IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2012-CF-6463-AXXX-MA

DIVISION: CR-D

STATE OF FLORIDA,

VS.

DENNIS THURNADO GLOVER.

_____/

MOTION TO DECLARE DEATH QUALIFICATION UNCONSTITUTIONAL

This motion seeks an order from the Court preventing death qualification of Defendant Dennis Glover's jury because the price of death qualification, as shown in the first-of-its kind study attached hereto as Exhibit B, is the systematic exclusion of Black potential jurors at a rate *twice as high* as white potential jurors, and excludes other jurors of color at an *even greater disproportionate rate*. Death qualification, if permitted here, will violate Mr. Glover's constitutional rights to a fair trial, fair cross section, impartial jury, equal protection, and to be free from cruel and unusual punishment under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 2, 9, 17, 18 and 22 of the Florida Constitution. This violation of Mr. Glover's constitutional rights would occur at a time that the representation of Black jurors and other jurors of color is already likely to be significantly suppressed by the ongoing COVID-19 pandemic, exacerbating the problems with death

qualification. To uphold the Constitution, this Court should enter an order barring death qualification of Dennis Glover's jury.

OVERVIEW

This motion, and the path-making study on which it relies, demonstrates unequivocally that "death qualification" in Duval County capital trials means exclusion of Black jurors and other jurors of color – *exclusion at a two to one rate or greater*. This data further demonstrates that, when the State's peremptory strikes are factored in, *even more* potential jurors of color are excluded. This motion thus is about voice and responsibility within the greatest institution in our legal system – the jury. This litigation will decide who will be accepted and who will be excluded from a jury that shoulders the responsibility, on behalf of the community in this county, to make the most important decision any jury could ever make – whether a fellow human being must be executed or may be sufficiently punished by life imprisonment without release.

This motion is about the levers of power in Duval County, who will operate them, and who will be excluded from doing so. And, in a case with a Black defendant and white victim, this motion will decide if exclusion from the jury making this life and death decision may be lawfully predicated on race, in particular whether Black, Latinx, Asian, and other people of color may be excluded systematically and knowingly by the State. This motion is about the lost voice, over this last decade, of these communities of color on capital juries in this county. In a state and county in which Black voices are not been frequently heard on the critical issue of the death penalty, this motion seeks relief to restore the lost voice of jurors who, under our Constitutions, must always be heard. As Yale Law Professor Monica Bell recently wrote, "Governments that have actively silenced and diminished the political voices of marginalized people have an

obligation to correct that injustice . . . to restor[e] that lost political voice." Monica C. Bell, *Reckoning with State-Sanctioned Racial Violence: Lessons from the Tulsa Race Massacre*, Just Security (May 29, 2021), https://www.justsecurity.org/76699/reckoning-with-state-sanctioned-racial-violence-lessons-from-the-tulsa-race-massacre/.

This Court would never knowingly and intentionally permit a jury-selection process that systematically excluded 39% of Black potential jurors and 43% of other potential jurors of color from Duval County, but, through this same process, only 17% of white potential jurors. These data account for those jurors in this county who have answered the jury summons, posed no hardship basis for excusal, and were not subject to cause challenge based on any type of bias or prejudgment of the facts in favor of either side. To do so, would violate multiple provisions of the Florida and U.S. Constitutions, as set out below. The Court would not allow it.

So too this Court should prevent death-qualification in this case, which, as shown in this motion and attached report, over the twelve last available capital trials in Duval County, has resulted in the same percentage of exclusion of Black (39%), other race (43%) and white (17%) potential jurors otherwise eligible, willing and able to serve. While the Legislature has provided the State of Florida with the alternative sentencing options of execution or life imprisonment without parole for certain aggravated first-degree murders, Fla. Stat. 921.141, the State has no constitutional right to death qualification – the process of excluding those so opposed to the death-penalty sentencing option that they cannot consider fairly consider it.[1] "[L]egislative will is not frustrated if the [death] penalty is never imposed[.]" *Furman*, 408 U.S. at 311 (White, J.,

[1] Rather, the process has, in the past, merely been *permitted*, in order to facilitate the State's ability to carry out its laws. *See Wainwright v. Witt*, 469 U.S. 412, 424 (1985). The Constitutional rights of *individuals* (jurors and Mr. Glover) against impermissible and intrusive state action that violates the Bill of Rights are another matter altogether.

concurring). *Cf. State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984) (noting the "right to peremptory challenges is not of constitutional dimension" and forbidding, pre-*Batson*, the State's peremptory strikes based on race).

The Florida Supreme Court's condemnation of the discriminatory use of peremptory strikes applies with equal force to the discriminatory effect of death qualification:

> Article I, section 16 of the Florida Constitution guarantees the right to an impartial jury. The right to peremptory challenges is not of constitutional dimension. The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. *It was not intended that such challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.*

Id. (emphasis added). Death qualification, if permitted to go forward here, will encroach upon Mr. Glover's constitutional right to an impartial jury. And although Black people should be on every capital jury in this county and never excluded, it is notable in this case that death qualification will excise Mr. Glover's own racial group from the jury that will decide if he lives or dies.

The lack of representation in Duval County capital juries demonstrated here parallels the lack of representation in every other office of power that could affect who lives and who dies under Florida's death penalty scheme. In a state with over 3.5 million Black persons, no Black person sits in the governor's mansion, the lieutenant governor's office, attorney general's seat, or on this State's Supreme Court.[2] Of 20 State Attorneys in Florida, it appears that two are Black and one Latinx. The State Attorney in this

[2] News Service of Florida, *Florida Supreme Court will have no black justice for first time in nearly four decades*, Tampa Bay Times (Nov. 30, 2018), https://www.tampabay.com/florida-politics/buzz/2018/11/30/florida-supreme-court-will-have-no-black-justice-for-first-time-in-nearly-four-decades/.

jurisdiction is white. Of 29 Circuit Judges, who hold the authority in capital cases to override death sentences to life, few appear to be Black or Latinx. *See Circuit and County Judges of the Fourth Judicial Circuit, Fourth Judicial Circuit Courts of Florida*, https://www.jud4.org/Circuit-and-County-Judges-of-the-Fourth-Judicial-C.aspx.

The attached study by Associate Professor Jacinta Gau, of Criminal Justice at the University of Central Florida,[3] evaluates comprehensive data from available past capital trials in this county, and places the State on notice of death qualification's discriminatory effect. *See* Exhibit B. If the State elects to continue to use a process that excludes based on race, it can only be concluded that the State intends precisely that outcome. *Cf. Turner v. PCR, Inc.*, 754 So. 2d 683, 691 (Fla. 2000) (employing exception from immunity under "standard [that] imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur"). Continuing on this path in conscious disregard of the risk of systematic discrimination is not only indefensible, but as shown below unconstitutional, and, as this Court should now hold, impermissible. *Cf. Borden v. United States,* 141 S. Ct. 1817, 1824 (2021) ("A person acts recklessly, in the most common formulation, when he 'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards. . . . Speeding through a crowded area may count as reckless even though the motorist's 'chances of hitting anyone are far less [than] 50%.'") (internal citation omitted).

Although addressed to this Court to prevent an injustice at Mr. Glover's trial, this motion is also presented to the State Attorney for the Fourth Judicial Circuit, who is in a

[3] *See* University of Central Florida, Profile, Professor Jacinta Gau, https://ccie.ucf.edu/profile/jacinta-gau/.

position to change course, beginning with this case. If the State didn't know before, now it knows. Now known, this history should not be permitted to repeat itself.

When the U.S. Supreme Court rejected a constitutional challenge to death qualification under this right in *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court distinguished those unable to meaningfully consider a death sentence from groups the Court had previously recognized as "distinctive," whose removal on "the basis of some immutable characteristic such as race, gender, or ethnic background, undeniably gave rise to an 'appearance of unfairness.'" 476 U.S. at 175.[4] This motion shows, beyond doubt, that death qualification excludes based on race, and that inability to meaningfully consider a death sentence is itself a product of race and racial discrimination. Death disqualification disproportionately excludes Black potential jurors over whites by nearly a two to one margin, and other jurors of color by even larger margins. It does so by building on prior racial discrimination. The framers provided the Sixth Amendment jury right to thwart "oppression by the Government." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Essential to the right is "the selection of a petit jury from a representative cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975). The right protects a criminal defendant's interest "in having the judgment of his peers interposed between himself and the officers of the state who prosecute and judge him[.]" *Apodaca v. Oregon*, 406 U.S. 404, 411 (1972). As this motion and the attached study demonstrate, death qualification will unconstitutionally strip Mr. Glover's jury venire from the very peers, the representative

[4] In *Lockhart*, the Court had before it the testimony of several experts who in turn relied on a significant body of consistent survey data showing that, given the attitudes about the death penalty among Black and white people, Black people would be more likely to be excluded. See 476 U.S. at 201 (Marshall, J., dissenting) (citing *Grigsby v. Mabry*, 569 F.Supp. 1273, 1291-1308 (E.D. Ark.1983)). But the Court did not have before it, as here, documentation from capital trials of the actual discriminatory results of death qualification.

community members, who ought to be interposed between Mr. Glover and the State as it attempts to condemn him to death.

For reasons set our further below, this Court should not allow it.

I. Factual background and premises

A. Death qualification in twelve Duval capital cases since 2010 disproportionately excluded Black prospective jurors.

Dennis Glover was sentenced to death in 2015, but the Florida Supreme Court reversed his death sentence in 2017, and remanded for a new sentencing. Dr. Gau's study, on which this motion is predicated, analyzes data from Mr. Glover's original 2015 trial, and the jury selection of eleven other capital trials from 2010-2018. The twelve trials on which Dr. Gau relies are the only known capital trials with juries from 2010 to September of 2021 in Duval County with publicly-available data about the racial makeup of the venire and juries.[5]

The twelve trials are:

[5] In the Duval County capital trials of Russell Tillis (2021), Rodney Newberry (2018), Randall Deviney (2017 & 2015), Donald Smith (2019), Terry Smith (2010), and Arthur Martin (2012), each of the presiding judges has entered an order shielding the juror information in the trials, including names and other identifying information, from the public (in the Deviney case, the Clerk of this Court has stated that the original 2015 order carried over to the 2017 trial). *See* Exhibit A (compilation of orders). Therefore, these trials are not included in the data in this motion at this time. Mr. Glover is filing a motion seeking a limited exception to the orders in those cases for the purpose of completing this study.

Two capital trials occurred in December, after Dr. Gau's report. On December 10, 2021, Paul Durousseau, No. 16-2003-CF-010182-AXXX-MA, was sentenced to life imprisonment without parole. On December 14, 2021, the jury returned a verdict of death against Thomas Bevel, Case No. 16-2004-CF-004525-AXXX-MA. It is expected that in the former case, there will be no court-ordered transcript but in the latter there will be, in light of the expected appeal. Undersigned counsel plan to update the study when the Bevel transcript becomes available, and ask this Court, in a separate motion, see Motion No. 19, to issue an order funding preparation of the transcript from the Durousseau jury selection.

Year of Trial	Name of Defendant	Sentence
2018	Collins, Keith	LWOP
2018	Jackson, James	LWOP
2017	Bright, Raymond	Death
2014	Newberry, Rodney	Death
2013	Glover, Dennis	Death
2013	Jackson, Kim	Death
2012	Phillips, Terrance	Death
2012	Sheppard, Billy	Death
2011	Brown, Thomas	Death
2011	Sparre, David	Death
2010	Dubose, Rasheem	Death
2010	McMillian, Justin	Death

Three sets of public records maintained by the Duval County Clerk of Courts comprise the data Dr. Gau analyzed from these twelve cases:

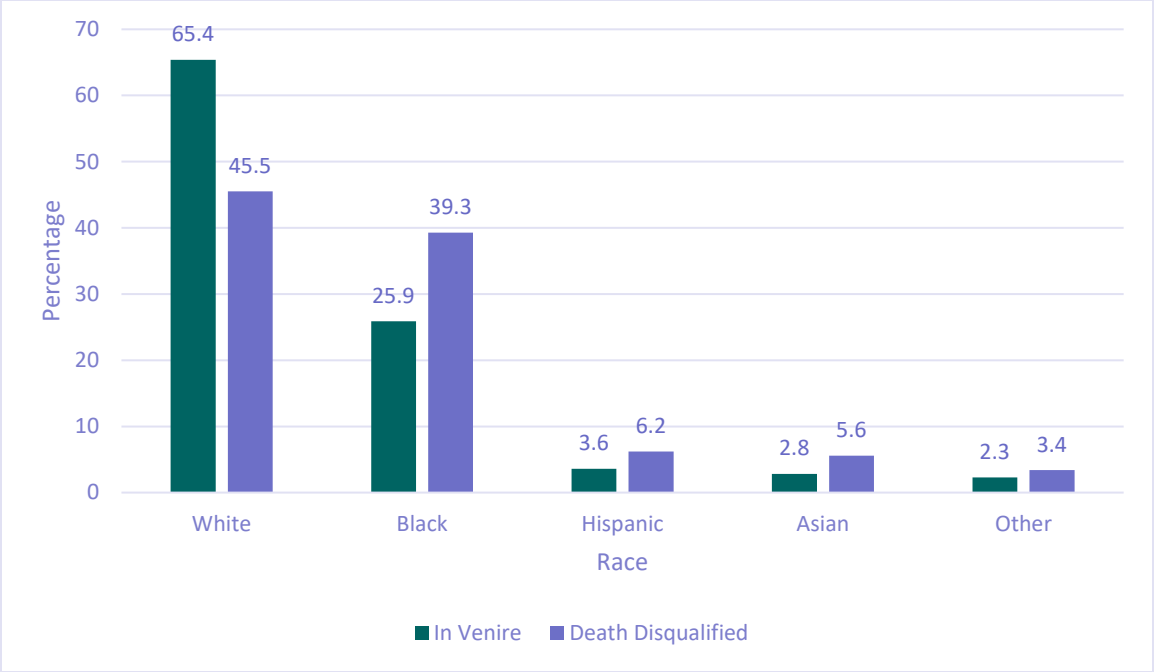
- First are the transcripts of the jury selection in these twelve cases, which reveal the ultimate outcome for each potential juror, such as dismissed for hardship, cause, or by peremptory strike, or served as a juror or alternate, or dismissed because the jury and alternates were selected before the attorneys made an ultimate strike or pass decision.

- Second, are the clerk's venire lists for each case. The lists are largely duplicative of the names stated in the transcript, but valuable for stating the precise names (including middle names) of each potential juror, sometimes in the order in which they generally appeared (as juror number one, two, three, etc.).[6]
- Third are the list of juror candidates maintained as public records by the Duval County Clerk of Court under Fla. Stat. § 40.011 (1), which contain the potential juror candidates (hereafter juror candidates or potential jurors) for the county for each year, and include each potential juror's race and gender, among other information.

Dr. Gau's report evaluating this data is attached as Exhibit B to this motion. In short, after evaluating what happened to each potential juror in this dataset, and the race and gender of each, she has found that the process of death qualification disproportionately excludes Black jurors and other jurors of color. She has also found that when death qualification is combined with the peremptory strikes employed by this State Attorney's Office, the effect is to remove an overwhelming majority of otherwise qualified, willing and available Black jurors in this county's capital trials.

To begin, Dr. Gau has provided the demographic breakdown of all of the potential jurors in the twelve trials, and then compared that breakdown to the proportion of jurors excluded through death qualification. Figure 1 illustrates the percentage for each racial group of their representation in the *entire* venire versus their percentage amongst all excluded for death qualification as set forth as Figure 1 in Dr. Gau's report (Exhibit B at 5):

[6] The Clerk's Office keeps two different types of these lists. One has numbered juror names, in the order the jurors are called in court. A second uses alphabetical order, typically in an excel spreadsheet. In some cases, only the alphabetical listing was available.

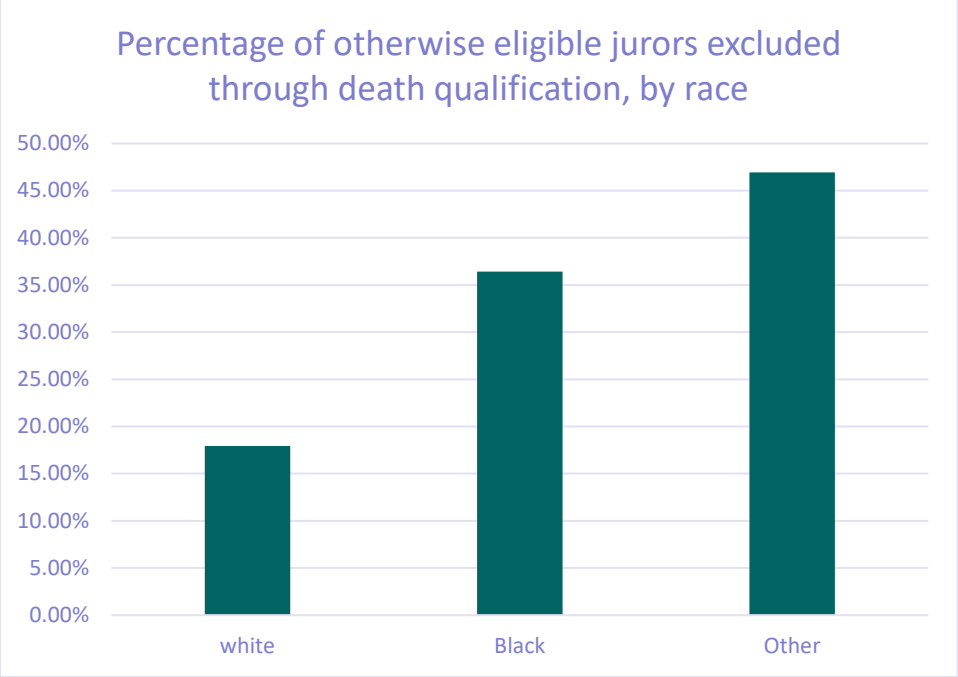


Thus, white people make up the overwhelming majority of potential jurors summoned to Duval County capital trials (65%), but only 45% of those excluded by death disqualification. Black jurors, by contrast, make up only 26% of the venire, but 39% of those death disqualified. As summed, potential jurors of color – including Black potential jurors, Hispanic, Asian, and other – comprise 35% of those summoned,[7] but make up a combined majority (54%) of jurors removed through death qualification. *Id.*

Looking at a different measure, 27.1% of all Black potential jurors were removed through death qualification, as were 32.4% of all other jurors of color, but only 12.8% of white potential jurors were removed through death qualification. *See* Exhibit B at 8, Table 3.

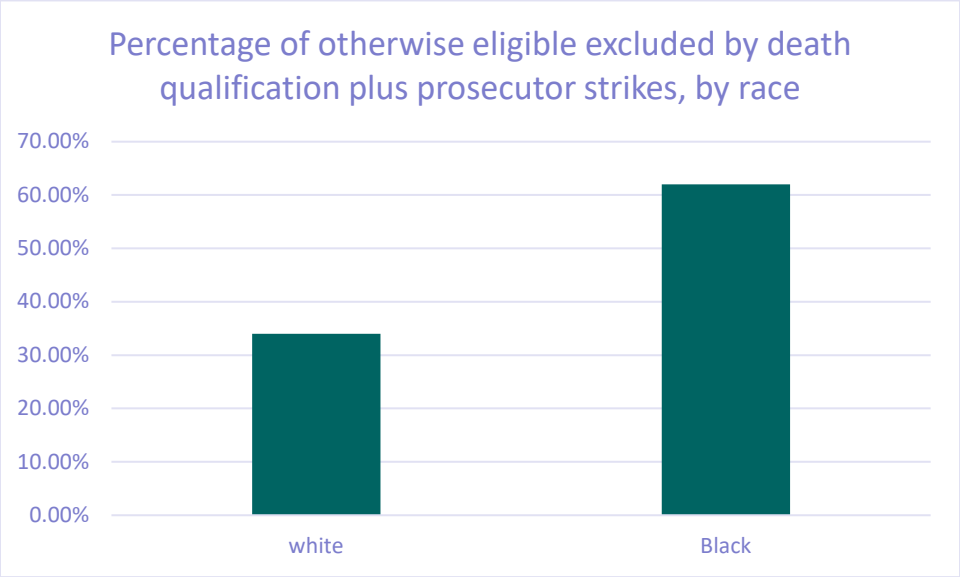
[7] These are the race identifiers provided in the clerk's master juror candidate lists.

Dr. Gau also examined those removed for death qualification as a percentage of those prospective jurors who were otherwise qualified, willing, and able to serve. The examined population is therefore made up of jurors who were not dismissed for hardship or removed for cause on any basis unrelated to death qualification. In other words, present here are only those prospective jurors who could and should have been available for these capital trials, but for death qualification. Of these potential jurors, 38.6% of Black willing and eligible jurors were removed through death qualification, and 43.4% of other jurors of color were dismissed through death qualification. By contrast, death qualification removed only 17.1% of white potential jurors. *See* Exhibit B, Table 4. These figures are represented as follows:



Dr. Gau then added to those dismissed by death qualification those dismissed through prosecutors' peremptory strikes. This group, combining exclusions under death qualification and through prosecutor strikes, showed even more significant exclusion of Black jurors and jurors of color. Only 34% of white potential jurors, otherwise eligible and willing, were excluded based

on the combination of death qualification and prosecutor strikes. But 62% of Black potential jurors were excluded by this same combination. *See* Exhibit B, at 9, Table 5. These figures are represented as follows:



The picture becomes even more stark when gender is broken out. Fully two thirds of Black women, otherwise eligible and willing, were excluded by the combination of death qualification and the prosecutors' peremptory strikes. Exhibit B at 11, Table 7.

As Dr. Gau attests to in her report, all of these findings are robustly statistically significant, with chi-square tests revealing p values under .001 under every comparison. Exhibit B, at 6, 7, 9, 10, 11. The "statistical significance of the chi-square test means that the differences between groups cannot be attributed to chance alone. In other words, there are systematic patterns in outcomes by race." Exhibit B at 6.

***

Regardless of the measure used, as a whole, this data proves beyond any doubt that death qualification in this county, over a period of ten years and twelve trials, disproportionately excluded Black potential jurors, and other jurors of color, including those otherwise ready, willing and eligible to serve.

B. Other studies reveal similar discriminatory impact of death qualification.

The above data proves consistent with numerous studies of death qualification in jury selection in multiple states. Studies consistently reveal that Black potential jurors are significantly more likely than whites to be excluded from capital juries based upon their death penalty opposition. *See* Ann Eisenberg, *Removal of Women and African-Americans in Jury Selection in South Carolina Capital Cases*, 1997-2012, 9 Ne. L.J. 299, 333–34 (2017) (finding in study of transcripts in South Carolina capital trials that 32% of Black potential jurors removed for cause based upon death penalty opposition, but only eight percent of white potential jurors); Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 137 (2016) (finding in study of Louisiana capital trials conducted between 2009 and 2013, using the Witherspoon standard, that Blacks potential jurors were excluded an average of 36.0% percent whereas whites were excluded an average of 20.0%; "[c]onsequently, black jurors were 1.8 times more likely to be struck under Witherspoon than white jurors"); Justin D. Levinson, *Robert J. Smith & Danielle M. Young, Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, 89 N.Y.U. L. Rev. 513, 553, 558 (2014) (finding in study of 445 jury-eligible citizens from six leading death penalty states that "white participants were significantly more likely to be death-qualified (83.2%) than non-White participants (64.3%)"); Alicia Summers, *R. David Hayward & Monica K. Miller, Death Qualification as Systematic Exclusion of Jurors with Certain Religious and Other Characteristics*, 40 J. App. Soc. Psych.

3218, 3224-25, 3228 (2010) (finding in study of mock jurors that "racial minority members were more than twice as likely as were White mock jurors to be excluded by the death-qualification item"); Craig Haney et al., *The Continuing Unfairness of Death Qualification: Changing Death Penalty Attitudes and Capital Jury Selection*, Psychology, Public Policy, and Law 12 (2022), advance online publication, https://doi.org/10.1037/law0000335 (hereafter Continuing Unfairness) (reporting on detailed "death qualification" survey in California, New Hampshire, and Florida: "African American respondents in Florida were significantly more likely than Whites (specifically) to be Excludable, and significantly more likely to be Excludable compared with all other racial groups combined."); Craig Haney, Aida Hurtado & Luis Vega, *"Modern" Death Qualification: New Data on Its Biasing Effects*, 18 L. & Hum. Behav. 619, 630 (1994) (finding in survey of adult California residents that 26.3% of the group excluded by death qualification were racial minorities, "so that death qualification (even when it included strong death penalty proponents) resulted in the loss of 27.1% of [the] minority respondents"); Rick Seltzer, Grace M. Lopes, Marshall Dayan & Russell F. Canan, *The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example*, 29 How. L.J. 571, 573, 604 (1986) (finding in 1983 Maryland public opinion survey that 34.1% of black respondents would be disqualified through death qualification, compared to 9.5% of white study participants); Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & Hum. Behav. 31, 46 (1984) (finding that "[b]lacks are more likely than other racial groups to be excluded under *Witherspoon* (25.5% vs. 16.5%)"); Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to*

the Death Penalty, 73 J. Crim. L. & Criminology 379, 386 (1982) (finding that 55.2% of black respondents were "Witherspoon-excludable" compared to 20.7 % of white respondents).[8]

C. Historic and ongoing race-based abuse of state power leads to opposition to the death penalty in the Black community and in turn disproportionate exclusion from jury service.

Social scientists observe that opposition to the death penalty in the Black community is best explained by a historically rooted fear of state power. James Unnever, Francis Cullen & Cheryl Lero Johnson, *Race, Racism, and Support for Capital Punishment*, 37 Crime & Just. 45, 83 (2008).[9] In our Nation, Black people have frequently experienced the state as an institution that protects white interests and the criminal justice system "as unjust and potentially an instrument of oppression," which "fostered wariness among African Americans about the state's power to take life." *Id.* at 82. Death qualification compounds prior discrimination by removing from capital juries those who have experienced it, know of it from familial and community

---

[8] *See also* Mona Lynch & Craig Haney, *Death Qualification in Black and White, Racialized Decision Making and Death-Qualified Juries*, 40 L. & Pol'y 148, 157 (2018) (for general proposition of exclusion of Black); Sullivan, J., *The demographic dilemma in death qualification of capital jurors*, 49 Wake Forest L. Review 1107- 1172 (2014) (noting the "demographic dilemma in death qualification," namely that the process not only "necessarily result[s] in a jury that does not respect the view of a substantial portion of the community-the significant opposition in the black community to capital punishment," but also operates to "exclude the expressed moral judgment on capital punishment held by this part of the community" and thus "serves to reduce the black presence in a symbolically important process in the criminal justice system"); Swafford. A, *Qualified support: Death qualification, equal protection, and race*, 39 American J. Crim. Law 147-174 (2011) (similar).

[9] *See also* Cochran, J., & Chamlin, M, *The enduring racial divide in death penalty support*, 34 (1) J. Crim. Just 85, 97-98 (2006), https://doi.org/10.1016/j.jcrimjus.2005.11.007 ("Given the role of the police as the 'gatekeepers' of the criminal justice system with whom 'first impressions' are often made, it may be of no surprise that negative perceptions of the police lead to minority skepticism, distrust, and a lack of confidence in the criminal justice system as a whole. Lower levels of support for capital punishment may simply be symptomatic of a much larger and more serious problem[.]"); Perney, M. & Hurwitz, J, *Persuasion and resistance: Race and the death penalty in America*, 51 (4) J. Political Science 996-1012 (2007), https://www.jstor.org/stable/4620112.

experience, and/or sympathize with the notion, based on experience as people of color, that the government has engaged in prior acts of discrimination, including in the criminal punishment system (and in death penalty trials), and continues to do so up to the present moment. It means that those most sympathetic to the problems with the death penalty, and its historic link with racism, the history of white superiority that allowed slavery to occur, lynching, and racialized incarceration and punishments, are excluded. And those sympathies naturally tie to race in the first instance.

The "longstanding, durable racial divide" in death penalty support cannot be treated as the product of chance; it must be understood within a legacy of state-supported racial subordination. Unnever et al., supra, at 81. As Justice Brennan observed, "[W]e remain imprisoned by the past as long as we deny its influence in the present." *McCleskey v. Kemp*, 481 U.S. 279, 345 (1987) (Brennan, J., dissenting). The inescapable consequence of death qualification is that it perpetuates the exercise of the state's authority against Black community members by excluding them from capital juries.

D. Racism in government and the criminal justice system in Duval County and the state leads to the conditions for Black potential jurors opposing the death penalty.

Death qualification cannot be properly understood outside of the context of racial discrimination in this county and state. Duval County has a history of racial violence and discrimination by state actors, which permeates through to today. Florida was a slave state before the Civil War and joined the Confederacy to preserve slavery. This racial inequality and violence deeply impacted the formation and foundation of the death penalty in the United States. "Both before and immediately after the [Civil] War, capital punishment was imposed for crimes against whites under circumstances in which similar crimes against African-Americans were punished

less severely or went unpunished" Anthony G. Amsterdam, *Opening Remarks: Race and the Death Penalty Before and After McCleskey*, 39 Colum. Hum. Rts. L. Rev. 34, 35 (2007) (citing Randall Kennedy, *Race, Crime, and the Law* 84-85; Theodore Brantner Wilson, *The Black Codes of the South* 97, 105-06 (1965)); Stuart Banner, *The Death Penalty: An American History* 8-9 (Harv. U. Press 2002) (documenting state statutes targeting Black persons with capital punishment for minor property crimes such as burning or destroying grain). *See also Luke v. State*, 5 Fla. 185, 192-93 (1853) ("A careful review of the legislation of the State must lead to the conclusion that it was intended to establish and preserve a distinction between the punishments to be inflicted on slaves and free persons of color, and those on white persons for the same violations of the criminal law.").

Florida's history with the death penalty is part and parcel of a history of racial discrimination endorsed and enforced by the law, the long-term of effects of which society still grapples with today. It is not a history that is easy to forget even by current-day citizens called to jury service, particularly jurors of color and those who yearn for equal justice under the law. Before the Civil War, Florida's law was explicit: white people and Black people, whether enslaved or free, faced vastly different punishments. Black people could be executed for a number of offenses for which white people could only be fined, among other inequalities and indignities. *Luke*, 5 Fla. at 192-93. For example, "the offences of assault, assault and battery, with or without the intent to kill or murder, were . . . punished by a fine, at the discretion of the jury. . . ; while the same offences committed by a slave or colored freemen upon a white person, are punished more severely by the Act of Nov. 21, 1828, a simple assault being punished by the infliction of 39 stripes, and the more aggravated offence of assault with intent to kill is punished by death." *Id.* Meanwhile, "robbery and burglary were punished by fine, pillory, or stripes, while

. . . if committed by a slave, they are punished by death." *Id.* at 193. In the chilling words of Florida's high court, the difference in punishment was warranted to maintain white "superiority" and the "inferior position" and "degraded case" of Black people in the state of Florida:

> The perpetuation of the institution, indeed the common safety of the citizens during its continuance, would seem to require that the superiority of the white or Caucasian race over the African negro, should be ever demonstrated and preserved so far as the dictates of humanity will allow—the degraded caste should be continually reminded of their inferior position, to keep them in a proper degree of subjection to the authority of the free white citizens.

Id. at 195. *See also Murray v. State*, 9 Fla. 246, 250 (1860) (reaffirming *Luke*).

And the mandates from this state's high court were matched by the practices in this state's execution chamber. Five of this State's 16 first known executions, all prior to the Civil War, were of white men convicted of aiding persons enslaved to escape. *Executions in the U.S. 1608-2002: The Espy File*, https://files.deathpenaltyinfo.org/legacy/documents/ESPYstate.pdf (search FL). (The remaining 11 were for murder, suggesting an equivalence between that severe crime and aiding persons enslaved). Of the 314 Florida persons Florida executed, documented from territorial times to 1972 (when the U.S. Supreme Court invalidated all extant death-penalty laws in *Furman v. Georgia*, 408 U.S. 238 (1972)), 214 were Black persons, 96 white persons, and four of unknown race. *Id.* Florida's execution gap between Black and white in this period – roughly two to one for all crimes – explodes for the crime of (non-homicide) rape, driven by convictions of Black defendants with white rape victims. *See* Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 Annals of the Amer. Acad. of Polit. & Soc. Sci., 119, 126-33 (1973) (studying multiple states, including Florida, finding that "black defendants whose victims were white were sentenced to death approximately eighteen times more frequently than defendants in any other racial combination of defendant and victim").

Before the U.S. Supreme Court outlawed the execution for the crime of non-homicide rape in *Coker v. Georgia*, 433 U.S. 584 (1977), Florida executed 48 men for non-homicide rape, 44 of them Black, four white. See *Executions in the U.S. 1608-2002: The Espy File*, *supra*. **The ratio is 11 to one.** This history is not easily forgotten.

These patterns did not change after the Civil War. In fact, that era was one of the most divisive and violent in United States history. After some initial improvements in conditions for Black people after the Civil War, the North soon withdrew its oversight of Florida and other hostile southern states. The South quickly dismantled the protections of Reconstruction and implemented a "caste system based on race." Isabel Wilkerson, *The Warmth of Other Suns: The Epic Story of America's Great Migration* 37-38 (Vintage 2010) (documenting the migration and impetus for migration for four southerners, including one from Florida). In 1896, our nation's highest court upheld this caste-race system in *Plessy v. Ferguson*. Wilkerson, *supra*, at 38; *Plessy v. Ferguson*, 163 U.S. 537 (1896). *Plessy* placed a government-approved stamp of inferiority on Black people throughout our nation, approving of their exclusion from white spaces and banishment to "separate but equal" Black spaces. This anathema to equality stood for the next sixty years, enabling white supremacy and violent hatred, including the routine torture, mutilation, and execution of black men, women, and children in front of large white crowds. Wilkerson, *supra*, at 38-39.

In particular, southern states such as Florida "began to look to the criminal justice system to construct policies and strategies to maintain the subordination of African-Americans." Bryan Stevenson, *A Presumption of Guilt*, N.Y. Rev. of Books 8 (July 13, 2017), http://www.nybooks.com/articles/2017/07/13/presumption-of-guilt/. "Black people were routinely charged with a wide range of 'offenses,' some of which whites were never charged

with." *Id*. The "tension" between the South's determination to maintain the regime of white supremacy and the ambition of African Americans to "rise up from slavery by seeking education and working hard under difficult circumstances. . . . [l]ed to an era of lynching and violence that traumatized black people for decades." *Id.* Most of the southern Black population had "witnessed a lynching in their own communities or knew people who had." Wilkerson, *supra*, at 39.

Florida played its role. It was the site of some of the country's most infamous lynchings and incidents of racial violence. James Oliver Horton & Lois Horton, *Slavery and the Making of America* 171 (2006); *see also* Equal Justice Initiative, *Slavery in America: The Montgomery Slave Trade* (2010). Roughly matching the execution record in numbers for a similar time period, more than three hundred Black Americans were murdered in documented lynchings in Florida between 1877 and 1950. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror* 16 (2017) (hereafter *Lynching in America*).

At least seven Black Americans were lynched in Duval County between 1877 and 1950. Equal Justice Initiative, *Lynching in America: Confronting the Legacy of Racial Terror – Lynchings by County* 3. Many of these lynchings were of Black men accused of assaulting, and often merely paying attention to, a white woman. In September 1919, a group of fifty to a hundred white men overpowered a jailer, looking for a Black man charged with assaulting a white young woman. The sheriff had moved the accused man to another prison. But the mob was undeterred. It grabbed two *other* Black men in the jail, and shot them. The mob then dragged the bodies of one of the murdered men behind a car, finally cutting it loose in front of the Windsor Hotel on Hogan Street, not more than a block from the State Attorney's Office. Times-Union editorial board, *Friday's Editorial: Jacksonville's untold history involves lynching and more*, The Florida Times-Union (Nov. 9, 2017),

https://www.jacksonville.com/article/20171109/OPINION/801258122. "Were those involved in the lynchings brought to justice? Not likely. Only 1 percent of those involved in lynchings were ever convicted of a criminal offense." *Id.*

In 1923, Ben Hart was lynched near Jacksonville based on the mere suspicion that he had peered into a young white woman's bedroom window. Ten unmasked white men came to his home, claiming to be sheriffs, and informed Mr. Hart of the accusation. Although he asserted his innocence, he agreed to go to the jail with the men. The next day his handcuffed and bullet-ridden body was found in a ditch three miles from the city. He had been shot six times. Investigation found that he had been at his home twelve miles away when the peeping incident occurred. He was innocent. No one was prosecuted for his murder. *NAACP Annual Report: A Summary of Work and Accounting* 19 (1923).

That same year, 120 miles away from Jacksonville, white mobs lynched at least eight people from the Black community of Rosewood, and burned the town to the ground (leaving today only a green highway marker on State Highway 24). *See generally* C. J. Bassett, *House Bill 591: Florida Compensates Rosewood Victims and Their Families for a Seventy-One-Year-Old Injury*, 22 Fla. St. U. L. Rev. 503 (1994). A special master issued a report on which the Legislature relied in compensating the victims and their descendants. The special master found fault in state actors, including local Sheriffs' and their deputies' failure to intervene and protect victims and/or property, the Governor's failure to send the National Guard (when one of the Sheriffs said it wasn't needed), and the failure of a Special Grand Jury – ordered by the Governor, presided over by a Circuit Court Judge, and led by a State Attorney – to indict and purportedly to find any evidence, despite the existence of witnesses still available and presented to the Special Master 70 years later. *See* Richard Hixson, *Special Master's Report to Florida*

House of Representatives 12-15 (March 21, 1994), http://edocs.dlis.state.fl.us/fldocs/leg/hr/pubs/rosewood1994.pdf. The special master specifically noted that some of the displaced residents of Rosewood then moved to Jacksonville. *Id.* at 8.

In light of these Florida murders and lynchings, including in Jacksonville and Rosweed, the NAACP urged in the 1930's the passage of a federal anti-lynching bill. But Florida legislators in particular resisted reform efforts. Senator Claude Pepper filibustered the proposed bill in 1936 saying "we do not want a return to the shackles of Reconstruction days upon the backs of *our* people." Walter T. Howard, *Extralegal Violence in Florida During the 1930s* 108 (2005) (emphasis added). The bill did not pass, and that year, Florida led the nation in lynchings. Not a single perpetrator was convicted, indicted, or even arrested. *Id.* at 112.[10]

The response of the criminal justice system to lynching, meanwhile, was to use it to justify the death penalty (which as shown above was plagued by its own racial injustice). When the U.S. Supreme Court approved death sentences going forward in *Gregg v. Georgia*, 428 U.S. 153, 183 (1976), it stated in a now-famous passage: "'When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.'" *Id.* (quoting *Furman*, 408 U.S. at 308 (Stewart, J., concurring)). Lynching and formal

[10] The passage of the Civil Rights Act in 1964 and the Voting Rights Act of 1965 did not heal racial wounds in the United States, Florida, or Duval County, and indeed the police in this county exacerbated community tensions rather than keeping the peace. The history of discriminatory police encounters and shootings, overincarceration in the Black community, and instances of racism coming directly from the court system, in this county and state as elsewhere, offers yet further inextricably intertwined reasons for people of color to rightfully feel skeptical about the ability of the government to met out equal justice and in particular when administering the most severe and only irrevocable punishment in our criminal punishment system. For reasons of economy, that history is not presented here at this time. At a hearing on this matter, however, a complete history should be brought before the Court.

executions have long been linked – the latter gradually replacing the former. "One of the strongest predictors of a state's propensity to conduct executions today is its history of lynch mob activity more than a century ago." Carol M. Steiker & Jordan S. Steiker, *Courting Death: The Supreme Court and Capital Punishment* 17 (Belknap Press of Harv. U. Press 2016) (citing Franklin E. Zimring, *The Contradictions of American Capital Punishment* 66 (N.Y.: Oxford U. Press 2003)).

In sum, the Equal Justice Initiative concluded that "the death penalty's roots are sunk deep in the legacy of lynching . . . evidenced by the fact that public executions to mollify the mob continued after the practice." *Lynching in America, supra,* at 6. Like other troubling historical vestiges, Florida and other states have relied on the death penalty – rather than legal or constitutional protections such as a federal anti-lynching bill – to eradicate lynching. This understandably gives pause to those who yearned to see the abhorrent practice taken on directly.

The transition from reliance on lynching to death-sentencing practices that continue to this day continues a history of racial injustice that would inform those who oppose the death penalty. Public knowledge in the Black community about Duval County death sentences, in particular, would only further contribute to the belief that the system is tilted against Black defendants. Of the 99 executions in Florida since 1977, 28 of those executed have been Black-Americans.[11] Of these 99, 86, or 87%, have involved a white victim, including all nine of the executions from this county.[12] Meanwhile 17 of the 30 innocent people Florida has sent to death row, and now exonerated, are Black, like Clifford Williams falsely convicted in Duval County and who served four decades in prison for a crime he did not commit, including time on death

[11] *See* https://deathpenaltyinfo.org/executions/execution-database (filter Florida).
[12] *Id.* (filter Florida, race of victim white).

row.[13] Of these 17 innocent Black men who spent time on death row, eleven were cases with at least one white victim, and at least two featured all-white juries.[14] According to the 2020 Census, Duval County is approximately 60% white and only 30% Black. But of 46 documented current death sentences issued in the county, 28, or 61% of those currently sentenced to death have been Black, including eight of the last ten, and 11 of the last 15.[15] This is not lost in Black communities. Not surprisingly, a new Pew Research national poll has found that, among Black respondents, 85% said "Black people are more likely than Whites to receive the death penalty for being convicted of similar crimes (61% of Hispanic adults and 49% of White adults [said] this)." Pew Research Center, *Most Americans Favor the Death Penalty Despite Concerns About Its Administration* (June 2, 2021), https://www.pewresearch.org/politics/2021/06/02/most-americans-favor-the-death-penalty-despite-concerns-about-its-administration/.

***

Through death qualification, the State of Florida in this case could garner a death sentence for a Black man convicted of a white woman in part by bearing the fruit of its own past discrimination against Black community members. Past (and ongoing) discrimination drives current exclusion of Black community members under the rational of death qualification. A

[13] See https://deathpenaltyinfo.org/policy-issues/innocence-database (filter Florida).
[14] See Death Penalty Information Center, *Description of Innocence Cases*, https://deathpenaltyinfo.org/policy-issues/innocence/description-of-innocence-cases.
[15] *See* Florida Department of Corrections, Death Row Roster, http://www.dc.state.fl.us/OffenderSearch/deathrowroster.aspx (documenting 46 people from Duval County on death row). The figures include those marked on the website, as in Mr. Glover's case, as "sentence pending review." These appear to be *Hurst* resentencings. Those previously sentenced to death, but now sentenced to life imprisonment for whatever reason, are not included.

vicious cycle continues.[16] The only way to end the cycle, and to break this link, is to end death qualification.[17]

F. Death qualification of Mr. Glover's jury will result in a biased and non-representative jury, more likely to sentence him to death.

The facts above require Mr. Glover and his lawyers to expect, if death qualification is to occur, that a large percentage of his community, the Black community, will be excluded from his trial due based in part on past instances of discrimination. This in turn will prejudice his right to a fair and impartial jury trial on the question of whether he lives or dies at the hands of the State.

In *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968), the Court recognized that the purpose of a jury trial is to "prevent oppression by the Government. . . . Providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." *Id.* But death qualification accomplishes, if anything, the opposite. It biases the composition of the jury, and allows the State to manipulate the jury to produce a verdict in its favor. "Because of the

---

[16] *Cf.* Vida B. Johnson, *Arresting Batson: How Striking Jurors Based on Arrest Records Violates Batson*, 34 Yale L. & Pol'y Rev. 387, 389 (2016) (critiquing practice of questioning potential jurors about their arrest records and allowing that information to serve as "race neutral" reasons for prosecutors' peremptory strikes as resulting in juries "whiter than that of the respective communities" and "compound[ing] the racially disparate impact of our criminal justice system"). *See also State v. Andujar*, 254 A.3d 606, __, 247 N.J. 275, __ (2021) (finding "evidence of implicit bias that appears in the extensive record" where Black potential juror from Newark spoke extensively of knowing friends and relatives who had been both prosecuted for and victims of crime, but maintained he could be fair and impartial, where prosecutors, unsuccessful in moving to remove him for cause, thereafter ran a criminal background check on him and discovered an outstanding warrant).

[17] At least for the foreseeable future. Even if perfect racial equity were to begin today, including the reconciliation needed for healing, a scenario difficult to imagine, the scars and old wounds caused over years and decades would take long to heal. The earned trust in the State on which death qualification is premised remains far off.

fundamental importance of the jury trial to the American system of criminal justice, any further reduction that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance." *Ballew v. Georgia*, 435 U.S. 223, 239 (1978).

Death qualification creates capital juries that are less representative of the community, more likely to favor the prosecution, and more likely to convict.[18] As noted earlier, because death qualification adversely affects the ability of Black community members to serve, capital juries are unrepresentative of general jury pools in Florida.

In addition, death-qualified juries are more likely to hold "law-and-order," "crime control," and "pro-prosecution" views than other kinds of juries. *See* BENJAMIN FLEURY-STEINER, JURORS' STORIES OF DEATH: HOW AMERICA'S DEATH PENALTY INVESTS IN INEQUALITY 24-25 (2004) ("Capital jurors hold disproportionately punitive orientations toward crime and criminal justice, are more likely to be conviction-prone, are more likely to hold racial stereotypes, and are more likely to be pro-prosecution."); Williams J. Bowers et al., *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1506-07 (1998) (finding that among a survey of 916 capital jurors, over half the jurors believed that the death penalty is the *only* acceptable punishment for each of repeat murder, multiple murder, and premeditated murder); Rick Seltzer et al., *The Effect of Death-qualification on the Propensity of Jurors to Convict: The*

[18] A death-qualified jury is more likely to convict on the basis of the same set of facts and circumstances than non-death-qualified jurors. While problematic in other cases, this concern does not affect Mr. Glover in *this* chapter of his case because he was previously convicted. His sentence was vacated and he is now awaiting only resentenicng.

Maryland Example, 29 HOWARD L.J. 571, 607 (1986) ("This study, combined with the body of empirical data on death-qualification, conclusively shows that the removal for cause of *Witherspoon* excludables results in a petit jury that is prone to convict and under representative of the community from which it is drawn."). These views are more likely to be held by death penalty supporters and are more likely to be retained in the capital jury pool following death qualification.

And because death-qualified juries have fewer moral reservations about imposing the death penalty, and have been selected precisely on the basis of their ability to do so, death-qualified juries are more likely to sentence defendants to death. *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 ARIZ. ST. L.J. 769, 784-85 (2006) ("After carefully controlling for each of the *McCree* Court's concerns, the [Capital Jury Project] data nevertheless invariably confirms what Professor Zeisel's study showed back in the 1950s: The death-qualification process today still seats juries uncommonly willing to find guilt, and uncommonly willing to mete out death."); William J. Bowers & Wanda J. Foglia, *Still Singularly Agonizing*, 39 CRIM. LAW BULL. 51, 57 (2003) (finding that 30.3% of jurors had decided to vote for death before the start of the penalty phase); David Niven et al., *A "Feeble Effort to Fabricate National Consensus": The Supreme Court's Measurement of Current Social Attitudes Regarding the Death Penalty*, 33 N. KY. L. REV. 83, 108 (2006) (noting that "[t]he pre-trial voir dire process of focusing on the willingness of potential jurors to impose a death sentence encourages a belief among jurors that the defendant is guilty . . . and that opposition to the death penalty is disfavored by legal authorities").

Death-qualified juries are also more likely to devalue or ignore mitigating circumstances and emphasize aggravating circumstances. *See* Mona Lynch & Craig Haney, *Capital Jury*

Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination, 33 LAW & HUM. BEHAV. 481, 486 (2009) (finding that between 14% and 30% of pro-death jurors on a death-qualified panel "actually weighed mitigating evidence as favoring a death sentence," interpreting this evidence as aggravation instead); Brooke M. Butler & Gary Moran, *The Role of Death-qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 183 (2002) ("[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances.").

The Eighth Amendment, however, prohibits such behavior. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1976) (requiring sentencer to consider mitigation). Sentencing practices are meant to reflect "contemporary community values," *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), in which jurors are to base their sentencing verdicts on their own "appraisal of a [capital defendant's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000). Death qualification produces an imbalance in views that unconstitutionally disfavors the defendant. *See Baze v. Rees*, 553 U.S. 35, 84 (2008) (Stevens, J., concurring).

In sum, death-qualified juries are more likely to favor the prosecution, devalue mitigating circumstances, and impose the death penalty than juries in non-capital criminal cases. These effects enhance the risk of inaccurate results due to the imbalance of prejudices of the jury. In turn, death qualifications cause a significant deficiency in the quality of jury deliberations.

LEGAL ARGUMENT

Death qualification, in practice, excludes Black people from participating in juries, violating Mr. Glover's Sixth and Fourteenth Amendment rights to an impartial jury drawn from a fair cross section of the community and equal protection, and his Eighth Amendment right against cruel and unusual punishment, as well as his Florida Constitutional right to an impartial jury under Article I, section 16 of the Florida Constitution.

Considering similar allegations of discrimination and disparate impact inherent in death qualification made in a Kansas capital case – but based on an undeveloped record – the Kanas Supreme Court recently concluded that these "allegations most certainly warrant careful analysis and scrutiny." *State v Reginald Dexter Carr Jr.*, No. 90,044, Slip Op., 2022 WL 187437 *24 (January 21, 2022). The Court was unable to review the legal claim, however, because the "issue was not raised or developed at trial," and thus the trial "court made no factual findings related to the LDF's claim." *Id.* With this motion, the attached report, and the evidentiary hearing he seeks thereon, Mr. Glover seeks to make the factual record that was missing in Kansas, and to fully assert his right to the constitutional protections set out more fully below.

I. Death qualification would violate Mr. Glover's right to be free from cruel and unusual punishment under the Eighth Amendment.

Death qualification should not be permitted because, not only is it not constitutionally guaranteed to the State, but more importantly it will violate Mr. Glover's rights, under the Eighth Amendment of the U.S. Constitution and Article I § 17 of the Florida Constitution, to be free from cruel and unusual punishment that is informed by "evolving standards of decency." It is not unusual to hear in the halls of this courthouse, and in public pronouncements, that the State will "allow the jury to decide." That practice can sound reasonable to the unknowing. But the truth is

that death qualification rigs the jury in favor of the State's preferred outcome in such cases – execution. And it does so while ridding from juries those most willing to consider mitigating evidence. Most troubling to Mr. Glover, a Black man, it does so while disproportionately excluding Black jurors from the process. A decision to execute Mr. Glover by a death-qualified jury would not accurately reflect "contemporary community values," *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968), and would constitute an arbitrary outcome forbidden by the Eighth Amendment. This Court should not allow it.

Death-qualified juries don't speak for the community. Time after time, the U.S. Supreme Court has emphasized the link between community values and punishment permitted under the Eighth Amendment. In *Witherspoon*, the Supreme Court observed that "one of the most important functions any jury can perform in making [the penalty] selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" 391 U.S. at 519 n.15 (plur. op. of Warren, C.J.) (quoting Trop, 356 U.S. at 101).

In *Furman v. Georgia*, Justice Brennan concluded that the death penalty had "proved progressively more troublesome to the national conscience" as evinced by "[j]uries, 'express(ing) the conscience of the community on the ultimate question of life or death.'" 408 U.S. 238, 299 (1972) (Brennan, J., concurring) (quoting *Witherspoon*, 391 U.S. at 519). Justice Brennan observed that juries "vote[d] for death in a mere 100 or so cases among the thousands tried each year where the punishment [was] available." *Id.* Justice Powell, joined by three other Justices in his dissenting opinion, agreed that "[a]ny attempt to discern . . . where the prevailing standards of

decency lie must *take careful account of the jury's response* to the question of capital punishment." *Id.* at 440–41 (emphasis added).

Four years later, in *Woodson v. North Carolina*, 428 U.S. 280 (1976), the plurality emphasized the importance of jury verdicts as evidence that North Carolina's mandatory capital punishment statute did not comport with "contemporary values." *Id.* at 295 (plur. op. of Stewart, J.). In *Coker v. Georgia*, Justice White observed that "'(t)he jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.'" 433 U.S. 584, 596 (1977) (plur. op. of White, J.) (quoting *Gregg v. Georgia*, 428 U.S. 153, 181 (1976)); *see also Enmund v. Florida*, 458 U.S. 782, 788 (1982) (explaining that the Court must look, among other factors, at juries' sentencing decisions).

If the function of juries is to "maintain a link between contemporary community values and the penal system," *Witherspoon*, 391 U.S. at 519 n.15, what role do death-qualified juries play? The answer is that they eviscerate the link. As the Court explained in *Witherspoon*, a jury "cannot speak for the community" when it is "[c]ulled of all who harbor doubts about the wisdom of capital punishment." *Id.* at 520.

As one scholar has explained, after reviewing death qualification in Louisiana trials, the "use of death-qualified jury verdicts as 'objective indicia' of contemporary values produces an obviously warped data set from which to gauge 'evolving standards of decency.'" Aliza Plenar Cover, *The Eighth Amendment's Lost Jurors*, 92 Ind. L.J. 113, 128 (2016). Stated differently, the Supreme Court's view that "juries serve as a link between punishments and the conscience of the community" fails "to account for the impact of death qualification upon the representativeness of the capital jury." *Id.* at 124, 126. Cover concluded that "[d]eath qualification eliminates from

jury service a sizable portion of the population that disagrees with the morality of the death penalty and therefore prevents jury verdicts from accurately reflecting the stance of the community on whether the death penalty is 'cruel and unusual.'" *Id*. at 126.

Death-qualified juries fail to consider mitigation. Community judgments about execution are "moral judgments" made through individual assessments of culpability that account for "evidence about the defendant's background and character . . . because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Sentencers thus "must consider all relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982). And because such analysis is largely dependent on a person's moral judgment, *Williams*, 529 U.S. at 398, a juror's determination of mitigation becomes a "question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016) ("[J]urors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.").

To comply with the Eighth Amendment requirement to treat defendants as "uniquely individual human beings," the decision whether to choose "the ultimate punishment of death" must include the consideration of "possibility of compassionate or mitigating factors." *Woodson*, 428 U.S. at 304. But studies have shown that death-qualified jurors do not consider constitutionally-required mitigation, or are more likely to both devalue mitigation and overvalue aggravation compared to non-death-qualified jurors. *See* Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 486 (2009) (finding that between 14 and 30% of pro-death jurors on a death-

qualified panel "actually weighed mitigating evidence as favoring a death sentence," interpreting this evidence as aggravation instead); Brooke M. Butler & Gary Moran, *The Role of Death-qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 183 (2002) ("[D]efendants in capital trials are subjected to juries that are oriented toward accepting aggravating circumstances and rejecting mitigating circumstances."). Because death-qualified jurors are by definition less morally opposed to capital punishment, they are less inclined to grant any mitigating significance to the facts and circumstances and are more likely to impose the death penalty.

Death qualification introduces an arbitrary factor – race. The U.S. Supreme Court has repeatedly critiqued the arbitrary impact of racial discrimination in death-penalty determinations.[19] When race infects the decision to execute, the Court has struck down such death sentences. This includes instances in which the trial permits "an infusion of race into proceedings." *Buck v. Davis*, 137 S .Ct. 759, 779 (2017). There can be no more pernicious infection of race bias into a capital sentencing trial of a Black man convicted of killing a white

[19] *See Furman*, 408 U.S. at 255 (Douglas, J., concurring) ("we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position"); *id.* at 294 (Brennan, J., concurring) ("[n]o one has yet suggested a rational basis that could differentiate ... the few who die from the many who go to prison"); *id.* at 365 (Marshall, J., concurring) ("committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is ... an open invitation to discrimination" [internal quotation marks omitted]); *Baze v. Rees*, 553 U.S. 35, 85 (2008) (Stevens, J., concurring in the judgment) ("[a] ... significant concern is the risk of discriminatory application of the death penalty"); *Tuilaepa v. California*, 512 U.S. 967, 991–92 (1994) (Blackmun, J., dissenting) ("One of the greatest evils of leaving jurors with largely unguided discretion is the risk that this discretion will be exercised on the basis of constitutionally impermissible considerations—primary among them, race. . . . For far too many jurors, the most important 'circumstances of the crime' are the race of the victim or the defendant.") (citations omitted)).

woman than the systematic exclusion of Black jurors that grows (based on good-faith world views) naturally from historic racism in our own criminal justice system and government.

By systematically excluding Black jurors disproportionately, by excluding people who are more likely to consider the mitigating factors inherent in Mr. Glover's background -- and instead retaining a racially unrepresentative group more likely to ignore mitigation – the death qualification process would eviscerate the judgment of the community on whose behalf the State seeks Mr. Glover's execution. The law requires much more. It requires jurors both capable of considering Mr. Glover's proffered mitigating circumstances, and jurors capable of rendering mercy. Death qualification, if permitted, would sever the connection between punishment that is informed by "evolving standards of decency." This Court should bar it.

II. Death qualification would violate Mr. Glover's state constitutional rights to a fair and impartial jury.

Before the U.S. Supreme Court issued its opinion in *Batson v. Kentucky*, 476 U.S. 79 (1986), setting up the now familiar burden-shifting framework for evaluating whether peremptory strikes have been exercised in a racially discriminatory manner in response to the failure of prior precedent to stop such discrimination, the Florida Supreme Court applied section 16 of the Article I, the Declaration of Rights, to go further than then U.S. Supreme Court required and further than it would later require in *Batson*. *See State v. Neil*, 457 So.2d 481 (Fla. 1984).

As the Court put it later when it reaffirming this decision, in "interpreting our own Constitution, this Court in [*Neil*] recognized a protection against improper bias in the selection of juries that preceded, foreshadowed and exceeds the current federal guarantees. We today

reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial. *See* Art. I, § 16, Fla. Const." *Slappy*, 522 So.2d at 20–21.

In doing so, the Court outlined first principles of deep importance under Florida law and the Constitution, and of continuing importance here. The Court explained that the "need to protect against bias is particularly pressing in the selection of a jury, first, because the parties before the court are entitled to be judged by a fair cross section of the community, and second, because our citizens cannot be precluded improperly from jury service." *Slappy*, 522 So.2d at 20. And the Court emphasized that "jury duty constitutes the most direct way citizens participate in the application of our laws." *Id.*

"Discrimination within the judicial system is [the] most pernicious." *Batson v. Kentucky*, 476 U.S. 79, 87-88 (1986). It would therefore "seem equally self-evident that the appearance of discrimination in court procedure is especially reprehensible, since it is the complete antithesis of the court's reason for being—to insure equality of treatment and evenhanded justice." *Slappy*, 522 So.2d at 20.

As shown above, death qualification, by excluding Black jurors and other jurors of color at rates twice and higher than white jurors, creates all of the problems the Florida Supreme Court sought to address when it committed itself, and then recommitted itself, to "a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial." *Slappy*, 522 So.2d at 20–21. People of color are being disproportionately excluded from jury service, and the result is that those facing execution are not being "judged by a fair cross section of the committee." *Id.* at 20. Whatever may be said about the prior use of this

method in this county, going forward, now that the State knows that death qualification disproportionately excludes jurors of color, i.e., that disproportionate exclusion is "objectively 'certain' to occur," the method must be regarded as tantamount to intentional discrimination. *Turner*, 754 So.2d at 691 (employing exception from immunity under "standard [that] imputes intent upon employers in circumstances where injury or death is objectively 'substantially certain' to occur").

The continued use of this discriminatory practice impugns the court system, because death qualification is a creature not born from any person's constitutional rights but only of court procedure and the State's desire to seek the most severe punishment the law recognizes, while looking past the lawful alternative of life imprisonment without parole. If the State must choose between seeking death at full tilt, or refraining from discriminatory jury selection, *Slappy* and the Florida Constitution make clear that there is choice at all. Discrimination cannot continue.

If the State is unable or unwilling to refrain from a practice it now knows to discriminate, this Court should bar it once and for all.

III. Death qualification would violate Mr. Glover's right to be tried by a fair cross section of his community.

Constructing a jury using death qualification, to which the State holds no constitutional right, would violate Mr. Glover's rights, under the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I §§ 9, 17, 22 of the Florida Constitution, and deprive him of his right to an impartial jury and to be tried by a "petit jury selected from a fair cross section of the community." *Duren v. Missouri*, 439 U.S. 357, 358-59 (1979).

Juries play a vital role in the democratic process of the criminal justice system. Repeatedly, the Supreme Court has emphasized the belief that jurors represent the "conscience of the community." *Lockhart v. McCree*, 476 U.S. 162, 197 (Marshall, J., dissenting); *see, e.g., Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice."); *Witherspoon*, 391 U.S. at 519 n.15 ("[O]ne of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system."); *Woodson*, 428 U.S. at 293 (relying on jury determinations as one of the "crucial indicators of evolving standards of decency"); *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (explaining that juries represent "community's moral sensibility" because they "reflect more accurately the composition and experiences of the community as a whole"). The exclusion of Black jurors and other people of color from the jury "inhibits the functioning of the jury as an institution to a significant degree." *Ballew*, 435 U.S. at 231 (finding five-member jury deprived defendant of Sixth and Fourteenth Amendment right to trial by jury).

The framers afforded the jury right to stop "oppression by the Government." *Duncan*, 391 U.S. at 155. Its purpose was to serve as a roadblock to prosecution based on the malice or incompetence of government officials. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (quoting *Duncan*, 391 U.S. at 156). The right protects a criminal defendant's interest "in having the judgment of his peers interposed between himself and the officers of the state who prosecute and judge him[.]" *Apodaca*, 406 U.S. at 411. The term "peers" carries constitutional significance: it means "a representative cross section of the community[,]" serving as "an essential component of the Sixth Amendment right to a jury trial." *Taylor*, 419 U.S. at 528.

As the U.S. Supreme Court has more recently made clear, the protections of the Sixth Amendment – the only amendment that affirmatively affords benefits to individuals rather than simply restricting the government – trumps prosecutorial interests, such as "in securing its punishment of choice . . . as well as the victims' interest in securing restitution." *Luis v. United States*, 578 U.S. 5, 136 S. Ct. 1083, 1093 (2016). As the Court held, such state interests, though "important," as compared to the Sixth Amendment right to counsel, "lie somewhat further from the heart of a fair, effective criminal justice system." *Id.* So too here. The State's conceded interest in seeking its punishment of choice must yield to Mr. Glover's Sixth Amendment right to having his jury drawn from a representative pool.

When *Lockhart v. McCree*, 476 U.S. 162 (1986) was decided – rejecting a fair-cross section challenge to death qualification – nearly four out of every five Americans supported the death penalty and a comparatively tiny number opposed. *Continuing Unfairness*, at 12 (reviewing survey data). Execution support was then climbing to an all-time high, while those in opposition had dwindled considerably. *Id.* During this time, the effects of death qualification were arguably at their smallest.

But the opposite trend has since taken hold. Increasing numbers oppose the death penalty, resulting in a greater percentage of prospective jurors who are likely to be excluded through the death qualification process. Recent polls show that, as of 2018, opposition to the death penalty is shared by over 40% of Americans. Justin McCarthy, *New Low of 49% in U.S. Say Death Penalty Applied Fairly*, GALLUP (Oct. 22, 2018), https://news.gallup.com/poll/243794/new-low-say-death-penalty-applied-fairly.aspx. Further, 45% of Americans believe the death penalty is applied unfairly and 29% believe the death penalty is applied too often. *Id.* A substantially larger group of opponents, compared to 16% of death penalty opponents in the early 1990s, indicates

that death qualification more significantly affects jury composition than previously considered. *See also* Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, Gallup (Nov. 19, 2020), https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx ("Americans' support for the death penalty continues to be lower than at any point in nearly five decades. For a fourth consecutive year, fewer than six in 10 Americans (55%) are in favor of the death penalty for convicted murderers. Death penalty support has not been lower since 1972, when 50% were in favor."). And the data here shows the highest opposition exists in the Black community, and other communities of color.

To establish a prima facie violation of the fair cross section requirement, the defendant must show: "1) that the group alleged to have been excluded is a 'distinctive group' in the community; 2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and 3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Duren*, 439 U.S. at 364. The test for distinctiveness is whether "1) the group is defined and limited by some factor; 2) that a common thread or basic similarity in attitude, ideas, or experience runs through the group; and 3) that there is a community of interest among members of the group such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process." *Willis v. Zant*, 720 F.2d 1212, 1216 (11th Cir. 1983). Once the defendant has established a prima facie case, the burden shifts to the State to demonstrate that the State's interest outweighs the defendant's constitutional right to a jury drawn from a fair cross section of the community. *Id*. at 368. As evidenced by the study of capital trials in this county, and other studies, Black people are disproportionately excluded.

Courts have repeatedly recognized that Blacks constitute a distinctive group in relation to jury selection. *Peters v. Kiff*, 407 U.S. 493, 498 (1972). In *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), the Court recognized that the exclusion of Blacks from jury service injures the members of the excluded class, denying them the "privilege of participating equally . . . in the administration of justice" and declaring them unfit for jury service by putting "a brand upon them, affixed by law, an assertion of their inferiority." *Id.* Courts have since provided relief to uphold the interests of Black prospective jurors. *See State v. Neil*, 457 So. 2d 481, 486 (Fla. 1984) ("It was not intended that [peremptory] challenges be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended that such challenges be used to encroach upon the constitutional guarantee of an impartial jury.").

Although the Court in *Lockhart v. McCree* concluded that the death qualification process did not violate the fair cross section requirement because it did not involve systematic exclusion of a distinctive group in the community, empirical evidence, unavailable at the time of *Lockhart*, but presented here, demonstrates that excluding people who oppose the death penalty effectively means that members of protected classes—Blacks—are excluded. *See* Section I (A), (B), *supra*. As shown above, death qualification in Duval County death cases excluded Black jurors at a rate nearly twice the rate of white jurors. Fully, 36% of Black Duval County citizens, who answered the jury summons, posed no hardship basis for excusal, and were not subject to cause challenge based for any other reason, were excluded for opposing the death penalty. And 47% of other jurors of color were so excluded. But only 18% of white, but otherwise identically-situated jurors were disqualified based on their death-penalty views. This demonstrates that the representation of Black potential jurors is not fair and reasonable in relation to the number of Black citizens of Duval County, meeting *Duren*'s second criterion. *Duren*, 439 U.S. at 364.

As to *Duren*'s third criterion of showing systemic exclusion, the data in Dr. Gau's report unmistakably "demonstrate[es] that a large discrepancy occurred not just occasionally but" over a period of years and every currently-available capital trial since 2010 "manifestly [indicating] that the cause of the underrepresentation was systematic – that is, inherent in the particular jury selection process utilized." *Duren*, 439 U.S. at 366 (finding such systemic exclusion based on a year's worth of data week to week).

Finally, under the final step of *Duren* analysis, once the defendant has established a prima facie case, the burden shifts to the State to demonstrate that the State's interest outweighs the defendant's constitutional right to a jury drawn from a fair cross section of the community. *Duren*, 439 U.S. at 368. The State cannot do so here.

Florida law anticipates sentences of life imprisonment. Fla. Stat. § 921.141 (3)(a) ("If the jury has recommended a sentence of: (1) Life imprisonment without the possibility of parole, the court shall impose the recommended sentence."). Indeed, more than 27,000 people are sentenced to life imprisonment without release in Florida, including 1,833 from this county. *See* Florida Department of Corrections, Public Records Requests for the OBIS Database, http://www.dc.state.fl.us/pub/obis_request.html. Many of these are convicted, as is Mr. Glover, of first-degree murder. Those sentenced to death by contrast make up the exception (317 total in the state, and 46 from this county). *Id.* "[L]egislative will is not frustrated if the [death] penalty is never imposed[.]") *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring).

In comparison to the legitimate and lawful views of Black persons and other persons of color eliminated from capital juries through death qualification, the State's desired punishment of death is just that – a preference among lawful options. It "lie(s) somewhat further from the

heart of a fair, effective criminal justice system." *Luis v. United States*, 578 U.S. 5, 136 S. Ct. 1083, 1093 (2016). It cannot trump the constitutional concerns of systematically excluding cognizable groups in violation of the Constitution. *See id.* (holding prosecutor's desire to impose punishment of restitution, and victim's interest in restitution, could not trump Sixth Amendment right to counsel).

***

Death qualification runs counter to the tradition of using juries as "a body truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940). "[T]he counterbalancing of various biases is critical to the accurate application of the common sense of the community to the facts of any given case." *Ballew*, 435 U.S. at 234. The Court has also acknowledged that "a person in the minority will adhere to his position more frequently when he has at least one other person supporting his argument." *Id.* at 236. By excluding Black prospective jurors based on opposition to the death penalty, death qualification would create a jury that is homogenous and unrepresentative of the community's views. If permitted, the resulting trial would violate Mr. Glover's constitutional rights.

IV. Death qualification would violate Mr. Glover's Florida constitutional rights to a jury, by excluding from service in capital juries those who could never have been excluded when the Constitution went into operation.

Employing language both more powerful than the extant Sixth Amendment jury right – and nowhere found in the U.S. Constitution – the framers of Florida's original Constitution stated: "That the right of trial by jury shall remain forever inviolate." Fla. Const. art I, § 6 (1838), State Archives of Florida, https://www.floridamemory.com/items/show/18908. Mirroring the Sixth Amendment, section 10 provided additional jury protections for those facing criminal

prosecutions, specifically, the right to "an impartial jury of the County or District, where the offense was committed[.]" *Id.* at § 10. The framers restated these protections, in the very same precise terms, in every subsequent version of the Constitution, including in 1865, 1868, 1885, and 1968. These provisions now reside, respectively, in sections 22 (inviolate) and 16 (rights of accused) of Article I, the Declaration of Rights.

As the Florida Supreme Court has repeatedly emphasized, the jury right is "an indispensable component of our system of justice" enshrined in the "state constitution's Declaration of Rights[.]" *Blair v. State*, 698 So. 2d 1210, 1213 (Fla. 1997); *State v. Webb*, 335 So. 2d 826, 828 (Fla. 1976) (noting the right of trial by jury remains inviolate and has been "carefully protected and enforced" by the Court).

In choosing the word "inviolate," and reaffirming the requirement time and again, the framers meant that no subsequent legislative or judicial action could change the right as it was understood at Florida's founding and set out in its founding charter. *Flint River Steamboat Co. v. Roberts*, 2 Fla. 102, 114 (Fla. 1848). As the Court then explained, only a decade after the Constitution was written and three years after Florida had become a state, "inviolate" means that "the right shall (in all cases in which it was enjoyed when the Constitution became binding and obligatory) continue unchanged." *Id.* Furthermore, inviolate "does not merely imply that the right of jury trial shall not be abolished or wholly denied, but that it shall not be impaired." *Id.* (emphasis in original). As Lexicographers of this founding era had taught, the word means "unhurt, uninjured, unpolluted, unbroken. Inviolate says Webster is derived from the latin word 'inviolatus' which is defined by Ainsworth to mean, not corrupted, immaculate, unhurt, 'untouched.'" *Id.* Given these facts, the Court "conclude[d] that the General Assembly has no

power to impair, abridge, or in any degree restrict the right of trial by jury as it existed when the Constitution went into operation." *Id.*

As shown below, death qualification, a novel creature of modern death-penalty law, however, unconstitutionally restricts the jury right "as it existed when the Constitution went into operation." *Flint River Steamboat Co.*, 2 Fla. at 114.

To begin, when the Constitution went into operation, Florida capital procedure and law was much different. The jury in a capital case was required to convict or acquit, and could, if it so chose, recommend mercy. Absent a recommendation of mercy, the punishment was death. *See generally Keech v. State*, 15 Fla. 591, 607 (1876) (holding trial court could lawfully instruct a jury to consider and pass upon the question of mercy with its verdict, but was not required to do so unless the defense requested it); *Dobbert v. Fla.*, 432 U.S. 282, 288 (1977) (quoting statute in effect before *Furman*: "A person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment." Fla. Stat. Ann. § 775.082 (1971)).

In this founding era, as now, service on a jury was an essential duty and a right of citizenship. Jury service was a "valued civil and political right" that held "parallel importance to the other democratic rights of voting and serving as an elected official." Andrew Guthrie Ferguson, *The Jury as Constitutional Identi*ty, 47 U.C. Davis L. Rev. 1105, 1116-19 (2014). "Indeed, jury duty constitutes the most direct way citizens participate in the application of [Florida] laws." *State v. Slappy*, 522 So.2d 18, 20 (Fla. 1988), *abrogated on other grounds Melbourne v. State*, 679 So.2d 759, 763 (Fla. 1996).

It would have been unheard of in the founding era to exclude jurors because they would not meaningfully consider imposing a sentence of death. "Neither at common law, nor in Blackstone's England, did the death qualification of jurors exist." G. Ben Cohen & Robert J. Smith, *The Death of Death Qualification*, 59 Case W. Res. L. Rev. 87, 92 (2008).[20]

As would later develop, with its own controversy and inextricable link to racism,[21] cause challenges would become available if, due to a person's views about the death penalty, they could not convict. A founding era provision of Florida's 1868 criminal code provided that "no person whose opinions are such as to preclude him from finding any defendant guilty of an offence punishable with death shall be compelled or allowed to serve as a juror on the trial of such an offence." Fla. Crim. Code of 1868, Ch. 12, § 12 (as cited in *Metzger v. State*, 18 Fla. 481, 481 (Fla. 1881)). As the Supreme Court described the statute in 1881, it "disqualify[ies] those whose opinions are such as would prevent them from convicting persons of capital offences from setting on juries in such cases." *Metzger*, 18 Fla. at 486. And it described the "object of the statute [as] to prevent persons going upon a jury who would refuse from scruples of conscience to find a verdict of guilty, or for some reason other than that of a want of sufficient proof, and to procure juries who would be governed by their oaths to find according to

[20] At common law, four different cause challenges existed: 1) a Lord could be excused out of respect for his nobility; 2) a person with a prior criminal conviction could be excused; 3) an enslaved person or non-citizen could be excused; and 4) a person related to either party, or who had served in a prior jury in the same case, could be excused. *Death of Death Qualification*, 59 Case W. Res. L. Rev. at 92.

[21] The 1859 Virginia trial of John Brown, for instigating a rebellion of enslaved people and for his raid on Harper's Ferry, was the first known to employ a type of death qualification. *Death of Death Qualification*, 59 Case W. Res. L. Rev. at 92. The presiding judge asked the jurors: "Have you any conscientious scruples against convicting a party of an offence [sic] to which the law assigns the punishment of death, merely because that is the penalty assigned?" *Id.* Even still, the question was whether the juror could *convict*, not, as in present times, whether a juror can impose a sentence of death.

evidence." *Id.* at 487. A juror who refused to reach a guilty verdict, ignoring the law and evidence, usurped the court's law-stating role and miscarried its own fact-finding role.[22]

This common-law rationale for this limited version of death qualification – the need to ensure that a defendant's guilt would be fairly adjudicated – provides with no justification for the broad version of death qualification used in modern capital trials. But more to the point here, it provides absolutely no justification for death qualification in Dennis Glover's sentencing retrial, where the jury will say nothing as to guilt and its only question will be one of sentence. A juror who cannot impose death, or meaningfully consider it, is a far cry from a juror with "beliefs which preclude him or her from finding a defendant guilty." Fla. Stat. § 913.13 (cause standard capital cases). "[L]egislative will is not frustrated if the [death] penalty is never imposed[.]" *Furman v. Georgia*, 408 U.S. 238, 311 (1972) (White, J., concurring).

Indeed, while the law may certainly require jurors to follow their oaths, weigh the evidence, and to convict upon proof of guilt beyond a reasonable doubt, it nowhere requires a death sentence. Whether to impose death is a judgment call, a value call – not a decision dictated by the evidence when it is properly weighed and assessed by a juror abiding her oath. "Whether mitigation exists . . . is largely a judgment call (or perhaps a value call)," and "the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy." *Kansas v. Carr*, 136 S. Ct. 633, 642 (2016).

Therefore, on these bases, death qualification impedes and indeed corrupts the inviolate jury right, Fla. Const. art. I, § 22, "as it existed when the Constitution went into operation." *Flint*

[22] Other state courts during this era also fashioned rules excluding jurors who could not convict regardless of the evidence. *See Commonwealth v. Lesher*, 1827 WL 2776, at *3 (Pa. 1827); *People v. Damon*, 1835 WL 2512, at *3 (N.Y. Sup. Ct. 1835); *Williams v. State*, 32 Miss. 389, 394 (Miss. Err. & App. 1856).

River Steamboat Co., 2 Fla. at 114. Because the importance of jury service, the right of every eligible juror to serve, and of every litigant to have such eligible jurors available for their jury, the post-founding eligibility requirement death qualification foists on jurors and defendants alike gravely harms the jury right as it existed at the time the Constitution went into operation. As the Florida Supreme Court has held in other matters, this Court should "reaffirm this state's continuing commitment to a vigorously impartial system of selecting jurors based on the Florida Constitution's explicit guarantee of an impartial trial." *Slappy*, 522 So.2d at 20–21.

V. Death qualification violates equal protection and discriminates on the basis of gender and race

Death qualification, if permitted, would violate Mr. Glover's right to equal protection under the Fourteenth Amendment of the U.S. Constitution, and Article I § 2 of the Florida Constitution, because the process, in effect, disproportionately excludes Black people from capital juries.

To establish a prima facie claim of discrimination against a particular class, the defendant must demonstrate that 1) the group is a recognizable class, "singled out for different treatment under the laws, as written or as applied," 2) the selection procedure resulted in substantial underrepresentation of the group over a significant period of time, and 3) the selection procedure is "susceptible of abuse or is not racially neutral." *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); *see Cunningham*, 928 F.2d at 1013. Once a prima facie case of discrimination is made, the burden shifts to the State to rebut that showing. *Castaneda*, 430 U.S. at 495.

Black persons are of course a distinctive group for this purpose. *Peters*, 407 U.S. at 498. And again, the exclusion of people based on their opposition to the death penalty has resulted in

substantial underrepresentation of Black jurors in capital trials over a period of ten years, dating back to 2010. As also shown, the exclusion of Black prospective jurors is not race neutral.

The effects of death qualification have long been known within the legal community, confirmed by multiple studies, and even highlighted by Justice Marshall in his dissent in *Lockhart*, 476 U.S. at 187-88 (Marshall, J., dissenting) (agreeing that death qualification excludes a "disproportionate number of blacks and women"). Not only does death qualification provide an opportunity for discrimination, it virtually guarantees discrimination through exclusion of Black jurors. While death qualification may appear neutral on its face, as now shown, it is decidedly not. With the Court and State now on notice, this violation of equal justice and of Mr. Glover's rights under the Equal Protection Clause should not be permitted to continue.

VI. Conclusion

The U.S. Supreme Court "has emphasized time and again the 'imperative to purge racial prejudice from the administration of justice' generally and from the jury system in particular." *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) (quoting *Peña Rodriguez v. Colorado*, 137 S. Ct. 855 (2017)). "[I]t is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quoting *Strauder*, 100 U.S. at 309). "Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process." *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019). By excluding jurors based on their opposition to the death penalty, death qualification, disenfranchises the Black people of Mr. Glover's community from the decision whether he should be executed. It would deprive him of the fairness and equal

justice the Florida and U.S. Constitutions demand. It would deprive him of jury representative of a fair cross section of his community, equal protection under the law, and would unconstitutionally limit the range of contemporary moral values and mitigating circumstances considered in the trial for his life. As protectors of the Constitution and equal justice, the State Attorney's Office should decline to engage in discriminatory death qualification.

If the State does not act to correct the injustice of death qualification, this Court should forbid it. The Court should continue in the judicial tradition of ensuring "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). A vulnerable defendant has "nowhere to turn except the judiciary for the protection of their constitutional rights." Erwin Chemerinsky, *Closing the Courthouse Door: How Your Constitutional Rights Become Unenforceable* 9 (2017). Mr. Glover turns to this Court.

WHEREFORE Mr. Glover respectfully requests that this Court find that the current method of death qualification violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Article I §§ 9, 17, and 22 of the Florida Constitution, and issue an order barring it in Mr. Glover's pending capital trial.

/s/ Brian W. Stull
BRIAN W. STULL
NC Bar No. 36002, pro hac vice here
201 W. Main Street, Suite 402
Durham, NC 27701
bstull@aclu.org

/s/ Gonzalo Andux, ESQ.
Fla. Bar No. 525286
Finnell, McGuinness, Nezami & Andux P.A.
2114 Oak Street
Jacksonville, FL 32204

GAndux@fmnlawyers.com

Attorneys for Mr. Glover

CERTIFICATE OF SERVICE

I hereby certify that this motion today has been served, via the electronic portal, on the State of Florida, represented by Assistant State Attorney Alan Mizrahi.

/s/ Brian W. Stull
BRIAN W. STULL
NC Bar No. 36002, pro hac vice here
201 W. Main Street, Suite 402
Durham, NC 27701
bstull@aclu.org
Attorney for Mr. Glover

This 17th day of February, 2022

Exhibit A

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO.: 16-2016-CF-10602-AXXX

DIVISION: CR-D

STATE OF FLORIDA

v.

RUSSELL DAVID TILLIS,

Defendant.
_____/

ORDER DIRECTING THAT JURORS' IDENTITES BE KEPT CONFIDENTIAL

The State and Defendant requested, stipulated, and agreed that in the above-styled case any and all information that in any way identified any potential or ultimately seated juror, including any alternate juror, should be protected from disclosure. This protection includes any photographs, video, drawings, sketches, or other images of any juror or potential juror, and includes any recording of their voices as they answer questions during voir dire. This Order shall protect a juror's name, address, date of birth, specific place of employment, and any other aspect of their identity that may lead to the revealing of their identity. This Order also includes any attempt to capture images of jurors as they travel to and from the courtroom, as well as protecting the jurors' means of transportation and any description of their vehicles or license plate numbers.

The State and Defendant further request, stipulate, and agree that the Court may protect any identifying information such as name, address, date of birth, specific place of employment, or any other aspect of the jurors' identities that may lead to the revealing of their identities.

FILED
APR 01 2021
DUVAL CLERK OF COURT

The State and Defendant lastly request, stipulate, and agree that the voir dire panel and the ultimately seated jurors and alternate jurors should be protected from any attempt by any person to follow, surveil, photograph, record, or in any way capture images as those jurors travel to and from the courtroom, including protecting the jurors' means of transportation and any description of their vehicles or license plate numbers from disclosure.

The stated purpose of these requests, stipulations, and agreements in this high publicity criminal case is to protect jurors from any prejudicial outside influences. Sheppard v. Maxwell, 384 U.S. 333 (1966).

As set forth herein, the State's and Defendant's request, stipulation, and agreement shall be granted. The jurors' identities and addresses will be known to the attorneys of record so that they may properly inquire during voir dire. However, the parties and participants shall refer to those jurors by the juror number assigned to them by the Clerk of the Court, and shall also not disclose the jurors' current residential addresses or places of employment. This is to be done in order to protect the prospective jurors from harassment and pressure from the public at large. Sunbeam Television Corp. v. State, 723 So. 2d 275, 279-81 (Fla. 3d DCA 1998) (rehearing held en banc, with an issued per curiam opinion adopting J. Cope's initial dissenting opinion). The jurors will be properly instructed that the anonymity is for their protection from potential harassment and undue public and media influence on them, and shall not impact the Defendant's presumption of innocence. See State v. Bowles, 530 N.W.2d 521, 531 (Minn. 1995). This Order is not intended to prevent the media from reporting on or disclosing information disclosed during voir dire. Sunbeam Television Corp., 723 So. 2d at 281.

Accordingly, it is hereby **ORDERED AND ADJUDGED** that:

1) The State's and Defendant's request, stipulation, and agreement to keep juror identities confidential is hereby **GRANTED**.
2) Such prohibition shall remain in full force and effect until sixty (60) days after the conclusion of this case, with said conclusion to be determined by the Court.
3) The Clerk of the Court shall not release to the public the names of the jurors called to be part of the venire in this case.
4) The parties shall not identify the jurors by their names during voir dire. The jurors shall only be identified by the parties by their given juror numbers.
5) Prospective jurors may not be photographed or identified during the course of jury selection. Such prohibition shall be lifted upon their release from jury service by the Court.
6) Sitting and alternate jurors shall not be identified or photographed during the course of the trial or any pertinent related proceeding.

DONE in Jacksonville, Duval County, Florida on April 15th, 2021.

MARK BORELLO
Circuit Court

Copies To:

Charles R. Fletcher
Counsel for Defendant
8833 Perimeter Park Blvd. Suite 104
Jacksonville, FL 32216
williamfletcher96@yahoo.com

Donald B. Mairs
Counsel for Defendant
1514 Landon Ave.
Jacksonville, FL 32207
don@mairslaw.com

Alan S. Mizrahi
Assistant State Attorney
Office of the State Attorney
311 W. Monroe St.
Jacksonville, FL 32202
SAO4DuvalCriminal@coj.net

CERTIFICATE OF SERVICE

I hereby certify a copy of this Order has been furnished to the parties' legal counsel via their above-listed addresses on APRIL 2ND, 2021.

Deputy Clerk

CASE NO.: 16-2016-CF-10602-AXXX
/js

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

v.

CASE NO.: 16-2012-CF-009296-AXXX-MA
DIVISION: CR-C

RODNEY R. NEWBERRY,
Defendant.
_____/

ORDER PERMITING PRODUCTION OF REDACTED TRANSCRIPTS AND ORDER DIRECTING THE JURORS' IDENTITY BE KEPT CONFIDENTIAL

This matter came before the Court pursuant to a public records request received by the Office of the Clerk of Duval County, Florida, seeking transcript(s) of the jury selection portion of the trial in the underlying death penalty case. For the reasons set forth *infra*, the Clerk may release the requested transcripts to the party making the public records request. However, prior to releasing the transcripts, **the Clerk shall redact** from the transcript(s) all identifying information of individuals/venire members as more fully set forth below.

A. It is axiomatic that jury selection is, as is the entire trial of this cause, a public proceeding to which the public is presumed to be entitled to access. See generally, Morris Publishing Group, LLC v. State, 136 So. 3d 770 (Fla. 1st DCA 2014).

B. Commonsensically, the law extends this right of access to the Court's records of the trial, including jury selection. Rule 2.420(a), Florida Rules of Judicial Administration, assures, "[T]he public shall have access to all records of the judicial branch of government, *except as provided below.*" Rule 2.420(a), Fla. R. Jud. Admin. (emphasis added). Rule 2.420(b)(1)(A) expressly includes in the definition of "records

FILED
IN COMPUTER
DUVAL CO.

FILED 01/28/16 PM 04:13 FUSSELL

of the judicial branch" any court records, including transcripts filed with the clerk. See Rule 2.420(b)(1)(A), Fla. R. Jud. Admin.

C. However, the Florida Rules of Judicial Administration permit the Court to declare certain records confidential if such confidentiality is required to, *inter alia*, (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; (ii) protect a compelling governmental interest; and/or (iii) avoid substantial injury to innocent third parties. See Rule 2.420(c)(9), Fla. R. Jud. Admin.[1]

D. It is within the Court's discretion and authority to order that the clerk be prohibited from disclosing information that would enable specific identification of individual juror members. Sarasota-Herald Tribune v. State, 916 So. 2d 904, 910 (Fla. 2nd DCA 2005); Sunbeam Television Corp. v. State, 723 So. 2d 275, 277 (Fla. 3d DCA 1998); Times Publishing Co. v. State, 632 So. 2d 1072, 1074 (Fla. 4th DCA 1994); Rule 2.420(c)(9), Fla. R. Jud. Admin.; compare, AGO 2005-61, Fla., Nov. 21, 2005 (finding that "section 322.20(9), Florida Statutes, does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury [pool] list compiled by the clerk of court" as opposed to certain circumstances where a court finds a basis for denying release of the information)(emphasis added).

E. The Court hereby determines that all identifying information revealed in the jury selection transcripts of any juror in the trial of the underlying cause (including the alternate jurors), as well as any citizens who were on the venire, shall remain confidential on the grounds that such confidentiality is required to (i) prevent a serious

[1] Of course, the degree, duration and manner of confidentiality ordered by the Court shall be no broader than necessary to protect such interests and there must not exist any other less restrictive means to protect such interests. See Rule 2.420(c)(9)(A)-(C), Fla. R. Jud. Admin.

and imminent threat to the fair, impartial, and orderly administration of justice; (ii) protect a compelling governmental interest; and (iii) avoid substantial injury to innocent third parties. Rule 2.420(c)(9), Fla. R. Jud. Admin.[2]

F. This case is still active and has not yet concluded. This is a capital death penalty case, where the Defendant was convicted of premeditated First Degree Murder, committed during armed robbery. The Court imposed the death penalty upon the Defendant on April 4, 2014. Pursuant to law, the case was direct appealed to the Florida Supreme Court on April 7, 2014. This direct appeal is still pending and has not yet concluded.

G. The evidence revealed that the Defendant and two accomplices drove around on a "hunt" with firearms, setting out to commit armed robbery. The Defendant took possession of the accomplice's AK-47 along with his own .357 magnum. Eventually, they spotted a victim (Mr. Stevens). One accomplice, Mr. Phillips, followed the victim into a club to let the Defendant know when Mr. Stevens was leaving the club. The Defendant and the other accomplice, Mr. Anderson, drove to Mr. Stevens's car. The Defendant got out of the car with the AK-47 and ran to the driver's side, yelling at Mr. Stevens to "give it up...." The Defendant fired twelve shots and killed Mr. Stevens without giving him a chance to comply. Mr. Anderson never used his MAC-11 and stayed by the car.

H. As they drove off (leaving Mr. Phillips in the club), the Defendant offered Mr. Anderson money he took from Mr. Stevens. Initially, Mr. Anderson refused the money because it had blood on it, but then took $75.00. Eventually, Mr. Phillips joined

---

[2] Contrary to the Court in Kever v. Gilliam, 886 So. 2d 263 (Fla. 1st DCA 2004), this Court is able to find a "basis for denying" the release of names and identifying information of the jurors for the reasons provided *infra*.

them and both men gave Mr. Phillips $20.00 of the money the Defendant took from Mr. Stevens.

I. The Defendant had several prior serious felony offenses: (a) August 14, 1990, for Aggravated Battery in Case No. 16-1990-CF-09242; (b) June 20, 1994, for Aggravated Assault in Case no. 16-1994-CF-04967; and (c) July 5, 2011, for two Counts of Attempted Murder in the First Degree, Possession of a Firearm by a Convicted Felon and Possession of Heroin in Case No. 16-2010-CF-03064, where the Defendant was chased by Sergeant Bilyew and Officer Shrum, sworn law enforcement officers. Once he was tackled, the Defendant pointed a gun at the Officer's eye. After the officer pushed the gun away, the Defendant fired the gun three more times, hitting the Officer in the foot. Sergeant Bilyew returned gunfire, and the Defendant shot the Sergeant in the hand.

J. As established by this case and the several prior felony convictions, this Defendant is a violent, dangerous prisoner on death row who conspires with other dangerous criminals. Further, the Defendant has throughout most of his adult years demonstrated an utter and profound disregard for the law and other members of the community. The Defendant possesses an abiding readiness and desire to use violence to pursue his purposes – even against sworn law enforcement officers.

K. In light of the facts set forth *supra*, it is self-evident that limited confidentiality is required to avoid substantial injury to innocent members of this community. These individuals who comprised the venire would suffer substantial injury if their identifying information was needlessly made public. These men and women, who honored their civic obligation by responding for jury duty, were summoned – *involuntarily* – to their county courthouse and *compelled* to answer questions truthfully

and completely so that the Court could empanel a fair and impartial jury to determine the cause – and protect the Defendant's constitutional right to a public and timely trial by jury. One's cooperation to serve our community in this most fundamentally important manner should not provide a vehicle by which that individual's privacy (assured by law) is meaningfully and substantially invaded. To hold otherwise, on the facts and request as presented in this case, would be unconscionable.

L. Further, this limited confidentiality is necessary to protect the compelling governmental interest of being able to assemble members from across the community to serve on juries – in both criminal and civil cases. To subject members of the citizenry who respond to a jury summons to this unwarranted invasion of privacy would create a substantial chilling effect on the willingness or availability of individuals to serve on a jury. If one's service for jury duty, by even responding for examination as a potential juror who is ultimately not selected, exposed that individual's entire private life to public inspection, a person may well be led not to respond at all for jury duty, or to craft answers intended to require excusal from jury service. Such a reality would be a substantial and profound impediment to the fair, impartial and orderly administration of justice.

M. The Court has an abiding obligation to protect – to the extent not inconsistent with the Constitutional rights of parties before it – the privacy interests of the jurors (including unchosen potential jurors and alternate jurors) who served in this case and to shield them from harassment while this case is pending.

Accordingly, it is

ORDERED:

1. In response to the public records request for transcripts of the jury selection portion of the trial in the underlying death penalty case, the Office of the Clerk of Court, Duval County, Florida may release the requested transcripts in a manner not inconsistent with this Order.

2. Specifically, the Clerk of Court **shall redact** from said transcripts, all identifying information of members of the venire, including, but not limited to, the (i) name, (ii) location/area of residence, (iii) employer/job description, (iv) family information (including, but not limited to, personal and employment/education information of spouses, partners and/or children), and (v) all other identifying information that in any way individually identifies any member of the venire. Such information shall be redacted from the transcript, regarding all individuals, whether any individual was not chosen to serve or ultimately chosen for service as an acting or alternate juror.

3. Unless otherwise ordered by this Court, this Order shall remain in full force and effect until 60 days after the conclusion of the cause, said conclusion to be determined by this Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 27th day of January, 2016.

ADRIAN G. SOUD
Circuit Court Judge

Copies to:

Bernie de la Rionda, Esq.
Assistant State Attorney
Office of the State Attorney

Matt Shirk, Esq.
Elizabeth Webb, Esq.
Public Defender's Office, Fourth Judicial Circuit

Filing # 36225450 E-Filed 01/06/2016 03:02:59 PM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2009-CF-14374-AXXX-MA
DIVISION: CR-B

vs.

ARTHUR JAMES MARTIN,
Defendant.
_____/

ORDER DIRECTING THE JURORS' IDENTITY BE KEPT CONFIDENTIAL

This matter came before the Court pursuant to a public records request received by the Office of the Clerk of Duval County, Florida, seeking transcripts of the jury selection portion of the trial in the underlying death penalty case. For the following reasons, the Clerk shall not release nor disclose any and all information that in any way identifies any juror who has served in this case, nor any potential or ultimately seated juror, including any alternate juror:

1. This case is still very active and has not yet concluded.

2. The guilt phase of the jury trial commenced on March 26, 2012, wherein the jury returned a verdict on March 28, 2012, finding the Defendant guilty of First Degree Murder. The jury also found the Defendant discharged a firearm, causing death during commission of the offense. On April 2, 2012, the penalty phase commenced, and after the State and Defense presented testimony, the jury returned a recommendation that the Defendant be sentenced to death for the murder of Javon Daniels.

3. The Judgment and Sentence was imposed on August 3, 2012.

4. The conviction and sentence was affirmed by the Florida Supreme Court on direct appeal on December 17, 2014.

5. Numerous Motions for In Camera Inspection have been filed and the Court has entered Orders on several of them. Further, as recently as December 21, 2015, the Defendant filed a Response to Florida Department of Law Enforcement's Objections to Demand for Additional Public Records, asserting that the records sought are relevant to the subject matter of a 3.851 post-conviction proceeding or appear reasonably calculated to lead to discovery of admissible evidence under Florida Criminal Procedure Rule 3.852(g)(3)(C).

6. A Status Hearing is scheduled for March 17, 2016.

FILED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/11/2016 01:13:21 PM

7. Two days before the murder of 19-year old Javon Daniels, the Defendant's friend Franklin Batie was involved in a shooting where he was grazed on the back of his head and neck by a bullet. Mr. Batie did not know the identity of the shooter. On the day of the murder, Mr. Batie drove the Defendant to Weber 5B Apartments so the Defendant could visit someone. Mr. Batie remained in the car while the Defendant got out and engaged in a conversation. In the back seat of the car was Mr. Batie's loaded .45 caliber handgun.

While waiting for the Defendant, Mr. Batie noticed an SUV and believed he recognized the driver as the shooter. Mr. Batie retrieved his gun and mentioned to the Defendant that he possibly recognized the driver as having tried to shoot him. The Defendant took Mr. Batie's gun, went to the driver's side of the SUV, and fired multiple shots at Mr. Daniel. When Mr. Daniels tried to escape through the passenger side, the Defendant walked around the front of the SUV to the passenger side and continued firing, shooting him back down in the car.

Mr. Daniels ultimately died at the scene. He received twelve gunshot wounds, four of which produced fatal injuries. The Defendant walked back to Mr. Batie's car and Mr. Batie drove the Defendant home. Mr. Batie then drove home to Starke, where he disposed of his car and began driving another vehicle. The weapon was never located.

There were multiple eyewitnesses. The Defendant asked one eyewitness, Tasheana Hart, not to tell anyone and offered her money in exchange for her silence.

8. In addition, the Defendant was previously convicted of Murder in the Second Degree with a Deadly Weapon, two counts of Armed Robbery, Burglary with Assault or Battery (Armed), and Possession of a Firearm by a Convicted Felon. He was sentenced to ten years of incarceration and was released less than six months prior to taking another life.

9. As an aggravating circumstance, the Court found the capital felony was especially heinous, atrocious or cruel. The Court also found the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any presence of moral or legal justification, as another aggravating circumstance.

10. As established by his prior and current convictions for murder, the Defendant is a dangerous prisoner, he is on death row, and he has approached one eyewitness and offered her money in exchange for her silence.

11. Contrary to the Court in Kever v. Gilliam, 886 So. 2d 263 (Fla. 1st DCA 2004), this Court is able to find a "basis for denying" the release of names and identifying information of the jurors for the reasons provided above.

12. This Court has determined that all identifying information of any juror who has served in the trial of the underlying cause, or any potential or ultimately seated juror, including any alternate juror revealed in the jury selection transcripts shall remain confidential on the grounds that confidentiality is required to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; to protect a compelling governmental interest; and to avoid substantial injury to innocent third parties. Rule 2.420(c)(9), Fla. R. Jud. Admin.

13. It is within the Court's discretion and authority to prevent the clerk from disclosing information that would enable specific identification of individual juror members. Sarasota-Herald Tribune v. State, 916 So. 2d 904, at 910 (Fla. 2nd DCA 2005); Sunbeam Television Corp. v. State, 723 So. 2d 275, 277 (Fla. 3d DCA 1998); Times Publishing Co. v. State, 632 So. 2d 1072, 1074 (Fla. 4th DCA 1994); Rule 2.420(c)(9), Fla. R. Jud. Admin.; compare, AGO 2005-61, Fla., Nov. 21, 2005 (finding that "section 322.20(9), Florida Statutes, does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury [pool] list compiled by the clerk of court" as opposed to certain circumstances where a court finds a basis for denying release of the information)(emphasis added).

14. The Court has both a valid concern to protect the privacy interests of the jurors who served in this case to shield them from retaliation or harassment while this case is pending and a basis for denying release of the information deemed to be confidential.

Accordingly, it is

ORDERED AND ADJUDGED that:

A. In response to the records request for transcripts of the jury selection portion of the trial in the underlying death penalty case, the Office of the Clerk of Court, Duval County, Florida shall redact any and all information that in any way identifies any juror who has served in the trial of the underlying cause, or any ultimately seated juror, including any alternate juror while this Order is in effect, including their name, address, and employment information.

B. The Office of the Clerk of Court, Duval County, Florida shall not release any information that in any way identifies any juror who has served in the trial of the underlying

cause, or any ultimately seated juror, including any alternate juror while this Order is in effect, including their name, address, and employment information.

C. Unless otherwise ordered by this Court, this Order shall remain in full force and effect until 60 days after the conclusion of the cause.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 5 day of June, 2016.

LINDA F. McCALLUM
Circuit Court Judge

cc:

Richard Mantei, Esq.
Ms. Meredith Charbula, Esq.
Assistant State Attorney
Office of the State Attorney

Berdene Beckles, Esq.
Assistant Attorney General
Office of the Attorney General

Janine Robinson, Esq.
General Counsel
Florida Department of Law Enforcement

Dawn B. Macready, Esq.
Robert Friedman, Esq.
Capital Collateral Regional Counsel – North
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2008-CF-012641-AX
CASE NO.: SC15-1903
DIVISION: CR-D

v.

RANDALL DEVINEY
_____/

ORDER DIRECTING THE JURORS' IDENTITY BE KEPT CONFIDENTIAL

This matter came before the Court pursuant to a public records request received by the Office of the Clerk of Duval County, Florida. The records request was made by the American Civil Liberties Union (ACLU), seeking transcripts of the jury selection portion of the trial in the underlying death penalty case. For the following reasons, the Clerk shall not release nor disclose any and all information that in any way identifies any juror who has served in this case, nor any potential or ultimately seated juror, including any alternate juror:

1. This case is still ongoing and has not yet concluded.

2. Two trials were held in the underlying cause. The first trial was held on March 4, 2010. The Defendant was found guilty and the Defendant was sentenced on June 11, 2010. The Florida Supreme Court reversed and remanded the case on July 5, 2013. The second trial was held on July 17, 2015. The Defendant was found guilty and sentenced on October 14, 2015. The case is pending on appeal with the Florida Supreme Court.

3. Therefore, the above-styled cause has not concluded.

4. This case was a high profile case.

5. This is a capital death penalty case, where the Defendant was convicted of murder in the first degree by two separate juries. The Defendant is a dangerous prisoner on death row.

6. The Court has a valid concern to protect the privacy interests of all jurors who served in both trials in this underlying cause to shield them from retaliation or harassment while this case is pending.

7. It is within the Court's discretion to prevent court-provided access to information that would enable specific identification of individual juror members. Sarasota-Herald Tribune v. State,

FILED 12/17/2015 AM 10:55 RUSSELL

916 So. 2d 904, at 910 (Fla. 2nd DCA 2005); Sunbeam Television Corp. v. State, 723 So.2d 275, 277 (Fla. 3d DCA 1998).

Accordingly, it is

ORDERED AND ADJUDGED that:

A. In response to the record request made by the American Civil Liberties Union (ACLU) for transcripts of the jury selection portion of the trial in the underlying death penalty case in this cause, the Office of the Clerk of Court, Duval County, Florida shall redact any and all information that in any way identifies any juror who has served in either trial of this cause, or any potential or ultimately seated juror, including any alternate juror while this Order is in effect.

B. The Office of the Clerk of Court, Duval County, Florida shall not release any information that in any way identifies any juror who has served in either trial of this cause, or any potential or ultimately seated juror, including any alternate juror while this Order is in effect.

C. Unless otherwise ordered by this Court, this Order shall remain in full force and effect until 60 days after the conclusion of the case.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 16 day of December, 2015.

Mallory Cooper, Circuit Judge

cc:

Elizabeth Webb, Esq., APD, Counsel for Defendant
Bernie de la Rionda, Esq., SAO

FILED
FEB 06 2018
D.W. Jones
CLERK CIRCUIT COURT

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA.

CASE NO.: 16-13-CF-005781-AXXX-MA
DIVISION: D

STATE OF FLORIDA,

v.

DONALD J. SMITH,
Defendant.
_____/

ORDER DIRECTING THAT JURORS' IDENTITIES BE KEPT CONFIDENTIAL

The State and Defendant requested, stipulated and agreed that in the above-styled cause any and all information that in anyway identifies any potential or ultimately seated juror, including any alternate juror, be protected from disclosure. This protection includes any photographs, video, drawing, sketch, or other image of any juror as well as any recording of their voices as they answer questions during voir dire. This Order shall protect a juror's name, address, date of birth, specific place of employment or any other aspect of their identity that may lead to the revealing of their identity. This Order also includes any attempt to capture images of jurors as they travel to and from the Courtroom to include protecting the jurors means of transportation and any description of their vehicles or tag numbers.

The State and Defendant further request, stipulate and agree that this Court protect any identifying information such as name, address, date of birth, specific place of employment, or any other aspect of their identity that may lead to the revealing of their identity.

The State and Defendant lastly request, stipulate and agree that the voir dire panel and the ultimately seated jurors and alternates should be protected from any attempt of

any person to follow, surveil, photograph, record, or in any way capture images as those jurors travel to and from the courtroom to include protecting the jurors' means of transportation and any description of their vehicles or tag numbers from disclosure.

The State and Defense in support of this request cite Sunbeam Television Corporation v. State, 723 So.2nd 275 (Fla. 3rd DCA 1998) and Florida Rule of Judicial Administration 2.450

The stated purpose of these requests, stipulations and agreements in this high publicity case is to protect the jurors from any prejudicial outside influences. Sheppard v. Maxwell, 284 U.S. 333 (1966). (Administrative Order No.: 2013-08 addresses this issue and said Order has been implemented in this case.)

As set forth herein, the State and Defendant's request, stipulation and agreement shall be granted. The jurors' identities and addresses will be known to the attorneys of record so that they may properly inquire during voir dire. However, the participants shall refer to those jurors by the juror number assigned to them by the Clerk of the Court and shall also not disclose the jurors' current residential addresses or places of employment. This is to be done in order to protect the prospective jurors from harassment and pressure from the public at large. Sunbeam Television Corp. V. State, 723 So.2d 275, 279 (Fla. 3rd DCA 1998). The jurors will be properly instructed that the anonymity is for their protection from media harassment and shall not impact the Defendant's presumption of innocence. See State v. Bowles, 531 N.W. 521, 531 (Minn. 1995). This order is not intended to prevent the media entities from reporting on or disclosing information disclosed during voir dire. Sunbeam Television Corp., 723 So.2d at 281.

Based upon the foregoing, it is

ORDERED AND ADJUDGED that:

1. The State and Defendant's request, stipulation and agreement to keep juror identity confidential is hereby **GRANTED**.

2. Such prohibition shall remain in full force and effect until 60 days after the conclusion of this case, said conclusion to be determined by the Court.

3. The Clerk of the Court shall not release to the public the names of the jurors called to be part of the venire in this case.

4. The parties shall not identify the jurors by their names during voir dire. The jurors shall only be identified by the parties by their given juror numbers.

6. Prospective jurors may not be photographed or identified during the course of jury selection. Such prohibition shall be lifted upon their release from jury service by the Court.

7. Sitting jurors shall not be identified or photographed during the course of the trial.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida on this 6 day of February, 2018. nunc pro tunc January 5, 2018

MALLORY D. COOPER
Circuit Court Judge

Copies to:

Melissa Nelson, State Attorney
Mark Caliel, Assistant State Attorney
Office of the State Attorney

Julie Schlax, Esq.
Attorney for Defendant

Chuck Fletcher, Esq.
Attorney for Defendant

Filing # 36225450 E-Filed 01/06/2016 03:02:59 PM

IN THE CIRCUIT COURT, FOURTH JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

STATE OF FLORIDA

CASE NO.: 16-2009-CF-14374-AXXX-MA
DIVISION: CR-B

vs.

ARTHUR JAMES MARTIN,
Defendant.
_____/

ORDER DIRECTING THE JURORS' IDENTITY BE KEPT CONFIDENTIAL

This matter came before the Court pursuant to a public records request received by the Office of the Clerk of Duval County, Florida, seeking transcripts of the jury selection portion of the trial in the underlying death penalty case. For the following reasons, the Clerk shall not release nor disclose any and all information that in any way identifies any juror who has served in this case, nor any potential or ultimately seated juror, including any alternate juror:

1. This case is still very active and has not yet concluded.

2. The guilt phase of the jury trial commenced on March 26, 2012, wherein the jury returned a verdict on March 28, 2012, finding the Defendant guilty of First Degree Murder. The jury also found the Defendant discharged a firearm, causing death during commission of the offense. On April 2, 2012, the penalty phase commenced, and after the State and Defense presented testimony, the jury returned a recommendation that the Defendant be sentenced to death for the murder of Javon Daniels.

3. The Judgment and Sentence was imposed on August 3, 2012.

4. The conviction and sentence was affirmed by the Florida Supreme Court on direct appeal on December 17, 2014.

5. Numerous Motions for In Camera Inspection have been filed and the Court has entered Orders on several of them. Further, as recently as December 21, 2015, the Defendant filed a Response to Florida Department of Law Enforcement's Objections to Demand for Additional Public Records, asserting that the records sought are relevant to the subject matter of a 3.851 post-conviction proceeding or appear reasonably calculated to lead to discovery of admissible evidence under Florida Criminal Procedure Rule 3.852(g)(3)(C).

6. A Status Hearing is scheduled for March 17, 2016.

FILED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 01/11/2016 01:13:21 PM

7. Two days before the murder of 19-year old Javon Daniels, the Defendant's friend Franklin Batie was involved in a shooting where he was grazed on the back of his head and neck by a bullet. Mr. Batie did not know the identity of the shooter. On the day of the murder, Mr. Batie drove the Defendant to Weber 5B Apartments so the Defendant could visit someone. Mr. Batie remained in the car while the Defendant got out and engaged in a conversation. In the back seat of the car was Mr. Batie's loaded .45 caliber handgun.

While waiting for the Defendant, Mr. Batie noticed an SUV and believed he recognized the driver as the shooter. Mr. Batie retrieved his gun and mentioned to the Defendant that he possibly recognized the driver as having tried to shoot him. The Defendant took Mr. Batie's gun, went to the driver's side of the SUV, and fired multiple shots at Mr. Daniel. When Mr. Daniels tried to escape through the passenger side, the Defendant walked around the front of the SUV to the passenger side and continued firing, shooting him back down in the car.

Mr. Daniels ultimately died at the scene. He received twelve gunshot wounds, four of which produced fatal injuries. The Defendant walked back to Mr. Batie's car and Mr. Batie drove the Defendant home. Mr. Batie then drove home to Starke, where he disposed of his car and began driving another vehicle. The weapon was never located.

There were multiple eyewitnesses. The Defendant asked one eyewitness, Tasheana Hart, not to tell anyone and offered her money in exchange for her silence.

8. In addition, the Defendant was previously convicted of Murder in the Second Degree with a Deadly Weapon, two counts of Armed Robbery, Burglary with Assault or Battery (Armed), and Possession of a Firearm by a Convicted Felon. He was sentenced to ten years of incarceration and was released less than six months prior to taking another life.

9. As an aggravating circumstance, the Court found the capital felony was especially heinous, atrocious or cruel. The Court also found the capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any presence of moral or legal justification, as another aggravating circumstance.

10. As established by his prior and current convictions for murder, the Defendant is a dangerous prisoner, he is on death row, and he has approached one eyewitness and offered her money in exchange for her silence.

11. Contrary to the Court in Kever v. Gilliam, 886 So. 2d 263 (Fla. 1st DCA 2004), this Court is able to find a "basis for denying" the release of names and identifying information of the jurors for the reasons provided above.

12. This Court has determined that all identifying information of any juror who has served in the trial of the underlying cause, or any potential or ultimately seated juror, including any alternate juror revealed in the jury selection transcripts shall remain confidential on the grounds that confidentiality is required to prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; to protect a compelling governmental interest; and to avoid substantial injury to innocent third parties. Rule 2.420(c)(9), Fla. R. Jud. Admin.

13. It is within the Court's discretion and authority to prevent the clerk from disclosing information that would enable specific identification of individual juror members. Sarasota-Herald Tribune v. State, 916 So. 2d 904, at 910 (Fla. 2nd DCA 2005); Sunbeam Television Corp. v. State, 723 So. 2d 275, 277 (Fla. 3d DCA 1998); Times Publishing Co. v. State, 632 So. 2d 1072, 1074 (Fla. 4th DCA 1994); Rule 2.420(c)(9), Fla. R. Jud. Admin.; compare, AGO 2005-61, Fla., Nov. 21, 2005 (finding that "section 322.20(9), Florida Statutes, does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury [pool] list compiled by the clerk of court" as opposed to certain circumstances where a court finds a basis for denying release of the information)(emphasis added).

14. The Court has both a valid concern to protect the privacy interests of the jurors who served in this case to shield them from retaliation or harassment while this case is pending and a basis for denying release of the information deemed to be confidential.

Accordingly, it is

ORDERED AND ADJUDGED that:

A. In response to the records request for transcripts of the jury selection portion of the trial in the underlying death penalty case, the Office of the Clerk of Court, Duval County, Florida shall redact any and all information that in any way identifies any juror who has served in the trial of the underlying cause, or any ultimately seated juror, including any alternate juror while this Order is in effect, including their name, address, and employment information.

B. The Office of the Clerk of Court, Duval County, Florida shall not release any information that in any way identifies any juror who has served in the trial of the underlying

cause, or any ultimately seated juror, including any alternate juror while this Order is in effect, including their name, address, and employment information.

C. Unless otherwise ordered by this Court, this Order shall remain in full force and effect until 60 days after the conclusion of the cause.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 5 day of June, 2016.

LINDA F. McCALLUM
Circuit Court Judge

cc:

Richard Mantei, Esq.
Ms. Meredith Charbula, Esq.
Assistant State Attorney
Office of the State Attorney

Berdene Beckles, Esq.
Assistant Attorney General
Office of the Attorney General

Janine Robinson, Esq.
General Counsel
Florida Department of Law Enforcement

Dawn B. Macready, Esq.
Robert Friedman, Esq.
Capital Collateral Regional Counsel – North
Attorney for Defendant

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO.: 16-2009-CF-004417
DIVISION: CR-C

STATE OF FLORIDA

v.

TERRY SMITH,

Defendant.
_____/

ORDER PERMITTING PRODUCTION OF REDACTED TRANSCRIPTS AND ORDER DIRECTING THE JURORS' IDENTITY BE KEPT CONFIDENTIAL

This matter came before the Court pursuant to a public records request received by the Office of the Clerk of Duval County, Florida, seeking transcript(s) of the jury selection portion of the trial in the underlying death penalty case. For the reasons set forth *infra*, the Clerk may release the requested transcripts to the party making the public records request. However, prior to releasing the transcripts, **the Clerk shall redact** from the transcript(s) all identifying information of individuals/venire members as more fully set forth below.

A. It is axiomatic that jury selection is, as is the entire trial of this cause, a public proceeding to which the public is presumed to be entitled to access. See generally, Morris Publishing Group, LLC v. State, 136 So. 3d 770 (Fla. 1st DCA 2014).

B. Commonsensically, the law extends this right of access to the Court's records of the trial, including jury selection. Rule 2.420(a), Florida Rules of Judicial Administration, assures, "[T]he public shall have access to all records of the judicial

FILED
IN OPEN COURT
DATE

FILED01/28/'16PM0413 FUSSELL

FILED01/28/'16PM0416 FUSSELL

branch of government, *except as provided below*." Rule 2.420(a), Fla. R. Jud. Admin. (emphasis added). Rule 2.420(b)(1)(A) expressly includes in the definition of "records of the judicial branch" any court records, including transcripts filed with the clerk. See Rule 2.420(b)(1)(A), Fla. R. Jud. Admin.

C. However, the Florida Rules of Judicial Administration permit the Court to declare certain records confidential if such confidentiality is required to, *inter alia*, (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; (ii) protect a compelling governmental interest; and/or (iii) avoid substantial injury to innocent third parties. See Rule 2.420(c)(9), Fla. R. Jud. Admin.[1]

D. It is within the Court's discretion and authority to order that the clerk be prohibited from disclosing information that would enable specific identification of individual juror members. Sarasota-Herald Tribune v. State, 916 So. 2d 904, 910 (Fla. 2nd DCA 2005); Sunbeam Television Corp. v. State, 723 So. 2d 275, 277 (Fla. 3d DCA 1998); Times Publishing Co. v. State, 632 So. 2d 1072, 1074 (Fla. 4th DCA 1994); Rule 2.420(c)(9), Fla. R. Jud. Admin.; compare, AGO 2005-61, Fla., Nov. 21, 2005 (finding that "section 322.20(9), Florida Statutes, does not operate to exempt from public disclosure jurors' names and addresses appearing on a jury [pool] list compiled by the clerk of court" as opposed to certain circumstances where a court finds a basis for denying release of the information)(emphasis added).

E. The Court hereby determines that all identifying information revealed in the jury selection transcripts of any juror in the trial of the underlying cause (including

[1] Of course, the degree, duration and manner of confidentiality ordered by the Court shall be no broader than necessary to protect such interests and there must not exist any other less restrictive means to protect such interests. See Rule 2.420(c)(9)(A)-(C), Fla. R. Jud. Admin.

the alternate jurors), as well as any citizens who were on the venire, shall remain confidential on the grounds that such confidentiality is required to (i) prevent a serious and imminent threat to the fair, impartial, and orderly administration of justice; (ii) protect a compelling governmental interest; and (iii) avoid substantial injury to innocent third parties. Rule 2.420(c)(9), Fla. R. Jud. Admin.[2]

F. This case is still active and has not yet concluded. The jury trial was held and the Defendant was found guilty in March 2011. Sentence was imposed on May 12, 2011. The conviction and sentence were affirmed by the Florida Supreme Court on direct appeal on January 16, 2014.

G. On November 20, 2015, the Defendant filed a Motion to Vacate Judgment and Sentence under Rule 3.851, Florida Rules of Criminal Procedure and Special Request for Leave to Amend. On December 7, 2015, the Court scheduled a Status Conference for February 12, 2016. Thus, the Defendant's Rule 3.851 Motion for post-conviction relief is still pending, and the above-styled cause has not concluded.

H. Importantly, this is a capital death penalty case, where the Defendant was convicted of three Counts of First Degree Murder based on both the premeditated and felony-murder theories. The Defendant and Breon Williams were invited into a residence by Desmond Robinson to purchase cocaine from Desmond Robinson and Berthum Gibson, two of the three murder victims. Instead of leaving the house after shooting Desmond Robinson multiple times and killing him, the Defendant stepped over the dead body and walked to the opposite end of the residence with the purpose of

---

[2] Contrary to the Court in Kever v. Gilliam, 886 So. 2d 263 (Fla. 1st DCA 2004), this Court is able to find a "basis for denying" the release of names and identifying information of the jurors for the reasons provided *infra*.

hunting down and murdering the other two victims, Berthum Gibson and Keenethia Keenan, who was unarmed. Breon Williams fled the scene.

I. In addition, in Case No. 16-2009-CF-14759, the Defendant was convicted of a violation of RICO, and plead guilty to one Count of Conspiracy to Engage in Pattern of Racketeering Activity and two Counts of Violation of Racketeering Laws. His sentence was ordered to run concurrently with the Death Penalty sentence imposed in Case No. 16-2009-CF-4417.

J. As established by his convictions for multiple drug-related murders and RICO violations, it is plainly evident that this Defendant is a dangerous prisoner on death row who has conspired with other dangerous individuals (and may still so conspire).

K. In light of the facts set forth *supra*, it is self-evident that limited confidentiality is required to avoid substantial injury to innocent members of this community. These individuals who comprised the venire would suffer substantial injury if their identifying information was needlessly made public. These men and women, who honored their civic obligation by responding for jury duty, were summoned – *involuntarily* – to their county courthouse and *compelled* to answer questions truthfully and completely so that the Court could empanel a fair and impartial jury to determine the cause – and protect the Defendant's constitutional right to a public and timely trial by jury. One's cooperation to serve our community in this most fundamentally important manner should not provide a vehicle by which that individual's privacy (assured by law) is meaningfully and substantially invaded. To hold otherwise, on the facts and request as presented in this case, would be unconscionable.

L. Further, this limited confidentiality is necessary to protect the compelling governmental interest of being able to assemble members from across the community to serve on juries – in both criminal and civil cases. To subject members of the citizenry who respond to a jury summons to this unwarranted invasion of privacy would create a substantial chilling effect on the willingness or availability of individuals to serve on a jury. If one's service for jury duty, by even responding for examination as a potential juror who is ultimately not selected, exposed that individual's entire private life to public inspection, a person may well be led not to respond at all for jury duty, or to craft answers intended to require excusal from jury service. Such a reality would be a substantial and profound impediment to the fair, impartial and orderly administration of justice.

M. The Court has an abiding obligation to protect – to the extent not inconsistent with the Constitutional rights of parties before it – the privacy interests of the jurors (including unchosen potential jurors and alternate jurors) who served in this case and to shield them from harassment while this case is pending.

Accordingly, it is

ORDERED:

1. In response to the public records request for transcripts of the jury selection portion of the trial in the underlying death penalty case, the Office of the Clerk of Court, Duval County, Florida may release the requested transcripts in a manner not inconsistent with this Order.

2. Specifically, the Clerk of Court **shall redact** from said transcripts, all identifying information of members of the venire, including but not limited to the (i) name, (ii) location/area of residence, (iii) employer/job description, (iv) family

information (including, but not limited to, personal and employment/education information of spouses, partners and/or children), and (v) all other identifying information that in any way individually identifies any member of the venire. Such information shall be redacted from the transcript, regarding all individuals, whether any individual was not chosen to serve or ultimately chosen for service as an acting or alternate juror.

3. Unless otherwise ordered by this Court, this Order shall remain in full force and effect until 60 days after the conclusion of the cause, said conclusion to be determined by this Court.

DONE AND ORDERED in Chambers, in Jacksonville, Duval County, Florida, on this 15th day of January, 2016.

ADRIAN G. SOUD
Circuit Court Judge

cc:

Mr. Mark Caliel, Esq.
Ms. Pamela Hazel, Esq.
Ms. Meredith Charbula, Esq.
Assistant State Attorney
Office of the State Attorney

Mr. Patrick Delaney, Esq.
Assistant Attorney General
Office of the Attorney General

Ms. Karen Moore, Esq.
Capital Collateral Regional Counsel – North
Attorney for Defendant

Exhibit B

Correspondence Addressed To:
Brian W. Stull
Senior Staff Attorney
American Civil Liberties Union
201 W. Main Street, Suite 402, Durham, NC 27701
917.238.5491 | bstull@aclu.org

Dear Mr. Stull,

You asked me to evaluate transcripts and other materials related to 12 capital jury trials in Duval County, Florida, to determine whether and the extent to which death qualification impacts jurors disparately by race. You also asked me to assess any additional race effects of the prosecutors' use of peremptory strikes. As summarized in greater detail below, in these 12 trials, conducted from 2010 to 2018, death qualification disproportionately excluded people of color, and Black people, who make up roughly 30% of this county, in particular. In every model examined, Black people, as were other jurors of other color, were excluded at rates more than twice of White jurors. This effect only became more concerning when the prosecutors' peremptory strikes were assessed for their cumulative likelihood of excluding jurors of color: fully two thirds of Black women otherwise eligible, qualified, and willing to serve were excluded by the combination of death qualification and prosecutor peremptory strikes, as were 55% of Black men. The details of my investigation are set out further below.

I hope the information in this report is useful to you. If additional analyses are required, please let me know.

Sincerely,
Jacinta

Jacinta M. Gau, Ph.D.
Professor
Department of Criminal Justice
University of Central Florida
Jacinta.Gau@ucf.edu

Study Background

This study began in November 2020 when ACLU Senior Staff Attorney Brian Stull contacted me to discuss his research needs. I hold a Ph.D. in criminal justice and am a tenured full professor in the Department of Criminal Justice at the University of Central Florida. I am currently acting in my own capacity as a subject-matter expert and not as a formal representative of my department or university. No payment was offered or accepted for my services; as such, I submit this report as the product of my investigation. I have no vested interest in the outcome of the ACLU's efforts in the present effort. My analyses were conducted solely for the purpose of fulfilling Attorney Stull's request for an inquiry into whether death disqualification appeared to exert disproportionate racial impacts.

Attorney Stull provided the transcripts analyzed here. The sample contained 12 defendants and 1,042 prospective jurors. The defendants and trial years were:

- Rasheem Dubose (2010)
- Justin McMillian (2010)
- Thomas Brown (2011)
- David Sparre (2011)
- Terrance Phillips (2012)
- Billy Jim Sheppard, Jr. (2012)
- Dennis Glover (2013)
- Kim Jackson (2013)
- Rodney Newberry (2014)
- Raymond Bright (2017)
- Keith Collins (2018)
- James Jackson (2018)

I am aware that there are five additional capital defendants from Duval County during the study time period that are not included in the present analysis because juror information has been sealed by court order. If the courts unseal the files, the data used here could be updated to include the new information and the analyses could be updated. It is unknown whether the addition of these five defendants' jury venires would change any of the conclusions in this report.

Methods and Data

The data file used in this study was constructed from three sources: trial transcripts, jury venire lists, and the list of juror candidates maintained as public records by the Duval County Clerk of Court under Fla. Stat. § 40.011 (1), which are derived from lists provided to the Clerk by the Department of Highway Safety and Motor Vehicles from driver's license and state-identification records. The sample contains 1,042 prospective jurors spread across 12 capital defendants tried between 2010 and 2018 in Duval County, Florida.

The jury venire lists were used to construct the list of names of individuals in each venire. Race, gender, and age for all people in the venire lists were then pulled from the clerk's juror-candidate

lists described earlier. These matchings were straightforward. The name of each prospective juror from the venire list was located in the Clerk of Court record. Use of first, middle, and last names ensured accurate identification of the prospective juror in the Clerk's file and thus accurate recording of race, gender, and age.

Outcomes for people in the venires were gleaned from the transcripts. This required close and careful reading of the transcripts to locate the type of outcome for each person in the venire and, for those who were removed, the type of removal and the reason for it. Nine outcomes were recorded:

- For-cause removal, not related to death disqualification
- Death disqualification
- Automatic death penalty disqualification
- Prosecution peremptory
- Defense peremptory
- Seated as juror or alternate
- Hardship excusal or other form of removal
- Did not reach

For-cause removals were those persons excluded due to bias, conflict of interest, or some other problem with impartiality or ability to serve. When the transcript contained no indication that a for-cause removal was related to the person's views about capital punishment, the person was coded as a for-cause removal unrelated to death penalty attitudes. Anyone removed for cause as a result of strong opposition to the death penalty was coded as death disqualified. A handful of people said they could only impose death upon someone convicted of murder and would not consider prison as an alternative. Those removed for this reason were coded as automatic death penalty removals.

Prospective jurors who were not removed for cause were sometimes later removed by peremptory strike. A few were excused for hardship (e.g., illness) or some other reason. A sizeable number were never reached at all because they were in the back of the seating chart and the court selected all necessary jurors and alternates before these individuals were ever considered. For present purposes, the people in the "Did not reach" category are excluded from the analyses. Seating is random. There is no reason to suspect that racial disparities exist in who is reached and who is not.

My research assistant and I ensured the reliability of the outcome determinations through continuous communication and verification. Two final reliability checks were conducted before the analyses were run. First, a random sample of 10% of cases was drawn. I gave my research assistant a file containing the names of each person in this subsample and the defendant in the case; the file did not contain the outcomes. My research assistant read the transcripts to identify the outcomes. When she finished, we compared the new file to the existing one for similarities and discrepancies. There were very few discrepancies. When they arose, I revisited the transcript to determine how the differences should be resolved. Finally, I sent my research assistant a list of all the people removed for cause and had her verify these outcomes again. I did the same thing

with all the people removed for death disqualification. Minor edits were needed, but the vast majority were determined to have been coded correctly. Notes were taken about each prospective juror to help us understand and remember why each person was removed so that we could properly distinguish between the different types of for-cause removals.

A list of venire persons' names, races, genders, and outcomes can be downloaded here. It is possible that someone else who constructed their own data file based on these transcripts would arrive at alternative conclusions about a small number of the outcomes for prospective jurors, but I am confident that the discrepancies would be minor and would not impact the substantive conclusions contained in this report.

Findings

Description of Sample

Across all 12 defendants, 26.2% of people in the venire were Black, 65.2% were White, 3.5% were Hispanic, 2.8% were Asian, and 2.3% were of other races. In the following analyses, Hispanic, Asian, and other-race individuals will be combined into a single category. It would be ideal to analyze them each separately, but the extremely small numbers make this impractical from a statistical standpoint. The mean age was 45.8 years (sd = 13.6) and 53.6% were women.

Table 1 displays the outcome breakdown with those who were not reached excluded, yielding a sample of 802 people. Death disqualification removed 23% of potential jurors, more than the percentage excluded for non-death penalty related causes or for intense pro-death penalty attitudes.

Table 1. Outcomes across all Venires, excluding those Not Reached

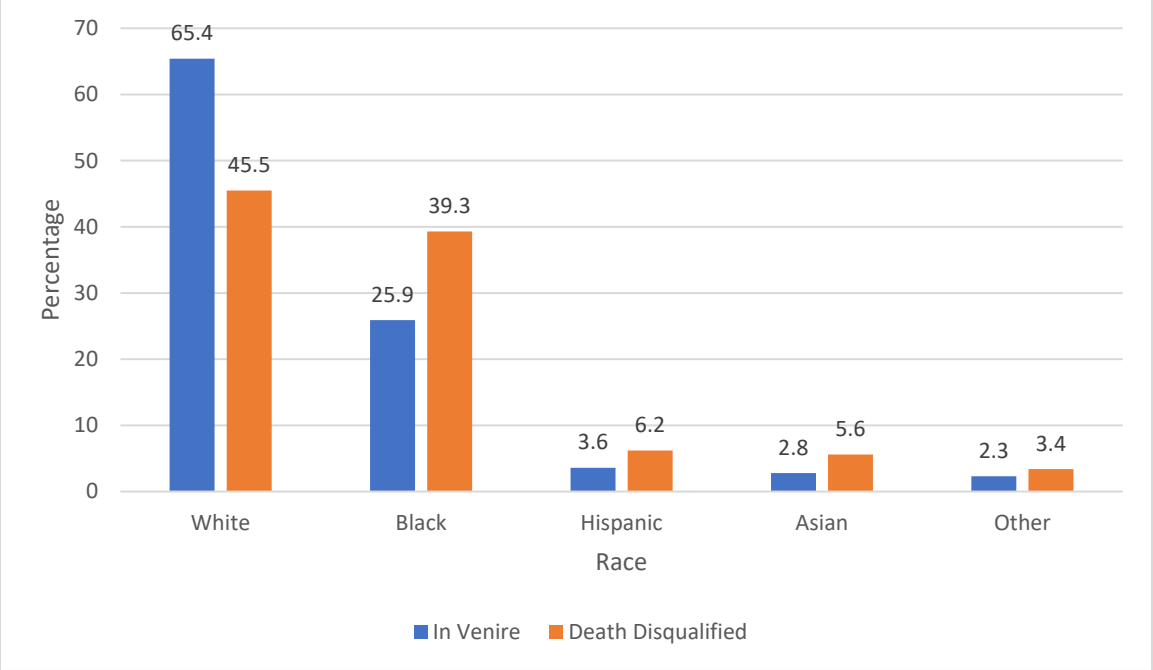
Outcome	***Percent (n)***
Death Disqualification	22.3 (n = 179)
Defense Peremptory	15.0 (n = 120)
Prosecution Peremptory	13.5 (n = 108)
For Cause	13.7 (n = 110)
Automatic Death Penalty	6.5 (n = 52)
Other Removal	7.6 (n = 61)
Seated as Juror or Alternate	21.4 (n = 172)
	Total N = 802

Figure 1 displays the race of all people within the venire (including those not reached; n = 1,041) compared to the racial breakdown among people excluded for death disqualification (n = 178).[1] In Figure 1, the two bars for each racial group would be of equal height if there were no racial disparities in death disqualification. If the bar marking a racial group's percentage of the entire

[1] Race information was unobtainable for one juror. This was Lesley Rae Grimes, who was in the venire for the Glover trial. She was excluded by death disqualification. This will cause a reduction in the sample size (n) by one person in all analyses that include race as a variable.

venire is higher than the bar marking that group's percentage among death-disqualified persons, then that group is said to be underrepresented among the death disqualified. If the percentage bar for the venire is shorter than the death-disqualified percentage bar for a certain group, then that group is underrepresented. As can be seen in the figure, White individuals are underrepresented in the death-disqualified group, while every other racial group is overrepresented.

Figure 1. Race of Persons in Entire Venire and Race of Persons Excluded for Death Disqualification (Percentages)



The analysis turns now from an overview of the univariate descriptives to bivariate tests for statistical relationships between venire member race and voir dire outcome. This report presents the inquiries you have asked me to undertake, based on what you believe is legally probative to this case. If the Court or parties ask for different inquiries, I can likely perform those on this same dataset.

Death Disqualification Removals by Race

Starting in this section and continuing for the remainder of the report, the following acronyms are employed:

- Death disqualification removal (DD)
- Automatic death penalty removal (ADP)
- For cause removal (FC)
- Prosecution peremptory strike (PP)

- Defense peremptory strike (DP)
- Hardship and other excuses (OE)
- Seated as juror or alternate (JA)

The DD and ADP categories were constructed in two alternative ways. First is a version coded to include people who may have also had some potential underlying for-cause removal. For instance, someone who expressed skepticism about police officers telling the truth during courtroom testimony and additionally reported strong objection to capital punishment would be technically excused as a DD removal, but would probably have been an FC removal anyway (independent of death-penalty opposition) because of an impartiality impairment. Similar instances occurred in the ADP group, too. Thus, in Table 3 (as in Tables 1 and 2), the more expansive coding is used. To designate this, the categories DD and ADP will be called DD+ and ADP+. Here and moving forward, those people in the venires who were Hispanic, Asian, or of another race are collapsed into an "other" category. The sample sizes for each race were small and would have created problems in the analyses. In the tables, percentages are presented first and underneath them is the sample size enclosed in parentheses.

Table 2. Outcomes by Race, Expansive (Row Percentages)

				Outcome				Total (Row)
Race	**DD+**	**DP**	**PP**	**FC**	**ADP+**	**OE**	**JA**	
Black	33.8	3.4	16.4	14.5	5.3	7.7	18.8	n = 207
	(70)	(7)	(34)	(30)	(11)	(16)	(39)	
White	15.5	20.3	12.6	13.8	6.9	7.6	23.3	n = 523
	(81)	(106)	(66)	(72)	(36)	(40)	(122)	
Other	38.0	9.9	11.3	11.3	7.0	7.0	15.5	n = 71
	(27)	(7)	(8)	(8)	(5)	(5)	(11)	
Total	20.0%	15.0%	13.5%	13.7%	6.5%	7.6%	21.5%	
(Column)	n = 178	n = 120	n = 108	n = 110	n = 52	n = 61	n = 172	N = 801

The percentages in Table 2 go across the rows to show the percentage of people *within each racial group* who received each outcome. In Table 2, it can be seen that 34% of Black venire persons are excluded due to death disqualification, as are 38% of people of other races. By contrast, just 16% of White venire persons are removed for this reason.

A chi-square test for the numbers in Table 2 revealed statistically significant differences between races on these outcomes ($\chi^2 = 66.369$, df = 12, $p < .001$). The statistical significance of the chi-square test means that the differences between groups cannot be attributed to chance alone. In other words, there are systematic patterns in outcomes by race.

Figure 2 graphically depicts some of the numbers from Table 2. The figure shows the proportion of people in each racial group that was removed for strong death-penalty opposition. Black individuals are more than twice as likely as White individuals to be removed for this reason, and other people of color (Asian, Hispanic, etc.) are even more likely than their Black peers to be prohibited from jury service for opposing the death penalty.

Figure 2. By Race, Percentage Removed by Death Disqualification (Expansive)

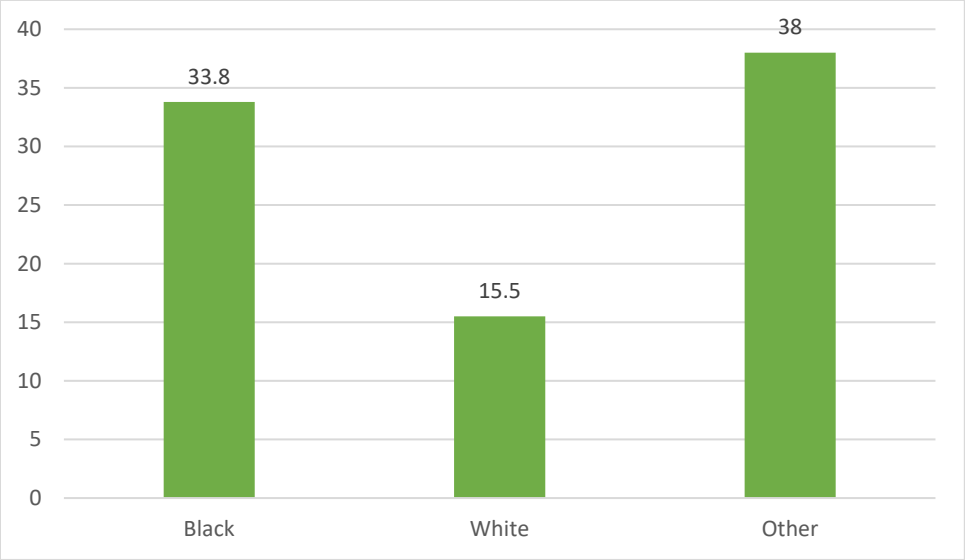


Table 2 and Figure 2 demonstrate that laws allowing for-cause removal on the basis of opposition to the death penalty is a systematic barrier to the participation of people of color on capital juries. Worthy of note in the present examination, all but one of the 12 defendants in this sample were Black.

As previously described, Table 2 employs an expansive definition of DD and ADP (called DD+ and ADP+, respectively) that both include some individuals who expressed conflicts of interest unrelated to capital punishment that may have led to for-cause challenges even if there had been no issue with their death-penalty sentiments. For a more conservative analysis, both categories were recoded with these individuals removed and placed into the FC category.

Table 3 contains the results of these more restricted versions of DD and ADP. Once again, the model chi-square was statistically significant ($\chi^2 = 61.379$, df = 12, $p < .001$) indicating the presence of systematic between-race differences that cannot be attributed to chance. Restricting DD and ADP removals in this manner produced no substantive changes in the interpretation of the model. Sizeable racial differences remained for people removed due to strong opposition to capital punishment, with Black individuals removed at more than double the rate of White individuals and those of other races removed even more often.

Table 3 also demonstrates that Black venire persons and other people of color on venires are less likely than White individuals to end up seated as jurors. Only 19% of Black and a mere 16% of other prospective jurors of color ultimately serve as jurors or alternates, while nearly one-quarter of White venire persons are seated.

Table 3. Outcomes by Race, Restricted (Row Percentages)

				Outcome				Total (Row)
Race	**DD**	**DP**	**PP**	**FC**	**ADP**	**OE**	**JA**	
Black	27.1	3.4	16.4	21.7	4.3	8.2	18.8	n = 207
	(56)	(7)	(34)	(45)	(9)	(17)	(39)	
White	12.8	20.3	12.6	17.4	5.7	7.8	23.3	n = 523
	(67)	(106)	(66)	(91)	(30)	(41)	(122)	
Other	32.4	9.9	11.3	18.3	5.6	7.0	15.5	n = 71
	(23)	(7)	(8)	(13)	(4)	(5)	(11)	
Total	18.2%	15.0%	13.5%	18.6%	5.4%	7.9%	21.5%	
(Column)	n = 146	n = 120	n = 108	n = 149	n = 43	n = 63	n = 172	N = 801

Two main conclusions flow from these analyses. First, as previously noted, death disqualification is a significant barrier to jury service for racial minorities. The requirement that someone hold religious or moral values that do not conflict with capital punishment keeps sizeable proportions of citizens of color off capital juries. Second, people of color in venires are less likely overall to ultimately be selected as jurors. Due to the cumulative effects of death disqualification, for-cause removals, and prosecutor peremptory strikes, Black, Hispanic, Asian, and other people of color are systematically removed from venires.

Another way to examine death disqualification is by excluding from the analysis the venire persons who were removed for cause (unrelated to death-penalty attitudes) and for hardship or other reasons. This was the approach taken by Grosso and O'Brien in their analysis of racially discrepant outcomes in capital jury selection.[2] In Table 4, the FC and OE categories have been omitted. This permits a look at how death disqualification affects the jurors who are ready, willing, and able to serve but for death qualification. Again, the percentages are calculated across the rows for a *within-race* examination of what happens to people within each racial category.

Table 4. Outcomes by Race, FC and OE Removals Excluded (Row Percentages)

			Outcome			Total (Row)
Race	**DD**	**PP**	**DP**	**ADP**	**JA**	
Black	38.6	24.3	4.8	6.2	26.9	n = 145
	(56)	(34)	(7)	(9)	(39)	
White	17.1	16.9	27.1	7.7	31.2	n = 391
	(67)	(66)	(106)	(30)	(122)	
Other	43.4	15.1	13.2	7.5	20.8	n = 53
	(23)	(8)	(7)	(4)	(11)	
Total	24.8%	18.3%	20.4%	7.3%	29.2%	
(Column)	n = 146	n = 108	n = 120	n = 43	n = 172	N = 589

[2] Grosso, C. M. & O'Brien, B. (2011). A stubborn legacy: The overwhelming importance of race in jury selection in 173 post-*Batson* North Carolina capital trials. *Iowa Law Review, 97,* 1531 – 1559.

The analysis revealed statistically significant differences ($\chi^2 = 61.313$, df = 8, $p < .001$) and the racial discrepancies in death disqualification are even sharper with the otherwise-disqualified people removed. Approximately 39% of Black venire persons who are ready, willing, and able to serve are banned from doing so by the death-disqualification rule. A full 43% of people of other races (Hispanic, Asian, and so forth) are barred from service by the rule. This sits in contrast to only 17% of White venire persons for whom death-penalty opposition poses a barrier to jury service.

Prosecutorial use of peremptory strikes to remove people of color from venires is a perennial topic of debate. As such, in the present analysis, a category was created that combines death disqualification with prosecutorial peremptories to examine the combined impact of these two sources of exclusion on Black individuals and other people of color. A summary table was created to feature three main findings from the death-disqualif.ication analysis. Table 5 shows these summaries. No statistical analysis is run for this table because it is a summary of three separate sets of numbers and percentages.

Table 5. Death Disqualification by Race as a Function of Total Sample, Otherwise Eligible, and Death Disqualification Combined with Prosecutorial Peremptory as a Function of Otherwise Eligible

	Outcome		
Race	**DD/Total**	**DD/Eligible**	**DD & PP/ Eligible**
Black	27.1	38.6	62.1
	(56)	(56)	(90)
White	12.8	17.1	34.0
	(67)	(67)	(133)
Other	32.4	43.4	58.5
	(23)	(23)	(31)
Total (Column)	18.2%	24.8%	43.1%
	n = 146	n = 146	n = 254

The column in Table 5 labeled "DD/Total" is the percentage of death-penalty removals as a function of the entire sample size (N = 801). The "DD/Eligible" column shows DD removals as percentages of potential jurors otherwise able to serve (N = 589). In the "DD &PP/Eligible" column, death disqualifications are combined with prosecutor peremptories and the denominator is the number eligible to serve (N = 589). These three ways of examining the removal of people of color from jury venires highlight the ways Black Americans and other Americans of color are systematically barred from jury service.

The analyses up to now have focused on race alone, but gender may also be an important factor in the voir dire process. Research indicates that women support the death penalty less than men

do.[3] The following section brings gender into consideration to determine whether the racial differences seen thus far in this report are also gendered.

Death Disqualification Removals by Race and Gender

This section examines the intersection of race and gender in outcome type. Due to the small number of other-race individuals in this sample, these analyses are limited to Black and White venire members. The restricted versions of the DD and ADP variables are used, as well. This makes for a conservative estimate of the impacts of anti-death penalty attitudes on people's removals – if anything, these results *underestimate* the effects of death disqualification on racial disparities. Table 6 shows the results for Black and White prospective jurors broken down by gender.

Table 6. Outcomes by Race and Gender (Row Percentages)

	Outcome					Total (Row)
Race	**DD**	**PP**	**DP**	**ADP**	**JA**	
BW	42.5	24.1	3.4	8.0	21.8	n = 87
	(37)	(21)	(3)	(7)	(19)	
WW	18.3	18.8	23.3	3.5	36.1	n = 202
	(37)	(38)	(47)	(7)	(73)	
BM	32.8	22.4	6.9	3.4	34.5	n = 58
	(19)	(13)	(4)	(2)	(20)	
WM	15.9	14.8	31.2	12.2	25.9	n = 189
	(30)	(28)	(59)	(23)	(49)	
Total (Column)	22.9% (n = 123)	18.7% (n = 100)	21.1% (n = 113)	7.3% (n = 39)	30.0% (n = 161)	N = 536

Table 6 reveals stark disparities at the intersection of race and gender. The chi-square test was statistically significant ($\chi^2 = 71.736$, df = 12, $p < .001$). Nearly 43% of Black women (BW) were removed due to death disqualification, as were a full one-third of Black men (BM). Less than one-fifth of White women (WW) and even fewer White men (WM) were DD removals. Black women's DD removal rate was more than double that for either of the White groups, and Black men's DD rate was double that for White men and nearly double that of White women.

Black women were also the group most likely to be subject to prosecutors' peremptory strikes. Black men trailed close behind. Nearly one-quarter of all Black individuals who were otherwise qualified to serve ended up being struck by prosecutors. Black women were the race-gender dyad least likely to be empaneled on juries. The DD removal procedures systematically bar Black citizens from serving on capital juries, and this barrier is particularly high for Black women.

Table 6 shows that prosecutor peremptory strikes also exclude a sizeable percentage of Black venire persons. To explore this finding further, Table 7 presents an analysis with DD and PP

[3] For instance, see Cochran, J. K. & Sanders, B. A. (2009). The gender gap in death penalty support: An exploratory study. *Journal of Criminal Justice, 37,* 525 – 533.

exclusions combined. The chi-square statistic remains statistically significant ($\chi^2 = 67.014$, df = 9, $p < .001$).

Table 7. Outcomes by Race and Gender, DD and PP Combined (Row Percentages)

	Outcome				Total (Row)
Race	**DD or PP**	**DP**	**ADP**	**JA**	
BW	66.7	3.4	8.0	21.8	n = 87
	(58)	(3)	(7)	(19)	
WW	37.1	23.3	3.5	36.1	n = 202
	(75)	(47)	(7)	(73)	
BM	55.2	6.9	3.4	34.5	n = 58
	(32)	(4)	(2)	(20)	
WM	30.7	31.2	12.2	25.9	n = 189
	(58)	(59)	(23)	(49)	
Total	41.6%	21.1%	7.3%	30.0%	N = 536
(Column)	(n = 223)	(n = 113)	(n = 39)	(n = 161)	

As can be seen in Table 7, two-thirds of otherwise-qualified Black women were excluded through the combination of death disqualification and prosecutorial peremptory strikes. More than half of Black men were also lost to this combination. Approximately one-third of White women and White men had this outcome. The numbers from this sample of death penalty cases paint a picture of cumulative disadvantage. The concept behind cumulative disadvantage is that racial disparities in the criminal-justice system are usually not produced by any one source that can be pinpointed as the sole cause. Instead, disparities build up across several decision points.[4] In the present study, racial disparities in jury selection appear to result from the accumulation of DD and PP removals.

The differences in percentages are all the more meaningful because there are fewer Black men and women in the venire to start with. While this may make sense as a function of the demographic makeup of Duval County, the low absolute numbers combined with the high percentage of removals targeting this group means that there are very few Black citizens left to sit on juries. Because there are relatively few Black individuals on the venire, all sources of attrition have a magnified impact on this group's ultimate representation on juries.

In addition to the actual administration of justice potentially being threatened, the exclusion of jurors of color through death qualification, particularly when cumulated with the prosecutors' use of peremptory strikes, harms the appearance of justice. This is especially true when defendants are Black or Brown. In the present study, 11 of the 12 defendants were Black.

[4] Several studies have examined cumulative disadvantage in the justice system. One example is Kutateladze, B. L., Andiloro, N. R., Johnson, B. D., & Spohn, C. C. (2014). Cumulative disadvantage: Examining racial and ethnic disparity in prosecution and sentencing. *Criminology*, *52*(3), 514-551.

Public perceptions of fairness are based not solely upon outcomes but upon processes. People's willingness to accept outcomes depends in large part on whether they trust the integrity of the process leading to those outcomes. If potential jurors of color are routinely excluded in the manner set observed in this report, the public's trust in the justice system may falter.

Summary and Conclusion

This concludes my report. I hope these analyses are helpful to you and shed light on important aspects of capital jury selection. Let me know if I can be of service with additional analyses in the future if needed.