Intro to Death Penalty Voir Dire[1]

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Intro to Death Penalty Voir Dire

Death is different. Because of the irrevocable nature of the penalty, different rules have evolved for the impaneling of the "death-qualified" jury. The beginning of a modern rule came to being in *Witherspoon v. Illinois*, in which the court began to seriously consider what kind of jurors, as evidenced by their answers to voir dire, should be allowed to become jurors in death penalty cases. These thoughts were modified through *Adams v. Texas*, *Boulden v. Holman*, *Maxwell v. Bishop*, *Wainright v. Witt*, *Morgan v. Illinois*, and by the time the Court decides *Darden v, Illinois*, and *Uttecht v. Brown*, that which seemed to be an evolving rule becomes, more or less, a matter in which the appellate courts are to presume the trial courts acted correctly, perhaps even in spite of a lack of evidence in the record that this is so.

B. *Witherspoon,* "Conscientious Scruples" and "Automatically Vote"

1. Supreme Court

In *Witherspoon v. Illinois*, [3] the Supreme Court considered a narrow question. The issue was not whether the State could exclude as a juror those jurors who indicated that they would not vote for the death penalty. The issue was not whether the State could exclude as a juror those jurors who indicate that their feelings about the death penalty would color their judgment of the guilt of innocence of the defendant. The issue is

[3] 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

whether the State could exclude, without more, and summarily, the prospective juror who expressed some level of hesitation about the imposition death penalty.

In *Witherspoon*, appellant was found guilty of murder and sentenced to death.[4] At that time, Illinois had a statute protecting the sanctity of the death penalty: "In trials for murder it should be cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he opposes the same."[5] Pursuant to this statute, in picking the jury at trial in *Witherspoon*, "the prosecution eliminated nearly half of the venire of prospective jurors by challenging, under the authority of this statute, any venireman who expressed qualms about capital punishment."[6] These dismissals, the court noted, were quite summary.[7] Indeed, the trial judge was noted to have said at voir dire, "Let's get these conscientious objectors out of the way, without wasting any time on them."[8]

As to procedure, the record is not completely clear. The exact questions asked prospective jurors are not preserved. Rather, this is recited:

> Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death. Thirty-nine veniremen, including four of the six who indicated that they did not believe in the capital punishment, acknowledged having "conscientious or religious scruples' against the infliction of the death penalty' or against the infliction 'in a proper case' and were excluded

[4] 512, 1772.
[5] 512, 1772.
[6] *Id.*
[7] "In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty." 514, 1773.
[8] 514, 1773.

> without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.[9]

The State argued upon appeal that "… individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge could make death the proper penalty."[10]

The Court was clearly concerned that a jury as chosen be one which will follow the mandates of the law and the instructions of the trial judge. Yet the Court was also concerned that a jury chosen by excluding all those who have any qualms whatsoever about the death penalty may result in "…a jury uncommonly willing to condemn a man to die."[11]

The State clearly could have no objection to those prospective jurors who indicated having pro-death penalty feelings. But what of the two other classes of prospective jurors, those who are staunchly anti-death penalty and those who express some degree of hesitancy concerning imposition of the death penalty? Further inquiry, on both fronts, is needed. As to the staunchly anti-death penalty veniremen, the court noted: "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocable committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide

[9] 514-515. 1773.
[10] 518-519, 1775.
[11] 521, 1776.

by his oath as a juror and to obey the law of the State."[12]

It cannot be less for those with lesser anti-death penalty feelings. Or, as the Court said:

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment…. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.[13]
> .

In that spirit, the Court held that the State could with impunity move to strike all those prospective jurors "who stated in advance of trial that they would not even consider returning a verdict of death,"[14] or, in the words of the famous footnote 21:

> …those who made it unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt."[15]

The State, however, could not so exclude "all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle."[16] To do so creates "a jury uncommonly willing to condemn a man to die."[17]

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[12] n. 7, 515, 1773.
[13] n. 21, 523, 1777.
[14] 520, 1776.
[15] n. 21, 521, 1777.
[16] *Id.*
[17] 521, 1776.

C. *Boulden v. Holman*, and *Adams v. Texas*

1. Restrictive Statutes

In *Boulden v. Holman*, [18] and *Adams v. Texas*,[19] the Supreme Court faced state statutes designed to regulate, or perhaps micromanage, juror membership in death penalty cases. In all three cases, the statutes were found to be wanting. In *Boulden*, the Supreme Court faced a situation in which fifteen prospective jurors were excluded under an Alabama statute which provided: "On the trial for any offense which may be punishable capitally, … it is a good cause of challenge by the state that the person has a fixed opinion against capital… punishment…."[20] The Court is bothered by a subsequent State court interpretation of the statute which interpreted the statute to allow " the exclusion of potential jurors who, although 'opposed to capital punishment, … would hang some men."[21] It appeared, then, that the jurors subject to exclusion were in the exact class about which *Witherspoon* was concerned: those with varying degrees of concern about the imposition of the death penalty. After a review of the summary voir dire, discussed below, contained in the record, the Court noted that "the sentence of death cannot stand under *Witherspoon v. Illinois*," and remanded the matter to Federal District Court for further proceedings.[22]

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[18] 394 U.S. 478, 89 S.Ct. 1138. 22 L.Ed.2d 433 (1969).
[19] 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980).
[20] 481, 1140.
[21] *Untreinor v. State*, 146 Ala. 26, 33, 41 So. 285, 287, is cited for this proposition at 481, 1140.
[22] 484, 1142.

In *Adams v. Texas*, appellant was found guilty of killing a policeman and sentenced to death.[23] The issue pitted the rule of *Witherspoon* against a Texas statute which read:

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact.[24]

Numerous prospective jurors were excused who indicated they could not take the oath.[25]

The Supreme Court began by glossing *Witherspoon's* ruling: "…[A] state may not constitutionally execute a death sentence imposed by a jury culled of all those who revealed during voir dire examination that they had conscientious scruples against or were otherwise opposed to capital punishment."[26] The Court noted that "case law has established" the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[27] This becomes the standard.

The Texas statute went too far and excluded too many;

> Such a test could and did exclude jurors who stated that they would be "affected" by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others

[23] 41, 2524.
[24] Tex. Penal Code Ann. Sec. 12.31 (1974) at 42, 2525.
[25] *Id.*
[26] 43, 2525.
[27] 45, 2526.

> were excluded only because they were unable to positively state whether or not their deliberations would in any way be "affected."[28]

This, in and of itself, is insufficient for exclusion. The ultimate question is whether the prospective juror's thoughts, feelings and opinions are such that they might cause the juror difficulty in following the court's instructions.[29]

2. A Comparison of Two Cases in the Post-*Adams* Pre-*Darden* Era: *Maxwell v. Bishop* and *Lockett v. Ohio*

Two cases decided 8 years apart show, by comparison, acceptable and non-acceptable voir dire practices in this very narrow area. In *Maxwell v. Bishop*,[30] the court confronted a pre-*Witherspoon* trial voir dire, summary in nature and inadequate. In *Lockett v. Ohio*, [31] the Court considered voir dire which was hardly greater in length than that of *Maxwell*, but within Constitutional dimensions.

In *Maxwell*, an exchanges such as this as to three separate jurors take place at voir dire:

> 'Q: If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?
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> 'A: I think I do.'
>
> …
>
> 'Q: Do you entertain any conscientious scruples about imposing the death penalty?"
>
> 'A: Yes, I am afraid I do.'
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> …
>
> 'Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have any feelings about returning a death

[28] 49-50, 2528-2529.
[29] Id.
[30] 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970).
[31] 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

> sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad as to merit the death sentence?
>
> 'A; No, I don't believe in capital punishment.'[32]

All three jurors were excused.[33] Four other jurors were removed about which the Court has serious questions, but their voir dire was not included in the opinion.[34] The Court found that the statements made by the prospective jurors were "general objections to the death penalty' or those that "expressed conscientious or religious scruples against its infliction."[35] As such, without more queries as to the nature of the beliefs of the individual jurors, such statements are insufficiently clear. If a juror is to be excused, his opinion must be unambiguous.[36]

In *Lockett v. Ohio*, the observer is able to see the standard in practice. Appellant alleged upon appeal that four jurors were excluded from her jury in violation of the principles outlined in *Witherspoon*.[37] At voir dire, the prosecutor asked of the prospective jurors if "any of the prospective jurors were so opposed to capital punishment that 'they could not sit, listen to the evidence, listen to the law, [and] make their determination solely upon the evidence and the law without considering the fact that capital punishment' might be imposed."[38] The four jurors in question responded affirmatively and then were asked by the trial judge: "Do you feel that you could take an oath to well

[32] 264-265, 1580.
[33] 264-265, 1580.
[34] n. 2, 265, 1580.
[35] 265, 1580.
[36] 265, 1580-1581.
[37] 595, 2960.
[38] 595, 2960.

and truly [sic] try this case. . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?"[39]

The jurors indicated they could not take such an oath and were excused.[40] The Court ruled that the jurors, in answering the questions of the prosecutor and judge, that each had made it "unmistakably clear" that they could not do so.[41] It may be said, based upon *Lockett*, that further inquiry is necessarily when a juror equivocates about the death penalty, and, while that inquiry should be pointed concerning the juror's ability to obey the instructions of the court and set aside one's beliefs, that inquiry need not be extensive.

E. The Devolving *Witherspoon* and *Adams* Standards and the Rise of Demeanor

A. Supreme Court

Adams probably represents the high water mark of the thinking of the Supreme Court in the area. In *Wainright v. Witt*,[42] the test enunciated in *Adams* began to become considerably less distinct. Concomitant with the boundaries of this test becoming somewhat opaque, one sees a rise in respect for trial judge's discretion to observe the "demeanor" of the prospective juror.

In *Wainright*, the following colloquy took place between the prosecutor and a prospective juror at voir dire:

> [Q. Prosecutor:] Now let me ask you a question, ma'm. Do you have any religious beliefs or personal beliefs against the death penalty?
> [A. Colby:] I am afraid personally but not—
> [Q:] Speak up, please.

[39] 595-596, 2960.
[40] 596, 2960.
[41] 596, 2960.
[42] 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

> [A:] I am afraid of being a little personal, but definitely not religious.
> [Q]:Now, would that interfere with you sitting as a juror in this case?
> [A]: I am afraid it would.
> [Q]: You are afraid it would?
> [A]: Yes, Sir.
> [Q]: Would it interfere with judging the guilt or innocence of the Defendant in this case?
> [A]: I think so.[43]

The said juror was stricken for cause.[44] The Court noted that *Witherspoon*, in footnote 21, set a standard that, in order for a juror to be excluded for cause, the juror must make it

> "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.[45]

Maxwell and *Boulden* indicated that the prospective juror, in order to be a proper subject for exclusion had to state, "… unambiguously that he would automatically vote against the imposition of capital punishment."[46]

The *Wainwright* Court then affirmed that the proper standard is that of *Adams*. What then is the status of a prospective juror who indicates that certain beliefs will "interfere" with the guilt/innocence or sentencing phase? The Court answered that question with a shrug. Indeed, "…this standard likewise does not require that a juror's bias be proved with unmistakable clarity."[47] The reason for this is that "… many

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[43] 416, 848.
[44] 416, 848.
[45] 416, 848, citing *Witherspoon*, 391 U.S. at 522, 1121, 88 S.Ct. at 1777, n. 21 (emphasis in original).
[46] 419, 849, fn 2, citing *Maxwell*, 398 U.S. at 265, 90 S.Ct. at 1140 (emphasis is that of the Supreme Court).
[47] *Wainwright*, 424, 852.

veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may want to hide their true feelings."[48] In "confirming" the *Adams* standard, the court divorced itself from the "automatic" standard of *Witherspoon* and stepped back from the "unmistakable clarity" requirement of *Maxwell* and *Boulden*.[49] Instead, the Court indicated that the trial judge will be presumed to be correct,[50] that no specific finding of fact will necessarily be required of the presiding judge,[51] that such rulings of the trial judge will be assumed to be based upon the trial judge's observations of the demeanor of the prospective juror.[52]

By the time the Court reached the next case, *Darden v. Illinois*,[53] it was clear that the Court was inclined to extend its thoughts expressed in *Wainright*.

In *Darden*, the trial judge clearly asked a death qualifying question which complied with the overruled *Witherspoon* standard but not with the requirements of *Adams*. The trial judge asked: "Do you have any moral or religious principles in

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[48] *Wainwright*, 424-425, 852.
[49] "That [Adams] standard is whether the juror's view would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." [FN omitted] We note that, in addition to dispensing with Witherspoon's reference to "automatic" decision making
[50] 431, 856.
[51] "We decline to require the judge to write out in a separate memorandum his specific findings on each juror excused. A trial judge 's job is difficult enough without senseless make work. Now do we think under the circumstances that the trial judge was required to announce for the record his conclusion that Colby was biased, or his reasoning. The finding is evident from the record." 430, 855. Really? The whole point of the opinion is that there is no record so a legal presumption must be formed.
[52] "…deference must be paid to the trial judge who sees and hears the juror." 426, 853.
[53] 477 U.S. 168, 106 S.Ct. 2464, 91 S.Ct. 144 (1968).

opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?"[54]

Prospective juror Murphy answered in the affirmative and was excused.[55]

Curiously, the Court called this the "correct standard,"[56] in spite of the fact that *Adams* had been decided six years prior. "The precise wording," said the Court, "of the question asked of Murphy, and the answer he gave, do not by themselves compel the conclusion that he could not under any circumstances recommend the death penalty."[57] Then the said juror was wrongly excluded? Well, no. It is the thing unseen or unrecorded which is the best evidence of what happened. "The trial court, 'aided as it undoubtedly was by its assessment of [the potential juror's] demeanor,' [footnote omitted] was under an obligation to determine whether Murphy's views would 'prevent or substantially impair the performance of his duties as a juror.'[58]

While that is true, the opinion seems bereft of any fact which could lead the reader to the conclusion that the trial judge was even acquainted with the *Adams* standard. Inexplicably, the Court put great faith in the facts that "… Murphy was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear. No specific objection was made to the excusal of Murphy by

[54] 176, 2469.
[55] *Id.*
[56] 177, 2469.
[57] 178, 2470.
[58] 178, 2470.

defense counsel. Nor did the court perceive, as it had previously, any need to question further."[59]

Darden is followed by the somewhat more disturbing *Uttecht v. Brown*,[60] expressing further the Court's reliance on a lack of record to prove that the trial court's decision was based upon "demeanor." "Juror Z" was probably not the ideal juror, but when he was asked the ultimate question as to his death penalty beliefs, he indicated he "believe[d] in the death penalty in severe situations… I don't think it should happen never happen and I don't think it should happen 10 times a week either…. There are times when it would be appropriate."[61] Questioned as to what he thought would be an "appropriate" circumstance, he indicated a situation in which "the defendant actually came out and said he wanted to die," and when "a person is incorrigible and would reviolate if released."[62] Juror Z indicated in his answer on a juror questionnaire that he was "in favor of the death penalty if it is proved beyond the shadow of a doubt if a person has killed and would kill again."[63] When informed that, if the defendant was found guilty of first degree murder, "there was no possibility of Brown's release to reoffend," and being so informed, "… can you think of a time when you would be willing to impose the death penalty?"[64] Juror Z answered "I would have to give that some thought."[65] Finally,

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[59] 178, 2470.
[60] 127 S.Ct. 2218, __ U.S. __, 167 L.Ed.2d 1014 (2007).
[61] *Id.*, 2226-2227.
[62] *Id.*, 2227.
[63] *Id.*, 2227.
[64] *Id.*, 2227.
[65] *Id.*, 2227. Was Juror Z smarter than the court is giving him credit? If the question is killing, clearly the defendant does not have to be released to reoffend. A cellmate or a guard may serve as a victim. Perhaps this *is* worthy of some thought.

Juror Z was asked "whether he could impose the death penalty when there was no possibility of parole." He answered "[I]f I was convinced that was the appropriate measure."[66]

While Juror Z appears as rambling and disorganized in his thinking as the voir dire in this trial, it is difficult to see how Juror Z is "substantially impaired" in his ability to render a death verdict. Yet the Court does so: "The transcript of Juror Z's questioning reveals that, despite the preceding instructions and information, he had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case."[67]

Further:

> Juror Z's answers, on their face, could have led the trial court to believe that Juror Z would be substantially impaired in his ability to impose the death penalty in the absence of the possibility that Brown would be released and would reoffend. And the trial court, furthermore, is entitled to deference because it had the opportunity to observe the demeanor of Juror Z. We do not know anything about his demeanor, in part because the transcript cannot fully reflect that information but also because the defense did not object to Juror Z's removal.[68]

It appears fair to say that *Uttecht* is decided on the basis of that which the Supreme Court "does not know," and the fact that the defendant did not object to the removal of a juror who described himself as believing in the death penalty.

G. *Morgan v. Illinois* and Life Qualification

[66] *Id.*, 2227.
[67] *Id.*, 2226.
[68] *Id.*, 2229.

1. Supreme Court

In *Morgan v. Illinois*,[69] the Court considered the flip side of the question presented in *Witherspoon*.[70] The Court in that matter decided that prospective jurors must be able to consider the death penalty and reach such a sentence if justified by the statutory scheme, the facts of the case and the mitigating and aggravating evidence presented. In *Morgan*, the issue is whether voir dire must be asked to determine if the prospective juror is able to give a sentence other than death after considering those matters.

Voir dire began with the trial judge asking the following question of all prospective jurors: "Would you automatically vote against the death penalty no matter what the facts of the case were?"[71] After seven venire persons had been questioned and three seated, appellant requested that the following question be propounded of all prospective jurors: "If you found Derrick Morgan guilty, would you automatically vote to impose the death penalty no matter what the facts are?"[72] This question was refused, the court indicating that it had "asked the question in a different vein substantially in that nature."[73]

The Court looked to *Ross v. Oklahoma*.[74] In that matter in which a pro-death penalty juror was impaneled and, after the rejection of a challenge for cause, was stricken

[69] 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992)
[70] *Supra.*
[71] 723, 2226.
[72] 723, 2226.
[73] 723, 2226.
[74] *Id.*

by appellant, the Court noted that the offending juror did not sit, but "[h]ad [this juror] sat on the jury that ultimately sentenced petitioner to death, and had petitioner properly preserved his right to challenge the trial court's failure to remove [the juror] for cause, the sentence would have to be overturned."[75] Given this principle, the record is not as clear cut as is *Ross* that a juror or jurors had been improperly impaneled. Indeed, the record cannot be that clear as the pertinent question was refused.

Further the Court noted that the burden for establishing bias rests with the party sponsoring the challenge for cause.[76] This strongly mitigates for the asking of this important question.[77] The Court refers to this question as complimentary to *Witherspoon.* [78] Lastly, the court frowned on the thought that more general questions adequately covered "life qualification." The Court was concerned that general questions fail to probe sufficiently as to the prospective juror's true beliefs: "It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. [footnote omitted] A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception."[79]

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[75] *Ross* at 487 U.S. at 85, 108 S.Ct. at 2277. cited in *Morgan* at 728-729, 2229.
[76] Citing *Lockhart*, at 733, 2232.
[77] "Were voir dire not available to lay bare the foundation of petitioner's challenge for cause against those prospective jurors who would *always* impose death following conviction, his right not to be tried by such jurors would be rendered as nugatory and meaningless as the State's right, in the absence of questioning, to strike those who would *never* do so." 733, 2232.
[78] *Id.*
[79] 735-736223.

H. Related Issues

a. *Witherspoon* Excludables

In *Witherspoon*, the Court articulated a concern about the makeup of a death-qualified jury. A jury must be representative of the community.[80] The nature of jury selection is that of culling out jurors from a larger pool. The concern is raised thusly:

> A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. Guided by neither rule not standard, 'free to select or reject as it (sees) fit,' a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing lees-than express the conscience of the community on the ultimate question of life or death. Yet, in an nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community, Culled of all who harbor doubts about the wisdom of capitol punishment-of all who would be reluctant to pronounce the extreme penalty-such a jury can speak only for a distinct and dwindling minority.[81]

This is the determining moment of those who come to be known as "*Witherspoon*- excludables," those jurors who oppose the death penalty, to a widely varying degree of commitment. As *Witherspoon* notes, those with mere "general objections" or conscientious scruples"[82] against capital punishment, so long as the said

[80] I don't know what this cite is. Maybe 6th Amendment.
[81] *Witherspoon*, 519, 1775-1776.
[82] 522, 1777.

juror could decide the case impartially and obey the court's instructions, were suitable jurors.[83] To put this group in other words borrowed from Witherspoon, they are "…[T]hose prospective jurors who stated in advance of trial that they would not even consider returning a verdict of guilty…."[84]

Not only might this group "*Witherspoon*-excludables" be a definable sub-group of society, but the Supreme Court clearly thought that it is, in this narrow area of capital punishment, the dominant and growing group.

> Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment—of all who would be reluctant to pronounce the extreme penalty—such a jury can speak only for a distinct and dwindling minority.[85]

How can such a group be excluded? Such attacks on exclusion have been based on the impartial jury requirement of the Sixth Amendment and have come about alleging that the exclusion of these jurors offends the "fair cross section" requirement and that studies of death-qualified jurors show them to be biased toward the prosecution.

b. *Witherspoon* Excludables and Fair Cross Section Requirement

[83] *Id.*
[84] *Id.*
[85] *Witherspoon*, 519-520, 1775-1776.

The Sixth Amendment[86] requires that the accused be tried by an impartial jury. This has been interpreted to require that that the jury pool from which the jury is drawn de representative of the community in which the defendant is tried. In the past, the court has used "fair cross section" analysis to discuss adequate representation of blacks,[87] women[88] and Mexican-Americans.[89]

1. Supreme Court

a. Are *Witherspoon*-Excludables a Distinct Group for Purposes of "Fair Cross Section"?

In *Lockhart v. McCree*[90] the Court considered whether "*Witherspoon*-excludables" were such a group, the exclusion of which would offend the Sixth Amendment. The Court cited *Duren* for the proposition that a "'fair cross-section' claim is the systematic exclusion of 'a 'distinctive group in the community.'"[91] Further,

> [D]istinctiveness must be linked to the purposes of the fair-cross-section requirement. … [W]e identified those purposes as (1) "guarding against the exercise of arbitrary power" and ensuring that the "commonsense judgment of the community will act as a hedge against the overzealous or mistaken prosecutor," (2) preserving public confidence in the fairness of the criminal justice system," and (3) implementing our belief that "sharing in the administration of justice is a phase of civic responsibility."[92]

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[86] 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. Sixth Amendment to the United States; Constitution.
[87] *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972).
[88] *Duren v. Missouri*, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2e 690 (1975).
[89] *Castenida v, Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977).
[90] *Lockhart v. McCree*, 476 U.S. 162, 175, 106 S.Ct. 1758, 1766, 90 L.Ed.2d 137 (1986).
[91] 174, 1765.
[92] 174-175, 1765-1766.

Blacks, women and Mexican-Americans were kept from serving as jurors "for reasons completely unrelated to the ability of members of the group to serve as jurors…," [93] and all three of the above principles were consequently offended. Unlike these groups, however, *Witherspoon*-excludables do not have similar immutable characteristics,[94] are not "historically disadvantaged," and have not been deprived of the right to serve as jurors.[95] *Witherspoon*-excludables are not a group within the meaning of "fair-cross section analysis". "In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinct groups" for fair-cross section analysis."[96]

Further, the State has a legitimate interest in "obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases…."[97]

This issue is seen in stark relief in *Buchanan v. Kentucky*.[98] In that matter, appellant was tried jointly for murder with another. The State, however, only pursued the

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[93] *Id.*
[94] "…[U]nlike blacks, women and Mexican-Americans, 'Witherspoon-excludables' are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." 177, 1766.
[95] …[T]he removal for cause of "*Witherspoon*-excludables" in a capital case does not prevent them from serving as jurors in other criminal cases, and that leads to no substantial deprivation of their basic rights of citizenship." 176, 1766.
[96] 174, 1765.
[97] 175, 1766.
[98] 438 U.S. 402, 107 S.Ct. 2906, 97 L.Ed.2d 336 (1987).

death penalty on appellant's co-defendant. Appellant's situation then was that he was facing non-capital charges with a death-qualified jury.[99]

The Court was unsympathetic to appellant's plight. "…[T]he Commonwealth did not arbitrarily single out the '*Witherspoon*-excludables' for a reason unrelated to their ability to serve as jurors at trial…."[100] The State, even in this matter, has a legitimate "… interest in having a jury that could properly find the facts and apply the law at both the guilt and sentencing phase."[101]

Appellant argued that the "Commonwealth's interests in having '*Witherspoon*-excludables' removed from his jury were minimal in comparison to the prejudice he suffered by being convicted and sentenced by this jury…."[102] He also proposed various alternative jury scenarios.[103]

Little or no discussion is had as to whether such juries do or do not tend to be more liable to convict. Instead, the Court focused on the State's interest in having joint trials[104] and mentioned the unfortunate fact that appellant did not move for severance of

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[99] 413, 2912.
[100] 415, 2913-2914.
[101] 415, 2914.
[102] *Id.* "In Kentucky, the jury making the guilt or innocence determination for the felony defendant also determines the punishment to be imposed within the limits fixed by statute *[citation omitted."*n. 13, 413, 2912.
[103] "For example, one alternative proposed by petitioner *[citation omitted]* to which he alluded at oral argument, *[citation omitted]* would be to have one jury for the guilt phase for both defendants and for the penalty phase for petitioner (this jury not being "death-qualified") and another "death-qualified" jury for the penalty phase for the capital defendant. On the other hand, there is the alternative, also acknowledged by petitioner at oral argument, *[citation omitted]* of using a "death-qualified" jury for the guilt phase for both defendants and for the capital defendant's penalty phase, and another jury (not "death-qualified") for petitioner's penalty phase." n. 18, 419, 2915.
[104] "Where, as here, one of the joined defendants is a capital defendant and the capital sentencing scheme requires the use of the same jury for the guilt and penalty phases of the capital defendant's trial, the interest in this scheme, which the Court recognizes as significant in *McCree [citation omitted]*, coupled with the Commonwealth's interest in a joint trial, argues strongly in favor of permitting "death qualification" of the

his trial from his co-defendant.[105]

b. Fair Cross Section and the Reach of the Doctrine

Appellant's attack with the tool of fair cross section" was also flawed. While there are numerous cases in which appellant attacked the procedure in which the jury pool has been formed, in the matter here before the court, the issue is not that *Witherspoon*-excludables had been systematically kept from the jury pool, but rather, the way in which the voir dire procedure had been carried out had necessarily stricken Witherspoon excludables, not leaving them as even possible jurors. But the Court in *Lockhart* accurately noted that the Court has never required petit juries "to reflect the composition of the community at large,"[106] and a "fair cross section challenge" is therefore inapposite.[107]

d. Studies and Their Impact

(1) Supreme Court

While a fair cross-section challenge alleges that the striking of "*Witherspoon*-excludables" makes the remaining jury unrepresentative of the community, some appellants have alleged, further, that such a jury is also inherently impartial.

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jury. 419-420, 2916.

[105] "Indeed, it appears that , by not moving to sever his case from that of Standford [codefendant], petitioner made the tactical decision that he would fare better if he were tried by the same jury that tried Standford, the "triggerman" in Poore's murder." 418, 2915.

[106] 173, 1765

[107] 173-174, 1765.

This allegation was made in *Witherspoon*.[108] Upon appeal, appellant requested the court to consider various studies of death-qualified juries which, appellant contended, supported this position.[109] These studies were found by the Supreme Court to be "tentative and fragmentary"[110] and the Court concluded, "We simply cannot conclude, either on the basis of the record before us or as a matter of judicial notice, that the exclusion of jurors results in an unrepresentative jury if the issue of guilt or substantially increases the risk of conviction."[111]

Eighteen years later, in *Lockhart v. McCree*,[112] the Court was again facing this issue in a situation in which appellant appeared to have a stronger hand. The case came to the Supreme Court by way of federal habeas corpus.[113] In federal court, appellant alleged that "… the removal for cause of the so-called 'Witherspoon-excludable' prospective jurors [footnote omitted] violated his right under the Sixth and Fourteenth Amendments to have his guilt or innocence determined by an impartial jury selected from a representative cross-section of the community."[114] While not completely clear by the

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[108] "He [appellant] maintains that such a [death-qualified] jury, unlike the one chosen from a crosssection of the community, must necessarily be biased in favor of conviction, for the kind of juror who would be unperturbed by the prospect of sending a man to his death, he contends, is the kind of juror who would too readily ignore the presumption of the defendant's innocence, accept the prosecutor's version of facts, and return a verdict of guilt." *Witherspoon* at 517, 1774

[109] fn 10, 517, 1774.

[110] 517, 1774.

[111] 517-518, 1774-1775.

[112] 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). This issue was also raised prior to *Lockhart* in *Bumper v. California*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968), but was dealt with in a summary fashion: "The petitioner adduced no evidence to support the claim that a jury selected as this one was is necessarily 'prosecution prone', [footnote omitted] and the materials referred to in his brief are no more substantial than those brought to our attention in *Witherspoon*. [footnote omitted]." 545, 1790.

[113] 165, 1760.

[114] 167, 1761-1762.

statement of the issue in the opinion, appellant claimed, amongst other things, that his jury, and juries of this nature, are more inclined to convict.[115]

Upon his hearing in federal District Court, "numerous social studies"[116] were put into evidence and the District Court agreed with appellant that "'death qualification' produces juries that 'were more prone to convict' capital defendants than 'non-death qualified' jurors."[117] The Eight Circuit affirmed.[118]

On a very firm basis, then, appellant found himself before the Supreme Court. The Supreme Court was not impressed with the state of the studies, which the Eight Circuit found to supply "substantial evidentiary support" for the judgment of the federal District Court.[119] Rather the Supreme Court noted the following objections: some of the studies were irrelevant to the issue;[120] some were "marginally relevant";[121] six of the studies had already been considered and disregarded in *Witherspoon*;[122] the remaining studies (three) failed to supply "substantial support."[123]

Nevertheless, the Court decides it "will assume for the purpose of this opinion that the studies are both methodologically valid and adequate to establish that

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[115] *Id.*
[116] 167, 1762.
[117] 167, 1762.
[118] 168, 1762.
[119] 168, 1762.
[120] "McCree introduced into evidence some 15 social science studies in support of his constitutional claims, but only6 of the studies ever purported to measure the potential effects on the guilt-innocence determination of the removal from the jury of '*Witherspoon*-excludables.'" 168-169, 1762-1763.
[121] "Eight of the remaining nine studies dealth solely with generalized attitudes and beliefs about the death penalty and other aspects of the criminal justice system, and were this, at best, only marginally relevant to the constitutionality of McCree's conviction." 169, 1762-1763.
[122] 170, 1763.
[123] 171, 1764.

"death-qualification" in fact produces juries somewhat more "conviction-prone" than "non-death qualified" juries."[124] To be exact, appellant argued that his jury lacked impartiality "because the absence of '*Witherspoon*-excludables' 'slanted' the jury in favor of conviction."[125] To paraphrase, those most likely to acquit or see appellant's case favorably were not allowed to serve; the jury was taken from those remaining.

Appellant's argument suffered as he admitted that the jurors who served were impartial, as that term has been defined by the Court.[126] But, said appellant. "…[B]ecause all individual jurors are to some extent predisposed towards one result or another, a constitutionally impartial *jury* can be constructed only by "balancing" the various predispositions of the individual *jurors*."[127]

The Court did not find this a suitable practical theory of the administration of justice. "In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints." [128] Individual viewpoints are of little significance "…so long as the jurors can conscientiously and properly carry out their duty to apply the law to the facts of the particular case."[129]

e. Life Sentence and *Witherspoon* Analysis

[124] 173, 1764.
[125] 177, 1767.
[126] 177, 1767.
[127] 177-178, 1767.
[128] 183, 1770.
[129] 184, 1770.

(1) Supreme Court

It is perfectly clear that *Witherspoon* cases are those in which the death penalty is requested by the State. But supposing a death penalty does not result. Does that case still receive *Witherspoon* analysis?

Bumper v. North Carolina[130] was decided the same day as *Witherspoon*. It is distinguishable from *Witherspoon* in one very important way: the jury did not impose death. In that matter, the prosecutor challenged for cause "all prospective jurors who stated that they were opposed to capital punishment or had conscientious scruples against imposing the death penalty."[131] The Court seems, in subsequent cases, interested in those persons who indicate having scruples against the death penalty. This seems to require that the trial court make further inquiry to determine the relative depth of their scruples. The Supreme Court here is uninterested, ruling that *Witherspoon* "does not govern the present case, because here the jury recommended a sentence of life imprisonment."[132]

Bumper cannot be reconciled with the next case in which the court is confronted with a *Witherspoon* issue in a matter in which the death penalty is not the ultimate result. Eighteen years after *Bumper*, the Supreme Court decided *Lockhart v. McCree*.[133] At trial, 8 jurors were stricken for cause as each stated he could not vote for the death penalty. Appellant McCree was convicted, but the jury set the punishment at life imprisonment. Under the rule in *Bumper*, it would appear that this matter does not fall within the

[130] 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968)
[131] 545, 1790.
[132] 545, 1790.
[133] 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986).

purview of *Witherspoon*, yet the Supreme Court goes on to reach out and decide this matter, citing *Bumper* for only what the Court perceives to be the common issue in both cases, and that common issue has nothing to do with the propriety of applying *Witherspoon*.[134]

It is easy to read that fact patterns in these cases and come to the conclusion than that *Lockhart* overruled *Bumper* without explicitly stating so. In this matter, the jury was both the finder of guilt or innocence and the sentencing body. Yet the issue, as the court saw it, primarily revolved around not the sentencing aspect but the guilt/innocence phase.

> Again, as in *Witherspoon*, the discretionary nature of the jury's task led us to conclude that the State could not "exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty," [cite omitted]
> In the case at bar, by contrast, we deal not with capital sentencing, but with the jury's more traditional role of finding the facts and determining the guilt or innocence of a criminal defendant, where jury discretion is more channeled.[135]

f. Forced Use of Peremptories

1. Supreme Court

In *Ross v. Oklahoma*,[136] appellant was forced to use a peremptory challenge in order to strike a juror who should have been excused for cause. Prospective juror Huling, upon examination by defense counsel, indicated that if appellant were found guilty, he

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[134] *Bumper* and *McCree* are said to share this common issue: "Does the Constitution prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial?" 165, 1761.

[135] 183, 1770.

[136] 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988), *reh'ing denied*, 487 U.S. 1250, 109 S.Ct. 11, ___ L.Ed.2d ___ (1988).

would automatically vote for the death penalty.[137] Upon this information, defense counsel moved that Huling be stricken for cause. This motion was denied by the trial judge. Defense counsel then struck Huling using one of his nine peremptory challenges allowed by Oklahoma state law in a capital case.[138]

There is no dispute that the trial judge was in error. Indeed, the opinion of the Court recites, "Had Huling sat on the jury that ultimately sentenced the prisoner to death, and had the petitioner properly preserved his right to challenge the trial court's failure to remove Huling for cause, the sentence would have to be overturned."[139] This observation, however, is but the framework for the inquiry. Having struck Huling, appellant was without an argument that the jury which judged him was impartial. Indeed, appellant did not contend that the remaining twelve jurors were impartial.[140] While it was unfortunate that appellant was required to use a peremptory challenge on a juror who, pursuant to the law, should have been stricken for cause, the Court will not and does not see such a wrong as one of "constitutional dimension."[141] "So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."[142]

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[137] 83-84, 2276.
[138] 84, 2276.
[139] 85, 2277.
[140] 86, 2277.
[141] "Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error, But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury. We have long recognized that peremptory challenges are not of constitutional dimension." 88, 2278.
[142] 88, 2278.

Finding the Constitution not implicated, the Court looked toward State law and noted "it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise,…"[143] The Court determined further that Oklahoma law required reversal in this situation "only if the defendant exhausts all peremptory challenges and an incompetent juror is forced upon him."[144] As the juror was struck, this situation did not obtain. The Court cannot give relief when appellant did not suffer an impartial jury.

g. Demeanor

(1) Supreme Court

The issue of judge's discretion and judging the demeanor of the prospective juror arose first in *Wainright v. Witt.*[145] It's importance can hardly be overstated as with the rise of demeanor, there is a distancing from the standards set by previous cases. The Court in this matter came to their conclusion in a manner which seems more straightforward in the context of Federal court than State court. Indeed, procedurally, appellant was found guilty in State court and his conviction was upheld on appeal. He sought relief through a Federal Habeas Corpus proceeding and relief, upon the *Witherspoon* issue, was granted. The Supreme Court took up the appeal of the Federal Habeas proceeding.[146]

In judging the voir dire of the trial court, the Supreme Court noted, it, as all federal courts, is bound my 28 U.S.C. 2254 (d), which reads, in pertinent part:

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[143] 89, 2279. [cites omitted]
[144] 89, 2279. [cites omitted].
[145] 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985)
[146] 415, 847.

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, of other reliable and adequate written indicia, shall be presumed correct…. [147]

The Court noted several of its cases under this statute and indicated that this line of cases "emphasized that state-court findings of fact are to be accorded the presumption of correctness."[148] Similarly, here, "the trial judge is … 'presumed correct'".[149]

As to the record, about which 28 U.S.C. 2254(d) seems to require some sort of writing, the Supreme Court appeared unequivocally to be in favor of no record being made of any sort:

> We decline to require the judge to write out in a separate memorandum his specific findings in each juror excused. A trial judge's job is difficult enough without senseless make-work. Nor do we think under the circumstances that the judge was required to announce for the record his conclusion that juror Colby was biased, or his reasoning.[150]

Of course, one would not want to overburden a judge in a death penalty case merely to attempt to assure fairness of the jury.

h. Summary General Questions and General Answers

(1) Supreme Court

In two cases decided within 14 months of one another, the Court ever so slightly appears to have fleshed out part of the standard as stated in *Witherspoon*. Part of the

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[147] FN 7, 427, 854.
[148] 428, 854.
[149] 431, 856.
[150] 431, 855.

holding in *Witherspoon* was that, 'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples."[151] In *Boulden v. Holman*,[152] two jurors were excused as each indicated he would be unwilling to impose the death penalty under any circumstance.[153] Two were dismissed because each indicated they did not "believe in" capital punishment.[154] Eleven were dismissed because of the expression of a "fixed opinion" about capital punishment. [155] These latter examinations of prospective jurors appear in the Court's opinion to be somewhat summary and consist of not much more than of the asking of the question "Do you have a fixed opinion against capital punishment?" and if the prospective juror indicated in the affirmative, a challenge was immediately lodged and honored without more.[156]

Boulden, like *Witherspoon*, requires of those conducting voir dire something more than just formulaic questions designed for nothing further than knee jerk reactions from prospective jurors. Further discussion may be required when seemingly blanket

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[151] Witherspoon, 391 U.S. at 522, 88 S.Ct. at 1727.
[152] 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 (1969).
[153] 482, 1141.
[154] 483, 1141.
[155] 482, 1141.
[156] For instance, the voir dire of prospective juror Mr. Seibert is recorded as going in this fashion:

> The Court: Do you have a fixed opinion against capital punishment?
> Mr. Seibert: Yes, sir.
> Mr. Hundley: We challenge.
> The Court: Defendant?
> Mr. Chenault: No questions.
> The Court: Stand Aside.

483, 1141.

answers are given to seemingly blanket questions as "… it is entirely possible that a person who has a' fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case."[157]

Similarly, in *Maxwell v. Bishop,*[158] the Court looked at the dismissal of three jurors in voir dire. Two are dismissed because, in brief voir dire, each indicated "conscientious scruples" might keep them from decided for the death penalty.[159] The third indicated, as some prospective jurors in *Boulden* did, that he did not "believe in" capital punishment.[160] The Court clearly believed that these answers are exactly what was referred to in *Witherspoon* as "general" objections or expressions of "scruples"[161]. They are innately ambiguous in the context of capital case voir dire and the trial judge who excludes such jurors without fairly extensive further probing the depth of their feelings

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[157] 483-484, 1141-1142.

[158] 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970)

[159] One of these jurors was dismissed on the basis of this exchange:

> "Q. If you were convinced beyond a reasonable doubt at the end of this trial that the defendant was guilty, and that his actions had been so shocking that they would merit the death penalty do you have any conscientious scruples about capital punishment that might prevent you from returning such a verdict?
> A. I think I do."
> Another was dismissed pursuant to this question:
> "Q. Do you entertain any conscientious scruples about imposing the death penalty?
> A. Yes, I am afraid I do."

264, 1580.

[160] "Q. Mr. Adams, do you have any feeling concerning capital punishment that would prevent you or make you have and feelings about returning a death sentence if you felt beyond a reasonable doubt that the defendant was guilty and that his crime was so bad s to merit the death sentence?
A. No, I don't believe in capital punishment." 265, 1580.

[161] 265, 1580.

and their ability to set these feelings aside and obey the instructions of the court does so at great risk.[162]

i. Harmless Error

In *Gray v. Mississippi*,[163] a prospective juror who was death qualified through the voir dire process[164] was ultimately excused by the trial judge.[165] This excusal was done at the urging of the prosecutor.[166]

The exclusion for cause of an otherwise qualified juror had been the subject of prior Supreme Court litigation, most notably in *Davis v. Georgia*.[167] In that matter, the Supreme Court of Georgia found such error harmless as "The rationale of *Witherspoon* and its progeny is not violated where merely one of a qualified class or group is excluded where it is shown, as here, that others of such groups were qualified to serve."[168] The

[162] "… it cannot be supposed that once such people take their oaths a jurors they will be unable 'to follow conscientiously he instructions of a trial judge and to consider fairly they imposition of the death sentence in a particular case.' 165, 1580, *citing Boulden* at 394 U.S. 484, 89 S.Ct. at 1142.
[163] 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987)
[164] "Although the voire dire of member Bounds was somewhat confused, she ultimately stated that she could consider the death penalty is an appropriate case and the judge concluded that Bounds was capable of voting to impose it." 653, 2049.
[165] 655, 2050.
[166] "Evidently deciding that he did not want Bounds on the jury and realizing that he had no peremptory challenges left, the prosecutor asked the court to allow the state another such challenge. [footnote omitted] He argued that the court had erred in denying five or six of the State's for-cause challenges and thereby had compelled the State to use its peremptory challenges against the venire members. The prosecutor asserted that, if he had another challenge, he would use it to strike Bounds" 654, 2049..
[167] 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976).
[168] 122, 399.

Supreme Court of the Untied States failed to see such a matter as "harmless" then[169] and was asked to reconsider their position in *Gray*.

In *Gray*, the prosecutor asked each prospective juror "whether he or she had any conscientious scruples against capital punishment and whether he or she could vote to impose a death sentence."[170] Anyone who was hesitant with this thought was challenged for cause. If the challenge was denied, the prosecutor used a peremptory strike to relieve the offending juror.[171]

A Ms. Bounds became the juror of issue. By the time voir dire was addressed to him, the prosecutor had used all of his peremptory strike.[172] Ms. Bounds was found to be a suitable juror by the trial judge. Nevertheless, the prosecutor did not want Bounds to sit. [173] "He argued that the court had erred in denying five or six of the State's for-cause challenges and thereby had wrongly compelled the State to use its peremptory challenges against those venire members. The prosecutor asserted that, if he had another challenge, he would use it to remove Bounds."[174] After further examination of Bounds, the results of which in no way tended to disqualify her, the judge excused Bounds for cause.[175]

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[169] "Unless a venireman is 'irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceeding,' [footnote omitted] he cannot be excluded; if a venireman in improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand." 123, 400. *Davis* was decided prior to the court's decision in *Adams* which changed the standard to "substantially impair".
[170] 652, 2048.
[171] 652, 2048.
[172] 653, 2049.
[173] 653-654, 2049.
[174] 654-2049.
[175] 654-655, 2049-2050.

The Court considered three possibilities as reasonable interpretations of the actions of the trial court:

> …[T]he trial judge recognized that he had erred earlier in failing to dismiss one of the jurors for cause and therefore restored to the State a peremptory challenge that the prosecutor then exercised to strike Bounds. The second is that the trial court could be seen as concluding that the trial court itself offset its earlier error in denying a valid for-cause *Witherspoon* motion as to Bounds. The third is that the court could be seen to have decided that the trial judge restored a peremptory challenge to the State, by determining that he had erred previously in denying one of the prosecutor's *Witherspoon* motions, but still removed Bounds for cause.[176]

The first and third possibilities are discarded as "wholly unsupported by the record."[177] As to the second, the Court "cannot condone the 'correction' of an error by the commission of another."[178]

The Court refused to consider the possible interplay of peremptory challenges for cause and citing the need for "on-the-spot decision making" with the "incalculable uncertainties of choosing a jury,"[179] observed "The nature of the jury selection process defies any attempt to establish that an erroneous *Witherspoon-Witt* exclusion of a juror is harmless."[180]

d. Rehabilitation of Prospective Juror

(1) **Rehabilitation Allowed**

[176] 661, 2053.
[177] 662, 2053.
[178] 663, 2054.
[179] 665, 2055.
[180] 665, 2055.

In *Grandison v. State*,[181] it is clear that rehabilitation of jurors at voir dire is allowable and does occur. Upon appeal, one of the many issues raised was one concerning the failure to strike for cause certain jurors who indicated an aversion to allegations of drug abuse or drug selling.[182] While this was a capital murder case, the underlying facts included the allegation that the defendant "entered into an agreement whereby Evans [codefendant tried separately] would kill David Scott Piechowicz and his wife, Cheryl, because the couple were scheduled to testify against Grandison in a narcotics case."[183] Evans killed David Scott Piechowicz and Susan Kennedy, the latter in belief that she was Cheryl Piechowicz.[184]

Six jurors were in question.[185] The Court of Appeals noted that these jurors did express varying levels of concern about drug involvement as a possible subject of the trial.[186] Most importantly, the Court noted that each juror was rehabilitated by counsel for Grandison.[187] This example is given:

> MR. CRAWFORD: Could I ask you one more question? I am sorry. Getting back to this drug business, if something came out in trial to indicate that there were drugs involved, and although this man is not on trial for any drug involvement, if it should develop during the course of he trial that there may have been some drug involvement, although he is not in trial for that, would you have any—make any difference to you as to how you arrived at a verdict regarding what he is on trial for?

[181] 305 Md. 685, 506 A.2d 580 (1986).
[182] 726, 600.
[183] 697, 585-586.
[184] 697, 586.
[185] 726, 600.
[186] 726, 600.
[187] 726, 600.

> MRS. DORSEY: No, if it wasn't pertinent to the case. Like I said, I just don't like drugs. I had an experience in drugs with my son, and he is well, thank God. I just don't like drugs.[188]

Other jurors who were the subject of this appeal issue indicated that their decision would be based on the evidence and the law.[189]

(2) **Rehabilitation Not Required**

Rehabilitation of jurors at voir dire, however, is not required. [190] In *Wooten Bey*,[191] the defense counsel asked for a chance to question jurors prior to their summary dismissal.[192] In upholding the trial court's action, the Court of Special Appeals noted that Maryland Rule 4-312(d)[193] is "permissive" in nature and "the trial judge was not required to allow defense counsel to question individually each juror- nor was the trial judge required to conduct such an individualized examination."[194]

In *Henry v. State*,[195] pursuant to the choosing of the jury, Juror Smith indicated that there was no circumstance under which she would impose the death penalty. She was

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[188] 726-727, 600-601.
[189] 727, 601.
[190] Wooten-Bey v. State, 76 Md. App. 603, 547 A.2d 1086 (1988).
[191] Supra.
[192] *Id.*
[193] Maryland Rule 4-312(d):

(d) **Examination of Jurors**. The court may permit the parties to conduct an examination of prospective jurors or may itself conduct the examination after considering questions proposed by the parties. If the court conducts the examination, it may permit the parties to supplement the examination by further inquiry or may itself submit to the jurors additional questions proposed by the parties. The jurors' responses to any examination shall be under oath. Upon request of any party the court shall direct the clerk to call the roll of the panel and to request each juror to stand and be identified when called by name.

[194] 1095, 621.
[195] 324 Md. 204, 596 A.2d 1024 (1991).

excused.[196] Defense counsel objected and suggested to the court that further questioning would be in order in this vein:

> "You can ask the jurors, your honor, for example, if they found the people that bombed the Pan Am flight, if they can impose the penalty in that situation, if they could discuss other situations. I think just the category because they say they can't impose the death penalty doesn't mean under all circumstances. They may admit to the Court that they could then follow the instructions as to the law in this case." [197]

This question was refused.[198] On appeal the issue concerned the trial court's necessity to understand whether the said juror could, nevertheless, apply the law in spite of negative feelings as to the death penalty. The allegation was that further questioning was necessary.[199] This matter is dealt with briefly by the appellate court. Maryland Rule 4-312(d) does not require the trial court to honor the request of counsel for additional questions during voir dire[200] and "[t]he court may, in its discretion, refuse to ask questions that it deems are speculative or insufficiently tailored to the particular case at hand."[201]

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[196] 219, 1032.
[197] 219-220, 1032.
[198] 220, 1032.
[199] 220, 1032.
[200] 220, 1032.
[201] 221, 1033.