University of Arkansas at Little Rock Law Review

Volume 8 | Issue 3 Article 2

1985

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Robert M. Berry

REMEDIES TO THE DILEMMA OF DEATH-QUALIFIED JURIES

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I. INTRODUCTION

In capital cases, the trial process is commonly separated into a guilt phase and a sentencing phase. In the guilt phase, capital trial jurors determine whether the defendant is guilty of a crime for which death may be an appropriate penalty. If guilt is determined during this initial phase, the trial moves to a sentencing phase where the same jury must then decide whether to impose the death penalty or life imprisonment.

Because of the risk that adamant opponents of the death penalty could not fully consider the range of punishments allowed by law in the sentencing phase, and because their opposition to capital punishment could nullify meaningful deliberations during the guilt phase, prospective jurors who express an inability to consider the death penalty if the defendant were found guilty are excluded from jury service for cause. The resulting "death-qualified" jury has been declared unconstitutional by the Eighth Circuit.[1] The Eighth Circuit decision creates an intercircuit conflict[2] to be resolved by the United States Supreme Court in

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* B.A., M.A., and Ph.D., University of Arkansas at Fayetteville, Associate Professor of Psychology and Criminal Justice, University of Arkansas at Little Rock.

1. Grigsby v. Mabry, 758 F.2d 226 (8th Cir.), *cert. granted, sub nom* McCree v. Lockhart, 546 U.S. 1088 (1985) (No. 84-1865, 1986 Term).

The plenary hearing consolidated the *Grigsby* case with two other habeas corpus petitions, by DeWayne Hulsey and Ardia McCree, which also raised *Witherspoon* arguments. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).Only Grigsby and McCree were successful as Hulsey did not object to the exclusion of Witherspoon-excludables at the time of his trial and his case was held to be procedurally barred under the rule of Wainwright v. Sykes, 433 U.S. 72 (1977). The trial court opinion was published as Grigsby v. Mabry, because Mabry was Commissioner of the Arkansas Department of Correction when Grigsby filed his petition. When McCree filed his petition, Vernon Housewright was Commissioner and the Eighth Circuit opinion was published as Grigsby v. Mabry and Housewright v. McCree. By the time of the appeal to the Supreme Court, Grigsby had been murdered in his cell (June, 1983) and Lockhart was the Commissioner of Corrections. The style of the Supreme Court case now is McCree v. Lockhart.

2. The Fifth Circuit upheld death-qualified juries in Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), with further discussion in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *aff'd on rehearing* 671 F.2d 858, *cert. denied*, 459 U.S. 882 (1982). The Fourth Circuit upheld death-qualified juries in Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), *rev'g* 578 F. Supp. 1164 (W.D.N.C. 1984).

1986. The purpose of the present article is not to anticipate the Court's decision but to assess the effect of several structural trial arrangements on critical issues associated with death-qualification.

II. BACKGROUND

Since 1968, significant constitutional questions have been raised concerning the "death-qualified" jury which results from the screening process. The year 1968 marks the date of *Witherspoon v. Illinois*,[3] a landmark case relative to the death-qualification issue. Prior to *Witherspoon*, prospective jurors were excluded from capital cases on the basis of *any* expressed opposition to the death penalty. However, Witherspoon argued that the removal of forty-seven prospective jurors from his trial because of their reservations concerning the death penalty resulted in a jury predisposed to convict him at the guilt phase and to deliver a death sentence at the penalty phase of his trial. In regard to bias at the penalty phase, the Court agreed and concluded that it was "self-evident"[4] that the exclusion of prospective jurors simply on the basis of "general objections to the death penalty"[5] unfairly favored a death sentence and violated due process requirements under the fourteenth amendment.[6] As a consequence, Witherspoon's death sentence was overturned and the Court altered the definitional attributes of a death-qualified jury. In particular, exclusion on the broad basis of general opposition to the death penalty was narrowed as the Court ruled that the only prospective jurors who could constitutionally be eliminated because of their opposition to capital punishment were:

> [T]hose who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.[7]

The Court also considered whether the same exclusions resulted in a "tribunal organized to convict"[8] at the guilt phase of a trial. Unlike the self-evident rationale which governed the penalty-phase decision, empirical research was consulted to determine whether a guilt phase

3. 391 U.S. 510 (1968).
4. *Id.* at 518.
5. *Id.* at 522.
6. *Id.* at 523.
7. *Id.* at 522-23 n.21.
8. *Id.* at 521 (quoting Fay v. New York, 332 U.S. 261, 294 (1947)).

bias resulted from death-qualification. Three unpublished studies were reviewed which suggested that death-qualified jurors were more likely to convict than were jurors excludable because of their opposition to the death penalty.[9] The studies were judged as "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt"[10] or that the "exclusion of jurors opposed to capital punishment increases the risk of conviction."[11] The Court went on to invite further research on the issue when it noted that:

> Even so, a defendant convicted by [a death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence — given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment. That problem is not presented here, however, and we intimate no view as to its proper resolution.[12]

In short, the Court defined the issue as an empirical question, susceptible to scientific resolution, but withheld judgment in ruling that a constitutional decision would require an empirical record more complete than the limited evidence available at the time.

After 1968, as new studies became available demonstrating a reliable relationship between death-penalty attitude and conviction behav-

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9. The studies were:
   (a) W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas, 1964).
   (b) F. Goldberg, Attitude toward Capital Punishment and Behavior as a Juror in Simulated Cases (unpublished manuscript, Morehouse College, undated), subsequently published as Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970).
   (c) H. Zeisel, Some Insights into the Operation of Criminal Juries (unpublished manuscript, University of Chicago, 1957), subsequently published as CENTER FOR STUDIES OF CRIMINAL JUSTICE, UNIVERSITY OF CHICAGO LAW SCHOOL, SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT (1968).

10. 391 U.S. at 517-18.

11. *Id.*

12. *Id.* at 520 n.18 (emphasis in original). In the *Witherspoon* dissent, Justice White also added that he "would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt." *Id.* at 541 n.1.

ior, several cases were heard in which the defense sought to establish that the evidence was no longer "tentative and fragmentary."[13] The clear pattern of interpretation by the courts was that the new results were still not definitive as not enough new evidence had been added since the issue was last considered. Two exceptions to this pattern were *Hovey v. Superior Court*[14] in California and an Arkansas case, *Grigsby v. Mabry*.[15]

A central issue in both *Hovey* and *Grigsby* concerned the impact of the death-qualified screening process on jury composition, and subsequent jury performance at the guilt phase of a trial. Consider two prospective jurors, neither of whom would consider the death penalty. Both jurors are excludable under the *Witherspoon* standard and may be described as *Witherspoon*-excludable (WE). The exclusion of both jurors from the sentencing phase of a trial is consistent with the state's legitimate interest that all legally relevant penalties be considered. But their disposition toward sentence also removes both jurors from the guilt phase of a trial where their performance may clearly be distinguishable. The critical distinction between the two jurors turns on their response to whether or not they could make a fair and impartial determination of guilt given their common opposition to the death penalty. Suppose one says that he or she could not. Clearly, then, that individual is a "nullifier" and is legitimately excluded from both phases of the trial. Further suppose, however, that one says yes, that despite his or her death-penalty views, he or she could make a fair and impartial determination of guilt. This second juror is therefore *not* a nullifier but is nonetheless indiscriminately excluded from capital jury service under the prevailing *Witherspoon* standard.[16] Some kind of distinction is required between the two types of prospective jurors. Since both are excludable under *Witherspoon*, the WE label clearly applies to both subjects. However, since one would nullify meaningful guilt deliberations whereas the other could be fair and impartial, the nullifier will be re-

13. Comment, *Grigsby v. Mabry: A New Look at Death-Qualified Juries*, 18 AM. CRIM. L. REV. 145, 145-63 (1980). The author cites twenty-two unsuccessful cases. *Id.* at 161-62 n.154. The author also suggests that the incremental consideration of the new studies, rather than the cumulative evidence, contributed to the repetitive "tentative and fragmentary" findings. *Id.* at 162 n.155.

14. 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

15. 483 F. Supp. 1372 (E.D. Ark. 1980), *modified, reh'g granted*, 637 F.2d 525 (8th Cir. 1980).

16. As will be seen, the contemporary justification for exclusion of the second juror is based on his or her inability to consider the full range of penalties allowed by law.

ferred to as "WE_{null}" and the impartial juror as "WE_{fair}."[17]

Now suppose that studies were conducted which compared the jury composition, and jury performance, of traditional death-qualified juries (which eliminated all classes of WE's) with juries that eliminated WE_{null}, but included WE_{fair} jurors. If the comparison revealed that death-qualified juries significantly distorted jury composition (e.g., by the disproportionate elimination of distinctive groups or distinctive community viewpoints), or were more likely to convict a defendant than juries that included WE_{fair} jurors, then a case could be made that the results of death qualification were unfair to the defendant and that WE_{fair} jurors should be included at the guilt phase of a trial.

In both *Hovey* and *Grigsby*, extensive evidentiary records were introduced which demonstrated that the exclusion of WE_{fair} jurors through death-qualification had a marked effect, to a defendant's disadvantage, both on jury composition and jury performance. By virtue of their correlation with death-penalty attitude, both blacks and females are disproportionately excluded from capital jury service as are individuals who tend to be more critical of testimony, exhibit better retention of evidence, and are generally associated with additional characteristics related to jury deliberations and jury decisions.[18] That is, the composition of a death-qualified jury significantly differs from the composition of a jury when it includes WE_{fair} jurors. The evidentiary record also impressively demonstrated that death-qualified juries are significantly more likely to convict a defendant when WE_{fair} jurors are excluded.[19]

In *Hovey*, the California Supreme Court found the evidence persuasive that death-qualified juries allowable under *Witherspoon* are biased against the defendant at the guilt phase of a trial. However, death-qualification in California provides for the exclusion not only of WE's who would *never* vote for the death penalty, but also of prospective jurors who would *always* vote for the death penalty (Always death penalty or "ADP"). Conceivably, the exclusion of ADP's counterbalanced the exclusion of WE's if the relative frequencies in the excluded groups were approximately equivalent. Since the frequencies could not be estimated with any precision, the California Supreme Court con-

17. The terms WE_{null} and WE_{fair} are novel adoptions. The usual terms are nullifier and GPI (Guilt Phase Includable), used in both *Grigsby* and *McCree*.

18. In addition to the trial records, many of the research results are now available in an elaborated form, published in a special issue devoted to death-qualification. *See generally* 8 LAW AND HUMAN BEHAVIOR 1-195 (Haney ed. 1984).

19. *Id. See also* Berry, *Death-Qualification and the "Fireside Induction,"* 5 UALR L.J. 1, 2 (1982).

cluded that death-qualification, as practiced in California, was not clearly unconstitutional.[20] The introduction of the ADP issue injected a new dimension into constitutional challenges to death-qualification. Now, relevant studies would be required to demonstrate that the composition and performance of death-qualified juries were significantly different from juries that included both WE_{fair} jurors and ADP jurors.

At approximately the same time as the *Hovey* case, the *Grigsby* case was heard in Arkansas, where a more limited evidentiary record was available and where, like California, ADP's were ostensibly excluded from capital trial proceedings.[21] Nevertheless, the trial court in *Grigsby* found the limited record suggestive and recommended a full evidentiary hearing on the issue at the circuit level. Then, upon remand from the Eighth Circuit,[22] the district court held a plenary hearing to consider the cumulative evidence relating to whether a defendant's constitutional guarantees were violated by the systematic exclusion of jurors excludable under the *Witherspoon* standard. Essentially the same evidence available to *Hovey* was introduced in *Grigsby*. In addition, post-*Hovey* studies which provided for reasonable estimates of the numerical size of both the WE and the ADP groups were available.[23] These latter studies indicated that the ADP group constituted less than one percent of the eligible juror population while the WE group was between ten and fifteen percent. The primary significance of the numerical difference was to indicate that the exclusion of ADP's was not an effective counterbalance to the exclusion of WE's. This showing removed the *Hovey* barrier, which prevented a finding of guilt phase bias

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20. 28 Cal. 3d at 45, 616 P.2d at 1346, 168 Cal. Rptr. at 173-74.

21. The *voir dire* discovery and exclusion of ADP's is difficult. Consider the following exchange from *Grigsby*:

> Q. Do you have any conscientious scruples or fixed opinion about the use of the death penalty?
>
> A. No, sir.
>
> MR. WILLIAMS: That's all.
>
> BY MR. GRAVES:
>
> Q. Do you have any scruples about using the death penalty in favor of anybody?
>
> MR. WILLIAMS: I object to whatever that question was.
>
> MR. GRAVES: Your Honor, my question was the reverse of his. He asked if he had any conscientious scruples against using the death penalty, and I asked if he had any conscientious scruples in favor of using the death penalty. I thought it was a fair question.
>
> THE COURT: Well, the Court thinks it is not.

Supplemental Abstract and Brief for Appellee at 7, Grigsby v. State, 260 Ark. 499, 542 S.W.2d 275 (1976).

22. Grigsby v. Mabry, 637 F.2d 525, 528-29 (8th Cir. 1980).

23. *See* BERRY, *supra* note 19, at 26-30.

in death-qualified juries that were modified by the exclusion of ADP's. In an incisive analysis of the empirical evidence and the legal issues, the trial court concluded that death-qualification suffered "from two serious constitutional defects: first, it denies the accused a trial by a jury representative of a cross-section of the community; and second, it creates juries that are conviction-prone."[24]

As a consequence, prospective jurors in capital cases could not be "barred over the defendant's objection from jury service because of their views on capital punishment on any broader basis than inability to follow the law or to abide by their oaths. . . ."[25]

On the one hand, judicial recognition of the composition and performance bias which results from death-qualification creates a climate of consistency between the legal system and the scientific community. In addition, however, it creates a dilemma for the single-jury system traditionally used to try capital cases. The essence of the dilemma is that death-qualification results in the removal of WE_{fair} jurors which, in turn, results in a non-representative, conviction-prone jury at the guilt phase of a trial. One obvious remedy would be to include WE_{fair} subjects in capital cases. However, in the event of a guilty verdict, the WE_{fair} juror could not participate in the sentencing phase as he or she would not consider all penalties. The dilemma is the problem of accommodating the apparently conflicting fair trial interests of both the defendant and the state, i.e., accommodating the defendant's interest in including WE_{fair} jurors at the guilt phase with the state's interest in excluding the same jurors from the sentencing phase. The dilemma is acute for a single jury that decides both guilt and sentence because one category of juror, the WE_{fair}, cannot participate in both phases.

In contending with the conflict, Judge Eisele noted that the "*presumption of inclusion*"[26] was basic to the concept of a jury in a democratic society and that "[i]nclusion, not exclusion, must be the basic rule."[27] Further, the criterion of inclusion was whether prospective jurors could "honestly swear that they can, and will, try the case upon the basis of the law and the evidence."[28] Since WE_{fair} jurors met the inclusion criterion at the guilt phase, but not at the penalty phase, the trial court's remedy was to order that the state of Arkansas must hold bifurcated jury trials in capital cases with one jury deciding the ques-

24. Grigsby v. Mabry, 569 F. Supp. 1273, 1275 (E.D. Ark. 1983).
25. *Id.* at 1323.
26. *Id.* at 1311 (emphasis in original).
27. *Id.* at 1284.
28. *Id.*

tion of guilt or innocence and, if necessary, a second, separate jury to decide the question of punishment.[29] The separate jury remedy was seen by the trial court as the "least intrusive"[30] means to achieve a balance between several state interests and the defendant's interest in a fair and impartial trial.

The Eighth Circuit affirmed the district court's judgment that death-qualified juries were unconstitutional but vacated the requirement directing the state to utilize two separate juries. The actual procedural remedy was left to the discretion of the state.[31]

The Eighth Circuit decision created an inter-circuit conflict[32] and the Supreme Court granted a writ of certiorari to resolve the issue.[33] No prediction is made here concerning the Court's ultimate decision and the analysis which follows is independent of that decision. What can be predicted is that any decision the Court makes will have significant implications for the structure of a capital-case trial: whether the guilt phase and sentencing phase are to be heard by a single jury or some variant of independent juries.

III. THE REMEDIES

The prevailing capital-trial structure in Arkansas is the single-jury system in which the same jury decides both guilt or innocence and, if necessary, the penalty. The most apparent independent jury alternatives would have guilt or innocence decided by one jury while any necessary penalty would be decided by (1) a traditional death-qualified jury that is separate from the guilt phase jury, (2) the same jury that decided guilt, with necessary replacements for WE_{fair} jurors, or (3) the judge. A further description of the three independent remedies is provided below.

A. *Separate Juries*

In its most basic form, the separate jury solution would require the formation of a guilt phase jury under rules which assured the exclusion of nullifiers and the non-causative exclusion of WE_{fair} jurors.[34] If the defendant were found guilty, the guilt phase jury would be dismissed

29. *Id.* at 1313.

30. *Id.*

31. Grigsby v. Mabry, 758 F.2d 226, 243 (8th Cir.), *cert. granted, sub nom* McCree v. Lockhart, 546 U.S. 1088 (1985) (No. 84-1865, 1986 Term).

32. *See supra* note 2.

33. 546 U.S. 1088.

34. The WE_{fair} juror could still be excluded by peremptory challenge.

and a second jury formed. The second jury would experience death-qualification *voir dire* to identify, and eliminate, prospective jurors who could not consider the full range of penalties.

The most obvious problem with separate juries involves considerations of possible cost. In *Grigsby*, however, it was not clear whether separate juries would increase, or decrease, the cost of trial processing.[35] What was clear, was that a potential increase in expense did not justify the denial of a fair trial.[36] In our democratic system, what is the price of a trial before fair and impartial jurors?

Another objection to separate juries was outlined by the Arkansas Supreme Court when, in the *Rector v. State*[37] response to *Grigsby*, it described the separate jury remedy as the "least appealing"[38] of the known possibilities. The Arkansas court's objection was that the penalty trial "would be comparable to having the actors in a play, after the audience had left the theater, repeat their lines in a second performance for a few spectators in a nearly empty house. Such repetitive trials could not be consistently fair to the State and perhaps not even to the accused."[39]

In *Rector*, the court did not elaborate as to why "repetitive trials" could not be fair and one can only speculate concerning the rationale for its objection. Presumably, a primary factor would be the necessity to recall witnesses and to rehear testimony. While this necessity might influence cost, it is not at all clear how it would affect fairness.

B. *Replacement Juries*

A variation of the separate jury is the replacement jury. These two arrangements are identical with respect to jury formation at the guilt phase but differ at the sentencing phase. In the separate jury remedy, the guilt phase jury is "fair-qualified" and then dismissed even after a guilty verdict. In the replacement remedy, a guilty verdict would be followed by death-qualification of the same fair-qualified jurors who determined guilt. The guilt phase jurors who could consider the full range of penalties would be retained. Thus, while the separate jury remedy forms a completely new jury at the sentencing phase, the re-

35. Grigsby v. Mabry, 569 F. Supp. 1273, 1319-21 (E.D. Ark. 1983).

36. *Id.*

37. 280 Ark. 385, 395, 659 S.W.2d 168, 173 (1983).

38. Id. at 396, 659 S.W.2d at 173.

39. *Id.* The analogy to a play is questionable. Repetitive performance is a characteristic of the most successful plays. And if not fair to the accused, one must wonder why the defense has not embraced this position.

placement remedy simply replaces the number of WE_{fair} jurors removed after the death-qualifying *voir dire* with the necessary number of replacements.

One obvious advantage of the replacement remedy is that it would be more efficient and more economical to replace a few jurors than to replace twelve. Further, the necessity to recall witnesses or rehear testimony could be avoided if a sufficient number of alternate jurors were seated at the guilt phase to satisfy the required number of replacements at the penalty phase, should sentencing become necessary.

A practical question concerning the necessary number of replacements is revealed in the following interchange during oral argument before the Supreme Court:

> *Justice White:* I suppose if you had a rule that you cannot throw off Witherspoon excludables, you cannot exclude them from the guilt or innocence phase you would just — you would find out if they were opposed to the death penalty, but then seat them. And then you could, when you had filled up the — got your twelve jurors, you would add some alternates.
>
> *Mr. Clark:* Your Honor, I think that procedure perhaps could be advanced.
>
> *Justice White:* I guess we just wouldn't know how many alternates you would have had to have on that basis in this case.
>
> *Mr. Clark:* We would not have known, Your Honor, that's correct.
>
> *Justice White:* We don't know now.
>
> *Mr. Clark:* *No, that's right.*[40]

While neither Justice White nor Mr. Clark could be expected to have known, their question concerning the necessary number of alternates can be addressed. In Arkansas, for example, an examination of forty-six capital murder cases involving 2,142 jurors revealed that 284 had been excluded by the *Witherspoon* criterion.[41] An additional eleven were excluded as ADP's, making a total of 295 prospective jurors (13.77%) excluded due to their death penalty view. Presumably, however, some of those excluded were nullifiers. Since there is agreement that nullifiers would continue to be excluded from capital cases, there are no nullifiers from the guilt phase to replace at the sentencing phase.

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40. Lockhart v. McCree, Official Transcript proceedings, U.S. Supreme Court, Jan 13, 1986, 54-55 (No. 84-1865).

41. Young, A., Arkansas Archival Study, 1981 (unpublished).

Accordingly, fourteen percent would seem to provide a liberal estimate of the population frequency of WE_{fair} (and ADP_{fair}) jurors for whom replacements would be necessary. While ten percent probably provides a better estimate, the more realistic approach is to assume that the frequency is represented within a range of five to fifteen percent. Given this assumption, Table One specifies the probability that a given number of alternates would be required for replacement purposes.[42]

Table 1

Probability that x or more jurors would be required to replace WE_{fair} jurors at sentencing phase

Replacements required	population frequency		
	.05	.10	.15
1 or more	.4596	.7176	.8568
2 or more	.1183	.3410	.5566
3 or more	.0195	.1109	.2642
4 or more	.0022	.0257	.0852
5 or more	.0001	.0044	.0164

Table One can be interpreted in the following manner: If the population frequency of replacement jurors is equivalent to a given proportion, say .10, then a guilt phase jury of size twelve could be expected to require four or more replacements at the sentencing phase in fewer than 3 out of every 100 capital cases (from .0257). In more than one-fourth of the cases (1 - .7176 = .2824), no necessary replacement would be expected.

Actually, the probabilities appearing in Table One overestimate the number of alternates who would have to be *added* for potential replacement purposes. This is because most capital case juries already include alternates. If the original guilt phase jury included two alternates, then the sentencing phase would require the seating of twelve jurors from a pool of fourteen. When n = 14, the probability that twelve eligible jurors would be unavailable would occur when there were three or more to be excluded. The likelihood of this event is .1584, or, put another way, in approximately 16 out of 100 capital cases, more than two alternates would be required. By the simple addition of one

42. The entries in Table One were derived from the individual terms of the binomial distribution when n=12. *See* E.P. HICKMAN and J.G. HILTON, PROBABILITY AND STATISTICAL ANALYSIS (1971).

more alternate, the unlikely probability of not having twelve eligible jurors from a pool of fifteen is reduced to .0555. With two more (n = 16), the probability is only .0170.

These results may be summarized by the statement that only rarely would more than three alternates be required. The results demonstrate that total replacement, equivalent to the separate jury remedy, would virtually never be necessary. It would be an improvement, of course, if the exact number of needed alternates could be known before any penalty phase replacement became necessary. This possibility will be considered in the context of the "sentencing phase" problem.[43]

C. *Judge*

The final variant of the independent jury remedy would form the guilt phase jury in a manner identical to the other arrangements. Then, should a guilty verdict be obtained, subsequent argument concerning sentencing would be before the judge who would decide the penalty issue.

To the extent that the judge would not require death-qualification, the use of the judge as the equivalent of the sentencing phase jury would eliminate the necessity to recall witnesses or rehear testimony. It would also eliminate the necessity for any extensive *voir dire* to assure that all penalties could be considered. These potential advantages need to be weighed against reported discrepancies between the behavior of judges and juries. For example, Kalven and Zeisel[44] sent questionnaires to judges throughout the country and asked them to briefly describe criminal trials over which they had presided. The judges were also asked to describe the jury decision and how they would have disposed of the case had there been no jury. Any observed difference provides one measure of how often the jury disagrees with the judge and the direction of disagreement. Out of the 3,567 cases reviewed, the judge agreed with the jury verdict in slightly more than seventy-five percent of the cases. The agreement included the belief that thirteen percent of the defendants should be acquitted and sixty-two percent should be convicted. Judges disagreed with juries in about twenty-five percent of the cases. The disagreement was generally due to cases where the jury acquitted but the judge would have convicted. In fact, judges agreed with jurors in fewer than half of the acquittals. These results suggest

43. *See infra* text accompanying note 59.

44. KALVEN and ZEISEL, THE AMERICAN JURY (1966).

that juries tend to be more lenient than judges with respect to the determination of guilt. The present concern, however, is with sentencing, not guilt, and the Kalven and Zeisel results provide no guidelines here. The most relevant information would concern sentencing differences between judges and juries in cases involving the death penalty. The available data, limited to Florida, suggests that judges are somewhat more likely to favor the death penalty than are juries.[45]

Now that the basic trial arrangements have been outlined, the following analysis examines the ability of the single jury system and the independent jury systems to address several fundamental issues associated with death-qualification. Four basic problems can be identified for analysis. One issue deals with balancing the defendant's interest in a guilt phase hearing before a fair and impartial tribunal with the state's interest in the removal of "nullifiers." This issue can be described as the "guilt phase problem." A second issue can be described as the "process" problem as it relates to consequences associated with the very process of death-qualification. A third issue is the "sentencing phase problem." This is concerned with assuring that the determination of penalty be achieved in a context which provides for the full consideration of all legally prescribed penalties. A final issue is whether differences between the various trial arrangements compel a preference for one trial structure over another. This issue defines the "structure problem."

IV. THE GUILT PHASE PROBLEM

When measured against non-capital criminal cases, death-qualification is anomolous in that capital cases are the only cases in which the prospective juror's views on sentencing are explored, and penalty endorsements secured, as a necessary prelude to jury service.[46] Viewed historically, however, a compelling but dated objective of death-qualification has been to remove from the determination of guilt those prospective jurors who so objected to the death penalty that they would automatically vote for acquittal (the nullifiers).[47] The exclusion of nul-

45. Lockhart v. McCree, Official Transcript proceedings, U.S. Supreme Court, Jan. 13, 1986, 32-33 (No. 84-1865).

46. Arkansas contests this description. *See supra* note 40 and accompanying text.

47. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 TEX. L. REV. 545 (1961). Oberer traced the origin of the death-qualification practice to a time when conviction of a capital offense was automatically followed by the death penalty. Under these conditions the exclusion of death penalty opponents (which would include both WE_{fair} and WE_{null} jurors) was considered essential. As sentencing variations were developed which functionally separated the trial process into the bifur-

lifiers continues to be regarded as a legitimate state interest in a fair and impartial trial and was acknowledged, not challenged by the *Grigsby* plaintiffs.[48] The real *Grigsby* challenge was that the mechanism which insures the removal of nullifiers also removes a distinctive class of WE_{fair} jurors and results in a jury biased in favor of conviction.

The *Grigsby* decision prohibited the causative removal of WE_{fair} jurors at the guilt phase but supported the continued exclusion of nullifiers. The practical task of any remedy, therefore, is to identify these two groups while minimizing process effects.[49] As suggested by the trial court, identification of the critical groups could be achieved as follows:

> [I]f the court clearly explains to the jurors the alleged facts underlying the capital charge, and points out that the jury chosen will be called upon only to determine the guilt or innocence of the defendant—and not the penalty—and then inquires of the panel if there be any reason why any of them could not fairly and impartially try the issue of the defendant's guilt in accordance with the evidence presented at the trial and the court's instructions as to the law, and none of the jurors respond, then, the Court suggests, further inquiries about the jurors' attitudes towards the death penalty would be inappropriate. . . . Of course, if a juror indicates that there might be some reason that he or she could not fairly and impartially try the issue of the defendant's guilt, then that juror could be isolated from the other jurors and further inquiry made as to his or her reasons. If scruples against the death penalty were suggested as the reason, then further "death-qualification" questioning could be permitted and the juror excused for cause if it is established that he or she is in fact a nullifier.[50]

The ability to identify nullifiers and WE_{fair} jurors by this procedure contributes to a successful resolution of the guilt phase problem because it makes possible remedies accommodating both the state's interest (in removing nullifiers) and the defendant's interest (in retaining WE_{fair} jurors). The successful resolution is ultimately related to the independence of the guilt phase jury from a sentencing phase jury as the independence eliminates the necessity to determine *Witherspoon*-excludables prior to the sentencing phase. As such, the procedure is

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cated guilt-penalty proceeding, the justification for excluding the WE_{fair} juror was removed. Nevertheless, the traditional practice was retained.

48. Accordingly, the inclusion of nullifiers is a non-issue. Despite this status, the question repeatedly re-emerges as if it were an issue. One reason, perhaps, is the continued reliance on analyses from prior cases in which nullification was an issue.

49. *See infra* text accompanying notes 51-58.

50. Grigsby v. Mabry, 569 F. Supp. 1273, 1310 (E.D. Ark. 1983).

suited to each of the three alternative remedies because all three use some form of a bifurcated scheme in which a juror's views on fairness, not sentencing, define the necessary attributes for determination of guilt. It is not suited to the single-jury system in which acceptable penalty views are a prerequisite for the seating of jurors at both phases of a trial. Beyond their common distinction from the single-jury system, the three remedies are indistinguishable from one another at the guilt phase and are equally successful in their treatment of the guilt phase problem. This result is not surprising because each remedy was primarily designed to achieve this very objective.

V. THE PROCESS PROBLEM

The central issue concerning death-qualified juries revolves around the effects of death-qualification on a jury's composition and conviction performance. In addition, and independently of these effects, there is evidence that the very process of death-qualification produces significant consequences on juror performance. The primary consequence is that the death-qualification process increases the probability that the defendant will be found guilty.

Process consequences are vividly illustrated in a study[51] in which one-half of a group of *Witherspoon*-qualified jurors[52] viewed a two-hour videotape, which portrayed a *voir dire* examination of prospective jurors, with thirty minutes of the tape devoted to death-qualification. The remaining jurors viewed the identical videotape except that the death-qualification segment was eliminated. Then, prior to hearing any evidence, the subject-jurors responded to a questionnaire in which they evaluated their belief in the defendant's guilt, the chance that he would be convicted, and their perceptions of the beliefs and attitudes of the attorneys and the judge. A comparison of the responses between the two groups revealed several significant differences. First, the group which had simply been exposed to the death-qualification process was more likely to convict the defendant prior to hearing any evidence than was the group which had not witnessed death-qualification. In addition, subjects who were exposed to the death-qualifying *voir dire* were significantly more likely to believe that (a) the defendant would be convicted and sentenced to death, (b) the judge, prosecutor and even the defense attorney shared the belief that the defendant was guilty and would be

51. Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW AND HUMAN BEHAVIOR 121 (1984).

52. Note that Haney's subjects did not include WE_{fair} jurors, as *all* were death-qualified.

sentenced to death, (c) the law disapproves of persons who oppose the death penalty, and (d) the defendant deserves the death penalty. In *Grigsby*, Judge Eisele noted:

> [s]o, independently of the compositional effects of *voir dire*, and in addition thereto, the process itself increases the likelihood that the jury which ultimately sits will be more likely to convict than the same jury absent its exposure to that process. The process itself predisposes the "surviving" jurors to convict.[53]

Haney[54] has identified several mechanisms which contribute to these unintended process consequences. For example, one limited source of process effects is associated with group *voir dire*. Extended discussions of penalty may imply that the defendant *is* guilty, and witnessing such debate may desensitize the observing juror to the death penalty. Such process effects were considered in *Hovey* when the California Supreme Court concluded that *voir dire* for death-qualification tends to create a biased, conviction-prone jury.[55] In order to minimize such "prejudicial effects,"[56] the court held that individualized, sequestered *voir dire* should be required. Unfortunately, while sequestration may eliminate some of the prejudicial effects associated with group *voir dire*, it may also introduce its own unique biasing effects. This possibility, and the process problem generally, have been extensively considered by Haney.[57] His analysis of process effects leaves most observers generally pessimistic that the effects can be neutralized as long as "[l]egally mandated procedures compel attorneys . . . to engage in lengthy discussions about death penalty attitudes with prospective jurors . . . ."[58] Nevertheless, since the various trial structures would require death-qualification at different stages, it may be useful to distinguish between process effects introduced at the guilt phase versus effects introduced at the penalty phase.

The principal, adverse process effect at the guilt phase, of course, is the increased probability of a conviction not based upon the evidence. The necessity to qualify jurors for possible sentencing purposes requires a focus on penalty which generates extra-evidentiary process effects

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53. Grigsby v. Mabry, 569 F. Supp. 1273, 1304 (E.D. Ark. 1983).

54. Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW AND HUMAN BEHAVIOR 133 (1984).

55. 28 Cal. 3d 1, 616 P.2d 1303, 168 Cal. Rptr. 128 (1980).

56. *Id.*

57. *See* Haney, *supra* notes 51, 54.

58. Haney, *Juries and the Death Penalty: Readdressing the Witherspoon Question*, 26 CRIME AND DELINQUENCY 512, 521 (1980).

even before any proper evidence relating to guilt or innocence is introduced. Put simply, process effects are the product of a single-jury system in which sentencing views are filtered for guilt phase eligibility. The independent remedies manage to delay process effects until the sentencing phase. At the guilt phase, the remedies avoid process effects because none requires the exploration of sentencing views to determine eligibility at the guilt phase.

The "process problem," like the "guilt phase problem," seems most effectively resolved by the independent remedies. However, even a single-jury system could take measures which would minimize, and perhaps avoid, process effects at the guilt phase. Consider, for example, the information required by the single-jury system which death-qualification is designed to provide: the identification of jurors who would not consider the death-penalty (or life imprisonment) under any circumstance. One creative alternative to death-qualification would be to develop the necessary penalty information in a relatively process-free environment. One potential tool is provided by the initial juror questionnaire used to define a juror's qualifications to serve on the panel. A question might be included which essentially asks, "Are there any legally prescribed punishments for criminal offenses, such as the death penalty or life-imprisonment, which you could not fully and fairly consider under any circumstance?" The response to this type of question should serve to identify WE jurors and should also minimize process effects. An incidental virtue of the modified procedure should be a substantial savings in cost.

VI. THE SENTENCING PHASE PROBLEM

Any sentencing phase jury is required to include only those jurors who would consider the full range of penalties prescribed by law. Until *Grigsby*, the present single-jury system was not confronted with a sentencing problem because all jurors unalterably opposed to the death-penalty had already been excluded prior to the guilt phase. If WE_{fair} jurors were included at the guilt phase, then a single-jury system would encounter a sentencing phase problem under circumstances in which the composition of the guilt phase jury included one or more WE_{fair} jurors and that jury found the defendant guilty. Under such a circumstance, the WE_{fair} jurors could not serve at the sentencing phase because their tolerance of only one penalty would subvert the state's interest. This essentially restates the dilemma and suggests that some kind of restructuring of the single-jury system is necessary if WE_{fair} jurors are to be represented.

When the judge or replacement juries are used for sentencing purposes, they are not presented with the "sentencing problem" since the prior guilt phase jury, along with any WE_{fair} jurors, would have been dismissed prior to sentencing. The replacement remedy will occasionally be presented with the problem but the replacement of the WE_{fair} juror is precisely the problem for which the replacement remedy was tailored.

Another problem to be considered at the sentencing phase concerns process effects. Recall that the independent remedies, and even the single-jury system when modified by the questionnaire procedure, are able to control process effects at the guilt phase. For the independent remedies, however, process effects are simply delayed until the sentencing phase when a juror's penalty view is relevant.

The separate jury and replacement jury remedies should be subject to similar process effects at the sentencing phase since both would require that all jurors be death-qualified. To the extent that the guilt phase itself generated process-like effects, the separate jury would not be as vulnerable as the replacement jury. In the case of both of these juries, however, it would again seem possible that the initial juror qualification questionnaire could be used to identify the *Witherspoon*-excludables ineligible for the sentencing phase. The acquisition of the critical information in such an unobtrusive manner minimally provides temporal detachment and probably eliminates most of the adverse process effects that can reasonably be eliminated.

In addition to minimizing process effects, the questionnaire could be utilized advantageously for other purposes. For example, while the replacement jury was tailored for the replacement of WE_{fair} jurors, the discussion of remedies noted[59] that the procedure could be improved if the exact number of needed alternates could be known before any penalty phase replacement became necessary. Earlier, we saw how the questionnaire might be used to identify *Witherspoon*-excludables by asking whether there were any "legally prescribed punishments for criminal offenses, such as the death penalty or life imprisonment, which you could not fairly and fully consider under any circumstance?" With a slight modification, the questionnaire could also be adapted to identify WE_{fair} jurors. For example, a question might be developed along the lines of whether or not a prospective juror's views on penalty would interfere with his or her determination of guilt (e.g., "are there any legally prescribed penalties for criminal offenses which you oppose,

59. *See supra* text accompanying note 43.

such as the death penalty or life imprisonment, that could conceivably interfere with your fair and impartial determination of a defendant's guilt of innocence?"). An affirmative response to such a question would define potential WE_{fair} jurors. By consulting the information available from the questionnaire, a relatively precise estimate of the necessary number of alternates could be derived even prior to the guilt phase of a trial.

It might be expected that the judge would be associated with minimal process effects in the absence of any necessary death-qualification. On the other hand, a case could be made that the judge's trial experience may be equivalent to death-qualification over and over again. Judicial experience certainly would seem to provide a unique opportunity to develop a belief that most defendants are guilty and, perhaps, that severe penalties are appropriate. It is at least interesting to speculate concerning the extent to which reported disparities between judges and juries reflect process effects associated with judicial experience.

VII. THE STRUCTURE PROBLEM

A central question concerning the various remedies is whether they introduce other effects which might defeat the state's interest in a single-jury system. And if so, does the preservation of the state's interest in a single-jury system take precedence over the defendant's interest in a remedy which enhances the opportunity for a fair and impartial trial?

The relative priority of the state's and defendant's interests will be assessed and resolved by the Supreme Court. Here, the priority issue will simply be sketched followed by a discussion of the state's argument that there are functional differences between the single-jury system and the independent jury remedies.

Simply outlined,[60] the state's position on the priority issue is that Arkansas law provides for the exclusion of WE_{fair} jurors at the sentencing phase of a trial because of their death-penalty views. Because the single-jury system requires the same jurors at the sentencing phase who decided guilt, then jurors legally excluded from the sentencing phase are necessarily excluded from the guilt phase. Further, guilt and penalty are not independent decisions. Independent juries would diminish the responsibility of jurors at both phases and therefore violate the

60. The outline is based on oral arguments made before the Court in the McCree case, *supra* n.45. The state's position is presented on pp. 21-22 and also on pp. 50-53. The defense position is presented on p.28 and p.34.

state's fundamental interest in the single-jury system.

The defense position on the priority issue is that death-qualification is neither justified nor required by any state interest. While conceding the state's penalty interest as legitimate, the defense view holds that determination of guilt or innocence is nonetheless primary. Since the policy of a single-jury procedure results in a constitutional violation at the more basic guilt phase, the defendant's constitutional interest in a fair and impartial trial supercedes the state's interest in a penalty procedure.

Since the burden of proof for demonstrating the inviolate status of the single-jury system rests with the state, it will be useful to consider the more significant effects which result from the various trial structures.

One possible effect, considered and rejected by the trial court,[61] was that independent juries would be more expensive than single juries. A second possible effect is that independent juries might necessitate the wholesale recall of witnesses and re-hearing of testimony. As noted earlier, however, the judge, and the alternates in a replacement jury would have heard the evidence, thereby making repetition unnecessary. This would appear to obviate the objection to "repetitive trials" developed in *Rector*.

A less apparent objection was noted in *Rector*, echoed by the dissenting opinion in the Eighth Circuit's *McCree* decision, and adopted by the state. In *Rector*, the Arkansas Supreme Court suggested that:

> A jury system that has served its purpose admirably throughout the nation's history ought not to be twisted out of shape for the benefit of those persons least entitled to special favors. It has always been the law in Arkansas . . . that the same jurors who have the responsibility for determining guilt or innocence must also shoulder the burden of fixing the punishment. That is as it should be, for the two questions are necessarily interwoven.[62]

The *Rector* court did not fully develop the "interwoven" nature of the guilt and penalty determinations so it is difficult to evaluate the contrasting effects associated with different trial structures. However, the argument was elaborated upon somewhat in the *McCree* dissent where the supporting rationale expressed was that:

> Placing the moral responsibility on the same group of jurors to decide both guilt and punishment is justified by the most significant policy

61. Grigsby v. Mabry, 569 F. Supp. 1273, 1319-21 (E.D. Ark. 1983).
62. 280 Ark. at 395, 659 S.W.2d at 173.

> considerations. When one jury hears both phases of the case, the jurors that comprise it cannot evade the heavy responsibility placed upon them of whether a convicted person should receive the death penalty . . . [A] division of responsibility between the two groups, even if only a few are replaced, would dilute accountability and disadvantage the accused.[63]

In one sense, this argument simply suggests that the presumed independence of guilt and sentencing judgments is illusory in a single-jury system. Empirical support for this proposition includes reports that the evidentiary requirements of guilt necessary for conviction appear to increase as the severity of the prescribed penalty increases.[64] As a consequence, the probability of conviction likely is related to penalty severity given a constant strength of evidence. There is less evidence available that confidence in guilt influences penalty but it is easily conceivable that a juror on the threshold of reasonable doubt might be sufficiently convinced to vote for guilt but with a margin of doubt that tempered penalty. Such results, however, may characterize independent juries as well as single juries. The critical question, of course, involves a comparison between single juries and independent juries. The sense of the proposition is that the responsibility level of a juror's judgment is diminished if the same juror is not involved in both guilt and sentencing decisions. The implication is that a juror cannot fairly and impartially determine guilt on the basis of the evidence if that same juror will not also have sentencing responsibilities. In the absence of any evidence comparing the relative conviction performance between single and independent juries, the assertion amounts to a "fireside induction"[65] which may or may not be true. In this sense, the evidence favoring single juries is even more "tentative and fragmentary" than the original evidence regarding conviction bias presented in *Witherspoon.*

It is possible that the concern over possible penalty influences on guilt simply expresses anxiety over what was earlier identified as a continually resurfacing non-issue: the fear that nullifiers might be seated at the guilt phase of a trial. In such a case, the appropriate focus would

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63. Grigsby v. Mabry, 758 F.2d 226, 247 (8th Cir.) *cert. granted, sub nom* McCree v. Lockhart, 546 U.S. 1088 (1985) (No. 84-1865, 1986 Term).

64. *See e.g.*, Kerr, *Severity of Prescribed Penalty and Mock Jurors' Verdicts*, 36 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 1431 (1978).

65. "Fireside induction" was a phrase coined by Paul Meehl and refers to common-sense empirical generalizations about human behavior which derive from introspection, anecdotal evidence, and culturally transmitted beliefs. *See* P. MEEHL, LAW AND THE FIRESIDE INDUCTION: SOME REFLECTIONS OF A CLINICAL PSYCHOLOGIST, LAW JUSTICE, AND THE INDIVIDUAL IN SOCIETY (J. Tapp & F. Levine ed. 1977).

seem to center on the ability of the *voir dire* questions to distinguish between the WE_{fair} and WE_{null} juror. If the distinction cannot be achieved, the fear is real. If the distinction can be achieved, the fear amounts to "nulliphobia" and only serves as a hidden agenda which inhibits a satisfactory resolution to the death-qualification issue.

Finally, the argument would seem to challenge the legal norm because jury sentencing is the exception rather than the rule.[66] If a single jury that decides both guilt and penalty is a priority interest because of the fair and responsible decisions which result, it would seem to invite a challenge from all defendants convicted by a jury but sentenced by a judge.

VIII. CONCLUSION

The basic issue before the Court concerns the inclusion or exclusion of the WE_{fair} juror from the guilt phase of a trial. In the event of a court decision which favored their continued exclusion, then remedies would simply not be required. The single-jury system could be retained in its present form. Nevertheless, the potential influence of extra-evidentiary process effects could, and should, be modified. The pre-trial identification of the *Witherspoon*-excludable juror would achieve the objective of death-qualification while at the same time minimizing process effects. While process effects are not currently a primary issue, they may present themselves as such as this particular research frontier is extended. It is difficult to imagine any objection to a modification which met the state's purpose of economy and efficiency, while preserving the single-jury system. Further, the modification would contribute to the fairness, and appearance of fairness, in capital cases.

If the Court's decision favors inclusion of the WE_{fair} juror, then a consideration of remedies is paramount. On the basis of the primary issues, the defense would appear to have little preference concerning remedies because all three equally solve the guilt phase problem. However, it may be presumed that the defense would have some objections to the judge deciding the sentencing issue if judges actually are more severe in penalty decisions than are juries.

The state's arguments suggest a preference for the replacement jury. Both sentencing by the judge and by separate juries have in common the separation of "felt responsibility" to which the state has attached such importance. While none of the remedies would entirely

66. In non-capital cases, jury sentencing occurs in only seven states. III AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980).

preserve this interest, the replacement jury would most nearly achieve the state's objective. In many cases, no replacements would be necessary and the result would be the single-jury system. When replacements were necessary, the number of replacements would be minimal and the disruption of the responsibility continuum would be minimized.

In any case, if the Court perceives obstacles which prevent the inclusion of the WE_{fair} juror, such obstacles would not seem to derive from the remedies discussed here.

[Editor's Note: During the final stages of the publication of this article, the United States Supreme Court held that the exclusion of WE_{fair} jurors from capital cases is not unconstitutional. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).]