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Constitutional Law—Death-Qualified Juries Are Not Prohibited by the Sixth Amendment Right to a Fair and Impartial Jury

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NOTES

CONSTITUTIONAL LAW—DEATH-QUALIFIED JURIES ARE NOT PROHIBITED BY THE SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

On the morning of February 14, 1978, a gift shop and service station in Camden, Arkansas was robbed and the owner shot and killed. Ardia McCree was arrested and tried for capital murder. At voir dire, the trial judge excluded for cause eight prospective jurors who stated that they could not under any circumstances vote to impose capital punishment. McCree was convicted of capital felony murder and sentenced to life in prison. The conviction was affirmed on appeal.[1] Following an unsuccessful petition for post-conviction relief in state court, McCree petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of Arkansas.[2] McCree argued that the death-qualification of prospective jurors violated his right to be tried by a fair and impartial jury selected from a representative cross section of the community.[3]

In August 1983, the district court concluded that death-qualification produces juries that are conviction prone. The court held that death-qualification violates both the fair cross section and impartiality requirements of the sixth and fourteenth amendments.[4] In a five-to-four decision, the United States Court of Appeals for the Eighth Circuit affirmed, finding that substantial evidence existed for the district court

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

2. McCree's habeas petition was consolidated with the habeas petitions of James Grigsby and Dewayne Hulsey. The Grigsby and Hulsey petitions asserted the same claim as did McCree's and had previously been remanded by the Eighth Circuit for an evidentiary hearing in the district court. Grigsby v. Mabry, 637 F.2d 525 (8th Cir. 1980). The district court dismissed Grigsby's petition upon learning of his death in 1983. Hulsey's petition was held to be procedurally barred under Wainwright v. Sykes, 433 U.S. 72 (1977), since he made no contemporaneous objection regarding death-qualification.

3. Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983).

4. *Id.*

to conclude that death-qualification produces conviction-prone juries.[5] The court found Arkansas' jury selection process unconstitutional and implicitly ordered the state to adopt a method consistent with the Constitution.[6] The United States Supreme Court granted certiorari and reversed the Eighth Circuit. The Court held that death-qualification does not violate the defendant's constitutional rights. *Lockhart v. McCree*, 106 S. Ct. 1758 (1986).

Death-qualification is a process by which prospective jurors are dismissed for cause if they express unwillingness to impose capital punishment during questioning at voir dire. Traditionally, the sole function of the jury in capital cases was to determine guilt or innocence. The penalty of death followed as a matter of law. Therefore, courts deemed it vitally important to death-qualify the jury. It was believed that nondeath-qualified juries tended to acquit, this being the only means by which opposition to capital punishment could be asserted. The fear was that failure to death-qualify a jury would result in the placement of veniremen on the jury who would ignore the evidence and law, and decide guilt or innocence according to their attitude toward capital punishment. To protect the administration of criminal law from a possible subversion of justice, state legislatures enacted statutes that gave courts discretion to disqualify veniremen who expressed scruples against imposing capital punishment. In the absence of such statutes, the same result was achieved through case law.[7]

As the humanitarian movement spread through the country, use of the mandatory death sentence declined and juries were vested with discretion to impose sentences other than death.[8] Arguably, such discretion would mitigate the concern for unjustified acquittal. However, courts continued to death-qualify juries.[9] Any manifestation of hesitance to impose capital punishment was often sufficient to justify exclusion.[10] The general attitude was that such exclusion was properly left to the discretion of the trial judge.[11] Most courts did not consider whether prospective jurors with scruples against imposing capital punishment could determine guilt independently from punishment.[12]

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

6. *Id.* at 243.

7. Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt*, 39 TEX. L. REV. 545, 550 (1961).

8. *Id.* Juries were given discretion to impose life sentences in lieu of death.

9. *Id. See, e.g.*, State v. Williams, 50 Nev. 271, 278, 257 P. 619, 621 (1927).

10. Oberer, *supra* note 7, at 547.

11. *Id.* at 548.

12. *Id.* at 550-51.

Beginning in the 1800's, the United States Supreme Court held that a state's systematic exclusion of a constitutionally cognizable group violated the defendant's right to a fair trial under the equal protection clause of the fourteenth amendment.[13] In 1947, the Supreme Court held that a defendant's right to equal protection would be violated if the trial court were vested with discretion to exclude certain categories of veniremen[14] from the jury selection process, and such exclusion resulted in the increased probability of conviction.[15]

In 1968, the issue of death-qualification reached the United States Supreme Court. In *Witherspoon v. Illinois*,[16] the petitioner argued that the exclusion of veniremen who harbored reservations about the death penalty denied him a fair trial. The Court agreed and held that a death penalty could not be carried out if veniremen who voiced general disfavor with imposing capital punishment were excluded from the jury.[17] The Court concluded that a state did not have a valid interest in such a broad-based rule of exclusion because those opposed to capital punishment could still follow their oath and impartially apply the law.[18] However, the Court in *Witherspoon* suggested that the state might have a valid interest in excluding jurors on grounds more narrowly drawn. The Court recognized that a trial court could continue to exclude prospective jurors "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 trial . . . or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*."[19] These veniremen are typically referred to as "*Witherspoon excludables*"

13. Strauder v. West Virginia, 100 U.S. 303 (1879) (holding unconstitutional a state statute that gave trial courts authority to exclude blacks from jury service).

14. Courts could exclude disqualified or exempted persons; all persons convicted of criminal offenses or found guilty of fraud and misconduct by judgment of a civil court; all persons who held conscientious objections to capital punishment; and all persons who doubted their ability to impartially decide the issue in question. Such a selection process resulted in a significant reduction in the number of eligible veniremen. *See, e.g.*, Fay v. New York, 332 U.S. 261 (1947).

15. *Id. See also* Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (the exclusion of wage earners from the jury panel was unconstitutional); Ballard v. United States, 329 U.S. 187 (1946) (the exclusion of women from the jury panel was unconstitutional); *see* White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973). ("This equal protection analysis is analogous to that which would be applied in determining whether a fundamental constitutional right should be protected under the due process clause.") *Id.* at 1201, n.131.

16. 391 U.S. 510 (1968).

17. *Id.* at 522.

18. *Id.* at 519.

19. *Id.* at 522-23, n.21 (emphasis in original).

("WE's").[20]

The petitioner in *Witherspoon* also argued that death-qualification produced nonrepresentative or conviction prone juries.[21] The Court rejected this argument, concluding that "[t]he data adduced . . . 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."[22] This language invited further litigation on the issues of whether a death-qualified jury is fairly representative of a cross section of the community and whether such juries are conviction prone.[23]

The controlling cases on the fair cross section issue are *Taylor v. Louisiana*[24] and *Duren v. Missouri*.[25] *Taylor* established a criminal defendant's right to be tried by a jury drawn from a venire representing a cross section of the community.[26] *Duren* established the test for a prima facie violation of the fair cross section requirement.[27] The *Duren* test required a criminal defendant to show that: (1) the persons excluded from the venire constituted a distinct group in the community; (2) the representation of this group was not fair and reasonable in relation to the number of those persons in the community; and (3) the underrepresentation was caused by a systematic exclusion of this group during the selection process.[28] *Taylor* and *Duren* also recognized that a state may justify a fair cross section infringement by advancing a significant state interest.[29]

The fair cross section issue[30] was first presented in the context of death-qualification in *Lockett v. Ohio*.[31] In *Lockett*, the trial court excluded four prospective jurors who stated that their convictions against

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20. *See* Grigsby v. Mabry, 758 F.2d 226, 228 (8th Cir. 1985). The term "Witherspoon excludables" is a misnomer, since Adams v. Texas, 448 U.S. 38 (1980) broadened the term to include those prospective jurors whose attitudes regarding capital punishment would substantially impair their ability to act impartially. *See infra* notes 44-46 and accompanying text.

21. 391 U.S. at 516.

22. *Id.* at 517.

23. *Id.* at 522, n.21; *see also* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair-Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595 (1981).

24. 419 U.S. 522 (1975).

25. 439 U.S. 357 (1979).

26. 419 U.S. at 530.

27. 439 U.S. at 364.

28. *Id.*

29. *See Taylor*, 419 U.S. at 533-34; *Duren*, 439 U.S. at 367-70.

30. *See Taylor*, 419 U.S. at 533-34, in which the petitioner challenged the Louisiana jury selection process requiring women to register to become eligible for jury duty. This had the effect of systematically excluding women from the jury venire; *see also Duren*, 439 U.S. at 360.

31. 438 U.S. 586 (1978).

capital punishment were so strong that they could not impartially try the case.[32] Petitioner argued that prospective jurors were excluded from the jury in violation of the rights expounded in *Taylor*.[33] The Court rejected the argument, noting that nothing in the *Taylor* opinion suggested that the right to a representative jury also included the right to be tried by jurors who would not follow the law and instructions of the court.[34]

After *Lockett*, the general consensus of the lower federal courts was that *Taylor* and *Duren* required only that the selection of veniremen for the jury pool must be representative of a fair cross section of the community.[35] The courts rejected any contention that the actual jury panel must represent a fair cross section of the community.[36] Recently, however, in *Grigsby v. Mabry*, the Eighth Circuit construed the language of *Taylor* and *Duren* as applicable to the petit jury as well as the jury venire, at least with respect to death-qualification.[37] The court in *Grigsby* held that the exclusion for cause of Witherspoon excludables from the petit jury resulted in a prima facie violation of the sixth amendment right to a fairly representative jury.[38] The court, applying the *Duren* test, concluded that "WE's" constitute a distinct group in society;[39] that the representation of "WE's" on the jury was not fair and reasonable in relation to the number of such persons in the community;[40] and that "WE's" were systematically excluded from the jury.[41]

Witherspoon had also suggested that someday there might be an occasion for a court to conclude that death-qualification produces a partial and unfair jury with regard to the determination of guilt.[42] Ini-

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32. *Id.* at 595-96.

33. *Id.* at 595.

34. *Id.* at 596-97.

35. *See, e.g.*, Keeten v. Garrison, 742 F.2d 129, 133 (4th Cir. 1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir. 1981), *cert. denied*, 459 U.S. 882 (1982).

36. *Id.*

37. The court reasoned that there was no functional difference between the systematic exclusion of prospective jurors from the jury pool and the systematic exclusion of veniremen from the petit jury. "The result is the same in either case: a distinct group of the citizenry is prevented from being considered for service on petit juries." *Grigsby*, 758 F.2d at 230, n.7.

38. *Id.* at 229.

39. *Id.* at 231. "WE's" constitute between 11% and 17% of those eligible for jury service in Arkansas. *Id.*

40. *Id.* at 231-32, "WE's" are totally excluded from the guilt phases of capital trials in Arkansas.

41. *Id.* at 232.

42. 391 U.S. at 520, n.18, *see also* Colussi, *supra* note 23, at 595.

tially, however, the question was whether the *Witherspoon* principles applied to a bifurcated capital trial.[43] The answer came in *Adams v. Texas*,[44] in which the petitioner challenged his death sentence on the grounds that prospective jurors had been unconstitutionally excluded for cause in contravention of *Witherspoon*. The Court held that *Witherspoon* applied to bifurcated jury trials.[45] *Adams* is also significant in that it modified the *Witherspoon* standard of exclusion. The Court in *Adams* noted that prospective jurors could not be excluded for cause because of their attitudes toward capital punishment, unless those attitudes would prevent or substantially impair their duty to act according to their instructions and oath.[46] In *Wainwright v. Witt*,[47] the Court upheld the *Adams* standard of exclusion and stated that its effect was to lower the more rigid *Witherspoon* standard and vest trial judges with discretion in determining whether opposition to capital punishment would prevent prospective jurors from acting impartially.

Following *Adams*, the issue of death-qualification narrowed. Courts were presented with the question of whether "WE's" could be constitutionally excluded from the guilt phase of a bifurcated capital trial.[48] Essentially, the argument was that conviction-prone juries were created when courts excluded "WE's" from the petit jury.[49] The proposition was based on numerous sociological surveys indicating that "WE's" share a unique set of attitudes and behavior that is more favorable to the defendant than are the attitudes and behavior of persons more willing to impose capital punishment.[50] Therefore, it is believed that juries from which "WE's" are excluded are unfairly and unconstitutionally biased in favor of the prosecution.[51] Prior to *Grigsby*,

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43. *Witherspoon* concerned a jury trial in which both the guilt or innocence and the penalty were determined simultaneously.

44. 448 U.S. 38 (1980); TEX. CODE CRIM. PROC. ANN. Art. 37.071 (Vernon Supp. 1986), requires capital cases to be conducted in two phases. The first phase concerns the issue of guilt. If the jury returns a guilty verdict, the second phase is conducted for the purpose of determining the penalty.

45. 448 U.S. at 45-47. The court found no significant difference in bifurcated jury trials and trials in which guilt and punishment are simultaneously considered. Under either proceeding, the jurors are vested with a certain amount of discretion in determining punishment.

46. *Id.* at 45.

47. 105 S. Ct. 844, 850 (1985).

48. *See, e.g.*, Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985); Keeten v. Garrison, 578 F.2d 129 (4th Cir. 1984); Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), *modified*, 671 F.2d 858 (5th Cir. 1981), *cert. denied*, 459 U.S. 882 (1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

49. *See supra* note 48.

50. *Grigsby*, 758 F.2d at 232-35.

51. *Id.* at 242.

courts rejected the idea that death-qualification contravened sixth and fourteenth amendment requirements for a fair and impartial jury.[52] Courts asserted that the sociological surveys were inconclusive and unreliable,[53] or that the surveys evidenced only that death-qualified juries may favor the prosecution and that nondeath-qualified juries may favor the defense, but that the evidence failed to indicate which jury is impartial.[54] The courts concluded that a defendant does not have a right to a jury biased in his favor.[55]

In addition, the courts recognized a substantial state interest in death-qualifying a jury.[56] This reasoning is based on a fear that "WE's" would engage in nullification if allowed to sit on the jury.[57] Courts also recognized that a state has a significant interest in having the same jury try both the guilt and penalty issues in a capital trial.[58] Having one jury decide both issues creates greater responsibility for the jury than would a process in which the issues were tried by separate juries.[59] Furthermore, a jury comprised of different jurors at the guilt and penalty phases would place an unfair burden on the state and the accused.[60]

The *Grigsby* court, however, accepted the sufficiency of the sociological studies and considered them conclusive proof of the fact that

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52. *Keeten*, 742 F.2d at 133; *Smith*, 660 F.2d at 583; *Spinkellink*, 578 F.2d at 596.

53. The Court in *Keeten* found that these sociological studies were flawed in that they lack random samples, are poorly designed, and are too general to predict actual behavior in a real trial situation. *Keeten*, 742 F.2d at 132.

54. *See, e.g., Keeten*, 742 F.2d at 134; *Smith*, 660 F.2d at 578; *Spinkellink*, 578 F.2d at 593-94.

55. "The guarantee of impartiality cannot mean that the state has a right to present its case to the jury *most* likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury *most* likely to acquit." *Smith*, 660 F.2d at 579 (emphasis in original).

56. *See, e.g., Smith*, 660 F.2d at 580-81; *Spinkellink*, 578 F.2d at 597-98.

57. In capital cases, nullification is a process in which a juror opposed to capital punishment votes to acquit for no other reason than that a conviction could lead to a sentence of death. Nullification would arguably result in near immunity for capital crimes, frustrating the state's interest in the just and evenhanded application of its laws. *See, e.g., Keeten*, 742 F.2d at 133; *Spinkellink*, 578 F.2d at 596. "[C]apital punishment could in effect be abolished, not by popular will, but by deliberate ruse." Rector v. State, 280 Ark. 385, 397, 659 S.W.2d 168, 174 (1983), *cert. denied*, 466 U.S. 988 (1984).

58. Rector v. State, 280 Ark. at 395-97, 659 S.W.2d at 173-74. *See* ARK. STAT. ANN. § 41-1301 (1977 & Supp. 1985), which provides that in capital trials the jury shall first hear the evidence and determine guilt or innocence and second, if the defendant is found guilty, the same jury shall hear additional evidence and determine the penalty.

59. *Rector*, 280 Ark. at 396, 659 S.W.2d at 173.

60. The state would be forced to repeat every capital trial for the benefit of a second jury, which would then determine punishment. Such a process would separate the responsibility of determining guilt or innocence from the responsibility of fixing the penalty and unfairly disadvantage the accused. *Id.*

death-qualification creates conviction prone juries.[61] The court found that an impartial jury could not exist if "WE's" were excluded.[62] While the majority opinion did not address the issue of whether a state could have a significant interest in death-qualification, a vigorous dissent contended that Arkansas indeed had significant interests that justified the process.[63]

The *Grigsby* decision created a discrepancy among the circuits on the issue of death-qualification as it pertains to the guilt phase of a capital trial. Other courts were not willing to accept the reasoning in Grisby.[64] The Arkansas Supreme Court explicitly refused to follow the *Grigsby* ruling.[65] Finally, the United States Supreme Court granted Arkansas' request for certiorari[66] and resolved the issue in *Lockhart v. McCree*.[67] The question presented was whether the Constitution prohibits the exclusion of "WE's" from the guilt phase of a bifurcated capital trial. The Supreme Court held that the Constitution does not prohibit such exclusions.

As a preliminary matter, the Court reviewed the sufficiency of the social science studies relied on in *Grigsby*.[68] The Court concluded that eight of the fifteen studies dealt with generalized attitudes and beliefs regarding capital punishment and, therefore, were not sufficiently relevant to the issue.[69] A ninth study dealt with the effect on prospective jurors of voir dire questioning concerning their attitudes toward the death penalty. The Court found this study irrelevant, noting that a state must be allowed the opportunity to identify prospective jurors whose opposition to capital punishment would prevent them from making an impartial decision concerning guilt or innocence.[70] The remaining six studies concerned the effects on the determination of guilt or innocence when "WE's" are excluded from the jury. Of these six death-qualification studies, three were previously rejected in *Wither-*

61. *Grigsby*, 758 F.2d at 236-38.

62. *Id.* at 242.

63. *Id.* at 247-48 (Gibson, J., dissenting).

64. Watson v. Blackburn, 756 F.2d 1055 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 2259 (1986). *See, e.g.*, State v. Malone, 694 S.W.2d 723 (Mo. 1985), *cert. denied*, 106 S. Ct. 2292 (1986); State v. Williams, 690 S.W.2d 517 (Tenn. 1985); Bird v. State, 692 S.W.2d 65 (Tex. Crim. App. 1985), *cert. denied*, 106 S. Ct. 1238 (1986).

65. *See* Hendrickson v. State, 285 Ark. 462, 465-66, 688 S.W.2d 295, 297 (1985); Hall v. State, 286 Ark. 52, 52-53, 689 S.W.2d 524, 524-25 (1985).

66. 106 S. Ct. 59 (1985).

67. 106 S. Ct. 1758 (1986).

68. *McCree*, 106 S. Ct. at 1762-64.

69. *Id.* at 1762.

70. *Id.* at 1762-63.

spoon as inconclusive.[71] The three remaining "new" studies were found to lack reliability in predicting the behavior of actual jurors.[72] Finally, the Court concluded that all six death-qualification studies failed to account for nullifiers.[73] In the Justices' opinion, even if the empirical data were reliable, the Constitution would not prohibit death-qualification.[74]

Next, the Court addressed the fair cross section and fair and impartial jury requirements expressed in the sixth and fourteenth amendments. The Court held that death-qualification does not violate the fair cross section requirement.[75] The Court rejected the reasoning in Grigsby that petit juries must be fairly representative of the community, concluding that only jury pools must be representative and that *Taylor* and *Duren* principles do not require that the petit jury reflect the composition of the community at large.[76] In addition, the Court found that "WE's" do not constitute a distinctive group for fair cross section purposes.[77] The Court reasoned that the essence of a fair cross section claim is the systematic exclusion of a distinctive group.[78] The Court concluded that a group defined solely in terms of shared attitudes does not make up a distinctive group for sixth amendment purposes.[79] While the exclusion of blacks, women or Mexican-Americans is totally unrelated to any state interest, the exclusion of "WE's" serves Arkansas' purpose of obtaining a single jury that can impartially decide the case at both the guilt and penalty phase of a capital trial.[80]

With regard to the fair and impartial jury requirement, the Court acknowledged that exclusions based on race or other immutable characteristics give rise to the appearance of unfairness and deprive members of these historically disadvantaged groups of their rights as citizens to serve on juries in criminal cases.[81] On the other hand, the Court

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71. *Id. See also Witherspoon*, 391 U.S. at 517-18.

72. *McCree*, 106 S. Ct. at 1763-64. Justice Rehnquist maintained that the studies were deficient in that they failed to test actual jurors sworn under oath in capital cases, failed to take into account the effects of group deliberation on the jury as a whole, and failed to predict the extent to which the presence of "WE's" on the jury would alter the outcome of guilt determination.

73. *Id.* at 1764 (nullifiers can properly be excluded from the jury and any study that fails to take them into account is fatally flawed).

74. *Id.*

75. *Id.* at 1764-65.

76. *Id.*

77. *Id.* at 1765.

78. *Id.* at 1765-66.

79. *Id.* ("WE's" differ significantly from groups previously recognized as distinctive. Distinctiveness is based on such immutable characteristics as race, gender, or ethnic background.)

80. *Id.*

81. *Id.*

pointed out that the exclusion of "WE's" is based on an attribute that is within the control of the individual. Furthermore, the appearance of unfairness is lacking since only those persons who will not impartially apply the law are excluded. Finally, the exclusion of "WE's" from capital juries does not prevent them from serving as jurors in other criminal cases and, therefore, does not substantially deprive them of their basic rights as citizens.[82]

The Court rejected the impartiality claim advanced in *Grigsby*, which the Court concluded was based on the theory that individual jurors are predisposed toward certain decisions and that an impartial jury could only exist by balancing the various predispositions of jurors. The theory proposes that the exclusion of prospective jurors with a particular viewpoint results in an impermissibly partial jury.[83] The Court rejected this proposition, finding "that an impartial jury consists of nothing more than jurors who will conscientiously apply the law and find the facts."[84] Furthermore, the court reasoned that the impartiality claim was "illogical and hopelessly impractical."[85] Even if death-qualification results in a jury biased in favor of the prosecution, the same twelve jurors could conceivably end up on the jury through the "luck of the draw," without violating the Constitution. In one context it would be violative of the Constitution, but in another it would not.[86] The Court also indicated that requiring a certain mix of individual viewpoints on the jury would require the trial judge to undertake the burdensome task of balancing the juries to make certain that all possible viewpoints were represented, and peremptory challenges would be eliminated.[87]

Finally, the Court rejected the argument that *Witherspoon* and *Adams* stand for the proposition that a constitutional violation results when a state slants the jury in favor of the prosecution by excluding "WE's." The Court found two distinguishing characteristics between *Witherspoon* and *Adams* and the instant case.[88]

First, the Court noted that in neither *Witherspoon* nor *Adams* was a valid state interest recognized that would have justified the exclu-

82. *Id.*

83. *Id.* at 1766-67.

84. *Id.* at 1767 (quoting Wainwright v. Witt, 105 S. Ct. 844 (1985)).

85. *Id.*

86. Justice Marshall disagreed with this argument, indicating that *Witherspoon* stands for the proposition that a state cannot actively participate in the creation of an unfair jury. *Id.* at 1773 (Marshall, J., dissenting).

87. *Id.* at 1767.

88. *Id.* at 1767-68.

sions. In both cases all prospective jurors who voiced general objections to capital punishment were excluded, including those who felt they could put aside their views and determine the issues impartially. Such exclusion resulted in a jury much more likely to impose capital punishment.[89] On the other hand, the Court found that Arkansas had demonstrated several valid interests justifying the exclusions. These interests include: obtaining a single jury which decides both the guilt and penalty issues in capital cases; ensuring that the defendant benefits, during the penalty phase, from any residual doubts regarding the evidence presented during the guilt phase of the trial; and a concern for the substantial burden that would be placed on the state and the defendant if separate juries were required to hear the guilt and penalty phases of the trial.[90]

Second, *Adams* and *Witherspoon* concerned the issue of death-qualification as it affects the penalty phase of a capital trial. Since those jurors were given considerable discretion in determining whether the death penalty should be imposed, it was imperative that the jury reflect the conscience of the community with regard to capital punishment.[91] *McCree* did not concern the penalty phase, but instead focused on the jury's role in determining guilt or innocence. In this context juror discretion is much more limited and there is not a comparable concern over the possible effect of an imbalanced jury.[92] Applying this rationale, the Court concluded that *Witherspoon* and *Adams* principles are not generally applicable outside the capital sentencing structure and, therefore, do not support the Eighth Circuit's decision.[93]

Justice Marshall, dissenting, accepted the reliability of the empirical data, finding that the later studies identified and corrected the flaws in the earlier surveys and corroborated the conclusion that death-qualification creates conviction-prone juries.[94] He did not specifically address the fair cross section question, indicating that the issue could be sufficiently decided under the impartiality requirements of the sixth amendment.[95] Marshall determined that the state interest in efficient trial management is not sufficient to justify the exclusion of "WE's."[96]

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89. *Id* at 1768.
90. *Id.* at 1768-69.
91. *Id.* at 1769-70.
92. *Id.* at 1770.
93. *Id.*
94. *Id.* at 1772-73 (Marshall, J., dissenting).
95. *Id.* at 1775.
96. The cost of accommodating defendants' rights is not significant. *Id.* at 1781 (construing Ballew v. Georgia, 435 U.S. 223 (1978)).

He rejected the majority's reasoning regarding residual doubts, finding the argument "offensive."[97] Marshall noted that in cases in which a defendant's sentence has been set aside, a new jury decides the issue anyway, depriving the defendant of any benefit from residual doubts. Further, the Court has denied certiorari in those cases in which states have refused to allow residual doubts to be considered during resentencing procedures.[98]

Finally, Justice Marshall construed *Adams* as applicable to both the guilt and penalty phases of the capital process. He felt that the role of the jury at the guilt phase is indistinguishable from that at the penalty phase, since jurors are vested with a certain amount of discretion at both stages of the process.[99]

Clearly, *McCree* has settled the death-qualification issue as it relates to the guilt phase of a capital trial. However, the decision may have additional ramifications. The determination that petit juries need not be representative of the community, and the language indicating that a defendant is only entitled to a jury that can impartially apply the law would, arguably, allow states to construct juries that favor the prosecution in all criminal cases. The state need only advance an important interest to justify an impingment of the sixth amendment right to a fair and impartial jury, and a lower standard of scrutiny will be applied. It appears that the Court will give states considerable deference in the construction of their jury selection process.

Justice Marshall, however, suggests that *McCree* is a reflection of the majority's support for the death penalty.[100] If this is so, the holding in *McCree* will most likely be confined to the jury selection process of capital trials.

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97. 106 S.Ct. at 1781.

98. *Id.* at 1781-82.

99. *Id.* at 1777 (citing Gillers, *Proving the Prejudice of Death-Qualified Juries after Adams v. Texas*, 47 U. PITT. L. REV. 219, 247 (1985)).

100. 106 S.Ct. at 1782.