The Battle over the Standards for Death-Qualifying Juries: Defendants Lose Another Round - Wainwright v. Witty

Cynthia L. Meltzer
The exclusion of scrupled jurors from capital trials, has created tribunals commonly referred to as death-qualified juries. Whether a death-qualified jury can be a truly neutral tribunal has been a hotly contested issue. In 1968, the Supreme Court imposed a standard which strictly limited the circumstances when exclusion of scrupled jurors was permissible. However, the Supreme Court has set forth a new and broader standard governing the exclusion of scrupled jurors from capital cases.

In Wainwright v. Witt, the Supreme Court recently redefined the standard for juror exclusion in capital cases. In Witt, the Court examined the standard that courts have typically followed in determining when exclusion is proper and defined the standard for appellate habeas corpus review. The Witt Court held that a scrupled juror may be excused for cause if his personal views on capital punishment would prevent or substantially impair his ability to abide by an oath. Secondly, the Court held that for purposes of appellate habeas corpus review, a finding of juror bias is one of fact. Thus, the reviewing court must pre-
sume the correctness of the trial court’s finding pursuant to 28 U.S.C. § 2254(d).10

In Witt, the Supreme Court effectively diminished a capital defendant’s sixth and fourteenth amendment rights by requiring that the defendant, not the state, bear the risk of a partial jury. This comment examines the Witt opinion and the constitutional standards for excluding scrupled jurors during voir dire. Relevant Supreme Court decisions will be set forth. Witt will then be presented and analyzed. Finally, the Supreme Court’s improper expansion of the standard for scrupled-juror exclusion and the broadening of the scope of 28 U.S.C. § 2254(d) to include the trial court’s determination of scrupled-juror bias will be examined.

HISTORICAL BACKGROUND

Witherspoon’s “Two-pronged” Standard

The Supreme Court, in 1968, addressed the constitutionality of death-qualified juries for the first time in nearly eighty years.11 In Witherspoon v. Illinois,12 a trial court excluded forty-seven prospective jurors pursuant to an Illinois statute13 that permitted the exclusion of any

---

11. The conscientious scruples standard was articulated by the Supreme Court in its decision in Logan v. United States, 144 U.S. 263 (1892). In Logan, the Supreme Court upheld a statute that permitted the exclusion of jurors who voiced conscientious scruples against the death penalty. This came to be known as the conscientious scruples standard. Id. at 298. Most courts followed this standard and excluded jurors for indicating any mere objection to capital punishment. Prior to 1968, the majority of states permitting capital punishment excluded jurors in capital cases due to their stated opposition to the death penalty. See, e.g., Untreinor v. State, 146 Ala. 26, 33, 41 So. 285, 287 (1906) (“opposed to capital punishment”); People v. Riser, 47 Cal. 2d 566, 575, 305 P.2d 1, 7 (1956) (“opposed to death penalty”), cert. denied, 353 U.S. 930 (1957); People v. Fernandez, 301 N.Y. 302, 320, 93 N.E.2d 859, 868 (1950) (“opposed to capital punishment”), cert. denied, 340 U.S. 914 (1951); State v. Leland, 190 Or. 598, 623, 227 P.2d 785, 796 (1951) (“conscientious scruples against capital punishment”), aff'd, 343 U.S. 790 (1952). See also Schnapper, supra note 1, at 982 n.20 (1984) (a complete list of courts following the conscientious scruple standard); Comment, Jury Challenges, Capital Punishment and Labat v. Bennett: A Reconciliation, 1968 DUKE L.J. 283; Comment, 3 SUFFOLK U.L. REV. 210 (1968).
12. 391 U.S. 510 (1968). Witherspoon was the first case the Supreme Court decided in this century that dealt with the constitutionality of excluding scrupled jurors from capital trials. Forty-seven scrupled jurors were excused for cause. The Court examined the conscientious scruples standard and its effect on jury composition. The Court was particularly concerned with maintaining neutral juries that were not biased against the defendant. Hence, the Court held that the practices prior to 1968 infringed defendants’ sixth and fourteenth amendment rights. Thus, the Court set a strict standard (see infra note 17 and accompanying text) and reversed the sentence leaving the conviction intact. Id.
13. At the time of the Witherspoon decision, the jury’s determination on sentencing was binding on the judge. The pertinent Illinois statute read:

In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.
prospective juror who harbored conscientious scruples against the death penalty. The defendant argued that the elimination of prospective scrupled jurors deprived him of his right to an impartial jury under the sixth and fourteenth amendments, for it created a biased jury more likely to impose the death penalty. The Witherspoon Court held that if prospective jurors were excluded from a jury merely because they were opposed to capital punishment, the state could not execute a death sentence imposed by such a jury.

In reversing Witherspoon's death sentence, the Court set forth a two-pronged standard for determining when a scrupled juror may be properly excluded from a capital jury. A juror may be excused only if


14. 391 U.S. at 512. The conscientious scruples standard allowed the state to bar from all capital cases those jurors who opposed the imposition of capital punishment only in certain circumstances. Thus, if one opposed capital punishment for one type of crime he would be barred from trials for other types of crimes involving capital punishment. See, e.g., Waller v. State, 40 Ala. 325, 327 (1867) (juror opposed to imposing capital punishment for whites); People v. Tanner, 2 Cal. 257, 258-60 (1852) (juror opposed to capital punishment for theft not murder); Piccott v. State, 116 So. 2d 626 (Fla. 1959) (juror opposed to capital punishment for rape not murder), cert. denied, 364 U.S. 293 (1960); Abbott v. State, 24 Ga. App. 367, 100 S.E. 759 (1919) (juror opposed to imposing capital punishment for women).

15. 391 U.S. at 516. In upholding the defendant's argument, the Court reasoned that a jury stripped of all scrupled jurors would be more likely to impose the death penalty. Excluding scrupled jurors would create a less than neutral jury, which does not represent a fair cross section of the community. Cf. State v. Williams, 50 Nev. 271, 257 P. 619 (1927) (noting that many jurors could not set aside their convictions to vote impartially in a capital case).

16. 391 U.S. 510 (1968). The Witherspoon Court found that even though one may oppose the death penalty, he could, in a particular case, follow the law and consider imposing the death penalty. On this basis the Court imposed a strict certainty standard. The Court asserted that unless a prospective juror makes his position "unmistakably clear," his position cannot be assumed. Id. at 516 n.9, 521 n.21.

Subsequent studies have affirmed Witherspoon's proposition that scrupled jurors may still be able to vote to invoke the death penalty. In a 1968 Gallup Poll, 38% of those who claimed that they had conscientious scruples against the death penalty stated that in some cases they would vote for capital punishment. See Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law, 5 HARV. C.R.-C.L. L. REV. 53, 63 n.30 (1970); see also Boulden v. Holman, 394 U.S. 478, 482 (1969) (quoting Witherspoon, 391 U.S. at 516 n.9); Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U. L. REV. 299, 326 (1983) (noting that persons opposed to the death penalty are less likely to vote in favor of imposing it); White, The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries, 58 CORNELL L. REV. 1176, 1178 n.12 (1973) (a 1971 Harris poll revealed that while 36% of the population was opposed to capital punishment, only 23% would never vote for the death penalty).

17. The Court stated the standard as follows:

[N]othing 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.

391 U.S. at 522-23 n.21 (emphasis in original). The Court also made it clear that a juror's mere reference to his conscientious scruples would not satisfy the "unmistakably clear" requirement. Id.
he makes it "unmistakably clear" that he would either "automatically" vote against the death penalty, or that his scruples would impair his deliberations about a defendant's guilt.\textsuperscript{18} The \textit{Witherspoon} Court found that this standard protected defendants from partial juries and preserved the state's interest in efficient law enforcement.\textsuperscript{19} Thus, the \textit{Witherspoon} standard strictly curtailed the blanket exclusion of scrupled jurors from capital trials.\textsuperscript{20}

\textbf{Limits Placed on Jury Discretion}

Since \textit{Witherspoon}, the Supreme Court has, on several occasions, addressed the constitutionality of mandatory death penalty statutes granting juries unlimited sentencing discretion in capital cases.\textsuperscript{21} In \textit{Furman v. Georgia}\textsuperscript{22} the jury sentenced the defendant to death pursuant to Georgia's mandatory death penalty statute, which required the imposition of the death penalty upon conviction of a capital offense.\textsuperscript{23} Furman argued at 516 n.9. For a detailed and exhaustive analysis of the \textit{Witherspoon} decision, see Schnapper, \textit{supra} note 1.

\textsuperscript{18} Subsequent cases strictly adhered to the \textit{Witherspoon} two-pronged standard because it ensured the defendant's right to an impartial jury. For example, in Boulden v. Holman, 394 U.S. 478 (1969), the defendant was convicted of murder and sentenced to death. At voir dire a prospective juror was excluded from the jury because he stated that he had a "fixed opinion against capital punishment." \textit{Id.} at 483. The Supreme Court applied \textit{Witherspoon} and held that the juror was improperly excused for he may still have been capable of abiding by the law and voting to impose the death penalty.

Similarly, in Maxwell v. Bishop, 398 U.S. 262 (1978), several prospective jurors were excused because they said they thought they opposed the death penalty. The Court found the jurors were improperly excused because their statements were ambiguous. Thus, \textit{Witherspoon}'s "unmistakably clear" requirement was not met. See also Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980) (an in depth analysis of the effect of strongly held death penalty opinions on jury neutrality).

\textsuperscript{19} Many other cases have addressed the sixth amendment right to a neutral jury. See, e.g., Davis v. Georgia, 429 U.S. 122 (1976) (rejecting the argument that improper exclusion of only one juror did not violate \textit{Witherspoon} if others with general objections were not excused); Maxwell v. Bishop, 398 U.S. 262 (1978); Boulden v. Holman, 394 U.S. 478 (1969). Cf. Peters v. Kiff, 407 U.S. 493 (1972) (holding that a white defendant was entitled to habeas corpus relief upon a showing that blacks had been excluded from the jury); Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that exclusion of women from the jury venire was a violation of the sixth and fourteenth amendments); Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a criminal conviction by a jury of less than six persons was unconstitutional); Duren v. Missouri, 439 U.S. 357 (1979) (holding that a fair cross-section violation of the sixth amendment would be allowed only upon a showing that state interests outweighed it). See generally Comment, Proposals to Balance Interests of the Defendant and State in the Selection of Capital Jurors: A Witherspoon Qualification, 59 N.C.L. Rev. 767 (1981) (a general overview of the law concerning challenges to jury composition and the death penalty).

\textsuperscript{20} See \textit{supra} note 17 for the text of Witherspoon's two-pronged standard.

\textsuperscript{21} Mandatory death penalty statutes dictated that upon conviction of a capital felony a sentence of life imprisonment or death was mandatory. Juries had unlimited discretion for upon conviction the death penalty was automatically imposed. Thus, the courts had no control over the penalty phase of a trial involving capital punishment. See, e.g., Furman v. Georgia, 408 U.S. 238 (1972).

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} \textit{Id.} The statute involved gave juries unlimited discretion in determining whether a convicted defendant should live or die. The Court held that this type of statute violated a defendant's
that the mandatory sentencing procedures constituted cruel and unusual punishment in violation of his eighth and fourteenth amendment rights.\textsuperscript{24} The \textit{Furman} Court interpreted the Georgia statute as permitting the imposition of the death penalty in an arbitrary and capricious manner and declared the statute unconstitutional.\textsuperscript{25} As a result of the \textit{Furman} decision, nearly every state has enacted statutes endorsing bifurcated sentencing schemes which separate the guilt and penalty phases of a trial and which require the judge to afford juries "guided" discretion in sentencing.\textsuperscript{26}

\textit{Adams v. Texas}

In 1980, the Supreme Court again addressed the scrupled-juror issue in \textit{Adams v. Texas}.\textsuperscript{27} The trial court in \textit{Adams} excused several prospective jurors pursuant to section 12.31(b) of the Texas Penal Code,\textsuperscript{28} which provided for the disqualification of any prospective juror whose views on capital punishment would "affect" his deliberations in the case.\textsuperscript{29} Adams argued that the statute had been applied to exclude prospective jurors in violation of \textit{Witherspoon}.\textsuperscript{30} The Court held, in accord with \textit{Witherspoon},

\textit{STANDARDS FOR DEATH—QUALIFYING JURIES}

\textit{Adams v. Texas}

In 1980, the Supreme Court again addressed the scrupled-juror issue in \textit{Adams v. Texas}.\textsuperscript{27} The trial court in \textit{Adams} excused several prospective jurors pursuant to section 12.31(b) of the Texas Penal Code,\textsuperscript{28} which provided for the disqualification of any prospective juror whose views on capital punishment would "affect" his deliberations in the case.\textsuperscript{29} Adams argued that the statute had been applied to exclude prospective jurors in violation of \textit{Witherspoon}.\textsuperscript{30} The Court held, in accord with \textit{Witherspoon},

\textit{STANDARDS FOR DEATH—QUALIFYING JURIES}

\textit{Adams v. Texas}

In 1980, the Supreme Court again addressed the scrupled-juror issue in \textit{Adams v. Texas}.\textsuperscript{27} The trial court in \textit{Adams} excused several prospective jurors pursuant to section 12.31(b) of the Texas Penal Code,\textsuperscript{28} which provided for the disqualification of any prospective juror whose views on capital punishment would "affect" his deliberations in the case.\textsuperscript{29} Adams argued that the statute had been applied to exclude prospective jurors in violation of \textit{Witherspoon}.\textsuperscript{30} The Court held, in accord with \textit{Witherspoon},
that the word "affect" did not necessarily mean that one could not follow instructions or abide by an oath.\textsuperscript{31}

In reversing Adams' sentence, the Supreme Court relied primarily on the \textit{Witherspoon} reasoning.\textsuperscript{32} The \textit{Adams} Court found \textit{Witherspoon} applicable to Texas' bifurcated sentencing scheme. The Court noted that the defendant's right to an impartial jury in bifurcated sentencing schemes must also be safeguarded by limiting the state's power to exclude jurors.\textsuperscript{33} Ultimately, \textit{Adams} held that a scrupled juror may be excused for cause only if his views on capital punishment would "prevent or substantially impair" his ability to follow instructions or abide by an oath.\textsuperscript{34}

\textbf{28 U.S.C. § 2254(d)}

The Supreme Court has also dealt with the question of whether the determination of juror bias is a finding of fact subject to 28 U.S.C.

\textsuperscript{31} \textit{Id.} at 50. \textit{Adams} determined that the word "affect" could not portray the jurors' views with unmistakable clarity because it was ambiguous.

\textsuperscript{32} \textit{Id.} at 47-48. The \textit{Adams} Court explained that a juror would violate his oath if he was partial as to guilt. \textit{Adams} however did not refer to the first part of the \textit{Witherspoon} test, which speaks to whether a juror would vote automatically against the death penalty. Furthermore, the Court did not use the "unmistakably clear" language in its opinion. \textit{Cf.} \textit{Lockett v. Ohio}, 438 U.S. 586 (1978); \textit{Boulden v. Holman}, 394 U.S. 478 (1969) (in both cases the Court specifically focused on whether the jurors made their opposition to the death penalty "unmistakably clear").

\textsuperscript{33} 448 U.S. at 48. The \textit{Adams} Court in rendering its decision recognized that even in a bifurcated sentencing scheme an accused's rights to an impartial jury must be protected. Hence \textit{Adams} embraced \textit{Witherspoon} for \textit{Witherspoon} limited a state's power to exclude scrupled jurors. \textit{Id.} Note, \textit{Texas Law Requiring Venireman's Oath that the Death Penalty Will Not Affect their Deliberations is Unconstitutional as Applied: Adams v. Texas}, 12 TEX. TECH L. REV. 764, 780 (1981). \textit{See} \textit{Burns v. Estelle}, 592 F.2d 1297 (5th Cir. 1979) (the court found that the application of TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1979) to the facts of the case violated \textit{Witherspoon}). The Texas bifurcated sentencing statute requires that three questions be answered during the penalty phase of the trial. The answers to these questions dictate the sentence imposed. In pertinent part the Texas statute reads as follows:

\textbf{(b)} On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

\begin{enumerate}
  \item 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;
  \item whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
  \item 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.
\end{enumerate}

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

\textsuperscript{34} 448 U.S. at 48. The Court combines the two prongs of \textit{Witherspoon} into one statement. Thus, the standard under \textit{Adams} embodies the \textit{Witherspoon} standard. The standard requires that a juror may be excused only if his views on capital punishment "would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." \textit{Id.} at 45. \textbf{See} Note, \textit{Witherspoon Revived: Adams v. Texas}, 18 HOUS. L. REV. 931 (1981).
§ 2254(d). An appellate court must accord the trial court’s findings of fact a presumption of correctness under 28 U.S.C. § 2254(d). In Patton v. Yount, the Supreme Court expanded the scope of § 2254(d) to include a trial court’s determination of juror bias. Patton argued that the trial court improperly included jurors who were biased as a result of their exposure to news coverage of the case. In upholding the trial court’s ruling, the Court found that an evaluation of juror bias concerns the juror’s demeanor, a factor solely within the purview of the trial court. Thus, under Patton, the determination of juror bias is a finding of fact subject to § 2254(d)’s presumption of correctness.

Many lower courts, however, have construed the determination of biased jurors as a mixed question of law and fact not subject to § 2254(d). In Darden v. Wainwright, for example, the Eleventh Cir-
cuit did not defer to the trial court's finding because it viewed the question of scrupled-juror bias as a mixed one of law and fact. Hence, the court found that it need not accord the trial court a presumption of correctness.

**STATEMENT OF THE CASE**

**The Lower Court Holdings**

The defendant, Witt, was tried, convicted of first degree murder and sentenced to death. Witt challenged his sentence and conviction on constitutional grounds. On direct appeal to the Florida Supreme Court, Witt argued that the exclusion of three jurors who voiced their opposition to capital punishment violated his sixth amendment rights to an impartial jury. The Florida Supreme Court, in affirming the conviction, held that the excluded jurors' statements made during voir dire warranted their exclusion under *Witherspoon*. Witt filed for a writ of

excluded. In rendering its decision, the appellate court decided it need not defer to the trial court since a *Witherspoon* claim involved a mixed question of law and fact. *Id.* at 1529.

44. *Id.* See also *Schnapper*, supra note 1, at 1068-70 (a discussion of lower courts' interpretations of § 2254(d)).


46. Witt v. Wainwright, 714 F.2d 1069, 1071 (11th Cir. 1983), modified, 723 F.2d 769 (11th Cir. 1984). On October 28, 1973, Johnny-Paul Witt and a friend, Tillman, were hunting in a wooded area near a trail frequented by children. As eleven-year-old Jonathan Kushner rode by on his bicycle, Tillman struck him on the head with a metal drill bit. Witt and Tillman then gagged the boy, placed him in the trunk of Witt's car and drove to a deserted grove. Upon opening the trunk they discovered that the boy had suffocated. Witt and Tillman then committed a variety of violent sexual acts on the body, dug a grave, and buried it. Witt was found guilty of murder at a jury trial and convicted in accordance with FLA. STAT. ANN. § 782.04(1) (West Supp. 1982). Pursuant to the jury's recommendation, Witt was sentenced to death.


48. Witt argued that the exclusion of jurors who voiced opposition to the death penalty resulted in his being tried by a partial jury. He argued that excluding jurors for generally opposing the death penalty violated the standard set by the Supreme Court in its decision in *Witherspoon*. *Id.* at 498.

49. The appellate court found that the following exchange during voir dire between the prosecutor and Mrs. Colby, a prospective juror, did not satisfy the *Witherspoon* requirement that the juror's views on capital punishment impair her partiality toward determining guilt. *Id.* at 499. The pertinent part of the voir dire of Mrs. Colby reads as follows:

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

A. I am afraid personally but not—

Q. Speak up please.

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

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

A. I am afraid it would.

Q. You are afraid it would?
STANDARDS FOR DEATH—QUALIFYING JURIES

habeas corpus in the United States District Court for the Middle District of Florida after unsuccessfully petitioning for post-conviction review in the state courts. The district court denied Witt's petition. Appeal was taken to the Eleventh Circuit Court of Appeals.

On appeal, the Eleventh Circuit Court of Appeals overruled the district court and granted the writ of habeas corpus. The appellate court reviewed the voir dire statement of one juror, Mrs. Colby, who indicated that her views on capital punishment would "interfere" with her deliberations. The court held that the "unmistakably clear" criteria of Witherspoon was not satisfied and that Mrs. Colby was improperly excused. Moreover, the court of appeals noted that it need not accord the trial court a presumption of correctness as required under § 2254(d) because the issue was a mixed one of law and fact not subject to § 2254(d).

Accordingly, the Eleventh Circuit reversed Witt's sentence.

A. Yes, sir.
Q. Would it interfere with judging the guilt or innocence of the Defendant in this case?
A. I think it would.
Q. You think it would.
A. I think it would.
Q. Your honor, I would move for cause at this point.
THE COURT: All right. Step down.

Tr. 266-67.

105 S. Ct. at 848.

The Circuit Court of Appeals for the Eleventh Circuit based its decision to grant Witt a writ of habeas corpus on this exchange during voir dire. 714 F.2d at 1081-82 n.8.


51. Witt v. Wainwright, 714 F.2d 1069 (11th Cir. 1983), modified, 723 F.2d 769 (11th Cir. 1984).

52. Id.

53. Id.

54. 714 F.2d at 1083. Witt argued that three prospective jurors were improperly excused. The appellate court considered only Mrs. Colby's colloquy since it was the least certain statement of the three. Pursuant to Davis v. Georgia, 429 U.S. 122, 123 (1976) (one improperly excused juror was enough to reverse the sentence), the court reversed the sentence. 714 F.2d at 1083.

The appellate court held that the use of the word "interfere" was too vague and ambiguous to meet the Witherspoon certainty requirement. In so holding, the court followed Witherspoon and cited Adams as reaffirming the Witherspoon decision. Id. at 1080-82. Moreover, the court relied on Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981), cert. denied, 455 U.S. 1003 (1982) (a prospective juror's answer, "No, I don't think I could," to whether he could vote to impose the death penalty fell short of Witherspoon's certainty requirement), and Burns v. Estelle, 626 F.2d 396 (5th Cir. 1980) (the Witherspoon test was not met where the prospective juror stated that her views on the death penalty would "affect" her determination of guilt or innocence). 714 F.2d at 1082-83.

55. 714 F.2d at 1083 n.10. The appellate court voiced confusion over whether it was required to presume correctness of the trial court's finding with respect to a Witherspoon claim pursuant to 28 U.S.C. § 2254(d). See supra note 36 for text of 28 U.S.C. § 2254(d). However, the court stated that regardless of whether it was bound by 28 U.S.C. § 2254(d) with respect to a Witherspoon claim, the trial court erred in finding cause for excusal in this case "under even the least rigorous standard of appellate review." 714 F.2d at 1083 n.10.

56. Id.
Justice Rehnquist delivered the 6-1-2 majority opinion of the Supreme Court. In reversing the decision reached by the court of appeals, the Supreme Court stated that the appellate court improperly relied on the standard articulated in Witherspoon. The Supreme Court also found that the appeals court failed to accord the trial court a presumption of correctness required under 28 U.S.C. § 2254(d).

Witt explicitly discarded the Witherspoon standard in favor of the broader standard for exclusion set forth in Adams. The Court reasoned that the Witherspoon language could not be reconciled with the Adams language because Adams did not explicitly refer to Witherspoon's "automatically" and "unmistakably clear" language. Since Adams merged Witherspoon's two prongs, the Court concluded that Adams dispensed with Witherspoon's strict burden of proof and simplified the standard. Furthermore, in discarding Witherspoon's high burden of proof, Witt declared that the Witherspoon standard was dicta simply because it appeared in a footnote. The Court also found that Witherspoon could not coexist with modern-day juries because juries no longer have unlimited discretion in sentencing.

58. Id. The Court cited two Supreme Court cases and two lower court cases that applied the Witherspoon standard. In so doing, the Court inferred that these cases were no longer controlling as to the issue of scrupled jurors. See, e.g., Maxwell v. Bishop, 398 U.S. 262, 265 (1970); Boulden v. Holman, 394 U.S. 478, 482 (1969); Hackathorn v. Decker, 438 F.2d 1363, 1366 (5th Cir. 1971); People v. Washington, 71 Cal. 2d 1061, 1091-92, 80 Cal. Rptr. 567, 597-600, 458 P.2d 479, 496-97 (1969).
59. 105 S. Ct. at 849.
60. Id. at 851. Witt claimed that there was a trend away from strict adherence to Witherspoon. As support, the Court noted that Lockett, 438 U.S. at 586, referred to the second half of Witherspoon's footnote 21, dealing with a juror's inability to decide impartially a defendant's guilt, but that Lockett did not mention the "automatically" language. The Court viewed Lockett's failure to address Witherspoon's first prong as starting a trend away from strict adherence to Witherspoon. 105 S. Ct. at 850.
61. The Court makes this point in an effort to distinguish why Witherspoon should no longer be followed. The Court reasoned that Adams, like Lockett, reflected a trend away from strict adherence to Witherspoon. Id. at 851.
62. Adams, according to the Court, does not require that a juror may be excluded only if he would never vote for the death penalty. Witt viewed Adams' merging of Witherspoon's prongs as a simplification and broadening of Witherspoon's standard. Furthermore, the Court coins the term "Adams test" to refer to the criteria for juror exclusion articulated in Adams. Id. See supra notes 27-34 and accompanying text for a discussion of Adams.
63. 105 S. Ct. at 851. The Court's second reason for rejecting Witherspoon was that the Witherspoon standard was articulated in a footnote and thus was dictum. In so holding, the Witt Court relied on McDaniel v. Sanchez, 452 U.S. 130, 141 (1981), where the Supreme Court rejected language from a footnote as not controlling. Witt also could not reconcile Witherspoon's "automatically" language with the duties of present-day juries. The Court cited its decisions in Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), as examples that juries now are under the guided discretion of the courts. The Court reasoned that since juries are now
The \textit{Witt} majority next explained why \textit{Adams} is preferable to \textit{Witherspoon}.\footnote{105 S. Ct. at 851. The Court gave three reasons why it preferred \textit{Adams} to \textit{Witherspoon}. First, \textit{Witt} could not reconcile \textit{Witherspoon}'s “automatically” language with the duties of present-day juries. \textit{See supra} note 63. Second, the Court viewed the \textit{Witherspoon} standard as dictum. \textit{See supra} note 63 and accompanying text. Third, the Court viewed all types of juror bias equally. \textit{See infra} notes 65-68 and accompanying text.} Since \textit{Witherspoon} distinguishes scrupled-juror bias from other types of juror bias\footnote{Other types of juror bias would include racial or sexual bias, for example.} by imposing a strict standard, \textit{Witt} concluded that \textit{Witherspoon} favors juries biased for the defendant.\footnote{But see Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), modified, 758 F.2d 226 (8th Cir. 1985) (excluding jurors under \textit{Witherspoon} biases juries against the defendant because it creates juries more likely to convict).} The Court stressed that \textit{Adams} reflected the traditional reasons behind excluding biased jurors and held that \textit{Adams} properly viewed all juror bias equally.\footnote{The \textit{Witt} Court reasoned that since \textit{Adams} used broader language than \textit{Witherspoon} that \textit{Adams} accorded scrupled juror bias the same status as any other type of juror bias. \textit{Id.}} The \textit{Witt} majority also found that \textit{Adams} maintained the state's interest in obtaining jurors who will follow the law, and thus presented the proper standard for excluding scrupled jurors from capital trials.\footnote{The \textit{Witt} Court stated that \textit{Adams} dispensed with the “unmistakably clear” and “automatically” language of \textit{Witherspoon} since determining juror bias “cannot be reduced to question and answer sessions which obtain results in the manner of a catechism.” Thus, the Court viewed \textit{Adams} as a simplification of the strict \textit{Witherspoon} standard. \textit{Id.}}

The Court also analyzed the impact of 28 U.S.C. § 2254(d). While the appellate court found it unnecessary to defer to the trial court's findings,\footnote{Id. at 854. \textit{See supra} note 55 and accompanying text.} the Supreme Court rejected this view and instead relied on \textit{Patton}'s finding that an appellate court must presume the trial court's determination of juror bias correct in habeas corpus cases.\footnote{Id.} \textit{Witt} held that the determination of juror bias necessarily rests on the juror's demeanor, which, as argued in \textit{Patton}, cannot be discerned in an appellate record.\footnote{\textit{Id.}} The \textit{Witt} Court upheld \textit{Patton} as controlling on this issue.\footnote{Witt also found that the wrong standard was articulated in \textit{Darden} v. \textit{Wainwright}, 725 F.2d 1526 (11th Cir. 1984). The \textit{Witt} Court reasoned that since the strict legal standard of \textit{Witherspoon} no longer controlled, the determination of juror bias could not be a mixed question of law and fact. \textit{Darden} relied on \textit{Witherspoon}, as the Court points out. Therefore, the \textit{Witt} Court gave three reasons why it preferred \textit{Adams} to \textit{Witherspoon}. First, \textit{Witt} could not reconcile \textit{Witherspoon}'s “automatically” language with the duties of present-day juries. \textit{See supra} note 63. Second, the Court viewed the \textit{Witherspoon} standard as dictum. \textit{See supra} note 63 and accompanying text. Third, the Court viewed all types of juror bias equally. \textit{See infra} notes 65-68 and accompanying text.}
Moreover, for purposes of § 2254(d), the determination of scrupled-juror bias is a finding of fact subject to a presumption of correctness on federal appellate review.73 Hence, in order for an appellate court to review a trial court's finding of fact, the defendant must show by clear and convincing evidence that the record does not support the trial judge's findings.74

Finally the Witt Court applied the standards it found relevant to the facts of the case. Witt argued that the trial court's finding that Mrs. Colby was biased was not evidenced by the record.75 Witt also argued that the prosecutor's use of the word "interfere" was ambiguous.76 The Court rejected these arguments.77 Rather, the Court held that the trial court properly utilized the Adams test and that the determination of Colby's bias was a finding of fact supported by the record and presumed correct.78

The Concurring Opinion

Justice Stevens agreed with the majority's decision, which reversed the court of appeals, but found much of the majority's discussion unnecessary. Instead, Stevens focused on the defense's failure to object to the disqualification of Mrs. Colby during her voir dire.79 This, Stevens stated, indicated that the defense probably did not want Mrs. Colby as a juror in the first place.80 Furthermore, he argued that the state erred in failing to make the record, by not indicating the defense's failure to object. According to Stevens, however, this was not so fundamental an

Court stated that Darden came to the wrong conclusion regarding § 2254(d) because Darden applied the standard articulated in Witherspoon. 105 S. Ct. at 855.
72. 105 S. Ct. at 855.
73. Id.
74. See supra note 36 for text of § 2254(d). Exception number 8 requires a clear and convincing showing based on the record before a trial court's finding of fact can be overruled by an appellate court. 28 U.S.C. § 2254(d).
75. 105 S. Ct. at 856.
76. Witt argued that the ambiguity of the word "interfere" precluded a finding based on the juror's demeanor since such a finding would be worthless without determining that she understood the question. Id. at 857.
77. Id.
78. Id. The Witt Court examined the record and determined that the trial court followed the appropriate Adams test. The Court noted that the juror in question was the first to be questioned. However, Witt determined that upon reviewing the record as a whole, it was clear that the proper standard was applied by the trial court.
79. Id. at 859 (Stevens, J., concurring in judgment). Justice Stevens concluded that defense counsel did not want Colby as a juror based on the record and on his objections to the excusal of other scrupled jurors. Therefore, Stevens found that the state's failure to make the record in Mrs. Colby's case was not an error sufficient to overturn the death sentence. See 105 S. Ct. at 858-59 nn.1-6.
80. Id. at 859.
error to justify overturning the death sentence.\textsuperscript{81}

\textit{The Dissenting Opinion}

Justice Brennan focused his dissent on three main points of the majority opinion. First, Brennan disagreed with the majority’s finding that \textit{Adams} is inconsistent with \textit{Witherspoon}.\textsuperscript{82} In so doing, Brennan noted that \textit{Adams}' endorsement of \textit{Witherspoon} is evidenced by its explicit use of the \textit{Witherspoon} language.\textsuperscript{83} Brennan further argued that \textit{Adams} is wholly consistent with \textit{Witherspoon} and does not eliminate \textit{Witherspoon}'s strict burden of proof requirement for scrupled jurors. Brennan based this conclusion on the fact that under both \textit{Witherspoon} and \textit{Adams}, a juror may only be excused if it is shown that his views would impair his ability to determine guilt.\textsuperscript{84}

Second, Brennan criticized the majority for reading \textit{Adams} as viewing scrupled-juror bias in accord with other forms of juror bias.\textsuperscript{85} He indicated that the majority disregarded the fundamental objective of maintaining jury neutrality, that \textit{Witherspoon} sought to accomplish through its strict standards.\textsuperscript{86} In addition, Brennan condemned the majority for discarding \textit{Witherspoon} without addressing the vital sixth amendment considerations \textit{Witherspoon} attempted to protect.\textsuperscript{87}

Finally, Justice Brennan disagreed with the majority's holding that the determination of scrupled-juror bias is a finding of fact subject to § 2254(d)'s presumption of correctness.\textsuperscript{88} Brennan asserted that regard-

\textsuperscript{81} Id.
\textsuperscript{82} Id. at 866.
\textsuperscript{83} Id. In asserting that \textit{Adams} is consistent with \textit{Witherspoon}, the dissent cited numerous lower court cases that have read \textit{Adams} as an endorsement of \textit{Witherspoon}. See, e.g., Darden v. Wainwright, 725 F.2d 1526 (11th Cir. 1984); O'Bryan v. Estelle, 691 F.2d 706 (5th Cir. 1982); State v. Mercer, 618 S.W.2d 1 (Mo. 1981)(en banc).
\textsuperscript{84} 105 S. Ct. at 866-67.
\textsuperscript{85} Id. at 869. The dissent also disagreed with the court's other reasons for preferring \textit{Adams} to \textit{Witherspoon}. The dissent asserted that the majority reasoning did not adequately reflect the impact that \textit{Witherspoon} has had. See infra note 102 for a list of cases following \textit{Witherspoon}. Furthermore, the dissent attributed the majority's opinion to a revisionist reading of \textit{Adams}. Id.
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 870. The dissent criticized the majority for not discussing the reasons why \textit{Witherspoon} was decided in the first place. Hence, the dissent stated that because the majority did not acknowledge the rights \textit{Witherspoon} sought to protect it need not explain why the protections were no longer needed. Next, the dissent discussed the importance of a neutral jury. The dissent stated that any standard less stringent than \textit{Witherspoon} excludes an identifiable segment of the public. This exclusion results in a less than neutral jury. The dissent condemned the broad exclusion of scrupled jurors since it infringes the defendants' rights in a way that other types of bias do not. The dissent cited Duncan v. Louisiana, 391 U.S. 145 (1968), for the proposition that the sixth amendment guarantees an accused the right to an impartial jury. Id. See also Gross, supra note 3 (a discussion of the neutrality of death-qualified juries).
\textsuperscript{88} 105 S. Ct. at 872.
less of the standard used to exclude scrupled jurors, a trial court must still apply a legal standard to a historical fact.\(^8\) Therefore, Brennan interpreted the trial court’s determination of scrupled-juror bias as a mixed question of law and fact not subject to § 2254(d)’s presumption of correctness.\(^9\)

For reasons stated, Brennan viewed the majority opinion as a vehicle to give more power to the state. Brennan asserted that the relaxation of the exclusion standard ultimately infringes an accused’s right to an impartial jury.\(^9\) Accordingly, Brennan condemned the majority for diminishing a capital defendant’s right to an impartial jury and interpreting the trial court’s determination of scrupled juror bias as a question of fact subject to 28 U.S.C. § 2254(d).\(^9\)

**ANALYSIS**

*Eliminating Witherspoon’s Strict Burden of Proof*

Witt’s rejection of Witherspoon’s strict burden of proof is troubling for a variety of reasons. First, Witt’s fundamental failure lies in its refusal to address the doctrinal underpinnings of the Witherspoon and Adams decisions before discarding Witherspoon’s strict burden of proof. In Duncan v. Louisiana,\(^9\) the Supreme Court held that the sixth amendment guarantees a neutral jury in order to protect defendants from overzealous prosecutors and judges.\(^9\) In light of Duncan, it would be unjust to require a defendant to bear the risk of a less-than-neutral death-qualified jury. Moreover, several empirical studies have confirmed Witherspoon’s finding that there is an inherent risk that death-qualified juries will create partial tribunals “uncommonly willing to condemn a man to die.”\(^9\)

Thus, Witherspoon and Adams articulated standards designed to

---

89. *Id.*
90. *Id.* See Darden v. Wainwright, *supra* notes 43-44 and accompanying text.
91. 105 S. Ct. at 871-72.
92. *Id.* at 872.
93. 391 U.S. 145, 155-56 (1968). In examining a defendant’s right to a neutral jury, the Supreme Court found that “providing an accused with the right to be tried by a jury of his peers [gives] him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.” 105 S. Ct. at 860 (quoting *Duncan*, 391 U.S. at 155-56).
94. 391 U.S. at 155-56.
limit the state's ability to death-qualify juries.96 Contrarily, Witt affords prosecutors more opportunity to death-qualify juries by requiring a lower threshold of proof before excluding a scrupled juror.

Second, the Witt Court virtually ignored the right to a neutral jury which Witherspoon and Adams sought to protect. Although Witt noted that an accused has a right to a neutral jury, it failed to adequately consider this factor in defining the permissible scope for excluding scrupled jurors from capital trials.97 Instead, Witt emphasized that the standard promulgated in Adams maintained the state's interest in obtaining jurors who abide by their oaths.98 The Witt Court neglected to balance the defendant's interest in a neutral jury with the state's interest in obtaining jurors who will abide by their oaths. Thus, Witt's removal of a strict burden of proof is troublesome since it enhances the state's ability to death-qualify juries without considering the effects that death-qualification may have on the neutrality of juries.

Third, by relying on Adams as a basis to reject Witherspoon's strict burden of proof, the Court failed to recognize the fact that Adams was fundamentally based on Witherspoon.99 In succinctly stating that the exclusion of jurors on any broader basis than outlined in its decision would jeopardize the neutrality of the jury, Adams clearly reaffirmed the need for a strict burden of proof.100 The Witt Court, however, ignored this consideration because it contradicted the Court's basic premise that Adams dispensed with Witherspoon's strict burden of proof.

Witt's Interpretation of Adams

Witt's holding that Adams is preferable to Witherspoon is also questionable. The Witt Court interpreted Adams' "prevent or substantially impair" language as a deviation from the Witherspoon standard as a means to broaden Adams. However, the Adams Court specifically quoted Witherspoon's standard with approval in determining that Witherspoon applied to Adams' bifurcated sentencing scheme.101 Indeed, most lower courts102 and commentators103 have interpreted Adams as an

96. See supra notes 11-34 and accompanying text.
97. 105 S. Ct. at 855. The Witt Court briefly stated that it in no way denigrated the importance of a neutral jury. The Court cited Dennis v. United States, 339 U.S. 162 (1950), for the proposition that the trial court must protect the rights of an accused. 105 S. Ct. at 855.
98. 105 S. Ct. at 851.
100. 448 U.S. at 48-49. Adams found the use of a statute to exclude jurors on broader grounds than their ability to follow the law or abide by an oath was impermissible. Id.
101. Adams is discussed supra at notes 27-34 and accompanying text.
102. See, e.g., Darden v. Wainwright, supra; Davis v. Zant, 721 F.2d 1478, 1486 (11th Cir.
endorsement of Witherspoon. Clearly, the Witt Court's reading of Adams contradicts both the language in Adams and the majority of courts, which have read Adams as a revival of Witherspoon.

Additionally, the Witt Court perceived Adams as being consistent with traditional reasoning for excluding biased jurors from juries. A uniform classification of biased jurors is the underlying purpose of the Witt decision since it broadens the standard. Unfortunately, Witt failed to recognize the inherent difference between a claim challenging the improper exclusion of scrupled jurors and claims based on other types of bias that typically challenge the inclusion of biased jurors as in Patton. As the dissent correctly noted, in order for a blanket classification to be logical, the standard must address the issue of whether those who replaced the excluded jurors were biased and hence improperly included in the jury. Due to its interpretation of Adams as equivocating all forms of juror bias, Witt succeeded in broadening Adams.

Despite the apparent inconsistencies in the Witt Court's reasoning, it is noteworthy that the Court could have reversed the court of appeals without either rejecting Witherspoon or expanding Adams. During voir dire, Colby indicated that her views would "interfere" with her deliberations. The Witt Court noted, however, that the word "interfere" could literally mean "to create an obstacle." Based on this definition of "in-


104. 105 S. Ct. at 851. The traditional reason for excluding jurors is because they would bias the jury either for or against the defendant. Witt viewed the inclusion of scrupled jurors as biasing the jury for the defendant. Id. However, Witt did not recognize that excluding scrupled jurors would result in a jury comprised solely of those willing to impose capital punishment. Thus, the jury could be biased against the defendant. The Witt Court chose to protect the state's interest in efficient law enforcement over the defendant's interest in an impartial jury. Id.

105. 104 S. Ct. 2885. Patton involved a challenge of the constitutionality of including biased jurors in a jury. Patton is discussed fully supra at notes 37-41 and accompanying text.

106. 105 S. Ct. at 869 (Brennan, J., dissenting). The dissent reasoned that if the focus of the inquiry changed to the questioning of the bias of the jurors who replaced the excluded jurors then no harm would result from the exclusion of prospective jurors. The harm would result from the inclusion of the excluded jurors' replacements. Id.

107. 105 S. Ct. at 848. The defense argued that the prosecutor's use of the word "interfere" was ambiguous. He contended that if the word was ambiguous it could not be assumed that Colby understood it. For the text of Mrs. Colby's voir dire, see note 49 supra. See Note, supra note 99 at 942.

108. 105 S. Ct. at 857. The Court chose to define the word "interfere." Curiously, the Court also criticized the defense for engaging in an exercise in semantics when the defense argued that the word "interfere" could have a variety of meanings. Id.
terfere," the *Witt* Court could have decided that Mrs. Colby's views on capital punishment would prevent or substantially impair her ability to abide by an oath or to follow the law. Therefore, *Witt* could have appropriately upheld Colby's excusal without either broadening *Adams* or abandoning *Witherspoon*.

The Section 2254(d) Presumption of Correctness

*Witt*'s holding that a trial court's determination of scrupled-juror bias is a finding of fact is consistent with its broadening of *Adams*. Because *Witt* equivocated all types of juror bias, it expanded the decision in *Patton* to now include the determination of bias for scrupled jurors. Additionally, under *Patton*, absent a clear and convincing showing that the trial court erred in applying the standard, a federal review court must now presume the correctness of a trial court's findings about scrupled jurors. *Witt* has therefore made it more difficult for a defendant to challenge the exclusion of scrupled jurors from a capital trial.

In finding *Patton* controlling, *Witt* also emphasized the importance of demeanor evidence. Nevertheless, *Witt*'s recognition that a trial court must still apply a legal standard to a historical fact contradicts its holding. As the Supreme Court held in *Cuyler v. Sullivan*, when applying a legal standard to a historical fact the issue is a mixed question of law and fact not subject to § 2254(d). By emphasizing demeanor evidence and equivocating all juror bias, *Witt* interjected a mixed question of law and fact into the scope of § 2254(d). This line of reasoning not only justified, but perhaps required, the *Witt* Court's deferral to the trial court's findings on the disqualification of Mrs. Colby when the defense failed to make a clear and convincing showing of error.

Impact of the Decision

While the potential impact of *Witt* remains to be seen, its present implications are readily identifiable. Scrupled jurors will be more readily excluded from juries based on the trial court's interpretation of juror voir dire. Of more significance, however, is *Witt*'s removal of the strict burden of proof previously necessary to excuse scrupled jurors for cause. The *Witt* Court has indicated a willingness to favor the state over the

109. See discussion of *Patton*, supra notes 37-41 and accompanying text.
110. 104 S. Ct. 2885.
111. 446 U.S. 335 (1980). *Cuyler* involved a question of mixed law and fact. However, the issue did not revolve around the determination of scrupled-juror bias. The case stands for the premise that a mixed question of law and fact is not subject to § 2254(d)'s presumption.
112. *Id.* at 342.
defendant by making it easier for prosecutors to death-qualify juries. Hence, Witt's broadening of the standard may be a regression to the pre-Witherspoon era when few guidelines for death-qualifying juries existed.

Additionally, Witt's expansion of the scope of § 2254(d) will make it even more difficult for a defendant in a capital case to challenge the exclusion of scrupled jurors. Witt mandates that a higher burden of proof remain on the defendant to show convincingly that the trial judge's determination was not supported by the record. This shift of the burden of bearing the risk of a less-than-neutral jury from the state to the defendant may indicate a trend toward a further curtailing of one's sixth and fourteenth amendment rights. The foreseeable impact could be an increase in death-qualified juries predisposed to imposing the death penalty and predisposed to convict.113

CONCLUSION

Wainwright v. Witt examined both the permissible standard for excluding scrupled jurors from capital juries and the scope of § 2254(d). The Court rejected the Witherspoon standard by eliminating the stringent burden of proof and uniformly categorizing all types of biased jurors. Additionally, Witt held that a trial court's determination of scrupled-juror bias is a finding of fact subject to a § 2254(d) presumption of correctness. Thus, the Witt decision significantly broadened both standards and shifted the burden of bearing the risk of a less-than-neutral jury from the state to the capital defendant.

113. Studies confirm that death-qualified juries tend to impose capital punishment and also tend to be conviction-prone. See Cowan, Ellsworth & Harrington, Death Penalty Attitudes and Conviction Proneness: The Translation of Attitudes into Verdicts, 8 Law & Human Behavior 95 (1984). Lower courts have found that excluding scrupled jurors creates juries prone to convict. See Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), modified, 758 F.2d 226 (8th Cir. 1985); Hovey v. Superior Court, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980).