JURY SELECTION—EXCLUSION OF POTENTIAL JURORS IN CAPITAL SENTENCING CASES NO LONGER REQUIRES THAT VENIRE MEMBERS EXPRESS THEIR VIEWS ABOUT THE DEATH PENALTY WITH UNMISTAKABLE CLARITY—*Wainwright v. Witt*, 105 S. Ct. 844 (1985).

In 1968, the United States Supreme Court's decision in *Witherspoon v. Illinois*[1] established the touchstone for deciding when a potential juror may properly be excused for cause in criminal trials involving the death penalty.[2] The *Witherspoon* Court held that a capital defendant's sixth[3] and fourteenth[4] amendment right to an impartial jury in criminal trials involving the death penalty is violated by the exclusion for cause of a venireman who expresses general objections to the death sentence.[5] Since then, however, the role of the capital sentencing jury has been reduced to that of a trier of fact with little discretion in imposing the death penalty.[6] Recently, in *Wainwright v. Witt*,[7] the United States Supreme Court again addressed the issue of when a prospective juror may be excluded for cause based upon an expressed objection to the death penalty.[8] In clarifying the standard articulated in *Witherspoon*, the *Witt* Court held that the proper "standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' "[9]

In February of 1974, Johnny Paul Witt was convicted of the first degree murder of an eleven-year-old boy.[10] Based on the

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1 391 U.S. 510 (1968).

2 *See infra* notes 31-45 and accompanying text (discussing *Witherspoon*).

3 The sixth amendment provides in 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 . . . ." U.S. CONST. amend. VI.

4 The fourteenth amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

5 *See Witherspoon*, 391 U.S. at 518, 522.

6 *See* Gregg v. Georgia, 428 U.S. 153 (1976) (limiting jury discretion by requiring presence of specified aggravating circumstances before death sentence may be imposed); Furman v. Georgia, 408 U.S. 238 (1972) (holding unconstitutional state statutes giving the jury absolute discretion in imposing the death penalty). For a discussion of these cases, see *infra* notes 76-82 and accompanying text.

7 105 S. Ct. 844 (1985).

8 *See id.* at 847.

9 *Id.* at 852 (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)).

10 Witt v. State, 342 So. 2d 497, 500 (Fla.), *cert. denied*, 434 U.S. 935 (1977). Witt and his codefendant hid near a wooded road frequented by children and attacked a

jury's recommendation,[11] the trial judge sentenced Witt to death on February 21, 1974.[12] Witt appealed directly to the Supreme Court of Florida, urging that his conviction be reversed for improper exclusion of jurors[13] in violation of the *Witherspoon* standard.[14] The Florida Supreme Court affirmed Witt's conviction

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young boy who was riding a bicycle. *Witt*, 105 S. Ct. at 847. Binding and gagging the victim, they placed him in their trunk and drove to a secluded area where they discovered that the boy had been asphyxiated by the gag. *Id.* Both defendants then proceeded to commit sexual acts upon the boy's body before burying him. *Id.*

[11] Although in Florida the jury does not pass sentence, it does make a recommendation that the trial judge is required to consider. *See* FLA. STAT. ANN. § 921.141(2) (West 1973). Thus, the *Witherspoon* standard was applicable. *See generally* Spaziano v. Florida, 468 U.S. 447, 451-52 (1984) (outlining Florida's sentencing procedure).

[12] Witt v. Wainwright, 714 F.2d 1069, 1071 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984), *rev'd*, 105 S. Ct. 844 (1985). Witt was sentenced to death pursuant to FLA. STAT. ANN. § 782.04(1) (West 1976), which provided as follows:

> (a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, involuntary sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082.
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> (b) In all cases under this section, the procedure set forth in § 921.141 shall be followed in order to determine sentence of death or life imprisonment.

Id.

[13] Witt v. State, 342 So. 2d 497, 498 (Fla.), *cert. denied*, 434 U.S. 935 (1977). Witt also contended that (1) admission of his confession was improper because the state did not provide proper representation, (2) the Florida test for competency to stand trial was outdated, and (3) the sentence of death was excessive when compared with the life sentence that Witt's codefendant received in a separate trial. *Id.* at 498-99.

[14] *Witt*, 105 S. Ct. at 847; *see infra* notes 31-45 and accompanying text. Six potential jurors expressed their inability to prevent their feelings about capital punishment from being a factor in determining guilt or innocence. Witt v. State, 342 So. 2d 497, 499 (Fla.), *cert. denied*, 434 U.S. 935 (1977). Some jurors stated that they could not recommend a sentence of death after weighing aggravating and mitigating factors as required by Florida law. *Id.* The relevant Florida statute provides as follows:

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
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> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
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> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
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> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

FLA. STAT. ANN. § 921.141(2) (West 1973).

and sentence, and the United States Supreme Court denied certiorari.[15] Witt then attempted unsuccessfully to have his sentence vacated, set aside, or corrected in a separate, postconviction relief proceeding.[16] The Supreme Court of Florida affirmed this denial of relief,[17] and Witt was again refused certiorari by the United States Supreme Court.[18]

The United States District Court for the Middle District of Florida denied Witt's subsequent petition for a writ of habeas corpus.[19] The district court later affirmed its prior memorandum decision after an evidentiary hearing on the issue of potential juror exclusion.[20] Witt then appealed the lower court's decision to the United States Court of Appeals for the Eleventh Circuit.[21] Relying on the *Witherspoon* decision, the court of appeals determined that one of the potential jurors had been improperly excused for cause and therefore remanded the *Witt* case for resentencing.[22] In addition, the court of appeals expressed uncertainty with respect to the issue of "whether a state trial court's finding of bias should be accorded a presumption of correctness under the federal statute governing habeas corpus proceedings."[23]

The State of Florida then petitioned the United States

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

16 Witt v. State, 387 So. 2d 924, 931 (Fla.), *cert. denied*, 449 U.S. 1067 (1980). Witt's motion was based on issues other than juror exclusion. *See id.* He appealed the trial court's denial of postconviction relief on the basis of several changes in the law effected by decisions subsequent to his conviction. *Id.*

17 *Id.*

18 Witt v. Florida, 449 U.S. 1067 (1980).

19 *Witt*, 105 S. Ct. at 847. The writ of habeas corpus, now codified at 28 U.S.C. §§ 2241-2255 (1982), is provided for in the United States Constitution. *See* U.S. CONST. art. I, § 9, cl. 2. It was first codified by Congress in the Judiciary Act of 1789, which gave Federal courts the power to issue relief to prisoners "in custody, under or by colour of the authority of the United States." Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 82 (current version at 28 U.S.C. § 2241(c)(1) (1982)).

20 Witt v. Wainwright, 714 F.2d 1069, 1071 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984), *rev'd*, 105 S. Ct. 844 (1985).

21 *Witt*, 105 S. Ct. at 847.

22 Witt v. Wainwright, 714 F.2d 1069, 1082-84 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984), *rev'd*, 105 S. Ct. 844 (1985). The court's decision was based upon footnote 21 of the *Witherspoon* case and two prior circuit court cases, Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982) and Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980), in which the *Witherspoon* standard was applied. *See* Witt v. Wainwright, 714 F.2d 1069, 1082-83 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984), *rev'd*, 105 S. Ct. 844 (1985).

23 *Witt*, 105 S. Ct. at 849; *see* Witt v. Wainwright, 714 F.2d 1069, 1083 n.10 (11th Cir. 1983), *modified*, 723 F.2d 769 (11th Cir. 1984), *rev'd*, 105 S. Ct. 844 (1985).

Supreme Court for a writ of certiorari.[24] The Court granted certiorari and ultimately reversed the court of appeals' decision.[25] The Supreme Court held that the venireman in question had been properly excused because she entertained reservations about the death penalty that would have prevented her from performing the duties of a juror in accordance with her oath and instructions.[26] Justice Rehnquist, writing for the majority, noted that the standard for juror exclusion does not require that a venireman's bias be established with unmistakable clarity.[27] The Court also held that in a habeas corpus proceeding, the question of excusing a potential juror for cause is a factual issue requiring Federal courts to accord "a presumption of correctness" to the state court's findings.[28]

The sixth amendment guarantees a criminal defendant the right to a trial by an impartial jury.[29] This right applies to the states through the fourteenth amendment.[30] In 1968, the United States Supreme Court, in *Witherspoon v. Illinois*,[31] squarely addressed the issue of whether a state infringes upon this right when a trial court excuses for cause all members of the venire who express conscientious objections to capital punishment.[32] *Witherspoon* involved an Illinois statute[33] that permitted the state to "death qualify"[34] a jury by excluding for cause any prospective

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24 *See Witt*, 105 S. Ct. at 849.

25 *Id.*

26 *Id.* at 852, 855. The Court stressed that because a juror may not be able to express verbally his feelings about the death penalty, the standard for exclusion cannot be based simply on questions and answers. *Id.* at 852.

27 *Id.*

28 *Id.* at 853, 856. The statute governing habeas corpus proceedings requires Federal courts to presume that any state court determination of a factual issue is correct, unless one of eight enumerated exceptions applies. *See* 28 U.S.C. § 2254(d) (1982).

29 U.S. CONST. amend. VI; *see supra* note 3.

30 The United States Supreme Court held the sixth amendment applicable to the states through the due process clause of the fourteenth amendment in Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

31 391 U.S. 510 (1968).

32 *See id.* at 513. At the time *Witherspoon* was decided, most states with capital punishment schemes allowed the exclusion of jurors for cause merely because they opposed the death penalty. *See, e.g.*, People v. Riser, 47 Cal. 2d 566, 305 P.2d 1 (1956), *cert. denied*, 353 U.S. 930 (1957); Commonwealth v. Ladetto, 349 Mass. 237, 207 N.E.2d 536 (1965); State v. Reynolds, 43 N.J. 597, 206 A.2d 750 (1965). *See generally* Case Comment, *Jury Selection*—Witherspoon v. State of Illinois, 3 SUFFOLK U.L. REV. 210, 214-15 (1968).

33 *See Witherspoon*, 391 U.S. at 512 & n.1.

34 "Death qualify" is the term used to refer to "the exclusion for cause, in capital

juror who expressed objections to the death penalty.[35] In an opinion written by Justice Stewart, the Court noted that a juror with personal objections to the death penalty would nevertheless be able to put aside his beliefs and return a verdict of death.[36]

The *Witherspoon* Court reasoned that under the procedure for death qualification required by the Illinois statute, the resulting jury would not portray "the conscience of the community."[37] Rather, the Court opined that the jury would be one "uncommonly willing to condemn a man to die."[38] Emphasizing the broad discretion given the Illinois jury to determine the proper penalty, Justice Stewart noted the inevitable role a juror's general views on capital punishment play in such a decision.[39] In reaching its ultimate conclusion, the Court noted that a juror need only be able to consider the range of penalties allowed by state law.[40] Thus, the Court held that a jury from which veniremen had been excluded for general objections to the death penalty

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cases, of jurors opposed to capital punishment." *Witt*, 105 S. Ct. at 860 (Brennan, J., dissenting).

35 *Witherspoon*, 391 U.S. at 512.

36 *Id.* at 519. In footnote seven of its opinion, the Court stated,

> It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State.

Id. at 514-15 n.7. In addition, in footnote nine of its opinion, the Court noted, "Obviously many jurors 'could, notwithstanding their conscientious scruples [against capital punishment], return . . . [a] verdict [of death] and . . . make their scruples subservient to their duty as jurors.' " *Id.* at 516 n.9 (quoting Stratton v. People, 5 Colo. 276, 277 (1880)); *cf.* Bronson, *On the Conviction Proneness and Representativeness of the Death-Qualified Jury: An Empirical Study of Colorado Veniremen*, 42 U. COLO. L. REV. 1, 11 (1970) (survey showing that only 30% of scrupled jurors would approve of acquitting a guilty defendant in order to avoid imposing the death sentence).

37 *Witherspoon*, 391 U.S. at 519. The Court expressed its concern by stating that

> one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Id. at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion)).

38 *Id.* at 521. The sentence was characterized by the Court as resulting from "a hanging jury." *Id.* at 523.

39 *Id.* at 519. For a discussion of the role a juror's general views on capital punishment play in sentencing decisions, see Schnapper, *Taking* Witherspoon *Seriously: The Search for Death-Qualified Jurors*, 62 TEX. L. REV. 977, 997-99 (1984).

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

could not constitutionally impose a death sentence.[41]

The *Witherspoon* Court noted, however, that its holding was a narrow one.[42] In two celebrated footnotes, the majority limited the scope of its holding to situations in which a state attempts to exclude veniremen for cause merely on the basis that they expressed general objections to capital punishment or voiced religious or conscientious scruples against its infliction.[43] In footnote nine of the opinion, the *Witherspoon* majority qualified its decision by observing that "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."[44] Later in its opinion, the majority further qualified its decision by stating in footnote twenty-one that its holding did not apply to situations in which a juror would automatically vote against death or could not remain impartial in determining guilt.[45]

The *Witherspoon* Court's failure to articulate the specific level of expressed opposition to the death penalty that was necessary to exclude a potential juror for cause created a great deal of confusion in the lower courts.[46] In the two years after *Witherspoon* was decided, the Supreme Court announced two decisions that

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41 *Id.* at 522. Witherspoon's sentence was reversed, but his conviction was not disturbed. *See id.* at 517-18, 523. The Court found inadequate empirical evidence to sustain Witherspoon's claim that a jury from which scrupled jurors have been excluded is more prone to convict. *See id.* at 517; *cf.* Bumper v. North Carolina, 391 U.S. 543, 545 (1968) (similarly rejecting petitioner's claim that a "death-qualified" jury is more prone to convict). The Court recently decided that even if empirical evidence established that death-qualified juries were more prone to convict capital defendants, the conviction would still be upheld. *See* Lockhart v. McCree, 106 S. Ct. 1758, 1764 (1986).

42 *See Witherspoon*, 391 U.S. at 513-14.

43 *Id.* at 522.

44 *Id.* at 516 n.9.

45 *Id.* at 522-23 n.21. The Court expressly stated that

> nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

Id.

46 *See infra* notes 58-75 and accompanying text. Many commentators, however, considered the *Witherspoon* decision sufficiently clear. *See, e.g.*, Comment, *Unlawful Discrimination in Jury Selection—Witherspoon and Related Cases*, 21 BAYLOR L. REV. 73, 74 (1969); *Voir Dire Examination of Jurors in Capital Cases*, 14 VILL. L. REV. 125, 130 (1968).

added to this uncertainty by intimating that footnotes nine and twenty-one set forth those instances when a juror may constitutionally be excluded for cause.[47] In *Boulden v. Holman*,[48] the Supreme Court granted certiorari to determine whether the trial court had erred by allowing in evidence the defendant's pretrial confession.[49] Once before the Supreme Court, however, the defendant raised the juror exclusion issue for the first time.[50] The Court noted that it appeared two jurors were properly excluded because the voir dire questioning came within the parameters of footnotes nine and twenty-one of *Witherspoon*.[51] Although the Court perceived that other jurors were improperly excluded, it refused to decide whether a *Witherspoon* violation had in fact occurred because the issue had not been raised below.[52]

Similarly, in *Maxwell v. Bishop*,[53] the Court observed in dictum that a potential juror had been improperly excluded based on his answer to the following question: "[D]o you have any conscientious scruples about capital punishment that *might* prevent you from returning . . . a verdict [of death]?"[54] The Court found the questioning inadequate to disqualify the venireman under *Witherspoon*.[55] Once again, the Court articulated footnotes nine and twenty-one as the proper test for excluding a juror.[56] As in *Boulden*, however, the Supreme Court did not decide the *Witherspoon* issue, but remanded the case for further factual findings because the trial had occurred before *Witherspoon* had been decided.[57]

Subsequently, footnotes nine and twenty-one of the *Witherspoon* decisions were construed by the lower courts in conjunction with *Boulden* and *Maxwell* as defining the circumstances under which a juror could constitutionally be excused for cause.[58] The Federal appellate courts have generally adopted a broad application of *Witherspoon* based upon a strict construction of footnotes

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47 *See infra* notes 48-57 and accompanying text.
48 394 U.S. 478 (1969).
49 *Id.* at 481.
50 *Id.*
51 *Id.* at 482.
52 *Id.* at 483-84.
53 398 U.S. 262 (1970).
54 *Id.* at 264.
55 *Id.*
56 *Id.* at 265-66.
57 *Id.* at 266-67.
58 *See infra* notes 60-75 and accompanying text.

nine and twenty-one of the opinion.[59] For instance, in *Burns v. Estelle*,[60] the Court of Appeals for the Fifth Circuit held that a potential juror who had expressly stated that she did not believe in the death penalty was improperly excluded in violation of *Witherspoon*.[61] Despite the potential juror's testimony that her beliefs would have an effect on her consideration of any issue of fact, the *Burns* court reasoned that further questioning might have uncovered the venireman's ability to set aside her personal feelings and follow the jury instructions.[62] The court observed

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[59] *See, e.g.*, Darden v. Wainwright, 725 F.2d 1526 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984); Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982); Woodards v. Cardwell, 430 F.2d 978 (6th Cir. 1970). *But see* Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982), *cert. denied*, 463 U.S. 1214 (1983). In *Williams*, the Fifth Circuit Court of Appeals distinguished *Granviel* and applied the two-pronged *Witherspoon* test to approve the exclusion of a juror for cause. *See id.* at 385-86. The voir dire of one of the jurors excluded in *Williams* paralleled the voir dire of the excluded juror in *Granviel*, in which the Fifth Circuit held that the venireman had been improperly excluded. *Compare Williams*, 679 F.2d at 384-85 (questioning of excluded jurors) *with Granviel*, 655 F.2d at 684-90 (questioning of several veniremen). Nevertheless, the *Williams* court upheld the defendant's death sentence, noting that the excluded veniremen were "firm" in their unwillingness to impose capital punishment. *Williams*, 679 F.2d at 386.

[60] 626 F.2d 396 (5th Cir. 1980).

[61] *Id.* at 398.

[62] *Id.* at 397-98. The colloquy between the prosecutor and the potential juror proceeded as follows:

> Q. [By the prosecutor] All right. Let me ask you this question, a sentence of life imprisonment or death is mandatory on conviction of a capital penalty case, you understand that?
> A. Yes, sir, I understand it.
> Q. All right. And this is a capital felony case.
> A. I don't believe in it.
> Q. Ma'am?
> A. I do not believe in it.
> Q. Let me go into it then. You told me just then that you did not believe in death?
> A. That's right.
> Q. All right. Then will the mandatory penalty of death or imprisonment for life affect your deliberation on any issue of fact, which what you just told me it will, in other words the mandatory penalty of death or imprisonment for life will affect the deliberations on any issue of fact in this case, is that correct?
> A. That's right.
> MR. GREEN: All right. Judge, we ask this juror be excused.
> MR. ABALOS: I think we should ask some further questions about this matter.
> THE COURT: I don't know what you could ask. You challenge her for cause, is that correct?
> MR. WILLIAMS: That is the magic term phrase and she answered it the way you are not supposed to.
> THE COURT: Ma'am, I will excuse you. You are challenged for

that the juror had not testified that she would "automatically" vote against the death sentence and had not made it "unmistakably clear" that her feelings toward capital punishment would affect her impartiality with respect to guilt.[63]

While the lower Federal courts generally adopted a broad application of *Witherspoon*, the state courts applied *Witherspoon* narrowly.[64] For example, in *State v. Mathis*,[65] the New Jersey Supreme Court held that a juror who had responded that he was unsure whether he could vote for the death penalty was properly excluded.[66] The *Mathis* court reasoned that unless a potential juror affirmatively established his willingness to consider the death penalty, he could properly be excluded for cause under *Witherspoon*.[67] Thus, the New Jersey Supreme Court placed the burden

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cause, you will not be on the jury. You are dismissed from jury service. Thank you very much for your attendance.

Id. at 397-98 n.2.

63 *Id.* at 398; *see* Darden v. Wainwright, 725 F.2d 1526 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984). In *Darden*, the court held that a juror had been improperly excluded because the scope of the questioning had not encompassed the two-pronged test articulated in footnote 21 of the *Witherspoon* decision. *Id.* at 1532. The court stressed "that '[o]nly the most extreme and compelling prejudice against the death penalty' " warrants dismissal of a venireman under *Witherspoon*. *Id.* at 1528 (citation omitted). The court also noted that anything less than unmistakable clarity in establishing juror bias must be resolved in favor of allowing the venireman to sit on the jury. *Id.* In reaching its conclusion, the *Darden* court determined that the juror exclusion issue was a mixed question of law and fact, which required independent appellate review. *Id.* at 1530.

The Supreme Court subsequently vacated the decision in *Darden* and directed the Eleventh Circuit to reconsider its opinion in light of *Witt*. *See* Wainwright v. Darden, 105 S. Ct. 1158 (1985). After a review of its prior reasoning, the court of appeals determined that the trial judge's exclusion of the juror at issue was consistent with the standard established in *Witt*. *See* Darden v. Wainwright, 767 F.2d 752, 754 (11th Cir. 1985), *aff'd*, 106 S. Ct. 2464 (1986).

64 *See, e.g.*, Wilson v. State, 225 So. 2d 321 (Fla. 1969), *rev'd mem. sub nom.* Wilson v. Florida, 403 U.S. 947 (1971); Ladetto v. Commonwealth, 356 Mass. 541, 254 N.E.2d 415 (1969), *rev'd mem. sub nom.* Ladetto v. Massachusetts, 403 U.S. 947 (1971); State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), *rev'd mem. sub nom.* Mathis v. New Jersey, 403 U.S. 946 (1971); State v. Pruett, 18 Ohio St. 2d 167, 248 N.E.2d 605 (1969), *rev'd mem. sub nom.* Pruett v. Ohio, 403 U.S. 946 (1971).

65 52 N.J. 238, 245 A.2d 20 (1968), *rev'd mem. sub nom.* Mathis v. New Jersey, 403 U.S. 946 (1971).

66 *Id.* at 248, 245 A.2d at 26.

67 *Id.* The *Mathis* court stated:

> The State is entitled to a juror who is impartial, *i.e.*, one who is capable of considering whether the death sentence may be meet [sic]. Impartiality is a positive attribute. Its presence must appear affirmatively. If a juror, acknowledging racial, religious, or ethnic bias against an accused, is unable to say whether he could or could not judge the case on the merits, he is not an impartial juror. So here, the State is entitled to a juror who can at least assure the Court that he will judge.

of establishing a juror's impartiality on the defendant rather than requiring that the prosecutor unmistakably demonstrate the venireman's opposition to the death penalty.[68] Subsequently, the United States Supreme Court summarily reversed the New Jersey court's decision.[69]

Similarly, in *Wilson v. State*,[70] the Florida Supreme Court also interpreted *Witherspoon* narrowly. In *Wilson*, the court permitted the exclusion of nineteen jurors.[71] One juror testified that he could remain impartial with respect to the question of guilt, but could not return a sentence of death.[72] Three veniremen were uncertain whether they could return a guilty verdict knowing that death might be the penalty.[73] The other fifteen excluded jurors testified that they definitely could not return a verdict of guilty knowing that the death sentence might be imposed.[74] Again, the United States Supreme Court summarily reversed the state court's exclusion of these veniremen.[75]

Between 1971 and 1977, the Supreme Court continued to apprise the country's trial courts that its decision in *Witherspoon* required a two-pronged test and a high standard of proof.[76] During this period, however, the Court decided *Furman v. Georgia*[77] and *Gregg v. Georgia*,[78] which declared the death penalty unconstitutional when imposed by a capital sentencing jury invested with

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Id. (footnote omitted).

For similar reasons, the New Jersey Supreme Court in State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968), *rev'd mem. sub nom.* Funicello v. New Jersey, 403 U.S. 948 (1971) upheld the exclusion of a juror whose testimony revealed apprehension in imposing the death sentence. *Id.* at 291-92, 245 A.2d at 196.

68 *See Mathis*, 52 N.J. at 248, 245 A.2d at 26. Under *Mathis*, a juror whose impartiality was not affirmatively demonstrated by the defendant could be excluded. *See id.* In contrast, under the test articulated in footnote 21 of the *Witherspoon* decision, potential jurors were properly excluded only if the prosecutor established that they would automatically vote against the death penalty. *See Witherspoon*, 391 U.S. at 522 n.21.

69 Mathis v. New Jersey, 403 U.S. 946 (1971).

70 225 So. 2d 321 (Fla. 1969), *rev'd mem. sub nom.* Wilson v. Florida, 403 U.S. 947 (1971).

71 *Id.* at 327.

72 *Id.*

73 *Id.*

74 *Id.*

75 Wilson v. Florida, 403 U.S. 947 (1971). By reversing these state court decisions, the United States Supreme Court indicated that *Witherspoon* required a stricter standard for juror exclusion. *See infra* note 76 and accompanying text.

76 *See, e.g.*, Davis v. Georgia, 429 U.S. 122 (1976) (holding that a death sentence cannot stand if even one juror was excluded in violation of *Witherspoon*).

77 408 U.S. 238 (1972).

78 428 U.S. 153 (1976).

unlimited discretion in its choice of penalty.[79] In response to *Furman* and *Gregg*, most states enacted capital punishment schemes that required jurors to answer statutory questions[80] or weigh aggravating and mitigating factors in arriving at the appropriate sentence.[81] Consequently, juries were no longer permitted to impose discretionary sentences; rather, they were required to make factual determinations that resulted in statutorily imposed sentences.[82]

In 1978, the Supreme Court's decision in *Lockett v. Ohio*[83] signaled a move away from strict adherence to the two-pronged *Witherspoon* test.[84] In *Lockett*, the petitioner was convicted of "aggravated murder with specifications" and sentenced to death.[85] On appeal to the United States Supreme Court, the petitioner contended that four prospective jurors had been improperly excluded under the principles enunciated in *Witherspoon*.[86] In rejecting this assertion, the Supreme Court focused only on the issue of whether the excluded veniremen had made "it 'unmistakably clear . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.' "[87] Although the *Lockett* Court departed from the traditional two-pronged analysis of *Witherspoon*, it left intact the

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79 *See id.* at 189, 195 (Stewart, J., plurality opinion); *cf.* McGautha v. California, 402 U.S. 183, 196 (1971) (one year prior to *Furman*, Court held that standardless jury discretion was not unconstitutional). *See generally* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1692-99 (1974) (discussing *Furman*). After *Furman* declared the death penalty unconstitutional, several courts determined that *Witherspoon* was moot. *See, e.g.*, Guice v. State, 267 So. 2d 819, 820 (Fla. 1972); Donaldson v. Sack, 265 So. 2d 499, 504 (Fla. 1972).

80 *See, e.g., infra* note 92 (Texas capital punishment statute).

81 *See* Note, *supra* note 79, at 1699-1700; *see also Gregg*, 428 U.S. at 165 n.9 (Stewart, J., plurality opinion) (Georgia statute specified 10 aggravating circumstances). In *Gregg*, the jury was also permitted to consider any applicable mitigating circumstances. *Id.* at 164. Similarly, in Proffitt v. Florida, 428 U.S. 242 (1976), the applicable statute specified eight aggravating factors and seven mitigating circumstances to be considered by the jury. *See id.* at 248 n.6; *see also* N.J. STAT. ANN. § 2C: 11-3(c)(4), (5) (West 1982) (list of New Jersey's aggravating and mitigating factors).

82 *See* Note, *supra* note 79, at 1699-1701; *see also Witt*, 105 S. Ct. at 851 (post-*Furman* capital punishment statutes eliminated jury discretion).

83 438 U.S. 586 (1978).

84 *See id.* at 595-96.

85 *Id.* at 593-94.

86 *Id.* at 595. In addition to her attack on the exclusion of the four potential jurors, Lockett maintained that the prosecutor's closing argument was improper. *Id.* at 594-95. She also argued that the statute under which she was convicted failed to provide adequate notice of the offenses that it prohibited. *Id.* at 597. The Court rejected both of these contentions. *Id.* at 595, 597.

87 *Id.* at 596 (quoting *Witherspoon*, 391 U.S. at 522-23 n.21).

high standard of proof required to exclude a venireman under this test.[88]

Two years later, the Supreme Court again refined the *Witherspoon* holding.[89] In *Adams v. Texas*,[90] the Court was faced with the applicability of *Witherspoon* to a bifurcated capital trial.[91] Initially, the Court noted that unlike the *Witherspoon* jury, which possessed unlimited discretion in imposing the death sentence, the *Adams* jury was guided by statutory questions.[92] Nonetheless, the Court

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88 *See id.*; *see also Witt*, 105 S. Ct. at 863-64 (Brennan, J., dissenting) (noting that departure from the two-pronged test did not alter the high level of proof required for exclusion of a venireman under *Witherspoon*).

89 *See* Adams v. Texas, 448 U.S. 38 (1980).

90 448 U.S. 38 (1980).

91 *Id.* at 43. A bifurcated trial consists of two separate parts. *See* BLACK'S LAW DICTIONARY 148 (5th ed. 1979). During the first phase of a bifurcated capital punishment proceeding, the jury decides the guilt or innocence of the defendant. THE DEATH PENALTY IN AMERICA 250 (H. Bedau 3d ed. 1982). In a subsequent proceeding after a finding of guilt, the jury applies specific statutory criteria and determines whether to impose a death sentence. *Id.*; *see also* Note, Furman *to* Gregg: *The Judicial and Legislative History*, 22 How. L.J. 53, 87 (1979) (sentence determined by post-conviction sentencing hearing). For the bifurcated process employed by the State of Texas in the *Adams* case, see TEX. STAT. ANN. art. 37.071 (Vernon 1981). *See also* N.J. STAT. ANN. § 2C: 11-3(c) (West 1982) (outlining New Jersey's bifurcated process).

The *Adams* Court noted that the bifurcated procedure used by Texas in capital punishment cases differed from the statute involved in the *Witherspoon* case in three respects:

> (1) the *Witherspoon* jury assessed punishment at the same time as it rendered its verdict, whereas in Texas the jury considers punishment in a subsequent penalty proceeding; (2) the *Witherspoon* jury was given unfettered discretion to impose the death sentence or not, whereas the discretion of a Texas jury is circumscribed by the requirement that it impartially answer the statutory questions; and (3) the *Witherspoon* jury directly imposed the death sentence, whereas Texas juries merely give answers to the statutory questions, which in turn determine the sentence pronounced by the trial judge.

Adams, 448 U.S. at 45-46.

92 *Adams*, 448 U.S. at 45-46. The Texas statute provided for a mandatory sentence of death if all of the following questions were answered in the affirmative by the jury:

> (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. STAT. ANN. art. 37.071(b) (Vernon 1981). If any of these three questions were answered in the negative, the statute mandated a sentence of life imprisonment. *See id.* art. 37.071(e).

reasoned that even in a bifurcated trial, jurors must exercise discretion and judgment in abiding by their oath and instructions.[93] Thus, the Court concluded that *Witherspoon* clearly applied to a bifurcated capital punishment proceeding.[94]

After reaching this conclusion, the *Adams* Court then focused on the issue of whether the trial court's exclusion of several veniremen under a Texas statute[95] violated the *Witherspoon* standard.[96] Seven jurors had been excluded by the trial judge because they could not state under oath that Texas's mandatory death sentence would not affect their consideration of any issues of fact.[97] While the Court recognized that the state had a legitimate interest in obtaining jurors able to follow the law, it ultimately concluded that the Texas statute provided for juror exclusion on grounds broader than that permitted by *Witherspoon*.[98]

The *Adams* Court began its analysis by noting that *Witherspoon* did not supply a basis for excluding jurors.[99] Rather, the Court reasoned, *Witherspoon* and its progeny had limited a state's power to exclude veniremen by clearly establishing "that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[100] The majority further observed that if a juror's personal beliefs did not prejudice him to the extent that he would exceed the limits imposed on juror discretion by the Texas death penalty law, he could not properly be excluded.[101] The Court opined that a juror must demonstrate both a recognition that the death penalty is appropriate in some cir-

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93 *Adams*, 448 U.S. at 46.

94 *Id.* at 45.

95 *See* TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974). The statute at issue provided that prospective jurors were to be disqualified from service if the mandatory death penalty would "affect his deliberations on any issue of fact." *Id.*

96 *Adams*, 448 U.S. at 47.

97 *Id.* at 40, 42, 50 nn. 7-8.

98 *Id.* at 49. The Court noted that jurors were excluded for statements that "apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness." *Id.*

99 *Id.* at 47-48. Reasoning that the *Witherspoon* decision instead restricted the state's power to exclude potential jurors, the Court stated that "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." *Id.* at 48 (quoting *Witherspoon*, 391 U.S. at 522 n.21).

100 *Id.* at 45.

101 *Id.* at 46-47.

cumstances and an ability to answer the statutory questions without bias or distortion.[102]

The Court then examined the Texas statute in light of these observations to determine whether it passed constitutional muster under *Witherspoon*.[103] The majority noted that the Texas statute focused on whether the possible death sentence "would have *any effect at all* on the jurors' performance of their duties."[104] Justice White pointed out, however, that the relevant inquiry should be whether the potential jurors could follow the jury instructions and properly answer the questions bearing on the imposition of the death penalty.[105] The Court reasoned that the Texas statute's emphasis on "any effect at all" had excluded prospective jurors merely because they acknowledged "that the potentially lethal consequences of their decision would invest the deliberations with greater seriousness and gravity or would involve them emotionally."[106] Accordingly, the *Adams* majority concluded that the Texas juror exclusion provision ran afoul of the defendant's sixth and fourteenth amendment rights under *Witherspoon*.[107]

While the *Adams* decision clearly indicated that it was no longer necessary to establish that a juror would automatically vote against the death penalty,[108] it was uncertain whether the high standard of proof necessary to exclude a prospective juror under *Witherspoon* remained unaltered. Five years later, the Court eliminated this uncertainty when it emphasized in *Witt* that *Adams* had indeed changed the standard of proof required by *Witherspoon*.[109] The *Witt* Court held that a potential juror's steadfast opposition to the death penalty need not be established with "unmistakable clarity"; the sixth and fourteenth amendments required only a showing that the venireman's views would " 'substantially impair the performance of his duties as a juror' " in order to warrant his exclusion from the jury.[110]

Writing for a majority of the Court, Justice Rehnquist initially contrasted the duties of present-day capital sentencing juries with the duties of the jury in *Witherspoon*.[111] He noted that the

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102 *Id.* at 46.
103 *See id.* at 49.
104 *Id.* (emphasis added).
105 *Id.*
106 *Id.* at 49-50.
107 *Id.* at 50.
108 *See supra* notes 100-102 and accompanying text.
109 *See Witt*, 105 S. Ct. at 851, 852.
110 *Id.* at 852.
111 *Id.* at 851.

Witherspoon jury possessed unlimited discretion in determining the defendant's sentence.[112] Because the range of permissible sentences at the time of the *Witherspoon* decision included the death penalty, Justice Rehnquist observed that a juror at least had to be able to consider it as an alternative in order to fulfill his oath.[113] Consequently, according to Justice Rehnquist, *Witherspoon* gave the state the power to exclude a potential juror who would refuse to consider the death penalty as a possible sentencing alternative.[114]

The *Witt* majority pointed out, however, that *Furman* and *Gregg* had eliminated the jury's discretion in determining the appropriate penalty.[115] Justice Rehnquist observed that the defendant's sentence is now determined by the jurors' answers to specific factual questions.[116] Thus, the majority concluded that the first prong of the *Witherspoon* standard relating to the "automatic" vote against the death penalty is no longer applicable.[117] The Court declared that the state need only show that the venireman would reject the state's capital punishment scheme and refuse to answer the trial judge's questions truthfully.[118]

Justice Rehnquist then noted that *Witherspoon's* second prong—a juror's ability to determine guilt objectively—is better measured by the standard set forth in *Adams*.[119] The majority opined that this standard lowered the burden of proof necessary to show juror bias.[120] Justice Rehnquist observed that the proper test should be one that allows the trial judge broad discretion in ruling on challenges for cause.[121] He reasoned that many poten-

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112 *Id.* The *Witherspoon* jury had "broad discretion to decide whether or not death is 'the proper penalty' in a given case." *Witherspoon*, 391 U.S. at 519.

113 *Witt*, 105 S. Ct. at 851.

114 *Id.*

115 *Id.* For a discussion of the *Furman* and *Gregg* decisions, see *supra* notes 77-82 and accompanying text.

116 *Witt*, 105 S. Ct. at 851. After *Furman*, roughly two-thirds of the states redrafted their capital punishment statutes. *See* Note, *supra* note 91, at 84-91. For an example of a current death penalty statute that requires the jurors to answer specific factual questions, see *supra* note 92.

117 *Witt*, 105 S. Ct. at 851.

118 *Id.*

119 *Id.* For a statement of the standard articulated in *Adams*, see *supra* note 100 and accompanying text. Justice Rehnquist argued that the *Adams* test was preferable for these reasons: (1) it was consistent with the role of present-day capital sentencing juries, (2) the test articulated in footnote 21 of *Witherspoon* was dicta, and (3) the *Adams* standard was in harmony with the standards of juror exclusion in noncapital cases. *Witt*, 105 S. Ct. at 851.

120 *Witt*, 105 S. Ct. at 851.

121 *Id.* at 853.

tial jurors may be unable to express their true feelings about capital punishment at voir dire.[122] Therefore, Justice Rehnquist maintained that a venireman's views toward the death penalty could best be gauged by the trial judge's examination of that individual's demeanor and credibility.[123] Accordingly, the Court concluded that a venireman could be excluded from jury service if his attitude toward capital punishment would significantly hinder the proper discharge of his responsibilities as a juror.[124]

The *Witt* majority next addressed the issue of the amount of deference to be accorded in a Federal habeas corpus proceeding to a state court's determination that a venireman was biased.[125] The Court first noted that in habeas corpus proceedings, "a federal reviewing court is required to accord any findings of the state courts on 'factual issues' a 'presumption of correctness.' "[126] Relying on *Patton v. Yount*,[127] Justice Rehnquist stated that the issue of juror bias is strictly a question of fact, which is not subject to independent appellate review.[128] The Court recognized that a previous decision by a lower Federal court had held that the exclusion of prospective jurors under *Witherspoon* was a "mixed question of law and fact."[129] The Court rejected this interpretation, however, because it was based on the misconception that footnote twenty-one of *Witherspoon* had "imposed 'a strict legal standard' and 'a very high standard of proof.' "[130] Justice Rehnquist pointed out that the standard for excluding prospective jurors in capital cases is actually the same as the stan-

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122 *Id.* at 852. Justice Rehnquist noted that the voir dire may never make it unmistakably clear what a juror will do at trial. *Id.* He stated that the trial judge's decision to exclude a venireman for cause "cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Id.*

123 *See id.* at 852-53, 854.

124 *Id.* at 852. The Court applied this standard to the case at bar and determined that the court of appeals had erred because it had focused on whether the prospective juror's answers indicated that she would automatically reject the death penalty. *Id.* at 853.

125 *Id.* The Court addressed this issue because it believed there were parts of the lower court's opinion that were consistent with *Adams*. *Id.*

126 *Id.*; *see* 28 U.S.C. § 2254(d) (1982).

127 467 U.S. 1025 (1984).

128 *Witt*, 105 S. Ct. at 854.

129 *Id.* at 855. The Court noted that Darden v. Wainwright, 725 F.2d 1526 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984) espoused the "mixed question of law and fact" view. *Witt*, 105 S. Ct. at 855.

130 *Witt*, 105 S. Ct. at 855 (quoting Darden v. Wainwright, 725 F.2d 1526, 1528 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984)). In *Darden*, the Eleventh Circuit adhered strictly to the "automatic vote" requirement of footnote 21 of *Witherspoon*. *See Darden*, 725 F.2d at 1528; *see also supra* note 63 (subsequent history of *Darden*).

dard of exclusion in all other cases.[131] He reasoned that issues of juror bias are essentially questions of credibility, which are best resolved by the trial judge.[132] Accordingly, the majority concluded that a state court's findings with respect to juror exclusion are determinations of fact, which must be accorded a "presumption of correctness" by a Federal reviewing court.[133]

The Court then applied the enunciated principles to the facts of the case at bar.[134] In reaching its ultimate conclusion that the challenged venireman was properly excluded,[135] the Court rejected Witt's contention that the trial judge's decision to excuse a juror required a written opinion.[136] According to Justice Rehnquist, the transcript of the voir dire served as an accurate account of the judge's findings, and therefore a written opinion was not necessary to ensure that the correct standard was applied.[137]

The Court similarly rejected Witt's claim that the trial judge had applied an improper standard when he excluded the challenged panel member.[138] The majority observed that where the record contains no reference to the standard employed, application of the correct standard is presumed.[139] Moreover, the *Witt* Court noted that the transcript of the voir dire of other jurors indicated that the trial judge had applied the proper standard.[140]

Finally, the Court addressed Witt's contention that the prosecutor's voir dire of the excluded juror did not establish the level

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131 *Witt*, 105 S. Ct. at 855.

132 *See id.* Justice Rehnquist noted that the trial judge must apply "some kind of legal standard to what he sees and hears, but his predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record." *Id.*

133 *Id.* at 854, 856.

134 *See id.* at 855-58.

135 *Id.* at 855.

136 *Id.* The respondent's argument was based on 28 U.S.C. § 2254(d), which requires an adequate written indicia of the state trial judge's findings. *See Witt*, 105 S. Ct. at 855.

137 *Id.* The Court noted that its conclusion was bolstered by the lack of viable alternatives. *Id.* The Court declined to require the trial court to produce a written memorandum discussing why each potential juror had been excused. *Id.* In addition, the Court refused to require the trial judge to state specifically his conclusion of bias, noting that such a finding is clearly evident from the record. *Id.*

138 *Id.* at 856. Witt argued that there was no way to determine if the proper standard had been applied because the trial judge did not question the excluded juror. *Id.*

139 *Id.*

140 *Id.* The Court noted that although the judge did not participate in the questioning of the excluded juror, he did question other jurors. *Id.* These questions were consistent with the standard articulated in the *Adams* decision. *Id.*

of bias required by *Adams*.[141] Witt argued that the prosecutor's use of the word "interfere" instead of the phrase "prevent or substantially impair" created a level of ambiguity unacceptable under the *Adams* standard.[142] In rejecting this assertion, the Court noted that the voir dire questions need not be phrased in the specific language of the *Adams* opinion.[143] The majority opined that the trial judge was permitted to assess the venire member's demeanor and resolve any semantic ambiguity in favor of the prosecution.[144] The Court therefore concluded that the factual findings of the trial court were correct and reversed the decision of the court of appeals.[145]

While Justice Stevens concurred in the judgment of the Court, he refused to join the majority's opinion because it contained language inconsistent with the *Adams* standard.[146] Justice Stevens reasoned that the defense counsel's failure to object or to attempt rehabilitation of the excluded juror was actually the critical factor in a proper disposition of the case.[147] He observed that the defendant's lawyer had objected to the exclusion of several apparently more biased veniremen.[148] According to Justice Stevens, this fact "len[t] credence to the hypothesis that competent trial counsel could well have made a deliberate decision not to object to the exclusion of [the venire member] because he did not want her to serve as a juror."[149] Thus, Justice Stevens concluded that although this juror may have been excluded in violation of the *Adams* standard, the failure to object rendered the error harmless.[150]

In a strong dissent, Justice Brennan, joined by Justice Marshall, criticized the majority opinion for its abandonment of

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141 *See id.* at 856-57.

142 *Id.* at 857.

143 *Id.*

144 *Id.* at 857-58.

145 *Id.* at 858.

146 *Id.* (Stevens, J., concurring). Justice Stevens agreed with the majority that *Witherspoon* constitutes a limitation on a state's power to exclude, rather than a basis for excluding jurors. *Id.* at 858 n.2 (Stevens, J., concurring). He also agreed that the proper standard for excluding a potential juror is the test articulated in *Adams*. *Id.* at 858 (Stevens, J., concurring).

147 *Id.* at 858 & n.3 (Stevens, J., concurring). Justice Stevens noted that the majority had properly identified this fact. *Id.* at 858 (Stevens, J., concurring). He reasoned that defense counsel's failure to object to the exclusion of the potential juror was a tactical decision, which indicated that defense counsel believed the error was not critical to his client's case. *See id.* at 859 (Stevens, J., concurring).

148 *See id.*

149 *Id.*

150 *Id.* at 859 & n.4 (Stevens, J., concurring).

Witherspoon's strict standard of proof.[151] Initially, the dissent noted that in cases involving noncapital offenses, the state possesses significant leeway in excusing for cause prospective jurors who indicate that they may be unable to remain impartial.[152] Justice Brennan reasoned that "[a]lthough . . . exclusion on 'any broader basis' than a juror's unambiguously expressed inability to follow instructions and abide by an oath serves no legitimate State interest," it likewise "disserves no interest of the defendant" and therefore is harmless to noncapital cases.[153]

The dissent contrasted this proposition with cases involving the possibility of the death penalty.[154] Justice Brennan noted that in capital cases, exclusion of those opposed to the death penalty is likely to create a skewed jury.[155] He feared that such juries would be unlikely to approximate a fair cross-section of the community and would therefore violate the defendant's sixth amendment right to an impartial jury.[156] The dissent acknowledged, however, that the state's interest in an unbiased jury in-

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151 *See id.* at 860 (Brennan, J., dissenting). Initially, Justice Brennan noted that he would have affirmed the court of appeals' decision because of his belief that the death sentence constitutes "cruel and unusual punishment prohibited by the Eighth and Fourteenth amendments." *Id.* Justice Brennan further declared that even if his views on capital punishment were other than what they were, he would have voted to affirm the court of appeals' decision because "basic justice demands that juries with the power to decide whether a capital defendant lives or dies not be poisoned against the defendant." *Id.*

152 *Id.* at 861 (Brennan, J., dissenting). Prior to *Witherspoon*, the state possessed the same leeway for excluding jurors in capital cases. *See* Turberville v. United States, 303 F.2d 411, 419 (D.C. Cir.), *cert. denied*, 370 U.S. 946 (1962); Horton v. United States, 15 App. D.C. 310, 319 (D.C. Cir. 1899).

153 *Witt*, 105 S. Ct. at 861 (Brennan, J., dissenting) (citation omitted).

154 *See id.* Justice Brennan noted that "[t]he Court's crucial perception in *Witherspoon* was that such broad exclusion of prospective jurors on the basis of the possible effect of their views about capital punishment infringes the rights of a capital defendant in a way that broad exclusion for indicia of other kinds of bias does not." *Id.*

155 *Id.* Justice Brennan reasoned that excluding all scrupled jurors "keeps an identifiable class of people off the jury." *Id.* Therefore, a skew results. *Id.*

156 *Id.* In his dissent, Justice Brennan stressed the right to a jury trial as a safeguard " 'against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' " *Id.* at 870 (Brennan, J., dissenting) (quoting Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). Justice Brennan noted that the Court had held in Smith v. Texas, 311 U.S. 128, 130 (1940) and in Taylor v. Louisiana, 419 U.S. 522, 533 (1975) that the jury body must be representative of the community without excluding large, distinctive groups. *Witt*, 105 S. Ct. at 870 (Brennan, J., dissenting). While those cases dealt with the cross-section of the venire, Justice Brennan argued that the same principles should apply to a particular jury ultimately picked from the supposedly representative venire. *Id.* at 870 n.10 (Brennan, J., dissenting). The Court recently rejected Justice Brennan's argument. *See* Lockhart v. McCree, 106 S. Ct. 1758, 1764-65 (1986).

cluded the right to exclude prospective jurors whose opinions about capital punishment would prevent them from following the law.[157] Justice Brennan reasoned that the *Witherspoon* standard accommodated both the defendant's rights and the state's interests by permitting exclusion of veniremen "whose views would prevent them from being impartial but requiring strict standards of proof for exclusion."[158]

The dissent next observed that the *Witherspoon* standard effectively allocated to the prosecution "the cost of unavoidable uncertainty with respect to whether a prospective juror with scruples about capital punishment should be excluded."[159] Justice Brennan analogized this concept to that of "the 'proof beyond a reasonable doubt' standard of guilt [which] allocates to the State the cost of uncertainty with respect to whether a particular defendant committed a crime."[160] Justice Brennan claimed that the reason the law had imposed an extremely high standard of proof for exclusion of jurors in capital cases was that the fundamentals of criminal justice viewed a defendant's sixth amendment right to an impartial jury as greater than the state's interest in administering its death penalty scheme.[161] He noted that the Court had traditionally viewed the risk that a defendant's sixth amendment right might be violated through improper exclusion of a juror as far more serious than the risk to the prosecution of inclusion of a scrupled juror.[162]

The dissent then addressed the two-part inquiry expressed in footnote twenty-one of the *Witherspoon* decision.[163] Justice Brennan remarked that while permissible voir dire questions may depart from the language of footnote twenty-one,[164] they must still comply with the strict standard of proof required under *Witherspoon*.[165] According to the dissent, "the essence of *Wither-*

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157 *Witt*, 105 S. Ct. at 862 (Brennan, J., dissenting).

158 *Id.* Justice Brennan stated that *Witherspoon* precluded excusing for cause undecided jurors, vacillating jurors, and jurors who would view a capital case with greater scrutiny than a noncapital case. *Id.*

159 *Id.*

160 *Id.* (citing *In re* Winship, 397 U.S. 358, 370-73 (1970) (Harlan, J., concurring)).

161 *Id.* at 861 (Brennan, J., dissenting). Justice Brennan noted that a perfectly neutral jury was impossible to obtain. *Id.* (citing Gross, *Determining the Neutrality of Death-Qualified Juries*, 8 LAW & HUM. BEHAV. 7, 26-28 (1984)).

162 *Id.* at 863 (Brennan, J., dissenting).

163 *See id.*

164 *Id.* at 863-64 (Brennan, J., dissenting) (citing *Adams*, 448 U.S. at 44-45; *Lockett*, 438 U.S. at 595-96).

165 *Id.* at 864 (Brennan, J., dissenting).

spoon is its requirement that only jurors who make it unmistakably clear that their views about capital punishment would prevent or substantially impair them from following the law may be excluded."[166] Justice Brennan observed that the trial court had allowed the challenged juror to be excused for cause merely because she admitted that her feelings would interfere with her determination.[167] This alone, the dissent reasoned, failed to meet the strict standards of proof articulated in *Witherspoon*.[168] The dissent therefore concluded that both the court of appeals' application of the law and its analysis of the facts were correct.[169]

The dissent next considered the Court's finding that the *Adams* decision had renounced *Witherspoon's* stringent measure of proof of juror bias.[170] In contrast to the majority, Justice Brennan maintained that the *Adams* decision had reaffirmed the *Witherspoon* criteria.[171] He characterized the majority's decision as a debasement of the sixth amendment and noted that by discarding *Witherspoon's* stringent standards, the majority had effectively shifted "the risk of a biased and unrepresentative jury" to the defendant.[172]

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166 *Id.*

167 *See id.* at 865 (Brennan, J., dissenting).

168 *Id.* at 864 (Brennan, J., dissenting).

169 *Id.* at 864-65 (Brennan, J., dissenting).

170 *Id.* at 866 (Brennan, J., dissenting). Justice Brennan argued that the majority's decision left no distinction between capital and noncapital juror exclusion issues. *Id.*

171 *See id.* Justice Brennan noted that the Court in *Adams* quoted with approval the "unmistakably clear" language from *Witherspoon's* footnote 21. *Id.*; *see also Adams*, 448 U.S. at 44 (quoting footnote 21 of *Witherspoon*). Justice Brennan's conclusion was based in part on the fact that many lower courts had read the *Adams* decision as an approval of the strict legal standard of proof set forth in *Witherspoon*. *Witt*, 105 S. Ct. at 866 (Brennan, J., dissenting); *see, e.g.*, Darden v. Wainwright, 725 F.2d 1526, 1528-29 (11th Cir.), *cert. denied*, 467 U.S. 1230 (1984); Davis v. Zant, 721 F.2d 1478, 1486 (11th Cir. 1983), *rev'd sub nom. on other grounds on reh'g en banc*, Davis v. Kemp, 752 F.2d 1515 (11th Cir.), *cert. denied*, 105 S. Ct. 2689 (1985); Spencer v. Zant, 715 F.2d 1562, 1576 (11th Cir. 1983); Hance v. Zant, 696 F.2d 940, 954 (11th Cir.), *cert. denied*, 463 U.S. 1210 (1983); O'Bryan v. Estelle, 691 F.2d 706, 709 (5th Cir. 1982), *cert. denied*, 465 U.S. 1013 (1984); Burns v. Estelle, 626 F.2d 396, 397-98 (5th Cir. 1980); People v. Velasquez, 28 Cal. 3d 461, 462, 622 P.2d 952, 953, 171 Cal. Rptr. 507, 508 (1980); Herring v. State, 446 So. 2d 1049, 1055 (Fla.), *cert. denied*, 105 S. Ct. 396 (1984); People v. Gaines, 88 Ill. 2d 342, 351-52, 430 N.E.2d 1046, 1051 (1981), *cert. denied*, 456 U.S. 1001 (1982); State v. Mercer, 618 S.W.2d 1, 6 (Mo.), *cert. denied*, 454 U.S. 933 (1981).

172 *Witt*, 105 S. Ct. at 867 (Brennan, J., dissenting). The New Jersey Supreme Court's decision in State v. Mathis, 52 N.J. 238, 245 A.2d 20 (1968), *rev'd mem. sub nom.* Mathis v. New Jersey, 403 U.S. 946 (1971) similarly shifted this risk to the defendant. For a discussion of that case, see *supra* notes 65-69 and accompanying text.

Finally, the dissent attacked the majority's discussion of the proper standard of review to be applied to *Witherspoon* determinations made by state courts.[173] Initially, Justice Brennan inferred that one objective of the majority's abandonment of the strict requirements of *Witherspoon* was "to bring review of death-qualification questions within the scope of the presumption of correctness of state court factual findings on federal collateral review."[174] The dissent reasoned, however, that had the Court maintained the *Witherspoon* standard, this issue would be a mixed question of law and fact and thus not subject to the statutory presumption of correctness.[175] Justice Brennan further maintained that, even under the majority's new standard, it did not necessarily follow that a state court's *Witherspoon* determination should be afforded a presumption of correctness.[176] Thus, the dissent concluded that the Court's finding that a state court's *Witherspoon* finding should be afforded a presumption of correctness "thwart[ed] [the] vindication of fundamental rights in the federal courts."[177]

By abandoning the demanding burden of proof for juror exclusion in capital cases, the *Witt* Court has returned the standard to its pre-*Witherspoon* level. The traditional approach to juror exclusion in both capital and noncapital cases was for a court to consider only whether a juror would be influenced by a factor affecting impartiality.[178] Further questioning to ascertain whether a juror could put aside his bias and follow the law was unnecessary.[179] The rationale was that a party had no legitimate legal interest in retaining a juror prejudiced in his favor.[180]

The *Witherspoon* decision, however, established that a capital defendant's right to an impartial jury demanded retention of ju-

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173 *See Witt*, 105 S. Ct. at 872 (Brennan, J., dissenting).

174 *Id.*

175 *Id.* Justice Brennan defined "mixed question" as the "application of a legal standard to undisputed historical fact." *Id.* He reasoned that the review of juror exclusion issues necessitates the application of a legal standard to the venireman's undisputed opinions. *See id.* Justice Brennan therefore concluded that the determination of whether a capital sentencing juror was properly excluded is a mixed question of law and fact. *Id.*

176 *Id.*

177 *Id.*

178 *See id.* at 851-52, 855. Prior to *Witherspoon*, a state could properly exclude prospective jurors merely because they were opposed to the death penalty. *See, e.g.*, People v. Riser, 47 Cal. 2d 566, 575-76, 305 P.2d 1, 7 (1956), *cert. denied*, 353 U.S. 930 (1957); Commonwealth v. Ladetto, 349 Mass. 237, 246, 207 N.E.2d 536, 542 (1965).

179 *See Witherspoon*, 391 U.S. at 539 (Black, J., dissenting).

180 *See* Horton v. United States, 15 App. D.C. 310, 319 (D.C. Cir. 1899).

rors with reservations about the death penalty so long as they were not "irrevocably committed . . . to vote against the penalty of death."[181] Accordingly, *Witherspoon* and its progeny required an *unmistakable* showing by the prosecutor that a juror could not be impartial in the performance of his duties.[182] In so doing, the *Witherspoon* Court properly disposed of the assumption that veniremen with misgivings about capital punishment could not put them aside and objectively follow their oath.[183] The *Witt* Court, however, has abandoned the requirement that a venireman make it *unmistakably* clear that his views toward the death penalty will prevent him from abiding by his oath and following the law,[184] thus returning the standard for juror exclusion in capital cases to the same level required for juror exclusion in noncapital cases.

The *Witt* Court's conclusion that death-qualification exclusions must meet the same standard for juror exclusion in noncapital cases contravenes a number of earlier Supreme Court decisions. Prior to *Witt*, the Court had expressed the view that capital cases require greater scrutiny than noncapital cases.[185] For instance, in *Zant v. Stephens*,[186] the Court determined that because "there is a qualitative difference between death and any other permissible form of punishment, 'there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.' "[187] The *Zant* opinion thus recognized that the absolute finality of death as a penalty requires a high degree of reliability in the imposition of a capital sentence.[188] This need for reliability extends to all aspects of the capital trial, including the jury selection process. A prosecutor may now exclude prospective jurors, however, merely because they express reservations about the death penalty. The chance that the resulting jury will be representative of a fair cross-section of the community, as required by the sixth amend-

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

182 *See id.* at 522-23 n.21.

183 *See id.* at 514 n.7.

184 *Witt*, 105 S. Ct. at 850, 852-53.

185 *See, e.g.*, Spaziano v. Florida, 468 U.S. 447, 459-60 & n.7 (1984) (Court stressed minimizing risk of error in imposing the death sentence); Zant v. Stephens, 462 U.S. 862, 884-85 (1983) (Court stressed reliability in determining that death is appropriate sentence); Bullington v. Missouri, 451 U.S. 430, 446 (1981) (death sentence prohibited after retrial when a defendant was sentenced to life imprisonment upon initial conviction).

186 462 U.S. 862 (1983).

187 *Id.* at 884-85 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

188 *See id.*; *see also Furman*, 408 U.S. at 306 (Stewart, J., concurring) (the death penalty "is unique in its total irrevocability").

ment, is slim.[189] Consequently, there is a much greater possibility that the death sentence will be wrongfully imposed. Thus, the *Witt* Court's departure from the strict standard of proof required by *Witherspoon* has impaired both the reliability of the capital sentencing process and the criminal defendant's sixth amendment right to an impartial jury.

Although the *Witt* Court properly recognized that the evolution of the capital sentencing jury has rendered the first prong of the *Witherspoon* test inapplicable,[190] the majority's abandonment of the second prong and its departure from *Witherspoon's* high burden of proof were unwarranted. In support of its conclusion that the required burden of proof had been lowered, the *Witt* majority cited the *Adams* decision.[191] Justice Rehnquist noted that the jury involved in the *Adams* decision was required to answer questions regarding the nature of the crime.[192] The answers to these questions then determined the sentence that was imposed under the capital sentencing statute.[193] Nevertheless, the *Adams* Court concluded that a juror's views on capital punishment could still affect his ability to answer the required questions objectively.[194] Thus, while the *Adams* Court did not specifically state that a juror must make it "unmistakably clear" that his answers would be consciously distorted or biased, it is apparent that the *Adams* Court in fact applied a test that closely resembled the *Witherspoon* standard.[195]

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189 *Witt*, 105 S. Ct. at 861 (Brennan, J., dissenting) (citing *Adams*, 448 U.S. at 50; *Witherspoon*, 391 U.S. at 519-20). Justice Brennan correctly noted that

> broad exclusion of prospective jurors on the basis of the possible effect of their views about capital punishment infringes the rights of a capital defendant in a way that broad exclusion for indicia of other kinds of bias does not. No systematic skew in the nature of jury composition results from exclusion of individuals for random idiosyncratic traits likely to lead to bias. Exclusion of those opposed to capital punishment, by contrast, keeps an identifiable class of people off the jury in capital cases and is likely systematically to bias juries. Such juries are more likely to be hanging juries, tribunals more disposed in any given case to impose a sentence of death.

Id. (citing *Witherspoon*, 391 U.S. at 523).

190 *See id.* at 851.

191 *Id.* at 851, 852.

192 *Id.* at 851.

193 *Id.*; *see supra* note 92.

194 *See Adams*, 448 U.S. at 46.

195 *Compare Adams*, 448 U.S. at 45 (juror exclusion standard) *with Witherspoon*, 391 U.S. at 522 n.21 (same). The *Adams* Court stated that "neither nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the

Even if the *Adams* decision is construed to have lowered the standard for juror exclusion, the jury that tried Witt possessed a brand of discretion closer to that present in *Witherspoon* rather than *Adams*. The *Adams* jury's discretion was unique in that it involved answering specific, statutorily-imposed questions.[196] By contrast, most states' capital sentencing schemes require the jury to weigh aggravating and mitigating circumstances in determining whether the death sentence should be imposed.[197] Before the death penalty may be inflicted, the jury is required to find the existence of at least one aggravating circumstance.[198] At that point, the jury possesses absolute discretion in determining the presence of an aggravating circumstance. Thus, present-day juries are in essentially the same position as the *Witherspoon* jury. Hence, the strict standard of proof required by *Witherspoon* should remain intact.

Admittedly, the task of determining whether a prospective juror's views on capital punishment will prohibit him from properly applying the law or impartially viewing the facts is not an easy one. In fact, there is a substantial possibility that many trial judges may deny the exclusion of venire members who actually should be excused. As Justice Brennan noted, however, this is a risk that the state must bear.[199] The sixth amendment requires that protection of a defendant's right to an impartial jury be more solicitous than protection of the state's right to administer its capital punishment scheme.[200] The strict standard of proof mandated by *Witherspoon* would provide the necessary protection.

The *Witt* Court's additional conclusion that a state trial judge's determination of juror exclusion must be afforded a "presumption of correctness"[201] was clearly a consequence of its departure from the strict measure of proof required by *Witherspoon*. Under the *Witherspoon* test, the trial judge was required to apply a legal standard—"unmistakable clarity"—to the factual is-

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court's instructions and obey their oaths, regardless of their feelings about the death penalty." *Adams*, 448 U.S. at 50.

196 *See supra* note 92.

197 *See supra* note 81 and accompanying text.

198 *Gregg*, 428 U.S. at 164-65, 206 (Stewart, J., plurality opinion). *Gregg* required at least one aggravating factor to be present. *See id.* Individual state statutes may provide for a number of aggravating and mitigating factors, which the jury is free to weigh or to reject totally. *See supra* note 81; *see also* N.J. STAT. ANN. § 2C:11-3(c)(4), (5) (West 1982) (New Jersey's aggravating and mitigating factors).

199 *See Witt*, 105 S. Ct. at 862-63 (Brennan, J., dissenting).

200 *See id.* at 863, 864 (Brennan, J., dissenting).

201 *See id.* at 854-55.

sue of whether the prospective juror's views on capital punishment would prohibit him from impartially determining the defendant's guilt.[202] This was clearly a mixed question of law and fact, thus permitting a Federal court in a habeas corpus proceeding to determine whether the legal standard had been correctly applied.[203] The *Witt* Court, however, abandoned this strict standard of proof, and a trial judge's predominant function in determining juror bias now involves findings of credibility.[204] Because such findings are so clearly factual in nature, the trial judge's determinations must be given the deference afforded by the Federal habeas corpus statute.[205]

The ultimate decision to exclude a venire member from the capital sentencing jury now lies almost exclusively within the discretion of the trial judge. Hence, *Witt's* clarification of the *Witherspoon* standard should facilitate trial courts' future resolutions of this extremely sensitive issue. Unfortunately, the price for this new simplicity may be a dilution of a capital defendant's sixth amendment right to an impartial jury.

James F. Gizzi

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202 *See id.* at 855.
203 *See id.*
204 *Id.*
205 *See* 28 U.S.C. § 2254(d) (1982).