

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class Nine, Part 1 – Jury Selection

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge . . . The jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge.

- *Duncan v. Louisiana*,
391 U.S. 145, 156 (1968)

It is hard for everyone who wants to believe in ultimate fairness to acknowledge that the typical decisionmaker is not the ideal decisionmaker, that racial prejudice is not an aberration, that it taints everyone it touches, and that it touches everyone.

- Sheri Lynn Johnson,
Racial Imagery in Criminal Cases,
67 TUL. L. REV. 1739, 1803 (1993)

The Role of the Jury in Capital Sentencing

Before *Furman v. Georgia*, juries in most states decided guilt and punishment at a unitary trial. An exception was California, which conducted bifurcated trials in which the jury decided guilt in one phase and punishment in the other. See *McGautha v. California*, 402 U.S. 183 (1971) (describing California's bifurcated trial and Ohio's unitary trial).

Most states responded to *Furman v. Georgia* by adopting capital sentencing schemes which

provide that juries make the determination of whether to impose death at the second phase of a bifurcated trial. However, Arizona, Idaho, Montana, and Nebraska adopted statutes which provided for a trial judge, sitting alone, to determine the presence or absence of the aggravating factors required for imposition of the death penalty and to impose sentence without a jury. Colorado, which originally provided for jury sentencing, amended its procedure to provide for sentencing by three judges in 1995. Alabama, Delaware, Florida and Indiana provided for the jury to return an advisory verdict on punishment, and allowed the judge to override and impose a different sentence.

In some states the jury must be unanimous in order to impose death. In federal capital cases and in some states, if the jury does not reach a unanimous verdict with regard to sentence, a sentence of life imprisonment – usually without parole – will be imposed. In other jurisdictions, a new sentencing hearing will be held before a different jury. Other states do not require unanimity. For example, in Florida, the jury may recommend death by a bare majority of 7-5 (a vote of 6-6 is considered a recommendation of life imprisonment); in Alabama, a jury can recommend death by a vote of 10-2.

The Supreme Court upheld judges conducting the sentencing phase without a jury and imposing death based on their findings of aggravating and mitigating circumstances in *Walton v. Arizona*, 497 U.S. 639 (1990). The Court held that the additional facts found by the judge at the penalty phase were “sentencing considerations,” not “element[s] of the offense of capital murder.” However, ten years later, the Court held that any

factor which was a basis for an enhanced sentence must be found by a jury beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).¹ The Court reconsidered *Walton* in light of *Apprendi* in *Ring v. Arizona*, 536 U.S. 584 (2002), and concluded that defendants in capital cases are entitled to a jury determination of any fact on which the law conditions an increase in their maximum punishment. Thus, a jury must determine whether aggravating factors have been proven beyond a reasonable doubt. Accordingly, the Court overruled *Walton* and struck down the Arizona statute allowing a judge to sentence without a jury finding of aggravating factors.

The Court later held, 5-4, in *Schriro v. Summerlin*, 542 U.S. 348 (2004), that *Ring* announced a “procedural rule” which applies prospectively and to cases pending on direct appeal at the time it was decided, but not to cases that were final – that is, had completed direct review – when it was decided. Thus, defendants sentenced to death by judges without juries in cases that became final before *Ring* was decided are not entitled to habeas corpus relief. Justice Breyer, writing for the dissenters, expressed the view that the holding in *Ring* was a “watershed” procedural ruling that a federal habeas court must apply retroactively.

1. Apprendi was convicted of, *inter alia*, second-degree possession of a firearm, an offense carrying a maximum penalty of ten years under New Jersey law. On the prosecutor’s motion, the sentencing judge found by a preponderance of the evidence that Apprendi’s crime had been motivated by racial animus and thus was a “hate crime,” which doubled Apprendi’s maximum authorized sentence. The judge sentenced Apprendi to 12 years in prison, 2 years over the maximum that would have applied but for the enhancement. The Supreme Court held that Apprendi’s sentence violated his right to “a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” Thus, if a State makes an increase in a defendant’s authorized punishment contingent on the finding of a fact, that fact – no matter how a state labels it – must be found by a jury beyond a reasonable doubt. A defendant may not be “expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.”

In response to *Ring*, Arizona, Colorado, and Idaho adopted statutes providing for sentencing by juries in future cases. In Montana, sentencing hearings continue to be conducted before a judge sitting without a jury, but a judge can impose death only if the jury during the guilt phase found at least one statutory aggravating circumstance beyond a reasonable doubt. Montana Code Ann. §46-18-301.

The Florida Supreme Court has repeatedly rejected challenges based on *Ring* to its capital sentencing statute which does not require unanimity on either an aggravating circumstance or death and allows a judge to override the jury’s recommendation. See *Bottoson v. Moore*, 833 So.2d 693 (Fla.2002) (“The United States Supreme Court has repeatedly reviewed and upheld Florida’s capital sentencing statute over the past quarter of a century.”); *Lugo v. State*, 845 So.2d 74, 119 n. 79 (Fla. 2003). Justices Anstead and Pariente, expressed their view that because the jury is not required to be unanimous and is allowed to make a recommendation of death based on a bare majority, the procedure is contrary to *Ring*. See, e.g., *Butler v. State*, 842 So.2d 817, 835-841 (Fla. 2003) (Pariente, J., dissenting). A United States District Court in the Southern District of Florida found that the Florida statute violates *Ring*, *Evans v. McNeil*, 2011 WL 9717450 (S.D. Fla. June 20, 2011), but that decision was reversed by the Eleventh Circuit. *Evans v. Secretary*, 699 F.3d 1249 (11th Cir. 2012).

In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Supreme Court upheld Florida’s law allowing a judge to override the jury’s recommendation of a sentence of life imprisonment without parole and impose death. After receiving the jury’s advisory verdict, the judge makes written findings of aggravating and mitigating circumstances in accepting or rejecting the jury’s verdict. In *Hildwin v. Florida*, 490 U.S. 638 (1989), the Court held that the Sixth Amendment does not require the jury which renders an advisory sentencing verdict to specify which aggravating circumstances it found. The Florida Supreme Court has required that the trial judge must give “great

weight” to the jury’s recommendation and may not override the advisory verdict of life unless “the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So.2d 908 (Fla. 1975). As a result of that standard, the Florida Supreme Court seldom sustains overrides.

Alabama’s capital sentencing statute requires only that the judge “consider” the jury’s recommendation. The Supreme Court upheld the Alabama scheme in *Harris v. Alabama*, 513 U.S. 504, 515-526 (1995), over the lone dissent of Justice Stevens, who observed:

Not surprisingly, given the political pressures they face, judges are far more likely than juries to impose the death penalty. This has long been the case, and the recent experience of judicial overrides confirms it. Alabama judges have vetoed only five jury recommendations of death, but they have condemned 47 defendants whom juries would have spared.

* * *

Alabama trial judges face partisan election every six years. The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

Justice Sotomayor made the same observation in dissenting from the denial of certiorari in *Woodward v. Alabama*, 134 S.Ct. 405, 408-09 (2013):

What could explain Alabama judges’ distinctive proclivity for imposing death sentences in cases where a jury has already rejected that penalty? There is no evidence that criminal activity is more heinous in Alabama than in other States, or that Alabama juries are particularly lenient in weighing aggravating and mitigating circumstances. The only answer that is supported by empirical evidence is one that, in my view, casts a cloud of illegitimacy

over the criminal justice system: Alabama judges, who are elected in partisan proceedings, appear to have succumbed to electoral pressures. * * * One Alabama judge, who has overridden jury verdicts to impose the death penalty on six occasions, campaigned by running several advertisements voicing his support for capital punishment. One * * * expressly named some of the defendants whom he had sentenced to death, in at least one case over a jury’s contrary judgment. With admirable candor, another judge, who has overridden one jury verdict to impose death, admitted that voter reaction does “have some impact, especially in high-profile cases.” “Let’s face it,” the judge said, “we’re human beings. I’m sure it affects some more than others.”

Justice Sotomayor noted in her dissent that in the nearly two decades since *Harris*, the practice of judicial overrides has become increasingly rare:

In the 1980’s, there were 125 life-to-death overrides: 89 in Florida, 30 in Alabama, and 6 in Indiana. In the 1990’s, there were 74: 26 in Florida, 44 in Alabama, and 4 in Indiana. Since 2000, by contrast, there have been only 27 life-to-death overrides, 26 of which were by Alabama judges.

134 S.Ct. at 407. However, the Court declined to review overrides in Alabama.

The Alabama Supreme Court held in *Ex parte Waldrop*, 859 So.2d 1181 (Ala.2002), that its law allowing override of jury sentences by judges does not violate *Ring v. Arizona*. The Court held that because the jury must find an aggravating factor in order to convict a defendant of “capital murder” (e.g., that the murder was committed in the commission of an armed robbery) at the guilt stage, *Ring*’s requirement of a jury finding of the facts necessary to enhance punishment is satisfied. The Court also held that the determination that aggravating circumstances outweigh mitigating circumstances – necessary for imposition of death – is not a “finding of fact,” which must be decided by a jury.

Jury Pool Composition and Discrimination

After the case of the “Scottsboro Boys” was reversed by the Supreme Court in *Powell v. Alabama*, the defendants were given new trials. The judge changed venue for the trial to neighboring Decatur in Morgan County. Samuel Liebowitz, a lawyer from New York, represented the defendants. Prior to the trials, he challenged the exclusion of African Americans from the jury pools in Jackson County from which the grand jury that had indicted the defendants in 1931 was selected, as well as the jury pools from which the trial jurors were drawn for the retrial in Morgan County.

Alabama, by statute, provided the following qualifications for jury service:

The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.

Norris v. Alabama, 294 U.S. 587, 590-91 (1935). Once the commissioners had selected the people to be placed on the jury roll (the jury pool), names were drawn at random for jury service.

There were no African Americans in the jury pool in Jackson County. Officials tried to add African Americans to the jury rolls fraudulently in response to Liebowitz’s challenge, writing in the names of several African Americans at the end of

the list. In denying the motion to quash, the trial judge said he would not “be authorized to presume that somebody had committed a crime” or to presume that the jury board “had been unfaithful to their duties and allowed the books to be tampered with.” However, the Supreme Court, which examined the jury lists, concluded that “the evidence did not justify that conclusion.” 294 U.S. at 593. The Court, in an 8-0 decision with one justice not participating, concluded:

[T]he evidence that for a generation or longer no negro had been called for service on any jury in Jackson county, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted.

Id. at 596.

With regard to Morgan County, the record similarly established a “long-continued, unvarying, and wholesale exclusion of negroes from jury service.” *Id.* at 597. One of the jury commissioners testified, “I do not know of any negro in Morgan County over twenty-one and under sixty-five who is generally reputed to be honest and intelligent and who is esteemed in the community for his integrity, good character and sound judgment, who is not an habitual drunkard, who isn’t afflicted with a permanent disease or physical weakness which would render him unfit to discharge the duties of a juror, and who can read English, and who has never been convicted of a crime involving moral turpitude.”

Liebowitz had anticipated such an explanation and offered testimony that many African Americans were qualified for jury service. As the Supreme Court summarized it:

There was abundant evidence that there were a large number of negroes in the county who were qualified for jury service. Men of intelligence, some of whom were college graduates, testified to long lists (said to contain nearly 200 names) of such qualified negroes, including many business men, owners of real property and householders. When defendant's counsel proposed to call many additional witnesses in order to adduce further proof of qualifications of negroes for jury service, the trial judge limited the testimony, holding that the evidence was cumulative.

The Court refused to credit the jury commissioner's testimony:

In the light of the testimony given by defendant's witnesses, we find it impossible to accept such a sweeping characterization of the lack of qualifications of negroes in Morgan county. It is so sweeping, and so contrary to the evidence as to the many qualified negroes, that it destroys the intended effect of the commissioner's testimony.

Id. at 599. The Court found the commissioners had engaged in the "violent presumption" that blacks were unqualified to serve, which it had condemned in *Neal v. Delaware*, 103 US. 370, 397 (1880). Accordingly, the convictions were again vacated and the cases remanded to the trial court for new trials. For a description of the hearing and the appeal to the Supreme Court, see Dan T. Carter, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH 185-86, 194-202, 322-24 (LSU Rev. ed 1992).

Some states and jury commissions responded to *Norris* and other decisions by including only a single black in their jury pools. However, as the law developed, the Court required a comparison of the percentage of African Americans in the population of a county and the percentage in the jury pools. There are two constitutional grounds for challenging the underrepresentation of a cognizable group in jury pools – the equal protection clause of the Fourteenth Amendment, *Alexander v. Louisiana*, 405 U.S. 625 (1972), and

the right to have a jury venire represent a fair cross-section of the community protected by the Sixth Amendment's guarantee of trial by an impartial jury. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

The prima facie tests for an equal protection claim and a fair-cross-section claim are almost identical. In *Castaneda v. Partida*, 430 U.S. 482 (1977), the Supreme Court summarized the requirements for proving an equal protection violation:

The first step is to establish that the group is one that is a recognizable, distinct class, Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time. . . . Finally, . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.

In *Duren v. Missouri*, 439 U.S. 357 (1979), the Court set out the elements of a prima facie violation of the fair-cross-section requirement:

[T]he defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

It is now well established that racial minorities and women are recognizable and distinctive groups. *Strauder v. West Virginia*, 100 U.S. 303 (1879) (race); *Taylor v. Louisiana*, *supra* (women); *Hernandez v. Texas*, 347 U.S. 475 (1954) (persons of Mexican descent).

The Court has not delineated precise mathematical standards with regard to the degree of underrepresentation that must be shown, but it has found constitutional violations in *Castaneda*, 430 U.S. at 495-96, where 79.1% of county's population were of Mexican descent but only 39% of people summoned to grand jury service were Mexican-American); in *Alexander v. Louisiana*, *supra*, where blacks made up 21% of the parish population, but only 7% of the grand jury pool; and in *Turner v. Fouche*, 396 U.S. 346 (1970), where blacks comprised 60% of the population, but only 37% of the grand jury list.

In the cases, the Court has examined "absolute disparities," which are determined by subtracting the percentage of cognizable group in the jury pool from the percentage of the group in the jury-eligible population of the county. The Court has been resistant to a "comparative disparity" analysis, which divides the absolute disparity by the group's representation in the jury-eligible population. Justice Ginsburg described the two methods as follows in *Berghuis v. Smith*, 559 U.S. 314, 323 (2010):

"Absolute disparity" is determined by subtracting the percentage of African-Americans in the jury pool (here, 6% in the six months leading up to Smith's trial) from the percentage of African-Americans in the local, jury-eligible population (here, 7.28%). By an absolute disparity measure, therefore, African-Americans were underrepresented by 1.28%. "Comparative disparity" is determined by dividing the absolute disparity (here, 1.28%) by the group's representation in the jury-eligible population (here, 7.28%). The quotient (here, 18%), showed that, in the six months prior to Smith's trial, African-Americans were, on average, 18% less likely, when compared to the overall jury-eligible population, to be on the jury-service list.

A third method of calculating disparities is standard deviation analysis, which seeks to determine the probability that the disparity between a group's jury-eligible population and the group's percentage in the qualified jury pool is

attributable to random chance. No court has adopted this approach. *See United States v. Rioux*, 97 F.3d 648, 655 (2d Cir. 1996).

The subjective selection of jury members under a standard for jury services such as Alabama had at the time of *Norris* – and which is similar to the standards in many states today – is obviously susceptible to abuse. With regard to a fair-cross-section claim, the Supreme Court has defined "systematic exclusion" as "inherent in the particular jury-selection process utilized." *Duren v. Missouri*, 439 U.S. 357, 364 (1979). In *Duren*, women constituted 54% of the population in Jackson County, Missouri, but only 26.7% of those summoned for jury duty and about 15% of those appearing for jury duty because Missouri gave women the right to decline jury service.

To rebut a prima facie case made in support of an equal protection claim, the government must show that the disparities are not the result of bias toward the cognizable group. However, the Supreme Court has repeatedly declared, as it did in *Norris*, that mere assertions of good faith are "insufficient to overcome the prima facie case." *Whitus v. Georgia*, 385 U.S. 545, 551 (1967); *Alexander v. Louisiana*, 405 U.S. at 632.

To rebut a prima facie case supporting a fair-cross-section challenge, the government must show "that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Duren v. Missouri*, 439 U.S. at 367-68. In *Duren*, the Court rejected "safeguarding the important role played by women in home and family life" as a state interest that justified allowing women to opt out of jury service.

Once a violation of either the due process clause or the trial by jury clause is established, the conviction must be reversed without an inquiry into prejudice. In rejecting an argument that discrimination in grand jury pools was not harmful once the defendant had been convicted at trial, the Supreme Court, speaking through Justice

Marshall, stated:

[I]ntentional discrimination in the selection of grand jurors is a grave constitutional trespass, possible only under color of state authority, and wholly within the power of the State to prevent. Thus, the remedy we have embraced for over a century – the only effective remedy for this violation – is not disproportionate to the evil that it seeks to deter. If grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it.

Vasquez v. Hillery, 474 U.S. 254, 262 (1986).

Despite these decisions, state and federal prosecutors may work together to influence the racial composition of jury pools. Most criminal prosecutions are in the state courts, but many cases can be prosecuted in either state or federal court. Where there is a substantial black population in the jury pool of a county or parish of a state, the case may be prosecuted in federal court. For example, instead of prosecuting a case in Orleans Parish, where the jury pool is about 70 percent black, prosecutors may bring it in the federal court in the Eastern District of Louisiana, where only 20 percent of the jury pool is black.

Federal prosecutors have repeatedly sought the death penalty in federal courts instead of state prosecutors seeking it in New Orleans, Richmond, St. Louis and Prince Georges County, Maryland, where African Americans make up the majority of the population. As a result, more death sentences have been imposed in the U.S. District Courts for the Eastern District of Louisiana, the Eastern District of Virginia, the Eastern District of Missouri and the District of Maryland than in federal districts that include New York, Chicago, California, and Florida, where far more murders occur. See G. Ben Cohen & Robert J. Smith, *The Racial Geography of the Death Penalty*, 85 WASHINGTON L. REV. 425 (2010). Six of the 94 federal judicial districts account for one-third of death prosecutions in the federal courts; more than half the prosecutions come from 14 districts; and seven districts are responsible for approximately

40% of those under federal death sentence. No one has been sentenced to death in two-thirds of the districts and there have been no capital prosecutions in one-third of the districts. *Id.*

The Right to a Fair and Impartial Jury

The Sixth Amendment guarantees the right to a fair and impartial jury. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (recognizing the right to trial by jury as “the most priceless” among constitutional safeguards). The Supreme Court has insisted that no one be punished for a crime without “a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.” *Chambers v. Florida*, 309 U.S. 227, 236-237 (1940). A jury’s verdict is to be “induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.” *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907).

Potential jurors may not be impartial if they have any knowledge, attitude or belief that will interfere with their ability to decide the case based on the facts presented by the prosecution and defense and the jury instructions on the law given by the judge. Pretrial publicity is often an issue in capital cases that receive significant attention in the media. A court may deal with a prospective juror’s knowledge of the case in a number of ways, as will be discussed, but with regard to most other issues of impartiality, the questioning of jurors is supposed to reveal any biases or reasons that a prospective juror cannot be fair and impartial.

Pretrial Publicity

The Supreme Court once said that “where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity.” *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). See also *Rideau v. Louisiana*, 373

U.S. 723 (1963) (reversing because of failure to change venue); *Irvin v. Dowd*, 366 U.S. 717 (1961) (same). The Court found pervasive, prejudicial pretrial publicity resulted in unfair trials in these cases and reversed convictions without an inquiry into prejudice. It also reversed the conviction in *Estes v. Texas*, 381 U.S. 532 (1965), even though a change of venue had been granted. In both *Sheppard* and *Estes*, the Court expressed its disapproval of media disruption of the trials and the failure of the trial judges to protect the rights of the accused.

However, in 1975, the Court held that those decisions “cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... alone presumptively deprives the defendant of due process,” in upholding Jack Roland Murphy’s convictions for robbery and assault despite extensive pretrial publicity about him, the crimes he was accused of, and other crimes he had committed. *Murphy v. Florida*, 421 U.S. 794, 798-799 (1975).

Murphy, generally referred to in the media as “Murph the Surf,” was notorious for his part in the 1964 theft of the Star of India sapphire from a museum in New York, a murder conviction in a nearby county and a federal conviction involving stolen securities. While stating that a juror’s assurances that he or she can be fair is not determinative of the juror’s ability to serve, the Court upheld the convictions in an opinion by Justice Marshall. *Id.* at 800-01.

Justice Brennan, in the lone dissent, argued, “The risk that taint of widespread publicity regarding his criminal background, known to all members of the jury, infected the jury’s deliberations is apparent, the trial court made no attempt to prevent discussion of the case or petitioner’s previous criminal exploits among the prospective jurors, and one juror freely admitted that he was predisposed to convict petitioner.” *Id.* at 804.

The Court later upheld a failure to grant a change of venue and a jury selection that lasted only five hours despite extensive and often

vitriolic publicity in Houston regarding the financial improprieties and collapse of the Enron Corporation which caused thousands of people in Houston, where the corporation was based, to lose their jobs and retirement savings; the community passion aroused by the collapse; and the well-publicized guilty plea of a co-defendant shortly before trial. *Skilling v. United States*, 561 U.S. 358, 377-99 (2010). Despite the publicity, the trial took place in a courthouse just six blocks from Enron’s former headquarters.

Justice Alito issued a concurring opinion expressing his view that regardless of any pretrial publicity and community hostility, the requirement of an “an impartial jury” is satisfied so long as no biased juror is actually seated at trial. *Id.* at 425-27.

Justice Sotomayor, joined by Justices Stevens and Breyer, issued a dissent which described in detail the publicity, community hostility, and bias reflected on questionnaires answered by the jurors. *Id.* at 427-64. She concluded that the trial court’s questioning of prospective jurors failed to cover certain vital subjects or was “superficial,” and that “its uncritical acceptance of assurances of impartiality” left doubts “that Skilling’s jury was indeed free from the deep-seated animosity that pervaded the community at large.” *Id.* at 464.

Today, in cases involving extensive and prejudicial publicity and community hostility toward the defendant, judges are unlikely to continue trials and may not decide motions for a change of venue until prospective jurors are questioned about their knowledge of the case during jury selection. Depending upon their answers, a change of venue may be granted, but judges are more likely to proceed with questioning about the jurors’ ability to put aside what they know and remove – or “strike” – those who have formed opinions about guilt or punishment or know so much that they cannot be fair and impartial.

Judges also instruct jurors to disregard anything they have seen or heard about the case, although as Supreme Court Justice Robert Jackson

once observed, “The naive assumption that prejudicial effects can be overcome by instructions to the jury, * * * all practicing lawyers know to be unmitigated fiction.”¹

The media and the public have a right to observe court proceedings, *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), and one accused of a crime has a right to a public trial guaranteed by the Sixth Amendment. *Presley v. Georgia*, 558 U.S. 209 (2010). A court cannot restrain the media from disseminating what it learns, but it has the authority to control the trial participants. *See Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976).

Thus, courts may issue gag orders prohibiting the lawyers, law enforcement officials and other participants in a case from discussing it publically. Courts may also seal the files in a case so that the media and the public do not have access to them. In rare instances, courts may exclude the media and public from pretrial hearings and jury selection if necessary to protect the right of the accused to a fair trial. *See Gannett Co. v. DePasquale*, 443 U.S. 368 (1979); *Mississippi Publishers v. Coleman*, 515 So.2d 1163 (Miss. 1987).

The Supreme Court has acknowledged that intense publicity prior to a criminal trial may present problems where judges are elected because “[j]udges are human beings also and are subject to the same psychological reactions as laymen,” and the publicity may become a “political weapon” which may divert the judge’s “attention from the task at hand – the fair trial of the accused.” *Estes v. Texas*, 381 U.S. at 548. Nevertheless, whether to continue the trial, grant a change of venue, the extent of questioning of prospective jurors, and whether to strike a juror because of knowledge of the case is left to the discretion of the trial judge. Appellate courts defer to the rulings of trial judges on these issues, usually reviewing them under an “abuse of discretion” or “clearly erroneous” standard.

1. *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, concurring).

Examination of Prospective Jurors and Strikes for Cause

Prospective jurors may be questioned during jury selection to identify and exclude any who may have knowledge of prejudicial information or have formed opinions that would interfere with their ability to be fair and impartial in considering the evidence and reaching a verdict. Jurors may be asked, either in questionnaires or questions asked by the judge or lawyers in court or both, about such subjects as whether they know anything about the case – either personal knowledge or knowledge based on publicity or conversations with other people; whether they have ever been victims of, a witnesses to, or accused of crimes; knowledge of the victim or any witnesses in the case; associations with law enforcement organizations; attitudes regarding the death penalty; and any familiarity with issues that may arise in a particular case, such as experiences with the mentally ill, the intellectually disabled and victims of abuse. They may, in certain cases, be asked about their racial attitudes.

Defense lawyers are particularly concerned about jurors who have learned prejudicial information from the media that will not be admitted at trial. Jurors are required to decide the case only on the evidence admitted at trial, but it may be difficult for jurors to disregard reading about confessions, other crimes or opinions of government and law enforcement officials that are not admitted into evidence.

If a prospective juror answers a question that indicates that he or she has formed an opinion, has significant knowledge of the case, or would have difficulty being fair and impartial for other reasons, the prosecutor or defense lawyer may move to strike the juror for “cause.” A judge is to excuse the juror if she determines that the juror cannot fairly and impartially decide the case.

A prospective juror may not be disqualified just because he or she had heard about the case or even formed an opinion about it. The question is whether the potential juror is able to put that knowledge aside and decide the case based only

on the evidence. The ultimate decision of whether the juror can be fair and impartial is one for the judge to make, not the juror. There is no limit on the number of strikes for cause that may be granted. The judge is to remove any juror who cannot be fair and impartial. As previously noted and as the following cases will show, appellate courts usually defer to the trial judge's rulings.

Jurors who have not been struck for cause are qualified for jury service. But they are then subject to peremptory strikes by the prosecution or the defense. Each side has a number of peremptory strikes established by law, which varies from one state to another and may be different depending upon the seriousness of the case (*i.e.*, the number may be higher in felony cases than misdemeanor cases and, in some jurisdictions, higher in capital than other felony cases). The prosecutor and defense counsel may exercise a peremptory strike to remove any prospective juror so long as the judge does not find that the strike was based on race or gender. (Discrimination in the exercise of peremptory strikes will be examined in the materials on peremptory strikes).

The questioning of jurors, called *voir dire*, can range from the judge asking all of the questions to the entire group of people summoned for possible jury service – the “*venire*” – in a few hours to the lawyers questioning each prospective juror at length out of the presence of the other prospective jurors over a period of weeks or months. And there are many variations in between, such as questioning of groups of jurors by the lawyers and the judge.

Some of the variation is by jurisdiction. Connecticut, for example, provides that lawyers are entitled to question jurors individually, while in most federal courts the entire *venire* is questioned by the judge. In other jurisdictions, jurors may be questioned in small groups or “panels” of various sizes.

There are also variations in the way that strikes are exercised. In some jurisdictions, when jurors are questioned individually or in panels, the prosecutor and defense counsel must make their

challenges for cause and exercise their peremptory strikes as they go, *i.e.*, right after the questioning of an individual juror or group of jurors. In other jurisdictions, challenges for cause may be made at the time of questioning the jurors, but peremptory strikes are not exercised until the end of the process when enough jurors have been qualified so that 12 jurors and some alternates (usually two) are left after each side has exercised its peremptory strikes.

Even within a jurisdiction, different judges may conduct jury selection in different ways. The **Class 9, Part 2 Snyder Jury Selection** pdf posted with these materials provides an example of how jury selection was done in a Louisiana capital case. The prosecutor's strikes of African American prospective jurors was challenged in that case. The Supreme Court's decision regarding the strikes is included in **Class 9, Part 3 Peremptory Strikes**.

The answers that jurors give on questionnaires and in answer to questions during *voir dire* may be a basis for a party's peremptory strikes. As the Supreme Court has said, “Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges.” *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984).

Thus, the scope of *voir dire* – what questions may be asked, whether they are asked of jurors individually or in groups, whether they are asked by the lawyers or the judge, whether follow-up questions are allowed and other aspects of questioning prospective jurors – is important with regard to the prosecution and defense obtaining sufficient information to identify and challenge prospective jurors who cannot be fair and impartial, as well learning enough about prospective jurors to exercise intelligently their peremptory strikes. The Court addresses what is constitutionally required in the case that follows.

Knowledge of the Case

Dawud Majid MU'MIN,

v.

VIRGINIA

United States Supreme Court
500 U.S. 415 (1991)

Rehnquist, C.J., delivered the opinion of the Court, in which White, O'Connor, Scalia, and Souter, JJ., joined. O'Connor, J., filed a concurring opinion. Marshall, J., filed a dissenting opinion, in all but Part IV of which Blackmun and Stevens, JJ., joined. Kennedy, J., filed a dissenting opinion.

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Dawud Majid Mu'Min was convicted of murdering a woman in Prince William County, Virginia, while out of prison on work detail, and was sentenced to death. The case engendered substantial publicity, and 8 of the 12 venirepersons eventually sworn as jurors answered on voir dire that they had read or heard something about the case. None of those who had read or heard something indicated that they had formed an opinion based on the outside information, or that it would affect their ability to determine petitioner's guilt or innocence based solely on the evidence presented at trial. Petitioner contends, however, that his Sixth Amendment right to an impartial jury and his right to due process under the Fourteenth Amendment were violated because the trial judge refused to question further prospective jurors about the specific contents of the news reports to which they had been exposed. We reject petitioner's submission.

* * *

About three months before trial, petitioner submitted to the trial court, in support of a motion for a change of venue, 47 newspaper articles relating to the murder. One or more of the articles discussed details of the murder and investigation, and included information about petitioner's prior

criminal record, the fact that he had been rejected for parole six times, accounts of alleged prison infractions, details about the prior murder for which Mu'Min was serving his sentence at the time of this murder, a comment that the death penalty had not been available when Mu'Min was convicted for this earlier murder, and indications that Mu'Min had confessed to killing Gladys Nopwasky. Several articles focused on the alleged laxity in the supervision of work gangs and argued for reform of the prison work-crew system. The trial judge deferred ruling on the venue motion until after making an attempt to seat a jury.

Shortly before the date set for trial, petitioner submitted to the trial judge 64 proposed voir dire questions² and filed a motion for individual voir dire. The trial court denied the motion for individual voir dire; it ruled that voir dire would begin with collective questioning of the venire, but the venire would be broken down into panels of four, if necessary, to deal with issues of publicity. The trial court also refused to ask any of petitioner's proposed questions relating to the content of news items that potential jurors might have read or seen.

Twenty-six prospective jurors were summoned

2. The court approved 24 of the proposed questions, but did not allow the following questions regarding the content of what jurors had read or heard about the case:

"32. What have you seen, read or heard about this case?"

"33. From whom or what did you get this information?"

"34. When and where did you get this information?"

"38. What did you discuss?"

"41. Has anyone expressed any opinion about this case to you?"

"42. Who? What? When? Where?"

The trial court did ask several of the requested questions concerning prior knowledge of the case:

"31. Have you acquired any information about this case from the newspapers, television, conversations, or any other source?"

"35. Have you discussed this case with anyone?"

"36. With whom?"

"37. When and where?"

into the courtroom and questioned as a group. When asked by the judge whether anyone had acquired any information about the alleged offense or the accused from the news media or from any other source, 16 of the potential jurors replied that they had. The prospective jurors were not asked about the source or content of prior knowledge, but the court then asked the following questions:

Would the information that you heard, received, or read from whatever source, would that information affect your impartiality in this case?

Is there anyone that would say what you've read, seen, heard, or whatever information you may have acquired from whatever the source would affect your impartiality so that you could not be impartial?

.

Considering what the ladies and gentlemen who have answered in the affirmative have heard or read about this case, do you believe that you can enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or conclusion as to the guilt or innocence of the accused?

.

. . . In view of everything that you've seen, heard, or read, or any information from whatever source that you've acquired about this case, is there anyone who believes that you could not become a Juror, enter the Jury box with an open mind and wait until the entire case is presented before reaching a fixed opinion or a conclusion as to the guilt or innocence of the accused?

One of the 16 panel members who admitted to having prior knowledge of the case answered in response to these questions that he could not be impartial, and was dismissed for cause. Petitioner moved that all potential jurors who indicated that they had been exposed to pretrial publicity be excused for cause. This motion was denied, as was

petitioner's renewed motion for a change of venue based on the pretrial publicity.

The trial court then conducted further voir dire of the prospective jurors in panels of four. Whenever a potential juror indicated that he had read or heard something about the case, the juror was then asked whether he had formed an opinion, and whether he could nonetheless be impartial. None of those eventually seated stated that he had formed an opinion, or gave any indication that he was biased or prejudiced against the defendant. All swore that they could enter the jury box with an open mind and wait until the entire case was presented before reaching a conclusion as to guilt or innocence.

If any juror indicated that he had discussed the case with anyone, the court asked follow-up questions to determine with whom the discussion took place, and whether the juror could have an open mind despite the discussion. One juror who equivocated as to whether she could enter the jury box with an open mind was removed *sua sponte* by the trial judge. One juror was dismissed for cause because she was not "as frank as she could [be]" concerning the effect of her feelings toward members of the Islamic Faith and toward defense counsel. One juror was dismissed because of her inability to impose the death penalty, while another was removed based upon his statement that upon a finding of capital murder, he could not consider a penalty less than death. The prosecution and the defense each peremptorily challenged 6 potential jurors, and the remaining 14 were seated and sworn as jurors (two as alternates). * * *

The jury found petitioner guilty of capital murder and recommended that he be sentenced to death. * * *

* * *

Petitioner asserts that the Fourteenth Amendment requires * * * precise inquiries about the contents of any news reports that potential jurors have read. Petitioner argues that these "content" questions would materially assist in obtaining a jury less likely to be tainted by pretrial

publicity than one selected without such questions.
* * *

* * *

Acceptance of petitioner's claim would require that each potential juror be interrogated individually; * * * Petitioner says that the questioning can be accomplished by juror questionnaires submitted in advance at trial, but such written answers would not give counsel or the court any exposure to the demeanor of the juror in the course of answering the content questions. The trial court in this case expressed reservations about interrogating jurors individually because it might make the jurors feel that they themselves were on trial. While concern for the feelings and sensibilities of potential jurors cannot be allowed to defeat inquiry necessary to protect a constitutional right, we do not believe that "content" questions are constitutionally required.

Whether a trial court decides to put questions about the content of publicity to a potential juror or not, it must make the same decision at the end of the questioning: is this juror to be believed when he says he has not formed an opinion about the case? Questions about the content of the publicity to which jurors have been exposed might be helpful in assessing whether a juror is impartial. To be constitutionally compelled, however, it is not enough that such questions might be helpful. Rather, the trial court's failure to ask these questions must render the defendant's trial fundamentally unfair.

[O]ur * * * cases have stressed the wide discretion granted to the trial court in conducting voir dire in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense. The judge of that court sits in the locale where the publicity is said to have had its effect, and brings to his evaluation of any such claim his own perception of the depth and extent of news stories that might influence a juror. The trial court, of course, does not impute

his own perceptions to the jurors who are being examined, but these perceptions should be of assistance to it in deciding how detailed an inquiry to make of the members of the jury venire.

* * *

A trial court's findings of juror impartiality may "be overturned only for 'manifest error.'" "[A]dverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed," but this is not such a case. * * * Unlike the [small] community involved in *Irvin v. Dowd*, 366 U.S. 717 (1961), the county in which petitioner was tried, Prince William, had a population in 1988 of 182,537, and this was one of nine murders committed in the county that year. It is a part of the metropolitan Washington statistical area, which has a population of over 3 million, and in which, unfortunately, hundreds of murders are committed each year. * * * While news reports about Mu'Min were not favorable, they did not contain the same sort of damaging information [as in *Irvin*]. Much of the pretrial publicity was aimed at the Department of Corrections and the criminal justice system in general, criticizing the furlough and work release programs that made this and other crimes possible. * * *

* * * Under the constitutional standard * * * "[t]he relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant."
* * *

* * *

Justice O'CONNOR, concurring.

* * *

The dissent is correct to point out that the trial judge could have done more. He could have decided, in his discretion, to ask each juror to recount what he or she remembered reading about the case. The fact remains, however, that the trial judge himself was familiar with the potentially prejudicial publicity to which the jurors might

have been exposed. Hearing individual jurors repeat what the judge already knew might still have been helpful: a particular juror's tone of voice or demeanor might have suggested to the trial judge that the juror had formed an opinion about the case and should therefore be excused. I cannot conclude, however, that "content" questions are so indispensable that it violates the Sixth Amendment for a trial court to evaluate a juror's credibility instead by reference to the full range of potentially prejudicial information that has been reported. Accordingly, I join the Court's opinion.

Justice MARSHALL, with whom Justice BLACKMUN and Justice STEVENS join as to all but Part IV, dissenting.

Today's decision turns a critical constitutional guarantee – the Sixth Amendment's right to an impartial jury – into a hollow formality. * * *

* * *

I

* * * Regardless of how widely disseminated news of the charges against Mu'Min might have been, the simple fact of the matter is that two-thirds of the persons on Mu'Min's jury admitted having read or heard about the case. * * *

* * *

The circumstances of the murder generated intense local interest and political controversy. The press focused on the gross negligence of the corrections officials responsible for overseeing the work detail from which Mu'Min had escaped. * * * It was * * * reported that the lax supervision at the facility allowed the inmates to have ready access to alcohol, drugs, and weapons and to slip away from the work detail for extended periods without detection. * * * [T]he director of Virginia's Department of Corrections acknowledged that the explosive public reaction to the charges against Mu'Min had been intensified by the case of Willie Horton, whose rape and assault of a Maryland woman while on furlough became a major issue in the 1988 presidential campaign.

"The world's in an uproar right now," the official was quoted as stating.

Naturally, a great deal of the media coverage of this controversy was devoted to Mu'Min and the details of his crime. * * * Readers of local papers learned that Nopwasky had been discovered in a pool of blood, with her clothes pulled off and semen on her body. In what was described as a particularly "macabre" side of the story, a local paper reported that, after raping and murdering Nopwasky, Mu'Min returned to the work site to share lunch with other members of the prison detail.

Readers also learned that Mu'Min had confessed to the crime. Under the banner headlines, "Murderer confesses to killing woman," and "Inmate Said to Admit to Killing," the press accompanied the news of Mu'Min's indictment with the proud announcement of Virginia's Secretary of Transportation and Public Safety that the State had already secured Mu'Min's acknowledgment of responsibility for the murder. * * *

* * *

Those who read the detailed reporting of Mu'Min's background would have come away with little doubt that Mu'Min was fully capable of committing the brutal murder of which he was accused. One front-page story set forth the details of Mu'Min's 1973 murder of a cab driver. Another, entitled "Accused killer had history of prison trouble," stated that between 1973 and 1988, Mu'Min had been cited for 23 violations of prison rules and had been denied parole six times. It was also reported that Mu'Min was a suspect in a recent prison beating. Several stories reported that Mu'Min had strayed from the Dale City work detail to go on numerous criminal forays before murdering Nopwasky, sometimes stealing beer and wine, and on another occasion breaking into a private home. * * *

Indeed, readers learned that the murder of Nopwasky could have been avoided if the State had been permitted to seek the death penalty in Mu'Min's 1973 murder case. In a story headlined

“Mu’Min avoided death for 1973 murder in Va.,” one paper reported that but for this Court’s decision a year earlier in *Furman v. Georgia*, which temporarily invalidated the death penalty, the prosecutor at the earlier trial “would have had a case of capital murder.” * * *

Finally, area residents following the controversy were told in no uncertain terms that their local officials were already convinced of Mu’Min’s guilt. * * *

II

* * *

This Court has long and repeatedly recognized that exposure to pretrial publicity may undermine a defendant’s Sixth Amendment guarantee to trial by an impartial jury.¹ In order for the jury to fulfill its constitutional role, each juror must set aside any preconceptions about the case and base his verdict solely on the evidence at trial. * * *

* * *

[A] prospective juror’s own “assurances that he is equal to the task cannot be dispositive of the accused’s rights.” As Justice O’CONNOR has observed, an individual “juror may have an interest in concealing his own bias . . . [or] may be unaware of it.” * * * It is simply impossible to square today’s decision with the established principle that, where a prospective juror admits exposure to pretrial publicity, the trial court must do more than elicit a simple profession of open-mindedness before swearing that person into the jury.

* * *

In my view, once a prospective juror admits exposure to pretrial publicity, content questioning must be part of the voir dire for at least three reasons. First, content questioning is necessary to determine whether the type and extent of the publicity to which a prospective juror has been

1. The Due Process Clause likewise guarantees a criminal defendant’s right to an impartial jury.

exposed would disqualify the juror as a matter of law. * * *

Second, even when pretrial publicity is not so extreme as to make a juror’s exposure to it per se disqualifying, content questioning still is essential to give legal depth to the trial court’s finding of impartiality. One of the reasons that a “juror may be unaware of” his own bias, is that the issue of impartiality is a mixed question of law and fact, the resolution of which necessarily draws upon the trial court’s legal expertise. Where, as in this case, a trial court asks a prospective juror merely whether he can be “impartial,” the court may well get an answer that is the product of the juror’s own confusion as to what impartiality is. By asking the prospective juror in addition to identify what he has read or heard about the case and what corresponding impressions he has formed, the trial court is able to confirm that the impartiality that the juror professes is the same impartiality that the Sixth Amendment demands.

Third, content questioning facilitates accurate trial court factfinding. * * * Where a prospective juror acknowledges exposure to pretrial publicity, the precise content of that publicity constitutes contextual information essential to an accurate assessment of whether the prospective juror’s profession of impartiality is believable. * * *

* * *

Finally, I reject the majority’s claim that content questioning should be rejected because it would unduly burden trial courts. Sixty years ago, Chief Justice Hughes rejected a similar contention: “The argument is advanced on behalf of the Government that it would be detrimental to the administration of the law in the courts of the United States to allow questions to jurors as to racial or religious prejudices. We think that it would be far more injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute.” *Aldridge v. United States*, 283 U.S., at

314-315. This reasoning is fully applicable here.

* * *

Justice KENNEDY, dissenting.

* * *

* * * I find the voir dire in this case was inadequate for an informed ruling that the jurors were qualified to sit. In my view, a juror's acknowledgement of exposure to pretrial publicity initiates a duty to assess that individual juror's ability to be impartial. * * *

* * *

My difficulty with the voir dire in this case was expressed by the dissenting Justices of the Virginia Supreme Court: "[T]he questions in this case were deficient in that the prospective jurors could simply remain silent as an implied indication of a lack of bias or prejudice. This gave the trial court no effective opportunity to assess the demeanor of each prospective juror in disclaiming bias." I fail to see how the trial court could evaluate the credibility of the individuals seated on this jury. The questions were asked of groups, and individual jurors attested to their own impartiality by saying nothing. I would hold, as a consequence, that when a juror admits exposure to pretrial publicity about a case, the court must conduct a sufficient colloquy with the individual juror to make an assessment of the juror's ability to be impartial. The trial judge should have substantial discretion in conducting the voir dire, but, in my judgment, findings of impartiality must be based on something more than the mere silence of the individual in response to questions asked en masse.

Racial bias

African Americans, Latinos or members of other racial or ethnic minorities tried before all-white or predominantly white juries may be concerned about the racial attitudes of the jurors influencing their determinations of guilt and penalty. This concern is supported by polling and research by social scientists.

The Associated Press found in a survey conducted in October, 2012: "In all, 51 percent of Americans now express explicit anti-black attitudes, compared with 48 percent in a similar 2008 survey. When measured by an implicit racial attitudes test, the number of Americans with anti-black sentiments jumped to 56 percent, up from 49 percent during the 2008 presidential election."¹ An AP survey conducted in 2011 found: "52% of non-Hispanic whites expressed anti-Hispanic attitudes. That figure rose to 57% in the implicit test. The survey on Hispanics had no past data for comparison."²

Social scientists have found that the degree to which a defendant is perceived to have a stereotypically African American physical traits (e.g., broad nose, thick lips, dark skin) is a significant determinant of whether death will be imposed in cases involving white victims.³

The problem may be particularly pronounced in the South, which accounts for about 80 percent of executions since 1976. A CNN poll released in 2011 found that nearly four in ten white Southerners sympathize more with the

1. AP poll: U.S. majority have prejudice against blacks, Oct. 27, 2012, available at www.usatoday.com/story/news/politics/2012/10/27/poll-black-prejudice-america/1662067.

2. *Id.*

3. Jennifer L. Eberhardt, Paul G. Davies, Valerie J. Purdie-Vaughns, and Sheri Lynn Johnson, *Looking Deathworthy*, 17 *PSYCHOLOGICAL SCIENCE* 383 (2006) (included in as optional reading in folder "Decision Making Process" within "The Jury.")

Confederacy than with the Union.⁴ A Pew Research Center poll released in April 2011 found that most Southern whites think it is appropriate for modern-day politicians to praise Confederate leaders, the only demographic to believe that.⁵

Usually, the only opportunity to discover racial attitudes of prospective jurors is by questioning them during jury selection. As the following cases show, such questioning is allowed in limited instances and may be severely restricted.

Gene HAM, Petitioner,
v.
State of SOUTH CAROLINA.

Supreme Court of the United States
409 U.S. 524, 93 S.Ct. 848 (1973)

Rehnquist, J., delivered the opinion of the Court. Douglas, filed an opinion concurring in part and dissenting in part. Marshall, J., filed an opinion concurring in part and dissenting in part.

Mr. Justice REHNQUIST delivered the opinion of the Court.

Petitioner was convicted in the South Carolina trial court of the possession of marihuana in violation of state law. He was sentenced to 18 months' confinement, and on appeal his conviction was affirmed by a divided South Carolina Supreme Court. * * * We granted certiorari limited to the question of whether the trial judge's refusal to examine jurors on *voir dire* as to possible prejudice against petitioner violated the latter's federal constitutional rights. * * *

4. CNN Opinion Research Poll – April 9-10 – Civil War, April 12, 2011, available at <http://politicalticker.blogs.cnn.com/2011/04/12/cnnopinion-research-poll-april-9-10-civil-war>.

5. Pew Research Center for the People and the Press, Civil War at 150: Still Relevant, Still Divisive, April 8, 2011, available at www.people-press.org/2011/04/08/civil-war-at-150-still-relevant-still-divisive.

Petitioner is a young, bearded Negro who has lived most of his life in Florence County, South Carolina. He appears to have been well known locally for his work in such civil rights activities as the Southern Christian Leadership Conference and the Bi-racial Committee of the City of Florence. He has never previously been convicted of a crime. His basic defense at the trial was that law enforcement officers were "out to get him" because of his civil rights activities, and that he had been framed on the drug charge.

Prior to the trial judge's *voir dire* examination of prospective jurors, petitioner's counsel requested the judge to ask jurors four questions relating to possible prejudice against petitioner.⁶ The first two questions sought to elicit any possible racial prejudice against Negroes; the third question related to possible prejudice against beards; and the fourth dealt with pretrial publicity relating to the drug problem. The trial judge, while putting to the prospective jurors three general questions as to bias, prejudice, or partiality that are specified in

6. The four questions sought to be asked are the following:

1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?

2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?

3. Would you disregard the fact that this defendant wears a beard in deciding this case?

4. Did you watch the television show about the local drug problem a few days ago when a local policeman appeared for a long time? Have you heard about that show? Have you read or heard about recent newspaper articles to the effect that the local drug problem is bad? Would you try this case solely on the basis of the evidence presented in this courtroom? Would you be influenced by the circumstances that the prosecution's witness, a police officer, has publicly spoken on TV about drugs?"

the South Carolina statutes,⁷ declined to ask any of the four questions posed by petitioner.

The dissenting justices in the Supreme Court of South Carolina thought that this Court's decision in *Aldridge v. United States*, 283 U.S. 308 (1931), was binding on the State. There a Negro who was being tried for the murder of a white policeman requested that prospective jurors be asked whether they entertained any racial prejudice. This Court reversed the judgment of conviction because of the trial judge's refusal to make such an inquiry. Mr. Chief Justice Hughes, writing for the Court, stated that the "essential demands of fairness" required the trial judge under the circumstances of that case to interrogate the veniremen with respect to racial prejudice upon the request of counsel for a Negro criminal defendant.

* * * Since one of the purposes of the Due Process Clause of the Fourteenth Amendment is to insure these "essential demands of fairness," * * * and since a principal purpose of the adoption of the Fourteenth Amendment was to prohibit the States from invidiously discriminating on the basis of race * * *, we think that the Fourteenth Amendment required the judge in this case to interrogate the jurors upon the subject of racial prejudice. South Carolina law permits challenges for cause, and authorizes the trial judge to conduct *voir dire* examination of potential jurors. The State having created this statutory framework for the selection of juries, the essential fairness required by the Due Process Clause of the Fourteenth Amendment requires that under the facts shown by this record the petitioner be permitted to have

the jurors interrogated on the issue of racial bias.
* * *

We agree with the dissenting justices of the Supreme Court of South Carolina that the trial judge was not required to put the question in any particular form, or to ask any particular number of questions on the subject, simply because requested to do so by petitioner. * * * In this context, either of the brief, general questions urged by the petitioner would appear sufficient to focus the attention of prospective jurors on any racial prejudice they might entertain.

The third of petitioner's proposed questions was addressed to the fact that he wore a beard. * * * Given the traditionally broad discretion accorded to the trial judge in conducting *voir dire*, and our inability to constitutionally distinguish possible prejudice against beards from a host of other possible similar prejudices, we do not believe the petitioner's constitutional rights were violated when the trial judge refused to put this question. * * *

Petitioner's final question related to allegedly prejudicial pretrial publicity. But the record before us contains neither the newspaper articles nor any description of the television program in question. Because of this lack of material in the record substantiating any pretrial publicity prejudicial to this petitioner, we have no occasion to determine the merits of his request to have this question posed on *voir dire*.

* * *

Mr. Justice DOUGLAS, concurring in part and dissenting in part.

I concur in that portion of the majority's opinion that holds that the trial judge was constitutionally compelled to inquire into the possibility of racial prejudice on *voir dire*. I think, however, that it was an abuse of discretion for the trial judge to preclude the defendant from an inquiry by which prospective jurors' prejudice to hair growth could have been explored.

7. S.C. Code § 38-202 (1962). The three questions asked of all prospective jurors in this case were, in substance, the following:

1. Have you formed or expressed any opinion as to the guilt or innocence of the defendant, Gene Ham?
2. Are you conscious of any bias or prejudice for or against him?
3. Can you give the State and the defendant a fair and impartial trial?

* * *

The prejudices invoked by the mere sight of non-conventional hair growth are deeply felt. * * * Taken as an affirmative declaration of an individual's commitment to a change in social values, nonconventional hair growth may become a very real personal threat to those who support the status quo. For those people, nonconventional hair growth symbolizes an undesirable life-style characterized by unreliability, dishonesty, lack of moral values, communal ('communist') tendencies, and the assumption of drug use. If the defendant, especially one being prosecuted for the illegal use of drugs, is not allowed even to make the most minimal inquiry to expose such prejudices, can it be expected that he will receive a fair trial?

* * *

Mr. Justice MARSHALL, concurring in part and dissenting in part.

* * *

We have never suggested that this right to impartiality and fairness protects against only certain classes of prejudice or extends to only certain groups in the population. It makes little difference to a criminal defendant whether the jury has prejudged him because of the color of his skin or because of the length of his hair. In either event, he has been deprived of the right to present his case to neutral and detached observers capable of rendering a fair and impartial verdict. * * *

Moreover, the Court has also held that the right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial. A variety of techniques is available to serve this end, * * * but perhaps the most important of these is the jury challenge. * * *

Of course, the right to challenge has little meaning if it is unaccompanied by the right to ask relevant questions on voir dire upon which the challenge for cause can be predicated. * * *

* * *

Theodore RISTAINO et al., Petitioners,
v.
James ROSS, Jr.

Supreme Court of the United States
424 U.S. 589, 96 S.Ct. 1017 (1976).

Powell, J., delivered the opinion of the Court. White, J., filed a statement concurring in the result. Marshall filed a dissenting opinion in which Brennan, J., joined.

Mr. Justice POWELL delivered the opinion of the Court.

Respondent is a Negro convicted in a state court of violent crimes against a white security guard. The trial judge denied respondent's motion that a question specifically directed to racial prejudice be asked during *voir dire* in addition to customary questions directed to general bias or prejudice. The narrow issue is whether, under our recent decision in *Ham v. South Carolina* respondent was constitutionally entitled to require the asking of a question specifically directed to racial prejudice. The broader issue presented is whether *Ham* announced a requirement applicable whenever there may be a confrontation in a criminal trial between persons of different races or different ethnic origins. We answer both of these questions in the negative.

I

* * * The voir dire of prospective jurors was to be conducted by the court, which was required by statute to inquire generally into prejudice. Each defendant, represented by separate counsel, made a written motion that the prospective jurors also be questioned specifically about racial prejudice.⁸ * * *

* * *

8. The question proposed by Ross, who did not adopt as his own various other questions proposed by his codefendants, was:

5. Are there any of you who believe that a white person is more likely to be telling the truth than a black person?"

[The Court denied the motions.]

The voir dire of five panels of prospective jurors then commenced. The trial judge briefly familiarized each panel with the facts of the case, omitting any reference to racial matters. He then explained to the panel that the clerk would ask a general question about impartiality and a question about affiliations with law enforcement agencies.⁹ Consistently with his announced intention to “impress upon [the jurors] . . . that they are to decide the case on the evidence, with no extraneous considerations,” the judge preceded the questioning of the panel with an extended discussion of the obligations of jurors. After these remarks the clerk posed the questions indicated to the panel. Panelists answering a question affirmatively were questioned individually at the bench by the judge, in the presence of counsel. This procedure led to the excusing of 18 veniremen for cause on grounds of prejudice, including one panelist who admitted a racial bias.

The jury eventually impaneled convicted each defendant of all counts. * * *

II

The Constitution does not always entitle a defendant to have questions posed during voir dire specifically directed to matters that conceivably might prejudice veniremen against him. * * * [T]he State’s obligation to the defendant to impanel an impartial jury generally can be satisfied by less than an inquiry into a specific prejudice feared by the defendant.

* * *

9. The questions were, in substance, the following:

If any of you are related to the defendants or to the victim, or if any of you have any interest in this case, or have formed an opinion or is sensible of any bias or prejudice, you should make it known to the court at this time.

. . . Are you presently, or have you in the past worked for a police department or a district attorney’s office, or do you have any relative who is or was engaged in such work.

The circumstances in *Ham* strongly suggested the need for voir dire to include specific questioning about racial prejudice. Ham’s defense was that he had been framed because of his civil rights activities. His prominence in the community as a civil rights activist, if not already known to veniremen, inevitably would have been revealed to the members of the jury in the course of his presentation of that defense. Racial issues therefore were inextricably bound up with the conduct of the trial. * * * In such circumstances we deemed a voir dire that included questioning specifically directed to racial prejudice, when sought by Ham, necessary to meet the constitutional requirement that an impartial jury be impaneled.

We do not agree * * * that the need to question veniremen specifically about racial prejudice also rose to constitutional dimensions in this case.¹⁰ The mere fact that the victim of the crimes alleged was a white man and the defendants were Negroes was less likely to distort the trial than were the special factors involved in *Ham*. The victim’s status as a security officer * * * was cited by respective defense counsel primarily as a separate source of prejudice, not as an aggravating racial factor, and the trial judge dealt with it by his question about law-enforcement affiliations.¹¹ The

10. Although we hold that voir dire questioning directed to racial prejudice was not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant. Under our supervisory power we would have required as much of a federal court faced with the circumstances here. * * * The States also are free to allow or require questions not demanded by the Constitution. * * *

11. The facts here resemble in many respects those in *Aldridge*, where the Court overturned the conviction of a Negro for the murder of a white policeman because the federal trial judge had refused the defendant’s request that the venire be questioned about racial prejudice. * * * While *Aldridge* was one factor relevant to the constitutional decision in *Ham*, we did not rely directly on its precedential force. * * * In light of our holding today, the actual result in *Aldridge* should be recognized as an exercise of our supervisory power over federal courts.

circumstances thus did not suggest a significant likelihood that racial prejudice might infect Ross' trial. * * * In these circumstances, the trial judge acted within the Constitution in determining that the demands of due process could be satisfied by his more generalized but thorough inquiry into the impartiality of the veniremen. * * *

[Concurring opinion of Justice WHITE omitted.]

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

In 1973, the Court refused to review the affirmance on direct appeal of Mr. Ross' conviction. In dissenting from that refusal, I observed that "[t]o deny this petition for certiorari is to see our decision in *Ham v. South Carolina* stillborn and to write an epitaph for those 'essential demands of fairness' recognized by this Court 40 years ago in *Aldridge*." Today, * * * the Court emphatically confirms that the promises inherent in *Ham* and *Aldridge* will not be fulfilled. * * * Accordingly, I respectfully dissent.

Willie Lloyd TURNER, Petitioner
v.
Edward W. MURRAY, Director,
Virginia Department of Corrections.

United States Supreme Court
476 U.S. 28, 106 S.Ct. 1683 (1986).

White, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, in which Brennan, Blackmun, Stevens, and O'Connor, JJ., joined, and an opinion with respect to Parts II and IV, in which Blackmun, Stevens, and O'Connor, JJ., joined. Burger, C.J., concurred in the judgment. Brennan, J., filed an opinion concurring in part and dissenting in part. Marshall, J., filed an opinion concurring in the judgment in part and dissenting in part, in which Brennan, J., joined. Powell, J., filed a dissenting opinion, in which Rehnquist, J., joined.

Justice WHITE announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and III, and an opinion with respect to Parts II and IV, in which Justice BLACKMUN, Justice STEVENS, and Justice O'CONNOR join.

Petitioner is a black man sentenced to death for the murder of a white storekeeper. The question presented is whether the trial judge committed reversible error at voir dire by refusing petitioner's request to question prospective jurors on racial prejudice.

I
* * *

Prior to the commencement of voir dire, petitioner's counsel submitted to the trial judge a list of proposed questions, including the following: "'The defendant, Willie Lloyd Turner, is a member of the Negro race. The victim, W. Jack Smith, Jr., was a white Caucasian. Will these facts prejudice you against Willie Lloyd Turner or affect your ability to render a fair and impartial verdict based solely on the evidence?'"

The judge declined to ask this question, stating that it "has been ruled on by the Supreme Court." The judge did ask the venire, who were questioned in groups of five in petitioner's presence, whether any person was aware of any reason why he could not render a fair and impartial verdict, to which all answered "no." At the time the question was asked, the prospective jurors had no way of knowing that the murder victim was white.

The jury that was empaneled, which consisted of eight whites and four blacks, convicted petitioner on all of the charges against him. After a separate sentencing hearing on the capital charge, the jury recommended that petitioner be sentenced to death, a recommendation the trial judge accepted.

* * *

II

The Fourth Circuit's opinion correctly states the analytical framework for evaluating petitioner's

argument: “The broad inquiry in each case must be . . . whether under all of the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be indifferent as [they stand] unsworn”. The Fourth Circuit was correct, too, in holding that the mere fact that petitioner is black and his victim white does not constitute a “special circumstance” of constitutional proportions. What sets this case apart, however, is that in addition to petitioner’s being accused of a crime against a white victim, the crime charged was a capital offense.

In a capital sentencing proceeding before a jury, the jury is called upon to make a “highly subjective, ‘unique, individualized judgment regarding the punishment that a particular person deserves.’” The Virginia statute under which petitioner was sentenced is instructive of the kinds of judgments a capital sentencing jury must make. * * * Finally, even if the jury has found an aggravating factor, and irrespective of whether mitigating evidence has been offered, the jury has discretion not to recommend the death sentence, in which case it may not be imposed.

* * *

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected. On the facts of this case, a juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether petitioner’s crime involved the aggravating factors specified under Virginia law. Such a juror might also be less favorably inclined toward petitioner’s evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror’s decision in this case. Fear of blacks, which could easily be stirred up by the violent facts of petitioner’s crime, might incline a juror to favor the death penalty.

The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. * *

* In the present case, we find the risk that racial prejudice may have infected petitioner’s capital sentencing unacceptable in light of the ease with which that risk could have been minimized. By refusing to question prospective jurors on racial prejudice, the trial judge failed to adequately protect petitioner’s constitutional right to an impartial jury.

III

We hold that a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The rule we propose is minimally intrusive; as in other cases involving “special circumstances,” the trial judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. Also, a defendant cannot complain of a judge’s failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.

IV

The inadequacy of voir dire in this case requires that petitioner’s death sentence be vacated. It is not necessary, however, that he be retried on the issue of guilt. Our judgment in this case is that there was an unacceptable risk of racial prejudice infecting the capital sentencing proceeding. This judgment is based on a conjunction of three factors: the fact that the crime charged involved interracial violence, the broad discretion given the jury at the death-penalty hearing, and the special seriousness of the risk of improper sentencing in a capital case. At the guilt phase of petitioner’s trial, the jury had no greater discretion than it would have had if the crime charged had been noncapital murder. Thus, with respect to the guilt phase of petitioner’s trial, we find this case to be indistinguishable from *Ristaino*, to which we continue to adhere.

* * *

Justice BRENNAN, concurring in part and dissenting in part.

* * *

I cannot fully join either the Court's judgment or opinion. For in my view, the decision in this case, although clearly half right, is even more clearly half wrong. After recognizing that the constitutional guarantee of an impartial jury entitles a defendant in a capital case involving interracial violence to have prospective jurors questioned on the issue of racial bias[,] * * * the Court disavows the logic of its own reasoning in denying petitioner Turner a new trial on the issue of his guilt. It accomplishes this by postulating a jury role at the sentencing phase of a capital trial fundamentally different from the jury function at the guilt phase and by concluding that the former gives rise to a significantly greater risk of a verdict tainted by racism. Because I believe that the Court's analysis improperly intertwines the significance of the risk of bias with the consequences of bias, and because in my view the distinction between the jury's role at a guilt trial and its role at a sentencing hearing is a distinction without substance in so far as juror bias is concerned, I join only that portion of the Court's judgment granting petitioner a new sentencing proceeding, but dissent from that portion of the judgment refusing to vacate the conviction.

* * *

Justice MARSHALL, with whom Justice BRENNAN joins, concurring in the judgment in part and dissenting in part.

* * *

* * * Henceforth any capital defendant accused of an interracial crime may inquire into racial prejudice on voir dire. When, as here, the same jury sits at the guilt phase and the penalty phase, these defendants will be assured an impartial jury at both phases. Yet petitioner is forced to accept a conviction by what may have been a biased jury. This is an incongruous and fundamentally unfair result. * * *

Justice POWELL, with whom Justice REHNQUIST joins, dissenting.

The Court today adopts a per se rule applicable in capital cases, under which "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." This rule is certain to add to the already heavy burden of habeas petitions filed by prisoners under sentence of death without affording any real protection beyond that provided by our decisions in *Ham v. South Carolina*, 409 U.S. 524 (1973), and *Ristaino v. Ross*, 424 U.S. 589 (1976).

* * *

For consideration: How valuable is the right recognized in *Turner* in identifying racial bias on the part of prospective jurors? How would you examine prospective jurors in order to learn about their racial attitudes?

Attitudes Regarding Capital Punishment

The following decision in *Witherspoon v. Illinois* was handed down two years after the Gallup Poll found support for the death penalty in the United States at an all-time low of 42%. It was the only time over the course of 75 years of polling in which there was more opposition (47%) than support for the death penalty. These public attitudes may be reflected in the majority decision in *Witherspoon*. Public opinion was already changing to support for the death penalty by the time the case was decided and would exceed 70% not long after it.

William C. WITHERSPOON, Petitioner,

v.

STATE OF ILLINOIS et al.

Supreme Court of the United States
391 U.S. 510, 88 S.Ct. 1770 (1968).

Stewart, J., delivered the opinion of the Court. Douglas, J., filed an opinion concurring in part and dissenting in part. Black, J., filed a dissenting opinion in which Harlan and White, JJ., joined. White, J., filed a dissenting opinion.

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner was brought to trial in 1960 in Cook County, Illinois, upon a charge of murder. The jury found him guilty and fixed his penalty at death. At the time of his trial an Illinois statute provided:

In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.

Through this provision the State of Illinois armed the prosecution with unlimited challenges for cause in order to exclude those jurors who, in the words of the State's highest court, "might hesitate

to return a verdict inflicting [death]." At the petitioner's trial, the prosecution eliminated nearly half the venire of prospective jurors by challenging, under the authority of this statute, any venireman who expressed qualms about capital punishment. * * *

I.

The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them. For the State of Illinois did not stop there, but authorized the prosecution to exclude as well all who said that they were opposed to capital punishment and all who indicated that they had conscientious scruples against inflicting it.

In the present case the tone was set when the trial judge said early in the voir dire, "Let's get these conscientious objectors out of the way, without wasting any time on them." In rapid succession, 47 veniremen were successfully challenged for cause on the basis of their attitudes toward the death penalty. Only five of the 47 explicitly stated that under no circumstances would they vote to impose capital punishment. Six said that they did not "believe in the death penalty" and were excused without any attempt to determine whether they could nonetheless return a verdict of death.⁷ Thirty-nine veniremen, including four of the six who indicated that they did not believe in capital punishment, acknowledged having "conscientious or religious scruples against the infliction of the death penalty"

7. It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State. * * *

or against its infliction “in a proper case” and were excluded without any effort to find out whether their scruples would invariably compel them to vote against capital punishment.

Only one venireman who admitted to “a religious or conscientious scruple against the infliction of the death penalty in a proper case” was examined at any length. She was asked: “You don’t believe in the death penalty?” She replied: “No. It’s just I wouldn’t want to be responsible.” The judge admonished her not to forget her “duty as a citizen” and again asked her whether she had “a religious or conscientious scruple” against capital punishment. This time, she replied in the negative. Moments later, however, she repeated that she would not “like to be responsible for * * * deciding somebody should be put to death.” Evidently satisfied that this elaboration of the prospective juror’s views disqualified her under the Illinois statute, the judge told her to “step aside.”⁹

9. As the voir dire examination of this venireman illustrates, it cannot be assumed that a juror who describes himself as having “conscientious or religious scruples” against the infliction of the death penalty or against its infliction “in a proper case” thereby affirmed that he could never vote in favor of it or that he would not consider doing so in the case before him. Obviously many jurors “could, notwithstanding their conscientious scruples [against capital punishment], return * * * [a] verdict [of death] and * * * make their scruples subservient to their duty as jurors.” Yet such jurors have frequently been deemed unfit to serve in a capital case.

The critical question, of course, is not how the phrases employed in this area have been construed by courts and commentators. What matters is how they might be understood – or misunderstood – by prospective jurors. Any “layman * * * [might] say he has scruples if he is somewhat unhappy about death sentences. * * * [Thus] a general question as to the presence of * * * reservations [or scruples] is far from the inquiry which separates those who would never vote for the ultimate penalty from those who would reserve it for the direct cases.” Unless a venireman states unambiguously that he would automatically vote against the imposition of capital punishment no matter what the trial might reveal, it simply cannot be assumed that that is his position.

III.

* * * [I]n its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and Fourteenth Amendments. * * *

The only justification the State has offered for the jury-selection technique it employed here is that individuals who express serious reservations about capital punishment cannot be relied upon to vote for it even when the laws of the State and the instructions of the trial judge would make death the proper penalty. But in Illinois, as in other States, the jury is given broad discretion to decide whether or not death is “the proper penalty” in a given case, and a juror’s general views about capital punishment play an inevitable role in any such decision.

A man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror. But a jury from which all such men have been excluded cannot perform the task demanded of it. * * * [A] jury that must choose between life imprisonment and capital punishment can do little more – and must do nothing less – than express the conscience of the community on the ultimate question of life or death. Yet, in a nation less than half of whose people believe in the death penalty, a jury composed exclusively of such people cannot speak for the community. Culled of all who harbor doubts about the wisdom of capital punishment – of all who would be reluctant to pronounce the extreme penalty – such a jury can speak only for a distinct and dwindling minority.

If the State had excluded only those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death, it could argue that the resulting jury was simply “neutral” with respect to penalty. But when it swept from the jury all who expressed conscientious or religious scruples against capital punishment and all who opposed it in principle,

the State crossed the line of neutrality. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die.

It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal “organized to convict.” * * * It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict or death. Specifically, we hold that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.²¹ No defendant can

21. Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings. If the *voir dire* testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion.

We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant’s *guilt*. Nor does the decision in this case affect the validity of any sentence *other* than one of

constitutionally be put to death at the hands of a tribunal so selected.

Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the petitioner. To execute this death sentence would deprive him of his life without due process of law.

Mr. Justice DOUGLAS.

* * *

I see no constitutional basis for excluding those who are so opposed to capital punishment that they would never inflict it on a defendant. Exclusion of them means the selection of jurors who are either protagonists of the death penalty or neutral concerning it. That results in a systematic exclusion of qualified groups, and the deprivation to the accused of a cross-section of the community for decision on both his guilt and his punishment.

* * *

Mr. Justice BLACK, with whom Mr. Justice HURLAN and Mr. Justice WHITE join, dissenting.

* * *

* * * It seems particularly unfortunate to me that this Court feels called upon to charge that [the justices of the Illinois Supreme Court] would let a man go to his death after the trial court had contrived a “hanging jury” and, in this Court’s language, “stacked the deck” to bring about the death sentence for petitioner. With all due deference it seems to me that one might much more appropriately charge that this Court has today written the law in such a way that the States are being forced to try their murder cases with biased juries. If this Court is to hold capital punishment unconstitutional, I think it should do so forthrightly, not by making it impossible for States to get juries that will enforce the death penalty.

death. Nor, finally, does today’s holding render invalid the *conviction*, as oppose to the *sentence*, in this or any other case.

* * *

As I see the issue in this case, it is a question of plain bias. A person who has conscientious or religious scruples against capital punishment will seldom if ever vote to impose the death penalty. This is just human nature, and no amount of semantic camouflage can cover it up. In the same manner, I would not dream of foisting on a criminal defendant a juror who * * * claims, for example, that he adheres literally to the Biblical admonition of “an eye for an eye”. * * * While I have always advocated that the jury be as fully representative of the community as possible, I would never carry this so far as to require that those biased against one of the critical issues in a trial should be represented on a jury. * * *

* * *

* * * [T]he new requirement placed upon the States is that they cease asking prospective jurors whether they have “conscientious or religious scruples against the infliction of the death penalty,” but instead ask whether “they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them.” I believe that this fine line the Court attempts to draw is based on a semantic illusion and that the practical effect of the Court’s new formulation of the question to be asked state juries will not produce a significantly different kind of jury from the one chosen in this case. And I might add that the States will have been put to a great deal of trouble for nothing. * * *

I believe that the Court’s decision today goes a long way to destroying the concept of an impartial jury as we have known it. * * *

* * *

Mr. Justice WHITE, dissenting.

* * *

All Illinois citizens, including those who oppose the death penalty, are assured by the Constitution a fair opportunity to influence the legislature’s determinations about criminal sentences. Those opposing the death penalty have not prevailed in

that forum, however. The representatives of the people of Illinois have determined that the death penalty decision should be made in individual cases by a group of those citizens without conscientious scruples about one of the sentencing alternatives provided by the legislature. This method of implementing the majority’s will was presumably related to a desire to preserve the traditional policy of requiring that jury verdicts be unanimous. The legislature undoubtedly felt that if all citizens could serve on the jury, and if one citizen with especially pronounced “scruples” could prevent a decision to impose death, the penalty would almost never be imposed. * * * The delegation by Illinois, which merely excludes those with doubts in policy about one of the punishments among which the legislature sought to have them choose, seems an entirely reasonable and sensible legislative act.

* * *

Adams v. Texas

Randall Dale Adams came within 72 hours of execution before the Supreme Court granted a stay as well *certiorari* to consider the application of *Witherspoon* to jury selection for the bifurcated procedure that Texas adopted in response to *Furman v. Georgia*.

The Court reversed the death sentence for improper exclusion of jurors in an opinion by Justice White. *Adams v. Texas*, 448 U.S. 38 (1980). At the time of Adams trial, Texas law provided:

Prospective 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.

The Court found *Witherspoon* and other cases established 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 court.”

The Court also made it clear that “*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State’s power to exclude for cause: 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.”

The Court concluded that the Texas statute regarding juror disqualification was applied to exclude prospective jurors on grounds impermissible under *Witherspoon*, finding that jurors were not asked whether they could follow the instructions regardless of their personal opinions regarding the death penalty, but whether they would be “affected” by the fact that death could be imposed depending on the jury’s answer to the special questions in the Texas statute.

Such a test could, and did, exclude jurors who stated that they would be “affected” by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally. Others were excluded only because they were unable positively to state whether or not their deliberations would in any way be “affected.” * * * The grounds for excluding these jurors were consequently insufficient under the Sixth and Fourteenth Amendments. * * *

Justice Rehnquist alone dissented, expressing the view that *Witherspoon* should be reexamined in light the Court’s intervening decisions limiting the discretion of juries in capital cases. Because Texas limits jury discretion by requiring jurors to answer certain questions which determine whether death will be imposed, Justice Rehnquist saw “no reason why Texas should not be entitled to require

each juror to swear that he or she will answer those questions without regard to their possible cumulative consequences.”

Randall Dale Adams subsequently became the subject of a film, “The Thin Blue Line” (Miramax 1988), which revealed that he was innocent of the murder for which he had been sentenced to death. Adams was released in 1989. Adams described his experiences in a book, *ADAMS V. TEXAS* (St. Martin’s Press 1991).

**Louie L. WAINWRIGHT,
Secretary, Florida
Department of Corrections,
Petitioner,
v.
Johnny Paul WITT**

United States Supreme Court
469 U.S. 412, 105 S.Ct. 844 (1985)

Rehnquist, J., delivered the opinion of the Court. Stevens, J., filed opinion concurring in the judgment. Brennan, J., filed dissenting opinion in which Marshall, J., joined.

Justice REHNQUIST delivered the opinion of the Court.

This case requires us to examine once again the procedures for selection of jurors in criminal trials involving the possible imposition of capital punishment, see *Witherspoon v. Illinois*, 391 U.S. 510 (1968), * * *.

I

Respondent Johnny Paul Witt was convicted of first-degree murder in Florida and sentenced to death.

* * *

[The Court of Appeals for the Eleventh Circuit found a violation of *Witherspoon* in the following exchange during voir dire between the prosecutor and veniremember Colby.]

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

* * *

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

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

[A]: I am afraid it would.

[Q]: You are afraid it would?

[A]: Yes, Sir.

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

[A]: I think so.

[Q]: You think it would.

[A]: I think it would.

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

THE COURT: All right. Step down.

Defense counsel did not object or attempt rehabilitation.

* * * The Court of Appeals drew the standard for determining when a juror may properly be excluded from *Witherspoon's* footnote 21; jurors may be excluded for cause if they make it

unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.

* * * The court concluded that * * * Colby's limited expressions of "feelings and thoughts" failed to "unequivocally state that she would automatically be unable to apply the death penalty" * * *

* * *

II

* * *

Despite *Witherspoon's* limited holding, later opinions in this Court and the lower courts have referred to the language in footnote 21, or similar language in *Witherspoon's* footnote 9, as setting the standard for judging the proper exclusion of a juror opposed to capital punishment. Later cases in the lower courts state that a veniremember may be excluded only if he or she would "automatically" vote against the death penalty, and even then this state of mind must be "unambiguous," or "unmistakably clear."

But more recent opinions of this Court demonstrate no ritualistic adherence to a requirement that a prospective juror make it "unmistakably clear ... that [she] would automatically vote against the imposition of capital punishment"

* * *

This Court * * * examined the *Witherspoon* standard in *Adams v. Texas*. * * * The Court concluded:

This 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. * * *

* * *

* * * [T]he standard applied in *Adams* differs markedly from the language of footnote 21 [of *Witherspoon*]. The tests with respect to sentencing and guilt, originally in two prongs, have been merged; the requirement that a juror may be excluded only if he would never vote for the death penalty is now missing; gone too is the extremely

high burden of proof. In general, the standard has been simplified.

There is good reason why the *Adams* test is preferable for determining juror exclusion. * * * In *Witherspoon* the jury was vested with unlimited discretion in choice of sentence. Given this discretion, a juror willing to consider the death penalty arguably was able to “follow the law and abide by his oath” in choosing the “proper” sentence. Nothing more was required. Under this understanding the only veniremembers who could be deemed excludable were those who would never vote for the death sentence or who could not impartially judge guilt.

After our decisions in *Furman v. Georgia*, and *Gregg v. Georgia*, however, sentencing juries could no longer be invested with such discretion. As in the State of Texas, many capital sentencing juries are now asked specific questions, often factual, the answers to which will determine whether death is the appropriate penalty. In such circumstances it does not make sense to require simply that a juror not “automatically” vote against the death penalty; whether or not a venireman might vote for death under certain personal standards, the State still may properly challenge that venireman if he refuses to follow the statutory scheme and truthfully answer the questions put by the trial judge. To hold that *Witherspoon* requires anything more would be to hold, in the name of the Sixth Amendment right to an impartial jury, that a State must allow a venireman to sit despite the fact that he will be unable to view the case impartially. * * *

* * * *Witherspoon* is not grounded in the Eighth Amendment’s prohibition against cruel and unusual punishment, but in the Sixth Amendment. Here, as elsewhere, the quest is for jurors who will conscientiously apply the law and find the facts. That is what an “impartial” jury consists of, and we do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor.

As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality.

* * *

We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. * * * We note that, in addition to dispensing with *Witherspoon*’s reference to “automatic” decisionmaking, this standard likewise does not require that a juror’s bias be proved with “unmistakable clarity.” * * * [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made “unmistakably clear”; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.

* * *

III

This case arises from respondent’s petition for habeas corpus under 28 U.S.C. § 2254, and therefore a federal reviewing court is required to accord any findings of the state courts on “factual issues” a “presumption of correctness” * * *

* * * [T]he question whether a venireman is biased has traditionally been determined through voir dire culminating in a finding by the trial judge concerning the venireman’s state of mind. We also noted that such a finding is based upon determinations of demeanor and credibility that are peculiarly within a trial judge’s province. Such determinations were entitled to deference even on direct review; “[t]he respect paid such findings in a habeas proceeding certainly should be no less.”

* * *

* * *

IV

Turning to the facts, we conclude that juror Colby was properly excused for cause. * * *

* * *

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting. * * *

* * *

* * * Until today * * * our fundamental notions of criminal justice were thought to demand that the State, not the defendant, bear the risk of a less than wholly neutral jury when perfect neutrality cannot, as in this situation it most assuredly cannot, be achieved. * * *

* * *

The Court’s crucial perception in *Witherspoon* was that such broad exclusion of prospective jurors on the basis of the possible effect of their views about capital punishment infringes the rights of a capital defendant in a way that broad exclusion for indicia of other kinds of bias does not. No systemic skew in the nature of jury composition results from exclusion of individuals for random idiosyncratic traits likely to lead to bias. Exclusion of those opposed to capital punishment, by contrast, keeps an identifiable class of people off the jury in capital cases and is likely systemically to bias juries. Such juries are more likely to be hanging juries, tribunals more disposed in any given case to impose a sentence of death. These juries will be unlikely to represent a fair cross section of the community, and their verdicts will thus be unlikely to reflect fairly the community’s judgment whether a particular defendant has been shown beyond a reasonable doubt to be guilty and deserving of death. For a community in which a significant segment opposes capital punishment, “proof beyond a reasonable doubt” in a capital case might be a stricter threshold than “proof beyond a reasonable

doubt” in a noncapital case. A jury unlikely to reflect such community views is not a jury that comports with the Sixth Amendment.

* * * *Witherspoon* accommodated both the defendant’s constitutionally protected rights and the State’s legitimate interests by permitting the State to exclude jurors whose views about capital punishment would prevent them from being impartial but requiring strict standards of proof for exclusion. In particular, *Witherspoon* precluded any speculative presumption that a juror opposed to capital punishment would for that reason lack the ability to be impartial in a particular case[.] * * *

* * *

Today’s opinion for the Court is the product of a saddening confluence of three of the most disturbing trends in our constitutional jurisprudence respecting the fundamental rights of our people. The first is the Court’s unseemly eagerness to recognize the strength of the State’s interest in efficient law enforcement and to make expedient sacrifices of the constitutional rights of the criminal defendant to such interests. The second is the Court’s increasing disaffection with the previously unquestioned principle, endorsed by every Member of this Court, that “because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards” The third is the Court’s increasingly expansive definition of “questions of fact” calling for application of the presumption of correctness to thwart vindication of fundamental rights in the federal courts. These trends all reflect the same desolate truth: we have lost our sense of the transcendent importance of the Bill of Rights to our society. We have lost too our sense of our own role as Madisonian “guardians” of these rights. Like the death-qualified juries that the prosecution can now mold to its will to enhance the chances of victory, this Court increasingly acts as the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution irrespective of the Constitution’s fundamental guarantees. One can only hope that this day too will soon pass.

Lockhart v. McCree* and *Morgan v. Illinois

In *Lockhart v. McCree*, 476 U.S. 165 (1986), the Court rejected the argument that “death qualification” of the jury violates the right to jury that represents a fair cross-section of the community, as required by the Sixth Amendment, made applicable to the states by the Fourteenth Amendment.

The Court, speaking through Chief Justice Rehnquist, first held that the fair cross-section requirement applies only to the jury venire, and does not extend to the use of for-cause or peremptory challenges. In addition, the Court said that even if the fair-cross section requirement was extended to petit juries, “groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as a jurors . . . are not ‘distinctive groups’ for fair-cross-section purposes.”

The Court also rejected the argument that death qualification denied an “impartial jury” also guaranteed by the Sixth Amendment because the exclusion of those opposed to the death penalty resulted in a jury more likely to convict and impose death. The Court found this view of impartiality “both illogical and hopelessly impractical.” Justices Marshall, Brennan and Stevens dissented finding that the death qualification of the jury “diminishes the reliability of the guilt determination.”

In *Morgan v. Illinois*, 504 U.S. 719 (1992), the Court held that a state court may not refuse to allow inquiry into whether a potential juror would automatically vote *in favor* of the death penalty upon conviction of the defendant. A potential juror’s strong support for capital punishment may substantially impair his or her ability to fairly consider a sentence of life imprisonment.

The Georgia Supreme Court invoked the language of both *Witherspoon* and *Witt* in deciding whether a potential juror’s support for the death penalty was disqualifying in *O’Kelly v. State*, 670 SE2d 388, 394 (GA 2008):

O’Kelley claims that [prospective juror Carter] should have been excused for cause because he expressed support for the death penalty during his successful campaign for election as a state representative and because he stated on his juror questionnaire that “if [O’Kelley] is guilty, he should get the death sentence.” During voir dire, Mr. Carter explained that his intent in completing his juror questionnaire as he did “was simply to say that if the evidence [wa]s overwhelming, that [he] would not hesitate to impose the death penalty.” However, Mr. Carter repeatedly indicated that he would consider all three sentencing options [death, life imprisonment without parole and life imprisonment with the possibility of parole], and he specifically stated that he could consider a sentence of life with the possibility of parole where an intentional murder with aggravating circumstances was found. Mr. Carter was not unqualified because he “expressed a leaning for or against a particular sentence for a convicted murderer,” as he was not “irrevocably committed to voting against one of the three possible sentences.” Moreover, while Mr. Carter acknowledged that he would want his constituents to know that he favored the death penalty or a life without parole sentence and that he “care[d] very much about public service and [his] political career,” he stated that “[he] would sacrifice that to do the right thing.” Viewing the record as a whole and giving deference to the trial court’s finding that “[Mr. Carter] said he cannot do something against his convictions . . . despite his political aspirations,” we conclude that the trial court was authorized to find that Mr. Carter’s views on capital punishment would not substantially impair his ability to perform his duties as a juror in accordance with his instructions and his oath.

Voir Dire of Juror Z

in *State v. Brown*, Superior Court of
King County, Washington, Nov. 3, 1993.

This excerpt of the voir dire was appended to the Opinion of the Court in Uttecht v. Brown, 551 U.S. 1 (2007), which follows this excerpt. As you read it, how would you apply Witt to the question of whether Juror Z is disqualified from jury service because of his attitudes regarding the death penalty.

THE COURT: All right. [Juror Z]. (Prospective Juror, [Juror Z], entered the courtroom.)

THE COURT: That's fine, [Juror Z]. Good afternoon.

[JUROR Z]: Good afternoon.

THE COURT: Do you have any questions at all about any of the preliminary instructions that you got this afternoon and the format that we were talking about or the reasons why the attorneys have to discuss the penalty phase when there may never really be a penalty phase.

[JUROR Z]: No, I think I understand the situation.

THE COURT: Did you answer or nod your head about remembering something about having heard this crime before?

[JUROR Z]: No, I did not.

THE COURT: Okay. We'll start with the defense.

* * *

BY MS. HUPP:

Q Good afternoon. My name is Lin-Marie Hupp, and I'm one of Cal Brown's attorneys.

I would like to start off asking you some questions about your feelings about the death penalty. I want to reinforce what the Judge has already told you, which is there are no right or wrong answers. We just need to get information about your feelings so we can do our job.

A Okay.

Q Can you tell me when it was you first realized this was a potential death penalty case?

A Not until last Monday when I was here in the initial jury information session.

Q Okay. Can you tell me when the Judge read that long thing to you and basically told you that this was a potential in the case, can you tell me what you were thinking when you heard that?

A I guess I wasn't surprised when I got the announcement for jury duty. And it was more than the standard two weeks that most everybody else goes to. I thought it must be a pretty substantial case. In my mind I tried to guess what it might be, so this is one of the things that entered into it.

Q Can you give me an idea of what your general feelings about the death penalty are?

A I do believe in the death penalty in severe situations. A good example might be the young man from, I believe he was from Renton that killed a couple of boys down in the Vancouver area and was sentenced to the death penalty, and wanted the death penalty. And I think it is appropriate in severe cases.

Q And that case you're talking about, that is the one where he actually came out, the defendant actually came out and said that he actually wanted to die?

A I believe that was the case.

Q Does that have any kind of bearing on your idea that the death penalty was appropriate in his case?

A I believe that it was in that case.

Q If you removed that factor completely from it, is that again the type of case that you think the death penalty would be appropriate?

A It would have to be a severe case. I guess I can't put a real line where that might be, but there are a

lot of cases that I don't think it's where people would –

Q Okay. And let me kind of fill in the blanks for myself here by just asking you a couple of questions about that. I'm assuming that there would not be any case other than murder that you would think the death penalty would be appropriate?

A I think that is correct.

Q Okay. And the way the law is in Washington anyway, in order to get to the point where you would even consider the death penalty, the State would first have to prove that you had committed a premeditated murder and one that had been thought about beforehand.

Do you have any kind of feeling that something other than a premeditated murder, in other words, one that would have been planned that would be appropriate for the death penalty?

A No. I think it would have to be premeditated.

Q In addition to that in Washington even premeditated murders are not eligible for a potential death penalty unless the State also proves aggravating circumstances. In this case the State is alleging or is going to try and prove a number of aggravating circumstances, four of them. Okay. And the ones that they are going to try and prove are that the murder was committed, a premeditated murder was committed during a rape, a robbery, a kidnapping and that it was done in order to conceal a witness or eliminate a witness.

Does that fall within the class of cases that you think the death penalty is appropriate?

A I think that would be.

Q Okay. Now, how about other sentencing options in a case like that, do you think that something other than the death penalty might be an appropriate sentence?

A I think that if a person is temporarily insane or

things of that that lead a person to do things that they would not normally do, I think that would enter into it.

Q All right. Other than-well, maybe what we should do-the way that the law is in Washington, if the jury finds beyond a reasonable doubt that somebody has committed a premeditated murder with at least one aggravating circumstance, and in this case you have a potential for the four, then the jury reconvenes to consider whether or not the death penalty should be imposed or whether or not a life sentence without parole should be imposed.

One sort of aside here, life without parole is exactly what it sounds like. It is a life sentence. You're not ever eligible for parole. You hear about it in the papers sometimes where somebody has got a life sentence and they're going to be eligible for parole in 10 years or 20 years.

A I understand.

Q Were you aware before that Washington has got this kind of sentence where it's life without parole where you are not ever eligible for parole?

A I did not until this afternoon.

Q That is the two options that the jury has if they found the person guilty of premeditated murder beyond a reasonable doubt plus aggravating circumstances beyond a reasonable doubt.

Do you think that you could consider both options?

A Yes, I could.

Q Could you give me an idea sort of have you thought about sort of the underlying reason why you think the death penalty is appropriate, what purpose it serves, that kind of thing?

A I think if a person is, would be incorrigible and would re-violate if released, I think that's the type of situation that would be appropriate.

Q Okay. Now, knowing that you didn't know

before when you were coming to those opinions about the two options that we have here obviously somebody who is not going to get out of jail no matter which sentence you give them if you got to that point of making a decision about the sentence, does that mean what I'm hearing you say is that you could consider either alternative?

A I believe so, yes.

Q Now, in your, I think in your questionnaire you sort of referred to that also, what you kind of thought about was if somebody had been killed and it had been proven to you that they would kill again. Understanding that the two options there are life without parole or the death penalty, there is not a lot of likelihood that people are going to spend a lot of time talking about whether or not they're going to kill again in the sentencing phase of this case. Is that going to make you frustrated? Are you going to want to hear about things like that, about people's opinions in the penalty phase?

A I'm not sure.

Q Okay. That's very fair. Do you have any kind of feelings about the frequency of the use of the death penalty in the United States today? Do you think it's used too frequently or not often enough?

A It seemed like there were several years when it wasn't used at all and just recently it has become more prevalent in the news anyway. I don't think it should never happen, and I don't think it should happen 10 times a week either. I'm not sure what the appropriate number is but I think in severe situations, it is appropriate.

Q It sounds like you're a little more comfortable that it is being used some of the time?

A Yes.

Q You weren't happy with the time when it wasn't being used at all?

A I can't say I was happy or unhappy, I just felt that there were times when it would be appropriate.

Q Let me ask you, and we may have covered this already, but let me ask you just to make sure I understand. If the State were to prove beyond a reasonable doubt that the defendant had committed a premeditated murder with aggravating circumstances that I have laid out for you, rape, robbery, kidnapping, to conceal or eliminate a witness, at least one of those, in addition another thing you might hear in this trial is some evidence that the defendant deliberately inflicted pain upon the victim before she died for some period of time.

If that was the crime that you heard about and came to a decision about guilty about, do you think you consider a life sentence?

A I could consider it but I don't know if I really have enough information to make a determination.

Q Right. And it's real tough to be asking you these questions and even tougher for you to have to answer them without any evidence before you. But you understand that this is our only time to do that before you have heard all the evidence?

A I understand, yes.

Q As a matter of fact, the law in this state after, even after you have found somebody guilty of really hideous crime like that presumes that the sentence, the appropriate sentence is life without parole. The State has the burden of proof, again, in the penalty phase. And they would have to prove beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit a life sentence.

Are you comfortable with that idea that you start off presuming that, as a matter of fact, even for a hideous crime that a life sentence is the appropriate sentence?

A It is or is not?

Q That it is an appropriate sentence.

A I guess I'm a little confused by the question. So, you go into it with a life sentence is the

appropriate sentence?

Q Right. If you look at the chart here, there's almost a mirror image to start off a trial presuming that somebody is innocent and you start off a sentencing presuming that a life sentence is appropriate?

A I see.

Q Okay.

A Yes.

Q Okay. Now, as far as mitigating circumstances, you had mentioned the idea that maybe somebody was temporarily insane. The Judge is going to give you an instruction on mitigating circumstances, and I will define it for you, but the definition is real broad. The definition basically is, any reason, not a justification, not an excuse for the crime and not a defense to the crime, but a reason for imposing something other than death. That's pretty broad.

MR. MATTHEWS: I object to that question. I don't believe that is a question. I believe that's a statement.

THE COURT: The objection will be sustained.

Q (BY MS. HUPP) The judge will instruct you about what a mitigating circumstance is.

But what I want to be real clear about is that it's not a defense to the crime. Okay. In other words, if you believe that somebody was really temporarily insane at the time he committed the offense, well, then it wouldn't be premeditated. It would be an insanity defense, and that would all get dealt with-

MR. MATTHEWS: Your Honor, again, I am going to object to the nature of the question.

THE COURT: [Juror Z], you were the one that actually brought it up in terms of the mental status of the person. You are the one who said temporarily insane when they committed this kind

of crime. You realize that there are particular defenses that may be available in the actual criminal case itself, the guilt phase.

But once you get to the penalty phase, we're not talking about the crime in any way, and you're simply trying to determine what the appropriate punishment or sanction should be for a crime that a person has been found guilty of. At that point in time, something like all sorts of mitigating circumstances come into it, and mental status can come into it. But it would only be evaluated in the light of the mitigating circumstances, not a defense. Do you understand that?

A Understand.

Q (BY MS. HUPP) To just sort of follow up on that, if mental status came into play and you were presented with some sort of evidence about mental status, is that the sort of evidence you would consider?

A Yes, I could.

Q How about things like somebody's childhood or their emotional development?

A I could consider it. I don't have strong feelings one way or the other.

Q Okay. All right. And, also, when we talk about mitigating circumstances, what might be mitigating to you might not matter much to the person sitting next to you in juror's box. Do you think you could discuss your feelings about those things?

A Yes.

Q Could you, say the person next to you says something is mitigating and you don't think it's very mitigating at all, could you also discuss it in this situation?

A (Nodding head).

Q Could you respect that other person's opinion?

A Everybody is entitled to an opinion, yes.

Q Another thing that happens at the sentencing phase of the trial is that the jury would have to be unanimous, in other words, everybody would have to agree if they were going to impose a death sentence. If one person, four people, five people, how ever many people don't agree with that, then the sentence is life. Okay. So, it kind of strips away that sort of comfort in numbers that some people get from the idea of having a unanimous decision.

Do you think you can accept the responsibility for such an important decision for yourself?

A I do.

Q Okay. Thank you.

MS. HUPP: I have no further questions.

THE COURT: The State.

Voir Dire Examination by Mr. Matthews:

Q [Juror Z], I'm Al Matthews. I'm one of two prosecutors in the case. I have got some very specific questions, and perhaps we can clear them up real rapidly.

I see your step-brother is a policeman and you see him about four times a year.

A (Nodding head).

Q Do you ever have any discussions about the death penalty, is this a subject that ever comes up?

A No.

Q Have you ever had occasion to discuss it at all within the family circle?

A I don't believe so.

Q You mentioned on your questionnaire, and we do read them, that you're in favor of the death penalty if it is proved beyond a shadow of a doubt

if a person has killed and would kill again. Do you remember making that statement?

A Yes.

Q First of all, have you ever been on a jury trial before?

A I have not.

Q Now, you made this statement before you read your juror's handbook I imagine?

A Yes.

Q So, I want to ask you, the thing that bothers me, of course, is the idea beyond a shadow of a doubt. The law says beyond a reasonable doubt, and it will be explained to you what it actually means. But I want to assure you it doesn't mean, I don't believe the Court would instruct would you it means beyond all doubt or beyond any shadow of a doubt. Knowing that, would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?

A I would have to know the, I'm at a loss for the words here.

Q You can ask me any questions, too, if you need some clarification.

A I guess it would have to be in my mind very obvious that the person would reoffend.

Q Well, we're not talking about that, sir.

A Or was guilty, yes.

Q So, we're talking about that?

A Yes.

Q So, you would be satisfied with a reasonable doubt standard? You would be willing to follow the law?

A Yes.

Q In other words, nothing, there is very few things in life absolutely certain?

A I understand.

Q And that is basically what we're saying to you, and that is what the term reasonable doubt means –

A (Nodding head).

Q – that we don't have to prove it beyond all doubt.

Now, we get to the penalty phase and the question becomes slightly different. It presumes life as a person is presumed innocent in the guilt phase, it is presumed that the proper penalty for the beginning point in the penalty phase is life in prison without parole.

Now, you mentioned that you would have to be satisfied that the person would not kill again. Now, you know that the possible, that the only two penalties are life in prison without parole or death. The person, if he is committed, if he is convicted of aggravated murder, is not going to be out on the streets again, not going to come in contact with the people that he had a chance to run into before. So, the likelihood of him killing someone out in the street is nil or practically nil at that point.

I guess the reverse side of what you're saying is, if you could be convinced that he wouldn't kill again, would you find it difficult to vote for the death penalty given a situation where he couldn't kill again?

A I think I made that statement more under assumption that a person could be paroled. And it wasn't until today that I became aware that we had a life without parole in the state of Washington.

Q And now that you know there is such a thing and they do mean what they say, can you think of a time when you would be willing to impose a death penalty since the person would be locked up for the rest of his life?

A I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole.

Q And I realize this is put on you rather suddenly, but you also recognize as someone who is representing the State in this case, we have made the election to ask that the jury if he is found guilty, ask that the jury vote for the death penalty.

And I'm asking you a very important thing and to everyone in here, whether you, knowing that the person would never get out for the rest of his life, two things. And they're slightly different. One, whether you could consider the death penalty and the second thing I would ask you is whether you could impose the death penalty. I'm not asking a promise or anything.

But I'm asking you, first, could you consider it, and if you could consider it, do you think under the conditions where the man would never get out again you could impose it?

A Yes, sir.

Q So, this idea of him having to kill again to deserve the death penalty is something that you are not firm on, you don't feel that now?

A I do feel that way if parole is an option, without parole as an option. I believe in the death penalty. Like I said, I'm not sure that there should be a waiting line of people happening every day or every week even, but I think in severe situations it's an appropriate measure.

Q But in the situation where a person is locked up for the rest of his life and there is no chance of him ever getting out again, which would be the situation in this case, do you think you could also consider and vote for the death penalty under those circumstances?

A I could consider it, yes.

Q Then could you impose it?

A I could if I was convinced that was the

appropriate measure.

MR. MATTHEWS: I have no further questions.

THE COURT: All right. [Juror Z], there is something that I want to clarify in response to some of the questions that were asked of you.

BY THE COURT:

Q In your questionnaire it talks about beyond a shadow of a doubt, and the prosecutor here went into that a little further. You realize that that is the standard that the law imposes on the State to prove a case beyond a reasonable doubt. And, obviously, that is a question of interpretation.

You officiate basketball games. That's in your questionnaire. You, even at the college level, knowing how fast that game is, you have to make a call on some of those calls and you have to decide whether to blow that whistle and make that particular call. Do you think you understand the difference between a reasonable call and beyond a shadow of a doubt type call?

A I guess I do. The terminology beyond a shadow of a doubt, when I wrote that I wasn't even sure whether, I mean, it's just terminology that I have heard probably watching Perry Mason or something over the years. But I guess the point I was making that it has to be-

Q You would have to be positive?

A I would have to be positive, that's correct.

Q The State has to convince you?

A Yes.

Q As they would have to convince any reasonable person?

A Yes.

THE COURT: [Juror Z], let me have you step back into the juryroom. The bailiff will excuse you from there in just a few minutes. Thank you.

Counsel, any challenge to this particular juror?

MR. MATTHEWS: I would, your Honor, not on the term beyond a shadow of a doubt, I think he would certainly stick with the reasonable doubt standard. But I think he is very confused about the statements where he said that if a person can't kill again, in other words, he's locked up for the rest of his life, he said, basically, he could vote for the death penalty if it was proved beyond a shadow of. And I am certainly going to concede that he means beyond a reasonable doubt. And if a person kills and will kill again. And I think he has some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge.

MR. MULLIGAN: We have no objection.

THE COURT: Counsel, the request of the prosecutor's office, we will go ahead and excuse [Juror Z].

**UTTECHT, Superintendent, Washington
State Penitentiary, Petitioner,
v.
Cal Coburn BROWN.**

Supreme Court of the United States
551 U.S. 1, 127 S.Ct. 2218 (2007).

Kennedy, J., delivered the opinion of the Court, in which Roberts, C.J., and Scalia, Thomas, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Souter, Ginsburg, and Breyer, JJ., joined. Breyer, J., filed a dissenting opinion, in which Souter, J., joined.

Justice KENNEDY delivered the opinion of the Court.

Respondent Cal Coburn Brown robbed, raped, tortured, and murdered one woman in Washington. * * * Based on the jury's verdicts in

the guilt and sentencing phases of the trial, Brown was sentenced to death. * * *

[During jury selection, the State moved for the trial court to excuse Juror Z because the juror's ability to consider the death penalty was impaired. The defense stated, "no objection," but Washington law did not prevent the defense from raising the dismissal of Juror Z on appeal. The Washington Supreme Court ruled on the merits of the issue; it made no finding of waiver.]

Brown filed a petition for writ of habeas corpus[.] * * * [T]he United States Court of Appeals for the Ninth Circuit * * * [held] that it was unconstitutional to excuse Juror Z for cause. * * *

I * * *

[The Court's] precedents [in *Witherspoon*, *Witt* and other cases] establish at least four principles of relevance here. First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.

Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. Leading treatises in the area make much of nonverbal communication. * * *

The requirements of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) * * * create an independent, high standard to be met before a federal court may issue a writ of habeas corpus to set aside state-court rulings.

By not according the required deference, the Court of Appeals failed to respect the limited role of federal habeas relief in this area prescribed by Congress and by our cases.

II A

In applying the principles of *Witherspoon* and *Witt*, it is instructive to consider the entire *voir dire* in Brown's case. Spanning more than two weeks, the process entailed an examination of numerous prospective jurors. * * *

Eleven days of the *voir dire* were devoted to determining whether the potential jurors were death qualified. During that phase alone, the defense challenged 18 members of the venire for cause. Despite objections from the State, 11 of those prospective jurors were excused. As for the State, it made 12 challenges for cause; defense counsel objected seven times; and only twice was the juror excused following an objection from the defense. Before deciding a contested challenge, the trial court gave each side a chance to explain its position and recall the potential juror for additional questioning. When issuing its decisions the court gave careful and measured explanations.

* * *

* * * Before individual oral examination, the trial court distributed a questionnaire asking jurors to explain their attitudes toward the death penalty. When distributing the questionnaire, the court explained the general structure of the trial and the burden of proof. It described how the penalty phase would function:

[I]f you found Mr. Brown guilty of the crime of first degree murder with one or more aggravating circumstances, then you would be reconvened for a second phase called a sentencing phase. During that sentencing

phase proceeding you could hear additional evidence [and] arguments concerning the penalty to be imposed. You would then be asked to retire to determine whether the death penalty should be imposed or whether the punishment should be life imprisonment without the possibility of parole.

In making this determination you would be asked the following question: Having in mind the crime with which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency? If you unanimously answered yes to this question, the sentence would be death. . . . [Otherwise] the sentence would be life imprisonment without the possibility of release or parole.

After the questionnaires were filled out, the jurors were provided with handbooks that explained the trial process and the sentencing phase in greater depth. Small groups of potential jurors were then brought in to be questioned. Before Juror Z's group began, the court explained once more that if Brown were convicted, "there are only two penalties that a jury could return, one is life in prison without possibility of release or parole. And that literally means exactly that, a true life in prison without release or parole."

With this background, we turn to Juror Z's examination.

B

Juror Z was examined on the seventh day of the *voir dire* and the fifth day of the death-qualification phase. * * * The transcript of Juror Z's questioning reveals that, despite the preceding instructions and information, he had both serious misunderstandings about his responsibility as a juror and an attitude toward capital punishment that could have prevented him from returning a death sentence under the facts of this case.

* * * When questioned, Juror Z demonstrated no general opposition to the death penalty or scruples

against its infliction. In fact, he soon explained that he "believe [d] in the death penalty in severe situations." He elaborated, "I don't think it should never happen, and I don't think it should happen 10 times a week either." "[T]here [are] times when it would be appropriate."

The questioning soon turned to when that would be so. * * * Despite having been told at least twice by the trial court that if convicted of first-degree murder, Brown could not be released from prison, the only example Juror Z could provide was when "a person is . . . incorrigible and would recommit if released." The defense counsel replied that there would be no possibility of Brown's release and asked whether the lack of arguments about recidivism during the penalty phase would frustrate Juror Z. He answered, "I'm not sure."

The State began its examination of Juror Z by noting that his questionnaire indicated he was "in favor of the death penalty if it is proved beyond a shadow of a doubt if a person has killed and would kill again." The State explained that the burden of proof was beyond a reasonable doubt, not beyond a shadow of a doubt, and asked whether Juror Z understood. He answered, "[I]t would have to be in my mind very obvious that the person would reoffend." In response the State once more explained to Juror Z, now for at least the fourth time, that there was no possibility of Brown's being released to reoffend. Juror Z explained, "[I]t wasn't until today that I became aware that we had a life without parole in the state of Washington," although in fact a week earlier the trial judge had explained to Juror Z's group that there was no possibility of parole when a defendant was convicted of aggravated first-degree murder. The prosecution then asked, "And now that you know there is such a thing . . . can you think of a time when you would be willing to impose a death penalty . . . ?" Juror Z answered, "I would have to give that some thought." He supplied no further answer to the question.

The State sought to probe Juror Z's position further by asking whether he could "consider" the death penalty; Juror Z said he could, including

under the general facts of Brown’s crimes. When asked whether he no longer felt it was necessary for the State to show that Brown would reoffend, Juror Z gave this confusing answer: “I do feel that way if parole is an option, without parole as an option. I believe in the death penalty.” Finally, when asked whether he could impose the death penalty when there was no possibility of parole, Juror Z answered, “[I]f I was convinced that was the appropriate measure.” Over the course of his questioning, he stated six times that he could consider the death penalty or follow the law, but these responses were interspersed with more equivocal statements.

The State challenged Juror Z, explaining that he was confused about the conditions under which death could be imposed and seemed to believe it only appropriate when there was a risk of release and recidivism. Before the trial court could ask Brown for a response, the defense volunteered, “We have no objection.” The court then excused Juror Z.

III

* * * [T]he [Ninth Circuit] Court of Appeals granted Brown relief and overturned his sentence. The court held that both the state trial court’s excusal of Juror Z and the State Supreme Court’s affirmance of that ruling were contrary to, or an unreasonable application of, clearly established federal law. The Court of Appeals held that the Supreme Court of Washington had failed to find that Juror Z was substantially impaired; it further held that the State Supreme Court could not have made that finding in any event because the transcript unambiguously proved Juror Z was not substantially impaired. * * *

A

* * * The state [supreme] court did make an explicit ruling that Juror Z was impaired. * * *

Even absent this explicit finding, the Supreme Court of Washington’s opinion was not contrary to our cases. The court identified the *Witherspoon-Witt* rule, recognized that our precedents required deference to the trial court, and applied an abuse-of-discretion standard.

Having set forth that framework, it explained:

[Brown] did not object at trial to the State’s challenge of [Juror Z] for cause. At any rate, [Juror Z] was properly excused. On *voir dire* he indicated he would impose the death penalty where the defendant ‘would reviolates if released,’ which is not a correct statement of the law. He also misunderstood the State’s burden of proof . . . although he was corrected later. The trial court did not abuse its discretion in excusing [Juror Z] for cause.

The only fair reading of the quoted language is that the state court applied the *Witt* standard in assessing the excusal of Juror Z. Regardless, there is no requirement in a case involving the *Witherspoon-Witt* rule that a state appellate court make particular reference to the excusal of each juror. It is the trial court’s ruling that counts.

B

From our own review of the state trial court’s ruling, we conclude the trial court acted well within its discretion in granting the State’s motion to excuse Juror Z.

Juror Z’s answers, on their face, could have led the trial court to believe that Juror Z would be substantially impaired in his ability to impose the death penalty in the absence of the possibility that Brown would be released and would reoffend. And the trial court, furthermore, is entitled to deference because it had an opportunity to observe the demeanor of Juror Z. * * *

Juror Z’s assurances that he would consider imposing the death penalty and would follow the law do not overcome the reasonable inference from his other statements that in fact he would be substantially impaired in this case because there was no possibility of release. * * *

It is true that in order to preserve a *Witherspoon* claim for federal habeas review there is no independent federal requirement that a defendant in state court object to the prosecution’s challenge; state procedural rules govern. We nevertheless take into account voluntary acquiescence to, or

confirmation of, a juror's removal. By failing to object, the defense did not just deny the conscientious trial judge an opportunity to explain his judgment or correct any error. It also deprived reviewing courts of further factual findings that would have helped to explain the trial court's decision. * * *

* * *

* * * The need to defer to the trial court's ability to perceive jurors' demeanor does not foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses no basis for a finding of substantial impairment. But where, as here, there is lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial court has broad discretion. The record does not show the trial court exceeded this discretion in excusing Juror Z; indeed the transcript shows considerable confusion on the part of the juror, amounting to substantial impairment. * * *

* * *

Justice STEVENS, with whom Justice SOUTER, Justice GINSBURG, and Justice BREYER join, dissenting.

Millions of Americans oppose the death penalty. A cross section of virtually every community in the country includes citizens who firmly believe the death penalty is unjust but who nevertheless are qualified to serve as jurors in capital cases. An individual's opinion that a life sentence without the possibility of parole is the severest sentence that should be imposed in all but the most heinous cases does not even arguably "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Moreover, an individual who maintains such a position, or even one who opposes the death penalty as a general matter, "may not be challenged for cause based on his views about capital punishment." Today the Court ignores these well-established principles, choosing instead to defer blindly to a state court's erroneous characterization of a juror's *voir dire* testimony. *

* *

I

* * * After it was explained to Juror Z that the only two sentencing alternatives available under Washington law would be life imprisonment without the possibility of parole and a death sentence, Juror Z repeatedly confirmed that even if he knew the defendant would never be released, he would still be able to consider and vote for the death penalty. As for any general reservations Juror Z may have had about the imposition of the death penalty, it is clear from his testimony that he was in no way categorically opposed to it. * * *

While such testimony might justify a prosecutor's peremptory challenge, until today not one of the many cases decided in the wake of *Witherspoon v. Illinois* has suggested that such a view would support a challenge for cause. The distinction that our cases require trial judges to draw is not between jurors who are in favor of the death penalty and those who oppose it, but rather between two sub-classes within the latter class – those who will conscientiously apply the law and those whose conscientious scruples necessarily prevent them from doing so. * * *

* * *

In the alternative, * * * the Court relies on the fact that the trial court's judgment is entitled to deference because it had the unique opportunity to observe Juror Z's demeanor during *voir dire*. A ruling cannot be taken at face value when it is clear that the reasoning behind that ruling is erroneous in light of our prior precedents. There is absolutely nothing in the record to suggest * * * that anything about Juror Z's demeanor would dull the impact of his numerous affirmative statements about his ability to impose the death penalty in any situation. * * *

* * * Although the Court reads defense counsel's statement to mean that defense counsel had no objection to Juror Z's exclusion, it is more clearly read to mean that the defense had no objection to Juror Z serving on the jury and therefore no reason to challenge him.

* * *

II

* * * [T]he perverse result of [the Court's] opinion is that a juror who is clearly willing to impose the death penalty, but considers the severity of that decision carefully enough to recognize that there are certain circumstances under which it is not appropriate (*e.g.*, that it would only be appropriate in "severe situations"), is "substantially impaired." It is difficult to imagine, under such a standard, a juror who would not be considered so impaired, unless he delivered only perfectly unequivocal answers during the unfamiliar and often confusing legal process of *voir dire* and was willing to state without hesitation that he would be able to vote for a death sentence under any imaginable circumstance. * * *

Today, the Court has fundamentally redefined – or maybe just misunderstood – the meaning of "substantially impaired," and, in doing so, has gotten it horribly backwards. It appears to be under the impression that trial courts should be encouraging the inclusion of jurors who will impose the death penalty rather than only ensuring the exclusion of those who say that, in all circumstances, they cannot. The Court emphasizes that "the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes." But that does not and cannot mean that jurors must be willing to impose a death sentence in every situation in which a defendant is eligible for that sanction. That is exactly the outcome we aimed to protect against in developing the standard that, contrary to the Court's apparent temporary lapse, still governs today. * * *

[Dissent of Justice BREYER, joined by Justice SOUTER, omitted.]