Comments

CAPITAL PUNISHMENT

LOCKHART V. MCCREE: UPHOLDING THE PRACTICE OF DEATH QUALIFICATION AGAINST FAIR CROSS-SECTION AND JURY IMPARTIALITY CHALLENGES

In *Lockhart v. McCree*,[1] the United States Supreme Court rejected one of the last broad-based challenges to the death penalty when it ruled that the Constitution does not prohibit states from removing for cause, prior to the guilt phase of a bifurcated capital trial, those prospective jurors whose opposition to capital punishment would prevent or substantially impair the performance of their duty during the sentencing phase of the trial.[2] In a 5-3 vote, the Court rejected McCree's contention that the process of death qualification deprives defendants of their sixth and fourteenth amendment rights to an impartial jury selected from a fair cross-section of the community.[3]

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1. Lockhart v. McCree, 106 S. Ct. 1758 (1986).

2. *Id.*, at 1764-67. This process will be referred to as "death qualification." Those jurors properly removed for cause by the process of "death qualification" will be referred to as "Witherspoon-excludables" after the case which set the original standard for determining whether a juror has been properly excluded because of his scruples against capital punishment. *Id.* at 1761 n.1.

The *Witherspoon* standard required that a juror's opposition to capital punishment must be "unmistakably clear" and that the juror would "automatically" vote against the imposition of the death penalty. Witherspoon v. Illinois, 391 U.S. 510, at 522 n.21 (1968). Today, the controlling standard can be found in Wainright v. Witt, 105 S. Ct. 844 (1984), which only requires that a juror's opposition to capital punishment must "prevent" or "substantially impair" the fulfillment of his duties as a juror before he can be excluded for cause. *Id.* at 852. *See also infra* notes 27, 38-40 and accompanying text.

3. *Lockhart*, 106 S. Ct. at 1764. The Sixth Amendment right to trial by an impartial jury was made applicable to the states via incorporation through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). The fair cross-section requirement has been recognized since 1940 when a unanimous Supreme Court ruled that the wholesale exclusion of racial groups from juries was unconstitutional. Smith v. Texas, 311 U.S. 128 (1940). The Court stated: "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Id.* at 130. *See also* Apodaca v. Oregon, 406 U.S. 404, 410-411 (1972); Williams v. Florida, 399 U.S. 78 (1970); Carter v. Jury Comm'n, 396 U.S. 320 (1970); Brown v. Allen, 344 U.S. 443 (1953); Ballard v. United States, 329 U.S. 187 (1946); Glasser v. United States, 315 U.S. 60, 85-86 (1942).

In addition, the Federal Jury Selection and Service Act of 1968 provided that "[i]t is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the Court convenes." 28 U.S.C. § 1861. In Taylor v. Louisiana, 419 U.S. 522 (1974), the Court quoted from the Act: "[w]e accept the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation." *Id.* at 530.

CASE HISTORY

Ardia McCree was arrested on February 14, 1978, and charged with the shotgun murder of a Camden, Arkansas gift shop owner.[4] Over McCree's objections, the trial judge removed eight prospective jurors for cause during voir dire after they announced that they would be unable, under any circumstances, to impose the death penalty.[5] McCree was convicted of first degree murder and sentenced to life in prison after the jury rejected the prosecution's request that it impose the death penalty.[6]

After his conviction was affirmed on direct appeal,[7] McCree filed a federal habeas corpus petition alleging that the death qualification of the eight prospective jurors at his trial resulted in an impermissibly "conviction-prone" jury.[8] The district court granted McCree habeas relief on the ground that the process of death qualification violated the fair cross-section and impartiality requirements of the sixth and fourteenth amendments.[9]

The district court's decision was based largely on its extensive review of a number of social science studies submitted by the defense during a lengthy evidentiary hearing on the death qualification issue.[10] The studies indicated that death-qualified juries were, as a rule, statistically more conviction-prone than non-death-qualified juries.[11]

The Eighth Circuit Court of Appeals affirmed the district court's decision[12] bringing itself into direct conflict with other federal appeals courts which have handed down contrary rulings on the death qualification issue.[13]

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4. The most complete account of the facts are set forth in McCree v. State, 266 Ark. 465, 467-470, 585 S.W.2d 938, 939-941 (1979).

5. *Id.* at 471-473, 585 S.W.2d at 941-943.

6. *Lockhart*, 106 S. Ct. at 1761.

7. McCree v. State, 266 Ark. 465, 585 S.W.2d 938 (1979).

8. Grigsby v. Mabry, 569 F. Supp. 1273, 1275 (E.D. Ark. 1983). The district court's decision on McCree's habeas petition was appealed to the Eighth Circuit Court of Appeals. Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980). The Eighth Circuit consolidated McCree's petition with two other habeas petitions involving the same claim, remanding the cases back to the district court for an evidentiary hearing on the death qualification issue. The hearing was conducted in July, 1981. *Grigsby*, 569 F. Supp. at 1277. The Eighth Circuit ruled that if the evidentiary hearing indicated that death-qualified juries are more conviction prone, the petitioner will be entitled to habeas relief and a new trial on the grounds that his constitutional rights have been violated. *Grigsby*, 637 F.2d at 525.

9. *Grigsby*, 569 F. Supp. at 1275. Of the three original petitioners, only McCree was granted habeas relief. One of the two other petitioners died shortly before the District Court handed down its decision. The third petitioner's right to habeas relief was found to have been waived due to the lack of a timely objection to the death qualification of his jury. Grigsby v. Mabry, 758 F.2d 226, 229 (8th Cir. 1985).

10. *See infra* note 8.

11. *Grigsby*, 569 F. Supp. at 1291-1308. For an extensive list of the studies relied on by the district court and the Eighth Circuit Court of Appeals, see *Lockhart*, 106 S. Ct. at 1762, 1763 nn.4-5.

In his dissenting opinion, Justice Marshall summed up the studies' results by noting that "[t]he data strongly suggests that death qualification excludes a significantly large subset—at least 11% to 17%—of potential jurors who could be impartial during the guilt phase of the trial. Among the members of this excludable class are a disproportionate number of blacks and women." *Id.* at 1772.

12. Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).

13. *See, e.g.*, Keeton v. Garison, 742 F.2d 129, 133-135 (4th Cir. 1984) (jurors opposed to the death penalty do not constitute a distinct group for fair cross-section purposes). *See also* Smith v. Balkcomb, 660 F.2d 573, 576-578 (5th Cir. 1981), *modified on other grounds*, 671 F.2d 858, *cert. denied sub nom.* Tison v. Arizona, 459 U.S. 882 (1982); Spinkellink v. Wainright, 578 F.2d 582, 594 (5th Cir. 1978); United States ex rel. Clark v. Fike, 538 F.2d 750, 761-762 (7th Cir. 1976), *cert. denied*, 429 U.S. 1064 (1974); Corn v. Zandt, 708 F.2d 549, 564 (11th Cir. 1983).

Although the Eighth Circuit chose not to address McCree's impartiality claim,[14] it did uphold the district court's decision that prospective jurors who are excluded because of their inability to impose the death penalty are a "distinct group" for fair cross-section purposes and that their exclusion violated McCree's sixth amendment right to be tried by a jury composed of a fair cross-section of the community.[15]

The Eighth Circuit's opinion relied heavily on the social science data presented to the district court during its evidentiary hearing. An extensive portion of the court's decision was devoted to a survey of these studies which claimed to show that the process of death qualification results in a more conviction-prone jury.[16]

Although the Supreme Court took issue with the validity of the social science data presented by McCree,[17] it assumed, for the purposes of its opinion, that the studies did in fact support the conclusion that the process of death qualification results in a "somewhat more conviction-prone jury."[18]

As a result of this stipulation, the Court was faced with the issue of whether the Constitution prohibits the states from death qualifying juries, prior to the guilt phase of a capital trial, even if such a process results in juries being "somewhat more conviction-prone" than non-death-qualified juries. The majority addressed this issue by examining both McCree's fair cross-section and jury impartiality challenges in light of the prior cases dealing with death qualification in the limited context of capital sentencing.[19]

WITHERSPOON V. ILLINOIS, ADAMS V. TEXAS, AND *WAINRIGHT V. WITT*: THE LEGAL HISTORY OF DEATH QUALIFICATION

Witherspoon v. Illinois

In *Witherspoon v. Illinois*,[20] the Court addressed the limited question of whether a state could sentence a man to die based on the verdict of a jury from which all death penalty opponents had been excluded in accordance

14. *Grigsby*, 758 F.2d at 229.
15. *Id.*
16. *Id.* at 232-235.
17. *Lockhart*, 106 S. Ct. at 1763-64.
18. *Id.* at 1764. By contrast, the Eighth Circuit assumed that such a finding would automatically require the court to hold for the defendant. The *Grigsby* court stated: "[t]he fundamental issue facing the Court is whether the evidence supports the District Court's finding that a jury with WEs [Witherspoon Excludables] stricken for cause is a conviction prone jury. If the evidence supports this finding then we feel McCree has established his case that there has been a denial of his Sixth Amendment right." *Grigsby*, 758 F.2d at 232.

In *Lockhart*, on the other hand, the Court was willing to concede what had been the crux of the issue for the Eighth Circuit by stipulating that "death qualified" juries are indeed conviction-prone. *Lockhart*, 106 S. Ct. at 1764. The Court refused to concede, however, that the fact that "death-qualified" juries are more conviction prone necessarily leads to the conclusion that the process of death qualification is unconstitutional. *Id.*

The Court noted: "[h]aving identified some of the more serious problems with McCree's studies . . . we will assume for purposes of this opinion that the studies are both methodologically valid and adequate to establish that 'death-qualification' in fact produces juries somewhat more 'conviction-prone' than 'non-death-qualified' juries." *Id.*

19. *Lockhart*, 106 S. Ct. at 1764-66.
20. 391 U.S. 510 (1968).

with a state statute that required such a result.[21]

In *Witherspoon*, 42 prospective jurors were removed for cause at voir dire after they expressed their scruples against imposing the death penalty.[22] The jurors were not asked whether they would be able to impose the death penalty or whether they were able to impartially judge the guilt or innocence of the defendant, but only whether they were personally inclined to favor or oppose that type of punishment.[23]

Although social science studies were presented in support of the contention that such a jury is more conviction-prone,[24] the *Witherspoon* Court was unwilling to hold that the jury was impermissibly partial as an arbiter of guilt and refused to reverse the conviction based on the death qualification of the jury.[25] The Court was willing to reverse Witherspoon's death sentence, however, holding that the systematic exclusion of all jurors who express "conscientious scruples" against the death penalty violates a capital defendants right to an impartial jury during the sentencing phase of a capital trial.[26]

The Court ruled that such a wholesale exclusion of prospective jurors was constitutionally impermissible and implicitly established the standard that opponents of capital punishment may be removed for cause only if they make unmistakably clear (1) that they would "automatically" vote against the imposition of capital punishment, or (2) that their attitudes toward the death penalty would prevent them from making an impartial decision as to the defendants guilt.[27]

Witherspoon's "unmistakable clarity" and "automatic refusal" standard was used in the intervening years to strike down a number of capital sentences in trials involving the death qualification of the jury.[28] By 1980, however, the Court's dicta had eroded the longstanding *Witherspoon* death

21. *Id.*, at 513-514. The statute provided that: "[i]n trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." ILL. REV. STAT., c. 38, Section 743 (1959).

22. *Witherspoon*, 391 U.S. at 514-515.

23. *Id.* at 515. Only five of the 47 venireman excluded explicitly stated that under no circumstances would they vote to impose capital punishment. *Id.* at 514. The *Witherspoon* Court noted that the vast majority of the jurors "were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment." *Id.* at 515.

24. *Witherspoon*, 391 U.S. at 517 n.10. Only three of the fifteen studies presented to the Court in *Lockhart* were also presented to the Court in *Witherspoon*.

25. *Id.* at 517-518. The Court stated: "[t]he data adduced by the petitioner . . . are too tentative and fragmentary to establish that jurors not opposed to the death penalty tend to favor the prosecution in the determination of guilt. We simply cannot conclude, either on the basis of the record now before us or as a matter of judicial notice, that the exclusion of jurors opposed to capital punishment results in an unrepresentative jury on the issue of guilt or substantially increases the risk of conviction." *Id.*

26. *Id.* at 518.

27. *Id.* at 522 n.21. *See also Id.* at 515 n.9.

28. *See, e.g.*, Davis v. Georgia, 429 U.S. 122 (1976); People v. Washington, 71 Cal. 2d 1061, 1091-1092, 458 P.2d 479, 496-497 (1969); Hackathorn v. Decker, 438 F.2d 1363, 1366 (5th Cir. 1971); Maxwell v. Bishop, 398 U.S. 262, 265 (1970).

In Boulden v. Holman, 394 U.S. 478, 483-484 (1969), the Court upheld a *Witherspoon* challenge while emphasizing the importance of what the *Adams* Court would later characterize as "the state's legitimate interest in obtaining jurors able to follow the law. . . ." Adams v. Texas, 448 U.S. 38, 44 (1979). The *Boulden* Court stated: "[I]t is entirely possible that a person who has a 'fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law—to follow conscientiously the instructions of a trial judge and to

qualification standard through a gradual expansion of the circumstances under which the death qualification of a juror was permissible.[29]

Adams v. Texas

In *Adams v. Texas*,[30] the Court addressed the question of whether jurors could be removed for cause under *Witherspoon* if they admitted only that the possible imposition of the death penalty would affect their deliberations.[31] The Court held that the exclusion of jurors who had only acknowledged that they might be affected by the possibility that they would have to sentence someone to death was unconstitutional.[32] A simple acknowledgment by a juror that their deliberations might be affected by the possibility that they would be required to impose the death penalty did not rise to the level of the unalterable opposition required by the *Witherspoon* Court before a state is allowed to remove a juror for cause. Under such circumstances, the Court ruled that the jurors had not made sufficiently clear their unalterable opposition to imposing the death penalty.[33]

While affirming *Witherspoon*'s "unmistakable clarity" and "automatic refusal" requirements,[34] the *Adams* Court used language which would later lead to the rejection of the *Witherspoon* standard. Citing two cases decided since *Witherspoon*,[35] the Court suggested that this line of cases established a "general proposition" that a juror could be challenged for cause based on his views on capital punishment if those views would "prevent or substantially impair" the performance of his duties as a juror in accordance with his in-

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consider fairly the imposition of the death sentence in a particular case." *Boulden*, 394 U.S. at 483-84.

29. *Lockhart*, 106 S. Ct. at 1774. In Lockett v. Ohio, 438 U.S. 586 (1978), the Court had already begun to chip away at the *Witherspoon* standard. In *Lockett*, the Court upheld against a *Witherspoon* challenge the death qualification of a jury where the questions asked at voir dire properly excluded those jurors who merely expressed their inability to "take an oath" that might have required them to "follow the law" and impose the death penalty. *Id.* at 595-96.

Under the *Witherspoon* standard, the Court only allowed the exclusion of jurors who expressed their unalterable inability to impose the death penalty with unmistakable clarity. *See supra* notes 2 and 27 and the accompanying text. In *Lockett*, however, the Court allowed the exclusion of jurors whose opposition to the death penalty would have prevented them from taking "an oath" to "follow the law . . . knowing that a possibility exists in regard to capital punishment." *Lockett*, 438 U.S. at 595-96.

30. 448 U.S. 38 (1980).

31. *Id.* at 42. The Texas statute challenged successfully in *Adams* provided that: "[p]rospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact." TEX. PENAL CODE ANN., § 12.31(b) (Vernon 1974).

32. *Adams*, 448 U.S. at 54-55.

33. *Id.*

34. *Id.* at 44. Quoting the pertinent part of *Witherspoon*'s footnote 21 with approval, the *Adams* Court concluded that "this statement seems clearly designed to accommodate the state's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." *Id.*

35. *Boulden*, 394 U.S. at 483-84; and *Lockett*, 438 U.S. at 586 n.21. The *Adams* Court cited *Boulden* in support of the "state's legitimate interest in obtaining jurors able to follow the law. . . ." *Adams*, 448 U.S. at 44. *See infra* notes 46 and 60 and the accompanying text. The Court cited *Lockett* in support of the argument that prospective jurors were properly excluded if they could not give an affirmative answer to a question as to whether they could take an oath which might require them to impose capital punishment. *Id.* at 45.

structions and his oath.[36]

Wainright v. Witt

In *Wainright v. Witt*,[37] the Court dispensed with *Witherspoon*'s reference to "automatic" decision-making as well as the requirement that a juror's bias be proved with "unmistakable clarity."[38] Instead, the Court adopted the general proposition enunciated in *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment.[39] Thus, what had been described as a general proposition in *Adams v. Texas* now became the substantive standard for determining the constitutional permissibility of death qualification under *Wainright*.[40]

There was other language in the *Adams* opinion which, although ignored by the Court in *Wainright*, would seem to establish what could have been interpreted as a stricter standard for allowing the removal of death penalty opponents for cause.[41]

The standard suggested by this passage makes no mention of criteria involving "substantial impairment" of a juror's duties, but merely provides that: "if prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out."[42] As a result, this "standard" establishes stricter criteria than the "general proposition" enunciated in *Adams* since it does not allow a Court to exclude for cause those jurors whose attitudes toward the death penalty would only "substantially impair" the performance of their duties as jurors unless that impairment resulted in their "inability" to follow the law and carry out the performance of their duties.

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36. *Adams*, 448 U.S. at 45. The Court stated: "[t]his line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The state may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the courts." *Id.* at 45.

The Court continued: "it is clear beyond any peradventure that *Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . ." and that "[t]he state could, consistently with *Witherspoon*, use Section 12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths." *Id.* at 47-48.

37. 105 S. Ct. 844 (1985).

38. *Id.* at 852. The *Wainright* Court criticized the *Witherspoon* standard as a limited holding which subsequent courts had broadened beyond its intended significance. In support of this position it noted that the standard appeared only in a footnote and that "the *Witherspoon* footnotes are in any event dicta." *Id.* at 851.

The *Wainright* Court stated that "[t]he court's holding focused only on circumstances under which prospective jurors could *not* be excluded," and that "under *Witherspoon*'s facts it was unnecessary to decide when they *could* be [excluded]." *Id.* The Court also cited McDonald v. Sanchez, 452 U.S. 130, 141 (1981), a case which supported its position that language from a footnote, such as the footnote in which the *Witherspoon* standard appeared, is "not controlling."

39. *Wainright*, 105 S. Ct. at 851. *See supra* note 36 for the text of the *Adams* standard.

40. *Id.*

41. *Adams*, 448 U.S. at 47-48.

42. *Id.* at 48.

FAIR CROSS-SECTION CONSIDERATIONS

In *Lockhart*, the Supreme Court attacked the Eighth Circuit's use of the fair cross-section requirement[43] on two grounds.[44] First, the Court rejected the lower court's assumption that the fair cross-section requirement applies to either peremptory or for-cause challenges to prospective jurors, or to the composition of petit juries, as opposed to jury panels or venires.[45]

Second, the Court noted that even if it was willing to endorse such a broad application of the fair cross-section requirement, the death qualification of a jury would not violate that requirement.[46] In the past, the Court has required that fair cross-section claims be based on the systematic exclusion of a "distinctive group" in the community.[47] The Court was unwilling to recognize prospective jurors excluded because of shared attitudes as a "distinct group" for fair cross-section purposes.[48]

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43. *See supra* note 3 and accompanying text for the history of the fair cross-section requirement.

44. *Lockhart*, 106 S. Ct. at 1764-65.

45. *Id.* The *Lockhart* Court cited Taylor v. Louisiana, 419 U.S. 522 (1975), and Pope v. United States, 372 F.2d 710 (8th Cir. 1967), in support of its position that the fair cross-section requirement only requires that petit juries *be selected from* a fair cross section of the community as opposed to *being composed of* a fair cross-section of the community.

The *Taylor* Court stated: "[w]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinct groups in the population." *Taylor*, 419 U.S. at 538.

The *Pope* court stated: "[t]he point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn." *Pope*, 372 F.2d at 725.

46. *Lockhart*, 106 S. Ct. at 1765.

47. Duren v. Missouri, 439 U.S. 357, 363-364 (1979).

48. *Lockhart*, 106 S. Ct. at 1765. While refusing to define the term "distinct group," the Court did note that "the concept of 'distinctiveness' must be linked to the purposes of the fair cross-section requirement identified in *Taylor* as . . .:

1) "guarding against the exercise of arbitrary power" and ensuring that the "common-sense judgement of the community" will act as a hedge against the overzealous or mistaken prosecutor.
2) preserving "public confidence" in the fairness of the criminal justice system," and
3) implementing our belief that "sharing in the administration of justice is a phase of civil responsibility."

Taylor, 419 U.S. at 530-531. *See also supra* note 43.

Using these fair cross-section purposes as a rough guideline for identifying "distinctive groups," the *Lockhart* Court noted that cases which involve the wholesale exclusion of a "distinctive group" contravenes all three of the purposes of the fair cross-section requirement. *Lockhart*, 106 S. Ct. at 1765. The Court reasoned that the exclusion from jury service of large groups of individuals not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, gender, or ethnic background . . .:

A. creates a risk of juries being arbitrarily skewed in such a way as to deny criminal defendants of the common-sense judgement of the community;
B. gives rise to an "appearance of unfairness," and, . . .
C. improperly deprives members of historically disadvantaged groups of their rights as citizens to serve on juries in criminal cases.

Id. at 1765-66.

The Court noted that the "*Witherspoon*-excludables" at issue in *Lockhart* are not a "distinct group" for fair cross-section purposes because their removal contravenes none of the purposes of the fair cross-section requirement. *Id.* at 1766.

In the first place, their removal through the process of "death qualification" "is carefully designed to serve the state's concededly legitimate interest in obtaining a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phase of a capital trial." *Id.* This is supposed to dispel the fear that "death qualification" contravenes the first

Although the Court refused to define the term "distinct group,"[49] it drew a sharp distinction between the jurors excluded because of their scruples against imposing the death penalty and other groups such as blacks, women, and Mexican-Americans who have traditionally been identified as a "distinct group" for fair cross-section purposes.[50] The Court based this distinction on the case history of the fair cross-section requirement which revealed that "distinct groups" were traditionally excluded because of an attribute which was not within their control, and which had nothing to do with their ability to serve as jurors. The "*Witherspoon*-excludables," on the other hand, are being removed precisely because they have acknowledged their inability to fulfil their duties as a juror by following the law and imposing the death penalty once an individual's guilt has been decided.[51]

The Court stated that while there is no legitimate state purpose in excluding "distinct groups" from jury service because of an attribute totally unrelated to their ability to serve as jurors, it is a "perfectly legitimate" state interest to remove a juror if that is what is necessary to obtain a single jury that can properly and impartially apply the law to the facts of the case at both the guilt and sentencing phases of a capital trial.[52]

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purpose of the fair cross-section requirement by showing that the process was not instituted by the state in order to *arbitrarily* skew the composition of capital-case juries.

Second, "*Witherspoon*-excludables" are not singled out because of some immutable characteristic but solely because of their inability to follow the law which does not result in the "appearance of unfairness" and therefore contravene the second purpose of the fair cross-section requirement. *Id.*

Finally, "the removal for cause of '*Witherspoon* excludables' does not contravene the third purpose of the fair cross-section requirement since it does not prevent them from serving as jurors in other criminal cases, and thus leads to no deprivation of their basic rights of citizenship." *Id.*

49. *Lockhart*, 106 S. Ct. at 1764.

50. *Id.*, at 1766. *See, e.g.*, Peters v. Kiff, 407 U.S. 493 (1972) (prohibited the wholesale removal for cause of blacks under an equal protection challenge); Duren v. Missouri, 439 U.S. 357 (1979), and Taylor v. Louisiana, 419 U.S. 522 (1975) (both prohibited the wholesale removal for cause of women under a fair cross-section challenge); Castaneda v. Partida, 430 U.S. 482 (1977) (prohibited the wholesale removal for cause of Mexican-Americans under an equal protection challenge).

51. *Lockhart*, 106 S. Ct. at 1766. The Court stated: "unlike blacks, women, and Mexican-Americans, '*Witherspoon*-excludables' are singled out for exclusion in capital cases on the basis of an attribute that is within the individuals control. It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law." *Id.*

The *Lockhart* Court cited Lockett v. Ohio, 438 U.S. 586 (1978), in support of its position that any group defined solely in terms of shared attitudes may be excluded from jury service without contravening any of the basic requirements of the fair cross-section requirement if the shared attitude renders members of the group unable to serve as jurors in a particular case. *Id.* at 597.

While the Eighth Circuit recognized the necessity of removing *Witherspoon*-excludables from the sentencing phase of a capital trial, they ruled that they shouldn't be excluded during the guilt phase of the trial, where their ability to serve as jurors is not necessarily compromised by their inability to impose the death penalty, if it is shown that their absence results in a more conviction prone jury. *See supra* note 18. The Eighth Circuit suggested that in order to protect a defendant's sixth amendment rights, the states should either provide alternate jurors to replace the "*Witherspoon*-excludables" during the sentencing phase of a capital trial or have two separate juries impaneled for each phase of a bifurcated capital trial. *Grigsby*, 758 F.2d at 243.

The *Lockhart* Court rejected such a requirement as an unnecessary burden on an already overburdened criminal justice system. *Lockhart*, 106 S. Ct. at 1767. The Eighth Circuit had modified the district court's ruling that the states are required to impanel two juries in a bifurcated capital trial, *Grigsby*, 569 F. Supp. at 1319-20, and left the method for protecting a defendant's sixth amendment rights up to the individual states. *Grigsby*, 758 F.2d at 243.

52. *Lockhart*, 106 S. Ct. at 1766. *See infra* notes 69, 70, 75, 76, 102, 106 and accompanying text.

JURY IMPARTIALITY CONSIDERATIONS

The Supreme Court first examined the issue of jury impartiality in *Irvin v. Dowd*,[53] where it ruled that an individual juror is impartial if he can lay aside his impression and opinion and render a verdict based solely on the facts presented in Court.[54] Since *Irvin*, the Court has applied this individual measure of impartiality to the jury, but only in the sense that the impartiality of the jury is measured by the individual impartiality of its members.[55]

McCree's challenge focused not on the impartiality of the individual jurors, however, but on the charge that the exclusion of the "*Witherspoon*-excludables" slanted the entire jury in favor of conviction."[56] As a result, McCree's jury impartiality claim would have required the Supreme Court to venture beyond the established case law which has traditionally focused on the individual jurors rather than on the jury as a whole.[57]

The Court noted that McCree conceded that the individual jurors who served at his trial were impartial[58] and that none of the cases involving traditional jury impartiality could be applied to his situation.[59] While stipulating that the social science studies had established that death-qualified juries were "somewhat more conviction-prone"[60] than non-death-qualified juries, the Court was not willing to expand their traditional definition of jury impartiality to identify the conviction proneness of a jury with partiality where the individual jurors are impartial.[61]

The Court's ruling on the impartiality issue was based on its claim that McCree's position required that a constitutionally-permissible jury can be constructed only by balancing the various predispositions of the individual jurors.[62] The Court criticized this position as "illogical" and "hopelessly impractical" noting that the same jury could have been selected by mere chance, absent the process of death qualification, without violating the constitutional guarantee of impartiality.[63] The Court also argued that McCree's position would very likely require the prohibition of peremptory challenges since they alter the perfect balance of individual viewpoints McCree claimed is required by the Constitution.[64]

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53. 366 U.S. 717 (1961). The *Irvin* Court characterized the right to a jury trial as guaranteeing "to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Id.* at 723.

54. *Id.*

55. The *Wainright* Court ruled that an impartial jury consists of nothing more than "jurors who will conscientiously apply the law and find the facts." *Wainright*, 105 S. Ct. at 852.

56. *Lockhart*, 106 S. Ct. at 1767. *See also* Brief for Respondent at 65-67. Lockhart v. McCree, 106 S. Ct. 1758 (1986). For a more detailed examination of McCree's argument *see infra* notes 63-64 and accompanying text.

57. *See supra* notes 51-53 and accompanying text.

58. *Lockhart*, 106 S. Ct. at 1767. *See also* Brief for the Respondent, at 65-67. McCree conceded in his brief that the conclusion that a jury from which a group of individuals with shared attitudes has been excluded is conviction-prone does not imply a criticism of the impartiality of the individual jurors who were not excluded.

59. *Lockhart*, 106 S. Ct. at 1767. *See, e.g.*, Rideau v. Louisiana, 373 U.S. 723 (1963) (pre-trial publicity); Remmer v. United States, 347 U.S. 227 (1954) (ex parte communications); Estes v. Texas, 381 U.S. 532 (1965) (other undue influence).

60. *See supra* note 18 and accompanying text.

61. *Lockhart*, 106 S. Ct. at 1767.

62. *Id.*

63. *Id.*

64. *Id.*

The Court misstated McCree's impartiality claim, however. McCree did not contend that the Constitution requires a certain mix of individual viewpoints on a jury.[65] Both McCree's fair cross-section and impartiality challenges to the process of death qualification were based on the argument that the Constitution forbids the state from manipulating the mix of individual viewpoints so that a more conviction-prone jury results than had the state not manipulated the mix of individual viewpoints on the jury.[66]

If the same mix of individual viewpoints resulted by chance, McCree would have had no complaint since the conviction proneness of the jury would not have been the result of state manipulation. In addition, McCree's view of jury impartiality would not, as the Court suggests,[67] forbid the use of peremptory challenges since they are necessarily limited and available to both the defense and the prosecution. The process of death qualification, on the other hand, involves unlimited challenges for cause available only to the state.[68]

In essence, the Court has begged the question in its favor when it interprets McCree's position as demanding that the Constitution requires a certain mix of individual viewpoints on the jury.[69] The real question, which lies at the core of McCree's challenge, is whether the Constitution forbids a person from being convicted by a jury that has been death qualified by the state and, as a result of this process, is more conviction prone than a jury which has not been death qualified.[70]

The *Lockhart* Court's answer is no; it is constitutionally permissible for a state to manipulate a jury so that it is "somewhat more conviction prone," so long as the state action which resulted in the conviction proneness of the jury is done in furtherance of a legitimate state interest[71]—in this case, a desire to have a unitary jury system in all capital cases.[72]

The Court's reasoning is based on the principle that "the 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, so long as the individual jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case."[73] It is a reasoning which blurs the issues involved in the case by fo-

65. Brief for Respondent at 65-67.

66. *Id.* While conceding that "[a] juror is fair and impartial if he can base his decision solely on the evidence and the law," and that it is a common occurrence that "different fair and impartial jurors may reach opposing decisions," McCree argued that "[t]he rule is that neither of these legitimate points of view may be *systematically culled* from the jury. That is the result sought by McCree and ordered by the Court below." *Id. See also Lockhart*, 106 S. Ct. at 1775.

67. *See supra* note 62 and accompanying text.

68. T. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUE (1980), ch. 2.

69. *See supra* notes 60-63 and accompanying text.

70. *See supra* notes 54, 64 and accompanying text.

71. *See supra* note 50 and accompanying text. The Court reasoned that a defendant's right to be tried by a jury capable of rendering a fair and impartial determination of his guilt or innocence is outweighed by the state's interest in not being required to impanel two juries for each capital case. The Court ruled that the burden of such an accommodation of the defendant's rights would be too great for the state to bear and reaffirmed the state's interest in having a unitary jury system for all capital cases. *See also infra* notes 70, 75, 76, 102, 106, and accompanying text.

72. *Id.*

73. *Lockhart*, 106 S. Ct. at 1770.

cusing on the constitutional permissibility of the result, the impartiality of the individual jurors on the somewhat more conviction prone jury, while ignoring the constitutionality of the process which achieved the result.[74]

This is why the Court finds it so hard to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a state-ordained process, yet impartial when exactly the same jury results from mere chance.[75] The issue is not that one jury is partial and the other impartial. While the final result is that each jury is equally partial, one jury has been created through a state-ordained process that is constitutionally impermissible while the other has not.

The fact that the state has deliberately created a somewhat more conviction prone jury, albeit composed of individually impartial jurors, does not enter the equation when the Court determines the constitutional limits of jury partiality. Instead, the Court assumes the impartiality of the death-qualified jury[76] and then weighs the defendant's interest in not being tried by a conviction prone jury against the state's interest in maintaining a unitary jury system in all capital cases.[77] Regardless of how legitimate the state's interest in maintaining a unitary jury system may be, a capital defendant's sixth and fourteenth amendment rights to have his case tried by a jury capable of rendering a completely fair and impartial determination of his guilt or innocence should not be sacrificed to a negligible administrative convenience.[78]

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74. The dissenting justices were able to keep a clearer focus on the distinction between the two issues. "Respondent does not claim that any individual on the jury that convicted him fell short of the constitutional standard for impartiality," Justice Marshall noted. "Rather, he contends that by systematically excluding a class of potential jurors less prone than the population at large to vote for conviction, the state gave itself an unconstitutional advantage at his trial." *Id.* at 1775.

75. "Even accepting McCree's position that we should focus on the *jury* rather than the individual *jurors*," the Court noted, "it is hard for us to understand the logic of the argument that a given jury is unconstitutionally partial when it results from a State-ordained process, yet impartial when exactly the same jury results from mere chance." *Id.* at 1767. In his dissenting opinion, Justice Marshall explained the logic of McCree's argument by noting that "even though a non-biased selection procedure might have left him with a jury composed of the very same individuals that actually sat on his panel, the process by which those twelve individuals were chosen violated the Constitution." *Id.* at 1775.

76. *Id.* at 1770.

77. *See supra* notes 50, 69, 70, and *infra* notes 76, 102, 106, and accompanying text.

78. *Id.* Once the issue has been reduced to such a seemingly simple balancing test it becomes difficult to follow the court's reasoning. Start with the uncontested fact that death-qualification is a general exclusionary practice used by the state to systematically alter jury composition in capital trials. Individuals whose opposition to capital punishment renders them incapable of sitting on a jury during the penalty phase of a capital trial are removed from the jury prior to the guilt phase of the trial even though they are perfectly capable of obeying their oath by fairly and impartially determining the defendant's guilt or innocence. Then consider that the Court has stipulated that when a State death-qualifies a jury by excluding such individuals, it systematically alters jury verdicts to the detriment of the defendant by producing a somewhat more conviction prone jury.

It is hard to understand why the court is unwilling to hold that it is constitutionally impermissible for the state to use a process that produces a jury somewhat more conviction prone than had the state not altered the composition of the jury in the first place. it is even more difficult to understand how such a result can be justified by citing the administrative cost and inconvenience involved in requiring states to impanel separate juries to determine the guilt and penalty phase of each capital trial.

In his dissenting opinion, Justice Marshall argued that, "the additional costs that would be imposed by a system of separate juries are not particularly high. . . ." "In a system using separate juries for guilt and penalty phases, time and resources would be saved every time a capital case did not require a penalty phase," Marshall noted, arguing that "it cannot be fairly said that the costs of

NON-APPLICABILITY OF THE *ADAMS-WITHERSPOON* PRECEDENTS TO *LOCKHART V. MCCREE*

The Court also rejects McCree's claim that, by analogy to his situation, the precedents set by both *Witherspoon* and *Adams* forbids a state from removing for cause a group of jurors who are more likely to favor the defendant than the population at large.[79] McCree argued that the Court's decisions in the two cases imply that such a practice is unconstitutional because it "slants" the jury in favor, of conviction.[80] The Court flatly denied that the cases stood for such a proposition and drew two distinctions between the scope of the precedent set by *Witherspoon* and *Adams* and the circumstances surrounding the present case.[81]

The State's Interest in a Unitary Jury System As a Neutral Justification of Death Qualification

The first distinction drawn by the Court involves the differences between the death qualification process used by Illinois in *Witherspoon*, and by Texas in *Adams*, as opposed to the use of the process by Arkansas in *Lockhart*.

The State of Arkansas excluded from McCree's jury only those prospective jurors who could be properly excluded from the penalty phase of the deliberations under *Witherspoon, Adams,* and *Wainright v. Witt*.[82] The death qualification process used in *Witherspoon* and *Adams*, on the other hand, improperly excluded jurors and was therefore declared unconstitutional.[83]

Both Texas and Illinois were unable to point to a neutral justification for its systematic exclusion of all jurors who expressed any scruples against capital punishment.[84] The Illinois statute overturned by the Court in *Witherspoon*, for instance, was designed with the specific purpose of making the imposition of the death penalty more likely.[85] In contrast, in Arkansas, "[r]emoval for cause of '*Witherspoon*-excludables' serves the State's entirely

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accomodating a defendant's constitutional rights under these circumstances are prohibitive or even significant." *Lockhart*, 106 S. Ct. at 1781.

One authority cited by Marshall examined the costs that would be incurred by states required to maintain a bifurcated jury system in capital cases and concluded that the administrative expense and inconvenience would not be nearly as severe as the *Lockhart* Court suggests:

> "First, capital cases constitute a relatively small number of criminal trials. Moreover, the number of these cases in which a penalty determination will be necessary is even smaller . . . Even in cases in which a penalty determination will occur, the impaneling of a new penalty jury may not always be necessary. In some cases it may be possible to have alternate jurors replace any 'automatic life imprisonment' jurors who served at the guilt determination trial."

Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 57 (1982).

79. *Lockhart*, at 1767-70.

80. *Id.* at 1767.

81. *Id.* at 1767.

82. Wainwright v. Witt, 105 S. Ct. at 852. *See supra* note 2 for standard set in *Wainwright*. *Lockhart*, 106 S. Ct. at 1769.

83. *Lockhart*, 106 S. Ct. at 1769.

84. *Id.* at 1769.

85. *Id.* at 1768.

proper interest in obtaining a single jury that could impartially decide all of the issues in McCree's case.[86]

This distinction raises the question of what would be required in future challenges to prove that the state impermissibly manipulated the jury. McCree suggested that a common example of such manipulation can be found in a practice whereby prosecutors ask for the death penalty in order to death qualify the jury only to waive the capital sentence once a favorable jury has been assembled.[87] Because the state did not waive the death penalty in McCree's case, the Court refused to consider the implications of this type of potential abuse for future challenges.[88] In his dissent, Justice Marshall was not too optimistic about the success of future challenges based on this argument given the difficulty of proving the state's prior intent and motivations for making any given tactical decision.[89]

The Applicability of Adams *and* Witherspoon *Outside The Context of Capital Sentencing*

The second distinction drawn by the Court involves the fact that both *Witherspoon* and *Adams* dealt with the special context of capital sentencing, while *Lockhart* involved the effect of death qualification during the guilt phase of a capital trial.[90]

In drawing such a distinction, the Court focused on the range of discretion exercised by the jury during the guilt and sentencing phases of a capital trial.[91] The range of jury discretion is greater during the sentencing phase of a capital trial than the range of discretion exercised by the jury during the guilt phase of the trial.[92] During the culpability phase of a capital trial the jury's discretion is narrowly channeled by the nature of its task; to determine the guilt or innocence of a defendant by determining whether a given set of historical facts have occurred. During the sentencing phase of the trial, on the other hand, the nature of the jury's task involves the exercise of a wider range of discretion since they are required to make a value judgement as to whether the nature of the crime warrants the imposition of the death penalty. According to the Court, this distinction should give rise to a greater concern about the effect of death qualification on the outcome of jury deliberations during the sentencing phase of a capital trial than during the culpa-

86. *Id.*

87. *Id.* at 1766 n.16, and *id.* at 1772-73 n.4. McCree claimed that the process of death qualification is susceptible to abuse by prosecutors who use it solely as a means of manipulating the jury regardless of whether they intend to eventually ask for the death penalty. In McCree's original habeus hearing the district court recognized the potential for the abuse of death qualification when it suggested that many prosecutors had initially sought the death penalty only to get a more conviction prone, death-qualified jury. *Grigsby*, 483 F. Supp. at 1389 n.24.

As the district court noted, this charge is not a new one. As early as 1961, when the controversy over death qualification was in its infancy, a law review article argued that prosecutors may routinely take advantage of the opportunity death qualification provides to ensure a conviction prone jury. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 TEXAS L. REV. 545, 555, n.45(b) (1961).

88. Lockhart v. McCree, 106 S. Ct. at 1766 n.16.

89. *Id.* at 1772 n.4.

90. *Id.* at 1769.

91. *Id.* at 1769-70.

92. *Id.*

bility phase of the trial.[93]

The Court argues that since the effect of death qualification on a jury's deliberations is more dangerous during the sentencing phase of a capital trial, a more stringent standard is required when the jury's impartiality during the sentencing phase is at issue (as it was in *Witherspoon* and *Adams*) than when the jury's impartiality during the culpability phase is at issue (as it was in *Lockhart*).[94] This line of reasoning leads the Court to "reject McCree's suggestion that *Witherspoon* and *Adams* have broad applicability outside the special context of capital sentencing."[95]

In his dissenting opinion, Justice Marshall rejected the majority's distinction between the discretionary nature of the jury's role during the sentencing and culpability phases of a capital trial.[96] Joined in his dissent by Justices Brennan and Stevens, Marshall argued that the role of a jury during the two phases of a bifurcated capital trial is nearly indistinguishable and that the precedent set by *Witherspoon* and *Adams* are just as applicable to the effect of death qualification on the jury's deliberations during the culpability phase of a capital trial as it is to the effect of death qualification during the sentencing phase of the trial.[97]

Marshall also noted that the *Witherspoon* Court had anticipated the very set of circumstances considered by the Court in *Lockhart*.[98] In a footnote to *Witherspoon*, the Court speculated that a defendant convicted by a death qualified jury in some future case "might still attempt to establish that the jury was less than neutral with respect to guilt."[99] This is precisely what the Court was willing to stipulate in *Lockhart* when it assumed, arguendo, that a death qualified jury was somewhat more conviction prone.[100]

The *Witherspoon* Court noted that once a lack of neutrality had been shown, the question becomes "whether the state's interest in submitting the penalty issue to a jury capable of imposing capital punishment may be vindicated at the expense of the defendant's interest in a completely fair determination of guilt or innocence."[101] While expressly disclaiming any intimation

93. *Id.*

94. *Id.*

95. *Id.* at 1770.

96. *Id.* at 1777.

97. *Id.* "The message of *Adams* is thus that even where the role of the jury at the penalty stage of a capital trial is limited to what is essentially a fact-finding role, the right to an impartial jury established in *Witherspoon* bars the State from skewing the composition of its capital juries by excluding scrupled jurors who are nonetheless able to find those facts without distortion or bias. This proposition cannot be limited to the penalty stage of a capital trial, for the services that Adams' jury was called upon to perform at his penalty stage 'are nearly indistinguishable' from those required of juries at the culpability phase of capital trials." Gillers, *Proving the Prejudice of Death-Qualified Juries after Adams v. Texas*, 47 U. PITT. L. REV. 219, 247 (1985).

98. *Id.* at 1776. Justice Marshall stated: "In *Witherspoon*, the Court observed that a defendant convicted by a jury from which those unalterably opposed to the death penalty had been excluded might still attempt to establish that the jury was less than neutral with respect to *guilt*. Respondent has done just that. And I believe he has succeeded in proving that his trial by a jury so constituted violated his right to an impartial jury, guaranteed by both the Sixth Amendment and principles of due process. . . ." *Id.* at 1775 (footnotes omitted).

99. *Witherspoon*, 391 U.S. at 520 n.18.

100. *Lockhart*, 106 S. Ct. at 1764.

101. *Witherspoon*, 391 U.S. at 520 n.18.

of a view as to the proper resolution of the conflict,[102] the Court did suggest "the possibility of accommodating both interests by means of a bifurcated trial, using one jury to decide guilt and another to fix punishment."[103]

As has been discussed previously, this solution was recommended by McCree and rejected by the *Lockhart* Court.[104] The Court found that such an accommodation of the defendant's rights would be overburdening to both the state as well as the defendant.[105]

The fact that the process of death qualification results in a "somewhat more conviction prone" jury,[106] and therefore impinges on a defendant's interest in having a completely fair determination of his guilt or innocence,[107] is balanced against the state's interest in having a single jury that can impartially apply the facts to the case during the guilt and penalty phases of a capital trial.[108] By reaffirming the state's interest in having a unitary jury system for all capital cases, the *Lockhart* Court has rejected the defendant's right to be tried by a jury capable of rendering a completely fair determination of his guilt or innocence.

CONCLUSION

The Court's decision in *Lockhart* has had, and will continue to have, a wide ranging impact on the outcome of capital cases. For instance, the ruling immediately cancelled several dozen stays of execution granted to death row inmates pending the outcome of the case.[109] It also affected most of the pending appeals among the 1,714 inmates now on death row by automatically leaving their convictions intact.[110] In addition, its impact will be felt by several thousand convicted defendants who, like McCree, received a prison sentence instead of the death penalty after being convicted by a death qualified jury during a capital trial.[111]

The ruling also represents, as one news account noted, "a substantial setback for death-penalty foes who saw the case as one of the few remaining broad-based attacks on capital punishment."[112] In *McClesky v. Kemp*,[113] the Supreme Court rejected the last broad-based challenge to the constitutionality of capital punishment:[114] the Court ruled that Georgia's capital punishment scheme was not unconstitutional, even though several studies showed a systematic pattern of racial bias that resulted in the death penalty

102. *Id.* The Court stated: "[t]hat problem is not presented here, however, and we intimate no view as to its proper resolution."
103. *Id.*
104. *See supra* notes 50, 69, 70, 75, 76, and accompanying text.
105. *Id.*
106. *See supra* notes 18 and accompanying text.
107. *Witherspoon*, 391 U.S. at 520 n.18. Although they did not address the question of how much weight the court should give to this interest, the *Witherspoon* Court explicitly recognized that the defendant did have an interest in the "completely fair determination of his guilt or innocence."
108. *See supra* notes 50, 69, 70, 75, 76, 102, and accompanying text.
109. Washington Post, May 6, 1986, at p. A8.
110. *Id.* at p. A1, A8.
111. The Los Angeles Times, May 6, 1986, at p. 1.
112. *Id.* at 1.
113. McClesky v. Kemp, 107 S. Ct. 1756 (1987).
114. The Washington Post, May 6, 1986, at p.A8.

being imposed more often when the defendants are black and the victims are white.[115] For the first time since the death penalty was reinstated in 1976,[116] individual defendants are now left to challenge their convictions on a case-by-case basis.[117]

Nicholas Hentoff

115. McClesky'a argument, that race is systematically influencing death sentences in the state or Georgia, is based on two comprehensive studies of Georgia sentencing which show that capital defendants who kill white victims are nearly eleven times more likely to receive the death penalty than are these who kill black victims. Among those indicted for killing whites, black defendants receive death sentences three times as often as white defendants.

116. Gregg v. Georgia, 428 U.S. 153 (1976).

117. The Washington Post, May 6, 1986, at p.A8.