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Seventh Judicial District, Fremont County
Abbie Mace, Clerk of the Court
By: Shannon Cook, Deputy Clerk

R. James Archibald
Attorney at Law
Idaho State Bar No 4445
1493 North 1070 East
Shelley, Idaho 83274
(208) 317-2908
Email: jimarchibald21@gmail.com

John Thomas
Attorney at Law
Idaho State Bar No 6727
166 Martinsburg Lane
Idaho Falls, Idaho 83404
(208) 313-7481
Email: jthomas@co.bonneville.id.us

Attorneys for Defendant

THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF FREMONT

STATE OF IDAHO, Plaintiff, v. LORI VALLOW DAYBELL, Defendant.	Case No.: CR22-21-1624 MOTION TO PREVENT DEATH QUALIFICATION OF THE JURY, OR FOR ALTERNATIVE RELIEF

Comes now the Defendant, through her attorneys, and moves this Court to prevent death qualification of the jury in this case on the basis that it violates her rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Sections 1, 6, 7, and 13 of Article I of the Constitution of the State of Idaho, as follows:

1. Defendant is charged with murder and conspiracy to commit murder.

2. The State of Idaho is seeking the death penalty.

3. This Court has determined that she is indigent pursuant to Idaho Code § 19-854.

4. The notion that "the jury is a central foundation of our justice system and our democracy" is unquestionable. *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855, 860-61 (2017). "The jury is a tangible implementation of the principle that the law comes from the people." *Id.*

5. Empirical research has demonstrated that the systematic exclusion of jurors who have a moral objection to the death penalty results in capital juries that tend to be whiter, more conservative, more male, more sexist, more conviction-prone, more death-prone, and more biased against defendants. As a result, death qualification distorts the jury function and results in juries that do not fulfill their function as fair and impartial representatives of the community. Thus, death qualification violates her right to a fair trial by an impartial jury protected by the Fifth, Sixth, and Fourteenth Amendments and article I, sections 1, 7 and 13 of the Idaho Constitution, as well as her right to be free from cruel and unusual punishment protected by the Eighth Amendment and article I, section 6 of the Idaho Constitution.

6. The practice of death qualification is inconsistent with the Framers' original intent and understanding of the nature and scope of the criminal jury as embodied in the Sixth Amendment. It is also in irreconcilable conflict with the Supreme Court's Eighth Amendment jurisprudence.

7. The practice of death qualification also deprives her of equal protection of the law, because it irrationally and unjustifiably forces capital defendants to be tried before juries that have been skewed towards conviction by the jury selection process, while non-capital criminal defendants are put to trial without this disadvantage.

8. The practice also violates the fair cross-section requirement of the Sixth Amendment because it results in the wholesale exclusion of jurors based upon religious beliefs and disproportionately impacts minority jurors.

9. In the final section of this motion, a proposal is made for alternatives to death qualification in order to address these constitutional concerns.

I. The Practice of Death Qualification Violates Her Due Process Right to a Fair Trial by an Impartial Jury as well as the Prohibition Against Cruel and Unusual Punishment Because it Produces Juries that are Conviction- and Death-Prone and are Biased against Capital Defendants.

10. In *Lockhart v. McCree*, 476 U.S. 162 (1986), the United States Supreme Court rejected Ardia McCree's claim that the process of "death qualification" violated the fair cross-section requirement of the Sixth Amendment and his constitutional right to an impartial jury. McCree had been charged with capital murder and the prosecution sought the death penalty. During jury selection, the jury was "death qualified," meaning that during voir dire, the trial judge removed for cause, over defense objection, prospective jurors who stated that they could not under any circumstances vote for the imposition of the death penalty. *Id*. at 166. McCree was convicted of capital felony murder, but the jury rejected the death penalty and he was sentenced to life without parole.

11. In support of his claim that the "death qualification" of the jury violated his right under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross section of the community, McCree introduced into evidence numerous social science studies concerning the attitudes and beliefs of

"Witherspoon-excludables"[1] along with the potential effects of excluding them from the jury prior to the guilt phase of a bifurcated capital trial. *Id.* at 167.

12. In rejecting McCree's constitutional claims, the Court spent considerable time "pointing out" what it believed to be "several serious flaws" in the studies. *Id.* at 168. The Court noted that only 6 of the 15 studies introduced as evidence below dealt with the issue of the potential effects on the guilt-innocence determination of the removal from the jury of *Witherspoon*-excludables.[2] The Court criticized three of the six pertinent studies as being too old (three of them were also considered by the Court in 1968 in *Witherspoon*). Most importantly, however, the Court noted that:

> All three of the "new studies were based on the responses of individuals randomly selected from some segment of the population, but who were not actual jurors sown under oath to apply the law to the facts of an actual case involving the fate of an actual capital defendant . . . . In addition, two of the three "new" studies did not even attempt to simulate the process of jury deliberation, and none of the "new" studies was able to predict to what extent, if any, the presence of one or more "*Witherspoon*-excludables" on a guilt-phase jury would have altered the outcome of the guilt determination.
>
> Finally, and most importantly, only one of the six "death qualification" studies introduced by McCree even attempted to

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[1] In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Supreme Court held that excluding prospective jurors for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction violated the petitioner's Sixth and Fourteenth Amendment right to an impartial jury. A "*Witherspoon*-excludable," as the term was used in *Lockhart*, is a prospective juror whose views on the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *See Lockhart*, 476 U.S. at 167, fn. 1 (quoting *Wainwright v. Witt*, 469 U.S. 412, 424 (1985)).

[2] Eight of the other studies "dealt solely with generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system," and one dealt with death-processing – i.e. "the effects on prospective jurors of *voir dire* questioning about their attitudes toward the death penalty." *Id.* at 169-70.

> identify and account for the presence of so-called "nullifiers," or individuals who, because of their deep-seated opposition to the death penalty, would be unable to decide a capital defendant's guilt or innocence fairly and impartially.

Id. at 171.

13. While the Court ultimately assumed for purposes of its ensuing legal analysis that the studies were both "methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries," *id.* at 172, these perceived flaws in the social science research were clearly significant to the Court.[3]

14. Over three decades have passed since the Court rejected McCree's arguments regarding death qualification. Much has changed. Since *Lockhart*, social science research has substantially augmented the research that existed at the time, and has demonstrated that death qualification results in biased and death-prone juries.

15. The Capital Jury Project (hereinafter CJP) was created in 1991 by a consortium of university-based researchers from 14 states.[4] The aim of the CJP was to gather data from actual jurors who served on capital trials, rather than rely on data from simulated experiments using mock jurors as the studies criticized by the Supreme Court in *Lockhart* did. The goals of the CJP were to: (1) systematically describe jurors' exercise of capital sentencing discretion; (2) assess the extent

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[3] *See* Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 784 (2006) ("The Supreme Court's declaration that death qualification is constitutionally permissible even if the studies are true should have rendered the studies' validity moot. However, the Court raised a specter of hope – and ensured a vigorous response by the social science research community – when it nevertheless devoted more than four pages of its opinion to discrediting those underlying studies.").

[4] *See* State University of New York at Albany, "What is the Capital Jury Project?", available at: http://www.albany.edu/scj/13189.php (last visited on: January 9, 2019).

of arbitrariness in jurors' exercise of such discretion; and (3) evaluate the efficacy of capital statutes in controlling such arbitrariness.[5]

16. Interviews were completed with 1198 jurors from 353 capital trials in 14 states. These states were chosen for this research to reflect the principal variations in guided discretion capital statutes. Within each state, 20 to 30 capital trials were picked to represent both life and death sentencing outcomes. From each trial, a target sample of jurors was systematically selected for in-depth three-plus hour personal interviews. Since 1993, over 80 articles presenting and discussing the findings of the CJP have been published in scholarly journals.

17. New and developing research is largely immune to the criticisms lobbed by the Supreme Court at the studies introduced in *Lockhart*, and establishes what the nascent research cited in *Lockhart* strongly suggested: the process of death qualification results in juries that are resoundingly biased against criminal defendants and are not only more prone to convict in a myriad of ways, but are biased towards imposing the death penalty as well.

18. As one commentator noted:

> Broader in scope than any empirical study previously attempted, the CJP addresses each of the Court's articulated dissatisfactions. First, the CJP studies actual jurors--1201 actual jurors from 354 actual cases--thus assuaging the McCree Court's "doubts about the value of these studies in predicting the behavior of actual jurors." Second, because the CJP studies actual jurors, it necessarily studies those whose decisions were influenced by their peers through the mechanism of jury deliberation. Finally, because the CJP studies actual jurors, this research data remains uncontaminated by the influence of nullifiers, who would have been excused from service at voir dire.

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[5] *Id.*

Susan D. Rozelle, *The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation*, 38 Ariz. St. L.J. 769, 784 (2006).

19. Taken as a whole, the current state of social science research establishes that the "death qualification" of juries in cases in which the death penalty is sought violates a defendant's Sixth and Fourteenth Amendment right to a fair trial by an impartial jury as well as his rights under the Eighth Amendment and article I, sections 1, 6, 7, and 13 of the Idaho Constitution.

A. Death-Qualified Juries are More Conviction Prone.

20. Social science research has shown that death qualification produces juries that are both partial to the prosecution and prone to convict. A 1998 meta-analysis of research examining how the attitude a potential juror has toward the death penalty impacts the probability of favoring conviction confirmed what earlier research also indicated: "the more a person favors the death penalty, the more likely that person is to vote to convict a defendant." Allen, Mabry, & McKelton, *Impact of Juror Attitudes About the Death Penalty on Juror Evaluations of Guilt and Punishment: A Meta-Analysis*, 6 J. L. & Hum. Behav. 22 (Dec. 1998).

21. Early studies which have since been validated by the CJP reveal that people's attitudes towards capital punishment are strongly associated with a whole constellation of attitudes about the criminal justice system. These studies established, for instance, that people who support the death penalty – and who not only support it, but are able to tell the lawyers and the judge in the courtroom that they would be able to impose it – hold a number of other views about the criminal justice system that work strongly against the capital defendant. *See* Claudia L. Cowan, William C. Thompson, & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberations* 8 J. L. & Hum. Behav. 53 (1984);

Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes* 8 J. L. & Hum. Behav. 31 (1984).

22. The data demonstrates that these jurors, much more strongly than non-death-qualified jurors, believe that if a defendant does not testify in his or her own defense, that the failure to do so is affirmative proof of guilt. Death-qualified jurors do not believe in the presumption of innocence. They do not believe in Due Process guarantees, such as requiring the prosecution to bear the burden of proof beyond a reasonable doubt. They are highly suspicious of experts called by the defense. They are distrustful of defense lawyers and view everything they have to say with a great deal of skepticism. On the other hand, they are extremely receptive to the prosecution and its witnesses, and believe them. *See* Cowan, Thompson, & Ellsworth, 8 J. L. & Hum. Behav. at 75; Fitzgerald & Ellsworth, 8 J.L. & Hum. Behav. at 45-46.

23. The data collected and analyzed by the CJP confirms that "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." Rozelle, 38 Ariz. St. L.J. at 784–85 (internal quotations and citations omitted).

24. In short, death-qualified jurors are the jurors least representative of the community as a whole, and are the jurors least likely to give a criminal defendant the benefit of the doubt or a fair sentencing hearing and determination.

25. Moreover, "not only is it true that 'the more a person favors the death penalty, the more likely he or she is to favor conviction,' but the process of being death-qualified--simply being asked the death qualification voir dire questions--actually magnifies this effect." *Id.* at 791 (quoting Marla Sandys & Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality, in America's Experiment with Capital Punishment:*

Reflections on the Past, Present, and Future of the Ultimate Penal Sanction 385, 397 (James R. Acker et al. eds., 2d ed. 2003)).

26. Justice John Paul Stevens called this aspect of death qualification "troubling" in a speech at the American Bar Association's Thurgood Marshall Awards Dinner on August 6, 2005:

> In case after case many days are spent conducting voir dire examinations in which prosecutors engage in prolonged questioning to determine whether the venire person has moral or religious scruples that would impair her ability to impose the death penalty. Preoccupation with that issue creates an atmosphere in which jurors are likely to assume that their primary task is to determine the penalty for a presumptively guilty defendant.

See Justice John Paul Stevens, Remarks at the Thurgood Marshall Awards Dinner (Aug. 6, 2005), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html.

27. Death-qualified juries are also more prone to reject evidence presented in support of a mental health defense, and are also "more likely to endorse certain insanity myths." Butler and Wasserman, *The Role of Death Qualification in Venirepersons' Attitudes Toward the Insanity Defense,* 36 Journal of Applied Social Psychology 7, pp. 1744-1757 (2006). These myths include "that the insanity defense is used on a frequent basis, that the insanity defense is a 'legal loophole,' and that if a person if found not guilty by reason of insanity, he or she is released immediately back into society." *Id.* at 1752.

28. In addition, developments in social science research since *Lockhart* have uncovered implicit racial and other biases that flourish under death qualification. A recent empirical study of approximately 500 jury-eligible citizens across six death-penalty states concluded that "the process of death qualification results in capital jurors with significantly stronger implicit racial biases and explicit racial biases" than general jury-eligible citizens. Justin Levinson, Robert Smith & Denise

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 (2014).

29. Not only does death qualification result in juries that have more implicit racial bias but it also results in juries that have higher levels of bias based on sexism. Brooke Butler, *Death Qualification and Prejudice: The Effect of Implicit Racism, Sexism, and Homophobia on Capital Defendants' Right to Due Process*, 25 Behav. Sci. & L. 857, 865 (2007).

30. Other studies have found that "because the death qualification process systematically excludes person on the basis of their strong death penalty views from the jury, the demographic makeup of the capital jury is distinctive and problematic. That is, compared to juries seated in nondeath cases, death-qualified jury pools are disproportionately whites, male, older, and more religiously and politically conservative." Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 Law & Soc'y Rev. 69, 70 (2011); Marla Sandys and Scott McClelland, *Stacking the Deck for Guilt and Death: The Failure of Death Qualification to Ensure Impartiality*, in America's Experiment with Capital Punishment, James Acker, et al., eds. (2nd ed. 2003).

B. Death Qualification Results in Jurors Who are Biased in Favor of Imposing the Death Penalty in Several Ways.

31. In addition to being more conviction-prone, the research of the capital jury project found that those jurors who actually served on capital juries were in fact biased toward *imposing* the death penalty in several ways.

32. First, as explained in subsection A above, the process of being death-qualified makes conviction- and death-prone jurors even more prone to conviction and death. This is also known as the "death processing effect." Capital Jury Project research and interviews with actual jurors reveals that when prospective jurors are continually asked questions about whether they can

impose the death penalty in an intimidating courtroom atmosphere, the correct answer is yes. "This process conveys to the jurors who undergo it that the judge and both attorneys – including defense counsel – all believe that the defendant is guilty and that the only important task remaining is to find enough jurors who can do what is necessary. That necessary task, of course, is to sentence the defendant to death." Rozelle, 38 Ariz. St. L.J. at 792. *See also* William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 Crim. Law Bulletin 51, 65 (2003) ("The CJP indicates further that the jury qualification process itself creates a bias toward death.").

33. Second, those prone to convict are also likely to reach a premature decision that a death sentence should be imposed. Nearly half of the jurors (49.2 percent) interviewed by the CJP admitted to deciding on punishment before they had heard a single piece of evidence at the penalty phase of the trial, and nearly one-third (30.3 percent) had decided the penalty should be death. *See* Bowers & Foglia, 39 Crim. Law Bulletin at 65. Moreover, 70.4 percent of those who had taken a premature stance for death indicated that they were "absolutely convinced," and 27 percent said they were "pretty sure" the punishment should be death. Taken together, nearly all of those who took a premature stance for death – 97.4 percent -- felt strongly about their decision. *Id.* at 57.

34. Third, the process of death qualification produces juries that frequently contain automatic death penalty voters despite the fact that *Morgan v. Illinois*, 504 U.S. 719 (1992), requires that jurors be "life-qualified" as well as death-qualified.[6]

[6] Life qualification requires a willingness to consider a life sentence. Per *Morgan*, "Any juror to whom mitigating factors are likewise irrelevant should be disqualified for cause, for that juror has already formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Id.* at 739.

35. Bowers & Foglia explain, "The faulty application of jury selection standards yields a disproportionately guilt-prone and death-prone jury in two ways: (1) it "over-excludes" by barring jurors who would be able to impose the death penalty under appropriate circumstances despite reservations, and (2) it "under-excludes" by failing to dismiss "automatic death penalty" (ADP) jurors who would not give effect to mitigation in making their sentencing decisions." 39 Crim. Law Bulletin at 60-61.

36. For example, the CJP research reveals that over 70 percent of jurors interviewed felt that death "was the only acceptable punishment" for murders committed by a defendant with a prior murder conviction, and almost 60 percent agreed that death was the only acceptable punishment for "planned or premediated murder." *See* Rozelle, 38 Ariz. St. L.J. at 788. "On a twelve-person jury, then, anywhere from two to eight of the members seated are likely to be automatic death penalty jurors." *Id.* at 789.

37. These numbers are staggering and concerning, given that seating automatic death penalty jurors violates the Constitution. *See Morgan*, 504 U.S. at 729 ("Based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.").

38. However, even though the jurors interviewed by the CJP had undergone at least some sort of vetting to ensure they were willing to consider a life sentence during voir dire, the process of death qualification still leads to this unconstitutional result. As Rozelle explains, it is easier to identify the so-called *Witherspoon*-excludables during voir dire, because those jurors "tend to have come to their positions through conscious reflection." Rozelle, 38 Ariz. St. L.J. at

789. However, the voir dire process does not always effectively ferret out prospective jurors' bias in favor of death because "it seems likely that many automatic death penalty voters simply do not realize that is their position" without adequate questioning from attorneys. *Id.* "Presuming equal candor at voir dire (perhaps a naïve assumption), automatic death penalty voters will be harder to identify as a result." *Id.*

39. Finally, CJP research adds to the "troubling picture of how race influences who gets the death penalty by demonstrating that the racial composition of the jury and the race of the individual and the race of the individual juror affect sentencing outcomes." Bowers & Foglia, 39 Crim. Law Bulletin at 80. As noted in subsection A, above, the process of death qualification results in juries that are disproportionately whites, male, older, and more religiously and politically conservative compared to juries seated in cases not involving the death penalty. These demographics have sentencing consequences. CJP research revealed that in inter-racial homicides, "there were large differences in the percentage of death sentences depending on the number of white male and black male jurors on the jury." *Id.* at 77. This is so largely because black and white jurors' viewpoints on mitigation diverge dramatically on issues such as "(a) whether they have lingering doubt about the defendant's guilt, (b) their impressions of the defendant's remorsefulness, and (c) their views regarding the defendant's future dangerousness." *Id.*

40. In cases involving black defendants and white victims, "the CJP shows that the chances of a death sentence increase when there are five or more white males on the jury; they decrease when there is at least one black male on the jury. Jurors become more polarized as they experience the capital trial . . . . These results provide disturbing evidence of how the capital sentencing process is contaminated by race." *Id.* at 80.

41. Finally, the structure of a unitary trial process with a death-qualified jury also prejudices capital defendants and skews the process towards both conviction and death. Because the merits and penalty phase are tried before the same jury, the same jury that decides on punishment often hears evidence of aggravating and prejudicial facts at the merits phase that would not otherwise be admissible or relevant at the penalty phase of a trial. Cautionary and limiting instructions are insufficient to ameliorate the resulting prejudice to a capital defendant. *See, e.g., Bruton v. United States*, 391 U.S. 123, 135 (1968) ("There are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored.").

C. Conclusion

42. "A fair trial in a fair tribunal is a basic requirement of due process." *Morgan*, 504 U.S. at 727. Over 50 years ago the Supreme Court held that in its "quest for a jury capable of imposing the death penalty," the State violates due process if it "produces a jury uncommonly willing to condemn a man to die." *Witherspoon v. Illinois*, 391 U.S. 510, 520-21 (1968). The Court concluded, "Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution."

43. The Supreme Court has also acknowledged time and again that "death is a different kind of punishment from any other which may be imposed in this country. . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." *Gardner v. Florida*, 430 U.S. 349, 357-358 (1977). Therefore, rules that "tend to diminish the reliability" of either the guilt or sentencing determination in capital cases violate the Eighth Amendment and the Due Process Clause of the

Fourteenth Amendment and article I, sections 1, 6, 7 and 13 of the Idaho Constitution. *See State v. Draper*, 151 Idaho 576, 599 (2011) ("This Court's analysis of whether a sentence violates Article I, Section 6, has traditionally tracked the U.S. Supreme Court's Eighth Amendment jurisprudence").

44. The social science research that has been conducted to date establishes that the practice of death qualification in capital cases produces "hanging juries" and "stacks the deck" against capital defendants. The evidence is now clear that the process of death qualification unquestionably results in juries that favor the prosecution, are conviction-prone, are skeptical of mental health evidence and defenses, and generally hold views about the criminal justice system that work strongly against criminal defendants.

45. The CJP research also establishes that the process of death qualification results in juries that are prone to premature decision-making on the issue of sentencing, permits a staggering number of automatic death penalty jurors serving on capital trials, and results in juries that are less diverse, more conservative, and more susceptible to the ills of racial bias on issues pertaining to both guilt and sentencing.

46. As Rozelle summarizes:

> Capital punishment abolitionists argue both that the death penalty is unnecessarily deserved and that the system governing its administration is inherently unfair. But even those who favor capital punishment – those principled executioners who advocate for the death penalty in good faith – surely would be appalled to discover a thumb on the scale of their machinery. And yet the practice of death-qualifying capital juries – the way in which we question prospective jurors to ensure that their views concerning the death penalty would not interfere with their ability to serve – lays just such a thumb on the prosecutor's side of the scale. Long-suspected, later presumed, and recently reconfirmed, this practice of death qualification skews capital juries towards both guilt and death.

38 Ariz. St. L.J. at 770.

47. As a result, the process of death qualification violates the due process right to a fair trial by an impartial jury guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7 and 13 of the Idaho Constitution. Additionally, and for the same reasons, the process of death qualification violates the Eighth Amendment and article I, section 6 of the Idaho Constitution.

II. Death Qualification Is a Practice that Violates the Original Intent of the Sixth Amendment Right to a Jury Trial, and is Also in Irreconcilable Conflict with the Supreme Court's Modern-Day Eighth Amendment Jurisprudence.

A. Death Qualification is a Practice that Violates the Original Intent of the Sixth Amendment Right to a Jury Trial.

48. The Supreme Court's modern death qualification jurisprudence rests on the assumption that jurors are properly limited solely to findings of fact, and must be able to "follow the law." *See, e.g., Wainwright v. Witt*, 469 U.S. 412 (1985) (juror is unqualified to serve in a capital case if his or her views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath"); *Witherspoon v. Illinois*, 391 U.S. 510, 514, fn. 7 ("It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.").

49. However, as Ben Cohen and Robert J. Smith argue in a 2008 law review article concerning death qualification, "the Framers understood criminal petit juries to be responsible for making determinations of both fact and law," and "understood a verdict influenced by the jurors' conscientious scruples to be a salutary and critical function of the American jury." Cohen & Smith,

The Death of Death Qualification, 59 Case W. Res. L. Rev. 87 (2008). Over time, however, the United States Supreme Court's Sixth Amendment jurisprudence became untethered from that foundation, culminating in the Court's holdings in *Witherspoon*, *Witt*, and *Lockhart* explicitly validating the concept of death qualification.

50. Cohen and Smith explain that at the time of the founding of our country, prospective jurors who believed the death penalty to be unconstitutional in any particular case or context would not have been subject to a challenge for cause, "for the accused's right to an 'impartial jury' was simply a tool to eliminate relational bias and personal interest from the criminal adjudication process. A citizen's view on the constitutionality of a particular law did not constitute personal interest, but instead marked an important component of society's deliberative process." *Id.* at 88.

51. The common law rule that a juror "must stand indifferent was meant to protect the accused and the state from bias based on affiliation with the particular actors trying the case or stemming from personal involvement in the cause at issue." *Id.* at 98. Rather than a source of bias, a juror's "beliefs on the appropriateness of the law or its punishment served an important function both in the English system and in ours at common law." *Id.*

52. This core aspect of the Sixth Amendment jury function was intact in the late 1700s, even in cases involving slavery. In a 1788 Connecticut case, *Pettis v. Warren*, 1 Kirby 426 (Conn. 1788), involving a "black slave's suit for freedom," the state challenged a juror on the grounds that she believed that "no negro, by the laws of this state, could be holden a slave." *Id.* at 93. The trial court denied the challenge, and the Connecticut Supreme Court affirmed on the grounds that "jurors were supposed to make legal determinations." *Id*.

53. However, over the course of the next 200 years, courts gradually changed their orientation towards the responsibilities and duties of jurors.

54. The early 1800s marked a time when Quakerism was flourishing in Pennsylvania. Practicing Quakers opposed the death penalty, marking a "deep divide" between Quakers and other Christians on the issue of capital punishment. *Id.* at 93. In the case of *Commonwealth v. Lesher*, 17 Serg. & Rawle 155 (Pa. 1828), the trial court granted the prosecution's challenge for cause against a Quaker juror who stated he would be unable to impose a sentence of death. On appeal, the Pennsylvania Supreme Court affirmed Lesher's conviction under the auspices that a juror who refused to consider the death penalty could not be impartial. Cohen and Smith describe the *Lesher* case as the "origin" of death-qualification, and note that "the *Lesher* court performed no textual or historical analysis on the meaning or correct interpretation of the concept of partiality, or on the proper scope of the role of a criminal jury." *Id.* at 95. They further note that "within twenty years of *Lesher*, the practice of securing death-qualified juries had spread to Louisiana, New York, and Virginia." *Id*. at 95-96.

55. Cohen and Smith further explore how politics played a role in the development of the practice of death qualification. By 1859, jurors in the politically-charged trial of controversial slavery abolitionist John Brown were asked by the judge whether they had 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.* at 96-97. They write, "John Brown's inevitable death sentence could not be jeopardized by the 'conscientious scruples' of any would-be abolitionist juror in an already politically-charged trial." *Id.*

56. This trend continued until the Supreme Court decided *Witherspoon* and *Wainwright* in 1968 and 1985, respectively. According to Cohen and Smith, the Court's conception of a "balancing test" between "the accused's right to an impartial jury and the state's interest in

obtaining capital convictions," which emerged from *Wainwright*, "is a means in search of a historically acceptable basis." *Id.* at 108.

57. Notably, there has been a resurgence of interest in the historical underpinnings of the Sixth Amendment in the Supreme Court's recent Sixth Amendment case law. In cases such as *Jones v. United States*, 526 U.S. 227 (1999), *Apprendi v. New Jersey*, 531 U.S. 46 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely v. Washington*, 542 U.S. 296 (2004), *Hurst v. Florida*, 136 S.Ct. 616 (2016), and *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), even conservative members of the Court have expressed an interest in returning to the historical underpinnings of the Sixth Amendment, and the Court "has not hesitated to reexamine jurisprudence when evidence has emerged indicating that the foundation of the jurisprudence lacked basis in the text of the Constitution." *Id.* at 110.

58. For example, in *Jones*, Justice Souter discussed the importance of historical understanding of the Sixth Amendment, noting that "on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right." 526 U.S. at 244. Souter continued:

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.

Id. at 245.

59. Most recently, in *Pena-Rodriguez*, Justice Kennedy acknowledged the jury as a "central foundation of our justice system and our democracy," and explored the common law

foundations of the no-impeachment rule before ultimately endorsing an exception to the rule in order to permit a trial court to consider a claim that racial animus infected a juror's deliberations. 137 S.Ct. at 861.

60. In dissent, Justice Thomas wrote separately to explain why, in his view, the Court's holding "could not be squared with the original understanding of the Sixth or Fourteenth Amendments." *Id.* at 871. Notably, in doing so, he endorses Cohen and Smith's thesis that at common law, the concept of impartiality referred only to a prospective juror's personal bias or interest in a case (rather than his ability to "follow the law"): "the Sixth Amendment's specific guarantee of impartiality incorporates the common-law understanding of that term . . . . Impartial jurors could have no interest of their own affected, and no personal bias, or pre-possession, in favor of or against either party." *Id.* at 872.

61. In conclusion, as the foregoing establishes, the United States Supreme Court's death qualification jurisprudence stands at odds with the Framers' conception of the function of a jury and the Sixth Amendment right to a jury trial. Because the modern-day practice of death qualification conflicts with the original meaning and historical underpinnings of the Sixth Amendment, this Court should find that death qualification violates the Sixth Amendment right to a jury trial and preclude the use of this process in this case.

B. Death Qualification is in Irreconcilable Conflict with the Supreme Court's Modern-Day Eighth Amendment Jurisprudence.

62. This Court should also preclude the practice of death qualification in this case because, in addition to being inconsistent with the historical underpinnings of the Sixth Amendment jury trial right, the practice of death qualification is also in irreconcilable conflict with the Supreme Court's Eighth Amendment evolving standards of decency jurisprudence.

63. In making determinations about whether a punishment is cruel and unusual under its Eighth Amendment 'evolving standards of decency' doctrine, the United States Supreme Court looks predominantly, though not exclusively, to two main sources – legislation and the actions of sentencing juries:

> Our opinions have also recognized that data concerning the actions of sentencing juries, though entitled to less weight than legislative judgments, "'is a significant and reliable objective index of contemporary values,'" *Coker v. Georgia,* 433 U.S. 584, 596, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (plurality opinion) (quoting *Gregg, supra,* at 181, 96 S.Ct. 2909), because of the jury's intimate involvement in the case and its function of " 'maintaining a link between contemporary community values and the penal system,' " *Gregg, supra,* at 181, 96 S.Ct. 2909 (quoting *Witherspoon v. Illinois,* 391 U.S. 510, 519, n. 15, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)). In *Coker, supra,* at 596-597, 97 S.Ct. 2861, for example, we credited data showing that "at least 9 out of 10" juries in Georgia did not impose the death sentence for rape convictions. And in *Enmund v. Florida,* 458 U.S. 782, 793-794, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), where evidence of the current legislative judgment was not as "compelling" as that in *Coker* (but more so than that here), we were persuaded by "overwhelming [evidence] that American juries ... repudiated imposition of the death penalty" for a defendant who neither took life nor attempted or intended to take life.
>
> In my view, these two sources - the work product of legislatures and sentencing jury determinations - ought to be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment. They are the only objective indicia of contemporary values firmly supported by our precedents. More importantly, however, they can be reconciled with the undeniable precepts that the democratic branches of government and individual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.

Atkins v. Virginia, 536 U.S. 304, 323-324 (2002) (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, JJ.). *See also Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (noting that in evaluating

Eighth Amendment claims, the Court has been guided by "objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions").

64. In holding that imposition of the death penalty for the crime of rape was a disproportionate, cruel and unusual punishment under the Eighth Amendment, the Court stated:

> It was also observed in Gregg that 'the jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved.' 428 U.S., at 181, 96 S.Ct., at 2929, and that it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried.

Coker v. Georgia, 433 U.S. 584, 596 (1977). The Court noted that at least 9 out of 10 Georgia juries rejected the death penalty for rape.

65. In determining that the Eighth Amendment does not permit imposition of the death penalty on a defendant who aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill or intend that killing take place, the Court stated:

> Society's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made. As we have previously observed, "'the jury ... is a significant and reliable objective index of contemporary values because it is so directly involved.'" *Coker v. Georgia, supra*, at 596, 97 S.Ct., at 2868, quoting *Gregg v. Georgia*, 428 U.S. 153, 181, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859 (1976). The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioners.

Enmund v. Florida, 458 U.S. 782, 794, 102 S.Ct. 3368, 3375 (1982).

66. In addressing the constitutionality of imposition of the death penalty on persons under the age of 16, the Court explained the linkage between Eighth Amendment standards and sentencing jury determinations more fully:

The authors of the Eighth Amendment drafted a categorical prohibition against the infliction of cruel and unusual punishments, but they made no attempt to define the contours of that category. They delegated that task to future generations of judges who have been guided by the "evolving standards of decency that mark the progress of a maturing society." *(citation and footnote omitted).* In performing that task the Court has reviewed the work product of state legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases. Thus, in confronting the question whether the youth of the defendant-more specifically, the fact that he was less than 16 years old at the time of his offense-is a sufficient reason for denying the State the power to sentence him to death, we first review relevant legislative enactments, then refer to jury determinations,[FN7] and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.

*　　　*　　　*

FN7. Our capital punishment jurisprudence has consistently recognized that contemporary standards, as reflected by the actions of legislatures and juries, provide an important measure of whether the death penalty is "cruel and unusual." Part of the rationale for this index of constitutional value lies in the very language of the construed clause: whether an action is "unusual" depends, in common usage, upon the frequency of its occurrence or the magnitude of its acceptance.

The focus on the acceptability and regularity of the death penalty's imposition in certain kinds of cases-that is, whether imposing the sanction in such cases comports with contemporary standards of decency as reflected by legislative enactments and jury sentences-is connected to the insistence that statutes permitting its imposition channel the sentencing process toward nonarbitrary results. For both a statutory scheme that fails to guide jury discretion in a meaningful way, and a pattern of legislative enactments or jury sentences revealing a lack of interest on the part of the public in sentencing certain people to death, indicate that contemporary morality is not really ready to permit the regular imposition of the harshest of sanctions in such cases.

Thompson v. Oklahoma, 487 U.S. 815, 823 (1988) (certain footnotes omitted); *see also id.* at 831 ("The second societal factor the Court has examined in determining the acceptability of capital punishment to the American sensibility is the behavior of juries.").

67. Thus, the Supreme Court has found that imposition of the death penalty can be categorically unconstitutional based upon the nature of the crime charged (*Coker & Kennedy, supra* – rape), certain immutable characteristics of the defendant (*Atkins, supra* – mental retardation; *Thompson, supra* and *Roper v. Simmons*, 543 U.S. 551 (2005) – age), or a defendant's level of culpability (*Enmund, supra*).

68. The Court has further indicated that jury verdicts are one way of determining the evolving standards of the community when assessing whether a particular sentencing practice comports with the Eighth Amendment's ban on cruel and unusual punishment. As Cohen & Smith point out, "The modern Court confirms the Framers' intent as it relates to the power of criminal juries to give a voice to the people on questions of constitutionality." 59 Case W. Res. L. Rev. at 120 (citing *Blakely v. Washington*, 542 U.S. 296, 306 (2004) ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.")).

69. Yet as discussed extensively above, the Court's Sixth Amendment "death-qualification" jurisprudence prohibits jurors who state during voir dire that they could or would not vote for the death penalty from serving in capital cases. In *Uttecht v.* Brown, 551 U.S. 1 (2007), the Supreme Court summarized the four main principles for which *Witherspoon* and its progeny stand:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon,* 391 U.S., at 521, 88 S.Ct. 1770. Second, the State has a strong interest

> in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt,* 469 U.S., at 416, 105 S.Ct. 844. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.,* at 424, 105 S.Ct. 844. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.,* at 424-434, 105 S.Ct. 844.

Id. at 8.

70. Under *Witherspoon*, *Witt*, and their progeny, "a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause." *Id.* Thus, a prospective juror who indicates during voir dire that he or she could never impose the death penalty on a defendant with a certain characteristic or on a defendant accused of a certain type of crime is subject to a challenge for cause, if state law permits imposition of the death penalty for a defendant with that characteristic or accused of that type of crime. *See also Lockhart*, *supra* at 173 (practice of "death qualifying" the jury by removing "*Witherspoon*-excludable" prospective jurors does not violate Sixth Amendment right to impartial jury selected from representative cross section of the community).

71. In its Eighth Amendment jurisprudence, the Court has relied on the fact that "9 out of 10" juries refused to impose the death sentence for rape (*Coker*), that American juries repudiated death for defendants who did not take a life (*Enmund*), and that juries rarely imposed death on those under 16 years of age (*Thompson*). In these decisions, the Court assumes that the reason juries infrequently imposed the death penalty in those types of cases was because jurors, who are representatives of society and the community, did not believe it was appropriate for *those types of*

cases or defendants, and relies upon that assumption when performing its Eighth Amendment "evolving standards of decency" analysis.

72. Yet, pursuant to the Court's Sixth Amendment jurisprudence under *Witherspoon*, *Witt* and their progeny, a prospective juror who could not or would not impose the death penalty on a defendant based on a certain characteristic, or in a certain type of case, is challengeable for cause, if state law authorizes the death penalty for that type of defendant or case.

73. The Court's own "death qualification" jurisprudence in the Sixth Amendment realm thus impedes the very development of the second most "significant and reliable objective index of contemporary values" that exists in the Eighth Amendment realm. The two conflict irreconcilably. As Cohen and Smith argue, "As a result, when appellate courts review the frequency with which juries impose a death sentence for a certain class of capital crimes, that measure is necessarily an inaccurate thermometer for determining how much a society has chilled to the idea of executing certain classes of offenders." 59 Case W. Res. L. Rev. at 120-21.

74. In other words, "death qualification" of the jury in capital cases compromises the jury's role as the "voice of the community." Death-qualified juries echo the voice not of the community as a whole, but of the death-qualified community.

75. The Supreme Court's Sixth Amendment "death qualification" jurisprudence in *Witherspoon*, *Witt,* and *Lockhart* results in the unconstitutional exclusion of jurors who must be allowed to serve so that "[t]he jury ... is a significant and reliable objective index of contemporary values," for Eighth Amendment purposes. *Coker*, 433 U.S. at 596. The exclusion of such jurors and the practice of death qualification thus violates Mr. Ohlson's right, and the public interest, under the Eighth Amendment in having a jury that reflects evolving standards of decency and "is a significant and reliable objective index of contemporary values," so as to guard against cruel and

unusual punishment. U.S. Const. amends. VIII, XIV. Additionally, such exclusion violates her similar right, and the public interest of the people of Idaho, under article I, section 6 of the Idaho Constitution.

III. Death Qualification Denies Equal Protection of the Law.

76. The process of death qualification produces juries that are significantly more disadvantageous to criminal defendants than juries that are not subject to death qualification. In sum:

> Compared to the excludable group the death-qualified group is more punitive, less sensitive to procedural and constitutional guarantees, less equable in its evaluation of opposing counsel, and more willing to ignore a judge's instructions about pretrial publicity. The systematic character of these differences is advantageous to one side only. Capital juries, as they first sit down to hear the evidence, are more favorable to the prosecution than juries in any other kind of case. The practice of death qualification forces a defendant whose life is at stake to assume a special handicap in his contest with the State.

Fitzgerald & Ellsworth, 8 J.L. & Hum. Behav. at 45-46.

77. Only defendants who are facing the death penalty are forced to go to trial before conviction-prone juries, whereas non-capital defendants who go to trial lack this distinct disadvantage. This result is not only ironic and unconstitutional under the "heightened reliability" required by the Eighth Amendment and article I, section 6 of the Idaho Constitution in capital cases, *see* Section I. C., above, it also violates the Equal Protection principles embodied in the Fourteenth Amendment and article I, section 13 of the Idaho Constitution.

78. The Sixth Amendment right to jury trial is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure." *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) 42 U.S. 296, 305-06 (2004). Procedures or laws that create classifications

that burden fundamental rights trigger heightened scrutiny. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

79. The practice of death qualification cannot survive such scrutiny, because it impermissibly and unjustifiably burdens a capital defendant's fundamental Sixth Amendment right to trial by jury by generating juries that are conviction-prone, while sparing non-capital defendants from this detrimental burden.

80. The Supreme Court held more than a half a century ago:

> Our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons. Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court.

Griffin v. Illinois, 351 U.S. 12, 17 (1956) (internal quotations and citations omitted). *See also Douglas v. California*, 372 U.S. 353, 355-56 (1963).

81. There is no compelling state interest justifying the exclusion of "*Witherspoon*-excludable" jurors who cannot impose the death penalty from juries tasked with evaluating the merits (i.e. a defendant's guilt or non-guilt) of a criminal case as to one class of defendants but not as to another. The interest in seeking the death penalty is the only possible justification for the exclusion of prospective jurors who are opposed to capital punishment. However, this interest is by no means absolute, and cannot be vindicated at the expense of a "defendant's interest in a completely fair determination of guilt or innocence." *Witherspoon*, U.S. at 20, fn. 18.

82. Accordingly, the practice of death qualification is invalid under the Equal Protection principles enshrined in the Fourteenth Amendment of the United States Constitution

and the Idaho Constitution, and any conviction obtained against her by process which excludes prospective jurors for cause because of their opposition to capital punishment is invalid.

IV. Death Qualification Violates the Fair Cross Section Requirement of the Sixth Amendment and article II, section 7 of the Idaho Constitution because it Results in the Wholesale Exclusion of Jurors Based upon Religious Beliefs and Disproportionately Impacts Minority Jurors.

83. "The selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor v. Louisiana,* 419 U.S. 522, 528 (1975). "While the equal protection clause of the fourteenth amendment prohibits underrepresentation of minorities in juries by reason of intentional discrimination . . . the sixth amendment is stricter because it forbids any substantial underrepresentation of minorities, regardless of ... motive." *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989).

84. A defendant establishes a prima facie violation of the fair-cross-section requirement by showing "(1) that the group alleged to be 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 v. Missouri,* 439 U.S. 357, 364 (1979).

A. Religious Groups

85. In *Lockhart*, the Supreme Court rejected the held that the practice of death qualification did not violate the fair cross-section requirement of the Sixth Amendment because "groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors . . . are not 'distinctive groups' for fair-cross-section purposes." 476 U.S. at 174. The Court further noted that "our prior jury-

representativeness cases, whether based on the fair-cross-section component of the Sixth Amendment or the Equal Protection Clause of the Fourteenth Amendment, have involved such groups as blacks, . . . women, . . . and Mexican-Americans . . . ." 476 U.S. at 175.

86. However, the Court did not specifically address the issue of whether prospective jurors who oppose the death penalty because it would transgress their religious faith to impose it are a cognizable group for the purposes of satisfying the fair cross-section requirement.[7] Several lower courts have found that religious groups are a 'distinctive' group for fair-cross-section purposes. *See, e.g, Gelb*, 881 F.2d at 1161 ("Jews are a cognizable group for purposes of 42 U.S.C.

[7] Numerous religions oppose the practice of capital punishment. The American Baptist Resolution on Capital Punishment "condemn[s] the reinstatement of capital punishment and oppose[s] its use under any new or old state or federal law, and call[s] for an immediate end to planned executions throughout this country. *See* http://www.abc-usa.org/wp-content/uploads/2012/06/Capital-Punishment.pdf (last visited on January 9, 2019). The Episcopal Church opposes the death penalty. *See* Resolution Number 2000-A083, Urge Parishes and Dioceses to Study the Death Penalty and Explore Reasons for Opposition ("*Resolved,* that as the Episcopal Church continues its opposition to the death penalty, parishes and dioceses be urged to study the death penalty and explore the reasons for our opposition: the inequity as applied to minorities, the poor and those who cannot afford adequate legal representation, the contribution to continued violence, and the violation of our Baptismal Covenant."), available at: https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=2000-A083 (last visited on January 9, 2019). The Evangelical Lutheran Church in America "objects to the use of the death penalty because it is not used fairly and has failed to make society safer." *See* http://www.elca.org/Faith/Faith-and-Society/Social-Statements/Death-Penalty?_ga=1.82917462.1559333429.1456169322 (last visited on January 9, 2019). The Presbyterian Church, the Catholic Church, and the Unitarian Universalist Association have also long opposed capital punishment. *See* https://www.presbyterianmission.org/what-we-believe/capital-punishment/; http://www.usccb.org/issues-and-action/human-life-and-dignity/death-penalty-capital-punishment/catholic-campaign-to-end-the-use-of-the-death-penalty.cfm; http://www.uua.org/action/statements/end-death-penalty (last visited on January 9, 2019). The United Church of Christ passed a 1999 resolution calling for the abolition of the death penalty. *See* https://deathpenaltyinfo.org/files/pdf/1999uccgs22abolishdeathpen.pdf (last visited on January 9, 2019). The United Methodist Church also opposes the death penalty and "urge[s] its elimination from all criminal codes." *See* http://www.umc.org/what-we-believe/political-community#death-penalty (last visited on January 9, 2019). Finally, since 1959, the Central Conference of American Rabbis (CCAR) and the Union for Reform Judaism (URJ) have formally opposed the death penalty. *See* http://rac.org/position-reform-movement-death-penalty (last visited on January 9, 2019).

§ 1982 . . . . There is no reason to distinguish between section 1982 and the constitutional claim made by Gelb in this case. Accordingly, as the government concedes, Gelb meets the first prong of the *Duren* test."). Therefore, the practice of excluding prospective jurors who oppose capital punishment on account of their religious faith meets prong (1) of the *Duren* test.

87. The practice of death qualification also meets prongs (2) and (3) of the showing required to establish a prima facie violation of the fair-cross-section requirement under *Duren*. The wholesale exclusion of prospective jurors who oppose capital punishment because of their religious faith necessarily results in a total lack of representation by this group in venires from which juries are selected, which is not fair and reasonable in relation to the number of such persons in the community. Moreover, this lack of representation is clearly due to "systematic exclusion of the group" during jury selection. *Duren*, 439 at 364. Indeed, the systematic exclusion of such jurors is the precise aim of the practice of death-qualification.

B. Minority Jurors

88. As explained in Section I, above, studies have found that as compared to juries seated in nondeath cases, "death-qualified jury pools are disproportionately whites, male, older, and more religiously and politically conservative." Lynch & Haney, 45 Law & Soc'y at 70 (2011).

89. Cohen & Smith further note,

> African-Americans as a class may be disproportionately excluded from jury service by virtue of the group's disproportionate view of the inappropriateness of capital punishment. Moreover, researchers categorize jurors in capital cases as "'demographically unique'" in that they tend to be both white and male. This disproportionate exclusion of blacks appears to have a significant impact on the outcome of capital cases.

59 Case W. Res. L. Rev. at 122.

90. As with prospective jurors who oppose capital punishment as a result of their religion, the issue of whether death qualification violates the fair-cross-section requirement of the Sixth Amendment because it disproportionately impacts black and other minority venire members was not at issue in *Lockhart*.

91. Justice Rehnquist specifically wrote in *Lockhart* that the Sixth Amendment prohibits the exclusion of "distinct groups," such as African-Americans, women, and Mexican-Americans. Moreover, the social science research described in Section I, *supra*, establishes that the practice of death qualification systematically excludes black, women, and other minority jurors in a manner that results in their underrepresentation in venires from which juries are selected. *See Duren*, 439 U.S. at 364.

92. For the forgoing reasons, the practice of death qualification violates the fair-cross-section requirement of the Sixth Amendment and article I, section 7 of the Idaho Constitution.

V. Proposed Alternative Procedures in this Case in Light of the Constitutional Infirmities Inherent in Death Qualification

93. Defendant moves this Court to adopt at least one of the following alternatives:

a. Prevent any death qualification of the jury in this case and in fact mandate life qualification. In this scenario, those jurors who would be excludable under the *Witherspoon* and *Witt* rulings would be eligible to sit on the jury to ensure a fair cross-section of venire and eliminate the biases inherent, at both the merits phase and the sentencing, in juries that exclude this population. Additionally, those jurors who would automatically vote for the death penalty would be removed for cause as mandatory death sentences are *per se* unconstitutional. *See Morgan v. Illinois*, 504 U.S. 719 (1992); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

b. Empanel two juries, should a penalty phase become necessary. In this scenario, the Court would first empanel a non-death qualified jury to hear the trial on the merits and deliberate and render a verdict. Should this jury convict her on a death-eligible charge, a second jury panel would then be chosen to hear and render a verdict in the penalty phase.[8] This would eliminate the merits phase biases inherent in death

[8] At least three different federal district courts have granted requests to bifurcate capital juries in this way. *See United States v. Young*, 424 F.3d 499, 501 (6th Cir. 2005); *United States v.*

qualified juries and ensure a fair and impartial verdict on the merits of the charges as well as any affirmative defense and mental condition defense she is considering raising. It would also avoid the unconstitutional infirmities discussed above that stem from the same merits phase jury also rendering a verdict in the penalty phase. The process to empanel the merits phase jury could occur as follows:

i. The Court should prevent questioning during voir dire for the trial on the merits as to how a prospective juror would vote at a possible penalty phase or any similar inquiry into death penalty views.

ii. In the event the Court believes that some death qualification must be allowed to identify those jurors who could not be fair and impartial on the issue of guilt or innocence due to death penalty attitudes, questioning should be done individually and sequestered.

iii. The Court should not allow jurors to be excused at the trial on the charge solely because they would be unwilling or impaired in considering voting for death at a possible penalty phase.

The process to empanel the penalty phase jury should one become necessary could also occur in several ways:

iv. The Court should life qualify and not death qualify this panel as described in paragraph a above; or

v. In the event the court believes that life qualification is unconstitutional, the Court can impose death qualification with regards to this panel.

c. Empanel two juries at the outset of the case. One jury would be non-death qualified and the second jury would be death-qualified. While both juries would hear the merits phase of the case, only the non-death qualified jury would render a verdict at that stage. Should that non-death qualified jury convict her on any death-eligible charge, the second, death-qualified jury, having heard the evidence in the merits phase, would go on to hear and render a verdict in the penalty phase. Although it would not fully ameliorate the issues inherent in death qualification described above, this scenario would at least ensure a fair and impartial verdict in the merits phase under both the United States and Idaho Constitutions.

Green, 407 F.3d 434, 436 (1st Cir. 2005); *United States v. Williams*, 400 F.3d 277, 279-80 (5th Cir. 2005). Although the federal circuit courts ultimately struck down these district courts' orders they did so on the basis that bifurcation was inconsistent with the Federal Death Penalty Act, which does not apply here.

Defendant files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Idaho Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article I, sections 1, 6, 7 and 13 of the Idaho Constitution.

Dated: September 26, 2022 /s/______________________
R. James Archibald, Esq.

Dated: September 26, 2022 /s/______________________
John Thomas, Esq.

Certificate of Service

I hereby certify I served a true and correct copy of this document as follows:

Lindsey A. Blake, Esq. Efile and serve

Robert H. Wood, Esq. Efile and serve

Dated: September 26, 2022 /s/______________________
R. James Archibald, Esq.