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Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification

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Mandatory Voir Dire Questions in Capital Cases: A Potential Solution to the Biases of Death Qualification

"Given the important, delicate, and complex nature of the death qualification process, there can be no substitute for thorough and searching inquiry...."1

I. INTRODUCTION

The above quotation emphasizes the importance of voir dire in a capital case. Because of the gravity of the death penalty as an available punishment, courts should do everything possible to ensure capital voir dire results in a fair, impartial jury that is able to follow the rule of law. Unfortunately, it seems this result fails to occur under the current form of death qualification.

Voir dire differs in capital cases as compared with other trials in that jurors must be "death qualified" to serve in a capital case. While "death qualified" has meant different things to different courts, the term is most commonly used to describe a venire person able to follow both the juror’s oath and the law, despite whatever personal feelings that individual may harbor either for or against the death penalty.2 In contrast, death qualification "excludables," or "non-death qualifiers," are those eliminated from a capital jury because they cannot follow the law and the juror oath. While this may seem like a reasonable manner to empanel a fair jury, empiricists have found that death qualification results in unfair juries with many pro-prosecution biases.3

Many social scientists believe there are a number of flaws in-

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3. See discussion infra Part II.
herent in the current process of death qualification. Studies have shown that death qualified jurors are more likely to convict a defendant than non-death qualifiers. Additionally, studies have demonstrated that individuals eligible to sit on capital juries are more likely to have other attitudes related to their death penalty beliefs that effect their interpretation of the case in favor of the prosecution, despite their ability to follow the juror oath and the rule of law.

For instance, because ideas do not occur in a vacuum, those who qualify as capital jurors are more likely to be classified as legal authoritarians, and thus may believe in a crime control model of criminal justice. Crime control theorists are predisposed to believe the prosecution's version of events and witnesses, and are more likely to think a defendant is guilty before any evidence is heard in the case. These attitudes, thought to be held by many death qualified jurors, undermine the notion of a presumption of

4. As a cautionary note, it appears that after thorough examination of the empirical studies, social scientists tend to base their research on a definition of death qualification that focuses on those who can serve on a capital jury because their moral beliefs will not interfere with their ability to be impartial. See discussion infra Part II. This definition, however, fails to take into account those individuals not morally opposed to the death penalty, but rather will not enforce it because of their lack of faith in the ability of the justice system to be conclusive enough to warrant imposition of death. Those individuals are not death qualified because they would not be able to follow the juror instructions requiring consideration of death as an available punishment. It would be interesting to ascertain whether those jurors would have the same tendencies as those who are not death qualified for moral reasons.


6. See id. at 97.

7. See id. ("[A]ttitudes toward the death penalty do not exist in isolation but are associated with a cluster of other attitudes and beliefs about criminal justice.").


11. See Fitzgerald & Ellsworth, supra note 9, at 48.
innocence. Furthermore, death qualification has the adverse effects of frequently excluding minorities and women,\textsuperscript{12} and fostering a jury with a homogenous attitude toward the legal system, resulting in poorer jury deliberation and a jury stacked against the defendant.\textsuperscript{13}

Despite the abundance of research indicating these flaws, courts have refused to lend much positive credence to those findings.\textsuperscript{14} The research in this area has been developing for several decades, but the United States Supreme Court continues to hold it inconclusive and unsubstantial.\textsuperscript{15} However, even though the Court has been reluctant to rely on the empirical data, it has been forced to revise the death qualification process on several occasions, indicating that there are flaws inherent in the current process.\textsuperscript{16} This Comment proposes that courts should take a further step to revise death qualification by requiring judges in capital cases to ask a minimum mandatory set of voir dire questions aimed at eliciting death qualified jurors who are not burdened with the prosecution biases many current death qualifiers may possess.

"The essential function of voir dire is to enable counsel to gather information sufficient to make well informed decisions about jurors whose biases may interfere with a fair consideration of the evidence."\textsuperscript{17} The problem with death qualification in its present state is that, while it seeks to find jurors who can follow the law, many of those jurors may still have attitudes that make them more conviction prone. If voir dire questions can be utilized to identify jurors who would both follow the law and be impartial, then the process as a whole would become fairer for defendants and would help the court maintain an image of impartiality. Because the Court has already regulated voir dire in a variety of

\begin{itemize}
\item \textsuperscript{12}See \textit{id.} at 46-47 (including a table comparing death qualification results based on major demographic characteristics).
\item \textsuperscript{13}Cowan et al., \textit{supra} note 10, at 55.
\item \textsuperscript{14}See discussion \textit{infra} Part III.B.
\item \textsuperscript{15}See discussion \textit{infra} Part III.
\item \textsuperscript{16}See discussion \textit{infra} Part III.
\end{itemize}
This Comment’s thesis does not suggest a radical departure from Supreme Court jurisprudence. Instead, it proposes one of the few practical solutions to the complex problem of how to impanel a jury in a capital case able to impartially hear a trial.

Part II of this Comment will explore the empirical research in this area and discuss the biases inherent in the current death qualification process. Part III will examine the reasons the Supreme Court has given for rejecting the empirical research and its justifications for allowing death qualification in its current state. The Comment will conclude in Part IV with a proposal that judges be required to ask specific questions during voir dire to ascertain which jurors have less death qualified biases, thereby ensuring a fairer legal process.

II. THE EMPIRICAL RESEARCH ON DEATH QUALIFICATION BIASES

A. Jurors Retained Through the Process of Death Qualification

As the court opinions discussed below indicate, many legal experts do not believe death qualification results in a jury with biases significant enough to render the current method of jury selection unconstitutional. Several social scientists, however, hold contrary opinions and have attempted to demonstrate that death qualifiers as a group have biases that deny the defendant in a capital case his right to a fair and impartial jury. Many of these studies, however, have been examined and rejected by the courts. Nevertheless, it is important to understand what the attitudes and biases are that researchers allege death qualifiers have. It is also important to understand what characteristics and attitudes are consistently being eliminated from capital juries through death qualification. For if the empirical research on death qualification is correct, then the process may not be as impartial as the courts would like society to believe. More importantly, these attitudes must be understood to develop an appropriate solution to eradicate the alleged flaws in the process.

18. See discussion infra Part IV.
19. See discussion infra Part III.
1. Are Death Qualified Jurors More Likely to be Conviction Prone?

One of the most crucial potential problems of death qualification is conviction proneness. In 1971, George Jurow was the first to accept the Witherspoon Court's implicit invitation for further research in the area. Through his research, Jurow began to elaborate on the ideas of conviction proneness first put forth by Wilson, and later developed by Zeisel, both studies rejected in Witherspoon. Jurow noted the predominance of those in favor of the death penalty as being more likely to convict. The problem with this study, however, is even if the data is accurate, its practical implications are arguably limited. Some researchers attempt to use the theory of conviction proneness as a means of demonstrating that the defendant in a capital case is going into trial


22. The subjects in Jurow's study were divided into groups based upon how they responded, on a five-point scale, on when they could or could not administer the death penalty. Cowan et al., supra note 10, at 57-58. In one portion of the study, his data indicated that 44.7% of death qualified subjects voted to convict, as opposed to only 33.3% of the excludables. Id.

23. Id. at 56. Wilson found that individuals with objections to the death penalty were less likely to convict a defendant in the guilt phase of a trial when compared with those jurors who had no scruples against the death penalty. Id. Wilson separated college students into two groups based upon their responses to whether or not they had "conscientious scruples" against the death penalty. Id. Students were given cases to read and provided what their vote would be had they been on the jury. Id. Mock jurors with no scruples against capital punishment were more likely to convict the defendant. Id. While this "conscientious scruples" test is no longer the death qualification standard, this study may serve as an indication that death penalty attitudes are tied to conviction proneness. See Wainwright v. Witt, 469 U.S. 412, 424 (1985) (holding that the standard is whether a prospective juror's views on capital punishment would "prevent or substantially impair" his or her ability to follow juror instructions in accordance with his or her oath).

24. Cowan et al., supra note 10, at 57. Zeisel interviewed jurors who had previously sat on actual felony juries. Id. He asked them three questions: what the whole jury voted on the first ballot, what their individual vote was, and if they had any scruples against the death penalty. Id. Like Wilson, Zeisel found that jurors who favored the death penalty were more likely to convict the defendant. Id.


with a jury stacked against him. If Jurow's data is an accurate representation of human attitudes, however, less than half the death qualifiers elected to convict the defendant. While death qualified jurors do convict more than death excludables according to the research, Jurow's data indicates that it is not at an extraordinarily higher rate, and therefore may not be as large of a problem as researchers claim.

As time has passed, however, more reliable methods of evaluating death qualified jurors have developed offering potentially greater accuracy in demonstrating the presence of conviction proneness. One such study was conducted by William C. Thompson's research group, which established the conviction proneness of death qualified jurors through the administration of a "Regret Scale." The researchers concluded that death qualifiers are conviction prone because they are more likely to feel worse about letting a guilty man go free than about wrongfully convicting an

27. See, e.g., Cowan et al., supra note 10, at 53; Fitzgerald & Ellsworth, supra note 9, at 31.
28. See supra note 22.
29. Jurow's second case study, however, resulted in 60% of death qualifiers and only 42.9% of death excludables voting to convict. Cowan et al., supra note 10, at 58. This demonstrates a larger difference – almost 20% – in conviction proneness between the two groups, indicating that death qualifiers may in fact find the defendant guilty more frequently.
30. See, e.g., Irwin A. Horowitz & David G. Seguin, The Effects of Bifurcation and Death Qualification on Assignment of Penalty in Capital Crimes, 16 J. APPLIED SOC. PSYCHOL. 165, 165, 180-81 (1986). Horowitz and Seguin's research also found that death qualified jurors are more likely to convict. In that study, participants were divided into different mock juries and classified as either death qualified or non-death qualified. Id. at 172-73. The groups then heard either the guilt or sentencing phase of the trial. Id. The research indicated that the death qualified jury that heard both the guilt and sentencing phases of the trial gave the most severe verdicts. Id. at 180-81.

Interestingly enough, this is the procedure used in almost all capital trials. See, e.g., Buchanan v. Kentucky, 483 U.S. 402, 427 (justifying the use of having one jury decide both stages of the trial – guilt and penalty – because a single jury process avoids repetitive proceedings and ensures the defendant the benefit of any residual doubt jurors may feel regarding guilt at sentencing). Therefore, those who will be the harshest toward capital defendants are the ones trying capital defendants. What is even more fascinating about this study is, while it showed that death qualifiers are more conviction prone, the non-death qualified jurors still convicted the defendant eight out of eleven times. See Horowitz & Sequin, supra, at 176. This may indicate that the fear that many courts may have that non-death qualifiers would not convict at all is simply untrue.
31. Thompson et al., supra note 5, at 106.
innocent man. While the death qualifiers acknowledged that there are times when innocent people are wrongly convicted, they felt that this was a necessary flaw in the process of reducing crime and controlling the behavior of actual criminals. Therefore, the researchers concluded that death qualifiers convict more frequently and require less certainty of guilt because such persons feel it is important to control crime, and they do not feel guilty if they wrongly sentence a man to die, so long as the conviction was the result of a process which aims to make society safer from real law-breakers.

A problematic consequence of conviction proneness occurs when the death penalty is sought in cases where the death penalty would not be an appropriate punishment. Unlike judicial officers, prosecutors who routinely deal in capital cases may fully subscribe to the empirical data indicating the conviction proneness of capital juries and make practical use of this proclivity. For instance, some prosecutors may elect to use this information in an unethical fashion, by requesting the death penalty specifically to get the benefits of a death qualification process resulting in conviction prone juries. This may be done by prosecutors to increase the chances of success at trial, even when the death penalty may not be appropriate in the particular case. Even the most hardened supporters of the death penalty should view this as an abuse of the process, for the death penalty should not be sought simply as a way to in-

32. See id. at 107.
33. See id. at 107-08.
34. Id. at 108.
35. This unethical prosecutorial practice has been addressed by both commentators and judges. See, e.g., Lockhart v. McCree, 476 U.S. 162, 185, 188 n.4 (1986) (Marshall, J., dissenting) (criticizing the majority for failing to address the possibility that the State will request the death penalty in particular cases solely to obtain a death qualified jury); Samuel R. Gross, Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data, 8 LAW & HUM. BEHAV. 7, 13 (1984).
36. See Lockhart, 476 U.S. at 185 (stating that permitting such conduct by the prosecutor causes the State to have a "special advantage in those prosecutions where the charges are the most serious and the possible punishments, the most severe"); see also Gross, supra note 35, at 13.
37. There are formal guidelines and procedures a prosecutor must abide by before a court will allow the death penalty to become available. See, e.g., 18 U.S.C. § 3593 (2000). It appears to be relatively simple, however, for a prosecutor to satisfy the statutory requirements, thereby making the desired goal of obtaining a death qualified jury relatively easy to achieve. See id.
crease the chances of conviction.

2. Are Death Qualified Jurors More Likely To Favor Crime Control over Due Process Rights?

Empiricists have unearthed many other biases, in addition to conviction proneness, that death qualified jurors may have against a defendant in capital cases. While the death qualification process attempts to account for personal attitudes about the death penalty, it fails to appreciate that attitudes do not occur in isolation.\(^\text{38}\) Thus, researchers believe other biases are linked to death penalty attitudes that are not eliminated through current death qualification requirements, and that these attitudes result in a jury that favors the prosecution.\(^\text{39}\)

Researchers categorize individuals as having one of two types of beliefs regarding the criminal justice system: the crime control approach or the due process approach.\(^\text{40}\) Those who believe in the crime control ideology believe it is important to capture criminals quickly and efficiently.\(^\text{41}\) They also generally believe that police are capable of performing their jobs effectively, and therefore, that most defendants who make it to trial are probably guilty because the police most likely caught the right man.\(^\text{42}\) On the other hand, those who have a due process mindset are more concerned with the rights of individuals and are suspicious of state power.\(^\text{43}\) Unlike the crime control method, those who adopt a due process approach have a strong belief in the presumption of innocence.\(^\text{44}\) These distinctions are important because numerous studies indicate that death qualifiers are more likely to favor a crime control approach.\(^\text{45}\)

38. See Cowan et al., supra note 10, at 60.
39. Id.
40. Fitzgerald & Ellsworth, supra note 9, at 33-34.
41. Id. at 34.
42. Id.
43. Id. at 33.
44. Id.
45. See id. at 46-48. The authors noted the following regarding their study:

[T]he results of our study are in line with previous research indicating that a person's attitude toward capital punishment is an important indicator of a whole cluster of attitudes about crime control and due process. Compared to the death qualified jurors, the members of the excluded group are more concerned with the maintenance of the
The categorization of veniremen into either a crime control or due process approach represents a variety of ideas that individuals in each category may hold. Thompson's research group, in concluding that death qualifiers were more likely to favor crime control ideology, discussed how this would have a biasing effect on the defendant. For example, because of their crime control beliefs, death qualifiers may go into a trial presuming the guilt of a defendant, and ambiguous evidence at trial will generally be interpreted against a defendant. For instance, if there are missing details in a scenario of events, death qualifiers are more likely to fill those gaps with information tending to confirm their belief that the defendant committed the crime, and are more likely to mentally visualize the defendant committing the criminal acts. Similarly, death qualifiers with a crime control attitude are more readily willing to accept the prosecutor's version of the facts of the case while remaining distrustful of defense witnesses. Thus, these death qualified jurors would not likely give a defendant the benefit of a reasonable doubt because they would be likely to interpret the evidence against him and have trouble believing his witnesses. This leads to the aforementioned problem of conviction proneness, as well as a deprivation of a defendant's presumption of innocence.

Another anti-defendant bias that has been found to be a feature of death qualified juries is an increased belief in a defendant's culpability. In one study on this phenomenon, Jane Goodman-Delahunty's research group concluded that death qualified jurors

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fundamental due process guarantees of the Constitution, less punitive, and less mistrustful of the defense.

46. See id. at 33.
47. Thompson et al., supra note 5, at 103-05.
48. See id. at 104-05.
49. Id. at 105 (“People construe ambiguities and ‘fill-in’ missing details in accordance with their conception of how the scenario typically develops.”).
50. See id.; see also Cowan et al., supra note 10, at 69. The Cowan research group found that “death-qualified jurors were more impressed with prosecution witnesses,” and found the prosecutor more believable in comparison to death excludables' perceptions. Id. However, “[d]eath-qualified and death excludable jurors did not differ in their perceptions of the likability [sic], competence, or believability of the defense attorney.” Id. The question remains, however, that if death excludables were allowed on capital juries, would this not create a pro-defendant bias?
differ from death excludables in their interpretation of the criminal mens rea. When participants of their study were shown a videotaped criminal act, the death qualifiers were more likely to believe that the crime was committed intentionally. In contrast, death excludables were less likely to believe that the criminal's actions were intentional. The Goodman-Delahunty study concluded by making four general conclusions about death qualifier attitudes in general. The researchers found that jurors who were death qualified were more likely to infer from the evidence: "(1) that the defendant intended to murder the victim, (2) that his specific actions indicated premeditation, (3) that the defendant's substance abuse did not mitigate his actions, and (4) that the defendant would be a future threat to society."

These conclusions demonstrate the harshness of the conditions a defendant possibly must face in a capital trial. For instance, while a jury is supposed to take into account mitigating factors when determining guilt and an appropriate sentence, the Goodman-Delahunty study found that death qualified jurors are less likely to do this. Furthermore, because death qualifiers are more likely to believe a defendant intended his crime and would be a future threat to society, punishment will likely be harsher than what death excludables might determine to be an appropriate.


52. Id. at 269. The subjects in this study were shown a security tape of a man killing a convenience store clerk. The actus reus — the fact that this man committed the murder — was not in dispute; rather, the subjects were asked to determine his criminal intent from the evidence, and thus decide on the appropriate charge of first degree murder, second degree murder, or manslaughter. The charge would in turn determine whether the defendant would be eligible for the death penalty, which could be invoked only if the defendant was convicted of first degree murder. Id. at 262.

53. Id. at 265. The effect of this difference is obvious and quite problematic for the defendant. Presumably, if death qualifiers are more convinced that criminal acts are done intentionally, the result will be harsher punishments for the defendant. For example, death qualifiers will more likely find a defendant guilty of first degree murder than second degree murder or manslaughter. See id. at 269. It follows that in many instances, the effect of such biases could mean the difference between life and death for the defendant.

54. Id.

55. Id.

56. See id.
ate sentence. These conclusions are especially troubling when one considers that death qualified juries, the ones that were found to give the harshest punishments, are only used in those cases where the harshest punishment of all – the death penalty – is available.

This is only a brief list of some anti-defendant biases researchers have found a majority of death qualifiers possess. These attitudes are linked to death penalty beliefs; therefore, those who are not against the death penalty have been found to hold these additional ideologies. However, in addition to creating a jury with many pro-prosecution beliefs, the death qualification process also eliminates a number of characteristics that would counter-balance these biases.

B. Juror Characteristics Excluded Through Death Qualification

While death qualification may result in a jury whose members hold pro-prosecution attitudes, the process has the added negative effects of consistently eliminating certain individuals with attitudes and characteristics less biased toward conviction. In other words, diversity that could ensure procedural fairness is reduced. For instance, studies indicate that death qualification eliminates a

57. See Horowitz & Sequin, supra note 30, at 180.
58. One other final pro-prosecution attitude entangled with crime control thinking is legal authoritarianism. Legal authoritarians are similar to classical authoritarians in that they look to society's rules and laws for discipline and stability. This need for stability reflects their deep distrust of human beings in general. Narby et al., supra note 8, at 34. Legal authoritarians are those who are more likely than others to disregard the civil liberties and the rights of an accused. Id. at 35. This may include a disregard of "the presumption of innocence, the exclusive burden of proof borne by the prosecution, and various [other] constitutional procedural safeguards." Id. These attitudes, prevalent among death qualifiers bias the jury against a defendant because a defendant is being denied his entitlement to certain rights and presumptions. It would appear that the death qualification criteria would eliminate such legal authoritarians from the jury because the process supposedly eliminates those who cannot follow the law and their juror oath. See Wainwright v. Witt, 469 U.S. 412, 424 (1985). The problem, however, is that legal authoritarians are not eliminated under that standard; because they feel they are following a more important law, one they feel helps to ensure the convictions of defendants that they distrust and feel deserve punishment, the death qualification process overlooks them. See Narby et al., supra note 8, at 34.
59. See, e.g., Cowan et al., supra note 10, at 69.
large portion of women and minorities. Fitzgerald and Ellsworth examined this problem and concluded that death qualification eliminates a very sizable number of these demographic groups from service. This lack of diversity may presumably be harmful to a defendant, particularly if a defendant is a woman or minority.

Researchers may have optimistically hoped that because of their findings of inherent bias in the current death qualification process, courts might once again reconsider the validity of death qualification. Women and minorities have been held to be cognizable groups that cannot be eliminated from a jury simply because they are members of those classes. If it is true that death qualification frequently results in such removal, the courts might be more willing to once again redefine the death qualification process so that it no longer yields an unconstitutional result.

Death qualification also reduces diversity of ideas and perceptions causing juror deliberation to suffer. Due to this homogeneity of attitudes concerning the criminal justice system that death qualified juries have been found to possess, most death qualified jurors are likely to view a trial similarly and interpret evidence and witness credibility in a like manner. Therefore, deliberations will likely be shorter and there will be less discussion of the trial.

On the other hand, in studies of mixed juries composed of both death and non-death qualified jurors, there was a higher quality of deliberations. Because the jurors had dissimilar attitudes on criminal justice ideals, the trial was interpreted differently among the individual jurors. Consequently, there was more discussion about the evidence and facts, and more points of the

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60. E.g., id. at 67.
61. See Fitzgerald & Ellsworth, supra note 9, at 46. Their research indicated that 21% of all women jurors and 25.5% of all black jurors are eliminated from serving on capital juries due to the death qualification process. Id.
63. See Cowan et al., supra note 10, at 75-76.
64. See id.
65. See id. at 60 (“[The jurors] need only be different. In losing a different viewpoint the jury loses some of its capacity for controversy and self-criticism.”).
trial were raised during the deliberations. The lack of quality deliberation that results from death qualification is important because the ever-lofty ideal purpose of a trial is to “find the truth.” The only way to accomplish this is to look at the situation from a variety of perspectives, and this simply cannot happen after death qualification virtually wipes out dissimilar perceptions from the jury.

III. JUDICIAL REVIEW OF DEATH QUALIFICATION

Due to its controversial nature, the legality and fairness of death qualification has come before the courts on numerous occasions. Throughout the years, the United States Supreme Court has held the death qualification process constitutionally sound. However, this far from proves the process is the fairest procedure to obtain a capital jury.

A. Development of the Death Qualification Standard – Changes in Definition

The first major Supreme Court case that truly addressed the relationship between death qualified juror attitudes and their function in the legal system was Witherspoon v. Illinois. An Illinois jury had sentenced Witherspoon to death after the prosecution eliminated nearly half of the venire group on challenges. The trial court allowed the prosecution to go so far as to eliminate anyone who said they were opposed to the death penalty, or “expressed qualms about capital punishment.” Witherspoon attacked the use of challenges on those jurors and claimed that such

66. See id. at 76.
69. Id. at 513. Illinois, at the time, was operating under a state law that authorized challenges for cause on any venireman who, “on being examined, state[s] that he has conscientious scruples against capital punishment, or that he is opposed to the same.” Id. at 512 (quoting 725 ILL. COMP. STAT. ANN. 5/115-4 (West 2000)). The current version of this statute omits the original language completely and indicates instead that “[e]ach party may challenge jurors for cause.” Id.
70. Id. at 513. At one point during voir dire, the trial judge even specifically stated: “Let’s get these conscientious objectors out of the way, without wasting any time on them.” Id. at 514.
a procedure was a violation of his Sixth and Fourteenth Amendment rights to due process and to adjudication by a jury of his peers.\textsuperscript{71} Partially agreeing, the Supreme Court held the Illinois statute improper in its current form.\textsuperscript{72} The Court went on to establish guidelines that should be used to determine whether a potential juror could be properly excluded from a capital jury. The "Witherspoon Standard" wasannunciated as follows: In a capital case, veniremen could be excluded for cause if they:

made [it] 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 towards the death penalty would prevent them from making an impartial decision as to the defendant's guilt.\textsuperscript{73}

In establishing this standard, the Court made several key findings regarding death penalty juror attitudes. Most notably, by excluding those who would automatically vote against the death penalty, the Court demonstrated its belief that just because an individual has conscientious or religious scruples against the death penalty does not necessarily mean that such an individual would be unable to convict a capital defendant and inflict the death penalty in the "proper case."\textsuperscript{74} This belief epitomizes the Court's rejection of the psychological evidence presented by the defendant tending to show such a jury would indeed be biased against him.\textsuperscript{75} While the Court did not rely on any empirical research of its own in making this decision, it rather quite generally stated "[i]t has not been shown that this jury was biased with respect to the petitioner's guilt."\textsuperscript{76}

Another important conclusion in Witherspoon was that the

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\item \textsuperscript{71} See id. at 518; see also U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State . . . .") (emphasis added); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").
\item \textsuperscript{72} See Witherspoon, 391 U.S. at 522.
\item \textsuperscript{73} Id. at 522 n.21.
\item \textsuperscript{74} Id. at 515-16 n.9.
\item \textsuperscript{75} Id. at 517-18.
\item \textsuperscript{76} Id. at 518.
\end{itemize}
Court specifically stated its decision in the case only rendered the sentence of Witherspoon invalid, but not his conviction. This illustrates the Court’s continued belief that death penalty attitudes held by jurors do not have an inherent effect on a juror’s ability to determine guilt or innocence. On the other hand, by establishing the standard as it did, the Court did seem to acknowledge that death penalty attitudes could in some circumstances effect a juror’s ability to determine guilt. This conclusion follows from the specific language used by the Court, when it stated that veniremen may be excluded for cause when they made it “unmistakably clear . . . that their attitude towards the death penalty would prevent them from making an impartial decision as to the defendant’s guilt.”

By making such jurors excludable, the Witherspoon Court clearly demonstrated its conviction that certain individual beliefs are so strong they cannot be set aside. However, the standard is arguably flawed in that it will only exclude those who make it unmistakably clear that their death penalty beliefs will affect their ability to determine guilt. This fails to account for the view held by many researchers that death penalty attitudes subconsciously effect an individual’s ability to determine guilt. Simply exploring death penalty beliefs during voir dire should not be enough to death qualify a juror because other attitudes, ignored by the current death qualification, could negatively effect that person’s impartiality.

Courts have continuously altered the Witherspoon criteria and have applied changing standards to expanded situations. The strongest attack on the Witherspoon criteria came in Wainwright

77. Id. at 522 n.21.
78. See id.
79. Id. By adding this prong to the test, the Court appeared to recognize that death penalty attitudes effect not only the penalty phase of the trial, but also the juror’s ability to impartially determine guilt or innocence.
80. See, e.g., Cowan et al., supra note 10 (reviewing empirical studies conducted by a number of researchers). For example, a juror could qualify under the Witherspoon standard if he stated that while he may have reservations against the death penalty, it would not affect his determination of guilt. That person’s view on the death penalty, however, may be linked to other attitudes and biases that would subconsciously affect his or her vote on whether to convict or acquit the defendant. See discussion supra Part II.
v. Witt. In that case, the Court seemed frustrated with the high burden of proof required by the Witherspoon standard which required a showing that an individual would never vote for the death penalty. Furthermore, that standard did not focus on when veniremen could be excluded from capital cases, but rather only on when they could not be excluded. To remedy this problem, the Wainwright Court established the following standard: "A prospective juror may be excluded for cause because of his or her views on capital punishment... [when] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and his oath.'

Unlike the Witherspoon criteria, Wainwright did not focus on death penalty attitudes in particular. Rather, it centered on the idea that as long as a juror is able to follow instructions under the law, then that juror should be allowed to serve. As a result, the Court made it easier for prosecutors to exclude more jurors because of their feelings about capital punishment.

The Witherspoon standard required exhibiting unmistakably clear bias that a potential juror would automatically vote against the death penalty. After Wainwright, however, this high burden of proof is not required. Therefore, veniremen who may only have scruples against the death penalty but would not automatically vote against it could arguably be excluded from service if such beliefs could interfere with their role as jurors. This may allow prosecutors to eliminate more individuals who have fewer biases against a defendant than those who are completely in favor of the death penalty.

82. See id. at 421-22. Additionally, while the Witherspoon standard had been in use for a number of years, the Court pointed out that the standard was contained in a footnote of the Witherspoon opinion and interpreted it as mere dicta. Id. at 422.
83. See id. at 421-22.
84. Id. at 424 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).
85. See id.
86. Craig Haney et al., "Modern" Death Qualification: New Data on Its Biasing Effects, 18 Law & Hum. Behav. 619, 624 (1994) ("As expected, application of the Witt standard did increase the size of the groups of persons who were excludable on the basis of their death penalty opposition.").
B. Judicial Rejection of Empirical Data on Death Qualification Biases

1. Despite Alleged Biases, the Death Qualification Process is Constitutional

Many courts justify the process of death qualification on legal grounds, overlooking any empirical research indicating the biases inherent in the process, and dismissing those problems as insufficient to hold the procedure an unconstitutional violation of a defendant's rights. For example, in Buchanan v. Kentucky, the Court held that a death qualified jury was not extraordinarily conviction prone, and therefore, could decide the fate of a man not subject to capital punishment. More importantly, the Court rationalized the constitutionality of death qualification by holding that it does not violate a defendant's right to a jury selected from a representative cross-section of the community. Despite any attitudes that death excludables may share, they were held not to constitute a distinctive group for fair cross-sectional purposes because their exclusion was not based on a cognizable trait such as


The Supreme Court in McCree and in Buchanan assumed the validity of the studies before it and still ruled that the death qualified jury was a valid and constitutional instrument of the courts. The Supreme Court was not willing to find in McCree and Buchanan that the prejudice associated with a death qualified jury was sufficient to mandate another system of selecting juries.

Id. (citations omitted).
90. Id. at 413, 420. The Court justified the process to such a degree that it was held to be constitutional to use a death qualified jury against a defendant who was not even having the death penalty sought against him. Id. at 419-20. The case involved two co-defendants, but the death penalty was only sought against one. Because the death penalty was sought, the death qualification process was used to obtain the jury. Id. at 407-08. This was a non-bifurcated trial, so a single jury heard and decided all of the evidence against both defendants. Id. The Court held that even though the death penalty was not sought against one defendant, the death qualification process did not create an impartial jury for him, and therefore, there was no violation of his Sixth Amendment rights. Id. at 419-20.
91. Id. at 415.
race or sex. On the contrary, death excludable jurors are only excluded for their inability to perform in accordance with the jury instructions.

Much of the reasoning in Buchanan was derived from a case decided one year earlier, Lockhart v. McCree. Lockhart's importance lies in its full examination of the empirical research on death qualification biases, and rejecting that the Constitution does not prohibit the death qualification process in capital cases. Like Witherspoon, Lockhart involved a defendant's allegation that a jury of death qualifiers violated his Sixth and Fourteenth Amendment rights and deprived him of his right to have "his guilt or innocence determined by an impartial jury selected from a representative cross section of the community." The Court rejected these claims and held that the death qualification process did not deny the defendant his constitutional protections.

The Lockhart Court made two crucial findings in rendering its decision. First, the Lockhart Court found that a death qualified jury was not unconstitutionally impartial because such a jury could have been selected even without the use of the death qualification process. Second, the Court held that death qualified jurors

93. See Buchanan, 483 U.S. at 416.
95. See id. at 167-73.
96. Id. at 173.
97. Id. at 167.
98. Id. at 184.
99. Id. at 178. The Court noted that even McCree, the defendant in Lockhart, admitted that the jurors in the case "could have ended up on his jury through the 'luck of the draw,' without in any way violating the constitutional guarantee of impartiality." Id. McCree argued that the process of death qualification itself biases some jurors to view the case in a certain way and was therefore unconstitutionally prejudicial against the defendant in a capital case. Id. However, the Court found this argument "illogical and hopelessly impractical" because if the same jurors could have been selected even without the death qualification process, there is no sense in the argument that there would be injustice if they happened to be selected through death qualification instead. Id.
MANDATORY VOIR DIRE QUESTIONS

were not excluded because they belonged to a cognizable group. Rather, death excludables were removed from jury service because of their inability to follow the law. Therefore, the death qualification process was held not to violate the Constitution, nor was it found to give even the appearance of unfairness, because it simply eliminated those who could not legally obey the rules required for jurors.

The Lockhart Court further found that even if it were to accept the defendant's cognizable group argument, non-death qualified jurors are not a cognizable group for fair cross-section purposes. The Court articulated that cognizable groups for fair-cross sectional analysis refer predominantly to race and gender, and not to groups based on shared attitudes. Non-death qualifiers may be excluded, even as a group, because unlike race or sex, attitudes can arguably be controlled. Therefore, groups defined solely based upon shared beliefs that make members of the group unable to serve as jurors in a particular case may properly be excluded from jury service “without contravening any of the basic objectives of the [constitutional] fair-cross-section requirement.”

What may be inferred from Lockhart is that even if all the empirical data is true – that death qualifiers do have common attitudes and biases that tend to favor

100. See id. at 175-76.
101. Id.
102. Id.
103. Id. at 177.
104. Id. at 176-77.
105. Id. at 176.
106. Id. at 177.
107. Id. at 176. The Court fortified its position and summarized its holding with the following statement:

[A] jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Id. at 184.
the prosecution – the data appears to do little to dissuade the Supreme Court Justices from allowing death qualifiers to sit on a capital case, so long as the jurors state they can follow their oath.

2. The United States Legal System Refuses to Rely on the Empirical Research

*Witherspoon* and *Lockhart* best demonstrate the Supreme Court's refusal to rely on empirical research on death qualification biases. One of the most remarkable aspects of *Witherspoon* was the Court's implicit request for further empirical data on the effects of death qualification.108 This request was made in response to the Court's review of several early empirical works regarding death qualification.109 At the time, the Court found that the research on the subject was too "tentative and fragmentary" to conclusively determine that death qualified jurors are inherently filled with pro-prosecution biases.110 The Court's consideration of the empirical data, however, must have created much optimism in the scientific world that future studies could influence the Court to acknowledge the problems inherent in death qualification. This optimism must have turned to disappointment when the legal system continued to reject the research.

*Witherspoon* was certainly not alone in its rejection of the empirical research.111 In fact, *Lockhart* paid more attention to the

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108. *See* Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968). The Court stated that "[i]n light of the presently available information, we are not prepared to announce a per se constitutional rule . . . ." *Id.* at 518 (first emphasis added). This statement may be interpreted as a suggestion by the Court that further empirical evidence may sway it in a different direction in the future. Namely, the statement may mean the Court could be convinced the death qualification process is unconstitutional if newer and more reliable studies supported such a conclusion.

109. *See id.* at 517 n.10. In *Witherspoon*, the Court explained that it examined and commented on the following studies: W.C. Wilson, Belief in Capital Punishment and Jury Performance (1964) (unpublished manuscript, on file with the University of Texas); F.J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (undated) (unpublished manuscript, on file with Morehouse College); H. Zeisel, Some Insights Into the Operation of Criminal Juries 42 (Nov. 1957) (confidential first draft, on file with the University of Chicago). *Id.*

110. *Id.* at 517.

empirical data on death qualification than any other case.\textsuperscript{112} Lockhart took an in-depth look at the research on death qualified jurors, but like its predecessors, did not trust the findings and held them inapplicable to its legal conclusion.\textsuperscript{113} In making this determination, the Lockhart Court implicitly refuted the findings of \textit{Grigsby v. Mabry},\textsuperscript{114} one of the few cases that relied on the empirical data to conclude that death qualification produces a jury more likely to convict.\textsuperscript{115}

The Court offered great detail as to why it rejected the empirical data. First, the conclusion reached in \textit{Grigsby} was held erroneous because it was based upon several of the same studies that were examined, and ultimately rejected, in \textit{Witherspoon}.\textsuperscript{116} Second, the Court rejected many of the newer studies used in \textit{Grigsby} because it felt that they lacked real world applicability.\textsuperscript{117} Third, many of the studies did not simulate actual jury deliberations, and the Court apparently believed this deviation could impact the results of the empiricists.\textsuperscript{118} Furthermore, none of the studies relied on in \textit{Grigsby} were able to predict what would occur if a death excludable juror was allowed on a capital jury.\textsuperscript{119} Because no positive effects of allowing death excludables to hear

\begin{footnotesize}
\begin{enumerate}
\item[113] Id. at 173.
\item[115] See Grigsby, 569 F. Supp. at 1323. This finding was later affirmed by the United States Court of Appeals for the Eighth Circuit. Grigsby, 758 F.2d at 242, 243. In Lockhart, the Supreme Court found the Grigsby analysis erroneous, because none of the studies available at the time of Grigsby convincingly demonstrated that death qualified jurors were conviction prone. See 476 U.S. at 171.
\item[116] See Lockhart, 476 U.S. at 171; see also Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968). The Lockhart Court reasoned that if the studies were "too tentative and fragmentary" at the time of Witherspoon in 1968, then there was no reason to regard the same studies as acceptable, reliable data at the time of Lockhart in 1985. Lockhart, 476 U.S. at 171 (quoting Witherspoon, 391 U.S. at 517).
\item[117] See id. For instance, several of the studies involved participants who were not actual jurors sworn under oath to apply the law to the facts of an actual case. \textit{Id.} Because the experiments did not involve a real capital defendant whose life hung in the balance, the Court had doubts about whether these studies accurately predicted the behavior of actual jurors. \textit{Id.}
\item[118] \textit{Id.}
\item[119] \textit{Id.} at 171-72.
\end{enumerate}
\end{footnotesize}
capital cases were demonstrated by the studies presented to the Court, the Court found no need to change the process, and held that death qualification was constitutional.\footnote{Id. at 173.}

One might argue the Supreme Court was not completely blind to the problems of death qualification but that the Court was only following a long-held tradition of apprehension toward death qualification studies in general.\footnote{See, e.g., id. at 171 (quoting Witherspoon, 391 U.S. at 517) ("[I]f these studies were 'too tentative and fragmentary' to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.").} One argument supporting the Court's refusal to rely on the research is that many social studies are irrelevant because they are based on general studies of large groups and do not focus on the specific individuals of the case. Thus concerns arise about how scientists can link the generalized information to the particular case.\footnote{Robert P. Mosteller, Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence, 52 Law & Contemp. Probs. 85, 100 (1989).} The Court arguably finds the death qualification studies inapplicable because the studies' findings are not necessarily descriptive of the potential jurors in the individual case at hand.\footnote{See, e.g., Lockhart, 476 U.S. at 171-172.}

A second argument is that the Court may exclude social science research because of its perceived similarity to character evidence.\footnote{See Mosteller, supra note 122, at 104 ("The traditional treatment of character evidence may have broad importance for the admissibility of social framework evidence.").} Courts may believe that the research describing human traits and dispositions is akin to character evidence, which is “exclud[able] in most situations because its probativity is considered as relatively slight and its potential for prejudice relatively great.”\footnote{Id. at 172.} A court treating death qualification research as character evidence may be less willing to apply it in a particular case.\footnote{Id.} Death qualification research is similar to character evidence in that it focuses on the traits, beliefs, and personalities of potential jurors and the connection of such traits to death penalty out-

\footnote{120. Id. at 173.}
\footnote{121. See, e.g., id. at 171 (quoting Witherspoon, 391 U.S. at 517) ("[I]f these studies were 'too tentative and fragmentary' to make out a claim of constitutional error in 1968, the same studies, unchanged but for having aged some 18 years, are still insufficient to make out such a claim in this case.").}
\footnote{122. See, e.g., Lockhart, 476 U.S. at 171-172.}
\footnote{123. See Mosteller, supra note 122, at 104 ("The traditional treatment of character evidence may have broad importance for the admissibility of social framework evidence.").}
\footnote{124. Id. at 172.}
\footnote{125. Id.}
\footnote{126. See id. ("One may argue that social framework evidence generally resembles character evidence and should be admissible according to rules similar to those governing character evidence.").}
comes:127 “Just as character may indicate a propensity for an individual to act in a certain way, social framework evidence about a relevant group provides guidance in predicting individual conduct.”128 These modes of analysis for Supreme Court rejection of social science research may be analogized to general judicial rejection of specific social research on death qualification for similar reasons.129

These arguments, however, can be readily refuted. For instance, the argument that many social studies are irrelevant because they are based on general studies of large groups and do not focus on the specific individuals of the case fails to take into account the obvious fact that a large study sample is needed to predict juror behavior in specific cases because the voir dire group in each particular case is likewise being drawn from the community at large.130

Furthermore, the argument that courts should treat death qualified research as character evidence may easily be rebutted with the fact that social science research is not intended to predict or explain the behavior of any party or witness to the trial, the purpose for which character evidence is often introduced.131 Instead, the purpose of social science research is to show that all humans have inherent beliefs tied to the death penalty that should be taken into account when evaluating capital jury selection criteria, and to provide an understanding that inherent flaws exist in the jury selection system that mandate changing the constitutional quid pro quo.132 Because social science evidence is not utilized the same way character evidence is utilized, it should not be treated similarly.

127. See id.; Jurow, supra note 21, at 576 (hypothesizing that conviction proneness is a function of the personal beliefs of specific jurors).
128. Mosteller, supra note 122, at 104.
129. See, e.g., Lockhart, 476 U.S. at 173 (rejecting empirical studies on death qualification and holding them insufficient to support a determination that the death qualification process is unconstitutional).
130. Rather than making the studies irrelevant, the generalization is necessary to give the studies credibility. A study involving only the jurors of one particular case would lack credibility and predict nothing about juror attitudes regarding future cases.
132. See Jurow, supra note 21, at 567-68.
Moreover, even if courts were to treat social science evidence the same as character evidence, social science evidence should still be admissible under a character evidence analysis. There are some purposes for which character evidence is allowed.¹³³ For example, one purpose for which character evidence is allowed is to attack the credibility of a witness with evidence of a reputation for untruthfulness.¹³⁴ Character evidence is often introduced in practice to show potential bias of a witness as well. Similarly, social science evidence should be admitted to attack a jury member's character with a claim that they are biased against the defendant due to the death qualification process.

Nonetheless, in Lockhart, the empirical data was still explicitly rejected.¹³⁵ However, the specificity of the rejection of the data in the Lockhart opinion can be seen as a small victory. The Lockhart Court clearly articulated what it thought the studies were lacking and in which areas it felt they were most weak. After Lockhart, perhaps researchers may now develop studies that attempt to eliminate the problems stated by the Court. With such development there might be the possibility for further reexamination of the death qualification process. There does remain the possibility, however, that courts simply do not want to believe the data because of the disruption it would cause the jury selection system. No matter what changes are performed in the subsequent research studies, it is possible the Court may continue to find some way to discredit the studies, or hold them insufficient to require a change in death qualification.

IV. MANDATING QUESTIONS AIMED AT ELIMINATING DEATH QUALIFICATION BIASES: A PRACTICAL SOLUTION

If the empirical research is accepted as true, and the repeatability of the findings indicates that it should, then it is obvious there are flaws in the death qualification process. While these problems are easily observable, a possible solution is not as recognizable.

One of the simplest solutions, one might argue, would be to eliminate death qualification altogether. However, in a nation

¹³³ See Fed. R. Evid. 404, 405, 608.
¹³⁴ Fed. R. Evid. 608.
¹³⁵ See Lockhart, 476 U.S. at 173.
where the death penalty is still an accepted form of punishment in some states, such a solution is unrealistic because it would eliminate any use of the death penalty as a form of punishment. If death qualification were removed, the death penalty would hardly ever be used, because non-death qualifiers, now eligible to serve on capital juries, could nullify the choice of the death penalty as a sentence. The dilemma is the proverbial double-edged sword: without death qualification, guilty defendants may not be convicted or sentenced to death; but if death qualification continues in its current form, conviction prone jurors will serve in capital cases, thereby impairing a defendant’s chances of an acquittal. The solution then lies not in a total removal of death qualification, but through a change in the form of voir dire questioning.

As a general proposition, the flaws in the death qualification process can be alleviated to a certain degree by mandating in capital cases a minimum level of specific voir dire questions aimed at eliciting jurors who are death qualified, yet have a reduced level of pro-prosecution biases. While the empirical studies suggest that death qualified jurors are conviction prone and have attitude biases against the defendant, it must be remembered that these are, for the most part, statistical studies. This means that while researchers' data indicates that death qualified jurors are more likely to have the pro-prosecution beliefs mentioned above, it does not follow that all death qualified jurors hold such opinions. Required questions should be asked, preferably by the neutral judge during voir dire, that are designed to extract from the venire group those jurors who are death qualified but do not hold pro-prosecution biased attitudes and who are not conviction prone.

A. A Change in the System is Justifiable

While a set of mandatory voir dire questions may seem like a radical change in the voir dire system, this change is appropriate and justifiable. First of all, it is not such a radical change beyond the bounds of the law. Numerous other aspects of the voir dire system are controlled by the courts under already-promulgated rules of law. One such aspect of voir dire that has historically been

controlled is the allowance for and limitation of preemptory challenges.\(^{137}\) Additionally, judges are often given the discretion to dictate what types of questions will be asked as well as the procedures used in questioning (i.e. questionnaires, one-on-one individual questioning, etc.).\(^{138}\) A number of statutes also prescribe different requirements for voir dire, several even specifically geared toward regulating voir dire in capital cases.\(^{139}\) Because due process apparently is already presumed to permit the courts and the legislature to be heavily involved in regulation of the voir dire process, requiring certain questions to be asked by judges during capital voir dire would not be an overstep of any legal bounds.

The *Wainwright* Court confirmed that voir dire should be regulated at least to an extent by announcing a standard by which prospective jurors may be excluded for cause.\(^{140}\) While the Supreme Court did not require specific questions during voir dire in *Wainwright*, it did set the standard as to what types of jurors were properly excludable.\(^{141}\) It follows that requiring particular voir dire questions that specifically bring to light how particular jurors fit into the *Wainwright* standard may also be a justifiable process.\(^{142}\)

Furthermore, a mandated set of questions is justified in that capital voir dire has been anything but a stable practice. The courts have continuously had to reevaluate the process of death qualification and change its mechanics and application. For instance, in *Davis v. Georgia*,\(^{143}\) the Court had to decide if there were grounds for reversible error if only one juror was improperly

\(137\). See Fed. R. Crim. P. 24(b).

\(138\). See, e.g., McCullah Memorandum, supra note 17.

\(139\). See, e.g., 18 U.S.C. § 3432 (1998) ("A person charged with . . . [a] capital offense shall . . . be furnished with a copy of the indictment and a list of the veniremen . . . stating the abode of each venireman . . ."). While not dealing specifically with the content of voir dire questions, this is an indication of statutory control and regulation of juror selection procedures.

\(140\). See *Wainwright* v. Witt, 469 U.S. 412, 424 (1984) ("That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

\(141\). Id.

\(142\). But see id. at 424-25 (stating that "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'").

\(143\). 429 U.S. 122 (1976).
excluded under the Witherspoon standard.\textsuperscript{144} The Court held that it was error.\textsuperscript{145} Further, in another indication that the judiciary should perhaps be involved with mandating specific death penalty voir dire questions, the Court in Morgan v. Illinois,\textsuperscript{146} while not mandating specific questions as proposed here, did determine that certain questions were not specific enough to effectively achieve the goal of death qualification.\textsuperscript{147} The issue in Morgan was whether "general fairness and 'follow the law' questions" were sufficient to satisfy the defendant's right to make inquiry regarding whether juror's were biased.\textsuperscript{148} The Court held that general inquiries into a prospective juror's ability to follow the law were not sufficient to effectively determine if that juror could in actuality follow the law.\textsuperscript{149} This implies that specific inquires are required by the Court to truly understand a venire person's ability to serve in accordance with the law. If such specificity is required in questioning, the Court should mandate those particular questions that it decides are specific enough to ensure death qualification's effectiveness.

One of the key justifications for mandating specific voir dire questions in capital cases is the importance for the court system to

\textsuperscript{144} Id. at 123.
\textsuperscript{145} Id. ("[I]f a venireman is improperly excluded even though not so committed [to voting against the death penalty regardless of the facts], any subsequently imposed death penalty cannot stand."). The issue in Davis was whether the death penalty should stand when a juror who qualified for exclusion under the Witherspoon standard because he would not automatically vote against the death penalty was excluded by the prosecution because he had some reservations about the form of punishment. Id. Because he was properly death qualified, it was held to be reversible error to exclude the juror. See id.

\textsuperscript{146} 504 U.S. 719 (1992).
\textsuperscript{147} Id. at 734-35.
\textsuperscript{148} Id. at 734.
\textsuperscript{149} Id. at 734-35 ("Witherspoon and its succeeding cases would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties in accordance with their instructions and oath."). The Court was concerned that when people are asked generally if they could follow the law in sentencing, prospective jurors might believe that they could be impartial without truly realizing the effects that their death penalty attitudes would have on their ability to follow the juror oath: "It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining dogmatic beliefs about the death penalty would prevent him or her from doing so." Id. at 735.
maintain an impression of fairness and impartiality to the public. Lockhart specifically stated that one of the purposes of having a fair cross-section requirement is to “preserv[e] ‘public confidence in the fairness of the criminal justice system.”’ \(^{150}\) Grounds for change exist if the public does not feel that a defendant is given a fair chance in a capital trial.\(^5{151}\) That being so, a court has a duty to improve its image in the eyes of citizens. Any lack of faith by the citizenry in the legal system’s fairness and impartiality may be argued to undermine the validity of any decisions made by a court.

Moreover, the impaneling of pro-prosecution jurors removes fundamental fairness by inhibiting the capital defendant’s right to a reasonable doubt. As empiricists show, such jurors are more likely to believe the defendant is guilty even before any evidence is presented;\(^{152}\) therefore, less is arguably needed for them to believe the defendant is guilty beyond a reasonable doubt. This in turn denies a defendant the fundamental fairness that was desired of our system when the reasonable doubt standard was established. Despite this possibility, as has been repeatedly held by the Court, the empirical data on death qualification is not considered sufficient to overturn the death qualification process on constitutional grounds.\(^{153}\) In other words, death qualification is constitutional and does not deny a capital defendant of his fundamental rights according to the Court. However, nothing in this proposal would require the Court to classify death qualification as unconstitutional. The suggestion is simply that the empirical data be held sufficient to warrant an alteration of the process from its current form. Death qualification would thus remain constitutional; yet, through further questioning to elicit pro-prosecution biases, society, and more importantly defendants, would be assured of the fairness of the system.

Coincidentally, it appears that courts might be on the verge of mandating specific questions based on the active role the law has taken in supervision of capital voir dire. For instance, numerous decisions have established rulings on certain questions in capital

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150. Lockhart, 476 U.S. at 174-75.
151. While the courts choose to not rely on the empirical studies indicating death qualification biases, there is no indication that the nation at large would not believe in the veracity of the research.
152. See discussion supra Part II.
153. See discussion supra Part III.B.
voir dire that were deemed either to be relevant or in error.\textsuperscript{154} In addition, legal analysts have consolidated lists of specific question suggestions based upon these court rulings in a number of forms.\textsuperscript{155} Moreover, it is a general principal that the trial judge has the discretion to decide which questions to allow and disallow and how the process of voir dire is to be conducted.\textsuperscript{156} Arguably, if courts are maintaining control over what questions should or should not be excluded from voir dire, they should also have the authority to require particular questions. Although mandate is a considerable leap from simple allowance of certain questions, it is the best way to ensure eradication of death qualification biases.

In the alternative to requiring specific voir dire inquiries, questions could be developed as a practitioner's guide.\textsuperscript{157} Judges could be piloted with a series of specific questions geared toward eliciting death qualification biases. There are, however, problems with such a system. First, if such questions are only to be suggestions, there is the strong possibility they will not be used in every case, or even a majority of cases. If this result ensues, the change will not purge the system of the biases and unfairness inherent in the current death qualification process. In addition, questions for

\begin{itemize}
\item \textsuperscript{154} See, e.g., \textit{Vernon's Oklahoma Forms 2d: Criminal Law Practice And Procedure} § 21.24 (2002) (informing that the Oklahoma Criminal Court of Appeals will review a juror's entire voir dire to determine if the trial court properly excluded that juror for cause and indicating that specific questions may be held to be error when they are worded insufficiently or unfairly).
\item \textsuperscript{155} See, e.g., id. § 21.25:
\begin{quote}
Relevant inquiries by counsel may include questions concerning the "three punishment options, their beliefs about the death penalty, their religious affiliation, their faith's position on the death penalty, whether they would consider mitigating evidence and whether they would follow the trial court's instructions." The meaning of a life sentence and a sentence of life without parole, however, have been held an improper subject for voir dire. In addition, a capital defendant is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias when accused of an interracial crime. As to any other "special circumstances" that may be relevant in the case, the trial judge retains discretion concerning the form and number of questions on the subject, including the decision whether to question the venire individually or collectively.
\end{quote}
\item \textsuperscript{156} \textit{Id.} § 21.25 (footnotes omitted).
\item \textsuperscript{157} \textit{Id.} § 21.25; see, e.g., Morgan v. Illinois, 504 U.S. 719, 734-35 (1992); Davis v. Georgia, 429 U.S. 122, 123 (1976).
\end{itemize}
a practitioners guide are difficult to formulate because many of the biases require a number of questions, rather than just one question per possible bias, to elicit the proper information. Thus, a collection of possible questions is not the desired solution. Rather, this Comment seeks to require judges to use questions they decide are detailed enough to elicit the aforementioned biases.

B. The Questions that Could Make Death Qualification More Effective

The proposed solution of requiring specific voir dire questions has the purpose of eliminating the biases that many empiricists believe are held by a majority of death qualifiers. As already articulated, not all death qualified jurors have these prosecution, crime control biases; therefore, it could be possible to achieve a death qualified jury who is not conviction prone. To accomplish this, perhaps it should be left to the researchers themselves to develop an empirical system where specific questions could be asked to find this small group of “ideal jurors” sought in a capital case. This would not be the first time the legal system has invited the scientific world to conduct research in this area. However, until the social scientists take up this calling, an abundance of the specific questions that may achieve this sought-after goal of an unbiased capital jury may be found simply by examining some of the already existing questions asked by judges and attorneys who have tried capital cases. Many questions currently exist that are valuable in eliciting the biases of death qualifiers. If some of these questions were to become mandatory in all capital cases, it would serve the purpose of establishing the appearance of an impartial system.

A problem empiricists found is that death qualifiers who are legal authoritarians are more likely to believe prosecutors and their witnesses. Instead of simply asking generally whether a juror could follow the law, the bias of legal authoritarianism could

158. See discussion supra Part II.
159. See Witherspoon v. Illinois, 391 U.S. 510, 517-18 (1968) (indicating that the data adduced and presented at the time was insufficient to hold that the death qualification process was unconstitutional). The Witherspoon opinion may suggest that further research regarding death qualification could be enough for the Court to invalidate the current process.
160. See Thompson et al., supra note 5, at 105; see also supra note 50.
be extracted by simple questions. For instance, a juror could be asked the following: "Would you judge the testimony of a law enforcement officer as you would that of any other witness, i.e., not give his or her testimony any more or less weight merely because he or she is a law enforcement officer?"\(^{161}\) This is by no means meant to imply that one simple question will be able to elicit the sought-after biases or lack thereof, because as the courts have recognized,\(^{162}\) jurors may not realize how their attitudes could actually affect their ability at trial.\(^ {163}\) Several related questions, however, if specific enough, should be helpful to determine how a juror would respond to different situations. For example, in a New York case, jurors were asked several specific questions related to authoritarianism attitudes:

What is your opinion, if any, about prosecutors in general? . . . What is your opinion, if any, about defense attorneys in general? . . . When testifying as a witness in a case, do you believe that police officers or FBI agents have more credibility, less credibility, or the same credibility as an ordinary citizen? . . . [and] Do you believe that if a police investigation results in an arrest, the suspect is: Guilty, Probably Guilty, [or] Probably Innocent?\(^ {164}\)

These types of questions would be useful in uncovering those potential jurors who have the same biases feared by the empiricists.

Several other juror biases may be determined from specific voir dire questions as well, including juror attitudes about crime and whether or not jurors possess the crime control biases that a majority of death qualifiers have been alleged to possess.\(^ {165}\) For example, several questions on this matter were used in United States v. Jones, including: "In your opinion, what are the three (3) most important problems with law and order today," and "[w]hat,

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164. Juror Questionnaire, supra note 161 at q.65-68.
165. See supra notes 40-54 and accompanying text.
in your opinion, should or could be done about the crime problem?" While in form these questions may appear general, they are open-ended enough to elicit a wide spectrum of information and perhaps richly detailed answers that may shed light upon the attitudes of a venire person. Questions like these may be helpful in understanding what veniremen truly feel about the criminal justice system by eliciting deeper ideas than just their opinion about whether they can impartially serve or not. A comparison of these specific questions with a more commonly used general question, such as "[w]ould your views on capital punishment influence your verdict on whether the Defendant is guilty or innocent," shows how the more specific questions can elicit more complete information about what a venire person truly believes and how he or she will interpret the trial. Instead of simply answering "yes" or "no" to whether the individual believes he or she will be impartial, requiring longer explanations with their answers may help uncover deeper beliefs that can effect the way one will act as a juror. This form of questioning will uncover specific attitudes that will enable attorneys to effectively use their voir dire challenges.

The many ideologies associated with the "crime control" approach can each individually be revealed through the appropriate questions. For instance, crime control believers feel less strongly in the presumption of innocence than those with due process beliefs. Questions to extract this bias could include having the venire person rate on an agreement scale how strongly he or she believes in such statements as the following:

A defendant in a criminal case should testify or produce some evidence to prove he or she is not guilty; ... [a] defendant arrested for murder is presumed innocent; ... [and it] is possible that an innocent person could be accused and brought to trial for a crime he or she did not


168. See Fitzgerald & Ellsworth, supra note 9, at 34; supra notes 44-50 and accompanying text.
This agreement scale, along with a required explanation of potential jurors' beliefs, would make the judge aware if potential jurors actually believe in the presumption of innocence.

Similarly, death qualifiers believe it is better to convict an innocent man than to acquit a guilty man. This bias may be brought to light by requiring the venire person to rate his or her opinion and explain his or her beliefs about such statements as: “It’s better for a guilty person to go free than to convict an innocent person.” Also, crime controllers are more likely to believe the prosecution and have attitudes about each side before trial, so a useful inquiry may include a question asking what is the first thing that comes to the venire’s mind when he or she thinks of a defense attorney or prosecution attorney. This would allow a venire person to explain any prejudices that he or she may have toward either side.

One of the problems with death qualification voir dire in its current form is that jurors who are only asked general questions are not given enough information to accurately predict or demonstrate how they will perform and react to the evidence at trial. The dilemma is that the process “requires prospective jurors answering questions about capital punishment during voir dire to make self-judgments about unknown circumstances.” Because currently used voir dire questions may not be specific enough to inform individuals of what real life issues may confront them and effect their judgments at trial, responses to these current voir dire questions may be worthless because they do not accurately reflect how that potential juror will actually behave at trial. Studies have found that “a substantial percentage of juror candidates cannot be expected to know what their role would entail were they to become members of a jury in a capital case, and would, therefore, be likely to be inaccurate when responding to questions based on [Wain-

169. Juror Questionnaire, supra note 161, at q.162, 164, 169.
170. Thompson et al., supra note 5, at 107-08.
171. Juror Questionnaire, supra note 161, at q.172.
172. Fitzgerald & Ellsworth, supra note 9, at 34.
173. Stipulated Questionnaire, supra note 166, at q.71.
175. Id. at 148.
This problem may be alleviated by asking specific questions aimed at eliciting known biases that may emerge from death qualifiers at trial. The problem can be further resolved by providing veniremen with hypotheticals creating situations which may help the prospective jurors better understand what their jobs will be and thereby increasing the accuracy of their voir dire responses.

The use of hypothetical situations is thus another possibility that could help discover biases. Situational questions are recommended, in that they place in potential jurors' minds real images while answering voir dire questions. For example, the judge could give the following hypothetical in a homicide case:

Assume that you have been chosen as a juror in a murder case and that you and other jurors have unanimously found the person guilty of multiple intentional murders with no legal justification, beyond a reasonable doubt. Therefore, in this sense you know that the person is guilty of more than one murder. Additionally, the jury has unanimously found the person guilty of substantial planning and premeditation beyond a reasonable doubt. This constitutes an aggravating circumstance under the law and permits the jury to impose the death penalty. Now, in a case like that, could you in good conscience vote for a sentence other than the death penalty or would you vote for the death penalty?

Presumably, upon hearing this fact scenario, the jurors will place themselves in the hypothetical situation and other attitudes, besides simply whether or not they think they can follow the law and their juror oath, will rise to the surface and become apparent. For instance, if the venireman were asked the previous question, the goal would seem to be to determine the individual's ability to impose the death penalty. However, other attitudes may also be learned from the venire's response, such as the venire's

176. Id. at 160.
178. See supra note 177 and accompanying text.
ability to use mitigating factors in deciding on the proper punishment in a case. The use of hypotheticals would be effective in eliciting such factors because the hypotheticals are not based on abstract theoretical concepts, but rather on specific situations. When jurors contemplate specific situations in the form of hypotheticals, they may go through the same thought processes that they would use at trial, including feeling all of the attitudes they as human beings use in making decisions. Therefore, hypotheticals would be a useful tool for the courts to use to discover if, while one may be death qualified, there are other attitudes that may get in the way in a real life factual situation that would bias the individual as a juror.

A slight variation on the use of hypotheticals would ask the potential juror to place himself in the shoes of the defendant. The judge could ask, for instance, the following: “If you were sitting in the place of the defendant...charged with the same offenses, would you be willing to have a juror in your present frame of mind sit in judgment on your case?...Please explain.” This would enable the venire person to think about whether or not he would want himself as a juror. This arguably would then be helpful in ascertaining that individual’s biases.

Another way of dealing with mitigating factors other than hypotheticals is to simply direct questions to the venire group regarding the specific mitigating factors. For example, in a case where race will possibly be an issue, the judge could ask: “In deciding punishment in a murder case would you consider, if a defendant proved by a preponderance of the evidence, [that he] ‘suffered the effects of racial discrimination...’ as a reason or mitigating circumstance not to vote for imposition of the death penalty?” The effect of other mitigating factors could also be inquired about by asking similar questions, such as: “In deciding punishment in a murder case would you consider, if a defendant proved by a preponderance of the evidence, [that he] ‘was introduced to drug abuse at an early age...’ as a reason or mitigating circumstance not to vote for imposition of the death penalty?”

Questions regarding mitigating factors are important in death

179. Juror Questionnaire, supra note 162, at q.222.
180. Motion to Supplement, supra note 177, at q.B.3.
181. Id. at q.B.4.
penalty cases because, as already indicated, certain death qualifier attitudes diminish the weight the jury gives toward such mitigating factors.  

This is just a small sample of some of the types of more specific questions that should be required during death qualification. Concededly, there are a number of points of opposition to this proposed solution. Some might believe that mandatory specific questioning would be overly time-consuming. This assumption is untrue, because such questioning would not make voir dire any lengthier than it has already become in capital cases.  

For instance, in some cases voir dire has lasted for days and even weeks, and some juror selection sheets contain hundreds of questions. Furthermore, many of the same questions recommended here are from actual cases, so nothing radically different would be added to voir dire. Instead, this proposal would create a uniform system of the best questions available to elicit death qualification juror biases. Juror questionnaires already encompass a wide variety of topics, and are already quite time-consuming.  

Thus, including certain mandatory questions would not likely increase the time normally devoted to voir dire to an intolerable level. Some juror selection sheets even ask questions such as, "do you own a pet," or "list your [three] favorite television shows." While such questions are recognizably important to jury selection by helping attorneys understand the personality of a venireman, they are no more important than mandatory questions to elicit juror bias traditionally inherent in death qualified jurors. Both types of questions may be asked, or such personality questions may be altered so as to also elicit the potential juror biases death qualification should bring to light. Therefore, the time consump-

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182. See Goodman-Delahunty et al., supra note 51, at 269-70.
184. Id. at § D.
185. See, e.g., Stipulated Questionnaire, supra note 166 (containing a forty-seven page questionnaire with over two hundred combined questions).
186. See, e.g., id.
187. Id. at q.53.
188. Id. at q.91.
tion argument must fail.

Another possible criticism to having a mandatory minimum set of voir dire questions is that if, as is suggested, attorneys are already using these questions, why then should courts mandate what is already in practice? The answer is simply that not all attorneys – or judges – use the proper questions that can elicit the biasing attitudes of death qualified jurors. As many groups advocate, one of the biggest problems with capital cases is inadequate representation for the defendant. If defendants are poorly represented, it would be best to at least furnish them with a jury that is not prone to convict them from the start of the trial. Mandatory questions, presented by the judge and aimed at eliciting a death qualified, unbiased jury, would provide the defendant a chance of having his story believed, regardless of his attorney's abilities.

V. CONCLUSION

The alleged problems with death qualification are not unknown to the courts. Courts have addressed the issue on several occasions and have repeatedly failed to recognize the biases inherent in the process, and the resulting obstacles for the defendant. While the current death qualification process has been deemed constitutional, courts still should attempt to remedy the biases inherent in the current process. Courts have reworked the process on other occasions; thus, courts should accept the present challenge, if for no other reason than to preserve the appearance of fairness in capital cases. However, any belief that all jurors who are death qualified have biases and attitudes that favor the prosecution is an overstatement. While empirical data indicates that jurors who have passed death qualification are more likely to be conviction prone and hold pro-prosecution beliefs, it is incorrect to say that all death qualified jurors hold those attitudes. Because of this, it is possible to whittle down the class of death qualifiers further to those death qualifiers with reduced biases against the defendant. This could be accomplished by mandating specific questions designed to discover those death qualified jurors with the ability to be impartial. This would enable capital defense attorneys to make more effective use of their preemptory challenges

and hopefully, make it easier to obtain a jury less stacked against the defendant.

This is a simple solution to the problem with arguably no adverse effects. Even if courts are correct in their assumptions about the empirical data, no harm would result from implementing this procedure. Yet, if the courts have been wrong in their rejection of empirical statistics on the death qualification process, this revision could tremendously increase a defendant’s chances of obtaining his guaranteed right to a fair, impartial trial.190 Such an essential and fundamental constitutional right cannot, and should not, be denied.

Jesse Nason

190. See U.S. CONST. amend. VI.