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Lockhart v. McCree: Conviction Proneness and the Constitutionality of Death-Qualified Juries

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LOCKHART v. McCREE: CONVICTION-PRONENESS AND THE CONSTITUTIONALITY OF DEATH-QUALIFIED JURIES

Fundamental to the established tradition of American justice is the requirement that the accused shall be tried before an impartial jury[1] which is representative of a fair cross section of the community.[2] Consistent with this ideal, the courts have recognized that the impartial jury properly serves its role in the scheme of justice when it interposes, between the state and the defendant, the "common sense of the community."[3] It is therefore essential that the procedures used to select jurors, and the composition of the jury produced, comport with the basic guarantees of our judicial system.[4]

In cases involving the prospect of capital punishment, the choice between life imprisonment and death is most often made by a jury.[5] By requiring the

1. *See* U.S. CONST. amend. VI, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."

2. Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

3. Ballew v. Georgia, 435 U.S. 223, 233-34 (1978).

4. *See generally* Swain v. Alabama, 380 U.S. 202, 219-22 (1965) (discussing the use of peremptory challenges which were deemed necessary to ensure jury impartiality).

5. *See generally* Gregg v. Georgia, 428 U.S. 153, 181-82 (1976). Thirty-seven states presently have statutes authorizing the death penalty. Although a minority of states allow the judge to determine penalty, thirty-three states authorize the jury to determine penalty or recommend penalty to the judge. *See* ALA. CODE § 13A-5-47 (1982 & Supp. 1986); ARK. STAT. ANN. § 41-1301 (1977 & Supp. 1985); CAL. PENAL CODE § 190.3 (West Supp. 1986); COLO. REV. STAT. § 16-11-103 (1978 & Supp. 1985); CONN. GEN. STAT. ANN. § 53a-46a (West 1985 & Supp. 1986); DEL. CODE ANN. tit. 11, § 4209 (1979 & Supp. 1984); FLA. STAT. ANN. § 921.141 (West 1985 & Supp. 1986); GA. CODE ANN. § 17-10-31 (1982 & Supp. 1986); ILL. ANN. STAT. ch. 38, para. 9-1 (Smith-Hurd 1979 & Supp. 1986); IND. CODE ANN. § 35-50-2-9 (Burns 1985 & Supp. 1986); KY. REV. STAT. ANN. § 532.025 (Michie/Bobbs-Merrill 1985 & Supp. 1986); LA. CODE CRIM. PROC. ANN. art. 905.6 (West 1984); MD. ANN. CODE art. 27, § 413 (1982 & 1986); MISS. CODE ANN. § 99-19-101 (Supp. 1986); MO. ANN. STAT. § 565.030 (Vernon Supp. 1986); NEV. REV. STAT. § 175.554 (1986); N.H. REV. STAT. ANN. § 630:5 (Supp. 1983); N.M. STAT. ANN. § 31-20A-3 (1981 & Supp. 1986); N.C. GEN. STAT. § 15A-2002 (1983 & Supp. 1985); OHIO REV. CODE ANN. § 2929.03 (Anderson 1982 & Supp. 1985); OKLA. STAT. ANN. tit. 21, § 701.10 (West 1983 & Supp. 1985); OR. REV. STAT. § 163.150 (Supp. 1985); 4 PA. CONS. STAT. ANN. § 9711 (Purdon 1982 & Supp. 1986); S.C. CODE ANN. § 16-3-20 (Law. Co-op. 1985 & Supp. 1985); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1979); TENN. CODE ANN. § 39-2-203 (1982 & Supp. 1986); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1986); UTAH CODE ANN. § 76-3-207 (1978 & Supp. 1986); VT.

jury to determine punishment, courts assure that the criminal sanctions imposed in capital cases reflect contemporary community values and "standards of decency."[6] Since the procedures used to select jurors greatly affect the composition of juries, and possibly the decisions made by these juries, they have historically been the focus of constitutional scrutiny.[7]

In 1968, *Witherspoon v. Illinois*[8] addressed the practice of "death-qualifying" jurors for service in bifurcated capital trials.[9] Death qualification is a procedure by which members of a jury pool in capital cases are questioned during voir dire regarding their beliefs about the death penalty.[10] Jurors may be challenged for cause if they express that their views toward capital punishment would prevent or substantially impair their ability to impartially decide the facts and apply the law.[11] The remaining jurors cumulatively constitute a death-qualified jury.

Under the unitary, bifurcated jury system which is utilized in most states,[12] guilt and penalty are decided in two separate phases with a single jury making both determinations.[13] Hence, voir dire questioning to death-

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STAT. ANN. tit. 13, § 2303(c) (1978 & Supp. 1986); VA. CODE ANN. § 19.2-264.4 (1983 & Supp. 1986); WASH. REV. CODE ANN. § 10.95.080 (Supp. 1986); WYO. STAT. § 6-2-102 (1983 & Supp. 1986). *See also* Brief of Amici Curiae of Arizona at 3-4 & n.1, Lockhart v. McCree, 106 S. Ct. 1758 (1986) (No. 84-1865).

6. *See* Witherspoon v. Illinois, 391 U.S. 510, 519-20 & n.15 (1968).

7. *See, e.g., id.* at 519-23.

8. *Id.* at 510.

9. *See* United States v. Cornell, 25 F. Cas. 650 (C.C.D. R.I. 1820) (No. 14,868). This is the first documented use of a death-qualified jury in a capital trial in the United States. In an opinion by Justice Story, the circuit court permitted the exclusion of two Quakers who were opposed to the death penalty from a capital jury. The court held that "[t]o 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.

10. *See, e.g.,* Wainwright v. Witt, 105 S. Ct. 844, 848 (1985).

11. *See Witherspoon,* 391 U.S. at 522 n.21. The state may exclude all potential jurors who unmistakably express: "(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.* (emphasis in original). *See also* Adams v. Texas, 448 U.S. 38, 45 (1980); Boulden v. Holman, 394 U.S. 478, 483-84 (1969); Lockett v. Ohio, 438 U.S. 586, 595-96 (1978); *cf.* Wainwright v. Witt, 105 S. Ct. at 850-52; Darden v. Wainwright, 106 S. Ct. 2464, 2469-71 (1986) (dispensing with the "unmistakable clarity" standard of proof for juror bias).

12. At present, no state law requires a two-jury approach to bifurcated capital trials. Essentially, the reason the unitary, bifurcated approach is most prevalent is because this system is more efficient and less expensive than a two-jury approach. Grigsby v. Mabry, 569 F. Supp. 1273, 1319 (E.D. Ark. 1983); Brief of Amici Curiae for Alabama at 4, Lockhart v. McCree, 106 S. Ct. 1758 (1986) (No. 84-1865).

13. In some states a sentencing judge will determine penalty. *See generally* Rector v. State, 280 Ark. 385, 395-96, 659 S.W.2d 168, 173-74 (1983), *cert. denied,* 466 U.S. 988 (1984).

qualify jurors for the penalty phase causes exclusion of venirepersons who could fairly determine guilt, but who would not vote to impose death during the penalty phase.[14] The constitutional issue which arises from this process is whether a defendant receives a fair trial on the issue of guilt when the state is permitted to exclude all jurors who refuse to impose capital punishment during the later penalty phase proceeding.[15]

In *Witherspoon,* the Court limited the state's ability to remove jurors with reservations about capital punishment[16] from the penalty phase of capital trials.[17] The Court held that by excluding a wide range of individuals, the State of Illinois had "produced a jury uncommonly willing to condemn a man to die."[18] Regarding the jury's role in the guilt phase of the trial, the Court rejected the defendant's claim that, even with the newly imposed limits on exclusion, the death-qualified jury was pro-prosecution and conviction-prone.[19] The Court observed that social science data,[20] indicating that

14. Keeten v. Garrison, 578 F. Supp. 1164, 1170 (W.D.N.C. 1984), *rev'd,* 742 F.2d 129 (4th Cir. 1984), *cert. denied,* 106 S. Ct. 2258 (1986).

15. *Id.* at 1167.

16. The group contested in *Witherspoon* and addressed as "all persons voicing general objection to capital punishment" is composed of persons in categories 4, 5, and 6 below. *Witherspoon* narrowed the group which can constitutionally be removed for cause from the penalty determination to persons in categories 5 and 6 [hereinafter *Witherspoon*-excludables].

Categorization of all types of jurors in a venire:

(1) "Automatic Death Penalty" Group—all individuals who will automatically vote for the death penalty.

(2) "Favor Death Penalty" Group—all individuals favoring capital punishment but who will not vote to impose it every time.

(3) "Indifferent" Group—individuals neither favoring nor opposing the death penalty.

(4) "Oppose Death Penalty" Group—individuals opposing or having doubts about the death penalty but who will not automatically vote against it in every case.

(5) "Nullifiers"—individuals who are not impartial since they state they will not fairly and impartially determine guilt if the death penalty is a prospect.

(6) "Guilt Phase Includables"—individuals who will not vote to impose the death penalty but who indicate they could fairly and impartially determine a defendant's guilt.

These categories were adapted from Hovey v. Superior Court, 28 Cal. 3d 1, 20, 616 P.2d 1301, 1310-11, 168 Cal. Rptr. 128, 138 (1980) and Brief for Amici Curiae by the American Psychological Ass'n at 4-5, Lockhart v. McCree, 106 S. Ct. 1758 (1986) (No. 84-1865).

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

18. *Id.* at 521.

19. Witherspoon contended that the death-qualified jury,

> unlike one chosen at random from a cross-section of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, . . . is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecution's versions of the facts, and return a verdict of guilt.

Id. at 516-17.

20. The petitioner in *Witherspoon* presented a completed social science study to substantiate his conviction-proneness claim by W. Wilson, Belief in Capital Punishment and Jury Performance (unpublished manuscript, University of Texas) [hereinafter Wilson], and fragments

these juries are more likely to convict than noncapital juries, was "too tentative and fragmentary" to support a finding of conviction-proneness.[21] The Court, however, did not foreclose the possibility that such a determination could be made in some future case, and left an open invitation for additional evidence on this issue.[22]

It was not until 1986, in *Lockhart v. McCree,*[23] that the Supreme Court was faced with an overwhelming body of evidence supporting the convic-

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of later completed studies by Goldberg, *Toward Expansion of* Witherspoon: *Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law,* 5 HARV. C.R.-C.L. L. REV. 53 (1970) [hereinafter Goldberg]; and H. ZEISEL, SOME DATA ON JUROR ATTITUDES TOWARD CAPITAL PUNISHMENT (Univ. of Chicago Monograph 1968) [hereinafter Zeisel].

The Wilson study questioned junior and senior college students in Texas on how they would vote as jurors after reading five written descriptions of criminal cases. Wilson then compared the percentage of guilty votes to the students' answers to questions regarding their own "scruples" against the death penalty. He found that persons without scruples against capital punishment will vote to convict, impose heavier penalties, and favor the prosecution more often than persons with scruples against the death penalty. This study was criticized for its lack of sophistication, its use of college students as subjects, its use of written stimulus materials which were not sufficiently realistic, and its failure to simulate group deliberation which is inherent to the jury system.

Goldberg focused on the relationship between an individual's attitudes toward capital punishment and conviction-proneness by using written descriptions like Wilson's to study 200 undergraduates in Atlanta. The results Goldberg obtained were consistent with Wilson's results. The study, however, suffered the same scientific shortcomings as Wilson's study.

The Zeisel study used actual jurors who had participated in criminal trials in Chicago and Brooklyn to show that they also demonstrated the conviction-proneness shown in the Wilson and Goldberg studies. The only criticism levied at the Zeisel study was that it failed to consider categorizations of jurors as articulated in *Witherspoon.* The group of scrupled jurors studied by Zeisel were oppose death penalty jurors, nullifiers, and guilt phase includables. Nullifiers should not have been included in the survey of scrupled jurors. *See supra* note 16. *See also* Hovey v. Superior Court, 28 Cal. 3d at 27-33, 616 P.2d at 1315-19, 168 Cal. Rptr. at 142-46; Grigsby v. Mabry, 569 F. Supp. 1273, 1294-96 (1983); Brief for Amici Curiae by the American Psychological Ass'n at 4-9, Lockhart v. McCree, 106 S. Ct. 1758 (1986) (No. 84-1865).

21. *Witherspoon,* 391 U.S. at 517.

22. *Id.* at 520 n.18. The Court observed that

> a defendant convicted by such a 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. (emphasis in original).

See id. at 541 n.1 (White, J., dissenting). Justice White "would not wholly foreclose the possibility of a showing that certain restrictions on jury membership imposed because of jury participation in penalty determination produce a jury which is not constitutionally constituted for the purpose of determining guilt." *Id.*

23. 106 S. Ct. 1758 (1986).

tion-proneness contention.[24] *McCree* presented numerous post-*Witherspoon* social science studies which establish a near unanimous opinion[25] among legal researchers that death qualification produces a conviction-prone jury.[26]

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24. In addition to the Wilson study and the final texts of the Goldberg and Zeisel studies, *see supra* note 20, the respondent, McCree, presented: Jurow, *New Data on the Effect of a "Death-Qualified" Jury on the Guilt Determination Process,* 84 HARV. L. REV. 567 (1971) [hereinafter Jurow]; Cowan, Thompson & Ellsworth, *The Effects of Death-Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation,* 8 LAW & HUM. BEHAV. 53 (1984) [hereinafter Cowan]; Louis Harris & Assocs., Inc., Study No. 2016 (1971) [hereinafter Harris]; 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) [hereinafter Bronson-Colorado]; Bronson, *Does the Exclusion of Scrupled Jurors in Capital Cases Make the Jury More Likely to Convict? Some Evidence from California,* 3 WOODROW WILSON L.J. 11 (1980) [hereinafter Bronson-California]; Fitzgerald & Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes,* 8 LAW & HUM. BEHAV. 31 (1984) [hereinafter Fitzgerald]; Precision Research, Inc., Survey No. 1286 (1981) [hereinafter Precision Survey]; Thompson, Cowan, Ellsworth & Harrington, *Death Penalty Attitudes and Conviction Proneness,* 8 LAW & HUM. BEHAV. 95 (1984) [hereinafter Thompson]; Ellsworth, Bukaty, Cowan & Thompson, *The Death-Qualified Jury and the Defense of Insanity,* 8 LAW & HUM. BEHAV. 81 (1984) [hereinafter Ellsworth]; A. Young, Arkansas Archival Study (1981) (unpublished) [hereinafter Arkansas]; Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process,* 8 LAW & HUM. BEHAV. 121 (1984) [hereinafter Haney]. *See also* Lockhart v. McCree, 106 S. Ct. at 1762-63 nn.4-6. For a discussion on the results of these studies, see *infra* note 26.

25. *Contra* Osser & Bernstein, *The Death-Oriented Jury Shall Live,* 1 SAN FERN. V.L. REV. 253 (1968). This study contradicts the studies used in *McCree.* However, the study was not discussed in *McCree,* and it has been criticized as "incompetent" due to its flawed methodology. *See* Hovey v. Superior Court, 28 Cal. 3d at 41-42, 616 P.2d at 1325-26, 128 Cal. Rptr. at 153 n.80.

26. The post-*Witherspoon* studies are considered to be more scientifically precise and legally relevant than the Wilson, Goldberg, and Zeisel studies. *See supra* note 20.

The Jurow study, *supra* note 24, presented audio simulations of two murder trials to 211 employees of Sperry Rand Corporation in Long Island, New York. These subjects first completed a questionnaire on death penalty attitudes. After hearing the trial tape, the subjects were asked to vote guilty or not guilty. Jurow found that there was a direct correlation between pro-death penalty views and conviction-proneness.

Harris, *supra* note 24, conducted a nationwide person-to-person interview poll of 2,069 adults. The subjects were instructed to assume they were members of a jury in a criminal trial. Each subject was asked attitudinal questions which identified *Witherspoon*-excludables. The poll showed that death-qualified jurors voted to convict more often than *Witherspoon*-excludables and that more blacks and women would be excluded from jury service by death qualification.

The Jurow and Harris studies were legitimately criticized for their failure to distinguish nullifiers from guilt phase includables in the group of *Witherspoon*-excludables because it was necessary to prove that guilt phase includables were more conviction-prone than death-qualified jurors since guilt phase includables could be impartial in a guilt determination whereas nullifiers could not. *See supra* note 16.

This proof was supplied by the Cowan study, *supra* note 24. Cowan first questioned subjects on their willingness to impose the death penalty. Those jurors who could not impose the death penalty and who could not fairly determine guilt in capital cases were identified as nullifiers and were excluded from the study. Cowan then identified 258 death-qualified jurors and 30

While acknowledging the adequacy and validity of this research, the Court held that the Constitution does not prohibit the use of death-qualified juries during the guilt phase of capital trials, even if such juries are conviction-prone.[27]

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guilt phase includables. These individuals were shown videotaped reenactments of an actual murder trial. The guilt phase includables were mixed with the death-qualified jurors and the groups deliberated. The results showed that death-qualified jurors were more prone to find a defendant guilty than the guilt phase includables. This study confirmed the findings of the earlier studies while overcoming most of the criticisms of those studies.

The Bronson-Colorado study, *supra* note 24, interviewed 718 people drawn from jury lists in Colorado. The interviewees were asked whether they agreed or disagreed with statements about the criminal justice system and about capital punishment. The survey showed that persons who strongly support capital punishment tend to be pro-prosecution.

The Bronson California study, *supra* note 24, was modeled after the Colorado study. Two series of groups were interviewed, one group of 755 in Butte County, California and another group of 707 in Los Angeles, Sacramento, and Stockton, California. The results in California were consistent with the Bronson-Colorado results: pro-death penalty jurors are more likely to be pro-prosecution jurors. Bronson's two studies confirmed the theory that attitudes about the death penalty are associated with other distinct perspectives regarding the criminal justice system.

Fitzgerald, *supra* note 24, interviewed 811 randomly selected, jury-eligible individuals in Alameda County, California and found a very high statistically significant difference between the pro-prosecution attitudes of death-qualified jurors and guilt phase includables. Additionally, the study found that guilt phase includables constituted 17% of all jurors in jury pools.

The Precision Survey, *supra* note 24, used questions from the Fitzgerald study to poll 407 people in the state of Arkansas. The poll determined that 11% of all venirepersons were guilt phase includables (fair and impartial on the question of guilt).

Thompson, *supra* note 24, presented a videotape of prosecution and defense witness testimony to a group of potential jurors. Death-qualified jurors tended to interpret evidence more favorably for the prosecution than *Witherspoon*-excludables. Thompson theorized that such tendencies indicate that death-qualified juries have a lower "threshold of conviction" than juries which are not death-qualified.

Ellsworth, *supra* note 24, studied individuals who had been previously classified as death-qualified jurors or *Witherspoon*-excludables and measured their tendency to vote guilty or not guilty after reading four summaries of cases where pleas of insanity were entered. *Witherspoon*-excludables found defendants insane more often than death-qualified jurors.

The Arkansas Study, *supra* note 24, reviewed transcripts from Arkansas Supreme Court voir dires in capital cases. Eight percent of Arkansas men and 13% of all women were found to be guilt phase includables.

Haney, *supra* note 24, studied the effects of the voir dire, death qualification process on jurors since it was believed that this process subjected jurors to extremely suggestive pretrial conditioning. Thirty-two subjects viewed a videotape of a standard voir dire, and only seven believed that the death penalty was the appropriate penalty for an individual accused of a capital crime. Thirty-five subjects viewed a death-qualifying voir dire and twenty believed that the death penalty was appropriate. *See* Hovey v. Superior Court, 28 Cal. 3d at 33-60, 616 P.2d at 1319-46, 168 Cal. Rptr. at 146-68; Grigsby v. Mabry, 569 F. Supp. 1273, 1296-1305 (E.D. Ark. 1983); Grigsby v. Mabry, 758 F.2d 226, 232-35 (8th Cir. 1985); Brief for Amici Curiae by the American Psychological Ass'n at 10-19, Lockhart v. McCree, 106 S. Ct. 1758 (1986) (No. 84-1865).

27. *McCree*, 106 S. Ct. at 1759.

Ardia McCree was convicted of capital felony murder[28] by a jury which was death-qualified according to the guidelines first established in *Witherspoon.*[29] Those jurors who stated that they could not consider the death penalty as punishment were removed for cause at voir dire, over McCree's objections.[30] The jury found McCree guilty of capital felony murder and set his punishment at life imprisonment without parole.[31] McCree appealed his conviction to the Arkansas Supreme Court, alleging that jurors were improperly excluded at voir dire.[32] The court, however, found no evidence of improper exclusion under the *Witherspoon* requirements.[33]

McCree filed a petition for a writ of habeas corpus[34] in the United States District Court for the Eastern District of Arkansas. McCree's petition was consolidated with another habeas petition on the same issue.[35] The state's power to exclude jurors from the penalty phase, as outlined in *Witherspoon,* was not contested by McCree,[36] nor was the state's power to remove jurors who stated they could not impartially determine guilt given the prospect that death would be imposed in a later phase of the trial.[37] Focusing solely on those jurors who could fairly determine guilt or innocence but who could not impose the death penalty during the sentencing phase,[38] McCree alleged that the exclusion of these jurors resulted in an unrepresentative jury which was more likely than a noncapital jury to find guilt.[39]

The district court heard extensive testimony and reviewed numerous social science studies concerning the effects of removal of *Witherspoon*-excludables from the guilt phase of bifurcated capital trials.[40] After analyzing all of the evidence, the district court held that a death-qualified jury is less than

28. McCree v. State, 266 Ark. 465, 467, 585 S.W.2d 938, 939 (1979), *rev'd sub nom.* Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd,* 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

29. 391 U.S. at 520-21. *See supra* note 11.

30. *McCree,* 266 Ark. at 471-73, 585 S.W.2d at 941-42.

31. *Id.* at 467, 585 S.W.2d at 939.

32. *Id.* at 470, 585 S.W.2d at 941.

33. *Id.* at 473-74, 585 S.W.2d at 942.

34. 28 U.S.C. § 2254 (1982).

35. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd,* 758 F.2d 226 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986). The district court case was originated by James Grigsby who was convicted of capital murder by a death-qualified jury in an Arkansas state court. Grigsby filed a habeas corpus petition and the United States District Court for the Eastern District of Arkansas ordered an evidentiary hearing. Before the decision was rendered, however, Grigsby died and his case became moot. 569 F. Supp. at 1277 & n.2.

36. *See supra* note 11.

37. See *supra* note 16 for a discussion of nullifiers.

38. See *supra* note 16 for a discussion of guilt phase includables.

39. *See Grigsby,* 569 F. Supp. at 1275-76.

40. *Id.* at 1287-1308. *See supra* notes 24-26 and accompanying text.

neutral with respect to guilt, in violation of a capital defendant's right to a fair and impartial jury. Such a jury was also found to be unrepresentative of the community from which it is drawn, in violation of the sixth amendment representative cross section requirement.[41] The court recommended that states use separate juries in bifurcated trials, or modify their present procedure so that the guilt phase jury in a capital trial is made to resemble the juries in noncapital trials.[42]

The United States Court of Appeals for the Eighth Circuit affirmed the district court's decision, finding substantial support for the contention that a death-qualified jury is conviction-prone and therefore does not constitute a cross-sectional representation of the community.[43] The court chose not to prescribe the procedural modification necessary to remedy the bifurcated capital jury system, and left the decision to the discretion of the state.[44]

The United States Supreme Court, in a six to three decision[45] reversed the decision of the court of appeals, finding no constitutional violation in the use of death-qualified juries, in spite of the recognition that these juries are conviction-prone.[46] The Court also found no violation of the cross section requirement, holding that *Witherspoon*-excludables do not constitute a distinct group in the community warranting cross-sectional representation.[47]

In a dissenting opinion, Justice Marshall, joined by Justices Brennan and Stevens, charged the majority with blatant disregard for the clear implication of the evidence, as well as for the underlying constitutional principles involved.[48] Focusing solely on the impartiality claim, the dissenters argued that when a conviction is sought in a capital case, a procedure such as death

41. *See Grigsby,* 569 F. Supp. at 1321.

42. *Id.* at 1319.

43. Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985), *rev'd sub nom.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

44. *Id.*

45. The majority opinion, delivered by Justice Rehnquist, was joined by Chief Justice Burger and by Justices White, Powell, and O'Connor. Justice Blackmun concurred in the result. Justice Marshall filed a dissenting opinion which was joined by Justices Brennan and Stevens.

46. *McCree,* 106 S. Ct. at 1764. "[W]e will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries. We hold, nonetheless, that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases." *Id.*

47. *Id.* at 1766. "The group of '*Witherspoon*-excludables' involved in the case at bar differs significantly from the groups we have previously recognized as 'distinctive.' " *Id.*

48. *Id.* at 1774-75 (Marshall, J., dissenting). "This disregard for the clear import of the evidence tragically misconstrues the settled constitutional principles that guarantee a defendant the right to a fair trial and an impartial jury whose composition is not biased toward the prosecution." *Id.*

qualification, which "diminishes the reliability of the guilt determination," should be struck down.[49]

This Note will present an historical overview of the concept of jury impartiality, focusing particularly on the neutral jury as representative of a cross section of the community. The Court's application of this concept to the death-qualified jury will be evaluated, along with the Court's claim that *Witherspoon*-excludables do not constitute a distinctive group for cross-sectional purposes. Additionally, the Note will examine the issue of jury predisposition with emphasis on judicial interpretations of the conviction-proneness evidence. An analysis of *McCree* will suggest that the ideal of impartiality has been sacrificed to preserve the state's interest in using single juries in capital trials. The Note will conclude that, because death-qualified juries have been found constitutional, the *McCree* decision may represent an end to the long succession of case law attempting to establish the conviction-proneness of death-qualified juries.

I. THE REPRESENTATIVENESS OF DEATH-QUALIFIED JURIES

A. *The Fourteenth Amendment Requirement of a Representative Jury*

The requirement that a neutral jury represent a fair cross section of the community[50] derives from early cases[51] addressing the equal protection prohibition of racial discrimination in the selection of jurors.[52] In 1940, *Smith v. Texas*[53] addressed a claim that racial discrimination was used to intentionally and systematically exclude blacks from the grand jury which indicted the black defendant.[54] Voicing the ideal that equal protection of the laws must be guaranteed to all, the Court reversed the defendant's conviction, holding that a jury must truly represent the community to serve as

49. *Id.* at 1782 (Marshall, J., dissenting) (quoting Beck v. Alabama, 447 U.S. 625, 638 (1980)).

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

51. *See* Strauder v. West Virginia, 100 U.S. 303 (1879), which first emphasized the idea that a jury should be "a body of men composed of the peers or equals of the person whose right it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds." *Id.* at 308. In this case, the Court invalidated a state statute which excluded blacks from serving as jurors solely because of race and color. Since the Court considered the fourteenth amendment as prohibiting the implications of inferiority which such discrimination promoted, it followed that the all-white grand jury which convicted the black defendant was not truly representative of the community, and mandated a reversal of the trial conviction. *Id.* at 308-12.

52. *See, e.g.*, Akins v. Texas, 325 U.S. 398 (1945); Smith v. Texas, 311 U.S. 128 (1940); Pierre v. Louisiana, 306 U.S. 354 (1939).

53. 311 U.S. 128 (1940).

54. *Id.* at 129-30.

"instrument[s] an of public justice."[55] The exclusion of blacks and otherwise qualified groups from jury service was found to violate constitutional principles and the basic concepts of a democratic society.[56]

Since illegal and unconstitutional jury selection procedures unnecessarily taint the entire judicial process, the Court has held that an otherwise valid conviction must be reversed, even where no actual bias to the defendant has occurred.[57] In *Peters v. Kiff*,[58] the petitioner, a white man, claimed that blacks were systematically excluded from serving on the grand jury that issued his indictment.[59] Because the trial took place before the sixth amendment was made applicable to the states,[60] the Court conducted an equal protection and due process[61] analysis and concluded that the conviction was unconstitutional.[62]

The Court stressed that when certain identifiable groups are removed from the jury pool, "qualities of human nature" and "perspective[s] on human events that may have unsuspected importance"[63] are absent from the group's deliberations. The Court found great potential for harm in such an unrepresentative jury and the conviction was reversed, even though the defendant could prove no actual bias to himself.[64] In dictum, the Court offered that under the sixth amendment, a defendant's conviction would similarly be reversed if issued by an unrepresentative jury, regardless of whether the defendant suffered any actual bias.[65]

The requirement of community representativeness in the fourteenth amendment[66] context has also been extended to cases addressing the consti-

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55. *Id.* at 130.

56. *Id. See Pierre*, 306 U.S. at 355-58. In *Pierre*, blacks were deliberately excluded from service in grand and petit juries. The Court reversed the defendant's conviction finding that our traditional concept of justice is violated when particular groups, classes, or races are excluded from jury service. *Id.*

57. *See* Fay v. New York, 332 U.S. 261, 286 (1947); Taylor v. Louisiana, 419 U.S. 522, 526 (1975).

58. 407 U.S. 493 (1972).

59. *Id.* at 494.

60. *See infra* notes 74-76 and accompanying text.

61. *See infra* note 66.

62. *Peters*, 407 U.S. at 505.

63. *Id.* at 503-04.

64. *Id.* at 504.

65. *Id.* at 500.

66. U.S. CONST. amend. XIV, § 1, which provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

tutionality of death-qualified juries.[67] In *Witherspoon,* the prosecution exercised unlimited peremptory challenges to exclude all venirepersons who expressed reservations about capital punishment.[68] Focusing solely on this jury during penalty phase deliberations, the Court held that a death sentence is unconstitutional if it is recommended by a jury from which all venirepersons having doubts about capital punishment are removed.[69] While acknowledging the state's interest in obtaining jurors capable of imposing the death sentence without violating personal beliefs,[70] the Court reasoned that a capital jury must express the "conscience of the community" when it deliberates on the question of life imprisonment or death.[71]

To accommodate both the state's interest in a death-qualified jury and the defendant's interest in a completely fair determination of guilt, the *Witherspoon* Court restricted permissible juror exclusions to nullifiers and guilt phase includables, or those persons who will not vote for the death penalty under any circumstance.[72] Because exclusions on any broader basis were considered to violate the requirement that juries reflect the viewpoints and perspectives of the community, the Court decided that the new *Witherspoon* rule should be applied retroactively to invalidate all prior death sentences imposed by similar unconstitutional penalty phase juries.[73]

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67. *See, e.g., Witherspoon,* 391 U.S. at 510; Bumper v. North Carolina, 391 U.S. 543 (1968).

68. *Witherspoon,* 391 U.S. at 513.

69. *Id.* at 522.

70. *Id.* at 518-19.

> The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty.

Id.

71. *Id.* at 519-20.

> [A] jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.

Id.

72. *Id.* at 522 n.21. *See supra* note 16.

73. 391 U.S. at 523 n.22.

> [T]he jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided the petitioner's fate, and we have concluded that neither the reliance of law enforcement officials, nor the impact of a retroactive holding on the administration of justice warrants a decision against the fully retroactive application of the holding we announce today.

Id. (citations omitted). *See* White, *The Constitutional Invalidity of Convictions Imposed by*

B. The Sixth Amendment Representativeness Requirement

In 1968, the Supreme Court, in *Duncan v. Louisiana,*[74] found that the sixth amendment right to a trial by jury in criminal cases was sufficiently fundamental to the principles of liberty and justice,[75] to extend those rights to protect against state action.[76] Prior to this decision, the concept of a representative jury had been developed in federal court cases such as *Thiel v. Southern Pacific Co.*[77] There, the Court found that the systematic and intentional exclusion of a class of daily wage earners[78] reflected unconstitutional disregard for the tradition of trial by jury.[79] In dissent, Justice Frankfurter observed that the focus for determining improper jury selection is whether an excluded group possesses a "different outlook psychologically and economically" and whether they "have a different sense of justice, and a different conception of a juror's responsibility."[80] Consistent with this argument, the Court found that daily wage earners or laborers constituted a substantial

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Death-Qualified Juries, 58 CORNELL L. REV. 1176, 1213-15 (1973) (exploring *Witherspoon* as precedent for a finding that a new procedure of jury selection should be given retroactive application).

74. 391 U.S. 145 (1968).

75. *Contra* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *rev'd,* 391 U.S. 145 (1968). "The right to trial by jury . . . [is] not of the very essence of a scheme of ordered liberty . . . . Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [it]." *Id.*

76. *Duncan,* 391 U.S. at 147-58.

77. 328 U.S. 217 (1946). *See* Glasser v. United States, 315 U.S. 60, 83-86 (1942) (the exclusion of all women not members of the Illinois League of Women Voters from a federal jury panel denied the defendant an impartial jury drawn from a cross section of the community).

78. "Wage earners" is used to denote the class of laborers who work for a daily wage. The court clerk testified in *Thiel:*

> If I see in the directory the name of John Jones and it says he is a longshoreman, I do not put his name in, because I have found by experience that that man will not serve as a juror, and I will not get people who will qualify. The minute that a juror is called into court on a venire and says he is working for $10 a day and cannot afford to work for four, the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out . . . .

Thiel, 328 U.S. at 222.

79. *Id.* at 220. *See Glasser,* 315 U.S. at 85.

> Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For "[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. (quoting Smith v. Texas, 311 U.S. 128, 130 (1940)).

80. *Thiel,* 328 U.S. at 230 (Frankfurter, J., dissenting) (While asserting this notion Justice Frankfurter dissented from the majority's determination that wage earners possess a distinct social outlook.). *Compare supra* notes 63-65 and accompanying text *with* Justice Frankfurter's dissenting views.

portion of the community and that intentional exclusion of this entire economic class was unconstitutional.[81] The Court went further and suggested that federal jury selection procedures could not systematically and intentionally exclude social, religious, or political groups without violating the cross section requirement.[82] As in *Peters* and *Witherspoon,* the Court reasoned that exclusion of these groups unconstitutionally removes from the jury valuable viewpoints and perspectives which are inherent in the community at large.[83]

Taylor v. Louisiana[84] considered the cross section requirement in a case where women were excluded from a jury venire.[85] The Court emphasized that petit juries did not have to "mirror" the community to meet the cross section requirement.[86] Instead, they should represent the common sense of the community and thereby provide the necessary balance against "overzealous . . . prosecutors" and "overconditioned . . . judges."[87] Taylor's right to

81. *Thiel,* 328 U.S. at 225.

82. *Id.* at 220. *See* Ballard v. United States, 329 U.S. 187 (1946). In *Ballard,* the sixth amendment right to an impartial jury was considered. The Court found that

> evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. The systematic and intentional exclusion of women, like the exclusion of a racial group, or an economic or social class, deprives the jury system of the broad base it was designed by Congress to have in our democratic society.

Ballard, 329 U.S. at 195 (citations omitted).

83. *See Thiel,* 328 U.S. at 220. *See also supra* notes 77-83 and accompanying text.

84. 419 U.S. at 522.

85. *Id.* at 525.

86. *Id.* at 538.

87. *Id.* at 530 (citing *Duncan,* 391 U.S. at 155-56). In *Taylor,* the Court went on to note:

> This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Id.

See Williams v. Florida, 399 U.S. 78, 100 (1970). In *Williams,* the Court concluded that a jury composed of six persons instead of the usual twelve adequately represented a cross section of the community.

> The purpose of the jury trial . . . is to prevent oppression by the Government. "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.

Id. (quoting *Duncan,* 391 U.S. at 155-56).

such a jury was held to be violated by the exclusion of women from the venire.[88] The rationale established in *Peters*[89] was echoed here in that Taylor, a male, was not a member of the excluded class.[90]

In *Lockett v. Ohio,*[91] the Court reviewed the cross section requirement of the sixth amendment as it applied to the practice of death qualification.[92] Lockett was charged with aggravated murder. At her trial, four venirepersons were excluded for cause when they unequivocally expressed that they could not impartially decide guilt given the prospect that the death penalty might be imposed.[93] Lockett claimed that the exclusion of these jurors violated the *Taylor* requirement[94] that juries typify the community.[95] The Court denied this claim holding that the right to a representative jury does not convey the right to be tried by jurors who will disregard the evidence presented and refuse to impose the death penalty.[96] The Court in *Lockett,* however, was not asked to address the cross section requirement as it applied solely to the guilt phase jury, and simply adhered to the precedent of *Witherspoon* to reach its decision.[97]

C. The Cognizable Class Requirement

Duren v. Missouri[98] presented the Court with another situation where women were excluded from the jury venire[99] and introduced the requirement that excluded groups be deemed "distinctive" before a sixth amendment violation can be found.[100] Under the terms of *Duren,* a prima facie violation of

88. *Taylor,* 419 U.S. at 538.

89. *See supra* notes 64-65 and accompanying text.

90. *Taylor,* 419 U.S. at 526.

91. 438 U.S. 586 (1978).

92. *Id.* at 596.

93. *Id.* These jurors were properly excluded under *Witherspoon* since they were nullifiers. *See supra* note 16. *See also* Adams v. Texas, 448 U.S. 38, 50 (1980) ("We repeat that the State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths.").

94. 419 U.S. at 538.

95. *Lockett,* 438 U.S. at 596.

96. *Id.* at 596-97. *See* Mattheson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985); Keeten v. Garrison, 742 F.2d 129, 133-34 (4th Cir. 1984), *cert. denied,* 106 S. Ct. 2259 (1986); Smith v. Balkcom, 660 F.2d 573, 582-83 (5th Cir. 1981), *cert. denied,* 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 596-98 (5th Cir. 1978), *cert. denied,* 440 U.S. 976 (1979); United States *ex rel.* Townsend v. Twomey, 452 F.2d 350, 362-63 (7th Cir. 1971), *cert. denied,* 409 U.S. 854 (1972).

97. *Lockett,* 438 U.S. at 596-97.

98. 439 U.S. 357 (1979).

99. Although women constituted 54% of the population of Jackson County, Missouri where *Duren* arose, only 15% of all jurypersons on venires were women. *See id.* at 364-66.

100. *Id.* at 364; *see* Castaneda v. Partida, 430 U.S. 482, 495 (1977) (Mexican-Americans are a distinctive class); *Thiel,* 328 U.S. at 224 (discussed *supra* notes 77-83 and accompanying

the cross section requirement occurs when venire representation of a distinctive group "is not fair and reasonable in relation to the number of such persons in the community," and when "this underrepresentation is due to systematic exclusion of the group in the jury-selection process."[101] The Court stressed that when any exclusion is made which is tailored to further a significant state interest, proper caution must be exerted to prevent the unnecessary exclusion of broad community groups.[102] Upholding *Taylor,* the Court found women sufficiently distinct so that their exclusion created a prima facie violation of the fair cross section requirement.[103]

Since *Witherspoon*-excludables share attitudes toward capital punishment and the criminal justice system that are distinct from those attitudes possessed by death-qualified jurors,[104] it is significant to discern whether this group of excluded jurors is "distinct" under the terms of *Duren.*[105] In *Adams v. Texas,*[106] the Court refused to allow jurors to be excluded because they were unable to state whether their deliberations on guilt would be in any way affected by the prospect of capital punishment.[107] Such an exclusion was deemed "broader" than those exclusions permitted by *Witherspoon.*[108] The recognition that the absence of such a broad group of jurors would deprive the defendant of an impartial jury during the penalty phase permits the inference to be drawn that a jury could not function properly without the inclusion of the viewpoints and perspectives of these jurors.[109]

Under the statutory sentencing scheme used by the State of Texas, the jury's role at the penalty phase of a bifurcated capital trial is limited to a determination of facts which are used to answer three questions designed to set penalty.[110] In this specific capacity, the Texas penalty phase jury is indistinguishable from any guilt phase jury, whose sole function is to determine

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text); United States v. Yazzie, 660 F.2d 422, 426 (10th Cir. 1981) (Indians are a distinctive class), *cert. denied,* 455 U.S. 923 (1982); *cf.* United States v. Toner, 728 F.2d 115, 130 (2d Cir. 1984) (exclusion of noncitizens is not a constitutional violation); United States v. Olson, 473 F.2d 686, 688-89 (8th Cir.) (persons between the ages 18 and 21 are not a distinct group), *cert. denied,* 412 U.S. 905 (1973); United States v. Gibson, 480 F. Supp. 339 (S.D. Ohio 1979) (members of labor unions are not a cognizable group).

101. 439 U.S. at 364.

102. *Id.* at 370.

103. *Id.* at 367.

104. *See infra* note 125 and accompanying text.

105. 439 U.S. at 364.

106. 448 U.S. 38 (1980).

107. *Id.* at 50.

108. See *supra* note 16 for categorizations of excludable jurors.

109. *See generally Adams,* 448 U.S. at 50.

110. *Id.* at 40-41. At the penalty phase of a bifurcated capital trial, if the jury finds the facts sufficient to answer "yes" to each question below, the death penalty is imposed. A "no" answer to any one question warrants imposition of life imprisonment. The jury must decide:

the facts and apply the law.[111] The *Adams* Court focused on this unique penalty phase jury and prohibited the exclusion of jurors who could not definitively state that their deliberations on issues of fact would be influenced.[112] By citing *Witherspoon,* the Court found that the exclusion of such a broad group of jurors would result in a jury which could not speak for the community.[113] It follows that the distinct perspectives that the Court required these jurors to contribute to the Texas penalty phase jury[114] would similarly be valuable to any guilt phase jury since these juries were considered to serve the same roles.[115]

This reasoning is directly supported by dictum in *Ballew v. Georgia.*[116] In *Ballew,* the State of Georgia issued a conviction using a five-person jury. The petitioner requested a reversal of that conviction alleging that a jury of five could not constitutionally represent the community.[117] The Court found the evidence sufficient to suggest that smaller juries are less likely to engage in "effective group deliberation," and would thereby fail to apply the "common sense of the community to the facts" of a given case.[118] The value choices[119] which are inherent to many jury decisions were also discussed, and the Court emphasized that the counterbalancing of various predispositions and biases on a jury would be jeopardized by limiting jury size to five.[120] Significant in *Ballew* then, is the Court's recognition that the inclusion of various attitudes is vital to a fair, impartial, and representative

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(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon 1981 & Supp. 1986).

111. *See Adams,* 448 U.S. at 54 (Rehnquist, J., dissenting); *see also* Gillers, *Proving the Prejudice of Death-Qualified Juries After* Adams v. Texas*—Reviewing White, Life in the Balance: Procedural Safeguards in Capital Cases,* 47 U. PITT. L. REV. 219, 244-47 (1985).

112. *Adams,* 448 U.S. at 40.

113. *Compare id.* at 50-51 *with Witherspoon,* 391 U.S. at 520. *See McCree,* 106 S. Ct. at 1777.

114. *See generally Adams,* 448 U.S. at 50-51.

115. *See supra* note 111 and accompanying text.

116. 435 U.S. 223 (1978).

117. *Id.* at 226-27. *Cf.* Williams v. Florida, 399 U.S. 78 (1970) (addressing the use of six-person juries in Florida).

118. *Ballew,* 435 U.S. at 232-34.

119. *See Witherspoon,* 391 U.S. at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1957) (juries should reflect society's "evolving standards of decency").

120. *Ballew,* 435 U.S. at 233-34.

jury.[121]

Keeten v. Garrison[122] presented the United States District Court for the Western District of North Carolina with a claim that compliance with the *Witherspoon* death-qualification guidelines causes a prima facie violation of the sixth amendment representativeness requirement.[123] The petitioner presented numerous sociological studies which definitively established that persons with conscientious scruples against the death penalty possess attitudes about the criminal justice system which are distinct from persons who are for the death penalty, and from persons broadly opposed to capital punishment.[124] The Court summarized these studies and established that individuals willing to impose the death penalty tend to favor testimony of the prosecution's witnesses while doubting defense witnesses, advocate stricter crime control measures, feel that the courts too often allow guilty defendants released because of "technical loopholes," and find proof beyond a reasonable doubt more readily than those individuals with conscientious scruples about capital punishment.[125] The Court also found that the disproportionate exclusion of blacks and women was the by-product of death qualification since these groups tend to oppose the death penalty more than white men.[126]

Citing the requirements established by the Supreme Court in *Duren* and *Taylor,* the district court found that persons unwilling to impose the death penalty are a cognizable group in the community, representing eight to twenty-three percent of the population.[127] Paralleling *Witherspoon,* the court found that an exclusion of these jurors would prevent the guilt phase jury from reflecting the "collective conscience of the community."[128] The court then focused on whether the state's interest in saving taxpayer money by preserving the use of single juries in the bifurcated jury procedure justified exclusion of these jurors.[129] Financial reasons were deemed insufficient justification and the court found a violation of the sixth amendment cross

121. *See id.* at 232-39.

122. 578 F. Supp. 1164 (W.D.N.C.), *rev'd,* 742 F.2d 129 (4th Cir. 1984).

123. *Id.* at 1170.

124. *See id.* at 1171-77, 1181-82. Keeten presented the following: Fitzgerald, *supra* note 24; Bronson-Colorado, *supra* note 24; Bronson-California, *supra* note 24; Harris, *supra* note 24; Zeisel, *supra* note 20; Wilson, *supra* note 20; Goldberg, *supra* note 20, Jurow, *supra* note 24; Cowan, *supra* note 24; Thompson, *supra* note 24; Haney, *supra* note 24.

125. *Keeten,* 578 F. Supp. at 1171-77, 1181-82.

126. *Id.* at 1182.

127. *Id.* at 1179-81. *See* Harris, *supra* note 24 (*Witherspoon*-excludables represent 23% of all venirepersons); Bronson-Colorado, *supra* note 24 (8-9%); Fitzgerald, *supra* note 24 (17%).

128. *Compare Keeten,* 578 F. Supp. at 1181 *with Witherspoon,* 391 U.S. at 519.

129. *Keeten,* 578 F. Supp. at 1186-87. "The Attorney General argued . . . [that] [s]eparate trials of those issues before separate juries, or separate trial of the punishment issue before a freshly constituted jury, would be too much of a burden . . . on the taxpayers." *Id.* at 1186.

section requirement.[130]

The Fourth Circuit reversed this decision, finding that the state's interest in the use of a single jury outweighed the defendant's interest in a nondeath-qualified guilt phase jury.[131] Although the court reviewed evidence on juror attitudes not previously available, it opted to follow the earlier decisions of the Fifth[132] and Eleventh[133] Circuit Courts of Appeals regarding the cognizability of *Witherspoon*-excludables.[134] Clearly ignoring the suggested use of two juries in capital cases, the court cited *Lockett* and held that the right to a representative jury does not convey the right to be tried by jurors who will not follow the law.[135]

As these cases demonstrate, courts have interpreted the sixth amendment representativeness requirement as prohibiting the intentional exclusion of cognizable groups of individuals from jury venires.[136] Groups such as blacks and women have been deemed sufficiently cognizable so that their exclusion has been found to unconstitutionally fragment the spectrum of qualities and perspectives which are necessary to a representative jury.[137] Similarly, one court has reviewed extensive evidence which substantiates the claim that jurors who are excluded from service on capital juries under the *Witherspoon* requirements possess distinct attitudes which are essential to a fair, representative jury.[138] This court has advanced the notion that the subset of these jurors who could fairly determine guilt[139] should constitutionally be included on jury panels during the guilt determination portion of bifur-

130. *Id.* at 1187 ("The State of North Carolina can afford the few extra dollars, if any, that it might cost to provide fair trials to persons accused of capital felonies.").

131. Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984).

132. *E.g.*, Smith v. Balkcom, 660 F.2d 573, 582 (5th Cir. 1981) ("It must be remembered that a jury which reflects a fair cross-section of the community is a goal that is never to be achieved at the cost of leaving on a jury those veniremen who are legitimately disqualified."), *cert. denied*, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 597 (5th Cir. 1978) ("[W]e believe that Florida . . . has satisfactorily shown the 'weightier reasons' required by the Supreme Court in *Taylor* for the exclusion of such veniremen."), *cert. denied*, 440 U.S. 976 (1979).

133. *E.g.*, Corn v. Zant, 708 F.2d 549, 565 (11th Cir. 1983) ("[W]hen veniremen are properly struck under *Witherspoon*, their exclusion does not violate the representative cross-section requirement of the sixth and fourteenth amendments."), *cert. denied*, 467 U.S. 1220 (1984).

134. *Keeten*, 742 F.2d at 133-34.

135. *Id.* at 133 (quoting *Lockett*, 438 U.S. at 596-97).

136. *See, e.g.*, *Duren*, 439 U.S. at 364 (discussed *supra* notes 98-103 and accompanying text).

137. *E.g.*, *Peters*, 407 U.S. at 503-04 (discussed *supra* notes 58-65 and accompanying text); *Taylor*, 419 U.S. at 530 (discussed *supra* notes 84-90 and accompanying text).

138. *E.g.*, *Keeten*, 578 F. Supp. at 1181-82 (discussed *supra* notes 122-30 and accompanying text).

139. *See supra* note 16 for a discussion of guilt phase includables.

cated capital procedures.[140] This contention has raised some controversy in the lower courts[141] and was addressed by the Supreme Court in *McCree.*

II. CONVICTION-PRONENESS OF DEATH-QUALIFIED JURIES

A. Historical Conceptions of the Impartial Jury

Long before the sixth amendment right to an impartial jury was made applicable to the states,[142] the due process and equal protection clauses of the fourteenth amendment guaranteed all accused individuals a fair trial before a neutral jury.[143] In 1886, this concept was addressed in *Hayes v. Missouri,*[144] where the Court reviewed the constitutionality of a Missouri statute[145] specifying the peremptory challenges which were permissible in a capital trial.[146] To preserve the ideal of impartiality, the Court found that peremptory challenges were necessary to secure a neutral jury, free "from any bias against the accused [and] . . . prejudice against [the] prosecution."[147]

In the context of the fourteenth amendment, the Court once again reviewed the concept of jury impartiality in *Fay v. New York.*[148] There, the petitioner alleged that the "blue ribbon" jury,[149] which found him guilty, was partial to the prosecution since all laborers, service employees, and wo-

140. *Keeten,* 578 F. Supp. at 1181-82 (discussed *supra* notes 122-30 and accompanying text).

141. *See supra* notes 132-33 and accompanying text.

142. *See Duncan,* 391 U.S. at 147-58 (discussed *supra* notes 74-76 and accompanying text).

143. *In re* Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."); Fay v. New York, 332 U.S. 261, 285 (1947) (equal protection analysis is used to determine the constitutionality of a New York statute governing juror selection.).

144. 120 U.S. 68 (1887).

145. MO. REV. STAT. §§ 1900, 1902 (1879) which provided in pertinent part that: "in all capital cases, except in cities having a population of over 100,000 inhabitants, the state shall be allowed eight peremptory challenges to jurors, and, in such cities, shall be allowed fifteen." *Hayes,* 120 U.S. at 69 (citing the statute).

146. *Hayes,* 120 U.S. at 70.

147. *Id.*

148. 332 U.S. 261 (1947). *See In re* Murchison, 349 U.S. at 133. The ideal of an impartial jury is also discussed in this case. In reviewing the constitutionality of the one-man judge jury, the Court noted that the absence of actual bias is the goal our system of law has always endeavored to achieve. The Court held that it was unconstitutional for a judge who served as a one-man grand jury to try, on a later contempt charge, the witnesses who perjured themselves before him in the grand jury hearing. *Id.* at 139.

149. The blue ribbon or "special" jury is ordered for a particular trial at the discretion of the court upon a showing that the case is especially technical or intricate. Venirepersons are drawn from voting records and are questioned regarding their qualifications to hear a specific case. Individuals are selected to serve on this jury based on their special qualifications. *See Fay,* 332 U.S. at 268-69.

men were excluded from the panel.[150] The Court sought the appropriate balance[151] between the state's interest in obtaining qualified jurors and the defendant's interest in a fair and unbiased determination of guilt.[152] Finding no inconsistencies between the conviction rates of special juries as compared to those of ordinary juries, the Court upheld the state's use of blue ribbon juries.[153] However, the Court entertained the possibility that if a disparity in the conviction ratios of these juries were established, it would indicate that the use of a special jury violated an individual's right to an impartial jury.[154]

B. Prior Interpretations of the Conviction-Proneness Evidence

In *Witherspoon,* the Supreme Court first wrestled with the emerging social science research addressing the conviction-proneness of death-qualified juries.[155] While finding these early studies too speculative to support a constitutional determination that death-qualified juries are not impartial on the question of guilt, the Court recognized that the conviction-proneness claim might someday be substantiated by further proof.[156] Foreseeing the possibility that such proof would be offered, the *Witherspoon* Court speculated that for the practice of using single juries in bifurcated capital trials to continue, the state's interest in single juries must outweigh the defendant's interest in a completely fair determination of guilt.[157] To force a decision on this issue, legal scholars began research in order to conclusively establish the conviction-proneness indicated by the early studies. Varying degrees of this research have been incorporated in numerous post-*Witherspoon* impartiality claims.[158]

In 1976, the United States Court of Appeals for the Seventh Circuit reviewed additional conviction-proneness evidence in *United States ex rel. Clark v. Fike.*[159] In attempting to determine if a correlation existed between a juror's attitude about the death penalty and his attitude toward conviction,

150. *Id.* at 272-73.

151. *See, e.g.,* Tumey v. Ohio, 273 U.S. 510, 532 (1927) ("Every procedure which would offer a possible temptation . . . not to hold the balance nice, clear and true between the State and the accused denies the latter due process of law.").

152. *See generally Fay,* 332 U.S. at 266-69.

153. *Id.* at 285-86.

154. *Id.* at 286.

155. *Witherspoon,* 391 U.S. at 516-18 & n.10 (discussed *supra* note 20 and accompanying text).

156. *Id.* at 520 n.18 (discussed *supra* note 22 and accompanying text).

157. *Id.*

158. *E.g.,* Bumper v. North Carolina, 391 U.S. 543 (1968); Mattheson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985); United States *ex rel.* Townsend v. Twomey, 452 F.2d 350, 362 (7th Cir.), *cert. denied,* 409 U.S. 584 (1972).

159. 538 F.2d 750, 761-62 (7th Cir. 1976), *cert. denied,* 429 U.S. 1064 (1977).

the court reconsidered the three studies available in *Witherspoon*,[160] supported by five additional studies.[161] Although the evidence adduced by the court from the Jurow study[162] was found to indicate that death-qualified juries tended toward conviction, the court viewed this as a correlation of attitudes which was deemed insufficient to prove a constitutional violation of the right to an impartial jury.[163]

Reviewing a similar claim, the United States Court of Appeals for the Fifth Circuit in *Spinkellink v. Wainwright*[164] used a different approach to the conviction-proneness issue. In a circuitous fashion, the court reasoned that partiality as a legal concept is not *proven* when it can be factually shown that death-qualified juries are more conviction-prone than nondeath-qualified juries.[165] The court emphasized that by establishing that a jury tends toward conviction-proneness, the petitioner fails to bridge the gap of proving actual partiality since studies about attitudes are too general to predict behavior.[166] To substantiate this decision, the court quoted at length from a pre-*Witherspoon* opinion which curiously presupposes that the necessary and missing element of proof in these cases would show that death-qualified jurors are consciously "hostile" to criminal defendants.[167]

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160. *See supra* note 20.

161. In addition to the Wilson, Goldberg, and Zeisel studies, *supra* note 20, the *Clark* Court considered Bronson-Colorado, *supra* note 24; Harris, *supra* note 24; Rokeach & McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQ. L. REV. 125 (1970); Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issues of Guilt?*, 39 TEX. L. REV. 545 (1961); R. Crosson, An Investigation Into Certain Personality Variables Among Capital Trial Jurors (unpublished Western Reserve Univ. doctoral dissertation, January 1966), *cited in* Bumper v. North Carolina, 391 U.S. 543, 546 n.6; and Jurow, *supra* note 24.

162. *See supra* note 24.

163. *Clark*, 538 F.2d at 762.

164. 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

165. *Spinkellink*, 578 F.2d at 593-94.

> When the petitioner asserts that a death-qualified jury is prosecution-prone, he means that a death-qualified jury is more likely to convict than a nondeath-qualified jury. Proof that this proposition is true is far from conclusive, but for the moment we will assume its validity. Even if it is true, the petitioner's contention still must fail. That a death-qualified jury is more likely to convict than a nondeath-qualified jury does not demonstrate which jury is impartial. It indicates only that a death-qualified jury might favor the prosecution and that a nondeath-qualified jury might favor the defendant.

Id. (footnotes omitted).

166. *See generally id.* at 594.

167. *Id.* at 595 (quoting Turberville v. United States, 303 F.2d 411, 420-21 (D.C. Cir. 1962), *cert. denied*, 370 U.S. 946 (1962)).

> No proof is available, so far as we know, and we can imagine none, to indicate that, generally speaking, persons not opposed to capital punishment are so bent in their

Once again, in 1981, *Smith v. Balkcom*[168] presented the Fifth Circuit with the contention that a death-qualified jury violates the sixth amendment impartiality requirement.[169] *Smith* presented numerous additional social science studies,[170] not available when *Witherspoon, Clark,* and *Spinkellink* were decided, which offered uncontradicted support for the conviction-proneness argument.[171] Consistent with the rationale of *Spinkellink,*[172] the court concluded that this additional data was irrelevant since proof of conviction-proneness does not constitute proof of partiality.[173]

As in *Spinkellink,*[174] the Fifth Circuit did not present a definition of its concept of impartiality[175] and merely advanced that the new studies established a standard for determining a juror's tendency to convict, "not a standard for measuring impartiality per se."[176] The court went further and defined Smith's request for an impartial jury in this context as a request for a "defendant prone" jury or a jury likely to acquit.[177]

The Supreme Court offered little support for the Fifth Circuit's reasoning on the requirements for proof of partiality in *Maggio v. Williams.*[178] In a per curiam opinion, the Court vacated Williams' stay of execution, finding no

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> hostility to criminals as to be incapable of rendering impartial verdicts on the law and the evidence in a capital case.

Id. (quoting *Turberville,* 303 F.2d at 420).

168. 660 F.2d 573 (5th Cir. 1981).

169. *Id.* at 575.

170. In addition to the Wilson, Goldberg, and Zeisel studies, *supra* note 20, reviewed in *Witherspoon,* the petitioner presented Bronson-Colorado, Harris, Jurow, and Bronson-California, *supra* note 24, and preliminary drafts of Fitzgerald, Ellsworth, Thompson, and Haney, *supra* note 24.

171. *Cf.* Osser & Bernstein, *supra* note 25.

172. 578 F.2d at 593-94.

173. *Smith,* 660 F.2d at 578 n.13.

174. 578 F.2d at 593-95.

175. *See generally Smith,* 660 F.2d at 575-79.

176. *Id.* at 578 n.13.

177. *Id.* at 579.

> The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most* likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury *least* likely to convict or impose the death penalty, nor that the defense must present its case to the jury *least* likely to find him innocent or vote for life imprisonment. Yet Smith here urges that he has a constitutional right to a jury *more* likely than a death-qualified jury to find him innocent.

Id. (emphasis in original). Since the impartial, nondeath-qualified jury Smith requested was the equivalent of any jury used in noncapital trials, the Court's admonition of Smith's request is questionable, at best. *See* Gross, *Determining the Neutrality of Death-Qualified Juries: Judicial Appraisal of Empirical Data,* 8 LAW & HUM. BEHAV. 7, 13 (1984).

178. 464 U.S. 46 (1983) (per curiam).

merit in any of the constitutional issues raised.[179] Significant, however, were the Court's comments regarding Williams' sixth amendment claim that he was denied a representative jury.[180] On the issue as to whether Williams' death-qualified jury was less than neutral with respect to guilt, the Court repeated its position in *Witherspoon,* finding the evidence too "tentative and fragmentary" to establish that the jury was conviction-prone.[181] The Court did not adopt the reasoning of the Fifth Circuit which would have avoided an evaluation of the evidence while finding no merit whatsoever in the claim.[182]

The *Maggio* opinion clearly indicated the Supreme Court's intention[183] not to foreclose the invitation for proof of conviction-proneness which was first presented in *Witherspoon.*[184] Consistent with this rationale, the United States District Court for the Western District of North Carolina in *Keeten v. Garrison*[185] reviewed an extensive evidentiary record[186] and found that the death-qualified jury which convicted Keeten of murder was unconstitutional because it did not represent the community and because it failed to meet the impartiality requirement of the sixth amendment.[187] The court found that the sociological studies demonstrating that death-qualified jurors are pro-prosecution in their attitudes and beliefs also demonstrate that these attitudes translate into pro-prosecution behavior.[188] Since such behavior unnecessarily skews jury verdicts against the accused, the court found sufficient

179. *Maggio,* 464 U.S. at 50.

180. *Id.*

181. *Id.*

182. *See* Smith v. Balkcom, 660 F.2d at 578 n.12. *Cf. Maggio,* 464 U.S. at 64 n.7 (Brennan, J., dissenting):

> The Court has previously noted that, "[i]n light of . . . presently available information," it cannot be said that such juror exclusion results in an unrepresentative jury on the issue of guilt. . . . That conclusion . . . was reached 15 years ago, and recent cases and scholarship suggest that it may need to be reexamined. . . . An evidentiary hearing on this issue is clearly necessary.

Id. (quoting *Witherspoon,* 391 U.S. at 516-18) (citation omitted). *See* Woodard v. Hutchins, 464 U.S. 377, 380 (1984) (Rehnquist, J., with whom O'Connor, J., joined concurring): "But assuming that the merits of the *Witherspoon* aspect . . . are necessarily before us, we find that nothing in the material presented by respondent would show that the particular jurors who sat in his case were 'less than neutral with respect to *guilt.*' " *Id.* (quoting *Witherspoon,* 391 U.S. at 520 n.18) (emphasis in original).

183. *See* Knighton v. Maggio, 468 U.S. 1229, 1229-30 (1984) (Brennan, J., dissenting).

184. 391 U.S. at 520 n.18 (discussed *supra* note 22 and accompanying text).

185. 578 F. Supp. 1164 (W.D.N.C. 1984), *rev'd,* 742 F.2d 129 (4th Cir. 1984).

186. The studies presented as evidence of the conviction-proneness of death-qualified juries were the same studies which led the Court of Appeals for the Eighth Circuit in *Grigsby* to find the constitutional violations addressed in *McCree* (discussed *supra* notes 24, 26 and accompanying text).

187. *Keeten,* 578 F. Supp. at 1185.

188. *Id.* "[P]ersons who are willing to impose the death penalty not only share a set of

justification to invalidate the state's use of death-qualified juries during the guilt phase of capital trials.[189]

The Fourth Circuit reversed this decision, adopting the reasoning of the Fifth Circuit from *Spinkellink* and *Smith*.[190] Dismissing the conviction-proneness studies as irrelevant, the court contended that a request for a nondeath-qualified jury was, in effect, a request for a jury more likely to find innocence[191] than a death-qualified jury.[192] Since a defendant has a constitutional right only to an impartial jury, the court reasoned that the removal of *Witherspoon*-excludables did not violate any constitutional requirements.[193] The court ignored the premise central to *Witherspoon* which demonstrated that nondeath-qualified juries are, in effect, identical to typical noncapital juries. Such juries have always been considered fair and impartial.[194] The defendant's request, then, was for a jury no more acquittal-prone than the typical, presumptively impartial, noncapital jury. By reasoning that a request for a nondeath-qualified jury is equivalent to a request for a jury partial to the defendant, the Fourth Circuit has undermined the precedent which has supported *Witherspoon* as a constitutional rule since 1968.[195]

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attitudes that are more favorable to the prosecution, but also are predictably more likely *to decide* in a manner that favors the prosecution." *Id.* (emphasis added).

189. *Id.*

190. *Keeten*, 742 F.2d at 130.

191. *See* Winick, *Prosecutional Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 59 n.199 (1982).

> Underlying the [Court's] . . . concerns may be the suspicion that 'automatic life imprisonment' jurors may really be 'automatic acquittal' jurors, although they swear at voir dire that they are not. However, any such suspicion could not alone justify the exclusion of these jurors consistent with the explicit holding of *Witherspoon* and *Adams* . . . .

Id. (discussed *supra* note 16—groups 5 and 6).

192. *Keeten*, 742 F.2d at 134.

193. *Id. Cf.* Winick, *supra* note 191, at 59-60. Addressing the reasoning used in the Fifth Circuit cases and in *Keeten*, Professor Winick asserts:

> This conclusion appears inconsistent with *Witherspoon*'s central holding that exclusion of 'oppose death penalty' jurors results in an unconstitutionally death prone jury. As applied to *Witherspoon*'s facts, the Fifth Circuit approach would presumably call for affirmance of *Witherspoon*'s death sentence on the basis that juries including 'oppose death penalty' jurors are more life imprisonment-prone than death-qualified juries, and therefore biased in favor of the defendant. But *Witherspoon* explicitly rejected this contention in favor of a jury that the Court deemed more impartial than one which excludes all death penalty objectors. *Witherspoon* thus suggests that if a capital jury resembling the jury that sits in the typical noncapital case—universally regarded as fair and impartial—is found to be significantly less conviction-prone than a death-qualified jury, then the latter would be constitutionally suspect as a trier of the defendant's guilt.

Id. (footnote omitted).

194. *See generally Witherspoon*, 391 U.S. at 516-17.

195. Winick, *supra* note 191, at 59-60.

C. The Retroactivity Issue

In 1985, the United States Court of Appeals for the Eighth Circuit in *Grigsby v. Mabry*[196] reviewed the conviction-proneness evidence[197] and created controversy among the circuits by holding that death-qualified juries are unconstitutionally partial on the question of guilt or innocence.[198] In the wake of *Grigsby, Woodard v. Sargent*[199] presented the Eighth Circuit with the claim that the *Grigsby* decision should be applied retroactively to invalidate prior convictions issued by death-qualified juries.[200] Paralleling those principles first announced in *Witherspoon,*[201] the court identified the purpose of *Grigsby* as insuring the reliability of jury verdicts, and held that the *Grigsby* rule must be applied retroactively.[202] The court reasoned that such retroactive application was necessary regardless of the effect it would have on existing convictions in capital cases.[203] The court added that a full retroactive effect is mandated in cases such as these where the constitutional accuracy of criminal trials is at issue.[204]

As these cases illustrate, jury impartiality has always been a goal of our judicial system.[205] To preserve this ideal, the *Witherspoon* Court examined the concept of the neutral jury and speculated that one-day evidence would be presented to substantiate the claim that death-qualified juries are less than neutral with respect to guilt.[206] The evidence which was considered "tentative" in *Witherspoon,* today conclusively documents the conviction-proneness of death-qualified juries.[207] The courts have interpreted this evidence in a variety of ways,[208] and at least one court has held that such a conviction-prone jury violates the Constitution's impartiality require-

196. 758 F.2d 226 (8th Cir. 1985).

197. *See supra* notes 24, 26, 43-44 and accompanying text.

198. *Grigsby,* 758 F.2d at 229.

199. 753 F.2d 694 (8th Cir. 1985).

200. *Id.* at 695. Billy Woodard was tried before a death-qualified jury as specified in *Witherspoon.* The jury convicted Woodard of capital felony murder and sentenced him to death.

201. 391 U.S. at 523 n.22 (discussed *supra* notes 67-73 and accompanying text).

202. *Woodard,* 753 F.2d at 697.

203. *Id.* at 696.

204. *Id.* at 697. *See generally* White, *supra* note 73, at 1205-20.

205. *E.g., Hayes,* 120 U.S. at 70 (discussed *supra* notes 144-47 and accompanying text).

206. *Witherspoon,* 391 U.S. at 520 n.18 (discussed *supra* notes 155-58 and accompanying text).

207. *E.g., Keeten,* 578 F. Supp. at 1185 (discussed *supra* notes 185-89 and accompanying text). *See McCree,* 106 S. Ct. at 1764.

208. *Compare Clark,* 538 F.2d at 750 (discussed *supra* notes 159-63 and accompanying text) *with Maggio,* 464 U.S. at 46 (discussed *supra* notes 178-84 and accompanying text).

ment.[209] The resulting controversy is addressed by the Supreme Court in *McCree.*[210]

III. *LOCKHART V. MCCREE:* CONVICTION-PRONENESS AND THE CONSTITUTIONALITY OF DEATH-QUALIFIED JURIES

A. The Removal of Witherspoon*-Excludables Does Not Violate the Representative Cross Section Requirement of the Sixth Amendment*

Historically, the Court has depicted the representative jury as a group of individuals possessing the collective values[211] and common sense of the community.[212] The intentional exclusion of any group of persons possessing unique qualities and perspectives has been held to undermine the idea of the impartial jury which interjects community common sense into the adversarial arena of the courtroom.[213] In *McCree,*[214] the Court granted the state an exception[215] to these long preserved values by finding that the Constitution does not prohibit a procedure which has the effect of intentionally eliminating from panels an entire subset of fair and impartial guilt phase jurors because they interfere with the state's interest in using jurors willing to consider the death penalty during the second phase of bifurcated capital trials.[216]

The Court justified this decision by adjudging *Witherspoon*-excludables an "indistinct"[217] group under the prima facie requirements of *Duren.*[218] While acknowledging that no definition of the term "distinct" has ever been formulated, and admitting that no definition would be forthcoming, the Court nevertheless utilized the nebulous nature of this requirement as the basis for its entire cross-sectional analysis.[219]

The Court emphasized that distinctiveness has been deemed applicable

209. *See Keeten,* 578 F. Supp. at 1185 (discussed *supra* notes 185-89 and accompanying text).

210. 106 S. Ct. at 1762-64.

211. Smith v. Texas, 311 U.S. at 130 (discussed *supra* notes 53-56 and accompanying text); *Peters,* 407 U.S. at 503-04 (discussed *supra* notes 63-65 and accompanying text).

212. *Ballew,* 435 U.S. at 232 (discussed *supra* notes 116-21 and accompanying text).

213. *Peters,* 407 U.S. at 503-04 (discussed *supra* notes 57-65 and accompanying text).

214. 106 S. Ct. at 1758.

215. *Grigsby,* 569 F. Supp. at 1282 ("death qualification is the only procedure in our criminal justice system which has the effect of systematically excluding an entire group of fair and impartial jurors because of a particular attitude that they possess upon a matter that is irrelevant to their service as jurors in the trial of the issue of guilt or innocence of the accused.").

216. *McCree,* 106 S. Ct. at 1759-60.

217. *Id.* at 1766.

218. 439 U.S. at 364 (discussed *supra* notes 98-103 and accompanying text).

219. *McCree,* 106 S. Ct. at 1765.

only to groups such as blacks[220] and women[221] whose immutable characteristics were once the basis for discriminatory exclusion.[222] Precedent provides a sound basis for the Court's hesitancy to extend cross-sectional requirements to groups other than racial minorities and women.[223] However, an examination of the Court's rationale in these cases reveals that it is the excluded group's perspectives and qualities that are essential to a proper jury, not the immutable characteristic that gave rise to discrimination.[224] This rationale provides that basis for a fair conclusion that *Witherspoon*-excludables are a distinct group in the community.[225]

Common within each group deemed cognizable by the Court are shared attitudes and perspectives that are necessary to a representative jury.[226] An examination of excluded jurors in capital cases reveals that their restriction from jury service is based on a shared belief that the death penalty is never an appropriate punishment for any convicted criminal.[227] Social science studies have shown that, corresponding to this shared belief about capital punishment, these excluded jurors possess distinct views about the criminal justice system and about society's role in the deterrence of heinous crimes.[228] Although the *McCree* majority disagrees, it should be noted that this excluded set of jurors would inject extremely relevant views into guilt phase deliberations and should therefore be included on these jury panels.[229]

The decision of the *McCree* majority not to extend cross section requirements to scrupled guilt phase jurors is inconsistent with the basic premise that has established *Witherspoon* as a universally accepted constitutional measure.[230] The decision to limit permissible juror exclusions in *Witherspoon* reflects the Court's desire to impose the least intrusive means to accommodate the state's interest in obtaining juries capable of implementing their capital punishment statutes.[231] The courts have consistently inter-

220. *E.g., Peters,* 407 U.S. at 503-04 (discussed *supra* notes 57-65 and accompanying text).

221. *E.g., Taylor,* 419 U.S. at 538 (discussed *supra* notes 84-90 and accompanying text); *Duren,* 439 U.S. at 367 (discussed *supra* notes 98-100 and accompanying text).

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

223. *But see Thiel,* 328 U.S. at 220 (discussed *supra* notes 77-83 and accompanying text).

224. *E.g., Peters,* 407 U.S. at 503-04 (discussed *supra* notes 63-65 and accompanying text); *Thiel,* 328 U.S. at 220 (discussed *supra* notes 77-83 and accompanying text); *Witherspoon,* 391 U.S. at 519-20 (discussed *supra* notes 66-73 and accompanying text).

225. *See, e.g., Grigsby,* 569 F. Supp. at 1284-85.

226. *E.g., Peters,* 407 U.S. at 503-04 (discussed *supra* notes 63-65 and accompanying text); *Taylor,* 419 U.S. at 538 (discussed *supra* notes 84-90 and accompanying text).

227. *See supra* note 16 and accompanying text.

228. *See generally supra* notes 124-26 and accompanying text.

229. *See* Winick, *supra* note 191, at 70-73.

230. *Witherspoon,* 391 U.S. at 519-20 (discussed *supra* notes 66-73 and accompanying text).

231. *Id. See* Winick, *supra* note 191, at 56-59.

preted this to mean that a broader than necessary exclusion of jurors intrudes on a defendant's acknowledged interest in a representative jury.[232] This rationale should be extended to McCree's guilt phase jury, thereby prohibiting the unnecessary exclusion of guilt phase includable jurors who could fairly and impartially determine guilt.[233]

As the framers of the Constitution intended, accused individuals should receive the fairest trial before a jury which is most representative of the community.[234] To guarantee that this valued ideal is advanced, the Court must protect each individual's interest in a representative jury by guaranteeing that the conscience of the community is reflected in jury venires.[235] The *McCree* majority, by refusing to acknowledge the distinctiveness of *Witherspoon*-excludables, has allowed the state to continue its practice of economizing while compromising a defendant's interest in a truly representative guilt phase jury.[236] This decision, in effect, gives the state full discretion to intentionally and systematically exclude from the guilt phase of capital trials at least eleven to seventeen percent[237] of all fair and impartial jurors.[238]

B. The Impartiality of Death-Qualified Juries

Emerging from the *Witherspoon* succession of case law are two distinct approaches to the implications of the conviction-proneness evidence and the definition of an impartial jury.[239] Under the more traditional approach, which echoes the rationale that established *Witherspoon* as a stronghold in our scheme of justice,[240] the exclusion of a group of jurors that is less likely than the general population to vote for conviction violates the Constitution.[241] In stark contrast to these principles, the approach advanced by the Fourth and Fifth Circuits[242] finds no constitutional violation in the use of

232. *Adams*, 448 U.S. at 50-51 (discussed *supra* notes 106-15 and accompanying text).

233. *See generally supra* note 16.

234. *Peters*, 407 U.S. at 503-04 (discussed *supra* notes 63-65 and accompanying text).

235. *See Ballew*, 435 U.S. at 232-39 (discussed *supra* notes 116-21 and accompanying text).

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

237. *See supra* note 130; *see also Grigsby*, 569 F. Supp. at 1294; *McCree*, 106 S. Ct. at 1772 & n.3 (Marshall, J., dissenting).

238. The group of jurors referred to here are guilt phase includables. Sitting only during the guilt phase of a trial, these jurors would impartially determine the facts of a given case and apply the law. Because Arkansas utilized a unitary, bifurcated jury process, guilt phase includables are excluded simply because they will not vote to impose the death penalty during the sentencing phase of the bifurcated trial. *See supra* notes 12-16 and accompanying text.

239. *Compare Smith*, 660 F.2d at 573 (discussed *supra* notes 168-77 and accompanying text) *with Maggio*, 464 U.S. at 46 (discussed *supra* notes 178-82 and accompanying text).

240. *Witherspoon*, 391 U.S. at 520 n.18. *See* discussion *supra* note 22.

241. *E.g.*, *McCree*, 106 S. Ct. at 1775-76 (Marshall, J., dissenting).

242. *See Keeten*, 742 F.2d at 129 (discussed *supra* notes 190-95 and accompanying text);

conviction-prone juries.[243]

In *McCree*,[244] the majority opinion of Justice Rehnquist utilized elements of both of these approaches to find that the Constitution does not prohibit the state from death-qualifying jurors.[245] Although the opinion refrained from directly citing the circuit court decisions,[246] it seemed to parallel those principles first established in *Spinkellink*[247] by contending that partiality as a legal concept is not proven by studies referring to "some hypothetical mix of individual viewpoints."[248] The Court ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases.[249] Instead, the Court explained that a jury randomly selected from the community is presumed to be impartial, regardless of the actual mix of viewpoints represented on the panel.[250] This rationale was offered absent acknowledgment that the process of death qualification allows the state to systematically exclude that portion of the population opposed to capital punishment.[251]

To fortify this analysis, Justice Rehnquist stepped back into the traditional *Witherspoon* mode of judicial review by scrutinizing the conviction-proneness studies and reiterating criticisms of those studies.[252] By preserving the state's use of the death-qualified jury in bifurcated procedures while conceding that the Cowan study[253] was methodologically valid and sufficient to indicate that death qualification produces a jury prone to convict,[254] Justice Rehnquist then indirectly answered the question presented by the *Witherspoon* Court in 1968.[255] By interpreting McCree's request for a nondeath-qualified jury at the guilt phase of his trial as a request for a jury which will not conscientiously follow the law, Justice Rehnquist, in effect, held that the state's interest in the use of single juries in a bifurcated trial is vindicated at

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Spinkellink, 578 F.2d at 582 (discussed *supra* notes 164-67 and accompanying text); *Smith*, 660 F.2d at 573 (discussed *supra* notes 168-77 and accompanying text).

243. *E.g.*, *Spinkellink*, 578 F.2d at 594 (discussed *supra* note 166 and accompanying text).

244. 106 S. Ct. at 1758.

245. *Id.* at 1764.

246. The Fourth Circuit *Keeten* opinion is cited only in a footnote. *See McCree*, 106 S. Ct. at 1762 n.3.

247. 578 F.2d at 594 (discussed *supra* notes 164-67 and accompanying text).

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

249. *See generally id.* at 1764.

250. *Id.* at 1770.

251. *See generally id.*

252. *Id.* at 1762-63.

253. *See supra* note 24.

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

255. *Witherspoon*, 391 U.S. at 520 n.18. *See supra* note 22.

the expense of the defendant's interest in a completely fair determination of guilt.[256]

Justice Marshall's dissent strongly criticized the majority opinion while heartily advocating the application of a conventional *Witherspoon* analysis of the conviction-proneness evidence.[257] While charging the majority with misconstruing the constitutional parameters of the impartiality requirement, Justice Marshall firmly contended that the logic which led the *Witherspoon* Court to find the jury partial during the penalty phase determination must be adopted to *McCree*'s guilt phase jury.[258]

Addressing the significance of the social science research indicating that pro-prosecution attitudes of death-qualified jurors translate into impartial jury deliberations and verdicts, the dissenters advocate using alternate approaches to the unitary jury bifurcated trial procedure.[259] Justice Marshall pointed out that the only justifications that the state advances to preserve the use of a single jury are savings in court time and financial costs.[260] Because capital cases are relatively infrequent, the dissent indicated that empanelling two juries for capital cases would not greatly inflate court costs or jeopardize court efficiency.[261] Also, since not all defendants are found guilty, the court would not have to conduct a death-qualifying voir dire each time a prosecutor requests the death penalty.[262] This would only be done if guilt is found.[263]

Since the implication that death-qualified juries are conviction-prone is well documented, Justice Marshall observed that this information unnecessarily taints the reliability of the guilt determination process.[264] This unreliability is particularly repugnant to the dissenters because it affects accused individuals who may ultimately face death as their criminal sanction.[265] In such a context, Justice Marshall concluded that financial considerations should never take priority over an individual's constitutional rights.[266]

Most significant in the *McCree* majority opinion, is the Court's conclusion that conviction-proneness does not constitute partiality. For impartiality to retain some cogent definition as a legal concept, however, it must be affected

256. *See generally McCree,* 106 S. Ct. at 1770.
257. *Id.* at 1775 (Marshall, J., dissenting).
258. *Id. See supra* notes 16-22 and accompanying text.
259. *McCree,* 106 S. Ct. at 1781 (Marshall, J., dissenting).
260. *Id.*
261. *Id.*
262. *Id.*
263. *Id.*
264. *Id.* at 1782.
265. *See id.*
266. *See generally id.* at 1780-82.

by evidence that a jury is predisposed to rule in favor of one party. This notion is especially relevant when considering the compelling evidence demonstrating that the predisposition of death-qualified juries to vote in favor of conviction causes skewed jury verdicts which give the state a statistically significant advantage over accused individuals.[267] From the evidence presented, it seems apparent that by ordering an accused individual to present his case to a jury which is more likely to convict him than a jury randomly drawn from the community, the Court has disregarded the fundamental requirement that all defendants, even capital defendants, are guaranteed a trial before an impartial jury.[268]

To justify overlooking the implications of the conviction-proneness claim, the Court unnecessarily focused on the state's interest in conserving time and money. Obviously, some additional costs would be incurred if the states were ordered to modify the present capital procedure and impose a new constitutional rule retroactively.[269] However, it seems that these additional costs should be irrelevant in a society that values the essential fairness of its system of justice. The continued use of single juries in bifurcated capital trials lessens the reliability of guilt determinations and gives the prosecution an unprecedented advantage over accused individuals. Although *McCree,* in effect, forecloses the invitation for additional conviction-proneness evidence, a procedure such as death qualification should be discontinued until all sides agree that definitive proof of the impartiality of capital juries has been presented.

IV. CONCLUSION

In *Lockhart v. McCree,* the Supreme Court concluded that the use of death-qualified juries during the guilt phase of bifurcated trials does not offend the constitutional requirements of an impartial jury, drawn from a fair cross section of the community. *Witherspoon*-excludables, distinguishable by their shared attitudes and beliefs, were not found to be a sufficiently distinct group in the community to warrant cross-sectional representation. Additionally, studies have found that the exclusion of these jurors results in a jury which favors the prosecution in its attitudes and conclusions. In deeming this predisposition constitutional, the Court in *McCree* reasoned that conviction-proneness is not sufficiently indicative of partiality to support the imposition of a per se constitutional rule.

267. *See supra* note 26.

268. *See, e.g., Keeten,* 578 F. Supp. at 1164, *rev'd,* 742 F.2d 129 (4th Cir. 1984), *cert. denied,* 106 S. Ct. 2258 (1986). *See supra* notes 185-89 and accompanying text.

269. *See Woodard,* 753 F.2d at 697 (discussed *supra* notes 199-204 and accompanying text).

By refusing to find these claims unconstitutional the Court has fashioned a fragmented judicial analysis that preserves the state's interest in using single juries in bifurcated procedures. The decision also allows the states to avoid the prospect of a retroactive imposition of the *Grigsby* rule that would invalidate all prior convictions issued by death-qualified juries. *McCree* then, represents an uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury.

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