

1986

Assembling a Jury Willing to Impose the Death Penalty: A New Disregard for a Capital Defendant's Rights--Sixth Amendment: *Wainwright v. Witt*, 105 S. Ct. 844 (1985)

Patrick J. Callans

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Patrick J. Callans, *Assembling a Jury Willing to Impose the Death Penalty: A New Disregard for a Capital Defendant's Rights--Sixth Amendment: Wainwright v. Witt*, 105 S. Ct. 844 (1985), 76 J. Crim. L. & Criminology 1027 (1985)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

SIXTH AMENDMENT—ASSEMBLING A JURY WILLING TO IMPOSE THE DEATH PENALTY: A NEW DISREGARD FOR A CAPITAL DEFENDANT'S RIGHTS

Wainwright v. Witt, 105 S. Ct. 844 (1985).

I. INTRODUCTION

In *Witherspoon v. Illinois*,¹ the Supreme Court, in pursuance of a capital defendant's sixth and fourteenth amendment right to an impartial jury,² held that prospective jurors could not be excluded from a jury panel simply because they had "general objections" to capital punishment.³ In a footnote, the Court acknowledged that nothing in the decision restricted the power of the state to exclude for cause veniremen who made it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment . . . or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."⁴

Seventeen years later, in *Wainwright v. Witt*,⁵ the Supreme Court "simplified" the standard for juror exclusion.⁶ The Court held that a prospective juror may properly be excluded for cause when the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and

¹ 391 U.S. 510 (1968).

² The sixth amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury . . ." U.S. CONST. amend. VI. The fourteenth amendment denies the states the power to "deprive any person of life, liberty, or property, without due process of law," U.S. CONST. amend. XIV, and applies the sixth amendment protections to state criminal prosecutions. See, *Duncan v. Louisiana*, 391 U.S. 145 (1968).

³ *Witherspoon*, 391 U.S. at 522. The Court invalidated an Illinois statute which provided that in murder trials, "it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." *Id.* at 512 (quoting ILL. REV. STAT., ch.38 § 743 (1959)).

⁴ *Id.* at 522-23, n.21.

⁵ 185 S. Ct. 844 (1985).

⁶ *Id.* at 851.

oath.”⁷

In so holding, the Court recited the relative merits of its standard, which was announced previously in *Adams v. Texas*⁸ and rejected the language regarding juror exclusion contained in the *Witherspoon* footnote.⁹ In particular, the *Witt* Court recognized the strength of the state's interest in obtaining jurors who would apply the law and follow their oaths.¹⁰ The *Witt* Court further ruled that a trial judge's finding of juror bias was a “factual issue” subject to a “presumption of correctness” by a federal reviewing court.¹¹

This Note will analyze the *Witt* decision and the previous development of the sixth amendment safeguards provided for capital defendants. It will discuss the Supreme Court's past rulings on the issue of proper juror exclusion in light of the precepts of *Witherspoon* and in light of the Court's recognition of the delicate balance between a capital defendant's constitutional right to an impartial jury and the state's interest in obtaining jurors who will conscientiously apply the law and obey their oaths. This Note will conclude that although in *Wainwright v. Witt* the Supreme Court established a coherent standard by which the state may exclude jurors opposed to capital punishment, it ignored and abandoned the fundamental safeguards that *Witherspoon* provided for a capital defendant's constitutional right to an impartial jury.

II. FACTS AND PROCEDURAL HISTORY

In 1974, a Florida jury tried and convicted Johnny Paul Witt of first degree murder.¹² The jury recommended that Witt be sentenced to death, and the trial judge complied, imposing the death

⁷ *Id.* at 852.

⁸ 448 U.S. 38 (1980). See *infra* notes 47-58 and accompanying text.

⁹ *Witt*, 105 S. Ct. at 851-52. See *infra* notes 57-68 and accompanying text.

¹⁰ *Id.* at 850. See also *Adams*, 448 U.S. at 44.

¹¹ *Witt*, 105 S. Ct. at 858. 28 U.S.C. § 2254(d) (1985), provides that in any habeas corpus proceeding in a federal court pursuant to a judgment of a state court, a determination of a factual issue made by the state court shall be presumed to be correct absent certain enumerated disqualifying circumstances. See *infra* notes 69-72 and accompanying text.

¹² *Witt*, 105 S. Ct. at 847. Johnny Paul Witt and Gary L. Tillman committed the murder while they were hunting. Witt and his younger friend apparently had spoken on other occasions about killing someone and had even stalked persons as if stalking human prey. On October 28, 1973, Witt and Tillman were hunting with bows and arrows in a wooded area near a trail often used by children. When the victim, eleven-year-old Jonathan Kushner, rode by them on a bicycle, Tillman hit the boy on the head with a star bit from a drill. The two men gagged the boy, placed him in the trunk of Witt's car, and drove to a deserted area. Upon arrival, they discovered that the boy had suffocated. Witt and Tillman committed violent and sexual acts on the body, mutilated the body with a knife, and left it buried in a shallow grave. *Id.* Eight days later Witt was arrested,

penalty.¹³ Witt appealed to the Florida Supreme Court, raising a number of claims,¹⁴ including the contention that during the *voir dire* the trial court improperly excluded three prospective jurors for cause because of their stated objections to capital punishment.¹⁵ The court affirmed the conviction and the sentence, determining that the exclusion of the veniremen was proper and in accordance with the Supreme Court's ruling in *Witherspoon*.¹⁶ The Supreme Court denied Witt's petition for a writ of certiorari.¹⁷

After being denied post-conviction review in the state courts,¹⁸ Witt sought federal habeas corpus relief in the United States District Court for the Middle District of Florida.¹⁹ The district court denied his petition for the writ. The United States Court of Appeals for the Eleventh Circuit, however, finding that Witt's *Witherspoon* claim warranted granting of the writ, reversed on appeal and directed that Witt was entitled to resentencing.²⁰

The court of appeals limited its consideration of the *Witherspoon* issue to the following *voir dire* exchange which led to venireman

and two days after that confessed to participation with Tillman in the murder. Witt v. State, 342 So. 2d 497, 499 (Fla. 1977), *cert. denied*, 434 U.S. 935 (1977).

¹³ Witt, 105 S. Ct. at 847. Upon a defendant's conviction of a capital felony, Florida law provides for a separate sentencing procedure, in which the state and the defendant may present arguments to the jury for or against the sentence of death. After hearing the arguments, the jury deliberates and renders an advisory sentence to the court as to whether the defendant should be sentenced to life imprisonment or death. FLA. STAT. ANN. § 921.141. (West 1977).

¹⁴ Witt, 105 S. Ct. at 847. Witt raised claims that his conviction was erroneous because of (1) improper exclusion of prospective jurors, (2) improper admission of his confession, and (3) an assertion that the state rule on competency was outdated. He also argued that imposition of the death penalty was improper under the facts of the case. Witt v. State, 342 So. 2d at 498-99.

¹⁵ Witt v. State, 342 So. 2d at 498-99. The trial court excluded six prospective jurors who stated that they could not return a sentence of death even upon weighing all of the factors of the crime, or stated that they could not impartially judge the guilt or innocence of the accused without the possible imposition of the death penalty interfering with their findings. Witt's appeal challenged the exclusion of three of these prospective jurors. *Id.* at 499.

¹⁶ *Id.*

¹⁷ 434 U.S. 935 (1977).

¹⁸ See Witt v. State, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1867 (1980).

¹⁹ Witt v. Wainwright, No. 90-545-CIV-T-GC (M.D. Fla., May 14, 1981).

²⁰ Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983). On appeal to the Eleventh Circuit, Witt challenged the district court's rulings regarding (1) the admission of his confession, (2) the Florida Supreme Court's alleged use of non-record material in reviewing his sentence, (3) the admission of psychiatric testimony, (4) the trial court's reliance on non-statutory aggravating circumstances in sentencing, and (5) the cause excusal of three prospective jurors based upon their opposition to capital punishment. *Id.* at 1070. The only claim the Eleventh Circuit found to be of merit was the fifth, regarding the *Witherspoon* issue. *Id.* at 1070-71.

Colby's excusal:²¹

Mr. Plowman [for the state]: Now let me ask you a question, ma'am.
Do you have any religious beliefs or personal beliefs against the death penalty?

Ms. Colby: I am afraid personally but not—

Mr. Plowman: Speak up, please.

Ms. Colby: I am afraid of being a little personal, but definitely not religious.

Mr. Plowman: Now, would that interfere with you sitting as a juror in this case?

Ms. Colby: I am afraid it would.

Mr. Plowman: You are afraid it would?

Ms. Colby: Yes, sir.

Mr. Plowman: Would it interfere with judging the guilt or innocence of the defendant in this case?

Ms. Colby: I think so.

Mr. Plowman: You think it would?

Ms. Colby: I think it would.

Mr. Plowman: Your Honor, I would move for cause at this point.

THE COURT: All right. Step down.²²

²¹ Witt challenged the trial court's excusal of three veniremen, but the court of appeals focused only on the *voir dire* responses of Colby, which "arguably adduced the *least* certain statement of inability to follow the law as instructed." *Id.* at 1081. The court acknowledged that it was compelled to reverse the sentence if it found a *Witherspoon* violation with respect to even one prospective juror. *Id.* See *Davis v. Georgia*, 429 U.S. 122 (1976). In *Davis*, the Court reversed a judgment of the Supreme Court of Georgia which upheld a death sentence imposed by a jury from which "merely one" prospective juror had been improperly excluded. *Id.*

²² *Witt v. Wainwright*, 714 F.2d at 1882. The Eleventh Circuit noted that jurors Gehm and Miller both gave responses that were less ambiguous than Ms. Colby's; therefore, the court did not reach the question of the constitutionality of the cause excusals of Gehm and Miller. *Id.* at 1881 n.8. Prospective juror Gehm engaged in the following discussion on *voir dire*:

Mr. Plowman [for the state]: I am asking you [to] consider . . . aggravating circumstances . . . would you be able to follow that and come back with a death penalty conviction?

Mr. Gehm: I am afraid not, sir.

Mr. Plowman: You would not be able to do so?

Mr. Gehm: My religious convictions would be foremost in my mind up to this point and possibly beyond that.

Mr. Plowman: Okay.

Mr. Gehm: I am afraid I would be unable to.

Mr. Behuniak [for petitioner]: I am saying if you were to return a verdict of guilty of first-degree murder, could you keep an open mind as to whether you should vote for the death penalty or life?

Mr. Gehm: No, I could not.

Mr. Behuniak: Why is that, sir?

Mr. Gehm: I feel that the Almighty is the Judge of life or death.

Mr. Behuniak: That's right. You said that previously. But you would not let it interfere with your determination?

Mr. Gehm: I am afraid that it would be weighing on my mind during the trial.

Counsel for Witt did not object or attempt to question Colby.²³

The Eleventh Circuit held that the cause excusal of Colby violated Witt's constitutional right to an impartial jury by failing to satisfy the requirements established in *Witherspoon*.²⁴ In *Witherspoon*, the Supreme Court held that a death sentence could not be upheld "if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction."²⁵ In reversing Witt's sentence of death based on improper exclusion, however, the Eleventh Circuit considered Colby's responses in light of language set out in *Witherspoon*'s footnote twenty-one:

[The state may] execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to

Mr. Plowman: Your Honor, the state would move to dismiss for cause at this time.

THE COURT: Do you think that this state of mind will prevent you from acting with impartiality? Do you feel that the state of mind that you have will prevent you from acting with impartiality? What I am saying is—

Mr. Gehm: I am afraid it might, sir.

THE COURT: You are afraid so?

Mr. Gehm: I am afraid it might, sir.

THE COURT: Okay. Step down.

Id.

Prospective juror Miller responded to questions as follows:

Mr. Plowman: Okay. Did you hear the discussion that we have had just recently with Mrs. Davis regarding the death penalty?

Mr. Miller: That's right.

Mr. Plowman: Okay. Do you have any strong feelings one way or the other regarding the death penalty?

Mr. Miller: Well, I just couldn't bring a—I couldn't vote, I guess, well, I am against the death penalty.

Mr. Plowman: You are against the death penalty? Would that interfere with your determination in this case?

Mr. Miller: I think it would.

Mr. Plowman: Okay. And you wouldn't be able to follow the law as instructed by the Court?

Mr. Miller: When it comes down to a death verdict, I wouldn't.

Mr. Plowman: You could not do it. Okay. Regardless of the law?

Mr. Miller: No, sir.

Mr. Plowman: Okay. Your Honor, the state would move the Court to excuse Mr. Miller for cause.

THE COURT: Do you feel because of your state of mind regarding that particular situation it would make you unable to render a just and fair verdict in this case?

Mr. Miller: I am against the death verdict. I think it would.

THE COURT: Step down.

Id.

²³ *Witt*, 105 S. Ct. at 848.

²⁴ *Witt v. Wainwright*, 714 F.2d at 1082.

²⁵ *Witherspoon*, 391 U.S. at 522.

any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.²⁶

The court of appeals held that Colby's statements fell "far short of the certainty required by *Witherspoon* to justify for cause excusal."²⁷

Furthermore, the court of appeals expressed uncertainty as to the degree of deference owed to a trial court's finding of juror bias.²⁸ The court, however, found this immaterial to the case's resolution, since it was convinced that the trial court erred in excusing venireman Colby for cause "under even the least rigorous standard of appellate review."²⁹

The Supreme Court granted certiorari in order to resolve the confusion surrounding both the application of *Witherspoon* in the lower courts and the standard that federal courts should apply when reviewing procedures for juror selection in capital trials.³⁰

III. THE DEVELOPMENT OF THE *WITHERSPOON* PROTECTIONS

Prior to 1968, it was common for the state to exclude from capital juries anyone who opposed the death penalty in any manner.³¹ In *Witherspoon*, however, the Supreme Court declared unconstitutional an Illinois statute which provided for the cause excusal of any juror who stated that he had "conscientious scruples" against capital punishment.³² The Court invalidated the death sentence in *Witherspoon*,³³ holding that a jury chosen by excluding veniremen for cause "simply because they voiced general objections to the death

²⁶ *Witt v. Wainwright*, 714 F.2d at 1088 (quoting *Witherspoon*, 391 U.S. at 522 n.21).

²⁷ *Id.* at 1082. The court further stated that Colby's responses may have lacked the necessary certainty because of the prosecutor's failure to frame his questions in an unambiguous manner. Specifically, the court pointed to the state's inquiry to Ms. Colby as to whether her feelings would "interfere" with her sitting as a juror, without directly asking any questions that *Witherspoon* seems to require. *Id.*

²⁸ *Id.* at 1083 n.10.

²⁹ *Id.*

³⁰ 466 U.S. 957 (1984).

³¹ See Gross, *Determining the Neutrality of Death Qualified Juries*, 8 LAW & HUM. BEHAV. 7 (1984). The *Witherspoon* trial was a common example of the judicial tone of the *voir dire*. Prior to the questioning of the veniremen, the judge remarked: "Let's get these conscientious objectors out of the way, without wasting any time on them." Forty-seven veniremen were quickly excluded because of their attitudes toward the death penalty. *Witherspoon*, 391 U.S. at 514.

³² *Witherspoon*, 391 U.S. at 512.

³³ The Court declined, however, to reverse the conviction on the basis that a jury so selected was conviction-prone. The Court judged that the data on the subject was too fragmentary to make a ruling on the issue. *Id.* at 517. Since the Court's decision, many studies have considered the "prosecution-proneness" of "death-qualified" jurors. See, e.g., White, *Death Qualified Juries: The "Prosecution Proneness" Argument Re-examined*, 41 U. PITT. L. REV. 353 (1980).

penalty or expressed conscientious or religious scruples against its infliction" could not constitutionally sentence a man to death.³⁴

The Court in *Witherspoon* was clearly aware of the limitations of its holding. At the outset, the Court acknowledged that the issue before it was a narrow one:

It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. *Nor does it involve* the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse to consider its imposition in the case before them.³⁵

The Court reiterated this limitation on its holding in the often-quoted footnote twenty-one:

[N]othing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made 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 toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.³⁶

In limiting its holding as such, the *Witherspoon* Court technically decided the circumstances under which a juror may *not* be excluded for cause and left open the question of the circumstances under which a juror *may* be properly excluded for cause.³⁷

Nonetheless, subsequent Supreme Court and lower court decisions construed the language in *Witherspoon*'s footnote twenty-one and similar language in footnote nine³⁸ as the decisive holding in the case and the standard by which juror exclusions were to be measured.³⁹ Such a construction was inconsistent with the stated intent

³⁴ *Witherspoon*, 391 U.S. at 522. The Court stated that obviously many jurors "could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make their scruples subservient to their duty as jurors." *Id.* at 516 n.9.

³⁵ *Id.* at 513-14 (emphasis added).

³⁶ *Id.* at 522 n.21.

³⁷ See *Witt*, 105 S. Ct. at 851. See also *Adams*, 448 U.S. at 47-48 ("*Witherspoon* is not a ground for challenging any prospective juror.").

³⁸ *Witherspoon*'s footnote nine provides in part: "Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position." *Witherspoon*, 391 U.S. at 516 n.9.

³⁹ See, e.g., *Maxwell v. Bishop*, 398 U.S. 262, 265-66 (1970) (language from *Witherspoon*'s footnote nine quoted in overturning death sentence in rape case); *Boulden v. Holman*, 394 U.S. 478, 482 (1969) (footnote nine quoted in reversing death sentence in murder case); *Hackathorn v. Decker*, 438 F.2d 1363, 1366 (5th Cir. 1971) (reversal of

of the Supreme Court, which specifically limited the application of the footnote language only to cases in which the state excluded a venireman because his opposition to capital punishment would cause him to vote automatically against its imposition or would prevent him from impartially judging the defendant's guilt.⁴⁰

Despite subsequent adherence to the footnote language, the Supreme Court took small steps towards setting a coherent standard for proper cause excusals in *Boulden v. Holman*⁴¹ and *Lockett v. Ohio*.⁴² In *Boulden*, the Court emphasized the state's interest in obtaining jurors able to follow the law:

[I]t is entirely possible that a person who has "a fixed opinion against" or who does not "believe in" capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.⁴³

In *Lockett*, the trial judge addressed four prospective jurors as follows: "[D]o you feel that you could take an oath to well and truly [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"⁴⁴ Each of the four was excused for cause after stating that he or she could not "take the oath."⁴⁵ The Court held that the juror exclusions were in accordance with *Witherspoon* since "[e]ach of the excluded veniremen in this case made it 'unmistakably clear' that they could not be trusted to 'abide by the existing law' and 'to follow conscientiously the instructions' of the trial judge."⁴⁶

In *Adams v. Texas*, the Court finally announced a determinative standard regarding the circumstances under which a juror may properly be excluded for cause in a capital trial.⁴⁷ The Court's anal-

death sentence, citing language in footnote twenty-one as the "*Witherspoon* test"); *People v. Washington*, 71 Cal. 2d 1061, 1088, 458 P.2d 479, 495, 80 Cal. Rptr. 567, 583 (1969) (death penalty reversed in first-degree murder case, quoting footnote twenty-one language).

⁴⁰ In fact, the language in footnote twenty-one may not even be binding in such a specific case. See *Witt*, 105 S. Ct. at 851 (language from a footnote "not controlling").

⁴¹ 394 U.S. 478 (1969).

⁴² 438 U.S. 586 (1978). As in *Witherspoon*, 391 U.S. 510, the Court in *Lockett*, 438 U.S. 586, *Boulden*, 394 U.S. 478 and *Maxwell*, 398 U.S. 62, simply decided whether certain jurors had been improperly excluded. The Court did not establish a clear standard as to when jurors could be properly excluded for cause.

⁴³ *Boulden*, 394 U.S. at 483-84.

⁴⁴ *Lockett*, 438 U.S. at 595-96.

⁴⁵ *Id.* at 596.

⁴⁶ *Id.*

⁴⁷ See *Adams*, 448 U.S. at 45.

ysis of the development of the standard, however, may have perpetuated the confusion present in the lower courts.

The *Adams* Court initially proposed that the *Witherspoon* decision, in footnote twenty-one, recognized that the state "might well have power to exclude jurors on grounds more narrowly drawn" than exclusion for "conscientious scruples."⁴⁸ The Court stated that the language in footnote twenty-one was "clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths."⁴⁹ Thus, the Court announced the standard for cause excusal: "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."⁵⁰

Soon after the *Adams* decision, the Fifth Circuit, in *Burns v. Estelle*,⁵¹ while citing *Adams* as controlling, nevertheless applied the two prongs of *Witherspoon*'s footnote twenty-one as "talismans" in determining proper juror exclusion.⁵² In light of such continued misplaced loyalty to the *Witherspoon* footnote, it seems that the Court's attempt in *Adams* to clarify the standard for juror exclusion was ineffective. Thus, only five years after deciding *Adams*, the Court in *Wainwright v. Witt* attempted to clarify that which the Supreme Court and the lower courts had muddled.

IV. THE SUPREME COURT DECISION

By a 6-2-1 vote,⁵³ the Supreme Court reversed the decision of the Court of Appeals for the Eleventh Circuit.⁵⁴ Justice Rehnquist, writing for the majority, "simplified" the standard for cause excusal in capital cases by denying any "ritualistic adherence" to the language in *Witherspoon*'s footnote twenty-one⁵⁵ and embracing the

⁴⁸ *Id.* at 44.

⁴⁹ *Id.*

⁵⁰ *Id.* at 45.

⁵¹ 626 F.2d 396 (5th Cir. 1980). The Fifth Circuit waited for the Court's opinion to be handed down in *Adams* before rendering a decision in *Burns*. *Id.*

⁵² *Id.* at 398.

⁵³ Justice Rehnquist wrote the opinion for the Court, in which Justices White, Blackmun, Powell, O'Connor and Chief Justice Burger joined. Justice Stevens concurred in the judgment, and Justice Brennan wrote a dissenting opinion in which Justice Marshall joined.

⁵⁴ *Witt*, 105 S. Ct. at 849.

⁵⁵ The Court acknowledged that the language from *Witherspoon*'s footnote twenty-one and similar language in footnote nine was cited in later holdings as the standard for proper exclusion of jurors opposed to capital punishment. *Id.* at 849. See *supra* note 39.

standard originally set out *Adams v. Texas*.⁵⁶

The *Witt* majority proposed three reasons why the *Adams* standard was preferable to the language in *Witherspoon*'s footnote twenty-one for determining proper juror exclusion. First, the language in footnote twenty-one is not applicable to the duties of present-day juries in capital sentencing cases.⁵⁷ In *Witherspoon* the jury had unlimited discretion in choosing a sentence: a juror who could consider imposing the death penalty was deemed able to follow the law and abide by his oath.⁵⁸ Only veniremen who would never vote to impose the death penalty or who could not impartially judge guilt could be excluded for cause.⁵⁹ Juries today, Justice Rehnquist reasoned, no longer have such broad discretion, and sentencing is often a result of a jury being asked specific factual questions in order to determine if the death penalty is warranted in a particular case.⁶⁰ Regardless of whether a venireman *might* vote for the death penalty, the state should be able to challenge him if he indicates a refusal to follow the statutory scheme by truthfully answering the judge's sentencing questions.⁶¹

Second, the Court reasoned that the language in the *Witherspoon* footnote was dictum and therefore not controlling.⁶² The focus of *Witherspoon* was the circumstances under which veniremen could not

⁵⁶ 448 U.S. 38 (1980). In *Adams*, the Court upheld the applicability of the *Witherspoon* principles to the bifurcated procedure employed by Texas in capital cases. The state was held to have violated the sixth and fourteenth amendments when it excluded veniremen because they were unable to take an oath that the mandatory sentence of death or life imprisonment would not "affect [their] deliberations on any issue of fact." *Adams*, 448 U.S. at 48.

⁵⁷ *Witt*, 105 S. Ct. at 851.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ After the Court's decisions in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976), sentencing juries were no longer given wide discretion. Instead, legislatures adopted capital sentencing schemes much like the one discussed in *Adams*. In a Texas capital case, affirmative answers to three specific questions put to the jurors would automatically result in the trial judge's imposition of the death sentence: (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased. TEX. CODE CRIM. PROC. ANN., art. 37.871(b) (Vernon Supp. 1986).

⁶¹ *Witt*, 105 S. Ct. at 851.

⁶² *Id.* The Court cited *McDaniel v. Sanchez*, 452 U.S. 138 (1981) for this proposition. Justice Stevens, in his concurring opinion, stated that he did not agree with the Court's observation that dicta was not binding in future cases. *Witt*, 105 S. Ct. at 858 n.1 (Stevens, J., concurring). The *Witt* dissent also disagreed with the majority's proposition. See *infra* note 97 and accompanying text.

be excluded: thus, the Court did not decide when they *could* be excluded.⁶³

Third, Justice Rehnquist stated that the *Adams* standard was more in accord with traditional reasons for juror exclusion.⁶⁴ The state's power to exclude veniremen opposed to capital punishment originated from the idea that certain jurors, by not applying the law, could frustrate the state's legitimate interest in a sentencing scheme.⁶⁵ *Witherspoon* was simply a limitation on the state's power to exclude potential jurors—that power extended only to the interest in removing jurors who could not conscientiously apply the law and find the facts.⁶⁶

The Court concluded that the language of *Adams* was the correct standard: a prospective juror may be excluded for cause when his views on capital punishment would “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.”⁶⁷ In so ruling, the Court dispensed with the language from *Witherspoon* referring to “automatic” decision-making as well as the requirement that a juror's bias be proved with “unmistakable clarity.”⁶⁸ More importantly, the Court cleared up the confusion present even after the *Adams* decision as to what was the correct standard by which juror exclusions were to be measured.

The second issue the Court resolved concerned the degree of deference a federal habeas corpus court is required to pay to a state trial court's determination of juror bias. The Court held that a trial judge's finding of juror bias was a “factual issue” requiring a “presumption of correctness” by the reviewing court under 28 U.S.C. § 2254(d).⁶⁹

⁶³ *Witt*, 105 S. Ct. at 851. In fact, the *Witherspoon* Court twice stated the limitations on its holding. See *supra* notes 35-37 and accompanying text.

⁶⁴ *Witt*, 105 S. Ct. at 851.

⁶⁵ *Id.*

⁶⁶ *Id.* at 851-52. See also *Adams*, 448 U.S. at 47-48.

⁶⁷ *Witt*, 105 S. Ct. at 852.

⁶⁸ *Id.* The Court employed the rationale that “many veniremen simply cannot be asked enough questions to reach the point where their bias has been made ‘unmistakably clear.’”

⁶⁹ *Id.* at 855. 28 U.S.C. § 2254(d) (1985), provides in part:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus . . . pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct

The district court relied on § 2254(d) and accorded deference to the trial judge's finding of bias, but, as already noted, the court of appeals expressed confusion on the issue and did not reach a conclusion as to the application of the section. See *supra* notes 28-29 and accompanying text.

Subsequently, the Eleventh Circuit, in *Darden v. Wainwright*, 725 F.2d 1526 (11th

In a similar case, *Patton v. Yount*,⁷⁰ the Court granted § 2254(d) deference to a trial judge's determination that a potential juror was *not* biased and was therefore properly seated.⁷¹ In ruling that the holding in *Patton* applied equally to its present case, the Court stated that the trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record. These findings are the 'factual issues' that are subject to § 2254(d)." ⁷²

The Court concluded that the record provided "ample support" for the trial court's finding that venireman Colby's views would have prevented or substantially impaired the performance of her duties as a juror.⁷³ The Court held that the respondent had not established by "convincing evidence that the factual determination by the State court was erroneous," and reversed the court of appeals' decision.⁷⁴

Cir. 1984), *vacated*, *Wainwright v. Darden*, 105 S. Ct. 1158 (1985), adopted the position that a trial judge's determination of juror bias was a "mixed question of law and fact" not subject to a "presumption of correctness" under § 2254(d). See *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980) ("mixed determination[s] of law and fact" are not subject to the § 2254(d) presumption of correctness).

⁷⁰ 467 U.S. 1025 (1984).

⁷¹ *Id.*

⁷² *Witt*, 105 S. Ct. at 855. The Court recognized the "artful" discussion of Judge Higgenbotham in *O'Bryan v. Estelle*, 714 F.2d 365, 392 (5th Cir. 1983) (Higgenbotham, J., concurring specially), *cert. denied*, 465 U.S. 1013 (1984), in regard to the trial judge's advantage of having seen and heard the juror in deciding bias. Judge Higgenbotham suggested deference to the trial judge in order to preserve the trial court's integrity as a court of law. Moreover, he noted that on habeas review, comity and federalism indicate the need to pay deference to independent mechanisms of state governments that have already reached one decision on the same facts. *Id.*

⁷³ *Witt*, 105 S. Ct. at 856. Witt had attacked the record in two ways. First, he stated that from the record there was no way to determine whether the trial judge applied the correct standard. The Court, however, noted that where the record does not indicate the standard applied by the trial judge, he is presumed to have used the correct one. *Marshall v. Lonberger*, 459 U.S. 422, 433 (1983). Moreover, the Court stated that there was every indication that the trial judge did indeed apply the correct standard. Although the judge did not participate in the *voir dire* questioning of Ms. Colby, he did participate in several subsequent questionings in which he asked questions "entirely consistent with the *Adams* standard." *Witt*, 105 S. Ct. at 856. The Court found no reason to believe that the trial judge's understanding of the standard changed between the time of the questioning of Colby and the questioning of subsequent veniremen. *Id.*

Second, Witt claimed that the *voir dire* questioning of Colby was too ambiguous to justify her exclusion. The court of appeals had agreed with Witt that the word "interfere" used in Colby's questioning "admits of a great variety of interpretations," and the *voir dire* did not indicate the extent of the "interference." *Witt v. Wainwright*, 714 F.2d at 1082. However, the Supreme Court stated that "[r]elevant *voir dire* questions need not be framed exclusively in the language of the controlling appellate opinion." *Witt*, 105 S. Ct. at 857.

⁷⁴ *Id.* at 858. The presumption of correctness applies to the judge's findings unless, *inter alia*:

Justice Stevens, concurring in the judgment, proposed that the only fact important to the decision was defense counsel's failure to object to the exclusion of venireman Colby.⁷⁵ Justice Stevens hypothesized that defense counsel's decision not to object to Colby's exclusion might have been deliberate because counsel did not want her serving as a juror.⁷⁶ Therefore, Justice Stevens was unable to conclude that an error fundamental to the resolution of the trial had occurred.⁷⁷

Justice Brennan, writing for the dissent, initially asserted that the death penalty is cruel and unusual punishment,⁷⁸ and that the Eleventh Circuit's decision to vacate Witt's sentence was therefore proper.⁷⁹ Justice Brennan acknowledged, however, that even if he did not believe that the death penalty was unconstitutional in all cases, he would nonetheless affirm the decision based on his understanding of the principles underlying *Witherspoon* and its progeny.⁸⁰

Justice Brennan professed that *Witherspoon* imposed upon the state an exceptionally high burden of proof for showing that a venireman's views about capital punishment would result in actual

the Federal court on a consideration of . . . the record as a whole concludes that such factual determination is not fairly supported by the record. And . . . unless the court concludes . . . that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. § 2254(d) (1985).

⁷⁵ *Witt*, 105 S. Ct. at 858-59 (Stevens, J., concurring). Neither did defense counsel object to the exclusion of the other two jurors whose exclusions Witt challenged on appeal. Justice Stevens noted, however, that defense counsel did object to an exclusion subsequent to Colby's:

After answering several questions of the prosecutor, juror Kazmierczak stated: "I don't think [my views on the death penalty] would interfere with the guilt or innocence of the person, but the decision of what guilt and what the outcome would be for his destiny, I could not go along with the death penalty." (citation omitted). When the prosecutor later moved to excuse her for cause, defense counsel objected, [and] further questioning ensued The record thus demonstrates that defense counsel wanted Kazmierczak to serve as a juror, but that she was properly excused.

Id. at 859 (Stevens, J., concurring).

⁷⁶ Justice Stevens reasoned that given the "gruesome facts" of the case and Colby's "somewhat timorous responses," it was possible that her demeanor persuaded defense counsel that he would prefer a more vigorous, less reluctant juror than Colby. *Id.*

⁷⁷ *Id.* Justice Stevens based his opinion on a statement in a previous decision: "The failure to object generally indicates that the defense counsel felt that the trial error was not critical to his client's case; presumably, therefore, the error did not render the trial fundamentally unfair." *Engle v. Isaacs*, 456 U.S. 107, 136 n.1 (1982) (Stevens, J., concurring in part and dissenting in part).

⁷⁸ See also *Gregg v. Georgia*, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 257 (1972) (Brennan, J., concurring).

⁷⁹ *Witt*, 105 S. Ct. at 860 (Brennan, J., dissenting).

⁸⁰ *Id.*

bias before allowing exclusion of the juror for cause.⁸¹ In reversing the Eleventh Circuit's opinion, he wrote, the majority abandoned this strict limit on "death qualification"⁸² and held that death-qualification exclusions are to be evaluated under the same standards as exclusion for any other cause.⁸³

Justice Brennan perceived three important consequences of *Witherspoon's* strict exclusion standard. First, it permitted exclusions only of those jurors whose views would prevent or substantially impair them from following instructions or obeying an oath, and not those whose views would simply make these tasks more psychologically or emotionally difficult.⁸⁴ Second, it precluded exclusion of jurors whose *voir dire* responses were ambiguous or vacillating.⁸⁵ Third, it precluded exclusion of jurors who were uncertain at *voir dire* as to whether their views would prevent them from following their oaths.⁸⁶ Summarizing these consequences, Justice Brennan stated:

[Since the Court] viewed the risks to a defendant's Sixth Amendment rights from a jury from which those who oppose capital punishment have been excluded as far more serious than the risks to the State from inclusion of particular jurors whose views about the death penalty might turn out to predispose them toward the defendant, [the Court] placed on the State an extremely high burden to justify exclusion.⁸⁷

Thus, Justice Brennan's chief concern was that the removal of *Witherspoon's* strict standard would result in a capital defendant, rather than the state, bearing the risk of a less than wholly neutral jury.⁸⁸

The dissent criticized the Court's perception that *Adams* was in-

⁸¹ *Id.* at 862 (Brennan, J., dissenting).

⁸² "Death-qualification" is a term for the procedure of exclusion for cause, in capital cases, of jurors opposed to capital punishment. *Id.* at 860 (Brennan, J., dissenting).

⁸³ Justice Brennan proposed that while broad exclusions for random idiosyncratic traits result in no systematic bias, exclusion of those opposed to capital punishment keeps an identifiable class of people off juries and is likely to systematically bias juries. These juries would be unlikely to represent a fair cross-section of the community. *Id.* at 861 (Brennan, J., dissenting). As Justice Brennan explained, "the State's right to ensure exclusion of any juror who might fail to vote the death penalty when the State's capital punishment scheme permits such a verdict vanquishes the defendant's right to a jury that assuredly will not impose the death penalty when that penalty would be inappropriate." *Id.*

⁸⁴ *Id.* at 862 (Brennan, J., dissenting).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 863 (Brennan, J., dissenting).

⁸⁸ *Id.* at 861 (Brennan, J., dissenting). Justice Brennan conceded that in a capital trial, "perfect" neutrality cannot be achieved. *Cf. Gross, supra* note 31, at 26-28 (discussing the principle of uncertainty in criminal convictions).

consistent with the ideals of *Witherspoon*.⁸⁹ Justice Brennan argued that not only did *Adams* quote *Witherspoon*'s footnote twenty-one with approval,⁹⁰ but the decision also followed *Witherspoon*'s recognition that "the Constitution prohibits imposition of a death sentence by a jury from which a juror was excluded on *any broader basis* than an unambiguous, affirmatively stated inability to follow instructions and abide by an oath."⁹¹

The dissent further chastized the Court for abandoning *Witherspoon* and "rewriting" *Adams*, attacking the majority's three reasons for preferring the so-called "*Adams* test."⁹² First, Justice Brennan argued that the Court's assertion regarding the changed role of present-day juries was exactly the analysis that prompted Justice Rehnquist's dissent in *Adams*.⁹³ Thus, the same reasoning that led to the *Adams* dissent was later used to justify a test derived from the *Adams* holding.⁹⁴ Furthermore, the existence of a new role for juries "in no way diminishes the defendant's interest in a jury composed of a fair cross-section of the community."⁹⁵ Justice Brennan proposed that the risks that *Witherspoon* sought to minimize by establishing high burdens of proof for exclusions are equally present in the context of statutory sentencing schemes.⁹⁶

Second, the dissent argued that the Court's reasoning in construing *Witherspoon*'s footnote twenty-one as dictum did not convey the status accorded to the standard embodied in the footnote in

⁸⁹ *Witt*, 105 S. Ct. at 866 (Brennan, J., dissenting).

⁹⁰ *Id.* Justice Brennan, however, elicited no blind loyalty for "unthinking adherence to the particular . . . inquiry propounded in footnote 21." *Id.* He conceded that the language of footnote twenty-one carried "no talismanic significance." *Id.* at 863 (Brennan, J., dissenting).

⁹¹ *Id.* at 867 (Brennan, J., dissenting). The original language of the *Witherspoon* Court was as follows:

The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by the state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out

Witherspoon, 391 U.S. at 522 n.21.

⁹² *Witt*, 105 S. Ct. at 867 (Brennan, J., dissenting).

⁹³ *Id.* at 867-68 (Brennan, J., dissenting). Justice Brennan, "[i]n the interest of [the Court's] candor" pointed to this language of Justice Rehnquist's dissent in *Adams*: "at a time when this Court should be re-examining the doctrinal underpinnings of *Witherspoon* in light of our intervening decisions in capital cases, it instead expands that precedent as if those underpinnings had remained wholly static" *Adams*, 448 U.S. at 52.

⁹⁴ *Witt*, 105 S. Ct. at 868 (Brennan, J., dissenting).

⁹⁵ *Id.*

⁹⁶ *Id.*

subsequent rulings in the Supreme Court and in lower courts.⁹⁷

The dissent summarized the Court's third reason for preferring the "*Adams test*" as an argument in favor of excluding jurors for their opposition to the death penalty using the same standards as would be used in exclusion for any other type of bias.⁹⁸ Justice Brennan argued, however, that the very essence of *Witherspoon* was its recognition of a constitutionally significant distinction between cause exclusion of jurors opposed to capital punishment and exclusion for other biases.⁹⁹ If the only concern of the Court was the equivalent right of the state and the capital defendant to impartial jurors, then the constitutional protections *Witherspoon* accorded the defendant made no sense.¹⁰⁰

Throughout his dissent, Justice Brennan emphasized the protection of the integrity of the jury as a "body truly representative of the community."¹⁰¹ Broad death-qualification, he argued, threatens the requirement that juries be drawn from a fair cross-section of the community.¹⁰² Thus, if the sixth amendment requires only that individual jurors be impartial, then the right to a jury drawn from a fair cross-section of the community is lost.¹⁰³

Justice Brennan further displayed his unhappiness with the Court's abandonment of *Witherspoon*, asserting that even under the Court's new standard of cause exclusion, a trial court's determination of juror bias was still a mixed question of law and fact and therefore not subject to a presumption of correctness under § 2254(d).¹⁰⁴ Moreover, the dissent accused the Court of redefining the standard for death-qualification with the intention of bringing review of the bias findings within the presumption of correctness of § 2254(d).¹⁰⁵

V. ANALYSIS

The professed concern of the *Witt* Court was to set a standard

⁹⁷ *Id.* The Court conceded, however, that the language of *Witherspoon*'s footnote twenty-one "set[] the standard" for judging the proper exclusion of jurors in decisions subsequent to *Witherspoon*. *Witt*, 105 S. Ct. at 849.

⁹⁸ *Witt*, 105 S. Ct. at 869 (Brennan, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 870 (Brennan, J., dissenting); *accord*, *Smith v. Texas*, 311 U.S. 128 (1940).

¹⁰² *Witt*, 105 S. Ct. at 871 (Brennan, J., dissenting).

¹⁰³ *Id.* at 871-72 (Brennan, J., dissenting).

¹⁰⁴ *Id.* at 872 (Brennan, J., dissenting). The dissent stated that had the Court retained *Witherspoon*'s strict standard for death-qualification, the question of juror bias would definitely be one of mixed law and fact—"an application of a legal standard to an undisputed historical fact." *Id.*

¹⁰⁵ *Id.*

by which to distinguish between "jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial."¹⁰⁶ Implicit in this statement was the Court's recognition of the delicate balance presented in *Witherspoon* between the state's legitimate interest in obtaining jurors whose views will not frustrate a statutory sentencing scheme, and a capital defendant's right under the sixth and fourteenth amendments to an impartial jury.¹⁰⁷

The majority of the Court, however, while avowing adherence to the "essential balance" struck by the *Witherspoon* decision, discarded the language embodied in *Witherspoon*'s footnote twenty-one in preference of the test established in *Adams v. Texas*.¹⁰⁸ While claiming only to have "modified" and "simplified" the standard, the Court effectively ignored the basic precepts of *Witherspoon* by announcing proudly that "gone . . . is the extremely high burden of proof" for the state to show actual juror bias.¹⁰⁹

Witherspoon recognized the state's legitimate interest in excluding certain prospective jurors whose unbending opposition to the death penalty might frustrate the application of the state's statutory scheme providing for capital punishment.¹¹⁰ A prospective juror who is unable to subordinate his opposition to capital punishment to his duties as a juror to follow and apply the law interferes with the state's objective by coming to the sentencing procedure committed to a position that the state legislature has rejected.¹¹¹ If unanimity

¹⁰⁶ *Witt*, 105 S. Ct. at 850-51. *Witherspoon* recognized that any "layman . . . [might] say he has scruples if he is somewhat unhappy about death sentences [Thus] a general question as to the presence of . . . reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direst cases." *Witherspoon*, 391 U.S. at 516 n.9.

¹⁰⁷ *Witt*, 105 S. Ct. at 848.

¹⁰⁸ *Id.* at 851. It may have been unnecessary for the Court to reject the footnote twenty-one language in order to adopt the *Adams* standard. On one hand, the Court had the *Witherspoon* language, written originally as dicta, regarding a limitation on the state's right to exclude jurors; i.e., under what circumstances a juror *could not* be excluded. On the other hand, the Court had the *Adams* language which proposed to set a standard as to when jurors *could* be excluded. Moreover, the *Adams* Court developed its standard by *accepting* much of what the *Witherspoon* footnote professed. Nonetheless, the *Witt* Court proceeded to compare the relative merits of two arguably uncomparable standards.

¹⁰⁹ *Witt*, 105 S. Ct. at 851.

¹¹⁰ *Witherspoon*, 391 U.S. at 513-14.

¹¹¹ See Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 80 (1980). Professor Gillers criticized the *Witherspoon* decision for not focusing on the "precise" state interest in excluding certain jurors opposed to capital punishment. Rather, the decision merely suggested that a state may have a right to a jury "neutral" with respect to penalty," or to jurors able "to obey the law of the State." *Id.*

of the jury is required for sentencing, one such capital punishment opponent makes imposition of one of the state's authorized penalties impossible.¹¹²

The *Witherspoon* Court proceeded to put a limit on the state's power to exclude jurors opposed to the death penalty, but the decision did not establish what in addition to "general objections" to the death penalty a prospective juror must express before he can be properly excluded.¹¹³ Furthermore, as a protection to the state's interest, the "automatic" language in *Witherspoon*'s footnote twenty-one was unworkable. For example, the language would prohibit the state in a single-victim murder case from excluding for cause a prospective juror who would vote for the death penalty only in the case of a multiple murder. In the same case, the language would permit the state to exclude a prospective juror who would never vote for the death penalty, not even in the case of a multiple murder.¹¹⁴

In the same *Witherspoon* footnote, however, the Court began to define more clearly the parameters of the state's right to exclude:

The most that can be demanded of a venireman . . . is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.¹¹⁵

The *Adams* Court articulated the parameters of the state's interest more simply and completely: the state has a "legitimate interest in obtaining jurors who [can] follow their instructions and obey their oaths."¹¹⁶ It is this state interest that was Justice Rehnquist's

¹¹² *Id.* at 81.

¹¹³ The parameters of the state's power were very loosely defined. At one end, the state could not exclude jurors who simply had "general objections" to the death penalty; at the other, the state certainly had power to exclude at least those jurors who would automatically vote against the death penalty and those jurors who could not impartially judge the guilt of the defendant. See *Witherspoon*, 391 U.S. at 513-14.

¹¹⁴ See Schnapper, *Taking Witherspoon Seriously: The Search for Death Qualified Jurors*, 62 TEX. L. REV. 977, 984 (1984). *Witherspoon* stated that veniremen can not be excluded for cause "simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment." *Witherspoon*, 391 U.S. at 522 n.21. One commentator suggested that *Witherspoon*'s disapproval of the practice of excluding these "partially scrupled" jurors was well founded:

If a juror could be challenged for cause merely because he or she was against the death penalty in the circumstances at issue, a prosecutor could describe the particular facts of the case and demand to know how each venireman would vote at the penalty phase [J]urors would be hand-picked for their willingness to execute the very defendant on trial. Moreover, if the criteria for juror selection were based on the particular circumstances of each case, then veniremen of increasingly mild scruples would be excluded as the heinousness of the crime decreased.

Schnapper, 62 TEX. L. REV. at 985.

¹¹⁵ *Witherspoon*, 391 U.S. at 522 n.21.

¹¹⁶ *Adams*, 448 U.S. at 44. The Court evidenced this concern for the state's interest in

focus in *Witt*. To the extent that Justice Rehnquist recognized the importance of the state's interest, the standard set out in *Witt* was a correct one. But the majority's disregard of the other side of the "essential balance"—the rights of the capital defendant—is unjustifiable.

The *Witt* majority's only interest was in an "impartial" jury—one that would conscientiously apply the law and find the facts.¹¹⁷ Justice Rehnquist proved his disinterest for the capital defendant's rights by writing: "[w]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who will quite likely be biased in his favor."¹¹⁸ For this reason, the Court abandoned the "extremely high burden of proof" on the state to show juror bias.¹¹⁹

Certainly a capital defendant is not entitled to a jury biased in his favor, but his sixth amendment right should not be subordinated to the state's interest in facilitating its capital punishment scheme. Justice Brennan saw the majority's decision as part of a "disturbing trend" reflected in the Court's "unseemly eagerness to recognize the strength of the State's interest in efficient law enforcement and to make expedient sacrifices of the constitutional rights of the criminal defendant"¹²⁰ The state clearly has an interest in seating jurors who will apply the law, but the standards of proof for bias must remain high if the principles of *Witherspoon* are to have any meaning at all.¹²¹ In essence, the *Witt* Court "shifted to the capital defendant the risk of a biased and unrepresentative jury."¹²²

Moreover, the majority, by dissolving the high standard of proof, advocated the broad exclusion of jurors opposed to capital punishment on the same basis as exclusion for any other type of bias.¹²³ Since the decision in *Furman v. Georgia*,¹²⁴ however, the en-

quotations from *Lockett v. Ohio* and *Boulden v. Holman*. See *supra* notes 42-45 and accompanying text.

¹¹⁷ *Witt*, 105 S. Ct. at 852.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 851.

¹²⁰ *Id.* at 872 (Brennan, J., dissenting) (citing *United States v. Leon*, 468 U.S. 897 (1984) (evidence obtained in reasonable reliance on defective search warrant held to be admissible) (Brennan, J., dissenting)).

¹²¹ Justice Brennan seemed to indicate that retention of the "unmistakably clear" language would keep the standard high: "[The Court's decision today means that it] no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath." *Witt*, 105 S. Ct. at 867 (Brennan, J., dissenting).

¹²² *Id.*

¹²³ See *Witt*, 105 S. Ct. at 855.

¹²⁴ 488 U.S. 238 (1972) (death penalty under certain circumstances held to be violative of the eighth amendment's prohibition of cruel and unusual punishment).

tire Court has recognized the idea that "because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards" ¹²⁵ The merit of the *Witherspoon* decision was its recognition of this special protection accorded to the rights of a capital defendant. *Witherspoon* provided a framework by which to prohibit the state from "cross[ing] the line of neutrality . . . [and] produc[ing] a jury uncommonly willing to condemn a man to death." ¹²⁶ It was the high burden of proof on the state that protected the capital defendant from juries "organized to return a verdict of death." ¹²⁷ By dissolving this high burden of proof, the *Witt* majority ignored the important safeguards once deemed necessary for the protection of the capital defendant.

It was the Court's discarding of *Witherspoon*'s stringent standard of proof that spurred Justice Brennan's disagreement with the *Witt* majority. Justice Brennan held no blind loyalty to the language in *Witherspoon*'s footnote twenty-one, ¹²⁸ nor did he object to the

¹²⁵ *Spaziano v. Florida*, 468 U.S. 447, 468 (1984) (trial judge's imposition of the death penalty despite jury's recommendation of life imprisonment held constitutional) (Stevens, J., concurring in part and dissenting in part). In *Furman*, Justice Stewart aptly wrote: "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman*, 408 U.S. at 386 (Stewart, J., concurring). In the same decision, Justice Brennan concurred: "Death is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity The punishment itself may have been unconstitutionally inflicted; [citation omitted] yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.'" *Id.* at 290 (Brennan, J., concurring).

Furthermore, in *Spaziano*, Justice Stevens stated that "every Member of this Court has written or joined at least one opinion endorsing the proposition" that the death penalty must be accompanied by appropriate safeguards. *Spaziano*, 468 U.S. at 468. In *Witt*, Justice Brennan stressed this idea, stating that "[i]f the presently prevailing view of the Constitution is to permit the State to exact the awesome punishment of taking a life, then basic justice demands that juries with the power to decide whether a capital defendant lives or dies not be poisoned against the defendant." *Witt*, 105 S. Ct. at 868 (Brennan, J., dissenting).

¹²⁶ *Witherspoon*, 391 U.S. at 520-21.

¹²⁷ *Id.* at 521.

¹²⁸ [Footnote twenty-one's] particular two-part inquiry . . . carries no talismanic significance. Its purpose is to expose the ability *vel non* of a juror to follow instructions and abide by an oath with respect to both sentencing (the first prong) and determining guilt or innocence (the second prong). (footnote omitted) We have held that different forms of inquiry passed muster under *Witherspoon* so long as they were similarly directed at ascertaining whether a juror could follow instructions and abide by an oath.

Witt, 105 S. Ct. at 863 (Brennan, J., dissenting) (citing *Adams*, 448 U.S. at 44-45; *Lockett*, 438 U.S. at 595-96).

Court's recognition of the state's legitimate interest.¹²⁹ The dissent's chief concern was with the Court's new lenient standard: "[t]he Court no longer prohibits exclusion of uncertain, vacillating or ambiguous prospective jurors. It no longer requires an unmistakably clear showing that a prospective juror will be prevented or substantially impaired from following instructions and abiding by an oath."¹³⁰

Much of Justice Brennan's argument for the protection of the right of the capital defendant to an impartial jury focused upon the complexion of the jury as "a body truly representative of the community."¹³¹ Justice Brennan argued that if the jury is indeed to be the "link between contemporary community values and the penal system,"¹³² juries from which an "identifiable class of people" opposed to capital punishment have been excluded are unlikely to reflect fairly the community's judgment.¹³³

Accordingly, the Supreme Court has emphatically stated that the purpose of the jury is "to guard against the exercise of arbitrary power This prophylactic vehicle is not provided if the jury pool is made up of only segments of the populace or if large, distinctive groups are excluded from the pool."¹³⁴ There is no requirement, however, that juries must "mirror the community and reflect the various distinctive groups in the population."¹³⁵ Moreover, the

¹²⁹ Justice Brennan recognized the interest of the state in "the necessity of excusing for cause those prospective jurors who, because of their lack of impartiality from holding unusually strong views against the death penalty, would frustrate a state's legitimate effort to administer an otherwise constitutionally valid death penalty scheme." *Witt*, 105 S. Ct. at 864 (Brennan, J., dissenting) (quoting *Witt v. Wainwright*, 714 F.2d at 1076-80).

¹³⁰ *Id.* at 867 (Brennan, J., dissenting). Thus Justice Brennan's dissent was sparked by the majority's denial of the high burden of proof on the state, not by any disapproval of the language of *Adams*. See also *Witt*, 105 S. Ct. at 858 (Stevens, J., concurring) ("[T]he entire Court continues to endorse" the standard announced in *Adams*).

¹³¹ *Witt*, 105 S. Ct. at 870 (Brennan, J., dissenting) (quoting *Smith v. Texas*, 311 U.S. 128 (1940)). In *Smith*, the Supreme Court ruled that the systematic exclusion of blacks from jury service violated the requirement that juries be drawn from a "body truly representative of the community." *Smith*, 311 U.S. at 130.

¹³² See *Witherspoon*, 391 U.S. at 519 n.15 (quoting *Trop v. Dulles*, 356 U.S. 86 (1957)).

¹³³ In *Witherspoon*, the Court seemed to put some emphasis on empirical data showing that in 1966, approximately forty-two percent of the American public favored capital punishment while forty-seven percent opposed it and eleven percent were undecided. *Witherspoon*, 391 U.S. at 520 n.16. "[I]n a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority." *Id.* at 519-20.

¹³⁴ *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

¹³⁵ *Id.* at 538. See also LAFAYE & ISRAEL, *CRIMINAL PROCEDURE* § 21.2(d)(1984). The *Taylor* Court held that "[d]efendants are not entitled to a jury of any particular composi-

Court has held that even if there is a systematic exclusion of a distinct class from a jury panel, there is no constitutional violation if the exclusion is no broader than is necessary to serve a valid governmental purpose.¹³⁶

Thus, a complete "cross-section" requirement ignores the valid governmental purpose served by *some* level of death-qualification: excluding from juries that "distinctive group" that would not be able to conscientiously apply the law according to an oath.¹³⁷ The absence of a "fair cross-section" requirement, on the other hand, would result in the exclusion of prospective jurors whose general philosophical views might have no bearing on their ability to obey their oaths as jurors.¹³⁸ Again, the "essential balance" of *Witherspoon* seems to provide the solution: a capital defendant's right to a jury drawn from a "fair cross-section of the community" must be balanced against the traditional right of the state to challenge a juror for bias.¹³⁹

As a further consequence of the *Witt* decision "simplifying" the standard for juror exclusion, the Court held that a trial judge's decision regarding juror bias was a question of fact subject to a presumption of correctness under § 2254(d).¹⁴⁰ In so holding, the Court rejected the ruling in *Darden v. Wainwright*,¹⁴¹ in which the Eleventh Circuit declared that the question was one of mixed law and fact.¹⁴²

In *Darden*, the Eleventh Circuit ruled that although no court had previously decided the proper standard of review in cases involving *Witherspoon* issues, the "predominant if not exclusive" method of review undertaken by federal courts including the Supreme Court, had been "an independent review, based upon a close study of the voir dire transcript to determine whether a venireperson was im-

tion (citation omitted), but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community" *Taylor*, 419 U.S. at 538.

¹³⁶ *LAFAVE & ISRAEL*, *supra* note 135 § 21.2(d). *Accord*, *Taylor* 419 U.S. 522; *Duren v. Missouri*, 439 U.S. 357 (1979).

¹³⁷ The *Witt* majority noted that if the "fair cross-section" requirement is carried to its logical conclusion, it would require that a juror be seated who vowed that he would not and could not follow the judge's instructions on the law. *Witt*, 105 S. Ct. at 852 n.5.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 855. *See supra* notes 68-73 and accompanying text.

¹⁴¹ 725 F.2d 1526 (11th Cir. 1984).

¹⁴² *Id.* at 1529. Subsequent to the Eleventh Circuit's confusion as to the standard of review in *Witt v. Wainwright*, the court of appeals adopted this standard.

properly excluded from the jury.”¹⁴³ Moreover, the Eleventh Circuit held that the application of the *Witherspoon* rule was a mixed question of law and fact involving “the application of legal principles to the historical facts of [the] case” which made it a determination subject to independent review by the federal appellate court.¹⁴⁴

The Supreme Court in *Witt* rejected the ruling in *Darden*, stating that the Eleventh Circuit “labored under the misapprehension that the standard for determining exclusion was that found in *Witherspoon*’s footnote twenty-one—which imposed ‘a strict legal standard’ and ‘a very high standard of proof.’”¹⁴⁵ Of course, the *Witt* Court rejected the high standard of proof for juror bias, allowing the bias question to be deemed one of fact.¹⁴⁶ The Court held, therefore, that a federal reviewing court must give deference to a trial judge’s finding of juror bias: “such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge’s province.”¹⁴⁷

In support of its position that *Patton v. Yount*¹⁴⁸ applied to a trial judge’s finding of bias, the Court asserted that “excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias”¹⁴⁹ It was this idea, as well as the removal of the high standard of proof for juror exclusions, to which Brennan’s dissent took exception and which clearly evidenced the Court’s removal of the *Witherspoon* safeguards.

VI. CONCLUSION

In *Wainwright v. Witt*, the Supreme Court established a clear standard for the proper exclusion of jurors opposed to capital pun-

¹⁴³ *Id.* (citing, *inter alia*, *Adams*, 448 U.S. at 49-51; *Lockett*, 438 U.S. at 595-97; *Maxwell*, 398 U.S. at 264-65; and *Boulden*, 394 U.S. at 482-84).

¹⁴⁴ *Darden*, 725 F.2d at 1529. The Eleventh Circuit continued, however, stating that the federal court’s responsibility for independent review did not preclude the court on appeal from according deference to the trial judge’s decision, but only as to the assessment of the demeanor and clarity of the veniremen’s responses. Independent review, however, requires that a federal appellate court reach its own judgment on the question of whether a prospective juror was improperly excluded. *Id.* at 1530.

¹⁴⁵ *Witt*, 105 S. Ct. at 855.

¹⁴⁶ The dissent in *Witt* lamented that the Court was expanding the definition of a “question of fact” to include a determination of juror bias in a continuing ploy to “thwart the vindication of fundamental rights in the federal courts.” *Witt*, 105 S. Ct. at 872 (Brennan, J., dissenting).

¹⁴⁷ *Witt*, 105 S. Ct. at 854.

¹⁴⁸ 467 U.S. 1025 (1984) (§ 2254(d) deference granted to trial judge’s finding that juror was *not* biased).

¹⁴⁹ *Witt*, 105 S. Ct. at 855.

ishment. The Court also accorded state trial courts deference when federal courts review findings of juror bias.

By deeming a finding of juror bias a question of fact subject to a presumption of correctness under § 2254(d), the Court granted important deference to the conclusions of a trial judge. In simplifying the standard for cause exclusion, however, the Court strayed far from the principles of *Witherspoon*.

The *Witt* decision suggests to capital defendants like Witt that the state now has an increased power to exclude jurors who might hesitate to vote for the death penalty. Furthermore, the capital defendant may now be faced with a jury purged of all persons whose views on capital punishment would "invest their deliberations with greater seriousness and gravity"¹⁵⁰ or make their decision to impose the death penalty more psychologically or emotionally difficult.

Thus, the "essential balance" of *Witherspoon* has been tipped. While focusing upon the state's interest in carrying out its statutory sentencing schemes, the Supreme Court has ignored the basic protections that *Witherspoon* provided for a capital defendant's life.

PATRICK J. CALLANS

¹⁵⁰ See *Adams*, 448 U.S. at 49.