UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 66 | Number 1 Article 11

11-1-1987

Lockhart v. McCree: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional

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NOTES

Lockhart v. McCree: Death Qualification of Jury Prior to Guilt Phase of Bifurcated Capital Trial Held Constitutional

The sixth amendment of the United States Constitution guarantees that criminal defendants have the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed."[1] In *Duncan v. Louisiana*[2] the United States Supreme Court held that this "general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."[3] The right to a jury trial is thus applicable to the states via the due process clause of the fourteenth amendment.[4] The practice of death qualifying[5] the juries that hear capital trials has been a particularly controversial sixth amendment issue. Nowhere is the preservation of the defendant's right to an impartial jury more critical than in a capital trial, in which the extreme nature of the possible punishment makes it necessary to ensure that the defendant is treated with scrupulous fairness.

The leading case addressing the issue of death qualification of juries is *Witherspoon v. Illinois*.[6] In *Witherspoon* the Supreme Court held that a state could not inflict the death penalty on a defendant sentenced to die by a jury that 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."[7] The Court reasoned that such a jury "fell woefully short of that impartiality to which the [defendant] was entitled under the Sixth and Fourteenth Amendments."[8] The Court, however, refused to consider

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1. U.S. CONST. amend. VI.

2. 391 U.S. 145 (1968).

3. *Id.* at 157-58.

4. *Id.* at 156.

5. "Death qualified" is the term used to describe juries composed only of jurors who indicate they are willing to apply the death penalty should it be necessary. *See infra* note 7.

6. 391 U.S. 510 (1968). For analysis of the application of *Witherspoon* and its progeny by North Carolina courts, see Note, *Qualifying Jurors in Capital Trials: Are Sixth Amendment Rights Adequately Protected in North Carolina?*, 62 N.C.L. REV. 1213 (1984).

7. *Witherspoon*, 391 U.S. at 522. The Court reasoned that "a man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror." *Id.* at 519. The Court was careful to note that its holding did not affect a state's power to death qualify a jury by excluding those potential jurors who indicated

> (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.

Id. at 522-23 n.21. Such jurors are often referred to as "*Witherspoon* excludables."

8. *Id.* at 518. The Court concluded that the State's process of death qualification had "produced a jury uncommonly willing to condemn a man to die," and held that "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." *Id.* at 521.

defendant's argument that a death qualified jury also violated his right to an impartial jury on the issue of guilt.[9] Many commentators have criticized the Court's limitation of the *Witherspoon* doctrine to the penalty phase of a trial.[10] Commentators have suggested, in light of both the expansion of sixth and fourteenth amendment rights in later decisions[11] and other significant evidence arising after *Witherspoon*,[12] that the Court should extend its holding to bar death

9. *Id.* at 517-18. The Court reviewed defendant's evidence on this issue, *id.* at 517 n.10, which consisted of three opinion surveys: Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (unpublished manuscript, later published as *Toward Expansion of* Witherspoon: *Capital Scruples, Jury Bias and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970)) (surveying 200 college students at Morehouse College in Atlanta, Georgia); W. Wilson, Belief in Capital Punishment and Jury Performance (1964) (unpublished manuscript) (surveying 187 college students at the University of Texas); H. Zeisel, Some Insights into the Operation of Criminal Juries, (Nov. 1957) (confidential first draft) (surveying 1,248 jurors in New York and Chicago). The Court concluded the evidence was "too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt." *Witherspoon*, 391 U.S. at 517. Although it refused to address the issue directly, the Court did note that

> a defendant convicted by . . . a [death-qualified] jury in some future case might still attempt to establish that the jury was less than neutral with respect to *guilt*. If he were to succeed in that effort, the question would then arise whether the State's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence—given the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment.

Id. at 520 n.18.

In his concurring opinion, Justice Douglas argued that the exclusion from juries of persons who would never inflict the death penalty "[resulted] in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment." *Id.* at 528 (Douglas, J., concurring).

10. *See* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595, 617 (1982); Goldberg, *Toward Expansion of* Witherspoon: *Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53, 69 (1970) (published version of the Goldberg article cited in *Witherspoon*, 391 U.S. at 517 n.10); Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 387 (1982); White, *Death Qualified Juries: The "Prosecution-Proneness" Argument Reexamined*, 41 U. PITT. L. REV. 353, 405 (1980).

11. Commentators often look to such decisions as Peters v. Kiff, 407 U.S. 493 (1972) (exclusion of blacks from jury denied white defendant due process of law) and Taylor v. Louisiana, 419 U.S. 522 (1975) (venires from which petit juries are drawn must reflect fair cross-section of community; distinctive groups not excludable), as examples of the Court's increasing recognition of the importance of a defendant's right to a jury selected in accordance with the relevant constitutional principles.

12. This evidence is generally in the form of empirical data and social science studies purporting to analyze juror attitudes. *See* Berry, *Death-Qualification and the "Fireside Induction,"* 5 U. ARK. LITTLE ROCK L.J. 1 (1982); Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1 (1970); Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some California Evidence*, 3 WOODROW WILSON J.L. 11 (1980); Cowan, Thompson & Ellsworth, *The Effects of Death-Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 L. & HUM. BEHAV. 53 (1984); Ellsworth, Bukaty, Cowan & Thompson, *The Death-Qualified Jury and the Defense of Insanity*, 8 L. & HUM. BEHAV. 81 (1984); Finch & Ferraro, *The Empirical Challenge to Death-Qualified Juries: On Further Examination*, 65 NEB. L. REV. 21 (1986); Fitzgerald & Ellsworth, *Due Process v. Crime Control: Death Qualification and Jury Attitudes*, 8 L. & HUM. BEHAV. 31 (1984); Girsh, *The* Witherspoon *Question: The Social Science and the Evidence*, NAT'L LEGAL AID & DEFENDER A. BRIEFCASE, Sept. 1978, at 99; Goldberg, *Toward Expansion of* Witherspoon: *Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53, 69 (1970); Haney, *Juries and the Death Penalty: Readdressing the* Witherspoon *Question*, 26 CRIME & DELINQ. 512 (1980); Jacoby & Pater-

qualification altogether.[13] Lower federal court decisions conflict over the proper resolution of this issue.[14]

In *Lockhart v. McCree*[15] the United States Supreme Court resolved any doubt as to its position. The *McCree* Court rejected defendant's argument that the death qualification of jurors prior to the guilt phase of a bifurcated capital trial was a violation of his sixth amendment right to trial by an impartial jury selected from a fair cross-section of the community.[16] Instead, the Court held that the practice of death qualification did not violate the fair cross-section requirement. The Court noted 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, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.[17]

This Note analyzes the Court's reasoning in *McCree* in the context of prior sixth amendment decisions and assesses its likely impact on sixth amendment jurisprudence—both as applied to capital trials and in general. The Note concludes that the Court, in attempting to reconcile its approval of the process of death qualifying jurors in capital cases with its previous sixth amendment decisions, has issued an unnecessarily broad opinion that threatens to undermine the sixth amendment rights not only of defendants in capital cases, but of all criminal defendants.

The events that ultimately led to the Court's decision in *McCree* began on the morning of February 4, 1978, in Camden, Arkansas, with the robbery of a gift shop and service station and the murder of its owner, Evelyn Boughton.[18] Defendant Ardia V. McCree was subsequently arrested and charged with capital felony murder in the case.[19] At a *voir dire* hearing prior to the guilt-determina-

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noster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379, 387 (1982); Jurow, *New Data on the Effect of a Death Qualified Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971); Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts*, 8 L. & HUM. BEHAV. 95 (1984); White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973); White, *supra* note 10, at 405; Winick, Witherspoon *in Florida: Reflections on the Challenge For Cause of Jurors in Capital Cases in a State in Which the Judge Makes the Sentencing Decision*, 37 U. MIAMI L. REV. 825 (1983); Comment, Witherspoon—*Will the Due Process Clause Further Regulate the Imposition of the Death Penalty?*, 7 DUQ. L. REV. 414 (1969); Comment, *Capital Juries and the Fair Cross-Section Requirement: Modern Constitutional Reasoning in Jury Selection*, 73 KY. L.J. 1109 (1985).

13. *E.g.*, White, *supra* note 10, at 406.

14. *See, e.g.*, Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2258 (1986); Corn v. Zant, 708 F.2d 549, 565 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984); Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir.), *modified and aff'd*, 671 F.2d 858 (5th Cir. 1981), *cert. denied*, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 593-94 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); United States *ex rel.* Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977); *see infra* note 35 and accompanying text.

15. 106 S. Ct. 1758 (1986).

16. *Id.* at 1770.

17. *Id.*

18. *Id.* at 1761.

19. *Id.* Defendant was charged under ARK. STAT. ANN. § 41-1501(1)(a) (1977), which provides:

tion phase of defendant's trial,[20] the trial judge excluded for cause eight prospective jurors who said they could not vote to impose the death penalty "under any circumstances."[21] The jury convicted defendant of capital felony murder, but rejected the State's request for the death penalty in favor of life imprisonment without parole.[22] The Arkansas Supreme Court affirmed defendant's conviction on direct appeal.[23]

Defendant subsequently filed a federal habeas corpus petition "raising *inter alia* the claim that 'death-qualification' . . . violated his right under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross-section of the community."[24] This claim was then consolidated with *Grigsby v. Mabry*,[25] an already pending habeas corpus action involving the same issue. In an evidentiary hearing on the merits of the petitioners' claims, the United States District Court for the Eastern District of Arkansas determined that "through the death-qualification practices permitted by the State of Arkansas in the guilt-determination phase of capital trials, petitioners were denied their right to a neutral jury and to a representative jury."[26] The court thus set aside McCree's conviction and ordered the State "within 90 days, to retry him or to set him free."[27]

The United States Court of Appeals for the Eighth Circuit, in a five-to-four decision, affirmed the decision of the district court.[28] In explaining its reasoning,

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A person commits capital murder if: (a) acting alone or with one or more persons, he commits or attempts to commit rape, kidnapping, arson, vehicular piracy, robbery, burglary, or escape in the first degree, and in the course of and in furtherance of the felony, or in immediate flight therefrom, he or an accomplice causes the death of any person under circumstances manifesting extreme indifference to the value of human life.

Id.

20. Under Arkansas law, capital trials are bifurcated into a guilt phase and a sentencing phase (in the event that a defendant is found guilty of a capital offense), with the same jury sitting in both phases of the trial. *Id.* § 41-1301. The Supreme Court approved a similar capital trial procedure in Gregg v. Georgia, 428 U.S. 153 (1976).

21. *McCree*, 106 S. Ct. at 1761.

22. *Id.*

23. McCree v. State, 266 Ark. 465, 585 S.W.2d 938 (1979) (en banc).

24. *McCree*, 106 S. Ct. at 1761. Defendant thus alleged that the death qualification of the jury prior to the guilt phase of his trial resulted in two distinct violations of his sixth amendment rights as applied to the State by the fourteenth amendment. He alleged, first, that the death qualification process violated his right to an impartial jury, and second, that it violated his right to a jury chosen from a fair cross-section of the community. *Id.*

25. 569 F. Supp. 1273 (E.D. Ark. 1983), *modified and aff'd*, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986). The claim of a third habeas petitioner, Dewayne Hulsey, was also consolidated with *Grigsby*. The district court subsequently barred Hulsey from raising "*Grigsby* issues" for habeas review, because Hulsey had not raised them before the Arkansas court "in timely fashion." He had also failed to demonstrate "legally sufficient 'cause' for the failure to raise the issues" as required by the United States Supreme Court's decision in Wainwright v. Sykes, 433 U.S. 72 (1977). Hulsey v. Sargent, 550 F. Supp. 179, 187 (E.D. Ark. 1981).

26. *Grigsby*, 569 F. Supp. at 1324. In reaching its decision, the court relied heavily on empirical studies of juror attitudes. In fact, the court incorporated an extensive portion of one such study into its holding. *Id.* at 1322-23 (quoting Berry, *supra* note 12, at 37-38).

27. *Id.* at 1324. Grigsby died prior to the district court's decision and Hulsey, *see supra* note 25, was "denied the right to raise '*Grigsby* issues' because of his failure to object to the challenged procedures as required in State court." *Grigsby*, 569 F. Supp. at 1324.

28. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986). In its reasoning the court of appeals noted:

the court of appeals emphasized the "exhaustive" scope of the evidence in defendant's favor[29] and the absence of any contradictory studies.[30] The *Grigsby* court rejected the holdings of the other circuits because, in its view, they "focused on the wrong issue."[31] According to the *Grigsby* court, the proper consideration was "not whether a jury would be biased one way or another." Rather, the court should determine "whether a death qualified jury [was] more prone to convict than the juries used in noncapital criminal cases," and "whether an impartial jury can exist when a distinct [*Witherspoon* excludable] group in the community is excluded by systematically challenging them for cause."[32] The court quoted with approval Judge McMillan's district court opinion in *Keeten v.Garrison,*[33] holding that death-qualified juries violate the fair cross-section requirement.[34] Noting that its decision was in conflict with the decisions of several other circuit courts that had previously addressed the issue in question,[35]

> The exclusion of jurors who will never consider a penalty of death, approved in *Witherspoon*, becomes irrelevant when the focus is on the first half of a bifurcated trial; on the guilt-innocence phase, rather than the penalty determination. *Witherspoon* does not hold that jurors unalterably opposed to the death penalty, but who nonetheless can swear to consider the evidence and follow the law in determining guilt, can be excluded from the guilt-innocence phase of a bifurcated trial.

Id. at 232. The court modified the district court's decision only insofar as it held that the State should use separate juries in a bifurcated capital trial. In the appellate court's view, "the procedure to be followed to secure an impartial jury in the guilt-innocence phase of a trial should be left to the states." *Id.* at 243.

The court did suggest, however, that

> perhaps the best possible procedure, rather than have two separate juries, would be to add to the number of alternates who sit in the guilt phase of trial. If the defendant is convicted a new *voir dire* could take place and the same jury could be qualified with [*Witherspoon* excludables] excluded, to hear the penalty phase of the trial.

Id.

29. *Id.* at 238.

30. *Id.* At least one behavioral study has yielded a conclusion contrary to those cited in *Grigsby*. *See* Bernard & Dwyer, Witherspoon v. Illinois: *The Court Was Right*, 8 LAW & PSYCHOLOGY REV. 105, 114 (1984) (concluding that "pre-existing attitudes toward capital punishment do not affect judgments regarding guilt or innocence").

31. *Grigsby*, 758 F.2d at 241 n.31.

32. *Id.* at 241-42.

33. 578 F. Supp. 1164 (W.D.N.C.), *rev'd*, 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2258 (1986).

34. *Grigsby*, 758 F.2d at 242 (quoting *Garrison*, 578 F. Supp. at 1167).

35. In Spinkellink v. Wainwright, 578 F.2d 582, 593-94 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979), the United States Court of Appeals for the Fifth Circuit concluded that the evidence supporting defendant's claim that death-qualified juries were "prosecution-prone" was "far from conclusive." Further, the court noted, even if the claim was incontrovertible, it still would not prove that a death-qualified jury was less impartial than a nondeath-qualified jury. The Fifth Circuit further elaborated on its reasoning in Smith v. Balkcom, 660 F.2d 573, 579 (5th Cir. 1981), *modified and aff'd*, 671 F.2d 858 (5th Cir.), *cert. denied*, 459 U.S. 882 (1982). In *Balkcom*, the court observed that "the logical converse of the proposition that death-qualified jurors are conviction prone is that nondeath-qualified jurors are acquittal prone, not that they are neutral." *Id.* The United States Court of Appeals for the Fourth Circuit relied on *Spinkellink* and *Balkcom* to hold that "members of the venire who are irrevocably opposed to capital punishment would engage in jury nullification if permitted to sit at the guilt stage of a capital case and, therefore, would not be impartial fact finders." Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984), *rev'g* 578 F. Supp. 1164 (W.D.N.C.), *cert. denied*, 106 S. Ct. 2258 (1986); *see also* Corn v. Zant, 708 F.2d 549, 565 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984) (rejecting arguments that death-qualification of jury violated fair cross-section requirement and produced "prosecution-prone" jury); United States *ex rel.* Clark v. Fike, 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1977) (rejecting defendant's evidence as "fragmentary and tentative").

the court of appeals expressed hope that the United States Supreme Court would grant certiorari to resolve the conflict.[36]

The Supreme Court heard the appeal and, in an opinion by Justice Rehnquist, it reversed the holding of the court of appeals.[37] The Court based its conclusions both on its identification of "several serious flaws" in the evidence on which the lower court based its decision,[38] and on its interpretation of several of its own prior sixth amendment decisions.[39]

The Court first addressed the evidence on which the lower court based its holding, noting that only six of the fifteen social science studies on which the court of appeals relied "even purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of '*Witherspoon*-excludables.' "[40] Further, the Court noted the *Witherspoon* Court had deemed three of the six studies "too tentative and fragmentary" to establish the premise when it had considered them some eighteen years before.[41] The Court also was critical of the three more recent studies identifying a number of problems[42] and expressing "serious doubts about the value of these studies in predicting the behavior of actual jurors."[43] Not content merely to reject the evidence as inconclusive, as it had in *Witherspoon*, the Court held that even if "the studies [were] methodologically valid and adequate to establish that 'death qualification' in fact [produced] juries somewhat more 'conviction-prone' than 'non-death-qualified' juries, . . . the Constitution does not prohibit the States from 'death qualifying' juries in capital cases."[44]

Having rejected the evidentiary basis for the lower court's decision that a death-qualified jury was not an impartial jury, the Court considered the holding that death qualification of jurors was a violation of the fair cross-section requirement. The Court concluded that the court of appeals' attempt to apply the requirement to petit juries was erroneous because the requirement properly applied only to venires as a whole.[45] Further, the Court held that, even if it were willing to do so, extending the requirement to petit juries would have no effect on the practice of death qualification, because "[t]he essence of a 'fair cross-section' claim is the systematic exclusion of 'a distinctive group in the

36. *Grigsby*, 758 F.2d at 239.

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

38. *Id.* at 1762.

39. For a discussion of the Court's decisions in this area, see *infra* notes 60-110 and accompanying text.

40. *McCree*, 106 S. Ct. at 1762.

41. *Id.* at 1763. The three studies in question are listed *supra* note 9.

42. The Court noted that none of these studies involved actual jurors in a real capital case; two of the three studies made no attempt to simulate jury deliberation; none of the studies could predict what effect the inclusion of "*Witherspoon* excludables" would have on the guilt determination process; and, most importantly, only one of the six studies "attempted to identify and account for the presence of . . . 'nullifiers,' or individuals [whose] . . . deep-seated opposition to the death penalty would [render them] unable to decide a capital defendant's guilt or innocence fairly and impartially." *McCree*, 106 S. Ct. at 1763-64.

43. *Id.* at 1763.

44. *Id.* at 1764.

45. *Id.* at 1764-65.

community' "[46] and " '*Witherspoon*-excludables' do not constitute a 'distinctive group' for fair cross-section purposes."[47]

Finally, in rejecting defendant's alternative claim that death qualification "violated his constitutional right to an impartial jury"[48] as "both illogical and hopelessly impractical,"[49] the Court primarily relied on its statement in *Wainwright v. Witt*[50] that "an impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.' "[51] The Court reasoned that defendant's attempt to analogize his claim to the claims addressed by the Court in previous cases involving a capital defendant's right to an impartial jury was improper.[52] *McCree* dealt "not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant."[53]

In his dissenting opinion Justice Marshall, joined by Justices Brennan and Stevens, characterized the Court's decision as one rendered "with a glib nonchalance ill-suited to the gravity of the issue presented,"[54] and one that evidenced "a blatant disregard for the rights of a capital defendant."[55] Convinced that the Court's rejection of defendant's evidence was unwarranted, Marshall argued that the evidence[56] was probative of the claim that death qualification of the jury which convicted defendant "violated his right to an impartial jury, guaranteed by both the Sixth Amendment and principles of due process."[57] Marshall also emphasized what he perceived as flaws in the Court's reasoning and noted conflicts with several previous decisions.[58] Finally, Justice Marshall strongly criti-

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46. *Id.* at 1765 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

47. *Id.* at 1766. For the Court's definition of a "distinctive group," see *infra* notes 63-65 and accompanying text.

48. *McCree*, 106 S. Ct. at 1766-67.

49. *Id.* at 1767.

50. 469 U.S. 412 (1985).

51. *McCree*, 106 S. Ct. at 1767 (quoting *Witt*, 469 U.S. at 423).

52. *Id.* at 1770. Defendant cited Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams v. Texas, 448 U.S. 38 (1980), two cases that involved a jury acting within the special context of capital sentencing.

53. *McCree*, 106 S. Ct. at 1770.

54. *Id.* at 1771 (Marshall, J., dissenting).

55. *Id.*

56. Justice Marshall emphasized "the essential unanimity of the results obtained by researchers using diverse subjects and varied methodologies." *Id.* at 1773 (Marshall, J., dissenting). Marshall concluded from his examination of defendant's evidence and the record in *Grigsby* that

> [d]eath-qualified jurors are, for example, more likely to believe that a defendant's failure to testify is indicative of his guilt, more hostile to the insanity defense, more mistrustful of defense attorneys, and less concerned about the danger of erroneous convictions .... This pro-prosecution bias is reflected in the greater readiness of death-qualified jurors to convict or to convict on more serious charges.

Id. at 1772 (Marshall, J., dissenting) (citations omitted). Indeed, Marshall argued that "[t]he true impact of death-qualification on the fairness of a trial is likely even more devastating than the studies show." *Id.* at 1773-74 (Marshall, J., dissenting).

57. *Id.* at 1775 (Marshall, J., dissenting).

58. Marshall noted that the clear import of the Court's decision in Adams v. Texas, 448 U.S. 38 (1980), was that

> even where the role of the jury at the penalty stage of a capital trial is limited to what is essentially a fact-finding role, the right to an impartial jury established in *Witherspoon* bars

cized the Court's approval of the practice of using one jury to try both phases of a bifurcated capital trial.[59]

To better understand the *McCree* Court's decision and its reasoning, it is necessary to examine the development of the right to a jury trial as well as the practice of death qualification. The practice of death-qualifying juries that hear capital cases originated prior to the twentieth century. In 1892 the United States Supreme Court held in *Logan v. United States*[60] that in a capital case the prosecution could challenge for cause jurors who had "conscientious scruples in regard to the infliction of the death penalty for crime."[61] The Court reasoned that a "juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror."[62]

In the mid-twentieth century the Court began to show concern about the constitutionality of the practice of excluding various segments of the community from jury service.[63] The Court voiced this concern in *Thiel v. Southern Pacific Co.*,[64] in which it recognized the importance of "an impartial jury drawn from a cross-section of the community," and held that courts must ensure the empanelment of such juries by avoiding the "systematic and intentional exclusion" of any group in the community for "economic, social, religious, racial, political and

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the State from skewing the composition of its capital juries by excluding scrupled jurors who are nonetheless able to find those facts without distortion or bias.

McCree, 106 S. Ct. at 1777 (Marshall, J., dissenting). Marshall argued that "[t]his proposition can not be limited to the penalty stage of a capital trial." *Id.*

Justice Marshall further argued that the Court's reasoning was untenable in light of its holding in Ballew v. Georgia, 435 U.S. 223, 233 (1978), in which a criminal conviction rendered by a five-person jury was unconstitutional under the sixth and fourteenth amendments. In *Ballew* the Court had emphasized the importance of ensuring the objectivity of juries through the "counterbalancing of various biases" held by individual jurors. *Id.* at 234. In Marshall's view, death qualification upset such "counterbalancing." *McCree*, 106 S. Ct. at 1778 (Marshall, J., dissenting). Marshall also noted the *Ballew* Court's acceptance of empirical evidence on the issue of jury "imbalance," and its scrutiny of jury procedures operating to the " 'detriment of . . . the defense.' " *Id.* at 1778-79 (Marshall, J., dissenting) (quoting *Ballew*, 435 U.S. at 236). The *McCree* majority dismissed *Ballew* from consideration because it "did not involve jury selection at all, but rather the size of the petit jury." *Id.* at 1765 n.14.

59. *McCree*, 106 S. Ct. at 1780-82 (Marshall, J., dissenting).

60. 144 U.S. 263 (1892).

61. *Id.* at 298.

62. *Id.*

63. Prior to this time, the Court had held in Strauder v. West Virginia, 100 U.S. 303 (1880), that the statutory exclusion of blacks from jury participation was a violation of the fourteenth amendment. *Id.* at 310. The Court eventually developed the concept that venires, but not necessarily individual juries, should be composed so as to reflect the various "distinctive groups" within the community. Taylor v. Louisiana, 419 U.S. 522, 538 (1975). The *McCree* Court identified such groups as blacks, women, and Mexican-Americans as "distinctive" within the meaning of its previous decisions. *McCree*, 106 S. Ct. at 1765. Further, the Court noted the historical tendency to exclude members of such groups from jury service for reasons wholly unrelated to their ability to serve. *Id.* at 1765-66.

64. 328 U.S. 217 (1946). The Court had announced a similar opinion in Smith v. Texas, 311 U.S. 128 (1940), in which it unanimously held that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Id.* at 130.

geographical" factors.[65] Justice Murphy's dissenting opinion in *Fay v. New York*[66] expressed a similar view. Justice Murphy in dissent argued that "there is a constitutional right to a jury drawn from a group which represents a cross-section of the community,"[67] and that "[w]e can never measure accurately the prejudice that results from the exclusion of certain types of qualified people from a jury panel."[68]

In *Peters v. Kiff*[69] the Court expanded its notion of what kinds of exclusions were likely to infringe on a defendant's right to an impartial jury.[70] The Court observed that "the exclusion from jury service of a substantial and identifiable class of citizens has a potential impact that is too subtle and too pervasive to admit of confinement to particular issues or particular cases."[71] The Court also noted that such exclusions had the additional undesirable effect of "[removing] from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable."[72]

The Court emphasized the importance of the sixth amendment right to jury trial in criminal cases in its decision in *Duncan v. Louisiana*.[73] In *Duncan* the Court noted this right was "fundamental to the American scheme of justice,"[74] and the right existed in state courts, via the due process clause of the fourteenth amendment, in all cases in which it would apply if they were being tried in a federal court.[75] This decision was of particular significance because it laid the doctrinal foundation necessary for the Court to impose its sixth amendment holdings on the states. The reasoning in *Duncan* provides the basis for the argument that an abridgement of a criminal defendant's sixth amendment rights is a denial of due process and thus violates the fourteenth amendment. This due process argument is implicit in all subsequent cases involving the constitutionality of death-qualified juries in state criminal trials, because the fourteenth amendment provides the necessary basis for the application of sixth amendment rights in such cases.

Having established that the rights guaranteed by the sixth amendment applied to defendants in state criminal trials, the Court almost immediately decided *Witherspoon v. Illinois*[76] and its companion case *Bumper v. North Carolina*.[77] Basing its decision on the sixth amendment guarantee of impartial-

65. *Thiel*, 328 U.S. at 220.

66. 332 U.S. 261 (1947) (majority affirmed state's use of "blue ribbon" jury panel that excluded substantial segment of population based on questionnaire designed to test intelligence).

67. *Id.* at 299 (Murphy, J., dissenting).

68. *Id.* at 300 (Murphy, J., dissenting).

69. 407 U.S. 493 (1972).

70. Although the case deals with the denial of a white defendant's right to due process of law by exclusion of blacks from the jury that heard defendant's case, its implications are much broader.

71. *Peters*, 407 U.S. at 503.

72. *Id.* The Court further noted that because of the uncertainty of the effect of such exclusions, "proof of actual harm, or lack of harm, is virtually impossible to adduce." *Id.* at 504.

73. 391 U.S. 145 (1968).

74. *Id.* at 149.

75. *Id.*

76. 391 U.S. 510 (1968); *see supra* notes 6-9 and accompanying text.

77. 391 U.S. 543 (1968).

ity, the *Witherspoon* Court held that a state could not inflict a death sentence if it had excluded potential jurors from sitting on the jury in a capital case solely because those persons voiced "general objections to the death penalty or expressed conscientious or religious scruples against its infliction."[78] The Court thus established a strict test, allowing exclusion only of those jurors who made it "unmistakably clear" that they would either refuse to impose the death penalty under any circumstances or would be unable to make an impartial determination as to a defendant's guilt because of their strong feelings about capital punishment.[79] In *Witherspoon* defendant also argued that death qualification of the jury violated his right to an impartial jury on the issue of guilt, but the Court refused to rule on this issue, deeming the evidence "too tentative and fragmentary" to substantiate defendant's claim.[80]

In *Bumper* the Court noted that *Witherspoon* did not apply because the jury recommended that the trial court sentence defendant to life in prison rather than impose the death penalty.[81] The Court rejected defendant's argument that the trial court's exclusion from the jury of persons who would not have been excludable under *Witherspoon* was a violation of his sixth amendment right to trial by an impartial jury.[82] As in *Witherspoon*, the Court predicated its denial of defendant's claim on the insufficiency of the evidence, noting that defendant "adduced no evidence to support the claim that a jury selected as this one was is necessarily 'prosecution prone.' "[83]

Moving from the requirement of impartiality to the "fair cross-section" language of the sixth amendment, the Court in *Taylor v. Louisiana* [84] further enlarged the scope of the right to jury trial in criminal cases. In *Taylor* the Court held that the fair cross-section requirement was "fundamental to the jury trial guaranteed by the Sixth Amendment."[85] Although the Court had previously indicated its approval of the practice of selecting jurors from a cross-section of the community,[86] it had never before specifically held that the fair cross-section requirement was a "fundamental" sixth amendment right. The Court limited the requirement, however, to "the jury wheels, pools of names, panels, or venires from which juries are drawn"[87] and stated that it "[imposed] no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.[88] In *Duren v. Missouri*[89] the Court refined the *Taylor* holding to a list of three factors that a defendant seeking to

78. *Witherspoon*, 391 U.S. at 522.
79. *Id.* at 522-23 n.21.
80. *Id.* at 517; *see supra* note 9.
81. *Bumper*, 391 U.S. at 545.
82. *Id.*
83. *Id.*
84. 419 U.S. 522 (1975) (exclusion of women from venires held violative of defendant's right to jury chosen from fair cross-section of community).
85. *Id.* at 530.
86. *See supra* text accompanying notes 64-72.
87. *Taylor*, 419 U.S. at 538.
88. *Id.*
89. 439 U.S. 357 (1979) (state's broad exemption of women from jury duty constituted prima facie violation of fair cross-section requirement).

prove a prima facie violation of the fair cross-section requirement must demonstrate:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[90]

The Court first applied *Taylor* to the practice of death qualifying juries in *Lockett v. Ohio*.[91] In *Lockett* the Court rejected defendant's argument that death qualification of a jury in accordance with the principles enunciated in *Witherspoon* violated the fair cross-section requirement as defined in *Taylor*.[92] The *Lockett* Court commented that *Taylor* did not "[suggest] that the right to a representative jury includes the right to be tried by jurors who have explicitly indicated an inability to follow the law and instructions of the trial judge."[93]

The Court again addressed the *Witherspoon* assurance of an impartial jury at the penalty phase of a trial in *Adams v. Texas*.[94] The *Adams* court invalidated a death sentence imposed by a jury qualified under a penal statute[95] that called for the exclusion of any prospective juror in a capital case who could not " '[state] under oath that the mandatory penalty of death or imprisonment for life [would] not *affect* his deliberations on any issue of fact.' "[96] The Court held that, as applied, the statute violated the *Witherspoon* doctrine because the State used it to exclude not only those potential jurors who indicated "an unwillingness or an inability" to abide by the law and the court's instructions, but also those who merely could not swear that the possibility of a death sentence would have no effect on their deliberations, or were uncertain as to whether or not their deliberations would be "affected."[97] The Court concluded that, absent some indication the jurors "were so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme,"[98] a state could not exclude jurors simply because they conceded or were unable to determine whether the prospects that the death penalty might be imposed would affect either their evaluation of the facts or what they might deem to be a reasonable doubt.[99] Aside from its obvious importance

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90. *Id.* at 364.
91. 438 U.S. 586 (1978).
92. *Id.* at 595-97.
93. *Id.* at 596-97.
94. 448 U.S. 38 (1980).
95. TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974).
96. *Adams*, 448 U.S. at 42 (quoting TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974) (emphasis added)).
97. *Id.* at 49-50.
98. *Id.* at 51.
99. *Id.* at 50. The Court reasoned that

> [s]uch assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would be to deprive the defendant of the impartial jury to which he or she is entitled by law.

as a reaffirmation of the *Witherspoon* doctrine,[100] *Adams* was also significant as the Court's first extension of the doctrine to a bifurcated trial.[101]

Relying on its reasoning in *Adams*, the Court developed a new standard for death qualification of juries in *Wainwright v. Witt*.[102] The new standard, which the Court termed the "*Adams* test," was that a prospective juror in a capital trial could be excluded for cause if it seemed likely to the trial judge that the juror's 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.' "[103] As noted by a number of commentators,[104] *Witt* did far more than simply "reaffirm" the standard for juror exclusion established in *Adams*, as claimed by the Court.[105] Whereas *Adams* initially appeared to be no more than a reaffirmation or even an expansion of the *Witherspoon* doctrine, the *Witt* Court held that *Adams* had in fact replaced the strict *Witherspoon* test for juror exclusion with a standard designed to "simplify" the trial court's task of death qualifying juries.[106] In reaching its decision the Court dismissed the notion that there was something "talismanic about juror exclusion under *Witherspoon* merely because it [involved] capital sentencing . . . ."[107] Indeed, the Court reasoned:

> Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we 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 quite likely will be biased in

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Id.

100. *See, e.g.*, Note, *Fourteenth Amendment—Due Process: Texas Penal Code Section 12.31(b) Unconstitutionally Permits the Exclusion for Cause of Jurors Who Have General Objections To, or Religious or Moral Scruples Against the Death Penalty*—Adams v. Texas, *448 U.S. 38 (1980)*, 9 AM. J. CRIM. L. 251 (1981); Note, Witherspoon *Revived:* Adams v. Texas, 18 HOUS. L. REV. 931 (1980); Note, *Texas Law Requiring Veniremen's Oath That the Death Penalty Will Not Affect Their Deliberations is Unconstitutional as Applied*: Adams v. Texas, *100 S. Ct. 3521 (1980)*, 12 TEX. TECH L. REV. 764 (1981).

101. *Adams*, 448 U.S. at 45-46. The *Adams* Court did not address the constitutionality of the process of death-qualifying jurors prior to the guilt phase of a bifurcated capital trial, because the case raised only issues related to the penalty phase of such a trial.

102. 469 U.S. 412 (1985).

103. *Id.* at 420 (quoting *Adams*, 448 U.S. at 45).

104. *See* Comment, Wainwright v. Witt *and Death-Qualified Juries: A Changed Standard But an Unchanged Result*, 71 IOWA L. REV. 1187 (1986); Comment, *Excluding Death Penalty Opponents from Capital Juries:* Witt, Witherspoon, *and the Impartial Juror*, 34 U. KAN. L. REV. 149 (1985); Note, *The Battle Over the Standards for Death-Qualifying Juries: Defendants Lose Another Round*, Wainwright v. Witt, *105 S. Ct. 844 (1985)*, 61 CHI.[-]KENT L. REV. 611 (1985); Note, *Constitutional Law—Does the New Death Qualification Standard Ensure a Biased Jury?* Wainwright v. Witt, *105 S. Ct. 844 (1985)*, 21 LAND & WATER L. REV. 579 (1986); Note, *Who's Qualified to Decide Who Dies?* Wainwright v. Witt, *105 S. Ct. 844 (1985)*, 65 NEB. L. REV. 558 (1986); Note, Wainwright v. Witt: *A New Standard for Death Qualifying a Capital Jury*, 88 W. VA. L. REV. 133 (1985).

105. It is interesting to note that Justice Rehnquist, the lone dissenter in *Adams*, delivered the Court's opinion in *Witt*, and praised the reasoning of the "*Adams* test." *Compare Adams*, 448 U.S. at 52 (Rehnquist, J., dissenting) (arguing against further expansion of *Witherspoon*) *with Witt*, 469 U.S. at 421 (recognizing that "the *Adams* test is preferable [to *Witherspoon*] for determining juror exclusion" and that *Adams* "is proper because it is in accord with traditional reasons for excluding jurors and with the circumstances under which such determinations are made").

106. *Witt*, 469 U.S. at 421.

107. *Id.* at 423.

his favor.[108]

Another significant holding of the *Witt* Court was that a federal statute[109] required federal courts considering habeas corpus petitions to presume the correctness of a trial court's death qualification of a jury in the absence of "clear and convincing evidence" to the contrary.[110]

Against this background of gradual narrowing of the *Witherspoon* holding, the Supreme Court decided *Lockhart v. McCree*. The significance of *McCree* lies in its almost certain chilling effect on defendants' claims of state abuse of the death-qualification process. In conjunction with *Witt*, *McCree* expresses the Supreme Court's view that a state's interest in empanelling a jury that is willing to convict a capital defendant and impose a death sentence outweighs the countervailing interest in the preservation of the defendant's sixth and fourteenth amendment rights as defined by *Witherspoon* and other prior decisions concerning the right to jury trial. *Witt* gives the state courts broad discretion in death-qualifying juries and ensures that their determinations will be accorded a presumption of correctness if reviewed by a federal court.[111] *McCree* complements *Witt* by eliminating two avenues of appeal. The first, initially raised in *Witherspoon*,[112] is that a defendant might gain appellate relief by adducing evidence to prove the death-qualification process affected the jury's impartiality on the issue of guilt.[113] The second is the possibility that a defendant might successfully argue the process of death qualification violated the fair cross-section requirement by excluding, as a group, those persons presumably most likely to have given fair consideration to the defendant's interests.[114] In addition, the *McCree* Court reaffirmed the death-qualification standard enunciated in *Witt*.[115]

The implication of *McCree* is that the Court will strictly limit the application of *Witherspoon* and its progeny in future cases.[116] In order to raise a successful claim under *McCree* that a court improperly excluded a potential juror in violation of the *Witherspoon* doctrine, a defendant will have to satisfy two requirements. First, defendant must introduce clear and convincing proof that the trial judge excluded potential jurors even though he had no basis to believe their views toward capital punishment would " 'prevent or substantially impair the

108. *Id.*

109. 28 U.S.C. § 2254 (1966) (addressing habeas corpus powers of federal courts).

110. *Witt*, 469 U.S. at 435. This ruling is likely to impair a defendant's chances of being granted habeas corpus relief on the death-qualification issue. One commentator accurately observed that "Justice Rehnquist's dissent in *Adams* and his majority opinion in *Witt* contains [sic] language that enables one to predict easily the outcome of the Court's upcoming ruling in *Lockhart v. McCree*." Note, *Who's Qualified to Decide Who Dies?* Wainwright v. Witt, *105 S. Ct. 844 (1985)*, 65 NEB. L. REV. 558, 581 (1986). For a strong approval of the process of death-qualification, see Comment, *Death Qualification: Are Capital Defendants Entitled to Acquittal-Prone Juries? An Argument in Support of the Status Quo*, 30 ST. LOUIS U.L.J. 193 (1985).

111. *See supra* notes 102-10 and accompanying text.

112. *Witherspoon*, 391 U.S. at 520 n.18.

113. *McCree*, 106 S. Ct. at 1764.

114. *See id.* at 1766; *infra* text accompanying notes 119-26.

115. *McCree*, 106 S. Ct. at 1767.

116. *Id.* at 1770. The Court "reject[ed] McCree's suggestion that *Witherspoon* and *Adams* [had] broad applicability outside the special context of capital sentencing, and conclude[d] that those two decisions [did] not support the result reached by the Eighth Circuit." *Id.* (footnote omitted).

performance of [their] duties as . . . [jurors] in accordance with [their] instructions and [their] oath.' "[117] Second, defendant must make this allegation only with regard to his sentence, *not* his conviction.[118] Thus, a defendant in a capital case who does not receive a death sentence will be unable to raise in an appeal or a habeas corpus petition the issue of improper death qualification of the jury. The *McCree* Court's reasoning suggests that the policy considerations surrounding the death qualification issue have undergone a drastic change since *Witherspoon*. Public dissatisfaction with the justice system's apparent inability to deal efficiently with crime perhaps has induced the Court to accord more importance to the state's desire to get violent criminals off the streets than to the preservation and expansion of the rights of criminal defendants. The use of death-qualified juries is not a problem that lends itself to easy resolution by the effectuation of some sort of compromise between the competing interests of the state and the defendant. In *McCree* the Court had to undertake the difficult task of balancing a legitimate state interest against an important individual right and choosing one over the other.

The *McCree* Court was reasonably successful in reconciling its holding with prior decisions involving the right to jury trial under the sixth and fourteenth amendments. In particular, the Court carefully explained its reasons for refusing to allow the fair cross-section analysis in *Taylor*[119] and *Duren*[120] to support defendant's claim. The Court noted that both *Taylor* and *Duren* specifically held that the fair cross-section requirement applied only to the venires from which petit juries were chosen.[121] The Court stressed that it had "never invoked the fair cross-section principle to invalidate the use of either for cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."[122] In explaining its holding that *Witherspoon* excludables do not constitute a "distinctive group" within the meaning of the test for a violation of the fair cross-section requirement set out in *Duren*,[123] the Court distinguished between the exclusion of "*Witherspoon*-excludables" from death-qualified jury panels and the exclusion of groups such as blacks, women, and Mexican-Americans from venires.[124] The Court reasoned that the latter groups were historically excluded from jury service "for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case," thus violating a criminal defendant's sixth and fourteenth amendment rights.[125] Members of the former

117. *Id.* at 1761 n.1 (quoting *Witt*, 469 U.S. at 420).

118. *See id.* at 1764.

119. *See supra* text accompanying notes 84-88.

120. *See supra* text accompanying notes 89-90.

121. *McCree*, 106 S. Ct. at 1764.

122. *Id.* The Court noted that, in its recent decision in Batson v. Kentucky, 106 S. Ct. 1712 (1986) (in which prosecutor's use of peremptory challenges to exclude blacks from petit jury violated defendant's right to equal protection of the laws), it "expressly [declined] to address [defendant's] 'fair-cross-section' challenge to [a prosecutor's] discriminatory use of peremptory challenges." *McCree*, 106 S. Ct. at 1765.

123. *See supra* text accompanying note 90.

124. *McCree*, 106 S. Ct. at 1766.

125. *Id.* at 1765.

"group," however, were excluded specifically because of their inability or unwillingness to "properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial."[126]

One problem area the *McCree* Court declined to address was the possibility that prosecutors would seek the death penalty, in cases in which they otherwise would not, to obtain the benefit of trying their cases before more conviction-prone,[127] death-qualified juries, and would then waive the death penalty after obtaining the desired conviction. Although defendant argued that this practice was common in Arkansas, the Court refused to consider the issue because "the State did not 'waive' the death penalty in McCree's case."[128] The Court simply rejected the notion "that 'death-qualification' was instituted as a means for the state to arbitrarily skew the composition of capital juries,"[129] and noted that defendant "[did] not even argue the point."[130]

A more serious problem with the *McCree* decision is the majority's use of overly broad language in its holding. The Court concluded, "[t]he 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."[131] This conclusion could conceivably provide a doctrinal basis for unscrupulous prosecutors and trial judges to "stack the deck" against criminal defendants by excluding from petit juries those members of the venire who seem most concerned with the defendants' interests. Because the holding is not specifically limited to capital cases, the decision if applied in this manner would undermine much of the Court's prior sixth amendment jurisprudence relating to jury trials.

Although this application of *McCree* appears unlikely, it is theoretically possible. What is certain is that, when combined with the broad juror exclusion and the presumption of correctness propagated in *Witt*, this language will almost certainly strip capital defendants of the rights that *Witherspoon* sought to protect.

In *McCree* the United States Supreme Court held that death qualification of juries was constitutional as to both the guilt and sentencing phases of a bifurcated capital trial. The Court rejected defendant's evidence as inconclusive and indicated it would have upheld the process of death qualification even if there had been valid indicia that the juries selected thereby were somewhat more con-

126. *Id.* at 1766.

127. Although the Court rejected the notion that death-qualified jurors are more conviction prone, there is much to be said for one federal judge's observation that "[c]ommon sense suggests that people who favor the death penalty are more likely to convict defendants charged with capital crimes, and that people who do not favor the death penalty are less likely to convict defendants charged with capital crimes." Keeten v. Garrison, 578 F. Supp. 1164, 1167 (W.D.N.C.), *rev'd*, 742 F.2d 129 (4th Cir. 1984), *cert. denied*, 106 S. Ct. 2258 (1986).

128. *McCree*, 106 S. Ct. at 1766 n.16.

129. *Id.* at 1766.

130. *Id.* Defendant presumably realized that such an argument, although not without some merit, would have been an exercise in futility given the Court's historic approval of the practice of death qualification.

131. *Id.* at 1770.

viction-prone.[132] The Court also refused to recognize *Witherspoon* excludables as a distinctive group for fair cross-section purposes.[133] Finally, the Court refused to consider the imposition of a requirement that juries be selected so as to allow *Witherspoon* excludables to participate in the guilt phase of a bifurcated capital trial.[134] Implicit in this holding is the Court's position that death-qualified juries are impartial and representative of a fair cross-section of the community. Further, the decision reflects a recognition of a state's interest in using the process of death qualification to empanel "a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phase of a capital trial."[135] Along with *Witt*,[136] *McCree* marks a substantial departure from the Court's previous, defendant-oriented decisions in this area. This departure is understandable—and to some extent justifiable—in view of the public's increasing demand for more efficient disposition of criminal offenders. Unfortunately, however, the *McCree* Court delivered an unnecessarily broad opinion whose language appears to threaten the sixth amendment rights not only of capital defendants but also of criminal defendants in general. Thus, although the decision will have an arguably beneficial effect by discouraging many of the unnecessary appeals and habeas corpus petitions that continually undermine the states' expeditious execution of duly-imposed criminal sanctions, it also holds potential for abuse on a large scale, if given the broad application its language suggests.

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132. *Id.* at 1764.
133. *Id.* at 1766-67.
134. *Id.* at 1768. For an example of such a requirement see *supra* note 28.
135. *McCree*, 106 S. Ct. at 1766.
136. *See supra* notes 102-10 and accompanying text.