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WAINWRIGHT V. WITT: A NEW STANDARD FOR DEATH-QUALIFYING A CAPITAL JURY

I. INTRODUCTION

On March 6, 1985, Johnny Paul Witt was executed in Florida by electrocution.[1] The Supreme Court decision that eventually cleared the way for the death of Johnny Paul Witt, not only produced one of thirty-nine executions[2] since the Supreme Court established the current guidelines[3] for capital punishment, but also significantly changed the method for selecting jurors in capital trials.[4] Currently, thirty-seven states call upon citizens to serve as jurors and decide the fate of many defendants like Johnny Paul Witt.[5] Yet, for many people called upon to serve on capital juries, the decision whether to impose capital punishment produces a conflict between a juror's deeply held moral and religious beliefs and his oath to follow the law and the instructions of the trial judge.[6]

As a result of these personal beliefs, it has long been recognized that a prospective juror having "conscientious objections" to imposing the death penalty may be excluded from a jury for cause.[7] However, even though a state's right to "death qualify"[8] a jury is well settled,[9] a fervent debate rages through American courts over the appropriate standards to be used in determining whether a juror's opposition to capital punishment is sufficient to warrant exclusion.

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[1] Since this case represented Johnny Paul Witt's final appeal, his death sentence was reinstated on January 21, 1985, giving rise to his execution on March 6, 1985. N.Y. Times, March 7, 1985, at 28A, Col. 2.

[2] *Death Row U.S.A.*, LEGAL DEF. & EDUC. FUND NEWSLETTER, March 1, 1985, at 1.

[3] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[4] The Supreme Court in Wainwright v. Witt, 105 S. Ct. 844 (1985) moved from actual bias standards to traditional or implied bias standards when evaluating juror exclusions. *See infra* note 33 and accompanying text.

[5] The following states have capital punishment statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wyoming. *See supra* note 2, at 1.

[6] A 1982 Gallup Poll indicates that 25% of the United States population opposes capital punishment. NEWSWEEK August 23, 1982, at 29.

[7] In selecting juries, attorneys may exercise two types of challenges to individual jurors: 1) challenges for cause and 2) preemptory challenges. The challenge for cause is based on statutory grounds and is designed to permit the exclusion of potential jurors who display actual bias or implied bias, presumed from the juror's relationships or interests in ways specified by statute. *See infra* note 33. Traditionally, individuals who have conscientious objections to imposing capital punishment may be excluded for cause by the state. This principle of law was established in Logan v. United States, 144 U.S. 263 (1892) and subsequently upheld in *Lockett*, 438 U.S. 586. *See* Witherspoon v. Illinois, 391 U.S. 510 (1968).

[8] "Death qualify" is the process of removing those jurors having sufficient objections to capital punishment to warrant exclusion. Each state that allows jurors to consider the possible imposition of capital punishment death qualifies its juries. For a detailed analysis of this process, see Schnapper, *Taking Witherspoon Seriously: The Search for Death-Qualified Jurors*, 62 TEXAS L. REV. 977 (1984).

[9] *See e.g., Logan* 144 U.S. 263; *Witherspoon*, 391 U.S. 510; Adams v. Texas, 448 U.S. 38 (1980).

Traditionally, any prospective juror who expressed general objections about capital punishment during voir dire was excluded for cause.[10] However, in a recent series of cases, the Supreme Court has developed strict evidentiary standards that in effect prevent the exclusion of prospective jurors based solely on general objections.[11] These strict requirements have been difficult to administer, thereby causing a substantial disarray over the proper standard of review among state and federal appellate courts.[12]

The 1985 case of *Wainwright v. Witt*[13] presented the Supreme Court with the opportunity to review the standards used to death qualify a capital jury.[14] The Court decided that the previous requirements for death qualifying a jury, established in *Witherspoon v. Illinois*, were too rigorous and declared them invalid.[15] The Court, while reversing the decision of the Eleventh Circuit, set forth new standards for excluding capital jurors[16] and held that the jurors in *Witt* were properly excluded under the new requirements.[17]

II. Statement of the Case

Johnny Paul Witt was tried by a jury and convicted of first degree murder.[18] The trial judge, upon a recommendation from the jury, sentenced him to death.[19] The jury that determined Witt's guilt and recommended his punishment was death qualified pursuant to Florida law.[20] On appeal to the Florida Supreme Court, Witt raised a number of claims, one of which alleged several prospective jurors had

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[10] *See*, United States v. Cornell, 25 F. Cas. 650 (C.C.S.D. N.Y. 1820) (No. 14,868). *See, e.g.*, Note, *Competency of Jurors Who Have Conscientious Scruples Against Capital Punishment*, 8 Washburn L.J. 352 (1969).

[11] *Witherspoon* replaced the exclusion of general conscientious objectors allowed under *Cornell*. The *Witherspoon* standard requires a juror to make it unmistakably clear during voir dire that he will automatically vote against capital punishment regardless of the facts presented at trial. *Witherspoon*, 391 U.S. at 522 n.21. *See also*, Maxwell v. Bishop, 398 U.S. 262 (1970); Boulden v. Holman, 394 U.S. 478 (1969).

[12] Many commentators agree that the *Witherspoon* standards are difficult to administer. *See, e.g., Schnapper, supra* note 8; Fitzgerald, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 Law & Human Behavior L. Rev. 31 (1984); Jurow, *New Data on the Effect of a Death-Qualified Jury on the Guilt Determination Process*, 84 Harv. L. Rev. 567 (1971).

[13] *Witt*, 105 S. Ct. 844.

[14] A "capital jury", as used throughout this comment, is a jury deciding issues that determine whether a defendant may receive the death penalty. This should not be confused with states that have capital juries that decide only life imprisonment cases.

[15] *Witt*, 105 S. Ct. at 853.

[16] *Id.* at 852. The Court adopted the standard espoused in Adams v. Texas. The *Adams* standard requires that a juror's views about capital punishment "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Adams*, 448 U.S. at 45.

[17] *Witt*, 105 S. Ct. at 858.

[18] *Id.* at 846.

[19] *Id.*

[20] Fla. Stat. § 921.141(2) (1983) authorizes challenge for cause of a juror who "has conscientious beliefs that would preclude him from finding the defendant guilty."

been improperly excluded for cause in violation of *Witherspoon* standards. The Florida Supreme Court affirmed Witt's conviction and sentence and the United States Supreme Court denied certiorari.[21]

After unsuccessfully petitioning for post conviction review in state courts,[22] Witt filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida. The petition raised several constitutional claims, including the *Witherspoon* claim. The district court denied his petition.[23] Witt then appealed to the United States Court of Appeals for the Eleventh Circuit.[24] The Eleventh Circuit reversed and granted the writ,[25] finding that veniremember Colby's statements during voir dire were insufficient to justify her exclusion for cause.[26]

The United States Supreme Court granted certiorari and reversed the decision of the Eleventh Circuit Court of Appeals.[27] In a seven to two[28] decision, the Court abandoned the strict standards of juror exclusion set forth in *Witherspoon* and adopted an alternative test. The Court also held that a trial judge's decision to exclude a juror must be presumed correct thus limiting de novo review by the appellate court.[29] A concurring opinion argued that the failure of Witt's lawyer to object to juror Colby's exclusion indicated that Colby's demeanor must have conveyed her opposition to capital punishment.[30] A vigorous dissent contended that

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[21] *See* Witt v. State, 342 So. 2d 497, 499 (Fla. 1977), *cert. denied*, 434 U.S. 935 (1977).

[22] Witt v. State, 387 So. 2d 922 (Fla. 1980), *cert. denied*, 449 U.S. 1061 (1980).

[23] *See, Witt*, 105 S. Ct. at 846. The federal district court decision is unpublished.

[24] *Witt*, 714 F.2d 1069 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984), *rev'd*, 105 S. Ct. 844 (1985).

[25] *Witt*, 723 F.2d 769.

[26] *Witt*, 105 S. Ct. at 848. The following is the voir dire record of veniremember Colby:

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

[A. Colby]: I am afraid personally but not. . . .

[Q]: Speak up please.

[A]: I am afraid of being a little personal, but definitely not religious.

[Q]: Now, would that interfere with you sitting as a juror in this case?

[A]: I am afraid it would.

[Q]: You are afraid it would?

[A]: Yes, sir.

[Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?

[A]: I think so.

[Q]: You think it would?

[A]: I think it would.

[Q]: Your honor, I would move for cause at this point.

[The Court]: All right. Step down.

[27] *Witt*, 105 S. Ct. at 847.

[28] Justice Rehnquist delivered the opinion of the court, joined by Chief Justice Burger, and Justices White, Blackmun, Powell, Stevens, and O'Connor. Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

[29] *Witt*, 105 S. Ct. at 847.

[30] *Id.* at 858. *See infra* note 109 and accompanying text concerning the dissent's contention that Witt's attorney had no duty to object to an insufficient showing of juror bias.

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Colby's statements fell far short of the certainty required by *Witherspoon*.[31] The dissent concluded by suggesting that the exclusion of jurors by any broader standards than *Witherspoon* may produce a jury "uncommonly willing to condemn a man to die."[32]

III. PRIOR LAW

A. *Traditional Bias:*[33] *The Pre-*Witherspoon *Era*

In 1820, Justice Story stated in *United States v. Cornell*[34] the traditional standards for excluding prospective jurors.

> [W]hen [a Juror] acknowledges himself to be under influences, no matter whether they arise from interest, from prejudices, or from religious opinions, which will prevent him from giving a true verdict according to law and evidence, [failing to remove that Juror] would be to subvert the objects of a trial by jury, and to bring into disgrace and contempt, the proceedings of courts of justice. We do not sit here to procure the verdicts of partial and prejudiced men; but of men, honest and indifferent in causes.[35]

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[31] *Witt*, 105 S. Ct. at 864.

[32] *Id.* at 860 (quoting *Witherspoon*, 391 U.S. at 521).

[33] It is necessary to briefly distinguish traditional bias from actual bias. Traditional bias represents three basic ideas. First, traditional bias does not have to be conclusively shown on the record. In fact, traditional bias can be inferred from the existence of some fact, on the record, which may be assumed to give rise to actual bias. Second, traditional bias is a much broader standard for juror exclusion. A juror may be excluded based on objective statements regarding demeanor and waivering or vague statements. Third, traditional bias is given a low standard of review. Before overturning a judge's decision to exclude a juror under traditional bias, a reviewing court must defer to the trial court's determination of demeanor and waivering statements. A reviewing court usually will not disturb a trial court's decision to exclude jurors unless the decision is not supported fairly upon the record as a whole.

Actual bias differs from traditional bias in several ways. First, actual bias cannot be inferred by a juror's demeanor or vague statements. Actual bias requires that the statements on the record, beyond any other factor present before the trial judge, conclusively show that the juror is actually biased. During the review of the trial court's decision to exclude a juror based on actual bias, an appellate court must rely solely on the record to determine whether the statements clearly show sufficient bias to warrant exclusion.

Traditional bias was the type of bias used in all criminal trials until 1968. After the decision in *Witherspoon v. Illinois*, the standard for excluding capital jurors was changed from traditional bias to actual bias. The *Witt* decision, which is the focus of this comment, reversed *Witherspoon's* requirements for actual bias and returned to the pre-1968 standards of traditional bias.

Throughout this comment, traditional bias is referred to as the type of bias that inherently requires deference to the trial judge's decision since traditional bias allows the use of implied demeanor or vague statements to justify exclusion. Whereas actual bias refers to an actual showing upon the record that a juror's statements clearly indicate that the juror was actually bias.

[34] *Cornell*, 25 F. Cas. 650.

[35] *Id.* at 655. Justice Story, in *Cornell* questioned whether Quakers who were opposed to capital punishment had been excluded properly. He further explained his position. "To compel a Quaker to sit as a juror on such cases, is to compel him to decide against his conscience, or to commit a solemn perjury. Each of these alternatives is equally repugnant to the principles of justice and common sense." *Id.* at 655-56.

Seventy-two years later in *Logan v. United States*,[36] the Supreme Court adopted Justice Story's position. The Court held that a juror who has conscientious misgivings on any subject which would prevent him from rendering an unbiased opinion is not an impartial juror.[37] As a result of these cases, the traditional bias standard was institutionalized as the proper standard for excluding jurors in any criminal matter.

When using traditional bias as the standard for excluding jurors in criminal cases, a state is given considerable leeway to exclude those jurors who indicate that certain circumstances might affect their impartiality.[38] Broad exclusion is generally permitted even in situations where a juror, if pressed further on voir dire, could demonstrate the ability to lay aside his prejudices and make an impartial decision.[39] Moreover, under the traditional bias standard, the trial judge is given broad discretion to determine whether a juror's beliefs and attitudes would impair his ability to remain unbiased. The trial judge is accorded this discretion because he is in the best position to view the demeanor of each prospective juror during voir dire.[40]

The liberal discretion afforded the trial judge, combined with the broad power to exclude given to the states has led many commentators[41] to argue that using the traditional bias standard in capital trials creates a biased jury in violation of the sixth amendment.[42] During this controversy, the Supreme Court was presented with the opportunity to consider different standards for the exclusion of prospective capital jurors in the 1968 case, *Witherspoon v. Illinois*.[43]

B. *A Transition to Actual Bias: The* Witherspoon *Era*

In *Witherspoon*, the Supreme Court for the first time imposed constitutional limitations on the ability of states to remove potential jurors from capital juries on the basis of their opposition to the death penalty. Under Illinois law, the pro-

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[36] *Logan*, 144 U.S. 263.

[37] *Id.*

[38] *See generally*, 2 W. LaFave & J. Israel, Criminal Procedure § 21.3 (1984).

[39] *Id.*

[40] *Witt*, 105 S. Ct. at 854 n.9. The Supreme Court supported its position by relying on Reynolds v. United States, 98 U.S. 145 (1897). In *Reynolds*, the Court stated:

> [T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That [which] is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case.

Reynolds, 98 U.S. at 156.

[41] *See, e.g.*, Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on the Issue of Guilt*, 39 Texas L. Rev. 545 (1961); White, *The Constitutional Invalidity of Convictions Imposed By Death-Qualified Juries*, 58 Cornell L. Rev. 1176 (1973).

[42] The Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury. . . ." U.S. Const. amend. VI.

[43] *Witherspoon*, 391 U.S. 510.

secutor was permitted to remove for cause any juror who stated that he had "conscientious scruples against capital punishment, or that he is opposed to the same."[44] During voir dire, the trial court eliminated forty-seven veniremen based on their general opposition to the death penalty. Only five of the veniremen had stated that they could not vote for the death penalty under any circumstances.[45]

The Supreme Court held that by permitting the removal of jurors based merely on their general convictions against capital punishment, Illinois had denied the defendant his due process right to an impartial jury on the issue of sentence.[46] The Court stated that when the state eliminated from the jury all those who had expressed general conscientious or religious scruples concerning capital punishment, it produced a "hanging jury", one "uncommonly willing to condemn a man to die."[47] The Court concluded, "These jury selection practices violate a basic requirement of procedural fairness. The decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death."[48]

Although the *Witherspoon* Court reaffirmed a state's right to an impartial jury, the court restricted the use of challenges for cause.[49] In footnote twenty-one the *Witherspoon* Court stated that a state may only exercise its right to exclude veniremen who:

> [make it] unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.[50]

This test has been labeled the "actual bias test"[51] because of the high standard of proof that must be satisfied.[52] Unlike the traditional bias test, actual bias cannot

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[44] ILL. REV. STAT. Ch. 38 § 743 (1957); *See Witherspoon*, 391 U.S. at 519.

[45] *Witherspoon*, 391 U.S. at 514.

[46] *Id.* at 523. *Witherspoon* was a fourteenth amendment due process case rather than a sixth amendment case because the trial occurred before the Supreme Court held the sixth amendment applicable to the states in Duncan v. Louisiana, 391 U.S. 145 (1968). The Court, two weeks after deciding *Witherspoon* declined to give *Duncan* retroactive effect. DeStefano v. Woods, 392 U.S. 631 (1968).

[47] *Witherspoon*, 391 U.S. at 523.

[48] *Id.* at 521 n.19.

[49] *Id.* at 514.

[50] *Id.* at 522. n.21.

[51] *See supra* note 33 for an explanation of actual bias analysis.

[52] Many commentators predicted that *Witherspoon* would lead to the de facto abolition of capital punishment. *See, e.g.*, Note, *Prospective Jurors and Capital Punishment*, 29 LA. L. REV. 381 (1969); Comment, *Toward Assuring Fair Trials in Capital Cases: Some Reflections on Witherspoon v. Illinois*, 42 S. CAL. L. REV. 329 (1969); Justice Black, dissenting in *Witherspoon*, suggested the majority might be attempting to abolish capital punishment "by making it impossible for States to get juries that will enforce the death penalty." *Witherspoon*, 391 U.S. at 532. Before *Witherspoon*, a number of state court decisions predicted that such abolition would occur if scrupled veniremen could not be excluded from juries in capital cases. *See* People v. Riser, 47 Cal.2d 566, 576, 305 P.2d 1, 7 (1956), *cert. denied*,

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be implied from the transcript of voir dire. The record of voir dire must unmistakably show that a prospective juror is actually biased. Essentially, the only significant change made by *Witherspoon* was the imposition of a higher standard of proof for showing that a juror's beliefs would affect his decision during trial.

Shortly after *Witherspoon*, the Court decided several cases with similar claims.[53] In each of these cases, the Court upheld the strict standards set forth in *Witherspoon*. Several years later in *Lockett v. Ohio*,[54] the Court declined to apply the "automatic" language of *Witherspoon* and instead, decided the case based solely on a juror's refusal to take an oath to enforce state law.[55] Since *Lockett* was the first decision that failed to adhere to the strict standards of *Witherspoon*, it may have signaled a withdrawal from the use of actual bias as the standard for excluding jurors.[56]

C. *The Contemporary Application of Actual Bias: The Post* Witherspoon *Era*

In a 1980 case, *Adams v. Texas*,[57] the Supreme Court again examined the necessity of adhering to the strict *Witherspoon* requirements. The issue addressed by the Court in *Adams* was whether the *Witherspoon* standards were necessary under Texas' bifurcated capital punishment trial procedure.[58] The majority in *Adams* held that the justification for imposing strict standards on juror exclusions are the same under a bifurcated trial procedure.[59]

The most important aspect of the *Adams* decision was its apparent merger of the *Witherspoon* requirements into a single standard.[60] What had originally been a two prong test was presented as a single guideline: "this line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[61]

Although the Court decided *Adams* based on a loose interpretation of the *Witherspoon* standards, the majority expressly reaffirmed the *Witherspoon*

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353 U.S. 930 (1957) *overruled on other grounds*, People v. Morse, 36 Cal Rptr. 201, 212, 385 P.2d 33, 48 (1964); Commonwealth v. Ladetto, 349 Mass. 237, 246, 207 N.E.2d 536, 542 (1965); State v. Juliano, 103 N.J.L. 663, 671, 138 A. 575, 580 (1927).

[53] *See supra* note 11.

[54] *Lockett*, 438 U.S. 556.

[55] *Witt*, 105 S. Ct. at 850 (Rhenquist, J., interpreting *Lockett*).

[56] The Court stated: "[M]ore recent opinions of this Court demonstrate no ritualistic adherence to the requirement that a prospective juror make it 'unmistakably clear . . . that he would automatically vote against the imposition of capital punishment.' " *Id.* at 850.

[57] *Adams*, 448 U.S. 38.

[58] *Id.* at 40.

[59] *Id.*

[60] *Witt*, 105 S. Ct. at 851.

[61] *Adams*, 448 U.S. at 45.

requirements.[62] In a strong dissent, Justice Rehnquist argued that the time had come for the Court to re-examine the doctrinal underpinnings of *Witherspoon*.[63] He contended that *Witherspoon* was decided in an era that allowed juries "complete and unbridled discretion in considering the death penalty."[64] That era, he concluded, had passed along with the need for *Witherspoon's* strict standards.[65]

While the Supreme Court continued to apply the *Witherspoon* standards,[66] several lower federal courts during this same time period departed significantly from the *Witherspoon* requirements.[67] Both the Fourth and Eleventh Circuit Courts of Appeals upheld juror exclusions that were not "unmistakably clear" based on the record. Both courts held that proper juror exclusion should be based, in part, on the discretion of the trial judge.[68] These cases directly conflicted with *Witherspoon*, because *Witherspoon* mandated that a juror's bias be clearly shown on the face of the record.[69]

The Fifth Circuit Court of Appeals, unlike the Fourth and Eleventh circuits, continued to impose the strict standards outlined in *Witherspoon*.[70] At the same time, the Fifth Circuit stated that the Supreme Court's recent decisions raised some

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[62] *Id.* at 47.

[63] *Id.* at 52 (Rehnquist, J., dissenting). Although Justice Rehnquist dissented in *Adams v. Texas*, he later relied on its holding to overrule *Witherspoon*. *See infra* note 116 and accompanying text.

[64] *Id.*

[65] *Id.* Justice Rehnquist referred to the change from a single trial to a bifurcated capital trial procedure. The bifurcated trial procedure was mandated by the Supreme Court several years after *Witherspoon* was decided. *See supra* note 3.

[66] *See Maxwell*, 398 U.S. 262; *Boulden*, 394 U.S. 478; *Adams*, 448 U.S. 38.

[67] *See generally* Schnapper, *supra* note 8.

[68] Neither the Fourth or Eleventh Circuits have strictly adhered to the Supreme Court's interpretation regarding the question of deference to the trial judge when reviewing decisions to exclude jurors. The Fourth Circuit in Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984), stated: "under *Witherspoon*, a member of the venire may be stricken for cause if he is unwilling to *consider* all of the penalities provided by the state law. . . . The determination of whether a juror may be stricken is committed to the trial court's discretion." *Id.* at 134-35. Later in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), the Fourth Circuit upheld *Keeten* and further stated, whether a juror should be stricken under *Witherspoon* is "committed to the trial court's discretion," and will only be reversed for an abuse of discretion. *Id.* at 1246.

The Eleventh Circuit also supports the use of trial judge discretion when reviewing a *Witherspoon* claim. In McCorquodale v. Balkcom, 721 F.2d 1493 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 2161 (1984), the court stated:

> In assessing the adequacy of a venireperson's response to *Witherspoon* questions, a reviewing court must grant some deference to the trial court's assessment of the juror's demeanor and clarity of his answer. Even a simple 'yes' although on a cold record appearing crystal clear, can be delivered in a manner that conveys doubt. *Witherspoon* requires a reviewing court to independantly review the record to insure that the exclusions were proper, but that review must take into account that the trial judge was in a much better position to evaluate the clarity of a juror's reponse.

Id. at 1498.

[69] *See supra* note 11.

[70] *See* O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984).

doubt about whether courts should apply traditional or actual bias analysis.[71] The confusion throughout the circuit courts, combined with the apparent desire of several justices[72] to reform the *Witherspoon* standards, clearly indicated that a modification of *Witherspoon* was forthcoming.

IV. Supreme Court Analysis

The Supreme Court addressed two questions in *Wainwright v. Witt.*[73] First, the Court considered whether different standards for exclusion of capital jurors should be developed to replace the *Witherspoon* standards. Second, the Court reviewed the degree of deference a federal habeas court, pursuant to 28 U.S.C. section 2254, should pay to a state trial court's determination that a juror may be excluded for cause under *Witherspoon.*[74]

A. *The Development of a Proper Standard for Exclusion*

Under the *Witherspoon* standards, a state, during voir dire, is practically required to extract a yes or no answer to the question of whether a juror would automatically vote against the death penalty.[75] After recognizing the inherent inability of jurors to unequivocally express their opinion regarding capital punishment,[76]

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[71] The Fifth Circuit stated: "The Court's requirement of strict adherence to *Witherspoon*, however, . . . leaves us with some doubts about whether the Court would apply the traditional juror bias standard of review to a *Witherspoon* challenge. Further, the Supreme Court has not been entirely consistent in its treatment of the juror bias cases." *Id.* at 370. The *O'Bryan* court also noted that the courts had not specifically established a standard for appellate or collateral review of *Witherspoon* challenges.

[72] *See Adams*, 448 U.S. at 55 (Rehnquist, J., dissenting); Texas v. Mead, 465 U.S. 908, 909 (1984) (Rehnquist, J., dissenting to the denial of certiorari).

[73] *Witt*, 105 S. Ct. 844.

[74] 28 U.S.C. § 2254. Note this comment examines *Witt's* impact on habeas corpus review and is not intended to address the non-habeas implications of *Witt.*

[75] Even though a yes or no answer is not necessarily required, it is clearly the best way to get an "unmistakably clear" answer. Therefore, a yes or no answer is the best way to satisfy the strict *Witherspoon* requirements. *See, e.g., Witt*, 105 S. Ct. at 852.

[76] *Id. See e.g.*, the excerpts of the voir dire of veniremember Pfeffer set out in *O'Bryan*, 714 F.2d at 379.

> THE COURT: Well, the law requires that we have to have a definite answer.
>
> [A]: I understand, right.
>
> THE COURT: Because the law does allow people to be excused because of certain beliefs that could be prejudicial or biased for one side or the other, and both sides just want to know if you can keep an open mind, consider the entire full range of punishment, whatever that may be, and under the proper set of circumstances, if they do exist and you feel they exist, that you could return that verdict. And that's in essence what they're asking.
>
> [A]: Indirectly, I guess I would have to say no.
>
> THE COURT: You could not?
>
> [A]: I would have to say no then, to give you a yes or no answer.
>
> THE COURT: Then, am I to believe by virtue of that answer that regardless of what the facts would reveal, regardless of how horrible the circumstances may be, that you would automatically vote against the imposition of the death penalty?

the Court in *Witt* held that the *Witherspoon* standards should be modified.[77] The Court specified that the proper standard for exclusion was the standard expressed in *Adams v. Texas*.[78]

Writing for the majority, Justice Rehnquist presented three reasons why the *Adams* test is preferable to *Witherspoon*. First, he contended that the *"automatic"* language of *Witherspoon*'s footnote twenty-one "could not be squared with the present-day capital sentencing juries."[79] The jurors in *Witherspoon*, unlike jurors today, were vested with unlimited discretion in the choice of a sentence. As a result, during the *Witherspoon* era, it was necessary to exclude only those jurors who would automatically vote against the death penalty. Today, however, the decision to impose the death penalty is determined by the juror's answers to specified questions. Thus, Justice Rehnquist concluded ". . . it does not make sense to require simply that a juror not 'automatically' vote against the death penalty . . . the state still may properly challenge that venireman if he refuses to folow the statutory scheme and truthfully answer the questions put by the trial judge."[80] Second, Justice Rehnquist stated that the *Witherspoon* test, which is only found in footnote twenty-one of the opinion, was dicta and thus, not binding. He pointed to other occasions where the Court had similarly rejected language from a footnote as "not controlling."[81] Third, Justice Rehnquist stated that the *Adams* standard was consistent with the traditional bias standards for excluding jurors,[82] contending that there was nothing talismanic about juror exclusion merely because the exclusion involved capital jurors.[83] Rejecting the view that capital jurors should be excluded by stricter standards than other jurors, Justice Rehnquist concluded that in this case, as in any other criminal case, the quest was only for jurors who would conscientiously apply the law and find the facts.[84]

[A]: As I say, I don't know.

THE COURT: Well, that's the question I have to have a yes or no to.

[A]: Right.

THE COURT: And you're the only human being alive who knows, Ms. Pfeffer.

[A]: Right, I understand. If I have to make a choice between yes and no, I would say I couldn't make the judgment.

[77] *Witt*, 105 S. Ct. at 852.

[78] *Id.* The Court held that the standard for determining whether a juror's views justify exclusion, is that if those views "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" then the juror should be excluded. *See Adams*, 448 U.S. at 45.

[79] *Witt*, 105 S. Ct. at 851.

[80] *Id.*

[81] *Id. See also* McDaniel v. Sanchez, 452 U.S. 130, 141 (1981).

[82] *Witt*, 105 S. Ct. at 852. The third point made by Justice Rehnquist is very important because it explicitly states that there should be no difference between standards for exclusion of capital jurors and standards for exclusion of jurors in all other criminal matters. In fact, the majority has actually returned to the standards used in *Logan*, 144 U.S. 263. *See also supra* notes 33-35 and accompanying text. The return to traditional bias clearly reversed the notion that there is a constitutional distinction between exclusion of capital jurors and exclusion of jurors for any other crime. *See infra* notes 110-11 and accompanying text.

[83] *Witt*, 105 S. Ct. at 852.

[84] *Id.*

Justice Brennan, writing for the dissent in *Witt*, agreed that a state has a legitimate interest in excluding jurors whose views about capital punishment would so distort their judgment that they could not follow the law.[85] But, the dissent argued, the extremely high burden of proof required by *Witherspoon* was necessary to afford the accused an inestimable safeguard against the corrupt or overzealous prosecutor and the compliant, biased, or eccentric judge.[86] The dissent quickly dismissed the majority's first two reasons for replacing the *Witherspoon* doctrine. First, the dissent contended, a bifurcated trial scheme in no way diminished the defendant's interest in an impartial jury or in a jury composed of a fair cross-section of the community.[87] Second, in addressing the argument that the *Witherspoon* standard was dictum, the dissent noted that even if it was dictum, that fact was not an affirmative reason for expanding the scope of juror exclusion. Moreover, the dissent pointed out that the *Witherspoon* restrictions had been reaffirmed in many Supreme Court cases.[88]

The dissent labeled the majority's third point as the essence of the Court's holding. It examined whether stricter standards of exclusion should have been utilized when selecting a capital jury as opposed to the traditional exclusion standards used in all other criminal cases. The dissent argued that the crux of *Witherspoon* was its recognition of a constitutionally significant distinction between exclusion of jurors in capital trials and the exclusion of jurors in cases unrelated to the death penalty.[89] The dissent claimed that the elimination of this distinction demonstrated the majority's eagerness to discard the well established sixth amendment rights of a capital defendant for the sake of efficient capital punishment.[90]

The majority, defending its modifications of *Witherspoon*, contended that the changes would not erode the constitutional protection afforded a capital defendant.[91] The majority observed that the dissent, while clearly stating the reasons necessary for protecting the rights of capital defendants, failed to offer any alternative solutions to the functional problems inherent in using the strict *Witherspoon* standards. These inherent problems created the majority's basic rationale for overturning the *Witherspoon* standards.

> What common sense should have realized experience has proved: Many veniremen simply cannot be asked enough question to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings.[92]

Therefore, in many instances a juror's statement on the record could fail to clearly

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[85] *Id.* at 862.
[86] *Id.* at 860.
[87] *Id.* at 868.
[88] *Id. See supra* note 11.
[89] *Witt*, 105 S. Ct. at 869.
[90] *Id.* at 870.
[91] *Id.* at 855.
[92] *Id.* at 852.

show his opposition to capital punishment, even though the trial judge was left with a definite impression that the juror would be unable to faithfully and impartially apply the law.[93] Yet, *Witherspoon* required that the record of voir dire demonstrate with "unmistakable clarity" that a prospective juror would automatically vote against imposing the death penalty. These functional problems inherent in the strict *Witherspoon* standards, combined with the requirement of de novo review, not only produced the reasons for altering the strict *Witherspoon* standards, but necessitated changing the de novo standard of review. The shift from de novo review to a presumption of correctness was the second issue discussed in the case.

B. *Affording the Trial Court a Presumption of Correctness*

The new standards for juror exclusion adopted by the Court in *Witt* abandon the strict actual bias standard and return to the pre-*Witherspoon* traditional or implied biased standard. Accordingly, the trial judge, who is responsible for determining whether a juror's views on capital punishment "prevent or substantially impair the performance of his duties as a juror in accordance with his instruction and oath"[94] should be granted some deference by a reviewing court. As a result, the majority in *Witt* found it necessary to review the proper degree of deference a federal habeas court should pay to a state trial judge pursuant to 28 U.S.C. section 2254.[95]

28 U.S.C. section 2254(d)[96] provides for a presumption of correctness on factual issues. It does not provide the same presumption on mixed questions of law and

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[93] *Id.* at 853.

[94] *Adams*, 448 U.S. at 45.

[95] *Witt*, 105 S. Ct. at 853-55.

[96] 28 U.S.C. § 2254(d) provides:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

fact. Consequently, the Court first had to decide whether challenging a juror for cause under the new *Adams* standard was a factual issue or a mixed question of law and fact. The Court stated that the old *Witherspoon* standards, which were strict legal standards, involved a question of mixed law and fact. A trial court using *Witherspoon* could not be afforded a presumption of correctness.[97] Under the *Adams* standard, however, traditional juror bias is considered a question of fact, rather than a question of mixed law and fact.[98] Therefore, a trial judge's decisions made under the new *Adams* standard should be afforded a presumption of correctness.

In defending its move toward a presumption of correctness, the Court contended that the question of whether a venireman is biased has traditionally been determined based upon the venireman's demeanor and credibility. These findings are peculiarly within the province of the trial judge. As a result, the trial judge making these decisions should be afforded a presumption of correctness.[99]

The *Witt* decision not only changed the standards for excluding capital jurors, but it also established a presumption of correctness for a trial judge's decisions to exclude jurors when reviewed under 28 U.S.C. section 2254.[100] The Court stressed that granting a presumption of correctness to trial judges' decisions in no way diminishes the importance of an impartial jury.[101] Reiterating the holding of *Dennis v. United States*,[102] the Court stated that the trial court has a serious duty to determine the question of actual bias, and, in exercising its discretion, the trial court must be zealous to protect the rights of an accused.[103]

The majority concluded that the circuit court erred by unduly focusing on whether veniremember Colby's statements "automatically" showed she would vote against the death penalty.[104] Reversing the decision below, the Court held that the record showed that Colby's views on capital punishment would "prevent or substantially impair performance of her duties as a juror in accordance with her instructions and her oath." Therefore, Colby's exclusion for cause was permissible within the requirements of the newly adopted *Adams* standard.[105]

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(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

[97] *Witt*, 105 S. Ct. at 855.

[98] *Id.* at 854-56.

[99] *Id. See also* Patton v. Yount, 467 U.S. 300 (1984).

[100] *Id.* at 855.

[101] *Id.*

[102] Dennis v. United States, 339 U.S. 162 (1950).

[103] *Dennis*, 339 U.S. at 168. *See also Witt*, 105 S. Ct. 854 n.9 (quoting Reynolds v. United States, 89 U.S. 145, 156-57 (1879)).

[104] *Witt*, 105 S. Ct. at 853.

[105] *Id.* at 856-58.

The dissent labeled the majority's extension of a presumption of correctness to the selection of capital jurors as one of the three most disturbing trends in our constitutional jurisprudence.[106] Additionally, the dissent stated that if the Court had maintained *Witherspoon*'s strict standards for death-qualification there would be no need for such subjective decisionmaking by the trial judge.[107] Although the dissent's position is arguably valid, it failed to offer an alternative standard that would remedy the functional problems inherent in *Witherspoon* within the demands of the current capital punishment framework.

In a concurring opinion, Justice Stevens stated that the majority's opinion contained too much discussion.[108] He believed that the defense counsel's failure to object to the juror's exclusion was sufficient grounds to prove the trial court made no error.[109] Justice Stevens did not comment on the changes in the *Witherspoon* standard or the implications of the modification.

V. IMPLICATIONS OF *WAINWRIGHT V. WITT*

The Supreme Court's decision in *Witt* produces three major implications. First, *Witt* eliminates the *Witherspoon* distinction between standards for excluding capital jurors and non-capital jurors. Second, *Witt* determined that juror exclusion questions were questions of fact and not mixed questions of law and fact; therefore, the trial judge's decisions to exclude jurors should be afforded a presumption of correctness under habeas corpus review. Third, the cumulative effect of the first two implications of *Witt* practically eliminates any chance of a successful appeal where the defendant claims that jurors were inappropriately excluded.

While *Witt* represents major changes in jury exclusion standards and modification of the subsequent review of those decisions, one of the most significant implications of *Witt* is the majority's elimination of the distinction between standards for juror exclusion in capital trials as compared with the standards for juror

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[106] The dissent labeled the two other trends as:

> 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. . . [and] the Court's increasingly disaffection with the previously unquestioned principle, endorsed by every member of this Court, that 'because of its severity and irrevocability, the death penalty is qualitatively different' from any other punishment, and hence must be accompanied by unique safeguards. . . .

Id. at 872.

[107] *Id.*

[108] *Id.* at 858.

[109] *Id.* However, as the dissent correctly points out, the defense counsel has no duty under *Witherspoon* to make a record that shows a juror is biased. It is the state's burden to show on the face of the record that a juror is biased. If the state fails to demonstrate on the record a juror's bias, then that juror cannot be excluded under *Witherspoon*. Thus, the failure of defense counsel to object to the exclusion of a juror is not in question, since it is the state's duty to ensure that it only excludes jurors that, on the face of the record, are actually biased. *Witt*, 105 S. Ct. at 865 n.8.

exclusion in all other criminal matters.[110] The Court reasoned that the quest for an impartial jury is no different in capital trials than in other criminal cases. Thus, the jury selection standards in capital trials should not differ from the standards used in non-capital cases. The Court claimed that "there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. . . .[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard . . . in his favor."[111] The *Witherspoon* standard was then rejected by the Court, which favored the standard set forth in *Adams*. By adopting the *Adams* standard, the Court effectively returned to traditional or implied bias as the standard for juror exclusion. As a result, the Court eliminated the *Witherspoon* distinction between capital juror exclusion and non-capital juror exclusion.

The dissent was outraged by the majority's use of the *Adams* standard to eliminate *Witherspoon*'s constitutional distinction between capital juries and other criminal juries. First, the dissent argued that excluding jurors by any other broader base than *Witherspoon* created unrepresentative juries biased toward the death penalty.[112] The dissent further argued "if the present prevailing view of the Constitution is to permit the State to extract the awesome punishment of taking a life, then basic justice demands that juries with the power to decide whether a capital defendant lives or dies not be poisoned against the defendant."[113] The dissent's central concern was that exclusion of jurors whose voir dire responses were ambiguous, vacillating, or uncertain as to their views on the death penalty would prevent them from abiding by their oaths at trial, creating a jury bias for the prosecution.[114]

The second objection voiced by the dissent against the majority's adoption of the *Adams* standard was the majority's misinterpretation of the *Adams* standard as a substitute test for *Witherspoon*. The dissent argued "nothing in *Adams* suggests that the Court intended to abandon *Witherspoon*'s strict standards of proof. One need look no further than the text of *Adams* to understand why it has been perceived until today as consistent with *Witherspoon*."[115] Further, the dissent pointed to federal and state appellate courts that interpreted *Adams* as a clear endorsement of the *Witherspoon* standards. Yet, the majority construed *Adams* to read that there is no constitutional distinction between exclusion for death penalty bias and exclusion for other types of bias. Thus, the dissent claimed that *Adams* did not "desert the principles of *Witherspoon*," but that "it is the Court's brazingly revisionist

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[110] Obviously, elimination of this distinction is important because the dissent calls it one of the three most disturbing trends in today's constitutional jurisprudence. *Id.* at 872. *See supra* note 106.

[111] *Id.* at 852.

[112] *Id.* at 860 (quoting *Witherspoon*, 391 U.S. at 521).

[113] *Witt*, 105 S. Ct. at 860.

[114] *Id.* at 862.

[115] *Id.* at 866.

reading of *Adams* today that leaves *Witherspoon* behind."[116] In conclusion, the dissent argued that the majority could not use the precedential effect of *Adams* to undermine the strict standards of *Witherspoon*.

> Rewriting *Adams* to suit present purposes, the Court has of course relieved itself of much of its burden of justification; invoking precedent, the Court dodges the obligation to provide support for its decision to deprive the capital defendant of protections long recognized as fundamental . . . stripped of their false luster of precedential force, [the justifications for removing *Witherspoon*'s strict standards of exclusion] neither jointly nor severally support the Court's abandonment of *Witherspoon*.[117]

While the dissent persuasively argues that the majority rewrote *Adams* to overrule *Witherspoon*, the implications of *how* the majority arrived at adoption of *Adams* may be purely academic. It is the *use* of the new *Adams* standard that affects the defendants currently on death row.[118] For these people, who are currently condemned to die, the new standards for reviewing whether jurors were properly excluded is: whether a juror's views on capital punishment "prevent or substantially impair the performance of the juror's duties in accordance with his instructions and his oath."[119] The *Adams* standard is now the prevailing authority throughout the United States for excluding jurors in capital trials.

A second implication of *Witt* is the determination that a trial judge's decision to exclude a juror for cause must be afforded a presumption of correctness when examined under habeas corpus review. Since the Court determined that juror exclusion is a question of fact and not a question of mixed law and fact, the decision to exclude a juror is presumed correct under 28 U.S.C. section 2254(d).[120] It logically follows that if the new standard is the traditional bias standard, a trial judge must be afforded some deference when deciding whether a juror is sufficiently biased. In fact, it would be practically impossible to use traditional or implied bias as a standard for excluding jurors and then have an appellate court review the trial judge's decisions de novo.[121] Thus, once the Court decided that it is proper for the trial judge to determine whether a juror is sufficiently biased, the Court was compelled

[116] *Id.* The dissent's contention is well founded. In *Adams* Justice Rehnquist, in a dissent, stated "Thus, at a time when this Court should be re-examining the doctrinal underpinnings of *Witherspoon* in light of our intervening decisions in capital cases, it instead expands that precedent as if those underpinnings had remained wholly static. . . ." *Adams*, 448 U.S. at 52. It is ironic that in 1980 Justice Rehnquist labels *Adams* a needless expansion of the *Witherspoon* standards, and then in 1985 he uses *Adams* to renunciate the principles of *Witherspoon*.

[117] *Id.* at 867.

[118] *See supra* note 2 at 1.

[119] *Witt*, 105 S. Ct. at 852 (quoting *Adams*, 448 U.S. at 45).

[120] *See supra* note 96.

[121] This is true because judges are permitted to use, as a basis for exclusion, the demeanor of the prospective juror as well as his statements upon the record. Therefore, an appellate court reviewing these decisions de novo would have a difficult time affirming each judge's decision since the judge's basis for decision may not be reflected on the face of the record.

by its own logic to afford the trial judge's decision a presumption of correctness.

It is clear how this entire analysis departs significantly from the principles of the now overruled *Witherspoon* doctrine. *Witherspoon* required strict proof on the face of the record so that under de novo review an appellate court could decide whether the record clearly showed the juror was actually biased. But once the Court moved from a showing of actual bias to traditional or implied bias, the trial judge had to be given some leeway to decide whether a juror's statements demonstrated sufficient bias to warrant exclusion. As a result, de novo review became inherently inappropriate.

The departure from the strict *Witherspoon* standards is significant when viewed in terms of the trial judge's newly granted authority to exclude capital jurors. The dissent contended that the majority provided insufficient justification for granting the trial judge such authority.

> Not surprisingly the Court provides no support for the rather remarkable assertion that a judge will despite ambiguity in a juror's response be able to perceive a juror's inability to follow the law and abide by an oath when the juror himself or herself does not yet know how he or she will react to the case at hand.[122]

However, the majority's decision to afford the trial judge a presumption of correctness soundly rests upon legal precedent which has its roots in American jurisprudence since the late 1800s.[123] While the dissent may object to such judicial authority, it is clear that the majority is well within the bounds of precedent for granting the trial judge a presumption of correctness on the issue of juror exclusion.

A third implication of *Witt* is that the presumption of correctness practically forecloses any chance of a successful appeal based on a claim that a juror was not sufficiently biased to warrant exclusion. The burden of proof to overcome this presumption is a showing that the decision to exclude is not fairly supported by the record when viewed as a whole.[124] Because of this burden of proof, it is obvious that future capital defendants will have a difficult time appealing juror exclusion decisions. The only remaining alternative for capital defendants is to argue that the process of "death-qualifying a jury" produces a jury prone to convict. The Supreme Court first considered this question in *Witherspoon* and found that sufficient empirical evidence did not exist to support such a holding.

> The data adduced by the petitioner, however, are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the

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[122] *Witt*, 105 S. Ct. at 867 n.9.

[123] *See supra* notes 102-03.

[124] *Witt*, 105 S. Ct. at 856. The Court states that the finding of a trial judge is presumed correct unless one of the findings of bias is not fairly supported by the record viewed as a whole.

> issue of guilt or substantially increases the risk of conviction. . . .Even so, a defendant convicted by such a jury in some future case may still attempt to establish that the jury was less than neutral with respect to guilt.[125]

Since capital punishment schemes are not administered through a bifurcated process, the claim that death-qualifying produces a conviction prone jury is only valid when the state uses a death qualified jury to decide the guilt and innocence phase. The state's rationale for death-qualifying a jury at the guilt and innocence stage is two-fold. First, states desire to death-qualify juries in the first phase because a juror who opposes capital punishment may vote "not guilty" just to prevent the possibility of the state later imposing the death penalty. Second, because jurors who oppose capital punishment are excluded from the second phase, the penalty determination phase, states prefer to eliminate these jurors through death qualification in the first phase, so that the same panel of jurors can be used to decide both phases of trial.[126] With this analysis in mind, the only remaining challenge open to capital defendants following *Witt*, is whether a state may death-qualify a juror prior to the guilt-innocence phase of the bifurcated trial process.

Currently, there is a split of authority concerning this issue.[127] In the case of *Grigsby v. Mabry*,[128] the Eighth Circuit Court of Appeals determined that death-qualifying a jury prior to the guilt-innocence phase of a capital trial produces a conviction-prone jury which violates a defendant's sixth amendment rights to an impartial jury and a jury composed of a cross-section of the community.[129] The court noted that current empirical evidence proves that death-qualification increases the jury's likelihood to convict a capital defendant.[130] Moreover, the court held that excluding jurors opposed to capital punishment meets the prima facie requirements for showing a "systematic exclusion of a distinct group of society," resulting in a violation of the constitutional guarantee of a jury composed of a cross-section of a community.[131] The *Grigsby* court also noted that its decision created a conflict with both the Fourth and Fifth Circuit Courts of Appeal, and as a result the court stated "this decision relates to hundreds of prisoners now on death row. We are hopeful that the Supreme Court will grant a writ of certiorari and resolve this issue."[132] However, given the Supreme Court's desire to allow broad

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[125] *Witherspoon*, 391 U.S. at 517-18, 520 n.18.

[126] Both the majority and the dissent in *Witt* reaffirm the position that a state has the right to exclude jurors who are opposed to capital punishment in the penalty determination phase. *Witt*, 105 S. Ct. at 848, 862. This is true because allowing a person opposed to capital punishment to sit on the penalty determination jury clearly would deprive the state of a fair trial. However, the crux of this issue still remains: whether jurors, who only determine guilt and innocence, should be death-qualified.

[127] The Fourth and Fifth Circuits differ with the Eighth Circuit as to whether a death-qualified jury in the guilt-innocence phase is conviction prone. *See* Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985); Mattheson v. King, 751 F.2d 1432 (5th Cir. 1985); *Keeten*, 742 F.2d 129.

[128] *Grigsby*, 758 F.2d 226.

[129] *Id.* at 229.

[130] *Id.*

[131] *Id.*

[132] *Id.* at 239.

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exclusion of capital jurors combined with the Court's strong interest in protecting the state's right to have an impartial jury, the Eighth Circuit's request for Supreme Court review may in fact lead to its own reversal. In fact, it seems likely that the Supreme Court will agree with the Fourth and Fifth Circuit's views that death-qualifying the jury for the guilt-innocence phase is proper for two reasons. First, the Court will probably agree that jurors opposed to capital punishment must be excluded during the guilt-innocence phase since failure to exclude these jurors will frustrate the state's right to impose capital punishment. Undoubtedly, a single vote not to convict would create a hung jury and thereby prevent the state from imposing capital punishment. Thus, the only way the state may ensure that it can receive a capital conviction is to exclude all those jurors who may be opposed to capital punishment in the guilt-innocence phase of a trial.

Second, the Court may decline to give credence to the current empirical evidence that death-qualification increases the conviction rate. While the current evidence is better than the evidence considered originally in *Witherspoon*, it is still not conclusive and is therefore insufficient to establish a propensity to convict. Eventually, the only alternative left to a capital defendant when opposing death-qualification of a jury may be foreclosed by a future Supreme Court decision rendered upon the Eighth Circuit's request for review. Therefore, *Witt*, with its broad exclusionary standards and presumption of correctness, combined with a future Supreme Court decision affirming the Fourth and Fifth Circuits' decisions could effectively eliminate habeas corpus appeals of juror disqualification. Even unaccompanied by a future decision, *Witt* should produce a substantial decrease in the total number of habeas corpus appeals, and, as several commentators have indicated, the reduction of habeas corpus appeals is the Supreme Court's current objective.[133]

VI. Conclusion

In *Wainwright v. Witt* the United States Supreme Court overruled the *Witherspoon* actual bias standards for excluding potential capital jurors. The Court replaced the *Witherspoon* standards with the new *Adams* standard which allows exclusion of capital jurors only if a juror's views about capital punishment "prevent or substantially impair the juror's performance of his duties in accordance with his instructions and his oath."[134] Beyond replacing the stringent *Witherspoon* requirements with the broad discretionary *Adams* standard, the Court in *Witt* also decided that a trial judge's decisions to exclude jurors under these broad standards should be presumed correct when reviewed under habeas corpus.

Although the most immediate effect of this decision resulted in the execution of Johnny Paul Witt, the case also significantly affects the 1,428 inmates currently on death row who were placed there by death-qualified jurors.[135] For these con-

[133] *See* A.B.A.J., June 1985, at 38.

[134] *Adams*, 448 U.S. at 45.

[135] *See supra* note 2, at 1.

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demed men and women, *Witt*, significantly reduces their chances of having their death sentences overturned. Moreover, the *Witt* decision also affects future capital defendants. These defendants will, for the first time since 1969, face a capital jury selected under the broad exclusionary standards of traditional bias and considered by the Supreme Court to be no different than any other criminal jury. In the end, Johnny Paul Witt may only represent one person's struggle for a fair and impartial jury, but the principles set forth in his final appeal will set the tone for capital juror exclusion and the review of these decisions for years to come.

Phillip M. Stowers

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