aware of what Justice Marshall observed more than 30 years ago in another dissenting opinion: **the execution of the innocent is an inherent part of the American capital punishment system.**. (See *Furman v. Georgia* (1972) 408 U.S. 238, 366-369 (conc. opn. of Marshall, J.), emphasis added; see also *id.*, at p. 290 (conc. opn. of Brennan, J.) We now have empirical data which chronicles that frightening failure of our judicial system to accurately determine the guilt or innocence of individuals whose lives hinge on that determination. Stated simply, our process sometimes sentences the innocent to death.

This awareness should become the new lens through which the judicial system reexamines the constitutional validity of various aspects of our capital justice system.[1] The process of death-qualifying guilt phase jurors should be at the top of that list, and it will fall under such renewed analysis. This is not just because (as studies continue to show) it contributes to flaws in the fact-finding process which in turn renders constitutionally invalid

---

[1]Little more than a year ago, in *Atkins v. Virginia* (2002) 536 U.S. 304, for example, the Supreme Court reversed a decision it had rendered just 13 years earlier and held, based upon ensuing developments, that the execution of the mentally retarded violated the federal constitution.

any resulting conviction, but also because it is one aspect of the larger problem that is so easy to fix.

I.

PENAL CODE SECTION 190.4, SUBDIVISION (C) GIVES THIS COURT DISCRETION TO EMPANEL SEPARATE GUILT AND PENALTY PHASE JURIES. GOOD CAUSE EXISTS HERE TO DO SO.

Section 190.4, subdivision (c)[2] gives the trial court in a capital case discretion to empanel, for good cause, a second jury for the penalty phase of trial. (See *People v. Carpenter* (1997) 15 Cal.4th 312, 351 [request for separate jury granted].) A motion requesting the court to exercise its discretion under the statute may be brought, as here, before the guilt phase begins. (*People v. Rowland* (1992) 4 Cal.4th 238, 268.)

There is no authority affirmatively defining what constitutes "good cause" under this provision, nor how it may be shown. (See, e.g., *People v. Malone* (1988) 47 Cal.3d 1, 27 -28; *People v. Hart* (1999) 20 Cal.4th 546, 640 -641 [notion of good cause under subdivision (c) is "elusive"].) Nevertheless, empanelling separate guilt and penalty juries *in this case* would necessarily be a reasonable exercise of the court's discretion, for several reasons.[3]

First, as was recognized in the change of venue proceedings, the publicity in this case has been unprecedented, not only in its amount and widespread nature, but also in its negativity as to Mr. Peterson. (See, e.g., Motion for Change of Venue and supporting

---

[2]Undesignated statutory references are to the Penal Code.

[3]Unlike the situation in most of the cases discussing section 190.4, subdivision (c), the need for a second panel here is to help ensure a fair and impartial jury during the *guilt* phase of trial. The express language of the statute is susceptible to that reading, particularly in light of the broad overall discretion given the trial court in the jury voir dire arena.

exhibits and declarations, filed December 15, 2003.) Moreover, the number of potential jurors who have prejudged Mr. Peterson and found him guilty based solely upon the press is again huge. For example, data submitted previously to the Court showed that in December 2003, *39%* of people interviewed in Stanislaus County believed Mr. Peterson guilty of the crimes charged (see Motion for Change of Venue, Exhibit E, ¶ 6 (a)). It is not unreasonable to expect that the adverse prejudgment rate in San Mateo County will be relatively high as well.

The above two factors unique to this case will then interact with an element common to all death penalty cases – the above-mentioned death qualification of the jurors who will hear penalty phase proceedings should they prove necessary. As noted, "death qualification" is "the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial."[4] (*Lockhart v. McCree*, *supra*, 476 U.S. at p. 165.)

In section II.B. below, we explain that empirical studies uniformly indicate a death-qualified jury is more prone to convict a capital defendant than is a non-death-qualified jury. We then argue that because of recent revelations concerning the inadequacies of our capital justice system – that is, basically, that innocent people are being convicted and quite probably executed – the constitutional validity of death-qualifying the guilt phase jury needs to be reexamined. As Illinois Governor George H. Ryan observed last year, "Our capital system is haunted by the demon of error. . . ." (See discussion, *infra*, at pp. 11 et seq.)

For purposes of this specific request for separate juries under section 190.4,

---

[4]Such jurors are sometimes called "Witherspoon excludables" (or "WE's"), referring to the Court's earlier decision in *Witherspoon v. Illinois* (1968) 391 U.S. 510. In that case the Court held that the state could constitutionally exclude from jury service only those individuals who "made unmistakably clear . . . that they would *automatically* vote against the imposition of capital punishment," or would not be able to assess the capital defendant's guilt or innocence impartially. (*Id.*, at pp. 522-523, fn. 21.)

subdivision (c), however, this Court need not reach the constitutional issue. Here, the death-qualification process (and its impact on the guilt phase jury) is one of several factors which combine to form a compelling reason to grant separate juries as an exercise of discretion under the statute. The vast adverse publicity, the abnormally high prejudging of guilt, and the strong statistical showings that a death-qualified jury tilts in favor of the prosecution will together have a severe impact on the nature of the jury ultimately selected to decide Mr. Peterson's guilt or innocence.

Stated differently – this confluence of circumstances makes it more likely than not that Mr. Peterson's guilt or innocence will be judged by a jury that is inclined to favor the prosecution.

Eliminating the factor most easily controlled – the death qualification voir dire – would help even the playing field. This can be readily accomplished by either empanelling two separate juries at the outset, by selecting a penalty jury later should there be a conviction, or – perhaps most efficiently – by selecting a number of death-qualified alternates who will listen to the evidence during the guilt phase and substitute in for the "Witherspoon excludables" should a penalty trial prove necessary.

We repeat that we are not making a constitutional argument in this section of the motion. Instead, we maintain that, given all the above, it is well within the Court's discretion to grant this motion under section 190.4, subdivision (c). Although the statute does evidence a legislative presumption in favor of a single jury in death cases, we contend that in this case, any such presumption is rebutted by the overwhelming likelihood that separate juries will help ensure a fair trial. Similarly, any minor economic detriment to the State pales by comparison.

///

///

///

II.

"DEATH-QUALIFYING" THE GUILT PHASE JURY VIOLATES THE DEFENDANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY.

A. The Prior Decisions.

Both the United States and California Constitutions guarantee a criminal defendant the right to be tried by an impartial jury selected from a representative cross section of the community. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16; see also, e.g., *Taylor v. Louisiana* (1975) 419 U.S. 522, 530; *Turner v.* Louisiana (1965) 379 U.S. 466, 472; *People v. Wheeler* (1978) 22 Cal.3d 258, 265-266; *Rubio v. Superior Court* (1990) 24 Cal.3d 93, 97.) In *Lockhart v. McCree, supra*, 476 U.S. 162, the Supreme Court considered whether these constitutional guarantees prohibited the removal for cause of Witherspoon excludables for the guilt phase of a capital trial.

The District Court in *Lockhart* had granted habeas corpus relief after holding an evidentiary hearing during which it admitted numerous studies. Based upon such evidence, the District Court concluded "that persons who favor the death penalty are 'uncommonly' predisposed to find for the prosecution and against the defendant, and that death qualification thus "created juries that 'were more prone to convict' capital defendants than were 'non-death-qualified' juries. (*Grigsby v. Mabry* (1985) 569 F.Supp. 1273, 1322-1323, reversed by *Lockhart v. McCree, supra*, 476 U.S. 162.) The District Court also found that, for constitutional purposes, the group of excluded jurors is "distinctive and identifiable, since members of this group are currently excluded on the basis of their distinctive and identifiable attitudes toward the death penalty." (*Id.*, at p. 1323.) Paraphrasing *Adams v. Texas* (1980) 448 U.S. 38, the court held that "if prospective jurors in capital cases are barred over the defendant's objection from jury service because of their views on capital punishment on any broader basis than inability to

follow the law or to abide by their oaths, the guilty verdict must be set aside."[5] (*Id.*, at p. 1323.)

The Supreme Court reversed. (*Lockhart, supra*, 476 U.S. at p. 184.) Although expressing serious reservations about the studies the District Court relied upon for its factual findings (see *id.*, at pp. 168-173), the Court ultimately assumed for purposes of analysis that those studies did "establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries. (*Id.*, at p. 173.) The Court then held, nevertheless, that the Constitution does not bar such result. (*Ibid.*)

First addressing the claim that death qualification violated the defendant's Sixth and Fourteenth Amendment right to a jury which represents a cross section of the community, the Court stated that the analysis must focus on the entire venire, not the petit jury or individual peremptory or for-cause challenges. (*Id.*, at pp. 173-174.) And in any event, the Court said, the particular excluded jurors did not constitute a "distinctive" group in the community for purposes of the "cross section" analysis, essentially because death qualification is not a means to arbitrarily skew the composition of the jury and because Witherspoon excludables are identified for a trait that is within their control. (*Id.*, at pp. 174-176.)[6]

The *Lockhart* court next held that the fact that death qualification produced a jury more prone to side with the prosecution did not render it impartial for constitutional purposes. Constitutional impartiality, the Court stated, could not be defined "by reference

---

[5]The Eight Circuit affirmed the District Court's grant of habeas corpus relief. (*Grigsby v. Mabry* (1985) 758 F.2d 226.)

[6]The Court stated "We have never attempted to precisely define the term 'distinctive group,' and we do not undertake to do so today." (*Id.*, at p. 174.)

To establish a prima facie violation of the fair cross-section requirement, a defendant must show that: (1) the group allegedly excluded is a "distinctive" group in the community; (2) the group's representation in jury venires is not fair and reasonable in relation to the number of such persons in the community; and (3) the under-representation is due to the systematic exclusion of such persons in the jury selection process. (*Duren v. Missouri* (1979) 439 U.S. 357, 364.)

to some hypothetical mix of individual viewpoints. . . . [T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case." (*Id.*, at pp. 183-184.)

(See also, e.g, *People v. Steele*, *supra*, 27 Cal.4th at p.1242 [rejecting constitutional challenges to death qualification].)

Justice Marshall, joined by Justices Brennan and Stevens, wrote a scathing dissent, chastising the Court for its "glib nonchalance" in upholding "a practice that allows the State a special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe."[7] (*Id.*, at p. 185.) Under the majority's decision, the dissent observed, the "State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will . . . give the prosecution license to empanel a jury especially likely to return that very verdict." (*Ibid.*)

Justice Marshall pointed out that "overwhelming evidence" – relied upon by the District Court and assumed to be true by the majority for purposes of its analysis – showed that death-qualified juries are more likely to convict than are juries on which "unalterable opponents of capital punishment are permitted to serve." (*Id.*, at p. 184.) He lamented the majority's "disregard for the clear import of the evidence" and resulting tragic misconstruing of "the settled constitutional principles that guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution." (*Id.*, at p. 192.) The question in light of the evidence, Justice Marshall emphasized, is whether a defendant is entitled to "have his guilt or innocence determined by a jury like those that sit in noncapital cases – one whose composition has not been tilted in favor of the prosecution by the exclusion of a group of prospective jurors uncommonly aware of an accused's constitutional rights but quite capable of determining

---

[7]We focus on the *Lockhart* dissent because it takes on new life in the discussion set forth in Section II.B.below.

his culpability without favor or bias." (*Id.*, at p. 185.)

The dissent noted the "essential unanimity" of the evidence produced in the trial court, and the fact that, as the Court of Appeal had found, "all of the documented studies support the district court's findings." (*Id.*, at p. 190; see also *id.*, at pp. 187-190.) It also observed that the evidence "confirms, and is itself corroborated by, the more intuitive judgments of scholars and of so many of the participants in capital trials – judges, defense attorneys, and prosecutors."[8] (*Id.*, at p. 188, citing 569 F.Supp. at p. 1322.)

Concerning the constitutional analysis of impartiality itself, Justice Marshall first clarified the actual claim at issue – not whether any particular juror was impartial, but whether, "by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the State gave itself an unconstitutional advantage" at trial. (*Id.*, at p. 193.) In other words, it is the *process* combined with its likely result which is constitutionally infirm, not the result itself. Justice Marshall found precedent for this conclusion in the Court's own prior decision in *Witherspoon* where, as noted, the Court concluded "'that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death.'"[9] (*Id.*, at pp. 194, 197, quoting *Witherspoon*, *supra*, 391 U.S. at p. 521.) The dissent found that *Adams v. Texas, supra*, 448 U.S. 38, provided "clear precedent" for applying the *Witherspoon* analysis to the guilt phase of a capital trial. (*Id.*, at p. 197; see also *Ballew v.*

---

[8]The fact that it is the courts themselves who bar defendants from documenting the prejudicial effect of death qualification in *actual* trials should not prevent defendants from relying on the next best thing – recreations. (*Id.*, at p. 189.)

[9]The *Lockhart* majority stated that if the guilt jury in this case had been randomly selected, the same 12 jurors might have been seated – i.e., the defendant might have ended up with a death-qualified jury albeit unintentionally. The dissent emphasized the Court's inconsistency in this regard, reminding the majority that in *Witherspoon* the Court had addressed the exclusion of anti-death penalty jurors and concluded, concerning the penalty phase, that the manner of selecting the jury had "stacked the deck" against the defendant. (391 U.S. at p. 523.) But as in *Lockhart*, if the penalty jury in *Witherspoon* had been selected by the luck of the draw, it is possible the same 12 jurors who actually sat on the case might have been selected.

Georgia (1978) 435 U.S. 223, 236 [Court discusses "counterbalancing of various biases" as critical to the effective functioning of juries, and questions "any jury procedure that systematically operated to the 'detriment of . . . the defense'"].)

B. Recent Developments.

Lockhart was written during a time "when capital punishment systems in this nation functioned as if there were no real likelihood that we would execute an innocent person." (Rosen, *Innocence and Death* (2003) 82 N.C. L. Rev. 61, 62.) In *Herrera v. Collins* (1993) 506 U.S. 390, for example, Justice O'Connor stated that "the Constitution offers unparalleled protections against convicting the innocent." (*Id.*, at p. 420.)

Times have changed.

During the past 10 years, the public has become painfully aware of the tragic reality observed by Justice Marshall – innocent people are being convicted and executed.[10/] (See *Furman v. Georgia, supra*, 408 U.S. at pp. 366-369 (conc. opn. of Marshall, J.) The sanguine confidence reflected in the above quotation of Justice O'Connor has been replaced by a mounting skepticism in the reliability of our capital justice system. (See, e.g., Rosen, *Innocence and Death, supra*, 82 N.C. L. Rev. at p. 79; Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California* (2003) 44 Santa Clara L. Rev. 101 (hereinafter *"Comparison"*); White, *Errors and Ethics: Dilemmas in Death* (2001) 29 Hofstra L. Rev. 1265-1274; Dwyer, Neufeld & Scheck, Actual Innocence: Five Days to Execution and Other Dispatches frm the Wrongly Convicted (2000); Gross, *Lost Lives: Miscarriages of Justice in Capital Cases* (1998) 61-AUT Law & Contemp. Probs. 125.)

In response, various organizations, including the American Bar Association, have recommended a moratoriums on the death penalty. In January 2000 Illinois Governor

---

[10]In a 2001 poll, 73 percent of adults surveyed believed that innocent people had been executed during the prior five years. (Rosen, *Innocence and Death, supra*, 82 N.C. L. Rev. at p. 62, fn. 4.)

George H. Ryan declared a moratorium on executions in his state and appointed a commission to study its death penalty system. He took this action because 13 people who had been sentenced to death in Illinois were subsequently found to be innocent. Three years later, Governor Ryan commuted all death sentences in his state to life imprisonment without the possibility of parole. In so doing, he stated:

> "I must act. Our capital system is haunted by the demon of error – error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death row inmates."[11]

(Sanger, *Comparison*, *supra*, 44 Santa Clara L. Rev. at p. 102.)

California has the largest death row population of any state in the nation. (*Id.*, at p. 105.) Given the data gathered in other states, such as Illinois, and the relative numbers involved, it is reasonable to presume that innocent people have likely been sentenced to death in our state as well. (*Id.*, p. 114.)

This overall change in awareness, which has permeated all segments of society, now warrants a reevaluation of the constitutional validity of death-qualifying the guilt phase jury in a capital case.[12] Most important will be a renewed valuing (and updating if necessary) of the data relied upon by the District Court decision in *Lockhart,* which

---

[11]Even the Supreme Court has reacted to this influx of information showing the failures of our system to decide the guilt and innocence of capital defendants. (See, e.g., *Atkins v. Virginia*, *supra*, 536 U.S. at p. 320, fn. 25 [noting "disturbing" number of inmates on death row who have been exonerated]; see also, e.g., *McFarland v. Scott* (1994) 512 U.S. 1256, 1264 (dis. opn. of Blackman, J., from den. of cert.) [stating he now had "grave doubt" concerning the reliability of capital convictions]; *Callins v. Collins* (1994) 510 U.S. 1141, 1145 (dis. opn. of Blackman, J., from den. of cert.) [stating "from this day forward, I no longer shall tinker with the machinery of death"].)

[12]See, e.g., *Ring v. Arizona* (2202) 536 U.S. 584, 608 ["[o]ur precedents are not sacrosanct . . . [W]e have overruled prior decisions where the necessity and propriety of doing so has been established. . . . We are satisfied that this is such a case"]; *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 860 (conc. opn. Scalia, J.) ["That was then, this is now"].

evidence in turn formed the backbone of Justice Marshall's dissent. (See *Grigsby v. Mabry, supra*, 569 F.Supp. 1273.) This data did and still suggests that death-qualified juries tend to favor the prosecution.[13] (See also, e.g., Rosen, *Innocence and Death, supra*, 82 N.C. L. Rev. at p. 98 ["Jurors who survive the death qualification questioning are more prone to convict than the regular juror. . . . We could prohibit the use of that procedure, or we could require a separate, non-death-qualified jury for the guilt/innocence trial"]; Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, *supra*, 61-AUT Law & Contemp. Probs. at pp. 146-147 & fn. 103 ["many studies have shown" that death qualification produces "juries that are more likely to convict"].)

Although the *Lockhart* majority concluded that "conviction-proneness does not constitute partiality, . . . [f]or impartiality to retain some cogent definition as a legal concept . . . it must be affected by evidence that a jury is predisposed to rule in favor of one party." (Byrne, *Lockhart v. McCree: Conviction-proneness and the Constitutionality of Death-Qualified Juries* (1986) 36 Cath. U. L. Rev. 287, 316-317.) At the very least, the data adduced should have shifted the burden to the State to present "definitive proof of the impartiality of capital juries. . . ." (*Id.*, at p. 317.)

Therefore, in light of all the above, and assuming the Court does not grant Mr. Peterson's motion for separate juries under section 190.4, subdivision (c), we ask this Court to find that Mr. Peterson is constitutionally entitled to a non-death-qualified jury to determine his guilt or innocence. Stated otherwise, he simply asks for "the chance to have his guilt or innocence determined by a jury like those that sit in noncapital cases." (*Lockhart, supra*, 476 U.S. at p. 185 (dis.opn. of Marshall, J.).) This in turn will ensure that he is convicted or acquitted by an impartial jury which represents a cross section of the community. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.)

We are of course cognizant of the constraints of *stare decisis* and the fact that this Court cannot per se overrule the Supreme Court. Nevertheless, as discussed, the *Lockhart*

---

[13] As Justice Marshall stated, whether it *proves* the premise is not the point when we are talking about the right to an impartial jury in a capital trial.

decision may be distinguished from this case even on constitutional grounds by virtue of the substantial change in the social and judicial topsoil within which the constitutional analysis must take root.

Alternatively, this Court can find that the *California* Constitution does not permit death-qualifying the guilt phase jury because the process infringes the defendant's right to an impartial jury. Although, admittedly, numerous California Supreme Court decisions have rejected that argument, a closer reading of those opinions – including a historical tracing of the precedent cited – reveals that in fact the seminal California decision of *Hovey v. Superior Court, supra*, 28 Cal.3d 1, did not actually discuss the constitutional issue on its merits but found instead that the *evidence* submitted was not sufficient to sustain the claim. Thus California decisions instead rely upon *Lockhart* for the "impartiality" aspect of the analysis. Therefore, given that the data now available establishes that a death-qualified jury is conviction-prone, and given the recent and growing awareness of substantial defects in the adjudication of guilt or innocence in capital cases, this Court can find that the California Constitution does *not* permit death qualification of the guilt phase jury.

Lastly, Mr. Peterson requests an evidentiary hearing on the issue of the impact of death-qualified juries on the determination of guilt or innocence. At such hearing, live testimony and additional, updated documentary evidence could be adduced.

///

///

///

CONCLUSION

In light of the foregoing, Mr. Peterson respectfully requests that the Court grant him separate juries for the guilt and penalty phases of this trial, as requested.

Dated: February 6, 2004

Respectfully submitted,
GERAGOS & GERAGOS
Mark J. Geragos
Gregory R. Ellis

By: _____
MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON