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justice and confusion of the functions of judge and jury would be avoided without depriving criminal defendants of the opportunity to have the court consider their motions for the directed verdicts —a control device basic to trial by jury.[56]

Jean Talley

DISPOSITION OF WITHERSPOON-TYPE CASES

The United States Supreme Court, in *Witherspoon v. Illinois*,[1] declared unconstitutional the successful challenge for cause of prospective jurors who maintained conscientious or religious scruples against the death penalty. Stating that the exclusion of such persons left a jury prejudiced against the defendant on the penalty issue, the Court voided Witherspoon's sentence of death but affirmed his conviction of guilt. The actual disposition of *Witherspoon*, however, was not clear,[2] with the result that state courts have been far from uniform in disposing of *Witherspoon*-type cases. The states have found themselves faced with the question of what to do with defendants whose convictions are valid, but who may no longer be executed on the basis of the convicting jury's penalty determination. The Supreme Court of California has affirmed the conviction of such a defendant, and ordered a new trial on the penalty issue only under California's existing bifurcated trial procedure.[3] The other states which have had to cope with the problem do not have statutes allowing bifurcated trials, and have been forced to formulate *ad hoc* techniques. The Georgia court[4] affirmed the conviction and ordered a new trial on the penalty issue only, stating that it had no authority to enter a sentence other than death unless it had a jury recommendation of mercy. The North Carolina Supreme Court[5] and the Texas Court of Criminal Appeals,[6] on the other hand, reversed the convictions as well as the sentences and ordered complete new trials. The Mississippi Supreme Court[7] ordered

56. The court should take this step at the earliest possible time, since unless the trial judge assigns as the reason for denying the directed verdict the *Hudson* rationale, the defendant's motion would simply be denied without recourse to effective appeal on this point.

1. 391 U.S. 510 (1968), *noted in* 29 LA. L. REV. 381 (1969).

2. Witherspoon apparently was never retried by an Illinois court.

3. *In re* Anderson, 447 P.2d 117, 73 Cal. Rptr. 21 (1968).

4. Massey v. Smith, 224 Ga. 721, 164 S.E.2d 730 (1968) (on habeas corpus); Miller v. State, 224 Ga. 627, 163 S.E.2d 730 (1968) (on appeal).

5. State v. Spence, 274 N.C. 536, 164 S.E.2d 593 (1968) (on appeal).

6. *Ex parte* Bryan, 434 S.W.2d 123 (Tex. Crim. App. 1968) (on habeas corpus); Ellison v. State, 432 S.W.2d 955 (Tex. Crim. App. 1968) (on appeal).

7. Rouse v. State, 222 So.2d 145 (Miss. 1969) (on appeal).

that the case be reversed as to penalty only, unless the trial judge, with the district attorney's consent, elected to reduce to life imprisonment, without the intervention of a jury.

The Supreme Court of Louisiana has also been called upon, on appeal, to resolve this problem. In *State v. Turner*[8] and *State v. Benjamin*,[9] the Louisiana court ordered new trials on the guilt issue as well as the penalty issue. In *Turner*, the state, in applying for rehearing,[10] urged that the court should have only annulled the death sentence and remanded for sentencing to life imprisonment. The application was denied. When the state urged a similar contention in *Benjamin*,[11] it too was rejected. The court, unfortunately, assigned no reasons for disposing of the cases in the manner it did.

Two reasons for the Louisiana Supreme Court's decisions can, however, be postulated. The first is that the court is going beyond the *Witherspoon* holding and invalidating the convictions as well as the penalties on the ground that the juries were prejudiced on the issue of guilt. This seems improbable. The Supreme Court of Louisiana, when compared to the United States Supreme Court, has had a tendency to be conservative in matters of criminal procedure.[12] It would be the first state court to so hold,[13] and it is doubtful that it would be taking such a momentous step without discussing the issue. Moreover, there is language in the court's opinion from which it may be inferred that the court will not order new determinations of guilt in those cases coming to it on habeas corpus.[14] A second and more probable reason for the

8. 253 La. 763, 220 So.2d 67 (1969).
9. 254 La. 49, 222 So.2d 853 (1969).
10. State v. Turner, 253 La. 763, 767, 220 So.2d 67, 69 (1969).
11. State v. Benjamin, 254 La. 49, 222 So.2d 853 (1969).
12. *See, e.g.*, State v. White, 254 La. 389, 223 So.2d 843 (1969) (refusal to require unanimous verdict in non-capital felony case); State v. Jones, 251 La. 431, 204 So.2d 775 (1967) (refusal to grant jury trial for offense for which penalty did not exceed six months, in absence of United States Supreme Court directive).
13. At least four state courts have grappled with the theory that exclusion of scrupled jurors leaves a jury prejudiced on the guilt issue, and all have rejected it. *See* State v. Madden, 104 Ariz. 111, 449 P.2d 39 (1969); *In re* Arguello, 452 P.2d 921, 76 Cal. Rptr. 633 (1969). State v. William, 275 N.C. 77, 165 S.E.2d 481 (1969); Nelson v. State, 245 A.2d 606 (Mt. Ct. Spec. App. 1968).
14. State v. Turner, 253 La. 763, 767, 200 So.2d 67, 69 (1969): "The application for rehearing urges that in disposing of this case on appeal we should have only annulled the death sentence and remanded for sentence to life imprisonment instead of reversing the conviction, annulling the sentence, and remanding for a new trial. The application is denied. However, that portion of our decree which reversed the conviction and remanded for a new trial is not intended to, nor does it, apply to those cases where the

decisions is that the Supreme Court of Louisiana felt it had no authority *on appeal* to reduce the sentence to life imprisonment. Other state courts have announced their inability to take such action,[15] and it is doubtful that the Louisiana court could do so under Louisiana law.[16] The Louisiana Supreme Court may have authority under the supervisory powers granted to it by the Louisiana Constitution[17] to remove the death sentences from such defendants in *non-appellate* proceedings.[18]

State courts have understandably had difficulty in obeying the ruling of Witherspoon while still conforming to their states' procedural rules. The writer submits that the approach which may be inferred from *Turner* and *Benjamin* is a proper one: for unconstitutionally sentenced defendants who appeal, new trials should be ordered; while those defendants who can no longer appeal should have their death sentences vacated and should be remanded to prison.[19]

At the outset, it must be emphasized that *Witherspoon* was a very unusual decision. It was the first case in which the United States Supreme Court invalidated a death sentence as having been imposed without due process of law, and yet affirmed as entirely untainted the conviction upon which that sentence was

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conviction and sentence have become final after appellate review or by elapse of time for appeal." When it quoted this passage in *Benjamin*, the court emphasized the words "on appeal." *See* State v. Benjamin, 254 La. 49, n.3, 222 So.2d 853, 855 n.3 (1969).

15. *See* notes 4-7 *supra*. These courts have not, however, made any distinction between disposition on appeal and disposition on habeas corpus.

16. LA. CODE CRIM. P. art. 817: "In a capital case the jury may qualify its verdict of guilty with the addition of the words 'without capital punishment,' in which case the punishment shall be imprisonment at hard labor for life."

It has been said that a death sentence is mandatory if the jury does not qualify its verdict. State v. Iles, 201 La. 398, 9 So.2d 601 (1942). *See also* Bennett, *Louisiana Criminal Procedure: A Critical Appraisal*, 14 LA. L. REV. 11, 32-33 (1954).

It has generally been stated that a reviewing court may not reduce a jury's determination of penalty without statutory authority. *See* L. ORFIELD, CRIMINAL APPEALS IN AMERICA 101-21 (1939). For a recent discussion of the question, see Comment, 14 N.Y.L.F. 378 (1968) and the authorities cited therein.

17. LA. CONST. art. VII, § 10.

18. The Louisiana Supreme Court has said that if a lower court arbitrarily imposed a sentence, it (the Supreme Court) would, under its supervisory power, prohibit the execution of that sentence on the ground that due process had not been observed. Pizzolato v. Cataldo, 202 La. 675, 12 So.2d 677 (1943).

19. An additional question, not answered by *Witherspoon*, is what sentence these defendants are to serve. Are they to be confined on Death Row, or are they "lifers"?

based.[20] This dichotomy has created a unique legal limbo in which many defendants guilty of capital crimes are under invalid sentences. *Witherspoon* allows the states to retain these defendants in custody but forbids their execution. An unconstitutionally sentenced defendant who was constitutionally convicted some time ago should not, of course, be released. But must the state grant such a defendant a complete new trial and run the serious risk of having him escape conviction because evidence has grown stale or is no longer at hand?

Must the state even grant such a defendant a new trial on the penalty issue only, at considerable expense and inconvenience to the state and its jurors? This is unnecessary. With respect to defendants who can no longer appeal, the answer to the states' dilemma of what to do with *Witherspoon*-type cases lies in the writ of habeas corpus. (*Witherspoon* itself was a habeas corpus case.)[21] The history and nature of the writ of

20. In Frady v. United States, 348 F.2d 84 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 909 (1965), appellants' convictions of first degree murder were affirmed, but their death sentences were set aside with directions that each appellant be resentenced to life imprisonment on verdicts of guilty of first degree murder. The court cited 28 U.S.C. § 2106 (1948), a federal appeals statute, as authority for this manner of disposition. The writer has found no other case in which the death sentence was vacated but the conviction affirmed.

21. State habeas corpus relief was denied by the Illinois Supreme Court in People v. Witherspoon, 36 Ill. 2d 471, 224 N.E.2d 259 (1967). The United States Supreme Court granted certiorari and reversed in Witherspoon v. Illinois, 391 U.S. 510 (1968).

Had the petitioner sought relief under the federal habeas corpus statute, it would appear that the United States Supreme Court would have had authority to vacate Witherspoon's death sentence and remand him to custody without requiring any further proceedings. 28 U.S.C. § 2243 (1948) grants federal courts the authority to dispose of habeas corpus cases "as law and justice require." While it had previously been held that habeas corpus would not issue from a federal court unless immediate physical release from confinement were possible (McNally v. Hill, 293 U.S. 131 (1934)), the Supreme Court has recently given the federal statute a more liberal interpretation by disavowing the *McNally* holding in a case involving a defendant serving consecutive sentences. Peyton v. Rowe, 391 U.S. 54 (1968)(quoting with approval Judge Haynesworth's rejection of the *McNally* rule as a "doctrinaire approach"). There would seem to be little difficulty in extending this holding to a case where the petitioner was validly convicted and therefore not entitled to release, but was entitled to have his death sentence removed.

Even before *Peyton*, at least one federal court recognized that the writ should be granted even if immediate physical release were not possible. In Dennis v. Dees, 278 F. Supp. 354 (E.D. La. 1968), a state prisoner already on death row was found guilty of the murder of a fellow inmate and given a second death sentence. The petitioner was tried while wearing a striped prison uniform and leg irons. The court held that such treatment was violative of due process and warranted habeas corpus relief. Without mentioning *McNally* specifically, or the federal statute, Judge West said: "The Court is aware of the fact that ordinarily habeas corpus will not lie when to grant it would not result in the complete release of the petitioner. But an exception to this rule must be made where, as here, habeas corpus is sought

habeas corpus support the technique of remand to custody free of the death sentence without having a new penalty determination. The writ developed as an instrument for the vindication of the right of personal liberty, whenever that liberty was restrained by illegal means.[22] It was, and is, issued to determine the legality of the restraint upon the petitioner. The writ was sent to the one holding the petitioner in custody, ordering him to produce the prisoner and give the reason for his detention "that the court . . . may examine into it's [sic] validity [,] and *according to the circumstances of the case* may discharge, admit to bail, or remand the prisoner"[23] (emphasis added). If the petitioner was imprisoned under court order, the purpose of the writ was to examine the jurisdiction of the court which ordered the imprisonment.[24] If the court lacked jurisdiction, including jurisdiction to render the particular judgment,[25] the petitioner was entitled to be released. It was said that if the court rendered a judgment only part of which was null for lack of jurisdiction, "the whole will not be void, but only such part as is in excess of the powers of the court," if "the valid and invalid parts are independent of each other."[26] The concept of jurisdiction was eventually expanded, with the United States Supreme Court holding, for example, that a court which had jurisdiction of the case at the outset of the trial could lose it when the defendant's constitutional rights were violated.[27] Finally, the Court "abandoned the overstrained jurisdictional

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to release the petitioner not from incarceration in the penitentiary, but from the execution of a death sentence. In such a case, petitioner has the right to have his petition for habeas corpus heard and determined even though, if granted, he is still subject to continued incarceration for a prior conviction." *Id.* at 359.

22. *See* F. FERRIS & F. FERRIS, EXTRAORDINARY LEGAL REMEDIES § 4 (1926); R. HURD, HABEAS CORPUS 129-32 (1876); R. SOKOL, HANDBOOK OF FEDERAL HABEAS CORPUS § 1 (1965); 2 T. SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1152 (1901).

23. 3 W. BLACKSTONE, COMMENTARIES *133. *See also* W. CHURCH, HABEAS CORPUS § 106 (1886); F. FERRIS & F. FERRIS, EXTRAORDINARY LEGAL REMEDIES § 1 (1926); R. HURD, HABEAS CORPUS 230-31 (1876); Glass, *Historical Aspects of Habeas Corpus*, 9 ST. JOHN'S L. REV. 55, 60-61 (1934).

24. "In all habeas corpus proceedings the ultimate question is one of jurisdiction and power." F. FERRIS & F. FERRIS, EXTRAORDINARY LEGAL REMEDIES § 18 (1926). *See also* W. CHURCH, HABEAS CORPUS §§ 222-27 (1886); 2 T. SPELLING, INJUNCTIONS AND OTHER EXTRAORDINARY REMEDIES § 1152 (1901).

25. F. FERRIS & F. FERRIS, EXTRAORDINARY LEGAL REMEDIES § 19 (1926).

26. 1 A. BAILEY, HABEAS CORPUS AND SPECIAL REMEDIES 169 (1913).

27. Moore v. Dempsey, 261 U.S. 86 (1923) (mob domination of the trial). *See also* Johnson v. Zerbst, 304 U.S. 458 (1938) (court's failure to provide counsel as required by Sixth Amendment caused it to lose jurisdiction); Mooney v. Holohan, 294 U.S. 103 (1935) (knowing use of perjured testimony).

theory"[28] and held that the issuance of the writ from federal courts was not limited to cases involving jurisdictional defects, but extended also to those cases where the conviction had been in disregard of the constitutional rights of the defendant.[29] It can be seen, therefore, that the writ which originally served to test the jurisdiction of the court to impose a judgment affecting the prisoner today issues on many additional grounds. Still, the vindication of due process has always been the writ's function.[30] "[T]he nature and purpose of habeas corpus have remained remarkably constant."[31]

A defendant who has been sentenced to death by a jury from which jurors who have conscientious scruples against the death penalty have been excluded, has been sentenced without due process of law. A defendant sentenced in this way, and who has not appealed, should be granted relief from the death sentence by way of the Great Writ.[32] In this way, his rights are protected, and the state is spared the danger of acquittal by reason of present inadequacy of the evidence, or the time, expense, and difficulties of a second penalty determination.[33] Where appeals have been taken, defendants sentenced to death by juries declared improper by *Witherspoon* will apparently continue to be given complete new trials, or, in those jurisdic-

28. C. WRIGHT, FEDERAL COURTS 180 (1963).
29. *Id.*
30. Fay v. Noia, 372 U.S. 391, 402 (1963).
31. *Id.*
32. The Louisiana statute dealing with habeas corpus when the petitioner is imprisoned by virtue of a court order (LA. CODE CRIM. P. art. 362 (9)) provides only for the discharge of the prisoner convicted without due process of law. Comment (i) thereunder makes clear, however, that the drafters intended to broaden the authority of Louisiana courts to issue the writ and thereby limit federal court intervention in cases involving state law. Understandably, the legislature did not foresee the unusual situation created by *Witherspoon*. It is suggested that if the legislature could possibly have anticipated the problem, it would have provided habeas corpus relief to remedy the injustice to *Witherspoon*-type petitioners. For a discussion of LA. CODE CRIM. P. art. 362(9), *see* Bennett, *The 1966 Code of Criminal Procedure*, 27 LA. L. REV. 175, 190 (1967).
33. It appears that the Court foresaw no new trials for habeas corpus petitioners sentenced as Witherspoon was. Rejecting arguments that give only prospective application to its ruling, the Court stated that the "impact of a retroactive holding on the administration of justice" did not preclude giving retroactive effect to *Witherspoon*. Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968). The Court cited Johnson v. New Jersey, 384 U.S. 719 (1966), in which it had decided against applying Escobedo v. Illinois, 378 U.S. 478 (1964), and Miranda v. Arizona, 384 U.S. 436 (1966), retroactively, having concluded that to do so "would seriously disrupt the administration of our criminal laws. It would require the *retrial* or release of numerous prisoners found guilty by trustworthy evidence . . . ." Johnson v. New Jersey, 384 U.S. 719, 731 (1966) (emphasis added).

tions which have bifurcated trial procedures, new penalty trials. Such cases should be rare, however, since it is unlikely that judges will sustain challenges for cause on the basis of conscientious scruples now that the United States Supreme Court and the Louisiana legislature[34] have spoken. The factors which make a second trial for a habeas corpus petitioner potentially hazardous for the state are not likely to be present at the second trial of a defendant who has appealed and is retried shortly afterward. It should be noted, however, that although the United States Supreme Court in *Witherspoon* refused to hold that exclusion of prospective jurors conscientiously opposed to the death penalty results in a jury prejudiced on the issue of guilt,[35] the Court has not foreclosed the possibility of such a holding in the future.[36] Courts which grant new trials for violations of the new constitutional rule may, therefore, be following a wise course.

Larry C. Becnel

THE RIGHTS OF THE VENDOR IN REDHIBITION

The Louisiana Civil Code, while dealing extensively with the buyer's rights, is practically silent concerning the rights of the seller in a successful redhibitory action. Since each of the parties to a sale would like to be able to predict the legal consequences flowing from their transaction, the extent of liability and the available remedies are of utmost importance to the vendor. If a vendor sells a thing with redhibitory defects, three situations can arise. First, the thing can be defective to the point of total uselessness, in which case the total avoidance of the sale provides a fair remedy for both parties. Being totally defective, neither would the thing be capable of producing fruits nor would it have any use value for the buyer; therefore, the seller would

34. LA. CODE CRIM. P. art. 798 was amended after the *Witherspoon* decision and it is no longer permissible to challenge prospective jurors for cause simply because they express conscientious or religious scruples against capital punishment. La. Acts 1968, E.S., No. 13, § 1.

35. The Court again rejected the "prosecution-prone" theory in Bumper v. North Carolina, 391 U.S. 543, 545 (1968).

36. The Court said: "We simply cannot conclude, either on the basis of the record *now* before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt . . . ." Witherspoon v. Illinois, 391 U.S. 510, 517-18 1968) (emphasis added).

Justice Black, dissenting, said: "For the majority opinion goes out of its way to state that in some future case a defendant might well establish that a jury selected in the way the Illinois statute here provides is 'less than neutral with respect to *guilt*.'" *Id.* at 539 (emphasis in the original.)