DISTRICT COURT, ARAPAHOE COUNTY, STATE OF COLORADO 7325 S. Potomac St. Centennial, Colorado 80112	▲COURT USE ONLY▲
PEOPLE OF THE STATE OF COLORADO **v.** **JAMES EAGAN HOLMES,** **Defendant**	Case No. **12CR1522** Division: **202**
ORDER REGARDING DEFENDANT'S MOTION FOR FAIR, MEANINGFUL, AND CONSTITUTIONALLY ADEQUATE VOIR DIRE (D-252)	

INTRODUCTION

In Motion D-252, the defense advances four requests. The Court addresses each of the requests in turn, albeit out of order. For the reasons articulated in this Order, the motion is granted in part and denied in part.

ANALYSIS

First, the defendant asks the Court to reconsider the 10-minute time limitation on individual *voir dire* and its decision to schedule 18 prospective jurors per day for individual *voir dire*. Motion D-252 at p. 2. This request is denied.[1]

[1] The defendant's reliance on the New Jersey Supreme Court's decision in *State v. Erazo*, 594 A.2d 232 (N.J. 1991), is misplaced. Motion at p. 4. First, that case is not binding on the Court. Second, in *Erazo*, the Court disapproved of the trial court's "'three minute rule,' which limited counsel's questioning to three minutes." *Erazo*, 594 A.2d at 241. Third, the Court there stated

Second, the defendant requests an opportunity to review the Court's script for its videotaped instructions on the capital sentencing process during individual *voir dire*. *Id.* at p. 9. This request is granted. As the Court stated at the May 29, 2014 hearing, "counsel will get a copy of [the] comments in advance before they're recorded." 5/29/14 Tr. at p. 42.

Third, the defense expresses concern that the Court intends to misapply the law during *voir dire* and asks that the correct legal standard for death penalty cases be employed. Motion at pp. 9-10. This request is grounded in a statement in Order D-245-B, which the defense mistakenly claims misconstrues the law. *Id.* As counsel are well aware, Order D-245-B did not mention, much less discuss, the legal standard applicable to *voir dire* proceedings in capital punishment cases. *See generally* Order D-245-B. Rather, in a footnote, the Court observed that individual *voir dire* will take a long time because the Court and counsel must individually question hundreds of prospective jurors to find 100 to 120 who, among other things, will impose a death sentence if warranted by the evidence and the law. *Id.* at p. 2 n.1. In other words, the Court explained that individual *voir dire* will be extensive in part because it will include the death qualification of the jury. *Id.* Defense counsel frivolously argue that this "stated goal[]" means that the Court is

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that "*voir dire* should proceed uninhibited by any [] artificial constraints," so long as "counsel acts reasonably and responsibly." *Id.* In this case, the Court will consider increasing the 10-minute time limitation if counsel act reasonably and responsibly. However, for the reasons set forth in Order D-154-a-3, the Court is confident that 10 minutes will be an adequate amount of time.

apparently "intent upon organizing a tribunal to return a verdict of death, rather than the fair and impartial jury to which Mr. Holmes is constitutionally entitled." Motion at p. 10.

Defense counsel's accusation that the Court appears "intent" on "organizing" a jury that will sentence their client to death, in addition to being a groundless and improper allegation of partiality, misrepresents what the Court said. The defense conveniently ignores that the Court made clear that the jurors selected would have to agree to impose a death sentence only "if warranted by the evidence and the law." Order D-245-B at p. 2 n.1.

Moreover, as the juror questionnaire reflects, the Court understands that the law requires "both the 'death qualification' and 'life qualification' of a potential juror; that is, the inquiry into whether the juror is unalterably opposed to, or in favor of, imposing the death sentence." *People v. Harlan*, 8 P.3d 448, 461 (Colo. 2000), *overruled on other grounds*, *People v. Miller*, 113 P.3d 743 (Colo. 2005). The juror questionnaire contains questions related to both death qualification and life qualification. *See* Order C-159 Attachment. Nothing in Order D-245-B is inconsistent with the applicable legal standard. As the defense knows, however, courts and attorneys commonly refer to this standard in abbreviated form as "death qualification" or a variation of that phrase.

Significantly, the Colorado Supreme Court on more than one occasion has used the phrase "death qualification" and has made statements similar to the one under challenge in Order D-245-B. For example, in *People v. Dunlap*, the Court referred to "death qualification issues" and "the death qualification process." 975 P.2d 723, 757 (Colo. 1999); *see also People v. Rodriguez*, 914 P.2d 230, 266 (Colo. 1996) (referring to "the death qualification of the jury"); *People v. Rodriguez*, 786 P.2d 472, 474 (Colo. App. 1989) (same). The Court in *Dunlap* defined "[d]eath qualification" as "a juror's ability to impose the death penalty according to the jury instructions if he feels it is warranted." 975 P.2d at 757 n.37. This is substantively identical to what this Court said in Order D-245-B.[2]

This Court has used the term "death qualification" on multiple occasions in this litigation. *See, e.g.*, Order D-150; Order D-78 at p. 2; Order D-78a at p. 1; 5/29/14 Tr. at p. 28. The defendant's attorneys have never objected to such references. To the contrary, they, themselves, have repeatedly referred to the "death qualification" of the jury in previous filings. *See e.g.*, Motion D-150 at pp. 1-8; Motion D-150 Reply at pp. 1-2; Motion D-78 Reply at p. 1. There was no mention of "life qualification" in any of those submissions. Nor did counsel

[2] This Court referred to a juror's "willing[ness]," not "ability," to impose a death sentence if warranted. *See* Order D-245-B at p. 2 n.1. However, these are similar terms. "Willing" means "not refusing to do something." *Willing*, *Merriam-Webster*, www.merriam-webster.com/dictionary/willing (last visited November 8, 2014). "Ability" is defined as "the power or skill to do something." *Ability*, *Merriam-Webster*, www.merriam-webster.com/dictionary/ability (last visited November 8, 2014).

clarify in any of those pleadings that "death qualification" referred to more than the qualification of the jury to impose a death sentence. When viewed in this context, counsel's accusation in Motion D-252 is the height of irony.

Of course, in truth, there is nothing improper about referring to the "death qualification" of the jury or using similar abbreviated verbiage. It is downright farcical to allege that such language signals an apparent intent to qualify a jury that will only vote for a death sentence and will deprive the defendant of his constitutional right to a fair and impartial jury.[3] When the Supreme Court cases, the defense's pleadings, and the Court's written and oral rulings discussed above are considered in conjunction with the juror questionnaire, it becomes readily apparent that counsel's accusation is completely meritless. Unfortunately, the record reflects that this is not the first time counsel have impugned the dignity of the Court by accusing it of partiality. *See, e.g.*, Motion D-200 at p. 2 (advancing a baseless and improper accusation that the Court was "endeavoring to assist the prosecution's experts, and affirmatively help the prosecution win its case").

The Court takes no pleasure in rebuking counsel in this Order, but the undersigned has a "bounden duty to protect the integrity of his court." *In re Koven*, 35 Cal. Rptr. 3d 917, 924 (Cal. Ct. App. 2005) (quotation omitted). "[T]he

[3] The allegation is as preposterous as claiming that referring to this case as a "death penalty" case, which counsel and the Court have done on countless occasions, reflects an apparent intent to deny the defendant his constitutional rights in order to have him sentenced to death.

obligation is [placed] upon him by his oath to maintain the respect due to the court over which he presides." *Id.* (quotation omitted). Because defense counsel insist on making unfounded allegations of bias and partiality against the Court, they leave the Court little choice but to call them on their indiscretions.[4] Given the level of skill and experience possessed by the attorneys working for the defendant, the accusation in Motion D-252 is as puzzling as it is disappointing. That this is a death penalty case does not justify counsel's outrageous accusation that the Court appears "intent" on depriving their client of his constitutional rights and "organizing" a jury that will sentence him to death. *See* Motion at p. 10. All of the rules that govern proceedings in the criminal justice system apply with equal force in death penalty cases.

In sum, the defense's request fails. There is no basis to believe that the Court intends to misapply the law during *voir dire*. The defense's argument to the contrary is disrespectful, unfair, and wholly inappropriate. Counsel should not have included this claim in their motion.

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[4] The pattern that has developed in this case goes something like this: defense counsel advance a groundless and improper accusation against the Court; the Court calls counsel on it and reproaches them in order to fulfill its obligation to defend its dignity; counsel then file a motion bemoaning the Court's remarks and indignantly demanding that the Court retract them because this is a death penalty case and they are required to make such allegations. It should be clear by now that assertions of misconduct against the Court, which are devoid of a factual basis and completely meritless under the law, are not effective. It should be equally clear by now that defense counsel will never convince the Court that there is authority anywhere in the land that requires, or even permits, them to make baseless accusations of impropriety against the Court in a death penalty case.

Finally, the defendant contends that he has a right to be present while prospective jurors watch the Court's videotaped advisement on Colorado's capital sentencing process. The defendant misunderstands the law.

The defendant concedes that what is at issue is the viewing by prospective jurors of an informational videotape about Colorado's capital sentencing process. Motion at p. 7. Further, it is undisputed that there will be no interaction between the Court and prospective jurors during this time. In fact, the Court will not even be in session or present while the videotape plays. Instead, groups of up to 9 prospective jurors will watch the tape off the record and will be asked to follow along on a copy of the transcript of the recording. The video recording will specifically ask prospective jurors to refrain from making any statements or asking any questions about the advisement before they are called into the courtroom for their individual questioning session. Court staff will supervise the prospective jurors as they watch the recording to ensure that they are paying attention and that they do not make any statements or ask any questions about the advisement before they are called into the courtroom for individual questioning.[5]

It is axiomatic that a criminal defendant has the constitutional right "to be present at all stages of the trial where his absence might frustrate the fairness of the

[5] Of course, if a prospective juror makes a statement or asks a question related to the video recording, a Court staff member will inform the Court about it, and the Court will discuss the situation with counsel outside the presence of the prospective jurors.

proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). It is likewise well-established that the impaneling of the jury is such a stage. *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989).

In proceedings that do not involve the confrontation of witnesses or the presentation of evidence, the defendant's right to be present is rooted not in the Confrontation Clause of the Sixth Amendment, but in the Due Process Clause of the Fifth Amendment. *United States v. Santiago*, 977 F.2d 517, 522 (10th Cir. 1992). However, the right to be present is not absolute. *Snyder v. Massachusetts*, 291 U.S. 97, 105-06, 54 S.Ct. 330, 78 L.Ed. 674 (1934), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Rather, it is triggered only when the defendant's "presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* Accordingly, the defendant has no constitutional right to be present if his "presence would be useless, or the benefit but a shadow." *Id.* at 106-07, 54 S.Ct. 330. The right exists only to the extent that "a fair and just hearing would be thwarted by [the defendant's] absence." *Id.* at 108, 54 S.Ct. 330.

Based on these tenets, the Second Circuit Court of Appeals found in *Cohen v. Senkowski* that the defendant has the right to be present for "substantive inquiry into juror qualification." 290 F.3d 485, 489-90 (2d Cir. 2002). However, the

Court distinguished such questioning "from an 'administrative empanelment process.'" *Id.* at 490 (quoting *Gomez*, 490 U.S. at 874, 109 S.Ct. 2237). The Court, therefore, concluded that there is no right to be present during the questioning of prospective jurors "on matters such as personal hardship in serving." *Id.* (citations omitted).

In *United States v. Greer*, the Court held that the district court did not commit reversible error "by excluding the parties and counsel from *in camera* meetings with the venire members relating to jury service hardship excuses." 285 F.3d 158, 167 (2d Cir. 2000). The Court reasoned that "routine administrative procedures relating to jury selection are not part of the true jury impanelment process in which parties and counsel have a right to participate." *Id.*

Similarly, in *United States v. Williams*, the Court observed that "[v]oir dire is conducted by the judge in the courtroom, not by the clerk in the central jury room." 927 F.2d 95, 96 (2d Cir. 1991) (citation omitted). Therefore, it "was not constitutionally forbidden" for a clerk to inform prospective jurors that the trial was expected to last approximately six weeks and to inquire about possible hardship. *Id.* Nor was the clerk prohibited from excusing two prospective jurors who indicated "that service for that length of time would be a hardship." *Id.*

In *United States v. Bordallo*, the Ninth Circuit noted that the defendant's right to due process "does not mean [] that the judge of a court cannot organize his

court and qualify his prospective jurors generally, without bringing into court for such a proceeding each and every defendant who may be tried during the entire term." 857 F.2d 519, 523 (9th Cir. 1988) (quotation omitted). Relying on jurisprudence from the Second and Ninth Circuits, the Third Circuit determined in *United States v. Hicks* that the challenged process, which "involve[d] nothing more than the technological equivalent of drawing names from a hat," was an "administrative process," and that the defendant's "presence at this preliminary stage could not in any way have affected the proceedings." 403 F. App'x, 709, 711 (3d Cir. 2010). Consequently, the defendant "had no constitutional right to be present" during that aspect of jury selection and "his absence did not violate his due process rights." *Id.*

It is true that at least one court has indicated that the defendant in a capital case "has a constitutional right to be continuously present at all stages of the proceedings." *Welch v. Holman*, 246 F. Supp. 971, 973 (M.D. Ala. 1965), *aff'd*, 363 F.2d 36 (5th Cir. 1966). But even *Welch* did not extend that right to all contacts by the Court with prospective jurors. To the contrary, the Court in *Welch* observed that "[i]n the absence of some specific showing of prejudice . . . the determination of the general qualifications of jurors, before a specific case is called for trial, is a matter for the trial judge to handle and not for the defendants or their attorneys." *Id.* at 974. The Court added that, extending the defendant's right to be

present to ministerial acts "would impose an impossible burden upon [] trial judges." *Id.*

The defendant directs the Court's attention, however, to *Larson v. Tansy*, 911 F.2d 392 (10th Cir. 1990). Motion at p. 8. *Larson* is inapposite. In *Larson*, the defendant was absent from most of his trial. 911 F.2d at 393. The Tenth Circuit Court of Appeals ruled that the defendant had a right to be present during jury instructions, closing arguments, and the rendering of the verdict, but that no due process violation occurred as a result of the defendant's absence from the jury instructions conference. *Id.* at 396-97. The Court explained that the defendant's attendance during the jury instructions, closing arguments, and the rendering of the verdict "would have provided more than a shadow of benefit." *Id.* at 395. As to these critical stages of the trial, the Court held that the defendant had been "deprived of his due process right to exert a psychological influence upon the jury, completely aside from any assistance he might have provided to his counsel." *Id.* at 396. Inasmuch as the defendant "might have assisted his counsel" and his "mere presence could have exerted a psychological influence on the jury," his absence was not harmless error. *Id.*

However, two years later, in *Santiago*, the Court recognized the limited scope of the holding in *Larson*. In *Santiago*, the Court determined "that the district judge's discussion, *ex parte* but on the record, with [a] juror was an

appropriate exercise of his discretion and did not deprive the defendant of any constitutionally protected right." 977 F.2d at 522. Distinguishing the holding in *Larson*, the Court concluded that "a judge's *in camera* examination of a juror for possible bias is not so critical a trial function that a defendant's presence to exert a psychological influence is constitutionally mandated." *Id.* at 523 n.6. The Court noted "that [such] examination is not a trial 'proceeding' that the defendant ordinarily would be expected to attend or one where jurors may question the defendant's absence or speculate adversely about it." *Id.* Hence, *Santiago* demonstrates that the holding in *Larson* is not inconsistent with the aforementioned cases from the Second, Third, and Ninth Circuits.

Here, contrary to the defendant's contention, he has no right, constitutional or otherwise, to be present while prospective jurors watch an informational videotape on the capital sentencing process. This is clearly an administrative aspect of jury selection. Significantly, prospective jurors will watch a more general videotape on the justice system earlier in the jury selection process without the Court, the parties, or counsel present. *See* Order C-156 Attachment at p. 2. Yet the defendant does not complain about being absent from that ministerial act.

The defendant's presence during the showing of the videotape on the capital sentencing process would not provide even a shadow of benefit. He cannot assist his counsel because there is nothing with which to assist. Whatever assistance the

defendant wishes to provide his counsel in relation to the videotape will be provided before it is finalized or after it is played for prospective jurors. As indicated earlier in this Order, counsel will have an opportunity to review the transcript of the informational videotape and make objections to it before it is recorded. Furthermore, after the videotape is shown, counsel will have an opportunity to question prospective jurors about its contents and their understanding of the law.

Nor is the viewing of the videotape so critical a trial function that the defendant's presence to exert a psychological influence is constitutionally required. By its very nature, this is not a trial "proceeding" that the defendant ordinarily would be expected to attend or where jurors may draw adverse inferences from his absence or question why he is not present.

The defendant maintains that "it is highly likely that there will be times when prospective jurors make comments or ask questions to each other, or to the bailiff, or make facial expressions or other gestures that would be important for the parties to know about, and for an appellate court to have a record of." Motion at p. 9. The Court is unpersuaded. First, this is pure speculation on the defendant's part. Second, as the Court mentioned, it will instruct prospective jurors to abstain from making comments or asking questions related to the videotape. Third, to the extent any prospective juror makes a comment or asks a question, the Court will

share that information with the parties, and counsel can question the prospective juror about it. Finally, the defendant cites no authority for the proposition that he has a constitutional right to observe prospective jurors' facial expressions and gestures while watching an informational videotape off the record. Taking the defendant's assertion to its logical extreme would entitle the defendant and his attorneys to follow each prospective juror around during recesses, including at the end of the day, because they would be entitled to observe all facial expressions and gestures related to the case.

CONCLUSION

For all the foregoing reasons, the Court concludes that Motion D-252 is largely meritless. The Court grants the defendant's request for an opportunity to make objections to the advisement regarding the capital sentencing process. His remaining requests are denied.

Dated this 10th day of November of 2014.

BY THE COURT:

Carlos A. Samour, Jr.
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2014, a true and correct copy of the **Order regarding Defendant's motion for fair, meaningful, and constitutionally adequate voir dire (D-252)** was served upon the following parties of record:

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