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Sixth Amendment--Death Qualification of the Jury: Process is Permissible Where Defendant Does Not Face Death Penalty

Barbara J. Whisler

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SIXTH AMENDMENT—DEATH QUALIFICATION OF THE JURY: PROCESS IS PERMISSIBLE WHERE DEFENDANT DOES NOT FACE DEATH PENALTY

Buchanan v. Kentucky, 107 S. Ct. 2906 (1987).

I. INTRODUCTION

In *Buchanan v. Kentucky*,¹ the United States Supreme Court severely limited a criminal defendant's right, under the sixth² and the fourteenth³ amendments, to trial by an impartial jury.⁴ In denying petitioner Buchanan's claims,⁵ the Court found its prior decision in *Lockhart v. McCree*⁶ dispositive of the issues presented in *Buchanan*.⁷ In *McCree*,⁸ the Supreme Court addressed the issues it had left unresolved in its earlier decision in *Witherspoon v. Illinois*⁹ and held that "death-qualification"¹⁰ of a jury prior to the guilt phase of a bifur-

¹ 107 S. Ct. 2906 (1987).

² The sixth amendment provides in pertinent part: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

³ The fourteenth amendment provides in pertinent part: "[n]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV.

⁴ The sixth amendment has been interpreted as requiring that the jury be drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

⁵ Petitioner Buchanan claimed that his right to a fair and impartial jury drawn from a fair cross-section of the community was violated when the Commonwealth of Kentucky was permitted to "death-qualify" the jury in his joint trial with a capital defendant, and further, Buchanan claimed that his sixth amendment right to the assistance of counsel was infringed when the Commonwealth was permitted to introduce a report concerning Buchanan's amenability to psychiatric treatment pending trial.

⁶ *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

⁷ *Buchanan*, 107 S. Ct. at 2913.

⁸ *McCree*, 106 S. Ct. 1758.

⁹ 391 U.S. 510 (1968).

¹⁰ "Death-qualification" is the process whereby the state is permitted to exclude from the jury those veniremen who state that they are unwilling to impose the death penalty under any circumstances. The excluded veniremen are known as "*Witherspoon*-excludables." *Buchanan*, 107 S. Ct. at 2902-10 n.6 (citations omitted).

cated¹¹ capital¹² trial did not violate the defendant's right to an impartial jury.¹³ Furthermore, the *Witherspoon* Court held the fair cross-section requirement¹⁴ applicable to venires¹⁵ only. The Court stated that even if it were to hold the fair cross-section requirement applicable to petit juries¹⁶ as well as to venires, "death-qualification" of the jury would not violate this requirement because those excluded from the jury through the "death-qualification" process did not constitute a "distinctive group"¹⁷ for fair cross-section purposes.

The final link in the *Witherspoon/McCree* chain was forged with the majority holding in *Buchanan*.¹⁸ The majority held that the sixth amendment right to an impartial jury trial is not violated where the state is permitted to "death-qualify" the jury in a joint trial of a capital and a non-capital defendant.¹⁹

The majority in *Buchanan* also severely limited the protection afforded a criminal defendant through the fifth amendment right against self-incrimination.²⁰ In *Estelle v. Smith*,²¹ the Court held that psychiatric testimony concerning the defendant's future dangerousness was inadmissible at the sentencing phase of the defendant's trial where the psychiatrist had conducted a competency exam²²

¹¹ A bifurcated trial is the procedure whereby the defendant's guilt is determined in one proceeding, and, if found guilty, the defendant's sentence is determined in another proceeding.

¹² Capital trials are those situations where the defendant has been charged with a crime for which one of the possible penalties is death.

¹³ *McCree*, 106 S. Ct. at 1760.

¹⁴ See *supra* note 4.

¹⁵ A venire is the pool from which the jury is drawn. A venire may be compiled in a variety of ways. Usually, voter registration rolls are used or phone listings are employed.

¹⁶ A petit jury is the group selected from the venire to try the case.

¹⁷ *McCree*, 106 S. Ct. at 1765. The Court noted that the fair cross-section requirement prohibits the systematic exclusion of a "distinctive group" in the community. Since the Court refused to extend "distinctive group" status to "*Witherspoon*-excludables," "death-qualification" did not violate the fair cross-section requirement. *Id.* at 1765-67. See *supra* note 10 for a discussion of "*Witherspoon*-excludables."

¹⁸ See *infra* notes 90-96 and accompanying text.

¹⁹ *Buchanan*, 107 S. Ct. at 2916.

²⁰ The fifth amendment provides in pertinent part: "nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V.

²¹ 451 U.S. 454 (1981).

²² In criminal trials, state statutes often provide for the court or counsel to order psychiatric exams on the defendant's competency to stand trial. See, e.g., TEX. CRIM. PROC. CODE ANN. § 46.02 (Vernon 1979). At the core of this procedure is the belief that the state cannot convict one who does not understand the proceedings against him and cannot, therefore, assume the adversarial position necessary to the American system of criminal justice.

only and the defendant did not receive the warnings required by *Miranda v. Arizona*²³ prior to this examination. While *Buchanan* was analogous to the facts of *Estelle*, the Court refused to reach an analogous result and instead upheld the admission of a report concerning Buchanan's amenability to pre-trial treatment at the sentencing phase of petitioner Buchanan's trial.²⁴

This Note considers the *Buchanan* opinions and concludes that the majority decision constitutes an unwarranted expansion of the state's right to "death-qualify" a jury. This Note argues that the preeminence afforded the state's interest in a "death-qualified" jury by the *Buchanan* Court is achieved only through an infringement upon the defendant's right to trial by an impartial jury. Furthermore, the Court's reliance on the *McCree* decision is misplaced as this reliance is an attempt to achieve similar results for completely dissimilar scenarios. Moreover, this Note examines the Court's reasoning concerning the admissibility of the competency report and suggests that the decision will have an adverse impact on both the willingness of the defendant to proffer an insanity defense and the truthfulness of the defendant during a psychiatric exam. Finally, this Note considers the future implications of the *Buchanan* decision and concludes that *Buchanan* effectively closes the door to future challenges to the "death-qualification" process and further, that *Buchanan* severely undermines the protection previously afforded to a criminal defendant through the sixth amendment right to counsel.

II. FACTUAL BACKGROUND OF *BUCHANAN*

On January 7, 1981, the Louisville, Kentucky police found Barbel C. Poore's partially-clad body in the back of her automobile.²⁵ Poore had been sexually assaulted and shot twice in the head.²⁶ After a police investigation, David Buchanan, Kevin Stanford and Troy Johnson were arrested.²⁷ According to the confessions of the accused, Buchanan had approached Johnson with the idea of robbing

²³ *Estelle*, 451 U.S. at 461, 468. *Miranda v. Arizona*, 384 U.S. 436 (1966), requires that a defendant who is in custody and subject to interrogation be given certain warnings. The defendant must be told of his right to remain silent and that if he gives up this right, anything he says may be used against him. The defendant must also be told of his right to an attorney and he must be told that if he cannot afford an attorney, one will be appointed for him. *Miranda*, 384 U.S. at 444-45.

²⁴ *Buchanan*, 107 S. Ct. at 2918.

²⁵ *Id.* at 2908.

²⁶ *Id.*

²⁷ Troy Johnson pled guilty to accomplice liability in exchange for testifying against Buchanan and Stanford at trial. *Id.* at 2909 n.2. Buchanan, although a juvenile at the time of the crime, was charged with murder, first-degree robbery, sodomy, and receiving stolen property. *Id.* at 2909 n.3.

the Checker Oil Station where Poore worked.²⁸ After Buchanan obtained a gun and bullets from Johnson's brother, the three drove to the gas station.²⁹ Buchanan and Stanford then entered the station office.³⁰ While Buchanan attempted to locate and open the station's safe, Stanford, armed with a gun, took Poore into the station's interior restroom where he raped her.³¹ After Buchanan's attempt to open the station's safe failed, he joined Stanford and the two "took turns raping and sodomizing Poore despite her plea to [Buchanan] that the assault cease."³² Approximately one-half hour later, Stanford drove Poore in her car a short distance from the gas station as Buchanan and Johnson followed in Johnson's car.³³ As Buchanan looked on, Stanford shot Poore in the face.³⁴ When Buchanan began to return to Johnson's car, Stanford shot Poore again in the back of the head.³⁵

After the indictment of Stanford and Buchanan,³⁶ the Commonwealth of Kentucky elected to prosecute the two defendants in a joint trial.³⁷ Buchanan, while not requesting that his trial be severed

²⁸ *Buchanan*, 107 S. Ct. at 2908.

²⁹ *Id.*

³⁰ *Id.* Stanford was carrying the gun. *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 2908.

³⁴ *Id.* at 2909.

³⁵ *Id.*

³⁶ See *supra* note 27. The relevant Kentucky murder statute provides:

(1) A person is guilty of murder when:

(a) With intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime;

(b) Including, but not limited to, the operation of a motor vehicle under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

(2) Murder is a capital offense.

KY. REV. STAT. ANN. § 507.020 (Michie/Bobbs-Merrill 1985).

³⁷ The relevant Kentucky Rules of Criminal Procedure provided:

Two (2) or more offenses may be charged in the same complaint or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment or information in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

KY. REV. STAT. ANN. Rule 6.18 (Michie/Bobbs-Merrill 1986).

Two (2) or more defendants may be charged in the same indictment, information or complaint if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such

from Stanford's, filed two pre-trial motions with the court.³⁸ Buchanan first moved the court to prevent the Commonwealth of Kentucky from "death-qualifying"³⁹ the jury at the guilt phase of the trial.⁴⁰ In support of this motion, Buchanan argued that "death-qualification" violated his rights, under the sixth and the fourteenth amendments,⁴¹ to an impartial jury drawn from a fair cross-section of the community.⁴² Buchanan also contended that the process of "death-qualifying" a jury through "death-qualification" voir dire⁴³ would result in a prosecution-prone jury violative of his right to trial by a fair and impartial jury.⁴⁴ Finally, Buchanan argued that any state interest in securing a jury free from those unwilling to impose a punishment if mandated by law could be protected at the punishment phase of the trial.⁴⁵ The court subsequently denied this motion.⁴⁶ Alternatively, Buchanan's second motion requested that the court impanel two juries.⁴⁷ Buchanan sought a "non-death-qualified" jury to determine his guilt or innocence and a second "death-qualified" jury to determine penalty in the event the first jury returned a verdict of guilty.⁴⁸ The court also denied this motion.⁴⁹

defendants may be charged in one or more counts together or separately, and all of the defendants need not be charged in each count.

KY. REV. STAT. ANN. Rule 6.20 (Michie/Bobbs-Merrill 1986).

The court may order two (2) or more indictments, informations, complaints or uniform citations to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment, information, complaint or uniform citation. The procedure shall be the same as if the prosecution were under a single indictment, information, complaint or uniform citation.

KY. REV. STAT. ANN. Rule 9.12 (Michie/Bobbs-Merrill 1986). The United States Supreme Court held these rules applicable to the facts of *Buchanan*. See *Buchanan*, 107 S. Ct. at 2902 n.4.

³⁸ *Buchanan*, 107 S. Ct. at 2909.

³⁹ See *supra* note 10, wherein the process of "death-qualification" is explained.

⁴⁰ *Buchanan*, 107 S. Ct. at 2909.

⁴¹ See *supra* notes 2 and 3.

⁴² Motion to Preclude "Death Qualification" of Jury During Voir Dire at Guilt-Innocence Phase of Trial at 5, *Commonwealth of Kentucky v. Buchanan*, (Jefferson Circuit Court, 9th Div. 1982) (No. 81-CR-1218). [hereinafter Motion to Preclude "Death Qualification"].

⁴³ Voir dire literally means to "speak the truth." It refers to the process which may be undertaken by the court or by counsel wherein the potential juror or witness is questioned as to his competency or his knowledge. See FED. R. CIV. P. 47.

⁴⁴ Motion to Preclude "Death Qualification" at 5.

⁴⁵ *Id.*

⁴⁶ *Buchanan*, 107 S. Ct. at 2910.

⁴⁷ *Id.* at 2909.

⁴⁸ *Id.* See also Motion for Separate Juries for Guilt-Innocence and Sentencing Phases with Proviso That in the Selection of Guilt-Innocence Phase Jury No Removal for Cause be Allowed of Jurors Who are not "Death Qualified" Under *Witherspoon v. Illinois*, *Buchanan* (No.81-CR-1218). [hereinafter Motion for Separate Juries].

⁴⁹ *Buchanan*, 107 S. Ct. at 2910.

Buchanan subsequently filed a third pre-trial motion requesting dismissal of the capital portion of the indictment against him.⁵⁰ This motion was granted.⁵¹ At the start of voir dire,⁵² Buchanan renewed his earlier two motions on the "death-qualification" of the jury, both of which were denied.⁵³

At trial, Buchanan attempted to prove the affirmative defense⁵⁴ of "extreme emotional disturbance."⁵⁵ Martha Elam, a social worker assigned to Buchanan when he was in the Commonwealth's custody for unrelated crimes, served as Buchanan's sole witness.⁵⁶ Elam read into the record reports and letters concerning Buchanan's mental status.⁵⁷ Over Buchanan's objections,⁵⁸ the

⁵⁰ *Id.*

⁵¹ *Id.* Buchanan sought dismissal of the capital portion of the indictment because he was not the "triggerman" and, therefore, under *Enmund v. Florida*, 458 U.S. 782 (1982), it was constitutionally impermissible to sentence him to death.

⁵² See *supra* note 43 for an explanation of voir dire.

⁵³ *Buchanan*, 107 S. Ct. at 2910.

⁵⁴ An affirmative defense is raised by the defendant in order to reduce the charge against him. For example, in Kentucky, if a defendant charged with murder was suffering from extreme emotional disturbance at the time of the crime, the charge of murder becomes one of manslaughter. See *supra* note 36 for the applicable Kentucky murder statute.

⁵⁵ Extreme emotional disturbance is a defense in Kentucky to the charge of murder. See *supra* note 36 for the applicable Kentucky murder statute. Extreme emotional disturbance may be aroused by "'any event, or even words. . . .'" *Gall v. Commonwealth*, 607 S.W.2d 97, 108 (Ky. 1980)(emphasis in original)(quoting Drafters' Commentary to Kentucky Penal Code), *cert. denied*, 450 U.S. 989 (1981). In Kentucky, the presence of extreme emotional disturbance is determined by an objective test. The test is whether there was a reasonable explanation or excuse for the extreme emotional disturbance. *Gall*, 607 S.W.2d at 108. However, in determining if a reasonable explanation or excuse for the extreme emotional disturbance was present, the triers of fact must place themselves in the defendant's position as he believed that position to be at the time he acted. *Id.* at 108. Thus, the common law test that the provocation be of the type which would "inflame the passions of the ordinary reasonable man," *id.*, is rejected. See also *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985)(overruling contention that the absence of extreme emotional disturbance is an element of the crime of murder and must be proven; and stating that extreme emotional disturbance and mental illness are not synonymous terms).

⁵⁶ *Buchanan*, 107 S. Ct. at 2910.

⁵⁷ *Id.* Elam's testimony involved reports and evaluations made concerning Buchanan. Elam essentially stated that Buchanan possessed a borderline intelligence quotient and had the potential for developing a full-blown schizophrenic or psychotic disorder in the future. The reports went on to note that Buchanan was in need of ongoing extensive mental health intervention. The reports concluded that Buchanan had extensive rage stemming from an extreme unmet dependency need. Despite these reports, Buchanan was released from State custody only two weeks after a report was issued stating that Buchanan continued to resist treatment and resented his placement in Kentucky's Danville Youth Development Center. Buchanan was released on October 13, 1980, into the custody of his mother. On November 10, 1980, Buchanan was placed in the tenth grade despite a fourth grade reading level. By December 4, 1980, Buchanan had missed six days of school. On January 7, 1981, Barbel C. Poore was brutally raped

prosecution then had Elam read from a report evaluating Buchanan's amenability to involuntary hospitalization pending his trial for Poore's murder. The evaluation was prepared at the request of both the prosecution and Buchanan's counsel.⁵⁹

The jury returned a verdict of guilty against Buchanan on all counts of the indictment.⁶⁰ The same jury⁶¹ imposed upon Buchanan the maximum sentence for each charge.⁶² The Supreme

and murdered. On November 5, 1981, David Buchanan was charged with crimes in connection with this event. See Excerpts from Transcript of Buchanan's Trial at 39-53, *Buchanan* (No. 81-CR-1218).

⁵⁸ Buchanan objected because the report was prepared in order to aid in the determination of whether Buchanan should have been hospitalized and treated while awaiting trial. The report did not concern Buchanan's mental status at the time of the crimes. Buchanan also objected because he was not warned that the findings would be used against him, and this failure to warn violated both his fifth amendment right against self-incrimination and his sixth amendment right to the assistance of counsel. *Buchanan*, 107 S. Ct. at 2911-12.

⁵⁹ At the time of Buchanan's trial, counsel could request such an exam pursuant to statutory authority. The relevant statute provided:

If after their examination the physicians certify that the respondent is a mentally ill person who presents an immediate danger or an immediate threat of danger to self or others as a result of mental illness and that he can reasonably benefit from treatment and that hospitalization is the least restrictive alternative mode of treatment presently available, then such person may be retained in the hospital pending a hearing and order of the appropriate court, or may be transported to an appropriate hospital for retention.

KY. REV. STAT. ANN. § 202A.070 (Michie/Bobbs-Merrill 1977). This statute has since been repealed.

⁶⁰ *Buchanan*, 107 S. Ct. at 2912. See also *supra* note 27 for a discussion of the charges Buchanan faced.

⁶¹ In felony proceedings in Kentucky, the jury deciding guilt also determines the punishment within the standards set by the applicable statutes. *Buchanan*, 107 S. Ct. at 2912 n.13. The Kentucky Rules of Criminal Procedure provide:

(1) When the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court.

(2) When the defendant enters a plea of guilty, the court may fix the penalty, except in cases involving offenses punishable by death.

KY. REV. STAT. ANN. Rule 9.84 (Michie/Bobbs-Merrill 1986). The Kentucky sentencing statutes applicable at the time of Buchanan's offense provided that:

(1) A sentence of imprisonment for a felony shall be an indeterminate sentence, the maximum of which shall be fixed within the limits provided by subsection (2), and subject to modification by the trial judge pursuant to [KY. REV. STAT. ANN. § 532.070 (Michie/Bobbs-Merrill 1986)].

(2) The authorized maximum terms of imprisonment for felonies are:

(a) For a Class A felony, not less than twenty (20) years nor more than life imprisonment;

(b) For a Class B felony, not less than ten (10) years nor more than twenty (20) years;

(c) For a Class C felony, not less than five (5) years nor more than ten (10) years; and

(d) For a Class D felony, not less than one (1) year nor more than (5) years. . . .

KY. REV. STAT. ANN. § 532.060 (Michie/Bobbs-Merrill 1986).

⁶² *Buchanan*, 107 S. Ct. at 2912. The jury also ordered that Buchanan serve his

Court of Kentucky affirmed Buchanan's conviction and sentences.⁶³ The court rejected Buchanan's claims that the process of "death-qualification" deprived him of a jury drawn from a fair cross-section of the community and that "*Witherspoon*-excludables" constituted a distinctive group for fair cross-section purposes.⁶⁴ The court also rejected Buchanan's claim that the introduction of Dr. Lange's report was error because it infringed upon his fifth amendment right against self-incrimination and his sixth amendment right to counsel.⁶⁵

The United States Supreme Court granted certiorari⁶⁶ to consider two issues. First, the Court examined whether the State's "death-qualification" of the jury violated Buchanan's right to an impartial jury representative of a fair cross-section of the community.⁶⁷ Second, the Court reviewed whether the admission of the psychiatric exam concerning Buchanan's fulfillment of the involuntary hospitalization criteria violated his fifth amendment right against self-incrimination and his sixth amendment right to counsel.⁶⁸

III. DEVELOPMENT OF THE *WITHERSPOON* TEST AND ITS APPLICATION IN *MCCREE*

In *Witherspoon v. Illinois*,⁶⁹ petitioner William Witherspoon challenged his conviction for murder as well as the jury-fixed penalty of death.⁷⁰ In order that the prosecution might exclude those potential jurors who "might hesitate to return a verdict inflicting [death],"⁷¹ the court allowed the prosecution unlimited challenges for cause.⁷² Witherspoon challenged the state's right to allow a jury

sentences consecutively. *Id.* The court accepted the jury's sentencing determination but ordered that the sentences run concurrently with the life sentence on the murder charge. *Id.* The jury imposed a sentence of capital punishment for Stanford on the murder charge. *Id.*

⁶³ *Buchanan v. Commonwealth*, 691 S.W.2d 210 (Ky. 1985).

⁶⁴ *Buchanan*, 107 S. Ct. at 2912-13.

⁶⁵ *Id.* at 2913.

⁶⁶ 106 S. Ct. 2245 (1986).

⁶⁷ *Buchanan*, 107 S. Ct. at 2908.

⁶⁸ *Id.*

⁶⁹ 391 U.S. 510 (1968).

⁷⁰ *Witherspoon*, 391 U.S. at 512.

⁷¹ *Id.* at 513 (citations omitted).

⁷² *Id.* at 512. The applicable Illinois statute provided: "[i]n trials for murder 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." ILL. REV. STAT. ch. 38 § 743 (1959). This statute has since been repealed.

A challenge for cause allows counsel to strike a venireman based upon criteria es-

so constituted to determine his guilt or innocence.⁷³ The United States Supreme Court rejected Witherspoon's statistical data⁷⁴ as "too tentative and fragmentary"⁷⁵ to support a conclusion that those jurors who are unopposed to the imposition of the death penalty also tend to favor the prosecution in determining the guilt of the defendant.⁷⁶

Although the Court refused to overturn Witherspoon's conviction,⁷⁷ the Court did reverse Witherspoon's death sentence,⁷⁸ holding that, "a sentence of death cannot be carried out 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."⁷⁹ The Court noted that its decision in no way infringed upon a state's right to put a defendant to death if that defendant was sentenced to death by a jury from which opponents of the death penalty were legitimately excluded.⁸⁰ To constitute legitimate exclusion, the Court held that one of two tests must be met. First, the juror must state that he would automatically vote against imposing

established by statute. A peremptory challenge allows counsel to strike a venireman without explanation, e.g., for cause, for no cause, or for any reason.

In *Witherspoon*, forty-seven veniremen were successfully challenged for cause based solely on their attitudes toward the death penalty. Those excluded represented almost one-half of the total venire. Only five of the forty-seven excluded expressly stated that they would be unable, under any circumstances, to impose a sentence of death. *Witherspoon*, 391 U.S. at 514.

⁷³ *Witherspoon*, 391 U.S. at 516. Witherspoon argued that a jury so selected violated his right to a fair and impartial jury trial because the prosecution's exclusion process resulted in a jury biased in favor of conviction. Witherspoon maintained that a juror who offered no resistance to the death penalty was the type of juror who would also "too readily ignore the presumption of the defendant's innocence, accept the prosecution's version of the facts, and return a verdict of guilt." *Id.* at 516-17.

⁷⁴ In support of his argument that a jury so selected was "prosecution-prone," Witherspoon offered several studies. *Id.* at 517 n.10. In his petition for certiorari, Witherspoon cited a preliminary, unpublished study which stated that "death-qualification" of the jury resulted in a "prosecution-prone" jury. The study noted further that "death-qualification" of the jury reduces the defendant's chances of acquittal. *Id.* See also 8 LAW AND HUM. BEHAV. 7-160 (1984) (entire issue is devoted to a discussion of the process of "death-qualification" and its effects on jury composition) for a discussion of later studies which reaffirm the findings of the studies used in *Witherspoon*.

⁷⁵ *Witherspoon*, 391 U.S. at 517.

⁷⁶ *Id.* at 518.

⁷⁷ *Id.* The Court stated that Witherspoon had failed to show that the jury was biased with respect to the guilt determination. *Id.* at 517.

⁷⁸ "[I]t is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments." *Id.* at 518 (citations omitted).

⁷⁹ *Id.* at 522 (footnote omitted).

⁸⁰ *Id.* at 522 n.21.

the death penalty regardless of what the evidence showed at trial.⁸¹ Alternatively, a juror is legitimately excluded if his attitude regarding the death penalty would render him unable to impartially decide the defendant's guilt.⁸² The majority's opinion in *Witherspoon* left undecided the issue of whether a defendant, presenting more persuasive data than that offered by the defendant Witherspoon, could convince the Court that "death-qualification" of the jury resulted in a "conviction-prone" jury.

In *Lockhart v. McCree*,⁸³ the Supreme Court considered the issue it had left unresolved in *Witherspoon*.⁸⁴ Defendant McCree submitted fifteen social science studies in support of his claim that "death-qualification" of the jury produced a conviction-prone jury and thereby infringed upon his right to a fair and impartial jury.⁸⁵ The Court accepted the validity of the studies and assumed, for the purposes of its opinion, that the studies adequately established that the "death-qualification" process results in juries which are more conviction-prone than "non-death-qualified" juries.⁸⁶ Nonetheless, the Court held it constitutionally permissible for the states to "death-qualify" a jury in a capital case.⁸⁷ Thus, the Court upheld McCree's sentence of death imposed by a jury which was "death-qualified" prior to the sentencing phase of his trial.⁸⁸

Buchanan, *Witherspoon*, and *McCree* form the triumvirate of "death-qualification" decisions by the Court. In *Buchanan*, the Court resolved the final issue left unaddressed by *Witherspoon*. The *Buchanan* majority held it permissible for a state to "death-qualify" a jury prior to the sentencing phase of a joint trial even though one defendant is not charged with a capital offense.⁸⁹

⁸¹ *Id.*

⁸² *Id.*

⁸³ *McCree*, 106 S. Ct. 1758 (1986).

⁸⁴ "[A] defendant convicted by such a jury [from which all those unable to impose the death penalty have been excluded] in some future case might still attempt to establish that the jury was less than neutral with respect to guilt." *Witherspoon*, 391 U.S. at 520 n.18 (emphasis in original).

⁸⁵ *McCree*, 106 S. Ct. at 1762. See also the Court's discussion of the studies submitted. *Id.* at 1761-64 and accompanying notes.

⁸⁶ *Id.* at 1764.

⁸⁷ *Id.* The Court refused to hold the process of "death-qualification" violative of the Constitution. The Court reasoned that since "*Witherspoon*-excludables" were not a "distinctive group" for fair cross-section purposes, the "death-qualification" process whereby "*Witherspoon*-excludables" are struck from the jury does not violate the sixth amendment's fair cross-section requirement. *Id.* at 1766.

⁸⁸ *Id.* at 1770.

⁸⁹ See *infra* notes 90-127 and accompanying text for a discussion of the majority's holding in *Buchanan*.

IV. THE *BUCHANAN* MAJORITY—"DEATH-QUALIFICATION" AND THE EXTENSION OF *MCCREE*

Justice Blackmun's majority opinion in *Buchanan v. Kentucky* concerning the issue of "death-qualification" was joined by five justices.⁹⁰ Justice Blackmun initially noted that the Court's earlier decision in *Lockhart v. McCree* controlled the instant case.⁹¹ In *McCree*, the Court held that "death-qualification" of the jury prior to the guilt phase of a bifurcated capital trial was constitutionally permissible.⁹² Furthermore, the Court held that this "death-qualification" did not violate McCree's right, under the sixth and the fourteenth amendments, to an impartial jury selected from a representative cross-section of the community.⁹³ In *Buchanan*, Justice Blackmun reiterated what *McCree* had explained: the fair cross-section requirement applies only to venires⁹⁴ and not to petit juries.⁹⁵ Furthermore, the majority noted that if the fair cross-section requirement were to be held applicable to petit juries, the process of "death-qualification" would not violate this requirement.⁹⁶

According to the Court, no violation of the requirement occurs when a jury is "death-qualified" because "*Witherspoon*-excludables"⁹⁷ do not constitute a "distinctive group" for fair cross-section purposes.⁹⁸ Justice Blackmun noted that the reasons cited in *McCree* for denying distinctive group status to "*Witherspoon*-excludables" were no less applicable to the instant case.⁹⁹ Justice Blackmun explained that those excluded from Buchanan's jury were not excluded for reasons, such as race or gender, having no relation to the ability of those individuals to serve as effective jurors.¹⁰⁰ Rather, Justice Blackmun stated that the Commonwealth of Kentucky had a legitimate interest in excluding veniremen whose opposition to the

⁹⁰ Justice Blackmun was joined by Chief Justice Rehnquist and Justices White, Powell, O'Connor and Scalia.

⁹¹ *Buchanan*, 107 S. Ct. at 2913.

⁹² *Id.* at 2913. See *supra* notes 83-88 and accompanying text for a discussion of *McCree*.

⁹³ *Buchanan*, 107 S. Ct. at 2913 (citing *McCree*, 106 S. Ct. at 1766, 1770).

⁹⁴ See *supra* note 15 for an explanation of the venire.

⁹⁵ *Buchanan*, 107 S. Ct. at 2913. See *supra* note 16 for an explanation of the petit jury. The Court noted that "[a]ccordingly, petit juries do not have to 'reflect the composition of the community at large.'" *Buchanan*, 107 S. Ct. at 2913 (quoting *McCree*, 106 S. Ct. at 1765).

⁹⁶ *Buchanan*, 107 S. Ct. at 2913.

⁹⁷ For a discussion of "*Witherspoon*-excludables", see *supra* note 10.

⁹⁸ *Buchanan*, 107 S. Ct. at 2913-14. A "distinctive group" is one whose exclusion from the jury is impermissible as violative of the fair cross-section requirement. See *McCree*, 106 S. Ct. at 1765.

⁹⁹ *Buchanan*, 107 S. Ct. at 2914.

¹⁰⁰ *Id.*

death penalty rendered them unable to apply the law to the facts of a capital case.¹⁰¹

The majority opinion acknowledged that *McCree* involved a single trial whereas *Buchanan* concerned a joint trial in which one defendant did not face capital charges. However, Justice Blackmun extended the reasoning of *McCree* to the instant case, asserting that the state's interest in procuring a jury free of "*Witherspoon*-excludables" was not lessened because Buchanan was a non-capital defendant.¹⁰² Justice Blackmun stated that the state's interest in "death-qualifying" the jury was as strong as that in *McCree* because "the '*Witherspoon*-excludables' would not have been able to assess properly the appropriateness of imposing the death penalty on [Buchanan's] codefendant Stanford."¹⁰³ Thus, the facts of *Buchanan*, according to the majority, did not alter the conclusion of *McCree* that "*Witherspoon*-excludables" do not constitute a "distinctive group" for fair cross-section purposes.¹⁰⁴ The majority found no violation of the sixth amendment's fair cross-section requirement in Buchanan's case.¹⁰⁵

The majority also rejected Buchanan's claim that the removal of "*Witherspoon*-excludables" violated his sixth amendment right to an impartial jury.¹⁰⁶ Justice Blackmun again relied upon the *McCree* decision, stating that an impartial jury requires only " 'jurors who will conscientiously apply the law and find the facts.' " ¹⁰⁷ Justice Blackmun reiterated that the impartial jury requirement does not mandate that the individual jurors represent a balancing of viewpoints.¹⁰⁸ The majority noted that if this balancing of viewpoints were required, it would impose a severe burden upon the justice system because the trial court would have to ensure " 'that each [jury] contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on.' " ¹⁰⁹

In rejecting Buchanan's claim that his right to an impartial jury was infringed, the majority again cited the state interests in a single

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (citing *McCree*, 106 S. Ct. at 1767 (quoting *Wainwright v. Witt*, 469 U.S. 412, 423 (1985))).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* (citing *McCree*, 106 S. Ct. at 1767).

jury recognized in *McCree*.¹¹⁰ Justice Blackmun noted that the state has an interest in a single jury deciding all the issues in a capital trial.¹¹¹ The majority then distinguished the situation in *Witherspoon* where the State “‘crossed the line of neutrality’”¹¹² and struck all veniremen who expressed “‘any scruple about the death penalty.’”¹¹³ The Court invoked two arguments in support of the state’s interest in a single jury. First, Justice Blackmun recognized that the state has an interest in promoting the efficient administration of the justice system.¹¹⁴ The majority noted that this aim can be achieved by having a single jury determine all the issues of a trial in which more than one defendant is charged with crimes arising out of the same event.¹¹⁵ Furthermore, the majority noted that a single trial in front of a single jury avoids the necessity of both the prosecution and the defense presenting the same evidence at different trials or in front of different juries.¹¹⁶ Second, Justice Blackmun recognized the state’s further interest in ensuring that the defendant benefits at the sentencing phase from any residual doubts which the jury holds over from the guilt phase of the trial.¹¹⁷ Justice Blackmun noted that the state can confer this benefit on the defendant only by having a single jury decide both the guilt and the sentence of the defendant.¹¹⁸

As further support that Buchanan’s right to an impartial jury was not infringed, the Court cited Buchanan’s failure to move the court for severance of his trial from Stanford’s.¹¹⁹ From this failure to move for severance, the majority inferred that Buchanan “made the tactical decision that he would fare better if he were tried by the same jury that tried Stanford, the ‘triggerman’ in Poore’s murder.”¹²⁰

Finally, the majority noted that the concern of an “‘im-

¹¹⁰ *Id.* at 2914-15.

¹¹¹ *Id.* at 2914.

¹¹² *Id.* at 2915 (citing *McCree*, 106 S. Ct. at 1767-68 (quoting *Witherspoon*, 391 U.S. at 520)).

¹¹³ *Id.* (citing *McCree*, 106 S. Ct. at 1767-68 (quoting *Witherspoon*, 391 U.S. at 520)).

¹¹⁴ *Id.* at 2915. This argument will be referred to as the efficiency argument.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ This argument will be referred to as the residual doubt argument. Its premise is that if the jury is uncertain of the defendant’s guilt but does not have sufficient reasonable doubt to acquit, this uncertainty will reflect itself in a lighter penalty than if a jury which had not sat during the guilt phase of the trial determined the defendant’s sentence.

¹¹⁸ *Buchanan*, 107 S. Ct. at 2915.

¹¹⁹ *Id.* See *infra* notes 217-222 and accompanying text for a discussion of the severance issue.

¹²⁰ *Buchanan*, 107 S. Ct. at 2915.

balanced' jury"¹²¹ in the context of a capital sentencing¹²² proceeding was absent in *Buchanan*.¹²³ At the guilt phase of a non-capital defendant's trial, the jury's discretion "is more channeled than at a capital-sentencing proceeding. . . ."¹²⁴ Also, the jury's discretion at the penalty phase is "limited to specific statutory sentences and is subject to review by the judge."¹²⁵ Noting that "the Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury. . . .,"¹²⁶ as well as the significant state interests in a joint trial, the Court held that Buchanan's right to an impartial jury had not been violated.¹²⁷

V. THE MAJORITY—THE PSYCHIATRIC REPORT

A. THE FIFTH AMENDMENT

The majority rejected Buchanan's claim that the introduction of Dr. Lange's report violated his fifth amendment right against self-incrimination.¹²⁸ In so doing, the majority declined to apply *Estelle v. Smith*¹²⁹ to the facts of *Buchanan*. In *Estelle*, a psychiatrist examined the defendant pursuant to an order issued *sua sponte* by the trial court.¹³⁰ Defense counsel received neither notification of the competency exam nor of its scope.¹³¹ Defense counsel had not placed the defendant's competency in issue, nor had an insanity defense been offered.¹³² At the capital sentencing phase of the defendant's trial, the prosecution called the examining psychiatrist as its sole witness.¹³³ The doctor testified that the defendant Smith was a sociopath and could not be rehabilitated through treatment.¹³⁴ At the time of Smith's trial, the Texas capital sentencing procedure consisted of three questions posed to the jury.¹³⁵ If the

¹²¹ *Id.* at 2916 (quoting *McCree*, 106 S. Ct. at 1769).

¹²² *Id.* (citing *McCree*, 106 S. Ct. at 1769).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (quoting *McCree*, 106 S. Ct. at 1770).

¹²⁷ *Id.*

¹²⁸ *Id.* at 2918.

¹²⁹ 451 U.S. 454 (1981).

¹³⁰ *Buchanan*, 107 S. Ct. at 2917 (citing *Estelle*, 451 U.S. at 466).

¹³¹ *Id.* (citing *Estelle*, 451 U.S. at 470-71).

¹³² *Id.* (citing *Estelle*, 451 U.S. at 457-58).

¹³³ *Id.* (citing *Estelle*, 451 U.S. at 459-60).

¹³⁴ *Id.* (citing *Estelle*, 451 U.S. at 459-60).

¹³⁵ The questions posed to the jury were:

[W]hether 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

jury answered these questions affirmatively, the judge imposed the death penalty.¹³⁶ One of the questions posed to the jury under the Texas procedure concerned the defendant's future dangerousness,¹³⁷ and it was this "issue that the psychiatrist in effect addressed."¹³⁸ Smith was sentenced to death and appealed.

The United States Supreme Court held that the psychiatric testimony violated Smith's fifth amendment right against self-incrimination¹³⁹ as such testimony was based not just on the doctor's observations of Smith, but also on Smith's detailed statements of the underlying crime.¹⁴⁰ Thus, the Court characterized Smith's statements to the doctor as "testimonial in nature."¹⁴¹ The Court asserted that the doctor went beyond the bounds of testifying as to Smith's competency and in doing so, the doctor's "'role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.'" ¹⁴² In this setting, the Court held that the failure to warn Smith as required in *Miranda*¹⁴³ constituted a violation of Smith's fifth amendment right against self-incrimination.¹⁴⁴

In analyzing Buchanan's claim of a fifth amendment violation, the majority recognized that *Estelle* was a case of "'distinct circumstances.'" ¹⁴⁵ Furthermore, the majority noted that *Estelle* did not prohibit the state from introducing psychiatric evidence to rebut an insanity defense.¹⁴⁶ The majority noted that where, as in *Buchanan*, the defendant requests a competency evaluation or presents psychiatric evidence, "the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant re-

deceased or another would result . . . [;] whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society . . . [;] and [;] whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Estelle, 451 U.S. at 458 (citing TEX. CRIM. PROC. CODE ANN. § 37.071 (b)(1)-(3) (Vernon Supp. 1980)).

¹³⁶ *Buchanan*, 107 S. Ct. at 2917 (citing *Estelle*, 451 U.S. at 457-58).

¹³⁷ See *supra* note 135 for the precise wording of the question posed to the jury.

¹³⁸ *Buchanan*, 107 S. Ct. at 2917.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *Estelle*, 451 U.S. at 464 n.9).

¹⁴¹ *Id.*

¹⁴² *Id.* (quoting *Estelle*, 451 U.S. at 467).

¹⁴³ For a discussion of the *Miranda* warnings, see *supra* note 23.

¹⁴⁴ *Buchanan*, 107 S. Ct. at 2917.

¹⁴⁵ *Id.* (quoting *Estelle*, 451 U.S. at 466).

¹⁴⁶ *Id.* "'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case.'" *Id.* at 2917 (quoting *Estelle*, 451 U.S. at 465).

quested."¹⁴⁷ The *Buchanan* Court concluded that the fifth amendment offers no protection against the introduction of such evidence.¹⁴⁸

The majority distinguished *Buchanan* from *Estelle* on its facts, noting that Buchanan's counsel joined the request for examination pursuant to the Kentucky statute.¹⁴⁹ Furthermore, Buchanan's sole defense was a claim of extreme emotional disturbance.¹⁵⁰ Moreover, because Buchanan did not testify, the majority noted that "the Commonwealth could not respond to this defense [of extreme emotional disturbance] unless it presented other psychological evidence."¹⁵¹ Finally, the majority pointed out that Dr. Lange's report dealt only with the doctor's observations of Buchanan and did not describe any of Buchanan's statements regarding the crimes with which he was charged.¹⁵² As *Estelle* concerned differing facts than those presented in *Buchanan*, the majority determined that *Estelle* was not controlling in Buchanan's case. Accordingly, the majority found no violation of Buchanan's fifth amendment right against self-incrimination.¹⁵³

B. THE SIXTH AMENDMENT

The majority also rejected Buchanan's claim that the introduction of Dr. Lange's report violated his sixth amendment right to the assistance of counsel.¹⁵⁴ In *Estelle*, the Court also had found that Smith's sixth amendment right to counsel had been violated.¹⁵⁵ The *Estelle* Court had recognized that Smith's counsel was not informed that the examination would include an evaluation of Smith's dangerousness. Furthermore, since Smith's counsel was uninformed regarding the scope of the exam, Smith was denied an opportunity to discuss either the exam or its scope with his counsel.¹⁵⁶ Due to this denial, the *Estelle* Court held that Smith had been denied his right to counsel under the sixth amendment.¹⁵⁷

The *Buchanan* Court noted that, in contrast to *Estelle*,

¹⁴⁷ *Id.* at 2918.

¹⁴⁸ *Id.* (citations omitted).

¹⁴⁹ *Id.* See also *supra* note 59 for the precise wording of KY. REV. STAT. ANN. § 202A.070.

¹⁵⁰ *Buchanan*, 107 S. Ct. at 2918.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 2918-19. See also *supra* note 2.

¹⁵⁵ *Buchanan*, 107 S. Ct. at 2918 (citing *Estelle*, 451 U.S. at 469-71).

¹⁵⁶ *Id.* (citing *Estelle*, 451 U.S. at 471).

¹⁵⁷ *Id.*

Buchanan's counsel had requested Dr. Lange's exam.¹⁵⁸ The *Buchanan* majority noted that it must therefore be assumed that Buchanan's counsel consulted with Buchanan regarding the exam.¹⁵⁹ Although Buchanan conceded he requested the exam, he argued that the *Estelle* holding was applicable because he was not told that the exam would be used to undermine his defense of extreme emotional disturbance.¹⁶⁰ The Court responded to this argument by stating that Buchanan "misconceives the nature of the Sixth Amendment right at issue here. . . ."¹⁶¹ The majority noted that Buchanan's argument concerned the use of Dr. Lange's report and not the right of consultation with counsel which the sixth amendment ensures.¹⁶² To consult effectively with a client, counsel must know both the nature and scope of the exam. The *Buchanan* Court concluded that since Buchanan's counsel undoubtedly had this information, there was no sixth amendment violation.¹⁶³

VI. THE DISSENT

A. "DEATH-QUALIFICATION"

Justice Marshall, joined by Justices Brennan and Stevens, dissented on the "death-qualification" issue.¹⁶⁴ Justice Marshall, acknowledging his previous dissent in *McCree*, stated that "[t]oday's extension of that holding to permit death qualification in a *joint* trial, where not all the defendants face capital charges, compels me to dissent again."¹⁶⁵ Justice Marshall denied that any interest of the Commonwealth of Kentucky would justify the invasion of Buchanan's sixth amendment rights which occurred when veniremen were excluded from the jury on the basis of responses to an issue wholly unrelated to the non-capital charges against Buchanan.¹⁶⁶

The dissent rejected both the efficiency and the residual doubt arguments advanced by the majority in support of its position.¹⁶⁷

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2918-19.

¹⁶² *Id.* at 2919.

¹⁶³ *Id.*

¹⁶⁴ *Id.* (Marshall, J., dissenting).

¹⁶⁵ *Id.* (Marshall, J., dissenting) (emphasis in original).

¹⁶⁶ *Id.* (Marshall, J., dissenting). See *infra* notes 167-74 and accompanying text for a discussion of Justice Marshall's rejection of the state interests in a joint trial advanced by the majority opinion. See also *supra* notes 114 and 117 and accompanying text for a discussion of the majority's efficiency and residual doubt arguments.

¹⁶⁷ *Id.* at 2920 (Marshall, J., dissenting). See also discussion at 2920-22.

As to efficiency, Justice Marshall noted that the number of capital trials among state criminal prosecutions is relatively low and that "even fewer capital defendants are actually subjected to sentencing proceedings."¹⁶⁸ In addition, Justice Marshall noted that any additional costs the state would incur by implementing either a separate jury system or a system in which "death-qualified" jurors would replace "non-death-qualified" jurors at the sentencing phase of the trial would be "minimal by comparison."¹⁶⁹ Justice Marshall noted that the Commonwealth of Kentucky had produced no evidence in support of its claim that providing separate juries or alternate jurors at the sentencing phase of trial would impose an administrative burden on the state,¹⁷⁰ adding that "[t]he rarity of joint trials such as petitioner's belies any claim that the cost of impaneling an extra jury, or of providing alternate jurors, overrides his interest in being tried before a jury that is not uncommonly conviction-prone."¹⁷¹

As to the majority's residual doubt argument, Justice Marshall reiterated his stance taken in *McCree*¹⁷² that the state cannot invoke the benefit of residual doubt as justification unless it allows the defendant the option of waiving this benefit.¹⁷³ Since the option of waiving this benefit was absent in *Buchanan*, Justice Marshall asserted that "the Court's suggestion that the joint trial was in petitioner's best interest is untenable. . . ."¹⁷⁴

B. THE PSYCHIATRIC REPORT

Justice Marshall also dissented from the Court's decision regarding the use of Dr. Lange's report.¹⁷⁵ Justice Marshall chided the majority for glossing over the difference between a report regarding a defendant's current amenability to involuntary hospitalization and a report regarding the defendant's mental status at the time of the crimes.¹⁷⁶ Justice Marshall explained that a report com-

¹⁶⁸ *Buchanan*, 107 S. Ct. at 2920 (Marshall, J., dissenting).

¹⁶⁹ *Id.* (Marshall, J., dissenting).

¹⁷⁰ *Id.* (Marshall, J., dissenting).

¹⁷¹ *Id.* (Marshall, J., dissenting).

¹⁷² *Id.* (Marshall, J., dissenting) (citing *McCree*, 106 S. Ct. at 1781).

¹⁷³ *Id.* at 2921 (Marshall, J., dissenting) (citing *McCree*, 106 S. Ct. at 1781) (citation omitted). In *McCree*, Justice Marshall noted that "'the residual doubt' justification for the single jury [is] untenable, unless the capital defendant's option to waive this purported benefit is recognized." *Id.* at 2920 (Marshall, J., dissenting) (citing *McCree*, 106 S. Ct. at 1781-82).

¹⁷⁴ *Buchanan*, 107 S. Ct. at 2921 (Marshall, J., dissenting).

¹⁷⁵ On this issue, Justice Marshall was joined only by Justice Brennan.

¹⁷⁶ *Buchanan*, 107 S. Ct. at 2922. Justice Marshall noted that "[t]he Court acknowledges this temporal difference [between the time of the two reports] but misses its importance." *Id.* (Marshall, J., dissenting) (citations and footnote omitted).

piled pursuant to the relevant Kentucky statute¹⁷⁷ is designed to aid the mentally ill who will benefit from hospitalization,¹⁷⁸ noting that the exam is "not intended to generate evidence of a defendant's criminal responsibility, including his mental status at the time of the alleged offense."¹⁷⁹ In order that the statute's aim be given full effect, "the defendant must feel free to request an examination without lingering fears that the content of his discussions with the examiner, or the examiner's impressions of his current mental status, will be used against him at trial."¹⁸⁰

Justice Marshall also noted that there was no proof that either Buchanan or his attorney knew to what use the state intended to put Dr. Lange's report when the joint request for examination was filed.¹⁸¹ Since Buchanan's request as well as his consultation with counsel was materially uninformed, Justice Marshall concluded that Buchanan's fifth and sixth amendment rights were violated by the admission of Dr. Lange's report.¹⁸²

VII. ANALYSIS

A. "DEATH-QUALIFICATION" OF THE JURY

The majority in *Buchanan*¹⁸³ incorrectly determined that the holding of *McCree*¹⁸⁴ applied to the facts of *Buchanan*. In *McCree*, the Court held it constitutionally permissible for states to "death-qualify" the jury in a capital case.¹⁸⁵ In so doing, the Court held that "Witherspoon-excludables"¹⁸⁶ are not a "distinctive group" for fair cross-section purposes.¹⁸⁷ In *Buchanan*, the Court extended the *McCree* holding to permit the "death-qualification" of a jury prior to the guilt phase of a joint trial in which one defendant did not face capital charges.¹⁸⁸ The *Buchanan* Court reiterated the *McCree* holding and explained that in capital cases, "Witherspoon-excludables" do not constitute a "distinctive group" because the exclusion of these po-

¹⁷⁷ See *supra* note 59 and accompanying text for a discussion of KY. REV. STAT. ANN. § 202A.070.

¹⁷⁸ *Buchanan*, 107 S. Ct. at 2923 (Marshall, J., dissenting).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* (footnote omitted).

¹⁸¹ *Id.* (Marshall, J., dissenting).

¹⁸² *Id.*

¹⁸³ See *supra* note 90.

¹⁸⁴ For a discussion of the holding in *McCree*, see *supra* notes 83-88 and 92-96 and accompanying text.

¹⁸⁵ See *supra* notes 92-96 and accompanying text.

¹⁸⁶ See *supra* note 10.

¹⁸⁷ See *supra* notes 97-101 and accompanying text.

¹⁸⁸ See *supra* notes 102-27 for a discussion of the *Buchanan* holding.

tential jurors is directly related to their ability to serve on a jury in a capital case.¹⁸⁹ "*Witherspoon*-excludables" are excluded from juries in capital cases because of their refusal to apply the law to reach a particular result¹⁹⁰ if required by the facts as shown at trial. The Court noted that this exclusion is therefore based directly upon a characteristic affecting the juror's ability to serve effectively.¹⁹¹ The Court reasoned that the exclusion is not based upon characteristics of the veniremen, such as membership in a certain race or gender group, wholly unrelated to their ability to serve.¹⁹²

While the majority's summary of the *McCree* holding is correct, the extension of this holding to the factual situation of *Buchanan* is unwarranted. When the state is permitted, as it was in *Buchanan*, to remove "*Witherspoon*-excludables" from a jury which determines the guilt or innocence of a non-capital defendant who is not subject to the death penalty punishment, those excluded constitute a "distinctive group." A "distinctive group," as defined by the *McCree* Court, is one which is excluded from the venire based upon reasons wholly unrelated to the members' ability to serve as effective jurors by applying the law to the facts as they find them.¹⁹³ When a defendant faces charges for which one of the possible penalties is death, a potential juror's ability or inability to impose the death penalty bears directly upon that venireman's ability to serve as an effective juror. The state is, therefore, completely justified in excluding such a venireman when it seeks to impose the death penalty upon a defendant. However, where, as in *Buchanan*, the defendant is not subject to capital charges, the death penalty is not part of the law applicable to his case. Thus, a potential juror's beliefs concerning the death penalty do not affect his ability to apply the law in such a case. If the potential juror is nonetheless excluded from serving on a case in which the defendant is not facing capital charges, that juror has been excluded for reasons wholly unrelated to his ability to serve as an effective juror and, thus, becomes a member of a "distinctive group" impermissibly excluded from serving on the jury.

In *McCree*, the "*Witherspoon*-excludables" who were not permitted to serve on the jury were excluded from jury service based upon beliefs they held rendering them unable to serve as effective jurors

¹⁸⁹ *Buchanan*, 107 S. Ct. at 2914 (citing *McCree*, 106 S. Ct. at 1766).

¹⁹⁰ The result these excluded jurors are reluctant to reach is that of putting the defendant to death.

¹⁹¹ *Buchanan*, 107 S. Ct. at 2914.

¹⁹² *Id.*

¹⁹³ See *McCree*, 106 S. Ct. at 1765-66.

in determining the guilt or innocence of the defendant *McCree*.¹⁹⁴ In *Buchanan*, by contrast, potential jurors were excluded on the basis of beliefs held on an issue completely unrelated to the charges the defendant faced.¹⁹⁵ Thus, the non-distinctive group which was permissibly excluded from the jury in *McCree* became, in *Buchanan*, a distinctive group whose complete exclusion from the jury should have been deemed constitutionally impermissible by the Court.

The majority's analogy to *McCree* is misleading and minimizes the essential difference between the factual situations of *McCree* and *Buchanan*. In *McCree*, the defendant faced trial for a capital offense.¹⁹⁶ In contrast, although *Buchanan* initially faced a capital charge of murder,¹⁹⁷ the capital portion of the indictment against him was dismissed before the trial commenced.¹⁹⁸ Moreover, based solely on the fact that Buchanan was tried jointly with a capital defendant,¹⁹⁹ the state was permitted to engage in a procedure which would have been constitutionally impermissible had Buchanan been tried alone.²⁰⁰ When the state was permitted to "death-qualify" the jury despite the fact that defendant Buchanan could not be put to death for his crimes, the excluded veniremen became what they had not been in *McCree*, namely, a "distinctive group" under a fair cross-section analysis. To justify this procedure, the majority held *McCree* to be controlling and refused to recognize that "death-qualification" of the jury in a trial where the defendant faces capital charges is not

¹⁹⁴ *Id.*

¹⁹⁵ *Buchanan*, 107 S. Ct. at 2919 (Marshall, J., dissenting).

¹⁹⁶ *McCree*, 106 S. Ct. at 1761. *McCree* was charged with capital felony murder in violation of ARK. STAT. ANN. § 41-1501(1)(a) (1977). *Id.* at 1761.

¹⁹⁷ See *supra* note 27 for an enumeration of the charges facing Buchanan.

¹⁹⁸ See *supra* note 51 and accompanying text.

¹⁹⁹ The majority made much of the fact that Buchanan did not move for severance pursuant to the Kentucky Rules of Criminal Procedure. *Buchanan*, 107 S. Ct. at 2915. The relevant rule provides:

If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. . . .

KY. RULE CRIM. PRO. § 9.16 (1977).

The majority then arrived at the conclusion that the failure to move for severance was a "tactical decision that he [Buchanan] would fare better if he were tried by the same jury that tried Stanford, the 'triggerman' in Poore's murder." *Buchanan*, 107 S. Ct. at 2915.

The majority gives cursory attention to the fact that Stanford had moved the court for a severance and this motion was denied. There is nothing to suggest that the court's denial communicated anything more to Buchanan than the court's determination to allow the Commonwealth to proceed with a joint trial. See *id.* at 2909 n.5.

²⁰⁰ *Buchanan*, 107 S. Ct. at 2922 (Marshall, J., dissenting).

synonymous with "death-qualification" of the jury in a trial where the defendant faces exclusively non-capital charges.²⁰¹ Ignoring these distinctions, the Court superimposed the fact-specific holding of *McCree* onto the completely different factual situation of *Buchanan*.

The majority's analogy of *McCree* to *Buchanan* cannot withstand analysis. The law which the Commonwealth of Kentucky feared would be thwarted by the inclusion of "non-death-qualified" jurors on the jury panel was inapplicable to *Buchanan*. In *Buchanan*, the "death-qualification" of the jury excluded a "distinctive group" from the jury and therefore *McCree* should not have been deemed controlling. What in *McCree* is a permissibly excludable group becomes in *Buchanan* a "distinctive group" impermissibly excluded from the venire, thus creating the "'appearance of unfairness'"²⁰² which *McCree* lacked.

The Court's refusal to recognize that those veniremen excluded from *Buchanan*'s jury represent a cognizable and distinctive group for fair cross-section purposes opens the door to further abuse of a criminal defendant's rights.²⁰³ It has been shown that the white male is not the typical "*Witherspoon*-excludable."²⁰⁴ Rather, blacks, women, minorities and young adults are frequently overrepresented in a group of excluded veniremen.²⁰⁵ By sanctioning the "death-qualification" process for a non-capital defendant, the Court increases the chances that cognizable groups will be excluded from the jury. Although the Court denies that "*Witherspoon*-excludables" are a "distinctive group," the process of "death-qualification" excludes members of groups the Court has recognized as distinct.²⁰⁶ When, as in *Buchanan*, a defendant does not face capital charges, the

²⁰¹ *Buchanan* initially faced the death penalty on the charge of murder along with his co-defendant Stanford. However, because the state could not have sought the death penalty against *Buchanan* under the holding of *Enmund v. Florida*, see *supra* note 51 for a discussion of *Enmund*, the state should not have been permitted to engage in the same procedure of "death-qualification" which it had previously been permitted to employ only in the case of a capital defendant.

²⁰² *Buchanan*, 107 S. Ct. at 2914 (quoting *McCree*, 106 S. Ct. at 1766).

²⁰³ The majority's decision fails to recognize that the concept of a "distinctive group" is nebulous and must be redefined and refined in each case in which a violation of the fair cross-section requirement is alleged. That the "distinctive group" concept defies standard definition is evidenced by how categories of individuals have not been recognized as having "distinctive group" status at one point in time only to be accorded this "distinctive group" status at a later point in time. See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women); *Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (blacks).

²⁰⁴ For an excellent discussion of the effects of "death-qualification" on jury composition, see generally studies and conclusions found in 8 LAW AND HUM. BEHAV., 7-160 (1984).

²⁰⁵ *Id.*

²⁰⁶ See *Taylor v. Louisiana*, 419 U.S. 522 (1975) (women); *Batson v. Kentucky*, 106 S. Ct. 1712 (1986) (blacks).

sanctioning of the exclusion of these groups from the jury cannot be condoned.

The majority's efficiency argument, which accorded almost talismanic importance to the state's interest in a joint trial,²⁰⁷ fell short of justifying the infringement of Buchanan's sixth amendment right to an impartial jury. Buchanan's right to an impartial jury should not have been sacrificed on the altar of state efficiency. In support of its position, the majority offered no interest of the Commonwealth of Kentucky of such importance as to justify the imposition upon the defendant's right to a fair and impartial jury which *Buchanan* represents. As Justice Marshall correctly noted in his dissent, "the Commonwealth's asserted interest in efficiency is even more attenuated [here] than it was in *McCree*."²⁰⁸ Although the majority cited the burden which would attach to the state if forced to present the same evidence to different juries, the dissent questioned what proof the Commonwealth had submitted to substantiate this claim.²⁰⁹ If the Commonwealth's burden in providing separate trials is truly as great as the majority contends, there is no explanation for Kentucky's own statute which provides for the impaneling of separate juries in the case of persistent felony offenders ("PFOs").²¹⁰ If the state had no provisions for separate trials,²¹¹ its claim that burdensome costs prohibit the provision of such services would be accorded some legitimacy. But where, as with Kentucky, the state provides for separate juries in certain instances, the state

²⁰⁷ See *Buchanan*, 107 S. Ct. at 2915-16. In support of this argument, the Court first cites the state's interest in promoting both reliable and consistent results for each defendant. This interest is achieved by presenting all the relevant evidence against each defendant charged with crimes arising out of the same event at a single trial. *Id.* at 2915. As further support, the Court next cites the state's interest in avoiding repetitive presentation of identical evidence at separate proceedings for defendants charged with crimes arising out of the same event. *Id.*

²⁰⁸ *Id.* at 2920 (Marshall, J., dissenting).

²⁰⁹ "[The state] can only *presume* the magnitude of this burden." *Id.* (Marshall, J., dissenting) (emphasis in original).

²¹⁰ See *id.* at 2920 n.2 (Marshall, J., dissenting). Kentucky's "PFO" statute provides in pertinent part:

(1) When a defendant is charged with being a persistent felony offender, the determination of whether or not he is such an offender and the punishment to be imposed pursuant to subsection (6) of this section shall be determined in a separate proceeding from that proceeding which resulted in his last conviction. Such proceeding shall be conducted before the court sitting with the jury that found the defendant guilty of his most recent offense unless the court for good cause discharges that jury and impanels a new jury for that purpose. . . .

KY. REV. STAT. § 532.080(1) (Michie/Bobbs-Merrill 1977).

²¹¹ This is not the case here, as Kentucky provides for separate juries in the case of "PFOs" and also in cases in which severance has been granted.

cannot be heard to argue that it cannot afford a procedure provided for by its own laws.

In opposition to the argument that the Commonwealth's claim of undue burden is superfluous, it might be argued that the sheer number of capital and non-capital defendants tried jointly prevents the implementation of a separate jury system similar to that in place for "PFOs." However, this argument fails. First, as Justice Marshall noted in *McCree*²¹² and reiterated in *Buchanan*,²¹³ capital cases "constitute a relatively small number of criminal trials."²¹⁴ Furthermore, if a system of separate juries were in place for the guilt and punishment phases of capital trials there is no evidence that the number of defendants who would request that such a system be used in their cases would overwhelm the state's resources to such an extent as to constitute an undue burden on the state.²¹⁵ Finally, a system of separate juries for the guilt and sentencing phases of a capital trial is not the only way to solve the efficiency problem facing the states. Other alternatives are available to a state at minimal cost which would not extract a disproportionate cost from the defendant in the form of his right to a fair and impartial jury trial.²¹⁶

Furthermore, the majority's residual doubt argument is speculative and unsupported.²¹⁷ The majority points to Buchanan's failure to move to sever his case from Stanford's to show not only that "death-qualification" of the jury did not prejudice Buchanan's right to an impartial jury but also as proof that Buchanan decided it would be to his advantage to be tried alongside Stanford.²¹⁸

²¹² *McCree*, 106 S. Ct. at 1781 (Marshall, J., dissenting) (citing Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and A Constitutional Analysis*, 81 MICH. L. REV. 1, 57 (1982)). [hereinafter Winick, *Prosecutorial Peremptory Challenge Practices*].

²¹³ *Buchanan*, 107 S. Ct. at 2920 (Marshall, J., dissenting).

²¹⁴ *McCree*, 106 S. Ct. at 1781 (Marshall, J., dissenting) (citing Winick, *Prosecutorial Peremptory Challenge Practices*, 81 MICH. L. REV. at 57).

²¹⁵ The number of defendants who would take advantage of such a system were it in place has never been empirically determined in Kentucky or in other states.

²¹⁶ Among the possible alternatives a state could implement are: adding another layer of state courts to deal solely with capital offenses, or adopting procedural regulations which allow the judge to fix the penalty for each individual defendant after a "non-death-qualified" jury has determined the respective guilt of each defendant. A possible objection to the second alternative is that it would deprive the defendant of his right to have a jury of his peers determine the penalty he will face. However, this argument ignores the reality of a judicial system in which judges alter jury-imposed penalties quite frequently. These judicial alterations take one of two forms. First, the judge may reduce a defendant's jury-set penalty in a criminal case. Alternatively, the judge may reduce a plaintiff's jury-set damage award in a civil case.

²¹⁷ *Buchanan*, 107 S. Ct. at 2921 (Marshall, J., dissenting).

²¹⁸ See *supra* notes 119-120 and accompanying text for a discussion of the severance issue.

Residual doubt, however, is often cited as a benefit accruing to the defendant from the state's use of a single jury to determine both guilt and punishment.²¹⁹ Any doubts the jury may have had regarding the defendant's guilt are said to transfer to the defendant at the sentencing phase of the defendant's trial.²²⁰ It is argued that this transference results in a lesser penalty for the defendant than he would have received had his guilt and sentencing been determined by separate juries.²²¹ It is questionable whether Buchanan in fact benefited from the jury's residual doubt. As Buchanan was not subject to the death penalty, the most severe sanction available to the jury lay in imposing upon Buchanan the maximum sentence of imprisonment for each offense. Buchanan received the maximum sentence possible, and the jury took the additional step of recommending that the terms run consecutively.²²² Buchanan's sentence is eloquent testimony that no residual doubt on the issue of Buchanan's culpability was created in the minds of the jurors by his joint trial with Stanford.

The majority's reasoning also represents a misapplication of the residual doubt argument. The residual doubt argument is most frequently used to justify the state's use of a single jury to determine both the guilt and the punishment of a capital defendant. In *Buchanan*, however, the majority used the argument to support the Commonwealth's joint trial of a capital and a non-capital defendant by a "death-qualified" jury. The issue of a single jury determining both the guilt and the sentence of a defendant and the issue of a joint trial are distinct issues; while the residual doubt argument may be applicable in the first instance, it is inapplicable in the second.²²³

Even if Buchanan had benefited from the jury's residual doubt, this does not justify a single "death-qualified" jury. As the dissent accurately noted, the Court cannot invoke the benefit of residual doubt to the defendant as justification for a single jury determination of guilt and punishment unless the defendant is also given the option of waiving this benefit.²²⁴ Furthermore, studies of the "death-qualification" process show that "death-qualified" juries are more prone to convict and less likely to entertain doubts as to the defendant's guilt.²²⁵ There is, therefore, arguably no residual doubt

²¹⁹ *McCree*, 106 S. Ct. at 1768-69.

²²⁰ *Id.* at 1769.

²²¹ *Buchanan*, 107 S. Ct. at 2921 (Marshall, J., dissenting).

²²² See *supra* note 62.

²²³ See *supra* notes 195-98 and accompanying text.

²²⁴ *Buchanan*, 107 S. Ct. at 2920 (Marshall, J., dissenting). See also *McCree*, 106 S. Ct. at 1781 (Marshall, J., dissenting).

²²⁵ See *supra* notes 74 and 204.

on "death-qualified" juries from which the defendant could benefit. Finally, the residual doubt argument has a fatally flawed premise. This premise is that the defendant will be able to successfully argue to the jury which convicted him of the crimes for which he was charged that his innocence is a mitigating factor to be considered during their penalty deliberations.²²⁶ The majority's invocation of the residual doubt argument is "more than disingenuous. It is cruel."²²⁷

The majority's resolution of the "death-qualification" issue presented by *Buchanan* will likely end further challenges to the "death-qualification" process. By allowing states to wield the tool of "death-qualification" voir dire, previously used in capital cases only, against non-capital defendants who are tried alongside capital defendants, the Court severely erodes a criminal defendant's right to a fair and impartial trial under the sixth and fourteenth amendments. The state is now free to do what it could not before, namely, "death-qualify" the jury when the defendant is not subject to the death penalty. The potential for abuse exists. The state will jointly try defendants it would not have before solely to secure a "death-qualified" jury. In addition to permitting the "death-qualification" process to prejudicially impact upon a non-capital defendant's case, the Court's decision allows for the admission of previously inadmissible evidence at the non-capital defendant's joint trial. Evidence pertaining to the capital co-defendant's conduct will be admissible as relevant to the issues confronting the jury in the joint trial. This evidence, which would not have been admissible had the non-capital defendant been tried alone, may further prejudice the jury against the non-capital defendant. Thus, the United States Supreme Court has approved of the state jointly trying defendants who face different penalties by a jury which the Court itself has recognized as more "conviction-prone."²²⁸

B. THE PSYCHIATRIC REPORT

The disputed report of Dr. Lange concerned Buchanan's fulfillment of the statutory criteria for involuntary hospitalization and treatment pending trial.²²⁹ The report did not concern the defendant's mental status at the time of the crimes²³⁰ and should not have

²²⁶ *McCree*, 106 S. Ct. at 1781 (Marshall, J., dissenting).

²²⁷ *Id.* at 1782 (Marshall, J., dissenting).

²²⁸ *Id.* at 1764.

²²⁹ The report was requested pursuant to statutory authority. See *supra* note 59 for the applicable statute.

²³⁰ Indeed, Buchanan's report dealt solely with the issue of the defendant's mental

been used as rebuttal evidence to Buchanan's claim of extreme emotional disturbance. Buchanan offered Elam's testimony as proof that he was suffering from a mental disturbance on the night Poore was killed.²³¹ Elam's report showed that Buchanan was disturbed prior to the crime and that he received no treatment for this disturbance.²³² The jury could have inferred from this testimony that his mental condition had not changed from the time of the report to the time of the crimes and that the absence of treatment had exacerbated his condition. The Commonwealth's introduction of a report based on an examination of Buchanan seven months after the commission of the crimes effectively destroyed any inference the jury might have made concerning Buchanan's mental condition on the night the crimes were committed.

Buchanan introduced Elam's testimony in support of his claim of extreme emotional disturbance.²³³ The reports and evaluations which were the subject of Elam's testimony tended to establish Buchanan's need for treatment.²³⁴ In rebuttal, the prosecution offered a report concerning Buchanan's eligibility for involuntary hospitalization which was prepared seven months after the commission of the crimes for which Buchanan was charged.²³⁵ The later report was based upon a one hour interview and focused on the "here and now."²³⁶

It was improper for the Court to uphold the use of Dr. Lange's report in rebuttal. The majority's claim that Buchanan opened the door to the use of Dr. Lange's report by offering psychiatric reports in support of his defense of extreme emotional disturbance²³⁷ was incorrect. Buchanan did open a door by offering Elam's testimony. But the door opened was to the prosecution's use of rebuttal evidence regarding his mental status at the time of the commission of the crime and not to the use of evidence on whether he should receive involuntary hospitalization and treatment pending trial. The prosecution's substitution of one type of psychiatric inquiry for another should not have been condoned by the Court.

status prior to and up until the time of the crimes. Its introduction was for the limited purpose of establishing that Buchanan suffered from extreme emotional disturbance at the time of the crimes. This disturbance would have been sufficient to reduce the murder charge against Buchanan to a charge of manslaughter.

²³¹ See *supra* notes 54-59 and accompanying text.

²³² See *supra* note 57 for a summary of the report's findings.

²³³ See *supra* notes 54-59 and accompanying text for a discussion of the introduction of the report.

²³⁴ *Buchanan*, 107 S. Ct. at 2922 (Marshall, J., dissenting).

²³⁵ *Id.* (Marshall, J., dissenting).

²³⁶ *Id.* (Marshall, J., dissenting).

²³⁷ *Id.* at 2918.

The examination "was not intended to generate evidence of a defendant's criminal responsibility. . . ." ²³⁸ Rather, as the dissent noted:

The examination takes its meaning instead from humanitarian and therapeutic concerns unrelated to the prosecution of criminal defendants, concerns that may be fully served only by the unimpeded establishment of relations of trust and cooperation among the physician, the Commonwealth, and the potential patient. These concerns apply with full force to the mentally ill criminal defendant, and in this context require the trust and cooperation of the defendant's attorney as well. ²³⁹

By upholding the admission of Dr. Lange's report, the majority severely impinges upon a defendant's fifth amendment right to be free from self-incrimination ²⁴⁰ and his sixth amendment right to the assistance of counsel. ²⁴¹ The majority has curtailed both a defendant's willingness to request an examination and his willingness to be entirely truthful with the examiner. ²⁴² Anything the defendant tells the examiner during the exam may be used against him at a later trial, regardless of the lack of the warnings and waivers *Miranda* ²⁴³ has deemed necessary. Furthermore, because defendant's counsel need not be warned of the detrimental use to which such a report will be put later, the defendant is denied effective assistance of counsel, a right previously ensured to the defendant by the sixth amendment.

The end result of the majority's decision concerning the report's admissibility will be two-fold. First, those in need of a psychiatric exam in order to determine the best possible course of treatment will be reluctant to request or submit to such an exam. Most of those in need of such an exam will refuse the exam altogether due to the lack of certainty over how the results will be used. Second, the trust necessary to an effective doctor-patient relationship will become difficult, if not impossible, to achieve. The patient will never know how the doctor may employ the results of the exam in the future. Similarly, the doctor will be inclined to question the patient's truthfulness since the *Buchanan* Court has given the patient an incentive to lie.

²³⁸ *Id.* at 2923 (Marshall, J., dissenting).

²³⁹ *Id.* (Marshall, J., dissenting).

²⁴⁰ See *supra* note 20.

²⁴¹ See *supra* note 2.

²⁴² The defendant now knows that if he confesses to either the crimes for which he is charged or to a desire to receive professional psychiatric help, there is a strong likelihood that this confession will be introduced at trial.

²⁴³ See *supra* note 23 for a discussion of the required *Miranda* warnings.

VIII. CONCLUSION

The line of "death-qualification" cases began with judicial recognition of the constitutionality of the "death-qualification" process.²⁴⁴ It proceeded with judicial permission to conduct this process prior to the guilt phase of a criminal defendant's trial.²⁴⁵ It ended with the judicial pronouncement that a jury determining a non-capital defendant's guilt and punishment could nonetheless be "death-qualified" if the defendant was tried jointly alongside a capital defendant.²⁴⁶ Thus, *Buchanan* may be viewed as a closing of the "death-qualification" circle.

The *Buchanan* Court's rationale is founded upon a recognition of the state's legitimate interest in proceeding with a joint trial when two criminal defendants face charges arising out of the same event. However, the Court's rationale ignores the more compelling state interest in guaranteeing that every criminal defendant be tried by an impartial jury capable of analyzing the defendant's guilt or innocence objectively.²⁴⁷ The state not only has an interest in protecting the constitutional right of the defendant to an impartial jury trial, it is also under an affirmative obligation to provide the defendant with this right.²⁴⁸ *Buchanan* releases the state from this obligation and eviscerates the sixth amendment right of a non-capital defendant tried jointly with a capital defendant to a fair and impartial jury. The *Buchanan* Court provides a weak analogy between the facts of *Buchanan* and those of *McCree* to justify the exclusion of a "distinctive group" from defendant Buchanan's jury. In its eagerness to grant the state an unwise amount of discretion in the conduct of joint trials, the *Buchanan* Court ignores the constitutional mandate of the sixth amendment and opens the door to further abuse of a criminal defendant's rights.²⁴⁹

The Court's decision allowing the use of Buchanan's hospitali-

²⁴⁴ See *Witherspoon*, 391 U.S. 510 (1968). See also *supra* notes 69-82 and accompanying text for a discussion of *Witherspoon*.

²⁴⁵ See *McCree*, 106 S. Ct. 1758 (1986). See also *supra* notes 83-88 and accompanying text for a discussion of *McCree*.

²⁴⁶ See *Buchanan*, 107 S. Ct. 2906 (1987). See also *supra* notes 89-127 and accompanying text for a discussion of the majority's holding in *Buchanan*.

²⁴⁷ See *supra* note 2.

²⁴⁸ The fourteenth amendment of the United States Constitution imposes upon the states the affirmative duty to ensure its residents many of the rights which the Constitution grants to all citizens. See *supra* note 3.

²⁴⁹ As the *Buchanan* dissent noted: "[the majority's decision represents 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 to such interests.'" *Buchanan*, 107 S. Ct. at 2922 (Marshall, J., dissenting) (quoting *Wainwright*, 469 U.S. at 462-463 (Brennan, J., dissenting)).

zation report to rebut the defendant's offer of psychiatric evidence further erodes the criminal defendant's sixth amendment rights. The decision will have a chilling effect upon a criminal defendant's willingness to undergo evaluative treatments. State statutes providing for medical evaluation of individuals held in state custody aim to procure appropriate medical care for those awaiting trial or similar judicial dispositions of their cases. The statutes are not designed to provide the state with a means of gathering incriminating evidence against a defendant to be used against that defendant in a criminal prosecution. The Court's decision is a thinly veiled attempt to sacrifice the legitimate state interest in providing appropriate and necessary medical attention to individuals in its custody in the name of the illegitimate state interest of gathering further evidence of a defendant's culpability without adhering to the *Miranda* warnings.

BARBARA J. WHISLER