**THE COLORADO METHOD OF JURY SELECTION**

Death penalty jurisprudence varies from state to state with each state having different capital sentencing schemes depending upon the preferences of various legislative bodies around the country. The Eighth Amendment, however, mandates a certain level of conformity to very broad principles of law common to each jurisdiction. The federal death penalty law, currently codified in 18 U.S.C. §§3591 *et. seq.* is fairly typical of the various statutes around the United States. It requires generally that a unanimous jury determine whether the government has proven an aggravating circumstance beyond a reasonable doubt. The jury must then consider mitigation and finally make a determination whether death is the appropriate punishment. The jury must then consider each aggravator and weigh it against the aggregate mitigation then make a determination as to what sentence would achieve justice or is appropriate.

A body of expertise in capital litigation has developed in Colorado, primarily from the efforts of former chief deputy public defender from Public Defender, which has proven to be of great assistance to capital defense attorneys nationwide. This expertise lies primarily in the area of jury selection in capital cases and is widely believed to be the reason why there currently are, and traditionally have been so few people on Colorado's death row. Indeed, as of May, 2006, only two people reside on Colorado’s

\*Also admitted to practice in California

+Also admitted to practice in New York

ˆLicensed In Missouri only

death row, neither one of whom had attorneys who utilized the Colorado method of capital jury selection.

The basic structure of the Colorado method is extremely simple. It includes the identification of potential jurors in death penalty cases through a ranking system. A concept known as the "Juror's Bill of Rights" will be discussed. Lastly, and perhaps most importantly, the psychological dynamics of penalty phase deliberations will be addressed and how jurors routinely fail to follow the law of most states and the United States Constitution during their deliberations. The concept of "insulate and isolate" will be explained as a vital tool to assist attorneys in making jurors, DAs and judges better understand how they can follow the law as mandated by the various state legislatures, Congress and the United States Supreme Court as set forth in *California v. Brown*, 479 U.S. 538, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934 (1987);

*Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988); *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct.

2934, 106 L. Ed. 2d 256 (1989); *Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed. 2d

384 (1988) and *Simmons v. South Carolina*, 111 S.Ct. 2187, 2198-2199 (1994). Each of these decisions makes it crystal clear that the decision to impose life or death requires a "*reasoned moral response*" by each juror to the evidence in the case. The Colorado method gives practitioners the tools to understand the difference between what the law requires of jurors in a penalty phase as opposed to a guilt phase, and how to utilize these differences effectively.

# JUROR IDENTIFICATION

In jury selection, a defense attorney’s goal is three-fold: first, the attorney must identify life-giving and life-taking jurors; second, counsel must “insulate and isolate” the jury; and third counsel must push pro-death jurors into challenges for cause instead of using precious peremptory challenges.

Before jurors can be educated regarding their role in penalty phase deliberations during the *voir dire* process, it is essential that the attorneys become educated regarding each juror’s attitudes toward one thing and one thing only – the death penalty.

More often than not, determining which jurors to choose in a capital case resembles a game of Russian Roulette, with fatal results for the defendant. Colorado defense attorneys, as do most defense attorneys, face the usual obstacles in jury selection such as limited time to question jurors, limitations upon individually sequestered *voir dire*, and the numerous objections interposed by the prosecution. Given the limits in *voir dire*, it is essential that time is not wasted with irrelevancies.

The Colorado method ranks jurors based solely upon their responses to penalty-phase *voir dire*. It is **absolutely essential** that a juror’s attitudes about the death penalty be the **only** criteria for selection. For example, a defense attorney may have a drug-murder case and a juror with great views about drugs. There may have been an ideal juror who has been demographically profiled as the best acquitting juror in the history of jurors. Defense counsel *must* disregard all of that. The **only** criteria for picking or rejecting a juror is that juror’s attitudes about the death penalty. If there is any iron-clad rule in the Colorado method, this is it. This is because virtually every death penalty case is likely a slam-dunk conviction at the guilt phase. Even if it is not, utilizing this method will result in generally good jurors from the defense perspective. This is not to say that other traditional inquires should not be made, time permitting. For example, a juror who has been tainted by extensive pretrial publicity who has been rated a number 4 juror for death penalty beliefs should be challenged before a number 4 rated juror who has not been so tainted.

# STRIPPING JURORS AS PART OF THE IDENTIFICATION PROCESS

When inquiry is made of jurors regarding their attitudes about the death penalty, they will frequently give answers that, on their face seem good for a defendant, but in reality indicate a certainty for a death vote. For example, in asking a juror “What is your attitude about the death penalty?” a typical response may be “Oh, I’m only in favor of the death penalty under the *most* extreme circumstances imaginable.” It sounds good but chances are that the lawyer and the juror are not only two distant ships passing in the night, but on two different planes of existence as human beings. The lawyer is thinking “The *most* extreme circumstance…she’d only execute Tim McVeigh” when in reality, the juror is thinking “The *most* extreme circumstances…like when someone intentionally kills another person.”

Not infrequently jurors will proudly announce that they would not impose a death penalty on “a crazy guy, an innocent guy, or a guy who was acting in self-defense” nor would they impose a death penalty unless they were “really sure that the guy was guilty.” In order to determine a juror’s true feelings about the death penalty, it is imperative that counsel strip away any possible mitigation or legal defenses from the juror’s mind and get the unadulterated, unvarnished truth about how they feel about the death penalty philosophically.

Counsel cannot beat around the bush in getting to the heart of the matter. Simply flat-out ask the juror “What do you think about the death penalty for a completely guilty, no doubt about it, planned it, did it, wanted to do it defendant?” The goal is to find out who this particular juror will vote to execute. It does counsel no good to hear that a juror is very antagonistic toward the death penalty, and then find out after the death sentence is handed down to the kidnapping, raping, killing defendant, that the only exception to that antagonism is for kidnapping, raping, killing defendants who the juror believed should *always* get the death penalty. Strip the juror.

“Okay, I want you to assume that we’re talking about a guy who wanted to kill, planned the killing, deliberated on it, thought about it, wanted to do it for weeks in advance, did it in cold- blood, no self-defense, no insanity, no excuses. Now what about the death penalty for someone like that?” It is essential that jurors be stripped of any reasons not to impose a death penalty in order for you to ascertain their true feelings.

Counsel is absolutely entitled to a fact-specific *voir dire*, bringing out the essential facts of the case. If, for example, you have a child victim, you are entitled to ask specific questions about juror’s attitudes on the death penalty for child killers. You will frequently hear objections that this is “too fact specific.” The appropriate response is that under *Wainwright v. Witt*, 469

U.S. 412 (1985) and *Morgan v. Illinois*, 504 U.S. 719 (1992), any juror who is “substantially impaired” in his or her “ability to follow the law” is excludable for cause. The inability of a juror to give serious consideration to mitigation when a child killer is in the dock renders them “substantially impaired in his or her ability to follow the law.” Fact-specific penalty phase *voir dire* is not only essential to saving a defendant, it is mandated by the constitution. Even Tim McVeigh had the right to jurors who would not automatically vote death simply based upon the facts of the crime, but who would give serious and meaningful consideration to his mitigation case. If the facts overwhelm any given juror and “substantially impairs” his or her ability to meaningfully consider mitigation, the juror is excluded for cause.1

# RANKING JURORS

1 Prosecutors will endlessly battle over the definition of “consider” in relation to mitigation. The prosecutorial definition of whether someone will “consider” mitigation is simply that they will not cover their ears or run from the courtroom when it is presented. It is essential that counsel understand and argue that under *Penry v. Lynaugh*, 492

U.S. 302 (1989), to “consider” mitigation means to give *meaningful* consideration and force and effect to mitigation. A juror may “consider” lighting the courthouse on fire and running naked down the street, but with rare exception, there is no real or meaningful consideration of undertaking these acts. Counsel must explain this to the jurors and not let them weasel by saying “sure, I’d consider everything” when it is clear that the consideration they are talking about is not meaningful.

The ranking generally follows a scale ranging from one through seven, with pluses and minuses added for fine tuning the selection process.

A juror ranked as a "one" is someone who is absolutely against the death penalty in all circumstances and would never vote to impose it. Clearly, under the *Wainwright v. Witt*, 469

U.S. 412 (1985), standard, this juror would be properly challenged for cause by the prosecutor.

If counsel can somehow push a one into being a two, thereby forcing the prosecutor to burn a peremptory, counsel should do it.

A number two-ranked juror is a juror who is generally against the death penalty but under certain rather extreme circumstances, like for Osama Bin Laden, or Tim McVeigh, would be able to impose it. If counsel can find some number two-ranked jurors, the trick will be to prevent a prosecutorial challenge for cause through counsel’s efforts to make the juror acknowledge that whether an individual should live or die would be solely determined by the facts and the law of any given case. Defense counsel cannot let prosecutors beat a two into becoming a one.

A number three-rated juror is someone who is generally uncomfortable with the death penalty but does not have strong feelings about it one way or the other. They will seriously consider mitigation and genuinely want to hear about a defendant’s life, background etc.

A number four-rated juror is someone who has no feelings one way or the other regarding the death penalty and has not thought much about it. A number four juror on some scales is someone who is very weakly generally in favor of the death penalty and will give real consideration to mitigation.

A number five-rated juror is someone who is in favor of the death penalty. It is someone who will honestly consider mitigation but won’t probably be moved by much. This person would be inclined to have a default to the death penalty position over life but can be convinced to

vote for life.

A number six-rated juror has very strong feelings about the death penalty but claims not to believe in it for every murder and would be able to “consider” mitigation. Frequently these jurors are simply sevens who claim they would “consider” mitigation before they vote to execute the defendant. Every defense attorney is commonly confronted with these jurors and in order to be successful it is imperative that these jurors be successfully challenged for cause under the *Morgan v. Illinois*, 112 S.Ct. 2222 (1992) standard for pro-death penalty jurors. If it would take extreme mitigation to convince a six-rated juror to vote for life, they may indeed be substantially impaired in their ability to follow the law. It is counsel’s job to push a six into a seven.

A number seven-rated juror is an automatic death penalty juror (ADP). These jurors must always be challenged for cause and are usually excused without much fight.

If a juror is substantially impaired in his or her ability to follow the law (either ADP or close to it), under *Wainwright v. Witt* and *Morgan v. Illinois*, a legitimate challenge for cause exists. As such, it is imperative to explore mitigation with jurors. I refer to either the statutory mitigation or mitigation defined by state case law in jurisdictions, such as Idaho, with no statutory mitigation. With jurors ranked 5-7 defense counsel should attempt to get these jurors to admit that they would not consider as mitigation certain statutory or case-law defined mitigators. These jurors will frequently admit that they would be substantially impaired in their ability to give effect to this mitigation as a reason to not impose death. Once a juror admits to being substantially impaired in his or her ability to give effect to statutory mitigation, a challenge for cause can be used as opposed to a peremptory challenge. For example, as is the case in most states, Colorado has as a statutory mitigator the fact that at the time of the commission of the offense, the perpetrator had a lessened "capacity...to appreciate the criminality of his conduct or

to conform his conduct to the requirements of law [because of]... intoxication." Frequently death penalty inclined jurors (5's and 6's) will admit that they would never consider it as any kind of real "excuse" [i.e. mitigator] that the defendant was "high on dope" or "all boozed up" as something which should result in a sentence less than death, regardless of what the court instructs them. If a juror cannot give meaningful consideration and effect to that mitigation, as defined either by statute or the state supreme court, that juror is substantially impaired in his or her ability to follow the law and must be excused for cause. Do not confuse a juror’s ability to give serious consideration to a mitigator such as this with a juror’s promise that the mitigator will make a difference in the verdict. No juror needs to promise in advance that any mitigator will save a defendant’s life. All a juror needs to do is promise that they will potentially be moved by the concept of mitigation and will give serious and meaningful consideration to all statutorily or case law defined mitigators as a realistic reason for imposing a sentence less than death.

Under *Lockett v. Ohio*,438 U.S. 586 (1978) anything which bears upon the record, background and history of the defendant, or circumstances of the crime and lessens the perpetrator's moral culpability is *per se* mitigation and must be considered by the jury. Thus, anything defense counsel has in his or her case which could be arguably considered as mitigation must be considered by a juror. Counsel has a right to “shop” mitigation to the jury as the jury is statutorily and constitutionally mandated to give it real consideration. If a juror is substantially impaired in his or her ability to consider and give effect to anything which *Lockett* permits them to consider and give effect to in defense counsel’s actual case, the juror must be challenged for cause as being substantially impaired in his or her ability to follow the law.

The best way to get to the point is to simply get to the point. "What are your feelings about the death penalty for a cold-blooded, calculating, premeditating killer who kills a

completely innocent person, not in self defense or because he’s crazy but because he wanted to?" is without a doubt the most important question an attorney can ask. Everything else is of secondary importance. It is the response to this question which causes a juror to be ranked in whatever category they fall into. Counsel’s job is not to argue with the juror, but to make that juror understand that there are no right or wrong answers, just truthful answers to this question. A usual follow up is "How strongly to you believe that way?" along with "Why do you believe that way?"

# JUROR'S BILL OF RIGHTS

It is essential that jurors understand that the fact-finding decision making at the guilt- innocence phase of a trial is completely different in nature from the morality-based judgment rendered in the penalty phase. Fact-based decision making, such as whether the light was red or green, or whether it was a .22 on 38th Street or a .38 on 22nd Street can be debated amongst reasonable people and solid evidence can be brought up in support of a “correct” factual determination. This is the typical deliberation all attorneys and judges are used to. What very few attorneys and judges are accustomed to is the notion that a penalty phase “deliberation” is a completely different exercise. A penalty phase involves morality-based judgments rendered by each individual juror, not subject to “evidence” in support of or against any given judgment.

The dictionary definition of “deliberate” is “to carefully consider.” Nowhere is there a definition or jury instruction which defines “deliberate” as “debate, justify, or defend yourself.” Sadly, that is what jury “deliberations” are usually about. It is the aggressive death penalty proponents on the jury who demand that life-giving jurors defend, justify and explain their reasons for life and push the life givers into submission.

It is unfortunately not an uncommon experience to talk to jurors after a death verdict and

hear them complain that "I really wanted life but I just couldn't take it anymore." The concept of the "Jurors Bill of Rights" was developed by David Wymore and the Colorado Public Defenders. This idea is designed to empower weaker life giving jurors and cause pro-death penalty jurors to not only back off, but to even have them protect life givers. It is designed to "insulate and isolate" each juror from the pressures exerted by other jurors. In essence, it instructs jurors that they are to scrupulously follow the law and make a **personal moral judgment** based upon their own reasoning and moral judgment as to whether death is the appropriate punishment in a given case. In other words, the decision to execute is not deemed a collective decision. It is the individualized determinations of twelve separate jurors which is expressed through the verdict. This is precisely what the law requires.

It becomes counsel’s job to give the jurors ranked 1-3 the tools necessary to “insulate” them from any attacks by the death penalty proponents. It is further counsel’s job to “isolate” the 4-7 jurors and to not “attack” the life givers.

It begins with a statement to the juror that she is here to act in accordance with the law and perhaps determine whether a man will live or die. It is an awesome responsibility which will take every bit of her personal courage and concentration. It may surprise the juror to find out, however, that while she and her fellow jurors have been herded like cattle thus far in the proceedings, along with her duties, she has certain rights which absolutely no one can take away from her. We refer to these things as the “Juror's Bill of Rights.” No one can violate this Juror's Bill of Rights. This includes defense counsel, the prosecutor and even the judge.

This is followed by a lecture that the decision whether someone lives or dies is a **“personal moral judgment”** of each individual juror. It is as sacrosanct as the juror’s religious beliefs, choice of spouse, whether or not to have children and how to raise their children. These

decisions cannot be rationally criticized or questioned by anyone. Indeed, any juror would be horribly offended if his or her religious beliefs were criticized or even questioned by other jurors. The decision of life or death is of exactly the same nature. Each juror will lose endless hours of sleep coming to his or her own **personal moral judgments** about life or death. To have a fellow juror ask questions about why a fellow juror has decided in the way that he or she has is as offensive as having a juror mock another juror for his or her religious beliefs. Counsel must instruct the life givers and the death penalty proponents that no one in the jury room is required to explain their mitigation, to justify it, to defend it and indeed any given juror may not even be able to articulate their mitigation in their own minds, yet their personal moral judgment is for life. If a juror simply says “My personal moral judgment is for life” that is the end of the process as far as that juror is concerned. That juror can then, with the full force of the court and the Constitution of the United States of America behind him or her, ask the foreperson for the verdict form and sign on for life. No other juror has any right whatsoever to attempt to dissuade the life giver, criticize, demand an articulation of reasons or even question that decision anymore than they would have the right to dissuade, criticize or question a fellow juror for their religious beliefs. There is no constitutional jury instruction which forces any juror to defend their position to their fellow jurors or to be lectured by a pro-death penalty juror on why one position is right and the other wrong.

One absolutely inviolate right enjoyed by the jurors is that each juror has an absolute right to be treated with the highest degree of respect and dignity from every other participant in the system as can possibly be accorded by human beings. No one under any circumstances has a right to criticize or even question any juror for their decision, no matter what it is. The juror may be shocked to hear that sometimes during deliberations, people have actually attempted to

persuade their fellow jurors that their personal moral judgment is incorrect. These individuals have shown a complete lack of respect for the personal moral judgment of their fellow jurors. This is tantamount to telling a fellow juror that they have adopted the wrong religion. It is important that defense counsel make each juror understand that they have an unyielding right to be treated with absolute respect by their fellow jurors. Make them commit to the notion that in a matter of life and death, they will likely never confront a more serious issue and they will expect, even demand, that they be respected for their decision.

The United States Supreme Court has repeatedly held that a decision of life and death must be a "reasoned moral response" from twelve separate individual members of the jury. In this country, the defendant is entitled to the independent judgment of twelve separate and distinct judges. In penalty phase, it is essential that each juror be made aware that the life or death decision is a "moral" decision based upon the facts and law2. They each have an absolute right not to have their "morality" questioned by any other juror. Unlike in a traffic case where the issue may be whether the light was red or green, in a penalty phase, the law of each state and the United States mandates that life and death is a decision based not on computer-like factual thinking but on the "reasoned moral response" of twelve separate individuals. No one’s morality can be right or wrong anymore than someone’s religious beliefs can be right or wrong. You must ask each juror if they acknowledge that they have an absolute right to have their own unique moral position respected by their fellow jurors. The juror must be informed that while the guilt phase was fact-based decision making, subject to evidentiary considerations and review of facts, penalty phase decision making is normative in nature and what “should” happen is a

2*California v. Brown*, 479 U.S. 538, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934 (1987), *Franklin v. Lynaugh*, 487 U.S.

164, 185 (1988), *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989), and *Mills v.*

*Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L.Ed. 2d 384 (1988).

matter of personal morality, not subject to a red light/green light fact-based analysis.3 It cannot be stressed enough that jurors *must* be informed that this is *not* group debate but a *personal* moral judgment as stated by the United States Supreme Court.

It is of the utmost importance that jurors equate their own personal moral judgment as to whether a man lives or dies with their own personal religious beliefs. No juror would tolerate any other juror questioning them about why they believe in whatever religion they believe in.

Similarly, for whatever reason a life giver has a personal moral judgment that life is the appropriate punishment they are not obligated to explain it, defend it, justify it or even be able to articulate it to themselves. When the judge instructs them to “deliberate” at a penalty phase, that simply means to tell the other jurors that deep thought has gone into the personal moral judgment for life and please hand me the verdict form because that is my personal moral judgment.” Your ultimate goal is to have twelve people go around a table once, each setting forth their own personal moral judgments about life or death. When one juror says “life” that ends the discussion. You do not want to do anything which would cause the other death jurors to press this life giver for *any reason* to have to explain, justify, or defend that position. You strive for a five-minute penalty phase deliberation.

At this juncture, counsel must inform jurors that along with the Juror's Bill of Rights, comes some responsibility. Each juror is responsible for according the utmost respect to the morality of their fellow jurors. Each must acknowledge that every other juror is struggling with the same awesome decisions as he or she is struggling with. Simply because another juror may have arrived at a conclusion different from yours does not give you any right whatsoever to

3 It is important to understand that the “personal moral judgment” or life or death is not merely an “opinion” or an “attitude” or a “belief” or a “decision.” It is *far* more important than those things. A juror can have an “opinion” on the Bronco’s chances this year and make a “decision” about which shoes to wear to court. This is a ***PERSONAL MORAL JUDGMENT*** not subject to debate, discussion, articulation or criticism.

demand explanations or justifications of that juror. Of course, each juror must do what the judge says and discuss the case, but for any juror to criticize, to disrespect, or to demand justifications of the morality of any other juror would be simply unthinkable. Counsel must extract a solemn promise from each juror that they will be absolutely respectful of the conclusions of their fellow jurors. If they hear any juror demanding an explanation, a defense, or an articulation of the most personal, moral decision of a fellow juror, they will immediately intervene and take steps to insure that the decisions of each juror are respected by all.

It is critical that these concepts be firmly implanted into the minds of each juror. This is perfectly consistent with the law. The deliberation/justification session is not consistent with the law which provides for the individualized "reasoned moral response" of twelve separate judges. It is not simply a matter of “bullies” in the jury room forcing a life giver into a death verdict. It is the normal pleasant discourse and peer pressure which results in death verdicts. “Honey, I know voting for death is difficult but let’s take one more look at those autopsy photos, okay?

Now don’t you really think death is more fair?” is far more likely to be heard in the death deliberation than angry or harsh words like “How can you be such an idiot?! What do you mean you want to vote for life?!”

This jury selection technique permits each life giving juror to be "insulated” and the proponents of the death penalty become “isolated". Indeed, it results in pro-death penalty jurors actually stepping in to protect weaker jurors from being victimized by jurors who feel that a life giving juror be compelled to justify their personal moral judgment. Counsel must obtain a commitment from the pro-death penalty jurors that simply because someone’s personal moral judgment differs from theirs, they will not only respect the difference but if they hear anyone in the room demand explanations, or become in any way critical, they will follow the law and stop

it from continuing just as if someone were questioning them about the “idiocy” of their religious beliefs.

# PICKING THE JURY

At the end of the process, picking the jury is very easy. It is purely a numbers game where the *only* criteria for selection is based upon the lowest number in the ranking system. A number 3 ranked juror will never be selected over a number 2 ranked juror regardless of how nice she seems, or how good she’ll be on a discreet issue in the guilt phase. Twos are selected before threes, who are selected before fours etc.

# CONCLUSION

The proven success of this technique of capital jury selection has been repeatedly demonstrated nationally whenever it has been employed. It is so effective that attorney- conducted *voir dire*, pre *Ring v. Arizona,* was banned in Colorado. This technique has been used with great success in such far-flung places as Texas, Oklahoma, California, New York, Louisiana, Georgia, Kentucky, Louisiana, Florida, Alabama and Colorado, as taught by the Colorado Public Defenders. It is a proven method for achieving success in the penalty phase.