DEATH-QUALIFICATION AFTER *WAINWRIGHT v. WITT*: THE ISSUES IN *GRAY v. MISSISSIPPI*

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When juries were given the right to decide whether a person convicted of a capital offense should live or die, judges had wide latitude in determining whether a venire member's views about the death penalty disqualified him from service.[1] For many years, judges generally were allowed to find anyone who said he opposed, did not believe in, or had "conscientious scruples" about the death penalty unfit to sit on juries in capital cases. This practice, which was designed to provide the State with juries that would pass "impartially" upon defendants' guilt and consider imposing the ultimate sanction upon the guilty,[2] undoubtedly resulted in the excusal for cause[3] of some people who would have been willing and able to do both of these things. Nonetheless, because the defendant's right to an "impartial" jury was thought to guarantee only

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1. The history of the "death-qualification" of capital sentencing juries through the Supreme Court's decision in Darden v. Wainwright, 106 S. Ct. 2464 (1986), is chronicled in Krauss, *The* Witherspoon *Doctrine at* Witt*'s End: Death-Qualification Reexamined*, 24 AM. CRIM. L. REV. 1 (1986).

2. Prior to the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), juries generally determined a defendant's guilt and penalty in a single, unanimous, verdict. Moreover, the jury had absolute discretion on the life-or-death sentencing question. As a result of *Furman*, every jurisdiction now provides for a post-conviction hearing and a separate verdict as to punishment, and a defendant must be found guilty of an aggravated form of murder in order to be eligible to receive a death sentence. However, where jury sentencing is employed, the unanimity requirement has been retained. Krauss, *supra* note 1, at 3 n.14 and accompanying text. Finally, federal law not only continues to permit sentencers to exercise unbridled discretion as to whether a death-eligible defendant should die, it requires that they be allowed to consider, and grant mercy on account of, "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion). Krauss, *supra* note 1, at 86.

3. Prospective jurors who are actually biased, or legally presumed to be, are subject to challenge for cause. Peremptory challenges, on the other hand, may be exercised "without a reason stated, without inquiry and without being subject to the court's control." Swain v. Alabama, 380 U.S. 202, 220 (1965).

that he be tried by a group of "impartial" jurors, few courts were troubled by this prospect.

The Supreme Court flatly rejected this traditional wisdom in *Witherspoon v. Illinois*.[4] Since most Americans appeared to have qualms about the death penalty, the Court felt that the for-cause exclusion of every such individual disabled Witherspoon's jury from "express[ing] the conscience of the community on the ultimate question of life and death."[5] Indeed, the Court was persuaded that their systematic disqualification barred his jury even from voicing "the conscience of the community" of persons willing to do what the State expects of jurors in capital cases. Therefore, the Court deemed this a "hanging jury,"[6] not the "impartial" jury to which Witherspoon was entitled under the sixth[7] and fourteenth[8] amendments, and held that the death sentence that it had imposed upon him could not be carried out. Without expressing an opinion as to whether an individual's aversion to the death penalty could ever justify his disqualification from a capital sentencing jury, the Court declared that people may not be so excused if they have not 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*.[9]

Seventeen years later, in *Wainwright v. Witt*,[10] the Court held that the State can consider people whose feelings about the death penalty would prevent their "following the law" unqualified to sit on capital sentencing juries. The legitimacy of purging these juries of everyone who would never vote to condemn a human being to die (automatic voters against death, or "AVADs")[11] or who would vote to acquit a guilty defendant in

4. 391 U.S. 510 (1968).

5. *Id.* at 519 (footnote omitted).

6. *Id.* at 523.

7. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." U.S. CONST. amend. VI.

8. "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

9. 391 U.S. at 522 n.21.

10. 469 U.S. 412 (1985).

11. *Witt* suggested that *Witherspoon*'s "automatic voting" language is not the correct constitutional test of sentencing bias. I have previously considered the significance of *Witt*'s "refinement" of this test. See Krauss, *supra* note 1, at 86 n.374. Suffice it to say that, for the purposes of this article, this development may be overlooked.

order to protect him against what they believed would be an undeserved death sentence ("nullifiers") is debatable,[12] but this unexplained holding was clearly foreshadowed by prior decisions.

What was unprecedented about *Witt* was its rejection of the evidentiary standard announced in *Witherspoon*.[13] *Witt* involved a collateral attack on the for-cause exclusion of a juror who said only that she did not believe in the death penalty, that she was "afraid" that this would "interfere with [her] sitting as a juror in this case," and that she "th[ought]" it would "interfere with judging the guilt or innocence of the Defendant in this case."[14] By affirming her dismissal, the Court ruled that the inability of AVADs and nullifiers "impartially" to "follow the law" need not be "unmistakably clear" in order for their excusal for cause to be constitutional. Rather, it decided that prospective capital sentencing jurors may be declared incompetent whenever they have been shown to lack "impartiality." As a corollary, *Witt* also held that a trial judge's determination whether a juror's views on the death penalty would render him an AVAD or nullifier is a factual finding entitled to deference on *habeas corpus* review. And the Court's evaluation of the exclusion challenged in that case manifested a committment to reducing federal scrutiny of these decisions to a truly minimal level.[15]

12. The justification for the exclusion of AVADs is unclear in three respects. First, it is not evident how juries can voice the "conscience of the community" on whether a defendant deserves to die if this segment of the community is excluded from their discussions. Second, if, as the Court has held, a sentencer can legitimately opt for mercy whenever "any aspect of a defendant's character or record and any of the circumstances of the offense" makes that seem appropriate, Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion), it is not clear why a person should be considered an unfit sentencer merely because he is convinced that every killer's story must include such a factor (i.e., the reason why he became a killer). Finally, if an AVAD can somehow be said to be guilty of nullifying a state's capital sentencing law, it is not apparent how the disqualification of AVADs can be reconciled with our honored tradition of jury nullification, Krauss, *supra* note 1, at 56 n.231, the legitimacy of which the Court has sporadically recognized in other contexts. *See infra* note 214.

The excludability of nullifiers from capital sentencing juries is suspect for both the last named reason and one other: if a nullifier is "impartial" on the capital sentencing question (even if AVADs are not, not all nullifiers are AVADs), it is not clear why the State's desire to submit the guilt and sentencing issues to a single jury justifies his exclusion therefrom. *Cf.* Lockhart v. McCree, 106 S. Ct. 1758 (1986).

13. Although *Witherspoon* had always had its detractors on the Court, there was only one clear hint prior to *Witt* that the Court might be prepared to repudiate the "unmistakable clarity" requirement. In Texas v. Mead, 465 U.S. 1041 (1984), Justice O'Connor, who had not participated in the decision of a *Witherspoon* case since she succeeded *Witherspoon*'s author on the Court, joined in an opinion implicitly advocating just such a retrenchment. 465 U.S. at 1043 (1984) (Rehnquist, J., dissenting from the denial of certiorari).

14. 469 U.S. at 415-16.

15. In *Witt*, these principles allowed the Court to uphold the exclusion of a juror who was

The Court gave one reason for this doctrinal retrenchment: "excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias."[16] Justice Rehnquist,[17] spokesman for the six-Justice majority,[18] expanded upon this theme in a passage worth repeating in full:

> Exclusion of jurors opposed to capital punishment began with a recognition that certain of those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths. *Witherspoon* simply held that the State's power to exclude did not extend beyond its interest in removing those particular jurors. But there is nothing talismanic about juror exclusion under *Witherspoon* merely because it involves capital sentencing juries. *Witherspoon* is not grounded in the Eighth Amendment's prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an "impartial" jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.[19]

There is one problem with this analysis: there is something talismanic about juror exclusion under *Witherspoon* precisely because it involves capital sentencing juries. That is why *Witt* reaffirmed *Witherspoon*'s ban on the practice of regarding jurors with reservations about the death penalty *ipso facto* as biased. And the Court has renewed its commitment to the idea that the selection of capital sentencing juries is "different" even

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evidently found to have lacked "impartiality" in regard to the determination of the defendant's guilt or innocence. The Court invoked the same principles to uphold the dismissal of a prospective juror on the ground that he was not "impartial" with regard to the determination of the defendant's sentence in Darden v. Wainwright, 106 S. Ct. 2464 (1986).

16. 469 U.S. at 429.

17. With one exception, the decisions discussed in this article were all handed down before Justice Rehnquist became Chief Justice. In the interests of brevity, I will therefore refer to him throughout by his then-current title.

18. Justice Stevens concurred in the judgment. He would evidently have voted to vacate Witt's sentence on direct appeal, but the possibility that defense counsel chose not to object to the excusal of the juror in question because he did not want her on the jury led Justice Stevens to conclude that her erroneous exclusion did not warrant a grant of *habeas* relief. 469 U.S. at 436-38 (Stevens, J., concurring in the judgment). Justices Brennan and Marshall would have reaffirmed the "unmistakable clarity" requirement and vacated Witt's death sentence, and so they dissented. 469 U.S. at 439-63 (Brennan, J., dissenting).

19. 469 U.S. at 423.

after *Witt*. In *Lockhart v. McCree*,[20] the Court considered the charge that the exclusion of AVADs from the jury that convicted McCree of capital murder violated his right to an "impartial" jury on the question of his guilt or innocence because, in their absence, a jury is more likely to find a person guilty of criminal behavior (or on more serious charges) than would a jury truly representative of the views of the unbiased community. Assuming the validity of his social science claims, the Court dismissed McCree's legal argument on the ground that *Witherspoon* and its progeny, on which he relied, were inapposite. According to Justice Rehnquist, who once again spoke for the Court, this was principally because those cases "dealt with the special context of capital sentencing, where the range of jury discretion necessarily gave rise to far greater concern over the possible effects of an 'imbalanced' jury."[21] In other words, one year after *Witt*, the Court characterized its prohibition of the exclusion of "impartial" jurors with reservations about capital punishment as a reflection of its judgment that greater care must be taken to guarantee the "impartiality" of capital sentencing juries than of juries employed to determine guilt or innocence, even of a capital offense. The same judgment is also evident in *Turner v. Murray*,[22] in which the Court held that the failure to allow *voir dire* inquiry with regard to the possibility of bias on the part of white jurors where a black defendant is accused of an interracial crime vitiates his death sentence, but not his conviction.

Since the Court has shown no signs of backing away from its decision in *Witt*,[23] the question arises how far its commitment to deregulating the death-qualification process extends. *Gray v. Mississippi*[24] presents the Court with a number of aspects of that question. After reviewing the record in *Gray*, this article will consider them seriatim. Part II will explore the deference to which appellate court fact finding is entitled on direct review in a criminal case, as I consider what are to be taken as the facts in *Gray*. Each of the two most reasonable ways of reading the record in this case presents significant issues regarding the capital sentencing jury selection process, and they will be examined in Parts III and IV. Part III will focus upon the risks of *ex post facto* factfinding as they bear

20. 106 S. Ct. 1758 (1986).

21. *Id.* at 1769.

22. 106 S. Ct. 1683 (1986).

23. On the contrary, the Court arguably extended *Witt* by applying it to validate the disqualification of an alleged AVAD in Darden v. Wainwright, 106 S. Ct. 2464 (1986). See *supra* note 15.

24. 106 S. Ct. 1182 (1986).

upon the reconsideration of rulings that jurors are qualified to serve under *Witt* and the use of peremptory challenges to accomplish what *Witherspoon* and *Witt* forbade. Part IV will discuss the excludability of jurors on the ground that they do not know whether they could ever vote to impose a death sentence upon a convicted murderer. Finally, Part V will consider the harmless error problems presented by the case in the event that one juror was improperly disqualified on that basis.

I.

At *voir dire*, the judge who presided over David Gray's 1982 capital murder trial refused to grant some of the prosecution's challenges for cause of venire members who stated that they would never vote to impose the death penalty upon a convicted criminal. He also refused to disqualify one juror who said he did not know whether he could ever vote to impose a death sentence. The State peremptorily challenged all of these people, as it did every other juror who voiced reservations about capital punishment. Eventually, it exhausted its quota of peremptories. It was then that Juror Bounds was quizzed about her excludability under *Witherspoon*.

The prosecutor began this inquiry by asking her the same question he had posed to the previous jurors: "[D]o you have any conscientious scruples against Capital Punishment when imposed by the law?"[25] When Ms. Bounds said she did not know, the prosecutor indicated that what he really wanted to find out was whether she could vote to impose it. And so he asked her the "conscientious scruples" question again. This time, the transcript records her response as "([i]naudible),"[26] but the prosecutor appears to have heard a negative response. He then inquired whether she meant to say that, "if the evidence warrants and the law allows"[27] it, she could vote to impose the death penalty. Juror Bounds asked that he repeat the question. He replied by telling her that the law would allow the imposition of the death penalty in this case, but that the jury would have to decide whether the evidence warranted it. According to the transcript, her reaction to this statement was "([i]naudible)."[28] At this point, the prosecutor asked the judge to take over the examination of this juror.

25. Joint App. at 16.
26. *Id.*
27. *Id.*
28. *Id.* at 17.

The judge asked her whether she would "automatically vote against the imposition of the Death Penalty without regard to any evidence that might be developed in the trial in this case."[29] Ms. Bounds replied that she "would try to listen to the case."[30] The judge said that was not an acceptable response, and he posed the question again. After repeating it yet a third time, at the juror's request, the judge got the "yes or no" answer that he said he needed: twice, Ms. Bounds answered, "No," she would not be an AVAD.[31] In the course of the ensuing colloquy, however, she backtracked, saying that she would "do [her] best," and that she did not "think" she would "automatically vote" against the death penalty.[32] But when the judge again insisted upon a "yes or no" answer, she said "no" three more times.[33]

This evidently satisfied the judge, but not the prosecutor, and the judge allowed him to ask Juror Bounds "one [last] time"[34] whether she could vote to condemn Gray to die if she thought the evidence warranted such a verdict. This time, she responded with a question of her own: "How can I say [yes or no] when I've never experienced it?"[35] The prosecutor repeated his question, and now she answered, "I don't think I could."[36]

Mischaracterizing this statement as a confession that Ms. Bounds "could not" do what he had asked, the prosecutor attempted to challenge her for cause.[37] The following colloquy ensued:

> BY THE COURT: (Interposing) Well, I don't know whether she could or couldn't. She told me she could, a while ago.
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> BY [PROSECUTOR] NECAISE: Well, all I can do, Judge, is go by what the lady says. The Court's put, the Court has put the State in a precarious position by making us use our challenges when we clearly met the law in about six cases. On about six challenges that the Court has made us use. . . .
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> BY THE COURT: (Interposing) Well, I think I had one or two that. . . .
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> BY MR. NECAISE: (Interposing) I agree with you, Judge. There's two or [sic] them. . . .

29. *Id.* (quoting *Witherspoon*, 391 U.S. at 522 n.21).
30. *Id.*
31. *Id.*
32. *Id.* at 18.
33. *Id.*
34. *Id.* at 19.
35. *Id.*
36. *Id.*
37. *Id.* at 20.

BY THE COURT: . . . . just used that to get off the Jury. At least one person that I'm positive of.

BY MR. NECAISE: Well, I'm sorry that they did that, Judge.[38]

Thereafter, under renewed questioning by the judge, Ms. Bounds twice repeated her statement that she would not "automatically vote against" the death penalty. At this point, the judge asked whether she realized that she was saying that she could vote for its imposition. Her response led the judge to conclude that she had not understood the "automatic voting" question derived from *Witherspoon*. Accordingly, he asked if she "would vote against" the death penalty.[39] She said "no," but, asked if she "would not vote against it," she did not respond.[40] The judge then inquired directly whether she "could vote for the Death Penalty."[41] When she said "I think I could,"[42] the judge seemed satisfied.[43]

Outside the hearing of the venire, the State now made another motion.

(BY MR. NECAISE: The State ha[s] exhausted [its] peremptory challenges, [its] twelve peremptory challenges. And, of course, the State would not, the Court would not allow the State to excuse anybody who had conscientious scruples against Capital Punishment under any circumstances and would vote against the Death Penalty under an[y] circumstances on five different Jurors, which we can give the Court their names, and the Court MADE us use our challenges. And now we get on one where the Court has, where she has equivocated and where she has said one time yes and one time no. And there's just no question about it that if we had another challenge, we would use it on this lady because as the Court can see she is very weak and indecisive about the question. And I ask the Court, because the Court has not followed [*Witherspoon*], throughout the case, that you let us have another challenge in this case, in particular, on this woman and we can give you the ones on Ruiz, uh, Coker, uh, Arlean Walker, Annie Mae Bush, uh, Lassabe, Price, and uh, who were very unequivocal, that they would not under any circumstances, would not vote to impose the death penalty.

(BY THE COURT: Well, I think that's right, I made you use about five of them that didn't equivocate. Uh, I never had no idea that we'd run into this many.

(BY MR. NECAISE: I didn't either, Judge.

38. *Id.*
39. *Id.* at 21.
40. *Id.*
41. *Id.* at 22.
42. *Id.*
43. He remarked, "All right. She says she can vote for the Death Penalty." *Id.*

(Discussion between Court and Counsel.)

(BY [DEFENSE COUNSEL] STEGALL: We're going to object to the granting of a thirteenth peremptory challenge. The Court has already ruled on the State's, uh, uh, arguments in previous attempts at challenges for cause and the granting of a thirteenth would, uh, be one in excess of that provided by law. And the Defendant would object, if, uh,. . . .

(BY MR. NECAISE: Judge, I'm not asking you to give us a thirteenth challenge. I'm asking the Court to change its ruling and use those, uh, for cause rather than having the Court, uh, rather than having the State to use its peremptories.

I'm asking the Court to, to change its ruling. . . .

(BY THE COURT: (Interposing) Well, I didn't examine them myself. Of course, I admit that they were unequivocal, about five of them, that answered you that way.

Go ask her if she'd vote guilty or not guilty, if she could vote guilty or not guilty and let's see what she says to that.

If she says, if she gets to equivocating on that, I'm going to let her off as a person who can't make up her mind.

(BY MR. STEGALL: Well, Judge, my, uh, we will respond, of course, subject to what happens here. . . .

(BY THE COURT: (Interposing) All right. All right. Let's go.)[44]

The prosecutor then asked Ms. Bounds if she "could reach a verdict in this case, either guilty or not guilty in this case,"[45] and she said she could. Undaunted, he asked if she could vote to impose the death penalty in this case if the evidence warranted it, and she said, "Yes."[46] He responded, "Ma'am?," and she repeated her previous answer.[47]

Nonetheless, the prosecutor announced that he "could challenge her for cause."[48] When defense counsel objected, the judge called the lawyers back to the bench. The ensuing debate began with defense counsel's observations that Juror Bounds had "answered [the prosecutor's] questions in exactly the proper manner,"[49] and that *Witherspoon*'s "automatic voting" language had not been used in the examination of the jurors whom the court had previously refused to disqualify. The judge agreed with the latter point, but the prosecutor argued that it was irrele-

44. *Id.* at 22-23.
45. *Id.* at 24.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 25.

vant, as he had asked whether they could ever vote to impose a death sentence. The rest of this side bar proceeded as follows:

(BY THE COURT: (Interposing) I should have questioned them on this, I guess. . . .

(BY [MR. NECAISE]: (Unable to distinguish Mr. Necaise's remarks as the Court continued talking, at the same time.)

(BY THE COURT: . . . . but I never had no idea it was going to. . . .

(BY [MR. STEGALL]: (Interposing) Disregarding the evidence. . . .

(BY THE COURT: . . . . wind up in a mess like this. I'd hate to get a conviction and get it reversed because of this one woman. She can't make up her mind.

Well, let the record show that the Court is of the firm opinion that there was at least five, even though I think there's around nine challenges been used by the District Attorney for cause, either eight or nine, all right, there was eight or nine, all right, there was eight of them that had said that they were against Capital Punishment.

And I think there was, uh, five of those that were unequivocally opposed to it and answered, in substance, if not even stronger language than the question set forth in the Witherspoon case, uh, from the United States Supreme Court, uh, that I should, at this point, allow him to challenge this lady for cause. She is totally indecisive. She says one thing one time and one thing another.

The Court is of the opinion that it cheated the State by making him, uh, use, uh, by making the District Attorney use his peremptory challenges in at least five instances. And I'm going to allow it in this particular case.

(BY [MR. STEGALL]: Excuse her for cause?

(BY THE COURT: I'm going to excuse her.

(BY [MR. STEGALL]: Let me ask the Court this, is the Court of the opinion that, uh, that there has been a sufficient record. . . .

(BY THE COURT: (Interposing) I'm not going to add any to his challenges.

(BY [MR. STEGALL]: Okay. All right.

(BY THE COURT: I'm not going to go back and give him five more. I'm going to excuse her for cause.

(BY MR. STEGALL: Okay. All right.)

(BY THE COURT: You can go, Mrs. Bounds, and call back tomorrow afternoon.[50]

Ultimately, a jury was empanelled, and it found Gray guilty as

50. *Gray*, 472 So. 2d at 422.

charged and sentenced him to death. In his motion for a new trial, defense counsel complained, *inter alia*, that

> [t]he Court erred when it excused . . . Mrs. H. C. Bounds, for cause, after the State had exercised its twelve peremptory challenges, after Mrs. Bounds advised the District Attorney and the Court that she had no conscientious scruples against the death penalty when justified by the circumstances and the law.[51]

The entire discussion of this issue at the hearing on this motion went as follows:

> BY MR. STEGALL: Paragraph Six goes to Juror Number 12, on Petit Jury Number 3. The State had already exercised it's [sic] twelve peremptory challenges and Mrs. H. C. Bounds took, uh, entered the Jury. And the Court questioned her. She was the lady that had some difficulty in responding to the, to some of the questions. But, when the Court. . . .
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> BY THE COURT: (Interposing) I don't think she ever understood the first one.
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> BY MR. STEGALL: Well, that's what my point was. And the Court finally, after three or four times of going over it, of going over the question to her, she answered, unequivocally, that she did not have conscientious scruples and could. . . .
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> BY THE COURT: (Interposing) Well, she'd say that, Mr. Stegall. And then she'd come back, I'd ask her the question the next time and she'd answer it the other way.
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> I don't want to publicize what I think about any particular Juror. But, I got the definite opinion that the lady never understood the first question.
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> It depended on the way I asked her, as to what answer she would give me. And they would be diametrically opposed.[52]

The motion was denied.[53]

On appeal, the State initially conceded that Ms. Bounds had been struck for cause in violation of *Witherspoon*. Reading *Davis v. Georgia*[54] as holding that *Witherspoon* error cannot be deemed harmless, it also

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51. Motion for a New Trial, Record at 1481.

52. Tr. at 1436-37.

53. I am indebted to David Rossman of the Boston University School of Law for bringing this motion to my attention.

54. 429 U.S. 122 (1976) (per curiam).

admitted that Gray's death sentence could not stand.[55] However, the Supreme Court handed down its decision in *Witt* before the state supreme court heard oral argument in *Gray*, and that decision prompted the State to reconsider its position in *Gray*. Retracting its confession of error, the prosecution now argued that Juror Bounds had properly been found incompetent for service in this case.[56]

A divided Mississippi Supreme Court upheld Gray's sentence. The whole court agreed that Ms. Bounds was not excludable for cause under *Witt*. Nonetheless, the majority viewed her dismissal as "affirmative action"[57] taken "to correct an error [the judge] had committed in refusing to dismiss other jurors for cause after they had unequivocally stated that they could not vote to impose the death penalty in any circumstance."[58] In essence, it ruled that she had been struck via a revived peremptory challenge, and that the judge's characterization of her dismissal as "for cause" was a harmless error.[59] The dissenting justices, on the other hand, insisted that Juror Bounds had been excused for cause and that *Davis* established that the possibility that the state might have been entitled to additional peremptory challenges could not make her erroneous disqualification a harmless error.[60]

II.

The dispute between the members of the Mississippi Supreme Court concerned a purely factual issue—whether Ms. Bounds was excused peremptorily or for cause. State court findings of fact are generally entitled to deference when attacked in the federal courts, and *Witt* held that this is equally true when the finding concerns the death-qualification of a capital sentencing jury.[61] It is also well-established that this presumption of correctness attaches to the factual findings of appellate, as well as trial,

55. Brief for Appellee at 10-16.

56. Supplemental Brief for Appellee at 1-14; Motion to Reset Oral Argument and to Rebrief Proposition IV of Appellee's Brief at 1-2.

57. 472 So. 2d at 423.

58. *Id.* at 422-23.

59. The court implicitly rejected Gray's claim, Brief for Appellant at 21-22, that peremptory challenges may not be used to remove jurors whose disqualification is prohibited by *Witt*. This is consistent with the position it took on the question in Capler v. State, 237 So. 2d 445 (Miss. 1969), *vacated on other grounds*, 408 U.S. 937 (1972).

60. The dissenters also challenged the court's explanation of why the State was entitled to an additional peremptory.

61. Although *Witt* was a *habeas corpus* case, the Court was careful to note that its holding was also applicable to direct review of rulings on juror competence. 469 U.S. at 428. *Accord* Texas v.

courts.[62] Despite the Supreme Court's willingness to give virtually blind deference to the trial court rulings of juror bias in *Witt* and its progeny, *Darden v. Wainwright*,[63] however, it should not accept the state supreme court's implicit finding that Juror Bounds was struck via a peremptory challenge.[64]

The state supreme court's account of these events has a certain appeal. To put it bluntly, it is hard to see how anyone who has read the transcript of the selection of Gray's jury could not have some doubt about whether the trial judge really thought that Ms. Bounds' feelings about the death penalty rendered her subject to a challenge for cause. His conduct during most of the *voir dire* in this pre-*Witt* trial strongly suggests that he viewed an "unmistakably clear" admission to being an AVAD or

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Mead, 465 U.S. 1041, 1043 (Rehnquist, J., dissenting from the denial of certiorari); Reynolds v. United States, 98 U.S. 145 (1879).

62. Wainwright v. Goode, 464 U.S. 78 (1983) (per curiam); Sumner v. Mata, 449 U.S. 539 (1981).

63. 106 S. Ct. 2464 (1986). The degree of deference to be given to appellate court findings in this context was a question the Court found it unnecessary to consider in *Witt*. 469 U.S. at 432 n.12.

64. The state supreme court's finding that Ms. Bounds was not excludable for cause under *Witt* is even more suspect, since it is apparent that the court misunderstood the teaching of that case. In Fuselier v. State, 468 So. 2d 45 (Miss. 1985), the Mississippi Supreme Court held that numerous errors required the reversal of the defendant's conviction and death sentence. Among them was the dismissal of three jurors due to their views about the death penalty. One of these jurors, Ms. Landrum, initially said she could be a fair and impartial juror. However, she then stood up in response to the prosecutor's question whether "there [are] any of you that just could not vote the death penalty no matter what the facts or what the circumstances are? No matter what?" *Id.* at 54. Without examining her further (and there is no hint in the opinion that any further examination was sought), the judge excused her for cause. The state supreme court condemned this ruling as error under *Witt*, for the following reason:

> Absent a clear showing that the prospective juror would be unable to follow the court's instructions and obey the juror's oath, that juror's feelings regarding the death penalty do not constitute grounds for a challenge and the granting of such a challenge is reversible error. *Wainwright v. Witt, supra, Adams v. Texas, supra.*
>
> . . . A clear showing that a juror's views would prevent or significantly impair the performance of his or her duties requires more than a single response to an initial inquiry.

Id.

The problem is that *Witt* does not make a "clear showing" of incompetence a prerequisite to a juror's disqualification. More plainly still, it does not require that a juror's protestations of "impartiality" be believed, especially when later testimony indicates that they were ill-advisedly made. Most importantly, though, it does not mandate the posing of any talismanic number of questions before a venire member can be found unqualified. *See generally* 469 U.S. at 423-26.

The only explanation that the Mississippi Supreme Court gave for its announcement that Juror Bounds was "clearly qualified to be seated as a juror under the *Adams* and *Witt* criteria," 472 So. 2d at 422, was a citation to *Fuselier*. In light of the fact that that decision was based upon an incorrect interpretation of *Witt*, there is a real danger that the court may have judged Ms. Bounds fit to serve on Gray's jury for an improper reason.

a nullifier as a prerequisite to a person's disqualification on that basis from a capital sentencing jury.[65] Since Juror Bounds made no such "unequivocal" confession, it would seem unlikely that the judge thought she was excludable under that standard.[66] Indeed, what he said when he dismissed her was that she could not "make up her mind" about whether she could ever vote for a death sentence, which is something that she had unqualifiedly acknowledged to be true. Yet a ruling that Ms. Bounds' indecision rendered her unfit for service would have been flatly inconsistent with his earlier refusal to dismiss the indecisive Juror Lassabe, which he justified on the ground that Mr. Lassabe "didn't even know" if he would "automatically vote" against death.[67] If the judge had changed his mind about the competence of indecisive jurors—and his recantation does not seem to have included his ruling on Mr. Lassabe's fitness—, it is hard to see why he would have felt that his prior rulings had created "a mess" or feared that his excusal of Juror Bounds might jeopardize a judgment based upon a verdict rendered by Gray's jury.[68]

Nonetheless, the judge said that he would consider Juror Bounds incompetent if she could not "make up her mind" about whether she

65. The judge's questioning of Jurors Bounds and Schleh, see *infra* note 112 and accompanying text, did not track the "automatic voting" language of *Witherspoon*'s footnote 21. His condemnation of some of his earlier rulings is further evidence that he did not think that queries about juror willingness to "follow the law," Joint App. at 15, had to be cast in the exact words of that footnote. *See also infra* note 120. However, he never ceased to emphasize the necessity of an "unequivocal" acknowledgement of incompetence.

66. Assuming, *arguendo*, that a single "unmistakably clear" admission of incompetence would have justified the exclusion of a vacillating juror, *but see Witt*, 469 U.S. at 443-44 (Brennan, J., dissenting), Ms. Bounds never made a statement of that nature. The closest she came was when she said that she "didn't think [she] could" condemn a man to death. There was no state supreme court authority on this point, but *Witherspoon* said that a finding of sentencing bias cannot stand if the juror has not admitted that he "*would* automatically vote against the imposition of capital punishment no matter what the trial might reveal." In Maxwell v. Bishop, 398 U.S. 262, 265 (1969) (dictum), the Court made it clear that it viewed uncertain responses like Ms. Bounds' as inadequate proof of bias. *See infra* notes 175-77 and accompanying text. While its subsequent decision in Lockett v. Ohio, 438 U.S. 586 (1978), may have signalled a retreat from this position, *see infra* notes 178-80 and accompanying text, the trial judge's insistence upon a "yes or no" answer after Ms. Bounds said that she "didn't think [she] would" be an AVAD suggests that he so understood the law. (Perhaps not coincidentally, the prosecutor did not seriously contend that she was excludable for cause. On the contrary, he pressed for the right to strike her peremptorily, explaining that he did so because "she ha[d] equivocated" and was "very weak and indecisive about" whether she would "automatically vote" against death.)

67. Joint Appendix at 15, *Gray*.

68. Similarly, it is hard to imagine why the judge would have thought the situation a "mess" had he believed that Juror Bounds had made it "unmistakably clear" that she was an AVAD or a nullifier.

would be a nullifier. Beyond this, having pronounced her unable to "make up her mind" about whether she was an AVAD, he excused her for cause. He did so after the prosecutor had implied that Ms. Bounds was unfit to serve.

Moreover, everyone seems to have understood her dismissal to reflect the court's judgment that she was incompetent.[69] While defense counsel's initial reaction to this ruling is inscrutable,[70] it is plain that he so interpreted Juror Bounds' dismissal when he challenged that ruling in his motion for a new trial. The State was also firmly persuaded that her dismissal represented a decision that she was incompetent, and it confessed error in the Mississippi Supreme Court because this finding could not be sustained under *Witherspoon*.[71] In fact, the State never hinted at

69. In *Witt* and *Darden*, the Court regarded the defendants' lawyers' failure contemporaneously to protest the rulings being challenged on appeal as evidence that those rulings were correct. I have argued elsewhere that the inherent ambiguity of that silence made it unfair to draw such an inference under the circumstances of those cases. See Krauss, *supra* note 1, at 79 n.345, 92 n.392. For obvious reasons, these concerns do not prompt me to doubt the reasonableness of regarding the statements of the lawyers in this case as evidence of what the trial judge's ruling was.

70. After asking a couple of questions about the judge's decision to strike Ms. Bounds, the defense counsel's final contemporaneous words on the matter were, "Okay. All right." In fact, he said them twice. Since he had already denied that Ms. Bounds could be excluded for cause and indicated that the defense thought the prior rulings to have been correct, his failure to object to her dismissal is ambiguous. It might be taken as an indication that the lawyer had changed his mind about something, and that he now approved of her excusal. (In that event, his post-trial attack on this ruling would presumably represent an unexplained reconsideration of this position.) Or he may have thought—correctly—that no further objection was necessary in order to preserve the question of the propriety of this ruling for appeal. Indeed, as the judge's parting words to Jurors Schleh, see *infra* note 112, and Bounds indicate that the jurors whose fitness was belatedly being denied had already been sent home for the day (and were thus unavailable for further questioning), counsel may have thought a renewed objection would be pointless. Finally, his remarks might have been the product of abject confusion about what was going on, although there is no evidence of any such confusion in the record. *But see* 472 So.2d at 421 ("everyone involved admitted to being confused" by Ms. Bounds' examination). In any event, these statements shed no light on the theory upon which this juror was struck.

71. In its first brief to the state supreme court, the State explained its concession in the following way:

> Had the trial court given both sides an additional peremptory challenge as was in his discretion to do, there would have been no error. Had the trial court changed its ruling on one of the jurors peremptorily challenged making it a challenge for cause and allowing the State to have one of its challenges back we would have had no error. However, when the judge insisted that he was removing Mrs. H.C. Bounds for cause there is but one conclusion that can be drawn, there is reversible error in the sentence phase as the exclusion of one juror in violation of *Witherspoon*, *supra*, is reversible error.

Brief for Appellee at 15-16.

No claim was made that the judge's labelling of this dismissal as "for cause" was a mistake. On the contrary, the State expressed some sympathy for the view that Juror Bounds' inability to "make up her mind" established her incompetence to serve on Gray's jury. However, being convinced that

any other understanding of the nature of this ruling until it submitted its brief on the merits in the Supreme Court. But even in that document, its principal argument continues to be that the judge correctly determined that this juror was not "impartial."[72] However, the most significant evidence that the judge meant what he said when he announced that he was excusing her for cause lies in his reaction to the post-trial motion. The defense claimed that Ms. Bounds had been excluded for cause, and that this ruling was improper because she had not been shown to have been unqualified. The judge did not respond to this charge by denying that she had been found incompetent. Rather, he quibbled with the contention that she was fit to serve.[73] Thus, this dialogue, which the state supreme court did not mention, indicates that the judge, like the lawyers who witnessed these events, did not share the appellate court's understanding of the basis for this ruling.

The remaining portions of the transcript of this *voir dire* do not resolve the tension between these aspects of the record. For example, it does not

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it would be "futile to attempt to argue the point and win," *id.* at 14-15, the State confessed error. (Incidentally, unless the State used a peremptory challenge in response to an erroneous refusal to disqualify a juror, the trial judge would not have had the authority to "give both sides an additional peremptory challenge," the number available to each party being set at 12 by MISS. CODE ANN. § 99-17-3 (1973).)

72. Brief for Respondent at 9, 15-18, 22-23. The State also claims, half-heartedly at most, that the trial judge's statement that he was excusing Juror Bounds "for cause" was a mistake, and it points to his comment that the prosecutor had used "around nine challenges . . . for cause" against people who "said that they were against Capital Punishment" as proof that he was confusing challenges for cause with peremptories. *Id.* at 19. But this statement evidences no such confusion. The judge's remark was accurate and perfectly appropriate. The prosecutor did challenge each of these jurors for cause. As the judge went on to note, it was his refusal to grant some of those challenges that he now felt to have "cheated the State by making . . . the District Attorney use his peremptory challenges in at least five instances." That, in turn, created the "mess" with which he was currently faced.

73. More specifically, he suggested that Juror Bounds' lack of intelligence had led her to respond to his questions in a hopelessly contradictory manner. Three points merit emphasis in regard to these comments. First, they greatly exaggerate the extent of her vacillation. Only once did Ms. Bounds say that she did not think she could ever vote for a death sentence, and that was in reply to a question put to her by the prosecutor. Second, while the judge voiced some concern about whether she understood the questions she was being asked, he seemed entirely satisfied with her subsequent responses. And after his statement that "she says she can vote for the death penalty," she never deviated from her insistence that she could "impartially" try the case. Third, if, as no one has suggested, Juror Bounds was deemed incompetent because the judge thought her too stupid to act as a juror (and a person's inability to "make up [her] mind" about whether she could ever vote to condemn a fellow human being to die does not make her unintelligent), the case would not involve a *Witherspoon* problem. However, it would raise questions about whether and according to what standards jury membership can be limited to the "intelligent" among us. *See* Fay v. New York, 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting).

take much imagination to infer that the point of the judge's "for the record" remarks may have been that he felt the State deserved the type of ruling the state supreme court credited him with having made. In the same vein, his three final comments at this sidebar could reflect his conviction that no "sufficient record" of Ms. Bounds' lack of "impartiality" was required, that the prosecutor did not need any "additional" peremptories, and that he was simply preventing his earlier rulings from causing a miscarriage of justice. But this is by no means the only way in which these remarks can be read. It appears that two different motions were before the court at this time, as the State had suggested that Juror Bounds be excused for cause and asked the judge to reconsider his prior rulings and return the peremptories that it had used on those occasions. These remarks could have been intended to constitute the judge's rulings on these motions. On this assumption, he may have meant to say exactly what he said: that he had "cheated the State" out of several peremptories, that he would not allow it to reclaim them, and that Ms. Bounds was unqualified to serve.

Similarly, the fact that he chose to comment upon Juror Bounds' indecision when he announced her exclusion is subject to diverse interpretations. It could reflect the judge's belief that it would have been unfair for the State to have been unable to prevent her from sitting on account of his prior rulings.[74] Or it could be that, despite his ruling on the competence of Juror Lassabe, he felt it a ground for excusing her for cause.

In sum, the most that can be said is that the record in this case contains conflicting evidence about the judge's true reason for dismissing Juror Bounds. Under these circumstances, should the Supreme Court accept the state court's finding that the judge did not mean what he said when he said he was excusing her for cause?

The course of action identified by the Mississippi Supreme Court may have been the appropriate one for the trial judge to have followed under the circumstances of this case.[75] Perhaps it is even what, at some level, he meant to do. But there is simply no rational basis for asserting that this is what he actually did in *Gray*. Therefore, despite the enthusiasm that it

74. Contrary to the prosecutor's rhetoric, however, it is worth emphasizing that the judge did not make the State use its peremptories on these jurors. The prosecutor chose to do so, and the distinction is not unimportant. *See infra* text accompanying notes 236-38.

75. At least, it may be what the Mississippi Supreme Court would have wanted him to do, in light of its narrow reading of *Witt*. *See supra* note 64.

showed for deferring to trial judge determinations on juror "impartiality" in *Witt* and *Darden*, the Court should reject this finding.

At first glance, this suggestion might seem at odds with the Court's decision in *Wainwright v. Goode*.[76] Under Florida law, a death sentence may not be imposed because of the possibility that the defendant would commit other criminal acts if he was allowed to live.[77] Notwithstanding this bar, in a *habeas corpus* petition filed in the state supreme court, Goode charged that he had been condemned to die on account of his future dangerousness.

In support of this claim, Goode pointed to the record of his penalty trial. After the jury recommended Goode's execution,[78] a lawyer argued that society would be better served by sparing his life and trying to learn more about why people like him sexually abuse children. The judge then listed the statutorily-recognized aggravating circumstances and the mitigating circumstances that he believed to be present in the case, as Florida law required.[79] Finding that the latter did not outweigh the former, he announced that Goode would be sentenced to death. Finally, he uttered the following remarks:

> "In closing I want to address myself to Counsel Smith's remarks for just a moment. The question of why should this man be executed for what he has done is a question that the Court has wrestled with for several days and has carefully considered the circumstances, but I have to be able to answer to myself why should I invoke the awesome punishment of death. Could not something be learned from Arthur? Am I not doing as I have seen and heard many do and merely be so outraged by the activities that he has done that possibly my reason and judgment are blurred? I believe not.
>
> "If organized society is to exist with the compassion and love that we all espouse, there comes a point when we must terminate that, and there are certain cases and certain times when we can no longer help, we can no longer rehabilitate and there are certain people, and Arthur Goode is one of them, that's actions demand that society respond and all we can do is exterminate.
>
> "Philosophically, I believe that in certain limited instances we should do that. In this particular case that is my opinion, and that is my order, and

76. 464 U.S. 78 (1983) (per curiam).

77. Miller v. State, 373 So. 2d 882 (Fla. 1979); FLA. STAT. ANN. § 921.141(5) (West 1985).

78. In Florida, the judge is the sentencer in a capital case. However, the jury plays a role in sentencing, too, as it returns an advisory verdict on penalty. For a more detailed discussion of Florida's capital sentencing law, see Krauss, *supra* note 1, at 4 n.14, 70 n.300.

79. FLA. STAT. ANN. § 921.141(3) (West 1985).

> the only answer I know that will once and for all guarantee society, at least as far as it relates to this man, is that he will never again kill, maim, torture or harm another human being, and as you said in trial, Arthur, maybe I don't know who we blame. God forgive you of those desires or something in your environment that has made you have them, and whoever is to blame is beyond the power of this Court.
>
> "You have violated the laws, you have had your trial and I am convinced that the punishment is just and proper, and truthfully, may God have mercy on your soul."[80]

The Florida Supreme Court declined to issue the writ.[81] According to that court, the record did not show that the judge had considered Goode's future dangerousness when determining his sentence. Rather, the court described the judge's parting words as an aside intended to inform Smith of why the judge thought the sentence just, even though it was imposed for other reasons.[82]

Goode then initiated federal *habeas corpus* proceedings. The district court sustained the state supreme court's view, but the court of appeals disagreed, and so it enjoined the execution of Goode's sentence.[83] This judgment, in turn, was summarily reversed by the Supreme Court.

The Court gave two different justifications for its ruling. Initially, it noted that the state supreme court had necessarily held either that the trial judge's action was correct under state law or that he had not actually considered Goode's future dangerousness in determining his sen-

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80. Goode v. Wainwright, 410 So. 2d 506, 508 (Fla. 1982).

81. *Id.* at 509.

82. Goode's formal claim was that his appellate counsel had incompetently failed to raise this issue on appeal. As a result, the state supreme court had refused to allow him to raise it in a subsequent motion to vacate the sentence, Goode v. State, 403 So. 2d 931 (1981), and he might have been unable to do so in a *habeas* petition in the federal courts. Smith v. Murray, 106 S. Ct. 2661 (1986). Since it was not persuaded that the judge relied upon an improper factor in sentencing Goode, however, the Florida Supreme Court concluded that the failure to raise the point on appeal did not render counsel ineffective.

The court also suggested, with obvious hesitation, that this omission may not have been incompetent because it had not held a defendant's future dangerousness an impermissible consideration in deciding the life-or-death sentencing question at the time the initial appeal in Goode's case was filed. 410 So. 2d at 509. But the court's qualms about this argument were justified; state law clearly provided that non-statutory aggravating circumstances could not justify the imposition of a death sentence, *see, e.g.*, Elledge v. State, 346 So. 2d 998 (Fla. 1977); Provence v. State, 337 So. 2d 783 (Fla. 1976); FLA. STAT. ANN. § 921.141(5) (West 1985), and future dangerousness is plainly not one of the factors listed in that statute as a valid aggravating circumstance.

83. Goode v. Wainwright, 704 F.2d 593 (11th Cir.), *rev'd per curiam*, 464 U.S. 78 (1983). The federal courts considered Goode's attack on his sentence directly, not filtered through an ineffective assistance of counsel claim. *Cf. supra* note 82.

tence. In either case, the Court concluded, the court of appeals should have accepted the state court's decision. But even if the trial judge had sentenced him to die in violation of state law, the Court thought that Goode would have no constitutional claim. While the court of appeals feared that the judge's breach of Florida's capital sentencing law would render Goode's execution an isolated occurrence, offensive to the eighth amendment,[84] the Court insisted that the fact that both a properly instructed jury and the state supreme court[85] felt that Goode deserved to die meant that this concern was misplaced.

The idea that the court of appeals should have bowed to the Florida Supreme Court's finding that the trial judge did not rely upon Goode's dangerousness is simply astonishing. Although the judge's closing words are, as the Supreme Court said, "[a]t best . . . ambiguous,"[86] they obviously suggest that he deemed it proper to "invoke the awesome punishment of death" to make sure that Goode would be unable to hurt anyone in the future. Absent more, this possibility might have been insufficient to overcome the presumption of regularity, by virtue of which it is assumed that judges follow the law.[87] Unfortunately, however, there was more. The judge had also said that he believed he could take into account aggravating factors not listed in the statute.[88] In fact, he had explicitly relied on the future dangerousness factor in a prior case, for which reason the Florida Supreme Court later reversed the sentence imposed on Jon Miller in the decision that inspired Goode's *habeas* petition.[89] And in that case, like this one, the judge had made his findings on

84. "[N]or shall cruel and unusual punishments be inflicted." U.S. CONST. amend. VIII. This provision was held applicable to the states in Robinson v. California, 370 U.S. 660 (1962).

85. Pursuant to the mandate of FLA. STAT. ANN. § 921.141(4) (West 1985), the state supreme court claims to review each death sentence imposed in that State and "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So. 2d 481, 484 (Fla. 1975), *vacated on other grounds*, 430 U.S. 952 (1977). In this case, it did so in Goode v. State, 365 So. 2d 381 (1978), *cert. denied*, 441 U.S. 967 (1979). (For an evaluation of the court's exercise of its power of independent review, see, e.g., Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913 (1983).)

86. 464 U.S. at 85.

87. *Cf.* Townsend v. Sain, 372 U.S. 293, 315 (1963) ("the coequal responsibilities of state and federal judges in the administration of federal constitutional law are such that we think the district judge may, in the ordinary case in which there has been no articulation, properly assume that the state trier of fact applied correct standards of federal law to the facts, in the absence of evidence . . . that there is reason to suspect that an incorrect standard was in fact applied").

88. 704 F.2d at 607.

89. Miller v. State, 373 So. 2d 882 (Fla. 1979).

the statutory aggravating and mitigating circumstances and declared that the latter did not outweigh the former before mentioning the banned consideration.[90] In other words, the state supreme court was willing to infer from his failure expressly to state that he was once again justifying a death sentence on the basis of a non-statutory aggravating factor that the judge thought Goode's future dangerousness justified his execution, felt that factor could be taken into account in fixing his sentence, and yet did not do so.

However just it may have been for the Court to saddle Goode with the risk that this implausible scenario was fiction,[91] there are two reasons why *Goode* does not mandate deference to the state supreme court's finding that Ms. Bounds was excused peremptorily. First, the presumption of regularity does not militate in favor of this finding with nearly the strength it had in *Goode*, for the impropriety of striking her for cause was not nearly as clear as was the impropriety of the action that Goode's judge was accused of having taken.[92] Florida's capital sentencing law, and supreme court decisions interpreting it, clearly stated that aggravating circumstances not named in the statute, of which a defendant's future dangerousness was plainly one, could not form the basis of a death sentence in Florida.[93] In contrast, despite the reluctance of the trial judge in *Gray* to treat a juror's indecision about her ability to vote for a death sentence as a ground for holding her incompetent, the state supreme court had never spoken about the fitness of indecisive jurors, and the signals emanating from the Supreme Court were in conflict.[94] Further, since the highest state court had upheld the disqualification of a juror who, after saying that she could not return a verdict that "could result in

90. *Id.* at 883-84.

91. To the extent that the Court was convinced that the trial court's consideration of Goode's future dangerousness would have been harmless error, it may not have been unfair for it to defer to the Florida Supreme Court's factual finding.

92. *See* Townsend v. Sain, 372 U.S. 293, 315, 320-21 (1963).

93. *See supra* note 82.

94. The relevant Supreme Court decisions are discussed in Part IV, *infra*. The state supreme court has still not spoken to this question. However, in Billiot v. State, 454 So. 2d 445 (Miss. 1984), *cert. denied*, 469 U.S. 1230 (1985), it did discuss the fitness of a juror who said that, in spite of her views on the insanity defense, she would "try" to obey her oath and follow the law. Although noting that the point was mooted by the defense's use of a peremptory challenge of the juror in question, the high court announced that the trial judge should have granted its motion to strike her for cause. Inasmuch as the supreme court also declared that "the prinicples announced in [its leading case on the death-qualification of capital sentencing juries] are instructive here," *id.* at 457, the question arises why it thought Ms. Bounds to have been qualified. Unfortunately, it did not answer this question in *Gray*.

the death penalty," said that she would try to be fair,[95] the impropriety of finding that Juror Bounds was an AVAD might also have been unclear at that time.[96]

The second basis for distinguishing *Gray* from *Goode* is even more telling. The Mississippi Supreme Court's finding, unlike the finding of the Florida Supreme Court that was challenged in *Goode*, is explicitly contradicted by the record. Consequently, the case presents a very different legal issue than did *Goode*: was the state supreme court competent to reject the trial judge's own characterization of his ruling?[97]

There can be no doubt but that someone who had witnessed these events might be able to decide that the judge really meant something other than what he said. As the Supreme Court has observed, "[d]emeanor plays a fundamental role . . . in simply understanding what a [person] is saying. . . . Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensi-

95. Edwards v. State, 413 So. 2d 1007, 1009 (Miss.), *cert. denied*, 459 U.S. 928 (1982).

96. There was actually no prior warning of the strict view of *Witherspoon* that the Mississippi Supreme Court was to endorse in *Fuselier*, which is discussed in note 64, *supra*.

97. The fact that *Goode* was a *habeas corpus* case, not a direct appeal from the judgment imposing his death sentence, is unimportant. The Court has repeatedly said that "[t]he respect paid [factual] findings in a habeas proceeding certainly should be no less" than that given them on direct appeal. Patton v. Yount, 467 U.S. 1025, 1038 (1984). On the other hand, common sense dictates that they should not be given greater deference on collateral attack than on direct review. Particularly inasmuch as the availability of *habeas corpus* proceedings insures that factfinding relating to constitutional claims will eventually be subject to careful scrutiny in the lower federal courts, there is no reason for the Court to dissipate its limited resources in what would surely be a futile effort to evaluate their support in the record of each case before it on direct review. It is thus hard to see why a defendant's inability to convince the Court to scrutinize the record in his case should adversely affect the final outcome of his case, especially when his life is at stake. *Cf.* 16 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4033, at 600 (Supp. 1987).

The remaining possibility—that direct and collateral federal review of state court factfinding should be governed by the same principles—is supported by Townsend v. Sain, 372 U.S. 293 (1963). *Townsend* was primarily concerned with clarifying the law as to "when a district court must hold an evidentiary hearing before acting on a habeas petition," Miller v. Fenton, 474 U.S. 104, 111 (1985), and the Court has described 28 U.S.C. § 2254(d) (1982), which sets forth the rules governing federal review of state court factfinding in *habeas* cases, as "an almost verbatim codification of the standards delineated in" that case. *Id.* Consequently, it has generally looked to *Townsend* for guidance in interpreting that statute. *See, e.g.*, Ford v. Wainwright, 106 S. Ct. 2595, 2602-03, 2606 (1986) (plurality opinion); *Miller*, 474 U.S. at 111, 115; Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980); LaVallee v. Delle Rose, 410 U.S. 690, 694-95 (1973) (per curiam). *But see, e.g.*, Cabana v. Bullock, 474 U.S. 376 (1986); Sumner v. Mata, 449 U.S. 539 (1981). It is therefore significant that *Townsend* indicated that the same deference should be given to state court findings of fact on direct and *habeas corpus* review. *See* 372 U.S. at 312-18; *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1133 (1970). *But see* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility*, 75 YALE L.J. 895, 946-47 (1966).

ble."[98] Indeed, it was principally the trial judge's access to demeanor evidence that formed the basis for the Court's conclusion that trial court rulings on juror "impartiality" are entitled to deference.[99]

Of course, the members of the Mississippi Supreme Court had no access to the judge's demeanor at the time that he made this ruling or when he heard the defendant's post-trial attack upon it. The parties, who did, seem to have taken the ruling at face value. While there are surely statements that "are so internally inconsistent or implausible on [their] face that a reasonable factfinder would not credit [them],"[100] this finding can scarcely be considered one of them—particularly because the alternative explanation of the ruling involves so many problems of its own.

Thus, the true analogue to this case would be a situation like one the Court discussed in *Cabana v. Bullock*.[101] *Enmund v. Florida*[102] decided that capital punishment may not be imposed on someone who has neither "killed, attempted to kill, nor intended that a killing take place or that lethal force be used."[103] Among other things, *Cabana* held that the determination whether a person is eligible, under *Enmund*, to be put to death for his crime, need not be made by a jury. In addition, the Court announced that findings on this issue would enjoy a presumption of correctness on *habeas* review.[104] Nonetheless, it noted that "there might be

98. Patton v. Yount, 467 U.S. 1025, 1038 n.14 (1984).

99. *Witt*, 469 U.S. at 428; *Yount*, 467 U.S. at 1038.

100. Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 575 (1985).

101. 474 U.S. 376 (1986).

102. 458 U.S. 782 (1982).

103. 474 U.S. at 387.

104. The underlying issue in *Cabana* was what a *habeas* court should do when it discovers that a person who has been sentenced to death in the state courts has not been found eligible for that penalty under *Enmund*. A five-Justice majority held that, under these circumstances, the federal court should not hold a hearing and resolve this factual question itself. Rather, the Court decided that it should "issue the writ of habeas corpus vacating [the] death sentence but leaving to the State . . . the choice of either imposing a sentence of life imprisonment or, within a reasonable time, obtaining a determination from its own courts of the factual question whether [the petitioner] killed, attempted to kill, intended to kill, or intended that lethal force would be used." 474 U.S. at 392.

Neither the majority nor the dissenters noted that Townsend v. Sain, 372 U.S. 293 (1963), declared that federal factfinding is mandatory when the state courts have not resolved a factual question relevant to a *habeas* petitioner's claim. Five months later, the *Cabana* dissenters, joined by Justice Powell, held that, when the state fails properly to determine that a person is currently sane, and therefore eligible to be put to death, the federal *habeas* court should adjudicate his claim of current insanity. Ford v. Wainwright, 106 S. Ct. 2595 (1986). This time, the plurality remembered that *Townsend* had some bearing on the subject, *id.* at 2602-03, 2606 (plurality opinion), but no one, including the Justices who favored sending the case back for a hearing in the state courts, *id.* at 2611-13 (O'Connor, J., joined by White, J., concurring in the result in part and dissenting in part), mentioned Justice White's opinion for the Court in *Cabana*. Thus, this aspect of *Cabana* now seems to

instances . . . in which the presumption would not apply to appellate factfinding regarding [these] criteria because appellate factfinding procedures were not 'adequate.' "[105] As an illustration, it offered the following hypothetical case: "the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record."[106]

The reason why appellate courts are generally unable to make accurate credibility judgments "on the basis of a paper record" is simple. A speaker's credibility is largely a function of his demeanor.[107] Because appellate courts lack access to demeanor evidence, they are ill-suited to make credibility determinations.

Thus, the same logic that led the Court to defer to the factual findings of trial judges in *Witt* and *Darden* counsels the rejection of the Mississippi Supreme Court's effort to resolve the difficulties in the record of the *voir dire* in this case by substituting its wishes for the trial judge's words.[108]

III.

In Part II of this article, I have suggested that the Supreme Court should not accept the state supreme court's finding that Ms. Bounds was, in effect, excused peremptorily. If the Court should disagree, or if, on remand, the trial judge should affirm that this had been his intention, two questions would remain. First, was it proper for the judge to reconsider his findings about the competence of the jurors who had pronounced themselves AVADs in the way he did? Second, may the prosecutor use peremptory challenges to exclude jurors whose disqualification is prohibited by *Witt*? I shall now examine each of these issues in turn.

A.

At the conclusion of the examination of Juror Bounds, the trial judge

be something of a derelict . . . on the waters of the law." Dice v. Akron, C. & Y. R.R., 342 U.S. 359, 368-69 (1952) (opinion of Frankfurter, J.).

105. 474 U.S. at 388 n.5 (quoting 28 U.S.C. § 2254(d)(2)).

106. *Id.*

107. *Yount*, 467 U.S. at 1038.

108. Even if, contrary to the argument in note 97, *supra*, state court factfinding is to be reviewed in a more deferential manner on *habeas* than direct review, *Cabana*'s declaration that state court findings made without access to critical demeanor evidence will not be accepted on *habeas* review precludes federal deference to the findings in *Gray* on direct review.

announced that "at least five" previously challenged venire members were unqualified. He apparently made this finding with his eye on a legal standard of "impartiality" falling well within the scope of what *Witt* declared the government entitled to demand of capital sentencing jurors. His decision was consistent with four jurors' unambiguous and uncontradicted testimony that they would not be "impartial."[109] Nevertheless, the Supreme Court should not sustain this finding.

The state supreme court found that the judge had initially refused to exclude these jurors for cause "because he believed that [they] were simply claiming to have conscientious scruples against the death penalty so that they could be released from jury service."[110] There is much to commend this view. Although the judge overruled the State's motions to strike these jurors without explaining why, it is appropriate to begin by presuming that he did so because he did not credit their testimony.[111] This presumption is buttressed by several facts in the record. First, the judge announced a proper standard of excludability when he finally pronounced them incompetent, and there is no reason to suppose that his understanding of the law had changed since his initial ruling on their fitness. Second, while the state still had peremptory challenges left, he excused Juror Schleh for cause on account of her unwillingness to consider voting to impose the death penalty.[112] On its face, her examination does not differ in any significant respect from that of the jurors whom the

109. It is not clear which of the previously challenged jurors the judge now considered unqualified. Jurors Ruiz, Coker, Bush, and Walker had expressly stated that they were AVADs, Joint App. at 3, 6, 9, 12-13, and so they were presumably among the belatedly damned. The State contends that Juror Price was the fifth and final member of this class, *see, e.g.*, Brief for Respondent at 19-22, but it is worth noting that her testimony was materially different than the others'. Ms. Price was a vacillating juror. After explicitly acknowledging that she was an AVAD, Joint App. at 10, she said that her willingness to vote for a death sentence "would depend upon the type of case and . . . the facts," *id.* at 11, 12 before stating, that she did not "think" she could vote to condemn anyone to die. Hence, unlike Jurors Ruiz, Coker, Bush, and Walker, she hardly fits the judge's description of the class members as people "unequivocally opposed to" the death penalty who "answered in substance, if not even stronger language than the question set forth in [*Witherspoon*]."

110. 472 So. 2d at 421.

111. If the proper respect for state court judges requires that federal courts presume their final rulings to represent bona fide efforts to apply the law to the facts of the cases before them, see *supra* text accompanying notes 61-62; note 87 and accompanying text, it must also require that the same assumption be made with respect to their tentative rulings. It follows that the reconsideration of tentative rulings should be taken, absent proof to the contrary, to indicate a *bona fide* change of heart about the proper application of the law to the facts.

112. The Mississippi Supreme Court did not even allude to her dismissal. The relevant portion of her *voir dire* examination has not been included in the briefs submitted in the state or federal courts, and it is therefore set forth below:

judge had previously deemed fit but retrospectively found unqualified.[113] Finally, he had previously implied that one juror who said she was an AVAD was being dishonest. When the prosecutor challenged Juror Pannell, who initially stated that she could never vote to impose a death sentence, the judge quizzed her further. When she conceded that she might be able to vote for death after hearing the evidence at trial, he denied this motion, and the prosecutor challenged her peremptorily. As she left the jury box, the judge admonished the rest of the panel, "I don't want nobody telling me that [he is an AVAD], just to get off the jury. Now, that's not being fair with me."[114] The prosecutor seems to have shared his sense that juror dishonesty was afoot. Prior to the examina-

BY MR. NECAISE:	Are you telling me, Mrs. Schleh, that if you were seated on a Jury, regardless of what the evidence might show and the law might say concerning the imposition of the Death Penalty, you, as a member of the Jury, could never vote for the imposition of the Death Penalty?
BY MRS. SCHLEH:	Yes, sir.
BY MR. NECAISE:	If the Court please, we move for . . .
BY THE COURT:	(Interposing) Let me ask her a question.
BY MR. NECAISE:	All right, sir.
BY THE COURT:	Would you, ma'am, automatically, vote against the imposition of the Death Penalty, now you'd do it automatically, without regard to any evidence which might be developed?
BY MRS. SCHLEH:	(No response.)
BY THE COURT:	Just, just disregard all the evidence and regardless of how heinous it might reflect, would you still vote against the imposition of the Death Penalty? Just automatically do so?
BY MRS. SCHLEH:	I, I mean I assume I have a choice, I would assume I have a choice. But, I could not vote for the Death Penalty. I would have to vote another way, uh, if. . . .
BY THE COURT:	(Interposing) That's without regard to what, to any evidence, what it might show?
BY MRS. SCHLEH:	I'd have to qualify myself because there is an option here and I would be active. . . .
BY THE COURT:	(Interposing) Well, is your answer to my question yes?
BY MRS. SCHLEH:	Yes. That's it.
BY THE COURT:	That's all I wanted you to say.
BY MR. NECAISE:	Now, if it please the Court, we move to excuse her.
BY THE COURT:	All right. She'll be excused.
BY MR. NECAISE:	And ask the Court not to, not to charge the State with that challenge.
BY THE COURT:	All right.
BY MR. NECAISE:	Because she fits right squarely in. . . .
BY THE COURT:	(Interposing) All right. Okay.

Record at 504-06.

113. Like them, she simply said that she could never vote for a death sentence. Although the questions the judge asked her were not identical to the ones posed to her and the other jurors by the prosecutor, the differences are insignificant under any theory. In particular, it is worth emphasizing that the judge did not question her in the precise langauge of footnote 21, did not notice that the prosecutor had failed to do so, or have any reason to think this necessary. See *infra* note 120.

114. Joint App. at 16.

tion of Juror Pannell, he had cautioned another juror against saying he was an AVAD in order to avoid jury service.[115]

There are, however, two significant problems with the state supreme court's finding. First, during the interrogation of Ms. Bounds, the judge stated that he had not disqualified "one or two" of the jurors who said they were AVADs because he thought they were simply trying to avoid jury duty. Yet he ultimately condemned "at least five" of his prior rulings. Why had he made the others? Second, if the judge did not believe these jurors when they spoke, why did he subsequently change his mind? The state supreme court offered no suggestions on this score. No further testimony cast doubt upon the accuracy of the judge's initial impressions, and his apparent change of heart seems to have been prompted solely by the prosecution's statement that it wanted to resurrect one of its peremptory strikes in order to remove Juror Bounds from the panel. If the judge had actually been convinced that these jurors were lying, the prosecutor's desire to prevent Ms. Bounds from serving in this case would hardly have been an acceptable reason to cast this credibility judgment aside.[116]

Some alternative explanations for the judge's conduct may be dismissed out of hand. For example, it is highly unlikely that he initially refused to dismiss these jurors because he was not paying sufficient attention to their testimony. Not only did he say that he had heard the questions put to one of them,[117] but his response to the prosecutor's motions to strike other members of the venire reveal that he was listening carefully to their testimony.[118] In any event, if the judge had misunderstood

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115. The prosecutor's examination of Juror Lassabe included the following exchange:

BY MR. NECAISE: All right, sir. Mr. Lassabe, do you have any conscientious scruples against Capital Punishment when imposed by the law?

BY MR. LASSABE: Well, I. . . .

BY MR. NECAISE: (Interposing) Let me tell you this, let me say this to you before you answer that, Mr. Lassabe. I need to know whether you believe in that or whether you want to get off the Jury. You'd just rather not serve.

BY MR. LASSABE: I. . . .

BY MR. NECAISE: (Interposing) And I want you to use that one on me, you know, because, quite frankly, I'm getting down close on my challenges now and I might go a different way if you tell me that you just would rather get off, you know.

Id. at 13.

116. *See* 472 So. 2d at 424 (Sullivan, J., dissenting).

117. Joint App. at 3 (Juror Ruiz).

118. For example, he accurately summarized the testimony of Juror Lassabe. *See supra* text accompanying note 67. And he seems to have detected insincerity in Juror Pannell's statements to the prosecutor. *See supra* text accompanying note 114.

their statements, this mistake could not have been remedied at the time he called them incompetent, inasmuch as they had said nothing more on the subject and defense counsel insisted that they were fit to serve.

Nor is it likely that the judge hesitated to disqualify these jurors because he had not questioned them himself.[119] While he did note this omission twice during the examination of Juror Bounds, he did not suggest that this had been the basis of these rulings. And one need not look far for an explanation for the latter omission: the state supreme court had clearly stated that "it is not mandatory for the trial judge to ask the questions about the death penalty."[120]

Three possibilities remain. Perhaps the judge was uncertain about the credibility of these venire members' claims that they would never vote to impose the death penalty. Perhaps, further, his instinct was to err on the side of refusing to exclude jurors when he had even the slightest doubt about their unfitness. If so, the prosecutor's complaint may have reminded him that this policy was not cost-free, and led him to decide that he had been overly inclined to err in favor of the defense (i.e., inclusion). This would explain why the judge said, by way of response, that he "never had no idea that we'd run into this many" or "that [the *voir dire*] was going to wind up in a mess like this." And it would also explain why he refused to return five peremptories to the State.[121]

But this hypothesis is not without difficulties of its own. If this is an accurate reconstruction of the factual basis for the judge's rulings in this case, why was he so concerned that the exclusion of Juror Bounds would be deemed reversible error? Why was he so bent upon establishing that she was incompetent? If he had doubts about whether he *could* reconsider these rulings, why did he not at least place his rationale on the

119. He did question Jurors Pannell, Schleh, and Bounds.

120. Myers v. State, 254 So. 2d 891, 894 (Miss. 1971) (dictum). Similarly, the state supreme court had made it clear that *Witherspoon* questions need not be posed in the precise words of footnote 21. *See, e.g.*, Edwards v. State, 413 So. 2d 1007, 1009 (Miss.), *cert. denied*, 459 U.S. 928 (1982); Moore v. State, 237 So. 2d 844, 848 (Miss. 1970) (dictum). Thus, even if the judge had noticed the prosecutor's failure to quiz these jurors in that language (and the record suggests he had not, *see* Joint App. at 25), it is doubtful that this would have disinclined him to exclude them. His ultimate decision to denounce those rulings makes this scenario still less plausible. Finally, had the judge thought the intonation of talismanic language to have been a prerequisite to a juror's disqualification and noted the State's failure to use it, it is unlikely that he would have witnessed this spectacle in silence. It is much more likely that he would have instructed the prosecutor as to the proper mode of inquiry or questioned the jurors himself. And it is surely worth noting that his examination of Jurors Pannell, Schleh, and Bounds showed no slavish obsession with the language of that footnote.

121. *See supra* text accompanying note 74.

record that he was so purposefully creating? And if he had no such doubts, why did he not expressly return *any* of the prosecution's previously used peremptories?[122] It bears repeating that he not only stated that he was excusing Ms. Bounds for cause; he explicitly refused to "give [the State] five more" peremptories at *voir dire*, and, at the hearing on the post-trial motion, he did not dispute the defendant's contention that the prosecution had no peremptories left with which to challenge her.[123]

Most important of all, however, is a legal issue posed by this reconstruction of these events. Even assuming that it is proper for appellate courts to engage in this kind of factual speculation in order to avoid the other possible conclusions—e.g., that the judge's reconsideration of his earlier rulings was either a wholly irrational act or a deliberate attempt, made in bad faith, to shield an improper ruling on Ms. Bounds' fitness for service from appellate review—, should a trial judge be able to reconsider rulings on juror fitness in this manner?

There is surely nothing wrong with a judge bearing in mind the fact that his rulings on questions of juror fitness will have a substantial impact on the "impartiality" of a capital sentencing jury. Indeed, it would be undesirable for a judge to sit at *voir dire* without being mindful of the gravity of his responsibility. It would also seem eminently reasonable to allow a judge, upon reflection, to change his mind about the credibility of a juror's testimony. We all know that, on occasion, it takes a while for gnawing doubts to build into conscious insight, and it would be surpris-

122. Indeed, how could he have thought it just not to return them all?

123. Although defense counsel had previously voiced his approval of the judge's initial rulings on these jurors' fitness, Joint App. at 23 (unlike his subsequent protest against their exclusion, *id.* at 25, this one does not seem to have been based upon the fact that the prosecutor's questions did not track the language of footnote 21), he did not object when the judge denounced them. As has previously been noted, see *supra* note 70, counsel's response is intractably ambiguous. It is therefore difficult to see how one could find in his failure to protest evidence that he felt that at least one of the judge's prior rulings had been erroneous, and that the State was thus entitled to one more peremptory.

Several other considerations bolster this conclusion. Given *Davis*' rejection of the notion that the availability of unused peremptory challenges renders *Witherspoon* error harmless and the judge's insistence that Ms. Bounds was being excused for cause, Gray's lawyer may well have been unaware that an objection would have been in order. Further, these jurors had long since been excused, and it is unlikely that an objection would have served any purpose, as they would probably have been unavailable for further questioning. *See supra* note 70.

Davis may also explain counsel's failure to object to this announcement in his post-trial motion. Beyond this, he did argue at that time that the State had no peremptory challenges left when Ms. Bounds was excused, and the judge did not disagree with this assertion.

ing for the legal system not to recognize that this type of awareness comes better late than never.

Still, the facts of this case present a qualitatively different issue. The judge's decision to change these rulings long after the venire members in question had been sent home,[124] when the prosecution had run out of peremptories and wished to prevent the participation of a prospective juror whose lack of legally cognizable bias it seemed to concede, has the appearance of impropriety. Whether or not the judge was trying to help the State exceed the legal limit upon the number of peremptories it could be allowed to exercise in this case[125] (or to insulate from appellate review his dubious finding that Ms. Bounds was biased), this course of action smacks of judicial favoritism. And because one can never really know what motivated a judge to reappraise prior rulings on challenges for cause, toleration of this type of behavior would also threaten the integrity of the jury selection process in capital cases. Accordingly, if the Court really believes that the systematic disqualification of competent jurors with reservations about the death penalty deprives a defendant of an "impartial" capital sentencing jury, and that the appearance of justice is of special significance in the capital sentencing process,[126] it should not allow the finding that these jurors were unfit to stand.[127]

B.

Witherspoon held that prospective capital sentencing jurors may not be

124. *See supra* note 70.

125. *See supra* note 71.

126. *See, e.g.*, Zant v. Stephens, 462 U.S. 862, 885 (1983); Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.).

127. The proper balance between allowing judges freedom to correct their own mistakes and protecting defendants against the threat or reality of biased capital sentencing juries may entail difficult line-drawing problems the further one strays from the facts of this case. If defense counsel had been able timely to recall the jurors in order to attempt their rehabilitation, would a hearing have smacked too much of a charade to allow the new rulings on their fitness to stand? Had the judge recalled the jurors, interrogated them further, and only then pronounced them unfit for service, the post-hearing decision might have seemed less of a post-hoc justification of a foregone conclusion; but this type of procedure would still be susceptible to, and may appear to have been used to perpetrate, this type of abuse. The risk and appearance of impropriety might be even smaller if the reconsideration occurred before the State exhausted its stock of peremptories, and would be yet more minute if the judge could explain his change of ruling as the product of a reevaluation of the law (a claim that, thanks to *Witt*, should be less and less plausible with the passage of time). But would it be remote enough? Fortunately, it is not necessary to know how all of these cases should be decided in order to know that the mix of circumstances present in *Gray* renders the judge's pronouncement in that case irretrievably suspect.

excused for cause on account of their qualms about the death penalty if they would "impartially" decide the case to be tried. *Witt* reaffirmed this ruling. Although the Court has not yet considered whether the State may get around this prohibition by excluding these jurors peremptorily, as the lower courts have allowed it to do in *Gray*,[128] both principle and precedent indicate that this practice ought not be tolerated.[129]

Peremptory challenges are not constitutionally required, but every American jurisdiction makes them available to the State and the defense in criminal cases.[130] This is because they are thought to be a valuable means of insuring that criminal cases are, and appear to be, decided by "impartial" juries. They enable counsel to ask probing questions about venire members' "impartiality" and challenge them for cause without having to worry about incurring their hostility in the process. In addition, peremptories allow the parties to exclude people whose bias they can sense or infer, but not prove to the judge's satisfaction.[131]

While the number of peremptory challenges available to the State is everywhere limited by statute,[132] *Gray* shows that it can use them to achieve precisely what *Witherspoon* and *Witt* forbade: the systematic ex-

128. In addition to Ms. Bounds and the five jurors on whose fitness the trial judge wavered, the prosecutor appears to have used peremptory challenges against Jurors Easton, Lassabe, and Pannell because of their reservations about capital punishment. *See* Joint App. at 4-5, 13-16. *But see* Brief for Respondent at 22 (suggesting Juror Easton was dismissed because she did not want to serve). Thus, Gray's sentence might be vulnerable to attack even if those six jurors were properly disqualified as AVADs. See *supra* note 59.

129. In Adams v. Texas, 448 U.S. 38 (1980), the Court held that prospective capital sentencing jurors can not be dismissed for cause because they admit that their sentencing deliberations might or would be "affected" by the possibility that the accused might be sentenced to die. The State argued, *inter alia*, that the death-qualification of capital sentencing juries by means of this standard of juror fitness was not proscribed by *Witherspoon* because "the origins and specific purposes of the *Witherspoon* doctrine and [the "affect" test of juror fitness] are different." Brief for the Respondent at 50-53. In response, the Court noted that the "affect" test, "[u]nlike grounds for exclusion having nothing to do with capital punishment, such as personal bias, ill health, financial hardship, *or peremptory challenges*, . . . focuses the inquiry directly on the prospective juror's beliefs about the death penalty and hence clearly falls within the scope of the *Witherspoon* doctrine." 448 U.S. at 48 (emphasis added). When peremptories are exercised on account of "the prospective juror's beliefs about the death penalty," this reasoning would not exempt them from condemnation under the *Witherspoon* doctrine.

130. On peremptory challenges, see generally 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 21.3(d) (1984); J. VAN DYKE, JURY SELECTION PROCEDURES 139-75 (1977).

131. Of course, they also make it possible for each party to try to fashion a jury biased in its favor. Lockhart v. McCree, 106 S. Ct. 1758, 1767 (1986).

132. The Court has not decided whether the Constitution would countenance the unlimited use of peremptories, although Justice Douglas suggested that it would not. *See Witherspoon*, 391 U.S. at 530 (opinion of Douglas, J.). *Cf. infra* note 137.

clusion of prospective capital sentencing jurors with reservations about the death penalty. Further, the evidence suggests that prosecutors routinely do use them in this manner.[133] The only published study of the records of capital trials found this behavior to be common in Florida's Fourth Judicial Circuit,[134] and several types of anecdotal evidence attest to the general applicability of its conclusion. For example, a speaker at a recent meeting of prosecutors in office of the Missouri Attorney General plainly took it for granted that his colleagues/listeners used their peremptories to circumvent *Witt*.[135] And then there are the many reported cases, like *Gray*, in which prosecutors have admitted that this was their policy.

The Court has said that the reason why jurors with doubts about the death penalty may not *ipso facto* be excluded for cause is that the Constitution prohibits the use of capital sentencing juries that have been deliberately skewed in favor of a verdict of death.[136] A hanging jury does not cease to be a hanging jury just because the instrument of its creation has been given a new name. Therefore, if the State's interest in purging these people from capital sentencing juries is constitutionally insufficient to justify their systematic excusal for cause, it cannot justify the accomplishment of this end via peremptory challenges.

There is only one other context in which the Court has held the use of challenges subject to constitutional constraints.[137] In that setting, it has

133. *McCree*, 106 S. Ct. at 1774 (Marshall, J., dissenting).

134. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1 (1982).

135. T. FINNICAL, STRATEGY AND TACTICS IN THE JURY SELECTION PROCESS IN DEATH PENALTY CASES, A PROSECUTOR'S PERSPECTIVE 21, 24, 29 (1985) (available at the Missouri Attorney General's Office).

136. The Court has not held that the State has a duty to make sure that capital sentencing juries be drawn from a pool fairly representative of the sentencing attitudes of the non-AVAD community. *Cf.* Duren v. Missouri, 439 U.S. 357 (1979) (sixth amendment right to jury trial requires that juries be drawn from a pool representing a fair cross-section of the community); Taylor v. Louisiana, 419 U.S. 522 (1975) (same). Nor has it required that individual juries include people with reservations about the death penalty.

137. In Lockhart v. McCree, 106 S. Ct. 1758, 1764-66 (1986), the Court rejected the argument that the use of challenges should also be limited by the sixth amendment right, see note 136, *supra*, to a jury selected from a fair cross-section of the community. At first blush, this would seem to mean that the State would be free to gut this right by making members of cognizable groups *ipso facto* excludable for cause or systematically striking them with peremptory challenges. However, it is by no means certain that this is so.

In the first place, the comments in *McCree* were arguably dictum, as this was but one of several grounds on which the Court rejected McCree's sixth amendment claim. Beyond this, the only groups that the Court has suggested must be fairly represented on venires are groups that also enjoy

considered the State's power peremptorily to challenge jurors for reasons that would render their excusal for cause unconstitutional. Its decisions in these cases support the proposition that the State may not use peremptories to render the doctrine announced in *Witherspoon* and confirmed by *Witt* a mere " 'form of words.' "[138]

Not long after the end of the Civil War, the Court construed the Equal Protection Clause of the fourteenth amendment[139] to bar the exclusion of blacks from jury duty because of their race.[140] Eighty-five years later, *Swain v. Alabama*[141] hinted that the State may not use peremptory challenges to deny blacks, or members of "any [other] identifiable group in the community which may be the subject of prejudice,"[142] their proper place in the administration of justice.[143] But the Court saw nothing wrong with the State's tactical use of peremptories to exclude black jurors on account of their race.[144] Given the practical realities of *voir dire*, the Justices saw the freedom to estimate the likely "impartiality" of individual jurors by reference to their group membership as vital to the realization of the salutary ends for which the peremptory was designed. Further, the Court perceived that a requirement that prosecutors explain why they exercised peremptories on black jurors in individual cases would be inconsistent with the nature of the peremptory challenge.

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special protection against discrimination under the fourteenth amendment. *See id.* at 1765. If no other groups come within the sixth amendment's "fair cross-section" requirement, *see* Krauss, *supra* note 1, at 45 n.184, 46 n.185, efforts to nullify the "fair cross-section" principle via the discriminatory use of challenges at *voir dire* would be barred by the equal protection decisions discussed in the text. If other groups are cognizable for sixth amendment purposes, their discriminatory exclusion at *voir dire* might also violate the Equal Protection Clause if jury service, like voting, *see* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973), were to be deemed a fundamental right. Finally, if the purpose of the exclusion of such a class was to facilitate a defendant's conviction, the Court might distinguish *McCree* on the ground that the class involved in that case (AVADs) were concededly unfit to sit in part of the (capital) case from which they were excluded, and condemn the practice as a violation of the defendant's right to an "impartial" jury. *See* 106 S. Ct. at 1768. (This would seem particularly unlikely, however, in light of the tenor of the Court's opinion in *McCree*. *See id.* at 1770.)

138. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

139. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

140. Strauder v. West Virginia, 100 U.S. 303 (1879). In *Strauder* and its progeny, blacks were shut out of the jury system before the assembly of a venire, but there is no doubt that those decisions would have barred any attempt to make a juror's race a ground for his disqualification at *voir dire*.

141. 380 U.S. 202 (1965).

142. *Id.* at 205.

143. *See id.* at 203-05, 221-24.

144. Batson v. Kentucky, 106 S. Ct. 1712, 1742-44 (1986) (Rehnquist, J., dissenting); Thompson v. United States, 469 U.S. 1024, 1026 (1984) (Brennan, J., dissenting from denial of certiorari).

Thus, it ruled that prosecutors are to be presumed to use their peremptories for valid reasons, and that the fact that every black person on the venire from which a black defendant's jury was chosen was struck in this manner does not rebut this presumption.[145]

In *Batson v. Kentucky*,[146] the Court ruled that a trial judge erred in denying a black defendant a hearing on his claim that the prosecutor's peremptory dismissal of all four black members of the venire in his case violated his constitutional rights. In the process, it reversed several key elements of its decision in *Swain*. On the one hand, *Batson* held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[147] On the other hand, it held that a black defendant can make out a *prima facie* case of discrimination solely on the basis of the prosecutor's use of peremptory challenges against black jurors in his case.[148]

145. The Court allowed that the presumption that prosecutors are not using their peremptories against black jurors for invalid reasons might be rebutted if, as a result of their use of these challenges, black venire members never got to serve on juries in criminal cases. However, because it found that Swain had made no such showing, the Court reserved judgment on this question. 380 U.S. at 223-24.

146. 106 S. Ct. 1712 (1986).

147. *Id.* at 1719. The Court disingenuously denied that *Batson*'s condemnation of the latter justification for the use of peremptories against black jurors represented a change in the substantive law. Rather, misreading *Swain* as having said that a *prima facie* equal protection claim would be made out by proof that prosecutors' peremptory strikes had effectively excluded black citizens from the jury system, *id.* at 1720, see *supra* note 145, it claimed merely to be relaxing "the evidentiary burden [that *Swain* had] placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury." *Id.* at 1714. *See also id.* at 1725 (White, J., concurring). In light of the Court's stated belief that prosecutors had been flouting this chimerical dictate of *Swain* for almost twenty-five years, its suggestion that one reason why the abolition of peremptory strikes was unnecessary to the prevention of discrimination in the selection of juries is that there was "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate purposes," *id.* at 1724 n.22, is simply absurd.

148. In Peters v. Kiff, 407 U.S. 493 (1972), the Court decided that a white defendant has standing to object to the discriminatory exclusion of black jurors from the grand jury that indicted him. Inasmuch as *Batson* claims to represent the application to peremptory challenges of the same principles and decisions as the Court allowed Peters to cite on behalf of the black citizens excluded from jury service in his case, it would seem likely that white defendants will also be allowed to protest the discriminatory use of peremptory challenges against black jurors. However, as the use of peremptories to strike black members of a white defendant's venire may not be as likely to reflect discrimination as it would be in cases involving black defendants, it is unclear whether the same evidentiary rules will, or should, apply in both contexts.

Four considerations seem to have driven the Court to take these steps. First, it now regarded the tactical judgment that blacks are less likely than whites to be "impartial" jurors in prosecutions involving black defendants as equally discriminatory as the view that blacks are unfit for jury duty in general.[149] In addition, the Court still believed that, if it is to mean anything, the Equal Protection Clause must be read to outlaw discrimination at every stage of the jury selection process.[150] Third, it realized that, in the absence of an effective sanction, the discriminatory exercise of peremptory challenges had continued to occur on a "widespread" basis.[151] Finally, it judged the suppression of discrimination to be more important than the protection of the State's interest in the unfettered use of peremptory challenges to obtain more "impartial" juries.[152]

These decisions would appear to compel the conclusion that *Witherspoon* and *Witt* must restrict the State's use of peremptory challenges; any other rule would allow the State to eviscerate the limitations these cases placed upon its use of challenges for cause. However, Justice O'Connor has argued that they reflect the Court's unique commitment to fighting racial discrimination, and that their analysis cannot be applied on a more generalized basis.[153] In response, Justice Brennan has denied that the Court "may pick and choose which constitutional rights [it] will and will not vindicate in monitoring the jury selection process."[154]

Of course, the Court does, in fact, "pick and choose" among constitutional rights, preferring some and disfavoring others.[155] But *Turner v.*

149. Justice Rehnquist dissented from this position on the ground that white jurors are similarly the victims of peremptory strikes in cases involving white defendants. 106 S. Ct. at 1744-45 (Rehnquist, J., dissenting). Not surprisingly, he adduced no proof of this startling claim.

150. *Id.* at 1718, 1724.

151. 106 S. Ct. at 1725 (White, J., concurring). *See also* 106 S. Ct. at 1724; *id.* at 1726-27 (Marshall, J., concurring).

152. In fact, the Court claimed that, by curtailing their use in a discriminatory manner, *Batson*'s regulation of the use of peremptories would actually strengthen "the contribution the challenge generally makes to the administration of justice." 106 S. Ct. at 1724.

153. Brown v. N. Carolina, 107 S. Ct. 423, 423-24 (1986) (O'Connor, J., concurring in denial of certiorari). Apparently because of the fact that the State has only a limited number of peremptories to exercise, *but see supra* note 132, Justice O'Connor also claimed that their use as a way around *Witt* "simply does not implicate the concerns expressed in *Witherspoon*." *Id.* at 424. This view, however, simply does not jibe with reality: as noted above, see *supra* text accompanying notes 132-35, prosecutors can and do use them to create what the Court has branded "hanging juries."

154. *Id.* at 427 (Brennan, J., dissenting).

155. In the area of constitutional criminal procedure, the clearest example of this phenomenon may be the special treatment the Court has given to claims involving the fourth amendment. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Murray[156] indicates that the pecking order may be just the opposite of what Justice O'Connor has suggested. In *Turner*, a black man challenged his murder conviction and death sentence on the ground that the trial court denied his request to ask the prospective jurors at *voir dire* whether the interracial nature of the crime with which he was charged would affect their ability to decide the case "impartially." The Court decided that the risk of discrimination in the determination of Turner's guilt did not require that the judge accede to this request, but it ruled that his failure to do so necessitated the vacation of Turner's death sentence. Inasmuch as there is an undeniable risk that racial bias could have tainted Turner's conviction,[157] this ruling must reflect a judgment that safeguarding the integrity of the capital sentencing process is more important than protecting defendants against racially-based discrimination.[158]

There is, however, one potentially significant difference between *Turner* and the Court's decisions on the discriminatory use of peremptory challenges: Turner's attack on his conviction and sentence was grounded in his right to an "impartial" jury, not the Equal Protection Clause. Thus, the discrimination-related values which he sought to have the Court vindicate were not the same as those that led it to limit the power of peremptory challenge in *Swain* and *Batson*. In both contexts, defendants asserted their own, and society's, interests in the actual and apparent fairness of a black defendant's trial.[159] But *Swain* and *Batson* also implicated the rights of black citizens to serve as jurors and be free of the racial prejudice that discriminatory jury selection fosters. To the extent that those factors were critical to the Court's decision in these cases, *Tur-*

156. 106 S. Ct. 1683 (1986).

157. *Id.* at 1688 n.8.

158. The Court has never explained why the failure to ask this question upon demand should not be fatal to a defendant's conviction. *See* 106 S. Ct. at 1692 (Marshall, J., concurring in the judgment in part and dissenting in part).

159. It has long been clear that the Due Process Clause, one of the sources of the right to an "impartial" jury, Ristaino v. Ross, 424 U.S. 589, 595 n.6 (1976), requires that adjudicators seem, as well as be, "impartial." *See, e.g.*, In re Murchison, 349 U.S. 133, 136 (1955). Justice White's suggestion in Rosales-Lopez v. United States, 451 U.S. 182, 190 (1981) (plurality opinion), an earlier case concerning the scope of a trial judge's obligation to inquire at *voir dire* into the jurors' racial or ethnic prejudice, that "the appearance of justice in the federal courts" is a factor relevant only to federal judges' extraconstitutional duty to insure that juries are "impartial" is therefore astonishing. However, this passage may have been intended to mean nothing more than that the Court is willing to insist that greater care be taken to preserve the appearance of justice in federal courts than the Constitution requires.

ner does not prove Justice O'Connor to have been wrong.[160]

While the issue at hand implicates the right of competent persons with qualms about the death penalty to serve in capital cases, their peremptory exclusion from these cases is simply not comparable to the discriminatory exclusion of black jurors. Over one hundred years ago, the Court described the latter practice as "practically a brand upon [black citizens], affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of [their] race that equal justice which the law aims to secure to all others."[161] The effects of the peremptory excusal of members of the class exempted from disqualification under *Witherspoon* and *Witt* are of a different order entirely. These people are not the "subject of prejudice" in society. They serve on juries in other types of cases. They are treated like almost every other group whose "impartiality" may rationally be doubted—i.e., they may be struck without "cause."[162] Thus, the Court might well say of their peremptory dismissal what it said in regard to the excusal of AVADs from the process of the guilt-determination in *Lockhart v. McCree*:[163] it "leads to no substantial deprivation of their basic rights of citizenship."[164]

Nonetheless, the evasion of *Witt* by the use of peremptory challenges may well be more likely to have an impact on the outcome of the sentencing proceedings than is the peremptory challenge of black venire members on the determination of even a black defendant's guilt or

160. If *Turner* does not dispose of Justice O'Connor's argument, it is not likely to be because the common factors made Batson's the discrimination claim more pressing than Turner's. It is simply hard to believe that the low probability that the peremptory excusal of black jurors would affect the outcome of a black defendant's trial, *see* Allen v. Hardy, 106 S. Ct. 2878, 2881 (1986) (per curiam), could be constitutionally more significant than the possibility that a judge's failure to ask the question requested by Turner (and which might have led to the peremptory or for-cause exclusion of someone who actually sat on the defendant's petit jury) may have affected the jury's decision on his guilt. It seems equally unlikely that the public's faith in the fairness of the judicial system could be undermined to a constitutionally less important degree by a prosecutor's decision peremptorily to exclude black jurors in cases involving black defendants than by a judge's failure to ask a relevant question about white jurors' bias at the request of black defendants that intuition suggests would surely be asked if the situation were reversed.

161. Strauder v. West Virginia, 100 U.S. 303, 308 (1880).

162. Again, the one currently-recognized exception to this rule, *see* Brown v. N. Carolina, 107 S. Ct 423, 424 (1986) (O'Connor, J., concurring in denial of certiorari), is the groups protected by *Swain* and *Batson*.

163. 106 S. Ct. 1758 (1986).

164. *Id.* at 1766.

innocence.[165] And the impact that they would have—bringing about the imposition of an "undeserved" death sentence—is more serious.[166] Finally, the State's creation of what the Court has described as "hanging juries" must surely be at least as threatening to the public confidence in the administration of justice as the racist exclusion of black jurors.[167] These factors thus tilt much more heavily in favor of the regulation of peremptory challenges in this context than in the equal protection cases.

At the very most, however, these arguments only show that *Batson* and *Swain* may not have settled the legitimacy of using peremptories to remove jurors whose exclusion for cause is prohibited by *Witt* and *Witherspoon*.[168] But that would simply mean that a decision to proscribe this practice would plough new ground. Unless *Witherspoon* and *Witt* are to be stripped of all real significance, that ground should be broken.[169]

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165. Given the direct relevance to a juror's sentencing responsibilities of his opinions about capital punishment, common sense suggests that the position tentatively advanced in the text is correct. In any event, the evidence indicates that the Court is of this opinion. The Court's judgment about the effect on verdict reliability of overbroad death-qualification and the discriminatory use of peremptory challenges against black jurors was critical to its decision to hold *Witherspoon*, but not *Batson*, applicable to cases in which the judgment was no longer subject to attack on direct appeal when it was decided. *Compare Witherspoon*, 391 U.S. at 523 n.22, *with* Allen v. Hardy, 106 S. Ct. 2878 (1986).

166. *See, e.g., Turner*, 106 S. Ct. at 1688, 1689.

167. While the public may not share the Court's perception that juries selected as was Witherspoon's are "hanging juries," it may also not be outraged by the use of peremptories to cull black venire members from juries empanelled to decide cases involving black defendants. However, the Court's concern in each case should be the sentiments of the members of the community who respect the law and demand that it be followed in the courts.

168. The relative strength of the Court's commitments to defending the integrity of the capital sentencing process and combatting racial discrimination is also at issue in McCleskey v. Kemp, 753 F. 2d 877 (11th Cir. 1985), *cert. granted*, 106 S. Ct. 3331 (1986), and Hitchcock v. Wainwright, 745 F. 2d 1332 (11th Cir. 1984), *cert. granted*, 106 S. Ct. 2888 (1986).

169. The question would remain as to the means by which this prohibition would be enforced. The same options are available as in the discrimination cases. A defendant could be allowed to contest the peremptory dismissal of a juror with qualms about the death penalty only if the prosecutor voluntarily stated that they were his reason for excusing the juror. This would presumably curb the practice to a certain extent, and it would eliminate the argument, *see infra* text accompanying notes 236-48, that improper disqualifications are harmless error when the State has not used all of its peremptory challenges at trial. (It would therefore require the rejection of the state supreme court's rationale, if not the defendant's sentence, *see supra* note 128, in *Gray*.) Or defendants could be allowed to attack the State's use of peremptories by satisfying the type of evidentiary requirements suggested by *Swain*, *see supra* note 145, as set forth in *Batson*.

IV.

The trial judge said he was excusing Juror Bounds for cause because she could not decide whether she would automatically vote against the death penalty. Assuming that this is what he really meant to do,[170] should his ruling be sustained? The legitimacy of regarding indecision as incompetence in this context has not been resolved, but the logic of the *Witherspoon* doctrine points to the prohibition of this practice.

Witherspoon signalled that indecisive jurors may not *ipso facto* be excused from capital sentencing juries. In footnote 21, the Court proclaimed that

> 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 penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.[171]

It went on to declare that a juror could only be deemed an AVAD (or a nullifier) if he acknowledged in "unmistakably clear" terms that he was of this persuasion. The Court repeated this message in footnote 9, where it emphasized that, "[u]nless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position."[172]

A person who says that he "does not know" whether he could vote for the imposition of the death penalty is not making such a statement. Rather, he is stating that he would have to consider voting for the death penalty, that his mind is not already made up. Therefore, *Witherspoon* would appear to have forbidden his disqualification on this basis.

Nonetheless, many lower courts continued to approve of the exclusion of indecisive jurors on the ground that "[i]mpartiality is a positive attri-

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170. If the judge meant to exclude Ms. Bounds for cause, the record strongly suggests that this was his reason. While the judge is to be presumed to have applied the proper legal standard to the facts before him when the standard is clear, the question whether indecisive jurors may *ipso facto* be considered unfit to sit on capital sentencing juries had not been clearly resolved. Moreover, although the judge never suggested that he believed she was an AVAD, or that he thought her dishonest in any respect, he did say he was excusing her because of her indecision. With respect to his post-trial comments about her intelligence, *see supra* note 73.

171. 391 U.S. at 522 n.21.

172. *Id.* at 516 n.9.

bute . . . [the] presence [of which] must appear affirmatively."[173] As the leading proponent of this view put it, "the State is entitled to a juror who can at least assure the court that he will judge"[174] whether the defendant deserves to die.

In apparent response to these decisions, the Court signalled its disapproval of this doctrine in *Maxwell v. Bishop*.[175] It had granted certiorari in *Maxwell* to determine the constitutionality of the standardless, single-verdict, capital sentencing procedure used in Arkansas and almost every other State in the Union, but its intervening decision in *Witherspoon* allowed it to dispose of the case without reaching these questions.[176] Rather than a simple memorandum order remanding for further consideration in light of *Witherspoon*, though, the Court issued an opinion giving the lower courts a clear reading of what it thought of the manner in which this jury had been death-qualified.

The *per curiam* opinion announced that there were "evident" *Witherspoon* violations in the selection of the jury that sat in Maxwell's 1962 capital rape trial.[177] Among them, it suggested, was the judge's decision to disqualify a juror who said that she "thought" she had certain scruples about the death penalty which "might" prevent her from voting for a death sentence. Stressing these words and emphasizing that *Witherspoon*'s footnotes 9 and 21 set forth the proper test of juror fitness, the Court hinted that venire members who are uncertain or indecisive about their ability to consider voting for the death penalty or impartially determine the defendant's guilt may not *ipso facto* be deemed unfit to serve on capital sentencing juries.

The Court spoke somewhat more directly to this issue in *Lockett v. Ohio*.[178] *Lockett* affirmed the disqualification of several people whose reservations about the death penalty barred them from swearing that

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173. State v. Mathis, 52 N.J. 238, 248, 245 A.2d 20, 26 (1968), *rev'd mem.*, 403 U.S. 946 (1971). *See* Krauss, *supra* note 1, at 32.

174. *Mathis*, 52 N.J. at 248, 245 A.2d at 26 (footnote omitted).

175. 398 U.S. 262 (1970) (per curiam). For a more in-depth discussion of *Maxwell*, *see* Krauss, *supra* note 1, at 34-37.

176. *See supra* note 2.

177. 398 U.S. at 264. As a result of the Court's decision in Coker v. Georgia, 433 U.S. 584 (1977), the death penalty is no longer a legitimate punishment for the crime of rape.

178. 438 U.S. 586 (1978). In between *Maxwell* and *Lockett*, the Court reversed the New Jersey Supreme Court's ruling on the death sentence imposed in *Mathis*. *See supra* note 173. The only explanation given for this summary judgment was a citation to *Witherspoon*, *Maxwell*, and Boulden v. Holman, 394 U.S. 478 (1969), a case cut from the same mold as *Maxwell*. (For a discussion of *Boulden*, *see* Krauss, *supra* note 1, at 32-34.) Since there was another possible problem with the

they would fairly and impartially try this capital case. The Court flatly denied that *Witherspoon* posed an obstacle to their excusal, and this might seem to imply that it thought indecisive jurors could *ipso facto* be deemed incompetent.[179]

However, it is far from clear that the Court intended to resolve this matter in *Lockett*.[180] To begin with, no one seems to have viewed Lockett's jury as a capital sentencing tribunal. Nor did anyone discuss the excludability of indecisive jurors in that case. Indeed, no one seems to have realized since then that, to the extent that it was a *Witherspoon* case at all, that is what *Lockett* involved.

Witt squarely presented the question of the fitness of indecisive jurors, but the Court purported to reserve judgment on it. The case involved a collateral attack on the for-cause excusal of a juror who said that she did not believe in the death penalty, that she feared that this would "interfere with [her] sitting as a juror in this case," and that she "thought" it would "interfere with judging the guilt or innocence of the Defendant in this case."[181] One of Witt's principal arguments in the Supreme Court was that it could not be assumed that the trial court had determined her competence with the proper standard in mind.[182] The Florida Supreme Court had recently reaffirmed its view—challenged by Witt—that indecisive jurors are unqualified to serve in capital cases.[183] He therefore maintained that the state court judge who presided over his trial may have (improperly) considered her excludable because she had not simply stated that she would be "impartial."

Claiming that the judge's questioning of other jurors showed him to have understood the proper standard of excludability, the Court affirmed this exclusion and Witt's death sentence without commenting upon Witt's contention. As a result, the meaning of its decision is problematic. In the examples cited by the Court, the judge basically asked whether the

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death-qualification of Mathis' jury, it is unclear whether this ruling reflected a rejection of the state court's view on the competence of indecisive jurors. *See* Krauss, *supra* note 1, at 48 n.191.

179. A venire member's unwillingness to take this oath might reflect nothing more than uncertainty about whether he could ever vote to impose a death sentence.

180. *See* Krauss, *supra* note 1, at 44 n.180, 48 & n.192.

181. Tr. at 266-67, *quoted in Witt*, 469 U.S. at 415-16.

182. *See* Brief of Respondent on Merits at 10-13.

183. Brown v. State, 381 So. 2d 690 (Fla. 1980), *cert. denied*, 449 U.S. 1118 (1981). It had previously endorsed this position in Williams v. State, 228 So. 2d 377 (Fla. 1969), *vacated on other grounds*, 408 U.S. 941 (1972). The State relied upon both of these decisions when Witt challenged this ruling on direct appeal. Brief of Respondent on Merits at 13.

jurors would follow the law and excluded jurors who said they would not.[184] Nonetheless, it would be unrealistic in the extreme to assume that the judge was not applying the law articulated in the governing decisions of his State's supreme court, and the Court did affirm this sentence.

In any event, the Court's rationale supports the position advocated by the Florida Supreme Court. There can be no doubt that "[i]f a juror, acknowledging racial, religious, or ethnic bias against an accused, is unable to say whether he could or could not judge the case on the merits, he is not an impartial juror."[185] Given the Court's belief that "[o]ur criminal justice system 'requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution,' "[186] the same thing should be true of a juror whose bias in favor of the accused prevents him from saying whether he could judge the case on the merits. If "excluding prospective capital sentencing jurors because of their opposition to capital punishment is no different from excluding jurors for innumerable other reasons which result in bias,"[187] it should follow that a juror who says that qualms about capital punishment prevent him from stating whether or not he would be willing to consider its imposition should also be excludable for cause.[188]

However, this conclusion is difficult to square with another portion of *Witt*'s critique of the "unmistakable clarity" requirement. Elsewhere in his opinion, Justice Rehnquist disparaged this standard on the ground that

> determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many 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*

184. 469 U.S. at 432 n.12. During the questioning of one of these jurors, the judge asked whether her views "might make [her] unable to follow the law," but this was an aberration, and her response was an "unambiguous" admission that she "could not bring back a death penalty."

185. *Mathis*, 52 N.J. at 248, 245 A.2d at 26.

186. Batson v. Kentucky, 106 S. Ct. 1712, 1729 (1986) (Marshall, J., concurring) (quoting Hayes v. Missouri, 120 U.S. 68, 70 (1887)).

187. *Witt*, 469 U.S. at 429.

188. Indecisive jurors are not saying that they "can make the discretionary judgment entrusted to [them] by the State and can thus obey the oath [they] take as . . . jurors." *Witherspoon*, 391 U.S. at 519. That is, they do not promise to decide whether the defendant deserves to die. What they do say is that they would consider voting for a death penalty, which might simply mean that they would think about whether they could ever vote to execute a fellow human being. Thus, their sentencing deliberations could focus entirely on the legitimacy of capital punishment, not the appropriateness of its imposition upon the defendant.

> *will react when faced with imposing the death sentence*, or may be unable to articulate, or may wish to hide their true feelings. *Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.*[189]

If the Court felt indecision a ground for disqualification, the final sentence in this passage would be rather out of place.

The notion that *Witt* validates the systematic disqualification of jurors who say they do not know whether they could ever vote for a death sentence is also at odds with the Court's claim that *Witt*'s formulation of the constitutional limitations on the death-qualification of capital sentencing juries broke no new ground. *Adams v. Texas*,[190] to which it unjustly attributed the adoption of its preferred test of excludability,[191] involved the disqualification of jurors who were unwilling to swear that their deliberations on three questions would be unaffected by the fact that affirmative responses to all three would require that the accused be given a death sentence. Given the inevitability—indeed, the propriety—of such an effect, coupled with the prejudice that would flow from the exclusion of all who said they would experience it, the Court decided that this practice is intolerable.

"Never [having] experienced [such a situation],"[192] it would seem equally obvious that only the most ideologically hidebound, non-reflective, or callous, individuals could honestly claim to know that they could vote to impose a death sentence.[193] At the very least, it is hard to imagine that any juror with doubts about the death penalty could not also doubt his ability to vote for it. Thus, the systematic dismissal of venire members voicing such doubts[194] would render capital sentencing juries "hanging juries" to the same extent as the jury selection scheme struck

189. *Witt*, 469 U.S. at 424-26 (emphasis added) (footnote omitted).

190. 448 U.S. 38 (1980).

191. *See* Krauss, *supra* note 1, at 84.

192. *See supra* note 35.

193. Like some jurors who may have said that they would not have been affected by "the potentially lethal consequences," 448 U.S. at 49, of their answers to the three questions in *Adams*, some people who say they know they would be willing to vote to kill some defendants may well be wrong. Just as some people who honestly say that they would never vote for a death penalty would condemn a defendant to die if confronted with a particularly horrendous set of facts, some who say that they could vote to terminate a fellow human being's life would surely prove unable to do so.

194. In this context, there is no principled basis for distinguishing between jurors who say they do not know whether they are AVADs, those who demonstrate their indecision giving inconsistent responses to the questions at *voir dire*, and those who can only say that they "think" they are not AVADs.

down in *Adams*. In fact, were it to be legitimated, the sixth amendment's prohibition of the practice of regarding as unfit all jurors with reservations about the death penalty "might as well be stricken from the Constitution."[195]

Consistent with that prohibition, the most that can and should be asked of jurors is that they be willing to think about voting to impose the death penalty after the evidence is in.[196] That is precisely what indecision indicates a juror's position to be. Therefore, indecisive prospective capital sentencing jurors should not *ipso facto* be considered incompetent.

V.

The law generally regards the disqualification of competent jurors as wholly inconsequential. As long as their replacements are also "impartial," such rulings are said to leave the parties with exactly what they are entitled to—an "impartial" jury. Accordingly, they are viewed as harmless error under state law, and they are not considered constitutional error at all, harmless or otherwise.[197]

Nonetheless, *Witherspoon* held that the Constitution forbade the petitioner's execution because his death sentence was imposed by a jury from which people with qualms about capital punishment had been systematically excluded. Several years later, the Court vacated two death sentences on the authority of *Witherspoon* even though the prosecution had more peremptory challenges left when the jury was empanelled than it would have needed to strike all of the jurors dismissed via the process of death-qualification.[198] Finally, *Davis v. Georgia*[199] ruled that a trial court's refusal to disqualify other venire members with reservations

195. Weeks v. United States, 232 U.S. 383, 393 (1914). *Witt* may indirectly have accomplished this by allowing trial judges wide leeway in identifying jurors who lack "impartiality," but it reminded them that the for-cause exclusion of qualified jurors because of their reservations about capital punishment is unconstitutional.

196. See *supra* note 11.

197. In Lockhart v. McCree, 106 S. Ct. 1758, 1770 (1986), the Court declared that

> [t]he Constitution presupposes that a jury selected from a fair cross-section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, as long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

198. Bernette v. Illinois, 403 U.S. 947 (1971), *rev'g mem.* 45 Ill. 2d 227, 258 N.E.2d 793 (1970); Tajra v. Illinois, 403 U.S. 947 (1971), *rev'g mem.* 45 Ill. 2d 227, 258 N.E.2d 793 (1970). This was the ground on which their sentences had been affirmed by the Illinois Supreme Court and defended before the United States Supreme Court. Krauss, *supra* note 1, at 43.

199. 429 U.S. 122 (1976) (per curiam).

about capital punishment does not render its excusal of one juror in violation of *Witherspoon* a harmless error.

The Court rejected the harmless error arguments advanced in *Bernette v. Illinois*,[200] *Tajra v. Illinois*,[201] and *Davis* without ever identifying the fault in their logic. It decided *Bernette* and *Tajra* summarily and without opinion. A brief *per curiam* opinion was issued in *Davis*, but it is not terribly illuminating. That opinion does say that the problem with the state supreme court's determination that Davis' death sentence could stand was that it was not based upon "the test [of reversibility] established in *Witherspoon*, and . . . applied [by the Court] in subsequent cases where a death penalty was imposed after the improper exclusion of one member of the venire."[202] Unfortunately, however, *Witherspoon* is silent on the subject of the relief appropriate where jurors with reservations about the death penalty have been disqualified on a non-systematic basis, and the "subsequent cases" to which the *Davis per curiam* refers were summary dispositions without opinion.

Given the Court's commitment to the principle that the systematic exclusion of competent jurors with such reservations is a denial of the right to an "impartial" sentencer, should the improper disqualification of one venire member of this stripe ever be considered harmless error? Assuming that Juror Bounds was improperly excused for cause because of her feelings about the death penalty, *Gray* presents three different aspects of this question. First, should the State have an opportunity to prove that she was actually incompetent? Second, should the mistaken excusal of one juror be overlooked on the theory that *de minimis non curat lex*? Third, assuming that the judge's reconsideration of his prior rulings was proper and that peremptories can be used to strike jurors whose disqualification is prohibited by *Witt*, should Gray's sentence be affirmed on the

200. 403 U.S. 947 (1971), *rev'g mem.* 45 Ill. 2d 227, 258 N.E.2d 793 (1970).

201. 403 U.S. 947 (1971), *rev'g mem.* 45 Ill. 2d 227, 258 N.E.2d 793 (1970).

202. 429 U.S. at 123. The state supreme court had affirmed Davis' death sentence on the theory that the erroneous exclusion of one of several qualified venire members professing qualms about the death penalty did not "deny [Davis] a jury of veniremen representing a cross section of the community." *Id.* (quoting Davis v. State, 236 Ga. 804, 810, 225 S.E.2d 241, 245 (1976)).

In his dissent from the Court's summary reversal of this decision, Justice Rehnquist suggested, *inter alia*, that the error could be considered harmless because the State may not have used all of its peremptory challenges. *Id.* at 124 (Rehnquist, J., dissenting). Although the Court's ruling could be taken as further evidence, *see supra* note 198 and accompanying text, of its rejection of the "unexercised peremptories" harmless error argument, this is by no means certain. Even the State had not claimed that it had any remaining peremptories, *compare* Brief for the Respondent in Opposition at 9 *with* 429 U.S. at 124 n.*, and so the Court may not have thought the issue raised by the case.

ground that the State would have removed Ms. Bounds with one of the peremptories to which it was entitled by virtue of the judge's reconsideration of those rulings had she not been excused for cause? It is to the investigation of these issues that the inquiry shall now turn.

A.

In *Davis*, Justice Rehnquist observed that the fact that a venire member's exclusion violated *Witherspoon* did not mean that she was neither an AVAD nor a nullifier. It meant only that the State had not met its burden of proving that she was incompetent. Thus, he suggested that her disqualification did not necessarily justify the vacation of Davis' death sentence. Rather, he urged the Court to consider the possibility that "a hearing . . . could be conducted to finish the aborted questioning and determine whether she would have, in fact, been excludable for cause."[203]

The Court implicitly rejected this proposition in *Davis*, as it summarily held that the defendant's death sentence could not be carried out. This decision was consistent with its ruling in *Witherspoon* itself, which unconditionally enjoined the execution of the defendant's sentence because of the erroneous exclusions. But no one sought such a hearing in *Witherspoon*, and the Court did not discuss the question whether a hearing could render the exclusion of a juror who had not made his lack of "impartiality" "unmistakably clear" harmless error.[204] Because *Davis* also failed to provide a reasoned explanation of why a post-trial hearing of this type can never cure a *Witherspoon* error, the Court has never done so.

The problem with Justice Rehnquist's proposal is obvious: when a finding of juror incompetence is struck down under *Witt*, there is a real danger that a subsequent hearing will culminate in a finding of harmless error that neither is nor appears to be reliable. There are several reasons why this is so. First, the excluded juror may be able in all honesty to deny being an AVAD under these circumstances simply because of his knowledge that he would not be called upon directly to make the sentencing decision in this case. He may feel reluctant to cause the reversal

203. 429 U.S. at 124 (Rehnquist, J., dissenting).

204. Moreover, if the *Witherspoon* Court correctly judged that a significant portion of the community held reservations about the death penalty but were neither AVADs nor nullifiers, *see* Krauss, *supra* note 1, at 19 n.66, it is extremely unlikely that all of the venire members whose exclusion was condemned in that case (47 of the 95 members of the venire) would have proven unfit.

of a death sentence. Similarly, the judge, who may have already shown himself insufficiently solicitous of the accused's right to an "impartial" sentencing jury, may feel pressure to vindicate his prior ruling and sustain the previously-imposed death sentence.[205] And since the standard of review employed in *Witt* renders the chances of a second reversal virtually nil, appellate courts cannot be relied upon to protect the defendant against these eventualities.

A pair of recent Supreme Court decisions indicate that these difficulties may not be prohibitive. In *Smith v. Phillips*,[206] the Court held that a post-trial hearing provided adequate insurance that a member of the jury that convicted Phillips of murder and attempted murder was "impartial" even though he had been seeking employment in the prosecutor's office during the trial. And in *Rushen v. Spain*,[207] it approved the use of a post-trial hearing to determine whether a judge's failure to apprise the defendant of his mid-trial discovery of a potential basis for challenging the "impartiality" of a member of the jury that found him guilty of murder and conspiracy was a harmless constitutional error.[208] In each case, the dubious probative value of a juror's belief that he had obeyed his oath and decided the case "impartially" and the possibility that an elected judge may feel pressure to uphold a defendant's conviction despite the law did not deter the Court from finding a post-trial hearing an acceptable way to determine the validity of that conviction.[209]

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205. *See* Witt, 469 U.S. at 459-60 (Brennan, J., dissenting); Baldwin v. Alabama, 472 U.S. 372, 397-98 (1985) (Stevens, J., dissenting).

206. 455 U.S. 209 (1982).

207. 464 U.S. 114 (1983) (per curiam).

208. Assuming, *arguendo*, that this communication violated the defendant's constitutional rights to counsel and to be present at all critical stages of the trial (he did not claim that his right to an "impartial" jury was also violated by what happened in the trial court), the Court summarily ruled that the state courts' determination that this error was harmless beyond a reasonable doubt had "fair support" in the record, and was therefore to be presumed correct in this *habeas corpus* action. To be more precise, the factual finding that the Court deemed entitled to deference was that "the jury's deliberations, as a whole, were not biased." *Id.* at 120, 121. That may or may not be the same thing as a finding that Juror Fagan was "impartial," *compare id.* at 118 n.2 *with id.* at 130 n.9 (Stevens, J., concurring in the judgment), and the Court's failure to mention the California Court of Appeal's finding that the juror was not prejudiced, Petition for Certiorari app. C at 35, 38 n.8, is striking. *Cf.* 464 U.S. at 141-42 (Marshall, J., dissenting). Still, in explaining why this finding fell within the parameters of § 2254(d), the Court remarked that "[t]he substance of the *ex parte* communications and their effect on juror impartiality are questions of historical fact entitled to this presumption." 464 U.S. at 113.

209. As the *Spain* Court put it, "[t]he adequacy of any remedy is determined solely by its ability to mitigate constitutional error, if any, that has occurred. Post-trial hearings are adequately tailored to this task." 464 U.S. at 119-20 (citations omitted).

On closer examination, however, it becomes clear that these precedents are not necessarily dispositive of the issue at hand. In the first place, they involved claims that people were wrongly included on, rather than excluded from, petit juries. Hence, the hearing in each case sought to discover an historical fact about someone who actually served as a juror in a real case—whether he was an "impartial" juror. A hearing of the type that Justice Rehnquist suggested, in contrast, would entail an investigation of a much more speculative matter—whether a person would have been willing to determine the defendant's guilt "impartially" and to consider voting to impose a death sentence in the event of a conviction of capital murder. Moreover, to the extent that this would amount to a quest to discover an historical fact, it is a quest whose timing would typically be very different than the ones in *Phillips* and *Spain*. Those hearings were held shortly after the conclusion of their respective trials, when a juror's state of mind might still be evident from his demeanor, with which the trial judge may have been familiar from observation at *voir dire* and at trial. Were a hearing to be held in response to an appellate court's decision that a juror's disqualification was improper under *Witt*, however, it would come long after the trial. In *Gray*, for example, at least five years would have passed between the *voir dire* and a second hearing. Ms. Bounds' attitude towards capital punishment may have changed greatly during this period, to an extent that even she may not realize.[210] Thus, there is no way of knowing whether 1987 questioning will give the judge accurate data about her competence at the time of trial.[211] It may therefore come as no surprise that in *Batson*, the only non-death-qualification case in which the Court has discussed the relief to be granted when venire members are excused illegitimately, it did not call for a hearing to determine whether some acceptable basis for challenging the venire members in question might turn up; it said rather that the defendant's conviction must be reversed.[212]

210. Public opinion polls indicate that people's views about capital punishment have changed over relatively short periods of time. *See, e.g.*, H. BEDAU, THE DEATH PENALTY IN AMERICA 65 (3rd ed. 1982).

211. To allow the judge to make findings on the basis of his memory of her testimony at *voir dire* would be unfair, inaccurate, and unseemly. The problems discussed in the text may be less acute if the hearing were held in conjunction with a post-trial motion in the trial court, but a hearing held at that time may still appear too readily used as a vehicle for the judge to cover up a mistake made at trial.

212. *Batson* does not constitute a perfect analogy in this context, however. First, the fact that peremptory challenges were involved makes it harder to guarantee the *bona fides* of a prosecutorial claim that the testimony on remand provided an independent reason to strike the juror peremptorily.

There is second basis for distinguishing *Phillips* and *Spain*: the defendants in those cases were not given death sentences. As has already been noted, the irrevocability of capital punishment has led the Court to insist that greater care be taken to insure the appearance and reality of "impartiality" in this context than in the determination of guilt or innocence. Thus, even if a long-delayed hearing on the propriety of a juror's exclusion would be appropriate in some other context, the Court could find the risk of error inherent in such a procedure to be unacceptable in this setting.

B.

It is well established that the denial of the right to an "impartial" adjudicator cannot be harmless error,[213] and this rule makes good sense. In part, this is because the defendant may not have gotten his "just deserts." To begin with, the trier may not have found the relevant facts accurately. Beyond this, bias may have influenced its resolution of a discretionary issue that it was called upon to decide in the course of its deliberations—for example, whether the defendant's conduct was sufficiently blameworthy to be deemed first degree murder, or whether he "deserved" to die for his crime.[214]

Of course, the virtues of this rule are not limited to the reduction of the risk of unreliable decisionmaking.[215] Judicial efforts to dismiss violations of the right to an "impartial" tribunal as harmless error would inevitably be met with suspicion on the part of at least some segments of the populace. The automatic reversal rule thus reinforces public confidence in the

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Second, although it can be assumed that black jurors struck in violation of the Equal Protection Clause had not shown themselves subject to a proper challenge, the same can not be said about Ms. Bounds. If she was excused for her indecision, it may be because the judge incorrectly (with the benefit of 20/20 hindsight) thought federal law prohibited him to find her an AVAD because she did not say so with "unmistakable clarity." (This may still be a correct reading of state law, but the point remains the same.)

213. Rose v. Clark, 106 S. Ct. 3101, 3106 (1986). This is contrary to the general rule, according to which constitutional error can be dismissed as harmless if the State proves beyond a reasonable doubt that it was such. *Id.* at 3105-8.

214. In a similar vein, an "impartial" jury may have been driven by its sense of justice to use its nullification power to convict him of a lesser included offense or none at all. The Court has expressed contradictory views on the legal significance of this possibility. *Compare* Vasquez v. Hillery, 106 S. Ct. 617, 623 (1986) *with* Strickland v. Washington, 466 U.S. 668, 694-95 (1984).

215. Although Justice Powell's opinion for the Court in *Rose* stressed this aspect of the rule, it acknowledged that nonreliability concerns also justify the rejection of harmless error arguments in some contexts, 106 S. Ct. at 3106, and it did not deny that such concerns also favor the automatic reversal rule in this context.

integrity of the legal system.[216] And it gives expression to our fundamental belief that everyone, including the most culpable of wrongdoers, is entitled to "fair play" in his dealings with the State.[217]

Although the Court has modified the test of excludability set out in *Witherspoon*, *Witt* and *McCree* reaffirmed *Witherspoon*'s determination that the systematic excusal of competent jurors with reservations about the death penalty breaches this right. On this analysis, then, the doctrinal question posed by *Gray* is whether the excusal of a single juror in violation of *Witt* is a denial of the right to an "impartial" jury.

The Court considered a comparable question in *Aetna Life Insurance Co. v. Lavoie*.[218] A judge who took part in the state supreme court's decision of that case had a sufficient pecuniary interest in its outcome that he was not "impartial" within the meaning of the Due Process Clause. Without deciding whether the participation of a biased person on a multimember tribunal must always result in the vacation of its decision, the Court vacated the judgment of the Alabama Supreme Court on the ground that the disqualified judge had cast the decisive vote.[219] This fact was significant, in the Court's view, because " 'justice must satisfy the appearance of justice.' "[220]

Where, as in Mississippi,[221] a death sentence can be imposed only with the jury's unanimous consent,[222] every juror may be said to have cast the deciding vote on the question of punishment in every case in which that penalty has been imposed.[223] Thus, *Aetna* would plainly prohibit the execution of a death sentence returned by a jury including a single person biased against the defendant. But does it follow that a death sentence

216. This does come at a price; frustration or anger at the fallibility of the system which delays or prevents the punishment of the guilty.

217. The last two statements in the text must be qualified, as not everyone or every value we hold dear is favorably disposed to this rule. It doubtless undermines the faith of some in the legal system, people who feel that, while the accused has a right to be treated "fairly," the rule unjustly slights the public's "right" to punish the guilty.

218. 106 S. Ct. 1580 (1986).

219. The Court was not unanimous on this point. *See id.* at 1590-91 (Blackmun, J., concurring in the judgment).

220. In re Murchison, 349 U.S. 133, 136 (1955), *quoted in part in Aetna*, 106 S. Ct. at 1589.

221. MISS. CODE ANN. § 99-19-101 (3) (Supp. 1986).

222. This is the general practice in states authorizing capital punishment. *See* Krauss, *supra* note 1, at 3 n.14.

223. Where unanimity is not required, each juror's vote may still be decisive. First, a sentencing judge may find the fact, or the number, of dissenting votes a meaningful consideration when deciding whether to reject a jury's recommendation of death. Moreover, the absent juror's arguments, which may have persuaded others to vote for mercy, may have been unmade in his absence.

should be vacated when a venire member with reservations about capital punishment has been (albeit improperly) replaced by another competent juror?[224]

The short answer to this question is "yes." At first blush, the substitution of one "impartial" juror for another, unlike the seating of a biased juror, may not seem to threaten the integrity of the sentence in any way. However, this situation takes on a rather different complexion when it is recalled that the law does not regard capital sentencing juries as "impartial" if the State has used its challenges to prevent them from reflecting the full range of community sentiment about the death penalty, save for the most extreme views. In light of the broad discretion *Witt* allows trial judges to exercise in determining juror fitness, it is virtually inconceivable that a replacement juror would ever be as favorably disposed towards mercy as the wrongly excluded one.[225] Thus, on those rare occasions when *Witherspoon* error is detected, there is in fact reason to fear that the attitudinal makeup of the jury—hence the outcome of its sentencing deliberations—may have been affected to the detriment of the accused.[226]

Consideration of the practical alternatives reinforces the conclusion to which *Aetna* points. Three other possibilities come to mind. The Court could simply declare that nothing short of the systematic elimination of venire members with reservations about the death penalty violates the right to an "impartial" sentencer. Or, just as it has arbitrarily decided that, in criminal cases, juries must consist of a minimum of six people, it could decide that no more than some magic number of erroneous excusals will be tolerated. Finally, it could take the position that *Witherspoon* violations do not cause a sentencing jury to lack "impartiality" unless they disable it from fairly representing the views of the members of the "open-minded" community with reservations about the death

224. An analogous question is prompted by *Batson*. The Court has ruled that black citizens may not systematically be excluded from jury service and that peremptories may not be used to remove black jurors for discriminatory reasons. However, it has not considered whether the discriminatory exclusion of a single black juror by peremptory challenge, if proven, would be objectionable.

225. Indeed, absent the invocation of an incorrect standard of excludability, it is virtually inconceivable that a trial court's disqualification of a prospective capital sentencing juror because of his reservations about capital punishment could ever be condemned under federal law by a reviewing court. Krauss, *supra* note 1, at 80.

226. The apparent injustice of executing a death sentence in such a situation would be even stronger when, as here, the result of the improper exclusion is that the sentencing jury includes no persons with reservations about capital punishment.

penalty.[227]

None of these prospects, however, represents an appropriate substitute for the automatic reversal rule endorsed by the Court in *Davis*. The first would effectively transform *Witherspoon* into a requirement that one competent person with reservations about the death penalty be held qualified during the jury selection process in every capital case in which any such venire members were identified. This would be a particularly odd development, because *Witherspoon* does not purport to require that capital sentencing juries (or the pools from which their members are chosen) include anyone with reservations about the death penalty,[228] and there is no reason to suppose that the Constitution should be satisfied by the qualification in each case of exactly one such person. As intellectually unsatisfactory an exercise of raw judicial power as it is, even the "rule of six" could only look good in comparison to any attempt to formulate a talismanic number of permissible *Witherspoon* violations. After all, while the abandonment of the traditional "rule of twelve" only forced the Court to select one arbitrary number to resolve the jury-size issue, this enterprise would (presumably) call for rather more creativity, in recognition of the fact that jury selection does not inherently require the examination of any particular number of jurors.[229] In theory, the hazards of numerology could be avoided by recourse to the third approach mentioned above.[230] But that analysis entails difficulties of its own.

The Constitution demands that juries be drawn from a source fairly representative of the community.[231] Only a jury chosen from such a pool can be relied upon accurately to express the community's judgment on matters submitted to it for resolution, and only a jury chosen in this manner is deemed "impartial."[232] A "fair cross-section" claim charges that a jury was picked from a pool in which some legally recognized class of people was significantly underrepresented. The validity of such a claim is determined by comparing the percentage of group members in the venire

227. In that event, the jury would not be able to "express the conscience of the [open-minded] community on the question of life or death."

228. *See supra* note 136.

229. For example, would the same number of mistakes be allowed in a case where 15 venire members were examined as in a case involving the examination of 100 prospective jurors?

230. This seems to have been the test employed by the Georgia Supreme Court in *Davis*. *See* Davis v. State, 236 Ga. 804, 225 S.E.2d 241 (1976), *rev'd*, 429 U.S. 122 (1976) (per curiam).

231. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975).

232. *See supra* note 197. It is unclear how the exclusion of AVADs and nullifiers can be reconciled with this doctrine. *See supra* note 12; *Witherspoon*, 391 U.S. at 528-30 (opinion of Douglas, J.).

to their percentage in the community. If a "fair cross-section" violation is established, the defendant's conviction is subject to automatic reversal.

Although the Court has denied that this doctrine generally limits the State's use of challenges to strike venire members,[233] *Witherspoon* is one of the exceptional cases in which the law acknowledges the effect that challenges can have on the jury's ability to speak for the community. By analogy to the rule applied in the "fair cross-section" cases, it could be argued that *Witherspoon* error does not warrant the reversal of a death sentence if the class of "open-minded" people with qualms about capital punishment was not substantially underrepresented on the jury as a result. However, even if the practical problems in implementing such a rule could be overcome,[234] this would not solve the problem. *Witherspoon* and the "fair cross-section" concerns that it reflects do not require that any class members actually sit on the sentencing jury chosen in a capital case. Nor do they set a maximum limit on the number of class members that may be empanelled in any particular case. Rather, they seek to ensure that these juries are selected from a random sample of eligible people; this means that actual juries will sometimes include fewer class members than would be appropriate under a proportional representation system, sometimes more. In addition, the substantial underrepresentation rule is based on a fallacious premise; namely, that competent jurors with doubts about the death penalty are fungible. Only on this basis could it be claimed that, notwithstanding the disqualification of a competent juror, the defendant's sentencing jury included the requisite diversity of viewpoints. Yet it should be obvious that this presumption is unjustified. While people with reservations about the death penalty may be less likely (as a group) to vote to condemn a defendant to die than people without them, they are not clones. Their reservations may be prompted by different considerations, be held with different degrees of intensity, and lead them to vote in different ways in the same case. But even if all class members had the same perspective on the ques-

233. *See supra* note 137.

234. Whereas the relevant statistics are readily available with respect to women, the only group to have been recognized by the Court as a cognizable class in the "fair cross-section" context (and with respect to the other groups whose cognizability has been suggested by the Court, *see supra* note 137), comparable information regarding "open minded" people with reservations about the death penalty is not likely to be as easily obtainable. Census data does not reveal their numerical strength in society at large, and the size of their presence on a venire may also be unknown. These obstacles could be overcome by a requirement that the State either collect the data itself or empower defendants to do so, but this might be a difficult task, given the fluctuation of public opinion on this issue.

tion of capital punishment in general, there is no more reason to suppose that they would all agree about the appropriate disposition of any particular case than to think that all people without such reservations would be of one mind on the subject. And the State presumably rejected that proposition when it decided that capital sentencing decisions must be made by a unanimous vote of twelve jurors.[235]

C.

But what if the judge's reconsideration of his rulings on the competence of the prior venire members meant that the State had a right under state law to the extra peremptory challenges that, but for the judge's decision that Ms. Bounds was unfit for service, would have empowered it to strike her without cause? Provided that the Constitution would have allowed the prosecution peremptorily to challenge her at trial, how could her for-cause dismissal have been prejudicial error?

As a general proposition, the notion that *Witherspoon* error is not rendered harmless by the fact that the prosecution did not use all of its peremptories at *voir dire* is rather appealing.[236] Peremptories are exercised for tactical reasons, and the decision when to use one is guided by three considerations: the degree to which a juror strikes a party as undesirable, the odds that his replacement would be more favorably inclined towards that party, and the number of peremptories available to it. In light of the subjective nature of two of these factors, a retrospective claim that the prosecutor would peremptorily have challenged a wrongly disqualified juror can be easy to make but impossible to verify. Moreover, had he done so, he may have chosen—or been forced by a shortage of peremptories—to accept some of the jurors who he actually excluded because of their views about the death penalty. Thus, it may be impossible to tell what the jury's composition, and the result of its sentencing deliberations, would have been if not for the *Witherspoon* violation.[237]

235. Initially, states may have required unanimity because of the possibility that this was what the Constitution required. However, there has been no rush to abolish this requirement in the wake of the decision in Spaziano v. Florida, 368 U.S. 447 (1984), which held that the Constitution does not mandate jury sentencing in capital cases. (This may be due to fear that jurors would otherwise engage in more frequent nullification, but no one has suggested that this is the case in Florida, where the jury's sentencing recommendations need not be unanimous.)

236. *See* Moore v. Estelle, 670 F.2d 56, 58 (5th Cir. 1982) (Goldberg, J., concurring), *cert. denied*, 458 U.S. 1111 (1982); Blankenship v. State, 280 S.E.2d 623, 623-24 (Ga. 1981) (Gregory, J., concurring).

237. That these concerns are not purely hypothetical is revealed by the behavior of the prosecu-

These arguments may appear somewhat less telling in *Gray* than they were in *Bernette* and *Tajra*, as the prosecutor expressed a desire peremptorily to challenge Juror Bounds at *voir dire*. More than that, he asked the judge to reconsider his earlier rulings precisely so that he could peremptorily strike her. If the judge had revived the State's peremptories as per this request, there is no reason to doubt that one of them would have been exercised on her.

Nonetheless, it does not follow that her for-cause exclusion was harmless error. By hypothesis, the judge "cheated" the State out of several of its peremptories. Therefore, the real question presented by the "unexercised peremptories" claim in this case is not whether Ms. Bounds would have served on Gray's jury but for her improper disqualification. Rather, it is whether the jury's attitudinal makeup—and Gray's sentence—would have been the same if the judge had not "cheated" the State out of *any* of (or if he had "returned" all of) these challenges.

With this in mind, it should be obvious that the "remaining peremptories" argument is not persuasive in this case. If the prosecution had had five more peremptories, it might have used them to strike four other members of the venire, in addition to Juror Bounds. Given that the defense did not exhaust its stock of peremptories, it is impossible to say who would have served on Gray's jury—perhaps a juror who professed to have reservations about the death penalty might have even been seated. In other words, the "general proposition" referred to above would be just as properly applied here as in the case in which the State attempts retrospectively to exercise peremptories on appeal.[238]

VI.

One of the ways in which "death is different" is that the Court has taken greater care to insure the "impartiality" of capital sentencing juries than any others. To this end, it has taken the extraordinary step of forbidding the disqualification of competent capital sentencing jurors because of their reservations about the death penalty.

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tor in *Gray*. *See supra* note 115. It should also be borne in mind that the non-moving party may also have had peremptory challenges left, which would complicate any attempt to figure out what the jury would have looked like had history been different.

238. Were the reconsideration of the five previous rulings the only *Witherspoon* error in the case, however, the fact that the prosecutor had actually excluded these jurors peremptorily, coupled with the fact that he did not peremptorily challenge any venire members after them, would strongly suggest that the errors should be held harmless.

Witt robbed this bar of much of its vitality. It renounced *Witherspoon*'s demand that proof of a juror's inability to "follow the law" be "unmistakably clear" before he could be disqualified on this account. And it held that rulings on juror fitness are to be presumed correct on federal review, even in the absence of explicit findings of fact.

At bottom, the question posed by *Gray* is how much further the Court will go in rendering *Witherspoon*'s prohibition a nullity. If *Witherspoon* is to be totally undone, "[a]t least it deserves a decent burial."[239] Otherwise, the Court should see to it that the remaining element of its mandate be enforced.

[After this article was accepted for publication, the Supreme Court reversed the state supreme court's decision in *Gray*. 107 S. Ct. 2045 (1987). Without addressing the question discussed in Part IV of this article, a five-Justice majority summarily concluded that Ms. Bounds' disqualification violated the principles of *Witherspoon* and *Witt*. These Justices went on to hold that this could not be considered a harmless error. It should also be noted that five Members of the Court—Justice Powell and dissenting Justices Rehnquist, White, O'Connor, and Scalia—argued that *Witherspoon* and *Witt* do not limit the prosecution's use of peremptory challenges.]

239. Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184, 212 (1977).

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