

RESOLUTION 03-05-04

DIGEST

Juror Disqualification: Opposition to Death Penalty

Amends Code of Civil Procedure section 229 to provide that opposition to the death penalty is not a basis for automatic juror disqualification.

**RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE**

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 229 to provide that opposition to the death penalty is not a basis for automatic juror disqualification. This resolution should be disapproved because as long as the law of the state allows capital punishment, no juror unwilling to impose a sentence allowed by law should be qualified to serve. All jurors in all cases are required to be willing to apply the law as instructed by the court. The concept behind this resolution is simply jury nullification restricted to capital punishment.

This resolution should be disapproved for the additional reason that it would promote inconsistency in the application of the death penalty. The abolition of capital punishment is a political question to be decided by the legislature, not a question to be decided on a case by case basis depending on whether or not a juror unwilling to return a death verdict happens to be on the panel.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 229 to read as follows:

- 1 § 229
- 2 A challenge for implied bias may be taken for one or more of the following causes,
- 3 and for no other:
- 4 (a) Consanguinity or affinity within the fourth degree to any party, to an officer of
- 5 a corporation which is a party, or to any alleged witness or victim in the case at bar.
- 6 (b) Standing in the relation of, or being the parent, spouse, or child of one who
- 7 stands in the relation of, guardian and ward, conservator and conservatee, master and
- 8 servant, employer and clerk, landlord and tenant, principal and agent, or debtor and
- 9 creditor, to either party or to an officer of a corporation which is a party, or being a
- 10 member of the family of either party; or a partner in business with either party; or surety
- 11 on any bond or obligation for either party, or being the holder of bonds or shares of capital
- 12 stock of a corporation which is a party; or having stood within one year previous to the

13 filing of the complaint in the action in the relation of attorney and client with either party
14 or with the attorney for either party. A depositor of a bank or a holder of a savings account
15 in a savings and loan association shall not be deemed a creditor of that bank or savings and
16 loan association for the purpose of this paragraph solely by reason of his or her being a
17 depositor or account holder.

18 (c) Having served as a trial or grand juror or on a jury of inquest in a civil or
19 criminal action or been a witness on a previous or pending trial between the same parties,
20 or involving the same specific offense or cause of action; or having served as a trial or
21 grand juror or on a jury within one year previously in any criminal or civil action or
22 proceeding in which either party was the plaintiff or defendant or in a criminal action
23 where either party was the defendant.

24 (d) Interest on the part of the juror in the event of the action, or in the main
25 question involved in the action, except his or her interest as a member or citizen or
26 taxpayer of a county, city and county, incorporated city or town, or other political
27 subdivision of a county, or municipal water district.

28 (e) Having an unqualified opinion or belief as to the merits of the action founded
29 upon knowledge of its material facts or of some of them.

30 (f) The existence of a state of mind in the juror evincing enmity against, or bias
31 towards, either party. If the offense charged is punishable with death, opposition to
32 imposing a sentence of death shall not be considered cause for disqualification under this
33 section.

34 (g) That the juror is party to an action pending in the court for which he or she is
35 drawn and which action is set for trial before the panel of which the juror is a member.

36 ~~(h) If the offense charged is punishable with death, the entertaining of such~~
37 ~~conscientious opinions as would preclude the juror finding the defendant guilty; in which~~
38 ~~case the juror may neither be permitted nor compelled to serve.~~

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

Existing Law: Currently, in capital cases, California permits unlimited disqualifications for cause of potential jurors because of their opposition to the death penalty. *See People v. Cash* (2002) 28 Cal.4th 703.

This Resolution: Will remove opposition to capital punishment as a basis for excusing jurors for cause from capital cases.

The Problem: Removing jurors who express opposition to the death penalty in capital cases –creating a “death-qualified” jury – undermines a fundamental principle of American justice: the right to a fair trial before a jury of one’s peers selected pursuant to nondiscriminatory criteria. While the use of death-qualified juries has been found to be Constitutionally permissible,

Witherspoon v. Illinois, 391 U.S. 510 (1968), it is not mandated and favors the prosecution in a fundamentally unfair manner. As the Supreme Court recognized in *Lockhart v. McCree*, 476 U.S. 162 (1986), numerous studies have demonstrated that, as an empirical matter, death-qualified juries are more likely to convict. See e.g., D.N. Bersoff, *AMERICAN PSYCHOLOGIST* 42(1), 52-58 (1987); C.L. Cowan, *et al.*, *LAW & HUMAN BEHAVIOR* 8, 53-80 (1984). Institutionalizing a jury biased toward the prosecution in a capital case is particularly disturbing given that the defendant's life is at issue.

It has also been shown that death-qualified juries include fewer women and minorities because they are more likely to oppose the death penalty, which in turn may explain why the death penalty is disproportionately imposed where the victim is white. While excluding jurors based upon gender or race is unconstitutional, dismissing jurors for cause because of their opposition to the death penalty indirectly has the same impermissible effect. Moreover, recent polls show that as many as 40% of Californians do not support the death penalty, and one poll found that 73% support a moratorium because of existing flaws or doubts. That 40% or more of Californians could be excluded from a jury because they believe the death penalty is flawed demonstrates the unjust consequences of death qualification.

Prosecutors have not hesitated to take advantage of death qualification to unfairly manipulate the jury panel. In the trial of Andrea Yates, the Houston mother who drowned her five children, prosecutors sought the death penalty and secured a conviction from the death-qualified jury who rejected an insanity defense. The prosecution then made no serious attempt to obtain a death sentence in the penalty phase, even admitting that the facts did not warrant the death penalty, and Ms. Yates was sentenced to life in prison.

Under this Resolution, inquiries into a potential juror's sentiments about the death penalty will still be permitted and jurors may be dismissed using the limited number of peremptory challenges. However, no longer will prosecutors be permitted an unlimited number of disqualifications for cause to unfairly slant the jury. In *Witherspoon*, the Supreme Court recognized the critical role of a jury to "express the conscience of the community on the ultimate question of life or death." That conscience should reflect the entire community rather than including only those with a pro-death penalty, pro-conviction predisposition.

IMPACT STATEMENT

This resolution does not impact any other law, statute, or rule.

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RESPONSIBLE FLOOR DELEGATE: Geoffrey T. Holtz

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

The San Diego County Bar approves resolution 3-05-2004 if the deleted text in subdivision (h) is restored and the new language in subdivision (f) moved to follow the last sentence in subdivision (h). The statute as amended would read as follows:

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, opposition to imposing a sentence of death shall not be considered cause for disqualification under this section.

However, if the entertaining of such conscientious opinions would preclude the juror finding the defendant guilty, the juror may neither be permitted nor compelled to serve.

The suggested amendment distinguishes between jurors who, although they may be opposed to imposing a death sentence, could nonetheless be a fair and impartial juror on the determination of guilt or innocence as compared to a juror who's personal beliefs in the death penalty would preclude him or her from fulfilling assessing a defendant's guilt or innocence with whom disqualification would still be appropriate.