Constitutional Law - Does the New Death Qualification Standard Ensure a Biased Jury - Wainwright v. Witt

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CASE NOTES


On October 28, 1973, Johnny Paul Witt and a friend committed a murder. They waited in a wooded area and, when an eleven year old boy rode by on his bicycle, the accomplice hit the boy on the head. The two gagged the stunned victim, put him in the trunk of their car, and drove to a deserted area. When they opened the trunk, they discovered the victim had choked on the gag and died. The pair performed sexual and violent acts on the body and buried it.¹

Witt was convicted of first degree murder in Florida and the jury sentenced him to death.² At Witt’s trial eleven jurors were recused for cause. His attorney unsuccessfully contended on appeal in the state courts that three of these veniremen were improperly recused based on the recusal standard outlined in Witherspoon v. Illinois.³ Witt raised the same issue in a petition for a writ of habeas corpus in United States District Court. His petition was denied.⁴ The Court of Appeals reversed and granted the writ.⁵ The Supreme Court granted certiorari,⁶ and subsequently rejected Witt’s Witherspoon claim.⁷ The Witt Court developed a new standard for voir dire and recusal of veniremen in a capital case. This author contends that the Witt standard denies the defendant due process because a Witt jury will be more likely to convict and sentence the defendant to death than a jury seated under Witherspoon.

2. Id.
3. 391 U.S. 510 (1968). Recusal is the process by which veniremen are removed from the jury either for cause (prejudice either for or against the defendant) or preemptorily.

The Court also held that the determination of venireman opposition to the death penalty is a factual and not a legal question. Id. at 855. Therefore, on habeas review, the trial judge’s determination must be afforded a “presumption of correctness.” Federal Courts on habeas review must defer to this finding, and apply a narrower standard of review. The federal habeas corpus statute, 28 U.S.C. § 2254(d) (1982) provides in pertinent part:

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

The U.S. Supreme Court has deferred to the trial court’s finding of fact in other cases. See Patton v. Yount, 104 S.Ct. 2885 (1984). The Patton Court found the issue of whether pretrial publicity had created prejudice in a venireman a factual issue to be accorded section 2254(d)’s presumption of correctness. See also Sumner v. Mata, 449 U.S. 539 (1981); Rushen v. Spain, 464 U.S. 114 (1983); Cuyler v. Sullivan, 446 U.S. 335 (1980). But see Irwin v. Doud, 366 U.S. 717 (1961), where the Court held the question of the effect of pretrial publicity on juror prejudice to be a mixed question of law and fact requiring de novo habeas review.
BACKGROUND

The sixth amendment to the United States Constitution guarantees: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." In *Duncan v. Louisiana* the U.S. Supreme Court ranked the right to an impartial jury trial among those which are fundamental to our American scheme of justice.8 The *Duncan* Court was convinced that a general grant of a jury in trials for serious offenses was mandatory to prevent miscarriages of justice and for insuring that defendants obtained fair trials.9

The Court has recognized that an essential component of the guarantee of an impartial jury trial is that the jury be composed of a fair cross-section of the community.10 A criminal defendant must be assured that his case will be judged not by some isolated social, economic, or political segment of the community. Rather, jurors of all backgrounds, perspectives and viewpoints should hear his case. The Supreme Court in *Witherspoon v. Illinois* applied this reasoning to the issue of juror recusal in death-penalty cases.11

In *Witherspoon*, the U.S. Supreme Court enunciated a new standard for death-qualifying a jury.12 Prior to *Witherspoon*, a venireman might be recused in a capital case merely because he generally opposed the death penalty or if he had scruples13 against its infliction. On this basis, forty-seven veniremen were successfully challenged for cause at Witherspoon's trial. The Court reversed Witherspoon's death sentence14 because the death-qualification procedure violated Witherspoon's sixth and fourteenth amendment rights to an impartial jury.15 The Court held that a capital case jury may not be cleansed of those who generally oppose the death penalty or those who expressed conscientious or religious scruples against

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9. *Id. at 157-58.* Consequently, the Court held that this right has been "incorporated" by the fourteenth amendment so as to apply to the states.
10. *Taylor v. Louisiana*, 419 U.S. 522 (1975). The argument may be made that *Taylor* and *Duren v. Missouri*, 439 U.S. 357 (1979), only guarantee the accused a venire which is composed of a fair cross-section of the community; but, *Witherspoon*, *Adams v. Texas*, 448 U.S. 38 (1970), and even *Witt* extend this right to a petite jury as well. In *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court held that this right is also "incorporated" so as to apply to the states.
12. A "death-qualified" jury is simply one which is qualified to sit in a capital case. In other words, those jurors unqualified to sit because of their opposition to the death penalty have been recused.
13. A "death-scrupled" venireman, in the context of this note, is one who is not irrevocably opposed to the death penalty, but who has some conscientious or religious scruples against it.
14. A *Witherspoon* reversal only reverses and remands for a new sentencing hearing. The jury's finding of guilt is not disturbed.
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it, but who might return the death penalty in certain circumstances. The Court was convinced that such a sanitized jury would be a "hanging jury" quick to convict and quick to return the death penalty, thus denying the defendant due process.

The Court also developed a test which has provided the standard for capital case juror recusal. Only those jurors who make it unmistakably clear that they would (1) automatically vote against the death penalty without regard for the evidence, or (2) whose attitude toward the death penalty would prevent them from being impartial as to the defendant's guilt (those who would vote not guilty or guilty to a lesser charge) can be recused. Since Witherspoon, the state and federal courts have consistently followed this test.

In 1980, however, the Supreme Court in Adams v. Texas slightly modified the Witherspoon standard. The Adams Court reversed the death sentence of a habeas petitioner. Justice White wrote that states may only exclude veniremen whose beliefs regarding capital punishment would lead them to ignore the judge's instructions or to violate their oaths as jurors. Though the Adams Court reversed on the basis of the Witherspoon doctrine, the Court departed from strict adherence to the Witherspoon test. Under Adams, a prosecutor may have a venireman recused for cause if his views about capital punishment would prevent or "substantially impair" his ability to convict or return the death penalty.

In some respects, the Adams "test" significantly differs from the Witherspoon test. The Witherspoon test demands that the venireman be impartial and that he at least consider the death penalty. Adams merges and simplifies this two-prong inquiry by requiring only that the juror adhere to the judge's instructions. Adams also does not require, as does

\begin{enumerate}
  \item Witherspoon, 391 U.S. at 522.
  \item Id. at 522 n.21. The test was:
  \begin{quote}
  Nothing we say today bears upon the power of a state to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.
  \end{quote}
  \end{enumerate}

Witherspoon reversals are not very common. In his brief on the merits, Witt indicated that between 1980-83 the federal and state courts reached the Witherspoon issue in 175 cases. The courts reversed the death sentence 26 times—14.9%. Brief of Petitioner on the Merits (appendix pp. 1a-7a), Wainwright v. Witt, 105 S.Ct. 844 (1985). For examples of Witherspoon reversals see Granviel v. Estelle, 665 F.2d 673 (5th Cir. 1981); People v. Szabo, 94 Ill. 2d 327, 447 N.E.2d 193 (1983); Chandler v. State, 442 S.2d 171 (Fla. 1983).

19. Id. Justice Rehnquist was the lone dissenter in Adams. His majority opinion in Witt does not differ in any significant fashion from his dissent in Adams.
20. In Texas, a capital case juryman must swear that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact. Tex. Penal Code Ann. § 12.31(b) (Vernon 1974).
22. Id. at 45. Thus, Adams incorporates the Witherspoon test as well as adding the impairment "substantial" test.
Witherspoon, that the venireman make unmistakably clear his opposition to the death penalty.

Most importantly, Adams allows a venireman to be recused if his beliefs regarding the death penalty substantially impair his ability to perform his duties as a juror in a capital case. Under Witherspoon only those veniremen whose beliefs would prevent them from making an impartial decision as to the defendant’s guilt may be recused. The Adams test allows a larger class of veniremen to be recused.

Arguably, the Adams Court did not intend to change the Witherspoon test. The Court’s use of the phrase “substantially impair” is, if anything, a description of the Witherspoon doctrine in slightly different words. The significance of the change is only evident in retrospect. Neither Justices Brennan or Marshall, who in Witt vociferously castigate the Witt majority for departing from the Witherspoon test, objected to the use of the phrase in Adams. Either Justice White had a “hidden agenda” in Adams or he did not realize the potential significance of what he had done when he expressed the Court’s position in the way that he did.23

Despite the shift in Adams from the Witherspoon standard, both Adams and Witherspoon support the general proposition that the recusal standard in capital cases should be significantly different from the recusal standard in other kinds of trials. In a capital case, the state might only recuse veniremen who are demonstrably biased in the defendant’s favor. The Witherspoon Court was convinced that a death-qualified jury would be organized to return a verdict of death as well as “organized to convict.”24

The Court in Witherspoon forthrightly recognized that a verdict of death returned by such a jury is unconstitutional because the jury is not impartial. To execute a defendant under such circumstances would deprive the defendant of his life without due process of law. The Witt Court, however, rejected this perspective and fundamentally redefined the process of voir dire in a death penalty case.

THE PRINCIPAL CASE

The Witt Court25 first examined Witt’s contention that three of the recused veniremen were improperly recused for cause. The court below granted the petitioner’s writ of habeas corpus based on the voir dire colloquy between the prosecutor and venireman Colby. The colloquy is indicative of the confusion that pervades voir dire in general and death

24. Witherspoon, 391 U.S. at 521. The Court’s position was also predicated on an awareness of the growing unpopularity of the death penalty. It noted that in 1966, approximately 42% of the public favored capital punishment, while 47% opposed it. Id. at 520, n.16.
qualification of a capital case venire in particular. The exchange illustrates the difficulty in accurately discovering a venireman’s belief about the death penalty:

“[Q. prosecutor]: Now, let me ask you a question, ma’am. Do you have any religious beliefs or personal beliefs against the death penalty?

“[A. Colby]: I am afraid personally, but not _________

“[Q.]: Speak up, please.

“[A.]: I am afraid of being a little personal, but definitely not religious.

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

“[A.]: I am afraid it would.

“[Q.]: You are afraid it would?

“[A.]: Yes, sir.

“[Q.]: Would it interfere with judging the guilt or innocence of the Defendant in this case?

“[A.]: I think so.

“[Q.]: You think it would?

“[A.]: I think it would.

“[Q.]: Your honor, I would move for cause at this point.

“The Court: All right. Step down.”

The Court of Appeals reversed Witt’s death sentence because the prosecutor used the word “interfere” in questioning the venireman. The Court of Appeals said that the word “interfere” would admit to more than one meaning. Because the question was ambiguous, the venireman had not made it “unmistakably clear” that her attitude would prevent her from impartially deciding Witt’s guilt. The Supreme Court was critical of the Court of Appeals’ rigid adherence to form. The Court would allow prosecutors to ask the relevant voir dire questions without the requirement that they be framed exclusively in Witherspoon language.

The Witt Court was unconcerned with whether the colloquy was ambiguous, or whether the voir dire violated Witherspoon’s textual and substantive requirements. No longer may a venireman be excluded only when he would “automatically” vote against the death penalty, nor must the venireman’s expression of belief be “unambiguous” or “unmistakably

26. Id. at 848 (emphasis added).
clear." The Court specifically rejected the Witherspoon standard and adopted that of Adams v. Texas.

The Witt Court persuasively reasoned that the Adams standard is preferable to the Witherspoon test. Justice Rehnquist noted that Witherspoon's two-prong testing of the venireman's attitude toward guilt and sentencing had been merged and simplified in Adams. In addition, Witherspoon's high standard of proof of venireman incompetence is not required.

Justice Rehnquist urged that Adams is superior because it accords with the traditional reasons for excluding jurors in any kind of case (an approach Witherspoon implicitly rejected in the capital case context). The majority in Witt rejects any distinction between recusal standards for capital and noncapital cases. An "impartial" jury in any case is one which is biased neither for nor against the defendant. The Witt Court was convinced that a jury death-qualified under Witherspoon produces a jury biased in the defendant's favor.

The Witt Court's strongest argument for adopting the Adams standard is the change in death penalty statutes from the Witherspoon era to those of today. In the Witherspoon era, a capital sentencing jury was vested with nearly complete discretion in sentencing. After Gregg v. Georgia, in contrast, a capital case jury is strictly guided by the trial court in its sentencing determination. It may sentence only within the statutory scheme. Under Gregg, the jury may return the death penalty only if it finds one or more aggravating circumstances. The Witt Court reasoned that recusal of a wide class of death-scrupled veniremen will not violate the defendant's sixth amendment right to a fair and impartial jury because the jury is not free to vote its prejudices but can return a verdict of death only in a narrow range of circumstances.

Critique

As already shown, the sixth amendment to the U.S. Constitution guarantees a criminal defendant the right to an impartial jury composed of a fair cross-section of the community. A jury death-qualified under Witt violates these rights. Death qualification under Witt works only to the advantage of the prosecutor regarding conviction and sentencing.

Justice Brennan, dissenting in Witt, argued that the Witt standard produces a biased jury from which an identifiable segment of the community has been excluded.

29. Id.
30. Id. at 851.
31. Id.
32. Id.
33. 428 U.S. 153 (1976). For example, in Wyoming a death sentence may be imposed only if the jury finds an aggravating circumstance in the circumstances of the crime. Among others, these include: the defendant was a prisoner, he had already been convicted of murder, the victim was a police officer. Wyo. Stat. § 6-2-102 (1977).
This conclusion is supported by extensive socio-psychological data adduced in many jury studies. Justice Brennan, in his dissent in Witt, noted these studies but did not base his dissent on them. The federal circuits have taken note of the issue raised by the jury studies and are in conflict as to whether death-qualification produces biased juries in the prosecution's favor. Justice Marshall, dissenting to a denial of a stay of execution in Witt's case, asserted that the high Court must soon take up the issue to resolve the conflict.

With only a single exception, researchers find a strong correlation between conviction proneness and death-qualified juries. For example, Ellsworth and Fitzgerald report that even a jury death-qualified under Witherspoon is more punitive, less sensitive to the defendant's constitutional guarantees, less equitable in its evaluation of defendant's counsel and more willing to ignore the judge's instructions. According to their research, death-qualified juries are more favorable to the prosecution than juries in any other kind of case.

Death-qualified jurors hold the prosecution to a lesser standard of proof, are more likely to be prejudiced against the defendant's assertion of his fifth amendment privilege, are more likely to support punitive as opposed to reformatory measures against defendants, and generally favor the prosecution counsel over the defendant's counsel. In comparison, the Witherspoon-excludable juror is more concerned with the maintenance of

34. In Witherspoon, the Court had before it three studies purporting to show that the exclusion of death-scrupled jurors produced a conviction prone jury. W.C. Wilson, Belief in Capital Punishment and Jury Performance (1964) (unpublished manuscript); F.J. Goldberg, Attitude Toward Capital Punishment and Behavior as a Juror in Simulated Capital Cases (undated) (unpublished manuscript) (since published as Goldberg, Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and the Use of Psychological Data to Raise Presumptions in the Law, 5 HARV. C.R.-C.L. L. REV. 53 (1970)); H. Zeisel, Some Data on Juror Attitudes Toward Capital Punishment (1968). The Court found the data too tentative and fragmentary to establish the proposition. The Court "invited" better proof of the proposition. Witherspoon, 391 U.S. at 520, n.18.

35. Witt v. Wainwright, 105 S.Ct. 1415, 1417 (1985). Courts rejecting the claim on habeas review include: Keeten v. Garrison, 742 F.2d 129 (4th Cir. 1984); McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). Federal courts accepting the argument include: Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), cert. granted sub nom, Lockhart v. McCree, 106 S.Ct. 59 (1985). The California Supreme Court has considered the jury studies in detail. The court was impressed with the fact that the results of all the studies were consistent even though the test subjects included southern college students, northern industrial workers, Illinois or New York jurors, California jurors, or a nationwide sample. Hovey v. Superior Court of Alameda County, 23 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980).

36. Osser & Bernstein, The Death Oriented Jury Shall Live, 1 SAN FERN. V.L. REV. 253 (1968). This study has been severely criticized for methodological error. Cowan, Thompson, & Ellsworth, The Effects of Death Qualification on Juror's Predisposition to Convict and on the Quality of Deliberation, 8 LAW & HUM. BEHAV. 53 (1984) [hereinafter cited as Cowan].


38. Id. at 42.
39. Id.
40. Id. at 43-44.
41. Id.
the fundamental due process guarantees of the Constitution, less punitive, and less mistrusting of the defense.\textsuperscript{42}

In a related study,\textsuperscript{43} the same authors found the best single predictor of juror sentencing is his attitude toward the death penalty (the other predictors analyzed being age, sex, education, previous juror experience, and income).\textsuperscript{44} The more committed the juror is to death as a valid sanction, the greater the likelihood he will return a verdict of death regardless of the circumstances of the case. The authors found that mixed juries\textsuperscript{45} were more critical of both the prosecution and defense witnesses and collectively had a better memory for all the evidence in a case.\textsuperscript{46} Clearly a jury death-qualified under Witt will be even more biased toward the defendant.

Research also shows that death-qualified juries do not represent a fair cross section of the community. Certain significant segments of society are disproportionately removed from juries by the process of death qualification. A person’s attitude toward the death penalty is a reliable indicator of a cluster of social/political attitudes ranging across the whole spectrum of criminal justice issues.\textsuperscript{47}

Death-qualified juries do not represent the population as a whole or the communities of which they are a part. They are not a jury of the defendant’s peers. Research shows that seventeen percent of the population is excludable under the Witherspoon standard.\textsuperscript{48} The process of death qualification excludes more women, blacks, Jews, and atheists, more of the poor, and twice as many Democrats as Republicans.\textsuperscript{49} This group represents a significant segment of the population, the exclusion of which violates the right of the accused to a jury composed of a fair cross section of the community.\textsuperscript{50}

All of these jury studies point to the same conclusion—the defendant’s due process rights are violated by a death-qualified jury.\textsuperscript{51} Though not all capital case juries will manifest the constitutional deficiencies outlined here, as long as some defendants are prejudiced, a death-qualified jury is constitutionally invalid.

\begin{itemize}
\item \textsuperscript{42} Id. at 46, 48.
\item \textsuperscript{43} Cowan, supra note 36.
\item \textsuperscript{44} Id. at 74.
\item \textsuperscript{45} Mixed juries are those composed of both Witherspoon excludables and death-qualified jurors.
\item \textsuperscript{46} Cowan, supra note 36, at 77.
\item \textsuperscript{47} Fitzgerald, supra note 37, at 43.
\item \textsuperscript{48} Id. at 42.
\item \textsuperscript{49} Id. at 46.
\item \textsuperscript{50} Taylor v. Louisiana, 419 U.S. 522, 527 (1975).
\end{itemize}
Wyoming Law

Wyoming criminal procedure incorporates Witherspoon into statute. The statute requires that, in a capital case, a venireman be recused for cause if "his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death."\(^5^2\)

The Wyoming Supreme Court has faced the issue of death qualification in five cases.\(^5^3\) Three of these cases were decided before Witherspoon and reflect the liberal recusal standard of that era.\(^5^4\) In Sims v. State,\(^5^5\) however, the Wyoming Supreme Court held that Witherspoon is the recusal standard in Wyoming.

In Hopkinson v. State,\(^5^6\) (Hopkinson I) the Wyoming Supreme Court affirmed Sims. The court rejected the defendant's claim that it is unconstitutional to allow Witherspoon-excludables to be recused. The court reasoned that if the state were precluded from recusing those veniremen from the jury who were adamantly opposed to the death penalty then the death penalty would not be imposed.\(^5^7\)

What the Wyoming courts or legislature will do post-Witt is an open question. The Wyoming Supreme Court has found Witherspoon's exposition of federal law presumptively correct in Wyoming. The state is bound to comply with federal constitutional standards. Despite this requirement, the state may, if it chooses, provide its criminal defendants with a greater measure of due process protection than the federal constitution requires.\(^5^8\)

The U.S. Supreme Court's power to review state court judgments is limited to those which involve federal questions.\(^5^9\) The Court has consistently upheld the "adequate and independent state ground" doctrine. Under this rule the Court will refuse to exercise its jurisdiction over final state court judgments involving a federal question if there is a nonfederal ground sufficiently broad, independent, and tenable to support the

\(^{55}\) 496 P.2d 185, 188 (Wyo. 1972). The court's holding was also based on its reading of state law.
\(^{57}\) Id. at 158.
\(^{58}\) Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1974). The Wyoming Constitution guarantees to the defendant that "[t]he right of trial by jury shall remain inviolate in criminal cases. . . . Wyo. Const. art. 1, § 9. Also, "[i]n all criminal prosecutions the accused shall have the right . . . to a speedy trial by an impartial jury. . . ." Wyo. Const. art. 1, § 10.
\(^{60}\) Town of Venice v. Murdock, 92 U.S. 494 (1875).
\(^{62}\) Ward v. Love County, 253 U.S. 17 (1920).
judgment.\textsuperscript{63} The Oregon Supreme Court in \textit{Sterling v. Cupp}\textsuperscript{64} outlined a proper sequence of review when a defendant bases his challenge of his conviction on state and federal law. The court reasoned that state law, including its constitution, must first be analyzed before reaching the federal constitutional claim.\textsuperscript{65} In \textit{Michigan v. Long},\textsuperscript{66} however, the Supreme Court made plain what it would demand of decisions of state courts which predicate the grant of a right on both federal and state grounds. The state court must indicate clearly and expressly the alternative and independent state ground in which its decision lies or the Supreme Court will assert jurisdiction over the case.\textsuperscript{67}

The Wyoming Supreme Court has found its role in constitutional interpretation to encompass review of both the state and federal constitutions. In \textit{Richmond v. State},\textsuperscript{68} the court said that federal constitutional guarantees, as announced by the United States Supreme Court, are minimal, and the state constitution and laws may provide a broader locus of procedural rights for criminal defendants. In other cases focusing on the defendant’s right to a fair and impartial jury, the Wyoming court has explicated the right solely in terms of Wyoming constitutional guarantees.\textsuperscript{69}

In the area of juror recusal in capital cases, the Wyoming Supreme Court has held that unwillingness of a juror to inflict the death penalty under any circumstances would constitute an unwillingness to execute the laws of the \textit{State}. The \textit{Pixley} court’s delineation of the \textit{Witherspoon} doctrine in state terms satisfies the \textit{Michigan v. Long} requirement that the independent state ground be clearly expressed. Because Wyoming incorporates the \textit{Witherspoon} standard into state law it meets the minimal federal requirements of \textit{Wainwright v. Witt}. Consequently, \textit{Witt} will have no effect on this provision of Wyoming criminal procedure unless the Wyoming legislature changes the statute. In any future case the Wyoming Supreme Court may continue to provide its capital defendants with a greater measure of due process guarantees by finding the right within the Wyoming, rather than the federal, Constitution.

\textbf{Conclusion}

\textit{Witt v. Wainwright} represents a significant change in the standard by which juries are “death-qualified.” The issue affects the state which is concerned with the effective enforcement of its laws, and the defendant whose life is at stake. The state, faced with a jury which has not been

\begin{itemize}
\item \textsuperscript{64} 290 Or. 611, 625 P.2d 123 (1981).
\item \textsuperscript{65} \textit{Id.} at 614, 625 P.2d at 126.
\item \textsuperscript{66} 463 U.S. 1032 (1983).
\item \textsuperscript{67} \textit{Id.} at 1041.
\item \textsuperscript{68} 554 P.2d 1217, 1223 (Wyo. 1976).
\end{itemize}
death-qualified, might well find it impossible to obtain a conviction or
deadth sentence. A death penalty state might certainly argue only those
who can return the ultimate sanction—only those who can follow the law—
ought to sit on capital case juries. A juror who adamantly opposed the
deadth penalty could not honor his oath if state law allows for capital
punishment.

The defendant’s interests are at least as great, if not greater, than
those of the state. The holding in Witt has prejudiced the defendant’s due
process right to a fair and impartial jury composed of a fair cross-section
of the community. Henceforth, a capital defendant faces a suspicious, in-
tolerant and punitive jury which cares more for its collective interests than
his due process guarantees. The United States Supreme Court must soon
directly face the issues raised by the conviction-proneness studies.\textsuperscript{70}

On March 6, 1985 Johnny Paul Witt was executed in the Florida elec-
tric chair.\textsuperscript{71}

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\textsuperscript{70} On Oct. 7, 1985 the U.S. Supreme Court granted certiorari in Lockhart v. McCree, 106 S.Ct. 59 (1985) to hear petitioner’s claim that juror recusal under Witt produces a convic-
tion and death prone jury.

\textsuperscript{71} Telephone interview with the Information Department, Florida Department of Cor-
rections (February 17, 1986).