

1 GERAGOS & GERAGOS

2 A PROFESSIONAL CORPORATION

3 LAWYERS

319TH FLOOR

350 S. GRAND AVENUE

4 LOS ANGELES, CALIFORNIA 90071-3480

5 TELEPHONE (213) 625-3900

6 FACSIMILE (213) 625-1600

7 MARK J. GERAGOS SBN 108325

8 GREGORY R. ELLIS SBN 121705

9 Attorney for Defendant SCOTT LEE PETERSON

FILED
SAN MATEO COUNTY

FEB 13 2004

Clerk of the Superior Court

By  DEPUTY CLERK

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN MATEO

12 THE PEOPLE OF THE STATE OF
13 CALIFORNIA,

14 Plaintiff,

15 vs.

16 SCOTT LEE PETERSON,

17 Defendant.

Case No. SC55500

BY FAX

(STANCO 1056770)

DEFENDANT'S REPLY TO
OPPOSITION TO MOTION FOR
SEPARATE GUILT AND PENALTY
PHASE JURIES

TRIAL DATE: February 9, 2004

TIME: 9:00 a.m.

PLACE: Dept. 2M

18 Scott Lee Peterson, by and through counsel, hereby replies to the People's
19 Opposition to his Motion for Separate Guilt and Penalty Phase Juries.

20 Dated: February 13, 2004

Respectfully submitted,

GERAGOS & GERAGOS

Mark J. Geragos

Gregory R. Ellis

25 By: 

MARK J. GERAGOS

Attorney for Defendant

SCOTT LEE PETERSON

GE

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY

The question under Penal Code section 190.4, subdivision (c) is whether the specific factors operating in this case constitute "good cause" for separate guilt and penalty phase juries. (See Pen. Code, § 190.4, subd. (c).) Although the statute reflects a legislative preference for a single guilt and penalty jury, it also implicitly recognizes that this preference may be overcome. We cited *People v. Carpenter*^{1/} as an example that trial courts do in fact grant separate juries under the statute notwithstanding a statutory preference for a single jury. (See Motion, p. 4.)

The decision in *Lockhart v. McCree*^{2/} has no precedential bearing on the analysis whether in this case, good cause supports the request for separate juries under section 190.4, subdivision (c). The potential constitutional considerations alternatively discussed in section II of the moving papers^{3/} – that is, the conviction-proneness of a death-qualified jury and the recent revelations that innocent people are being sentenced to death under our capital justice system – should inform the Court's exercise of discretion, but as factual rather than legal factors. It was in that context that we argued that the findings of fact made by the district court in *Grigsby v. Mabry* (1985) 569 F.Supp. 1273, 1322-1323, which were assumed to be true for purposes of analysis in *Lockhart*, should be taken into consideration when evaluating good cause under section 190.4, subdivision (c).

The cases – including those cited by the prosecution – demonstrate that "good cause" under this statute is a fluid concept, completely case-specific. Thus, contrary to what the prosecution suggests, the court in *People v. Bradford* (1997) 15 Cal.4th 1229, 1354, did not hold that in all cases, good cause would be defined as "an inability to

^{1/}(1997) 15 Cal.4th 312.

^{2/}(1986) 476 U.S. 162.

^{3/}We submit that alternative argument on the moving papers.

perform the functions of a juror. . . .⁴ (See Opposition, p. 2.) Moreover, in *Bradford* the defendant's motion (which targeted the penalty and not the guilt phase jury) focused on difficulties in jury deliberations. Hence the court's discussion of a definition of good cause which had been used in an analogous context was arguably appropriate for that case. (*Id.*, at pp. 1353-1354.) It is not, however, helpful or applicable to this case.⁵

In *People v. Rowland* (1992) 4 Cal.4th 238, 267-268 and *People v. Mendoza* (2000) 24 Cal.4th 130, 168-169, both also cited by the prosecution, the defendants sought separate guilt and penalty juries so that the jury voir dire concerning uncharged crimes evidence (relevant to penalty phase but not to guilt phase proceedings) would not create a bias against the defendant at the guilt phase. In both cases the Supreme Court held that in itself, counsel's desire to conduct different voir dire for the guilt and penalty phases of a capital trial did not constitute good cause under the statute.

Mr. Peterson's motion, however, does not argue that separate juries are required to facilitate strategic decisions concerning voir dire. Instead, his motion is based upon the *unfair composition* of the *guilt* phase jury he is likely to get if he is not permitted to have separate panels. As it is, given the unique circumstances surrounding this case – the unprecedented adverse media coverage that has permeated all markets and the unusually high numbers of people who have prejudged him guilty – Mr. Peterson will have a difficult time obtaining a fair and impartial jury. When the additional factor of death qualification is added in, that objective will be virtually unattainable, resulting in a jury inclined to favor the prosecution's evidence, reasoning, and viewpoint.

This Court should therefore exercise its discretion to find good cause under section 190.4, subdivision (c) to eliminate the one factor most easy to control – the death

⁴Even if that were the definition of good cause, given the factors set forth in the moving papers, that definition would be met.

⁵In *Bradford*, *supra*, the court also held that mere speculation by counsel that a jury, having found a defendant guilty, could by definition no longer be impartial, did not constitute good cause under section 190.4, subdivision (c). Again, that is not this case.

1 qualification of the jury for the guilt phase. This in turn can be readily accomplished by
2 empaneling separate juries or, as alternatively suggested in the moving papers, selecting
3 sufficient death-qualified alternate jurors.

4 Citing *People v. Kraft* (2000) 23 Cal.4th 978, 1070, the prosecution argues that
5 California has rejected the contention that death-qualified jurors are guilt prone. (See
6 Opposition, p. 3.) Not so. That's not what the *Kraft* court said, or was even discussing,
7 in the excerpt quoted by the prosecution. (See Opposition, p. 3, quoting *Kraft, supra*, 23
8 Cal.4th at p. 1070.) In *Kraft*, the defendant argued that the jury who had just found him
9 guilty would not be able to give him a fair trial on the question of penalty. The defendant
10 submitted evidence by a psychologist that the guilt phase jury, having unanimously found
11 the defendant guilty on 16 murder counts and 11 special circumstance allegations, would
12 not be as likely to give the defendant a fair trial on penalty as would a newly chosen jury.
13 (*Id.*, at p. 1069.) The Supreme Court affirmed that the expert testimony was "general in
14 nature, applicable to a greater or lesser degree in any capital case in which evidence of
15 other crimes is admitted in the penalty phase. . . ." (*Ibid.*)

16 It was in this context that the *Kraft* court stated that "provided the chosen
17 procedure satisfies basic principles of fairness, we are aware of no rule requiring the
18 Legislature to select the process psychologically designed to render jurors most favorably
19 disposed toward a defendant."⁶ (*Id.*, at p. 1070.) The court was not speaking to the
20 question of whether a death-qualified jury is more conviction-prone than a jury that is not
21 death-qualified. Furthermore – and this is a crucial distinction – what Mr. Peterson asks
22 for here is *not* a jury "most favorably disposed toward a defendant" but a jury that is *not*
23 *most favorably disposed towards the prosecution*. It is well within this Court's discretion
24 to endeavor to provide him that.

25
26
27 ⁶As quoted above, the *Kraft* court established as a predicate requirement that the
28 "chosen procedure satisfies basic principles of fairness. . . ." (*Id.*, at p. 1070.) We maintain
that, under the circumstances of this case and for the reasons set forth in the moving papers,
"basic principles of fairness" will be abandoned if the guilt phase jury is death-qualified.

1 It is true a court's decision under section 190.4, subdivision (c) is reviewable only
2 for abuse of discretion. But that principle cuts both ways. The same deferential standard
3 applied in the cases cited by the prosecution where the request was denied would be
4 applied to this Court's decision to *grant* the request. Certainly, under the facts peculiar to
5 this case, it would not be beyond the bounds of reason for the Court to grant this motion.

6 Finally, we note that other than citing the statutory language evidencing a
7 preference for a single jury, the prosecution has not provided a single affirmative reason
8 why this motion should be denied under the facts of this case. We therefore can only
9 presume that the very fact an opposition was even filed implicitly reflects the
10 prosecution's recognition that, as was asserted in the moving papers, the "confluence of
11 circumstances" in this case "makes it more likely than not that Mr. Peterson's guilt or
12 innocence will be judged by a jury that is inclined to favor the prosecution." (Motion, p.
13 6.)

14 To prevent that result, this Court should grant the request.

16 CONCLUSION

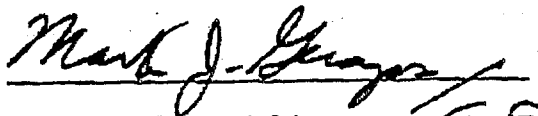
17 For the reasons set forth above and in the moving papers, Mr. Peterson respectfully
18 requests that the Court grant him separate juries for the guilt and penalty phases of this
19 trial.

20 Dated: February 13, 2004

Respectfully submitted,

GERAGOS & GERAGOS
Mark J. Geragos
Gregory R. Ellis

24 By:


MARK J. GERAGOS
Attorney for Defendant
SCOTT LEE PETERSON

PROOF OF SERVICE BY FAX

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 S. Grand Avenue, 39th Floor, Los Angeles, California 90071.

On execution date set forth below, I served the following

DOCUMENTS OR DOCUMENTS DESCRIBED AS:

**DEFENDANT'S REPLY TO OPPOSITION TO MOTION FOR SEPARATE
GUILT AND PENALTY PHASE JURIES**

_____ placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, to the attorneys and their perspective addresses listed below, in the United States Mail at Los Angeles, California.

X transmitting by facsimile transmission the above document to the attorneys listed below at their receiving facsimile telephone numbers. The sending facsimile machine I used, with telephone number (213) 625-1600, complied with C.R.C. Rule 2003(3). The transmission was reported as complete and without error.

_____ personally delivering the document(s) listed above to the party or parties listed below, or to their respective agents or employees.

PARTIES SERVED BY FAX:

Rick Disatso, DDA
David P. Harris, DDA
Fax No.: 209-525-5545

Kirk McAllister
McAllister & McAllister
Fax No.: 209-575-0240

Executed on February 13, 2004, at Los Angeles, California.

I declare under penalty of perjury that the above is true and correct.



ELIZABETH KALBAKLIAN